

File No. MA 007-00

L. Kamerman)
Mining and Lands Commissioner)

Wednesday, the 23rd day
of January, 2002.

THE MINING ACT

IN THE MATTER OF

Mining Claims L-1225672, situate in the Township of Milner, in the Larder Lake Mining Division, and Mining Claims L-1225673 to 1225678, both inclusive, 1226881, 1226882, 1227025, 1227027 to 1227029, both inclusive, 1227048, 1227049, 1227199, 1227255 and 1234970, situate in the Township of Van Hise, in the Larder Lake Mining Division, recorded in the names of Glenn Walter Bray, as to a 27.2% interest, Sharon Adelia Cotton, as to a 20.4% interest, Fred Ross Swain, as to a 17% interest, 903573 Ontario Limited, as to a 13.6% interest, Margaret Kaye Montgomery, as to a 6.8% interest and W. Johnson Mining and Oil Services Ltd. as to a 15% interest, hereinafter referred to as the "Mining Claims";

AND IN THE MATTER OF

An Agreement dated June 21, 1999, between Lake Superior Resources Corporation and Fred Ross Swain on behalf of Glenn Walter Bray, Sharon Adelia Cotton, 903573 Ontario Limited and Margaret Kaye Montgomery, involving lands in Milner and Van Hise Townships and alleged to include the Mining Claims, hereinafter referred to as the "Swain Agreement";

B E T W E E N:

LAKE SUPERIOR RESOURCES CORPORATION and
RANDBURG INTERNATIONAL GOLD CORPORATION

Applicants

- and -

GLENN WALTER BRAY, SHARON ADELIA COTTON,
FRED ROSS SWAIN, 525055 ONTARIO LIMITED,
(formerly 903573 Ontario Limited) and MARGARET KAYE
MONTGOMERY

Respondents
(Amended January 23, 2002)

AND IN THE MATTER OF

An application under section 105 of the **Mining Act** for a declaration that the Swain Agreement dated June 21, 1999, is still in force and effect and that notice of such Agreement be recorded against title to the Mining Claims.

ORDER ON COSTS

1. THIS TRIBUNAL ORDERS that costs in the amount of \$6,800.00 be and are hereby fixed, payable by the applicant, Lake Superior Resources Corporation, to the respondents, Mr. Glenn Walter Bray, Ms. Sharon Adelia Cotton, Mr. Fred Ross Swain, 525055 Ontario Limited, (formerly 903573 Ontario Limited) and Ms. Margaret Kaye Montgomery.

2. THIS TRIBUNAL FURTHER ORDERS that the aforementioned costs shall be paid within 30 days of the making of this Order.

Reasons for this Order are attached.

DATED this 23rd day of January, 2002.

Original signed by L. Kamerman

L. Kamerman
MINING AND LANDS COMMISSIONER

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MONTGOMERY

Respondents
(Amended January 23, 2002)

AND IN THE MATTER OF

An application under section 105 of the **Mining Act** for a declaration that the Swain Agreement dated June 21, 1999, is still in force and effect and that notice of such Agreement be recorded against title to the Mining Claims.

REASONS**Background**

This Application was commenced on February 17, 2000 by a letter received from Michael Bourassa of Aird & Berlis, counsel for Lake Superior Resources Corporation ("Lake Superior"). Lake Superior had entered into an agreement (the Swain Agreement"), a copy of which was included, with Mr. Fred Swain on behalf of himself and respondents Bray, Cotton, 525055 Ontario Limited (formerly 903573 Ontario Limited) and Montgomery on June 21, 1999.

According to Mr. Bourassa, the Swain Agreement granted an option which provided that Lake Superior would be entitled to a 75 percent interest in all the Swain Group lands in the two townships in exchange for shares of Lake Superior and of Randsburg International Gold Corporation ("Randsburg"). Lake Superior alleges that on January 21, 2000, Mr. Fred Swain, on behalf of the Swain Group and without cause, gave notice that the Swain Agreement was null and void. Lake Superior was seeking a declaration of the tribunal, pursuant to section 105 of the **Mining Act**, that the Swain Agreement was in full force and effect and that notice of the Agreement be recorded on the abstracts of the Mining Claims.

The Swain Group was described as holding rights to 8,320 acres of land in the Milner and Van Hise Townships, comprised of the Mining Claims. Mr. Bourassa advised that a significant amount of assessment work had been performed by Lake Superior and Randsburg on this property. This work was the subject matter of tribunal File MA-038-99. In that case, a third party contractor company, W. Johnson Mining and Oil Services ("Johnson"), alleged that it had not been paid what was considered adequate compensation for the work performed and sought a vesting order pursuant to section 69 of the **Mining Act** for a vesting of the interests of Lake Superior and Randsburg in certain mining claims. It should be noted that the Swain Group of claims was a different group from another held by Lake Superior, and ultimately Johnson sought the vesting of an interest in both sets of mining claims. That is, both the Mining Claims held by the Swain Group and those held by Lake Superior. It resulted in a vesting of a 15 percent interest in certain mining claims, including the Mining Claims which are the subject matter of this application, in Johnson. In File MA 038-99, an Interlocutory Judgment was issued on December 6, 2000 and supplemented by a further Order dated February 13, 2001.

In accordance with tribunal procedures, an Order to File documentation was issued on February 23, 2000. As was noted in Mr. Fitz's documentation in support of this costs application, there were a series of requests by the applicant for extensions of time for filing documentation. These occurred on March 15, 2000, when a 14 day time extension was requested,

on April 4, 2000, when a 14 day time extension was requested and on May 4, 2000 when an oral request was made on behalf of the applicant, that this action be adjourned *sine die* pending the outcome of File MA-038-99. The matter was adjourned, with the consent of the then representative of the Respondents, Mr. Fred Ross Swain.

The reasons for the initial several extensions were not communicated to the tribunal. However, the tribunal notes that all requests, including that for the adjournment, were made by Mr. Michael Opara, principal of Lake Superior. There is no information in this file as to why Mr. Bourassa, acting on behalf of Lake Superior, was not consulted. This departure from communication with the tribunal only by and through counsel occurred throughout this matter. It is also noted that, at some point during the proceedings in File MA-038-99, Lake Superior discharged Aird & Berlis as its counsel. New counsel was not retained until well into the preliminary proceedings of File MA-007-00, being approximately late May, 2001. Given that Aird & Berlis ultimately removed themselves as Counsel in the MA-038-99 matter, the pattern of Mr. Opara choosing to deal directly with the tribunal does not appear to be unusual in this file. In any event, proceeding without the benefit of consistent legal counsel was of concern to the tribunal in determining whether this was an appropriate case in which to exercise its discretion and award costs against the applicant, Lake Superior.

In the intervening period between the adjournment and the disposal of File MA-038-99, Mr. Opara wrote to the tribunal on behalf of Lake Superior on December 21, 2000 and January 23, 2001, ostensibly, in connection with File MA-007-00. He requested that additional mining claims held by Ms. Sherry Swain, Mr. Fred Swain and Mr. Michael Opara be added to the Mining Claims for File MA-007-00.

In the December 21, 2000, letter, Mr. Opara sought to have 14 additional mining claims added to those named in the original application. All were held in the name of Ms. Sherry Lynn Swain, wife of Mr. Fred Swain with the exception of one claim, which was held in the names of Mr. Fred Swain and Mr. Michael Opara, each as to a 50 percent interest.

In the January 23, 2001, letter, Mr. Opara named an additional 22 mining claims. Of these, 11 were held in the names of Mr. Fred Swain and Mr. Michael Opara, each as to a 50 percent interest, 9 were held by Ms. Sherry Swain and two were held by Ms. Sherry Swain, as to a 25 percent interest and Mr. Michael Opara, as to a 75 percent interest.

On December 22, 2000, the tribunal requested that the Provincial Mining Recorder place a notation of "pending proceedings" on only one claim which was due to forfeit shortly. On February 20, 2001, it requested a notation of "pending proceedings" be placed on the remaining 13 claims listed in Mr. Opara's December, 2000, letter. On June 22, 2001, notations of "pending proceedings" were placed on 13 mining claims in the January, 2001, letter and a further request was made of the Provincial Mining Recorder that the lands underlying the other 9 mining claims, which had forfeit, be withdrawn from staking.

The mining claims listed in the two letters were in Tyrrell, Nicol, Fawcett, Demorest, Knight and Turner Townships. All, except Turner, are located in the Larder Lake Mining Division, clustered around the Mining Claims. Turner is in the Sudbury Mining Division and is located six townships to the south and one east of the group or cluster of Larder Lake Mining Division townships. The tribunal had concerns as to whether the various areas claimed were properly part of MA-007-00. In addition to the disparate township issue, the tribunal was concerned about the proposed respondents. Ms. Sherry Swain, is not part of the Swain Group, holders of the Mining Claims which were the subject matter of the original application. Also, Mr. Fred Swain was listed as holder with Mr. Michael Opara, principal of Lake Superior, which might have given rise to facts and circumstances materially different from his capacity as one of the respondents named in File MA-007-00 and referred to as the Swain Group.

Once the Johnson matter [File MA-038-99] had been finally disposed of, the tribunal issued an Order to File, dated March 21, 2001, requiring the applicant to file its documentation by April 27, 2001. This Order was sent to Mr. Michael Opara for the applicant and Mr. Fred Swain, on behalf of the respondents. Counsel for Lake Superior was no longer in the picture and neither Mr. Fitz, nor Mr. Werbowski for that matter, had yet commenced acting for the parties.

On April 10, 2001, Randsburg was added as an applicant in this matter, at its request.

On April 19, 2001, in an effort to facilitate the hearing of this matter, given the potential expansion of the subject matter involved, the tribunal issued a Notice of Issues. The purpose was to attempt to clarify the extent of the tribunal's jurisdiction in relation to the nature of the application and to set out the issues which it believed must be addressed in this matter. The tribunal further indicated that a Telephone Conference Call would be desirable to further discuss and determine issues raised. With the consent of the parties, an Appointment for Pre-Hearing Conference by Telephone Conference Call was issued the 23rd day of April, 2001 and scheduled for the 1st day of May, 2001, to discuss and determine the nature of the section 105 application and the jurisdiction of the tribunal. The telephone conference Preliminary Motion was heard on the 1st day of May, 2001, with Ken Fitz appearing as counsel for the respondents.

Based upon representations made at the Pre-Hearing Conference on the 1st day of May, 2001 and in particular, the allegations and relief sought in the applicant's filings of the 27th day of April, 2001, the tribunal issued a Notice and Direction dated the 3rd day of May, 2001. It advised that the application would be limited to the scope of the original application, involving the Swain Agreement. It set out that the requests for additional notations of pending proceedings and particulars in the Statement of Claim "disclosed a further cause of action which is materially different from the original application with respect to subject matter, the nature of the relief sought".

Also directed in its May 3, 2001, Notice and Direction, Randsburg was ordered to file "all of its correspondence with Lake Superior ... and with the Vancouver Stock Exchange, including any VSE Policies, Rules or Directives, as referred to and in support of the allegations contained in ... Lake Superior Resources Statement of Claim in connection with the matter of

the issuance of the approval of the Randsburg/Lake Superior Agreement and the issuance of any shares of stock", which it failed to do. On May 31, 2001, Mr. Fitz, requested a Direction that Randsburg be ordered to request certain specified documentation from the Canadian Venture Exchange be provided to Mr. Fitz. The tribunal issued its Order and Direction on the 4th day of June, 2001.

The tribunal indicated that the matters disallowed in MA-007-00 would become part of a new file, which was opened, bearing number MA-008-01. The tribunal issued a Notice and Direction on the 17th day of May, 2001, outlining the various matters raised. There were allegations of a breach of fiduciary duty owed by Mr. Fred Swain to Lake Superior in his capacity as a former Director of Lake Superior. It is further alleged that, as a result of this breach, the staking of the Mining Claims was based upon proprietary information made available to Mr. Fred Swain.

Lake Superior was seeking a vesting of the interests of the respondents in Lake Superior, as well as damages. Lake Superior was also seeking damages for the amount of the reduction of assessment work which could be applied on the Swain Mining Claims, as well as damages for the cancellation of the June 21, 1999 Agreement. Lake Superior also sought against Ms. Sherry Lynn Swain a vesting of the Nichol, Knight, Milner and Tyrrell Township mining claims, asserting that their staking was made pursuant to proprietary information available to her husband, Mr. Fred Swain by virtue of his capacity as a Director and former Director of Lake Superior.

Mr. Michael Opara, acting in his personal capacity, sought a vesting of the Mining Claims held exclusively by Ms. Sherry Lynn Swain in Turner Township. Ms. Sherry Swain and Mr. Opara hold a number of other mining claims in Turner and Demorest Townships, with 25% and 75% interests, respectively. It was unclear whether Mr. Opara is seeking to have the vesting of only a 75% interest in the Mining Claims in Turner Township, or whether he is seeking a vesting of the entire interest.

Both Mr. Michael Opara and Lake Superior are seeking against Mr. Fred Swain a vesting of his 50% interest in Mining Claims in Fawcett and Tyrrell Townships. The reasons for this were not apparent to the tribunal from the material filed, but appear to be related to an authorization from Mr. Fred Swain for the sale of these and other Mining Claims by Lake Superior or Mr. Opara, which Mr. Swain is alleged to have subsequently withdrawn. Mr. Michael Opara and Lake Superior are seeking against Mr. Fred Swain and Ms. Sherry Swain, damages in the amount of \$500,000.00 for the cancellation of the sale authorization, reimbursement of funds paid for assessment work to be carried out, \$20,000.00 for the failure to perform certain assessment work, causing cancellation of cancelled Mining Claim L-1227266 and an Order requiring Mr. Fred Ross Swain and Ms. Sherry Lynn Swain to perform all outstanding assessment work on such mining claims as held jointly with Mr. Michael T. Opara in Tyrrell Township.

The tribunal set out its belief that a number of causes of action were disclosed from the foregoing, as follows:

1. Lake Superior v. Fred Ross Swain, with Bray, Cotton, 903573 Ontario Limited and Montgomery potentially 3rd part, and, if desired, Randsburg, Johnson as 4th part.
2. Lake Superior v. Sherry Swain
3. Michael Opara v. Sherry Swain
4. Michael Opara & Lake Superior v. Fred Swain.

The tribunal was also concerned that Lake Superior and Mr. Michael Opara were seeking damages or specifics in connection with a number of their allegations, being beyond its jurisdiction.

The tribunal directed Mr. Opara and Lake Superior to advise as to how they wished to proceed with the various matters listed. Soon after, on May 25, 2001, Mr. Werbowski, advised the tribunal that he had been retained by Lake Superior.

The matter of retaining counsel was not as straightforward as may be implied. Further to a request from Mr. Opara, the tribunal's May 3, 2001, Notice and Direction was initially sent to counsel, Mr. Roberto Cucci, on May 4, 2001. Mr. Fitz advised that he had been retained to act only on this application, MA 007-00 and not on MA 008-01.

Returning to the MA-007-00 matter, in its May 3, 2001, Direction and Notice, Mr. Opara was asked to provide the tribunal in writing with amendments to his Statement of Claim in this application, whereby he would specify those paragraphs which were not applicable to the current application. This was duly complied with in a timely fashion.

An Appointment for Hearing had been issued for File MA-007-00, on April 10, 2001 scheduling this matter to be heard on June 5 and 6, 2001. These dates subsequently being amended to June 20 and 21, 2001, so as to accommodate the newly retained counsel.

In his letter of May 25, 2001, advising that he had been retained, Mr. Andrew Werbowski, of the firm of Morrison Brown Sonovitch LLP, also advised that it was his view that there is considerable overlap in the circumstances surrounding the two applications. He further advised that it was his preliminary view that these matters should be transferred to the Superior Court of Justice (Ontario) and that he would further advise as to whether he would be making a section 107 application after he had the opportunity to review the forthcoming Respondents' filings which were subsequently filed on May 28, 2001.

Mr. Werbowski requested an adjournment on June 13, 2001, so as to proceed with the section 107 application to have this matter transferred to the Superior Court of Justice (Ontario). This was not opposed by the Respondents. However, their counsel, Mr. Kenneth Fitz, requested that upon adjourning the matter *sine die* so that the section 107 application could proceed, that his clients be given leave to bring an application for costs pursuant to section 126 of the **Mining Act** in the event that the Respondents did proceed with their section 107 application.

On June 15, 2001, the tribunal issued a further Order Adjourning Hearing, adjourning the matter to the 28th and 29th days of August, 2001. It also gave leave, in the event that application was made to transfer the matter to the Superior Court of Justice (Ontario), to the respondents to bring a motion for costs. In reviewing its June 15, 2001, Order, the tribunal notes that it is not clear that the purpose behind it was to provide adequate time for the applicant to apply to the Superior Court of Justice (Ontario) for transfer, with the new hearing dates intending to provide a deadline for taking this step. However, it is quite clear from correspondence that this had been the intent, despite the inactivity of the applicant to this point.

During the period after Mr. Werbowski was retained, on July 25, 2001, his letter to the respondents indicates that he has been instructed to pursue the section 107 application. Furthermore, while he had been instructed to pursue the possibility of settlement with each, if he did not hear from them by August 3, 2001, he will assume that the litigation must proceed.

Mr. Fitz wrote to the tribunal on July 26, 2001 and advised that his clients are not prepared to explore further settlement options. He proposed that the matter of costs be heard and also suggested that, should no steps have been taken by the applicant to transfer the proceedings pursuant to section 107, then the matter should be dismissed by the tribunal.

The next two letters from each of Messrs. Fitz and Werbowski make reference to each other's letters to the tribunal, neither of which was received/copied directly by the writer, but rather was forwarded by the tribunal.

On August 20, 2001, Mr. Fitz reiterates his client's position of July 26th and in particular requesting a dismissal if an action to transfer is not commenced. On August 21st, Mr. Werbowski states that all adjournments but one were on consent, that he did not receive any advance notice of the terms of the adjournment sought by Mr. Fitz, nor was he consulted regarding availability as to dates, that at least one change was made to accommodate Mr. Fitz's schedule, and that he could have simply issued a Notice of Application to have the matter transferred at a date convenient to himself only, but thought it prudent to arrange a date convenient to Mr. Fitz. Mr. Werbowski advised that the date of August 28 was not convenient for him, but that he could proceed with a prior date. There was further discussion of whether to proceed unilaterally or on an agreed upon date.

Despite time given to either transfer the matter, pursuant to section 107, or prepare for the hearing, the tribunal was advised that the scheduled dates were not convenient. On the 23rd day of August, 2001, having been advised that the application for transfer had not yet been made, the tribunal issued a further order adjourning the Appointment for Hearing set for the 28th and 29th days of August, 2001 and further granted until the 30th day of September, 2001, for the applicants to bring their application for transfer pursuant to section 107. On September 27, 2001, Mr. Werbowski sent a copy of the Notice of Application to the Superior Court of Justice, dated September 26, 2001, to the tribunal. On December 13, 2001, Mr. Werbowski provided the tribunal with a copy of Rivard J.'s December 4, 2001, Judgement transferring both files MA-007-00 and MA-008-01 to the Superior Court of Justice (Ontario).

The following is reproduced from Mr. Fitz's application for costs:

Issues

14. The following issues are raised in the application:
- (a) Should the Ontario Mining and Lands Commissioner make an Order in favour of the Respondents for the costs which they have incurred in defending Action No. MA-007-00 since this matter was commenced?
 - (b) What is the appropriate award of costs and the terms thereof, to be made in favour of the Respondents?

Relevant Legal Considerations

Jurisdiction of Ontario Mining and Lands Commissioner

15. The jurisdiction provided to the Mining Commissioner is broad in scope with respect to rights, privileges or interests conferred by or under the authority of the **Mining Act**. The Mining Commissioner may make such order or give such directions as she considers necessary to make effectual and enforce compliance with her decisions. [s. 105]
16. The Commissioner may in her discretion award costs to any party. Further, the Commissioner may order that a lump sum be paid in lieu of assessed costs. [s. 126]
17. Subject to any express provision contained therein, every Order or Judgment of the Commissioner take immediate effect. [ss. 129(2)]
18. In exercising the Commissioner's discretion to fix costs, the following considerations are applicable:
- a.** The parties should be given the opportunity to make submissions on whether costs should be fixed;
 - b.** The Commissioner does not have unfettered discretion to fix costs. This discretion should be exercised where the Commissioner, having received the parties' submissions, is satisfied that she is in a position to do procedural and substantive justice in fixing costs instead of directing an assessment; and

- c. Having decided to fix costs, the Commissioner should conduct an appropriate hearing on the amount to be fixed. This hearing may properly take the form of written submissions from the parties. [*Murano v. Bank of Montreal* (1998), 163 D.L.R.(4th) 21 (Ont. C.A.) at para. 88]
19. The Ontario Rules provide the Court with discretion to award costs where any steps in a proceeding was improper, mistaken or unnecessary. [Ontario Rule 57.0.1(1)(f)]
20. Unnecessary proceedings, which include taking action by one procedure as opposed to another or bringing two actions where one would have been sufficient, give rise to cost consequences. [*Sandberg v. Giesbrecht* (1963), 42 D.L.R. (2nd) 107 at Q.L. p.3 (B.C.S.C.)]
- (a) *Fixing Costs Above the Tariff***
21. The jurisdiction to award costs on a higher scale than party-and-party scale has been recognized in the Province of Ontario for many years. [*Foulis v. Robinson* (1978), 92 D.L.R. (3rd) 134 (Ont.C.A.) at Q.L. p.5]
22. There are cases in which justice can only be done by a complete indemnification for costs. [*Foulis*, supra at Q.L. P.7]
23. The Court may fix costs where the tariff would be inadequate given the resources that the Respondents had expended. [*Panamericana de Bienes y Servicios, S.A. v. Northren Badger Oil & Gas Ltd.*, [1990] A.J. No.381, Rev'd on other grounds 86 D.L.R. (4th) 567 (Alta. C.A.)]
24. Where one party is responsible for a proceeding not continuing, the party who occasions the delay should bear the costs thrown away by the innocent party. [*Taillefer v. St. Germain*, [1988] O.J. No. 2805]
- (b) *Awarding Solicitor-and-Client Costs***
25. It is not necessary that a matter proceed to trial for costs to be awarded on a solicitor-and-client basis. [*Apotex Inc. v. Egis Pharmaceuticals* (1990), 2 O.R.(3rd) 126 at Q.L. p.4 (Gen. Div.)]

26. Solicitor-and-client costs have been ordered in circumstances where one party has applied to the wrong court. [*424317 Ontario Ltd. v. Silber* (1989), 70. O.R. (2nd) 59 (H.C.J.) at Q.C. P.2]
27. Significant fixed costs have also been awarded where one party has delayed proceedings and ran up substantial costs. [*LaChapelle v. LaChapelle* (1999), 85 A.C.W.S. (3rd) 102 (Ont. Ct. - Gen. Div.) at Q.L. p.1]
28. An award of costs on a solicitor-and-client scale is also useful in discouraging harassment by one party of another through fruitless litigation. [*Apotex Inc. v. Egis Pharmaceuticals* (1991), 4 O.R.(3rd) 321 (Gen. Div.) at Q.L. p.3]
29. An award of solicitor-and-client costs is also appropriate where one party has prolonged a matter through consuming trial time on unnecessary or irrelevant issues or unreasonably prolonging the matter through litigation tactics. [*Pacific Blasting, Demolition and Shoring Ltd. v. Skeena Cellulose*, [1993] B.C.J. No. 266 at Q.L.p.3.]

(c) ***Application to MA-007***

30. The Respondents respectfully submit that this is an appropriate case for costs to be fixed on a solicitor-and-client basis. This matter was initiated by the Applicants on February 27, 2000. Thereafter, time extensions were requested by the Applicants on March 15, 2000, April 4, 2000 and May 4, 2000.
31. Pursuant to correspondence dated May 25, 2001, counsel for the Applicants indicated that his preliminary view was that this matter should be transferred to the Ontario Superior Court of Justice. Notwithstanding this initial determination, the Applicants were content to force the Respondents to go to the expense of filing written submissions before the Applicants would "confirm [their] position with respect to a Section 107 application".
32. The recent events surrounding the purported transfer by the Applicants of Action No. MA-007 to the Ontario Superior Court of Justice further illustrates the intent of the Applicants in delaying an adjudication of this matter on the merits and putting the Respondents to the time and expense of attempting to move this matter forward.

33. It is the respectful submission of the Respondents that they have been put to considerable time and expense through no fault of their own. The Applicants selected the Mining Commissioner's Office as the appropriate forum for this matter in February, 2000. After having reviewed the written submissions of the Respondents, they now determine this matter is better suited to the Ontario Court of Justice. They should not be entitled to effect this transfer without providing full indemnity to the Respondents for the costs which they have incurred to date in defending this action.
34. Although there might be some overlap in the work already performed on behalf the Respondents in defending this action to date, they will now be put to the expense of engaging new counsel in Ontario or for their existing counsel to obtain an Ontario Temporary Call and the attendant costs associated with that so as to defend this action before the Ontario Superior Court. Accordingly, it is respectfully submitted that under the circumstances full indemnity on a solicitor-and-client basis is appropriate.
35. In further support of their claim for costs on a full indemnity basis, the Respondents draw the Commissioner's attention to the improbable claim for relief sought in paragraph 1(b) of the Notice of Application to transfer this proceeding filed by the Applicants on September 26, 2001.
36. The Respondents further submit that if the requested Order issues by the Ontario Mining Commissioner that costs be payable, that there be a recommendation to the Ontario Superior Court, embodied in the Order, that the costs awarded to the Respondents be immediately payable in full as a condition of any Order transferring Action No. MA-007-00.
37. Authority for this type of relief is reflected in Ontario Rule 23.04(2) which provides:

Where a plaintiff has discontinued and is liable for costs of an action, and another action involving the same subject matter is subsequently brought between the same parties or their representative or successors in interest before payment of the costs of the discontinued action, the court may order a stay of the subsequent action until the costs of the discontinued action have been paid.

(d) *The appropriate quantum of costs*

38. The Respondents have expended \$9,480.24 on legal fees and disbursements in defending Action No. MA-007-00 since its commencement to the date hereof.

PART 4 - REMEDY SOUGHT

39. That the Respondents in Action No. MA-007-00 be awarded with fixed costs in the amount of \$9,480.24 for all steps taken with respect to this action from the date of its commencement.
40. That the award of costs indicate a recommendation to the Ontario Superior Court that if this matter is to be transferred, that all costs awarded in Action No. MA-007-00 be paid by the Applicants to the Respondents as a condition of granting the transfer application.
41. That in the event the Applicants elect not to proceed with the transfer application scheduled for November 21, 2001, that Action MA-007-00 is dismissed without the necessity of any further application.

Relevant portions of the Notice of Application are reproduced:

1. The Applicants make application for:
 - (a) an order transferring applications bearing File Nos. MA 007-00 and MA-008-01 before the Mining and Lands Commission to the Ontario Superior Court of Justice;
 - (b) their costs of this application on a solicitor and client basis; and
 - (c) such further and other relief as to this Honourable Court may seem just.
5. The grounds for the application are:
 - (a) there are currently two proceedings brought before the Mining and Lands Commissioner bearing File Nos. MA 007-00 and MA 008-01, (the "Mining Commissioner Applications")
 - (b) the legal and equitable principles in the Mining Commissioner Applications involve private, civil and property rights and therefore fall within the jurisdiction and expertise of the Ontario Superior Court of Justice;
 - (c) the claims advanced by the Applicants involve a claim for significant monetary damages;
 - (d) the Mining Commissioner has given Notice to the parties that it has no jurisdiction to award damages;
 - (e) the most efficient and expeditious manner of resolving the dispute between the parties is to have one proceeding before a judicial officer who had jurisdiction to deal with all claims advanced by the parties; and

- (f) section 107 of **the Mining Act**, R.S.O. 1990, c.M.14 as amended;
- (g) such further and other grounds as counsel may advise and this Honourable Court may permit.

Mr. Werbowski agreed with the facts presented by Mr. Fitz, with the exception that he pointed out that the adjournment of the matter *sine die* in 2000 was on consent of all of the parties, "and the actual filing of the paperwork was done by the Applicant as the Swains did not want to do so." He also pointed out that an element of rescheduling was to accommodate Mr. Fitz's schedule.

According to Mr. Werbowski, during the course of the Pre-Hearing Conference, Mr. Fitz stated that he was too busy to do the written submissions but would engage a law student to do so. Similarly, Mr. Fitz's clients have taken no position with respect to the application pursuant to section 107 to transfer the matter; they have not consented, so that one must infer that they do not consent.

The Respondents have taken no position with respect to the application to transfer under section 107 of the **Mining Act**. They have not consented to the transfer but, presumably are opposed to it having regard to the submissions made by the Respondents on the question of costs and the requirement to engage Ontario counsel or arrange for a temporary call for Alberta counsel.

At the time of the filing of submissions on costs, the section 107 Application was pending and a determination as to the transfer had not been made. Therefore, the application before the tribunal cannot be considered as finalized. In addition, the quantum of costs claimed is not supported by an itemized breakdown of time spent. Mr. Werbowski submitted that it is impossible to assess that issue in the absence of such further evidence.

According to Mr. Werbowski, the issue in this costs application is whether the tribunal should make any order as to costs.

Portions of Mr. Werbowski's written submissions are reproduced:

Relevant Legal Considerations

4. Although the Ontario *Rules of Civil Procedure* provide that the Court may award costs where any step in a proceeding was improper, mistaken or unnecessary, it is clear from the vary terms of the **Mining Act** that transfer applications are routinely considered in disputes of this nature.

Section 107 of the Act

5. Section 107 of the **Mining Act** specifically provides that "a party to a proceeding" may "at any stage of the proceeding" apply to the Ontario Court for an order transferring the proceeding to that Court. It should be noted that this section of the **Mining Act** is not restricted to a responding party. Accordingly, any party has the statutory right to seek a transfer to the Court.
6. It is difficult to suggest that the exercise of a statutory right by a party to the Mining Commissioner proceeding should give rise to the implication that previous actions taken were "improper steps".
7. It should also be noted that section 108 and 109 of the **Mining Act** provide further examples of where disputes in the context of mining claims can be transferred from the court system to the Mining Commissioner. Accordingly, it is submitted that the legislature has recognized the possibility that there are two appropriate forums for the resolution of mining disputes and the proper forum may not be obvious until such time as the issues are clearly defined.

Efficiency of One Proceeding in One Forum

8. It is submitted that the Applicant's request that this matter be transferred to the Ontario Superior Court will likely increase the efficiency and resolution of this matter. It should be noted that the Applicants have sought leave to advance additional and related claims (MA-008-01) at the same time as the claims advanced in MA-007-00. The Mining and Lands Commissioner, in her discretion, has directed that these matters not proceed at the same time. The proposed transfer application under section 107 would serve to have both disputes transferred to the court system and determined in one proceeding rather than the necessity of two separate proceedings as would be the case should this proceed before the Mining and Lands Commissioner.
9. Accordingly, it is submitted that the attempt by the Applicants to transfer all outstanding claims to the Ontario Superior Court of Justice is ultimately likely to enhance the efficiency of the resolution of all disputes between the parties. There is no merit to the suggestion that the Applicant is seeking to delay a resolution or adjudication on the merits. To the contrary, the Applicants are seeking to have all matters between the parties transferred to an appropriate jurisdiction to have them dealt with at one time.

The "Inappropriate Proceedings" Allegation

10. Finally, with respect to the cases submitted by the Respondents on the issue of inappropriate proceedings and the quantum of costs that ought to flow from that determination, it should be noted that there has been no determination that this matter will be transferred. The Ontario Court may refuse, in its discretion to transfer the matter. In that circumstance, the application before the Mining and Lands Commissioner would proceed and it would be heard on the merits at which point an appropriate award of costs could be made depending on the success of the parties.

Authority to Make "Recommendations" to the Court

11. The Mining Commissioner derives its authority from the **Mining Act** and is not a court of inherent jurisdiction. There is no statutory authority for the Mining and Lands Commissioner to make "recommendations" to the Ontario Superior Court of Justice regarding the imposition of costs or terms of such costs awards. The effect of the respondents' request would be to require the Applicants to effectively post security for costs for exercising a statutory right provided under the **Mining Act**. This would represent an inappropriate burden on the Applicants and should any such term be imposed, may result in the Applicants having to consider whether it is financially feasible to pursue the statutory remedy under section 107 of the **Mining Act** if such terms are imposed.

Costs Not Thrown Away

12. There is little merit to the suggestion that there have been costs thrown away. The issues raised in the mining application are obviously identical to the issues that will be raised in the court proceedings should the matter be transferred. If the section 107 application is unsuccessful, there have been no costs thrown away. Any preparatory work done by the Respondents in relation to this application will clearly be relevant and of benefit to the Respondents in defending the claims in the Ontario Superior Court of Justice. There has been no evidence or calling of witnesses that will need to be repeated. There have been no personal attendances before the Mining and Lands Commissioner.
13. There has been no breakdown in the forum of dockets to substantiate the costs incurred. It is impossible to assess in any meaningful way the amount invoiced by counsel to the Respondents.

Order Requested

14. It is respectfully requested that the Respondent's request for costs be denied.
15. It is respectfully requested that if there is any order as to costs, that costs be payable to the Applicants for having to respond to this request by the Respondents in the sum of \$750 (which reflects a position of the time spent responding to the Respondents' request).

Findings

While the tribunal is not bound by the *Rules of Civil Procedure*, nonetheless, they provide a useful framework for consideration in determining whether to exercise its discretion to award costs.

The common law rule holds that a successful party does not have a legal right to costs, but may have a reasonable expectation of receiving costs, subject to the tribunal's discretion. The *Rules of Civil Procedure* [57.01(2)] also provide for a cost award against a successful party in a proper case. Included in Rule 57.01(1) for consideration, in addition to written offers to settle and the result, are "(c) the complexity of the proceeding, (d) the importance of the issues and (e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceedings ... and (i) any other matter relevant to the question of costs."

This action may be broadly divided into three distinct time periods, each with sufficiently differing considerations and characteristics, which the tribunal finds relevant in determining whether to exercise its jurisdiction to award costs.

During the initial time frame in 2000, aside from the initiating document, communications concerning the various adjournments between the tribunal and parties were conducted without counsel. The tribunal notes that the respondent, Mr. Fred Swain, consented to the requests. As to the adjournment *sine die* pending completion of MA-038-99, that outcome could have influenced the direction of this litigation. One potential result of that litigation could have caused Lake Superior and Randsburg to lose all of their interest in the Mining Claims to Johnson. The nature of the interest, however, arose out of the option agreement (the Swain Agreement) and it is the Swain Group which is listed as the recorded holder. While it is uncertain as to how this result could have assisted Johnson in acquiring anything other than the right to acquire an interest in the Mining Claims, undoubtedly, this is something his counsel, Mr. Fitz, was prepared for. That eventuality, however, did not occur, as Johnson merely acquired a portion of the Lake Superior and Randsburg interest in the Mining Claims.

The tribunal finds that the initial requests for extensions of time for filing in 2000, were not unreasonable in the circumstances. The respondents gave their consent. Nor does the tribunal find that the requests were simply a means of causing unreasonable and unnecessary

delay. The tribunal finds that it was not unreasonable of Lake Superior to request the adjournment until such time as a decision was reached by the tribunal as to whether Mr. Opara's company's interest in the Mining Claims would exist upon completion of the Johnson File MA-038-99 matter.

The second time frame of relevance to the question of costs is during the reactivation of proceedings. Prior to this time frame, the matters raised in the December 2000 and January 2001 letters, both by Lake Superior and Mr. Michael Opara, augmented and changed the combined proceedings to such a degree that an informed evaluation was necessary. Lake Superior and Mr. Opara could have benefitted from knowing, in advance, the impact of their allegations on the initial litigation. They could have also benefitted from advice on how best to proceed, given the nature of the various types of relief sought, not to mention the added respondents named. Simply stated, due to complexity, carriage of the matter required informed decision-making based on the advice of legal counsel.

What is not known is whether, on the part of Lake Superior, the discharge of its original counsel was done for financial reasons, or whether there was intended to be some strategic advantage to its actions. Nor was the situation assisted by the lack of counsel on behalf of the respondents until a relatively late date. Also, conduct of this matter was hampered by the fact that the respondents' counsel, Mr. Fitz, was successful in limiting the scope of File MA-007-00 and then advised that he had not been retained on the second matter, MA-008-01. It is noted that, despite the numerous adjournments and extensions, most were on consent of the respondents or their counsel.

The tribunal notes that, in attempting to determine whether to exercise its discretion to award costs to the respondents is the effect of the section 107 transfer of both MA-007-00 and MA-008-01 to the Superior Court of Justice (Ontario). The tribunal determined that the applicants, Lake Superior and Randsburg, would be held to the parameters of the original application, concerning determinations involving the Swain Agreement. The resulting decision of Rivard, J. in transferring both matters in a single action, without determination on the merits of whether there are separate causes of action involved, amounts to a successful appeal of the tribunal's determination. While this result may have been unforeseen, the wording of section 107, which states, "may, at any stage of the proceeding, apply ... for an order transferring the proceeding...", clearly contemplates that this is possible.

It is true that proceedings before the tribunal are intended to be relatively informal and that retaining counsel is not strictly necessary. It is also true that the tribunal takes steps to assist those parties which are unrepresented. However, in the original File MA-007-00, numerous allegations were added involving respondents other than those initially named. The ensuing confusion as to the limits of the tribunal's jurisdiction with respect to damages and specific performance caused the tribunal's initiation of a determination of issues in File MA-007-00 as well as ultimately the application pursuant to section 107. Although not discussed directly in the materials filed, due to previous knowledge from File MA-038-99, the tribunal is aware that

extensive land holdings are involved in the litigation and that sufficient contingency financing has been problematic throughout this endeavour. Whatever the reasons, it is quite clear that litigation of this magnitude, involving serious issues of option agreements, breaches of trust or fiduciary duties and requests for specific performance have been hampered by the lack of, if not the same counsel, then at least constant representation by some counsel.

The tribunal attempted to assist, in a neutral manner, the carriage of this file. However, it was obvious that the parties, with the benefit of counsel, found their own distinct direction for proceeding. Nonetheless, the tribunal has been left with the impression, at this point, that Mr. Opara, on behalf of Lake Superior, was figuring matters out as he went along and later, reacting to unanticipated counter-strategies by counsel on behalf of the respondents.

This being said, the tribunal recognizes that Mr. Opara, on behalf of Lake Superior, at various times throughout the proceedings, has initiated and attempted to reach a settlement with the respondents. One example is reflected in his letter to Mr. Fitz of May 11, 2001, wherein he reflects that Mr. Fitz did not communicate an offer of settlement to his client, showing that the expiry date was May 8.

One of the reasons cited for this application for costs was that the application for transfer pursuant to section 107 did not take place until after the respondents documentation was filed. The possibility of transferring the matter(s) to the Superior Court of Justice (Ontario) was raised on May 25, 2001, but was not made until well after the filings, in fact, well after the matter had been scheduled and rescheduled for hearing several times. Nonetheless, such action did not take place until after the respondents were required to file their documentation, thus being put to some unnecessary and duplicated expense. Mr. Werbowski specifically stated that he wanted to see this filing before he decided whether to proceed with the section 107 application. His reasons for doing so are not clear.

The tribunal has considered balancing Lake Superior's rights concerning the carriage of its case with the rights of the respondents to know the issues. The tribunal cannot help but to conclude that some portion of the lengthy and drawn out proceedings are a direct result of Mr. Opara's attempts to sort through the matters he had initiated, until he finally resolved that he required legal counsel.

The tribunal finds that Mr. Opara was unable to resolve whether to retain counsel and ultimately whether to proceed with the section 107 application until after the successful challenge to broaden the issues by Mr. Fitz. Once the tribunal stated the limits of its own jurisdiction and once a second application was commenced, it was then that Mr. Opara started making better efforts to seek and retain knowledgeable legal counsel. The timing of this decision on the part of Mr. Opara coincides with the period after the respondents were required to file their documentation. The fact that Mr. Opara was unable to decide what to do with the litigation he initiated until this relatively late date in the proceedings is a determining factor. Accordingly, the tribunal finds that, based upon this face, it will exercise its discretion in favour of awarding costs against Lake Superior.

As to the costs associated with the respondents' filing, there undoubtedly will be some overlap between the documents prepared for the tribunal and those which will be necessary for the court proceedings. However, the respondents have now retained Ontario counsel (Mr. Crawford Smith), so it has become uncertain as to the extent the earlier research and filing might be used. Also, Mr. Fitz made it quite clear that he did not act for the respondents in File MA-008-01. The effect of the Superior Court of Justice (Ontario) decision is to require that the respondents be represented on those issues raised in both matters against them. Therefore, the tribunal is satisfied that the applicant, Lake Superior, be required to pay a substantial portion of the respondents' solicitor and client costs in preparing materials.

The third period of time to which costs may be applied is the intervening period between the June, 2001 scheduling of the hearing of MA-007-00 and the ultimate application made for transfer, on September 27, 2001. This period reflected considerable activity and correspondence, not to mention a series of Orders by the tribunal. While it may have initially been unclear from the correspondence and Orders that Mr. Werbowski was being given a deadline to make his client's application for transfer and indeed a second opportunity was given after the hearing scheduled to commence at the end of August, 2001, ultimately, it should have been clear that the time for making a decision was up.

The tribunal finds that, although a modicum of time in which to make its section 107 application was reasonable, the length of time actually taken, with attendant scheduling and rescheduling of hearing dates, was unnecessarily lengthy and did not demonstrate due diligence in choosing a forum for the hearing of this matter. Accordingly, the tribunal finds that nominal costs will be awarded for this portion of the proceedings.

Fixing of Costs and Quantum

The tribunal finds that this is an appropriate case to fix costs, as opposed to requiring an assessment of costs. The hearing of this matter has been transferred. Further costs may be assessed at the Superior Court of Justice level. Nothing would be gained, at this point, from requiring a further, drawn out proceeding as to quantum of costs.

The tribunal finds that the estimates of costs submitted by Mr. Fitz are reasonable in the circumstances and will base its award on his figures.

No costs will be awarded on account of the initial proceedings in this matter. Costs of \$6,000 are fixed against the applicant, Lake Superior Resources Corporation, on a solicitor and client basis, on account of the intermediate proceedings in this matter. Nominal costs of \$800.00 are awarded against the applicant, Lake Superior Resources Corporation, for undue delay in making its application pursuant to section 107 of the **Mining Act** for transfer of the proceedings to the Superior Court of Justice (Ontario).

The time for the payment of costs of \$6,800.00 is within 30 days of the making of this Order.

Request that Costs Award Pre-date Section 107 Application and be Made Conditional

The applicants requested that the costs award be made prior to the hearing of the section 107 transfer application and further that the tribunal request that the Court not consider the application until such costs were paid. The tribunal is not aware of any authority permitting it to make an Order with such recommendations or conditions. Rather, the tribunal believed it would be prudent to delay issuance of its Decision on Costs until such time as the Superior Court of Justice (Ontario) determined whether or not it would agree to transfer the applications.

Pending Proceedings and Exclusions of Time

It is pointed out to the parties and to the Superior Court of Justice (Ontario) that the mining claims remain under notations of "pending proceedings". Such notations are not specifically recognized in the **Mining Act**, but have developed as an administrative mechanism, recognizing the authority of the tribunal and the Provincial Mining Recorders to exclude time pursuant to the provisions of section 67. In addition, at the request of the tribunal, those lands covered by forfeit mining claims have been ordered removed from staking by the Provincial Mining Recorder exercising authority of the Minister pursuant to section 35 of the **Mining Act** delegated to him.

The effect of the notations of "pending proceedings" is to hold all assessment work requirements in abeyance pending the outcome of litigation. Once concluded, the time during which the Mining Claims are the subject matter of litigation may be excluded in calculating time for performance of required assessment work, should the tribunal or Mining Recorder be satisfied that any delay in settling the matter is not the fault of the recorded holder. Effectively, the time spent in litigation is not counted when determining when assessment work becomes due. Without performance of the required assessment work, the Mining Claims would forfeit, in accordance with clause 71(1)(b).

It is drawn to the attention of the parties that once litigation in the Superior Court of Justice (Ontario) is at an end, it will be necessary to remove the notations of "pending proceedings" from the abstracts of the Mining Claims and make a finding as to whether time should be excluded. Whether such an order is requested from the Court, the tribunal or the Provincial Mining Recorder is left in the hands of the parties. However, the tribunal wishes to caution the parties as to the carrying out of this final requirement under the **Mining Act**. Should there be a mediated settlement in the matter, with conditions, the necessary requirements for the meeting of all conditions should be clear, so that a determination can readily be made that proceedings are at an end and "pending proceedings" thereby vacated. Also, should such an application be left to the parties to bring either to the tribunal or to the Provincial Mining Recorder, the relevant date for completion of litigation will be the date when proceedings are concluded with the Court, so that any delay will not enter into the time excluded. Similarly, the Provincial Mining Recorder should be served with the final Order or Judgment, so that those lands removed from staking may be re-opened.

Finally, the tribunal will mention once again that, while time may be excluded during pending litigation, the value of assessment work actually performed is not placed in abeyance in a similar manner. Pursuant to section 4 of Ontario Regulation 6/96, assessment work is eligible for 100 percent of its value for the first 24 months after it has been performed. Thereafter, it is eligible for 50 percent of its value for up to 60 months after it is performed.

Considerable assessment work, which was the subject matter of File MA-038-99, was performed in July through September, 1999. At the time of litigation of File MA-007-00, no assessment work report had been filed in connection with this work. It will be of no value if it is not filed on or before September, 2004.