File No. MA 022-09

M. Orr	)	Friday, the 24th day
Deputy Mining and Lands Commissioner	)	of September, 2010.

THE MINING ACT

IN THE MATTER OF

An application under subsections 51(4), 51(6) and 80(2) of the **Mining Act** in respect of certain portions of the surface rights of Mining Claims TB-1239573 and 1239574, situate in the Township of Ashmore, in the Thunder Bay Mining Division, recorded in the name of Michael Malouf, (hereinafter referred to as the Malouf Mining Claims");

AND IN THE MATTER OF

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

AND IN THE MATTER OF

An application for a direction from the tribunal to the Minister of Northern Development and Mines and Forestry that the surface rights over particular portions of the Malouf Mining Claims be removed from staking pursuant to section 35 of the **Mining Act**, as being required for the use of the Crown, as contemplated by subsection 51(6) of the **Mining Act**.

B E T W E E N:

MINISTER OF NATURAL RESOURCES &
MUNICIPALITY OF GREENSTONE

Applicants

- and -

MICHAEL MALOUF

Respondent

O R D E R

1. **IT IS ORDERED** that this application be and is hereby granted.

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2. **IT IS FURTHER ORDERED** that the Respondent, Mr. Michael Malouf and his assigns shall retain and preserve all such rights to access and work his mining rights pursuant to the **Mining Act**, **AND FURTHER t**he Applicants, the Minister of Natural Resources and the Municipality of Greenstone shall allow the aforementioned Respondent, Mr. Michael Malouf and his assigns to conduct and perform all phases of assessment work, exploration and extraction permitted by the **Mining Act** and shall allow access to the aforementioned Respondent, Mr. Michael Malouf and his assigns for the purposes of conducting and performing such activities as are permitted by the **Mining Act**.

3. **IT IS FURTHER ORDERED** that the Applicant Municipality shall grant an easement to the Respondent and that the Respondent shall pay for the cost of the survey for such easement as directed and described below.

4. **IT IS DIRECTED** that the easement to be surveyed will consist of that part of Access Road "A" (as shown in Schedule "A" attached hereto and forming part of this Order) that begins at Highway 11 and proceeds north crossing patented mining claim TB-10700 and then breaks off to the west to cross the Malouf Mining Claim TB-1239574, terminating at the boundary of that mining claim and the Koroscil patented mining claim TB-12738 **AND FURTHER** the easement should include that part of Access Road "B" (as shown in Schedule "B" attached hereto and forming part of this Order) that cuts across the landfill site in a northeasterly direction until it touches the boundary of patented mining claim TB-12737. Upon completion of the Applicant's land acquisition needs along the northwest boundary of the landfill site (Koroscil TB-12737), the easement will proceed through the buffer created by any such acquisition and ending at the outer boundary of the buffer zone acquired through disposition of surface rights of Malouf Mining Claim TB-1239573.

5. **IT IS FURTHER ORDERED** that no costs shall be payable by any party to this application.

THIS TRIBUNAL FURTHER ADVISES that, pursuant to subsection 129(4) of the **Mining Act**, R.S.O. 1990, c. M. 14, as amended, a copy of this Order shall be forwarded to the Provincial Mining Recorder **WHO IS HEREBY DIRECTED** to amend the records in the Provincial Recording Office as necessary and in accordance with the aforementioned subsection 129(4).

Reasons for this Order are attached.

DATED this 24th day of September, 2010.

Original signed by M. Orr

M. Orr
DEPUTY MINING AND LANDS COMMISSIONER

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B E T W E E N:

MINISTER OF NATURAL RESOURCES &
MUNICIPALITY OF GREENSTONE

Applicants

- and -

MICHAEL MALOUF

Respondent

REASONS

Appearances:

Applicant Municipality of Greenstone:	Mr. Vance Czerwinsky, Director of Public Services
Respondent:	Mr. Michael Malouf

The tribunal notes that while a senior technician was present from the Ministry of Natural Resources and while the Ministry was named in the matter, the Ministry itself did not participate, nor was there any need for them to do so.

Introduction

This matter focuses primarily on a history of opposing needs regarding the use of certain surface rights. On one side is the owner of various unpatented mining claims (as well as patented mining claims) with a need to access those claims and on the other is a municipality attempting to work within regulatory constraints to manage a landfill site. The owner of the claims (and the Respondent in this matter), has refused to give his consent to the disposition of surface rights over two of his unpatented mining claims sought by the Municipality (a co-applicant in this matter) under the **Public Lands Act**, R.S.O., 1990, c. P.43, as amended. The Municipality has found itself at odds with regulatory requirements regarding buffer zones for its landfill site, which is still in use. It needs to acquire abutting surface rights in order to address certain environmental buffering needs. The Respondent claims that a long history of dealings with the Municipality has made it necessary for him to ask for something more than just a letter acknowledging his right to access minerals below the surface.

Issues

Should an application for the disposition of certain surface rights be granted? Should the Respondent's request for easements delineating access roads be granted?

Overview of Facts Not in Dispute

The referral of an application for the disposition of public lands (under the **Public Lands Act**) was made by the Minister of Northern Development and Mines to the Mining and Lands Commissioner as the lands in question had been staked and the holder of the mining claims had refused to consent to the disposition of the surface rights.

Greenstone's landfill site dates back to the 1970's. According to the materials filed by the Municipality, a Land Use Permit was issued by the Ministry of Natural Resources in 1973 and revised in 1977 (HM 215). An application for a Certificate of Approval (to operate the site for waste disposal) was submitted to the Ministry of the Environment in 1972. It may be that approval for a waste disposal site was given in the late 1970's. In any event, the landfill site's existence pre-dates the Respondent's staking activities for the affected mining claims being (TB-1239573 and TB-1239574) which were staked in June of 2002. In both cases, there were certain reservations including sand, gravel and peat.

Both the landfill site and the Respondent's mining claims lie north of Highway No. 11 in the Municipality of Greenstone. The landfill site is actually called the Geraldton Landfill Site. A small triangle of Malouf Mining Claim TB-1239573 crosses Highway No. 11. This highway also provides the jumping-off point for the access roads used by the parties.

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The Municipality's disposal activities apparently triggered a non-compliant status with its Certificate of Approval and in order to bring itself back into compliance, it went about seeking to acquire additional abutting land. Some abutting lands are owned privately. The mining claims at issue were staked on Crown lands. Under the **Public Lands Act**, the Minister of Natural Resources has charge of the disposition of public lands. However, prior to disposition, the consent of any mining claim holder must be obtained and failing that, an Order must be made by the Mining and Lands Commissioner under the **Mining Act,** R.S.O., 1990, c. M.14, as amended**.**

Both parties have discussed the issues facing them at length; however, the Respondent has refused to consent to the disposition of surface rights that would go to providing (in part) additional land to the Applicant Municipality for its landfill needs.

Analysis

Statutory Context and Parties' Positions

The disposition of public lands takes place pursuant to the **Public Lands Act**. Pursuant to section 51 of the **Mining Act**, where disposition is of surface rights on an unpatented mining claim, the holder of the mining claim must provide consent before disposition can occur. If consent is forthcoming, then an entry is made on the record of the claim (respecting the consent) and the surface rights can be disposed of by the Ministry of Natural Resources. A survey of the surface rights may be required by the Minister of Northern Development, Mines and Forestry, at the expense of the person acquiring the surface rights.

If consent is not forthcoming, then the Minister of Northern Development, Mines and Forestry may refer the matter, pursuant to section 51 of the **Mining Act**, to the Mining and Lands Commissioner, who will make a decision weighing the interests of both sides in the matter. This assessment of competing interests has been called the application of the "multiple use principle". It has its origins in the report of a government committee called the "Public Lands Investigation Committee, 1959". "[A] number of principles related to multiple use of Crown lands" were drawn up and "a method of resolving, if feasible, conflicting uses or the prevention in a proper case of the subsequent acquisition of surface rights through a hearing before the Commissioner" was achieved.[1] The interests of those who stake mining claims is preserved by way of the **Mining Act**, and their prior rights to use the surface to explore and develop mines is well documented. Indeed, the actual "consent" form for the disposition of surface rights acknowledges this fact. However, while this document forms part of the public record under the **Mining Act**, it may be that circumstances can arise where a variety of competing interests come into existence whereby publicity pursuant to the **Mining Act** is not sufficient.

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[1] Kamiskotia Ski Resorts Limited v. Lost Treasure Resources Ltd., 6 M.C.C., page 462.

The Municipality is caught between the proverbial "rock and a hard place". It has, in the past, deposited waste in such a way that it has run afoul of environmental regulations. Cost issues make it expensive to dig up and relocate the waste that is the source of the problem. It is also running out of space as far as the current site is concerned and it will have to find another site. While it estimates that it has three to five years of usage left at the current site, in order to make that time line feasible, it must negotiate with neighbouring interests to secure additional land needed for buffering and attenuation purposes. It retained an expert (Trow Associates Inc.) to update the designs and operation at the landfill site, but did not call this expert to the hearing. The expert's report (the "Trow report") was produced at the hearing to support the Municipality's contention that it needed additional buffering lands on the east and west sides of the site as well as additional lands to the west to accommodate the attenuation zone which addresses potential leaching. These buffering needs and standards are set by the MOE and measure 30 – 50 metres in width. In this case, 30 metres is needed. The Municipality has made it clear that it has no intentions of doing anything within this border and that mining activity could continue.

Since neither party was represented by counsel, it was frequently necessary for the tribunal to extract relevant information by asking numerous questions. The Trow report provided the basis for the Municipality's request and it was clear from submissions that public consultation regarding the Municipality's plans had been sought. The Municipality was of the opinion that it had no choice but to proceed with expanding the overall size of the landfill boundaries in order to comply with MOE requirements and to protect it against present and future liabilities associated with landfill sites. Indeed, the MOE has stipulated the terms to be fulfilled – the production of the Trow report being one of them; the creation of buffers at the edges of the site being another. The tribunal made it clear to the parties that it was not in a position to determine the merits of changing the boundaries of the landfill site. In fact, the Respondent asked for a number of points of relief which were outside the jurisdiction of the tribunal.

If one describes the shape of the landfill site as a quadrangle or quadrilateral, then two sides on the north side form a peak, the third side to the south forms a base and the fourth side to the west is a short connecting line between the top two sides and the bottom base side. If one were to describe the shape of the mining claims, one might conclude that they formed the shape of a "U" without the curves. The landfill site would be found at the bottom of the "U". The mining claims were staked after the landfill site had been in existence and based on mapping that dates back to 1977, it appears that access roads date back to that time. They traverse the lands covered by the landfill site as well as the lands now staked by various mining claims and patents. Based on the documentation submitted by the Municipality, these roads appear to originate some time in the 1970's or perhaps earlier. One can safely assume that they provided access both to the landfill site and to mining claims in the area at one time or another.

The Respondent is the president of a company called "Hardrock Extension Inc.", which holds an option on mineral rights to the two mining claims affected by the application brought before this tribunal. The company also has interests in other mining claims to the north of the landfill site. The Respondent himself says that he owns the surface rights to a number of patents located to the north as well. This is where the Respondent's chief interest lies – to the

north and all of the access roads he claims to use now are routed in such a way that they head north from Highway 11, past or through the landfill site.

The Respondent produced a myriad of documents (including planning documents) that while not relevant to the issues before the tribunal in themselves, they formed the basis (in his mind at least) for his unwillingness to trust the Municipality to keep its word regarding any right on his part to access his mining claims over lands acquired by it. Whether the Respondent's allegations are baseless or not is of no relevance to the issues before this tribunal. However, documentation was accepted to explain the foundation for the Respondent's belief that he could not trust the municipality to carry through on its promise to provide access to his mining claims once he had consented to disposition of the surface rights. It was for the Respondent to provide relevant evidence that the tribunal could use to understand his reluctance to give consent and this he did do.

The Respondent has been working his mining claims around and to the north of the landfill site. He produced five maps which depicted five access routes that he has utilized over the years to access claims north of the landfill site. Some are used more than others. Two roads use Highway 11 as the starting point and make their way north of the landfill site. The Respondent provided maps delineating the access roads he has used and would like to use. Access Road "A" cuts north (from Highway 11) through TB-10700 and forks to the west just south of the landfill site so that it continues in a northwesterly direction through mining claim TB-1239574 and heads into TB-12738 (the Koroscil lands). The Respondent obtains permission from Koroscil to cross into his claims further north. Access Road "B" again starts at Highway 11, (on the east side of the landfill site) but after heading north for a bit through Mining Claim TB-1239573, it jogs to the west and follows the periphery of the landfill site and crosses over into TB-12737 before heading into the landfill site and connecting with Road "A". These appeared to be the Respondent's routes of choice.

Mr. Malouf sees much potential in the mining claims and patents that he or his company own. However, he is concerned that his heirs (and his company) will inherit more than just mining claims – they could also inherit the same problems he is encountering with accessing these mining claims and those that lie to the north of the landfill site. For example, he has encountered locked gates, electric fencing and boulders blocking his path. No one from the Municipality gave him notice of these things happening. The Municipality's explanation was that the site had to be fenced in order to discourage people and animals from entering the site to dump garbage and to rummage in it.

It was also mentioned by the Respondent that he has had to consider access issues with the Ministry of Transportation as the Ministry has gravel pit interests on lands covered by his mining claims. That Ministry also suggested that the Respondent rely on having a key to a gate to access his mining claims.

Given these experiences, the Respondent feels that he (and any future owners of the mining claims) requires something on title that would give notice to others of his right to access. Putting an easement on title for instance would achieve this goal and at the same time reduce the potential for legal actions were the access to be denied. The Respondent was there-

fore wary of granting consent to the disposition of surface rights without obtaining something tangible in return.

The Municipality countered by saying that a letter (from the Municipality) stating that the Respondent had access and that the providing of keys to gates would be adequate to the Respondent's needs. It was pressed to obtain the surface rights and was also loathe to spending money on costs associated with surveys and easements. The tribunal notes that both the Municipality and the Respondent made the tribunal aware of the fact that a survey would accompany any disposition of the surface rights.

Findings and Conclusions

The tribunal finds that the Applicant Municipality has demonstrated an important public need – namely, bringing the Geraldton Landfill site into compliance with provincial environmental regulations. Taking jurisdiction into account, the tribunal has not made any determinations with respect to whether the buffer on the west side of the landfill site could be justified by the Municipality (the Respondent claimed that the buffer on the west side of the landfill site was not needed.) The tribunal further finds that the Municipality's need should be addressed and dealt with through the application of the "multiple use principle" of land. The tribunal finds that based on the submissions of the Applicant Municipality a disposition under the **Public Lands Act**, should be granted.

The tribunal also finds that the Respondent has demonstrated a reasonable need to have dependable and recognizable access to his mining claims both now and in the future. His access has been negatively affected in the past and there is reason to believe that the future could present him (and anyone else owning the affected mining claims) with the same situation.

There is no doubt that the mix of competing interests concerning the surface rights in this area is causing some confusion and unease. It is apparent to the tribunal that the Respondent's activities, which take place under the **Mining Act**, are not always taken into account in the day to day administration of the Municipality. While the Municipality's offer to put something in writing regarding the Respondent's access rights is laudable, based on the Respondent's evidence concerning electric fencing, locked gates and boulders on the roadway, it appears that his fears that such assurances will get lost or be forgotten are not without foundation. He was not provided with any information regarding the Municipality's need to control access with locked gates, nor were his activities taken into account when the Municipality took more drastic action by placing boulders in his way. In reviewing the Trow Report, the tribunal noted that one of the recommendations for the future dealing with "post closure and monitoring" of the site was that "fencing and lockable gate should be kept in place, with no changes to the existing controlled site access."[2] So it appears that the challenges faced by the Respondent today will undoubtedly exist as long as the landfill site needs maintenance. The tribunal therefore finds that the Respondent should have at least one access route recognized with an easement and the survey that accompanies it. The tribunal also finds however, that the

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[2] "Updated Design and Operations Plan", Trow Associates Inc., see Exhibit 2a, page 18.

Respondent should pay for the cost of the survey only as it affects his route since his ability to access his mining claims is already a statute based right under the **Mining Act,** R.S.O., 1990, c. M.14, as amended. As for the choice of route, the tribunal finds that the routes depicted in Exhibit 4 (a) & (b), being named as Access Road "A" and Access Road "B" by the Respondent should serve as base line information for purposes of a survey for the easement. To be specific, the access to be surveyed will consist of that part of Access Road "A" that begins at Highway 11 and proceeds north crossing TB-10700 and then breaks off to the west to cross the Malouf Mining Claim TB-1239574 terminating at the boundary of that mining claim and the Koroscil patented mining claim TB-12738. The easement should include that part of Access Road "B" that cuts across the landfill site (and the Malouf Mining Claim TB-1239574) in a northeasterly direction until it touches the boundary of TB-12737 (additional Koroscil land). In the future, should the Municipality succeed in purchasing the Koroscil interest in this area for its buffer, then the easement should be plotted through the buffer acquired through that purchase and proceed through the buffer being acquired through the disposition of surface rights on the Malouf Mining Claim TB-1239573. The tribunal is not prepared to grant a request for an easement located on the east side of the landfill site. The security of access provided through the **Mining Act** is sufficient. The tribunal leaves it to the parties to determine their liabilities and responsibilities as both providers of and users of access across a landfill site.

The tribunal finds that it will be unnecessary to make any determination pursuant to sections 35 or 80 of the **Mining Act**.

The circumstances of this case, where an ongoing public need to address regulatory requirements comes up against the public interest in developing the rich mineral resources of the province through the hard work of prospectors, calls for certainty. Both sides should be able to take comfort in knowing what their responsibilities and rights are for now and the future. This disposition should not be taken as a precedent for other such applications.

There will be no costs payable by any of the parties to this application.