Ontario

Box 330
C.P. 330
24th floor, 700 Bay Street
24e étage, 700, rue Bay
Toronto, Ontario
Toronto (Ontario)
M5G 1Z6

The Mining and Lands Commissioner
Le Commissaire aux mines et aux terres

File No. MA 040-99

L. Kamerman)
Mining and Lands Commissioner)
M.Orr)
Deputy Mining and Lands Commissioner)

Monday, the 8th day
of July, 2002.

THE MINING ACT

IN THE MATTER OF

An appeal by Wallbridge Mining Company Limited pursuant to subsection 112 (1) of the Mining Act from the decision of the Provincial Mining Recorder, dated the 2nd day of December, 1999, to not record its Filed Only Mining Claim 1217049, being for land known as Island F.L. 52 in Kelly Lake, situate in the Township of Broder, in the Sudbury Mining Division, hereinafter referred to as the "Wallbridge Filed Only Mining Claim";

AND IN THE MATTER OF

Section 30(c) of the **Mining Act**;

BETWEEN:

WALLBRIDGE MINING COMPANY LIMITED
Appellant

THE MINISTER OF NORTHERN DEVELOPMENT AND MINES
Respondent

- and -

INCO LIMITED
(formerly known as International Nickel Company of Canada, Limited)
Party of the Third Part

AND IN THE MATTER OF

Mining Licence of Occupation No. 10,872, dated May 6, 1947 for lands under the waters of Kelly Lake, comprised of unpatented Mining Claims S. 37531 through S. 37343, both inclusive, and S. 37429 through S. 37531, both inclusive; and Order No. W-25/87 NE made pursuant to section 36 of the Mining Act, R.S.O. 1980, c. 268 for the withdrawal of mining and surface rights from staking of islands outlined in red on the map attached to and forming part of the Withdrawal Order.

ORDER ON COSTS

WHEREAS THIS APPEAL was received by this tribunal on the 2nd day of December, 1999;

AND WHEREAS this appeal was heard by this tribunal on the 29th and 30th days of November, 2000, the 1st day of December, 2000 and the 10th day of January, 2001;

AND WHEREAS the Motion On Costs was heard by this tribunal on the 10th day of July, 2001;

1. **THIS TRIBUNAL ORDERS** that it will fix costs (on a party and party basis) at $57,829.27 to be awarded by the Appellant, Wallbridge Mining Company Limited to be paid to the Party of the Third Part, Inco Limited.

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

Reasons for this Order are attached.

DATED this 8th day of July, 2002.

Original signed by
L. Kamerman

Linda Kamerman
MINING AND LANDS COMMISSIONER

Original signed by
M. Orr

M. Orr
DEPUTY MINING AND LANDS COMMISSIONER

Ontario

Box 330
C.P. 330
24th floor, 700 Bay Street
24e étage, 700, rue Bay
Toronto, Ontario
Toronto (Ontario)
M5G 1Z6

The Mining and Lands Commissioner
Le Commissaire aux mines et aux terres

File No. MA 040-99

L. Kamerman)
Mining and Lands Commissioner)
M.Orr)
Deputy Mining and Lands Commissioner

Monday, the 8th day
of July, 2002.

THE MINING ACT

IN THE MATTER OF

An appeal by Wallbridge Mining Company Limited pursuant to subsection 112 (1) of the Mining Act from the decision of the Provincial Mining Recorder, dated the 2nd day of December, 1999, to not record its Filed Only Mining Claim 1217049, being for land known as Island F.L. 52 in Kelly Lake, situate in the Township of Broder, in the Sudbury Mining Division, hereinafter referred to as the "Wallbridge Filed Only Mining Claim";

AND IN THE MATTER OF

Section 30(c) of the **Mining Act;**

BETWEEN:

WALLBRIDGE MINING COMPANY LIMITED
Appellant

- and -

THE MINISTER OF NORTHERN DEVELOPMENT AND MINES
Respondent

- and -

INCO LIMITED
(formerly known as International Nickel Company of Canada, Limited)
Party of the Third Part

AND IN THE MATTER OF

Mining Licence of Occupation No. 10,872, dated May 6, 1947 for lands under the waters of Kelly Lake, comprised of unpatented Mining Claims S. 37531 through S. 37343, both inclusive, and S. 37429 through S. 37531, both inclusive; and Order No. W-25/87 NE made pursuant to section 36 of the Mining Act, R.S.O. 1980, c. 268 for the withdrawal of mining and surface rights from staking of islands outlined in red on the map attached to and forming part of the Withdrawal Order.

REASONS

INCO

Inco is seeking costs in the matter of this appeal, in accordance with sections 126 and 127 of the **Mining Act,** which makes express reference to the powers of an Assessment Officer and the powers to fix costs, thereby incorporating reference to Rule 57 of the **Rules of Civil Procedure.**

Inco's position is that it is entitled to costs on a mixed party and party and solicitor and client basis or, in the alternative, that it is entitled to costs on a party and party basis. The relevant date for the cut-off on party and party costs is November 11th, 2000, after which Inco hopes to persuade the tribunal that it is entitled to costs on a solicitor and client basis. Total mixed costs submitted are $87,344.68, which breaks down to $80,400 in fees, $1,200 in disbursements and the rest GST, $5,744.68. The alternative submission is costs of $57,829.27, with $52,850 in fees, the same as above for disbursements and GST of $3,779.27. Ms. Dyer pointed out that the fees do not reflect her full solicitor client rate, nor those of her firm's partners, associates or students.

Ms. Dyer reviewed events leading up to the determination of the appeal. Inco was made a third party to the proceeding by Order of March 20th, 2000. On April 4th, 2000, the tribunal ordered that the Ministry was prohibited from amending Inco's MLO and from otherwise allowing Island FL 52 to be granted or dealt with until the appeal of Wallbridge had been heard, determined, withdrawn or abandoned in writing.

Resulting from the second Order was a change in Inco's filing date and Inco found that its prior application to amend its MLO, which it had been diligently pursuing, could not be dealt with until the end of the hearing. As a result, this appeal was not just a dispute between the staker and the Ministry, as referred to in some portions of *Dupont v. Inglis*, [1958] S.C.R. 535, 14 D.L.R. (2d) 417, rev'g [1957] O.R. 377, 3 M.C.C. 210 (C.A.), but it also directly affected Inco. The evidence showed that Inco has plans for the development of a mine in Kelly Lake where Island FL52 has strategic importance as a safety or vent raise, being part of the mine infrastructure.

Ms. Dyer submitted that, first, in seeking both the interim injunction against the Ministry without notice and the final order, Wallbridge's actions seriously and adversely affected Inco's commercial interests. Also, throughout the hearing, Wallbridge persisted in attempting to seek the finding that Inco's prior application for the amendment to its MLO to include FL52 be deemed abandoned, declared null and void or that it had never actually been made. Ms. Dyer submitted that Wallbridge brought Inco into this proceeding and should not at this juncture be excused from the cost consequences of its actions.

Secondly, Inco is a party with a valid interest, and as set out in Dupont, *supra,*

there is a distinction between a dispute between the Minister and the staker and the parties before the tribunal.

Wallbridge had staked Island FL 52, being lands on which the surface rights were held by Inco as a summer resort location. Inco had been attempting to acquire the mineral rights under FL 52 through an amendment to its Mining Licence of Occupation 10,872 ("MLO") of the surrounding lands under the waters of Kelly Lake. Inco's original inquiries regarding an amendment date back to 1987, at which time a Withdrawal Order of the lands was made by the Minister. Somehow, the existence of this Withdrawal Order became lost over the course of time. The Provincial Mining Recorder refused Wallbridge's staking of December, 1999, and marked the Application to Record as "filed only". Wallbridge appealed the Mining Recorder's decision to the tribunal, but also persuaded the tribunal to intercede directly to the Minister's delegate, Mr. Ron Gashinski, regarding a certification of discovery of valuable mineral in place. At all times, Wallbridge wanted a condition of this certification process to be that its staking would not be invalid, despite having taken place prior to certification. Mr. Gashinski was not agreeable to this condition. In connection with this strategy, Wallbridge sought to have its dealings with FL 52 kept confidential from Inco.

Inco was made a third party to the proceedings by Order dated the 20th day of March, 2000. In the ensuing period, the existence of the Withdrawal Order became known, whereupon, on April 4th, 2000, the tribunal ordered that the Ministry was prohibited from amending Inco's MLO until such time as Wallbridge's appeal was finally disposed of, thereby preventing Inco from having its application and interest in FL52 dealt with.

The issue of whether Inco was properly a party to the appeal was raised throughout the course of the hearing and reappeared concerning the matter of costs. Wallbridge asserted that it was not. In Ms. Dyer's words, the appeal was not merely a dispute between the staker and the Crown, as was referred to by the Supreme Court of Canada in *Dupont v. Inglis*, but also directly affected Inco. The evidence showed that Inco has plans for the development of a mine in Kelly Lake where Island FL 52 has strategic mine infrastructure importance as a safety or vent raise. Wallbridge's seeking of the interim injunction against the Ministry without notice seriously and adversely affected Inco's commercial interests. Wallbridge persisted in its attempt to obtain a finding that Inco's prior application for the amendment to its MLO be deemed abandoned, null and void or that it had never actually been made; it argued that they should be set aside, deemed to have expired or have a built-in expiry date. However, in its final submissions, filed in mid-December, 2000, showed Wallbridge's concession that the Withdrawal Order was a bar to the Application to Record, and sought to have both Withdrawal Orders set aside. Through all of these actions, Ms. Dyer submitted, Wallbridge brought Inco into this proceeding and should be required to bear the consequences of its actions through paying costs.

When Wallbridge first became aware of the Withdrawal Order either in March or April of 2000, it could have saved considerable costs by abandoning its appeal, but did not do so. Rather, it sought further relief in the matter.

Inco tried unsuccessfully, by way of preliminary motion, to have the issue of the Withdrawal Order and the jurisdiction of the tribunal to make such Orders constraining the Minister dealt with. This was an effort to narrow the issues, which Wallbridge opposed, arguing that it was necessary for the tribunal to have an evidentiary record upon which to make its jurisdictional findings. Ms. Dyer submitted that this is a material factor under Rule 57.01, as to whether conduct in the course of proceeding serves to either lengthen or shorten the process.

Notwithstanding Wallbridge's position that the need for a hearing could be avoided, if Mr. Gashinski would consider Wallbridge's application for certification of the finding of valuable mineral in place, pursuant to section 30(c), Wallbridge refused to meet with Mr. Gashinski. Wallbridge asked the tribunal to impose conditions on the Ministry prior to the meeting, which it did not do.

After August 3rd, 2000, the date for final filings in this matter, there was an exchange of correspondence between the parties in an effort to narrow the issues. In a letter to former Wallbridge counsel Michael Bourassa dated the 30th day of October, 2000 (Ex. 1, Tab B, Costs Hearing), Ms. Dyer alleged on behalf of Inco that Wallbridge had no evidence of discovery of valuable mineral in place which, if true, would make any hearing in the matter moot. Mr. Bourassa stated in the material filed that there is a precedent as authority for Wallbridge's staking pursuant to subsection 30(c), which Ms. Dyer asked to see. In the response (Ex. 1, Tab A, Costs Hearing), Mr. Bourassa indicated that he was seeking instructions from Wallbridge, that it would no longer be seeking to remove Inco as a party and that it was seeking Examinations for Discovery. Ms. Dyer objected to Discoveries on November 6th, 2000 (Ex. 1, Tab B1, Costs Hearing), also seeking answers to hear earlier questions. In an attempt to determine Wallbridge's then current position, a pre-hearing conference with tribunal Registrar, Mr. Daniel Pascoe and Mr. John Norwood, counsel to MNDM, was set up.

The pre-hearing conference was scheduled, with an indication that the Deputy Mining and Lands Commissioner would be available to resolve the matter of Discoveries, if the parties could not. The Deputy Commissioner also wrote to the parties, outlining issues which the tribunal was asking the parties to consider. The Registrar contacted the parties to discuss the possibility of settlement. The proposal was to dismiss the appeal on the condition that the Ministry consider an application for certification. Wallbridge sought dismissal without costs. These were the issues in the first party to party settlement conference. Ms. Dyer undertook to provide a summary of Inco's fees, disbursements and costs (Ex. 1, Tab 3, Costs Hearing). Before the conference, Inco proposed the dismissal based upon Wallbridge paying costs of $10,000 on account of $17,000, along with the undertaking that Wallbridge not attempt to stake any other Inco lands covered by Licenses of Occupation; Wallbridge declined.

.5

At the pre-hearing conference, the no staking condition was not accepted. It was proposed that the matter be settled, as discussed (See Ex. 1, Tab 5, Costs Hearing), with the exception of the matter of costs, to be argued on the 29th day of November, 2000, instead of the hearing on the merits. The parties agreed to submit written submissions regarding costs by November 21st. A draft Order was prepared and circulated. However, there was no agreement as to wording and, as Mr. Wayne Whymark C.E.O. of Wallbridge was not present, the pre-hearing conference was adjourned so that amendments to the wording of the proposed condition could be made.

Inco prepared a second proposal (Ex. 1, Tab B6, Costs Hearing) setting out the terms of what Wallbridge would be required to do, what the Minister could consider and the relevance of the staking. It concluded with, "The Minister will retain the complete and unfettered discretion on how to proceed with the review, subject only to the duty to act fairly, not to reopen the lands for staking, or if reopened, not to award the staking rights or any other mineral rights to Wallbridge or any other person."

Ms. Dyer wrote to Mr. Stevens on November 16th, when she did not hear back from him following the settlement discussions. On November 17th, 2000, Mr. Blue wrote, advising that he had been retained and that his client wished to proceed to a hearing on the merits.

Mr. Blue objected to the filing of Ms. Dyer's letter of November 16th. Ms. Dyer countered that it was evidence of settlement discussions, in which offers are properly before the tribunal, so long as they are not filed prior to a hearing on the merits. Mr. Blue stated that prior to 1985, the law used to be that if a letter was marked "Without Prejudice", it could not be referred to in any proceedings. Now, with Rule 49, the law is unclear, with decisions going both ways. He stated that he has no objections to the tribunal seeing the letter at this time.

Based on the foregoing, Ms. Dyer is seeking costs on a solicitor and client basis for the time period from November 10th, 2000, based upon Rule 57.01 and 49.13, which allows the Court to consider any offer in writing. Inco submits that, following the principles in the Rules, it is entitled to costs on a party and party basis up to the date of the offer to settle and on a solicitor and client basis thereafter. Ms. Dyer pointed out that Wallbridge was wholly unsuccessful in this proceeding and Inco and MNDM were entirely successful. Moreover, the result of the dismissal and confirmation of its points of jurisdiction, along with confirmation that its application to amend its MLO was pending, was as favourable, if not more so, than the terms of the offer of settlement.

Authorities for Costs

Turning to the authorities, Ms. Dyer submitted that the starting point is Rule

57.01, which sets out the factors which are to be applied in exercising the discretion under section 131 of the **Courts of Justice Act** to award costs. In *Palu v. Graf*, (MLC, October 15, 1996: MA 012-95, unreported) the tribunal confirmed that it looks to the factors set out in Rule 57 when exercising its jurisdiction under section 126 and 127 of the **Mining Act.**

Rule 57.01(1) states:

> In exercising its discretion, the court may consider in addition to the result of the proceeding and any offer to settle or to contribute made in writing, . . .

Ms. Dyer summarized the outcome of the proceedings on the merits. Inco was successful in protecting its prior claim to FL 52. It obtained the declarations sought on its preliminary jurisdictional motion, with the exception of the constitutional point which was not addressed by the tribunal. The claims for relief sought by Wallbridge in its amended submissions filed November 26th, 2000 were dismissed. With respect to Inco's proprietary interest in its pending application, the tribunal found that Inco had applied for an amendment to its MLO, that Inco had worked diligently to protect its position and that it had never relinquished its interest in FL 52. The process was further protected by the 1987 and 2000 Withdrawal Orders, so that, by virtue of all steps taken, the mineral rights were inaccessible.

S &A Strasser Ltd. v. the Town of Richmond Hill and Captain Developments Ltd. And Parkway Hotels Ltd. (1990), 1 O.R. (3d) 243 (C.A.),

Relying on *Strasser*, Inco submits that the general discretion which is granted by the opening words of Rule 57 permits the award of solicitor and client costs from the date of the defendant's offer to settle. The case involved a defendant who made an offer to settle of $30,000, which was declined and after the trial, the plaintiff's case was dismissed.

Rule 49.10 provides for solicitor and client cost consequences to the plaintiff, from the date of the offer. It also provides, that if a defendant's offer to settle is either as favourable or less favourable than the offer, the defendant is entitled to party and party costs from the date of the offer. The issue was whether the discretion provided by Rule 57.01, which provides that the "court may consider, in addition to the result in the proceeding any offer to settle made in writing...:" could apply to a defendant who made an offer which was exceeded by the result. The Court of Appeal, relying on the importance of such offers to settle, has said that the discretion provided by Rule 57.01 permits the award of solicitor and client costs from the date of the offer to settle, even

though it doesn't fit within the parameters of Rule 49.10. The Court of Appeal states at page 246:

> That bonus should be related to the offer and its date and, based upon the general principles enunciated Rule 57.01, I would award solicitor and client costs to the defendant following the date of the offer and party and party costs up to that date.

Inco is requesting the same treatment in this application for costs and has drafted its bill of costs in accordance with this principle.

This general discretion is confirmed, in Ms. Dyer's submission, in the *Douglas* case, where, at page 225, the Court says:

> We are prepared to acknowledge that the existence of a settlement offer is one of a number of factors to be considered on the issue of the costs of an appeal.

The Court did acknowledge that the legislature did not specify costs awards to be applicable to settlement on appeals within Rule 49. However, the Court recognized that it would be within the public interest to have litigation, including appeals, resolved expeditiously, with an offer to settle an appeal meriting consideration of costs.

It states at page 226:

> ...We would go no further in this case than to observe that, while we recognize and accept that R. 49 has no application to offers to settle appeals, the existence of an offer to settle may, in appropriate circumstances, be considered by the court in exercising its discretion on costs under s. 131 of the **Courts of Justice Act**, R.S.O. 1990, c. C.43.

Ms. Dyer submitted that this applies even outside of Rule 57.

Douglas Hamilton Design Inc. v. Mark (1993), 20 C.P.C. (3d) 224 (Ont. C.A.)

Ms. Dyer also submitted that this is the approach that was proposed by the Morden Committee in 1985, which has subsequently been pursued by the Court of Appeal, namely that reasonable settlement offers are to be promoted. This approach has seen the development and implementation of mandatory mediation of cases within Toronto, and implementation of full case management on July 3rd. This is a clear indication that the Civil Justice Committee is promoting mediation and settlement.

This very same principle was adopted by the tribunal in *Graf v. Palu*, and Ms. Dyer submits that Inco and MNDM were faced with a similar situation to that commented on by the tribunal at page 21:

These proceedings were hampered by the fact that, despite attempts at settlement, ongoing discussions and one telephone pre-hearing conference call, at the outset of the hearing the actual issues or issue to be determined continued to evolve throughout the course of the hearing itself.

Ms. Dyer submitted that in this appeal, there are several new arguments which have found their way into first the written submission and then the rebuttal and supplementary rebuttal of Wallbridge. The case continued to change from day to day. It changed significantly on November 26th with the filing of the amended submissions (Ex. 14) and continued in Exhibits 33A, 37 and 39, culminating in the final submission (Ex. 39) delivered at 4:30 on the day before the oral argument. On page 21 in *Graf v. Palu*, the tribunal refers to the comments of Henry J. in *Apotex Inc. v. Egis Pharmaceuticals and Novopharm Ltd. 4 O.R. (3d) 321 (Gen. Div.),* commencing at the bottom of page 323:

> ...The reality of commercial life is that to mount a successful defense against a determined plaintiff is costly, as will be obvious from the summary of costs claimed above. Any individual or corporation attacked in the courts is entitled to retain the legal services that can best submit its cause to the court; it is not expected to shop for cheaper services but is entitled to be represented by counsel of its choice.
>
> ...,the practical effect of this is that the litigant who, as plaintiff or defendant, continues to pursue the litigation willy-nilly, may be saddled not only with the legal charges of his own solicitor and counsel but also with all or part of his adversary's costs if he loses. He is assumed to know and accept this as a business risk and his legal advisers are responsible for informing him. It is the policy of the judicial system to encourage litigants to settle, which generally means that both parties make a sensible business decision t end the dispute and so cut their losses and avoid the risk of failure and further costs. I refer for example to Rule 49, **Rules of Civil Procedure**, O. Reg. 560/84, as well as to the pre-trial procedures designed to segregate the real issues for trial and to expose the strengths and weaknesses of the parties' respective positions. An important objective of the system is thus, by an award of costs (among other

> things) to discourage harassment of any other party by the pursuit of fruitless litigation. The award of costs on the solicitor and client scale is an important device that the courts may use to this end, particularly where a party has conducted itself improperly in the view of the court.
>
> ...Furthermore, while the award of costs between parties on the solicitor and client scale has traditionally been reserved for cases where the court wishes to show its disapproval of conduct that is oppressive or contumelious, there is also a factor that frequently underlies the award, that is not necessarily expressed, that the successful party ought not to be put to any expense for costs in the circumstances. That is a factor in my decision in this case.
>
> The general principle that guides the court in fixing costs as between parties on the solicitor and client scale, as is provided in my order, is that the solicitor and client scale is intended to be complete indemnification for all costs (fees and disbursements) reasonably incurred in the course of prosecuting or defending the action or proceedings, but is not, in the absence of a special order, to include the costs of extra services judged not to be reasonably necessary.

Relating back to the current case, Ms. Dyer stated that Inco's most valuable discovery in the Sudbury area within the last 50 years was indirectly under attack. It was pursuing an amendment to its MLO following a meeting with MNDM and on the advice of Mr. Mark Hall, currently an officer of Wallbridge, but who was at that time acting in his capacity as Chief Mining Recorder. Ms. Dyer also submitted that the rules followed by the tribunal are designed to attempt to promote the narrowing of issues and to separate real issues for trial to expose the strengths and weaknesses of the parties' positions, so as to discourage the pursuit of fruitless litigation.

Although she did not have the case, Ms. Dyer stated that in subsequent cases, the *Apotex* case has been dealt with as the conduct of the party having been reprehensible to fit within the exceptional rules. Some judges have applied *Apotex* as the tribunal did, on the basis stated while other judges do not. In Ms. Dyer's submission, the tribunal is entitled to take into consideration, given the history of the **Mining Act** and its promotion of the just and efficient and expeditious resolution of these proceedings, some of which can be very material. Rules 49 and 57 dealing with offers to settle, are an additional basis upon which solicitor client costs are awarded. In the absence of an offer, the tribunal can look for fraud, dishonesty and allegations that are pursued and not attack someone's personal reputation.

...10

Lavigne and Ontario Public Service Employees Union, (1989) 67 O.R. (2d) 536 (C.A.)

There is a suggestion in Mr. Blue's materials that interveners should not be given costs, that third parties should not have costs, that Inco is a third party for these proceedings and that the dispute is properly with the Ministry. However, Ms. Dyer submitted, that it is clear from the jurisprudence that interveners are awarded costs, even when such parties are added at their own request.

In *Lavigne*, a Charter challenge, there had been union representation as well as third parties. Costs were ordered to interveners in the appeal on the basis that their interests had been seriously affected by Lavigne's application. The last two pages in Part VII of the Court's decision deal with costs. Lavigne's cost had been underwritten by the National Citizen's Coalition. At page 576, the Court states:

> The interests of the N.U.P.G.E., the C.L.C. [Canadian Labour Congress] and the O.F.L [Ontario Federation of Labour] were seriously affected by Lavigne's application. They quite properly applied for and were granted to leave intervene. Although White J. did not grant declaratory relief against them because they were not parties to the application, he held that O.P.S.E.U. should be required to see that funds paid to these bodies were only used for the purpose of promoting collective bargaining. (see 60 O.R. (2d) at p. 512, 41 D.L.R. (4th) at p. 112). In the circumstances, we believe that N.U.P.G.E., the C.L.C. and the O.F.L. should receive their costs here and below.

The Attorney General of Ontario did not ask for costs and so there was no award made. Ms. Dyer submitted that the case has been followed in numerous instances. The similarity, in her submission, was that Inco's interests have been equally seriously affected. In fact, it now appears that the dispute concerning FL 52 was just one in a series of matters, with Wallbridge now going after the Kelly Lake deposit itself.

The Ballard Estate case was an application to intervene and on what terms such intervener status would take place. Essentially, according to Ms. Dyer, the case stands for the proposition that, once a party makes an application to intervene and is added as a party, it has all the rights of a party. At page 225, paragraph 26, Brown J. states:

> The authorities cited above support the proposition that an intervener is entitled to deliver pleadings, conduct discoveries and participate fully as a party as would seem to be contemplated by the wording of Rule 13.01(1) that a person may move for leave to intervene as an added party.

> Accordingly, in my view, once leave to intervene is granted, the person has the status of a party for all purposes of the action, including pleadings, production, discovery, calling of witnesses, cross-examination of other parties' witnesses and argument.

Ms. Dyer stated that there are many other cases which support the position that, having applied to make oneself a party, one can be both entitled to costs or be exposed to costs. The general rule, however, is that the party is one for all purposes and is one which has been followed before the tribunal dating back to *Dupont v. Inglis.*

(Attorney General) v. Ballard Estate, (1994), 36 C.P.C. (3d) 213

Rule 57.01

Rule 57.01 sets out specific considerations for the court and in Ms. Dyer's submission, for the tribunal to consider in addition to the result and any offer to settle. Inco is relying on those set out in subparagraphs (1)(c), involving the complexity of the proceeding, (d), the importance of the issues and (e), the conduct of any party tending to lengthen or shorten proceedings.

Concerning (1)(c), it is submitted that the proceedings became very complex. What had started out as a simple clause 30(c) application under the **Mining Act** experienced numerous legal and factual issues, particularly as they developed in the twelve days prior to the hearing. This continued until the rebuttal argument was delivered on the 9th day of January, 2001 and required considerable effort by counsel to read, understand and prepare a response. Similarly, the hearing commenced with one set of facts, which continued to develop during the course of the hearing.

Concerning the importance of issues (1)(d), Ms. Dyer submitted that it was important to Inco that any staking prohibitions in sections 30 and 35 of the **Mining Act** be upheld. Inco had relied on the current **Mining Act** and its historical counterparts to acquire and develop mining properties in Ontario for almost one hundred years. The particular prohibition in section 30 has been in existence since 1925. The ability to make withdrawal orders has been in existence since 1906, although previously the authority rested with Cabinet. The staking rules are essential and fundamental to the granting of mining tenure and the development and prospecting of mining properties in Ontario. Inco was found by the tribunal to have properly relied upon the withdrawal order made. It is of utmost importance to the industry to have certainty. The tribunal has found that to treat closed lands as if they were open would create chaos and to have done otherwise would in Ms. Dyer's submission, be contrary to the basic purpose of the **Mining Act.** The importance of security of tenure cannot be underestimated in the mining business. Any attempt to develop a property into a mine, with attendant dealings with banks and shareholders, all require security of tenure to proceed. This property is of significant

interest to Inco. It had applied for an amendment to its existing MLO for inclusion of the mining rights. Through this proceeding, Inco's interest has been attacked by Wallbridge, a new junior mining company and is an issue of great importance to Inco. And, as stated earlier, this is but a first step in attempting to obtain control of the Kelly Lake ore body.

Concerning the conduct of the party in lengthening proceedings (1)(e), Ms. Dyer referred first to the failure of Aird and Berlis, initial counsel for Wallbridge, to respond to the letter of October 30th, 1999. Secondly, was the failure to narrow the issues in response to the pre-hearing discussions of counsel and the letter from the Deputy Commissioner of matters to be considered at the pre-hearing conference, which was because counsel thought there was a settlement, subject to finalization of the wording and arguing costs, so that the pre-hearing conference was cancelled. But that was followed by a radically changed nature of relief sought, which unnecessarily lengthened the duration of the proceeding.

Ms. Dyer relied on the cases discussed above, and in particular *Apotex*, and *Graf v. Palu*, as support for the position that an award of costs can discourage the harassment of any other party by the fruitless pursuit of litigation. (p. 22 *Graf*). Ms. Dyer submitted that the attempt commencing with the retainer of the new law firm and the public appearance on November 17th to set aside the 1987 Withdrawal Order was such pursuit of fruitless litigation.

In Ms. Dyer's submission, Wallbridge was represented by a senior and well-established counsel, knowledgeable in administrative law matters. Both Messrs. Hall and Whymark demonstrated knowledge that the Withdrawal Order would have to be set aside or rescinded before the lands could become open for staking. In Ms. Dyer's submission, Wallbridge's former counsel, Michael Bourassa, was also well aware of the procedure. And yet FL 52 was staked with full knowledge of what was required before the lands could be considered open.[18]

Therefore, as an alternative to the solicitor client costs, Ms. Dyer submitted that there is authority for an award on what is known as the higher end of party and party costs. For example where the court wants to award solicitor and client costs but felt that it was restrained from doing so. Mr. Justice White's case was such an example. In *Barman*, there were no offers to settle and allegations of fraud were not made; the party had been brought into the proceeding unnecessarily. The plaintiff refused to let them out and refused to agree to anything which was proposed to shorten the proceedings. As a direct result of this conduct, the defendants were awarded costs at the most liberal end of the spectrum of party and party costs, with Mr. Justice White stating that he would have given solicitor and client costs if he could have. Ms. Dyer submitted that the tribunal has the authority to do the same.[19]

---

[18] *Bargman v. Rooney,* [1998] O.J. No. 5528, Commercial List File No. 98-CL-2909 and Court File No. 98-CV-142584.
Findlayson v. Roberts (1998: Carswell Ontario 1723) (Ontario Court - General Division)

With respect to the rates requested and time, there has been, in Ms. Dyer's submission, no challenge with respect to time spent.

The issue of rates, however, has been put into issue. In *Findlayson*, Sutherland J. gives a very good summary of developments in costs and rates. At paragraph 25 (page 10), he refers to a paper that the judges considered at one of their internal conferences, prepared by Mr. Justice O'Brien and distributed in 1997, which made reference to three unreported decisions on when costs were fixed. The costs that were being fixed at that time on a party and party scale range between $175 and $225 per hour, at a time when senior counsel in Ms. Dyer's firm were charging between $400 and $425, with her rate being $410.

> As to hourly rates charged by senior counsel I welcome the assistance provided by a paper by O'Brien J., distributed at the 1997 Spring Seminar of this court, where it is stated, with reference to three unreported decisions of judges of this court, namely, *Buyanovsky v. Townsgate Ltd.*[i]:
>
> Minuteman Press of Canada Co. v. Touche Ross & Co.[ii]
>
> ii. and Guarantee Co. of North America v. Gordon Capital Corp.[iii]
>
> iii. that on a party and party basis experienced counsel may be allowed from $175 to $225. In the same paper O'Brien J., who has much current experience with civil cases involving senior counsel states that senior experienced counsel are now charging hourly rates of $400 (or more) on a solicitor and client basis. *Dejong*, supra.[iv]
>
> iv. is an example of cases where an hourly rate of $400 for senior experienced counsel was asserted and not rejected by the court. In *Omega Digital Data In v. Airos Technology Inc.*[v]
>
> v. a senior experienced counsel was shown to be charging $425 per hour and another such was shown to be charging $400 per hour.

(March 12, 1993), Doc. M1502/91U, M2257/19U, M2682/91U [reported (1993) 30 R.P.R.(2d) 269n(Ont. Gen. Div.)].

ii (February 10, 1994), Doc. 23289/87 [reported (1994), 27 C.P.C. (3c) 70 (Ont. Gen. Div.)].

iii (January 17, 1994), Doc. 93 - CQ-40684 [reported (1994), 18 O.R. (3d) 9 (Ont. Gen. Div.)].

iv *DeJong (Litigation Guardian of) v. Owen Sound General & Marine Hospital* (1996), 31 O.R. (3d) 594 (Ont. Gen. Div.).

(1997), 33 O.R. (3d)23(Ont. Gen. Div.).

Burlie v. Chesson (1999: Carswell Ont 2831) (Ont. S.C

Kitely J. found in Burlie at paragraph 12, after going through a survey of cases where party and party costs were allowed:

For all of those reasons, I will not second-guess Mr. McGoey's hourly rate of $200.00. [That represents about 75% of his solicitor and client rate during the period in which the trial occurred.]

Ms. Dyer provided information regarding the cases cited.

Case	Rate
Canadian Express v. Blair	Party and party rate was $130. to $150.
Minuteman Press of Canada Co. v. Touche Ross & Co.	Party and party scale was $175.
Pitman Estate v. Bain (1994), 35 C.P.C.(3d) 67 (Ont.Gen.Div.)	Hourly rate for senior counsel was $175.
DeJong (Litigation Guardian of) v. Owen Sound General & Marine Hospital Hoilett J.	Allowed an hourly rate of $400.
Roberts v. Morana (1997), 37 O.R.(3d) 333 (Ont. Gen. Div.)	O'Brien J. allowed most senior counsel rates of between $260. and $350.
Homes For Sale Magazine Ltd. v. Auto Mart Magazines Ltd. (July 29, 1997), Doc. 42604/96 (Ont. Gen. Div.)	McFarland allowed $200.
Peddle (Litigation Guardian of) v. Ontario (Minister of Transportation (1997), 14 C.P.C.(4th) 340 (Ont. Gen. Div.)	The court allowed the party and party scale of $200.
Laws v. Berry (1997), 23 O.T.C. 392 (Ont. Gen. Div.)	On appeal the reduction by an assessment officer from $175. to $150. was allowed. Benotto J. found that the rate was within the range and therefore neither inappropriate nor unreasonable so as to warrant interference.

Gill Estate v. Marriott (2000: Carswell Ontario 1670) (Superior Court of Justice)

Ms. Dyer referred to page 6, paragraph 26, of the *Gill Estate* case, where Quinn J. stated

> The proposed party-and-party bill of costs of the plaintiffs as submitted by counsel for the defendant totals $95,826 (inclusive of disbursements and GST). I think it fairly

follows the form of a party-and-party bill and I disagree with the contents only in four respects:

1. The party-and-party hourly rate of Mr. G.D.E. Adair is shown as $175. This is 53% of his solicitor-and-client rate of $325. [20] I think that a party-and-party hourly rate of $210 [21] would be more appropriate (65% x $325 = $210). Mr. Adair was well prepared and conducted himself with great skill.

2. The defendant allowed a per diem counsel fee (for senior and junior counsel) of $2,500 for each of the 13 days of trial attendance. I think this should be increased to $3,000.

3 In my opinion, the plaintiffs should experience a full recovery of their disbursements, all of which were reasonably incurred in the prosecution of this difficult case.

4 Ms. Dyer submitted that these cases establish a range, which, if the decision-maker stays within its parameters, an appeal court will not overturn.

[20] I agree with the submission of Ms. Springstead that Mr. Adair is a "bargain" at $325. I have not the slightest doubt that, absent an agreement with the plaintiffs to the contrary, Mr. Adair, if he sought same, would be allowed more on a solicitor-and-client assessment.

[21] Our courts have repeatedly eschewed accepting a rule of thumb that party-and-party costs should be a certain percentage of the fee charged to the client. The usual reason given is that such a rule would take away the element of discretion in the judge or the assessment officer. However, I find it very helpful, in fixing party-and-party costs, to ask myself what degree of indemnification the successful litigant should experience. Does the justice of the case require compensation for roughly one-half, two-thirds or some other percentage of what he or she has paid, or is likely to have to pay, to his or her solicitor? Such an approach allows party-and-party costs to follow, in somewhat of a sliding scale, the solicitor-and-client costs. There is always the possibility, in employing the approach of calculating party-and-party costs such as a function of solicitor-and-client costs, that the successful litigant/client subsequently may have the latter costs assessed at a lower-hourly rate than was used when the former were fixed. However, in my view, that possibility does not detract from the general usefulness of such an approach and, at bar, the possibility is non-existent.

Turning to Tab C1 of Exhibit 1, Ms. Dyer set out a comparison of rates, based on a review of the Burlie and Gill Estate decisions:

Hourly Rate of Inco's Counsel (Solicitor and Client)	**65% of Hourly Rate**	**75% of Hourly Rate**	**Rate Claimed By Inco on a Party And party basis.**
Dyer (1982) $410.00	$266.50	$307.50	$250.00
Olivery (1985) $400.00	$260.00	$300.00	$240.00
Taylor (1996) $255.00	$165.75	$191.25	$140.00
Students $125.00	$81.25	$93.75	$60.00

The decision in *Burlie* was 75% and in *Gill Estate* was 65%. It is pointed out that the rate claimed by Inco is less than both of these. Ms. Dyer submitted that the rates claimed are within the range.

Therefore, should the tribunal find that it is not inclined to give effect to the offer to settle and a party and party scale is awarded. With respect to the per diem counsel fee, it is in the party and party bill, claimed at $2,500. Ms. Dyer notes that the fee was increased by Quinn J. on that of Mr. Adair to $3,000.

On the issue of disbursements, the bill is based on the tariff, with details in the docket entries and summary of the bills. The amounts shown are less than have been incurred.

As for the solicitor and client scale, if the tribunal is inclined to accept that it is warranted after November 10th, the general rule in the Courts, as was applied by the tribunal in *Graf v. Palu*, is for complete indemnity to the successful party. In that case, Mr. Bourassa's rate was reduced from $410, being a premium rate, to the amount actually charged, namely $265. Following from the decisions summarized in the Burlie case, at paragraph 10, Blair J is quoted:

> 10. ... Lastly, I am mindful of the following observation made by Blair J. in 131842 *Canada Inc. v. Double "R" (Toronto) Ltd.* (1992) C.P.C. (3d) 190 (Ont. Gen. Div.) at page 195 where he considered the question of hourly rates charged by trial counsel:
>
> In fixing costs as between parties on a solicitor and client scale, the court is seeking to provide complete indemnity to the successful party, within the parameters set out above.

> In such circumstances, provided the rates charged by counsel bear some reasonable relationship to those prevailing in the relevant marketplace for counsel of comparable skill and experience, it is not the function of the court, in my view, to act as an arbiter of what should be or to impose a different (and lower) rate, deemed to be 'reasonable'. Judges are insulated from the business factors that come into play in the setting of such rates and, because they no longer practice law, are not attuned to the niceties of balancing those various factors in carrying out such a practice. Within these guidelines, the court should be wary about imposing its own view of what may be reasonable.

In conclusion, Ms. Dyer submitted that both the solicitor and client bills and party and party bills are less than the amount actually billed to Inco, so there is no issue of Inco asking for more, as had occurred in *Graf v. Palu.*

WALLBRIDGE

Mr. Blue commenced his argument by advising the tribunal that his client has chosen to appeal the tribunal's decision on the merits. This being the case, he suggested that it might be appropriate for the tribunal to reserve its decision until the Court has decided the appeal, as it might then be the case that it will be Wallbridge which is asking for its costs in this matter.

In Mr. Blue's submission, the tribunal should find that Inco should not be entitled to its costs in respect of this matter. Referring to the case of *Dupont v. Inglis*, which involved a situation where one of the parties alleged that portions of the **Mining Act** which established the Office of the Mining Commissioner were unconstitutional. One of the grounds argued by the parties was that the Commissioner was resolving disputes between parties the way the courts did prior to 1867, and hence the Commissioner was acting as a court. This being the case, the Office could be created only, and appointments be authorized only, by the federal government. This was section 97 of the **Constitution Act** argument.

Dupont v. Inglis, [1958] S.C.R. 535 (S.C.C.)

Mr. Blue quoted from the judgement at page 544:

> It was urged that the issue was in reality between the respondents and the individual appellants, but that confuses the matter. The question is the validity of the alleged first staking, and that is a matter between the licensee and the

....18

> Crown. Its adjudication may affect a subsequent staking by another licensee; but there is no vinculum juris and no lis between the two licensees, and the disputant is before the tribunal only as he is permitted by the statute to have the claim of another put in question before the Recorder. In the enquiry the subsequent staking is irrelevant, and the decision should be the same as if no such action had taken place.

Mr. Blue submitted that the Court stated that the dispute is between the appellant Wallbridge and the Minister of Northern Development and Mines; it is not, in his submission, a dispute between Inco and Wallbridge. Therefore, if the tribunal considers Inco a party and treats it as the respondent by giving it costs of the type it is seeking, the tribunal would be making an error of law which would not be in accordance with the decision of the Supreme Court in *Dupont v. Inglis*.

According to Mr. Blue, nothing that Wallbridge did brought Inco into the proceeding. Wallbridge did not join Inco, nor serve it initially. The tribunal determined that Inco should be added as a party. Wallbridge did not ask that Inco participate and would have preferred that Inco did not participate.

Mr. Blue's third point is that Inco had not staked and did not have any rights to the mineral deposits under Island FL 52. It was those rights which Wallbridge sought to stake, hence the staking by Wallbridge did not affect any legal interest held by Inco.

Inco's evidence from Mr. Cochrane was that there was no valuable mineral in place under Island FL 52, as argued by Ms. Dyer. Even if Inco had believed that it wanted to obtain title to the mining rights, their evidence was that there was nothing of interest for them to acquire. Rather, it wanted a service lift and an air lift. Inco's evidence was that, should Wallbridge have been allowed to record its staking, these rights could be negotiated. Mr. Hall stated that Wallbridge would be prepared to provide those rights to Inco. Mr. Blue submitted that the evidence does not support the position that Inco's interest is affected by the actions of Wallbridge. Wallbridge did not seek any order against Inco and did not join them on the basis that Inco's interests were not being affected. Inco, rather, was present to protect its business and commercial interests. Therefore, Wallbridge was doing nothing to affect Inco's interest.

Mr. Blue contradicted the position taken by Ms. Dyer concerning the *ex parte* Order of the tribunal precluding the Provincial Mining Recorder and Minister from processing Inco's application to amend its MLO pending the outcome of this proceeding. According to him, the March 4th Order did not tie Inco's hands, because the evidence showed that

Inco did nothing to secure the mineral rights between the time of its meeting with MNDM in 1995 and 2001. Mr. Blue submitted that there was no inconsistency between the tribunal's finding that Inco's application to amend its MLO was still alive with the position taken by Wallbridge that Inco did nothing to further the application. Therefore, even if Inco felt prejudiced by the tribunal's March 4th Order preventing processing of its application, by its own evidence there was nothing of value underlying Island FL 52.*Friction Division Products v. E.I. Du Pont De Nemours & Co.* (1985), 51 O.R. (2D) 244 (High Court), Mr. Blue referred to *Friction Division Products*, where at page 246, Barr J. notes:

> ...At the beginning of the hearing an application was made by Du Pont Canada Inc. for leave to intervene as an added party. The evidence showed that the Canadian company has legitimate commercial interests which may be adversely affected by my decision. I accordingly granted the application under rule 13.01(1)
> When the matter of costs arose, the court found, at page 250:
> ...There will be no order as to the costs of Du Pont Canada Inc. as it intervened in the proceedings at its own request and for the protection of its own interests and was not brought into the proceedings by the applicant.

Kongrecki v. Rafael (1994), 58 C.P.R. (3d) 522 (BCSC), (BCSC),

Mr. Blue referred to the decision in *Kongrecki*, where MacDonald J. states at pages 523 and 525:

> ...Among other things, the intervention of that solicitor led to the execution of a Mutual Full and Final Release, which I regard as a complete answer to any conduct on the part of the defendants up to that date.
>
> Counsel for Mr. Cram supports the plaintiff by emphasizing the absence of any reported case where an allegation of breach of fiduciary duty in itself has led to special costs being awarded. He says that the reference to "professional reputations" of the defendants was made in the context of settlement negotiations.
>
> It was decided that there would be no award of costs to Mr. Cram. Mr. Blue invited the tribunal to read the judgement. He submitted that it would find that the counsel of Mr. Cram had been quite helpful and very busy. The case is a

> precedent for the proposition that costs will not be awarded against an applicant in favour of an intervenor who is there to protect its own interests.

In the Alternative

Mr. Blue moved on to discuss how the tribunal should handle this matter in the event that it has determined that this is a proper case for costs, and read section 126 of the **Mining Act** into the record. He submitted that the tribunal has a choice; it can award costs in a lump sum or determine that it is "too complicated for us" and refer it to an Assessment Officer. The distinction can be found in certain jurisprudence such as the *Murano* case and give other situations in which a court should order a lump sum versus sending the costs to be assessed. Ms. Dyer is asking that the tribunal fix a lump sum. If the tribunal does so, that amount is never an indemnity to Inco for Ms. Dyer's firm's bill or some simulacrum of that bill, such as the party and party bill of costs submitted. It is, rather, a discretionary amount that the tribunal determines is appropriate in the circumstances. Similar wording is found in section 131 of the **Courts of Justice Act.**

According to Mr. Blue, the **Mining Act** provides that the scale of costs shall be according to the tariff in the Superior Court of Justice. There is no tariff applicable, other than for disbursements, so Mr. Blue submitted that this is subject to the discretion of the tribunal.

Mr. Blue submitted that the tribunal also has the discretion to find that no costs are appropriate in the circumstances. He suggested that there are several reasons why this would be an appropriate finding. For purposes of clarity, Mr. Blue reiterated that he was elucidating his position not on whether Inco was entitled to costs, but rather, if the tribunal should find that Inco were so entitled, that the tribunal determine that it will not exercise its discretion in awarding costs.

Mr. Blue stated that, first, the true respondent in this case is the MNDM, which has waived costs. If anyone were entitled to costs, it would be the respondent. There is no rule that says the Crown is not entitled to costs, so that if the Crown elects to waive costs, why should Inco be entitled to its costs. Mr. Blue turned to the reason which he submitted was why the Crown chose to waive costs.

Wallbridge was unsuccessful in this matter, but without overstating it, in Mr. Blue's submission, Wallbridge had legitimate issues placed before the tribunal for which there had been no previous decision of either a Commissioner or Court. Wallbridge sought an interpretation of paragraph 30(c) of the **Mining Act**, which had never been done before. Wallbridge requested that the tribunal specify a procedure by which a licensee could stake a summer resort location. The tribunal's response to this issue was that paragraph 30(c) was similar to other provisions which were once found in the **Mining Act**. Those provisions were "tough", but a licensee had to live with them as they were plainly worded. That decision had never before been made.

A fairness issue was raised, concerning what would transpire if someone discovers a valuable mineral in place in a summer resort location, namely whether it was fair that the discoverer could not stake until the Minister has determined whether there is discovery of a valuable mineral in place. The Ministry accepted that as a fairness issue. Mr. Gashinski said he did agree that there was a fairness issue. He also stated for the first time during the hearing on the merits that he thought Wallbridge should have the first right to stake in the situation where there was found to be discovery of a valuable mineral in place.

Issues of whether a Withdrawal Order could expire were raised. Similarly, issues of whether or not the tribunal has the power to require the Minister's designate, who made the decision about opening, closing and reopening lands, to do so. The fact that the tribunal found contrary to Wallbridge's position in this matter does not take away from the fact that the questions were open and legitimate and required answers.

These questions were raised by what must be considered a junior mining company and it is acknowledged that the questions annoyed and made Inco feel uncomfortable, but that type of probing question should be encouraged by the tribunal as fulfilling the goals set out in section 2 of the **Mining Act**, namely the development of lands in Ontario. That is the nature of the industry. That is creative minds at work and that is what the tribunal is here to decide. But in no sense, in Mr. Blue's submission, can these questions be regarded as a fruitless or as an unmeritorious request or as anything but a fair argument, consideration and decision of open questions. Mr. Blue submitted that the Crown did not ask for costs. The Ministry wanted to obtain some clarity, just like Wallbridge, and the tribunal provided that clarity. The system contemplated by the **Mining Act** worked the way it was supposed to work. Mr. Blue further submitted that Inco was here merely to protect its own interests. Certainly, Wallbridge was here to advance its interests and the Ministry was here to obtain clarity on what the rules are. This would be an appropriate case of the many which are heard by the tribunal for each party to bear their own costs.

In the event that the tribunal does not agree with these submissions, Mr. Blue submitted that the tribunal should find that Inco is not entitled to its solicitor and client costs. That is really asking too much.

With respect to who first offered to settle, Mr. Blue referred the tribunal to sealed envelope #4 (Ex. 1, Tab B4). Mr. Blue reminded the tribunal of a letter dated the 3rd day of March, 2000 (Ex. 10, Tab 2) from Mr. Gashinski, in which he said that the Ministry had discovered a Withdrawal Order, in which he said:

> As there is a prior application for the mining rights for License FL 52 and since the lands are all withdrawn from prospecting , we are not in a position to entertain a request from Wallbridge Mining Company Limited to stake the location, as provided in section 30(c).

. .22

> As far as the Ministry is concerned, the staking by Wallbridge Mining Company Limited is invalid.

Recalling that until that point in time, the evidence was that Mr. Gashinski was prepared to meet with Wallbridge to hear their case for certification of valuable minerals in place and to allow them to stake, or to consider their staking, but as a result of this letter, he changed his position and said that there would be no meeting and no consideration.

Some eight months later, on November 10th, 2000, Wallbridge's counsel, Mr. Stevens wrote to Mr. Norwood and Ms. Dyer, stating:

> While Wallbridge believes it has been justified in the actions that it has taken to date in this matter, in an effort to resolve the matter at the least cost and convenience to all parties, Wallbridge has proposed a manner in which to resolve the matter in a telephone call to each of you this morning. In order to ensure that there is no confusion about the terms of this proposal, we are taking the opportunity to write all parties. Wallbridge would be prepared to abandon its appeal to the Mining and Lands Commissioner on the condition that MNDM provide Wallbridge with a letter evidencing MNDM's agreement to accept Wallbridge's application to prove that there is valuable mineral in place under Island FL 52 in Kelly Lake and that the MNDM will consider Wallbridge's application in the event that MNDM does not accept any pre-existing application for these mineral rights. For greater certainty, in the even that MNDM or the Minister considers Wallbridge's application, then Wallbridge will at that time provide its evidence that there is valuable mineral in place and will seek relief under section 30(c) of the Mining Act. Wallbridge hopes that the parties are able to accept this proposed resolution and would be prepared to have Wallbridge's appeal discussed on a without costs basis, in accordance with this proposal.

This illustrates that it was Wallbridge which was initiating the offer to settle on November 10th. The letter states that all Wallbridge was seeking was to meet with Mr. Gashinski for him to consider its application for discovery of a valuable mineral in place, on the assumption that he hadn't granted those mineral rights to someone else in the meantime and that the appeal be dismissed on a without costs basis, because at that stage in the matter there had been no hearing. Mr. Blue submitted that this was a perfectly reasonable offer to compromise, avoiding a hearing and saving costs for everyone.

Then, Ms. Dyer added terms and conditions. She asked for $10,000, which resulted in Wallbridge not settling. However, it cannot be said that Wallbridge hadn't tried to compromise. Wallbridge, in Mr. Blue's submission, made a perfect compromise, which was spoiled by the adding of unreasonable conditions by Inco. Inco cannot say that it tried to settle on its terms. With Inco's proposal, one of the terms of settlement was unrelated, namely that Wallbridge refrain from staking any lands in which Inco might have an interest. That is unacceptable to anyone, in Mr. Blue's submission. Therefore, he submitted that the conditions Inco was trying to impose were not in the spirit of compromise. They were ones which caused Wallbridge to not be able to agree with Inco and led to the hearing.

With respect to the matter of costs, or with respect to the request that the claim be totally dismissed or that Wallbridge shall never stake another Inco property again, legally that is not compromise for purposes of Rule 49 for entitling one to costs. Referring to *Walker Estate v. York Finch General Hospital* (1999) 42 O.R. (3d) 461 (Ont. Ct. of App.), which supercedes the 1989 *Lavigne* decision referred to by Ms. Dyer, there had been an offer to settle and the offer was basically that a party would be held to the position total defeat, but without costs. The Court of Appeal held that such an offer was not a compromise, and at page 480 states:

> What is the significance of the absence of an element of compromise in the application of rule 49.10(1)? This question was considered by this court in *Data General (Canada) Ltd. v. Molnar Systems Group Inc.* (1999), 6 O.R.o (3d) 409, 85 D.L.R. (4th) 392. In that case the plaintiff Data General had offered to settle its liquidated claim for its full amount. The trial judge held that, because of the absence of an element of compromise, this offer was not an offer to settle within the meaning of this term in Rule 49. Accordingly, he held that the plaintiff *Data General* was entitled to party and party costs, and not solicitor and client costs, following the date of the offer. This court agreed with the trial judge's conclusion but not with his reasons for it.
>
> For the policy reasons set out in *Data General* at p. 415, this court concluded that it should not be an absolute requirement that all offers to settle contain an element of compromise. It held, however, that where fairness is a relevant consideration, the absence of an element of compromise in the offer may appropriately be taken into account when the application of the discretionary exception in rule 49.10(1) is under consideration.

The court then referred to its earlier general statement in *Niagara Structural Steel (St. Catharines) Ltd. v. W.D. Laflamme Ltd.*(1987), 58 O.R. (2d) 773 at p. 777, 19 C.P.C. (2s) 163 with respect to when resort may properly be had to the exception:

> While rule 49.10(1) does not set forth the basis for resorting to the exception to it, it is reasonable to assume that the occasions for the application of the exception should not be so widespread or common that the result would be that the general rule no longer is, in fact, the general rule. If this were to happen, the presumption in favour of the general rule and the resulting reasonable degree of predictability respecting the incidence of costs would disappear and the incentive policy of the rule would be substantially frustrated. Another consequent would be a more uneven application of the rule in litigation generally.
>
> . . . . . .
>
> Keeping the matter on a general plan, it can be said that resort should only be had to the exception where, after giving proper weight to the policy of the general rule, and the importance of reasonable predictability and the even application of the rule, the interests of justice require a departure.
>
> We are satisfied that the circumstances of the case before us bring it within the scope of the discretionary exception. There was no element of compromise in the offer - a discount of less that 1/8,000th of a liquidated claim so clearly falls short of what could amount to a compromise that it is not necessary to express an opinion on that point there would be an element of compromise. The offer amounted virtually to a statement that if the full claim was not paid the CRCS would automatically be obliged to pay solicitor and client costs from the date of the offer.

Mr. Blue submitted that this is exactly the situation with respect to the Inco offer. Unless Wallbridge withdrew its case and agreed to pay Inco $10,000 in costs, and unless Wallbridge agreed to never stake a claim on anything affecting Inco in the future, then it is seeking solicitor and client costs. Mr. Blue submitted that this is not a fair compromise. A fair compromise would have been to just allow Mr. Gashinski to consider Wallbridge's claim and not bother the tribunal further. Mr. Blue submitted that on the basis that Inco's so-called compromise was not a compromise, it is not entitled to its solicitor and client costs.

In *Jet Print Inc. v. Cohen,* [1999] O.J. No. 3329, Court File No. 99-CV-162779 Mr. Blue referred to paragraphs 4 and 5, found at page 2:

> 4. The defendants seek solicitor and client costs on the basis that on at least two occasions prior to the hearing of the motion, the defendants offered to allow the plaintiffs to withdraw their motion if the plaintiffs paid the defendants their party and party costs to date. First, I would point out that rule 49 of the **Rules of Civil Procedure** does not, by the express provision of rule 49.02(2), apply to motions although the existence of an offer is still a matter that the court can take into account in disposing of costs.
>
> 5. Secondly, there is no element of compromise contained in the defendants' offer. While I appreciate that an offer to settle need not contain an element of compromise, in the context of rule 49.10 of the **Rules of Civil Procedure** to trigger the costs consequences of that rule, it nonetheless is recognized as a factor that the court may consider in exercising its discretion to "order otherwise' under that rule - see *Data General (Canada) Ltd. v. Molnar Systems Group Inc.* (1991), 6 O.R. (3d) 409 (C.A.).

Again, Mr. Blue submitted, that Inco was required to demonstrate a genuine effort to compromise before it can maintain that it is entitled to solicitor and client costs, which in his submission has not been done.

Mr. Blue then referred to the hourly rates claimed. Ms. Dyer stated that an appropriate hourly rate for her time is $250.00 per hour, which he submitted was too high. Mr. Blue further submitted that Ms. Dyer can cite no case where a lawyer received that sum on a party and party basis.

Referring to the decision of Malloy, J. in *Bigio v. Royal Insurance Co. of Canada,* [2001] O.J. No. 584, Court File No. 96-CU-108781, at paragraph 3:

> 3 The action was commenced in 1996 and settled in 2000. The assessment officer allowed an hourly rate of $200.00 for senior counsel (a specialist practicing in this field since 1960) and rates of $130/140 for counsel called to the Bar in 1990. Those hourly rates are within an acceptable range of rates for specialized litigation counsel in Toronto

. .26

> for the periods in question: *Currie v. Boyd* (1992), [999] O.J. No. 1440, 92 A.C.W.S. (3d) 935 per Jenkins J.: *Burlie v. Chesson*, [1999] O.J. No. 3328 (S.C.J.) per Kitely J.; *Bemar Construction (Ontario) Inc. v. Toronto Transit Commission*, [2000] O.J. No. 1487, per Master Clark. I agree with Mr. Akazaki's submission that the hourly rates set out in the cases cited by the appellants are somewhat out of date and, in any event, if adjusted for inflation are not much different from the rates awarded in this case. It certainly cannot be said that the rates awarded in this case are so clearly out of line as to constitute an error in principle.

Malloy J. therefore allowed an hourly rate for party and party costs of somewhere between $200 per hour for very senior counsel, which Ms. Dyer is not, although she is experienced, and between $130 and $140 for counsel called to the Bar in 1990. Interpolating between those two numbers would suggest an hourly rate for party and party costs of $175 an hour.

In *Laws v. Berry*, [1997] O.J. No. 3, DRS-04035, Court File No 38482/89, Benotto J. states at paragraphs 7 through 9:

> 7. The solicitor and client rate was reduced by the assessment officer from $350 to $300 per hour. Counsel for the plaintiffs says that the assessment officer should not have "interfered with the market rate". He argued that he was able to chare $350 per hour at the relevant time in other cases, higher amounts have been awarded elsewhere to other counsel and, in yet another case, his own fees were allowed at $400 per hour.
>
> 8. There is no chart or set fee structure for counsel's hourly rate on assessment. There is only a range of rates. The assessment officer, with his or her specialized skill and experience, determines the appropriate rate. It can vary from case to case. I am not prepared to find that the assessment officer is bound by other lawyers' rates in other cases or by this lawyer's rate in another case. The assessment officer may use this information in setting the rate, but it is not written in stone. While some cases fix the rate higher for senior counsel, others fix it lower. The assessment officer is dealing with a

. . . .27

> range of rates. As long as the amount awarded is within the range, there can be no error in principle. The rate of $300 is within the range of solicitor client rates awarded.
>
> 9. This same reasoning holds true for the party and party rate which was reduced from $175 to $150. While some judges (and perhaps some assessment officers) would have determined a different amount, the rate awarded is within the range. Since this is a 1997 case, so that inflating the allowed $150 slightly, it would render an amount of $175 as appropriate, in Mr. Blue's submission.

In *Schneider v. Equitrac Corp.*, [2000] O.J. No. 374, Court File No. 92-CU-57177, Master Albert, who is a very experienced Master, in 2000, states at paragraph 53:

> 53. In fixing the amount of costs, I have taken into account a number of factors. Fixing costs in not an assessment of costs and the quantum arrived at based on a consideration of a number of factors. The factors I have considered include:
>
> Appropriate hourly rates for party-and-party costs in the circumstances are $175 for Ledger (1979), $100 for Tictchie (1989 call), $90 for Galway (1991 call) and $50 for students.

Again, Mr. Blue indicated that Ms. Dyer is a 1982 call, so that $175 under that rule would be appropriate for Ms. Dyer.

Ms. Dyer referred to *Finlayson v. Roberts*, paragraph 25 which states quite clearly, "...that on a party and party basis experienced counsel may be allowed from $175 to $225." In *Burlie v. Chesson,* Ms. Dyer did not draw the tribunal's attention to the last sentence of paragraph 9, which states, "In *Laws v. Berry* ... Benotto J., on appeal from a report of an Assessment Officer, concluded that the Assessment Officer's reduction of the hourly rate from $175 to $150 on a party and party basis was within the range and consequently not so unreasonable or inappropriate as to warrant interference." These cases suggest an appropriate rate would be $175 per hour.

Referring to Re *Lavigne and Ontario Public Service Employees Union*, which is a decision of the Court of Appeal and a major Charter decision where special rules apply, the issue was whether or not the Rand formula of requiring an employee not a member of a union to contribute union funds was constitutional on the favour of association issue.

Ms. Dyer referred the tribunal to portions of the decision which involved the other unions besides OPSEU, which had intervened to support the position that the Rand formula was constitutional. The court did give those interveners costs. Mr. Blue submitted that the interveners in Charter cases are in a little different position than Inco in the matter before the tribunal. In addition, an undertaking from counsel for the unions was extracted that those amounts could be used only for collective bargaining purposes and not go to the general revenue fund. Mr. Blue submitted that the case was special and not applicable to the one the tribunal is determining.

In *Re Ballard Estate*, Ms. Dyer referred the tribunal to page 225, which Mr. Blue submitted does not deal with the issue of costs and whether an intervener is entitled to costs, which is clear from reading paragraph 28:

> Counsel may speak or write to me regarding the costs of this motion.

Mr. Blue submitted that if there is a range of hourly rates, he would submit that the range is $175 plus, between $150 and $200, but nowhere near the $250 claimed. Mr. Blue pointed out that, although Wallbridge lost, the tribunal did not adopt the position of Inco. Rather, it did its own analysis. Ms. Dyer's work was highly competent but not exceptional.

Mr. Blue submitted that, from its submissions, Inco would like the tribunal to send a message to Wallbridge, essentially to the effect of not attempting anything new and innovative, to not dare question the basis of all of Inco's land holdings, because if it does, the tribunal will award heavy and onerous costs against it. That is, in his submission, not the message for the tribunal to be giving to junior mining companies in this province. He submitted that it is fair for any junior mining company, any prospector to study the maps and look at the status of documents, to look at what has not been staked and to attempt to record and if the Mining Recorder refuses such staking, then to seek the judgment of the tribunal.

Therefore, Mr. Blue submitted that the tribunal should not award costs to Inco as they are not entitled to it. Alternatively, the tribunal should exercise its discretion in not awarding costs. Thirdly, if the tribunal determines that it will award costs, it not award solicitor client costs because Wallbridge's conduct has not been reprehensible and Wallbridge has attempted to compromise. It was, rather, Inco, which has been unreasonable.

In the event that the tribunal finds it will award party and party costs, such an award should be based on $175 per hour. If the tribunal is going to award costs, Mr. Blue submitted that it should fix an amount which doesn't have to be reflective of the number of hours claimed. It can be an amount that is appropriate, considering that Wallbridge lost the case and the tribunal's time was taken up, but it should be in the $10,000 to $20,000 range, and not the $57,000 claimed by Inco.

Mr. Blue pointed out that even had Wallbridge won its case, Inco would have lost nothing. It would have lost no valuable mineral in place, on its evidence and it would have lost nothing that it owned. It would have been able to secure all the rights that it wanted through the mineral rights on Island FL 52.

Inco Response

In response, Ms. Dyer stated that Mr. Blue's last argument and the earlier argument that said no order was sought against Inco was not accurate, based on the submissions that were filed by Wallbridge on July 1, 2000 (Ex. 10). In the initial paragraph, 27(1), Mr. Bourassa made the request that Inco be removed as a party and that its alleged 13 year old application to amend MLO 10,872 be declared null and void. In subparagraph 3, the request was that any ministerial or delegated authorization allowing FL 52 to be staked would be exclusive to Wallbridge. In paragraph 4, in the event that the Ministry rejected Wallbridge's evidence and another party, including Inco, provides evidence of a valuable mineral in place, then even so, any order the Minister would give would be exclusive to Wallbridge.

Therefore, Wallbridge made an attack on Inco's prior application and it was seeking priority, even if Inco had the better evidence, which was in the letter to the Commissioner (also included in the exhibits). The concern was that Inco would prove the deposit and the Minister might exercise his discretion to give Inco the rights. After Mr. Blue took over the case, the position was augmented to seek a finding that the application be declared null and void.

In subparagraph 4 of the amended submission, subject to getting these orders set aside and requiring the Minister to consider this, declaring that Wallbridge has the exclusive right to stake out the subject lands and that Wallbridge has priority in registration to Inco of its claim and seeking costs, without any indication as to who they're against. So, the conclusion must be drawn that there were orders sought against Inco's interest and against Inco directly with respect to costs. But the declaratory relief, although not a judgment against Inco, was an order being sought against Inco.

Further to Mr. Blue's submission that awarding costs would be an error of law and contrary to *Dupont v. Inglis*, Mr. Blue read into the record the famous statement on pages 544 and 545, "the issue was in reality between the individual respondents and the individual appellants, but that confuses the matter." The dispute is really with the Ministry. However, Ms. Dyer drew to the attention of the tribunal the cost award in the Supreme Court of Canada, where the respondents are ordered to pay the appellants their costs but there are no costs to or against the Attorney General of Canada or the Attorney General of Ontario.

. . . .30

Wallbridge

Mr. Blue has submitted that the jurisdiction of the tribunal with respect to costs is to fix them or to refer them to an Assessment Officer. With respect, that is not correct. It overlooks any scheme that is set out both in sections 126 and 127 of the **Mining Act**, which is quite different from the Ontario Courts. In section 126, the tribunal is given the same powers, which are that it may award costs or direct such costs to be assessed by an Assessment Officer or it may order that a lump sum be paid in lieu of assessed costs. That is what the Courts do in the fixing of costs, which is the case when a trial judge in a motions court now fixes the costs rather than ordering them out for assessment but, subsection 127(2) is unique to the tribunal, which was once a court. The Commissioner is given the same powers of an Assessment Officer of the Ontario Court (General Division). What comes out of the *Murano* case cited by Mr. Blue, when it talked about fixing costs and when a judge should fix and when it should be ordered to the assessment. By the time there is an end of trial, the judge, who has not been party to all of the previous interlocutory proceedings, the pleadings, the production of documents, who typically doesn't go through the dockets and deal with hourly rates and time spent and what is reasonable. Those are the specialized area for the Assessment Officers. The courts say, "We are not Assessment Officers. We are not equipped to act as Assessment Officers." Subsection 127(2) says that the tribunal has those same powers.

When the Courts then fix costs, what they do is look at the situation, as Blair J. did in the interim motion of *Bargman v. Rooney,* or as Kitely J. did in *Burlie*, and they look to fix costs by the general principles that an Assessment Officer will follow. But the jurisprudence is clear that it is not the same item by item assessment that goes on with respect to the fixing of costs, as opposed to an assessment, and then they try to fix a rate and fix an amount. Typically, they do look at fixing rates in coming to a conclusion and look at the work that was done, that reflects their assessment of what is fair and reasonable in all the circumstances.

But this case where all of the interlocutory proceedings have been under the control of the tribunal and all before the tribunal, Ms. Dyer submits is quite different from a trial. It is more similar to what Blair J. faced and says in his reasons, "I handled all these interlocutory matters, I had the 9:30 appointments. I know better than anybody else what happened in this case." Here the pretrial proceedings were the Orders to File, the settlement discussions encouraged by the Registrar, the attempt for a pre-trial hearing and the hearing itself.

With respect to the issue of rates and whether there is any case where the rates claimed by Inco were given, Ms. Dyer referred to the review by Kitely J. of fixing rates in her decision in *Burlie v. Chesson*, at paragraphs nine and ten. Hoilett J. allowed $400 in *DeJong (Litigation Guardian of) v. Own Sound General & Marine Hospital* (1996), 31 O.R. (3d) 594 (Ont. Gen. Div.); O'Brien J. allowed between $260 and $350 in *Roberts v. Morana*. In 1997 MacFarland, J. allowed senior council an hourly rate of $200. At paragraph 10:

> Based on the foregoing, I conclude that, generally speaking, the judge who heard the motion, application or trial is more generous than the Assessment Officer. That is consistent with the judge having an appreciation of the worth of the services in the particular case. Furthermore, in the cases where the hourly rates were the lowest, the judges hearing the appeals from the reports of the Assessment Officers were bound by the jurisdictional threshold of not interfering unless the amount of the certificate is so grossly inadequate as to justify interference.

The rate was fixed at $200, which was 75 percent of his solicitor client rate.

Ms. Dyer addressed speculation by Mr. Blue as to why the Crown was not seeking costs. She pointed out that Mr. Norwood had been here and could have been asked to address that before he left. But then, she asserted, this was consistent with both the past practices of Mr. Norwood and Mr. Bourassa generally in their capacity as counsel to MNDM and of *Dupont v. Inglis*, where the Attorney General didn't get costs, the Attorney General does not typically request costs. MNDM, as Mr. Marshall indicated in the second Wallbridge matter before the tribunal, has a supervisory role. Yes, it may be a fight with the Crown, but the Ministry's job is to enforce the **Mining Act** for the benefit of all participants. Ms. Dyer questioned whether MNDM seldom asks for costs, absent a charge of fraud or something similar against Ministry officials, if there in fact ever was such a case. The fact that MNDM is waiving costs should not in any way affect Inco's claim.

As to the matter of all questions being raised by Wallbridge being open and legitimate questions, and not fruitless or unmeritorious, the issue with respect to the withdrawal order was dealt with by Inco and MNDM on the basis of it being understood that you cannot stake against a withdrawal order and everyone knows that. The authorities cited by Inco in its initial submissions were from Barton's textbook that dealt with withdrawal orders and how the lands are removed from staking. It is not an open question. It has not been an open question in Ontario since the Privy Council decision in 1912 in *Florence Mining Co., Limited v. Cobalt Lake Mining Co., Limited,* (1908-1909) 18 O.L.R. 275 (C.A.). Both the Court of Appeal for Ontario and the Privy Council stated that you cannot stake in the face of a withdrawal order. So, it is not surprising that there have been no recent decisions on this issue when Wallbridge contemplated doing so, because the industry, the staking profession and the mining industry have known that when a Minister withdraws lands they are closed, and the rule applies to everyone. It is not an issue between a junior and senior mining company.

This is a situation where Inco is looking to protect its prior claim for an amendment to the MLO, having purchased the surface rights on the advice of Mark Hall and others at MNDM in 1995. Inco is willing to have any valid question, obviously, dealt with. It tries to deal with it on points of law as to what Inco and its counsel believe

. . . .32

are well settled principles. This is not such a case. The request of costs is for compensation on a party and party basis, consistent with the tribunal's practice or on a solicitor and client basis because of the rules and the offer.

As to whether or not it is Inco's position that Wallbridge didn't make any proposal, Ms. Dyer indicated that she sealed the relevant documents, found at Tab 7, which were subsequently unsealed. There had been a negotiating process. This wasn't a case where Inco is saying, "Don't ever stake my lands or there is not settlement". Ms. Dyer doesn't deny that this was a request made as matters got underway on November 9th, and possibly even early on the 10th, but the way the matter was left from the time for which costs on a solicitor and client basis are requested was after November 10th, at which there was an agreement between Mr. Stevens, Mr. Norwood and Ms. Dyer that there would be an argument as to costs on November 29th and both sides were taking a risk. There was an outstanding offer of $10,000 on a bill of $17,000, but the arrangement was, "if we cannot agree on any number that it will have to be argued". But there was another concept to this settlement where there was no agreement and that was on the condition. Tab B6 indicates the condition that went out after the negotiation of its terms, with Mr. Pascoe's assistance and Mr. Norwood's input. It went out prior to the telephone conference call and formed the basis for negotiation and changes which are reflected in the correspondence found at B7. That is the offer of compromise.

The cases raised by Mr. Blue are distinguishable because there is an element of compromise and furthermore, the very sections that he cited, the Court of Appeal (Tab 1, page 480, subparagraph e) says it is not an absolute requirement. The offer in the *Walker* case at 481 was different from the offer made by Inco.

The *Jet Print* case, Nordheimer J. confirms that an element of compromise is not a necessary requirement when the automatic cost consequences of 49.10 are invoked. It also confirms that the lack of compromise is a factor that can be taken into account. With respect to *Lavigne* being a special case, in Ms. Dyer's submission, it is not accurate to say that interveners only get their costs in Charter cases. Ms. Dyer referred to the *Gow* case, on equality for gays and lesbians.

As to the range of rate on a party and party basis, Ms. Dyer submitted that the $175 proposed by Mr. Blue is too low given the complexity of the case and particularly how it developed at the end. When costs are fixed, they have been fixed for senior counsel whether called for 19 years or called in 1960. The chart shows that Ms. Dyer is in the range of the cases, as are those of her colleagues, associates and students. $250 is a reasonable rate, particularly when costs are to be fixed. No challenge has been taken tot the work done and the hours claimed.

Mr. Blue wanted to clarify matters with respect to settlement. Wallbridge made the initial offer in November. Ms. Dyer came back with conditions in reply. There was no meeting of the minds, there wasn't an offer accepted and the case law on costs say in

that situation that it is not an offer that triggers the solicitor and client costs consequences. Ms. Dyer countered that the offer would have to trigger it, because if it had been accepted, then they would be dealing with the offer to settle. Its is only when the offer is not accepted because there is no meeting of the minds that after the trial the judge deals with what the offer had to say.

Findings

Adding Inco as a Party

The tribunal notes that Wallbridge challenged its decision to add INCO as a party in this matter at an early stage in the proceedings, and continued to raise the question as to INCO's standing and rights in the matter of costs. Despite challenges in the correspondence and during the hearing, no formal motion was brought. In the giving of these Reasons, the tribunal has determined that this matter should be addressed, so as to not be left without mention, prior to addressing the issue of whether INCO should be entitled to its costs in this matter.

This matter came to the tribunal on December 2, 1999 by way of an appeal from the decision of the Provincial Mining Recorder to not record filed only Mining Claim 1219049. This appeal was not typical of refusals stemming from staking deficiencies. The decision of the Recorder was not forwarded. However, in the Notice of Appeal, Wallbridge states:

> Title to LO 10972 did not grant the mining rights under Island FL 52 in Kelly Lake. FL 52 was disposed of by the MNR as a summer resort location (reserving the mining rights to the Crown). On November 12, 1999 Wallbridge staked Island FL 52 ...on the basis that Wallbridge can demonstrate a discovery of valuable mineral in place, making the claim recordable pursuant to subsection 30(c) ... The Ministry of Northern Development and Mines is obligated to provide Wallbridge the exclusive opportunity to demonstrate that there has been a discovery of valuable mineral in place, and once demonstrated to certify that discovery and subsequently record the claim, or grant Wallbridge's priority in restaking FL 52, or issue an unpatented mining claim under subsection 176(3)...

Certification of discovery of valuable mineral in place is outside of the tribunal's jurisdiction, being under the authority of the Minister, or his delegate. The appeal was not typical of the type of appeal normally seen, involving staking deficiencies. Wallbridge was basing the legitimacy of its having staked lands which the statute describes as "lands not open" on certain assumptions and statutory interpretation. The formal appeal process would not permit the tribunal to take the place of the Minister and determine whether certification was warranted. The tribunal followed its normal practice of attempting to resolve matters wherever possible outside of the formal hearing process. The tribunal wrote to the Minister's delegate, Mr. Ron Gashinski, Senior Manager, Mining Lands

Branch, Ministry of Northern Development and Mines, concerning certification pursuant to clause 30(c), noting that the reason for the refusal to record was apparently due to the disposition of the surface rights as a summer resort location. The tribunal raised the issue of whether an application for certification of a valuable mineral in place could be applied in the circumstances of this case. It was noted that Wallbridge hoped that the Minister would issue an unpatented mining claim pursuant to subsection 176(3) of the **Mining Act**. The tribunal also questioned whether there would be a problem with the staking having occurred prior to certification.

In his written response, Mr. Gashinski indicated that the certification must take place prior to the staking, also noting that Wallbridge had not filed any documentation for certification. He also indicated his unwillingness to bring forward a recommendation to Cabinet for the issuance of an unpatented mining claim under subsection 176(3), as all existing bureaucratic and ministerial processes or approaches bearing consideration had not been exhausted. Mr. Gashinski was willing to meet with Wallbridge, but he stated that the mining claim would likely have to be restaked.

At this point, Wallbridge began expressing an intention to establish an interest ahead of anyone else vis-à-vis the staked lands. For example, in its letter to the tribunal of January 20th, 2000, Wallbridge indicated that it would seek to protect the rights it believed it had acquired through staking before setting up any meeting with Mr. Gashinski. Wallbridge did complain about the lack of a procedure to be followed for certification. To this end, Wallbridge asked that the tribunal issue certain orders that would have the effect of giving Wallbridge priority ahead of INCO. It requested that its appeal remain in effect until withdrawn or abandoned. It further requested that it be given the exclusive right to apply for certification and that any authorization permitting staking of Location FL 52 be exclusive to Wallbridge. Finally, should its application for certification be rejected, Wallbridge requested that it receive exclusive right to stake following any successful certification by another party.

Wallbridge noted that FL 52 is surrounded by LO 10872, which is held by INCO. It pointed out that Wallbridge took steps to determine that the mining rights were not included in the Licence of Occupation and asserted that INCO may or may not be aware of this fact. This assertion was set out in Wallbridge's letter of January 20, 2000, under the signature of Mr. Mark Hall.

It questioned the fairness of having Wallbridge attempt to have its discovery certified without the protection of prior staking. Wallbridge noted that INCO was in a better position to demonstrate what lay under FL 52 and MNDM would have been within its rights to award the staking permission to INCO. Wallbridge believed that its only course to protect its interest was to proceed as it had.

On March 3, 2000, MNDM advised the tribunal that the mineral and surface rights under

. . .35

FL 52 had been withdrawn from staking by Withdrawal Order W-S-25/87 pending the possible amendment of MLO 10872. Wallbridge and the tribunal received formal notice that INCO was also interested in acquiring the mining rights. Mr. Gashinski also, definitively answered MNDM's position concerning the matter of Wallbridge's staking, namely that it was considered invalid.

Wallbridge advised the tribunal that a copy of the Withdrawal Order was not on file in the Provincial Recording Office, as required by subsection 35(3). Wallbridge also asserted that the Withdrawal Order is inconsistent with MNDM's position that the land was not open for staking by reason of its being a summer resort location. Pointing out that the attempt to amend the MLO dates back to 1985 with no attempts at finalisation until the filing of Wallbridge's appeal, Wallbridge indicated that it wished to proceed with the appeal, namely through the Order to File documentation, as opposed to engaging in further settlement discussions which had been initiated earlier by the tribunal's Registrar. Accordingly, the tribunal issued its Order to File on the 20th day of March, 2000, naming INCO as Party of the Third Part.

Wallbridge, through its solicitor, Mr. Michael Bourassa, objected to the adding of INCO, pointing out that the appeal was from a decision of the Mining Recorder. It had nothing whatsoever to do with INCO's application to amend its MLO. MNDM took four months to "exhume a long dead application". Under what he termed "normal circumstances", the matter of such application would not even be considered an issue. He went on to say, "Wallbridge is particularly concerned that MNDM chose to advise INCO of Wallbridge's appeal and effectively invited them to revive the 1987 application and to be added as a party to Wallbridge's appeal." Mr. Bourassa also requested similar Orders to those requested by Wallbridge.

Despite the fact that decisions of the Minister cannot be appealed to the tribunal, the **Mining Act**, to paraphrase Rand J. in *Dupont v. Inglis*, supra is legislation primarily providing for the administration of mining resources according to the rules provided. The Supreme Court also noted the jurisdiction of the tribunal found in the predecessor to section 105. As the wording now exists, the Commissioner may determine every claim, question and dispute in respect of the matter or thing, and in doing so may make such order as may be considered necessary to give effect to and enforce that determination.

The matter before the tribunal was whether Wallbridge's Mining Claim should be recorded under the circumstances. Initially, this question was in relation to the pre-existing summer resort location and whether the lands could be staked. Then, the existence of the withdrawal order relating to the proposed amendment of the MLO was uncovered.

Wallbridge sought to have this matter determined in isolation from other pre-existing interests in the mining rights under FL 52. This does not reflect the reality under which the **Mining Act** operates. The acquisition of mining rights is a competitive process under

the legislation, even with respect to what comes after certification of discovery of a valuable mineral in place, as required by clause 30(c).

The tribunal's decision to add INCO as a party was based, in part, on its status as owner of the summer resort location. The **Mining Act** provides notice and certain rights to the holders of surface rights where mining activity is proposed. At a minimum, the holder is entitled to compensation for damage sustained to the surface rights [s. 79]. If the uses of the surface rights fall into the items listed under section 32, such as a pleasure ground, which arguably applies to a summer resort location, the holder is entitled to be asked for his consent, failing which the terms may be determined by the Recorder or Commissioner. Although this notice is not specifically provided for in section 30(c), the procedures to be employed for certification were unknown at the time of Wallbridge's staking.

Mr. Hall committed himself to a written assertion on January 20th, 2000 that INCO might not be aware that it did not own the mineral rights under FL 52. Yet, under cross-examination by Ms. Dyer, Mr. Hall acknowledged that he was present at a meeting in his former capacity of Chief Mining Recorder of MNDM, with Mr. Brian Randa in attendance on behalf of INCO and Mr. Gashinski on behalf of MNDM. Mr. Hall also acknowledged that Mr. Randa "had expressed a concern to acquire the mining rights of Island FL 52 for INCO." Ms. Dyer went on to ask: "So that INCO was aware in 1995 and had discussed with you personally the fact that the mining rights under this FL 52 might not be in the Licence of Occupation" to which Mr. Hall agreed. The tribunal did not hear submissions on what would appear to be contradictory evidence concerning what INCO did and did not know at the time of the Wallbridge appeal. Clearly, from Mr. Hall's evidence, INCO was fully aware that it did not have the mining rights under FL 52. He was also, in his capacity as Chief Mining Recorder, aware that INCO was interested in taking whatever steps were necessary to acquire those rights. Based upon advice given at this meeting, INCO acquired the summer resort location from Carmen Fielding. Whether Mr. Hall was aware of this subsequent purchase is irrelevant. He was aware of INCO's knowledge of its holdings, vis-à-vis the mining rights under FL 52, despite his assertions to the contrary in his correspondence with the tribunal in January 2000.

The tribunal comes to the conclusion that, in his attempts to keep information concerning Wallbridge's activities outside of the knowledge of INCO, Mr. Hall was willing to mislead the tribunal. Mr. Hall explained this, in further cross-examination, to the effect that he did not know what INCO's intentions were with respect to the prospective purchase of the surface rights of the summer resort location, FL 52.

The tribunal has not attempted to ascertain Mr. Hall's motives in misleading the tribunal in his correspondence. However, the fact remains that Mr. Hall did assert in writing in January, 2000 that INCO might not be aware of the status of those mining rights under FL 52, when it is clear that he had personal knowledge that INCO was aware of that fact. The tribunal concludes that Wallbridge's continuing to maintain that INCO had no business at the hearing was self-serving and contrary to the evidence borne out in the

hearing of the case. The tribunal concludes that the decision to add INCO as a party was the correct decision under the circumstances.

At the time of the issuing of the Order to File, it was known that there was a pre-existing withdrawal order, issued on account of INCO's application to amend its MLO. In effect, INCO's right to be heard in this matter arises out of this pre-existing application. It was apparent to this tribunal that the issues raised would require INCO's participation. It was anticipated that this would aid the tribunal in its adjudication on any of the issues raised up to that time, as well as those that would arise, whether expected or unexpected, in the course of the proceedings. Whatever the status of the withdrawal order ultimately turned out to be, the fact is that the tribunal determined that it was fitting and proper to include INCO in this proceeding.

Wallbridge asserted that this was an appeal from a decision of the Provincial Mining Recorder to not record its staking. However, unlike the typical appeal of this sort, staking deficiencies were not involved. Rather, the issues touched upon INCO's interests in this land at every turn. INCO, as owner of the surface rights, was entitled to assume that the lands were not open for staking, a fact which has been borne out by the hearing of this appeal and further review by the Ontario Court of Justice. More importantly, the status of INCO's application to amend its MLO was very much in issue. The ongoing validity of that application could not be determined without either hearing from INCO directly, either as to what had transpired to allow it to sit unattended for thirteen years, or in argument as to whether it continued to be a valid and subsisting application. The matter of a pre-existing application for the same lands raised questions concerning the status of that application which only INCO and MNDM could answer.

The tribunal is master of its own procedure. Adding parties, while having substantive underpinnings, also is a procedural determination. Wallbridge raised issues which it asserted have never been raised before. This is true, although there certainly is an element of these issues never having been raised because they are so fundamental to the operation of the **Mining Act**. This is so much so that that no one, not even a former highly placed employee of the Ministry, has sought to raise them as having any chance of success. Notwithstanding the nature of the issues, whether they are categorized as novel by the appellant or unreasonable by others, it was still within Wallbridge's rights to bring them to this tribunal and pursue its case. Specifically, the issues were whether lands which are by statute not open to staking may be staked and whether a withdrawal order associated with an application for amending an MLO, lost or forgotten in the bureaucracy, has a built-in expiry date. These issues have far reaching importance to the mining community. Perhaps Wallbridge was within its rights to assert the position of exclusivity that it did. However, despite Mr. Hall's reputation as former Chief Mining Recorder, he was no longer acting in the best interests of the mineral exploration program, but in that of Wallbridge. His written assertion on January 20th, 2000 that INCO may or may not have been aware that it didn't own the mineral rights under FL 52 was patently false and he should have been well aware of this fact, given that he participated in a meeting in 1995 exploring the avenues open to INCO to acquire those rights..

In retrospect, the tribunal was much aided by the assistance provided by counsel for INCO in ensuring that all pertinent facts and law were brought to its attention throughout the adjudication of this novel and difficult matter.

The questions raised by Wallbridge formed part of this inquiry, but do not encompass the whole of it. Any attempt to preclude INCO could have resulted, had Wallbridge been successful in this matter, in conflicting and contrary results of who was entitled to the mining rights under FL 52. This is clearly contrary to both the intent of the **Mining Act** and the powers given to the tribunal to determine all questions raised in connection with an application or appeal before the final order is issued.

Hearing of the Facts

At the outset of this proceeding, INCO brought a motion for determination of the jurisdiction of the tribunal, which the tribunal determined it would render upon hearing the appeal.

Wallbridge attempted to have the tribunal issue orders which it ultimately found it did not have jurisdiction to make, involving the Minister's powers concerning the withdrawal orders, compelling the Minister's delegate to proceed with an application for certification in a manner guaranteed to provide exclusivity to Wallbridge's efforts and ultimately, ensuring that exclusivity beyond the circumstances of this particular appeal. This jurisdictional issue was unique, in that no prior attempts to have the tribunal issue such orders were produced. It was asserted on behalf of Wallbridge that the unique nature of the appeal was such that a full hearing, on the evidence it wished to present, would be necessary for the tribunal to render a decision concerning its jurisdiction. It was asserted that the hearing of such evidence was necessary in order for a decision maker to make a decision on the issue, being necessary to the decision maker's understanding of the decision he or she must make.

Wallbridge succeeded in having, for a time, the circumstances surrounding the tenure of that withdrawal order examined, but in the end, it was found to be valid and subsisting and applying to the lands. Similarly, Wallbridge succeeded in opening the question of the manner, or rather the sequence of necessary events, in which an application for certification for discovery of valuable mineral in place to be considered. Both questions were coined as unique, but in truth, the circumstances under which they arose proved to be so contrary to the fundamental manner in which mining rights can be acquired under the **Mining Act** that neither argument was successful, either before the tribunal or before the courts. In addition, the argument concerning staking before certification was also not successful before the Mining Recorder.

The question of whether staking can occur before certification on lands not open for staking by statutory prohibition could have been answered without having to hear evidence. It may have served some other purpose for the junior mining company to take on the much larger, established company, INCO. There were assertions that there was a

difference in the manner in which either received treatment from MNDM, although what that purpose may have been is not clear for the purposes of this case. Rather, it is seen as self-serving and carried absolutely no weight, given that the actions of the staker were contrary to the provisions of the **Mining Act**. That Wallbridge was concerned that it would lose whatever priority it felt it could muster through its actions was not persuasive, as the **Mining Act** has been found to be a statute which promotes competition and not pre-existing exclusivity, in the race to acquire mining rights.

As to the second issue, dealing with the withdrawal orders, the facts are found to have had a bearing on, if not the outcome, at least the case which Wallbridge sought to make. Wallbridge pursued two tactics. The first was to issue the various orders discussed above, giving it priority to establish its interest in FL 52. The second was to bring in all evidence concerning the withdrawal order to establish that, on the facts, it could no longer be considered in operation. The tribunal found the tone and tenor taken by Mr. Blue disturbing, where he stated at page 24 of the November 29th, 2000, transcript: *"If you eliminate some of my orders, I anticipate a lot of objections, a lot of arguing objections."* [emphasis added]. This review of the Order issued by the Minister's delegate was jurisdictionally troubling to the tribunal, and to INCO, hence its jurisdictional motion. Counsel for Wallbridge stated that, by having an appeal pursuant to section 112, which he had asked the tribunal to read as being from anything ministerial being done by any official, done in connection with a decision of the Mining Recorder, not only could this ministerial decision underlying the Mining Recorder's refusal be reviewed, but more importantly, his client would be entitled to a decision based upon the equities, pursuant to subsection 121. Had there been no staking and no appeal, if the request for consideration were made pursuant to section 27, then Wallbridge would not be able to bring such equitable issues to bear in any judicial review which would flow from such actions, if the request were denied.

Referring to the case of *Inglis v. Dupont,* it was submitted that the tribunal, in accordance with the **Interpretation Act** should give a broad liberal interpretation of its authority. He argued that the tribunal should err on the side of seizing jurisdiction to do that which the Legislature intended. According to Rand J., the tribunal should be making decisions on subsidiary issues, in this case such as on the orders relating to exclusivity requested. The tribunal is to be regarded as an integral part of the internal administration of the **Mining Act**. The evidence which Wallbridge sought to introduce will relate to the circumstances under which the withdrawal order was made, what happened to it, the circumstances in which the invitation regarding certification were then put off due to the discovery of an old withdrawal order and other such specific matters. All of these matters, although ancillary to the main question, it was submitted, are necessary in determining whether the decision of the Mining Recorder was the correct one. The tribunal, it was submitted, is charged with making just such decisions under the **Mining Act**. At page 62 of the transcript, it was asserted:

> You would be making decisions not about the Minister, not about the Crown, but about the actions and what must be done by functionaries, as

> the Supreme Court of Canada has said, or officials under the **Mining Act**; that is within your jurisdiction. If you don't have that jurisdiction, you don't have any power. And I submit it would be very unwise for you, in advance of the evidence, [to] say that you do not have the power to make those subsidiary orders.

The tribunal notes that MNDM did not have objections to the hearing of the specific evidence which Wallbridge wished to adduce, although its submissions were that it agreed with INCO.

Wallbridge was not successful in having the withdrawal order overturned or declared void. The evidence on this issue extended the length of the proceedings. However, Wallbridge was determined to have the tribunal hear the evidence since it formed a necessary part of its case. A tribunal can never tell how dubious a case will turn out to be and it sometimes finds itself allowing evidence despite any misgivings about that evidence. And while Wallbridge may try to gain some sympathy from its status as a "junior mining company", the tribunal notes that it was represented by able counsel who would be knowledgeable in terms of the risks associated with bringing "unique" cases to court

Discretion in Awarding Costs

It was submitted on behalf of Wallbridge that, in the event that it found Inco was entitled to costs, the tribunal exercise its discretion to not award costs. Reasons were that MNDM was the true respondent, and it elected to waive costs. Therefore, why should INCO be so entitled. Also, it was submitted that the issues raised had never been before the Commissioner or a Court. The case Wallbridge sought to make was unique and novel.

The tribunal has considered the submissions on behalf of Wallbridge. It acknowledges that the case that it sought to make, both with regard to section 30(c) and with regard to the withdrawal order, has indeed not been made before. However, with both sets of issues, the cases were marginal and made contrary to a straightforward statutory prohibition. The first words of section 30(c), [now clause 30(1)(c)] are "No mining claim shall be staked out or recorded on any land..." Similarly, clause 35(1)(a) permits the Minister to withdraw lands from staking by order.

It was these straightforward statutory prohibitions which Wallbridge sought to overcome in its case, relying on the fact that there was no process for certification and that the initial withdrawal order was old. The proper course would have been to have the certification take place, thereby dealing with the wording of section 30(c), and to have the lands ordered reopened. Anyone knowledgeable in the operation of the **Mining Act** should have known that this was the proper manner in which to proceed. Any other action would bring with it those risks inherent in proceeding contrary to the statute. This was clearly the risk that Wallbridge was willing to take, in order to attempt to establish

the priority it sought with respect to its unlawful staking or to be given priority to anything which could occur after the fact.

The tribunal finds that this risk carries with it the possibility that the approach will fail outright. In these circumstances, the tribunal finds that this is a proper case to exercise its discretion and award such costs as it determines are appropriate in the circumstances. It therefore, does not accept the suggestion by Wallbridge that it not exercise its discretion.

As to the matter of MNDM waiving its costs in this matter, the tribunal relies on the case of *Dupont v. Inglis*. The actions such as that case, or the current one, are quite typical of matters which are raised under the **Mining Act**. The lis may be between the Ministry and the appellant, but upholding the decision of the Mining Recorder is actively and properly pursued by the interested third party, in this case INCO. In *Dupont v. Inglis*, it was quite correctly pointed out that the Supreme Court of Canada awarded costs to the respondents, despite the fact that there was no cost award to either of the Attorneys General for Canada or Ontario.

Offer to Settle

The circumstances surrounding the Offer to Settle, in November, 2000, were highly unusual, in that the refusal to finalize the offer coincided with the time when Aird Berlis was discharged by Wallbridge and Mr. Blue was retained. Whatever circumstances arose giving rise to this change of counsel, what is abundantly clear from the documentation filed, is that the direction taken changed substantially at that time. Indeed, as was pointed out in submissions, issues developed rapidly in the twelve days prior to the hearing on the merits.

Wallbridge was encouraged by the tribunal's Registrar, as well undoubtedly by the tribunal's Guidelines, to enter into settlement discussions, a suggestion which it complied with. There were two agendas for this settlement discussion, apparently, one being the settlement itself, and the other being a list of issues to be addressed, drafted by the Deputy Mining and Lands Commissioner. One cannot know whether Wallbridge's counsel came to that conference with specific instructions only as to the latter. However, it is clear that Wallbridge was unwilling to agree to the terms of the proposed settlement and may have also been unwilling to accept the legal advice given by Aird Berlis concerning its chances at a successful outcome at a hearing. This, however, is only speculation, as one can only guess that there was a breakdown in the solicitor client relationship. Nonetheless, shortly after the conference, Mr. Blue was retained and the tone and tenor of the legal representation changed substantially.

The tribunal notes that the circumstances surrounding this change in counsel are not clear. Further, notwithstanding the solid reputation of Aird Berlis before this tribunal in dealing with mining matters, it is clear that Wallbridge, and any party before the tribunal, is entitled to have the representation it desires. It is also entitled to pursue its case and give instructions as it sees fit. The timing of this change in counsel, the tribunal finds,

. . . .42

removes some of the merits of considering whether to award costs on a solicitor and client basis. However, that is not the end of the matter.

The tribunal has stated elsewhere [*Graf v. Palu*, p. 22] that it relies on the principles contained in certain specific portions of Rules 57.01. The tribunal is not strictly bound by the *Rules of Civil Procedure*, having its own statutory authority in Part VI of the **Mining Act**, its Guidelines, and being governed by the **Statutory Powers Procedure Act**. This being said, the tribunal finds that the principles of the *Rules*, and applicable cases, with respect to the awarding of costs are extremely helpful in determining whether and in what manner to exercise its discretion in awarding costs. In finding that it will rely on these principles, the tribunal will also consider whether it is appropriate to do so in the circumstances of the case.

The tribunal has considered the authorities cited on behalf of INCO with respect to this issue of settlement. It agrees that there are ample instances when the Court applied its discretion pursuant to Rule 57. One of the governing factors was where the outcome was no better than what had been offered in settlement.

With the greatest of respect to INCO, however, the tribunal finds that the offer, while no better that the ultimate outcome, was of a quality to be akin to a total capitulation. In this regard, it finds that it agrees with the submissions made on behalf of Wallbridge, that the offer to settle did not contain any element of compromise. Relying on the case of Walker Estate v. York Finch General Hospital, supra, the tribunal recognizes compromise or fairness are not absolute requirements for an offer to settle to be considered within the Rule. The tribunal finds that there was no element of compromise, but that Wallbridge was also seeking the certainty which flows from an adjudicated decision.

The offer was one that required Wallbridge to in essence withdraw from asserting its position of priority in FL 52 and be permitted to make its application for certification with none of the protections it was seeking from the tribunal. The right to make an application for certification is contained in the statute, and the tribunal can think of no way in which INCO could have opposed such a course. Therefore, the right to make application is nothing new or unusual. In addition, Wallbridge would have had to pay INCO's costs. Finally, Wallbridge was to undertake to not stake any other of INCO's mining licenses of occupation. Not only was this as near a total withdrawal by Wallbridge of its position, but it would have served to limit certain actions in the future.

Clearly, Wallbridge believed it had developed a strategy for the acquisition of proven mining lands. Despite it being highly questionable whether the strategy was one contemplated by the **Mining Act,** nonetheless, Wallbridge was entitled to have the question determined at a hearing as opposed to having a similar, albeit somewhat more far reaching limitation, in the terms of proposed settlement. This is the course Wallbridge chose.

The tribunal finds that it will not apply its discretion to award costs on a solicitor and

client basis from the date of the offer to settle. Although no case law to this effect was introduced, the issues raised by Wallbridge were ones of statutory interpretation, rather than arising from contract or tort. The matters of settlement, in such a case, can be viewed as less satisfactory than outcomes such as damages or specific performance. While in both cases, there may be a clear winner and a clear loser, the matter of the statutory interpretation sought by Wallbridge has the tenor of tribunal sanctioned and in this case court sanctioned interpretations, something which is not available on settlement.

The tribunal finds that, based upon the facts and issues raised in this case, and owing to the statutory interpretations around which this case revolves, it will not exercise its discretion and award costs on a solicitor and client basis from the date of the offer to settle.

Concerning costs to a Third Party or Intervenor the tribunal finds that INCO's participation in the hearing was both useful and necessary. Wallbridge alleged that INCO was merely acting to protect its business interests. The tribunal finds that it disagrees with this statement.

INCO presented facts and argument on issues from the perspective of a company seeking to rely on certain protections under the **Mining Act**, including but not limited to being assured that the mining rights under its summer resort location FL 52 would not be opened to staking or otherwise acquired, other than through the operation of the provisions of the legislation. While MNDM was in a better position to defend the existence of a withdrawal order, it was only INCO which could answer the question as to why the application to amend its MLO had not been pursued in a more timely manner. Wallbridge sought to present evidence on this issue and it was evidence to which only INCO could adequately respond.

Once again, the tribunal relies on the authority of *Dupont v. Inglis* in its determination that the awarding of costs to a third party, such as INCO, is contemplated by the manner in which the **Mining Act** operates. While this was the result in *Dupont v. Inglis*, the entitlement of a third party is more clearly spelled out in *(Attorney General) v. Ballard Estate*, wherein it is noted that once a party is added, that party has every right to participate in all aspects of the hearing, including entitlement to costs.

Costs on a Party and Party Basis

As has been stated above, the tribunal regards Wallbridge as having assumed the risks inherent in bringing this case, such as it did. On the one side, this was not a typical case where a party has a clear inkling, through established precedent and practice, as to the outcome. On the other hand, the statutory interpretation sought by Wallbridge was one which was highly unlikely, given that it required endorsement of actions contrary to the statute. One factor in determining whether to assess costs against Wallbridge is that it knew, or should have known, the risks involved, and have been prepared to bear the result, including the assessment of costs.

INCO pointed to Rule 57.01 for the tribunal to consider, and in particular, the complexity, the importance of the issues, and the conduct of any party. The tribunal has considered the tests set out in this Rule, as referred to by INCO and finds that it is reasonable in the circumstances to adopt them.

The tribunal has reviewed the matter of the complexity of this proceeding thoroughly. In particular, it has reviewed the filings of the parties, both from the perspective of introduction of issues, as well as the late filing of complex materials. In fairness to all sides, some of the filings were designed to assist in locating materials in what turned out to be an extremely voluminous file. Aside from this fact, the materials filed relate to what can only be described as issues which were inordinately complex and continued to evolve. What rendered issues complex was, in no small part, a result of the novel statutory interpretations asserted by Wallbridge at every turn. This includes, but is not limited to, such questions as are outlined here.

One question was whether the wording in subsection 112(1), involving an appeal from a Mining Recorder could encompass decisions acts or things of a ministerial, administrative, or judicial character by other MNDM officials ancillary to, but affecting the ultimate decision of the Mining Recorder could form part of the questions under appeal. Another was whether the operation of sections 105 and 121, and the Supreme Court of Canada's description of the nature of the tribunal in Dupont v. Inglis served to provide the tribunal jurisdiction to afford certain equitable relief of a quality not available to the appellant upon judicial review. The former question was addressed in a summary manner by MNDM at the hearing and the latter was not addressed by the tribunal in its decision in this matter. Nonetheless, the issues were raised, and were required to be dealt with. The issues raised required an examination of the statutory history of the provisions concerning discovery of valuable mineral in place. This provision was once a requirement for the staking of any mining claim, but has since been dropped so that it is retained exclusively in connection with acquiring mining rights under a summer resort location. However, the legislative purpose behind the earlier provision was examined and related to its current use. The last examples are those which were the nub of the proceedings, namely the interpretation of section 30(c), as well as the complexity of facts and law which gave rise to the arguments as to what was asserted to be a defunct withdrawal order. In both cases, the proposed interpretations were so unique that they added a complex element to the proceedings.

The second category cited by INCO was that of the importance of the issues raised. The matter of whether lands which were closed to staking by statutory prohibition could somehow be staked, through a circumvention of the legislative provisions, was a fundamental issue under the operation of the **Mining Act**. Without belabouring the point, considerable argument was heard concerning the importance of this statutory provision and others like it. Underlying this issue was also the competitive nature of the acquisition of mining rights in Ontario, something which has not changed, although the need for discovery of valuable mineral in place is no longer present other than in connection with summer resort locations. The matter of fairness was raised in support of

Wallbridge's position, but this was found to not override the competitive nature of the acquisition of mining rights upon which the legislation is based. Similarly important were issues flowing from the question of when a withdrawal order which has not been ordered revoked may be seen to no longer be in effect, essentially exhausted. Again, the veracity of a withdrawal order, as well as the factual circumstances surrounding its inception and the failure to have it shown properly on the map available in the Provincial Recording Office, all had implications for the operation of the **Mining Act** and the industry. It was also necessary to consider and examine the implications of the lack of certification process, and weigh the potential resulting unfairness issues raised with the purposive provisions of the legislation, which were found historically to favour competition.

Finally, the third point was the conduct of Wallbridge in lengthening the proceedings. The tribunal has noted that it was the discharge of Aird Berlis and retention of Mr. Blue which demonstrated its intention to pursue its appeal and chose its solicitor accordingly to carry out this assignment. While Mr. Blue was certainly dogged in his pursuit of the issues he raised on behalf of his client, this change in direction must be attributed to the change in solicitors by Wallbridge in its determination that it would pursue its appeal. The tribunal finds that the change in solicitors was a factor in serving to lengthen the proceeding, as there was a clear change in direction from this time forward. In particular, one does wonder whether settlement discussions would have gone on as long as they had, or to a similar conclusion had Mr. Blue been retained prior to that time. The very real change in tone, tenor and direction of the proceedings are all strong indications that matters would have proceeded differently had Mr. Blue been retained throughout. The tribunal finds that the proceedings were lengthened as a result of the manner in which this proceeding was handled, perhaps not so much on behalf of Wallbridge, but by Wallbridge itself in its choice of solicitors. This is particularly so, in light of the decision to change solicitors at a critical juncture in the proceedings and continue to pursue its case. This decision carried with it a certain risk factor associated with bringing a "novel" case to court, as Wallbridge had staked lands which the statute describes as "lands not open"..

The tribunal is satisfied, based upon the factors set out in Rule 57.01, that it will apply its discretion and award costs from Wallbridge to INCO on a party and party basis.

Awarding of Costs

The tribunal has discretionary power to award costs, may direct that costs be assessed by an assessment officer or may fix costs [s. 126]. The tribunal also has the powers of an Assessment Officer of the Superior Court of Justice with respect to counsel fees [s. 127(2)]. Therefore, once the tribunal has determined that it will exercise its discretion and award costs, it has one of three choices. It may fix costs. It may assess costs. Or, it may direct the assessment of costs.

The tribunal has determined that it would be appropriate to fix costs in this case. All of

the costs claimed have been set out in considerable detail, with the accounting having been done on a docket and a summary basis. The tribunal has reviewed the material filed, and although items were blackened out, the tribunal accepts that these items had no bearing on the case before it. Therefore, with no other objections having been raised, it finds no reason to question the numbers of hours spent by the various lawyers and students who worked on the file. Similarly, there were no issues raised as to the disbursements.

In reviewing the two Bills of Costs, filed as Tabs A1 and A2 to Exhibit 1, Documents on Costs, the tribunal noted that the times spent by Ms. Dyer varied in two respects. It should be noted that Tab A1 is the Bill for Party and Party Costs to November 11th, 2000 and Solicitor and Client Costs thereafter. Tab A2 is for Costs on a Party and Party Basis throughout the period claimed. The first difference is in the time claimed in Heading C entitled "Settlement Discussions". The total number of hours claimed in under A1 is 10.1 hours. Under A2, the total claimed is 8.8 hours. The second difference is that the Party and Party Bill, A2, shows a daily rate for attendance at the hearing of 4 days at $2,500 per day. At the hourly rate, this would break down to 40 hours. On the Solicitor and Client Bill, A1, the actual time spent is shown as 41.2 hours.

The tribunal has reviewed the itemized monthly dockets, which do not break down in sufficient information and detail, the various categories into which the time spent should fall. Without the opportunity to ask questions, the tribunal is satisfied to allow the number of hours shown on the Party and Party Bill. The total difference is a matter of 2.5 hours.

The claim for costs has been divided into sections, the hours of which are summarized

A. Investigate and Prepare Submissions in Response to Order to File

9.4 hours Oliver 4.9 hours Taylor 36 hours

B. Preparation for Hearing

6.8 hours Student 18.5 hours

56 hours

C. Settlement Discussions

8.8 hours

D. Hearing

40 hours

D. Post-Hearing

Dyer 58.hours Student hours

E. Reasons for Decision

Dyer 1.5 hours

Dyer 180.5 hours Oliver 4.9 hours Taylor 36 hours Student hours

Disbursements $1,199.05 + GST of 7% of $83.93 = $1,282.98

Quantum

The tribunal has reviewed the rates claimed on behalf of INCO by Ms. Dyer and notes that she has set out a chart of the lawyers' hourly rates. Based upon the authority of two cases cited, namely *Burlie and Gill Estate*, she has calculated the respective percentages allowed of 65 and 75 percent. Finally, Ms. Dyer has listed the party and party rate claimed, which in each case is shown to be less than those of Burlie and Gill Estate. Mr. Blue has highlighted other cases cited by Ms. Dyer and his own, with rates ranging from $130 to $175.

The tribunal finds that it will fix costs at the hourly rates proposed on behalf of INCO on a party and party basis, that is, $250 for Dyer, $240 for Oliver, $140 for Taylor and $60 for students. It relies on the authority in *Bargman v. Rooney.*

It has been asserted on behalf of Wallbridge that accepting the quantum put forward by INCO would send a clear signal to the industry; that junior mining companies should not take on any new and innovative questions. Further, it was asserted that companies such as Wallbridge should not dare to challenge the basis for the large mining lands holding of companies such as INCO. This argument underlies much of Wallbridge's evidence.

It has not been stated elsewhere and so must be stated here. The case asserted by Wallbridge was unique and unusual because it was outside the bounds of what was contemplated by the **Mining Act**. The tribunal heard Wallbridge's evidence and gave it a full hearing. The tribunal listened to Wallbridge's counsel's many "arguing objections" and gave Wallbridge the benefit of the doubt when it came to presenting evidence.

Despite these and many other facts, the staking of a mining claim on lands not open to staking by operation of statute or by Ministerial order, are closed to staking. The tribunal found this to be the case and the Court agreed. Many, if not most, in the industry would also agree, and this is the most cogent reason why a case of this nature has never come forward.

. . . .48

Added to this is the fact that one of the principals of Wallbridge is the former Chief Mining Recorder for the Province of Ontario who ought to have known how fundamental this principle of not staking closed or withdrawn lands is to the orderly acquisition of mining lands tenure in this province. Further, this principal of Wallbridge was privy to information, going so far as to hear advice dispensed to INCO, concerning its own efforts to acquire the mining rights to FL 52 in 1995. Wallbridge should be aware that the tribunal has examined carefully the wording of section 26 of the **Mining Act** and has considered the procedures outlined in that section in connection with this case. It has determined that the wording is such that it can discourage the prospector licensee, but would have little or no effect on the corporate interests involved.

In a similar vein to what was done in *Bargman v. Rooney*, at paragraph 25, the tribunal finds that it will award costs at the liberal end of the party and party scale as a means of showing ***the measure of*** its displeasure at what transpired giving rise to this case. With reference to the various heading under Rule 57.01, the tribunal relies on paragraph (f), namely any other matters, which are discussed in the proceeding paragraphs..

Conclusions

Costs will be fixed as follows:

Dyer 180.5 hours x $250 = $45,125

Oliver 4.9 hours x $240 = $1,176

Taylor 36 hours x $140 = $5,040

Student 25.1 hours x $60 = $1,506

= $52,847

GST 7% $ 3,699.29

$56, 546.29

Disbursements $1,199.05 + GST of 7% of $83.93 = $1,282.98

= $57,829.27

The tribunal finds that it will fix costs at $57,829.27, relying on the authority in *Bargman v. Rooney*. Costs shall be paid within thirty days of the issuance of this Order.