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

File No. MA 040-99

M. Orr
Deputy Mining and Lands Commissioner)

L. Kamerman
Mining and Lands Commissioner)

Wednesday, the 30th day of May, 2001.

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.

ORDER

UPON hearing from the parties and reading the documentation filed;

1. **THIS TRIBUNAL ORDERS** that this appeal 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 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, be and is hereby dismissed.

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 the 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 30th day of May, 2001.

Original signed by M. Orr

M. Orr
DEPUTY MINING AND LANDS COMMISSIONER

Original signed by L. Kamerman

L. Kamerman
MINING AND LANDS COMMISSIONER

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REASONS

Appearances

WALLBRIDGE:	Mr. Ian Blue of Cassels Brock & Blackwell
MNDM:	Mr. John Norwood of MNDM Legal Services Branch
INCO:	Ms. Valerie A.E. Dyer of Osler, Hoskin & Harcourt

Background

Wallbridge Mining Company Limited ("Wallbridge" or the "appellant"), is a corporation under the laws of Ontario.

INCO Limited ("INCO"), is incorporated under the laws of Canada, having changed its name from The International Nickel Company of Canada Limited by Supplementary Letters Patent.

Island F.L. 52 ("F.L.52"), (Parcel 19507 Sudbury East Section), is an island found in Kelly Lake in the Township of Broder in the District of Sudbury. It is .839 of an acre in size. Its history for the purposes of this hearing is as follows.

In January 1944, certain mining claims were staked and recorded. These claims surrounded F.L. 52 and included the lands under the waters of Kelly Lake. Claim No. S 37339 surrounds F.L. 52, and says that F.L. 52 is "excluded".[1] The claims themselves became the subject of a Mining License of Occupation # 10,872 (LO 10,872), and this license is dated May 6, 1947. The license was issued in the name of "The International Nickel Company of Canada, Limited", now known as INCO Limited. The Licensee for purposes of the license was "Copper Cliff". The grantor was the then Minister of Mines.

On May 24, 1944, a Patents Plan was laid down by the then Department of Lands and Forests, in conjunction with the creation of a plan of survey for a Summer Resort Location under the Public Lands Act on Island F.L. 52 in Kelly Lake located opposite Lot 12, Concession VI, in the Township of Broder in the District of Sudbury.

On May 4, 1955, F.L. 52 was conveyed to Carman Fielding as a Summer Resort Location under **The Public Lands Act** (according to Letters Patent No. 7899 dated May 4, 1955, and registered on June 21, 1955). The mining rights were reserved to the Crown. The aforementioned plan of survey and field notes formed part of the grant to Fielding.

[1] Exhibit 13(c) Tab 5, 3rd page in (page 31)

On March 4, 1987, Withdrawal Order (Order No. W-25/87 NE) was made by S.E. Yundt, Director, Land Management Branch, Ministry of Natural Resources on behalf of the Minister of Northern Development and Mines under section 36 of the **Mining Act** R.S.O. 1980, c. 268. The islands in Kelly Lake were identified in this Order (as being outlined in red). The Withdrawal Order caused the mining and surface rights of the islands to be withdrawn from prospecting, staking out, sale or lease. The reason given was to prevent adverse alienation while the ministry considered the possibility of amending LO 10,872.[2]

On June 24, 1997, Carman Fielding conveyed his interest in Summer Resort Location F.L. 52 to INCO.

Mining Claim 1217049 (which is the subject of this hearing), was staked on November 10, 1999, on behalf of Wallbridge. The claim was received by the Mining Recorder on November 12, 1999. It was marked "Filed Only". Wallbridge's appeal was filed on November 23, 1999. On December 2, 1999, the claim application was marked "Refused" by the Mining Recorder – the reason that was given was that the subject land was a Summer Resort Location.

On March 16, 2000, a second Withdrawal Order (Order No. W-S-12/00 NER) was made by Ron C. Gashinski, Senior Manager, Mining Lands Section of the Ministry of Northern Development and Mines (MNDM) under section 35 of the **Mining Act**. The islands in Kelly Lake were again identified as the subject matter. The reasons were the same as in the previous Withdrawal Order.

On April 4, 2001, this tribunal issued an Interlocutory Order pursuant to section 105 prohibiting the MNDM from amending Mining License of Occupation 10,872 or allowing F.L. 52 to be otherwise granted pending the outcome of this hearing.

INCO sought, and was granted party status prior to the hearing getting underway.

This matter was heard over a period of four days on November 29, 30, December 1, 2000 and January 10, 2001, in Toronto.

Before the hearing got underway, INCO brought a Motion saying that the tribunal did not have the jurisdiction to grant the orders sought by Wallbridge. After hearing from all the Parties, the tribunal decided that the Motion request would be dealt with once the evidence had been heard.

[2] Exhibit 2

Evidence

Appellant – Wallbridge

Mark Hall is a Land Manager for the Appellant. He has a degree in geology, and at one time worked for the provincial government as a Mining Recorder starting in 1981 when he began as a trainee. He had been the Chief Mining Recorder for nearly six years, from 1992 to 1997, when he left the government. He took up mining land work in the private sector.

He began his testimony by telling the tribunal that the appellant is an exploration mining company looking for mineral sites to explore and develop. The appellant had an option (Kallio Option) on a property located specifically in Waters and Broder Township. Geologically speaking, the property is found in the Sudbury Basin. This property was described by Mr. Hall as having "high mineral potential" due to its relationship with the "Copper Cliff Offset Dyke", a "vertical sheet" characterized as having "very prolific mineral deposits". According to Mr. Hall, the location of F.L. 52 in relation to this Dyke makes the island valuable in terms of its mineral potential.

Mr. Hall described the process followed by the appellant in carrying out its goal to obtain developable land. Potential sites were identified by the appellant and Mr. Hall then searched title. Using claim maps, he determined whether the land was Crown land or not and if it was not, whether the owner would be willing to sell it to the appellant.

Mr. Hall's efforts to research the status of F.L 52 consisted of searching title, looking at the Mining License of Occupation, doing a desktop analysis, checking the claim map for outstanding applications on the site and filing a request under the **Freedom of Information Act.**

Referring to a more detailed map of Broder Township, (Exhibit 21), Mr. Hall indicated that he researched the parcels, picking up their numbers and then determined their ownership by using the parcel abstract. Mr. Hall's opinion was that the Dyke crossed F.L 52. Mr. Hall indicated that any lands which had been withdrawn from staking would have been marked with the letter "R" with a subscript inside a circle. Stippling around the withdrawal would indicate the boundary of any withdrawn lands. Mr. Hall's examination of the map led him to conclude that there was no indication on the map that F.L. 52 lands had been withdrawn from staking.

Mr. Hall's efforts to research the status of F.L. 52 included a reference to the Mining Licence of Occupation 10,872. His interpretation of that License was that it pertained to the lands covered by the waters of Kelly Lake, but did not include F.L. 52. His search of the title to F.L. 52 indicated that it was a Summer Resort Location. His final conclusion with respect to the mining rights was that they resided in the Crown.

Mr. Hall said that he and one R.J. Ingram canoed out to F.L. 52 on November 10, 1999, and staked the island. He said that at the time of the staking he was aware of Section 30(c) of the **Mining Act** and that he also knew that INCO held the surface rights as a Summer Resort Location. The explanation given for going ahead with the staking was that:

> "... there was no specific policy or procedure for addressing applications for the discovery of valuable mineral in place. In lack of that procedure being in place, there was no given process for making an application. ... In the absence of that policy or procedure, we tried to for the company cover all the bases that we could. ... It appeared as if there may have been some latitude to stake first and have that recording done after the certification."

Mr. Hall testified that when he went to record the claim it was refused. Consequently, he requested that it be taken as "Filed Only", as he felt this would allow him the opportunity to dispute or appeal the Recorder's decision.

He described Wallbridge's appeal of the Mining Recorder's decision as a "specific request" and said:

> "... recognizing that it was disposed of as a Summer Resort Location and that the mining rights resided with the Crown, that we wanted to make application or were making application to be heard for the presentation of making a discovery of a valuable mineral in place."

Mr. Hall recounted to the tribunal his knowledge of the history of the interest that INCO had displayed in the mineral rights to F.L. 52 and the actions it had taken to look into and acquire those rights. Part of that history took place during Mr. Hall's employment with the MNDM. He was aware of the fact that the surface rights being owned by someone other than INCO had presented a problem for INCO. INCO would have to consider purchasing the surface rights in order to smooth the way to their acquiring the mineral rights. Mr. Hall was present at a meeting held on May 19, 1995, when this issue was discussed and he recalled that there had been a reference by INCO to its using the subject land for a "vent raise". Mr. Hall denied knowing about a Withdrawal Order at the time the aforementioned meeting took place.

Mr. Hall also gave evidence concerning his knowledge of INCO's 1987 Mining License of Occupation. In doing so, he referred to a letter sent by INCO to the Ministry which inquired into the status of two small islands found "within the limits of L.O.

10,872" asking whether title to the islands was included in the License. The Ministry's opinion was sought on this point. F.L. 52 is one of the islands referred to in this letter. Mr. Hall noted that while the INCO letter makes mention of protecting an interest in the lands (the islands), and while it asked to have the lands withdrawn from staking, he did not consider the letter to be an "application" to amend the LO. He saw it as an inquiry. He also took the position that INCO did not have an interest in the lands under the island – they were owned by the Crown.

As for INCO's request for a Withdrawal Order, Mr. Hall testified that Withdrawal Orders are not regarded as, nor meant to be, permanent in nature. They are "meant to be in existence while something is resolved." He also noted that such Orders do not carry an expiry date. He gave an example of the creation of a park, with the associated need to set boundaries or pass regulations associated with that creation. Lands would be re-opened after this had been done. Mr. Hall described one notable exception regarding the re-opening of withdrawn lands, that being the Great Lakes which have permanently been withdrawn from staking. He noted that some Orders have been lost or misplaced but that the MNDM staff was making efforts to locate them and look into re-opening them. He recalled one presentation he made on this issue when the Ministry employed him.

When asked how long the Ministry kept applications for mineral rights open, Mr. Hall testified about his own experience both as a government employee and as a private consultant. He described time periods of anywhere from thirty days to six months.

When asked what he thought about the time the Ministry should have taken to amend the MLO "in the normal course of business", Mr. Hall testified that a year and a half would have been more than enough time.

Mr. Hall also made reference to a second Withdrawal Order dated March 16, 2000. This Order had apparently been made with a view to preventing adverse alienation of the subject lands while the Ministry was determining the status of F.L. 52. Mr. Hall expected that the Ministry would look at the title. He also said that it was "unusual" to find one Withdrawal Order being made while one still existed for the same lands. Mr. Hall's view of this was that it indicated or implied that the first Order was defective and perhaps had no effect.

After referring to a Press Release dated March 6, 2000, issued by INCO and dealing with discoveries made at Kelly Lake, Mr. Hall indicated that it was his belief that INCO knew of Wallbridge's attempt to file a claim prior to INCO issuing its release. He also testified that Wallbridge had a study that indicated that a discovery of valuable min-

eral in place had been made on F.L. 52. Furthermore, his client was prepared to show the study to the Minister. He concluded his testimony by giving an opinion to the effect that trying to stake a small piece of mineral rights which are surrounded by mineral rights owned by others is a common practice in the industry.

Mr. Hall also recounted events that had occurred after Wallbridge had filed its appeal. He referred to Ministry correspondence which he felt supported his position that there was some question as to how to proceed with the process associated with proving a discovery of valuable mineral in place for purposes of acquiring mineral rights under a summer resort location. That correspondence was in response to a letter from this tribunal shortly after Wallbridge launched its appeal wherein the tribunal had asked if there was an opportunity to resolve the matter without litigation. The Ministry responded on December 23, 2000 and indicated that Wallbridge could meet with the Ministry regarding the matter of certification, but that "there [was] a likelihood that the land [would] have to be restaked." The Ministry also reiterated that demonstration of a valuable mineral in place had to take place "prior to staking a mining claim". [3] (The Ministry confirmed this position again in a letter dated March 3, 2000, addressed to the tribunal, indicating that it regarded the Wallbridge staking as invalid, as "additional material" in the form of a Withdrawal Order showed that the mineral and surface rights had been withdrawn from staking. See Ministry Evidence below)

Under cross examination by the MNDM counsel in dealing with the reference made by Wallbridge counsel to "favours" having been given to INCO, Mr. Hall described INCO lands people as "talented", the inference being that talented staff would get the benefit of the doubt if the situation called for it. When asked if he could give an example of Withdrawal Orders with expiry dates, Mr. Hall was unable to recall any. Once matters had been resolved, an order would be made under section 35 of the **Act** reopening the land. With respect to applications for mineral rights, he acknowledged that there were exceptions to the Ministry practice of being "expeditious". He also agreed with the MNDM counsel that he knew F.L. 52 was a Summer Resort Location at the time he staked it. However, there was no policy or procedure in place to deal with section 30(c) situations or applications. He did consult with the Ministry about whether a policy was in place to deal with such a situation, but came away from his discussions with the understanding that no set policy existed. He also admitted that the owner was not notified with respect to the staking activities that took place, nor with respect to the discovery he and his co-staker made of what they considered to be valuable mineral in place.

Mr. Hall was also cross-examined by INCO's counsel. He admitted that he did not have personal first-hand knowledge of the 1987 Withdrawal Order, nor did he have any direct knowledge as to how INCO's request to amend the Mining Licence of Occupation

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[3] Exhibit 10, Tab 2, page 1

was handled within the Ministry. He was aware of INCO's inquiries regarding the possibility of acquiring the mineral rights to F.L. 52, and he was also aware of the Ministry's answer that INCO would have to purchase the surface rights from their owner prior to the Ministry disposing of the mineral rights. He also admitted that he knew that Section 30(c) of the **Act** required that certification be obtained prior to the lands being staked, and that Wallbridge had staked prior to seeking certification. His reason for staking despite this was that there was no existing procedure on "how to do it", referring to the procedure related to obtaining certification. He went on to say that the concern was that other parties could become aware of Wallbridge's information and try to "usurp [Wallbridge's] position in the queue" (to apply for certification). Under further questioning by INCO counsel, Mr. Hall went on to explain further that Wallbridge's fear was that INCO could provide more comprehensive or better evidence of a valuable mineral in place. He likened the situation to the competition between stakers. "If somebody comes in and .... stakes a claim and records it, that gets put on record. But there doesn't seem to be that assurance in making application for valuable mineral in place because there is no precedent." He acknowledged upon further questioning by INCO counsel that priority of time (as it relates to staking), existed because it was a stipulation in the **Mining Act**. With respect to the situation Wallbridge found itself facing, "you have to take whatever precedents and ... assumption that you can make." Upon being questioned as to what efforts had been made to put Wallbridge's information before the Ministry, he acknowledged that no evidence regarding the discovery of valuable mineral in place had been presented to the Ministry. However, he went on in cross-examination to describe how Wallbridge had investigated the mineral content of the island and was questioned by INCO counsel as to the nature of what was found on the island. Mr. Hall was asked about what Wallbridge knew about the work done by INCO with respect to its lands (which surround the island), what Wallbridge did to investigate the mineral potential of the island itself, and the lengths it went to in publicizing that potential.

Questions were also asked relating to the study that Mr. Hall said had been prepared by Wallbridge to support its contention that "valuable mineral in place" could be found on F.L. 52. In his reply testimony, Mr. Hall said that at the time of the staking, which was November 12, 1999, no report was in existence. The "possibility" of minerals occurring on the site had been only "discussed". The report itself had been drafted in December 1999. Mr. Hall's recollection on this point was vague. His knowledge of the actual contents of the report was also vague. When asked by the tribunal what would happen to the claim if the Minister did not certify the findings in the report, Mr. Hall said that the claim would become a "nullity".

Respondent – Ministry of Northern Development and Mines

The Ministry' evidence began with the testimony of Mr. Ron Gashinski, Senior Manager for the Mines and Minerals Division for the Mining Lands section of the Ministry. He described himself as the "most senior administrator for the **Mining Act,** excluding Part VII." Among other things, he said he was responsible for "numerous sections of the **Act** that require[d] ministerial discretion."

Mr. Gashinski's testimony began with a review of the history of F.L. 52 and the related documentation. Apparently, in 1944, a Plan of Survey was drawn up for a Summer Resort Location on the island. The tribunal notes that the then name of "Department of Lands and Forests" is stamped or marked on the Survey exhibit. The tribunal notes that the Survey is marked with the words "Applicant. C. Fielding". The Plan and Field notes of the Ontario Land Surveyor, F.C. Lane, also form part of the Letters Patent for Summer Resort Location F.L. 52 and which were granted to a Carman Fielding in 1955 under the **Public Lands Act**. Summer Resort Location F.L. 52 is described as "comprising an island in Kelly Lake opposite Lot 12, Concession 6, Township of Broder, District of Sudbury." As Mr. Gashinski explained, the minerals and trees were reserved to the Crown. Mr. Fielding conveyed this Summer Resort Location to INCO Limited on June 24, 1997.

Mr. Gashinski also testified about the Mining License of Occupation, (also called License of Occupation) 10,872 (MLO 10,872) dated May 6, 1947. This license pertained to twelve mining claims that happened to surround and cover Kelly Lake. The tribunal notes that the Department of Lands and Forests did the mapping that accompanies the License. This is noted on the Plan that is part of the License. The License permitted the working of these claims and referred to them as "being land covered by the waters of Kelly Lake." The tribunal notes that one claim in particular (S-37338) has within its boundaries what appears to be F.L. 52. On looking at the claim itself which was part of the INCO exhibits, the tribunal notes that the claim has been marked with the words "Excl. Island F.L. 52". The acreage of the Island (.839 acres) is noted above these words on that document.

The tribunal also notes that a letter from the Surveyor General at that time, F. Beatty, dated February 25, 1947 and directed to the then Deputy Minister of Mines and describing the description for the License, says "[y]ou will notice that this description does not include any islands or islets which may lie within the boundary as described."

Mr. Gashinski described the actions taken by INCO commencing in 1987 with a letter dated January 28, 1987, to the Mining Recorder in Sudbury. While INCO opined in that letter that the license granted title to what it described as "the entire area", it also said that "there could be some uncertainty as to the status of the two small islands located

within the limits of L.O. 10,872 and whether title to these lands was also included." INCO also asked that the lands be withdrawn from prospecting pursuant to the **Act**, then Section 36(1)(a), or "some other suitable measures which would effectively protect our interest in these lands." No mention was made in the letter of the existence of Summer Resort Location F.L. 52. The Ministry apparently agreed to follow up on this request and in a letter dated February 19, 1987, from the MNDM to the MNR, asked that Ministry if it had any concerns with the possibility of revising the License to include the islands, as "[i]t had been determined that the islands were not included in the original grant to INCO in 1947." The MNDM also said in that letter that the lands were being withdrawn under the then Section 36 of the **Mining Act**, so as to "protect the company's interest". The MNR responded in March of that year to say that it had no concerns with including the islands in the License. Officials with the MNDM also indicated that they were proceeding to amend the License. The tribunal notes that the existence of Summer Resort Location F.L. 52 is not mentioned in any of the correspondence (letters, memos or notes) referred to by Mr. Gashinski in his testimony.

Mr. Gashinski reviewed the history leading up to the signing of a Withdrawal Order on March 4, 1987, which he said was currently in effect. He told the tribunal that a second Withdrawal Order was made in March 2000, recognizing that something was going on. It was an attempt to put an end to further ambiguity and uncertainty regarding the availability of the islands in Kelly Lake for staking, prospecting etc. This, despite the fact that his research determined that the 1987 Withdrawal Order "clearly outlin[ed] the islands in Kelly Lake [were] not available for staking." Mr. Gashinski stated that it was his decision to issue a second Withdrawal Order, whether "rightly or wrongly". As he saw things, even experienced Ministry staff was expressing concerns with what was being uncovered through the research. Mr. Gashinski stated that the Order was intended to bring to an end any ambiguity and that he thought the action to be "prudent".

A gap in the historical record seems to have occurred between 1987 and 1995, when it seems that a meeting was held between INCO and the MNDM. However, Mr. Gashinski said he was not in attendance at such a meeting and could recollect only a meeting which was held at that time between INCO (Brian Randa) and the MNDM (Hall, Denomme, the latter being the Mining Recorder for the Sudbury Mining Division at that time).

Under cross-examination by Wallbridge counsel, Mr. Gashinski agreed that the certification process under Section 30(c) of the **Act** should recognize the person who discovers minerals in a Summer Resort Location. He also indicated that the reopening of lands affected by a withdrawal order would include a fourteen-day notice provision (in order to be fair to interested parties).

Evidence of F. R. J. Spooner – MNDM

Mr. Spooner has been a Provincial Mining Recorder for three years and before that was a Divisional Mining Recorder for approximately thirteen years.

His testimony addressed the Application to Record made by Wallbridge on November 12, 1999. He also described a conversation that he had with Mr. Hall prior to the Application being received wherein Mr. Hall discussed a "situation where perhaps there would be staking of an island that was surrounded by restrictions in a lake and that the island was a Summer Resort Location." When the Wallbridge Application arrived in his office, he asked his staff to research the island's status. The Application was not recorded. It was marked "Filed Only" on November 25, 1999 and "Refused" on December 2, 1999. This latter notation was made after it was learned that F.L. 52 was a Summer Resort Location through a title search at the Registry Office. Wallbridge's Appeal is dated November 23, 1999. The tribunal notes that November 12, 1999, is given as the date of the Decision appealed from. Mr. Spooner attempted to clear up what he described as "confusion" concerning these dates, and indicated that "[p]erhaps Mr. Hall was somewhat ahead of me...." In cross-examination by INCO counsel, Mr. Spooner elaborated on his conversation with Mr. Hall and indicated that he advised Mr. Hall that he (Spooner) "would not be automatically recording his mining claim. It was a Summer Resort Location."

Mr. Spooner was also privy to discussions in the MNDM as to whether section 30(b) of the **Act** was also applicable. This section deals with an application pending in which the applicant may acquire the minerals. Effectively, according to Mr. Spooner, the land was not open for staking by virtue of three different sections of the **Act**, i.e. sections 30(b) and (c) and section 35.

According to Mr. Spooner, who referred the tribunal to a case of Commissioner Ferguson, "**Weirmeir et al. v. The Director of the Lands Administration Branch of the Ministry of Natural Resources et al**"[4] , wherein the Commissioner considered that an application under the **Public Lands Act** was "established as soon as there was something on file with the Ministry of Natural Resources." In the matter of the "application" that relates to this matter, Mr. Spooner considered the original 1987 correspondence from of INCO as forming the "application" to amend the License of Occupation.

Party Of The Third Part - INCO

The evidence was presented through the testimony of two witnesses, Mr. L.B Cochrane and Mr. B. Randa. The former witness is a Director of Mines Exploration and

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[4] 5 M.C.C. 469

the latter is a "Senior Land Man". Mr. Cochrane's employment with INCO went back to 1970; Mr. Randa's to 1969.

Mr. Cochrane is a professional geologist and gave evidence relating to the historical presence of INCO in the Sudbury area. He also described INCO's licenses of occupation in and around Kelly Lake. He told the Tribunal that INCO had carried out exploration on MLO 10,872 (now License of Occupation 10,872), since 1947, and provided information with respect to the estimated 450,000 feet of diamond drilling the company had carried out on lands covered by the License. This was broken down in to 153 holes, with approximately 350,000 feet drilled from surface locations and approximately 102,000 feet carried on in underground locations.

While Mr. Cochrane had no direct connection to the 1987 correspondence described earlier by Mr. Gashinski, he understood that INCO's interest in F.L. 52 stemmed from the fact that the company held all the surrounding ground and the island might be useful to the work they were carrying out around the island. Also, it would be difficult for another party to explore or develop the island, given that INCO held the surrounding ground. He said that INCO continued to have an interest in F.L. 52 and that in 1995, was told by the MNDM that gaining the mining rights would be helped by purchasing the surface rights from the owner, Carman Fielding. He also said that the surface rights were of interest "for consideration for development of the Kelly Lake deposit."

In 1997, INCO purchased the surface rights from Mr. Fielding. In the meantime, the Ministry had withdrawn the mining rights from staking. According to Mr. Cochrane, with this withdrawal INCO did not need to press the Ministry with respect to amending the MLO, because the request was still under consideration by the MNDM. In the meantime, INCO was able to use the hiatus afforded by the withdrawal to determine what F.L. 52 "meant to the development of Kelly Lake." He said it was "not a pending issue" – the claims were withdrawn from staking.

Mr. Cochrane went on to describe INCO's work on the Kelly Lake deposit. He referred to an October 22, 1997, press release describing two new areas of mineralization in the Copper Cliff South mine vicinity. A significant new ore zone was discovered at a depth of 1370 metres which INCO was confident could be developed into a mineral resource and ore reserve. In March 2000, a second press release announced discovery of a major deposit at Kelly Lake of nickel and platinum group metals that were found to be richer than those currently mined by INCO in the area. The significance of this release was the discovery of a quantity and quality resource that could be mined. The next steps would be to develop a feasibility study, including the cost of capital and operation, and form a development plan. F.L. 52 was being considered in the current development plan.

He indicated that he heard about the Wallbridge staking of F.L. 52 on March 6, 2000, at the Prospectors and Developers Convention. INCO apparently checked to see if the claims had been staked and then moved to protect its interest by becoming a party to the hearing before this tribunal.

Mr. Cochrane stated that if mineralization is suspected in an area, prospecting and geophysical work would be necessary to determine whether there was a potential deposit. It would be necessary to sample through diamond drilling, sampling and assays. As for the efforts described by Mr. Hall to investigate for the presence of "valuable minerals in place", Mr. Cochrane said that "one could not draw from Mr. Hall's comments that there were valuable minerals in place...." He was of the opinion that valuable minerals in place had never been found in an olivine diabase dyke, which are very common in the Sudbury area and are not to be confused with the Copper Cliff Offset Dyke, which underlies the Kelly Lake deposit. The olivine diabase dykes are approximately 1.2 to 1.3 billion years old, while the offset dyke intruded in the neighbourhood of 1.8 billion years ago. The former are known to contain no significant mineralization while the latter are known to contain mineralization.

He also denied that INCO had ever received special treatment in its dealings with the MNDM, in response to the evidence given by Mr. Hall.

Under cross-examination, Mr. Cochrane explained the reason for INCO's interest in the mining rights for F.L. 52, (as opposed to just owning the surface rights). It would obviate the need to negotiate agreements with the mining rights owner to excavate on their property – a lengthy procedure. While INCO did not have a formal report for the minerals under F.L. 52, it did have information resulting from its drilling and geophysics efforts. He also admitted that the information he gave the tribunal was as a result of reading the INCO documentation prepared for the hearing and that he had no direct involvement in its preparation. He further admitted that INCO did not take active steps to obtain the mineral rights as the Withdrawal Order had the effect of tying up the island. When asked by Wallbridge counsel why INCO purchased the surface rights in 1997 with the island rights "tied up sufficiently by the Withdrawal Order", Mr. Cochrane explained that INCO was "looking to the future and trying to avoid dealing with a third party on the surface rights."

Mr. Randa told the tribunal that he looked after INCO's mining properties across Canada and elsewhere. He reported to Mr. Rodney, who no longer was with the company. In referring to letters between the MNDM and Mr. Rodney of INCO dated January 28 and 29, 1987, he indicated that he first saw them in the early 1990's.

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He described the May 19, 1995, meeting held at the MNDM with Mr. Hall, Mr. Roy Denomme and himself. The reason for the meeting was to discuss the means by which INCO could acquire the mining rights to F.L.52. The topics discussed included the existence of the Summer Resort Location, and the withdrawal of the mining rights. As Mr. Randa put it, Mr. Hall "kept coming back to Section 30(c)." It was his evidence that "I was led to believe that INCO could regain control of the mining rights if we were the owner of the surface rights and could demonstrate to the Minister that valuable mineral in place had been discovered and the mining rights could be granted if the Minister would certify it, and I was led to believe that only the owner of the surface rights could make that requisition to the Minister."

Mr. Randa also testified with respect to a memo he wrote dated May 24, 1995, addressed to an INCO employee in which he reviewed the history of INCO's involvement with F.L. 52 and MLO 10,872. He also reviewed the meeting he had with Messrs. Hall and Denomme, including a reference to the effect of Section 30 (c). Mr. Hall was to contact his Director at the time, although it is not clear to what purpose. In Mr. Randa's memo he said "under this legislation INCO would be the only eligible staker if the discovery of valuable mineral in place has been made, but only if INCO is the owner of the summer resort location." Apparently, Mr. Hall got back to Mr. Randa and confirmed the conclusions set out in Mr. Randa's aforementioned memo.

Submissions

Motions

A motion brought by INCO ("INCO motion") preceded the hearing of this matter.

Prior to the INCO motion, Wallbridge changed solicitors and filed amending paragraphs to its submissions relating to its appeal. The originating Notice of Appeal, involving the refusal of the Mining Recorder to record the mining claim, had as its reasons "Wallbridge can demonstrate a discovery of valuable mineral in place, making the claim recordable pursuant to subsection 30(c) of the **Mining Act**, R.S.O. 1990. 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 a priority in restaking FL 52, or issue an unpatented mining claim under subsection 176(3) of the **Mining Act**, RSO 1990."

With the change in solicitors, the Wallbridge appeal was expanded to include the following requests:

1) finding and ordering that INCO's "application" to amend MLO #10,872 be declared null, void or abandoned by inaction;

2) requiring the Minister to consider Wallbridge's application under paragraph 30(c) of the **Mining Act** to have the Minister certify in writing that in his opinion a discovery of valuable mineral in place has been made on the subject lands;

3) requiring the Minister to, or recommending that the Minister, rescind the Orders dated March 4, 1987, made under section 36 of the **Mining Act**, R.S.O. 1980 and March 16, 2000, under section 35 of the **Mining Act**, 1990, withdrawing the mining and surface rights of the islands of Kelly Lake in the Townships of Broder, McKim, Snider and Waters of the subject lands from staking out;

4) subject to the Ministerial actions as required in paragraphs (2) and (3) above, 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;

5) that Wallbridge is entitled to its costs; and

6) such further and other order as seems just.

The MNDM requested that the Wallbridge appeal be dismissed for a number of reasons. The Ministry's primary reason was that the land was not open for staking. The island's status as a Summer Resort Location meant that the Minister had to certify the finding of valuable mineral in place prior to any staking being able to occur. The island was also covered by a Withdrawal Order issued in 1987. According to the MNDM, the staking of F.L. 52 was a nullity, and Wallbridge could not rely on any legal right to stake the land before it came open. Nor, (in MNDM's submission), did Wallbridge have any standing with respect to the matters between INCO and the Minister, such as INCO's request to amend its Mining License of Occupation.

The Wallbridge appeal was dealt with by INCO in its motion materials.

In its motion, INCO argued the following:

1) the Commissioner had no jurisdiction to grant the relief sought by Wallbridge in items 2, 3 and 4 above, as what Wallbridge was asking for amounted to an order for mandamus or prohibition. Such an order could be granted only by a Court of superior jurisdiction appointed under section 96 of the **Constitution Act**;

2) alternatively that what Wallbridge was requesting amounted to judicial review of the Minister's decision (MNDM) and that such review fell within the exclusive jurisdiction **of the Ontario Divisional Court (section 135, the Mining** Act) and sections 2(1), 6 and 7 of the **Judicial Review Procedure Act**;

3) the Commissioner did not have any authority under the **Mining Act** to review the Minister's decision or the exercise of the Minister's discretion;

4) the Minister's discretion under section 30(c) was exclusive to the Minister in terms of the certification process and whether a Summer Resort Location should become "land open for staking";

5) an order coming from the Commission[er] at this point (prior to the Minister being provided with the results of Wallbridge's search for valuable mineral) would fetter the Minister's discretion;

6) the Minister has exclusive jurisdiction to deal with the reopening of lands withdrawn from staking under section 35 of the **Mining Act**;

7) section 121 of the **Mining Act** does not grant any powers (general or residual) which have not been already granted to or vested in the Commissioner already;

8) the proceeding is limited to an appeal pursuant to subsection 112(1) of the **Mining Act** – in this case, the Provincial Mining Recorder's decision not to record the Wallbridge claim 1217049.

While Wallbridge argued that the INCO motion should be heard after the hearing, the tribunal decided to entertain the motion and then make a decision after hearing evidence on the Wallbridge appeal. These reasons will deal with the Wallbridge appeal and the motion arguments of all the Parties.

Issues

1 Can a Mining Claim be staked on lands not open for staking?

2. Does the situation change in the case of a proposed or purported staking on lands covered by section 30(c)? What is the effect of staking a mining claim before the Minister certifies discovery of valuable mineral in place?

3. Is there any lack of fairness in requiring certification before lands come open? Is there unfairness in a competitive staking, where an individual has spent time and money on the certification application?

4. Is the matter of who may be in the best position to develop the lands a proper consideration?

5. What is effect of the two withdrawal Orders?

6. Has INCO made application to amend its MLO 10,872

7 If the answer to #6 is yes, does Wallbridge have standing to challenge the application made by INCO to amend the MLO 10,875?

8. What scope of inquiry is appropriate under a section 112(1) appeal? Can the tribunal consider the decision the Mining Recorder was empowered to make (only) or can the tribunal also take into account underlying decisions of the Minister?

9. Where the surface rights have been alienated from the Crown in a summer resort location, within the meaning of clause 30(c), is it necessary to withdraw the lands from staking?

10. Is there an application within the meaning of 30(b)?

Findings

While various issues have been raised as a result of the appeal and motion materials, the primary issue centres on the fact that the Mining Recorder refused to record Wallbridge's application. The basis of this refusal was that the lands had been conveyed for summer resort purposes and therefore closed to staking, there being no certification of a valuable mineral in place.

Mr. Hall was aware of the status of the subject lands (as a Summer Resort Location) and the treatment of such lands under the **Act** at the time he staked F.L. 52 on behalf of Wallbridge. The appellant argued that its staking must be allowed to take place prior to the certification required by the Minister as to the discovery of a valuable mineral in place, under section 30(c), in order to address an alleged lack of fairness in the process leading up to certification. According to the appellant's argument, staking prior to certification protects the investment that goes into the work behind an application for certification of the discovery of valuable mineral in place. Without the advantage that the appellant claims pre-staking provides, it would have to compete against others once the lands came open as a result of the Minister's having provided written certification. Counsel put it this way – "[d]oes paragraph 30(c) of the **Mining Act** protect the priority of the person who discovers valuable minerals in place on a Summer Resort Location....If so, what is the appropriate process for a staker, like Wallbridge in this case, to follow." Counsel described this as "the central issue".

Section 30(c) of the **Act** says:

No mining claim shall be staked out or recorded on any land,

... where the surface rights have been subdivided, surveyed, sold or otherwise disposed of by the Ministry of Natural Resources for summer resort purposes, except where the Minister certifies in writing that in his or her opinion discovery of valuable mineral in place has been made;

The tribunal disagrees with the appellant's characterization of the central issue. For one thing, in accepting the appellant's characterization, one would have to agree that a person discovering valuable mineral in place on a Summer Resort Location acquires a priority over others in terms of staking those lands. To be fair, counsel for Wallbridge also said that the issue was whether the Mining Recorder's interpretation of Section 30(c) was correct - that interpretation being that a claim cannot be recorded prior to the Minister or his delegate certifying in writing that a discovery of valuable mineral in place had been made. Discovery had to precede staking.

The tribunal would agree that the interpretation of Section 30(c) is the key issue and the question that needs to be answered is whether staking can precede discovery and certification on lands conveyed for summer resort purposes. The tribunal would answer this question in the negative.

Staking Before Discovery (on Lands Open for Staking)

The tribunal was asked for guidance in determining "an appropriate procedure with respect to paragraph 30(c)" as counsel for the MNDM phrased matters. The tribunal is of the view that the guidance sought is provided by the **Act** itself and relevant case law. A brief review follows.

Historically, the **Act** treated "discovery" as a precursor "to stake out" a mining claim.[5] The tribunal could not find a case, (nor was one provided by any of the parties), wherein the act of discovery itself gave a staker priority over other stakers. Nor was the tribunal able to find a case, (again no case being provided) where staking had preceded discovery and been accepted on the basis that the investment in the discovery had to be recognized and protected. The **Act** provided no such protection to the discoverer; others could "discover" and stake on the same land in competition with one another.

In reviewing the history of mining legislation in the province, the tribunal notes that prior to 1922 the staking of a claim (on lands that were open to staking) could be carried out only after a discovery of valuable mineral in place had been made. The erecting of a "discovery" post could be followed immediately by the placing of the No.1 post. The cases show that discovery and staking were part of a competitive process and could result in a number of parties claiming priority.

A licensee who was interested in mining lands, but unable to make a discovery through surface prospecting methods, was entitled to acquire exclusive possession of an area of mining land open for exploration, by staking out those lands according to the rules set out in paragraphs 1 to 13 of section 141, **The Mines Act**, 1906. The licensee was required to state under oath that there was to his knowledge no adverse interest, whereupon a Work Permit could be issued within 60 days. The granting of the Work Permit entitled the licensee to prospect for minerals. The provisions for mining claims themselves, which could only be staked after discovery, required activities related to mine development after recording, until such time as all of the work requirements were met and a patent could be applied for [ss.160-164].

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[5] Re McDonald and the Beaver S.C.M. Co. M.C.C. 1906, at 10, The Mines Act, 1906, 6 Edw. VII, s. 132.

Therefore, whoever was interested in acquiring an initial interest in the mining lands was expected to spend money and time in one of several ways. The licensee could exercise non-exclusive rights to prospect, essentially working towards discovery, after which time staking of a mining claim could occur or he could apply for a work permit which would entitle him to the exclusive right to prospect. Again, upon making his discovery, he would be entitled to stake a mining claim. The spending of time and money could very well have been wasted if there was no exclusive right for prospecting through the Work Permit, or if the staking of the mining claims after discovery was not done in substantial compliance and was rejected.

The discovery of a valuable mineral formed the basis for the staking of a mining claim. The making of a "discovery" ahead of anyone else did not entitle the discoverer to stake first, unless there was exclusive right to explore. Indeed, staking a claim before making a discovery (or relying on discovery made after staking) could lead to loss of the claim. [6]

The appellant impressed upon the tribunal the importance (especially in a monetary sense) of the investment that went into its "discovery". There is no indication that the time and money spent on a discovery were any less important an investment in the early days of mining. Discovery was the foundation upon which a mining claim was to be staked and the mining claim itself essentially allowed the licensee to proceed for a period of three years to work towards the development of the mine. While prior to 1922 the Mining Recorders were charged with the task of determining whether a discovery had in fact been made, (appeals being made to the Commissioner), changes to the **Act** since that time have as far as summer resort locations and section 30 (c) are concerned, have given the task to the Minister.

The changes to the legislation reviewed by the tribunal for purposes of this hearing indicate that starting in 1922, recognition was given to the fact that the Crown sometimes granted, sold or leased the surface rights of lands while reserving the mineral rights. The 1922 amendment in question said that where surface rights had been "granted, sold, leased or located by the Crown, a mining claim may be staked out **only upon discovery by the licensee of valuable mineral in place**, ..." (emphasis added) [7] In interpreting this wording to mean that staking could follow immediately after discovery, the tribunal is of the view that it is applying an interpretation that is in harmony with the cases from this era. As far as the **Act** was concerned, these lands were still open for staking – provid-

[6] Re McCrimmon and Miller M.C.C. 1907, 79; Re Bilsky and Devine M.C.C. 1909, 394; Re Smith and Kilpatrick et al. M.C.C. 1908, 314

[7] The Mining Amendment Act, 12-13 Geo. V. chapter 22, section 8

ed that a discovery had been made (before staking was attempted). The amendments that follow those made in 1922 build on the knowledge and understanding that certain land uses were not compatible with mining uses and could be harmed by them.

The amendments of 1925 saw the introduction of the familiar looking list of lands over which no claim could be staked or recorded. These amendments reflected an era of cooperation between the then Department of Mines and the Department of Lands and Forests, brought on by the fact that both departments had separate but concurrent land interests.[8] The amendment in question reads:

> Section 36(a). *No mining claim shall be staked out or recorded on any land, -*
>
> *...(c) which has been reserved or set apart by the Department of Lands and Forests for summer resort purposes, except where the Minister of Mines certifies in writing that in his opinion discovery of valuable mineral in place has been made;"*

The tribunal is of the view that its interpretation of the 1922 legislation and the sequence of "discovery first, staking second", would likewise apply to the 1925 amendments.

Later versions of the **Act** dealing with "lands not open" are similarly worded (to the earlier versions). Of particular interest are the versions relevant to 1937 – 1950. This is the timeframe within which the subject lands were surveyed as a summer resort location and within which they were excluded from the M.L.O. 10,872. It is clear in reading those versions of the **Act** that summer resort location lands were not open to staking. The tribunal therefore concludes that the subject lands were not considered open for staking at the time the M.L.O. 10,872 was made. The tribunal is of the view that nothing has changed to alter the status of the subject lands at the present time – either in the wording of the legislation or in the way it is interpreted.

The tribunal sees nothing in the appellant's argument to persuade it to agree that the current wording of the section (now section 30(c)) should be interpreted any differently than it has been in the past. The right to enter on to lands in order to stake them is dependent on the **Act** considering those lands to be open. The **Act** describes lands open for staking in Section 27. Lands not open for staking are the subject of a separate section and include lands where the surface rights have been subdivided, surveyed or otherwise disposed of by the Ministry of Natural Resources for summer resort purposes.

[8] The Mining Laws of Ontario and The Department of Mines, Thos. W. Gibson, Printed by Order of The Legislative Assembly of Ontario, Toronto, 1933, p. 36

The appellant's attempt to place some importance on the use of the present tense for the word "certifies" is not supported by the cases dealing with discovery and staking. The section requires that the act of discovery precede the act of staking. The order of "discovery first, staking second", is not affected by the use of the present tense for the word "certifies" In argument, counsel for the appellant claimed that it was not obvious from the wording "whether a discoverer may stake and record mineral rights and then seek certification of a discovery of valuable minerals in place or whether a discoverer must obtain certification before he can stake and record the discovery." The tribunal fails to see anything ambiguous about the section if it is read within the context of the **Act**, and taking into account the history recounted above. The tribunal is of the view that the tense signifies only that certification may be given at any time. Discovery must still precede staking.

The tribunal is persuaded that the meaning of the provisions are clear and do not lead to the absurdity alleged on behalf of the appellant. The matter of priority of first stakers is not frustrated or contradicted by this interpretation. Such a suggestion would necessarily ignore the underlying issue upon which this appeal is based, namely whether any staking on land not open for staking can be valid.

Staking Lands Not Open (Rationale Being They May Come Open if Discovery is Certified)

Staking is a well-regulated activity under the **Act** and takes place under certain conditions. The land must already be open to staking or become open to staking through the operation of the **Act** before staking can actually be carried out. For many of the kinds of tenure, upon termination, the lands must be re-opened. The process for the re-opening of such lands is described in the Act. Subsections 81(13) and 82(8), involving leases or surface rights leases, provide that, upon termination, the lands "are not open for prospecting, staking out, sale, lease ... until a date fixed by the Deputy Minister, two weeks' notice of which shall be published in *The Ontario Gazette*". Subsection 179(4) contains similar provisions for cancelled patents. Subsection 183(5) similarly deals with surrendered mining lands. Subsection 184(2) has similar provisions for lands forfeited to the Crown pursuant to the either the **Corporations Act, the Business Corporations Act** or due to intestacy without lawful heirs. Even the termination of licenses of occupation, found in section 41(3) do not escape this 14 day notice provision, which has the effect of opening the lands to competitive staking.

Section 72 provides that mining claims which are forfeit due to lack of assessment work, (or fraudulent or effacing activities), will automatically

become open for staking and prospecting. This affords competition, as it is not unusual for licensees to monitor claims and stake them the day following their forfeiture. Section 35 provides for the ordered withdrawal and reopening by the Minister. It is interesting to note that this power did not always rest with the Minister (or his or her delegate). Under **The Mining Act 1906** legislation, sections 98 and 99 allowed the Lieutenant-Governor-in-Council to withdraw lands from staking, under the direction of the Minister. The provisions of section 99 do not have on equivalent today:

> 99. *The Lieutenant-Governor-in-Council may re-open for exploration, location or sale as mining lands any Crown lands which may at any time have been withdrawn [by Order in Council] from exploration or sale, either upon the terms and conditions contained in this Act, or upon such other terms and conditions as may be provided or authorized in that behalf by the Legislature.*

The staking of lands not open to staking is prohibited (even those actually due to come open) and has never been considered an acceptable practice under the **Act.** Short of amending the legislation, nothing can legitimize a prohibited act. The appellant has called upon the tribunal to exercise its powers under sections 105 and 121 of the **Act** and to rule on the "real merits and substantial justice of the case", applying equitable considerations. The tribunal finds that the effect of the appellant's requests is to amend the **Act** to permit the staking of unopened lands. Overriding the **Act** in this way could hardly be categorized as ruling on the "real merits and substantial justice of the case". The appellant's staking is invalid. It cannot rely on the **Act** for validation.

Is There a Lack of Fairness?

The appellant argued that the lack of guidelines or a clear process regarding discovery and certification under section 30(c) is a good reason for allowing staking to precede discovery. The tribunal disagrees with this argument. The tribunal finds that the process leading to certification may be difficult if one does not have title to the surface or if one cannot obtain permission from the owner of the surface rights. However, the process, as historical analysis has demonstrated, is clear. While the path to certification may be difficult, it is difficult for a reason. Access to land for staking purposes is based on the free entry system. The free entry system is premised on the subject lands being considered open for staking. Summer resort location lands are not

open and therefore there is no free entry to those lands. The legislation intended to separate those lands from the "open" lands because the legislature has perceived need to protect the associated use and enacted the means to do so.

Since these lands are not open to staking and not subject to the free entry system, it goes without saying that anyone seeking to change their status to "open" must either acquire permission from the owner of the surface rights to enter them or must acquire the surface rights themselves. That would be the first step in the process.

The second step would be to go about gathering the information needed to demonstrate valuable mineral in place in order to obtain certification, which can be seen from the discussion below, is likely to be remote. Upon receiving written certification, the next step would be to stake the ground. At the time the lands came open for staking, it would be a competitive staking situation. This is the case for all lands open to staking. The **Act** favours healthy and fair competition. In the days when discovery was a part of the staking process, staking before discovery was not permitted. The tribunal finds that this rule has continued in very limited form in clause 30(c).

The nature of the discovery was such that, upon staking the mining claim, the required work to be performed consisted of developing the mine to production, the assumption being that there would be a mine. The cases support this. An example is found in **Re Lamothe** (1908) 1 M.C.C. 167 at p. 171, (adopting finding in **Collom v. Manley,** 32 S. C. R. 378):

> "...that under the British Columbia law, by which an affidavit of discovery is required, there must be discovery of mineral *in fact* before a location is made; *belief* of the locator is not sufficient; and where the locator had sworn absolutely to discovery in his affidavit, but in his evidence at the trial could not put the matter higher than belief that it was valuable mineral, the claim was held invalid."

The tribunal considers the definition of "valuable mineral in place" to be an onerous one. It needs to be "a vein, lode or deposit in place *appearing to be at the time of discovery* of such as nature and containing *in the part thereof then exposed such kind and quantity of mineral ... so as to make it probable ...of being developed into a producing mine likely to be workable at a profit*". This definition is for the Minister's delegate to interpret and apply. However, this wording echoes that found in the earlier legislation, when discovery was required

as a pre-condition to staking. Moreover, there is a very clear and unambiguous requirement that the discovery be perceived to be profitable, and there is no doubt that it is the quality of the minerals found which is referred to.

The foregoing approach to the issue of discovery is not unfair. There is clearly a legislative intent to treat summer resort locations differently. It is not inconsistent with the purpose behind the creation of summer resort locations, namely that they are outside the free entry system until a discovery has been certified.

Assuming no Withdrawal Order had been made on the subject property, the appellant could have purchased the surface rights and quietly gone about discovery, certification and staking – in that order. Since the lands are not open to staking to begin with, there is no lack of fairness in the **Act's** being particular about the method to be used to change their status to "open". Furthermore, to allow staking prior to discovery and certification would have the effect of tying up the property as for other competitors. The tribunal asked how long this state of affairs would be expected to last. How long could one expect to have to wait for a final answer as to the property's status? And, what if certification was refused? The tribunal does not agree that the appellant's interpretation reflects the **Act's** intent to promote a competitive environment.

Appellant In Best Position to Develop the Lands?

The tribunal is of the view that if the argument relating to development is applicable, it only applies to lands open for staking. The legislation sets certain lands aside for one reason or another and says they are not open to staking. The legislative intent then is that these lands, "summer resort locations" among them, are not to be treated in the same way as "lands open for staking". The Appellant's argument would in effect treat unopened lands in the same way as open lands and therefore conflicts with the intent of section 30. An interpretation that creates this result is not supportable and would create chaos in the administration of the **Act** and in the industry.

The "closed to staking" status could be reversed following the process set out above. In the meantime, the legislation has made it clear that these lands are not to be treated in the same way as lands open for staking. Therefore the appellant's argument on this point fails.

Conclusions on the Appeal from the Mining Recorder's Decision

On the appeal from the decision of the Mining Recorder to refuse the application of Wallbridge, this tribunal finds that the application to record for staking of lands not open for staking must be refused. The appeal will therefore be dismissed.

Other Issues

The tribunal is satisfied that the staking carried out by the appellant was invalid. However, certain issues (previously listed) were raised prior to the hearing through the INCO motion and the party responses. Chief among them was the effect of the two Withdrawal Orders made by the Ministry in 1987 and 2000, as well as an attack by the appellant on the efforts made and time taken by INCO to amend the status of its Mining License of Occupation. Also, the appellant questioned the time taken by the Ministry to deal with the matter including the duration of the two withdrawal orders.

The tribunal is of the view that the appellant's invalid staking removes any standing it might have to question or attack the status of the Withdrawal Orders. Furthermore, there is no evidence that the appellant had any interest in the subject property when the Mining License of Occupation was granted, nor when INCO began its efforts to amend the License and not when both of the Withdrawal Orders were made. Indeed, the evidence is that INCO was continually dealing with the subject land and the issue of its mineral rights in one form or another from at least 1987 to the present day when it came before this tribunal seeking party status. The fact that INCO was not persistent in seeking to have the application resolved merely supports its position that no other party could acquire the mining rights. This was particularly so as it was unclear even to INCO or MNDM as to how this could be accomplished or resolved. The tribunal therefore finds that INCO has not abandoned its interest having the MLO amended.

As to whether the INCO "application" to amend the Mining License of Occupation should be treated as null or void, as requested by the appellant, the tribunal adopts the approach taken by Commissioner Ferguson in the *Weirmeir* case[9] which was referred to by Ministry witness Spooner. In his approach to the word "application", Commissioner Ferguson noted[10] that "there was no argument to the effect that the letter ... did not constitute an application." However, in discussing the form of an application under the affected section he said:

[9] 5 M.C.C. 469

[10] The case dealt with a sale of land under the The Public Lands Act at the time.

> *"As there is no legal requirement as to the form of an application, the adequacy of a document alleged to be an application should depend on whether adequate information has been provided, either in the document or by supplementary information to process the sale."*[11]

And in discussing how the section was activated, Commissioner Ferguson said:

> *"... it is apparent that the clause becomes effective not on the exercise by a public official of an administrative procedure but on the act of a member of the public making an application within the meaning of the clause."*[12]

The tribunal is satisfied in this case that the evidence of both INCO and the Ministry confirm that INCO applied for, and was having considered, an application to amend its License. The tribunal is also satisfied on the evidence that after initiating an interest in F.L. 52, INCO worked diligently to protect whatever gains it had made along the way. The tribunal is also of the view that the presence of the Withdrawal Orders could have very well offered some measure of comfort to INCO's concerns. The tribunal is satisfied that INCO never relinquished its interest in F.L. 52. Furthermore, the processing of the amendment request was capped by the making of two Withdrawal Orders, the first being made in 1987. This action on the part of the Ministry was sufficient to remove the mineral rights from being accessed, if they had not already been affected by the conveyance of the land for summer resort location purposes. The tribunal is satisfied that the foregoing can be encompassed in an application made under section 30(b).

There is no statutory life span accorded to Withdrawal Orders. The evidence was that they were intended to be temporary in nature, the length of time being determined by the reason the Order was made in the first place. Even Mr. Hall testified that some orders could be of long duration. The tribunal accepts the Ministry's evidence regarding the state of its administrative affairs and the efforts made to update its records with respect to the Withdrawal Orders.

As for the appellant's requests to have this tribunal require the Minister to certify, or to require (or to recommend) that the Minister rescind the Withdrawal Orders, the tribunal finds that such requests are outside the jurisdiction of the Commissioner's authority under the **Act**. Certification of a discovery under sec-

[11] Ibid., p. 480, 481
[12] Ibid., p. 480

tion 30(c) and the making of a withdrawal order under section 35 are decisions made by the Minister (or the Minister's delegate) under the **Act**. In the case of certification, the Minister, presumably after consultation and investigation, may decide to give an opinion that can have the effect of opening lands once closed to staking. There is no statutory power given to the Commissioner to recommend to the Minister to consider, or requiring the Minister to consider, the appellant's efforts to discover a valuable mineral in place. Likewise, there is nothing in the **Act** that empowers the Commissioner to become involved in the administrative process dealing with withdrawal orders.

Appeals to the Commissioner under Section 112(1)

The Mining Recorders (now Provincial Mining Recorders) are statutory officers under the **Act**, being appointed by the Minister and having clear responsibilities concerning the administration of the Recording Office (now, the Provincial Recording Office). There are numerous provisions discussed during the course of this hearing in which the Mining Recorders have statutory powers of decision-making. Subsection 112(1) recognizes the broad range of duties, providing an appeal to the tribunal regarding "a decision of or by any act or thing, whether ministerial, administrative or judicial, done or refused or neglected to be done by a Recorder...". The appeal to the tribunal is from the actions of the Recorder, as set out. The mention of "ministerial" does not mean the Minister's delegated decisions, but rather reflects the characterization of the function exercised by the Recorder. This wording is taken directly from section 129 of the British North America Act, as noted in Dupont v. Inglis:

> *By s. 129 of the Confederation Act, all laws, Courts and all legal Commissions, Powers and Authorities, and all officers, Judicial, Administrative and Ministerial" existing in Ontario at the union were continued subject to be repealed, abolished or altered by Parliament or Legislature according to the authority of each. Within this continuity was the Gold Mining Act; and the function of deciding the sufficiency of compliance with the statutory requirement, as for example, of staking by the officer, was either an integral part of the rights arising, or if of a judicial character, of a type not then exercised by the Superior Courts.*[13]

The tribunal notes that there is no provision in the **Act** allowing the Commissioner to hear appeals from a decision of the Minister and his or her delegate (as opposed to decisions of a Mining Recorder). The tribunal perceives that there has been a blurring of the very clear line between the actions of the Mining Recorders and their superior, the Senior Manager, Mining Lands Section, acting at times at the Minister's delegate. A review of delegated

[13] 1958 S.C.R. 535 at p.541

authority under the **Act** (Northern Development and Mines Policy GA 100, issued June 30, 2000) indicates that there are cases where Provincial Mining Recorders hold the Minister's delegated authority, for ss 6(1) [limited to appointment of acting mining recorders], 22(1), 23(2), 35, 42, 51(3), 51(4), 72(2), 79(2), 81(17), 95(6), 95(7), 96, 97(1) and 97(2).

This blurring of the lines between functions may be present from a purely administrative point of view, but legally it does not exist. The legislature has made it clear that it is the decisions of the Mining Recorders that may be appealed to the tribunal. Those of the Minister may not. Over time, many changes have been made. For example, in the 1906 statute, it was the Mining Recorder who determined the sufficiency of required assessment work performed on mining claims. Today, that power rests with the Minister's delegate. Notwithstanding any movement between the two, it remains that the only avenue open to questioning Minister's decisions, including those of his or her delegate, is through judicial review.

Taking the above one step further, and looking at the fact that the Mining Recorder makes a decision based on a Minister's decision, the tribunal is of the view that one cannot use an appeal from a Mining Recorder's decision to question the basis of a Minister's decision.

The tribunal notes that the appellant has been careful to ask that recommendations and requirements be directed to the Minister by the tribunal. The tribunal notes that the power of the Commissioner to "recommend" is one that is given in the **Mining Act** for example in subsection 81(9), and other statutes, such as the **Aggregate Resources Act**. As with appeals from decisions of the Minister, the tribunal is of the opinion that no statutory power exists in the **Mining Act** that would allow the tribunal to contemplate such a request. As for the appellant's request regarding the two Withdrawal Orders, the tribunal is of the view that such a request amounts to a review of the Minister's decisions in terms of the making of those Orders and as such is properly brought before the courts under the **Judicial Review Procedure Act**. The tribunal notes and adopts the decision of Commissioner Ferguson in the case of *Sheridan v. The Minister of Mines*[14], wherein he determined that while section 126 (now 105) could arguably address what might be described as equitable remedies, that those remedies have been codified in the **Judicial Review Procedure Act**.

In conclusion, the tribunal finds that the subject lands are not open for staking and that no staking can occur prior to certification. The appeal is therefore dismissed.

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[14] 7 M.C.C. 405 at p. 420

Further to submissions made at the hearing, the parties may address the tribunal as to the issue of costs.

COURT FILE NO.: 402/01

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

FARLEY, MACDONALD AND SEDGWICK JJ.

Wallbridge Mining Company Limited
v.
The Minister of Northern Development and Mines

Transcript of Endorsement dated February 4, 2002

The appeal is dismissed. We are in agreement with the views of the Mining Commissioner dated May 30, 2001 from which this appeal is taken. Aside from the concession that the withdrawal order would not allow the subject island to be validly staked, the interpretation of s. 30(1)(c) is correct. That interpretation according to legislative interpretation principles is reasonable and fair on its specific language and in the context of the Act - namely that the certificate of DVMP is a condition precedent to any staking. That does not lead to an absurd result since the scheme is workable on a fair basis with an arrangement made between the potential staker and the owner of the designated summer resort property (who ought not otherwise be subjected to staking with attendant interference of enjoyment of that property). The Commissioner heard the evidence of Inco witnesses and concluded that Inco had not abandoned its amendment to its licence request; we see no basis for interfering with that finding. The (c) and (d) relief requests are in our view an indirect mandamus request on a hypothetical basis.

It was agreed that the Minister receive $4,000 in costs from Wallbridge. Wallbridge is to pay Inco $12,500 in costs.

"J.M. Farley, J.

"Edythe I. MacDonald, J."

"G. Sedgwick, J."