File No. MA 001-02
File No. MA 013-07

L. Kamerman ) Friday, the 21st day
Mining and Lands Commissioner ) of May, 2010.

**THE MINING ACT**

**IN THE MATTER OF**

The required certified closure plans regarding the mining operations of Moneta Porcupine Mines Inc. ("Moneta") involving Part of Parcel 2804 Whitney and Tisdale, being patented Mining Claim P-13332, being the NE1/4 of the S1/2 of Lot 12, Concession II, in the Township of Tisdale, (hereinafter referred to as the "certified closure plans");

**AND IN THE MATTER OF**

The Requirements of the Director of Mine Rehabilitation (the "Director") pursuant to subsection 147(1) of the **Mining Act**, dated the 12th day of December, 2001 and the 4th day of May, 2007, respectively, that Moneta shall give notice in writing to the Director that contains the prescribed information relating to the Moneta Mine in connection with the certified closure plans;

**AND IN THE MATTER OF**

Notices Requiring Hearings before the tribunal under Part VII of the **Mining Act**, pursuant to subsection 152(1) of the **Mining Act**, concerning the Requirements of the Director, dated the 12th day of December, 2001 and dated the 4th day of June, 2007, respectively.

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

MONETA PORCUPINE MINES INC.
Appellant

- and -

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

- and -

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CITY OF TIMMINS, TIMMINS OVERHEAD DOORS LTD.,
(500779 ONTARIO LTD.) and CLEMENT RAYMOND carrying
on business as RAYMOND'S GARAGE
Parties of the Third Part for MA 001-02 only

**O R D E R**

**WHEREAS** the appeals to the tribunal in these matters were received on the 11th day of January, 2002 and on the 14th day of June, 2007, respectively, both pursuant to subsection 152(3) of the **Mining Act**;

**UPON** hearing from the parties and reading the documentation filed;

**1. IT IS ORDERED** that the Order of the Director of Mine Rehabilitation, Ministry of Northern Development and Mines, dated the 12th day of December, 2001, that Moneta Porcupine Mines Inc. submit a certified closure plan for the Stope 1-2 mine hazard to be rehabilitated to prescribed standards be and is hereby confirmed, to be completed within six months from the date of this Order and furthermore, that appeal MA 001-02 be and is hereby dismissed.

**2. IT IS FURTHER ORDERED** that the Order of the Director of Mine Rehabilitation, Ministry of Northern Development and Mines, dated the 4th day of May, 2007, that Moneta Porcupine Mines Inc. submit a certified closure plan for the mine hazards relating to crown pillars of the number 1-1 and 1-7 stopes of the Moneta Mine, that four shafts that come to the surface bearing numbers 1 through 4 and the fill raise that comes to the surface be rehabilitated to prescribed standards, be and are hereby confirmed, to be completed within six months from the date of this Order and furthermore, that appeal MA 013-07 be and is hereby dismissed.

**3. IT IS FURTHER ORDERED** that the tribunal will consider submissions for costs in this matter in writing from counsel for the respondent, to be filed with the tribunal and counsel for the appellant within 45 days of the issuance of this Order **AND** a further submission in response, from counsel for the appellant to be filed with this tribunal and counsel for the respondent within 15 days thereafter.

Reasons for this Order are attached.

**DATED** this 21st day of May, 2010.

Original signed by L. Kamerman

L. Kamerman
MINING AND LANDS COMMISSIONER

File No. MA 001-02
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**AND IN THE MATTER OF**

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**AND IN THE MATTER OF**

Notices Requiring Hearings before the tribunal under Part VII of the **Mining Act**, pursuant to subsection 152(1) of the **Mining Act**, concerning the Requirements of the Director, dated the 12th day of December, 2001 and dated the 4th day of June, 2007, respectively.

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

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**REASONS**

**Appearances:**

Mr. Francis Yungwirth: Agent and Counsel on behalf of the Appellant
Ms. Catherine Wyatt: Counsel on behalf of the Respondent

Moneta Porcupine Mines Inc., having acquired by grant from the Crown mining lands in fee simple, operated the Moneta Mine in Timmins, Ontario, until operations ceased in the early 1940s, after which the surface rights were severed, sold off and developed, thereby removing most visible traces on the surface that the mine ever existed. Based initially upon repeated and significant subsidence of one particular feature of the Moneta Mine and later upon concern regarding the overall stability of the underground workings of a defunct mine in a municipal setting, the Director of Mine Rehabilitation, Ministry of Northern Development and Mines, issued two orders pursuant to Part VII of the Mining Act requiring the filing of two certified closure plans, from which requirements Moneta has appealed.

Moneta's case is based upon a highly idiosyncratic approach to the interpretation of provisions of the **Mining Act** and upon it's maintaining that it has the option of opting out of those provisions entirely The tribunal has been asked to find that Moneta does not meet the statutory definition of a proponent by virtue of the fact that, with no surface mine features remaining and without a statutory right of access to the underground features of the old Moneta Mine, whatever characterization may be given to its remaining interests, its interest does not constitute mining lands in any practical or operational sense. Moneta has asked the tribunal to find, again by virtue of the fully urban development of the surface overtop of its mine, that a statutory contrary intention to having Part VII apply exists, whereby the Director is precluded from making any orders in relation to the closure of the mine. Moneta has asked to have recognized that it be allowed to impose confabulated private arrangements on the Director as an alternative to filing closure plans. Finally, Moneta has asked the tribunal to ignore the statutory definition of a mine hazard by requiring the Director to prove that a hazard exists.

The tribunal finds that there is no basis in law for allowing Moneta to effectively opt out of the regulatory scheme imposed by Part VII of the **Mining Act**. Its legal arguments are distorted and marginal alternatives to straightforward statutory interpretation. The tribunal has been asked to outright ignore the operation of mining law specifically drafted to deal with rehabilitation in favour law or principals taken wholly out of context. Moneta's carriage of the proceedings was equally troubling, in that it elected to call no evidence whatsoever, attempting throughout to provide evidence through long, rambling and often totally irrelevant cross-examination. This continued despite ongoing objections by counsel for the Director and admonishments by the tribunal.

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The tribunal finds that it has heard no compelling or relevant evidence and no meaningful and/or logical arguments from Moneta which would lead it to interfere with the Director's two Orders. Both appeals will be dismissed and the Director's Orders will be confirmed.

**Overview**

The two appeals in these matters arise from two orders issued by the Director of Mine Rehabilitation pursuant to subsection 147(1) of the **Mining Act** requiring the filing of closure plans, which were appealed by Moneta Porcupine Mines Inc. (Moneta) and referred to the tribunal by the Director for hearings pursuant to subsection 152(3).

On December 12, 2001, the Director issued an Order that the 1-2 stope be rehabilitated to prescribed standards; the appeal was dated and received by the Director on January 3, 2002 and subsequently referred to the tribunal on January 11, 2002. The second Order of May 4, 2007, required that that crown pillars of the number 1-1 and 1-7 stopes of the Moneta Mine, 4 shafts that come to the surface bearing numbers 1 through 4 and a fill raise that comes to surface be similarly rehabilitated to prescribed standards. The appeal to the Director was both dated and received on June 5, 2007 and referred in accordance with legislative requirements on June 11, 2007 and received by the tribunal on June 14, 2007.

These matters were heard in Timmins on November 27 and 28, 2007, with final submissions having been heard via telephone conference call on December 17, 2007 and January 28, 2008. The delay in bringing the first appeal to a hearing was due to ongoing attempts by the Registrar of the tribunal and the Director to reach a settlement with Moneta. For reasons properly not disclosed to the tribunal, settlement could not be achieved.

Moneta elected to call no witnesses. As indicated above, Moneta's cross-examination, such as it was, was more in the nature of its counsel and agent purporting to give evidence or attempting to obtain agreement from the Director's witness on its interpretations of the applicable law. There was little meaningful challenge to the facts as presented by the witness on behalf of the Director. This will be outlined as facts which are unchallenged.

Issuance of a decision has remained outstanding while the tribunal has extensively grappled with how to present what it heard. Normally, this tribunal has regarded as important that it demonstrate to the losing party that it was heard and understood and explain why its position was not successful. In this case, instead, the tribunal found itself delving into the Rules of Professional Conduct of the Law Society of Upper Canada as well as case law on the impact of issues with carriage of files by counsel. The tribunal has concluded that there is no recourse through these proceedings for the challenges it faced. Disciplinary proceedings are the purview of the Law Society and as far as the impact of conduct on a case, allegations that a lawyer's carriage of a file may be incompetent appears to be material only on appeal, only in a criminal proceeding and only if it resulted in a miscarriage of justice[1].

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[1] **R. v. B (G.D.)** 2000 CarswellAlta 348; 2000 S.C.C. 22, per Major, J.

**Burden of Proof**

The matter of the burden of proof was not addressed directly by counsel. However, there was discussion concerning Moneta introducing evidence through the Director's witness, Mr. Kaczmarek, Mine Rehabilitation Specialist, Ministry of Northern Development and Mines, which was noted both by Ms. Wyatt and the tribunal to be highly unusual. Mr. Yungwirth stated that he hoped that he would not have to present evidence and did not indicate that he was prepared to be a witness. In this, he was vague, stating that if he could not introduce evidence through Mr. Kaczmarek, he would have to do a 'presentation' himself. The hearing proceeded with the Director calling its witness and allowing Moneta the opportunity to cross-examine.

Burden of proof in Part VII proceedings was discussed in **MacGregor v. The Director of Mine Rehabilitation**, (tribunal file MA 033-93, unreported, December 23, 1993). There, the tribunal determined that, as there had been no hearing before the Director, the matter would proceed with a new hearing. It is the Director who must persuade the tribunal that the decision was reasonable. At the time, the tribunal based its reasoning on that of Bouck J., in **Re Andres Wines (B.C.) Ltd. and B.C.(Marketing Board)**, [1987] 41 D.L.R. (4th) 368 (B.C. S.C.). The tribunal found similarities between its jurisdiction in hearing appeals under Part VII of the **Mining Act** with those to the B.C. Marketing Board from a decision of the Grape Board; there is no hearing before the Director who will always be the respondent in Part VII appeals. In **MacGregor**, the tribunal noted that although appeals under Part VII would be treated as new hearings, the test prescribed by the Court was one of reasonableness, a test which properly reflects appeal jurisdiction.

The law of evidence is clear: that the "… incidence of the legal burden of proof means that the party has the obligation to prove or disprove the existence or non-existence of a fact or issue to the civil or criminal standard; otherwise that party loses on that issue.[2]" The Director has discharged its evidentiary burden primarily through its presentation of undisputed evidence on the existence of mine features which have not been rehabilitated to current standards. Moneta did not dispute what has or has not been done on these features, instead attempting to gain admission from the Director's witness that a mine hazard could not exist without prior investigation which had not been carried out. Based on the dearth of evidence presented by Moneta in an acceptable manner, the only way in which Moneta could succeed is if its approach to the governing law should be accepted. None of its legal arguments have been found to have merit. The Moneta appeals must fail.[3]

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[2] Sopinka, JLederman, S., Bryant, A., **The Law of Evidence in Canada** (2nd Ed.), Markham: LexisNexis Canada Inc., 1999, §3.10, page 57.

[3] See **Re City of Mississauga Official Plan Amendment 174 and Zoning By-laws 695-90 and 696-90 (No. 1)**, (1991), 27 O.M.B.R. 110; **Re Oakville (Town) Zoning By-Law 2001-007**, (2002), O.M.B.R. 236; and **1349883 Ontario Ltd. v. City of Brampton**, (2005), 50 O.M.B.R. 313.

**Evidence**

Mr. Stanislaw Kaczmarek, qualified as an expert in mine engineering, rehabilitation and mining, having been with MNDM since 2002, presented the only uncontested evidence given at the hearing. His testimony was based upon documentary evidence filed. The report of Dr. Jean Hutchinson of Innovative Geomechanics, dated August 17, 2001 and entitled Review of Moneta Mine Surface Stability, Timmins, Ontario was prepared following a site visit and in reliance upon materials available at the local MNDM office. These included mine drawings and plans, newspaper articles, cases involving a subsidence event within the 1-2 stope in 1963, a 1987 report by Trow Ltd. and a Report of Subsidence of Fill at Moneta Porcupine Mine Limited by R.F. Lockhart, District Mining Engineer for the Ministry of Mines dated November 14, 1963.

Mr. Kaczmarek also referred to the B.H. Martin Consultants Ltd. Progressive Rehabilitation Report on Moneta Porcupine Main Shaft Capping, prepared for Moneta in June, 2004 and to various items of correspondence or documents in the MNDM file on Moneta.

**Moneta Mine Stope 1-2**

The Moneta Mine operated from 1939 to 1943 and possibly 1944, within the City of Timmins, near railway tracks. The 1-2 stope is on the first level, second ore body. Where it came to the surface it was approximately 14 metres to sub-crop, being an outcrop which does not break surface. Given the nature of the at-surface opening and activity, interlocking steel sheet pile walls were driven into 40 feet of overburden around the stope. (B.H. Martin, MA 001-02: Ex. 24, page 4). Dimensions of surface activity which saw overburden excavated was 50 by 135 feet. After mining activity was concluded, the area was filled with rock and sand.

In addition to the fill around the central stopes around the shaft, timber support and bulkheads were used on the main levels. However, the majority of the stopes beyond this central shaft were not filled. It is estimated that the voids are four times the size of the filled areas. Fill barricades and pillars of barren rock were left between the filled and the unfilled stopes.

There is a concrete waste pass, a vertical or near vertical passage used for transferring rock or material from an upper level to a lower level, likely in this case to supply fill to the lower level. The concrete collar is shown (MA 001-02: Ex. 4, Tab 4, Letter from P. Lunder dated April 17, 2000 to then Director Dr. Dick Cowan) in pictures with the fill material having subsided within it. This particular subsidence activity along with that occurring on the adjacent Hollinger Mine created a heightened concern, based on the configuration of the mine itself and the type of mining which had occurred, that further subsidence could occur within the 1-2 stope in the future.

The entire Raymond's Garage property is located on top of this backfilled stope. Timmins Overhead Doors and Raymond's Garage saw their businesses shut down by the City

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after the latest in a series of subsidence events rendered their lands and buildings to be declared unsafe by the City of Timmins. Prior to the major subsidence, the Director sought to have access to the surface substantially curtailed. By letter dated September 18, 2001, (MA 001-02, Ex. 4, Tab 4, item 13), the Director asked Moneta to advise the surface owners and occupants in writing of its concerns regarding potential subsidence and damage to property. Moneta responded by notifying some but not all of the surface rights owners (Item 14 addressed to Raymond's Garage and City of Timmins). Moneta advised the Director it had complied in part with notification and was carrying out title searches to determine what utility owners might be affected. Moneta also advised that the 1-2 stope had been filed to surface beneath the Raymond Garage parking lot but that it is fenced and locked when not in use, supposedly at night when work shuts down. In other words, the businesses continued to operate during the day, with all attendant pedestrian and vehicular traffic, only being locked down at night. Understandably, this did little to assuage the Director's concerns regarding surface activity.

The Hutchison Report outlines the major subsidence events that have occurred in relation to the Mine at the location of the 1-2 stope (MA 001-02: Ex. 4, Tab 2, page 6), following which there has been one additional major event. There is no information concerning the first event, which occurred in 1944. The second occurred in 1945, requiring 10,000 cubic yards of gravel to fill it. In 1963, a major subsidence event occurred, which swallowed three school buses and caused a further two to be unrecoverable due to unstable conditions. Fortunately, these vehicles were parked and unoccupied. The steel piling which encircled the area remained in place only on the south side. The piling located along the east side partially collapsed; the west side and most of the north side disappeared into the hole. The dimensions of the hole created by this subsidence were 60 by 60 feet with an average depth of 30 feet. 4500 cubic yards of fill was placed to a height of 12 feet. In 2000, fill in the waste pass subsided to a depth of ten feet. The Hutchinson Report indicated that Mr. Raymond had been washing down the fill the week before.

Correspondence early in 2000 (MA 001-02: Ex 4, tab 4, document 4 and preceding) indicated that the Rehabilitation Code requires that the foundation rock be inspected prior to capping, which Moneta found impractical given that the rock was 42 feet from the surface and the water table was at 12 feet. MNDM did not accept this position; it replied that replacement of the concrete collar would be considered a temporary rehabilitation measure only (MA 001-02: Ex 4, tab 4, document 7). A meeting was held on July 19, 2000, to discuss further rehabilitation measures. The concerns regarding risk of subsidence over the long term and reasons for it were reiterated. It was noted that an extensometer, an instrument which had been installed by Trow Engineering in 1987, purportedly to provide a means of predicting gross movement and potential subsidence, had in fact never been read. Mr. Kaczmarek commented on MNDM's concerns that its placement had in fact not been a good use of the instrument, as placing it in fill rather than solid rock could not provide assistance in predicting a further subsidence, which, under these conditions could occur suddenly and without warning. An extensometer could capture the slow deterioration of solid rock and be used as a predictor of potential subsidence in that context. The failure of fill, however, is another matter entirely, as huge volumes of material, through a sudden loss of support, could suddenly collapse until the various pressures and voids came to a new equilibrium.

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At this time, it was recommended that a geotechnical risk assessment be undertaken immediately to determine the long term risk to occupants of the property and adjacent lands (MA 001-02: Ex. 4, Tab, 4, document 9). It was recommended that monitoring equipment be installed to provide early warning of any movement of the fill within the stope. Moneta was reminded of its responsibility as the owner of the mine and it was reiterated that the necessary assessment should be undertaken immediately. As late as February 21, 2001, (MA 001-02: Ex. 4, Tab 4, document 10), no response had been received by MNDM. Moneta responded that Golder Associates had conducted a recent site inspection, to observe historical drill holes and instrumentation installed in 1987, with no noticeable change occurring but recommending regular monitoring.

The draft Golder Report (MA 001-02: Ex 2) is a volume balance assessment, which was essentially a paper study to determine the volume in the stopes which would be available in case of subsidence. The focus of the report are those excavations close to or connected with the 1-2 stope. The Report did provide a list of recommendations for future work. The report identified three areas of potential fill movement. These have 29,200 $m^3$ with between 9,000 $m^3$ and 15,000 $m^3$ actually at risk; 16,100 $m^3$ with between 6,000 $m^3$ and 9,000 $m^3$ actually at risk; and 18,100 $m^3$ of which the majority is at risk. The report suggests that subsidence which occurred in 1945 and 1963 was likely the result of fill broaching the timber bulkheads and barricades having been breached, although the likelihood of further deterioration is now lessened with the workings being submerged. On the other hand, fill movement will now be more susceptible to changing water levels. The Report recommends monitoring and a contingency for rapid fill movement. The Report noted that in the event of an unexpected rapid fill movement event, monitoring would not be sufficient to predict fill movement and so contingency planning to mitigate potential effects should be undertaken. It is recommended that an assessment be conducted to establish methods for the required contingency.

Mr. Kaczmarek stated that, when the Hutchinson Report recommended a site investigation be conducted, the type of work set out in the Golder Report was not what she had been thinking of. A paper study was clearly deficient. More concrete information based on evidence gathering was required. He also pointed out that the Report does not go into the specifics. It could be as simple as having trucks a phone call away to start filling the void because one does not want the crater to get any bigger. If it were raining, the slopes of the affected area would be shallower which would cause a larger area to be affected and this must be avoided. The Report ends with a statement that the probability of this further subsidence occurring is low, but that it cannot be determined on the available data. Mr. Kaczmarek also questioned how monitoring would allow initial indications of fill movement to be detected and significant fill movement to be predicted. How this could occur is unclear, unless the Golder Report is referring to some sort of deep seated underground monitoring, although it is simply not sufficiently specific.

On September 17, 2001 (MA 001-02: Ex. 4, Tab 4, Item 12), a Ministry official conducted a surface level survey of the stope area within the Raymond's Garage yard and found a 5 inch depression. These figures were compared with a previous base line reading. Concerns were raised due to subsidence activity on an adjacent golf course and the fact that this depression could be the precursor to a larger event. . . . . 8

The Director issued his order in connection with the 1-2 stope in December, 2001, (MA 001-02: Ex. 4, Tab 4, Item 17). The intent at the time was, although other mine hazards might exist in relation to the Moneta Mine, this one was of the most pressing concern. Subsidence events had occurred on the adjacent Hollinger property; there had been subsidence in the waste pass collar and the depression in the yard, taken together raised concerns in connection with this feature. Referring to two letters from Moneta, dated October 5, 2001 and January 3, 2002, Mr. Kaczmarek could not guess what was meant by the reference in Moneta's correspondence to particle contact in a saturated state as being indicative of the threat of subsidence being negligible. These terms were simply not familiar to him, the only qualified expert at this hearing. The documentation implies that the saturation level has risen from an 80 foot depth to a 15 foot depth, but apparently no evidence was provided to support this conclusion. Notwithstanding what the actual water levels might be, according to the Hutchinson Report, the actual angle of repose of saturated fill is greater than that of dry which means that if there were an event under saturated conditions, a greater surface area would be affected. Wet fill settles at a flatter slope than dry fill so that more of it will be involved in any subsidence, where essentially the fill falls into the void and only comes to rest when its new equilibrium is reached. Also, the fill would be less and not more stable under saturated conditions.

The correspondence from Moneta also suggests that, due to resistance from the owners of Raymond's Garage, it was unable to carry out the necessary investigations from the surface. Mr. Kaczmarek questioned this, having remarked that in his experience, owners allowed entry for drilling in order to determine the nature and extent of the risk being faced. No one from Raymond's Garage ever indicated to the Ministry that there was a problem with access. Moneta's assertions and insistence that those owners had a lifetime of empirical knowledge of the site is meaningless, as this was a relatively recent use of the surface rights and there was no evidence of those owners having been employed in the mine. Also, despite written assertions to the contrary, there was no evidence that scientific monitoring has been carried out at the site.

The appeal states that "closure is impractical". Mr. Kaczmarek stated that there is a difference between carrying out "closure" and the filing of a certified closure plan. The plan requires a listing of each item required to rehabilitate the site along with the posting of financial assurance so that all of the items listed will be covered from a monetary perspective. Closing out the site means carrying out the actual work listed in the certified closure plan. Different options for the property include, through investigation, determining the maximum zone of influence of potential subsidence and ensuring that permanent fencing surrounds that area. Another much more expensive option would be jet grouting which entails high powered cement being forced into the bulkhead areas to ensure that they are secure and no longer subject to failure, thereby replacing the wooden support for the fill situated above it.

On April 12, 2004, there was another major subsidence event following which Raymond's Garage and Timmins Overhead Doors properties were closed to access on the order of the City. Documents filed with MA 001-02, Exhibit 15, indicate that the size of this subsidence was 80 feet by 40 feet and 30 to 40 feet deep. There was also flooding when displaced water from the mine workings due to the collapse rushed out of a capped shaft on the

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Northern Allied Steel Company property. Over the course of the ensuing few days, 2,400 $m^3$ of fill were placed in the opening. The BH Martin Report, (MA 001-02: Ex. 9, Tab 4 and figures Ex. 15) prepared for Moneta, indicated that, in addition to the original two properties under discussion earlier, a city sanitary sewer line, fire hydrants and water main were affected, among others. While Raymond's Garage and Timmins Overhead Doors could no longer be occupied, further geotechnical evaluation was required to determine the extent to which the various municipal infrastructures would be affected within the zone of potential subsidence. BH Martin recommended, on a short term basis, that those businesses be vacated and closed and temporary fencing be installed, that medium term, geotechnical assessment of the stope walls and overburden be conducted to establish the location of permanent fencing and rerouting of all municipal workings, and long term, that permanent rehabilitation measures be carried out in accordance with the Mine Rehabilitation Code. A monitoring program should also be implemented, following recommendations of the geotechnical investigation.

A comparison between pictures of the 1963 subsidence and the 2004 subsidence shows that the latter event is substantially larger, with the concrete waste pass having been partially exposed. The sheet piling, which started to be displaced in 1963, became affected to a greater degree, no longer offering support on any but the south side. Mr. Kaczmarek characterized it as a temporary measure in any event. The 2004 filling had to be completed by a remote control bulldozer. The Director issued an Emergency Order (MA 001-02: Ex. 9, Tab 2) which required the proponent to remove all objects from the subsided area, to retain professional engineering assistance to assess, recommend and carry out appropriate rehabilitation measures and to maintain site security to restrict access to authorized personnel. Most of the items which could be recovered were removed. As to the professional services, the immediate services were completed but the geotechnical work recommended in the BH Martin Report has not been addressed to date.

With regards to the cause of the 2004 subsidence, Mr. Kaczmarek reiterated from the Hutchinson Report that the cause was unknown but that one could speculate on which of the different mechanisms was the trigger. Saturation would cause instability in the soils, but there was also a question of whether deterioration of bulkheads, rib pillars and stope walls was caused by saturation or even whether seasonal variation of water levels causing increased mobility of fill. Ultimately, the BH Martin report agrees with the earlier reports that future subsidence can occur suddenly and without warning.

Unlike earlier reports which regarded the probability of subsidence as low or requiring further study, this time examination of the continued existence of void space became very important. Moreover, it was willing to predict further subsidence. Mr. Kaczmarek reiterated that most of the short-term recommendations in the BH Martin Report had been complied with but that until the results of full geotechnical investigations are know, the location of a permanent fence cannot be determined. It also comments that all known openings such as shafts and raises shall be investigated and if unsafe shall be prevented from inadvertent access by means of fence or other barricades. Only the #5 shaft has been rehabilitated to code standards; none of these other inquiries have been done. The geotechnical assessments of the crown pillars

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have not been carried out. Re-routing the sanitary sewer line and other identified at risk infrastructure to be outside the potential zone of subsidence has also not been done, nor has the construction of permanent rehabilitation measures such as fences and concrete caps, with the exception of the number 5 shaft.

**Mine Features in 2007 Order**

The Director's Order of May 4, 2007, required the filing of a closure plan for the crown pillars of stopes 1-1 and 1-7, the four shafts which come to surface, numbered 1 to 4 and the fill raise which comes to surface (MA 013-07, Ex. 1, Tab 10). Part I of the Mine Rehabilitation Code would cover the mine openings to surface; Part 3 would apply to the 1-1 and 1-7 stopes and crown pillars. As set out on Figure 8 of Exhibit 15, there are two crown pillars, the main shaft and three others as well as a raise coming to surface on the property.

The 1987 Trow Report[4] describes attempts to locate and investigate the crown pillars associated with the 1-1- and 1-7 stopes so that rock quality analysis, rock mass rating and design strength could be assessed in the crown pillars. The 1-7 stope could not be located, so it was recommended that some boreholes be made to attempt to penetrate the stope. To this day, the information to be provided from this type of investigation remains an outstanding question with respect to the crown pillar for the 1-7 stope. The crown pillar for the 1-1 stope was drilled off target to some degree. Information gleaned at that time indicated overburden thickness of between 12 and 21 feet and the 1-1 stope located at 43.5 feet below surface. The stope was not filled. The rock was rated at very good quality, given a Q rating. Reference to the 1-7, even though it was missed, recommended as far back as 1987 that additional monitoring and additional bore holes should be carried out in the 1990s. These activities did not occur. The extensometer itself was probably installed incorrectly and further, its readings were not being monitored.

The executive summary of the Hutchinson Report[5] discusses the crown pillars involving the 1-1, 1-5 and 1-7 stopes, the first two of which involve the same crown pillar. In the short term, Dr. Hutchinson felt that the crown pillars were stable, but cautions that they might not meet the requirements for long term closure. It is reasonable and probable that the 1943 and 1944 closure would not meet current standards set in 2000. The Hutchinson Report sets out that the 1-1, 1-5 and 1-7 are covered with 1-1 an 1-5 being essentially the same stope. Backfill was not used. Dr. Hutchinson states that analysis of the crown pillar stability can only be reliable if a detailed engineering investigation and analysis is carried out[6]. It was recommended that such

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[4] The tribunal notes that the Trow Report is entitled "Rock Mechanics Investigation of Potential Mine Hazards in Timmins, Ontario" Prepared for the City of Timmins, June 25, 1987. The client of this report is significant in these proceedings as it points to a pattern observed with Moneta that significant investigation which has taken place over time was not initiated by Moneta but rather by others.

[5] The August, 2001 Hutchinson Review of Moneta Mine Surface Stability was commissioned by the Mines Group of MNDM, evidence that ongoing investigations concerning surface safety issues was being carried out by and through the concerns of those other than Moneta.

[6] Hutchinson Report page 2, last paragraph.

work be carried out in the near future, to include, "geotechnical investigation of the overburden depth, the geometry of the stope, the geometry and rock mass quality of the crown pillars. … If the walls of the stopes or base of the crown pillar have been failing, which can only be assessed by drilling the sites, then the probability of failure of the crown pillars will increase."[7] Although only a very basic assessment of the crown pillar stability and potential rock mass quality, the probability of failure of the 1-1 and 1-7 stopes is less than .5% and 5% respectively, which Dr. Hutchinson notes meets the requirements for long term closure.

At page 11, Dr. Hutchinson expands on her executive summary of these two stopes. The ensuing discussion over pages 11 to 14 does not provide comfort or certainty with respect to the projections made and it becomes clear that much of the data is based on reasoned guess-work, hardly conclusive or likely to invoke confidence as an adequate assessment of the long-term needs for rehabilitation. The estimate of crown pillar stability uses the scaled crown pillar approach. The degree of unreliability of these dimensions, figures and calculations for purposes of satisfying the Director that proper long-term closure can be met is apparent. Table 2 uses Trow's information and assumed data, scaled from mine drawings. Table 3 is based upon data from the adjacent Hollinger Golf Course from a report done by B.H. Martin. Comments in the text include such statements as "uncertainty with the current state of crown pillar rockmass and with the geometry of the pillars", "Drilling as well as careful geotechnical logging of core is required…", "A re-analysis of the rockmass quality is warranted at this time", "Most probable Q for Stope 1-1 ranges between 1.1 and 10. Most probable Q for Stope 1-7 ranges between 0.8 and 7.5.", Geomechanics site investigation and assessment are required before a valid, defendable analysis of the crown pillar stability on this site can be made.", "a further geotechnical analysis of the crown pillar rockmass and current geometry is warranted." Dr. Hutchinson's statement that "The analysis reported here is based on limited geomechanics data and as such should not be considered to be conclusive." Dr. Hutchinson also recommends that stope 1-5 should be considered in any analysis of crown pillar stability from which the tribunal takes it to mean that it should not be lumped together with the analysis of the 1-1 stope. The tribunal takes this to mean that significant additional data is required in relation to the 1-5 stope which would affect any rehabilitation of this crown pillar. The ability of the crown pillars to meet requirements for long term closure is questioned. Analysis of crown pillar stability can be completed only after a detailed engineering investigation and analysis is carried out. That analysis should be done immediately. Moneta has referred to the probability of failure being low but it was based on a very basic testament of stability and potential rock mass quality. These are things which deteriorate over time and that same recommendation which suggested a low probability of failure required that additional investigation be done. (Tab 3 of Director's submissions). The reference to the 1-1 stope is safe under current conditions but there are concerns that factors could change.

Mr. Kaczmarek pointed out that there is a requirement in Part 3 of Schedule 1 to the Mine Rehabilitation Code, that crown pillars be assessed in terms of short and long term rehabilitation. Because the Hutchinson Report was a paper study, there was not sufficient data to

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[7] Hutchinson Report page 2, last paragraph.

make any conclusive determinations for the long term. Section 30 of the Code sets out what form of geotechnical study should be carried out. It is a fairly rigorous evaluation. Depending on the initial assessment of degree of risk, one might have to proceed to the requirements under sections 31 and 32.

The B.H. Martin Report (MA 013-07, Ex 2, Tab 2) recommended that all known openings such as shafts and raises require investigation and if found unsafe, should be prevented from inadvertent access by means of fences or other barricades. Known openings and raises should be rigorously investigated by geotechnical study to determine what is required for permanent rehabilitation. Such measures as fences and concrete caps (recapped) may be required to satisfy the Mine Rehabilitation Code. Establishment of a monitoring programme for the crown pillars associated with the 1-1 and 1-7 stopes and their hazards as would be recommended by the yet to be carried out geotechnical assessment.

The B.H. Martin report indicated that they were retained to provide Moneta with engineering services for immediate, temporary rehabilitation as well as strategies for the long term rehabilitation requirements. Golder Associates' Report (Item 1 of Tab 1 of Ex. 2), indicates that it was not retained to examine the crown pillars associated with the three near surface stopes, but largely concentrated on issues concerning the 1-2 stope.

The concrete waste pass referred to in correspondence (Ex. 7 of MA 013-07, dated April 13, 2000, letter from Per Lunder to Moneta) was considered in isolation as a possible hazard to someone falling in. Ensuing correspondence from MNDM indicates that no satisfactory follow up strategies for dealing with this or other hazards was received from Moneta (Ex. 8 through 10). In particular, while in 1987, Trow indicated that problems with the crown pillars would likely be of low probability in the earlier time frames and that follow up monitoring would be necessary to ensure that this remained the case. MNDM indicated in August, 2000 (Ex. 11) that follow up evaluations were overdue to determine whether the likelihood of failure of the crown pillars had increased with the passage of time. Moneta was given until October 5, 2000, to respond to the concerns associated with the crown pillars related to the 1-1 and 107 stopes.

Mr. Kaszmarek indicated that the 1938 plans of the Moneta Mine could be used to locate the current location of those identified mine features which have not yet been located. With rehabilitation work having been done on the #5 shaft by B.H. Martin Consulting, it can be used as a reference point along with the 1938 plan to locate the other shaft collars. Using the scale plan on existing mapping, one can locate the other features identified through use of either GPS or standard surveying equipment. Concerning the inability to locate the numbers 1 and 3 shafts to date, Mr. Kasmarek stated that by using the surveys acquired for the number 5 shaft, the location of the fill raise, and using plans of the Moneta surface, one would have two fixed points from which the other shafts could be located.

The No. 3 shaft is located within a private residence. The evidence was that no attempts to locate it had been made. Despite this being the only evidence properly introduced, Mr. Yungwirth suggested that it could not be located. Mr. Yungwirth, in his capacity as agent for Moneta, advised it that it should not impose itself on its neighbours in any negative manner, even if ordered to do so.

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Correspondence from Mr. Rob Ferguson, Mine Rehabilitation Inspector, MNDM, South Porcupine, Ontario, to Mr. Yungwirth dated August 11, 2000, (MA 013-07, Ex. 9) commented on the low probability of subsidence noted in the Trow report and requirement for continual monitoring and installation of additional monitoring equipment. Mr. Kaczmarek stated that none of the recommendations for further and future monitoring had ever been done. The letter requires that the crown pillars should be reviewed and the report of their condition updated. Further subsidence was raised as a possibility within the fill raise and a removable cap was recommended. This was followed up with a subsequent letter, (Ex. 10) dated February 23, 2001, when no reply was forthcoming. On February 26, 2001 (Ex. 11), Moneta advised that the recommendation would be incorporated into a forthcoming consultant's report.

Tab 6 of Exhibit 2, MA 013-07 contains various pictures, including, in figure 1, an aerial view of the property with all mine features which are the subject of the two orders sketched on. Figure 2 depicts the concrete cap of the #5 shaft having been dislodged from its footings when water inside the mine broke to surface. This was described as the path of least resistance for the water; the #5 shaft is also referred to as the main shaft. Figure 3 shows the deterioration of the concrete cap on the fill raise. A flash flood was created, as can be seen in figure 5, looking east on Railway Street. The tribunal notes that the concrete has crumbled, both on the sides and on the cap where some rebar is exposed. Figure 4 depicts the deterioration of the concrete cap on the #2 shaft.

B.H. Martin wrote to Moneta on April 26, 2004, in relation to this flash flood (Ex 2, Tab 8, page 2). The tribunal notes that the flash flood was related by B.H Martin to the subsidence in the Raymond Garage yard, which caused water to be forced through the main shaft (also known as shaft #5). B.H. Martin indicated that the impact of the rush of water lifted the concrete cap off the ground. The rock bearing became dysfunctional, likely as a result of weathering over time and having suffered some impact as a result of the adjacent subsidence. The Mine Rehabilitation Code requires that caps be secured to bedrock with a minimal strength in bearing pressure. In its current state, the rock needs to be scraped down to better quality bedrock, at which point the cap can be secured properly. The cap itself must also be assessed and it must be determined whether the rebar, which is imbedded in the concrete, has deteriorated. Factors taken into consideration in determining the condition of the concrete cap include: whether it is of adequate thickness and meets load requirements; investigative drilling to determine whether there has been enlargement of the opening at surface which would adversely affect its bearing capacity; the cap was lifted off of the ground, thereby being subject to loading and weathering of the rock surrounding the surface of the shaft; the location of the opening is in a high traffic area; short dowels used in the original construction of the cap have little or no shear resistance where replacement dowels would be longer with more of their length embedded and grouted into place; and the fact that the cap is not resting on rock.

The B.H. Martin Report raised concerns for the Director in that, although it was a progressive rehabilitation report, the bearing capacity of the caps on other shafts may have also been deficient. The fact that this was in a high traffic area is not so much a factor in a closure plan but may be a factor in asking for a plan because of the increased risk to the public in high traffic, high volume areas. This particular cap would not be to code as it is very thin, approxi-

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mately 4 or 5 inches whereas the code requires 30 centimetres or 12 inches. As for buildings being put on top of shaft caps thereby inhibiting access, that is an overly simplistic depiction. The B.H. Martin Report deals with this in short term recommendations. All known openings such as shafts and raises require investigation and those which are unsafe need to be prevented from inadvertent access such as fences or barricades. This was Moneta's own expert which they had obtained as a result of the subsidence all dealing with short term, not medium or long term.

In order to determine what rehabilitation may be necessary, investigative drilling would have to take place in the Northern Allied yard for the No. 1 and No. 4 shafts and in the Nasco Propane yard for the No. 2 shaft. Mr. Kaczmarek disagreed with Mr. Yungwirth's assertions that those under buildings could not be found, stating that the No 4. had been shown to him, located in a warehouse office facility. Although no evidence was introduced that actual problems had been encountered in attempting to gain access or carry out investigations, Mr. Yungwirth maintained that this was something that he would not personally impose on people he knows as neighbours, acts for or does business with. Moneta's position on what it would do in the circumstances does not seem to have been addressed – at least there was no evidence as to what it would do. There was no difficulty dealing with the No. 5 shaft because it was out in the yard whereas the Nos. 1, 2 and 4 shafts would require that Moneta enter and rip apart the buildings and that the owner would never permit it. Mr. Yungwirth was asked repeatedly by the tribunal to limit himself to questions, with little effect. Mr. Kaczmarek indicated that no one had asked that the buildings be ripped apart. Instead, one could cordon off a small area where one could also install dust control, and conduct the drilling itself which would involve a few hours work. From an investigative standpoint, there should be little difficulty, particularly with a business where the work can be scheduled outside of business hours. When the potential impact of a hazard which has not been rehabilitated to prescribed standards was explained to the surface rights holder, Mr. Kaczmarek stated that they would permit the investigation, likely through probe drilling, so long as a thorough explanation was provided. Despite clear evidence of what would be entailed, including information that the interior of the Northern Allied building involved a partial dirt floor, Mr. Yungwirth was unable to relinquish his own ideas that the intrusion would be catastrophic and that the floor would have to be torn up, a concept that Mr. Kaczmarek described as overkill.

Despite Mr. Kaczmarek's patient and reasonable explanation of what would be required to carry out investigations inside of structures and the extent in which there would be an impact on the surface interests, Mr. Yungwirth persisted in his insistence that such investigation would involve ripping apart buildings and considerable impact on places of business. He likened this to the requirement for large equipment and excavators used in rehabilitating the No. 5 shaft and asked how this could possibly take place inside a building.

This was not cross-examination, not even argumentative cross-examination. It was the presentation of fact, not only outside proper procedure for the giving of testimony, but wholly improper in that Moneta elected to call no witnesses. Nonetheless, it is a representative sample of the persistent manner in which Mr. Yungwirth sought to introduce facts improperly. Moreover, it pointed to Mr. Yungwirth's failure to either grasp or accept evidence which was and would remain procedurally unrefuted. Throughout, he did not waiver from his own view of what the Director was asking Moneta to undertake, essentially that the required steps would be destructive to businesses and property involved. . . . . 15

Referring back to the Hutchinson Report and to the summary of the Trow Drilling from 1987, Mr. Kaczmarek was unable to comment on whatever attempts may have been made to detect the crown pillars of the 1-1 and 1-7 stopes. He was also unaware that there were fibre optic cables running down the O & R right of way which coincide with the location of the crown pillars.

In conclusion, there is evidence that mine hazards exist in connection with both appeals, where a mine feature which has not been rehabilitated to prescribed standards constitutes a mine hazard under the definition.

**Closure plan**

A draft closure plan (MA 001-02: Ex. 18) was filed on June 26, 2006, but it fell well short of MNDM expectations. According to Mr. Kaczmarek, it seemed to ignore some of the fundamental requirements such as financial assurance. It failed to identify the rehabilitation requirement for the site. There was a meeting between staff and Moneta in March, 2006, where the requirements for a certified closure plan were reviewed, including Schedules 1 and 2, the latter of which is a check list. This was followed up by a letter from the Director dated April 6, 2006 (MA 001-02: Ex. 9, Tab 5, document 1), in which it was acknowledged that everything might not lend itself to being dealt with, but one must provide an alternative in the form of a time table and the requisite financial assurance. Work can be deferred as long as financial assurance is in place.

Mr. Kaczmarek compared the draft closure plan submitted by Moneta to a typical plan. Instead of the table of mere pages which had been submitted, a proper plan would encompass several binders of materials. Moneta ignored the most basic requirements, such as a proper transmittal letter signed by a senior officer; a certification which requires two signatures, rather than the typewritten name of one, a total lack of certification of stability or securing the stope, a site plan without requisite boundaries, claim or parcel numbers, details of land tenure including surface rights, up to date project conditions, etc. There is a total lack of detail and compliance to the point that the draft simply cannot be taken as a serious attempt at compliance. Moneta has taken it upon itself to suggest that, owing to the minimal amount of work required over a minimal length of time, no financial assurance is required. The conclusion drawn by Mr. Kaczmarek was that the draft could not be regarded as a genuine attempt to comply with the Director's order.

The tribunal notes that for item 13, Financial Assurance, Moneta stated, "(i) Given the short time frame required to implement the Closure Plan, the nature of the Project, and the minimal ongoing costs, the Proponent intends to proceed with the Plan upon acceptance by the Ministry and hence does not intend to provide any financial assurance." This "draft" document, incidentally, refers to Moneta as the Proponent, although it has denied that it meets the definition for purposes of these appeals. However, this is not reflected in the draft.

Upon receipt of the draft plan itself, Mr. Kaczmarek was unable to discern whether Moneta was taking the matter seriously or whether all of the deficiencies were due to

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misunderstandings. Although MNDM does not approve draft closure plans, a response was sent out on July 21, 2006 (MA 001-02: Ex. 9, Tab 5, document 2) outlining the deficiencies. It lacked all of the requisite certification letters, even dummy copies if they could not be finalized. These letters are a critical part of the plan. Whatever type of work needs to be done must be certified by the corresponding professional, such as geotechnical, hydro-geological and so on. The site plans are a critical part of closure due to their importance to identify mine hazard sites in perpetuity. There is no mention of the monitoring of either water levels in the mine or stope stability. Overall, financial assurance was virtually ignored with there being a great deal of work outstanding. There was no expenditure schedule for performing the work.

The reasoning behind issuing a second Director's order requiring the filing of a closure plan was as follows. Initially, the new Director (Ms. Cindy Blancher-Smith) was under the mistaken assumption that the 2001 Order dealt with the whole area instead of just the 1-2 stope. Once the significant 2004 subsidence occurred, concerns were raised about all of the features. This was also echoed in the earlier Hutchinson and Trow reports in that future monitoring and assessment should be undertaken to determine the long term stability of the features, particularly the crown pillars of the 1-1 and 1-7 stopes. The 2007 Order was designed to ensure that all mine hazards on the Moneta property were being addressed adequately and in a timely manner.

In the intervening years between the Director's Orders, according to Mr. Kaczmarek, Moneta did very little investigation to facilitate a closure plan. Contrary to ongoing and vocal assertions during the course of the hearing, in Mr. Kaczmarek's and MNDM's experience, there was never any difficulty in dealing with the surface rights owners. Any investigative work was regarded as a benefit in the face of mine hazards which were not rehabilitated. Access has never been an issue. There is no actual evidence of attempts to inform surface rights owners, aside from the 1-2 stope, nor is there evidence of access in these cases being denied.

Throughout the process with Moneta, the new Director found herself frustrated by Moneta's conduct. Although outwardly responsive, little or no actual progress has been made throughout in terms of filing of a closure plan. As characterized by Mr. Kaczmarek, Moneta was cooperative in terms of speedy responses to all inquiries, but the quality of the responses left much to be desired in that there were no satisfactory answers or commitments with accompanying time frames. It seemed to the Director that every step along the way only served to push back the closure plan date even further than the last correspondence or meeting.

As to whether the work could be carried out if instability were a problem, this would be something the studies would determine. Even if it is ultimately determined that instability cannot be overcome, as was set out in the Hutchinson Report, the geotechnical work would still be required to determine the extent of the area of influence. In other words, one would need to determine the exact extent of fencing and other barriers which would encompass the entire area of potential subsidence. This is not a desirable option as the land could no longer be used. Such sites do exist, however. Where property prices are low, it may not be cost effective to carry out more expensive closure options. In a city such as Timmins, where property prices are sufficiently low, one could not recover costs from rehabilitation on sites over which there is deep overburden. . . . . 17

Schedule 1 of O. Reg. 240/00 sets out how the various hazards are to be rehabilitated and Schedule 2 is essentially a check list of what is required. Qualified professionals must be consulted in preparation of the certified closure plan, a fact which must be certified by the CEO. In Moneta's case, Mr. Kaczmarek questioned the apparent reluctance to make this certification at this level by the CEO at the time, Mr. Snook.

Once the certified closure plan is submitted to the Director, no actual review will take place unless the financial assurance is in place in the Sudbury office. The purpose of the financial assurance is to have a guarantee that the money is in place for any outstanding rehabilitation work to be done on the mine property in addressing all the existing mine hazards. Once an aspect of the work has been completed, the corresponding financial assurance is returned. What normally happens with the certified closure plan after the financial assurance is determined to be adequate, is that it is sent out to the various stakeholders, including the Ministries of Environment and Natural Resources, in this case, the City of Timmins, aboriginal groups and others. The Plan is to contain a timetable for carrying out the work. Amendments, as may become necessary, can be made which are submitted for further review.

At one time, MNDM was prepared to provide a secured loan to Moneta to assist in relocating the businesses which were affected by the large subsidence. This initiative was under discussion and negotiation between the fall of 2002 and summer of 2005 (see MA 013-07 Tab 1, documents 6 through 33). Without reiterating the exact nature of the correspondence which went back and forth, throughout, there was no meeting of the minds concerning this loan. It is not clear at the outset whether Moneta even realized that this would be a secured loan with a repayment schedule. MNDM attempted to make it clear that the loan was to assist Moneta in meeting its rehabilitation obligations including the relocation of affected businesses. Moneta, on the other hand, throughout, refused to accept that it should be 100 percent liable for the loan due to what it characterizes as a change in land use of the surface. MNDM made it clear that it will not assume responsibility for relocating the businesses and if Moneta takes a similar position in connection with rehabilitation, then the offer of financial assistance would be withdrawn. For its part, Moneta maintained its view that secure fencing would be sufficient for the rehabilitation of the 1-2 stope. This continued, notwithstanding the Director's staff has ongoing concerns that further testing is required, if for no other reason than to safely predict the outside limits of permanent fencing.

Mr. Kaczmarek stated that the purpose of the loan was made clear in the Minister's letter of July 24, 2004, which predated that of the Director, found at Tab 1, Item 29 of Ex. 2, by almost six months. This is illustrative of the circular nature of dealings with Moneta into which the Director and MNDM found themselves repeatedly drawn. The offer of the loan was ultimately withdrawn because its terms were not met.

Returning to the issue of the certified closure plan, Mr. Kaczmarek was asked whether, after all the geotechnical studies were completed, one could apply reasoned judgment to the situation and recommend closure through the erection of permanent fencing. He indicated that what was proposed could be one part of a certified closure plan but all of the requirements outstanding in Schedules 1 and 2 would have to be dealt with. Mr. Yungwirth attempted to

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formulate his question differently, stating that given what one now knows about the 1-2 stope, knowing the value of the property, knowing that the risk of further subsidence cannot be qualified, using "some reasoned judgment" and assuming the geo-technical and other studies are complete, postulated that a "proper" certified closure plan would be to put a fence around the area. When Mr. Kaczmarek indicated that he had already answered the question, Mr. Yungwirth stated that he was merely trying to summarize the answer. Mr. Kaczmarek also indicated that he didn't mention the value of the property and wasn't sure of its relevance. Discussion ensued regarding an appraisal for relocation of Raymond's Garage and the cost of relocating businesses, which is dependent on their property value.

In Ms. Wyatt's submission, the certified closure plan itself is a planning tool. It is not doing the work. Access is not necessarily required to do the certified closure plan and in any event, there are ways of dealing with access. There was actually no evidence produced to show what efforts were made by Moneta with the various landowners and that access had been refused. There is an assertion that because of litigation, nothing can be done in connection with the 2002 appeal. There is no evidence that this is the case. It is not clear that those issues might not be able to be resolved if the tribunal could be involved in the process. It is incomprehensible that someone would refuse access to have a problem on their property fixed.

There is no evidence of what efforts Moneta has made to find a consultant or of refusals. We don't know what was presented to any consultants, if they were formally presented with terms of reference or simply told of a certified closure plan to deal with hazards. Despite allegations to the contrary, the evidence stands that a certified closure plan is not set in stone and it is not the same thing as doing the work. Moneta's position was that subsection 12(1) of O.Reg. 240/00 requires that the proponent who files a closure plan ensure that it is carried out, so that assurances that the step requiring the filing of a closure plan only does not assuage its concerns about the actual implementation. Even if a schedule were set and delays or changes in circumstances were experienced, the certified closure plan could be amended.

**Water**

The issue of water level and its potential source was raised by Moneta in support of its position and unsubstantiated by any expert testimony. It was stated that water poured in from the adjacent Hollinger/McIntyre mines after pumping ceased at the 3000 foot level between 1988 and 1990. While there were conflicting accounts concerning the cause of the rise in the water table or potential saturation of the unconsolidated materials, the only expert testimony was that which was provided on behalf of the Director. That testimony raised serious doubts as to the extent of the rise in water table.

Initially, the Lockhart Report stated that in 1963, the water table was located at 150 metres from the surface and was draining away at that depth through a common wall to the Hollinger Mine. Mr. Kaczmarek questioned the reliability of this statement [referring to Ex 2, Tab 5, MA 013-07, now Exhibit 19 A through F, corresponding to depths between 150 feet and 1400 to 1425 feet]. While the plan of the various drill holes does show one area where the party wall was crossed by Hollinger, it did not connect with any of the Moneta mine workings; more-

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over, there is one drain hole which conceivably could have connected the two, but it is shown as not having been drilled. This non-activity was set out on the 675 foot level on the Hollinger side. Other levels depicted show the drill holes ending in solid rock.

Much was made in correspondence and at the hearing concerning water, whether flooding was taking place from the adjacent Hollinger Mine and other scenarios. In terms of what this data means for a potential certified closure plan, Mr. Kaczmarek stated that despite there being ample evidence that the Moneta Mine is not affected or connected to the Hollinger Mine and flow of water from one to the other, nonetheless, one could use this information in the terms of reference employed for hiring a hydro-geologist to determine the impact of water levels within the mines. The potential instability created by saturated conditions would not prevent one from carrying out a certified closure plan. Rather, that fact could be encompassed in the terms of reference under which a hydro-geologist would be engaged.

The amount of financial assurance posted for a hydro-geological assessment and otherwise, would have to be adequate to carry on the scope of the work set out. It is possible to set contingencies for potential work, so long as accompanying financial assurance is guaranteed. A timetable is also required. When one submits a certified closure plan, it does not mean that everything required for closure be covered where this is impossible. Rather, the plan can incorporate the various studies which will be required to determine the nature and extent of the work required, as long as there are adequate allowances for the work itself and a timetable for carrying it out.

Under cross-examination, Mr. Yungwirth alleged that the ground water was in a steady state in 1988 when pumping was ongoing at the adjacent Hollinger/McIntyre Mines. Throughout this cross-examination, Mr. Yungwirth purported to give evidence or base his questions on evidentiary assumptions which were not before the tribunal. The witness indicated that he was unfamiliar with where the Hollinger and McIntyre connected, but it would be the lowest most connection between them from which the water was running. Eventually, the pumps in the McIntyre were 30 metres below the surface. It was agreed that the water levels in the two mines were similar. Mr. Yungwirth suggested that water was evident in the bottom of the Moneta hole in the 2004 subsidence at a depth of 15 metres, being suggestive of the water between the mines being in a steady state. Mr. Kaczmarek stated that there may be two separate things involved. If Mr. Yungwirth were correct that the water at the bottom of the Moneta subsidence were groundwater, it is something quite distinct from mine water. Ground water comes from surface run off. Mine water comes up through the mine. Its source can be from a combination of ground water from various watersheds and potentially from different aquifers and water bearing strata. That is the issue which is unknown and can be determined only through a hydro-geological investigation. The flows from water bearing rock are much lower than those of groundwater. The two types of water would not necessarily be at the same elevation if the shafts are isolated and not coming to surface. However, when a stope such as the 1-2 is open to surface, the two types of water could be in a steady state at the same elevation.

Referring to the 1999 Golder Report, commissioned by the Mattagami Conservation Authority, which projected that it would be 40 days until the water in the McIntyre and Hollinger mines came to surface, Mr. Kaczmarek was asked to explain why such a small

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mine, next to two large mines which existed for 60 years without getting full of water would suddenly become so. Mr. Kaczmarek indicated that his area of expertise is not hydro-geology. It was suggested that if the Moneta Mine was totally isolated and collected only groundwater, it would have been full years ago. The Hutchinson Report makes reference to some outflow found by Lockhart on the 150 foot level. Mr. Kaczmarek once again reiterated that all the records and plans for the Moneta Mine did not indicate any evidence that it was connected to the other mines. Asked to refer to geological maps (MA 001-02: Ex. 20 A through F) for the purpose of identifying cracks and fissures on the 150 foot level which could have allowed water to seep into the Moneta Mine, it was conceded that it was possible for water to move along the Hollinger fault, both at the north and south breaks, given that the two mine openings intersect the main breaks on both sides.

Mr. Yungwirth referred to June 29, 1937, business records which reported slips, slides and oxidization by a geologist named J. Buffam (MA 001-02: Ex 26). In connection with the first level, being the 150 foot level, the document states that accurate mapping cannot be carried out because of the number of flat joints and the abundance of oxidization. Recognizing that neither he nor the witness are geologists, Mr. Yungwirth suggested that the oxygen had to come from somewhere, if not the air and therefore, the logical conclusion was that it came from water. The document goes on to describe the orientation of the flat joints, having been produced by localized relief from pressure and do not exist on the lower levels. This is the only documented wet level and "a large portion of the water comes from the flat joints". Mr. Kaczmarek responded that what Mr. Yungwirth was presenting was a theory and without data and hydro-geological studies, it is merely speculation and he could not comment further. He explained that joints are discontinuities within rock which are short, contrasted with faults which are more pronounced. Being 15 degrees, they are nearly flat.

The document refers to the main fault which is intersected. Mr. Yungwirth suggested that this is a continuous break in the rock. Mr. Kaczmarek explained that faults vary in type in that they can be tight too, so that they can be hundreds of metres in length but be such that they do not transmit water. Or, they can be part of a shear zone where the fault itself is of poor material. Unless there is data, one cannot know what one is dealing with. Mr. Yungwirth suggested, since the mines are underwater, one cannot examine what is in fact at play to which Mr. Kaczmarek disagreed, stating that through drilling and hydrological studies, one would be able to determine the nature of the faults. Mr. Yungwirth suggested that the faults have been mapped from both sides so that its nature isn't something that isn't determined. Mr. Kaczmarek stated that, he was uncertain whether one could determine the quantity of flow by learning the nature of the fault but rather that study could determine the differential flows between two wells, which would give one a flow direction. Mr. Yungwirth posed a question concerning the mechanics of flow differential, where one is pumped and elevation could be measured in the other, suggesting that all that one would measure is a natural elevation drop as opposed to pressure. He stated that the pressure would be the same on both sides. Mr. Kaczmarek indicated that he was uncomfortable answering as this was in the realm of hydro-geology, but he did indicate that Mr. Yungwith's hypothesis failed to mention all sorts of variables, such as alignment of the fault, depth and more which would be at play in this scenario.

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Asked about the cessation of pumping in 1988 and associated elevations in water levels, there was evidence of massive subsidences in the two years previous on the Hollinger Golf course (referred to in the Golder volume balance), Mr. Kaczmarek stated that he was not familiar with the details he was asked, having started with the Ministry in 2002. Mr. Yungwirth suggested that, in addition to the large one on the golf course, there were others, one on First Avenue and the large one on the Raymond's Garage property. Mr. Kaczmarek agreed that there was an increase in subsidence activity at the Hollinger Mine between 1999 and 2002.

As to the effect of groundwater on fill, Mr. Kaczmarek agreed that it had been his evidence that, if in a dry state, the angle of repose of particles would be 45 degrees whereas if saturated, the angle would be somewhat less. Mr. Kaczmarek stated that there are a number of variables at play. If it is in a fluid state, all that is required is a small change in shear stress for those saturated materials to mobilize. Mr. Yungwirth's analogy in questioning involved comparison with waves washing over sandcastles on a beach. Mr. Yungwirth posed a further question concerning ostensibly closure of the 1-2 stope if saturated and mixed with overburden versus dry. Asked if the dry closure would be relatively simple with respect to the certified closure plan, Mr. Kaczmarek stated that one would still have to explain how it is going to remain drained. Also, if pumping were required, this would increase its complexity. Also, there would need to be a guarantee that there are no further voids for the material to migrate into.

According to Ms. Wyatt, the inordinate amount of information on flooding, water levels, water travelling through rocks, who's flooding whom, when pumping started, who is or is not saturated was raised. It must be borne in mind that the technical reasons behind the 1-2 stope subsidence are not relevant. The issue is that Moneta must deal with all mine hazards according to statute. The water may become relevant as part of the certified closure planning process when one is trying to determine what causes the subsidence and how to deal with rehabilitation of that hazard in the future. The experts could only guess at what was causing all the subsidence and whether it was structural failings deep in the mine, but no one knows because no one has been inside and performed the required studies. The subsidence events in the 1940s and 1963, before evidence of the flooding of the Hollinger and McIntyre Mines, it suggests that other factors are at play. Water is irrelevant other than being something which must be dealt with. It provides no reason that Moneta shouldn't file a certified closure plan to find out what is going on and how to fix it.

**Analysis**

The overriding issue in this appeal is whether Moneta, as the owner of the patented mining rights only, is a proponent of a number of mine hazards for which it is liable under the **Mining Act** to file a certified closure plan. The tribunal finds that it is.

Is Moneta a Proponent as Contemplated by Part VII of the **Mining Act**?

The requirements to rehabilitate found in Part VII apply to a proponent, as defined, and will include an owner, which in turn is defined in section 1 as being the owner of mining lands.

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Moneta seeks to have the tribunal disregard the **Mining Act** in favour of finding that by having eliminated all obvious surface features of a mine and removing obvious access to the underground workings, a layman would essentially find that no mining lands exist for purposes of Part VII. The surface rights have been severed and developed so that no visible surface evidence of previous mining activity remains. Moneta maintains that, as the owner of a mining patent only where the surface rights are held and developed by others within a municipal setting, its interest has lost its character as mining lands as defined in the statute. The Director disputes Moneta's reasoning, asserting that the definitions in the **Mining Act** capture Moneta's interests, making it an owner of a mine. The tribunal has reviewed both arguments and finds that it agrees with those of the Director. Moneta's interests are mining lands. It is the owner of a mine and as such, is a proponent within the meaning of the statute.

Moneta maintained that lands which started out as mining lands can become "not mining lands" over time due to the fact that the definition within the **Mining Act** intends that such lands be used for mining. Rather, it is the intended use that the innate legal character of the lands which govern. For the Moneta Mine, having been closed out since the 1940s, its character has not been mining lands since that time. Rather, it has become part of and under the control of the City of Timmins; moreover, Timmins exercised that control by its actions of zoning the subject lands as either commercial or residential. Landowners either set up businesses or lived there, having complied with zoning, occupancy and the like. Even when the City removed the grants of occupancy based upon underlying danger, there was no choice but to comply. Moneta further maintained that it is the determination of the City which governs. A landowner developing a property will put in improvements through their occupancy. That land cannot be said to be mining lands within any context that the public would recognize as such.

Moneta based its position on the fact that its ownership of a mining patent does not give it the right of access to the minerals. It contrasts the definition of "mining lands" in section 1 of the **Mining Act** with that found for "mining rights" in the **Conveyancing and the Law of Property Act**, which grants a specific right of access to win those minerals. Without the statutory right specified in the **Mining Act** or a contractual right of access with the surface rights owners, there is no way in which the rehabilitation could be carried out and therefore must be beyond what is contemplated by the statute. Subsection 12(1) of O.Reg. 240/00 makes the proponent solely liable for carrying out the measures set out in a closure plan but does not provide any lawful right to access.

The Director invited the tribunal to consider rules of statutory interpretation, set out extensively in the 3rd and 4th editions of Sullivan and Driedger on the Construction of Statutes (Markham: Butterworths Canada Ltd., 1994 & 2002). The modern rule for statutory interpretation, accepted by the Supreme Court of Canada, is found at page 131 of the 1994 edition:

> … courts are obliged to determine the meaning of legislation in its total context, having regard to the purpose of the legislation, the consequences of proposed interpretations, the presumptions and special rules of interpretation, as well as admissible external aids. In other words, the courts must consider and take into account all relevant and admissible indicators of legislative meaning. After

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> taking these into account, the court must then adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of the legislative purpose; and (c) its acceptability, that is, the outcome is reasonable and just.

The focus in a contextual analysis is on overall legislative intent with a presumption against absurdity, not just in logic and grammar but in acceptable standards of reasonableness and justice. The more absurd the potential result, the greater a departure from ordinary meaning is encouraged. Statutes are to be considered remedial in nature and are to be given a "fair, large and liberal interpretation as best ensures the attainment of its objects" (Legislation Act, 2006, Part VI – Interpretation, ss. 64(1)).

The tribunal finds that it is not persuaded by Moneta's argument which would lead to an absurd and narrow construction of this mining statute, whose purpose it is to support mining activity from its inception during exploration through to and including final rehabilitation.

Reliance on the **Conveyancing and the Law of Property Act** as authority for its position is misplaced. The provisions provide for rights of access in conveyances as well as reservations. Early in the last century, Moneta was the holder of a mining lands patent in fee simple, owning both mining and surface rights. When it conveyed the surface rights and severed its interest, according to that statute, it reserved the right to access its interests in the minerals.

The interest in a mining patent does not change because of surface rights development. Despite Mr. Yungwirth's assertions to the contrary, the layman's definition of what constitutes mining lands is of no assistance in interpreting this statute making determinations as to its applicability. The Mineral Development Strategy for Ontario is a policy document and is not intended as a tool for the interpretation of the **Mining Act**, although, as noted by counsel for the Director, it does mention the requirement to address legacy mining issues such as the Moneta mine. Reference to subsection 90(2) of the **Mining Act** has no bearing on this matter as the facts contemplated by that section do not apply; the surface rights were included in the original patent and not reserved to the Crown.

The tribunal, in making its findings, adopts the argument so ably laid out by Ms Wyatt on behalf of the Director that Moneta is a proponent. The definition of "mine", as amended in 1989, includes those mines which have been closed out, rendered inactive or abandoned, which is in keeping with the intention to deal with legacy mining issues.

As set out in the opening paragraph of Barton, B. **Canadian Law of Mining**, (Calgary: Canadian Institute of Resources Law, 1993) "Four different elements may be perceived in mining law: property law, mining legislation, mining transactions, and regulation." Property law deals with title transactions; mining legislation is predominantly derived from Crown ownership of minerals and methods of acquisition; mining transactions are business transactions involving mineral properties such as sales, options and joint ventures; and finally mining regulation deals with environmental matters, health and safety and securities transactions.

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Transactions involving title and conveyances, excluding the original alienation from the Crown, will be governed by the common law of property as it has evolved over time along with any statutes enacted to limit, change or confirm what is found in the common law. **The Conveyancing and the Law of Property Act** is limited in its scope to delineating or circumscribing property transactions. Findings based upon the law of property may be relevant to this proceeding involving mining regulation insofar as it may shed light on the nature of the property interest with which this tribunal is concerned. It is irrelevant and inappropriate, however, to use legislation dealing with the law of property in an attempt to unseat legitimate legislative sovereignty, such as the **Mining Act**.

The land in question was alienated from the Crown as mining lands. Land which is patented as mining lands or becomes used as mining lands will retain that character under the **Mining Act** (See for example **Citadel Gold Mines Inc.**, tribunal files MA 020-04 & 002-92, (unreported), November 30, 2005). Moneta's assertion that no remnants of the surface operations remain is irrelevant to any finding as to whether the subject lands are mining lands. What governs is whether the lands were originally alienated from the Crown as mining lands or came to be used at some point in their history as mining lands. That the lands meet one of these requirements is found in the definition of mining lands set out in section 1 and is mirrored in Part XIII of the **Mining Act** dealing with mining land tax.

In the case of the Moneta Mine, the original patent was for mining lands, thereby meeting the definition and making those lands subject to applicable provisions of the **Mining Act**. There is no requirement for lands to currently be used for mining in order to continue meeting the definition. Their character cannot change from the original patent. An "owner" means, among other things, the owner of a mine, whether or not it is currently being mined. The origin of the mining lands remains recognized throughout this tenure. Finally, a "proponent" is an owner of a mine, even one which is not actively being mined at this time. Current land use is irrelevant. Lack of surface characteristics of a mine is irrelevant. Activities or potential activities on adjoining mining properties are irrelevant. All that is relevant is that Moneta, as the original and continuing owner of the Moneta Mine, having carried out mining during its lifetime, is by statutory definition the proponent and as such is responsible for all obligations under the **Mining Act** which are those of a proponent.

Contrary to what is suggested on behalf of Moneta by its counsel, Mr. Yungwirth, the meaning and intent of the legislation is not unduly obscure on this point. It is a fairly fundamental principle of law that one cannot contract out of statutory liability; nor can one impose irrelevant considerations on the sovereignty of the Crown. The statutory drafting, through the various definitions and applications, clearly applies to mining lands, whether they obtain that character through their original alienation from the Crown or from subsequent usage.

While the common law preserves the mineral property and the surface property as two distinct entities, certain presumptions operate to make them both viable. This fundamental principle of the right to access the minerals has long been established so that it is not often articulated in modern times. In **Harris v. Ryding**, (1839), 5 M. & W. 60, 151, E.R. 27 at 32 (Exch.), Alderson, B.:

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> The case therefore stands thus: here are two persons, one who has the land above – one who has the mines below, with the power of getting those minerals; they are each to enjoy their right of property, and each is to act in respect of those rights of property, upon the maxim that he is to use his own property so as not to injure his neighbour. Then the question is, whether the grantor is not to get the minerals which belong to him, and which he has reserved to himself the right of getting, in that reasonable and ordinary mode which he would be authorized to get them, provided he leaves a proper support for the land which the other party is to enjoy? It appears to me that that is the reasonable construction of the exception, and the reasonable adjustment of the rights of the parties derived out of that exception.

Barry Barton in **Canadian Law of Mining** states at page 55:

> However, surface use questions must often be decided in the absence of express powers of working. The instrument of severance may make insufficient provision for working, it may contemplate obsolete methods of working, or it may not mention working powers at all. The general principle of the rights of the mineral owner was stated by Lord Porter in Borys v. C.P.R. [1953] A.C. 217 at 227-228 (P.C. Alta.)., that "a reservation [of a substance] necessarily implies the existence of power to recover it and of the right of working." The principle is an old one: "When anything is granted, all the means to attain it, and all the fruits and effects of it, are granted also, and shall pass inclusive, together with the thing, by the grant of the thing itself … By the grant of mines, is granted the power to dig them…." W. Sheppard, Sheppard's Touchstone of Common Assurances, Fed. Vol. 1 (London: Luke Hansard & Sons, 1820) at 89. Also Saunder's Case (1599), 5 Rep. 12a, 77 E. R. 66 (Common Pleas).

While the foregoing commentaries deal with the opposite situation, where the minerals rights are granted by severance, the opposite must also hold true in this case where it was Moneta which granted the surface rights. Moneta sought to invoke **Conveyancing and the Law of Property** to avoid its statutory obligations. What it has failed to appreciate is that the operation of that statute has caused it to reserve to itself the right of access to its minerals at the time it severed the surface rights. What it retained along with the minerals is the implied right to win those minerals or the right to carry out all of its statutory obligations in relation to the mining rights and mining lands.

Whatever may be the opinion of a layperson encountering lands such as those in question here is irrelevant. Not only does the law prevail in this instance, something which should be self-evident to any qualified member of the Ontario bar, but its importance is highlighted by the facts of this case. While rehabilitation measures exist to protect the safety of individuals, they must be even more stringent when the underground workings of a mine are invisible at the surface and where the potential dangers are hidden and are unknown to those in the community who will not have had experience with the lands when they had all the surface characteristics of an operating mine. Moneta's position is found to be counter-intuitive. The fact that there are few clear features on the surface to indicate the previous life of an operating mine in this, an urban setting, should be taken as a cause for greater, not less concern, let alone trying to walk away from any sort of statutory obligation. . . . . 26

Application of Part VII of the **Mining Act** to the proponent of a mine in Ontario is not optional to that current or former holder of freehold or leasehold patents in mining lands. It is obligatory as a regulatory framework designed to address legacy and prospective mine hazards as *defined by statute*.

Mr. Yungwirth, as counsel on behalf of Moneta, asked that it not be ordered to impose itself on its friends and neighbours to carry out the necessary investigations inherent in preparation of a certified closure plan, let alone execute such measures as may be determined necessary through such work. Nowhere did Moneta allege that it had attempted to gain access and that such attempts had failed. Nor did Moneta call any evidence in connection with any purported attempts to gain access. None of the surface rights holders were called by Moneta as witnesses. Whether or not actual access would be a problem remains factually unresolved insofar as what the tribunal has as Moneta's assertion that it is not entitled to gain access legally and it would not attempt to impose itself on its neighbours, even if ordered to do so.

There was no evidence introduced at all by or on behalf of Moneta that actual problems had been experienced. On a personal level, Mr. Yungwirth expressed concern that he had to live with his neighbours and did not wish to be associated with any actions whereby they were imposed upon. This was a statement of individual conscience on his part, reflecting his personal relationships in the place where he lived. It was not meant nor should it be construed as a statement of corporate disobedience, however. Furthermore, there was no evidence that Moneta would not carry out the work if ordered to do so. It was difficult for the tribunal to discern when Mr. Yungwirth was speaking as counsel, when he was acting as Moneta's agent and when he was speaking as a concerned citizen of Timmins, although it is noted that he didn't have standing in this hearing in this last role and it was of no assistance to the tribunal to muddy the waters with these personal comments.

**Applicability of Part VII - Contrary Intention**

Moneta carried out mining activities within the Moneta Mine in the 1930s to early 1940s, after which no further mining was undertaken. In 1989, the **Mining Act** was amended to add Part VII [S.O. 1989, c. 62], setting out requirements for ongoing mine rehabilitation as well as to deal with mining legacy issues, namely old mines which had not been closed out to modern standards. This was done in consultation with the industry, as set out in the 1988 "Green Paper", relevant excerpts of which were provided by the Director. Any questions concerning the scope of the requirement to rehabilitate and the scope of the rehabilitation itself were clarified in subsequent legislative amendment, found in the **Savings and Restructuring Act, 1996**, S.O. 1996, s. 1, Sched. 0, with those provisions relating to Part VII being proclaimed on June 30, 2000, to allow for the development of a new Mine Rehabilitation Code as set out in O. Reg. 240/00. However, the purpose of the legislation, found in s. 2, was amended in 1996 to include health and public safety in addition to concerns regarding the environment.

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Moneta has asserted that the wording of the new section 153.3(1), which provides that the patentee of mining rights is liable for rehabilitation in accordance with Part VII unless a contrary intention is shown, captures Moneta's own situation. According to Mr. Yungwirth, its position is supported by the severance of the mining interest from the surface rights, the latter of which have been developed to totally change the character of Moneta's interests from that of mining rights to merely an interest in a mining patent. According to Moneta, this constitutes a contrary intention, which operates to remove it from the operation of Part VII and as such, it has no continuing liability to prepare and implement a certified closure plan.

According to the Director, no direction is provided in the legislation concerning what might constitute a contrary intention. Ms. Wyatt provided several cases stemming from the estates field [**Doucette v. Fedoruk Estate** [1992] M.J. No. 597 (Man. C.A); **Perry v. Hicknell** (1982), 34 O.R. (2d) 246 (Ont. H.C.)] to support the Director's position that a clear and express intention must be shown to not have the statutory provision apply, which has not been done in this case. This intention should, also, expressly specify that it is liability under Part VII of the **Mining Act** which is not to apply. Further, although it does not specify where to look for a contrary intention, this statutory obligation cannot be contracted out of between the proponent and a third party to remove itself from statutory liability imposed by the Crown. As it is the Crown which has created this liability, it is only the Crown which may release Moneta from its obligation. There is no evidence that this has been done, such as according to the terms of its patent or through some collateral agreement with the Crown.

The tribunal finds that Moneta has not demonstrated any contrary intention that Part VII not apply to its obligation to comply with an Order of the Director to file a certified closure plan. Contrary intention must be shown through agreement with or involvement of the Crown. One cannot unilaterally opt out of this remedial statute. Involving third parties, such as is the case when severance of the surface rights has occurred, cannot be imposed on the Crown as indicative of contrary intention. Nor can the passage of time or urban development of those surface lands constitute a contrary intention, their having nothing to do with obligations imposed by the legislation. Part VII imposes a statutory obligation to file a certified closure plan in accordance with the Mine Rehabilitation Code. The only entity which can release a proponent from this statutory obligation is the Crown. Such release, if it were to exist, must be very specific so that there is no question as to whether any statutory obligations continue. There is no such agreement here. The **Mining Act** is not planning legislation; zoning is totally irrelevant to how this legislation operates. Whatever the relationship between a proponent and surface rights owners or a municipality may be is totally irrelevant. Obliteration of surface features of a mine in a municipal setting does not in any way involve the **Mining Act,** with the exception of the Minister exempting unsevered mining lands from mining taxation under section 190, which does not apply to the facts of these appeals.

It is beyond absurd to suggest that Moneta can unilaterally opt out of its statutory obligation. Nor can Moneta unilaterally impose a contract or agreement on the Crown. Nothing in the documentation filed, nor in the conduct of the Crown in this matter, can be construed to constitute acquiescence on the part of the Crown to such an arrangement. Throughout, the Crown has maintained that Moneta has statutory obligations with which it has failed to comply.

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**Mine Hazard**

The Director is authorized by subsection 147(1) of the **Mining Act** to order the filing by the proponent of a certified closure plan where a mine hazard exists. A "mine hazard" is any feature or disturbance in a mine which has not been rehabilitated to the prescribed standard, which in other words, is in accordance with the Mine Rehabilitation Code established in 2000.

The normal meaning of the word "hazard" found in dictionaries is risk or chance of danger. A statutory mine hazard is not a dictionary definition. As stated in Driedger and Sullivan: at page 51:

> "…When a word is defined by statute, the binding character of the stipulated meaning depends not on shared linguistic convention but on legislative sovereignty. The stipulated meaning may closely resemble the conventional meaning of the defined term (whether ordinary or technical) or it may effect a radical departure (although a radical departure would violate current drafting standards). In either case, interpreters are bound to apply the meaning stipulated by the law-maker, which may or may not incorporate conventional meaning."

Contrary to what was argued by Moneta and formed a substantial part of its cross-examination, the Director is not required to prove that a mine feature constitutes a real danger in any sense of the word. This position would advocate that it is the dictionary meaning for hazard which governs. No prior investigation is required – this is clear from its statutory definition which has been enacted to unseat shared linguistic convention. It is legislative sovereignty, namely the right of the government of the day, to enact provisions it deems appropriate under the circumstances. Barring constitutional challenge, such enactments cannot be unseated. A member of the bar should be counted upon to understand this fundamental legal principle.

Moneta has also argued that there have to be real and probable grounds that an actual mine hazard exists. The "real and probable grounds" test likely does not enter into the inquiry, but if the tribunal is wrong and this test is to be considered as relevant or appropriate, it must be in connection with whether a mine feature which has not been rehabilitated to statutory standards exists. "Real and probable grounds" that the dictionary definition of hazard meaning danger exists is completely irrelevant. "Real and probable grounds" that a mine feature exists which has not been rehabilitated to the prescribed standard would be all that is necessary to enable the Director to make her order.

What constitutes a mine hazard can be found by the statutory definition which assigns responsibility, placed squarely on the proponent. In this case the proponent is the holder of the mining rights and the self-same operator of the original mine. It really doesn't matter for purposes of application of the statute whether the current principals of Moneta were even born when Moneta stopped producing as a mine.

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All that is required by the legislation on the part of the Director is to identify mine features. Part VII contemplates ongoing, progressive rehabilitation, always to the prescribed standard, throughout the life of a mine. Throughout, oversight and approval of rehabilitation efforts are provided by the Director, whether those activities may be "voluntary", i.e. at the proponent's own initiative, or mandatory, pursuant to an order to file a closure plan. The ongoing oversight effectively ensures that it will be apparent to the Director, based on mandated and monitored activities related to rehabilitation, whether any given feature has been rehabilitated to the prescribed standard. If, by some chance, a feature has in the not too distant past been rehabilitated to the prescribed standard without compliance with Part VII and therefore without the knowledge of the Director, the feature must still be described as a mine hazard whose rehabilitation must be assessed and certified by a qualified expert in the particular field of rehabilitation.

It is inescapable that every feature of a mine will be, at one time or another, subject to the Director's scrutiny, the level of which is set rigorously high. In an urban area, the Director's interest in ensuring compliance with set standards of rehabilitation is understandable. Urban development means that the area is populated, creating serious risk to safety if the owner of the mining rights does not step up and take appropriate responsibility for rehabilitation.

Indeed, at the site of the Moneta Mine, one has seen all but the worst kind of hazard involving major subsidence of the 1-2 stope. No one was injured, but businesses have been shut down and property has been destroyed. Initially, fill inside the concrete collar of the waste pass subsided some ten feet on April 3, 2000. This and a depression noticed in September, 2001 (MA 001-02, Ex. 4, Tab 4, Item 12) led to considerable concerns on behalf of the Director (Letter of September 18, 2001, MA 001-02, Ex. 4, Tab 4, Item 13) that the site was not safe. Yet, all that Moneta was willing to do to ensure the security and safety of the site was to write to some, but not all of the surface rights holders (MA 001-02, Ex 4, Tab 4, Item14), advising the City and Raymond's Garage in the vaguest of terms that MNDM have concerns regarding possible subsidence. The Director wrote to Moneta on December 12, 2001 (MA 001-02, Ex. 4, Tab 4, Item 17), advising that only two of four property owners were notified, that, while fenced, Raymond's Garage was open for business whereby no protection was provided and finally that no commitment was made to any action concerning the need for a geotechnical study to determine long-term stability, given current use.

In other words, in response to historical subsidence of sufficient magnitude to swallow several school buses, recent subsidence within a concrete collar, a developing depression overtop of the self-same stope which suffered catastrophic failure in the past, Moneta did virtually nothing. Meaningful and adequate notice to all surface rights holders, not a select few, should have properly stated that, until such time as geotechnical studies could be undertaken so that the extent of *necessary* rehabilitation measures could be determined, continued use of the surface should be considered unsafe and closed to all access. How this could be confused with Moneta's assurances that the Raymond Garage location was closed at night when not conducting business is beyond comprehension. It speaks to a wilful blindness as to the seriousness of the situation and the seriousness of Moneta's obligations in relation to rehabilitating the site.

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**Alternatives and Rehabilitation Schemes**

In addition to not having properly presented evidence through a sworn or affirmed witness and asking that the tribunal ignore the operation of the law, Moneta seeks to unilaterally impose on the Director any number of rehabilitation schemes outside the scope of the legislation.

Throughout its long and storied dealings with the Director's staff, Moneta has acted as though it has a choice as to whether the Director could proceed under Part VII and throughout has sought to rely on examples of alternative arrangements or opportunities to offload its responsibilities onto third parties. Moneta does not have this choice, nor can it unilaterally impose opting out of Part VII on the Director. Part VII is a regulatory framework for the rehabilitation of mining lands, designed to encompass every type of mining activity, be it future, current and legacy mines.

According to Moneta, if the Director could be persuaded to wait an unspecified length of time, much necessary work might end up being done by others outside the statutory framework and the rest could and would be done by Moneta voluntarily without the need to go through the process of certifying and implementing a certified closure plan. But, as correctly pointed out by Ms. Wyatt, if one examines the correspondence carefully, one will see a pattern emerge that something is on the horizon which will resolve the whole situation. All we have to do is wait for that eventuality to occur. At the time of the hearing six years later, nothing has been resolved.

The details of the various schemes were not properly introduced through a witness, but rather, formed part of Mr. Yungwirth's running commentary throughout these proceedings. They are given no weight or even under remote consideration as being viable. Rather, they illustrate the nature and extent of Moneta's avoidance of the issue in these appeals, namely must Moneta file certified closure plans under the **Mining Act**?

Moneta wanted to wait on the municipality's potential but as yet unconfirmed five year plan to replace, repair or upgrade infrastructure such as sewer lines or optic cables with the hope that such a municipal undertaking could take the place of any potential obligation on the part of Moneta to move existing sewer lines which might be threatened by an existing mine hazard.

Moneta sought to attribute rising water levels within the Moneta Mine to inactivity and cessation of pumping on an adjacent mining property. Ms. Wyatt submitted that the potential Hollinger joint venture appears to be the latest thing to save the day for the 1-2 stope and for Moneta's need to rehabilitate the mine hazard. Yet, Hollinger is merely a feasibility study and it doesn't mean that the dewatering of that mine will suddenly occur. If they decide to go ahead with it, it may take ten years or more. Moneta sought a finding that saturated fill would be more and not less stable, a position which contradicted the evidence of the one expert witness. Moneta placed undue importance on the impact of activities of a joint venture on that adjacent property as being the answer to all issues related to water.

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Moneta asked repeatedly that the Director's orders be found premature and should wait on the outcome of civil litigation between itself and several affected surface rights holders whose businesses were shut down and ordered vacated by municipal order after only the most recent (as of the time of the hearing) subsidence. Moneta wanted the Director and tribunal to wait and see whether the outcome of the litigation would be to make the surface rights holders, and by extension their insurance companies, liable for many activities which might also be included in a certified closure plan.

At the time the property was acquired, the previous subsidence was noted on title. In MA 001-02, Exhibit 4, Tab 3, particularly parcel 9176, on which it is annotated "the transferee acknowledges that the property, the subject matter of the transfer, is situated over an abandoned mining property and has been affected by previous cave-ins and herein agreed to identify and hold harmless the transferor from any and all claims as set out within the transfer." This had been registered on title nine years after the 1960 subsidence. A similar clause was contained in the transfer for parcel 12981 for Timmins Overhead Doors. Once litigation commenced in 2005, Moneta alleges that it could no longer access the properties in question. Moneta argues that ordering the filing of a certified closure plan would be highly prejudicial to ongoing litigation where negligence is alleged.

Based upon terms of the sales of the severed properties, Moneta is hoping that the surface rights holders are found liable for the damage which occurred to their various properties. There is no access and it is impractical to enter either so the whole process would be meaningless. Mr. Yungwirth questioned whether having a matter open in the Superior Court had any influence on the Parties of the Third Part's decision to not attend the hearing before the tribunal.

How such an outcome would translate into relevance in regards to Moneta's statutory responsibilities is unclear. If insurance were to cover what might otherwise be Moneta's responsibilities to third parties, then this would affect its own costs of implementing its closure plan. Clearly, for the time being, such costs would have to be included on a contingency basis in its certified closure plan, and financial assurance would be required accordingly. If it becomes unnecessary, the Director would be in a position to release or relinquish that part of the financial assurance.

In his argument, Mr. Yungwirth persisted in his denial that there was evidence of mine hazards relying on absence of evidence or highly speculative studies based upon little actual data. He placed a great deal of emphasis on the failure to locate certain features, but no evidence was introduced concerning what efforts had been made to actually locate those features. In a total reversal of the onus, Mr. Yungwirth suggested that there exists mere speculation as to where particular features are located and how they can be uncovered. He denies that the four mine shafts whose actual state of stability remains unknown, constitute mine hazards.

Moneta made some reference to a drained void as opposed to one involving ground water monitoring, or an undrained void. The only evidence before the tribunal is that what is required as part of the certified closure plan is hydrogeological study. The drained void

versus a complex version are not concepts in the Mine Rehabilitation Code. The tribunal finds that Moneta's understanding of what is taking place amounts to oversimplifications of highly technical engineering processes. In this regard, such statements become nonsense. They are incomprehensible to the one witness at the hearing and can be given absolutely no weight in this matter.

Furthermore, it is not clear why the process of how or why water gets into the Moneta mine workings is even relevant. It is relevant to the fact that Moneta is responsible for cleaning up its mine hazard. There may be concern with the extent to which water is a factor in the subsidence and in the hazard. The most major subsidence occurred in 1963 and predated all the evidence of flooding in Hollinger and McIntyre and the recent rise in saturation levels in Moneta. Even the experts are not sure about what all the factors in the subsidence are.

The primary focus of Mr. Yungwirth's concerns are what he envisions would be involved in attempting to access and rehabilitate features within buildings, describing it at times as dramatic and even catastrophic, involving ripping buildings apart. Impracticability of carrying out any rehabilitation within such features is a primary defence to the requirement to file a certified closure plan cited by Moneta. He has repeatedly asserted that the existing fencing surrounding the property, which evidence regards as a temporary measure, should be sufficient for long-term closure, notwithstanding that necessary geotechnical investigations have not been carried out to determine the surface area which could be potentially affected. Ms. Wyatt submitted that the argument on impracticality comes across as a form of "we just don't want to do this". It might be difficult; it might involve investing money. Contrary to what was asserted, the crown pillar has been located, even if a good job wasn't done in drilling into it. No one is asking Moneta to rip buildings apart, a fact which does not seem to have been heard judging from Moneta's submissions. There was evidence that work can occur within buildings. As for there being no evidence of a mine hazard, whether the owners being capable of knowing they are on a hazard is irrelevant and is unlikely to occur until some catastrophic event. The point should be to not wait until that happens.

The tribunal finds that there is an alarming pattern to the approach taken by Moneta in these proceedings. First, in the face of glaring actual dangerous circumstances, Moneta has maintained a wilful blindness concerning what has transpired, preferring to treat the subject lands as if no underground or open to surface mining had ever taken place. It has minimized all that it is facing in connection with its unrehabilitated mine hazards – the unfortunate saying comes to mind: "if it ain't broke, don't fix it." Mr. Yungwirth states that it is unlikely that any catastrophic failure will take place, fully in the face of repeated evidence to the contrary.

Moneta has sought to rely on various studies in connection with the unrehabilitated mine features which have glaring disclaimers throughout that no actual data was used and that further study is urgently required. The Trow study in particular predates the applicable mine rehabilitation and is of little value in terms of its conclusions. Moreover, such monitoring as is advocated is never undertaken. Moneta has preferred to ignore that all of the

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relevant studies call for hard data. These constitute ominous signs of what in the tribunal's opinion amounts to a house of cards which may come down at any moment, both figuratively and literally. Moneta has no hard data by today's standards which tell it or the Director anything they need to know in relation to these identified features.

And yet, Moneta prefers to deny, deflect, delay and obfuscate. Wait for the litigation – the Director's orders are premature. Wait for the joint venture – someone else will be responsible for pumping the water. Wait for the city to implement its long-term capital plan and move utilities which are currently at risk. Wait for all the surface rights owners to step up to the plate. Involve the stakeholders and not jump the gun. Wait for Moneta to do the necessary work on a voluntary basis.

What is most alarming about what has transpired is the statement by Mr. Yungwirth, in no uncertain terms, that notwithstanding any order that might be forthcoming resulting from these appeals, Moneta would not impose itself on its neighbours or friends and carry out such necessary work as may be imposed. It is risky to impose oneself on those who do not want you there working on something no one can see. Essentially, Moneta would defer to someone else if they want to do the work so that Moneta could accept statutory responsibility

Pursuant to subsection 152(10), an appeal lies to the Divisional Court on a question of law from any decision of the tribunal. A proponent may also appeal in writing to the Minister, pursuant to subsection 152(11), within 30 days of receipt of the tribunal's decision any matter other than a question of law and the Minister will confirm, alter or revoke the tribunal's decision in accordance with what the Minister considers to be in the public interest.

Of significant concern to the tribunal regarding the outcome of these appeals are Mr. Yungwirth's many statements to the effect that he would not be willing to impose himself on his neighbours so that Moneta could carry out the terms of the appeal orders. Failure to comply with an order of the Director or on appeal an order of the tribunal constitutes an offence for each day that such failure continues. Subsection 167(2) as it was on the day these appeals were filed, states that failure to take reasonable steps of compliance with an order under Part VII is guilty of an offence and liable to a fine of not more than $30,000 for each day on which the offence either occurs or continues. Subsection 167(6) provides that every director or officer of a corporation who has a duty under Part VII to ensure that the corporation complies with the statutory requirements is guilty of an offence and liable to a fine of up to $10,000. These provisions were changed in 2009; it is an open question whether a failure to comply with an order under section 167 arising after October 28, 2009, would be liable to the new provisions. If it were the case that the new provisions apply, imprisonment of a term of not more than two years could be levied in addition to or instead of the fines.

The **Mining Act** treats failure to comply with orders made pursuant to Part VII as extremely serious. That much is clear. Moneta's apparent intransigence in respect of its statutory obligations, as evidenced by correspondence in the file written by Mr. Yungwirth as its counsel and or agent, can become the subject of these extreme measures, if matters are allowed to continue in the same vein. The tribunal was unable to discern whether Mr. Yungwirth's ongoing commentary on behalf of Moneta as its counsel or agent was disingenuous or not. As

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the contact person for or on behalf of Moneta, he has remained engaged throughout the process with the Director, but frankly has failed to move forward on any of the issues raised in any meaningful manner. It is clear, however that the Director does have statutory options to hold Moneta accountable in very tangible ways should Moneta's conduct not change significantly in the future.

**Conclusion**

The Director's Orders of December 12, 2001 and May 4, 2007, will be confirmed and the appeals dismissed. There was evidence presented at the hearing concerning rehabilitation of the fill raise. However, notwithstanding the witness's evidence that it has been properly rehabilitated, the tribunal finds that it would prefer to have this feature examined and re-certified as compliant due to the passage of time.

The tribunal will entertain submissions from the Director and a response from the appellant as to costs.