File No. MA 013-93
File No. MA 036-93

L. Kamerman) Thursday, the 15th day
Mining and Lands Commissioner) of June, 1995.

THE MINING ACT

IN THE MATTER OF

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

AND IN THE MATTER OF

Two Notices of the Director of Mine Rehabilitation (the "Director") pursuant to subsection 149(1) of the **Mining Act**, dated the 13th day of April, 1993, to Nelson Machinery Company Ltd. to file a Closure Plan and the 8th day of September, 1993, to Conwest Exploration Company Limited to submit changes to their proposed Closure Plan;

AND IN THE MATTER OF

Two appeals from the Notices of the Director, from Nelson Machinery Company Ltd. by its receiver manager, Eric A. Biagi, received by the tribunal on the 14th day of May, 1993 (MA 013-93) and from Conwest Exploration Company Limited, received by the tribunal on the 27th day of October, 1993 (MA 036-93).

B E T W E E N:

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

Appellant of the First Part

- and -

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CONWEST EXPLORATION COMPANY LIMITED

Appellant of the Second Part

- and -

THE DIRECTOR OF MINE REHABILITATION,
MINISTRY OF NORTHERN DEVELOPMENT AND MINES

Respondent

ORDER

UPON hearing from the parties and reading the documentation filed:

1. THIS TRIBUNAL ORDERS that the requirement of the Director dated the 13th day of April, 1993 that Nelson Machinery Company Ltd. file a Closure Plan in respect of the buildings and equipment located within the fenced in mill area located on Mining Location K-65 and Mining Claim TB-82838 is confirmed, excepting that the date by which the said Closure Plan shall be filed is altered to be within six months of the date of this order, or in the event of any further appeal, within six months of the final disposition of this matter.

2. THIS TRIBUNAL FURTHER ORDERS that the requirement of the Director dated the 8th day of September, 1993 that Conwest Exploration Company Limited make changes to its proposed Closure Plan in respect of all underground workings and openings to surface located on Mining Location K-65 and Mining Claim TB-82838 is confirmed, excepting that the date by which the changes to the proposed Closure Plan shall be filed is altered to be within six months of the date of this order, or in the event of any further appeal, within six months of the final disposition of this matter, and without limiting the foregoing shall include the information as set out in paragraphs 1 and 2 of the Director's requirement dated the 8th day of September, 1993.

3. THIS TRIBUNAL FURTHER ORDERS that the requirement of the Director dated the 8th day of September, 1993 that Conwest Exploration Company Limited make changes to its proposed Closure Plan in respect of the tailings mass located on

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Mining Claims TB-82837, 82838, 62886 and 62887 is confirmed, excepting that the date by which the changes to the proposed Closure Plan shall be filed is altered to be within twelve months of the date of this order, or in the event of any further appeal, within twelve months of final disposition of this matter, and without limiting the foregoing, shall
include the information set out in paragraphs 1 and 2 of the Director's requirement dated the 8th day of September, 1993.

4. THIS TRIBUNAL FURTHER ORDERS that the requirement of the Director dated the 8th day of September, 1993 that Conwest Exploration Company Limited make changes to its proposed Closure Plan in respect of the buildings and equipment located within the fenced in mill area located on Mining Location K-65 and Mining Claim TB-82838 is revoked.

DATED this 15th day of June, 1995.

Original signed by

L. Kamerman
MINING AND LANDS COMMISSIONER

File No. MA 013-93
File No. MA 036-93

L. Kamerman	)	Wednesday, the 14th day
Mining and Lands Commissioner	)	of June, 1995.

THE MINING ACT

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Appellant of the First Part

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CONWEST EXPLORATION COMPANY LIMITED

Appellant of the Second Part

- and -

THE DIRECTOR OF MINE REHABILITATION,
MINISTRY OF NORTHERN DEVELOPMENT AND MINES

Respondent

REASONS

This matter was heard in the Commissioner's Court Room, 24th Floor, 700 Bay Street, Toronto, Ontario, on December 8 and 9, 1994.

Appearances:

Rick Coburn	Counsel for Conwest Exploration Company Limited ("Conwest")
John Norwood	Counsel for the Director of Mine Rehabilitation, Ministry of Northern Development and Mines (the "Director")

No one appeared for Nelson Machinery Ltd. ("Nelson") although notice was sent by the tribunal by registered mail to its mailing address at 1500, 1075 West Georgia Street, Vancouver, British Columbia, and to Andrew and Valerie Greenwood, 264 West 14th Street, North Vancouver, British Columbia.

Preliminary Matters:

Jurisdiction of the Tribunal on Appeal

The issue of the nature of an appeal under Part VII of the **Mining Act** was introduced by the tribunal, the consideration of which included who would be charged with

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the burden of proof. Submissions on this issue were received from counsel and Mr. Coburn indicated that he was willing to proceed to call his witness first, as he had been prepared to do so.

The tribunal considered the issue of its jurisdiction in detail in the case of **MacGregor v. The Director of Mine Rehabilitation** (M.L.C.) unreported, MA 033-93, December 23, 1994, which had not been released prior to the commencement of the current appeals, and finds that nothing in the current submissions would result in changes to its earlier findings. Relevant portions of that decision are reproduced commencing on page 14:

> A hearing before the tribunal under Part VII is the first hearing of these issues. Nothing in Part VII requires the Director to hold a hearing, nor are his actions governed by the **Statutory Powers Procedure Act**, R.S.O. 1990, c. S.22. There was no discussion of the burden of proof or the nature of inquiry to be conducted by the tribunal on an appeal from the Director.

The tribunal applied and distinguished the decision of the British Columbia Supreme Court in **Re Andres Wines (B.C.) Ltd. et al. and British Columbia Marketing Board et al.** [1947] 41 D.L.R. (4th) 368, and concluded at pages 16 and 17:

> Although the Court in the **Andres** case described the appropriate procedure as a hearing **de novo**, the test prescribed by the Court was one of reasonableness, which properly reflects appeal jurisdiction. This is reflected in the reasoning, which found that there was no error of law in failing to make new findings on the evidence presented. Rather, the Court found that the Provincial Board properly considered whether the decision of the Grape Board was reasonable.
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> Applying the principle of **Andres** to Part VII appeals, the tribunal finds that appeals from an order, declaration or requirement of the Director are appeals **de novo**. Hearings will involve a thorough canvassing of evidence

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> before the Director, opportunity for examination and cross-examination of witnesses and the right to make submissions. The test, however, will be that of an appeal, namely, whether the Director's order, decision or requirement is reasonable and can be supported on the facts and evidence of the case. This review of the actions of the Director will result in one of the determinations provided for in subsection 152(5), that the actions of the Director should be allowed to stand ("confirm"), be struck down ("revoke") or changed (alter").
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> . . . . .
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> The tribunal finds that, for purposes of Part VII appeals, it must review the evidence which was originally before the Director and determine whether there was adequate substantive basis for reaching the requirement, order or declaration appealed from and in so doing, must use its discretion to place itself in the shoes of the Director in determining whether any discretion exercised was reasonable. The tribunal finds that it must also consider the statutory interpretation of sections applied to the facts, as presented by the Director, and make findings as to whether they have been interpreted reasonably and correctly.

Director's Motion

Mr. Norwood brought a motion without notice, seeking to limit the scope of the appeal. He submitted that section 149 contains three separate avenues of appeal, which should be treated as mutually exclusive.

The scheme of section 149 outlines the process for dealing with abandoned sites. The Director may require the filing of a closure plan under subsection (1). Assuming there has been compliance with the requirement, the Director may require changes to the closure plan under subsection (2). If notified that the closure plan is acceptable, the proponent must rehabilitate the site. Should a proponent fail to comply with either subsections (1) or (2), the Director may declare the site abandoned and have the Crown implement rehabilitative measures, which shall not be done until notice is given

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in the prescribed form under subsection (5). In addition, where a proponent continues in possession, the Lieutenant Governor in Council may declare the lease void, upon the recommendation of the Minister, pursuant to subsection (6).

This scheme applies to over 6000 sites in Ontario. To date, the Director has dealt with complaints only as opposed to utilizing a systematic approach. However, Mr. Norwood submitted that it is important to manage the scheme in compliance with the legislation.

The rights of appeal which arise under section 149, specifically being subsections (1), (2) and (4) are contained in clauses 152(1)(a), (b) and (e), which, in Mr. Norwood's submission, are three separate and discrete instances for appeal. In considering an appeal under one of these clauses, the tribunal must determine whether it will consider every potential issue which might arise under each of subsections 149(1), (2) and (4) or whether the appeal is limited to the issues germane to the subsection under which the appeal arises. He submitted that the latter interpretation should be favoured, otherwise the Director would be put in triple jeopardy with respect to all of the requirements to file closure plans under section 149.

Applied to the current appeals, Mr. Norwood submitted that Nelson appealed the Director's subsection 149(1) requirement to file a closure plan. Conwest appealed the Director's subsection 149(2) requirement for changes to be made to an existing closure plan and should therefore be confined to the issues related to the rationale for changes to the existing closure plan. In other words, Conwest cannot raise issues of whether or not they are a proponent at this juncture and had Conwest wanted to argue this matter, Conwest should have appealed the requirement to file a closure plan.

Mr. Coburn commenced by expressing amazement that this motion was brought without prior notice. He also expressed surprise that the Director would attempt to eliminate an appeal on the merits on the basis of a purely technical argument. The result of the Director's position would be over 6000 appeals of subsection 149(1) requirements.

For the record, Mr. Coburn pointed out that Conwest did file a closure plan for those portions of the property for which it believed it was responsible. There have been no changes in ownership from the time of filing until the hearing of the appeal.

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The scheme of section 149, presented sequentially, is incorrect in Mr. Coburn's submission. Mr. Burns agreed in his evidence that there is no requirement for the Director to give notice to obtain compliance and receive a closure plan.

However, more important is the language used in subsection 152(1), which states:

> **152.**--(1) Where the Director,
>
> . . . .
>
> the proponent may appeal the Director's requirement, order or declaration to the Commissioner, if within thirty days of receiving the notice of the Director requiring the changes or proposed closure plans referred to in clause (a) or (b) ... .

Therefore, within the meaning of clause 152(1)(b), the proponent can appeal the initial requirement within thirty days of receiving a notice requiring changes to an existing closure plan.

Mr. Coburn submitted that the appeal clearly raises the question of ownership of that portion of the closure plan for which Conwest does not admit ownership. He suggested that if Mr. Norwood is not prepared to deal with the issue of ownership, the matter ought to be adjourned and the parties should be allowed to make a full set of submissions on that issue, as it is relevant to the arguments.

Mr. Coburn stated that he regards this motion as a technicality, pointing out that Conwest was made a party to Nelson's appeal of the Director's requirement under subsection 149(1) and as such, it is entitled to raise issues of ownership attributable to it.

Finally, Mr. Coburn submitted that the tribunal is bound to consider the "real merits and substantial justice" of the case, as set out in section 121 of the **Act**, and that there is no overriding obstacle with respect to this issue. He reiterated that it is strange for the Director to attempt to stop the tribunal from considering the merits of the appeals, as required by sections 149 and 152, when taken in conjunction with section 121.

In reply, Mr. Norwood stated that, with respect to being joined on Nelson's appeal, Conwest can raise issues with respect to Nelson's ownership. He challenged Mr. Coburn's contention that the Director has other options, pointing out that the clear powers of prosecution set out in subsection 147(6) do not appear in section 149. Mr. Norwood also stated that the Director does not regard the section as purely sequential, as subsection 149(2) is merely an option which need not be exercised by the Director.

For purposes of clarification, Mr. Norwood submitted that Conwest is limited by its having been added as a party to the Nelson appeal to raising issues of ownership to that appeal only. He submitted that ownership of the tailings areas on the three mining claims to the east cannot be considered on Conwest's appeal. Mr. Norwood proposed that the tribunal proceed with the hearing of evidence and hear further argument on this matter during final submissions. Mr. Coburn agreed to proceed on this basis.

Agreed Statement of Facts:

Counsel spent considerable effort in arriving at an agreed statement of facts (Ex. 38, Tab 1), which had the effect of reducing hearing time considerably. Although Mr. Zurowski was led through this evidence at the hearing and expanded on several points, the tribunal has attached a photocopy as Schedule A to these Reasons. To those unfamiliar with the facts of this case, reference should be made to this schedule first, as many of these facts are not repeated elsewhere in these Reasons.

Issues:

1. What is the scope of an appeal? Is the appellant limited to raising only those issues which relate to the specific subsection under which an appeal is made, in this case, subsection 149(2) or can the appeal of the requirement to make changes to an existing closure plan include the issue of whether or not the appellant is a proponent?

2. What are the requirements of a proposed closure plan? Have these been met by Conwest?

3. Is Conwest an owner of the mill buildings? If not, is it an occupier of the mill buildings? What is the effect in law of the Bill of Sale?

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4. Is Nelson an owner or an occupier of the mill buildings? Is Nelson a "proponent" within the meaning of the **Mining Act**?

5. Is Conwest the owner or occupier of the tailings area? What is the intent of the 1977 conveyance of the "mining rights only"? Can other evidence be considered in determining the intent?

Evidence:

Fenced in Mill Area

The most up-to-date description of physical assets of the fenced in mill area, prepared by Michael Zurowski, Vice-President of Conwest, is found in Exhibit 32, Tab 1. A copy has been attached to these Reasons as Schedule B. Mr. Zurowski explained that those structures shown as demolished were done by or on behalf of Nelson. The fence itself has three gates, being on the west, south and east sides. There are signs on the fence indicating that the area is the property of Nelson.

Mr. Zurowski testified that Nelson was in the business of purchasing mine sites and selling off assets. It had cut holes in the buildings and fences to remove machinery and then patched both. They hired a man called "Ojala" to complete the demolition for the cost of salvageable material. In June 1992, Mr. Zurowski visited the site and observed Ojala tearing down buildings. The Ministry of Labour stepped in after one month, stating that the work did not comply with their regulations, and Ojala backed out for this reason and because of the vandalism he had experienced. This resulted in buildings being left open to the elements.

Cecil Burns, Rehabilitation Inspector, Mine Site Reclamation Section, Ministry of Northern Development and Mines, offered the most complete evidence with respect to the features and their current state or what is needed.

No. 3 Shaft and 257 Vent Raise

Outside the fenced in mill area, there are two potential hazards, being one shaft and the 257 vent raise. The cost of rehabilitation will depend on Conwest's Closure Plan. Both of these features were capped a number of years ago, so that there must be

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an engineering assessment of the integrity of the caps. If they are not sound, they would have to be removed and replaced at a cost of $6,000 for the No. 3 shaft and $5,000 for the vent raise. Conwest is the registered owner of these features and has admitted responsibility for rehabilitation.

Three Crown Pillars

There are three crown pillars, shown on Schedule B as three circular or rectangular areas along the southern portion of the fence. Crown pillars were described as the shelf of land over an underground cavern created by mineral extraction. These are estimated to be between 20 and 40 feet thick with 50 feet being the minimum safe thickness to prevent collapse or weakening on the surface. The potential hazard arises from subsidence which may result in the shelf falling into the cavern creating an opening to surface. The Director would wish to ensure that the crown pillars are structurally sound, which involves assessment by a geotechnical engineer. Their rehabilitation depends on structure and depth, with two techniques available. One would be to backfill the cavern to give the shelf support, using such materials as concrete, sand, tailings and rock. The other would be to blast down the pillar to create an opening to surface. Estimated costs of rehabilitation for the three crown pillars would be $75,000 for geotechnical assessment and up to $40,000 each for rehabilitation.

Conwest's position on the crown pillars is that the stope is 200 feet long and 20 feet wide. According to Mr. Zurowski, they are in very good condition, having no indication on the surface of subsidence, unjointed or fractured rock. Coldstream had left the openings, which Conwest concreted off to a thickness of five feet. There are no vent pipes which Mr. Norwood suggested would create a great deal of pressure on the pillar. Mr. Zurowski stated that the practice in closing off the pillars is left to the operator. As this is a very shallow mine, in his opinion, not much pressure is exerted on the pillars. Also, they involve solid rock which is much more secure than other types of crown pillars. The testing of the pillars and the drilling and drafting of theoretical diagrams requires significant effort.

Openings to Surface

There are four other shafts on the property, being the No. 4 shaft inside of the head frame (#15 on Schedule B); the No. 1 shaft (#5 shaft house on Schedule B); the

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No. 2 shaft, located half way between shaft Nos. 1 and 3; and the intake vent inside the intake fan house (#11 on Schedule B). According to the Conwest Closure Plan, these shafts were capped by Coldstream. It is unknown how sound these caps are and if they fail, openings to surface would be created.

Steps for rehabilitation would be to test the integrity of the caps and to recap the shafts if warranted. Estimated costs for this range from $6,000 each for the two small shafts, $5,000 for the vent raise and $10,000 for the larger No. 4 shaft.

PCB Storage Site

According to Mr. Zurowski, a fairly new barrel of PCB's was dumped on the property. Due to restrictions on transporting and disposal of PCB's, a compound was created within the services building at the north east corner. The storage site is in two names, those of Nelson and Conwest and they were required to deal with the Ministry of the Environment and Energy, ("MOEE").

Mr. Zurowski stated that the PCB site is inspected monthly. In addition to the barrel, two capacitors were found in the mill area and are also stored. Although Conwest is involved, at relevant times, the site was acknowledged to be owned by Nelson. After the storage site was created, there were two break-ins and protective equipment was stolen. To prevent more break-ins, Conwest took responsibility to repair the broken fence by hiring a contractor and shared the expense with Nelson.

Under cross-examination, Mr. Burns agreed that the PCB's were secure and as such they were not a hazard. However, their continuing security remains at issue. The storage occupies a small portion of the services building, approximately 10 percent. He agreed that Conwest was compelled by the MOEE to store PCB's on this site and that destruction or transportation of PCB's is virtually impossible.

Services Building

The services building is the largest structure shown on Schedule B. The main safety concern is that it is derelict, while the main environmental concern is that it houses a PCB storage site. Its rehabilitation could be accomplished through demolition

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and disposal of the rubble, at an estimated cost of $60,000. The cost of relocating the PCB storage depends on whether it would be removed off-site or will be housed on this site. Costs are between $15,000 and $25,000.

Mr. Burns admitted under cross-examination that the structural integrity of the services and head frame buildings is an issue, with concrete block construction archways having no means of support as well as the possible crumbling of iron stairways. This opinion is based on his lay perspective, as he is not a structural engineer.

Mill Building

The mill building (#12 on Schedule B) poses the safety concerns associated with a derelict building. It is open to the elements, and sheet metal could blow off or the whole building could collapse. Environmentally, the asbestos in the walls and ceiling has fallen onto the floor and is migrating. According to the Ministry of Labour, it is class three friable asbestos, which means that the fibres have crumbled and broken down, making them subject to wind and an inhalation risk. The Ministry of Labour district mining engineer has informed Mr. Burns that the situation is not safe enough to allow workers to remove the asbestos prior to demolition. The cost of asbestos removal and disposition, as well as demolition of the building, is estimated at $400,000.

Head Frame and Shaft House

Described as #15 on Schedule B, the head frame and shaft house of the No. 4 shaft poses the exact same problems as that of the mill building. Removal and disposition of the asbestos and demolition of the building is estimated at $200,000. The main hazards are safety from fear of collapse and the health hazard posed by the friable asbestos.

Under cross-examination, Mr. Burns clarified that the mill and head frame/shaft house had been insulated with asbestos which became friable through exposure to the elements due to neglect. The hazard posed is to the health of humans. He agreed that had Nelson either maintained the buildings or demolished them in 1968, there would not be a problem today, which was caused by exposure to the elements after holes were punched in the buildings in 1992.

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Minor Buildings

The gate house (#2 on Schedule B), the carpenter's shop (#18 on Schedule B) and diamond drill shop (#22 on Schedule B) would cost $500, $2,000 and $2,000 respectively to demolish. The oil storage building (#19 on Schedule B) would cost $1,000 to demolish. However, the soil would have to be examined to determine whether any oil is present, in which case, costs would escalate for its removal.

Mr. Burns was asked whether PCB storage, friable asbestos and structural integrity of buildings were not properly under the authority of the Ministries of Labour and Environment and Energy. Mr. Burns indicated that the Ministry of Northern Development and Mines would defer to the opinion of those ministries as to the adequacy of measures in place, but the requirement for rehabilitation arises through the closure plan under Part VII the **Mining Act**. He agreed that if those ministries had expressed no concerns with respect to these existing or potential hazards, the Director would not pursue it.

Tailings Area

The tailings pile is 600 feet long and 40 feet in elevation. Within TB-82838 is located the tailings dam and part of the tailings, estimated to be 10 acres. In addition, tailings are located on TB-82837, 62886 and 62887. At the dam, the span is estimated to be 40 feet across. There are two potential hazards associated with the tailings; that of the stability of the dam and the tailings themselves.

There is not much information as to whether the tailings dam is structurally sound. Mr. Burns estimated the cost of an engineering study to be $30,000 and estimated that it could cost $40,000 to stabilize the dam. There is no information on whether the tailings pile is acid producing or is chemically active. If there are sulfides in the tailings, this would result in acid drainage. MOEE stated that the pH level of water draining from the site is four, being moderately acidic. There are also elevated levels of copper and iron. No vegetation grows on the tailings, so that they are subject to wind action and surface water run-off. The tailings area is considered to be a high priority. In 1990, as a result of a study commissioned from Golder and Associates of acid producing sites, this area was classified as a "priority one" site.

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Mr. Burns explained that the reduced pH makes metals existing in the tailings more soluble. They dissolve into waters flowing through tailings and migrate to surrounding water bodies.

Without information on the tailings themselves and the hydrology of the area, it is not possible to say what rehabilitation measures are necessary. A chemical analysis of its composition is estimated at $15,000, while an engineering study to determine what may be possible is estimated to cost $50,000 to $75,000.

Three alternative rehabilitative measures were described. By providing a cover to the tailings, it would be possible to revegetate the surface which would prevent the creation of at least some of the acid run-off. Cost of revegetation would be $30,000. In addition, depending on the extent to which soil may be required as a cover, between $40,000 and $70,000 additional cost may be necessary. A water cover could be engineered to cover the entire area, which effectively blocks oxygen coming into contact with the tailings. Depending on the extent of engineering involved, which must maintain the water cover at all times and ensure that sufficient water is available through either drainage or pumping, associated minimum cost would be $100,000. A collection and treatment system to treat surface and ground water with lime could be constructed. Cost of an active treatment plant is impossible to gauge without information on the required collection systems and the volume. However, estimates would start at a minimum of $100,000.

Mr. Burns explained that tailings are the residue of processing of natural ore, consisting of natural fine sandy or clay size materials. Their chemical composition will determine whether they are hazardous or inert. However, even inert tailings may be an issue due to siltation of streams and watercourses caused by overland drainage of water across the tailings area. Studies based on two samples taken from the east drainage channel to Hallet Lake show that the soil is moderately acidic, having a pH factor of 3.4. There is no data available on the acidity of naturally occurring soils in the area, but Mr. Burns suggested that it was immaterial owing to the evidence of metals, namely copper of 0.56 micrograms/litre and iron of 21,000 micrograms/litre in the tailings run-off, both being in excess of water quality objectives contained in the MOEE Blue Book setting out water quality guidelines.

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Dr. W.R. Cowan, the Director of Mine Rehabilitation, Ministry of Northern Development and Mines, stated that the tailings pose two potential hazards. One is its location next to a public highway where failure of the structure could cause damage to works or harm individuals. The second is potential hazards from acid drainage and metals leaching into surrounding watercourses and ground water.

Fenced in Mill Area

Tailings Areas

Whatever interest Conwest may have in the tailings area arose by way of a settlement of debt between Coldstream Mines Limited ("Coldstream") and International Mogul Mines Limited ("International Mogul"), predecessor to Conwest. Agreements which convey a number of properties are contained in Tabs 19 and 20 of Exhibit 26, although those listed in the former are not involved in these proceedings. The latter dated November 18, 1976, sets out in paragraph 7:

> 7. To the extent that the interest of Coldstream in and to the Leases and Property is in mining rights only, Mogul shall have no obligation with respect to anything left on the surface prior to the execution of this agreement or arising out of surface rights, and Coldstream agrees to indemnify and save harmless Mogul from any claims, damages or other obligations relating to arising (**sic**) from same.

Schedule "A" lists a number of patented mining claims, including TB-82838 and K-65, specifically stating that "mining rights only" are involved. The documents at Tabs 24 and 25 of Exhibit 26 are the registered conveyances of lands involved in the agreement. The former, dated April 6, 1977, registered as instrument 197183, is for K-65 upon which the mill site discussed above is located. The latter, bearing the same date and bearing instrument number 130994, outlines that "secondly", mining rights only in Mining Claim TB-82837 are conveyed; "thirdly", Mining Claim TB-82838; "twenty-eighthly", mining rights only in Mining Claim TB-62886; and "thirty-sixthly", mining rights only in Mining Claim TB-62887.

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Mr. Zurowski referred to an internal International Mogul memorandum written by him to Messrs. J.C. Lamacraft and K.C. O'Connor dated November 25, 1976 (Tab 21, Ex. 26) and testified that he was aware of the potential liability associated with the tailings and recommended that International Mogul acquire the mining rights and not the surface rights. It was his understanding that tailings went with the surface rights. In a discussion with Mr. G.A. Jewett of the Ministry of Natural Resources, Mr. Zurowski was given the impression that if surface rights were not transferred to International Mogul, upon surrender of Coldstream's interest, the surface rights and tailings would vest in the Crown. In spite of Mr. Zurowski's recommendations, the conveyances of K-65 and
TB-82838 are not for mining rights only.

Tailings Policy

Mr. Burns gave evidence that his ministry's position is that tailings belong to the mining rights holder. He believes that the **Mastermet Cobalt Mines Ltd. v. Canadaka Mines Ltd.** (1978) 91 D.L.R. (3d) 283 (Ont. C.A.); aff'g (1977) 79 D.L.R. (3d) 743 (Ont. H.C.); aff'd [1980] S.C.R. 119, decision supports this policy, which is a general working policy, presumably internal, and not published.

Compliance with Closure Plan

Under subsection 152(5) of the **Act**, the Commissioner does not have the power to dispense with closure requirements, but is limited to confirm, alter or revoke the action of the Director. It was explained that the requirements of a closure plan are set out in Ontario Regulation 114/91 and that by appealing the requirements of a closure plan, Conwest is asking the tribunal to disregard the regulation. It was clarified that one of the matters outlined was an estimate of cost, but that this cannot be done until all relevant studies have been undertaken. The question was posed as to how valuable estimates ranging between no cost and millions would be to the Director in evaluating a closure plan.

Submissions:

Mr. Coburn commenced by stating that despite the complex set of facts, the legal issues to be determined are relatively straight forward. He submitted that there are two general propositions which should be considered at the outset.

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First, the **Mining Act**, in creating legal obligations and liabilities, does not create property rights. The liabilities which arise are dependent upon such ownership as leases or occupation. The tribunal must discover whether the property rights have been established, such as ownership or occupancy. The **Act** does not create a property interest; it does not define occupancy; nor does it define charge, management or control. Therefore, the tribunal cannot make the leap to the conclusion of ownership, but must determine if a lease leads to occupancy or charge and control.

Second, with respect to the mill and the tailings, if the legal instruments and other documents will be relied upon to determine whether property rights exist, they must be construed in light of the intention of the parties to the documents. Through the importation of foreign definitions, those of the **Mining Act** into the law of property and conveyancing, it is only appropriate to aid in ascertaining what is meant through the intention of the parties if there is no other evidence. However, if there is other evidence, that should be relied upon by the tribunal.

Mill Area

Mr. Coburn stated that Conwest is the registered owner of the surface and mining rights with respect to K-65 and TB-82838. The proposed rehabilitation concerns the buildings and other features. There is a dispute as to which of Conwest or Nelson is responsible for several of the features, such as the buildings enumerated above. However, Conwest has given a closure plan and acknowledged responsibility for other features, such as the three crown pillars, shafts and vent raise.

Concerning the dispute involving the buildings, Mr. Coburn submitted that it is a question of property interest. Laterally, from the type of evidence given, if Conwest does not own the buildings, is there evidence of its occupation.

The property interest question revolves around the bill of sale between Coldstream and Nelson, being a simple indenture document. Mr. Coburn submitted that the bill of sale treats the buildings as though they were chattels. This interest is conveyed to a company engaged in salvage operations, having been conveyed unconditionally. The evidence is that at all times up until 1992, Nelson acted as if they were the owner of the buildings, to the extent that Conwest was required to obtain permission to gain entry for purposes of fulfilling the obligations imposed by MOEE. Both Nelson and Conwest believed, and Mr. Coburn submitted that there is evidence that the Director was aware,

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that it was Nelson and not Conwest which owned the buildings.

Mr. Coburn referred to the Affidavit of Valerie Greenwood (Ex. 27, Tab 9A), which was made in her capacity as corporate secretary of Applecross Holdings Ltd. "Applecross"), having also been corporate secretary of Nelson. The affidavit is evidence that Nelson and Applecross have a common directorship, with the same individuals involved on both sides of the receivership. Paragraph 11 of the affidavit is, in Mr. Coburn's submission, a clear admission on the part of a former principal of Nelson that "certain abandoned buildings which had been previously owned by " Nelson and goes on to disclose a potential liability to the "Ministry of Mines in the Province of Ontario", which could increase the potential shortfall to the debenture holders. Mr. Coburn submitted that the paragraph was in error insofar as the buildings were never conveyed away from Nelson, so that at the time of the affidavit, it remained the owner of the buildings. The fact that there is a potential to increase the shortfall is indicative of Nelson's thinking with respect to its obligations, namely that it took whatever steps it could to avoid them.

Referring to the Final Statement of Receipts and Disbursements November 1, 1991 to September 30, 1993 (Ex. 27, Tab 11A, Exhibit D to Affidavit of Eric Biagi), Mr. Coburn pointed out that there had been $1,351,863 realized from the sale of Nelson's assets, and suggested that Nelson was not without the ability to pay for the cost of rehabilitation pursuant to an accepted closure plan. However, what was necessary was an assertion of priority on the part of the Director before it was too late.

Mr. Coburn invited the tribunal to review the material filed in Exhibit 27 and submitted that it would be reasonable to conclude that the money ended up in the hands of Nelson Machinery and Equipment Limited continuing to operate in western Canada without having had to pay a cent of its obligations. Mr. Coburn invited the tribunal to review the materials filed to come to its own conclusions in connection with what had transpired through the lack of action on the part of the Director in asserting its priority of claim.

Mr. Coburn submitted that the buildings and other equipment were conveyed by Coldstream to Nelson as chattels. He posed the question of whether this was possible from a legal standpoint given that in most circumstances buildings and equipment become part of the realty rather than remaining separate from the land. He submitted that the prerequisites for separation of the buildings from realty have been met in these circumstances.

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Referring to the **Sale of Goods Act** R.S.O. 1980, c. 462, which dates back to 1920 in the form of **The Law Relating to the Sale of Goods** and its predecessor the **Imperial Act** of 1893, 56 & 57 Vict. c. 62, Mr. Coburn submitted that it applied to the facts as they were in 1968. The relevant definition is reproduced:

> "goods" means all chattels personal, other than things in action and money, and includes emblements, industrial growing crops, and things attached to or forming part of the land that are agreed to be severed before sale or under the contract of sale;

He submitted that there was an agreement to sever the buildings and equipment under the agreement of sale. It flows from this that, under the application of the **Sale of Goods Act** that the property passed when the contract was made. Section 19 and rule 1 thereunder are of relevance:

> **19.** Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:
>
> **Rule 1.**--Where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made and it is immaterial whether the time of payment or the time of delivery or both is postponed.

Mr. Coburn submitted that the property in the buildings and equipment passed to Nelson in 1968 when the agreement was made.

Regarding the question of severance, Mr. Coburn referred to passages contained in Williston, Samuel, **Williston on Sales**, Fourth Edition. Rochester, New York: The Lawyers Co-operative Publishing Co., 1973, at pages 130 and 131:

> It is a general rule of law that fixtures actually or constructively annexed to realty, will be presumed to have

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> become a part of that realty and to have inured to the benefit of those who may be entitled to the freehold interests. Articles which have become part of the realty by annexation can become personalty again only by severance from that realty; but for the severance to be valid and effective, it must be, generally speaking, done by the owner of the land, since he is the only person who has any right of control over the article annexed thereto.
>
> It is said that under the situation where the owner of the freehold contracts to sell and deliver a building situated thereon, which building is to be removed and located elsewhere, the contract will be held to be one for the sale of goods, even though the building is at the time affixed to the realty. The rationale for this position is that the parties to the transaction have expressed their intention by their contract to buy and sell a building separate from the realty and moved away from its foundation, and did not express an intention to buy and sell a building coupled with the real property interest. The courts in this situation will give effect to the intention of the parties. The buildings become personalty by the intention of the parties. The buildings become personalty by the intention of the parties as soon as the sale is made, because the sale itself operates as a severance from the land, and is an agreement collateral to the land which passes no interest thereon. Other courts have said that where the intent of the parties is to sell a building as a chattel and the intent is apparent from the contract and circumstances attending it, the severance may be made by the vendee.

The American case of **Stiles v. Gordon Land Co.** 44 S.O. 2d 417 (1950) dealt with the sale of a building to a salvage company, where the Court gave effect to the intention of the parties to separate the building from the realty.

Mr. Coburn speculated that Mr. Norwood would submit that the article and case addresses situations where the building is to be moved, which was not the intent in

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the case under appeal. However, it was submitted that sale for purposes of destruction is equivalent to a sale for purposes of moving; it is the intent of the parties which is the key. The 1968 transaction did not convey the surface rights of the land with the buildings, evidence of Coldstream's and Nelson's intent. There is evidence of a series of events which supports their intent to sever the buildings from the realty.

It was clear from its salvage activities in 1992 that Nelson would take the buildings apart piece by piece, if it were profitable to do so. This evidence of salvage activity is contrary to any imputed intention to treat these buildings as anything but chattels.

Referring to Mr. Burns' evidence concerning the legal validity or continuing legal validity of the bill of sale, Mr. Coburn submitted that the legislation has no effect in rendering the document any less of a title transfer document. Regardless of the effect of the **Act**, it has been repealed. Subsection 84(2) of the **Personal Property Security Act**, S.O. 1989, c. 16 sets out:

> (2) No sale of goods to which the **Bills of Sale Act** applied before its repeal shall be void for failure to comply with that Act.

Mr. Coburn submitted that there is nothing which would render the sale void and that should be the end of the inquiry. However, if the tribunal had to deal with the document on its face, it is still not rendered void.

Section 3 of the **Bills of Sale Act**, S.O. 1967, c. 7, which requires a bill of sale evidenced by writing, an affidavit of an attesting witness, and its registration as provided by the Act applies to cases only where there was no delivery or changing of possession. Mr. Coburn submitted that such was not the case here. There is adequate evidence of a change in possession. The tribunal has heard evidence of the fence surrounding the buildings and no trespassing signs having been erected by Nelson. In addition, Conwest sought Nelson's permission to enter onto the property in 1992. He submitted that this provides open and conspicuous evidence of Nelson's ownership. This evidence should be relied on in finding that Nelson owns all of the buildings. The **Mining Act** cannot create property rights, and if Nelson owns the buildings by virtue of property law, then Conwest cannot be an owner within the meaning given by the **Mining Act**.

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Mr. Coburn posed the question of how else could Conwest be responsible for the buildings. One suggestion is that Conwest has access to and is responsible for a PCB storage site which constitutes occupancy. This is extended to the proposition that Conwest is an owner and a proponent. Mr. Coburn submitted that Conwest cannot be an occupant. There is no definition of occupant in the **Mining Act**. Under the circumstances, the evidence is that Conwest is involved with the site because it is required to be there, due to the PCB storage site. It is not the intent and purpose of the **Act** to capture the facts of this situation. MOEE forced Conwest to keep PCB's at this location, due to restrictions on their movement and destruction. This is not the type of occupancy which the **Act** is attempting to capture. Rather, the **Act** is aiming to capture those who are otherwise trying to avoid liability through conspicuous forms of occupancy.

In the alternative, if the tribunal finds that the PCB storage site does constitute a form of occupancy, the only liability which should flow should be from that portion of the building it occupies and not from other portions of the building or other buildings.

Mr. Norwood invited the tribunal to go over the definitions of "mine" and "owner" in the legislation in connection with each of the features outlined above. He submitted that the word "mine" does not necessarily apply to a site or to a large complex, but can apply to individual mine features as well. Responsibility for rehabilitation can vary within a complex and each feature may have to be addressed individually.

The relevance of the definition of "owner" is that it can include a number of owners so that the **Act** is capable of having multiple owners responsible for each mine.

As an example, the services building can be treated as a separate mine. The responsibility for its rehabilitation to be determined by the tribunal can be based on both ownership and occupancy. Should the tribunal finds that Nelson is the owner of the building, it is still open to it to find that Conwest is an occupier of all or part of the services building.

Mr. Norwood submitted that there are two responsible parties in relation to the mine buildings. If the tribunal were to find that Conwest is the owner, then it would equally be open to it to find that Nelson is an occupier. Mr. Norwood submitted that the practice and policy of the Director in attributing multiple ownership should not be a problem for the tribunal in adopting this approach.

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Mr. Norwood referred to those features for which Conwest has admitted ownership and accepted responsibility, namely the 600 foot tailings dam, 100 acres of tailings, shaft No. 3, and vent raise 257 located outside the fenced in mill area and all openings to surface and crown pillars within the fenced in mill area. In connection with the latter, it is the Director's practice that responsibility for such features is assumed by the mining rights owner.

With respect to the buildings and above ground features located within the fenced in mill area, Mr. Coburn has taken the tribunal through statutory materials in an attempt to establish that Nelson is the owner. Mr. Burns gave evidence that he was unable to ascertain whether the bill of sale had been registered and that the required affidavits had not been executed. Efforts were made to ascertain whether the bill of sale was registered and Mr. Burns was able to convey in his evidence that there was no means available through public documentation to ascertain whether there was additional ownership. Mr. Norwood submitted that the point where the burden of proving that the bill of sale was registered or otherwise valid rests with Conwest. Given the provisions of the **Bills of Sale Act** as it existed in 1968, the tribunal should find that the sale was void. The only conclusion which can be drawn from this is that the ownership of the buildings continues with Conwest.

Alternatively, if the tribunal determines that the Bill of Sale is valid evidence of ownership in Nelson, the question of whether Conwest occupies the services building must still be determined. There is adequate evidence to support the presence of Conwest on the property on a number of occasions, in particular in relation to the PCB storage site. On this basis, the tribunal should find, in his submission, that Conwest is an occupier of the services building.

With respect to the mill and other buildings, the ownership will also be dependent on the validity of the bill of sale. Even though there is evidence to suggest that it was a valid sale, there is also evidence that Conwest is an occupier of those buildings, by virtue of their visits to the site and having undertaken to fix the fence.

Therefore, the conclusion can be made that, whether it is as an owner or occupier, Conwest should be found to be a proponent of the fenced in mill buildings.

Lastly, Mr. Norwood pointed out that Conwest's appeal was from the requirements of the Director's letter for changes to its Closure Plan, for which the tribunal has the authority to confirm, alter or revoke those changes. Paragraph 1 of the Director's

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letter enumerated the required changes to the Closure Plan, specifically listing sections 8 to 17 of Ontario Regulation 114/91. He submitted that the tribunal should confirm that those requirements should be complied with, that Mr. Burns had testified that the information listed is necessary for proper completion of a closure plan. He reiterated that, even if the tribunal finds that it would like to change or revoke these requirement, there is no authority to do so.

Tailings

Mr. Coburn stated that the same themes, meaning the intent of the parties and the construction of the conveyancing documents, should be considered in determining the applicability of the **Mining Act** to the tailings.

With respect to Mining Claims TB-62886, 62887, 82837 and 82838, Conwest is the registered owner of the mining rights only, with the exception of TB-82838, where it owns both. There is evidence of a discrepancy between the initial documentation involving this mining claim, and in spite of the fact that Mr. Zurowski made recommendations concerning its acquisition, Conwest has acquired both mining and surface rights in this one mining claim. However, Mr. Coburn pointed out that Conwest has not resisted responsibility for the tailings in this area and has included it in its Closure Plan. Specifically, at page 6 of its proposed Closure Plan, the second paragraph states:

> Conwest acknowledges ownership to the surface rights of mineral claim TB-82838 which contains about 10 acres of some 50 acres of tailings on the Coldstream property. The 10 acres contains the main tailings dam and part of the tailings proper. Conwest is prepared to undertake the necessary remedial work to properly terrace the area, stabilize any sections requiring stabilization and vegetate the 10 acres to establish a permanent plant growth.

Mr. Coburn submitted that the Crown is the owner of the remaining tailings. Mr. Burns was not sure how this came about, but that presumably it is in connection with Coldstream, having been the original explorer and miner on the property.

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At the time, International Mogul took an interest in the mining rights only. Mr. Coburn submitted that it is clear and inescapable that the property in the tailings remained vested in Coldstream. Mr. Coburn submitted that he did not know what more could have been done by Conwest to make this clear. The conveyance was for the mining rights only, and one could hardly expect a conveyancer to put in whether the tailings were included unless the parties specifically identified the tailings in their discussions.

Strangely enough, the tailings are mentioned in the Agreement of Purchase and Sale dated November 18, 1976 (Ex. 26, Tab 20), where at paragraph 7 the document refers to "mining rights only", where Mogul will not have any obligation arising out of the surface rights. Mr. Coburn submitted that Mr. Norwood's argument that the tailings create a new surface is nothing more than word play. Referring to Mr. Zurowski's memo (Ex. 26, Tab 21), it is clear that Mogul believed that the tailings would go to the surface rights holder and their acquisition was not recommended. There is nothing more that Mogul could do to make clear its intent. Coldstream generated the tailings, having mined the site, and the tailings reverted to the Crown when Coldstream surrendered its property. It was never intended that Conwest would be the owner or would be responsible.

Conwest is also not the occupier having responsibility for the tailings. The effect of the **Mastermet Cobalt Mines Ltd. v. Canadaka Mines Ltd.** (1978) 91 D.L.R. (3d) 283 (Ont. C.A.); aff'g (1977) 79 D.L.R. (3d) 743 (Ont. H.C.); aff'd [1980] S.C.R. 119, which Dr. Cowan conceded, is that the principle is not that tailings and mining rights always go together, but rather, it is the intent of the parties which governs. This reflects the common law principles of construction of contracts. Mr. Coburn referred to sections 16, 17 and 18 of the **Conveyancing and Law of Property Act**, R.S.O. 1980. Both sections 16 and 17 provide that the provisions of those sections are subject to a contrary intention. He submitted that this contrary intention is not limited to the document itself but is extended to the Agreement of Purchase and Sale. The agreement between Coldstream and International Mogul is a classic case of contrary intent, unlike the **Mastermet** case, where the court only construed the instrument.

Mr. Coburn submitted that the **Mastermet** case does have value. The case stands for the proposition that the words used in a conveyance must be interpreted, and such interpretation will include the intention of the parties. In the case of Mogul, it is the "mining rights only" which have been conveyed. This can be interpreted only as limiting the conveyance to that which was contained below the ground. The implication is, in Mr. Coburn's submission, that there was the necessary intent to limit that which was received. No similar limitation through the use of the word "only" is contained in either **Mastermet**.

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Direct evidence of intent aside, Mr. Coburn submitted that the words, "mining rights only" gives the right to deal with only those mining rights which are below the ground. While **Mastermet** may be the leading decision in this regard, it can be used only to conclude that the Crown, and not Conwest, is the owner of the tailings.

The theme of intent is contained in the other cases filed, namely **Seymour Management Ltd. v. Kendrick**, [1978] 3 W.W.R. 202 (B.C.C.S.) and **Peterson Lake Silver Cobalt Mining Co. v. Dominion Reduction Co.** (1918), 44 O.L.R. 177 (C.A); aff'g (1917), 41 O.L.R. 182 (S.C.); aff'd (1919), 59 S.C.R. 646 and Barton, Barry J. **Canadian Law of Mining**. Calgary: Canadian Institute of Resources Law, 1993 at pages 47 through 50.

Mr. Coburn submitted that the policy of the Director is a red herring, because it is the intent between the parties which governs. Mr. Burns could not account for the discrepancy between the policy and Exhibit 41, nor could he point to where the policy had been committed to writing. Mr. Zurowski gave evidence of the practice of the industry that surface rights and tailings go together. However, all of this is immaterial, as it is the intent of the parties which governs. One need only look at the agreement of purchase and sale to conclude that the property remained with Coldstream and has become vested in the Crown.

With respect to the tailings located on TB-828387, 62886 and 62887, Mr. Norwood submitted that it is important for the record to trace the registration of title. The original crown grants for each, as they concern the mining rights and surface rights, refer to "MINING LAND" (see Ex. 13, Tab 23 in respect of TB-82837 dated March 26, 1958; Tab 24 in respect of TB-62886 dated December 6, 1960; and Tab 25 in respect of TB-62887 dated December 6, 1960). It was the evidence of Mr. Burns that between the time of the original crown grants and what Mr. Norwood called the omnibus conveyance to International Mogul (Ex. 26, Tab 25, dated April 6, 1977) there was no evidence of other conveyances.

The conveyance itself was for "mining rights only". Mr. Norwood asked what significance should be given to the word "only". He submitted that the **Mastermet** decision is directly on point, noting that it occurred at the same time as the facts relating to the 1977 omnibus conveyance. Applying the same legislation as was used in **Mastermet** to the circumstances surrounding Conwest, at trial, the court found that, absent intent to the contrary, the tailings would go to the mining rights owner. This was confirmed on appeal and before the Supreme Court of Canada without dissent. Mr. Norwood referred to the

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last page of the decision of the Court of Appeal at page 290:

> As I have said, the statutory definition of words in the **Mining Act** should be given substantial weight in the construction of private transfers or deeds of mining lands. Having regard also to the language used in the transfer of title to the predecessor of the respondent's lessor of the "mines, minerals and mining rights, in, upon and under" the land and to the provisions of s. 16 of the **Conveyancing and Law of Property Act** above quoted, which defines the expression "mining rights" in a conveyance of land, I am bound to conclude that the appellant's predecessor did not obtain the ownership of or the right to mine the mineralized tailings which had accreted on the surface at the time of the severance of surface rights.

Referring to the definition in the **Act** which states, "'mining rights' means the right to minerals on, in or under any land", Mr. Norwood referred to page 287 of the Court of Appeal decision where it states:

> To understand the vernacular of mining engineers and other mining people, it is of great practical assistance to turn to the definitions of the noun and the verb "mine" and the word "mining" contained in s. 1, paras. 15 and 16 of the **Mining Act** and its predecessor, and quoted above.
>
> I would give substantial weight to this provincial statute governing the mining industry in determining the meaning of the language of mining engineers and other persons engaged in mining -- the definition of its words -- in the same way that the meaning of the language of other trades and professions is influenced by relevant legislation. ...
>
> The definitions in the Act make it abundantly clear that in the mining industry in Ontario a conveyance containing the words in the 1936 transfer of mining rights above quoted

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> confers an exhaustive right to mine all minerals, including the silver contained in the tailings. In my view, the acquisition of mining rights was never intended to be limited to the acquisition of valuable minerals in place, and in sufficient concentration to be extracted at a profit, as contended by a mining engineer called at trial to give evidence on behalf of the appellant. The definition of mining in s. 1 para. 16, to include any method whereby a mineral-bearing substance may be dealt with "... for the purpose of obtaining any mineral therefore, **whether it has been previously disturbed or not**" (emphasis added), necessarily includes the removal, by any process, of silver from tailings accumulated on the surface.

Mr. Norwood submitted that the interpretation of "mining rights only" was never intended to be limited to minerals in place, but was intended to be applied to minerals whether they had been disturbed or not. The Court of Appeal gave weight to the **Mining Act** as it existed at that time. According to definition, mining tailings are included in mining rights.

Section 16 of the **Conveyancing and Law of Property Act** is consistent with the position that tailings are included in mining rights. Therefore, while the tailings are located on the surface, absent a contrary intention within the instrument, the tailings are conveyed with the mining rights.

This leads to an examination of the instrument itself. The words used do not exclude tailings. This is common in the mining industry where tailings are regarded both as a resource and a liability. Those involved are very careful to address the tailings issue. Mr. Norwood submitted that the 1977 deed (Ex. 26, Tab 25) is the only relevant document which should be considered in determining what was conveyed. Section 16 of the **Conveyancing and Law of Property Act** also makes reference to the words used in the instrument and not to other evidence or circumstances which may be used to determine intent. According to section 16, unless the instrument contains words imparting a contrary intent, the tailings will be included in the mining rights only. Mr. Norwood submitted that the facts in this case are the same as those in **Mastermet**. The tribunal should find that it is compelled to make a similar finding, being bound by the decision of the Supreme Court.

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Mr. Norwood pointed out that the Supreme Court made its decision after **Seymour** had been determined, and while the court there determined that the tailings belong to the surface rights holder, it was decided in a different province, involving a different law and upon different facts.

Referring to the excerpt from Barton, B.J. **Canadian Law of Mining** (1993; Canadian Institute of Resources Law, Calgary), Mr. Norwood submitted that the law has been statutorily reversed so that tailings are included in the definition.

Alternatively, Conwest should be found to be an occupier of the tailings, for which there is evidence in the form of having gained access for purposes of filling the decant tower.

Mr. Coburn stated in reply that section 16 of the **Conveyancing and Law of Property Act** does not restrict the inquiry as suggested by Mr. Norwood, but even if it does, the intent outlined by Conwest is supported by the transfer document.

Mr. Coburn offered clarification with respect to dates, pointing out that **Mastermet** was decided some months after the transfers took place.

With respect to occupation of the tailings area, Mr. Coburn submitted that any such occupation on the part of Conwest is **de minimus**. The decant tower is a small area within the tailings pile, and the result of finding that Conwest is an occupier of the entire tailings area will be fear within the mining industry.

Mr. Coburn submitted that, in seeking relief through its appeal of the requirement to make changes under subsection 149(2), Conwest is asking that those matters listed in item 3 of Exhibit 28, Tab 7, be eliminated.

Conclusions

In response to questioning by the tribunal, Mr. Norwood responded that there is no requirement that the Director prove proper use of his discretion in requiring the filing of a closure plan in connection with Conwest, as the appeal is in relation to changes to an existing closure plan under subsection 149(2) and not in respect of the

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requirement to file a closure plan under subsection 149(1). If the threshold issue proves determinative in respect of whether Conwest may raise issues in its appeal normally attributable to subsection (1) questions, Mr. Norwood submitted that his client should be given leave to make additional submissions.

On the issue of apportionment between Conwest and Nelson, the position of the Director is that Conwest is fully responsible. If there is any liability to be attributed to a proponent, then that proponent should be fully liable. Mr. Coburn countered by suggesting that equity and fairness must be exercised in any apportionment. If Conwest is found to be an occupant, then its liability should be limited to that of an occupant.

To clarify the issue of mining rights "only", Mr. Coburn submitted that the definition contained in the **Mining Act**, which states, "'surface rights' means every right in land other than the mining rights" may not include the tailings, but by virtue of the use of "only" in relation to the mining rights, they have been excluded in the transfer. In this way, Coldstream was not left with only the surface rights, but the surface rights and tailings.

Findings:

It must be stated at the outset that in its proposed Closure Plan (Ex. 12) Conwest has admitted ownership to a limited extent of land described as the Coldstream Mine property at the first paragraph of page 3 where it states:

> Based on these discussions we herewith review ownership and responsibilities and submit a Closure Plan on those aspects of the Coldstream Mine property that Conwest believes it is responsible for as to rehabilitation and maintenance.

There is evidence that exploration work was done by Noranda pursuant to an option agreement with Conwest. However, there was no challenge as to the applicability of Part VII of the **Act** to this mine either before the Director or before the tribunal.

Based upon the foregoing, issues of whether features of this mine have been abandoned have not been considered in this appeal.

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Scope of Appeal and Director's Motion - Notice

There is no prescribed form for the giving of Notice by the Director pursuant to subsection 149(1) of the **Act**. However, the original Notice given by the Director to Conwest on November 26, 1992 (Ex 28, Tab 1) follows an informal letter format, not adhering to the format of other prescribed forms under Part VII of the **Act**, which can be seen in Ontario Regulation 111/91, Forms 25 through 29. While there was no issue raised by the parties of whether the notice given sufficiently complies with the legislation, undoubtedly its lack of formality has contributed to several of the problems which subsequently arose.

Before moving on to discuss this issue, the tribunal recommends that the Director adopt a format similar to others used. The following format is suggested:

Mining Act

NOTICE REQUIRING THE FILING OF A PROPOSED CLOSURE PLAN
PURSUANT TO SUBSECTION 149(1)

TO:

PROJECT:

PURSUANT TO AN INSPECTION conducted by a Rehabilitation Inspector on , I consider this site (or specify portions of the site) to be abandoned as defined in subsection 139(1) of the **Act**, and consider it to have been abandoned prior to June 3, 1991.

BY THIS WRITTEN NOTICE I require that a proposed Closure Plan be submitted to me by , the contents of which shall meet all requirements of sections 7 through 17 of Ontario Regulation 114/91.

FAILURE TO SUBMIT THE PROPOSED CLOSURE PLAN will result in further legal action as allowed under the **Act**.

SHOULD YOU WISH TO APPEAL THIS REQUIREMENT FOR A PROPOSED CLOSURE PLAN IN CONNECTION WITH THE ENTIRE SITE

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OR SPECIFIC PORTIONS OF THE SITE, you must within thirty (30) days of receipt of this Notice serve me with the prescribed Notice Requiring a Hearing Before the Commissioner pursuant to subsection 152(1) of the **Act.**

DATED AT SUDBURY THIS DAY OF , 19 .

(Signature)

DIRECTOR OF MINE REHABILITATION

The casual tone used in the former Director's Notice belies the seriousness of the requirement and fails to adequately capture the substantive nature of events which flow from the giving of the Notice. The stage has thus been set for the responses received from Conwest.

The letter to the Director from Conwest dated December 1, 1992 (Ex. 28, Tab 3) clearly attributes responsibility for the fenced in mill area to Nelson, which was relied upon by the Director in issuing a Notice Requiring a Proposed Closure Plan to Nelson on April 13, 1993.

In the proposed Closure Plan itself (Ex. 12, pages 5 & 6), Conwest states that it believes that the tailings areas belong to the owner of the surface rights, thereby not including those portions of the tailings for which it holds mining rights only.

Clearly, Conwest's letter of December 1, 1992 and details of its proposed Closure Plan denying liability for a portion of the tailings do not follow the prescribed form for a Notice Requiring a Hearing Before the Commissioner. Both do however contain all essential information listed in Form 29, namely detailed information regarding the proponent, the property concerned, the date of the Notice of the Director and the reasons why Conwest should not be considered as the proponent of the fenced in mill area and that portion of the tailings impoundment area outside of Mining Claim TB-82838. Significant in the context of this appeal is that the tone of the letter and proposed Closure Plan do mirror the Director's Notice as to style.

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Although characterized as changes, a portion of clause i and all of clause iii in paragraph 3 of the Notice Requiring Changes to an Existing Closure Plan (Ex. 28, Tab. 7) are in substance a notice of requiring a closure plan and the Form 29 Notice to Require Hearing (Ex. 15), in respect of those clauses, is in substance an appeal pursuant to clause 152(1)(a). Based upon its equitable jurisdiction as contained in section 121 of the **Act** to make its decisions on the real merits and substantial justice of the case, the tribunal finds that it will allow Conwest to raise the issue of whether or not it is the proponent of a mine in respect of the fenced in mill area and with respect to the tailings.

Notwithstanding this finding, on the facts of this case, once Conwest was added as a party to the Nelson appeal, all issues of whether or not it is a proponent of the fenced in mill area are properly within the jurisdiction of the tribunal hearing an appeal of a requirement under subsection 149(1).

These findings are confined to the facts of this particular case. In future, the tribunal will be reluctant to throw open the scope of an appeal in the manner feared by the Director. The tribunal is persuaded by Mr. Norwood's argument that an appeal from the requirement to file or make changes under subsections 149(1) and (2) or declarations under subsections 149(4) and 152(1) are limited to the clause under which the right of appeal arises.

In his book **Construction of Statutes**, 2nd edition, Toronto: Butterworths, 1983, E.A. Driedger discusses the internal context of words in chapter seven. Words are to be given their ordinary meaning and retain their grammatical sense, to be read in context with the scheme or framework of the statute. When faced with the possibility of a general or a specific meaning, Driedger suggests that a more restrictive interpretation must be applied. At page 111, he refers to the words of Prouse J.A. at page 608 of **R. v. Twoyoungmen** (1979), 101 D.L.R. (3d) 598:

> When general and specific words are associated together, and where they are capable of analogous meaning, the general words should be restricted to their more specific analogous meaning, **noscitur a sociis**, except where doing so would be contrary to the clear intention of the statute as a whole.

Applied to the words used in subsection 152(1), it is clear that the "requirement, order or declaration" of the Director which may be appealed, being found in the phrase

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immediately after clause (e), although general, refer to the specific matters which might be appealed as enumerated in clauses (a) through (e). The general reference to "requirement, order or declaration" is limited to the particular subsection of the **Act** as set out elsewhere in once of the clauses of subsection 152(1). Therefore, the tribunal finds that the rule of statutory construction, **noscitur a sociis** applies in limiting the scope of an appeal to inquiry under that subsection under which the appeal arises.

While the scope of each appeal will be decided on the merits of the case, it must be reiterated that subsection 152(1) provides for appeals limited to the scope of the actions of the Director within the subsection appealed from. To the extent that the Director undertakes to modify his Notices, future appeals will be treated as limited in scope, within the clear intention of the subsection.

Requirements of a Proposed Closure Plan

It is admitted by Conwest at page 3 of its proposed Closure Plan (Ex 12) that the format of the requirements of a closure plan are not met:

> Although our submitted plan does not follow the requirements or format as described in O.R. 114/91 of the new Mining Act, it addresses the concerns what (**sic**) we believe are Conwest's obligations and responsibilities according to its property tenure and those under the Mining Act.

The information provided concerning the mine openings to surface, crown pillars and the tailings impoundment area (see pages 5 and 6) do not provide adequate information to comply with the regulation. The magnitude of the undertaking of preparing a proposed Closure Plan has clearly not been brought home to Conwest and while there is no excuse for not following the detailed requirements of the regulation, the tribunal believes that Conwest has done little more in this regard than following the former Director's lead.

The casual nature of the information provided is simply inadequate for the purposes of the objectives of Part VII of the **Act**. It does not allow the Director to assess either the adequacy of proposed rehabilitation or of financial assurance.

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Sections 21 through 25 of Ontario Regulation 114/91 set high and specific rehabilitation standards to be met through the execution of a closure plan. While section 24 does provide several exemptions, such as impracticability or adverse affects on the environment, there is no provision for the absence of detailed technical information which characterizes the Conwest proposed Closure Plan. Mr. Norwood is quite correct in his assertion that the tribunal does not have the jurisdiction to excuse a proponent from complying with all of the requirements of sections 7 through 17, with the exception of those exemptions listed in section 24. While there was no suggestion on Mr. Coburn's part that his client should be excused, it must be reiterated that the stringent requirements of complying with the requirement to file a proposed closure plan are serious in nature, constitute an immense undertaking and their magnitude and seriousness cannot be minimized.

It is noted that Conwest was given in excess of seven months in which to comply with the Director's Notice. Much evidence was heard from witnesses for the Director regarding the costs of evaluation in order to determine what work would be necessary. Nowhere in the regulation is this cost itemized. However, in paragraph one of both subsections 22(2) and 23(2) the standard for openings to surface, taken to mean current and previously closed off, must be capable of "supporting a uniformly-distributed load of twelve kilopascals and a concentrated load of fifty-four kilonewtons". The only way in which the adequacy of existing caps or stability of crown pillars can be assessed is through evaluation by a qualified engineer. The costs borne by a proponent in undertaking such evaluations are incurred prior to the submission of the proposed closure plan and do not come into play in the financial assurance required. However, the description of features and their evaluation must be accurate and reliable as all aspects of rehabilitation will flow from it.

The tribunal finds the Director's findings are reasonable and that it will confirm the following portions of the Director's requirement to make changes to a proposed closure plan (Ex. 28, Tab 8) and reiterates that the prospective changes required detailed assessment and information pursuant to Ontario Regulation 114/91.

Conwest is required to make the following changes to its proposed Closure Plan:

1. That the information required by Sections 8, 9, 10, 11, 12, 13, 14, 15, 16 an 17 of Regulation 114/91 be

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appended to the proposed Closure Plan.

2. That the information required to ensure that the minimum rehabilitative measures specified by Section 23 of Regulation 114/91 are achieved, be appended to the proposed Closure Plan.

3. The above appended information will relate to:

   ii. all underground workings and openings to surface associated with the mine operation ....

Ownership of Mill Buildings - Bill of Sale

The transactions involving Nelson and Coldstream are anything but straightforward and require examination to determine what interests are encompassed and whether or not they were conveyed.

On December 9, 1968, a letter from Coldstream to Nelson purports to confirm the sale of "... the Mine Hoist and all remaining Buildings and Equipment at our Burchell Lake property, exclusive of the town site buildings, services and land, for the price of $220,000." On December 27, 1968, Nelson and Coldstream executed an indenture transferring from Coldstream to Nelson "the said goods, chattels and effects and buildings situate on the fenced in mining property on mining claims K-65 and T.B. 82838 east of Moss Township in the District of Thunder Bay." Attached are three promissory notes, each in the amount of $55,000, with dates of payment being February 15, 1969, April 15, 1969 and June 15, 1969.

Confusion has arisen from two other documents executed on December 27, 1968 between Nelson and Coldstream as follows:

1. A memorandum of agreement for the purchase of "all and singular the lands and premises comprising the surface rights to parts of Mining Claim T.B. 82840, T.B. 82838, T.B. 82841, K-64, K-65 and the whole of Mining Claim T.B.82839 comprising approximately 137.7 acres reserving unto the Vendor all mineral rights thereunder reserving all mining rights".

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The document sets out a purchase price of $180,000, with $90,000 allocated to the surface rights and lands and $90,000 allocated to the town site buildings, equipment and services. $5,000 was payable immediately and the balance was to be a first mortgage of $175,000.

2. A mortgage in the amount of $175,000 involving the lands set out in paragraph 1. Payments are to be made on July 15, 1969 of $55,000, on December 31, 1969 of $30,000 and on December 31, 1970 of $90,000.

Provision for the registration of the mortgage and preparation and registration of a transfer is made within the body of the agreement of purchase and sale, conditional upon a survey of the real property being done by Nelson in 1969. This was never done.

Problems appear to have arisen with respect to the real property. The July 15, 1969 payment was not made and Nelson was surprised that it had agreed to purchase only 137.7 acres instead of 375 acres, which it had been advertising for sale. By December 9, 1970, no payments had been made on the mortgage.

From correspondence in 1971 between Nelson and Coldstream, it would appear that a new deal was struck, the details of which require further analysis. A letter from Coldstream to Nelson dated August 19, 1971, purports to confirm a mutual agreement to "accept $65,000 cash in full settlement of the mortgage we hold on the Burchell Lake townsite". This wording appears to sever off that portion of the mortgage, namely $90,000, which is allocated to the town site. However, this is not clear, nor is it borne out by the contents of a subsequent letter from Coldstream to Nelson dated September 17, 1971, where the allocation between the town site buildings and surface rights is reiterated. The letter purports to agree to accept "$65,000 cash in full settlement of the mortgage in the amount of $175,000."

In a further letter dated December 15, 1971 addressed to Nelson from Coldstream, it sets out that parts of Mining Claims TB-82840, 82841 and 82838, along with the whole of Mining Claim TB-82839 and the whole of Mining Locations K-62, K-64 and part of K-65 would be transferred to the purchaser of the town site. This appears to be what transpired, as evidenced by two deeds to Coldstream Holiday Properties, having been registered as instrument numbers 152280 and 99467 on January 2, 1973. The same land transfer tax affidavit was affixed to each, setting out consideration of $142,236 for land, buildings, fixtures and goodwill, and chattels of $500, with a mortgage of $120,000 to Nelson, as evidenced by instrument number 152282.

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A review of the schedules attached to these two instruments has satisfied the tribunal that the lands and buildings involved do not comprise any portion of the lands which have been described throughout the hearing as the fenced in mill area.

This being the case, the tribunal must examine the other transaction of December 27, 1968 involving the "fenced in mining property". There is no evidence that these monies were paid. However, there is also no evidence that this agreement was ever in default. In letters found at Tab 18 of Exhibit 26, inquiries are made by third parties of Coldstream, during the period of October, 1972 through September, 1974, regarding a big storage shed, a D6 dozer, a proposed lease for purposes of a resort property, and two metal hockey goal frames. In all cases, Coldstream has responded that the property was sold to Nelson.

The tribunal finds that the December 8, 1968 letter and December 27, 1968 instrument were intended to sever the chattels from the fenced in mill area. Title to the surface and mining rights of this area is not included in any of the documentation involving Nelson. There is considerable confusion which resulted from the unregistered agreement of purchase and sale and mortgage, the failure to make payments and renegotiations. However, as is evidenced by the ultimate transfers to Coldstream Holiday Properties with mortgage to Nelson, Coldstream regarded the town site buildings and lands as that of Nelson. There is nothing in the documentation filed, including the legal descriptions contained in the schedules, which contradicts the finding that Coldstream intended, and in fact did, retain the surface rights and mining rights in lands upon which is found the fenced in mill area.

The tribunal has considered the submissions of Mr. Coburn and Mr. Norwood with regard to the law in the matter of the **Sale of Goods Act**, the **Bills of Sale Act** and the **Personal Property Security Act**. Having found in the preceding paragraph that the chattels were severed from the land in the fenced in mill area, the tribunal finds that there had been actual change of possession from Coldstream to Nelson of the buildings and equipment in the fenced in mill area. This being the case, there is no requirement that the bill of sale be registered or that the affidavit of an attesting witness and of the buyer be executed, as set out in section 3 of the **Bills of Sale Act**. Therefore, the tribunal finds that, at the time of execution of the bill of sale and as of the date of the Director's Notice of Requirement to Nelson on April 13, 1993, Nelson was the owner of the title to the chattels, meaning buildings and equipment located within the fenced in mill area.

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Occupier

In **Webster's New International Dictionary** (2nd Edition, Unabridged, 1959; G. & C. Merriam Co., Springfield, Mass.) "occupier" is defined:

> **1.** One who occupies. **2.** Esp., one in occupation of property as owner or tenant; often, in British usage, a tenant occupying property, as distinguished from an owner, occupiers of property of certain values of classes being liable to certain rates, eligible to the voting franchise ...

"Occupy" is defined as:

> . . . .
>
> **2. Obs. a** To hold possession; to be an occupant or tenant; reside. **b** To make use; ...

Although "occupier" is not defined in the **Mining Act**, there are a number of pieces of legislation in Ontario where it is defined. The definitions are consistent, with one variation, that of referring to one of either the "premises" or "land". The names of the various legislation and the definitions are set out below. Those words appearing in parenthesis correspond to those Acts which appear in parenthesis; similarly those words appearing in square brackets correspond to the Acts set out in square brackets. All other words are common to all of the Acts:

(The **Health Protection and Promotion Act**, R.S.O. 1990, c. H.7, ss 1(1); the **Occupiers' Liability Act**, R.S.O. 1990, c. O.2, cl. 1(a); the **Trespass to Property Act**, R.S.O. 1990, c. T. 21, ss. 1(1)) and [the **Off-Road Vehicles Act**, R.S.O. 1990, c. O.4, s. 1]:

"occupier" includes,

> (a) a person who is in physical possession of the (premises) [land], or
>
> (b) a person who has responsibility for and control over the condition of (premises) [land] or the activities there carried on, or control over persons allowed to

enter the (premises) [land].

The definitions of "owner" and "mine" include both the land and the separate features found on or in that land, so that, to the extent that either the dictionary definition or the definition in the **Off-Road Vehicles Act** refer to land, they are not applicable to this fact situation.

There is no evidence that Conwest was a tenant of the fenced in mill area on the date of the Director's Notice, namely April 13, 1993. It did then and does currently own the land and mining rights. Nelson's ownership of the buildings and machinery is acknowledged in a letter from Nelson to the Ministry of Natural Resources in 1985, found at Exhibit 26, Tab 27.

Based upon the evidence, it is clear that Conwest did not have possession of the structures located on the fenced in mill area on April 13, 1993. Being an owner of both the land upon which the structures are located and the underground and at surface mine workings serves to blur any possible distinction. The evidence concerning the sharing of expenses for the repair of the fence does not support the proposition of occupancy, because Conwest would have an interest in restricting access to the underground mine workings which it does own.

Conwest does make use of part of the service building as a PCB storage area for a barrel which was recently dumped on the property and two capacitors which appear to be connected with the buildings and equipment. This use has been imposed on Conwest by the MOEE based upon its constituent legislation. It is not clear from the evidence whether Conwest is held responsible for both the barrel and the capacitor. However, Conwest's obligation appears to flow from its ownership of the land on which the barrel was found (See Ex. 26, Tab 29).

There is not sufficient evidence to determine whether the capacitors are from the machinery which was used to operate the mine or not. However, their custody and security has been addressed by MOEE, so that they do not constitute a threat to the public.

It is interesting to note that the storage of the barrel on what is characterized in the MOEE letter as Nelson's property was intended to be temporary. Based upon the temporary nature of this PCB storage site, the fact that there is no threat to the public and fact that evidence linking the barrel and capacitors to mining activity is

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weak, the tribunal finds that the temporary PCB storage site is not related to the mining activity which had been carried out at this site, and is not a "mine" within the definition in section 1 of the **Mining Act**, nor does it constitute occupancy or ownership of a mine.

Based upon the foregoing, the tribunal finds that the findings of the Director are not reasonable and that it will revoke that portion of the Director's Requirement to Conwest to Make Changes which concerns the buildings and equipment within the fenced in mill area.

Proper Use of Director's Discretion

If the tribunal is incorrect in its finding that Conwest is not an occupier, and therefore an owner, of the buildings and equipment within the fenced in mill area or in the event the Director issues a new Notice Requiring the Filing of a Proposed Closure Plan from Conwest in respect of the buildings and equipment, it would be necessary to consider whether the Director was exercising proper use of his discretion in requiring a proposed closure plan either from both Nelson and Conwest, or in the future from Conwest. In **MacGregor v. The Director of Mine Rehabilitation**, the tribunal considered the Draft Procedure on Section 149 (see **Schedule 1** commencing at page 26 of **MacGregor**) and made findings on whether the Director properly exercised his discretion, at page 25. Similar considerations would have to be applied in this appeal.

Mr. Norwood has correctly pointed out that additional evidence and submissions on this issue would be required. The parties did not seek to address this issue in the course of the hearing, wishing to do so only upon the tribunal's direction if it became necessary. The tribunal makes no findings in this regard. However, the manner in which the Director exercised his discretion in proceeding against Conwest raises serious questions. The decision to not oppose the discharge of the Receiver Manager at a time when funds were available in Nelson to pay for rehabilitation is of concern. Similarly, the choice of proceeding against Conwest when it was the activities of Nelson's agents which has caused cost estimates to escalate due to the deterioration of the asbestos is also of concern.

The impact of the Director's conduct may also have implications in Conwest's future status in relation to this property. The severance of the buildings and machinery from the realty as chattels in this case is unusual in that normally such severance is

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followed by removal or demolition. However, this was not the case. Whether they must be regarded as remaining as chattels in perpetuity would have to be addressed. The issue of annexation is addressed in **Stack v. Eaton** (1902), 4 O.L.R. 335 (Div.Ct.) where Meredith, C.J. states at page 338:

> I take it to be settled law:--
>
> (1) That articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as shew that they were intended to be part of the land.
>
> (2) That the articles affixed to the land even slightly are to be considered part of the land unless the circumstances are such as to shew that they were intended to continue chattels.
>
> (3) That the circumstances necessary to be shewn to alter the **primâ facie** character of the articles are circumstances which shew the degree of annexation and object of such annexation, which are patent to all to see.
>
> (4) That the intention of the person affixing the article to the soil is material only so far as it can be presumed from the degree and object of the annexation.
>
> (5) That, even in the case of tenants' fixtures put in for the purposes of trade, they form part of the freehold, with the right, however, to the tenant, as between him and his landlord, to bring them back to the state of chattels again by severing them from the soil, and that they pass by a conveyance of the land as part of it, subject to this right of the tenant.

The discharge of the Receiver Manager of Nelson by the British Columbia Supreme Court on November 5, 1993 may well have constituted an abandonment by

Nelson of the chattels, so that they would have, as of that date once again become merged in the realty and the property of Conwest. Should the Director proceed against Conwest in future, there may be legal consequences to his prior conduct which would have to be argued in any future appeal before the tribunal.

Is Nelson a Proponent?

In its interlocutory order dated May 12, 1994, the tribunal found, at page 20, that "[i]t would be contrary to the public interest to allow Nelson to withdraw or to discontinue its appeal until the question of whether Nelson is a proponent for all or a portion of Mining Location K-65 and Mining Claim TB-82838 can be determined."

Based upon its findings under the heading "Ownership of Mill Buildings - Bill of Sale", that Nelson is the owner of the chattels, meaning the buildings and equipment within the fenced in mill area, the tribunal finds that this ownership falls within the definition of "proponent" in subsection 139(1) of the **Act**.

As this was the only issue which was raised in the Notice Requiring Hearing filed by Nelson, the tribunal finds that it will confirm the requirement of the Director under subsection 149(1) that Nelson is required to submit a proposed closure plan.

Tailings Area

At the time the tailings were deposited, both the surface and mining rights were held by Coldstream Copper Mines Limited. It is in the transactions between the reorganized North Coldstream Mines Ltd. and the predecessor to Conwest, that rights were severed.

In the conveyance from Coldstream Mines Limited to International Mogul Mines Limited, registered July 25, 1977 as instrument 197183, 44 separate parcels are involved, being 29 whole parcels and 15 partial parcels. Part of Parcel 5685 District of Fort William Freehold is comprised of Mining Claim TB-82838, and although it is the evidence of Mr. Zurowski that this land was acquired in fee simple in error, Conwest has assumed responsibility for the tailings located thereon.

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The relevant portions of the conveyance refer to those parts of the parcels listed, using the description "THE MINING RIGHTS ONLY in Mining Claim" TB-82837, 62886 and 62887.

Mr. Coburn referred to the Schedule "A" of the Agreement of Purchase and Sale, dated November 18, 1976 (Ex. 26, Tab 20) which lists the mining rights only of the patented mining claims listed, including those listed above. He also referred the tribunal to paragraph 7 of the Agreement:

> 7. To the extent that the interest of Coldstream in and to the Leases and Property is in mining rights only, Mogul shall have no obligation with respect to anything left on the surface prior to the execution of this agreement or arising out of surface rights, and Coldstream agrees to indemnify and save harmless Mogul from any claims, damages or other obligations relating to arising from same.

The general rule of construction of deeds is set out in paragraph 46 of **Deeds and Documents**, Title 44, Volume 8, Canadian Encyclopedic Digest (Ontario, Third Edition) as follows:

> **46** The court must, if possible, construe a deed so as to give effect to the plain intent of the parties.[18] In the interpretation of deeds and other writings, the true meaning of the parties must be the ultimate object; and where the parties were really agreed and have expressed that agreement, the courts ought to be able to find, and give effect to it. The governing rule in all cases of construction is the intention of the parties, and, if that intention is clear, it is not to be arbitrarily overborne by any presumption.[19] The intention of

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18. *Nat. Trust Co. v. Whicher*, [1912] A.C. 377 (P.C.) and *Detomac Mines Ltd. v. Reliance Fluorspar Mining Syndicate Ltd*., [1952] O.R. 423; affirmed [1952] O.R. 783.

19. *Barthel v. Scotten* (1895), 24 S.C.R. 367; *Farquharson v. Barnard Argue, etc. Co*., 25 O.L.R. 93 at 111; affirmed [1912] A.C. 864 (P.C.).

> the parties is to be gathered from the sense and meaning of the document as determined in the first place by the terms used in it,[20] and effect should, if possible, be given to every word of the document.[21]

With respect to Mr. Coburn's submission that extrinsic evidence, such as the Agreement of Purchase and Sale, internal memoranda of International Mogul Mines, and the evidence of Mr. Zurowski, on what was intended by the parties by the words, "mining rights only", the tribunal finds that such evidence cannot be considered, relying on the decision of Strong, C.J. in **Barthel v. Scotten**, (1895) 24 S.C.R. 367 at page 373, where he states:

> I have not referred to the parol evidence or extrinsic facts, as a good deal of it, however conclusive in an action for rectification, seems to me to be strictly inadmissible in aid of the construction of the deed.

In **Peterson Lake Silver Cobalt Mining Co. Limited v. Dominion Reduction Co. Limited** (1918), 44 O.L.R. 177(CA); aff'g (1917), 41 O.L.R. 182 (SC); aff'd (1919), 59 S.C.R. 646, the issue was whether the tailings, which were an asset or chattel at the time they were "created" remained as such when deposited on the property of another, without express agreement as to ownership or whether they became part of the realty of the land upon which they were deposited. At page 183, Meredith, J. adopts the conclusion and reasoning of the trial Judge, found at (1917) 41 O.L.R. 182, set out at page 185:

> I have come to the conclusion that the tailings when so deposited upon the land of the plaintiff became its property.

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20. *Glynn v. Margetson*. [1893] A.C. 351, 358 (H.L.); *Morei v. Lefrancois* (1906), 38 S.C.R. 75.

21. *Can. Cement Co. v. Fitzgerald* (1916), 53 S.C.R. 263 at 272; **Wells v. Mitchell**, [1939] O.R. 372 (C.A.); *Burke v. Ritchie* (1906), Cout. S.C. 365.

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> I adopt the words of Bigham, J., in **Boileau v. Heath**, [1898] 2 Ch. 301, 305:--
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> "They could not sell it and did not want to sell it, and when they piled it on the earth their intention was that it should once more form part of the earth out of which it had been produced, and should no longer be, if ever it was, of the nature of a chattel."

In **Seymour Management Ltd. v. Kendrick**, [1978] 3 W.W.R. 202 (BCSC) involves a determination of whether a reservation in the original Crown Grant of minerals would apply to minerals contained in tailings which were deposited on the surface of the land afterwards. At pages 204-5 , Munroe, J. states:

> If additional earth containing minerals had accreted to the land after the Crown grants by means of natural forces, those minerals would be subject to the Crown reservation - but is that so where, as here, the tailings materials were deposited after the Crown grants by man? I think not. Such reservation must, I think, be expressly stated. The intention of the parties to the Crown grants could not have been to reserve title in the Crown to minerals in tailings which were then regarded as of no practical value, place on the land by man, and which later may have become practicable to treat at a profit by a new process resulting from technological advances.

In **La Rose Mines Ltd. v. Mining Corp. of Canada Ltd.** (1922), 22 O.W.N. 61, Middleton, J. states at page 61:

> ... Though at the time the ore was passing through the mill the tailings as well as the concentrate belonged to the plaintiffs, they must be taken to have assented to what was done, and to the tailings, then regarded as worthless, being deposited upon the defendants' property in such as way as to constitute part of the freehold. They could not be regarded as chattel property stored at the bottom of the lake for convenience.

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In **Mastermet**, the facts were that "the mines, minerals and mining rights in, upon and under the lands" in certain mining locations were conveyed to the predecessor of Canadaka Mines Ltd., while "the surface rights only" to the same parts of the same numbered mining locations were conveyed to the predecessor of Mastermet Cobalt Mines Ltd. The trial judge relied on the definitions of "mine", "mining" and "surface rights" in finding that mineral-bearing deposits, known as tailings, retain their character being composed of particles of minerals regardless of economic value of change in character and that the intention of the conveyance in referring to the rights transferred to the predecessor of Canadaka was an exhaustive right to mine.

The Court of Appeal, in **Mastermet**, discussed the cases referred to above which support the proposition that where earth or other substances containing minerals accrete to the land by forces of nature, they become part of the land. These cases were held not to be helpful because of the severance of the mining and mineral rights by a conveyance which had to be construed and by reason of the definitions quoted. At page 290, Lacouciere J.A. states:

> As I have said, the statutory definition of words in the **Mining Act** should be given substantial weight in the construction of private transfers or deeds of mining lands. Having regard also to the language used in the transfer of title to the predecessor of the respondent's lessor of the "mines, minerals and mining rights, in, upon and under" the land and to the provisions of s. 16 of the **Conveyancing and Law of Property Act** above quoted, which defined the expression "mining rights" in a conveyance of land, I am bound to conclude that the appellant's predecessor [owner of the surface rights only] did not obtain the ownership of or the right to mine the mineralized tailings which had accreted on the surface at the time of the severance of surface rights.

Clearly, **Mastermet** involves the situation most closely resembling the current appeal, namely that the court was asked to interpret a conveyance. The decision reiterates and refines the method of determining the nature of the interest conveyed where there has

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been a severance of mining rights and surface rights. This process is as follows:

1. In accordance with section 16 (now 17) of the **Conveyancing and Law of Property Act**, determine whether the intent of the parties can be determined from the instrument itself. Extrinsic and parol evidence will not be considered.

2. In attempting to ascertain the meaning of the words used in the instrument, statutory definitions of the words used, such as those contained in the **Mining Act** will be given weight. In this regard, the Court of Appeal in **Mastermet** took the meaning of the intent of the document further by indicating that the vernacular within the industry could be relied upon, and relied on the relevant definitions of the **Mining Act**, its reasoning set out at pages 286 and 287:

> The words "mine", "mines" and "minerals" have been given different meanings in the various cases which deal with these words as used in particular statutes, or in leases and other conveyancing documents containing a reservation of mines and minerals, or as exceptions out of a grant of land. Most of these cases approach the problem whether a substance is a mineral as a question of fact to be determined by the use, character and value of the substance, in the light of the common understanding of mining engineers, commercial men and landowners at the time of the conveyance: see **Stroud's Judicial Dictionary of Words and Phrases**, 4th ed., vol. 3, p. 1671; **A.-G. for Isle of Man v. Moore**, [1938] 3 All E.R. 263; **Lord Provost & Magistrates of Glascow v. Farie** (1888), 13 App. Cas. 657; **Seymour Management Ltd. et al. v. Kendrick et al; Princeton, Third Party**, [1978] 3 W.W.R. 202; **Midland R. Co. et al. v. Robinson** (1889), 15 App. Cas. 19.
>
> To understand the vernacular of mining engineers and other mining people, it is of great practical assistance to turn to the definitions of the noun and the verb "mine" and the word "mining" contained in s. 1 paras. 15 and 16 of the **Mining Act** and its predecessor, and quoted above.

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> I would give substantial weight to this provincial statute governing the mining industry in determining the meaning of the language of mining engineers and other persons engaged in mining -- the definitions of its words -- in the same way that the meaning of the language of other trades and professions is influenced by relevant legislation.

As the conveyance in this appeal took place in 1977, the tribunal finds that the applicable legislation for purposes of definitions is the **Mining Act**, R.S.O. 1970, c. 274. These are set out below:

> "mining rights" means the ores, mines and minerals on or under any land where they are or have been dealt with separately from the surface;
>
> the noun "mine", except as defined in Part IX, includes any opening or excavation in, or working of the ground for the purpose of winning, opening up or proving any mineral or mineral-bearing substance, and any ore body, mineral deposit, stratum, rock, earth, clay, sand or gravel, or place where mining is or may be carried on, and all ways, works, machinery, plant, buildings and premises below or above ground belonging to or used in connection with the mine, and also any quarry, excavation or opening of the ground made for the purpose of searching for or removal of mineral rock, stratum, earth, clay, sand or gravel and any roasting or smelting furnace, concentrator, mill, work or place used or in connection with washing, crushing, sifting, reducing, leaching, roasting, smelting, refining, treating or research on any of such substances;
>
> the verb "mine" and the word "mining", except as defined in Part IX, include any mode or method of working whereby the earth or any rock, stratum, stone or mineral-bearing substance may be disturbed, removed, washed, sifted, leached, roasted, smelted, refined, crushed or dealt with for the purpose of obtaining any mineral therefore whether it has been previously disturbed or not;
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> "surface rights" means every right in land other than the mining rights;

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The words in the conveyance are "mining rights only in" the mining claims. Mr. Coburn submitted that the use of the word "only" serves to show that the intent was to limit the rights to those below the ground, and while the tribunal sympathizes with the respondent that this was what it had intended, such intent was not captured by the words used in the instrument. The tribunal has difficulty in finding that the use of the word "only" precludes tailings in which the minerals have previously been disturbed. Rather, the use of the words "mining rights only" serves to distinguish the nature of the interest conveyed from those other mining claims which were transferred in fee simple. While Mr. Coburn has suggested that it was not in the nature of conveyances at the time to specifically list tailings, the tribunal finds that the words "mining rights only" do not sufficiently limit what has been conveyed so as to exclude mining rights in minerals which have been previously disturbed.

Based upon the foregoing, the tribunal finds that Conwest is the owner of the tailings located on Mining Claims TB-82837, 62886 and 62887. The tribunal further finds that the findings of the Director are reasonable and that it will confirm the Director's requirement with respect to the tailings, except that the date will be altered as set out on page two of this Order. Although not set out in detail in these findings with respect to tailings, the tribunals comments with respect to the required details of a closure plan concerning the underground workings and openings to surface apply equally to tailings. Therefore, the Director has reasonably required the details set out in paragraphs one and two of his requirement dated September 8, 1993, and the tribunal finds that this is confirmed.

Conclusions:

Based upon its jurisdiction under subsection 152(5) and on the foregoing findings, the tribunal finds that it will confirm the Director's requirement that Conwest make changes to its existing Closure Plan in respect of all underground workings and openings to surface associated with the mine operation and with respect to all mine tailings, subject only to the alteration of dates as set out further below; that it will revoke the Director's requirement that Conwest make changes to its proposed Closure Plan in respect of the buildings and equipment located within the fenced in mill area.

Based upon its jurisdiction under subsection 152(5) and on the foregoing findings, the tribunal also finds that the requirement of the Director that Nelson file a

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closure plan in respect of the buildings and equipment located within the fenced in mill area is confirmed, subject only to the alteration of dates as set out further below.

Insofar as the original dates for compliance with the Director's requirements have passed, and in the event that there may be further appeal of these matters from the decision of this tribunal, the tribunal finds that it will alter the dates by which compliance with the Directors' Notices and Requirements as follows. The date by which the Closure Plan or alterations to the Closure Plan in respect of the fenced in mill area and all underground workings and openings to surface shall be filed will be altered to within six months of the date of this order or to within six months of final disposition of this matter upon further appeal. The date by which the alterations to the Closure Plan in respect of the tailings area shall be filed will be altered to within twelve months of the date of this order or to within twelve months of the final disposition of this matter upon further appeal.

S C H E D U L E A

THE MINING AND LANDS COMMISSIONER

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

THE MINING ACT

IN THE MATTER OF

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

AND IN THE MATTER OF

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

AND IN THE MATTER OF

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

B E T W E E N:

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

Appellant of the First Part

- and -

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

Respondent of the Second Part

- and -

CONWEST EXPLORATION COMPANY LIMITED ("Conwest")

Party of the Third Part

- AND -

IN THE MATTER OF

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

AND IN THE MATTER OF

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

AND IN THE MATTER OF

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

B E T W E E N:

CONWEST EXPLORATION COMPANY LIMITED

Appellant

- and -

MINISTER OF NORTHERN DEVELOPMENT AND MINES

Respondent

AGREED STATEMENT OF FACTS

CONWEST AND THE MINISTER, by their solicitors, respectfully submit the following statement of facts agreed upon for the purposes of these proceedings:

A. GENERAL CONTEXT

1. The Coldstream Mine Site consists of approximately 70 mining claims. The claims which are at issue in the appeals before the Commissioner are (i) parts of Mining Claims K-65 and TB 82838; in particular, those parts which contain a fenced area enclosing a service building, mill, shaft house, and other related features (the "Mill Area") and (ii) parts of Mining Claims TB 82837, TB 82838, TB 62886 and TB 62887; in particular, those parts which contain surface tailings deposits (the "Tailings Area").

Coldstream Property Claim Map, Exhibit 12, Tab 2

Plan of Physical Assets, Additional Supplementary Brief of Documents, Tab 1

2. Title documents indicate that throughout the 1950's Coldstream Copper Mines Limited, an Ontario corporation, held mining and surface rights to the claims within the Tailings Area and the Mill Area, as well as rights to other claims outside these areas.

Exhibit 26, Tab 2

3. Between 1951 and 1957, Coldstream Copper Mines Limited conducted exploration and development operations over portions of the Coldstream Mine Site, and from 1957 until 1958, conducted mining operations over portions of the Site.

Exhibit 12, Text by M. Zurowski, p.1

4. In 1959, Coldstream Copper Mines Limited re-organized and changed its name to North Coldstream Mines Ltd. Mining operations resumed until August, 1967.

Exhibit 12, Text by M. Zurowski, p.p.1-2

5. In 1968, North Coldstream Mines Ltd. entered into a series of transactions with Nelson Machinery Company Limited, outlined in Part B herein. These transactions concern the Mill Area, and the Coldstream "Townsite" located to the west of the Mill Area.

Exhibit 12, Text by M. Zurowski, p.2

6. Pursuant to an amalgamation in December, 1971, North Coldstream Mines Ltd. changed its name to become Coldstream Mines Limited.

Exhibit 12, Text by M. Zurowski, p.2

7. In June, 1975, Coldstream Mines Limited issued a series of debentures to International Mogul Mines Limited, which debentures subsequently went into default.

Exhibit 26, Tabs 19 and 23

8. On November 9 and November 18, 1976, International Mogul Mines Limited entered into settlement agreements with Coldstream Mines Limited, more fully outlined in Part C herein. The latter agreement, dated November 18, 1976, concerns inter alia the Tailings Area.

Exhibit 26, Tabs 19 and 20

9. In June, 1980, the Ontario charter for Coldstream Mines Limited was cancelled.

Additional Supplementary Brief of Documents, Tab. 4

10. In August, 1982, International Mogul Mines Limited amalgamated with three other companies to become Conwest Exploration Company Limited.

Exhibit 12, Text by M. Zurowski, p.2

B. THE MILL AREA

11. The following transactions were entered upon by North Coldstream Mines Ltd. (the predecessor by amalgamation of Coldstream Mines Limited) and Nelson Machinery Company Limited, a British Columbia corporation carrying on the business of disposal and salvage of mining buildings and equipment:

(a) On December 27, 1968, North Coldstream and Nelson entered into a memorandum of agreement whereby North Coldstream agreed to sell and Nelson agreed to purchase the surface rights to parts of Mining Claims K-64, K-65, T.B. 82840, T.B. 82841, T.B. 82838, and the whole of Mining Claim T.B. 82839, as marked on a schedule attached to the agreement. The property so marked encompasses the former Coldstream Mine "Townsite" lying west of the Mill Area and does not include the fenced-in portion of K-65 on which the mill is sited. The parties agreed that North Coldstream would deliver

a conveyance and that Nelson would deliver a mortgage back, but that the conveyance and the mortgage would not be registered on closing. The parties further agreed that Nelson would provide a survey whereupon the parties would deliver a conveyance and a mortgage in registrable form, and such deed and mortgage would be registered forthwith after delivery.

Exhibit 26, Tab 5

(b) On December 27, 1968, pursuant to the memorandum of agreement, Nelson executed an unregistered mortgage to North Coldstream in respect of all the lands covered by the memorandum of agreement, and North Coldstream executed an unregistered conveyance of portions of the lands covered by the memorandum of agreement located within Mining Claims K-65 and K-64. However, surveys of the lands covered by the memorandum were not completed until 1972, by which time Coldstream Mines Limited had become the successor by amalgamation of North Coldstream.

Exhibit 26, Tabs 6, 8, and 15

(c) On December 27, 1968, North Coldstream also executed an indenture as "Bargainor", transferring to Nelson all goods, chattels and effects and buildings situate on the fenced-in mining property on mining claims K-65 and T.B. 82838. This latter reference encompasses the buildings and other assets located within the Mill Area. There appears to be no evidence that the indenture was registered in any fashion.

Exhibit 26, Tab 7

Plan of Physical Assets, Additional Supplementary Brief of Documents, Tab 1

12. On September 27, 1972, Coldstream Mines Limited, acting on the directions of Nelson, executed a registered conveyance in respect of surface rights to Mining Claims K-62 and K-64, and part of Claim K-65, to Coldstream Holiday Properties Ltd. (Inst. No. 152280). By Transfer No. 99467 dated

September 27, 1972, Coldstream also conveyed the surface rights to part of Mining Claims T.B. 82840, T.B. 82841, T.B. 82838 and all of T.B. 82839 to Coldstream ~~Holding~~ Holiday Properties Ltd. The properties conveyed encompass the "Townsite" lying west of the Mill Area, and do not include the fenced-in portion of K-65 on which the mill sits.

Exhibit 26, Tabs 15 and 17
Additional Supplementary Brief of Documents, Tab 2

13. Nelson has acknowledged its ownership and control of the buildings and other assets contained in the Mill Area, both to the Ministry of Natural Resources and to third parties.

Exhibit 26, Tabs 27, 28, and 29
Exhibit 27, Tab 9A para. 11

14. Conwest is the current registered owner of the mining rights and surface rights relating to the Mill Area.

Exhibit 13, Tab 1
Exhibit 26, Tab 24

C. THE TAILINGS AREA

15. The settlement agreements entered into by Coldstream Mines Limited and International Mogul Mines Limited, in November 1976, which are referred to in paragraph 8 above, included the following terms:

(a) Pursuant to the agreement dated November 9, 1976, Coldstream Mines Limited agreed to transfer certain properties to International Mogul Mines Limited in lieu of partial payment of interest owing. This agreement does not affect the ownership of the Tailings Area or the Mill Area.

Exhibit 26, Tab 19

(b) Pursuant to the agreement dated November 18, 1976, Coldstream Mines Limited agreed inter alia to transfer to International Mogul Mines Limited all of its right, title and interest in certain additional properties. According to this agreement, these properties were to include Coldstream's interest in the mining rights only in the Tailings Area and the Mill Area. The agreement further provided that to the extent that the interest of Coldstream was in mining rights only, Mogul should have no obligation with respect to anything left on the surface or arising out of surface rights.

Exhibit 26, Tab 20

16. Subsequent to the agreement dated November 18, 1976, Coldstream Mines Limited executed conveyances which purport to transfer to International Mogul Mines Limited the mining rights only in Mining Claims T.B. 82837, T.B. 62886, and T.B. 62887. However, the conveyances of the interest of Coldstream Mines Limited in Mining Location K-65 and Mining Claim T.B. 82838 are not expressly limited to mining rights only.

Exhibit 26, Tabs 24 and 25

17. Conwest is the current registered owner of the mining rights, and the Crown is the current registered owner of the surface rights relating to the Tailings Area.

Exhibit 26, Tab 25

D. RECENT EVENTS

18. By Notice dated November 26, 1992, the Director of Mine Rehabilitation (the "Director") required that Conwest submit a closure plan by June 30, 1993 with respect to the Coldstream Mine Site.

Exhibit 28, Tab 1.

19. On December 1, 1992, Conwest wrote to the Director, providing a detailed claim map and advising that in so far as the Director's Notice pertained to the closure of the buildings located within the Mill Area, the Notice should be addressed to Nelson as owner of this property.

Exhibit 28, Tab 3

20. On April 13, 1993, the Director served Notice on Nelson requiring that Nelson submit a closure plan by June 30, 1993 with respect to Claims K-65 and TB 82838. Eric A. Biagi, the Receiver-Manager of Nelson, filed a Form 29 Notice to Require Hearing, advising *inter alia* that "the receiver has no funds to act on the Notice", notwithstanding that by September 30, 1993 Nelson would have achieved a net realization from liquidating assets in the amount of $1,351,863.00. Mr. Biagi did not deny Nelson's ownership of the buildings and other assets within the Mill Area.

Exhibit 28, Tab 4
Exhibit 27, Tab 11A, para. 7 and Exhibit D

21. On June 29, 1993, Conwest filed a proposed closure plan in response to the Director's Notice dated November 26, 1992. In its proposed plan, Conwest maintained its position that it was not responsible for the closure of the buildings located in the Mill Area, or for the rehabilitation of the tailings deposits in the Tailings Area.

Exhibit 12, Text by M. Zurowski

22. On September 9, 1993, the Commissioner ordered that Nelson, the Minister and Conwest, as "Party of the Third Part", file copies of all documentation in their possession in relation to the title of Claims K-65 and TB 82838 no later than October 8, 1993. The Commissioner also advised that the tribunal would set a date to determine whether Conwest should be added as party to Mr. Biagi's appeal.

Exhibit 28, Tab 6

23. On September 13, 1993, Conwest received further Notice from the Director requiring that Conwest make changes to its proposed closure plan to include rehabilitative measures with respect to the buildings located within the Mill Area, and with respect to the tailings deposits in the Tailings Area. Conwest filed a Form 29 Notice to Require Hearing.

Exhibit 28, Tab 7

24. On October 6, 1993, Conwest received a copy of a letter from Mr. Biagi's counsel, Michael Bourassa, purportedly in furtherance to the Commissioner's Order to File dated September 9, 1993. The letter was received without attachments, and made reference to five title documents, including the Indenture dated December 27, 1968 (Exhibit No. 26, Tab 7), whereby North Coldstream Mines Limited sold Nelson all goods, chattels, effects, and buildings situate on the Mill Area.

Exhibit 28, Tab 8

25. On October 8, 1993, Conwest delivered its Brief of Documents pursuant to the Commissioner's Order to File. (Exhibit 26). By cover letter, Conwest submitted that Mr. Bourassa's record of documents was incomplete as it failed to provide any particulars of Nelson's receivership.

Exhibit 28, Tab 9

26. On October 14, 1993, Mr. Bourassa wrote to the Commissioner undertaking to deliver particulars of Nelson's receivership "as soon as possible". However, particulars of Nelson's receivership have never been delivered by Nelson or by Mr. Bourassa.

Exhibit 28, Tab 10.

27. On October 27, 1993, counsel for Conwest wrote to Mr. Bourassa advising of receipt from the Minister of an extract from an affidavit filed by Mr. Biagi in the British Columbia Supreme Court. In this affidavit, Mr. Biagi deposed to the Court that he had been informed by Mr. Bourassa and verily believed that no orders had been issued against Nelson under the Ontario Mining Act requiring Nelson

to undertake any rehabilitation work. In his letter to Mr. Bourassa, counsel for Conwest expressed the opinion that it would be inappropriate to disburse funds from the receivership until such time as the Director's claim against Nelson had been resolved, and requested notice of any steps taken towards discharge of Nelson's receiver.

Exhibit 28, Tab 11, and Exhibit 27, Tab 9B, paras. 8 and 9

28. Mr. Bourassa responded on November 3, 1993 referring to the stay prescribed by s. 152(2) of the Mining Act, and indicating that the Minister had had notice of all steps taken in the receivership. Mr. Bourassa advised that steps were being taken to discharge the receiver on November 5, 1993 and that the Minister had also received notice of the discharge proceedings.

Exhibit 28, Tab 12

29. Counsel for Conwest wrote to the Minister on November 4, 1993, advising that in light of the information received from Mr. Bourassa, Conwest would attempt to intercede before the British Columbia Supreme Court in order to ensure that the Court had been fully apprised of the proceedings under the Ontario Mining Act. Counsel for the Minister offered to appoint Conwest as its agent in the proceedings in British Columbia. Conwest did not accept the offer, feeling that its representation of the Minister would be inappropriate in the circumstances, given that Conwest and the Minister were adverse parties in the appeals.

Exhibit 28, Tab 13

30. Conwest retained Geoffrey H. Dabbs of the Vancouver law firm Davis & Company, to appear on November 5, 1993 in the proceedings with respect to the discharge of Nelson's receiver. Mr. Dabbs reported that the Court discharged the receiver upon being advised that the Director had been served in the proceedings and that the Director had confirmed that no one would appear on the Director's behalf. The Court indicated to Mr. Dabbs that only the Director had standing to intercede, and not Conwest.

Exhibit 28, Tab 14

31. After the receivership proceedings on November 5, 1993, Mr. Dabbs sent Conwest copies of the Court documents which Nelson, or its creditors, had filed and previously served on the Director. These documents, which had not been disclosed previously to Conwest, were filed by Conwest as a Supplementary Brief of Documents on December 6, 1993. (Exhibit 27). The documents disclose that:

(a) Nelson was placed in receivership on November 1, 1991 upon the application of Applecross Holdings Ltd., and Mathew and Dawne Dunsmore as plaintiffs against and creditors of Nelson.

Exhibit 27, Tab 5 and 6

(b) The directors and officers of Applecross Holdings Ltd. are also directors and officers of Nelson.

Exhibit 27, Tabs 1 and 2

(c) Mathew Dunsmore was the president of Nelson.

Exhibit 27, Tab 1

(d) On July 29, 1992, the British Columbia Supreme Court approved a sale of Nelson's inventory and equipment to an entity known as "Nelson Machinery & Equipment Limited". Corporate search records and Mr. Biagi's own affidavit sworn in support of the sale indicate that Nelson Machinery & Equipment Limited is controlled by the former principals of Nelson.

Exhibit 27, Tab 3, 7, 7A para. 5 and 8

(e) On August 5, 1993, the British Columbia Supreme Court granted an order substituting Nelson Machinery & Equipment Limited as plaintiff against Nelson. In her affidavit

supporting the motion, Valerie Greenwood, a principal of Nelson Machinery & Equipment Limited and a former principal of Nelson, deposed that:

> "I am further informed by Mr. Biagi and verily believe that there is a potential liability of the Company [ie. Nelson] arising with respect to a claim being made by the Ministry of Mines in the Province of Ontario concerning certain abandoned mining buildings and equipment which had previously been owned by the Company in Northern Ontario. In the event that such a claim were made by the Ministry of Mines, the potential shortfall to the Plaintiffs in these proceedings could increase."

Ms. Greenwood further indicates that the terms under which Nelson Machinery & Equipment Limited was to be substituted as plaintiff included the vesting of Nelson's remaining assets to Nelson Machinery & Equipment Limited, which vesting was accomplished or to be accomplished by court order.

Exhibit 27, Tabs 9, 9A paras. 11 and 12 and Exhibit E (para. 5 and Sch. B)

(f) In his affidavit supporting the motion brought on August 5, 1993, Mr. Biagi also confirms that:

> "On November 27, 1968, the Company entered into an agreement with North Coldstream Mines Ltd. under the terms of which the Company agreed to purchase all of the surface rights and certain buildings and equipment located at the Birch [sic] Lake property."

Exhibit 27, 9B paras. 3 and 9, and Tab 10

(g) Prior to the discharge of the receiver, the sale of Nelson's assets to Nelson Machinery & Equipment Limited was completed on September 30, 1993. Between November 1, 1992 and September 30, 1993, Nelson had liquidated assets and realized net proceeds available for distribution in the amount of $1,351,863.00.

Exhibit 27, Tab 11A para. 7 and Exhibit B

32. In November, 1993, the Registrar for the Commissioner convened a pre-hearing conference for December 10, 1993. On December 3, 1993, Mr. Bourassa wrote to advise that Nelson would not be proceeding with its appeal.

Exhibit 28, Tab 15

33. On May 12, 1994, the commissioner issued a Interlocutory order that the withdrawl or discontinuance of the appeal by Nelson was contrary to the public interest and would not be allowed.

Interlocutory Order of the Commissioner, Additional Supplementary Brief of Documents, Tab 3

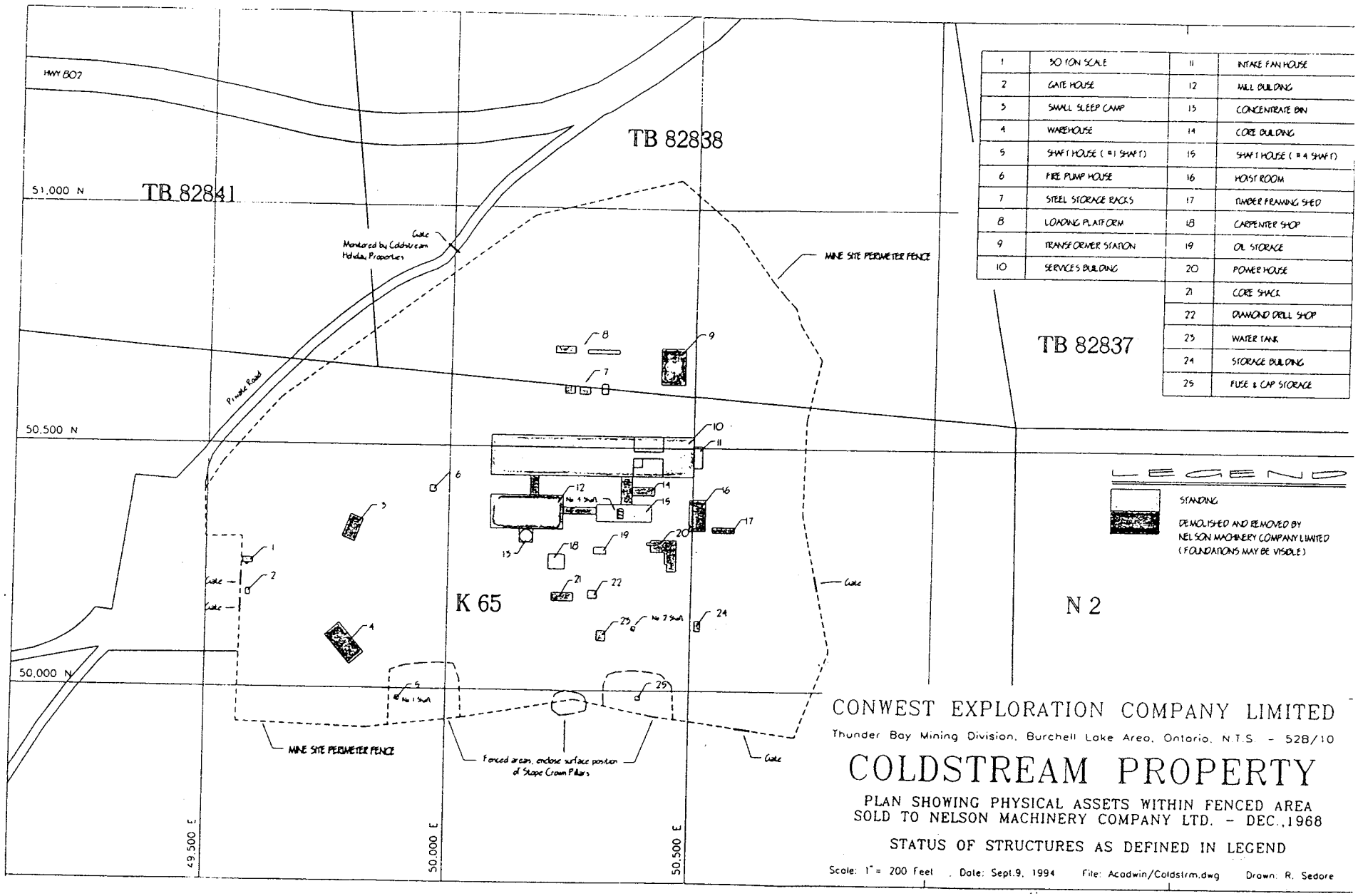
RESPECTFULLY SUBMITTED BY

Frederick F. Coburn
Solicitor for Conwest

John Norwood
Solicitor for the Minister

DATED: DECEMBER 6, 1994

SCHEDULE B



CONWEST EXPLORATION COMPANY LIMITED

Thunder Bay Mining Division, Burchell Lake Area, Ontario, N.T.S. - 52B/10

COLDSTREAM PROPERTY

PLAN SHOWING PHYSICAL ASSETS WITHIN FENCED AREA SOLD TO NELSON MACHINERY COMPANY LTD. - DEC.,1968

STATUS OF STRUCTURES AS DEFINED IN LEGEND

Scale: 1" = 200 Feet . Date: Sept.9, 1994 File: Acadwin/Coldstrm.dwg Drawn: R. Sedore