

File No. MF 009-99

L. Kamerman ) Thursday, the 21st day  
Mining and Lands Commissioner ) of October, 1999.

**THE ASSESSMENT ACT**

**IN THE MATTER OF**

Plan 55M505, Lots 1 to 24, both inclusive, Lambert Island, Township of MacGregor, Municipality of the Township of Shuniah, District of Thunder Bay, more particularly identified as roll numbers:

58 28 010 005 613 00 0000; 58 28 010 005 613 02 0000;  
58 28 010 005 613 04 0000; 58 28 010 005 613 06 0000;  
58 28 010 005 613 08 0000; 58 28 010 005 613 10 0000;  
58 28 010 005 613 12 0000; 58 28 010 005 613 14 0000;  
58 28 010 005 613 16 0000; 58 28 010 005 613 18 0000;  
58 28 010 005 613 20 0000; 58 28 010 005 613 22 0000;  
58 28 010 005 613 24 0000; 58 28 010 005 613 29 0000;  
58 28 010 005 613 34 0000; 58 28 010 005 613 36 0000;  
58 28 010 005 613 38 0000; 58 28 010 005 613 40 0000;  
58 28 010 005 613 42 0000; 58 28 010 005 613 44 0000;  
58 28 010 005 613 46 0000; 58 28 010 005 613 48 0000;  
58 28 010 005 613 50 0000; 58 28 010 005 613 52 0000; and  
58 28 010 005 625 00 0000;

- and -

Island 15 South of Lambert Island, Parcel 11780, Township of MacGregor, Municipality of the Township of Shuniah, District of Thunder Bay, more particularly identified as roll number 58 28 010 005 617 00 0000, all aforementioned roll numbers hereinafter referred to as the Assessed Property;

(Amended October 21, 1999)

**AND IN THE MATTER OF**

The Managed Forest Tax Incentive Program, administered by the Ministry of Natural Resources;

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**AND IN THE MATTER OF**

Section 40 of the **Assessment Act** and Ontario Regulation 282/98;

**AND IN THE MATTER OF**

The 1998 and the 1999 taxation years.

**B E T W E E N:**

LAMBERT ISLAND LIMITED

Appellant

- and -

ADMINISTRATOR, MINISTRY OF NATURAL RESOURCES, within the meaning of section 33 of Ontario Regulation 282/98

Respondent

- and -

THE MUNICIPALITY OF THE TOWNSHIP OF SHUNIAH

Party of the Third Part

(Amended October 21, 1999)

**O R D E R**

**UNDER** the power vested in this tribunal under clauses 116(1)(b) and (g) of the **Mining Act**, R.S.O. 1990, c. M.14;

**AND UNDER** section 40 of the **Assessment Act**, R.S.O. 1990, c. A.31 and Ontario Regulation 282/98;

**AND PURSUANT TO** a complaint in writing to the Assessment Review Board dated August 31, 1998, which was referred to the tribunal for hearing pursuant to paragraph 1 of section 35 of Ontario Regulation 282/98, having been received by this tribunal on the 3rd day of June, 1999;

**AND WHEREAS** a site visit was conducted on the subject property on Wednesday, the 8th day of September, 1999, which was attended by Mr. Donald Patterson, agent for the Appellant, and Mr. Edwin Ayer, R.P.F., resident of Lambert Island and Mr. Daniel Pascoe, Registrar, on behalf of the tribunal;

**AND WHEREAS** Mr. Alexander Patterson, on behalf of the Appellant, executed a Consent with conditions to grant this appeal, dated the 14th day of October, 1999, Ms. Doris Krahn, on behalf of the Respondent, executed a Consent with conditions to grant this appeal, dated the 14th day of October, 1999 and Mr. Art Wellington, on behalf of the Party of the Third Part, executed a Consent with conditions to grant this appeal, dated the 14th day of October, 1999;

**1. THIS TRIBUNAL ORDERS** that the appeal be allowed upon the following conditions:

- i. That the Assessed Property, having a total of 102.43 acres, shall be assessed as having a Managed Forest component of 16.45 acres in accordance with the map and the aerial photograph of the eligible area set out in Schedule "A" attached hereto and forming part of this Order.
- ii. That the Assessed Property possesses a unique subdivision agreement that will not allow for the future sale of the 26 roll numbers thereby protecting the provincial interest of maintaining the integrity of the forest block.
- iii. That the Assessed Property continues to be managed according to the approved Managed Forest Plan in a consistent manner across the compartment.
- iv. That the granting of this appeal shall not be precedent setting in any way.
- v. That the eligible managed forest area of the Assessed Property shall be as indicated on the chart set out in Schedule "B" attached hereto and forming part of this Order.

**2. THIS TRIBUNAL FURTHER ORDERS** that there are no costs payable by any party to this appeal.

Reasons for this Order are attached.

**DATED** this 21st day of October, 1999.

L. Kamerman  
MINING AND LANDS COMMISSIONER

File No. MF 009-99

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Mining and Lands Commissioner ) of October, 1999.

**THE ASSESSMENT ACT**

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58 28 010 005 613 50 0000; 58 28 010 005 613 52 0000; and  
58 28 010 005 625 00 0000;

- and -

Island 15 South of Lambert Island, Parcel 11780, Township of MacGregor, Municipality of the Township of Shuniah, District of Thunder Bay, more particularly identified as roll number 58 28 010 005 617 00 0000, all aforementioned roll numbers hereinafter referred to as the Assessed Property;

(Amended October 21, 1999)

**AND IN THE MATTER OF**

The Managed Forest Tax Incentive Program, administered by the Ministry of Natural Resources;

**AND IN THE MATTER OF**

Section 40 of the **Assessment Act** and Ontario Regulation 282/98;

**AND IN THE MATTER OF**

The 1998 and the 1999 taxation years.

**B E T W E E N:**

LAMBERT ISLAND LIMITED

Appellant

- and -

ADMINISTRATOR, MINISTRY OF NATURAL RESOURCES, within the meaning of section 33 of Ontario Regulation 282/98

Respondent

- and -

THE MUNICIPALITY OF THE TOWNSHIP OF SHUNIAH

Party of the Third Part

(Amended October 21, 1999)

**REASONS**

This matter arose by way of a complaint to the Assessment Review Board (the "ARB") dated August 31, 1998, which, pursuant to the provisions of paragraph 35 (1) of O.Reg 282/98, as amended, has been referred to the Mining and Lands Commissioner (the "tribunal") for determination as to the issue of the classification of managed forests. The referral from the ARB was received by the tribunal on June 3, 1999.

This matter is being disposed of with the consent of the parties. Therefore, the purpose of these Reasons is to set out the rationale for the tribunal's decision to accept the consent of the parties allowing the appeal.

The municipal tax assessment involves land known as Lambert Island, being Plan 55M505, Lots 1 to 24, both inclusive, Lambert Island; and Island 15 South of Lambert Island, Parcel 1780, both in the Township of MacGregor, Municipality of the Township of Shuniah, District of Thunder Bay. The corresponding roll numbers are set out in detail in the Title of Proceedings and are not reproduced.

Lambert Island Limited ("LIL") is a corporation incorporated in Ontario which wholly owns the lands in question. On the island are 25 cottage lots for which LIL issues indi-

vidual leases to shareholders of the corporation. The tribunal notes that LIL has issued and allocated shares to which are attached more than 50% of the voting rights ordinarily exercisable at the meetings of the individual shareholders and that those shares are owned by Canadian citizens. The explanation of the history of this island, as set out in the appellant's submission (Ex. 1), is reproduced:

Lambert Island was purchased by Lambert Island Ltd. (LIL) in the early 1960's with the intent of combining a low density summer residence development with a well forested setting. Twenty two cottage lots each with a minimum size of approximately 1 hectare were created along with some common land. Each shareholder of LIL entered into a 21 year lease with the corporation and elected an executive to manage the road, bridge and property affairs. In the early 1980's the 21 year leases expired and the corporation attempted to renew them. LIL was advised by the Ontario Municipal Affairs Ministry that such lease renewal would be a breach of the Ontario Planning Act and that the only way to extend the term of the expired leases was to enter into a plan of sub-division agreement with the Township of Shuniah. Neither the Township nor LIL wanted to go this route. The Township did not want to assume any liability with respect to LIL's road and bridge facilities and LIL did not want to give up its status as a private landowner capable of managing its own affairs not the least of which was its ability to manage its private woodlot.

Following several years of negotiation, LIL and the Township of Shuniah then entered into a Plan of Sub-division Agreement in 1985 which vehicle was the best compromise available to meet each party's goals. Shuniah has been indemnified against any liability whatsoever relating to the bridge and road on the island, the province has been satisfied with respect to its title concerns that arose from the existence of the long term leases and LIL has maintained its independent corporate status. In fact, LIL had its 38th annual meeting on July 7 where it elected its executive to manage the bridge, road, woodlot and other affairs of the island. Indeed, the August 28, 1998 Managed Forest Plan was unanimously adopted by the shareholders of LIL with the executive having been given the full authority to carry out the plan.

It is interesting to note that LIL is subject to 100% municipal taxation (which amounted to the payment of more than \$50,000 in 1998) while receiving no benefit from the Township for road, bridge and forest maintenance. In fact, this is the written requirement of the sub-division agreement entered into between LIL and the Township of Shuniah, is registered on title and which agreement has been complied with by LIL and its shareholders. LIL is solely responsible for all bridge, road and forest maintenance and has spent significant monies annually to carry out this maintenance activity.

Lambert Island Ltd. is appealing to you to accept our application within the spirit of the intent of the Managed Forest Tax Incentive Programme. The Ontario Ministry of Natural Resources, in developing the Programme, had concerns that Ontario's conservation lands are threatened by urban encroachment, land clearance, drainage and filling. The MNR has recognized the need for private stewardship of some of our provincial woodlots to be critical to the success of the protection of the province's natural heritage. Lambert Island has a beautiful woodlot that is a "showcase example" of good forest management practices to the surrounding communities. LIL has an approved Forest Management Plan and is the sole owner of the Island with the authority to enforce the plan vested in the Lambert Island Ltd. Executive. LIL has been a beneficiary of this incentive programme in past years and has used the incentive well to maintain its woodlot. We feel it is unfair to no longer qualify given that the only change in our status has been to enter into the 1985 Plan of Sub-division agreement. The ability and will to manage our woodlot remains unchanged and we would like to continue with the help of the provincial incentive.

#### Ontario Regulation 282/98

Section 9 of O.Reg. 282/98 sets out the requirements for managed forest classification eligibility:

**9.** (1) The managed forests property class consists of eligible land determined in accordance with this section to be managed forest land.

(2) Land that is covered by a forest, and including outbuildings used for forest operations, is eligible land if the following requirements are satisfied:

1. The land is owned by,
  - i. an individual who is a canadian citizen or has been lawfully admitted to canada for permanent residence,
  - ii a corporation that has issued and allocated shares to which are attached more than 50 percent of the voting rights ordinarily exercisable at meetings of the individual shareholders and that are owned by individuals described in subparagraph i,  
 . . . . .
2. The forest including any area included under subsection (3) is at least four hectares in size.

3. The land is all or part of a single parcel of land or, if the land consists of land from more than one parcel, the forest on land in each parcel satisfied the requirement in paragraph 2.
4. Subject to subsection (3), the forest has, per hectare, at least,
  - i. 1,000 trees of any size,
  - ii. 750 trees that, at a height of 1 1/3 metres, are more than 5 centimetres in diameter,
  - iii. 500 trees that, at a height of 1 1/3 metres, are more than 20 centimetres in diameter, or
  - iv. 250 trees that, at a height of 1 1/3 metres, are more than 20 centimetres in diameter.
5. The land is not,
  - i. land for which a plan of subdivision has been registered, or
  - ii. licensed under the *Aggregate Resources Act* or zoned for aggregate extraction if that Act does not apply to the land.

(3) An area in a parcel of land that does not have enough trees to satisfy the requirement in paragraph 4 of subsection (2) forms part of the eligible land in the parcel if the area contributes to the objectives of the managed forest plan for the forest and if the total of such areas does not exceed 10 per cent of the forest on the land in the parcel that satisfies the requirement in paragraph 4 of subsection (2).

(4) Eligible land is managed forest land for a taxation year if the requirements set out in subsection (5) or (6) are met.

(5) The following requirements apply with respect to eligible land that was not managed forest land for the previous taxation year:

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(6) The following requirements apply with respect to eligible land that was managed forest land for the previous taxation year:

1. Since the most recent previous application for the classification of the land as managed forest land was made, the land must have been managed in accordance with the managed forest plan and the owner must not have breached anything the owner agreed to in the previous application.



2. On or before August 31 of the previous taxation year, the owner of the eligible land must submit a completed application for the classification of the land as managed forest land to a designated government agent.
  3. In the application, the owner must state that,
    - i. the land is eligible land and the owner wishes the land to continue to be managed forest land, and
    - ii. the requirement in paragraph 1 is satisfied.
  4. In the application, the owner must agree,
    - i. to manage the forest in accordance with the approved managed forest plan,
    - ii. to allow a person selected by the Minister of Natural Resources to inspect the land and to inspect documents relating to the land to ensure that the forest is being managed in accordance with the approved managed forest plan and that the land remains eligible land, and
    - iii. to cooperate with the person described in subparagraph ii in the course of the inspection.
  5. The owner must have an audit of the forest performed on or before August 31 of the previous taxation year unless the forest has been audited during the five years proceeding the beginning of the current taxation year. Subject to subsection (8), this paragraph does not apply with respect to any of the first five taxation years for which the land is classified as managed forest land.
  6. The audit must be performed by a managed forest plan approver, but not by the person who approved the managed forest plan then in effect.
- (7) A managed forest plan that is approved under the Managed Forest Tax Rebate Program of the Ministry of Natural Resources for 1996 or 1997 shall be deemed to be an approved managed forest plan.

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(12) In this section,

"approved managed forest plan" means a managed forest plan that is approved by a managed forest plan approver as having been prepared in accordance with the Ontario government publication published in 1997 titled "A Guide to ... The Managed Forest Tax Incentive Program (MFTIP)";

"designated government agent" means a person described in the Ontario government publication published in 1997 titled "A Guide to ... The Managed Forest Tax Incentive Program (MFTIP)" as a person to whom the applications are to be sent;

"managed forest plan approver" means a person designated by the Minister as a managed forest plan approver.

The tribunal makes reference to the provisions of Order In Council number 2212/95, pertaining to the 1996 tax year. In this Order in Council, having been made pursuant to section 4 of the **Forestry Act**, are found similar provisions with respect to size and numbers of trees, residency requirements for individuals or corporations, size of forest, management plan extending to 20 years, and provides certain ineligibility criteria, such as to a conservation authority, land which is licensed for aggregate extraction or zoned for such, or eligible for tax rebates under another program.

The most notable difference between the Order in Council and the current regulation are the provisions which provide that lands subject to a registered plan of subdivision (s.9(2), para. 5 i) and the land being of a single parcel of land, or where from multiple parcels, the forest land on each parcel satisfies the requirements (s. 9(2), para 3).

### Changes to the **Planning Act**

Through its own inquiries, the tribunal has ascertained that the provision of the **Planning Act**, R.S.O. 1990, c. P.13 which the Lambert Island 21 year leases ran afoul of was clause 50(3)(a), which is reproduced:

**50.(3)** No person shall convey land by way of a deed or transfer, or grant, assign or exercise a power of appointment with respect to land, or mortgage or charge land, or enter into an agreement of sale and purchase of land or enter into any agreement that has the effect of granting the use of or right in land directly or by entitlement to renewal for a period of twenty-one years or more unless,

(a) the land is described in accordance with and is within a registered plan of subdivision;

However, these provisions were contained in earlier versions of the **Planning Act** as can be seen from the following discussion in Troister, S.H. and Waters, K.A. **The Law of Subdivision Control in Ontario, A Practical Guide to Section 50 of the Planning Act**, 2nd ed. (Carswell: Toronto, 1994), commencing at page 1:

### **An Introduction to Subdivision Control**

#### SUBDIVISION CONTROL AND ITS EVOLUTION

Section 50 of the *Planning Act*<sup>1</sup> affects or is at least a consideration in virtually all transactions involving real property interests in Ontario. Its purpose, and that of its predecessors, is to control the manner in which land can be divided, and non-compliance is fatal to any transaction. The section is restrictive in nature, limiting the manner in which owners can deal with their land and, as a result, it has been the subject of numerous schemes for avoidance and extensive litigation to determine the manner in and extent to which it affects transactions.

Section 50 of the Act (which in earlier Planning Acts have been contained in ss. 23, 24, 26, 29 and 49) is the main enforcement mechanism of subdivision control in Ontario. Subdivision control means the statutory control by government of the division of land into smaller parcels. This is a broad definition and includes land divisions which might serve a wide range of purposes. For example, the breaking up of a farm by a developer into hundreds of building lots is controlled by the Act, but so is the division in half of a single lot to allow construction of two separate single residences. Not only are divisions created by the transfer of title affected and restricted, but most other dealings with a part of one's parcel of land are also prohibited to ensure control of all practical dealings with land.

Curiously, the process is referred to as "subdivision" control, rather than "division of land" control. The latter term might represent more accurately the aim of the legislation, since it is not just the creations of "subdivision" in the commonly understood sense of the word which is prohibited. However, according to Milner, the "division" of all Ontario land occurred in the 19th century, when township lots were created. Any further division must be a "subdivision" of a township lot.<sup>2</sup>

The absolute right of an owner in fee simple to dispose of his lands as he wishes had been a cornerstone of English law since the 11th century.

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<sup>1</sup> R.S.O. 1990, c. P. 13

<sup>2</sup> J. B. Milner, ed., *Community Planning: A casebook on Law and Administration* (Toronto: University of Toronto Press, 1963), p. 283: "An Introduction to Subdivision control Legislation" (1965) 43 Can. Bar Rev. 49.

The right of a tenant in fee simple to convey his estate was recognized by the statute of *Quia Emptores*, passed in the 18th year of the reign of King Edward 1. That statute is part of the law of Ontario and is reprinted in volume 6 of the Revised Statutes of Ontario, 1970. This right of alienation remained an inseparable incident to an estate in fee simple until, in Ontario, 647 years later, the *Planning Act* was amended so as to avoid certain types of conveyances.<sup>3</sup>

In 1961, the Ontario legislature added the nullification provision (now subs. 50(21)) to subdivision control law making any transaction contravening the Act of no legal effect to create or convey an interest in land. The willingness of the Legislature to deprive all property owners of a basic incident of ownership in order to provide an effective deterrent to unregulated development demonstrates how essential subdivision control was considered to be in Ontario by 1960.

Prior to the introduction of limited subdivision control in Ontario in 1912, the only controlling factor over the use of land and in particular the division of parcels of land, construction of houses and so on were provided by the market and the law of nuisance. Nuisance, as Milner has observed, has more to do with the use of land for specific purposes than with planning in the broader sense. Furthermore, the law of nuisance is not able to provide administrative regulation in the public interest. It is completely concerned with the use to which an individual has already put property and whether that use is tolerable, rather than on the best use for the community at large.<sup>4</sup> Clearly, the market and the law of nuisance were insufficient to address larger planning concerns.

At the turn of the century, the market was producing strip development on highways and roads along the outskirts of cities, where developers could take advantage of cheaper land and prospective residents appreciated lower taxes.<sup>5</sup> However, even then such strip development was undesirable. Any servicing of the properties by pipes, hydro lines, etc. as more expensive because people and properties were so spread out. It was dangerous to drivers and residents alike for there to be so many driveways with direct access to a highway. For all of these reasons, it was felt necessary to limit the amount of strip development in Ontario.

One can identify four stages in the development of subdivision control in Ontario. The first stage lasted from 1912 to 1917, when control was exerted over the subdivision into lots of "any tract of land lying within or within 5 miles of a

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<sup>3</sup> The Honourable Mr. Justice F. S. Weatherston, "Land Severances and the *Planning Act* [1974] Spec. Lect. L.S.U.C. 169.

<sup>4</sup> J. B. Miler, "Administrative Appeals under Planning Legislation" [1956] Spec. Lect. L.S.U.C. 117 and note 2 *supra* at p. 3 of *Community Planning*

<sup>5</sup> Note 3, *supra*.

city, having a population of not less than 50,000.<sup>6</sup> For this five year period, the problem must have been perceived as relating to overflow from only the largest of Ontario's cities, those with 50,000 or more people.

During the second period which lasted from 1917 to 1946, subdivision control applied to land within cities, towns, villages and urban zones; an "urban zone" consisting of the area within 5 miles of a city or within 3 miles of a town or village.<sup>7</sup> Smaller concentrations of development and population must by this time have begun to generate their own strip development.

The third stage in the emergence of subdivision control lasted from 1946 to 1970. In at least one way it represents a retreat from the earlier imposition of controls on *all* cities, towns and villages and their surrounds. The power to decide whether subdivision control was necessary passed to the individual municipality in 1946.<sup>8</sup> During this period, subdivision control only applied to land within a municipality which had passed the appropriate subdivision control by-law which invoked the application of the law to the municipality.

Over that 25 year period, the exemptions now found in the current version of the act were slowly developed. But in some ways, the act became more stringent. The opportunity for part lot control was added in 1955<sup>9</sup> and the ultimate penalty, nullification of any contravening transaction, came into effect in 1961.<sup>10</sup> By 1967, so many titles had been jeopardized by contraventions and possible contraventions that the Legislature felt compelled to pass a blanket pardon for prior contravention, and have everyone start anew.<sup>11</sup>

Since 1970, all land in Ontario has been subject to subdivision control and part lot control.<sup>12</sup> There have been almost annual amendments, as the Legislature has struggled to close loopholes and create needed exceptions, culminating in a revised Act in 1983. The interpretation and application of some of the newer provisions are as yet unclear, due either to the drafting itself or to no judicial consideration as yet.

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<sup>6</sup> *City and Suburbs Plans Act*, S.O. 1912 (2 geo. V), c. 43.

<sup>7</sup> *Planning and Development Act*, S.O. 1917 (7 Geo. V), c. 44.

<sup>8</sup> *Planning Act, 1946*, S.O. 1946, c. 71, s. 23.

<sup>9</sup> *Planning Act, 1955*, S.O. 1955, c. 61, s. 24.

<sup>10</sup> *Planning Amendment Act, 1960-61*, S.O. 1960-61, c. 76, s. 1(1).

<sup>11</sup> *Planning Amendment Act, 1967*, S.O. 1967, c. 75, s. 10.

<sup>12</sup> *Planning Amendment Act, 1970*, S.O. 1970, c. 72, s. 1.

And stated further at page 60:

(iii) *Leases*

A lease clearly has the effect of granting the use of land for a term of years and is an agreement that may be subject to the Act. Agreements that grant such use of land for at least 21 years whether directly or "by entitlement to renewal" are prohibited. As a result, a lease with a term of 25 years and a lease of 15 years with an option to renew for a further 10 years (whether or not the tenant ever exercises the option) are both prohibited agreements.

In *Spooner v. Arcand*,<sup>14</sup> a tenant in 1973 leased premises for 20 years. In 1980, parties agreed that upon the expiration of the lease, it could be renewed for a further 20 years. The landlord later claimed that the subsequent agreement contravened the Act since together with the 13 unexpired years of the original lease it meant that the premises were leased for 37 years.

The court concluded that two very separate agreements existed and were not prohibited by the language of subs. (3) and (5). The documents did not grow out of one transaction or negotiation or were used to attempt to evade the intention of the Act. The parties were dealing at arm's length and the agreement did not constitute a fraud upon the Act.

Plan of Sub-Division

As a result what it believed were changes rather than consolidation of provisions in the **Planning Act**, Lambert Island Ltd. found that it was unable to enter into or execute further 21 year leases for the lands on Lambert Island. Resulting from this situation, a Subdivision Agreement was entered into by the Corporation of the Township of Shuniah and Lambert Island Limited on October 9, 1985. A copy of this Agreement has been filed (attached to and forming part of Exhibit 3), and although it contains considerable detail, the tribunal will refer to only certain provisions.

Clause 9, being pursuant to section 284 of the **Municipal Act** sets out that neither Lambert Lane nor Lambert Island Bridge were built by Lambert Island Limited, neither having been established by by-law of the Township, and further acknowledges that the Township never has had nor will it ever have a duty to repair. It further sets out that the Township does not intend to own or maintain either, nor are they there for the use of the public or Township.

Clause 10 sets out that Lambert Island Limited is responsible for the repair of Lambert Lane and Lambert Island Bridge and that in case of default, Lambert Island Limited shall be liable for all damages sustained.

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<sup>14</sup> (1993), 13 O.R. (3d) 835 (Gen Div).

Clause 11, being made pursuant to section 286 of the **Municipal Act**, sets out that the registration of the plan of subdivision shall not be deemed to be ownership or assumption by the Township of any Road, with no attendant responsibility.

Clause 12 sets out that the Township has not, nor does it intend to, assume either Lambert Lane nor Lambert Island Bridge for public use, nor does it intend to have its employees do any work, nor make any expenditures of public money for their improvement; and covenants unequivocally not to own or assume responsibility for public use or repair.

Clause 13 sets out that, while neither party intends that the Township be required to carry out or perform maintenance or emergency repairs to Lambert Lane or Lambert Island Bridge, in the unlikely event that such repairs or maintenance should take place, any such work is to be ascribed as a courtesy rather than as an assumption of liability. Further it provides that if requested by Lambert Island Limited to do such work, it will be the Township's intention to do nothing. Lambert Island Limited covenants to inform all shareholders and lessees of the foregoing and to obtain an acknowledgement of the foregoing along with a covenant of the lessees to not take any action.

Clause 14 provides that any entry over Lambert Lane or Lambert Island Bridge by anyone connected with the Township or members of the Shuniah Volunteer Firefighters Association shall not constitute nor be deemed to constitute ownership or acceptance by the Township of either the road or bridge.

Clause 15 provides that there is no intended public ownership or use, also providing for the erection of signs.

Clause 16 provides that there will be no transfer of any of the lots or blocks in the plan of subdivision, but that there may be only leasing of such blocks or lots to shareholders in Lambert Island Limited. Entry of the Plan of Subdivision is to be made pursuant to section 117 of the **Land Titles Act**, R.S.O. 1980, c. 320, on the parcel register and that no transfer shall be made or charge against the freehold title of Lambert Island Limited, unless the consent of the Clerk of the Township is given.

Clause 17 provides that Lambert Island Limited will obtain from all existing lessees or occupants a release of all existing rights and obligations, and a discharge or release of all mortgages, liens, encroachments and other interests, with the understanding that it has full power and authority to enter into the agreement; it further agrees to indemnify the Township with respect to any claims arising from the lessees or occupants.

Clause 18 is agreement that Lambert Island Limited will not enter into any agreement of purchase and sale, nor to convey, any of the lots.

Clause 19 provides that Lambert Island Limited will guarantee to repair and replace the bridge within a reasonable time. Every lease must contain a clause binding the lessee to pay its proportionate share of the bridge rebuilding.

Clause 20 contains several provisions prior to final granting of approval of the plan of subdivision by the Minister of Municipal Affairs and Housing, including rerouting of septic systems, delivery to the Township of certified copies of resolutions or by-laws authorizing the execution of the Agreement, delivery of executed acknowledgements from all shareholders, in a form acceptable to Township solicitors, of the obligations of Lambert Island Limited, as to road and bridge repair, non public use and indemnity insurance, a statutory declaration that there are no encumbrances affecting title, to deliver to the Township a final copy of the lease to be used, payment of a parkland levy of \$15,000 and delivery of a certified copy of liability insurance.

#### View of Lambert Island

Under section 118 and 119(1) of the **Mining Act**, the tribunal is permitted to obtain the assistance of experts or to view a property or to receive such additional evidence as it considers proper. In this regard, the tribunal requested its Registrar, Mr. Daniel E. Pascoe, to attend Lambert Island and provide a description of what was seen. The body of this report is reproduced:

At your request, I conducted a site visit of Lambert Island on Wednesday, September 8, 1999. You specifically requested that I view the Island for purposes of objective fact gathering, based upon only visual observations. You further requested that I view the areas surrounding the cottages with a view to summarizing my observations. Included was to observe whether the lands immediately surrounding cottages had been landscaped through cultivation of grass, for example and further observation of demarcation between the lots surrounding the cottages, such as fences.

I was met by Mr. Donald Patterson, agent, on behalf of the appellant and Mr. Edward Ayer, R.P.F. and long-time Lambert Island resident.

The cottage lots on the 98 acre site (as per materials in the file) of Lambert Island do not have the appearance of discreet lots. According to documentation, there are 26 cottage lots on the Island, with an average size of approximately four acres.

There were no visual cues to discern where one lot started and the next one ended. There are no fences save and except for one, old, low, abandoned one on the southwestern end of the Island. (I was informed that this fence was built many years ago on an effort to prevent animals from entering that portion of the Island at that time.)

Very little empty space was evident. It was not possible to see one cottage from the next. The uncultivated forest area extends almost to the door of each cottage. There is little or no grass but rather, a typical forest floor biomass.



The actual size of each of the cottages varies and some of them are winterized. (I was informed that the average length of occupancy is four months per year but that there is **no year around residency.**)

I saw a combination of both new and old growth trees including ash, birch, white cedar and white and red pine. (I was informed that Lambert Island has had periodic infestations of spruce budworm and as a result, the island has been sprayed periodically in cooperation with MNR in an effort to control the budworm.)

A copy of this report, in the form of a Memorandum addressed to L. Kamerman, was provided to Mr. Patterson, on behalf of the appellant and Ms. Krahn, on behalf of the respondent. Ms. Krahn indicated in an informal telephone discussion that she was impressed by the content of the report that these lands could qualify for a managed forest, but for the plan of subdivision, and she would be willing to consent to such a disposition, as long as it did not have precedential impact for future appeals involving plans of subdivision.

Managed Forest Plan

The Managed Forest Plan was submitted with each of the lots under appeal and sets out the following information (which is the same for each of the lots under appeal):

**3.1 General Description of the Property History**

In 1960, a group of dedicated environmentalists purchased Lambert Island and incorporated it. The purpose was to ensure protection and recreation in perpetuity. Control is maintained through leases to the 21 participants.

Each parcel is a minimum of one hectare and there are two parcels reserved for common use. The island is completely forested.

Subsequently, a steel bridge was built, Lambert Street was constructed and hydro lines were erected.

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**5.2: Detailed Property Level Objectives, Strategies and Activities**

Located on Lake Superior, the site is exposed to spring and fall storms. They cause repeated windfalls which require removal.

The spruce budworm infestation in the early 1990's killed about 50% of the balsam fir. Other species have been planted to reduce that percentage.

Wildlife Habitat/Recreation

Shoreline trails and the main Lambert street are maintained for hiking.

Ducks, geese, shore birds, grouse, rabbits and chipmunks are common. There are also some moose, foxes and skunks. Woodpeckers and hummingbirds are also seen.

Forest Products

It is a constant job to cut windfalls for firewood.

Others - Fire Protection

Firebreaks and roads are maintained year round. Brush removal is ongoing. There has been no forest fires. The Shuniah fire department is 4.5 miles away.

**5.3: Strategy for Plan Implementation**

Each parcel is maintained by each leaseholder. The forest practice is to remove dead trees, thin thick stands, encourage natural growth and plant resistant species.

Although natural regeneration is excellent, more than 5000 trees have been planted.

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**7.1: General Description**

The island is a typical example of a contiguous northern boreal forest of tolerant spruce and balsam fir. Small windfall openings have allowed some aspen and birch to establish.

**7.2: Compartment Site Characteristics**

Soil Type	thin, acidic or leached	Physical Features	pre-Cambrian bedrock
Drainage	poor	Access	year round, good
rocky		Topography	rough,
surround	Other Features	boulders strewn from lake	Water Features lake

.....

**7.4: Compartment Inventory**

tree species composition	per cent	age (yrs)	average height(m)	average diameter breast height (cm)	average (# stems per ha)	density
Balsam Fir	60	65	15	12		600
W.& B.Spruce	15	80	25	25		300
White Birch	10	50	15	15		400
Aspen	10	35	15	15		400
Jack Pine	5	65	20	30		250

The following letter (Ex. 1, Tab 3) dated August 30, 1998, addressed to Lambert Island Limited by Mr. Terry Wilson, giving conditional approval by a person selected by the Minister of Natural Resources to inspect the land and to inspect documents relating to the land to ensure that the forest is being managed in accordance with the approved managed forest plan, is reproduced:

I have reviewed your aforementioned management plan. Based upon the changes made to the plan (due to my visit to the woodlot on August 30/98) I find that the plan meets the minimum requirement for acceptance (*with the possible exception of your area/roll number*). I am not sure how the authorities will view the fact that you have a number of different "properties" of which only one (Lot #13) meets the minimum area requirements. Given the fact that you have not contacted me regarding this plan until the last week of August, I do not have time (**sic**) clarify this matter. Therefore, I am giving your plan "tentative approval based upon the following:

- . You stated that you had talked to Doris (and possibly others) regarding your land and, from this conversation(s) you are under the impression that you are o.k. as long as there is one land-owner.
- . As it is the final weekend of August, I cannot clarify this issue further since no official offices are open and, to delay it any further, would mean that you would probably miss the deadline for plan submission.
- . I do recall something mentioned to me earlier about (adjacent) properties with the same owner qualifying for the original (MFTRP) re-introduced program by pooling areas together. At this point in time I do not know if this has been changed (quite possibly it has) and, again, I cannot clarify this matter before tomorrow.

## Findings

The facts of this appeal are found to be unique. There is an apparent misunderstanding on the part of the appellant, Lambert Island Limited, as to the nature of changes made to the **Planning Act**, insofar as that legislation has been evolving since 1912. The tribunal finds it unnecessary to review in any greater detail the changes that have been made prior to 1983. Suffice to say that it is likely that the changes affecting Lambert Island came into existence between 1946 and 1970, but were unlikely to have come to the attention of LIL until 1983. In 1983, notwithstanding the earlier state of planning law, the **Planning Act** served to make it no longer possible for LIL to continue its practice of long-term leases without a plan of subdivision.

The actual plan of subdivision is noteworthy in that it specifically excludes many of the usual municipal responsibilities in the Township of Shuniah, namely for road and bridge maintenance not to mention outright ownership by Lambert Island Limited and not the Municipality. Responsibility for and maintenance of such improvements is one of the uses to which municipal taxes which are collected are put.

In considering the eligibility criteria of the Managed Forest Tax Incentive Program as set out in section 9 of O.Reg. 282/98, the tribunal finds that it is satisfied that all of the criteria are met, save and except for the ones relating to minimum area within a lot.

There are 25 lots within Lambert Island, including Island 15, thereby involving 26 separate roll numbers. Within these individual lots, five have no seasonal residences and six have two seasonal residences, with the remaining 15 lots having one seasonal residence each. The existing lots each have a water lot characterization and many of these lots have a significant proportion which is in fact a water lot. MNR has considered each of the residences as taking up something less than one acre. The resulting residue of each of the lots is such that none qualify for the minimum 4 acre managed forest. However, the total area within Lambert Island and Island 15 which would qualify for the MFTIP if taken as a whole, is 16.45 acres.

The tribunal, along with Ms. Krahn on behalf of MNR, were very impressed by the view done by tribunal Registrar, Daniel Pascoe. Ms. Krahn's role in this matter, along with giving her consent to allowing the appeal, is a keen awareness of the objective of stewardship of private forest lands to be continued into the future. Mr. Pascoe's report describes an area mainly covered by forest. While there is a main road, and individual roads leading to the various seasonal residences, the remainder of the land is held in what appears to the naked eye to be an uncultivated and densely forested area. The degree of forestation described in the Managed Forest Plan is in keeping with the objectives of the MFTIP. There is little or no cultivation, no modern fences and no lines of demarcation between the various lots.

All of the physical evidence is in turn supported by the manner in which control over Lambert Island and Island 15 is maintained. The management of Lambert Island is directed towards ongoing stewardship of the forest and is controlled by Lambert Island Limited. It is Lambert Island Limited which is listed on the various applications and appeals for the individual roll numbers, relating to this consolidated appeal. The fact is, and the tribunal has no difficulty in so finding, that Lambert Island and Island 15 has but one owner, a corporation which qualifies under clause 9(2)(ii) of O.Reg. 282/98.

The tribunal is further persuaded by the fact that, as can be seen from a copy of a lease filed as Exhibit 3, the individual lots cannot be sold by the lessee. Rather, it can only be assigned, such assignment requiring that the one share in Lambert Island Limited [see clause 4(j) of Exhibit 3, being the lease between Lambert Island Limited and Robert J. Prettie, as Lessee].

The tribunal relies on the following findings of fact:

1. The ownership by one corporate entity of the whole of Lambert Island and Island 15;
2. The physical features being consistent with the forested eligibility requirements of section 9 of O.Reg. 282/98;
3. The appellant for all of the rolls being Lambert Island Limited, a corporation which meets the eligibility criteria under clause 9(2)(ii);
4. The fact that this property qualified under the previous Managed Forest Tax Rebate Program;
5. The demonstrated knowledge, experience and commitment to the ongoing management of this land as a steward of the existing forest by Lambert Island Limited;
6. The acceptable forestry practices evidenced in the Managed Forest Plan, conditional approval by a qualified managed forest plan approver; and
7. The consent of MNR in this matter, with the proviso that this consent should not set a precedent for other cases involving plans of subdivision,

in finding that it will exercise its jurisdiction pursuant to section 121 of the **Mining Act** in finding that, while not in form, as a matter of substance, Lambert Island Limited, owner of 100 per cent of the lands under appeal, meets the eligibility criteria under section 9 of O.Reg. 282/98.

Section 121 of the **Mining Act** states,

**121.** The Commissioner shall give a decision upon the real merits and substantial justice of the case.

The tribunal has received the consent of the Township of Shuniah to allowing the appeal of 16.45 acres of the property as managed forest class. It is noteworthy that Shuniah has so consented, as it is the Township which is in the position of losing the municipal taxes which would have been collected on the property, but for this successful appeal. The tribunal takes this consent to mean that the Township has acknowledged its role in taking no responsibility for the road and bridge, allowing the land to be maintained as a private entity. Similarly, there is a passing recognition of the value in maintaining Lambert Island Limited in its role of maintaining this managed forest.

For the foregoing reasons, the tribunal finds that it will allow the appeal on the conditions set out in the consents signed by the parties, which will be duplicated in the body of the Order. The tribunal makes note of the cooperative approach taken by all concerned in this matter.

There are no costs payable by any of the parties to this appeal.

### **Conclusion**

The appeal is allowed on consent, based upon the unique circumstances of this case. This disposition should not be taken as a precedent for other plans of subdivision.