File No. MA 038-93

L. Kamerman) Tuesday, the 17th day
Mining and Lands Commissioner) of October, 1995.

THE MINING ACT

IN THE MATTER OF
Mining Lease 105934, comprising Mining Claims K-475272 to 475277, both inclusive, registered in the Fort Frances Registry Office ("the McKenzie-Grey Group");

AND IN THE MATTER OF
Unpatented Mining Claims K-1079415 to 1079417, both inclusive, 1079419 to 1079424, both inclusive, 1082231, 1082251 to 1082253, both inclusive, 1085503 to 1085507, both inclusive and 1092740 to 1092747, both inclusive, situate in the Bad Vermilion Lake Area, in the Kenora Mining Division ("the West Rock");

AND IN THE MATTER OF
Rights of way or passage through land described as Mining Locations K.74 and K.75, Rainy River District, Fort Frances Registry Office;

AND IN THE MATTER OF
An Application under section 175 of the **Mining Act**.

B E T W E E N:
NIPIGON GOLD RESOURCES, LTD.

Applicant

- and -

GEORGE ANSLEY ARMSTRONG and
KIRSTI ALICE ARMSTRONG

Respondents

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INTERIM ORDER

UPON hearing the argument of counsel and reading the material filed;

AND UPON finding that it is necessary in connection with the proper working of a mine;

THIS TRIBUNAL ORDERS that the application of Nipigon Gold Resources Ltd. for a 66 foot right of way for purposes of a right of passage and transmission of electricity or power over Mining Locations K.74 and K.75 in the District of Rainy River be granted, pursuant to clauses 175(1)(f) and (g), subject to provision by Nipigon of the legal description of the right of way, in registerable form and subject to the following conditions:

1. That the compensation payable for past and current injury and damage suffered by the respondents, George Armstrong and Kirsti Armstrong, calculated to be $15,732 be set off against the money on account for Nipigon with Armstrong.

2. That annual compensation for grading of the subject road on the right of way, in the amount of $1,500 for three passes per annum, be paid to the respondents, George Armstrong and Kirsti Armstrong in advance.

3. That this order may be changed, altered, varied or rescinded at any time by this tribunal for good cause shown.

4. That costs will be awarded based upon findings of the tribunal and submissions to be received on account of the preliminary motion and on account of the hearing of the merits.

IT IS FURTHER DIRECTED that Counsel for the parties make written submissions as to costs on account of the preliminary motion and on account of the hearing of the merits by the 1st day of December, 1995.

DATED this 17th day of October, 1995.

Original signed by
L. Kamerman

L. Kamerman
MINING AND LANDS COMMISSIONER

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REASONS

This matter was heard in Thunder Bay with Steven Lukinuk appearing as counsel for the Applicant and Jennifer Le Dain appearing as counsel for the Respondents.

Introduction:

An application pursuant to section 175 was made to the tribunal for an order to permit Nipigon Gold Resources, Ltd. ("Nipigon") to use a 66 foot road and road allowance across Mining Locations K.74 and K.75 ("the Armstrong Lands") both as a road and as a hydro and utility corridor. In connection with this application, the tribunal was also asked to permit Nipigon to survey the road for purposes of obtaining a legal description which could subsequently be registered and to fix compensation, if any, which may be payable to either Kirsti or George Armstrong.

There are two main roads which cross the Armstrong Lands (Ex. 50). On K.74, these run in a northeasterly to southwesterly direction and are largely parallel to one another. The southernmost of these roads, the cottage road, runs near the shores of Shoal Lake, although it is not within the 66 foot reservation to the Crown. The subject road runs somewhat north of this. The cottage road moves inland on K.75 to what is called the Pow Wow Grounds. The subject road continues in its southwesterly course and then turns due west, running into Part 6 of Reference Plan 48R-3078, formerly Mining Claim K-475275. This mining claim is known as the McKenzie-Grey property and is held by Nipigon.

At the time of the application, the subject road was an existing road (see clause 1, Ex. 8). Pursuant to a 1988 agreement (Ex. 8) between the parties, Nipigon was permitted to use the subject road. As the interpretation of this agreement is at issue between the parties, it will be discussed in greater detail below.

The relevant portions of section 175 are reproduced:

> **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,
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> (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 therefor;

(g) the right to transmit electricity or any other kind of power, or have it transmitted, through or over any land or water in any form or manner and to do everything necessary or convenient therefor;

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(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 rights obtained under this section shall be fully compensated for.

(3) The order granting the right shall fix such compensation, or shall provide for the ascertainment thereof, and shall contain any provisions that are considered proper for securing the same and for protecting the rights and interests of any person whose land, property, rights or interests are affected or endangered, and, if considered proper, may require the applicant to make grants or concessions to or construct works or do any other thing for, or for the benefit of, that person or that person's land or property, and such order may in all cases be upon such terms, and may grant the right upon such conditions and for such time as are considered proper.

(4) In every application for such an order, the application, in addition to anything else required or directed, shall file in duplicate with the Commissioner a clear and precise statement of the right or rights being applied for, of the land or property affected and the owner or owners thereof so far as they

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> can be ascertained, a map or plan of the locality showing the land and water involved, and definite and detailed plans and specifications of the works or things proposed to be constructed or done and, for the purpose of preparing the same, the Commissioner may authorize the applicant, and the applicant's engineers and assistants to enter upon the land of any other person and make such examinations and measurements as may be necessary, and such statement, map or plan and plans and specifications may, by order, be amended or altered or modified at any stage of the proceedings and the Commissioner may give directions as to the notice to be given to the parties interested, the time and manner of service and the particulars to be furnished to such parties respectively.

Issues:

1. Is there a mine? Is the requested right of way required in connection with the proper working of a mine?

2. Is it "reasonable and fitting" to grant the proposed right of way to the applicant in the circumstances? Is alternate access a factor in determining whether the requested access should be granted?

3. Is there past damage or injury which must first be compensated? Does money allegedly owing for breach of contract constitute injury or damage within the meaning of subsection 175(2)? Was the existing road improperly constructed, and if so, are damages payable on it by the applicant? Is the tribunal the proper forum to determine the quantum of damage? What is the effect of a pre-existing contract, which the applicant may be in breach of, to the tribunal's jurisdiction?

4. If the application is granted, what is the quantum of damage or injury that may be compensated for?

Evidence:

Is The McKenzie-Grey Property A Mine?

Claude P. Laroche gave evidence on behalf of Nipigon. Mr. Laroche acts as a private consultant to companies. He operates Oval Bay Geological Services and was retained by Nipigon to examine its properties and evaluate their potential. He explained that McKenzie-Grey draws its name from the original prospectors, dating back to 1926.

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Activity on the McKenzie-Grey site has included exploration since the 1920's, as evidenced by Ministry of Northern Development and Mines ("MNDM") files for assessment work. Serious exploration work started in 1984 with the Mine Centre Joint Venture, after which Falconbridge did some sampling in 1985/86. Nipigon acquired the property in 1987. In 1990, Nipigon worked a small open pit where a bulk sample was taken and treated by a local mill 7 km. away. The absence of prior serious exploration work up to this time was due to production problems encountered with the type of mineralization found and a lack of available technology for extraction.

In 1992, Mr. Laroche was asked to supervise diamond drilling, the exploration target being a gold bearing structure containing a high concentration of silver, zinc, lead, copper and cadmium. This configuration of minerals is unusual. The structure itself is narrow, measuring 10 feet in width and containing just enough gold to break even. However, the presence of other minerals makes it viable.

At this time a small portable mill, having a capacity of 25 tons per day was installed and two bulk samples of 500 tons and 50 tons respectively, were done. The purpose of the diamond drilling was to test ideas regarding the separation of metals, using funds from a Norfund grant. Producers are penalized for massive sulfites. However, the testing done proved significant gold from volume, silver and zinc concentrations. Results of the treatment of the concentrate produced by milling at the site are not yet available. No further sampling has been done since that time.

In addition to the portable mill, there are boxed explosives and a small bobcat loader stored in the main building at the site. Nipigon is permitted to take water from the Seine River, which is adequate for its purposes. A pump has been permanently installed for this purpose, which is run by the generator servicing the mill. Hydro is produced on site. The mill itself is mounted on a 45 foot flatbed, with a generator on front and a crusher on back. Small machinery and tools can be run from this facility. There is no housing on site, but accommodation is available off Highway 11 in Mine Centre.

There are two known mineral bearing structures on the site, measuring 7 feet wide by 14 feet deep and 35 feet wide by 14 feet deep respectively. The initial extraction was by open pit. Preliminary costs indicate that there is sufficient mineralization to operate a profitable mine and create jobs. Also, there are numerous structures on the property which have not been explored. However, it is believed that the knowledge gained from mining the original structures can be applied to these. A closure plan has been completed to the satisfaction of MNDM up to 1993. Nipigon is in the process of asking for quotes for development. Mr. Laroche stated that his mandate was to put together a package, so that while he could have verified additional reserves, it was his recommendation that efforts should be made to ensure that known reserves could be profitably mined. Mr. Laroche agreed that the property is still at the exploration and development stage.

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Nipigon was able to justify a 21 year lease for this property and has invested $1.5 million in development and exploration. However, its financial base it not secure, as Mr. Laroche explained, financing for junior mining companies within the last five years has been limited. While currently a private exploration company, it is in the process of attempting to either amalgamate or go public to raise capital.

According to Mr. Laroche, a junior mining company small scale mine operates on up to 250 tons per day, while this one could be profitable on 25 tons per day, as long as all the minerals are recovered. The mill, which operates on the gravitational system, would have to be modified many times over its lifetime, depending on what is to be extracted, with stockpiling for later extraction. No environmental problems are anticipated. For future extraction, Nipigon would have to apply for a permit for a decline in place of its current open pit. There is sufficient known tonnage to operate continuously for five years.

Michael Sjersen, project coordinator for Nipigon for one and a half years, further described the equipment on site as being a 60 by 80 foot mill building, which houses the generator, jaw crusher, rod mill, ball mill, cyclone and wilfrey gravity table. The latter measures 3 1/2 feet by 8 feet and is used to separate gold from other minerals using flowing water. There is also a storage trailer, 12 feet x 48 feet, which houses the office for operations, storage of samples and maintenance equipment. The drill core is stored in the core shack. There is both a tailings pond and polishing pond, both measuring 60 feet x 200 feet. The tailings are pumped into the tailings pond and then into the polishing pond so that the solids can settle. There is a water pump house and a facility for storage of power. Currently, everything is run by generator, although Nipigon intends to bring in hydro at some point. According to Mr. Sjersen, the total area stripped on the McKenzie-Grey site is 6 1/2 acres.

Elaborating on the earlier bulk samples, Mr. Sjersen stated that in 1984, the Mine Centre Gold Joint Venture ran a 24 ton bulk sample which was tested at the Foley mill up the road. In 1990, there was a 1,500 ton sample taken, of which 300 tons were milled and the remaining 1,200 tons are stored on site. The difference between the 1990 and 1992 sample was that the latter took only ore from the vein itself. With the remaining tonnage stockpiled on site having an estimated value of $500 per ton, the value of the stockpile is close to $1,000,000. The next step, according to Mr. Sjersen, would be to drop an incline and go into production.

The Access Agreement

Of significant importance to the parties in presenting their cases, this application is the meaning and impact of an agreement entered into between Mr. Armstrong, Max Reiter and Nipigon, dated November 18, 1988 (Ex. 8), of which portions are reproduced below:

> 4. The parties acknowledge that the said roadway is not improved and, by virtue thereof, will be required to be improved

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> by Nipigon for all year round use. In the event improvements are required to the said road, NIPIGON hereby grants to ARMSTRONG and his company, GEORGE ARMSTRONG CO. LIMITED (hereinafter referred to as the "CORPORATION"), the sole and exclusive right to make such improvements at the cost of NIPIGON, provided that NIPIGON shall pay to ARMSTRONG and the CORPORATION the cost of such required improvements in advance and ARMSTRONG and the CORPORATION shall have no obligation to commence any such work unless such advance payment has been received.
>
> . . .
>
> 7. This agreement shall remain in force for a period of two years from the 10th day of November, 1988 and shall thereafter be ended unless renewed by the parties in writing. Provided further that if NIPIGON has paid the CORPORATION for substantial improvements to the road exceeding $10,000.00 on or before November 14th, 1990, then NIPIGON, at its option may renew the agreement for a further one year period from November 15th, 1990. NIPIGON may continue to renew the agreement thereafter from year to year provided it has paid the CORPORATION no less than $5,000.00 for road improvements during each previous renewal period.
>
> 8. NIPIGON shall acquire no right or interest to the lands of ARMSTRONG by virtue of this agreement, nor shall NIPIGON acquire any rights under the Road Access Act, and the roads across K74 and K75 shall not be deemed to be an access road as defined in the Road Access Act. Provided further that NIPIGON does not hereby waive any access rights it currently has under the Road Access Act, if any, to reach its property. NIPIGON, however, agrees to use the road access marked on Exhibit "A" as the exclusive means of access to NIPIGON'S property for commercial vehicles so long as that access remains open and available to NIPIGON under the terms of this agreement.

George Armstrong gave evidence on behalf of the respondents. Mr. Armstrong lives in Fort Francis and is president of a company which builds highways, railroads and bridges. In total, he has 69 years experience in Ontario and Manitoba. Mr. Armstrong has built many bush roads and has Ontario Minnesota Pulp and Paper Company Limited, J.A. Matthew Paper Company Limited, Boisee Cascade Limited and the Ministry of Transportation ("MTO") as his principal clients. His company built 91 miles of highway from Highway 11 to Dryden for the MTO. Mr. Armstrong remains involved with his company to this date.

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Mr. Armstrong stated that he is familiar with MTO standards for road building, having followed such standards in his work. In this connection, there are different standards set by the MTO and local roads boards for different types of roads, being A, B, C and D. The easiest to build has the least number of specifications.

In addition to road building, Mr. Armstrong's company is involved in building and the gravel business. He also owns readimix plants. In his road building experience, Mr. Armstrong has had to cost out road jobs, which depend on whether rock, sand, gravel or paving are used. In all cases, the cost will depend on the standard involved.

Referring to Exhibit 8, Mr. Armstrong stated that he had been approached by Nipigon in 1988 for access to its mine. Mr. Armstrong told Nipigon that he was prepared to make a deal, provided that they could agree on price. The agreement was in exchange for $5,000 per year, Nipigon could have access across his property. Nipigon had been pleased with the deal. Mr. Armstrong could not recall the names of all the people involved, although Max Reiter was one of them. In clause 7, the agreement provided for the payment of $5,000 per year for two years, and a further $5,000 upon renewal. Mr. Armstrong acknowledged that the money was paid for a few years. According to clause 6, Armstrong was to have the right to close the road if there was a breach of the agreement by Nipigon. Nipigon was not obliged to begin improvements to the road until April 1, 1989.

According to the agreement, Nipigon was to build, at its own expense, the subject road to local roads board standards. Mr. Armstrong stated that he allowed Harold McQuaker to do the work, as his company was too busy. However, the money owing under the agreement was over and above the cost of the road.

Exhibit 52 sets out the payments made under the agreement, totalling $19,469.29, although approximately $1,500 was paid for gravel. None went to his company for road work. No payments were made for 1992, 1993 or 1994. Mr. Armstrong referred to a letter dated January 24, 1990 from his lawyer, Theo Wolder to Benjamin Houge, the lawyer for Nipigon (Ex. 14), which demands payment under the agreement. Portions of the letter are reproduced below:

> Pursuant to an agreement of November 10, 1988, our client, George Ansley Armstrong, granted permission to Mr. Reiter and Nipigon Gold Resources Ltd. to cross our client's property known as Mining Locations K74 and K75 on the condition that all work with respect to constructing, enlarging and maintaining the roadway across our client's property be awarded exclusively to our client and our client's company, George Armstrong Co. Limited.
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> We have been advised that Nipigon had in fact engaged another contractor in 1989 to perform work on the road in

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> violation of the agreement. In addition, we understand that further work is being contemplated, which work should be granted exclusively to our client. If work is being contemplated, please provide our client, or our firm, with the specifications so our client can submit an estimate of costs for such work in order to allow you to decide whether to proceed with the work or not.
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> The agreement further provides that Nipigon shall make an annual payment of no less than $5,000.00 to our client each year in order to keep the agreement in good standing. We therefore demand payment of $5,000.00 for the work which should have been granted to our client in 1989. If the work for 1990 equals or exceeds $5,000.00, then this will meet Nipigon's obligation for the current year.

After the letter was sent, Nipigon eventually paid for 1988 and 1989. In 1992, payment for 1991 was made.

Mr. Armstrong referred to a letter dated January 24, 1991 from Ian J. McLennan to Benjamin Houge (Ex. 16) wherein it states:

> A review of that agreement indicates that it expired on November 15th, 1990. My client advises that he is prepared to renew this agreement on specific terms which require immediate payment of $5,000.00 plus an additional payment of $2,500.00 as compensation for the fact that travel across my client's property has not been restricted to the agreed road.

On February 19, 1991, Joseph Strauss answered directly to Mr. Armstrong on behalf of Nipigon (Ex. 17) advising that Houge no longer represented them. While it does not acknowledge the demand for an additional $2,500, the letter does request an additional 60 days to make the missed November payment. Mr. Armstrong stated that the next payment was in fact received in June, 1992.

McLennan again wrote to Houge on September 12, 1991 (Ex. 18) advising that his client takes the position that the agreement is at an end as its terms have been repeatedly breached; payments owing are in default and the agreement has not been renegotiated or extended. The letter further advised that any entry on any portion of K.74 and K.75 will be treated as trespass.

By letter to Mr. Armstrong dated September 23, 1991 (Ex. 19), Mr. Strauss suggests that the matter could be resolved with a new contract during his next visit to Fort Frances. By letter dated January 22, 1992 from Mr. Strauss to Mr. McLennan (Ex. 21), the

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following information is set out. First, the money owing was not paid as the company ran out of funds owing to exploration. Nipigon accepts that it owes Armstrong $5,000, which it offers to pay as part of an overall restructuring of the rental agreement, "along with addressing additional compensation to make Mr. Armstrong whole as a result of said delinquency". He asks for specific locations of taps and drains so that the matter can be referred to McQuaker. The letter goes on to state:

> Suggest that we could not operate under a situation where we have to check with Mr. Armstrong every time we want to visit the property, and do exploration work, mining or milling activities, or related work projects.

Referring to the question of upgrading of the road, the letter states, "In reference to this subject, we are in a quandary as to what needs upgrading, as the Ministry of Roads (**sic**) representative signed off on the road construction project so (**sic**) time ago". Mr. Armstrong indicated that he felt that this letter was in error, and that $15,000 was owed.

Mr. Armstrong stated that he allowed McQuaker to do the work, he indicated "Why not?". In response to the suggestion that the agreement calls for work to be done for every dollar paid to Armstrong, Mr. Armstrong disagreed, stating that the money was for the use of the right of way and nothing else. Mr. Lukinuk read clauses 4 and 7, indicating that Armstrong has the right to do the road improvement work and to be paid in advance for such work and that if Nipigon has paid in excess of $10,000 it may renew for no less than $5,000. Mr. Armstrong reiterated that the agreement did not require any action on his part.

Asked where the agreement entitles him to payment without the need for work to be done, Mr. Armstrong stated that he signed whatever his lawyer put in front of him and if it is wrong, his lawyer made a mistake.

Mr. Armstrong agreed that he had allowed Mr. McQuaker to construct the road, stating that he was a good contractor, and that he would not allow Nipigon to do the work themselves. Mr. Armstrong was not present during the building of the road, but saw it two months later. He called Mr. McQuaker in to perform some improvements, including one more tap drain and digging to drain some of the ditches. According to him, McQuaker did a bit but not much.

Referring to Exhibit 52, showing money paid by Nipigon, Mr. Armstrong stated that the money was for his supply of the road. He acknowledged that he might have been required to "maybe do a few things" under the agreement, such as maintain the road. He did grade the road once, but did not realize that he had to under the agreement. No bill was sent, nor was the amount credited to Exhibit 52. Mr. Armstrong could cite no harm which would occur if Nipigon were allowed to use the road, stating that as long as the money was paid, everything would be fine.

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Regarding the various letters sent, which suggest that less money would be acceptable, Mr. Armstrong stated that he agreed only to more money. Although he did not agree to anything, he simply wanted a new agreement. Asked why he did not fix the road and credit the balance with Nipigon, Mr. Armstrong stated that he does not do anything for nothing. Grading was estimated at $1,500 per year, involving three passes at $500 apiece.

Subject Road And Access

Mr. Laroche has testified that the cottage road continues as a winter road further to the south and west. He first obtained access to the McKenzie-Grey site in 1987 through Bad Vermilion Lake. Commencing in 1990, access to the site was obtained via the main highway in the area to the cottage road, also known as the Shoal Lake Road. This road is 20 feet wide and care must be exercised due to oncoming traffic. Along this road is an intersection to a newly built road, which gives access to the property. Mr. Laroche could not recall any signs indicating that the cottage road was private, although it is common practice to ask for permission to use private roads. After a time, Nipigon informed Mr. Laroche that there was a problem in using the private road. However, he was not present when equipment went in, so he could not comment on how access was gained. However, since 1993, when discussions concerning the use of the private road heated up and permission was denied, the project itself was put on standby.

Referring to the sketch of Mining Locations K.74 and K.75, with the private road drawn in pencil (Ex. 50), Mr. Laroche stated that the map does not show other existing roads located on K.74 and K.75. The cottage road, which forms part of the sketch, runs north of the road allowance along Shoal Lake, continuing beyond the southwest corner of K.75 when it becomes a winter road. Not shown are numerous roads running north to south which connect the cottage road to the subject road.

Mr. Laroche described access to the mill located on the McKenzie-Grey site, which is half way into Mining Claim K-475275. In addition to the road shown connecting the cottage and subject road, there is another road which goes through a gravel pit and joins the cottage road approximately 600 or 700 feet past the boundary of K.75. This north-south road, and others like it, form a loop and are used as such. The width of the subject road west of K.74, through K.75, is narrow for oncoming traffic. There were contractors present cutting the wood, making passage difficult. Mr. Laroche stated that Mr. Armstrong had never personally refused him access.

Asked what is required on the subject road to maintain it in the event there is a mining operation, Mr. Larche stated that the first part of the road is good, but that the lumber company presence is making it difficult to pass. He assumed that Nipigon, or whatever mining company operating the mine, would fix the road to save time and money. The subject road is

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minimally adequate, although parking waysides would be needed along the road. A considerable portion remains unimproved. Also, there would be no problem bringing in hydro alongside the road. The estimated cleared area is 40 to 50 feet in width.

Based upon his visit during the summer of 1992, Mr. Laroche stated that there are no drainage problems on the road itself, although there is water in some of the ditches. It is, however, in better condition than the cottage road, where the sand is fine, and gets washed away in rainfall. In his opinion, the physical structure of the road is good, being built on eskers and outcrops. There is sand of all types, which is usually good, although one area has fine sand. Also, one area goes through a swamp which probably needs more filling.

Concerning the requirements to maintain the subject road, Mr. Laroche stated that he is not experienced in road building. However, insofar as needed for mining purposes, it was in good condition for moving back and forth.

Ms. Le Dain suggested that alternative access was available to the McKenzie-Grey site, from the property to the north of Mining Locations K.74 and K.75. Mr. Laroche pointed out that this alternative access was less than ideal, as the road allowance along the Finger Lakes was located in a swamp. Also, no road currently exists and would have to be constructed and Nipigon would have to contend with numerous owners. Finally, there are a number of hills and substantial outcrops towering 30 feet or more. Even with a four wheel drive, portions of the suggested access would not be passable. As an alternative, the cottage road is too narrow. Mr. Laroche stated he would not like to see it used.

Concerning vehicles going across the subject road, Mr. Laroche agreed that part of the research with Norfund involved taking ore to the McKenzie-Grey mill from the Foley mine. No consent had been obtained from Mr. Armstrong for this.

Referring to Exhibit 50, Mr. Laroche read for the record that Mining Location K.74 was subject to a right of way, which according to him means a right to use the existing 20 foot cottage road. The double line which denotes the cottage road leads into the Pow Wow Grounds beyond which there are dotted double lines. Mr. Laroche suggested the draftsman failed to capture what was in fact on the ground. The road, according to him, extends southwest along these dotted lines to another reservation.

Mr. Laroche stated that in 1994, he had used neither the subject road nor the cottage road. He used both several times in 1993. In 1992, with ongoing drilling, both roads were used.

Mr. Sjersen confirmed the location of the cottage and subject roads on Exhibit 50. The subject road was described as being in good condition. Although much equipment went into the site, as did trucks of ore from the Foley mine, Mr. Sjersen could not say with certainty.

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There is a water problem along the high road, and as far as he could remember, there were a couple of ponds. The soil itself was described as sandy. He was unable to comment on the road's construction.

Mr. Sjersen estimated the cleared area of the road to be 60 feet, estimating a total of 12 to 13 acres. Mr. Sjersen stated that the subject road is ploughed, and everyone in the Mine Centre area uses it. He stated that a title search disclosed the Deeds involving two landowners along the cottage road, involving Robert La Fond and Alan Edward McCormick (Ex. 54 and 55 respectively), each of which states:

> TOGETHER WITH the right to use any existing roadway across Mining Location K-74 for the purpose of ingress and egress to the land herein described.

Bulk samples were taken from the Foley mine to the McKenzie-Grey mill by Mr. McCormick, using a single axel gravel truck, carrying eight to ten tons. Four or five trips would have been made. This, according to Mr. Sjersen, is in accordance with the right provided in his deed.

Mr. Sjersen stated that Nipigon did not use the cottage road much in 1994. He did use it personally to store his boat on the McKenzie-Grey site. In 1993, the cottage road was used frequently, by both Nipigon and himself. The road branching off of the cottage road to the subject road is very sandy, so that it is difficult to use heavy equipment. Mr. Sjersen could make no comments on use in 1992, as he was not there.

Mr. Sjersen stated that neither he nor Nipigon used the subject road in 1994. He met Mr. Armstrong in June of 1993, when he was told he could not use it. It had been used up to that time. In 1993, Wayne Homestead Associates used both roads while they were on site for a period of 2 1/2 weeks. Dennis Robinson Limited moved the crusher in while Mr. Sjersen was in Thunder Bay, so he could not comment on which road was used. There was no apparent damage to the road resulting from use by either Homestead or Robinson. Mr. Armstrong did not complain, although he knew Mr. Sjersen was on site.

Based upon his background in commercial and residential building, Mr. Sjersen estimated that maintenance for the subject road would be $1,500. This would take care of washboards and crown the road to allow water to drain. Having examined it, Mr. Sjersen stated that he could not see a problem with water. Mr. Armstrong never complained about it, but Mr. Sjersen was not privy to discussions with Joseph Strauss, president of Nipigon.

Mr. Sjersen identified a statement under the name of George Armstrong made out to Nipigon Gold (Ex. 52) which sets out a number of credits dating from February, 1990 through to June, 1992. The balance shows a credit of $19,469.29. Mr. Sjersen stated that he

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did not know what it was for. Based upon his current responsibilities, any such payments, had they been made since he commenced working for Nipigon in 1993, would be his responsibility.

Mr. Sjersen stated that, to his knowledge, neither Mr. Armstrong nor his company had improved the road. Nipigon made improvements to the subject road, not only as it crossed Mining Locations K.74 and K.75, but also as it extends up to Highway 11. Referring to clause 8 of the agreement (Ex. 8), Mr. Sjersen stated that Nipigon did not waive any rights that it had to use the cottage road.

After mid-1993, Nipigon and its employees used the cottage road exclusively, which Mr. Sjersen estimated to be about 75 or 80 times. A backhoe was brought in by Homestead using the cottage road and crossing the corner of K.75 on the sandy road heading north. It was conceded by him that, even using the cottage road and sandy road, one must traverse a portion of the subject road to reach the Nipigon property.

Mr. Sjersen stated that he did research to determine how long the sandy road which ran from the cottage road to the subject road had been in existence. He determined that it had been a portage dating back to the early 1900's. Although he could not comment on the end points of the road, he believed the portage was from the Dumbell Lakes to Shoal Lake.

On the map (Ex. 50), Mr. Sjersen stated that he is familiar with the extension of the cottage road beyond the Pow Wow Grounds, shown in dotted lines. It is a winter road, which makes it difficult to traverse in summer.

Mr. Sjersen could not comment on the money spent by Nipigon to improve the subject road. However, he believes that considerable money was spent, but the result is that the subject road is in better condition than the cottage road. The length of the subject road is approximately one and a half miles. Harold McQuaker did the actual road work, being a road contractor in heavy equipment. A backhoe, trucks and graders were used. Without being specific as to how much was spent on which portion of the road, Mr. Sjersen stated that the upgrading of the road from Highway 11, through K.74 and K.75, cost approximately $170,000. He was uncertain whether a portion of this cost went to the cottage road and to the best of his knowledge, nothing was spent on the connecting roads between the cottage and subject roads.

Mr. Sjersen stated that Nipigon had obtained the McKenzie-Grey property from Ken McTavish and Steve Lacitosh in 1987. The option at that time included a right of access across K.74 and K.75, using the cottage road. Mr. Sjersen was of the impression that the dotted lines denoting the extension of the cottage road which also continue to the north and join the subject road, were for public access, due to their prior use as a portage, and thus being a link to the north. Concerning the extreme westerly portion of the subject road, Mr. Sjersen stated that Ken McTavish had been accessing the McKenzie-Grey site well before the time Nipigon acquired it.

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There is no possibility of Nipigon having used either road for a period of 20 years, with its interest in the McKenzie-Grey site existing since 1987. Mr. Sjersen had no knowledge that Nipigon received a grant from the MTO for that portion of the road that crossed K.74 and K.75.

David Franklin Petrunka gave evidence on behalf of Nipigon, having been involved in work in the area as early as 1984. His company, Oro Treck Resources, set up a joint venture which, in turn had an agreement with the owner of McKenzie-Grey to take a bulk sample. Milling was done at a mill north of K.74 and south of Highway 11.

Mr. Petrunka referred to a letter to him from the Ministry of Natural Resources ("MNR") dated July 11, 1984 (Ex. 58) which was in connection with obtaining government funding to improved the road used. The road in question, according to Mr. Petrunka, was the cottage road, including its extension beyond the Pow Wow Grounds running both northwest and southwest.

Mr. Petrunka stated that he had been involved with the cottage road in 1984 which had been upgraded and widened so that long and wide loads could be moved. Improvement of the road extended approximately 6 miles to a location 1/4 mile south of the branch in the road to the Foley mine. Along K.74 and K.75, there were a few deep holes which needed filling, but otherwise the road was essentially good until the swampy area beyond the Pow Wow Grounds. Under cross-examination, it was clarified that the Oro Treck mine was two miles northeast of the Armstrong property and road improvements did not extend that far. However, some of the government funds were used to fill the potholes.

Travel into McKenzie-Grey was by car or pick up truck. The ore was brought out by tandem truck. There was a loader which took the ore through the swamp and loaded it onto a truck near the Pow Wow Grounds for transport to the mill.

Mr. Petrunka stated that he checked into the history of the cottage road beyond the Pow Wow Grounds. If followed northward, it branches off to Grassy Bay north of Seine Bay. The branch which goes to McKenzie-Grey is an old portage road. Referring to a map from the Department of Mines Geological Survey, published in 1934 (Ex. 57), a portage is shown from Bad Vermilion Lake to Shoal Lake. The location of the portage appears to correspond with the southwest corner of K.75. Ms. Le Dain suggested that the legend denotes a trail to be used by foot to move canoes and is not meant for vehicles. Mr. Petrunka disagreed, stating that a winter road does not mean that it can be used only when frozen, but that it can be used during any dry season.

George Luyt gave evidence on behalf of Nipigon. He is retired from his job as access roads manager for the MTO, which he did for 12 years in the Thunder Bay area. Mr. Luyt was a member of an interministerial committee, the Northern Ontario Resources Transportation Committee, which includes the MNR, the MTO and the MNDM, having been its field/technical person. When a request for cost sharing is received for purposes of access

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to mines or forestry, he was charged with going out to the property and looking over the proposal. He reported back to the committee and if the response was favourable, he would administer it.

Mr. Luyt stated that he was familiar with both the Oro Treck and Nipigon projects discussed at the hearing. Nipigon had wanted to upgrade a portion of the road from Highway 11 to a point just north of the Armstrong property. In addition, it wanted to build a new portion across K.74 and K.75 to the McKenzie-Grey site. An estimated cost of $100,000 was shared on a 50/50 basis, and although this was to include the portion across the Armstrong land, it was used up before Armstrong's land was reached.

Although Mr. Luyt initially requested that Nipigon's agreement with Mr. Armstrong be changed, and was told it would be, he never received confirmation of this fact. It was no longer an issue as ultimately the money expended were entirely taken up by the upgrading of the existing road northeast of the Armstrong land.

Under cross-examination, Mr. Luyt stated that he was always careful to ensure that there was a proper agreement with private landowners to ensure public access, if not during the mining operation, then afterwards. The reason that documentation was required was to ensure this, as without consent, the road could never be designated as public access. This consent could not consist of a company confirming that the private landowner had given consent.

The issue of consent is particularly important on a new road, as there has been no prior access. However, Mr. Luyt reiterated that this issue did not arise as the funds, used to improve approximately seven to eight kilometres of road from Highway 11 to the Armstrong boundary, were depleted.

Mr. Luyt also discussed the arrangement with Oro Treck, and although he had been on the cottage road once, he could not describe its status beyond the Pow Wow Grounds. Petrunka had told him that access to the small branch roads was required and the committee would attempt to help in these small endeavours. A letter stating that contact had been made with private landowners would have sufficed, and one must have been received. There was no requirement for a direct consent from Mr. Armstrong. However, based upon the 1983/84 funding, it cannot be said that any of the roads on Mr. Armstrong's land became public access roads.

In re-direct, Mr. Luyt stated that there is no designating process that he is aware of which could make a new road a King's Highway, industrial road or tertiary road. In 1984, the work to be done was determined by a drive through, with areas for ditching, filling in of road, culverts etc. being pointed out. This was not specific. South of the Pow Wow Grounds work was minor. There were no complaints concerning the work done from the property owner.

Mr. Luyt stated that he had two problems with the Nipigon/Armstrong agreement. The first was that the work had to be done by Mr. Armstrong's company and the second was

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that of public access. Clarifying his first point, he did not want to see the work becoming of a larger scale than absolutely necessary, and wished to restrict it to the needs of the mining companies.

Mr. Armstrong is familiar with the McKenzie-Grey property, and knew McTavish, Lacitosh and Nipigon, as well as Dr. McKenzie, who owned it in 1926. Dr. McKenzie gained access to the property through Bad Vermilion Lake, as it is on the Vermilion River. He travelled on the portage past the Pow Wow house along what was just a trail. There are no other portage routes, according to Mr. Armstrong, as this is the shortest route. Asked about the second trail shown on the 1934 map (Ex. 57), he stated that he has never seen it, so that it must be a very old trail.

In order for Nipigon to reach its property, it would have to use either the subject road or the cottage road. In the latter case, once it passes the Pow Wow Grounds, it would have to take one of two roads heading north to join the subject road. Mr. Armstrong stated that he built the westernmost north-south road three years ago. Referring to Exhibit 50, Mr. Armstrong stated that his engineer prepared it for him. The dotted line, denoting the western end of the cottage road beyond the Pow Wow Grounds is a trail and an old road going miles to a dam and indian reserve. This road does not touch the Nipigon property, being located well south.

Exhibit 50 is an undeposited plan, and there is no transfer of right of way. Mr. Armstrong had commissioned it to determine where the west boundary of K.75 was located and to determine the distance from the Pow Wow Grounds to this line. Mr. Armstrong could not say what was meant by the dotted line.

Mr. Armstrong stated that he intends to develop a subdivision of 18 lots along the shore line. He acquired title to the 66 foot reservation, as evidenced by Exhibit 53. His title is subject to surface rights in public or colonization roads or highways. Asked how this subdivision would be affected if Nipigon gets permission to use the subject road, Mr. Armstrong stated that it will not be affected. He stated that use of the cottage road by Nipigon could be a problem as the road is curved just past K.74, so that there would be difficulty in hauling.

Mr. Armstrong estimated that K.74 and K.75 is just under six miles from Highway 11, between two and a half and three miles from Petrunka's property and 1/4 mile from the Foley mine. He stated that the right of way shown on the claims map through K.74 and K.75 is not correct, having checked for its existence with MNR.

Mr. Armstrong stated that he heard for the first time at the hearing of Mr. Petrunka's being on his property in 1983/84 and that he had no knowledge of the purported access to the McKenzie-Grey property at that time. Neither Petrunka nor Oro Treck had asked his permission to designate the cottage road as a public road, nor did he consent to the use of public money on the road.

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Mr. Armstrong stated that in discussions with Nipigon, he indicated that the road must be improved to MTO standards. However, he never authorized government funds to be spent. He also never closed the subject road when Nipigon was in breach. Also, according to clause 8, it was understood that the subject road was not to be a public access road.

Mr. Armstrong gave evidence that Nipigon continued using the road after payments stopped through 1992 and 1993, although he could not recall the names of the employees. He met and spoke with Mr. Sjersen. Al McCormick hauled materials from the Foley mine, using the cottage road past the Pow Wow Grounds, having indicated that the subject road was too muddy. Dennis Robinson went in with a big crusher and used the subject road because the cottage road was too narrow.

Mr. Armstrong stated that there is no way to get to the McKenzie-Grey property without using a portion of the subject road. Even if the cottage road and one of the extension roads north is taken, one must travel at least 1,000 feet along the subject road. Asked to describe the subject road, he stated that the easterly 1,500 feet is rocky and hilly, with the remaining stretch being relatively flat. According to his specifications, the subject road was to have been built to the minimum standards for subdivision roads and streets in Appendix A (Ex. 43), which sets out a right of way of 66 feet, cleared width of 40 feet and surface width of 18 feet, having four inches of crushed gravel or stone. Culverts are to be a minimum 15 inch diameter, larger where required.

Mr. Armstrong suggested that Nipigon could use the northern route to its property, including the 66 foot right of way along the Finger Lake. Concerns with the swamp are no more than are encountered on his land.

Under cross-examination, Mr. Armstrong estimated the length of the subject road to be one mile. He estimated that it is 10 or 12 feet wide, and felt it was an area of five acres, including the cleared width of 60 to 66 feet.

Concerning Mr. Luyt's evidence and the local roads boards standards, Mr. Armstrong agreed that he had not given Nipigon the specifications. Mr. Lukinuk suggested that the standards in Appendix A (Ex. 43) are for a higher standard, applicable for cottage road streets. Asked whether there is a local roads board standard calling for four inches of crushed rock, Mr. Armstrong stated that Mr. Luyt told him it had been changed, while it never was.

Mr. Lukinuk referred to a consent received by Mr. Armstrong for a plan of subdivision to construct cottages along Shoal Lake on K.74. Mr. Lukinuk referred to Schedule A of the decision of the Ontario Municipal Board, file S 890017, dated January 12, 1990, paragraphs 3, 4, 5 and 6. Essentially, the conditions set out that the portion of the cottage road from Highway 11 to the subdivision shall be a public road, with a dedicated width of 20 metres. The road must be constructed and improved to subdivision standards specified as Directive MTR B-18 of the Ministry of Transportation. Mr. Armstrong testified that the road has not been done

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yet, as it will be the last thing to do in the subdivision. Mr. Armstrong also stated that he has not built the subdivision because he has not felt like it.

Mr. Armstrong stated that he never refused Nipigon access across this road. However, the reason that he has refused Nipigon the requested easement is because it has not paid him the money owed under the agreement. It was never his intention to prevent Nipigon from using the subject road. However, they made an agreement, which they are in breach of. If they had paid, there would be no problem. Similarly, if they renew the agreement every year and pay what is owing, there would be no problem.

Mr. Armstrong asserts that he owns the cottage road beyond the Pow Wow Grounds. Similarly, he owns all of the north-south roads joining the subject road. He denied that these are public access roads.

Mr. Lukinuk referred to paragraph 8 of the agreement and suggested that Nipigon could use any road to which it was entitled under the **Road Access Act**. Mr. Armstrong indicated that this was not what he had intended, but simply that he did not want commercial traffic on the cottage road. Mr. Lukinuk asked how Mr. Armstrong could prevent Nipigon from using a public road. Mr. Armstrong suggested that his lawyer did not correctly reflect his intentions with respect to the use of this other road.

Land Valuation

Mr. Petrunka gave evidence on the value of properties in the area. Generally, staked lands are worth $60 per 16 hectares. Leased land payments start at $20,000 and double after five years. In a transfer of the Lucky Coon Mine dated January 19, 1995, located five or six miles from McKenzie-Grey, the price was $15,000.

Damage

If Nipigon is allowed the right of way over the subject road as requested, Mr. Armstrong outlined what of value would be lost to him. He charges $1 per yard for sand and gravel. Although Nipigon did buy some, he estimated that they used 48,600 cubic yards, so that its value is $48,600. His estimate is based upon gravel on the road six feet deep, and a total of five acres of roadway. Mr. Armstrong testified that one acre equals 1,640 square yards x 5 x 6 = 48,600 cubic yards. In addition, a fair amount of poplar and pine were destroyed, although he was unsure of how much. Mr. Armstrong stated that a cord of poplar costs him $12 while a cord of pine costs $40. By his estimates, this land had 22 cords of poplar and 18 cords of pine to the acres. He estimated that five acres of poplar were affected, totalling $1,320, while two acres of pine were destroyed, totalling $1,440. Therefore, a total of $2,760 worth of lumber was destroyed.

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Mr. Armstrong told Nipigon it could hire McQuaker. However, instead of normal ditches, they are up to seven feet deep, with excavated materials used for the road surface. Tap drains cannot be installed because the ditches are too deep and the water forms pools. The four inches of crushed rock are not in place. On rock stretches, no blasting occurred for drainage between the holes, to prevent water from ponding. 12 inch culverts were used instead of 15 inch ones. The deep ditches would also have to be filled. Only one tap drain was used instead of four or five, although McQuaker rectified this situation somewhat. He also installed an additional culvert and dug one hole between two water holes. The deficiencies have cause problems. The road is only 12 feet wide instead of 18. To repair the road, Mr. Armstrong estimates that $25,000 is required, with an additional $8,000 in crushed rock or gravel required to top it off.

Mr. Armstrong hired a photographer to take pictures of the road, which were admitted as Exhibits 38, 1 to 10, many of which show water standing in what is described as a ditch alongside the road. Cattails are also evident. Mr. Armstrong stated that the area is not wet, but that the water is trapped wherever they were able to remove material from between the rocks. The worst time of year for the road is April through June, when it cannot be used.

Mr. Armstrong estimated maintenance of the roads to MTO standards would cost $1,500 per year. This would be to grade the road and remove washboard.

Referring to the agreement (Ex. 8), Mr. Armstrong stated that road A was bulldozed by Russell Cohen for Corporate Oil and Gas. He was unsure of when the alignment went in, but most of the trees were not removed. Over Ms. Le Dain's objections, Mr. Armstrong was questioned about the resulting law suit, claiming $15,000 in damages. Mr. Lukinuk stated that the statement of claim was in respect of the same roadway. Ms. Le Dain stated that there is no evidence that this was the same road as the subject road. Mr. Lukinuk pointed out that the agreement refers to an existing roadway.

Mr. Armstrong stated that Nipigon did not follow the existing roadway, but cut north on K.75. The issue was settled by the purchase of property for $10,000, which was not the fair market value, although no money was ever received in the suit. Mr. Armstrong reiterated that most of the subject road was on new terrain.

Mr. Lukinuk pointed out that the agreement did not refer to a standard of construction for the subject road. Mr. Armstrong insisted that Nipigon knew of the standard it must meet, even though he did not provide it with specifications. He could not say how much had been spent on the road, nor how much he would have charged to do it, but reiterated that it would cost $25,000 to fix it plus the additional $8,000 for gravel to top it.

Mr. Lukinuk suggested to Mr. Armstrong that he owed Nipigon $18,000 worth of work, less $1,500 for one year's grading. Referring to paragraph 4 of the agreement, where money for improvement must be paid in advance, Mr. Lukinuk pointed out that considerable

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money was paid in advance and asked whether anything was done for it. Mr. Lukinuk also suggested that Mr. Armstrong owed Nipigon for staying off of the cottage road and that the exchange was preservation of the cottage subdivision by keeping mining traffic off of a public road. Mr. Armstrong answered that Nipigon gave up their legal right to use a public road, being the agreement which it signed. He also stated that the agreement, while in arrears for $15,000, remains in full force and effect.

Concerning the cost of lost timber, Mr. Armstrong stated that the pictures show "maybe one pile" of wood. Concerning the water alongside the road, and referring to a sediment trap, Mr. Armstrong stated that they were straw bags with holes in them.

Concerning the MTO maintenance schedule with respect to outcrops, Mr. Armstrong stated the protocol involved in drilling and blasting. A local roads board would do this. However, there is none in Mine Centre and taxes are not paid by Armstrong to either a local roads board or school board for K.74 and K.75. Mr. Armstrong did not agree with Mr. Luyt that the subject road was improved to the same degree as was done between Highway 11 and his property, the former having deep holes.

Concerning the value of sand and gravel under the right of way, Mr. Armstrong stated that he has sold 3,000 yards from K.74 and nothing from K.75. While he charged a dollar a yard, Cecil Saville who obtained it had to strip the pit, excavate and transport it himself. With respect to the 66 foot right of way applied for, no sand or gravel has been removed, just shifted around. However, it is not open to salvage due to being full of stumps.

Mr. Lukinuk asked whether Mr. Armstrong had brought another suit concerning the agreement, damages for sand, gravel and timber and the like. Mr. Armstrong agreed that his lawyer, Lawrence Patrillo has brought a suit for $50,000 against Nipigon, although he did not know where the figure comes from. He reiterated Nipigon would have to make good on the amounts given in his testimony would be required in order to use the subject road. He could not say whether additional damage would be experienced if Nipigon were allowed to continue using the road.

In re-direct, Mr. Armstrong agreed that he never signed a document which purported to change the existing agreement; that it was never changed to allow the subject road to become public access and Nipigon never stated that they did not owe money. Nor did Nipigon say they would not pay until Armstrong did the road work. Nor was it ever suggested that Armstrong owed Nipigon money. Nipigon never called the money owing a payment for road work, nor did it ever ask Armstrong to do the work.

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Submissions:

Requirements of the **Act**

Pointing out that section 175 of the **Mining Act** allows the Commissioner to confer rights over another person's land where it is required for the proper working of a mine, Mr. Lukinuk submitted that the current application is a very good illustration of why this provision forms part of the **Act**, as mines would otherwise be sterilized. He submitted that the rights contemplated by section 175 are tempered with common sense. Subsection 2 allows for the payment of compensation or the making of conditions so that the rights of the landowners or others are not unnecessarily affected. The test is that there be no unnecessary damage.

The application is for a 66 foot road allowance across two mining locations for use as a right of way for a mine, and if necessary, for the erection of hydro poles. Mr. Lukinuk submitted that the requirements of the **Act** have been fulfilled by the applicant and that the tribunal has the discretion to grant the order applied for. He commented that the application is not really contested and should not have reached this stage.

Is There A Mine?

Mr. Lukinuk submitted that Nipigon has a lease, by which the Crown has granted Nipigon the right to win minerals. "Mine" is defined in the **Act** as:

> any opening or excavation in, or working of the ground, for the purpose of winning any mineral or mineral bearing substance, and all ways, works, machinery, plant, buildings and premises below or above the ground belonging to or used in connection with such activity, and any roasting or smelting furnace, concentrator, mill, work or place used for or in connection with washing, crushing, grinding, sifting, reducing, leaching, roasting, smelting, refining, treating or research on any of such substances and includes mines that have been temporarily suspended, rendered inactive, closed out or abandoned as well as lands where tailings, or wasterock, or both, or any other prescribed substances from any opening or excavation or working of the ground have been deposited.

The evidence has shown that Nipigon, which is involved in research on the best method to mine the minerals found on the site, has a 25 ton per day mill which has temporarily suspended production. There are existing stockpiles on the property, the evidence of Mr. Laroche indicating that 1,000 tons are present. In addition, 50,000 tons have been blocked out but not extracted. The evidence of Mr. Sjersen is that $1,000,000 worth of minerals are present in

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stockpiles at various stages of mining. The next step for this mine would be to drive an incline so that mining can expand. Alternatively, it could continue to be mined on a small scale basis.

Ms. Le Dain invited the tribunal to conclude that there is no mine on the McKenzie Grey property. She acknowledged that Nipigon did exploration of a mine and has prospects for a working mine of 25 tons per day. 750 tons a day is considered small, but 25 tons is infinitesimal. Ms. Le Dain submitted that it cannot be a producing mine because it is not viable. Nipigon is looking at selling and both Laroche and Sjersen, neither of whom is an expert, have testified that no decision has been made to develop the mine. Therefore, the subject road is not required in connection with the proper working of a mine as required by section 175.

Similar to the case of **Howes v. Estate of M.E. Manderson et al.** 5 M.C.C. 348, Ms. Le Dain submitted that this application is premature. While there is jurisdiction in the tribunal to make the order where there is a mine in operation or about to be in operation, Nipigon has made no such decision regarding production in connection with the McKenzie-Grey mine.

In reply, Mr. Lukinuk suggested that Ms. Le Dain's view is diametrically opposed to his own. The tribunal was invited to consider that "mine" is defined in the **Act**. If this contrary view were accepted, there would be no need for a closure plan which was required for this mine. Finally, if it is the finding of the tribunal that this operation is too small to be a mine, it should be specifically so stated in the order. Mr. Lukinuk suggested such a finding would be of interest to the community, where operations of this size are typical of mining in the province.

Mr. Lukinuk submitted that the case of **Great Lakes Nickel Limited v. Wallenius et al.** 5 M.C.C. 101 should be followed, owing to its similarity to the current application. Namely, the research was done, and while small in scale, the mine was nearing production. Nipigon has a mill for treating ore on site and the treatment has undisputedly occurred. The fact that it has been idle for one season should not be found to detract from the basic facts.

The Access Agreement

Mr. Lukinuk invited the tribunal to conclude that the agreement speaks for itself. The problem arises in that it was drafted with the presupposition that all work would be done by Armstrong and be paid for in advance. However, McQuaker did the work with Armstrong's consent, so that the prepaid work by Armstrong did not take place. The correspondence should be viewed as an attempt to make up for the need for prepayment which technically, according to Mr. Lukinuk, was unnecessary. There are no invoices, nor is there any liability.

Mr. Lukinuk pointed out that the documentation shows, in at least two places, that Nipigon should cease and desist from using the subject road. He stated that Armstrong "sucks

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and blows" as it suits him, stating that there is money owing, that no work was required to be done, and blames his lawyers for not making this clear in the agreement or correspondence. Mr. Lukinuk reminded the tribunal of Mr. Armstrong's uncooperative cross-examination, where evidence was not given freely and submitted that, when Armstrong's evidence conflicts with someone else's, the tribunal should prefer that of the other person.

On the assumption that the tribunal finds that it does have jurisdiction over the agreement, Mr. Lukinuk submitted that there is in fact no breach. Nowhere is it apparent in the correspondence that Nipigon agreed that there is an enforceable contract. A letter stating that Nipigon will pay is just an invitation to treat at law and little weight should be put on Armstrong's evidence in this regard.

Concerning the standards in the agreement itself, Mr. Armstrong agreed that McQuaker was good; it was Armstrong and not Nipigon who talked to McQuaker about the road and now it is him who states that the road is not fixed properly. However, if one looks to the exhibits, there are six or seven different claims for compensation. That means that the litigation process has been used and should be the conclusion of enforcement of either body as to what is going on. Mr. Lukinuk submitted that Armstrong wants everything in his favour and rejects everything else.

Mr. Lukinuk asked what Mr. Armstrong got out of the agreement and what was the consideration. He suggested that the Ontario Municipal Board decision involving the cottage subdivision along the lakeshore coincides with the time the problem with Nipigon arose. That appeal makes reference to government bodies not wanting the subdivision to go ahead because of the proximity to mining activities. This appears to be the rationale behind Mr. Armstrong wanting the agreement concerning the road, to keep mining traffic away from his subdivision. Then, when Nipigon went ahead with road improvement from Highway 11 to his property, Mr. Armstrong obtained the benefit of this activity virtually to his door. In addition to the widening of the road, money was spent to keep vehicles off of the cottage road.

Ms. Le Dain submitted that one of the requirements of this type of application is that the applicant must show that it is reasonable and fitting to be granted. Nipigon, by being in flagrant breach of its agreement, is trying to use these proceedings to circumvent an existing contract. The only conclusion which can be drawn is that it would not be reasonable and fitting in the circumstances to grant the application.

Ms. Le Dain submitted that Nipigon obtained Armstrong's agreement for the use of the right and agreed to compensation. There is a signed written agreement as evidence of this, to apply for excess of two year, as long as Nipigon paid $10,000 in advance and renewed it for $5,000. The money is not for road work and the agreement does not suggest that Mr. Armstrong had to do anything to receive this money. Rather, the money is simply for the right to use the road.

According to Ms. Le Dain, the list of debits (Ex. 52) was not, as suggested, prepared by an accountant, but done by a secretary. The balance shows accumulating payments. There is no suggestion of this being a debit and the brackets mean nothing. As to the question of what is owing, there is no evidence of anything owing to Nipigon, only to Armstrong.

Ms. Le Dain submitted that initially, Nipigon improved and used the road. Then it stopped paying. In February, 1990, Nipigon wanted to renew the agreement and admitted to Armstrong that it was in default, asking for extra time to pay. It is clear in the letter from Nipigon's counsel that without payment, there would be no more access. In January, 1992, Nipigon's president, Joseph Strauss, who is a lawyer, admitted that there was a breach and promised to make payments. He also suggested a new agreement with increased payments of $7,500 and $6,000. There is no suggestion that the money is for work owed by Armstrong.

Concerning the intentions of the parties surrounding the agreement, Ms. Le Dain pointed out that there were no witnesses from Nipigon involved in the agreement. The only evidence is from Mr. Armstrong and the intention of the agreement is clear.

Subject Road And Access

Mr. Lukinuk pointed out that the subject road itself has been used with Armstrong's authorization during the period when the agreement was not in contention. As to what is the nature of the complaint, Mr. Lukinuk stated that the question becomes how to adequately compensate Mr. Armstrong for its continual use. The evidence shows that it is an existing road which has been improved at Nipigon's own cost. However, there is nothing unique about the subject road; it is just another access road. There is no indication that the use of the subject road has diminished the Armstrongs' use and enjoyment of their land. Some gravel was sold. Mr. Armstrong did some diamond drilling.

Mr. Armstrong also did not demand that the location of the road be changed. Any straightening was mutually agreed upon and constructed with the consent of the respondent. Costs were born by Nipigon, and subject to the provincial subsidy, it paid over $100,000 to do so.

In looking through the materials filed, Mr. Lukinuk submitted that the tribunal will note that the cottage road was conveyed as a public road for the Pow Wow Grounds before Mr. Armstrong was involved. There is commonality of the Crown in this, in that, where one Ministry grants land, it is common to all, with dedication of public money to make it a public road.

Referring to Exhibit 50, Mr. Lukinuk suggested that it is significant by what is not there. Looking at the northwest corner, the heavy line shows a road allowance which is not elucidated. Mr. Lukinuk suggested that the possibility of inaccuracy is part and parcel of

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Armstrong's wanting Nipigon to go around his property. Mr. Lukinuk suggested that the unregistered reference plan is lodged with the surveyor general, which the tribunal may wish to obtain to determine whether Armstrong's information is correct. It was suggested that this obfuscation is evidence of Mr. Armstrong wishing to get mining off his road.

Mr. Lukinuk suggested that the registry system in Fort Frances involves a double entry system, and he suspects that the register does not contain all the abstracts pertaining to these properties. Should the matter go to appeal, Mr. Lukinuk cautioned the tribunal that there may be some abstracts which are not before it. He, however, commented that he believed the tribunal's finding with respect to Corporate Oil and Gas was correct.

The main consideration, Mr. Lukinuk suggested, is that Mr. Armstrong is looking for a way to save his cottage subdivision investment and not have a mining company use the subject road or the cottage road. The suggestion that Nipigon is attempting to get the right of way for nothing is ridiculous. Any money paid was done so under duress. There is no consideration, no invoices, no services, no entry and money was paid in advance.

In the normal reading of the cases, the right of way should be at the southern end because of the length of time the road has been used, the existence of the portage, with the conclusion that there has been no damage suffered. If the finding is that it would be fair that Mr. Armstrong should receive something, then Mr. Lukinuk submitted that he should be granted a right of first refusal to do work on the subject road paid by Nipigon at a commercially justifiable price.

Ms. Le Dain pointed out that no payment has been received since the 1991 payment was made. Nipigon is now seeking the jurisdiction of this tribunal to obtain access. It is clear that the right should not be granted. Nipigon continued to use the road during 1992, 1993 and 1994. The road was not blocked nor has it been to this day. Even when not used in its entirety during the last period, Nipigon or its agents have continued to use the north-south leg beyond the cottage road to the west, which necessitated using the subject road for the last leg. While Mr. Lukinuk has suggested that the entire cottage road is a right of way to the government, it does not extend beyond the Pow Wow Grounds. Nipigon is, in Ms. Le Dain's submission, getting a free ride with respect to the subject road which is neither fitting nor reasonable.

Ms. Le Dain submitted that the right requested is not required because Nipigon has other means of access. Mr. Armstrong's evidence is that a road could be put in to the north of his property. There is no evidence that it is not possible to put a road there.

Ms. Le Dain submitted that there is no evidence that there is an error with respect to the road allowance (Ex. 50), which was compiled from deeds. Mr. Armstrong owns up to the Finger Lake. The only error is the typographical reference to the Mining Location number.

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Mr. Lukinuk had a full title search done and while not able to put his finger on that plan which deals with the road allowance, the tribunal does have the plan for part of the survey and field notes for the Pow Wow Grounds. The sketch of the Pow Wow Grounds shows the road allowance.

Ms. Le Dain stated that, even if the tribunal were to find that Nipigon has the right to use the cottage road and north south road, it must still use a portion of the subject road to gain access to the McKenzie-Grey property. However, Ms. Le Dain submitted that the tribunal should find that the 20 foot road allowance ends at the Pow Wow Grounds and while the cottage owners have the right to use the cottage road, those rights are specific to those owners. Nipigon does not get the same rights by being in the area.

Ms. Le Dain submitted that there is no evidence that funds were expended on the subject road making it a public road. There is no evidence in the agreement, nor does Mr. Luyt consider that the subject road to be public access. Even if public funds were spent on the subject road, without Mr. Armstrong's consent, it cannot be considered a public road. The agreement specifically states at clause 8 that Nipigon shall acquire no interest or right nor shall it acquire rights under the **Road Access Act**, so that the status of the subject road is clear. The **Road Access Act** prescribes when an owner can close off access on his property where in clause 2(1)(b), paraphrased by Ms. Le Dain, no person shall construct a barrier over an access road unless the closure is done in accordance with a written agreement. Referring to clause 6 of the agreement, Ms. Le Dain submitted that Mr. Armstrong has the right to close the road. Also, section 6 of the **Road Access Act** provides that nothing confers a right of ownership in land where it does not otherwise exist at law. Therefore, the section does not affect alternative remedies, such as an application under section 175 of the **Mining Act**. The agreement specifically states that the subject road is not to become a public access road.

According to Ms. Le Dain, Nipigon has no common law rights to the cottage road. Whatever rights to pass over the road allowance exist, there is no private right of way at common law. The express right or reservation by deed, by an implied grant or reservation when land in common is severed or by prescription. Pursuant to section 31 of the **Limitations Act**, a right of way by prescription must have been pre-existing for 20 years. Therefore, while a right of way must be in use by a person claiming the right for 20 years, Nipigon has only had an interest in McKenzie-Grey since 1987. There is no possibility of relying on prior use of others, so that Nipigon is precluded from asserting a right in this regard.

With respect to the suggestion that there is some benefit to Mr. Armstrong from the right being granted, Ms. Le Dain submitted that there is no evidence from Mr. Armstrong that he uses the road or would in the future. He does not want access across his property at this point and does not need a road to perform his diamond drilling.

Mr. Lukinuk replied that the significance of the north south road is that the subject road has been constructed perpendicular to one of the portages which has existed since

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the turn of the century. This is the only reason why Nipigon used this road and why Mr. Armstrong did not try to stop them. Also, there is no evidence of damage and the **Road Access Act** does apply. In terms of the common law rights for road access, Mr. Lukinuk submitted that there is no evidence that Armstrong owns the fee simple in the cottage road. The fact that he owns land around it is irrelevant. The town makes it a public highway.

Mr. Lukinuk submitted that, contrary to Ms. Le Dain's position, Mr. Armstrong cannot close the subject road without first obtaining the permission of a judge. Furthermore, the status of the cottage road is clear in that the Road Access **Act** does not apply to a public highway, the existence of which is evidenced by Mr. Petrunka's evidence that it has been public from the turn of the century and the fact that public money has been expended on its maintenance.

Land Valuation and Damage

As to whether there was unnecessary damage, Mr. Lukinuk submitted that the only evidence was the allegation of sediment ponds. If Mr. Armstrong's evidence is correct that they exist, Mr. Lukinuk submitted that they were put in during the construction and improvement of the road, as part of the agreement and were in fact agreed to by both parties.

As to the evidence that McQuaker made some requested improvements but not enough, Mr. Lukinuk questioned Mr. Armstrong's standards and submitted that those of the neutral Mr. Luyt should be preferred. Mr. Luyt refused to allow Armstrong to carry out the road improvement as his standards were too high. The requirement that the work be done by someone else was to not permit the improvement to Armstrong's lands as a gravy train, using the public funds to improve his land. Armstrong clearly allowed someone else to do the work, notwithstanding the agreement, stating that he was too busy.

Mr. Lukinuk submitted that whatever damages are claimed by Mr. Armstrong are already under the terms of the agreement. He cautioned the tribunal to not confuse these proceedings with an action for surface rights compensation. Pursuant to section 175, the Commissioner is empowered to grant the right of way applied for, subject to the right to supplement, vary, alter or rescind the order granted.

As to quantum of adequate compensation, Mr. Lukinuk submitted that a 66 foot right of way for a length of about a mile at an angle would constitute 6,600 square feet or approximately ten acres. Based upon the four valuations for the price of land in this area, he submitted that the tribunal should recognize an average of $125 per acre.

Mr. Lukinuk submitted that there is evidence of another action instituted by Mr. Armstrong and the principle of **autre fois acquit** should apply. He asked whether the word

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"damage" in subsection 175(2) and meaning to be given to "full compensation" is such that the tribunal should have the right to interpret a contract and particularly if there is another action for the same amount of compensation between the same parties for the same things. Therefore, the alleged value of the wood, sand and gravel as well as the $25,000 to repair the road and another $8,000 for gravel, should be handled by the Courts. The reason for the Statement of Claim was issued was to provide Court protection for discoveries, where the rules of evidence are wide, speed is important and the matter should be allowed to proceed. He submitted that it is within the power of this tribunal to determine that the definition of damage and compensation does not include the interpretation of a contract, particularly when the matter is being dealt with by the Courts.

Mr. Lukinuk indicated that he would leave it to the tribunal to determine its powers in this regard. However, sticking to the straight concept that this compensation is based upon future use and the only compensation that should be considered is for use of the north-south road running from the cottage road at the Pow Wow Grounds to the subject road, but he submitted that there is no evidence of damage as it is everyone's road.

Concerning the argument that the subject road was not done properly, Mr. Lukinuk submitted that the standard advocated by Mr. Armstrong is too high, being that of a cottage subdivision, and should be given no weight.

Concerning the accounting of transactions between Nipigon and Armstrong, the tribunal should regard all amounts shown as debits, which require adequate invoices for work done. Mr. Lukinuk submitted that by his own accounting records, it is shown that Mr. Armstrong has received money and has done no work for it. Even with the minute amount of gravel provided, this debit cannot be accounted for. Mr. Lukinuk submitted that Mr. Armstrong has received money for which no consideration has been given. Money paid in advance is regarded by accounting methods as a corporate liability.

While continuing to maintain that the right applied for should not be granted, Ms. Le Dain submitted that subsection 175(2) clearly provides that before the right can be granted, it must compensate the landowner for existing damage. Therefore, in the event that it is found that the right should be granted, Ms. Le Dain submitted that no rights can be granted unless adequate compensation can be made. The right cannot be granted until compensation and damage has been determined by the tribunal and paid for.

Ms. Le Dain submitted that there is existing damage to the Armstrong property which must be compensated for before the right can be granted. First, the subject road has not been surfaced properly, and according to MTO standards, there must be four inches of crushed gravel placed on top. Ms. Le Dain pointed out that Mr. Armstrong is in the business of road construction and his evidence that this cost would be $8,000 should be accepted.

Second, the damage to the property as a result of flooding from improperly constructed ditches, where Nipigon allowed materials from the side of the road to be used

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instead of purchasing materials has resulted in ditches up to seven feet deep. Photographs show the standing water caused by this, so that there is no proper drainage of the ditches. Humps and hillocks should be blasted and drilled, and the road needs approximately 5 more tap drains. The existing culverts are too small and must be enlarged. Again, with Mr. Armstrong's experience, it has been estimated that $25,000 is necessary to repair these problems and there is no reason or evidence not to rely on this amount.

Third, the loss of timber on the property, which was cut when Nipigon built the road, must be compensated for a total of $2,760. The applicant contended that the earlier owner had cut the trees. However, Carl David Huston, previous owner in trust of K.74, according to Mr. Armstrong, cut only a swath ten feet wide on K.75. Nipigon not only constructed a wider road than that of Huston, but did not follow the existing road.

Fourth, there is money owing under the agreement for 1992 through 1994, being a total of $15,000.

In addition to the requirement that the respondent be compensated for existing damage, there is the additional requirement that before the order is granted, the tribunal must fix compensation for all injury or damage which may be caused by the order. There are, in Ms. Le Dain's submission, two causes of continuing damage if the right is granted. Evidence has shown grading costs of $1,500 per year will be required. The second element of continuing damage is the loss to Mr. Armstrong of the gravel under the road. Based upon evidence and calculations at the hearing, the damage should be compensated in the amount of $48,600.

Conclusions

Mr. Lukinuk submitted that the order should be made for a 66 foot road allowance. He suggested that, should the tribunal deem it necessary, the order could be conditional upon no commercial vehicles using the cottage road, which would put the parties back to where they were with the original agreement. This, however, would mean that there is no cash compensation. If cash remains an issue, Mr. Lukinuk submitted that it should be proved in court. With respect to future damage, the reference in the agreement of $5,000 presupposes that Armstrong will do work for this money. Again, this is evidence of Mr. Armstrong seeking to pick and choose which facts should be found relevant. Yet the compensation claimed is very heavy.

In Mr. Lukinuk's opinion, this application should never have come to the tribunal because Armstrong's original lawyer did not know the **Mining Act**, how it would be applied and that Nipigon should be found entitled to its right of way.

In conclusion, Ms. Le Dain submitted that the applicant has not met the requirements of section 175 in that it is not reasonable and fitting and not required in connection

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with the proper working of a mine, as there are other means of access. Alternatively, if the order is granted, the respondent must be compensated for existing damage and compensation must be fixed for injury and damage which may be caused. Ms. Le Dain submitted that if the right of way is granted, it would be unfair to grant less than freely agreed to between the parties. With the sources of continuing damage, there is sufficient evidence to support more than $5,000 dollars per year. Ms. Le Dain reminded the tribunal that, even if it is satisfied that all of the tests contained in the subsection are met, the determination of granting the order remains discretionary. It was submitted that the application should not be granted where the applicant continues in flagrant breach of the agreement and that the applicant wants its rights for nothing where previously it was prepared to pay.

Findings:

At page 353 of **Howes v. Estate of M.E. Manderson**, 5 M.C.C. 348 the following test is set out, regarding what is now section 175:

> Apart from other technical matters there are five basic requirements to be established before an order may be granted under section 645 [now 175] of *The Mining Act*. Firstly, it must be established that the right applied for is one of the rights contained in the clauses found in subsection 1. Secondly, it has to be established that the right is required for or in connection with the proper working of a mine, mill for treating ore or quarry. Thirdly, there has to be filed with the tribunal an adequate legal description of the part of the land to be made subject to the right in order than an order may be granted and be made effective by registration in the land registry office. Fourthly, subsection 2 of section 645 prohibits the granting of the order unless in all the circumstances it seems reasonable and fitting to grant the right and fifthly, prohibits an order unless compensation can be made for all injury or damage.

The rights applied for are found within clauses (f) and (g) of subsection 175(1), so that tribunal finds that the first test has been met.

Is There A Mine?

The test in the opening words of subsection 175(1) contemplates that the right applied for be required in connection with the proper working of a mine, mill or quarry. The words do not, as submitted by counsel for the respondent, require an up and running mine or mill. However, as evidenced by the case law, the words do contemplate the existence of an

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operation which is beyond its preliminary or exploratory stages.

After considering the evidence, the tribunal notes that, although the proposed operation would be small, having a capacity of up to 25 tons per day, this does not preclude a viable operation. There are sufficient reserves on the property to support this very small mill and reasonable profitability is expected, notwithstanding its small size. It is not necessary to exhaustively explore all of the mineral structures on the property where existing reserves would support the mill for a period of five years.

It should be noted, in contrast to the **Howes** case, that the applicant is not currently proposing an exploration or feasibility study program. Evidence of Messrs. Laroche and Sjersen indicates that, although funds are scarce, the proposed direction would be to operate a small mill which can be self sustaining. Funding appears to be the major obstacle in respect of the next step, along with secured access to the mill and the outside world.

The tribunal is satisfied, on the facts, that there is a mine on the McKenzie-Grey property, within the meaning of subsection 175(1). This is in keeping with the definition in section 1 of the **Mining Act**. The size of the operation is not an issue where questions of viability, profitability and proven reserves are found to be adequate. Indeed, the tribunal is most persuaded by Mr. Lukinuk's comments that such small operations are the backbone of the junior mining companies and should not be compared to major companies able to produce on a large scale.

This finding is supported by a number of prior cases. In **Marmoraton Mining Company Limited et al. and Lake Surprise Mines Limited et al.** 3 M.C.C. 126 construction of a mill had commenced and adequate reserves for its operation had been established. Similarly, in **Great Lakes Nickel Limited v. Wallenius et al.** 5 M.C.C. 101 the plan was to build a 6,000 ton per day mine and concentrating plant, although neither existed at the time of the making of the application.

The tribunal has considered and adopted the words of former Commissioner Ferguson in **Howes** where he states at page 357:

> ... The intent is obviously to assist an owner of a viable operation who would otherwise not be able to go into production and is not to provide assistance in financing, exploration and development programs. In conclusion with regard to the second requirement, I am of the opinion that it cannot be said that the right requested is "required for or in connection with the proper working of a mine" where there is no basis established on which a mine would be opened or a mill constructed.

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Legal Description

While no legal description was filed, this should not defeat the application. As is clear from the evidence of those speaking on behalf of the applicant and of Mr. Armstrong himself, problems arising from the 1988 agreement make it problematic to gain entry for a proper survey to be done. The tribunal finds that it agrees with Mr. Lukinuk, that an interim order is available in applications of this nature to gain entry on behalf of the applicant to survey the property so that a proper legal description of the right applied for can be obtained in registerable form.

Is The Right Applied For Reasonable And Fitting?

There are two issues which arise in connection with whether the right applied for is reasonable and fitting. Should an alternative means of access be a consideration of the tribunal? Does the existence of a pre-existing agreement, of which the applicant may be in breach, affect the decision of the tribunal?

Two alternative means of access have been discussed in the course of the hearing. As of yet unconstructed, there is a possibility of a road through numerous properties to the north, ending at a road allowance along the Finger Lake and then running south through Part 1 of Reference Plan 48T-3978 to Part 3. The second involves the cottage road to the Pow Wow Grounds, the northern leg of what has been described as a portage or winter road, and a short portion of the subject road. Mr. Armstrong did not advocate use of the cottage road, but, to the contrary, made all attempts to keep Nipigon off the road. In this vein, it has not been conceded by him that portions of southerly route are along a public access road.

Clause 175(1)(f) does not specify the means of access which may be applied for, instead using the words, "passage through or over any land or water". There is no requirement in the **Act** that the applicant canvass all surrounding property holders to arrive at numerous alternate means of access, then justify which is preferable in the circumstances. In the facts of this case, there is no existing roadway to the north of the Armstrong lands which can be used. Similarly, the cottage road is not sufficiently wide to meet Nipigon's needs.

The subject road, and its extension to the east to Highway 11, represents the best existing means of access to the McKenzie-Grey site, access upon which Nipigon has spent considerable money improving. It is the finding of this tribunal that private funds on the subject road and public and private funds on the extension to the east have been expended by Nipigon, the aggregate sum of which exceeds $100,000.

The tribunal can find no principle in law, and counsel for the respondents has suggested none, which requires Nipigon to go back to the drawing board and commence from scratch in construction of a new road when one already exists which it has spent considerable time and money improving for its use.

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The tribunal finds that the words of clause 175(1)(f) do not require justification for the particular route of access applied for in preference to potential other routes. Nor is there any indication in the clause, or prior case law, which suggests that part of the test of "reasonable and fitting" must prove an exhaustive list of alternative means of access. The application is clearly for the subject road. The tribunal finds that it falls within the test of "reasonable and fitting in the circumstances" at the very least that access along an existing road, improved at the expense of the applicant, is preferable to construction of a new road over lands held by numerous owners. This is particularly so when the alternative would be over terrain which, due to its nature as evidenced by testimony of Messrs. Sjersen and Laroche, would be even more expensive to build upon, containing hills, outcrops and swamp.

Resolution of the issue of the impact of the agreement between Nipigon and Mr. Armstrong is not helped by the absence of testimony on behalf of Nipigon. While it is somewhat helpful to have the evidence of Mr. Armstrong, on the whole the tribunal finds it to have been self-serving and not overly elucidating.

The agreement itself grants Armstrong the exclusive right to improve the subject road (clause 4) which are to be paid for in advance. There is no requirement **per se** that the road be improved, but states, "In the event improvements are required". Clause 5 stipulates that Nipigon cannot do the improvement work on its own, nor can it engage any other person to do so. Yet, it is the evidence of Mr. Armstrong that he relinquished this exclusive right under the agreement and recommended McQuaker, who ultimately did the work.

Clause 7 provides that the agreement remains in force for a period of two years. Where Nipigon has paid Armstrong for road improvements exceeding $10,000, it may renew the agreement "from year to year provided it has paid the Corporation [Armstrong] no less than $5,000 for road improvements during each previous renewal period". It is the evidence of Mr. Armstrong that he performed no road improvements during the period of 1988 to 1994. It is further his position that $5,000 per year is owing under the terms of the agreement, notwithstanding that the improvements were not done by Armstrong.

The understanding of the parties regarding the meaning of the agreement appears to change over time, with the meaning ascribed by Mr. Armstrong appearing later in their dealings. This is evidenced by a letter from Benjamin Houge, solicitor for Nipigon, dated March 10, 1989 (Ex. 9) wherein he states, "My apologies for any confusion regarding the agreement regarding the road". However, the issue of road improvements as a condition of payment of money extends through to January 24, 1990 (Ex. 14), when Theo Wolder, Armstrong's solicitor writes:

> The agreement further provides that Nipigon shall make an annual payment of no less than $5,000.00 to our client each year in order to keep the agreement in good standing. We therefore demand payment of $5,000.00 **for the work which should have been granted to our client in 1989**.

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It is interesting to note that the positions of both of the parties change in 1991, when Ian J. McLennan is retained by Armstrong and Joseph Strauss commences speaking on behalf of Nipigon. The absence of Max Reiter in these subsequent dealings is not explained, notwithstanding that he is an original signatory along with Nipigon. It is McLennan who asserts on January 24, 1991 that money is owing for use of the road (Ex. 16) with no mention of the precondition of work being performed and Strauss who agrees in February, 1991 (Ex. 17) that Nipigon is in arrears and asks for time. It is useful to note that this correspondence takes place over two years after the original agreement is made and apparently without the benefit of having read its terms.

On September 12, 1991, McLennan (Ex. 18) advises Houge that the agreement is at an end to which Strauss replies directly to Armstrong on September 23, 1991 (Ex. 19) asking for time until a new contract can be reached. The reply from McLennan dated November 21, 1991 (Ex. 20) sets out that three conditions must be met, that payment of $5,000 in arrears plus $2,500 compensation must be paid, the road must be fixed to certain specifications and future access can only be with Armstrong's prior approval.

On January 22, 1992, Strauss accepts in writing to McLennan (Ex. 21) that a $5,000 rental payment is owed. Specifics of the necessary repairs are requested and a new agreement is requested suggesting that access for each instance of use is untenable. Strauss suggests that the annual rental be increased to $7,500 at first instance and $6,000 thereafter. Throughout this letter, the lack of specifics appears to be an outstanding issue. The response from McLennan dated August 10, 1992 (Ex. 23) sets out that Armstrong will consider entering into a new agreement upon payment of amounts outstanding plus interest, terms outlined in the letter of November 31, 1991 and annual compensation in advance of $12,000.

By letter from Strauss to Armstrong dated July 8, 1993, (Ex. 22) two references are of interest, namely "You have graciously permitted our staff and our contractors to cross your property over the past two plus years." and "Nipigon authorized additional work on the road as per your request this Spring. Harold McQuaker repaired the road as per your instructions".

The schedule of payments made (Ex. 52) sheds no additional light on the meaning of the agreement. The first payment is made in February, 1990, in the amount of $12,000, which does not reflect the alleged agreed amount of $5,000 per annum. No breakdown of the amounts paid was provided by Armstrong, nor did Nipigon provide evidence in this regard.

The tribunal finds that the agreement is clear. Nipigon is permitted to use the subject road in exchange for agreeing not to use the cottage road. The matter of payment in advance for improvements to be done exclusively by Armstrong's company is an ancillary term which Armstrong waived. The result of this waiver is that no money is owing for work not done by Armstrong. Nor can the words of the contract support the position that money paid must be for the right to cross Armstrong land.

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The provision for renewal of the agreement, outlined in clause 7, is meaningless in the face of the waiver by Armstrong that his company be required to do improvement work. As Armstrong has frustrated the renewal terms through his waiver, the parties would have had to enter a new agreement concerning the use of the subject road, something which on the facts of the case, they did not do. Therefore, the tribunal finds that the original agreement was at an end on November 18, 1990 and has not been renewed. The tribunal also finds that there is no money owing as a result of the agreement, either for the period November, 1988 to November 1990, and more particularly beyond.

Based upon the finding that there is no agreement in which Nipigon is in breach of, there is no impediment to the right of access applied for. The tribunal finds that, in the circumstances, it is reasonable and fitting that Nipigon should be granted the right of access across the subject road, as well as the right to install hydro and utilities.

Compensation For Injury And Damage

Subsection 175(2) provides for three distinct types of injury or damage, namely that which has already been suffered, for which compensation is determined by the tribunal, that which will be caused by the granting of the right, and that which may be caused in future as a result of the granting of the right.

It has been suggested by Mr. Lukinuk that past damage alleged for the construction of the road, including the value of the gravel used, would best be dealt with by the Courts, particularly as Mr. Armstrong has commenced an action in another forum. However, this other action was commenced in connection with the agreement, which predates the application under the **Mining Act** and could be sustained had the current application not been brought. The wording of subsection 175(2) is clear in that the right applied for cannot be granted until, where injury or damage which has already been suffered, compensation has been determined by the tribunal. The tribunal can find no authority to abrogate its jurisdiction in this regard. It should be noted that considerable difficulty is faced by the tribunal in attempting to assess compensation in this case, where no evidence has been advanced on behalf of the applicants and that of the respondent, in the guise of having the appearing of an expert in road building, is found to be self-serving and exorbitant.

The value of gravel used in the road has been estimated by Mr. Armstrong to be 48,600 cubic yards, notwithstanding that the road, while improved and perhaps straightened or widened in areas, was pre-existing. The calculations of Mr. Armstrong do not take into account that the subject road was built on top of an existing road, so that there is no evidence of the height above grade of the existing road. Also, there is no evidence of an existing gravel pit which crosses the entirety of the Armstrong lands. One is left with the impression that all of K.74 and K.75 constitute one large gravel pit subject to sale. Mr. Armstrong's evidence that the height of the road, estimated to be six feet, is based upon the depth of the ditches left from

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the excavation is troublesome in that the slopes of ditches cannot exist at a right of way to the road for want of stability. Similarly, estimates of excavated material based upon crude calculations of these sloping ditches are not reliable. Finally, there is no evidence of what has happened to the overburden which covered the ditches, nor whether additional overburden was stripped from the 66 foot right of way. None of the photographs show piles of waste materials and no testimony was given as to its existence. The tribunal finds that it cannot accept the implied evidence that all of the stripped material is either sand or gravel.

The tribunal also has experienced difficulty duplicating Mr. Armstrong's calculations and will rely on its own determinations. There is evidence from Mr. Armstrong that the subject road across his property is approximately one mile long, while other estimates range up to one and a half miles. The tribunal will give Mr. Armstrong the benefit of the greater length in its calculations.

A 66 foot right of way one and a half miles long will be 7,290 feet by 66 feet or 522,720 square feet. One acre is 43,560 square feet, so that the entire right of way will be exactly 12 acres.

According to Mr. Armstrong, while he wanted the road to be 18 feet wide, in fact it had been constructed 12 feet wide with no shoulders. Therefore, the acreage of the subject road itself is calculated to be 7,260 feet by 12 feet, or 95,040 square feet, or 2.1818 acres.

One acre is calculated to be 43,560 square feet or 4,840 square yards. For each acre of road, and using as a starting point the evidence of Mr. Armstrong that the depth of the gravel is 6 feet or 2 yards, the total cubic yardage of gravel used is calculated to be 4,840 x 2 x 2.1818, or 21,119.824, rounded to 21,120 cubic yards.

The tribunal finds that, in the absence of accurate evidence concerning the amount of overburden, it will reduce the total cubic yardage by a factor of 10 percent as overburden, being neither sand nor gravel, for which there will be no compensation. In addition, the tribunal finds that the estimate of a six foot road bed based upon six foot ditches will be reduced by a factor of 30 percent, owing to the slopes of the ditches. While this is not wholly accurate, it is based upon the best evidence available and compensates for the unknown height of the pre-existing road bed. Therefore, 60 percent of 21,120 cubic yards is calculated to be 12,672 cubic yards. From this is deducted the 1,500 cubic yards which Nipigon purchased, so that the total cubic yardage of sand and gravel for which compensation is owing is calculated to be 11,172.

The tribunal finds that it accepts Mr. Armstrong's evidence of charging $1 per cubic yard and will allow compensation in the amount of $11,172 for sand and gravel.

Concerning the timber affected by the road improvement and clearing of the right of way, once again, evidence is scanty. There is no evidence of the maturity of the trees nor of when the land was originally cleared. Owing to the fact that, once again, Nipigon failed to

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produce any evidence concerning timber, and based upon its own conclusions that slightly less than ten acres of land would have been affected, the tribunal finds that, upon having checked the estimates for accuracy, it will adopt the evidence presented by Mr. Armstrong and will allow $2,760 for timber.

Concerning the road repairs and standard of road construction which should be imposed on Nipigon, there is nothing in the **Mining Act** which requires that the road be built to specified standards. Based upon the evidence of Mr. Luyt that MTO did not wish to have Armstrong involved in its construction, owing to the fact that he would over improve it, based upon evidence that Mr. Armstrong had McQuaker come in to make further repairs which were performed, based upon the evidence of Mr. Armstrong himself that he does not use the subject road himself and based upon the fact that Nipigon had the road improved to meet its own needs and not those of Mr. Armstrong, the tribunal finds that there is no reason to order further repairs. Similarly the tribunal finds that there is no jurisdiction in it to require that the road be built to the standard specified by Mr. Armstrong and that no further improvements to the road will be ordered under the heading of injury or damage.

This case would have been greatly aided by independent expert evidence on the cost of road construction and the standard of road required for mining purposes. In this regard, the tribunal notes that Mr. Armstrong's case would have been aided by independent expert evidence on road construction. In addition, Nipigon complicated matters by failing to produce McQuaker to give evidence on exactly how the road was constructed and to speak to the deficiencies alleged.

The tribunal concludes that past injury or damage for construction of the road must be paid in the amount of $13,932. This amount is set off against the total payments on account made by Nipigon, of $19,469.29 less $1,500 for gravel, or $17,969. Therefore, Nipigon will have $4,037 remaining on account with Mr. Armstrong.

As to the question of future damage, the tribunal has heard evidence from both Mr. Sjersen and Mr. Armstrong that maintenance of the road would cost $1,500 per year, allowing for grading three times a year at a cost of $500 per. The tribunal finds that it is satisfied with this estimate and will allow future compensation in the amount of $1,500 payable by Nipigon to Armstrong in return for grading of the road, which shall take place three times per annum.

It has been suggested that proper compensation for the value of the land used in the right of way should reflect that of values for expropriation. Indeed, there is very little existing case law concerning section 175, or its predecessors, on the subject of value of the land upon which a right is applied for. Section 79, involving surface rights compensation, differs from a section 175 application in that, the former involves cases where the surface rights have been severed from the mineral rights whereas the latter involves cases of using the surface rights

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of another over which access for one of the enumerated reasons is required. In **Dzuba v. Grann**, 6 M.C.C. 236, former Commissioner Ferguson considered nine principles for fixing compensation for surface rights under the predecessor to a section 79 application, including, under the second principle at page 244, "The amount of compensation should be a reasonably liberal one analogous to one payable on expropriation".

Historically, there has been no equivalent governing principle for section 175 compensation. Indeed, in the case of **In Re Superior Sand, Gravel & Supplies, Limited**, 4 M.C.C. 72, involving an application for a right of access over an existing right of way for an estimated 600 vehicle crossings per day. Former Commissioner McFarland had an experienced Ontario Land Surveyor perform a site visit, the result of which was recommendation of an alternative means of access which would not disturb the private dwelling enjoying the right of way. It is interesting to note that the owner of the right of way consented to the alternative right of way and did not seek compensation for its use (at page 75).

In **The Algoma Steel Corporation Limited v. Locke et al.**, 5 M.C.C. 163, the right of way for a tunnel, which was not expected to interfere with the use of the surface, was compensated for on an annual basis, in the amount of $4 per acre, being ten percent of the assessed value of the land by the local municipality. This amount was to be reviewed every ten years.

In **Great Lakes Nickel Limited v. Wallenius et al.**, 5 M.C.C. 101, former Commissioner Horan's decision dealt with the issue of expropriation at page 110:

> It did appear to the tribunal that Mr. Lukinuk was somewhat misled insofar as the matter was one of expropriation whereas in fact what I am asked to pass upon is the disposal of tailings for a limited period of time on the property of another person. The owner of that property does not lose his title thereto in any way whatsoever and it remains within him, his heirs or assignees, to whom it passes upon the cessation of the operation of the mine and the rehabilitation thereof as required by the various Acts covering such.

In evidence, the owner of the property stated that he had listed the property of $35,000 and had expected Great Lakes Nickel to purchase it. No other offers were received and the Commissioner stated at page 112, "... I think, having observed the witness and detailed research of the transcript of evidence before it, that in all equity no other purchaser could possibly be found who would be so foolhardy as to make such a tender". An appraisal from a real estate agent estimated its value as $6,100. The average price of properties in the area was calculated to be $6,166. At page 115, the Commissioner fixed compensation for the use of the property at $10,000 for 160 acres, with no reasons given.

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The evidence presented at the hearing as to the value of the 66 foot right of way is, to say the least, poor. There were no qualified appraisers giving evidence. There is no documentary evidence of other sales or listings in the area. The evidence of Mr. Petrunka mentioned $60 per 16 hectares, $20,000 generally for leased lands and $15,000 for the Lucky Coon mine some 5 or 6 miles away. Mr. Petrunka is not an appraiser and his evidence must be weighed accordingly. Mr. Armstrong, who had no difficulty rattling off figures for compensation, did not give evidence of what the property was worth. As to other property, he acquired a half interest in Mining Claim FF2247, directly south of K.75, 15 or 20 years ago for $3,000, having later acquired the remaining interest through a vesting order. He acquired Mining Location K.75 for $10,000, although he stated that this was not fair market value.

The tribunal finds that it will allow $150 per acre for the 12 acres, for a total of a $1,800 one time payment as compensation for the right of way. There is no basis to allow an annual sum for the subject road, as there was no evidence or suggestion of annual damage.

Conclusions:

The tribunal will allow the application. Nipigon will be permitted entry onto the Armstrong lands for purposes of undertaking a survey of the 66 foot right of way across Mining Locations K.74 and K.75.

Based upon the foregoing, the tribunal finds that compensation payable in connection with injury or damage will be set at $15,732. This amount is set off against the total payments on account made by Nipigon, of $19,469.29 less $1,500 for gravel, or $17,969. Therefore, Nipigon will have $2,237 remaining on account with Armstrong which can be applied to the first and second year charges for grading of $1,500 per annum.

As there are no amounts which must be paid prior to the granting of the application, once a proper legal description has been filed, an order will follow setting out the lands describing the 66 foot right of way for road access and hydro in registerable form.

The matter of costs, both on the preliminary motion and on the hearing of the merits remains outstanding. Counsel for the parties are invited to make written submissions in this regard prior to the issuance of the final order of the tribunal.