File No. MA 031-93

L. Kamerman) Thursday, the 21st day
Mining and Lands Commissioner) of December, 1995.

THE MINING ACT

IN THE MATTER OF

An application under section 79 of the **Mining Act** in respect of Mining Claims S-1118498, 1118500, 1118502, 1118507, 1118862 to 1118864, both inclusive, 1165505 to 1165508, both inclusive, 1179076 to 1179080, both inclusive and 1179177 to 1179179, both inclusive, situate in the Township of Best, in the Sudbury Mining Division, hereinafter referred to as the "Mining Claims".

B E T W E E N:

GINO CHITARONI

Applicant

- and -

BOT CONSTRUCTION LTD., MINISTER OF NATURAL RESOURCES and MINISTER OF TRANSPORTATION

Respondents

O R D E R

1. **THIS TRIBUNAL ORDERS** that the application as against the Minister of Transportation is hereby dismissed.

2. **THIS TRIBUNAL FURTHER ORDERS** that the application against BOT Construction Ltd. and the Minister of Natural Resources for compensation for damage to the mineral exploration showing located on Mining Claim S-1118862 be allowed.

3. **THIS TRIBUNAL FURTHER ORDERS** that BOT Construction Ltd. and the Minister of Natural Resources each be apportioned liability for negligence of 50 percent.

4. **THIS TRIBUNAL FURTHER ORDERS** that BOT Construction Ltd. and the Minister of Natural Resources pay to the applicant Gino Chitaroni compensation for damages in the amount of $97,435. Their liability is joint and several.

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5. THIS TRIBUNAL FURTHER ORDERS that this order may be changed, altered, varied or rescinded at any time by this tribunal for good cause shown, pursuant to subsection 79(7) of the **Mining Act**.

6. THIS TRIBUNAL FURTHER ORDERS that the application for compensation for environmental liability be and is hereby dismissed.

7. THIS TRIBUNAL FURTHER ORDERS that the application for punitive damages be and is hereby dismissed.

8. THIS TRIBUNAL FURTHER ORDERS that costs in the amount of $2,000 be payable by the applicant Gino Chitaroni to the Minister of Transportation within thirty days from the making of this Order.

Reasons for this Order are attached.

DATED this 21st day of December, 1995.

Original signed by
L. Kamerman

L. Kamerman
MINING AND LANDS COMMISSIONER

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REASONS

This matter was heard in the courtroom of the tribunal in Toronto, Ontario. Serge Hamel appeared as counsel for the applicant, Gino Chitaroni. Donald J. Dacquisto appeared as counsel for the respondent, BOT Construction Ltd. ("BOT") and Caroline Engmann appearing as counsel for the respondents, Minister of Natural Resources ("MNR") and Minister of Transportation ("MTO").

Background:

This application is made by Mr. Chitaroni pursuant to subsection 79(3) of the **Mining Act**, R.S.O. 1990, c. M.14, for compensation for damage sustained to his mining claims.

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In the course of completing the widening of Highway 11 in 1993, BOT dumped a large quantity of rock overburden outside the area outlined in its work permit issued by the MNR. In so doing, a mineral showing on a mining claim held by Mr. Chitaroni was completely covered and surrounded.

The application seeks compensation for damage to the mineral showing sufficient to restore Mr. Chitaroni to his position prior to the dumping by way of removal of the dumped materials, punitive damages, and a means of assessing and attributing potential environmental liability arising from the dump.

Subsection 79(3) of the **Mining Act** is reproduced:

> **79.**--(3) Every person who damages mineral exploration workings or claim posts, line posts, tags or surveyed boundary markers delineating mining lands shall compensate the holder of the mining claim or the owner or lessee of the mining lands, as the case may be, for damages sustained.

Issues:

1. Was BOT negligent in failing to inform itself of the co-existing use by Mr. Chitaroni, negligent in dumping in an area outside of its permitted area and negligent in exceeding the quantity of material for which a permit was issued?

2. Was Mr. Chitaroni contributorily negligent in failing to exercise reasonable care for the protection of his mining interests? Did Mr. Chitaroni have a duty to mitigate the losses he sustained and did he fail to so mitigate?

3. Is the MNR a "person" who may be liable for damages within the meaning of subsection 79(3) of the **Mining Act**?

4. Was it reasonably foreseeable that Mr. Chitaroni's mineral exploration workings would be harmed by BOT's dumping activities in the area? Did the MNR owe Mr. Chitaroni a duty of care to ensure that BOT was advised of these mineral exploration workings?

5. Was the decision to monitor some but not all of BOT's activities in relation to its three work permits a policy decision on behalf of the Crown which does not attract tort liability, or was it an operational decision for which tort liability may attach?

6. What is the effect of the Indemnity Provisions of the Work Permit as between BOT and the MNR?

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7. How should liability be apportioned?

8. Is the reference to "damages" in subsection 79(3) of the **Mining Act** limited to the amount actually expended by Mr. Chitaroni in performing his assessment work, dependent on a specific dollar per day formula for time spent performing assessment work or can it include the actual cost of removal of the rock overburden? Is there adequate proof of the actual cost of removal?

9. Does the tribunal have the jurisdiction to assess punitive damages and is this a case where punitive damages should be awarded?

10. Does the tribunal have the authority to assess and attribute liability for potential environmental damage? Has such potential environmental damage been proved?

11. Should the MTO be awarded its costs in this matter and if so, what is the quantum?

Facts not in Dispute:

Although the initial application claims both damage to access and dumping of waste rock on a key mineral showing, the evidence and submissions concentrate on the rock overburden dump.[1] Similarly, at first instance, Trans-Canada Pipelines Limited, O.J. Pipelines and Premier Murphy Pipelines Inc. were named as respondents in addition to BOT, the MNR and the MTO, but the matter proceeded against only the latter three. During the course of the hearing, Ms. Engmann pointed out that there was no cause of hearing against the MTO and the tribunal found that the action against the MTO was withdrawn and would be dismissed.

In 1978, land in twenty townships was removed from mineral exploration as a result of cautions registered by the Teme-Augama Anishnabi in 1973. In January 1992, land in four of the townships including Best Township where Mr. Chitaroni's mining claims are located was reopened for staking and mineral exploration.

On January 7, 1992, Mr. Chitaroni staked 19 mining claims in Best Township in a competitive staking resulting from this reopening, involving what is known as the Granite James Lake Area. Mr. Chitaroni's mining claims can be divided into four distinct areas, which the resident geologist refers to as the North, Central and South Zones as well as the Niemetz Copper Zone. It is the North Zone and in particular Mining Claim S-1118862 which is the focal point of these proceedings.

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[1] There is no concession as to whether the dumped material is primarily composed of rock or dirt and gravel. For purposes of reference only, the dump has been characterized by the tribunal as "rock overburden". The term is intended to be read as ambiguous and does not constitute a finding of fact. The issue of the materials comprising the dump will be dealt with in the evidence of the parties below.

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As required by the **Mining Act**, Mr. Chitaroni performed assessment work during 1992 and 1993 which was filed on all of the mining claims in 1994. The total amount expended is in excess of $23,000. In 1992, Mr. Chitaroni cleared and mechanically power stripped areas of the North Zone, referred to as the Rib Lake Copper showing outcrop power stripped area, approximately 30 by 20 metres. Within this stripped area and specifically located on Mining Claim S-1118862, further washing and cleaning of a smaller area exposed a mineral exploration showing an assay of which revealed copper values present. The value of the assessment work performed on Mining Claim S-1118862 was estimated to be between $2,000 and $3,000. Mr. Chitaroni applied for and received a work permit from the MNR in 1992 for the washing and cleaning on Mining Claim S-1118862.

In early 1993, BOT contracted with the MTO for the widening of a 12.7 kilometre stretch of Highway 11 north of Temagami which was to be undertaken between March and the end of September 1993. The contract between the MTO and BOT, bearing number 92-214, is dated January 18, 1993 (Ex. 5, Tab 2). BOT applied for and was issued five work permits related to the construction (Ex. 5, Tabs 3 to 7). In particular, Work Permit (3)46-027-93 (Ex. 5, Tab 3) (the "Work Permit"), effective March 25, 1993 to September 30, 1993, involved push-offs[2], dump sites and right of way clearing. Maps or numbered sheets, attached to the Work Permit, delineate one dump site, one proposed dump site and one possible dump site. Of specific concern to these proceedings is the dump site shown on Sheet 1 located within the right of way formed by the Old Ferguson Highway.

In the course of the summer of 1993, BOT caused rock overburden to be dumped on the outcrop power stripped area instead of on the dump site authorized to be located on the Old Ferguson Highway. His mineral exploration showing was completely covered in the process. It is this dumping for which Mr. Chitaroni is seeking compensation and was the focus of the hearing.

Mining Claim S-1118862 is 16 hectares or 40 acres, measuring 1320 by 1320 feet. The rock overburden dump is 300 by 300 feet.

Evidence:

Gino Chitaroni, the applicant in this matter, gave evidence on his own behalf. Mr. Chitaroni, a prospector, obtained a diploma from the Haileybury School of Mines and a B.Sc. from the University of Michigan.

According to Mr. Chitaroni, in carrying out the widening of Highway 11, BOT eliminated access to his skidder road from Rib Lake Road as a result of which his access to the North Zone has been cutoff. This was not the only incident of such interference as BOT

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2. Documentation filed makes reference to both "push-offs" and "push-outs", which are used interchangeably. For purposes of these Reasons, the tribunal will use the term"push-offs".

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interfered with access on his South Zone and a pipeline company interfered with his access near Granite Road. In the matter involving the pipeline, once the pipeline company was contacted by Mr. Hamel, his lawyer, the situation was remedied to Mr. Chitaroni's satisfaction.

Mr. Chitaroni described the assessment work done by him on the mineral exploration showing in 1992, explaining that a prospector will conduct physical or geotechnical work to examine the value of a property through a process of elimination. The showing consists of stringer bands of sulphide mineralization containing pyrrhotite, pyrite and chalcopyrite which assay results showed strong presence of copper. This showing led him to hire Art Beecham to conduct what was named a "Compilation of Geology and Mineral Occurrences James Lake Area" (Ex. 4, Tab 12) during August and September 1992. According to Mr. Chitaroni, this compilation indicates high potential for the areas described. Based upon several visits conducted in 1992, the Cobalt Resident Geologist included descriptions of three zones in the 1992 annual report at pages 318 and 319 (Ex. 4, Tab 14).

Had there been no showing present in the North Zone, exploration could proceed on the basis of physical stripping, geological mapping, geochemical soil sampling, exploration grid and a number of other measures to determine whether deposits exist at shallow or long depths. However, although interest in these properties was expressed by a number of mining companies, more work was required on the covered mineral exploration showing.

Therefore, the problem caused by the rock overburden dumping is that a crucial piece of the puzzle is removed from assessment of the worth of the Chitaroni property. In addition, companies investing in the property would want an environmental audit and Mr. Chitaroni expressed concern of being assessed with personal liability.

Mr. Chitaroni stated that he first became aware that BOT was in the area in the spring of 1993, when he wanted to perform some work on his Niemetz Copper Zone one weekend at which time he observed the heavy equipment present, the forest clearing and overburden outcrops. On May 11, 1993, Mr. Chitaroni was again present and became concerned that the work was on his mining claims, that BOT did not know where the rights of way were and that it might be going further than it should. Mr. Chitaroni discussed the situation with Jeff Gilbert of the MNR who advised that he should take up the matter directly with BOT.

At the time he became concerned, Mr. Chitaroni made two attempts to contact BOT, the first being a note which he left with a flag girl, Giselle Preston Cyr, in early May 1993 and the second being in a note addressed to Gary Cooper dated May 11, 1993 (Ex. 4, Tab 10) which he left at the trailer as Mr. Cooper was not present. The note states:

> Please call me a (**sic**) 705-679-5946. If you need to dump material I have several places right near your work at Granite Lake. This would help me tremendously and at the same time give you an accessible place to dump material. The MNR has given me the OK as well.

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Mr. Chitaroni agreed that the note does not refer to his mining claims. His intention was to indicate that BOT had several places to dump and that with off-road trucks, they could not go far. He could have used the dumped material to create access to his claims, which would require an additional permit. It was his intent that BOT could help him through its dumping activities. No one ever contacted him with respect to either message.

Mr. Chitaroni's next visit to the North Zone was at the end of May or the beginning of June 1993 at which time BOT had already started dumping on his stripped area of Mining Claim S-1118862. He did not contact anyone, nor did he feel that there was anything he could do. The resident geologist advised him to contact the Mining Recorder in Kirkland Lake and Mr. Chitaroni also discussed the matter with Carl Forbes. The Mining Recorder gave him an outline of the procedure to follow. Mr. Forbes advised that he should contact all of the respondents. He also called the MNR district office in Sudbury. Based upon the advice of Mr. Forbes and the Mining Recorder, Mr. Chitaroni commenced his action on August 26, 1993.

Mr. Chitaroni took a series of pictures on July 13, 1993 and August 21, 1993, which were described at the hearing (Ex. 13, A through S).

Mr. Chitaroni stated that his mineral exploration showing has been completely obliterated by the rock overburden dump. Removing the pile would not restore the showing as it would have to be power stripped again. As long as the pile is in place, he is precluded from carrying out any surface exploration of the mining claim. He is precluded from diamond drilling as the casings cannot go through broken rock, estimated to be 25 to 30 feet thick, without incurring mechanical problems.

Without restoring the integrity of the mineral exploration showing, which would require removal of part of the pile, Mr. Chitaroni stated that he could diamond drill from a distance to reconstruct the picture sufficient to recreate what he had discovered and the surrounding geology before the dumping. This would require drilling at between 45 and 60 degrees with adequate horizontal distance to get beyond the 300 feet dimensions of the pile. Assuming 600 feet of drilling per hole, drilling of six to ten holes of 1½ to 2 inch diameters, at $13 to $15 per linear foot, plus mobilization costs of approximately $250 to $1,000 would range from $47,050 to $91,000. This does not include the cost of access and it is uncertain whether a road would have to be put in to accomplish this. Mr. Chitaroni added that the overburden requires a casing, which makes the cost higher, at between $16 to $18 per linear foot, for a range of costs of $57,850 to $109,000.

From the point of view of the prospector, it is cheaper to continue exploration with a showing than to have to obtain the same information through diamond drilling. The whole idea behind exploration is to do it as cheaply as possible. Further work in the vicinity would leave a 300 by 300 foot black hole for which no data is available. In the time the showing was exposed, Mr. Chitaroni had time only to wash and sample. No grids had yet been laid. The next step would have been a magnetometer survey to determine whether more magnetite or pyrite were

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measured in the earth's surface. The object would be to locate a conductor in order to determine a diamond drill target. With the pile in place, none of this is possible. Nor is it possible to undertake geochemical testing or soil horizon testing. It is also possible that the original soil has been contaminated through the dumped materials.

Concerning potential environmental concerns, Mr. Chitaroni stated that there are sulphides present in the rock overburden in an amount of 0.5 to 1 percent. With the expanded surface area, oxygen will break down the sulphur present and leach into the water run-off. There is concern under the current **Mining Act** as to how responsibility for such damage will be assessed. Mr. Chitaroni expressed concern over the interpretation of these provisions in a recent case, **MacGregor v. The Director of Mine Rehabilitation** (M.L.C.) unreported, MA 033-93, December 23, 1994 ("**MacGregor**"). Also, United Reef has a 20,000 tonne rock dump with similar concerns regarding leachate and is unable to dispose of its interest due to environmental liability.

The procedure of bringing mining claims to option is to demonstrate the potential of property to junior mining companies. Where there is potential environmental liability, the junior mining companies would be disinclined to option it. Therefore, rock overburden such as the one on top of his mineral exploration showing constitute major deterrents to dealing with the property.

Mr. Chitaroni discussed a letter from the MNR concerning his work permit for line cutting (Ex. 10, Tab 14), wherein it states in part:

> On part of your approved work permit area located between James and Granite Lake there are a number of ski trails that are maintained by Scandia Inn/Smoothwater Recreational Trails. Before any line cutting begins, we recommend that you contact Alex Baird at Scandia Inn and make him aware of your activities in this area.

Mr. Chitaroni concluded that a similar letter was sent to Grant Forest Products Corp. as he received a letter dated December 8, 1993 from Rene Bourgoin of that company advising of its activities (Ex. 10, Tab 15), which states:

> As mentioned in our telephone conversation on November 23/93, Grant Forest Products Corp. will have a logging operation in Lorrain Township in the Kirk Lake Area. We will protect all your corner and perimeter posts. For your information, I have also enclosed a copy of the map of the allocated area which shows the access.

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In another letter from the MNR accompanying a work permit in 1994, Mr. Chitaroni was advised to contact the Township of Temagami to ensure that the work permit conforms with their requirements (Ex. 10, Tab 16).

In a letter from the Temiskaming Nordic Ski Club, dated June 27, 1994 (Ex. 10, Tab 19) Mr. Chitaroni was advised as follows:

> We have applied to the Ministry of Natural Resources for a permit to carry out work on the property we hold in Coleman Township under lease and land use permit from the Ministry of Natural Resources. We understand that you are the holder of the mining claims around the Ski Club.
>
> The Ministry will not issue us a work permit without a consent form signed by yourself as holder of these claims.

In Mr. Chitaroni's opinion, it would not have substantially added to the cost of the process had BOT been similarly dealt with in respect of his mining claims and that the damage which could have been avoided as a result of such a process was considerable. He also added that it could have been mutually beneficial. That was the purpose of his two notes to BOT.

Mr. Chitaroni stated that ideally he would like to see the pile removed, but if it must stay, he wishes to be adequately compensated. In addition, he is seeking an environmental audit for his own and any prospective optionors protection.

Under cross-examination by Mr. Dacquisto, Mr. Chitaroni reiterated that the value of his 19 mining claims is diminished by the rock overburden dump, although he maintained his objections to having access blocked on the South and Central Zones.

Mr. Chitaroni stated that it is the principle of not asking him what to do with his claims which was objectionable and not legal. If BOT had dumped within its permitted area, he would have no grounds for complaint. Concerning the removal of access, Mr. Dacquisto suggested that if BOT were directed to put in ditches, Mr. Chitaroni would have to live with it. Mr. Chitaroni reiterated that access in his Central and South Zones had been withdrawn as a result, but has since been restored as a result of the MNR performing mine hazard restoration work.

Mr. Dacquisto questioned Mr. Chitaroni concerning the adequacy of his attempts to contact BOT. It was pointed out that he had gone low in the chain of command and failed to indicate in his notes that he was worried specifically about the integrity of his claims and works. It was only the threat of impending litigation which could be considered the only real communication, and Mr. Dacquisto suggested that no real effort to contact BOT had been made. Mr. Chitaroni countered that he had work elsewhere and was not in a position to "babysit" his

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mining claims. Mr. Chitaroni assumed that BOT knew where the mining claims were located and would be sufficiently concerned to contact him.

Asked whether it was unreasonable of BOT to assume that the Crown owned everything, Mr. Chitaroni indicated that his expectation is that someone working on Crown lands must consider all possibilities. Mr. Dacquisto suggested that BOT could only be aware of the presence of mining claims if it were told by the MNR or if the mining claim holder were to make inquiries. Mr. Chitaroni countered that the onus was on BOT.

Mr. Chitaroni explained that running a grid on a mining claim would involve hiring a professional line cutter, such as Len McBride, to tie onto known points and run lines according to parameters, such as 100 metre spacing with 25 metre stations. All future work, such as mapping, surveys and the like, would be tied in to the grid. Given that the size of the dump is 9,000 square feet on a mining claim of approximately 90,000 square feet, Mr. Dacquisto suggested that a grid could be run around it. Mr. Chitaroni responded that there is no effective way to replace information from the area which is missing.

Mr. Chitaroni agreed that he could not accurately estimate the cost of work on the mineral exploration showing, but that it was approximately $2,500 to $3,000, and that his program to September 1993 had cost $25,000 on all of the mining claims. The summary of expenses is based upon hourly expenses of between $15 to $18 per hour, while OPAP allows a maximum of $100 per day to a prospector doing his own work.

Mr. Chitaroni explained that, at the time in late June 1993 when he discovered that BOT had started dumping on his stripped area, he was unaware of his recourse under the **Mining Act**. However, based upon the actions of Premier Murphy Pipelines Inc. involving his access, Mr. Chitaroni indicated that he was intimidated at the idea of approaching BOT. Even when he became aware of his rights, he did not know the procedure to follow.

Mr. Dacquisto referred to a portion of the transcript of Mr. Chitaroni's discussion with Jeff Coulson of Coulson Insurance, (Ex. 4, Tab 2) at pages 7 and 8 outlining how a drag is built at incremental heights and material is dumped in progressive stages. At the time he first saw the dumping in late June 1993, Mr. Chitaroni indicated that BOT was between 50 and 100 feet from his showing. Mr. Dacquisto indicated that Mr. Chitaroni could have spoken to Mr. Cooper at that time and prevented the dumping from taking place. Mr. Chitaroni indicated that he does not live in the vicinity and would have to travel to get there. Mr. Dacquisto countered that were his livelihood at stake, he would have spoken to someone in authority.

Mr. Dacquisto suggested that the value of the mineral exploration showing is speculative at best at this stage and that further exploration might yield no return. Mr. Chitaroni indicated that the MNR was aware of the dumping and advised him to work out the matter with BOT. He indicated that he did not anticipate the magnitude of the damage.

Mr. Chitaroni discussed test results, indicating that there was promising copper present (Ex. 4, Tab 13, samples 8154 and 8158). The property was offered for option to Teck

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Exploration Ltd., among others, but Teck indicated that it was not interested in pursuing claims at the grassroots exploration phase (Ex. 4, Tab 17). Alex Christopher of Teck also states,

> Your Best township - Granite Lake claims appear to have reasonable potential for either a magmatic Cu-Ni (+PGE) deposit or a VMS style deposit associated with the Northland Pyrite Mine. As discussed I feel a detailed mapping program followed by some sort of deep penetrating geophysics would be the next type of program to carry out on the property.

Mr. Chitaroni did undertake a magnetometer and vlf survey (Ex. 4, Tab 20) in December 1993 and indicated that, while there was no problem doing the work over the rock overburden dump, the results were not useful for purposes of evaluating the rock overburden portion of the mining claim. In February, 1994, a horizontal electromagnetics geophysical survey was done by David Laronde (Ex. 4, Tab 21), an expensive means of reading anomalies in the rock at great depth. This work was carried out on the western mining claims, and did not include the rock overburden pile. Assessment Work Reports filed against the group of claims are found at Exhibit 4, Tab 28 and indicate that the amounts of $3,911 and $777 were actually done on Mining Claim S-1118862, while in the case of the first figure, only a portion was requested to be applied to the claim. The abstract shows that $777 was accepted and applied to the mining claim.

Cost estimates to remove the pile are contained in the materials (Ex. 4, Tabs 23 and 25 and Ex. 10, Tab 8). Pedersen Construction Inc. estimates removal costs of $293,000 to a location one mile away without restoration work. James Lathem Excavating Limited estimated costs of $451,000 to remove the materials using highway trucks and restore the showing. J.L. Tindale & Associates Inc. estimated costs of $125,000 to remove the pile without restoration.

Under cross-examination by Ms. Engmann, Mr. Chitaroni stated that his mineral exploration workings are several hundred feet east of the Old Ferguson Highway. Ms. Engmann pointed out that a condition of Mr. Chitaroni's work permit issued in 1992 for the mineral exploration workings (Ex. 6, Schedule B) is that he would indemnify the Crown. Mr. Chitaroni was advised to contact the Township concerning an approval to remove trees. Ms. Engmann suggested that if the permit would impact on the interests of others, the covering letter from the MNR would so indicate. Mr. Chitaroni agreed that that was his experience.

At the time he approached the MNR with his concerns regarding BOT in May 1993, Ms. Engmann suggested that it was consistent that Mr. Chitaroni be told to work matters out with BOT. Ms. Engmann went on to suggest that there was no problem with competing uses at the time the Work Permit was issued to BOT and only when it became apparent that BOT was dumping in the vicinity of the mineral exploration workings was there a problem. Mr. Chitaroni disagreed and stated that BOT should have been told of the existence of his mining claims at the time the Work Permit was issued.

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Ms. Engmann suggested that Mr. Chitaroni had failed to have an assessment made of the environmental liability of the rock overburden dump and Mr. Chitaroni's position on this was speculative.

It was at this point in the hearing that it was determined that no cause of action existed against the MTO and that portion of the matter was dismissed.

Under re-direct, Mr. Chitaroni reiterated that he was not concerned at the time he discovered the dumping near his showing that BOT would ever actually cover it. He simply wanted to ensure that the dumping not injure him in any way, but he did not foresee the magnitude of the damage.

Stanley Gradyn Wilson, Manager of Construction for the MTO, was called as a witness by Mr. Chitaroni. He stated that the contractor has the responsibility to obtain the necessary permits for any road work from the MNR. It is his belief that the MTO property section might be aware of mining claims in the vicinity of construction, but it has not been MTO practice to check into this. In the case of BOT, subsection 79(3) of the **Mining Act** was not brought to their attention, but the contract stipulates that they must comply with all legislation.

Under cross-examination by Mr. Dacquisto, Mr. Wilson stated that he was not aware of the MTO waiving its rights to a 300 foot right of way on either side of Highway 11. Any material dumped on this right of way is irrelevant to mining claim holders, as it is owned by the MTO. Mr. Wilson confirmed that push-offs are sketched into the schedules to the contract by eye, with no dimensions listed, and indicated that this was very rough. He confirmed that the MTO was on site during the construction in 1993.

Under re-direct, Mr. Wilson indicated that he was not sure of the width of the Old Ferguson Highway, but imagined it was an old road allowance of 66 feet. The MTO filed a plan of ownership with respect to it in 1937, and it was his impression that the MTO still owned it.

Mr. Wilson advised that the MTO was not consulted when the MNR issued its permits with Schedules to BOT.

Douglas Raymond Robinson, qualified as a mining/milling technician and geological engineer, gave evidence on behalf of Mr. Chitaroni. Mr. Robinson's involvement with Mr. Chitaroni was to map geological and mineral currencies for purposes of filing an assessment work report and to establish the existence and location of the rock overburden pile dumped on Mining Claim S-1118862.

Mr. Robinson confirmed that the calculations done by Art Beecham were accurate to within 2 percent and estimated that 97,000 short tonnes of material was dumped. He presented a map entitled "Geology-James Lake Grid" upon which he made modifications, dated April 24, 1995 (Ex. 14). The two areas shown in blue are the permitted push-off and dump site

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areas in the BOT Work Permit. The area in pink is the actual dumping which occurred, measuring 9 metres high by 105 metres wide. The purpose of the map is to reflect the size and scale of the permitted dumping. Mr. Robinson testified that the site of the Old Ferguson Highway is very clear and easy to follow on the ground, being raised and smooth, with ditches on both sides. Assuming a slope of 30 degrees, approximately 3,806 short tonnes of material could be dumped on the permitted portion of the Old Ferguson Highway. There is no material on the push-off next to Highway 11. Mr. Robinson stated that the material on the existing rock overburden dump site would not fit within the limits of the two permitted sites.

Mr. Robinson described the buried mineral showing as an interflow sediment horizon, containing base metals with copper mineralization. The outcrop is an archean volcanic chert horizon, which may house volcanic masses or sulphides at greater depths.

Mr. Robinson stated that one possible alternative to the removal of the rock overburden pile would be to diamond drill from outside the pile. This could be done at an angle across the entire zone which would recreate an acceptable although not equal exposure. Five successful holes across the zone, which might require eight or more actual holes to be drilled, would have to be 170 metres or 2,789 feet in length, at a cost of $25 per foot, which includes mobilization and demobilization, the presence of a technician to engineer and supervise the drilling, cost of sampling and technical report writing, for a total of $488,075. There remains a high probability that two or three of the holes drilled would miss the showing entirely. Nor would the textural relationships between the showing and host rock be disclosed by this process.

Mr. Robinson estimated that 10 percent of the mining claim might contain the outcrop, of which 5 percent would house the mineralized showing. He acknowledged that this is a very small percentage of the overall mining claim. Mr. Robinson stated that this showing had excellent potential to host massive sulphide deposits. The trend within the showing was northwest, but it is not linear. At a distance of 100 metres, it would be very easy to miss the extension of the horizon.

Downhole geophysics, which was described in detail, would require a diamond drill hole and would be useful, but not give equivalent results.

According to Mr. Robinson, the best way to restore Mr. Chitaroni's position would be to re-establish the showing, ensuring that the horizon can be cleared and extended around it without encountering the hindrance of the rock overburden pile. This would require removal of two-thirds of the pile.

Under cross-examination by Mr. Dacquisto, Mr. Robinson indicated that the 300 foot right of way to the Crown, measured from the edge of Highway 11, would not exclude a substantial portion, approximately two-thirds of the rock overburden pile. He indicated that it was possible that the reservation of Highway 11, or of the Old Ferguson Highway, extended to include the mineral exploration showing.

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Mr. Robinson described the problems which are likely in drilling through the rock overburden pile. The loose material could rotate and boulders could crush the casing. It would be cheaper to drill from the sides. There would be two technical problems involved. Straight drilling would miss the zone whereas at a 45 degree angle, there would be a better chance of crossing it. As one drills closer to the hole, it becomes more difficult to intersect the zone. A significant find is not likely to be widespread, but rather erratic with a volcanic break at the surface. While deep penetrating geophysics, which were recommended by the mining companies to Mr. Chitaroni, would be useful, it would not replace the direct observation of the showing.

Mr. Robinson stated that, while the grade of copper in the showing could be established, its value cannot. It is possible that nothing of value would result.

Under cross-examination by Ms. Engmann, Mr. Robinson agreed that he had never observed the mineral exploration showing, but was relying on other reports for his comments. However, he was able to establish that 100 percent of the showing is covered and that his comments on its value were not speculation. He reiterated that if restored, the past results could be verified, whereas they could not be duplicated by any other known method.

John David Michael Leahy gave evidence on behalf of Mr. Chitaroni. Mr. Leahy is active in the Northern Prospectors Association and a member of the Mining Minister's Advisory Committee.

Mr. Leahy stated that he is familiar with the geology of the Temagami area having been involved in monitoring activities and negotiating deals. Many of the properties in the area have high potential for gold, copper, diamonds, iron and industrial diamonds and minerals.

Mr. Leahy confirmed Mr. Robinson's estimates of the incidence of outcrops and showings. The value placed by a prospector on a showing is considerable as it is the key which leads to finding an ore body. There are many anecdotal incidents of properties being explored extensively and nothing being discovered until someone stumbles across an ore showing. One example of this occurred with 30 mining claims in Kirkland Lake where several mining companies spent millions of dollars in diamond drilling, geophysical surveys, geological mapping and underground workings, with no discoveries over fifteen years. Then, in 1991, a trench four feet wide was dug with a backhoe over several thousand feet which uncovered a small surface showing. The showing was stripped along the formation which proved to be an interesting new lead, not of ore grade. However, through careful follow up involving magnetometer readings at close spacings, which led to the diamond drilling of several holes which were disappointing and then several which were promising, the resultant discovery was of two million tonnes of 0.6 ore and $157,000,000 in reserves.

Mr. Leahy stated that the proper sequence is for there to be geological mapping, a magnetometer survey and a vlf survey to give the lay of the land, all of which will disclose areas for stripping and trenching. Once the trenching has been done, the results can be

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interpreted for the determination of where to perform related geophysics and diamond drilling. The sequence follows not only a logical sequence for formulating the basic groundwork, but it also follows an economic sequence, whereby a prospector starts with the cheaper work followed by the more expensive.

The purpose of outcrop stripping is to evaluate what is determinable on or from the surface without having to diamond drill or sink a shaft. Based upon knowledge gleaned from other results, the showing will have a general trend which must be discovered, as it will snake through the ground. It is of little use to try to find another such showing. Rather, one must trace it from the source to obtain information to determine the next step.

Mr. Leahy indicated that he had walked the rock overburden pile. Its potential environmental hazard liability is uncertain due to limited number of precedents and existing decisions. Anyone wishing to involve themselves in a mining property would want clear attribution of liability of any foreign substance found, in this case the pile. Therefore, the optioning of the property would be impeded until the issue of liability was determined. Not only is the mining claim itself affected, but the whole claim group is affected, as one mining claim is rarely sufficient to host an ore body.

Prior to 1991, the current subsection 79(3) of the **Mining Act** did not exist. There were many instances of parties performing work on mining lands without regard for the rights of the mining claim holders, so that there was destruction of grids, claim posts, burying of showings, blocking of access and the like. As a result of these problems, many in the industry lobbied and were successful in having this new provision enacted. Prior to June 3, 1991, the only remedy to the prospector was civil action in the courts.

Mr. Leahy testified that the holder of a mining claim has the exclusive right to explore and develop his mining claim, including the right to enter upon the surface rights held by another once proper notice is given. Where there is no agreement, other avenues are available. Asked about the 300 foot reserve to the Crown for roads, Mr. Leahy pointed out that, pursuant to subsection 182(5), a mining lease can be obtained in or under a highway. Where the highway establishes previously held rights, it would apply to the use for mining purposes and the ability to lease those surface rights. However, with the Minister's consent, the lease holder can mine, lease, mine under the highway or cause the highway to be moved. Examples of this include the Pamour Mine in Timmins which involved moving the highway. Another example is Hemlo, where the Teck Mine is a stone's throw from the highway. It is common for mapping, surveys, diamond drilling and geological surveys to extend to the highways. The 300 foot reserve is not prohibitive, but rather indicates that the MTO has first dibs on it.

The mining industry must be recognized as operating on different principles from other industries, based upon the best guess for the available information. However, a discovery zone of alteration or rock horizon with only trace amounts of mineralization is significant because one would continue looking along the horizon itself to find the ore body. The existence of such

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a showing would be integral to finding a mining company with which to do costly exploration in a joint venture.

Mr. Chitaroni could be restored to his previous position by having the rock overburden removed and the showing rewashed. The rock overburden would have to be deposited where it would pose no liability to his claim group. Alternative means of exploration could be explored, but the results would be only second best.

Mr. Leahy estimated the value of the claim group according to various deals with which he is familiar. A junior mining company would look to combine stock and cash whereas a deal with a major company would involve cash only. Amounts involved might include a $5,000 to $10,000 down payment plus 100,000 shares worth between $0.25 and $1 each. Then an additional $200,000 to $400,000 over the term of the agreement plus a 2 to 4 percent royalty. A commitment to perform work would be involved. Where there is merit by virtue of a showing, the down payment rises to between $10,000 and $20,000 and involves cumulative payments of $500,000 over five years, commitment to perform assessment work worth several hundred thousand dollars plus a royalty when a mine goes into production. Generally speaking, an option is worth more when the mining claim group is in proximity to other known finds; one of unknown geology is worth less. Those mining claims located in Best Township are well above average. While the Chitaroni group does not have a reserve, it has all the other ingredients such as promising mineral geology, adjacent to known mines, access and no known encumbrances other than the rock overburden pile.

Under cross-examination by Mr. Dacquisto, it was suggested that it would be legal for the Crown to deposit excavated material. Mr. Leahy countered that this is true as long as it is done pursuant to existing legislation, including the **Mining Act**. He stated that if it prevents the use of the land for mineral exploration, the prospector could ask to have it removed. Asked about how one should best go about protecting one's mining claim interests, Mr. Leahy stated that there is no existing process within the **Act**.

On the issue of whether the whole pile needs to be removed, Mr. Leahy agreed that the working itself does not extend under the whole pile, but indicated that it covered a portion of the geological formation which had been exposed. The areas surrounding the showing would have to be enlarged as the next step in exploration. Mr. Dacquisto suggested that the surrounding areas are not mineral exploration workings. Mr. Leahy stated that restoration would include allowing Mr. Chitaroni to proceed with the next step in his exploration program, which includes the adjacent areas.

On the issue of environmental liability, Mr. Leahy stated that the new laws have little regard for the perpetrator, but put the onus on the present owner as having liability.

Under cross-examination by Ms. Engmann, Mr. Leahy indicated that he did not personally see the showing located under the rock overburden dump. His opinion, however, is

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based upon 20 years of experience as a prospector. His opinions are based upon what he has heard in the course of the hearing. In response to Ms. Engmann's question, Mr. Leahy indicated that he could tell from listening to Mr. Robinson's testimony, involving pyrite in a massive sulphite pile and could well tell what it is worth.

Under re-direct, Mr. Leahy explained the manner in which assessment work was treated prior to the June 3, 1991 changes to the **Mining Act**. The system had evolved from 1906, where a man day was the equivalent of six hours of labour. Once 200 man days were reached, one could apply for a 21 year lease. Other calculations included one man day for every foot of diamond drilling, with maximums established.

Mr. Leahy reiterated that there is currently a case before the courts where the issue on appeal involves the finding that pre-existing hazards on leased lands are the responsibility of the current lease holder.

Gary John Cooper, the former construction supervisor for BOT for eight years, was called as a witness by Mr. Dacquisto. The widening of Highway 11 north of Temagami took eight months to complete, being March to October 1993. Mr. Cooper indicated that he and the foreman had a trailer next to the office trailer on the site, where they lived Monday through Friday, that he had other accommodations in Temagami and a phone and a two-way radio in his truck.

The contract with the MTO involved three passing lanes of 3.2 kilometres each on a 12 kilometre stretch of the highway. Trailers were moved in on March 1, 1993, prior to which it had been necessary to obtain work permits. These were necessary for purposes of aggregates extraction from a nearby pit, to authorize clearing along the highway, to set up the trailers and for push-offs and dump sites.

According to Mr. Cooper, the majority of the material in the rock overburden pile is earth, gravel and sand, with approximately 15 percent being blasted rock. Equipment used was a six wheel drive volvo, 20 and 22 ton euclids and 40 ton triaxles. Seventy thousand cubic metres of earth and up to twenty thousand cubic metres of blasted rock were removed.

Mr. Cooper described the procedure used to deal with the waste. He stated that it was necessary to determine areas to dump which were accessible, acknowledging that it is cheaper to employ push-offs, involving bulldozers and backhoes. There is normally not enough room to store all of the debris on push-offs, which are intended to be for 1,000 cubic metres of excavated material. Where there was too much material, it was necessary to create a dump site.

Mr. Cooper testified that the Ministry of Environment and Energy ("MOEE") advised him to apply to the MNR for work permits for push-offs and dump sites and the MTO advised that most of the land involved was Crown land. At no time was he advised of the existence of mining claim holders by either the MTO or the MNR.

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The plans for the widening were supplied by the MTO. On Sheet 12 (Ex. 5, Tab 3), Mr. Cooper stated that he drew in two possible push-off locations. The possibility of a dump was mentioned, but with snow on the ground, it was hard to determine appropriate locations. The drawn-in sites were sent to MNR and accepted as part of the Work Permit. No discussions occurred as to scale, and Mr. Cooper was simply told that someone from the MNR would come with him and take pictures. Someone named Becky came along for the first and second passing lanes and later, Carl Alexander attended for the third passing lane. At all times during this perusal of proposed sites, they never left the shoulder of the road. Discussions were general, where he was told to cut close to the rock, keep the sites and the general vicinity of the sites from being unsightly. After this field exam, there was a report approving minor quantities of rock. However, Mr. Cooper stated that he never indicated that there would be minor quantities of material involved, nor was he trying to hide anything. While each push-off might have been minor, the job itself was vast.

On Sheet 10 (Ex. 5, Tab 3), the circular dump site indicated is not to scale. The MNR did not indicate that it was dissatisfied with this, notwithstanding that the site was hand drawn. The Work Permit was issued after the MNR received the map (Sheet 10) but not before. Similarly, the dump site shown on Sheet 14 (Ex. 5, Tab 3) is also drawn in roughly by hand. There was no attempt made by Mr. Cooper to predict the size or make approximations.

The dump in question was completed in September 1993. BOT commenced at the north end with the mineral exploration workings being located in the south, based upon the evidence of Mr. Robinson. The terrain was rough and a road was built initially so that the trucks could turn around. Mr. Cooper estimated that the dump reached the mineral exploration workings in June.

The MNR assigned eight or nine people to supervise the road construction. Eventually, when BOT started getting confusing messages regarding the permitting and cutting licences, Mr. Alexander was assigned to monitor activities, with the assistance of Charlotte Smith who checked the push-offs and dump sites. Ms. Smith came by approximately every two weeks at the end of the day, but never commented on interference with mining claims. BOT was never told to redo the work permit or to have the site of the dump enlarged. Mr. Alexander rode in a BOT vehicle on two or three occasions, with concerns that trees not be destroyed and that asphalt not be included in the dumped materials. MNR vehicles were visible on the site throughout the process, but no one ever told BOT that mining claims were being endangered or that BOT was dumping in excess of the permitted area.

On the dump site in question, one could see the outcrop. Mr. Cooper assumed it was the Old Ferguson Highway as there were big trees on either side.

Mr. Cooper could not recall when he received Mr. Chitaroni's note, but indicated that he probably read it. He assumed it was a request for materials at a reduced cost or for nothing. However, as BOT already had a good dump site, he chose to ignore the note. He was

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never contacted by Mr. Chitaroni and it made no difference to him that the note was from a prospector.

Mr. Cooper indicated that if it had been brought to his attention that the dumping was affecting mining claims, and more particularly if told to stop by the MTO or the MNR, BOT would have stopped. As there was equipment on site, BOT could have avoided covering the mineral exploration workings. Had Mr. Cooper received notice such as that which commenced these proceedings during the course of the dumping, he would have taken some action to rectify the situation. If required, it would have been possible to move part of the pile with the equipment on site at the time. At the time, he could have prevented the dumping or could have arranged to have it moved to the Old Ferguson Highway. Even now, it could be pushed on to the old right of way a few hundred feet away. Using a shovel and bulldozer, 10,000 or 15,000 cubic metres of fill could be pushed at a cost of $1 per cubic metre. Costs would escalate only where it would be necessary to load big trucks. Also, big boulders would impede progress, but the matter could essentially be rectified in a couple of weeks.

Under cross-examination by Mr. Hamel, it was pointed out that a push-off on Sheet 6 (Ex. 5, Tab 3) does have the actual dimensions of 30 metres by 30 metres included. Mr. Cooper stated that BOT had a temporary letter to allow it to start the job and that it was quite possible that this diagram was completed before the permit was obtained. However, BOT was never asked to specify the dimensions of the push-offs and dumps for purposes of the permit. Had BOT been asked, it would have complied. It is common to have permits for unspecified areas as it is difficult to predict in advance how much material will be involved. There also can be a variance of 25 to 40 percent in the ratio of rock to soil, where gravel is considered soil.

Mr. Cooper stated that the father of one of his employees used to be a prospector, but other than the land caution, at the time of the construction no one mentioned mining issues. After sitting in the hearing, his awareness has increased substantially.

Referring to the MTO's Statement (Ex. 8), Addendum 1 to the contract, the definition of non-hazardous solid industrial waste, "means waste described as non-hazardous solid waste in Regulation 309, under the **Environmental Protection Act**, Ontario". Mr. Cooper stated that it is the MTO's job to ensure that no hazardous material is placed on the highway and that it should be their job to analyze the waste. The MTO did not supervise the work but ensured only that permission was received from the proper sources. The MNR gave this permission. As far as he knew, no one in either ministry undertook sampling to determine if the rocks were hazardous. Mr. Cooper estimated that less than 20 percent of the overburden was blasted rock.

Mr. Cooper stated that he was under the impression that the MNR owned all of the Crown land off of the right of way. In this regard, he assumed that the laws were being complied with as BOT proceeded with the dumping.

Asked to explain the discrepancy on Sheet 14 (Ex. 5, Tab 3) between the allowed dumping and the actual dumping, Mr. Cooper stated that he and Becky Mullens of the MNR

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stood by the side of the road looking where the dump was to be located. He assumed that the right of way was in the middle of the zone, where there were small trees and open areas. In retrospect, it is possible he was viewing the skidder trail, although it did not appear likely as there was a ditch on either side. Mr. Cooper did not walk the site, nor was he instructed by the MNR to do so. His only inspection constituted ensuring that no large trees were affected by the dumping.

Mr. Cooper indicated that it is very important that dump sites be accessible. The dump is comprised of between 3,000 and 4,000 truck loads. While another site could have been located, it would have been costly. If a larger area were needed, the MNR generally authorized the expansion on site. BOT was constantly monitored by the MNR, as is evidenced by the work in the vicinity of the sand pit. BOT was immediately stopped and required to stake and flag it.

As an experienced surveyor, Mr. Cooper indicated that he could have told from Sheet 14 where the Old Ferguson Highway is located. However, there was no requirement to be precise, and the MNR did not require it of him.

Under cross-examination by Ms. Engmann, Mr. Cooper stated that Margaret Hall of the MNR indicated that there were no problems with BOT's push-offs and dump sites. Ms. Engmann advised that Ms. Hall is a typist with no authority to make such comments, which was surprising to Mr. Cooper. The site visits conducted with Ms. Mullens were conducted on March 25, 1993, before the work permits were issued. Mr. Cooper was under the impression that the requirements were not specific, but just general. The MNR did not have input into the locations, but just approved them.

In looking over the Sheets attached to the Work Permit, Mr. Cooper was questioned on the dimensions. He indicated that the circle on Sheet 10 for the dump site was as vague as the rectangle on Sheet 14, even though it conformed to the limits of the Old Ferguson Highway. Mr. Cooper indicated that he had not intended to misrepresent the scope of the work to the MNR and in fact, it would be of no use to do so.

Referring to paragraph 5 of the "Interim approval for pushout construction" (Ex. 16), which provides that written permission is necessary to modify any conditions, Mr. Cooper indicted that this was a condition of the interim approval only and as far as he was aware, this was null and void when the written Work Permit was issued. However, the MNR monitored BOT's progress and was aware of its locations. There was no indication that the maps should be to scale. BOT would have flagged out its dump locations had this been required. Also, the dumping did not happen over night and the MNR monitored every step of the way. BOT saw the outcrop, regarded it as a good site for the trucks, as it did not require bulldozers. Mr. Cooper did not consider this a breach as it was not miles away from the proposed site. Ms. Mullens was aware of it. If there was a problem, the MNR would have shut BOT down. In retrospect, it would have been better to stake the dump site.

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With respect to Mr. Chitaroni's attempts to contact BOT or to get the MNR involved, Mr. Cooper assumed that if there was a serious problem with the dump site, the MNR would have shut him down. He could not recall being told about Mr. Chitaroni's mining claims at any of the inspections.

Jeffrey Howe Gilbert gave evidence on behalf of the MNR. Mr. Howe has worked as a line technician, area operations coordinator and senior technician since joining the MNR in 1985. At the time of the BOT construction, he was area operations coordinator. His duties included the assignment of work to area technicians supervising activities on Crown lands. Mr. Gilbert sits on the Work Permit and Operations District Committees.

Mr. Gilbert knows Mr. Chitaroni, who has taken out permits for work on his mining claims. Although having dealt with him personally, he was not involved in the work permit for assessment work on Mining Claim S-1118862. Mr. Gilbert did say that he did go into the field in the summer of 1992 to look at the proposed work and conveyed his information to the committee, whereupon a work permit was subsequently issued. He also conducted a post construction site inspection of the BOT work in the summer of 1993. It was done from the highway and was the only inspection in which he was involved.

Mr. Gilbert recalled a brief conversation with Mr. Chitaroni in May or June 1993 concerning the dumping of BOT materials. At the time, there was no concern that mineral exploration workings would be interfered with and he gave Mr. Chitaroni Gary Cooper's name. Based upon their conversation at the time, there was no reason for the MNR to contact BOT. In Mr. Gilbert's opinion, there was no serious concern raised by the note left by Mr. Chitaroni for BOT.

In August or September 1993, the MNR became aware of the serious dumping when a copy of the letter to the tribunal was received. Based upon the existing work permits to Mr. Chitaroni and BOT, Mr. Gilbert compiled a map (Ex. 17) which defines the area of the actual dumping (outlined in red), the area of Mr. Chitaroni's work permit (outlined in pink) and the area of permitted dumping by BOT (outlined in blue). It is obvious from this composite map that the Work Permit has not been complied with.

Mr. Gilbert was questioned concerning letters regarding the Scandia Inn (Ex. 10, Tab 14) and the Nordic Ski Club (Ex. 10, Tab 19). The purpose of these letters was to ensure that mining claims were not damaged. It is consistent with MNR practice to issue such letters where there is a perceived conflict. Parties are encouraged to contact one another to avoid damage.

The MNR issues 300 to 400 work permits annually, the bulk of them being between March and July. The committee has the option of requesting monitoring within their area. When an individual applies for a work permit, it will be the applicant's decision where the work is to occur and the MNR will rely on such submissions. Generally the MNR does not tell an applicant where to move its proposed works.

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Under cross-examination by Mr. Hamel, Mr. Gilbert confirmed that the duty of the committee in approving a work permit is to ensure that there is adequate protection from conflicting uses where it is aware of such uses. Mr. Gilbert stated that he never visited Mr. Chitaroni's mineral exploration workings after the power stripping had been completed, but believed that he would recognize a mineral exploration working if he saw one.

The conversation with Mr. Chitaroni in May 1993 was not brought to the attention of the committee as there were no concerns raised and the potential conflict was not foreseen. However, Mr. Gilbert confirmed that the MNR does have the power to alter a permit. It would have been possible to either require BOT to increase or decrease the area of the dump, and include as a condition that BOT contact Mr. Chitaroni. However, this was not done as there was no basis for doing so.

Mr. Gilbert stated that it is not MNR policy to leave it to the person who might be damaged to contact the permittee. Rather, where there is a perceived conflict, the permittee is advised to contact the other user. While the proximity of the BOT and Chitaroni areas are sufficiently apparent to Mr. Gilbert to warrant a caution, he stated that at the relevant time, he was not on the committee and therefore, it was not brought to its attention. Since this incident, the MNR has not changed its approach in these matters. However, it has become more sensitive to mining claims. With the land caution having been in place for more than 20 years, the district office had little reason to be aware of mining claims. Now, it is getting more involved in potential conflicts.

The process whereby dump sites and push-offs are determined is based upon the drawings of the applicant, rather than on the MNR dictating the appropriate location. Mr. Gilbert did not agree that it would be fair to ask Mr. Chitaroni about the dump considering that he would be a neighbour to the construction, as he is not a private land owner, but simply has an interest in Crown land. The mining claim holder has the right to explore and use the surface rights or to bring the property to lease. While such rights are considerable, they do not compare with a private land owner.

Mr. Gilbert stated that there was sufficient difference between what BOT had applied for and where Mr. Chitaroni's mineral exploration workings were that there should not have been interference. Despite the breach of the permit, the MNR was advised by legal counsel not to prosecute.

It was Mr. Alexander's responsibility as the technician assigned to the file to ensure that the dumping occurred as permitted and he was qualified to do so in Mr. Gilbert's opinion. There is, however, no check list for site inspections. It is a condition of the work permit that it be available at the site, and had Mr. Alexander requested it, it should have been given to him.

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According to Mr. Gilbert, all maps attached to work permits should be drawn to scale and are interpreted as such by the MNR. Any distortions caused by photocopying are not significant and would not lead to the actual dumping which occurred. Mr. Gilbert confirmed that, if he had the Work Permit in his hand at the site, he could have seen that there was a problem.

Under cross-examination by Mr. Dacquisto, Mr. Gilbert confirmed that the tonnage involved in the BOT application was not known nor was it sought by the MNR. Nor was BOT asked to specify measurements for its dump site. Even though the permit map has no measurements, Mr. Gilbert assumed that it had been drawn to scale. This was never actively confirmed by the MNR, nor was it marked as such on the map. Mr. Dacquisto pointed out that the dump sites on Sheets 10 and 14 were roughly drawn in, but that this was never followed up by the MNR.

Pointing out that the Old Ferguson Highway runs through the Chitaroni mining claim, and that the dump would be within the mining claim, Mr. Gilbert confirmed that BOT was not advised to watch out for claim posts or tags, let alone workings which could be affected. Nor was this made a condition of the permit. The MNR has the right to issue conditions, and the work permit is subject to such conditions. If a permittee is found in contravention of the work permit, the MNR can order that activities cease, it can order the withdrawal of the permit and can lay charges against the permittee. Mr. Gilbert stated that he was not aware of all the reasons behind the MNR's decision not to prosecute. He conceded that one possible reason was due to the rough nature of the sketches. If competing interests could not be worked out between the parties, the MNR would have attempted to sit down and aid in reaching a solution.

Jerard (Jerry) Peter Van Leeuwen gave evidence on behalf of the MNR. His current role is that of a coordinator and compliance specialist. Compliance monitoring involves the addressing of competing concerns, including legal and policy questions in such diverse areas as the **Game and Fish Act**, R.S.O. 1990, c. G.1, the **Public Lands Act**, R.S.O. 1990, c. P.43, the **Forest Fires Prevention Act**, R.S.O. 1990, c. F.24, the fisheries regulations and other statutes administered by the MNR. Mr. Van Leeuwen is a member of the Work Permit Committee.

With respect to the BOT application which resulted in Work Permit (3) 46-027-93, Mr. Van Leeuwen explained that BOT has the original Work Permit which is identical to that found at Schedule B, Tab 2 of Exhibit 6. The application was received on March 2, 1993 by the MNR. Prior to that date the application had been given to Ms. Hall, a typist and the area clerk, whose responsibility it was to hand out applications. She would have directed which portions to fill out. The application for work permit was completed by Mr. Cooper.

Exhibit 18 is a copy of the face of a work permit sheet which discloses various types of legislation administered by the MNR. Although such concerns as fish, flora, fauna, fire and watercourses are dealt with, it is not meant to deal with the specific concerns of the **Mining Act**. However, the work permit does not preclude the permittee from being bound by other legislation.

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The Work Permit Committee, made up of MNR employees with expertise in various disciplines such as fish, native issues and forest fires, would have to review the application and note their concerns on the form designed for this purpose. Mr. Van Leeuwen went over the various comments and identified the members of the committee for the tribunal. On March 24, 1993, the Work Permit was ready to be issued by the public lands officer, in this case the district manager. Mr. Van Leeuwen indicated that his role was to ensure that all concerns raised have been addressed and then Ms. Hall would have prepared the Work Permit.

In the case of BOT, there was a problem with the poor quality of the map. Mr. Cooper came in and was advised of the problem. However, as he was anxious to commence work, based upon inspection of a limited number of sites, he was given interim approval. It was Ms. Mullens and Ms. Smith who inspected three or four locations between Guppyville and Owaissa with Mr. Cooper. Mr. Cooper did indicate generally the location of the push-offs with a sweep of the hands and the technicians were able to judge the locations. There was no verbal approval given by the technicians, nor were they authorized to do so. Mr. Van Leeuwen speculated that there had been miscommunication in the field.

The Interim Approval (Ex. 16) provides that it is subject to the conditions listed, which include the site area only for the stock piling of minor amounts of material as the site where major dumping would be approved in the work permit process. Paragraph 3 indicates that the authority of the interim permit will only address concerns within the MNR's mandate and the permittee is not absolved from seeking approvals from other agencies concerning other legislation. This document represents a very hurried attempt to meet BOT's needs in the interim.

When Mr. Cooper provided the maps with specific push-off and dump site locations, Mr. Van Leeuwen confirmed that dimensions were not sought, the reason being that they were scale drawings. Mr. Cooper was never asked if the drawings were to scale but they were assumed to be. Based upon the maps, and with the exception of concerns near a septic area in a trailer park, no problems were found. The Work Permit was issued in due course and was mailed on April 2, 1993. Although Mr. Alexander was the point person in dealing with BOT, his responsibilities involved areas within the MNR's mandate. Problems such as the filling of Rory Lake were handled through a stop work order. Once there was compliance, BOT was allowed to proceed. Mr. Van Leeuwen indicated that he was unaware of problems with the dump until August, 1993.

It was verified that there was excessive dumping at a location not permitted. Based upon legal advice, it was determined that charges would not be laid, as there was an impending action.

Under cross-examination by Mr. Hamel, Mr. Van Leeuwen confirmed that there is nothing in Exhibit 18 which deals with mining concerns. He agreed that it would be better if there was someone on the committee to deal with such matters. Currently, such issues would have to be cleared through the mining recorder. However, the permit for stripping must go

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through the committee and it would have records of the Work Permit issued to Mr. Chitaroni. There is no mechanism to bring old permits forward to be considered in the process. It is not considered the MNR's duty to contact the mining recorder and it will do so only where a conflict is perceived. There is a lot of activity which can occur on a mining claim which does not require the prior approval of the MNR, but where it receives the application of a recorded holder, the MNR will call the mining recorder to confirm that the person indeed does hold the mining claim.

During 1992 and 1993, of the 400 annual applications for a work permit received, few dealt with mining claim holders. There is no mechanism currently in place to ensure that concerns under the **Mining Act** are addressed. It is not the MNR's responsibility. Even though the MNR would not knowingly issue a work permit contrary to other law, there is no mechanism to ensure that this does not happen. However, the MNR does not have the expertise to prevent it. It would help if the Ministry of Northern Development and Mines ("MNDM") could sit on the committee. However, the MNR issued the permits. It would go to other ministries if it perceives a concern, such as the Ministry of Health ("MOH"), the MTO or the MOEE.

It is too strong to state that Mr. Alexander's role is to ensure compliance. His job is also to ensure that BOT meets Crown interests and when other interests are identified, he should contact the district office. It is easy to identify the error on the ground, with the work permit in hand. However, the technician does not generally carry the permit. The permittee has it on site and the technician can request it for verification. Mr. Alexander's training would enable him to see the discrepancies, had he had the Work Permit in hand.

Under cross-examination by Mr. Dacquisto, it was pointed out that the MNR does control the Work Permit and if the map accompanying the application did not meet its standards, the MNR could have rejected it. The issue of dimensions on the map was not asked for as there was no indication that they were not correct as drawn. Mr. Dacquisto referred to clause 14(1)(a) of the **Public Lands Act** which sets out:

> **14.**--(1) Except in accordance with a work permit, no person shall,
>
> (a) carry on or cause to be carried on any logging, mineral exploration or industrial operation on public lands;

He suggested that the enforcement of mineral exploration matters is within the MNR's mandate under this legislation. The Work Permit does not indicate that it was issued under the authority of the **Public Lands Act**, which Mr. Van Leeuwen conceded was done in error. Despite requiring as much detail as possible, Mr. Dacquisto suggested such information as height, width, length and compass headings were not required. In addition, had the dumping extended beyond the permitted area by even 20 or 30 feet, there could have been a problem, such as interference with an osprey nest or mine workings. If damage occurs on a proposed site, the only time the MNR would be alerted is if the technician sees it or if the MNR is alerted. Mr. Van Leeuwen stated that whether fish or wildlife or mining interests are affected, if it exceeds the work permit 25

area, that is sufficient cause to shut down the operation. Then it would go to the committee to determine whether the work permit could be amended.

Mr. Van Leeuwen stated that he differentiated between the circles and rectangles on the various maps as the rectangles had been shaded in. This is based upon previous experience and was an educated guess.

Gary John Cooper was recalled by Mr. Dacquisto and asked about the accuracy of the drawings. He indicated that Ms. Smith was frequently at the site and was aware of what was going on. He observed the dump site location from the side of the road with Mr. Alexander. Had dimensions been required for the dump sites, BOT would have provided them. However, no such request was made.

Mr. Cooper confirmed upon being questioned by Ms. Engmann that the Work Permit was located in the trailer. It had been delivered at the site of the dump in question by Mr. Alexander and Ms. Engmann suggested that Mr. Alexander was not on site to inspect, but rather to deliver.

Submissions:

At the request of the parties, the tribunal agreed to entertain written submissions. The submissions of the applicant dated May 10, 1995, that of the respondents, dated May 25, 1995 and the reply of the applicant, dated June 5, 1995, were received in due course.

Liability of BOT Construction Ltd.

Mr. Hamel submitted that BOT had a duty to ensure that it would not damage mineral exploration works, one of the terms of its contract with the MTO being compliance with all laws included in the **Mining Act**. It was reasonably foreseeable that harm would come to bear on co-existing users where excessive dumping and failure to adhere to the permitted area was allowed to occur. Mr. Hamel invited the tribunal to conclude that BOT was negligent in dumping the rock overburden, through which negligence considerable damage was incurred.

BOT was given an MNR permit to dump rock overburden along the Old Ferguson Highway delineated on the permit maps in an area relatively remote from Mr. Chitaroni's mineral exploration workings. Not only did the actual dumping occur outside the permit area but it was far in excess of that actually permitted.

BOT knew of mining activity in the Temagami area but failed to take steps necessary for its activities on Crown lands. No efforts were made to determine whether there

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were co-existing users in the area, no consultations with either the Mining Recorder or the MNR were undertaken concerning co-existing users and there was an absence of instruction to its employees regarding identification of mining claims or mineral exploration workings.

At all times commencing with Mr. Chitaroni's two attempts to communicate with BOT in the spring and summer of 1993, which went unheeded, leading up to this application, BOT was in a position to rectify the situation, having equipment on site.

The MNR made no submissions on this point. Mr. Dacquisto's submissions on this point are found under the next heading below.

In his reply, Mr. Hamel submitted BOT failed in its obligation to make sure that all of its activities in and around the mining claims were legal by dumping rock overburden outside the permitted area in quantities in excess of what was allowed. It was not Mr. Chitaroni who had the duty to make BOT aware of the mining claim. Rather, it was BOT which had an obligation to ensure that it did not interfere with other uses and to inform itself of co-existing users. Any damage arising as a result of this failure to inform itself should be compensated by BOT.

Liability of Gino Chitaroni

Contributory Negligence

Mr. Dacquisto submitted Mr. Chitaroni failed to exercise reasonable care for the protection of his mining interest. Based upon **Caswell v. Powell Duffryn Associated Collieries, Ltd.**, [1940] A.C. 152 (H.L.) at page 164 and Fridman, **The Law of Torts in Canada**, Toronto: Carswell, (1989) vol. 1, at page 372, the tribunal must determine whether Mr. Chitaroni used a standard of reasonable ordinary care to protect his mining claims, the test being objective, not subjective. In this regard, it is not necessary that he owe BOT a duty of care as contributory negligence assumes that a duty is owed to one's self. As to whether there will be a finding of contributory negligence will depend on the facts of the case, including whether Mr. Chitaroni had prior knowledge of the danger of the situation in acting or omitting to act in a certain way.

Contributory negligence consists of the failure to use reasonable care of the protection of one's own person or property. Although at common law it was a complete defence so that a successful finding would result in no recovery by the plaintiff, this has been superseded in Ontario by the **Negligence Act**, R.S.O. 1990, c. N.1. If there is finding of contributory negligence on the part of a plaintiff, or in this case the applicant, damages will be apportioned between the parties according to their respective responsibility or fault.

In the period between when he first became aware of BOT's activities generally in the vicinity of his mining claims in May 1993 and the application of August 26, 1993, Mr.

Chitaroni made no effort to inform himself of who was in charge of BOT's operation or to contact Mr. Cooper. As a result of this failure, BOT had no knowledge of the existence of the mining claims and therefore was not in a position to either avoid the actual dumping or to rectify it once it had occurred.

The two attempts by Mr. Chitaroni to contact BOT in May 1993 do not constitute adequate notice of his concerns. The written note is no more than a solicitation of materials, which is how it was treated by BOT and the conversation with the flag girl fails to bring concerns to the person in charge regarding the mining claims. These events constitute unrefutable evidence that Mr. Chitaroni made no or only inadequate attempts to contact BOT until August 26, 1993 in a manner indicative of concern for his interest and should be found to amount to a clear case of contributory negligence on his part.

Mr. Hamel denied that there was contributory negligence on the part of Mr. Chitaroni. The alleged failure to show concern for his interests is contradicted by his evidence, where it is clear that during May 1993, he was primarily concerned with the creation of push-offs and having his access cutoff. There was no indication that BOT would dump rock overburden on his mineral showing until he discovered in late August 1993. This extreme action, which he did not foresee led Mr. Chitaroni to commence this application.

Mr. Hamel submitted Mr. Chitaroni's actions were that of a reasonable person. Based upon the lack of response to his inquiries, Mr. Chitaroni assumed that BOT was ignoring him. The written note should not be construed as a solicitation of material by Mr. Chitaroni, but an expression of concern regarding activities in the vicinity of his mining claims. Mr. Chitaroni could not have foreseen that BOT received numerous requests for fill which were not being followed up. Based upon his negative experience in dealing with a pipeline company, Mr. Chitaroni was reasonable in assuming that BOT was ignoring him.

Mr. Hamel submitted that, based upon the specific facts of this case, the actions of Mr. Chitaroni do not support a finding of contributory negligence. However, if one is to look at all of the circumstances, it becomes clear that in September 1993, when BOT had full notice of the material dumped on the mineral showing, BOT was in a position to remove the materials at little cost, owing to having equipment located at the site. This is contrasted to the positive steps taken by the pipeline company when it received similar notice.

Mitigation

Mr. Dacquisto provided for the tribunal's consideration the general principle of mitigation, found in **Halsbury's Laws of England**, vol. 12 (4th ed. 1975), para. 1193:

> **Plaintiff's duty to mitigate loss.** The plaintiff must take all reasonable steps to mitigate the loss which he has sustained

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> consequent upon the defendant's wrong, and, if he fails to do so, he cannot claim damages for any such loss which he ought reasonably to have avoided.

Based upon this principle, Mr. Chitaroni was bound to act to mitigate his loss once he was aware that the dumping had occurred and failed to do so in that he did not make a request directly to BOT to remove the rock overburden. Rather, he commenced this action which is indicative of being more interested in proceeding with litigation than in preventing damage.

According to Mr. Hamel, Mr. Chitaroni believed that his note of May 11, 1993 had the effect of putting BOT on notice of his concerns regarding the dumping of the rock overburden. It is his belief that the note constituted a request to have the dumping occur away from his mining claims and is not a solicitation of materials. Had BOT enquired after the note, it would have discovered the existence and location of Mr. Chitaroni's mining claims and there was no way to anticipate that BOT had received and was ignoring numerous requests for materials.

Liability of the MNR

While it is the object of the **Mining Act** to encourage staking, exploration and development, Mr. Hamel submitted that, within subsection 79(3) there exists a mechanism to protect such activities from those who would harm them. In this regard, it is suggested that the MNR is a "person" within the meaning of the subsection. If this were not so, the Crown could, through its acts or omissions, damage the interests of a mining claim holder. It is contrary to the intent of the **Mining Act** to have anyone, including the Crown, excluded from liability. Therefore, the wording of subsection 79(3) should be broadly applied so as to afford the protection to prospectors, which is clearly the intent of this recent provision which became effective on June 3, 1991.

Mr. Hamel invited the tribunal to consider this new provision in light of section 10 of the **Interpretation Act**, R.S.O. 1990, c. I.11, which requires that legislation must be given a large and liberal interpretation. Therefore, the provision of protecting mining claim holders from the acts of "any person" should be interpreted as remedial and applied broadly. In this regard, it should be interpreted to include, in addition to those who actually physically damage a mining claim, those who by failing to meet their obligations, allow others to cause such damage.

Mr. Hamel submitted the MNR had a duty to ensure that the terms of its permit to BOT were complied with. The evidence of its own witnesses indicates that it is the duty of the MNR employee assigned with the responsibility, in this case Mr. Alexander, to ensure that the permit was complied with. Even though BOT was required to post the Work Permit at the job site and it would have been easy to ensure that the rock overburden was dumped in the

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correct location, the fact is that no one on behalf of the MNR undertook to ensure that this compliance occurred. Had this supervision occurred, Mr. Chitaroni's mineral exploration working would not have been covered or would not have been covered to the extent that it had before a stop work order was issued.

Also, because Mr. Chitaroni had applied for a work permit for his mining claim in the previous year, the MNR was in a position to know of their proximity and was in a position to advise BOT of their existence, which it failed to do.

Whether the actions of the Crown will attract tort liability has been dealt with by the Supreme Court of Canada in **City of Kamloops v. Nielsen** [1984], 2 S.C.R. 2 and **Laurentide Motel v. Beauport (City)**, [1989] 1 S.C.R. 705 at pages 718 and 722. The principle can be stated as follows: The decision to take a certain course of action may be a policy decision which will not attract tort liability. However, once a course of action is taken, it is no longer a policy decision and becomes operational and attracts tort liability. Mr. Hamel submitted that the MNR's actions were operational based upon the actual supervision of BOT's activities which failed to ensure that there was actual compliance with the terms of the Work Permit, notwithstanding that the evidence shows that Mr. Alexander attended the road widening operation regularly. This negligence, according to Mr. Hamel extends beyond the absence of adequate supervision and includes a failure in its duty to advise BOT of co-existing users of the land. The MNR was aware of Mr. Chitaroni's mineral exploration workings and was in a position to foresee that these workings could be damaged if BOT's dumping strayed outside of permitted areas.

Based upon the tribunal's findings in **Callisto Minerals Inc. et al. v. Buchanan Forest Products Limited et al.**, (M.L.C.) unreported, September 23, 1991, ("Callisto Minerals") Mr. Hamel submitted that two parties can be found liable for damages to a mining claim where only one of the parties did the actual damage. In that case the tribunal found that the two companies were jointly and severally liable. Applying the principle to the facts of this case, there is authority under subsection 79(3) of the **Mining Act** to attribute liability to the MNR as a person having allowed the damages to occur.

Mr. Dacquisto indicated that he was in agreement with the points raised by Mr. Hamel concerning the MNR's liability and reiterated that the MNR knew that Mr. Chitaroni had mining claims in close proximity to the dumping area, it did not advise BOT of the existence of the claims or that they could be affected and that it had closely monitored BOT operations through regular attendance at the site. He added the following. Based upon cases of **City of Kamloops v. Nielsen**, *supra*; **Just v. British Columbia** [1989] 2 S.C.R. 1228; and **Mortimer v. Cameron** (1994), 17 O.R. (3d) 1 (C.A.), he indicates at paragraph 21 of his written submissions (Ex. 22):

> . . . The granting of the work permit, the actual attendance at the site while the dumping was taking place, the failure to advise BOT of [Mr. Chitaroni's] claims, and the failure to advise BOT that the

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> dumping may have been in breach of the permit, were clearly operational functions which, if negligently performed, give rise to liability.

Given the MNR's awareness of the existence of Mr. Chitaroni's mining claims in close proximity to the permitted dumping area at the time the Work Permit was issued to BOT, the potential conflict in the interests of BOT and Mr. Chitaroni was apparent. It is also clear from the evidence that in situations where the MNR was aware of conflicts which could arise, it would advise the permittee to contact the co-existent user. It is the evidence of Mr. Gilbert, who sits on the committee which issues work permits that had he sat at the time of the BOT application for permit, he would have ensured that a warning was given. However, given the employees who were involved, this was not done either at the time the Work Permit was issued or at any subsequent time.

Despite being in the area to monitor the construction during the summer of 1993, the MNR failed to advise BOT that it was dumping outside its permitted area and in quantities in excess of what was allowed. This contrasts with evidence of other violations, particularly concerning the sand pit, where the MNR acted quickly and effectively to ensure that the limits set by work permits were not violated. The complete absence of action on the part of the MNR in this situation stands in contrast.

Even though the MNR knew of the existence of Mr. Chitaroni's mining claims, was aware that dumping would take place in proximity to the mineral exploration showing and as of May 1993, that Mr. Chitaroni was concerned about the dumping, officials failed to notify BOT either of the existence of the claims or of potential conflict. This failure by the MNR in the circumstances, in Mr. Dacquisto's submission, constitutes negligence on the part of the MNR.

Ms. Engmann relied on two cases to set out the test to determining whether there was a duty on the part of the MNR to advise BOT of Mr. Chitaroni's mining claims. In **Donoghue v. Stevenson**, [1932] A.C. 562 where Lord Atkin states at page 580:

> The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be -- persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question. (emphasis added)

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The test is further explained for purposes of public authorities by Lord Wilberforce in **Anns v. Merton London Borough Council** [1978] A.C. 728 at page 751:

> Through the trilogy of cases in this House - *Donoghue v. Stevenson* [1932] A.C. 562, . . ., *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] A.C. 465, and *Dorset Yacht Co Ltd. v. Home Office* [1970] A.C. 1004, the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter -- in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise . . .

The question which the tribunal should ask, in Ms. Engmann's submission is whether it was reasonably foreseeable to the MNR in issuing the Work Permit to BOT that Mr. Chitaroni's mineral exploration workings would be buried? The answer to this, according to Ms. Engmann is that it was not. Therefore, there was not sufficient proximity to establish a duty of care.

Owing to the permitted dumping on the Old Ferguson Highway, a considerable distance from the permitted area, there was in Ms. Engmann's submission, no duty on the part of the MNR to advise BOT of Mr. Chitaroni's mining claims at the time the Work Permit was granted. The possibility of a conflict between BOT and Mr. Chitaroni was not reasonably foreseeable. At the relevant time, Mr. Chitaroni was not working on his mining claims, nor did he have a work permit.

The current practice of the MNR is reasonable and is based upon visual inspection and advising permittees of potential conflicting users. It would be unnecessarily onerous to suggest that MNR advise all permittees to seek out the holders of all mining claims to ensure that potential conflict is avoided.

Ms. Engmann suggested that Mr. Chitaroni had not advised the MNR of the location of his exploration workings. Nothing in the MNR's files indicates that there would be

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a conflict between line posts and markings of Mr. Chitaroni and the dump site areas proposed by BOT. The fact is that the approved dump sites were separate from Mr. Chitaroni's mineral exploration workings. In addition, as Mr. Chitaroni was not actively working on his North Zone mining claims at the time the Work Permit was issued to BOT, it would not be reasonable to presume that the MNR was aware of his activities. Based upon evidence of existing and past practice of the MNR, it can be inferred that had the MNR perceived a potential conflict, an appropriate warning would have issued from the Work Permit Review Committee.

The size of the road widening project undertaken by BOT was prohibitive. Therefore, it was not, in Ms. Engmann's submission, possible for the MNR to know that there was a breach of the Work Permit. The MNR monitors a number of natural resource concerns such as fire, lands, outdoor recreation, forestry, environmental and fisheries. Although extensive monitoring did occur on some aspects of the project, such as Rory Lake and Owaissa, the Work Permit Review Committee determined that monitoring was unnecessary on the leg of construction involving dumping on the Old Ferguson Highway.

Relying on the cases of **Brown v. British Columbia**, [1994] 1 S.C.R. 420 at pages 441 and 442 and **Swinamer v. Nova Scotia**, [1994] 1 S.C.R. 445 at pages 454, 455, 465 and 466, Ms. Engmann submitted that the decision of whether monitoring will take place and the extent of the monitoring on the part of a public authority is a policy decision and as such does not attract tort liability. Approximately 400 work permits are issued annually for this district. In determining who will be assigned to a project and setting out the scope of monitoring involves consideration of financial resources and personnel on the part of the Work Permit Review Committee, which the case law sets out as a policy matter.

It is clear that Mr. Alexander did not hesitate to carry out his duties in issuing stop work orders, which he did on two occasions, a fact confirmed by the evidence of Mr. Cooper on behalf of BOT. Similarly, it cannot be said that he failed to exercise or was negligent in monitoring specified aspects of the road widening. When it became aware of the illegal dumping, the MNR immediately inspected the site and advised Mr. Chitaroni to negotiate with BOT for the removal of the rock overburden. The determination to not prosecute was discretionary, based upon legal advice and the fact that the action had already been commenced under the **Mining Act**. It was the evidence of Mr. Van Leeuwen that it would not appear to be good form to lay charges where an action was already under way, nor would it likely result in the correction of the problem. Ms. Engmann submitted that no adverse inference should be drawn from this decision to not prosecute. Nor should the decision not to prosecute be construed as a condoning of BOT's actions.

Ms. Engmann submitted that the facts in the current application differ from those of **Callisto Minerals** in that the two companies found liable were related companies, whereas in this case there is no suggestion that the MNR and BOT are related.

In reply, Mr. Hamel submitted that, in the circumstances, it would have been reasonable for the MNR to foresee the potential conflict in uses. Having issued a work permit

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to Mr. Chitaroni for the mineral exploration workings the prior year, the MNR was aware of his interest and he should have been notified so that he could protect it.

If it is the case that the locations of the permitted and actual dumping were sufficiently distant from one another, then it should have been apparent from site visits that there was a problem. On the other hand, if the BOT drawings regarding the dump site were inadequate, they should not have been approved.

While the Crown does retain the right to grant permission for surface rights uses, it must exercise a duty of care to ensure that conflicting or multiple uses can be achieved harmoniously without resulting in damage to one of the users. It is suggested that the existence of the Crown reservation for roads is irrelevant as a mining claim holder may apply for and receive permission to conduct exploration within such a reservation.

Mr. Hamel submitted that the approved area for the dump site is not well away from Mr. Chitaroni's exploration workings, as was submitted by the MNR and BOT, but was in fact quite close as can be seen by the map (Ex. 17). The MNR officials failed in their duty to identify the illegal dumping and in taking steps to ensure that the problem was corrected. Mr. Alexander could have determined the area where dumping was permitted and his failure renders the MNR liable. Moreover, even though officials attended BOT construction on the North Zone, they failed to realize that BOT had exceeded the permitted size. The fact is that BOT did not receive permission to increase the size of its dump.

Mr. Hamel submitted that the MNR could have avoided this situation by taking the following steps as seen at Exhibit 24, paragraph 21:

> (a) Inform the Applicant and other users of the potential conflict;
>
> (b) Circulate the application of the permit to the Resident Geologist and mining recorder for mining concerns;
>
> (c) Take better care in outlining the permitted area and notifying BOT of the potential for conflict in uses if they exceed the permitted area.

Mr. Hamel reiterated strong disagreement with the assertion by Ms. Engmann that the MNR was not aware of the location of Mr. Chitaroni's mineral exploration workings for which a permit was required. Mr. Gilbert attended at the site of the workings during the summer of 1992 and therefore knew of its location. Furthermore, Mr. Hamel submitted that a distance of 150 feet is sufficiently close in proximity as to constitute a potential conflict in uses. For purposes of awarding damages, according to Mr. Hamel, it is irrelevant whether Mr. Chitaroni

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was working on his mining claims at the time the dumping occurred. The only facts which are relevant are that Mr. Chitaroni is the holder of the mining claims and his mineral exploration workings have been lost as a result of the dumping.

Mr. Hamel submitted that, after Mr. Chitaroni's conversation with Mr. Gilbert in May 1993, the MNR could have revised its Work Permit owing to the potential conflict in uses.

With respect to Ms. Engmann's submission that the decision to monitor certain aspects of the project was a policy decision the scope of which is not subject to tort liability, Mr. Hamel submitted that the evidence indicates that Mr. Alexander and others from the MNR were assigned to visit the dump sites and did in fact visit the dump sites. Therefore, the activities of the MNR were operational and the fact is that the monitoring was inadequate as it did not discover the dumping. Nor did it take adequate steps to cause the situation to be remedied at the time the violation was discovered.

Apportionment of Liability and Interpretation of Indemnity Provisions

The following terms and conditions are included in the Work Permit:

> 1. This Work Permit gives the permittee only the right to carry out work on the described site for the purpose specified in this permit and does not convey any right, title or interest in the land.
>
> 2. The permittee covenants to indemnify and forever save and keep harmless the Crown, its officers, servants and agents from and against any and all claims, demands, suits, actions, damages, loss, cost or expenses arising out of any injury to persons, including death, or loss or damage to property of others which may be or be alleged to be caused by or suffered as a result of or in any manner associated with the exercise of any right or privilege granted to the permittee by this Work Permit.
>
> 7. Violations of any of the conditions constitutes an offence.

Mr. Hamel, in denying contributory negligence and a duty to mitigate, argued by implication that his client should not have any of the damages found apportioned against him.

Mr. Dacquisto referred to **Canada Steamship Lines Ltd. v. The King**, [1952] A.C. 192 (P.C.) ("Canada Steamship"), where Lord Morton of Henryton, giving the unanimous

judgement of the Privy Council states at page 208:

> Their Lordships think that the duty of a court in approaching the consideration of such clauses may be summarized as follows:--
>
> (1) If the clause contains language which expressly exempts the person in whose favour it is made (hereafter called "the proferens") from the consequence of the negligence of his own servants, effect must be given to that provision . . .
>
> (2) If there is no express reference to negligence, the court must consider whether the words used are wide enough, in their ordinary meaning, to cover negligence on the part of the servants of the proferens. If a doubt arises at this point, it must be resolved against the proferens . . .
>
> (3) If the words used are wide enough for the above purpose, the court must then consider whether "the head of damage may be based on some ground other than that of negligence" . . . The "other ground" must not be so fanciful or remote that the proferens cannot be supposed to have desired protection against it; but subject to this qualification . . . the existence of a possible head of damage other than that of negligence is fatal to the proferens even if the words used are prima facie wide enough to cover negligence on the part of his servants.

Based upon the decision of Viscount Dilhorne in **Smith v. South Wales Switchgear Ltd.**, [1978], 1 All E.R. 18 (H.L.) ("Smith") at page 22, Mr. Dacquisto submits that these principles apply equally to indemnity clauses:

> While an indemnity clause may be regarded as the obverse of an exempting clause, when considering the meaning of such a clause one must, I think, regard it as even more inherently improbable that one party should agree to discharge the liability of the other party for acts for which he is responsible.

Mr. Dacquisto submitted that the first test in the **Canada Steamship** case is not met as there is no express provision for indemnity against the consequences of the MNR's negligence, whereby express provision regarding the negligence must be made according to Lord

Frazer in **Smith** as set out at page 26:

> I do not see how a clause can 'expressly' exempt or indemnify the proferens against his negligence unless it contains the word 'negligence' or some synonym for it . . .

The indemnity clause fails in the second **Canada Steamship** test, namely whether the words used in the indemnity clause are wide enough, in their ordinary meaning, to cover the MNR's negligence. The courts are reluctant to allow a party to contract out of its own negligence and Mr. Dacquisto suggested that doubt in the interpretation of the clause must be determined against the MNR.

The wording of such a clause, found in **Browne v. Core Rentals Ltd.** (1983), 23 B.L.R. 291 (Ont. H.C.) ("Browne") at pages 294 to 296, both inclusive, dealing with the leave of heavy construction equipment, was considered by Montgomery J. in **Canada Steamship**. The clause from **Browne** states at page 293:

> . . . The Lessee agrees that the Lessor is not responsible or liable for any damage, loss or injury whatsoever to persons or property caused by or arising out of directly or indirectly the use of the leased equipment. The Lessee further agrees to save harmless and indemnify the Lessor from and against all claims, actions and demands arising out of any such loss or injury.

Montgomery J. states at page 296:

> I have a strong doubt whether the words are broad enough [to cover negligence] and that doubt must be resolved against the *proferens*.

Even if the second part of the test is satisfied, the tribunal must still consider the third, of whether the head of damage may be based upon some ground other than negligence. This is described in **Lamport & Holt Lines Ltd. v. Coubro & Scrutton (M. & I.) Ltd.** [1982] 2 Lloyd's Rep. 42 (C.A.), at pages 49 and 50:

> On the other hand if there is a head of liability upon which the clause could bite in addition to negligence then, because it is more unlikely than not that a party will be ready to excuse his other contracting party from the consequences of the latter's negligence, the clause will generally be construed as not covering negligence.

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Mr. Dacquisto submitted that an alternative head of liability to be considered is that of nuisance, and once again relied upon Montgomery J. in the **Browne** case at pages 296 and 297:

> Even if I had held the language broad enough to satisfy the second test, the *proferens* founders on test three. There are other potential causes of action. To give a few examples: nuisance from vibrations of machine, nuisance from nose of machine, trespass by the machine.

Ms. Engmann submitted that the MNR was not negligent in issuing the Work Permit to BOT nor in monitoring the BOT project. In the alternative, should the MNR be found liable to Mr. Chitaroni, then the MNR claims and is entitled to indemnity from BOT in accordance with Condition #2 of the Work Permit.

Mr. Dacquisto submitted that the evidence shows that BOT was unaware of the existence of Mr. Chitaroni's mining claims or any interference it might have caused prior to August 26, 1993. Nor was there any reason to believe that the rights of another were being affected or that the Work Permit was being violated. BOT reasonably expected the MNR to bring to its attention any potential conflicting uses at the time the Work Permit was issued and similarly expected that the MNR to advise if the Work Permit were being violated or exceeded. By the same token, Mr. Chitaroni did not advise BOT of the problem until August 26, 1993, but only by way of legal action rather than a request to have the situation corrected. This conduct on the part of the MNR and Mr. Chitaroni gave BOT a false sense of security regarding its activities in that it believed it was carrying on in a lawful manner. Therefore, it is suggested that the blame in the consequences should rest with Mr. Chitaroni and the MNR.

Mr. Hamel indicated that this issue is between the MNR and BOT and accordingly, made no submissions.

What is the Nature of Damages Contemplated by Subsection 79(3) of the **Mining Act**?

Mr. Dacquisto submitted that the compensation payable under subsection 79(3) must be limited to physical damage. He relies on the following three principles of statutory interpretation, based upon Côté, **The Interpretation of Legislation in Canada** (2nd ed. 1991), pp. 263-70 and **Glenn v. Schofield**, [1928] S.C.R. 208 at page 210. First, the meaning of a phrase or expression can be determined by the words it is associated with, known as **noscitur a sociis**. Second, as a general expression the word "damages" must be interpreted strictly in accordance with specific words which precede it or **ejusdem generis**. Third, having regard to the provisions of the entire statute and the language of the section involved, one must be aware of the damage which the statute is intended to remedy.

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Mr. Dacquisto submitted that the word "damage" in subsection 79(3) of the **Mining Act** must relate back to the specific items which precede it. In this regard, the **Act** contemplates only damage to mineral exploration workings or claim posts, line posts, tags or surveyed boundary markers delineating mining lands. Therefore, logically, the only type of damage which can be compensated is physical damage. If it should be determined that Mr. Chitaroni can recover more than just the physical damage described, the tribunal would be acting as a court under section 96 of the **Constitution Act, 1867**, and such provision would be beyond the competence of the legislature to enact.

Mr. Hamel submitted that the damage contemplated by subsection 79(3) of the **Mining Act** is not limited to physical damage, but extends to loss of opportunity. Mr. Chitaroni should be restored to his former position prior to the dumping, which necessarily involves more than the loss of the work performed on the mining claim. This may be calculated as the cost of removing the rock which was dumped illegally or alternatively paying the cost of diamond drilling of several thousand feet which would render similar data to that which could be reasonably expected to be obtained through the mineral exploration showing.

Rather than focus on the meaning of the word "damage", it is the word "compensate" which should be examined according to Mr. Hamel. In fairness, it should be given the widest possible meaning and be interpreted to restore Mr. Chitaroni to his former circumstances. Concerning the issue of the constitutionality of awarding the damage requested, Mr. Hamel submitted that this was adequately dealt with by the tribunal in the **Callisto Minerals** decision and should be followed accordingly.

Damages

Mr. Hamel acknowledged the difficulty in assessing damages for this case, as the cost of what was put into the mineral exploration workings, between $2,000 and $3,000, is not sufficient to compensate for what had occurred. The mineral occurrence uncovered by the assessment work is considered to be fairly rare, according to the evidence of Messrs. Robinson and Leahy. Moreover, the evidence is that similar showings have led to important discoveries, even where other disparate methods of exploration had been previously used. To compensate Mr. Chitaroni for only money actually spent would, in Mr. Hamel's submission, be inadequate in the circumstances as something of value has been lost. This case can be distinguished from **Callisto Minerals** in that, notwithstanding the damage which had occurred, the prospector was still able to restake and reestablish himself in the same position he was in before the damage had occurred. Mr. Chitaroni cannot restore himself to his previous situation by any means other than by removing the rock which has been dumped. By finding that his situation must be restored, the tribunal would restore Mr. Chitaroni's lost opportunity to proceed with testing to realize the potential of his showing.

To restore Mr. Chitaroni to his former position would entail the cost of removing sufficient rock from the North Zone to permit exploration to resume plus the costs expended in

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exploration, which according to Robinson's evidence would entail removal of two-thirds of the pile. Estimates for rock removal range from $125,000 to $451,622.80.

Mr. Dacquisto submitted that, even if the tribunal were to find that it has jurisdiction to award compensation for more than the physical damage which has occurred, the award should be a small one based upon the value of the work actually done on Mining Claim S-1118862. This entire situation could have been avoided or rectified had Mr. Chitaroni advised BOT in a timely manner of his interests in the area. The evidence of Mr. Cooper remains uncontradicted on this point. Also, both the MNR and Mr. Chitaroni were aware of the potential encroachment and failed to take adequate steps to notify BOT. Based upon the circumstances in the case, it is submitted that it would be grossly unfair to require BOT to now remove the materials in their entirety at a cost, according to the applicant, of between $125,000 and $451,000. Rather, the compensation should be limited to $22 per assessment day (ten) for a total of $220 or at a maximum of the actual $2,000 to $3,000 expended by Mr. Chitaroni, reduced in proportion to the degree of fault attributable to his failure to mitigate.

Based upon **McGregor on Damages** (15th ed. 1988), page 214, Mr. Dacquisto submitted in the alternative that damages should be determined in accordance with certain well-established principles, namely that Mr. Chitaroni, in seeking damages must prove on a balance of probabilities both the fact of damage and its amount. None of the estimates concerning removal of the rock overburden were presented by the individuals giving the quotes. Experts who prepared the estimates on which the applicant relies were called to give evidence. The estimates themselves are based upon the assumption that the material is primarily broken rock, yet Mr. Cooper is uncontradicted in saying that 15 percent of the pile was large rock and the remaining 85 percent was dirt and gravel, the latter being cheaper to remove. The estimates are based upon removal of the material entirely rather than shifting the material onto adjacent land over which the MNR has a reservation of surface rights. Based upon the dimensions of the pile and the mineral exploration showing, Mr. Dacquisto submitted that 20 percent of the pile need be moved in order to expose the mineral exploration showing. The only evidence before this tribunal as to the cost of so shifting the materials is that of Mr. Cooper. His estimate of $1.50 per cubic meter of $12,000 to $15,000 was not contradicted or seriously challenged.

Mr. Dacquisto pointed out that it is not certain that Mr. Chitaroni would stand to benefit from the removal of the materials, as the value of the mineral exploration workings is not proved. Therefore, it would be unfair to require BOT to pay the removal costs sought.

In reply, Mr. Hamel submitted that the costs associated with the removal of the rock have been adequately proven. There is photographic evidence that the dumping is comprised of primarily large boulders which were placed on site by off-road trucks necessary for heavy loads. The evidence of Mr. Cooper on the cost of removal should be disregarded as it fails to consider the cost of bringing machinery on site nor does it describe the tonnage involved.

Mr. Hamel submitted that reimbursement solely for the amounts expended on the mining claim would be inadequate in this circumstance and pointed out that if such compensation

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were to be considered adequate, there would be no deterrent to pay such compensation instead of avoidance of damage on any mining claim.

The fact is that Mr. Chitaroni cannot carry on exploration work where the dumping has occurred. Also, the evidence of Mr. Robinson is that the pile must be both stabilized or removed, that partial removal would not allow sufficient space for exploration and that the remaining slopes would be too high and steep for safety. The amount of compensation should be adequate for the removal of the pile to restore Mr. Chitaroni to the position he was in before the dumping occurred.

Environmental Damages

Mr. Hamel submitted that there should also be compensation awarded for the potential environmental hazard created by the rock overburden dump. While the current evidence is that such risk may be minimal, the evidence of Messrs. Chitaroni, Robinson and Leahy is that any such potential environmental hazard will create an impediment to dealing with one's mining claims through, for example, options or marketing. Mr. Hamel invited the tribunal to find BOT liable for environmental problems created by the pile in the future or alternatively to order BOT to carry out of an environmental assessment and remedy anything uncovered by such assessment.

Mr. Dacquisto submitted that there is not adequate evidence of environmental damage, that the risk was admittedly minimal and no such loss has been established.

Mr. Hamel reiterated concerns regarding environmental liability either in bringing the mining claim to lease or even if left as a mining claim.

Punitive Damages

Based upon the findings in **Callisto Minerals**, Mr. Hamel invited the tribunal to find that the MNR's and BOT's demonstrated disregard for Mr. Chitaroni's mining claim, discussed above, is such that punitive damages should be awarded. As Mr. Chitaroni is unable to proceed with his exploration program as matters currently exist, it is submitted that the tribunal should award punitive damages in an amount exceeding $5,000.

With respect to the request for punitive damages, Mr. Dacquisto relied on the decision of the Supreme Court of Canada in **Vorvis v. Insurance Corporation of British Columbia**, [1989] 1 S.C.R. 1085 ("Vorvis") at pages 1107 and 1108, which has indicated that punitive damages may be awarded only "in respect of conduct which is of such nature as to be deserving of punishment because of its harsh, vindictive, reprehensible and malicious nature". Mr. Dacquisto submitted that no such conduct is present in this case. Moreover, in **Callisto Minerals** the respondents persisted in their damaging activities despite warnings both prior to and

during their activities. Whereas that situation amounted to a wanton disregard of rights, the situation involving BOT does not, as BOT had no knowledge of Mr. Chitaroni's mining claim.

MTO Submission as to Costs

Ms. Engmann asked the tribunal to exercise its powers under sections 126 and 127 of the **Mining Act** and award the MTO costs against Mr. Chitaroni. The basis of this request is the fact that the MTO was not involved in the hearing on the merits, its involvement being only the contract for road widening with BOT. No evidence was adduced at the hearing as to the MTO involvement in the matter nor were any allegations made against it.

The reason for naming the MTO as a party, in Ms. Engmann's submission, was to obtain discovery of its documents. In this regard, it is seeking costs of $2,000.

Mr. Hamel submitted that none of the MTO witnesses were called by Mr. Chitaroni. He suggested that the proper award of costs should be according to the tariff of the Ontario Court (General Division) as it pertains to the summoning of witnesses.

Findings:

Liability of BOT Construction Ltd.

Under the terms of the Work Permit, BOT was allowed to dump material on the Old Ferguson Highway. Although the quantity was not specified, the dimensions of the permitted dumping are within the old right of way. BOT was further under a legal obligation, under the terms of its contract with the MTO, to abide by all legislation, including the **Mining Act**. The tribunal finds that BOT owed a duty of care to the MNR to ensure that dumping on Crown lands was within the permitted area and in permitted quantity. The tribunal further finds that BOT owed a duty to any holder of a mining claim in the vicinity of its road widening to avoid damage to mining claim boundary markings and mineral exploration workings.

The tribunal finds that BOT took inadequate steps, if any, to ensure that the location on the ground of the rock overburden dump was as was allowed by the Work Permit. The evidence of the MNR is that the selection of sites is determined by the applicant and relied upon by the MNR in granting a permit. In this regard, the MNR had no reason to believe that BOT really intended to dump material on a rock outcropping some distance from the Old Ferguson Highway. Apparently, the Old Ferguson Highway location met the requirements of both BOT and the MNR, being in close proximity to the road widening while being on land already set aside by the Crown for its own purposes.

As was illustrated in other dealings between BOT and the MNR, the location of permitted activities is absolute, within the limits of detection and limitation periods. BOT was

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no stranger to stop work orders on this project, nor to being required to stake a sand pit, when the MNR believed such an area was threatened.

In the course of Mr. Cooper's evidence, it became apparent that BOT relied on the MNR to tell it what was right and what was wrong in relation to its activities. This reliance was misplaced as it was under an obligation to comply with the Work Permit and abide by all legislation. The MNR is limited to six months for prosecutions under the **Provincial Offences Act**, R.S.O. 1990, c. P.33:

> **76.**--(1) A proceeding shall not be commenced after the expiration of any limitation period prescribed by or under any Act for the offence or, where no limitation period is prescribed, after six months after the date on which the offence was, or is alleged to have been, committed.

It is possible under the **Provincial Offences Act** to have activities to undetected for periods exceeding the six month limitation, so that they would go unprosecuted. However, such absence of prosecution is not necessarily indicative of compliance. BOT failed to comply with the requirements of the **Mining Act** that mineral exploration workings not be damaged, and in so doing, it liable to Mr. Chitaroni to pay compensation for damages sustained, within the meaning of subsection 79(3).

The tribunal finds that BOT was negligent in failing to comply with the location and area for dumping allowed within the Work Permit. The location of the actual dumping is on top of a mineral exploration working, within the meaning of subsection 79(3). The tribunal finds that BOT was the primary cause of the dumping which occurred on the mineral exploration showing.

Liability of Gino Chitaroni

Under the **Mining Act**, a prospector may stake a mining claim in the manner prescribed (section 38). Ontario Regulation 115/91 ("O.Reg. 115/91") provides for the size of a mining claim and manner of staking. Included are details on corner posts, line posts, blazing of perimeter lines as well as cutting of the underbrush.

The recorded holder of a mining claim must perform such annual units of assessment work as are prescribed (subsection 65(1) of the **Mining Act**). Ontario Regulation 116/91 ("O.Reg. 116/91") sets out the amount of assessment work required annually, delineates factors for attribution of work to groups of claims and itemizes different types of work.

Clause 50(1)(a) of the **Mining Act** sets out the rights of a mining claim holder after staking and after the recording of assessment work:

> **50.**--(1) The staking out or the filing of an application for or the recording of a mining claim, or the acquisition of any right or interest in a mining claim by any person or all or any of such acts, does not confer upon that person,
>
> (a) any right, title, interest or claim in or to the mining claim other than the right to proceed as is in this Act provided to perform the prescribed assessment work or to obtain a lease from the Crown and, prior to the performance, filing and approval of the first prescribed unit of assessment work, the person is merely a licensee of the Crown and after that period and until he or she obtains a lease the person is a tenant at will of the Crown in respect of the mining claim;

Mr. Chitaroni caused Mining Claim S-1118862 to be staked on his behalf on January 7, 1992 and the mining claim group was primarily staked in early 1992, with a number of claims added in 1994. Although he performed considerable assessment work specifically on this mining claim and the claim group in general, the Report[s] of Work Conducted After Recording Claim (Ex. 10, Tabs 20 through 23) (the "Work Report(s)") and abstracts (Ex. 10, Tab 9) show that the work was not approved and applied until the period commencing January 6, 1994 and ending July 12, 1994. Therefore, at the time of the dumping on the mineral exploration showing, the tribunal finds that Mr. Chitaroni was a licensee of the Crown.

The scheme by which the performance of assessment work can be described in the following manner. Based upon section 2 of O.Reg. 116/91, the recorded holder has two years after the recording of a mining claim to perform $400 worth of work on that claim and thereafter one year to perform each additional $400 worth of work. Work done on contiguous mining claims can also be applied (section 7 of O.Reg. 116/91). While there was no evidence presented on this point, $400 worth of work represents a relatively short period of time present on the mining claim. For example, if one accepts the old standard recognizing $22 per day for prospecting, which is no longer applicable under the current rules, a recorded holder would be required to spend less than 20 days working on the claim to meet the requirements of the legislation. Therefore, within a 24 month period after staking, and for 12 month periods thereafter, the recorded holder may be on or near a particular mining claim for relatively short periods of time.

Mining claims can of course be located in relatively remote locations. Similarly, prospectors need not live in the area in which their claims are located. All that is required of the recorded holder is that sufficient assessment work be performed to meet the requirements of the **Mining Act** and the regulation.

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There is no requirement in the **Mining Act** for a recorded holder to take steps to ensure the preservation of his or her staking or mineral exploration works. The evidence of staking and other works on the ground constitutes notice to others of the presence of a mining claim and gives rise to the rights of the recorded holder. A mining claim holder is not required to periodically view his or her mining claim periodically to ensure that there has been no interference with his or her rights. The tribunal finds that there is no duty to do so.

The time required to be spent on a mining claim performing assessment work in a given year is contrasted with the time actually spent on the mining claim group by Mr. Chitaroni. Work Permit 46-119-92 (Ex. 4, Tab 8) is limited to the stripping of two outcrops located on Mining Claim S-1118862 and extends from May 1, 1992 to September 1, 1992. By contrast, Work Permit (3)46-090-93 (Ex. 4, Tab 3) extends from May 1, 1993 to October 31, 1993, and involves work on Mining Claims S-1165507, 1179079, 1179177, 1118864, 1165505 and 1118498. The four Work Reports list dates of activities of June 1, 1992 to February 1, 1994, May 15, 1993 to December 30, 1993, September 15, 1993 to December 20, 1993 and February 1, 1994 to February 27, 1994, respectively. It is telling to note that on those mining claims originally staked in either January or February 1992, all have had sufficient assessment work applied as of 1994 to keep them in good standing until 1999. This represents a considerable amount of time spent on the mining claim group over the two year period commencing at the time of staking and recording.

In March 1993, Mr. Chitaroni became aware of BOT's presence on his mining claims. At this time, the tribunal finds, based upon the evidence of Mr. Chitaroni, that his mineral exploration showing was not in threat of obliteration. His attempts to contact BOT and conversations with the MNR represent attempts to execute a good business practice of taking advantage of activity in the area by obtaining dumped material to create better access. The tribunal finds that the leaving of the notes and conversation with the flag girl do not constitute notice of concern for the integrity of the mineral exploration showing. That these attempts were ineffective only speaks to the quality of Mr. Chitaroni's attempts to take advantage of the situation and better his business opportunities and they were clearly wanting in this regard. However, these attempts are found to have no bearing on the issue before the tribunal. Again, at this time there was no threat to the mineral exploration workings and Mr. Chitaroni was under no duty to advise BOT of his presence.

In June 1993, when Mr. Chitaroni returned to Mining Claim S-1118862, BOT had commenced dumping on the north end of the stripped area, measuring approximately 66 feet by 100 feet, the mineral exploration showing being at the south. The area of the showing was approximately five feet by five to ten feet.

In evidence, Mr. Chitaroni stated that he never dreamed that BOT would actually cover his showing. The tribunal must determine whether his attitude and absence of action constitute contributory negligence.

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The meaning of contributory negligence is discussed in Fridman, **The Law of Torts in Canada** (1989), vol. 1, at pages 372 and 373:

> . . . But contributory negligence does not depend on any duty owed by the injured party to the party sued. What has to be proved by the defendant on whom rests the onus of establishing contributory negligence is that the injured party did not act in his own interest by taking reasonable care of himself, and so contributed by his want of care to his own injury . . . Whether the plaintiff has been negligent in this way will depend on his prior knowledge of the danger he is incurring by acting or omitting to act in a certain way[1001] . . . Such prior knowledge, however, does not inevitably lead to a finding of contributory negligence . . . Much depends on the plaintiff's foresight of the consequences of his behaviour. To be guilty of contributory negligence, the plaintiff must foresee harm to himself even though he owes no duty to himself . . . Contributory negligence, equally with negligence, arises from a failure to take such care as the circumstances require . . . All the elements of actionable negligence must be established save only the requirement of a duty owed by the party alleged to be guilty of contributory negligence (although, as pointed out, such a duty might be owed, when it may be easier to prove contributory negligence on the part of the plaintiff) . . . Hence, a momentary lapse is not sufficient to prove contributory negligence. Nor is a want of attention. There has to be a lack of reasonable care that was demanded by the situation . . .

1001 *Leischner v. West Kootenay Power & Light Co. Ltd.* (1986), 24 D.L.R. (4th) 641 at 652 (B.C.C.A.), citing *Logan v. Asphodel*, [1938] O.W.N. 215 (H.C.); *Keech v. Smith's Falls* (1907), 15 O.L.R. 300 (Div. Ct.); *Gordon v. City of Belleville* (1887), 15 O.R. 26 (Q.B.); *Copeland v. Village of Blenheim* (1885), 9 O.R. 19 (C.P.).

In **Leischner v. West Kootenay Power & Light Co. Ltd.** (1986), 24 D.L.R. (4th) 641, (B.C.C.A.), the Court states at page 652:

> Prior knowledge of danger does not inevitably lead to a finding of contributory negligence: See *Logan v. Township of*

Asphodel, [1938] 3 D.L.R. 748*n*, [1938] O.W.N. 215 at p. 218, as follows:

> Mere forgetfulness or want of attention or failure to look for some source of danger that is not present in the mind of the person injured, does not necessarily defeat his right to recover even though he had prior knowledge of the danger: Keech v. Smith's Falls (1907), 15 O.L.R. 300.

See also *Keech v. Smith's Falls* (1907), 15 O.L.R. 300 at p. 301, as follows:

> *Gordon v. City of Belleville* (1887), 15 O.R. 26, and *Copeland v. Village of Blenheim* (1885), 9 O.R. 19, shew that mere forgetfulness, or want of attention, or failure to look for some source of danger that is not present to the mind of the person injured, does not necessarily defeat his right to recover.

There is a distinction between want of attention and negligence: see judgement of Lord Wright in *Caswell v. Powell Duffryn Associated Collieries Ltd.*, [1940] A.C. 152 at pp. 175-6:

> Negligence is the breach of that duty to take care, which the law requires, either in regard to another's person or his property, or where contributory negligence is in question, of the man's own person or property. The degree of want of care which constitutes negligence must vary with the circumstances. What that degree is, is a question for the jury or the Court in lieu of a jury. It is not a matter of uniform standard. It may vary according to the circumstances from man to man, from place to place, from time to time. It may vary even in the case of the same man. Thus a surgeon doing an emergency operation on a cottage table with the light of a candle might not properly be held guilty of negligence in respect of an act or omission which would be negligence if he were performing the same operation with all the advantages of the serene atmosphere of his operating theatre; the same holds good of the workman. It must be a question of degree. *The jury have to draw the line where mere thoughtlessness or inadvertence or forgetfulness ceases and where negligence begins.*

(Emphasis added.)

In **Gordon v. The City of Belleville** (1887) 15 O.R. 26 at page 28, Armour, C.J. states:

> The question how far knowledge of the neglect of duty causing the injury is contributory negligence, has been much discussed in the Courts in the United States with varying results in the various States; but the general result seems to be that knowledge is not *per se* contributory negligence.

And in **Copeland v. Corporation of Blenheim**, (1885) 9 O.R. 19, at page 24, Rose, J. states:

> It must be remembered that the onus is on the defendants to satisfy the jury that the plaintiff was guilty of contributory negligence: that it is not on the plaintiff to shew that he was not so guilty.

The case of **Caswell v. Powell Duffryn Associated Collieries Ltd.**, [1940] A.C. 152 (H.L.) ("Caswell") was provided by Mr. Dacquisto where Lord Wright states at page 172:

> If the defendants' negligence or breach of duty is established as causing the death, the onus is on the defendants to establish that the plaintiff's contributory negligence was a substantial or material co-operating cause.

and at page 174 Lord Wright adopts the test established by Lawrence J. in **Flower v. Ebbw Vale Steel, Iron and Coal Co., Ltd.** [1934] 2 K.B. 132, at pages 139 and 140, which is the standard to help a judge decide whether or not there is negligence in such instances:

> . . . The principle, he said, did not demand of "a workman in a factory a higher degree of care than an ordinary prudent workman in a factory would show." He proceeded: "The question is then whether the plaintiff by the exercise of that degree of care which an ordinary prudent workman would have shown in the circumstances could have avoided the result of the defendants' breach of duty."

Lord Porter states in **Caswell** at page 185 and 186:

> . . . Strictly speaking the phrase "contributory negligence" is not a very happy method of expressing an act of the employee which may relieve the employer from liability. Probably the phrase "negligence materially contributing to the injury" would be more accurate, but if the word "contributory" be regarded as expressing something which is a direct cause of the accident, either phrase is accurate enough and the less accurate phrase is, I think, sanctioned by long usage.

The question which the tribunal must determine is whether Mr. Chitaroni failed to take reasonable care to act in his own interests to preserve his mineral exploration showing which materially contributed to the burial of that showing. The relevant time frames for this question do not, as advanced by Mr. Dacquisto, commencing on March 11, 1993 but rather in the period commencing in June, 1993 and ending on August 26, 1993.

While there is no duty upon Mr. Chitaroni to take steps to protect his mining claims beyond their staking and recording, do the facts of this case, as they existed commencing in June 1993 change the situation sufficiently to create in him an obligation or duty to protect himself?

At all material times, the tribunal finds that Mr. Chitaroni did not anticipate that his showing would be covered. The distance across the stripped area on the outcrop to his showing was still considerable when he observed the dumping in June 1993. It was reasonable for him to believe that the MNR would not grant a permit for dumping on his showing, owing to the fact that the MNR had in the previous year given him a permit for excavation of the showing. Although there is evidence that Mr. Chitaroni felt intimidated at the thought of approaching BOT again, and that the MNR had earlier indicated that he must work matters out with BOT, there is no indication that Mr. Chitaroni had the foreknowledge that the dumping would occur in the magnitude or at the location that it did. The tribunal finds that any perceived intimidation by BOT on the part of Mr. Chitaroni did not materially cause the dumping.

It is clear that Mr. Chitaroni did not foresee the harm which ultimately occurred. The tribunal finds that this is not unreasonable in the circumstances as it would be difficult to imagine circumstances in which the MNR failed to adhere either to the location or to size of its permitted dumping, that the MNR would grant a permit for dumping over an area for which a work permit for mineral exploration had been issued just one year previously and finally, to imagine that the MNR would not monitor the size and location of the permitted dumping. The tribunal finds that Mr. Chitaroni's actions in this case do not constitute contributory negligence, not being the material cause of the dumping.

Mitigation

Similarly, the evidence does not uphold a finding that Mr. Chitaroni failed to mitigate his loss. It is irrelevant to this issue that he notified BOT by way of commencing an application. The fact is that, once the dumping occurred, the only thing that could have been done to mitigate the situation rested with BOT, namely that it could have used its equipment on the site to move the rock overburden dump to the permitted location. Instead, it called in its insurance company, Coulson Insurance, and opposed the application. Clearly, nothing in these steps was in the control of Mr. Chitaroni, so that any steps to mitigate the situation were unavailable to him.

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Liability of the MNR

The approach suggested by Ms. Engmann regarding the question of proximity has been endorsed by the Supreme Court of Canada in **City of Kamloops v. Nielsen**, [1984] 2 S.C.R. 2, Cory J. in **Just v. British Columbia**, [1989] 2 S.C.R. 1228 states at page 1235:

> . . . Nevertheless it is a sound approach to first determine if there is a duty of care owed by a defendant to the plaintiff in any case where negligent misconduct has been alleged against a government agency.

Therefore, the first question to be determined is whether the MNR, whose responsibility it is to issue work permits under clause 14(1)(a) of the **Public Lands Act**, owes a duty of care and if it does, to whom.

The MNR administers vast tracts of Crown lands. In doing so, it necessarily must have information regarding resources, such as rivers, lakes, watercourses, the existence of hazards such as forest fires and records of past work permits.

It is inconceivable that the MNR would issue a work permit for an area on which there is a conflicting use or which is unsuitable for the proposed dumping. At the very least, the MNR would have to ensure in issuing a work permit for dumping that the location allowed is not on top of an area for which a previously issued work permit exists. The tribunal finds that, in exercising its statutory power of discretion, the MNR owes a duty of care to applicants for work permits as well as co-existing users of Crown lands to take reasonable steps to ensure that the location for the proposed use does not put the applicant at risk of interfering with natural resources or these other uses.

The granting of the Work Permit to BOT is not an issue in this application. The tribunal must determine whether the decision of how to proceed to deal with co-existing uses is a policy or an operational decision.

Mason J. of the Australian High Court in **Sutherland Shire Council v. Heyman** (1985), 60 A.L.R. 1, was quoted by Cory J. in **Just v. British Columbia** [1989] 2 S.C.R. 1228, at page 1241:

> . . . The standard of negligence applied by the courts in determining whether a duty of care has been breached cannot be applied to a policy decision, but it can be applied to operational decisions. Accordingly, it is possible that a duty of care may exist in relation to discretionary considerations which stand outside the policy category in the division between policy factors on the one hand and operational factors on the other.

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and at page 1242:

> The distinction between policy and operational factors in not easy to formulate, but the dividing line between them will be observed if we recognize that a public authority is under no duty of care in relation to decisions which involve or are dictated by financial, economic, social or political factors or constraints. . . . But it may be otherwise when the courts are called upon to apply a standard of care to action or inaction that is merely the product of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness.

Cory J. goes on to state at page 1242:

> The decisions in *Anns v. Merton London Borough Council* and *City of Kamloops v. Nielsen, supra*, indicate that a government agency in reaching a decision pertaining to inspection must act in a reasonable manner which constitutes a *bona fide* exercise of discretion. To do so they must specifically consider whether to inspect and if so, the system of inspection must be a reasonable one in all the circumstances.

It is evident that the MNR engaged in the practice of warning of co-existing uses on Crown lands, as evidenced by letters found at Exhibit 10, Tabs 14 through 16 and 19, involving the Scandia Inn, Grant Forest Products Corp., the Township of Temagami and the Temiskaming Nordic Ski Club. The tribunal finds that this practice constitutes a policy decision on the part of the MNR. Based upon the decision in **Just v. British Columbia**, the tribunal must determine whether the MNR acted in a reasonable manner constituting a **bona fide** exercise of its discretion in advising of co-existing uses on Crown lands. If the MNR did not act reasonable, this would support a finding that it was negligent.

The road widening undertaken by BOT straddles Mr. Chitaroni's mining claims for a distance. Ms. Engmann submitted that evidence of the past and present practice of the MNR regarding conflicts was such that it would have issued a warning if it were aware of a potential conflict.

The tribunal finds that the presence of the mining claim group under the area of the road widening is sufficiently proximate that the MNR should have warned BOT, as was its practice in other situations, of the existence of the mining claims and that it failed to do so. The evidence is persuasive that the MNR failed to give notice to BOT not because it would be prohibitive to do so, but that this district office was relatively inexperienced in dealing with mining claims, owing to the land caution. In this regard, it is the negligent means by which the MNR executed its policy decision of when to notify which is determinative in this case. Indeed, Mr. Gilbert testified that, had he been involved with the committee at the relevant time, he would

have ensured that BOT was aware of the mining claims. Therefore, the tribunal finds that the system of advising prospective work permit holders of other uses and potential conflict was reasonable in the circumstances but carried out negligently.

In addition, from the evidence, it was believed that Mr. Chitaroni's mineral exploration workings were sufficiently remote that the problem which occurred was not foreseen. It is also clear that assumptions were made by the MNR that BOT would limit its dumping to the permitted area and by BOT that the MNR would issue a stop work order if there were a problem. However, at the time of the issuance of the Work Permit, the eventuality of the wrongful dumping was not foreseen by the MNR. Had BOT been advised of the existence of the mining claim group in general, it would have been in a position to inform itself of what was on the ground which had to be avoided. Therefore, it is not the failure to advise of the mineral exploration workings, but of the existence of the mining claim group in general, which constitutes the negligent action by the MNR.

Moving to the matter of inspection in the course of the road construction, the quote from **Just v. British Columbia** by Cory J. is equally applicable to the tribunal's determination. Based upon the decisions in **Just v. British Columbia**, **Anns v. Merton London Borough Council** and **City of Kamloops v. Nielsen** the inspection must be carried out in a reasonable manner through a **bona fide** use of discretion.

There is no question that the MNR is not required to inspect activities related to its work permits. Cory J. states at page 1243 of **Just v. British Columbia**:

> . . . Thus a decision either not to inspect at all or to reduce the number of inspections may be an unassailable policy decision. This is so provided it constitutes a reasonable exercise of *bona fide* discretion based, for example, upon the availability of funds.
>
> On the other hand, if a decision is made to inspect lighthouse facilities the system of inspection must be reasonable and they must be made properly. See *Indian Towing Co.*, 350 U.S. 61 (1955). Thus once the policy decision to inspect has been made, the Court may review the scheme of inspection to ensure it is reasonable and has been reasonably carried out in light of all the circumstances, including the availability of funds, to determine whether the government agency has met the requisite standard of care.

Subsection 5(1) of the **Public Lands Act** allows the Minister of Natural Resources to ". . . appoint such officers to carry out and enforce this Act . . ." Under clause 4(1)(a) of Ontario Regulation 795/90, an officer may cancel a work permit where the holder has

contravened the work permit or failed to comply with its terms and conditions. The power to monitor and inspect to determine compliance is an implied power granted by clause 28(b) of the **Interpretation Act**, R.S.O. 1990, c. I.11 whereby:

> **28.** In every Act, unless the contrary intention appears,
>
> (b) where the power is given to a person, officer or functionary to do or to enforce the doing of an act or thing, all such powers shall be understood to be also given as are necessary to enable the person, officer or functionary to do or enforce the doing of the act or thing;

Therefore, the power to monitor and inspect BOT's progress on the road widening is a statutory power. Generally, such powers are discretionary.

At page 748 of **Laurentide Motels v. Beauport (City)** [1989] 1 S.C.R. L'Heureux-Dubé J. refers to an article by Professor Stephen Todd ("The Negligence Liability of Public Authorities: Divergence in the Common Law" (1986), 102 L.Q.R. 370) where he states at pages 396 and 397, in analyzing the public/private aspects of **Anns v. Merton London Borough Council** and **City of Kamloops v. Nielsen**:

> Where, however, the local authority acts pursuant to a statutory power, it is not the statute which is the source of any duty. The point is that the authority may be in a position where a duty arises at common law. The statute provides the authority or reason for acting but no more than that. The source of the duty is in familiar common law principles of foreseeability, proximity, reliance and the like. Any supposed purpose of the statute should not debar recovery of damage which is of a foreseeable kind and is not otherwise irrecoverable for some good reason of policy.

The decision of whether monitoring will take place and the extent of monitoring is found by the tribunal to be a policy decision which does not attract liability. However, the evidence of witnesses on behalf of the MNR is that a work permit must be posted at the job site, in this case at BOT's office trailer. In its implementation of monitoring and inspection of work sites, MNR employees do not ensure that they have the work permits and attached maps in hand to ensure compliance. Mr. Gilbert confirmed in evidence that, with the Work Permit in hand, it would have been possible to see that BOT was outside of its permitted area and dumping in excess of the size allowed. Newcombe J. held in **The Acadia Coal Company, Limited v. MacNeil** [1927] S.C.R. 497 at page 502, "I do not think, however, that conduct, which is

negligent, ceases to be so, if, or because, it is ordinary and usual". Furthermore, Spence J. states in **Hodgins v. Hydro-Electric Commission of the Township of Nepean** [1976] 2 S.C.R. 501 at page 515:

> . . . *Prosser on Torts*, in the 4th ed. 1971, deals with that matter on pp. 167-8:
>
> > Much the better view, therefore, is that of the great majority of the cases, that every custom is not conclusive merely because it is a custom, and that it must meet the challenge of "learned reason", and be given only the evidentiary weight which the situation deserves. It follows that where common knowledge and ordinary judgment will recognize unreasonable danger, what everyone does may be found to be negligent;

The tribunal finds that the operational aspect of monitoring and carrying out inspections by this district office of the MNR, without having the work permit and maps in hand is negligent and precludes its ability to see and determine whether there is a contravention or failure to comply with its terms and conditions.

Ms. Engmann did not make submissions on the issue of whether the MNR could be considered a person for purposes of subsection 79(3) of the **Mining Act**, nor could the tribunal find any legislation which precluded the liability of the Crown in situations such as the current application. The tribunal finds it will adopt the argument of Mr. Hamel in this regard, namely, that pursuant to section 10 of the **Interpretation Act**, subsection 79(3) of the **Mining Act** should be given a "large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit". The tribunal finds that the intent of subsection 79(3) of the **Act** is to provide protection to mining claim holders against any and all mining claim works being damaged by others. This includes the negligence of the Crown.

Interpretation of Indemnity Provisions and Apportionment of Liability

The tribunal finds that the interpretation of the indemnity provisions of the Work Permit is a matter between the MNR and BOT and as such, the tribunal does not have the jurisdiction to determine the respective rights raised in argument. This is an application by Mr. Chitaroni for damages and the tribunal is limited to determining whether BOT and the MNR are liable in negligence.

Section 1 of the **Negligence Act** is as follows:

> **1.** Where damages have been caused or contributed to by the fault or neglect of two or more persons, the court shall determine

> the degree in which each of such persons is at fault or negligent, and, where two or more persons are found at fault or negligent, they are jointly and severally liable to the person suffering loss or damage for such fault or negligence, but as between themselves, in the absence of any contract express or implied, each is liable to make contribution and indemnify each other in the degree in which they are respectively found to be at fault or negligent.

The tribunal has found that BOT and the MNR are at fault for having caused the damage suffered to the mineral exploration workings of Mr. Chitaroni. Therefore, according to the **Negligence Act**, BOT and the MNR are jointly and severally liable to Mr. Chitaroni. The actions of each is the primary cause of the damage, BOT in dumping outside its permitted area and the MNR for failing to warn BOT of the existence of the mining claims generally and for its negligent inspection of the dump site. Based upon the facts of this case, the tribunal finds that each is 50 percent liable to Mr. Chitaroni for the damage caused by their respective negligence.

What is the Nature of Damages Contemplated by Subsection 79(3) of the **Mining Act**?

The issue of the nature of damages contemplated is interesting in that in past cases involving subsection 79(2) of the **Act**, damages to the surface rights, and the **Callisto Minerals** case have not dealt with the loss of ability to continue with an exploration program. While it may be relatively straight forward to reconstruct a claim post, it must be determined whether the legislation intends to restore the mining claim holder when his mineral exploration working has not only been damaged, but in fact has been obliterated unless expensive excavation and restoration is included in the compensation or whether compensation is limited to the money expended by the holder on the mineral exploration working.

The relevant words of subsection 79(3) of the **Act** are "Every person who damages . . . shall compensate the holder . . . for damages sustained".

In E.A. Driedger, **Construction of Statutes**, 2nd ed. (Toronto: Butterworths, 1983) Chapter 2 at page 35 outlines the Purposive Analysis, which Driedger indicates is favoured by modern courts and is reproduced:

> ***Propositions comprising purposive analysis.*** The purposive approach to statutory interpretation may be summarized by the following propositions.
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> (1) All legislation is presumed to have a purpose. It is possible for courts to discover, or to adequately reconstruct, this purpose through interpretation.

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> (2) Legislative purpose should be taken into account in every case and at every stage of interpretation, including the determination of ordinary meaning.
>
> (3) Other things being equal, interpretations that are consistent with or promote legislative purpose should be preferred and interpretations that defeat or undermine legislative purpose should be avoided.
>
> (4) The ordinary meaning of a provision may be rejected in favour of an interpretation more consistent with the purpose if the preferred interpretation is one the words are capable of bearing.

Subsection 79(3) of the **Mining Act** was introduced in the legislation, effective June 3, 1991, to protect mining claim holders against damage to mining claims. While the **noscitur a sociis** and **ejusdem generis** rules of interpretation may serve to restrict the meaning of the words in a phrase, in this case there appears to be no such issue of restriction. It is clear that the damage must be to whatever workings are located within a mining claim or whatever means are used to circumscribe the boundaries. There has been no suggestion that Mr. Chitaroni's mineral exploration showing is not a mineral exploration working within the meaning of the subsection.

The tribunal is unable to make the leap suggested by Mr. Dacquisto that "damages", which refers back to the boundary markings or mineral exploration workings, limited to physical damages, must be limited to the amount spent by Mr. Chitaroni on stripping a large area, trenching and washing a smaller area, and the cost of assays conducted on samples taken. The physical damages sustained in this case are found to be the covering and undoubted physical damage to the surface area of the mineral exploration showing caused by the rock overburden dump. The damage suffered is that he cannot find his showing. Therefore, the tribunal finds that the meaning of compensation in the **Act** entitles him to have his mineral exploration showing restored to its state prior to the rock overburden dump being placed on top of it.

There were also estimates given of drilling through the rock overburden pile. The tribunal finds that this is a less desirable means of attempting to restore Mr. Chitaroni to his prior position as the probability of intersecting with the showing is quite low on any given attempt. Also, drilling cost estimates given at the hearing were such that they could easily match or exceed the cost of excavating the pile while rendering less useful results. There is no advantage, either in dollars or in information, to accept that this would be a practical alternative.

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Damages

The evidence of quantum of material in this case is found to be contradictory and not entirely helpful to the tribunal in determining the cost for removal. The tribunal will review the estimates.

Mr. Cooper stated that the rock overburden pile was approximately 85 percent dirt and gravel and 15 percent rock. The cost of shifting the material is estimated at $1.50 per cubic yard. The total cost is estimated at between $12,000 and $15,000. This can be broken down into a range of 8,000 to 10,000 cubic metres. Mr. Cooper did not estimate the number of cubic metres directly for the tribunal, so that these figures represent the logical conclusion from his estimates.

Pedersen Construction Inc. (Ex. 4, Tab 23) estimates the removal of 52,000 cubic metres of rock to within 1.5 kilometres of the current site, at a cost of $5.65 per cubic metre, for a total of $293,800.

Art Beecham, a geologist, made an estimate of the rock overburden pile to obtain a rough estimate of what he has called the rock pile (Ex. 4, Tab 24). This was done by surveying the pile. Mr. Beecham was not called as a witness, and therefore, there was no opportunity to challenge his assumption that the pile was primarily rock. It is apparent from his comments in the estimate that the pile was covered with deep snow, so that it is possible that questioning would not be helpful. He estimates the rock overburden pile on Mining Claim S-1118862 to be 50,500 cubic metres. This translates, in his estimation, to 88,000 tons or 96,800 short tonnes.

J.L. Tindale of J.L. Tindale & Associates Inc. bases his estimates (Ex. 4, Tab 25) on the tonnage estimates of Mr. Beecham. He indicates that the material is coarse and "will have to be moved with large loaders and heavy duty off highway trucks. Alternatively it will be necessary to drill and blast much of the material in order to move it with conventional dump trucks". The estimate is based upon moving the material a distance of ten kilometres. Approximately 100,000 tons of material moved in loads of 40 tons costing $50 per load, would require 2,500 loads at a total cost of $125,000.

James Lathem Excavating Limited ("James Lathem") gives estimates (Ex. 10, Tab 8) for moving two rock piles, the southern of which had been estimated by Mr. Beecham as being 1,150 cubic metres, 2,000 tons or 2,200 short tonnes. This estimate includes several elements not considered in the others, such as clearing the new dump site of trees, building a road for access to the southern pile, removal of larger rocks using off road trucks if possible and if not

blasting, and restripping and rewashing of an area 100 feet by 50 feet. The table of costs is reproduced:

Total Cost of Project

To prepare new dumpsite, excavate both piles, construct road to pile number 2, blast oversized rock and mechanically strip area to bedrock.

51,624 cubic metres to excavate	@ $6.60/cu.met.	=$340,718.40
51,624 cubic metres for oversized	@ $1.85/cu.met.	= 95,504.40
Construct Road		= 5,900.00
Prepare New Site		= 6,500.00
Bare to Bedrock		= 3,000.00
	Total	$451,622.80

All necessary permits are extra and taxes are not included.

The tribunal is faced with estimates ranging from $12,000 to $451,622.80 to restore Mr. Chitaroni's mineral exploration showing. These estimates are based upon factors for which there is inadequate or conflicting evidence, namely the composition of the material and whether it would be necessary to move any material by truck.

The tribunal finds that there are 50,500 cubic metres of material on the northern rock dump, relying on the written evidence of Art Beecham which is the most thorough analysis available. Based upon the evidence at the hearing, the tribunal finds that it will order that the material dumped on Mining Claim S-1118862 must be moved and the stripped area and showing be restored. There was no evidence adduced as to the importance of the area of the southern dump to Mr. Chitaroni and therefore, the tribunal finds that it will not order that this material be excavated.

The tribunal is persuaded by the evidence of Mr. Cooper that at least some of the material can be pushed off of its current location. In fact, an ideal dump site exists in close proximity to the current location, namely the approved location on the Old Ferguson Highway right of way. The MNR is encouraged to expand the permitted size of this dump site to allow all of the material to be dumped on the right of way in order to reduce the cost of the excavation by avoiding the necessity of trucking to another location. However, whether this is possible is not known at the time of the making of this order.

The tribunal finds that it accepts the evidence of Mr. Cooper that much of the dumped material is composed of gravel, sand and small rock. However, it cannot discount the evidence of Mr. Chitaroni and Mr. Robinson who also are familiar with the dump and

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investigated the matter of diamond drilling. Therefore, the tribunal finds that it will add to Mr. Cooper's estimate of 15 percent rock and finds that large rock constitutes 20 percent of the rock overburden dump. Based upon Mr. Cooper's estimate that pushing such material would cost $1.50 per cubic metre, 80 percent of the pile would be 40,400 cubic metres, for a total of $60,600.

The tribunal finds that it will allow a total of $3.35 per cubic metre for treatment of the large rock in the pile, be it by blasting, based upon the estimate of James Lathem Excavating Limited of $1.85 per cubic metre for oversized and $1.50 per cubic metre for moving as estimated by Mr. Cooper. 10,100 cubic metres at a cost of $3.35 per cubic metre would be $33,835.

The tribunal finds that, based upon moving the material to the Old Ferguson Highway, there is no need at this time to construct a new road.

The only evidence concerning the preparation of the new site is that of James Lathem. There was no evidence as to whether this would be necessary or whether it is included in the cost estimates of pushing the material, as given by Mr. Cooper. Therefore, the tribunal finds that it will make no order in this regard at this time.

Mr. Chitaroni gave evidence that the stripped area and showing would have to be restored. Again, the only evidence in this regard is that of James Lathem, being $3,000, comparable to what Mr. Chitaroni stated that he spent in the first instance when stripping and trenching Mining Claim S-1118862. Therefore, the tribunal finds that it will allow $3,000 in restoration costs in this regard.

Therefore, the total costs allowed on this application at this time are $60,600 plus $33,835 plus $3,000 which equals $97,435.

Subsection 79(7) of the **Mining Act** states:

> **79.**--(7) The Commissioner, on notice to all interested parties and for good cause shown, on such terms as seem just, may by subsequent order or award at any time change, supplement, alter, vary or rescind any order made under this section.

This subsection has historically existed to apply to compensation for surface rights owners, where mining activities are ongoing and the ultimate total of costs is not known at the time of the application. However, it is drafted to apply to subsection 79(3) of the **Mining Act** and therefore, the tribunal finds that it is applicable to this type of situation. Essentially, Mr. Chitaroni is seeking specific performance of restoration of his mineral exploration showing, which the tribunal does not have the power to order directly. Also, as can be seen from the estimates given, there

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exists the concern of creating a windfall situation of ordering more compensation than may be necessary for the restoration of the mineral exploration showing. This is clearly not the object or intent of the subsection.

Based upon its jurisdiction, the tribunal has awarded that Mr. Chitaroni be compensated $97,435 in order that his mineral exploration showing be restored. However, the tribunal reserves the right given under subsection 79(7) of the **Mining Act** to vary this award to allow adequate compensation for removal of all of the rock overburden dump from its current location on Mining Claim S-1118862. Although this list is not conclusive, factors which may impact include whether all of the materials can be pushed onto the Old Ferguson Highway, whether it will be necessary to truck loads elsewhere, whether costs will be incurred in clearing the new site, and whether upon excavation of the dump it becomes apparent that greater than 20 percent of the material is composed of large boulders which require blasting.

Environmental Damages

The issue of the environmental liability of the rock overburden is best addressed through its complete removal. Clearly, any potential liability was not caused through Mr. Chitaroni's activities and in restoring him to his original position, no potential environmental liability should remain.

By moving the rock overburden to the Old Ferguson Highway right of way, the liability for the pile would be moved to an area the rights of which rest with the MTO and the Crown. This is as it should be, given the activity which gave rise to the creation of the pile.

Should ownership of the rock overburden become an issue at such time as a lease may be applied for, the MNDM is strongly encouraged by this tribunal, based upon fairness, to exclude that portion of the surface rights of the mining lands upon which this and other rock overburden piles may be ultimately located.

Punitive Damages

The tribunal finds that no case has been made for the award of punitive damages in this case. The facts do not lend themselves to such a finding. BOT's dumping did not occur in spite of knowing of the mineral exploration showing or after having been given warnings. Although BOT did proceed negligently in violation of its Work Permit, it was at all times up until August 26, 1993 ignorant of the damage it had done. There is nothing in its conduct which could be construed as "harsh, vindictive, reprehensible and malicious" as was set out in the **Vorvis** case presented by Mr. Dacquisto.

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MTO Submission as to Costs

The tribunal is in agreement with the submissions of Ms. Engmann as to the matter of costs of the MTO. After Mr. Chitaroni's case was presented, it became apparent that no cause of action against the MTO had been made and that portion of the matter was dismissed. Nonetheless, the MTO was required to respond to the application, be represented at the hearing up until the time of dismissal, counsel was required to prepare for the hearing, to brief witnesses and witnesses were required to attend. The tribunal finds that it cannot agree with the submission of Mr. Hamel that costs should be limited to those associated with the attendance of witnesses at the hearing.

Based upon the finding that the MTO was improperly named as a party and was forced in the circumstances to be represented and file written submissions, the tribunal finds that it will award costs against Mr. Chitaroni in favour of the MTO in the amount of $2,000.

Conclusions:

The application is allowed against the respondents, BOT and the MNR, each having been found to be jointly and severally liable for 50 percent of the compensation awarded. Compensation for damages is awarded in the amount of $97,435, subject to variation which may be allowed upon application of the parties pursuant to subsection 79(7) of the **Mining Act**. There is no award for punitive damages or for environmental damages. The application against the MTO is dismissed for lack of cause of action with costs in the amount of $2,000 awarded against Mr. Chitaroni.