Ontario

Box 330
C.P. 330
24th Floor, 700 Bay Street
24e étage, 700, rue Bay
Toronto, Ontario
Toronto (Ontario)
M5G 1Z6

The Mining and Lands Commissioner
Le Commissaire aux mines et aux terres

File No. MA 016-07

L. Kamerman)
Mining and Lands Commissioner)
A. MacKenzie)
Deputy Mining and Lands Commissioner)

Friday, the 11th day
of May, 2012.

THE MINING ACT

IN THE MATTER OF

Mining Claim TB-3016678, situate in the Township of McTavish, in the Thunder Bay Mining Division, staked on the 21st day of September, 2004 and recorded in the name of Mr. Tony Robert Yozipovic, as to a 100% interest (hereinafter referred to as the "Mining Claim");

(Amended May 11, 2012)

AND IN THE MATTER OF

The Surface Rights of the SE1/4 of Section (Lot) 11, Concession 7, situate in the Township of McTavish, in the District of Thunder Bay, Province of Ontario, registered in the name of Mr. Lawrence Timothy Watson;

AND IN THE MATTER OF

An application pursuant to s. 105 of the **Mining Act**, for a declaration delineating the ownership and the rights and privileges to the minerals in, on or under the Mining Claim, as set out in subsections 50(1) and 50(2) of the **Mining Act**.

(Amended May 11, 2012)

B E T W E E N:

TONY ROBERT YOZIPOVIC

Applicant

-and -

LAWRENCE TIMOTHY WATSON

Respondent

O R D E R

1. **IT IS DECLARED** that the Applicant, Mr. Tony Robert Yozipovic, has complete and total access to Mining Claim TB-3016678, including the right to perform prescribed assessment work.

. . . . 2

2. **IT IS ORDERED** that the area to be exempted from Mining Claim TB-3016678, at the location of the dwelling of the Respondent, Mr. Lawrence Timothy Watson, will extend to the western boundary of his property, having dimensions of 63.75 metres by 63.75 metres, comprising a total of 4,064.0625 square metres, such area being centred to encompass Mr. Watson's dwelling and whatever part of the yard and road extend to the western boundary where his garden is located **AND IT IS FURTHER ORDERED** that an additional area on Mr. Watson's property will be exempted, having the exact same dimensions, being 63.75 metres by 63.75 metres, comprising a total of 4,064.0625 square metres, such area being centred to encompass Mr. Watson's recreation area, with the trailer at its centre **WITH THE PROVISO THAT** should topography or disagreement between the parties cause uncertainty of the area of exemption, the parties may either seek clarification from the tribunal or enlist in the services of the tribunal's Registrar/Mediator, Daniel Pascoe, to determine the coordinates of the area of exemption as contemplated by this Order.

3. **IT IS HEREBY DECLARED** that notwithstanding the issuance of this Order, the ongoing status of the 2003 Agreement over Parts 7 and 8 on Plan 55 R-11510, in the Township of McTavish and access in accordance with that Agreement is beyond the jurisdiction of the Tribunal **AND FURTHER** that the parties may exercise their rights for a determination of the status of that Agreement in the Superior Court of Justice which has jurisdiction to determine the matter or to refer the question to the tribunal pursuant to section 108 of the **Mining Act.**

4. **IT IS HEREBY DECLARED** that the agreements made between the parties in 2001 and 2005 are revocable licences which can be revoked by Mr. Watson at any time.

5. **IT IS HEREBY DECLARED** that Mining Claim TB-3016678 is not *void ab initio* as the first prescribed unit of prescribed assessment work has been performed and filed on the Mining Claim, pursuant to clause 48(5)(b) of the **Mining Act**.

6. **IT IS HEREBY DECLARED** that the tribunal does not have the requisite jurisdiction to award any damages or compensation to the Applicant, Mr. Tony Robert Yozipovic, as a result of the alleged removal by the Respondent, Mr. Lawrence Timothy Watson, of gravel on the SE1/4 of Section (Lot) 11, Concession 7, situate in the Township of McTavish, in the District of Thunder Bay, Province of Ontario, **AND IT IS FURTHER NOTED** that the Applicant does not own the gravel unless and until he takes Mining Claim TB-3016678 to lease.

7. **IT IS FURTHER ORDERED** that the notation "Pending Proceedings", which is recorded on the abstract of Mining Claim TB-3016678, to be effective from the 24th day of July, 2007, be removed from the abstract of the Mining Claim.

8. **IT IS FURTHER ORDERED** that the time during which Mining Claim TB-3016678 was under pending proceedings, being the 24th day of July, 2007 to the 11th day of May, 2012, a total of 1754 days, be excluded in computing time within which work upon the Mining Claim is to be performed and filed.

. . . . 3

9. **IT IS FURTHER ORDERED** that the 13th day of October, 2015, be fixed as the date by which the next unit(s) of prescribed assessment work, as set out in Schedule "A" attached to this Order, must be performed and filed on Mining Claim TB-3016678, pursuant to subsection 64(5) of the **Mining Act** and all subsequent anniversary dates are deemed to be October 13 pursuant to subsection 64(5) of the **Mining Act**.

10. **IT IS FURTHER ORDERED** that no costs shall be payable by either party to this application.

THIS TRIBUNAL FURTHER ADVISES that, pursuant to subsection 129(4) of the **Mining Act**, R.S.O. 1990, c. M. 14, as amended, a copy of this order shall be forwarded to the Provincial Mining Recorder **WHO IS HEREBY DIRECTED** to amend the records in the Provincial Recording Office as necessary and in accordance with the aforementioned subsection 129(4).

Reasons for this Order are attached.

DATED this 11th day of May, 2012.

Original signed by L. Kamerman

L. Kamerman
MINING AND LANDS COMMISSIONER

Original signed by A. MacKenzie

A. MacKenzie
DEPUTY MINING AND LANDS COMMISSIONER

Schedule "A"

Mining Claim	**New Due Date**
TB-3016678	October 13, 2015

Ontario

Box 330
C.P. 330
24th Floor, 700 Bay Street
24e étage, 700, rue Bay
Toronto, Ontario
Toronto (Ontario)
M5G 1Z6

The Mining and Lands Commissioner
Le Commissaire aux mines et aux terres

File No. MA 016-07

L. Kamerman)
Mining and Lands Commissioner)
A. MacKenzie)
Deputy Mining and Lands Commissioner)

Friday, the 11th day
of May, 2012.

THE MINING ACT

IN THE MATTER OF

Mining Claim TB-3016678, situate in the Township of McTavish, in the Thunder Bay Mining Division, staked on the 21st day of September, 2004 and recorded in the name of Mr. Tony Robert Yozipovic, as to a 100% interest (hereinafter referred to as the "Mining Claim");

(Amended May 11, 2012)

AND IN THE MATTER OF

The Surface Rights of the SE1/4 of Section (Lot) 11, Concession 7, situate in the Township of McTavish, in the District of Thunder Bay, Province of Ontario, registered in the name of Mr. Lawrence Timothy Watson;

AND IN THE MATTER OF

An application pursuant to s. 105 of the **Mining Act**, for a declaration delineating the ownership and the rights and privileges to the minerals in, on or under the Mining Claim, as set out in subsections 50(1) and 50(2) of the **Mining Act**.

(Amended May 11, 2012)

B E T W E E N:

TONY ROBERT YOZIPOVIC

Applicant

-and -

LAWRENCE TIMOTHY WATSON

Respondent

REASONS

. . . . 2

Appearances

Tony Robert Yozipovic	Ms. Bev McRae and Mr. Tony Yozipovic. Written submissions were made by Mr. Jack M.N. Jamieson, a Barrister & Solicitor with Carrel & Partners, LLP
Lawrence Timothy Watson	Mr. Joseph Pintar and Mr. Timothy Watson.

Background

This matter first came to the tribunal on July 24, 2007, with the applicant, Mr. Tony Yozipovic seeking a resolution to ongoing conflicts involving access to his current Mining Claim which was staked on his behalf in September, 2004. Mr. Timothy Watson is the owner of the surface rights of the corresponding quarter section to the same parcel, having purchased it in 1997. The mining rights had forfeit to the Crown in 1955 for failure to pay mining taxes, a fact which may not have been recognized by any of the subsequent sales up to and including the one to Mr. Watson. So, notwithstanding that he thought he had purchased the entire title, as far as the Provincial Recording Office was concerned, and any stakers examining maps available through that Office, the mining rights were the property of the Crown and eligible for staking, if not already held as an unpatented mining claim.

Some of the most entrenched and bitter conflicts can arise over questions of road access on the same parcel of land. This is just such a case. Mr. Yozipovic framed the issue as a question of unfettered access to his Mining Claim. The underlying issue throughout the history of this intractable relationship has been the extent of a right of road access across someone's private lands to arrive at one's mining claim and later the right of road access within one's mining claim where the surface rights are owned by another. For purposes of this application, Mr. Yozipovic wants access through a locked gate at the perimeter of Mr. Watson's quarter section and use of the private road built by Mr. Watson which leads to or very near to where Mr. Yozipovic would now like to extract stone. Production is contingent on his finding a partner through joint-venture or other means. In other words, the Yozipovic application essentially asked that Mr. Watson be told by the tribunal what section 50 means in terms of allowing total access on the Mining Claim via the existing road.

The Mining Claim is the only claim Mr. Yozipovic has held in McTavish Township since September, 2004. The tribunal's determinations of all the issues flowing from this question of access on the claim (set out under a separate heading below) have been obscured by the long history between these parties.

Specifically, in late, 1999, Mr. Yozipovic commenced asserting to both MNR and Mr. Watson that the **Mining Act** provided him with the right to preserve or maintain his right to his existing access to the mining claims**.** Mr. Watson had purchased his quarter section in 1997 and during that time frame, applied to the Ministry of Natural Resources (MNR) for a Crown land sale of adjacent lands, which would provide road access and a lawful railway crossing from the highway to his home on the quarter section.

. . . . 3

In these Reasons, although the findings must be limited to what access a mining claim holder can have to the surface of a claim when the surface rights are held by another, the tribunal will address the issue of crossing over land which is privately held in order to reach a mining claim.

The long and bitter history between the parties caused considerable confusion for everyone, including the tribunal. The chronology of events and facts is complicated. It was never totally clear to the tribunal whether Mr. Watson and Mr. Yozipovic were ever in total agreement or whether from the very first, Mr. Watson's acquiesce to the granting of access and signing successive agreements granting access was a product of MNR's attempts to mediate and facilitate a cooperative result in which both Mr. Yozipovic and Mr. Watson could acquire respective use of resources within the quarter section.

For his part, throughout, Mr. Yozipovic was unable to obtain a concise statement from any ministry or government official as to what constituted a lawful right of access according to the **Mining Act** so that he could apply that information to his exploration in the field. Unfortunately for both parties, the Consent Order dated October 25, 2007, was little more than an acknowledgement that Mr. Yozipovic as holder of the Mining Claim was entitled to perform and file assessment work as prescribed by the **Mining Act** which carries with it the right to bring the Mining Claim to lease. The main purpose of pursuing the consent was to clear the cloud on title. Nonetheless, Mr. Yozipovic attempted to use the tribunal's process to obtain a clear and concise statement of what an unpatented mining claim holder is entitled to under the legislation. Clearly, Mr. Yozipovic misunderstood what a consent order could accomplish in that the issue of the extent of road access remained obscured. The tribunal was unaware that the Consent Order would not answer all of the questions between the parties and that there remained outstanding the very real need to address this question of respective rights of a surface rights owner and mining claim holder to be addressed in detail.

For its part, the tribunal encountered a hearing that was also protracted and complicated. Rather than straight-forward presentations of evidence, it was peppered with frequent interruptions, lengthy procedural explanations from the tribunal, off the record discussions, questioning of witnesses more in the nature of speculation and innuendo and very little in the way of succinct questions posed and answered. In the writing of these Reasons, the tribunal found from the transcripts that many questions were of such a vague and rambling nature, in reality a series of many sub-questions that the answers, such as they were, provided little of value to enhancing its knowledge of the reasons why many things happened as they did. Much of the verbal testimony proved vague or was contradictory with the documentary evidence filed. The tribunal weighed the benefits of reconvening and determined that it was in a position to complete its decision without the necessity of having to do so.

Much of the evidence heard also focused on relatively recent, *without prejudice* negotiations to settle the matter between the parties. These negotiations apparently took place at the request of Mr. Watson, overseen by MNR and the Ministry of Northern Development and Mines (MNDM). Mr. Yozipovic would have liked the tribunal to impose the terms of the proposed settlement on Mr. Watson, as set out in documents drawn up by his daughter, Bev McRae.

. . . . 4

This evidence, was of limited usefulness and the parties should be aware that settlement details are irrelevant once a matter proceeds to a hearing. From the perspective of the tribunal, the information from the proposed settlement served to focus the information in the more recent time frame whereas the tribunal heard little evidence regarding the earliest time frame, being much more relevant to this question of access allowed under the **Mining Act.** It was this early history which gave rise to the conflict in the first place and had considerable impact on the actions and interactions of the parties after the 2004 staking and after the 2007 application was made. In addition, a significant amount of evidence focused on allegations of trespass or the need to involve the police or MNR to prevent escalation each time Mr. Yozipovic sought to enter upon the Mining Claim in recent months and years.

There were also numerous misunderstandings which occurred even when the parties appeared to agree, stemming from using the same words but understanding their meaning differently. An illustration of this is what was meant by "registered access" where Mr. Watson had expected notice by registered mail prior to each entry and Mr. Yozipovic properly understood this to mean an agreement registered on title. Another example was just what MNR required of Mr. Watson in terms of granting access to Mr. Yozipovic as a condition of the Crown land sale (a term not accepted by the tribunal explained in detail below) contrasted with what Mr. Watson believed and with what Mr. Yozipovic sought to institute.

Over time Mr. Watson decided he had had enough. This was in part owing to suspicions that he had been duped in agreeing to Mr. Yozipovic's efforts to correct the very significant error on title, namely that he did not acquire the mining rights in his 1997 purchase. Mr. Yozipovic's efforts in this regard were legitimate. Mr. Watson consented to the October, 2007 Order declaring that the mining rights had forfeit to the Crown for non-payment of mining taxes, a historical fact which through error was not reflected on the title of his quarter section. Mr. Watson felt that he had no choice but to sign the Consent. It became apparent to the tribunal, during the course of the hearing, that he did not understand the process. A consent is a document meaning that he agrees with its content. Mr. Watson signed it without obtaining independent legal advice. Apparently, he was unaware that he would have been within his rights to refuse to sign it. Had this occurred, the subject matter of correcting title would have gone to a hearing.

The end of any semblance of cooperation came after the settlement had purportedly been agreed to. Essentially, the parties had agreed to split the units down the middle. As holder of an unpatented mining claim to the western half of the quarter section, Mr. Watson would acquire the right to apply for a permit to remove gravel from the existing quarry, something he had done until he found out that he had no right to it without holding the claim. In return, Mr. Yozipovic wanted total access to the eastern half of the claim. The obligation to pay for any rerouting of the only existing road was to fall to Mr. Watson, should the need arise if and when the quarry for stone went into production. At this point, all Mr. Watson wanted was to regain quiet enjoyment of the land surrounding his residence. According to the terms of the proposed settlement, he could only do this at considerable expense to himself.

The events and relationship between the parties in this case flow directly from the fact that Mr. Watson did not acquire the mining rights in his 1997 purchase of his quarter section. Rather, the title of the mining rights was held by the Crown, which meant that they

. 5

were open for staking or could be acquired through staking as unpatented mining claims. Mr. Watson should have realized this, given that he was the holder of an unpatented claim on the quarter section immediately before Mr. Yozipovic. He lost it when it forfeit to the Crown for failure to file required assessment work. Mr. Watson did not educate himself in a timely manner about his rights and obligations according to the **Mining Act** to maintain his interest in the mining rights although he gave evidence that he had performed assessment work but had not filed it in the required form at the required time.

The failure on the part of Mr. Watson to be completely aware of the limited extent of his title and the inability of Mr. Yozipovic to obtain a concise statement of his entitlements under the **Mining Act** at relevant times since 1999 served to escalate conflicts and resentments to a highly volatile degree.

Issues

1. What are an unpatented mining claim holder's rights of entry and access on a mining claim whose surface rights are held by another?

2. What are an unpatented mining claim holder's rights of access across the private property/surface rights of another in order to gain access to the mining claim? Does it fall within section 175?

3. What portions, if any, of Mr. Watson's quarter section should be excluded from the Mining Claim pursuant to section 32?

4. What is the agreement made between MNR and Mr. Watson for the sale of Crown Land?

5. If the condition of access imposed on Mr. Watson by MNR forms no part of the agreement between Mr. Watson and MNR for the Crown land sale, what is its legal status?

6. What is the status of the various agreements between Mr. Watson and Mr. Yozipovic dated 2001, 2003 and 2005, notwithstanding that section 175 applies to facilitate the access requested

7. A finding has already been made that the Mining Claim is not *void ab initio.* The reasons for this are set out.

8. Similarly, the reason that the Minister did not seek to be added as a party are addressed.

9. Is Mr. Yozipovic entitled to compensation for gravel taken by Mr. Watson?

10. Discussion of the Consent Order to correct title.

. . . . 6

History

At the time of his purchase in 1997, Mr. Watson applied to the MNR for the purchase by him of adjacent Crown lands which would give him access to the nearby highway and a lawful railway crossing.

In 1999, Mr. Yozipovic advised MNR that he was seeking to enforce his rights under the **Mining Act** for access to unpatented mining claims he then held. The claims in question abutted the Watson quarter section to the south and southeast, so essentially Mr. Yozipovic wanted to secure access across "other" land to gain an entry point to his mining claims. As part of his efforts, Mr. Yozipovic sought help from MNR to obtain the right to pass through the Crown lands which it was in the process of selling to Mr. Watson. It is unclear whether Mr. Yozipovic ever specifically told MNR that the rights he sought to enforce under the **Mining Act** in his mind included passage through Mr. Watson's quarter section. Mr. Yozipovic's actions and correspondence over the life of this matter commencing in 1999 make it clear to the tribunal that Mr. Yozipovic throughout sought access over whatever roads existed at the time, from the highway to his former mining claims. These former claims, which forfeit regularly every two years for failure to file perform and file assessment work.

The access Mr. Yozipovic sought involved using the Watson quarter section as a thoroughfare between the Crown lands MNR was selling to Mr. Watson and mining claims held by Mr. Yozipovic from prior to 1999 to mid-2004. Those earlier mining claims have all since expired, having forfeit to the Crown for lack of filing of required assessment work. Mr. Watson signed access agreements with Mr. Yozipovic and as matters progressed, Mr. Yozipovic later characterized his efforts as seeking to enforce those agreements against Mr. Watson.

At an undisclosed point in time between the 1999 acceptance by MNR of Mr. Watson's application for the purchase of the Crown lands and the 2001 issuance of letters patent, Mr. Yozipovic convinced MNR that he should be entitled to retain a right of way over those Crown lands to maintain access to his mining claims. At MNR's insistence, Mr. Yozipovic obtained a right of way over the former Crown lands sold to Mr. Watson, initially by a written agreement in 2001 and eventually, after MNR's having threatened to void the Crown land sale and keep the money paid by Mr. Watson, through a formal agreement in 2003, which was registered on title. Mr. Watson signed agreements in 2001, 2003 and 2005, all granting some form of rights to Mr. Yozipovic. Each agreement was between Mr. Watson and Mr. Yozipovic. MNR was not mentioned as a party.

Mr. Watson was not aware, upon his purchase of the quarter section, or perhaps until this matter arose, that he had a qualified title and that he had not bought the mining rights, which had forfeit to the Crown in 1955.

The Applicant's rights of access to his claim as an unpatented mining claim holder and the Mining Act

The rights of an unpatented mining claim holder for access to the surface are extensive. Any limits set to that entitlement of access are found in section 32 and involved such

surface features as private and business structures, uses such as those involving tilling of the soil and structures associated with water. As for the right to cross over the property of another, the unpatented mining claim holder may apply under section 175(1) for an Order to obtain rights as listed in the sub-clauses, including the right traverse an existing road. Applications under section 175 are quite rigorous. It has never been used in connection with an unpatented mining claim. This provision will be discussed at length below.

Throughout the history of this matter, Mr. Yozipovic attempted to obtain a definitive statement from the Provincial Mining Recorder as to what rights of access exist for an unpatented mining claim, where the surface rights are privately held. Such a statement was not forthcoming. The tribunal speculates as to whether he also tried to get this information from MNR based upon an unproved document (to be discussed in detail below) apparently containing a hand written note that Pat MacDonald of MNDM had advised that nothing in the **Mining Act** would facilitate access.

The situation became increasingly complicated through Mr. Yozipovic's efforts to obtain written agreement from Mr. Watson concerning rights of access. These various agreements will be discussed below. The chronology of this is obscure because the documentary evidence was not supplemented through adequate oral evidence. Initially in December, 1999, Mr. Yozipovic asked Mr. Watson to send written approval to MNR that his access to his mining claims would continue (Ex. 37, page 9A). This request was to permit access over Mr. Watson's quarter section, not just the Crown lands. At an unspecified time between late 1999 and 2001, this request on the part of Mr. Yozipovic morphed into a condition imposed on Mr. Watson by MNR to provide a registered right of way for access over the Crown lands (Ex 37, Page 10).

During the same time, Mr. Yozipovic's mining claim interests were not static, but were a succession of claims. Changes in the underlying mining interests, i.e. forfeiture and restakings did not deter Mr. Yozipovic from his quest to obtain an agreement in writing from Mr. Watson for access. Mr. Yozipovic did not help his cause by asking that Mr. Watson sign successive agreements, each with different wording and by his failing to identify the successive mining claims by their proper legal description in the respective document, i.e. their unpatented mining claim number(s). Undoubtedly everyone concerned with this file was equally confused by the propensity on the part of Mr. Yozipovic to refer to his holdings in the plural, when in fact they were at various times single claims of multiple units or multiple claims of single or multiple units. This activity obscured for the uninitiated such as Mr. Watson, apparently both Mr. Christie and Mr. Jamieson, lawyers caught up in this matter, and MNR, the exact unpatented mining claim interest covered by each successive agreement.

Mr. Yozipovic's right to road access on his Mining Claim is provided by subsections 50(2) and 51(1) of the **Mining Act** as they existed on the date of his original application to the tribunal in 2007. This is the right he acquired in September, 2004, when Mr. Yozipovic *first* acquired the Mining Claim.

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

. . . . 8

> efficient exploration, development and operation of the mines, minerals and mining rights therein.
>
> **51. (1)** Except as in this Act is otherwise provided, the holder of an unpatented mining claim has the right prior to any subsequent right to the user of the surface rights, for prospecting and the efficient exploration, development and operation of the mines, minerals and mining rights

The operative words in these provisions are "the right to enter upon, use and occupy such part … as are necessary for the purpose of prospecting and the efficient exploration, development and operation of the mines…" In the more than 100 years since its inception, the tribunal has not adjudicated on the question of the extent of access provided for in the legislation. However, the Court of Appeal had done so in **Coniagas Mines Ltd. v. Town of Cobalt and Jamieson Meat Company** 1910 Carswell, Ont. 145, 20 O.L.R. 622 (C.A.).

The **Coniagas** case differed in several respects, namely in that the mining interests were patented and were acquired prior to the surface rights. The action was an attempt to prevent the mining company from using a road which the company had built itself to bring in equipment and remove ore. It also sought to explore for minerals under the roads and township lots. The township erected a fence to prevent both use of the road and exploration for minerals. Sir Chas. Moss, C.J.O. stated at page 15:

> "The grant thereby made unquestionably carried with it everything that was reasonably necessary to the proper enjoyment and use of the thing granted, including, of course, such convenient way or ways, or means of ingress and egress as were required. …
> …
> It appears to be at the present the only practicable way by which the plaintiffs can transport whatever is required for the prosecution of their mining operations and the due and proper working of their mines, including the carrying away of the ores, metals and other products. The defendants have shewn no good reason for interfering at the present time, and under present conditions, with the reasonable user by the plaintiffs of the roadway for this necessary purpose."

The Hon. Mr. Justice Meredith stated at page 17:

> "The respective rights of the parties in such a case as this seem to be to be so plain and reasonable that litigation over them could not but be avoided if each would have some regard for the other's rights and not concentrate all thought and energy upon his own interests and gain only.
>
> The plaintiffs are the owners of all the mining rights in the lands; the defendants who have acquired any title to them acquired it with a knowledge of, and expressly subject to, such mining rights.

. . . . 9

> The mining rights include all such things as are reasonably necessary in seeking minerals and in working mines, but must be exercised so as to do as little injury as reasonably can be to the land, and consequently the defendants' interests; and such rights include all reasonable necessary ways."

This commentary on the right to the use of the surface as being necessary to access an unpatented mining claim constitutes a legal right to use the road. This is a legislative concept seen in the **Road Access Act,** 1990, c. R. 34, as amended. The **Road Access Act** provides that no one may place a barrier across an access road, defined as one which is not on land owned by a municipality, not a public highway and which serves as a motor vehicle access route to one or more parcels of land. That **Act** goes on to provide that no person is to place an obstacle over an access road which prevents access to one or more parcels of land not owned by that person unless an application has been made to a judge for an order closing the road, is done in accordance with an agreement in writing with owners of land affected, is of a temporary nature for maintenance or repair or is for a twenty-four hour period to prevent acquisition of prescriptive rights. In determining whether to close the road, the judge must be satisfied that such closure is necessary to prevent substantial damage or injury to the interests of the applicant or for some other purpose in the public interest or if satisfied that the persons whose access will be blocked do not have a legal right to use the road.

In the definitions under the **Mining Act,** a "mining claim" means a *parcel of land* staked and recorded in accordance with the legislative requirements. Based upon the same words used in the two pieces of legislation, the tribunal finds that the meaning to be given to those who have a legal right to use an access road, within the meaning of the **Road Access Act** must include the holder of an unpatented mining claim held on the same *parcel of land* on which the surface rights owner has constructed a road.

Given that this matter arises under the **Mining Act,** it will be those provisions which govern, and not the **Road Access Act**. However, what the latter legislation does demonstrate is the way in which roads across private property are regarded by the legislature, namely that in certain circumstances, their use by others will be justified and/or endorsed by the courts.

To state it succinctly, since early in the last century, the courts have recognized through successive versions of the **Mining Act** that the right to the mines, minerals and mining rights includes the right to access and use such parts of the surface as are reasonably necessary to prospect and explore for and exploit those minerals. The **Road Access Act** also contains this concept and recognizes it as a legal right to use any access road located on a parcel of land shared between the mining rights holder and surface rights owner. This is the case, even where the surface rights owner has constructed the road at his own expense prior to the acquisition of the unpatented mining rights, as was the case between Mr. Watson and Mr. Yozipovic.

There is a question of whether Mr. Yozipovic could acquire the right to use the private road on Mr. Watson's quarter section in order to access his claims beyond the Watson property, i.e. prior to acquiring the Mining Claim in September, 2004. Further the tribunal notes that Mr. Watson's private road does not extend to the southern boundary of his quarter section or

cross into what were any of Mr. Yozipovic's earlier mining claims located to the south or southwest of the Watson quarter section. Mr. Watson's evidence was that such access is an actual impossibility, that there is a cliff that runs through his property and the existing road skirts the top of the cliff; so to veer off to the south toward abutting claims would literally involve driving off a cliff. The law also would have required that Mr. Yozipovic have some legal right to use the road, such as a valid agreement or application/order under section 175.

It is unfortunate that there has been little case law on subsections 50(2) and 51(1) to which the Provincial Recording Office staff or even tribunal staff could refer when queries are made concerning use of mining and surface rights on the same parcel. Although commentary in the 1910 **Coniagas** decision alludes to the extent of the use that the mining rights holder can make of the surface, more information is found in cases dealing with surface rights compensation under what is now section 79 of the **Mining Act**. The leading case on the test for valuation of damages to surface rights is **Dzuba v. Grann et al.** (1982) 6 M.C.C.236, where at pages 244-5, Commissioner Ferguson set out the principles for assessing compensation:

1. Compensation is fixed in respect of past and future damage

2. The amount of compensation should be a reasonably liberal one analogous to one payable on expropriation.

3. The benefit of any doubt is to be given to the surface owner.

4. Care must be taken to protect a miner from exorbitant or extortionate demands.

5. The surface owner is entitled to the present value of any enhanced or prospective value the land may have for building purposes.

6. Compensation should be fixed keeping in mind that the "miner will practically have the right to destroy almost the whole surface should the property develop great richness".

7. In some cases the compensation was split, leaving part of the compensation to be payable upon application for lease…

8. Timber values may not be relevant where the valuation is related to a use that would involve a harvesting of timber that is not viable.

9. Consideration should be given to the fact that under modern statutory controls, the land will ultimately be rehabilitated.

Generally, applications for surface rights compensation payable to the surface rights owner have been relatively modest, based upon the quality and type of evidence presented. Each such case must be decided on its merits after a hearing.

However, the exception is the 1982 case of **Young v. Robinson et al.** 6 M.C.C. 262. In that case, as here, the surface rights owner was not aware that he had not acquired the

mining rights, with submissions from the mining claim holder that the purchase price paid reflected this belief. The land was not developed, beyond a modest cottage and was used as intended, in a relatively pristine state as recreational and wilderness land. The mining exploration activity was confined to a small portion of the land and although a trail had been cut through a marsh with two diamond drill holes made. The disruptive effect on wildlife was noted, but wildlife was found to be an interest in land. Debris that had been left by the exploration was cleaned up at the tribunal's request. The compensation paid was 91 percent of what was paid for the land.

The questions relating to access in this matter could have been addressed in an application made under s. 175(1) of the **Mining Act**. The jurisdiction to make an Order requiring the granting of an easement or right of way in connection with a mining matter is within the exclusive jurisdiction of the tribunal. Relevant portions of section 175 provide:

> **175.** (1) Where required for or in connection with the proper working of a mine, mill for treating ore or quarry, the owner, lessee or *holder of it* or the person entitled to work it may, subject as hereinafter provided, obtain and have vested in him, her or it by order of the Commissioner, made after hearing such parties interested as appear or on appeal from the Commissioner,
>
> …
>
> **(f)** rights of way or passage through or over any land or water, and the right to construct, improve, maintain and use suitable roads, tramways, aerial tramways, channels, waterways, passages and other means of transit and transportation upon, through or over any land or water, together with such other rights of entry upon and use of land and water as may be necessary or convenient therefore;
>
> **(2)** No such right shall be granted unless any injury or damage caused to any other person thereby can be adequately compensated for and unless in all the circumstances it seems reasonable and fitting to grant the right, and it shall not be granted until, in the case where injury or damage has already been suffered, compensation has been determined by the Commissioner, and the amount thereof paid, and in the exercise of any right so granted no unnecessary injury or damage shall be done to the land, property, rights or interests of other persons, and all injury and damage that may be caused to any person by the granting and exercise of any right obtained under this section shall be fully compensated for.

Section 175 has long been used in connection with patented mining interests, but subsection (5) clearly states that it applies in connection with any patented or unpatented lands. The wording used in subsection (1) includes a "holder" which is used in reference to unpatented mining claims and licenses of occupation.

The tests for the granting of an easement or right of way in connection with a mine-related activity under section 175 are very rigorous. Subsection (1) requires that the granting of the right be "required in connection with the proper working of a mine". This is a test which the owner/holder of the mining interest must prove to the tribunal's satisfaction. The

test in subsection (2) includes that the applicant seeking the right of way must convince the tribunal that "in all the circumstances it seems reasonable and fitting to grant the right".

An application pursuant to section 175 would have been the proper manner for Mr. Yozipovic to secure access over the Watson quarter section to the earlier Yozipovic mining claims/units up to and including the claims that expired in July, 2004. Given that the former Crown lands did not abut any Yozipovic mining claims until 2004, section 175 would also have been the proper manner in which he should have proceeded to obtain access across the former Crown lands after they were purchased by Mr. Watson. Or, according to the evidence from MNR, another alternative would have been to see the title remain in the Crown so that all those who required access could continue to use it unimpeded.

Had it proceeded to a hearing, the application would have been considered but not been limited to such matters as the viability of Mr. Yozipovic's proposed quarry and the potential for its immediate operation. The location of the existing road mere metres from Mr. Watson's home and running between it and his garden would have been canvassed as to potential impact. Whether the existing road next to Mr. Watson's home should properly be rerouted would also have been raised. Also potentially relevant would have been potential impact on Mr. Watson's monetary arrangement with Cantel, which was already paying for the road to be kept in good shape. Mr. Watson would have been given the opportunity to make his case for a rerouting of the road, or at least that portion of it that ran through his "yard" to another location. The matter of who should bear the expense of any costs associated with potential rerouting of the road would have been heard, although it is pointed out that historically, the applicant in section 175 applications bear those costs. In this case, that would have been Mr. Yozipovic.

In other words, if Mr. Yozipovic had wanted a road-based right-of-way/easement across Mr. Watson's two parcels of land, he would have had to answer to the tribunal why he should not be the one paying for it. In the tribunal's opinion, what Mr. Yozipovic saw was an opportunity to use an existing road, one which he manipulated to ensure that no cost would fall to him, and obtaining MNR's cooperation, he persisted until he obtained the 2003 Agreement registered on title to the former Crown lands

Despite what should have happened, as the holder of the unpatented mining claim, the Applicant has entitlements to use the surface of the land stemming from subsections 50(2) and 51(1) of the **Mining Act** as they existed on the date of his original application to the tribunal in 2007. The Tribunal finds that the Applicant, Mr. Yozipovic, has the legitimate right to use whatever portions of the surface of his current Mining Claim as reasonably necessary to prospect for and explore his interests. The only exception to uses of the surface fall under the discussion of lands exempt pursuant to section 32, the discussion of which ensues below.

Exemption under Section 32 of the Mining Act

Mr. Yozipovic has applied to this tribunal to enforce what he has, throughout, considered to be his legal access to his Mining Claim. The mining rights belong to the Crown and were open for staking, while the surface rights are under private ownership.

. . . . 13

Concerning what portions should, if warranted, be exempt pursuant to section 32, Mr. Watson made the following submissions. His home lies within feet of the western boundary of the Mining Claim. His private driveway and a large parking lot lie along the western border. Both his garden and his artificial pond lie either along of just west of the western boundary in the area marked A in his written submission. His campground area, serviced by hydro and with a trailer, is located along the bluff in the eastern portion of the Mining Claim. The campground is located within a cleared area which extends north to the edge of the Mining Claim, east to a lake located along its eastern boundary and south to the road which Mr. Watson built for the purpose of accessing his campground.

Mr. Watson submitted that the entire area beyond the house itself should be considered as a pleasure ground, given that the Mining Claim consists of four units and only the northwest unit does not encompass a pleasure ground. He also emphasized the fact that no consent to stake had been sought.

Mr. Watson submitted that he had no knowledge that his private property had been staked until nearly three years later. He submitted that the primary purpose of ground staking is to convey this knowledge to other concerned persons. He questioned the existence and location of the #4 post.

Mr. Watson pointed out that the staking itself is not properly within the boundaries of the staked lot and concession, but rather skewed. There is no evidence that any staking activity took place on the ground beyond the #3 post, with no blazing, flagging or marking of the boundaries for the purposes of delineating the boundaries.

Mr. Watson submitted that, should the tribunal find that it has jurisdiction to determine whether any lands should be excluded from a Mining Claim pursuant to section 32, then all of the units should be excluded as none were staked or could have been staked without the consent of the surface rights holder, which was not obtained.

The Watson quarter section is unique in that there is a 65 metre bluff running along its eastern boundary. There are only three access routes to the bluff. One is the direct route along the road built by Mr. Watson for his own recreational purposes. The other two require traversing the bush on two trails of 5 km and 20 km respectively. The sandstone is located on the bluff within the recreational area and private campground. The eastern boundary crosses through the clearing on the bluff, which provides a panoramic view of all of Mr. Watson's surface improvements.

Mr. Watson submitted that it would not have been possible to stake without being aware of the improvements on the property. Mr. Watson would like to see the **Mining Act** applied to cancel Mr. Yozipovic's Mining Claim entirely.

The tribunal finds that due to the lengthy lapse of time between the original staking and the date when Mr. Watson became aware of it, the **Mining Act** does not allow the existence of the Mining Claim to be challenged. Subsection 71(2) conclusively deems that the staking and recording of a mining claim has complied with the legislation.

. . . . 14

The proper staking of this Mining Claim should have followed the staking fabric, such that the western boundary would be located somewhere in Mr. Watson's yard, between the road and garden. The failure of the staker to properly locate the Mining Claim and to obtain prior surface owner consent or either an Order of the Provincial Mining Recorder or the tribunal, cannot be used at any future date to overcome the statutory exemption in section 32 for the exemption of lands. The deeming provisions of subsection 71(2) that the Mining Claim shall be conclusively deemed to have been staked out and recorded in compliance with statutory requirements does not extend to the rights of a third party, the surface rights owner.

These deeming provisions do not dispense with the surface rights owner's legal entitlement to either give his consent or require that the staker obtain an order to determine whether certain features are not to be excluded from the Mining Claim. Subsection 32(1) is clear that the staker must obtain one or the other in order to overcome the exemption governing that portion of the land upon which certain features are located. These include but are not limited to his house, his garden and recreation area. Neither the consent of Mr. Watson nor an order pursuant to section 32 had been obtained in this case.

While the staking of Crown lands is between the Crown (MNDM) and the staker, the exemptions involve a third party to the staking. Even though the mining rights underlying all of the quarter section are owned by the Crown, the surface rights owner has been granted by the law the opportunity of a modicum of relief from mining activity underlying his lands. Even though the staking and recording of Mr. Yozipovic's Mining Claim can no longer be attacked by Mr. Watson as a whole, that does not take away Mr. Watson's entitlement to assert his legal rights in relation to portions of that Mining Claim.

Section 32 sets out a process whereby the surface rights holder is given a voice to either agree to consent to the staking of the lands covered by exempt uses or to respond to an application where his objections can be heard and considered by either the mining recorder or tribunal in reaching a decision. The outcome is not a certainty. This happens as a precursor to staking.

However, in this case the staking has already taken place prior to consideration of Mr. Watson's rights in relation to his land. The equities, as set out in section 121 of the **Mining Act**, which requires that decisions must be made on the real merits and justice of the case, must now be considered by the tribunal in how to treat Mr. Watson's rights and interests.

The actual location of the west boundary as staked on the ground, to the west and in the bush, allowed that boundary to remain hidden, rather than attracting questions and challenge on the part of Mr. Watson. The proper location of the boundary would have been within Mr. Watson's yard, between his home and garden, the placement of which was certain to draw questions.

The real merits and justice of this case require that the exemptions created to protect the surface rights holder must be upheld. To find otherwise would be to allow Mr. Yozipovic to obtain an unfair advantage of his failure to ensure that the west boundary of the Mining Claim was in its proper location. Application of equitable principles and the discretionary

. . . . 15

jurisdiction of the tribunal on the facts of this case lead to the finding that the failure of Mr. Yozipovic to honour his obligation to obtain consent for his staker will be construed against him.

The only question left to be determined is the extent of the exemption.

The garden is located outside the boundary to the west of the Mining Claim, on the triangular area of former Crown land sold to Mr. Watson. The access road bisects the garden and Mr. Watson's home. Both are given excluded status under subsection 32(1). What this means is that it is not unreasonable to have the exemption surround Mr. Watson's home and encompass all lands to the western boundary, extending as if the garden were to form part of the exemption. The tribunal finds that Mr. Watson is entitled, by subsection 32(1) to have his home, yard and garden treated as if it were one discrete part of the lot. However, sections 50 and 51 preclude excluding the use of the road by Mr. Yozipovic to access other parts of the Mining Claim.

The tribunal finds that one acre will be excluded from the Mining Claim at the location of Mr. Watson's home. This amount corresponds with one acre exemptions of land for dwelling houses under the Conservation Land and Managed Forests Program administered by MNR and implemented for tax purposes under the **Assessment Act**. In the absence of concrete evidence of area, it is found to be reasonable to apply an area comparable to one acre for purposes of the dwelling house. This exempt area will extend to the western boundary, having dimensions of 63.75 metres by 63.75 metres, a total of 4,064.0625 square metres (compared with an acre being 4046.85 square metres). It should be centred to encompass the house and whatever part of the yard and road extend to the western boundary beyond which the garden is located.

An area of the same size (i.e. 4,064.0625 square metres) is exempt for the recreation area, with the trailer at its centre. To the extent that the parties may encounter difficulties in determining the location of the exempt area encompassing the recreation area, particularly given the location of the bluff relative to the trailer, they may apply to the tribunal for a determination or alternatively seek the mediation services of the tribunal Registrar/Mediator, Mr. Daniel Pascoe. Should a tribunal determination become necessary, its decision in this regard will form an addendum to this Order.

Claim Not *Void ab Initio*

The tribunal canvassed the parties to make submissions on whether Mr. Yozipovic's Mining Claim TB-3016678, which was staked without the consent of Mr. Watson or an Order of either the Provincial Mining Recorder or the Mining and Lands Commissioner pursuant to section 32 of the **Act** was *void ab initio*. It was explained that this term meant that it would be treated as though it had never existed.

Mr. Jamieson submitted that the tribunal has no jurisdiction to make a finding that the Mining Claim is or is not *void ab initio*. He has submitted that no such request was made by the Respondent, Mr. Watson, through a dispute under s. 48(1) heard by the Mining Recorder or through an appeal under section 112. In this regard, the tribunal is limited to issues raised in the

. . . . 16

application before it. Even if the tribunal does have jurisdiction to consider whether the claim is void at the time of its staking such that it never existed, the statutory time period for such an inquiry has expired.

Mr. Jamieson pointed out that the **Mining Act** is a complete code for challenging contested mining claims and as such, the tribunal's jurisdiction must be found within the **Act**. The term *void ab initio* is not found within the **Act** nor is it a concept relevant to the interpretation of its provisions. He summarized the procedures for the recording or not recording and filing of a dispute as set out in sections 46 and 48 as well as an appeal pursuant to section 112.

Mr. Jamieson submitted that the concept of *void ab initio* is a construct raised hypothetically by the tribunal. As Mr. Yozipovic did not raise the validity of his own claim in his application, Mr. Watson did not file a dispute and did not raise the term *void ab initio* in his case, the tribunal's attempt to consider the concept of *void ab initio* is outside the tribunal's jurisdiction under the **Mining Act**.

Aside from compliance with any statutory requirements under the **Mining Act**, Mr. Jamieson submitted that there is no jurisdiction in the tribunal to make a determination on its own initiative during the course of an application filed by the recorded holder of a mining claim. The tribunal considered the extent of its jurisdiction in **Gagne v. Falconbridge Ltd. & MNDM** (MA 028-04) wherein it stated that section 105 does not give it the right to commence a proceeding or inquiry, there being no inherent powers beyond what has been provided for in the statute.

In the past the tribunal has itself recognized its limitations of jurisdiction; it should consider itself bound in this case. The tribunal should consider itself bound by the provisions of section 71 in any inquiry regarding whether the Mining Claim is *void ab initio*. That section provides that a mining claim shall be conclusively deemed to have been staked and recorded in accordance with statutory requirements once one year has elapsed or after the first unit of prescribed assessment work has been performed and filed. In **3814793 Canada Inc. & Mousseau-Leadbetter v. Pele Diamond Corporation & 2098680 Ontario Inc.**, Tribunal File MA 016-06), a case in which the assessment work was filed within days of recording thereby putting the mining claim beyond any sort of challenge as to validity, the tribunal found itself bound by the deeming provisions of section 71. As to making application to the Minister's delegate, a further application resulted in a decision that the paramountcy of security of tenure should govern and that no challenge to a mining claim would be entertained following the recording of the first units of prescribed assessment work.

Mr. Watson's position with respect to the *void ab initio* issue was submitted by Mr. Joseph Pintar by letter dated November 22, 2010. His position was that to have been able to challenge the validity of the Mining Claim, one must have knowledge of it. Mr. Watson's position is that considering whether the claim is *void ab initio* does not take into account that the Mining Claim existed for many years without his knowledge. He therefore feels that the answer to the question must be that the Mining Claim cannot be *void ab initio* since he cannot make submissions that something never existed if he had no knowledge that it existed initially.

The tribunal indicated to the parties prior to their further filings that it has found that the Mining Claim is not *void ab initio*. The tribunal is bound by its earlier decisions. Security of tenure, meaning having a mining claim which cannot be challenged beyond one year after staking or after the first unit of assessment work is approved, has been chosen as a fundamental principle under the regime. Security of tenure was determined to be of paramount importance in consultations leading to the 1989 amendments; so much so that there is in reality no provision for such security to be overturned. This can be readily seen from the Minister's delegate's decision in **Mousseau-Leadbetter** where the concept prevailed despite there potentially being very real concerns surrounding the staking. It is clear that, while the legislation can result in some cases of unfairness or potential injustice, the overall objectives are felt to be sufficiently compelling to override the equities in circumstances falling outside the regulatory framework.

Notwithstanding this finding, considerable written submissions were made on behalf of Mr. Watson effectively attempting to cherry pick various provisions of the **Mining Act** to allow the tribunal to re-open the issue of proper staking of the Mining Claim. He attempted to address substantial and deemed substantial compliance of staking provisions. Mr. Watson also referred to Part XI of the **Mining Act** dealing with offences, and in particular, subsections 164(1) and (2) and 169(3). Mr. Watson's argument, based upon the two year limitation in subsection 169(3) is that, rather than the statutory one year period for challenging the staking of the Mining Claim, the two year limitation should be applied. Mr. Watson acknowledges that other limitations in the **Act** do not include this same wording, but submitted that no other possibility can exist, that all must have knowledge to be given an adequate opportunity to respond. To do otherwise creates the situation in which one party has an advantage by keeping information from another until the limitation period has passed. Referring to subsection 67(2) involving computation of time for performance of assessment work, Mr. Watson submitted that any exclusion of time affecting one anniversary must also affect all anniversaries including whatever limitations concern a particular party. Time must be applied equally to all.

This is not how legislation operates. It cannot be applied analogously, using words from various sections and cobbling them together to create intent that is not found in the legislation as it is written.

Notice to Minister to be Added as a Party

On October 20, 2010, the tribunal issued an Interim Order and Notice to the parties and to the Minister of Northern Development and Mines (MNDM). MNDM was asked whether it wished to be added as a party to these proceedings. Although the Applicant, Mr. Yozipovic, referred throughout his evidence to this matter as an appeal, in fact it was an application under section 105 of the **Mining Act** which, at the date the matter was received in 2007 stated:

> **105**. Except as provided by section 171, no action lies and no other proceeding shall be taken in any court as to any matter or thing concerning any right, privilege or interest conferred by or under the authority of this Act, but except as in this Act otherwise provided, every claim, question and dispute in respect of the matter or thing

> shall be determined by the Commissioner, and in the exercise of the power conferred by this section the Commissioner may make such order or giver such directions as he or she considers necessary to make effectual and enforce compliance with his or her decisions.

In simple terms, this section gives the Commissioner (tribunal) exclusive jurisdiction to make determinations regarding rights and interests which arise under the legislation.

MNDM determined that it would not seek to be added as a party to this matter. Indeed, although there did not appear to be a reason for MNDM to have been canvassed, nonetheless, the tribunal was concerned that there was a greater public interest and sought the Minister's submissions on whether a mining claim could be declared *void ab initio* years after it had been staked. The Minister declined to take a position based on the jurisdictional limitations of the matter of *void ab initio* predicated on the fact that this smatter was not an appeal from a decision of the Provincial Mining Recorder but rather was an application directly to the tribunal under section 105 of the **Mining Act**.

Original Contract between Mr. Watson & MNR

The history of this matter set out in detail in the tribunal's Interim Decision of October 20, 2010. Mr. Watson purchased his quarter section in 1997 and applied to the MNR for a Crown Land Sale of an adjacent parcel to gain highway access to his home as well as use of a lawful railway crossing. Although MNR's January 20, 1998, correspondence with the Ministry of Transportation (Ex. 37, page 3) indicated that it had received several expressions of interest for the SW 1/4 Section 11, Concession 7, McTavish Township, its letter states that there were only two actual applications for portions of the property. One was from an existing golf course and one from the adjacent quarter section owner, namely Mr. Watson.

In the letter from MNR of August 19, 1999 (Ex. 37, page 7), Mr. Watson is told by Mr. Craig Hockridge that his application to purchase Crown land is approved. Mr Watson is required to have a survey performed at his own expense. The cost per acre is set out. Mr. Hockridge noted that the original boundary between Mr. Watson's and Mr. Cooney's purchase had changed from the original proposal as agreed, this being the only reference to a third party.

There is no mention of Mr. Yozipovic in this letter. The offer was to be valid for six months. Despite the actual Letters Patent not being issued until 2001, the tribunal found on those parts of the MNR documents filed, as Exhibit 37, that this approval had expired. Nor was the tribunal provided with any documentary evidence involving MNR that prior to the August 19, 1999, letter from MNR that Mr. Yozipovic was in any way involved in Mr. Watson's transaction with MNR.

The tribunal finds that the application and acceptance has remained in place until the survey was completed, money paid and Letters Patent issued.

Mr. Watson's original application to purchase and the August 18, 1999, letter of acceptance from MNR, with terms set out is the entire contract. The tribunal finds that the

. . . . 19

contract was between MNR and Mr. Watson exclusively. The tribunal further finds that the contract was for the sale of the parcel of adjacent Crown lands to Mr. Watson and nothing more. As stipulated, Mr. Watson was to pay the specified amount per acre plus GST and to have a survey carried out at his own expense. MNR was to issue Letters Patent upon completion and compliance by Mr. Watson and receipt of funds. There was offer, acceptance, consideration and completion of all terms specified. The acceptance on the part of MNR is straightforward and plain on its face. It is a two party agreement involving MNR and Mr. Watson, a simple contract.

Mr. Yozipovic's Involvement

The facts and documentary evidence give no indication that Mr. Yozipovic had expressed his interests at the time Mr. Watson applied to MNR for the sale of Crown land in 1997, nor was he mentioned in MNR's letter of August, 1999. Mr. Jamieson asserts in his submissions that a meeting between Mr. Watson, Mr. Yozipovic and MNR took place in which the requirement to provide access to Mr. Yozipovic was laid out as a condition of the agreement to sell the Crown lands to Mr. Watson. While the tribunal does not doubt that such a meeting took place, no date was provided either in this submission, nor in any written or oral testimony.

However, the tribunal finds that by his letter of December 8, 1999, to Mr. Watson (Ex. 37, page 9A), Mr. Yozipovic commenced with the words, "Information suggests that the Ministry of Natural Resources has tentatively approved your purchase…". There was no evidence as to how this came to Mr. Yozipovic's attention. He refers to an earlier telephone conversation and asks that Mr. Watson, "…please confirm your approval to the Ministry of Natural Resources, maintaining my present access to the above subject Mining Claims under the Provincial Mining Act, by registered Right-of Way from Hwy 587 along the southern boundary of your property, the SE 1/4 Sec. 11 Conc. VII to the easterly limit." The mining claims at that time were to the south and southeast of Mr. Watson's quarter section, so that the "access" to which Mr. Yozipovic referred was in fact a right to pass through the Watson quarter section.

The date and content of Mr. Yozipovic's letter support the tribunal's finding that the terms of Mr. Watson's proposed agreement with MNR for purchase of the former Crown lands were completed before Mr. Yozipovic insinuated himself into matters. As such, it was beyond MNR's powers to impose new terms on the agreement for the land sale on Mr. Watson without Mr. Watson being given something in return, some fresh consideration.

The fact that Mr. Yozipovic's involvement was not mentioned in the initial agreement letter from MNR of August 18, 1999, means that any purported terms involving Mr. Watson were not included in the agreed upon contract. The law is clear that once a contract has been reached, once its terms have been negotiated and agreed upon, one of the parties cannot unilaterally add new terms without the agreement of the other party and without new consideration flowing. (c.f. **Rees v. Howcutt,** 1854 Carswell Ont 51, 4 U.C.C.P. 284) (Upper Canada Court of Common Pleas). Simply put, after reaching its agreement with Mr. Watson, MNR could not add an obligation to the agreement without Mr. Watson receiving some additional benefit from Mr. Yozipovic in return. No such benefit or consideration was received. Indeed, Mr. Jamieson on behalf of Mr. Yozipovic has maintained that it was not necessary, having been part of the original requirement imposed by MNR. The history and facts do not bear out this position.

. . . . 20

Past consideration cannot constitute consideration for the additional term to the contract. (c.f. **Cunningham v. Richardson,** 1850 Carswell Ont 236, 7 U.C.Q.B. 163). Mr. Yozipovic's involvement cannot be imported at a later date as an additional term as there was no additional consideration to Mr. Watson.

Although the interactions between the parties were prone to be misconstrued throughout, Mr. Watson's beliefs at this point may have some bearing on his being induced to agree to enter into the first agreement for access with Mr. Yozipovic across the former Crown lands.

Mr. Watson's documentary evidence (Ex. 6) is that Mr. Yozipovic told him that he (Mr. Yozipovic) had first rights to purchase the Crown lands in question. Mr. Watson also believed that Mr. Craig Hockridge of MNR supported this contention. Mr. Watson also stated that it was his belief that the Crown lands would be sold to Mr. Yozipovic if he didn't sign an agreement with Mr. Yozipovic providing guaranteed access which compelled him to do so.

There is no documentary evidence from MNR that supports Mr. Watson's belief. It is contradicted by the documents from the MNR file (Ex. 37). Specifically at page 3, Mr. Gary Davies, Senior Area Technician, MNR, indicated in a letter to the Ministry of Transportation that it has received several expressions of interest and two formal applications for the purchase of portions of the SW 1/4 of Section 11, Concession 7, McTavish Township. The formal applications are from the owner of an existing golf course and from the owner of an adjacent property seeking access, namely Mr. Watson.

The tribunal could find no evidence of any actual right of first purchase granted to Mr. Yozipovic, nor did Mr. Yozipovic himself produce any documentary evidence supporting such a right. None of the documentary evidence filed revealed anything in writing from Mr. Yozipovic purporting to have a first right of purchase.

Mr. Yozipovic did not give evidence at the hearing that he had the first right to purchase. Rather, what he referred to in the hearing was his right under subsection 51(1) of the **Mining Act.** Mr. Yozipovic also stated that all he was attempting to do is preserve his right of unfettered access over Crown land.

The tribunal does wonder whether Mr. Watson has confused the words used in subsection 51(1) which Mr. Yozipovic undoubtedly quoted to him, much as he did during the hearing, with an actual first right of purchase on the part of Mr. Yozipovic. Indeed, it is most unfortunate that Mr. Watson did not ask for further, written documentation from MNR or MNDM in support of whatever was his understanding was the situation. Such early action and inquiries on his part may have alleviated some of the growing tension and resentment between the parties, although that might be optimistic hindsight. Whatever the source of Mr. Watson's belief, the tribunal finds that no such first right of purchase exists either under the **Mining Act** or by way of agreement made between MNR and Mr. Yozipovic.

MNR's Involvement

The tribunal assumes that Mr. Yozipovic was one of the several expressions of interest mentioned in the MNR's January 20, 1998 letter (Ex 37, page 3). The tribunal wonders why MNR took Mr. Yozipovic's interest in the Crown lands so seriously, given that between 1999 and September, 2004 his unpatented mining claims did not abut it. The tribunal was perplexed that MNR would purport to facilitate for Mr. Yozipovic instead of directing him to rely on the **Mining Act.**

Mr. Hockridge of MNR provided evidence that that Mr. Yozipovic approached MNR with concerns about access to Crown lands and use of the railway crossing which was on the Crown lands to be sold to Mr. Watson. Mr. Hockridge stated that if MNR were concerned that a property was being used by more than one party it would likely not sell it to a private individual, but retain the land in the public domain. He stated that there is no absolute requirement to sell the land; it could always remain as a public road on Crown lands. However, MNR assured itself that it would be able to protect the private interests by asking the two parties to get together and agree to an easement over the Crown lands to be sold. That is what happened in this case, and so MNR went ahead with the sale to Mr. Watson.

Mr. Hockridge did not produce or refer to any MNR policy which was used in such circumstances to evaluate whether Crown lands should be sold or remain in the public domain. As was typical of the evidence given at this hearing, Mr. Hockridge's evidence was plagued by confusing and vague questioning. The tribunal did not hear any details concerning how MNR came to be so concerned with Mr. Yozipovic's mining interests or exactly which of Mr. Yozipovic's interests MNR was attempting to protect, let alone why it acted as it did. Mr. Hockridge stated that normally, MNR does not check out the interests on adjacent land, but only the subject of the sale to determine whether the land was staked. He indicated that, should it be brought to MNR's attention that there is an interest beyond the Crown lands subject to potential sale, then it would have to decide how to proceed.

It is difficult to understand the decision by MNR to sell the land to Mr. Watson based upon the practice outlined by Mr. Hockridge. The Crown lands were being used by Mr. Watson to gain access to his home and they were also being used by Mr. Yozipovic to cross beyond, over Mr. Watson's surface rights, to the Yozipovic claims to the south and southeast. The tribunal does not agree that it was necessary for MNR to impose on Mr. Watson the requirement to grant a right of access to Mr. Yozipovic over the former Crown lands.

Mr. Yozipovic's unpatented interests in the mining rights in 1999 were different from his rights in 2001, again different in 2003 and finally, involved a completely different parcel in 2004. Further, any Crown lands open for staking in the vicinity, requiring the subject Crown land gateway, could be staked by anyone possessing a valid prospector's licence, and thus were tenuous and subject to change upon forfeiture or new stakings. Every time Mr. Yozipovic's mining claim(s) forfeit between 1999 and 2004, they could just have easily been acquired by another staker. This being the case, MNR's actions make little sense to the tribunal. In his own words, Mr. Hockridge stated that MNR's usual practice was that if multiple parties were concerned about its use for access, MNR would not sell, but retain the land. In keeping with this,

. . . . 22

MNR's goals could have been served by retaining the Crown lands as Crown lands and not selling them to Mr. Watson or anyone else. It is unclear why MNR failed to adhere to this.

Mr. Yozipovic's letter to Mr. Watson was part of the MNR file and showed that he was seeking access over the southerly portion of Mr. Watson's quarter section in addition to the Crown lands. It also clearly stated that he wanted this done through a registered right of way (Ex. 37, page 9A). The MNR date stamp shows that it was received by MNR on December 10, 1999. The MNR file also contains an unidentified map (Ex. 37, page 5) which purports to be a fax from Jim Paterson to Gary Davies dated April 24, 1998. This document was contentious. None of the government witnesses was able to speak to its origin and it is unknown whether it was ever sent. Nonetheless, the document does speak for itself in one very significant way; it contained a dotted line across Mr. Watson's surface rights only quarter section which was labelled "potential access". It really doesn't matter who the author of the document was. The fact is potential access across Mr. Watson's quarter section is set out. The document shows a hand-written note suggesting that Pat MacDonald of MNDM indicated that nothing in the **Mining Act** facilitates such access. The tribunal concludes that in 2001 MNR must have known that Mr. Yozipovic was seeking access over Mr. Watson's quarter section; no evidence was offered about whether MNR followed up on this.

MNR was clear in its letter of October 25, 2001 to Mr. Watson from Mr. Hockridge (Ex. 37, page 10) which refers to a mutual agreement between Mr. Watson and Mr. Yozipovic for an easement for Parts 7 and 8 on Plan 55R-11510, being the Crown lands under sale. In other words, as of October 25, 2001, Mr. Watson was asked by MNR to agree to grant Mr. Yozipovic an easement over the former Crown lands. It would have been preferable if MNR also had stated equally clearly, to both Mr. Watson and particularly Mr. Yozipovic what land, (i.e. Mr. Watson's quarter section) the required access would not cover.

Mr. Watson's evidence was that he was bewildered by the process which involved Mr. Yozipovic. For his part, Mr. Watson did not attempt to fully understand what MNR was asking of him and why. Instead, he acquiesced to his understanding of what MNR asked of him. The tribunal questions whether Mr. Watson's willingness to allow Mr. Yozipovic across his quarter section in 2001 stemmed from the fact that MNR required Mr. Watson to reach an agreement with Mr. Yozipovic. The evidence shows that he acquiesced to signing agreements which went beyond what was contemplated by MNR in its 2001 letter. No mention was made in MNR's correspondence at that time of any access across Mr. Watson's quarter section.

At some later but unspecified date, the grant of access was in return for not seeing Mr. Watson's Crown land purchase voided and purchase money forfeit to the Crown, as set out in a letter of March 13, 2003 from Mr. Hockridge who characterized this condition in his letter,

> "The Ministry of Natural Resources accepted our offer to purchase the lands in question with the implicit proviso that you grant an easement to ensure access to Mr. Yozipovic's abutting interests and you were directed to negotiate the location of the easement. This constituted a collateral agreement, which is evidenced by the fact that you did enter into a written agreement with Mr.

. . . . 23

> Yozipovic and the surveyor preparing the legal description identified the proposed easement as a part on the survey plan. You have now refused to honour that commitment. It is our opinion that your deliberate misrepresentation with respect to your intention to grant the easement in order to secure the sale from the Crown could well be viewed as coming within subsection 23(1) of the *Public Lands Act*. That provision states: "If the Minister is satisfied that a purchaser, … has violated any of the conditions of sale, … the Minister may cancel such sale … and dispose of it as if the same had never been made, and upon such cancellation all money paid in respect of such sale …. Remain the property of the Crown and the improvements, if any, on the land are forfeited to the Crown…."

MNR made several mistaken assumptions in this correspondence. The chronology of what took place and correspondence does not support MNR's position that the requirement to provide access to Mr. Yozipovic was a condition of its Crown land sale to Mr. Watson. The suggestion that the 2001 Agreement entered into between Mr. Watson and Mr. Yozipovic was collateral to the completion of the Crown land sale does not follow. The evidence of Mr. Watson throughout, however, is that he believed he had no choice in the matter. The tribunal does not accept the conclusion that Mr. Watson deliberately misrepresented the facts to MNR in negotiating the sale of Crown lands.

MNR also made a factual error in its letter, namely that the Crown lands abut Mr. Yozipovic's mining claims. Mr. Yozipovic's various mining claims did not abut the former Crown lands at any time between 1999 and 2003. It appears that MNR was not informed of what unpatented mining claim interests Mr. Yozipovic had in the area and what it could legitimately do for him. MNR proceeded as though it had to protect Mr. Yozipovic's interests when at that time, Mr. Yozipovic had no interests which would warrant this type of protection on the part of MNR. He had nothing more than non-abutting non-patented mining claims.

Mr. Yozipovic's Rights of Access According to Successive Agreements with Mr. Watson

Mr. Yozipovic had been the recorded holder of a succession of unpatented mining claims on the same patch of land to the south and southeast of Mr. Watson's land between 1996 and 2004. A review of the history of Mr. Yozipovic's unpatented mining claims between 1999 and 2003 shows that there were no fewer than three separate sets for the same parcel of land. What this means is that Mr. Yozipovic's ongoing commitment to those mining claims was extremely tenuous. At each forfeiture there was always the very real possibility that someone else could have staked those lands and he would have had no mining claim interests in the vicinity whatsoever. He failed to take the necessary legal steps to keep the claims in good standing. It is unclear whether or not he actually carried out assessment work or if so, where. Nonetheless, his interest in generating interest from the industry in quarrying building stone was sufficient that he produced a pamphlet towards that end which was filed with his evidence.

Mr. Yozipovic had actively shopped around the opportunity for an option, joint venture or other type of involvement for a quarry development in this vicinity in these adjacent claims, as was clear from his oral evidence and from his pamphlet under the title of Black Gold

Explorations (forming part of Exhibit 7). The pamphlet lists latitude of 48°10' and longitude of 88°30'which has been difficult to situate. An attempt by the tribunal to locate it on Google Earth ends up at a point on the northeast tip of Isle Royale, which is located within Lake Superior off Sibley Peninsula within American waters. The pamphlet has been marked up by hand, so that the original 480 acres is changed to 1280 acres and instead of the pictured one type of rock, now has listed in handwriting red sandstone and red dolomite. The picture showing the height of the cliff on which the rock is found has a railway track running along its base beside a road. Perusal of the Google Earth photo of the vicinity with the Watson quarter section outlined (Ex.9) shows that the only railway tracks in the vicinity run along highway 11/17 and are not found anywhere on the Watson quarter section or Mining Claim. One could surmise that the photograph on this pamphlet was taken from within Mr. Yozipovic's earlier claims to the south and southeast, below the ridge shown.

In 2004, Mr. Yozipovic's attention moved from these abutting lands on which he allowed the last in the succession of claims to lapse to Mr. Watson's quarter section. Despite this later date, Mr. Yozipovic has throughout asserted a right of access to *his mining claims*, having succeeded under the auspices of MNR's purported say so, in getting Mr. Watson to sign a succession of documents agreeing to mining claim access.

Despite Mr. Hockridge's letter of October 25, 2001, referring to Parts 7 and 8 on the Crown land parcel only, Mr. Yozipovic sought additional access. In the October 30, 2001 Agreement of Understanding to provide Mr. Yozipovic with unrestricted access to the Crown land parcel, a second paragraph stipulated that the access *"shall"* extend across the southern portion of Mr. Watson's quarter section to the southeast corner (Ex. 11). Mr. Watson signed this 2001 agreement which was drafted to include the access over the Watson quarter section. Although Mr. Watson didn't mention it in connection with this 2001 Agreement, he gave evidence that the dotted line showing access on the unproved fax/map was an impossibility, that it would entail going off a cliff, that no such access was actually possible (Ex. 37 page 5). Again, Mr. Watson did himself a disservice in having failed to question the 2001 Agreement he signed. Nevertheless, the tribunal finds that Mr. Watson was induced to enter into the 2001 Agreement through the mistaken belief that he was required to do so to obtain lawful access to his quarter section as part of the Crown land purchase.

No consideration is mentioned in this 2001 Agreement between Mr. Watson and Mr. Yozipovic. Mr. Jamieson, counsel retained by Mr. Yozipovic after the conclusion of the hearing when additional written argument was sought pursuant to the tribunal's Order of October 20, 2010, provided submissions as requested.

Mr. Jamieson acknowledged that a binding agreement requires that each party receive consideration or a benefit in exchange for the promises given, while it need not necessarily be monetary. In the case of consideration received by Mr. Watson for granting access to Mr. Yozipovic, Mr. Jamieson submitted that Mr. Watson was told by MNR he could not purchase the Crown land, which Mr. Yozipovic also wanted to purchase, unless he met the condition that Mr. Yozipovic be granted a lawful right to cross it. Mr. Jamieson submitted that the consideration received by Mr. Watson was the right to purchase the Crown land in exchange for the right of access granted to Mr. Yozipovic. Mr. Watson is now attempting to be allowed to behave as though he made no such agreement. Further, the later written agreements signed flow from this initial promise by Mr. Watson.

. . . . 25

Mr. Jamieson further submitted that the 2003 and 2005 agreements flowed from the original promise made in 2001, which is based on the promise that Mr. Watson gave to MNR and Mr. Yozipovic that Mr. Yozipovic would have access over Mr. Watson's quarter section. According to Mr. Jamieson, Mr. Watson acknowledged that the reason he has given this promise is the promise of the Crown land sale, which is the consideration for the promise.

Mr. Jamieson submitted that the 2003 Agreement flows from this promise. Moreover, in that 2003 Agreement Mr. Watson has acknowledged receipt of consideration. Mr. Jamieson pointed out that the law does not concern itself with a subjective evaluation of the adequacy of consideration, merely of the fact of whether it was given, and further the law assumes that the parties to a bargain evaluated the adequacy of consideration themselves.

This line of reasoning is not accepted by the tribunal. The agreement between MNR and Mr. Watson was struck before Mr. Yozipovic entered into the process, as evidenced by the documentation on file. Specifically, Mr. Watson's application was approved by MNR in August, 1999. Mr. Yozipovic did not initiate contact with Mr. Watson concerning access to his mining claims until December of 1999. Furthermore, there is no evidence concerning the exact date when matters turned into three-party negotiations, but the evidence is incontrovertible that it occurred after MNR and Mr. Watson had reached their agreement. Mr. Yozipovic first wrote to Mr. Watson in December, 1999, asking that Mr. Watson contact MNR directly to confirm continuing access. Whatever steps either Mr. Yozipovic or MNR took thereafter cannot in law form part of that original agreement between MNR and Mr. Watson. Nor can the sale of the Crown land to Mr. Watson form any part of the required consideration for an agreement with Mr. Yozipovic.

Agreements in light of successive mining claims and the 2001 Agreement

The tribunal posed in its Order of October 20, 2010, questions regarding the continuing validity of the successive agreements signed by Mr. Watson, given that the particular mining claims held by Mr. Yozipovic at the date each agreement was signed subsequently expired. Mr. Jamieson submitted that the Agreement of October 30, 2001, speaks for itself, is not limited as to location, as to form of tenure and as to time. The Agreement is for unrestricted access and he submitted that no restrictions should be read into the Agreement by the tribunal. Mr. Watson had already agreed that such unrestricted access would extend across the southern portion of his quarter section. According to Mr. Jamieson, the parties clearly put their minds to the matter of whether restrictions should exist and the wording of the Agreement indicates that they should not.

The October 2001 agreement provides for access across the former Crown lands as well as Mr. Watson's quarter section. This Agreement between Mr. Watson and Mr. Yozipovic is separate from the agreement for purchase of Crown lands between MNR and Mr. Watson. As such, the tribunal finds that it requires fresh consideration from Mr. Yozipovic, something which did not occur. Without consideration and the tribunal finds that there was none, the Agreement amounts to no more than a revocable license granted by Mr. Watson to Mr. Yozipovic. (C.f. **Beeven v. Reid,** 1851 Carswell Ont. 226, 9 U.C.Q.B. 152) It is not an agreement under seal. The past consideration of the Crown land sale from MNR plays no part in this purported agreement.

. . . . 26

As for whether the 2003 Agreement should be limited in time to the corresponding mining claim which Mr. Yozipovic held when it was signed, Mr. Jamieson submitted that this Agreement is a companion and supplement to that of 2001, is not a replacement for nor any limitation of it. He stated that the terms of the 2001 Agreement reflect the fact that nothing could be recorded on title until Watson completed his purchase. The 2003 Agreement which was recorded on title came into existence and according to Mr. Jamieson, it is immaterial whether the claims subsequently forfeit.

Mr. Jamieson submitted that the 2003 Agreement was based upon the unrestricted access across the quarter section, which Mr. Watson was bound to do. Also, in the 2003 Agreement, Mr. Watson agreed to sign such further agreements as required to give effect to the existing agreement for unrestricted access. This also demonstrated a clear understanding by Mr. Watson that the 2003 Agreement would not necessarily be the last that would be required of him.

Mr. Jamieson submitted that, it is Mr. Watson's attempt to breach the 2003 Agreement as well as the 2001 Agreement which has led to the impasse between them now.

The tribunal does not agree with Mr. Jamieson's submissions based upon the fact that the Watson/MNR agreement stood on its own. Therefore, as a revocable licence, Mr. Watson was entitled to revoke the 2001 Agreement at any time. There is no evidence that he did so prior to the execution of the 2003 Agreement, but if the tribunal is wrong in that regard, he was nonetheless entitled to do so at will. Given that there was no consideration, the tribunal does not accept that Mr. Watson's actions in signing subsequent agreements necessarily flowed from the original. Each agreement is seen as standing on its own and must be evaluated on the terms specified in the document.

The 2001 Agreement by Mr. Watson to allow Mr. Yozipovic access over the quarter section throughout remained a revocable license until Mr. Yozipovic acquired the Mining Claim in September 2004, at which time he was able to assume the rights of use of the surface necessary to work his claim within the meaning of the **Mining Act.** At that point in time, any earlier agreement concerning access over the quarter section, become moot.

The 2003 Agreement

The 2003 Agreement, as indicated by Mr. Jamieson, does acknowledge that Mr. Watson received consideration. The consideration relied upon to make this finding is the acknowledged $1 and not flowing from or resulting from the agreement Mr. Watson made with MNR.

The 2003 Agreement was entered into after Mr. Hockridge's letter to Mr. Watson of March 13, 2003, in which it was stated that the requirement to provide access to Mr. Yozipovic was a condition of the Crown land sale. It was also the letter that threatened to void the Crown land sale and see the money paid forfeit if Mr. Watson did not comply.

Presumably drafted by lawyer David Christie, the only recital in the copy of the 2003 Agreement filed with the tribunal provides that Mr. Watson had agreed to permit Mr. Yozipovic to use as a right of way Parts 7 and 8, Plan 55R-11510 (former Crown lands) for the

. . . . 27

purpose of access "*for all purposes to the Mining Claims"*. The document, as filed, does not have a recital setting out what lands constitute the "Mining Claims". It made no sense to the tribunal that a legal document would use a defined term without defining it.

The tribunal obtained another copy directly from the Land Titles Office so that it could verify whether an attached schedule had been inadvertently omitted, which seemed a logical explanation. It turned out that this was not the case. ***Rather, the document which had been filed by or on behalf of Mr. Yoziopovic had been altered.*** In the copy obtained from the Land Titles office, the two *missing* recitals appear in the body of the first page, not at the end of the page, where they could have been inadvertently cut off in transmission or copying. The tribunal has not yet made the parties aware of its actions or the discrepancy in the documents. However, due to the location on the page of the missing recitals, there is a very strong likelihood that the alteration and omission was deliberate.

The ***complete unaltered document*** contains three recitals, commencing with the words "Whereas" or "And Whereas". The first recital describes the Watson lands as the SW 1/4 Sec. 11, Con. 7, designated as Parts 3, 4, 5, 6, 7 and 8 on Plan 55R-11510, or what the tribunal has been calling the Crown or former Crown lands. The second recital specified that Mr. Yozipovic *owns* mining claims on the NE 1/4 Sec. 12, Con. 7 & SE 1/4 Sec. 12, Con. 7, being to the south and southeast of the Watson quarter section. The third provided that Mr. Watson agreed to permit Mr. Yozipovic to access the mining claims over Parts 7 and 8, Plan 55R-11510, *being a portion of the Watson lands.*

In the first paragraph, Mr. Watson agreed to permit Mr. Yozipovic, his executors, administrators, successors and assigns to use as a right of way over Pt. SW 1/4, Sec. 11, Con. 7, designated as Parts 7 and 8 "*for the purpose of access for all purposes to the Mining Claims"*.

Why the 2003 Agreement did not specify access across the Watson quarter section was explained in the March 4, 2003 letter Mr. Christie wrote to Mr. Yozipovic (Ex. 24) in which he summarized what was agreed to in an earlier meeting. Mr. Watson at this point has agreed to allow Mr. Yozipovic access to his mining claims "via his property". The tribunal is prepared to assume that this refers to the Watson quarter section. There are two conditions attached to this, namely that there will be a locked gate and that Mr. Watson reserves the right to reconsider if an active quarry is developed and the quiet enjoyment of his residential property may be detrimentally affected. Mr. Christie concluded:

> "In the circumstances, he [Mr. Watson] does not wish to have his property subject to a formal registered right-of way, particularly since such a registration would have to be accomplished against his entire property."

The information in Mr. Christie's letter cannot be used to interpret what the 2003 Agreement itself means or what the parties intended it to mean. It does, however, shed light on why the Watson quarter section was not encumbered as a result.

Is the vague wording of the first paragraph "for purpose of access for all purposes" sufficient to capture the Watson quarter section? Given that in the second paragraph,

"Mr. Watson further covenants and agrees to execute and deliver whatever additional documentation that is reasonably required from time to time to give effect to the foregoing", the tribunal finds that the answer is that it is not. The wording of the first paragraph is sufficiently specific to the former Crown lands, specifying those parts over which the easement/right-of way for access will be granted. The second paragraph contemplates a further agreement, one which would require Mr. Watson to execute such further documentation as required to give effect to access *those particular mining claims or claim units.* In other words, an additional document specifying access over the Watson quarter section would be required to extend the terms of this 2003 Agreement to those lands.

The copy of the 2003 Agreement provided to the tribunal has been deliberately altered. The question is by whom and for what purpose. A date stamp on the copy shows that in August of 2006 it had been sent to and received at the office of the Provincial Mining Recorder in Sudbury. There is also a facsimile number from 2009 for transmission of the document of (807) 475-1112, and the name on the fax is the OGS Thunder Bay, which corresponds with a listing for the Thunder Bay South Regional Resident Geologist Office. This information provides no information as to who sent the document and for what purpose.

The law of altered documents has been set out in **Royal Bank of Canada v. Druhan** 1997 Carswell NS 438, 163 N.S.R. (2d) 174, 487 A.P.R. 174, 15 R.P.R. (3d) 12, [1997] N.S.J. No. 422, (N.S.C.A.) commencing at paragraph 47:

> The genesis of the legal principles, with respect to alteration of documents is the often quoted *Pigot's Case* (1614), 77 E.R. 1177 (Eng. K.B.). Those principles are set out in *Halsbury's Laws of England* (4th) Volume 9 at p. 413-414 as follows:
>
> **597.** Unauthorized material alteration. If, after a written contract has been executed, a promisee intentionally alters it in a material respect without the consent of the promisor, whether by adding anything to it or by striking out any part of it or otherwise, the promisor is discharged, even if the original words can still be read. The rule applies not only to contracts under seal, but to all contracts in writing and written instruments.
>
> A party seeking to enforce an altered instrument must show that it is not invalidated by the alteration.
>
> **598.** Scope of the rule. Even if the alteration is made by a stranger without the knowledge of the promise the other party is discharged if the document is in the custody of the promise or of his agent, but there is no discharge where the alteration was made by a stranger whilst the document was not in such custody. The promisor is not discharged where the alteration was made by accident or mistake; but the contract is avoided where the alteration was intentional, even if made under a mistake of law as to the legal effect of the document…
>
> **599.** What alterations material. To have the effect of discharging the promisor the alteration must be material, that is to say it must be one which alters the obligations created by the instrument. An alteration which merely expresses what would otherwise be implied is immaterial and does not affect the liability under the contract.
> …

> Professor Waddams in *The Law of Contracts*, 3rd edition, 1993, suggests that in Canada these principles have been somewhat narrowed by the requirement to prove actual fraudulent intent in order to have an altered document declared void in its entirety. He says at p. 235:
>
> > Where a document is altered after execution it is plain that the obligations evidenced by it cannot thereby be increased. The alteration will be void against the obligor in the absence of assent to it. Where a material alteration is made fraudulently by the obligee, it has been held that the document is void altogether, the basis of this rule being a penal one. A person should not be able to attempt a fraud with nothing to lose if the attempt fails. Some statements of the rule go much further and it has been suggested that any alteration made while the document is in the custody of the obligee voids the document, on the ground that the obligee is bound to keep the document intact. This version of the rule seems too wide. The *quasi*-penal consequence of total nullity rests on deterrence of fraud, and should be reserved, it is submitted, for cases of actual fraudulent intent.

Notice of the 2003 Agreement for the former Crown lands, being SW 1/4 Sec. 11, Con.VII, was registered on title on January 13, 2004 under section 71 of the **Land Titles Act.** The 2003 Agreement itself was entered into through the requirements imposed on Mr. Watson by MNR. As far as the continuing applicability of the 2003 Agreement to the former Crown lands is concerned, the tribunal has no jurisdiction to determine whether the terms under which it was made, namely for the purpose of gaining access to a mining claim which forfeit on July 22, 2004, can continue to bind Mr. Watson. The power to make findings concerning patented lands rests with the Superior Court of Justice. Should Mr. Watson wish to pursue having 2003 Agreement and Document vacated from the parcel for the former Crown lands, such decision would have to be made in that forum.

The only potential manner in which the tribunal could return to this question would be through a reference from the Court through section 108 of the Mining Act which states,

> **108.** Where in the opinion of the court in which an action is brought the proceeding may be more conveniently dealt with or disposed of by the Commissioner, the court may, upon the application of a party or otherwise and at any stage of the proceeding, refer the action or any question therein to the Commissioner as a referee on such terms as to the court seems just and the Commissioner shall thereafter give directions for the continuance of the proceeding before him or her, and, subject to the order of reference, all costs are in his or her discretion.

Should either party determine that it wishes to pursue this in the Superior Court of Justice and seek a referral to the tribunal for resolution of the issue, the Commissioner would exercise her jurisdiction and have such a matter heard and determined by a Deputy Commissioner who was not involved in these proceedings to date.

The 2005 Agreement

On May 18, 2005, Mr. Watson signed a Memorandum of Understanding for the S.E. 1/4 Sec. 11, Con. VII & S.W. 1/4 Sec. 11, Con. VII – Plan 55R-11510, Pt. 4., which

. . . . 30

stipulates that as the surface rights owner he agrees to the definition of mining rights and "provides for equal right of access, without impediment, to Tony Yozipovic and associates across his Registered Right-of-Way, Plan 55R-11510. Pt. 4 and his recorded Mining Claims in McTavish Township." The copy filed with the tribunal as Exhibit 22 is on the letterhead of Sleeping Giant Stone Products and is not signed by Mr. Yozipovic, although there is a place for him to have done so.

The tribunal does not know the significance of Part 4 on the Reference Plan; the prior agreement sets out Parts 7 and 8 which corresponds with the surveyed road through the former Crown lands. It appears that it is another part of the former Crown lands that Mr. Watson had granted access over. Being an agreement made without consideration, it too is no more than a revocable licence which Mr. Watson can revoke at any time.

As for the 2005 Memorandum of Understanding, its subject line refers to the Watson quarter section. However, what it provides for in the body is Mr. Watson's agreement to the following:

> "agrees to the **Mining Act** R.S.O. 1990 definition of Mining Rights that "Surface Rights "are every right in land other than Mining Rights" and provides for equal right of access, without impediment, to Tony Yozipovic and associates across his Registered Right-of-Way, Plan 55 R-11510 Pt 4 and his recorded Mining Claims in McTavish Township.

The mining claims are referred to in the plural. If the tribunal were to follow Mr. Jamieson's reasoning, this would suggest that Mr. Watson has agreed to grant access to all mining claims, whether they are now in existence or may be staked in future. Such an interpretation stretches credibility and is not supported by what has gone on before. Perhaps Mr. Yozipovic has, throughout, merely been attempting to nail down that which he believes sections 50 and 51 of the **Mining Act** guarantee to the unpatented mining claim holder. That is not unreasonable, given that no one has articulated with any certainty for him and Mr. Watson what that constituted.

The 2005 Agreement, at the date on which it was signed, refers to recorded "Mining Claims". Given the propensity throughout the various agreements to intermingle and confuse mining claims with numbers of units within a single mining claim, the tribunal prefers the interpretation which recognizes only the Yozipovic Mining Claim as it existed on that date. The 2005 Agreement, therefore, is for some right of access over Part 4 on Plan 55R-11510 within the former Crown lands, which is not the road, and for the lawful use of the surface of the Yozipovic Mining Claim as provided for by sections 50 and 51 of the **Mining Act**.

This document is wholly unnecessary as it concerns access to the Mining Claim. Mr. Yozipovic has total access to it and the tribunal will issue a declaration accordingly.

The Gravel & Proposed Agreement

Mr. Watson, once interested in developing the gravel pit in the southwest corner of his quarter section, is no longer interested in any compromise which would allow him com-

mercial access to or ownership of the aggregate, something which is denied him through Mr. Yozipovic's unpatented Mining Claim. At an earlier date, there had been a tentative settlement which would have given Mr. Watson the rights to the gravel pit, in effect that one unit of the four unit claim in which the pit is located, in exchange for unimpeded access to the area of interest to Mr. Yozipovic. During the early phases of proposed development of the rock quarry, that of showing the rock to interested investors and perhaps the bulk sampling phase, would have entailed use of the existing road which runs between Mr. Watson's home and garden. Should the quarry proceed to development, it had been proposed that the road would be located elsewhere at Mr. Watson's expense. Understandably, Mr. Watson was not enthusiastic about this prospect. Now, he simply wants Mr. Yozipovic gone for good.

The tribunal heard considerable evidence concerning this negotiation and proposed agreement concerning dividing up of the Mining Claim. All of this information is irrelevant to the proceeding before the tribunal. Indeed, the parties should be made aware that negotiations proposing settlement of an action, if unsuccessful, have no bearing on the proceedings are irrelevant and not binding on the tribunal. It is unusual even to have evidence of this nature raised in the course of a proceeding. By attempting to grant the parties the right to air all of their complaints, the tribunal may have erred on the side of being too lenient and too permissive by allowing this evidence to be admitted at the hearing.

Mr. Yozipovic has asked for compensation for gravel Mr. Watson had removed from the pit and sold to third parties. The tribunal does not have jurisdiction to award compensation of this nature. It is limited to compensation for "mineral claim workings … claim posts, line posts, tags or surveyed boundary markers…" within the meaning of subsection 79(3).

The Crown is the only one who had a right to take action during the period of Mr. Watson's alleged illegal extraction of gravel. Mr. Yozipovic does not have any right of ownership in connection with the gravel or even the stone for that matter. What he does have is the right to proceed under the legislation only. This means that he has the right to proceed to do his assessment work and apply for a lease upon meeting the legislative requirements. It would be a different matter, if he had already taken the Mining Claim to lease but that is not the case here. He is not the owner of the mining rights but merely a holder of an unpatented mining claim.

Incidentally, the issues of the statutory time limits for actions by Mr. Watson have been raised in connection with his right to challenge the existence of Mr. Yozipovic's staking. It may interest Mr. Watson to know that the Crown too is limited by statute. Under section 59.1 of the **Aggregate Resources Act,** no action can be taken once five years have elapsed after the illegal operation of a pit or quarry without a licence or permit.

Mr. Watson's Title

Mr. Watson purchased his quarter section without realizing that the mining rights were forfeited to the Crown many years earlier. This fact was apparently not caught by the lawyer who handled the sale to Mr. Watson. This was also not caught by the lawyer acting for those owners in 1955 who lost their mining rights, whose transfer documentation purported to

transfer the entire, unsevered title. Nor was this caught at the time or during any subsequent transfers by the Land Registrar. It is unfortunate that the **Registry Act** and the **Land Titles Act** do not require that deeds which were alienated from the Crown as mining lands be required to reflect that designation for purposes of that legislation, effectively to raise a flag to title searchers and conveyancing lawyers.

It was, however, caught by Mr. Yozipovic, through his daughter, Ms. MacRae, who works as a title searcher. In his initial application, Mr. Yozipovic sought a correction of title to reflect the historical fact that the mining rights were not part of the quarter section owned by Mr. Watson.

This part of the proceeding was handled on the part of the tribunal by its Mediator and Registrar whose role it is to attempt to settle matters. There was an apparent settlement in that Mr. Watson (and Mr. Yozipovic) consented to an Order which would direct the Director of Titles to correct the title to reflect the status of the land in fact and in law.

Mr. Watson signed the Consent for this Order. He apparently did not receive independent legal advice as to what he was signing. From his subsequent written submissions, it appears that Mr. Watson believed that he had no choice but to sign the Consent. Although not known by the tribunal at the time, it has become apparent through his written submissions that he did not understand what it was he was signing. The tribunal has heard nothing from Mr. Watson to suggest he completely understands it even now.

This fact is of considerable concern to the tribunal because it has resulted in a misconception by Mr. Watson that he was railroaded into giving up his interest in the mining rights. This is not what the Consent was about. It was to signal his agreement that in law he in fact never owned the mining rights. There were errors made by various owners and their representatives from the time of the original forfeiture in 1955 until Mr. Watson's purchase in 1997. It is quite clear from the abstract of title that the owner in 1955 didn't realize that he should be paying the mining tax or that the mining rights forfeit. This is reflected in 1966 when the owner since 1935, Rasmus Kristiansen, transferred it to Jorgen Martin Aegard. This is noted on the abstract directly below the entry of the Certificate of Forfeiture. The abstract shows that Mr. Kristiansen transferred the whole of the 160 acres to Mr. Aegard. This error continued on through to the transfer to Mr. Watson in 1997, with none of those caught up in those transactions or the various mortgages in the interim, catching the error.

The Abbreviated Parcel Register for the Watson quarter section filed by or on behalf of Mr. Yozipovic in support of his application to correct the title error is dated August 2, 2007. It was converted from the registry to land titles system on June 21, 2004. It is a qualified land titles conversion and subject to forfeiture to the Crown. This is specified on the Abstract and required further and thorough investigation at that time.

The only ways in which Mr. Watson could have acquired the mining rights underlying his quarter section would have been to stake the lands, perform and file all required assessment work and apply to take them to lease.

. . . . 33

Notwithstanding how things transpired, a different process would not have changed the result. Had there been a hearing on the status of the mining rights, the outcome would have been the same as it was with Mr. Watson having signed a Consent for an Order correcting title. In the time frames involved, there was no way in which Mr. Watson should be thought of as having given up something which he never had. The mining rights had been forfeited to the Crown in 1955. What took place was a move to correct title. Had Mr. Watson disputed the application on the part of Mr. Yozipovic, all of the documentation relied upon in that application, which had been filed with the tribunal and served on Mr. Watson, would have been presented at a hearing. The tribunal, having had all this documentation, satisfied itself that the application to correct and clarify title was in order. Nothing untoward was found in these documents. Indeed, it should be made clear that, even with a Consent for an Order filed by both parties, the tribunal would not have issued the Order to correct title without having satisfied itself that there was a problem on title which required correction. The mining rights were the property of the Crown and there is not now nor has there ever been a process by which the forfeiture could be reversed years after the fact.

Of equal concern to the tribunal is that Mr. Watson signed a document which he did not understand and for which he did not receive independent legal advice. At the hearing, he and Mr. Pintar speaking on his behalf, questioned much of what had taken place over the considerable history. This questioning would have better served him had it occurred each and every time he was made uncomfortable with what was being asked of him, by Mr. Yozipovic, by MNR and by the tribunal. Mr. Watson would have been well served to have received independent legal advice throughout this matter. The law in this case has been complex. Mr. Watson has had pressure placed on him at each interaction in this matter.

Conclusions

The tribunal has concluded that the Applicant is to have free, unfettered, complete and total access to his Mining Claim and that it will further exempt two areas from that Mining Claim. The two areas to be exempted will be just over an acre in size each and will centre around the dwelling and the trailer, respectively, of the Respondent.

The tribunal has declared that the agreements concerning access made between the parties in 2001 and 2005 are revocable licences. In the event that litigation is required to determine any issues as between the parties concerning one agreement only, that being the 2003 agreement, they would be directed to the Ontario Superior Court of Justice.

The tribunal has found that the subject mining claim (TB-3016678) is not *void ab initio* due to the fact that the first unit of prescribed assessment work has been performed and filed on it.

The tribunal has also concluded that it does not have the jurisdiction to make any awards for damages to the Applicant as a result of the removal of gravel that may or may have not been carried out by the Respondent. In any event, the tribunal has adjudged that the Applicant does not, in fact, own the gravel unless and until he makes the decision to take the subject mining claim to lease.

. . . . 34

The tribunal will order that the notation of “pending proceedings” on the subject Mining Claim be removed, that the time during which it was subject to the pending proceedings notation be excluded in computing time within which work upon the Mining Claim is to be performed and filed and it will set a new anniversary date for the performance and filing of the next units of prescribed assessment work.

No costs shall be payable by either of the parties to this application.