File No. MA-019-00

L. Kamerman	)	Tuesday, the 25th day
Mining and Lands Commissioner	)	of November, 2003.

THE MINING ACT

IN THE MATTER OF

The required Closure Plans regarding mining operations of Noranda Inc. ("Noranda") involving the Mattabi Mine, in the Penassi Lake Area, Sixmile Lake Area and Valora Lake Area and the Geco Mine, situate in the Township of Gemmell, (hereinafter referred to as the "Closure Plans");

AND IN THE MATTER OF

The Requirement of the Director of Mine Rehabilitation (the "Director") pursuant to subsection 147(7) of the **Mining Act**, dated April 5, 2000, that Noranda post an acceptable financial assurance instrument in connection with the Closure Plans;

AND IN THE MATTER OF

A Notice to Require a Hearing before the tribunal under Part VII of the **Mining Act**, pursuant to subsection 152(1) of the **Mining Act**, concerning the Requirement of the Director, dated April 5, 2000, (the "Director's Requirement of April 5, 2000").

B E T W E E N:

NORANDA INC.

Appellant

- and -

THE DIRECTOR OF MINE REHABILITATION

Respondent

O R D E R

UPON hearing from Counsel for the parties, and upon reading the materials filed in support;

AND UPON its finding that the letter of April 5, 2000, constitutes a requirement for changes by the Director to a proposed Closure Plan, within the meaning of subsection 147(7) and clause 152(1)(b) of the **Mining Act**, found in Part VII of the **Mining Act** as it was immediately prior to June 30, 2000;

. . . . 2

1. THIS TRIBUNAL ORDERS that the motion of the Director be and is hereby dismissed.

2. THIS TRIBUNAL FURTHER ORDERS that the hearing of this appeal shall proceed on the basis of having been perfected under Part VII of the **Mining Act** as it was immediately prior to June 30, 2000.

AND THIS TRIBUNAL FURTHER DIRECTS that Counsel for the parties communicate with the tribunal Registrar, Mr. Daniel Pascoe, to advise him whether either party will require time for the filing of additional materials prior to the setting down of this matter for hearing.

DATED this 25th day of November, 2003.

Original signed by L. Kamerman

L. Kamerman
MINING AND LANDS COMMISSIONER

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B E T W E E N:

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Respondent

REASONS

Appearances

Mr. Douglas Hamilton	Counsel on behalf of Noranda Inc.
Mr. William J. Manuel	Counsel of Behalf of the Director of Mine Rehabilitation

Preliminary Matters

It was agreed with Counsel that documents which had been filed and were on the proposed Exhibit List would be marked as Exhibits 1 and 2 to the Motion of October 8, 2003.

Mr. Manuel indicated that the parties would proceed on the basis of written argument and without calling *viva voce* evidence. Mr. Hamilton indicated that this was not entirely correct. Mr. Manuel was at liberty to call *viva voce* evidence. Mr. Hamilton would not concede that the materials filed in the exhibits, comprised largely of correspondence, would be sufficient for the purposes of the Director's motion, but he did concede that it was not necessary to call a witness to identify any of the documents.

The Director

Mr. Manuel started with the proposition that any right of appeal pursuant to Part VII is a statutory right of appeal. There is no jurisdiction for an appeal otherwise. [Mr. Hamilton indicated that he would not be suggesting anything other than a statutory right of appeal]. In Sara Blake, **Administrative Law in Canada, 3rd ed.**, at page 152:

> Any right to appeal a tribunal decision must be found in the statute governing that tribunal. If none is found, the tribunal's decision cannot be appealed. … [at p. 153] What matters may be the subject to an appeal. The scope of an appeal is defined by the statute granting the right of appeal. [The appellate body has no mandate to go beyond that].

Mr. Manuel asked that the tribunal keep those principles in mind when conducting an analysis of whether a right of appeal exists. He also referred to Robert Reid and William David, **Administrative Law and Practice**, at 449:

> The only appeal jurisdiction that any tribunal, be it a court or a tribunal and be it high or low, can have is that given to it by some statute that must be provided by express statutory language or by necessary implication….p. 450, It follows that the existence, scope and nature of appeal jurisdictions are really matters of construction of statutes.

It was the position of the Director that the statutory requirements for a right of appeal in this case have not been complied with and that no right of appeal exists. The **Mining Act** (the "**Act**") provides for a formal process for the submission of a Closure Plan, which has a number of statutory and regulatory requirements. Rather than follow that formal process, the parties chose to embark on a course of negotiations towards an acceptable Closure Plan. A review of the documents filed would support that the Director and Noranda were engaged in the process of negotiating towards the submission of a Closure Plan which the Director would then accept.

Mr. Manuel submitted that Noranda never did submit a Closure Plan as required by the **Act** and Regulations as the parties never got to that stage. In the course of the negotiations, it was the Director's contention that Noranda took one letter and is attempting to cast it as if they were engaged in the formal process of a written requirement requiring a change to a Closure Plan, which is not a factually accurate account of what took place as there was no Closure Plan as required by the **Act**. The issue is a matter of statutory interpretation in light of the factual dealings between the parties.

The appeal is important because if it should be found that Noranda has a right of appeal, then it will have crystallized its process under the provisions of Part VII of the **Act** before substantive changes took effect.

Mr. Manuel dealt with the documentation filed, first with the Mattabi Mine (Exhibit 2, Tabs A 1 through 8). The letter from staff for the Ministry of Northern Development and Mines ("MNDM" or the "Director") dated October 19, 1993, is an Acknowledgement of Receipt of a Closure Plan. Included are other letters showing that the Closure Plan has been circulated for comment to the relevant government officials. Similarly, in letters of MNDM dated March 2, 1994, Appendix 3 to the Closure Plan was circulated for review. In the August 2, 1995, letter from MNDM to Noranda, it states that the documents submitted have been reviewed.

In the letter dated April 15, 1997, to Noranda, MNDM deals with the information required:

> Based on an inter-ministerial review, the following items must be addressed *before the acceptance of a closure plan can be recommended to the Director of Mine Rehabilitation.* [emphasis added]
> …
> In addition to the remaining estimated rehabilitation costs, the total amount of financial assurance provided should include a net present value estimate of three percent of the long-term.

The July 24, 1997, letter acknowledges receipt of the Mattabi Rehabilitation Project Closure plan Addendum, indicating that Noranda is modifying its plan by adding to it.

The second last paragraph in the letter of October 5, 1999, MNDM tells Noranda:

> The addendum to the closure plan adequately addresses the outstanding concerns with respect to the closure plan. We are prepared to recommend the acceptance of a closure plan, providing that prior to undertaking the proposal of receiving water assessments in the year 2000, the terms of reference and study designs be reviewed by our Minister before. Final acceptance of a closure plan to Director of Mine Rehabilitation must receive financial assurance. Due to the amount of rehabilitation …. Please contact our financial officer, Mr. Ed Solonka to arrange the form and details of the financial assurance.

The documents relating to the Geco mine are at Exhibit 2, Tabs B 1 through 7 and a misfiled document found at Tab A 4. There is a similar receipt and acknowledgement dated March 23, 1995. On July 4, 1995, the proposed Closure Plan was sent out for inter-ministerial comments, with relevant comments found in the second sentence of the second paragraph:

> This letter outlines the items that must be addressed on the basis on inter-ministry review before recommendation of the Director for the acceptance of a closure plan.

Noranda submitted an addendum, the receipt of which is acknowledged on August 26, 1996, where concerns are raised. Similarly, on September 4, 1996, MNDM acknowledges an alteration to the Closure Plan.

This leads to the letter of March 13, 1997, from MNDM Rehabilitation Specialist Mr. Gerald Myslik, which Mr. Manuel submitted is instructive in describing what has transpired transpiring between the parties. There are two issues at this stage. One is that the tribunal must determine what the closure cost estimates are. At the end of four years, if this matter is still outstanding, an amount must be negotiated at the present time before the Closure Plan can be recommended for acceptance. The second issue is the estimated cost for both the removal of equipment and facilities and the demolition of buildings and structures. At the second full paragraph, it states:

> The review of Closure Plan Addendum 1 has been completed. The responses to inter-ministerial review comments and the informational submissions are largely acceptable. The only issue which still remains unresolved before the closure plan can be recommended for the acceptance by the Director of Mine Rehabilitation is that of closure cost estimates.

And on page two, in the third line down, it states:

> That will be the basis for the determination, the form and details of your financial assurance.

Noranda's response with respect to closure costs is noted. On April 6, 1997, MNDM wrote to Noranda, stating on the second page:

> Prior to the final acceptance of a closure plan, financial assurance must be received by the Director of Mine Rehabilitation, based on the amounts estimated in your March, 1995 cost estimate submission, financial assurance for the total annual operation, testing…please contact our financial offices…

The last two letters in the Director's Exhibit 2 coincide with the beginning of Noranda's book of documents found in Exhibit 1 to the Motion of October 8, 2003, found at Tabs 1 and 2. Mr. Manuel submitted that it is important to understand the letters in the context of what was occurring, namely the process of negotiating towards an acceptable Closure Plan. The conclusion must be made that the statutory requirements for a Closure Plan have not yet been complied with.

Noranda prepared a slide presentation dated January, 2000, in the form of a submission to the Director to persuade him to accept Noranda's position of what the financial assurance should consist of, their arguments in favour and the analysis of various options. In the Director's materials, at Tab C, are the notes from this meeting of January 13, 2000, which states, in part:

> Purpose of the meeting was to advise MNDM of expenditures to date and estimates for remaining activities of the Geco and Mattabi sites, and discuss financial assurance in general. Overhead presentations were provided. Noranda would prefer to complete the closure plans prior to the legislative changes requiring certification... Noranda was hopeful the Ministry would consider a corporate guarantee as financial assurance, but it was advised this could not be considered. The Ministry would be prepared to look at a reasonable schedule for the balance of capital expenditures and discuss the form and amount for the balance related to long-term treatment. The company was advised of the Ministry's pv calculations, which are based on a three per cent interest rate in the case of Geco…. Noranda was advised to itemize the rehabilitation requirements completed against the original closure plan, to clearly identify remaining expenditures and operating costs, and prepare costs for final financial assurance negotiations.

This was followed up with the January 7, 2000 letter from the Director, which stated:

> The closure cost estimates are acceptable and there remains now to negotiate this issue of financial assurance.

This was followed by another slide presentation by Noranda in an attempt to persuade the Director to agree to its position. This is followed by the letter from the Director of April 5, 2000, which is the document at issue in this motion. It is the Director's position that the letter does not meet the statutory requirement for a requirement for a change to a Closure Plan. It is the Director's position that the letter is a further exchange in the process of negotiating towards a Closure Plan which Noranda would then submit with confidence that it would be acceptable by the Director.

. . . . 6

Mr. Manuel referred to the legislative provisions under Part VII of the **Act**:

> **152** (1) Where the Director,
> …
> (d) requires changes to either an existing or proposed closure plan under subsection …147(7) …;
>
> the proponent may appeal the Director's requirement, order or declaration to the Commissioner,….
>
> **147**. (7) Prior to the Director informing the proponent that the closure plan requirement under subsection (4) or (6) is acceptable, the Director may by written notice, require changes to the closure plan.

Looking to the other provisions in section 147, subsection (3) is the notice provision, which is the requirement on the part of a company to submit a Closure Plan within the period of time specified. Mr. Manuel submitted that this was not done. Rather, what the parties have done is operate on an informal basis outside the statutory scheme. The Director's position is that Noranda cannot engage in an informal process of negotiating towards a closure plan and then seek to argue that one step in that informal process is part of the formal process. Looking at the formal requirements, set out in section 139 of the **Act**, a "closure plan" means a plan prepared in the prescribed manner to rehabilitate a project…"

Looking at Ontario Regulation 114/91, there are a number of requirements which constitute a Closure Plan. It is clear that over the period of time after the submission of the initial document, the parties were engaged in negotiations to satisfy all of the other requirements listed and they were successful on all fronts except for that of financial assurance. Section 13 of the regulation provides

> **13.** The closure plan shall specify the form and amount of the financial assurances to be provided by the proponent in respect of the project.

Mr. Manuel submitted that Noranda never took the step of providing financial assurance. Instead, all it did was make two slide presentations which did not constitute the Closure Plan formally contemplated by the legislation.

When the April 5, 2000, letter is examined, it deals with two issues. One is the interest rate, where the Director states his position that he is going to take two percent. The second is that he will not accept the corporate guarantee, but he falls short of stating what he would accept. According to Mr. Manuel, the letter does not require a change, nor does it indicate to Noranda what must be included. It simply says that the corporate guarantee is not acceptable. The letter was never intended as a change to a Closure Plan. Effectively, the choice at that time rested with Noranda as to whether to submit a Closure Plan for the Director's consideration and potential acceptance.

Mr. Manuel submitted that the tribunal has before it an appeal, the subject matter of which are changes required to a Closure Plan when there is in fact no Closure Plan. There is no proposal put before the Director in the normal course to which the Director could require changes. This position is made clear, where it states at the second page of the April 5, 2000, letter:

> Later this spring, we will examine how we might be able to earn a higher interest rate on the cash financial assurance we are holding. If we are successful in finding some favourable and acceptable alternatives, the Order-in-Council will then have to be amended. At that time, we can re-examine your situation and determine if the financial assurance you will be providing can be reduced.

Had Noranda wanted to engage in the formal Closure Plan process, then it should have pursued that process by making its proposal, putting forward a Closure Plan which would encompass all of the requirements of the regulation, so that the Director could have then put forward any matters to which changes were required. The letter of April 5, 2000, does not do this. It is not possible from the letter to ascertain what change is required, nor was the overall statutory scheme followed. Therefore, the pre-conditions to a right of appeal are not present. All that the letter in question indicates is a break-down in negotiations, from which there is no right of appeal.

Noranda

Mr. Hamilton indicated to the tribunal that he was prepared for one of the Director's arguments but not the other. The new argument for which he did not prepare was, as he understands it, that Noranda, in submitting its Closure Plan, was not complying with the statute or was not following a statutory process, thereby taking itself out of the **Mining Act**. Accordingly, it should have no rights of appeal. The second argument, which Mr. Hamilton was prepared to answer, was that the April 5th letter was simply a step in the discussions between Noranda and the Director concerning what form of financial assurance would be acceptable under the Closure Plan. The concept that the steps taken by the parties over the course of eight years were allegedly outside the process was a matter of some surprise.

The Director had no evidence to make concerning his submission. Mr. Hamilton submitted that, to suggest that whatever plan was submitted by Noranda did not comply with statutory requirements, without producing that Noranda's purported "Closure Plan" and walking the tribunal through everything which Noranda did produce, is a submission that the Director cannot make. Mr. Hamilton invited the tribunal to conclude from the correspondence, dating from 1993 for Mattabi and 1995 for Geco, that Closure Plans were submitted. He questioned that the documents submitted by Noranda cannot be said to meet the statutory requirements for a Closure Plan, thereby taking Noranda out of the scheme contemplated by the legislation, whereby the Director could nonetheless arrive at a decision which could have an impact on Noranda's interests and for which it would have no right of appeal.

. . . . 8

The Director must prove his position concerning the April 5th letter and was permitted by the tribunal to be called as a witness and chose not to do so. Mr. Hamilton submitted that the tribunal could draw a negative inference from this fact. The tribunal has before it no *viva voce* or other evidence that this was a process of negotiation or that the April 5th letter was simply a position letter. A review of the correspondence would support Noranda's position. The April 5th letter itself contains acceptance of certain terms and the rejection of others proposed by Noranda. Where rejected, modifications were required which constitutes an acceptance of a Closure Plan, with modifications to what Noranda would have liked with regards to several matters concerning financial assurance.

It was pointed out to the tribunal that all of the correspondence referred to speaks directly of the submission of a Closure Plan. An example would be the addendum to the Closure Plan. The inter-ministerial review refers to the acceptance of a Closure Plan. There is an indication that the only issue remaining to be resolved before the Closure Plan can be recommended for acceptance, is that of financial assurance. The Director is suggesting that all of the correspondence between the parties over the course of eight years was outside of the contemplated legislative scheme and that the Closure Plans did not meet the requirements of the regulation. The Director must be required to provide evidence to support his position. The tribunal cannot make a determination, where the documents in question have not been produced or a witness has not been called, in support of this position.

With respect to the second argument, Mr. Hamilton pointed out that the Director has referred to Noranda's submission as a proposal, rather than as a position which is being responded to, notwithstanding that the latter is being asserted by the Director.

Pursuant to clause 152(1)(b) of the **Act**, the proponent may appeal the Director's requirement where there have been required changes to an existing or *proposed* Closure Plan. [emphasis added] In this case, there is a Closure Plan which was submitted, with its review having taken place in sections. Looking at the letter of March 13, 1997, referred to above, one can see that the technical issues had been resolved and that the only outstanding issue was that of financial assurance. The rest of the proposal [proposed Closure Plan] can be recommended for acceptance.

The letter dated January 27, 2000, from the Director to Noranda, relating back to proposals for both the Mattabi and Geco mines, indicates the following. The Director has reviewed the financial assurance proposal concerning the costs and has found the closure cost estimates to be acceptable. When taken with the letter of April 5th, it can be seen that there is a Closure Plan which has been submitted and all *other* issues have been accepted. What remained to be identified and as of January 27th were accepted, were the closure cost estimates. What follows from the Director's acceptance is that there must be set aside the financial assurance which will cover those costs in future. The amount and form have to be determined.

Mr. Hamilton reviewed the materials sequentially in Exhibit 1, commencing with Tab 1. The first is a letter dated April 16, 1997, which shows the Geco Mine Closure Plan has been submitted, essentially completed, with the form and details of financial assurance to be

determined. That of October 9, 1999, effectively says the same thing regarding Mattabi, with the closing comment, "Please contact our Financial Officer, Mr. Ed. Solonyka, … to arrange the form and details of the financial assurance." F-Group Closure Plan correspondence is included as it was being done in conjunction with the Mattabi mine.

Mr. Hamilton presented Noranda's slide presentation of its first proposal (Ex. 1, Tab 4), which corresponds with Mr. Robertson's notes found at Tab C of Exhibit 2 in greater detail. The first two pages contain closure cost estimates. Over the next pages, Noranda made submissions concerning the form and amount of security, including discussion of a letter of credit, surety bonds and corporate financial assurance. This corresponds with the reference in Mr. Robertson's notes that financial assurance negotiations are to come. The reason that further negotiations are required is to determine the form and amount of the required financial assurance.

As indicated above, the cost estimates are the subject of the January 27, 2000, letter, which are accepted in that correspondence by the Director. Again, what remains is still the form and amount of financial assurance.

The proposal at Tab 7 is a second slide presentation by Noranda, setting out its capital costs, its position and the Province's assumptions, where it states, on pages 1 and 2:

> To calculate financial assurance, the Province has,
> - Discounted the water treatment costs over 50 year period
> - Assumed an interest rate of 3%
> - Accepted Noranda's estimate of the costs for ongoing treatment at Mattabi and Geco of $741,800 and $606,200 per year, respectively
> - Accepted Noranda's estimates of the remaining project cost to complete the closure plan for Mattabi and Geco of $1,342,000 and $3,787,000

At page 7, under the heading "Noranda's Proposal Encompasses Three Areas", each is discussed under the ensuing slides. In Mr. Hamilton's submission, in the Director's letter of April 5th, he makes a decision on each of the three remaining areas. 1) "What are the remaining project costs?" which are the capital costs to put in place the treatment system. 2) "What are the ongoing water treatment and maintenance costs?" and 3)"What is the form of the financial assurance?". The first two items identify the amount of assurance to cover capital, then the ongoing operational costs of that capital treatment and the third being the form of financial assurance. Returning to the slide presentation, Noranda has set out its proposal for the three areas, two dealing with the amount and one dealing with the form. Noranda then breaks those three proposed areas down and sets out its position on each, at pages 8 and 9, with **capital cost**:

> For the remaining project costs…
>
> - Noranda requests that it be allowed to provide an undertaking based on its financial status and good track record to cover the remaining project costs at each site.
>
> …

- We believe this is appropriate given Noranda' s near-term financial capacity to complete the projects is extremely strong
- The remaining projects also comprise a very small proportion of the overall capital cost and have a minimal amount of risk from a technical point of view

In summary, if the work is not done by a certain date, Noranda would post an acceptable instrument until the work can be completed. At the time of the presentation, a great amount of the required work had already taken place, with corresponding required capital utilized.

On page 10, Noranda set out its position on the second issue, the **ongoing water treatment and maintenance costs**, representing annual costs into the future. Noranda has proposed an interest rate of 8.5 percent for the calculation of the net present value (NPV) of those costs. The next page explains its number, which renders a current amount of $15.6 million for both sites instead of the Province's $34.7 million, reached by using 3 per cent.

On page 11, Noranda deals with the third issue, being the **form of financial assurance**. It proposed a combination of instruments, namely a surety bond for 2/3 of the amount, $10.4 million, and a written undertaking for the balance of 1/3, $5.2 million.

Pages 12 through 15 of the slides set out why Noranda believes that a written undertaking for one-third is appropriate for Noranda, given its financial position, all within the context of a Closure Plan.

Tab 8 contains internal e-mails within MNDM, where officials are evaluating Noranda's proposal. One is a message from Mr. Solonyka to Mr. Neil Humphrey, copying the Director, dated March 23, 2000, which sets the stage and then goes on to ask a question about what interest rate should be used:

> Neil
> We are in the process of negotiating the financial assurance required for projects such as Mattabi and Geco. Both of these sites are in the process of being rehabilitated and we are now in the process of determining the amount of financial assurance required to cover the long term maintenance/monitoring costs over the next 50 years.
> Historically we have been saying that the financial assurance should equal the NPV of the stream of annual costs at a rate of 3%. To date we have not collected any financial assurance based on that calculation.

The critical letter of April 5, 2000, (at Tab 9), addressed to Mr. Vern Coffin of Noranda, starts off with the words, "Since our meeting we have reviewed your financial assurance proposal." Mr. Hamilton submitted that this is contrasted with Mr. Manuel's assertion that there was no proposal. The letter demonstrates that the Director was thinking it was a proposal and that the financial assurance was part of the Closure Plan. The letter then goes on to address each of the three proposed items which were highlighted above by Mr. Hamilton from the slide presentation:

> [**capital costs**:]
> "We are prepared to forgo the requirement of financial assurance for the remaining project costs at each site with the understanding that if the projects are not completed by December 31, 2002, Noranda will post an acceptable financial assurance instrument until completion.
> [**ongoing water treatment and maintenance costs:**]
> As for the long term water treatment and maintenance costs at the Mattabi and Geco sites, we have examined several options on the calculation of the NPV on these ongoing costs. In the end, we were informed by our auditors that the interest rate we must use for such calculations is the one stated in the Order-In-Council that states that the interest rate to be used in the calculation of interest for cash deposits. That interest rate is equal to the Province of Ontario Saving Office's daily interest in their Trillium Account, which has averaged 6.1% since that type of account was introduced in January 1986. During the same period, the inflation rate has averaged 2.9% resulting in a net interest rate of 3.2%. Thus, for the time being, we will be using this interest rate for NPV calculations. Therefore, the financial assurance for the long term water treatment and maintenance costs for the Mattabi site with annual costs of $741,800 is $18,382,236 and for the Geco site with annual costs of $606,200 is $15,021,989 with both totaling at $33,404,225.
> [**form of financial assurance:**]
> Your proposal also requested that we consider accepting a corporate guarantee for a portion of this amount. As we are unable to legally do so, the full amount of financial assurance must be provided.

Mr. Hamilton submitted that these are not position statements, but are statements of decision. The words do not suggest that this is the Director's position. Nor does he invite Noranda to indicate why it disagrees. Noranda is appealing the calculation of the total indicated for long-term water treatment and maintenance costs, as it believes that the calculation is inappropriate. At the second page of the April 5th letter, the Director goes on to state:

> Later this spring, we will be examining how we might be able to earn a higher interest on the cash financial assurance we are holding. If we are successful in finding some favourable and acceptable alternatives, the Order-In-Council will then have to be amended. At that time we can re-examine your situation and determine if the financial assurance you will be providing can be reduced.

According to Mr. Hamilton, the expressed intent to re-examine suggests that the Director has made his determination on the applicable interest rate. This rate dictates the amount of financial assurance to be provided. If the interest rate is increased at the time of re-examination, the amount can be reduced accordingly. The letter does not invite Noranda to make additional proposals or set out an alternate position. Nor is there an invitation to come in and discuss it further. This is the end of the matter.

. . . . 12

After the April 5th letter, Noranda served its notice on the Director on May 3, 2000, to require a hearing before the tribunal. What happened, in Mr. Hamilton's submission, shows the intent of the Director at that time. The Director did not attempt to intervene, or attempt to retract his statements of April 5, 2000, based on the position advanced at this hearing, that the letter was nothing more than a position taken in ongoing negotiations. The Director did not, through either word or deed, attempt to indicate that he didn't mean what he wrote. In fact, the Director referred the matter to the tribunal.

In keeping with the statutory process contemplated by Part VII of the **Act,** Noranda served the Director, who then in turn referred the matter to the tribunal. This is not the action of one who did not intend his letter to be a requirement within the statutory meaning of the word.

The tribunal issued its Order to File documentation on May 11, 2000, which was subsequently amended to require that certain documentation be provided by the Director initially. Noranda indicated that, based on its contact in the interim with the Director, there was no immediate prospect of settlement. Had the Director thought otherwise, owing to an ongoing process of negotiation, he could have advised the tribunal of that fact.

Despite the fact that the Order to File refers to the Director's requirement of April 5, 2000, the Director at no time denied that it was a requirement. Rather, he complied with the Order. In his covering letter of June 13, 2000, he even refers to the letter as "the Director's requirement" of April 5th. According to Mr. Hamilton, it was not until counsel became involved that the jurisdictional issue was raised at all. His conduct in May and June belies his current position that the letter of April 5th was a requirement, within the statutory meaning, and not one step in the alleged process of negotiation.

As of the date of the motion, there is no evidence from the Director to indicate that he never intended his letter to be a requirement, notwithstanding its demanding tone or tenor. The mediation which did take place was conducted with the assistance of the tribunal Registrar.

Beyond having no *viva voce* evidence, Mr. Hamilton submitted that the wording used in the April 5th letter does not support the position that what had occurred was a step in the negotiation process. Nor do the subsequent actions of the Director. The letter, instead, required changes to a proposal which dealt with the form and amount of financial assurance, being one aspect, of a proposed Closure Plan.

Returning to section 152, Mr. Hamilton submitted that the words used lend themselves to the application and to the circumstances of this case. The Director has required changes to a proposed Closure Plan and Noranda is seeking to appeal those changes. Up to this point in time, all other aspects of the proposed Closure Plan have been accepted and this was the only outstanding matter.

In response to the tribunal's question, Mr. Hamilton indicated that over the course of the years 1993 through 2000, rehabilitation of the Mattabi and Geco mine sites was taking place. Their rehabilitation had been taking place over a period of years and part of the reason for the updated closure cost estimates for 2000 were because Noranda had already spent considerable money on the completed portions of closure. At Tab 11, in the Summary of Facts, it is set out that the rehabilitation of Mattabi commenced in 1989. In total $22,000,000 has been spent as of 2000. Similarly, $32,000,000 was spent on Geco. Therefore, throughout the discussions over the last three and a half years concerning financial assurance, rehabilitation has continued in the mines.

Mr. Manuel

Mr. Manuel indicated that he had three points he wished to address. With respect to the point that the Director only latterly acquired a position of disputing the meaning of the April 5th letter, Mr. Manuel pointed out that at Tab 10 of Exhibit 1, being a letter from the Director to Mr. Hamilton dated June 15, 2000, the Director clearly states his position, which has not changed:

> I wish to reiterate that the Mattabi and GECO closure plans have not been accepted to date as financial assurance must be provided prior to acceptance of any closure plan. Furthermore, my letter of April 5, 2000 clearly states that neither the amount or form of financial assurance proposed by Noranda to support the closure plan were acceptable to the Director and that the full amount of financial assurance must be provided.
>
> We acknowledge that should the Mining and Lands Commissioner agree that you have a valid appeal, then there would be a stay in proceedings respecting this matter pursuant to Subsection 152(2). However, should the commissioner decide that your characterization of my April 5 letter as an "acceptance with modifications" is incorrect, then you may find yourself without the legal basis for an appeal and thus subject to complying with the new post June 30 rules unless you have negotiated an acceptance of your closure plans with us by that date.

According to Mr. Manuel, Mr. Hamilton was well aware as of that date that the proceedings would be stayed. The Director was completely clear in terms of the position he was taking that there is no valid appeal. Anything prior to that date from the Director were merely process documents in response to Mr. Hamilton.

The Director cannot pre-judge a matter, but he is required to refer the matter to the tribunal and follow its processes. He has complied with the procedural Orders to File documentation, but has taken and maintained the position that there is no valid appeal, with Noranda having incorrectly characterized the letter at issue.

Referring back to the second slide presentation involving three issues, and the April 5th letter, Mr. Manuel drew attention to the words, "understanding that if the projects are not completed by December 31, 2002, Noranda will post an acceptable financial assurance instrument until completion." This is not a statement indicating what would be an acceptable financial assurance instrument. Therefore, it cannot be ascertained from this statement what would be acceptable. Rather, it can be clarified only through further discussion.

A proposal is not a term of art under the **Act,** whereas the term "closure plan" is. The Director has never taken the position that there was no proposal. Noranda has made various proposals on various elements of the Closure Plan throughout the entire period of time involved, which were generally accepted, until arriving at this impasse.

Mr. Manuel conceded that the Director's determination on interest of 3.2 per cent was made.

Mr. Manuel disputed that there was any actual requirement to change with respect to the refusal to consider a corporate guarantee. Noranda was left to decide on and propose an alternative form of financial assurance.

The letter cannot be construed as a decision. The Director does not indicate what form an acceptable financial assurance must take. Nor is he telling Noranda how the full amount of financial assurance must be provided. That matter remains outstanding to be decided. Even the interest rate is not set, as evidenced by the last paragraph, which indicates that the required interest rate could change.

As for not calling the Director to give evidence, Mr. Manuel submitted that there is no case law to support the position of drawing a negative inference. The evidence is found in the documents exchanged between the parties over the course of their dealings from which no inference can be taken.

The June 10th letter demonstrates that, at a very early stage, the Director's actions were consistent with the position being taken.

Finally, the Closure Plans have in fact been filed as part of the original filings in this matter. Mr. Manuel stated that he was not of the impression that he had to duplicate exhibits. The documents show that the Closure Plan document initially submitted had many matters which had not been addressed.

In response to the tribunal's question, Mr. Manuel stated that a Closure Plan must be submitted under subsection 147(7). Despite all of the various components which had been agreed to over what had then been the past eight years, a slide presentation attempting to persuade the Director does not constitute a Proposed Closure Plan. There must be a Closure Plan requiring changes under subsection 147(7), having been submitted in compliance with subsection (4). What Noranda and the Director were doing was negotiating to determine whether Noranda's submission would be acceptable to the Director or not. The April 5th letter does not set out what would be acceptable. It does not require a change. It is left open for Noranda to determine what,

in fact, it will submit as part of its Closure Plan. Section 152 does use the word "proposed", where it refers back to subsection 147(7), which is the Closure Plan contemplated by subsection (4) which must have the form and content of financial assurance. The April 5th letter does not say what is acceptable or require a change.

The tribunal noted that section 147 uses the term "required closure plan", but not a proposed closure plan, nor is a proposed closure plan found in the definitions. Mr. Manuel stated that in section 152, the word "proposed" is used, but the provision mentions other sections, being 141(3), 142(2), 144(6), and 149(2), but section 147(7) is clearly referring back to 147(4) and (6), and in particular, (4) is applicable. It states, "shall submit the required closure plan to the Director…". Section 13 of the regulation states that the prescribed manner shall specify the form and amount of the financial assurances to be provided by the proponent in respect of the project.

What the Director did in the April 5th letter is let Noranda know the full amount would have to be provided, but he did not say in what manner. He also would not accept the corporate guarantee. The other matter was accepted, that a certain time could elapse before compliance was required, giving Noranda the opportunity to get the mine to a certain point by a certain date, then they would have to provide financial assurance for that work. This was simply a negotiation process. The Director has not rejected any proposed Closure Plan because there was no proposed form of financial assurance.

The tribunal asked whether the surety bond for 2/3 and written undertaking for 1/3 do not comply with the requirements of section 13 of the Regulation, when it provides that the form should be specified. Mr. Manuel reiterated that the form and amount was not provided because it was a submission seeking approval in advance of being put into the proposed Closure Plan. The tenor of the letter does not coincide with a direction as to what would be acceptable. All that was addressed was the corporate guarantee, and the fact that the full amount must be provided.

Neither counsel could provide any case law on the issue of whether something amounted to a proceeding as opposed to a negotiation.

Findings

The Legislative Requirements

The parties did not address the time lines set out in section 147 in their entirety. Subsection 147(1) provides that notice in writing to the Director containing prescribed information must be given by every proponent of a producing mine or from a mine which is temporarily suspended. Subsection (2) sets out that, upon receipt of the notice by the Director, the Minister determines the time within which the proponent must submit a proposed closure plan. Pursuant to subsection (3), the Director must notify the proponent who has given notice pursuant to subsection (1) in writing of the time determined by the Minister within which the proposed Closure Plan must be submitted. This information, or a clear statement that it did not exist, would have been useful to the tribunal.

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In attempting to view the inception of this process, however it may ultimately be characterized, the tribunal referred to Exhibits 3c and 3d to the appeal on the merits, entitled "Mattabi Rehabilitation Project …Closure Plan Document" and "Geco Rehabilitation Project Closure Plan Document, respectively. The Mattabi document commences with a letter dated October 1, 1993, addressed to Mr. N. Jarvis, Mines Rehabilitation [MNDM]. The first paragraph includes the following information: "…I am pleased to submit eleven copies of the Mattabi Closure Plan Document *in accordance with your letter dated April 3, 1992* and the requirements of the Mining Act." The aforementioned MNDM letter of April 3, 1992 could not be located in the materials, which is unfortunate, as it may have shed some light on this particular point.

Subsection 147(4) sets out that the proponent must submit the proposed closure plan within the period of time set out in subsection (3). It has been contended on behalf of the Director that subsection (4) was not complied with because the parties have operated on an informal basis outside of the statutory scheme.

The tribunal has conducted a cursory analysis of Part VII, as it was at the time the Notice to Require a Hearing was filed. The relevance of this may be of limited application for prospective Part VII appeals, given that the new statutory scheme has taken effect.

Section 139 defines "closure plan" as a "plan prepared in the prescribed manner to rehabilitate a project at any stage of closure and includes the information, particulars, maps and plans prescribed, as well as provision in the prescribed manner of financial assurance to the Crown for the performance of the requirements of the closure plan;". There is no definition for "proposed closure plan", although this term is used repeatedly in Part VII, including clause 152(1)(b), being the appeal provision under which this matter arises. To further complicate or confuse matters, the definitions of "closed out', "temporary suspension" use the term "accepted closure plan", again, which are not defined.

Sections 141 and 142 provide that notice of advanced exploration or mine production be given by the proponent to the Director. Flowing from this is the possibility that the proponent must provide public notice and/or submit a proposed Closure Plan. The project cannot proceed until the Director accepts the Closure Plan and public notice has been given.

Section 143 stands in contradiction to the latter two provisions, where a proponent is required to progressively rehabilitate a site whether or not closure has commenced or the Closure Plan has been accepted. Section 144 allows for the management of closure through compliance with the plan, if applicable and annual reporting. The process for amendments to an existing Closure Plan is also delineated. Section 145 sets out requirements for form and amount of financial assurance. Section 146 provides for rehabilitation inspectors and describes their duties and powers. Section 147 has been described in detail above. Sections 148 and 149 involve abandoned projects, where the Crown may take steps to rehabilitate or cause the lease to be declared void.

A proposed Closure Plan must include all of the prescribed information set out in sections 7 through 17 of O. Reg. 114/91 [plans under 16 and 17 may be requested, but must be prepared]. It is an extensive and comprehensive document. The filing of eleven copies facilitates a one window inter-ministerial review. The regulation itself, however, only uses the term "closure plan" and not "proposed closure plan".

Immediately apparent from this overview of Part VII and O. Reg. 114/91 is that the submission and acceptance of a proposed Closure Plan was anticipated as being a relatively early and comprehensive step in the rehabilitation process, albeit one which could be preceded by the need for ongoing or progressive rehabilitation. The provisions also anticipate prospective changes and annual reporting.

With respect to the Mattabi mine, apparently the letter of April, 1992, referred to above must have set some process in motion. The proposed Closure Plan for Mattabi is dated October 1, 1993, which was apparently followed up with an Appendix III on or about March 2, 1994. Although there is no explanation, the Main Tailings Dam Reconstruction 1995 was reviewed and accepted August 2, 1995. It was, however, not until April 15, 1997, that the review of the initial document was completed, with five pages of comments on additional information required. The letter acknowledged that considerable time had elapsed.

It took three and a half years to complete the review of the initial document, during which time additional documents were either elicited or provided. At this time, an additional addendum was elicited and acknowledged on July 24, 1997. Again, it was not until October 5, 1999, that the proposed Closure Plan was ready for recommendation for acceptance by the Director, with the exception of the outstanding issues on financial assurance, leading to the slide presentations and letter of April 5, 2000.

As for the Geco mine, the Closure Plan document is dated March 1, 1995, with the initial acknowledgement letter being March 23, 1995. The first paragraph of the Geco letter of March 1, 1995, addressed to Mr. Cecil Burns, CET, Mines Rehabilitation Inspector [MNDM] states in part, "…I am pleased to submit eleven copies of the Geco Closure Plan document *in accordance with the requirements of the Mining Act*. Some supporting documents are to follow shortly." There is no mention in the covering letter that the Closure Plan is submitted in response to any letter sent by MNDM. Initial comments were provided on July 4, 1996, resulting in an addendum acknowledged on August 26, 1996. The cost estimates were outstanding on March 13, 1997 and largely accepted April 16, 1997. At that time, the financial assurance issue remained outstanding.

The circulation and revisions took place over a six year period for Mattabi and a two year period for Geco, yet in both cases was not complete, due to the matter of financial assurance being outstanding.

Examining the new provisions for closure, pursuant to the amendments which took effect on June 30, 2000, show significant substantive changes affecting Closure Plans. A proponent is required to file a *certified Closure Plan* or a *proposed Closure Plan*. The nature of both documents has changed considerably from the pre-amendment requirements, not so much in

the overall content, but in the structure in which the content must be presented. Section 11(1) of O. Reg. 240/00, as amended by section 2 of O. Reg. 282/03, requires that a Closure Plan must include at least all of the information in the same sequence as set out in Schedule 2 to the regulation. A certified "Closure Plan" must be accompanied by a certificate signed by the proponent, who has relied upon the necessary professionals in completing the document. Compliance with the **Mining Act**, O. Reg. 240/00 and the Mine Rehabilitation Code of Ontario must also be certified. Certificates are also required from all professionals who examined the Closure Plan project. Calculation of the form and amount of financial assurance involves comprehensive evaluation of the "life of the mine" and its "proven and probable reserves", also taking into consideration the credit rating of the proponent. The difference between the certified and proposed Closure Plans appears to be one of evaluation. The certified Closure Plan is meant to rely on the paid expertise of professionals working in the private sector, while the proposed Closure Plan, although it may have the input of such professionals, is evaluated by the expertise within MNDM, the cost of which must also be borne by the proponent.

The time of acceptance is specified as being either when there is a written acceptance of the proposed Closure Plan or when there is a written acknowledgement from the Director of the certified Closure Plan. There is considerable detail, not discussed here, concerning reporting, changes to either the Closure Plan or to the financial assurance.

For the purposes of this motion, the tribunal has heard no evidence concerning the reasons for the changes to Part VII and the accompanying regulation. Whether they are based on potential time delays of seeking inter-ministerial approval of the pre-June, 2000, Closure Plans or whether the cost to the Director of evaluating the adequacy and appropriateness of the Closure Plans were factors, would be speculative. Once prospective litigation commences under the new regime, undoubtedly, issues will arise. Nonetheless, on the surface, the new scheme has the appearance of dealing in a thorough fashion with Closure Plans which are either likely comprehensive and complete from their initial filing, being those that are certified by the proponent and relevant professionals and those which involve deliberation and addendums, being those which are proposed.

The new scheme has the appearance of incorporating the earlier scheme in a more comprehensive and minutely detailed manner and one which provides the proponent with alternative processes in which to engage towards an accepted or acknowledged Closure Plan. Similarly, with respect to provision for financial assurance, there is a comprehensive and detailed scheme for its calculation, taking into consideration such factors as a prescribed test for the life of a mine, its proven and probable reserves and credit or debt rating by assessment of outside rating agencies, Dominion Bond Rating Service Limited and Moody's Investors Services Inc. being two examples. The financial assurance scheme also discloses several alternatives under which a proponent and project may be assessed which will have an impact on the form of financial assurance which is acceptable.

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Correspondence of the Parties

The words used in the correspondence from officers of MNDM charged with Mine Rehabilitation issues to Noranda are relevant to the issue in this motion. Without reproducing vast excerpts of these documents, the tribunal is satisfied that the highlighting of relevant phrases is of assistance in determining what was occurring.

- In the April 15, 1997 letter involving Mattabi, Gerald Myslik of MNDM wrote, "…We would appreciate receipt of this information within 30 days *in order to keep the Closure Plan process moving under the current regulatory requirements*."

- The MNMD correspondence of October 5, 1999 from Leslie Cooper indicates that that it has completed review of the Addendum and further, "[T]he Closure Plan was submitted under the existing legislation and has been *reviewed under the current process…if this Closure Plan is not accepted prior to the proclamation date,* the Closure plan will be subject to the terms of the amended act…. *Before final acceptance of the Closure Plan, the Director of Mine Rehabilitation must receive financial assurance.*"

- With respect to the Geco Mine, in the letter dated July 4, 1996, from John Robertson of MNDM to Noranda, it states: "The Geco Rehabilitation Project Closure Plan *was submitted under the existing legislation and has been reviewed under the current process*. This letter outlines the items that must be addressed on the basis of the interministry review before recommendation to the Director for the acceptance of the Closure Plan."

- On April 16, 1997, MNDM wrote to Noranda concerning the Closure Cost Estimates, that the review has been completed and outlines the required documents to be encompassed into the accepted Closure Plan. The letter ends with the following: "Prior to the final acceptance of the Closure Plan, financial assurance must be received by the Director of Mine Rehabilitation based on the amounts estimated in your March 1995, cost estimate submission. Financial assurance for the total annual operation, testing and inspection costs should be calculated over a justified period of time and be based on a present value calculation (@3%)."

- On January 27, 2000, the Director wrote that he has reviewed the updated costs for closure, stating, "I have reviewed the financial assurance proposal and find the closure cost estimates to be acceptable."

The Noranda slide presentation on the calculation of financial assurance takes place after January 27, 2000, followed by the letter of April 5, 2000, which is the subject matter of this motion. In this response, the Director does not mention any process which is taking place, nor make mention that the prospective legislative changes which would require a certified Closure Plan, should the proposed Closure Plan not be accepted by June 30, 2000. This letter is confined strictly to the issues outstanding regarding financial assurance and the three items proposed by Noranda.

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In his letter of June 15, 2000, the Director refers to earlier correspondence from MNDM and confirms the date for the new legislative provisions to take place. He quite clearly sets out his position in the second paragraph:

> I wish to reiterate that the Mattabi and GECO closure plans have not been accepted as financial assurance must be provided prior to acceptance of any closure plan. Furthermore, my letter of April 5, 2000 clearly states that neither the amount or form of financial assurance proposed by Noranda to support the closure plan were acceptable to the Director and that the full amount of financial assurance must be provided.

Tribunal Analysis

At all times over the course of the six years in which components of the Mattabi and Geco Mine Closure Plans were being circulated for inter-ministerial review, commented upon and added to through the filing of addenda, MNDM has referred to what has taken place as stages in an ongoing process, one which is tied directly to the pre-June 30, 2000, Part VII **Mining Act**. The tribunal bases this statement on the various MNDM correspondence, examples of which can be seen from the italicized excerpts of letters set out in bullet format above.

The tribunal finds that there is a tacit acknowledgement on the part of MNDM that the original Mattabi and Geco proposed Closure Plans have been submitted and are being processed in contemplation of the Part VII requirements. However, throughout this process, up until the time when the form and amount of financial assurance was finally under discussion, there were never completed proposed Closure Plans which were awaiting acceptance by the Director. Rather, there was a piecemeal evaluation. The initial filings were proposed, but deficient Closure Plans. This was followed by the filing of different components of required Closure Plans, whose purposes were to address those deficiencies raised by MNDM or omitted in the initial documents filed by Noranda.

At the time that the matter of form and amount of financial assurance was under discussion, MNDM acknowledged that all required aspects of the proposed Closure Plans had been adequately addressed by Noranda. Once an acceptable financial assurance was provided, acceptance of the proposed Closure Plan by the Director was going to be recommended by staff charged with overseeing its review.

The tribunal finds that acceptable financial assurance is and has been acknowledged by or on behalf of the Director, as the only matter outstanding before the proposed Closure Plans could be filed for acceptance. That the fracturing of the process took place over the period of six years and two years, respectively, in the tribunal's estimation, does not detract from the fact that MNDM has acknowledged, in much of its correspondence throughout, that it was engaged in a Part VII process with Noranda aimed at the objective of reaching proposed Closure Plans to be filed for acceptance. It does not matter, in the end, why the process took so long and speculation as to the reasons behind the changes to the legislation are irrelevant. The

tribunal notes that at no time did anyone within MNDM indicate in writing that what was taking place was outside or parallel to the Part VII requirements, whose objective was, on the part of the Director, to be in receipt of proposed Closure Plans. All correspondence is indicative that the steps noted were in keeping with the existing statutory process.

Without a doubt, the process which the parties underwent was tortuous, involving voluminous documentation and painstaking inter-ministerial review. A considerable amount of fine tuning took place, as did persuasion on the part of Noranda. At each of the phases of this ongoing process, MNDM Mines Group officials evaluated the content of the components of the proposed Closure Plans. The question arises, at any stage of this ongoing evaluative process, whether changes or additional information would constitute "require[d] changes to the closure plan" as contemplated in subsection 147(7).

The correspondence of MNDM is ambiguous in this regard, in that it acknowledged the submission of the original Closure Plans and acknowledged that there is an ongoing process of review. One letter which is particularly telling is that of April 16, 1997, in relation to the Geco mine, which indicated that when accepted the Closure Plan will include five specified documents which were in existence at that time, were referred to by name and all bear dates which predate the letter in question. This is a clear indication by MNDM of a piecemeal preliminary approval of components of the proposed Closure Plan for the Geco mine.

In referring to the provisions of section 147, the requirements refer to notice by the Director of the period of time specified for the filing of the proposed Closure Plan. The tribunal received no evidence concerning dates by which the proposed Closure Plans for Mattabi and Geco should be filed. However, from the actions of MNDM, the conclusion can be drawn that both initial filings were within the period of time specified. The process which took place thereafter is captured by subsection 147(7). In this regard, all of the letters requiring the filing of addenda or the changes to closure cost estimates meet the criteria of "the Director informing the proponent that the closure plan required under subsection (4) or (6) is acceptable, the Director may by written notice require changes to the closure plan." The only difference is that what the parties are attempting to achieve are two fully completed and vetted proposed Closure Plans for the consideration of the Director.

Turning to the analysis of the April 5, 2000, letter provided by Mr. Hamilton, the tribunal finds that it accepts this analysis. There are three components of financial assurance addressed in this correspondence which have been adequately addressed by Mr. Hamilton as set out in his argument. The issues of capital costs, ongoing water treatment and maintenance costs and the form of financial assurance are addressed. As far as the argument on behalf of the Director that his response does not provide an alternative is concerned, this is a red herring and not persuasive. In the slide presentation, Noranda has proposed to use a surety bond for 66.7 per cent of the value calculated, so that the corporate guarantee is for the balance of 33.3 per cent. The Director's rejection is for that portion of the proposal which deals with a corporate guarantee. The words used by the Director speak to this issue. He stated, "Your proposal also requested that we consider accepting a corporate guarantee for a portion of this amount. As we are unable to legally do so, the full amount of financial assurance must be provided." The Director has not addressed the issue of the surety bond, as this is an acceptable form of financial assurance. This can be seen from the e-mail from Neil Humphrey to Ed Solonyka, dated March 28, 2000:

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- The Mining Act permits the Director to accept financial assurance in many forms (eg: cash, bonds, treasury bills, irrevocable letters of credit, etc);

The wording of clause 152(1)(b) encompasses a proposed Closure Plan as well as an existing Closure Plan. What the Director and Noranda have engaged in is a piecemeal process to perfect the two original Closure Plans submitted. The changes and addenda constitute ongoing changes to the original proposed Closure Plans. This includes the information concerning the form and amount of financial assurance.

Conclusions

The tribunal finds that the letter of April 5, 2000, from the Director to Noranda constitutes required changes to two proposed Closure Plans within the meaning of clause 152(1)(b) and subsection 147(7). Therefore, the appeal will proceed on the basis of hearing the matter pursuant to Part VII of the **Mining Act** as it was prior to amendments which became effective on June 30, 2000.