File No. MA 020-97

L. Kamerman	)	Tuesday, the 16th day
Mining and Lands Commissioner	)	of December, 1997.

THE MINING ACT

IN THE MATTER OF

A prosecution pursuant to Section 170 of the **Mining Act**, that fines totalling $10,000 be levied against each of the Defendants for each violation of clause 164(1)(d) of the **Mining Act**.

B E T W E E N:

DANIEL GERVAIS

Complainant

- and -

BRUNO GERVAIS, MARCEL GERVAIS AND 957293 ONTARIO LIMITED

Defendants

SENTENCING ORDER AND COSTS

WHEREAS the findings of the tribunal as to the guilt or innocence of the Defendants were read into the record on Tuesday, the 4th day of November, 1997;

AND WHEREAS the tribunal heard submissions from Counsel for the Complainant and Counsel for the Defendant as to sentencing on Tuesday, the 4th day of November, 1997;

UPON HEARING from Counsel;

1. THIS TRIBUNAL ORDERS that the passing of sentence in the matter of all three counts of the Information against the Defendant, Bruno Gervais is hereby suspended pursuant to clause 72(1)(a) of the **Provincial Offences Act AND THE TRIBUNAL FURTHER DIRECTS** that the Defendant comply with the conditions contained in the Tribunal's Probation Order dated the 16th day of December, 1997.

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2. THIS TRIBUNAL ORDERS that the passing of sentence in the matter of all three counts of the Information against the Defendant, Marcel Gervais, is hereby suspended pursuant to clause 72(1)(a) of the **Provincial Offenses Act AND THE TRIBUNAL FURTHER DIRECTS** that the Defendant comply with the conditions contained in the Tribunal's Probation Order dated the 16th day of December, 1997.

3. THIS TRIBUNAL FURTHER ORDERS that the Defendant, Bruno Gervais, pay costs to the Complainant, Daniel Gervais, fixed in the amount of $5,000, within 30 days of the date of this Order, pursuant to section 126 of the **Mining Act**.

4. THIS TRIBUNAL FURTHER ORDERS that the Defendant, Marcel Gervais, pay costs to the Complainant, Daniel Gervais, fixed in the amount of $5,000, within 30 days of the date of this Order, pursuant to section 126 of the **Mining Act**.

5. THIS TRIBUNAL FURTHER ORDERS that it can make no findings with respect to restitution as against the Defendants, Bruno Gervais and Marcel Gervais, as it is limited to the wording found in clause 72(3)(a) of the **Provincial Offences Act** which specifies that the restitution be required or authorized by an Act, and clause 164(1)(a) and section 170 of the **Mining Act** make no provision for restitution.

DATED this 16th day of December, 1997.

Original signed by

Linda Kamerman
MINING AND LANDS COMMISSIONER

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B E T W E E N:

DANIEL GERVAIS

Complainant

- and -

BRUNO GERVAIS, MARCEL GERVAIS AND 957293 ONTARIO LIMITED

Defendants

REASONS

Submissions on sentencing were heard on Tuesday, the 4th day of November, 1997, in Conference Room "A" of the Days Inn, 117 Elm Street, Sudbury, Ontario.

Appearances

Franklin Richmond	Counsel on behalf of the Complainant
Marcel Leger	Counsel on behalf of each of the Defendants

The following information was contained in an Agreed Statement of Facts prepared by counsel and submitted to the tribunal. It is reproduced, with certain changes of which the tribunal was advised orally at the hearing:

Agreed Statement of Fact

In 1985, Temagami River Management Ltd., a corporation owned and operated by Rene Gervais, purchased the property in question, which is located in the District of Sudbury and is comprised of approximately 5,000 acres.

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In 1992, 957293 Ontario Limited, a corporation owned and operated by Bruno Gervais and Marcel Gervais purchased the surface rights to the said property from the Federal Business Development Bank following a foreclosure action.

In 1991, 75% of the mining rights to the said property was transferred from Temagami to the complainant Daniel Gervais. In January, 1992 the remaining 25% of the mining rights were transferred to Daniel Gervais by Jean Gilles Gaudette.

Rene Gervais, a witness at trial, is the father of Daniel Gervais. The defendant marcel Gervais is the brother of Rene Gervais. The defendant Bruno Gervais is the son of Marcel Gervais.

Since 1992, what was once a close knit family carrying on business together has split into two warring factions, with Rene Gervais and Daniel Gervais inter alia on the one side, and Marcel Gervais and Bruno Gervais inter alia on the other.

The adversarial nature of the relationship between Rene Gervais and his family and Marcel Gervais and his family has given rise to numerous disputes over the years, and some of these disagreements have resulted in litigation.

In March 1995, 957293 Ontario Limited instituted action against inter alia Rene Gervais for inter alia an order setting aside the transfer of the mining rights to Daniel Gervais in 1992.

Various parties are therefore claiming ownership, or a right to ownership of the mining rights on the said property. This, coupled with the obvious bad blood between the two families, has created a feud which continues to this date to embroil its participants.

The Moose Mountain Mine Complex has been inactive since 1979.

***Note:** **The paries hereto have submitted this agreed Statement of Fact for the sentencing portion of the trial only and accordingly it cannot be used and relied upon for any other purpose.**

In addition to the above-noted information, Mr. Richmond advised the tribunal that the issue of the ownership of the mining and surface rights is before the Ontario Court (General Division), a matter which is not being handled by his firm. Although he wondered why the resolution of this matter was not before the tribunal, he had no knowledge of the reason.

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Contents of a letter from Mr. Mark R. Frederick of Miller Thompson, dated May 9, 1997, to 957293 Ontario Inc. c/o Gervais Forest Products, addressed to Bruno Gervais and Rene Gervais (Ex. A to the Sentencing Hearing) was read into the record:

> This firm acts for Ranger Resources Ltd. ("Ranger"). As you are aware, our client holds the surface mining rights on the Moose Mountain mine at Capreol, Ontario. It has come to the attention of our client that you and/or persons associated with you, including your families and/or employees, have entered into upon those areas of the mine site currently reserved by law to our client including stockpile areas, etc.
>
> Our client has taken every step to ensure the mine and stockpile sites are both safe and secure. However, the constant trespass referred to above jeopardizes the safety of persons committing such trespass.
>
> Our client will accept no responsibility for any harm occurring to your (**sic**) or your respective families or employees as a result of such trespass and our client puts you on notice to govern yourselves accordingly and immediately cease and desist from entering into those parts of the property reserved for the use of our client.
>
> Continued breach will result in our client taking appropriate action to have you enjoined from any further activity of this nature.

Mr. Richmond stated that the letter illustrates the concern expressed by the private complainant for the safety of the mine property and persons coming onto it. This letter was written about one month prior to the occurrence of the offences involved in the sentencing hearing. Around the time the letter went out, the defendants put up gates with locks on various sites around the mine property which stopped exploration attempts by the complainant in the area of the pits. This activity continues up to this time.

According to Mr. Richmond, this is an active mine site. Geologists were hired as recently as 1994. The complainant has attempted to enter into joint venture or option agreements with respect to the mine, but has been held up by various pieces of litigation. There are many details concerning the issues between the parties which are being addressed by the court and findings in connection with these issues will result. The matter before the tribunal is limited to sentencing.

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Pursuant to subsection 164(1) of the **Mining Act**, the maximum fine for each offence is $10,000. Pursuant to section 121 of that **Act**, the tribunal is charged with making its decisions on the real merits and substantial justice of the case. Mr. Richmond commented on the issue of entrapment, stating that it is a common law defence raised in argument, but should not be considered as an aggravating factor when the matter of passing of sentence is considered. It requires a degree of encouragement, namely calculation on the part of the complainant that if the signs were put up, the defendants would take them down.

The fact is that the signs were taken down less than 24 hours after they were put up. There was clearly an attempt to interfere with mining. Mr. Richmond referred to section 2 of the **Act**, which states that the purpose of the legislation is to "encourage the prospecting, staking and exploration for the development of mineral resources". Mr. Richmond submitted that the actions of the defendants were designed to do nothing less than stop the efforts of the complainant. Answering the tribunal's comments concerning wording on the signs which refers to an offence under subsection 175(14) of the **Act**, Mr. Richmond agreed that to his knowledge, there has been no ruling made by the tribunal pursuant to that section and therefore, the applicability of that part of the Notice should, in his submission, be regarded as mere surplusage.

Dealing with aggravating and mitigating factors which may be taken into consideration when determining sentence, Mr. Richmond submitted that it is a mitigating factor that these are first offences and that the defendants have not been convicted before. An aggravating factor is the fact that, notwithstanding that the legislation no longer refers to the act as wilful, nonetheless, the conduct which led up to the commission of these offenses was done with as much malice aforethought as could be imagined. Mr. Richmond encouraged the tribunal to keep in mind just how wilful this act was. At least one other individual was brought into the scheme, telling the witnesses to get their cameras ready, thereby virtually announcing that an offence was about to be committed. He submitted that the offence was done by Bruno and Marcel Gervais to teach some sort of a lesson, namely that they were not prepared to stand by and permit signs put up under the authority of the **Mining Act**. He submitted that the two accused want to prevent the holders of the mining rights from exercising their rights under the legislation. Since June, there have been continuing attempts to impede access to the mine site, even though no charges have been brought.

Mr. Richmond referred to section 170 of the **Mining Act**, which provides that, "save as is herein otherwise provided, the *Provincial Offenses Act* applies to every such prosecution." The **Provincial Offences Act** is designed to deal with sentencing under provincial statutes generally and there is no statement in the **Mining Act** which specifically precludes the sentencing provisions of the former **Act**. Therefore, the complainant is seeking a fine, with provincial surtax, a restitution order, a probation order and an order as to costs.

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With respect to the amount of fine which should be levied, there is no precedent which can give the tribunal guidance. This is a first offence for both defendants, for which the maximum fine would be unwarranted. Where there are a multitude of offenses occurring at the same time, the courts have historically used a lesser amount.

Mr. Richmond submitted that the conduct of Bruno Gervais can be looked at as being more serious than that of Marcel, as Bruno actually took the sign down. Although it could be argued that the driving influence was Marcel Gervais, there is no evidence of this fact. This sort of conduct is impossible to police. There are 5,000 acres of largely inaccessible wooded land. It is nearly impossible to observe the type of conduct of which the defendants have been convicted. Mr. Richmond submitted that the tribunal should send a message to others, as a specific deterrence from committing further similar acts, and also as a general deterrence to others that, although they may be involved in a dispute, the tribunal will not tolerate their taking of the law into their own hands.

In this regard, Mr. Richmond submitted that Bruno Gervais should be sentenced to a fine of $6,000 for the first count and $3,000 for each of the second and third counts. Marcel Gervais should be sentenced to a fine of $5,000 for the first count and $2,500 for each of the second and third counts. To these totals, all provincial surtaxes should be applied.

A fine is a payment of money to Her Majesty. Mr. Richmond submitted that this is a proper case to order restitution to the complainant. Clause 72(3)(a) of the **Provincial Offences Act** states:

> **72.** (3) In addition to the conditions set out in subsection (2), the court may prescribe as a condition in a probation order,
>
> (a) that the defendant satisfy any compensation or restitution that is required or authorized by an Act;

Mr. Richmond submitted that the tribunal should order restitution of $300, being the value of the signs, payable to Daniel Gervais.

With respect to the issue of probation, the relevant sections of the **Provincial Offences Act** are set out:

> **72.** (1) Where a defendant is convicted of an offence in a proceeding commenced by information, the court may, having regard to the age, character and background of the defendant, the nature of the offence and the circumstances surrounding its commission,
>
> (a) suspend the passing of sentence and direct that the defendant comply with the conditions prescribed in a probation order:

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> (b) in addition to fining the defendant or sentencing the defendant to imprisonment, whether in default of payment of a fine or otherwise, direct that the defendant comply with the conditions prescribed in a probation order; or
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> . . . . .
>
> (2) A probation order shall be deemed to contain the conditions that,
>
> (a) the defendant not commit the same or any related or similar offence, or any offence under a statute of Canada or Ontario or any other province of Canada that is punishable by imprisonment;
>
> (b) the defendant appear before the court as and when required; and
>
> (c) the defendant notify the court of any change in the defendant's address.

Mr. Richmond submitted that the provision that the defendants not commit the same or any related offence automatically goes into a probation order. He is seeking one additional term, namely that the defendants in no way interfere with the rights in respect of the mining rights on the property. He pointed out as a caution that subsection 72(4) provides that the term of probation cannot be more than two years from the date the order takes effect.

Mr. Richmond pointed out that sentencing pursuant to the **Provincial Offenses Act** permits a defendant to be represented by counsel. The defendant need not appear. However, in passing sentence the tribunal should take into account how the accused conducted themselves. Marcel Gervais attended the hearing of the information but was not present for the sentencing hearing. Bruno Gervais did not attend on either occasion. While entitled to be represented by counsel or an agent, it should be noted that neither one has come forward, nor shown any remorse in the committing of these offenses. It is not unusual for an accused on their own to take steps to see that the victim is made whole. Here, there have been no such steps, but the situation continues to the extent that the complainant and his family are sufficiently fearful that they have not posted new signs. Mr. Richmond submitted that the complainant has been stripped of any power in his attempts to protect the site and the tribunal should show that there are teeth in the legislation which can be of assistance to them.

Section 126 of the **Mining Act** gives the tribunal the power to award costs, either through assessment or a lump sum. Section 127 provides that costs and disbursements be according to the tariff of the Ontario Court (General Division). In the event the tribunal finds that costs are appropriate in the circumstances of this case, Mr. Richmond submitted that the tribunal ought to exercise its discretion as an assessment officer and fix the costs here today. The hearing of this matter has already been sufficiently onerous on the complainant and nothing would be gained by requiring a further cost assessment hearing.

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The costs incurred in this matter are essentially counsel time, preparation and prosecution of the Information. Solicitor and client accounts rendered to date in this matter prior to the sentencing hearing total $13,500. Added to this are costs and disbursements of the sentencing hearing, including attendance and travel, of $2,500, for a total of $16,000. Mr. Richmond pointed out that it is very unusual for a complainant to be out of pocket in the laying of an Information. Police forces have declined to get involved in the provisions of the **Mining Act**. It puts the victim in the situation where if he or she wants the quasi-judicial criminal law jurisdiction of the province enforced, he or she will incur the expenses associated with its prosecution. This is not the case under other provincial legislation, such as health and safety or environmental protection provisions. Therefore, the victim has the choice of continuing to be victimized or laying the Information.

Mr. Richmond submitted that this case involves the wilful and blatant conduct of the two defendants and it is therefore not inappropriate for the complainant to be awarded costs. Also, the prosecution of this matter could be regarded as a civic duty, which if no prosecutorial branch of government will enforce it, has left the matter in the hands of the victim. The costs set out represent total compensation on a solicitor and client basis inclusive of disbursements.

Monsieur Leger commenced by clarifying the issues between the parties as they are before the courts. He stated that there is no doubt that the corporation, the acquitted defendant, is the owner of the surface rights. There is similarly no dispute as to the ownership of the mining rights. The issue is whether the numbered company has a right to be on the property.

The issue of jurisdiction of the tribunal in passing sentence, Monsieur Leger submitted, is limited to a fine only. Matters of probation and restitution are within only the jurisdiction of the courts and not the tribunal, which does not have the jurisdiction of the courts. He illustrated his point by posing the question of what would happen if probation were ordered and breached. The tribunal cannot order a jail sentence as it is not in the realm of relief which can be granted by an administrative tribunal. These powers are limited to the courts.

The situation is similar with respect to restitution, which is limited to courts with powers to make such orders. Again, Monsieur Leger submitted that this power is not within the jurisdiction of the tribunal. Therefore, the sole jurisdiction of the tribunal is limited to a fine and costs.

In a criminal or quasi-criminal proceeding, it is the right of the accused to appear by counsel or an agent and it is their right to testify or not. Attendance cannot be compelled, nor can testimony and flowing from this, no adverse inference can be drawn. These defendants have proceeded in the manner permitted by the **Provincial Offences Act** and elected to appear by counsel.

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Monsieur Leger submitted that it is trite law and a basic tenant to determine the sentence to fit the particular circumstances and offence. In this regard, he submitted that the tribunal should determine the correct fine based upon the following facts. The signs in question were put up by Rene Gervais on June 6 and removed on the 7. The loss sustained in dollar figures is limited to $300. There was no evidence that the complainant sustained any losses in addition to the signs. There is similarly no additional harm or prejudice which has been sustained by the complainant in the matter of whether he could exploit the mining rights. If it is true that the defendants caused gates to be locked thereby blocking access of the complainant to the pits, the question of why the complainant did not bring an action under the **Road Access Act**, which option was at all times and is still available. Therefore, there is a reasonable inference which can be drawn that the complainant has not had his access limited in any way. It may be that actual access is in fact not important to the complainant, because no actual mining is taking place on the property.

Rene Gervais stated that the purpose of posting the signs was for safety, but the question is raised as to whether this is believable, given that only three of the five signs were ever posted and none after June 7. Two signs continue to remain available for posting. It is the belief of Rene Gervais that they would be torn down if posted. This is speculative at best and in Monsieur Leger's submission, not worthy of the tribunal's consideration.

Monsieur Leger submitted that the tribunal must ask whether the purpose behind the posting of the signs is potential liability of the complainant. Why have the additional signs not been posted? Why were the signs ordered in the first place? There is no evidence that the absence of the signs has preventing the performing of mining activity.

The other issue raised is the matter of risk to the complainant, or prejudice if at the relevant time no mining activity was taking place. It is uncontroverted that there was no mining activity for three years and the mine has also been inactive since 1979. Despite the fact that there has been no mining activity since 1994, the complainant claims to be concerned for safety of others, and yet the sign was posted only for one day. Particularly where there are signs available, the question becomes what happened to the concern for safety. Monsieur Leger submitted that the purpose for posting the signs was achieved, namely the picture which was taken showing the truck of Bruno Gervais instrumental in its removal. He submitted that this is the only reasonable conclusion and there can be no other.

It is no coincidence that the two so-called guards were ready and waiting. The tribunal is invited to draw the inescapable conclusion that this was a staged event for the purpose of furthering a running feud in this matter. The parties, who used to carry on business, are now embroiled in a bitter and acrimonious dispute divided into two camps, each owning some rights in the same property.

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The matter of this prosecution has nothing to do with mining rights or their protection, as there has been no activity since 1994. The dispute in the courts involves the seeking of declaratory and injunctive relief as well as damages. The tribunal should refuse to become a pawn to be used by the complainant in an ongoing dispute which is being considered in another forum. The tribunal should not condone this behaviour and should say so in its finding on the matter of fine and costs.

For purposes of sentencing, although there are six counts, Monsieur Leger submitted that they would be viewed as one whole incident involving three separate signs, and not three separate incidents of offending behaviour. The actual cost of the chattels involved is $300. The amount of the fine must reflect at least that fact, as the value of the chattel is important in assessing fine. This is true in cases involving shoplifting or robbery, for example.

Monsieur Leger submitted that, in the circumstances, considering the deportment of the defendants as well as the fact that these are first offenses, there being no evidence of any loss other than the signs, a fine of $600, representing double the value of the signs would be in order.

With respect to the issue of costs, Monsieur Leger acknowledged that section 126 of the **Mining Act** does give the tribunal the authority to issue an award as to costs, including the discretion to withhold costs. He pointed out that the complainant was successful in only six of the nine counts, meaning that he was not one hundred percent successful. Therefore, at first instance, both sides achieved some measure of success.

Monsieur Leger pointed out that the issue of costs is in the discretion of the court. Principles governing costs should be appropriate in the circumstances. Referring to M.M. Orkin, **The Law of Costs**, 2nd Ed. (Aurora: Canada Law Book Inc., 1997), it states at page 2-10, under heading **203. Inherent Jurisdiction as to Costs**, "While generally speaking the jurisdiction of the court to award costs must be found in some statute,[68] the court has an inherent jurisdiction to award costs against one who wrongly invokes the aid of its process."[69]

Monsieur Leger submitted that there was an ulterior motive involved in putting up the signs. This is from the inescapable conclusion that the whole matter was staged to get evidence to support a prosecution, as there had been no mining since 1994.

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68 Re Sturmer and Town of Beaverton (1912), 2 D.L.R. 501 (Ont. Div. Ct.)
69 R. v. Bennett (1902), 5 C.C.C. 456 (Ont. H.C.); R. v. Leach (1908), 14 C.C.C. 375 (Ont. H.C.). And see Re Bombay Civil Fund Act, 1882 (1888), 40 Ch. D. 288 (C.A.).

Referring to Orkin in the third full paragraph at page 2-18 under the heading **205. Entitlement to and Liability for Costs**, it states:

> The discretion of the court to deprive a successful litigant of his or her costs[142] is a discretion which must be exercised judicially[143] and upon proper material[144] connected with the case,[145] or having relation to the subject-matter of the action.[146] In exercising this discretion the judge may consider the conduct of the party not merely during the course of the litigation but also prior to and leading up to or contributing to it.[147] As Jessel M.R., pointed out in *Cooper v. Whittingham*:[148]
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> > There may be misconduct of many sorts: for instance, there may be misconduct in commencing the proceedings, or some miscarriage in the procedure, or an oppressive or vexatious mode of conducting the proceeding, or other misconduct which will induce the Court to refuse costs ...
>
> The discretion of the trial judge to exempt an unsuccessful party from the payment of costs is unfettered provided that it is exercised judicially, and an appellate court is not entitled to

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142 Johnson v. Erickson, supra, footnote 137; Currie v. Thomas (1985), 19 D.L.R. (4th) 594 (B.C.C.A.).

143 Johnson v. Erickson, supra, footnote 137; Currie v. Thomas (1985), 19 D.L.R. (4th) 594 (B.C.C.A.).

144 English v. Kern Agencies Ltd., supra, footnote 137; Villeneuve v. Kelvington, supra, footnote 135.

145 Johnson v. Erickson, supra, footnote 137.

146 Harmon v. McClearn Co. Ltd., (1942) D.L.R. 582 (N.S.S.C.).

147 Ibid; Selig v. Nowe (1903), 36 N.S.R. 99 (S.C.); O'Lone v. O'Lone (1850), 2 Gr. 125; Federal Business Development Bank v. Huitika (1989), 16 A.C.W.S. (3d) 458 (Ont. Dist. Ct.) (procedural delays by successful plaintiff held not to constitute unreasonable or oppressive behaviour justifying deduction from costs).

148 Ibid; Selig v. Nowe (1903), 36 N.S.R. 99 (S.C.); O'Lone v. O'Lone (1850), 2 Gr. 125; Federal Business Development Bank v. Huitika (1989), 16 A.C.W.S. (3d) 458 (Ont. Dist. Ct.) (procedural delays by successful plaintiff held not to constitute unreasonable or oppressive behaviour justifying deduction from costs).

> substitute its own discretion[149] and will not interfere where there was a sound basis for exercising the discretion;[150] nor is it open to argue before the assessment officer or on an appeal therefore that because of the misconduct of a party the trial judge's disposition of costs should be varied.[151] However, the judge's reason for departing from the general rule as to costs should be shown on the record.[152]

Monsieur Leger invited the tribunal to keep in mind exactly what happened and why it happened. In summary, there was no mining activity. The mine has been closed since 1979. The signs were posted for 24 hours, and no additional signs have been posted, although they are available. There are no interests to protect. The imposition of costs will pose a financial burden to the defendants.

In Monsieur Leger's view, if the submissions of the complainant are accepted, it would be to give a cost award when the process is used to further a feud. Neither side is blameless and the appropriate award is no costs against either party. Doing otherwise would be tantamount to awarding the complainant for his conduct and would further encourage the use of this or any other tribunal for revenge. The circumstances of this case, in his submission, are woefully short to allow for an award of costs.

Monsieur Leger referred to a case quoted in **Graf v. Palu**, (unreported) MA-012-95, October 15, 1996, at page 21, where the tribunal referred to the case of **Apotex Inc. v. Egis Pharmaceuticals and Novopharm Ltd.** 4 O.R. (3d) 321 (Gen. Div.), where Henry J. states at page 325:

> Furthermore, ... the award of costs between parties on the solicitor and client scale has traditionally been reserved for cases where the court wishes to show its disapproval of conduct that is oppressive or contumelious, ...

Monsieur Leger submitted that the signs are not valuable. There was also no evidence of how the other two signs were disposed of.

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149 Henderson v. Laframboise; Robertson v. Laframboise, (1930) 4 D.L.R. 273 (Ont. S.C. App. Div.); and see Law and McLean v. Sawyer-Massey (1918), 39 D.L.R. 547 (Alta S.C. App. Div.).

150 Currie v. Thomas, supra footnote 143.

151 Jackson v. Hughes (1910), 16 O.W.R. 916 (H.C.).

152 Leonard v. Whittlesea (1918), 43 D.L.R. 62 (Alta. S.C. App. Div.); Goold v. Stockton (1891), 31 N.B.R. 57 (S.C.).

Monsieur Leger submitted that there should be no award of costs. In the event costs are awarded, they should be on a party and party basis and should be assessed by an assessment officer, to assess what is appropriate given such officer's experience and knowledge in such matters.

Mr. Richmond responded by pointing out that there is an outstanding dispute with respect to the mining rights. However, until such time as a court orders otherwise, Daniel Gervais has the mining rights. The mere fact that there is a dispute is not a mitigating factor in sentencing. If such actions are allowed where there is an outstanding dispute, it would allow parties to take the law into their own hands and act as vigilantes.

With respect to the jurisdiction of the tribunal, section 170 of the **Mining Act** makes it clear, and there is no question, that the tribunal has all the authority granted to a provincial court judge under the **Provincial Offences Act** unless the **Mining Act** provides otherwise.

The suggestion that the fine should be double the value of the signs fails to consider two factors. The value of the offence is not represented by the value of the sign, but rather by its intent. The general purpose of the **Mining Act** leads to the protection of the mining rights owner as well as protection to the public.

The suggestion that the sole purpose for erecting the sign was to obtain a photograph makes victims out of the defendants. There was not a scintilla of evidence that the complainant wanted the signs torn down. The fact that his mine manager suspected that this might occur doesn't make the complainant guilty of anything.

With respect to the issue of costs and the conduct of the parties leading up to the offence, there is no evidence of improper conduct on the part of either Rene Gervais or his son Daniel. Simply because he owns the mining rights and is involved in civil litigation, indicating a willingness to have the matter resolved in Ontario Court (General Division) does not mean he is precluded from exercising his right to put up signs. He runs the risk if there is injury, as he is the responsible party. He is also entitled to protect his mining interest. Notwithstanding that two factions of this family are feuding, there is no evidence that there is improper conduct by the complainant.

Mr. Richmond referred to the cases involving interference with a mining claim cited in the tribunal's Reasons of the Offence portion of this hearing. Interference with mining lands includes unknowing interference. In his submission, the wilful and blatant interference of the defendants distinguishes cases meriting party and party costs from one such as this which merits costs on a solicitor and client basis. The courts, in ordering punitive damages have discussed high handed conduct and vigilante justice. Mr. Richmond strongly urges the tribunal to not wait for the courts to adjudicate this matter but to exercise its jurisdiction and indemnify his client for the costs of this prosecution.

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Findings

The powers of this tribunal in hearing a mining prosecution pursuant to the **Provincial Offences Act** has been made an issue in this proceeding. Two cases shed light on the matter.

In **The McLean Gold Mines, Limited v. Attorney General for Ontario, Minister of Mines and The Porcupines Paymaster Mines, Limited** (1923) 54 O.L.R. 573; (1924) 1 D.L.R. 10, 3 M.C.C. 25, the following comments were make by Meredith, C.J.O. of the Supreme Court of Ontario, Appellate Division, having prepared his judgement prior to his death, the reasons for which were not followed by the other judges sitting in the matter:

> ...The effect of sec. 123 of the Mining Act of Ontario, R.S.O. 1914, ch. 32, is, I think, to constitute the Mining Commissioner a Court for the purposes of the section - whether a superior or an inferior court it is not necessary to consider.
>
> Although the Mining Commissioner is not in terms declared to be a court, the powers and jurisdiction which are conferred upon him constitute him a court.
>
> In **Inglis v. Dupont** [1958] S.C.R. 535, Rand J. states at page 541:
>
> By s. 129 of the *Confederation Act*, all laws, Courts and all] legal Commissions, Powers and Authorities, and all officers, Judicial, Administrative, and Ministerial" existing in Ontario at the union were continued subject to be repealed, abolished or altered by Parliament or Legislature according to the authority of each. Within this continuity was the *Gold Mining Act*; and the function of deciding the sufficiency of compliance with the statutory requirements, as for example, of staking, by the officer, was either an integral part of the rights arising, or, if of a judicial character, of a type not then exercised by the superior courts.
>
> If judicial power was conferred and it is to be held of the type exercised by superior Courts, then either the officers under the Act, for all purposes of this administrative statute, would be required to be appointed by the Dominion, or the adjudicatory function notionally segregated and held to be beyond exercise by a provincial appointee. That question would arise on the death or cesser of tenure of the functionary so continued in office. In the latter alternative those sections of the statute providing for the determination of disputes would at that moment automatically cease

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> to have force, and resort, of any were open, would be to the superior Courts: it would be a constitutional absurdity that the Dominion should appoint, in accordance with ss. 96, 99 and 100, the officer of such a tribunal for his role as adjudicator of incidental disputes and the Province appoint the same person for all other purposes. I cannot accept a view that produces such a result as the effect of s. 129.

Of note is the wording of the original, pre-Confederation statute, being **An Act Respecting Gold Mines**, c. IX of the Statutes of Upper Canada, 1864, s. 3:

> **3.** The Governor may appoint such Officer or Officers as he shall deem necessary for the purposes of this Act, who will respectively be under the direction of the Commissioner of Crown Lands, and by Order in council may prescribe their duties and fix their titles and salaries; and they shall be *ex officio* Justices of the Peace of the District or Districts which a Gold Mining Division may comprehend or include, in whole or in part, or in which or in any portion of which, a Gold Mining Division may lie; and it shall not be necessary that any such Officer shall possess any property qualification whatever in order to enable him lawfully to have jurisdiction as a Justice of the Peace over all the territory comprised within the division for which he may be appointed, with power to settle summarily all disputes as to extent or boundary of claims, use of water, access thereto, damage by licensees to others, forfeiture of licenses, and generally to settle all difficulties, matters or questions, which may arise under this Act, or offenses against any of the provisions of this Act, or the regulations to be make under it; and the decision of any such Officer, in all cases under this Act, shall be final, except when otherwise provided by this act or when another tribunal is appointed under the authority of this Act' and no case under this act shall be removed to any Court by Writ of Certiorari.

Another illustration of the judicial powers exercised by the tribunal can be found in the predecessor to the current section 164, which was section 172, R.S.O. 1980, c. 268. Subsection 172(2) states:

> **172.** (2) Every person who knowingly makes a false statement in an application, certificate, report, statement or other document filed or made as required by or under this Act or the regulations is guilty of an offence and on conviction is liable to a fine of $500 or to imprisonment for a term of not more than six months, or to both.

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The incarceration powers of the tribunal were also found in sections 174 and 176 of the 1980 statute.

The tribunal finds that, in connection with the Offenses, Penalties and Prosecutions Part XI of the **Mining Act**, it has all of the applicable powers of a court hearing such a prosecution under the **Provincial Offences Act**.

The fine provisions in Part XI of the **Mining Act** changed substantially with S.O. 1989, c. 72, which received Royal Assent on December 14, 1989. Effective on the proclamation date, all references to incarceration were deleted and the fine provisions increased substantially. At initial glance, this change appeared to be part of the overall changes to the **Mining Act** which provided stringent new provisions for mine rehabilitation, found in Part VII. However, examination os S.O. 1989, c. 72 revealed that the changes were part of a statute entitled the **Provincial Offences Adjustment Act, 1989**, which essentially enacted a substantial increase in fines in a number of provincial statutes.

Therefore, notwithstanding that subsection 172(1) of the 1980 statute prescribed a fine of $20 for every day upon which the offence occurs or continues, the tribunal is satisfied that the increase in the fine found in subsection 164(1) is not based upon the introduction of the then new Part VII of the **Mining Act** and related offences, but denotes the general attitude of the Legislature that any offences carry a heavier burden than had previously been the case.

The tribunal is satisfied that these offences, taken together, may be regarded as a first offence, which will impact on the sentence pronounced. The tribunal also recognizes that these offences were committed with a considerable degree of malice aforethought, having been deliberate and provocative acts on the part of the two defendants. It is this provocation which remains troubling.

The tribunal has heard that, but for the activities of the defendants, mining activities would have resumed in earnest on the subject property, as Daniel Gervais is seeking to option the property or enter into a joint venture. Certainly, one of the prerequisites to entering into either an option or a joint venture arrangement would be to have the matter of outstanding litigation settled, particularly when issues of title or access to the lands is in question. Therefore, the tribunal is satisfied that there may be an element of protection of one's assets and rights. However, the tribunal has before it one small element of an overall dispute which is before the courts, the outcome of which may likely place a great financial burden on the defendants. One cannot help but come to the conclusion that this potential financial burden is part of a strategic whole, designed to impact, if not on the final outcome of the matter before the courts, at least on the ability to proceed to that outcome.

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This having been said, it still remains that offences committed pursuant to subsection 164(1) of the **Mining Act** carry a substantial penalty, which becomes more onerous when there is more than one accused and more than one count, as is the case here. By its very severity, anyone confronting a notice or sign which indicates that its destruction or defacement should be well aware that this is a matter which the tribunal will not treat lightly. This may be a family dispute, gone terribly wrong, but the fact remains that it occurred out in the open and bears very real consequences, having invoked the jurisdiction of the **Mining Act**. It cannot be said that the defendants were unaware of the consequences of their acts, the notice in question clearly stating the section and quantum of the fine involved.

Sections 71 and 72 of the **Provincial Offences Act** are curious in the following regard. Section 71 discusses the suspension of sentence on conditions, where provided for in the Act in which the offence arises. Clearly, subsection 164(1) of the **Mining Act** does not provide for a suspended sentence. However, clause 72(1)(a) permits a suspended sentence with compliance with conditions in a probation order, where the court has "regard to the age, character and background of the defendant, the nature of the offence and circumstances surrounding its commission". Clearly, since Mr. Richmond is seeking to have the tribunal avail itself of clause 72(1)(b), namely the imposition of a probation order in addition to a fine, he must take the position that the tribunal has sufficient information in regard to the prerequisites for making a probation order, notwithstanding that it is clause (a) and not (b) which the tribunal is now considering.

The tribunal is not influenced in any way by the fact that the defendants have not appeared at the sentencing hearing, electing to be heard through their counsel, Monsieur Leger, as is their right. Having considered all of the factors presented at the sentencing hearing, including the issue of an ongoing dispute which has yet to be resolved, the tribunal determines that it will suspend sentence in this matter pursuant to clause 72(1)(a) of the **Provincial Offences Act** and the defendants, Bruno Gervais and Rene Gervais are directed to comply with the following conditions which will be prescribed in a Probation Order pursuant to section 72. In keeping with subsection 72(2), the following conditions are deemed to apply:

(a) the defendants, Bruno Gervais and Marcel Gervais not commit the same or any related or similar offence, or any offence under a statute of Canada or Ontario or any other province of Canada that is punishable by imprisonment;

(b) the defendants, Bruno Gervais and Marcel Gervais, appear before this tribunal as and when required;

(c) the defendants, Bruno Gervais and Marcel Gervais, notify this tribunal of any change in either defendants' address; and

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The following condition is imposed in addition to those deemed above:

> (d) the defendants, Bruno Gervais and Marcel Gervais, shall not interfere in any manner in respect of the mining rights on the property, described as Parcel Numbers 47623 and 47624, in the Township of Hutton, in the Town of Capreol, District of Sudbury.

All conditions shall remain in force for a period the lesser of two years from the date upon which the Probation Order takes effect, or until the matter is decided in Ontario Court (General Division), pursuant to subsection 72(4) of the **Provincial Offences Act**.

The matter of a suspended sentence is further dealt with under clause 75(d) of the **Provincial Offences Act**, which provides that

> "where the defendant otherwise wilfully fails or refuses to comply with the order the defendant is guilty of an offence and upon convision the court may,
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> . . .
>
> (e) where the justice presiding is the justice who made the original order, in lieu of imposing the penalty under clause (d), revoke the probation order and impose the sentence the passing of which was suspended upon the making of the probation order.

Therefore, the defendants should be aware that the tribunal will not hesitate to pass sentence should it become aware of a breach of its Probation Orders. As indicated above, the matter of quantum of the fine was addressed by the Legislature in 1989, and the tribunal is of the opinion that it would be well within the intent of the **Mining Act** as amended, to levy a fine which bears no resemblance to the pre-existing nominal fines prior to that time.

With respect to the request for restitution, the tribunal notes that the wording in clause 72(3)(a) places the jurisdiction for a condition of restitution in the legislation in which the offence is found, through the words, "satisfy any compensation or restitution that is required or authorized by an Act". There are no provisions, either in subsection 164(1) or generally in the **Mining Act** which gives the tribunal the power to order restitution. Therefore, the tribunal finds that it is without the jurisdiction to do so.

As to the matter of costs, the tribunal has considered the submissions of the parties on this issue and finds that it will exercise its discretion to award costs to the complainant

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Daniel Gervais, pursuant to section 126 of the **Mining Act**. Given that the bringing of this prosecution is but one small element in a much larger dispute between the complainant and the two defendant, or perhaps the company which was acquitted, the tribunal finds that the complainant, Daniel Gervais, is not entitled to complete compensation for the prosecution expenses incurred in bringing this matter before the tribunal. However, the tribunal recognizes that normally prosecution of regulatory offenses is carried out by an arm of government and as none was available to assist the complainant in enforcing his rights under the **Mining Act**, he should be compensated substantially. Therefore, the tribunal finds that it will fix costs in the amount of $10,000, with $5,000 to be paid by the defendant Bruno Gervais and $5,000 to be paid by the defendant, Marcel Gervais. These costs shall be paid within 30 days of the date of the tribunal's Order.

Form 132

COURTS OF JUSTICE ACT
AND MINING ACT

PROBATION ORDER UNDER SECTION 72 OF THE **Provincial Offences Act**
AND UNDER SECTION 170 OF THE **Mining Act**

OFFICE OF THE MINING AND LANDS COMMISSIONER
PROVINCE OF ONTARIO

Whereas Bruno Gervais, hereinafter called the defendant, was convicted of the offences of having pulled down, injured or defaced three notices posted up by the manager or a mine, being three separate counts contrary to the **Mining Act**, R.S.O. 1990, c. M.14, c. 164(1)(d) by the Mining and Lands Commissioner at Sudbury on the 4th day of November in a proceeding commenced by Information.

And whereas on the 16th day of December, 1997, the Mining and Lands Commissioner suspended the passing of sentence of the defendant and directed the defendant to comply with the conditions set out below.

Now therefore, it is ordered that for the lesser of a period of two years from the date of this order, or until the matter is decided in Ontario Court (General Division) the defendant shall comply with the following conditions:

1. The defendant shall not commit the same offence or any related or similar offence, or any offence under a statute of Canada or Ontario or any other Province of Canada that is punishable by imprisonment.

2. The defendant shall appear before the tribunal as and when required;

3. The defendant shall notify the tribunal of any change in the defendant's address.

And, in addition

4. the defendant shall not interfere in any manner in respect of the mining rights on the property, described as Parcel Numbers 47623 and 47624, in the Township of Hutton, in the Town of Capreol, District of Sudbury.

Ordered at Toronto
this 16th day of December, 1997

Original signed by

L.Kamerman
MINING AND LANDS COMMISSIONER

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I certify that the defendant was given a copy of this probation order on the 16th day of December, 1997, by sending it to the defendant by registered mail and courier to the defendant's last known address as it appears on the records of the tribunal.

Original signed by

D. Pascoe
REGISTRAR

NOTE: Sections 73 and 75 of the ***Provincial Offences Act*** are as follows:

73. - (1) A probation order comes into force,

(a) on the date on which the order is made; or

(b) where the defendant is sentenced to imprisonment other than a sentence to be served intermittently, upon the expiration of that sentence.

(2) Subject to section 75, where a defendant who is bound by a probation order is convicted of an offence or is imprisoned in default of payment of a fine, the order continues in force except in so far as the sentence or imprisonment renders it impossible for the defendant to comply for the time being with the order.

75. Where a defendant who is bound by a probation order is convicted of an offence constituting breach of condition of the order and,

(a) the time within which the defendant may appeal or make motion for leave to appeal against that conviction has expired and the defendant has not taken an appeal or made a motion for leave to appeal;

(b) the defendant has taken an appeal or made a motion for leave to appeal against the conviction and the appeal or motion for leave has been dismissed or abandoned; or

(c) the defendant has given written notice to the court that convicted the defendant that the defendant elects not to appeal

or where the defendant otherwise wilfully fails or refuses to comply with the order, the defendant is guilty of an offence and upon conviction the court may,

(d) impose a fine of not more than $1,000 or imprisonment for a term of not more than thirty days, or both, and in lieu of or in addition to the penalty, continue the probation order with such changes or additions and for such extended term, not exceeding an additional year, as the court considers reasonable; or

(e) where the justice presiding is the justice who made the original order, in lieu of imposing the penalty under clause (d), revoke the probation order and impose the sentence the passing of which was suspended upon the making of the probation order.

R.R.O. 1980, reg. 809, form 132, *revised.*

Form 132

COURTS OF JUSTICE ACT
AND MINING ACT

PROBATION ORDER UNDER SECTION 72 OF THE **Provincial Offences Act**
AND UNDER SECTION 170 OF THE **Mining Act**

OFFICE OF THE MINING AND LANDS COMMISSIONER
PROVINCE OF ONTARIO

Whereas Marcel Gervais, hereinafter called the defendant, was convicted of the offences of having pulled down, injured or defaced three notices posted up by the manager or a mine, being three separate counts contrary to the **Mining Act**, R.S.O. 1990, c. M.14, c. 164(1)(d) by the Mining and Lands Commissioner at Sudbury on the 4th day of November in a proceeding commenced by Information.

And whereas on the 16th day of December, 1997, the Mining and Lands Commissioner suspended the passing of sentence of the defendant and directed the defendant to comply with the conditions set out below.

Now therefore, it is ordered that for the lesser of a period of two years from the date of this order, or until the matter is decided in Ontario Court (General Division) the defendant shall comply with the following conditions:

1. The defendant shall not commit the same offence or any related or similar offence, or any offence under a statute of Canada or Ontario or any other Province of Canada that is punishable by imprisonment.

2. The defendant shall appear before the tribunal as and when required;

3. The defendant shall notify the tribunal of any change in the defendant's address.

And, in addition

4. the defendant shall not interfere in any manner in respect of the mining rights on the property, described as Parcel Numbers 47623 and 47624, in the Township of Hutton, in the Town of Capreol, District of Sudbury.

Ordered at Toronto
this 16th day of December, 1997

Original signed by

L.Kamerman
MINING AND LANDS COMMISSIONER

. . . . 2

I certify that the defendant was given a copy of this probation order on the 16th day of December, 1997, by sending it to the defendant by registered mail and courier to the defendant's last known address as it appears on the records of the tribunal.

Original signed by

D. Pascoe
REGISTRAR

NOTE: Sections 73 and 75 of the ***Provincial Offences Act*** are as follows:

73. - (1) A probation order comes into force,

(a) on the date on which the order is made; or

(b) where the defendant is sentenced to imprisonment other than a sentence to be served intermittently, upon the expiration of that sentence.

(2) Subject to section 75, where a defendant who is bound by a probation order is convicted of an offence or is imprisoned in default of payment of a fine, the order continues in force except in so far as the sentence or imprisonment renders it impossible for the defendant to comply for the time being with the order.

75. Where a defendant who is bound by a probation order is convicted of an offence constituting breach of condition of the order and,

(a) the time within which the defendant may appeal or make motion for leave to appeal against that conviction has expired and the defendant has not taken an appeal or made a motion for leave to appeal;

(b) the defendant has taken an appeal or made a motion for leave to appeal against the conviction and the appeal or motion for leave has been dismissed or abandoned; or

(c) the defendant has given written notice to the court that convicted the defendant that the defendant elects not to appeal

or where the defendant otherwise wilfully fails or refuses to comply with the order, the defendant is guilty of an offence and upon conviction the court may,

(d) impose a fine of not more than $1,000 or imprisonment for a term of not more than thirty days, or both, and in lieu of or in addition to the penalty, continue the probation order with such changes or additions and for such extended term, not exceeding an additional year, as the court considers reasonable; or

(e) where the justice presiding is the justice who made the original order, in lieu of imposing the penalty under clause (d), revoke the probation order and impose the sentence the passing of which was suspended upon the making of the probation order.

R.R.O. 1980, reg. 809, form 132, *revised.*