Mediation and Arbitration Board
 # 114, 10142 - 101 Avenue
Fort St. John, BC V1J 2B3

FILE NO. M0023
Date: March 30, 2006 **Board Order No. A 395**

BEFORE THE MEDIATOR:

IN THE MATTER OF THE PETROLEUM AND NATURAL GAS ACT, R.S.B.C. 1996, c. 361 as amended and THE MINING RIGHT OF WAY ACT, R.S.B.C. 1996, c. 294
(THE ACTS)

AND IN THE MATTER OF LAND TITLES KW11604 (PID#025-852-965) and KW11605 (PID#013-287-834) LILLOOET LAND DISTRICT AND KR87666 (PID#013-287-753), AND KL74791 (PID#014-566-346) KAMLOOPS DIV OF YALE LAND DISTRICT,
(THE LANDS)

BETWEEN:

TILAVA MINING CORPORATION
(APPLICANT)

AND:

LOUISE ECCLES
IAN AND BRENDA JONES
WALTER KLENNER &
SHARONCADIEUX
ARLENE AND KRAIG GARBET
(RESPONDENTS)

ARBITRATION ORDER

Heard at Kamloops,
before Paul Love, Chair, Mediation and Arbitration Board
on March 2, 2006

APPEARANCES:

Applicant:	Willy Kovacevic, for Tilava Mining Corporation
Respondents:	Louise Eccles
	Brenda Jones
	Walter Klenner
	Sharon Cadieux

BACK GROUND:

Tilava Mining Corporation ("Tilava" or "Applicant"), is the holder of a free miner's certificate # 136967, and is the registered holder of certain mineral titles, known as the WK Claims in the Kamloops Mining Division (the mineral claims) as shown on the map in Schedule "A". The mineral claims are located on Crown land adjacent to private land holdings of the Respondents, north of Cache Creek.

A portion of the Applicant's mineral titles can be accessed over Forest Service Road 5100 from Highway 97. Not all mineral titles can be accessed using this road unless the Applicant engages in road building.

The Respondents are the owners of lands described as:

Louise Eccles: KW11603 (PID#025-852-965) and

Ian and Brenda Jones:	KW11605 (PID#013-287-834) LILLOOET LAND DISTRICT;
Walt Klenner and Sharon Cadieux:	KR87666 (PID#013-287-753),
Arlene and Craig Garbet:	KL74791 (PID#014-566-346) KAMLOOPS DIV OF YALE LAND DISTRICT,

Tilava seeks to use an existing roadway across the Respondents' lands to the mineral claims. Tilava wishes to explore, and remove bulk samples of mineralized (bentonite-rich) rock for testing purposes from its mineral titles on crown land via a private access road owned by the Respondents (as shown in solid red on the attached map in Schedule "B").

Tilava gave written notice of its request for access to each of the Respondents, but was unable to secure an access agreement with each of the Respondents. Tilava applied to the District Gold Commissioner for dispute resolution. The District Gold Commissioner was unable to resolve the road access dispute. Tilava applied to the Mediation and Arbitration Board ("The Board") on April 16, 2005. Bruce McKnight was duly appointed by the Board to mediate this case, and the Board Member held mediation sessions in Cache Creek on June 22 and July 6, 2005. After the formal mediation sessions, but as part of the continuing mediation process, the Board member prepared a proposed form of agreement to assist the parties in resolving the dispute. The Board member was unable to mediate this dispute to a successful conclusion. The Board member issued Mediation order #M0023 on October 26, 2005.

Tilava filed a notice of appeal [1] on November 22, 2005, indicating that it did not approve the Mediator's order. The Board is required to arbitrate an application unless the application is withdrawn or the parties agree to the order:

Pursuant to section 20 of the *Petroleum and Natural Gas Act*, the Board must hold an arbitration hearing to hear evidence and make a final determination of the matters in issue. Section 20 reads as follows:

> **Arbitration hearing**
>
> 20 (1) Unless the application is withdrawn or the applicant and the person who will likely be directly affected by an order approve the order of the mediator, the board must hear representation by or on behalf of the applicant and persons likely to be directly affected by an order, and must arbitrate

[1] The Board does not require a form of document called a Notice to Appeal, and the Board accepted this document as notice that the Applicant did not accept the Mediator's Order and required arbitration of the dispute.

for the purpose of resolving the complaint specified in the application.

(2) Unless the applicant and the other persons otherwise agree, the board must review an order of the mediator made under section 19, and may confirm or vary the order, subject to the terms it considers proper.

(3) Unless the applicant and the other persons otherwise agree, the board,

(a) if a mediator has made an order under section 18 (4), must review the order, confirm it or vary it in the manner and subject to the terms the board considers proper,

(b) if a mediator has not made an order under section 18 (4), must determine, the amount of money to be paid to a person, as rent for occupation or use, or for damage caused, up to the date stated in a certificate of restoration, for the entry, occupation or use, and

(c) may determine the disposition of the amount remaining of the deposit required under section 19 (2) as between the applicant and the owner.

This application proceeds pursuant to section 10 of the *Mining Right of Way Act*, the salient portions of which are:

Power to use existing road

10 (1) A recorded holder who desires to use an existing road, whether on private land or Crown land or both and whether built under this or another Act, may use the road for the purposes referred to in section 2.

(2) A free miner who desires to use an existing road, whether on private land or Crown land or both and whether built under this or another Act, may do so in order to locate a claim and need not serve notice on the owner or operator of the road of the intention to use the road and need not pay compensation for its use, but is constrained by all lawful conditions that govern its use under this or any other Act.

(3) A recorded holder who wishes to use an existing road

(a) must serve written notice on the owner or operator of the road of the intention to use the road,

(b) if the road is an access road, must undertake use of the access road in accordance with the rights of the deemed owner

and subject to payment of compensation in accordance with section 6,

(c) if the road was not built under this Act, must compensate the owner or operator of the road in an amount or manner agreed on or settled between the parties, and

(d) is constrained by all lawful conditions that govern the use of an existing road under this or any other Act.

(4) For the purposes of subsection (3) (c), in default of an agreement between the parties and on application of one of the parties, the mediation and arbitration board has jurisdiction to settle the issue of compensation and the terms of the settlement are binding on the parties.

The purposes for which a recorded holder can use an existing road under section 10 are set out in section 2 of the *Mining Right of Way Act*. These purposes are:

> for the purpose of constructing, maintaining and operating facilities necessary for the exploration, development and operation of a mineral title, or for the loading, transportation or shipment of ores, minerals or mineral bearing substances from a mineral title, or for the transportation of machinery, materials and supplies into or from a mineral title

I held a pre-hearing conference by telephone conference call with the parties [2] on February 3, 2006. I issued a Board order containing directions for hearing following that conference call. The parties exchanged documents and position papers pursuant to those directions. The parties attended for an arbitration hearing in Kamloops on March 2, 2006. The documentary record before me consists of the application and attachments, as well as the exhibits. [3] There was also oral evidence from Mr. Kovacevic on behalf of Tilava, and from Ms. Eccles, Mr. Klenner, and Ms. Jones.

Preliminary Matters:

New Evidence by Mr. Klenner:

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[2] Mr. and Mrs. Garbet were provided notice of the preliminary conference date, and hearing date, and apparently advised the Board's administrator that they were content with the terms of the Mediator's Order and did not intend to participate in the arbitration process.

[3] **Error! Main Document Only.**Exhibit 1 - Tilava Notice of Appeal dated November 22, 2005; Exhibit 2 - Collection of Tilava's Materials; Exhibit 3 - Eccles Collection of Materials; Exhibit 4 Klenner and Cadieux Materials;
Exhibit 5 Tilava's Letters responding to the Submissions of the Respondents

At the outset of the hearing, Mr. Klenner attempted to file further documents with the Board concerning noise levels, grades of the road across the lands and permitted grades under the *Forest Practices Code*. This information was objected to by Tilava on the basis that it was new technical information, to which it had no opportunity to respond.

I did not permit the introduction of the documents into evidence, for the reasons following. This dispute has been ongoing since 2004. The issues now before me are similar issues that the Respondents raised prior to the referral of the dispute to the Gold Commissioner. Mr. Klenner's documents raise new issues not contained in his points of claim. A portion of this information appears to be in the nature of expert evidence, and the parties advised me at the pre-hearing conference that no expert evidence would be called. If a party had indicated that expert evidence would have been called I would have ensured that this information was produced in a timely way, in compliance with the *Evidence Act*, R.S.B.C. 1996, c.124.

New Evidence by Tilava:

During the hearing Mr. Kovacevic referred to maps and other documents which Tilava had not produced to the Respondents, and sought to introduce some of these documents on the basis that the documents were provided or referred to in mediation. The Respondents objected to introduction of these documents into evidence. I did not permit the introduction of these documents into evidence at this hearing.

The issue of documents and the relationship of mediation to the arbitration process was canvassed by me at the pre-hearing conference on February 2, 2006. In my directions for hearing, I made very clear directions that if the party intended to introduce documents, they were required to tender those documents to the opposing party in advance of the hearing date. Mediation before the Board is a without prejudice process. Generally, the issues discussed and information exchanged at the mediation is confidential. The only record kept of the Mediation is the order, if any that is issued by the Mediator. The fact that a party referred to a document at mediation is of no assistance in the arbitration process, as usually the person who mediates does not arbitrate, the process is a hearing de novo, where the parties are required to introduce the evidence on which they rely.

FACTS:

The Respondents, other than Mr. and Mrs. Garbet, purchased portions of the lands owned by Nancy Ferguson, "The Ferguson Ranch" between 1999 and 2002. At the time of purchase, a section of road, approximately 1.3 kilometres in length traversed the lands owned by the Respondents. This road over the

Respondents' property is joined to, or alternatively is part of the "5100 Road" over Crown lands. The precise nature of the 5100 road on Crown land is uncertain. It appears to be a road constructed for timber harvesting purposes, and appears to be an all weather gravel road. The exact date of the construction of the road over the Respondents' lands is unknown, and predates the ownership by the Respondents of their properties, and use of the road by Tilava or its principal Mr. Kovacevic. It appears that the road was constructed by Bonaparte Lumber Co. Ltd. ("Bonaparte") in the 1950's. The documents in this case indicate that the original owner, Jane Ferguson, granted an easement to Bonaparte to permit the construction and use of the road in April of 1958. The road was used to access timber on crown land.

While the road over the Respondents' lands may not meet modern standards of road construction under the *Forest Practices Code*, it is apparent that this road is in a driveable condition. The road may require improvements in order to be used as an industrial haul road in the event of production, but that is not a matter that requires my consideration at the present time. From the evidence before me there is no doubt that the road is in a driveable condition for the access of mineral claims. I accept Mr. Kovacevic's evidence that he has used this road for more than fifteen years, before the Respondents installed gates in connection with another road use dispute involving West Fraser Mills Ltd.

It is apparent that Tilava has a free miner's certificate, and is a registered holder of claims on crown land adjacent to the property.

While there is a public access road over Crown land, 5100, that could be used by Tilava, this road does not go to all the claims, or near all the claims that Tilava has staked on Crown land adjacent to the Respondents land. For example the road on Crown land does not access mineral claims 522312, 522313, 522171. The landowners do not dispute that the private road is a longer way around. It would add approximately 60 km round distance to the hauling cycle. The landowners prefer the longer way around rather than a "short cut" between their properties. It is more convenient for the landowners if Tilava uses the public road on Crown land, and it is more convenient to Tilava to use the shorter access route over the respondents' lands.

There is a degree of animosity between Mr. Kovacevic and the landowners. Mr. Kovacevic attempted to paint the landowners as persons who were attempting to impose unreasonable conditions on him as a ruse to deny him access to the lands. He is upset that Ms. Eccles has returned both registered and regular mail. The land owners have concerns about the prospect of fire, vandalism, garbage dumping, dust, water contamination, and safety. The landowners also attempted to paint Mr. Kovacevic as a threatening person. The landowners are concerned about the future plans that Tilava has with regard to its claims.

It is unnecessary for me to express my views on the history of the dealings of the parties and the style brought by each participant to the resolution of this conflict. What is apparent to me, based on the oral and documentary evidence, is that the parties are unable to resolve all the aspects of this dispute without an arbitrator's order imposing the terms on both parties.

While certain of the Respondents believe that Mr. Kovacevic simply staked further lands in order to attempt to justify this application, I am satisfied that the Tilava has had a long standing interest in the minerals on crown land adjacent to the Respondents' lands.

POSITION OF THE PARTIES:

The Applicant:

Tilava is content with much of the Mediation Order; however there are portions of the order that Tilava says should be modified. [4] Tilava's disputes relate to clauses 3(a), (b) and (c) of the Mediation Order, as well as some of the general language in the Background to the Order. Tilava says that it has a right under the *Mining Right of Way Act* to access the roads on the Respondent's lands. Tilava says that it used the road, and other free miners used the road for many years to access claims. Tilava says it was prevented from using the road by the Respondents when the Respondents installed gates on the road in 2004. Tilava says that the 60 day [5] limit on the use of the road imposed in the mediation order is unduly restricted and amounts to a denial of reasonable access. It would take many years for Tilava to haul the permitted samples from its claims if access is limited to 60 days per year and the use of a 5 ton capacity truck. Tilava says it should have access from March 1 to November 30 of each year. Tilava is content with the $500 per applicant per year payment in the mediation order. Tilava says that it should only be required to make a payment in respect of road use, if it commercially shipping of the 10,000 tonnes of material. Tilava is concerned that the way the order is drafted it would be required to pay the amount for a single crossing of the road and the amounts would be prohibitive. Tilava says that it should not be required to give 48 hours notice prior to accessing the lands. Tilava says that certain landowners have refused to accept his letters in the past, and he does not want this to be used to deny access. Tilava has no problem with notifying for passages by contractors. Tilava has a problem with paragraph 3(i) of the order in limiting the number of passages to six per day for tucks of 5 tons. Tilava's theory is that the landowners have put up unreasonable road blocks and conditions similar to how they dealt with West Fraser Mills hoping that Tilava will back off from using the road.

Respondents' Arguments:

[4] Tilava has no objection to clauses 3(d), 3(e), 3(f), 3(g), 3(h), 3(i) and 3(j) of the Mediation Order

[5] Paragraph 3 (a) of the Mediation Order.

In my view, while certain of the respondents provided separate written submissions and presentations, the common theme is that the Respondents say that Tilava should not be permitted to use the roadway over private lands, when there is a public access road that was recently constructed by a forest company. The Respondents have common concerns that the road usage, particularly for the hauling of samples or mineral production and transportation would significantly interfere with their enjoyment of their properties. Given the layout of the road which transects four properties over a 2.5 km distance and the steepness of the roads all the respondents have concerns for noise, dust, and safety of children and animals. Ms. Eccles and Ms. Jones characterized the position of their property as gatekeepers as their houses are close to the road, and close to the location where the road intersects with Highway 97, north of Cache Creek. They have concerns with campers, trespassers, and the dumping of garbage, by persons who see an actively used road. In short, the respondents expressed concerns about child and animal safety, liability, fire, noise, dust, road damage, water contamination and increased access for theft and vandalism.

The Respondents have felt threatened by Tilava's conduct. In particular the Respondents object to Tilava's comments that if there is no deal, Tilava will go to Supreme Court. The Respondents' say that if an order is granted permitting use of the road the order should not be assignable by Tilava to another party.

In particular, Ms. Eccles says that if access is granted it is important to modify clause 3(a), 3(b) and 3(i). Ms. Eccles says that Tilava's access should be limited to a two week window between June 1 and September 30 of each year. During the window multiple transits of the road should be limited to the hours of 6:00 a.m. and 6:00 p.m. The amount of the compensation should be doubled to $1,000 per party. Ms. Jones would prefer access not be granted to the road. If access is not granted she submits that the access should be for a six week period, for the purpose of exploring and analyzing the claim, with the use of a pickup truck only to transport, and that compensation should be doubled to $1,000 per party.

Mr. Klenner and Ms. Cadieux say that the issue is not whether Tilava has the right to access the road, but the terms and conditions of the access. Mr. Klenner and Ms. Cadieux accept the conditions in the Board order with the following additions:

1. The period of access should be limited to six weeks.

2. The road should only be used for exploration and not commercial hauling of materials.

3. Any upgrading for the road for commercial hauling should be to the standards of a certified road engineer, with low impact methods including end haul rather than side cast.

Applicant's Reply:

Tilava says it is not convenient to use the public access road to access a portion of its claims. Tilava estimates that 90 % of its claims cannot be accessed using the public road. Tilava says at no time did either it or it's principal, Willy Kovacevic threaten or attempt to threaten the owners. Tilava says it merely informed the landowners of the process if the parties could not reach an agreement.

Issues:

1. Does that fact that Ms. Eccles has the title to minerals on her land, prevent Tilava's access to her lands under the *Mining Right of Way Act*?

2. Does Tilava have the right to use the road?

3. Does the Board have jurisdiction to limit the assignment of the Order?

4. If access is ordered, what terms should be ordered?

REASONS:

Issue # 1:

In my view, the fact that Ms. Eccles has title to minerals [6] on her land does not preclude the applicant from accessing her land under the *Mining Right of Way Act* to access its claims located on Crown land. The *Mining Right of Way Act* defines private land as:

"Private land" means land other than Crown land, but does not include land owned by an agent of the government;

The fact that Ms. Eccles has some mineral ownership of her lands, does not remove the land from the definition of private land under the *Mining Right of Way Act*. Holding mineral title may mean that her lands are not mineral lands

[6] Documentary evidence was not produced indicating the extent of Ms. Eccle's mineral ownership; it appears that she owns all minerals except gold and silver

as defined by the *Mineral Tenures Act.* [7] Tilava is not seeking any entry for staking rights, or removal of minerals from Ms. Eccles' lands under the *Mineral Tenure Act*. It is simply seeking the right to use an existing roadway on her lands. The argument that Ms. Eccles' lands are not mineral lands does not bear on the issue before me.

Issue #2:

The evidence before me demonstrates that the access road across the Respondents lands was constructed as a logging road by Bonaparte Timber. There is no evidence that it has been decommissioned, or is not useable by an off road logging truck or by a pickup truck. While Mr. Klenner gave evidence concerning the status of the road on Crown, I am unable to give his evidence much weight. There is no evidence that he has any peculiar knowledge of the status of the road in terms of expert evidence, and there is no evidence before me that he is authorized to speak by either the forest company or the Ministry of Forests. I note, further that the legislation does not define roads in terms of *Forest Practice Code* standards, and in my view, it would be illogical to import this standard into a *Mining Right of Way Act* case.

I accept that this road may not be up to current *Forest Practice Code* standards. It was constructed in the 1950's and undoubtedly the standards of road construction have increased over time. I note that none of these standards were in evidence before me, but I can generally accept this proposition.

The respondents also filed a legal opinion that they obtained when there was a dispute with West Fraser concerning the use of the roadway. In my view, an opinion of counsel is of little assistance in resolving this case. To the extent that it trenches on the very issue before me – the rights of the parties – I have not put any weight on the opinion.

Tilava is a recorded holder of mineral titles. Tilava established that it had claims on crown land adjacent to the Respondents' land. I note that the claims are north of the lands of Mr. Klenner and Ms. Cadieux.

Further, I am satisfied that Tilava is seeking to use the road through the Respondents' lands for the purposes set out in section 2 of the *Mining Right of Way Act*:

> for the purpose of constructing, maintaining and operating facilities necessary for the exploration, development and operation of a mineral title, or for the loading,

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[7] **"mineral lands"** means lands in which minerals or placer minerals or the right to explore for, develop and produce minerals or placer minerals is vested in or reserved to the government, and includes Crown granted 2 post claims;

> transportation or shipment of ores, minerals or mineral bearing substances from a mineral title, or for the transportation of machinery, materials and supplies into or from a mineral title

The fact that there may be public roads to which the applicant could road build from to connect to his claims on crown land, is not a valid reason to deny Tilava the use of roads on private land. Section 10 of the *Mining Right of Way Act*, provides a very broad right of access for the use of a road by a free miner or a registered holder. A free miner or registered holder is not required to build roads, where there is an existing road on private land. Mr. Klenner's guess that it is unlikely that the private access road over Crown land will not be decommissioned is not helpful to the Board. Mr. Klenner is entitled to express his opinion, but I put little weight on the evidence.

In my view there is no discretion in the Board to deny to deny a recorded holder the use of a road on private land based on the fact that another road may be available for use. The legislation clearly provides for this right.

I am satisfied that Tilava's use of the road will pose a nuisance, inconvenience, and interfere with the Respondents' quiet enjoyment of their lands. I am satisfied that the landowners have raised legitimate concerns about the use of the road. They appear to honestly believe that Tilava refuses to address these concerns. Tilava also has a basis to believe that its access has been frustrated. Gates have been installed, other limitations on access have been proposed and certain of the respondents have refused to accept mail from Tilava.

Issue 3: Assignment

The landowners, particularly Mr. Klenner wish access rights to the road to be limited to Tilava, so that Tilava has no right to assign its rights to another person. The Board is a statutory tribunal and must find jurisdiction to make an order before it can make an order. I note that the *Mining Right of Way Act* is silent on the issue of assignments. The *Petroleum and Natural Gas Act*, provides for the assignment of Board orders:

> **29** An order by the board may be assigned by
>
> (a) serving notice of the assignment on the other parties named in the order,
>
> (b) filing a certified copy of the assignment with the board, and

(c) filing the assignment with the registrar of the appropriate land title district, who, on payment of the appropriate registration fee, must endorse against the indefeasible or absolute title of the land affected by the assignment.

I note that the right of access to Tilava under the *Mining Right of Way Act,* does not necessarily confer the granting of rights to other persons. This is still a private road over private lands, and the respondents are owners and have all the benefits incidental to land ownership, including the right to remove trespassers from their land. A free miner or recorded holder has a right in the *Act*, and the exercise of that right is not contingent on first obtaining the approval of the Mediation and Arbitration Board. The Board makes final and binding orders in the case of conflict or disagreement. The fact that access has been granted to Tilava, does not preclude any other free miner or recorded holder from using the road, provided the person seeking access can bring itself within the purposes expressed in section 2 of the *Mining Right of Way Act.* It follows therefore as a matter of statute law, that the concept of assignment is not relevant to the issue of access under the *Mining Right of Way Act* as any person who meets the requirements of that Act is entitled to access. The Board does not have the jurisdiction to limit the use of the access road to only one recorded holder or person with a free miner certificate.

Issue 4: Terms of the Order

Other Terms and Conditions of Entry:

In the mediation process, Mr. McKnight met with the parties and attempted to resolve the issues in a way which would be acceptable to the parties. He attempted to draw up an agreement which would be acceptable to the parties, and issued an order which he hoped would be acceptable to the parties. Mr. McKnight placed in his order a creative solution. Large portions of his order are acceptable to both parties.

In the Board's process under the *Petroleum and Natural Gas Act*, an arbitrator is required to consider the order made by the Mediator. The arbitration process is not a negotiation process, it is a determination based on the evidence and the applicable law. I have considered Mr. McKnight's order. I have not changed those portions of the order which are consented to by the parties. I have imposed other terms based on an analysis of the rights of the parties under the *Mining Right of Way Act*. This has resulted in an order which is more favourable to Tilava than the original mediation order.

It appears that the Board has jurisdiction to fix terms and conditions concerning the use of the road, as use relates to compensation. Both parties appear to have

accepted that the Board has jurisdiction, and made helpful submissions concerning the orders that should be made.

Compensation for Use:

The *Mining Right of Way Act* gives authority for the Mediation and Arbitration Board to assess compensation for use of a private road by a recorded holder. The parties have not agreed on a method or manner of compensation. No evidence has been led which permits me to quantify the maintenance costs or capital costs associated with the road. I accept that any use of the road by Tilava will result in a nuisance, inconvenience and disruption to the Respondents' enjoyment of their properties. The mediator awarded the sum of $500 per party per year. I also consider the sum of $500 awarded by the mediator to be a nominal amount.

The Legislature has provided that under section 10(2) of the *Act*, a free miner can use a road without compensation. A recorded holder is, however, required to compensate the owner of the road. There are no criteria set out in the *Mining Right of Way Act* for making a compensation order under sections 10(3)(c) and (4). Section 10 (3) (c) of the *Act* states that a recorded holder who wishes to use an existing road:

> (c) if the road was not built under this Act, must compensate the owner or operator of the road in an amount or manner agreed on or settled between the parties, and
>
> (4) For the purposes of subsection (3) (c), in default of an agreement between the parties and on application of one of the parties, the mediation and arbitration board has jurisdiction to settle the issue of compensation and the terms of the settlement are binding on the parties.

I contrast section 10(3)(c) of the *Act* for recorded holders using privately owned roads with section 10(3)(b) for recorded holders using an access road. Under section 1 of the *Act*, an access road means a road built on Crown land. The criteria for compensating an owner in respect of an access road are set out in section 6(2) which relates to actual maintenance costs or capital costs. In construing section 10(3) and (4) of the *Mining Right of Way Act* in respect of a recorded holder seeking access for a private road, not built under the *Act*, it appears that compensation must be "something more" for the use of the road than actual maintenance costs or reimbursement for capital costs. I note that there are no criteria in the *Act* for assessing compensation.

I have considered whether the statutory criteria in the *Petroleum and Natural Gas Act* (*PNGA*) should be applied. Interestingly, while the *Mining Right of*

Way Act, refers to the Board in settling compensation issues, it does not refer to the *Petroleum and Natural Gas Act*, in settling compensation issues. The *Mining Right of Way Act* does not specify that the Board should assess compensation in accordance with the criteria set out in the *PNGA*.

The compensation criteria with respect to *Petroleum and Natural Gas Act* matters are set out in section 21:

Determining amount

21 (1) In determining an amount to be paid periodically or otherwise on an application made under section 12 or 16 (1), the board may consider

(a) the compulsory aspect of the entry, occupation or use,

(b) the value of the land and the owner's loss of a right or profit with respect to the land,

(c) temporary and permanent damage from the entry, occupation or use,

(d) compensation for severance,

(e) compensation for nuisance and disturbance from the entry, occupation or use,

(f) money previously paid to an owner for entry, occupation or use,

(g) other factors the board considers applicable, and

(h) other factors or criteria established by regulation.

(2) In determining an amount to be paid on an application under section 12, the board must consider any change in the value of money and of land since the date the surface lease, order or authority was originally or last granted.

These criteria apply with regard to entries (section 16) and lease renewals (section 12) with respect to what amounts to a statutory lease under the *PNGA*. The statutory criteria are used in effect to fix a "rental amount" for the use of land or the amount of damage to the land or suffering to the owner which is caused by the entry or occupation.

Can it be said that these are the criteria which the Board apply in assessing compensation for the use of a road? In dealing with applications under section 12 or 16 of the *Petroleum and Natural Gas Act*, the Board the applicant is

seeking a right to use the land to the exclusion of other uses, whereas under the *Mining Right of Way Act*, the right of access is available to any free miner or recorded holder. More than one free miner or recorded holder may use a road. Further under the *PNGA* the Board often deals which agricultural land which is taken for an indefinite period of time by way of a lease for the use of an installation or construction of a road. Under section 10 of the *Mining Right of Way Act*, the recorded holder is seeking the use of an already constructed roadway.

The criteria do not easily apply to the use of an existing roadway. Clearly there is a compulsory aspect to the use of the roadway, [8] and the landowner cannot deny access. The "value of the land" criteria does not apply [9] because the land under the surface of the road is already alienated from other uses and is being used as a road. The temporary and permanent damage from use criteria [10] appears to speak to maintenance or construction costs, captured in section 6(2) of the *Mining Right of Way Act*. As noted earlier there is no evidence of maintenance and construction costs. The concept of severance [11] does not apply because the use is not exclusive, and more use of an existing road, does not severe the land. There is no evidence in this case of money previously paid. [12]

The one clear factor that may apply is compensation for the nuisance, disturbance and use (section 12 (d)).

I note in this particular case the parties made no representations concerning the appropriate method of assessing compensation, and focused rather on whether the amount should be $500 or $1000 per party, and whether the amount should be payable upon transit by a pickup truck, or upon transit by a larger vehicle when minerals are removed.

In order to assess the amount of compensation to be ordered, if any, I have considered the statutory criteria in section 21 of the *Petroleum and Natural Gas Act*.

I have considered the following:

1. The nature, of the right granted to the recorded holder is in the nature of an entry or trespass which is authorized by statute. The owner has no choice to grant or not grant access.

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[8] Section 12 (a) PNGA
[9] Section 21(b) PNGA
[10] Section 21 (c) PNGA
[11] Section 21(d) PNGA
[12] Section 21(f) PNGA

2. The legislative policy encourages the use of existing roads over private land, and therefore the compensation should not be set in a punitive manner to discourage use of a private road.

3. The focus is on compensation for use, and not damages.

4. There may be multiple daily entries over a work season, and this will disrupt the owner's enjoyment of property. In order to facilitate access, and particularly the ease of access, the payment should be in the form of an annual lump sum, rather than an amount payable on each use of the road.

5. The payment should not be set in such a high amount that it interferes with the right of the recorded holder to exercise access under the terms of the *Act*, and perform the necessary work on claims.

6. Once the person establishes that it is a recorded holder and that the entry is for a purpose under section 2, it is entitled to access. The recorded holder's particular purpose for use of the road is not relevant to the setting of compensation. The payment is not linked to the value of minerals produced, or the purpose for the intended access, as it is intended to compensate the owner for use of the road. The landowner has no legal or ownership interest in the minerals transported over the lands, and the recorded holder is entitled to access if it can show a statutory purpose for the entry under section 2 of the Act.

7. Where no special element of compensation such as road maintenance or capital cost reimbursement is proven, the amount should be in a predictable and nominal amount. In my view, it is impossible to compensate a person who does not wish any recorded holder to use a road by any particular sum of money.

Applying these factors, and considering the Mediation Order made previously, I assess the sum of $500 per year per landowner for each year Tilava exercises access under the order.

(a) To What Portions of the Land:

I am satisfied that Tilava has met the test to use existing roads under the land. In my view Tilava is entitled to have access over the portions of roads which are on the respondents' lands. This includes the portion of the road which is

represented as a dotted line as well as a solid line. It is apparent from the evidence, particularly Mr. Klenner's evidence that the dotted line portion is less well built than the solid line portion on the map. In my view whether portions of the road are properly or poorly constructed, it is still a road, and if it is a road the Tilava is entitled to use the road under section 10 of the *Mining Right of Way Act.*

(b) Time Limitations on Access:

I have reviewed the *Mining Right of Way Act.* I am not satisfied that there is any right to restrict Tilava's access to the land by limiting access to 60 days per year. I note that Tilava has a large number of claims. It must do certain work each year on the claims, or pay monies in order to maintain the claims in good standing. Any temporal limit has the possible impact of reducing the Applicant's ability to keep the claims in good standing. In my view there are practical reasons why this road will not be used outside of the period from March 1 to November 30, as the evidence tends to suggest that the lands will be snow bound during the winter months. Tilava has no intention of entering the lands when there is snow or when the roads are too wet to use. Use of the road during the winter months (December 1 to February 28) would likely have an impact on maintenance of the road and compensation costs, and the amounts payable by Tilava for compensation. I note also that if Tilava damages the roads, Tilava can be liable to damage claims or repair costs under the legislation.

I therefore cannot accept clause 3(a) and 3(q) in the Mediation Order as drafted, and have revised the timing of access in the Order. I have imposed a temporal limit, as use in the winter months would likely have an impact on compensation to the landowner for the use of the road, and in any event Tilava is not seeking access for the period between November 30, and the end of February.

(c) Who has access?

Ordinarily a landowner is entitled to control who enters onto his or her land. A person who enters without consent is a trespasser. An order under the *Mining Right of Way Act* alters and interferes with the rights of the surface holder. It is important, given the landowners' concerns regarding other trespassers, that any of the respondents should be able to identify who is using the road. In my view, Tilava should provide to each person entering the land, a letter of authority which the driver should carry on his person or in his vehicle. Further, it is important that the landowner be able to monitor who has been on the property in the case of damage. Records of road use may assist the parties to sort out further disputes that may arise, or damage claims that could arise from use of the road by Tilava. Once monthly, Tilava will provide a listing to each landowner by regular mail. The purpose is to ensure that the landowners can prevent access by persons who are not free miners, recorded holders, and unconnected with Tilava's rights as set out in this order.

For the reasons set out above, the Board does not have jurisdiction to restrict the right to use the road just to Tilava, or prevent Tilava from assigning the order. Any free miner or recorded holder is entitled to use the road. The Board's order is made, however, in respect of Tilava's application for access.

I have not made any order or direction concerning the standards of improvements to be made to the road, as requested by Mr. Klenner. Tilava's evidence was that it did not intend to make any improvements unless Tilava expropriated the road under section 2 of the *Mining Right of Way Act*. Any disputes concerning the quality of the maintenance work undertaken by Tilava, or the recovery of costs of maintenance by the Respondents can be dealt with by the Board, at a later time, upon application if this becomes necessary.

ORDER:

THE MEDIATION AND ARBITRATION BOARD MAKES THE FOLLOWING ORDERS:

The Applicant is permitted to access the roads outlined and solid and dotted red over the lands of the Respondents between March 1 to November 30 of each year ("private access road").The following conditions shall apply:

1) Pursuant to Section 19(2) of the *Petroleum and Natural Gas Act*, the Applicant must deposit security by cheque in the amount of two thousand dollars ($ 2,000) payable to the "Minister of Finance and Corporate Affairs." Thereafter the Respondent shall ensure that it maintains the sum of $2,000 each year with the Mediation and Arbitration Board. The Board or the Government of British Columbia shall hold the amount in trust for the purpose of ensuring payments to the Respondents as provided in 2 below. The Applicant may apply to the Board for return of the security, once the Applicant has made application to the Board, notifying the Board, and the Respondents that it no longer requires the access over the Respondents' lands;

2) The Applicant shall pay to each of the Respondents once per year an annual road usage fee of five hundred dollars ($500) for each year that the Applicant uses each Respondent's portion of the private access road to access the Mineral Claims. This amount shall be paid by March 31st of each year, provided the Applicant continues to use the road;

3) Tilava shall ensure that any of its employees, agents or contractors who use the road have a letter from Tilava which identifies the person as an employee, agent or contractor of Tilava, performing work for Tilava, which

shall be produced by the employee, agent or contractor if requested by the Respondents;

4) In any month where Tilava or any person authorized by Tilava has exercised access, Tilava shall by the 15th day of the month following the access, provide by ordinary mail to each of the landowners a schedule showing the date, time, licensed vehicle, and driver entering the property;

5) Tilava shall provide sets of locks and keys to each Respondent be added to the locks on the gates to allow the Applicant and the Respondents separate, independent, access without troubling each other. Tilava shall remove its locks at the end of November of each operating year;

6) The Applicant shall lock all access gates on the Private Access Road promptly after use, shall permit no entry to unauthorized persons and shall report any suspicious activity on the Lands to the Respondents;

7) The Respondents shall cooperate with the Applicant in maintaining security while installing and removing the separate locks and in keeping the access road clear for Applicant traffic during the authorized access period;

8) Tilava shall provide to each of the Respondents a Certificate of General Liability Insurance, with coverage of at least $2 million, prior to the Applicant's entry on to the Lands each year;

9) Tilava shall ensure that any agents or contractors of the Applicant which Tilava authorizes to use the access granted under this Order shall maintain similar or greater general liability insurance coverage. Tilava shall provide proof of this coverage on request by the Respondents;

10) Tilava shall indemnify and save harmless the Respondents, from any and all claims, demands, losses, charges, liabilities, costs, expenses, and injury which Respondents may suffer or incur or to which the Respondents may be threatened, including the Respondent's legal expenses of defending any such claims, in connection with the use of the Private Access Road by the Applicant or its employees, agents and contractors;

11) Tilava shall limit its vehicle traffic transiting the Lands to daylight hours during the ordinary course of using the road, unless emergency conditions such as equipment breakdown, health and safety, forest fire watch prevail;

12) The Applicant shall adhere to all Ministry of Highways and Ministry of Energy, Mines and Petroleum regulations regarding driver qualifications, safety and maintenance of vehicles used, type and tonnage of materials carried, under the road conditions encountered;

13) The Applicant shall restrict vehicular speeds to less than 10km/hr when transiting the Lands on the Private Access Road;

14) The Applicant shall desist from using the Private Access Road during wet conditions or when the BC Forest Service Fire Rating for the region is High or Extreme;

15) The Applicant shall promptly repair any damage caused by its vehicular traffic to the Private Access Road, including damage to gates or cattle guards;

16) The Applicant shall make every reasonable effort to avoid harmful contamination of water sources on the Lands.

MEDIATION AND ARBITRATION BOARD
UNDER THE MINING RIGHT OF WAY ACT

Dated this 30th day of March 2006, Campbell River, British Columbia

Paul Love, Chair
Mediation and Arbitration Board