

File No. MA 020-97

L. Kamerman)
Mining and Lands Commissioner)

Wednesday, the 29th day
of October, 1997.

THE MINING ACT

IN THE MATTER OF

A prosecution pursuant to Section 170 of the **Mining Act**, that fines totalling \$10,000 be levied against each of the Defendants for each violation of clause 164(1)(d) of the **Mining Act**;

B E T W E E N:

DANIEL GERVAIS

Complainant

- and -

BRUNO GERVAIS, MARCEL GERVAIS AND 957293 ONTARIO LIMITED

Defendants

FINDINGS AND REASONS

This matter was heard on Wednesday, the 17th day of September, 1997, in Conference Room "A" of the Days Inn, 117 Elm Street, Sudbury, Ontario.

Appearances

Franklin Richmond Counsel on behalf of the Complainant

Marcel Leger Counsel on behalf of each of the Defendants

Preliminary Matters

Mr. Richmond brought a preliminary motion pursuant to clause 34(1)(a) of the **Provincial Offences Act**, R.S.O. 1990, c. P.33, as amended by S.O. 1992, c. 20, s. 1; S.O. 1993, c.27, Sched.; S.O. 1993, c. 31, s. 1; S.O. 1994, c. 10, s. 23; S.O. 1994, c. 17, ss. 130, 131; S.O. 1994, c. 27, s. 52; S.O. 1995, c. 6, s. 7 for the amendment of each of the counts in

the information:

On page 1, in the paragraph immediately preceding the "Particulars of Count One", the words, "on or about the 7th day of June, 1995" should be changed to read, "on or about the 7th day of June, **1997**".

On page 3, in the second paragraph of the count, which reads, "(2) AND FURTHER on or about the 7th day of June, 1995...", the date should be amended to read "the 7th day of June, **1997**".

On page 3, in the third paragraph of the count, which reads, "(2) AND FURTHER on or about the 7th day of June, 1995...", the date should be amended to read "the 7th day of June, **1997**".

Monsieur Leger indicated that he consented to the proposed amendments. The tribunal found that it would allow each amendment as set out above, on the authority provided in clause 34(1)(a) of the **P.O.A.**

Pleas

Messrs. Richmond and Leger waived the reading of the Information.

Monsieur Leger entered the following pleas on behalf of his clients:

Bruno Gervais	As to the first count	Not guilty
	As to the second count	Not guilty
	As to the third count	Not guilty
Marcel Gervais	As to the first count	Not guilty
	As to the second count	Not guilty
	As to the third count	Not guilty
957253 Ontario Inc.	As to the first count	Not guilty
	As to the second count	Not guilty
	As to the third count	Not guilty

Evidence of Witnesses

Rene Gervais, age 55 of Lot 12, Concession VI, Capreol, Ontario, mine manager of the Moose Mountain Mine, gave the following evidence.

The Moose Mountain Mine is located in Hutton Township, Lots 8 and 9, Concession IV. On the Index to Land Disposition (Ex. 7), the Moose Mountain Mine property is outlined in red, being comprised of approximately 5000 acres. Regional Road 84, shown with a double red line runs into the property from south east to north west, with what is known as the Moose Mine Road going into the mine. Legal rights of way for the Ironside Lake Cottagers, which runs off of Regional Road 84, are shown with a green and red stripe.

Rene Gervais stated that numerous roads run off to the open pits to the tailings and to the located where the processing mill was located. The mining rights to the area shown in red are owned by his son, Daniel Gervais. Two certified copies parcel registers setting out that Daniel Gervais is the owner of 100 percent of the mining rights were entered as exhibits (Ex. 2a, being Parcel Register # 47623 and 3a, being Parcel Register #47624, both signed by Walter Zaverucha, Land Registrar and dated September 5, 1997).

As the manager of the Moose Mountain Mine, Rene Gervais received instructions from Daniel Gervais regarding the posting of signs. Five signs were made and three were posted. Two remain in Rene Gervais' possession. The cost of the signs was \$100 each.

The locations for the placing of the signs was described and is also noted on the Index to Land Disposition with an asterix at each location. The eastern most asterix is located on the mill road, at a location 20 feet south of the Moose Mountain Road. The middle asterix is at the entrance of the Number 3 Pit, which is reached via a road which runs south of the Moose Mountain Road. The sign was located on that southbound road a distance of 60 feet from the Moose Mountain Road. The western most asterix was located on the road leading to the Number 10 Pit. The road to the Number 10 Pit runs off of the legal right of way for the Ironside Lake Cottagers, so that the sign was described as being two roads away from the Moose Mountain Road. The sign was posted on a gate in the road to the Number 10 Pit, which leads directly to the pit, characterized as an open pit.

Two photographs not taken by Rene Gervais (ex. 5A and 5B) were introduced into evidence, which show the sign placed on the road to Number 10 Pit, which is identical to the other two signs. The contents were read into the record and are reproduced below:

No Trespassing By Order of Mine Manager Rene Gervais Mining Act

164(1)(c) Every Person who Pulls Down or Defaces any Rules or Notices Posted up by the Manager of a Mine is Liable to a Fine of up to \$10,000.00

175(14) Every Person who Refuses to Obey is Liable to a Fine of \$250.00 Per Day for each Day of such Refusal

The sign shown in the photographs is that of the Number 10 Pit. In the case of the sign at the Number 3 Pit, it was mounted on a wooden stand with two little skids at the bottom, which allowed it to be moved as might be necessary. In the case of the other two signs, at the Number 10 Pit and on the Mill Road, there was a place for a sign to be mounted which was used for that purpose. The photograph showing the sign placed at the Mill Road (Ex. 5C) shows the place where the "No Trespassing" sign was nailed, with the road being to the right.

Rene Gervais stated that all three signs were posted on June 6, 1997. On that date, the sign located on the sign board shown in Exhibit 5C was still there. At no time did Mr. Gervais remove or instruct anyone to remove the signs.

Rene Gervais stated that the purpose for the installation of the signs was owing to the increased activity in the area in the proceeding months. As he was responsible for the safety of those in the vicinity, constituting a dangerous situation, Mr. Gervais consulted with a lawyer and received advice to post the signs.

During an inspection with his wife, at some time between 3 and 4 o'clock on the afternoon of June 7, 1997, Rene Gervais returned to the various sites of the signs and all three were gone. A fourth photograph (Ex. 5D) shows where the sign was posted, but was no longer located, on the road to Number 10 Pit. There is a metal gate across the road, but the sign was placed in such a way that it would still have been possible to open the gate and drive through. Rene Gervais concluded his evidence in chief by stating that he had instructed his wife and Ms. Plouffe to watch over the signs.

Under cross-examination, Rene Gervais indicated that he was quite familiar with the Moose Mountain Mine property, and resides on an adjacent lot to the north east. He confirmed that the access road is used regularly by him to gain access to his residence.

Rene Gervais stated that he works as manager for Ranger Resources, a limited company owned by his son, Daniel, Andre Gervais and Diane Roy. Rene Gervais confirmed that Ranger does work on a contract basis for a company named Friers, on such matters as road building. Asked about mining activity in the Moose Mountain Mine, Rene Gervais stated that Daniel became the owner in 1991 and the only mining activity which took place since then was in 1994. However, there was also drilling in 1991 and 1992. There are three employees on the payroll, in addition to himself, being Ms. Plouffe, Andre Gervais and Earle Popowich.

Mr. Richmond interjected with a question of relevance of this line of questioning, submitting that cross-examination must go to the issue of relevance or credibility. Monsieur Leger indicated that he wished to explore the reason behind the posting of the signs, which he submitted was relevant. Mr. Richmond submitted that the reason for the posting of the signs is not an issue to be determined by the tribunal. Intent is not an essential element of the charge. Monsieur Leger countered by pointing out that each of the counts contains the words "Wilfully"

which denotes a state of mind which can be explored. Mr. Richmond stated that there is no onus on the complainant to prove that the signs have been pulled down wilfully, as the legislation has been amended and the word, "wilfully" has been deleted. In Bill 26, the **Savings and Restructuring Act**, having received Royal Assent on January 30, 1996, this provision was removed.

Mr. Richmond submitted that wilfully having committed the offence is not an essential element, which leads to a more fundamental issue. This case involves either strict liability of **mens rea**, and defences in cases of absolute liability are not available to the defendants. The issue before the tribunal is the mental element of the person damaging the sign and not the **mens rea** of the person who put it up. The material elements of the offence pursuant to clause 164(1)(d) puts the onus on the complainant to show that there was a sign, having been posted by a mine manager which was defaced. There is no need to prove the intent of the mine manager in putting up the sign. Mr. Richmond warned the tribunal that there are other issues between this complainant and these defendants which are currently before the Courts. He strongly urged the tribunal to stick with the narrow issue. He indicated that he is prepared to argue the law, namely that the intent that is material is that of the defendants.

Monsieur Leger respectfully submitted that the use of the word "wilfully" in the information is not surplusage, but rather that it should be considered as fundamental surplusage. He indicated that Mr. Richmond is attempting to amend the information without going through the requirements of the **Provincial Offences Act**. Without the requirement that the act be wilful, all common law defences, such as abuse of process or entrapment no longer apply. If there is an amendment sought to the Information, Monsieur Leger submits that the defendants are being prejudiced with respect to the charge. Any such amendment would seriously prejudice their case.

Mr. Richmond submitted that clause 34(1)(a) and subsection 34(4) of the **Provincial Offences Act** set out that the charges may be amended. There is no issue of prejudice to the accused, because the issue of intention is still before the tribunal and the defence in connection with **mens rea** is still available. In addition to the **Provincial Offences Act**, there is power in the tribunal found in clause 116(b) of the **Mining Act**, as well as in Rule 21 of the Procedural Guidelines issued by the tribunal in February, 1997. Finally, there is jurisdiction in the tribunal pursuant to section 121 of the **Mining Act** to make its findings on the real merits and substantial justice of the case.

Monsieur Leger submitted that, while section 34 of the **Provincial Offences Act** contemplates the allowable making of amendments, the nature of the proposed amendments is such that they cannot be done without working a substantial injustice, as certain defences are precluded.

The tribunal called a short adjournment to research whether an amendment such as the one proposed, which would effect the nature of defences available, has been allowed

pursuant to the **Provincial Offences Act**, but found that there were none. The tribunal found that any prejudice which might arise could be cured through a brief adjournment to allow Monsieur Leger to regroup and refine his case, according to this finding. The matter was therefore adjourned until after 2 pm.

After the adjournment, upon further cross-examination by Monsieur Leger and objections by Mr. Richmond, the issue of the status of the mine arose. Referring to the definition of a mine in section 1 of the **Mining Act**, which includes a mine which has temporarily suspended operation, Mr. Richmond submitted that the complainant need only show that there is a mine. The tribunal indicated that it wanted to hear the answers to the questions regarding the status of the mine.

Rene Gervais confirmed that the actual ore extraction operation had not gone on for a period of years. The mill road goes to what used to be the mill plant for the mine, which ceased to operate in 1979. There has been no extraction in the Numbers 3 and 10 Pits during the last several years, although there had been activity in 1994.

The signs were erected late in the evening of June 6, 1997, at approximately 10 to 11 o'clock pm. A building had been moved recently onto Number 3 Pit by Marcel and Bruno Gervais, two of the defendants. It was that recent activity and general concern about safety which prompted getting a legal opinion which ultimately led to the erection of the signs. Also, with the building being on the land, when the mine reopens, of which there is a good chance, the defendants will want compensation for their building.

Rene Gervais discussed the existence of other roads on the property, as well as the state of the development of other pits. Asked whether they are required to maintain the roads by the Ministry of Natural Resources, Mr. Gervais responded by saying that they have a contract with Fred Rose to maintain the roads and that they also do some maintenance themselves.

With the exception of a large sign which was erected in 1987 cautioning motorists to remain on the 66 foot right of way, no signs had been erected either prior to June 6, 1997 or after June 7, 1997. After their removal, Rene Gervais did not replace the signs, as he indicated that they would just be destroyed. Indicated that the reason for erecting the signs had been safety, Monsieur Leger asked why they had not been replaced. Mr. Richmond objected again, stating that the mine manager's reason for erecting the signs was not relevant. Monsieur Leger submitted that the issue of the reason for the erection of the signs relates to the tribunal's jurisdiction to make its decisions on the real merits and justice of the case. What was the purpose behind the erection of the three signs? He submitted that it is relevant to the tribunal in making its determination as to whether the purpose was to protect mining rights, assets or whatever. Mr. Richmond submitted that these questions are properly determined in another forum. The tribunal found that the reason for placing the signs was not material to the offence.

Asked who had hired Mrs. Noella Gervais, Rene Gervais indicated that she is his wife. There were no further questions on cross-examination or re-direct.

Noella Gervais, age 51 and wife of Rene Gervais, gave the following evidence. Mrs. Gervais stated that she is familiar with the property in question and knows the location of the works on the Moose Mountain Mine.

On June 6, 1997, after a communication with her husband, Mrs. Gervais went to the property in late afternoon. Late evening she started watching one of the signs with a part-time employee of Ranger Resources and friend, Sylvie Plouffe.

From around midnight to 8 am June 7, 1997, Mrs. Gervais was in the van with Ms. Plouffe. After that, they sat outside along the road on lawnchairs. Around 8:30 am, a vehicle came down the hill from town, down the Moose Mountain Road and stopped in front of Mrs. Gervais and Ms. Plouffe right in front of the sign. Although she recognized the driver, Mrs. Gervais doesn't know his name. The vehicle was described as one of Bruno and Marcel Gervais' "club cabs", being a dark green GMC. The driver spoke on his mobile CB radio.

During this time, the green GMC was 30 feet away from Mrs. Gervais and Ms. Plouffe. After he finished talking, the driver backed up the truck to within five or ten feet of them and said, "Get your cameras ready. They're coming."

Next, Mrs. Gervais saw a vehicle coming down from the Moose Mountain Road to the road to the Number 3 Pit. The vehicle was an expensive white GMC suburban owned and driven by her brother-in-law, Marcel Gervais, who was identified in the hearing room. Mrs. Gervais stated that she has known Marcel Gervais for 34 years. The truck was stopped about four feet away from where Mrs. Gervais and Ms. Plouffe were sitting. Marcel Gervais said, "Bonjour" and nothing more.

Next, Mrs. Gervais saw a white truck coming down the hill very fast, having taken the same route. The truck hit the sign, which stayed on its hood. Mrs. Gervais stated that she took got up and took the picture, which has been entered as Exhibit 5E (the enlargement being 5Ei). Bruno Gervais was driving the white truck. Mrs. Gervais stated that she has known Bruno Gervais all of his life and that he is the son of Marcel Gervais.

Describing the vehicles in the picture (Ex. 5E), the vehicle in the foreground was the first to arrive. The one in the middle was driven by Marcel Gervais and the vehicle in the front is the one driven by Bruno Gervais. Mrs. Gervais stated that the white vehicle didn't stop and the white square on the hood of the truck is the sign which was pinned to the vehicle. Bruno Gervais just kept driving until he was out of sight.

Mrs. Gervais stated that she did not see those three vehicles again that day. The sign was never returned. Right after the incident, she drove to see whether the sign on the road to the Number 10 Pit was still there and it was. Later that day, around 3:00 or 4:00 in the afternoon, the sign was missing. The location of the sign on the mill road was also checked later in the day, but was missing. The signs or portions of the signs were never found.

Mrs. Gervais was the photographer of the exhibits entered during the evidence of Rene Gervais. Exhibits 5A and 5B, showing the sign in place, were taken at approximately 10:00 am on June 7, 1997, Exhibit 5D, which was taken later in the day, shows the location where the sign had been earlier, but was not missing.

Under cross-examination, Mrs. Gervais stated that she is not an employee of Ranger Resources, but just, in the words of Monsieur Leger, "carried out the duties of a watchman" on June 6 and 7, 1997, until the signs were removed.

The sign on the road to Pit # 3 was not attached to a gate, but rather was attached to a stand. Upon being questioned as to its location, Mrs. Gervais confirmed that the sign was put up in the middle of the road. She stated that she did not take a picture of it, as it had been put up late the night before.

Mrs. Gervais stated that she has worked as a watchman every day, as she lives there. She watches the roads to Pits #'s 3 and 10. She has slept there on many occasions to see who is going in and coming out. There is no guard post on the road to Pit # 3, but Mrs. Gervais has her van, cellular phone and two cameras.

Marcel Gervais did not leave his vehicle when he arrived. Mrs. Gervais was not paying attention to whether Bruno Gervais had a passenger with him.

In re-direct, Mrs. Gervais stated that while the sign had been put up in the middle of the road, it could have been moved without a problem.

Sylvie Plouffe, age 36, of Capreol, gave the following evidence. She is acquainted with Rene Gervais and is an employee of Ranger Resources.

On June 6, 1997 she attended at the property with her boyfriend, Rene and Noella Gervais, the latter two of whom had just come back from what they had been doing. She proceeded with Mrs. Gervais to the access road to the Number 3 Pit, arriving about 12 midnight and sat in the van and waited.

Around 8 am the next morning, when it was already light out, they moved outside. Ms. Plouffe confirmed that the sign in question was located in front of the gate in the middle of the road, to ensure that no one was trespassing. The green club cab came down the

hill and the driver spoke on the radio, but she didn't hear him. Then he backed up his vehicle and made the comment about having cameras ready and that "they're coming". He parked 15 or 20 feet away. Then Marcel Gervais, who has been known to her for 10 years and was identified in the hearing room, came down the hill in his vehicle, and parked, having merely greeted Ms. Plouffe and Mrs. Gervais. Then Bruno Gervais, whom she has also known for 10 years, came down the same route, hit the sign and kept going.

Ms. Plouffe stated that there was no attempt to manoeuvre to avoid hitting the sign. Ms. Plouffe reiterated the evidence of Mrs. Gervais, identifying the vehicles in the photograph (Ex. 5E) and stating that the three vehicles drove away. Ms. Plouffe could not say how it was that the sign hooked itself to the hood of the vehicle, but nonetheless, identified the large white square on the hood as the sign. She then went to see the sign on the road to the Number 10 Pit, which was still there. Then she left to go home. She never saw the signs again after that.

Under cross-examination, Ms. Plouffe stated that she has been employed part-time by Ranger Resources since May, 1997, at the rate of \$8 per hour. This is her sole source of income. Ms. Plouffe stated that she had never "watched" before this occasion and has not done it since.

Bruno Gervais' vehicle was the first to cross the gate, with the others following, but Ms. Plouffe did not see a passenger. None of the other vehicles hit a portion of the sign.

There was no re-direct.

Monsieur Leger called no witnesses.

Submissions

Mr. Richmond submitted that this is a fairly straight forward matter, involving three defendants on three separate counts, as amended.

The tribunal has heard from Rene Gervais, with supporting exhibits, that his son, Daniel Gervais owns the mining rights to the lands in question. It is his uncontradicted evidence that he had been instructed to erect the signs. The tribunal has heard from Noella Gervais as to when the signs went up. The tribunal has seen photographic evidence of the contents of one of the signs, has heard evidence that all three were posted, on a mine which is defined in section 1 of the **Mining Act**. Although the definition is extensive, Mr. Richmond submitted that it includes a mine which has temporarily suspended operation. There is no evidence that this mine has been abandoned. The evidence is that it was operating in 1994 and would be operational now, but for interference.

The evidence has shown that the signs in question were posted by the mine manager, although Mr. Richmond has submitted that there is no magic in having a mine manager do it, as an agent could have also posted the signs. The tribunal must determine whether anyone has pulled down or destroyed the signs. Mr. Richmond submitted that there is evidence of how the pulling down and/or destruction of the signs took place, stating that the acts were wilful and wanton. Based upon conversations in evidence, it was apparent that someone was going to do something. Then one of the accused, Marcel Gervais, arrived and greeted the witnesses, pulling his truck to the side of the road. Then his son, Bruno Gervais, arrived in his truck and drove into one of the signs posted at the road to Pit # 3. There is a photograph showing the contact of Bruno Gervais' truck with the sign and showing it driving off into the distance.

Mr. Richmond submitted that the evidence is clear, based upon the photograph and statements of two eye witnesses, that Bruno Gervais pulled down the sign on the road to Pit # 3. There has been no challenge to this evidence and therefore the law is clear. The tribunal is bound to accept the evidence of the witnesses as truthful. The case for the first count as against Bruno Gervais has been made.

With respect to the actions of Marcel Gervais on the first count, it is clear that he should be found a guilty party. His arrival prior to Bruno Gervais with the greeting, along with the fact that he sped away immediately after Bruno Gervais hit the sign makes it clear that he was assisting Bruno Gervais. It should be remembered as well, that Marcel Gervais is Bruno Gervais' father.

Mr. Richmond submitted that the evidence shows that Marcel Gervais was attempting to distract the witnesses, having positioned his vehicle to block their view. There are issues of consciousness of guilt and flight which the tribunal should consider in making its findings as to whether Marcel Gervais is a party to this offence.

As to 957293 Ontario Inc., the Articles of Incorporation (Ex. 1) show that Bruno Gervais is the operating mind of the company. The documents show that Bruno Gervais is its sole director as well as its Secretary, President and Treasurer. The bottom line, in Mr. Richmond's submission, is that Bruno Gervais and his company are indivisible and as such, the tribunal should register a conviction against the defendant company.

As to the matters of the second and third counts, Mr. Richmond submitted that the evidence is circumstantial. Where there is a logical inference which can be made, as Mr. Richmond submitted can be done in this case, the tribunal should make it. Even though there is no direct evidence regarding the remaining two signs on how they came to disappear, the evidence shows that they were put up on June 6th and disappeared on June 7th, after Messrs. Bruno and Marcel Gervais were observed at the first sign. The witnesses had been told to get

their cameras ready. Mr. Richmond submitted that this unknown person knew that Bruno Gervais was coming to destroy the first sign. After this was done and it is known by whom and how, the logical inference can be drawn. It was announced that something would happen and subsequently, something did happen.

Mr. Richmond pointed out that this is the first prosecution to his knowledge under section 170 of the **Mining Act**. It is obviously difficult to prosecute such an offence owing to the difficulty in obtaining evidence of its commission. Under the circumstances, it would have been impossible for the witnesses to have observed the destruction of the other two signs. Mr. Richmond asked the tribunal to recognize the obvious public policy reasons for the inclusion of the offence in the legislation.

Monsieur Leger, in dealing with the second and third counts, submitted that there is no direct evidence as to how these signs came to be missing from the mill road or the Number 10 Pit. He submitted that there was no **actus reus** as required by clause 164(1)(d) of the **Mining Act** as to what happened. It is not sufficient in a criminal matter involving strict liability, to infer guilt when there is no evidence.

The land on which the signs were located is huge. Rather than being closed off or remote, many people make use of the surrounding lands, including the cottagers as well as the employees of Ranger Resources. Monsieur Leger submitted that, not only is the evidence not sufficient, but that there is no evidence as to what happened to these two signs. Therefore, he submitted that counts 2 and 3 should be dismissed against all of the defendants.

With respect to the first count, there is evidence which may lead the tribunal to make a finding of guilt as against the defendant, Bruno Gervais. However, Monsieur Leger submitted that there is no evidence that Marcel Gervais had any involvement in the commission of count 1. The only thing which the evidence supports is the fact that Marcel Gervais was in attendance and made a friendly gesture. He did not attempt to impede any of the parties from doing anything and indeed what could he have done? He did not impede, obstruct or in any way strike the sign in question.

According to Monsieur Leger, there is no evidence of the corporation's involvement with any of the counts. With respect to count 1, there is no evidence that the corporation sanctioned or condoned the act. If there was in fact an offence committed, there is no evidence which would lead the tribunal to the conclusion that the corporation was involved, condoned, encouraged or participated in the act.

With respect to the first count against Bruno Gervais, Monsieur Leger invited the

tribunal to consider what has been heard. This case is one between relatives who have admitted to bad blood in that there is other pending litigation between them. There is evidence that there has been no actual mining activity in the last several years. The alleged concerns for safety, in his submission, ring hollow, as there are no signs posted anywhere on the matter of safety.

The sign involved in count 1 was right in the middle of the road, as was stated by Noella Gervais. As such, it prevented access and egress to the owners of the surface rights. (Mr. Richmond pointed out that there was no evidence of this fact.) There were two persons watching the sign on the night and morning in question. Ms. Plouffe only watched on this one occasion, while Mrs. Gervais did so on an ongoing basis. It is quite apparent from the facts that Rene Gervais and Daniel Gervais wished to provoke some reaction, which they did. Monsieur Leger submitted that this seemed to have worked.

Monsieur Leger referred to section 121 of the **Mining Act**, which requires that the Commissioner make decisions on the real merits and substantial justice of the case. Here, there are nine prosecutions on the three counts. The value of the signs is a mere \$100 each. He submitted that the tribunal must ask why the signs were put up in the first place, when it was not clear afterwards. Monsieur Leger submitted that the intention for putting up the signs is clear, that of obtaining evidence.

In closing, Monsieur Leger submitted that there is no evidence whatsoever involving two of the accused on all three counts and only evidence concerning one accused on one of the counts. The acts of the defendants should compel the tribunal to examine what the purpose of erecting the signs actually was, namely getting justice or to further pursue a vendetta.

In rebuttal, Mr. Richmond addressed three matters. With respect to circumstantial evidence, comparing the situation to finding a dead body in a room with evidence of an act, is comparable to the situation of finding the signs missing. If there is evidence surrounding the body, such as running from the scene or a smoking gun, it may be open to convict, even if there is no direct evidence. Similarly in this situation, it is open to the tribunal to draw a logical inference when there is direct evidence of the defendants having wilfully destroyed another sign in the same time frame. Mr. Richmond submitted that the impugned acts had nothing to do with the cottagers or the employees. At minimum, the tribunal has evidence to convict Bruno Gervais. The other signs disappeared within hours of his having been observed with the first sign on the hood of his truck. If the Commissioner is comfortable in drawing such an inference, that is sufficient to convict.

Mr. Richmond referred to the Rule in **Hodge's Case** (1838), 2 Lewin 227, 168 E.R. 1136 setting out the common law with regard to circumstantial evidence. This rule was modified by decisions subsequent to a Supreme Court of Canada case which, in *obiter*, indicated that the rule should not be applied as widely (see **R. v. Cooper** (1977), 34 C.C.C. (2d) 18 (S.C.C.)). Nonetheless, it remains in place where the circumstantial facts lead to the inference of guilt beyond a reasonable doubt. In this case, he submitted, the evidence is sufficient to find beyond a reasonable doubt, as there is evidence that Bruno and Marcel Gervais were working hand in hand.

The law relating to parties is set out in subsection 77(1) of the **Provincial Offences Act**, which provides that a person is a party to an offence, even where they do or omit to do anything for the purpose of abetting or where they abet in the committing of the offence. Mr. Richmond submitted that it would stretch credulity to believe that Marcel Gervais was present because he wanted to say, "Bonjour" and nothing more. There is no suggestion that he committed the offence himself, but rather that he was there with a common intention to see the sign destroyed.

With respect to count 1 and the corporation, Mr. Richmond reiterated his submission that the corporation is the alter-ego of Bruno Gervais, and he submitted that they are inseparable.

With respect to the issue of why the signs were put up, Mr. Richmond submitted that the issue is not before the tribunal. If there was an onus on the complainant to justify the putting up of the signs, it would be part of the offence. However, the only onus on the complainant is to show that there was a sign and this has been met. At its worst, if the only reason to put up the sign was that Rene Gervais wanted to aggravate his brother Marcel, it wouldn't make any difference. The fact is that the sign was up, which is clear from the evidence. For purposes of determining guilt or innocence, the reason for the putting up of the sign ought to not matter.

Findings

Is there a Mine?

The tribunal has experienced some difficulty with the definition of a mine, found in section 1 of the **Mining Act** as it applies to an offence pursuant to clause 164(1)(d). It is a requisite to the commission of the offence that there be a "mine" where the owner, manager or agent has posted the sign(s) or notice(s) in question.

Prior to June 3, 1991, the definition of a "mine" when used as a noun, for all but Part IX of the **Act**, did not include the words, "mines that have been temporarily suspended, rendered inactive, closed out or abandoned" found under (e) of the current definition. The problem arises in attempting to understand the meaning of clause (e) of the definition. Each of the terms, or a variation of those terms, namely "temporary suspension", "inactivity", "closed out" and "abandoned" are found defined in subsection 139(1) of the **Act**, found in Part VII. The words which commence the subsection are "**139.** (1) In this Part,". Therefore, the meaning of the words found in the definition in section 1 cannot be found through the definitions of those actual phrases found in section 139.

As an aside, glancing at the various definitions, it is interesting to note that the

definitions in section 139 have more to do with the issue of rehabilitation rather than the more colloquial or ordinary meaning of the words. Thus, "abandoned" entails ceasing or indefinitely suspending mining operations, without having rehabilitated, so that no comment is made on actual ownership; "closed out" denotes that all stages of an accepted closure plan have been complied with and is in the final stage of such closure; "inactivity" denotes indefinite suspension of certain mining activities in accordance with a closure plan; "temporary suspension" denotes suspension in accordance with a closure plan on a planned or unplanned basis, with continuous monitoring and protective measures in place.

There was no evidence at the hearing concerning the mine rehabilitation of the Moose Mountain Mine, although the requirements of Part VII are such that this information should be readily available. With the evidence heard, it is impossible for the tribunal to determine whether the mine meets with the definitions under Part VII of the **Act**.

The tribunal finds, on the evidence given, and based upon the colloquial meaning of the words, "inactive" or "temporarily suspended" that the Moose Mountain Mine meets these requirements and is a mine within the definition set out in section 1 of the **Act**. The tribunal also finds that it accepts the evidence of Rene Gervais that he is the mine manager of the Moose Mountain Mine and in that capacity ordered the signs which were posted, within the meaning of clause 164(1)(d).

Essential Elements of the Offence

The essential elements of the offence set out in clause 164(1)(d) are straightforward. There must be a mine, which the tribunal has determined in the affirmative. There must be a notice or notices posted by a mine manager. The tribunal finds that the signs which are shown in the photographic evidence constitute a notice or notices within the meaning of the clause. There must be a person who pulls down, injures or defaces the notice or notices.

Findings on the Various Counts Against the Defendants

The First Count - Notice on the Road to Pit # 3

The tribunal has considered the evidence of the eye witnesses, Mrs. Gervais and Ms. Plouffe, and finds them to have been believable and credible. Therefore, the tribunal finds the following facts.

There was a sign posted on a stand erected on skids which was erected in the centre of the road to Pit # 3, containing the words which have been read into the record. The posting of the sign took place prior to midnight between June 6 and June 7, 1997.

On the morning of June 7, 1997, a green truck with an unidentified driver came from the main road, or Moose Mountain Road to the location of the notice posted on the road to the Number 3 Pit and told them to get their cameras ready and that "they're coming". This latter phrase denotes to the tribunal that the unknown man was acting in concert with others, and the use of the word, "they" denotes more than one other person. He then moved his vehicle aside. Shortly thereafter, Marcel Gervais drove up in his vehicle and greeted the witnesses and then moved his vehicle to the side. There is nothing in the evidence to support the allegation that Marcel Gervais was attempting to visually block the view of the witnesses. Shortly thereafter, Bruno Gervais drove to the same location in his vehicle and without slowing down or attempting to avoid it, did run into the notice at its location in the centre of the road. After hitting the notice, which was observed by the witnesses and is shown in the photograph (Ex. 5E), it remained on the hood of his vehicle as he sped off into the distance along the road to Pit # 3. The vehicle with the unknown driver and with Marcel Gervais then followed.

As to the first count against Bruno Gervais, the tribunal finds that the evidence has shown beyond a reasonable doubt that he did commit the said offence and finds him guilty.

As to the first count against Marcel Gervais, the tribunal has not heard any evidence that he attempted to prevent Bruno Gervais from his removal of the notice. Given that there were observed radio conversations of the unknown driver and his subsequent comments to Mrs. Gervais and Ms. Plouffe, the tribunal finds that the unknown driver was aware of what was coming next and that, given the specific words that he used, what was about to unfold would involve at least two others. Marcel Gervais arrived shortly thereafter. The tribunal finds beyond a reasonable doubt that his arrival was planned, based upon the comments of the unknown driver. The commission of the offence by Bruno Gervais was a highly visible and deliberate act. The tribunal finds beyond a reasonable doubt that Marcel Gervais both aided and abetted the commission of the offence by Bruno Gervais, within the meaning of clauses 77(1)(b) and (c) of the **Provincial Offences Act**. Therefore, the tribunal finds Marcel Gervais guilty as a party to the first count.

Concerning the role of 957293 Ontario Inc., its interest and involvement in the commission of the first, as well as the other two counts, is not clear. While it has been proven beyond a reasonable doubt that the company is owned by Bruno Gervais, the tribunal cannot agree that the man is inseparable from the company. Exhibit 1 shows one of the areas in which the company is involved is real estate development.

Paragraphs 3, 15 and 27 of the Information state that the company was the registered owner of the surface rights of the property upon which the Moose Mountain Mine is situated. This material fact was not proved during the course of the trial. While there were strong inferences that one of the defendants owned the surface rights, an inference is not enough and proves nothing.

Without a strong, substantive link between the interest of the company or of Bruno Gervais in this particular land which would lead it to benefit from the commission of the

offence, the tribunal finds that the case against the company has not been made. Therefore, the tribunal finds that 957293 Ontario Inc. is not guilty of the commission of the first count.

The Second Count - Notice on the Road to # 10 Pit
 The Third Count - Notice on the Mill Road

The evidence concerning the commission of these two offences is the same (except as to the posting of two separate notices) so the tribunal will treat them as one, for purposes of its discussion and findings in determining guilt or innocence.

The tribunal has considered the evidence of Rene and Noella Gervais and finds that there were signs posted on the road to the Number 10 Pit and on the Mill Road, containing the words which have been read into the record. The posting of the sign took place prior to midnight between June 6 and June 7, 1997.

Clearly, there is no direct evidence concerning the removal of the notices at these locations. However, the evidence has shown and the tribunal finds it to be entirely believable, that these notices were removed some time after 10:00 am during June 7, 1997.

It is indeed circumstantial that Bruno Gervais was observed by witnesses and recorded on film removing the notice for the Number 3 Pit. It has been suggested that others, such as persons using the Moose Mountain Road to cross the property or cottagers, also have easy access and could have committed these offences. The tribunal finds that it does not accept this argument. Clearly, something is going on between this complainant and these defendants, the details of which were not allowed as not being essential to proving the commission of the offences. The only thing the tribunal is aware of is that there is other ongoing litigation.

Notwithstanding the circumstantial nature of the evidence, the tribunal finds that Marcel Gervais, Bruno Gervais and another individual were travelling about the property on June 7, 1997, communicating by radio and forming a roving convoy or pack whose sole purpose was to locate and destroy the notices posted by Rene Gervais in connection with the Moose Mountain Mine. The tribunal finds this to be the case beyond a reasonable doubt, given the very open and deliberate nature of the commission of the first offence. In making this finding, the tribunal is satisfied that this is the only reasonable inference that can be drawn from these facts. In so finding, and given the wording of subsection 77(1) of the **Provincial Offences Act**, it does not matter which of the three actually removed the notices, the legislation provides that they are all parties to the offences.

Therefore, as to the second and third counts, as against Bruno Gervais, the tribunal finds that he is guilty of the commission of these offences.

For the same reasons, as set out above, as to the second and third counts, as against Marcel Gervais, the tribunal finds that he is guilty of the commission of these offences.

As to 957293 Ontario Inc., for the reasons set out above under the heading of the first count, the tribunal finds the company to be not guilty of the commission of the second and third counts.

Sentencing

Subsection 164(1) provides for a fine of "not more than \$10,000" for the conviction of each count of an offence set out. This is potentially a very serious matter, given that two of the defendants face three convictions each. However, it is clear from the wording of the subsection that the fine set out expresses a range and the tribunal has a wide discretion in passing sentence.

While the relationship between the tribunal's powers under Part VI of the **Mining Act** and a prosecution pursuant to the **Provincial Offences Act** is not entirely clear and certainly has not been adjudicated, the tribunal is of the opinion that matters of proof of the essential elements of an offence are governed by criminal procedures. The same cannot be said for the exercise of the tribunal's very wide discretion in the matter of sentencing. In this regard, section 121 of the **Mining Act** will play a very real and substantial role when the tribunal determines the sentences, in that the tribunal will make its determinations as to quantum based upon the real merits and justice of the case. In this regard, the facts of this case give rise to a number of matters which the tribunal expects to see addressed at the sentencing hearing, scheduled to commence at 9:30 am on November 4, 1997. These are discussed below.

There is far more to the situation between the parties than has been presented to date. The Commissioner stated at the trial that it didn't take a rocket scientist to see that the posting of the notices was like holding a red flag to a bull. Monsieur Leger, in his submissions concerning the amendment to the Information to delete the words, "Wilfully" mentioned the defence of entrapment. While this defence was ultimately not raised, nonetheless, there is strong suggestion of a set up on the facts surrounding the first count. This is of concern to the tribunal when considering passing of sentences.

The primary area of concern to the tribunal is the appropriateness of use of a private prosecution to resolve the issues between the parties. It does occur to me that the process has merely served to heighten the tensions and creates other issues which are well outside of the jurisdiction of the tribunal, namely as to whether there are issues involving other statutes such as the **Trespass to Property Act**, R.S.O. 1990, c. T.22, the **Road Access Act**, R.S.O. 1990, c. R.34 and the **Occupiers' Liability Act**, R.S.O. 1990, c. O.2.

The purpose for the posting of the notices is clearly not a necessary element for proving the commission of the offences. However, before passing what has the potential to be a severe sentence, the tribunal requires additional information regarding the exact purpose behind the posting of the notices. Given that the complainant arranged for the watching of one of the notices immediately after it was posted indicates that he expected something to happen in short order, which was borne out as the first notice was removed less than twelve hours later.

The tribunal also requires evidence regarding the ownership of the surface rights as well as the status of the Moose Mountain Mine under Part VII of the **Mining Act**.

The tribunal is seeking to be informed of what the exact nature of the dispute between the complainant and the defendants, namely whether this whole matter arises out of opposition to development of surface rights, prevention of mining activity, along with associated rights of compensation, or some other reason(s).

The parties should be aware that the tribunal has taken a dim view elsewhere of the owner of surface rights attempting to impede, prevent or even interfere unknowingly with mining activity on or near certain lands (See for example the recent cases of **Nipigon Gold Resources Ltd. v Armstrong and Armstrong**, (unreported) MA-038-93, October 17, 1995; **Chitaroni v. Bot Construction Ltd, Ministers of Natural Resources and Transportation**, (unreported), MA-031-93, December 21, 1995; and **Graf v. Palu**, (unreported) MA-012-95, October 15, 1996). The parties are also referred to section 2 of the **Mining Act** which is a strongly worded purpose section to the **Act**

The tribunal is also puzzled by and is seeking an explanation of the following wording on the notices: "175(14) Every person who refuses to obey is liable to a fine of \$250.00 per day for each day of such refusal". Section 175 provides for easements or rights of way to be vested in the owner, lessee or holder of a mine, mill or quarry, ordered by the Commissioner where certain legislative tests have been met. The reason for this caution is unclear, as the tribunal has been unable to find a record in its files of any such order or application pursuant to section 175 concerning these lands.

To summarize, the tribunal will be looking to the real story of what is behind this prosecution, as permitted by section 121 of the **Mining Act** in making its determinations on sentencing.

Conclusions

Based upon the reasons set out in its Findings above, the tribunal will enter the following on the Information:

1. As to the first count against the defendant, Bruno Gervais, the tribunal finds the defendant guilty as charged;
2. As to the second count against the defendant, Bruno Gervais, the tribunal finds the defendant guilty as charged;
3. As to the third count against the defendant, Bruno Gervais, the tribunal finds the defendant guilty as charged;
4. As to the first count against the defendant, Marcel Gervais, the tribunal finds the defendant guilty as charged;
5. As to the second count against the defendant, Marcel Gervais, the tribunal finds the defendant guilty as charged;
6. As to the third count against the defendant, Marcel Gervais, the tribunal finds the defendant guilty as charged;
7. As to the first count against the defendant, 957293 Ontario Inc., the tribunal finds the defendant not guilty and the defendant is hereby acquitted;
8. As to the second count against the defendant, 957293 Ontario Inc., the tribunal finds the defendant not guilty and the defendant is hereby acquitted;
9. As to the third count against the defendant, 957293 Ontario Inc., the tribunal finds the defendant not guilty and the defendant is hereby acquitted.

Sentence of the defendants Bruno Gervais and Marcel Gervais will be passed following a hearing on this matter to be held in Sudbury, at the Days Inn, Conference Room A, commencing at 9:30 am, Tuesday, November 4, 1997.