File No. MA 014-00

L. Kamerman	)	Wednesday, the 8th day
Mining and Lands Commissioner	)	of November, 2000.

THE MINING ACT

IN THE MATTER OF

An application under subsections 51(1) and 80(2) of the **Mining Act** and an application under section 21 of the **Public Lands Act**, in respect of Mining Claim L-1206101, recorded in the name of Barry Ken McCombe, situate in the Township of Grenfell, being an unsurveyed township, in the Larder Lake Mining Division, District of Timiskaming, hereinafter referred to as the "Mining Claim";

AND IN THE MATTER OF

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

AND IN THE MATTER OF

An application for an order under the **Public Lands Act** for a grant of easement in favour of the Applicant over particular portions of the Mining Claim;

AND IN THE MATTER OF

An application for an order excluding particular portions of the surface rights from the Mining Claim.

B E T W E E N:

GERRY ROY

Applicant

- and -

BARRY KEN McCOMBE

Respondent

- and -

MINISTER OF NATURAL RESOURCES

Party of the Third Part

O R D E R

UPON hearing from the parties in this matter and upon reading the material filed;

1. THIS TRIBUNAL ORDERS THAT the application for the disposition of surface rights in connection with an application by Gerry Roy, under the **Public Lands Act** be and is hereby allowed.

2. THIS TRIBUNAL FURTHER ORDERS THAT there are no conditions attached to this Order and that no survey will be required.

3. THIS TRIBUNAL FURTHER ORDERS THAT no costs shall be payable by any of the parties to this application.

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

Reasons for this Order are attached.

DATED this 8th day of November, 2000.

Original signed by L. Kamerman

L. Kamerman
MINING AND LANDS COMMISSIONER

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Applicant

- and -

BARRY KEN McCOMBE

Respondent

- and -

MINISTER OF NATURAL RESOURCES
Party of the Third Part

REASONS

The hearing of this matter took place in the Larry Brown Room, Royal Canadian Legion Hall, Summerhays Avenue, Kirkland Lake, Ontario, on October 2, 2000.

Appearances:

Gerry Roy, applicant	Appearing on his own behalf
Barry McCombe, respondent	Appearing on his own behalf
Douglas Robinson	Acting on behalf of Mr. McCombe
Lane LaCarte, party of the Third Part	Kirkland/Claybelt Area Supervisor, Kirkland Lake District, Ministry of Natural Resources (MNR)

Nature of Proceedings

This is an application pursuant to subsection 51(4) of the **Mining Act** for the disposition of surface rights on an unpatented mining claim pursuant to the **Public Lands Act**, duly referred to the tribunal by the Minister of Northern Development and Mines. Where there is an application to the Ministry of Natural Resources for a Land Use Permit on Crown Lands and where there is a pre-existing unpatented mining claim, the applicant must obtain the consent of the mining claim holder to the disposition of surface rights, pursuant to section 51 of the **Mining Act**. Subsection 51(2) creates a statutory obligation on the applicant to obtain the mining claim holder's consent to disposition.

> **51.** (2) Where the holder of an unpatented mining claim consents to the disposition of surface rights under the *Public Lands Act*, the recorder shall make an entry on the record of the claim respecting the consent, and thereupon the surface rights may be dealt with as provided in the *Public Lands Act*.

Where the mining claim holder does not consent to the disposition of surface rights to all or a portion of his or her mining claim, the matter is referred to the tribunal and may proceed to a hearing. Subsections 51(4) through (6) of the **Mining Act** apply to these proceedings:

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> **51.** (4) Where an application is made for disposition under the *Public Lands Act* of surface rights on an unpatented mining claim and the holder of the unpatented mining claim does not consent to the disposition and provision for the reservation or exclusion of the surface rights is not otherwise provided for in this Act or any other Act, the Minister may refer the application to the Commissioner.
>
> (5) Where an application under subsection (4) is referred to the Commissioner, he or she shall, upon giving all interested persons at least ninety days' notice and after hearing such interested persons as appear, make an order based on the merits of the application.
>
> (6) Where surface rights on an unpatented mining claim are required for the use of the Crown or other public use, this section applies with necessary modifications.

Background

Grenfell Township is located just north of the junction of Highways 11 and 66, having within its borders most of Kenogami. The Town of Sesikinika is located to the north and Swastika, Chaput Hughes and Kirkland Lake lie to the east.

Mr. Barry McCombe is the recorded holder of Mining Claim L-1206101 (the "Mining Claim"), located in the Township of Grenfell, having recorded the Mining Claim on April 24th, 1995. The application to record was not filed, so that the actual date of staking is not available; however, the legislation requires that it would have been within the 30 days immediately preceding the date of recording.

The Roy Applications

On May 12, 1999, Mr. Gerry Roy applied to the Ministry of Natural Resources (MNR) for a Land Use Permit pursuant to the **Public Lands Act** for a Sceptic Waste Disposal Site (Ex. 7, tab 1), to be located wholly within the lands of the Mining Claim. In addition, he has applied for a Work Permit for purposes of waste trench construction (Ex. 7, Tab 4) and for the construction of a 200 metre length of road, being six metres wide, to extend from the existing aggregate pit operated by Mr. Roy to the proposed waste disposal site (Ex. 7, Tab 4).

On September 16, 1999, Mr. Roy also applied to the Ministry of the Environment for a Provisional Certificate of Approval for a Waste Management System, pursuant to the **Environmental Protection Act**. The Waste Management System (Hauled Sewage) No.

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A920462 Provisional Certificate of Approval for a Hauled Sewage Disposal Site was issued on May 8, 2000, expiring on May 1, 2005. The Provisional Certificate of Approval itself does not entitle Mr. Roy to operate a Sceptic Disposal Site on Crown Lands. Therefore, the Provisional Certificate of Approval is of no force and effect without the Land Use Permit from MNR.

Following the receipt of the application for Land Use Permit, MNR went through its approvals process. According to materials filed, a Circulation of Request dated October 21, 1999 (Ex. 7, tab 3) was distributed for comments from the staff biologist, district planner, forest management coordinator, lands comments and area supervisor comments. This Request states, "Ensure no existing staked mining claims. Use of area consistent with adjacent uses (2 existing sludge sites adjacent.) Otherwise OK". At the bottom it sets out that the claim holder is Barry McCombe.

Mr. McCombe's Mining Claim

Mr. McCombe has refused to provide his consent to the disposition of the surface rights for the proposed 1.1 hectare site, which measures 152 metres by 61 metres. As set out above, the **Mining Act** has created a statutory right in the Mining Claim holder to refuse his consent. In the case of Mr. McCombe, he has asked for certain conditions, which are set out further below.

The Mining Claim is described as a 7 unit claim, having boundaries of 800 metres by 1,200 metres, although irregular, the 1,200 metre boundaries being those running north to south. The western boundary of the Mining Claim is along the east side of Highway 11, although for the most part it does not directly abut the highway.

Mr. McCombe is the recorded holder of a series of contiguous mining claims, which are shown outlined in yellow on Exhibit 13, being a portion of the Index to Land Disposition (Map), received from the MNDM Resident Geologist Office during the course of the proceeding. The McCombe Mining Claims run approximately half the north to south length of Grenfell Township and although varying in width, run a strip which varies between approximately 3 and 6 units (ie. 1,200 and 2,400 metres) in width. The tribunal would describe this as a moderately substantial block of claims.

Mr. McCombe has performed or has caused to have performed a considerable amount of assessment work on this block of claims. The abstract for the Mining Claim shows $5,600 and $3,006 performed and filed on this claim, $1,850 and $5,100 performed on this claim and filed on some other mining claim(s) all in 1997. Another three work reports show $2,594, $1,710 and $1,090 applied to this claim. Of those amounts, a total of $790 was actually performed on the Mining Claim. This filing was completed during 2000. Filed as Exhibit 10 is a map, drawn up by Mr. Gamble during the time the claims were optioned to Kinross Gold

Corporation, showing this block of claims with various details noted. While not affording a direct interpretation, comments noted include various pits and trenches, with values ranging from 0.8 opt (ounces per ton) to 95.50 opt. There is also activity on a shaft to the north of the Mining Claim denoting a number of bulk samples with between 2.96 to 17 oz of Au (gold).

Mr. McCombe stated that his considerable assessment work on the property has identified a crystalline structure bearing gold. While these numbers are most encouraging, the type of rock in which the gold is located and available chemical process for extraction, will be a factor in determining whether such figures will lend themselves to a profitable mine. Further assessment work and bulk sampling will likely be necessary.

Surface Activity on Mining Claim

There is considerable surface activity on Mr. McCombe's unpatented Mining Claim, which both pre-dates and is subsequent to his staking, which could be better illustrated through an actual sketch. However, no sketch was filed and it appears that no government ministry at this time can produce a map which depicts unpatented mining claims and surface rights features together. On October 12, 2000, the tribunal requested that Mr. LaCarte provide information concerning the commencement dates of the various surface activities. This was duly provided on October 25, 2000.

For purposes of orientation, it is noted that an IPCL pipeline runs northwest to southeast through the eastern side of the Mining Claim. The legend on the Index to Land Disposition indicates that an application for right of way has been made. Highway 11 runs in a similar orientation, just west of the Mining Claim and only abuts the claim at its southwest corner.

There is an MNR operated Waste Disposal Site operated in part within the subject lands. The original application provided is dated October 1, 1971, and a Provisional Certificate of Approval issued February 18th, 1981 is also enclosed. The document indicates that the site is a 1.4 hectare dump site located within a total site are of 3.2 hectares. The dump is located approximately just south of the mid-point of the Mining Claim, both in and outside of its western boundary.

There is a Land Use Permit issued to Martin J. Lautaoja Construction Ltd. for a Sewage Disposal Site, applied for November 20th, 1996 and issued May 12th, 1997 to be effective January 1, 1997 to December 31, 1997. It is noted (at Exhibit 7, Tab 26) that on June 1, 2000, Mr. McCombe granted Lautaoja Construction Ltd. permission to cross the Mining Claim. Due to the restrictions placed on one of the access roads by MNR, which is discussed below, Mr. Lautaoja was required to use the second, more northerly road. The aforementioned permission involved connecting that northern road to his Sewage Disposal Site.

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Land Use Permit #18237 issued to W. Phippen was originally dated June 3, 1975 and was to be effective from June 5, 1975 to June 4, 1976, comprising lands consisting of 3.5 acres, although the supporting application specified 5 acres. The purpose of this permit was for a Sewage Disposal Site.

There is a new Quarry Permit which was issued to Wayne Phippen on May 31, 1984, involving an area of .97 hectares. The material attached, which purports to be a preliminary survey, is dated May 26, 1983, naming the applicant as W. Phippen.

There are purportedly two Ministry of Transportation aggregate extraction sites (MTO Sites), although they are connected, separated by only a road. The earliest available request for approval to enter Crown Lands and work a pit or quarry for purposes of removing material is dated December 17, 1984. Aggregate Permit No. AP 10791 applies to eight hectares, being valid from January 1, 1991 to December 21, 1995 and appears to apply back to the earlier request. No information was provided on a second MTO site. As there was no reference to the Phippen quarry or aggregate pit at the hearing, the tribunal questions whether the Phippen Quarry eventually became the second MTO site, or whether the MTO's interest consists of the one site bisected by the road.

There are three further Aggregate Permits bearing number 9653, issued to Martin G. Lautaoja and Gerry Roy, involving 4.51 hectares, which were originally issued January 1, 1993 and renewed January 1, 1995, February 1, 1995 and January 1, 1996 respectively. Only one Aggregate Extraction Site is specified. The documentation suggests that Mr. Lautaoja originally operated the aggregate pit, and it was taken over by Mr. Roy in February, 1995.

There are two roads onto the Mining Claim from Highway 11. The more northerly road has a locked gate and being built up adequately for purposes of controlled access to a provincial highway. This road runs north of the MNR Site. It commences from the west by running along the south side of the MTO pit to a point where it bisects the MTO pit, meaning that the MTO pit is located both to the north and south of this road. The road continues in an easterly direction past the MOT pits and to the north of the Phippen and Lautaoja pits, whereupon it veers south, before reaching the pipeline right of way. This road will be referred to as the "MTO Road", not for purposes of ownership, but for reasons of proximity only.

The MNR Waste Disposal Site has been in operation to service lands in the area, being without municipal organization. A second road running from Highway 11 enters the Mining Claim immediately south of the MNR Site, and will be referred to, for reasons of proximity, as the MNR Road.

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The Roy aggregate extraction site is located southeast of the MNR Road. It is via this road and his aggregate extraction operation that Mr. Roy would obtain access to his proposed Sceptic Waste Disposal Site (Roy Sceptic Site). The Phippen Site is to the east of the MTO Sites and Mr. Lautaoja's Site is south of Phippen's. Mr. Phippen's Sites are accessible from the MTO Road.

The proposed Sceptic Waste Disposal Site is immediately adjacent to an aggregate extraction operation also operated by Mr. Roy.

It was pointed out to the tribunal that the Provisional Certificate states that the Site is located at Lot 6, Concession 2, Grenfell Township, which must be in error, as Grenfell Township is an unsurveyed township (see documents filed with Exhibit 2).

Mr. Roy's application sketch shows an access road (the MNR road) running from Highway 11 leading to his aggregate pit, running through his pit to where he has sketched in a short let of a proposed road, leading to the Sceptic Site. The MTO road is also shown sketched in to the north.

Status of MNR Site and Road

The MNR Waste Disposal Site is at the end of its life, having operated for approximately 30 years and is in the process of being closed and rehabilitated by MNR. While some activity is ongoing, it would appear to be in relation to illegal dumping which has taken place in adjacent areas and is not projected to continue.

Flowing from this closure is an intent to see the access for the MNR Site, namely the MNR Road, no longer accessible to the public. Until recently, Mr. Lautaoja also enjoyed access by the MNR road, by going through the Roy aggregate permit area. Despite being to the east of Mr. Roy's existing aggregate pit and proposed sceptic site, Mr. Lautaoja must now access via the more northerly MTO Road.

The pole and chain barrier on the MNR Road has been replaced with a locked gate at a different location along the road. Mr. McCombe has vehemently objected to this removal of one of his access points to his Mining Claim and has made an issue of his loss of access via this road.

Issues

1. Given that the holder of an unpatented mining claim has the statutory right to refuse his or her consent for the disposition of surface rights, under what conditions should a consent to the disposition of surface rights be granted or denied?

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2. What are the rights of a mining claim holder with respect to other users of the surface, namely those whose interests arose before the staking of his Mining Claim and those which arose subsequently?

3. What are the rights of access onto a mining claim with respect to existing roads?

4. What effect, if any, is the prior granting of a Provisional Certificate of Approval to the application?

Preliminary Matter

Subsection 51(5) requires that at least ninety days notice be given to interested persons of the hearing before the tribunal. At the commencement of the hearing, the tribunal pointed out that the Appointment for Hearing is dated the 11th day of September, 2000, well short of the required ninety days. The parties indicated that they were prepared to proceed and were willing to waive the notice requirement. Should this matter be appealed, the tribunal notes that there is authority for the Court pursuant to section 136 of the **Mining Act** to confirm a proceeding whose validity may be called into question due to a failure to comply with the legislation. Given the agreement of the parties to waive the ninety day requirement, the tribunal is satisfied that none of the parties are prejudiced by the giving of shorter notice than required by the legislation.

Evidence and Submissions

On November 22, 1999, Mr. McCombe was advised in writing of Mr. Roy's application by Mr. Lane LaCarte, then Area Supervisor, Kirkland/Claybelt Area, MNR (Ex. 7, tab 7). The contents of the letter are reproduced:

> Please be advised this office has received an application for a Land Use Permit to construct and operate a sewage trench system on the above-mentioned claim. The proposed site is adjacent to the Gerry Roy aggregate pit off Highway #11.
>
> Please direct any comments and/or concerns to Rusty Fink ... within 30 days of the date of this notice.

On January 11, 2000, this was followed up by another letter from Mr. LaCarte (tab 8) which refers to the earlier letter, several phone calls, and sets out in part:

> As discussed Mr. Roy will be constructing shallow trenches for sewage disposal as approved by the Ministry of Environment. He will avoid any interference with your mining activities as outlined in the Work Permit issued by this office.

> Enclosed please find a consent form for the release of surface rights to construct a sewage trench system along with a self addressed stamped envelope. Please sign and return the executed consent for to this office in order that we may conclude this transaction with Mr. Roy.

The enclosed Release sets out:

> I, Barry McCombe of Kirkland Lake recorded holder of staked mining claim #1206101 hereby release the Surface Rights on an area of 1.1 hectares as shown on the attached sketch. This release is to allow disposition under the Public Lands Act of Surface Rights on the subject area for the purpose of sewage trenches.

The following was received by MNR on March 2, 2000 (Ex. 7, tab 11):

> Notice to: Mining Recorder, Ministry of Northern Development and Mines District Manager, Ministry of Natural Resources
>
> Subject: Release of Surface Rights
>
> I Barry Mccombe of Kirkland Lake recorded holder of staked mining claim 1206101 hereby release the Surface Rights on an area of 1.1 hectares as shown by measurements in relation to the existing claim posts on the attached sketch. This release is for a (sic) to be permitted sewage disposal site conditional on the following:
>
> 1. All costs of surveys including any Ontario Land Survey are to the account of Her Majesty the Queen in Right of Ontario (MNR).
>
> 2. The area of surface rights to be released be clearly marked on the ground and on accompanying sketches prior to signing this release.
>
> 3. Her Majesty the Queen in Right of Ontario (MNR) assures that Barry Mccombe and his agents have continuous access to the surrendered surface of these claims for mineral exploration and mining activities.
>
> 4. Her Majesty the Queen in Right of Ontario (MNR) assures that Barry Mccombe and his agents have permanent and continuous access and passage over and along all roads, rails, survey lines and grid lines over his mining claims affected by the surface rights holders.

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a. This right includes continuous possession of all keys for locked gates.
b. her Majesty the Queen in Right of Ontario (MNR) assures no gates, blockages or barricade prevents vehicle access to Barry McCombe or his agents to, or over his mining claims affected by surface rights holders. This includes access from Highway 11.

5. Her Majesty the Queen in Right of Ontario (MNR) assures any surface rights released by this agreement be returned back to mining lands owner if:
   a. a mineral resource is identified under or near (requiring surface access) the released surface rights or
   b. sewage sites permitted during or after the year 2000 are abandoned.

6. Compensation from the mining rights owner shall be equivalent to the exchanged amount agreed to in this release.

7. All parties to this agreement agree to respect sewage permits ensuing from this agreement. Her Majesty the Queen in Right of Ontario (MNR) agrees not to impose undue restrictions or expenses to permitting, licensing, or fees on relocation to relocation to equivalent sites in the event of mineral extraction from this claim.

8. Her Majesty the Queen in Right of Ontario (MNR) assures all surface waters and underground water, beneath or, or and proximal to this released surface rights area remain free from contaminants derived from the utilization of the surface rights released by this agreement.

9. In the event of dispute relating to the source of contamination of underground or surface water or other contamination having chemical or biological or physical characteristics reasonably expected from the surface uses on the surface rights released, it shall be the onus of Her Majesty the Queen in Right of Ontario to prove contamination is not from the above mentioned surface uses.

10. Barry McCombe or his agents to be given right to cut for profit or personal use and without cost any timber including pine on the surrendered surface rights.

According to Mr. Roy, the proposed site is for household sewage disposal. He stated that there are already two existing sceptic disposal sites located and operating on the Mining Claim. His proposed operation would effectively be splitting business three ways. However, if denied, the waste would merely go into one of other two sceptic waste sites on the Mining Claim.

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Mr. LaCarte raised the point that the conditions put to Mr. Roy and MNR by Mr. McCombe were not put before the other surface rights holders; Mr. McCombe was able to negotiate a separate agreement with the other Sceptic Site operators, but it is pointed out that those facilities were pre-existing.

As to the conditions which Mr. McCombe proposed in satisfaction of the required release of surface rights, Mr. LaCarte stated that he could not sanction those conditions which served to bind MNR.

Closure of the Road/ Access to the Mining Claim(s)

Mr. McCombe objected to the closure of the MNR Road without notice or public consultation, although he agreed that a gate should be there for safety reasons. Mr. Mccombe stated that while he is entitled to prospect on lands where the aggregate pit is located, he is unable to gain access because he has no key to the gate. At the time of his staking in 1995, there was no gate on the MNR road, only two poles with a cable across lying on the ground, located 80 metres east of Highway 11.

Mr. McCombe stated that he believed that the MNR Road was there for his use as well as for the use of others. He submitted that MNR is attempting to take away his rights. If the application is granted, there will be seven extraction or disposal sites operating on his Mining Claim and he would be denied his right to prospect.

Mr. Roy is not denying access to Mr. McCombe. However, for insurance purposes, Mr. McCombe cannot have his own key but must obtain one each time he wishes access. In fact, Mr. McCombe stated that he had walked onto the aggregate pit on one occasion without prior permission, which Mr. LaCarte characterized as trespassing.

Mr. Roy explained that the MNR Road was originally a logging road from 25 or 30 years ago. Then there was the MNR pit (Waste Disposal Site) and the pipeline came in and built a shack at the end of the road. Mr. Roy has gone through a separate process of approvals for a limited access roadway onto Highway 11. Such a roadway would be excluded from any application for lease of the mining rights or mining lands.

Mr. Roy stated that he closed the MNR road because Mr. Rusty Fink of MNR advised him to do so (See Ex. 7, tab 6):

> This letter provides authority under Section 27(11) of the Public Lands Act to maintain a gate on Crown Land between Highway 11 and the site of your Aggregate Permit numbered 9653.
>
> This gate is necessary to restrict access to the aggregate extraction site for reasons of public safety.

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> This gate will also serve to prevent unauthorized access to the Ministry of Natural Resources Waste Disposal Site adjacent to your permit area, which is now closed to the public.

Mr. LaCarte explained that the gate on the MNR Road constructed by Roy was moved closer to Highway 11 for purposes of safety. While the previous crude gate had attempted to restrict access to the aggregate extraction site, MNR wished to ensure that access to the aggregate extraction site was no longer possible. Unauthorized entry to aggregate pits is a matter of extreme concern for MNR vis-a-vis safety. Also, MNR wished to ensure that there could be no access to the MNR Disposal Site. Once the MNR Site is rehabilitated and closed and the aggregate extraction site is mined out, the road will be closed for good, and access to the proposed Roy Sceptic Site would have to be from the north, via the MTO Road.

As to the matter of the locked gate and access, Mr. LaCarte stated that there have been a number of fatalities associated with aggregate pits and the signage and restricted access were to address issues of public safety. As to the use of the MNR Road, MNR wants to ensure that once the MNR Waste Disposal Site is fully closed, that no further access would be available. Furthermore, once the aggregate pit is fully mined out, MNR wishes to see that the MNR Road is no longer accessible. Also, for the useful life of the Roy Aggregate Extraction Site, it is desirable to reduce the number of trucks using a road. The MTO Sites will similarly be operating for a limited term.

The matter of restricted access is pursuant to the concerns of the Ministry of Transportation involving controlled access highways, such as Highway 11. The northern MTO road has always been the entry point for access to these lands. The MTO wishes to ensure that such access is restricted to roads which are properly banked, for purposes of safety, due to the fast moving nature of vehicles on the Highway. The MTO Road enjoys considerable use, as in addition to the various disposal and extraction sites, it is part of the provincial snowmobile trail and the public has requested that such roads be locked, again, for reasons of safety. The MNR administers a single lock on this gate, but it is part of a lock chain series. Mr. McCombe would be able to gain access via the MTO road by using his own lock in the chain. This alleviates the burden on the Crown in administering access to the road.

Water

Mr. McCombe stated that he uses water from what is supposedly a dry shaft, located 800 metres to the south, on Mr. Nychuk's land. However, according to him, this purported dry shaft must involve flowing underground water, an aquifer or fractures in the rock through which seepage has occurred, as he could not pump it dry. Mr. McCombe's concern is that, should he do diamond drilling or underground blasting on his Mining Claim, owing to the fractured rock beneath, toxins and organic compounds disposed of in the proposed Sceptic Site could seep into the aquifer.

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Mr. LaCarte questioned whether Mr. McCombe's use of the water was legal, his not having obtained the requisite permit. Mr. LaCarte also questioned whether there was any hydrological evidence to suggest the water drawn on Nychuk's land was drained into from the Mining Claim.

Concerns for Ministry of the Environment

Mr. Robinson submitted that, if MOE and MNR are responsible for the Provisional Certificate of Approval and Land Use Permit respectively, they should be willing to sign off on a meaningful agreement with Mr. McCombe to the effect that he would not be held liable for any groundwater contamination which could occur. Mr. McCombe, through his drafting of conditions for signing the release of surface rights, wants to be assured that he would not be liable for environmental damage which could occur from any seepage of sceptic waste resulting from his mining activities. He is seeking an acknowledgement that MNR, MOE and Mr. Roy would be responsible for environmental damage which could result. Some of the veins identified in his assessment work run directly under the trenches of the sceptic waste disposal sites.

Mr. LaCarte stated that once the application had been received, the site was inspected to determine whether it was suitable for the proposed purpose. Concurrent was the review by MOE, leading to the Certificate of Approval. With respect to concerns raised by Mr. McCombe through Mr. Robinson regarding water leakage, this was addressed by MOE (Ex. 9) in response to questions raised by Mr. Robinson in his letter of June 23, 2000. The following shows Mr. Robinson's questions in a letter dated June 23, 2000 addressed to James Deem, Director Section 39, MOE, followed by the responses received from Daryl Firlotte, Senior Environmental Officer, Timmins District, MOE:

2. *Has this Proposal or will this Proposal be entered on the Environmental Registry for Public Comment?*

2. No.

3. *When will a hearing be held which is referred to in the PCA (Provisional Certificate of Approval) as follows, "The portions of the approval or each term or Condition in the approval in respect of which the hearing is required ..."*

3. A hearing will not be held.

4. *What is the purpose of assessing an appeal as referenced in the PCA?*

4. The proponent for this Certificate of Approval did not file an appeal with this Ministry.

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5. *In the event Waters discharged into the Environment from mining or mineral exploration activities contain contaminants from the Site of Mr. Roy, who is responsible for penalties, costs and other considerations?*

5. Mr. Roy is responsible for the discharge from this approved sewage works.

6. *Will permitting of this Site restrict in any way the existing rights and normal activities or parties that hold mining rights to this Site or nearby Sites?*

6. Mr. Roy's Grenfell Township site is approved as a HAULED SEWAGE DISPOSAL SITE and any activities that affect its performance to treat the material it was designed for, will not be allowed.

In cross-examination, Mr. LaCarte indicated that the MOE had answered Mr. Robinson's concerns and that the response to question 6 meant activities by Mr. Roy would not be allowed.

7. *Will use of this Site restrict in any way the existing rights and normal activities of parties that hold mining rights to this Site or nearby sites?*

8. *Has the Ministry of the Environment actively protected water entering or potentially entering mining property at the bedrock surface?*

7&8 This site was designed based on the Reasonable Use Concept, MOE Guideline B-7 (attached) and any future use of this location must consider the present approved use.

9. *Will all contaminants dumped on this site be rendered non-contaminants by aerobic digestion (biodegrading processes) above the water table?*

9. Mr. Roy's Grenfell Township site is approved as a HAULED SEWAGE DISPOSAL SITE.

10. *Will any soluble contaminants enter the water table below or proximal to this Site?*

10. Mr. Roy's Grenfell Township approved HAULED SEWAGE DISPOSAL SITE was designed to remove contaminants before they go off property.

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11. *Has the Ministry of the Environment assured no contaminants from this site will enter into Mining Land below and proximal to the Site?*

11. Mr. Roy's Grenfell Township HAULED SEWAGE DISPOSAL SITE was designed based on the Reasonable Use Concept, MOE Guideline B-7.

12. *Will "Gerald Clovis Joseph Roy or his Assigns or Other's (Mr. Roy) be dumping into these trenches 12 months a year?*

12. The operation of the Grenfell Township approved HAULED SEWAGE DISPOSAL SITE with Certificate of approval #A920462 (attached) is Mr. Roy's responsibility.

13. *Where will Mr. Roy be spreading the residues from PCA project on the surface?*

13. No.

14. *If Mr. Roy is spreading residues from this PCA on the site, will this spreading be prohibited during the months of December, January, February and April.*

14. N/A

In reading through Guideline B-7, entitled "Incorporation of the Reasonable Use Concept into MOEE Groundwater Management Activities", 5.0 states:

5.0 Environments Unsuitable for Waste Disposal

The Ministry may not support proposals for facilities for the disposal of waste in the following environments:

5.1 No appreciable attenuation can be provided

...

5.2 A disposal facility may not be supported in a location where the ability of the natural environment to attenuate contaminants is weak, as in fractured rocks, and as compensation, a very large area is required for the attenuation of contaminants. For technical reasons, environments where this is necessary are generally quite expensive to evaluate and contingency plans in such environments are seldom practical.

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Procedure B-7-1 entitled "Determination of Contaminant Limits and Attenuation Zones" at 3.1"

> 3.1 The following comments apply to a disposal site:
>
> (a) Future use of the land should be strictly controlled. Based on technical considerations, such control should be permanent or continued until it can be shown that such control is no longer necessary (see Section 46 EP Act)
>
> (b) As there are environments which the Ministry does not believe are appropriate for waste disposal, the Ministry will either oppose the use of such environments or will insist that stringent safeguards be incorporated in any design for the disposal site and that there be appropriate monitoring and contingency plans. These safeguards may include provision for the collection and treatment of contaminants which will be produced. Guidelines for identifying environments unsuitable for waste disposal are presented in Section 5.0 of Guideline B-7.

It was Mr. LaCarte's evidence that Mr. McCombe's concerns regarding potential damage to underground water should properly be addressed by MOE. He stated that the questions raised in Mr. Robinson's letter of June 23, 2000 raised these matters and, as can be seen from the foregoing questions and responses, MOE has dealt with their concerns. Through its own process, MOE has confirmed that the proposed site is suitable for the purpose.

Alternate Locations for Sites

As to the location of the sceptic sites, Mr. McCombe stated that he has had two mining claims elsewhere expropriated for purposes of a waste disposal dump which never went in. He has been suggesting throughout that the sceptic sites be located on those lands instead. Mr. LaCarte indicated that the considerations for sighting Waste Disposal Sites is quite different from that of Sceptic Disposal Sites. In any event, the purpose of the hearing is not to consider a trade. Mr. Robinson pointed out that he had written a letter to MNR on June 23, 2000 and submitted that Mr. LaCartes' oral testimony was the first response from MNR regarding queries about an alternate site.

Mr. Robinson suggested that MNR was obfuscating in this matter. At LaCarte's suggestion, he wrote to the Provincial Mining Recorder to determine the rights of a mining claim holder, but the response came back declining to answer the question while the matter was before the tribunal. Mr. LaCarte indicated that surface rights for all of the areas of activity would be excluded from any future application for lease. As to his rights of access and crossing, such questions would have to be answered after a thorough legal review.

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Rights of Mining Claim Holder to Explore

Mr. McCombe is also seeking a declaration that he has the right to explore under any of the lands which are subject to surface rights land use permits issued by MNR, whether for aggregate extraction or in connection with Provisional Certificates of Interest issued by MOE. Mr. McCombe stated that a prospector has the right to pump clean water for purposes of diamond drilling, washing outcrops and blasting. He does not want the water to be dirty, nor does he want to be responsible for any contamination which may result, due to the location of the sceptic sites.

Mr. McCombe is willing to acknowledge that others have the right to be on the surface of his Mining Claim. However, he believes that he should have a right to use the MNR road, possession of a key which permits access to the Roy aggregate site, and not be denied access at any time. Mr. McCombe stated that he has walked into the aggregate pit area without permission, as is his right to do so.

Mr. Robinson submitted that Mr. McCombe is seeking to protect his continuous right of access to his Mining Claim. As the recorded holder, McCombe has the right to pass across any existing or proposed roads, dumpsites, aggregate pits - in summary, he has the right to exercise quiet mineral exploration, a form of quiet enjoyment. As to the position taken by MOE, it suggests that the sewage disposal site is a higher use of the land than that of mining. Mr. Robinson submits that Mr. McCombe's right to mine is the higher right. Mr. McCombe has raised questions concerning the question of a structural break in the underlying rock and is concerned about his responsibilities in the event of ground water contamination.

Findings

Provisional Certificate of Approval

The concerns raised by and on behalf of Mr. McCombe involve the potential environmental impact of the proposed Sceptic Waste Disposal Site on his prospective mining and exploration activity, such as manual and mechanical overburden stripping, bedrock trenching, shaft sinking, driving adits, open cutting digging pits and dewatering of underground workings [see O.Reg.6/96, ss. 10(1)].

Mr. McCombe has two concerns. The first is that any breach to the Sceptic Site from his ongoing mining activity which may lead to environmental degradation of groundwater not give rise to liability on his part. The second is that any resulting degradation to groundwater could affect his access to otherwise clean water available and needed for mining activities.

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The tribunal finds that such environmental concerns are not properly within its jurisdiction for purposes of an application and referral pursuant to section 51. The application before the tribunal can in no way review the granting of the Provisional Certificate of Approval by the Director, Section 39, **Environmental Protection Act**.

There is a common law right to those holding an interest in property, which includes an unpatented mining claim holder, to be notified of activities which may affect their rights. Therefore, it would be expected, in the normal course of events, a mining claim holder, or in this case Mr. McCombe, should have been notified of the Application for Provisional Certificate of Approval and had the opportunity afforded by that process to raise any environmental concerns.

Given the concerns involving groundwater elsewhere in the Province at the time of writing these Reasons, one can only hope that the Director, MOE is ensuring that applicants are providing notice to all interested parties, including unpatented mining claim holders, in the course of receiving and considering applications under their authority. Frankly, the tribunal finds very troubling Mr. Firlotte's response to Mr. Robinson's questions 6, 7 and 8, that activities which will affect the hauled sewage disposal site will not be allowed, and future use must take this into account. The mining exploration was a pre-existing use. Mr. Firlotte does not appear to acknowledge this fact. The question is open as to whether the MOE application and approval process took this into account.

Despite whatever the nature of inquiry which took place leading to the granting of the Provisional Certificate of Approval, the current application and referral before the tribunal is not automatic and should not be regarded as such. In other words, once the Provisional Certificate of Approval is granted, the tribunal does not regard a referral under section 51 of the **Mining Act** as leading to a rubber stamp of the MOE approval. The two are not connected, as different areas of authority are involved.

Surface Rights and Mining Rights Under the **Mining Act**

The sections of the **Mining Act** which govern the rights of a mining claim holder are set out in subsections 50(1), (2) and 51(1):

> **50.** (1) The staking out or the filing of an application for or the recording of a mining claim, or the acquisition of any right or interest in a mining claim by any person or all or any of such acts, does not confer upon that person,

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(a) any right, title, interest or claim in or to the mining claim other than the right to proceed as is in this Act provided to perform the prescribed assessment work or to obtain a lease from the Crown and, prior to the performance, filing and approval of the first prescribed unit of assessment work, the person is merely a licensee of the Crown and after that period and until he or she obtains a lease the person is a tenant at will of the Crown in respect of the mining claim; or

(b) any right to take, remove or otherwise dispose of any minerals found in, upon or under the mining claim.

(2) The holder of a mining claim does not have any right, title or claim to the surface rights of the claim other than the right to enter upon, use and occupy such part of parts thereof as are necessary for the purpose of prospecting and the efficient exploration, development and operation of the mines, minerals and mining rights therein.

51. (1) Except as in this Act is otherwise provided, the holder of an unpatented mining claim has the **right prior to any subsequent right to the user of the surface rights** for prospecting and the efficient exploration, development and operation of the mines, minerals and mining rights.

What is now section 51 was not always a part of the **Mining Act**. Its addition was discussed by Commissioner Ferguson at page 462 of **Kamiskotia Ski Resorts Limited v. Lost Treasure Resources Ltd.**, (1984) 6 M.C.C. 460:

> The present section 61 [now 51] was added to the *Mining Act* by section 17 of the *Mining Amendment Act*, 1962-63 with substantially the same wording as it appears today. These provisions were enacted after the report of the Public Lands Investigation Committee, 1959 which recommended a number of principles relating to multiple use of Crown lands. They set out a method of resolving, if feasible, conflicting uses or the prevention in a proper case of the subsequent acquisition of surface rights, through a hearing before the Commissioner. While the failure of the respondent to appear and provide evidence as to the nature of the mineral potential of the mining claim or the methods of exploration or the compatibility or otherwise of the proposed use of the surface rights, the tribunal was provided with no evidence to come to a finding that the disposition under the Public Lands Act should be refused.

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> On the other hand, the applicant did not seek an absolute title to the surface rights and merely sought a licence of occupation. The use of the public lands under such documents is usually prescribed and limited to a named use. The proposed use is seasonal and does not contemplate the construction of major buildings or structures. The tribunal can only conclude .... that there would be no serious interference with the exploration program of the respondent and that it is a proper case for an order to issue.

This was also discussed by Commissioner Ferguson in **The Improvement District of Gauthier v. Egg**, (1987) 7 M.C.C. 281, at page 286:

> The tribunal, on the legal grounds, accepts the argument of counsel for the applicant. The tribunal is satisfied that the provisions of section 97, 98 and 99 relate to provisions of leases issued to the mining industry under the Mining Act and are not designed for the purpose of creating a sole use of the lands for the mining industry. The restriction in the provisions is part of the amendments added to the Act following the work of the Public Lands Investigation Committee (circa 1958) which report and subsequent legislative amendments recognized a concept of multiple use and it is through hearings such as the present hearing that the multiple use principle is to be applied where the holder of the unpatented mining claim does not give his consent.
>
> In weighing the interests of the applicant and the interests of the respondent, the evidence of the respondent has failed to convince the tribunal that the programs or the nature of the holdings by the respondent are such that the multiple use principle should not be applied in this case. The public interest in the use and management of a municipal park is an essential aspect of the multiple use concept and in the view of this tribunal should be given priority where there is a dearth of evidence to establish any future expectation of need of exclusive use of the surface rights of the part of the mining claim in issue. The application is limited in respect of the nature of the title sought to a licence of occupation. Such a title may be terminable and if the public interest in the future requires the termination of the licence of occupation consideration in the future may be given to that possibility. In addition the respondent, through the process of the issue of a licence of occupation is not deprived of the incidental rights that arise in situations involving split ownership and accordingly the tribunal is of the opinion that the application should be granted.

The multiple use principal was also discussed at page 9 of **Ontario Hydro v. Nahanni Mines Limited** (1993), unreported, MLC:

> ... To defend an application for release of surface rights, the respondent must show that the granting of the release would interfere with its exploration or extraction of minerals or other activity on the Mining Claims.

This test was recognized in **Northland Power v. Labine, MNR,** (1996), unreported, MLC and in B. J. Barton, **Canadian Law of Mining** (Calgary: Canadian Institute of Resources Law, 1993) at page 165:

> Apart from the effect of the free entry system on government authority, one must also have regard to its effect on conflicts between different resources and land uses. The free entry system assumes that mining is to have priority over competing uses of land and resources[65]. The miner's right to enter on lands containing Crown minerals is broad enough to permit the miner to enter and take possession of land that is of value or under use for many other purposes. The exceptions are the land uses that the mining acts declare to be closed to mineral activity: land under buildings, land under crops and the like. The priority given to mining in all other cases is best seen in contrast to the procedures of the allocation of other resources. As we have noticed, minerals are the only resource that can be appropriated and exploited under a title that is obtained from the Crown as the result of one's own acts. Timber rights, oil and gas rights, fishing rights and trapline and outfitting rights are all issued by government only after a discretionary decision to do so. Before the decision is made, there is an opportunity for the government to consider the land and resource use concerns that the application raises, engage in resource use management, and minimize resource use conflicts. The impact of one resource use may be evaluated and balanced against the others. However, when mineral rights are granted, there is no such opportunity and no balancing. If people are interested in procuring mining claims in some area, then resource management and land use planning efforts must work around the claims[66].

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[65] M. Crommelin, “Mineral Exploration in Australia and Western Canada” (1974) 9 U.B.C.L. Rev, 38 at 54

[66] The free entry system is fundamentally at odds with an initiative such as that of the B.C. Commission on Resources and Environment's Report on a Land Use Strategy for British Columbia (Victoria: Queen's Printer for British Columbia, August 1992) (Commissioner S. Owen) for negotiated and mediated decision-making. Mining statutes still embody the free entry system even where they contain general statements of purpose to promote sustainable development or to minimize environmental effects, e.g. see Chapter 1, Part 3.

From the foregoing, it should become patently clear that mining has historically been and continues to be through current legislation, afforded the highest priority for land use, excepting those items listed in subsection 32(1), or those lands withdrawn from staking by the Minister, for purposes of Native land claims or provincial parks.

Compatibility of Co-existence of Surface Rights with Mining Rights

With the exception of the proposed application and the Land Use Permit of Martin G. Lautaoja Construction Ltd. issued May 12, 1997, all of the surface rights activities discussed in these Reasons pre-date the staking of the Mining Claim by Mr. McCombe, namely the MTO aggregate pit, MNR Waste Disposal Site, Phippen Sceptic Disposal Site and Phippen/Roy Aggregate Pit.

In the case of Crown lands, it does not necessarily follow that surface rights uses cannot co-exist with mining rights; the holder has no right title or claim to the surface of the claim other than those enumerated in subsection 50(2). While mining is recognized as a high use, the changes in the **Mining Act** discussed in the cases above outline the principle of multiple uses. The test is one of compatibility and whether there is an expectation of exclusive use of the surface rights by the mining claim holder.

The mining claim holder does not receive notice of all surface rights dispositions from the Land Disposition Map. However, when seeking to stake a mining claim, the best source for information as pre-existing land use and aggregate permits on the lands is through inquiries in the district MNR office. While the Land Disposition Map does show any leased or patented surface rights, there is no guarantee that all other permits and uses are depicted. It is incumbent on the staker to make such inquiries in order to be aware of any alienation of Crown interest in the surface rights to third parties. It must be kept in mind that the time frames associated with many permits tend to be relatively limited. On the other hand, a mining claim's tenure can also be limited. Where there is a failure to perform required assessment work within two years of recording, the mining claim forfeits. While Mr. McCombe has demonstrated every intention of keeping his mining claims in good standing, such is not always the case with other properties and other holders.

As to the status of lands for which there are other surface rights uses, the only time lands are withdrawn from staking in respect of such permits is when the application is pending [cl. 30(b)]. When the permit is issued, such withdrawal orders are vacated.

Also, while the mining claim holder is required to consent to surface rights disposition, the existence of permits for surface rights use does not mean that the right to acquire an interest in the surface rights is lost for all time. When applying for a lease, pursuant to section 81, the mining claim holder may elect to apply for a lease of the mining rights only, which necessarily means that in the ordinary course, application would be for surface and mining rights.

The surface rights permits denote a relatively low form of tenure in the lands, being for specified purposes and for a limited time, such as when aggregates are mined out or disposal pits are at capacity and closed out.

On the date of staking, such a staker will obtain his rights to the mining claim as set out in subsection 50(1), subject to the existing surface rights uses, or alienation through patents or leases. This is consistent with provisions of subsection 79(2), which recognises surface rights owners and occupiers who, in the opinion of the Minister, are entitled to compensation for, among other things, damages sustained through conduct of assessment work.

Mr. McCombe's Right to his Mining Claim and to the MNR Road

Subsection 50(2) provides that Mr. McCombe does not have any right, title or claim, other than the right to enter upon, use and occupy such part or parts of his Mining Claim as are necessary for the purpose of prospecting and efficient exploration. Mr. McCombe has asserted his right to the use of the entire surface of the Mining Claim, including the MNR Road and the Roy Aggregate Pit.

The evidence of Mr. LaCarte only supports in part the restricted access imposed on the MNR Road. The letter of Mr. Fink dated November 10, 1999 (Ex. 7, Tab 6) refers to subsection 27(1) of the **Public Lands Act**, which sets out that no person may deposit or cause to be deposited on public lands any material without authorization of the Minister. Mr. LaCarte did indeed state that MNR wished to control access to the MNR Waste Disposal Site, but that there were also considerable concerns regarding the aggregate pit. The authority exercised by MNR has had the effect of restricting access to the Roy Aggregate Pit for purposes of safety. There are apparently insurance issues in refusing to give Mr. McCombe a key and safety issues associated with unrestricted entry to the Aggregate Pit.

Frankly, had there been no aggregate pit along the MNR Road, the tribunal cannot determine why Mr. McCombe could not have a permanent key to the gate. Given the insurance restrictions placed on Mr. Roy, Mr. McCombe will have to accept the situation. His rights to his claim cannot be such as to give rise to liability in others. MNR's role in this situation can be readily explained as a cost-saving measure. A locked gate is required in connection with the Dump pursuant to the **Public Lands Act**. Safety concerns exist with respect to aggregate extractions sites. The single gate installed by Mr. Roy is simply in the place of two.

It is noted that Mr. McCombe earlier this year (ex. 7, Tab 26) granted permission concerning new road access to Mr. Lautaoja for a road for access to his Sceptic Disposal Site, which was necessary when access via the MNR Road and through Roy's Aggregate Pit became restricted.

Subsection 80(2) recognizes that a mining claim holder's right to enter may be curtailed through intervention of the tribunal or recorder, where any part of the surface rights necessary for the occupation and utilization of improvements put there prior to the time the claim

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was staked may be excluded. It is not clear whether this could apply to a pre-existing road. Although the subsection is listed in the title of proceedings, this is not an application by anyone (ie. Roy, MNR or MNDM) to have the Roy Aggregate Site ordered removed from the surface rights of the Mining Claim.

While the tribunal will not consider the making of an Order pursuant to subsection 80(2) at this time, should McCombe's proposed activity on any of the lands which have permits prove to become a safety issues which cannot be resolved in a satisfactory manner by the parties, it is not unreasonable to expect that application may be made to either the Provincial Mining Recorder or the tribunal for an Order excluding the surface rights pursuant to subsection 80(2).

The Application

The purpose of the referral under section 51 by the Minister of Northern Development and Mines is to consider the Roy Site for Sceptic Waste Disposal. This does not involve a review of the changes in access via the MNR Road or of the pre-existing numerous surface rights users on the Mining Claim, being the two MTO pits, the three Sceptic Disposal Sites operated by Phippen, the Roy Aggregate Extraction Site or the MNR Waste Disposal Site. Nor, as stated above, can it be a review of the Provisional Certificate of Approval.

Mr. McCombe has staked a Mining Claim on lands where there has been considerable pre-existing extraction and disposal activity, with two roads having been constructed for access, although the MNR Road may have existed prior to the Dump. Notwithstanding the considerable surface rights activity, Mr. McCombe has demonstrably not been prevented from carrying out his assessment work obligations or making considerable headway in his exploration program, as evidenced by the figures he has provided.

That Mr. McCombe has allowed Mr. Lautaoja the use of the surface for a new and alternate road access to the Lautaoja Sceptic Disposal Site, made necessary due to the closing of the MNR Road, as late as this year without the lengthy conditions he seeks to impose on MNR and Mr. Roy is telling.

Mr. LaCarte alluded to the matter at the hearing and the tribunal is inclined to agree. The need for this application has arisen, not because of an overall reluctance to allow yet another encroachment onto the surface of the Mining Claim, but as a result of what had already been lost or denied to Mr. McCombe. What got his attention was the absence of notice from MOE, the restrictive nature of the access imposed on use of the MNR Road and any limit to be place on his access to the Roy Aggregate Site.

The tribunal finds that these are not valid reasons for the denial of the surface rights disposal application sought. To be a valid reason, Mr. McCombe must demonstrate that the proposed Sceptic Disposal Site will impede his ability to deal with his rights to his Mining Claim, being those rights set out in subsection 50(1). At all times since the date of staking, there has been surface activity, and Mr. McCombe has not been impeded. He has been able to conduct his work and with considerable success.

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Should the nature of future works be in some way affected, given the pre-existing nature of most of the uses, he will have to go around them, or if drilling is involved, change the angle of his approach, locating his surface activities in such a way as to do no harm to the surface use. To do otherwise would render him liable for compensation.

Conditions

Mr. McCombe has asked for numerous conditions to be met by MNR or Mr. Roy upon the granting of this application. The tribunal does not find that a survey is required at this time. It would be costly and on the facts, a survey is not warranted. Mr. McCombe will be able to locate the proposed pits on the ground quite readily and avoid them. The need for a survey has not been demonstrated. Furthermore, land use permit and not a long-term lease is involved.

As to questions of environmental liability, it is hoped that MOE would have had to take into account the existence of cracks and fissures underlying the surface as well as groundwater hydrology in reaching its decision to grant the Certificate. It is beyond of the jurisdiction of the tribunal to consider in an application and referral pursuant to subsection 51(4).

Conclusion

The application for the disposition of surface rights under the **Public Lands Act** will be allowed without conditions attached. No survey will be required on the part of MNR or Mr. Roy.

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