Court File No. 445-13

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

B E T W E E N:

2274659 ONTARIO INC.

Applicant/Appellant

- and -

CANADA CHROME CORPORATION

Respondent/Respondent in Appeal

FACTUM OF THE APPELLANT

December 16, 2013

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PART I - IDENTITY OF APPELLANT, PRIOR COURT & RESULT

1. 2274659 Ontario Inc. appeals from the Order of the tribunal of the Mining and Lands Commissioner ("MLC") dated September 10, 2013, dismissing its application under section 51 of the *Mining Act*, R.S.O. 1990, c. M.14 to dispense with Canada Chrome Corporation's ("CCC") consent, as the holder of unpatented mining claims, to an application by 2274659 Ontario Inc. to the Minister of Natural Resources ("MNR") for a 100 metre-wide easement over certain Crown lands, under the *Public Lands Act*, R.S.O. 1990, c. P.43.

PART II - OVERVIEW - NATURE OF CASE AND ISSUES

2. This case raises important legal and factual issues. It raises an issue of first instance before this Court regarding the interpretation of sections 50 and 51 of the *Mining Act* and the extent to which mining claim holders may assert rights over the surface of those claims. If the MLC's interpretation of the Act is accepted, the public interest in the multiple use of Crown land will be undermined. Factually, the appeal calls on the Court to review a decision of the MLC which lacks support in the evidence and, is contrary to the evidence. If the decision stands on its merits, the effect will be to prevent development of valuable mineral deposits in the "Ring of Fire" in northern Ontario – delaying, if not destroying, economic development and benefits that would flow from the Appellant's project.

3. The purpose of the Ontario *Mining Act* is to encourage prospecting, staking and exploration for the development of mineral resources. At the same time, the Act guards against prospectors improperly alienating Crown lands (from other uses) without developing mineral resources on those lands. While a mining claim holder may use the surface of those lands for mineral exploration and development, the Act recognizes the clear public interest in allowing multiple other uses of Crown land, and encourages them, where the other uses of the surface do not interfere with the exploration and development of minerals on the claim. To prevent another use,

therefore, the Act requires the mining claim holder to show that the proposed other use of the land would interfere with its exploration or extraction of minerals on the mining claims such that the multiple use principle should not be applied.

4. The clear limits on the surface rights of a mining claim holder are set out in section 50 of the *Mining Act*, which provides that the holder of a mining claim does not have any right, title or claim to the surface rights of the claim other than the right to enter upon, use and occupy such part 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.**" (Emphasis added.) Section 51(1) of the Act then prioritizes this right but only in so far as, "**the holder of an unpatented mining claim has the right prior to any subsequent right to the user 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.**" (Emphasis added.)

5. In this case, however, the MLC – in a case it recognized as one of "first instance"[1] – incorrectly and unreasonably interpreted section 50 of the Act to only apply to privately held land. This resulted in an extremely broad interpretation of a claim holder's rights to the surface of Crown land, that would extend to "all activities" associated with mining conceivably anywhere in the province, effectively nullifying the "multiple use" principle. In this case, it led the MLC to block the MNR's consideration of the Appellant's application for an easement over Crown land to build a Road (which would be subject to careful review by the MNR and be subject to an environmental assessment before ultimate approval) where the easement passes over mining claims staked by the Respondent for the purpose of controlling a transportation corridor – the

[1] Order and Reasons of The Mining and Lands Commissioner, September 10, 2013 ("MLC Reasons"), p. 31. [Appeal Book and Compendium ("AB"), Vol. 1, tab 2B, p. 42]

Respondent speculatively asserting that, some day, it may wish to construct a railway in order to transport ore from a mine that may or may not be built, on a mineral deposit – *not* on the mining claims at issue – called "Big Daddy", that it does not even control.

6. In coming to this conclusion, the MLC made egregious errors in statutory interpretation that will lead to results inconsistent with other provisions of the *Mining Act* and prior MLC decisions. By ignoring section 50, the MLC held that a claim holder on Crown land need merely show "interference" with any use which it asserts it may wish to put to the surface of the land (no matter how vague or speculative). The MLC does not have such a broad mandate under section 51 of the *Mining Act,* which would effectively pre-empt the MNR's authority and mandate to consider the merits of any proposed easement, and cut off an environmental assessment and other regulatory steps that would refine and assess the merits of the alternative or multiple use of Crown land.

7. By any standard of deference, the decision of the MLC is unreasonable and contrary to the Act, statutory interpretation, and common sense. The MLC's errors include, *inter alia*:

(a) that in the case of Crown lands, the claim holder's use of the surface does not have to relate to developing mines and minerals in the claims themselves;

(b) holding that there is nothing in the *Mining Act* that defines the surface rights of a mining claim holder on Crown lands;

(c) relieving CCC of the evidentiary onus to demonstrate interference with its use of the surface of its mining claims to develop mines and minerals on the claims;

(d) fundamentally misapprehending the principle of multiple use of Crown lands underlying section 50 and 51 of the Act;

(e) weighing speculative evidence of competing proposed uses of the surface (one of which – CCC's proposed railway – would require CCC itself to obtain consent from other mining claim holders to fill significant gaps along the route of its proposed railway), rather than whether there is any evidence of interference with CCC's development of mines and minerals on its claims and weighing that against the presumption in favour of multiple uses of Crown lands;

(f) accepting speculative assertions from CCC regarding its intended use of the lands as a valid basis for refusing consent to the easement;

(g) accepting CCC's speculative assertions of future testing on the claims as a valid basis for refusing consent to the easement;

(h) failing to recognize and give due weight to the inherent public interest that exists

in multiple uses of Crown lands; and,

(i) basing its decision on irrelevant considerations, foremost among them the business relationship of the parties as characterized by the MLC.

PART III - SUMMARY OF FACTS

A. Cliffs' Proposed Road Corridor Easement

8. The Appellant, 2274659 Ontario Inc. is a subsidiary of Cliffs Natural Resources Inc. (the Appellant, Cliffs Natural Resources Inc., and its subsidiaries, are hereinafter collectively referred to as "Cliffs"). Cliffs has mining claims in the "Ring of Fire" area of Northern Ontario. In 2010, Cliffs acquired interests in the "Black Thor" chromite deposit, located in the Ring of Fire.[2] Chromite ore can be smelted to produce ferrochrome, which is a critical ingredient in the production of stainless steel.[3]

9. The Cliffs project consists of the construction, operation, and eventual decommissioning of a chromite mine and an ore processing facility at the Black Thor deposit, an all-season road and transload facility for the loading of concentrate onto rail, as well as a ferrochrome production facility located near Sudbury, Ontario (the "Project").[4] The Black Thor mine site near McFaulds Lake is located approximately 540 kilometres north of Thunder Bay, Ontario and approximately 240 kilometres west of James Bay.[5] Critical to the Project is the construction of a road from the mine site to the CN rail line at Cavell, Ontario (the "Road"), approximately 340 kilometers to the south.[6] While the Road is proposed to be built and operated by Cliffs, access and use of the Road would not be exclusive to it, as Cliffs has publicly stated.[7]

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[2] Affidavit of W. Boor, sworn April 27, 2012 ("Boor Affidavit #1"), para. 3 [Exhibit Book ("EB") p. 13, AB Vol. 2, tab 17, p. 216]
[3] MLC hearing exhibit 12A, Excerpt, May 2011 Project Description, p. 2 [EB p. 1359, AB Vol. 3, tab 29, p. 616]
[4] MLC hearing exhibit 12A, Excerpt, May 2011 Project Description, p. 1-2 [EB pp. 1358-59, AB Vol. 3, tab 29, p. 615-16]
[5] MLC hearing exhibit 12A, Excerpt, May 2011 Project Description, p. 1-2 [EB p. 1358-59, AB Vol. 3, tab 29, p. 615-16]
[6] Boor Affidavit #1 at paras. 3-4 [EB p. 13, AB Vol. 2, tab 17, p. 216]; MLC Hearing Exhibit 12A, Excerpt from May 2011 Project Description, p. 2 [EB p. 1359, AB Vol. 3, tab 29, p. 616]
[7] Fourth Affidavit of W. Boor, sworn September 21, 2012, paras. 16-18, and Ex. "D", Noront press release dated Sept. 4, 2012 [EB pp. 1008-1009, 1066 AB Vol. 3, tab 23, 23D, p. 462-468]; direct exam. of W. Boor, Feb. 4, 2013, transcript vol. 1, p. 103, l.4 – 13 [AB Vol. 1, tab 5, p. 140]; cross-exam. of F. Smeenk, Feb. 6, 2013 transcript, vol. 3, p. 168, l.1 – p. 170, l. 4 [AB Vol. 1, tab 10A, p. 167-169].

10. For the purpose of the Road, Cliffs made an application to the MNR under section 21 of the *Public Lands Act*,[8] for surface rights to a 100 metre-wide easement over Crown lands.[9] The easement width is to accommodate a 10 metre-wide road, with an allowance of 50 metres on each side of the proposed Road centreline, for the Road, shoulder, slope, drainage, snow removal, sight lines, and maintenance facility structures.[10] The proposed easement allows Cliffs flexibility to move the Road centreline within it, as determined desirable by Cliffs and the MNR after completion of the environmental assessment process, including input from Aboriginal communities, mining claim holders, and stakeholders.[11] If the planned Road goes outside the easement set out in Cliffs' current application, Cliffs will have to make a separate easement application to the MNR for an easement over such new lands as it requires.[12]

11. The requested easement passes, partially, over certain mining claims staked by CCC.[13] Cliffs negotiated with CCC to obtain its consent to the application, which was refused.[14]

B. The CCC Mining Claims

12. The Respondent, CCC is a subsidiary of KWG Resources Inc. ("KWG"). KWG holds a 30 percent interest in the "Big Daddy" chromite deposit in the Ring of Fire, located adjacent to and to the south of the Black Thor deposit.[15] Cliffs holds the other 70 percent. KWG would prefer to see

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[8] R.S.O. 1990, c. P.43, s. 21

[9] MLC Exhibit 10, Agreed Statement of Facts ("Agreed Facts") at paras. 3-4 [EB p. 1704, AB Vol. 3, tab 27, p. 586]. The MNR accepted the easement application on January 12, 2012. The application was updated on September 20, 2012, and accepted by MNR on December 21, 2012: Agreed Facts, paras. 6-7 [EB p. 1705, AB Vol. 3, tab 27, p. 587]; Second Affidavit of Gabriel Johnson, sworn April 27, 2012 ("Johnson Affidavit #2"), Ex. "E", January 12, 2012 letter from MNR to Cliffs [EB p. 64, AB Vol. 2, tab 18E, p. 258]; Third Affidavit of Gabriel Johnson, sworn September 21, 2012 ("Johnson Affidavit #3"), Ex. "A", September 21, 2012 letter from J. Aagenes to J. Sills [EB p. 1074, AB Vol. 2, tab 21A, p. 313]; MLC Hearing Exhibit 11, December 21, 2012 letter from MNR to Cliffs [EB p. 1699, AB Vol. 3, tab 28, p. 591]

[10] Agreed Facts, para. 8 [EB p. 1705, AB Vol. 3, tab 27, p. 587]; the current road surface is planned to be 10 metres: cross-exam. of G. Johnson, Feb. 5, 2013, transcript vol. 2, p. 29, l.25 – p. 31. 15 [AB Vol. 1, tab 8, p. 147-149]

[11] Boor Affidavit #1, para. 5 [EB p. 13, AB Vol. 2, tab 17, p. 216]; cross-exam. of W. Boor, Feb. 4, 2013, transcript vol. 1, p. 160, l.4 – 13 [AB Vol. 1, tab 5, p. 141]

[12] Agreed Facts at para. 10 [EB p. 1705, AB Vol. 3, tab 27, p. 587]

[13] Agreed Facts at para. 2 [EB p. 1704, AB Vol. 3, tab 27, p. 586]

[14] Boor Affidavit #1, paras. 8-30 and Ex. "A" and "B" [EB pp. 14-17, 20, 22, AB Vol. 2, tab 17, p. 217-220, 223-227]; Agreed Facts at para. 22 [EB p. 1707, AB Vol. 3, tab 27, p. 589]

[15] Boor Affidavit #1 at para. 7 [EB p. 13, AB Vol. 2, tab 17, p. 216]; Second Affidavit of R. Kruse sworn September 20, 2012 ("Kruse Affidavit #2"), Ex. "E" [EB p. 988, AB Vol. 2, tab 22E, p. 457]

Big Daddy developed by Cliffs, rather than Black Thor. However, Cliffs has no present intention of developing Big Daddy.[16] Cliffs intends to develop Black Thor prior to Big Daddy because it is larger and wider than Big Daddy, contains a superior grade of ore, and is easier to access.[17]

13. In 2009, CCC staked unpatented mining claims along a series of linear sand ridges from Exton, Ontario running approximately 340 kilometres north to close to (but not adjacent to) the Big Daddy deposit.[18] The CCC claims are non-contiguous – there are areas of Crown land between the Big Daddy property and Exton over which CCC does not have contiguous mining claims – including areas where mining claims have been staked by third parties – in addition to a gap between the CCC claims and the Big Daddy property itself.[19] The subset of CCC unpatented mining claims over which the requested easement passes were designated as the "Mining Claims" and "Transferred Mining Claims" before the MLC[20] (hereinafter collectively referred to as the "Mining Claims"). The applied-for easement affects a small percentage of the area of each mining claim crossed, and does not cross a significant number of unpatented mining claims staked by CCC for its proposed railway.[21]

14. Despite assertions to the contrary before the MLC, CCC staked the Mining Claims in order

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[16] Agreed Facts, at para. 25 [EB p. 1708, AB Vol. 3, tab 27, p. 590]; cross-exam.of F. Smeenk, February 6, 2013, transcript vol. 3, p. 151, l. 16-19 [AB Vol. 1, tab 10A, p. 165]

[17] Fourth Affidavit of W. Boor, sworn September 21, 2012, at para. 12 [EB p. 1007, AB Vol. 3, tab 23, p. 461]

[18] Agreed Facts at paras. 3, 11-16, 24 [EB pp. 1704, 1706, 1708, AB Vol. 3, tab 27, p. 586, 588, 590]; Affidavit of M. Lavigne, sworn May 30, 2012 ("Lavigne Affidavit #1") at paras. 40-43 [EB pp. 430-431, AB Vol. 2, tab 20, p. 297-298]; cross-exam. of F. Smeenk, Feb. 6, 2013, transcript vol. 3, p. 134, l. 3 – p. 135, l. 22 [AB Vol. 1, tab 10A, p. 153-154]

[19] Kruse Affidavit #2, Ex. "E" [EB p. 988, AB Vol. 2, tab 22E, p. 457]; cross-exam. of F. Smeenk, Feb. 6, 2013, transcript vol. 3, pp. 136-138, 142-143 [AB Vol. 1, tab 10A, p. 155-157]; cross-exam. of M. Lavigne, Feb. 7, 2013, transcript vol. 5, p. 98, l. 7 – p. 100, l. 22 [AB Vol. 1, tab 12, p. 177A-177C]; Agreed Facts at paras. 16, 24-25 [EB pp. 1706, 1708, AB Vol. 3, tab 27, p. 588, 590]

[20] Agreed Facts at para. 3 [EB p. 1704, AB Vol. 3, tab 27, p. 586]. The "Transferred Mining Claims" were mining claims crossed by the easement that were transferred from INV Metals Inc. to KWG Resources Inc. after the application had been referred to the MLC, and added to the application. See First Affidavit of Gabriel Johnson, sworn March 30, 2012, at paras. 2-5 [EB pp. 2-3, AB Vol. 2, tab 16, p. 211-212]. See Ex. "B" to Kruse Affidavit #2 for the location of the requested easement relative to each Mining Claim, shown on an overview map of the entire route followed by individual maps of each claim; see Ex. "E" for a map of all the CCC mining claims, including those not crossed by the easement. [EB pp. 759-867, 988, AB Vol. 2, tab 22B, 22E, pp. 337-446, 457]

[21] Kruse Affidavit #2, paras. 13-16, and Ex. "A" claims crossed by road corridor, "B" maps of easement location, "D", list of CCC mining claims, "E", claims in green and grey [EB p. 752-757, 759-867, 978-986, 988, AB Vol. 2, tab 22, 22A, 22B, 22D, 22E, p. 321-322, 333-336, 337-446, 447-455, 457]

to have control over a transportation route leading to the Ring of Fire.[22] While Cliffs was aware that KWG staked the Mining Claims for this purpose and had no objection to it doing so, this was not because the staking of mining claims gave surface rights – Cliffs was aware that the staking of mining claims does not give exclusivity over the surface of Crown land.[23]

15. In late 2009 and early 2010, CCC retained consultants to determine the route for its claims,[24] and to undertake geotechnical field investigation to determine the feasibility of a railroad corridor on the CCC claims.[25] A consulting firm called Golder Associates conducted a geotechnical field investigation to drill and sample the native soils in boreholes along the proposed corridor route, the purpose of which was to "(a) provide geotechnical related data to support the engineering design and construction of embankments, bridges, and related structures; (b) to identify and characterize potential material site prospects; and (c) generate a pre-feasibility level engineering document, which will enable informed consultations with affected First Nations and all other local and regulatory constituencies, on the feasibility of constructing a railroad."[26]

16. Construction of a railway to the Ring of Fire would cost billions of dollars,[27] and neither CCC nor its parent KWG has the necessary funding for it. KWG CEO Frank Smeenk's evidence was that, "CCC doesn't have a snowball's chance in hell of raising $2 billion to build a railroad."[28]

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[22] Boor Affidavit #1, Ex. "B", letter from F. Smeenk to J. Aagenes, Sept. 23, 2011 [EB p. 22, AB Vol. 2, tab 17, p. 225]; Affidavit of F. Smeenk, sworn May 30, 2012 ("Smeenk Affidavit #1"), para. 49 [EB p. 295, AB Vol. 2, tab 19, p. 275]

[23] Cross-exam.of W. Boor, Feb. 4, 2013, transcript vol. 1, p. 115, l. 11-20 and p. 121, l. 21 – p. 122, l. 1 [AB Vol. 1, tab 6, p. 142-144]

[24] CCC retained a railway engineering company, Krech Ojard & Associates, to determine the route for its claims: Agreed Facts, para 23 [EB p. 1708, AB Vol. 3, tab 27, p. 590]; cross-exam.of F. Smeenk, February 6, 2013, transcript vol. 3, p. 135, l. 2-22 [AB Vol. 1, tab 10A, p. 154]

[25] CCC retained Golder Associates to undertake geotechnical field investigation, together with Krech Ojard & Associates, to determine the feasibility of a railroad corridor within the CCC claims: Lavigne Affidavit #1 at paras. 49, 52-57 [EB p. 433-436, AB Vol. 2, tab 20, p. 300-303], Smeenk Affidavit #1 at para. 27 [EB p. 289, AB Vol. 2, tab 19, p. 269].

[26] Lavigne Affidavit #1, paras. 53-54 [EB p. 434-435, AB Vol. 2, tab 20, p. 301-302]. CCC filed a Golder report as proof of assessment work, but only $8 million out of $15 million in work was actually filed and accepted by the Ministry of Northern and Development and Mines, since railway engineering did not qualify as assessment work: cross-exam. of M. Lavigne, Feb. 7, 2013, transcript, vol. 5, p. 117, l. 3-20 [AB Vol. 1, tab 12, p. 181]; MLC Reasons, p 16 [AB Vol. 1, tab 2B, p. 27]

[27] Cross-exam. of F. Smeenk, Feb. 6, 2013, transcript vol. 3, p. 143, l. 16 - p. 144, l. 10 [AB Vol. 1, tab 10A, p. 159-160]

[28] Cross-exam. of F. Smeenk, Feb. 6, 2013, transcript vol. 3, p. 144, l. 14 - p. 148, l. 19 [AB Vol. 1, tab 10A, p. 160-164]

Smeenk also testified that the possibility of KWG obtaining funding for a railroad is "remote".[29] Neither CCC nor KWG have secured any financing at all for a railroad.[30] Nor has CCC filed a project description for an environmental assessment for a railroad.[31]

17. In what appears to be late 2012, CCC retained an engineering firm called Tetra Tech to "identify critical material resource sites for aggregate and granular fill within the CCC Claim,"[32] i.e., aggregate materials that could be used to construct a railway bed. Tetra Tech produced a "Material Availability Assessment Report"[33] that shows that none of the CCC claims crossed by the proposed Road had rock that could be used as subgrade material for CCC's proposed railway.[34] In other words, there is no available bedrock in CCC's proposed railway corridor on the Mining Claims that could be used to build a railway.

C. CCC Withholds Consent Without Justification

18. Cliffs applied to the MNR under the *Public Lands Act* for an easement in order to build a road to the Black Thor deposit. Since the requested easement crosses over portions of some of the mining claims staked by CCC, Cliffs asked for CCC's consent to the easement, as required under the *Mining Act*. In negotiations with CCC, Cliffs consistently indicated its willingness to discuss the location of the Road to accommodate CCC's concerns. However, CCC was unwilling to

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[29] Cross-exam. of F. Smeenk, Feb. 6, 2013, transcript vol. 3, p. 144, l. 14 – p. 148, l. 19 [AB Vol. 1, tab 10A, p. 160-164]
[30] Cross-exam. of F. Smeenk, Feb. 6, 2013, transcript vol. 3, p. 148, l. 9-12 [AB Vol. 1, tab 10A, p. 164]
[31] Q. from Commissioner Orr to F. Smeenk, Feb. 7, 2013, transcript vol. 5, p. 34, l. 8-18 [AB Vol. 1, tab 10B, p. 169A]
[32] Affidavit of P. Hartmann, December 17, 2012 ("Hartmann Affidavit") para. 4 and Ex. "B" [EB pp. 1280, 1290 AB Vol. 3, tab 26, 26B p. 487, 488]. The body of the report itself is undated and does not specify when Tetra Tech was retained, however Appendix 4 of the report contains a memo from Tetra Tech to KWG dated November 1, 2012 setting out the basis of design for the study. [EB p. 1315, AB Vol. 3, tab 26B, p. 513A]
[33] Hartmann Affidavit, Ex."B" [EB p. 1290, AB Vol. 3, tab 26B, p. 490]; direct exam. of L. Bodi, Feb. 11, 2013, transcript vol. 7, p. 45, l. 21 – p. 48, l. 4 [AB Vol. 1, tab 13, p. 182-185]
[34] Hartmann Affidavit Ex."B", DVD of Appendices to Tetra Tech Report, Appendix 12, pp. 26-61 [EB p. 1315, and printed pages reproduced in MLC Exhibit 20 at EB pp. 1648-1683, AB Vol. 3, tab 26B, p. 541-576]. And see: cross-exam. of P. Hartmann, Feb. 11, 2013, transcript vol. 7, p. 126, l. 20 – p. 127, l. 18 and p. 129, l. 1 – p. 142, l. 11 [AB Vol. 1, tab 14, p. 186-201], and Hartman Affidavit Ex. "B", report p. 16 [EB p. 1305, AB Vol. 3, tab 26B, p. 504]; MLC Hearing Exhibit 13, map at Kruse Affidavit #2, Ex. "E" with additional markings [EB p. 1711, AB Vol. 3, tab 30, p. 620].

discuss the location of the Road or easement, and refused to provide its consent.[35] Smeenk testified, "There is virtually no middle ground."[36]

19. In correspondence, Smeenk confirmed to Cliffs that CCC had acquired the corridor of Mining Claims "to obtain leases for the corridor lands, for the purposes of constructing a railway to exploit the Big Daddy claims."[37] (Emphasis added) Smeenk asserted that the Road would impede or delay construction of a railway, "and perhaps eradicate entirely the economics of the railway that we [CCC] have been developing..."[38] In affidavit evidence, Smeenk stated that "KWG has not provided its consent to Cliffs for an easement because the easement over the CCC Claims is contrary to KWG's business interests."[39] In other words, a road would defeat KWG's hoped-for monopoly on transportation, which is the only way a railroad would be economically viable. He continued:

> KWG continues to believe that a railway is a superior use of the CCC Claims. KWG continues to rely upon the *Mining Act* to protect its priority to surface rights of the CCC Claims for the exploration of the mineral interests contained within (base metals, diamonds, and aggregate), and the development of necessary mine infrastructure for Big Daddy...[40]

D. The MLC Decision

20. The question before the MLC was not whether the easement ought to be granted – that is for the MNR to determine – but whether CCC's consent to the easement application could be dispensed with, in order to allow the application before the MNR to proceed. To make that determination, the MLC had to decide whether CCC demonstrated that the granting of the release would interfere with its use of the surface of the Mining Claims for the exploration or extraction of

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[35] Boor Affidavit #1, paras. 8-30, 37, Ex. "A", "B" [EB p. 14-17, 19, 20-22, AB Vol. 2-2B tab 17, p. 217-227]; direct exam. and re-exam. of W. Boor, Feb. 4, 2013, transcript vol. 1, p. 100, l.2-18, and p. 170, l. 22 – p. 171, l. 9 [AB Vol. 1, tab 5, p. 139 and tab 7, p. 145-146]; direct exam. of F. Smeenk, Feb. 6, 2013, transcript vol. 3, p. 123-125 [AB Vol. 1, tab 9, p. 150A-152], Agreed Facts, para. 22 [EB p. 1707, AB Vol. 3, tab 27, p. 589].

[36] Direct exam. of F. Smeenk, Feb. 6, 2013, transcript vol. 3, p. 125, l. 5-18 [AB Vol. 1, tab 9, p. 152]

[37] Boor Affidavit #1, Ex. "B", letter from F. Smeenk to J. Aagenes, Sept. 23, 2011 [EB p. 22, AB Vol. 2, tab 17B, p. 225].

[38] Boor Affidavit #1, Ex. "B", letter from F. Smeenk to J. Aagenes, Sept. 23, 2011 [EB p. 22, AB Vol. 2, tab 17B, p. 225].

[39] Smeenk Affidavit #1, para. 49 [EB p. 295, AB Vol. 1, tab 19, p. 275].

[40] Smeenk Affidavit #1, para. 50 [emphasis added] [EB p. 295, AB Vol. 1, tab 19, p. 275]. The Mining Claims are not known to contain a commercially proven deposit of ore or diamonds: Agreed Facts, para. 27 [EB p. 1708, AB Vol. 3, tab 27, p. 590]

minerals on the claims, so as to override the presumption of multiple uses of Crown lands. Instead, the MLC, based on flawed legal analysis, influenced by irrelevant considerations and inadequate and unsupported findings of fact, purported to determine whether Cliffs' proposed road would interfere with CCC's proposed speculative railway, and whether the road had a 'public purpose'. The MLC dismissed Cliffs' application, preventing the MNR from even considering the application for an easement, and effectively blocking the Project. The result is that an unpatented mining claim holder without any mining projects underway in the Ring of Fire – let alone on the Mining Claims themselves – has, on the basis of financially unsupported aspirations of a railway, blocked access by any other party to the development of mineral deposits in the region, including in this case the Cliffs Project.

PART IV - STATEMENT OF ISSUES, LAW & AUTHORITIES

21. This appeal raises the following issues:

(a) Whether the MLC erred in law in holding that sections 50 and 51 applied to private and public lands, respectively, and therefore the limitation on a claim holder's surface rights in section 50(2) did not apply to public lands, effectively deleting the multiple use principle from section 51;

(b) Whether the MLC erred in law in reversing the evidentiary burden under section 51 of the *Mining Act* in not requiring positive evidence from CCC of interference with its limited surface rights, and in not dispensing with CCC's consent where there was, in fact, no evidence of interference with the development of the mining claims to override the multiple use principle;

(c) With respect to (a) and (b), whether the MLC erred in law in interpreting section 51 of the *Mining Act* to require Cliffs to lead evidence of "public interest" in its proposed road; and

(d) Whether the MLC based its decision on irrelevant considerations, including its perception and characterization of the parties' relationship.

A. The Standard of Review

22. The above issues all involve questions of law. To the extent that issue (b) may involve the application of a legal test to a set of facts, the MLC in this case made extricable errors in principle

with respect to the application of the legal test that amounted to an error of law.[41]

23. Although the standard of correctness normally applies with respect to errors of law,[42] it has been held that the standard of review applicable to decisions of the MLC interpreting the *Mining Act* is reasonableness, unless the question is one of general law, central to the legal system as a whole, and outside of the MLC's expertise.[43]

24. Even applying a deferential standard of reasonableness, the MLC fundamentally misapprehended the nature of the rights granted to a mining claim holder under sections 50 and 51 of the *Mining Act*, leading to palpable and overriding error in its application of the legislative provisions to the facts and a decision that was unreasonable. Moreover, both the MLC's erroneous reversal of the evidentiary burden and the basing of its decision on irrelevant considerations are questions of general law and questions central to the rule of law, attracting a standard of review of correctness.[44]

B. The Limited Surface Rights of a Mining Claim Holder

(i) "Mining Claim" Includes Unpatented Mining Claim

25. Ontario operates under the "free-entry system" whereby licenced prospectors may obtain mineral rights on a first-come basis by staking claims on their own initiative.[45] A mining claim is a square or rectangular area of Crown land or Crown mineral rights, usually of an area of 256

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[41] *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 31-37. Writing for the majority of the Court, Major J. and Iacobucci J. held that where an erroneous finding of the trial judge can be traced to an error in his or her characterization of the legal standard, this encroaches on the law making role of an appellate court and less deference is required, consistent with the a "correctness" standard of review.

[42] *Housen*, supra at paras. 8-9 [*Housen*]; see also *3437400 Canada Inc. v. Niagara Peninsula Conservation Authority*, 2012 ONSC 1503 (Div. Ct.) at para. 6 [*Niagara Peninsula*]. In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] S.C.J. No. 9, the Supreme Court set out the standard of review on judicial review (as opposed to on appeal), holding that there ought to be two standards of review: reasonableness and correctness, the latter "in respect of jurisdictional and some other questions of law", which promotes "just decisions and avoids inconsistent and unauthorized application of law" (see paras. 34-50).

[43] *Ontario (Minister of Transportation) v. 1520658 Ontario Inc.*, 2011 ONCA 373, [2011] O.J. No. 2148, aff'ing [2009] O.J. No. 4475 (Div. Ct.), at paras. 16, 33-35 ["*MTO*"]; *Niagara Peninsula*, supra, at para. 8

[44] See, for example *Niagara Peninsula*, supra, at para. 8.

[45] *Mining Act*, R.S. O. 1990, c. M.14, s. 27.

hectares,[46] that a licensed prospector marks out through ground staking (erecting posts at four corners of the claim and blazing a line to delineate the perimeter) or map staking.[47] The staking of a claim only gives the claim holder the right to perform assessment work (prescribed under the Act) or to obtain a subsequent lease from the Crown.[48] The staking of a mining claim alone does not give a prospector the right to take, remove or otherwise dispose of any minerals found in, on, or under the mining claim.[49] Section 50(2) of the Act gives the mining claim holder a defined and limited set of rights to use the surface of the claim for the purposes of exploring and developing mines and minerals on the claim, and under section 51 the mining claim holder has the prior right to use the surface of Crown land only for these purposes. In accordance with the multiple use principle, the Act has a mechanism for disposition of surface rights either with the claim holder's consent, or by order of the MLC.

26. The "Rights of Licensee" section of the *Mining Act* (under Part II – "Mining Claims") begins with sections 50 and 51. Section 50 of the Act sets out the limits on rights granted to a mining claim holder, including the limitation on surface rights set out in section 50(2). Section 51 then grants a priority to the unpatented mining claim holder of those limited rights in section 50. Sections 50 and 51 of the *Mining Act* are properly read together (as even CCC submitted).[50]

27. Section 50 of the Act provides, *inter alia*:

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

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[46] *Claim Staking and Recording*, O. Reg. 43/11, s. 15(1)(b); see also maps at Ex. "B" to Kruse Affidavit #2, illustrating that the majority of the Mining Claims are 1600 m x 1600 m [EB pp. 760-867, AB Vol. 2, tab 22B, p. 339-446]

[47] *Mining Act*, R.S. O. 1990, c. M.14, s. 38; *Claim Staking and Recording*, O. Reg. 43/11, Part I, Ground Staking of Mining Claims, and Part II, Map Staking of Mining Claims.

[48] *Mining Act*, R.S. O. 1990, c. M.14, s. 50(1)(a).

[49] *Mining Act*, R.S. O. 1990, c. M.14, s. 50(1)(b).

[50] Factum of the Respondent before the MLC, dated February 14, 2013, at para. 73 [AB Vol. 4, tab 32, p. 709]; in its oral submissions, CCC acknowledged the link between s. 50 and s. 51, and it did not argue that these were separate regimes, Feb. 14, 2013, transcript vol. 10, p. 13-14 [AB Vol. 1, tab 15, p. 208-209]

> (a) any right, title, interest or claim **in or to the mining claim** other than the right to proceed as is in this Act provided to perform the prescribed assessment work or to obtain a lease from the Crown and, prior to the performance, filing and approval of the first prescribed unit of assessment work, the person is merely a licensee of the Crown and after that period and until he or she obtains a lease the person is a tenant at will of the Crown in respect of the mining claim; or
>
> (b) any right to take, remove or otherwise dispose of any minerals found in, upon or under the mining claim.
>
> **Surface rights**
>
> (2) The holder of a mining claim does not have any right, title or claim to the surface rights of the claim other than the right, subject to the requirements of this Act, 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**. [Emphasis added]

28. Section 51 of the *Mining Act*, at the time of the current application,[51] provided:

> **Surface rights on unpatented mining claim**
>
> 51. (1) Except as in this Act is otherwise provided, the holder of an unpatented mining claim has the right prior to any subsequent right to the user of the surface rights, except the right to sand, peat and gravel, for prospecting and the efficient exploration, development and operation of *the* mines, minerals and mining rights.
>
> **Disposition of surface rights**
>
> (2) Where the holder of an unpatented mining claim consents to the disposition of surface rights under the *Public Lands Act*, the recorder shall make an entry on the record of the claim respecting the consent, and thereupon the surface rights may be dealt with as provided in the *Public Lands Act*.
>
> **Survey of surface rights**
>
> (3) Where the holder of an unpatented mining claim consents to the disposition of surface rights under subsection (2), the Minister may require a survey of such surface rights, and the survey shall be provided at the expense of the person who has acquired the surface rights.
>
> **Where holder does not consent to disposition of surface rights**
>
> (4) Where an application is made for disposition under the *Public Lands Act* of surface rights on an unpatented mining claim and the holder of the unpatented mining claim does not consent to the disposition and provision for the reservation or exclusion of the surface rights is not otherwise provided for in this Act or any other Act, the Minister may refer the application to the Commissioner.
>
> **Where application referred to Commissioner**
>
> (5) Where an application under subsection (4) is referred to the Commissioner, he or she shall, upon giving all interested persons at least ninety days' notice and after hearing such interested persons as appear, make an order based on the merits of the application.
>
> **Where surface rights required for public use**

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[51] *Mining Act*, R.S.O. 1990, c. M.14, prior to amendment by S.O. 2009, c. 21, s. 29 in force November 1, 2012. This application was referred to the MLC on February 23, 2012, under section 51 as it existed prior to the coming into force of the amendments. Following amendment by S.O. 2009, c. 21, s. 29, the equivalent provisions to the previous s. 51(4) and 51(5) are ss. 51(2) and 51(3). The current s. 51(3) provides that the MLC is required to "make an order on such terms and conditions as the Commissioner considers appropriate with respect to the surface rights." While the provisions of the *Mining Act* were amended, the mandate of the MLC in connection with the referral of this matter to it did not change.

> (6) Where surface rights on an unpatented mining claim are required for the use of the Crown or other public use, this section applies with necessary modifications. [Emphasis added]

29. The *Mining Act* distinguishes between "mining claims", "mining rights" and "surface rights". A "mining claim" is merely a parcel of land that has been staked and recorded in accordance with the Act and the regulations, and merely provides a right to do assessment work and obtain a lease from the Crown, while "mining rights" are "the right to minerals on, in or under any land".[52] "Surface rights" means "every right in land other than the mining rights".[53]

30. Section 50(2) only grants the mining claim holder limited "surface rights", namely those "necessary for the purpose of prospecting and the efficient exploration, development and operation of the mines, minerals and mining rights therein." Section 51(1) then specifies that the surface rights of an "unpatented mining claim holder" (i.e., involving land on which no "patent, lease, licence of occupation or any other form of Crown grant" is in effect[54]) for "prospecting and the efficient exploration, development and operation of the mines, minerals and mining rights" is "prior to [that is, takes priority over] any subsequent right to the user of the surface rights" (other than sand, peat and gravel).

31. A "mining claim" is defined in the Act to mean "a parcel of land, including land under water, that has been staked and recorded in accordance with this Act and the regulations." "Unpatented" is defined in the negative, "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." (Emphasis added.) Therefore, in the context of section 50 which deals with the staking and recording of a mining claim, "mining claim" must include, if not mean, unpatented mining claim. Clearly, references to a "mining claim" in other provisions of the Act cannot be intended to exclude unpatented mining claims. If that were the case, many provisions of the Act

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[52] *Mining Act*, R.S.O. 1990, c. M.14, ss. 1, 50(1)
[53] *Mining Act*, R.S.O. 1990, c. M.14, s. 1
[54] *Mining Act*, R.S.O. 1990, c. M.14, s. 1

would not make sense, such as section 18 stating that a licence is required to stake out and record mining claims, sections 27 and 28 setting out where a prospector may stake a mining claim, section 38 setting out the manner in which a mining claim is to be staked, sections 44 to 46.1 regarding applications to record mining claims, and many others.[55]

(ii) Limitation on Surface Rights Applies to Private and Public Lands

32. However, in this case the MLC erroneously drew a distinction between "surface rights" in section 50 and section 51. Ignoring the absurd implications for the rest of the *Mining Act*, the MLC held that, "[s]ections 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'", and held that section 50 only applies to lands where the surface rights are privately owned, not where they are owned by the Crown. It went on to conclude, without justification, that section 50(2) therefore does not apply to the CCC claims since they are unpatented claims on Crown lands.[56]

33. The effect of the MLC's holding is to extinguish the clear limits placed on the surface rights of a mining claim holder under section 50(2) of the Act.[57] This is unreasonable, disregards the clear language of the Act, flies in the face of the multiple use principle, and is inconsistent with prior MLC decisions which have affirmed that in the case of Crown lands, the claim holder has no surface rights other than those enumerated in section 50(2):

> In the case of Crown lands, it does not necessarily follow that surface rights uses cannot co-exist with mining rights; the holder has no right title or claim to the surface of the claim other than those enumerated in subsection 50(2). While mining is recognized as a high use, the changes in the **Mining Act** discussed in the cases above outline the principle of multiple uses. The test is one of compatibility and whether there is an expectation of exclusive use of the surface rights by the mining claim holder.[58]

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[55] For e.g., see also ss. 7, 26(6)-(10), 54, 58, 60-67, 70-72, 79, 81, 92(4), 95-97, 104, 164, and 176.

[56] MLC Reasons pp. 30, 33 [AB Vol. 1, tab 2B, p. 41, 44]

[57] Indeed, the MLC appeared to recognize this, stating that "that "the Mining Act does not say anything definitive about the uses that a mining claim holder may put to the surface." MLC Reasons, p. 34 [AB Vol. 1, tab 2B, p. 45]

[58] *Gerry Roy v. Berry, Ken McCombe & the Minister of Natural Resources*, File No. MA 014-00, Order of the Mining and Lands Commissioner, November 8, 2000 at p. 22 [*McCombe*] [emphasis added]. See also *Tony Robert Yozipovic v. Lawrence Timothy Watson*, File No. MA 016-07, Order of the Mining and Lands Commissioner, May 11, 2012, where the surface rights were under private ownership, and both sections 50 and 51 were held to apply, at p. 12: "...as the holder of the

34. The words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of the legislature. It is presumed that the provisions of legislation are meant to work together as parts of a functioning whole, and that the legislature does not intend its legislation to have absurd consequences.[59] Applying these principles, it is plain and obvious that the MLC erred in interpreting sections 50 and 51 to apply to different claims – a fundamental misinterpretation that led to its misapplication of section 51 to the facts of this case.

35. Nowhere in either sections 50(2) or 51(1), or anywhere else in the Act, does it state that the section 50(2) is only applicable to land where the surface rights are privately owned, while section 51(1) is applicable to land where the surface rights are owned by the Crown. Such an interpretation does not flow from use of the terms "mining claim" and "unpatented mining claim". Moreover, even the MLC seems to see-saw back and forth on section 50's application stating, e.g., that section 50(1)(a) "is useful"[60], that it provides "guidance"[61], and that "s. 50(1) works to establish a right (and a relationship only between the claim holder and the Crown) under the Act", but then says "the nature of this relationship has no bearing on this case".[62]

36. Moreover, the Legislature anticipated circumstances where land is privately owned, by defining the term "surface rights owner" to mean "in respect of an area of land, an owner in fee simple of the land, as shown in the appropriate land registry office, who does not own the mining rights for the land."[63] Had section 50(2) been intended to apply only to private land, where there is a surface rights owner, or section 51 to apply only where there is not a surface rights owner, the

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unpatented mining claim, the Applicant has entitlements to use the surface of the land stemming from subsections 50(2) and 51(1) of the **Mining Act** as they existed on the date of his original application to the tribunal in 2007." [Emphasis added]

[59] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham: LexisNexis Canada, 2008) at 1, 300-301, 325.

[60] MLC Reasons, p. 31 [AB Vol. 1, tab 2B, p. 42]

[61] MLC Reasons, p. 32 [AB Vol. 1, tab 2B, p. 43]

[62] MLC Reasons, p. 32 [AB Vol. 1, tab 2B, p. 43]

[63] *Mining Act*, R.S.O. 1990, c. M.14, s. 1

provisions would have said so.[64] Similarly, "Crown land" is defined under the Act to exclude, *inter alia*, "land, the surface rights, mining rights or the mining and surface rights of which are under lease or licence of occupation from the Crown". Had the legislature intended section 50 not to apply to Crown land that also would have been expressly stated. The application of section 50(2) to Crown land has also been expressly acknowledged by the MNR in its *Free Use Policy*, which permits buildings placed "on an unpatented mining claim used by the holder of the claim (as allowed under the *Mining Act*, subsection 50(2))" and "Camping on Crown land while undertaking mineral exploration activities as allowed under subsection 50(2) of the Mining Act…"[65] If section 51 granted unpatented claim holders broad surface rights over Crown lands, other provisions of the Act would be redundant and render the Act incoherent.[66]

37. That the priority of surface rights in section 51 refers to the limited surface rights of a mining claim holder set out in section 50 is consistent with the grammatical construction of section 51(1). Section 51(1) uses the definite article "the" to introduce "mines, minerals and mining rights", which "[i]ndicates that the noun following it is someone or something previously mentioned or understood from the context."[67] The implication of this construction is that under section 51(1) priority is granted to those rights of the mining claim holder that are necessary for the purpose of prospecting and the efficient exploration, development and operation of the mines, minerals and mining rights previously mentioned, being mines, minerals and mining rights in the mining claim, i.e., "therein", as stated in section 50(2).

38. The intent behind what is now section 51 of the Act was to preclude a party from alienating

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[64] As in, for example, section 46.1 of the Act, which states that, "If a mining claim is staked on land for which there is a surface rights owner," confirmation of the staking of the mining claim must be given to the surface rights owner.
[65] PL 3.03.01, issued September 20, 2004, see Table A – Free Uses of Public Lands, Column B, Permitted Uses/Limitations, at p. 4 [AB Vol. 4, tab 45, p. 837]
[66] For example, s. 175, which sets out the rights over land that may be granted to a leaseholder for the proper working of a mine, would not need to exist if an unpatented mining claim holder already had those rights.
[67] D. Dukelow, *The Dictionary of Canadian Law*, 4th ed. (Toronto: Thomson Reuters Canada, 2011), p. 1291 [emphasis added].

Crown land simply by staking the land, without developing minerals from it. Section 51 came from the *Report of the Public Lands Investigation Committee, 1959.*[68] In the early days of the *Mining Act*, a mining claim holder who obtained a Crown grant to the land became owner of both the mining and surface rights; as a result, much of the land that was alienated under the *Mining* Act was kept from other uses "without itself producing mineral of value."[69] In 1957, the Act was amended to allow for the reservation, in a patent or lease, of all surface rights considered necessary for any purpose other than the mineral industry which were not essential to the development of the mines, minerals and mining rights.[70] Industry criticized this amendment, asserting that the surface rights required for mining purposes could not be known prior to sufficient exploration and development, and the 1959 Committee was then struck to "devise some means of granting mining lands which will not hinder the industry and at the same time prevent large areas of the Province from being alienated with no development or exploration other than the performance of sufficient work to enable the claim holder to obtain patent."[71]

39. Sections 50 and 51 do not grant an unpatented mining claim holder surface rights to Crown land at large, for any purpose that can be tied to mines, minerals or mining rights, *anywhere*, yet the MLC came to precisely this conclusion finding that "section 51 gives a prior right to surface use to the claim holder with respect to <u>all</u> activities covered by the Act…..".[72]

40. The MLC's erroneous interpretation allows CCC to alienate a piece of Crown land based on an assertion that it might one day develop a railroad to service a mine somewhere other than on that land. Such an interpretation allows any party to effectively alienate *any* piece of Crown land under the *Mining Act* simply by staking a claim on the basis that a road, railroad, airport, or any

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[68] *Report of the Public Lands Investigation Committee, 1959*, October 1961 [AB Vol. 4, tab 44, p. 788]; *Kamiskotia Ski Resorts Limited v. Lost Treasure Resources Ltd.* (1984), 6 M.C.C. 460 (Mining and Lands Comm.) at 462; *McCombe*, supra, p. 22.
[69] *Report of the Public Lands Investigation Committee, 1959*, October 1961, p. 1-2, 4 [AB Vol. 4, tab 44, p. 797-798, 800]
[70] *Report of the Public Lands Investigation Committee, 1959*, October 1961, p. 1-2 [AB Vol. 4, tab 44, p. 797-798]
[71] *Report of the Public Lands Investigation Committee, 1959*, October 1961, p. 4, 6-7. [AB Vol. 4, tab 44, p. 800, 802-803]
[72] MLC Reasons, p. 32 [AB Vol. 1, tab 2B, p. 43]

other development built on that land could, in theory, be for the purpose of the development and operation of mines, minerals, or mining rights *somewhere* in the province. This runs directly contrary to the clawing back of surface rights in the history of the *Mining Act* and the *Report of the Public Lands Investigation Committee, 1959*. While the MLC referred to this very issue, noting that prior to 1957 a patentee obtained all the surface rights which were "in effect alienated from the Crown forever", it seems to have been lost on the MLC that its interpretation of section 51 accomplishes this all over again. The MLC's interpretation allows CCC to continue to try to wield its unpatented mining claims as bargaining leverage against another party, in a backdoor attempt to share in the potential profits from a mineral deposit owned and being developed by that other party (in this case, Cliffs).[73]

C. The Respondent's Heavy Burden on a Section 51 Application

41. On a section 51 application, the MLC has previously and properly held that the burden of proof is on the Respondent to show that the granting of a release would interfere with its exploration or extraction of minerals on the mining claim:

> To defend an application for release of surface rights, the respondent must show that the granting of the release would interfere with its exploration or extraction of minerals or other activity on the Mining Claims.[74]

42. The MLC referred to the policy behind section 51 in its decision, noting that prior to 1957 a patentee obtained all the surface rights which were "in effect alienated from the Crown forever" and that "the Committee's main concern...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."[75]

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[73] See direct exam. of F. Smeenk, Feb. 6, 2013, transcript vol. 3, p. 117, l. 2-15 [AB Vol. 1, tab 9, p. 150]
[74] *Ontario Hydro v. Nahanni Mines Limited*, Appeal No. MA 026-92, Order of the Mining and Lands Commissioner dated November 17, 1993 at p. 9 [emphasis added].
[75] MLC Reasons, p. 34 [AB Vol. 1, tab 2B, p. 45]

43. Consistent with this policy, the MLC has noted that "section 51 was not drafted to provide for a ransom"[76] and, in weighing the interests of the applicant and the interests of the respondent, the respondent must convince the tribunal "that the programs or the nature of the holdings by the respondent are such that the multiple use principle should not be applied in this case."[77] In other words, the respondent must adduce evidence strong enough to displace the presumption in favour of multiple use of Crown lands.

44. In this case, the MLC categorically ignored its prior jurisprudence and the policy behind section 51 and held in error, that "[t]he 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."[78]

45. The Act is clear that a mining claim does not give the claim holder the right to preclude other uses of the surface rights on the claim absent evidence that the other uses will interfere with the claim holder's limited right to use of the surface rights to exploration and extraction of minerals in its claim.[79] It cannot hold all other surface uses to ransom simply by arguing its activities would be "affected". As discussed below, CCC adduced no evidence of interference with its use of the surface rights for developing mines and minerals on its claims, and there was no basis for the MLC's holding that an easement would interfere with the development of CCC's claims. Indeed Cliffs was, and remains, prepared to adjust the route of the Road to accommodate CCC's reasonable and legitimate requests with respect to exploration of the Mining Claims.[80]

D. MLC Erred in its Interpretation and Application of Section 51

(i) MLC Failed to Place an Evidentiary Burden on the Respondent

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[76] *Northland Power v. Morris H.J. Labine and Ministry of Natural Resources*, File No. MA 011-95, Order of the Mining and Lands Commissioner dated June 7, 1996 at p. 12.
[77] *The Improvement District of Gauthier v. Egg* (1987), 7 M.C.C. 281 at 286 [*Gauthier*] [emphasis added].
[78] MLC Reasons, p. 36 [AB Vol. 1, tab 2B, p. 47]
[79] *Mining Act*, R.S. O. 1990, c. M.14, s. 50(2) and 51(1).
[80] Boor Affidavit #1 at paras. 9-11, 14, 18-21, 37 [EB pp. 9-19, AB Vol. 2, tab 2, p. 217-219, 222]

46. Rather than placing the burden on CCC to show evidence of interference with the use of the surface of the Mining Claims to develop the mines, minerals, and mining rights in the Mining Claims, such that the multiple use principle should not apply, the MLC treated the case simply as one of competing corporate interests, contrary to its own jurisprudence.[81] Without evidence or legal justification, it inflated CCC's rights and preferred CCC's speculative plans for a railway over the ability of the land to accommodate Cliffs' Road without interfering with the actual, limited rights of CCC.

47. In *Gauthier*, the MLC stated that the respondent must convince the tribunal "that the programs or the nature of the holdings by the respondent are such that the multiple use principle should not be applied...":[82] However, the MLC ignored this in holding in this proceeding that, with respect to the multiple use principle, "[i]t 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."[83] The MLC's starting point was incorrect, since it wrongly found that an unpatented mining claim holder's surface rights on Crown lands are very broad. This is wrong based on the proper interpretation of section 50(2), as argued above. Absent interference with specific surface rights to explore, develop and operate mines on that land, the claim holder has no legal basis on which to preclude other uses of the surface of Crown lands.

48. The MLC therefore incorrectly weighed evidence of competing proposed uses, going beyond its limited role to simply evaluate the evidence underlying CCC's refusal to give its consent to determine, first, whether the limited surface rights of CCC would be affected and

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[81] MLC Reasons, p. 42: "What is before the tribunal is no more than a simple corporate fight...". [AB Vol. 1, tab 2B, p. 53], contrast with *Ontario Hydro v. Nahanni Mines Limited*, Appeal No. MA 026-92, Order of the Mining and Lands Commissioner dated November 17, 1993 at p. 9

[82] *Gauthier*, supra at 286 [emphasis added].

[83] MLC Reasons, p. 36 [AB Vol. 1, tab 2B, p. 47]

second, if so, whether those rights should give way to the public interest in multiple use of Crown land. The mining claim holder must justify its refusal or failure to provide consent in light of the limited surface rights it actually holds under the Act. While consent may be "contrary" to CCC's "business interests", it cannot withhold consent based on rights it does not have – and it does not have exclusive rights to use the surface of the Mining Claims for *any* purpose that may be in its business interest. The MLC contradicted its own ruling in this proceeding in a preliminary order regarding intervener status, that section 51 requires the claim holder to justify its refusal of consent in the face of the multiple use principle:

> ...This is all that section 51 is about – a mining claim holder has either refused consent or failed to provide it (as in the **Kamiskotia** case) and the Commissioner is being asked to assess that refusal or failure in light of an application for disposition. A hearing is needed to give the mining claim holder the opportunity to explain the reasons for his or her position in the face of the principle of multiple use of public lands...The role of the Mining and Lands Commissioner in a section 51 hearing is to "weigh the interests of the parties in accordance with the principle of multiple use of public lands." This is really "it" in a nutshell.[84]

49. This must be juxtaposed against the MLC's later statement on the merits:

> "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..."[85]

(ii) No Evidence of Interference

50. Applying an incorrect interpretation of the Act and the wrong evidentiary standard, the MLC concluded that "CCC would encounter serious issues that would negatively affect the development of its mining claims were Cliffs to obtain its desired easement,"[86] ignoring the absence of actual evidence from CCC of interference with development of mines and minerals on the claims, and contrary to the evidence before it.[87] In dismissing the application on that basis, the MLC exceeded its mandate under section 51 and, by engaging in its own weighing of competing

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[84] *2274659 Ontario Inc. v. Canada Chrome Corporation and Minister of Natural Resources and Neskantaga First Nation*, File No. MA 005-12, Order of the Mining and Lands Commissioner dated August 24, 2012 ("MLC Order on Neskantaga FN Party Status") at p. 11 [emphasis added] [AB Vol. 4, tab 33, p. 740]
[85] MLC Reasons, p. 42 [AB Vol. 1, tab 2B, p. 53]
[86] MLC Reasons, p. 39 [emphasis added] [AB Vol. 1, tab 2B, p. 50]
[87] Boor Affidavit #1, paras 11-37 [EB pp. 14-19, AB Vol. 2, tab 17, p. 217-222]; direct exam. and re-exam. of W. Boor, Feb. 4, 2013, transcript vol. 1, p. 100, l.2-18 and p. 170, l. 22 – p. 171, l. 9 [AB Vol. 1, tab 5, p. 139 and tab 7, p. 145-146]

uses, pre-empted consideration of those matters by the MNR and through environmental assessment processes.

51. CCC's 'evidence' of interference consisted of a collection of straw-man assertions that fell largely into two categories: (1) possible interference with access to speculative consolidated aggregate (bedrock) quarries on the claims, which might be used for developing a railway; and (2) access to the sand ridge in the Mining Claims, for the purpose of testing for indicative samples for minerals which might be found "up ice". None of CCC's 'evidence' was actually evidence that an easement would interfere with its use of the surface of the Mining Claims to develop mines and minerals on the claims. In fact, it was a finding of the MLC that Smeenk "could not say with certainty whether the road would interfere with any mining activity on CCC's mining claims", only that Smeenk "believed that interference was 'likely'."[88]

52. Tellingly, CCC did not assert that a rail corridor on the surface of the Mining Claims would 'sterilize' the development of those claims, as it argued that an easement for a road would. This simple fact alone demonstrates that CCC is not concerned with 'sterilizing' the development of minerals on the claims – it is concerned with 'sterilizing' its stranglehold over a transportation route.[89] But it is not the purpose of the *Mining Act* to facilitate the building of monopolistic transportation infrastructure across the Province.

a. No Evidence of Interference with Aggregate

53. CCC's evidence of the *available supply* of aggregate to build a railway[90] along the claim route was irrelevant to the question of interference with the use of surface rights to develop mines and minerals in the Mining Claims. Further, there was no evidence of interference, even assuming

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[88] MLC Reasons, p. 13 [AB Vol. 1, tab 2B, p. 24]

[89] Smeenk referred to the mining claims as 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." MLC Reasons, p. 20 [AB Vol. 1, tab 2B, p. 31]

[90] The *Mining Act* defines "minerals" to mean "all naturally occurring metallic and non-metallic minerals, including coal, salt, quarry and pit material, gold, silver and all rare and precious minerals and metals, but does not include sand, gravel, peat, gas or oil." (s.1) [Emphasis added] Therefore, minerals could include consolidated aggregate – bedrock – but not unconsolidated aggregate, such as sand and gravel.

CCC has the prior right to the surface in order to, some day, perhaps, build a railway:

(a) First, section 51 of the Act does not give priority to the claim holder to the use of sand, peat, and gravel (these would be and are the subject of aggregate permits or permit applications under the *Aggregate Resources Act*[91]).

(b) Second, as regards consolidated aggregate (bedrock), an easement over the surface of an unpatented mining claim alone would not grant Cliffs the right to take minerals from the ground. CCC's belief that Cliffs would take bedrock from the Mining Claims was on its own admission speculation,[92] and Cliffs' direct evidence was that to the extent that construction of the Road would require quarry and pit material or naturally occurring non-metallic minerals, "Cliffs will not be sourcing any of those materials from the Mining Claims or the Transferred Mining Claims."[93] Therefore, CCC's claim that if granted an easement Cliffs would deplete available bedrock was unfounded.

(c) Third, CCC's own evidence is that there is no available bedrock in the CCC Claims over which the Road would cross.[94]

54. CCC's "evidence" regarding aggregate consisted of unfounded assertions that the Road would cover CCC's boreholes and that this would 'sterilize' CCC's development of aggregate in the Mining Claims. Mr. Lavigne asserted, without foundation, that if a road were built along the boreholes, it would 'sterilize' the aggregate in that stretch from any other use,[95] that is, use in constructing a railroad, since the boreholes were drilled for that purpose. The MLC seemed to accept this, stating, "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."[96]

55. The MLC's conclusion that "any attempt to develop the claims would have to make use of the borehole line", and that "[i]t 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" was made without any evidentiary basis. Development of the claims is not dependent on use of the

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[91] R.S.O. 1990, c. A.8

[92] Cross-exam. of M. Lavigne, Feb. 7, 2013, transcript vol. 5, p. 115, l. 7 – p. 116, l. 12 [AB Vol. 1, tab 12, p. 179-180]

[93] Fourth Affidavit of Gabriel Johnson, sworn September 21, 2012, at para. 6 [EB p. 1081, AB Vol. 3, tab 24, p. 471]

[94] See footnote 34 above, and Hartmann Affidavit Ex. "B", Tetra Tech Report Appendices, App. 12, pp. 26-61 [EB p. 1315, and printed pages reproduced in MLC Exhibit 20 at EB pp. 1648-1683, AB Vol. 3, tab 26B, p. 541-576]

[95] Direct exam. of M. Lavigne, February 7, 2013, transcript vol. 5, p. 83. l. 1 – p. 84, l.5 [AB Vol. 1, tab 11, p. 173-174]

[96] MLC Reasons, p. 40 [AB Vol. 1, tab 2B, p. 51]. In contrast, see Cliffs' evidence that a road would benefit other mining claim holders and would make the Big Daddy deposit itself more economically viable: Boor Affidavit #4, paras. 14, 16-17. [EB p. 1007-1008, AB Vol. 3, tab 23, p. 461-462].

borehole line, which takes up an almost infinitesimal percentage of the surface area of each Mining Claim.[97] The MLC's conclusion was also premised on the assumption, unfounded in evidence, that the CCC Claims can only be accessed in a linear north-south fashion.[98]

b. No Interference with Development of Minerals in the Claims

56. CCC's other assertion, that it planned to conduct future sampling in the claims for "representative" samples of diamonds or other minerals "up ice", i.e. on lands not part of the Mining Claims in issue, was both not related to development of mines and minerals in the claims and speculative. There is no evidence of a deposit of ore or diamonds in the Mining Claims.[99] Rather, CCC's evidence was that the sand ridge running through the Mining Claims acts as a "net" capturing samples of what might exist elsewhere: "this line of samples essentially becomes a very fine net capturing minerals that are representative, mineral deposits that might be found up-ice..."[100] CCC's proposed future sampling was not to develop minerals in the claims themselves, there was no evidence of future work planned, and CCC's evidence was that any follow up is contingent upon market support.[101] Despite this, the MLC held that it was left with the "impression" that CCC would carry out future mineral sampling work.[102]

57. There is also an obvious contradiction between CCC's proposed railway activities on the claims and its proposed mineral exploration of the claims, as the MLC itself acknowledged: "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

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[97] Most of the Mining Claims are each 1600 m x 1600 m (256 hectares), see Kruse Affidavit #2, Ex."B" [EB pp. 760-867, AB Vol. 2, tab 22B, p. 339-446]. The diameter of a borehole is 7.5 inches (cross-exam. of M. Lavigne, Feb. 7, 2013, transcript vol. 5, p. 105, l.4-6 [AB Vol. 1, tab 12, p. 178]).

[98] To the contrary, e.g., CCC's exploration activities to date have been undertaken thorough access by helicopter (Direct exam. of M. Lavigne, Feb. 7, 2013, transcript vol. 5, p. 65, l. 5-20 [AB Vol. 1, tab 11, p. 172]).

[99] Agreed Facts, para. 27 [EB p. 1708, AB Vol. 3, tab 27, p. 590]; CCC also relied on evidence relating to the prospective diamond exploration activities of a company called Debut Diamonds which was completely irrelevant and is not evidence of work or activities being carried out by CCC – Debut Diamonds is a public company, and its assets are not assets of KWG or CCC (cross-exam. of M. Lavigne, Feb. 7, 2013, transcript vol. 5, p. 87, l. 8 – p. 89, l. 23 [AB Vol. 1, tab 12, p. 175-177]).

[100] Direct exam. of M. Lavigne, Feb. 7, 2013, transcript vol. 5, p. 54, l. 8-16 [AB Vol. 1, tab 11, p. 170]

[101] Direct exam. of M. Lavigne, Feb. 7, 2013, transcript vol. 5, p. 57, l. 11-14 [AB Vol. 1, tab 11, p. 171]

[102] MLC Reasons, p. 39 [AB Vol. 1, tab 2B, p. 50]

exploration program in years to come." The MLC nevertheless cavalierly dismissed this concern, stating that it was "reluctant to believe" that the wished-for transportation corridor activities would not also somehow make use of the geological information.[103] It went on to effectively grant CCC exclusivity of surface rights over the claims – not to protect against interference with the use of the surface for the development of mines and minerals in the claims as required by the Act – but to protect ease of access to the sand esker within those claims, for the purpose of exploring the geology "in the area":

> 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.[104]

58. To allow CCC to use section 51 of the Act to ensure such speculative future activity – not intended to develop mines or minerals within the claims – to the exclusion of any other use of the surface of the Crown land, leaves the land alienated without producing minerals, contrary to the purpose for which section 51 was enacted. In any event, CCC does not need the boreholes – which it has already drilled and sampled and which cover only a tiny portion of each Mining Claim (and assuming it does not cover them with a railroad) – to explore minerals in the Mining Claims.

c. Road and Railroad can Co-Exist

59. The MLC held that "[t]here 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,"[105] and it went on to conclude:

> 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

[103] MLC Reasons, p. 39 [Emphasis added] [AB Vol. 1, tab 2B, p. 50]
[104] MLC Reasons, p. 42 [Emphasis added] [AB Vol. 1, tab 2B, p. 53]
[105] MLC Reasons, p. 40 [AB Vol. 1, tab 2B, p. 51]

> equally well-built transportation systems designed to move very heavy loads could be situated on the sand ridge or esker.[106]

60. Again, the MLC erred in law. The limited section 50(2) surface rights, and the section 51 grant of priority to the mining claim holder of those rights over subsequent users of surface rights for development of mines, minerals and mining rights in the claim, do not grant CCC priority of surface rights at large just because it asserts that its proposed railway is for a mine elsewhere.

61. In any event, there was evidence before the MLC that the road and railroad could co-exist, contrary to CCC's "assertion that a road and railroad could not co-exist together" which the MLC noted was Lavigne's "opinion and not that of a qualified civil engineer."[107] Cliffs adduced evidence of two representative cross-sections of the Road and a typical heavy haul railway bed as contemplated by the "Canada Chrome Railway Feasibility Study" prepared by CCC's consultants,[108] showing that whether on separate embankments or a common embankment, construction of both could be accommodated well within the 100 metre width.[109]

E. MLC Erred in Requiring Cliffs to Lead Evidence of "Public Interest"

62. The MLC held that "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," asserting, "[t]his 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."[110]

63. This is wrong. There is *always* a public interest element to consider, being the public interest

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[106] MLC Reasons, p. 42 [AB Vol. 1, tab 2B, p. 53]
[107] MLC Reasons, p. 16 [AB Vol. 1, tab 2B, p. 27]
[108] Affidavit of C. Tattersall, sworn September 20, 2012 ("Tattersall Affidavit") at paras. 7-11 and Ex. "B" and "C" [EB pp. 991-992, 999-1000, AB Vol. 3, tab 25-25C, p. 474-475, 482-483].
[109] Tattersall Affidavit at paras. 9-10 and Ex. "B" [EB pp. 991-992, 999, AB AB Vol. 3, tab 25-25B, p. 474-475, 482-482]. Cliffs, in fact, specifically addressed Lavigne's evidence. Tattersall's evidence was as follows: "In response to the statement at paragraph 44 of the Lavigne Affidavit that the glacial eskers along which the CCC Claims were staked 'is very narrow in some locations, at times spanning less than 100 m', I am not aware of locations where the glacial eskers reduce the width of high ground to less than 100 metres. However, if this situation does exist, a road and a railway would be able to co-exist on such a formation, as shown on the Drawing. Moreover, narrow sections of suitable terrain can be widened as necessary, and in my experience often are." Tattersall Affidavit, para. 15 [EB p. 993, AB Vol. 3, tab 25, p. 476]
[110] MLC Reasons, pp. 41- 42 [emphasis added] [AB Vol. 1, tab 2B, p. 52-53]

in upholding multiple use of Crown lands. This explains the onus on a respondent to displace the presumption of multiple uses, by demonstrating that the proposed other use would interfere with its ability to work its mining claim. The test is not whether the respondent's "ability to work its claims would likely be affected by the existence of a road,"[111] or that "CCC's ability to work its claims will be negatively affected by the existence of a road"[112] and if so whether the proposed other use has a public element. Rather, it is whether the respondent has sufficiently displaced the presumed public interest in maintaining multiple uses of Crown lands.

64. As long as there is another proposed use of the surface, whatever that proposed use may be, the public interest in multiple use of Crown lands is engaged. Whether or not the public is served by the easement is for the MNR to decide in determining whether or not to grant it.[113]

65. In any event, there was evidence of public interest. Aside from the public interest in creating access to and developing mineral deposits that would otherwise be stranded pending CCC's "snowball's chance in hell" of raising the billions of dollars required for a railroad, the proposed Road will not just be used by Cliffs and will thereby create a transportation route to a large portion of northern Ontario not otherwise served.[114]

F. MLC Based its Decision on Irrelevant Considerations

66. The MLC also erred in basing its decision on considerations that were irrelevant to whether CCC had demonstrated interference with the development of the Mining Claims.

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[111] MLC Reasons, p. 38 [AB Vol. 1, tab 2B, p. 49]

[112] MLC Reasons, p. 42 [AB Vol. 1, tab 2B, p. 53]

[113] See *Grant of Easements* PL 4.11.04, April 7, 2006, and *Application Review and Land Disposition Process,* PL 4.02.01, July 24, 2008 at Ex. "A" and "B" to Johnson Affidavit #2 [EB pp. 31, 35, AB Vol. 2, tab 18A-18B, p. 234-257]

[114] Boor Affidavit #4, at paras. 16-17; see also para. 14 [EB pp. 1007-1008, AB Vol. 3, tab 23, p. 461-463]. CCC's unfounded assertion that the expected truck traffic on the Road would make it 'de facto' exclusive to Cliffs also fell apart on cross-examination: "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." (MLC Reasons, p. 13 [AB Vol. 1, tab 2B, p. 24]; see also cross-exam. of F. Smeenk, Feb. 6, 2013, transcript vol. 3, p. 168, l. 1 – p. 170, l. 4 [AB Vol. 1, tab 10A, p. 167-169].) See also submissions of Neskantaga First Nation that this will be the first all-season road into the region, summarized in MLC Order on Neskantaga FN Party Status at p. 4 [AB Vol. 4, tab 33, p. 733]

(a) Proposed easement crossing the Mining Claims: The MLC held that CCC would find its work affected along the length of its claims because "the proposed easement would touch on or cross over each of the mining claims in some fashion."[115] This is entirely circular, and incorrect. The Mining Claims at issue were, by definition, the CCC claims crossed by the proposed easement.

(b) Evidentiary procedure: The MLC said it "was frustrated by the position taken by Cliffs that actual witnesses did not have to be produced" even though they presented evidence through affidavits and cross-examination.[116] The manner in which evidence was presented at the hearing is irrelevant to the question of whether, as a matter of fact, CCC discharged its burden on the application. The MLC confused procedure with substance, and its comments on this are, in any event, perplexing, if not troubling.[117]

(c) Business relationship of the parties: Despite stating that the allegations relating to the past relationship between Cliffs and KWG "played no role"[118] in its decision, the MLC devoted several pages of its reasons to the relationship between the parties, perplexingly stating that "[t]he history associated with the parties to this hearing is important", and, "...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..."[119] It is clear on the face of the decision that the MLC improperly allowed the business relationship of Cliffs and KWG, including their Big Daddy deposit joint venture, Cliffs' offer to purchase KWG at a certain point in time, and Cliffs' acquisition of other mining interests in the Ring of Fire, to influence its decision.

G. Court Ought to Dispense with Consent

67. Unless otherwise provided, this Court may make any order or decision that ought to have been made by the tribunal appealed from and may make any order or decision that is considered just, and may also, in a proper case, draw inferences of fact from the evidence to enable the Court to determine the appeal, except where inconsistent with a finding that has not been set aside.[120] As

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[115] MLC Reasons, p. 39, see also 42 [AB Vol. 1, tab 2B, p. 50]

[116] MLC Reasons, p. 38 [emphasis added]; see also p. 37, where the MLC stated that it "was struck by the intransigence displayed by both sides in the matter when it came time to discuss their plans" and that "[t]he 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." [AB Vol. 1, tab 2B, p. 48-49]

[117] If lack of information was a legitimate concern of CCC in its ability to defend the application, it was open to it to avail itself of the procedures available for discovery, and the remedy for procedural concerns would have been a procedural order, such as an adjournment or order for disclosure of documents.

[118] MLC Reasons, p. 27 [AB Vol. 1, tab 2B, p. 38]

[119] MLC Reasons, p. 27; see also pp. 28 and 38 where the MLC made various statements suggesting the behavior of the parties had influenced its decision. [AB Vol. 1, tab 2B, p. 38-39, 49]

[120] *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 134(1)(a) and 134(4)(a)

section 133 of the *Mining Act* does not restrict the orders that may be sought on appeal,[121] the Court may make any order or decision that ought to have been made by the MLC and may make any order or decision that it considers just.

68. As CCC adduced no evidence of interference with the exploration and development of mines and minerals on its claims, and succeeded on the application based on the MLC's erroneous and unreasonable interpretation of the law – including ignoring the limits on surface rights in section 50, its reversal of the evidentiary burden of proof on the Applicant, misapprehension of the principle of multiple use of Crown lands, and irrelevant considerations – it is appropriate for this Court to not only set aside the MLC's Order but also dispense with CCC's consent to Cliffs' easement application.

69. Moreover, the numerous comments in the reasons of the MLC regarding Cliffs and its relationship with CCC,[122] destroy the appearance of fairness and impartiality in any future hearing of these same issues before the Commissioners.

PART V - ORDER REQUESTED

70. Cliffs respectfully requests that the Order of the MLC be set aside and that an Order be granted as follows:

(a) Dispensing with CCC's consent pursuant to s. 51(5) (now s. 51(3)) of the *Mining Act,* and permitting Cliffs' easement application to the Minister of Natural Resources pursuant to the *Public Lands Act*;

(b) its costs of this appeal and of the proceedings before the MLC; and

(c) such further and other relief as to this Honourable Court may seem just.

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[121] *Mining Act*, R.S. O. 1990, c. M.14, s. 133

[122] See, *inter alia,* comments in MLC Reasons at pp. 27, 28, 29, 37, 38, including references to "the disingenuousness of Cliffs behaviour" and, "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." [AB Vol. 1, tab 2B, p. 38-40, 48-49]

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 16th day of December 2013.

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Court File No. 445-13

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

B E T W E E N:

2274659 ONTARIO INC.

Applicant/Appellant

- and -

CANADA CHROME CORPORATION

Respondent/Respondent in Appeal

CERTIFICATE

I estimate that 1 day will be needed for my oral argument of the appeal, not including reply. An order under 61.09(2) (original record and exhibits) is not required.

DATED AT Toronto, Ontario this 16th day of December, 2013.

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2274659 ONTARIO INC. -and- CANADA CHROME CORPORATION
Applicant/Appellant Respondent/Respondent in Appeal

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ONTARIO
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Proceeding commenced at Toronto

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