File No. MA 015-98

L. Kamerman	)	Wednesday, the 20th day
Mining and Lands Commissioner	)	of June, 2001.

THE MINING ACT

IN THE MATTER OF

Mining Claim P-1224136, situate in the Township of Cargill, in the Porcupine Mining Division, recorded in the name of Leo Alarie and Sons Limited, on the 25th day of February, 1998, hereinafter referred to as the "Alarie Mining Claim";

AND IN THE MATTER OF

Mining Claim P-1224141, situate in the Township of Cargill, in the Porcupine Mining Division, recorded in the name of Don Thomas Fudge, on the 9th day of March, 1998, hereinafter referred to as the "Fudge Mining Claim";

AND IN THE MATTER OF

Ministry of Natural Resources Aggregate Permit Number 20018, issued to Lachance Construction on the 22nd day of April, 1998;

AND IN THE MATTER OF

An appeal under subsection 112(1) of the **Mining Act** from the decision of the Provincial Mining Recorder, dated the 12th day of May, 1998, to give priority to Aggregate Permit 20018 which was issued after the recording of the Alarie Mining Claim and the Fudge Mining Claim;

AND IN THE MATTER OF

Section 30(b) of the **Mining Act** and Ministry of Northern Development and Mines, Mining Lands Branch Policy LP 505-1 and LP 505-2.

B E T W E E N:

DON THOMAS FUDGE AND
LEO ALARIE AND SONS, LIMITED

Appellants

- and -

MINISTER OF NATURAL RESOURCES

Respondent

- and -

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MINISTER OF NORTHERN DEVELOPMENT AND MINES
Party of the Third Part

- and -

782900 ONTARIO LIMITED and ROGER LACHANCE
carrying on business as LACHANCE CONSTRUCTION
Party of the Fourth Part
(Amended June 20, 2001)

D E C L A R A T O R Y O R D E R

WHEREAS this action was commenced on the 25th day of May, 1998, and culminated with an Order to File and an Appointment for Preliminary Motion by Telephone Conference Call dated the 16th day of October, 1998, to hear and consider in a preliminary determination of certain questions set out;

AND WHEREAS an application was subsequently brought by the appellants, Leo Alarie and Sons Limited and Don Fudge, pursuant to section 107 of the **Mining Act** seeking to transfer the proceedings to the Superior Court of Justice (Ontario), having been heard on the 16th day of July, 1999, with an Order transferring the proceedings issued on the 30th day of August, 1999, followed by an appeal by the Party of the Fourth Part, 782900 Ontario Limited and Roger Lachance carrying on business as Lachance Construction to the Court of Appeal (Ontario), heard on the 18th day of May, 2000, which resulted in the remittance of the appeal to the tribunal;

AND WHEREAS Mr. Guy Wainwright, acting for Lachance Construction, in a letter dated the 21st day of September, 2000, suggested that the matter of the Order to File and Preliminary Motion of the 16th day of October, 1998, be resumed, or alternatively, that the matter should be dismissed **AND WHEREAS** Mr. Peter Doucet, acting for Leo Alarie and Sons Limited and Don Fudge, set out that the proper procedure would be to allow parties to now make submissions on the issues set forth in the Order of the 16th day of October, 1998;

AND WHEREAS the tribunal has neither amended nor rescinded its Order to File of October 16, 1998;

UNDER the power vested in me by clause 116(1)(d) of the **Mining Act**, R.S.O. 1990, c. M.14, and upon hearing from Counsel for the parties:

1. THE TRIBUNAL HEREBY DECLARES that the Mining Recorder, and on appeal the Commissioner, have the jurisdiction to record a mining claim "subject to" an aggregate permit. Taking into account the definitions found under the **Mining Act** and **Aggregate Resources Act**, and the provisions of section 103 and 104 of the **Mining Act**, there is clear legislative intent that those minerals which also fall under the definition of "aggregates", create a subset of non-metallic minerals known colloquially as "structural industrial minerals" are to be dealt with at first instance under the provisions of the **Aggregate Resources Act**.

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Section 104 of the **Mining Act** is clear that the existence of an aggregate permit does not preclude the staking of a mining claim for the remaining minerals and it follows that the staking of a mining claim would be "subject to" the aggregate permit which predates the staking.

2. THE TRIBUNAL HEREBY FURTHER DECLARES that the Mining Recorder and upon appeal, the Commissioner, are authorized by the **Mining Act** to determine, as a preliminary jurisdictional question, whether there is a pending aggregate permit application. There are, however, operational constraints involved in ascertaining the existence of any application or purported application, over which their respective offices have neither custody nor control. However, there is clear jurisdiction as provided by sections 110 and 111, of the **Mining Act**, in the case of the Mining Recorder and 105, in the case of the Commissioner, to determine whether there is an application made in good faith within the meaning of clause 30(b). This jurisdiction ceases once any aggregate permit has actually been issued by the Ministry of Natural Resources, as the question for determination pursuant to clause 30(b) no longer exists. The jurisdiction is at all times limited to determination of whether the lands are not open for staking.

3. THE TRIBUNAL HEREBY FURTHER DECLARES that a determination of the relevance of clause 30(b) is hampered by the facts of this case. On those facts, it has become impossible to determine whether there is an application pending, as the application has been granted. Attempting to make a determination would be to go behind an application granted pursuant to a statutory power of decision outside the jurisdiction of review by this tribunal. Accordingly, for purposes of this appeal, the tribunal will deem the application to have been granted at the time of staking, so that no determination of clause 30(b) is required.

DATED this 20th day of June, 2001

Original signed by L. Kamerman

L. Kamerman
MINING AND LANDS COMMISSIONER

File No. MA 015-98

L. Kamerman	)	Wednesday, the 20th day
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THE MINING ACT

IN THE MATTER OF

Mining Claim P-1224136, situate in the Township of Cargill, in the Porcupine Mining Division, recorded in the name of Leo Alarie and Sons Limited, on the 25th day of February, 1998, hereinafter referred to as the "Alarie Mining Claim";

AND IN THE MATTER OF

Mining Claim P-1224141, situate in the Township of Cargill, in the Porcupine Mining Division, recorded in the name of Don Thomas Fudge, on the 9th day of March, 1998, hereinafter referred to as the "Fudge Mining Claim";

AND IN THE MATTER OF

Ministry of Natural Resources Aggregate Permit Number 20018, issued to Lachance Construction on the 22nd day of April, 1998;

AND IN THE MATTER OF

An appeal under subsection 112(1) of the **Mining Act** from the decision of the Provincial Mining Recorder, dated the 12th day of May, 1998, to give priority to Aggregate Permit 20018 which was issued after the recording of the Alarie Mining Claim and the Fudge Mining Claim;

AND IN THE MATTER OF

Section 30(b) of the **Mining Act** and Ministry of Northern Development and Mines, Mining Lands Branch Policy LP 505-1 and LP 505-2.

B E T W E E N:

DON THOMAS FUDGE AND
LEO ALARIE AND SONS, LIMITED

Appellants

- and -

MINISTER OF NATURAL RESOURCES

Respondent

- and -

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MINISTER OF NORTHERN DEVELOPMENT AND MINES
Party of the Third Part

- and -

782900 ONTARIO LIMITED AND ROGER LACHANCE
carrying on business as LACHANCE CONSTRUCTION
Party of the Fourth Part
(Amended June 20, 2001)

REASONS

Background

The appeal of Don Thomas Fudge and Leo Alarie and Sons Limited (Fudge and Alarie) was received on May 25, 1998. The appeal was from the decision of the Provincial Mining Recorder, dated May 12, 1998, which set out that Mining Claims P-1224136 and P-1224141, were subject to two aggregate permits (quarry permits). The crux of the appeal was whether the Mining Recorder erred in making the Mining Claims subject to the aggregate permits.

Pursuant to successive procedural steps taken, the parties were required to provide submissions and attend a Preliminary Motion scheduled to take place by Telephone Conference, after filing their respective positions on a series of questions agreed to by the parties in discussions with the tribunal.

In the interim, an application was brought to transfer the appeal to the Superior Court of Justice (Ontario), pursuant to section 107 of the **Mining Act**. Mr. Justice Boissonneault allowed the application. Upon appeal by 782900 Ontario Limited and Roger Lachance, carrying on business as Lachance Construction, to the Court of Appeal (Ontario), the Court allowed the appeal. At page 6 of the Order, M. Rosenberg, J.A., states in his first paragraph involving an analysis of the matter:

> [1] In my view, the applications judge erred in transferring the proceedings on the assumption that the Superior Court would have a broader jurisdiction than the "Mining Court". The only proceeding before the Commissioner, and therefore the only proceeding transferred to the Superior Court, is the s. 112 appeal. That appeal is restricted to determining issues under the *Mining Act*. Transferring the appeal to the Superior Court could not vest a greater jurisdiction in the Superior Court to permit an investigation of matters under different legislation, such as the *Aggregate Resources Act*. To the extent that the respondents' real complaint is with the granting of the permit under the *Aggregate Resources Act*, and not the conduct of the Mining Recorder, the matter is one for judicial review, if possible, in the Divi-

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sional Court. The validity of the aggregate permit is not a matter to be determined under the *Mining Act* whether the s. 112 proceedings are before the Commissioner or the Superior Court.

The matter of the preliminary jurisdictional question was once again raised and addressed by the parties in writing.

Appearances

Leo Alarie Sons Limited and Don Thomas Fudge — Peter J. Doucet, Barrister and Solicitor

Ministry of Natural Resources — Krystine Linttell, Barrister and Solicitor

Ministry of Northern Development and Mines — John Norwood, Barrister and Solicitor

782900 Ontario Limited and Roger Lachance carrying on business as LaChance Construction — Guy Wainwright, Barrister and Solicitor

Submissions

The questions are reproduced, along with each parties' written position.

1. Does the Mining Recorder have the jurisdiction to record a mining claim "subject to" an aggregate permit? The parties are directed to consider sections 104 and 110 of the **Mining Act** in making submissions as to whether either of these provisions are applicable to this jurisdiction.

If the answer to #1 is yes,

2. What kind of inquiry does the **Mining Act** authorize the Mining Recorder and upon appeal, the Commissioner, in determining whether there is an aggregate permit application pending? At issue is whether this determination is made by ascertaining and adopting the position of the Ministry of Natural Resources or whether an independent determination may be made.

3. Of what relevance, if any, is clause 30(b) of the **Mining Act** to this preliminary issue? If relevant, how should it be interpreted and applied?

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Mr. Doucet, on behalf of Leo Alarie and Sons Limited and Don Fudge:

The Appellants Leo Alarie and Sons Limited and Don Fudge submit that there is no jurisdiction in the Mining Recorder to record a mining claim "subject to" an aggregate permit. It is the duty of the Mining Recorder to determine whether a mining claim will be recorded or not, and in so doing, to determine if there is a proper **bone fide** prior application pending for either a mining claim or an aggregate permit, and in so doing, must determine priorities.

To do otherwise, would result in chaos. It would provide for situations where two parties assert legal rights to extract aggregate or minerals from the same lands under two entirely different regimes.

Pursuant to **section 104**, the procedure is not to record the mining claim "subject to an aggregate permit". A mining claim may be staked out on the Crown Land effected by the permit or license and any question of property damage to the holder of the aggregate permit is determined pursuant to **section 79.**

Under **section 110**, the Mining Recorder should then determine the dispute as between the parties who have competing interest to the land in question, and decide the questions as outlined in **section 110(2)** of the **Act**.

With respect to the second question raised by the Commissioner in her Order of October 16, 1998, the inquiry authorized by the Act is pursuant to **section 110** to hear and determine disputes. This means that the principles of natural justice should apply and the Recorder should hear evidence from both parties, examine all relevant documents, and make a determination acting judicially. In the event of an appeal to the Commissioner under **section 112**, the Commissioner should review the actions as well as the decision of the Mining Recorder to determine if the Mining Recorder acted judicially and carried out the responsibilities conferred on her pursuant to the Act.

The issue here is whether the Recorder acted judicially and fulfilled her statutory obligations. It is the respectful submission of the Appellants that by failing to make an independent verification of whether there was a "prior **bona fide aggregate permit**", and by abrogating that aspect of her decision making power to the Ministry of Natural Resources by simply asking them to write to her and advise if in deed there was such a "**bone fide application**", that the Mining Recorder did not fulfil her duty as she is not empowered to abrogate that aspect of her decision making authority to the Ministry of Natural Resources.

The Recorder should have made her own determination as to whether there was a "**bone fide prior application**" and should not have simply written to the Ministry and accepted a short letter as determinative of that fact.

The Commissioner has ruled in the Labelle decision that she does not have the authority to overview the actions of the Ministry of Natural Resources. While jurisdictionally that may be so, it is the position of the Appellants that in exercising her powers of appeal, the Commissioner must look at the actions of the Mining Recorder, and in that regard can take note of what the Mining Recorder did and learned as a result of the position taken by the Ministry of Natural Resources, and whether or not the Mining Recorder acted in accordance with the statutory duty in so doing.

The relevance in **section 30(b)** again goes back to the position of the Appellants that it is the duty of the Mining Recorder to determine if there is a "application brought in good faith". That cannot simply be left to a bureaucrat of the Ministry of Natural Resources to determine by way of letter. That is a duty imposed upon the Mining Recorder and it is she that must do her own due diligence in that respect and make a factual determination. She cannot subcontract that factual determining responsibility to the Ministry of Natural Resources.

Mr. Wainwright, on behalf of 782900 Ontario Limited and Roger LaChance, carrying on business as LaChance Construction:

Question #1

It is my submission that the general provision in the Mining Act for the recording of information by the Mining Recorder is contained in Section 46. The Mining Recorder is to enter "the particulars" of an application to record a mining claim. In the sketch to be attached to the application, it would be normal to include a reference to a pre-existing Application for an Aggregate Permit. Section 104 confirms that the situation can exist where an Aggregate Permit is issued under the Aggregate Resources Act and as well a Mining Claim recorded on the same land. The Mining Recorder has jurisdiction under Section 110 to determine disputes between persons as to unpatented mining claims. However, it is submitted that the facts of this case do not provide a dispute within the meaning of Section 110. The dispute of Leo Alarie & Sons Limited is in reality a dispute with the Ministry of Natural Resources for issuing the Aggregate Permit to Lachance Construction.

Question #2

It is submitted that this Tribunal has already held in File #MA 028/97 (Nordic Group, Applicant and Marcel J. Labelle, Respondent) that it would be contrary to the intent of the

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legislation to grant a power to the Mining Recorder to conduct a Judicial Review of the actions of the Ministry of Natural Resources. It is submitted that the Mining Recorder is simply recording that the Ministry of Natural Resources has issued an Aggregate Permit. The Mining Recorder is not certifying that the Aggregate Permit was issued properly and it is always open to the Applicant to take whatever judicial procedures it wishes to attempt to have the Aggregate Permit set aside. If it was successful, an Application could then be made to the Mining Recorder to remove the reservation registered against the Mining Claim.

Question #3

It is submitted that Section 30(b) of the Mining Act has no relevance to the matters presently before the Tribunal. No one has made a submission to the Mining Recorder that the Mining Claim should not have been staked or recorded, and therefore this issue is not before the Tribunal. Alternatively, the Tribunal has already held in the aforementioned case (Nordic Group v. Labelle) that an Application for an Aggregate Permit is covered by Section 30(b) of the Mining Act. Accordingly, the land would not have been open for staking or recording on February 25, 1998 since the Application for the Aggregate Permit had already been made on October 1, 1997.

Krystine Linttell, on behalf of the Ministry of Natural Resources:

In response to the issues raised in the Commissioner's Order of October 16, 1998, the Ministry of Natural Resources endorses the submissions set out on behalf of Lachance Construction by Mr. Guy Wainwright in his letter to the Commissioner dated October 23, 1998.

It is the Ministry's position that the Mining Recorder has no duty to determine if an application for a permit pending under the Aggregate Resources is a bona fide application. The Mining Recorder is entitled to rely on notice of such an application received from the Ministry of Natural Resources and is not required to undertake any inquiries with respect to the application.

John Norwood, on behalf of the Ministry of Northern Development and Mines:

Question #1: Yes, the Mining Recorder does have jurisdiction to record a mining claim "subject to" an aggregate permit.

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Question #2: In determining whether there is an aggregate permit application pending, the Mining Recorder is entitled to rely on the position of the Ministry of Natural Resources (who are empowered with the responsibility of administering that statute) as ascertained from it, without any duty on the Recorder to make an independent verification.

Question #3: MNDM believes that clause 30(b) of the Mining Act is relevant and should be interpreted and applied so that if there is an application pending in the Ministry of Natural Resources under the Aggregates Act (which in MNDM's view falls within "or other-wise") for minerals X and Y, then a mining claim can still be staked during the period that the application is pending, but is only effective with respect to the minerals claimed other than minerals X and Y.

This interpretation finds support from recently passed clarifying amendments to Section 28 and 30 of the Mining Act (see excerpts from Bill 119 attached) which will become legally effective on December 26, 2000.

BILL 119
(Chapter 26
Statutes of Ontario, 2000)

SCHEDULE M
AMENDMENTS PROPOSED BY THE MINISTRY
OF NORTHERN DEVELOPMENT AND MINES

MINING ACT

1. Subsection 26(3) of the Mining Act is amended by inserting "or revoke" after "suspend".

2. Section 28 of the Act is amended by adding the following subsections:

Application under other Act

(2) A licensee may stake out a mining claim with respect to any minerals or rights that no applicant is specifically requesting to acquire in an application accepted under the Public Lands Act or any other Act.

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Priority of application

(3) If an applicant is specifically requesting to acquire minerals or rights in an application accepted under the Public Lands Act or any other Act, the application shall have priority over any mining claim staked during the time that the application is pending.

Addition to mining claim

(4) If the application lapses, is withdrawn or is not accepted or approved, a mining claim staked during the time that the application was pending shall be deemed to be amended to include the minerals and rights that were the subject of the application, as if the application had never existed.

3. (1) Clause 30(b) of the Act is repealed and the following substituted:

(b) for which an application brought in good faith is pending in the Ministry of Natural Resources under the Public Lands Act or any other Act, and in which the applicant may acquire the minerals that are included in the application; or

Oral Hearing

This matter was scheduled for further oral hearing, by telephone conference call, on February 13, 2001. The purpose of the telephone conference call was to grant the parties an opportunity to further clarify their positions and respond to those of the other parties.

Mr. Doucet:

It was submitted that the Mining Recorder and the tribunal are governed by the wording in the **Mining Act**, which sets out in sections 30 and 104 what has to be done. There is no wording in section 104 which suggests that there is jurisdiction to record a mining claim subject to an aggregate permit. There is, in section 104, a very specific procedure set out which is to be followed.

When the **Act** is read as a whole, the procedure which must be undertaken by the Mining Recorder is clear. The statute contemplates a quasi-judicial inquiry to determine questions of priority. Apart from the examination of section 30, one must also consider sections 44 and 46. In particular, subsection 46(2) describes, when priority is an issue, that the Mining Recorder must receive and file the mining claim and then adjudicate questions as to priority

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which arise. Those provisions, as well as section 110 which gives the Mining Recorder authority to determine disputes at first instance, it was submitted, lend credence to the position that the Mining Recorder cannot merely rely on the word of an employee of the Ministry of Natural Resources as to whether there is a **bona fide** application. To do so would be to abrogate their judicial responsibility to the staker of the mining claim.

The **Act** then goes on in great detail in the provisions mentioned above, as to how such disputes are determined, namely that hearings are contemplated as well as the receipt of evidence and the review of documents.

Section 111 sets out the procedure to be followed by the Mining Recorder in making his determinations and the tribunal was invited to review all of the aforementioned legislative provisions in detail. It was submitted that the wording of section 111 specifically mentions an adequate opportunity for knowing the issues in the proceedings and of presenting material and making representations, none of which was done in this case by the Mining Recorder. Rather, the Mining Recorder merely abrogated her jurisdiction by relying on the word of a Ministry of Natural Resources employee. It was submitted that the Mining Recorder did not comply with the statutory duty in carrying out her responsibilities and obligations.

In conclusion, it was submitted that the tribunal does not have the authority to overrule the actions of the Ministry of Natural Resources or to adjudicate upon them, but rather that the tribunal does have the authority to examine what the Mining Recorder did or didn't take into consideration when determining whether those duties were carried out properly.

In response to the tribunal's question regarding distinction between priorities in stakings by a number of parties and those situations involving the jurisdiction of the Ministries of Natural Resources and Transportation, Mr. Doucet stated that roads may be a different matter because section 104 specifically addresses what happens when there is an aggregate permit and licence obtained under the **Aggregate Resources Act**. This skirts around the issue of section 30.

Section 30, it was submitted, is wider than section 104, speaking of applications made in good faith, pending before the Ministry of Natural Resources, under the **Public Lands Act** or otherwise. It is submitted that this would involve any application before the Ministry of Natural Resources. Section 30 also deals with lands which are disposed of for summer resort purposes, as well as certification that land is required by the Ministry of Transportation for water power or a highway. In those respects, it was submitted, that the **Act** is the same. Sections 44, 46 and 110 address priorities and those are not limited to priorities under the **Act**. Therefore, in conclusion, all types of priorities must be determined judicially by the Mining Recorder by holding hearings, making inquiries and receiving evidence.

Mr. Wainwright:

The main problem with the approach taken on behalf of Alarie and Fudge is that there is no logic in saying that the Mining Recorder held that there is or was a **bona fide** aggregate permit outstanding. All the Mining Recorder's decision states is that such a permit exists. As to whether or not it is **bona fide** is not a determination within the scope of the **Mining Act**. 10

For example, had the Mining Claims not been recorded, it does not follow that the aggregate permit would cease to exist or if the mining claim had priority in respect of the aggregate permit, the priority would have governed. Therefore, it is submitted that the **Mining Act** does not give the Mining Recorder the responsibility or the authority to make the determination of whether a bona fide permit exists.

Rather, the Mining Recorder is just recording information that is available, so that when the appellant asks the Mining Recorder and by extension the Commissioner, to conduct some type of hearing in respect of whether it was a **bona fide** permit, what in essence is being requested is a review. If it is not a **bona fide** permit, then it would have been issued improperly by the Ministry of Natural Resources and that is what a judicial review would examine.

The Court of Appeal has made it clear that the Mining Recorder and the Commissioner do not have that authority. That is for the Superior Court of Justice (Ontario) to determine. So there is no logic to the approach of suggesting that the Mining Recorder has legitimized the aggregate permit.

Mr. Norwood:

The Ministry of Northern Development and Mines supports the position taken on behalf of Lachance Construction. It was submitted that it is asking too much for the Mining Recorder to make an independent verification of the existence or not of a **bona fide** application under the **Aggregate Resources Act**. Such a question is internal to the Ministry of Natural Resources, and the Mining Recorder must rely on the information which he or she obtains from that Ministry. If the matter requires further exploration, it must be the subject matter for judicial review.

Ms. Linttell

The Ministry of Natural Resources is in agreement with the submissions on behalf of Lachance Construction and the Ministry of Northern Development and Mines.

Reply of Mr. Doucet

It is submitted that section 30(b) is specific and provides that no mining claim shall be staked or recorded on any land for which an application is brought in good faith and is pending before the Ministry of Natural Resources under the **Public Lands Act** or otherwise, in which that applicant may acquire the minerals. That is not, it is submitted with respect, something which must be determined under the **Aggregate Resources Act**. It is specifically spelled out in section 30(b) of the **Mining Act** that the Mining Recorder must determine in his or her discretion under the sections cited above, whether the situation applies. This is under the auspices of the **Mining Act**.

The tribunal asked Mr. Wainwright whether the recording of the mining claim should have been silent, whereby any prospective problems arising could be dealt with by section 79 of the **Mining Act**. Mr. Wainwright responded that, even if the aggregate permit were not mentioned in the Mining Claims, it would not disappear. It was issued to Lachance Construction and until such time as it is set aside, it remains valid.

The Mining Recorder has the discretion to record particulars concerning a mining claim. She has received information that the permit application was made and a permit was issued. Such information on the abstract for the Mining Claims does not preclude someone taking action in another proceeding to bring into question the validity of the permit.

Mr. Doucet responded that all that the Mining Recorder was obligated to do under section 104 was to grant and record a mining claim and allow Alarie and Fudge to pursue their rights as permitted by the **Mining Act**, including claims for property damage or compensation, as provided by section 79. This is exactly what section 104 says. It does not, on the other hand, give the Mining Recorder the authority to record a mining claim subject to the aggregate permit. If the Recorder were going to determine issues of priority, he or she must go back to section 46, record the mining claim as filed and then under subsection 46(2) adjudicate the questions provided.

Mr. Wainwright countered by stating that this is not a case of competing interests under the **Mining Act** but interests arising under another piece of legislation. In section 46, the Mining Recorder is authorized to record the particulars of the mining claim. All the Mining Recorder did is record a particular which exists in respect of these Mining Claims, namely that an aggregate permit outstanding.

Findings as to Jurisdictional Questions

1. Does the Mining Recorder have the jurisdiction to record a Mining Claim "subject to" an Aggregate Permit?

Through the analysis which has led to the drafting of these Reasons, and upon reflection, this first question is in fact made up of two questions. One is the jurisdiction of the Mining Recorder and the other is what is the nature of the interest(s) granted by an aggregate permit and mining claim. As a result, I have elected to change this question to "Does the **Mining Act** allow a mining claim to be recorded subject to an aggregate permit", leaving the issue of the Mining Recorder's jurisdiction to question 2 below.

Looking to the definitions of what may be acquired under either the **Mining Act** or the **Aggregate Resources Act**, the following are considered. Under the **Mining Act**:

> "minerals" means all naturally occurring metallic and non-metallic minerals, including natural gas, petroleum, coal, salt, quarry and pit material, gold, silver and all rare and precious minerals and metals, but does not include sand, gravel and peat;

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Quarry and pit are both defined in the **Aggregate Resources Act** as are aggregate and rock:

> "quarry" means land or land under water from which consolidated aggregate is being or has been excavated, ...
>
> "pit" means land or land under water from which unconsolidated aggregate is being or has been excavated, ...
>
> "aggregate" means gravel, sand, clay, earth, shale, stone, limestone, dolostone, sandstone, marble, granite, rock or other prescribed materials.
>
> "rock" does not include metallic ores, asbestos, graphite, knanite, mica, nepheline syenite, talc, wollastonite and other prescribed material.

Section 7.1 of O.Reg. 244/97, as amended by O. Reg. 195/00, provides further definition:

> 7.1 The following materials are not rock for the purpose of the definition of "rock" in subsection 1(1) of the Act: andalusite, barite, coal, diamond, gypsum, kaolin, lepidolite, magnesite, petalite, phosphate rock, salt, sillimanite and spudumeme.

In considering these various definitions, for purposes of the **Mining Act**, non-metallic minerals include pit and quarry material. Through reliance on the definitions for pit and quarry material as found in the **Aggregate Resources Act**, non-metallic minerals, within the definition of the **Mining Act,** appear to include stone and crushed stone as well. The tribunal finds that stone and crushed stone are captured by the definitions of "mineral" under the **Mining Act** as well as of "aggregate" under the **Aggregate Resources Act**. Clearly, while crushed stone and rock are captured by both, it is necessary to look further to determine how this legislative overlap in definitions are to be treated and examine the resulting authority flowing from the provisions.

The tribunal considers that the facts leading up to the legislative framework may be of some assistance in determining the intent of these potentially overlapping provisions.

History of Part V

The history of the situation which existed prior to changes in what became s. 103 (S.O. 1989, c. 62 and since amended by S.O. 1994, c. 27, s. 134(6)) and 104, comprising Part V of the **Mining Act** is discussed in a consultation document entitled, **Ontario's Mines and Minerals Policy and Legislation: A Green Paper** (Ministry of Northern Development and Mines, December 12, 1988), Chapter III, page 27:

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3.1 INDUSTRIAL MINERALS

An industrial mineral is a non-metallic, non-fuel mineral such as talc, salt and silica, that is extracted and processed for industrial end-uses. Structural materials such as sand, gravel, clay, crushed stone, building stone and manufactured products like cement and bricks or refractories are also regarded as industrial minerals. Industrial minerals are characterized by their diversity of original and occurrence, the range of production volumes and the variety of end uses. They are frequently extracted from open pit mines or quarries. The prospects for future growth in this sector are high in comparison with metallic and fuel minerals. There are numerous opportunities to expand into both domestic and export markets. In Ontario, in 1987, the value of production for non-metals and structural materials exceeded $1.5 billion.

At present, the surface mining of industrial minerals is controlled by three separate pieces of legislation: The **Pits and Quarries Control Act**, the **Beach Protection Act** and the **Mining Act**. Underground mining of industrial minerals is controlled by the **Mining Act** *[emphasis added]*.

The **Pits and Quarries Control Act**, which is administered by the Ministry of Natural Resources, provides for the regulation and licensing of all surface industrial mineral mining operations that are situated on private lands in designated areas of the province. Designated areas currently include most of Southern Ontario and some townships around Sudbury and Sault Ste. Marie, as well as a few islands north of Little Current. The **Beach Protection Act**, which is administered by the Ministry of Natural Resources, provides for the regulation and licensing of removing sand from private or Crown land which is associated with the bed, bank, beach shore or waters of any lake, river or stream.

Part VII of the **Mining Act** deals with quarry permits for industrial minerals on Crown land and is currently administered for the Ministry of Northern Development and Mines by the Ministry of Natural Resources. Part VII has not changed for many years and does not adequately reflect the present need to administer industrial minerals consistently on both Crown lands and private lands. In addition, the provisions for plan submissions and the requirements for rehabilitation are inadequate and do not reflect current public expectations.

The **Pits and Quarries Control Act** is currently used to regulate and administer all surface-mined industrial minerals in designated areas.

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The **Aggregate Resources Act** was tabled for First Reading in the Legislature on June 27th, 1988. This Act will replace all the above legislation, and will regulate all surface industrial mineral mining operations on all Crown lands and private lands in designated areas of the province. It will also regulate the development of industrial minerals on Crown lands which are not held under mining leases (one can still obtain a lease under the **Mining Act** to "mine" industrial minerals).

By currently including all surface-mined industrial minerals under the **Aggregate Resources Act**, the regulation of all surface mined, non-structural industrial minerals is substantially improved until new mining legislation is in place to provide for effective administration and regulation of these open pit industrial mineral mines.

RECOMMENDATIONS

Include in the Mining Act all conventional industrial mineral surface-mining operations on private and Crown lands, with the exception of structural industrial minerals including aggregates such as sand, gravel, crushed or broken stone, cement, lime structural clay products and similar commodities (which would continue to be administered under the Aggregate Resources Act).

Include in the Mining Act, for the surface mining operations of industrial minerals, requirements for quarry permits, operating and rehabilitation plans, financial assurance and transfers of permits.

The foregoing extrinsic evidence, the use of which is limited for purposes of interpreting legislation which is discussed in Sullivan, Ruth **Driedger on Construction of Statutes**, 3rd ed. (Butterworths: 1994, Markham) in Chapter 18, entitled "Extrinsic Aids". The approach for their use, as affirmed by the Supreme Court of Canada is discussed at page 432:

> **Commission reports - the partial exclusion rule.** Often legislation is preceded by the report of a government commission or other body that has investigated a condition or problem and recommended a legislative response. Such reports set out the results of the investigation and the commission's recommendations, sometimes in the form of draft legislation. In so far as these reports are public documents that set out facts and authoritative opinions, they are admissible as evidence of external context. They may be included as such in the research of counsel and may be judicially noticed by the courts. In addition, because these reports play a role in the preparation of legislation, in some cases a major role, they also are part of its legislative history. This enhances their relevance and significance, for the information they contain is not simply presumed to be known to the legislature during the legislative process. May these reports therefore be relied on as direct evidence of legislative intent?

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> The traditional answer to this question is no. It is permissible to look at commission reports to discover the mischief at which the legislation is aimed, or the conditions to which it responds; in other words, it is permissible to use the report as evidence of external facts. But the reports cannot be looked at as direct evidence of legislative meaning or purpose[1] ...
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> This approach has been affirmed by the Supreme Court of Canada. In *Morguard Properties Ltd. v. City of Winnipeg*, Estey J. wrote:
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> > It has, of course, been long settled that, in the interpretation of a statute (and here I do not concern myself with the constitutional process...), the report of a commission of inquiry such as a Royal Commission may be used in order to expose and examine the mischief, evil or condition to which the Legislature was directing its attention. However, in the interpretation of a statute, the court, according to our judicial philosophy, may not draw upon such reports and commentaries, but must confine itself to an examination of the words employed by the Legislature in the statutory provision in question and the context of that provision within the statute.... The logic is, of course, inexorable that the Legislature may well have determined not to follow the recommendation set out in the report ...[2]
>
> By reading the words of the legislation against the facts and surrounding circumstances examined in the report, the court may draw inferences about the purpose of the legislation and the meaning of particular provisions. But the report cannot be used as direct evidence of the legislature's intended purpose or meaning.

The tribunal finds that "mischief" which existed up to 1988, with the enactment of the **Aggregate Resources Act** and repeal of the several statutes referred to following which considerable changes were made to the **Mining Act**, was recognition by the legislature of industrial minerals as an emerging area of substantial growth and to provide a revised legislative framework for more effective regulation and administration of industrial minerals. The tribunal has reproduced that portion of the report referring to recommendations, not for purposes of determining whether the recommendations were implemented in the legislative amendments, but to note the juxtaposition of the terms "conventional industrial mineral surface mining operations" and "structural industrial minerals". An examination of sections 103 and 104 is necessary to determine how they must be interpreted.

The original wording of section 103, which is not in issue in this proceeding, as changed by R.O. 1989, c. 62, s. 69, stated:

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[1] ***See*** *Assam Railways and Trading Co. Ltd. v. Commers. of Inland Revenue*, ***[1935] A.C. 445, at 458 (H.L.). See also*** *A.G. for British Columbia v. A.G. of Canada,* ***[1937] A.C. 368 (P.C.);*** *Ladore v. Bennett*, ***[1939] A.C. 468 (P.C.). Although it is often said that commission reports may be used as evidence of legislative purpose, this evidence is indirect. The report is admissible as direct evidence of external facts from which the purpose then is inferred.***

[2] ***(1983), 3 D.L.R. (4th) 1, at 4-5 (S.C.C.).***

103. - (1) Any person who proposes to commence the surface mining of non-metallic minerals, excluding natural gas and petroleum, on Crown land not in a part of Ontario that has been designated under the *Pits and Quarries Control Act,* being chapter 378 of the Revised Statutes of Ontario, 1980, or under subsection 5(2) of the *Aggregate Resources Act*, may proceed,

(a) by applying for and obtaining an aggregate permit or a licence under the *Aggregate Resources Act*; or

(b) by complying with the requirements of Part II of this Act.

(2) Any person who proposes to commence the surface mining of non-metallic minerals, excluding natural gas and petroleum, on Crown land in a part of Ontario that has been designated under the *Pits and Quarries Control Act* or under subsection 5(2) of the *Aggregate Resources Act*, in addition to an aggregate permit or a licence issued under the *Aggregate Resources Act*, may also obtain a lease from the Crown for the lands affected by complying with the provisions of Part II of this Act.

This was changed in 1994, S.O. c. 27, ss. 134 to:

103. (1) A person who proposes to commence the surface mining on Crown land of non-metallic minerals, excluding natural gas, petroleum and aggregate, as defined in the *Aggregate Resources Act*, shall proceed by complying with the requirements of Part II of this Act.

(2) A person who proposes to commence the surface mining on Crown land of aggregate as defined in the *Aggregate Resources Act* shall proceed by applying for and obtaining an aggregate permit or licence under the *Aggregate Resources Act* and may also obtain a lease from the Crown for the lands affected by complying with the provisions of Part II of this Act.

Section 104 has not been changed since S.O. 1989, c. 62, s. 69, and states:

104. Although an aggregate permit or license has been obtained under the *Aggregate Resources Act*, any licensee under this Act may stake out a mining claim or claims on Crown land affected by the permit or licence, in which case the provisions of this Act apply and any question of property damage shall be determined in the manner set out in section 79.

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The current wording of subsection 103(1) is limited to the surface mining of “non-metallic minerals ... excluding ... aggregate...” This exclusion does not encompass the entire definition of non-metallic minerals but rather creates a subset of non-metallic minerals which excludes aggregate, (among other things). This limited definition corresponds very closely with the concept of industrial minerals discussed in the Green Paper.

Subsection 103(2) then goes on to discuss the rules for surface mining of aggregate as defined in the **Aggregate Resources Act**. By making it applicable to aggregates, the legislators are found to be creating a subset of non-metallic minerals which are referred to in the Green Paper as structural industrial minerals. Subsection 103(2) very clearly states that an aggregate permit or licence is mandatory. It also provides that it is optional for the aggregate or permit holder to also acquire a lease from the Crown for the same lands, by proceeding with the processes found in Part II of the **Mining Act**.

Section 104 provides a framework for the situation where an aggregate permit or license has been issued under the **Aggregate Resources Act** for substances covered by subsection 103(2). This aggregate permit or license is for those industrial non-metallic minerals specified in the document, being any of those which are structural in nature, such as stone and crushed rock. Section 104 goes on to state that a mining claim may be staked by "any licensee", taken to mean a third party, on lands “affected by” an aggregate permit or license.

Clearly, this is to allow the ordinary prospector desiring to establish a claim in his or her search for minerals, except aggregates, to have access to the same lands for which an aggregate permit or license may already be in existence. Therefore, section 104 clearly contemplates that a mining claim may be made "subject to" an aggregate permit. Part V of the **Mining Act**, by the framework set out therein, provides the authority for a mining claim to be recorded "subject to" any pre-existing aggregate permit or license.

2. What kind of inquiry does the Mining Act authorize the Mining Recorder and upon appeal, the Commissioner, in determining whether there is an aggregate permit application pending? At issue is whether this determination is made by ascertaining and adopting the position of the Ministry of Natural Resources or whether an independent determination may be made.

As discussed above, the tribunal has added the question of the jurisdiction of the Mining Recorder and upon appeal, the Commissioner, to this specific question involving a pending application.

Jurisdiction of the Mining Recorder

Subsection 110(2)[3] is relevant to this matter:

> **110.** (2) Any question as to whether the provisions of this Act regarding a mining claim have been complied with, unless the Commissioner otherwise orders or unless the recorder with the consent of the Commissioner transfers the question to the Commissioner for his or her decision, shall in first instance be decided by the recorder.

The meaning of this subsection and the jurisdiction of the Mining Recorder is discussed at length in **Weirmeir v. Director of Lands Administration Branch of the Ministry of Natural Resources** (1979) 5 M.C.C. 469. The facts bear some similarities to those of the current appeal. In **Weirmeir** a lawyer's letter inquiring as to the process for the purchase of Crown Lands was made to the local MNR District Office, in connection with a proposed uranium refinery. At the time of a subsequent staking, the proposed acquisition of Crown lands had not proceeded to anything resembling the formal application process under the **Public Lands Act**. Within eight days of the date of the lawyer's letter, the process commenced to remove the lands from staking. However, owing to the manner in which this was required to be undertaken, with letters to Sault Ste. Marie who communicated with Head Office in Toronto, the recommendations for a Minister's Order withdrawing the lands from staking was not processed prior to staking of a number of mining claims taking place between six and 20 days later, and was abandoned as a result of the intervening stakings. Therefore, prior to the stakings and upon their being recorded, there was nothing in the Mining Recorder's office to indicate that the lands were not open for staking.

When the stakings came to the attention of the MNR official, he "caused" the Mining Recorder to institute a "show-cause" notice directed to the stakers concerning the validity of the stakings by reason of the prior request made by the informal letter. The Mining Recorder did so, and held that the letter constituted a **bona fide** application within the meaning of what is now subsection 30(b). The Mining Recorder cancelled the mining claims.

This was appealed to the tribunal. On the issue of the jurisdiction of the Mining Recorder, generally and dealing with subsections 110(2) and 111(1), Commissioner Ferguson stated at page 476:

> In my opinion the mining recorder has under subsection 2 of 143 [now 110] adequate authority to hear any question raised as to whether the Crown lands were open for staking at the time of the staking regardless of there being a competitive licensee and the broad power of control of proceedings under subsection 1 of section 144 (now 111) by a mining recorder is ample to authorize a show-cause procedure for determining the question. Further, if any questions based on this argument respecting jurisdiction of the appellate tribunals would fail. 19

[3] Subsection 110(1), which speaks to the hearing and deciding of disputes, is not reproduced. The current appeal does not involve a dispute, which has a specific meaning and is a term of art. The opening words of subsection 48(1), "A dispute in the prescribed form,...". It is also noted that subsections (1) and (2) have been changed by S.O. 1999, ch. 12, Schedule O, ss. 39(1); subsections (3), (4) and (7) have been repealed; and (10) has been added. This decision is based on the section as it was at the time the appeal was received, namely May 25, 1998. Query whether the changes noted have changed the nature of the Mining Recorder's general jurisdiction by limiting it to disputes under section 48.

By his last statement, the tribunal takes Commissioner Ferguson to have meant that notwithstanding the powers of the Mining Recorder, the Commissioner does have the jurisdiction to examine the question of whether lands are open for staking, including the situation where a staker is required to show cause as to whether the staking was valid. This does not shed any light, however, on the matter of looking behind an oral or written statement from MNR concerning the existence of an aggregate permit application.

The matter of whether the lands involved in an application to record the staking of a mining claim are open for staking is a necessary preliminary issue to be determined by the mining recorder when exercising his or her jurisdiction under subsection 46 of the **Mining Act** of whether to record the application. According to Commissioner Ferguson, the Mining Recorder, in exercising powers found in subsection 110(2) gives "adequate authority to hear any question raised as to whether the Crown lands were open for staking at the time of staking..." in his or her determination of whether the requirements of the **Mining Act** regarding a mining claim have been complied with.

The tribunal enjoys somewhat broader powers as found in section 105:

> **105.** Except as provided by section 171, no action lies and no other proceeding shall be taken in any court as to any matter or thing concerning any right, privilege or interest conferred by or under the authority of this Act, but, except as in this Act otherwise provided, every claim question and dispute in respect of the matter or thing shall be determined by the Commissioner, and in the exercise of the power conferred by this section the Commissioner may make such order or give such directions as he or she considers necessary to make effectual and enforce compliance with his or her decision.

Again, though not specifically stated in their Order [remitting this matter to the Commissioner, Docket C32881] Rosenberg J.A. raises some question of the extent of this power for the Court of Appeal at paragraph 19:

> [19] The core of the dispute between the respondents and the appellants may be a matter of civil and property rights ...

It also bears mentioning that an appeal to the High Court of Justice in **Weirmeir** was found to be outside the statutory requirement of being filed within 15 days (now 30) as required by the legislation. Grange J. found he could not extend time for the appeal to hear it. He stated (at page 485 of 5 M.C.C.), “I regret this decision.” By these words there is raised the concern for the tribunal that some portion of Commissioner Ferguson’s judgement which the Court would have liked to review.

As set out above, the **Mining Act** empowers the Mining Recorder and the Commissioner to determine whether lands are open for staking. In this regard, both have the authority to examine situations raised by any of the various provisions found in sections 29 through 34, as well as looking into whether the lands have been withdrawn from staking by Order of the Minister, in point of fact the Minister's delegate, by virtue of section 35.

The power to determine whether lands are open for staking is preliminary to any action of either recording or not recording an application to record the staking of a mining claim. As was apparently done in **Weirmeir**, it was held that such a determination necessarily involved determining whether an application brought in good faith was pending in the Ministry of Natural Resources. The inquiry extended to an examination of the **Public Lands Act** to determine what constituted an application as well as the matter of *bona fides*. Based upon the extensive analysis and inquiry in **Weirmeir**, it was found that the Mining Recorder and the Commissioner had the authority to look into the not only the legislative requirements set out in the **Public Lands Act**, but also examined the facts to determine whether that which took place in the Ministry of Natural Resources was such to render the lands not open for staking in accordance with what is now clause 30(b).

The tribunal agrees that the Mining Recorders do have that power and the jurisdiction to make the necessary determination within the parameters of clause 30(b). What is uncertain, however, is how a Mining Recorder or the Commissioner could go about determining the existence of an application beyond either what is sworn to on the application to record or what is communicated by the Ministry of Natural Resources. It would be hoped that the Ministry of Natural Resources would advise the Provincial Recording Office of any potential application falling under section 30(b), but there is currently no statutory requirement that they do so.

Is it, however, necessary for each and every application to record a mining claim received in the Provincial Recording Office to institute a show-cause proceeding essentially setting out that the Mining Recorder be advised of any application, inquiry, correspondence, letter and incomplete application which may affect the lands which are subject to the staking? The tribunal further finds that, in the absence of any clear reason to do so, it is not necessary for the Provincial Mining Recorders to notify the Ministry of Natural Resources each time they are considering whether to record an application to record. It is beyond what is contemplated under either sections 110 and 111 or 105 to subject an MNR district office to in-person scrutiny or extensive questioning, beyond the usual routine correspondence. Their inquiry must necessarily be limited to whatever information is on file in the Provincial Recording Office, namely that information over which the Mining Recorders have custody and control. The whole applications process for aggregates or otherwise takes place outside the Mining Recorders' knowledge, within the Ministry of Natural Resources, but for the notification.

Countless applications to record are received in the Provincial Recording Office. Informal statistics indicate the filing of an average of 12 such applications per day during the first five months of this calendar year, in which between one and 25 mining claims may be involved. These are processed according to the information available in the Recording Office.

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To require the Mining Recorders to do otherwise, *for each and every mining claim involved*, would be unreasonable. Nor does the **Mining Act** state that it is the responsibility of the Mining Recorder to launch into such an investigation *outside the ambit of their own office.*

However, the existence of the application is nonetheless a question of fact, whose very existence would have a bearing on the application to record a mining claim. Where an application is later found to have existed, but subsequently is granted, the situation become more complicated, as the Mining Recorder will not have had the opportunity to make the necessary determination. The tribunal finds that there is no jurisdiction to go behind the granting of the application by the Ministry of Natural Resources, and evaluate the application itself, as this could have the effect of overturning the decision of a delegate of the Minister of Natural Resources. Also, as the statutory power of decision has been exercised, through the issuance of the permit, the review would have the effect of being a judicial review over the actions of the Minister of Natural Resource's delegate.

It has been stated in **Nordic Group v. Labelle, MNR and MNDM**, File MA -028-97 (August 28, 1998), unreported, which was an appeal pursuant to subsection 112(1) of the **Mining Act** from a decision of the Mining Recorder to record certain mining claims staked on behalf of Labelle which partially covered lands which were included in Nordic's Application for Aggregate Permit. Subsequent to the recording of the mining claims, a quarry permit was issued to Labelle. The facts of that case were different from the current appeal in that the Ministry of Natural Resources did not consider Nordic's efforts to constitute an application sufficiently perfected so as to require that the Mining Recorder should have been apprised. Nordic's appeal to the tribunal also sought a declaration, based upon the Nordic application which was earlier in time, that the lands were not open for staking. It was held that a review of the failure by MNR to remove the lands from staking pending the Nordic aggregate permit application was outside of the jurisdiction of the Mining Recorder and the Commissioner. What took place was a refusal by MNR to acknowledge the Nordic application followed by acceptance of a subsequent application and issuance of a permit to Labelle. It was held that the relief sought was in the nature of a judicial review of the actions of MNR. [It is now noted that the Reasons in **Nordic** at page 11 erroneously made reference to clause 30(f) instead of 30(b).]

Although not stated in the **Nordic** decision, which was in essence between two entities vying for the same right to an aggregate permit, the determinative factor in both that case and the current appeal is whether an aggregate permit has been issued. It remains of concern to the Commissioner that any appeal involving a preliminary determination of the Mining Recorder would in essence be a reversal of the granting of a permit by another Ministry, notwithstanding the role played by that Ministry in the time leading up to the granting of the application.

The Commissioner does not have the power to conduct such a review and declines any and all attempts to compel the exercise of this remote, collateral jurisdiction. While the issue may come under the cover of whether the lands are closed to staking, it is found to be in point of fact an attempt to judicially review the processes within the Ministry of Natural Resources. Such a request, if accepted, would require the Mining Recorder or Commissioner to review and potentially reverse a decision of that Ministry to issue an aggregate permit.

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While actual principles of judicial review are determined by the Superior Courts, relying on commentary in texts on Administrative Law is helpful in describing the issue in legal and jurisdictional terms. In Rene Dussault & Louis Borgeat, **Administrative Law*, A Treatise***, 2nd ed. Vol 4 (Carswell: 1990, Toronto), in a discussion on Judicial Review of the Legality of Administrative Action, at page 186:

(ii) Preliminary or Collateral Questions

> In addition to performing various statutory duties relating to procedure or formality, the jurisdiction of an agency, inferior tribunal or public officer may also be dependent on certain questions of law or of fact being determined prior to any decision by the authority. Such questions are usually referred to as matters "preliminary" or "collateral" to the agency's jurisdiction.[4] Laroche J. of the Quebec Superior Court explained in Commission des ecoles Catholiques de Shawingan v. Roy:[5]
>
> There is an essential distinction between, on the one hand, preliminary facts, those aspects of law and of fact that condition the existence of jurisdiction, and on the other hand, the very issue which the inferior tribunal has to inquire into [Tr.].
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> Any error in a preliminary matter goes to jurisdiction and is thus reviewable by the courts.[6]

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[4] See DE SMITH, *op. cit.*, note 18, pp. 114-119; WADE, *op. cit.*, note 8, pp. 249-262; P.P. CRAIG, *Administrative Law*, 1983, pp. 301-304; GARANT, *op. cit.*, note 6, pp. 682-692; PEPIN and OUELLETTE, *op. cit.*, note 8, pp. 208-215; J.M. EVANS *et al., Administrative Law: Cases, Text and Materials*, 3rd ed., 1989, pp. 553-555; JONES and DE VILLARS, *op. cit.*, note 8, pp. 111-115; REID and DAVID, *op. cit.*, note 6, p. 191: "In the language of this branch of the law, "jurisdictional", "preliminary", and "collateral" are synonymous".

[5] [1965] C.S. 147 at 152 (Que. S.C.).

[6] Delivering the decision on behalf of the Supreme Court in *Union des employees de service, local 1298 (F.T.Q.) v. Bibeault*, [1988] 2 S.C.R. 1048 at 1086, Beetz J. reasoned as follows: "The idea ... is based on the principle that the jurisdiction conferred on administrative tribunals and other bodies created by statute is limited, and that such a tribunal cannot by a misinterpretation of an enactment assume a power not given to it by the legislator." Laroche J. pointed out, *ibid*., p. 153: "*Certiorari* lies for erroneous interpretation of jurisdictional questions" [Tr.]. However, "preliminary" or "collateral" matters forming the very basis of the agency's jurisdiction must be distinguished from 'incidental" questions that concern the agency's duties. Only the former is reviewable by the courts, unless, as we discuss later, there is an error on the face of the record or patently unreasonable error. See *infra*, notes 446 - 508 and the accompanying text. See *Kearney v. Desnoyers* {1901] C.S. 279 at 283, *per* Davidson J.; *R. v. Ontario Labour Relations Board, ex parte Taylor* (1963), 41 D.L.R. (2d)456 at 462 (Ont. H.C.), *per* McRuer J. See also J.G. PINK, "Judicial 'Jurisdiction' in the Presence of Privative Clauses" (1965), 23 *U. of T. Fac. L. Rev.* 5 at 12; MERCER, *loc. cit.*, note 106, pp. 659 - 662.

A very crucial distinction is drawn between a jurisdictional error, *i.e.* one made in determining a preliminary question, or one that affects the very existence of jurisdiction, [7] and an error committed within jurisdiction. [8]

The first type is reviewable, [9] and the second it not[10] unless the decision is patently unreasonable.[11] B.L. Strayer described the distinction as follows (although he did not consider the test for "patent unreasonableness" which was developed later):[12]

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[7] See *infra*, notes 401 - 431 and the accompanying text.

[8] See *infra*, notes 432 - 445 and the accompanying text. As P.W. HOGG remarks in "The Jurisdictional Fact Doctrine in the Supreme Court of Canada: *Bell v. Ontario Human Rights Commission"*) (1971), 19 *Osgoode Hall L.J.* 203 at 209: In Anglo-Canadian administrative law the distinction between a jurisdictional fact and a fact within jurisdiction is crucial". See S.A. DE SMITH "Judicial Review in Administrative Law: The Ever Open Door?" (1969), 27 *Cam L.J.* 161 at 163 (comments on *Anisminic Ltd. v. Foreign Compensation Comm.* [1969] 1 All. E.R. 208 (H.L.)). See also D.M. GORDON, "What did the Anisminic Case Decide?" (1971), 34 *mod. l. Rev.* 1 at 9 -11. See also *Commission des relations ouvrieres du quebec v. canadian international paper co.*, [1963] B.R. 181 at 183 (Que. Q.B.) *per* Casey J.: "Consequently the question that arose on the application for the writ was whether the error complained of amounts to 1. an usurpation or assumption of a jurisdiction that the Board does not possess or 2. no more than the wrong exercise of a jurisdiction that it does." See also *Segal v. City of Montreal*, [19310 S.C.R. 460 at 472; *Richstone Bakeries Inc. v. Labour Relations board, supra*, note 182, p. 569 (Que. Q.B.); *R. v. Agricultural Land Tribunal for the South Eastern Area, ex parte Bracey* [1960] 2 All E.R. 518 at 520 (Q.B.D.); *Doric Textile Mills Ltd. v. Commission des relations ouvrieres du Quebec*, [1965] B.R. 167 at 177 (Que. Q.B.) *per* Casey J. dissenting; *Commission de transport de la Communaute urbaine de Montreal v. Labelle*, Montreal, September 25, 1987, C.A. 500-09-001446-855 (Que. C.A.) p. 10, *per* Monet j. (unanimous decision).

[9] As Spence J. of the Supreme Court pointed out in *Galloway Lumber v. Labour Relations Board of British Columbia* [1965] S.C.R. 222 at 230: "[A] judicial or quasi-judicial decision of an administrative board delimiting its field of jurisdiction is reviewable on *certiorari*." See also *Alfred Lambert v. Commission des relations ouvrieres du Quebec*, [1963] R.D.T. 519 at 531 (Que. S.C.) *per* Archambault J.; *Anisminic Ltd. v. Foreign Compensation Comm., ibid*,p. 216.

[10] See *Canadian Ingersoll Rand Co. v. Commission des relations ouvrieres du Quebec*, [1961] B.R. 97 at 106 (Que. Q.B.), *per* Taschereau J.; *Association unie des compagnons et apprentis de l'industrie de la plomberie et tuyauterie des Etats-Unis et du Canada*, [1969] S.C.R. 466, unanimous decision delivered *per* Abbott J; *Cahoon v. Conseil de la Corporation des ingenieurs*, [1971] R.P. 209 at 216 - 217 (Que C.A.), *per* Deschenes H. See also *Service Employees' International Union, Local 333 v. Nipawin District Staff Nurses Association*, [1975] 1 S.C.R. 382 at 389, *per* Dickson J; *Canada Labour Relations Board v. City of Yellowknife*, [1977] 2 S.C.R. 729 at 738 -739, *per* Pigeon J. See also P. CUTLER, "Les brefs de prerogative et le nouveau Code du trvail" (1966), 26 du B. 7 at 9.

[11] See *infra*, notes 483 - 487, 542 - 544 and the accompanying text.

[12] "The Concept of 'Jurisdiction' in Review of Labour Relations Board Decisions" (1963), 28 *Sask Bar Rev.* 157 at 159.

> It is trite law that an inferior tribunal cannot give itself a jurisdiction to which it is not entitled by statute. Questions of fact or law upon which depends the "jurisdiction" of the tribunal - the so-called "preliminary" or "collateral" questions - may be decided initially by the tribunal but the decisions will always be open to review by a superior court. On the other hand, questions which do not relate to jurisdiction - questions which are "within the jurisdiction" of the tribunal - are to be decided by the tribunal alone.

It is not always an easy task to determine whether a question is preliminary to the existence of jurisdiction or whether it is directly within the agency's jurisdiction. The courts have been inclined to show reserve when dealing with agencies specialized in a particular field and to decide in favour of the agency should some doubt exist.[13] But where they conclude in examining the statute that the agency's jurisdiction is predicated on a preliminary matter, the reserve falls; it falls to the courts to resolve the matter, and faced with error on the part of the agency they must set aside the decision. In *Syndicat des employees de production du Quebec et de l'Acadie v. Canada Labour Relations Board,* Beetz J. explained the problem in the following terms.[14] 25

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[13] See *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227 at 233, *per* Dickson J. In *Syndicat des employees de production du Quebec et de l'Acadie v. Canada Labour Relations Board, supra*, note 18, p. 421, Beetz J. termed the concept of preliminary or collateral question "fleeting and vague". See also *Canada Labour Relations Board v. Halifax Longshoremen's Association* [1983] 1 S.C.R. 245 at 256, *per* Laskin C.J.; *Syndicat des travailleurs unis de Columbia International (C.S.N.) v. Dulude*, [1988] R.J.Q. 1400 at 1401 - 1402 (Que. S.C.), *per* Trudeau J. See R.P. GANON, "L'application de la notion d'erreur manifestement deraisonnable
in *les Recent developpments en droit adminstratif, Colloquium held by the bar of Quebec, Sherbrooke, October 1988, pp. 3 - 8.*

[14] *Ibid.*, p 441. See also *Produits Petro-Canada Inc. v. Moalli*, [1987] R.J.Q. 261 at 266 - 268 (Que C.A.) *per LeBel J (unanimous decision). However*, see the recent decisions of the Supreme Court in *Union des employees de service, local 298, (F.T.Q.) v. Bibeault, supra*, note 203, where beetz J. put forward a new approach to qualifying the concept of preliminary or collateral question, consisting of a serve of the legislative intent through a reading of the statutory provisions, of the object to the Act, of the raison d'etre of the tribunal, of the domain of expertise of its members and of the nature of the problem submitted (pp. 1087 -1090):

> The concept ... diverts the courts from the real problem of judicial review; it substitutes the question "Is this a preliminary or collateral question to the exercise of the tribunal's power?" for the only question which should be asked, "Did the legislator intend the question to be within the jurisdiction conferred on the tribunal?"
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> ...
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> The formalistic analysis of the preliminary or collateral question theory is giving way to a pragmatic and functional analysis, hitherto associated with the concept of the patently unreasonable error. ... It is nevertheless true that the first step in the analysis necessary in the concept of "patently unreasonable" error involves determining the jurisdiction of the administrative tribunal. At this stage, the Court examines not only the wording of the enactment conferring jurisdiction on the administrative tribunal, but the purpose of the statute creating the tribunal, the reason for its existence, the area of expertise of its members and the nature of the problem before the tribunal. ...

> What makes this kind of error fatal, whether serious or slight, is its jurisdictional nature, and what leads to excluding the rule of patently unreasonable error is the duty imposed on the Federal Court of Appeal to exercise the jurisdiction conferred on it by s. 28(1)(a) of the Federal Court Act.... Once a question is classified as one of jurisdiction, and has been the subject of a decision by an administrative tribunal, the superior court exercising the superintending and reforming power over that tribunal cannot, without itself refusing to exercise its own jurisdiction, refrain from ruling on the correctness of that decision, or rule on it by means of an approximate criterion.

In some instances, an agency's faulty weighing of the preliminary facts to the merits is a result of an incorrect interpretation of a legislative provision and gives rise to a mixed question of law and of fact, [15] although most often, preliminary or collateral errors may be identified clearly as errors of either law or of fact.[16]

Robert Reid & Hillel David, Administrative Law and Practice, 2nd ed. (Toronto: 1978, Butterworths) at page 192 in Chapter 5 entitled, "Finality of Tribunal Action, "Collateral Issues"" states:

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> This development seems to me to offer three advantages. First, it focuses the Court's inquiry directly on the intent of the legislator rather than on interpretation of an isolated prosvision…Second, a pragmatic or functional analysis is better suited to the concept of jurisdiction and the consequences that flow from a grant of powers. ... The third ... it puts renewed emphasis on the superintending and reforming function of the superior courts.

See P. GARANT, *'L'introubale notion de juridiction: les derniers efforts de clarification du Juge Beetz*" (1989), 2 *C.J.A.L.P.* 337.

[15] These cases have been classified under "error of law' or "error of fact" depending on their predominance.

[16] Where a jurisdictional preliminary or collateral matter is involved, the distinction between error of law and error of fact has no influence on their legal effect because both entail the invalidity of the decision. As HOGG, *loc. cit.*, note 205, p. 215, points out:

> Fortunately, in the context ... the classification ... as questions of "law" or of "fact" (and perhaps this is the most accurate) of "mixed law and fact" ... makes no difference: our problem, which is whether the question to be decided by the agency or the court, is exactly the same however the question is classified.

> It is trite that a tribunal may not give itself jurisdiction by a "wrong" decision on a collateral issue. The *locus classicus* is the judgement of Lord Coleridge.[17] The tribunal may not arrogate powers to itself by a misinterpretation of its constituting legislation, [18] nor may it misinterpret that legislation so as to decline to exercise its jurisdiction.[19] The statute may entrust a tribunal with the power to determine what matters are relevant before it, [20] and whether the preliminary facts or other conditions precedent on which its jurisdiction rests exist.[21] The onus of showing absence of a fact prerequisite to the tribunal's jurisdiction rests with the person so alleging.[22]

While there is a right of appeal from a decision of the Commissioner, unlike with many administrative tribunals, the principle of decisions which are collateral to jurisdiction as set out above will still apply. The Mining Recorder and Commissioner are empowered to determine whether lands are closed to staking before considering whether an application to record a mining

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[17] In *Bunbury v. Fuller* (1853), 9 Ex. 111, at p. 140, 156 E.R. 47, at p. 60, quoted by Roach J.A. in *Re On. Labour Relations Bd.; Bradley and Canadian General Electric Co. Ltd.*, [1957] O.R. 316, at p. 324: "Now it is a general rule, that no Court of limited jurisdiction can give itself jurisdiction by a wrong decision on a point collateral to the merits of the case upon which the limit to its jurisdiction depends; and however its decision may be final on all particulars, making up together that subject-matter which, if true, is within its jurisdiction, and however necessary in many cases it may be for it to make a preliminary inquiry whether some collateral matter be or not be within the limits, yet upon this preliminary question, its decision must always be open to inquiry in the superior Court. Then to take the simplest case - suppose a Judge with jurisdiction limited to a particular hundred, and a matter which is brought before him as having arisen within it, but the party charged contends that it arose in another hundred, this is clearly a collateral matter independent of the merits; on its being presented, the Judge must not immediately forebear to proceed but must inquire into its truth or falsehood, and for the time decide it, and either proceed or not with the principal subject-matter according as he finds on that point; but this decision must be open to question, and if he has improperly either forborne or proceeded on the main matter in consequence of an error, on this the Court of Queen's bench will issue its *mandamus* or prohibition to correct his mistake." See also, *Jarvis v. Assoc. Medical Services*, [1964] S.C.R. 497, 44 D.L.R. (2d) 407; *R. v. Ont. Labour Relations Bd.; ex p. Taylor*, [1964] 1 O.R. 173, 41 D.L.R. (2d) 456, at p. 462; *R. v. N.S. Labour Relations bd.; ex p. J.B. Porter Co.* (1968), 68 D.L.R. (2d) 613, at p. 620, Board wrongly deciding that provincial rather than federal labour legislation applied. See also *R. v. Workmen's Compensation Bd.; ex. p. Foster Wheeler Ltd.* (1968), 70 D.L.R. (2d) 313, wrong interpretation of statute.

[18] *Re Shopmen's Local Union*, [1972] 2 o.r. 549, 26 D.L.R. (3d) 153 (C.A.)' *Re CSAO National Inc. and Oakville Trafalgar Memorial Hospital Assoc.* [1972] 2 O.R. 498, 26 D.L.R. (3d) 63 (C.A.); *Re Canac Shock Absorbers and Int'l Union U.A.W.* (1974), 5 O.R. (2d) 645, 51 D.L.R. (3d) 208.

[19] *Assoc. Int. des Commis. v. Commn. des Rels.*, [1971] S.C.R. 1043, at p. 1049.

[20] *Re Sheehan and Criminal Injuries Compensation Bd.* (1974), 52 D.L.R. (3d) 728 (Ont. C.A.).

[21] *Re Cruikshank* (1975), 64 D.L.R. (3d) 420 (B.C); *Re General Longshore Workers and Maritime Employers Assoc.* (1975), 12 N.B.R. (2d) 507, 65 D.L.R. (3d) 166 (C.A.).

[22] *Re Cutter Laboratories Ltd. and Anti-Dumping Tribunal*, [1976] 1 F.C. 446, 64 D.L.R. (3d) 5 (C.A.).

claim will be recorded. What may distinguish **Weirmeir**, discussed above, in this regard is that in that case the Ministry of Natural Resources approached the Mining Recorder with the issue of a pre-existing application, rather than a licensee asking that the Mining Recorder exhaust any and all possibilities of the existence of an application, including to rule on whether the application was properly made.

3. Of what relevance, if any, is clause 30(b) of the Mining Act to this preliminary issue? If relevant, how should it be interpreted and applied?

Clause 30(b) operates to close lands for staking pending an application in the Ministry of Natural Resources. As to whether this closing will occur will affect the outcome, namely whether the Mining Claims may be recorded "subject to" the permit or will not be recorded.

Subsection 103(2) requires that a person wishing to commence surface mining of aggregates must obtain an aggregate permit or licence. That person may also obtain a lease from the Crown "for the same lands", by proceeding with the processes found in Part II of the **Mining Act**. What is unclear from the wording is whether the mining lease would include those aggregates, or be limited to those remaining minerals not already included in the aggregate permit/license.

This issue is important is because it raises the question of whether the aggregate permitting process is exclusive or overlapping with that of the processes within the **Mining Act**. Is the only way to obtain a right to "surface mine" aggregate through a license or permit pursuant to the **Aggregate Resources Act**? If it is, then an aggregate permit application should have no bearing on whether the lands are closed to staking, other than that of being a means of providing notice to prospective stakers that a aggregate extraction may take place on the same lands as the mining claim.

The **Mining Act** includes pit and quarry material in the definition of minerals. Minerals are included in the definition of "mining rights" as being "the right to minerals on, in or under any land". The **Aggregate Resources Act**, on the other hand, is suggestive of jurisdiction over surface rights only, as can be seen from clauses 5(1)(a) and 34(1)(a):

> **5.** This Act and the regulations apply to,
>
> (a) all aggregate and topsoil that is the property of the Crown or that is on land the surface rights of which are the property of the Crown;
>
> **34.** (1) No person shall, except under the authority of and in accordance with an aggregate permit, operate a pit or quarry,
>
> (a) to excavate aggregate or topsoil that is on land the surface rights of which are the property of the Crown, even if the surface rights are leased to another person; S.O. 1996, c. 30, s. 29(1).

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The final clause of 34(1)(a) purports to have aggregates not included in a lease of surface rights to another. This would be the case if aggregates formed part of the mining rights, and yet the provision does not appear to be suggesting that the right is a mining right.

The Ministry of Northern Development and Mines takes the approach that authority over both structural and other non-metallic industrial minerals overlaps that of Natural Resources. Its policy entitled **Mining Lands Leases, Licences and Patents Policy, LP 505-1**, dated October 29, 1996 sets out, in part, at page 1:

> **Policy:**
> An unpatented mining claim includes the exclusive right to explore for all metallic and non metallic minerals except for sand, gravel, and peat. To produce aggregate from a claim, either a mining lease or an aggregate permit is required.

Although not operative for purposes of this appeal, the new [2000 S.O., ch.26, Sched. M, sections 2 and 3] provisions in the **Mining Act** of subsections 28(2), (3) and (4) and the rewording of clause 30(b) leave no doubt that there is concurrent jurisdiction over these substances between the two Ministries, which is governed by priority. Through their operation, an aggregate permit application would not render the lands closed for staking, as it does not involve the minerals available to be staked. These new provisions would support the position of Northern Development and Mines and would reflect the decision made by the Mining Recorder.

The tribunal finds it must agree with the position taken by Northern Development and Mines. Aside from the confusion caused by overlapping jurisdiction, nonetheless, at the time of staking, there was an application pending. However, the ability of the Mining Recorder or the Commissioner to scrutinize a pending application to determine the applicability of clause 30(b) has been precluded by the actions of the Ministry of Natural Resources.

Due to the granting of the aggregate permit application, the tribunal has two choices. It can deem the pending application to have met the requirements of clause 30(b) and find that the lands were not open for staking. This would clearly cause unfairness to the appellants, who undertook their staking unaware of the situation. The other possibility is to deem the aggregate permit application as having already been granted at the time of the staking, which would render a decision on whether the lands are closed to staking unnecessary. Neither possibility is ideal, but to attempt to do otherwise, or to fail to do otherwise, would either cause the tribunal to exceed or refuse to exercise its jurisdiction, resulting in no decision.

The tribunal notes that Mr. Wainwright pointed out that this issue was not raised by the parties, and therefore, the tribunal is given to assume that his clients would not have been seeking to stake a mining claim for this land and bring it to lease.

Based upon the foregoing, the tribunal is prepared to find that clause 30(b) has no relevance to the particular facts of this case, owing to the special circumstances, namely the failure to notify the Mining Recorder of the pending application and the subsequent granting of the permit shortly after the staking. The aggregate permit application will be deemed to have been granted at the time of staking.