File No. MA 026-06

M. Orr Deputy Mining and Lands Commissioner	))	Tuesday, the 14th day of October, 2008.
L. Kamerman Mining and Lands Commissioner	))	

THE MINING ACT

IN THE MATTER OF

Mining Claims S-3016181, 3016187 and 3016188, situate in the Township of Dill, in the Sudbury Mining Division, all recorded on the 15th day of April, 2003, in the name of 1520658 Ontario Inc., as to a 100% interest (hereinafter referred to as the "Mining Claims");

AND IN THE MATTER OF

Ministry of Northern Development and Mines Order No. W-SO-25-03, dated the 23rd day of June, 2003, Orders In Council 2502/92 and 368/04, clause (1)(1)(a), section 27(a), subsections 51(1), 51(6) and sections 75 and 79 of the **Mining Act**;

AND IN THE MATTER OF:

The transfer of proceedings from the Ontario Superior Court of Justice (Court File 06-CV-315192PD1) to the tribunal, pursuant to the Order of Low, J., dated the 22nd day of January, 2007;

B E T W E E N :

MINISTER OF TRANSPORTATION

Applicant

- and -

1520658 ONTARIO INC.

Respondent

AND IN THE MATTER OF

An application for a declaration that the Mining Claims are invalid;

AND IN THE MATTER OF

An application for a declaration that the lands upon which the Mining Claims were staked were in the actual use and occupation of the Crown or the Ministry on or prior to the 15th day of April, 2003 and therefore, excluded from staking pursuant to subsection 1(1) and section 27(a) of the **Mining Act**;

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AND IN THE MATTER OF

An application for a declaration that if the Mining Claims are valid, that the Respondent is a tenant at will of the Crown and that the Crown may terminate the tenancy upon notice, pursuant to section 50 of the **Mining Act**;

AND IN THE MATTER OF

An application for costs and such further relief as the tribunal deems just;

AND IN THE MATTER OF

A cross application for the dismissal of the application of the Ministry of Transportation seeking a declaration that the Mining Claims of 1520658 Ontario Inc. are invalid and, in the alternative, a declaration that 1520658 Ontario Inc. is a tenant at will of the Crown and that the Crown may terminate the tenancy upon notice;

AND IN THE MATTER OF

A cross application for a declaration that the Mining Claims are validly staked and recorded, pursuant to the provisions of the **Mining Act**, and are not subject to dispute;

AND IN THE MATTER OF

A cross application for a declaration that 1520658 Ontario Inc. has a prior right to the use of the surface rights on the Mining Claims in connection with prospecting, exploration and mineral rights pursuant to subsection 51(1) of the **Mining Act**;

AND IN THE MATTER OF

A cross application for a declaration that the Ministry of Transportation failed to comply with the provisions of Section 51(6) of the **Mining Act** prior to acquiring surface rights to the area encompassing the Mining Claims;

AND IN THE MATTER OF

A cross application for an order for compensation for damage caused by the Ministry of Transportation, or its agents, to mineral exploration workings, claim posts, line posts, and tags on the Mining Claims pursuant to Section 79(3) of the **Mining Act**, such request being in addition to and not in lieu of any request for compensation made in other proceedings before the Ontario Superior Court of Justice;

AND IN THE MATTER OF

A cross application for costs and such further relief as the tribunal deems just.

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O R D E R

WHEREAS this application, with documentation filed in support, was received from Mr. Peter Bull, agent, on behalf of the applicant, 1520658 Ontario Inc., by this tribunal on the 17th day of July, 2006;

AND WHEREAS the tribunal issued a certification on the 18th day of July, 2006, that a proceeding involving the applicant was pending in a court in respect of the land upon which the Mining Claims are situate, and in particular, that an action was pending involving Her Majesty The Queen in Right of the Province of Ontario represented by the Minister of Transportation for the Province of Ontario as the applicant and 1520658 Ontario Inc., as the respondent, having commenced in the Ontario Superior Court of Justice in Toronto, Ontario, being Court File No. 288/06 on the 15th day of June, 2006 and was currently pending;

AND WHEREAS the tribunal Ordered the Provincial Mining Recorder to note "Pending Proceedings" on the abstracts of each of the Mining Claims, to be effective from the 15th day of June, 2006, *nunc pro tunc*;

AND WHEREAS this matter, on the application of the Minister of Transportation and with the consent of 1520658 Ontario Inc., was transferred to the tribunal by Order of Low, J., dated the 22nd day of January, 2007;

AND WHEREAS this matter was heard by the tribunal on the 12th to the 15th days of May, 2008, with Final Argument being heard on the 26th day of June, 2008;

1. IT IS ORDERED that the various applications of the Minister of Transportation be and are hereby dismissed.

AND WHEREAS the various cross-applications of the Respondent are addressed in the Reasons;

2. IT IS FURTHER ORDERED that the notation "Pending Proceedings" which is recorded on the abstracts of Mining Claims S-3016181, 3016187 and 3016188, to be effective from the 15th day of June, 2006, *nunc pro tunc*, be removed from the abstracts of the Mining Claims.

3. IT IS FURTHER ORDERED that the time during which Mining Claims S-3016181, 3016187 and 3016188, were under pending proceedings, being the 15th day of June, 2006, to the 14th day of October, 2008, a total of 853 days, be excluded in computing time within which work upon the Mining Claims is to be performed.

4. IT IS FURTHER ORDERED that the 15th day of August, 2012, be fixed as the date by which the next unit(s) of prescribed assessment work, as set out in Schedule "A" attached to this Order, must be performed and filed on Mining Claims S-3016181, 3016187 and 3016188, pursuant to subsection 67(3) of the **Mining Act** and all subsequent anniversary dates are deemed to be August 15 pursuant to subsection 67(4) of the **Mining Act**.

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

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 by the tribunal 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).

DATED this 14th day of October, 2008.

Original signed by M. Orr

M. Orr
DEPUTY MINING AND LANDS COMMISSIONER

Original signed by L. Kamerman

L. Kamerman
MINING AND LANDS COMMISSIONER

SCHEDULE "A"

MINING CLAIM #'s	**NEW DUE DATE**
S- 3016181	August 15, 2012
S-3016187	August 15, 2012
S-3016188	August 15, 2012

File No. MA 026-06

M. Orr) Tuesday, the 14th day
Deputy Mining and Lands Commissioner) of October, 2008.

L. Kamerman)
Mining and Lands Commissioner)

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AND IN THE MATTER OF

An application for costs and such further relief as the tribunal deems just;

AND IN THE MATTER OF

A cross application for the dismissal of the application of the Ministry of Transportation seeking a declaration that the Mining Claims of 1520658 Ontario Inc. are invalid and, in the alternative, a declaration that 1520658 Ontario Inc. is a tenant at will of the Crown and that the Crown may terminate the tenancy upon notice;

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A cross application for an order for compensation for damage caused by the Ministry of Transportation, or its agents, to mineral exploration workings, claim posts, line posts, and tags on the Mining Claims pursuant to Section 79(3) of the **Mining Act**, such request being in addition to and not in lieu of any request for compensation made in other proceedings before the Ontario Superior Court of Justice;

AND IN THE MATTER OF

A cross application for costs and such further relief as the tribunal deems just.

DECISION AND REASONS

Appearances:

Mr. Ronald Carr	Counsel for the Applicant
Mr. Henry Weilenmann	Counsel for the Applicant
Mr. Neal Smitheman	Counsel for the Respondent
Mr. Richard Butler	Counsel for the Respondent
Mr. Michael J. Bourassa	Counsel for the Respondent

Background:

The Applicant and the Respondent entered on to certain lands in the Township of Dill, in the Sudbury Mining Division and carried out two separate sets of activities on those lands. Both parties state that as a result of their activities, the lands are theirs to use pursuant to the **Mining Act**. The Applicant (sometimes referred to as the "MTO" and "Applicant Ministry") was planning to re-align Highway 69. To that end it had survey stakes driven into the ground; boreholes made, and had brush and vegetation cut during the winter of 2003 after completing a period of legislated processes including an environmental assessment. The Respondent staked mining claims covering in part the lands surveyed by the Applicant Ministry. Mining Claims S-3016181, 3016187 and 3016188, (herein referred to as the "Mining Claims"), were staked on April 14, 2003, April 9, 2003 and April 10, 2003 respectively. They were all recorded on April 15, 2003 in the name of 1520685 Ontario Inc. (sometimes referred to as the "Respondent Company").

The Applicant argues that the lands were in the "actual use or occupation of the Crown" and therefore excluded from (or not open for) staking. The Applicant also alleges that the Respondent's staker made a false statement in the declaration forming part of the Application to Record his mining claims.

The Respondent Company argues that the lands were open for staking and that the lands were not in the use or occupation of the Crown. The Respondent Company also argues that the Applicant should have exercised its rights under section 35 of the **Mining Act** and had the lands formally removed from staking before they were staked.

Issues:

1. Were the lands in the use or occupation of the Crown at the time they were staked?
2. Are the Mining Claims valid?
3. Was the staker for the Respondent Company obliged to indicate the presence of survey stakes (on the subject lands) on his application to record? If the answer is yes, what effect does his decision to not indicate have on the validity of the mining claims?
4. If the mining claims are valid, what effect (if any) does the subsequent withdrawal order have on them?

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Evidence of the Applicant

The MTO produced four witnesses who described the planning work and the exploratory efforts that pre-dated the selection of a final route for the proposed highway.

Paul Lecoarer

The Applicant Ministry's first witness, Mr. Paul Lecoarer, was Head of Planning and Design for the MTO at the time of an affidavit he produced for court and which was relied on for the matter before the tribunal. He had become involved in the Highway 69 process in the early 1990's. The work on the Highway itself (which was progressing in stages based on three distinct areas) extended from Muskoka Road 5 in the south to Sudbury in the north. The intention was to make it a four lane highway to accommodate increasing traffic and large trucks. The speed would also increase to 100 kilometres per hour. A minimum 45 metre setback needed on either side of the highway.

According to Mr. Lecoarer, initial planning studies for the reconstruction of the highway began in 1995. In fact, a consultant was hired and an Environmental Assessment Report was completed in 1999. An amended report evaluated alternate corridors in the study area as the presence of swamps presented construction difficulties. Another route was recommended. As far as lands in the vicinity of the Mining Claims were concerned, the recommended route ran north south-west and crossed Mining Claim S-3016187 in a north-westerly diagonal line starting from the lower south-east boundary of the Mining Claim and rising to the north-west across the Mining Claim exiting approximately half-way up its north-west boundary.

Mr. Lecoarer described the Environmental Assessment process that was required to be followed by the Ministry in accordance with the **Environmental Assessment Act** and the "high degree of consultation" that was carried out. Public information sessions were held between 1995 and 1999 in various centres. One such centre ("Wanup Pit Community Centre") was located to the south of the lands in question.

Mr. Lecoarer presented pictorial exhibits to illustrate where the Ministry had aligned the proposed highway work in relation to the Mining Claims – depicting the original alignment with a green line (now abandoned) as well as a new alignment (with a red line).

Mr. Lecoarer indicated that work on the new alignment began on January 9, 2003 and that all the physical work that had been done on the original alignment earlier was also carried out for the new alignment. Surveying work was carried out and it consisted of "cutting" the centre line of the new alignment and establishing new property limits for the highway on either side of the proposed new highway. The centre line was marked by the cutting of trees and the placing of survey stakes. Photographs taken by the consultants were entered as exhibits. The centre line was staked every 25 to 50 metres, depending on whether the line was straight or curved. Under cross-examination, Mr. Lecoarer admitted that the placing of stakes might not have been consistently followed. The stakes measured two feet long and one inch by one inch in thickness and had the notation "Hwy 69" on them as well as a red or florescent orange piece of tape on top. Location markings were put on the stakes which also had a florescent tape on top. Foundation investigations were carried out to determine the location and depths of swamps, overlying muskeg, and the depths of over-

burden. Consultants carried out the work during the winter months, drilling through ice where necessary. Test holes of various sizes (6 inches to large holes) were dug. Bore holes were drilled wherever a structure was going to be placed (e.g., abutments, footings). The holes were back-filled and packed down after the work had been done. Swamps were delineated using test holes as well. The consultants' work was the subject of complaints from nearby landowners about a lack of information as to the location of the highway.

As for following processes for the withdrawing of lands from staking set out under the **Mining Act**, Mr. Lecoarer said that the MTO did not have a "fixed practice" prior to it carrying out its activities. Instead, the Ministry waited until the southern corridor was settled before withdrawing the lands from staking – in order to keep the corridor "as tight as possible", meaning that they did not want to withdraw lands that would not be needed for the highway. While the Ministry carried out an active search to identify property owners, the same was not done for mining claims; there was no search of mining claim maps. In fact, the MTO was not aware of the existence of the Hicks Claims that had been staked prior to the disputed Mining Claims. Documents provided for this hearing indicate that the Hicks Claims (which were larger than the disputed Mining Claims but which included the same lands), were staked and recorded March 2, 2001 and April 23, 2001. They expired two years later as no assessment work had been carried out. As far as those claiming compensation from the MTO were concerned, while it did have some experience dealing with claimants, in this case, the MTO was told to get off the property and it complied with this demand. In dealing in general with the issue of land ownership the MTO had the power to expropriate or purchase lands outright. In fact, the Ministry had purchased lands in the area from Mr. Marcel Ethier, the brother of Mr. Leonard Ethier, the President of the Respondent Company. No further details aside from giving lot numbers were provided by the witness.

As for the subject lands, the Applicant's search in the Registry Office would have told it that the lands were Crown lands and this would have presumably cleared the way for the Applicant's plans.

The construction contract for work on the proposed road was awarded in January, 2005 to Leo Alarie and Sons.

Under cross-examination by the Respondent's counsel, Mr. Lecoarer admitted that the MTO normally did not post signage when "engineering surveys" were being carried out. Nor was anything registered on title. The tribunal notes that one of the complaints made by a homeowner (referred to above) was that there was nothing on title warning him of the impending highway. In his words, Mr. Lecoarer said that the Ministry puts up signs where "the public needs to know", the example he gave being the closing of a road. Under cross-examination, he indicated that while the original alignment had been staked by March 23, 2001, and abandoned, the stakes could still be in the ground. He admitted that one would not be able to tell which alignment was the intended route. In other words, the MTO's intentions to change the placement of the alignments could not be ascertained by looking at the survey stakes.

Under further cross-examination, Mr. Lecoarer admitted to the MTO's being able under the **Act** to have lands withdrawn at a number of points through the process relating to the final settlement of the alignment, but that it waited until certain issues were cleared up in the Parry Sound stretch. It was not good planning to encumber lands that were not needed. Counsel for the Respondent

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produced material related to discussions with the MNDM wherein the MNDM indicated that the **Mining Act** permitted the withdrawal of lands from staking and that "[t]o protect the public interest this withdrawal should be carried out for the area of interest prior to the commencement of highway planning and any public notification." Mr. Lecoarer said that he disagreed with the timing.

During the course of cross-examination, Mr. Lecoarer admitted that adjustments to the alignment were possible at a number of stages due to the fact that while the Ministry might have 99% of the information it needed to locate the highway, there could be conditions on the ground that necessitated a change of position.

Under cross-examination, Mr. Lecoarer also admitted that he was not familiar with the staking process and that he knew about blazing from his personal hunting experience. He had no knowledge of the Hicks claim posts. He pointed out that if claim posts had been "there", he would be surprised if the Ministry's consultants missed it. If they had been in the field and it had been brought to their attention, they would have followed up. If Mr. Hicks had called, they would have dealt with him. The Ministry had been able to deal with issues arising out of the staking of claims in the past. When the Ministry did send someone out to check later, it was discovered that there was evidence of two sets of mining claims and Mr. Lecoarer presumed that one set was the previously staked Hicks mining claims. When Mr. Lecoarer walked the line for the new alignment (which would have taken him through Mining Claim S-3016187 crossing into Mining Claim S-3016188), he said that he did not see any evidence of staking. Mr. Lecoarer admitted to a limited knowledge of staking mining claims and his exposure to mining claim posts really was minimal, having come across posts when hunting.

Mr. Lecoarer also admitted that the Ministry had not made any effort to prevent people from entering into the area it had identified as being necessary for the new alignment. There were no fences, no gates, no signage and no one discussed limiting access to the property. When questioned about how the public was to know about the Ministry's activities in the area and that a third party would not be able to tell on the ground that the original alignment had been abandoned, Mr. Lecoarer pointed out the fact that notices were published in newspapers.

Mr. Lecoarer's testimony was followed by that of witnesses whose primary function appeared to be to support Mr. Lecoarer's words.

Brian R. Gray

Mr. Gray is a principal with Peto McCallum, an engineering firm that was retained by Totten Sims in 2001 to carry out the foundation and geotechnical work needed to understand the nature of the land upon which the highway was to be built. He is a professional civil engineer by training and has a master's degree in geotechnical engineering. His firm drilled 2000 bore holes along the original alignment. They carried out testing on the bore holes, finding four swamps to the south (in the area of one of the Claims). A record was kept of all the holes that were drilled with a log for each hole.

Their equipment included a mechanical excavator which removed everything from the surface ground down to rock. They dug test pits. Two meters of over-burden were removed. The bore

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holes were eight inches in diameter and after the tests were done, they were backfilled and plugged with soil and cement grout. Under cross-examination he agreed that the work they had done in winter (on ice) would be filled with water when the ice melted.

Stephen Senior

Mr. Senior is the acting head of the Soils and Aggregate Section for the Ministry. In 2003, he was the Senior Soils and Aggregate Engineer. He took photos to investigate a proposed rock cut for the highway located north of the subject Mining Claims.

Michael Simpson

Mr. Simpson represented the surveying company which was used to survey the line for the re-aligned Highway 69. He has been the Manager of Surveying for the firm's North Bay office since 2003 and is a licensed Ontario Land Surveyor. His company worked on the original alignment cutting and staking the alignment "at regular intervals for field investigations for geo-technical work and other design work … as well to collect …, ground elevation information to build a ground model for design purposes." The work for the original alignment was done in 2001, 2002 (starting in the summer through the duration). The centre line median was staked at 25 meter intervals through "the length of the project." The stakes were "typical survey stakes". The witness indicated that the stakes themselves are not permanent; they "will fall down or get knocked over". They could be knocked down by a drilling rig traveling the centre of the cut line. Mr. Simpson indicated that each stake is marked and he identified the letters "CL" which stood for "centre line" and "HWY" which stood for highway. Other letters might also be found on the stakes. Mr. Simpson's company was also responsible for surveying the new alignment. Again, the stakes were not considered permanent as they could fall down or be "knocked out".

Evidence of the Respondent

Peter Bull

Mr. Bull began his testimony by saying that he had been a surveyor for 23 years and that he was President of Bull Surveying Corporation. He holds an Ontario Prospector's Licence and has eight years of staking experience. His staking experience consisted of staking twenty times "or twenty units before this", starting in 2000 - 2001. He also described himself as a specialist in "survey science", following studies at Erindale College, University of Toronto. He described the Respondent (a numbered company) as an "exploration company that develops mineral – non-metallic mineral resources in Ontario". The owner of the company, Mr. Leonard Ethier, had passed away a couple of months earlier. Mr. Ethier was the "primary driver" of the company and approved all the decisions made by Mr. Bull and others. Mr. Bull was one of five shareholders.

The disputed Mining Claims were staked on April 9, 10, and 14, 2003, and recorded on April 15, 2003 in Sudbury. Mr. Bull had been "on the site" since 1987, when he was carrying out reference plan work for a large aggregate resources company ("Alexander Centre Industries Limited"). He described how he next came to be on the property in 2003 – he was exploring "several sites" along with Mr. Harold Cheley in early April including the quarry connected with the old Wanup Pit Road. The quarry is located well along the way into Wanup Road. They decided that what they

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found there was "poor quality" and on their way back out, they stopped in the vicinity of the disputed Mining Claim S-301618. Using a Geological Survey of Canada map they could see that "Nipissing Diabase" was shown to be in this area. Nipissing Diabase is a stone used in the making of concrete and asphalt. They observed a corner post left by the previous mining claim owner (Hicks) and did not find a new post. They did see a "cut line" and Mr. Bull was able to identify what he saw by comparing his observations to what was depicted in the photographs introduced by the Applicant through Mr. Lecoarer. Mr. Bull identified the cut line he saw as being on what was described as the "Bot Holdings property". The property is adjacent to disputed Mining Claim S-3016188 along its northern boundary. Mr. Bull said the line was on what he described as "private property". Mr. Bull was also familiar with plans for what he described as the redesign of a proposed controlled highway access dating back to 1975 that was registered in 1976. He was also familiar with a redesign of a proposed controlled access highway in 1992 and a related Order in Council. The lines associated with these proposals ended near the North West corner of the Bot Holdings properties. Mr. Bull said he became aware of these proposed highways in 1997 through a Registry office search related to work he was doing for someone interested in their aggregate holdings. He produced a composite map he had compiled showing all the things he found when he was carrying out his research in 1997 and again in April 2003 when he and Harold Cheley were investigating the lands containing the disputed mining claims. Mr. Bull used the Ministry of Northern Development and Mines (the "MNDM") web site ("claims map web site") to determine if the land was open for staking. The tribunal notes that the date at the bottom of the web search referred to by Mr. Bull is March 28, 2003. He did not see "any evidence of new staking", and decided that the land was open for staking. In fact, the lands had once been staked by a "Gerald Hicks", but had come open in March 2003.

Mr. Bull described how he staked the three disputed Mining Claims, starting with Mining Claim S-3016187 on April 9, 2003, followed by Mining Claim S-3016188 on April 10, 2003, and concluding with Mining Claim S-3016181 on April 14, 2003. All three Mining Claims were recorded on April 15, 2003. Mr. Bull described what he saw as he carried out his staking work. At one point for example, he saw an "open area" that in his words, indicated "that a vehicle had traveled down it and crushed brush … a heavy vehicle…. [A] skidder or a small dozer". Part way down the easterly boundary of Claim S-3016187 he saw a "cut line running … into Claim 3016187 roughly on the northwestern bank…." On the exhibit, his site matched the spot where the new alignment (red line) for Highway 69 met the eastern boundary line of Mining Claim S-3016187. When asked what the "cut line" meant to him, Mr. Bull said "exploration" because there was no evidence of blazing. When he returned to his original post (number one post), he saw the "cut line" running "out to Old Wanup Pit Road". When asked about a stake he had seen he said "[i]t didn't have any meaning to me." When asked if he had seen anyone while staking, he said that he had never seen anyone on the site except for gravel trucks. His knowledge of the terrain and environmental features came from his review of them for purposes of preparing site plans in order to obtain aggregate permits.

He and his colleagues in the Respondent Company became aware of the construction plans for the highway in December 2004. He testified as to his aggregate permit related activities (an application for a permit had been filed in May or June 2005) for the site as well as the fact that at some point the MTO was provided with information as to the costs incurred by the Respondent with respect to the Claims, namely staking, assessment work, sampling, re-staking, legal and consulting fees – amounting to approximately $200,000.00. He also estimated that a certain quantity of rock had been "sterilized" presumably from the Applicant's road construction activities

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(he called it "development") in the value of $43 million. (The issues arising out of these allegations were not before this tribunal). He explained that by 2005 he and his colleagues were aware of the planned highway construction on the site of the Mining Claims and were concerned that the line posts might be damaged as a result. When damage did occur, it was reported to the President of the Respondent Company who sought an order from the Provincial Mining Recorder to replace the post and re-stake the claim line. An Order was obtained for Mining Claim S-3016188 to replace line posts and re-mark the claim boundary line with pickets. A subsequent Order was made to move a line post even further as the construction activities made it apparent that the post might still be in the way of the equipment. When he approached the Applicant to be paid for his troubles, the Applicant replied that the Respondent did not have a valid mining claim – the mining recorder not having been told about the Applicant's activities (which it equated with "actual use or occupation"), prior to the claim having been staked.

Under cross-examination Mr. Bull was questioned about the differences between survey stakes and claim posts, the latter being four inches square, roughly hewn, with a metal plate attached to it; survey stakes being machined and thinner with an orange or red flag attached to the top. Mr. Bull was also taken through his relationship with the Respondent Company – he is a shareholder and admitted that his affidavit might appear to be that of an independent person retained by the Respondent, while in actual fact, he had an interest in the outcome of the proceeding. He was taken through the information provided in Mr. Bull's affidavit relating to the other individuals who had done work for the Respondent and each was revealed to be a shareholder of the Respondent, counsel's point being that his interest in the Respondent Company might cloud his vision on the ground at the time of staking and as a result he could not be objective when viewing the effects of the MTO's activities on the site. Mr. Bull was questioned about the crushed area he had attributed to a skidder and why he thought people might have moved such equipment into the area. His response was that mining claims were often the subject of exploration. He sees cut lines in his business and trampled areas and skidder rows and so these things did not concern him at the time. He agreed that it did not resemble a snow mobile trail. He also admitted that he did see a survey stake but gave no thought as to who might be planting survey stakes in the area.

Mr. Bull was also asked about the Respondent's plans for the lands covered by the claims, and the plans were to obtain a permit under the **Aggregate Resources Act** to develop the property as a pit or quarry. In fact, it was their (meaning him and his fellow shareholders) intention to develop the property as an aggregate operation "right from the beginning." The company did not intend to mine the property, "in a conventional sense". Staking a mining claim is not a necessary precursor to obtaining such a permit, but it does have the effect of protecting the resource, at least in the opinion of Mr. Bull. The Respondent received information about the location of the highway and went ahead in 2005 to apply for two permits. When Mr. Bull was asked whether the work carried out for purposes of the future quarry/pit was used to answer the requirement for assessment work in terms of the mining claims, he answered that it was. He was not concerned that disclosing this information about the purpose to the MNDM would have a negative effect on the extension of the mining claims. He was not concerned that a quarry/pit rather than a mine was being developed.

Mr. Bull was asked about the information he passed along to the Provincial Mining Recorder when it came time to fill out his Application to Record form. He agreed that the Provincial Mining Recorder relied on the information supplied by the staker as to the features present on the land. While he depicted the existence of a plywood shack on lands covered by Mining Claim S-3016187, he did not indicate the presence of any survey stakes or the location of the trampled

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down area. He said that he did not know of the Applicant Ministry's activities at the time seeming to refer to 2001 and 2003 but that he did not deny that the activities had resulted in the things described by the Ministry at the hearing. When asked whether he had attended any of the information sessions regarding the proposed highway, he said he had not. He has been a resident of Sudbury for most of his adult life.

In re-examination, Mr. Bull indicated that he had not seen fit to walk either of the two corridors for the original and new alignments at the time he was staking because there was no blazing but had there been, it would have alerted him to an "adverse interest" and it would have got his attention. However, he was not concerned that what he saw had a connection to the work he was doing. As for the survey stakes, he had used the same sort of stakes for geophysical exploration (which was mining related) – staking baselines and section lines.

In re-examination he explained why he noted the location of the shack in his application to record and that was because he was following a staking guide. According to his reading of the guide he was to show the location of buildings or improvements. He did not consider the cut line or the trampled area to be an improvement. He had indicated the presence of creeks and Wanup Road.

When asked why he staked lands that were going to then be developed for a quarry/pit, he said that through his reading of decisions of the Mining and Lands Commissioner that where staking preceded the application for a permit, the staking would prevail since it was first in time. He wanted to protect his quarry/pit development goals. When asked about the stakes used for grid lines, he advised that they could be machine made or even handmade pickets.

Harold Cheley

Mr. Cheley has had a varied career, testifying that he had worked in the mining industry for twenty years; had worked for the Ministry of Natural Resources as a conservation officer; had been a pits and quarries inspector; and a mining claims inspector. He had worked for Ethier Sand and Gravel Company, one of the principals of that company, Leonard Ethier being the president of the Respondent Company. Mr. Cheley was also a shareholder in the Respondent Company.

He described walking the site with Mr. Bull in early April, 2003. They were relying on a map and thought the land had "potential" and that it was Crown land. There were other aggregate operations in the area; there was trucking available. The geological map they were using indicated material that would be useful for asphalt and cement structures. Mr. Cheley reviewed the lands covered by aggregate permits in the general area. He also said that he became aware of the MTO's fieldwork in December 2004 from someone he knew as a client. He passed the information along to Mr. Ethier (through Mr. Bull it was learned), the president of the Respondent Company. He described why two aggregate permits were prepared, the reason being the proposed highway location and he was attempting to account for this in his applications. He reviewed the MNR **Mining Act** Claim and Leases Aggregate Permits Policy No. AR5.00.06, issued March 15, 2006 which indicated that the staking of lands intended to be developed for aggregate purposes provides protection from competing interests.

Under cross-examination Mr. Cheley said he had been a resident of Sudbury since 1970, that he lived about twenty kilometers south of the Wanup Pit Road, being approximately three kilometers from the proposed highway; that he never received any notice of same; that he occasionally reads

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the local paper the "Sudbury Star"; that he was not aware of the proposed four-laning of Highway 69; that he was aware of the fact that it had been the subject of some debate and interest in the local community for "decades". He admitted knowing at the time the application package for the aggregate permit was delivered that the proposed highway corridor went through the middle of the mining claims. He was also asked about the fact that he had not disclosed his shareholder status in the Respondent Company in his affidavit.

When asked about the work he did with respect to staking the claims, he said that he did not walk the entire perimeter of the three claims, and that he walked only enough to determine that the property was open for staking but had not been involved in the actual staking.

Ray Jambakhsh

Mr. Jambakhsh is a professional engineer who was hired for his explosives experience. When he attended the site, he was led to the site; the exhibit maps meant nothing to him and he could not identify where he had been taken. He did not see any sign of disturbances and despite the blasting, he saw no one. The blasting was carried out in November, 2004.

Findings:

Were the lands in the use or occupation of the Crown at the time they were staked?
Are the Mining Claims valid?

This tribunal is not prepared to grant the Ministry's application for a declaration that the Mining Claims are invalid on the grounds that the lands were in the actual use of the Crown at the time of staking. The lands were not in the use or occupation of the Crown at the time they were staked by the Respondent.

The Mining Act deals with the subject of prospecting and staking out mining claims under two primary headings; "lands open" and "lands not open".

Following the heading "Lands Open" the **Act** states in section 27 that "the holder of a prospector's licence may prospect for minerals and stake out a mining claim on any Crown lands, surveyed or unsurveyed…not at the time … withdrawn by any Act, order in council, or other competent authority from prospecting, location or sale, or declared by any such authority to be not open to prospecting, staking out or sale as mining claims." "Crown land" is defined by what is not included, namely, (among other things), "land in the actual use or occupation of the Crown, the Crown in right of Canada, or of a department of the Government of Canada or a ministry of the Government of Ontario."

The heading "Lands Not Open" is followed by a number of sections (starting with section 29) that describe lands that are not open for staking. One of the reasons given in subsection 30(d) is "where the Minister (MNDM) or the Minister of Transportation certifies that land is required for the development of water power of for a highway or for some other purpose in the public interest and the Minister (MNDM) is satisfied that a discover of mineral in place has not been made thereon…."

A closer look at the phrase "actual use or occupation of the Crown" (focusing on "actual use") is warranted here. The word "actual" is used as an adjective, while the word "use" is a noun. "Actual" connotes an existence in reality; something really exists. It is real and not imaginary or potential, or possible or intentional; it exists in the present. The phrase "actual income" is an example familiar to taxpayers. The phrase "actual use" therefore must refer to a use that exists, that is recognizable as a use, that is describable, and that is known to be a use. It follows that an actual use of the Crown must have all of these features but should also have a recognizable "Crown" component.

There is a scarcity of Commissioners' decisions that might be of assistance under these circumstances. Two decisions were submitted by the parties in their final submissions. In *Re Maher* dealt with a situation where the land in question was owned by the Queen in Right of Canada and was actually being used for an airport. The question was put to one of the witnesses was the land actually being used for an airport and the answer was in the affirmative. *Re Juby* was of no assistance since the Commissioner in that case appears to have made his decision by focusing on the mining rights and consequently determining that the lands were under a licence of occupation, thereby excluding them from staking.

The tribunal is of the view that the Ministry has failed to establish that the lands were in the actual use or occupation of the Crown at the time of staking. The Ministry's evidence on the other hand points to the fact that the Ministry had not settled the alignment and that it was not yet ready to withdraw lands from staking. The evidence points to two sets of survey stakes and clear cuts having been made at two different times to shoot a line for a proposed highway. As Mr. Lecoarer said, these were "engineering surveys" and the exercise did not warrant the closing of the lands to public access. Mr. Lecoarer's approach is indicative of the Ministry's view of the work it was undertaking at the time and that is that the work connoted a preliminary stage. It could not be described as an actual use. The placing of survey stakes, the cutting of swaths, the drilling of bore holes and so on over many months in themselves were not reliable as signifying an actual use for purposes of the **Mining Act**. The stakes could be removed or fall over, the cut areas could grow back, bore holes filled in with water and vegetation. In fact, the engineering exercise was carried out twice at two different locations. Are both locations to be treated as being in the actual use of the Crown? A positive response to this question would most certainly lead to confusion for anyone staking under the **Act** where notice is a key aspect of staking. Indeed, the Applicant argued that both areas were in the actual use of the Crown. The Respondent's witness Mr. Bull testified that what he saw could have amounted to exploratory mining work and the tribunal agrees that a staker on the ground coming across a swath cut through trees or the occasional survey stake might very make the same observation. In their isolation on the ground, these features do not support the Applicant's contention that the land was in the actual use of the Crown.

Nor does the tribunal find any support for the Applicant's argument in the fact that public information sessions were held by the Applicant. The holding of these public sessions does not lead to a closing of the lands for staking under the **Act**. Highway 69 comprises a segment of the Trans Canada Highway. It connects (in part) Sudbury with Parry Sound. Both are major centres in their own right; the former being an important mining community, the latter being an equally important tourist destination. The highway is a major thoroughfare and it's proposed widening and re-routing was the subject of public information sessions held in various locations along the proposed route at different times. This is to be expected, given that the highway was going to be transformed into a series 400 highway at the end of the process. The process that has to be

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followed in order to widen a highway or to change its route is undoubtedly long. One only has to consider, for example, the length of time that passed before Highway 407 was actually built. Three of the public information meetings for this highway proposal were held at the Wanup Pit Centre in April of 1995. Presumably this is a community centre. All of these sessions were made public through local newspapers. The background investigative research and environmental work was carried out by various professional firms contracted to the Ministry of Transportation. The evidence presented at this hearing undoubtedly represented many hours of work and in turn would have cost many thousands of dollars to produce the reports that were submitted. Judicial notice can be taken of the fact that such preliminary work translates into millions of dollars worth of actual construction work. The holding of public information sessions does factor in to the Respondent's witnesses' credibility as far as their alleging they knew nothing about the Applicant's intentions is concerned. While the testimony of the Respondent Company's witnesses will be discussed further later, the tribunal finds it difficult to believe that such work would not be noticed by those people who work in the aggregate business. The testimony of the witnesses for the Respondent Company who quite categorically stated that they knew nothing of the proposed work is hard to accept. For one thing, they have lived in or near the area in question for some years. More importantly, they are in the business of aggregates and would be on the look-out for news of major road construction which would, for them, represent an opportunity to supply raw materials needed to build the highway. Indeed, one of the Ethier brothers (Marcel) even sold property to the Ministry in anticipation of road building. The evidence provided by the Appellant Ministry depicted a large stretch of roadway complete with abutments for exit and entry ramps. The use of aggregates in the construction of such structures would be of the greatest importance. However, whether the Respondent Company's witnesses knew and ignored the public information or whether they honestly did not know, the fact is that the holding of information sessions did not mean that the subject lands were in the actual use of the Crown for something at the time of staking.

Does the **Act** expect the Applicant to formally withdraw lands from staking every time it shoots survey stakes for a highway? The answer might lie in the *Maher* decision. The case of In *Re Maher* has the Mining Commissioner actually asking the question as to how the lands were being used. The reply was that they were being used exclusively for an airport. Given the approach of at least one previous Commissioner in *Maher* and the tendency in both the *Maher* and *Juby* decisions to undertake a careful analysis of the state of the lands under scrutiny, it would be reasonable to expect the Applicant to follow the scheme set out in the **Act** for withdrawing lands from staking thereby giving notice to the staking world of its intentions in those instances where it cannot rely on the existence of an actual use. After all, the **Act** contains a scheme that might have saved the parties some aggravation in this case had it been implemented earlier in the process.

The tribunal is of the view that the sections referred to at the beginning (and section 35) of the **Mining Act** set out a comprehensive scheme for the removal of lands from staking without resorting to the approach advocated by the Applicant which distorts the interpretation of the phrase at issue here. The scheme appears to address the very set of circumstances depicted in this case. At the same time, it operates to give notice to all those interested in staking Crown lands, a key component of the **Act**. This giving of notice is an important feature of the **Act**, in that the **Act** operates in large part on the basis that actions like the staking of land or the closing of land are announced to the world through the filing of certain documentation in public places, namely the Office of the Provincial Mining Recorder. Filing an Application to Record a staked Mining

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Claim, followed by recording, constitutes a publication of sorts that lets the world know that the posts in the ground signify an intention to work the ground and possibly, to apply for greater rights. In fact, the placing of the proper posts in the correct fashion by a prospector is probably the only time when signifying an "intention" to use the land carries any weight under the **Act**. The Crown in this case seemed to rely on the tribunal accepting that it had an "intention", but this has to be rejected as the definition of Crown lands calls for something actual.

Nor is the tribunal prepared to agree that the definition for "Crown land" should drive the operation of the **Act** insofar as it relates to the setting aside of lands for anticipated public works. Not only is such an approach unnecessary, given that a suitable scheme exists; such an approach would not be reasonable given the **Act's** preference for requiring activities that might affect staking work be as public as possible. Indeed, in this case, even the Provincial Mining Recorder was unaware of the Ministry's activities and proceeded with recording the Claims. If the lands had been in the actual use or occupation of the Crown, then it would be reasonable to expect that the **Act** would provide an administrative mechanism to let its own officials know. Given the comprehensive scheme set out in the **Act**, it may very well be that the definition for "Crown land" insofar as the phrase "actual use of the Crown" is concerned is primarily intended to catch and remove any Crown lands that might fall through the cracks of the legislation. A close look at the definition reveals that it is essentially reiterating what one would find in the **Act**. It is extremely doubtful that it was intended to set up some new class of untouchable Crown land that was much different from what is set out in the various sections of the **Act** that deal with such land, especially section 30. Indeed, the definition section appears to work in association with those sections of the **Act** that fall under the heading of "Lands Not Open" and section 30.

The Certification by the staker Bull

This brings up the issue of the certification given by the staker Bull for the Respondent Company when filing his claim. The Certificate of Recording Licensee calls for the staker to certify that "at the time of staking there was nothing upon the lands to indicate that they were not open to be staked and I believe they were so open". However, in stating this belief, the staker is still required to put certain information regarding what was seen on the ground before the mining recorder. The form in question calls for the staker to certify that "no buildings, clearings or improvements for farming or other purposes except as follows and indicated on the sketch…." It also requires that the accompanying sketch "include topographic features such as lakes, rivers, creeks, ponds, etc. and developments such as hydro lines, highways, railways, pipelines, buildings, etc. as shown on [the sample sketch included in the regulations]". The Guide and the information provided by the MNDM to stakers are but a guide. The staker is required to put all relevant information before the mining recorder. The word "improvement" requires that the staker make note of anything that has a "betterment" effect on the lands. The existence of clear-cutting and bore holes and survey stakes would point to the fact that someone may have been on the land for some purpose. However, there is nothing to indicate that these items constitute an "improvement" in the sense that would be contemplated under the **Act**. Does the clear – cutting carried out by the Ministry's contractors constitute a clearing or improvement for farming or other purposes? The answer is "no". The reason lies in reading the relevant phrase in its entirety and extracting the interpretation from the phrase as a whole. The reference to farming or other purposes must mean that the clearing or improvement has a connection to farming or another purpose and would reflect the purpose in question. In other words, there would be a tangible and visible connection between the clearing or

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improvement and the use or purpose to which it was being put. As well, the use or purpose would be in existence. For example, an improvement for farming might be a ploughed field or a fenced pasture land. This would be a "betterment" of the land for the purpose of farming. The "betterment" aspect in other examples would be the establishment of permanent structures or buildings that change the character of the land. Canadian law dictionaries indicate that improvements also include services such as water and gas pipelines. All of these examples are actual uses and not examples of an "intention" to do something. The evidence of engineering surveys having been carried out are just that and not indicative of an improvement as intended under the **Act**.

While it would be difficult to believe that the staker Bull was not aware of the forthcoming highway, that in itself is not a reason for invalidating the mining claims he staked on the basis of his certification which appears to have come within the requirements set out in the forms and guide.

The effect of the later withdrawal order on the mining claims and whether they can or should be re-drawn to allow for the highway to go through?

The finding that the mining claims are valid obviously might have a bearing on the answer to these questions. Under normal circumstances, lands are formally withdrawn, entries in abstracts are made and the world knows that such lands are not open to staking. The lands would come under the description set out in Section 27(d) of the **Act** and would not be open to staking. Ideally, the process is one that precludes and therefore predates any staking. Barton, in his text on mining law describes the process this way: "[w]ithdrawal is clumsy because it generally prohibits all mineral activity, even though in some circumstances limited mineral activity might not interfere with the other values being protected. The withdrawal must also be done in advance of any staking; legislation does not permit the outright cancellation of claims merely because their location has subsequently been withdrawn." Barton also goes on to say that "[t]he only option then is to use another blunt instrument and expropriate the claims. The withdrawal of land, whatever its failings, is frequently necessary to limit the effect of the free entry system." [1]

Barton also gives some insight in to the timing of withdrawal orders saying "[p]robably the most frequent use made of withdrawal mechanisms is to protect infrastructure, whether planned or existing. Often corridors for proposed electrical transmission lines will be withdrawn from staking even before the final route is settled."[2]

The question here is, does the making of a Withdrawal Order affect valid mining claims and if so, how? The Withdrawal Order in this case cites "surface and mining rights" and states that they are "withdrawn from prospecting, staking out, sale or lease". It was made on June 23, 2005. The **Act** does allow for the Minister to withdraw lands, mining rights and surface rights that are the property of the Crown in section 35. Valid mining claims themselves are not cancelled. Is assessment work suspended while a withdrawal order is in effect? There is nothing in the **Act** to indicate that assessment work must be suspended and information found on the MNDM's web site dealing with policies related to Withdrawal Orders as they affect assessment work is reflective of this observation. Exploration work and assessment work are allowed to continue and there is no

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[1] Barry J. Barton, Canadian Law of Mining, Canadian Institute of Resources Law, Calgary 1993, page 166

[2] Barton, ibid., page 170

need for the tribunal to make an order with respect to the exclusion of time related to the impact of the Withdrawal Order that affects these Mining Claims, at least at this time. If it becomes an issue, the Respondent Company can resort to the process set out under section 67 of the **Act**. The section itself sets out the information that would be needed to address the matter.

The tribunal has noted the Respondent Company's request for a declaration that the Applicant failed to comply with subsection 51(6). Section 51 deals with the right of the holder of an unpatented mining claim to use the surface rights (for prospecting and the like) and it sets out a process to deal with the possible frictions that might ensue where the surface rights are sold off or otherwise separated from the mining rights. In this case, the Respondent Company has indicated that it staked its Mining Claims solely for the purpose of protecting its aggregate interests and this in itself may raise issues for the parties at some point. As the process under section 51 has not been initiated (and the tribunal has made no ruling on whether it even applies), there is no need for such a declaration.

As the tribunal has found that the Mining Claims are valid, the imposition of the Withdrawal Order on their existence means that the parties have moved to another level in their dealings with one another. It is not for this tribunal to pose solutions to their problems; however, from the tribunal's standpoint, the issues do not seem insurmountable.

The tribunal notes the Respondent's submissions regarding a "tenant at will of the Crown" and the Respondent's assumption that the issue was abandoned. While the issue may have been raised at some point in the hearing, the Applicant has not pursued it and the tribunal is not prepared to deal with it.

The issue of compensation has been raised by the Respondent Company saying that the Ministry through its contractors has damaged "mineral exploration workings, claim posts, line posts and tags" The evidence pertaining to this claim consisted of some photographs and the issue was not developed beyond producing the photos and making the complaint. The tribunal has considered the Respondent's request and sets the amount at $800.00.

This matter raised serious and complicated issues and undoubtedly both sides have paid a heavy price to get those issues addressed. There will be no costs awarded to either side.

Exclusion of Time

Pursuant to subsection 67(2) of the **Mining Act**, the time during which Mining Claims S-3016181, 3016187 and 3016188, were pending before the tribunal, being the 15th day of June, 2006 to the 14th day of October, 2008, a total of 853 days, will be excluded in computing time within which work upon the Mining Claims is to be performed and filed.

Pursuant to subsection 67(3) of the **Mining Act**, as amended by S.O. 1996, c.1, Sched. O, s. 18, August 15, 2012, is deemed to be the date for the performance and filing of the next unit(s) of prescribed assessment work on Mining Claims S-3016181, 3016187 and 3016188

Pursuant to subsection 67(4) of the **Mining Act**, all subsequent anniversary dates for Mining Claims S-3016181, 3016187 and 3016188 are deemed to be August 15.