File No. MA 019-00

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

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INTERLOCUTORY JUDGMENT

UPON hearing from the parties and reading the materials filed;

1. THIS TRIBUNAL DECLARES that the Respondent, the Director of Mine Rehabilitation, has standing as a party to this appeal, to make representations and to produce evidence on the preliminary jurisdictional question of whether there is a proper appeal.

Reasons for this Interlocutory Judgment are attached.

DATED this 14th day of May, 2003.

Original signed by L. Kamerman

L. Kamerman
MINING AND LANDS COMMISSIONER

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REASONS

Background

On April 5, 2000, Dr. W.R. Cowan, the Director of Mine Rehabilitation for the Ministry of Northern Development and Mines (the "Director") issued a letter addressed to Mr. Vern Coffin, Director for Reclamation, Noranda Inc. ("Noranda"). This correspondence sets out the Director's willingness to forgo the posting of financial assurance for the remaining project costs at each of the Mattabi and Geco mine sites, unless completion is delayed beyond December 31, 2002. He stated that the calculation of Net Present Value (NPV) for the costs must be as stated in an Order-In-Council referred to but not named. The interest must be that used for the calculation of interest for cash deposits as being equal to the **Province of Ontario Saving Office's** daily interest rate in their Trillium Account. This account has averaged 6.1 percent interest since its introduction in January 1986. With inflation for the corresponding period, having been 2.9 percent, this resulted in an effective interest rate of 3.2 percent. Dollar figures are given for long-term water treatment and maintenance costs. The Director also informed Noranda that he was not in a position to accept Noranda's offer of a corporate guarantee for a portion of the financial assurance. [Note: The new owner of the Province of Ontario's Savings Office is Desjardins Credit Union Inc.]

On May 2, 2000, a Notice to Require Hearing Under Part VII of the **Act** [**Mining Act**] was filed by Mr. Douglas Hamilton, counsel for Noranda. On May 9, 2000, the Director wrote to the Office of the Mining and Lands Commissioner (the "Commissioner" or the "tribunal"), setting out that Noranda is appealing the Director's decision concerning financial assurance for water treatment costs at their Mattabi and Geco mine sites.

On May 11, 2000, Mr. Hamilton wrote to Mr. Daniel Pascoe, Registrar of the tribunal. Noranda was in possession of only the letter of April 5, 2000. As such, it was not in a position to know the basis for the decision made by the Director or the evidence upon which it was made. Accordingly, Mr. Hamilton asked that the usual Order to File not be issued but instead that the Director be required to first produce the material upon which he had relied to make his decision in the April 5, 2000, letter. The Order to File was issued accordingly, setting out that the Director file certain information contained in five subparagraphs. Noranda was then to file materials upon which it was to rely on, followed by the Director filing of those materials upon which he relied upon.

Filed as part of the submissions on August 16, 2000, on behalf the Director (Ex. 4, Tab A) was the following:

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> The premise of part B of Noranda's submission is that the Director's April 5 letter required changes to the closure plans such as to constitute the legal basis for an appeal pursuant to Sections 147(7) and 152(1)(b) of the pre-June 30, 2000 version of Part VII. MNDM denies that this was the intention or the legal effect of the Director's April 5 letter and asserts that there is no proper legal basis for this appeal.

On September 8, 2000, Mr. Hamilton requested an appointment for a preliminary motion concerning the legal basis for Noranda's appeal.

Appearances

This matter was heard in the Courtroom of the Mining and Lands Commissioner (the "Commissioner" or the "tribunal"), 24th floor, 700 Bay Street, Toronto, Ontario, commencing on the 23rd day of August, 2000. Noranda Inc. was represented by Mr. Douglas Hamilton and Mr. Matthew Taylor. The Director (the "Director" or "MNDM") was represented by Mr. John Norwood.

Adjournment

There was a lengthy adjournment, ostensibly to permit Mr. Norwood to seek instructions at the conclusion of the presentation of Noranda's motion, after which the parties attempted repeatedly to work out a mutually acceptable solution. Upon failure to arrive at an acceptable solution, the matter was reconvened by telephone conference call on the 5th day of September, 2002, to determine the manner in which to proceed. Mr. Hamilton appeared for Noranda and Mr. Dennis Brown, of the Ministry of the Attorney General, appeared for the Director. Mr. Norwood was also in attendance, also on behalf of the Director, being part of seconded legal services with the Ministry of Northern Development and Mines.

The hearing of the motion was reconvened on November 30th, 2002, with Mr. William J. Manuel and Mr. Norwood appearing for the Director and Mr. Peter Brady attending on behalf of Noranda.

Context

Although not having a bearing on how this matter will be determined, the dates of the Director's letter, April 5, 2000 and the Notice to Require Hearing, May 2, 2000, both pre-date changes to Part VII of the **Mining Act**, which became effective on June 30, 2000. The relevant provisions are set out:

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> **147.** (7) Prior to 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.
>
> **152.** (1) Where the Director,
>
> (b) requires changes to either an existing or proposed closure plan under subsection 141(3), 142(2), 144(6), 147(7) or 149(2);
>
> the proponent may appeal the Director's requirement, order or declaration to the Commissioner, if within thirty days of receiving the notice of the Director requiring the changes or proposed closure plans referred to in clause …(b)…., the proponent serves the Director with the prescribed notice requiring a hearing before the Commissioner, and within thirty days of being served, the Director shall refer the matter to the Commissioner for hearing.

After June 30, 2000, there is no appeal from the requirement for changes to an existing or proposed closure plan. The new provisions provide for appeal from an order requiring changes to a certified closure plan.

Submissions

On October 23, 2000

Mr. Hamilton spoke initially for Noranda, after which Mr. Taylor took over. With respect to the standing of the Director in connection with the motion, Mr. Hamilton submitted that the Director has improperly challenged the jurisdiction of the Commissioner. He submitted that the Director has no standing to proceed in the determination of the preliminary jurisdictional question as to whether there is a proper appeal. Related to this first issue, but not heard in connection with the motion, is whether the Director should be able to call evidence.

Mr. Hamilton characterized the issue under consideration as a fundamental preliminary issue. So fundamental in fact that it follows that the Director should not even make submissions on whether he can be heard on this preliminary issue of challenge to the tribunal's jurisdiction. However, Mr. Hamilton indicated that his client was prepared to waive argument and to allow the Director to be heard. In response to a question from Mr. Norwood, Mr. Hamilton clarified that the question is not whether there is authority for the appeal, but rather, it is whether the tribunal can hear this particular appeal.

Mr. Taylor, taking over from Mr. Hamilton, stated that the point raised by Mr. Norwood leads to the question of how one defines jurisdiction. The question leads to the position that there is a factual issue to be resolved. This serves as a trigger as to whether the tribunal has a legal right to hear the appeal. The factual determination is the jurisdictional decision which must be made.

Clause 152 (1) (b) [R.S.O. 1990, c. M.14] was read into the record.

Mr. Taylor submitted that the appeal and the service of notice by the proponent is not actually an optional right. The issue raised by the Director is essentially whether the factual pre-conditions for an appeal have taken place, namely whether there has been an actual requirement from the Director that changes be made to an existing or proposed Closure Plan. This can be coined as either a question of authority or jurisdiction. However, underlying the question is the factual determination of whether the tribunal has the legal right to hear the matter. It is the Director's position that the factual events which give rise to an appeal have not occurred or the pre-conditions for jurisdiction have not been met. Therefore, there is no proper legal basis upon which to appeal. Essentially, the challenge is not to the Commissioner's jurisdiction but merely as to whether the facts which have occurred give rise to jurisdiction.

However, in Noranda's submission, the decision as to whether the pre-conditions for jurisdiction have been met is one for the tribunal to make and not the Director. Further, it is a jurisdictional decision which sets out a critical, preliminary determination for the tribunal. Mr. Taylor further submitted that any submissions by the Director in connection with this issue are wholly inappropriate as to jurisdiction.

Referring to a decision of the Federal Court of Appeal in **Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Association** (1988) 30 Admin. L.R. 277 (F.C.A.), Mr. Taylor outlined the basic principle of this case where there is a fact-finding body from whom there is a right of appeal to an appellate body. In administrative law generally, and in this case specifically, it is inappropriate for the Director to make submissions with regard to the jurisdiction of the Commissioner or the right of the Commissioner to hear the appeal.

The case involved proceedings brought by the Canadian Pilots' Association before the Canada Labour Board. In the course of its investigations, the Board ordered CP, the airline, to file certain information and documents. CP brought a judicial review and the Pilots moved to quash. The Board sought to be heard on the motion. The Federal Court of Appeal had to determine the preliminary issue of whether to grant standing to the Board to make representations. The Court stated:

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> On the hearing of the motions to quash, counsel for the board sought to make representations. We indicated, in our view, this did not seem to be the type of matter in which standing should be granted to the tribunal whose order is under attack. After hearing counsel for the board on the question of his right to be heard, we confirmed our preliminary view and denied him standing.
>
> While one may recognize the interest, and therefore the standing, of a tribunal to make representations on the issue of its own jurisdiction in the narrow sense, it can have no such interest in questions relating strictly to the jurisdiction of this Court to review the tribunal's orders. There is a strong public interest to be served in refusing to a tribunal to take sides in a court battle between parties to a proceeding currently pending before it.

Mr. Taylor stated that the Court recognized a distinction in this case between the right of a tribunal to make submissions on its own jurisdiction and the right to make representations on the appeal tribunal's jurisdiction. In the case before the Commissioner, the Director is asserting that the Commissioner has no right to hear this appeal; that it is premature and that there hasn't been a triggering event which is necessary in order for the Commissioner to have the right to hear it.

The tribunal sought clarification as to whether a distinguishing factor between this case and the one cited is that the Director is named as a party to an appeal under clause 152(1)(b). Mr. Taylor responded that the cases will show that the issue is not one of whether the Director is properly a party, where the status is clear on an outright appeal. The real principle is not one of who is a party, but of the propriety of a lower tribunal or court making submissions to a higher tribunal about that tribunal's right to hear the case.

The Northwestern Utilities Limited and The Public Utilities Board of the Province of Alberta v. The City of Edmonton, [1979] 1 S.C.R. 684 is the leading authority in cases such as this. **Northwestern Utilities** involved the company, having applied to the Alberta Public Utilities Board for an order for rate increase. The Board, which derived its jurisdiction from the **Public Utilities Board Act**, granted an interim increase and the City of Edmonton appealed to the Supreme Court of Alberta. The relevant part of the proceedings was that the Board sought to participate in the court proceedings. The case makes reference to the fact that the **Act** did entitle the Board to be heard upon the argument of an appeal. Mr. Taylor submitted that this is similar to the situation with the Director in the case before the tribunal. Excerpts from the judgement of Estey J., at pages 708 and 709, were read into the record:

Section 65 no doubt confers upon the Board the right to participate on appeals from its decisions, but in the absence of a clear expression of intention on the part of the Legislature, this right is a limited one. The Board is given *locus standi* [the right to participate] as a participant in the nature of an *amicus curiea* [friend of the court] but not as a party. That this is so is made evident by s. 3(2) of *The Public Utilties Board Act* which reads as follows:

> The party appealing shall, within ten days after the appeal has been set down, give to the parties affected by the appeal or the respective solicitors by whom the parties were represented before the Board, and to the Secretary of the Board, notice in writing that the case has been set down to be heard in appeal, and the appeal shall be heard by the court of appeal as speedily as practicable.

Under s. 63(2) a distinction is drawn between "parties" who seek to appeal a decision of the Board or were represented before the Board, and the Board itself. The Board has a limited status before the Court, and may not be considered as a party, in the full sense of that term, to an appeal from its own decisions. In my view, this limitation is entirely proper. This limitation was no doubt consciously imposed by the Legislature in order to avoid placing an unfair burden on an appellant who, in the nature of things, must on another day and in another cause again submit itself to the rate fixing activities of the Board. It also recognizes the universal human frailties which are revealed when persons or organizations are placed in such adversarial positions.

This appeal involves an adjudication of the Board's decision on two grounds both of which involve the legality of administrative action. One of the two appellants is the Board itself, which through counsel presented detailed and elaborate arguments in support of its decision in favour of the Company. Such active and even aggressive participation can have no other effect than to discredit the impartiality of an administrative tribunal either in the case where the matter is referred back to it, or in future proceedings involving similar interests and issues or the same parties. The Board is given a clear opportunity to make its point in its reasons for its decision, and it abuses one's notion of propriety to countenance its participation as a full-fledged litigant in this Court, in complete adversarial confrontation with one of the principals in the contest before the Board itself in the first instance.

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Mr. Taylor stated that an analogy can be drawn between the **Northwestern Utilities** case and this one. All of the evidence the tribunal requires to reach a decision is found in the record, namely in the form of the Director's letter which gave rise to this proceeding. Regarding his testimony, the Director has already had the opportunity to set out his reasons. According to the Supreme Court of Canada, it is inappropriate for that lower decision making body to defend its decision at the appellate level. Returning to the **Northwestern Utilities** case, at page 709, the SCC continues:

> It has been the policy in this Court to limit the role of an administrative tribunal whose decision is at issue before the Court, even where the right to appear is given by statute, to an explanatory role with reference to the record before the Board and to the making of representations relating to jurisdiction.

Mr. Hamilton submitted that the foregoing paragraph stands for the proposition that the role of an administrative tribunal in an appeal is limited to an explanatory role with respect to the record, and limited to making representations as to its own jurisdiction. This does not include representations relating to the appellate tribunal's jurisdiction. By attempting to make argument concerning the Commissioner's jurisdiction as well as arguing that there is no proper legal basis for the appeal, the Director has exceeded the two exceptions set out by the Supreme Court.

At pages 709 and 710 of its decision in **Northwestern Utilities**, the Court quotes from a decision of Aylesworth, J. in **International Association of Machinists v. Genaire Ltd. and Ontario Labour Relations Board** [1958], 18 D.L.R. (2d) 288, wherein he states:

> Clearly upon an appeal from the Board, counsel may appear on behalf of the Board and may present argument to the appellate tribunal. We think in all propriety, however, such argument should be addressed not to the merits of the case as between the parties appearing before the Board, but rather to the jurisdiction or lack of jurisdiction of the Board. If argument by counsel for the Board is directed to such matters as we have indicated, the impartiality of the Board will be the better emphasized and its dignity and authority the better preserved, while at the same time the appellate tribunal will have the advantage of any submissions as to jurisdiction which counsel for the Board may see fit to advance.

Mr. Hamilton submitted that to the extent that the Director makes submissions with respect to either of the merits of the motion or with respect to the jurisdiction of the appellate body, he has stepped outside his bounds. The Director has no

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legal right to make a submission on whether his letter constitutes an Order of the Director pursuant to provisions of sections 147 and 152 of the **Act**. Asked for clarification as to the limits of the Director's rights on an appeal, Mr. Hamilton stated that the Director would have a limited role in the hearing on the merits of the appeal, as to the quantity of financial assurance that may be required.

The final decision of **Re Bambrick** (1992), 10 Admin. L.R. (2d)112 (Newf. Sup. Ct.) involves an appeal regarding entitlement to benefits by a worker from the Workers' Compensation Commission to the Workers' Compensation Appeal Tribunal. At the appeal, the Commission was present and represented by an officer and counsel. The worker objected to the Commission having any role or status at the appeal before the tribunal, but the tribunal granted standing to the Commission. The worker appealed to the court, which overruled the tribunal's decision on standing. It ruled that the Commission had no standing before the tribunal and had no right to make submissions.

Re Bambrick deals with the situation where there is an appeal from one administrative body to another. It applies the same principal as in the case of a judicial review from an administrative decision. At page 136 the Court states:

> Nevertheless, I am not convinced that the principles behind the position which has so clearly and uniformly been adopted by courts in reviewing the decisions of inferior tribunals are properly restricted only to the process of judicial review of appeal before a superior court, as distinct from a reviewing tribunal within the administrative framework itself. The same principles should apply.

Effectively the court has said that the principles are the same and that a lower tribunal is not entitled to make legal submissions to a higher tribunal or court with regard to the right of that higher tribunal or court to hear a matter. The lower tribunal has no jurisdiction and no standing regardless of whether the appeal is from a lower tribunal to a higher tribunal or from a lower tribunal to a court. The operation of the rule must be the same. As found in the general principles in **Northwestern Utilities**, the attempt by a lower tribunal to make submissions on jurisdiction of the appellate tribunal serves to undermine the propriety of the system.

Mr. Taylor discussed the right of the Director to testify as to what he meant by his April 5 letter. In **Ermina v. Minister of Citizenship and Immigration** (1988), 167 D.L.R. (4th) (F.C.T.D.) the applicant was declared a convention refugee, but no reasons were given by the Immigration and Refugee Board. Later it was determined that the application's birth certificate had been altered. The Minister applied to have the

earlier decision reconsidered and vacated. The applicant attempted to call as a witness the chair of the panel who granted her refugee status. The chair was in fact willing to testify or give an affidavit, but the panel refused to hear from her. The Federal Court then heard and dismissed an appeal, and affirmed the decision that the chair would not testify. At page 767, Tremblay-Lamer J. referred to **Agnew v. Ontario Association of Architects** (1987), 64 O.R. (2d) 8 Div. Ct., which sets out the principles of why it is inappropriate for an administrative tribunal member to testify at an appellate level with respect to the decision.

> The authorities do not make it clear whether this general rule applies equally to members of administrative tribunals. In logic there is no reason why it should not. The mischief of penetrating the decision process of a tribunal member is exactly the same as the mischief of penetrating the decision process of a judge.
>
> Apart from the practical consideration that tribunal members and judges would spend more time testifying about their decisions than making them, their compellability would be inconsistent with any system of finality of decisions. No decision and *a fortiori* no record, would be really final until the judge or tribunal had been cross-examined about his decision. Instead of review by appeal or extraordinary remedy, a system would grow up of review by cross-examination.

To the extent that the Director is entitled to testify at this hearing, Mr. Taylor submitted that that there would be cross-examination, which the Divisional Court says is completely inappropriate. The Court goes on to state:

> In this case of a specialized tribunal representing different interests the mischief would be even greater because the process of discussion and comprise among different points of view would not work if stripped of its confidentiality.

Mr. Taylor submitted that the same would apply to Ms. Cooper and Mr. Solonyka, who participated in the decision process. Returning the decision, at paragraph 10:

> [10] I accept the reasoning of Campbell J. in *Agnew v. Ontario Association of Architects* and find that it applies equally to the issue of competency. To permit a panel member to voluntarily testify would defeat the whole concept of judicial immunity. In the present matter, for example, the applicant would presumably ask what other evidence the

> panel had before it, when making its decision. This clearly opens the door to a re-examination of the panel's decision, particularly in the event of cross-examination. Decisions must be final and subject to review in the ordinary channels.

Agnew involved a question of compellability, whether an adverse party could subpoena a tribunal member. The matter before the Commissioner is slightly different in that the Director and the others are voluntarily wishing to testify. Looking to paragraph 8 of **Ermina**:

> [8] The applicant agrees that the Board members are not compellable but submits that they are competent to testify. This argument fails. It would be contrary to the administration of justice and would undermine the integrity of the system to find otherwise. The doctrine of judicial immunity applies, in my opinion, both to the compellability and the competency of members of administrative tribunals.

Mr. Taylor stated that, following the principles of the cases referred to, allowing a tribunal member to testify would undermine the judicial system.

Agnew involved a judicial review in which an unsuccessful applicant to the Experience Requirements Committee of the Ontario Association of Architects wanted to subpoena the members of the Committee to testify about their decision that he required more experience before he could be licensed. The issue in the case was whether the subpoenas were appropriate or should be quashed. At page 14 the court says:

> The mischief of penetrating the decision process of a tribunal member … is exactly the same as the mischief of penetrating the decision process of a judge.

MacKeigan v. Hickman (1989), 61 D.L.R. (4th) 688 (S.C.C.) which has markedly different facts, involved an attempt to subpoena judges of the Court of Appeal by a public inquiry under the **Public Inquiries Act** in Nova Scotia. The judges objected. The case was included based upon the principles of judicial independence and judicial immunity, as discussed in **Ermina** and **Agnew**. In the current appeal, the Director is in effect a tribunal with ongoing past, present and future dealings with Noranda. He is taking an adversarial position in seeking to testify before the Commissioner on the very same issues that may well be subsequently back before him, which would undermine his appearance of impartiality.

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Mr. Manuel commenced by stating that two procedural issues are in dispute. Does the Director have standing to make submissions on the motion as to jurisdiction and can he call evidence on the jurisdictional issue which he raised? By adopting these points raised by the Director, Noranda's actions have had the effect of taking matters off the rails, which was unfortunate because this was really the Director's motion. The Director's position is that there is no decision and therefore no statutory basis to hear Noranda's appeal.

This motion is the Director's and he should have carriage of it. The Director has expressly been made a party to these proceedings by statute. Noranda has misconstrued the status of the Director. There are only two parties to this proceeding, namely the Director and Noranda. This is not a case where there is a third party tribunal trying to interject itself into a dispute between two parties. Everything turns on this point.

The preliminary issue of whether there is an appeal was raised by the Director, as a party to these proceedings. If there is no jurisdiction, there can be no hearing on the merits. All of the cases raised by Noranda deal with situations where the tribunal in issue was not a party and the issue was to what degree of standing as a non-party was the tribunal entitled to.

Subsection 152(9) of the **Mining Act** specifically states that the Director is a party. In the absence of anything in the statute cutting down the rights of the Director, he has all of the rights of any other party including Noranda. There is nothing in the statute which would allow the Commissioner to distinguish between the rights accorded to the Director as a party and the rights accorded to Noranda as a party. A review of relevant portions of the statute confirm this. There is nothing limiting the rights of the Director as a party to these proceedings.

The **Statutory Powers Procedure Act** provides that, "A party to a proceeding may … call and examine witnesses and present evidence and submissions…" This is exactly what the Director is seeking to do.

Mr. Manuel submitted that a party is entitled to participate fully in the hearing. Any restriction of a party's right to participate would result in loss of jurisdiction by the Commissioner to continue with this hearing. Noranda is suggesting that there needs to be only one party before the Commissioner on this preliminary jurisdictional issue, with no one in opposition. Such a situation cannot be allowed to exist.

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Referring to **Kane v. University of British Columbia**, [1980] 1 S.C.R. 1105 at pages 6 and 7 of 12 of the Quicklaw version, points 4 and 5 were read into the record. The tribunal's copy is highlighted starting at the second point

> 2. As a constituent of the autonomy it enjoys the tribunal must observe natural justice which, as Harman L.J. said, [Ridge v. Baldwin[1962] 1 All E.R. 834 (C.A.)], at p. 850] is only "fair play in action". In any particular case, the requirements of natural justice will depend on "the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter which is being dealt with, and so forth": per Tucker L.J. in Russell v. Duke of Norfolk[[1949] 1 All E.R. 109], at p. 118. To abrogate the rules of natural justice, express language or necessary implication must be found in the statutory instrument.
>
> 3. ….
>
> 4. The tribunal must listen fairly to both sides, giving the parties to the controversy a fair opportunity for correcting or contradicting any relevant statement prejudicial to their views.
>
> 5. It is a cardinal principle of our law that, unless expressly or by necessary implication, empowered to act ex parte, an appellant authority must not hold private interviews with witnesses (de Smith Judicial Review of Administrative Action (3rd ed.) 179) or, a fortiori, hear evidence in the absence of a party whose conduct is impugned and under scrutiny. Such a party must, in the words of Lord Denning in Kanda v. Government of the Federation of Malaya [[1962] A.C. 322], at p. 337, "… know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them. … Whoever is to adjudicate must not hear evidence or receive representations from one side behind the back of the other." In Errington v. Ministry of Health [[1935] 1K.B. 249], Greer L.J. held that a quasi-judicial officer must exercise powers in accordance with the rules of natural justice, and must not hear one side in the absence of the other.

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> If .. he takes into consideration evidence which might have been, but was not, given at the public inquiry, but was given ex parte without the owners having any opportunity whatsoever to deal with that evidence, then it seems to me that the confirming Order was not within the powers of the Act. (p. 268)

The principle was summarized in the headnote in these words:

> > If the Minister holds a private inquiry to which the owners are not invited or takes into consideration ex parte statements with which the owners have had no opportunity of dealing he is not acting in accordance with correct principle of justice….

> In the early case of Re Brook and Delcomyn [(1864), 16 N.B.R. (N.S.) 403], Erle C.J. came to the conclusion that the law had been violated when an arbitrator brought before the umpire evidence which had never been communicated to the other arbitrator and which, consequently, one of the parties never had an opportunity of meeting by contradictory evidence. Erle C.J. referred to this as "not a point of form" but a matter of substance, and "one of the last and deepest importance".

The effect of Noranda's position is to co-opt the Director's issue and have the Commissioner deal with it to the exclusion of the Director.

Referring to **International Woodworkers of America, Local 2-69 v. Consolidated-Bathurst Packaging Ltd.**, [1990] 1 S.C.R. 282 (S.C.C), at page 12 of 37 (Quicklaw):

> 22. The full Board hearing in this case is said to violate the principles of natural justice in two respects: first, that members of the Board who did not preside at the hearing participated in the decision; and second, that the case is decided at least in part on the basis of materials which were not disclosed at the hearing and in respect of which there was no opportunity to make submissions.
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> 23. Although these are distinct principles of natural justice, they have evolved out of the same concern: a party to an administrative proceeding entitled to a hearing is entitled to a meaningful hearing in the sense that the party must be given an opportunity to deal

> with the material that will influence the tribunal in coming to its decision, and to deal with it in the presence of those who make the decision. As stated by Crane in his case comment on the Consolidated-Bathurst decision (1988), 1 C.J.A.L.P. 215, at p. 217L "The two rules have the [page 299] same purpose: to preserve the integrity and fairness of the process." In the first case the party had had no opportunity to persuade the tribunal as to the impact of material obtained outside the hearing.

Contrary to the position taken by Noranda, Mr. Manuel submitted that the Director cannot be excluded from the hearing. To do so would be fatal to the proceedings and there is no basis in law to do so.

Referring to **Kampman v. Canada,** F.C.A. [1993] F.D.J. No. 66 at page 3 of 3 (Quicklaw):

> The denial of natural justice in the present case emerges from the fact that the applicant was not afforded the opportunity to be present at the hearing so as to testify on her own behalf. It is not for this Court to speculate whether her testimony would have advanced her case for, as was laid down by the Supreme Court of Canada in Cardinal et al. v. Director of Kent Institution, [1985] 2 S.C.R. 643, the denial of a right of a fair hearing itself renders a decision invalid. This principle is found in the words of LeDain J., at page 661:
>
> > …I find it necessary to affirm that the denial of a right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision. The right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have. It is not for a court to deny that right and sense of justice on the basis of speculation as to what the result might have been had there been a hearing.

In **People First of Ontario v. Porter, Regional Coroner Niagara** 6 O.R. (3d) 289 (C.A.), the issue involved limiting the rights of those who have a right to participate in the hearing. The **Coroners Act** limits the rights of persons who are given standing being entitled to cross-examine on matters which affected their interest. Health

records of certain individuals were going to be kept from some of the parties. Without provisions in the statute, the Court of Appeal was very clear that to limit their right to participate in the hearing would result in the denial of natural justice. The Court agreed with the position taken that those denied parties needed to see the records in order to fully exercise the right that they had to cross-examine. The Court held that to deny them the ability to fully exercise their rights would result in the denial of natural justice and was a jurisdictional error. Mr. Manuel submitted that this is the correct law which applies to this situation.

Mr. Manuel stated that in none of the cases submitted by Noranda was the entity in issue given party status. On that basis alone, he submitted that all of the cases have absolutely no application.

Canadian Pacific Airlines is a case involving a dispute between the company and the Canadian Pilots Association. Where two parties are adverse in interest, all of the issues which affect their interests will be raised because it is in their best interests to do so. In these situations the Courts have recognized that the tribunals may have a particular interest in preserving their jurisdiction because they may take a longer view of the issue than the parties may bring to a particular hearing. It is for this reason that the lower tribunal is given limited standing. However, the tribunal is not a party. There is no case in which a tribunal is given party status but then limited in the role which it exercises. There is no concept in law which would allow the tribunal to do as Noranda is asking, namely to co-opt the Director's issue and have it dealt with to the exclusion of the Director.

The rationale for limiting the role of a tribunal in an appeal is found at page 280:

> …There is a strong public interest to be served in refusing to a tribunal the right to take sides in a court battle between parties to a proceeding currently pending before it.

In contrast to all of those tribunals, which are adjudicative in nature, the Director's decision-making capacity is not adjudicative but administrative. There is a right of appeal granted to Noranda from this administrative decision in which the Director is expressly recognized as a party obviously adverse in interest to Noranda. Otherwise there would be no party in opposition to the appeal. No one but the Director can assume this role which is why he is given standing as a party. Otherwise, there would in essence be no appeal, because the Commissioner would not hear the other side. Mr. Manuel submitted that the cases provided by Noranda are simply not on point. The **Mining Act** recognizes the unique characteristic of the Director. It expressly gives him standing as a party for which there is a reason.

The same is true of the **Northwestern Utilities** case. The parties in opposition in that case were the city and the utility. The Board was given the right to participate on appeal from its decision. At page 688, the point is well exemplified:

> As for the participation of The Public Utilities Board in these proceedings, there is no doubt that s. 65 of *The Public Utilities Board Act* confers upon the Board the right to participate on appeals from its decisions, but in the absence of a clear expression of intention on the part of the Legislature, this right is a limited one. The Board is given *locus standi* as a participant in the nature of an *amicus curiae* but not as a party. That this is so is made evident by s. 63(2) under which a distinction is drawn between "parties" who seek to appeal a decision of the Board or were represented before the Board, and the Board itself.

Mr. Manuel submitted that there is no such distinction in the case involving the Director, who is a full party.

Re Bambrick (1992), 10 Admin. L.R. (2d) 112 (Newf. Sup. Ct.) involved an attempt by the Workers' Compensation Commission to attain or achieve status at an appeal hearing before the Appeal Tribunal. This is in contrast to the Director who is given status by statute. Mr. Manuel submitted that the Commissioner cannot limit the participation of the Director. There is no basis in law to do so. The Director is not asking for status. He is given status by the statute.

The cases referred to at Tabs 5, 6 and 7, **Ermina v. Minister of Citizenship and Immigration**, **Re Agnew and Ontario Association of Architects**, and **MacKeigan v. Hickman** all deal with adjudicative entities, judicial officers and administrative officials who are put into an adjudicative role. When the Commissioner makes a decision, reasons are given. There will be a record, evidence filed, testimony heard. The record will be complete and if there were an appeal or a judicial review.

The same is not the case concerning the decisions of the Director. The Director must call evidence on all the issues raised, just as Noranda must do. The hearing is *de novo* **[the tribunal notes that according to subsection 153(9), section 113, which provides for a hearing *de novo* does not apply to these proceedings]** to which the Director is a party. He is not analogous in any way to a judicial or quasi-judicial officer who has decided a dispute between two parties. He is given an administrative statutory power to make a decision and then there is a right to appeal from that decision, which is what the Commissioner is dealing with. On that appeal, the Director is a party.

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Even taken Noranda's position, there are limits to that position and to its application. One such limitation is found in **Federation of Women Teachers' Associations of Ontario v. Ontario (Human Rights Commission)** (1988), 56 D.L.R. (4th) 721 at 741 (page 17 of 22, Quicklaw):

> F.W.T.A.O. has argued that the Commission has improperly conducted itself at this proceeding by arguing the merits of the application.
>
> Estey . in Re Northwestern Utililites and City of Edmonston (1978), 89 3 D.L.R. (3d) 161 at pp. 178 –79, [1979] 1 S.C.R. 684, 12 A.R. 449 (S.C.C.), states:
>
> > It has been the policy in this Court to limit the role of an administrative tribunal whose decision is at issue before the Court, even where the right to appear is given by statute, to an explanatory role with reference to the record before the Board and to the making of representations relating to jurisdiction: vide Labour Relations Board of New Brunswick v. Eastern Bakeries Ltd. et al. (1960), 26 D.L.R. (2d) 332, [1961] S.C.R. 72, 45 M.P.R. 96; Labour Relations Board of Saskatchewan v. Dominion Fire Brick & Clay Products Ltd., [1947] 3 D.L.R. 1 [1947] S.C.R. 72, 45 M.P.R. 95; Labour Relations Board of Saskatchewan v. Dominion Fire Brick & Clay Products Ltd., [1947] 3 D.L.R. 1, [1947] S.C.R. 336.
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> > Where the right to appear and present arguments is granted, an administrative tribunal would be well advised to adhere to the principles enunciated by Aylesworth, J.A., in Int'l Ass'n of Machinists v. Genaire Ltd. et al. (1958), 18 D.L.R. (2d) 588 at pp. 589-90, [1959] 0.W.N. 149 sub nom. R. v. Ontario Labour Relations Board, Ex. p. Genaire Ltd.:
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> > "Clearly upon an appeal from the Board, Counsel may appear on behalf of the Board and may present argument to the appellate tribunal. We think in all propriety, however, such argument should be addressed not to the merits of the case as between the parties appearing before the Board, but rather to the jurisdiction or lack of jurisdiction of the Board. If argument by counsel for the Board is directed to such matters as we have indicated, the impartiality of the Board will be better emphasized and its dignity and authority the better preserved, while a the same time the appellate tribunal will have the advantage of any submissions as to jurisdiction which counsel for the Board may see fit to advance." 19

> Where the parent or authorizing statute is silent as to the role or status of the tribunal in appeal or review proceedings, this Court has confined the tribunal strictly to the issue of its jurisdiction to make the order in question: vide Central Broadcasting Co. Ltd. v. Canada Labour Relations Board et al. (1976), 67 D.L.R. (3d) 538, [1977] 2 S.C.R. 112, 9 N.R. 345.
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> In the sense the term has been employed by me here, "jurisdiction" does not include the transgression of the authority of a tribunal to adhere to the rules of natural justice. In such an issue, when it is joined by a party to proceedings before that tribunal in a review process, it is the tribunal which finds itself under examination. To allow an administrative board the opportunity to justify its action and indeed to vindicate itself would produce a spectacle not ordinarily contemplated in our judicial traditions.
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> The very nature of its mandate as an investigative body indicates that the Commission is a very different authority than the Public Utilities Board in Northwestern Utilities. The latter is a tribunal empowered to fix rates for public utilities. Its decision is ***[page 742]*** fully understood from the reasons for decision and the record. The Commission, on the other hand, investigates complaints alleging discrimination and decides what consequential action should be taken. On review, the Commission must necessarily explain its conduct of the investigation and be allowed to make submissions with regard to its conduct with reference to the record. Without these submissions a reviewing court could not fully appreciate the nature of the investigation nor the resulting decision. I am not persuaded that the Commission in the circumstances of this case has acted improperly before this court.

Mr. Manuel submitted that there are exceptions to what was discussed by the court, such as when the Legislature makes the Director a party. The Legislature recognized that, in the case of the **Mining Act**, the role of the Director is very particular. The nature of its role is very different from that of the Public Utilities Board. There are no reasons for decision. It will be the Commissioner who issues a decision in this matter. It is the Director who is given the statutory duty to investigate the closing of this mine and determine what appropriate measures need to be taken to protect the public, the envi-

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environment and so on. The Director is required to explain why he acted as he did. He must be allowed to explain his conduct. Without hearing from the Director, the Commissioner could not appreciate what has taken place.

Therefore, even if the law is as Noranda says, there is a recognized exception for the reasons set out. The Director is not asking for the right to participate. He already has that right. Noranda is attempting to have those rights taken away. There is no authority in law which would allow the Commissioner to do that.

The last case referred to by Noranda is **Northwestern Utilities**, where at page 6 of 6 (Quicklaw) the Federal Court of Appeal states:

> Where the parent or authorizing statute is silent as to the role or status of the tribunal in appeal or review proceedings, this Court has confined the tribunal strictly to the issue of its jurisdiction to make the order in question.

The statute is not silent. There is no ambiguity regarding the role of the Director. The statute makes it clear that he is a party, so that he is entitled, in Mr. Manuel's respectful submission, to call evidence on the motion and to make submissions.

Reply of Mr. Brady

Noranda does not disagree with Mr. Manuel's emphatic insistence that the Director is a party to these proceedings. However, one needs to distinguish where the proceedings actually commence. Mr. Manuel is correct that the Director has the right to call evidence and make submissions to the *de novo* hearing, all of which Mr. Brady agrees with, once the hearing begins. There is agreement that the Director is a party once the hearing begins.

This situation here is that the Director has issued a decision to Noranda on an issue and Noranda has acted upon its statutory right to appeal that decision. It is interesting that Mr. Manuel has affirmed that in his submissions. However, what the Director has done is come before the Commissioner and said that she has no jurisdiction to hear that appeal on a very interesting basis, namely that it isn't a decision.

This proceeding is being referred to as a motion. Mr. Brady submitted that it is actually a kind of preliminary administrative issue which could very well be dealt with internally. It is the triggering mechanism or the triggering point for the appeal. The question is where the Director's letter is a decision giving rise to the right to appeal. Noranda's position is that the Director should not be allowed to do what is impermissible at law and that is to render a decision and come before the Commissioner and state that

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the Commissioner has no jurisdiction to hear the appellant's statutory right of appeal, stating that it wasn't a decision. This approach essentially insulates the Director from appellate review. What Noranda is saying is that the decision, and a determination of whether it is a decision, must be made without the Director descending into the fray as an advocate for that issue.

Mr. Manuel has pointed out that the cases in Noranda's case book do not speak directly to the issue, because what the Director is doing here, in the form of administrative law, is irregular. It does not occur and that is why there are no cases. The cases presented are simply for the purpose of underlining that the courts have seen fit to limit an administrative decision-maker's role in subsequent proceedings. On the facts, Noranda believes that this is an appropriate case to limit the Director's actions on that narrow administrative preliminary issue.

Its seems quite irregular that the Director issues what Noranda is calling a decision, stating certain things must be done. This is a decision-maker with statutory authority to compel certain things to be done. The Director has issued a decision in writing saying these things must be done. Noranda, has taken issue with the requirement and seeks to appeal the decision. The Director asserts that Noranda does not have a right of appeal because it wasn't a decision. Mr. Brady submitted that this is obtuse in the extreme.

The Director certainly has other avenues, if he believes this isn't a decision, existing outside of the ambit of the Commissioner. The Director is free to revoke or amend his decision. But it certainly does not behoove the Director to come before the Commissioner and challenge the Commissioner's statutory jurisdiction, where the Commissioner is set up as the appellate body for the aggrieved party.

The tribunal asked whether cases involving the Ministry of the Environment would have parallels, but there are no cases in this area. Mr. Manuel agreed that the decisions made by the Director in MOE are very similar to those of the Director of Mine Rehabilitation.

Mr. Manuel submitted that the **Mining Act** gives the Commissioner the authority to give other people party status and that would be the case should there be a finding that the Director is not entitled to raise this issue or make submissions. The Attorney General could decide to direct counsel to make an application before the Commissioner or to judicially review the Commissioner's decision.

Asked about the argument that the Commissioner could not hear the matter by only hearing from one side, Mr. Brady stated that, given that the party on the other side is an administrative decision-maker acting as a party, that role and that prelim-

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inary issue needs to be limited. This is distinct from the other side being an individual party or a private party. He submitted that the decision is not made in a vacuum. The reason that there are no decisions or any jurisprudence on point is because this is simply decided via correspondence with the tribunal. That is an argument for down the road, but it is essentially the case that when Noranda made its appeal and it was set down for hearing, the Commissioner made a decision that the letter of April 5, 2000, properly triggered an appeal. It is not a decision in a vacuum. Notwithstanding Noranda's position that it is improper, if the Director has the power to challenge the jurisdiction of the Commissioner, the decision is not made in a vacuum. They are saying, "This letter is not a decision". The decision on whether or not this is a decision can simply be made on the face of the document.

Mr. Brady restated Noranda's position that the case law stands for the notion that the courts have seen fit to limit the role of an administrative tribunal. He submitted that this is a situation where that role should be limited for participation at that level. Full participation in the hearing, once such hearing begins, is proper and necessary, but on this one issue, it seems odd that the Director has the ability to issue a decision, turn around and say it is not a decision when their remedy is simply to write another letter or to issue a new decision. He submitted that it is odd in administrative law that they would come before the overseeing administrative body, in this case the Commissioner, and challenge the jurisdiction of the Commissioner.

Asked what Noranda's position would have been had the Director rescinded and issued a new decision, Mr. Brady pointed out that he was acting without instructions. However, where the Director issues a decision requiring a party or corporation to do something and in their normal dialogue, the company says that it disagrees, and the regulator in turn reconsiders. It is not a decision. We are not requiring you to do anything. Or we are now requiring you to do something else. In the latter case, there may be an appeal from that decision.

However, on the issue of whether this is a decision, it seems to be something that should be dealt with on a basis as between the regulator and the corporation as opposed to a jurisdictional challenge.

Findings

It has been suggested that one of the reasons that there is no case law directly on point is that this type of matter is usually handled via correspondence with the tribunal. With the greatest respect, once parties contested, the matter is removed from the administrative framework and must be determined after hearing from both sides.

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The reference by Mr. Taylor to page 709 of Estey J.'s decision in **Northwestern Utilities Ltd. et al. v. Edmonton** does not contain the reference to the cases upon which the Supreme Court has relied. That portion of Estey J.'s decision is reproduced with the relevant cases:

> It has been the policy in this Court to limit the role of an administrative tribunal whose decision is at issue before the Court, even where the right to appear is given by statute, to an explanatory role with reference to the record before the Board and to the making of representations relating to jurisdiction.(*Vide The Labour Relations Board of the Province of New Brunswick v. Eastern Bakeries Limited et al.* [11]*; The Labour Relations Board of Saskatchewan v. Dominion Fire Brick and Clay Products Limited et al.*[12]*)* …

Labour Relations Board of New Brunswick v. Eastern Bakeries Ltd. involved an application for union certification as a bargaining agent, where Eastern Bakeries attempted to include employees who were not resident within New Brunswick included in the vote. The Labour Relations Board described the bargaining unit as those employees on payroll at the Muncton plant. Eastern Bakeries obtained a writ of certiorari to the Court of Appeal which quashed the certification order. The Labour Relations Board then appealed to the Supreme Court of Canada. Kerwin, C.J. states at page 78:

> The Appeal Division considered that counsel for the Board should have refrained from involvement in the controversy. In *The Labour Relations Board of Saskatchewan v. Dominion Fire Brick and Clay products Limited*[2]*,* it was held by the majority of the Court that the Labour Relations Board of Saskatchewan had a right to be heard in Court. In this particular case the Board not only had such a right but was entitled to make clear exactly what had occurred and as to the position it took on the question of its jurisdiction.

In **The Labour Relations Board of Saskatchewan v. Dominion Fire Brick and Clay products Limited**, Kellock J. states commencing at page 340:

> The respondent instituted *certiorari* proceedings by notice of motion pursuant to Rule 4 of the Crown Practice Rules of Saskatchewan and the notice was directed to the [Labour Relations] Board [of Saskatchewan] by its official title and also to the respondent union and the

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[11] [1961] S.C.R. 72.
[12] [1947] S.C.R. 336.
[2] [1947] S.C.R. 336

Attorney General of Saskatchewan. By Rule 11 such a notice is required to be served upon "the person or one of the persons who made the judgement, conviction or order" and in pursuance of this provision the notice of motion was served upon the Board. The method of service was not disclosed to us.

Assuming that the respondent company is right in objecting that the Board is not an entity distinct from its members, I think that it is not for the respondent company at this stage, having chosen to designate them by their collective name and after having obtained a decision in its favour, including an order for the payment of costs, to get rid of them now by such an objection. I think the language of Lord Lindley in *Taff Vale Railway v. Amalgamated Society of Railway Servants* [(1)] may be used with propriety here. After saying that the respondent was not a corporation, His Lordship said: "The use of the name in legal proceedings imposes no duties and alters no rights; it is only a more convenient mode of proceeding than that which would have to be adopted if the name could not be used."

With regard to the ground of decision of the Court of Appeal, it is necessary to refer to certain other statutory provisions. By *The Kings Bench Act*, R.S.S. 1940, Chap. 61, section 2 (14), "party" includes "every person served with notice of *** any proceedings, although not named in the record". It may be pointed out here that in the notice of motion here in question the Board, as well as the union, are named respondents and, as already mentioned, the Board was served. Accordingly, the Board was a "party" in the Court of King's Bench. By section 6 of *The Court of Appeal Act*, R.S.S. 1940, Chap 60, it is provided that the Court of Appeal shall have jurisdiction and power, subject to the rules of court, to hear and determine all appeals or motions in the nature of appeals respecting any judgement, order or decision of any judge of the Court of King's Bench.

In *Mackay v. International Association of Machinists*[(2)], the defendant association had applied to the Labour Relations Board for an order requiring an employer to refrain from certain alleged unfair labour practices and the Board made an order granting the application. In that case, which was an appeal in *certiorari* proceedings, Martin C.J. S. said at 260:

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(1) [1901] A.C. 426, at 455.
(2) [1946] 2 W.W.R. 257.

> Counsel for the association cited many authorities showing that it is not the practice in Canadian Courts to make an inferior Court or tribunal a party in *certiorari* proceedings; all that these authorities indicate is that the inferior tribunal is not formally named as a defendant but that circumstances cannot alter the fact that the tribunal may be a party as it undoubtedly is in this province by virtue of the service of the notice upon it
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> Gordon J.A., at 264, said:
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> > Both under the English practice and under our own Crown Practice Rules (Rule 11) the notice of motion for a writ of *certiorari* must be served upon "the person or one of the persons who made the judgment, conviction or order". Service on one member of the Labour Relations Board was effected in this case and the Board is therefore a party and a necessary party to the proceedings.
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> In my opinion, the Board was both a proper and a necessary party to the proceeding here in question and, being a party, had the right of appeal to the Court of Appeal and required no further or other status. It is urged that a tribunal charged with the responsibility of deciding as between other persons should have no interest in supporting its decision in a Court of Appeal. However that may be in other circumstances, the argument is irrelevant here in view of the statutory provisions referred to. A number of illustrations could be given where statutory bodies not dissimilar in function to the appellant Board have appeared by counsel to support their decisions. It is sufficient to refer to *The King v. Electricity Commissioners*[(1)]

The case of **King v. Electricity Commissioners** involved Electricity Commissioners appointed under the **Electricity Act, 1919**, wherein they were to promote, regulate and supervise the supply of electricity and perform the powers and duties conferred by the **Act**. The Commissioners constituted a scheme establishing two committees to which it was proposed would be delegated the powers and duties of the joint committee. This scheme was challenged as *ultra vires*. Although the case does not deal with the issue of standing of the Electricity Commissioners, they were represented by counsel and were heard on the appeal to the Court of Appeal.

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(1) [1924] 1 K.B. 171.

The tribunal has considered the position put forward on behalf of Noranda. Notwithstanding references in the case law as to the impropriety of an appeal tribunal hearing from a lower tribunal on matters of its own jurisdiction, the fact remains that the legislature has seen fit to grant the Director full party status, by way of statute. Mr. Manuel has, on behalf of the Director, repeatedly and correctly emphasized that an appeal to the Commissioner involves the proponent and the Director. This is not a case where there are two parties, Noranda and another, between whom the Director would be determining rights.

The tribunal finds that the case of **The Labour Relations Board of Saskatchewan v. Dominion Fire Brick and Clay Products Limited** speaks directly to the issue raised by Noranda, namely that the legislation specifies that the Director shall be a party. There can be no limiting of this standing as a party, as there is nothing in the statute which would purport to do so.

Therefore, the tribunal finds that the Director can be heard on this preliminary issue to the jurisdiction of the tribunal, namely whether there has been an Order of the Director which gives rise to the appeal of Noranda.