File No. MA 012-95

L. Kamerman) Tuesday, the 15th day
Mining and Lands Commissioner) of October, 1996.

THE MINING ACT

IN THE MATTER OF

An application under section 79 of the **Mining Act** in respect of Mining Claim SO-1156528, situate in the Township of Faraday, in the Southern Ontario Mining Division, hereinafter referred to as the "Mining Claim".

B E T W E E N:

VIVIAN GRAF

Applicant

- and -

GIUSEPPE PALU

(amended October 15, 1996)

Respondent

O R D E R

1. **THIS TRIBUNAL ORDERS** that the Title of Proceedings be amended by striking "Senator Stone Supply Ltd." as respondent and inserting "Giuseppe Palu" to reflect the recorded holder of the Mining Claim.

2. **THIS TRIBUNAL FURTHER ORDERS** that the application by Vivian Graf for compensation for damages to surface rights of Mining Claim SO-1156528 by Senator Stone Supply Ltd. be allowed.

3. **THIS TRIBUNAL FURTHER ORDERS** that Giuseppe Palu pay to the applicant, Vivian Graf, compensation for damages to surface rights in the amount of $875.00 within thirty days of the making of this Order.

4. **THIS TRIBUNAL FURTHER ORDERS** that the notation "Pending Proceedings", which is recorded on the abstract of the Mining Claim, to be effective from the 19th day of May, 1995, be removed from the abstract of the Mining Claim.

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5. THIS TRIBUNAL FURTHER ORDERS that the time during which the Mining Claim was pending before the tribunal, being the 19th day of May, 1995, to the 15th day of October, 1996, a total of 516 days, be excluded in computing time within which work upon the Mining Claim is to be performed.

6. THIS TRIBUNAL FURTHER ORDERS that the 29th day of April, 2002, be fixed as the date by which the sixth unit of prescribed assessment work must be performed and filed on the Mining Claim pursuant to subsection 67(3) of the **Mining Act** and all subsequent anniversary dates are deemed to be April 29 pursuant to subsection 67(4) of the **Act**.

7. THIS TRIBUNAL FURTHER ORDERS that it will fix costs in the amount of $11,007.28 to be awarded to the respondent, Giuseppe Palu, to be paid by the applicant, Vivian Graf within thirty days of the making of this Order.

IT IS FURTHER DIRECTED that upon payment of the required fees, this Order be filed in the Office of the Mining Recorder for the Southern Ontario Mining Division.

Reasons for this Order are attached.

DATED this 15th day of October, 1996.

Original signed by
L. Kamerman

L. Kamerman
MINING AND LANDS COMMISSIONER

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REASONS

This matter was heard on August 22, 1996 in the Courtroom of this Tribunal, 24th Floor, 700 Bay Street, Toronto, Ontario. Vivian Graf attended in person and was represented by her husband, William H. Graf. Giuseppe Palu, who was in attendance was represented by his counsel, Michael Garvey. Mr. Palu is the President of Senator Stone Supply Ltd. ("Senator Stone"), which was originally the respondent in this proceeding. Throughout the proceedings, activities of the respondent were referred to as those of Senator Stone. Where appropriate, the tribunal has treated evidence in reference to Senator Stone as if it were in reference to Mr. Palu.

Background

This is an application by Vivian Graf, the surface rights owner of Lot 41, in the Township of Faraday, for compensation for damages allegedly sustained by Senator Stone during the removal of a bulk sample conducted on Mining Claim SO-1156528 ("the Mining Claim").

The matter arises through an application dated May 19, 1995 pursuant to

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subsection 79(2) and (4) of the **Mining Act**, R.S.O. 1990, c. M.14. Taken together, these subsections entitle the owner of surface rights to be compensated for damages sustained to the surface rights as a result of prospecting, assessment work and other mining related activities. Failing agreement between the surface rights holder and the holder of the mining claim as to compensation, the matter is determined by this tribunal.

The Grafs have lived on the adjacent Lot 42 since 1962, building their home on 8 acres which they purchased in 1958. They acquired Lot 40 in 1968 and retain all but the westerly 40 acres, now owned by their son, who has built a home on it. Mrs. Graf acquired the surface rights of Lot 41, upon which the Mining Claim is located, in January, 1995. The surface rights of the land where the Mining Claim is located forms the subject matter of this application. The Grafs knew the Barkers, who were the previous owners of the surface rights of Lot 41, with whom they had a gentlemen's agreement for its purchase. Negotiations began in September, 1994, with the transfer being signed on January 26, 1995 and registered on February 13, 1995.

There are two pre-existing marble quarries located on Lot 41. Referred to as the north and south quarries, they were in operation intermittently after 1908. The mining rights were privately owned until 1974 and after their surrender they have been staked as mining claims from time to time, with assessment work done and reports filed (Ex. 5, Tabs B through F).

The Mining Claim consists of a long narrow lot, 660 feet or 10 chains wide. Historically, there has been quarrying exclusively of marble in the front (east) part of the lot, near Highway 62. A bush road enters from Lot 42 at the northeast and runs westerly between the two quarries beyond the west limit of the south quarry where it doubles back, moving southeast. There is a fork in the road, with one branch entering the south quarry at the its northwesterly limit and the other branch moving southwesterly to the Graf son's home. This road was widened by Senator Stone in 1994. It is also the road used by the Grafs when walking to their son's home.

The Mining Claim was staked and recorded in November, 1993 on behalf of Giuseppe Palu (Ex. 5, Tab A). Senator Stone received a Letter of Permission to Test Ore dated July 18, 1994 from the Ministry of Northern Development and Mines ("MNDM") permitting removal and sampling of marble not in excess of 400 tonnes (Ex. 5, Tab H). Mr. Palu requested and received an extension of time, so that removal would have to be completed by December 31, 1995 with the report to MNDM submitted by February 15, 1996 (Ex. 5, Tabs L and M).

On January 11, 1995, Senator Stone commenced proceedings with MNDM to bring the Mining Claim to lease (Ex. 5, Tab I). In accordance with clause 81(2)(c) of the **Mining Act**, Senator Stone must obtain an agreement with the surface rights holder indicating that compensation has been paid, secured or settled, failing which an order of this tribunal is required. The issue of compensation with the previous owner of the surface rights, Douglas Barker, was settled for all activity up to January 27, 1995 in the amount of $2,000 (Ex. 5, Tab K).

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The matter of compensation with Mrs. Graf could not be resolved to the satisfaction of the parties. Mrs. Graf's application was commenced on May 19, 1995 through her solicitor, O. Gregory Anderson. However, Senator Stone also has requested that the tribunal issue an order in connection with this matter and that the order be registered against the title of the lands held by Mrs. Graf (Ex. 5, Respondent's Reply, Paragraph 13).

Preliminary Matters

At the outset of the hearing, Mr. Garvey sought clarification of the issues to be addressed by the proceedings. In spite of the many heads of relief sought in the Statement of Claim (Ex. 4), recent correspondence with Mr. Anderson appeared to concede that the sole issue was compensation for loss of use and enjoyment. This was also the only head of damage of those listed which was within the tribunals' jurisdiction under section 79. Mr. Graf agreed that this was the case. However, in the course of the hearing, it became apparent that compensation for loss of timber was also sought.

Issues

Timber

1. Can the issue of loss of timber be introduced during the course of the hearing, notwithstanding that the respondent and the tribunal had no notice?

2. Is the applicant limited to a claim for losses in merchantable timber which occurred after her acquisition?

3. Were any losses in merchantable timber incurred on the three acres occupied by the respondent after the date of acquisition?

Use and Enjoyment - "Rehabilitation"

4. Despite the road widening and a substantial portion of the tree cutting having taken place prior to acquisition of the surface rights, is the failure to clean up (or what Mr. Graf appears to have meant by rehabilitate) the fallen trees, roots and branches, including those in and along what has been described as one of an intermittent watercourse or just run-off, damage for which compensation can be paid?

Costs

5. The respondent has claimed costs, amounting to indemnity for his legal costs. Is this a case in which the tribunal should exercise its discretion and award costs.

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Evidence

William Henry Graf stated that the Grafs purchased Lot 41 with three uses in mind. Mrs. Graf enjoys walking on the property as a release from the stresses of her work. They often walk to their son's place, a distance of 3/4 of a mile. Hoping to build their retirement home on the back half of Lot 40, better access to Highway 62 can be obtained through Lot 41, due to an existing road and the rough topography which would make a new road expensive or impractical. Finally, being in the timber business, Mr. Graf was interested in the trees on Lot 41, which, according to his estimates, are worth more than the land.

With respect to timber values, Mr. Graf produced documentary evidence by which he hoped to show the tribunal the value of timber in this vicinity generally.

- In a hand-written estimate of saw logs on a one acre plot adjacent to the road to the quarry, (Ex. 21, page 3) Wayne Ruprow, Scaler Licence #3532, estimated that there are 51 trees having a diameter of 10 or more inches, for a total of 5395 foot board measure ("F.B.M.").

  In addition, hardwood and poplar pulp trees are calculated to number 92, with a total of 6.5 cords.

  In a handwritten note added to the end of this estimate, Mr. Graf has indicated that 5,395 board feet have an estimated value of $1.70 per thousand feet, or $917.15.
  Not included in the estimate is the possibility of 15 percent of this wood being of veneer grade, valued at $700 to $1,300 per thousand feet. [5,395 x .15% = 809.25. 809.25 x $700/1000 = $566.48. 809.25 x $1,300/1000 = $1,052.02]

  In addition to the value of the larger trees, clearing will affect the smaller trees, which will be lost for harvest further down the road.

- Referring to an "Unauthorized Cutting Report" completed by F.H. (Buck) Hillis, Forest Technician, Scaler Licence #1429 (Ex. 22), colloquially known as a "trespass", Mr. Graf stated that his company had cut outside an area contracted for and had to reimburse the landowners, Lorne and Donna Rosamond, on Lot 24, Con. XV, Township of Chandos.
  In an area of .61 acres, 18 red oak trees were cut, totalling 3069 F.B.M. This was compensated at $240/F.B.M. totalling $736.56. There was an additional penalty of $736.56 for unauthorized cutting.

  It was acknowledged that $240 per F.B.M. is higher than Mr. Graf pays, reiterating that $170 F.B.M. is the value of the timber to W.H. Graf & Son.

- Mr. Graf produced invoice 422531 of W.H. Graf & Son Ltd., dated August 16, 1996, made out to Cyril Hilker of Chandos Township (Ex. 21, page 2), asking that it be considered illustrative of values.

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Involved are 3495 feet of basswood birch logs at $120 per 1000 feet valued at $419.40; 4095 feet of maple and oak logs at $170 per 1000 feet valued at $682.65; 910 feet of poplar logs at $50 per 1000 feet valued at $45.50; and 37.590 tons of pulp at $5.50 per ton valued at $206.74.

The total value of the timber is $1,359.29.

Based upon this evidence, Mr. Graf estimates that the loss of value in timber, including those which are not yet mature, is in the range of $1,000 per acre (Three acres are involved, with $3,000 requested in compensation in submissions). Of concern were the trees lost during the building of the road in 1994 and again when the berm was constructed in 1995.

Mr. Graf produced 12 pictures (Ex. 20) taken alongside the road, in the vicinity of the quarries and near a stream. (The existence of the stream was not conceded by Mr. Palu, who opined that there was only spring run-off in the vicinity of the quarries.) Mr. Graf commented on trees having been left at the side of the road or in the stream and stumps which were left visible, rather than buried. He referred to the area as his back yard and was emphatic that he did not appreciate having such a mess left on his property. Mr. Graf's primary concern was that the stream had not been rehabilitated and that he no longer enjoys walking on his property.

Mr. Graf indicated that he had discussed the matter with Mr. Palu, indicating that it would take three and a half days to clean up the debris. Mr. Graf assumed that Mr. Palu would comply, owing to the fact that the area is so sensitive, with cottagers and full-time residents living nearby. This type of work is no longer acceptable, while it might have been the standard twenty years ago. Now one must take out the trees first and then bury the stumps.

Referring to the berm built along one side of the quarry (Ex. 20) Mr. Graf stated that the trees had been smashed up were all through it and, in his opinion, new ones were cut in making the berm. He reiterated that the unsightly conditions in the area were not appreciated by him and his wife.

Mr. Graf introduced several pictures, including two taken from the air (Ex. 23 A & B) of the vicinity including his home. The area shows the lake approximately 2,000 feet away. Highway 62 is shown, with the quarries described as just off the picture to the right. The cottage of Wolfgang Bell (Ex. 23 B & C) is within 900 feet of the lake shown, L'Amable Lake, and has an estimated value of $450,000. Mr. Graf wanted to impress upon the tribunal that the quarry is not located in the remote bush. His own home is 2,000 feet away from the lake and the $450,000 cottage of Wolfgang Bell is on its shore. These are the neighbours of the proposed quarry.

Commenting on the offer of $1,500 per year for compensation, Mr. Graf indicated that he had been reluctant to agree to sign an agreement due to the clause that the Grafs not

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oppose the re-zoning application. Mr. Graf added that had Senator Stone agreed to rehabilitate the stream "and things like that" we would have been more obliging. He indicated that such work would be unacceptable in the city and that no one in the area wants to go back there any more. He indicated that the type of work is unacceptable.

Under cross-examination, Mr. Graf conceded that his desired access for Lot 40, rather than being exclusively for a potential retirement home, also includes at least one rural residential lot for development. Although there is potential access to the main road to the east across lot 40, it is not as convenient because of the topography. It would be expensive to construct a new road. Without access to these building lots, it would be impossible to build on them.

Mr. Graf confirmed that he has lived in the area for some time and was familiar with the quarrying on Lot 41 in the early 1970's. In fact, he had been contracted to take out some of the loose pieces of marble on Malloy's dump truck.

Concerning his three uses, Mr. Graf indicated that while not physically prevented from walking across his property today, the site of the road with debris is not pleasant. The only way around it would be to build a new road. In response to Mr. Garvey's question, Mr. Graf indicated that several of the pictures were taken alongside the road after the fork to the quarry, so that he was not required to use this part of the road to go to his son's home, nor would he be subjected to the unsightliness of the quarry.

Mr. Graf indicated that he had not yet built on Lot 40, but was contemplating the possibility of building his retirement home there. He has not yet decided to retire. Also, the existence of the quarry may affect his well being and financial status. It was his belief that if the quarry were to go ahead, no one will want to build or buy on lot 40.

In response to the suggestion that he had crossed the property for many years without owning the surface rights, Mr. Graf stated that one could not be certain of this continuing when ownership changed hands.

Mr. Graf reiterated that he was uncomfortable with the clause in the proposed agreement with Senator Stone requiring that he not oppose any application for re-zoning. He reasoned that Mr. Palu had not tried to work with people in the area and that no one is happy with the thought that Senator Stone could proceed unopposed. Mr. Graf reiterated that the community does not want what is shown in the photographs to be located in their area. Mr. Graf indicated that, had Mr. Palu rehabilitated the area, he would have been more obliging. However, he was unsure at the time of his liability vis-a-vis snowmobilers and cross-country skiers. Mr. Graf could not respond to whether his lawyer had advised him with respect to the issue of liability. However, Mr. Graf was unwilling to accept Senator Stone's offer without the issue of rehabilitation also being addressed and taken care of.

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Mr. Graf stated that the quarry has taken three acres of land out of production. Mr. Garvey suggested that the road widening had taken place prior to the purchase of the land from the Barkers. Referring to the Agreement of Surface Rights Compensation Paid (Ex. 5, Tab K), Mr. Graf could not explain what the payment of $2,000.00 was for, saying that he did not read the fine print.

Mr. Garvey suggested that, at the time he arranged to purchase the property from the Barkers, Mr. Graf was aware of Senator Stone's presence at the quarry, had full knowledge of the mining activity and none of this impacted on his decision to purchase. Mr. Graf stated that the property was purchased with the knowledge that there could be a quarry. Mr. Garvey suggested that he would have seen the damage at the time.

Contrary to paragraph 6 of the Statement of Claim dated July 7, 1995 (Ex. 4), wherein it states that the operation continued to remove stone during April and May, 1995, Mr. Graf indicated that he could not recall when Senator Stone was on the property.

In re-direct, Mr. Graf was permitted to discuss the possible rezoning of his son's property, which is large enough to be a subdivision. Mr. Graf indicated that he would have liked to have parcelled it off, which influenced his decision to purchase Lot 41. The subject property is preferable for access, as there is a road right through it. Any quarry would negatively impact the development potential of this property.

Paul William Kingston, Resident Geologist for MNDM for Southeastern Ontario, was recognized by the tribunal as an expert witness in the responsibilities associated with his position. MNDM is interested in mineral rights and seeks to be informed of exploration activities and development taking place. The responsibilities of the resident geologist include inventorying of sites, site visits, recording of activities, writing of reports, publishing maps and reports which are designed to support the prospecting industry on anything from cleared rocks to test pits to large scale mines. Information contained in assessment work reports, such as the 1987 report written by M. Digirolamo, entitled "Bancroft Pink Marble Property" (Ex. 27) are useful to MNDM.

Dr. Kingston is familiar with the quarries located on the Mining Claim. The Barker Property, as it is known in the stone business, was the source for stones used in landmark buildings, such as the Royal Ontario Museum, the Parliament Buildings and various other public buildings (Ex. 5, Tab B, Work Report). The quarries were operated from 1908 to the 1930's, after which there is little information through to the 1950's. After the surrender of the land to the Crown, assessment work commenced again in 1976 and thereafter by subsequent recorded holders. The area consists of rolling hills and outcrops, treed throughout with maple, birch and ash, most of which are quite small, with one poplar; in Dr. Kingston's opinion, there is not a large quantity of merchantable timber.

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There were four site visits by MNDM staff, with photographs taken (Ex. 28, Tabs A through D, 16 photographs). Dr. Kingston produced a map (Ex. 25) which he enlarged from an assessment work report (Ex. 27). The photographs were introduced as evidence of the location and type of work being carried out on the dates specified. The map illustrates location of activity with corresponding dates.

The purpose of the first visit (13/09/94) also attended by Chris Papertzian of MNDM, was to determine what had taken place on the ground for the Ministry's annual summary of field work. In the photographs of the south quarry, (#1) one can observe the face of the quarry wall looking from the valley up the hill. The left portion of the photo shows bare rock with flat vertical surfaces. Near the right extreme, some overburden, standing trees and visible tree roots remain. On the hill in the background, one can observe several fallen tree trunks and possible branches. (#2) Part of the northern perimeter of the outcrop is shown. Several trees on the ground are shown along the top of the outcrop.

The photographs of the south quarry (#'s 3, 4 & 5) from the second visit(21,/11/94), show the storage area for the blocks, west of the road near the entry to the quarry. Dr. Kingston testified that the equipment was moved from the south quarry in the interim between the first and second visits, and indeed, none is shown at this southern location. Activity on the northern site included trenching and quarrying. A safety fence is visible about half way down the hill. Fallen trees are visible both inside and outside the fenced area. Equipment is visible at the north quarry (#'s 6 & 7), where test blocks are being removed.

Dr. Kingston testified that he believed, based upon several drive-bys in December, 1994 during which he observed no persons or equipment, that Mr. Palu finished his work shortly after these pictures were taken.

Photographs (#'s 8 & 9) from the third visit (09/19/95) (attended by MNDM staff Mr. Papertzian, Myra Gerow and Pam Sangster only) show further development of the of the south quarry face, with more blocks having been quarried out and the remaining block debris having been moved for what appears to be greater maneuverability in the steep topography.

Photographs (#'s 10 - 16) from the last visit (08/07/96) show virtually all exposures of the quarries, including the berm (#14), the construction of which was required by the Sudbury MNDM office.

Dr. Kingston summarized his view of the difference in the quarry areas between his 1994 visits and that of 1996. During earlier visits, the area was more cleared of scrub than in 1996, with the regeneration apparent. The bulk of the assessment work was carried out in 1994. Later work was confined to the face, management of wastepiles, general housekeeping and clearing of rubble. Dr. Kingston described the later work as reshuffling; a little clearing of outcropping, grasses and weeds was performed.

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In cross-examination, Dr. Kingston agreed that some of the downed trees seen in the photographs which were 4 or 5 inches in calliper may have in fact been branches of larger trees. Mr. Graf drew Dr. Kingston's attention to the large piles of debris with substantial timber matter in photos # 10 and 14.

In re-direct, Dr. Kingston maintained that the bulk of the clearing was done in 1994.

Giuseppe Palu, President of Senator Stone Supply Ltd., described his operations as limited to marble extraction and finishing. The issuance of a lease by MNDM has been delayed pending the outcome of this hearing. At the time of the hearing, Mr. Palu no longer had a subsisting Permission to Test Ore, with the previous permit expiring in December, 1995. Since that time there has been no mining activity on the Mining Claim.

Senator Stone first entered onto the property to conduct its mining activities in the spring of 1994. There was a very old road into the quarries, which it improved and widened in the fall of 1994. Since acquiring the Mining Claim, the overburden was cleared, including tree removal, in 1994. A full scale quarry has never been operated on this site by Senator Stone.

Of the bulk sampling done pursuant to the Permission to Test Ore, 80 percent was done prior to January, 1995. Since January 28, 1995, there has been no removal of overburden and no exposure of outcropping, with the exception of a small area, shown in blue on the map produced by Dr. Kingston (Ex. 25). A pre-existing trench from the 1970's was cleaned up and between one and eight inches of soil was removed. Senator Stone was also required by the Township of Faraday to create the berm in order to protect some trees and shrubs. As a result the quarry will not be enlarged in that direction. In addition, some general housekeeping was done, such as, for example, landscaping of the wasterock.

On the issue of compensation, Mr. Palu arranged payment of $2,000.00 with Mr. Barker, the previous owner of the surface rights (Ex. 5, Tab K) for damage suffered up to January 27, 1995, immediately prior to the sale to Mrs. Graf. Mr. Palu stated that he was never contacted directly by the Grafs concerning a problem with their use and enjoyment of the property. It was only when he tried to deal with surface rights compensation with Mrs. Graf as the new owner of the surface rights, in attempting to bring the Mining Claim to lease, that he became aware of that the Grafs were dissatisfied.

More than one offer of compensation was made to the Grafs, including a letter dated May 26, 1995 for $1,500.00 per year for the duration of mining operations (Ex. 5, Tab M) and an offer to purchase the surface rights. This latter offer was made during a Pre-Hearing Telephone Conference Call initiated by the tribunal, at which Mr. Palu and his lawyer Michael Bourassa, and Mr. Graf's lawyer, Mr. O. Gregory Anderson were in attendance. Mr. Palu assumed the offer was acceptable during the course of the conference call, but it was subsequently rejected rather quickly.

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The tribunal asked Mr. Palu about the creek on the Mining Claim, and he stated that there is a creek one mile away. At the quarry there is what in his opinion constitutes annual run-off.

Under cross-examination, Mr. Graf gave evidence that there is water in the stream running alongside and under the road. He stated that the stream is definitely there year around, referring to his pictures (Ex. 20, #'s 1 and 12). He also asked Mr. Palu to account for 20 percent of the work which was done after acquisition of the surface rights. Mr. Palu stated that, in addition to the berm, sand was removed from the bedrock, but that no additional trees were cut.

In re-direct, Mr. Palu suggested that the creek marked on the map is to the west of the quarry and road; the channel in the pictures just accommodates run-off.

Submissions

Mr. Graf stated that the multiple use of land was never addressed. He had never intended to make big money as a result of his purchase of the surface rights, but was very concerned with the state in which the stream and road were left. There were also, in his estimation, definitely trees cut when the berm was built. Mr. Graf submitted that, for the use of the land and the damage done, he should be awarded $3,000.00.

Mr. Garvey submitted that section 79 of the **Act** reflects a change from section 92 of the pre-1991 amendments, which dealt with damages that had occurred or could occur. Under the new wording, no claim which can be made for future damages and damages must be limited to those which occurred to date.

Senator Stone's position is that all of the damage which may have occurred predates the purchase of the surface rights by Mrs. Graf. This includes the 1994 road improvement and the one acre where assessment work occurred. No new timber was cut after acquisition by Mrs. Graf and the activity since that time has been minor.

Mr. Garvey submitted that Mrs. Graf is not entitled to compensation for damaged sustained to the surface rights occurred prior to her ownership. The legislation is clear that the only damages with which Mrs. Graf could support her application would be required to have occurred after January, 1995. This is further limited to those areas where there was actual activity. Two prior cases of the tribunal, **Laberada Mines Limited v. Chontos**, 5 M.C.C. 294 and **Mono Gold Mines Inc. v. 586108 Ontario Inc.**, 7 M.C.C. 267 were cited as authority for his client's position that there could be no compensation for damage which occurred prior to acquisition.

Senator Stone paid the previous surface rights holder, Mr. Barker, $2,000.00 for damages which occurred up to the date of the sale. According to the evidence of Dr. Kingston

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and Mr. Palu, the state of the surface rights has remained essentially the same since acquisition, with the exception of the construction of the berm and the clearing and cutting of a small wedge of rock, as noted by the area in blue on Exhibit 25. This evidence remains unchallenged, in that there was no significant vegetation present which was damaged. It is evident from the photographs that only shrubs were present after her date of acquisition. Furthermore, the construction of the berm created an environmental benefit.

With respect to the loss of enjoyment, Mr. Garvey submitted that the expectation of enjoyment at the time the surface rights were acquired would have included the existence of a potential quarry, that is, that the Grafs knew what they were getting. He submitted that there could be no loss, as the activities which lead to the situation upon which the Grafs have based their claim occurred prior to acquisition.

Mr. Garvey stated that he would have hoped that the damage amount claimed would have been contained in the Statement of Claim. In light of the evidence and submissions, there should be no compensation awarded for lost timber. There is no evidence to suggest when the logs found inside the berm were cut, with the evidence of the respondent being that they could easily have been cut prior to acquisition.

Costs

Mr. Garvey submitted that the manner in which this matter has been handled before the tribunal by and on behalf of Mrs. Graf should give rise to an award of substantial costs payable to Senator Stone. The conduct of the case by and on behalf of the Grafs, which he characterized as evolving with no consistency or predictability right up to the making of final submissions at the hearing, was unnecessarily onerous for his client. Counsel for Mr. Palu was retained to be prepared, which was avoidably costly, directly attributable how the case unfolded. Mr. Garvey submitted that his client should not be considered at fault for the manner in which the case was conducted.

The Statement of Claim, which commenced the action, is described by Mr. Garvey as difficult, and its relevance is questionable, given that it does not touch on anything dealt with at the hearing. Nonetheless, it must be regarded as having been derived from instructions received from Mrs. Graf. Senator Stone was required to respond, not allowing its contents to remain unchallenged. As the issues contained in the Statement of Claim fell away, including rehabilitation, due to irrelevance, there was no consistency in the introduction of new issues. The issue of loss of use and enjoyment is introduced quite late (c.f. Mr. Anderson's 08/13/96 letter, Ex. 16), at which time Mr. Anderson also acknowledged the flaws in the Statement of Claim. Finally, there was the introduction of loss of timber during the course of the hearing of which Mr. Garvey and his client had no notice or opportunity to prepare. Mr. Palu has been obliged, quite unfairly, to deal with each of these.

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In the interim, there were a number of attempts to settle the matter. Senator Stone made one offer of $1,500.00 per year for the duration of mining activity. Another was an outright purchase of the surface rights. This arose during the course of a Pre-Hearing Conference Call initiated by the tribunal, which was not attended by the Grafs. Mr. Garvey indicated that his client had been left with the impression that the offer would be accepted and went to the expense of having counsel prepare a written Offer of Purchase and Sale.

Mr. Garvey suggested that, in correspondence to the Honourable Chris Hodgson, Minister of Northern Development and Mines (not included in the exhibits, but see Exhibits 8 and 9), there is a suggestion that the Grafs could not afford this litigation and yet they chose to continue.

Notwithstanding that it was Mr. Anderson who represented Mrs. Graf from the commencement of this proceeding, some ten days prior to the hearing (08/12/96), that the tribunal and Mr. Garvey were advised by Mr. Anderson that he would not attend. Mr. Garvey submitted that this should be regarded as abusive and not something which any court or this tribunal should be faced with. Moreover, Mr. Anderson is still their lawyer and counsel of record. He was aware from Mr. Garvey that costs would be sought at this hearing and was in a position to make submissions. The tribunal should not be deterred from awarding costs in this matter by the fact that there was no lawyer in attendance on behalf of Mrs. Graf.

It should be quite clear to the tribunal, from the foregoing, that Mrs. Graf was at all times unwilling to settle the matter. This, Mr. Garvey submitted, is not proper. Mr. Palu has been put to needless expense during the last year, which has also resulted in a delay in the processing of his lease application. The handling of the matter by and on behalf of the Grafs was characterized as "nickel and diming" to which Mr. Garvey took great exception. The fact that Mrs. Graf elected to attend the hearing without counsel has proved unnecessarily onerous for this client. Also, given that Mr. Anderson is not present but continues to be counsel should not deter the tribunal from assessing costs against Mrs. Graf.

Mr. Garvey submitted that his client cannot be faulted for its conduct throughout these proceedings. He is faced with costs of approximately $13,000.00 (this amount was amended after the tribunal requested a complete accounting), the delay in time in being allowed to proceed with the lease application, and other costs associated with the hearing, such as the requirement that Dr. Kingston appear under summons with his costs paid, numerous meetings, preparations of documents, including an offer to purchase, all in relation to a claim which should never have been filed. Mr. Garvey submitted that the whole process has been wasteful and his client should not be forced to bear the expense.

Mr. Graf stated that, as they felt that this matter did not involve a lot of money, they decided to come without Mr. Anderson. He reiterated that his livelihood is affected by Senator Stone, with three acres taken out of production. There are still trees on the property and the question becomes, who do they belong to, the Grafs or the mining rights holder. He

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submitted that this activity on the part of Senator Stone is not fair, as he would not be allowed to carry on in a similar manner on someone else's land.

With respect to legal costs, Mr. Graf stated that, he too, had incurred legal costs. He, however, didn't cut the trees, build a berm, wash out the road. Mr. Graf reiterated that he felt he was the innocent party in this matter.

Mr. Garvey finished by stating that Mr. Anderson was aware that his client would be seeking costs and should have attended.

After consideration of the issue of costs, the tribunal found that it would consider Mr. Garvey's request concerning the awarding of costs. However, no invoices were filed at the hearing, and indeed, the accounting was incomplete at that time. Pursuant to a direction of the tribunal dated October 2, 1996, sent by facsimile, with copies sent to Mrs. Graf and Mr. Anderson, a complete listing of costs submitted, along with copies of invoices, was requested. These were delivered on October 4, 1996. The total claimed is $16,155.46. The following constitutes as summary of the billings:

October 10, 1995	**$1,981.56**
Fees, incl. GST	1,837.73
Disbursements incl. GST	143.83

Exclusively related to this matter, incl. Freedom of Information.

November 15, 1995	**$1,611.81**
Fees incl. GST	1,551.50
Disbursements incl. GST	60.31

Exclusively related to this matter, incl. Freedom of Information and conversation with David Constable, MNDM employee re: quarry.

December 20, 1995	**$ 296.23**
Fees incl. GST	283.55
Disbursements incl. GST	12.68

Amendment to proposed surface rights agreement for purposes of registration.

March 7, 1996	**$ 151.61**
Fees incl. GST	141.78
Disbursements incl. GST	9.83

Telephone call with O.G. Anderson and Office of tribunal regarding settlement.

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June 25, 1996	**$ 1,009.30**
Fees incl. GST	987.61
Disbursements incl. GST	21.69

Activity on four dates related to this matter; one date related to aggregate permit.

July 5, 1996	**$ 952.57**
Fees incl. GST	947.49
Disbursements incl. GST	5.08

Exclusively dealing with this matter, incl. attendance at Pre-hearing Conference Call and preliminary preparation of offer of purchase and sale.

September 5, 1996	**$10,152.38**
Fees incl. GST	$ 9,580.25
Disbursements incl. GST	$ 572.13

Approx. 1 1/2 hrs. related to offer of purchase and sale; preparation for hearing, including summons, briefing witnesses and attendance at hearing.
44 hours total of billing.

Findings

Title of Proceedings

Notwithstanding that all documentation bears the name of Senator Stone and this issue was not raised by either the parties or the tribunal at the hearing, in fact the abstracts indicate that Giuseppe Palu is the recorded holder of the Mining Claim. The tribunal finds that no prejudice will result, and it will amend the title of proceedings to properly reflect the recorded holder. Throughout the hearing, Senator Stone and Mr. Palu were referred to interchangeably. In the evidence above, the tribunal has treated them as interchangeable where appropriate, noting that any discrepancies do not in any way impinge on the findings in this matter.

Timber

As to the matter of the loss of timber, there are several issues, not the least of which is whether the issue should properly be raised at this stage of the proceeding, notwithstanding that counsel for Mr. Palu had no notice. However, Mr. Garvey admirably recovered from this. The issue of loss of timber which occurred prior to the purchase is clear, namely that Mrs. Graf purchased the surface rights with three acres of timber potential for harvest taken out of production. The cases are clear, and the tribunal finds that no damages can be awarded for loss of timber prior to acquisition.

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As to the matter of damage to timber, the tribunal finds, upon the evidence presented, that no damage to timber occurred after acquisition has been proved. The tribunal finds that it accepts the evidence of Dr. Kingston and Mr. Palu that no additional trees were cut down after January, 1995 and none were cut down for the creation of the berm. Therefore, no damages will be awarded on account of timber.

"Rehabilitation"

The issue of rehabilitation appears in paragraph 13 (f) of the Statement of Claim, reference being made to section 2 of the **Act**. Early in the course of the hearing, that the Grafs were and Mr. Anderson had in his ongoing correspondence and documentation, used the term "rehabilitation" to mean something different than the definition contemplated in the **Act**. Subsection 139(1), (reproduced below as at the time of this application) limits the definition to apply to Part VII of the **Act** as follows:

> **139.** - (1) In this Part,
>
> "rehabilitate" means measures taken in accordance with the prescribed standards to treat the land or lands on which advanced exploration, mining or mine production has occurred so that the use or condition of the land or lands,
>
> (a) is restored to its former use of condition, or
>
> (b) is made suitable for a use that the Director sees fit,
>
> and includes taking protective measures.

The bulk sample constitutes none of "advanced exploration, mining or mine production", ...

It is unfortunate that the Grafs did not participate in the Telephone Pre-Hearing Conference, so that Mr. Palu or his counsel could have been made aware that they were seeking a "clean-up" of fallen trees, tree stumps and general tidiness in the area of what the tribunal finds to be an intermittent watercourse. It is perhaps more unfortunate that Mr. Anderson, the only person with direct contact with the Grafs throughout the conduct of these proceedings up to the date of the hearing, did not better understand and convey his client's concerns.

Notwithstanding that the Grafs must be taken to have purchased the surface rights "as is" with respect to timber values and removal of three acres of land from potential harvesting, the tribunal finds that it would not have been unreasonable for Mrs. Graf to assume that the untidy condition of the newly expanded road represented work in progress.

Mr. Graf made a convincingly impassioned plea to the tribunal of surface rights

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expectations in general and the Graf's in particular, of what should be acceptable in an area with multiple land users, particularly where many of the surface rights holders live, have recreational properties or enjoy the surface rights through recreation. The tribunal finds that it agrees, that there is no reason why the newly expanded road on this Mining Claim should be littered with downed trees and roots.

The disregard for the quality of landscape on the part of Mr. Palu is illustrated by his characterization of the intermittent watercourse, or stream as it was called by Mr. Graf, as simply run- off. It is quite clear from the pictures, (Ex. 20, #'s 4, 5, 10 and 12) that there is a discrete channel, and in fact there is water visible.

It is quite clear that the Grafs would prefer to not have a quarry operating on their land, near their home or that of their son, or on land owned by them which they may develop for their own use or profit. However, they have no say in the matter, as the mining rights do not form part of their land holdings.

They are entitled to the reasonable expectation that those portions of the land, which in effect are their backyard, which are outside of the fenced in quarry sites, will be restored in a neat and tidy condition, not littered with timber roots and debris.

They are further entitled to have the channel of the intermittent watercourse, whether inside or outside of the fenced area, to be free of trees, timber debris, overburden and rocks.

The tribunal finds that it accepts the evidence of Mr. Graf, in that it would take 3 1/2 days to clean up the debris left by the road widening. Based upon two men and equipment per day at $250.00, the tribunal calculates that cost of clean up will be allowed at $875.00 for the clean up of the side of the bush road to its fork and all areas of the intermittent watercourse.

Costs

The request for costs by the respondent has caused significant difficulty for the tribunal, given the facts of this case. The costs sought are considerable. This is more problematic given the quantum of the award finally sought on behalf of Mrs. Graf ($3,000) and the quantum of damages awarded ($875). Added to this is the manner in which the case was advanced on behalf of Mrs. Graf. The tribunal finds that the process was unnecessarily lengthy. The tribunal is further disadvantaged by being deprived of the opportunity to hear from Mr. Anderson on the issue of costs, and clearly his absence at this stage of the proceedings is an abuse of this process.

Pursuant to section 126 of the **Act**, the tribunal has, in its discretion, the power to award costs to be assessed by an assessment officer or to fix costs in a lump sum. By virtue of section 127, the tribunal has power to assess costs itself, having the powers of an assessment

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officer of the Ontario Court (General Division), with the tariff of that Court being applicable. In the circumstances of this case, where there have been considerable legal costs incurred by the respondent, the tribunal finds that this is a proper case to avoid further costs having to be incurred by the respondent through an assessment, and determines that appropriate costs will be fixed in a lump sum by the tribunal.

Subsection 131(1) of the **Courts of Justice Act**, R.S.O. 1990, c. C.43 provides that "... costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court..." Rule 57.01 of the **Rules of Civil Procedure**, O.Reg. 560/84 is reproduced:

> 57.01 (1) In exercising its discretion under section 121 of the **Courts of Justice Act** to award costs , the court may consider, in addition to the result in the proceeding and any offer to settle made in writing,
>
> (a) the amount claimed and the amount recovered in the proceeding;
>
> (b) the apportionment of liability;
>
> (c) the complexity of the proceeding;
>
> (d) the importance of the issues;
>
> (e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;
>
> (f) whether any step in the proceeding was
>
> (i) improper, vexatious or unnecessary, or
>
> (ii) taken through negligence, mistake or excessive caution;
>
> (g) a party's denial of or refusal to admit anything that should have been admitted;
>
> (h) whether it is appropriate to award any costs or more than one set of costs where a party,
>
> (i) commenced separate proceeding for claims that should have been made in one proceeding; or

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(ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different solicitor; and

(i) any other matter relevant to the assessment of costs.

(2) The fact that a party is successful in a proceeding or a step in a proceeding does not prevent the court from awarding costs against the party in a proper case.

(3) In awarding costs, the court may fix all or part of the costs with or without reference to the Tariffs, instead of referring them for assessment, and where the costs are not fixed, they may be assessed under Rule 58.

(4) Nothing in this rule or rules 57.02 to 57.07 affects the authority of the court under section 131 of the **Courts of Justice Act**,

(a) to award or refuse costs in respect of a particular issue or part of a proceeding;

(b) to award a percentage of assessed costs or award assessed costs up to or from a particular stage of a proceeding; or

(c) to award all or part of the costs on a solicitor and client basis.

While there is a basic rule that costs are awarded to the successful party in an action , there is discretion to depart from this, where good reasons exist [see **McFie v. Cater** (1920), 48 O.L.R. 487, affirmed 50 O.L.R. 452].

In **Le Page v. Laidlaw Lumber Co. Limited** (1918) 43 O.L.R. 400, a case where the plaintiff was nominally successful and ordered to pay the costs of the defendant, Sutherland, J., characterizing the situation, on page 403, as one where the "defendants have in reality substantially succeeded" discusses the law of costs at some length. While at common law, the rule is that the loser pay the costs, in equity, costs are a matter for the courts to deal with. He concludes at the bottom of page 403:

> But, whatever the law might otherwise be, it is plain that under sec. 74 of our Judicature Act [predecessor to ss. 131(1) of the **Courts of Justice Act**], which is as follows - "(1) Subject to the express provisions of any statute, the costs of and incidental to all proceedings shall be in the discretion of the Court or Judge, and the Court or Judge shall have full power to determine by whom

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> and to what extent the costs shall be paid" -the costs are solely in the discretrial Judge; and under sec. 24, his order as to the costs is not properly the subject of an appeal, except by his leave.

Arthur J. Fish Ltd. v. Moore et. al. (1985), 53 (2d) 65, 8 C.P.C. (2d) 77 (Div Ct.) involved the issue of whether it was proper for a Master to fix the quantum of costs of one of the parties without first hearing submissions from the parties. In that case, the Master refused to accept a draft bill of costs, finding that its submission was premature. Southey, J. stated at page 84:

> ...In our view, a person presiding at a trial that goes for 11 days, as was the situation in this case, ought not to fix the amount of costs to be awarded to a successful party without hearing submissions from the parties as to what the amount should be. It seems clear that the learned Master recognized that principle when he refused to accept the draft bill of costs as premature. The clear implication was that the submission of a draft bill or the making of submissions as to quantum would be appropriate at a later stage.

The Court goes on to say that the best person to hear the issue of costs was the Master who heard the trial.

The tribunal finds that it entertained submissions on costs at the close of the hearing, notwithstanding that invoices were submitted some time later at its direction. Although the matter of costs was discussed by Mr. Garvey at the close of the hearing, its significance was clearly not understood by Mr. Graf, who stated that trees had been lost and that his wife, too, had incurred legal costs. Notwithstanding that Mr. Graf's submissions on the issue of costs can be given no weight, it was Mrs. Graf's choice to attend the hearing without her lawyer. Mr. Anderson is qualified to speak to the issue of costs and was aware that costs would be an issue, thereby being in a position to strongly urge and advise Mrs. Graf that she should retain representation on this matter. Mr. Palu should not be deprived of his opportunity to have this issue considered. The tribunal finds that, although lacking in substantive quality, representations made by Mr. Graf amount to submissions on the issue of costs so that she has not been deprived of the opportunity of being heard, in keeping with the rules of fairness and natural justice.

The conduct of this case was most troubling to the tribunal. Despite considerable efforts on the part of tribunal staff to have the parties settle the matter, such attempts only served to prolong the proceedings, through no fault of Mr. Palu or his lawyer. The tribunal notes that no offer was made on behalf of Mrs. Graf. Similarly, no counter offer was made to any of those of Senator Stone. All of this leads the tribunal to speculate as to whether Mrs. Graf even wished to settle the matter. There is considerable evidence to suggest that the proceedings were being used as a delaying tactic and that the Grafs ultimately did not wish the quarry to proceed in any event. The existence of the quarry, by Mr. Graf's own admission, would devalue their property

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and could impact on any plans to build either a retirement home or develop an entire subdivision on the west portion of Lot 40.

Without the opportunity to hear from Mr. Anderson at the hearing, the tribunal was unable to assess where the payment of costs properly lies, as between Mrs. Graf and Mr. Anderson. Notwithstanding, the tribunal finds that this is a proper case for the exercise of its discretion in awarding costs.

The tribunal notes difficulties with the Statement of Claim (Ex. 4), which makes the following allegations:

- that the premises are not a mining claim;
- that the Letter of Permission is void;
- Senator Stone failed to register a Notice of Claim of any interest on title;
- failed to obtain a licence and file a plan, as required by the **Aggregate Resources Act**, R.S.O. 1990, c. A. 8;
- is operating a quarry on property zoned as rural in contravention of the local by-law, having failed to pursue an application to amend the by-law to permit the use;
- has conducted advanced exploration and is operating a mine, within the meaning of the **Mining Act**, having failed to provide public notice or submit a Closure Plan;
- that Senator Stone is required to file a specific plan showing the extent of work to be conducted on the surface and cost of rehabilitation;
- that the tribunal arrange for inspection of the site by assessors, to ensure that the surface be restored to a safe and tidy condition.

These allegations are broad and, with the exception of one small portion of the final point, are inaccurate. Mr. Palu has a valid and existing interest in a mining claim, which can be ascertained by contacting the Office of the Mining Recorder for the Southern Ontario Mining Division located in Toronto. Mr. Palu has proceeded to deal with this mining claim properly, by way of performing the statutorily required assessment work. That he chose to perform this work by way of a bulk sample, having received Permission to Test Ore, is irrelevant. The Permission is valid. There was not, nor is there currently mine production, advanced exploration or a quarry operation on the Mining Claim. The requirements of Part VII of the **Act** as well as the **Aggregate Resources Act** are irrelevant at this stage of the proceedings in relation

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to this property. While the matter of improper use vis-a-vis zoning may be correct, the fact is that Senator Stone was not operating a quarry at the time of removal of its bulk sample.

These proceedings were hampered by the fact that, despite attempts at settlement, ongoing discussions and one Telephone Pre-Hearing Conference Call, at the outset of the hearing, the actual issues or issue to be determined continued to evolve through the course of the hearing itself. This involved a lengthy Statement of Claim whose relevance is questionable owing to the fact that most of the grounds of the application were not proceeded with. Finally, the Statement of Claim and participation in pre-hearing procedure was prepared or conducted by O. Gregory Anderson, solicitor for the applicant in this matter up to the week prior to the hearing. The failure of Mr. Anderson to attend, or for the Grafs to realize the importance of having their solicitor complete the case which he had commenced on their behalf, resulted in a disjointed proceeding, where the solicitor for Mr. Palu was required to switch tracks immediately prior to the hearing in order to adequately prepare.

Comments by Henry, J. on the issue of costs in **Apotex Inc. v. Egis Pharmaceuticals and Novopharm Ltd.** 4 O.R. (3d) 321 (Gen Div.) commencing at the bottom of page 323 are adopted by the tribunal in its reasoning for awarding costs on a solicitor and client scale:

> ... The reality of commercial life is that to mount a successful defence against a determined plaintiff is costly, as will be obvious from the summary of costs claimed above. Any individual or corporation attacked in the courts is entitled to retain the legal services that can best submit its cause to the court; it is not expected to shop for cheaper services but is entitled to be represented by counsel of its choice.
>
> ..., the practical effect of this is that the litigant who, as plaintiff or defendant, continues to pursue the litigation willy-nilly, may be saddled not only with the legal charges of his own solicitor and counsel but also with all or part of his adversary's costs if he loses. He is assumed to know and accept this as a business risk and his legal advisers are responsible for so informing him. It is the policy of the judicial system to encourage litigants to settle, which generally means that both parties make a sensible business decision to end the dispute and so cut their losses and avoid the risk of failure and further costs. I refer for example to Rule 49, Rules of Civil Procedure, O. Reg. 560/84, as well as to the pre-trial procedures designed to segregate the real issues for trial and to expose the strengths and weaknesses of the parties' respective positions. An important objective of the system is thus, by an

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> award of costs (among other things) to discourage harassment of any other party by the pursuit of fruitless litigation. The award of costs on the solicitor and client scale is an important device that the courts may use to this end, particularly where a party has conducted itself improperly in the view of the court.

Henry, J. continues at page 325:

> Furthermore, while the award of costs between parties on the solicitor and client scale has traditionally been reserved for cases where the court wishes to show its disapproval of conduct that is oppressive or contumelious, there is also a factor that frequently underlies the award, that is not necessarily expressed, that the successful party ought not to be put to any expense for costs in the circumstances. That is a factor in my decision in this case.
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> The general principle that guides the court in fixing costs as between parties on the solicitor and client scale, as is provided in my order, is that the solicitor and client scale is intended to be complete indemnification for all costs (fees and disbursements) reasonably incurred in the course of prosecuting or defending the action or proceeding, but is not, in the absence of a special order, to include the costs of extra services judged not to be reasonably necessary.

The tribunal relies on the principles contained in clause 57.01(1)(e), subclause (1)(f)(i), subsection (2) and clause (4)(c) of the Rules of Practice in awarding costs to Mr. Palu on a solicitor and client basis.

Determination of Quantum

The amount of the cost award will be reduced by 29 percent, which corresponds to the percentage that the damages awarded to Mrs. Graf are of the total claimed by her ($875.00/3,000.00 = 29.16666%).

After a review of the billings, the tribunal finds that the November 15, 1995 invoice, which involves 3.3 hours for a total of $1,450.00 results in an hourly rate of approximately $440.00 for Mr. Bourassa. Based upon the March 7, 1996 billing, it would appear that Mr. Bourassa's hourly rate is in the neighbourhood of $265.00 per hour. The allowable amount will be reduced to $874.50 + $61.22 for GST, for total fees of $935.72. The total fees and disbursements claimed will be reduced by $615.78.

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The tribunal is satisfied that all other fees and disbursements are reasonably incurred in connection with this matter. Therefore, the total costs, before discounting, are $15,539.68. Reduced by 29.1666 percent, the amount becomes $11,007.28.

Exclusion of Time

Pursuant to subsection 67(2) of the **Mining Act**, the time during which the Mining Claim was pending before the tribunal, being May 19, 1995 to October 15, 1996, a total of 516 days, will be excluded in computing time within which work upon the Mining Claim is to be performed.

Pursuant to subsection 67(3) of the **Act**, April 29, 2002 is deemed to be the date for the filing of the sixth unit of prescribed assessment work on the Mining Claim. Pursuant to subsection 67(4) of the **Act**, all subsequent anniversary dates are deemed to be April 29.

Conclusions

The application will be allowed with compensation for damages incurred to be paid in the amount of $875.00. Costs have been awarded to Mr. Palu, respondent in this matter, on a solicitor client basis in the amount of $11,007.28.

The time during which this application has been pending before the tribunal will be excluded for purposes of determining when the next unit of assessment work must be preformed and filed. This appears to be moot, as evidence and the abstract indicate that an application for lease has been made and is pending the outcome of this proceeding.