

File No. MA-005-01

L. Kamerman )  
Mining and Lands Commissioner )

Friday, the 30th day  
of November, 2001.

M. Orr )  
Deputy Mining and Lands Commissioner )

**THE MINING ACT**

**IN THE MATTER OF**

An appeal by 2001352 Ontario Inc. pursuant to subsection 112(1) of the **Mining Act** from the decision of the Provincial Mining Recorder, dated the 14th day of February, 2001, to not record its Filed Only Mining Claims 1246177, being for the land under the waters of Kelly Lake, being part of projected Lot 1, Con. VI and part of projected Lot 1, Con. V, in Waters Township and 1246178, being for the land under the waters of Kelly Lake, being part of projected Lot 12, Con. VI, Broder Township, in the Sudbury Mining Division, hereinafter referred to as the "2001352 Filed Only Mining Claims";

**AND IN THE MATTER OF**

Section 30(a) and Section 41 of the **Mining Act**;

**BETWEEN:**

2001352 Ontario Inc.

Appellant

- and -

THE MINISTER OF NORTHERN DEVELOPMENT AND MINES

Respondent

- and -

INCO LIMITED

(formerly known as International Nickel Company of Canada Limited)

Party of the Third Part

**AND IN THE MATTER OF**

Mining License of Occupation No. 10,872 dated the 6th day of May, 1947 for lands under the waters of Kelly Lake, comprised of unpatented Mining Claims S. 37335 through S. 37343, both inclusive, and S. 37429 through S. 37531, both inclusive; and evidence that the monthly payments due on Mining License of Occupation No. 10, 872 were in default for one month or more between the date of issue and the 27th day of March, 1958;

**AND IN THE MATTER OF**

An application pursuant to S.105 of the **Mining Act** for an Order by the Mining and Lands Commissioner that the Minister of Northern Development and Mines shall be prohibited from amending MLO No. 10,872 or allowing that the lands and lands covered by water in respect of which it was issued to be otherwise granted until the appeal of 2001352 Ontario Inc., as being heard and determined or withdrawn or abandoned in writing;

**AND IN THE MATTER OF**

An application pursuant to S.105 of the **Mining Act** for an Order by the Mining and Lands Commissioner that the Recorder shall be prohibited from recording any claim in respect of the lands and lands covered by water in respect of which MLO No. 10,872 was issued, until the appeal of 2001352 Ontario Inc. has been heard and determined or withdrawn or abandoned in writing.

**O R D E R**

1. **THIS TRIBUNAL ORDERS** that this appeal be and is hereby dismissed without prejudice.
2. **THIS TRIBUNAL FURTHER ORDERS** that Inco Limited's motion to hear argument on costs be granted and the hearing with regard to costs will proceed against 2001352 Ontario Inc., Wallbridge Mining Company Limited, Mr. Wayne Whymark and Mr. Mark Hall.

Reasons for this Order are attached.

**DATED** this 30th day of November, 2001.

Original signed by  
M. Orr

DEPUTY MINING AND LANDS COMMISSIONER

Original signed by

L. Kamerman  
MINING AND LANDS COMMISSIONER

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**REASONS****Reasons for Dismissal**

The company 2001352 Ontario Inc. ("the appellant") launched an appeal on March 1, 2001, from the decision of the Provincial Mining Recorder, dated February 14, 2001.

Two preliminary hearings took place. Various orders were made both as a result of these preliminary hearings and correspondence from the parties. One of the aforementioned hearings dealt with the appellant's motion for the production of certain documents. The appellant claimed at that time that the production of the requested documents would lead to either its continuing the appeal or not. After representations were made as to the need for the documents and the ability of the tribunal to order their production, the tribunal, on July 12, 2001, did in fact order them to be produced by the respondents by no later than July 19, 2001.

In a letter dated July 23, 2001, the appellant notified the tribunal that it wished to discontinue its appeal. Upon receipt of this letter, the tribunal issued an order dated August 2, 2001, wherein it rescinded those paragraphs in its July 12th Order dealing with the production of

documents. It also notified the parties that, among other things, it would require an indication as to whether the parties were consenting to the appellant's request. It also asked for written reasons regarding the appellant's request to terminate the proceedings, given that the appeal raised "issues of general concern to the mining industry".

After noting that none of the affected parties objected to the appellant's request to discontinue the action or expressed an interest in proceeding to deal with the issues on the merits, the tribunal, in an Order dated September 12, 2001, notified the parties that it was considering dismissing the appeal. The reason being that, in the view of the tribunal, the **Mining Act** "seeks finality of proceedings to recognize security of tenure". The tribunal also advised the parties in that Order that it would also consider ("in a summary manner"), whether it had the necessary jurisdiction to consider a motion for costs against a non-party. The Respondent Inco was proposing to ask for costs against certain persons, including Wallbridge Mining Company Limited, none of whom were parties to the action started by the appellant number company.

While a number of documents were submitted by the parties prior to the preliminary hearing of October 1, 2001, no hearing on the merits took place. In response to a request from the tribunal, one document, dated February 15, 1944, was provided to the tribunal for its file record.

In answer to the order of September 12th, the parties attended on October 1, 2001, and provided submissions on the issues relating to discontinuance, dismissal and costs against non-parties. Other issues were left to another day.

After hearing submissions, the tribunal decided against allowing the appellant to discontinue its action and chose to dismiss the matter without adjudication on the merits.

These reasons are intended to address the issues of dismissal without adjudication and costs against non-parties.

### **Issue of Dismissal Without (Prior To) Adjudication**

This tribunal, like this province's mining legislation, dates back (in one form or another) to pre-confederation days. As a lower court of review it has built up a rich set of substantive and procedural precedents relating to decisions under the **Mining Act**.

The jurisdiction of the Mining and Lands Commissioner is set out in section 105 of the **Mining Act**. This section says that one cannot take an action or proceeding to any court if it has to do with "any matter or thing concerning any right, privilege or interest conferred by or under the authority of [the **Mining Act**]...". The section requires that "except as in this Act otherwise provided, every claim, question and dispute in respect of the matter or thing shall be determined by the Commissioner..." The section concludes by giving the Commissioner the power "to make such order or give such directions as he or she considers necessary to make effectual and enforce compliance with his or her decision." The tribunal believes that this section provides the Commissioner with the inherent power to determine how best to dispose of

a matter before it gets adjudicated under the **Mining Act**. It is the view of the tribunal that this power extends to rejecting a party's request to discontinue an appeal without adjudication and instead, dismissing it where the circumstances and the legislative intent warrant such a decision. The tribunal believes that for the purposes of finality and security of tenure, this appeal should be dismissed and not discontinued. The appellant's request to discontinue its action is therefore refused.

### **Appellant's Argument**

After launching its appeal, the appellant decided that it was not ready to pursue the matter at this time. However, the appellant wants to be able to bring the issue forward at another time without running into the argument that the issue is *res judicata*. Hence, its request to be allowed to discontinue its action at this time. Even before October 1, 2001, the appellant made it clear that it did not want to have its appeal dismissed on the basis of a non-suit.

The appellant argued that pursuant to section 113 of the **Mining Act**, the tribunal was required to hold a hearing at which evidence would be presented, submissions would be made and a decision rendered. In other words, before a matter could be dismissed, the tribunal was compelled to hold a hearing and make a decision on the merits. The appellant also referred to section 122 of the **Mining Act** (which does deal with dismissal for failing to provide security for costs after a matter has been considered vexatious) and submitted that it did not apply. It was the appellant's submission that the tribunal does not have the jurisdiction to reject the appellant's request to discontinue its action and dismiss the appeal. What the tribunal should be considering was whether to grant the appellant leave to discontinue its appeal. The appellant also submitted that a dismissal could provide others with the argument that the appellant's allegations regarding the status of the subject Mining License of Occupation lacked merit. A dismissal would prejudice the efforts of anyone in the future pursuing the issue currently being raised by the appellant. As the appellant put it, "...it may prejudice the rights of other parties who may want to make a similar argument by dismissing it without deciding the case on the merits..." An order dismissing the appeal would "create *res judicata* against Wallbridge or anyone else that might want to pursue this issue." The case was analogous to a court refusing to grant leave to appeal on a particular legal issue and this refusal being the basis for an argument that the issue at hand "must be invalid" as a result of that refusal. An order granting leave to discontinue would have the effect of allowing others to pursue a hearing on the same issues in the future. When pressed by the tribunal as to who would be prejudiced by a dismissal of the appeal, appellant's counsel referred to "Wallbridge, 2001352 or some other party". When asked about the "finality of this proceeding" by the tribunal, the appellant's counsel responded by saying that "I would not be able to re-initiate this appeal. I'm considering that this appeal is ended by the discontinuance." However, appellant's counsel quite candidly pointed out that on the issue of the respondent Inco's MLO's on other properties, then the issue of the status of the MLO's might be raised again. The fear was that at this time, a dismissal of this appeal would make the issue itself "*res judicata*" even without actually holding a hearing on the merits. The appellant makes the point

that the two issues are tied to one another so that not permitting a party to discontinue will have an impact on that party's ability to pursue the issue at some time in the future.

## Decision

The tribunal is of the view that a decision dealing with the disposition of an appeal, being a procedural matter, lies completely within the jurisdiction of the tribunal. In short, this tribunal can control its own processes. Furthermore, the tribunal is of the view that the appellant will be able to have its day in court at some future date if it so wishes.

With respect to cases coming out of this tribunal, the procedural practice is to dismiss matters that are abandoned, or not pursued, or where the appellant withdraws its appeal. The tribunal found one instance where an appellant sought to discontinue its appeal from a mining recorder's decision to remove claims from the record, on the grounds that a settlement had been reached with the "restaker". The tribunal does not find this case helpful in this instance, given that none of the parties here have reached a settlement.<sup>1</sup>

As for the Appellant's argument regarding section 113 of the **Mining Act**, the tribunal is of the view that this section indicates that the hearing of an appeal from a Mining Recorder's decision is a "new" hearing, or a hearing *de novo*. The section provides no help as far as trying to deal with an appellant's request to discontinue its appeal and not hold a hearing.

This tribunal, as master in its own house, can decide how to regulate its proceedings including the disposition of matters under the **Mining Act**. Furthermore, the tribunal is not bound by the statutory rules of procedure found in regulations made under the **Courts of Justice Act**. Notices filed under those rules result in certain consequences for the parties, some of which relate to the awarding of costs. A party under those rules is expected to seek leave to discontinue its action. In determining how to best process a request to stop a party's action under the **Mining Act**, it is the tribunal's view that the integrity of the **Act** and its administration are important considerations. The tribunal is of the view that the **Act** seeks finality in terms of completing matters (processes) between parties. Where there is an opportunity and a procedural means to do so, (to finalize the process as between parties), then this tribunal will work towards that end.

It is clear from what the appellant has said that it (or another person) intends to bring the same issue forward at another time. It has also said that it sought to discontinue the action in order to allow it to do just that. How the appellant chooses to conduct its affairs (including an assessment of the risk of incurring costs) is up to the appellant. This tribunal is interested in finalizing processes under the **Mining Act**.

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<sup>1</sup> Re H-L Minerals Holdings v. Minister of Mines, June 14, 1991, unreported.

No hearing on the merits occurred. The tribunal believes that the appellant will be able to file an appeal on exactly the same issue at a future date if the current case is dismissed without adjudication on the merits. In other words, the appellant's issues will live to see another day. This appeal will be dismissed without prejudice.

### **Costs against non-party**

The Respondent Inco included non-parties in its request for costs. The tribunal indicated that it would hear argument in a summary fashion on the issue of jurisdiction to include non-parties in an award of costs.

Section 126 of the **Act** says that costs may be awarded "to any party". The word "party" carries with it a particular legal connotation. The word "costs" is not defined. The tribunal finds the cases provided by the parties dealing with subsection 131(1) of the **Courts of Justice Act** helpful. The words "by whom" are taken to refer to "parties" before the courts. However, the cases also say that when a person who is not a party is (in various circumstances) the "real" plaintiff, then that person may find themselves responsible for costs. The cases describe this person as one who remains behind the scenes to avoid liability for costs or for other reasons. This person also puts forward a "man of straw" in the action. The *Heaven*<sup>2</sup> case is helpful with respect to this issue. It is clear that the tribunal in the past approached this issue from the same perspective and that in some instances the "real" party (plaintiff or defendant) may be found liable for costs.

The tribunal is of the view that it has the necessary jurisdiction to consider a motion for costs proposed by Inco against Wallbridge Mining Company Limited, Wayne Whymark and Mark Hall and will therefore consider this motion at the time it hears the parties' arguments with respect to costs.

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<sup>2</sup> Re Thew v. Heaven 7 MCC at pg. 328