File No. MA-005-01

L. Kamerman	)	Monday, the 20th day
Mining and Lands Commissioner	)	of September, 2004.
M. Orr	)	
Deputy Mining and Lands Commissioner	)	

THE MINING ACT

IN THE MATTER OF

An appeal by 2001352 Ontario Inc. pursuant to subsection 112(1) of the **Mining Act** from the decision of the Provincial Mining Recorder, dated the 14th day of February, 2001, to not record its Filed Only Mining Claims 1246177, being for the land under the waters of Kelly Lake, being part of projected Lot 1, Con. VI and part of projected Lot 1, Con. V, in Waters Township and 1246178, being for the land under the waters of Kelly Lake, being part of projected Lot 12, Con. VI, Broder Township, in the Sudbury Mining Division, hereinafter referred to as the "2001352 Filed Only Mining Claims";

AND IN THE MATTER OF

Section 30(a) and Section 41 of the **Mining Act**;

BETWEEN:

2001352 Ontario Inc.

Appellant

- and -

THE MINISTER OF NORTHERN DEVELOPMENT AND MINES

Respondent

- and -

INCO LIMITED
(formerly known as International Nickel Company of Canada Limited)

Party of the Third Part

AND IN THE MATTER OF

Mining License of Occupation No. 10,872 dated the 6th day of May, 1947 for lands under the waters of Kelly Lake, comprised of unpatented Mining Claims S. 37335 through S. 37343, both inclusive, and S. 37429 through S. 37531, both inclusive; and evidence that the monthly payments due on Mining License of Occupation No. 10, 872 were in default for one month or more between the date of issue and the 27th day of March, 1958;

AND IN THE MATTER OF

An application pursuant to S.105 of the **Mining Act** for an Order by the Mining and Lands Commissioner that the Minister of Northern Development and Mines shall be prohibited from amending MLO No. 10,872 or allowing that the lands and lands covered by water in respect of which it was issued to be otherwise granted until the appeal of 2001352 Ontario Inc., as being heard and determined or withdrawn or abandoned in writing;

AND IN THE MATTER OF

An application pursuant to S.105 of the **Mining Act** for an Order by the Mining and Lands Commissioner that the Recorder shall be prohibited from recording any claim in respect of the lands and lands covered by water in respect of which MLO No. 10,872 was issued, until the appeal of 2001352 Ontario Inc. has been heard and determined or withdrawn or abandoned in writing.

ORDER FOR COSTS

WHEREAS a motion for costs payable to Inco was heard on November 19 and 20, 2002, with Ms.Valerie Dyer appearing on behalf of Inco and Mr. Ian Blue appearing on behalf of 2001352 Ontario Inc. (the "Wallbridge Subsidiary");

1. THIS TRIBUNAL ORDERS that in lieu of assessed costs, that costs in this matter up to October 10, 2002, are fixed on a substantial indemnity basis at $317,483.59 including fees, disbursements and GST, to be paid by 2001352 Ontario Inc. (the "Wallbridge Subsidiary") to Inco Limited within thirty (30) days of the date of this Order For Costs.

2. THIS TRIBUNAL ORDERS AND DIRECTS that if the aforementioned costs payable by 2001352 Ontario Inc. (the "Wallbridge Subsidiary") are not fully paid within thirty (30) days of the date of this Order of Costs this Tribunal may be spoken to.

3. THIS TRIBUNAL FURTHER ORDERS that Inco Limited and 2001352 Ontario Inc., (the "Wallbridge Subsidiary"), make written submissions on the issue of whether costs should be awarded to Inco Limited by 2001352 Ontario Inc., (the "Wallbridge Subsidiary"), for the period commencing October 11, 2002, up to and including the date of the making of their submissions, two copies of which are to be filed with the Tribunal and one copy to be served on the other no later than the 20th day of October, 2004.

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4. THIS TRIBUNAL FURTHER ORDERS that Inco Limited and 2001352 Ontario Inc. (the "Wallbridge Subsidiary"), make written submissions in response to the filings of the other on the issue of whether costs should be awarded to Inco Limited by 2001352 Ontario Inc., (the "Wallbridge Subsidiary"), for the period commencing October 11, 2002, up to and including the date of the making of their responding submissions, two copies of which are to be filed with the Tribunal and one copy to be served on the other no later than the 4th day of November, 2004.

Reasons for this Order For Costs are attached.

DATED this 20th day of September, 2004.

Original signed by L. Kamerman

L. Kamerman
MINING AND LANDS COMMISSIONER

Original signed by M. Orr

M. Orr
DEPUTY MINING AND LANDS COMMISSIONER

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REASONS

Appearances

2001352 Ontario Inc., (the "Wallbridge Subsidiary" or the "Subsidiary")	Ian Blue, Q.C. & Arthur Hamilton
The Minister of Northern Development and Mines ("MNDM")	Tom Marshall, Q.C.
Inco Limited ("Inco")	Valerie Dyer

Executive Summary and Summary of Findings

The Tribunal has determined that this is an appropriate case in which to award costs to Inco. This finding is based upon the absence of evidence in the hands of the Wallbridge Subsidiary at the time of launching its appeal and throughout the proceedings, as well as the manner in which this case was conducted throughout these proceedings.

Having determined that it will award costs, the Tribunal finds that it will fix costs, pursuant to its jurisdiction under section 126 of the **Mining Act**.

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Notwithstanding the agreement between the parties that the application for costs proceed on the basis of Partial Indemnity, the Tribunal finds that it will base its order for costs on a Substantial Indemnity basis. While counsel for the parties may consider themselves to be bound by an agreement which purported to take the Substantial Indemnity issue off the table in exchange for withdrawal of the request on the part of the Wallbridge Subsidiary to cross-examine all of the counsel who acted on the file on Inco's behalf, the Tribunal does not regard itself bound by this agreement. Rather, it wishes to show the extent of its displeasure for the Subsidiary having brought this appeal without evidence of persuasive merit and further for the manner in which this matter was handled on the Subsidiary's behalf.

In accordance with its jurisdiction under sections 126 and 127 of the **Mining Act,** the Tribunal will fix costs, on a Substantial Indemnity basis, in the amount of $317,483.59, including GST. This amount is payable by the Wallbridge Subsidiary within 30 days of the issuance of this Order. As the Wallbridge Subsidiary transmitted to the Tribunal the Wallbridge Mining Company Limited's guarantee to pay all costs, disbursements and GST due under any Order For Costs issued by this Tribunal in respect of this proceeding against the Wallbridge Subsidiary, dated the 31st day of October, 2002 and signed by Risto Laamanen, Chairman and CEO of Wallbridge Mining, the Tribunal may be spoken to in the event that all of the costs payable by the Subsidiary are not paid to Inco within the time frame specified.

The course of this proceeding was very disturbing to the Tribunal, so much so that it has considered the issue of whether it would hear submissions concerning the actions of Mr. Blue on behalf of the Wallbridge Subsidiary in the conduct of this appeal. In this regard, the Tribunal considered the requirements of Rule 57.07, by analogy, as to whether Mr. Blue should be given notice at the termination of all of the findings as to costs, including those arising after October, 11, 2003, to determine whether he should be required to pay a portion of the costs assessed against the Wallbridge Subsidiary. Normally, the Tribunal would be required to hear submissions from both counsel as to whether a proposed step would be appropriate in the circumstances. However, the Tribunal has considered its powers under sections 126 and 127 and has reached the conclusion that it does not have the power to proceed in this manner. Unlike a court, pursuant to section 131 of the **Courts of Justice Act**, the powers of the Tribunal under the **Mining Act** are limited to those of an assessment officer. While it does have the power to proceed according to the tariff, such power does not extend to allow it to initiate proceedings to award costs against a solicitor.

Notwithstanding the foregoing, the Tribunal is concerned about the effect that the conduct of Mr. Blue had on this proceeding. This was an appeal for which, it turned out, there was no evidence at its commencement of the appeal and so was launched without merit. It was discontinued only after the Tribunal ordered the production of documentation. At the time the appeal was launched, this evidence was not in the hands of the Wallbridge Subsidiary, a fact which was known to its counsel, Mr. Blue, but which was absolutely essential to the case which it sought to pursue.

The Tribunal has only considered certain *Rules of Professional Conduct* of the Law Society of Upper Canada, in connection with Mr. Blue's conduct in this matter. Specifically, those of concern to the Tribunal are:

> 2.02(2) That a solicitor shall discourage a client from commencing useless legal proceedings.
>
> 1.03(1) That the solicitor has a duty to discharge responsibilities to a tribunal with integrity.
>
> 4.01(6) That the solicitor shall be courteous, civil and act in good faith.
>
> 4.01(2)(g) that an advocate shall not knowingly assert as true a fact when its truth cannot reasonably be supported by the evidence.

However, these concerns are left for another forum to consider.

Legal Basis to Award Costs

Mining Act

> **126.** The Commissioner may in his or her discretion award costs to any party, and may direct that such costs be assessed by an assessment officer or may order that a lump sum be paid in lieu of assessed costs. R.S.O. 1990, c.M14, revised.
>
> **127.** (1) The costs and disbursements payable upon proceedings before the Commissioner shall be according to the tariff of the Superior Court of Justice.
>
> (2) The Commissioner has the same powers as an assessment officer of the Superior Court of Justice with respect to Counsel Fees. R.S.O 1990, c.M14, revised.

As such, the Tribunal has the power to award costs to Inco in a lump sum in accordance with the Superior Court of Justice's Tariff, including those related to Counsel Fees, and does so. The relevant Rules and Tariff are set out in Schedule B hereto.

Chronology

This matter had its genesis in the staking of lands that are covered by Mining Licence of Occupation MLO 10,872 ("the MLO") which has been held by Inco Limited ("Inco") since May 6, 1947. Mr. Tom Johnson staked the lands in question on January 31, 2001. While the Application to Record indicates 2001352 Ontario Inc. ("the Wallbridge Subsidiary", the "Subsidiary" or "the appellant") as the recorded holder, this company did not come into existence until February 7, 2001. It is a wholly owned subsidiary of Wallbridge Mining Company Limited ("Wallbridge"). The names are used interchangeably in places, which is a fair reflection of the ongoing activities of Wallbridge and it's Subsidiary during this and other proceedings.

The combination of events, correspondence and strategizing by the parties had the effect of drawing the Tribunal into the procedural issues to an extreme degree. As a result, the

Tribunal finds itself compelled to review the events, correspondence and actions of the parties for the purposes of determining the matter of costs.

The events described commenced at a time when the hearing of another appeal, "Wallbridge #1", was still before the Tribunal. That case involved lands known as FL 52, being an island within the waters of Kelly Lake, the surface rights of which were held as a summer resort location. As such, the land was closed to staking until such time as the Minister was to certify the discovery of a valuable mineral in place. This fundamental principal was challenged by the parent company, Wallbridge.

By the time the staking of the subject Mining Claims had taken place on January 31, 2001, several attempts were made by Wallbridge, Mr. Whymark and Mr. Hall, Wallbridge and its Subsidiary to discuss rental payment records with MNDM officials involving Mining Licences of Occupation and "issues of administration of title"; which attempts were rebuffed by MNDM officials. Attributing their actions to the earlier litigation, MNDM employees demonstrated caution and reticence in their dealings with Wallbridge and its principles, Mr. Mark Hall and Mr. Wayne Whymark in the time leading up to the staking, if not afterwards.

On February 14, 2001, an attempt was made to record the two claims (1246177 and 1246178, Broder and Waters Township, Sudbury Mining Division) in the name of the Subsidiary. The Provincial Mining Recorder refused, noting that they had been staked on lands not open for staking according to provisions of the **Mining Act** due to the existence of the MLO.

There was never any dispute about the fact that the claims were staked on lands covered by the MLO. Rather, the Wallbridge Subsidiary took issue with the validity of the MLO itself, arguing that it had become void some forty years prior to the staking. The Wallbridge Subsidiary alleged that certain lease payments had not been made in accordance with its terms and that the clauses in the lease itself treated a failure to pay on time as voiding the lease.

At the time the Application to Record had been filed and refused on February 14, 2001, Wallbridge (and not its Subsidiary), had initiated an *ex parte* and *in camera* action in the Superior Court of Justice in the form of a "third-party pre-action discovery" whose purpose was to secure preservation of and obtain access to certain documentation relating to payment records involving three Mining Licences of Occupation held by Inco. Materials filed in support of the application included affidavits of Mr. Hall, who is a former Chief Mining Recorder for the Province and of Mr. William Good, also a former Chief Mining Recorder whose tenure with MNDM and its predecessors dates back to the 1950's. Contained in these affidavits are concerns that MNDM officials would knowingly dispose of the requested documentation before an application pursuant to the **Freedom of Information and Privacy Act ("FOIPPA")** could be made. An Interim Order was issued by the Court, with the hearing on the merits having been set down for February 21, 2001.

Notwithstanding the allegations raised in the affidavits that some of the requested documents might be discarded by MNDM, the Superior Court application was settled by the parties on February 16, 2001. The settlement involved lodging payment records then known to MNDM with its Legal Director and agreement by MNDM to expedite a **FOIPPA** application. On February 16, 2001, a **FOIPPA** application was initiated by Wallbridge (not by the Subsidiary).

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The herein appeal of the Provincial Mining Recorder's refusal was filed with this Tribunal on March 1, 2001. The Notice of Appeal indicated, among other things, that the Subsidiary had evidence that payments of the MLO were in default for one month or more, rendering it void. The Notice of Appeal also stated that the Subsidiary had submitted a **FOIPPA** request to MNDM in settlement of court proceedings which it had agreed to respond to expeditiously. Facts stated in the Notice of Appeal were misrepresented, in that the Subsidiary maintained that it had evidence of the default in payments and further that it, rather than in fact Wallbridge, had settled the court proceedings referred to and had filed the **FOIPPA** application.

The filing of the appeal marked the beginning of a complicated, convoluted and often onerous sequence of events which were in turn accompanied by voluminous correspondence. The Tribunal counted over 110 pieces of correspondence (being those for which it was copied although there were numerous references to others) between the parties for the period February 16, 2001 to mid-November, 2002. The Tribunal itself was required to issue 13 Notices, Procedural Directions and Orders, this being an unusually high number for any of its proceedings. The extent of this activity outside the preliminary hearings and hearing on costs is in sharp contrast to the number of actual hearing days, being seven. The length of hearing time does not reflect the true extent of the work put into this matter.

Wallbridge issued a Press Release on March 6, 2001, announcing that its Subsidiary had staked lands under the waters of Kelly Lake. In that Release, Wallbridge said that its wholly owned subsidiary "has evidence that the lands in question became open for staking prior to March 27, 1958, and have been open for staking ever since." The Press Release acknowledged Inco as an affected party to this staking and made reference to an earlier Press Release of Inco, dated March 6, 2000, in which it outlined its activities and its assessment of a major deposit under the waters of Kelly Lake.

The materials sought under the "expedited process" under **FOIPPA** were not released in as timely a fashion as was sought by Wallbridge and the Superior Court action was resurrected on March 9, 2001. Included in those materials was an affidavit of Mr. Blue dated March 6, 2001, wherein he sets out that a normal time period for a **FOIPPA** application is 30 days and that an expedited process should be expected to have taken less time. In an answering affidavit of Mr. Ron Gashinski, Senior Manager, Mining Lands Branch of MNDM, the **FOIPPA** statutory process is described in detail, setting out mandated time lines. Mention is made of third party notification obligations, along with their rights to make submissions and file an appeal. Ms. Dyer caused a Notice of Appearance to be filed on behalf of Inco on March 12, 2001. No further information concerning the Superior Court proceeding is known to the Tribunal, although sealed materials have been provided in relation to attempts to negotiate a Stand Still agreement.

The Subsidiary's herein Notice of Appeal of March 1, 2001 also requested that the Tribunal make preliminary Orders pursuant to clauses 30(f) and section 105 of the **Mining Act** to the effect that the Minister be prohibited from amending the MLO or allowing those lands to be otherwise granted and that the Provincial Mining Recorder be prohibited from recording any claim in respect of those lands until such time as the appeal has been heard, withdrawn or abandoned. The Tribunal issued its first procedural Order on March 28, 2001, outlining its intention to hear and determine these issues on a date to be set along with notice of certain histor-

ical legislative provisions it believed would have a bearing on this matter for which submissions would be sought.

On March 29, 2001, counsel for Inco wrote to advise of its intention to raise its own preliminary points of law to dismiss or strike the appeal. It sought to provide further particulars once in receipt of the Tribunal's decision in Wallbridge #1, whose issuance was imminent, to which the Tribunal agreed. June 27 and 28, 2001, were set for these motions. The decision in Wallbridge #1 was released on May 30, 2001. As a result of that decision, counsel for the Subsidiary wrote to advise the other parties that it would be withdrawing its request for preliminary orders and a copy of this letter was provided to the Tribunal on June 6, 2001. In keeping with its agreement, Inco filed its particulars on June 5, 2001.

On June 14, 2001, Mr. Blue, counsel for the Subsidiary, wrote to the Tribunal, about having an evidentiary record prior to its being able to make a decision on any of the preliminary issues raised by Inco. A number of points were presented, and on no fewer than four occasions, Mr. Blue ended with the comment, "..[i]f the Tribunal were to deny …, 1352 [the Subsidiary] is confident that the Divisional Court would not support that decision." On the same date, summonses were sought by Mr. Blue's co-counsel, Mr. Arthur Hamilton, from the Tribunal against certain individuals in Inco or MNDM who would have access or possession to payment records as they related to MLO 10,872. Mr. Tom Marshall, counsel for MNDM and Ms. Dyer on behalf of Inco wrote and indicated that they would be seeking to quash the summonses.

At the June 27, 2001, procedural hearing, Mr. Blue maintained that no determination should be made on Inco's preliminary points of law without the Subsidiary being able to adduce evidence to provide a clear evidentiary record and upon which a court could use for purposes of appeal or judicial review, should that become necessary. In the meantime, Inco came prepared with several of its chosen counsel to argue its preliminary issues, none of which were heard. This was the result of a determination by the Tribunal, upon repeated urging on behalf of the Subsidiary that an evidentiary record was necessary to resolve those preliminary issues, that it would merge Inco's jurisdictional questions with the hearing on the merits. The Tribunal also decided that it would order disclosure of the rental records pertaining to MLO 10,872 and examinations for discovery.

Upon the adjournment of the June 27, 2001, proceeding and prior to the issuance of the resulting Procedural Order, issues were raised immediately. It became necessary to reconvene another Procedural Hearing on July 10, 2001, for their determination. The Subsidiary maintained that Inco was not adverse in interest to MNDM and as such, no employees of the latter should be examined by the former. The status of Mr. Good, who was not an employee of the Subsidiary, was raised by it as a bar to discovery, as his answers would not be binding.

There was ongoing difficulty in obtaining acknowledgement from the Subsidiary that the answers of Mr. Hall, as its agent would be binding. Timing of discoveries, disclosure of documentation, confidentiality and time limits for examinations for discoveries were also in contention.

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The resulting Order required that Inco and MNDM provide to the Subsidiary relevant rental payment records by July 19, 2001. Copies of those records were filed with the Tribunal having been sealed until the confidentiality issue could be determined. The Subsidiary was required to provide a statement of its position and disclosure of documents by July 23, 2001. Inco and MNDM were to have filed their particulars by July 26 and 30, 2001, respectively, but that became unnecessary due to events as they unfolded. Examinations for discovery were ordered, including the unusual step of declaring Mr. Good to be the Tribunal's own witness.

On July 23, 2001, Mr. Blue filed a Notice of Discontinuance on behalf of the Subsidiary. This resulted in a request by Inco, dated July 26, 2001, for the return of originals and copies of all documents which it had served on the Subsidiary. It also sought the opportunity to make application for costs in this proceeding. Mr. Blue indicated that he wished to have off the record discussions concerning these documents before steps should be taken.

The Tribunal issued an Order of Rescission and Notice on August 2, 2001. Most outstanding portions of its earlier Order of July 12, 2001, were rescinded, including those which required filings by the Subsidiary. The Tribunal also indicated, via the Notice, that it remained concerned about the issues raised in this appeal and sought written submissions concerning the "potential or ongoing likelihood of this matter arising with respect to other properties" held under MLOs by Inco.

On September 14, 2001, the Tribunal issued an Appointment for Hearing for Final Disposition of this matter, along with other listed issues, to be held on October 1, 2001. Confidentiality and return of documents continued to be highlighted by Inco as an issue, one to which the Subsidiary did not agree. It became necessary to add a second hearing date and make a further Order that the documentation in question not be copied, and that the documents in question be filed with the Tribunal in sealed envelopes. On September 21, 2001, Mr. Blue filed six volumes of documents with the Tribunal, including all documentation related to the Superior Court of Justice application and the **FOIPPA** application. On September 25, 2001, Ms. Dyer objected to the improper filing of voluminous material, including settlement negotiations. At her request, certain documents identified for the Registrar of the Tribunal were singled out and sealed in envelopes. In fact, while these documents were sealed and filed, this was done by making photocopies and filing those copies, with the originals being retained by Mr. Blue. This was done contrary to the spirit of the Tribunal's July 19 Order and with the knowledge that confidentiality was an unresolved issue.

The issue of whether Inco's motion for costs could stand against the parent company, Wallbridge, Mr. Mark Hall and Mr. Wayne Whymark was raised in the course of the filings by Inco. At the October 1, 2001, hearing, the issue of the disposition of this matter, namely the effect of the proposed "discontinuance" was heard, along with the issue of whether the application for costs by Inco could be brought against non-parties, in addition to the Subsidiary. The Tribunal issued its decision on November 30, 2001, to the effect that it would dismiss the appeal without prejudice and that the Tribunal would hear Inco's costs application against the non-parties proposed.

This decision was appealed by the Subsidiary to the Superior Court of Justice on December 17, 2001 and was dismissed on April 9, 2002, the Court having the view that it was banned by section 117 of the **Mining Act**. This position had been taken by Inco, whose counsel wrote to Mr. Blue to that effect on January 17, 2002. In its decision, the Court awarded costs of $12,000 plus GST to Inco.

Subsequent to that decision, in consultation and with the agreement of counsel for Inco and the Subsidiary, on June 5, 2002, the Tribunal issued an Appointment for Hearing setting October 9 through 11, 2002, to hear the application of Inco for costs. In August, in an apparently preemptory manner, another tribunal sought to fix similar or overlapping dates for a hearing in Saint John, New Brunswick. Mr. Blue sought to change the hearing dates set by this Tribunal. Ms. Dyer did not immediately agree, pointing out that the eventuality of a hearing in the other matter had not been determined, but was pending. This fact was confirmed by subsequent correspondence and documentation dealing with that other proceeding. On August 15, 2002, another counsel from Mr. Blue's firm, under the latter's direction, indicated that he would arrange for one of his partners to attend. Incidentally, the dates relayed by Mr. Blue and his various associates during this time were in error, having assumed that October 7 to 9 were at issue, with the former being a Sunday. Subsequently, Mr. Blue retracted this position, indicating that his client preferred that he have carriage of a file with which he was best acquainted.

The Tribunal was of the view, at this time, that the administration of justice was not well served by the re-arranging of hearing dates once set to alleviate subsequent scheduling conflicts of counsel. Despite that view, on September 25, 2002, it rescheduled the hearing date to November 8, 18, 19 and 20, 2002, conditional upon receipt of personal undertakings from Mr. Blue and his co-counsel that, if they were unable to attend on those dates, they would ensure that alternative counsel attend and be briefed and prepared to proceed.

Mr. Blue indicated on September 19, 2002 that he now had instructions to act for all four against whom costs were sought. On October 24, 2002, Mr. Blue indicated in writing to Ms. Dyer that Wallbridge was prepared to guarantee that it would stand behind any costs order issued and would sign an agreement to that effect. Such an agreement was signed by the Chairman and CEO of Wallbridge on October 31, 2002 and filed with the Tribunal.

In September, 2002, Mr. Blue also raised the issue that he would be entitled to cross-examine the various Inco counsel on their dockets filed in support of the Bill of Costs on a Solicitor and Client basis, which was changed in the course of proceedings to that of Substantial Indemnity. The day of November 8 had been set aside to hear the issue of entitlement to cross-examination as well as a motion to strike the Bill of Costs filed.

The hearing proceeded as scheduled. On November 14, 2002, the Tribunal was advised that the issue of the cross-examination of counsel had been settled between the parties in that the Subsidiary would abandon seeking this right in exchange for Inco withdrawing its application for Substantial Indemnity Costs in favour of Partial Indemnity Costs for the period up to and including October, 11, 2002. The Tribunal was advised of this agreement during the course of the costs proceedings. Counsel did not seek an indication that the Tribunal would

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approve its terms and there were times when Mr. Blue made overtures to reintroduce the cross-examination issue, to which Ms. Dyer objected and which the Tribunal did not permit.

Also in September, 2002, the Tribunal was advised that the Freedom of Information and Privacy Commissioner had rejected Inco's bid for confidentiality of documents. Mr. Blue advised that he would be filing documents in opposition to the costs application, including those documents for which Inco had claimed confidentiality.

The hearing of the costs application proper took place on November 19 and 20, 2002.

Inco's Argument for Costs

Inco is seeking Partial Indemnity Costs in this case as being appropriate where costs normally follow the event. Ms. Dyer noted that it had agreed with the Subsidiary to not pursue its initial claim of Substantial Indemnity Costs in exchange for not subjecting all of Inco's counsel to cross-examination. Inco maintained that it had been successful in protecting its mining interests through the dismissal of the appeal. The appeal was not just a dispute between the Crown and the Subsidiary (see *Dupont v. Inglis*, [1958] S.C.R. 535). Inco was added as a party and served with a copy of the Notice of Appeal.

Ms. Dyer submitted that mining properties are the life blood of any mining company and Inco had the right to expect that its security of tenure would be respected, a position which underlies the fundamental rule in Ontario that staking cannot occur on lands that are closed to staking and any attempt to take away established rights granted under the legislation should be treated seriously. The fact that this property was estimated by Mr. Hall to have a value of $3 billion dollars only underlies its importance to Inco. Nor is Inco's position undermined by the fact that the Subsidiary "abandoned" its appeal.

Ms. Dyer made reference to discretion under the **Rules of Civil Procedure** to award costs and to abusive actions and the risk one takes in bringing an action, relying on *Yang et. al v. Mao* (1995), 23 O.R. (3d) 466 (Ont. Ct. Gen. Div.) and the Tribunal's past reliance on *Apotex Inc. v. Egis Pharmaceuticals and Novopharm Ltd.* (1991), 4 O.R. (3d) 321. In her submission, the Wallbridge Subsidiary carried on a "fishing expedition", where it "never had any evidence." The Subsidiary's assertion that this was a novel issue, while again underscoring the risk it has taken, serves to distort and attempts to refocus a fundamental principle under the **Mining Act**, that prospectors do not stake lands which are closed to staking. Therefore, this appeal would better be characterized as marginal, dubious, unreasonable and contrary to a straight forward statutory prohibition. Ms. Dyer made particular reference to *Collom v. Manley* (1902), 32 S.C.R.371.

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Inco's Explanation of Costs Claimed

The revised Bill of Costs on a Partial Indemnity Basis, is comprised of seven headings to correspond with different phases of the proceeding (A, B, C, D, E, G and H), with total fees to October 11, 2002, being $197,096.00, disbursements of $3,874.64 and GST for a total of $215,038.58. Not included in the amount claimed are amounts for work done for the October 18, 2002, filings, preparation time and hearing time on November 8, being the motion to quash and cross-examination of counsel on their dockets, and the hearing of costs. Also, Inco has reserved the right to claim its costs for the Costs Motions on a Substantial Indemnity basis.

The issue of entitlement to cross-examination by the Wallbridge Subsidiary of all of Inco's counsel was resolved by agreement between Mr. Blue and Ms. Dyer in exchange for a withdrawal of the Substantial Indemnity cost claim. (There were a few of these types of "bargains" struck following overtures made by Mr. Blue. The Tribunal was not a party to these affairs, nor should it ever be. **Nor did it make a finding in respect of the resulting November 15, 2002 agreement regarding not cross-examining counsel in return for Inco only seeking costs on the basis of Partial Indemnity.)**

The new Costs Grid formed the basis of revised filings and final submissions, based upon *Canadian Broadcast Corporation Pension Plan (Trustee of) v. BF Realty Holdings Limited* (Ont. C.A., Unreported, November 13, 2002). No issue was taken with this change. **Counsel also indicated that they were in agreement that any costs that may be awarded should be fixed rather than assessed.**

In Wallbridge #1, the Tribunal adopted those factors set out in the **Rules of Civil Procedure** when considering the exercise of its discretion under sections 126 and 127 of the **Mining Act**. Ms. Dyer outlined in detail the factors applicable in this case. Inco was able to successfully protect its MLO 10,872 (***result***). The costs claimed are only a small percentage of the total value of the MLO which Inco sought to protect from being scooped by the Wallbridge Subsidiary (***amount at issue***). The conduct of Mr. Blue on behalf of the Subsidiary in raising a considerable number of interlocutory matters, with examples cited, served to ***unnecessarily lengthen proceedings***. There were a number of instances of last-minute requests cited as examples of ***steps which were improper or vexatious***. The appeal was fraught with ***complexity***, involving a wide variety of factual and legal issues, requiring Inco's legal team to conduct research into historical provisions, substantive and procedural defenses including jurisdiction, responding to threatened judicial review of interlocutory decisions dealing with prohibition, standing, privity of contract among others.

Inco's success in defeating the appeal was of tantamount *importance* to Inco, to protect a mining property in which it had invested 50 years of exploration and guard against the potential impact on all of its other mining licences of occupation, the latter of which would similarly be of considerable concern to the entire industry. This is not a case in which the determination of costs should be based upon some formulaic ratio of preparation to hearing time, given all that has taken place, as the highest standards of preparation were absolutely necessary; Inco had attempted to isolate the legal issues and maintain a schedule; the fact that the appeal was vexatious served to hold Inco to ransom due to the inherent costs, delays and cloud on title;

at the time of staking the Wallbridge Subsidiary had no evidence relating to the mining licence of occupation rental payment records (***other matters***).

Ms. Dyer highlighted the issues raised by the Notice of Appeal, having been characterized as significant. These included the limited scope of review under section 112 of the **Mining Act**, the absence of jurisdiction to review the Minister's decision to treat the MLO as valid, the lack of standing of the Subsidiary to challenge performance under the MLO as a contract, due to the lack of interest held by the Subsidiary in the lands before the MLO was granted in 1947 and due to prohibited staking. As matters progressed additional issues were added throughout the proceedings. These included, but were not limited to legal and factual issues involving the examinations for discovery including the rules which would govern, quashing of summonses, awarding of costs against non-parties and cross-examination of lawyers on their work. Unanticipated attempts on the part of Mr. Blue to reintroduce matters which had been withdrawn or settled required that previous research be retained so that none of the efforts of Inco's legal team could be characterized as superfluous. Research and strategy for each new issue required the expenditure of significant resources to ensure that they were adequately addressed.

Ms. Dyer sought to justify the use of a legal team approach based upon the importance of the lands to Inco, in which it had invested over fifty years and considerable funds in this property. A decision involving one MLO had potential to have an impact on other lands held as MLOs. Ms. Dyer submitted that the test when fixing costs is not to second guess the necessity of the work or the reasonableness of successful counsel, but on the other hand, not to ignore or refuse to examine the issue of duplication or consider the arguments of opposing counsel. Various cases relied upon were referred to, with excerpts read into the record. In *Apotex Inc. v. Egis Pharmaceuticals and Novopharm Ltd.* (1991), 4 O.R. (3d) 321 at page 331 Henry J. stated, "The time to view the decision to commit services to the project is before the hearing or trial – not on the basis of hindsight which might indicate that as it turned out, the service was unnecessary." In *Barman v. Rooney*, [1998] O.J. No. 5528, at paragraph 30, the court indicated that it did not doubt the work outlined had been performed according to what experienced counsel thought was necessary, and relied on Feldman, J. (as she then was) in *Tri-S Investments v. Vong*, [1991] O.J. No. 2292 (Gen. Div), "I do not view it to be the court's function when fixing costs to second-guess successful counsel on the amount of time that should or could have been spent to achieve the same result, unless the time spent is so grossly excessive as to be obvious over-kill." Ms. Dyer submitted that the value of the work done on Inco's behalf should be based upon the nature of the proceeding, the rate and speed with which interim matters were raised and the value of the lands. In reference to the last point, it was submitted that lands whose value is alleged to be $3 billion should exact a different standard than litigation involving a nominal amount.

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Where an appellant advised that it would not proceed with its motion for injunctive relief in an attempt not to incur the cost consequences of its actions through Rule 37.09(3), the Court was not persuaded and characterized it as abandonment. *[BNY Financial Corp. – Canada v. National Automotive Warehousing Inc.,* [1999] O.J. No. 1273 (Ont. Ct. –Gen. Div.)] In proceeding to fix costs, the Court cited *Murano v. Bank of Montreal* (1998), 41 O.R. (3d) 222 (C.A.), which in turn found the approach of the Court in *Worsley v. Lichong*, [1944] O.J. No. 614 (Gen. Div.), to be the correct one, wherein it was stated that "…the fixing of costs still requires a critical examination of the work undertaken…" The Court in *BNY Financial* asked itself whether this meant that each docket required infinitesimal scrutiny, and determined that it did not. The decision went on to state that what was required was "…a responsible analysis of the work done [involving] … a review of the elements of the work, a testing of the dockets and an overall weighing of the value of the work, taking into account the factors enumerated in the Rules."

Ms. Dyer explained the manner in which the dockets referred to in this motion for costs were organized, summarized and categorized. All of the computerized dockets are comprised of a monthly Account Report followed by information pertaining to each of the lawyers involved in the account. Some of the notations are blackened out, and a reduced time is marked in by hand, representing activities which were, in part, not on account of this appeal. The dockets also disclose a breakdown into the categories summarized on the Bill of Costs, namely, A) time immediately after receipt of the Notice of Appeal, B) preparation for the Interlocutory Motion of June 27, 2001, C) attendance at that motion, D) preparation for and attendance at the July 10, 2001 motion, E) preparing response and collection of documentation in response to the resulting order for production, F) settlement discussions (which are not claimed) and G) preparation and argument on Bill of Costs. Some discretion was required to classify work which could fall into several of the categories. The Tariff rate is reflected for attendance at the motions, rather than actual time spent. The fees outlined have actually been paid, with proof provided, in response to the question raised by the Wallbridge Subsidiary of whether there could be a claim for fees if there were no proof of payment.

Ms. Dyer described the approach taken and treatment of the appeal upon its receipt by J. Brett Ledger, the Chair of Osler's Litigation Department, advocating the reasonableness and necessity of the team approach used. Ms. Dyer is the counsel who has attended and who spoke on behalf of Inco in all of the interlocutory matters. Mr. Ledger and Mr. Jamal attended the June 27 motion, but due to the Tribunal's determinations or withdrawal of issues, they did not need to speak. Ms. Dyer signed correspondence. In addition, the team was primarily comprised of a second senior litigator and a research partner in the Research Department. The establishment of the Research Department occurred under the tutelage of Mme Bertha Wilson. Several associates were also involved, as were students and clerks, in total 17 individuals. The names appearing on the dockets and their status were: **Ledger** – Partner and Chair of Litigation Department, 1979; **Dyer** – Partner, Litigation, 1982; **Peltomaa** – Partner in the Legal Research Department, 1981; **Jamal** – Partner, Litigation and Chair of the Public Law and Constitutional Litigation Group; **Code** – Associate in the Research Department, 1998; **Callaghan** – Associate in Research, 1995. Other names and their status appearing on the Bill of Costs are: **Francis** – Associate; **Miller** – Clerk; **Moudry** – Clerk; **Wiggins** – Clerk; **McPhail** – Clerk; **Carss** – Clerk; **Segal** – Student; **Stren** – Student; and **Williams** Other. Other names appearing in the compilation of dockets are **Tuit**, and **McMahon,** respectively.

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The involvement of the various individuals was described in detail. Partners were responsible for their respective areas of expertise. Associates were used for research and writing. The clerks were used for legislative research, on-line legal research and compilation of the multitude of documents which found their way to becoming exhibits. The initial investigation required review of documents, historical legislative research, consideration of strategy, including motion to dismiss on points of law, fleshing out of issues related to contract (several) and licences of occupation, correspondence with client, opposing counsel, MNMD counsel and tribunal and various related activities are described. Despite overlap between the items listed in the Bill of Costs, dockets were not split, nor were they duplicated. The number of individuals involved reflects the extreme urgency of the situation for Inco, as well as the number of issues being generated throughout.

Ms. Dyer looked at the legislative rights of the holder of a mining licence of occupation as they existed in 1947. Since the legislative provisions pre-date the inception of Inco's MLO 10,872, it was necessary to go back even earlier in time to determine when the form of tenure was enacted, what prohibitions existed, and what was the nature of the regulatory regime. The historical context of the time required information about the system in place to acquire this type of interest. [Note: at the time it was issued, an MLO was the only form of tenure available for lands under water.] The Research Department engaged the services of a law clerk to conduct computerized searches for cases judicially considered and their citations. An associate of the Department was brought in to work on updating the mining legislation. When research led to questions regarding the historical legislative landscape, Ms. Dyer was the point person for identifying the necessary legislative provisions to research. An associate conducted the manual searches for those amendments identified. Throughout this time, the work was seemingly expanding, due to the proliferation of issues by the Subsidiary.

Ms. Dyer indicated that the team approach does not automatically lead to duplication stemming from researching and reporting. Rather, it consisted of a preliminary vetting of relevancy, which was of benefit to senior members of the team. While the case law may have been read by more than one senior lawyer, this was not unreasonable in a case involving a property worth $3 billion dollars. Ms. Dyer pointed out that the delineations involving legal research and corresponding stages of the proceeding tended to be porous. Some research on issues would have been restricted to the motions while other research corresponded to the deferral of issues until the hearing on the merits, had that have eventually become necessary.

Once issues were identified, the team proceeded on a coordinated approach in preparation for oral argument. There was also the preparation of the statement of particulars as required by the Appointment for Hearing, preparation and service of documents and case book, researching law on quashing of summons, collection of documents referred to in the summons, preparing witness for examination, preparing chronology of scheduling, research and preparation of argument on issue of delay in response to request for adjournment, preparing and serving preliminary Written Submissions on Inco's preliminary legal issues and on the merits, preparing response to Appellant's Written Submissions and preparing oral arguments. The issues which arose at this phase deal with strangers to the contract, as Ms. Dyer characterized them, which began with the motion to restrain the Minister. Counsel agreed to an oral hearing and a schedule

was agreed to, after which it was necessary for Inco to respond to an Order to File in connection with the preliminary issues. The filing of the full particulars of Inco's motion, which was ultimately delivered on June 5, 2001, was deferred until after the issuance of the decision in Wallbridge #1, which occurred on May 30. Inco sought orders declaring that the Tribunal has no jurisdiction to essentially use a section 112 appeal to go behind the decision of a Mining Recorder to question the basis upon which the Minister's delegate treated the licence of occupation. Inco challenged the standing or capacity of the Wallbridge Subsidiary, having no interest in the lands on the date the MLO was issued, to challenge or attack it or allege that there was a breach of the contract between MNDM and Inco. Inco also sought a declaration that the Wallbridge Subsidiary could not attack the MLO due to having undertaken a staking prohibited by the terms of the **Act**. In essence, Inco sought to have the appeal quashed at the preliminary stages.

At the time when Mr. Blue withdrew his client's motion to restrain the Minister, he confirmed that no supporting material would be filed. According to Ms. Dyer, time was spent by research counsel on the issue of the Tribunal's jurisdiction to deal with prohibition. Francis, a first year associate, and Jamal, head of the firm's Public Law Department and administrative law expert, were involved in the research, writing and preparation at this stage. Notwithstanding the withdrawal of the issue by Mr. Blue on June 1, Jamal attended the June 27 motion, which was fortuitous as Mr. Blue subsequently referred to the *ex parte* order in Wallbridge #1 and said he wanted a similar order, which was vehemently challenged. Inco prepared for this issue, it was dropped, but Mr. Blue nonetheless attempted to revive it.

Mr. Blue then advised on June 7 that the Wallbridge Subsidiary would be bringing a motion to quash Inco's motion. It also was seeking a deferral of the hearing of the preliminary motions until matters before the Information and Privacy Commissioner could be resolved. Ms. Dyer pointed out that dates for the motion had already been set aside for June 27 to 29. On June 14, Mr. Blue made written requests to the Tribunal asking for pre-hearing determinations and raising a number of issues, including adjournment, the request to have the Minister's delegate give evidence. This letter alleged the whipsawing of the Wallbridge Subsidiary's appeal, through lack of procedural fairness, by bringing on the motion to quash in relation to Inco's legal issues *while denying the Wallbridge Subsidiary access to evidence needed* in order to respond to the motion and procedural unfairness. The Wallbridge Subsidiary was seeking a reasonable adjournment to look at the documents, if they were in fact produced. Mr. Blue concluded by stating that the motion to quash is unfair because it is a "weird loony tune where the duck has all the lines". He alleged that the appeal is between the Wallbridge Subsidiary and the Crown. Inco and MNDM also sought to have the summonses issued on June 18 quashed on the grounds that they were unnecessary to a preliminary motion. As a result of the foregoing Ms. Dyer submitted that it is wholly inappropriate for Wallbridge to summarize what took place as being that Inco "lost" its summary judgment motion. Inco's motion was not granted, but neither was it dismissed. It was combined with the hearing on the merits. The tribunal did not order the delay to wait for the **FOIPPA** proceedings, and rather, set the matter for hearing for seven days in December, 2001. Ms. Dyer submitted that despite the fact that Inco's motion became moot, given that it was rolled into the hearing on the merits, it was still necessary to carry out all of the preparation for June 27.

The dockets are summarized electronically in Exhibit 22(b), which provides a summary of time spent by lawyers at Tab 70, commencing on page 325. The work and time was not duplicated, but involved teamwork, reviewing matters separately and meeting to form strategies for the necessary next steps. Accordingly, it would be unfair and unnecessary to reduce the amounts shown as being a duplication of time or effort. Had it been a case of two counsel sitting on discoveries, then it could be the type of duplication referred to in *Wotherspoon v. Canadian Pacific Ltd.* (1988), 33 C.P.C. (2d) (Assessment Officer) which says that there is some necessary element of duplication when one person writes a memo and another reads it. Ms. Dyer submitted that such findings should not take place in this case and that there should be no reduction due to the taking of a team approach.

Ms. Dyer explained that Mr. Ledger's time did not begin in earnest until the significant part of his preparation on June 25 and 26, 2001. The impact of the **FOIPPA**-related proposed adjournment had to be determined, so that Mr. Ledger looked at the new grounds raised to delay the hearing. Discussions were conducted on how to proceed on issues at the motion as they were raised to ensure that lead roles of Inco counsel would not conflict, to determine what the delay might be and particularly what leverage was being sought. Mr. Ledger would monitor a major letter such as the one which arose at this point, but he would not be involved in all of the lesser matters.

There were reviews and amendments by Ledger and Peltomaa on the draft submissions. Ledger would work on his factum for the jurisdiction and standing motion and would provide leadership on the overall tactical approach. As a former civil litigator, the team relied upon Peltomaa to conduct background research and provide input in form and substance. The work-up for the factum was done primarily by Dyer and Francis. The work on the factum or submissions, terms used interchangeably, involved lawyers working on issues within their fields of specialization. Peltomaa's expertise in contract would see him assist the other lawyers to ensure that the factum reflected logical and properly fleshed out arguments in a mining context.

Callaghan did work for Peltomaa on two small matters. Jamal, expert in administrative law, reviewed the memorandum on prohibition, which was drafted by a first year associate. After June 20, the work was refocused on the procedural unfairness issue raised, as well as quashing the summons, and whether the adjournment would be granted. The *Alarie* decision was examined, as was the Wallbridge Subsidiary's factum in relation to the motion to quash and the possibility of an interlocutory appeal on judicial review, the latter of which was raised as a possibility by Mr. Blue no fewer than four times in his June 14 letter. In this regard, Inco's counsel had to proceed on the assumption that if the Wallbridge Subsidiary is not successful in its motion, it would launch an immediate Divisional Court appeal. Ms. Dyer submitted that the legal team's efforts were reasonable in connection with this activity, so that Inco should be entitled to counsel fees for those three lawyers in attendance for the motion, notwithstanding how it eventually unfolded.

The time of Ms. Francis in drafting the factum was claimed at a reduced rate. Her work was reviewed by senior counsel. It was submitted that having separate lawyers do the work, as set out in their dockets, was reasonable, given the issues which were being raised.

Turning to the arithmetic approach taken in *Blair v. Enfield* (See Wallbridge Subsidiary submissions, below), Ms. Dyer submitted that it was clear that the work on Inco's behalf was not merely in connection with the actual hearing days and attendant preparation of issues determined, but rather in connection with the myriad of issues raised and procedural curves thrown by counsel for the Wallbridge Subsidiary, as shown by the correspondence and formal documentation. Considerable time was spent going back and forth in an effort to obtain agreement as to scheduling. Mr. Blue sought to rely on cases which had proceeded on the merits, whereas in this case, work was done on issues which were deferred or withdrawn. It is well recognized that the preparation and hearing of an appeal takes much longer because of the need to review the evidence and to narrow the issues.

Ms. Dyer submitted that there is no requirement to apply a ratio of time spent in preparation, notwithstanding the finding in *Canadian Express* that there should be some reasonable ratio. While the ratio may be one factor to be considered, in this appeal, the issue is not so straight forward. The pre-emption of hearing days and putting matters over for hearing, had there been one, are also factors. *Delrina Corporation v. Triolet Systems Inc.* (Unreported; Ontario Court of Appeal; October 2, 2002) involved an appeal which was heard over three days. As set out in paragraph 8, the total preparation time for appeal for two in-house lawyers and one outside counsel were sought. The court allowed the two in-house counsels' hours in their entirety, and reduced the hours of outside counsel by a factor of a third, to 400 hours, having insufficient evidence of the latter's time and finding an element of duplication. However, the overall accounts and costs were assessed to have been reasonable. The court looked at the amount recovered in the proceedings and the complexity of the issues. One of the in-house counsel was not allowed above grid rates, while the expertise of the other warranted an amount above the grid. The counsel fee was reduced for the outside counsel, because the other two were not reduced, but overall, the court did find that three counsel was reasonable in the circumstances of the case.

Ms. Dyer submitted that the Tribunal should take the same approach and that the overall effort made on behalf of Inco should be examined in the context of the continually changing landscape and the $3 billion value placed on the property. The Tribunal itself issued 13 orders in this matter. The value of the outcome to the Wallbridge Subsidiary was $0 because of its abandonment. The importance of issues merited the team approach, and accordingly, no ratio of preparation to hearing time should be applied.

Eastwalsh Homes Ltd. v. Anatal Development Corp. (1995), 37 C.P.C. (3d) 374 (Ont. Ct. – Gen. Div.); aff'd (1995) 80 O.A.C. 141 (C.A.) was an appeal from the assessment of costs in an action where the initial damages award of $2 million was reduced to $1000 on appeal. The appeal was based on the suggestion that the team approach was not appropriate to the party and party scale. The court dismissed the appeal, upon finding that the team approach "… was not too inefficient as to preclude recovery for reasonable time spent…" Accordingly, no error in principle was found. The assessment officer exercised discretion after looking at the facts. The "multiple test", being the preparation time ratio, was rejected by the assessment officer due to the nature and level of preparation required for an appeal, with which the court agreed.

Ms. Dyer stated that the purpose of the Tribunal's rules (Guidelines) is to ensure that all necessary preparation is done well in advance of the hearing, so that parties come forward fully prepared, with documents disclosed, encountering no surprises, to argue the appeal on issues identified by the parties and the tribunal. In fact, the Tribunal indicated at the motions of June 27 and July 10 was that it would develop a list of issues for counsel to address.

In *Wotherspoon v. Canadian Pacific Ltd. et al.* (1988) 3 C.P.C. (2d) 74, six counsel were involved. The 1100 hours of preparation time were reduced by a factor of ten percent, for reasons of duplication. The court acknowledged that where there is more than one lawyer, there must be a degree of duplication. There, the remaining hours were held to be justifiable upon consideration of the context of the case. These results, characterized as a 1/12 reduction were contrasted by Ms. Dyer with Mr. Blue's submission that costs, if allowed, be reduced by 96 percent. She submitted that the proposed figure is so unreasonably low as to show the weaknesses of the argument.

Up to November, 2001, Inco had actually incurred $363,000 in counsel fees, GST and disbursements. According to Ms. Dyer, even to put that amount over a numerator of the estimated seven hearing days fails to acknowledge the preparation time which was reasonably necessary on the factors set out in Rule 57(1)(b). She submitted that the actions taken on behalf of Inco were not unreasonable. Asking for a reasonable portion of its fees, Ms. Dyer submitted that the fees outlined in the Bill of Costs should not be reduced, or alternatively, not reduced significantly from the amounts claimed. She submitted that the Tribunal's determination in Wallbridge #1, where it awarded 100 percent of its costs to Inco, involved essentially the same approach as advocated by Inco in this case with respect to the analysis and the production of dockets and the allocation of time.

In Item C, the counsel fee for attendance at the hearing on June 27 has been revised. It was reduced from the hourly rates originally requested to the grid rate reflected in the new Tariff of $2,100 for those three lawyers whose attendance was necessary, according to Ms. Dyer, given the anticipated issues. This would result in savings to the Wallbridge Subsidiary as a considerable number of hours were involved on that day, but Inco is held to a fixed rate.

The dockets comprising item D stemmed from the direction taken in the hearing of June 27 with the Tribunal indicating that it would issue an order for examinations for discovery. Counsel were to make submissions on outstanding issues as to who could be discovered, how and when. This led to another flurry of letter writing in which, as was pointed out by Ms. Dyer, Mr. Blue failed to agree to one of her proposals. As a result, Inco requested a further hearing to address a significant number of issues as to how the matter of discoveries would be dealt with. Upon Inco's request, an Appointment for Hearing was issued for July 10, which contained a significant number of issues for counsel to address in response to how the matter of discovery would be dealt with.

The Wallbridge Subsidiary would not commit to providing a witness whose answers would bind it. There was no agreement on who could be examined. Mr. Bill Good, a former MNDM employee, had executed an Affidavit in connection with the Superior Court of Justice matter purporting to have knowledge of MNDM practice during the time frame of rele-

vance to the appeal. As he was not the Subsidiary's employee and his answers would not be binding on his client, Mr. Blue argued that Mr. Good's evidence should preferably be provided in a witness statement. The Tribunal determined that Mr. Good should be examined by Inco and MNDM and resolved the issue by naming him as its own witness, making arrangements for both parties to examine him. The Wallbridge Subsidiary sought to examine both the Mining Recorder and the Minister's delegate, but the Tribunal limited the examination to one person. It also sought to restrict Inco from examining the MNDM witness, as Mr. Blue suggested that those two parties were not adverse in interest. The issue of the extent to which the **Rules of Civil Procedure** would govern the discoveries arose, instead of proceeding with whatever the Tribunal's Guidelines could be on discovery. The Tribunal's Order provided for discoveries, with additional provision for re-attendance, should issues arise. The Tribunal also settled the matter of production of documents, noting that payment documents had been compiled in answer to the summons, and would be the first to be produced. Mr. Blue was concerned that there would be another motion to strike due to lack of evidence, which Ms. Dyer indicated would not occur because the matter had been dealt with. However, Inco maintained its position that the appeal was without merit, that there was no evidence and that the Tribunal had never had any evidence.

Inco produced its documents and on the eve of the date for the Wallbridge Subsidiary to disclose, Mr. Blue sent a Notice of Discontinuance. Notwithstanding this preemptory end to the hearing on the merits, Inco had been nonetheless forced to deal with the issue of which witnesses would be examined for discoveries, scheduling and the tribunal's Order and prepared its written submissions.

Contrary to Mr. Blue's assertion that Inco had resisted discovery of the payment records, once the Tribunal had determined that it would proceed to a legal and factual hearing in December, it was fundamentally important to ensure that all of the facts were before it. Ms. Dyer stated that she had left the motion on June 27 on the understanding that there were going to be discoveries, there would be an Order to File and dates were to be set. Inco was not providing any resistance.

The result of the July 10 hearing was that a number of items had been agreed to and others had been left outstanding, denoting success for both parties. However, Ms. Dyer urged that the greater success belonged to Inco because it received an Order to examine Mr. Hall, who was only a consultative agent, but whose answers would bind the Wallbridge Subsidiary. In contrast, the Wallbridge Subsidiary's request that Inco not be given the right to examine any of the MNDM officials was not granted, and Inco was permitted the examination.

Inco's 100 per cent success in achieving its objectives was contrasted with the fact that the Wallbridge Subsidiary did not achieve anything on the points raised against Inco. Inco acknowledged that it is seeking recovery of amounts which are substantial. This is the case because of the steps that had been taken to effectively delay this hearing by the Subsidiary resulted in work being redone several times.

Item E of the Bill covers matters arising out of the Tribunal's Order of July 12, the production of documents and an Affidavit of Documents. The work done by the clerks and

students under the direction of senior counsel for the filing of documents and compilation of exhibits is shown. A small amount of Mr. Ledger's time is noted, but is not claimed. The time of the clerks is claimed at $45 per hour. They worked with the Filemaker database, doing a review of documents, identification for privilege, if any, entry of documents and organization of the Affidavit of Documents for production. Ms. Dyer submitted that the amount claimed for the clerk of $207 is reasonable.

The senior counsel's time was spent looking at the documents on a more substantive basis. Included was work involved in preparing the draft written submissions and addressing issues which required a factual or legal response. It is acknowledged that some of the research involved has already been captured under Item B, but Ms. Dyer noted for the Tribunal that the work had not been divided between the research and preliminary motion. It was stressed emphatically that work was not redone, but simply used at this later stage. The notations in the dockets say general trial preparation, and include correspondence, discussions and whatever else was summarized.

The work described continued up until receipt of the Notice of Discontinuance. Flowing from it, there were discussions on its impact, reporting to the client, corresponding with the tribunal and the request for costs. This moves into Item G which is preparation for the Bill of Costs and Costs Argument. As stated elsewhere, this item will be dealt with after the issuance of this initial Order on Costs.

The Wallbridge Subsidiary's Response to Inco's Request for Costs

Mr. Blue categorized Inco's request for costs as a request to punish the Wallbridge Subsidiary and offered three principal reasons for asking the Tribunal to refuse. First, the Wallbridge Subsidiary maintained that the issue raised by the appeal was a novel one and therefore each should bear its own costs. Second, Inco's conduct in this matter, having obstructed the disclosure of documents relevant to the appeal through its **FOIPPA** appeal, should render it undeserving of costs. Finally, on June 27, 2001, Inco in effect, lost a summary judgment motion and therefore should not be awarded any costs.

Mr. Blue indicated in oral submissions that the Wallbridge Subsidiary was probably entitled to costs on a substantial indemnity scale or was entitled to have its costs set-off against those of Inco. However the Tribunal notes that no quantum was ever mentioned, it did not file the requisite application for costs, nor did the Wallbridge Subsidary ever submit an itemized account.

In reference to the novel issue argument, Mr. Blue insisted that the question of whether the lands were open for staking was very much an open one, and facts surrounding payments for the MLO painted a picture of confusion and inconsistency. The fact that MNDM issued a Withdrawal Order on June 13, 2002 supported this position, created an inference that there was cause to be concerned about title. He submitted that the Tribunal should prefer newer decisions regarding mining licences of occupation. *Farris Bowling et al v. Shearn C. Mining* (1977), Ky. App. Lexis 933 supported his position of what, in that case, was described as a "self-executing lease." A British Columbia case advanced a modern approach to mining property, that

where obligations are not met, someone else should be entitled to develop the property. He distinguished *Collom v. Manley* as involving a lease and not a mining licence application, being based upon landlord and tenant law, whereas an MLO is, in his submission, the weakest form of ownership, which was "hanging by a thread, and the thread was the obligation to pay. This supported his argument that the MLO was void by operation of its own terms, the "self-executing" clause– the inference being that privity was not the determining issue. Mr. Blue also sought to credit the Subsidiary's actions with having moved Inco to take steps to enter a lease, whose obligations would ensure that the lands were developed in a more advantageous fashion, making reference to *Clark v. Nahanni Mines Ltd. et al.,* (1983), 6 M.C.C. 430. Costs had been denied in *Sutherland v. Rose,* (1974), 5 M.C.C 144, where the attempts to define the lands open for staking were stymied. *Schiralli v. Esso Minerals Canada* (1983), 6 M.C.C. 435 was similarly a new issue, involving an overstaker's questioning of assessment work requirements. *Weirmeir et al. v. The Director of the Lands Administration Branch of the Ministry of Natural Resources et al.* (1979), 5 M.C.C. 469 was a similar case of first instance, where costs were denied.

Mr. Blue reminded the Tribunal that the Wallbridge Subsidiary had decided in July 2001, to not go ahead with the appeal at that time because "while they had a good case, they did not have a slam dunk case ….".

It was Inco's obstruction in relation to the Subsidiary's attempts to obtain the discovery and delivery of documentation, according to Mr. Blue, that had an impact on the costs Inco experienced and as such it was the author of its own misfortune. As he put it, "…all the [Wallbridge Subsidiary] ever wanted out of all these proceedings, was to see the documents."

Mr. Blue submitted that it was Inco's duty to disclose the documents and the facts. Recognizing that they were key to its position, all of his client's efforts had been focused on obtaining access to the documents before coming to the Mining and Lands Commissioner. MNDM displayed similar reluctance, even where the holder of the licence made the request. Reviewing the chronology and making reference to Inco's March 12, 2001, notice that it would protect what it considered "confidential information", Mr. Blue stated that it was the delayed disclosure of documents on the part of Inco which needlessly led to complications for the appeal.

At the same time, Inco tried to "tie up" or end the appeal with its preliminary motion by attempting to steal the initiative and oppose his client's request for an adjournment pending the **FOIPPA** determination. The decision to hear the Inco motion at the hearing on the merits was proof of this point. Similarly, the position taken by Inco that his client should submit to discoveries before disclosure of documents amounted to obstruction. He described how the Tribunal's Order of July 12, 2001, confirmed his client's position that the documents were "crucial", since the Order had directed Inco and the MNDM to deliver payment records to the numbered company prior to its being required to file. The actions of Inco under the **FOIPPA** and before the Tribunal in seeking the motion to dismiss amounted to a purposeful strategy to not disclose documents. Various cases on the point were put forward to support the argument that such uncooperative behaviour should result in no costs being awarded. But for Inco's intentional obstruction of access to "public" information from MNDM, the appeal would have terminated sooner and at minimal cost.

Mr. Blue directed his arguments to Inco's efforts to bring a motion to have the appeal dismissed, as well as Inco's response to his own attempts to secure the evidence needed for his client's appeal. Inco's grounds were not helpful and all facts were in dispute. Inco's motion, should be viewed as a losing effort as it did not receive the relief sought. The decision of the Tribunal indicated, in his submission, that there was a genuine issue for hearing to be determined on the facts. Inco's motion should be regarded as misleading and it should bear the cost consequences accordingly. Mr. Blue maintained that the Wallbridge Subsidiary had an affidavit claiming that payment records were late. Mr. Blue took the Tribunal through the rules dealing with the consequences of losing a motion for summary judgment. He argued that "evidence was in the payment records and Inco knew that …"

Mr. Blue proposed to approach costs in a global manner without having to go through all of the dockets. In this regard, he filed a re-configuration of the docket summaries, in Exhibit 40.

Mr. Blue attempted to resurrect his "novel issue" argument through reliance on Ms. Dyer's characterization several times to the complexity involved in this matter. Similarly, her reference to the numerous factual and legal issues raised by the Notice of Appeal gave credence in support of his defence to Inco's summary judgment motion.

As to the matter of quantum, Mr. Blue referred to his Analysis of Inco's Electronically Compiled Dockets (Exhibit 40), which is a re-working of the accounting in the Osler Exhibit 22(b), tab 69. The first section is entitled "Dyer Research" and encompasses work done on Items A, B and G. A total of 105.6 hours is listed. Mr. Blue has highlighted those entries concerning **Mining Act** research and related memoranda in the photocopy of the Hours by Lawyer dockets for Ms. Dyer.

The second section is entitled "Research Duplication" comprised of five pages, encompassing research for Items A and B. Under A, there are three subsections, the rationale being that the delineations are not immediately clear. Within each subsection, the description of the work, involving between two and four counsel, outlines the researching of various issues, consulting with one another, preparing and reviewing of memoranda and reviewing of case law. Item B involves five similar subsections outlining the work of between three and four lawyers for each. Subsection 1 involves administrative law, prohibition and jurisdiction of the Commissioner; subsection 2 involves standing before administrative tribunals; subsection 3 involves the drafting of the factum; subsection 4 involves review of the recent *Alarie* decision; and subsection 5 involves reviewing the Wallbridge submissions and drafting of Inco reply submissions. In total, 96 hours are spent on Item A and 121.5 on Item B. Corresponding Hours by Lawyers docket summaries are attached, with relevant portions to the Wallbridge Subsidiary analysis highlighted in yellow.

The third section is entitled "Dyer Supervised by Ledger" with separate listing for Items A, B, C, D and E, each containing between one and thirteen subsections. In each, the description of work discloses several meetings and preparation of memoranda and letters.

The fourth section depicts the total hours spent by Jamal, being 29.75, taken from the Hours by Lawyer docket summaries. The first several descriptions involve reviewing memoranda by Dyer and Francis and then discussions with each. There are several meetings with Dyer and Ledger along with review of background materials and legislation.

The fifth section is entitled "Preparation for Summary Judgment Motion to quash/dismiss Appeal, Selected References up to June 27th" and is a listing of activities principally for Dyer, but includes references to Ledger and Peltomaa. Included are discussion of issues, research of cases, preparation of memoranda, meetings and revisions. The sixth section is entitled "Ratio of Preparation Time to In-Court Time". Item A involves 320 hours, B involves 269.1 hours and C involves 8 hours, for a ratio of 73.6 hours to one.

The seventh section is for the preparation of the Bill of Costs and Costs Arguments. This work involves 80.9 hours of time for Dyer, with an additional 38.4 hours by clerks, a student and "other". The total costs for this are $26,381.50, of which $23,461 is attributable to Dyer. There is an additional $2,100 for attendance for Item H. Item I is entitled "Further preparation for and attending at the resumed Costs Hearing", which amount is not claimed at this time. In addition, there are highlighted portions of the Disbursements, being six copies of the 41 pages of written submissions on Costs @ 15¢ per page, or $36.90; documents in Inco Volumes I and II on Costs of 272 pages @ 15¢ per page or $244.80 and documents in Inco Volumes III, IV and V on Costs of 303 pages @ 15¢ per page or $272.70.

The dockets in Exhibit 40 have been highlighted with a typed sheet indicating a percentage from a "rolled up docket". For example, the task of reviewing earlier versions of the **Mining Act** has indicated 6.3% on the first page; the total for Item A is 52.9 hours by Ms. Dyer of which some percentage is legal research. The analysis of research duplication encompassed all of the research activities of all of the lawyers in the team which are regrouped according to lawyer and activity. In this way, Item A for example involved 96 research hours, which includes the percentage of Ms. Dyers' hours. Similar analysis was carried out for Items B and C. The Tribunal's attention was brought to the fact that the research done by the Research Partner was done by five other lawyers.

Mr. Blue submitted that this analysis shows that there are too many hours spent reviewing mining legislation. With the firm holding itself out as having mining expertise, Ms. Dyer should not have had to conduct the type of review allegedly undertaken. As for collecting old versions of the legislation from 1947 forward, this can readily be done by a clerk in virtually no time. Counsel for Wallbridge indicated that a similar exercise took him no more than half an hour.

Mr. Blue invited the Tribunal to carefully review his foregoing analysis. He submitted that the time spent was excessive. The work described was contrasted with the case of the Wallbridge Subsidiary, in which all of the legal research was done by one person. In *Wotherspoon*, the team approach is acknowledged but duplication should be disallowed according to the relevant circumstances of each case. It was submitted that using fifteen lawyers would cause massive duplication.

In *Canadian Express Ltd. v. Blair Enfield Corp. and Montreal Trust Co. of Canada*, (1992), 91 D.L.R. (4th) 559; 8 O.R. (3d) 769 (Gen. Div.) the court indicated in relation to the team approach that the preparation time for the appeal was of greatest concern, with a ratio of preparation to in-court time of 20 to one. The court felt there should be a "reasonable relationship between the out of court preparation time and time taken by the hearing." Although the assessment officer reduced the amount for preparation by $20,000, a factor of about 16 percent the court reduced the amount by $70,000, thereby allowing $32,000 of the original amount claimed. This recalculation resulted in a reduction in the ratio from 20 to 1 to 7 to 1. In so doing, the court was unable to find the rationale for allowing the large number of hours and, without grounds to back it up, found the amount "… to be so excessive as to amount to an error in principle." By comparison, the blended rate of Inco's claim, based upon a ratio of 73 to one was $265. At a similar rate, if the total time was reduced to the seven to one ratio allowed in the *Canadian Express* case and if Inco were to be awarded all of its costs, the resultant award would be $10,840. By contrast, in the Wallbridge #1 decision, 205 hours were spent by the various Inco lawyers, with a ratio of 5.125 preparation hours to one hearing hour. Mr. Blue presented other cases where these principles have been discussed and applied, resulting in reductions of unreasonable costs in a global fashion. [*Eagleson v. Dowbiggan* (1996), 4 C.P.C. (4th) 55 (Ont. Gen. Div.); *5550551 Ontario Ltd. v. Ontario (Employment Standards Officer, Ministry of Labour*), [1991] O.J. No. 1809 (Ont. Gen. Div.)]

The global approach does not require that the effort made be belittled or otherwise questioned. Rather, it stands for the principle that, although a party may be free to "pull out all the stops" in having its lawyer prepare its case, this does not mean that the other side has to pay for this effort. Accordingly, it is unnecessary to go into all of the dockets filed, other than to recognize the obvious duplication. Going through the dockets would be difficult in any event, as they are rolled up dockets and the information listed is very general and broad. However, Mr. Blue did indicate that he was satisfied with opposing counsel's honesty in this regard.

When questioned about the various hearings which never took place, Mr. Blue maintained that most of the activity was directed towards the preliminary motion and protection of confidential material, although it would be impossible to delineate between Items A and B without cross-examination. He characterized this as a great deal of preparation time being claimed for a motion which failed and for issues which became moot, such as the quashing of the summonses. Ms. Dyer was unable to break down those notations identified as "preparing for motion" further, to identify what part of the motion would have been involved.

Discussions ensued regarding a seven hour docket which Mr. Blue alleged was in relation to what was to have been a settlement meeting and was supposed to be privileged. Mr. Blue questioned whether Inco intended to withdraw its privilege. Alternatively, he submitted that all settlement discussion dockets should be excluded. Ms. Dyer indicated that the settlement portion of the docket was a meeting which took one hour or ninety minutes.

Mr. Blue argued against the use of the *Delrina Corporation* as authority in not applying the *Canadian Express* because it is only applicable to cases involving substantial indemnity which is no longer the case with Inco's claim. Also, the point of *Canadian Express* is

that, although a party may incur whatever costs it wishes, the question is one of how much the other party should have to pay. *Wotherspoon* is also distinguishable because it involved full argument taking 18 days in the Court of Appeal, whereas in this appeal the merits have not been looked at.

Spending on fees by Wallbridge in its Annual Report also included costs associated with Wallbridge #1, the action in front of Molloy J. and the **FOIPPA** appeal. The suggestion that the amount of $425,790 spent in 2001, is comparable to what was spent by Inco is in error. This assertion was challenged by Ms. Dyer, as the work on Wallbridge #1 would have been minimal in 2001 and the work on this appeal would have been substantial.

Should *Canadian Express v. Blair* not be applied, the dockets must be examined, an issue which Mr. Blue argued should be dealt with on a global basis. An experienced litigator could see that the dockets are grossly inflated, by a factor of 75 to 80 per cent whereas the Subsidiary's case was handled by three lawyers, one senior, one junior and one in research. Many of the issues could have been handled relying on past research, an approach taken by Mr. Blue. It would be an easy matter to build into argument the rules set out in *R. v. Waggle*. Mr. Blue similarly relied upon a similar compilation file for prohibition, an issue which along with judicial review, has formed part of his practice for a large number of years. The issue of prohibition was fully argued in Wallbridge #1, so that there was nothing new to research. Through use of internal e-mail, drafts of documents can be passed back and forth without it being necessary to hold a meeting. His approach of making all decisions in relation to his client's case was contrasted with the Inco file which Mr. Blue characterized as being "well churned" with dockets that were over-stated. Ms. Dyer countered that it is irrelevant how Mr. Blue runs his practice and undoubtedly, being in practice for 35 years, he is likely to know more on certain subjects than Mr. Jamal. However, the issue of prohibition was raised in the Notice of Appeal and Inco had to address it.

Mr. Jamal's dockets should be reviewed, in Mr. Blue's submission, keeping in mind that he was touted as an administrative law lawyer who should be familiar with those items listed in his dockets without the need to conduct considerable research. Included would be familiarity with the **Statutory Powers Procedure Act**, the availability of judicial review on an interlocutory matter, grounds for quashing a summons, regarding adjournments and whether a stay is automatic. Moreover, as all of the items concerned became moot as a result of the June 27 motion, the 29.95 hours claimed for Mr. Jamal should be reduced to zero. Ms. Dyer countered that this had not been a foregone conclusion going into the motion hearing and there is, consequently, no basis upon which to reduce the time allowed.

Seeking to minimize Inco's claim, Mr. Blue stated that the Tribunal has nothing beyond speculation as to how long the hearing would have lasted. Nor does it have any evidence that any of the work done on behalf of Inco related to the issues of the main hearing, as it was all done in anticipation of the preliminary issue, which Inco lost for failing to secure an order that the appeal was dismissed at that time. Inco lost because the Tribunal needed to hear evidence. This is the same reason why Inco, had it structured its application properly or not gone forward with it, required three counsel to be present. Since only one counsel spoke on that day, they should get counsel fee only for one.

The results flowing from the July 10 hearing were mixed and as such no costs should be awarded to either of the parties. An example of this was Inco's insistence that all examinations should proceed before documentary discovery and the allegation that the request for documentary discovery was a delay tactic. The Tribunal did not agree, but rather ordered that full documentary discovery by Inco and MNMD be carried out by July 19, with examinations for discovery to take place afterwards. The Wallbridge Subsidiary was principally concerned with this issue and it won. Ms. Dyer countered that the issue was whether examinations for discovery would proceed prior to documentary production. Actual production was never an issue; the timing was.

Mr. Blue submitted that Inco should receive no costs under Item E which, up until July 19 are all related to the aftermath of the failed June 27 proceedings. The dockets relate to making submissions about the matters arising out of the order of July 12, and to complying with the Tribunal's directions flowing out of June 27. As such, they constitute part of the failed motion for Summary Judgment.

Findings

Appellant's Search for Information

The Tribunal finds that the Subsidiary filed an appeal containing allegations which had no factual foundation at the time it was filed nor throughout the whole of the proceeding. Throughout and even prior to filing its appeal, the Subsidiary was searching for evidence to support its allegations, which activity continued well after proceedings were commenced. It never produced any evidence to support the allegation about the Inco MLO payments (or lack thereof) in its appeal. Yet it gave the Tribunal the impression that the process should either work around its inability to fulfill its obligations as a party, or that Inco, MNDM and the Tribunal should have assisted it in making its case. Illustrative of this is the fact that the first step in most proceedings which result in the filing of documentary evidence after the issuance of an Order to File first by an appellant did not take place. Instead, something so routine as the sequence of filings became one of the many issues raised by Mr. Blue in the course of this matter.

At the time it filed its appeal, the Subsidiary was not in possession of any evidence regarding the alleged failure by Inco to make lease payments, despite the fact that this allegation lay at the heart of its appeal. There were no time constraints associated with the staking. The Subsidiary could have delayed its staking until it obtained the evidence it sought upon which the staking was based, but chose not to do so. Had it not been concerned about keeping its actions a secret, it could also have walked away from its initial decision and staked again – only after it had established a satisfactory evidentiary basis in support of its action. This lack of an evidentiary basis for its appeal, and the means by which the Subsidiary, its counsel and Wallbridge pursued this quest for the sought-after evidence, carried considerable weight in the Tribunal's determination that it would award costs to Inco. The secretive nature of the actions of Wallbridge and its Subsidiary are also misguided, given that the **Mining Act** is predicated on competitiveness.

Mr. Blue was obdurate that his client be allowed to meet its need for copies of payment records pertaining to the MLO prior to being required to make its case before the Tribunal. The Notice of Appeal raised details relating to the February 16, 2001 **FOIPPA** application by the Subsidiary. [Note: the information set out in the **Chronology**, above, was not wholly available to the Tribunal until the filing by the Subsidiary of the six volumes comprising Exhibit 14(c) filed on September 21, 2001. Also, Note: the **FOIPPA** application and the Superior Court application were made by Wallbridge, not the Subsidiary.] The fact that this information was the subject of the ongoing **FOIPPA** matter was, in turn, highlighted for the Tribunal at the Preliminary Hearing held on June 27, 2001. The matter of the payment records came up again at the Procedural Hearing held on July 10, 2001.

Even though it did not have copies before it at the June and July, 2001 Procedural Hearings, the Tribunal was referred to the Hall and Good affidavits as a means of providing some of the background to the search efforts of Wallbridge and it's Subsidiary. The Tribunal was being asked to rely on allegations made for the Superior Court proceeding to either adjourn the proceedings until the **FOIPPA** matter was resolved or to accede to the Subsidiary's requests concerning the sequence of the proceedings. This was, in itself, problematic for the Tribunal. The lands were staked and the appeal was launched without the Subsidiary's having obtained the evidence it sought. In essence, the complicity of the Tribunal in delaying proceedings until the Subsidiary could obtain its evidence was sought .

When questioned by the Tribunal, Mr. Blue referred to the knowledge that Wallbridge had at the time of staking as found in the Hall affidavit. Mr. Hall referred to Whymark's inquiries concerning Ministry records, where apparently questions had been asked to the effect that it "might want information about MLOs held by others". Hall had also sought a meeting with MNDM for February 28, 2001, with Mr. Blue in attendance, to discuss "mining land titles and records". Mr. Hall further noted, "Wallbridge has staked the mineral rights under MLO 10,872" and "Wallbridge requires access to the rental-payment records of the MLOs to prove that the mining-rights claimed under them reside in the Crown and are open to staking." The initial request of Mr. Whymark pre-dates the staking and the subsequent inquiries took place prior to attempt to record the Mining Claims.

According to the Good Affidavit,"… Wallbridge seeks to review the MNDM's records for three specific MLO's….Wallbridge intends to review the MNDM's records for those MLOs and to apply to record mining-claims."

As late as July 10, the Wallbridge Subsidiary was still attempting to obtain copies of payment records, having made earlier attempts by resurrecting its Superior Court of Justice application on March 9, 2001 and by seeking the adjournment, summonses for June 27 and to fully respond to Inco's motion to quash. This lack of information proved to be an issue at nearly every stage of the pre-hearing process. It described the information as something it needed "to make a case" and for an "appropriate evidentiary base".

Although the Subsidiary never considered the timing of its search for evidence to be a problem, Ms. Dyer pointed out that Wallbridge's search for information regarding late payments did not commence until after the staking had occurred. Even though the existence of

the MLO was substantiated on its face and on the staking map in the Office of the Provincial Mining Recorder, the Subsidiary appeared confident that a search would produce records that would lend credence to its belief that the MLO payments were in default "for one month or more." That default, combined with its interpretation of the terms of the MLO, would, in the view of Mr. Blue, have removed it as a bar to staking under the **Act**. The Wallbridge Subsidiary claimed it needed to obtain the payment records before it could deal with Inco's motion or engage in the exchange of witness statements.

On July 10, 2001, Mr. Blue brought the information issue to the Tribunal's attention again when responding to Inco's request for documentation to substantiate the appeal. "[W]hen we were here on the 27th, we had said … that we required, for the motion to quash, the payment records that we were seeking by way of the Freedom of Information Act…. **[W]e need those documents before we can make our case, …**" And as well, "It makes no sense … to require Wallbridge to file what it has… because all that Inco is going to do is bring another motion to quash saying there's no evidence…." Mr. Blue had argued in June that the tribunal had no jurisdiction to deal with his client's appeal by way of hearing a motion to quash from Inco. There was nothing in the statute (the **Mining Act**) to allow for this. He had what he described as a "legal right" to adduce evidence, call witnesses and so on – in other words, he had a right to a hearing.

Mr. Blue continued to insist on the seemingly contradictory positions that he had a right to adduce evidence when in actual fact he was hunting for evidence with which to make his case. The witnesses he was intent on calling were ministry officials (Gashinski and Spooner) who he wanted to question on their handling of the Wallbridge application to record (i.e., did they look at the MLO's payment records in deciding that the Wallbridge application to record should be treated as "filed only") as well as their knowledge of Inco's lease payments. (June 27, 2001 transcript page 54) He advised that "I have asked Mr. Gashinski to bring those [payment records] to court or to the hearing today, and I want to have him tell us what they say. If they show that Inco made timely payments in the years '47 to '53, I will fold up and say I'm sorry, and Wallbridge will be happy to pay people's costs …." He went on, " [i]f I get that sort of evidence, which I suspect I will, then I submit the appeal is properly before [the Tribunal]…." It is abundantly clear that Mr. Blue's client never had any evidence with which to make a case.

At the July 10, 2001, Procedural Hearing, Mr. Blue continued to insist on having documents provided by Inco and MNDM before committing to his client's own filing. The issue of the sequence of filings, namely whether the Wallbridge Subsidiary would be ordered to produce particulars of its appeal prior to receiving the payment records, remained an issue for Inco, being insistent on knowing particulars of the Wallbridge Subsidiary evidence which led it to undertake its staking.

Despite having adjourned on June 27 with certain understandings concerning the procedural order the Tribunal would be drafting, it was necessary to reconvene again some few days later on July 10, 2001, with the time taken up once again dealing with the Wallbridge Subsidiary's efforts to obtain payment records information and the timing of that documentary disclosure. Also included were rather involved and convoluted issues and discussions relating to who would be examined for discovery by whom.

The Wallbridge Subsidiary never did indicate what documents, if any, it had in its possession prior to launching the appeal, or prior to seeking leave to discontinue its appeal. When pressed, Mr. Blue referred only to the opinions held by the deposers of the two affidavits, Hall and Good. The Subsidiary was acting on a "belief" when it staked its claims and again when it filed its appeal of the Provincial Mining Recorder's refusal to record the claims. On June 27, 2001, Mr. Blue indicated the nature of the evidence he had at that point, namely an indication from the Deputy Minister of MNDM "that we may see the payment records under the Freedom of Information and Protection of Privacy Act."

The issues surrounding the search for and production of documentation (and the treatment of same by the Subsidiary to a great degree and Inco to a lesser degree in necessary response) drew the parties and the Tribunal into a complicated procedural quagmire. Most fell well outside of what was contemplated by its own Guidelines for Hearings (which were designed to facilitate straight forward, fair and expeditious hearings).

While it seemed after June 27, 2001, that the parties were set to carry out the procedural orders to be drafted by the Tribunal, (the goal being to hear the matter in December) such was not to be the case. There inevitably arose a need to reconvene to further nail down particulars or to revisit those items which the Tribunal thought had been disposed of, in order to further deal with newly discovered loopholes or further issues arising out of their disposal, with the pre-hearing held in July of 2001 being but one example. The issue of whether Mr. Hall would bind the Subsidiary under examination, and whether Inco and MNDM were of like interests, thereby precluding Inco from examining MNDM officials were but two examples. The

Tribunal concluded its hearing of that date by stating, "I think now we can safely say that we are adjourned barring any unforeseen circumstances, to the first week in December."

Conduct

The brevity of description by the Tribunal of these matters should not be construed to mean that meetings of the parties before the Tribunal went smoothly. They did not. At each convening of the Procedural Hearings, almost every issue generated points of contention and lengthy submissions. Procedural niceties were ignored. In between these hearings, the Tribunal was copied with most of the numerous pieces of correspondence that flowed between the parties, sometimes within hours and minutes of each other. The tactics utilized by Mr. Blue generated an atmosphere of mistrust, wherein counsel for Inco took steps to head off potential issues and not just respond to issues as they arose. In this regard, Inco felt sufficiently threatened that it started copying the Tribunal on its correspondence, an extraordinary step under any other circumstances. The Tribunal finds that the Wallbridge Subsidiary and Mr. Blue should be held responsible for the atmosphere of mistrust which their conduct created.

Mr. Blue's letter to the Tribunal Registrar in which an adjournment of the June 27 proceeding was sought demonstrated the lengths to which he was prepared to go as well as his view of Inco's motion. He said, "… if INCO is determined to argue its cross-motion, [the Wallbridge Subsidiary] needs to adduce evidence on the motion. I understand that INCO's

counsel takes the position that no evidence is needed for that purpose; but I must respectfully remind you, on behalf of 1352, that that is for me to decide, not them. Again, if the Tribunal were to deny me the right to adduce evidence on the cross-motion, 1352 is confident that the Divisional Court would not support that decision."

Notwithstanding the fact that Tribunal was advised prior to the June 27 hearing that the Subsidiary's motion had been withdrawn, Mr. Blue purported to attempt to bring forward the very same issue that had been removed with the agreement of all the parties. Not surprisingly, counsel for both Inco and the MNDM took strong exception to this announcement. When confronted by the Tribunal as to the manner in which Mr. Blue brought the issue forward again on behalf of his client, Mr. Blue said, "*[w]ell, I can only say that I pumped it up this morning*." When the Tribunal denied his request, Mr. Blue pushed the matter further by asking Ms. Dyer to give an undertaking dealing with the same issue. Prior to the Preliminary Hearing held on July 10, 2001, no less than six Direction/Orders had been issued by the Tribunal given the ongoing issues raised by Mr. Blue.

The matter of costs was initially considered on October 1, 2001. The effecto of the discontinuance and the right to seek costs from the non-parties was also considered. The confidentiality of the payment records remained in issue and **in its Order and Notice of September 20, 2001, the Tribunal directed Mr. Blue not to photocopy those documents. In contravention of this Order, Mr. Blue filed copies of those payments, along with documentation concerning the Supreme Court of Justice and FOIPPA.** After hearing from counsel, the issue of proceeding for costs against non-parties was heard and the Tribunal determined that it would receive submissions on why costs should be awarded against the three non-parties. This interlocutory decision was appealed, which in turn adjourned the Costs Hearing before the Tribunal. The Superior Court of Justice dismissed the appeal April 9, 2002 on the basis that it was barred by section 117 of the **Mining Act**, not being the final decision in the matter.

Getting to the point where a hearing on costs could actually take place was just as arduous as the process described above. Time was spent dealing with matters that really should not have arisen. The hearing dates originally set by agreement for October 9, 10, and 11, 2002 went by the wayside when Mr. Blue, due to his having to attend at a hearing before an extra-provincial administrative tribunal taking place in another province, requested yet a later date. As discussed in the **Chronology**, above, while it was initially proposed that if the date could not be changed another counsel from the same firm would attend, this position was almost retracted immediately. The reason was that the Wallbridge Subsidiary indicated that it wished to be represented by Mr. Blue, who was familiar with its case to date. At this point, this Tribunal ordered that a new schedule for the hearing would be set only on conditions – one of which was an undertaking from both Mr. Blue and Mr. Hamilton regarding their attendance.

Even with this accommodation in scheduling, the Tribunal subsequently found it necessary to stagger the hearing on costs to hear argument on specific issues, which could realistically not be heard on the same date, given that determinations would have an impact on the later issues.

The issue of costs against non-parties proceeded with a request from Ms. Dyer for and issuance of summonses against H.J. Blake and Koby Smutylo of the firm of McLean & Kerr, LLP, who were the Corporate Secretary of Wallbridge and a Director or Former Director of the Wallbridge Subsidiary, respectively. This issue was settled in writing commencing on October 24, 2003, where Mr. Blue wrote to Ms Dyer:

> "It appears that you are attempting to adduce evidence that 2001352 Ontario Inc. is a "straw man" and that Wayne Whymark and Mark Hall are somehow acting beyond the scope of their authority and therefore may have personal liability for costs. I assume all this effort and expense on your part is to ensure that if Inco is successful in obtaining a costs order, it will be paid.
>
> Valerie, had you phoned me, we could have avoided all these costs to Inco."

By letter dated October 30, 2002, Mr. Blue wrote to Ms. Dyer setting out several agreed upon points. Wallbridge would provide a guarantee signed by a duly authorized officer, that it will pay all costs, interest and GST under any order of the Tribunal requiring the Subsidiary to pay costs to Inco, including the cost of any appeal. Wallbridge would agree to a term in the Order of the Tribunal that, upon default by the Subsidiary of payment in full within 30 days of such Costs Order, an Order may be issued against Wallbridge by the Tribunal directing Wallbridge to pay the costs according to its guarantee. Upon receipt of the foregoing, Inco would withdraw that portion of its costs application against Messrs. Hall and Whymark, subject to each making submissions at the conclusion of Inco's costs hearing as to what costs, if any, should be payable in respect of the withdrawn motion. There was agreement that the November hearing dates should remain in place for the time being and the Summons to Witnesses issued to Messrs. Blake and Smutlo be withdrawn. The agreed upon guarantee was signed on behalf of Wallbridge by Risto Laamanen, its Chairman and CEO on October 31, 2002.

This raises the question as to why the forthcoming guarantee was not provided prior to the hearing in September of the previous year. It is illustrative of the circuitous and tortuous path each and every element of this case underwent and of the difficulties experienced by the Tribunal and Inco in attempting to move a seemingly simple matter such as costs forward.

The resumption of the scheduled hearing, aside from the adjournment matter, purported to raise other issues found in correspondence dealing with the adjournment itself, as set out in clause 3 of Mr. Blue's letter of September 6, 2002. While not specific in nature, mention is made of remaining jurisdictional questions. Mr. Blue stated, "…there may be other motions to be considered before the parties turn their attention to the merits of Inco's cost demands." The possibility of cross-examination of Inco's counsel on their dockets was also raised.

The Wallbridge Subsidiary argued that the amount being sought by Inco was so large that it was only fair that it be able to delve in detail into the dockets through cross-examination of Inco's counsel. November 8, 2002, was set aside to deal with this issue and any other motions the parties might bring on the basis that the Bill of Costs failed to conform to

Tariff A (**Rules of Civil Procedure**) in terms of the number of counsel allowed. The argument being that the number was over the limit set in the Tariff and would therefore paint a distorted picture that might bias the Tribunal and prejudice the Wallbridge Subsidiary. This argument draws on Rule 25.11, which authorizes the court to "strike out or expunge all or part of a pleading or other document". There was also argument on the issue of "fixing" costs, which garners different treatment from assessment of costs. Inco challenged the "Tariff" motion on the basis that it had been made at the last minute, the Bill of Costs having been in the Wallbridge Subsidiary's hands for at least a year. Ms Dyer pointed out that the Wallbridge Subsidiary's position on costs had been set out in its earlier filings which did not raise the motion to strike. This filing had in fact taken place on September 21, 2001 with no reference to a Motion to Strike. The Motion to Strike was not granted at the November 8, 2002, Costs Hearing.

As to the issue of allowing Mr. Blue to cross-examine Inco counsel on their dockets – when questioned by the Tribunal as to what he wanted to cross-examine on (the concern of the Tribunal being that the hearing into costs would be taken up with "listening to cross-examination on every aspect of Inco's Bill") Mr. Blue replied, "I think that, as a practical matter, that's what you're into." As far as Mr. Blue was concerned, the amount of money being claimed by Inco served as the basis for asking questions about the dockets. When pressed by the Tribunal for an example to illustrate his concern, Mr. Blue cited one item where Ms. Dyer had listed "edited dockets" as one of the items being claimed. Mr. Blue insisted, "I'm entitled to know what they edited, I'm entitled to test that."

Mr. Blue also referred to s. 10(b) of the **Statutory Powers Procedure Act** saying that he was "entitled to cross-examine witnesses at the hearing", and since the Bill of Costs was an Exhibit to the Motion Record, he was entitled to cross-examine for that reason. He asserted that once an oral hearing as opposed to a written hearing was called, this would amount to a public hearing with the right to cross-examine according to the terms of section 10.1 of the **SPPA**. Attention was drawn to the word "hearing" under **SPPA** which would similarly apply to a hearing under section 127 of the **Mining Act**.

Contrary to this assertion, the Tribunal notes that the Bill of Costs is normally a document submitted by an Officer of the Court and that in this case, it was not accompanied by an affidavit from the solicitors involved. The Tribunal also notes that in this case, the Wallbridge Subsidiary never formally requested costs, nor did it ever quantify costs when it asked the Tribunal to reduce the amount of costs being sought by Inco.

Mr. Blue gave other examples which perhaps give a better idea as to the type of questioning he wanted to engage in. He referred to "dockets reviewing documents for evidence at hearing…" and posed questions asking what documents, what had been reviewed, what was meant by review, how much time had been spent, were the dockets "padded" and were lunch and bathroom breaks included? Mr. Blue saw these as legitimate questions the answers to which would allow the Wallbridge Subsidiary to "put together our arguments." This argument is based upon the decision in *Attorney General of Manitoba v. NEB*, [1974] 2 F.C. 502, where the Board's refusal to allow cross-examination was found to be a denial of natural justice. However, the issue in that case was in fact whether the tribunal in question could refuse to allow cross-

examination where an opposing party normally sought it. In this Subsidiary/Inco Costs Hearing, the issue is whether the material in the Bill of Costs submitted by Inco should be tested through cross-examination of each of the lawyers' associated with the billings. In considering this, the Tribunal is led to observe that a similar pattern exists here on the part of Mr. Blue where he is attempting once again to induce Inco to supply the evidence he requires to support his case. In this instance what he is seeking is the evidence needed by him to support his inferences as to impropriety on the part of the Inco counsel team.

Inco countered by referring to *Gas TOPS Ltd. v. Forsyth et al.* (1998) 42 O.R. 3rd 637, which this Tribunal adopts, where the court found that since the issue was fixing costs as opposed to assessment, there was no need to grant plaintiff's counsel's request to cross-examine on the dockets.

Ms. Dyer referred to the Tribunal's Guidelines for Hearings with respect to interrogatories. Accordingly, the issues should be focused rather than allowed to expand, so that Inco not be required to have numerous lawyers sitting through hours of hearing time. None of the counsel listed were present so there was in fact no one to cross-examine. Throughout, the onus was on Inco to make its case and justify the reasonableness of the entries and the time spent so that the Tribunal could then determine whether or not it was satisfied.

The Tribunal finds that at no time were the Inco dockets challenged with respect to credibility. Rather, the focus of the challenge by Mr. Blue was with respect to what was and what should be included in the time spent by solicitors. One such reference was to "bathroom breaks." Mr. Blue also stressed that there were multiple goings-on, involving **FOIPPA**, the matter in the Superior Court of Justice and the negotiations involving the Stand Still Agreement negotiations, essentially alleging that there was a strong likelihood that the dockets may not all pertain to the appeal before the Tribunal.

By the time the hearing actually got underway on November 19, 2002, it seems that the parties had agreed that the issue centred on the fixing (as opposed to the assessment) of costs.

Historical Perspective of Proceedings

The Subsidiary mounted an intricate, multifaceted and unorthodox campaign in their efforts to obtain the "evidence" they required to prove that MLO 10,872 (and others) held by Inco was void and had been void since the 1950's. The purpose behind these efforts was to successfully record certain mining claims staked on their behalf, lying under the waters of Kelly Lake, which were held by Inco under MLO 10,872.

From January to early March, 2001, Wallbridge and its Subsidiary, by the actions of Mr. Hall, Mr. Whymark, principles of one or both companies, and their counsel, Mr. Blue, put into operation sequential, overlapping, ambiguous and at times confusing inquiries, requests, applications, discussions and this appeal. Initially, these activities captured the attention of a number of people in MNDM including counsel, and eventually extended to representation from

the Attorney General. Given that the lands in the appeal involved it, Inco was also drawn into what must be called in retrospect the frenetic activity of reacting to an onslaught of forays into a number of related and inter-related areas of the administration of justice.

Although the Tribunal first became involved on March 1, 2001, it only began to piece together what was taking place only as the complete picture emerged after **the Subsidiary filed its Exhibit 14, which included all documentation relating to litigation in the other forums, not to mention other documentation Inco sought to protect as confidential.** Wallbridge and its Subsidiary sought to maintain the secrecy and security of their information upon which they based their belief that a number of old MLOs in the province are in fact void, thereby attempting to preserve an interest in the land prior to there being any possibility of competition. Their early activities were carried out in a manner which appeared to be governed by concern that if discovered, would cause them to lose the advantage gained by staking valuable lands which everyone else in the province, including the entity which administers those lands, thought were not open to staking.

Issue of Obstruction

The Wallbridge Subsidiary's arguments on this point are without foundation and provide no support for its position that costs should not be awarded to Inco. **The Tribunal finds that the actions taken by Inco before the Privacy Commissioner have no relevance to the manner in which it conducted itself before this Tribunal. The allegations made by Mr. Blue that Inco used the FOIPPA to obstruct the disclosure of evidence before this Tribunal are without foundation.** Concerning this appeal before it, the Tribunal finds that all of Inco's responses to this Tribunal's requests and orders were timely and carried out in a responsible fashion. Neither does this Tribunal accept Mr. Blue's argument that Inco was engineering a collateral attack on a decision emanating from the Superior Court matter (Molloy decision).

The Tribunal is disturbed that an issue of obstruction would be brought against Inco by the Wallbridge Subsidiary when its own strategy in seeking to enforce the agreement in the Superior Court matter has the appearance of attempting to circumvent third party [Inco's] rights under the **FOIPPA**. Yet, when Inco sought to exercise those statutory third party rights, the strategy failed. The attempt by Inco to invoke its statutory rights flowing from Wallbridge's *ex parte, in camera* proceedings is being coined as obstructionist, but it is irrefutable that Inco's actions are a direct result of Wallbridge's own machinations.

The fact that the Wallbridge Subsidiary had to go about obtaining information in other venues (prior to being able to fulfill its responsibilities upon launching an appeal before this Tribunal) is relevant to the issue of costs. Rather than casting aspersions on Inco for doing what is open to any party under the **FOIIPA** to do, the Wallbridge Subsidiary would have done well by ensuring that all its information had been assembled and reviewed for purposes of its appeal – prior to launching the appeal.

The Tribunal finds that the actions of the Wallbridge Subsidiary both in terms of preparing itself for a staking dispute and in terms of its conduct during the long and tortuous path leading up to an actual hearing date were of serious concern and enough of a reason for Inco to claim for costs. It is clear to this Tribunal, in **looking at the affidavits submitted with respect to the Superior Court application (and which were used by Mr. Blue before this Tribunal), that all the Wallbridge Subsidiary had at the time the lands were staked were opinions based upon vague knowledge of operations concerning administration of mining licences of occupation, generally, and nothing more.** It had no specific knowledge concerning the status of Inco's MLO. Its activities were focused on its attempts to collect concrete evidence related to those opinions. The Wallbridge Subsidiary based the legitimacy of its staking on the status of the MLO, so there is no doubt for the Tribunal that having evidence to support the opinions was key to its case. Yet it claimed not just to this Tribunal, but to the public as well, that it had "evidence".

Also, based on the materials filed, the Tribunal has no doubt that at the time the appeal was launched, the Wallbridge Subsidiary could have been criticized for not having a cause of action due to a lack of evidence. This has nothing to do with the nature of the issue or the status of the MLO. It was simply not ready to use the processes provided for under the **Act**. Abuse of process was not argued before the Tribunal. However, the Wallbridge Subsidiary led the other parties on a merry chase before deciding that the information it finally acquired was not useful for its appeal. When it finally obtained the payment records, the Wallbridge Subsidiary attempted to pull out. This is not a practice that can be condoned. It deserves to be penalized for this irresponsible behaviour and for toying with other parties and a public process that costs time and money to administer.

According to the Wallbridge Subsidiary, the decision of the Provincial Mining Recorder to not record the claim gave it the right to appeal. And standing before the Tribunal meant it could "raise anything relevant to the appeal." This Tribunal is of the view that "rights" are not to be used as an excuse for bad or questionable behaviour. Raising "anything relevant to [an] appeal" is an exercise that occurs once a proper foundation for a hearing has been established. The appeal itself must be valid. This necessarily includes having the necessary evidentiary base to its action.

No issue is taken with the right to appeal the decision of a Provincial Mining Recorder. However, the Tribunal does take issue with the manner in which the Wallbridge Subsidiary made use of the appeal process and the manner in which the appeal was conducted. The Wallbridge Subsidiary raised the issue of fairness and the spectre of appeals from interlocutory rulings of this Tribunal on more than one occasion. This Tribunal is well aware of the role of the **SPPA** and the rights of a party. But Mr. Blue is experienced counsel and knows that with rights come responsibilities. The Wallbridge Subsidiary did not behave responsibly. The Tribunal finds that the appeal was launched prematurely, given that the Subsidiary had no evidence, but merely allegations, to support its contention regarding the MLO when it staked the lands, and when it presented the claims for recording. This too has a bearing on the decision to award costs to the responding party Inco.

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Issue of Summary Judgment

In June of 2001 (and before the appeal was abandoned), Inco brought a motion to have the appeal dismissed or quashed on a number of grounds. The Wallbridge Subsidiary argued that in order to be able to respond to the motion, it needed an evidentiary base. After hearing from the parties, the Tribunal decided to join the Inco motion with the main hearing thereby allowing the parties to make arguments on the jurisdictional points raised by Inco (all the Wallbridge Subsidiary's evidence would by then have been assembled) and then make a determination accordingly. In fact, the motion made by Inco was never heard given the Subsidiary's abandonment.

Raising this motion as an answer to costs now (i.e. summary judgment – no costs because Inco lost) is not useful. The decision made at the time to allow the Wallbridge Subsidiary the opportunity to gather its evidence and to combine the Inco motion with the hearing proper cannot be turned on its ear now to make the Inco motion a "summary judgment" application at the time it was made, in the Tribunal's view, nor does it view it as such at the time of the issuance of this Order for Costs. As the parties well know, each of the pre-hearing days leading up to the moment when the Wallbridge Subsidiary decided to abandon its appeal were a mish-mash of legal and procedural wrangling, all in aid of the Subsidiary's attempts to garner the evidence it did not have but required to support its appeal.

Since no hearing on the motion took place, as the appeal was "discontinued", no one can say that Inco lost anything. It simply never came to pass. The Tribunal finds that all costs incurred by Inco flow from the fact that the Wallbridge Subsidiary brought the appeal and then sought to have it "discontinued" in July 2001. This summary judgment argument does not provide a basis for disallowing costs to Inco.

Novel Issue Argument

In making an argument on the issue of novelty, Mr. Blue referred to documents produced by Inco following the Tribunal's Order to File dated July 6, 2001. He argued that the documents painted a picture of confusion and inconsistency respecting payments made towards the MLO. He also pointed out provisions he described as "controlling" and a "legal requirement" in the MLO. Mr. Blue acknowledged that the Tribunal never decided the issue of the validity of the MLO; nevertheless, the issue itself was novel, (or in Mr. Blue's words "whether the lands were open to staking was very much an open question") and for that reason, no costs should be awarded to Inco.

Mr. Blue pointed to the Ministry's issuing a Withdrawal Order, dated June 13, 2002, effective July 2002, as an indication of the novelty of the issue. The inference was that MNDM and Inco were worried enough to go about obtaining a more secure title to the lands underlying the MLO.

Mr. Blue indicated that he did not trust the cases submitted by Ms. Dyer on behalf of Inco, because they were "old" and not representative of decisions regarding mining licences of occupation. Mr. Blue took the Tribunal to the U.S. case of *Farris Bowling et al v. Shearn C.*

Mining.(1977), Ky. App. Lexis 933. The court treated the life of the lease as being dependent on the royalty payments having been made, which it described as a "self-executing lease." Another case, out of British Columbia, was also put forward as indicative of a "modern approach to mining property". The policy cited by Mr. Blue was this, "… if you don't meet your obligations as stated, then someone else should have a chance so the property gets developed."

In answer to Ms. Dyer's reference to *Collom v. Manley*, Mr. Blue dismissed the importance of the issue of privity by stating that it was a lease case and not a mining licence application. Therefore, it was decided on the basis of landlord and tenant law, which does not apply to this appeal. An MLO is, in his submission, the weakest form of ownership, which was "hanging by a thread", and the thread was the obligation to pay. This supported the argument that the MLO was void by operation of its own terms, the "self-executing" clause– the inference being that privity was not the determining issue.

Despite there being cases in other jurisdictions dealing with "self-executing" leases, Mr. Blue's point was that this was a "substantial, novel issue" and that one could not find an Ontario case or a Supreme Court of Canada case dealing with the MLO's of Ontario.

Mr. Blue also canvassed earlier cases in which previous Commissioners had dealt with the impact on costs of "novel issues" dealt with by the Tribunal. *Clark v. Nahanni Mines Ltd. Et al.*, (1983), 6 M.C.C. 430, which is not a case dealing with costs or novel issues, was referenced to support the argument that the Wallbridge Subsidiary's actions prompted Inco to "take steps to enter into a lease which will have obligations that will better see the mining claims developed." In other words, Inco's legal costs were money well spent.

In the second case, *Sutherland v. Rose*, (1974), 5 M.C.C 144, the request for costs was denied after the hearing. According to the then Commissioner, the appellant's frustrations with "attempting to define the land open for staking" were understandable. Whereas, Mr. Blue in reference to this case said "… the numbered company [meaning the Wallbridge Subsidiary] was not unwarranted in pursuing the appeal."

Mr. Blue also referred to *Schiralli v. Esso Minerals Canada* (1983), 6 M.C.C. 435. The issue there related to claims where an "overstaker" questioned assessment work requirements, which was a new issue. The then Commissioner, describing it as a "case of first instance", decided that no costs would be awarded.

The case of *Weirmeir et al. v. The Director of the Lands Administration Branch of the Ministry of Natural Resources et al.* (1979), 5 M.C.C. 469 was also put before the Tribunal in support of the Wallbridge Subsidiary's position on costs. Reference was made to the then Commissioner's saying with respect to no award for costs that this was the "first occasion on which the clause in question has been considered"

Mr. Blue, in concluding argument on his first point, reminded the Tribunal that the Wallbridge Subsidiary had decided in July 2001, not to go ahead with the appeal "at this time" because "while they had a good case, they did not have a slam dunk case ….". He added

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that while the matter was not closed (pending evaluation of the FOI documents), the Wallbridge Subsidiary had acted "responsibly, as we said we would…." – hence a reason not to award costs to Inco. What this argument fails to address is the lack of preparation on the part of the appellant prior to filing its appeal, or prior to carrying out the staking. The fact is that after having searched for a basis for appeal after the staking, and not finding one, Mr. Blue then tried to say that the means justified the end.

Review of Dockets

Mr. Blue contended that the Tribunal should examine the all of the dockets filed very closely. He was very concerned that a Bill of Costs as large as had been submitted could not have been drawn up without there having been some duplication of effort and churning of the file. He was also concerned that the time reflected by the dockets in support of the costs application only be attributable to the appeal before the Tribunal. Not to be included were dockets relating to the Superior Court of Justice action, the **FOIPPA** application and appeal, or the proposed Stand Still Agreement.

Exhibit 40 represents, in his submission, a good summary of the Wallbridge Subsidiary's position on duplication and alleged file churning. It depicts numerous hours spent by the 17 individuals involved, with headings of "Dyer Research", "Research Duplication", "Dyer Supervised by Ledger", "Hours Spent by Jamal", "Preparation for "Summary Judgment Motion to Quash/Dismiss Appeal, Selected References" and "Bill of Costs and Costs References".

The Tribunal finds that it was satisfied with the description provided by Ms. Dyer in answer to its questions concerning duplication. The approach described involved the legitimate delegation of duties as opposed to duplication of effort, where associates were only given discrete portions of issues to deal with or cases to research, with only those of relevancy or significance being passed along the chain of command. The Tribunal is satisfied that there was no "back and forth" activity involving re-hashing or coming up to speed by the various counsel involved. While the number of meetings between various lawyers working on different issues would undoubtedly have had an impact on costs, this activity is found to relate directly to the conduct of counsel on behalf of the Subsidiary in making numerous requests and raising issues at the last minute. The Tribunal has considered and finds that it is satisfied with Ms. Dyer's explanation that one of the challenges faced by the team was having adequate time to prepare due to the number of issues and the tempo at which they arose. In this regard, it is persuaded that the involvement of three senior counsel at the initial stages would have been necessary to evaluate what was taking place and devise a strategy on Inco's behalf.

The Tribunal has gone over the dockets filed in considerable detail, not of the type of examination required by an assessment, but with a view to a serious review of the nature of the work carried out. Mr. Blue purported to give evidence of work done by him, Mr. Hamilton and a research associate for comparison's sake. The Tribunal, too, has compared that with the time it spent at the inception of the appeal and throughout, carrying out its own research concerning issues and legislation, not to mention its own meetings and telephone discussions.

One cannot but help come to the conclusion that it is far less time consuming to think up novel, intriguing, outlandish or even remote legal questions than it is to research them and answer them. It is a fact of litigation that counsel must be prepared to adequately address all issues raised in a proceeding. The fact that issues were being raised at a fast and furious pace has, in the Tribunal's opinion, required that Inco address all concerns within a quick time frame and act before the next round of issues could be raised. One wonders, at times, whether any counsel or group of counsel would have been able to keep up with the unfolding drama. Counsel for Inco faced this challenge.

Concerning the matter of overlap between this and other proceedings, this allegation comes very close to suggesting impropriety on the part of Inco counsel. The Tribunal is familiar with the work of Ms. Dyer and has found her to be principled and thorough in representing her clients' interests. The Tribunal is satisfied that Ms. Dyer would not have padded the dockets to maximize a cost award for her client and could find no evidence of any such padding or duplication and finds accordingly.

To the extent that there may be a modicum of error in attributing work to this appeal as opposed to the other ongoing matters, the Tribunal finds that it must give the benefit of the doubt to Inco and to its counsel. These matters were, at times, no more discernable than a large tangle of fishing lines and to the extent that those lines may have overlapped, such as in the case of reference to the Good affidavit at the June 27 proceeding, the Wallbridge Subsidiary should be prepared to pay the cost for that which it created.

This Tribunal is also reminded that it was the Wallbridge Subsidiary, and not Inco, who proffered the Superior Court affidavits in this proceeding, so that the duplication, if any, would have been of the Wallbridge Subsidiary's own making.

Wallbridge and its Subsidiary

The names of Wallbridge and its Subsidiary were used interchangeably when, in one action, it was necessary to refer to the goings on in the other. For example, the Superior Court action was commenced in the name of Wallbridge. Yet, in that action, Mr. Hall at paragraph (j) of his first affidavit swore that Wallbridge had staked the mineral rights under MLO 10,872. Whereas, the staking was done by an individual; while the Application to Record was in the name of the Subsidiary, not Wallbridge.

The **FOIPPA** application was one of the settlement points of Superior Court action. As set out in the February 16, 2001 letter, it was brought in the name of Wallbridge by its counsel, Mr. Blue.

The appeal to the Tribunal is in the name of the Wallbridge Subsidiary. However, the Notice of Appeal indicated that the Subsidiary had made the **FOIPPA** application "settling court proceedings"; which clearly contradicts which parties were actually involved. This seemingly simplistic overlap when referring to Wallbridge and its Subsidiary is one example of the complex and convoluted pattern underlying what was taking place. To mirror the glib attitude of Mr. Blue, (as shown in he transcripts and correspondence) and belying the serious

implications of what was taking place, trying to sort out and distinguish between the various strands of litigation which made up the chaotic saga of which this appeal was but one, was almost like saying "Who's on first?"

However innocuous the interchangeable use of the entities' names was at varying times in the various actions, when the Wallbridge Subsidiary "discontinued" its appeal, there was nothing innocuous about the defense which was mounted. When the dismissal without prejudice was considered and Inco sought the right to pursue its application for costs against non-parties, the interchangeability of Wallbridge and its Subsidiary became an extraordinarily contentious issue. When this motion was brought by Inco, Mr. Blue suggested that there had been no objections throughout the proceeding that Wallbridge was not named as a party. It was necessary to receive submissions on this issue, including issues of constitutionality. It was adjudicated on October 2, 2001, resulting in the interlocutory decision of November 30, 2001, that Inco would be allowed to present its case for costs against Wallbridge, Hall and Whymark in addition to the Wallbridge Subsidiary. This interlocutory decision was appealed to the Superior Court of Justice which dismissed the appeal pending the final order on costs.

In a completely surprising move, on October 24, 2002, Mr. Blue wrote to Ms. Dyer indicating that he had been instructed to advise that Wallbridge would guarantee any order for costs which might be made against the Wallbridge Subsidiary. As previously noted, he stated in the letter, "Valerie, had you had phoned me, we could have avoided all these costs to Inco."

Given the extent and diligent manner in which Inco was challenged on this issue, i.e. to the point of appealing its interlocutory decision to the courts, the Tribunal finds this statement on the part of Mr. Blue to be disingenuous. However, such abrupt and at times unwarranted changes in direction by Mr. Blue were not uncommon and are a part of the pattern uncovered by the Tribunal in its review of everything associated with the appeal.

Procedures

Mr. Blue's change in direction is similarly illustrated at page 127 of the transcript of June 27, 2001. The Wallbridge Subsidiary had written to the Tribunal on June 1, 2001, recognizing that the Tribunal had found in Wallbridge #1 that it did not have jurisdiction to require or request the Minister to take action, a decision which it was bound by, until such time as it might be reversed. Mr. Blue, in the intervening period between June 1 and 27 ascertained that the Tribunal had made an ex parte order in Wallbridge #1 where it had purported to restrict the actions of the Minister. In explaining his turn around from the letter of June 1, the following was stated:

> **Mr. Blue**: The nice thing about practicing before administrative tribunals who don't have rules of procedure is that there - - I'm afraid to change my mind if I would be in court. I'm changing my position and I have no written submissions. I have oral submissions and I'm entitled to make those.

The Tribunal does, in fact, have Guidelines for Hearings, a fact which was respected and adhered to by Ms. Dyer. Those Guidelines are comprised of 19 pages and 34 sections whose provisions involve broad statements.

For example, section 7 has four provisions dealing with Interrogatories and Discoveries. The level of detail in at least partial anticipation of thorny legal issues in no way approaches that found in the **Rules of Civil Procedure**. There is a reason for this and it is that the Guidelines are a reflection of the Tribunal's informal and efficiency-minded approach to its procedures under the **Act**. These Guidelines have operated very well, in concert with Part VI of the **Mining Act**, and provisions of the **SPPA**. That is to say, they work well when they are used by parties and counsel for purposes of guiding an application or appeal through the hearing process. However, even these Guidelines do not work well when the intent is to bog down the proceedings.

Given the general nature of these Guidelines and the evolution of administrative law jurisprudence, the Tribunal has, on occasion and where warranted, relied on the general principles found in certain provisions of the **Rules**. However, it was never intended that the **Rules** or anything approaching that level of detail be imported holus bolus into practice before the Tribunal.

In this appeal, the Tribunal has found that obscure, contentious, intriguingly novel and just plain outrageous applications of the **Rules**, the **Courts of Justice Act**, the common law and the **SPPA** have been raised with alarming regularity by Mr. Blue. All involved in the practice of law enjoy the intellectual challenge of arguments which push the edges of the envelope of existing jurisprudence, not to mention that this is the edge that clients seek in their counsel. Whether novel legal issues are found in one of the myriad of decisions in support of the main issue or in that main issue itself, their number is only a small proportion of the whole. When such issues are introduced with alarming frequency and without sufficient thought or substantiation being given to them, the process is in danger of becoming compromised and abused. It also raises questions of whether the other parties are being treated fairly and put to unwarranted expense.

Adjournment Request, Summonses and New Issues

When the Wallbridge Subsidiary changed its strategy, upon realizing that the disclosure of records would not take place quickly, it requested that the proceedings in this appeal be adjourned to allow the **FOIPPA** appeal to run its course. Inco did not consent to the adjournment. Ms. Dyer pointed out that Mr. Blue had agreed to the dates and the Tribunal notes that this was correct. The request for adjournment was one of several strategies employed to ensure that the "evidence" was before the Tribunal before Inco's motion could be heard.

The Tribunal did not respond to Mr. Blue's repeated written requests for adjournments as, where such a request is not on consent, the matter must be heard. It is uncertain whether this fact was communicated to Mr. Blue but as experienced counsel that would have been self-evident.

On June 14, 2001, Mr. Hamilton, on behalf of the Wallbridge Subsidiary requested three subpoenas to be issued by the Tribunal, for Mr. Brian Randa of Inco, Mr. Gashinski and Ms. Rushton of MNDM, along with documents in their possession relating to rental payments pertaining to MLO 10,872. The summonses were issued on June 18, in keeping with the practice of this and many tribunals that any issues related to whether the issuance of

summonses is warranted will be heard upon the request and notification of the parties. The effect of the summonses was to ensure that the "evidence" would be available at the hearing on the 27th of June, notwithstanding that the **FOIPPA** process had not run its course.

Mr. Blue also wrote to the Tribunal on June 14, advising that he would seek that Inco's motion (to dismiss on jurisdictional grounds) not be heard on June 27 or alternatively that it be merged with the hearing of the appeal. In the ensuing paragraphs, Mr. Blue raised issues concerning the hearing of Inco's motion without evidence, the potential for the Tribunal to make a finding on the motion that the Wallbridge Subsidiary has no interest in the lands, if it were to deny Mr. Blue the right to adduce evidence, and denying an adjournment until the **FOIPPA** appeal is heard would be procedurally unfair. In each of these instances, Mr. Blue states that, should the Tribunal make findings contrary to his position, his client "…is confident that the Divisional Court would not support that decision." These statements are made without any substantiation or case law quoted in support. There is no development of argument, as would be found in a factum. Instead, what one has is yet another proliferation of issues, not to mention the issues of whether the issuance of summonses should be allowed to stand. These are issues which Inco (and MNDM) must take up, analyze and respond to. The repeated mention of Divisional Court was insulting to the Tribunal, when there was nothing provided in support of the assertions, which left it with the feeling that it was being admonished, corrected or perhaps even threatened.

On this topic of proliferation of issues, this penchant for thinking up issues is further demonstrated on the third page of Mr. Blue's June 14 letter:

> I anticipate that Inco will object to some or all of the documents that such witnesses will be required to bring, on the grounds that admitting them into evidence would prejudice its appeal to the Information and Privacy Commissioner. Does it? If so, is that grounds for the Tribunal not to require the documents not to be admitted into evidence? Are those not rather nice legal questions? If those questions are raised, the cross-motion [Inco's motion] cannot proceed until they are decided.

In turn, Inco's counsel would have had to rescind these issues and prepare rebuttal.

Use of Rules to Confound Matters and Examinations for Discovery

When the Tribunal determined orally that it would order examinations for discovery at the June 27 proceedings, Mr. Blue had indicated that this was a waste of time in administrative tribunal proceedings, where the filing of witness statements would instead suffice. Mr. Blue submitted that this was just a way for lawyers to "churn the file". The matter was adjourned and it was thought that the Tribunal would retire to write the resulting procedural order.

Correspondence from the parties commenced immediately the next day, commencing with Ms. Dyer, who asked for an Order for Discovery of Mr. Good, Mr. Hall and one of Mr. Gashinski or Mr. Spooner, the Provincial Mining Recorder. Included were time

frames for submissions. Ms. Dyer sought an order for production of documents in accordance with the Tribunal's Procedural Guidelines and requested that the deemed undertaking rule found in Rule 31.01 of the **Rules** be modified to apply. Connected with this was a request for confidentiality of the payment records, which coincided with the **FOIPPA** request.

The examinations for discovery of Mr. Good, and an MNDM official were immediately brought into issue by Mr. Blue, as Mr. Good was not an employee of the Subsidiary whose answers would be binding and because Inco was not adverse in interest to MNDM. His correspondence did offer Mr. Hall as an agent for the Subsidiary and an officer of Wallbridge, but he failed to indicate that the answers would bind the company. He submitted that the discoveries should be conducted in accordance with Rules 30, 31, 34 and 51 of the **Rules**. The timing of the examinations for discovery in relation to the disclosure of documents was also an issue. Mr. Blue did not agree to the confidentiality request. He also felt that a termination date was not warranted.

Mr. Marshall, on behalf of MNDM agreed with Inco, particularly in relation to the timetables, stated that he had no objection to Mr. Gashinski's being examined by Inco and pointed out, quite correctly, that the **Rules of Civil Procedure** do not automatically apply. With respect to Mr. Good, he pointed out that the Tribunal is empowered to order the examination of a non-party in an appropriate case, but that answers are generally only admissible against the party whose representative is examined.

The issues raised, as discussed above, were sufficiently contentious that the Tribunal reconvened on July 10, 2001, to determine the issues raised by counsel. The Tribunal indicated that, with pre-emption of its normal proceedings in this matter, all future prospective procedural problems would require a Notice of Motion, Factum and Affidavit. The Tribunal noted at pages 24 and 25 of the July 10 transcript:

> Mr. Blue, we left here on the 27th assuming that we had some agreement as to what a procedural order would contain. It was not even halfway drafted before the correspondence started. There were a number of issues, including the manner in which discoveries would take place, the issue of whether certain witnesses could be discovered. Quite frankly, everything that seems to have been decided on the 27th was put back on the table via the correspondence of the parties that questioned again any decision made on that day that ran contrary to their party's case. …

On July 12, 2001, the Tribunal issued an Order to File, and for disclosure and discoveries. Mr. Good was declared to be its own witness and subject to examination for discovery by the parties. Included in the disclosure were rental payment records related to MLO 10,872. On August 2, 2001, in response to the fact that there was in effect a request to pre-empt a hearing on the merits through the filing of the Notice of Discontinuance, the Tribunal rescinded portions of that Order, including those sections which required the Subsidiary to disclose documents and provide a statement of its position.

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The proposal for using discrete provisions of the **Rules** in relation to examinations for discovery had the potential to be of assistance in the Tribunal's consideration of this matter. Mr. Marshall proposed to take matters ever further away from the ambit of the **Rules** in proposing that contentious matters could be brought forward with a brief document, either in person or by Teleconference, potentially even involving the Commissioner sitting alone. Where matters were unable to be resolved or were seriously contentious, the motion/hearing route could be resorted to. Mr. Blue was very concerned about using such a "cherry-picking" approach to the **Rules** when they had been enacted and intended as a complete code.

The conduct of examinations for discovery is not a new issue of contention for the civil litigation bar. The Task for on the Discovery Process in Ontario was struck as a result of issues raised in the Civil Justice Review of 1995. Established in 2001, chaired by Ontario Superior Court Justice Colin Campbell, the Review noted that the discovery process was too time consuming and difficult. The Task Force made recommendations covering 14 different aspects of the discovery process, which are to be submitted to the Ontario Civil Rules Committee. Information concerning the Task Force's work is found at www.ontariocourts. on.ca/discoveryreview/intdex.htm as well as in the December 15, 2003 issue of the **Law Times** at page 4. Several of the concerns experienced with discoveries are days long examinations, dealing with issues having a semblance of relevance as opposed to the proposed test of relevance, and productions of all documentation rather than relevant documentation which has led to extended examinations.

Had the proposal to import the **Rules** dealing with discoveries been suggested with a view to assist this process along, the Tribunal would not have been concerned. Given what had taken place throughout the conduct of this appeal, the Tribunal was dubious about the merit of Mr. Blue's suggestion taking into account the contentious nature of the discovery process for the profession as a whole.

Filings of Confidential Documents

The filings which took place included the five volumes of documents included in Exhibit 14(c), involving a number of documents for which Inco sought confidentiality, which were filed the day after the Tribunal issued its Order directing that Mr. Blue not make photocopies of the payment documents pending a determination on this issue. How Mr. Blue could file such documents for which Inco sought confidentiality and in clear contravention of its Order is very troubling to this Tribunal. Exhibit 14 was the Wallbridge Subsidiary's submission with regard to costs. When the five volumes of documents were received, Ms. Dyer wrote to the Tribunal on September 25, 2001, alleging that numerous documents were improperly and needlessly included. Ms. Dyer sought to have these documents removed, or in the alternative sealed, so that they not form part of the public record. This matter was not addressed at the various reconvened procedures which took place after that date, until the issue was withdrawn by Ms. Dyer on October 17, 2002. The **FOIPPA** appeal permitted the release of the requested payment records, so that Inco withdrew its request for their return.

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Prior to resolution of the issue, the inclusion of the allegedly confidential documentation by the Wallbridge Subsidiary was incendiary. Given that confidentiality was an as yet undetermined issue, in any event, it could only be expected that Inco would object to the inclusion of documentation involving its confidential settlement discussions. This is another instance when Inco was forced to incur costs directly associated with the manner in which this appeal was pursued and how the costs application was addressed on behalf of the Wallbridge Subsidiary by its counsel.

Given the knowledge that this was an issue, and the Tribunal's Order seeking to ensure confidentiality, had Mr. Blue sought to act in a respectful manner to the Tribunal, he could have sought its direction in this matter. That he did not illustrates carelessness towards an orderly process, bordering on contempt of this Tribunal.

Cross-Examination of Counsel on Bill of Costs – and **SPPA**

The right to cross-examine lawyers on their accounts was raised in *Tylman v. Tylman*, a case from the 1980's, where the court overturned a Master's decision not to hear evidence on a party and party taxation, but relied upon *Re: Solicitor*, a case involving a solicitor and his own client under the **Solicitors Act**. The court stated that the taxing officer is obliged to receive viva voce evidence. In *Coutts v. CIBC*, the court noted that while a taxation officer has power to hear evidence, it should only be done in an exceptional case. The annotation found at 42 C.P.C. 73 states that these two cases cannot be reconciled.

Both are dealt with in *Szewczyk v. Ralph*, 16 C.P.C. (2d) 227 [1987]. The Court noted that the usual procedure is not to hear viva voce evidence unless requested. It mentions that the *Re Solicitor* case involves the situation where tariff of fees is not applicable. In such a case, the judicial decision of the taxing officer should be based upon evidence. Therefore, it would appear that cases under the **Solicitors Act** are distinguished from applications for costs made under the **Rules**.

Staff Builders International Inc. v. Cohen 3 C.P.C. (2d) 158 [1985] also distinguished the Coutts and Tylman cases. In *Andrews v. Andrews*, 38 C.P.C. 175, an appeal from a party and party taxation by a taxing officer, the Court considered the scope of Rule 679, under the old Rules, which permitted an affidavit regarding disbursements, when what was received was a lengthy description of the litigation and steps taken. The Court stated at page 177:

> There is no reference in the Rules to the reception of sworn testimony. Rule 228 states that evidence upon a motion may be given by affidavit, but I doubt if a taxation is a motion.
>
> A substantial departure from a practice that has worked well over the years requires justification. There may be circumstances when it would be appropriate, and not unfair, to permit an affidavit to be filed that goes beyond disbursements. I do not go so far as to rule out the possibility. Strong justification would, however, be required for the reception of sworn evidence on matters that are

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> settled normally by informal discussion, for the result would be to turn a traditionally informal proceeding into a trial. That could require rulings on evidence and procedure. All of that would work against the expeditious disposition of party-and-party taxations.

The Tribunal notes that this issue seems to have flared up in the early 1980's and has remained unresolved. However, the fact is that evidence is an issue under the **Solicitors Act** and before an assessment officer. This costs application involves neither and so the cases must be of limited application. Ms. Dyer pointed out that the Rules do not provide for cross-examination of lawyers, although mention is made of cross-examination in the **Synopsis** for **Rule 57**, found in the **Ontario Annual Practice 2003-2004.**

On reading the documents relating to the settlement of this issue, described in detail elsewhere, it is evident that the spectre of cross-examination of all Inco's counsel was raised as a strategy whose result would see the Substantial Indemnity Bill of Costs taken off the table. That has certainly been the effect. The issue of cross-examination of counsel on their dockets was argued on November 8, 2002, along with the Subsidiary's motion to strike the Bill of Costs. The former was settled prior to the reconvened hearing on November 19, where Inco agreed not to pursue Substantial Indemnity for a major portion of the Bill of Costs up to a fixed date. Importantly, that agreement is not binding on this Tribunal, but only one of a number of relevant matters which has been considered in determining the scale of costs payable.

In this submission, a subject which came up with great regularity was the disconnect alleged by Mr. Blue between Inco having asserted that this was an extraordinary case and, in relation to this issue, that the Wallbridge Subsidiary should not be allowed to cross-examine counsel on their dockets. He referred to the provisions of the **Statutory Powers Procedure Act** where section 10.1 states:

> A party to a proceeding may in an oral or electronic hearing….
> (b) conduct cross-examinations of witnesses at the hearing … reasonably required for a full and fair disclosure of all matters relevant to the issues in the proceeding.

Mr. Blue submitted that assessment officers have the discretion to require evidence on costs. However, given that the **SPPA** applies, the legislature always intended that there can be cross-examination if there are facts in dispute.

In response to the Tribunal's question regarding the existence of sections 126 and 127 of the **Mining Act** prior to the enactment of the **SPPA**, Mr. Blue indicated that when the latter was enacted in 1971, it was clearly applicable to all Tribunals, regardless of pre-existing practices and all Tribunals were required to make their procedures comply. Also the Tribunal's cost powers were amended in 2000 and no exception to the **SPPA** was made at that time.

According to Mr. Blue, the reason that this issue has never come up before was that in all previous decisions, the Tribunal's cost awards were unexceptional and reasonable. However, in this case, Inco is seeking an extraordinary costs award. A considerable body of case law was referred to in the course of hearing this argument as to cross-examination. Inco was seeking the fixing of costs, rather than an assessment of costs.

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The fact is that an application for costs is a procedural matter. Suggesting that, because the **SPPA** applies imports the right to cross-examine counsel when such right would not exist under the **Rules** is yet another example of how novel issues were introduced for consideration. In this particular case, the issue was settled after it was argued. This propensity for settlement before an interim matter can be determined has been seen before in the Supreme Court of Justice matter. In both cases, the Wallbridge Subsidiary obtained a concession. The concession in this matter was agreement that the Osler's firm would not be required to present numerous lawyers for cross-examination.

Notwithstanding the settlement, the fact remains that this was an issue which had to be researched on behalf of Inco and was in fact argued before the Tribunal.

Motion to Strike Bill of Costs on Basis of Bias or Prejudice

The Subsidiary's motion to strike Inco's Bill of Costs was based on argument that it did not comply with the Tariff. In Exhibit 14(a), page 16, subparagraph (8), in the Submissions on Costs of the Wallbridge Subsidiary, it raises the issue of fees in excess of what is contemplated by the Tariff. In its motion for November 8, 2001, the grounds listed are: 1) that the Bill lists costs for four partners, three associates, five clerks and two students, where the jurisprudence expressly limits to one the number of counsel whose costs may be considered on assessment; 2) even where discretion is exercised, the jurisprudence limits the potential for addition of one junior; 3) the Bill is identical in form and content, excepting rates, for the previous Bill which seeks a complete indemnity, but does not conform to Tariff, and as such is irrelevant; 4) the Bill seeks to recover for on-line database searches, even though the Tariff does not recognize such expenditure; and 5) due to the irregularities listed, the amounts claimed are grossly inflated, and if not struck out will prejudice the Wallbridge Subsidiary as respondent to the motion for costs.

Mr. Blue clarified that his client was not raising issues of bias on the part of the Tribunal, but merely was using the throw away line that if the Bill is allowed to remain, it would prejudice a fair hearing of the costs issue. The Tribunal was and remains very concerned about the raising of these issues of bias and prejudice. These are not by any stretch of the imagination comments which may be just made in passing. At the time, Inco was required to respond. However, the Tribunal must, at all times, ensure that such serious allegations are dealt with in a satisfactory manner and expediently. What did occur was very casual on the part of Mr. Blue and belies the serious nature of these allegations, which caused all concerned in this proceeding to take serious notice and question what was behind the allegations.

According to Mr. Blue, the form of the Bill is not at issue, but to be in compliance with section 127 of the **Mining Act**, the costs must be in accordance with the Tariff of the **Courts of Justice Act**. Ms. Dyer had submitted that a defective Bill would not be struck as a nullity. Mr. Blue, however, submitted that an assessment officer would not accept it.

Mr. Blue referred to **Rule** 25.11, which states:

> The Court may strike out or expunge all or part of a pleading or *other document* [emphasis added] with or without leave to amend on the ground that the pleading or other document
>
> (a) may prejudice or delay the fair trial of the action;
> (b) is scandalous, frivolous or vexatious; or
> (c) is an abuse of the process of the Court

Everything found in clause 116(1)(c) of the **Mining Act** is also found in Rule 25.11, according to Mr. Blue.

This is another example of the proliferation of issues, where a serious allegation is plugged into the very broad words such as "or other document". The timing is also in question. As pointed out by Ms. Dyer, in the initial Submissions on Costs, as set out in Exhibit 14(a), there was no reference to bias or prejudice, which are very serious allegations. Then, as the hearing date for the costs motion approached, the Subsidiary's motion to strike was initiated on the basis of the wording "or other document" in relation to Rule 25.11, the test for which include prejudice, vexatious or an abuse of process, which at a close look does not even remotely resemble what Inco did.

The filing of a large Bill of Costs in itself will not bias the Tribunal and prejudice the appellant's ability to defend itself. As pointed out by Ms. Dyer, the fact that the property underlying this appeal has been estimated to be worth $3 billion puts the amount of the Bill somewhat into perspective. The Rule itself appears to contemplate documents in the nature of pleadings, rather than a Bill of Costs, so that asking that the words "or other documents" be interpreted to include a Bill appears to be novel and could be an undoubtedly controversial interpretation of that Rule. The cases and commentary set out in the **Ontario Annual Practice, 2003-2004** do not make one reference to the striking of a Bill of Costs. As with other issues, this motion was disruptive and costly.

Disingenuousness and Taking out of Context

In his letter of April 18, 2001, MNDM's Mr. Gashinski responded in writing to letters of Mr. Whymark of February 20, 26 and March 5. He pointed out that Mr. Whymark's March 5 letter stated that the right to appeal existed until March 16, noting that Mr. Whymark completely failed to acknowledge that the appeal had already been filed on March 1. This is an example of disingenuous communication on the part of the Subsidiary.

After the Tribunal issued its decision in Wallbridge #1 on May 30, Mr. Blue indicated that he would withdraw his preliminary issue on prohibiting the Minister from taking certain actions. As a result, he confirmed that he would be filing no affidavit material in support. Notwithstanding this fact, he sought to resurrect it at the hearing on June 27. The about face could have been regarded as whimsical, if not for the alarm raised by Ms. Dyer, Mr. Marshall, which was mirrored by the Tribunal.

During the course of the costs hearing on November 19 and 20, 2002, Mr. Blue raised the issue of the Wallbridge Subsidiary being entitled to costs, or that any costs found owing to Inco should be set off against costs which would have been properly owing to his client, but for the fact that no costs were claimed. This reference to potential costs for the Wallbridge Subsidiary occurred on more than one occasion to which Ms. Dyer vehemently objected, a position echoed by the Tribunal. Mr. Blue indicated that the comments were not to be taken as submissions that the Subsidiary should actually have costs assessed in its favour. Nonetheless, this conduct had the appearance of disregard or mockery of the requirement to file supporting documentation for any issues to be raised in the costs hearing.

Mr. Blue also made reference to the grounds for Inco's preliminary motions set out in Ms. Dyer's letter of June 5, 2001. He accused Ms. Dyer of misleading the Tribunal in point 11, his point being that the Subsidiary was alleged to be a stranger to the contract (MLO), which, he asserts, can only be true if the MLO is valid. In a further allegation, Mr. Blue wrongly pointed out that in point 13, Inco incorrectly referred to legislation which had no effect prior to 1953, when the period in question actually started in 1947.

The Tribunal noted at the time that putting a misleading argument to the Tribunal is a serious allegation. Ms. Dyer also felt compelled to submit that as an officer of the court, if Mr. Blue was going to refer to her arguments, he had a duty to properly and accurately state them. The Tribunal agrees with Ms. Dyer's submission.

Surprise

It is noted that Mr. Blue advised the Tribunal that he only heard the argument concerning the team approach for the first time only at the hearing. This is another instance in which Mr. Blue acted as though he expected a different set of rules or different standard to apply to his client than that applied to Inco. The Tribunal recalls that it was Mr. Blue's propensity for surprise in the proceedings which was one of the difficulties faced by Inco.

Rehashing of Issues

The strategy employed by Mr. Blue whereby he attempted in his response to Inco to swing back to the three topics dealt with in the earlier submissions as to whether or not costs should be awarded was troubling to the Tribunal. It regarded this tactic as bordering on an unfair strategy which Inco would feel compelled to address. Undoubtedly, this is at least one of the reasons that the hearing of this matter has involved a great deal of moving back and forth over points which have already been covered. Mr. Blue was advised that the points had been made and doing so again did not serve his client well. Moreover, the Tribunal regards this, again, as illustrative of the lack of respect to its processes.

Accuracy of Advice

In connection with the Bill of Costs, Mr. Blue submitted that his client was entitled to ask that the Tribunal make determinations based on the accuracy of advice provided, validity of disbursements, verification of payments made and determination of whether meetings or letters were necessary or too long given this was based on the case of *Mintz v. Mintz*, a

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matrimonial case from the early 1980's. There is no indication that this case has been relied upon, nor that this right has been established as a matter of course in an application for costs.

Conduct to Lengthen Proceedings

The argument was raised that the exercise by Inco of its third party rights to oppose and appeal release of documentation was conduct which served to lengthen the proceedings. The assertion was that the documents should have been available well before the June 27, 2001 hearing date, but for the actions of Inco.

To the extent that conduct served to lengthen the proceedings, the Tribunal does not find that it was the conduct of Inco or its counsel, nor was it in connection with the **FOIPPA** proceedings. The Wallbridge Subsidiary is seeking to blame Inco for the fact that the Subsidiary acted before it had obtained the evidence it required. The **FOIPPA** matter is a red herring, which at this juncture unsuccessfully attempts to deflect the Tribunal's attention from this fact. It had several options instead of bringing the appeal without adequate evidence. It could have proceeded with its Superior Court action for third-party pre-trial discovery or it could have carried through to completion of the **FOIPPA** process. Instead, it commenced this proceeding without having the required evidence and this fact weighs heavily in favour of Inco in its costs application.

Patterns

As demonstrated in the foregoing illustrations, the Tribunal has unearthed a number of observable patterns in the manner in which this matter was conducted on behalf of the Wallbridge Subsidiary. The Tribunal has had to engage in what felt like a forensic audit in this case.

Facts may not have been misstated, but specific details are omitted or captured in broad brushed statements which do not adequately capture what has transpired. How was Inco to react to such conduct? There is a need for clarification, be it in correspondence or by affidavit. Inco cannot be faulted in its conduct of the appeal proceeding, so overwhelming was the need to "set the record straight". The Tribunal finds that this must be a factor in the degree of activity witnessed on the part of counsel for Inco.

In this regard, the Tribunal is able to speak from its own experience in this matter. The Tribunal cannot recall another situation, perhaps excepting Wallbridge #1, when it issued as many procedural orders involving the level of detail and minutiae as it has done in this proceeding. Even so, neither has it ever had its drafting of procedural orders interrupted so frequently by correspondence serving to raise new issues seemingly having resulted from the immediately preceding procedural rulings.

The Tribunal was stymied on many occasions by what counsel on behalf of the Wallbridge Subsidiary was attempting to achieve. From the Tribunal's perspective, the pattern had the effect of almost a guarantee that, despite its efforts to maintain direction and progress in the proceedings, something always occurred to derail those efforts.

Nothing in this appeal ever went smoothly, despite the Tribunal's best efforts and it comes to wonder why this should have occurred. The pattern itself suggests that there was no intention for matters to go smoothly or go forward in an orderly manner. Furthermore, the Tribunal is not convinced that the pattern and tactics behind the pattern can be said to have served the best interests of the Wallbridge Subsidiary. To the contrary, these actions served to cost the Wallbridge Subsidiary and Inco additional costs in the form of counsel fees.

The observed patterns included the use of obscure, marginal, emerging legal arguments, which may have been for the purpose of wrestling ongoing concessions from Inco, when any refusal on its part to capitulate had the potential of increasing costs exponentially. The best example of this is the withdrawal of the Substantial Indemnity Bill of Costs in return for not seeking to cross-examine counsel.

Also an observed pattern was the proliferation of issues where it is much less time consuming to pose the legal questions than it is to address them. The extent of the dockets filed demonstrates the seriousness Inco attached to its role in addressing these various issues, including those which did not see full argument, such as the constitutional arguments and those of bias and prejudice.

*Historical **Mining Act** Research*

This issue demonstrates the polarity of approaches taken by counsel, when the Tribunal considers whether the 100 plus hours claimed for historical **Mining Act** research by Ms. Dyer and her team of lawyers was reasonable. This was contrasted with the half hour spent at the library by Mr. Blue to update the legislation, dating back to 1947. While the time spent by Mr. Blue was not an issue, there were several times when he did contrast details of his own approach with what was presented on behalf of Inco. Mr. Blue also suggested that Ms. Dyer, a partner held out by her firm as an expert in mining law, should not have required the amount of time claimed and should have been a knowledgeable resource to others in her firm.

The current **Mining Act** is quite lengthy, with over 200 sections, a considerable number of which have multiple subsections, some of which are long and perhaps seem somewhat convoluted. The drafting of many provisions dates back to 1906, or earlier and at times reflects old fashioned language (See Schedule A, hereto). Examination of the **Mining Act** is best approached with a healthy respect for its evolution, historical context and language. It is difficult to make accurate sweeping or blanket statements concerning its operation whether considering the current context or from the historical perspective. The ramifications of not approaching with caution are to come to incorrect conclusions or miss provisions altogether. This is without question appreciated by those practitioners who hold themselves out to be experts in mining law.

When one attempts to consider those legislative provisions relevant to mining licences of occupation, one would be hard pressed to actually write the list of the legislation involved, let alone locate, copy and analyze them in the thirty minutes Mr. Blue claims it took him to do his research on mining licences of occupation (see: Schedule A).

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Based upon the Tribunal's own experience with researching these numerous historical provisions, the 100 hours claimed by Inco appears reasonable in the circumstances. It is perhaps telling that in the Notice of Appeal, Mr. Blue referred to and relied upon provisions which came into force on March 27, 1958 and this proved to be in error. It was later established by Ms. Dyer and the Tribunal itself, that there was a predecessor to the current legislative rules governing mining licences of occupation which came into existence with section 4 of **The Mining Amendment Act, 1953**, which provided that "sections 3, 4 and 5 of section 47 apply *mutatis mutandis* to … licences and leases". That inaccuracy by the Subsidiary on a basic point to the appeal is really a complete answer to Mr. Blue's allegation.

General Analysis

Having regard to those matters referenced in sections 126 and 127 of the **Mining Act,** the Tribunal has considered and finds that several of those factors will be applied in the exercise of its discretion to award costs, and to fix them on the Substantial Indemnity scale.

Without needing to go into extreme detail, the Tribunal finds that the amount at issue in this proceeding was a factor. Mr. Hall asserted that this particular MLO covered lands with deposits valued at $3 billion, something which was not refuted by anyone appearing before the Tribunal. Whatever the value, and there was no actual evidence on this, it is very clear to the Tribunal that it was extremely large. The Tribunal did receive information concerning the research and exploration dollars invested by Inco, which were considerable from either the perspective of their bald amounts or converted into current dollars. Moreover, this would have been a test case for all of the lands held by Inco in the form of mining licences of occupation.

The Tribunal finds that this proceeding was extremely complex and labyrinthine. Stripping away all but the essential issues to the appeal, it still would have been a complex and involved determination for counsel and the Tribunal, but the manner in which issues were thought up and brought forward served to increase this complexity by geometric proportions.

The underlying issue of the status of mining licences of occupation prior to 1953 was of extreme importance to the mining industry and MNDM. The issues which were raised in pursuing this matter were of varying degrees of importance. Some were very important, such as the straw man issue Inco sought to establish in seeking to go against non-parties. As it turned out, despite having done considerable research on the part of Inco, the Tribunal did not have to make a determination. However, the fact remained that Inco would have had to approach this and every other issue raised as if its case hinged on it and therefore, each issue had an importance relating back to the value of the lands.

Without putting too fine a point on it, the conduct of Mr. Blue and the Subsidiary served to lengthen the duration of these proceedings to an extreme degree, as outlined in the forgoing analysis. To summarize, there was a proliferation of issues of extreme complexity and dubious merit, uncertainty as to whether settled issues would be raised again, and an overall disrespect for the process before the Tribunal.

With respect to the consideration of the reasonableness of what has taken place, in its decision in *Cooper v. Lake Simcoe Region Conservation Authority* (October 1, 2023), CA 001-00 (unreported), at page 21, in relation to costs, the Tribunal considered a test for reasonableness, where it set out:

> The test for reasonableness applied by the OMB set out in **Township of Scugog Zoning Bylaw 23-89 (No. 2)**, (1991), 24 O.M.B.R. 240 at 241, as found in its guidelines, was presented for the tribunal's consideration:
>
> > The test is: would a reasonable person, having looked at all of the circumstances of the case, the conduct or course of conduct of a party proven at the hearing, and the extent of his or her familiarity with the Board's procedure, exclaim, "that's not right; that's not fair; that person ought to be obligated to another in some way for that kind of conduct".
>
> Although the tribunal has no such test in its own Procedural Guidelines, it finds that this test is an acceptable standard and will be adopted.

The Tribunal finds that the Subsidiary's conduct to have been manipulative and abusive, and something quite clearly meeting the test of what a reasonable person would find unfair. In this regard, the pattern of conduct does meet the test of being improper, vexatious and unnecessary.

This, in turn, raises a number of questions which the Tribunal feels must be addressed:

1. Can serving the client result in abuse of the system?

2. When does serving the client become abuse of process?

3. With respect to the procedural tactics resorted to:

    a) what are they intended to achieve?
    b) are they legitimate?
    c) what is their end result?
    d) is it one of confusion for the Tribunal?
    e) what pressures have been created for the Tribunal?
    f) what is the effect on the operations of the Tribunal?

The Tribunal finds that the manner in which a client is served can result in abuse of the system. Rather than attempt to narrow and focus the inquiry, which would have been helpful to the real issue underlying this appeal, namely whether the MLO was void, the Tribunal, MNDM and Inco were reacting more like puppets whose strings were being constantly yanked. At every turn, and with every procedural order and item of correspondence, the information, direction, proposals and decisions were used as fodder for further obfuscation and creating the mire in which all concerned found themselves.

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The point at which serving the client becomes an abuse of process is when the tactics used are more than just those of a self-proclaimed underdog in a proceeding where the bulk of the known law purportedly favours the "Goliath". Similarly, the tactics become abusive when the rate of introduction and type of issues raised serves no useful purpose and results in confusion and distraction. In stating its concern about the number and type of issues raised, the Tribunal in no way discourages parties and their counsel from the introduction of novel and creative issues which serve to shed light on the main issue at hand. By contrast, many of the issues in this appeal were gratuitous, self-serving and of no assistance to the Tribunal in resolving matters.

There is no way to state with certainty what the Wallbridge Subsidiary and its counsel, Mr. Blue, were attempting to achieve through the various machinations which took place. However, their effect was to create so much confusion and animosity during the course of this appeal that Inco and MNDM (and quite candidly the Tribunal) were at risk on many occasions to potentially be reacting rather than thinking strategically in their client's or the public's best interest. The Tribunal is of the opinion that only because of the experience and integrity of the other counsel involved, this did not actually prove to be the case. Further, the effect of the conduct of proceedings by Mr. Blue and the Subsidiary has the appearance of setting up Inco in relation to this costs motion. An example of this is the introduction of issues at a fast and furious rate, but maintaining that the resulting number of counsel engaged to cope and deal with them demonstrated duplication and file churning. The Wallbridge Subsidiary and Mr. Blue had to have known that Ms. Dyer and her team were obliged to answer all of the issues, or ignore them at their peril. The extent to which a party decides to defend itself is for the party to decide. However, there is a very strong relationship between the type of defence used in response to a strategy which raises a myriad of issues, without abatement and without substantiation.

The Subsidiary's procedural tactics are set out in the preceding **Findings**. The Tribunal has found that they must have had the effect of increasing the legal expenses incurred by Inco. The Tribunal has discussed in adequate detail its concerns about the volume of marginal and remote argument which had the effect of causing the issues to mushroom. The Tribunal interprets the Subsidiary's tactics as an ongoing campaign to undermine its authority in connection with the finality of its interim decisions. The procedural orders issued in this matter as a result of Mr. Blue's interventions cannot compare in their length, level of detail and minutiae to any other issued in recent memory.

The Tribunal finds that, rather than permitting this proceeding to move forward, the Wallbridge Subsidiary did everything in its power to inhibit all efforts to resolve issues and move on. As discussed, it introduced new and some questionable issues at a fast and furious rate. It pursued such items as seeking costs against non-parties or cross-examination of counsel to the furthest extent possible, before exhibiting disingenuous withdrawal or capitulation, but in the interim having allowed Inco to incur the maximum possible costs in the circumstances.

Quantification of Costs

The Tribunal has determined that it would be appropriate to and does fix costs in this case by ordering a lump sum.

On the basis of and for all the reasons described in the foregoing Findings section of these Reasons, and considering the real merits and substantial justice of this costs issue, the Tribunal finds that it will award costs on a Substantial Indemnity scale.

Further, upon conducting its analysis of the conduct of the whole of this proceeding, the Tribunal is of the opinion that an award of costs on a Partial Indemnity scale does not reflect the magnitude of its displeasure concerning what amounted to a procedural imbroglio, the fault of which must be placed at the feet of the Wallbridge Subsidiary and its counsel, Mr. Blue. Given this conduct, the Tribunal can think of no other way to make its displeasure sufficiently known than to award costs on the basis of the Substantial Indemnity scale. To do otherwise, namely to consider the Partial Indemnity scale, would totally fail to capture the magnitude of abuse of process and unreasonableness with which this matter was pursued.

Also, it must be noted that while Ms. Dyer's and Mr. Blue's clients agreed that Inco would not pursue costs on the basis of the Substantial Indemnity scale, this Tribunal was not a party to that agreement and at no time indicated its being bound thereby.

Rates

The Tribunal notes that the rates claimed by Inco in its revised Bill of Costs on a Partial Indemnity Basis do not reflect the maximums set out in the Tariff, where all amounts are preceded by the words "Up to". Although the amounts claimed demonstrate a hierarchy of fees, based upon the year of call of the partners, the Tribunal finds that it will allow the maximum permitted. The reason for this is that it wishes to reiterate its displeasure towards the Wallbridge Subsidiary for the manner in which this appeal was brought forward prior to its having obtained the evidence it required and for its conduct throughout, having taken steps to lengthen the proceedings without justifiable reasons.

Hours

The Tribunal has examined the dockets of the individuals listed in Items A and B. Despite the various objections raised by Mr. Blue, the Tribunal finds that Inco and its counsel were reasonable in requiring the services of those listed and to the extent listed. Given the proliferation of issues over time, and given the blurring of the lines between issues raised in this matter and other matters, to the extent that there may have been required on the part of Ms. Dyer the use of her judgment in attributing costs to this and not other matters, the Tribunal finds that it must give the benefit of the doubt to Ms. Dyer. In other words, where there is extreme confusion, the Tribunal finds that it was as a direct result of the tactics employed by and on behalf of the Wallbridge Subsidiary and as such, the costs claimed are reasonable in the circumstances.

Raising the issue of ratios of preparation time to hearing time may be of assistance in cases where matters proceed along a normal course. Such is not the case in this appeal. There was nothing normal or usual about this proceeding. If Inco was forced to "squander" the time spent by its counsel on a variety of issues which never saw the inside of the Tribunal's courtroom, then the recognition of those hours by the Tribunal is the price which the

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Wallbridge Subsidiary must pay for having raised all of the issues which it did in the manner in which it did. The Tribunal finds that the principles set out in the ratio of preparation time to hearing time have no bearing on a case which is far outside the norm encountered in the hearing of an appeal. The only meaning which can be attributed to the ratio is that there was something very serious and disturbing occurring in this appeal.

The issue of duplication is in part predicated on the presumption that the team approach is an inefficient use of resources due to necessary to-ing and fro-ing between various members of the team. The Tribunal finds that it concurs with Ms. Dyer that the magnitude of the value of the resource under attack can justify the use of the team approach in defending the challenge to Inco's asset. The Tribunal also concurs that it is a reasonable approach to allow various counsel and their associates to concentrate in their areas of specialization. Had Ms. Dyer and one associate done all of the work it becomes possible that more time would have been required in those many areas where their expertise was not so well developed. It is doubtful whether Ms. Dyer and one associate could have performed the necessary work within the time frames required, such was the rate of proliferation of issues.

It has been urged that, while Inco is not precluded from mounting the type of defence which calls on numerous counsel to strategize, do research and writing, that the Wallbridge Subsidiary should not have to pay for the relevant portion of that strategy. From the perspective of the value of the asset under threat, purported to be $3 billion according to Mr. Hall, the type of defence is completely in proportion. This is the risk that the Wallbridge Subsidiary took in mounting its threat to the Kelly Lake interest, and it cannot now expect that Inco would have mounted a much smaller defence of its asset. That would not be logical, given all that Inco stood to lose.

This having been said, there is an element of duplication for overall review and coordination. Where numerous counsel are writing, someone must be charged with ensuring that the effort is unified as a whole, so that it does not appear as a disjointed, cobbled together effort. The Tribunal has considered whether such overlap or duplication is necessary. In the recent decision of *Banihashem-Bakhtiari v. Axes Investments Inc.* (2003) 66 O.R. (3d) 284 (S.C.J.), the Court discusses allowable costs. Two counsel appeared at trial, with several associates and clerks having been involved in preparation. The application was for substantial indemnity. The Tribunal finds the reasons compelling. At page 302, in dealing with preparation, the Court stated:

> [40] I have reviewed all the year-by-year summaries and many of the dockets, particularly relating to the Inquest and the trial, and, although the defendants have pointed to some apparent overlaps and duplication, I am of the view that the organization of the plaintiffs' forces was well done, the division of labour was reasonable and duplication of effort was kept to a minimum. There is an obvious need for conferences from time to time to keep team members up to speed on developments about which they all need to know. There are occasions when "brain-storming"in a group is an effective method of resolving problems. While such conferences show up on dockets as apparent duplication, in my experience, they avoid far greater expense in the long run.

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> I am not prepared to second-guess counsel as to who was present on particular days, or at case conferences or other meetings, or whether time was reasonable for particular tasks or as to particular dockets. None of the questioned charges appears to be obviously beyond the reasonable range.

In respect of Items A and B, the tribunal finds that it will allow the ***maximum*** Substantial Indemnity grid under the Tariff for **all** of the claims in respect of the partners and associates. In so doing, the Tribunal relies upon the principles of Lane J. in *TransCanada Pipelines Ltd. v. Potter Station Power Ltd. Partnership* (2002) 20 C.P.C. (5th) 382 (S.C.J.) as set out at page 385:

> 9. As to the rates to be applied, Mr. Olesen is a 6-year lawyer and the appropriate rate is "up to $225" per hour". This raises the question of what is the practical effect of the phrase "up to". What are the considerations to be applied? Rule 57.01(1) remains unchanged by the recent amendments introducing the costs grid and the new nomenclature. It provides that the court may consider a list of factors including offers, the result, complexity, the importance of the issues, conduct of the parties and any other relevant matter. I regard "up to" as a direction to consider these aspects of the case in determining not only who is to pay or receive costs, but also how much is appropriate. Counsel's hourly or daily rate should reflect not only his or her seniority at the bar, but also the relevant aspects of the matter itself. On this approach, maximum rates should be reserved for maximum cases.
>
> 10. I do not accept the view that the hourly rate is to be arithmetically pro-rated according to the actual years of experience within each class of experience in the grid. Some attention should be paid to that factor, but it is not an arithmetic exercise. In this case, Mr. Olesen, although relatively junior at the Bar and at the mid-point of the experience range, nevertheless carried the whole burden for his client in a matter where the coverage at issue would indemnify the defendant against claims approaching $3 million. It is not unreasonable to accord him a rate in the upper part of his grid range. I fix it at $175 per hour ….

The Tribunal considers this appeal to have been a "maximum case" due to the value of the asset involved and due to the conduct of the proceedings by or on behalf of the Wallbridge Subsidiary. Notwithstanding that the costs submitted on the Bill of Costs were reduced to reflect a hierarchy of amounts appropriate to a claim for Partial Indemnity, the Tribunal wishes to show its displeasure that this matter was allowed to proceed before the Wallbridge Subsidiary had completed its efforts to obtain the necessary evidence to make its case and for having staked lands which, according to the fundamental principles of the **Mining Act** were not open to staking and particularly the manner in which the proceeding was conducted. The Tribunal finds that it will allow the maximum Substantial Indemnity grid amount for the partners and the associates in their respective categories of the Tariff.

The amounts claimed as appropriate for Substantial Indemnity will also be allowed for the students and clerks.

With respect to Item C, counsel fees for June 27, the Tribunal finds the reasoning in *Banihashem-Bakhtiari* to be persuasive as to how the Tariff must be applied. At page 304, the Court deals with the attendance of two counsel at trial:

> [46] The "luxury" of having two counsel was discussed by J.W. Quinn J in *Dybongco [Dybongco-Rimando Estate v. Lee,* [2003] O.J. No. 534 (QL)(S.C.J) where two senior counsel took over a case in mid-trial and spent much time together interviewing witnesses. It was objected that one could have done the job and reported to the other. Quinn J. observed that there was a difference between duplication and collaboration and the latter was not necessarily inefficient, but enabled the counsel to use each other as a sounding board. The collaboration was reasonable and beneficial to the plaintiff in the prosecution of her case and could not be dismissed as a luxury that the defendants ought not to bear. Although the circumstances of our case differ from the case before Quinn J., the principle is applicable. The collaboration of Mr. Outerbridge and Ms Sefton, and the division of labour between them was both reasonable and beneficial in the conduct of the plaintiff's case. This is a case where a second counsel fee is justified. The Court stated at page 304:
>
> [46]…In my opinion, there is but one amount available for all counsel representing the same party. Is there authority under the grid system for two counsel fees? Under the former tariff there was a discretion to permit an additional fee for junior counsel where warranted, but the present tariff is silent on the point. I do not think that means that no fee for a second counsel is allowed; rather the tariff limits the total amount. In considering what "up to" means in the counsel fee grid, the court can allow a fee to second counsel where that expense is warranted by the nature of the case, as it is here, subject to the maximum total counsel fee set out in the grid.

The principle of the *Banihashem* case was that counsel fees for attendance at trial could be up to the limit provided for in the Tariff. Up to $4,000 were allowed per day in that case for Substantial Indemnity costs. Based upon the reasoning in this case, the Tribunal finds that Inco is entitled to the maximum of "up to" $3,500 for Item C, being costs for attendance at the motion of June 27, 2001, for the three counsel who appeared on that day.

For the same reasons set out above, with respect to Items A and B, the Tribunal finds that it will allow the costs claimed at the maximum Substantial Indemnity rates for partners and associates, for Items D, E and G.

The Tribunal finds that it will allow the counsel fee of $2,400 for Item D and $3,500 for Item H in accordance with the Tariff.

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Accordingly, the following amounts are allowed:

Item A

Ledger:	25. hours	@ $450/hr = $11,250
Peltomaa:	95.3 hours	@$450/hr = $42,885
Dyer:	110.9hours*	@ $450/hr = $49,905
Jamal	1.2 hours	@ $300/hr = $ 360
Callaghan	23.1 hours	@ $300/hr = $ 6,930
Code	40.4 hours	@ $300/hr = $12,120
Miller	8.5 hours	@ $125/hr = $1,062.50
Moudry	12.8 hours	@ $90/hr = $1,152
Segal	3.1 hours	@ $90/hr = $ 279

Item B

Ledger	50.4 hours	@ $450/hr = $22,680
Peltomaa	31.9 hours	@ $450/hr = $14,355
Dyer	106.8 hours	@ $450/hr = $48,060
Jamal	20.5 hours	@ $300/hr = $ 6,150
Callaghan	5.1 hours	@ $300/hr = $1,530
Francis	53.6 hours	@ $300/hr = $16,080
Segal	.8 hours	@ $90/hr = $72

Item C

Ledger, Dyer, Jamal = $3,500

Item D

Ledger	1.6 hours	@ $450/hr = $ 720
Dyer	8.0 hours*	@ $450/hr = $3,600

Counsel fee for 1/2 day = $2,400

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* In comparing the Solicitor & Client Bill of Costs with the Partial Indemnity Bill of Costs, the Tribunal noted discrepancies in the number of hours for this individual. Although the Tribunal could find no rationale for the reduction in the Tariff, it has determined that it will allow the lesser number, as found in the Solicitor & Client Bill of Costs.

Item E

Dyer	5.8 hours	@ $450/hr = $2,610
Wiggins	1.4 hours	@ $75/hr** = $105
McPhail	3.2 hours	@ $75/hr** $240
Segal	3.3 hours	@ $90/hr = $297

Item G

Dyer	80.9 hours	@ $450/hr = $36,405
Miller	30.7 hours	@ $125/hr = $3,873.50
Carss	1.0 hours	@ $125/hr = $ 125
Stren	6.3 hours	@ $90/hr = $567
Williams	.4 hours	@ $65/hr = $26

Item H

Counsel Fee = $3,500

Total Fees **=$292,839.00**
GST **= $ 20,498.73**
Subtotal **= $313,337.73**

Disbursements

$3,874.64 + $271.22 GST = $4,145.86 = $4,145.86

Total Fees and Disbursements and GST to October 11, 2002 = $317,483.59

Application for Costs Incurred After October 11, 2002

The Tribunal finds that it will allow submissions concerning whether costs should be paid to Inco by the Wallbridge Subsidiary for time spent after October 11, 2002. In this regard, both Inco and the Wallbridge Subsidiary will be required to provide their written submissions within 30 days of the issuance of this Order.

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** This amount reflects what was claimed in the Solicitor & Client Bill of Costs; both Bills claimed considerably under the maximum allowable and the amount claimed is allowed accordingly.

Each will then be provided with a further 15 days upon which their responses must be filed. The Bill of Costs may cover the period up to and including the drafting of responding submissions.

Conduct of Mr. Blue

The following are not comments which the Tribunal makes lightly and were considered seriously given the extreme nature of what took place in this proceeding. The Tribunal is of the opinion that it has no choice but to voice its considerable concerns.

The Tribunal examined very closely whether, at the termination of all of these proceedings on costs including those sought by Inco after October 11, 2002, it would initiate proceedings analogous to Rule 57.07(1) of the **Rules of Civil Procedure** and permit the Wallbridge Subsidiary to make application to have Mr. Blue pay all or a portion of the costs ordered.

Normally, this would be an issue for which submissions would be sought from counsel ahead of its making a determination. However, based upon its own research, the Tribunal has come to the conclusion that this is a discretionary power not available to it.

The power of the Tribunal to award and fix costs, found in sections 126 and 127 of the **Mining Act** do give the Tribunal discretion to award costs, but these powers are not so broad as those found in section 131 of the **Courts of Justice Act,** which permits the Court to determine by whom and the extent to which costs shall be paid. The reading of sections 126 and 127, taken together, must necessarily mean that the power to determine the extent of costs is similar to that of an assessment officer and not a court; despite it having been held elsewhere that the Tribunal is an inferior court of appeal, with powers concurrent with those of the [then] Divisional Court [*Dupont v. Inglis, supra* and *Minescape Exploration Inc. v. Bolen* (1998), 39 O.R. (3d) 205 (Gen. Div.)].

The Tribunal believes that its ambiguous status, (i.e. not being an agency, board or commission or scheduled agency while having been characterized as a court) and the wording of the **Mining Act** do not go so far as to clothe it with clear authority to apply Rule 57.07(1).

Despite this fact, the foregoing findings and analysis are of grave concern to the Tribunal. In this regard, it has come to question whether the conduct of Mr. Blue might be construed as being in violation of certain *Rules of Professional Conduct* of the Law Society of Upper Canada:

> 2.02(2) That a solicitor shall discourage a client from commencing useless legal proceedings.
>
> 1.03(1) That the solicitor has a duty to discharge responsibilities to a tribunal with integrity.
>
> 4.01(6) That the solicitor shall be courteous, civil and act in good faith.

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> 4.01(2)(g) that an advocate shall not knowingly assert as true a fact when its truth cannot reasonably be supported by the evidence.

But, that is a matter for another forum

Conclusions and Order

The Tribunal finds that it will fix costs on a Substantial Indemnity basis to be paid by the Wallbridge Subsidiary to Inco, up to October 11, 2002, in the amount of $317,483.59. This is based upon total fees of $292,839.00 plus GST of $20,498.73, for a subtotal of $313,337.73 and of disbursements of $3,874.64 plus GST of $271.22 for a subtotal of $4,145.86. This amount shall be paid within thirty days from the date of the Order For Costs.

Further to the Wallbridge Mining Company Limited's transmittal to this Tribunal wherein it agreed with Inco that it guarantees to pay all costs, interest and GST due under any Costs Order issued by the Tribunal in respect of this proceeding against the Wallbridge Subsidiary, 2001352 Ontario Inc., dated the 31st day of October, 2002, and signed by Risto Laamanen, Chairman and CEO of Wallbridge Mining Company Limited, the Tribunal may be spoken to if all of the aforementioned costs payable by the Wallbridge Subsidiary are not paid to Inco within the time frame specified.

Schedule A

Historic **Mining Act** Provisions

A list of historical legislation of the **Mining Act** has been prepared by the Tribunal in anticipation of the impending launch of its website. It is hoped that access to a complete historical record will provide assistance in future to those grappling with historic provisions:

1864 to 1905

- 27-28 Vict. (1864) CAP IX, **The Gold Mining Act**
- 29 Vict. (1865) CAP IX,
- 31 Vic. (1868) CAP XIX, **The Gold and Silver Mining Act**
- 32 Vict. (1868-69) CAP XXXIV, **The General Mining Act of 1869**
- R.S.O. 1877, c. 29, **The General Mining Act**
- 49 Vic. S.O. 1886, c. 8
- R.S.O. 1887, c. 31, **The General Mining Act**
- 53 Vict. S.O. 1890, c. 9
- 54 Vict. S.O. 1891, c. 8
- 55 Vict. S.O. 1892, c. 9, **The Mines Act, 1892**
- 57 Vict. S.O. 1894, c. 16
- 59 Vict. S.O. 1896, c. 13
- 60 Vict. S.O. 1897, c. 8
- 61 Vict. S.O. 1898, c. 11
- 62 Vict. S.O. 1899, c. 10
- 63 Vict. S.O. 1900, c. 13
- 5 Edw.VII S.O. 1905, c.9

Revised Statutes of Ontario

- 6 Edw. VII, R.S.O. 1906, c. 11
- R.S.O. 1914, c. 32
- R.S.O. 1927, c. 15
- R.S.O. 1937, c. 47
- R.S.O. 1950, c. 236
- R.S.O. 1960, c. 241
- R.S.O. 1970, c. 274
- R.S.O. 1980, c. 268
- R.S.O. 1990, c. M.14, as amended

Statutes of Ontario

- 7 Edw. VII, S.O. 1907, c. 13
- 8 Edw. VII, S.O. 1908, c. 21
- 9 Edw. VII, S.O. 1909, c. 17
- 10, Edw. VII, S.O. 1910, c. 26
- 1 Geo. V, S.O. 1911, c. 10
- 2 Geo. V, S.O. 1912, c. 8
- 3-4 Geo. V. S.O. 1913, c. 10
- 3-4 Geo. V, S.O. 1913, c. 18 **The Statute Law Amendment Act**

- 4 Geo. V, S.O. 1914, c. 14
- 5 Geo. V, S.O. 1915, c. 13
- 6 Geo. V, S.O. 1916, c. 12
- 7 Geo. V, S.O. 1917, c. 11
- 8 Geo. V, S.O. 1918, c. 9
- 9 Geo. V, S.O. 1919, c. 12
- 10-11 Geo. V, S.O. 1920, c. 13
- 11 Geo. V, S.O. 1921, c. 16
- 12-13 Geo. V, S.O. 1922, c. 22
- 14 Geo. V, S.O. 1924, c. 18
- 14 Geo. V, S.O. 1924, c. 21,
- 15 Geo. V, S.O. 1925, c. 20

The Mining Court Act, 1924

- 17 Geo. V, S.O. 1927, c. 45
- 18 Geo. V, S.O. 1928, c. 16

The Mining Act, 1927

- 19 Geo. V, S.O. 1929, c. 15
- 20 Geo. V, S.O. 1930, c. 8
- 21 Geo. V, S.O. 1931, c. 10
- 22 Geo. V, S.O. 1932, c. 13
- 23 Geo. V, S.O. 1933, c. 33
- 24 Geo. V, S.O. 1934, c. 32
- 1 Edw. VIII, S.O. 1936, c. 36
- 1 Geo. VI, S.O. 1937, c. 44

The Statute Law Amendment Act

- 2 Geo. VI, S.O. 1938, c. 37
- 3 Geo. VI, S.O. 1939, c. 5

The Statue Law Amendment Act

- 3 Geo. VI, S.O. 1939, c. 27
- 4 Geo. VI, S.O. 1940, c. 15
- 5 Geo. VI, S.O. 1941, c. 32
- 6 Geo. VI, S.O. 1942, c. 34
- 7 Geo. VI, S.O. 1943, c. 14
- 8 Geo. VI, S.O. 1944, c. 37
- 9 Geo. VI, S.O. 1945, c. 13
- 10 Geo. VI, S.O. 1946, c. 55
- 11 Geo. VI, S.O. 1947, c. 66
- 12 Geo. VI, S.O. 1948, c. 56
- S.O. 1949, c. 59
- S.O. 1950, c. 44
- S.O. 1951, c. 51
- S.O. 1952, c. 59
- S.O. 1953, c. 64
- S.O. 1954, c. 53
- S.O. 1955, c. 45
- S.O. 1956, c. 47
- S.O. 1957, c. 71
- S.O. 1958, c. 59
- S.O. 1959, c. 60
- S.O. 1961-62, c. 81
- S.O. 1962-63, c. 84
- S.O. 1964, c. 62
- S.O. 1965, c. 73
- S.O. 1967, c. 54
- S.O. 1968, c. 71
- S.O. 1968-69, c. 68
- S.O. 1970, c. 26
- S.O. 1970, c. 79
- S.O. 1970, c. 102
- S.O. 1970, c. 274
- S.O. 1971, c. 50
- S.O. 1972, c. 116
- S.O. 1973, c. 106
- S.O. 1978, c. 83
- S.O. 1980, c. 83
- S.O. 1988, c. 48
- S.O. 1989, c. 23
- S.O. 1989, c. 46
- S.O. 1989, c. 62
- S.O. 1989, c. 72
- S.O. 1994, c. 27
- S.O. 1996, c. 1
- S.O. 1996, c. 30
- S.O. 1997, c. 38
- S.O. 1997, c. 40
- S.O. 1998, c. 18
- S.O. 1998, c. 19
- S.O. 1999, c. 12
- S.O. 2000, c. 26
- S.O. 2001, c. 9
- S.O. 2002, c. 17
- S.O. 2002, c.18

Schedule B

Rules of Civil Procedure & Tariff

58.05(1) If costs are to be assessed, the assessment officer shall assess and allow,
(a) lawyers' fees and disbursements in accordance with subrule 57.01(1) and the Tariffs;

57.01 (1) In exercising its discretion under section 131 of the **Courts of Justice Act** [applying section 126 of the **Mining Act**] to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle or to contribute made in writing,

(a) the **amount claimed** and the **amount recovered** in the proceeding;
(b) the apportionment of liability;
(c) the **complexity of the proceeding**;
(d) the **importance of the issues**;
(e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;
(f) **whether any step in the proceeding was**,
  (i) **improper, vexatious or unnecessary**, or
  (ii) taken through negligence, mistake or excessive caution;
(g) **a party's denial or refusal to admit anything that should have been admitted**;
(h) whether it is appropriate to award any costs or more than one set of costs where a party,
  (i) commenced separate proceedings for claims that should have been made in one proceeding, or
  (ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different solicitor; and
(i) **any other matter relevant to the question of costs.**

58.06(1) In assessing costs the assessment officer may consider,

(a) the amount involved in the proceeding;
(b) the complexity of the proceeding;
(c) the importance of the issues;
(d) the duration of the hearing;
(e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;
(f) whether any step in the proceeding was,
  (i) improper, vexatious or unnecessary, or
  (ii)taken through negligence, mistake or excessive caution;
(g) a party's denial or refusal to admit anything that should have been admitted; and
(h) any other matter relevant to the assessment of costs.

Tariffs

Tariff A

Solicitors' Fees and Disbursements Allowable under Rule 58.06 PART I – COSTS GRID

Where students-at-law or law clerks have provided services of a nature that the Law Society of Upper Canada authorizes them to provide, the fees for those services may be assessed and allowed under this costs grid.
Where counsel has special expertise, his or her hourly rate classification may be varied accordingly.

1. Fees other than Counsel Fee

Hourly rates for pleadings, mediation under Rule 24.1 or Rule 75.1, financial statements, discovery of documents, drawing and settling issues on special case, settlement conference, notice or offer, preparation for hearing, attendance at assignment court, order, issuing or renewing a writ of execution or notice of garnishment, seizure under writ of execution, seizure and sale under writ of execution, notice of garnishment, or for any other procedure authorized by the Rules of Civil Procedure and not provided for elsewhere in the costs grid.

	Partial Indemnity Scale	Substantial Indemnity Scale
Law Clerks	Up to $80.00 per hour	Up to $125.00 per hour
Students-at Law	Up to $60.00 per hour	Up to $90.00 per hour
Lawyer (less than 10 years)	Up to $225.00 per hour	Up to $300.00 per hour
Lawyer (10 or more But less than 20 years)	Up to $300.00 per hour	Up to $400.00 per hour
Lawyer (20 years and over)	Up to $350.00 per hour	Up to $450.00 per hour

2. Counsel Fee – Motion or Application

	Partial Indemnity Scale	Substantial Indemnity Scale
0.25 hour	Up to $400.00	Up to $800.00
1.00 hour	Up to $1,000.00	Up to $1,500.00
2.00 hours (half day)	Up to $1,400.00	Up to $2,400.00
1 day	Up to $2,100.00	Up to $3,500.00