

Appeal No. MA 013-93
Appeal No. MA 036-93

L. Kamerman
Mining and Lands Commissioner

)
)

Thursday, the 12th day
of May, 1994.

THE MINING ACT

IN THE MATTER OF

Coldstream Copper Property located on Mining Location K-65 and Mining Claim TB-82838 in unorganized territory, District of Thunder Bay;

AND IN THE MATTER OF

The Notice of the Director of Mine Rehabilitation (the "Director") pursuant to subsection 149(1) of the **Mining Act**, dated April 13, 1993, to Nelson Machinery Company Ltd. to file a Closure Plan;

AND IN THE MATTER OF

An appeal from the Notice of the Director, dated May 4, 1993, and received in the Office of the Mining and Lands Commissioner on May 14, 1993.

B E T W E E N:

NELSON MACHINERY COMPANY LTD. through its Receiver Manager,
Eric A. Biagi ("Nelson")

Appellant of the First Part

- and -

....2

MINISTER OF NORTHERN DEVELOPMENT AND MINES (The
"Minister")

Respondent of the Second Part

- and -

CONWEST EXPLORATION COMPANY LIMITED ("Conwest")

Party of the Third Part

- AND -

IN THE MATTER OF

Coldstream Copper Property located on Mining Location K-65 and Mining Claims TB-82837, 82838, 62886 and 62887 in unorganized territory, District of Thunder Bay;

AND IN THE MATTER OF

The Notice of the Director of Mine Rehabilitation (the "Director") pursuant to subsection 149(1) of the **Mining Act**, dated September 8, 1993, to Conwest Exploration Company Limited to submit changes to their proposed closure plan;

AND IN THE MATTER OF

An appeal from the Notice of the Director, dated October 8, 1993, and received in the Office of The Mining and Lands Commissioner on October 27, 1993.

B E T W E E N:

CONWEST EXPLORATION COMPANY LIMITED

Appellant

- and -

MINISTER OF NORTHERN DEVELOPMENT AND MINES

Respondent

INTERLOCUTORY ORDER

UPON hearing from the parties and reading the material filed;

1. THIS TRIBUNAL ORDERS that the withdrawal or discontinuance of the appeal of Nelson Machinery Company Ltd., being File No. MA 013-93, being a matter within the jurisdiction of the tribunal in controlling its process, is contrary to the public interest and will not be allowed;

2. THIS TRIBUNAL FURTHER ORDERS that the hearing of the appeal of Conwest Exploration Limited, being File No. MA 026-93 will proceed in connection with Mining Location K-65 and Mining Claims TB-82837, 82838, 62886 and 62887 in unorganized territory, District of Thunder Bay;

3. THIS TRIBUNAL FURTHER ORDERS that the issue of costs will be deferred until the completion of the hearing of the appeals on the merits.

Reasons for this Order are attached.

DATED this 12th day of May, 1994.

Original signed by

L. Kamerman
MINING AND LANDS COMMISSIONER

Appeal No. MA 013-93
Appeal No. MA 036-93

L. Kamerman
Mining and Lands Commissioner

)
)

Thursday, the 12th day
of May, 1994.

THE MINING ACT

IN THE MATTER OF

Coldstream Copper Property located on Mining Location K-65 and Mining Claim TB-82838 in unorganized territory, District of Thunder Bay;

AND IN THE MATTER OF

The Notice of the Director of Mine Rehabilitation (the "Director") pursuant to subsection 149(1) of the **Mining Act**, dated April 13, 1993, to Nelson Machinery Company Ltd. to file a Closure Plan;

AND IN THE MATTER OF

An appeal from the Notice of the Director, dated May 4, 1993, and received in the Office of the Mining and Lands Commissioner on May 14, 1993.

B E T W E E N:

NELSON MACHINERY COMPANY LTD. through its Receiver Manager,
Eric A. Biagi ("Nelson")

Appellant of the First Part

- and -

MINISTER OF NORTHERN DEVELOPMENT AND MINES (The
"Minister")

Respondent of the Second Part

- and -

CONWEST EXPLORATION COMPANY LIMITED ("Conwest")

Party of the Third Part

- AND -

IN THE MATTER OF

Coldstream Copper Property located on Mining Location K-65 and Mining Claims TB-82837, 82838, 62886 and 62887 in unorganized territory, District of Thunder Bay;

AND IN THE MATTER OF

The Notice of the Director of Mine Rehabilitation (the "Director") pursuant to subsection 149(1) of the **Mining Act**, dated September 8, 1993, to Conwest Exploration Company Limited to submit changes to their proposed closure plan;

AND IN THE MATTER OF

An appeal from the Notice of the Director, dated October 8, 1993, and received in the Office of The Mining and Lands Commissioner on October 27, 1993.

B E T W E E N:

CONWEST EXPLORATION COMPANY LIMITED

Appellant

- and -

MINISTER OF NORTHERN DEVELOPMENT AND MINES

Respondent

1. hear and determine the effect of Nelson withdrawing its appeal and specifically whether withdrawal takes the appeal bearing tribunal file number MA 013-93 (the Nelson appeal) out of the Commissioner's jurisdiction;
2. hear and determine the issue of costs associated with the withdrawal of the appeal; and
3. hear and determine any other matters raised by the parties at the motion.

Background:

On November 26, 1992, a Notice was issued by the Director requiring Conwest to file a closure plan by June 30, 1993. Conwest advised the Director in writing on December 1, 1992 that buildings located on the fenced area of Mining Location K-65 and Mining Claim TB-82838 should be addressed to Nelson.

On April 19, 1993 the Director served Nelson with a Notice requiring the filing of a closure plan by June 30, 1993. Notice of Requiring a Hearing Under Part VII of the Act was served on the Director on May 4, 1993 on behalf of Nelson in Receivership by Eric A. Biagi, Receiver - Manager, with Michael Bourassa of Aird & Berlis as his lawyer, setting out the reasons for the appeal:

Without limitation or restriction to raising further issues: (i) Nelson is an insolvent British Columbia company subject to a B.C. Court-appointed receivership. The receiver has no funds to act on the Notice and has no authority to do so without direction of the Court. (ii) Nelson is not a "proponent" under the Mining Act.

On June 29, 1993 Conwest filed a proposed closure plan, but maintained its position that it was not responsible for buildings located in the fenced area of Mining Location K-65 and Mining Claim TB-82838, or for the tailings deposits on Mining Claims TB-82837, 82838, 62886 and 62887.

On July 20, 1993, the tribunal held a Telephone Conference Call with John

Norwood, Counsel for the Director, Cecil Burns, an employee of the Director, Michael Bourassa, counsel for Eric A. Biagi, Receiver - Manager of Nelson and Michael Zurowski, an employee of Conwest. Through the course of the Telephone Conference Call, the tribunal determined that there was no agreement as to which of Nelson or Conwest were responsible as proponent for which portions of Mining Location K-65 and Mining Claim TB-82838. The tribunal indicated that, in the absence of agreement, it would proceed with its jurisdiction under subsection 152(9) of the **Act** to determine, by way of its own motion, who the parties to the Nelson appeal are, adding Conwest as a party of the third part for purposes of its determination.

On September 9, 1993, the tribunal caused an order to be served on counsel for the Director and Nelson through its Receiver - Manager, and on Conwest, requiring the filing of all documents relevant to the determination of the parties in the Nelson appeal to be filed with the tribunal and served on the other named parties. The Order also advised of an Appointment for the Motion to determine who the parties to the Nelson appeal should be, upon seven days notice to be given.

On September 8, 1993, by a Notice of the Director, Conwest was required to make changes to its proposed closure plan. The following changes to the closure plan were required:

1. That the information required by Sections 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17 of Regulation 114/91 be appended to the Closure Plan.
2. That the information required to ensure that the minimum rehabilitative measures specified by Section 23 of Regulation 114/91 are achieved, be appended to the proposed Closure Plan.
3. The above appended information will relate to:
 - i. the entire tailings mass that was discharged during the mine operation located on patented Mining Claims TB-82838, 82837, 62887 and 62886, and

- ii. all underground workings and openings to surface associated with the mine operation located on patented mining claims and licences of occupation controlled by Conwest Exploration Company Limited and
 - iii. all buildings, equipment, infrastructures and waste material associated with the surface plant located on patented Mining Claims TB-82838 and K-65.
4. That the deadline for submission of the proposed Closure Plan including the above noted required changes be changed to November 30, 1993.

Conwest filed a Notice to Require a Hearing (Ex. 15) with the Director on October 8, 1993 which was forwarded by the Director and received by the tribunal on October 27, 1993. Conwest states as its reason for appeal, "Appellant is not the Proponent of the Mine referred to in the Requirement for Changes". The issues raised in paragraph 3. iii. were to be dealt with in common with the Nelson appeal in order that the tribunal could determine who was the proponent for which portions of Mining Location K-65 and Mining Claim TB-82838.

On October 8, 1993, Mr. Coburn wrote to the tribunal, Mr. Norwood and Mr. Bourassa advising that he had been retained by Conwest.

In a letter from Mr. Bourassa to the tribunal, Mr. Norwood and Mr. Coburn dated November 3, 1993, he states in the last paragraph on page 2:

Thirdly, my client consents to Conwest consolidating its separate appeal proceeding before the Mining and Lands Commissioner with my client's proceeding in that many of the issues to be dealt with by MNDM [the Director] and my client may also be relevant to the hearing of Conwest's appeal with MNDM, and visa versa. ...

On the basis of the consent to a consolidation of the two appeals, the

....7

tribunal attempted to schedule a date for a Pre-Hearing and Procedural Conference. December 10, 1993 was set tentatively.

On November 3, 1993, Mr. Bourassa wrote to Mr. Coburn referring to the stay of a decision or order of the Director prescribed by clause 152(2)(a) of the **Act**. Apparently the Director had notice of the proceedings in receivership, including the proposed hearing of November 5, 1993 to discharge the Receiver - Manager.

Mr. Coburn wrote to Mr. Norwood on November 4, 1993 advising that Conwest would attempt to obtain status to be heard at the discharge proceedings scheduled for November 5, 1993, to ensure that the Court would be aware of details concerning proceedings under Part VII of the **Act**. At that time Mr. Coburn expressed concern that the Director had failed to take steps to be heard in the discharge proceedings.

Counsel retained on behalf of Conwest in British Columbia advised that the Supreme Court of British Columbia discharged the Receiver - Manager on November 5, 1993, upon confirming that the Director had been served and that no one was appearing on his behalf. Counsel was advised by the Court that only the Director, and not Conwest, could be given status to be heard. Notwithstanding that Mr. Biagi did identify by affidavit the potential claim of the Director, the British Columbia Supreme Court found that there was no reason why Mr. Biagi should not be discharged.

On December 3, 1993, Mr. Bourassa again wrote to the tribunal, Mr. Norwood and Mr. Coburn advising that Nelson would not be proceeding with its appeal. He also advised that Nelson and Eric A. Biagi were no longer in possession of any assets or funds, and that Mr. Biagi had been discharged by the Court.

Pursuant to a meeting held on December 10, 1993 with staff of the tribunal, Mr. Coburn and Mr. Norwood, and with the agreement of those present, the tribunal did cause a Notice of Motion to be served on counsel for the Director and Conwest, on Nelson and on Andrew and Valerie Greenwood, the issues having been set out above.

Evidence and Submissions:

Mr. Coburn presented what he described as the undisputed facts concerning

the acquisition of ownership on the part of Nelson, referring briefly to Exhibit 26, Tabs 5 through 18, which contain documents, agreements and correspondence related to the North Coldstream Mines Limited ("North Coldstream") sale to Nelson. It has been Conwest's position throughout that Nelson is the owner of the buildings and equipment within Mining Location K-65 and Mining Claim TB-82838.

In 1976, International Mogul Mines Limited ("International Mogul") enforced its security and acquired mining claims and mining leases from North Coldstream, which had amalgamated and changed its name to Coldstream Mines Limited ("Coldstream"). International Mogul amalgamated with 465128 Ontario Limited, Central Patricia Limited, Conwest Exploration Company Limited, Chimo Gold Mines Limited on August 20, 1982 and became Conwest (Ex. 10).

Mr. Coburn submitted that the effect of Nelson's withdrawal is that the stay of the Director's Notice provided for in subsection 152(2) of the **Act**, which is automatic upon the service on the Director of a Notice Requiring a Hearing, will be automatically withdrawn. Therefore, the Director's Notice to File is once more effective against Nelson.

Mr. Coburn argued that by issuing a Requirement to File a Closure Plan to Nelson, the withdrawal by Nelson of its appeal, and the failure of the Director to ensure that the Director's interest in the assets of Nelson be protected through making representations in British Columbia before the discharge of the Receiver - Manager, the Director is legally and equitably barred from seeking recourse against Conwest with respect to buildings and equipment on Mining Claim TB-82838 and Mining Location K-65. Mr. Coburn suggested that the act of requiring Nelson to file amounted to acceptance on the part of the Director of Nelson's liability in the matter and the withdrawal by Nelson reinstates the original notice to file.

In his submissions regarding the status of the Nelson appeal, along with that portion of the Conwest appeal which was consolidated in the former, Mr. Coburn submitted that the tribunal does not have the jurisdiction to refuse to allow a party to withdraw its appeal. Referring to several cases [**Regional Municipality of Halton v. Andy-Vic Holdins Ltd.** (1980) 11 O.M.B.R. 181; **Ray-Don Machinery Ltd. v. Town of Richmond Hill Committee of Adjustment**, (1989) 24 O.M.B.R. 306; **Re Edgely Farms Ltd. and Uniyork Investments Ltd.** [1970] 12 D.L.R.(3d) 459 (Ont. C.A.)], Mr. Coburn submitted that the tribunal does not have the powers of a Section 96 court as have been granted to

the Ontario Municipal Board and does not have original jurisdiction in the matter. He did agree that powers conferred under the **Statutory Powers Procedure Act**, R.S.O. 1990, c. S.22 (the "SPPA") do allow a tribunal to prevent abuse of its process, there is nothing to prevent Mr. Biagi from withdrawing Nelson's appeal. Referring to section 6 of the **Consolidated Hearings Act**, which does have a provision for withdrawal of an appeal with conditions, Mr. Coburn submitted that by implication, in the absence of express powers, the tribunal cannot take away from an appellant its right to withdraw. He submitted that the powers of the tribunal must be found in the enabling statute and there is no such power in this case.

Mr. Coburn submitted that section 149 of the **Act** requires that the Director identify a single proponent, and this does not allow multiple Closure Plans to be filed in relation to the same property.

Mr. Coburn submitted that the Director should not be permitted to pursue Conwest in the matter of the buildings and equipment listed in the Nelson appeal, due to the Director's failure to enforce Nelson's responsibilities. Conwest had acted reasonably and to its detriment in agreeing to a consolidated hearing in the matter. If the Director is permitted to continue in the proceedings against Conwest as they concern the buildings and equipment on Mining Claim TB-82838 and Mining Location K-65, it would be an abuse of process.

Notwithstanding this absence of power to prevent withdrawal, Mr. Coburn did submit that the tribunal does have the power to award costs, and pointed out that both the Director and Conwest have incurred considerable legal costs in connection with Nelson's appeal regarding the closure of the building and equipment located on Mining Claim TB-82838 and Mining Location K-65. However, he suggested that the more appropriate time to address the issue of costs would be when the proceedings are completed.

Mr. Norwood referred to the colour-coded map in Section 2 of Exhibit 12, which is the proposed closure plan which had been prepared and filed by Mr. Zurowski of Conwest. Outlined in yellow are the buildings considered at risk. Mr. Norwood stated that he is not sure if the buildings go over onto Mining Claim TB-82838 or are wholly contained on Mining Location K-65.

At this point, Mr. Zurowski offered the following information. When the property was sold to Nelson, there were small service buildings, a millhouse, service building and shaft house on K-65. He suggested that the pump house and hydro substation might have been on Mining Claim TB-82838.

Mr. Norwood submitted, that, even giving the benefit of the doubt to Mr. Zurowski, the tailings area does extend to TB-82838. He stated that there are also tailings on TB-62887 and 62886, which form part of Conwest's appeal in the MA 036-93 matter. Mr. Norwood stated that TB-82838 also has a tailings dam and other related structures on it. He asked clarification that Mr. Coburn only wants to deal with the area outlined in yellow and the buildings contained thereon.

Mr. Norwood submitted that Mr. Coburn has strayed from the issue. In Mr. Bourassa's letter of December 3, 1993 (Ex. 21) the word "withdrawal" is not mentioned. Rather, Mr. Bourassa states that Nelson will not be proceeding with the appeal. Mr. Norwood submitted that this should be characterized as an abandonment. This interpretation, in his submission, has implications under section 152.

Putting Mr. Bourassa's letter into the context of an appeal, it is the position of the Director that the two matters have been consolidated, with specific referrals in the proceedings to both of the two files.

The significance of the treatment of Mr. Bourassa's letter is explained. Examining Nelson's withdrawal/abandonment, and examining what amounts to a three party dispute, there remains the issue of the mill site and of the tailings.

Referring to section 121 of the **Act**, Mr. Norwood submitted that the decision of the tribunal must be on the real merits and substantial justice of the case. He submitted that the case is a consolidated appeal. In other words, the totality of the consequences of the mill issue will require a determination of Nelson's responsibility. This determination is necessary to the impact on the parties, including the Director.

Without a determination of the responsibility of each of Nelson and Conwest, the Director cannot be sure who is responsible for the mill issue. In the letter sent to Conwest in 1992 (Ex. 27, Tab 2), the Requirement to File a Closure Plan refers to the whole property. When Conwest pointed out that the mill was not their responsibility, the

Director then wrote to Nelson requiring the filing of a closure plan. This was done without the Director knowing who was responsible. It had been contemplated then that there would be a hearing before the tribunal and at all times, the Director was intending to have a three party hearing. At no time did the Director pick sides in the matter.

The Director had attempted to bring Nelson and Conwest together to attempt to resolve the issue of responsibility. However, these meetings were not fruitful with each accusing the other. Mr. Norwood stated that he obtained the consent of Mr. Coburn and Mr. Bourassa in November, 1993 to consolidate the hearing of the two appeals. It remains the Director's position that the matters should be resolved through continuing with the consolidation.

The Director is seeking clarification of facts and law in this matter, having great significance to the mining industry in general. It will also be of great significance to Conwest, by helping to have the issue and consequences determined. Mr. Norwood submitted that the tribunal may have residual authority to determine the issues of fact and law in this case. He suggested that there was nothing in the **Mining Act** or **SPPA** to determine residual authority. Section 23 of the **SPPA** allows a tribunal to make orders and give directions to prevent abuse of its proceedings. Clause 116(1)(c) of the **Mining Act** allows the tribunal to give such directions or make such decisions as it deems proper.

Examining the wording of subsection 152(2), proceedings are "stayed until the disposition by the Commissioner". Therefore, according to Mr. Norwood, the stay is not regarded as automatic. The proceedings must continue until a determination of responsibility is made. Mr. Norwood characterized the possibility of Conwest's responsibility in Mining Location K-65 and Mining Claim TB-82838 as a residual issue in the Nelson appeal. Whether or not there is a right of withdrawal, there is an issue of substance to be determined which remains. For purposes of clarity, the matter must proceed, in so far as it touches this residual issue.

Mr. Norwood referred to the origins of the tribunal's jurisdiction, which date back to the pre-1867 **Gold Mining Act**, 27 -28 Vict., c. 9, which is discussed at page 541 of **Dupont v. Inglis**, [1958] S.C.R. 535, wherein the tribunal is described as having a ". . . judicial character, not then exercised by the superior Courts."

One other point of clarification presented by Mr. Norwood was that it is not

the view of the Director that only one person and only one closure plan can be required in connection with any property. Referring to section 149, the definition of "holder" in section 139, which refers to an "owner" as defined in section 1 to include every person. Therefore, in the Director's submission, there can be multiple proponents and multiple closure plans in connection with a property. Mr. Norwood suggested that the tribunal may wish to split the property off into many components. In conclusion, Mr. Norwood suggested that Mr. Coburn has raised this issue prematurely.

On the matter of costs, Mr. Norwood submitted that the Director is not seeking costs. He pointed out that the tribunal does have jurisdiction to award costs under section 126, and submitted that the tribunal should only consider doing so in exceptional circumstances.

Mr. Coburn countered that the real merits and substantial justice of the case required that the Director pursue Nelson. It required that, when the questions of proceedings arose in August, 1993 in British Columbia.

Findings of Fact:

The power of a tribunal to control its proceedings is not limited to those tribunals with section 96, or superior court powers. Although applicable to the Ontario Municipal Board, the case of **Edgely Farms** stands for the proposition that the Supreme Court of Ontario Rules did not give the Court of Appeal the power to refuse an appellant the right to withdraw an appeal. The Court found that it did have this power through the exercise of its jurisdiction to control its process.

The issue of withdrawal was considered in **Re Carfrae Estates Ltd. and Stavert et al.**, (1976) 13 O.R. (2d) 537. The Divisional Court, commencing at the last paragraph of page 344, discusses proceedings before a rent review officer, under the **Residential Premises Rent Review Act, 1975**, (Ont.)(2nd Sess.) c. 12. (**R.P.R.R.A.**), where Reid, J. states:

I turn to the question whether there is a unilateral right to withdrawal on the part of a person who has initiated the proceedings. The general tenor of the English decisions to

which we were referred is that if there is nothing in the statute that expressly says there shall be no right of withdrawal a right of withdrawal exists. Those decisions must rest on the context of the statute in relation to which they are given. There has been no attempt to equate the statute before us with the legislation that was before the English courts. It does not appear that the English Courts in those cases rested their decisions on any external governing principle. It appears that what they were doing was simply interpreting the language of the Acts before them rather than applying some governing principle that would be applicable to the statute before us.

We are therefore forced again simply to consider the words of the Act before us. A statute must be construed first in accordance with its ordinary meaning. Words in a statute must be construed in the context of the whole statute. Here we have a situation where we have no words in a statute that refer at all to a withdrawal. There is nothing in the statute that directly or indirectly suggests a right to withdrawal.

Reid J. then looked to the legislation to determine whether a right of unilateral withdrawal was precluded and observed:

1. The officer had the right to add issues which suggested that the tribunal acquires an interest in the matter once it has been initiated.
2. There is no provision in **R.P.R.R.A.** for notifying the parties of a unilateral withdrawal.
3. The officer has the authority to give directions for the conduct and carrying on of proceedings.

Reid J. then concludes:

That is a very broad power. It appears to us the implication of these sections means an application for directions with respect to a proposed withdrawal must be made to the officer at the hearing.

If there is an apt analogy it is perhaps to the proceedings of the Court. There are strong resemblances between the proceedings before a rent review officer and the proceedings of the civil Courts. It is beyond question that after a certain point a plaintiff, in the civil Courts, may withdraw only with the consent of the other side or with the consent or approval of the Court. The object is to prevent abuse of the Court's process and avoid prejudice to persons affected.

In **Carfrae**, the point at which the Notice for Hearing was issued was held to be the point at which the tribunal became seized of the matter.

Turning to subsection 152(2) of the **Mining Act**, it states, "the requirement, order or decision of the Director is stayed until the disposition of the appeal by the Commissioner". Nothing in sections 114, 115, 116 and 118 through 131 of the **Act**, which are imported into Part VII appeals by virtue of subsection 152(6) allow a party to unilaterally withdraw or discontinue an appeal. These sections deal with hearings before the tribunal, including, under clause 116(1)(c), the power on the part of the tribunal to give directions concerning the procedure and hearing as it considers proper.

The tribunal has long taken the view that the **Act** allows it to control its own procedures. The practice before the tribunal has been that once an Order to File Documentation is issued, the matter can be discontinued only with the consent of the parties, at which time an Order Dismissing the Appeal will be issued. In the absence of such consent, the issue of withdrawal must be adjudicated. That is the situation with Nelson, where the Director has not consented to the withdrawal or discontinuance. Therefore, the question of withdrawal is within the discretion of the tribunal.

Part VII of the **Act** is designed to ensure the safe and timely rehabilitation

of mining operations and mining lands by the "proponent". Defined in section 139:

"proponent" means the holder of an unpatented mining claim or licence of occupation or an owner as defined in section 1;

Owner is defined in section 1 as:

"owner", when used in Parts VII, IX and XI, includes every person, being the immediate proprietor, lessee or occupier of a mine, or a part thereof, or of any land located, patented or leased as mining land, and includes an agent, or a person designated by the owner or agent as responsible for the control, management and direction of a mine, or a part thereof, but does not include a person receiving merely a royalty from a mine, or mining lands, or the owner of the surface rights only;

Under Part VII of the **Act**, the Director, and under appeal the tribunal, is charged with ensuring that the public interest which is that of having responsibility for mine rehabilitation determined so that all steps to rehabilitate the lands can be taken.

The chronological sequence of events have given rise to confusion concerning the liabilities of the parties in respect of the notice of requirement to file or make changes to the proposed closure plans. This has only clouded the issue, which is determining the proponent or proponents responsible for all of the constituent parts of a mine site or project in keeping with the public interest.

Initially, the Director served a Notice on Conwest for all of the Burchell Lake - Coldstream mine property. Based on Conwest's letter of December 1, 1992 alleging that Nelson was in part responsible, the Director served a Notice on Nelson. However, the Director did not alter or revoke that portion of its earlier Notice to Conwest dealing with Mining Location K-65 and Mining Claim TB-82838.

At the time of the Telephone Conference Call in July, 1993, the tribunal had received only the referral of Nelson's Notice to Require a Hearing in connection with the Director's Requirement to File.

Subsection 152(5) allows the tribunal to confirm, alter or revoke the action of the Director, which in the case of the Nelson appeal, is the requirement to file a closure plan. Based upon its jurisdiction under subsection 152(9), the tribunal was within its power to determine whether it would add Conwest as a party to the Nelson appeal. This is what the Order and Notice Of Motion of the tribunal dated September 9, 1993, were designed to capture. The issue at that time was whether Conwest should be added as a party to Nelson's appeal, and the subject matter of the hearing was Mining Claims K-65 and TB-82838, in unorganized territory, District of Thunder Bay.

It was not until it received the Director's September 8, 1993 Notice Requiring Changes to be made to its Proposed Closure Plan, that Conwest issued its own Notice to Require a Hearing.

The September 8, 1993 Notice Requiring Changes had as its subject matter all items contained in paragraph 3 of the letter, which is reproduced for certainty:

3. The above appended information will relate to:
 - i. the entire tailings mass that was discharged during the mine operation located on patented mining claims TB 82838, TB 82837, TB 62887 and TB 62886, and
 - ii. all underground workings and openings to surface associated with the mine operation located on patented mining claims and licences of occupation controlled by Conwest Exploration Company Limited and
 - iii. all buildings, equipment, infrastructures and waste material associated with the surface plant located on patented mining claims TB 82838 and K. 65.

The subject matter of the Conwest appeal is therefore, in relation to all items listed in clauses i through iii of paragraph 3.

The Order To File and Notice Of Motion issued on September 9, 1993 was

in relation to clause iii only. However, once Conwest appealed the Director's requirement to make changes to its proposed closure plan, the question of Conwest's responsibility as a proponent came before the tribunal through its own appeal. The need to determine whether it should be made a party to the Nelson appeal no longer existed and became moot.

The motion to determine whether Conwest should be added as a party to Nelson's appeal never took place. Instead, Conwest, Nelson and the Director agreed to a consolidation of the two appeals.

Mr. Coburn's position with respect to the withdrawal of the Nelson appeal and removal of the stay under subsection 152(2) appears to be analogous to the principle of **transit in rem judicatem**, meaning "it passes into a matter adjudged; it becomes converted into a **res judicata** or judgement" according to Black's Law Dictionary. This principle is discussed in **Campbell Flour Mills Co. Limited v. Bowles; Campbell Four Mills Co. Limited v. Ellis**, [1914], 32 O.L.R. 270 (Appellate Division), commencing at the bottom of page 277, where Riddell J. states:

There are many cases in which one having a cause of action against two or more others is barred of proceedings against one by obtaining judgement against another, even without satisfaction of the judgement. These all depend upon the principle of our law that where a judgement is obtained every cause of action upon which the judgement is based is merged in the judgement and disappears.

For this to be the case, the stay operating in subsection 151(2) must necessarily be in respect of a final adjudication in respect of Nelson's responsibility for rehabilitation. The procedure following the issuance of a Notice under subsection 149(1) is indicative of whether the "requirement" is an interlocutory or final order or decision.

Subsection 149(1) of the **Act** empowers the Director to "by written notice require the proponent of a project the Director considers abandoned ... to submit ... a proposed closure plan to rehabilitate the site." Upon receipt of a proposed closure plan, the Director may either inform the proponent that it is acceptable or may require changes [ss. 149(2)]. Upon receipt of written notice that the proposed closure plan is acceptable,

the proponent is required to complete rehabilitation of the site [ss. 149(3)]. Where the proponent fails to comply with the requirement to file or change a closure plan, the Director may declare the project abandoned and have the Crown or an agent rehabilitate the site [ss. 149(4)]. Before it can have the Crown or an agent rehabilitate the site, the Director must give the proponent notice "in the prescribed form and manner of the Director's declaration" [ss. 149(5)], as set out in Form 28 of O.Reg. 111/91.

Where a project has been declared abandoned, the Director must notify the proponent of his intention to recommend to the Minister [ss. 149(7)] that the Minister recommend to the Lieutenant Governor in Council declare the lease void [ss. 149(6)].

Where the Crown or an agent carries out rehabilitation under subsection 149(4), the costs incurred are a debt to the Crown which is recoverable in a court or forms a lien and charge on the site [ss. 151(1)].

The Notice of Requirement to File a Closure Plan is but one step in the process of site rehabilitation which can be initiated by the Director. There is no doubt that the process in respect of Nelson is not at an end with the serving of a Notice. To enforce the legislation, the Director would have to cause the relevant portion of the site to be rehabilitated, and commence court proceedings to collect on the cost of rehabilitation from Nelson and its successors. In the course of such proceedings, the Director would have to prove that the debt owed is attributable to land for which Nelson is the proponent. In other words, there must be an adjudication on the merits.

There has been no conclusive determination in connection with who is the proponent for those portions of the site or project located on Mining Location K-65 and Mining Claim TB-82838. The tribunal notes that the fenced portion of the Coldstream property mine site, as outlined in yellow on the map in Section 2 of Exhibit 12, is located on only a part of Mining Location K-65 and Mining Claim TB-82838. There is no legal description for the fenced in portion. Nor is there a comprehensive list of buildings found either within or outside of the fenced area.

It appeared at the hearing of the motion that Mr. Coburn and Mr. Zurowski were clear on which portions of Mining Location K-65 and Mining Claim TB-82838 are Nelson's responsibility. The basis for this is not evident from anything presented at the hearing of the motion, nor from a review of the documents filed. Neither the title search

conducted by the Director nor other documents filed have clarified the issue of ownership. In fact, the convoluted nature of the title documents has only added to the confusion in trying to ascertain who the proponent is. It is not clear how responsibility can be determined in the absence of a hearing on the merits which traces title of each individual component of the project or mine site.

Documents filed were not examined at length during the motion. A cursory review by the tribunal reveals that the deed and mortgage involving Nelson and Coldstream were not registered. The original agreement required a survey to be performed within a specified period of time, which could have provided a legal description of the lands involved in the transactions between Nelson and Coldstream. This survey was never done. A review of correspondence between Nelson and Coldstream reveals that even Nelson itself was surprised by the fact that it had not "purchased" as much land as it had assumed, having acquired title to 137.7 acres instead of 375 (Ex. 26, Tab 11, letter from Nelson to Coldstream dated September 25, 1969). Indeed, letters to Nelson from Coldstream, dated December 9, 1968 and December 27, 1968 (Exhibit 26, Tabs 9 and 10 respectively) appear to be contradictory with regards to which buildings, machinery and equipment was intended in the sale.

There are a number of questions which arise in connection with title and responsibility. The following list is by no means exhaustive. What is the effect of an unregistered transfer from Coldstream to Nelson? Specifically which components of the mine site or project are captured by the agreements between Coldstream and Nelson? Are there certain components of Coldstream's interest in the mine site or project for which legal or beneficial interest has never been transferred?

There is nothing in the Director's proceeding against Nelson which should allow Conwest to avoid a determination on the merits at a hearing of which portions of Mining Location K-65 and Mining Claim TB-82838, if any, are its responsibility. This view is consistent with the purpose for which Part VII of the **Act** was enacted. A determination of whether Nelson is a proponent, within the meaning of the **Act** is inextricably intertwined with a determination of whether Conwest is a proponent in relation to all or a portion of Mining Location K-65 and Mining Claim TB-82838.

The tribunal finds that it does not accept that the Director should be barred from having a determination of Conwest's responsibility with respect to Mining Location

K-65 and Mining Claim TB-82838 by virtue of having failed to oppose the discharge of Nelson's Receiver - Manager in British Columbia. There is no evidence that Conwest will experience greater liability due to the absence of a representative of Nelson attending the hearing of the appeals. The issue of whether Conwest is a proponent is a question of fact. There is no suggestion that the Director is proceeding on the basis of joint and several liability in each of the prospective proponents.

The tribunal finds that there has been no final disposition of the Nelson appeal as contemplated by the words of subsection 152(2). It would be contrary to the public interest to allow Nelson to withdraw or to discontinue its appeal until the question of whether Nelson is a proponent for all or a portion of Mining Location K-65 and Mining Claim TB-82838 can be determined. Therefore, in order that the public interest in both appeals can be protected and preserved, the withdrawal or discontinuance of Nelson's appeal will not be allowed. The tribunal finds that the stay on Nelson's appeal imposed by subsection 152(2) will not be removed until the matter has been adjudicated by the tribunal.

With respect to the Conwest appeal, the tribunal finds that it will proceed with the hearing of all of Conwest's appeal to determine which portions of all properties listed in paragraph 3 of the Director's September 8, 1993 letter are the responsibility of Conwest. This hearing will necessarily involve consideration Nelson's responsibility for Mining Location K-65 and Mining Claim TB-82838.

Although the issue of whether the tribunal can refuse to allow a withdrawal of an appeal is not tied into whether it functions as a court, it should be mentioned that the powers granted to the tribunal under Part VII of the **Act** are that of an administrative tribunal and not that of a court. This administrative tribunal function is limited to Part VII of the **Act**, where the tribunal is required to consider the public interest component in reaching its decisions. This must be distinguished from its court-like jurisdiction in other parts of the **Act** where the tribunal does exercise powers of an inferior court of appeal, as is discussed by the Supreme Court of Canada in **Dupont v. Inglis**.

In its role of protecting the public interest, the tribunal is charged with ensuring that any and all prospective proponents are brought into proceedings so that responsibility for rehabilitation can be determined through determinations of the parties pursuant to subsection 152(9). The power to determine parties is limited to Part VII appeals.

The matter of costs will be determined after the hearing of the merits on the Conwest and Nelson appeals.

Conclusions:

Nelson will not be permitted to withdraw or discontinue its appeal. The hearing of the Nelson appeal will be simultaneous with the hearing of the Conwest appeal on all properties listed in the Title of Proceedings.

The matter of costs will be determined at the conclusion of the hearings.