File No. MA 009-07

M. Orr) Friday, the 7th day
Deputy Mining and Lands Commissioner) of March, 2008.

THE MINING ACT

IN THE MATTER OF

The mining operations of Moneta Porcupine Mines Inc. ("Moneta") on Part of Parcel 2804 Whitney and Tisdale, being patented Mining Claim P-13332, being the NE1/4 of the S1/2 of Lot 12, Concession II, in the Township of Tisdale, Porcupine Mining Division;

AND IN THE MATTER OF

The business operations of the applicant, which were located at what is municipally known as 263 Railway Street, Timmins, Ontario;

AND IN THE MATTER OF

An application for the determination of surface rights compensation, pursuant to section 79 of the **Mining Act**.

B E T W E E N:

ALDEGE RAYMOND, THE ESTATE OF ROSE RAYMOND,
ANTHONY RAYMOND
carrying on business as RAYMOND'S GARAGE

Applicant

- and -

MONETA PORCUPINE MINES INC.

Respondent

O R D E R

WHEREAS THIS APPLICATION was received by this tribunal on the 1st day of May, 2007 and heard on the 4th day of March, 2008, in the Courtroom of this tribunal in Toronto, Ontario;

UPON hearing from the parties and reading the documentation filed;

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1. **IT IS ORDERED** that the application be and is hereby dismissed without prejudice to the applicant to bring an application before the tribunal which deals with any issue(s) which is not before the Ontario Superior Court of Justice or where the Ontario Superior Court of Justice is unwilling or, for any other reason, unable to determine. Any such application will be expected to comply with all necessary aspects of the **Mining Act**.

2. **IT IS FURTHER ORDERED** that no costs shall be payable by either party to the application.

Reasons for this Order are attached.

DATED this 7th day of March, 2008.

Original signed by M. Orr

M. Orr
DEPUTY MINING AND LANDS COMMISSIONER

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REASONS

Appearances:

Mr. Gerard McAndrew on behalf of the Applicant
Mr. Francis Yungwirth on behalf of the Respondent

This application for compensation under s. 79 of the **Mining Act** was brought before this tribunal on May 1, 2007 and heard in the courtroom of this tribunal on March 4, 2008. In part, the application alleges a "complete loss of … land, inventory, buildings and business".

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Prior to this date, the Applicant commenced a civil action in the Ontario Superior Court of Justice against the Respondent, its Directors and an insurance company, alleging a "complete loss of … land, inventory, buildings and business." The amounts being claimed are very close, with $1,000,000.00 being claimed in the Ontario Superior Court of Justice, and $811,485.00 being claimed in this inferior court.

The Statement of Claim is almost identical to the application before the Mining and Lands Commissioner. The issues (with the exception of having to prove negligence and nuisance in the Ontario Superior Court) are the same. The evidentiary base is the same to the extent that it documents business activities and other associated issues that affect compensation values. I have no doubt that the witnesses would be the same for both actions. Indeed, the action in the Ontario Superior Court has already reached the stage of discoveries, with one witness already having been discovered.

The Respondent raised two objections to the application and one of these was that the Applicants were in effect "venue shopping" for relief. I would agree with that characterization. The Applicant's counsel was quite candid in responding to my question about his clients' reasons for filing a compensation application before the Mining and Lands Commissioner. He responded that the surface rights holder would not have to establish negligence or nuisance against the Respondent. In other words, the process before the Commissioner was a simple case of establishing damages caused by the activities of the mining rights holder. When asked what would happen to the action started in the Ontario Superior Court were his clients to be successful here, he again candidly said that it would probably be dropped – with the exception of the issues related to the insurance company and possibly the directors. How this would occur is questionable, at least to me. It seems highly doubtful at this point that this would be a desirable outcome for anyone concerned. If that is what the Applicants think might happen, then they need to decide where they want to pursue their claim. They cannot double dip in the system by starting two similar actions in two venues thereby costing time and money to both sets of administration. They are shopping for the same relief in two different venues. Commencing an action sets into motion more than just a hearing in a courtroom. Files must be administered; parties kept informed, notices sent out, preliminary matters dealt with, and so on. In addition, and in response to the notion that the s. 79 process might not be as rigorous as the one before the Ontario Superior Court of Justice, the question is, is the issue before the Commissioner under s. 79 a simple damage assessment claim? Even leaving aside a discussion on the issues of negligence or nuisance, there is still a need under s. 79 to establish certain important "connectors" between the activities of the mining rights holder and the damages experienced by the surface rights holder. Section 79 also calls for a preliminary opinion to be formed by the Minister as to whether a surface rights owner is entitled to compensation. This seems to be followed by an attempt by the parties to reach agreement on a sum, failing which either party can apply to the Commissioner for a hearing. There is no indication that this process has been followed. So, the process may not be as simple as the Applicants make it out to be, and undoubtedly would entail a careful analysis of all of the relevant evidence.

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As I indicated to the parties, they have to decide where they want to be and to take the appropriate administrative steps to put themselves in that place. Right now they are at odds with each other with respect to venues and are thereby burdening the system by their indecision. This is not in the best interest of the justice system at any level. The Applicants have already begun their action in the Ontario Superior Court of Justice. It reads practically word for word to the action commenced here, with the addition of allegations related to the directors' roles and the inclusion of the insurance company. Commencing a similar action before the Mining and Lands Commissioner is not a useful option for anyone at this stage. The cleanest approach is for the parties to keep all of their issues in one venue and the most logical place at the moment, given the range of issues, is the Ontario Superior Court of Justice.

For the above reasons, the application will be dismissed without prejudice to any future application being brought dealing with those issues that the Ontario Superior Court of Justice is unwilling or for any other reason, unable, to take under its jurisdictional wing for determination. This should avoid any duplication of efforts in either venue. But to be clear, in the event that the Applicants seek compensation under the **Mining Act** against this Respondent and/or its directors in this venue, they will be required to provide evidence of the fact that the same remedy is not being sought in another venue and they will have to show that they have followed all of the steps set out in s. 79. In the interests of all concerned, the **Mining Act** has within it, various sections dealing with the cross-referencing and migration of cases between the Mining and Lands Commissioner and the Ontario Superior Court of Justice. These are sections 107-109 inclusive.

No costs will be awarded.