File No. MA 027-96

L. Kamerman	)	Tuesday, the 10th day
Mining and Lands Commissioner	)	of June, 1997.

THE MINING ACT

IN THE MATTER OF

Mining Claims SSM-1037323 to 1037362, both inclusive, and 1037393 to 1037402, both inclusive, situate in the Township of Pilot Harbour, in the Sault Ste. Marie Mining Division, hereinafter referred to as the "Mining Claims";

B E T W E E N:

PENN-GOLD RESOURCES INC.

Applicant

- and -

THUNDER SWORD RESOURCES INC., formerly
OIL CITY LUBRICANTS LIMITED

Respondent

AND IN THE MATTER OF

An agreement dated January 28, 1991 between the Applicant and the Respondent involving the transfer of an undivided 25 percent interest in the Mining Claims (the "Agreement") to the Applicant;

AND IN THE MATTER OF

An application under section 105 of the **Mining Act** for the enforcement of the Agreement.

INTERLOCUTORY ORDER

UPON READING the submissions filed and hearing from counsel for the parties:

1. THIS TRIBUNAL ORDERS that Penn-Gold Resources Inc. pay to Thunder Sword Resources Inc. the amount of $11,606.00 to cure its default in the Agreement within 45 days of the date of this Order.

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2. **THIS TRIBUNAL FURTHER ORDERS** that costs payable by Penn-Gold Resources Inc. to Thunder Sword Resources Inc. be fixed in the amount of $3,000.00, payable within 45 days of the date of this Order.

3. **THIS TRIBUNAL FURTHER ORDERS** that upon proof of payment satisfactory to the tribunal, an Order vesting a 25 percent interest in the Mining Claims in Penn-Gold Resources Inc. will be issued.

4. **THIS TRIBUNAL FURTHER ORDERS** that upon failure to make the required payments within the time specified, an Order declaring that all interest of Penn-Gold Resources Inc. in the Mining Claims will hereafter cease will be issued.

Reasons for this Order are attached.

IT IS FURTHER DIRECTED that upon payment of the required fees, this Order be filed in the Office of the Mining Recorder for the Sault Ste. Marie Mining Division.

DATED this 10th day of June, 1997.

Original signed by

L. Kamerman
MINING AND LANDS COMMISSIONER

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An application under section 105 of the **Mining Act** for the enforcement of the Agreement.

REASONS

The hearing of this matter was done through written submissions pursuant to subsection 5.1(1) of the **Statutory Powers Procedure Act**, R.S.O. 1990, c. S.22, as amended by S.O. 1993 c. 27, Sched.; and S.O. 1994, c. 27, s. 56 and pursuant to paragraph 11(1) of its **Procedural Guidelines for Proceedings under the Mining Act**.

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Appearances:

Penn-Gold Resources Inc. by its solicitor George A. Jones

Thunder Sword Resources Inc. by its solicitor Stephen A. Mellows

Background

On January 28, 1991, Penn-Gold Resources Inc. ("Penn-Gold") and Oil City Lubricants Limited ("OCL"), which subsequently changed its name to Thunder Sword Resources Inc. ("Thunder Sword") entered into an agreement (the "Purchase Agreement") whereby the former purchased a 25 percent undivided interest in 50 mining claims, bearing Mining Claim numbers SSM-1037323 to 1037362, both inclusive, and 1037393 to 1037402, both inclusive, in the Township of Pilot Harbour, in the Sault Ste. Marie Mining Division, (the "Mining Claims"), with an option to acquire a further 20 percent interest in the Mining Claims upon performing an aggregate of $50,000 worth of exploration and development work.

The Mining Claims were staked in October, 1987 and were recorded on November 4, 1987. Considerable assessment work was performed prior to the execution of the Purchase Agreement, which through a change in assessment work provisions in the **Mining Act** effective June 3, 1991, resulted in keeping the Mining Claims in good standing beyond November 4, 1991. This work was characterized as "Assessment Work Credits" and the matter of whether an interest in the Credits was acquired with the purchase of the undivided 25 percent interest was in issue between Penn-Gold and Thunder Sword.

Copies of abstracts for the Mining Claims were not filed by the parties. However, the tribunal obtained representative copies from the mining recorder (Ex.7) and determined that the Mining Claims were recorded by Daniel St. Pierre. On October 19, 1988, the Mining Claims were transferred to Central Crude Ltd ("Central Crude"). On February 6, 1995, the Mining Claims were transferred to OCL. Pursuant to questions raised by the tribunal in a letter to the solicitors for the parties dated May 1, 1997, an explanation of the chain of title was provided during a telephone conference call held on May 8, 1997. George Jones attended on behalf of Penn-Gold. Stephen Mellows attended on behalf of Thunder Sword, with Mr. Naguschewski, President of Thunder Sword and former President of Penn-Gold also on the line.

Mr. Mellows expressed surprise at the existence of Central Crude on the abstracts for the Mining Claims and conveyed Mr. Naguschewski's explanation. The Mining Claims were actually staked by Harry Ferderber and recorded in the name of Daniel St. Pierre. On November 30, 1997, 25 of the Mining Claims were purchased by OCL for $5,000 and 100,000 shares in OCL. Shortly thereafter, the other 25 Mining Claims were purchased for an additional $20,000 and a further 100,000 shares.

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In July, 1988, Central Crude made a deal with OCL, paying $20,000 with the promise of conducting $1,000,000 of assessment work, in exchange for a 60 percent interest in the Mining Claims. Central Crude then made a deal with Noranda, where it sold all but 10 percent of its interest for an unknown amount, in exchange for Noranda expending $250,000 in assessment work and Central Crude spending $50,000, so that the total assessment work involved in this last arrangement was $300,000. The respective interests at this point were 50 percent - OCL; 40 percent Noranda; and 10 percent Central Crude. In 1990, Central Crude and Noranda cancelled the agreement, due to the results and 100 percent interest in the Mining Claims reverted to OCL. Mr. Mellows could only speculate as to why the records show that the transfer to OCL did not take place until 1995. Mr. Jones indicated that he was satisfied with this explanation, and that no new issues arose as a result.

Pursuant to an Order to File dated December 18, 1996, written summaries of facts and law, with exhibits appended, were submitted by Messrs. Jones and Mellows on behalf of their clients. During the course of this filing, it was determined that, as the parties and their solicitors were located in Vancouver and the issues to be determined involved interpretation of the Purchase Agreement, the tribunal's determination would be based upon the written documentation. Ensuring that all issues were addressed, each was given an additional opportunity to respond, so that documentation relevant to the issues was comprised of the following:

Exhibit 1	Submissions and Evidence of Penn-Gold dated January 23, 1997, with 15 tabs.
Exhibit 2	Submissions and Evidence of Thunder Sword dated February 21, 1997, with 17 tabs.
Exhibit 3	Applicant's Response dated April 28, 1997, with 3 tabs.
Exhibit 6	Respondent's Reply dated May 15, 1997, with 5 tabs.
Exhibit 7	Representative copies of the abstracts for the Mining Claims, obtained by the Tribunal pursuant to subsection 119(1).

Facts and Evidence

Mr. Jones set out (Ex. 1) that Penn-Gold was incorporated pursuant to the laws of the Province of British Columbia on March 30, 1988. Teddington Developments Ltd. was similarly incorporated on September 13, 1979, and on January 31, 1980 changed its name to Oil City Lubricants Ltd. ("OCL"). Mr. Jones assumed, based upon the Client Report (Ex. 1, Tab 1), that OCL expended approximately $300,000 on the Mining Claims, for which assessment work credit was granted. In the course of its subsequent inquiries detailed above, it has been determined that the assessment work credited to the Mining Claims was performed by Central Crude and Noranda.

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By Purchase Agreement dated January 28, 1991 (Ex. 1, Tab 2) OCL and Penn-Gold entered into an agreement for the sale, assignment and purchase of an undivided 25 percent interest in the Mining Claims for consideration of $75,000 (Paragraphs 1 and 2). According to Paragraph 19 of the Purchase Agreement, the Mining Claims were to remain in the name of OCL and to be held in trust for the parties according to their respective interests. Penn-Gold could request transfer of its interest at any time.

According to Paragraph 3 of the Purchase Agreement, Penn-Gold was also granted an Option to purchase a further 20 percent interest by expending an aggregate of $50,000 in exploration and development on or before June 30, 1992. This Option was subsequently extended to August 31, 1995 at which time it expired.

Paragraph 6(a) of the Purchase agreement is set out:

> 6. Until the option has been terminated, exercised or expired, the Purchaser [Penn-Gold] shall:
>
> (a) maintain in good standing those Mineral Claims comprised in the Property by the doing and filing of assessment work or the making of payments in lieu thereof, and the performance of all other actions which may be necessary in order to keep the Mineral Claims free and clear of all liens and other charges arising from the Purchaser's activities thereon;

At the time the Purchase Agreement was entered into, Siegfried Naguschewski was both President and director of OLC and Penn-Gold, positions he retained at least until October 25, 1993.

By letter dated April 10, 1996, OCL alleged that Penn-Gold had failed to pay its proportionate share of all costs since signing the Purchase Agreement (Ex. 1, Tab 3). Subsequent to its intervening name change, on September 6, 1996, Thunder Sword alleged in a letter (Ex. 1, Tab 4) that Penn-Gold had breached the Purchase Agreement by failing to keep the Mining Claims in good standing and that it was declaring the Purchase Agreement in default. It is Penn-Gold's position that this is the first indication since the inception of the Purchase Agreement that OCL was seeking additional funds. On October 4, 1996, Penn-Gold requested transfer of the 25 percent interest in the Mining Claims from OCL/Thunder Sword being held in trust.

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Frustration

Pursuant to subsection 119(1) of the **Mining Act**, the tribunal obtained representative copies of abstracts for the Mining Claims with copies provided to the parties and by letter dated May 1, 1997, discussed the implications of changes in the way assessment work was treated, effective June 3, 1991 and raised the issue of whether the Purchase Agreement had been frustrated. Portions of the tribunal's letter of May 1, 1997 are reproduced:

> The **Mining Act** underwent substantial changes in 1989, which became effective June 3, 1991 (see the **Mining Amendment Act, 1989**, S.O. 1989, c. 62, assented to December 6, 1989). These changes substantially affect the manner in which Assessment Work would be treated for purposes of maintaining mining claims in good standing. An extensive discussion of these changes is provided below, and relevant sections of the pre-1991 changes, along with the relevant sections of the new Assessment Regulation (O.Reg. 116/91) are included ...
>
> In the **Mining Act**, R.S.O. 1980, c. 268, Assessment Work could be performed to the extent of 200 days, being 20 days in the first year, 40 days in the second through fourth years and 60 days in the fifth year (see s. 76(1)). Once all of the required Assessment Work had been performed, the recorded holder had one year to bring the Mining Claim to lease (s. 94(2)). Pursuant to subsection 86(4), the Commissioner could extend time for applying for a lease not more than five years. It should be noted that after the work performed in the first five years, notwithstanding any extensions of time which may have been granted, no additional assessment work needed to be performed.
>
> Pursuant to changes which became effective June 1991, Assessment Work was performed in accordance with O.Reg. 116/91. Pursuant to section 1, a mining claim could be kept in good standing for an unlimited period of time, without the requirement to apply for lease, so long as the required assessment work was performed each year. With the exception of $0 required for the first year (which cannot be applied to those mining claims staked prior to June 3, 1990), the amount of work required each year is $400 per 16 hectare unit, which corresponds to one mining claim staked prior to June 3, 1990.
>
> Pursuant to section 21 of O.Reg 116/91, the Assessment Work Days performed prior to June 3, 1991 to a maximum of 200 days, could be converted to dollars at a rate of $22 for each day. At a maximum, $4400 could be credited to a mining claim, having the effect of keeping it in good standing for eleven years from the date of recording. This parallels the time allowed to take a mining claim to lease, being 5 years work (200 days) + 1 year to take it to lease + up to 5 years extensions of time allowable by the Commissioner = 11 years.

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By way of explanation, please be advised that the Assessment Work shown on the abstracts having been performed prior to June 3, 1991 is shown already converted to dollar amounts, with the conversion from days to dollars being one of the functions of the miscellaneous notation on that date.

For purposes of Mining Claims SSM-1037338 to 1037342 and SSM-1037393 to 1037398, only 107 days work of Assessment Work had been performed, keeping these Mining Claims in good standing up to 5 years. This calculation is as a result of the conversion to $2354, which was sufficient for 5 years, up to and including November 4, 1992. [In fact, for an additional $46 per mining claim, these claims would have been in good standing until November 4, 1993.] In October, 1993, time was extended for 1 year to November 4, 1994, and subsequently $446 Assessment Work was performed and credited. In October, 1995, an additional $400 Assessment Work was performed and credited. From that date, banked Assessment Work Credits were applied from other Mining Claims to keep these Mining Claims in good standing until November 4, 1998.

For purposes of the rest of the Mining Claims, with $3600 worth of Assessment Work credited, they would be kept in good standing to November 4, 1996. This is based upon 186 days of Assessment Work, with not all of the Assessment Work performed having been applied to the Mining Claims at the relevant date. $492 has been banked for future use.

The changes in the **Mining Act** became effective after the Purchase Agreement was executed (January 28, 1991), but before the next year's Assessment Work would have been due, had the legislation not changed, namely November 4, 1991. Had no changes to the requirements for assessment work been made, under the operation of the Purchase Agreement, assessment work would have been required first on November 4, 1991 (40 days) and again on November 4, 1993 (60 days). For purposes of the 11 Mining Claims listed above, 97 days of work would have been required during this period. For purposes of the other 39 Mining Claims, only 14 days was required to meet the obligation of the pre-1991 **Mining Act**.

The effect of the changes to the **Mining Act** is to have kept all of the Mining Claims in good standing during the original Option period (January 28, 1991 to June 30, 1992). Notwithstanding the extension of the Option period to August 31, 1995, the bulk of the Mining Claims would remain in good standing until November 4, 1996. The 11 Mining Claims would require $846 to remain in good standing up to November 4, 1995, a total of $9,306.

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> The issue which the Tribunal wishes to raise with respect to the effect of changes to the **Mining Act** is whether they operate to frustrate the terms of clause 6(1) of the Purchase Agreement, in that during the original term of the Agreement, June 30, 1992, no Assessment Work was required to keep the Mining Claims in good standing.

Mr. Jones submitted that the Purchase Agreement had not been frustrated as a result of the changes in legislation, because it was not the intent of the Agreement that existing assessment work on file would not be used to the benefit of both parties. Only after the credits were used up does the possibility of additional assessment work having to be carried out arise.

Mr. Mellows indicated that he agreed to the extent that the law of frustration does not apply to this fact situation. He submitted that the law of frustration is such that it would cause determination of the contract, through an occurrence so substantial that it could not be carried out. Mere hardship or changing obligations does not constitute frustration. In addition, a change in law to be frustration would require that there be an impossibility to perform the contract. Mr. Mellows suggested that, owing to the changes applicable to assessment work, if anything, it has become easier to maintain the Mining Claims, as it allows the movement of banked assessment work.

Submissions

It is Penn-Gold's position that the parties agreed through the Purchase Agreement that in exchange for the $75,000, in addition to the undivided 25 percent interest, it would receive the benefit of the Assessment Work Credits that OCL had obtained. Only if OCL had to expend further additional funds would Penn-Gold be required to pay 25 percent. This position is supported by a News Release dated February 15, 1991 (Ex. 1, Tab, 6), wherein OCL announced the purchase of an undivided 25 percent interest in the Mining Claims for $75,000. It is submitted that the only reference in the News Release to a continuing obligation is to that of the Option.

According to Mr. Jones, Penn-Gold, a private company at the time of the Purchase Agreement, made three attempts to go public. On August 29, 1991 a Preliminary Prospectus (Ex. 1, Tab 7) was signed by Siegfried Naguschewski, warranting full disclosure. The other attempts to go public were made on August 31, 1993 and October 14, 1993 by the Board of Directors of Penn-Gold, with both Preliminary Prospectuses (Ex. 1, Tabs 13 and 14) signed by Siegfried Naguschewski as Chief Executive Officer and Promoter and his wife Iris Naguschewski as Chief Financial Officer, warranting full disclosure. All three documents indicate that Penn-Gold had purchased an undivided 25 percent interest in the Mining Claims for $75,000. All of the prospectuses state that the purchase price represents approximately one-quarter of the exploration and development expenditures incurred since 1987, a total of $343,542. The latter two indicate that the money has been paid partly in cash and partly in forgiven debt owing by OCL. The only reference in all three to a continuing obligation is in respect to the further 20 percent Option.

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Mr. Jones points out that numerous audited Financial Statements of OCL (October 31, 1991; October 31, 1992 and 1991; and 1993 and 1992, being Exhibit 1, Tabs 8, 12 and 15 respectively) do not disclose a receivable due OCL by Penn-Gold, although the option is mentioned. Similarly, in a letter to the shareholders of OCL dated June 30, 1992 (Ex. 1, Tab, 9) Mr. Naguschewski does not mention the continuing obligation on the part of Penn-Gold, although the Option is mentioned. By letter to Penn-Gold dated July 30, 1992 (Ex. 1, Tab 10), Mr. Naguschewski on behalf of OCL states, "We confirm that the Agreement remains in full force and effect and is in good standing." The audited Financial Statements of Penn-Gold for August 31, 1992 and 1991 mention the 25 percent interest, but do not refer to any continuing obligation to OCL (Ex. 1, Tab 11).

Mr. Mellows submitted on behalf of Thunder Sword that the position advanced by Penn-Gold is untenable. He disagrees that, in exchange for $75,000 Penn-Gold would have received the benefit of Assessment Work Credits obtained by OCL, being contrary to the terms of the Purchase Agreement and the evidence of Mr. Naguschewski who was President of OCL and Penn-Gold at the time the Purchase Agreement was signed.

The obligations of the parties are determined by the Purchase Agreement. Relying on Fridman, **Law of Contract in Canada** (3rd ed. 1994) at page 453:

> The fact that all or many of the different aspects and obligations of the contract have been expressly stipulated evidences the importance placed by the parties upon the language which they have used. The contents of any express term or terms are basic to a true understanding of the nature, scope and extent of the contractual rights and duties of the parties. What has been spoken or written by them as part of the contract is the prime source of knowledge of their intentions.
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> ...
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> In the case of a completely oral contract there is greater flexibility in the nature of the evidence that is admissible to prove the contents of the contract and the meaning of the language used by the parties. In the case of a contract that is in writing the attitude of the law has been stricter. The reason for this is clear. If the parties have seen fit to put their contractual intentions into writing, it must be because they wanted their meaning to be clearly and unequivocally established. There should be no room for argument about what has been agreed. The written word should make plain beyond doubt or question what were the requirements of the contract that was entered into by the parties.

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Mr. Mellows submitted that the Purchase Agreement clearly states that Penn-Gold is purchasing only an interest in the Mining Claims and not in the Assessment Work Credits. He bases this submission on several provisions of the Purchase Agreement. The second recital provides that Penn-Gold is purchasing "an undivided 25% interest in the "**Property**". **Property** is defined as being the subject Mining Claims set out in Schedule A. Paragraph 1 provides for a transfer of an undivided 25% interest in the **Property** to Penn-Gold. Paragraph 2 provides that the "purchase price payable ... for the undivided 25% interest in the **Property** shall be $75,000".

Mr. Mellows submitted that the terms of the Agreement clearly refer only to an undivided interest in the Mining Claims. They do not stipulate that the purchase is either of the Assessment Work Credits or the right to use the Assessment Work Credits, which at all times in his submission have remained the property of Thunder Sword.

Mr. Mellows further submitted that other terms in the Purchase Agreement are clearly indicative of the intention on the part of Penn-Gold not to be entitled to the Assessment Work Credits or their benefit. Paragraph 3 grants an Option to earn a further 20 percent interest in the Mining Claims provided that an aggregate of $50,000 is spent on exploration and development by June 30, 1992. Paragraph 5 provides that during the term of the Option, Penn-Gold would have exclusive right to explore and develop the Mining Claims. Clause 6(a), set out above, specifically sets out Penn-Gold's obligations during the term of the Option, specifically regarding performance of assessment work or making payment in lieu thereof.

Calculations were provided for the amount of assessment work required to keep the Mining Claims in good standing during the period of the Option, being January 28, 1991 to June 30, 1992, a period of 17 months, based on $400 per claim per year, total $20,000 for one year and $28,333.39 for the Option period, pro-rated over the number of months affected. It is Thunder Sword's position that had the parties agreed to allow Penn-Gold to benefit from the assessment work credits, there would have been no need to include Clause 6(a) in the Purchase Agreement. Had the parties intended that the assessment work credits could be used to maintain the Mining Claims in good standing during the term of the Option, this Clause would not have been necessary.

According to Mr. Mellows, Penn-Gold has provided no direct evidence that it would be entitled to the assessment work credits as part of the Purchase Agreement. This is evidenced by the deposition of Mr. Naguschewski (Ex. 2, Tab C). Rather, OCL had intended to use the Assessment Work Credits as part of its share of future expenditures which would be required by the parties pursuant to the terms of the Purchase Agreement, once the Option had expired. At such time as the Option was exercised or expired, the assessment work contributions by the parties would be in direct proportion to the proportionate share of each, which for OCL could have been as high as 75 percent.

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Mr. Mellows submitted that reference to financial statements, letters and prospectuses do not mention Penn-Gold's obligation to maintain the Mining Claims. This documentation is circumstantial and not admissible as evidence of the parties' intentions at the relevant time, being when the Purchase Agreement was signed.

With respect to attempts by Penn-Gold to introduce extrinsic evidence relating to the conduct of the parties, Mr. Mellows submitted the law in Canada is clear that, in order for such evidence to be admissible, there must be an ambiguity of the terms of the contract which cannot be resolved without consideration of such extrinsic evidence. Where no such ambiguity exists, any extrinsic evidence, including that concerning the parties' conduct, is inadmissible. Pages 455 to 456 of Fridman are referred to in this regard:

> The fundamental rule is that if the language of the written contract is clear and unambiguous, then no extrinsic parole evidence may be admitted to alter, vary or interpret in any way the words used in the writing.

He also relied on the decision of the British Columbia Court of Appeal, which was affirmed by the Supreme Court of Canada in **Canadian National Railways v. Canadian Pacific Ltd.** [1979] 1 W.W.R. 258 (B.C.C.A.) affirmed 105 D.L.R. (3d) 170 (S.C.C.), where Lambert J.A. states at page 371-372:

> In Canada the rule with respect to subsequent conduct is that, if, after considering the agreement itself, including the particular words in their immediate context and in the context of the agreement as a whole, there remain two reasonable alternative interpretations, then certain additional evidence may be both admitted and taken to have legal relevance if that additional evidence will help to determine which of the two reasonable alternative interpretations is the correct one...
>
> The types of extrinsic evidence that will be admitted, if they meet the test of relevance and are not excluded by other evidentiary tests, include evidence of the facts leading up to the making of the agreement, evidence of the circumstances as they exist at the time the agreement is made and, in Canada, evidence of subsequent conduct of the parties to the agreement. However, to say that these types of evidence become admissible where two reasonable interpretations exist is not to say that the evidence, if tendered, must be given weight. In the case of evidence of subsequent conduct, the evidence is likely to be most cogent where the parties to the agreement are individuals, the acts considered are the acts of both parties, the acts can relate only to the agreement, the acts

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> are intentional and the acts are consistent only with one of the alternative interpretations. Where the parties to the agreement are corporations and the acts are the acts of employees of the corporations, then evidence of subsequent conduct is much less likely to carry weight. In no case it is necessary that weight be given to evidence of subsequent conduct....

According to Mr. Mellows, there is no ambiguity in the terms of the Purchase Agreement which could support the position either that Penn-Gold was purchasing an interest in the Assessment Work Credits or that they would be applied for its benefit. Therefore, the extrinsic evidence of past conduct should be found to be inadmissible. Had it been their intention, this could have been specified in a paragraph of the Purchase Agreement.

In the event that the tribunal should find that such evidence is admissible, Mr. Mellows submitted that it should be given little or no weight. Based upon the affidavit of Mr. Naguschewski, it is neither the norm nor is it possible to include every term of an agreement in a prospectus or news release, whose purpose is to provide a brief summary to the public. This is clear from the fact that the Prospectus provides for inspection of company material contracts by the public (Ex. 2, Tabs 13 and 14, both at page 16). The corollary of Penn-Gold's comments with respect to OCL's Financial Statements can be said of Penn-Gold's, in that they have not indicated that they have an interest in the Assessment Work Credits or are entitled to benefit from them (Ex. 1, Tabs 14 through 17). Finally, as principle of both, Mr. Naguschewski was aware of Penn-Gold's attempts to go public on the VSE and was aware that Penn-Gold would not be able to carry out work because it did not have sufficient funds. It is Thunder Sword's position that the indebtedness of Penn-Gold continued to accrue throughout, while it was attempting to raise funds through its offerings.

Thunder Sword maintains that, based on the clear and unambiguous wording of the Purchase Agreement, Penn-Gold had a continuing obligation during the Option period, which had been extended to include January 28, 1991 to August 31, 1995, to maintain the Mining Claims in good standing or make payments in lieu of such work. Payment in lieu of performance of assessment work is due to Thunder Sword.

In addition, the Purchase Agreement requires that, after the expiry of the Option term, the parties are required to share expenses relating to their proportionate share of the Mining Claims, so that Penn-Gold is required to pay 25 percent of costs to maintain the Mining Claims in good standing. Thunder Sword maintains that Penn-Gold has acknowledged its liability for these obligations as evidenced by its letter to OCL dated March 19, 1996 (Ex. 2, Tab C-3), wherein Robert W. Rosner writes on behalf of Penn-Gold:

> Please inform us if there has (**sic**) been any expenditures on the above noted property that need to be forwarded to us for our 25% contribution. As we have not been notified to date, we thought we might initiate the request.

and by a letter written to OCL by Penn-Gold's solicitor Stephen S. James dated July 30, 1996 (Ex. 2, Tab C-6), wherein Thunder Sword maintains that these obligations were acknowledged.

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On April 10, 1996 OCL wrote to Penn-Gold (Ex. 2, Tab C-4) advising that the latter had repudiated the Purchase Agreement by failing to meet its obligations in respect of the Mining Claims. No response was received until the above-noted letter of Stephen James wherein he quotes clause 7(b) of the Purchase Agreement, which deals with default, and wrote:

> If Oil City is of the opinion that the Company is in default of any requirement under the agreement, Oil City is obliged to give the Company notice specifying the default and allow the Company 30 days from receipt of such notice to remedy the default prior to terminating the Agreement. No such notice has been received by the Company.

Thunder Sword responded through its solicitor by letters dated September 6, 1996 and September 8, 1996 respectively, (Ex. 2, Tab C-8 and C-9), setting out that Penn-Gold could redeem its defaults by payment of $48,541.47, which was corrected to $90,416.85, within 30 days. By letter dated October 2, 1996 (Ex. 2, Tab C-10) Penn-Gold denied this obligation, which Thunder Sword submits is a further repudiation of the terms of the Purchase Agreement. The 30 day time period expired on October 7, 1996, during which time, it is submitted by Thunder Sword, Penn-Gold failed to cure its default, nor has it attempted to pay the amounts owing since that date. As a result, on October 11, 1996 Thunder Sword's solicitor wrote a letter (Ex. 2, Tab C-13) stating that Penn-Gold's repudiation has been accepted and that the Purchase Agreement is at an end.

Thunder Sword submitted that the term of the Purchase Agreement requiring Penn-Gold to maintain the Mining Claims during the term of the Option is of fundamental importance, the reason being self-evident. Penn-Gold has the sole and exclusive right to explore and develop the Mining Claims during the Option period. Attached to this is the corollary express obligation to keep the Mining Claims in good standing, without which they would lapse and be lost. Additional support of the position that Clause 6(a) is a fundamental term of the Purchase Agreement is the existence of Clause 7(b), which provides that a defaulting party will not lose any rights without first being given 30 days to rectify default.

In a situation where there has been a fundamental breach of contract by one party, the non-defaulting party is entitled to accept that breach and thereby terminates any obligations he may have under the contract. According to Fridman at page 559:

> The former kinds of breach [ie. breach of a fundamental term of condition] entitles the innocent party to treat the contract as ended, to the extent of terminating his obligations, without terminating the liability of the party in breach...

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> The true effect of a breach which may be said to 'discharge' the contract is to relieve the innocent party of his obligations to perform under the contract (and to entitle him to sue for damages in respect of his loss, in accordance with principles examined in a later chapter).

Thunder Sword submitted that the effect of Penn-Gold's breach of Clause 6(a) and the former's acceptance of that breach, is to end or discharge any of Thunder Sword's obligations including the obligation to transfer an undivided 25 percent interest or to hold it in trust for Penn-Gold. In addition, Thunder Sword is entitled to sue for damages.

It is submitted that, based upon the preceding evidence and argument, Penn-Gold's request for a transfer of an undivided 25 percent interest in the Mining Claims should be denied, as Thunder Sword's obligations in this matter have been discharged.

In addition, Thunder Sword is seeking an Order under section 181(2) of the **Mining Act** requiring Penn-Gold, as a defaulting party, to pay to Thunder Sword the sum of $90,416.85, as well as the further sum of $833.33 for each month after September, 1996 until the date of the Tribunal's Order, being 25 percent of the monthly cost of keeping the Mining Claims in good standing, plus interest at the prescribed rate.

In the alternative, Thunder Sword seeks an Order that Penn-Gold be required to pay damages in the amount of the above-noted indebtedness. It is submitted that, at no time has Penn-Gold disputed this accounting.

In the event that the Tribunal finds that the breach of the Purchase Agreement by Penn-Gold does not constitute a fundamental breach and as such only damages or compensation is payable, then Thunder Sword seeks an Order that the transfer of the undivided 25 percent interest in the Mining Claims be conditional upon the payment by Penn-Gold of the above-noted indebtedness, within 90 days, failing which the interest of Penn-Gold will be vested in Thunder Sword pursuant to subsection 181(5) of the **Mining Act**.

Discrepancy in clause 16

The tribunal pointed out that some discrepancy existed between the terms set out in Paragraphs 1, 2 and 9, with the terms contained in Paragraph 16, in that the former suggested a 25 - 75 percent split, and the latter suggested numbers which work out to a 32.6 - 67.4 percent split.

Mr. Mellows explained that the drafting of the Purchase Agreement was done by one lawyer on behalf of both parties, so that it did not have the benefit of two pairs of eyes to spot discrepancies. He submitted that paragraph 9 definitively sets out the participating interest of the parties, in the event that the Option is exercised or is not. He suggested that the lawyer used the wrong number in drafting paragraph 16. One alternative, which renders results close to but not equal to a 25/75 split is to add $50,000 to the $155,000, recognizing the value of assessment work done and the value of cost of acquisition.

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Mr. Jones submitted that it would be conceivable, according to this Paragraph, that amounts deemed to have been spent on the part of the purchaser could have included the initial $75,000 and the $50,000 required to exercise the Option. He suggested that the degree of uncertainty introduced by attempting to interpret this paragraph could render the clause invalid.

Mr. Mellows countered that it should be clear from the Agreement that the more money spent by the Purchaser, the greater its proportionate share. There is some suggestion that the Purchaser could acquire more than the 45 percent it would have acquired from exercising the Option. The purpose of the Agreement is that if the Purchaser doesn't pay its proportionate share of assessment work costs, it will lose proportionately in its interest. Mr. Jones disagrees, stating that Thunder Sword was meant to control the Mining Claims. Mr. Mellows concluded by stating that the 32 percent figure calculated by the tribunal is not supported by other documentation related to the Purchase Agreement.

It was conceded by both solicitors that the Purchase Agreement was poorly drafted.

Rebuttal Submission

Without going into the contents of the response filed by Mr. Jones, Mr. Mellows submitted that the tribunal's Order to File required all documentation to be filed at the ordered date. A summary of Mr. Rosner's evidence was not filed initially and should be precluded at this time. Mr. Jones submitted that to disallow the filing would hamstring the tribunal in reaching its findings. He pointed out that he would not be precluded at an oral hearing from bringing witnesses and that the other documents were those of Mr. Mellow's clients'.

The tribunal found that, at the time the Order to File was issued, it was not in the contemplation of the parties that the hearing would be conducted by written submission only. This possibility arose only after Mr. Jones had made his initial filing. It has been the practice of the tribunal to allow rebuttal evidence and submissions in the course of proceedings and in fact to allow witnesses even where the other side had no notice, the only caveat being that an adjournment would be granted to allow the other side to properly prepare cross-examination. This being the case, Mr. Jones rebuttal filing would be allowed and Mr. Mellows would be granted a further opportunity to made additional submissions or to provide rebuttal evidence. A period of one week, to May 16, 1997, was allowed. In the event that further problems arose in relation to Mr. Mellows' filing, Mr. Jones was directed to contact the tribunal Registrar, Mr. Daniel Pascoe.

Response of Penn-Gold

In response to OCL's submission that the Purchase Agreement involves the purchase of only the interest in the Mining Claims and not the Assessment Work Credits, Penn-

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Gold submitted that there is no wording in the Purchase Agreement to suggest that the Credits do not flow with the property. In support of this position, Mr. Jones refers to the Affidavit of Robert Rosner (Ex. 3, Tab 1), where paragraph 5 states:

> 5. With respect to the Mining Claims in question in this proceeding, Mr. Naguschewski specifically told me that the credits formed part of the lands which the Applicant had purchased, and further advised that the sum of $50,000 was needed to be expended by Penn-Gold in order to obtain a further 20% interest in the Mining Claims.

Referring to Thunder Sword's evidence that the Assessment Work Credits were to be excluded, specifically Paragraphs 3, 5 and 6(a) of the Purchase Agreement, Penn-Gold submitted that the terms of the first two paragraphs referred to are not contrary to Penn-Gold's right to exercise its Option for expenditure of $50,000, nor to its position that the credits flow with the land. With respect to the terms imposed by the third paragraph referred to, the obligation is to a third party, namely the Ministry of Northern Development and Mines. In all cases throughout the Purchase Agreement, the obligations are specifically between the parties or between the purchaser and vendor. Mr. Jones submitted that it is clear that, as there were credits in place, there was no assessment work to be done, nor could payment in lieu be required.

Referring to Thunder Sword's position that at the end of the first Option period, $28,333.39 was owed by Penn-Gold, this is not supported by the financial statements for Thunder Sword corresponding to the same period (Ex. 1, Tab 13). That same document only refers only to the amount required to exercise the Option, namely $50,000 by June 30, 1994.

Similarly, no mention of a receivable of $55,000.11 is made in a subsequent financial statement (Ex. 1, Tab 15), even through the amount required to exercise the Option is mentioned. Again, no mention is made in the corresponding financial statements (Ex. 3, Tab 2) of amounts due accruing to the total of $75,000.15, although the amount required to exercise the Option is stated.

The letter which extended the Option period from June 30, 1992 to June 30, 1994 (Ex. 2, Tab 10) does not mention accruing Assessment Work which was purportedly due, but only mentions the amount necessary to exercise the Option. This same document states, "We confirm that the Agreement remains in full force and effect and is in good standing." This contradiction is not explained in Thunder Sword's submissions.

Furthermore, in a letter dated August 19, 1994 from Penn-Gold to Thunder Sword (Ex. 3, Tab 3) whereby the Option is extended to August 31, 1995, no mention is made of any other amount due.

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In conclusion, it is the position of Penn-Gold that the Assessment Work Credits flow with the land and form part of the 25 percent interest acquired by Penn-Gold upon its initial payment of $75,000.

Additional Response of Thunder Sword

It is submitted that it is an improper method of contractual interpretation to suggest that the Assessment Work Credits flow with the property (ie. the Mining Claims), as there are no words of exclusion to suggest that they are not. The proper interpretation of a contract is to look at the words used in the Purchase Agreement to determine its intent. As previously submitted, the only property purchased by Penn-Gold is the Mining Claims. Had the parties intended to include the Assessment Work Credits, this could have been accomplished either by including the Credits in the definition of "Property", which was not, or by making provision for the Assessment Work Credits in a separate clause.

It is submitted that paragraph 3 of the Purchase Agreement specifically contemplates that monies are to be expended by Penn-Gold to fulfil its obligations under paragraph 6(a) of the Purchase Agreement. Paragraph 3 of the Purchase Agreement provides Penn-Gold with an option to earn an additional 20 percent interest in the Mining Claims, provided that it spend an aggregate of $50,000 in exploration and development during the term of the option. The term "aggregate" is explained in paragraph 7 of Mr. Naguschewski's supplementary affidavit (Ex. 6, Tab C) to include all expenditures including those required to maintain the Mining Claims in good standing. Had it not been contemplated that Penn-Gold would be required to make expenditures during the option period for exploration and development, the use of the word "aggregate" would have been unnecessary.

It is further submitted, and supported by paragraph 7 of Mr. Naguschewski's affidavit (Ex. 2, Tab 18), that Mr. Naguschewski knew at the time of the signing of the Purchase Agreement that sufficient assessment work had been performed to keep the Mining Claims in good standing for the duration of the Option period. To find otherwise would render paragraph 6(a) of the Purchase Agreement superfluous. There would be no need for Penn-Gold to maintain the Mining Claims if they were protected for the Option period. It is the law of contract that no words in a contract are to be superfluous. The parties are seen to intend meaning of all words and to be given effect of all words, according to Fridman, **The Law of Contract**, 1994, p. 469.

Thunder Sword disagrees with Penn-Gold's position that the obligation contained in Paragraph 6(a) relates to a third party, the Ministry of Northern Development and Mines. The reference in that paragraph to "in lieu thereof" must mean payments to Thunder Sword, since, at the time the Purchase Agreement was signed, there was no system in the **Mining Act** whereby a mining claim holder could make cash payments instead of performing assessment work.

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With respect to Penn-Gold's position that the monies claimed owing by Thunder Sword do not appear in correspondence, Mr. Naguschewski's position, found at paragraph 9 of Exhibit 6, Tab C, is that at the time, a formal demand for payment for reimbursement of the value of the Assessment Work Credits had not yet been made.

In response to Penn-Gold's further submissions, Thunder Sword maintains that Exhibit 6, Tab C-18, being a letter from Noranda Exploration Company Limited to Central Crude Ltd. dated April 17, 1990 terminating its option for the Mining Claims, supports the position that OCL knew that the Mining Claims would remain in good standing during the original Option period, so that Clause 6(a) of the Purchase Agreement is indicative of the requirement that Penn-Gold perform assessment work additional to that already in place on the Mining Claims.

Thunder Sword concluded by submitting that Penn-Gold has fundamentally breached and repudiated the Purchase Agreement and is therefore not entitled to an interest in the Mining Claims. Thunder Sword is seeking compensation for the value of Assessment Work Credits necessary to keep the Mining Claims in good standing, excepting for the period of January to May 1991. Under either regime for assessment work being in days or dollars, it is submitted that Penn-Gold was under an obligation to expend money on the Mining Claims so that Thunder Sword would not have to do so, or not have to use its banked Assessment Work Credits.

Notwithstanding that the nature of the obligation may have changed as a result of the change in law regarding assessment work (see paragraph 12 of Ex. 6, Tab A). Thunder Sword was required to apply its excess credits to individual Mining Claims and to transfer credits as between Mining Claims, thereby losing the ability to apply these Assessment Work Credits to the Mining Claims in the future. Had Penn-Gold carried out its requirements to carry out the $400 worth of assessment work for each Mining Claim, Thunder Sword would have been able to bank its Assessment Work credits. Through the use of these credits, Thunder Sword has lost the value of assessment work which should have been done by Penn-Gold, namely $400 per Mining Claim per year during the Option Period and 25 percent of $400 per Mining Claim per year for each year thereafter.

Thunder Sword concluded its submission by requesting costs pursuant to section 126 of the Act.

Findings

The Purchase Agreement involves two separate means of acquisition, each with its own obligations. Paragraph 1 provides for an outright purchase, subject to conditions, of an undivided 25 percent interest in the Mining Claims. These conditions include the purchase price of $75,000, which it has been admitted has been paid in cash and forgiven debt. Pursuant to clause 6(a), there is the obligation to keep the Mining Claims in good standing. Paragraph 9 sets out the initial participating interest, in the event that the Option is not exercised, of 25 percent/75 percent.

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The second means of acquisition is that of the Option to acquire a further 20 percent interest, pursuant to Paragraph 3, upon spending an aggregate of $50,000 in exploration and development. This latter means of acquisition is often referred to as a "farm-in" agreement, "working option" agreement, or "joint-venture" agreement. The Purchase Agreement itself provides that the relationship between Penn-Gold and OCL will be operated as a joint venture.

The purpose of a farm-in arrangement generally is to provide the acquirer with the opportunity to examine the property, through the doing of exploratory work, to determine whether the option will be exercised. The benefit to the disposing party is the value of the work done. Often in such cases, very little or no cash payment is required, as the disposing party wishes to see funds expended proving the property. Generally, the duration of the period of the option will be short, often 12 to 18 months and will seldom exceed five years. The expenditure of funds on exploration may be obligatory or optional, depending on the terms of the agreement.[1]

There is no disagreement between the parties that Penn-Gold did not exercise the Option, and therefore, no findings are required with respect to acquisition pursuant to the Option, which was allowed to expire.

The result of the execution of the Purchase Agreement is that Penn-Gold becomes a co-owner of the Mining Claims, to the extent of the initial participating interest of 25 percent. Had its obligations not been dealt with by the Purchase Agreement, its obligations to maintain the Mining Claims would have been proportional to its ownership, as provided by section 81 of the pre-June 3, 1991 **Mining Act** and section 68 of the post-June 3, 1991 **Mining Act**. That section also provides that, where a co-owner does not pay his or her proportional share of assessment work, the tribunal may vest all or a portion of their interest in the other, after a hearing.

The Purchase Agreement clearly provides at Clause 6(a) that Penn-Gold must keep the Mining Claims in good standing throughout the Option period, which the parties agree ran from January 28, 1991 to August 31, 1995. The tribunal finds that clause 6(a) of the Purchase Agreement sets out in clear unambiguous language the obligation of Penn-Gold during the Option period with respect to the performance of assessment work. This obligation uses the following terms, "maintain in good standing ... by the doing and filing of assessment work or the making of payments in lieu thereof..."

The tribunal finds that the words, "maintain in good standing" relate specifically to the status of the Mining Claims in the office of the Mining Recorder and it is that status which is determinative. Only that assessment work which is actually required to be performed and filed in the office of the Mining Recorder to keep the Mining Claims in good standing, and not subject to forfeiture, is required during the term of the Option.

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1 See K.J.C. Harries, "Mining Property acquisition and Exploration Agreements" in R. H. Bartlett, ed., **Mining Law in Canada,** Saskatoon: Law Society of Saskatchewan, 1984, 165 to 191.

The words, "or making of payments in lieu thereof" can only have one meaning. There was no provision for payment in lieu of assessment work under the pre- June 3, 1991 **Mining Act**, nor is there such a provision for outright payment in lieu, excepting the provision found in subsection 20(2) of O.Reg. 116/91, which became effective after the date the Purchase Agreement was signed. However, for purposes of information only, this subsection allows payment at double the rate required for assessment work for those mining claims whose area exceeds what has been prescribed, namely units of between 16 and 20 hectares. Therefore, the only meaning which can be given to these words is payment to OCL in lieu of performance of mandatory assessment work.

The tribunal finds that it will rely on the submissions of Mr. Mellows relying on Fridman in the **Law of Contract in Canada** in determining that the words of the Purchase Agreement itself constitute the terms of the contract between the parties, being clear and containing no ambiguity as to what was intended and no extrinsic evidence will be considered in this regard.

Notwithstanding its finding that the terms of the Purchase Agreement are determinative, the tribunal finds that this interpretation fits with the status of the Mining Claims at the time the Purchase Agreement was signed. As discussed above, 39 of the Mining Claims had 187 days of work performed. The 1980 statute required that 20 of days assessment work be performed during the first year; 40 days in each of the second through fourth years and 60 days in the fifth year. With 187 days of work recorded on the abstracts, the assessment work requirements had been met for 1988 through to November 4, 1991. Between November 4, 1991 and November 1992, an additional 13 days worth of work would have been required for each of these 39 Mining Claims. Given that the original Option period ran until June 30, 1992, Penn-Gold would have been responsible for 239/366 x 13 days of assessment work for these 39 Mining Claims (1992 having been a leap year).

Similarly, with the other 11 Mining Claims, which had only 107 days worth of work recorded, would have required 37 days worth of work by November 4, 1991 and an additional 60 days worth by November 4, 1992. Again, Penn-Gold's share of this work would have been the entire 37 days for 1991 and 239/366 x 60 days for up to June 30, 1992.

The June 3, 1991 changes to the **Mining Act** assessment work provisions had the effect of extending existing assessment work already performed further into the future, to a maximum of five years, with any excess credits banked for future use. The transitional provisions found in section 21 of O.Reg. 116/91 provide under subsection (1) that the number of days filed up to a maximum of 200 days are converted to dollars at a rate of $22 per day, less $400 for each year that has passed since the claim was recorded. This has the effect of allowing up to 11 years from the date of recording's worth of assessment work to keep a mining claim in good standing. However, the provisions found in subsection (2) provide that the forward provisions of applying this assessment work extend up to a maximum of five years into the future.

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The impact of the changes to the legislation was to extend the existing assessment work on the abstracts shown in days beyond what had been the case when the Purchase Agreement was signed. Penn-Gold was able to benefit from this situation through a lessening of its obligation, as the terms of the contract simply require that the Mining Claims be maintained in good standing. The effect of the legislation was to keep in good standing for some time into the future those mining claims which had met their current assessment work requirements. The tribunal accepts the submissions of the parties that the change in legislation did not frustrate performance of Penn-Gold's obligation to perform assessment work, but merely changed what would be necessary to meet the obligation at law.

The fact that a change in legislation created a situation where the Mining Claims could remain in good standing, within the meaning of clause 6(a) of the Purchase Agreement to the benefit of Penn-Gold's obligations at the time, does not extend to the Assessment Work Credits, being those shown as "banked" on abstracts for the 39 Mining Claims. These banked Credits were created by virtue of subsections 4(4) and 21(1) and (2) of O.Reg. 116/91. The terms of the Purchase Agreement clearly provide that the definition of the Property is the 50 Mining Claims. In the absence of express words dealing with the Assessment Work Credits, they cannot be included in the acquisition. Therefore, the tribunal finds that they were not acquired by Penn-Gold through its acquisition of a 25 percent interest in the Mining Claims.

Subsection 4(4) of O.Reg. 116/91 provides that those assessment work credits in excess of the five years allowable into the future may be carried forward indefinitely. The tribunal finds that the banked Assessment Work Credits were the property of OCL or Thunder Sword. There is no way in which they could have been used to keep any of the Mining Claims in good standing, once the extended time resulting from the conversion had run, without the express consent of Thunder Sword. The tribunal agrees with Mr. Naguschewski that the banked Credits were held by Thunder Sword to use at its discretion when circumstances warranted, such as to meet its share of obligations, once the Option period had expired.

The effect of the changes in legislation on the status of the Mining Claims, keeping them in good standing, was as follows. The 39 Mining Claims had sufficient days of recorded assessment work to keep them in good standing up to five years and 127 days into the future, so that no work was required until November 4, 1997.

The other 11 Mining Claims, being SSM-1037338 to 1037342, both inclusive and 1037393 to 1037398 (the "11 Mining Claims") had sufficient assessment work applied, as a result of the conversion, to remain in good standing until November 4, 1993. At that time $46 per Mining Claim was required. By November 4, 1994, an additional $400 per Mining Claim was required. The Option expired on August 30, 1995. With $400 worth of assessment work due by November 4, 1995, Penn-Gold's share under the terms of the Purchase Agreement would have been 300/365 x $400 per Mining Claim. The amounts which Penn-Gold should have paid are calculated:

11 x $ 46	= $ 506.00
11 x $400	= $ 4,400.00
300/365 x 11 x $400	= $ 3,616.44
Total to end of Option	= $ 8,522.44

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It is interesting to note that the facts which occurred after the execution of the Purchase Agreement up to the calendar year in which the Option expired support the tribunal's findings, in that OCL performed actual assessment work, and did not use its banked credits until after August 30, 1995.

The Assessment Work Credits were applied by Thunder Sword to the 11 Mining Claims to keep them in good standing until November 4, 1998, as was one other of the 39, SSM-1037324. The remaining 38 Mining Claims, but for these proceedings, would require assessment work on November 4, 1997. It is clear from the Purchase Agreement that Penn-Gold was expected to perform all of the required assessment work during the Option period and contribute to its proportionate share, ie. 25 percent, thereafter.

With respect to the issue of respective interests, the tribunal finds that this is clearly set out in Paragraphs 1, 2 and 9. However, Paragraph 16 contains errors and contradicts the earlier provisions. These errors appear to be numerical, in that the $155,000 shown as initial contribution by OCL does not work out to 75 percent of the total of figures used. With the exception of the number used on behalf of OCL, the Paragraph provides that $75,000 reflects the initial investment of Penn-Gold, entitling it to 25 percent of the Mining Claims. As the Option has not been exercised, the only remaining matter which this Paragraph must deal with is to have participating interest reduced pro rata, based on actual or deemed expenditures of each. As the actual expenditures related to the assessment work days credited prior to the change in legislation is not known, the deemed amounts attributable to OCL/Thunder Sword are not readily determinable. As such, the tribunal finds that this Paragraph is void for uncertainty and section 68 of the **Mining Act** will apply, with the respective interests of Penn-Gold and Thunder Sword at the expiration of the Option period, for purposes of contribution, will be 25/75. That section can be applied in future to deal with a pro rata reduction in respective interests, should this arise.

Those Credits which are banked are found to be under the control of and for the sole benefit of Thunder Sword. O.Reg. 116/91, and its successor, O.Reg. 6/96 allow for unused banked assessment work credits to be carried forward indefinitely, or used on contiguous mining claims. The fact is that Thunder Sword could have used the Assessment Work Credits on other contiguous claims which are not part of the Purchase Agreement Mining Claims.

There was no dispute as to the requirement on the part of Penn-Gold to pay its proportionate share of assessment work once the option has expired. For 1995, this amount is 65/365 x $400 x 11 = $783.56

For the period of November 4, 1995 to November 4, 1997, Thunder Sword has used its Assessment Work Credits on the 11 Mining Claims to keep them in good standing until November 4, 1998. The tribunal finds Penn-Gold's proportionate share of this is 25 percent, calculated to be (11 x $400 x 2) x. 25 = $2,200.

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For the period of November 4, 1996 to November 4, 1997, Thunder Sword has used its Assessment Work Credits on mining claim SSM 1037324 to keep it in good standing until November 4, 1997. The tribunal finds Penn-Gold's proportionate share of this is 25 percent, calculated to be $400 x .25 = $100.

The application of this matter was commenced on December 5, 1996, at which time pending proceedings were noted on the abstracts. The requirement that assessment work be performed is suspended during the period when proceedings are pending before the tribunal. There is jurisdiction in the tribunal to exclude time for the performance of assessment work during this time, where it is not the fault of the recorded holder. The fact that the intention of the parties in the Purchase Agreement required determination by the tribunal, and more particularly calculation of Penn-Gold's obligation was necessary, as neither party was correct in its submissions, the tribunal finds that delay in settling this matter was not the fault of either party, and therefore time will be excluded in a subsequent order finally disposing of this matter. However, this discussion is moot, as the remaining 38 Mining Claims would have continued to be in good standing until November 4, 1997, had pending proceeding not been noted on the abstracts. However, should Penn-Gold elect to cure its default through payment of the money owing, then its annual share of assessment work will become 25% of $400 x 38, or $3,800. In the following year, its annual proportionate share of the assessment work on all 50 Mining Claims would be 25% of $400 x 50 or $5,000.

While the tribunal has found Penn-Gold in default of its obligation to pay for all of the assessment work required due during the Option period, along with 25 percent of the assessment work actually due thereafter, the amount stated by Thunder Sword in its correspondence to cure this default was not correct. While it has been argued that the failure to pay constitutes a fundamental breach of the Purchase Agreement, the error in quantum would impact upon a finding to this effect. Therefore, the tribunal finds that it will allow Penn-Gold 45 days from the date of this Order to pay Thunder Sword the amount required to cure its default, being a total of $11,606, together with costs fixed at $3,000. Upon receipt of proof of payment of $14,606 by the tribunal, a declaration will issue vesting a 25 percent undivided interest in the Mining Claims in Penn-Gold. Failure to make the required payment within the time allowed will result in a further Order of the tribunal declaring that Penn-Gold's interest in the Mining Claims will cease.

When its final Order is issued, the time during which this matter has been pending before the tribunal will be excluded, and a new anniversary date for the performance and filing of assessment work will be fixed, pursuant to subsections 67(2), (3) and (4) of the **Mining Act**.

Conclusions

Penn-Gold is found to be in breach of its obligation to pay its proportionate share of assessment work on the Mining Claims. The amount required to rectify its breach is declared

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to be $ 11,606.00. Penn-Gold has 45 days from the date of this Order to rectify its breach by payment to Thunder Sword in this amount, plus costs fixed at $3,000.00. Once proof of payment satisfactory to the tribunal has been provided, an Order vesting a 25 percent interest in the Mining Claims in Penn-Gold will be issued. In the event that Penn-Gold fails to comply with this Order in the time frame allowed, an Order declaring that all rights of Penn-Gold in the Mining Claims ceases will be issued.

At the time of the making of the Final Order in this matter, the time during which these Mining Claims have been under pending proceedings will be excluded, a new anniversary date will be fixed and the notation "pending proceedings" will be removed from the abstracts.