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The Mining and Lands Commissioner
Le Commissaire aux mines et aux terres

File No. MA 005-12

M. Orr)
Deputy Mining and Lands Commissioner)
L. Kamerman)
Mining and Lands Commissioner)

Tuesday, the 10th day
of September, 2013.

THE MINING ACT

IN THE MATTER OF

Mining Claims P-4251521, 4251523, 4251524, both inclusive, situate in the BMA 522 862 Area, 4251514 to 4251520, both inclusive, situate in the BMA 523 862 Area, 4250189, 4251434, 4251510 to 4251513, both inclusive, 4254220, situate in the BMA 524 862 Area, 4248373, 4248438, 4248439, 4251502 to 4251509, both inclusive, situate in the BMA 525 862 Area, 4256490, situate in the BMA 526 862 Area, situate in the Porcupine Mining Division, TB-4251534 to 4251542, both inclusive, situate in the BMA 521 863 (TB) Area, 4248592, 4251525, 4251527 to 4251533, both inclusive, situate in the BMA 522 863 (TB) Area, 4251698 to 4251700, both inclusive, 4251881, 4252051 to 4252056, both inclusive, 4252058, situate in the Dusey River Area (TB), 4251543 to 4251546, both inclusive, situate in the Hale Lake Area, 4251687 to 4251697, both inclusive, situate in the Kagiami Falls Area (TB), 4251656 to 4251658, both inclusive, 4251660 to 4251662, both inclusive, situate in the Sherlock Lake Area, 4248432 to 4248434, both inclusive, 4252059 to 4252064, both inclusive, situate in the Tanase Lake Area (TB), 4251547 to 4251550, both inclusive, 4251651 to 4251655, both inclusive, situate in the Tillett Lake Area, 4251663, 4251672 and 4251673, situate in the Venton Lake Area (TB) and 4251664 to 4251667, both inclusive and 4251669 to 4251671, both inclusive, situate in the Wowchuk Lake Area, situate in the Thunder Bay Mining Division, recorded in the name of Canada Chrome Corporation, (hereinafter referred to as the "Mining Claims");

AND IN THE MATTER OF

Mining Claims P-1192735, 1192740, 1192743 and 1192744, situate in the BMA 523 862 Area and 1192755, 1192756, 1192759, 1192769 and 1192772, situate in the BMA 524 862 Area, situate in the Porcupine Mining Division, recorded in the name of Canada Chrome Corporation by transfer, after the above-noted application was filed, on the 11th day of April, 2012, (hereinafter referred to as the "Transferred Mining Claims").

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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**, R.S.O. 1990, c. M. 14, as amended, of an application under the **Public Lands Act,** R.S.O. 1990, c P. 43, as amended, (**PLA**) for disposition under the **PLA** of surface rights over portions of the Mining Claims and the Transferred Mining Claims:

AND IN THE MATTER OF

A determination and declaration of the nature of the relief contemplated by subsection 51(4) of the **Mining Act** that is within the jurisdiction of this tribunal.

B E T W E E N :

2274659 ONTARIO INC.

Applicant

- and -

CANADA CHROME CORPORATION

Respondent

O R D E R

WHEREAS THIS APPLICATION was filed with this tribunal on the 29th day of February, 2012;

AND WHEREAS this matter was heard in the courtroom of this tribunal on the 4th to the 7th, the 11th, the 13th and the 14th days of February, 2013, respectively;

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

2. **IT IS FURTHER ORDERED** that in the event that an appeal of this Order is not filed or a judicial review of this Order is not brought, pursuant to sections 133, 134 and 135 of the **Mining Act,** that Canada Chrome Corporation file submissions on costs related to the hearing of the merits of this matter, with the tribunal and with 2274659 Ontario Inc., by the 9th day of October, 2013 and that 2274659 Ontario Inc., file its response with the tribunal and Canada Chrome Corporation by the 16th day of October, 2013 and that Canada Chrome Corporation file its response (if necessary) with the tribunal and 2274659 Ontario Inc., by the 28th day of October, 2013; **all** filings to not exceed ten (10) pages.

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Reasons for this Order are attached.

DATED this 10th day of September, 2013

Original signed by M. Orr

M. Orr
DEPUTY MINING AND LANDS COMMISSIONER

Original signed by L. Kamerman

L. Kamerman
MINING AND LANDS COMMISSIONER

The Mining and Lands Commissioner
Le Commissaire aux mines et aux terres

File No. MA 005-12

M. Orr)
Deputy Mining and Lands Commissioner)
L. Kamerman)
Mining and Lands Commissioner)

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THE MINING ACT

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A determination and declaration of the nature of the relief contemplated by subsection 51(4) of the **Mining Act** that is within the jurisdiction of this tribunal.

B E T W E E N :

2274659 ONTARIO INC.

Applicant

- and -

CANADA CHROME CORPORATION

Respondent

REASONS

Appearances

Mr. Chris W. Sanderson, Q.C.	co-counsel for the Applicant
Mr. Toby Kruger	co-counsel for the Applicant
Mr. Neal J. Smitheman	co-counsel for the Respondent
Mr. Richard Butler	co-counsel for the Respondent

Introduction

The Issue

1. Should an order be made under the **Mining Act** dispensing with the consent of Canada Chrome Corporation, thereby allowing 2274659 Ontario Inc. to seek the granting of an easement under the **Public Lands Act**?

Background

The North is not a quiet place. The area around McFaulds Lake (colloquially known as the "Ring of Fire") has taken on almost mythical proportions with regards to the amount of chromite it is said to hold.

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KWG Resources Inc. ("KWG"), parent company to Canada Chrome Corporation ("Canada Chrome" or "CCC"), is a Canadian corporation that has been involved in exploring the James Bay Lowlands for diamonds since 1993. KWG's efforts, along with the work of other junior mining companies, resulted in the unexpected discovery of chromite and led to a staking rush in the Ring of Fire. Two major chromite deposits make up this "Ring"— the Big Daddy deposit and the Black Thor deposit. There are a number of other deposits but the Big Daddy and the Black Thor deposits were at the centre of this hearing. KWG was focussed on the development of the Big Daddy deposit through a joint venture with another corporation, Spider Resources Inc. ("Spider"). The Black Thor deposit, along with two other deposits (Black Label and Blackbird), had been discovered by other companies, namely Freewest Resources Inc. ("Freewest") and Noront Resources Ltd. ("Noront").

While the chromite deposits in the Ring of Fire are said to be very large, there is apparently no existing means of transporting the resource to a distribution point. Unlike diamonds, chromite, which is necessary for the production of stainless steel, is extremely heavy and bulky to transport, even in concentrated form. KWG thought of a scheme that would address the transportation issue. This scheme included the creation of a subsidiary, Canada Chrome.

KWG, being a junior company, went looking for financial help for its undertaking. It assumed it was being strategic in seeking a partner that either made steel or supplied steelmakers with raw materials. It found such a partner in Cliffs Natural Resources Inc. ("Cliffs"), an American corporation with a head office in Cleveland, Ohio. Cliffs was one of two companies identified by KWG as having the necessary size and expertise. Negotiations eventually led to Cliffs providing two private placements and it acquiring substantial control of KWG through a shareholder agreement.

Cliffs was onside with KWG's scheme to establish and maintain an unimpeded access to its chromite deposit on a priority basis. Thus, Canada Chrome was created as a non-publically traded entity to handle that portion of the venture. It staked a series of mining claims leading, in a generally unbroken linear configuration, from the Big Daddy deposit to Exton, just west of Nakina.[1] There are some gaps in the formation. The claims follow a sand ridge or esker that was formed as a result of glacial activity in the area. The ridge runs through lowlands comprised mainly of muskeg. Imagining a single line of mining claims running in a north-south direction is a good start to understanding the configuration. Staking took place from May to September, 2009. The linear configuration would accommodate a railroad to serve the Big Daddy deposit specifically and the Ring of Fire generally with a distribution point in the south. KWG was comfortable enough working with Cliffs. One of Cliffs' officers was on the KWG board, a term of the arrangement initially agreed to by KWG and Cliffs. This seemingly amicable working relationship between the two companies did not last.

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[1] "Testimony and documentary evidence makes reference to connection to the existing railway spur at Exton, Nakina and Cavell. Cavell, in fact Cavell Lake, is located along the railway spur half way between Nakina and Longlac. According to evidence later in these Reasons, Exton, which is listed as another location for the end of the road, is located just west of Nakina. There is no clarification in the evidence as to which of these three sites is the intended end of the road."

KWG eventually came to realize that Cliffs was not interested in developing Big Daddy in the near term and instead wanted to focus its energy on developing the Black Thor and Black Label deposits. After Canada Chrome completed staking its mining claims and commenced performing assessment work, Cliffs acquired the Black Thor deposit through its acquisition of Freewest. Cliffs also bought out Spider, thereby obtaining a majority interest in the Big Daddy deposit, much to the surprise of KWG. The break-up of KWG and Cliffs, which coincided with Cliffs' acquisition of KWG's joint-venture partner, Spider, left KWG in a minority position and Cliffs in a majority position with respect to the Big Daddy deposit. Cliffs attempted to acquire the remaining interest in Big Daddy from KWG; however, KWG was not willing to accept Cliffs' terms. Cliffs also focussed its sights on creating an alternative transportation route to the south (towards an existing rail system). While Cliffs had initially been supportive of KWG's railroad plans, this support evaporated as Cliffs' interest in the area grew. In place of a railroad, Cliffs began promoting the building of a road.

Cliffs is the parent company of a subsidiary numbered company ("2274659 Ontario Inc.") through whom it seeks an easement from the Minister of Natural Resources (the "Minister") under the **Public Lands Act** ("**PLA**"). An easement would allow the numbered company to build a road from the Black Thor deposit to a point in the south, where the proposed road would meet up with rail lines already in existence at Nakina. The proposed road is but one part of a large project for developing the Black Thor deposit. The project is in the early stages. Various levels of consultation are yet to take place. The PLA and the environmental assessment processes are but two that require some form of consultation with various stakeholders. Their outcomes have yet to be determined.

The proposed easement for the road runs directly over the boreholes previously drilled by Canada Chrome to locate its railroad. The boreholes are located along a "contiguous string of glacial sand ridges"[2] identified as desirable higher ground in an area dominated by boggy lowlands. Its value as unique "high ground" is crucial to the building of either a road or a railroad.

When Cliffs approached the Ministry of Natural Resources, starting in May, 2011 it was told it would have to obtain the consent of affected mining claim holders for use of the surface for its planned road. A refusal to consent would bring affected parties before the Mining and Lands Commissioner. Cliffs' proposed route for its road took it over each of the mining claims (to varying degrees) that are the subject of this hearing and that are held by Canada Chrome. Cliffs' attempts to gain the consent of Canada Chrome and KWG failed.

While the Ministry of Natural Resources was initially included as a party to this proceeding, it neither requested party status nor made substantive filings regarding the merits of the case. Further, the Ministry took no position as to the outcome. Upon being asked by the tribunal what role the Ministry wished to assume, it indicated that it had no wish to participate in any formal capacity. Its representatives attended the hearing as observers. In fact, no representative from any government ministry requested party status.

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[2] Canada Chrome Railway Feasibility Study, Lavigne Affidavit (Exhibit 5b MLC) at Ex. "L"

A Note Regarding Party Names

The actual parties to the hearing (the numbered company and CCC), are subsidiaries of two parent companies, Cliffs and KWG, respectively. Much, if not all of the evidence and testimony was provided by representatives of the parent companies. For the sake of convenience, a reference to a parent company is intended to incorporate a reference to its subsidiary.

The Evidence

2274659 Ontario Inc. Evidence (the "Applicant")

Mr. William C. Boor is the Senior Vice President—Global Ferroalloys, for Cliffs Natural Resources Inc. ("Cliffs"). Cliffs is the parent company of the applicant numbered company. Mr. Boor described how Cliffs' acquisition of Freewest gave it the Black Thor deposit. Through its acquisition of Spider, Cliffs also formed a partnership with KWG with respect to the Big Daddy deposit.

The building of a road is but one piece of a very large project being spearheaded by Cliffs and its affiliates to develop a mine at the Black Thor deposit. Mr. Boor described the project as having four parts with the building of a road being one of those parts. The road is intended to be used to transport chromite concentrate by truck from the proposed mine site south to Cavell where the road would meet up with an existing rail corridor. In addition, the road will move workers and materials into the mine site. As Mr. Boor described it, the all-weather road is part of an "integrated transportation system". The other components of this system include airstrips which are to be located at the mine site (the beginning of the road) and at the rail head (the end of the road).

Mr. Boor described Cliffs' efforts to gain the consent of KWG/Canada Chrome, beginning on August 16, 2011, when he met with the President of Canada Chrome (Mr. Frank Smeenk) and the Chairman of KWG (Mr. Rene Galipeau) in Cleveland, Ohio. According to Mr. Boor, while Cliffs was prepared to accommodate KWG's "legitimate and reasonable concerns", Cliffs was also prepared to seek a referral to the Mining and Lands Commissioner if consent was refused. Cliffs set a deadline of September 23, 2011, and despite KWG's negative response on that date, Cliffs made one more attempt on October 6, 2011, which failed on October 14, 2011.

Mr. Boor gave his view of what he called the "sole reason" why consent was refused by Canada Chrome. In his opinion, Canada Chrome had a "stranglehold" over the "key transportation corridor" to the Ring of Fire and it did not want to lose that stranglehold. As he put it in one of his three affidavits, "the Respondent has an expectation of exclusive use of the surface rights to the Mining Claims". He described the Respondent's concerns as he understood them to be — "the Road would destroy the Respondent's economic interest in the Big Daddy claims and … would make the Respondent's proposed railway uneconomic." His view was that Canada Chrome wanted to ensure the development of the Big Daddy deposit. Holding exclusive use of the surface rights of the mining claims would help in this endeavour. Canada Chrome also indicated to Cliffs that an easement would "interfere substantially with [its] intended use of the claims and the subsequent leases and significantly diminish the economics of those claims and leases…." Mr. Boor noted that, prior to refusing consent, Canada Chrome had not expressed any concerns or asked any questions about the location of the road within the easement corridor. Nor

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had it indicated that the road would interfere with the exploration or extraction of minerals from the mining claims. Mr. Boor also testified that prior to September 23, 2011, he was unaware of Canada Chrome's intention to take the claims to lease.

Mr. Boor explained that he tried to make it clear to Canada Chrome that Cliffs was willing to adjust the location of the road in the corridor and that the road was a high priority in a complex project that Cliffs "needed to work through … rather quickly". He tried to explain that the existence of a road could potentially lower the capital cost of a railroad since it would provide access for construction purposes — it was not Cliffs' intention to preclude third party access to the road.

Mr. Boor took the tribunal to those aspects of Cliffs' project that were related to the processing of its request for an easement. For example, he referred to a letter from the MNR dated January 12, 2012, which confirmed receipt of Cliffs' "formal application" submitted on behalf of the Applicant numbered company and which was dated December 15, 2011. (The tribunal notes that Cliffs advised the MNR of its intention to build a road to service a mine and ore processing facility on May 31, 2011, stating that the Project was to begin operations in 2015.) That letter identified a five kilometre-wide corridor entitled "Base Case Transportation Corridor". The letter states "the exact route of the proposed road (and thus the requested easement) will depend on the results of further study. Subject to the results of such study,…the required easement would be through the corridor…."

In the December 15, 2011, letter, Cliffs Chromite Ontario Inc., in its capacity as administrator of the Project, advised the MNR that it had now identified a proposed route for its road and that it lay within what was described as a "road corridor" measuring 100 metres in width. The corridor housed the centreline for the road and included an allowance of "approximately 50 metres on each side of the proposed centreline to accommodate the 12-metre wide Road, including all accompanying shoulders, roadway side slopes, drainage and snow removal areas, and Road related facilities and structures, and to allow for construction activities, as well as adjustments to the precise alignment of the Road." Mention was also made of an allowance for tree removal and safe passing areas. Cliffs was seeking access to the surface of the corridor "for the life of the Black Thor mine and any other interests of Cliffs or its affiliates served by the Road." In addition to what was called the "Road Corridor", Cliffs identified something called a "Buffer Corridor" which was five kilometres wide and intended to accommodate any changes to the road route necessitated by environmental assessment, First Nations consultation, and/or concerns of unpatented mining claim holders within the Road Corridor. The MNR, in its response dated January 12, 2012, advised that any relocation of portions of the proposed road corridor would require a new application. The MNR also indicated that portions of the corridor crossed over "numerous unpatented mining claims". While the application could be accepted by the MNR, it would be necessary for Cliffs to obtain "the consent from the affected unpatented mining claim holders to enable MNR to grant an easement over those lands." The MNR further advised in that letter that no easement would be provided before completion of an environmental assessment, First Nation and public consultation, and "other regulatory approvals as it relates to [Cliffs'] overall Chromite Project submission." Mr. Boor referred to the possibility that "there may be updates to the road corridor as we go forward in that process."

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Cliffs advised the MNR of further refinements to the road centreline by way of a letter dated September 21, 2012, and, in addition, advised that it was identifying three maintenance depots to be located at major river crossings along the Road Corridor route, namely the Attawapiskat (depot to be situated 25 metres off of the road with a 100 metre x 150 metre footprint), Albany (depot to be situated 40 metres off the road with a 180 x 200 m footprint), and Ogoki Rivers (dimensions as for Attawapiskat). Cliffs had also removed an east facing "jog" or kink from the route just north of the Albany River. Cliffs reiterated its position that it might be necessary to make further adjustments to the location of the road "to lands outside the Road Corridor" depending on the outcome of the consultation and environmental assessment processes.

The MNR responded to this letter on December 21, 2012, indicating, amongst other things, that Cliffs' planning process would require "the consent from … affected unpatented mining claim holders to enable MNR to grant an easement over [the] lands." The MNR accepted the application as "valid and complete". The Ministry advised that any decision to grant an easement was dependent on the outcome of environmental assessment and consultation processes.

When asked questions during cross-examination about the staking of mining claims by Canada Chrome, Mr. Boor agreed that both Canada Chrome's Mr. Smeenk and Mr. Fink (Vice-President of Global Ferroalloys of Cliffs and on the KWG board) informed Mr. Boor of Canada Chrome's intention to stake the claims. He agreed with counsel for Canada Chrome that Cliffs, Canada Chrome, and KWG were all concerned with protecting an interest in a transportation corridor through the staking of mining claims. As Mr. Boor put it, their "interests were aligned" and none of them wanted the claims to fall into the hands of others and become a means of blocking their interests.

Further questions were put to Mr. Boor regarding the timeline forecasted by Cliffs for the project's start-up. According to Mr. Boor, the company was at a very early phase of determining whether the project was feasible. In fact, the project team had not yet taken the issue of further advancing the project to the Board of Directors. He admitted that it was a "challenging time" for the company and that there was a risk it might not go ahead.

Mr. Boor was asked further questions about the completeness of the Cliffs application submitted to the MNR in May, 2011 and later completed on December 15, 2011. The tribunal notes that the letter writer for Cliffs asks the MNR to treat its request as confidential and to not discuss it outside the Ministry. Mr. Boor described how the MNR had wanted Cliffs to be more precise in terms of the width of the required easement. Under further questioning, Mr. Boor explained that the thinking behind Cliffs' estimation of the width of the easement was that a wide buffer area would allow Cliffs to accommodate stakeholders' needs and adjust as necessary. He agreed that Cliffs had worked its way down from an eight km buffer corridor to a five km buffer corridor but explained that the road corridor was 100 metres and that Cliffs was indicating it had not done all the work needed to further refine dimensions. Mr. Boor admitted that the refinement that had smoothed out the eastern "jog" just north of the Albany River point (thereby creating a straighter north-south line and which was described in the December, 2011 letter to the MNR) was really moving the easement 25 km to the west. Mr. Boor agreed that refinement of the design could result in further deviations from what had been depicted in the application submitted to the MNR in May, 2011.

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When asked about what volume of traffic could be expected on the road, Mr. Boor testified that it was projected to be 100 trucks per day.

When questioned by the tribunal as to whether Cliffs had compared alternative transportation modes (namely road versus railway), Mr. Boor indicated that the capital cost of a railroad could not be carried by the project.

Mr. Richard John Kruse, a geological/GIS technician, with Cliffs Chromite Ontario Inc., was called to testify as to the transportation corridor mapping he produced from data which he had assembled. Neither Mr. Kruse nor Mr. Gabriel Johnson, who followed Mr. Kruse in testifying, was examined-in-chief. Their testimony came in solely through cross-examination and only after respondent's counsel made a request to the tribunal to allow this to happen. Cliffs had filed affidavits for these witnesses but did not call upon them to testify.

Mr. Kruse explained how he used data to create the corridor mapping produced for the hearing. This mapping consisted in part of an overview map as well as a series of individual maps depicting where the corridor crossed each mining claim held by CCC. He sourced data from the Ontario CLAIM maps system found on the MNDM website and satellite images produced for the public domain. He was not involved in determining the dimensions or location for the corridor route and he had no contact with the MNR regarding the road corridor. He was able to confirm that the "jog" that had been removed and highlighted in December, 2011 had resulted in eight fewer Canada Chrome mining claims being crossed. The new straighter line did not cross any new mining claims.

Mr. Kruse was taken to the borehole data created for Canada Chrome by a company called Golder & Associates ("Golder"). The boreholes were part of assessment work carried out on Canada Chrome's mining claims. Once filed with a mining recorder, the borehole data became public information. Some of the resulting information related to the location of sand and gravel.

Mr. Gabriel Johnson, senior manager of land administration, for Cliffs, worked on coordinating Cliffs' easement application with the MNR. He confirmed that the current road surface width was to be ten metres and that the width of the easement was 100 metres in total. The purpose of the projected five kilometre wide "buffer corridor" was to take into account "adjustments". He also testified that Cliffs had submitted two other applications to the MNR to carry out aggregate investigation work and geotechnical work. This work, while separate from the easement application, was intended to support it. The geotechnical application referred to test pits, boreholes, and aggregate testing that would occur along the length of the road at various intervals. Similarly, aggregate testing areas would take place along the road's projected line. Mr. Johnson could not say why the information provided to the MNR by Cliffs regarding this proposed work was not also provided to KWG or Canada Chrome. He said that some of the aggregate testing areas fell within Canada Chrome's mining claims.

During Mr. Johnson's cross-examination, it was revealed that the MNR notified Canada Chrome in February, 2013 of the extent of the geotechnical work that was to be carried out, namely borehole and aggregate sampling; development of a snowmobile trail to provide access to work sites for workers and equipment; and the building of helicopter landing pads every ten kilometres along the route to allow for the moving of drill rigs by helicopter. A

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drilling area was to be cleared and a ten foot deep hole was to be drilled to extract samples. These samples would assist in determining whether the subsurface material could physically support a road. The aggregate sampling would assist in determining if materials were present that could be used to build a road. Mr. Johnson agreed that, "to the extent that Cliffs requires sand and gravel for the material layers of the road, they're going to obtain that material through an application through the Aggregate Resources Act" and that, as of the date of the hearing, Cliffs had submitted 122 applications. Mr. Johnson did not know how many permit applications were actually sitting on top of Canada Chrome's mining claims. He testified that consolidated bedrock would not be sourced from within Canada Chrome's mining claims. In response to further cross-examination questions, he described other related activities such as blasting to excavate surface material for subgrade placement. These activities were also listed on a website belonging to Cliffs.

While the tribunal is well aware of the tendency for websites to become dated, Mr. Johnson's testimony centred on activities that one might expect to occur with the building of a road in the corridor area.

Counsel for Cliffs opposed the idea of making the website information an exhibit on the grounds that it was out of date (not the website but the information found there) and that the purpose for it was "spent" as it was intended to assist federal and provincial agencies in understanding whether they had a regulatory responsibility for the overall project and what the extent of any responsibility might be. This led to a discussion between the tribunal and counsel for Cliffs as to the extent of the information produced by Cliffs for the hearing. The tribunal posited that it had not heard about locations for helipads or the location of a temporary winter road, for example. Cliffs' counsel advised that Cliffs could not prove a negative and that it need only meet a case wherein the mining claim holder had identified a concern. As far as Cliffs could tell, the respondent only had a concern with the finished product (meaning the road) and the idea of construction activity presenting a problem was "novel". For the respondent to be affected by construction activity it would have to be itself engaged in some activity that might be interfered with. Counsel also emphasized that the 100 metre strip being sought by Cliffs through its easement application was as precise as it could possibly be. Indeed, the centreline was "identified and noted".

Cliffs acknowledged that it would have to work with mining claim holders within the boundaries of the easement but that if it was necessary to go outside the requested boundaries, another hearing before this tribunal would be required.

With respect to the information on Cliffs' website, the tribunal's acceptance of an excerpt from the website dealing with environmental assessments prompted the production, by Cliffs, of Mr. C. J. Tattersall, Vice-President of Hatch Mott MacDonald (a subsidiary of Hatch) with the title of principal project manager. Hatch was retained by Cliffs to carry out the feasibility study for Cliffs' main chromite development project in the Black Thor deposit. After reviewing air photos contained in Mr. Kruse's affidavit with the road corridor imposed on them, Mr. Tattersall pinpointed where the corridor would cross specific mining claims held by Canada Chrome. He described the accuracy of the mapping as "essentially infinitely accurate" as it is a "geometric-shaped file so it's mathematized". He was asked about the activities that would accompany construction of the road itself including clearing and development of aggregate pits to obtain aggregate material (aggregate being soil, sand, silt, clay, and gravel but not rock). He

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also referred to stripping and piling of topsoil, rock protection of embankments, bridge construction, and a "pioneer road". The total construction period would be approximately two years. Different time periods would be needed for various aspects of the construction. He was cross-examined at length as to what information pre-feasibility and feasibility studies could provide in terms of cost and corporate decision-making. More questions were asked about whether one could obtain permits before the environmental assessment process was completed. Mr. Tattersall agreed that Cliffs was "taking advantage" of CCC's borehole data to help it confirm the route. He also agreed that Cliffs would be short of solid rock (bedrock) needed for crushing and to be used in the building of a road. Mr. Tattersall also testified with respect to an affidavit he had produced in response to an opinion given by Mr. Lavigne (for CCC) that a road and a railroad could not co-exist along the sand ridge. He produced a drawing showing a road/railroad combination that required approximately 41 metres of width. It was his opinion that these two modes could co-exist within a 100 metre corridor.

Canada Chrome Evidence (the "respondent")

Canada Chrome's first witness was Mr. Frank Smeenk, Chief Executive Officer of KWG. Mr. Smeenk is also the sole Director and President of Canada Chrome Corporation, a subsidiary of KWG. He was involved in the staking of Canada Chrome's mining claims. He characterized Cliffs' actions in coming before this tribunal as an attempt to use the tribunal to, in effect, expropriate the mining claims. Mr. Smeenk's opinion, as set out in his affidavit, is that the mining claims constitute an "important strategic asset" as "they help to ensure KWG/CCC's continued role in the development of the Big Daddy deposit." His view was that the mining claims held a "significant mineral and strategic value to CCC and KWG". In the same affidavit he takes issue with Mr. Boor's opinion that KWG wanted a "stranglehold of the key transportation corridor". He also claims that the development of the CCC mining claims "for the base metal, diamond and aggregate resources … was a priority for KWG/CCC."

KWG was described as one of a number of "surviving junior resource companies". It was incorporated in the 1930's and has gone through various reorganizations since that time. KWG has an interest in chromite (it had actually acquired the Black Horse deposit at the start of this hearing). It has also spent money on airborne surveys looking for diamonds. Mr. Smeenk said that KWG's and other companies' early exploration efforts had led to the staking rush that culminated in the Ring of Fire.

Mr. Smeenk testified as to KWG's work with other companies in the Ring of Fire, commencing with the purchase of an option on claims held by Freewest and which KWG could work. At the time, Freewest was not interested in working the claims. Under the terms of a much earlier joint venture agreement with Spider, KWG shared its option from Freewest with Spider. It was through the resulting assessment work program that the Big Daddy deposit was discovered.

KWG approached Cliffs in December of 2008, the intention being to contact one or two large steel suppliers or makers who appreciated the size and value of KWG's discoveries. Mr. Smeenk characterized his efforts as "recruiting" Cliffs in January, 2009. Apparently Cliffs agreed to a private placement of new treasury shares, to be issued by KWG, and which included a shareholder agreement between the two companies, one of the terms of which saw a Cliffs official (Mr. Richard Fink) become a director of KWG. While this agreement gave Cliffs a 19.9 percent share of KWG, in actual fact it gained substantial control of KWG by requiring that

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Cliffs be given first right of refusal on further share offerings. According to Mr. Smeenk, Cliffs was recruited to become a shareholder of KWG in order to help develop the Big Daddy deposit. It paid off for KWG as Cliffs invested approximately $3,500,000 USD in KWG as a result. Mr. Smeenk's view of this arrangement was that KWG would be a useful Canadian partner to Cliffs in the development of the Ring of Fire.

According to Mr. Smeenk, Mr. Fink agreed that KWG should stake what Mr. Smeenk described as a "right of way for a railway from the Big Daddy deposit." Based on past experience, Mr. Smeenk testified that it is difficult to garner interest in a landlocked deposit accessible only by plane. Investment interest would be equally lacking. Further discussions with Mr. Fink led Mr. Smeenk to incorporate a subsidiary company, CCC — its purpose being "initially so we could register … the claims, and not have it be completely public right away, that it was KWG's, but also to have them from the outset in a vehicle that we could then deal with in some fashion inasmuch as KWG clearly didn't have the money to build a railroad." Mr. Smeenk had various ideas that he thought would allow for financing the scheme including involving outside interests and government.

Mr. Smeenk testified that the staking pattern for the mining claims followed an esker which he believed was "the only place" for a transportation corridor. He testified that Cliffs supported the idea and even offered to help. With their focus on the esker, there were two objectives: "One was to get as quickly as possible the assessment work completed on the mineral claims so that we could bring them to lease and …[t]he other objective … was to learn what the soil profile and the bedrock along the line of claims was constituted of." In addition, and given what KWG had learned about diamond exploration in the past, investigating the claims for diamonds was deemed a "legitimate inquiry".

Mr. Smeenk believed that KWG had to work with Cliffs in order to gain an advantage regarding access. His concern was that if they (meaning KWG and Cliffs) did not do it, someone else would. Cliffs' earlier placement of funds also played a role in financing KWG's efforts. Mr. Smeenk said that Cliffs reiterated its further support for his scheme but that this failed to materialize and KWG went into the "red" with its assessment work. Mr. Smeenk's affidavit describes a series of meetings, emails, and discussions between himself and officials at Cliffs (Messrs. Fink and Boor) that refer, amongst other things, to the use of the surface of the mining claims for a railroad route. Mr. Smeenk pointed out that it was Cliffs who recommended that KWG/CCC make use of a certain American firm of engineers knowledgeable in the building of railways for further investigative and feasibility studies. Golder carried out borehole sampling, survey work, and so on between January and May, 2010 on behalf of CCC.

Expenses were "significant" and Mr. Smeenk kept Cliffs apprised of this fact in the course of asking for funding. He was given assurances that funding would be forthcoming; however, when discussions were held to determine how that funding could occur (including having Cliffs purchase CCC, an offer of which was made in May, 2010), the relationship between the parties began to unravel.

KWG was concerned that CCC's true value was not being recognized by Cliffs but managed to avoid having to sell with the help of outside funding. At this time (May, 2010), a series of events occurred that signalled an end to the relationship between Cliffs and KWG: first, Mr. Fink resigned from the KWG board on May 21, 2010; and second, Cliffs made an offer to

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acquire all outstanding shares of KWG (KWG and Spider had been negotiating a merger agreement that was supposed to give the merged corporation operating control of the Big Daddy deposit). When Cliffs bought Spider in July, 2010, Cliffs obtained a majority interest in the Big Daddy deposit. It also became apparent to Mr. Smeenk (through a press release issued by Cliffs) that Cliffs was intending to delay development of the Big Daddy deposit.

Mr. Smeenk testified that KWG's value was negatively affected by these events, but did not elaborate. Although the relationship with Cliffs was coming to an end, Mr. Smeenk testified that KWG wanted to maintain its interest in the Big Daddy deposit. CCC continued to explore its mining claims for their "mineral/diamond content and their potential as a railway corridor".

In August, 2011 Mr. Smeenk learned that Cliffs was proposing to build a road over the CCC mining claims so as to develop the Black Thor deposit. He indicated that he had been privy to Cliffs' realization that the cost of a railroad — originally thought to cost $600 million — could end up costing more than three times that amount. It was also in August of 2011 that Cliffs informed Mr. Smeenk that it wanted KWG's consent to use the surface of the CCC mining claims. He testified that KWG refused consent — the reason being that it was "contrary to KWG's business interests". He added that at the time KWG had a minority interest in one deposit (the Big Daddy deposit) in the Ring of Fire and wanted to participate in developing that deposit. He described how he offered Cliffs the road in return for some tonnes out of Black Thor and KWG would pay them back from the Big Daddy deposit. Mr. Smeenk indicated that he was still interested in selling chromite with Cliffs in a joint venture arrangement.

As for Cliffs' statement that its road would be public as opposed to private, it was Mr. Smeenk's view that this would be physically impossible given the number of trucks that would be using the road. Mr. Boor had testified that as many as 100 trucks per day would be using the road; Mr. Smeenk believed that this volume of truck traffic would not leave room for anyone else.

Mr. Smeenk also took issue with Cliffs' position that it had located the precise alignment of the road. As he put it, there had been "three or four" different alignments and he felt that, at the time of the hearing, the precise location of the road had not yet been determined.

In terms of the costs associated with a road as opposed to a railroad, Mr. Smeenk stated that the government of Ontario was "going to pay for the largest part of the cost of [the] road". KWG, on the other hand, was hoping to rely on a "Private Public Partnership" or "PPP" with the federal government. He indicated that amortization of the cost of the road would be tied to a certain number of tonnages being obtained from the Ring of Fire over a period of 100 years. It was his opinion that a railroad would ultimately be the cheaper option as a road would require maintenance and would depreciate over time. He was also of the opinion that if the province wanted to build a road it should be a public road. Cliffs on the other hand was proposing what he described as a private road to service the Black Thor deposit.

When asked about the possibility that Cliffs might decide to not proceed with its project, especially in light of financial concerns, Mr. Smeenk posited that "the development of the Ring of Fire will have to await the pleasure of Cliffs" as the "high ground" would be "sterilized".

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In cross-examination, Mr. Smeenk testified that he wanted to build a railroad and that he wanted both the Big Daddy and the Black Thor deposits to be developed at the same time. He admitted that "it would be a reach" for KWG to finance a railroad (estimated to cost in the region of $1.6 billion) on its own without having customers and income at hand. He further admitted that neither KWG nor CCC had secured any funding, although there had been exploratory discussions but did not indicate who these discussions were with. Mr. Smeenk testified that a schedule to develop the Big Daddy deposit had not yet been established. This fact was blamed on KWG's having relied on Cliffs' encouragement of KWG's work prior to their falling out.

Despite being pressed by Cliffs' counsel as to whether he now understood where Cliffs was placing the corridor, he could not say with certainty whether the road would interfere with any mining activity on CCC's mining claims; however, he believed that interference was "likely".

Mr. Smeenk was cross-examined with respect to CCC's efforts to take the mining claims to lease. He indicated that a survey required under the **Mining Act** (the "**Act**") had not yet been completed nor had the fee (required under the same legislation) been paid. He blamed the current proceedings for the delay. While CCC had completed the requisite assessment work, no fee would be paid until instructions had been received regarding a survey. When asked by the tribunal when the lease application process had actually started, Mr. Smeenk drew attention to a letter dated May 25, 2012, sent to the MNDM office in Sudbury. The letter described the assessment work that had been performed on the mining claims and indicated that KWG would "be making application for the lease of mining rights of the CCC claims". According to the letter, 321 samples (hand-augur soil sampling) were obtained over the period September 1, 2009, to November 9, 2009, and mechanized augur soil sampling was carried out from November 30, 2009 to March 15, 2011, during which 735 boreholes were drilled.

When cross-examined on his belief that truck traffic would negate use of the road by other users, Mr. Smeenk admitted that he had no knowledge as to how or if traffic would be managed. He had no knowledge as to how many trucks at a time would use the road or if they would be running 24 hours a day. He agreed that moving trucks in a convoy formation would allow other users an opportunity to use the road.

In response to questions about his position that Cliffs' acquisition of an easement could shut other users out of the transportation corridor, Mr. Smeenk reiterated his concern with the role he saw the provincial government playing, claiming that by its paying for "the bulk of it", the effect would be to sterilize the property for others who might have access. In addition, he complained about a lack of "regulatory filings" that could help others assess Cliffs' project.

Mr. Smeenk was followed by Mr. Maurice Lavigne, Vice-President of exploration and development at KWG. At one point in his career he was employed by the MNDM (1983-1997) and considered himself to be familiar with the **Mining Act**. Mr. Lavigne's primary responsibility at KWG was to design and execute exploration programmes and to look for "opportunities" as well as to move projects along, including the layout of the transportation corridor to the Ring of Fire.

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Mr. Lavigne testified about KWG's diamond exploration activity which had begun in 1993. Diamonds had been discovered in the Lowlands, specifically in the Ring of Fire. As he described it, kimberlite pipes had been found "almost superimposed on what we now know as the Ring of Fire. It was exploration of these pipes that led to KWG's discovery of copper and zinc at McFaulds Lake which precipitated the first staking rush in the Ring of Fire in 2002 and 2003. In 2007, Noront discovered a copper, nickel, and palladium deposit which led to a second staking rush, the data from which more fully delineated what became known as the Ring of Fire. KWG set up a subsidiary company (Debut Diamonds) in 2007 to focus on diamonds. Its intention was to have Debut Diamonds go public and raise money for further diamond exploration. Unfortunately for KWG, the economic downturn in 2008 put that project on hold.

Mr. Lavigne testified that despite its focus on the Ring of Fire, KWG had not lost sight of its interest in diamonds and the staking of the esker making up the CCC mining claims provided KWG with a unique opportunity to resume its investigations in this regard. Mr. Lavigne explained that a geologist member of KWG's board saw potential in the samples that were to be collected from the CCC mining claims area for the purpose of carrying out geotechnical work. The samples along the length of the esker constituted a representative sample of all the minerals that were scraped by ice flowing from Hudson's Bay and James Bay in a southwesterly direction. The esker essentially became a "very fine net capturing minerals that are representative, mineral deposits that might be found up-ice and it's very rare for any exploration company to have access to so many samples" due to expense. In this case, the sampling cost about eight million dollars (presumably Canadian dollars). The samples, having been preserved for further analysis, enabled KWG to finance Debut Diamonds and eventually list the company on the market. He did not identify the market he was referring to.

Mr. Lavigne testified that the results of the soil samples taken from along the transportation corridor for the railroad project would be due in mid-April of this year (2013). Once received, the sample results are entered into a database and can be used to guide exploration for at least the next decade. Under cross-examination, Mr. Lavigne admitted that it was not known, as of the date of the hearing, where exactly on any CCC claim there might be follow-up work; in fact, no follow-up exploration programme was in place as KWG was waiting for market support.

Mr. Lavigne opined that, following a mineral discovery, infrastructure needs such as a transportation route should be accounted for by staking mining claims. As he put it, "…by staking claims we would have access to the resources that we would need to build the transportation infrastructure that we would need…." In fact, his view of the **Mining Act** was that "…if we stake claims … for the purpose of building infrastructure for our mine development, the materials contained within those mining claims, which includes everything below your feet, can be used to construct your mine infrastructure." Based on his experience, it was Mr. Lavigne's opinion that resource companies occasionally staked mining claims to protect access to infrastructure opportunities.

Mr. Lavigne described how the James Bay Lowlands are, for the most part, muskeg. In 2009, Ontario geological survey maps helped in the discovery of a sand ridge that was the subject of further exploration by KWG. Staking a route "that was constructible" took about six months and was completed in September, 2009. Soil sampling took place between January and May, 2010 at the cost of about one million dollars a week. Mr. Lavigne referred to a

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document he called the Golder Report. In reviewing the document identified by Mr. Lavigne, the tribunal notes that Golder was contracted by CCC to provide geotechnical engineering services for "the proposed 329 km infrastructure corridor that extends from the 'Ring of Fire' chromite deposit to the existing railroad at Exton, Ontario." According to this document, which is marked "draft", it was prepared for the use of CCC and Krech Ojard & Associates in the design of the "planned infrastructure to connect the proposed mine site in northern Ontario to existing railroad facilities…." Mr. Lavigne's affidavit (prepared for the hearing on the merits) also contains a document entitled "Canada Chrome Railway Feasibility Study – Integrating Planning, Design, and Field Operations Data through GIS in Remote Environments". Three companies are listed as being involved. They are Krech Ojard & Associates of Duluth, Minnesota; Golder Associates of Anchorage, Alaska; and Pro-West & Associates of Walker, Minnesota. All three are obviously based in the United States. Reference is made to work carried out on behalf of Canada Chrome during the winter of 2010 "for a 329 km heavy haul railway from the Ring of Fire … to the existing rail junction at Nakina, Ontario." In the "Project Description", the document provides the following:

> In early 2009, KWG Resources focused on the strategic importance of infrastructure to bring the resource into development. Because of the size of the deposit and the quantity of material anticipated for transport, KWG realized the need for eventual railroad development and engaged KOA to begin focusing on possible corridor routes out of the inaccessible lowland swamps surrounding the Big Daddy and Black Thor chromite deposits.

The report goes on to state that 811 geotechnical boreholes were drilled and that the nearly 6,000 soil samples obtained were used "to assess ground conditions along the alignment, and to support preliminary design of structures, railroad and road embankments, and [identify] critical material sites." The report also indicates that the project team worked to understand "the potential needs of study, construction, and operations phases of the Canada Chrome rail development…." Mr. Lavigne made direct reference to these figures in his affidavit. The aforementioned Railway Feasibility Study refers to its information being harmonized with future work, including "preparations for the Environmental Assessment review process".

Mr. Lavigne noted that bedrock was exposed in few places. Muskeg, glacial till, or sand covers most of the bedrock. For what he called the northern half — comprising approximately two thirds of the railroad route — there is only one ridge of sand present. In the southern portion, he indicated there were "more choices".

Mr. Lavigne provided mapping to show where Golder boreholes had been drilled for CCC originally (January to May, 2010) and where proposed (Cliffs) boreholes were to be drilled. The location of Cliffs' proposed boreholes was based on information received by CCC from the MNR in a letter dated February 28, 2012, and sent from the Geraldton MNR office to Canada Chrome. The MNR letter served as notification to CCC of a proposal from Cliffs to conduct geotechnical investigations (aggregate testing) along its proposed road corridor. As Mr. Lavigne indicated, "75 percent of the length of … the Golder boreholes are within five or ten metres of separation between the proposed holes by Cliffs." In fact, Cliffs' investigation is described in the MNR letter as being in support of environmental assessment work for its project. Mr. Lavigne testified that Cliffs had not provided any information to CCC regarding the testing but that the information had come from the MNR. Nor had Cliffs provided any information regarding the work it intended to do in relation to the proposed investigations. He stated in his

affidavit that the test pit activity and aggregate sampling would affect CCC's ability to take aggregate or consolidated aggregate from its mining claims as there was a limited amount of this resource. His opinion was that a "simultaneous development of the road and railway are incompatible". The sand ridge was narrow and any aggregate found there would be "sterilized from any other use". By "sterilized" he meant that the "road itself is as wide as the sand deposit that it's going to be using as its base".

Mr. Lavigne indicated that in the spring of 2012, KWG submitted its own aggregate permit applications to the MNR which were rejected in August of that year for being incomplete. KWG could not afford to carry out the work that would have addressed the deficiencies but filed its application anyway. They have not pursued the project further, citing a lack of support, amongst other things. Mr. Lavigne did not elaborate on whether the support was

financial in nature. In cross-examination Mr. Lavigne testified that Debut Diamonds was no longer a subsidiary of KWG and that KWG only owned "some" shares. Both during oral evidence and in his affidavit, Mr. Lavigne referred to an alleged impact of certain withdrawal orders; however, under cross-examination he agreed that the land covered by the orders had no impact on the CCC mining claims. Mr. Lavigne also testified that CCC did not hold mining claims forming one continuous line to the Big Daddy deposit and that others held these claims; however, he suggested that CCC could come to an agreement with those mining claim holders so as to bridge any gaps.

When asked about the placement of a centre line for the proposed railroad, Mr. Lavigne indicated that the CCC boreholes functioned as initial indicators and that further investigation was being carried out by a company called Tetra Tech. He testified that his assertion that a road and railroad could not co-exist together was his opinion and not that of a qualified civil engineer. Similarly, Mr. Lavigne could not rely on professional training to give an opinion on how much aggregate would be used for building either a road or a railroad. He agreed that certain permit applications covering the CCC mining claims were for sand and gravel. He also agreed that he had speculated that Cliffs would take aggregate from within the CCC mining claims to build its road. As for the assessment work filed by CCC, Mr. Lavigne testified that while 15 million dollars' worth of work had been carried out, only eight million of that had actually been filed and accepted by the MNDM. As for why this was the case, and as stated by Mr. Lavigne in his affidavit, "railway engineering does not qualify to be filed as assessment work for a mining claim."

CCC produced two other witnesses to speak to road, railway, and geotechnical engineering issues, amongst other things. These were Mr. Laszlo Bodi, a geotechnical engineer, and Mr. Paxton Hartmann, a civil engineer from Tetra Tech with expertise in road and rail design. Mr. Bodi analyzed the soil profile information found in the Golder Report and evaluated the distribution of soils. Mr. Hartmann said that he was to carry out "a three-dimensional geometric analysis of a road and a rail corridor to come up with the needed volumes required to build such a structure". He then took Mr. Bodi's information and applied it to his three-dimensional geometric analysis to determine how much rock was needed. The alignment he used for his measurements was the same for both modes. Mr. Hartmann also testified as to the lifespan of a road and a railroad. According to the witness, roads are designed for a 20 year lifespan; however, during that period they require resurfacing and other forms of maintenance. As he indicated, roads have to be reconstructed and rehabilitated about four times during that lifespan. A railroad's lifespan is approximately 80 years.

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Mr. Hartmann looked at the availability of rock or aggregate only within the CCC mining claims area and not outside that area. He agreed that the amount of rock needed to build a railroad as opposed to a road was greater. Whether this is a universally true principle or whether it is true only for the area of the corridor was not asked or answered. He was not asked to consider where the rock might come from to make up any deficit. He indicated that building a road ahead of a railroad would have a significant impact on the building of the latter as useful building materials would be depleted. Mr. Hartmann assumed that Cliffs would be using rock found in CCC mining claims. On cross-examination he agreed that he had not considered that Cliffs might source rock outside the alignment area he had studied. He also made it clear that, for the purposes of his report, his work was not connected to the CCC mining claims. His work related only to the road/railroad confluence/conflict or overlap on the basis of a surfeit of available materials. Under cross-examination, his assumptions were questioned. Mr. Hartmann indicated that for the purpose of ensuring a fair analysis and because his analysis was based on the borehole data contained in the Golder Report, he assumed that a road alignment would follow on top of the rail.

The Arguments

2274659 Ontario Inc.'s Submissions

Mr. Sanderson began his submissions by referring to the application made by Cliffs (on behalf of 2274659 Ontario Inc.) to the Minister of Natural Resources under s. 21 of the **PLA**. The applicant was seeking access, in the form of an easement, to the surface of Crown lands which also happened to have mining claims filed on them. Under the **Mining Act**, the applicant requires the consent of the holders of the mining claims to share in the use of the surface rights. Where consent is not forthcoming, the applicant may seek an order from this tribunal dispensing with the need for consent. This occurs by way of a referral from the Provincial Mining Recorder under cl. 51(2)(a) of the **Mining Act**. Such was the situation faced by the applicant in this case as CCC refused consent.

Counsel cautioned that the tribunal was not being asked to determine whether the Minister should or should not grant an easement. As he put it, the tribunal's task was to determine whether the Minister should even consider that question (presumably by either granting or denying the requested order).

Mr. Sanderson described the respondent as a "tenant at will" in respect of its mining claims and its rights to the use of the surface of those claims as "more tenuous still". Subsection 50(2) of the **Mining Act** allows for the use of the surface above the claims for the purposes set out therein; however, rights to the surface use are not exclusive since they are subject to the "multiple use principle". Other uses, to the extent they are compatible with the development of a mine, are permitted. According to Mr. Sanderson, if no conflict exists between a proposed use and the "limited mining purposes" set out in s. 50(2), then there is no basis for withholding consent. In referring the tribunal to its ruling in *22274659 Ontario Inc. v. Canada Chrome Corporation, Minister of Natural Resources and Neskantaga First Nation* MLC (August 24, 2012),(unreported), Mr. Sanderson reviewed the multiple use principle and its inception through the work of the Public Lands Investigation Committee.

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In Mr. Sanderson's submission, once an applicant has made an application under s. 21 of the **PLA** and given notice to affected mining claims holder, if and when a holder refuses consent the onus shifts to the holder to show that the proposed use is incompatible with the holder's use; that the proposed use would interfere with development of the mining claims; and that the public interest favours permitting the holder's use rather than the applicant's proposed use. He took the tribunal to the case of *The Improvement District of Gauthier v. Egg* (1987), 7 M.C.C. 281, to illustrate his points. In that case, Commissioner Ferguson took into account the public interest in having a municipal park, stating "[t]he 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 on the part of the mining claim in issue." It was Mr. Sanderson's submission that this tribunal faced a similar situation, namely that there was a "complete dearth of evidence that the public use to which the applicant seeks to put the surface, that is, the construction of a road, is in conflict with any clearly identified use of the surface by the claimant for mining purposes." According to Mr. Sanderson, whether the road was to be used by Cliffs alone or Cliffs as well as the public was irrelevant as the multiple use principle does not discriminate. In any event, he stated that the road would be used by a number of different users and the "community".

Mr. Sanderson characterized the respondent's claim that it could not respond to Cliffs' request for access because it was uncertain as to the alignment of the road as a "red herring". The respondent had been asked to consent to an easement corridor measuring 100 metres wide and which had been accurately depicted on a number of air photo maps contained in an affidavit deposed by Mr. Kruse and referred to by Mr. Tattersall as being precise. If Cliffs strayed outside the stipulated width and alignment it faced the prospect of having to submit a further application or applications.

Mr. Sanderson pointed out that Mr. Smeenk's objections were aimed at the existence of the road itself, not its location. Mr. Smeenk was interested in mining chromite in the Ring of Fire, specifically in the Big Daddy deposit—he never mentioned an interest in mining chromite in the mining claims that are the subject of this hearing. According to Mr. Sanderson, CCC never identified any specific concerns with the location of the road; the road's existence, however, would interfere with KWG's plans for a railway and its business prospects in the Ring of Fire. Furthermore, Mr. Boor was consistent in his assertions that any objections about the road's location within the corridor would be dealt with by Cliffs in an effort to accommodate such objections.

As for CCC's position that the road would interfere with its interests, Mr. Sanderson said that it was up to CCC to identify those interests and support its assertions with evidence. The activities concerning the construction of the road involved nothing unusual, a fact with which Mr. Lavigne agreed. In fact, Mr. Sanderson submitted that each mining claim would be disturbed by construction activity "twice over a two-year period, once for four or five days to construct … [a] pioneer road, … the initial path,… and a second time, perhaps two or three weeks, to finish the road." Cliffs could be flexible in terms of "when it does what on which claim". Legally, CCC could not argue that the proposed road would interfere with its proposed railroad — it had to argue that the road would interfere with its development of the mining claims.

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Mr. Sanderson submitted that the real issue to consider was the impact of a permanent road on CCC's mining claims. In this respect, construction activity was no different than the existence of the actual road. Subsection 50(2) of the **Mining Act** includes the phrase "prospect or to efficiently develop a mine" which, according to Mr. Sanderson, defines whatever rights CCC had to the surface rights of its claims. Mr. Sanderson stressed the word "mine" for this part of his argument. It was in respect of these rights that CCC had to demonstrate any negative impact brought about by the existence of the road. He took the tribunal to *Ontario Hydro v. Nahanni Mines* M.L.C. (November 17, 1993) (unreported). As was the case in *Nahanni*, Cliffs' proposed use of the surface had nothing to do with the exploration or extraction of minerals from CCC's mining claims. This lack of conflict or lack of interference meant that the tribunal did not have to weigh the parties' interests in accordance with the multiple use principle. No interference meant no balancing was required. However, if the tribunal felt there were interests to be weighed, *Egg* would assist in that exercise. CCC had not demonstrated any interference with its mining claims and, in any case, the use and disposition of Crown land in Ontario was governed by the multiple use principle.

As for CCC's proposed use of the mining claims, Mr. Sanderson said the claims had been staked in "very unusual circumstances". CCC's objective was to "obtain the land required to develop a transportation corridor." Its parent company had interests in the Ring of Fire and the intention was to facilitate the movement of material from the Ring of Fire to the south to meet up with existing transportation networks. The mining claims were not staked for the purpose of developing a mine or prospecting for minerals. CCC never staked the mining claims for their mineral potential—the information it used for the staking was obtained from a railway engineering company. It wanted to move minerals from the Ring of Fire and to move workers, materials, and supplies back and forth — in other words, construct a general purpose railway. According to Mr. Sanderson, the **Mining Act** is not intended to be used for this purpose. The boreholes CCC had drilled were for delineating a railway route, not for extracting minerals.

According to Mr. Sanderson, the railway is the competing use in the sense that CCC wants to prohibit others from making any use of the surface of its mining claims. Subsection 50(2) of the **Mining Act** should not be interpreted so as to give CCC that power. Had that been the intention of the **Mining Act**, it would have included language specifically allowing for the staking of mining claims for the purpose of creating a transportation corridor. Even if this is found to be an acceptable use of the surface by the claim holder, there must still be a connection between the railway and mining activity in the underlying claims. CCC's plan to construct a railway was not in anticipation of any mine which CCC intended on developing, contiguous or otherwise. Mr. Sanderson referred to the definition of a "mine" and submitted that CCC had no desire to build anything that came within that definition.

Even if the tribunal could accept CCC's prospect of a railroad as opposed to a road, it was "not advanced sufficiently to require consideration under the multiple use principle". There was an absence of financing, suppliers, and a single mine owner expressing a desire to use CCC's planned railroad. Cliffs, on the other hand, had already reviewed the costs associated with building a railroad and found the endeavour to be too expensive. Mr. Sanderson called the building of a railroad an "absolutely speculative undertaking". Finally, the Province had indicated a preference for a road and was "prepared to make a major contribution to funding a road". Conversely, there had been no talk of funding a railway.

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Mr. Sanderson pointed out that Cliffs had always been sensitive to CCC's plan for a railway and had ensured that a "railway, could be physically accommodated within the corridor". There was no evidence that an easement was inconsistent with the construction and operation of a railway or that there was insufficient room to accommodate both. On the contrary, there was evidence that both a road and a railway could be accommodated within the corridor. Throughout the process, CCC had demonstrated that it was not interested in a "cooperative undertaking" and wanted exclusive access.

Mr. Sanderson took the tribunal to s. 51 of the **Mining Act** and said that the language in that section "mirrors" that found in s. 50(2). In Mr. Sanderson's submission, the words in s. 51 should not be understood as conferring a priority right to build a regional transportation corridor. Mr. Sanderson noted that KWG has a 30 per cent interest in the Big Daddy deposit as well as the potential to acquire rights in another deposit (Black Horse). At the moment, Cliffs is the majority owner and project operator of Big Daddy and has no immediate plans for its development. In response to questions put to him by the tribunal, Mr. Sanderson stated that the fact that CCC was the claims holder when it was actually KWG that was seeking to use the surface of the claims to build a railroad posed an additional obstacle for both companies. CCC neither needed a railway to service its claims nor did it have an interest in a mine which a prospective railway might support. It had an interest only in establishing a transportation corridor. More importantly, CCC's railroad proposal was so speculative that it should not have priority as a use at the expense of Cliffs' proposed road.

In reviewing Mr. Smeenk's evidence, Mr. Sanderson drew attention to Mr. Smeenk's statement that the mining claims were a "check-mate asset". As stated by Mr. Smeenk in his affidavit, "[w]e now have exclusive possession and management of a check-mate asset without which no substantial mineral deposit in the Ring of Fire can be beneficiated and made economic, for all practical purposes." According to Mr. Sanderson, Mr. Smeenk had "tied up the only infrastructure corridor in a way that [left] every mine hostage to [him]". Mr. Sanderson suggested that Mr. Smeenk's tactics, whether through KWG or CCC, went beyond merely attempting to secure a piece of the Ring of Fire action for himself to obtaining total control over access for all who held an interest in the Ring of Fire. Mr. Sanderson predicted Mr. Smeenk's future plan as being the creation of a "provincially-regulated operating railway", charging third parties for its services. He maintained that the province was in "clear opposition", although there was no provincial policy to this effect. Acknowledging that the tribunal was not the proper forum for determining which transportation mode was preferable, Mr. Sanderson reiterated his primary argument that there was nothing in the **Mining Act** to support giving a mining claim holder the right to construct a transportation corridor on the surface of Crown lands.

In reviewing the definition of a "mine", Mr. Sanderson focussed on "ways" or "works" and "for the purpose of winning any mineral or mineral bearing substance". Asking if CCC intended to do any of the things listed in the definition, or whether a railway could carry out any of the phrases that went into defining a "mine", his answer was no — a railway was not a mine. The use made of the surface of a mining claim by the mining claim holder must be tied to the actual mining claim. He argued that the word "therein" supported this interpretation.

Throughout his submissions, Mr. Sanderson maintained that in an application under s. 51 of the **Mining Act**, the onus is on the respondent to prove that its plans for use of the surface are so certain as to merit having the tribunal render a decision which effectively would block any other use. The purpose of Cliffs' application was not to seek the tribunal's permission

to use the surface of the claims — that would describe its application to the Minister of Natural Resources for an easement. Before the Minister may grant an easement, Cliffs must, through the production of sufficient and persuasive evidence, convince the Minister that the application meets all requirements. The only question before this tribunal is whether or not Cliffs will even be able to proceed with its application to the Minister. In making its decision, the tribunal must be sufficiently persuaded that CCC's proposed use of the surface of its mining claims is of such importance that, based on the tribunal's decision, the Minister of Natural Resources need not even ask the question of whether Cliff's proposed plans for the surface are in the public interest. Mr. Sanderson suggested that this constitutes an extraordinary power in that it effectively blocks any consideration of the public interest. The tribunal must be persuaded, based on the evidence led by the respondent, that the respondent's use of the surface warrants the termination of any further inquiry by the Minister of matters of public interest.

According to Mr. Sanderson, while development of the Ring of Fire itself was uncertain due to a variety of economic factors, CCC's plans were "even more speculative than might normally be the case for developments of this sort." Cliffs' plans were not as speculative.

Mr. Sanderson went on to describe what really amounts to a business fact of life — if Cliffs' application before this tribunal is unsuccessful, it might have to abandon its ambitions in the Ring of Fire rather than be held hostage to CCC/KWG's demands. He also referred to *Neskantaga* for the principle that authority for granting the necessary easement rests with the Minister under the **PLA** and not the Mining and Lands Commissioner under the **Mining Act.**

Mr. Sanderson referred to the decision of the Mining and Lands Commissioner in *Reid v. Hoover* MLC MA 006-05 (March 2, 2007) (unreported). In that case, the mining claim holder, concerned about losing fishing access because development was being proposed, staked claims and said that he would use the materials to help in road building. The tribunal did not believe his story. In Mr. Sanderson's view, Mr. Smeenk, like the claim holder in *Hoover*, wanted to stop development of a road and was trying to justify his position after the fact. The tribunal notes that the *Hoover* decision was precipitated by a referral by the Minister under s. 54 of the **Mining Act**.

As for CCC's contention that there was room for only one mode of transportation (road or rail but not both) Mr. Sanderson stated there was no evidence to support this position. Although there was a shortage of aggregate, there was no shortage of physical space. In any case, one user might have to go further afield for the materials needed to build either mode. According to Mr. Sanderson, that was what Mr. Hartmann's testimony really dealt with: he was asked to assume that the road would be built in the same place as the railway and compare amounts of building material required. His testimony was not helpful in understanding the impact either mode would have on the other when it came to the supply of aggregate materials. Cliffs made it clear that the crushed rock it required would not come from the mining claims and the assumption by Mr. Hartmann that Cliffs would source bedrock from the mining claims was false.

Mr. Sanderson addressed the issue of the aggregate use CCC claimed it would put the mining claims to, activity which is governed by the **Aggregate Resources Act**. Cliffs had made applications for permits, some of which covered CCC mining claims. Mr. Sanderson described CCC as a tenant at will with "a very specific right conferred by the **Mining Act**." CCC

had no rights to sand and gravel and it did not own the rock. Through the relevant permits, CCC was made aware of Cliffs' work. CCC was entitled to the use of the bedrock and Cliffs, through the **Aggregate Resources Act** permit process, the use of the sand and gravel. There was no conflict between these uses. CCC would have to demonstrate actual damage had occurred whereupon it would be entitled to make a claim for any damage to mineral exploration workings pursuant to s. 79 of the **Mining Act**. Mr. Sanderson referred to this tribunal's decision in *Chitaroni v. BOT Construction Ltd.*, MLC MA-031-93 (December 21, 1995) (unreported), as an example of where such a claim was successfully made. In Mr. Sanderson's submission, the anticipation of damage was an insufficient basis on which to block a competing activity. The **Mining Act** contemplates competition and provides a means for dealing with it. Acting Commissioner Goodman's decision in *Northland Power v. Morris Hector Joseph Labine and the Minister of Natural Resources,* MLC MA 011-95 (June 7, 1996) (unreported), demonstrated a clear analysis by the tribunal of the absence of conflict in the uses. In that case, it was found that an easement for the proposed transmission line would in no way interfere with the exploration or extraction of minerals for a quarry or mine.

It was Mr. Sanderson's position that CCC had not pointed to any activity it might carry out in respect of its claims that would be negatively affected by Cliffs' permits. Even the work on the railway boreholes had yet to be analyzed to the point that would allow for positive evidence of interference. In fact, Mr. Lavigne was not expecting to find evidence of mineable minerals at the borehole locations although the boreholes did point to something that might be found "off claim" (Mr. Sanderson's words). Information had been gleaned from the boreholes and one would have to look to either side of the sample locations for further data. CCC had not provided any reason for why it might return to the boreholes. Further, a railway has a bigger footprint than a road and would in Mr. Sanderson's submission, more profoundly interfere with mining work.

In his concluding remarks, Mr. Sanderson argued that the tribunal should not accept CCC's assertion that government interference was a relevant factor in the tribunal's decision. Nor should the tribunal accept CCC's claim that Cliffs did not intend to build a road at all as that question was not before the tribunal. It was ultimately not the tribunal's role to make determinations about the behaviour of mining companies. Both CCC and KWG had ceased to share a substantial relationship with Debut Diamonds and furthermore, any suggestion that its work was being interfered with was without foundation. Mr. Sanderson cited *Trillium Power Wind Corporation v. Ontario (Natural Resources)* 2012 ONSC 5619, as authority for the proposition that one does not ask an adjudicator to remedy a political decision but must instead resort to the ballot box. Finally, there was no basis for saying that Cliffs would tie up the easement and then never develop anything. It is up to the Minister to determine the terms and conditions attached to an easement. The tribunal could impose terms and conditions to ensure that the mining use was not interfered with. The easement could also have a finite life.

Canada Chrome's Submissions

Mr. Smitheman commenced his submissions by stating that he and Mr. Sanderson differed on two fundamental points. First, the issue was not "road versus railroad" so much as it was "easement versus mining rights". The second issue was the prematurity of the application for an easement (the corridor being a moving target), thereby making the need for consent premature as well. His client faced a challenge in attempting to answer the question as to what the inference might be when the location of the proposed road kept changing.

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According to Mr. Smitheman, the tribunal had to consider the following three issues:

1. What is the test under s. 51 of the **Mining Act**?

2. What rights does a mining claim holder have under the **Mining Act**?

3. Does the easement interfere with CCC's use of its mining claims?

In referring to s. 51(1) of the **Mining Act**, Mr. Smitheman stated that CCC's mining rights "have priority over Cliffs' rights under the PLA unless [Cliffs] is entitled to an easement that does not interfere with those mining rights….". He took the tribunal to the decision in *Roy v. McCombe* MLC MA 014-00 (2000) (unreported), wherein it was stated that, "[t]o 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 [any] other activity on the Mining Claims" (quoting *Kamiscotia Ski Resort*).

In Mr. Smitheman's submission, CCC's rights as a mining claim holder were "sacrosanct". CCC need only demonstrate interference. This was not a case in which the balancing of the public interest was involved. Mr. Smitheman referred to Mr. Sanderson's view that the MNR would determine the public interest aspect if and when it came time to grant an easement. Insofar as mining rights were concerned, if the holder's rights are infringed upon, the easement application should not go forward. He referred to Barton's discussion on the free-entry system and what it assumes in terms of priorities[3] and to complaints of cottagers as an example of the strength of mining rights. As stated by the tribunal in *McCombe*, mining rights have historically been afforded the "highest priority of land use" rights. In support of his argument, Mr. Smitheman also referred to various sections of the **Mining Act**, beginning with the definitions section and the word "minerals". And yet, in point of fact, the focus was on quarry and pit material — the aggregate. In getting to that aggregate, one had to deal with the surface rights of a mining claim holder. He argued that a claim holder has the right to enter upon the land for purposes of prospecting and to use and occupy such part or parts of the surface as are necessary for the efficient exploration, borehole testing, digging of test pits, and extracting of samples including bulk samples, all of which amounts to fairly extensive exploration activity.

CCC was primarily seeking "consolidated aggregate" — this was the "rock" it needed for the building of the railway. He claimed that Cliffs wanted the rock for its road. The rock was "precious" and "to fully protect access to consolidated aggregate, a proponent needs to stake and then obtain a permit". According to Mr. Smitheman, it would be "dangerous to simply attempt to get a permit under the **Aggregate Resources Act** without staking a claim." He referred to s. 103(2) of the **Mining Act**. CCC, while having staked the claims, was not yet ready to commence surface mining but had taken steps to obtain the aggregate permit and to comply with Part II of the **Mining Act**. In response to Cliffs' position that taking the claims to lease would render the easement "moot", the corresponding effect of an easement on the mining claims would be one of infringement.

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[3] Barry Barton, *Canadian Law of Mining,* (Calgary: Canadian Institute of Resources Law, 1993) at page 29

MNDM and MNR policies gave CCC the exclusive right to consolidated aggregate located in its mining claims. "Where there is an existing mining claim or mining lease, an aggregate permit (for a quarry) may only be issued to the holder of the mining claim or lease." He referred to the case of *Nordic Group v. Marcel J. Labelle* MLC MA 028-97 (1998) (unreported). CCC had an exclusive right to the consolidated aggregate located in its mining claims and Cliffs' argument that building a railroad was not a proper use under the **Mining Act** was simply a "straw man" argument according to Mr. Smitheman. CCC had a prior right to the aggregates. The proposed easement covered the aggregates and dispensing with consent (through the granting of the present application/easement) would effectively sterilize the area for CCC. He highlighted the issue for the tribunal, namely, "does the easement interfere with the mining rights? Does it interfere with prospecting, exploration, development of mines, minerals and other mining rights?" CCC wanted to use the aggregate to build a railroad the same way Cliffs wanted to use the aggregate to build a road.

Mr. Smitheman dealt with the *Hoover* decision by saying that the tribunal in that case considered the intentions of the staker and found them not to be credible or bona fide. The central issue was one of credibility — the claims had been staked to block development and not for what was contained in the claims. That was not the evidence in the present case. CCC had shown it had every intention of making use of the consolidate aggregate—to build a railway. Mr. Smitheman asked the tribunal to take the amount of money spent on assessment work into consideration in assessing the *bona fides* of CCC's intentions (eight million dollars). He outlined all of the things CCC had done to further its goal of being a "short-line railway operator". CCC's matter was completely distinguishable from *Hoover*. When asked about the linear pattern of the mining claims, Mr. Smitheman said that, "unlike the issue in Hoover … the building of the railroad, the issue of the railroad is evidence of the *bona fides* for staking the claims." In *Hoover* the tribunal found that it could not believe the respondent when he said he staked to sell aggregate for road building. In Mr. Smitheman's view, the *bona fides* of staking the claims for purposes of a railroad should be accepted. Mr. Smitheman illustrated his argument by using the example of someone staking claims for gold — one need not ask what the gold would be used for. "[A]s long as the exploration and mining of the gold in my example is not frivolous, then the purpose is not really relevant."

As for CCC's efforts exploring for diamonds, as diamond exploration had been a business interest in the past, they were going to look for diamonds in the mining claims as well. With respect to Mr. Sanderson's contention that something like a railroad was not protected under the **Mining Act**, Mr. Smitheman stated that CCC's original intentions were irrelevant — what it wanted to do today was what was relevant. Mining claims are sometimes developed over a period of time and may reveal different minerals from what was originally thought to exist. He cited the discovery of a nickel deposit at Voisey Bay as an example (the search was originally for diamonds). CCC's priority was the aggregate and the granting of the application for an easement would interfere with CCC's use of its mining claims.

Mr. Smitheman referred to the borehole data and related mapping as evidence that the proposed easement would go over the boreholes. He urged the tribunal to not accept Cliffs' statement that the location of boreholes it was proposing to drill was not connected to the location of its proposed easement. Mr. Smitheman claimed that the Golder boreholes (drilled in 2010) were used by Cliffs to determine the location of its proposed easement. He took the tribunal to exhibit 22, a map provided by Cliffs to the MNR outlining the location of boreholes it

wished to drill. Mr. Smitheman said that Cliffs' boreholes were superimposed on Golder boreholes and that this clearly demonstrated Cliffs' intention to test in the same areas CCC had tested so as "to obtain the aggregate for the railway". This would result in sterilization of the materials underneath, leading to the death of the railway route. Even Cliffs' suggestion that the two modes could share the area was invalid as there was insufficient aggregate. He said that Mr. Gabriel Johnson was the only witness for Cliffs who said they were not going to use the aggregate but that Mr. Johnson had admitted that the testing was for consolidated and unconsolidated rock.

It was Mr. Smitheman's view that Cliffs' application for sand and gravel permits would also lead to the blocking of CCC's efforts to access the aggregate. CCC was not interested in obtaining compensation — it simply wanted the aggregate. Even Cliffs' environmental assessment document noted that aggregate used to construct the road would be derived primarily from rock and eskers within the Integrated Transportation Corridor. This statement contradicted Mr. Johnson's testimony. Given that there was "precious little aggregate within the mining claims", if whatever aggregate that did exist was used for the building of a road there would be nothing left to support the building of a railroad.

In his submissions, Mr. Smitheman addressed the issue of the prematurity of the application. The location of the easement in the future was uncertain. Mr. Smitheman questioned how either the tribunal or CCC could, at the present time, be confident that the easement would not interfere with the claims. Cliffs had submitted three different versions to the MNR in the past 18 months. Mr. Boor had admitted that he was unsure of where the easement would finally be located based upon the environmental assessment and consultative processes. Stakeholders' concerns could translate into a change of the alignment just as could challenging terrain. Another application would have to be made. Mr. Smitheman said that Cliffs should be made to arrange its "ducks" in order before asking the Mining and Lands Commissioner to dispense with consent. He referred to the environmental assessment process and the effect it could have on the location of the easement. He said Cliffs should be made to go through the environmental assessment process, at which time CCC would be in a position to respond effectively when confronted with a request for its consent. In any event, an easement could not be granted until Cliffs had obtained consent from the other claim holders as well.

Cliffs was in a rush to obtain an easement because it was afraid that CCC would trump the easement by obtaining a lease over its claims. It was Mr. Smitheman's submission that Cliffs did not want to pay if the claims go to lease. The tribunal notes that, under s. 175(2) of the **Mining Act**, an easement will not be granted unless adequate compensation can be made. The provision is extensive, referring to damage to land, property, rights, or interests. Similarly, Cliffs itself was unsure of whether or not the easement would go forward. An easement would give Cliffs control over whether or not transportation infrastructure is ever developed in the Ring of Fire. As Mr. Smitheman put it, it might never occur.

Cliffs in Reply

With respect to the aggregate issue, Mr. Sanderson noted that CCC appeared to be saying that it was not entitled to put forward its mining claims as the basis for building a railway infrastructure but instead was focusing on its ability to access aggregate. He found it odd for a "would-be aggregate developer to try to block the construction of a road for which the aggregate

might be used." If CCC was really after aggregate, then only a couple of its claims would be affected. There might be quarries but not on most of the claims. There simply was no evidence of conflict on the surface of the claims.

Mr. Sanderson reviewed the multiple use principle as Mr. Smitheman had applied it and argued that Mr. Smitheman's approach was in effect out-dated. The tribunal should not be allowing CCC to "win" if it found any kind of interference. The 1959 Commission had dealt with that and had come up with the multi-use principle instead. As Mr. Sanderson put it "there's active efforts to seek to reconcile surface use to permit alternate uses". In this case, "a hypothetical, possible interference on one or two claims mustn't be permitted to frustrate the development of a 300-plus kilometre piece of infrastructure".

As for the permits Cliffs was seeking from the MNR under the **Aggregate Resources Act**, Mr. Sanderson clarified that the evidence showed "what Cliffs has sought is an aggregate permit for the sand and gravel, but not for the other forms of aggregate, and that's entirely consistent with the logic in Nordic Group".

Mr. Vesely (co-counsel for Cliffs) took the tribunal to Mr. Hartmann's evidence, specifically his testimony during cross-examination about the percentage of rock that occurred along the alignment. As Mr. Vesely noted, the figure given by Mr. Hartmann was always the same — zero. There was no evidentiary foundation for the proposition that CCC would be quarrying bedrock. Also," — we are a long way away in the evidence for [the tribunal] to be satisfied that there is any possibility of an aggregate quarry being infringed or interfered with in any way by the proposed easement".

Mr. Vesely directed the tribunal to Mr. Johnson's and Mr. Tattersall's testimony about Cliffs' intentions with respect to sourcing aggregate and noted that it was clear that Cliffs was not intending to source bedrock from within the CCC claims. Mr. Vesely addressed the environmental assessment document that had been dealt with during Mr. Tattersall's cross-examination. He pointed out that the reference to a corridor in that document was to a corridor measuring five kilometers wide. The document did not refer to the 100 metre easement. Indeed, the environmental assessment document pre-dated the location of the easement. As Mr. Vesely put it, "that's a wide, wide corridor from which Cliffs is considering it might find materials".

As for the argument that Golder boreholes were used by Cliffs to locate its proposed easement, Mr. Vesely pointed out that the current proposed road route was depicted in Mr. Kruse's affidavit containing air photos over which the easement had been delineated with parallel red lines 100 metres wide.

Finally, Mr. Vesely addressed the issue of sourcing aggregate. He stated that Mr. Hartmann had looked only at the "narrow railway alignment" for his purposes. According to Mr. Johnson's affidavit, Cliffs had a "significant number of applications in for aggregate off the CCC claims". There was no information before the tribunal to say where the aggregate could in fact be sourced from.

Mr. Sanderson addressed Mr. Smitheman's argument dealing with prematurity. In Mr. Sanderson's submission, it was too late for such an argument to be made given that over 18 months had passed since the process commenced to seek CCC's consent. Mr. Sanderson submitted that Mr. Smitheman was in effect asking the tribunal to reverse its decision in *Neskantaga*.

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Application of the Law and Findings

The hearing of this matter was made unduly complicated by the actions of the parties as well as the entrenched conduct of their counsel. Rarely was a step taken by either side that did not raise some procedural issue that had to then be dealt with by this tribunal. It may have been a case of "familiarity breeds contempt" as both parties knew each other and had even shared strategies before pursuing divergent paths. A great deal of time was spent by the tribunal sorting out the issues that arose and rendering interim decisions. Counsel for Cliffs was adamant that the allegations having to do with the relationship between the parties and which had arisen during the course of the hearing should not form part of the tribunal's decision. The tribunal has taken his words into account. However, the fact is, the changed relationship was a source of acrimony throughout the hearing and the tribunal is left thinking that it formed some, if not all, of the basis for the hearing. The tribunal is of the opinion that there is still an opportunity for the parties to work out a solution that will prove mutually beneficial to them both as it concerns the Ring of Fire.

In order to understand and adjudge this matter with a view to applying the **Mining Act** in any sensible fashion, it is necessary to consider certain historical facts and put them in their proper perspective. In doing so, the tribunal is in no way casting judgement on the corporate behaviour of the parties. Throughout the hearing, allegations surfaced with respect to the past relationship between Cliffs and KWG. These allegations played no role in this decision.

History and related Findings

The history associated with the parties to this hearing is important. Some time ago, KWG and Spider discovered what came to be known as the Big Daddy chromite deposit. KWG had a long history of exploring for diamonds in the James Bay Lowlands. Other discoveries, made by other companies (Freewest and Noront most notably), followed closely on the heels of the discovery of the Big Daddy deposit. One of these discoveries came to be known as the Black Thor deposit. What all of these discoveries ultimately revealed was that a substantial amount of chromite is located in the McFaulds Lake region of Ontario.

It is entirely plausible that KWG, being a junior mining company, would seek a comparatively wealthy partner with considerable experience in the exploration and production of stainless steel-related minerals to help develop its exciting find. As Mr. Smeenk explained, his efforts in this regard eventually led him to Cliffs.

Early on in their relationship, Cliffs seemed to take an interest in Mr. Smeenk's idea of securing a transportation route for a railroad from the vast chromite deposits in the north to a distribution point in the south by staking a line of mining claims. Mr. Smeenk testified that the officials he spoke with at Cliffs went along with his scheme including financing it. The tribunal believes him on this point. There is sufficient oral and written evidence to convince the tribunal that, either at the time the mining claims were staked or shortly thereafter, Cliffs officials (including Mr. Boor) were supportive of KWG's railroad scheme. Indeed, it is disingenuous of Cliffs to claim a lack of knowledge or support given that the companies were working so closely together as to have a Cliffs official on KWG's board, one who was in frequent contact with Mr. Smeenk. This was Mr. Fink who appeared to act occasionally as a go-between, but who also passed Mr. Smeenk's plans and comments to Mr. Boor. While Mr. Boor did not have direct contact with Mr. Smeenk, he was provided with information regarding Mr.

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Smeenk's ideas and plans. This in itself is not unusual. However, Mr. Smeenk, who appeared to the tribunal to be the type of individual who enjoys discussing his strategies, put all of his cards on the table in emails and discussions. Mr. Smeenk's "grand plan" was worked out early on in the relationship between CCC and Cliffs. Cliffs was enthusiastic about Mr. Smeenk's ideas and even put him in contact with an American engineering firm that specialized in railroad work to oversee the drilling of boreholes.

Unfortunately for Mr. Smeenk, Cliffs' interest in his plans went only so far. Cliffs obviously realized that it could flex corporate muscle and attempt to buy out junior explorers such as KWG. Indeed, it had only a short while before bought out Spider. KWG, however, refused to bow out of the picture and doggedly pursued its goal of a railroad and its hope of having a hand in at least one and perhaps more chromite mines in the Ring of Fire.

The result of the historical relationship between all concerned is that, in effect, both sides are arguing over who should take the lead in developing a major transportation system that would service the Ring of Fire. Both sides appear to have some level of contact with provincial officials. This information came to the tribunal through hearsay evidence rather than direct testimony from any of the witnesses. No witness appeared on behalf of any provincial government ministry or agency.

The Legality of the Mining Claim Holder's Use of the Surface is not in Issue

The tribunal is compelled to make this point at the beginning — no formal issue was raised by the Minister of Northern Development and Mines (the "Minister") regarding the legality or appropriateness of the use described by CCC for the surface of its mining claims, namely a railroad. There has been no referral by that Minister under s. 54 of the **Mining Act**. The tribunal has no jurisdiction at this point to entertain the issue on its own initiative. In the tribunal's view, s. 54 requires that it be proved, amongst other things, that the lands are being used for "a purpose other than that of the mineral industry". How this phrase and the section itself should be interpreted is not in issue here. However, s. 54 does provide some guidance in understanding the **Mining Act's** approach to those engaged in the activity of mining in the province of Ontario.

While s. 54 has not been directly invoked in this matter, at least one decision for which it was an issue was relied on by CCC to support its position. The relevance of that decision will be dealt with below. In the early stages of this matter, Cliffs made comments regarding the validity of the mining claims in such a way as to call into question the legality of CCC having staked mining claims for the purpose of securing a transportation route. In light of the financial support that Cliffs provided to CCC prior to the break-up of Cliffs and KWG, the tribunal was troubled by this veiled criticism since the use of mining claims for something other than what is intended under the **Mining Act** (i.e., a purpose other than that of the mineral industry) can have serious consequences for the claim holder – specifically an order cancelling the claim. The evidence before this tribunal shows that Cliffs never raised a concern about the validity of Mr. Smeenk's scheme at the time of the staking. Alluding to it after the fact only served to cloud the issues and cause needless concern. There does not appear to be any mechanism in the **Mining Act** that would allow the tribunal to initiate a hearing into an alleged improper use of land. Under s. 54 of the **Mining Act**, the Minister has the discretion to direct the Commissioner to hold a hearing. In this case, the Minister did not direct that a hearing be held into an alleged improper use of land and no government representative objected on this basis, or

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on any basis as a matter of fact. All of the mining claims that are the subject of this hearing were duly recorded even as they were staked in a linear fashion in a particular location and in a north-south direction. Furthermore, the tribunal accepts Mr. Smeenk's version of events relating to the staking activities wherein he said that he was encouraged by Cliffs to carry out his scheme. Cliffs' involvement in the scheme was further evidenced by the fact that it financed, to some extent, Mr. Smeenk's staking of the claims. The situation brings to mind the idiom of "the pot calling the kettle black". There is no doubt in the mind of the tribunal that Cliffs was quite happy to go along with the scheme until it felt ready to move in and take over.

Cliffs' counsel argued that CCC's use of its surface rights, in the context of s. 51 of the **Mining Act**, should not be included in those activities or rights that the **Act** protects in s. 50. This argument will be addressed below. There may not have been a "direction" made by the Minister pursuant to s. 54; however, the use of the surface as a railroad was argued by Cliffs' counsel to have no link to the mining claims themselves but rather to the Big Daddy deposit — a separate feature altogether with no physical connection to the mining claims.

The Tribunal has no Jurisdiction to Determine which Transportation Mode is Preferred

Although the present case involves two parties each seeking to establish their own transportation mode over the same land surface, there is nothing in the **Mining Act** that would allow the tribunal to make a decision as to which transportation mode is preferable, whether for environmental, financial, or any other reason. The tribunal did hear testimony and argument that there was enough room for both modes of transportation and this issue will be dealt with below.

Overview of relevant legislation

The **Mining Act** recognizes that the discovery and development of mineral resources in the province of Ontario occurs in a variety of environments. Surface rights issues present an increasingly important challenge to prospector and surface owner alike. The **Act** addresses the issue in various ways.

The tribunal notes that sections 50 and 51 were amended in 2009 but not proclaimed in force until November 1, 2012, after this matter had been referred to the tribunal. The version of the **Mining Act** that applied to this matter pre-dates that November date.

Subsection 50(1) describes the rights that accrue with the staking of a claim. It also describes the rights a claim holder has regarding the use of the surface. However, it is through the wording of s. 51(1) that the legislature identified and addressed surface rights accruing to a mining claim holder who stakes a claim on Crown land where the surface is owned by the Crown at the time of staking.

To understand the sections and how they work, one must refer to the definition section of the **Act**. A "mining claim" is defined as "a parcel of land, including land under water, that has been staked and recorded in accordance with this Act and regulations". The word "unpatented" when referring to land or mining rights means "land or mining rights for which a patent, lease, licence of occupation or any other form of Crown grant is not in effect". The **Act** defines "surface rights" as "every right in land other than the mining rights".

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Also of relevance is s. 27 of the **Act** which states what lands are open for staking. They include "Crown lands, surveyed and unsurveyed", as well as "lands, the mines, minerals or mining rights whereof have been reserved by the Crown in the location, sale, patent or lease of such lands where they have been located, sold, patented or leased after the 6th day of May, 1913".

Sections 50 and 51 address the issue of "surface rights"—the former in respect of a "mining claim" and the latter in respect of an "unpatented mining claim". To begin, s. 50(1) of the **Mining Act** confers upon an individual (with the staking or filing of an application to record a mining claim) the right only to proceed under the **Act** to perform prescribed assessment work or to obtain a lease from the Crown. There is no other "right, title, interest or claim in or to the mining claim" than those two. Nor is there a right to "take, remove or otherwise dispose of any minerals found in, upon or under the mining claim".

With respect to surface rights s. 50(2) provides that the mining claim holder has the right only to "enter upon, use and occupy such part or 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." This wording suggests that a mining claim holder will be limited insofar as surface rights are concerned. To put it in ordinary terms, entering upon, using and occupying the surface will be limited to doing what is needed to get at the materials "therein". Black's Law Dictionary and the Oxford Concise English Dictionary (4th and 9th editions, respectively) define the word "therein" as meaning "in that place" and "in that respect". Clearly those drafting the legislation used the word "therein" to draw attention to the fact that a mining claim holder (already limited in the manner described in s. 50(1) and (2) faces additional limitations in terms of his or her use of the surface. This limiting effect makes sense as the **Act** is recognizing that the staking of a claim can take place on lands where the surface rights are privately owned, but the mineral rights have been retained by the Crown. There are a number of sections in the **Act** that deal with the limitations faced by a mining claim holder in this situation and they are intended to address the conflict that might arise between a claim holder and the owner of affected surface rights. They do not play a role in this decision but are mentioned to indicate that the legislators were aware of the potential problem and tried to address it.

Section 51 deals with those situations where the surface rights are in the public domain at the time the mining claim is staked. Under s. 51, the holder of such a mining claim has a prior right to the use of the surface rights (except the right to sand, peat, and gravel) "for prospecting and the efficient exploration, development and operation of the mines, minerals and mining rights". The tribunal notes that the word "therein" is not found in the wording of this section (unlike in s. 50). The significance of this fact is discussed below.

Another person can apply for the use of surface rights under the **PLA**. Pursuant to s. 21 of the **PLA**, the Minister of Natural Resources "may grant easements in or over public lands for any purpose". Where the mining claim holder consents to a disposition of such surface rights, the recorder makes an entry on the claim record and a survey may be required from the person acquiring the surface rights. When consent is refused or not given, the matter is referred to the Mining and Lands Commissioner who makes an order "based on the merits of the application".

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Pursuant to s. 65 of the **Mining Act,** a mining claim holder is required to carry out assessment work. A dollar value is given to the units of work carried out and the regulations prescribe the type of work that is eligible for assessment work credits. The list of eligible physical work is extensive. As for the work carried out by or on behalf of CCC, some of it was not filed for approval "because [CCC] understood that railway engineering does not qualify to be filed as assessment work for [a] mining claim". The tribunal notes that this was engineering work carried out by the firm of Krech Ojard as part of the background work it produced for CCC for the building of a railway. This admission was elicited from Mr. Lavigne on cross-examination. The interesting point about this issue is that, indeed, at least one decision from the past does pass judgement on whether activities related to clearing "broken material from a road and loading it on trucks" with a bulldozer could be included in assessment credits; in *Re Stonecrest Ornamental Aggregates Ltd.*, 4 M.C.C. 196, they were not. In the case at hand, work connected with the railroad scheme was apparently not submitted by CCC for assessment credits; the tribunal is uncertain as to why this was the case. Perhaps CCC believed that the work would not be accepted or perhaps the company wished to maintain secrecy over information about future exploration work, which Mr. Lavigne — whom the tribunal found to be highly credible —described with considerable enthusiasm. Regardless of the reason, not having an activity count towards assessment credits is not determinative when interpreting s. 50 of the **Mining Act**. More to the point, the tribunal is not in a position to question the legality of CCC's proposed use of the surface of its mining claims.

Assessment work forms a necessary component to an application for a lease under s. 81 of the **Mining Act**. In addition, one also needs to produce a survey and pay the requisite fee. During the course of the hearing it was learned that KWG had, by way of letter dated May 12, 2012, put the MNDM on notice that it was intending to file an application for a lease of surface and mining rights in respect of its claims. In his testimony, Mr. Smeenk claimed that CCC's progress in taking the mining claims to lease was at a standstill and identified Cliffs' application for an easement under the **PLA** as the reason why.

The Differences between Sections 50 and 51 insofar as this Matter is Concerned

There are very few decisions under the **Mining Act** that deal with the sharing of surface rights between a mining claim holder and others. There are no decisions wherein the types of activities for which a mining claim holder can claim a prior right to the use of the surface under s. 51 was an issue. In making a decision in this matter, the tribunal must ask and answer a number of questions. To begin, how should s. 50 and 51 of the **Mining Act** be interpreted and does s. 50 have a bearing on this case?

The tribunal is of the view that s. 50(2) and s. 51 each address different circumstances. That being said, cl. 50(1)(a) is useful when carrying out the interpretative exercise that leads to the understanding of what statutory rights are associated with holding a mining claim.

To begin, counsel for Cliffs read s. 51 as if it should include the word "therein" (the word found in s. 50(2)). The tribunal disagrees with this approach. Subsection 50(2) of the **Mining Act** contains the word "therein" whereas s. 51 does not. The tribunal is of the view that this was a deliberate choice made by the drafters of the **Mining Act** and that the provisions are intended to address different issues. For starters, s. 50(2) contemplates those situations where

"the holder of a mining claim" has to assert a right to access materials in the ground and has to cross a privately owned surface in order to do so. It makes sense that in such a situation the rights to surface use are limited to a certain "part or parts" of the surface. The word "therein" has a limiting effect. Subsection 50(2) addresses those circumstances where a mining claim holder finds him or herself having to navigate or cross a surface that is privately owned by another. In such a situation it makes sense for the **Act** to place reasonable limits on the claim holder's rights of access.

Section 51 addresses a completely different situation and this will be explained more fully below. In this case we are not dealing with a situation where the mining claim holder has to contend with a private owner of the surface rights. The surface in this case is owned by the Crown. As far as the tribunal is concerned, there is no basis for interpreting s. 51 to include the word "therein". Where there is no private owner of the surface to contend with, the **Act** establishes a priority in favour of the unpatented mining claim holder in respect of the use of the surface. Section 51 gives a prior right to surface use to the claim holder with respect to all activities covered by the **Act —** from the point of prospecting to development and operation of a mine.

To be clear then, s. 50(2) does not apply in this case in the manner described by counsel for Cliffs. This provision does not establish purposes for which the surface of unpatented mining claims may be used. It does not limit or circumscribe the overall and general uses to which a mining claim can be put. What it does do is provide guidance to a mining claim holder as to how he or she must carry on where privately held surface rights exist. Nor does s. 50(2) form part of the test used to determine if a conflict exists between the holder of an unpatented mining claim and someone else seeking use of the surface.

What can s. 50 tell us about the rights that flow from the ownership of a mining claim? Does s. 50 have a bearing on this case?

Clause 50(1)(a) states that the owner of a mining claim has the right to proceed under the **Act** to "perform the prescribed assessment work or to obtain a lease from the Crown". It also states that, until the claim holder obtains a lease, he or she is a "tenant at will of the Crown in respect of the mining claim". Counsel for Cliffs argued that CCC's status as a tenant at will made its rights to the surface "tenuous" and that the application of s. 50(2) made its rights "more tenuous still". Indeed, counsel argued that CCC had "no rights to exclusive possession of the surface". The tribunal finds counsel's characterization vague and is of the view that, while s. 50(1) works to establish a right (and a relationship only between the claim holder and the Crown) under the **Act,** the nature of this relationship has no bearing on this case. At the risk of sounding repetitive, s. 50(2) does not say what use can be made of the surface of an unpatented mining claim.

Subsection 50(2) does not set limits on the use that may be made of the surface of an unpatented mining claim or assist in understanding what activities the holder of an unpatented mining claim can undertake in accordance with the **Act**. This is an important distinction — "use" as a verb and "use" as a noun. Subsection 50(2) allows the holder to enter upon and "use" (verb) subject to the **Act** and as permitted by the **Act**. It does not circumscribe what those uses (noun) might be. Those uses are dealt with elsewhere in the **Act** and indeed, are found throughout the **Act** when read as a whole. Section 50 is simply a starting point for understanding

the rights of a licensee under the **Act**. Consequently, and to be absolutely clear, s. 50 is not, as Cliffs' counsel argued, part of the test for determining whether consent should be dispensed with under s. 51.

The tribunal is also not persuaded that a claim holder's status as a "tenant at will of the Crown" under s. 50 minimizes or, indeed, has any effect on the unpatented mining claim holder's rights to the surface. As noted by Barton in his text, "Canadian Law of Mining" at page 394,

> "Tenancy at will is an odd thing to call a mining claim. The essence of a tenancy at will is that it is determinable by either party on demand, but under the Mining Act the Crown plainly cannot do that. Apart from automatic cancellation for non-performance of assessment work, a claim can only be cancelled on the grounds of breaches that are closely defined and must be properly proven. The situation is more like a term certain with a right of renewal."

Section 50 describes a relationship that exists for as long as the **Act** is complied with by the claim holder. This does not make the claim holder's status "tenuous". Furthermore, as Barton has indicated, the Crown cannot easily remove the claim holder's rights under the **Act**.

Section 51 provides that the holder of an unpatented mining claim is entitled to exercise a right prior to any subsequent right in respect of the use of the surface rights. In this case, CCC claims a prior right to use the surface rights along a line of mining claims that extend north-south for more than 300 kilometres. The line or strip is the width of a mining claim for practically its entire length. The tribunal believes that KWG's primary objective in the Ring of Fire is to assist in the development of the Big Daddy deposit. However, development of the deposit requires transportation infrastructure and, at the time of the hearing, there was no such infrastructure in place. KWG never hid the fact that while it was interested in developing whatever resource lay below the surface it also staked the mining claims for the purpose of securing its right to use the surface for a transportation route. The subject mining claims are therefore also a means to an end. Is this a fact that affects this tribunal's decision? Cliffs' counsel argued (relying on the wording in s. 50 of the **Mining Act**) that the use of the surface for a "general purpose railway" by CCC is not supported by the wording found in s. 50(2). A railway has no connection to those activities described in s. 50(2). Counsel took the tribunal through the wording and pointed out how a railway was not one of the activities referred to in that subsection. Emphasizing the word "therein", he argued that the mine or mining purpose must have a connection to the subject mining claims. Frankly, the tribunal struggles to accept the logic of this argument. Aside from the fact that s. 50(2) does not apply to CCC's unpatented mining claims, the argument itself does not take the purpose and intent of the legislation into account.

The focus of this case must be on the interpretation of s. 51 with careful attention paid to the **Act** as a whole. Subsection 51(1) provides that an unpatented mining claim holder has a prior right to surface use for "prospecting and the efficient exploration, development and operation of the mines, minerals and mining rights". This phrase has wide-ranging implications as it envisions a variety of activities sanctioned by the **Act**. An example might be the development of a mine once a lease has been obtained. Another example of the Act's recognition of the extensive needs of mining claim holders is s. 175 which sets out a variety of rights that might be conferred by the Mining and Lands Commissioner at a certain point in the working of a mine.

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Subsection 50(2) is applicable in those cases where the mining claim holder is seeking surface access to work a claim on lands where the surface rights are privately owned. Using s. 50(2) to limit an unpatented mining claim holder's use of the surface (let alone understand what uses can be made of the surface) is not supportable under the **Act** and the tribunal disagrees with this approach.

Nor is it a simple case of saying that the **Act** does not contemplate an unpatented mining claim holder using the surface for a railroad or "general purpose railway". This argument has no bearing on this matter as it would require some action on the part of the Minister under s. 54 in order to have it addressed. No such action occurred in this case.

During the course of the hearing, counsel for both parties referred to decisions dealing with s. 54 of the **Mining Act**. While the decisions were of interest, the fact of the matter is this is not a s. 54 case, for the reasons that follow.

In *Rapski v. Davis*, 6 M.C.C. 213 at p. 217, Commissioner Ferguson held that s. 54 (then s. 65) provided "a remedy to the Minister and not to a competing staker". In the present case, no direction was given to the tribunal by the Minister, a prerequisite under s. 54 of the **Mining Act**. The tribunal thus has no jurisdiction to question the use of the land by the mining claim holder. However, the tribunal can consider s. 54's wording in addressing Cliffs' argument that CCC has no rights under the **Act** (by virtue of its mining claims) to construct and operate a "general purpose railway". The tribunal is of the view that the **Mining Act** does not say anything definitive about the uses that a mining claim holder may put to the surface. The tribunal is not prepared to say that an unpatented mining claim holder's use of the surface is limited to the development of a mine. At certain stages in the life of a mining claim, one might possibly encounter the building of a siding (see *Egg*). The land comprising a mining claim might be needed for any number of things associated with the mining industry including a means of transit. The tribunal thus does not accept Cliffs' argument that s. 50(2) creates or imposes limitations on the use of the surface of an unpatented mining claim.

The tribunal also does not accept Cliffs' interpretation of the legislation insofar as Cliffs' counsel stated that a railway would not be an acceptable use to which the surface could be put.

Application of Section 51—Introduction

Should the surface rights be shared with Cliffs?

Starting with the report of the Public Lands Investigation Committee, the tribunal notes that the Committee's main concern (as set out at pages 6 and 7 of its Report) was that the mining industry not be hindered in its work, but also that large tracts of Provincial lands not be "alienated" through there being no development or exploration — with only enough work being performed to enable a claim holder to obtain a patent. The Committee was dealing with industry criticism that accompanied amendments to the **Mining Act** in 1957. Prior to the amendments, (and putting it very simply here), a prospector could obtain a patent in fee simple (including mining and surface rights) once assessment work had been carried out and a fee paid. The patentee obtained all the surface rights which were, in the words of the Committee (see page 4 of its Report) "in effect alienated from the Crown forever". At the same time, the Committee (as set out at page 5 of its Report) was clearly cognizant of the mining industry's needs which

included enough time to both develop claims as well as work to stimulate the interest of those parties who could provide financial support. Just as the public interest in recognizing multiple uses was important, so too was the claim holder's interest in being able to fully explore and develop a mining claim — sometimes over a period of years. This latter point could be the product of waiting for a "favourable market or operating conditions." The Committee (at page 5 of its Report) was of the opinion "that some policy covering surface rights on potentially valuable mining lands should be established that would protect the public interest and at the same time protect the claim holder until he has had full opportunity to explore his ground thoroughly, and thereby avoid further hazards to his efforts in bringing in new mineral deposits." It follows that the application of the so-called multiple use principle is a balancing act. The few cases on point demonstrate how that balance may be properly achieved.

Although the Committee's Report is not determinative, it is helpful, especially when there is a dearth of case law on point and when one of the Committee members, Mr. J. F. McFarland, was himself the Mining Commissioner at the time.

The Case Law and Section 51

Turning to the case law, in the few decisions dealing with the sharing of surface rights and the multiple use principle, the tribunal considered the claim holder's assessment efforts as well as its future plans for the mining claim. At the same time, the tribunal was careful to not negatively affect or cancel the claim holder's needs. Where a compromise could be achieved, a balance could be found. The unpatented claim holder is not required to give up his or her rights, but to share them where appropriate.

In *The Improvement District of Gauthier v. Egg* 7 M.C.C. 281, the municipality applied for an occupation of land licence to help it control access to and the management of a municipal park. The mining claim holder refused consent to share in the use of the surface rights. The Commissioner applied the multiple use principle to the use of the Crown lands and found in favour of the municipality. The municipality hoped to prevent vandalism in the park after hours. In exchange for consenting to the municipality's request, the claim holder would be given keys to a gate in the fence to be erected around the land. In addition, the claim holder would be permitted to use any roads that might be constructed. The municipality had no intention of constructing buildings or other structures.

In reviewing the respondent's evidence, the Commissioner considered the age of the claims; the nature of the assessment work that had been carried out and when; the results of geophysical surveys; and what the claim holder's engineer had to say about the potential of the claim's surface as a location for a siding for access to a neighbouring railroad "in the event a mine were discovered and developed". Commissioner Ferguson considered the fact that the municipality's application was limited to the northerly part of the claim and, after reviewing other evidence related to topography and mineralization, came to the conclusion that "in the event this type of use could be developed that the southerly part of the mining claim would be more likely to be used for this purpose." The engineer's evidence apparently supported this view. In addition, any plans for an open pit operation were focussed on an area that was "approximately one mile from the area under consideration." The Commissioner agreed with the municipality that the public's need for a recreational use such as a park had been established on the evidence. The water was clear and the beaches associated with the lake in question were more attractive and safer than other beaches. Opportunities for such a park were considered

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"limited". According to the tribunal, at page 286, surface rights usage should be shared where public interest in the use and management of a public park was matched against 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 only other decision of interest is *Kamiscotia Ski Resorts Limited v. Lost Treasure Resources Ltd.* 6 M.C.C. 460. The claim holder in that case failed to appear, leaving the Commissioner to order that a licence of application be processed without the consent of the claim holder. However, the Commissioner did refer to the effect of the ski resort's licence of occupation which, according to the tribunal, did not result in an absolute title to the surface rights. The proposed use was seasonal and did not include any "major buildings or structures". Given the claim holder's failure to appear, the tribunal "[could] only conclude…that there would be no serious interference with the exploration program of the respondent…." It was noted that the application actually had the effect of validating an already existing use — one that had been in existence for a number of years prior to the recording of the affected mining claim.

Applying Section 51 to this Matter

How does s. 51 of the **Mining Act** "work"? The tribunal does not agree with Cliffs' argument that, once the preliminary technical bridges have been crossed, the burden falls on CCC to persuade the tribunal that a conflict exists between Cliffs' proposed use of the surface and CCC's plans for prospecting or the efficient development of a mine. Subsection 51(5) says that the Mining and Lands Commissioner is to make an order based on the merits of the application. Of course, the Commissioner has to be apprised of the details regarding the unpatented mining claim holder's interest. However, the **Act** expects the person seeking consent to also provide information that will assist the tribunal in deciding whether the claim holder must be made to share. The exercise is not one that involves a shifting of burdens in the classic sense, but one that places an onus on both sides to clearly indicate what their interests in the surface are and how sharing or not sharing surface rights would affect those interests. The tribunal believes that Cliffs' approach to s. 51 does not do justice to the multiple use principle. It is probably more accurate to say that the holder of an unpatented mining claim continually faces the prospect of being asked to share surface rights because the multiple use principle advocates sharing the surface of Crown lands — where sharing can be accommodated. The multiple use principle involves a balancing of interests if such can be accommodated without affecting the claim holder's rights under the **Act**.

In reviewing past decisions on this point, it is clear that application of the multiple use principle should not result in the claim holder's interest in the surface being negatively affected, diminished, or cancelled out entirely. As *Kamiscotia* indicates, the goal of the multiple use principle is to resolve conflicting uses where feasible or prevent the subsequent acquisition of surface rights through a hearing process. Both parties in a s. 51 hearing are expected to produce the type of information that allows the tribunal to properly assess their plans and expectations with a view to balancing their interests. A claim holder is expected to produce information that would indicate when the claim was staked, what assessment work has been carried out and where, what plans it has for the future, and so on. In *Egg*, for example, the tribunal considered the claim holder's plan to build a siding in the future and the location of the siding. An applicant seeking to share in the surface use is likewise expected to produce information relating to the nature of the proposed use, its location, whether structures are anticipated, whether the claim holder's concerns can be accommodated, and so on.

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In the hearing of this matter, understanding either party's plans was difficult at best. The tribunal was struck by the intransigence displayed by both sides in the matter when it came time to discuss their plans, not to mention the disingenuousness of Cliffs behaviour, acting as though the claims had been staked for a purpose with which they did not agree or considered invalid. The entire hearing process, from start to finish, was affected by this behaviour. It resulted in the tribunal having to ask for information, specifically from Cliffs. Cliffs sought to present some of its evidence through affidavits only or with very few witnesses. Some of Cliffs' witnesses gave evidence only through cross-examination.

The tribunal is displeased that it had to ask for the information it saw as necessary for the making of an informed decision. The tribunal did not want to be put in the position of feeling as though it was writing a blank cheque. That information was not immediately forthcoming was probably due to a number of factors including the fact that the application for an easement of this magnitude is but one part of a much larger picture. The tribunal is of the view that the application reflected the fact that there is still work to be done and approvals yet to be given. While the tribunal is not prepared to use the word "premature" to describe Cliffs' application, it is of the view that the application was a rush job intended to beat CCC to the finish line or at least take the wind out of CCC's sails. Specifically CCC is precluded from taking its claims to lease until this litigation is over. The parties had a seemingly positive relationship at the time the mining claims were staked and when that relationship came to an end the two saw very little in common. Both sides scrambled to gain an upper hand insofar as protecting their interests. The tribunal is being polite.

The language of s. 51 requires the tribunal to consider the mining claim holder's priority position as its starting point. In this respect, the evidence indicates that CCC staked the subject mining claims in mid 2009. At the time of the staking, CCC and its parent company, KWG, had what could be called a cordial relationship with Cliffs. Both parties initially appeared to be acting in concert and cooperatively. The evidence indicates and the tribunal finds that *both* parties were interested in securing a transportation corridor that would service the chromite deposits in the Ring of Fire area. In the beginning, both parties were considering building a railroad. Cliffs financially contributed to CCC's staking efforts and referred KWG to an American engineering firm that specialized in railroad work. KWG's own resources were limited. Mr. Smeenk, testifying on behalf of CCC, candidly acknowledged that KWG "didn't have the money to build a railroad".

Will CCC's interests be negatively affected were Cliffs to share in the surface rights?

The tribunal is of the view that the granting of an easement for the building of a road will have a negative impact on the development of the mining claims for the reasons set out below.

The business relationship between Cliffs and KWG began to unravel in May, 2010, when Cliffs offered to buy out KWG and, after buying out its joint venture partner, Spider, placed KWG in a minority shareholder position with respect to control of the Big Daddy deposit. Perhaps in the spring of 2010, but definitely by 2011, KWG learned that Cliffs was interested in building a private road over KWG's mining claims so as to access the Black Thor deposit. Cliffs attempted to obtain consent to use the surface of the mining claims from KWG on a number of occasions in the fall of 2011. Cliffs finally gave up in October of that year. Cliffs had actually notified the MNR of its project on May 31, 2011 and made an application for an easement in December, 2011.

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The evidence also reveals that CCC was carrying out assessment work on the relevant mining claims between 2009 and 2011. Mr. Smeenk claimed that $15 million was spent and, as of May 25, 2012, $8,283,548 had been filed and approved by the Mining Lands Branch of the Ministry of Northern Development and Mines. CCC and KWG had been engaged in matters related to this hearing since at least the fall of 2011 and early 2012. It would not be an exaggeration to say that CCC and KWG probably felt as though they had been knocked back on their heels after finding out in quick succession that Cliffs wanted to buy them out and that it then wanted to make an application for an easement over the mining claims. The tribunal recalls the evidence which revealed that Cliffs had already made the MNR aware of its application plans for an easement under the **Public Lands Act** (and requested confidentiality) before advising CCC and KWG. The tribunal accepts Mr. Smeenk's evidence of when he heard about the road easement in August, 2011. While there may have been discussions between the two parties when their relationship was amicable about the idea of a road preceding the building of a railroad, Mr. Smeenk was facing a very different set of circumstances when Cliffs made an application to potentially locate an easement directly over the boreholes CCC had drilled earlier. The tribunal believes it would be extremely difficult for a small company to suddenly switch corporate gears and go from working with a large, comparatively wealthy partner with mutual goals, to having to plan to work on its own to develop its mining claims within the same time frame — while meanwhile also trying to engage in difficult discussions with that same corporate heavyweight. The tribunal finds that CCC did not have enough time to properly understand (let alone describe) how its interests would be negatively affected by the easement. By the time the request for consent was made in August 2011, Cliffs had already notified the MNR of its intentions. From that point onward, CCC and KWG were behind the proverbial eight-ball trying to preserve their interests while dealing with serious litigious issues.

The tribunal cannot accept Cliffs' argument that CCC has failed to produce evidence of conflict, despite having had 18 months in which to do so and that this is a sufficient basis for granting Cliffs' application. CCC and KWG have been busy hitting the reset button with respect to the mining claims as well as defending their interests in the Ring of Fire. CCC has maintained its position throughout the hearing that its ability to work its claims would likely be affected by the existence of a road. It has also maintained that it has had difficulty obtaining information regarding the details of Cliffs' application (such as the alignment of the easement). Indeed, the tribunal had to, on its own initiative, seek out information at the hearing with respect to what exactly could be expected in the way of activities associated with construction, maintenance and so on. Parties are certainly the authors of their own case, but the tribunal was frustrated by the position taken by Cliffs that actual witnesses did not have to be produced and that evidence could be provided through examination transcripts. This resulted in repeated arguments about the use of the transcripts and the need to examine actual witnesses. All this while being urged by counsel for Cliffs at nearly every stage of the process to make speedy decisions. The tribunal finds that CCC's complaint that it had difficulty obtaining information to be a valid one.

Cliffs' application was accepted by the MNR with MNR's noting that the final location of the road corridor might vary from what Cliffs was proposing. Even Mr. Boor admitted that it was subject to change.

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Given all of the above, the tribunal is of the view that ordering CCC to share on the basis that it has not produced actual evidence of a conflict would be unreasonable and not within the spirit of the **Mining Act.** The tribunal is satisfied that it has heard ample evidence to conclude that CCC would encounter serious issues that would negatively affect the development of its mining claims were Cliffs to obtain its desired easement.

The evidence indicates that the proposed easement would touch on or cross over each of the mining claims in some fashion. The importance of the borehole locations in those claims cannot be underestimated. Nor can the fact that the mining claims form a linear pattern be ignored. The claims will have to be developed following the line that they form. Since the boreholes indicate where high ground is located, it is reasonable to assume that this high ground would lend itself to carrying equipment as it has in the past. The evidence is that the borehole information points to the best location for the movement of equipment. Both parties face topography and geography that offers little in the way of choice when it comes to the location of a road or a railroad. This is why Cliffs wants to locate its easement along the borehole lines. It is not the job of this tribunal to try to figure out which transportation mode is preferable. However, the tribunal is satisfied on the evidence that placing the easement along the borehole line would lead to interference with any work to be carried out by CCC under the **Mining Act**.

The tribunal has considered the fact that CCC has carried out assessment work in the past. There is no evidence before the tribunal to suggest that such efforts will not continue in the future. The tribunal is left with the impression that CCC is determined to carry on with its exploration plans. CCC did not offer any evidence as to how it proposed to coordinate activities between its proposed railway and the geological information gleaned from its boreholes for purposes of a prospective exploration program in years to come. The tribunal acknowledges that Debut Diamonds is no longer owned by KWG although Mr. Lavigne testified that KWG does maintain an interest. The tribunal is reluctant to believe that CCC's prospective activities in relation to a transportation corridor — whatever form it may take and acknowledging that many levels of consultation and approval remain outstanding — would squander a geological database which Mr. Lavigne convincingly spoke of as providing insight about future exploration programs for years to come.

CCC raised the point that Cliffs' projected alignment of its easement has changed in the past and the tribunal agrees that there is a chance it could be subject to further change. Indeed, the tribunal wonders how, with the various "hoops" Cliffs' project still must go through, it can, at this stage, order that consent on the basis of the current easement projection be dispensed with, particularly when such an order would have some bearing on each of CCC's mining claims. CCC deserves to know precisely how and where its claims will be affected so as to be able to plan its future efforts with efficiency — which is what the **Act** says it is entitled to do. The tribunal is satisfied that, given the conditions on the ground in the vicinity of the boreholes, any attempt to develop the claims would have to make use of the borehole line. Placing an easement (and the resulting road) over that line would interfere with development of the claims under the **Mining Act** as it is clear to the tribunal that the line depicts the best place to locate either a road or a railroad. It follows that the line likely also depicts the best place to move exploration or other mining equipment to assist in the development of the claims themselves.

Cliffs argued that both a road and a railroad could co-exist "within the available space". The tribunal is not prepared to accept this argument because it is not satisfied that enough or, indeed, any evidence was produced to support such an argument. There has not been any useful evidence that the tribunal could comfortably rely on to agree with Cliffs that two major transportation modes could co-exist in the prescribed location. Mr. Lavigne, for CCC, mentioned that the esker or ridge is very narrow and at times is less than 100 metres in width. There has been no evidence from a qualified engineering firm to help the tribunal understand precisely the necessary bed width for either a road or a railroad or both, for that matter; embankment height and width for each; space needed to accommodate service vehicles, sheds and other equipment; and so on. On the other hand, there is evidence from Cliffs that a road would require maintenance, service sheds, a helicopter pad, and so on. One could posit that similar facilities might be needed for a railroad. How could both modes be facilitated? In addition, Cliffs anticipated that approximately 100 trucks per day would use the road. Would CCC be expected to obtain permission before crossing it? How would CCC move its equipment across the road? These are but a few of the concerns that come to mind when considering Cliffs' position before this tribunal.

Aggregate, Road Building Materials and the Chitaroni Decision

Cliffs' or CCC's activities under the **Aggregate Resources Act** are outside the purview of this hearing. While there was testimony relating to the existence of and lack of aggregate or useable road building material in the area of the boreholes, it is enough to say that any attempts by CCC to work its claims along the higher ground or esker will undoubtedly be hampered or curtailed by the existence of a road. The *Chitaroni* decision offers little assistance as it involved a claim for damages.

Public Interest and the easement application

Much of what was heard at the hearing centred on the size of the chromite deposits in the Ring of Fire, their value, and how their development would help to open up the northern reaches of this province. It goes without saying that the mining industry in Ontario has created jobs and wealth. The tribunal was made well aware by Cliffs that much depended on both a swift decision and one that went in its favour as it was in the best position to build the infrastructure that would in turn help to develop the Ring of Fire. The tribunal is not in a position to either accept this assertion or reject it. The tribunal accepts that Cliffs is a large and well-healed corporate entity. However, the tribunal is not satisfied that it has the information needed to accurately assess the cost of such infrastructure or to assess Cliffs' financial ability to build it. Cliffs freely admitted at the hearing that economic factors sometimes come to bear on the plans of industry and the tribunal notes that every expert seems to have a different opinion about current economic conditions.

In terms of understanding how the public could benefit from the granting of the requested easement or what the public interest actually was in the easement application, the tribunal considered past decisions, the words of the Committee, and the wording of s. 51 itself. It is clear from the latest amendments to s. 51(2) that the recognition of something called "public benefit" has arisen. Where an application is made under the **PLA** for surface rights use for the purpose of developing and operating a public highway, a renewable energy project, a power transmission line or a pipeline for oil, gas, or water, or for another use that would benefit

the public, and where consent is not given or refused, the matter may be referred to the Mining and Lands Commissioner. Another recent amendment to s. 51(4) has put into words the public's interest in preserving "sites of Aboriginal cultural significance".

While the Minister of Natural Resources may grant an easement under the **PLA** "for any purpose", the fact of the matter is that the Minister is dealing with Crown land. There is a clear public component. There must be a benefit to the public that will accrue from the granting of the easement — an interest that the public has in seeing the application granted. The cases cited earlier also demonstrate that the "public" must be identifiable.

The tribunal did not see a public component to this hearing. This is not to discount the application by the Neskantaga First Nation to be made a party to the hearing, which application was denied. The tribunal recognizes Neskantaga's right to be consulted. The tribunal's decision to deny party status was based on the view that the time for consultation was not during an application under s. 51 of the **Mining Act**, which deals with a request to dispense with consent.

This hearing was about a road intended to serve at least one company in the Ring of Fire. There was no evidence describing what segment of the public would be interested in or would benefit from such a road. There has been no public presence in the form of ministry participation. While the MNR and the MNDM appeared at a preliminary hearing to object to the Neskantaga's request for party status, neither entity requested party status at the hearing on the merits of the Cliffs application, instead preferring to maintain "observer" status. At the time, when the MNR was considered a party, it was required to file documentation and filed nothing whatsoever expressing concerns over the public interest or even indicating what the interest of the public might be. Nor did Cliffs produce any witnesses from any government agency or ministry to speak to the public's interest in Cliffs' proposed plans or to assert that the road is intended to be a public road.

There were no witnesses from the mining industry in general to speak to how dispensing with consent for purposes of granting an easement for a road designed to serve the interests of one particular corporate entity might benefit the industry.

Development of a mining deposit can generate wealth and benefits. Certainly there has been evidence from both sides that the chromite deposits in question are extremely valuable. But it is asking too much of this tribunal to make findings regarding the public interest without sufficiently useful, reliable, and meaningful evidence on the point. What the tribunal has heard has essentially been a dispute between two corporate entities, each representing themselves and their own interests. CCC's interests have been established in law through its priority and that priority has been maintained and proved through the evidence of its witnesses and documentation. Cliffs has sought rights in and over a portion of CCC's interests through other legislation which, admittedly, does allow for the overriding of rights granted under the **Mining Act** where it can be done so in a way that balances the competing interests and does not negate the interest of the claim holder. However, to its detriment, Cliffs has failed to convince the tribunal that there is an interest of the public that has to be accommodated on these Crown lands. The public interest was described by Mining and Lands Commissioner, Mr. Grant Ferguson, in the *Egg* decision as an "essential aspect of the multiple use concept". Rather, Cliffs has convinced the tribunal that its actions were confined to protecting its own corporate goals.

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The tribunal is troubled by the fact that no provincial representative came forward to testify as to the provincial or public interest. A letter wherein the province expresses an interest in the project is not a satisfactory basis for concluding that the road has a public component. It is one thing to hear evidence that a historic chromite discovery has occurred in the James Bay Lowlands; the tribunal is unable to extrapolate from that information, without evidence from those qualified to speak to the public interest, whether an application by one corporate entity, in preference to another, should be permitted to proceed.

In each of the past decisions there was some aspect of public interest that the Commissioner could identify and find conclusive — whether it was a municipal park or a ski operation that allowed the public free access. Such is not the case here. An alternative scenario presents itself and it may be the simpler one. This is not a case where there is a public interest element for the tribunal to consider. What is before this tribunal is no more than a simple corporate fight and, as between those two corporations, the law is clear; the application must fail.

Conclusions

The tribunal has carefully considered all the evidence and the arguments of both sides. The tribunal finds that Cliffs' application to dispense with the consent of CCC under s. 51 fails. CCC's ability to work its claims will be negatively affected by the existence of a road and all that goes with it including the movement of numerous heavy trucks every day. Given the linear nature of the mining claims and the fact that the proposed easement for the road touches each of the claims in some part, CCC will find its work affected along the length of its claims.

The tribunal accepts Mr. Lavigne's evidence regarding the use that the high ground of the esker will play both in terms of its being easier to access than muskeg and in terms of its telling a story about geology in the area. The tribunal also accepts that CCC's focus will be on further sampling and exploration of the boreholes. Covering the boreholes with an easement for a road would detrimentally affect CCC's efforts in this regard. The evidence is, and the tribunal finds that the sand ridge or esker is the most important feature of the mining claims. Regardless of whether it is right or wrong for CCC to build a railway over the claims, the tribunal finds that CCC's ability to access the feature would be negatively affected.

It is unreasonable to expect CCC to accommodate the placement of an easement on the basis that there is enough room for both parties to build their own separate infrastructures. There has been very little useful evidence produced that would allow the tribunal to conclude that two equally well-built transportation systems designed to move very heavy loads could be situated on the sand ridge or esker.

The tribunal is of the view that in this instance, the interests of both parties cannot be balanced. CCC's rights under the **Mining Act** would be negatively affected. There is support for CCC's position that it cannot share in the way that Cliffs wants it to share and that an easement would require. As a result, CCC should not be forced to share its right to use the surface.

Finally, there has not been any evidence that the tribunal could rely on to find that there is indeed a public component to the application for the easement or even that the public has an interest in the actual road.

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The tribunal has yet to render a decision on an earlier motion for costs brought by Cliffs. With respect to the costs of the hearing on the merits, the parties are invited to make concise written submissions, none of which are to exceed ten (10) pages. Filing dates for the submissions of Canada Chrome Corporation and 2274659 Ontario Inc. are set out in the Order section.

The tribunal's decision on costs will address the earlier motion for costs and the costs of the hearing on the merits.

At the conclusion of this matter, the tribunal will order that the "pending proceedings" notation on the subject mining claims be vacated, that the time during which the claims were subject to the notation be excluded and that a new anniversary date be set.