REFER OUR FILE MA 001-12**A**

L. Kamerman	)	Thursday, the 31st day
Mining and Lands Commissioner	)	of January, 2013.

THE MINING ACT

AND IN THE MATTER OF

The Order of the Director of Mine Rehabilitation (the "Director") pursuant to subsection 147(1) of the **Mining Act**, dated the 6th day of December, 2011, that William Sims Industries Limited, Armistice Resources Corp., Bear Lake Gold Ltd., Jubilee Gold Inc. and Gwen Resources Ltd. file a certified Closure Plan (as defined in the **Mining Act**) to rehabilitate mine hazards on the properties known as involving the Upper and Lower Kerr Tailings Area, situate in the Townships of McGarry and McVittie, District of Temiskaming, in accordance with the applicable requirements of the **Mining Act**, including O.Reg. 240/00 and the schedules thereto;

(Amended January 31, 2013)

AND IN THE MATTER OF

Armistice Resources Corp.'s, and Jubilee Gold Inc.'s respective applications under pursuant to sections 105 and 113(b) of the **Mining Act**, (i) for a determination as to whether Armistice Resources Corp., and Jubilee Gold Inc. are "proponents" under the **Mining Act** and with respect to the mine hazards at issue in the Director's Order; and (ii) to quash, or in the alternative vary, the Director's Order;

(Amended January 31, 2013)

B E T W E E N :

ARMISTICE RESOURCES CORP.
AND JUBILEE GOLD INC.

Applicants

(Amended January 31, 2013)

- and -

THE DIRECTOR OF MINE REHABILITATION

Respondent

NOTICE OF JURISDICTIONAL ISSUE

WHEREAS requests for a hearing pursuant to section 113 of the **Mining Act** were received by this tribunal on the 4th and 6th days of January, 2012, from Armistice Resources Corp. and Jubilee Gold Inc., respectively;

. . . . 2

AND WHEREAS on the 20th day of March, 2012, Mr. Gustavo Camelino, counsel for the appellant, Jubilee Gold Inc., filed preliminary motion materials which raised the issue of the appellant, Jubilee Gold Inc.'s status (e.g. whether they are proponents or owners) under the **Mining Act**;

AND WHEREAS the tribunal determined that it would hear the Motion of Jubilee Gold Inc., prior to the actual hearing of the merits of this matter and did so through a review of the written materials filed by the parties, including an Agreed Statement of Facts, submitted by Mr. Camelino on the 28th day of June, 2012, attached hereto as Schedule "A" and forming part of this Order and by hearing in person from the parties on the 8th day of May, 2012;

1. THE PARTIES ARE HEREBY GIVEN NOTICE that the tribunal has jurisdictional questions concerning the two applications pursuant to section 113(b) of the **Mining Act** and under the general authority provisions of section 105, which purport to invoke Part VII issues and/or processes, without having taken those statutory steps provided in section 152 appeal of the Order and referral by the Director **AND FURTHER DIRECTED** that the tribunal will order a reconvening of this matter to hear submissions on this issue on dates to be agreed upon, including such prior filing of documentation as the tribunal may require.

Reasons for this Notice of Jurisdictional Issue are attached.

DATED this 31st day of January, 2013.

Original signed by L. Kamerman

L. Kamerman
MINING AND LANDS COMMISSIONER

REFER OUR FILE MA 001-12**A**

L. Kamerman	)	Thursday, the 31st day
Mining and Lands Commissioner	)	of January, 2013.

THE MINING ACT

AND IN THE MATTER OF

The Order of the Director of Mine Rehabilitation (the "Director") pursuant to subsection 147(1) of the **Mining Act**, dated the 6th day of December, 2011, that William Sims Industries Limited, Armistice Resources Corp., Bear Lake Gold Ltd., Jubilee Gold Inc. and Gwen Resources Ltd. file a certified Closure Plan (as defined in the **Mining Act**) to rehabilitate mine hazards on the properties known as involving the Upper and Lower Kerr Tailings Area, situate in the Townships of McGarry and McVittie, District of Temiskaming, in accordance with the applicable requirements of the **Mining Act**, including O.Reg. 240/00 and the schedules thereto;

(Amended January 31, 2013)

AND IN THE MATTER OF

Armistice Resources Corp.'s, and Jubilee Gold Inc.'s respective applications under pursuant to sections 105 and 113(b) of the **Mining Act**, (i) for a determination as to whether Armistice Resources Corp., and Jubilee Gold Inc. are "proponents" under the **Mining Act** and with respect to the mine hazards at issue in the Director's Order; and (ii) to quash, or in the alternative vary, the Director's Order;

(Amended January 31, 2013)

B E T W E E N :

ARMISTICE RESOURCES CORP.,
AND JUBILEE GOLD INC.

Applicants

(Amended January 31, 2013)

- and -

THE DIRECTOR OF MINE REHABILITATION

Respondent

REASONS

. 2

Appearances:

Gustav F. Camelino:	For the Applicant, Jubilee Gold Inc. & the moving party
Berkley D. Sells: Richard Butler:	For the Applicant, Armistice Resources Corp., and respondent to the motion
Michael Mercer:	For the Respondent, Director of Mine Rehabilitation, Ministry of Northern Development and Mines, and respondent to the motion

No one appeared for Bear Lake Gold Inc., which was named in the original Title of Proceedings and which will receive a copy of this Notice. The tribunal understands that Messrs. Sells and Butler will represent Bear Lake in the future.

INTRODUCTION

This Notice of Jurisdictional Issue arises out of a motion by Jubilee Gold Inc. ("Jubilee") filed with the tribunal on March 20, 2012. After due deliberation of materials filed and after hearing from counsel appearing, the tribunal has concluded that before it can proceed further in this matter, it must address the issue of whether it has the jurisdiction to proceed. To do so, it needs to hear submissions from the parties.

By way of background, the question raised by the motion is:

> Is Jubilee Gold Inc. a person who "receives only a royalty from all or part of a mine, mine hazard or mining lands" within the meaning of subsection 1(3) of the *Mining Act* and therefore not an "owner" or "proponent" as those terms are defined in the *Mining Act*?

The Director's Order of December 6, 2011 named William Sims Industries Limited, Armistice Resources Corp., Bear Lake Gold Ltd., Jubilee Gold Inc. and Gwen Resources Ltd. as proponents and required that they each file a Certified Closure Plan in connection with their operations within tracts of mining lands within McGarry and McVitte Townships. Of five companies named in the Director's Order, only Bear Lake Gold Ltd. ("Bear Lake") has filed a notice with the Director requiring an appeal before this tribunal in accordance with the procedures contemplated by Part VII for mine rehabilitation purposes. Bear Lake did not appear at the hearing of the Jubilee motion. William Sims Industries Limited and Gwen Resources Limited did not appeal the Director's Order.

Jubilee and Armistice Resources Corp. ("Armistice") did not seek to have an appeal referred to the tribunal by the Director via section 153.2 of the **Mining Act** (under the auspices of Part VII).

. . . 3

Each specifically noted in their correspondence (January 6, 2012 and January 4, 2012, respectively) that they do not accept that they are a "proponent" within the meaning of Part VII. Instead, each has requested a hearing pursuant to section 113(b) for a determination in accordance with their positions. The letters are similar in content and intent. Portions of Jubilee's correspondence are reproduced:

> The Director's Order was purportedly issued against Jubilee pursuant to section 147(1) of the *Mining Act*, R.S.O. 1990, c.M.14 (the "Act" on the basis of the MNDM's view that Jubilee is a "proponent" under the Act. We are of the view that it is not.[1]
>
> We hereby request a hearing before the Commissioner, pursuant to section 113(b) of the Act, to (*sic*) for a determination of whether Jubilee is a "proponent" under the Act in connection with the alleged mine hazard identified in the Director's Order.
>
> We have not filed a "Form #5 – Notice to Require a hearing" with the Director of Mine Rehabilitation as Jubilee does not accept that it is a "proponent" as defined in the Act.
>
> Sections 105 and 113(b) state:
>
> **105.** (1) No action lies and no other proceeding shall be taken in any court as to any matter or thing concerning any right, privilege or interest conferred by or under the authority of this Act, but every claim, question and dispute in respect of the matter or thing shall be determined by the Commissioner except as otherwise provided in section 171 or elsewhere in this Act and except for matters relating to consultation with Aboriginal communities, Aboriginal or treaty rights or to the assertion of Aboriginal or treaty rights.
>
> **113.** The Commissioner shall determine,
>
> (a) an appeal from a recorder, after a hearing by way of a new hearing; and
>
> (b) a dispute referred to in section 48 or a claim, question, dispute or other matter within his or her jurisdiction after a hearing,
>
> pursuant to an appointment fixing the time and place for the hearing.

. . . . 4

[1] Note: Jubilee does hold a 25% carried interest in mining claims CE34, CE36. CE37 and L31130, McGarry Township, identified in the Director's Order. It is our view that Jubilee's interest in that regard is in the nature of a security interest securing its royalty interest and does not lead to its characterization as a "proponent".

By way of explanation, in addition to those numerous provisions within the **Mining Act** which provide for initiating a particular type of action, or section 112 appeals from decisions of the Provincial Mining Recorder, section 105 provides the tribunal with general, overarching jurisdiction to hear and determine "any matter or thing". This is an exclusive power, with certain, enumerated exceptions. Section 105 has often been used to initiate proceedings where the question or issue is not specifically provided for. Examples include declarations, transfer of mining claims upon option provisions not being fulfilled, interpretation of agreements and the like.

Section 113 provides no more that the tribunal will hold a hearing, setting out what that hearing will look like under what originating circumstances give rise to it. The decision of **Parres v Baylore Reources Inc.** (1987) 7, M.C.C 8 (S.C.O., Div. Ct.) sets out that appeal hearings are nonetheless hearings *de novo.* At page 9, McKinlay, J. stated:

> …I interpret s. 134(a) [now 113(a)] of the Act to deal with the nature of all hearings which come before the Commissioner by way of appeal, and s. 134(b) [now 113(b)] to deal with hearing which come before him at first instance, which of course, explains the absence in the latter subsection of the words, "*de novo*".
>
> This appeal before the Commission was properly treated as a hearing *de novo*.

Section 113(b) does not confer jurisdiction on the tribunal. It merely provides direction on how to proceed with a matter.

The tribunal, from the materials filed and oral arguments, heard considerable submissions on the nature of the test which should apply to Jubilee's motion. Mr. Camelino, on behalf of Jubilee, relied on two cases2, decided under Part VII Mine Rehabilitation Appeal proceedings, and asked that the test which was found applicable on the merits of a Part VII appeal proceeding be applied to his motion. Set out at length on at pages 17 and 18 of **MacGregor**, concerning the *de novo* nature of Part VII appeals, at its essence is "The test, however, will be that of an appeal, namely, whether the Director's order, decision or requirement is reasonable and can be supported on the facts and the evidence of the case."

Although touching on the **Statutory Powers Procedure Act,** Messrs. Butler and Sells, on behalf of Armistice, submitted that the test should be analogous to the summary judgment test found in Rule 20 of the **Rules of Civil Procedure**¸ with the operative words being "no genuine issue requiring a trial".

Mr. Mercer, on behalf of the Director, did not address the test in his factum, but believed that either of Rules 20 or 21, applied by analogy, would be more appropriate than the appellate test of reasonableness propounded on behalf of Jubilee.

. . . . 5

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[2] **Robert A. MacGregor v. The Director of Mine Rehabilitation** (Mining and Lands Commissioner, December 23, 1994) (**MacGregor)** and **Moneta Porcupine Mines Inc. v. The Director of Mine Rehabilitation et al.** (Mining and Lands Commissioner, 21 May, 2010) (**Moneta**)]

It is important to point out that, at this early juncture, neither the tribunal nor counsel on behalf of the Director appeared to notice or question just how or why preliminary questions appropriate to a Part VII appeal, should or even would be considered in a matter which is an application and not an appeal. This should have been the first opportunity, for the tribunal and perhaps the Director, to discern that there were very real jurisdictional issues associated with these proceedings and this motion.

More puzzling still, the language throughout the hearing of the merits of the motion invoked questions which would arise through proceedings contemplated by a section 152 appeal to the Commissioner (tribunal). Nor did anyone address that the motion question appeared to be the same as the question on the merits of the main application by Jubilee. The tribunal did come to question whether, in that circumstance, this would be a proper subject matter/question for any such pre-emptive motion.

Nonetheless, returning to the language, the tribunal was asked to interpret, based on certain agreed facts and a select set of documents and affidavits filed, the meaning of "proponent" and "owner" and make a factual determination of whether Jubilee, based upon its findings concerning the nature of Jubilee's interest in certain mining claims, is "a person who receives only a royalty" and therefore is not an owner within the meaning of the definition of "owner" pursuant to provisions of subsection 1(3). Proponent is defined in section 139, found in Part VII. That definition does direct one to section 1, where the definition of "owner" is found. Being or not being a proponent gives rise to the Director's jurisdiction to take actions over that person in relation to mine hazards, as set out throughout Part VII.

The tribunal wrestled with the issues raised in the parties' documentation at length and for a considerable time. In retrospect, the process for the tribunal always seemed somewhat skewed or off-balance. Even in its opposition to the motion, Armistice used language which invoked that of Part VII and not a general application pursuant to section 105 and 113. Armistice made the following submissions in its Factum (Ex. 6b):

> 48. In addition to the dismissal of Jubilee's motion, Armistice respectfully requests that in its interim decision the Commissioner's (sic) make no order, and make no findings, regarding the state of the Properties, or the mine hazards that may exist on or within the Properties. No evidence has been submitted by the parties on this motion regarding the physical characteristics of the Properties.

And, earlier:

> 5. In addition to requesting that Jubilee's motion be dismissed, Armistice respectfully requests that at this early stage of the proceedings, the Commissioner's (sic) make no order, and make no findings, regarding the Properties, or the mine hazards that exist on the Properties. No evidence has been submitted by the parties on this motion regarding the physical characteristics of the Properties. Such evidence, including empirical data and expert evidence will likely be

> filed in connection with the main hearing. Any findings regarding the physical characteristics of the Properties or the hazards at this early stage of the proceedings would be premature. Further, the broader issue of whether any of Jubilee, Armistice or Bear Lake can be considered a Proponent of the entirety of the Properties (including those portions of Properties for which the Appellants are not the registered owners) should remain to be determined at the final hearing, supported by a complete evidentiary record.

The jurisdictional quandary posed for the tribunal is the following:

Although the tribunal does have jurisdiction under section 105 to consider "every claim, question and dispute" does this extend to the question on this motion brought by Jubilee? In other words, can Jubilee use the general jurisdictional powers of the tribunal to avoid the proceedings contemplated by objections and issues to actions of the Director as thoroughly set out in Part VII of the **Mining Act**?

If the answer is "yes", then where is the legislative roadmap to accommodate whatever decision is arrived at? For example, if the motion is not granted or the question posed by Jubilee is answered in the negative, and the tribunal finds that they are not excluded/precluded from being considered an owner/proponent by failing to meet the requirement that they receive only a royalty through subsection 1(3), then what process, if any, is invoked by Jubilee's letter/application of January 6, 2012 (and by that of Armistice of January 4, 2012)?

The tribunal notes that both were named in the Director's Order, but there have not been any steps taken by them (in accordance with section 152) to put themselves into a Part VII hearing on the merits of the questions raised in their correspondence before the tribunal on a hearing.

What is the Director's position with respect to the originating correspondence of January 6 and 4, 2012, respectively? The tribunal notes that in neither case has the Director referred these two matters to it in accordance with subsection 152(3).

Is there another process contemplated by the **Mining Act** and if so, upon what basis does the hearing proceed?

If the answer to the preceding question is "no", does the tribunal have the power to "correct" or "convert" existing correspondence into a section 152 matter? There are time limits set out in section 152 for commencing an appeal to the tribunal and filing a notice with the Director to request a hearing. Those time frames have passed. There are no powers to extend time for filing appeals under the **Act,** and it is uncertain whether section 136 could or would have application in this instance or whether it is only the Courts which can invoke it.

Perhaps a rhetorical question is whether the Director is prepared to revoke and re-issue her Order in respect of Jubilee and Armistice only, thereby giving them the opportunity to proceed to a Part VII appeal through channels contemplated by the legislation.

Conclusion

Bear Lake Gold Ltd. has gotten caught up in this matter with Jubilee and Armistice, despite having initiated its appeal in accordance with Part VII of the **Mining Act.** Although it might be prudent to hear from Bear Lake and the Director as to how they wish to proceed, namely do they prefer to wait until this matter involving Jubilee and Armistice can be resolved or, would they prefer to recommence proceedings involving only Bear Lake's appeal. Whatever the answer, the tribunal will create a new file for Bear Lake to reflect its status as an appellant under Part VII of the **Mining Act.**

The tribunal has concluded that it is unable to proceed to answer the issues raised in Jubilee's motion until such time as it has heard further submissions from the parties with respect to the jurisdictional concerns raised herein.

SCHEDULE "A"

AGREED STATEMENT OF FACTS

Pursuant to a Director's Order to File a Certified Closure Plan to Rehabilitate Mine Hazards dated December 6, 2011 (the "Director's Order), the Director of Mine Rehabilitation (the "Director") ordered that Jubilee Gold Inc. ("Jubilee"), Armistice Resources Corp. ("Armistice"), Bear Lake Gold Ltd. ("Bear Lake"), William Sims Industries Limited ("William Sims") and Gwen Resources Ltd. ("Gwen Resources") file a certified Closure Plan in respect to a number of mining claims in the McGarry and McVittie Townships, in the District of Temiskaming, Ontario pursuant to subsection 147(1) of the *Mining Act*, R.S.O. 1990, c. M.14 (the "*Act*").

Bear Lake has appealed the Director's Order, pursuant to subsection 152(1) of the *Act*. Jubilee and Armistice have sought a hearing under section 113(b) of the *Act.* The appeal and hearings have been consolidated and are pending. William Sims and Gwen Resources have not appealed nor sought a hearing in respect of the Director's Order.

This is a preliminary motion brought by Jubilee for an order revoking the Director's Order as against it. The specific question posed by Jubilee before the Commissioner on this motion is:

> Is Jubilee Gold Inc. a person who "receives only a royalty from all or part of a mine, mine hazard or mining lands" within the meaning of subsection 1(3) of the *Mining Act* and therefore not an "owner" or "proponent" as those terms are defined in the *Mining Act?*

Jubilee's motion is concerned with four of the twenty-two mining claims listed in the Director's Order, being, CE34 (L6464); CE36 (L11135); CE37 (L4898); and L31130 (the "Impugned Claims"). The Impugned Claims are patented mining claims.

Jubilee's Historical Interest in the Impugned Claims

Jubilee was created though the amalgamation of four corporations on or about January 1, 2010. One of the predecessor corporations that amalgamated to form Jubilee was Sheldon-Larder Mines Limited ("Sheldon-Larder"). Jubilee's direct corporate predecessor, Sheldon-Larder, has had a continuous interest in the Impugned Claims and licenses of occupation in the McGarry Townships area since 1952.

For many years, Kerr-Addison Gold Mines Limited ("Kerr-Addison") carried on mining and milling operations on land that it owned to the east of the Impugned Claims. The Kerr-Addison mine was at one time Canada's largest gold producing mine and produced over 11 million ounces of gold during a 58-year operating life from 1938 to 1996.

Pursuant to an agreement between Sheldon-Larder and Kerr-Addison, dated June 6, 1952, (the "Lease Agreement"), Kerr-Addison acquired the right to construct two tailings pipelines across the Sheldon-Larder lands and to deposit tailings from Kerr-Addison's operations (as well as tailings from the mining and milling operations of another company) onto the Impugned Claims. The Lease Agreement gave Kerr-Addison the right to discharge and deposit tailings on the Impugned Claims from 1953 to 1982.

In early 1984, a company named Aurelian Developers Ltd. ("Aurelian") wished to acquire a right to explore certain properties (the "Properties") then owned by Sheldon-Larder and Arjon Gold Mines Ltd. ("Arjon") which included the Impugned Claims as well as an option to purchase the Properties.

By agreement dated March 1, 1984 (the "1984 Agreement") between Sheldon-Larder and Arjon as Optioners, and Aurelian, Aurelian acquired the right to explore and an option to acquire the Properties. Section 8.1 of the 1984 Agreement reads as follows:

> ROYALTY
>
> 8. (1) Because it is the intention of the parties that the Optionor's 25% undivided interest in the Properties remaining after the Corporation has exercised the Purchase Option shall be a fully-carried interest, the Corporation shall do all things necessary to maintain the Properties in good standing and to take all reasonable steps in order to bring the Properties into commercial production if warranted. Accordingly the Optionor's participation in profits from the Properties shall be restricted to and the Corporation shall pay to the Optionor a Royalty equal to the greater of
>
> (a) 25% of the Net Proceeds attributable to production of ores and mineral products form the Properties determined in accordance with Schedule B hereto, or
>
> (b) a sum equal to $1.00 per short ton of ore mined and milled derived from the Properties, or
>
> (c) commencing subsequent to the exercise of the Purchase Option, $12,500 payable on the last days of March, June, September and December in each year.

By assignment agreement dated February 11, 1985, Aurelian sold and assigned its right, title and interest in the 1984 Agreement to Armistice Resources Ltd. ("Armistice") with the consent of Sheldon-Larder and Arjon.

In 1988, Armistice exercised its option to acquire an undivided 75% interest in the Properties pursuant to the 1984 Agreement. In 1995 Arjon sold its interest in the Properties to Sheldon-Larder with the result that Sheldon-Larder thereupon held an undivided 25% interest in the Properties.

By amending agreement dated January 15, 1991 (the "1991 Amending Agreement"), the 1984 Agreement was amended, *inter alia,* to include the following:

> 1. The payments which became or will become due and payable to the Optionors on September 30, 1990, December 31, 1990 and March 31, 1991 pursuant to the Agreement are hereby waived and, notwithstanding anything to the contrary elsewhere in the Agreement or any schedule to the Agreement, all monies paid pursuant to sections 8(1)(b)

> and 8(1)(c) prior to the date hereof shall be deemed non-refundable sustaining payments which are not by way of royalty.

Thus, the 1991 Amending Agreement deemed all amounts paid to Sheldon-Larder under the 1984 Agreement to be "non-refundable sustaining payments", which were not a royalty. Those payments were made prior to January 15, 1991, (i.e. before the date of the Director's Order).

In contrast to the above noted treatment of the Impugned Claims, the 1991 Amending Agreement amended the 1984 Agreement to include certain properties (called the "Barber-Larder Properties) and to amend the royalty provisions in the 1984 Agreement. Included in the amendments to the royalty provisions was the inclusion of a 1% net smelter return royalty to Jubilee in respect of the Barber-Larder Properties. This net smelter return royalty right is the only interest that Jubilee has had in respect of the Barber-Larder Properties. The relevant provisions of the 1991 Amending Agreement are as follows:

:

> 3. Section 1 of the Agreement is hereby amended by adding thereto the following:
>
> "(dd) "Barber-Larder Properties" means those properties identified in Schedule 1 hereto,
>
> …
>
> 6. Paragraph (a) of subsection 8(1) of the Agreement is hereby deleted and the following is substituted therefore:
>
> "(a) the percentage of the Net Smelter Returns attributable to the production and sale of gold, silver, metals, minerals and other ores derived from the Properties determined as follows:
>
> (i) 2% for periods when the price of 1 Troy ounce of gold is less than U.S. $500,
>
> (ii) 3% for periods when the price of 1 Troy ounce of gold is U.S. $500 or more but less than U.S. $800, and
>
> (iii) 4% for periods when the price of 1 Troy ounce of gold is U.S. $800 or greater
>
> And the price of gold shall be determined by the London Second Fixing for gold on the last business day preceding the date of payment to the Optionors; plus 1% of the Net Smelter Returns attributable to the production and sale of gold, silver, metals, minerals

> and other ores derived from the Barber-Larder Properties; …

Jubilee's Current Interest in the Impugned Claims

As of the date of the Director's Order, Jubilee (through its predecessor Sheldon-Larder) and Armistice were parties to a written agreement dated June 30, 2004 (the "2004 Agreement") which sets out the nature of Jubilee's interest in a number of properties, including the Impugned Claims and the Barber-Larder Properties.

The 2004 Agreement amended and restated the 1984 Agreement and the 1991 Amending Agreement. The 2004 Agreement is the entire agreement between Jubilee and Armistice in relation to the Impugned Claims.

On the date of the issuance of the Director's Order, the registered owners of the Impugned Claims were Jubilee, which held an undivided 25% interest in the Impugned Claims and Armistice, which held the remaining undivided 75% interest in the Impugned Claims.

Counsel referred in oral argument to the following royalty provisions of the 2004 Agreement:

> 8. ROYALTY
>
> 8.1 It is the intention of the parties that Sheldon-Larder's 25% undivided interest in the Properties shall be a carried interest, and Armistice shall do all things necessary to maintain the Properties in good standing and take all reasonable steps in order to bring the Properties into commercial production if warranted. Accordingly, [Jubilee's] participation in profits from the Properties shall be restricted to and Armistice shall pay to [Jubilee] a Royalty equal to the greater of:
>
> > (a) as of and from the Date of Commencement of Production, the percentage of the Net Smelter Returns attributable to the production and sale of gold, silver, metals, minerals and other ores derived from the Properties determined as follows:
> >
> > > (i) 2% for periods when price of 1 Troy ounce of gold is less than U.S. $500;
> > >
> > > (ii) 3% for periods when the price of 1 Troy ounce of gold is U.S. $500 but less than U.S. $800, and
> > >
> > > (iii) 4% for periods when the price of 1 Troy ounce of gold is U.S. $800 or greater;

and the price of gold shall be determined by the London Second Fixing for gold on the last business day preceding the date of payment to [Jubilee]; or

(b) a sum equal to $1.00 per short ton of ore mines and milled derived from the Properties; or

(c) an Advance Royalty payment of $21,573.61 payable on the last days of March, June, September and December in each year.

8.2 Armistice Agrees that it shall, within 45 days after the last days of March, June, September and December in each and every year while this agreement is in force and effect, estimate and pay the Royalty with respect to the 3 calendar months ending on each such last day. Such payment shall be made at such place as may be designated in writing by [Jubilee] and shall be accompanied by interim financial statements as to the operations carried on hereunder and as to the Royalty payable hereunder with respect to such 3 month period. Armistice will, not later than the 30th day of July in each year, make a final payment with respect to the Royalty payable for the immediately preceding calendar year provided that if amounts have been paid in excess of those to which [Jubilee] is entitled in any such calendar year, the appropriate amount shall be deducted from the next Royalty payment or payments to which [Jubilee] is entitled. Subsequent to the Date of Commencement of Production, all payments based on Net Smelter Returns as described in Section 8.1(1) shall be adjusted with respect to tonnage royalty payments made pursuant to Section 8(1)(b) and payments of Advance Royalties made pursuant to Section 8.1(c), as described in Schedule D attached hereto.

…

8.4 Armistice agrees to maintain up-to-date and complete records of the operations conducted by it with respect to the Properties including the treating of the ore from such operations and/or the smelting of the products derived therefrom. [Jubilee] and its agents shall have the right at all reasonable times and their sole risk and expense to inspect all such records, statement and returns and make copies thereof at its expense for the purpose of verifying the amount of the Royalty payments to be made pursuant to this Agreement. [Jubilee] has the right at its expense to have such amounts audited by independent auditors once each year.

8.5 Armistice shall have audited financial statements prepared by its auditors as to the operations carried on hereunder and as to the Royalties payable hereunder. Armistice shall forthwith deliver

> a copy of such financial statements to [Jubilee] within 4 months after the end of each year.
>
> …
>
> 8.7 [Jubilee] acknowledges that all payments owing and due to be made prior to the date hereof pursuant to section 8(1)(c) of the 1984 Agreement as amended by the 1991 Amending Agreement, as well as payment to be made within 45 days after June 30, 2004 (in accordance with Section 8.2), have been made by Armistice as of the date hereof. All payments made on or prior to the date hereof pursuant to Section 8.1(c) of the 1984 Agreement as amended by the 1991 Amending Agreement shall be deemed to be non-refundable sustaining payments which are not by way of Advance Royalty. The next payment to be made pursuant to Section 8.1(c) of this Agreement shall be made within 45 day after September 30, 2004.
>
> …
>
> 8.9 …
>
> > (c) If an Advance Royalty has remained unpaid and is in arrears for a period of 48 months, then [Jubilee] shall be entitled to provide notice of default in writing to Armistice. Upon receiving such notice, the unpaid Advance Royalty shall forthwith be deemed to be a non-refundable sustaining payment which is not by way of Advance Royalty. Thereafter, any additional Advance Royalty or Royalties which continue to be unpaid and are in arrears for a period of 48 months shall automatically be deemed to be a non-refundable sustaining payment which is not by way of Advance Royalty

Thus, the 2004 Agreement deemed all amounts paid to Sheldon-Larder (now Jubilee) under the 1984 Agreement and 1991 Agreement to be "non-refundable sustaining payments", which were not an Advance Royalty. Those payments were made prior to June 30, 2004, (ie. before the date of the Director's Order).

Counsel also referred in oral argument to the following good standing provision in the 2004 Agreement.

> 11. GOOD STANDING
>
> 11.1 Armistice shall pay all taxes, fees and assessments and do all things necessary to maintain the Properties in good standing and in full force and effect (including renewing, mining development licences as they become due) and shall conduct all exploration and development work and all mining, milling, smelting processing

> and mining waste storage operations to the extent same are carried out on the Properties in accordance with good mining practice.

Finally, counsel referred in oral argument to paragraph 20 of the 2004 Agreement:

> 20. ABANDONEMENT AND FORFEITURE
>
> 20.1 If Armistice wishes to abandon or forfeit any of the Properties, it shall so notify [Jubilee] at least 45 days proper to the time when it intends to effect the abandonment of forfeiture. If [Jubilee] so requests, Armistice shall prepare and execute transfers to [Jubilee] in registerable form for those parts of the Properties which it had intended to abandon or forfeit and, so far as if is within Armistice's power, Armistice shall register such transfers. If Armistice is unable to obtain registration of same, then until all necessary consents have been obtained and all necessary recording have been completed Armistice shall hold such parts of the Properties in trust for [Jubilee]. At the time of any such transfer, Armistice shall ensure that those parts of the Properties being transferred are in the same or better condition that would be required under all then application laws, regulations and standards in order for armistice to effect abandonment to the Crown. Any part of the Properties abandoned or forfeited or transferred to [Jubilee] as aforesaid shall cease to be a part of the Properties and the provisions of this Agreement shall no longer apply to that part.

In addition to those items referred to in oral argument, counsel referred to and relied upon their written submissions in respect of the nature of the 2004 Agreement. Written submissions provided by counsel contained references to the following additional portions of the 2004 Agreement:

> 2 REPRESENTATIONS AND WARRANTIES
>
> …
>
> 2.2 [Jubilee] hereby represents and warrants to Armistice that:
>
> …
>
> (b) it is neither the recorded nor beneficial owner of any Mining Rights within the Area of Interest other than the Properties and a 1% Net Smelter Returns royalty in the Barber-Larder Properties;
>
> …

18. INDEMNIFICATION

18.1 Armistice hereby agrees to indemnify and save [Jubilee] harmless from and against all claims, demands, actions, suits, losses, damage and costs which may be brought against or suffered or incurred by [Jubilee] by reason of any matter or thing arising out of or in any way attributable to any work or operation carried out by Armistice or any of its employees, agents or contractors on the Properties or any part thereof, except for damage or loss suffered by [Jubilee] or any employee or agent of [Jubilee] to the extent such damage or loss is directly attributable to the negligence of [Jubilee] or any employee or agent of [Jubilee].

…

21 TERMINATION

…

21.3 Either party (the "**First Party**") may, at its election, and without prejudice to any other right or remedy, terminate this Agreement upon written notice to the other party (the "**Second Party**") at any time if the Second Party becomes insolvent or commits an act of bankruptcy or makes a sale in bulk of its assets or makes a general assignment for the benefit of its creditors or has a receiver, administrator or manager of its property, assets and undertaking appointed or is the subject of proceedings under any bankruptcy or insolvency laws; provided that should the Second Party reorganize its assets or its share or loan capital or enter into a plan for repaying its indebtedness without being in default under any other term or condition of this Agreement the First Party may not terminate this Agreement pursuant to this Section 21.3.

21.4 In the event this agreement is terminated pursuant to Section 21.3

(a) all payments theretofore made by the Second Party to the First Party, if any, hereunder shall be forfeited,

(b) the Second Party shall surrender its interest in the Properties to the First Party, and shall deliver up transfers of the Properties to the First Party in registerable form and, in substance, satisfactory to the First Party; and

(c) within 60 days of the effective date of such expiration or termination or forfeiture, the Second Party shall provide the First Party with copies of all maps, drill logs, sampling and assay records, and other factual data relating to the work carried out on the Properties.