

File No. MA 031-00

M. Orr )  
Deputy Mining and Lands Commissioner )

Friday, the 27th day  
of July, 2001.

**THE MINING ACT**

**IN THE MATTER OF**

Mining Claim S-1229840, recorded in the name of T.R.C. Management & Consulting Inc., situate in the Township of Dana, in the Sudbury Mining Division, (hereinafter referred to as the "Mining Claim");

**IN THE MATTER OF**

A Preliminary Exploration Agreement, dated the 28th day of March, 2000, between the Respondent and the Applicant;

**AND IN THE MATTER OF**

An application for the issuance of a Notice of Interest with respect to the Mining Claim, pursuant to section 105 of the **Mining Act**;

**AND IN THE MATTER OF**

Section 60 of the **Mining Act**.

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

PACIFIC NORTH WEST CAPITAL CORP.  
Applicant

- and -

T. R. C. MANAGEMENT & CONSULTING INC.  
Respondent

**SUPPLEMENTARY ORDER AS TO COSTS**

**WHEREAS** this application was received by this tribunal on the 18th day of August, 2000;

**AND WHEREAS** this application was heard in the courtroom of this tribunal on the 13th and 14th days of March, 2001, respectively;

**AND WHEREAS** the Order in this application was issued on the 4th day of May, 2001, wherein the tribunal advised the parties that they could speak to the issue of costs, pursuant to section 126 of the **Mining Act**;

**AND WHEREAS** the hearing concerning costs was held via telephone conference call on the 12th day of July, 2001;

**1. THIS TRIBUNAL ORDERS** that it will fix costs (on a party and party basis) at \$16,535.37 to be awarded to the applicant, Pacific North West Capital Corp., to be paid by the respondent, T. R. C. Management & Consulting Inc., and if necessary, to be set off against any monies payable by the applicant under the agreement between the two parties, dated the 28th day of March, 2000.

**THIS TRIBUNAL FURTHER ADVISES** that pursuant to subsection 129(4) of the **Mining Act** as amended, a copy of this Order shall be forwarded by this tribunal to the Provincial Mining Recorder **WHO IS HEREBY DIRECTED** to amend the records in the Provincial Recording Office as necessary and in accordance with the aforementioned subsection 129(4).

Reasons for this Order are attached.

**DATED** this 27th day of July, 2001.

Original signed by  
M. Orr

M. Orr  
DEPUTY MINING AND LANDS COMMISSIONER

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**REASONS**

Appearances: Mr. Burton Tait  
Counsel, Pacific North West Capital Corp.  
Mr. Andrew Loucks  
Counsel, T. R. C. Management & Consulting Inc.  
Mr. William Tang  
President, T. R. C. Management & Consulting Inc.

In its Reasons released on May 4, 2001, (following a hearing that took place on March 13 and 14, 2001), the tribunal invited the parties to make submissions with respect to costs, as both parties' documentation had included requests for costs and compensation.

The applicant filed materials in support of its request for costs on a party and party scale on June 13, 2001. (The applicant had initially asked for costs on a solicitor and client scale.) Counsel for the respondent filed a letter dated June 29, 2001, wherein, among other things, he objected to the awarding of any costs. (While the respondent, T. R. C. Management & Consulting Inc. (TRC) was not represented by counsel on March 13 and 14, 2001, it was represented at this hearing.)

Accordingly the hearing with respect to costs was held on July 12, 2001, by telephone conference call.

In his submissions on behalf of the applicant, Mr. Tait requested the tribunal to fix the quantum of costs. The total claimed by the applicant was \$16,565.37. Mr. Tait advised the tribunal that the amount claimed on behalf of Pacific North West Capital Corp. (PFN), in terms of fees was less than half of what PFC actually had to pay in legal fees for this case. The hourly rates (on a party and party basis) quoted by Mr. Tait were \$200 for himself (called to the bar in 1967); \$150 for a member of the firm called in 1994, and \$110 for another member called in 1998. Disbursements totaled \$739.37.

Mr. Tait was also concerned that his client could experience some difficulty in enforcing a cost order made against the respondent TRC (were one awarded). To that end he asked that the tribunal direct that any costs awarded to PFN be offset against any monies owing TRC under the agreement, should the costs not be paid. Mr. Tait drew the tribunal's attention to the payment of \$15,000.00 which will become payable by PFN to TRC on or before April 30, 2002, as a result of the tribunal's decision of May 4, 2001.

Mr. Loucks, (counsel for TRC) had no objection to the offset provision put forward by Mr. Tait. Mr. Loucks also deferred to his client, Mr. Tang, for a response to the applicant's costs request. Mr. Tang took issue with the applicant's entire list of cost-related items. Among other things, Mr. Tang harkened back to the agreement in question claiming that its authorship by PFN had led to confusion and the resulting dispute. He objected to the inclusion of any time spent at a pre-hearing conference (which dealt with settlement discussions) as this had been arranged at the request of the applicant. He refused to accept any responsibility for delay of the hearing because of the failure of his witness Mr. Douglas Boddy to appear on March 13, 2001, with the result that the hearing had to be set over to the next day in order to hear from Mr. Boddy. Mr. Tang painted a picture for the tribunal in which PFN's actions were the source of the costs it had incurred and he refused to accept any responsibility regarding costs. Furthermore, he was no longer seeking the \$5,000.00 compensation costs he had originally claimed; rather he asked the tribunal to award TRC the same amount being sought by the appellant at this hearing. TRC did not file any documentation in support of this new claim at this hearing.

Mr. Tait responded to Mr. Tang's submissions by saying that PFN's reliance on the pre-hearing procedure set out in this tribunal's Hearing Guidelines was a "genuine attempt ... to bring the matter under control". He further argued that the tribunal cannot award costs to a litigant not represented by legal counsel as sections 126 and 127 of the **Mining Act** provide no basis for compensating the "executive" time of a party. (The tribunal asked Mr. Loucks about this point but he indicated that he had no argument to put forward. His client was proceeding on the basis of "fairness and natural justice".) While Mr. Tait had initially pointed out that no costs were being claimed for this hearing, he later reversed that position in response to hearing from Mr. Tang and claimed an additional \$490.00. The tribunal later requested particulars with respect to costs associated with the applicant's "Review Request" of the tribunal's Reasons of May 4, 2001, and these were provided by PFN's counsel. (The applicant had filed a "Review Request" of the tribunal's Reasons only along with its request for costs.)

In coming to a decision awarding costs to the applicant PFN, the tribunal wishes to note the following.

Sections 126 and 127 of the **Mining Act** provide the authority for the tribunal to award costs. With respect to the issue of "executive costs" (or those incurred by a party without counsel), while section 127 does refer to the tariff being that of the Ontario Court (General Division), the tribunal is of the view that any decision with respect to costs is one that is fully within the discretion of the tribunal. In any event, the tribunal is of the view that the respondent in this case does not merit any monetary award.

The tribunal notes the applicant made use of this tribunal's Procedural Guidelines in an effort to resolve the matter before it went to a hearing.

The tribunal is also of the view that parties are expected to produce their witnesses on the hearing date. TRC's documentation and Mr. Tang's evidence certainly led the tribunal to conclude that Mr. Boddy's evidence would prove to be important in terms of the decision to be made by the tribunal. It was an inconvenience to all concerned to delay proceedings until the next day in order to hear from this witness. As it turned out, Mr. Boddy's evidence proved to be useful and illuminating.

The tribunal further notes that TRC's objections as they relate to the costs sought by PFN appear to be rooted in a belief that PFN was the real cause of the problem and the resulting costs.

The tribunal also notes that the awarding of costs is intended to provide complete or partial indemnification. To that end, the tribunal is of the view that costs claimed by PFN regarding PFN's "Review Request" respecting the tribunal's Reasons of May 4, 2001, are properly described as "anticipatory" in nature as no hearing into that matter has been held. A claim for costs relating to the "Review Request" should be made separately. The costs relating to this item will therefore not be included in this award for costs.

Further, the tribunal notes the case of *Apotex Inc. v. Egis Pharmaceuticals and Novopharm Ltd.* 4 O.R. (3d) 321 (Gen. Div.) wherein the engaging of parties in litigation was said to involve the assumption of a certain business risk. The risk is that the loser may be requir-

ed to pay all or part of the winner's costs. The court also noted the policy of the judicial system, which is to encourage litigants to settle. As with this tribunal and its Procedural Guidelines, the parties are encouraged to make what sometimes amounts to a sound business decision to end the dispute and cut their losses.

Finally, the tribunal will allow the costs claimed by PFN's counsel for the time for this hearing.

In conclusion, having considered the parties' submissions, the tribunal has decided that the applicant is entitled to party and party costs for fees and disbursements fixed at \$16,535.37 ( $\$16,565.37 - (2.60 \text{ hrs} \times \$200 = \$520.00) + \$490.00$ ). The tribunal has also decided that the costs awarded to PFN can be set off against any monies payable by PFN under the agreement between it and TRC dated March 28, 2000.