File No. MA 011-95

B. Goodman ) Friday, the 7th day
Deputy Mining and Lands Commissioner ) of June, 1996.

**THE MINING ACT**

**IN THE MATTER OF**

An application under subsections 51(1) and 80(2) of the **Mining Act** and an application under section 21 of the **Public Lands Act**, in respect of Mining Claim L-1202469, situate in the Township of Lebel, in the Larder Lake Mining Division, being in unsurveyed territory in the Municipality of the Town of Kirkland Lake, District of Timiskaming, hereinafter referred to as the "Mining Claim";

**AND IN THE MATTER OF**

A referral by the Minister Of Northern Development and Mines to the tribunal pursuant to subsection 51(4) of the **Mining Act**;

**AND IN THE MATTER OF**

An application for an order under the **Public Lands Act** for a grant of easement in favour of the Applicant over particular portions of the Mining Claim;

**AND IN THE MATTER OF**

An application for an order excluding particular portions of the surface rights from the Mining Claims.

**B E T W E E N:**

NORTHLAND POWER

Applicant

- and -

MORRIS HECTOR JOSEPH LABINE

Respondent

- and -

MINISTER OF NATURAL RESOURCES

Party of the Third Part

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**ORDER**

**UPON HEARING** from the parties and reading the documentation filed;

**1. THIS TRIBUNAL ORDERS** pursuant to subsection 51(5) of the **Mining Act** that the application for the disposition of surface rights be allowed for an easement in favour of the applicant, Northland Power, for those portions of the Mining Claim on which the transmission line is situate.

**2. THIS TRIBUNAL FURTHER ORDERS** that the notation "Pending Proceedings", which is recorded on the abstract of the Mining Claim to be effective from the 10th day of May, 1995, be removed from the abstract of the Mining Claim.

**3. THIS TRIBUNAL FURTHER ORDERS** that the time during which the Mining Claim was pending before the tribunal, being the 10th day of May, 1995 to the 7th day of June, 1996, a total of 395 days, be excluded in computing time within which work upon the Mining Claim is to be performed.

**4. THIS TRIBUNAL FURTHER ORDERS** that the 8th day of March, 1997, be fixed as the date by which the next unit(s) of prescribed assessment work shall be performed and filed on the Mining Claim and all subsequent anniversary dates shall be deemed to be March 8 pursuant to subsection 67(3) of the **Mining Act**.

**5. THIS TRIBUNAL FURTHER ORDERS** that costs in the amount of $2,000.00 be awarded to the applicant, Northland Power, to be paid by the respondent, Morris Hector Joseph Labine.

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

Reasons for this Order are attached.

**DATED** this 7th day of June, 1996.

Original signed by
B. Goodman

B. Goodman
DEPUTY MINING AND LANDS COMMISSIONER

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Applicant

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MINISTER OF NATURAL RESOURCES

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## REASONS

The hearing of these applications took place in the Royal Canadian Legion Hall in Kirkland Lake, Ontario on May 28 and 29, 1996.

**Appearances:**

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| Carlton D. Mathias | Counsel for the Applicant, Northland Power |
| Lane Lacarte | Agent for the Minister of Natural Resources |
| Morris Hector Joseph Labine | In person |

Witnesses:

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| Fred Brown | Executive Vice-President Operations, Northland Power |
| Morley Bowes | Director of Physical Services, Corporation of the Town of Kirkland Lake |
| Mark Dixson Hall | Chief Mining Recorder, Ministry of Northern Development and Mines |
| J.C. (Bud) Colquhoun | Retired District Lands Management Supervisor and Area Manager for Claybelt Area, Ministry of Natural Resources |
| Roy Spooner | Mining Recorder for the Larder Lake Mining Division, Ministry of Northern Development and Mines |
| Lane Lacarte | Area Supervisor, Kirkland Lake District, Ministry of Natural Resources |
| Morris Hector Joseph Labine | Respondent |

Affidavit Evidence

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|---|---|
| Christopher Sexton | Partner, Sexton McKay Limited, Land Surveyors |

**Background:**

Mr. Labine is the recorded holder of the mining claim (the "claim"). Prior to the staking and recording of the claim, Northland Power ("Northland") installed a transmission line, part of which crosses the claim. Northland has applied for an order under the **Public Lands Act**, R.S.O. 1990, c. P.43 for a grant of easement in its favour over the portion of the claim upon which the transmission line is located. Northland has also applied for an order excluding this portion of the surface rights from the claim. Mr. Labine did not consent to the release of surface rights sought by the applicant. As a consequence, the Minister of Northern Development and Mines referred the application to the tribunal pursuant to subsection 51(4) of the **Mining Act**, R.S.O. 1990, c. M.14 for determination.

The Ministry of Natural Resources ("MNR") advised the Office of the Mining and Lands Commissioner prior to the hearing of this application, that it was taking no position.

The day prior to the hearing of these applications by the tribunal, the applicant served upon the tribunal and the respondents a Notice of Motion seeking, among other things, a declaration that the respondent is not entitled at law to seek and obtain an order for the award of compensation under the **Mining Act** or the **Public Lands Act** in these proceedings. After hearing submissions in relation to this motion, the tribunal indicated that it would reserve its decision on the motion until the conclusion of the proceedings, and would address the motion in its reasons.

**Issues:**

1. What test should the Commissioner apply in making his or her order under subsection 51(4) of the **Mining Act**, and on whom does the onus lie?

2. Can the holder of an unpatented mining claim make a claim for, and be ordered by the Commissioner to receive compensation under subsections 51(4) and (5)?

**Facts and Evidence:**

In August 1989, Northland entered into an agreement with the Corporation of the Town of Kirkland Lake (the "Town") for the construction of a co-generation plant in the town (Ex. 2). Part of the construction included the installation of transmission lines to a previously existing substation. The agreement provided that where hydro facilities would pass over lands owned by the Town, easements would be provided at no cost to Northland, and that the Town would further use its best efforts to assist Northland in acquiring all other necessary easements. **Fred Brown** testified that the mayor and director of planning and engineering for the Town were very positive about this hydro project. They were keen to have it to diversify the Town's economy. **Morley Bowes**, the director of planning and engineering at the time, confirmed that

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the official plan review and development plan for the Town proposed developing the south end of town as an industrial park. The Town wanted the facility as a kick-off to the industrial park, which the Town was promoting as a way to create jobs, provide a new tax base, and diversify the Town's economy from mining. According to both Mr. Brown and Mr. Bowes, there was a good working relationship from the start between Northland and the Town.

The transmission lines were constructed between December 1989 and April 1990. Although the goal was to have the first power provided by June 1990, there was a delay as a result of a construction strike. Power was actually first delivered in August 1990.

**Roy Spooner**, Mining Recorder for the Larder Lake Mining Division, provided evidence concerning the history of the recorded mining claims for the lands presently recorded by Mr. Labine. His evidence indicates that, according to his office's abstracts, the then claim forfeited on June 16, 1989, and that a new claim was not recorded until March 1990.

The agreement between Northland and the Town provided that all surveys were to be provided by, and registered at, the expense of Northland. In 1989, Northland retained H. Sutcliffe Limited to perform, among other things, a legal survey of easement of the transmission line. According to Mr. Brown, the surveyor died, and none of this information which was paid for by Northland under its agreement with Sutcliffe, was provided. Mr. Brown testified that Northland and the Town understood that the transmission line was to pass entirely over lands owned by the Town. In the fall of 1991, in the course of arranging for financing for the project, he learned that this was not the case, and that in fact, in some places, the line passed over Crown Lands on which mining claims were recorded. Northland subsequently retained Sexton McKay Limited, who provided a preliminary Crown Lands Plan of the area in question in May 1992. Northland also asked its lawyers to look into the situation of the transmission line crossing mining claims in order that the necessary easements or licences could be obtained. At the same time, Northland's lawyers were in contact with Mr. Bowes, about this issue. Mr. Bowes indicated that the Town would speak to MNR about a licence of occupation, but first wanted to know what communication had taken place between Northland and the MNR. In June 1992, Mr. Bowes wrote to Northland's lawyers advising that he had contacted Mr. Colquhoun of MNR, who had assured him that the Ministry would cooperate with whatever method seemed to work the best, and that a work permit might be the best to start with. Mr. Bowes indicated that this would confirm Northland's presence on the property, and that if a more permanent type of easement was required, Northland's lawyers could proceed with it in the meantime. In July 1992, the lawyers wrote to Mr. Colquhoun advising that they would like to regularize the installation of the transmission line, and inquired whether it would be possible to obtain some form of licence of occupation. The letter confirmed that Mr. Colquhoun had suggested that a work permit might be a good interim measure, and requested that this be arranged. Northland's lawyer asked Mr. Colquhoun to get in touch with him to discuss the steps which Northland should take. In July of 1992, Mr. Colquhoun, who had formerly been District Lands Management Supervisor, became Area Manager for the Claybelt Area. In September 1992, Northland's lawyers wrote to another official at the MNR's offices in Swastika, enclosing a plan and field notes of parts of the mining

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claims crossed by the transmission line. The letter renewed the request for an easement or licence of occupation to permit the continuance of Northland's transmission line over the Crown Lands on which the claims had been recorded. The Area Supervisor for the Ministry wrote to Northland's lawyers in September 1992 confirming that the land in question was Crown Land, but indicated that the mining claims had been restaked and that the recorded holder had first right of refusal for the surface rights. The letter (Ex. 14) advised the lawyer to contact a numbered company, whose name, address and telephone number were provided, to arrange for the release of the surface rights. The letter requested the lawyers to advise when they had secured permission to use the surface rights, and MNR would then advise of their requirements to obtain an easement.

Mr. Brown testified that, subsequent to this, he learned from the MNR that the matter was still outstanding. He called a meeting with Northland's lawyers and instructed them to "get on with it." According to Mr. Brown, the lawyers approached the numbered company, but determined that the claim had "lapsed." Mr. Spooner's evidence shows that the claim forfeited in December 1993, and was cancelled in January 1994. In November or December 1994, Mr. Brown gave instructions for the subject lands to be staked and recorded in Northland's name, only to learn that the claim had been recorded by Mr. Labine in February 1994.

On January 3, 1995, Mr. Labine wrote to Northland, advising that he had spoken with officials in the Ministry of Northern Development and Mines, objecting to the installation of the transmission line "without regard to property rights or any other legal necessity re: work permits land use etc. ... You never even bothered to pay stompage (**sic**) on prime timber ... I will sign off when you pay me similar rates that Hydro pays -- calculated on poles erected -- transformers removed in the case 9 acres ...".

Because Mr. Labine did not consent to the easement sought by Northland, the Minister referred the application under the **Public Lands Act** to the Commissioner. Mr. Labine subsequently notified the Office of the Mining and Lands Commissioner that he wished the power line removed or relocated.

At the hearing of this application, Mr. Brown testified that, if the application for an easement was not allowed, Northland would be in default under its syndication arrangement, and its investors would incur substantial financial damages if the transmission line was removed or relocated. The cost of construction of a transmission line in the north was $250,000.00 - 300,000.00 per km. and the cost of reconstruction was greater that the construction cost. In addition, there would be lost production time. The lost gross profit would be $5,000.00 per hour. The total cost for Northland would be in excess of $2,000,000.00.

Evidence was led at the hearing of these applications concerning the practice of the MNR with respect to the issuance of permits or licences and requirements for stumpage fees at the time the transmission line was installed in the winter and spring of 1989 and 1990 respectively. **Lane Lacarte** testified that the requirement for work permits under the **Public Lands Act** commenced only in 1989, and that the Ministry engaged in a public education

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campaign at the time to inform people of these new requirements. Prior to this, work permits had been issued under the **Forest Fires Prevention Act**, R.S.O. 1980, c.173, but these permits contained conditions designed to prevent or stop fires. Exhibit 29, provided by Mr. Labine, is an example of such a permit. Neither Mr. Lacarte nor **J.C. (Bud) Colquhoun** could confirm whether permits were issued to Northland by MNR prior to the installation of the transmission line, and Northland did not produce evidence of any such permits. In May 1996, Mr. Lacarte had the subject land inspected by an accredited provincial scaler. This person wrote a letter on Mr. Lacarte's behalf to Northland's lawyers in preparation for this hearing, advising that the standing forest along both sides of the power line corridor contained little or no amount of merchantable wood (Exhibit SB17). The letter concluded that "in light of the fact that most of the people who were involved with this have since retired or been laid off, I can only assume that timber licensing was waived". At the hearing, Mr. Lacarte defined the term "merchantable" to mean of value to mills operating using that fiber. According to Mr. Lacarte, these mills would not use trees less than six inches in diameter. Mr. Lacarte testified that there was insufficient wood of merchantable value on either side of the transmission line to believe that a district cutting licence would have been justified at the time of the construction of the transmission line. Mr. Colquhoun, who retired from the Ministry in December 1992, testified that it was not uncommon at that time for individuals or companies to inadvertently build on Crown Land, and that this was more likely to happen in Teck Township and the Kirkland Lake District. In exercising its discretion as to whether MNR would take action under the **Public Lands Act** to prosecute or require the removal of such a structure, the Ministry would consider whether the failure to obtain a permit or licence was unintended and inadvertent, as opposed to wilful and intended. In such a case of unintended construction, it was not uncommon nor is it now for the MNR to authorize such building after the fact. He also testified that it was not unusual for the Ministry to waive stumpage fees if there were only a few trees or if the trees were of no commercial value, or the cost of cutting the trees would have been more than they could be sold for. According to Mr. Colquhoun, the Ministry would have granted a Land-Use Permit for the subject lands had one been applied for.

**Mark Dixson Hall** was qualified and accepted by the tribunal as an expert witness in relation to the administration of the **Mining Act**. He testified that, had the Mining Recorder's Office received notice from the MNR of a pending application under the **Public Lands Act** prior to the staking and recording of a claim, the Ministry of Northern Development and Mines would indicate this on its maps, because section 30(b) of the **Mining Act** provides that no mining claim shall be staked out or recorded on such land in such a case. If a claim was staked and recorded, the claim abstract would refer to the pending application in the reservation portion of the abstract. Mr. Hall was not aware whether Mr. Spooner had received notice of any application made by Northland under the **Public Lands Act** with respect to the subject lands. He testified that it is not always the case that the Mining Recorder's Office receives notice of a pending application from the MNR. The existence prior to staking of a hydro line would, according to Mr. Hall, be an important factor for the Mining Recorder to consider, and a recorder would normally make such an exclusion in the reservation section of the abstract. For example, in the claim abstract noting the particulars of Mr. Labine's claim ownership, (Ex. SB3), the reservation section

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indicates that other reservations under the **Mining Act** may apply, and that the claim excludes the hydro right-of-way. This refers to the Ontario Hydro Line shown on the sketch attached to the application to record Mr. Labine's claim by Mr. Michael Languef dated February 7, 1994. The sketch of the claim contained on Part D of the application does not show Northland's line. This is notwithstanding that, according to the evidence of **Christopher Sexton**, the surveyors plan and field notes prepared in April or May of 1992 indicate that the line runs through the mining claim intersecting the northeasterly and southwesterly boundaries of the claim, and that the greatest length of the transmission line over the claim is 527.51 metres.

According to Mr. Hall, this application under subsection 80(2) may be the first time that the Commissioner had been asked to exclude surface rights from a mining claim after the claim had been staked and recorded. He indicated that he considered a hydro line to be an "improvement" within the meaning of subsection 80(2). It was Mr. Hall's evidence that the Ministry of Northern Development and Mines applied the principle of multiple use of public lands. It was his view that, in order for a claim holder to succeed under subsection 51(4), he would have to provide persuasive evidence to the Commissioner, that the particular disposition of the surface rights would interfere with the extraction of the minerals and the exploration of the claim. For example, the claim holder might provide geophysical surveys or the results of diamond drilling and show the physical impact of the surface use on the exploration or development of the claim. He testified that the principle of multiple use of public lands was influenced by the fact that only ten percent of mining claims proceed to development, and provided many examples where mining claims were subject to surface uses such as the cutting of timber, hunting, fishing, and park use.

At the hearing, Mr. Labine elected to give direct evidence with respect to only two items, namely the work permit issued to him under the **Forest Fires Prevention Act** (Ex. 29) and the date the mining claims in Teck Township were transferred to the Town of Kirkland Lake. In this respect he provided a handwritten note (Ex. 30) which he stated was based on information received from the Land Titles Office in Haileybury, that the five mining claims in Teck Township were transferred to the Town of Kirkland Lake on July 7, 1991.

Mr. Labine relied on the details contained in his application of March 17, 1994 for funding under the Ontario Prospectors Assistance Program ("OPAP") and his magnetic survey (both part of Exhibit 27) as showing the nature of his mining operation and how it was or would be interfered with by the transmission line. The application indicated that the search was both for gold and the possibilities of establishing a quartz quarry. Mr. Hall testified that the information contained in this application was not sufficient to show that the transmission line would interfere with the exploration of the mining claim. In particular, there was no mention of the location of the deposit in relation to the transmission line, nor was there information about the nature and extent of the deposit, the grade of the minerals, the market for them, and whether the operation was commercially viable. There were, according to him, local geologists who could give an opinion as to the commercial viability of a deposit.

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In responding to the tribunal's question as to when Mr. Labine first became aware of Northland's transmission line on his mining claim, he testified that it was not until the fall of 1995, at which time he visited the property.

**Submissions:**

At the outset of this hearing, counsel for the applicant argued that Mr. Labine was not entitled at law, as part of this proceeding, to an award of compensation under the **Mining Act** or the **Public Lands Act**. He argued that it was clear from Exhibits 16 and 27 that Mr. Labine was seeking monetary compensation, but that if any compensation were to be paid it would be to the Crown, since the mining claim was situated on unpatented lands. Section 79 of the **Mining Act** deals with the right of the owner of surface rights to compensation, and no notice of an application under subsection 79(4) of the **Mining Act** for a hearing before the Commissioner has been given. Counsel for Northland contended that a section 79(4) hearing for a determination of compensation by the Commissioner is a substantially different proceeding than one under subsection 51(5), which deals with the disposition of surface rights, rather than compensation. In support of his submission, counsel for Northland relied on the decision of Commissioner Kamerman in **Ontario Hydro v. Nahanni Mines Limited** (M.L.C.) unreported, MA 026-92, November 17, 1993 ("**Nahanni**"). He also relied on Commissioner Ferguson's decision in **Kamiscotia Ski Resorts Limited v. Lost Treasure Resources Ltd.** 6 M.C.C. 460 ("**Kamiscotia**"), and an excerpt from page 99 of **The Canadian Law of Mining** by Barry Barton. Finally, he pointed to another decision of Commissioner Ferguson in **The Improvement District of Gauthier v. Egg** 7 M.C.C. 281. He asserted that the MNR was not seeking compensation under section 79. Counsel for the applicant apologized for not providing the notice set out in Part X of the "Procedural Guidelines For Proceedings Under The Mining Act". He indicated that, in preparing for the hearing, he decided to make the motion in an effort to narrow the issues to reduce the time necessary for the hearing.

As for the substance of the applications, counsel for the applicant submitted that the decision of the Commissioner in **Nahanni**, *supra* stood for the proposition that, to defend an application for release of surface rights under section 51, the respondent must show that the granting of the release would interfere with its exploration or extraction of minerals or other activity on the mining claims. After reviewing the evidence, counsel for the applicant contended that Mr. Labine had fallen far short of discharging this onus on the facts of this case. According to counsel for the applicant, the rights of the holder of an unpatented mining claim are qualified by the disposition of surface rights under the **Public Lands Act** and the principle of multiple uses. He argued that transmission lines are "improvements" within the meaning of section 80 and that the Commissioner had a discretion to exclude that portion of the surface rights necessary for the utilization of the transmission line. He pointed to section 30(b) of the **Mining Act** in support of his applications, contending that Northland had made application to the MNR under the **Public Lands Act**, and no mining claim should have been staked out or recorded on the subject land. He argued that, on the facts, it was clear that the transmission line had been installed prior to the

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staking and recording on behalf of Mr. Labine, who knew or should have known that the transmission line was there before the claim was staked and recorded. Mr. Languef, who staked and recorded the claim on Mr. Labine's behalf, certified in the application that there were no improvements on the lands staked other than as indicated in the application and on the sketch on Part D, and yet neither the application nor the sketch contained a reference to the Northland transmission line. Counsel submitted that this was a wilful omission.

Counsel for Northland suggested that, while it was possible that Northland did apply for permits and received them from the MNR when it installed the transmission line in late 1989 and early 1990, neither the applicant nor the Ministry has been able to provide evidence to substantiate this. It was argued that MNR was aware of Northland's application since June 1992 and was prepared to grant it, until it learned that a mining claim on the subject land had been recorded, and suggested that the consent of the owner of the claim should be sought. Counsel submitted that Northland's crossing was inadvertent and the MNR was aware of this and had accordingly elected to not prosecute or require the removal of the line. For all these reasons, counsel for the applicant argued that the tribunal ought to exercise its discretion under sections 51(5) and 80(2) in favour of Northland. The relief sought was the disposition of the surface rights sufficient to accommodate the transmission line in the form of an easement for those portions that the line runs over the claim, pursuant to a legal survey to be completed at Northland's expense.

For his part, Mr. Labine attempted to distinguish the facts of this case from the ones cited by the applicant's counsel. On the issue of the authority to claim and be awarded compensation, he argued that the Commissioner has the authority to order anything that he sees fit under the **Mining Act**. Not to order compensation here would amount to "legalized thievery". According to Mr. Labine, Northland "broke the law" and should be denied its rights as a consequence. He contended that there was ample evidence of a conspiracy between Northland and the Town of Kirkland Lake to defraud people of their lands in that Northland built a transmission line on lands not owned at the time by either Northland or the Town, and that these claims were only acquired by the Town in 1991. He relied on the decision of the Commissioner in **McChristie v. Rousseau** 5 M.C.C. 433. He also alleged that there had been a conspiracy between Northland and the Ministry on the subject of the work permits. According to Mr. Labine, there was no evidence that Northland had made an application for a work permit at the time the line was installed and that the witnesses from MNR at the hearing, were the very persons who should have charged Northland for installing the transmission line without a permit. According to Mr. Labine, the MNR was doing everything it could to assist Northland to continue with its breach of the law. According to him, MNR did not show a single case where it had waived stumpage fees. He also contended that a transmission line was not an "improvement" under subsection 80(2). Northland is trying to justify a wrong by applying for a work permit after the work was done. He argued that there was no substantial compliance with the **Mining Act** until Northland had completed all of its work. He submitted that prospectors must be given the right to develop their claims without incumbrances, and that while he believed in the principle of multiple uses, he contended that the grant application which is part of Exhibit 27 shows that the transmission line sits on top of the ore body on his claim.

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For all these reasons, he argued that the tribunal should exercise its discretion against granting the relief sought by the applicant. He indicated that he wanted Northland to move the transmission line 1,000 feet to the west, or buy him another quarry, or compensate him for the loss of his existing quarry.

In reply, counsel for Northland argued that there was no evidence of Northland breaking any law. The Commissioner had no authority to make either an order requiring that the transmission line be moved and or an order requiring compensation be provided by Northland to Mr. Labine. Nor was there evidence of a conspiracy between Northland and the Town or Northland and MNR. Northland's application for an easement was over Crown Lands, and the simple passage of time should not be determinative of whether there was good faith on Northland's part.

**Findings:**

By virtue of subsection 51(1) of the **Mining Act**, except as otherwise provided in the **Act**, the holder of an unpatented mining claim has the right prior to any subsequent right to the user of the surface rights for prospecting and the efficient exploration, development and operation of the mines, minerals and mining rights. When an application is made for disposition under the **Public Lands Act** of surface rights on an unpatented mining claim and the holder of the unpatented mining claim does not consent to the disposition and provision for the reservation or exclusion of the surface rights is not otherwise provided for in the **Mining Act** or any other act, the Minister may refer the application to the Commissioner (51(4)). Where an application under subsection (4) is referred to the Commissioner, he or she is authorized by subsection (5) after providing the requisite notice and hearing such interested persons as appear, to make an order based on the merits of the application.

Subsection 80(2) of the **Act** authorizes the Commissioner or the Recorder to exclude from any mining claim such part of the surface rights as may be necessary for the occupation and utilization of buildings, or improvements erected or made thereon prior to the time the claim was staked out.

The application before the tribunal has been brought under both sections 51 and 80 of the **Mining Act**, as well as section 21 of the **Public Lands Act**. That section entitles the Minister of Natural Resources to grant easements in or over public lands for any purpose.

In his decision in the **Kamiscotia** case, Commissioner Ferguson found that the present section 51 (then 61) was added to the **Mining Act** by section 17 of the **Mining Amendment Act**, 1962-63 with substantially the same wording as it appears today. These provisions were enacted after the report of the Public Lands Investigation Committee, 1959, which recommended a number of principles related to the multiple use of Crown Lands. They set out a method of resolving, if feasible, conflicting uses or the prevention in a proper case of

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the subsequent acquisition of surface rights through a hearing before the Commissioner. Commissioner Kamerman found in the **Nahanni** decision that to defend an application for release of surface rights, the respondent must show that the granting of the release would interfere with its exploration or extraction of minerals or other activity on the mining claims.

Having carefully considered the evidence and submissions in relation to this application, the tribunal finds that Mr. Labine has failed to provide evidence sufficient to persuade the tribunal that an easement for that portion of the transmission line which crosses Mr. Labine's mining claim, would interfere with his exploration or extraction of minerals or operation of a quarry or mine. In particular, neither the application for funding under OPAP, nor the magnetic survey, which form part of Exhibit 27 and which are relied upon by Mr. Labine, contain any information about the location of the transmission line in relation to the proposed quartz quarry. The tribunal accepts the evidence of Mr. Hall that more detailed information, such as geophysical surveys or reports of diamond drilling to show the nature and extent of any ore body, would be necessary to show how Northland's existing transmission line would interfere with extraction or development.

The tribunal finds, based on the evidence, that it is a reasonable inference that it is unlikely that Northland applied for a work permit or licence prior to its installation of the transmission line in late 1979 and early 1980. However, it is unclear from the evidence of Mr. Lacarte, whether any legal requirement existed at the time which would have required Northland to have obtained a work permit or licence prior to installation. No persuasive evidence has been produced before the tribunal to show a conspiracy between either the Town and Northland, or Northland and MNR, to subvert any legal requirements. Furthermore, no evidence has been produced before the tribunal to justify a finding that Northland "broke the law." The evidence of both Mr. Lacarte and Mr. Colquhoun does not support such a finding. No prosecution has been taken by the MNR against Northland in relation to the installation of the transmission line.

The tribunal finds that Northland did apply for disposition under the **Public Lands Act** of surface rights for the transmission line over unpatented mining claims in July 1992. This was more than 18 months prior to the recording of the claim on the subject lands by Mr. Languef, on behalf of Mr. Labine. It may be reasonably inferred that MNR neglected to inform the Mining Recorder's Office of the application so that consideration could be given by the Mining Recorder to excluding or reserving from the claim the surface rights necessary for the transmission line pursuant to section 30(b) of the **Act**. The tribunal finds, based on the evidence of Mr. Sexton concerning the location and length of the transmission line over Mr. Labine's claim, it may be reasonably inferred that Mr. Languef saw the transmission line when staking the claim, as the agent for Mr. Labine. As Mr. Languef's principal, Mr. Labine would accordingly be impressed with this knowledge, regardless of when he saw with his own eyes that the line crossed his claim.

Subsection 51(5) of the **Mining Act** requires the Commissioner, where an application is referred to him or her under subsection (4) to make an order based on the merits

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of the application. In making its order, the tribunal has taken the above factors into consideration. In addition, while Northland may not have applied for a permit or licence for its transmission line until July 1992, the fact is that an application was made to the MNR at that time to regularize its use of the surface rights for that part of the transmission line which crosses Mr. Labine's claim. Northland has also made reasonable attempts to obtain Mr. Labine's consent to the disposition and reservation or exclusion of the surface rights for the easement which it seeks. The tribunal has determined that this is evidence of good faith on the part of Northland.

The tribunal now turns to the issues raised by counsel for Northland in his motion brought at the outset of the hearing.

Commissioner Kamerman found in the **Nahanni** case that section 51 was not drafted to provide for a ransom, but rather was intended to resolve competing interests, and that there was no provision within the **Mining Act** to require compensation. She further found that the opposition of Nahanni in that application appeared to be a means of introducing a separate cause of action into a simple matter of multiple uses. In that case, Nahanni had indicated that it expected to receive compensation from Ontario Hydro before it would consider consenting to the release of surface rights. A similar situation exists in the instant application, where Mr. Labine has indicated to both Northland and this tribunal that, in the event that Northland is not prepared to move its transmission line over his claim, he wishes Northland to either provide him with a new quarry or pay him compensation in lieu thereof. Although the tribunal is not prepared to make the declaration sought by Northland as part of these proceedings, it has determined that no order for compensation should be made in favour of Mr. Labine. The tribunal notes that subsection 79(3) of the **Mining Act** requires every person who damages mineral exploration workings to compensate the holder of the mining claim for damages sustained. Subsection (4) provides that, in default of agreement and upon application made in the prescribed form by either party, the amount and the time and manner of compensation under subsection (3) shall be determined by the Commissioner after a hearing. No such application has been made to the tribunal. Because the tribunal has decided to make an order pursuant to subsection 51(5) of the **Mining Act**, it will not be necessary to make a determination in relation to the application under subsection 80(2) of the **Act**.

Costs:

At the conclusion of the hearing of this application, submissions were made on the issue of costs. Counsel for Northland contended that Northland had incurred substantial costs because of Mr. Labine's agenda, which was to show that Northland was a bad corporate citizen, and that there was a conspiracy or conspiracies concerning the installation of this transmission line. Mr. Labine was, according to counsel, trying to hold Northland for ransom, and had attempted to bully, intimidate, and embarrass it. It was argued that Mr. Labine had unreasonably withheld his consent to the easement sought, which necessitated this hearing; had prolonged the hearing by asking irrelevant questions; and had insulted witnesses and counsel at the hearing.

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Mr. Labine advised the tribunal that he was not seeking costs. He had a right to not consent to the release of the surface rights sought; and to have the matter determined by the Commissioner. He argued that, because Northland broke the law, it should be denied costs.

Section 126 of the **Mining Act** vests the Commissioner with the discretion to award costs to any party. The tribunal has determined that Mr. Labine should pay to Northland the sum of $2,000.00 towards its costs in these proceedings. In making this order, the tribunal has taken into account the conduct of the parties which led to this proceeding, as well as the proceeding itself.

Exclusion of Time

Pursuant to subsection 67(2) of the **Mining Act**, the time during which Mining Claim L-1202469 was pending before the tribunal, being May 10, 1995 to June 7, 1996, a total of 395 days, will be excluded in computing time within which work upon Mining Claim L-1202469 is to be performed.

Pursuant to subsection 67(3) of the **Act**, March 8, 1997, shall be deemed to be the date for filing of the next unit(s) of prescribed assessment work on Mining Claim L-1202469. All subsequent anniversary dates shall be deemed to be March 8.

**Conclusions:**

The application for the disposition of surface rights under the **Public Lands Act** will be allowed for an easement in Northland's favour over those portions of the Mining Claim on which the transmission line is situate. This easement will be based on a legal survey to be completed at Northland's expense.

Costs in the amount of $2,000.00 are awarded to the applicant to be paid by the respondent Morris Hector Joseph Labine.