File No. MA 029-05

M. Orr) Tuesday, the 22nd day
Deputy Mining and Lands Commissioner) of August, 2006.

THE MINING ACT

IN THE MATTER OF

Mining Claims SSM-1229647 and 1231116, situate in the Township of Deagle, in the Sault Ste. Marie Mining Division, recorded in the name of Rapier Resources Inc. as to a 100% interest, (hereinafter referred to as the "Mining Claims");

AND IN THE MATTER OF

An application pursuant to section 105 of the **Mining Act** for the enforcement of a Mining Claim Purchase and Sale Agreement, between the Applicants and the Respondent, dated the 24th day of May, 2001; for the transfer of ownership of the Mining Claims from the Respondent to the Applicants and such other relief as the tribunal deems just.

B E T W E E N:

MAI ELIZABETH WARD AND JAMES VANCE

Applicants

- and -

RAPIER RESOURCES INC.

Respondent

O R D E R

WHEREAS this application was received by this tribunal on the 13th day of December, 2005 and heard on the 5th day of June, 2006 in the Courtroom of this tribunal in Toronto, Ontario;

UPON hearing from the parties and reading the documentation filed;

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1. **IT IS ORDERED** that this application be and is hereby granted and that the ownership of the Mining Claims be and is hereby transferred from the respondent to the applicants, each as to a 50% interest.

2. **IT IS FURTHER ORDERED** that the notation "Pending Proceedings" which is recorded on the abstracts of the Mining Claims, to be effective from the 13th day of December, 2005, be removed from the abstracts of the Mining Claims.

3. **IT IS FURTHER ORDERED** that the time during which the Mining Claims were under pending proceeding, being the 13th day of December, 2005 to the 22nd day of August, 2006, a total of 253 days, be excluded in computing time within which work upon the Mining Claims is to be performed and filed.

4. **IT IS FURTHER ORDERED** that the 18th day of November, 2011, be fixed as the date by which the next unit(s) of prescribed assessment work, as set out in Schedule "A" attached to this Order, must be performed and filed on Mining SSM-1229647, pursuant to subsection 67(3) of the **Mining Act** and all subsequent anniversary dates are deemed to be November 18 pursuant to subsection 67(4) of the **Mining Act**.

5. **IT IS FURTHER ORDERED** that the 24th day of August, 2012, be fixed as the date by which the next unit(s) of prescribed assessment work, as set out in Schedule "A" attached to this Order, must be performed and filed on Mining SSM-1231116, pursuant to subsection 67(3) of the **Mining Act** and all subsequent anniversary dates are deemed to be August 24 pursuant to subsection 67(4) of the **Mining Act**.

6. **IT IS FURTHER ORDERED** that no costs shall be payable by either party to this application.

THIS TRIBUNAL FURTHER ADVISES that pursuant to subsection 129(4) of the **Mining Act**, R.S.O. 1990, c. M.14, as amended, a copy of this Order shall be forwarded by this tribunal to the Provincial Mining Recorder **WHO IS HEREBY DIRECTED** to amend the recorded in the Provincial Recording Office as necessary and in accordance with the aforementioned subsection 129(4).

DATED this 22nd day of August, 2006.

Original signed by

M. Orr
DEPUTY MINING AND LANDS COMMISSIONER

SCHEDULE "A"

Mining Claim #	**New Due Date**
SSM-1229647	November 18, 2011
SSM-1231116	August 24, 2012

File No. MA 029-05

M. Orr) Tuesday, the 22nd day
Deputy Mining and Lands Commissioner) of August, 2006.

THE MINING ACT

IN THE MATTER OF

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B E T W E E N:

MAI ELIZABETH WARD AND JAMES VANCE

Applicants

- and -

RAPIER RESOURCES INC.

Respondent

REASONS

Appearances:

Mr. D. Peter Best – Counsel for the Applicants
Ms. Manizeh Fancy – Counsel for the Respondent

Background:

This matter was heard on June 5, 2006, in the Courtroom of the tribunal in Toronto.

This matter arose when the applicants sought to have title to two mining claims conveyed to them under the terms of an agreement made with the respondent, Rapier Resources Inc. ("Rapier") in 2001.

Preliminary Matters:

At the start of the hearing, Rapier's counsel asked that Mr. Carmen Ward and Ms. Elizabeth Ward be excluded from the room while Mr. James Vance testified. Counsel for the applicants, after some submissions, agreed to this request.

Both counsel made opening statements. Counsel for the applicants agreed that in effect, his clients were saying that the claims had become "dormant" under the terms of the contract, and that as a result, they could be "re-acquired" at no cost to his clients. Counsel for the respondent on the other hand said that the applicants were trying to obtain something for nothing; that there was nothing in the agreement that pointed to the applicants being allowed to get the claims back at no cost to them. This was a commercial agreement and one does not get things for free as counsel put it. Furthermore, the applicants began showing early signs of "wanting more" as things progressed during negotiations. If the applicants' position was accepted, then they stood to gain a windfall and to be unjustly enriched as a result. In addition, the issue of the admission of extrinsic evidence was raised at the beginning as the applicants wanted to rely on a draft agreement to support their position. The respondent objected, but the tribunal ruled that arguments would be heard at the time the applicants attempted to submit whatever it was the respondent found objectionable. The tribunal did rule to accept the evidence and this is discussed in the Findings below.

Issues:

1. In an agreement signed by both sides dealing with the development of two mining claims, should the word "re-acquire" be interpreted to mean that the applicants have to pay Rapier to have the claims conveyed back to them?
2. If the agreement is to be interpreted in such a way that money must be paid, then what is the amount?

Evidence of the Parties:

James Vance (Applicant)

James Vance described himself as a prospector, who, along with Carmen Ward, had staked the two subject claims. The applicants' materials indicate that the claims were recorded in December, 1998, and March, 1999. Mr. Vance described Mr. Ward as his partner and in fact, Mr. Ward is also his father-in-law.

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Mr. Vance said that he had to carry out certain work in order to access the claims. The claims were recorded in Mai Ward's name (as to a 50% interest) as her husband Carmen Ward had had a heart attack, which affected his ability to actually stake land. The other 50% interest was recorded in the name of James Vance.

When asked what the intention was to do with the claims, Mr. Vance said that they intended to find someone to develop the claims, but that they themselves did not want to spend any of their own money on sampling or developing the claims. He also indicated that they (meaning him and the Wards) wanted to obtain royalties from whomever they got to develop the claims.

Mr. Vance connected with Mr. Schooley of Rapier Resources after being given his name (among others) from a staff person at the Mining Office in Sudbury in 1999. Mr. Schooley came up to Massey in September, 1999 to meet the Wards and Mr. Vance and to take "grab" samples from the claims. Grab samples are taken with a hammer by knocking off pieces of the quartz.

Mr. Vance said that in conversations with Mr. Schooley that he told him they were looking for royalty payments of $5/tonne and that they did not want to be liable if no royalty money was paid – the claims would "go back to us". Apparently Mr. Schooley said that the quantity and quality would determine that – meaning the royalty payment amount. Mr. Vance also indicated that he wanted to see copies of all analyses that would be done on the product.

More discussions took place and more samples were taken over a period of time in the fall of 1999. Mr. Vance described Mr. Schooley as being "very excited". After the small samples were taken, the next step was to take a drill sample. Mr. Schooley prepared the drilling plan. When it came time to actually do the drilling, the terrain had to be prepared as the drill had to move in under its own power, (from the pictures provided by Mr. Vance) much like a caterpillar tractor. Mr. Vance said that he prepared the road to the site, billed Mr. Schooley for the work and that Mr. Schooley paid his bill. Mr. Vance could not produce an invoice, but said that he billed about $1000.00. The results of the first drilling efforts indicated that there were some good areas and some bad ones. In March of 2000 another drilling attempt was made.

His counsel repeatedly asked Mr. Vance if Mr. Schooley was looking to be reimbursed for any of the work he was having done or if there were any conversations about reimbursement and Mr. Vance said "no".

After the second drilling effort in March 2000, Mr. Vance said that Mr. Schooley gave them a confidentiality agreement. When asked what his reaction was, Mr. Vance said that he was confused by the fact that Mr. Schooley had presented it. Mr. Vance did not sign the agreement and maintained that his relationship with Mr. Schooley was good.

The efforts at sampling the claims' contents continued to the point where a "bulk" sample was taken and sent to Globe Metallurgical Inc., a company in Niagara Falls, New York, for analysis. The bulk sampling process was a bigger job than a grab sampling exercise and

required further clearing of the road by Mr. Vance. The product had to be extracted and crushed in order to determine its quality. Mr. Vance indicated that they were paid a royalty for the value of the tonnage taken out and sampled in the bulk sampling exercise.

The costs associated with carrying out the sampling exercises were comprised of such things as having to build a bridge, fencing etc as the claims were in a sensitive area (Lands for Life). The costs amounted to roughly $150,000.00. At no time did Mr. Schooley ask for reimbursement. While Mr. Vance might provide the names of contractors to do the required tasks, Mr. Schooley paid for everything. Mr. Vance said he did not know the costs of the things done.

More serious discussions came about after the bulk samples were taken and in March 2001, Mr. Schooley brought a draft agreement to Massey to present to the Wards and Mr. Vance. Mr. Vance said that Mr. Schooley brought the draft to the Wards' house, but that he did not remember how long Mr. Schooley stayed or whether he was present when Mr. Vance and the Wards reviewed the draft.

In recounting the reaction of the Wards and himself to the draft, Mr. Vance indicated that he and the Wards were not happy with certain clauses (e.g., 2.4), that they were not going to pay anything, that it was common practice for companies to walk away and let the claims go back and that he had wanted a contract much earlier. Mr. Vance said that he (and the Wards) objected to some of the terms and that he made notations on the document to this effect.

A fax was composed by Mr. Vance and Mr. Ward, printed out by Mai Ward and then faxed by the Wards' daughter to Mr. Schooley. The purpose of the fax was to set out what they wanted changed in the draft. They felt that the draft required them to pay Mr. Schooley for the work he had done (and paid for) to take samples. Mr. Vance said that Mr. Schooley's words to him in a phone call were that "there would be no cost to you" and in referring to objectionable clauses he said "I'll take them out of there".

Mr. Schooley showed up in Sudbury in May 2001 and Mr. Vance and the Wards hurriedly reviewed the agreement. Mr. Vance and Mrs. Ward signed the document. They were satisfied that the changes they had wanted to see made had in fact been made.

During his testimony, Mr. Vance said that the purchase price in the agreement ($14,670.00) reflected the value of royalties taken from the bulk sampling done in 2000 ($4,670.00), as well as money intended to provide Rapier with two years to develop the property before the dormancy clock started running in 2004. In other words, Rapier would have four years to develop the property before the claims would be considered dormant. The $10,000.00 was considered (by Rapier and agreed to by the applicants) to be payment for two years of royalties (2002, 2003). No payments were made for 2004 and 2005 and the claims were considered dormant.

When questioned by counsel for Rapier, Mr. Vance admitted that he in fact had commercial experience as he sold fishing licences and ran a local restaurant. He said that he did not have much use for contracts but did have experience in "business relationships". He admit-

ted to not using the dispute resolution clause in the agreement and on looking at it at the hearing, was not sure he understood what the clause meant.

In terms of the discussions that were held with Mr. Schooley, Mr. Vance said that early on (September, October, 2000) the applicants agreed that Rapier would undertake and pay for whatever "reasonable work" was required and the understanding was that Rapier would be given the exclusive right to develop the properties. Mr. Vance claimed that the exact terms initially were that $10,000.00 would be paid up front and $10,000.00 per year would be paid afterwards. He also claimed that there had been a discussion on the right to re-acquire the claims, the discussion being that "if there was [sic] no royalties or no payment we would re-acquire the claims right from the beginning". This discussion took place according to Mr. Vance, the first time he met Mr. Schooley. He said that they would let Rapier go ahead as long as something was going on and that there were other prospects (meaning other interested parties) out there should things with Rapier not work out. If no royalties were forthcoming then they would reacquire the claims. He admitted that Mr. Schooley came up a number of times (over 50) and further that a lot of work was carried out by and paid for by Mr. Schooley.

When asked if Mr. Schooley paid for whatever he was asked to pay for, Mr. Vance made it clear that Mr. Schooley only paid for what he wanted to pay for. It came out later through Messrs. Ward and Schooley that on at least one occasion, Mr. Schooley was asked if he would pay for some work that Vance and Ward wanted to do on another property. He said no. When asked about the clauses that were found in the fax sent to Mr. Schooley after the draft agreement was presented, Mr. Vance said that Mr. Ward pulled ideas from other documents to get the wording they wanted.

In response to Rapier's counsel's questions about the language of the agreement and the fact that it did not specifically state that the claims could be acquired "at no cost", Mr. Vance replied that "what we're asking for is re-acquisition if there's been nothing done to the property", and that the agreement did not set out the fact that they would have to pay any costs. According to Mr. Vance, the fact that the agreement did not assign any costs to the applicants meant that they did not have to pay any money to get possession of the claims should they go dormant.

Carmen Ward (for the Applicants)

Mr. Ward is 65 years old, a resident of Massey, Ontario and was an electrician by trade. He had a heart attack in 1996. While he had physically staked lands prior to his heart attack, he had Mr. Vance do the legwork afterwards. Mr. Vance was his partner and recorded a 50% interest in the subject claims in Mrs. Ward's name as a precaution against something happening to Mr. Ward. Mr. Vance retained a 50% interest in his own name. Rapier's counsel cross-examined Mr. Ward on this point and asked why it was that the claims had been recorded in his wife's name, alluding to the fact that he was collecting a benefit. Mr. Ward answered that at the time of the staking he did not have a prospector's licence, he could have put them in his name but chose to put them in his wife's name because of the heart attack.

Mr. Ward met Mr. Schooley in 1999 and said that Mr. Schooley understood the first time they met that they (the Wards and Vance) did not want any liability over the money being spent by Mr, Schooley – that these were his decisions. Mr. Schooley never rendered a bill and there were never any discussions about the costs that Mr. Schooley was running up with the sampling he was carrying out.

Mr. Ward remembered objecting to certain clauses in the draft agreement that he interpreted as meaning that they would have to pay money to get the claims back. In effect, he felt that Mr. Schooley was trying to get the $10,000.00 back that he had paid to get the claims in the first place. Mr. Ward was surprised to see this in the draft.

Mr. Ward described how he, Mrs. Ward and Mr. Vance had reviewed the document and that when they saw the final version he was satisfied that what he described as the "offensive paragraphs" had been removed. He described the signing as a "little bit of a rushed deal", but said that the agreement allowed them to reacquire the property "at no cost", meaning (in Mr. Ward's mind) that he would not have to compensate Mr. Schooley for any money he might have spent sampling the property prior to the agreement.

In cross-examination, Mr. Ward described the discussions that pertained to getting the claims back, saying that the money they wanted from Mr. Schooley in payment for title to the claims (the $10,000.00) represented the time and work of the applicants and that allowing someone to come in and look at the property, drill it, and so on, and then that someone "walks away" would leave the applicants with "nothing". Mr. Ward admitted that the phrase "at no cost" never made it into the agreement but when questioned by the tribunal about his reaction to the signed agreement, he said he was "comfortable" with the agreement after the reference to paying any money had been removed. In response to counsel's questions about the fact that without the work needed to apply for assessment credit the claims could forfeit, Mr. Vance replied that he would have simply restaked the claims.

Mai Elizabeth Ward (Applicant)

Mrs. Ward wrote out the terms that her husband and James Vance had wanted in the agreement, as her printing was more legible. The terms were then faxed to Mr. Schooley.

Nils Schooley (for Respondent Rapier Resources Inc.)

Mr. Schooley is the President of Rapier and resides in Oakville, Ontario. He is a metallurgical engineer by profession and holds an MBA. After working for a large company dealing with everything from production, marketing (etc), he turned to investing in Ontario mining sources. This was his second experience with mining claims. He had a relationship with Globe Metallurgical Inc. ("Globe") who he described as being the world's largest producer of silicon metal. He understood there were customers who were looking for high purity quartz to produce silicon metal. The quartz was shipped to the United States (N.Y.) for silicon metal manufacturing.

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Mr. Schooley got a call from Mr. Vance on September 8, 1999 and met the Wards and Mr. Vance on September 16, 1999. He was taken to the property (which had three claims on it), by way of a trail (about two miles long) and to a white "showing" in a "green forest". The showing was named "Snow White" by Mr. Schooley - for obvious reasons. It looked to be "reasonably pure". He was also told about black granite showing elsewhere at a claim called "Mile 12".

Back at the Wards' house, he was told that the Wards and Mr. Vance did not want to bear any costs – "that anything we did, they didn't want to put anything out of pocket", and that they wanted to get it developed and were asking for $10,000 to sell the claims plus $5/tonne royalty. Mr. Schooley said that he agreed to that. In his words, though, he did not think they really had an idea a sense of what a royalty might be as they did not fully understand the silicon metal manufacturing process.

The small samples he took on his visit were analyzed by Globe that same year and the results were "encouraging". The quality of the material was important to Mr. Schooley. He shared the results with Ward/Vance in October and asked to have another look. The tribunal notes that Mr. Schooley's affidavit says, "they" (meaning the Wards and Vance) "told me that they did not wish to take any risk in developing the Mining Claims. They asked Rapier to undertake and pay for whatever reasonable work was required…. Rapier agreed to perform the required work and incur the expenses on the basis that Rapier would be given the exclusive right to develop the deposit and market the products over the long term, and the Applicants would transfer the Mining Claims for cash consideration and a per ton royalty payment for marketable high-purity silica products in the future." In his testimony he said, "… they didn't want to bear any of the costs and I agreed I would do it as we went along." The value of the work done could be applied against the claims for assessment credit. Mr. Schooley apparently had no problem with this proposition.

Mr. Schooley intended to undertake a grid pattern to take further samples. Once that was done, the next step was drilling, for which surveys were needed. Mr. Vance helped him find a driller. Mr. Schooley says that at this time there was no talk about re-acquiring the claims. He said he agreed to bear the costs he was incurring and he also agreed that Vance/Ward could use the work being carried out for assessment credits under the Mining Act. Drilling took place in January and February; the January samples being disappointing, and the February samples being more promising. After getting Globe to commit to using a smaller size bulk sample, Mr. Schooley took the steps needed to achieve bulk sampling. Permits were needed; a bridge had to be built, etc. The crushed product had to be sent to Thorold, Ontario and then to New York State. This was in mid September to November 2000.

Mr. Schooley said that the claims were coming due in December 2000 and March 2001, as they had been staked in 1998 and 1999. He had committed to letting the Wards/Vance use the value of the work he had carried out for assessment purposes as he expected to benefit in the long run. At this time, Mr. Ward brought up the topic of reacquiring the property. According to Mr. Schooley, this was the first time the issue had been raised. He said that it occurred to him that he was giving up the value of the work (to be used for assessment credits) and they started talking about reacquiring the property. Mr. Schooley saw the Wards/Vance as getting royalties, but Mr. Ward was talking about re-acquisition.

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About this time (December 2000) Mr. Schooley received money from Globe for the bulk sample that he had sent earlier that same year. He also had a contract drafted by a law firm (Stikeman Elliott). Mr. Vance called and told him there was a problem with the information being used for the assessment credits. There was no talk about contracts. There was talk about a $10,000 fee and a $5/tonne royalty. Mr. Schooley pointed out in his testimony that he was interested in the highest purity. In 2000, "permission to test" had been received from the Ministry of Northern Development and Mines, and in March 2001 a favourable detailed report (emanating from Globe) was sent to the Ministry. This favourable report reflected Globe's assessment of the sample sent earlier and led to the payment of a royalty to the applicants in the amount of $4,670.00, in advance of signing any agreement. He testified that he had not wanted to pay anything "up front" and that they "didn't want to pay for anything all the way along." The receipt of the favourable report led to the agreement that is at the centre of this dispute.

Mr. Schooley visited the Wards/Vance again in March 2001 and gave them a draft agreement at that time. He received a fax from the Wards/Vance in April 2001, which set out a number of changes they wanted to see to the agreement. In his words he was "incensed". He also said that he had already discussed with them that if they wanted to get the claims back, they would have to pay expenses he had incurred. It is not clear from his testimony, but it appeared that at some point prior to signing the agreement, Mr. Schooley told the applicants that even if they did not want to come to an agreement he would "make sure that I take whatever steps I can to get my money back now that [the applicants are] basically reneging on what I expected to be the agreement". This was how his "dormancy" clause in the draft document would work – they would pay him for what he had spent. He said that they were trying to "change horses in mid stream" and that they always seemed to be "looking for more" and not wanting to pay. He had spent about $130,000.00. He was taking all the risk, and they had not done any of the work. In his words, this was "unacceptable". When he met with them next, he outlined five other options of varying levels of risk, and no agreement had yet been reached. He still expected them to pay for what he had done if they wanted to reacquire the claims. The agreement was signed when he came to Sudbury in May 2001. He could recall going through the agreement with the Wards and Mr. Vance. According to Mr. Schooley, he took out the things that the applicants had wanted out. The tribunal notes that in February and April of that year, Mr. Schooley had compiled two lists; the February list had no title, and the April list bears the title "Unrecovered Cash Costs to Date". When asked by the tribunal, he described these as "capital costs" and he considered them to be evidence of the fact that the claims had been improved (their value increased) by the amount of money he had spent as per those lists. The tribunal notes that a variety of items are listed, including $2,000.00 for "legal costs for agreement" (April) and $809.00 for "legal costs for claims agreement" (February). In addition, the February list contains an amount of $14,670.00 for "purchase of claims including royalty on bulk sample" and the April list contains an amount of $4,665.00 for "royalty on bulk sample". For both of these items on both lists, "Vance/Ward" is listed as the "principal supplier". In his testimony at the hearing, Mr. Schooley said he would suffer a penalty if he was not covered for the money he had spent and he no longer had the claims. The claims were the means to an end in other words, the end being recovery of his costs.

In 2002, (according to Mr. Schooley's affidavit), "Globe presented a very difficult financial commercial risk" and no business was carried out with Globe that year. In April 2003,

Globe filed for bankruptcy protection in the United States. In Mr. Schooley's words, "… since Globe's bankruptcy, there has not been a material opportunity to sell high-purity silica from the Mining Claims."

In cross-examination, Mr. Schooley agreed that had the Wards and Mr. Vance walked away before signing the agreement, they would not have owed him any money. Under further questioning, Mr. Schooley said that he was basing his claim for reimbursement on an understanding he had with the applicants. In December the applicants had introduced the idea that they might want to reacquire the claims at no cost to them. As far as Mr. Schooley was concerned, they could reacquire the claims on condition that they paid all of his costs. Furthermore, as far as he was concerned, the applicants knew what was involved should they want to re-acquire the claims.

Upon further questioning by counsel for the applicants and in re-examination by his own counsel, Mr. Schooley maintained that the applicants would have to reimburse him for his expenses and that they could make him a reasonable offer. He had put capital cost into the property thereby adding value to it. He added that reacquiring property never becomes an issue if royalties are coming in.

Submissions of the Parties

The Applicants Vance and Ward

The applicants say that they do not have to pay any money to Rapier in order to have the claims re-conveyed to them. They produced the draft agreement in support and testified that during the time that Mr. Schooley was spending money on samples and associated work, not once did he ask for reimbursement. Before and after the issue was raised about money being spent on sampling the claims and associated work they made it clear to Rapier that they did not want to assume any risk nor to spend any money. When Mr. Schooley produced an agreement for signing that did not contain any reference to their having to pay for anything, they were satisfied that it reflected their wishes.

The Respondent Rapier Resources

Rapier says that the signed agreement should be interpreted to mean that the applicants must pay Rapier something in order to have the claims re-conveyed to them. The agreement is a commercial document and it would be absurd to interpret it in the way suggested by the applicants. The amount of money being sought by Rapier is unclear since Mr. Schooley left it at something to the effect of "make me an offer". Rapier says that there is nothing in the agreement to indicate that the applicants do not have to pay something. To allow them the claims back without paying would give them a benefit for free. They would be unjustly enriched and Rapier would have put value into the claims with nothing to show for it. Rapier says that the draft should be treated as extrinsic evidence and that it should be given little weight. At the same time, Rapier says that all the money spent on sample taking and other associated work that it carried out should in some way form the basis for payment before the claims can be re-conveyed.

Findings

For reasons that follow, this tribunal agrees that the applicants are not required by the terms of the agreement to compensate Rapier in order to have the claims conveyed back to them.

Analysis of the Evidence

Use of Extrinsic Evidence

Rapier's counsel objected to the submission of extrinsic evidence and in particular, a draft version of the agreement on the grounds that the signed agreement was clear and unambiguous, but that even if it were ambiguous, the ambiguity should not be cleared up in a way favouring the applicants. With respect to this latter point, counsel said that the applicants' evidence of intent was subjective and therefore not admissible. The kind of extrinsic evidence that would be admissible would be evidence of the "commercial context" or the "factual matrix" of the agreement. A sensible commercial result was necessary.

The applicants' counsel pointed out that the **Statutory Powers Procedure Act** applied and that the tribunal was like a small claims court in that it could admit evidence that would then be "weighted" in terms of its evidentiary value.

The tribunal decided to admit the evidence relating to the draft agreement on the basis of relevance. Both the respondent and the applicants were submitting opposite interpretations of the signed agreement and specifically the clause dealing with "re-acquisition". The applicants looked to the draft agreement to support their position that no money was owed since all references to their paying money had been objected to and had subsequently been removed from the agreement before signing. Rapier's argument, on the other hand, was that the draft should not be admitted and that the signed agreement contained all the words necessary to enable the tribunal to find that money was payable. Relying on its interpretation of the phrase "… [t]he Vendors shall have the right to re-acquire the Mining Claims", Rapier was asking for a "reasonable amount" (that would include money it had spent on the claims over a six-year period.

Hearings conducted by the Mining and Lands Commissioner are procedurally governed in part by the **Statutory Powers Procedure Act** (under the **Mining Act**), and by the **Mining Act** itself. Subsection 15(1) of the **Statutory Powers Procedure Act** states that a tribunal may admit any oral testimony and any document or thing "relevant to the subject-matter of the proceeding" "whether or not … admissible as evidence in a court". The word "tribunal" is also defined in that **Act**. The tribunal concludes that the legislators (for whatever reason) decided that the common law rule governing the admission of extrinsic evidence does not apply in a hearing before the Mining and Lands Commissioner under the **Mining Act**. This tribunal's accumulated expertise in matters under the **Mining Act** is a likely reason for the legislators' motives. While the Statutory Powers Procedure Act may relax the rules of evidence, it is not an open invitation to admit such evidence without appreciating the reason for the rule keeping it out. The Supreme Court of Canada in the case of *United Brotherhood of Carpenters and Joiners of*

America, Local 579 v. Bradco Construction Ltd., described the rule and its purpose. While the case at hand dealt with collective agreements, it is useful here to repeat the Court's words. *"The general rule prohibiting the use of extrinsic evidence … originates from the parol evidence rule in contract law. The rule developed from the desire to have finality and certainty in contractual obligations. It is generally presumed that when parties reduce an agreement to writing they will have included all the necessary terms and circumstances and that the intention of the parties is that the written contract is to be the embodiment of all the terms. Furthermore, the rule is designed to prevent the use of fabricated or unreliable extrinsic negotiations to attack formal written contracts."* [1] The Court was dealing with the fact that an arbitrator had referred to an earlier report to clear up what he considered to be ambiguous wording in an agreement. The Court went on to say, *"The arbitrator in this case was of the opinion that he was entitled to rely on the Harris report if the terms of the agreement were not clear and unambiguous. In my view [Sopinka, J], this was not an unreasonable approach. He was not required to attempt to apply the rules of evidence as to what constitutes ambiguity, but merely to reasonably conclude that the collective agreement was unclear."* The Court then referred to a case where it had been necessary to examine an underlying international agreement in order to provide clarity to the wording at issue. The wording originated in certain domestic legislation enacted to implement international obligations. [2] In the case before this tribunal, Rapier's interpretation of the agreement called for the payment of money upon conveyance of the claims back to the applicants. There was nothing in the body of the agreement to assist the tribunal on this point. For example, what did "re-acquire" mean? What was the payment based on? How much money should be paid? Given that Rapier itself came up with different amounts owing even during the course of the hearing, the tribunal feels that its decision to admit extrinsic evidence in this case was justified.

The Signed Agreement and the Meaning of Re-Acquire

The agreement was signed by the parties on May 24, 2001. It contained one clause dealing with the right of the applicants to re-acquire the claims. Clause 2.4 (headed "Right of Re-Acquisition") reads as follows:

> *"The Vendors shall jointly have the right to re-acquire the Mining Claims from the Purchaser in the event the Mining Claims are Dormant."*

The word "Dormant" is defined in the agreement and refers to the eventuality of royalty payments being less than $5000 per year for two successive calendar years – 2004 being the beginning year. The parties agree that the mining claims are dormant.

The word "re-acquire" is interpreted by Rapier in such a way that the applicants would have to pay the respondent to get the claims back. Since the word is not accompanied by the words "at no cost" it must mean what Rapier says it means. It would not make commercial sense otherwise.

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[1] 102 D.L.R. (4th) 402 at pages 419
[2] Ibid. Note 1 at page 420

The applicants do not agree with this of course, and make the argument that Rapier's interpretation does not correspond to the position they held with respect to risk and liabilities and to the fact that the agreement reflects their wishes at the time they signed it.

The agreement also contains a clause 6.6 entitled "Entire Agreement" and which says:

> *"This Agreement constitutes the entire agreement between the parties hereto with respect to the subject matter hereof and cancels and supersedes any prior understandings and agreements between the parties hereto with respect thereto. There are no representations, warranties terms, conditions, undertakings or collateral agreements, express, implied or statutory, between the parties other than as expressly set forth in this Agreement, or any other documents contemplated to be delivered hereunder or there under."*

Rapier argued that the word "re-acquire" should be interpreted to mean that money is paid. The lack of the words "at no cost" should indicate that a cost was contemplated. The tribunal disagrees with this interpretation. In referring to a dictionary meaning, the word re-acquire means "acquire anew". 3 In referring to legal dictionaries, the tribunal was unable to find anything that said the word "acquire" or re-acquire" connoted that money had to pass before something changed possession. 4 Nor does the tribunal accept Rapier's argument that because this is a commercial agreement money has to pass. It would not be unusual in the tribunal's opinion to find in the mining industry an agreement that said that claims could be re-acquired by their previous owner should a claim developer decide to walk away from the project for whatever reason. Indeed, the mining industry is familiar with option agreements that provide for the return of claims to their original owner if the optionee does not perform its obligations. Furthermore, there are no words in the agreement that speak to the need for money to be paid, let alone an accounting or an indication as to how much money should be paid. The tribunal finds that the clause in this agreement can be interpreted to mean that re-acquisition will occur without money changing hands.

It seems to the tribunal that by asking for payment, the respondent is in effect saying that the tribunal must consider the discussions that took place prior to signing the agreement, the draft agreement and to the lists created by Mr. Schooley tabulating his unrecovered costs. How else does the tribunal connect the signed agreement to a basis for payment? Yet the respondent says the tribunal cannot consider extrinsic evidence. The tribunal is of the view that the respondent's approach is confusing and conflicting but does serve to prove that the respondent acquiesced to the applicants' position that they not incur any costs at any stage of the relationship. The events that took place before the agreement was signed constitute another set of circumstances – one in which the respondent took a risk and which is discussed below.

The tribunal finds in fact that the clause dealing with reacquiring the claims stands on its own in the agreement. There is only one way to interpret it at the time it was signed given the wording of the agreement itself and given the evidence of both sides.

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[3] *The Concise Oxford Dictionary Ninth Edition*
[4] References made to *Black's* and *The Dictionary of Canadian Law*, Dukelow & Nuse, Carswell

Events Leading Up to the Signed Agreement

The tribunal ruled during the course of the hearing that it would admit evidence with respect to the discussions of the parties prior to their signing the agreement. The events consisted of meetings, discussions, actual work carried out on the claims, and the creation of a draft agreement.

On the one side of the discussions were Mr. Vance and the Wards with their position that they spend no money on the claims and get them back without paying anything. Indeed, as Mr. Schooley was soon to realize, they made every effort to cut costs and were not loathe approaching him to pay for work that had nothing to do with analyzing the claims in question.

On the other side was Mr. Schooley who was prepared to spend money (before signing an agreement) to better understand the quality of the quartz, who even accepted the fact that he needed to agree with the applicants' position to get access to the claims, but who eventually came to resent the fact that he might have to return the claims and not get reimbursed for his earlier work. He seems not to have raised the issue of costs before or after he started the work and only raised it when the applicants brought up the topic of re-acquisition should Rapier lose interest in the claims or fail to work them. Perhaps he was prepared to "eat" the costs associated with sampling the claims because he saw a pot at the end of the rainbow. After all, he had a company to process the quartz and the transportation costs were workable.

When the subject of re-acquisition came up, Mr. Schooley obviously began to think about the money he had spent and the fact that his work had been applied against assessment credits (with his approval and active involvement in the processing of same). He then tried to have the pre-agreement work subsumed into the agreement, but the applicants objected. If Mr. Schooley wanted to claim for the value of the work he carried out he should have either struck an agreement before he started work, or taken action at the time to recoup monies he had spent.

The tribunal finds that Mr. Schooley assumed a financial risk when he took it upon himself to take samples, cut a road, and talk to the Ministry of Northern Development and Mines (regarding assessment work required on the claims) all before signing an agreement. This is all that the evidence says – Mr. Schooley carried out certain work, did certain things and did not have an agreement in place to address such questions as to why he was doing this work and whether he expected to be paid. When it came time to sign an agreement dealing with the development of the claims, there was no reference to this work and its cost.

Mr. Schooley never demanded payment when the work was being carried out and even at the time of the hearing he was not clear what amount of money he thought should be paid by the applicants. How can the tribunal be expected to interpret the agreement in Rapier's favour if Rapier itself cannot present a clear basis for such an interpretation? Were the tribunal to go back in time (as Rapier's argument would require) it would have to agree that the signed agreement is incomplete or that there is more to be discussed. It would have to resort to considering extrinsic evidence. The respondent's argument is very confusing.

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The evidence regarding the discussions between the applicants and Mr. Schooley indicate that the applicants were not prepared to spend any money. The tribunal accepts the applicants' evidence that Mr. Schooley never approached them to pay for any of the work done prior to signing the agreement. Indeed, Mr. Schooley never said that he approached the applicants to pay and admitted under cross examination that had the applicants walked away before the agreement was signed, then he would have had to "eat" the costs. More importantly, Mr. Schooley seems to have been well aware of the fact that the applicants "didn't want to pay for anything all the way along." He also seems to have realized that he would have to commence an action in order to recoup his expenses if the applicants chose to walk away and not sign an agreement conveying the claims to him.

Mr. Schooley seems to have had his sites set on a bigger picture as he saw "great potential" in what he dubbed the "Snow White" property. However, in December 2000, when Mr. Vance first brought up the subject of re-acquiring the claims, Mr. Schooley seems to have realized that all the money he was spending might go to enhance the value of a property he might no longer own. At that point, the tone of discussions changed and he started talking about making the applicants pay some amount of money if they ever wanted to have the claims conveyed back to them. The problem is that he never ended up addressing that issue in some conclusive way and instead, left things at the point that the claims would go back if no work was carried out. Perhaps he thought that if he owned the claims, he could persuade the applicants to pay something to get them back.

The tribunal finds that the evidence of the applicants regarding discussions between the parties is not contradicted by the evidence of the respondent the result being that it cannot find anything in the agreement to support the respondent's contention that some money must be paid before the claims will be returned.

The Draft Agreement

Strangely enough, while the parties argued about the admission of this document, it added very little, if anything to help the applicants to interpret the phrase "re-acquire". The draft agreement does serve to confirm that at some point prior to an agreement being signed, Rapier had canvassed the idea of being reimbursed for the work it carried out before the claims were transferred. The problem for Rapier is that the work was carried out without an agreement in place and when it came time to reach an agreement about transferring the claims, that item was never placed in the agreement. This is dealt with above. The applicants had never accepted the idea of paying for anything and the respondent bowed to their wishes. They had never wavered in their dealings with Mr. Schooley. He was well aware of the applicants' position that they not spend any money on any aspect of the claims. By leaving the re-acquire clause in the agreement on its own, and by signing the agreement, he was committing himself to a bargain that would not allow him to claim for the money he had spent. There was no evidence whatsoever to the effect that the applicants had ever proposed to pay for any costs incurred by Mr. Schooley.

The $10,000 Paid By Mr. Schooley

The respondent stated in its submissions that the tribunal should consider a hypothetical in which Rapier had paid the applicants $10,000,000.00, instead of $10,000.00 to

obtain the claims. The inference being that it would not make sense to return the claims to the respondent without getting something in return. The tribunal does not find this suggestion helpful. It is helpful to look at the $10,000.00 paid by Rapier in terms of what it got for the money. For one thing, in getting title to the claims it got clear access to the property thereby allowing it to carry out whatever it needed to do. Can the money be said to reflect a particular value associated with the claims? The tribunal does not think so. Any value associated with what was in the ground had been determined only on a preliminary basis. If these claims were not unproven, they were close to it. The tribunal thinks that the value reflected no more than what it took to allow the respondent to get on the property (no permission required) to do what it wanted to do. In fact, the applicant Vance indicated that the $10,000.00 paid by Rapier was to push back the dormancy provision by two years (he said that Rapier wanted to consider the money as two years' worth of royalty payments). While this was not contested by Rapier, there is nothing in the document to support it. However, given that the document was signed in 2001 and no royalty provision was activated upon signing, he obviously obtained some breathing room as well. It would also be a good indicator of what the money really reflected – something more like a royalty than the actual value of what was in the ground. The point is that Rapier had to pass something to the applicants in order to get on the land and fulfill its goal of exploitation of the resource. Claim holders spend time and money themselves getting claims to the point where they can be of interest to developers. The claims represent a financial investment to them as well.

Is Rapier Being Penalized?

Under the heading "The Signed Agreement" above, this tribunal discussed the "automatic" nature of the agreement signed by both parties. The tribunal is of the view that the triggering of dormancy automatically terminates the agreement. The tribunal notes that the agreement says the applicants "may" reacquire the claims. The tribunal takes this to mean that if the dormancy provision is activated, then the applicants become empowered to re-acquire the claims. There is no deprivation of property rights, nor is this a case of forfeiture. Furthermore, Rapier is not being penalized. Rapier had the choice under the agreement to either work to ensure that the claims did not become dormant or walk away. The agreement would end automatically upon Rapier letting the claims go dormant and the claims would go back to the applicants.

The tribunal made an ironic discovery in its own review of mining cases. In keeping with the fact that the respondent dubbed the subject claims "Snow White", the tribunal came across a case dealing with a company by the name of "Snow Lake Mines Ltd.". [5] The court there had to consider the interpretation of a clause in an amending agreement dealing with a deadline for the production of ore. The clause allowed for payment of money before the deadline which would have the effect of extending the deadline. Production never started by the deadline and no money was paid to extend the deadline. The plaintiff Dunlop wanted the mining property re-conveyed to it as the agreements (original and amending) had terminated. Snow Lake tried to argue that terms in the original agreement applied but the court disagreed saying that such an approach would render the amending agreement "nugatory". Snow Lake had not defaulted on its obligations; rather it had made a choice and "the agreement simply terminated by

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[5] *W. Bruce Dunlop Ltd. v. Snow Lake Mines Ltd.* (Man. C.A.) [1991] M.J. No. 477

virtue of its own terms". Like the court in the Snow Lake decision, this tribunal finds "this is the situation here". Nothing more has to happen before the applicants can get the claims back. To be clear, no money has to be paid by the applicants to the Respondent. The tribunal finds nothing ambiguous about how clause 2.4 actually works. In fact, if the tribunal were to apply Rapier's reasoning, the clause could not work as it stands, since it would be dependent on the parties getting together and working out some sort of calculation or formula. This further step advocated by the respondent would require the parties to step outside the terms of the agreement in order to settle on first, whether the money was owed, and second, how much money was owed.

Conclusions

The tribunal finds that there really were two "events" that took place involving the parties. The first event consisted of the preliminary discussions between the parties, the construction work to allow for exploration and the sampling that went on prior to May 24, 2001. The second event was the signing of the agreement and everything that flowed from that point.

In terms of the first event, the tribunal finds that this is a separate set of legal circumstances. Mr. Schooley, after talking to the applicants and after they made it clear that they wanted no part of incurring costs, started to run up costs without an agreement in hand. For some reason, he thought he could work the costs in as a term of the agreement and then when he could not (given the applicants' objections), thought he could recover the costs either through profits earned as a result of sales of the quartz and later, when that venture became too costly, through bargaining with the applicants (since he would have title to the claims).

In terms of the second event, there is no evidence to support Mr. Schooley's contention that the recovery of money he spent prior to signing the agreement is contained in a clause of the signed agreement. As the tribunal has found with respect to the first event, the item never got carried over to the signed agreement. Even with all the evidence produced by Rapier, there is no clear understanding as to what amount is actually considered owing by Rapier. Mr. Schooley came up with various amounts and was even saying that he was willing to consider an "offer". His counsel indicated in final submissions that a minimum amount owing was the money paid as a purchase price for the claims. All that this does is indicate that the issue is not determinable under the signed agreement.

The tribunal therefore finds that the signed agreement anticipates that upon the claims becoming dormant, the applicants may have them re-conveyed back to them and that no moneys need pass.

There will be no costs payable by either party. Rapier's counsel attempted to attack Mr. Ward's credibility and Mr. Best took issue with this arguing that costs were in order. The tribunal thinks otherwise. The argument was weak and Mr. Ward's reputation is intact. Nor was Mr. Ward's credibility affected. None of this had a bearing on the tribunal's decision. The tribunal finds that both sides to this agreement were operating to some extent in the dark. The saying that if something is worth doing it is worth doing well comes to mind. Seeking outside advice before entering into their relationship (including the time before the agreement was

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signed) might have told them to not assume anything and to leave nothing to chance. Neither side should pay for the other's misadventure.

Exclusion of Time

Pursuant to subsection 67(2) of the **Mining Act**, the time during which Mining Claims SSM-1229647 and 1231116 were pending before the tribunal, being the 13th day of December, 2005 to the 22nd day of August, 2006, a total of 253 days, will be excluded in computing time within which work upon the Mining Claims is to be performed and filed.

Pursuant to subsection 67(3) of the **Mining Act**, R.S.O. 1990, c. M.14, as amended, November 18, 2011 is deemed to be the date for the performance and filing of the next unit(s) of assessment work on Mining Claim SSM-1229647.

Pursuant to subsection 67(3) of the **Mining Act**, R.S.O. 1990, c. M.14, as amended, August 24, 2012 is deemed to be the date for the performance and filing of the next unit(s) of assessment work on Mining Claim SSM-1231116.

Pursuant to subsection 67(4) of the **Mining Act**, all subsequent anniversary dates for Mining Claim SSM-1229647 are deemed to be November 18.

Pursuant to subsection 67(4) of the **Mining Act**, all subsequent anniversary dates for Mining Claim SSM-1231116 are deemed to be August 24.