File No. MA 019-00

L. Kamerman	)	Monday, the 26th day
Mining and Lands Commissioner	)	of March, 2018.

THE MINING ACT

IN THE MATTER OF

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

AND IN THE MATTER OF

The Requirement of the Director of Mine Rehabilitation (the "Director") pursuant to subsection 147(1) of the **Mining Act**, dated April 5, 2000, that Noranda post an acceptable financial assurance instrument in connection with the Closure Plans;

AND IN THE MATTER OF

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

B E T W E E N:

GLENCORE CANADA CORPORATION
(successor entity to Noranda Inc.)

Appellant

- and -

THE DIRECTOR OF MINE REHABILITATION

Respondent

O R D E R

WHEREAS this matter was heard on the 14th, 15th, 22nd, 27th, and 28th days of September, 2010, the 29th day of October, 2010, the 8th, 9th, 10th and 15th days of November, 2010, the 5th day of April, 2011, the 6th and 31st days of May, 2011 and the 1st and 27th days of June, 2011, respectively, with oral argument being heard on the 7th day of June, 2012, all in the courtroom of this tribunal;

UPON hearing this matter and reading the documentation filed:

1. IT IS ORDERED that the requirement of the Director, dated the 5th day of April, 2000, that Glencore Canada Corporation (successor entity to Noranda Inc.) post an acceptable financial assurance instrument in connection with the Closure Plans, is confirmed, excepting that the date by which the said Closure Plan shall be filed is altered to be within six months of the date of this Order, or in the event of any further appeal, within six months of the final disposition of this matter.

2. IT IS FURTHER ORDERED that the Director shall be entitled to his costs in this matter pursuant to s. 126 of the **Act.**

3. AND IF THE PARTIES ARE UNABLE TO AGREE AS TO QUANTUM, FURTHER DIRECTS pursuant to s. 126 that such costs be assessed by an assessment officer.

OR, IN THE ALTERNATIVE

4. DIRECTS THAT the Director apply to the Mining and Lands Tribunal for an Order that a lump sum be paid in lieu of assessed costs pursuant to s. 126.

THIS TRIBUNAL FURTHER ADVISES that pursuant to subsection 129(4) of the **Mining Act**, R.S.O. 1990, c. M. 14, as amended, a copy of this Order shall be forwarded by the tribunal to the Director of Mine Rehabilitation, now known as the Manager, Rehabilitation, Inspection and Compliance, Mines and Minerals Division, Ministry of Northern Development and Mines.

Reasons for this Order are attached.

DATED this 26th day of March, 2018.

L. Kamerman
MINING AND LANDS COMMISSIONER

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B E T W E E N:

GLENCORE CANADA CORPORATION
(successor entity to Noranda Inc.)

Appellant

- and -

THE DIRECTOR OF MINE REHABILITATION

Respondent

REASONS

Appearances:

Mr. Douglas Hamilton	Counsel for the Appellant
Mr. Ben Ratelband	Counsel for the Appellant
Mr. William Manuel	Counsel for the Respondent
Mr. Christopher Thompson	Counsel for the Respondent
Mr. Anathan Sinnadura	Counsel for the Respondent

Nature of the Appeal

Introduction/Overview

[1] This is an appeal under Part VII of the **Mining Act,** R.S.O.1990, c. M. 14, as amended,[1] involving the financial assurance portion of two proposed closure plans for two mines which are no longer in production.

[2] Between 1991 and 1999, and 1995 and 1997, respectively, closure plan costs were negotiated between Noranda Inc.[2] (the Corporation) and the Director of Mine Rehabilitation (the Director). Final Costs were submitted on January 20, 2000 and the Director approved (long-term) water treatment and maintenance for the two mines of $741,800 and $606,200, respectively, in writing on January 27, 2000. The Director waived financial assurance for short-term capital costs so long as this work was completed by a certain date. There was no problem.

[3] Final approval of proposed closure plans includes providing statutorily mandated financial assurance.

The *vehicle* for the financial assurance and the *interest rate* for calculating the *Net Present Value (NPV)* became the primary issues arising out of this appeal.

[4] Two meetings were held between the Corporation's staff, the Director and Ministry of Northern Development of Mines (MNDM or the Ministry) staff, on January 13, and February 28, 2000 at which the Corporation presented its proposal for financial assurance. Information from these meetings contained in two slide decks are included with MNDM's Financial Assurance Coordinator's book of documents.

[5] The Corporation proposed a unique form of financial assurance called ***Corporate Financial Assurance.*** No hard security[3] would be posted. Essentially, the Corporation would be trading on its reputation and balance sheet, which would be monitored by the Director. Upon its publically traded stock falling below an agreed upon threshold, the full amount of financial assurance would be converted to a tangible asset immediately such as a surety bond.

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[1] This would include significant amendments found in S.O. 1989, c. 62 and S.O. 1994, c. 27, Part XI, s.130 & 134. The applicable legislation was determined pursuant to the tribunal's Order dated November 25, 2003, one of the multitude of preliminary jurisdictional and procedural matters which arose in the course of this proceeding.

[2] The appellant, Noranda Inc. became Falconbridge Limited, then it became Xstrata Canada Corporation during the course of the hearing. After final oral submissions were completed, it became Glencore Canada Corporation. The tribunal has and will use the name "the Corporation" in these Reasons.

[3] While from a financial perspective, hard security is backstopped with an asset such as a line of credit, cash, bond; soft security can be a corporate guarantee, self-security, future royalties and the like, the meaning of "security" is an issue which arises during the course of this hearing, including the timing of its determination.

Monitoring would take place via a publically available bond rating service. Initially, it was proposed that the entire financial assurance take this form; at the second meeting 2/3 was in the form of a surety bond and 1/3 was by ***Corporate Financial Assurance***.

[6] **Net Present Value (NPV)** represents the calculation of how much money is required in today's funds to meet long-term financial assurance obligations. To calculate the amount of Net Present Value of the funds necessary, one needs to know the annual costs and the term. The variable at issue is the real rate of return, which is made up of two components, the actual rate of return on money earned on an investment less the rate of interest. Actual rate of return is sometimes referred to as the nominal rate. Rate of return and **discount rate** are synonymous but they are used in different contexts.

[7] **Financial assurance** forms the backstop that underwrites ongoing or future mine rehabilitation work in the event that rehabilitation measures cannot be carried out temporarily or catastrophically from regular cash flow. This amount is what has been agreed to in the closure plan which is approved by the Director.

[8] The Corporation proposed a rate of 8½% with zero interest. Throughout, in both correspondence and meetings, the Director, insisted on an interest rate of 3%. The Director's figure turned out to have no actuarial basis.

[9] The Director wrote a letter to the Corporation dated April 5, 2000 (the Letter) rejecting the proposals for financial assurance regarding the proposed vehicle and the interest rate for NPV calculation. In accordance with the legislation, it was couched in terms of requirements for changes to be made.

- the proposed interest rate (not specifically mentioned of 8.5%) for calculation of Net Present Value (NPV), requires a change to 3.2%
- he was unable to legally accept the proposed vehicle for financial assurance (which the Director called a corporate guarantee)
- requiring that the full amount of corporate assurance be provided

[10] The Corporation filed a Notice to Require a Hearing with the Director on May 3, 2000, which, in accordance with statutory requirements, was forwarded to the tribunal. It was dated May 9, 2000 and it was received on May 16, 2000.

Relevant legislation

[11] The title of Part VII of the **Mining Act** is "Operation of Mines". It encompasses the advanced exploration phase through mine production, to inactivity, closure, and if necessary to abandonment. Mines must be rehabilitated through all phases of their life cycles, pursuant to time frames set by the Minister of Northern Development and Mines (the Minister) for filing proposed closure plans which are subject to the approval of the Director.

[12] Part VII became effective on June 3, 2001.

[13] The Director's role is to approve proposed closure plans and tendered financial assurance for adequacy and form throughout the lifecycle of the mine.

> 143. A proponent shall take all reasonable steps to progressively rehabilitate a site whether or not closure has commenced or an accepted closure plan is in place.
>
> 145. (1) The financial assurance required as part of a closure plan shall be in the form of cash, a letter of credit from a bank named in Schedule I to the Bank Act (Canada), a bond of a guarantee company approved under the Guarantee Companies Securities Act or another form of security acceptable to the Director and shall be in the amount specified in the closure plan accepted by the Director or any amendment thereto.
>
> 147. (1) Within ninety days of June 3, 1991, every proponent of a producing mine or a mine from which production is temporarily suspended shall give a notice in writing to the Director that contains the prescribed information relating to that mine.
>
> (2) On the Director receiving a notice under subsection (1), the Minister shall determine the period of time within which the proponent shall submit to the Director a proposed closure plan in respect of that mine.
>
> (3) The Director shall notify in writing a proponent who has given notice under subsection (1) of the period of time determined by the Minister within which the proponent must submit to the Director a proposed closure plan
>
> (4) A proponent who has received a notice under subsection (3) shall submit the required closure plan to the Director within the period of time specified in the notice
>
> (5) The Director, within ninety days of June 3, 1991, may notify in writing any proponent of advance exploration that has commenced before and is continuing on the 3rd day of June, 1991 of the period of time within which the proponent must submit a proposed closure plan.
>
> (6) A proponent who has received a notice under subsection (5) shall submit the required closure plan to the Director within the time specified in the notice.
>
> **(7) Prior to the Director informing the proponent that the closure plan required under subsection (4) or (6) is acceptable, the Director may require changes to the closure plan.** [bold added]**[**

> **152.** (1) Where the Director,
> **…**
> (b) requires changes to either an existing or proposed closure plan under … subsection 147(7) …;
>
> The proponent may appeal the Director's requirement, order or declaration to the Commissioner, if within thirty days of receiving the changes … referred to in clause (b) …, the proponent serves the Director with the prescribed notice requiring a hearing before the Commissioner and within thirty days of being served, the Director shall refer the matter to the Commissioner for the hearing.
> …
> (5) Upon hearing the appeal of the proponent, the Commissioner may **confirm, alter or revoke** the action of the Director that is the subject matter of the hearing. 1989, c.62, s.77.

How the Director Arrived at his Decision

[14] The amount determined for NPV was arrived at through consultations by the Financial Assurance Coordinator with counterparts in the Ministry of Environment and Energy (MOE), (now the Ministry of Environment and Climate Change) which has a financial assurance requirement under the Environment Protection Act (EPA), and the Ministry of Finance (MOF) and Ontario Financing Authority (OFA) as well as counterparts outside of Ontario. Eventually, the various alternative prognostication methods were discarded when the discrepancy between what might be realized through securities and cash.

[15] The rate used by the Director was for cash loosely based on Order-In-Council 3439/94. It sets out the interest rate for cash financial assurance under s. 145 of the Mining Act for the Mine Reclamation special purpose account which is the Province of Ontario Saving Office (POSO) daily interest rate. As that rate was particularly low, an historic rate of the most favourable POSO Trillium account was taken since its inception, a period of 14 years, less inflation using the inflation rates for the Ontario Consumer Price Index (OPI) for the same corresponding period.

[16] The rate averaged 6.1% since it was created in 1986. The corresponding inflation rate for that period has been an average of 2.9%, so the net interest rate to be used to calculate NPV is 3.2%.

Argument to be Heard in Stages

[17] At the tribunal's suggestion this matter was heard in stages – corresponding to its jurisdiction under ss. 152(5) to "**confirm, alter or revoke**" the requirements of the Director. This first stage is to consider whether or not the Director's decision would be **confirmed**.

[18] The tribunal's rationale for this, was an attempt to hasten this matter along. The tribunal was concerned that there had already been a number of interlocutory matters4 with their attendant delays, and that an outstanding motion would create another delay.

[19] The first stage could proceed without it being necessary to hear this outstanding motion on whether a Crown witness waived solicitor-client privilege.

[20] The parties agreed to this approach.

[21] The Corporation attempted to misapply these three stages, which were, nonetheless, clear. It stated that they were:

[22] Step 1: Whether any or all of the Director's decisions were incorrect or reasonable such that they should be altered or revoked.

[23] Step 2: If it is determined that the decisions are unreasonable and/or incorrect, the tribunal will determine whether to revoke the decisions and send them back to the Director for

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[4] The tribunal received the Notice on **May 9, 2000** and issued its Order to File documentation on **May 16, 2000.** At the request of the Corporation, all documentation relating to the decision of the Director was to be included.

On **September 9, 2000**, Director's challenge that his letter of April 5, 2000, did not constitute a requirement for changes to a proposed closure plan within the meaning of s. 147(7), which is appealable under cl. 152(1)(b); **October 23, 2000**, the Corporation challenged the Director's standing to be heard on his own motion. Counsel for the Director required instructions. The matter was adjourned. Parties entered into discussions for two years; **November 30, 2002**, argument resumed. The Director represented by Attorney General Counsel; **May 14, 2003,** the tribunal found that the Director had standing to be heard on his own motion; **October 1, 2003**, motion heard; **November 25, 2003**, Interlocutory Order dismissed the motion, that the Letter constituted requirements to change a proposed closure plan. The tribunal also found that the appeal had been perfected pursuant to Mining Act, R.S.O, 1990, Part VII of the legislation as it was immediately prior to June 30, 2000, when S.O. 1996, ch. 1, Sched. O was proclaimed; between **November 25, 2003 and late 2009**, there was a prolonged hiatus while the parties entered into further discussions; on **October 15, 2009,** an Order to File documentation and notify the tribunal of any preliminary motions was issued; interlocutory proceedings were held **May 31, and June 10, 2010** with the Consent Order issued **July 10, 2010**; the hearing on the merits commenced on **September 14, 2010,** with sequential and intermittent dates through to the end of **October, 2010;** a *voir dire* to hear the Corporation's challenge of the Director's expert reply witness was heard on **November 8 – 10, and 15, 2010**, with an oral determination, delivered on **April 5, 2011;** proceedings resumed and the final witness was heard from on **June 27, 2011;** following receipt of original submissions, the tribunal raised questions which were conveyed to the parties on November 11, 2011; additional written submissions were received on **February 1, 2012**, **March 9, 2012** and **June 7, 2012;** oral argument was heard on **June 27, 2012**.

redetermination or if he determines that they should be altered by the tribunal itself based upon its own assessment of questions of fact and law, the parties would be permitted to make further submissions with respect to the tribunal's fresh determination.

[24] Step 3: If the tribunal concludes that any or all of the Director's decisions are not reasonable and/or correct and decides to not send the matter back to the Director for redetermination, but instead elects to re-determine the matter for itself, the parties would make new submissions, addressing the relevant legal and factual issues upon which the decision of how to alter the decision will be based.

[25] To be clear, there is no express power to refer a matter back to the Director but it is not necessary, to determine at this stage, whether there is an implied power to do so. At this stage the tribunal will determine whether to confirm the decisions of the Director.

[26] Varying them would take into account the considerable evidence presented by the Corporation on why its vehicle should be the basis for its financial assurance, which leads into support for an interest rate that is different from that of the requirement of the Director of 3.2%. This was introduced by the Corporation through its principal witness.

[27] There is, in fact, no difference between step 2 and step 3 as outlined above, which lends weight to the finding to the Corporation misunderstood the tribunal's explicit intentions. Counsel for the Director expressed similar surprise at this description.

Original Issues on Consent

[28] Following a motion to scope the issues, the parties agreed that the following issues were to be determined:

1. Whether the change required by the Director in respect of the discount rate/net interest rate from 8.5% to 3.2% was reasonable.
2. Whether the change required by the Director in respect of the form of the financial assurance rejecting a corporate undertaking as a form permitted under the **Mining Act** was reasonable.
3. If the tribunal determines that either of the Director's required changes were unreasonable, whether the tribunal should alter or revoke the Director's required changes and determine what is a reasonable discount rate/net interest rate, and what is a reasonable form of financial assurance for any portion of the financial assurance up to and including 100%.

[29] The Director's Letter of April 5, 2000 stated:

> Since our meeting, we have reviewed your financial assurance proposal. We are prepared to forgo the requirement of financial assurance for the remaining project costs at each site with the understanding that if the projects are not completed by December 31, 2002, Noranda will post an acceptable financial assurance instrument until completion. As for the long-term water treatment and maintenance costs at the Mattabi and Geco sites, we have examined several options on the calculation of the NPV on these ongoing costs. In the end, we were informed by

our auditors that the interest rate we must use for each calculation is the one stated in the Order-In-Council that states the interest rate to be used in the calculation of interest for cash deposits. That interest rate is equal to the Province of Ontario Saving Office's daily interest in their Trillium Account, which has averaged 6.1% since that type of account was introduced in 1986. During the same period, the inflation rate was averaged 2.9% resulting in a net interest rate of 3.2%. Thus, for the time being, we will be using this interest rate for NPV calculations. Therefore, the financial assurance for the long term water treatment and maintenance costs for the Mattabi site with annual costs of $741,800 is $18,382,236 and for the Geco site with annual costs of $606,200 is $15,021,989 with both totaling at $33,404,225. Your proposal also requested that we consider accepting a corporate guarantee for a portion of this amount. As we are unable to legally do so, the full amount of financial assurance must be provided.

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

[30] Counsel for both the Corporation and the Director focused their argument on whether the reasons for refusing to accept the proposed interest rate for NPV calculation set out in the Director's Letter met the tests for reasonableness of *justification, transparency and intelligibility* articulated in **Dunsmuir v. New Brunswick,** [2008] 1 S.C.R 190.[5]

OVERRIDING ISSUES

The tribunal does not conduct a judicial review of the decision(s) of the director. It does not have the constitutional authority to do so.

Does the Tribunal Carry Out a Standard of Review Analysis in its Review of the Requirement(s) of the Director in an Appeal under Part VII of the Mining Act?

[31] The tribunal does not apply a standard of review analysis in its review of an administrative decision-maker. The standard to be applied in a ss. 152(1) appeal is a question of statutory interpretation.

[32] This tribunal is mandated by statutes to review the statutory decision of the Director. The tests in Dunsmuir, which are the evolving standard in the superior courts for assessing reasonableness of decisions of adjudicative tribunals are not applicable to this statutory inquiry as to whether to confirm, alter or revoke a requirement of the Director.

[33] The tribunal is not a superior court. It does not have inherent jurisdiction. Its decision in this appeal must be made in accordance with its statutory mandate.

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[5] The tribunal sought additional submissions of instances in which an appellate tribunal applied **Dunsmuir** to an administrative decision in which no hearing was held, but none were forthcoming.

Can the Issue of Whether Security in the Phrase of ss. 145(1), "or other security acceptable to the Director" be Determined at this Time or is it a New Legal Issue Properly for Stage Two of Argument?

[34] The Corporation sought to have the issue restricted to a review of the reasons of the Director under the tripartite tests in **Dunsmuir** as to whether he could legally consider the proffered vehicle. This restriction is rejected. Pursuant to the statute, the inquiry must necessarily be one of determining whether the vehicle itself is "security" according to its meaning within the **Mining Act.**

As an Adjunct to this Argument, the Corporation seeks to have the issue of "security" determined pursuant to the post-June 30, 2000 legislative amendments. No Prior Notice Was Provided.

[35] This issue is without merit.

[36] The governing legislation was determined on November 25, 2003 to be the legislation as it was on the date the Notice to Require a Hearing was received by the Director, May 3, 2000.

Does the time elapsed since the filing of the appeal to the date of final argument (12 years) or the issuance of this decision (17 years) have an impact on the ability of the tribunal to order the amount of money which the Corporation must secure through calculation of NPV?

[37] This issue is without merit.

[38] Until such time as the financial assurance is provided and accepted by the Director, all that the Corporation has, all it has had since 1997 and 1999 is *two proposed closure plans* whose technical provisions are acceptable. At such time as financial assurance is arrived at as to quantum and the vehicle, via the issues to be determined in this appeal, there can be no accepted closure plan.

What is the Nature of the Appeal from an Administrative Decision-Maker Who Holds No Hearing to an Appellate Administrative Body – Where – ss. 152(5) Directs it to "…Confirm, Alter or Revoke…"?

[39] It was not apparent to the tribunal that the parties were asking it to perform the function of a superior court until the parties had completed all written and oral submissions. Nor was this apparent to senior counsel on either side when asked to provide cases in which Dunsmuir was applied by appellate tribunals to administrative decisions where no hearing took place.

[40] The test established in the tribunal's analysis in R. A. MacGregor v. The Director of Mine Rehabilitation, (23 December, 1994), MLC File MA 033-93 (MacGregor) at pages 16-17, was referred to by the parties for the appeal of the Director's requirement/order/declaration [as per ss. 152(1)] remains valid.

> … the tribunal finds that the appeals from an order, declaration or requirement of the Director are appeals *de novo*. Hearings will involve a thorough canvassing of evidence before the Director, opportunity for examination and cross-examination of witnesses and the right to make submissions. 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 evidence of the case…
>
> …
>
> The tribunal finds that it must also consider the statutory interpretation of sections applied to the facts as presented by the Director, and make findings as to whether they have been interpreted reasonably and correctly. [emphasis added]

[41] The tribunal in **MacGregor** relied upon the reasoning in **Andres Wines (B.C.) Ltd. v. B.C. Marketing Board** [1987] 41 D.L.R. (4th) 368, which involved an appeal to an appellate body from an administrative body which did not hold a hearing. It has been applied in the only other two Part VII appeals decided in the interim[6].

[42] The "reasonable and correct" referred to in MacGregor is not the same as that used by the superior courts in their analysis.

[43] The tribunal did review the case law provided by the parties, but concluded that it does not apply to the statutory appeal.

[44] The Corporation provided a number of references in support of application of the tripartite test in Dunsmuir[7]**.** It made three main submissions, with seven, four and eight submissions, respectively, under each and a further three under one of those. It submitted that the tribunal must deal with each of these. It also questioned why the Director chose not to address each of its arguments. The tribunal will also not address these individual arguments as it is unnecessary to do so.

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[6] **Nelson Machinery Company Ltd. v. The Director of Mine Rehabilitation** (15 June, 1995) MLC File MA 013-93 and MLC File MA 036-93, pages 4-5; **Moneta Porcupine Mines v The Director of Mine Rehabilitation** (21 May, 2010) MLC File MA 001-02 and MLC File MA 013-17, page 4.

[7] See **Barbulov v. Cirone,** [2009] O.J. No. 1439 (S.C.J.) paras. 28-29, which refers to **Canada v. Khosa**, [2009] 1 S.C.R. 339, repeating that post-**Dunsmuir,** reasonableness will be nuanced and related to the context of the legislation. See **Khosa** para 63 and **Dunsmuir** para 47. Also, **Baker v. Canada,** [1999] 2 S.C.R. 817 at para 43; **Oakville v. Read**, 2010 ONSC 170 (Div. Ct.) at para. 31, Aff'd 2011 ONCA 22; **Kalin v. Ontario College of Teachers** (2005), 75 O.R. (3d) 523 (Div. Ct.) at paras 58-59, the right of appeal from a disciplinary body to a tribunal is meaningless unless it "at a minimum … state the reasons for the conclusion it reached." **Baker** *op cit*, was referred to in the context of procedural fairness requiring writing a written explanation for the reasons; **Slau Ltd. v. Canada**, 2009 FCA at para 27, the court referred to **Canada Review Agency v. Telfer**, 2009 FCA 23 at para 25, after discussing the appropriate standard of review selection, discussed the tests set out in paragraph 47 of **Dunsmuir.**

[45] The Director distinguished reasonableness further – between ***Functional Reasonableness***[8] and ***Substantive Reasonableness.***[9] Furthermore, the changes that are required are changes to the closure plan, the equivalent of an appeal from the order and not the reasons. The principle in "The Conduct of an Appeal"[10] was relied upon for what was termed as "trite law" that appeals are from the order and not from the reasons.[11]

[46] In the second set of written submissions, prior to oral argument, the tribunal requested additional case law and submissions where the **Dunsmuir** test had been applied by an appellate tribunal to the decision of an administrative decision-maker who did not hold a hearing.

[47] The Corporation was unable to provide any such cases. Nonetheless, it argued that the three criteria appear to be applied by the *reviewing courts* at least as rigorously if not more so than if no hearing is held as would be applied when there has been a hearing. Two Manitoba Court of Appeal decisions (*not as between an administrative decision-maker to an appellate tribunal)* were provided as authority: **Brian Neil Friesen Dental Corp v. Director of Companies Office**, 2011 MBCA 20 at paras 92, 98 and 99; and **Russell v. Manitoba,** 2011 MBCA 56 at para 19, and 31-34.

[48] The Director, similarly, was not able to find any decisions which compares and contrasts.[12] As stated, "we have not located any decision that the reasonableness standard in reviewing decisions rendered following a formal hearing and decisions rendered in the absence of a formal hearing."

[49] Counsel for the Director referred the tribunal to the post-Dunsmuir case of Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board), [2011] S.C.J. No. 6213 and asked that the tribunal look to para. 12, in particular.

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[8] **Lake v. Canada (Minister of Justice),** [2008] S.C.J., para 46; **Law Society of Upper Canada v. Neinstein,** [2010] O.J. No. 1046 (O.CA.), para 61; **Clifford v. Ontario Municipal Employees Retirement System,** [2009] O.J. No. 3900, (O.C.A.), paras 31-32; **MacLean v. Marine Atlantic Inc.,** [2003] F.C.J. No. 1854, paras 16 and 47.

[9] **Dunsmuir**, *supra,* para 47-49; **Limestone District School Board v. Ontario Secondary School Teachers' Federation**, [2008] O.J. No. 4855 (Ont. Div.Ct.), para 24; **Law Society of New Brunswick v. Ryan**, [2003] S.C.J. No. 17, paras 55-56

[10] John Sopinka & Mark Gelowitz, *The Conduct of an Appeal,* 2nd Ed., (Toronto: Butterworths, 2000) at p. 6 as per Ex. 44(a) para 35.

[11] It is a fundamental premise in the law of appellate review that an appeal is taken against the formal judgment or order, as issued and entered in the court appealed from, and not against the reasons expressed by the court for granting the judgment or order. Although the appellate court will frequently discover in the reasons for judgment errors of law that ultimately ground the reversal of the judgment or order, it is the correctness of the judgment or order that is in issue in the appeal and not the correctness of the reasons.

[12] Para. 17 of Ex. 47(a).

[13] "Reasonable" means here that the reasons do in fact or principle support the conclusion reached. That is, even if the reasons in fact given do not seem wholly adequate to support the decision, the court must first seek to supplement them before it seeks to subvert them. For if it is

[50] Not only did the tribunal's question go unanswered. Counsel for both parties missed the point entirely by either relying on court decisions or providing mere speculation on the increased importance of Dunsmuir on the appellate tribunal.

[51] It is not necessary to refer to other cases cited by counsel on this point, given the direction of this analysis. They were numerous and were examined during the course of the tribunal's deliberations.

[52] Throughout this case and in the cases cited, it has been very easy to lose sight of key elements within the administrative justice system. When adjudicative tribunals look at developments in judicial review, they are looking at how the courts have regarded their decisions, i.e. the decisions of administrative tribunals when they are being judicially reviewed by or appealed to the courts. The cases cited above, as well as the volumes provided by counsel, are those of the courts. They are reviewing the decisions of tribunals, whether appellate or otherwise.

[53] There is nothing in any of the analysis provided which provides direction to an appellate tribunal in its role of reviewing a decision of an administrative decision-maker who has not held a hearing. Nothing, that is, other than a cautionary tale on how to govern itself as to the adequacy of its own reasons.

The Role of the Appellate Tribunal Where the Administrative Decision-Maker Holds No Hearing

[54] The tribunal draws on the excellent analysis of Slatter, J. of the Alberta Court of Appeal in **Newton v. Criminal Trial Lawyers' Assn.**, 2010 ABCA 399 (Alta CA), 2010 CarswellAlta 2461 as well as the commentary of a number of experts in administrative law.

[55] There are two paradigms for **standard of review analysis**:

> **1) The relationships between appellate superior courts and trial courts**. [**Housen v. Nikolaisen** [2002] 2 SCR 235, 2002 SCC 33 (SCC)].
>
> - The standard of review for questions of law is correctness
> - Other standards are set for mixed questions of fact and law.
> - With the correctness standard comes a degree of deference for fact-finding; it is not a re-trial.

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right that among the reasons for deference are the appointment of the tribunal and not the court as the front line adjudicator, the tribunal's proximity to the dispute, its expertise, etc., then it is also the case that its decision should be presumed to be correct even if its reasons are in some respects defective.

2) The relationship between administrative tribunals and superior courts.

- **Dunsmuir** refines the foundations laid down in **Pushpanathan v. Canada (Minister of Employment & Immigration),** [1998] 1 SCR 982(SCC):
- Jurisdictional questions are reviewed for correctness;
- reasonableness is the standard for matters within a tribunal's expertise or its mandate;
- where the question of law is of a more general interest to the legal system, the standard will be correctness.
- the role of the superior court over decisions of administrative tribunals is supervisory; the constitutional foundation of judicial review relates back to the rule of law. It is not for them to substitute their decisions for those of a tribunal.
- The tribunal has the statutory power of decision; deference will be a factor in setting the review based upon the following four factors (**Dunsmuir**, para 64):

(1) the presence or absence of a privative clause;
(2) the purpose of the tribunal as determined by interpretation of enabling legislation;
(3) the nature of the question at issue, and;
(4) the expertise of the tribunal

[56] These principles have been extended in their application from strictly judicial review to appeals (as was pointed out by the Corporation): **First Ontario Realty Corp. v. Deng,** 2011 ONCA at paras 16 and 22 and **Law Society of Upper Canada v. Terrigno**, [2010] L.S.D.D. No. 192 (Law Society Appeal Panel) at paras 41 to 45.

[57] The two paradigms meet when a **superior court decision** (or trial court) in a **judicial review of an administrative decision** is reviewed by a **court of appeal:**

- Q v. College of Physicians & Surgeons (British Columbia), [2003] 1 S.C.R. 226, 2003 SCC 19 (S.C.C.) at para 43, the trial court must be correct in the standard of review it selects for application in its review of the tribunal.
- However, the court of appeal will apply the Housen rules in reviewing the superior court's judicial review of the administrative tribunal decision.
- It was assumed by some courts [emphasis added] that the appellate administrative tribunal must be correct in its selection of the standard of review applied to the administrative tribunal at first instance: [Plimmer v Calgary (City) Chief of Police, 2004 ABCA 175, 28 Alta. L.R. (4th) 243, 354 A.R. 62 (Alta CA) at para 20].

What then should happen on an appeal from statutory decision-maker to another statutory decision-maker?

[58] The oversight role assumed by a superior court differs from that exercised by an appellate tribunal operating within a statutory structure. Statutory appeals to superior courts, whether drawing on judicial review principles or not, do not form part of the tribunal's analysis. [**British Columbia (Chicken Marketing Board) v. British Columbia (Marketing Board)**, 2002 BCCA 473, 216 DLR (4^{th}) 587 (BCCA) at para 14].

[59] The statutory appeal from the Chicken Marketing Board is noted to not be an adjudicative body [Paul v. British Columbia (Forest Appeals Commission), 2 SCC 55, [2003] 2 SCR 585 (SCC), para 44]. This was contrasted with the Marketing Board, which conducted hearings with sworn testimony, permitted counsel representation and issued reasons for decision, found by the Court of Appeal to be a full hearing on the merits. There was suggestion that no deference was owed to the lower board.

[60] In "Recent Developments in Administrative Law" [14] Jones also poses the question of whether the standard of review analysis should be applied by an administrative appellate tribunal when hearing appeals from lower administrative makers. At 1.1.10 4.D. **Standards of Review and Administrative Appellate Tribunals: Halifax (Regional Municipality) v. Anglican Diocesan Centre Corporation, (**2010) NSCA 38, Jones' analysis raises questions between a partial and complete appeal *de novo:*

- "To some extent, this issue may be tied up inextricably with the exact nature and scope of the appeal granted by the legislation."
- "Is the appeal a complete hearing de novo, in which case one would expect the appellate body to make its own decision on all aspects of the matter as though the original decision has never occurred?"
- "Is the appeal on the record below, with no new witnesses, in which case the appellate body might accept (defer?) to the findings of fact made by the original body which saw and heard the witnesses?"
- "Is there any justification for the appellate body to defer to the original decision on questions of law or on the actual determination of the merits of the appeal?"
- "Should the appellate body restrict its function to determining only whether the original decision was "reasonable"?"
- "Is deference appropriate where the appellate administrative body is every bit as expert as the original decision-maker?"

[61] At paragraph 23 of **Halifax (Regional Municipality) v. Anglican Diocesan Centre Corporation,**

> "The Board, itself an administrative tribunal under a statutory regime, does not immerse itself in Dunsmuir's standard of review that governs a court's judicial review. The Board should just do what the statute tells it to do."

[62] According to S. Blake in **Administrative Law in Canada** (5th ed.) (Markham: LexisNexis Canada Inc., 2011), p. 71, the parties are entitled to one hearing. If not before the first decision-maker, then a *de novo* appeal. Otherwise, the appeal is on the record. One must determine whether the administrative decision maker gave reasons that allow for meaningful

[14] Jones, David Phillip of de Villas Jones, Edmonton, AB for the Continuing Legal Education of British Columbia pulication *Administrative Law Conference – 2010* (October 2010) reprinted for the Continuing Legal Education Society of British Columbia, December, 2010, at II.D. Standards of Review and Administrative Appellate Tribunals: Halifax (Regional Municipality) v. Anglican Diocesan Centre Corporation

review and whether it is necessary to hear all the evidence and submissions. Without a full evidentiary record, there will be a hearing *de novo*.[15]

[63] In **Plimmer v. Calgary (City) Chief of Police,** 2004 ABCA 175, 28 Alta. L.R. (4th) 243, 354 A.R. 62 (Alta CA), the court stated at para 64 that statute may limit review by the appellate tribunal to correct errors of law. "…A reviewing tribunal which is given power to hold a hearing and make its own decision, however, should assume it has the power and the need to make the correct decision *unless the language of the statute expressly, or by implication, suggests otherwise*…"

Deference

[64] Blake, in **Administrative Law in Canada**, *op. cit.*, at page 173 illustrates that even where legislation provides for a *de novo* hearing, discretion may be accorded to the lower tribunal for other reasons. Greater expertise may lie with the lower decision maker who has practical experience from daily program oversight and should be given deference by the appellate tribunal[16].

[65] The ***relative expertise*** as between the original decision-maker and the appellate tribunal is **the *most important factor*** when it comes to deference.[17] Expertise may be derived from specialized knowledge, or from experience and skill[18].

Augmenting Reasons – Not Relevant in an Appeal De Novo

[66] The Corporation's case throughout has been predicated on application of the Dunsmuir standard of review of reasonableness to the Director's letter. It challenged the filing by the Director of his "after the fact" explanation [Ex 1, tab 5]. Several cases were provided to support

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[15] See **Kwan v Canada (Minister of Citizenship and Immigration),** [2001] F.C.J. No. 1333 (F.C.T.D.); **McLeod v. Alberta Securities Commission**, [2006] A.J. No. 939 (Alta. C.A.), leave to appeal refused [2006] S.C.C.A. No. 380; **Calgary General Hospital v. Williams,** 1982 CarswellAlta 266, [1982] A.W.L.D. 1110, [1982] A.W.L.D. 1126, [1982] A.J. No. 700, 142 D.L.R. (3d) 736, 17 A.C.W.S. (2d) 214, 26 Alta. L.R. (2d) 220, 42 A.R. 1, paras 4-5; and **Kawartha Pine Ridge District School Board v. Grant** [2010] O.J. No.1093 A.J. No. 310.

[16] **St-Pie (Municipalité de) c. Commission de protection du territoire agricole du Québec,** [2009] J.Q. no 15512 (Que.C.A.) *[Canlii 2009 QCCA 2397]* leave to appeal refused [2010] S.C.CA. No.54; **Plimmer,** *op cit*; **Budhai v. Canada (Attorney General)**, [2002] F.C.J. No. 1089 (F.C.A.; **College of Physicians and Surgeons v. Payne,** [2002] O.J. No. 3574 (Ont. Div. Ct.); **Brosseau v. Barreau du Québec**, [2001] C.S.C.R.no 142; **Walker v. Québec (régie des alcools, des courses et des jeux),** [2001] J.Q. no 70 (Que. C.A.)

[17] **Canada (Director of Investigation & Research) v. Southam Inc**., [1997] 1 S.C.R. 748 (S.C.C.).

[18] **Ryan v. Law Society (New Brunswick***)*, 223 D.L.R. (4th) 577, 2003 SCC 20 (S.C.C.), at para. 30.

this position that courts do not tolerate after the fact explanations, which are viewed with suspicion19 or serve no other purpose than to provide more thorough explanations of reasons20.

[67] Paragraph 20 of the Holmes decision distinguishes tax decisions which are "informal and non-adjudicative". Such cases stand apart, whether not being subject to a strict duty of fairness or no duty to give reasons[21].

ANALYSIS AND FINDINGS

[68] There was no hearing before the Director. There is no record. Before the tribunal can make any determination, it needs to hear testimony in connection with the documentary evidence filed. The viva voce evidence extended information concerning meetings, telephone discussions, written correspondence, emails, policies, draft or otherwise, and reports. This list is not exhaustive.

Appeal De Novo - The Tribunal's Hearing is an Appeal De Novo.

[69] The fact that the hearing before the tribunal is the first one, the *one hearing* that parties are entitled to is determinative. See Blake at page 71 referring to **Chicken Marketing Board**, *op cit.*

Nature and Scope Prescribed by the Legislation

[70] Jones, op cit. states that one must look to the legislation to determine the nature and scope of the appeal.

[71] Under Part VII, Operation of Mines, concerning mine rehabilitation matters, ss. 152(3) states that "**upon hearing the appeal** …, the [tribunal] may ***confirm, alter or revoke*** the action of the Director…" The ***nature and scope*** of the hearing granted by the legislation are that the appeal before the tribunal it is *the first hearing* of *those issues which are under appeal*. The legislation empowers the Mining and Lands Commissioner (tribunal) to hold the first hearing, thereby ensuring an airing of the issues. In principle, the rules of natural justice and procedural fairness are to be upheld.

SUBJECT MATTER OF THE HEARING - THE ISSUES

[72] Despite being an appeal de novo, the scope of the appeal hearing will be limited to the subject matter of the issues raised under appeal, issues identified on the Notice to Require a Hearing and further identified by the parties.

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[19] **Stemijon Investments Ltd. v. Canada**, 2011 FCA 299 at paras 41 to 42.

[20] **Holmes v. Canada**, 2010 FC 809, paras 26 through 31.

[21] **Brown and Evans**, *Judicial Review of Administrative Action in Canada*, Toronto: Canvasback, 1998, (loose-leaf)], at pp. 15-21 and Toronto: Carswell, 2009, para 15:2131.

[73] This means that the perspective will not be that of a standard of review analysis but rather that of an appeal *de novo* on the questions of the Director's requirements:

1. **Is the Director reasonable on the facts and correct in law to have required the change to a 3.2% interest rate to calculate Net Present Value using 14 years of historical figures based upon data from the Trillium account and Ontario Consumer Price Index?**

2. **Is the Director reasonable on the facts and correct in law in finding that the proffered vehicle of Corporate Financial Assurance is not "another form of security acceptable to the Director", (and now to the tribunal) within the meaning of ss. 145 (1)?**

[74] This will take into account any matters which have been settled prior to the hearing on the merits. The appeal is not a complete re-determination of every decision point the Director made concerning the whole of the proposed closure plans, nor is it a hearing on every decision point regarding financial assurance.

[75] The term of 50 years was agreed to prior to the hearing on the merits.

[76] This is in accordance with the Mining Act.

[77] Subsection 152(9) specifies those sections of the tribunal's procedural and jurisdictional powers under Part VI which apply to appeals of the Director's requirements/orders/directions. Sections 114, 115, 116 and 118 to 131 apply to section 152 appeals with necessary modifications along with the **Statutory Powers Procedure Act** (**SPPA**)**.** Concerning the latter, the exception is costs, where sections 126 and 127 apply. The tribunal's cost making powers were in existence prior to February 14, 2000, thereby exempting them from the criteria of the cost-making rule under the **SPPA.**

Findings - Nature and Scope Prescribed by the Legislation

[78] The tribunal will not defer to the Director on questions of law. There is no requirement in law that the Commissioner be a lawyer[22]. Circumstances are that in this appeal, the Director is not and the Commissioner is, but that is irrelevant.

[79] Rather, Part VI of the Mining Act contemplates that the tribunal has the necessary expertise to conduct the hearings. This includes authority to hear testimony and examine documentary and other forms of evidence, weigh all evidence, make findings of fact and law

[22] Originally since the inception of the legislation in 1906, the Commissioner - and judge, circa 1924-1956 - a lawyer ten years at the bar was required. This was removed in 1956 [**The Mining Amendment Act,** 1956, S.O. 1956, c.47, amending **The Mining Act**, R.S.O. 1950, c. 236]. Whatever unwritten policy that has been in place in recent years to assign mining matters to lawyers appointed to the tribunal has not been carried forward into law in the amendments to the **Ministry of Natural Resources Act**, S.O. c. 8, Sched 17, which has received Royal Assent and will be proclaimed April 1, 2018.

including mixed questions of fact and law and issue an order or decision with written reasons, with the proviso that reasons may be delivered orally [ss. 129(3)].

[80] The tribunal does recognize that the Director and his staff have the necessary and considerable technical expertise required for oversight of O. Reg. 114/91, entitled "Operation of Mines". The regulation is comprised of 25 sections, requiring a breadth and depth of technical knowledge concerning all aspects of mine operations in the life cycle of a mine. As was demonstrated by the evidence, the Director, in addition to his own inquiries, relied heavily upon the Financial Assurance Coordinator on matters of financial assurance. He, in turn, carried out considerable research and made recommendations, sought input and advice from those with expertise in finance, amortization and the Provincial Consolidated Revenue Fund from within the ministry, other ministries or agencies with either expertise or similar experience, counterparts in other jurisdictions and from an accredited professional actuarial association.

[81] The tribunal finds that it will grant a degree of deference to the Director's expertise. However, the legislation requires that in this, the first hearing, the tribunal make its own findings and it will do so or indicate when deference will be given to the Director and why.

Discussion and Analysis - Security

[82] The Corporation submitted that the issue was whether the Director's finding that he could not legally consider accepting the proffered vehicle – which the Corporation called a corporate guarantee – must be determined on finding that the Director was unreasonable and/or incorrect. The Director maintained that the question is one of statutory interpretation for the tribunal alone, namely whether the vehicle is "another form of security acceptable to the Director" within the discretion afforded by ss. 145(1), a question of correctness.

[83] The Director addressed the definition of "security" in his initial submissions. In reply, the Corporation strenuously objected to any argument dealing with security, which it characterized as a new legal issue. Its reasoning was that the tribunal and Director were limited to assessing whether the Director's reasons met the tripartite tests in **Dunsmuir.** Any inquiry into whether the vehicle falls within "another form of security acceptable to the Director" changes the nature of the appeal from assessing the Director's reasons to placing the focus on the vehicle itself. The Corporation maintained that line of inquiry should be left to a later stage of argument.

[84] Nevertheless, it did make "preliminary" reply submissions, which were so extensive as to be considered exhaustive by the tribunal.[23]

[23] The Corporation submitted 29 pages comprised of 91 paragraphs of submissions in the Appendix to its initial Reply submissions. This was followed by 7 pages comprised of 23 paragraphs of speculation as to what could have happened had negotiations not been cut short by the Director's Letter and a further 24 pages comprised of 76 paragraphs in its second set of submissions.

[85] The Corporation stated on June 27, 2012, in oral argument on the final day, that it intended to argue the question of the meaning of security pursuant to the post-amendment legislation. No prior written or verbal notice was given to the tribunal or Director.

[86] Disregarding that procedural irregularity, which was not the only one to occur on that occasion, the tribunal had already determined that the legislation as it was prior to the June 30, 2000 proclamation of the 1996 S.O. ch. 1 Sched. O amendments would be applicable to this appeal in its November 25, 2003 Interlocutory Order that the Letter constituted requirements for changes to a proposed closure plan.

[87] The changes to Part VII are substantial and their impact significant. It represents a total repeal and revamping of Part VII of the **Mining Act**. The overhaul of the financial assurance provisions would require that proponents [a defined term which includes among others mine owners and operators] submit closure plans that have both been prepared and certified by qualified third party professionals and further certified by company executives. Part of this process will require detailed estimated expenditures along with financial assurance in place at the time the certified closure plan is submitted to the Director for approval. MNDM's role would be changed to that of providing a cursory review. It no longer has the in-house expertise and numbers of staff to pour over proposed plans and financial assurance schemes.

[88] Section 145(1) has been expanded to go beyond the concept of security:

> **145. (1)** The financial assurance required as part of a closure plan shall be in one of the following forms and shall be in the amount specified in the closure plan filed with the Director or any amendment to it:

- Cash.
- A letter of credit from a bank named in Schedule I to the Bank Act (Canada).
- A bond of an insurer licensed under the Insurance Act to write surety and fidelity insurance
- A mining reclamation trust as defined in the Income Tax Act (Canada).
- Compliance with a corporate financial test in the prescribed manner.
- Any other form of security or any other guarantee or protection, including a pledge of assets, a sinking fund or royalties per tonne, that is acceptable to the Director. 1996, c. 1, Sched. O, c. 26; 1997, s. 36. [re: the Insurance Act] [new]

[89] The Corporation cannot have this section applied out of context. Part VII operates as one system. It cannot be picked apart to select the better options according to preferential treatments by different sections.

[90] Had the corporation believed that it would receive better treatment under the post-June 30, 2000 version of the legislation, it could have withdrawn its proposed closure plans, waited and elected to submit certified closure plans with the required full financial assurance instead. It did not. Instead, it is proceeding under the legislation as it was at this point in time and will be governed accordingly.

Does the time elapsed since the filing of the appeal to the date of final argument (12 years) or the issuance of this decision (18 years) have an impact on the ability of the tribunal to order the amount of money which the Corporation must secure through calculation of NPV?

[91] The Corporation, again on the day of oral argument without notice, submitted that twelve years have elapsed since the filing of the appeal. Therefore, only 38 years remain to the term. It further submitted that the tribunal does not have the requisite expertise to calculate the Net Present Value for the remainder of the term and that the matter must be referred back to the Director.

[92] It is not necessary to repeat the Director's submission on this point.

[93] It is not clear whether counsel for the Corporation is deliberately attempting to keep the tribunal and counsel for the Director off balance with these last-minute issues with no prior notice, whether it is making it up as it goes along (there was no paper to go along with this issue) or whether it is a case of bad manners. Whatever cause is attributed, in the end, it doesn't matter.

[94] This issue is without merit.

[95] Until such time as the financial assurance is provided and accepted by the Director, all that the Corporation has, all it has had since 1997 and 1999 is **two proposed closure plans** whose technical provisions are acceptable. At such time as financial assurance is arrived at as to quantum and the vehicle, via the issues to be determined in this appeal, there can be no accepted closure plan.

EVIDENCE AND ARGUMENT

1. Is the Director reasonable and correct to have required the change to a 3.2% interest rate to calculate Net Present Value using 14 years of historical figures based upon data from the Trillium account and Ontario Consumer Price Index?

Net Present Value

[96] **Net Present Value (NPV)** represents the calculation of how much money is required in today's funds to meet long-term financial assurance obligations. In its proposed closure plan, the technical aspects of which were accepted, the Corporation agreed to carry out long-term maintenance, water treatment and administration.

[97] To calculate the amount of Net Present Value of the funds necessary, one needs to know the annual costs and the term – in this case, both are known. The variable at issue is the real rate of return, which is made up of two components, the actual rate of return on money earned on an investment less the rate of interest. Actual rate of return is sometimes referred to as nominal rate. Rate of return and **discount rate** are synonymous but they are used in different contexts.

[98] Selection of the nominal interest rate and inflation for the rate of return is highly contentious. It is as much of an art as a science, as is true with any prognostication, and is big and risky business.

[99] Mr. Ed Solonyka, the Financial Assurance Coordinator with MNDM since 1997 until at least the dates of giving his evidence, was the primary witness on behalf of the Director and through whom the Corporation introduced Ministry-related/generated documentary evidence. He referred to his book of documents – Exhibit 10(b), some of which were those of the Ministry or Director.

[100] Seeking direction, the Director wrote to a colleague [Ex 10(b), tab 11] at the Ontario Ministry of the Energy in late February 2000. There, the nominal rate used based upon the Bank of Canada 20-30 year bond was between 6.3% - 6.5%. The colleague mentioned, in a foreshadowing of the issue upon which the Director's decision was ultimately based, the issue throughout, which has been the discrepancy between nominal rates for cash and bonds.

[101] The methodology described to both Mr. Solonyka and Dr. Cowan is similar to that of the Ministry of Finance, Ontario Financing Authority (OFA), Ministry of Energy and Environment (MOE) and several out of province institutions [see Ex. 10(b), Tabs 13, 14, 21, 22] which pre-date and post-date the decision letter under appeal.

[102] The stream of payments (annual costs) is inflated by the projected inflation rate. This is then discounted by the yield rate on a bond of a given term. When the matter is of longer term, the bond rate will change after 25-30 years – from a higher rate to a lower rate. Rates such as the 30 year rate of a Canada bond of 5.9% was given; (the example cited long-term Canada bond of between 25-30 year bond); there is mention of using a higher rate for short-term in BC of coupon rates on Government of Canada real return bonds of 4.25% until maturity, then switching to 3% but otherwise starting at a risk-free rate of 3%.

[103] From the outset, the Director started with and stood firm with a proposed a 3% interest rate for NPV calculations. This was found in early prior correspondence [eg. Ex. 10(b), Tabs 4, 6, 7] and in Mr. Solonyka's Will Say [Ex. 10(a)]. Under cross-examination, this proved to be an arbitrary and unsubstantiated figure. It was taken from what was known as the MEND24 report and based on an entirely erroneous assumption which proved to be without rationale. It was a made-up figure used to facilitate other calculations upon which the report was designed to focus and convey.

[104] Based upon the common practice in the industry for securities rather than cash, and based upon his inquiries, on March 16, 2000, Mr. Solonyka first recommended to the Director an interest rate of 3.79% for calculation of NPV. Method: inflate the costs by a rate of 2% and then

[24] "Acid Mine Drainage – Status Of Chemical Treatment And Sludge Management Practices" Report dated June, 1994 by SENES consultants, prepared for the MEND program for CANMET [Ex 10(b), tab 4, in part and Ex 22 in full].

discount at the annual yield rate as for a 30-year Canada bond of 5.79%[25] to arrive at a discount rate of 3.79%.

Meetings of January 13, and February 28, 2000

[105] The Corporation's representatives met with the Director and his staff twice to hear the former's proposals on financial assurance, summarized in two slide decks contained in Mr. Solonyka's book of documents [Ex. 10(b), tab 7 & 12].

[106] Initially the Corporation proposed that 100% of the financial assurance be via its proposed vehicle, the Corporate Financial Assurance; it later scaled this back to 1/3 with 2/3 by way of surety bond.

[107] The tendered Corporate Financial Assurance is based on the Corporation's balance sheet. It would not be attached to individual mine sites. Rather, it would attach to all of the mine sites of the company, whether under production or closed out. This vehicle is based on the company's financial viability and creditworthiness and not on narrowly construed characteristics attributable to one particular site.

[108] At the second meeting, hoping to persuade the Director to accept its proposal – vehicle and interest rate - the Corporation offered 2/3 of the financial assurance as a surety bond and 1/3 as what it called a written undertaking based upon its financial status and track record. Its slide deck erroneously referred to Ministerial regulatory discretion (unnumbered page 4) with respect to the form of security in what apparently meant to refer to the phrase in ss. 145(1) of the Act, "another form of security acceptable to the Director…"

[109] Although this new proposal would be taken into consideration, the Corporation was told that it was unlikely that the Director would accept a written undertaking for 1/3 of the financial assurance. Mr. Solonyka's words were that "we would like the full amount of financial assurance".26 Similarly, he stated that it was unlikely that the 3 percent NPV figure would be changed. The Corporation was advised as early as January 13, 2000 [see notes Ex. 10(b), tab 7] that its "corporate guarantee" was unlikely to be considered.

[110] In the end, Neil Humphry, MNDM's internal auditor, made a significant impression on Mr. Solonyka and the concerns expressed in emails induced him to change his recommendations to the Director. Taking to heart the advice that an NPV formula could run an actual risk of a discrepancy, Mr. Solonyka changed his methodology entirely. In his Will Say and at the hearing, the auditor's report [Ex 10(b), tab 30] were also referred to at length.

[111] Order-In-Council (OIC) 3439/94 [Ex 10(b), Tab Ex 10(b), which refers to s. 7(2) of the Financial Administration Act, R.S.O. 1990, c. F 12] sets out the interest rate for cash financial assurance under s. 145 of the Mining Act for the Mine Reclamation special purpose account will

[25] Reflects that point in time.
[26] Testimony of Edward Solonyka, September 14, 2010, page 59.

be the same as what is allowed on deposits with the Province of Ontario Savings Office (POSO), calculated on a daily balance and credited on June 30 and December 31 of each year.

[112] There is an actuarial risk caused between the mandatory interest rate required on cash financial assurance deposits governed by OIC 3439/94 and the methods described using the listed securities in ss. 145(1). The auditor's concern was that interest rates for cash deposits is comparatively low and any shortfall that occurs between the two would require the difference to be made up by taxpayers.

[113] Changing an OIC is not as straight-forward an undertaking as it sounds; it takes time, requiring the initiative of management and cooperation of the Legal Services Branch. What Mr. Solonyka did not say, but the tribunal noticed is that there appears to be a uniformity between Ministries on how cash deposit financial assurances are treated in OICs, so the matter may in fact also involve inter-ministerial policy considerations which were neither explored nor discussed.

[114] First he used the current POSO rate which became 2.15% after inflation was taken into account. This was even lower than the problematic 3% so Mr. Solonyka tried to get creative.

[115] Mr. Solonyka used 14 years of interest rates for the highest tier of POSO's 'Trillium' Interest Rate as being that used in the special purpose account, corresponding to when that account was started. Historical data gives him a weighted average for this of 6.1%. The corresponding Ontario inflation rate, according to statistics provided by the Ministry of Finance was 2.9%. He proposed a long-term financial assurance rate of 3.2%.

[116] In a flurry of activity, Mr. Solonyka ran this past Mr. Humphry on April 5, 2000. He did not check with any of the other ministries/agencies with whom prior consultations had occurred.

This was the basis upon which the Director's Letter was issued.

[117] Mr. Solonyka was challenged that this was contrary to actuarial recommendations, and was not recommended by any expert practicing in the field. Mr. Solonyka defended his approach of using interest and inflation for the same periods.

[118] The Corporation introduced several documents through Mr. Solonyka in cross-examination, upon which is sought to rely as forming a basis for what should have been the Director's decision – effectively binding the Director or indicative of the direction in which his decision should have gone.

[119] These documents pre-dated his tenure, which he was unable to discuss knowledgeably.

[120] The documents also pre-date the change in legislation and significant downsizing of the Ministry. The tribunal is impressed that the Ministry had been set upon a course dedicated to consultation and development of a program designed to support the legislation which was enacted in 1989, proclaimed in 1991, applicable to this appeal, but which was to be superseded in a matter of weeks following the filing of the appeal.

[121] The program itself had been abandoned except for the fact that the 1996 legislation could not be proclaimed without the necessary regulations and policies which would not occur until June 30, 2000.

[122] Patrick Reid, President of the Ontario Mining Association (OMA) wrote to Dr. John Gammon, Assistant Deputy Minister, expressing concerns regarding the types of financial assurance that would be acceptable to MNDM. In his response dated May, 1993 [Ex 3(e)] Dr. Gammon indicated that it was willing to consider a combination of *hard* [i.e. backstopped] and *soft security*, the latter being *self-insurance* which was likened at page 4 with a *corporate guarantee.* This would be dependent on both the site and annual reviews which allowed for flexibility and revisions. Dr. Gammon conceded that being subject to rehabilitation measures was an issue for the industry and no transitional provisions had been included to encompass legacy closed-out mines in the regulations and guidelines. He did state that there could be no outright provision for only *soft security* as some *hard security* is necessary to meet the intention of the legislation. This was necessary so that the province would not be exposed to risk unduly. Dr. Gammon expressed willingness to revisit and decrease the amount of *hard* security through an optimism that new technology for rehabilitation was on the horizon and could have an impact on annual financial assurance reviews.

[123] On June 1, 1993, the former Director, Mr. Mike Klugman, presented the Ontario experience to representatives of the federal and four other provincial governments, summarized in a document entitled "*Second Meeting On Financial Assurances For the Rehabilitation of Mine Sites*" [Ex. 3(f)] dated June 15, 1993. Information circulated to an undisclosed distribution list at page 2 stated:

Under this scheme, the peak of the liability curve occurs at midpoint when the mine is at its most profitable. Most of the liability is guaranteed by *hard assurance* like *cash, letters of credit,* or *bonds.* The remaining liability is guaranteed by *soft assurance* (i.e. *undertakings by the company*). Perpetual care is included in the life of the mine. The exact function of the curve is developed on a case-by-case basis and thereby reflects a flexible approach. …

[124] Mr. Klugman's graph had been developed in consultation with various interested parties including the Canadian Bar Association and Canadian Bankers Association, mining companies,

[125] In late December, 1994, Mr. Reid requested a status update on behalf of the OMA regarding mine closure, financial assurance and specifically (item 4) "the status of risk premiums in perpetual case costing… [and of] the Hatch-Anderson formula for estimating post closure formulas." Dr. Cowan responded on January 9, 1995, [Ex. 3(g)], to the numerous questions posed:

- *corporate guarantees* had not been accepted to date, would be entertained and were not being specifically precluded in future,
- the program had accepted 2 dozen closure plans totalling $2 million in financial assurance.

- At page 3, under the heading "**Acceptance***"* policies and procedures were in the process of being written for presentation to and the consideration of the Minister's Mining Act Advisory Committee (MMAAC).
- At page two under the heading Corporate Guarantee excerpts were read into the record. At counsel for the Director's request, the definition was included:

[126] A corporate guarantee involves three parties: the Creditor ... Debtor ... and Guarantor (usually parent of the Company or a financial institution). In a corporate guarantee, the Guarantor irrevocably and unconditionally guarantees the due and punctual payment and performance of all the Debtor's debts, liabilities and obligations to the Creditor.

[127] To date, the Ministry has not accepted corporate guarantees. However, this does not mean the Ministry will not entertain the idea of accepting a corporate guarantee should a company offer one as part of their financial assurance.

[128] The January 5, 1995 Draft Guideline entitled "Acceptable Forms of Financial Assurance", prepared by former Financial Assurance Coordinator Chris Hamlin, was also attached to this exhibit. An elaboration of other forms of security contemplated by the legislation is listed under "Background":

"Other forms of security may include, but are not limited to, *treasury bills, assets in the form of surplus equipment and scrap metal, mine reclamation trust funds, corporate guarantees,* promissory notes and letters, *government bonds, etc*. The schedule of payment may also be negotiated with the Director."

[129] Mr. Solonyka was unfamiliar with the "Present Value Model Re: Long-Term Perpetual Care Costs of Closed Mines in Ontario", prepared by Hatch Associates and Donald Anderson and Peak Business Consultant, dated March 27, 1992. D. Galloway who is listed on the distribution list on page two was the original (first) Financial Assurance Coordinator. The Director's written response was that no further work had been done but that the Ministry was interested in follow up work, namely field testing formulas. It was amenable to funding an OMA study to follow up the Hatch work. (see page 4 of the Cowan reply, Ex. 3f).

[130] So, while the MNDM Internal Audit Report on Mine Site Reclamation April 14, 1999 [Ex. 10(b), Tab 30] is less than complementary, it is based upon the earlier legislation and the requirements of the Ministry's 1994/1995 Business Plan under which the Mining and Land Management Branch had been audited.

[131] In the audit, the development of policies and guidelines was identified as priorities for providing guidance to proponents [page 10], with such topics requiring immediate attention including trust accounts, corporate guarantees, letters of credit, insurance bonds, surplus equipment and others.

[132] This was not completed due to the restructuring which followed immediately upon the heels of the publication of the 1994/95 plan.

- The auditor stated that the instruments could have little redeemable value if the proponents were unable to fulfill their obligations.

- At page 10, heading B.1 of the Audit Report, the Director was criticized for having failed to establish guidelines to assist in the exercise of the discretionary powers provided in s. 145(1).

- The auditor questioned the following forms of security shares of a proponent's company: salvageable physical plant and used mining equipment; scrap inventories; promissory notes; corporate guarantees issued by proponents; postdated cheques; registered bonds (redeemable only to the parties to whom the instruments are registered); securities also pledged under other Ontario statutes.

[133] Under cross-examination, Mr. Solonyka was taken through specific instances of corporate guarantees at pages 6 and 7 of the Audit Report. Four corporate guarantees or promissory notes [terms used in the Audit Report] were accepted: the Cobaltec Mill with a promissory note from Ego Resources and a promise to pay future quarterly installments, with the company having gone bankrupt; a corporate guarantee from the Madeline Mine with half of the financial assurance in this form by proponent Lac Des Isles Mines Limited; a corporate guarantee from Inmet Mining Company for Sturgeon Lake amounting to almost 95% of the closure costs, with the remainder by way of a letter of credit; and Golden Patricia Mine $1,046,000 with 100% corporate guarantee from proponent Barrick Gold Corporation. The auditor speculated that none were authorized to issue guarantee bonds under the Guarantee Companies Securities Act.

[134] Mr. Solonyka stated that Sturgeon Lake and Golden Patricia were for ongoing work – i.e. short-term capital costs over a period of two or three years. There were no long-term implications for the other two sites but reflected the actual closure costs. When pressed, Mr. Solonyka stated that it was his assumption that Barrick Gold was not required to post hard assurance for the Golden Patricia site because of the quick turn-around expected in the work. He stated that the auditor had not been happy with the Cobatec bankruptcy and conceded that it did not suggest that the Director was unable to accept a *corporate guarantee*.

[135] Counsel for the Director stated that the auditor's report was not a legal document, which the auditor was not legally qualified to give the opinions nor did the opinions expressed constitute legal advice. He pointed out that the auditor stated that different types of financial assurance pledged were of dubious value rather than answering the legal question of whether those items constituted "another form of security" within the meaning of the subsection.

[136] At the request of counsel for the Director, the tribunal further examined the report. It contained the following comments:

- Record keeping was inadequate for future payments of fixed amounts
- There was considerable risk that in the event of default or insolvency, debts could not be collected.
- Per ton royalty rates presented unknown quantities yet to be extracted. Closure plans are in place for the lifetime of a mine, not just post-production. There would be an inability to

raise funds at the early stages of a mine's life if required to provide financial assurance of one of the specifically listed types in ss. 145(1).

- According to the auditor, an agreement on a per ton financial assurance can permit a proponent to carry on indefinitely *without having an approved closure plan in place with the instrument not being a realizable security.*
- The auditor noted the lack of proper accounting procedures in place to keep proper records of the accounts for each financial assurance account for each separate closure plan, accounting for accrued interest and so on.
- Bank letters of credit were permitted to serve as financial assurance for two separate government programs (ministries), essentially double counting the obligation; it was unclear whether a legal opinion had been sought on this practice as to what would happen in the situation where a proponent's financial assurance would be inadequate and MNDM would not be first to access the letter of credit.

[137] **Michael Manning**, Chartered Financial Analyst, Executive Director, Capital Markets Division, Ontario Financing Authority (OFA) gave evidence on Special Purpose Accounts administered within the Consolidated Revenue Fund under the **Financial Administration Act**, R.S.O. 1990, c. F. 12.[27]

[138] Mr. Manning oversees and manages the Consolidated Revenue Fund (CRF) which is used to meet the day-to-day needs of the province pursuant to the **F.A.A**, enabled by the Capital Investment Plan Act, 1993, S.O. 1993, c. 23 and referred to his report entitled, "Special Purpose Accounts" [Ex 12(b)].

[139] His evidence gave rise to the motion to have access to a legal opinion summarized in an email (Ex. 10(b), tab 25] which motion has not been heard. The parties are in agreement that it will not be heard unless steps two and/or three are argued. Questions of solicitor-client privilege are raised. Also, MNDM is not the client for whom the opinion was prepared.

[140] The authority for OIC 3439 is found in s.7 of the **F.A.A.**

- The objective with the CRF is to preserve capital and minimize or avoid loss altogether.
- Accomplished through the best practice of investment in liquid reserves of high quality and short-term in the money market.
- Longer term investments are not compatible with the liquidity needs of government.
- Needs of government are reflected by obligations which arise by the day, week or month.
- For every basis point in which there is an increase in yield, the risk of capital loss goes up.
- The longer the term of an instrument will correspond to a greater variability in interest rates.

[27] Mr. Manning's report and evidence is problematic in that it is based upon the newer, post June 30, 2000 version of the **Mining Act.** His references to the special purpose accounts are based upon ss. 145(6)-(9), which are not in the version of s. 145 which govern this appeal. There is no provision for special purpose accounts in the pre-June 30, 2000 **Mining Act.**

- If the interest rates increase, the variability will be greater, reflected in the nature of pricing of interest.
- Eg. a 30 year bond would have 15 times more loss than a one year treasury bill; a 5 year bond would have 4 times the loss.

The government does not invest in equities due to constraints imposed by the governing legislation.

[141] The government essentially must invest in "a sound and efficient manner." When one invests in longer-term fixed income investments, there is unacceptable potential (**risk**) to incur large capital losses.

[142] This is contrary to the government's need for liquidity and minimizing risk. It will sell not when market conditions dictate but when it needs cash for the business of government.

[143] When faced with a choice, liquidity is more important than return on investment.

[144] The time horizons of the CRF are not comparable to investments in pension plans, equities and long-term instruments.

[145] With the benefit of ten years of hindsight since the filing of the appeal, there exists "actual future data" in addition to historical data:

[146] The following is based upon yields on Canada and Ontario zero coupon bonds, expected returns on long-term fixed income instruments. [Zero coupon bond does not pay interest but is traded at a deep discount, rendering its profit at maturity when it is redeemed for its full face value]

Fiscal year	97/98	98/99	99/00	00/01	01/02	02/03	03/04	04/05	05/06	06/07	07/08	08/09
Nominal Return	3.72%	5.06%	4.90%	5.77%	3.69%	2.70%	2.91%	2.33%	2.98%	4.34%	4.46%	2.41%
Annual Inflation	1.00%	1.00%	3.00%	2.40%	1.90%	4.20%	0.80%	2.30%	2.20%	2.30%	1.40%	1.20%
Real Return	**2.72%**	**4.06%**	**1.90%**	**3.37%**	**1.79%**	**(1.50%)**	**2.11%**	**0.03%**	**0.78%**	**2.04%**	**3.06%**	**1.21%**

According to the Special Report, there is a greater risk that capital will be lost with long-term bond investments and provide less certainty and efficiency.

PC Bond Analytics, February 26, 2010 [Ex 12(b), page 4]

Canada government bonds	YTM last 5 years	YTM last 10 years
Nominal return	**5.28%**	**6.5%**
Annual inflation	1.78%	2.25%
Real Return	**3.50%**	**4.25%**

Bloomberg March 22, 2010

Ontario zero coupon bonds	YTM 10 year bond	YTM 30 year bond
Nominal return	3.69%	4.87%
BoC[28] Target Rate	2.00%	2.00%
Real Return	**2.57%**	**2.87%**

Bloomberg March 22, 2010

Canada zero coupon bonds	YTM 10 year bond	YTM 30 year bond
Nominal return	3.69%	4.23%
BoC[29] Target Rate	2.00%	2.00%
Real Return	**1.69%**	**2.23%**

[147] **Scott Mantle**, Director of Finance, MNDM(F as it was at the time) gave evidence concerning controllership. Some of his preparation was based on the post-June 30, 2000 proclamation version of the legislation, like that of Mr. Manning. However, his methods and general information are nonetheless very useful. The actual controllership review of the Director of Mine Rehabilitation Operations as of 2010 is not useful.

[148] The purpose of financial assurance is to address mine hazards adequately with recourse available to the province should the need arise. Two fundamental principles are that it must be sufficient at all times to cover the prospective work and must be accessible at any time need arises.

[149] It was his opinion – albeit under the newer version of the legislation – that other forms of security must meet the definition of collateral in that it serves to protect taxpayers against the risk of the mine operator not living up to its responsibilities. It is critical that the government not have to compete for access to finances with others, which would involve drawn out processes, diminished pools of resources as opposed to ensuring that the financial assurance in place at all times be sufficient and accessible at all times. The province does not need to compete for funds whether inside of Ontario or other jurisdictions. The key is that a resource be encumbered sufficient to meet financial assurance requirements.

[150] Mr. Mantle does not advocate use of one index over another or one type of investment over another. Rather, one must look at what is available that meets the basic principles looking at a number of reference points in time. What are the actual returns on the CRF liquid reserves; returns on long-term risk-free investments; application of a theoretical diversified portfolio along the pension plan model; and the Government of Canada benchmark long-term bond yield as suggested by MOE financial assurance guidelines.

[151] The OFA, which trades commercial paper on a daily basis, yields about 2.4% on liquid reserves. Zero coupon bonds being Government of Canada Bonds are in the 4 to 5% range. Corporate paper and T-bills are in the 1% range. At the time of the report, it had been about 2.0%.

[28] Bank of Canada
[29] Bank of Canada

[152] An interest inflation index that is readily available must be used in preference to an obscure or proprietary one for practical and success in prediction reasons. Mr. Mantle reiterated his preference for the *Tender Price Index*. Its benefits are:

- $2 billion invested annually into the transportation network of Ontario;
- Just under half utilized in high priority areas across northern Ontario;
- Its predictive value is high, having been scrutinized by highly qualified professionals in the Finance Department with the Ministry of Finance, the Ministry of Infrastructure and as part of budgeting exercises for the province of Ontario;

[153] There are drastic differences between indices: The Tender price escalations averaged between 4.5% and 5% over the last 20 years whereas the Ontario's CPI averaged only 1.6%. This is not an unusual occurrence when looking at different sectors in an economy as opposed to a general price index.

[154] For specific annual price escalation with projections, the issue becomes how one applies the knowledge garnered from an index. In budgeting for three to five years, the approach Mr. Mantle favours is to weigh the future forecast and index in favour of the most current forecast. To forecast for five years based on 20 years of experience with an index and knowledge that has been applied, his preference would be to weight those future predictions in favour of the most current year. Mathematically, there are ways to favour different periods in time in a future projection. So using an inflationary number for progressive years in a financial plan, one would take those forecasted predictions and apply more weight to the first year prediction than to the fifth. It is better because the further into the future you take your calculations, the weaker your assumptions will be. This reflects the natural law of mathematics.

[155] As far as the price escalation factor for mine rehabilitation, one must look for the appropriate reference points to map out the alternatives and the options for "kicking" a price escalation factor. The logical reference points would be (a) an historical reference point, (b) a current reference point, and (c), some type of credible future prediction. The approach in completing this review was to map out all three.

[156] A current specific index was examined, in this case, being a Tender Price Index, for the next four years. Based on his preference, it was weighted in favour of the next year. The simple calculation/illustration [first approach, page 10, Ex. 11b] for weighting in favour of the current year would give a forecasted inflation number of about 3.7% based on four years, 2010 to 2013.

[157] A second more common approach, is to look at the longer term historical averages from the default position or the relevant indices. The assumption with this approach is that a specific index may be more appropriate at any given point in time, but the value of a general index is that at some point those costs will veer back towards a natural basket of all goods considered (the national or provincial consumer price index). That time period may be very long in nature so that in terms of longer term historical averages, one must examine 30, 50 or even more years of how those indices behave over time.

[158] The Ontario index, for example, over the past 30 years was about 3.1%. The Canada CPI over 50 years, about 4%, 3.8% since essentially the late 1940s, which is what is generally considered for investment purposes to be the "post war era".

[159] There has not been a lot of variation in those numbers when taken over the longer term. By comparison, the Tender Price Index over the last 15 years it was about 5.2% and CPI over that same time for Ontario was about 2%.

[160] The third approach, which is now becoming a more common approach because of the quality of some of the financial information that is available, is to look at credible sources of future predictions. Mr. Mantle used one that represents the Minister of Finance's budget report for their 20-year forecast which predicts a 1.9% CPI in Ontario. It has been the subject of negative public reception.

[161] Mr. Mantle discussed methodology. One looks at an industry specific index, such as his preferred MTO Tender Price Index forecast for short-term requirements [see calculations, Table page 10, Ex. 11b]. By using the range of potential growth for the years in the forecast, the weight given declines in each successive year. This is a complex statistical analysis with deviations from forecasted means; data is compiled and a statistical analysis is performed to establish a neutral position, which represents standard deviations from their targeted median.

[162] The second approach is based on longer-term historical averages from relevant indices, there being an assumption that specific price indices will hover back towards a general price index that reflects inflation for all goods and services. The average CPI for Ontario for the past 30 years is 3.1%. For Canada, it is 4% for the past 50 years and 3.8% since the late 1940s.

[163] The third approach is to validate economic variable projections that are in line with broader public and private sector forecasts. Ontario is projecting its CPI to be 1.9 % over the next 20 years.

[164] These latter two approaches were taken from page 10 of Ex. 11b as Mr. Mantle did not give oral evidence on them.

[165] In terms of selecting a rate of return, one must arrive at a reasonable means of calculating growth being held – the example of cash was used as the simplest illustration. It grows at a certain rate but erodes due to inflation. Any model must account for both.

[166] This must be done within the accessible and sufficiency model which governs the basic principles of financial assurance. This duality will take many forms of normal investing out of the running.

- Stocks have a natural variability with highs and lows, market surges and crashes.
- No one can predict when the money will be required.
- One may face depressed economic market conditions which could lead to insufficiency issues.

[167] Over that period, the OFA has averaged a 3.8% return managing the liquid reserves. This is not sufficient for the long-term – a criticism the tribunal heard from the Corporation. One has the luxury of investing portions but not all of that money in higher yielding opportunities like bonds, which speaks to the uncertainty of when and how much will be needed.

[168] A prudent approach would be to invest a considerable amount which does not have to be available for immediate or short-term liquidation in a higher interest bearing investment such as a longer term bond.

[169] Mr. Mantle stated that shares and equities are not prudent investments because of their volatility; one cannot state with certainty that one will have access to sufficient cash at those times that it may be needed. It would involve an entirely different investing pattern. To be able to invest in equities, one may be able to obtain greater profits but one must also be able to sustain greater losses, which is contrary to the nature of the purpose of financial assurance. Such a portfolio is variable in nature because it reflects the market and it is not regarded as an appropriate venue to meet the basic principles of financial assurance.

[170] The pension fund model does not work because of its nature. It is subject to evaluation with changes to contributions when necessary – in effect a mandate for massive contributions if funds become insufficient through market volatility. The manager is different from the mine owner whose very existence or residency is not assured over the life of the necessary financial assurance term. In such cases, it will fall to the Province and taxpayer which is what financial assurance is designed to avoid or prevent.

[171] Financial assurance is a legislative requirement rather than a risk-adjusted requirement. There is no risk analysis that is required which the Director will review – except under the post-June 30, 2000 legislation for mines where it can be proved there is more than eight years life left.

[172] Next, longer term historical averages were examined with the assumption being that current financial circumstances are an anomaly, with an expectation that the trend line would move back to a normalized trend line over a longer period of time.

[173] Applying the cost and return factors to establish a discount rate [page 13 of Ex 11b]:

[174] The following table illustrates how the reference points for price escalation (inflation) and return (interest) factors can be combined to map a range for assessing the appropriateness of a discount rate:

Time Period	Cost Factor % (Inflation)	Return Factor % (Interest)	Discount Factor
Short Term: 12 months 3-5 years	2.6 TPI 2010 3.7 Note 1	4.0-4.9 Bond market 0.5-2.5 Money market 2.9 5 year Tbills projection 4.6 5 year Bond projection	1.4 to 2.3 -2.1 to -0.1 -0.8 0.9
Historical: 30 year avg. 15 year avg. 15 year avg.	3.1 Ontario CPI 1982-2009 2 Ontario CPI 1995-2009 5.2 TPI 1995-2009	6.2 Tbills (past 30 years) 7.2 Bonds (past 30 years) 3.6 Tbills (past 30 years) 5.2 Bonds (past 30 years) 3.6 Tbills (past 30 years) 5.2 Bonds (past 30 years	3.1 4.1 1.6 3.2 -1.6 0
Projected: 2010-2030	1.9 CPI Projection	4.4 Tbills Projection 5.4 Bonds Projection	2.5 3.5

TPI = MTO's Tender Price Index
Note 1: MTO's Tender Price Index Forecast 2010-2013 weighted average in favour of current data.

[175] Based upon all of the information, the short term, historical and projected, the best advice at the current time would be to continue with a 3% discount rate.

[176] Under cross-examination, Mr. Mantle agreed that providing financial assurance puts financial pressure on a company but that it should be anticipated in its business plan; it is not a surprise cost which should give rise to insolvency. However, this was not the case when the subject mines were commenced.

[177] **William B. Solomon** is the Chair of the Canadian Institute of the Actuaries' Committee on Environmental Liabilities and one of the individuals with whom Mr. Solonyka consulted. His evidence was based largely on the funding of defined pension plans, asset returns, future economic expectations, the investment performance survey and Canadian economic statistics report. Most of Mr. Solomon's evidence would be relevant to the later stages of argument, should they become necessary.

[178] It was his opinion that using a nominal rate for a long term bond as the discount rate minus inflation would be an acceptable method for purposes of calculating the long term stream of financial assurance.

[179] However, the Draft Standards report [Ex. 10(b), tab 15], which has never been finalized, states that inflationary factors in urban and rural areas differ. Costs which are associated with transportation, materials and supply and demand for labour would differ from those patterns used for calculation of the Consumer Price Indices.

[180] At page 9 of the report it stated that given the disparities highlighted, the use of a net discount rate to evaluate environmental liabilities should not be based upon historical data but future expectations. He agreed that he had given his approval to the original methods proposed by Mr. Solonyka as to the method ultimately used. He stated that in the past he had a vote but not a veto.

[181] **Michael Dobner**, Pricewaterhouse Coopers LLP, has worked as an international valuation expert in mining with considerable experience in this field within the past 18 years. He is qualified to provide opinion evidence on behalf of the Corporation on the topic of net present value calculation and whether self-assurance or and/or corporate guarantee could be a form of financial assurance. This latter matter remained contentious throughout the hearing, as the Director maintained throughout that it was a matter of statutory interpretation for the tribunal to make.

[182] Risk assessment lies at the core of valuation and loss quantification. In order to develop a rate of return, risk assessment must be properly incorporated. Although asked to develop a method to determine the rate of return that should be used in calculating the liability of post-reclamation costs, including a method to calculate a reasonable discount rate for calculation of the present value of those costs, his evidence as to an alternative test will not be set out here and will wait for steps 2 and 3, should it be necessary.

[183] Second was to provide an opinion as to whether a corporate guarantee or self-assurance are acceptable forms of security for a portion or the full amount of financial assurance, which is the amount in the original presentation made by the Corporation to the Director.

[184] Mr. Dobner developed a model set out commencing at paragraph 39, page 13 of his report [Ex 8(a)] as to whether a corporate guarantee and/or self-assurance could be acceptable forms of security for a portion or of the full amount of the financial assurance. There are costs incurred by a company when it is required to set aside funds by any method considered as hard security, such as a letter of credit, the cost of which is likely between 1.5 and 2% with the Corporation paying 1.75% to the best of his knowledge.

[185] Mr. Dobner stated that a corporate guarantee is a legal document that puts the government into the position which is equivalent to a secured creditor although there is no fund set aside, but there is a promise of a claim that Ontario would be equivalent with a secured creditor. It could either be the company or an associated company. *Self-assurance* is when the company under obligation provides a promise that it will fulfill its obligation and Ontario would be equivalent to an unsecured creditor. Normally those kinds of arrangements also involve a financial test, so that if the provider of that *self-assurance* passes that test, it can provide the self-assurance, otherwise it would have to move to a form of *harder assurance*.

[186] It was unclear how the parent company guarantee with no assets either in the Corporation or Ontario, being a related but third party guarantor, would operate in his paradigm. During cross-examination, it was made clear that Xstrata PLC was not offering to give a guarantee of liability to the Director. However, Mr. Dobner stated that he was combining the two - Xstrata

PLC and Xstrata Canada - as one. Only at the point where they fail the test, then there is no corporate guarantee and hard security would have to be provided. Mr. Dobner maintained that the corporate guarantee that exists is between Xstrata PLC and Xstrata Canada. It exists notwithstanding the test which is for the Director to monitor.

[187] **Stephen Eadie** was accepted as an expert witness following a *voir dire* qualified to give expert opinion on the same areas as Mr. Dobner. His specialties are pension plans with experience in landfills, the risk management aspects of the former use the same principles. Mr. Eadie has considerable experience as an actuary, but not specifically in mine rehabilitation. Nonetheless, the tribunal found his rebuttal evidence was particularly persuasive and lends support via a differing methodology to what was done by the Director. In particular, the tribunal found his evidence on the cyclical nature of long-term returns, which invariably revert to the mean to have made the most sense in what is, after all, a predictive model. In other words, Mr. Eadie was neither overly optimistic nor overly pessimistic. His figures took into account the findings of Mr. Solonyka for the shorter term, which the latter rejected as being too low (without knowing why) and almost accidentally hit on a figure that is very close to that which Mr. Eadie's evidence was backed up with solid methodology.

[188] Here one is concerned only with closure and post-closure costs. The parties have agreed to the costs. The best information available must be used for the calculation. Two approaches can be used, using historical information or through modeling – going directly to the real discount rate via the nominal rate and inflation rate estimates.

[189] Mr. Eadie believes that the relationship between a long-term inflation rate and long-term interest rates used to calculate the real rates of return are cyclical in nature. Taken from his report [Ex. 14a], his methodology is to use a discounted post-closure cost for the first 20 years which is equal to the average real discount rates over the previous 36 months (rounded) and after 20 years to use 3.25%. The first calculation should be based on average yield of Government Bonds for each of those 36 previous months and average annual change in the CPI for each corresponding period. This would result in a real discount rate of 2.6% for the first 20 years and 3.25% thereafter for January 2010.

[190] The long-term real return s vary between 2 to 4½% but tending to revert to a mean which in his opinion is in the 3 to 3½% range – according to discussions with colleagues and economists within MOE. The 4½% represents the high returns seen in the 90s (echoing Mr. Solomon's evidence that the high rates seen are not likely to be seen again, although Mr. Eadie is more sanguine about this) and the low of 2% is what was seen at the time of the giving of his report. The mean of 3 – 3½% is hypothetical based upon the non-existent 60 year bond. There is a cycle which can be seen or studied over time. Everything reverts to the mean, with him having chosen the median of 3¼%.

[191] Mr. Eadie agreed that it may be possible to have higher returns 30 or more years from now, but the difficulty is in not having the opportunity to make adjustments down the road with those higher numbers.

[192] As for inflation, while there could be a case made for using site-specific inflationary numbers rather than the general indices, those figures are not readily available. Furthermore, while it could work in the short-term, its predictability value would diminish over the longer term. The MOE three-year review model based upon an historical average does work, however.

ANALYSIS AND FINDINGS

Burden of Proof

[193] The former Director, Dr. Dick Cowan, was originally listed as a witness (2000) but retired between the time of the filing of the appeal and the hearing of the merits, which commenced ten years after the appeal was commenced. He did not appear and did not give evidence.

[194] The Corporation made this an issue going to the burden of proof although it did not request a summons from the tribunal.

[195] Placing the burden of proof on that Director, whose decision is under appeal, is unnecessary insofar as the tribunal heard the Director's evidence through Mr. Solonyka. It is satisfied that his research was extensive and comprehensive, and that he kept the Director apprised, followed his instructions and made recommendations which the Director ultimately accepted. Mr. Solonyka has been in that position in 2000 when the events described occurred. Despite the criticisms arising during cross-examination, it was clear that the Director considered these options and advised the Corporation in the Letter that a number of options had been considered in arriving at his calculation for NPV for the costs of long-term rehabilitation. The evidence points to the reasonableness of the discount rate and there is no evidence that this was not the case.

Net Present Value

Interest Rate

[196] The Corporation commenced with a zero interest rate proposition in its proposals which was not accepted by the Director. The Director based his finding on fourteen years of the All Item Ontario Consumer Price Index between the years of 1986 – 1999 of 2.9%. The All Item Canada Consumer Price Index for the same years was 2.8%.

[197] Looking further at the figures [Ex. 10(b), tab 19), the inflation rates have decreased dramatically. Years not taken into account are included in the list provided to Mr. Solonyka by the MOF. In 1983, the Ontario rate was 6.3%; the Canadian rate was 5.8%. In 1985, the numbers had gone down to 4.1 and 4.0% respectively. Commencing in 1986, the first year taken into account in Mr. Solonyka's recommendation, the figures were 4.4 and 4.1% with the former having been used by him. By 1999 the figures were 1.9 and 1.7%, respectively, again, with the former having been used in his calculations. The low was 1994, with a zero rate for Ontario and a rate of 0.2% for Canada.

[198] Although the Corporation appeared to backtrack on its original position and advocated a region-specific inflation index, the tribunal is perplexed as to why this would have been the case.

[199] The evidence of Mr. Mantle was that he favoured the MTO Tender Price Index having good predictive value and withstanding scrutiny of the Ministries having comptrollership and use. However, the numbers, to say the least, would be highly discouraging for proponents, such as the Corporation, who are already claiming that the requirement to post hard financial assurance would have a negative impact on their ability to raise financing or penalizing them for the carrying cost of having the hard assurance in place.

[200] When one contemplates an average of between 4.5 and 5% over the last twenty years, such a figure would decimate resulting discount rates in all but the most lucrative years of when actual interest earned is particularly high – on government bonds or interest bearing accounts. The choices are not broad.

[201] However, his report and evidence are not quite so extreme in all regards. He has provided a range for the Tender Price Index for four years of 3.7% using the weighted averaging system discussed. The longer term historical approach examining indices has Ontario at 3.1% over 30 years and Canada at 4% over 50 years and slightly less since 1945 of 3.8%.

[202] This is contrasted with the Ontario CPI for the last 15 years of 2%. It should be noted that it is a different 14/15 year period from that which Mr. Solonyka was using in his calculation. The 20 year Ontario forecast in 2010 was for 1.9%.

[203] It is his explanation of methodology which is the most helpful in understanding how interest rates can be calculated using weighting on a diminishing scale. While the tribunal does not have a figure to compare with Mr. Solonyka's calculation, the 20-year forecast is an interesting figure for contrast, in that it is comparatively low. Mr. Solonyka's calculations were done during a period which was emerging from high inflation and the forecast model dropped further. His figure is not as high as that of the Tender Price Index.

[204] Mr. Manning and Mr. Dobner favoured the 2% rate.

[205] In the end, the tribunal finds that the methods discussed are all variations on a theme and the central theme was best expressed by Mr. Eadie. Inflation and interest are cyclical in nature. They rise and fall together and converge towards the mean. The longer the term or the larger the data pool, the more accurate the model.

[206] While the Director's figure of 2.9% may seem high in today's economy, the tribunal does in fact not have evidence before it which extends beyond 2011. Its findings must be predictive of the next 50 years.

[207] The tribunal finds that the interest rate of 2.9% is indicative of a rate which is or has converged towards the mean. It is within the range of acceptable figures. The methodology, while recognized as flawed in that it involved a limited data set, was not so small as to be untrustworthy. Mr. Mantle referred to data using 15 years.

[208] The tribunal finds that the interest rate of 2.9% is acceptable for calculation of Net Present Value.

Actual Interest Rate and its Use in Calculating the Discount Rate

[209] In looking over the figures used by Mr. Solonyka taken from the Trillium Account, as provided by the MOF [Ex. 10(b), Tab 18], a wide fluctuation of rates is shown. 12% was recorded between May 30 and June 12, 1990; 1.76 between November 19 and December 6, 1996.

[210] Mr. Mantle's best advice, based upon the graph he put together using his actual interest rates and various inflation figures, was to stick with a 3% discount rate. Mr. Dobner favoured a model which recommended a discount rate in the 4 – 5% range so that he was mistakenly misquoted as favouring a 4.5% rate.

[211] Clearly, there is an accepted model which sees annual costs inflated by the projected inflation rate (or some weighted rate if one accepts Mr. Mantle's approach). The figure is then discounted by an expected yield over a given term. The longer the term, the rate can be expected to change, as there is a greater degree of either variability or instability built in. The tribunal heard two variations of this model – they were essentially the same though, in that the figure had to be both inflated and discounted or the reverse.

[212] But, the tribunal throughout has been hearing an echo of several choice pieces of testimony. That the rate sought by the Corporation is based upon historical rates which were high, the likes of which we are unlikely to see again, or at least for some time to come and the past has a vote, not a veto (Mr. Solomon).

[213] Again, the tribunal has the benefit of Mr. Solonyka's evidence of fourteen years of actual data followed upon by the actual predictive model of Mr. Mantle which occurred in real time. The figures are not that different. This followed upon the evidence of Mr. Eadie, which, as before, stated that these figures are cyclical in nature and tend over time to revert to the mean.

[214] The tribunal finds that it will confirm the choice of the Trillium Province of Ontario Savings Account interest rates for the years 1986 – 1999, arriving at an actual rate of 6.1%.

[215] This yields a discount rate of 3.2%.

Credibility and Weight

[216] The tribunal observed the witness during the giving of the evidence.

[217] Mr. Solonyka had a very tough go of it. His Will Say was not well prepared. His Cross-Examination was grueling. He was easily caught up in discrepancies and oversights in his information.

[218] However, the tribunal finds him to be a truthful, helpful and honest witness with considerable credibility. It also finds that he performed a thankless task in coming forward to give this evidence, public servant though he may have been. It was his evidence that he became the Financial Assurance Coordinator with only two weeks overlap with his predecessor. The tribunal does not have the number of people in evidence who preceded him in this role but it was more than a few. There is no question but that significant institutional memory was lost. Mr. Solonyka did not have the necessary tools and knowledge made available to him when he took the job. Nonetheless, he did a creditable job of following through on the task of advising the Director. He also did so with persuading the tribunal of his position, despite missteps, errors and simply not knowing. In many cases, the documentary evidence spoke for itself.

[219] Evidence was filed by and presented through Mr. Solonyka by the Corporation which did not use one of its own as a witness. He had never seen the many documents he was called upon to address and was therefore unfamiliar with them. It is quite clear that programs and initiatives were abandoned in favour of running a skeleton crew until the new legislation could be properly fleshed out with regulations and guidelines with all efforts to complete supporting guideline materials and initiatives promised to the mining community abandoned under the old.

[220] The tribunal has given considerable weight to Mr. Solonyka's evidence as he is most familiar with what was done by the Director and the methods considered and ultimately used. He was able to explain the various scenarios under consideration and was forthright in answering questions regarding the vehicle, namely that the Director would no longer accept a corporate guarantee for mines no longer in production (relevant to the next issue). He even went so far as to express it as applying the prospective legislation rather than stating that the Director applied his discretion in that manner – discretion which ss. 145(1) affords him. He did not dissemble and was not coached to mold his answers into a pretty story. This fact alone impressed the tribunal and persuaded it as to his credibility.

[221] The other Ministry, outside Ministry officials and Mr. Solomon also provided assistance to the tribunal in understanding this complex material, as did Mr. Dobner on behalf of the Corporation. While it was not of the best assistance to have the government witnesses preparing and offering reports on the post June 30, 2000 legislation, nonetheless, their knowledge with respect to the NPV predictive model, the operation of the Consolidated Revenue Fund and issues arising out of short-falls with types of financial assurance (for the next issue) was most helpful.

[222] While Mr. Dobner's evidence has not been set out at length, as much of it pertained to altering the requirement of the Director, it too has proved useful to the tribunal.

2. Is the Director reasonable in fact and correct in law in finding that the proffered vehicle of Corporate Financial Assurance is not "another form of security acceptable to the Director" and now the tribunal within the meaning of ss. 145 (1)?

Vehicle
New Legal Argument? –" Security"

[223] The Corporation focused its case upon the words in the April 5, 2000 letter of the Director, "As we are unable to legally to do, the full amount of financial assurance must be provided." The Director did not file documentation pre-dating his decision but instead filed a single statement that a corporate undertaking is not a form of security acceptable to the Director as required under ss. 145(1) of the **Mining Act**. [Ex. 1, Tab 5] No other documents are identified relating to this decision and his case is based upon statutory interpretation.

[224] The tribunal indicated on November 14, 2011 through its Mediator/Registrar, Mr. Daniel Pascoe, to the parties that it was of the opinion that this was a question of statutory interpretation based upon correctness. The Corporation strenuously objected to this in its Supplemental Written Reply Submissions [marked as Ex. 46(d)].

[225] The tribunal had yet to make its determination concerning the standard of review analysis and that it does not apply the same tests (the Dunsmuir triumvirate) as a superior court does in an appeal from a requirement of the Director.

[226] The tribunal took all of the submissions from the Corporation which followed into consideration in its analysis. It finds that Issue 2 is the issue to be decided, which hinges on its findings surrounding the meaning of "security" in the context of ss. 145(1) of the Act, within the phrase "another form of security acceptable to the Director…".

[227] The appeal concerns a change to a proposed closure plan pursuant to cl. 152(1)(a), whereby the Director has rejected the proposed vehicle, which the Corporation has variably called *Corporate Financial Assurance*, a *written undertaking* and *a financial assurance which is inchoate,* whose negotiations were allegedly pre-empted by the letter of April 5, 2000. The change to that which was tendered or proposed by the slide presentations [See Ex. 10(b), Tabs 7 and 12] to one of the specified forms of security in ss. 145(1).

[228] The Director's conclusion is that he cannot legally accept the form of proffered financial assurance which led to his requirement that the Corporation offer another form of financial assurance. The tribunal is proceeding on the assumption that since the Corporation offered a surety bond that the Director intended the financial assurance to be for the same.

[229] The applicable, pre-June 30, 2000 version of ss. 145(1) allows for cash, a letter of credit from a bank named in Schedule I to the Bank Act (Canada), a bond of a guarantee company approved under the Guarantee Companies Securities Act "…or other form of security acceptable to the Director…".

[230] Counsel offered a number of different cases and legal sources in support of their opposing views on how security should be regarded. Both counsel relied on Child and Gower Piano Company v. Gambrel, [1933] S.J. No. 23 (Sask. C.A.) – the Director on para. 6 and 33 while the Corporation on para. 33 and 35-37.

[231] The Director's materials and cases support the premise that:

- Security for a debt is recourse when that debt will not be repaid.
- It is not the same thing as the debt itself.
- Security makes the recovery more readily recoverable [Stroud's Judicial dictionary, in vol. 3, p. 1814].
- It is more than the obligation of the debtor so that a promise to pay, whether or not in writing, does not constitute security.[30]

[232] The Corporation's focus was on authority which supported the following propositions:

- An undertaking can include a promise or the providing of an assurance
- A binding indemnity agreement can satisfy a statutory requirement for security.
- A debt security is an instrument beyond the original debt intended to provide both additional evidence of the debt and making the burden of the debt easier to discharge
- The creation of an instrument is one manner of creating a security but not "essential".
- "It appears to be enough that the instrument acknowledges a liability in a form which makes its enforcement easier or more convenient." Thus, promissory notes and certificates for unsecured loan stock are 'securities' and the term is now commonly used to describe virtually any form of financial instrument issued in connection with a loan.
- The breadth and scope of the usage of the term security are discussed in a number of cases and legislation, largely dealing with taxes, markets and criminal justice.
- The distinction is made between personal and judicial security.[31]

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[30] [**Daimler Chrysler Services Canada Inc. v. Cameron**, [2007] B.C.J. No. 456 (B.C.C.A.), para 39-41; **Alberta Opportunity Co. v. Schinnour**, [1990] A.J. No. 1125 (Alta. C.A.), p 5; a pledge requires a resource or a backstop when there is a default or failure to honour, according to lower courts: **Lad Construction Ltd. v. Foundation Building West Inc.,** [1994] B.C.J. No. 337 (B.C.S.C.), para 8; **K & W. Water Well drilling Ltd. v. Cornelsen** [1987], A.J. No. 510 (A.Q.B.) p.3. See also definition of "security" in J.R. Noland and J.M. Nolan-Haley, Black's Law Dictionary, 6th ed. (St. Paul: West, 1990) at 1355.
[**Jowitt's Dictionary of English Law**, 2nd ed. (London: Sweet & Maxwell, 2010), Vol 2 at pp. 2056 – 2057 & 2322; Dukelow, **The Dictionary of Canadian Law**, 3rd ed. (Toronto: Thomson, 2004) at p. 1348; **Alberta Agricultural Development Corp. v. Smith [**1993] A. J. No. 739 (Q.B.) at para 27; **Singer v Williams** [1921] 1 AC 41 at 49 (per Viscount Cave LC, 57 (per Lord Shaw, 59 (per Lord Wrenbury) and 63 (per Lord Phillimore);**Gore-Browne on Companies Act 2006** [(Bristol: Jordan Publishing Limited, 2010), Vol 2, at para 27[5]].

[31] [**Jowitt's Dictionary of English Law**, 2nd ed. (London: Sweet & Maxwell, 2010), Vol 2 at pp. 2056 – 2057 & 2322; Dukelow, **The Dictionary of Canadian Law**, 3rd ed. (Toronto: Thomson, 2004) at p. 1348; **Alberta Agricultural Development Corp. v. Smith [**1993] A. J. No. 739 (Q.B.) at para 27; **Singer v Williams** [1921] 1 AC 41 at 49 (per Viscount Cave LC, 57 (per Lord Shaw, 59 (per Lord Wrenbury) and 63 (per Lord Phillimore);**Gore-Browne on Companies Act 2006** [(Bristol: Jordan Publishing Limited, 2010), Vol 2, at para 27[5]].

[233] Referring to **Child & Gower** *op. cit*., the Corporation highlighted passages which allow that while the ordinary meaning is that which is secured on property, its innate flexibility has seen it given a wider meaning such as including stocks, shares, investments, promissory notes and cheques although the particular cases found were based upon intent as well as the governing legislation.[32]

[234] The tribunal will apply the Driedger tripartite test, (Construction of Statutes (2nd ed. 1983), p. 87 to the meaning of "security". This requires that the interpretive analysis of its meaning in ss. 145(1) is to be read within its immediate and overall legislative context, examined for its literal, grammatical meaning but with a view to the legislative purpose which achieves harmony with the legislative scheme and intent of parliament.

[235] This approach holds that to look only at the words within the section would be too narrow and focus only on the literal meaning, being an approach which has been viewed unfavourably by a number of Supreme Court of Canada cases.[33]

[236] The enumerated financial assurance, cash and instruments ss. 145(1) – those which precede the "other security" having the Director's discretion – are all types of hard security. Cash aside, they are of an institutional/commercial nature to which the Director would have recourse in the event of default. The ministry auditor uses the term "negotiable financial securities" [see Ex. 10(b), Tab 30, p. 1], which represents "security" in the narrowest sense as used in the materials and case law submitted by the parties. This is an identifiable class of items backed by a resource, which constitutes a narrow literal and grammatical reading of the word "security." It falls within ratio and not the obiter of Child & Gower Piano Company.

[237] The question is, based upon Driedger's tripartite test. Do the words, "other security acceptable to the Director" serve to broaden the class of security to include a wider definition?

[238] Those cases which do allow for a more expansive interpretation involved different fact situations; dissimilar legislation, instruments whose intent was captured in their drafting [i.e. instrument, not legislation]. The conclusion is that cases which refer to security broadly are contextual in nature and do not shed any light on this current appeal/situation.

[239] What then is the purpose of the use of the word "security" in ss. 145(1)? One must look further within the subsection and the **Act** to gain a clue.

[240] First, the security is required for financial assurance, for that surety required to underwrite the obligation to perform obligations set out in the closure plan, in the event that there

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[32] [**Re Gent and Easson's Contract** [1905] 1 Ch. 387, 74 L.J. Ch. 333; Stirling v. John, L J, M R [1923] 1 K.B. 577 (C.A.) 561; **Merz v. South Wales Equitable Money Society**, [1927] 2 K.B. 366 (C.A.)]

[33] [See **Re Rizzo & Rizzo Shoes Ltd.**, [1998] 1 S.C.R. 27; **Bristol-Myers Squibb Co v. Canada**, [2005] 1 S.C.R. 533; **ATCO Gas & Pipelines Ltd. v. Alberta**, [2006] 1 S.C.R. 140]. The tribunal was also referred to ss. 64(1) of the **Legislation Act, 2006**, S.O. 2006, ch. 21, Sch. F. with reference to s. 10 of the **Interpretation Act**, R.S.O., 1990, c. I.11, which was in force in 2000.

is a temporary or catastrophic failure on the part of the proponent to be able to do so out of regular cash flow.

[241] The current situation involves a closure plan for two mines which are in a state of "closure" which is a defined term: 139. "closure" means the temporary suspension, inactivity or close out of advanced exploration, mining or mine production;" In fact, but for the fact that there is no accepted closure plan, these mines could be considered to be closed out, another defined term, for ongoing requirements of a proposed closure plan are apparently being carried out on an annual basis:

139. "closed out" means that all the requirements of an accepted closure plan have been complied with and is in the final stage of closure;

[242] Closure plans and corresponding financial assurance are applicable for the life cycle of operating mines, not just for those which are in the post-production closure phase. The title of Part VII of the Mining Act is "Operation of Mines", encompassing the advanced exploration phase through mine production, to inactivity, closure, and if necessary to abandonment.

[243] The legislatively mandated closure plan is required to be in place for all operations and financial assurance is required to be posted for all of these phases. The nature of the security required for each of these phases must be of a sort that can be acceptable to the Director and meet the purpose of s. 2 of the Mining Act.

[244] A "purpose" provision was introduced into the legislation for the first time in 1989, S.O. 1989, c. 62, s. 2, and creates a balance or tension, depending on one's perspective, between principles supporting resource development and ensuring rehabilitation to minimize adverse effects on the environment. Part VII is the embodiment of the latter part of the stated purpose:

2. The purpose of this [Mining] Act is to encourage prospecting, staking and exploration for the development of mineral resources and to minimize adverse effects on the environment through rehabilitation of mining lands in Ontario.

[245] Insight into what this means can be found in the publication entitled, In Ontario Mines and Minerals Policy and Legislation: A Green Paper published following a comprehensive review of the 1980 **Mining Act**. Policy directions and priorities established by the government are set out. At page 20, in discussing the corporate right to confidentiality and public right for information, the document concludes, prior to a more detailed discussion of the mining life cycle:

> …It is therefore crucial to achieve an effective, mutually satisfactory reconciliation between the needs of the public, the mining industry and the government, without discouraging investment in mining in Ontario.

[246] There is a cost to the posting of hard security as it is problematic for a company's ability to conduct business through retention of its entire borrowing base on the open market without tying up its capital. The Corporation argued that the cost of providing hard security is

prohibitive and is contrary to the primary purpose under section 2 to encourage the exploration for and development of minerals which requires capital. How does one reconcile these two purpose statements, that while the **Mining Act** has historically been recognized as a resource development statute, it has, since 1989, provided for a means to rehabilitate mining lands supposedly without undue/onerous impact on investment. Mr. Dobner estimated costs in the 1.5% to 2% range to the Corporation.

[247] The actions of the Director, as disclosed through viva voce evidence and the auditor's report [Ex. 10(b), Tab 30], show that he was willing to forego or waive financial assurance during the capital cost period of post-production phase of operations prior to the onset of the long-term costs.

[248] The very requirement for the first three types of financial assurance listed in ss. 145(1) will have an impact on the financial means of a proponent to invest in ongoing exploration and development to some degree, described by the Corporation as onerous. Despite this fact, the tribunal finds that the legislature intended that there be hard security available as financial assurance until such time as the legislation was amended effected June 30, 2000 and perhaps even beyond that date.

[249] The tribunal notes that at no time did the Corporation suggest that it was not responsible for meeting its rehabilitation requirements and obligations. It was actually quite the contrary. It has been and would continue to do so from within existing cash flow.

[250] Rather, it is the form of financial assurance offered which is at issue. That is essentially tied to the Corporation's overall operations and credit rating, something which the Director would be able to monitor and if falling below an agreed upon threshold at any time, require its conversion to hard security. Call it whatever it likes. The terminology used in this case was changeable throughout. It was a form of self-assurance, a promissory undertaking, an agreement to enter into some sort of contract to be executed, an inchoate negotiation.

[251] The provincial auditor was critical in his April 14, 1999 report [Ex. 10(b), Tab 30, pages 1, 5-9] that in 1998, with 57 approved plans involving financial assurance of 55 million dollars, only 30% involved negotiable assets. The other accepted forms of financial assurance included categories that he characterized as inadequate due to the tangible risk that they may not be realized upon pursuant to the provisions of ss. 145(5). These included equipment, a proponent's guarantees, future installment payments and future production royalties. Apparently, the Director continued to accept financial assurance of the sort the auditor found questionable; this difference of opinion may have been resolved through the change in legislation in which acceptable financial assurance was broadened more in keeping with the Director's actions.

[252] There is no doubt that the new wording goes beyond what is security to encompass both a guarantee or protection – whatever the latter two words will be found to mean.

[253] Whatever the nature of financial assurance, the tribunal has concluded that it is not something that is added during the final stage of the life of a mine. It is not designed to be an added cost to a proponent to weigh it down financially. It is encompassed within the stated

purpose of minimizing the environmental impact through rehabilitation of mining lands and as such must be protected into the future through closed out mines. This is how those mines with accepted closure plans in place which cease production must be protected.

[254] What is the mechanism to address the continued existence of the proponent? In this age of mergers and acquisitions, hostile takeovers, selling of assets and liabilities, is it realistic to expect that an entity to continue to have resources available to the Director for conversion to hard security should he elect to accept a form of soft security such as the proposed vehicle offered by the Corporation?

[255] The tribunal finds that it is not. Based solely on the facts of this case, the original appellant was Noranda Inc., which merged with Falconbridge Limited during the course of the proceedings. It was taken over by another company whose Canadian subsidiary became known as Xstrata Canada Corporation. The tribunal became aware after final arguments were heard that the entity was the subject of further corporate machinations and became a new entity, Glencore Canada Corporation.

[256] The tribunal finds that for long-term maintenance, monitoring and administration costs, one cannot predict who will be present in five, ten, twenty, forty years or longer to make good on a required conversion, let alone whether the Crown will find a viable entity from which to seek a conversion from soft to hard security. A third party parent company which the tribunal has heard does not have assets in Canada (evidence given by counsel, not necessarily evidence *per se* but nonetheless, what was on record) do not satisfy the requirement for the posting of financial assurance.

Contextual Approach to the Meaning of Security

[257] Bell ExpressVu L.P. v. Rex, [2002] S.C.R. 558 articulates the contextual approach to statutory interpretation. The Environmental Protection Act ("the EPA"), R.S.O. 1990, c. E. 19, as amended and R.S.O. 1980, c. 141, to which the tribunal was directed does indeed have financial assurance provisions but they are, with few exceptions, not mandatory. The tribunal finds that the case relied on by both counsel – Detox Environmental Ltd. v. Ontario (Ministry of the Environment), [2009] O.E.R.T.D. No. 67 (Detox) – does not fit this approach.

[258] Briefly stated, relying on what was described at paragraph 27 as a seminal article by Professor John Willis, "Statute Interpretation in a Nutshell" (1938), 16 Can. Bar Rev. 1, at p.6. Metaphorically, the Supreme Court stated that words take their color from their surroundings, which in law can be part of a larger statutory scheme – which can, in certain circumstances, be more expansive. Such was the case where Driedger's principle of contextual interpretation between statutes arose in in **R. v. Ulybel Enterprises Ltd**. [2001] 2 S.C.R. 867, 2001, S.C.C. 56, at paragraph 52, where it was presumed there would be "harmony, coherence, and consistency between statutes dealing with the same subject matter". Other cases were also referred to in support.

[259] The Corporation misplaced reliance on cases under the EPA: Detox, Blackbird Holdings v. Ontario, [1990] O.E.A.B. No. 26 (Environmental Appeal Bd.) and Domtar v. Ontario [1989] O.E.A.B. No. 15 (Environmental Appeal Bd.).

[260] The financial assurance scheme under the EPA is not the same as it is under the Mining Act. The imposition of financial assurance is not mandatory, but complex and for the most part discretionary. It is also highly regulated. In contrast to the absence of a finalized applicable version of Mining Act financial assurance guidelines, the Financial Assurance Guideline under the EPA is very detailed and well developed. More information and evidence appears in the cases from the latter guideline than from the corresponding legislation or regulations upon which it is based.

[261] Ss. 145(1) of the **Mining Act** uses mandatory language: "The financial assurance required as part of the closure plan ***shall be*** … [in one of the enumerated forms of security]." With the exception of the discretionary phrase, all the listed forms are hard security.

[262] The definition for financial assurance under the **EPA** is far broader than that under ss. 145(1). It extends to a personal bond or that of a guarantor, each with collateral security, a bond of a licensed insurer, an agreement whose terms are specified in the Director's order or as prescribed by regulation.

[263] The tribunal has read the three cases put forth with care. The principles which were drawn to its attention, albeit containing compelling statements, sit on shaky foundations. It was suggested that if the Director of Mine Rehabilitation relied upon **Detox** in his argument, there is no reason to reject the Corporation's proposal that there is a common legislative purpose to the use of financial assurance in the **EPA** and **Mining Act.** By the very fact that the imposition of financial assurance under the **EPA** is discretionary and under the **Mining Act** is mandatory, there is no contextual comparison between the two pieces of legislation. The imposition of financial assurance is not a given under the **EPA**.

[264] In Domtar, that tribunal called the EPA requirements onerous by way of a fine or penalty. It likens the financial assurance to the work or actions in the required order as a means to produce a required result and not to the achievement of the result itself. That tribunal found that financial assurance should be ordered only when there is a demonstrated lack of either resolve or financial capacity to carry out the approval or order out of existing cash flow. This is a marked contrast from the obligatory nature of financial assurance under the Mining Act, notwithstanding that a proponent is expected to carry out the work out of existing cash flow and the financial assurance is a fall back measure. In other words, as the tribunal itself noted during the course of the hearing, the cost of the rehabilitation is expected to be covered twice over.

[265] In Blackbird, there is a similar analysis. The estimated cost of the financial assurance would exceed the cost of a construction bond by 130%, which posed a financial burden to the owner. The legislation makes provision for financial assurance if the work were to not be done; there is a cost recovery provision elsewhere should that route become necessary. The issue to be determined was to balance the danger of imposing financial assurance prior to that occurring at a time when there was capacity to carry out the ordered work out of cash flow. To do both would

have been beyond the owner's means. Yet, if the Ministry had to carry out the work at some later date and take cost recovery measures, its position would not be as advantageous had it imposed financial assurance ahead of time.

[266] Detox involved a subtler issue. With hauling of PCBs the regulation and Financial Assurance Guideline stipulate that financial assurance is mandatory. On appeal, the issue was the failure to consider a third party vehicle insurance policy could serve as financial assurance. The conclusion was that the appropriate legal and financial experts within the Ministry did not review the proposal with its guideline for non-standard financial assurance [paraphrasing para. 60].

[267] The Corporation maintained that the Director in the appeal before this tribunal was obliged to have at least considered the novel, non-standard form of security while the Director maintained that one cannot be exempt from the requirements of the legislation. As with the Director, the EPA is concerned with sufficiency and accessibility.

[268] The tribunal notes that the Corporation continues to advance a position that the Director should have permitted the discussion to continue as to whether its proposal would satisfy the intention of ss. 145(1).

[269] This is perplexing as there is credible evidence (Mr. Robertson's notes, Mr. Solonyka's testamentary) that it wished to have the matter determined prior to the change in legislation. And yet, it wishes to have the question of "security" determined under the post-June 30, 2000 legislation.

[270] The tribunal finds that the proffered vehicle as financial assurance is a promise to do that which is required by legislation. It provides nothing by way of a backstop in the event that the Corporation is unable to carry out its obligations either temporarily or permanently.

[271] The tribunal finds that the section contemplates a more rigorous, narrow, traditional interpretation of the term "security". Another, similar form is contemplated. The legislative scheme does not operate in a vacuum. The Part VII Operation of Mines is part of a whole.

[272] The requirement to post financial assurance is to be regarded as the cost of doing business. Unlike the EPA, it is a mandatory provision. Under the Mining Act, it is imposed from the time advanced exploration commences through to the time a mine is closed out. Of course one can never say never as new advances in extraction of trace minerals from tailings are always around the corner and hold out new hope but, they cannot be counted on. One does not plan for this in a business model or from a rehabilitation perspective.

[273] The tribunal has found nothing within the pre-June 30, 2000 Mining Act and there is nothing in the documentary evidence or testimony which detracts from the dual purposes set out in section 2.

[274] Ss. 145(1) gives the Director and now the tribunal discretion regarding the types of security which will be considered, beyond those particular types enumerated. The tribunal finds

that it must be of a class of security which is in keeping with the class enumerated in ss. 145(1). It must be a tangible asset, one which permits recourse in the event of temporary or catastrophic failure on the part of a proponent, not to mention the eventuality thirty, forty or forty-nine years hence when the proponent may cease to exist. It must be supported by currency or a negotiable instrument.

It must be an instrument of a readily identifiable class – that of hard security.

[275] The Corporation suggests that cutting off negotiations makes it impossible to know the outcome of negotiations. Far too much was left to speculation about this "inchoate" idealized scenario, but there was no testamentary or documentary evidence to support the arguments that more would have been forthcoming from the Corporation, but for the Letter. And it was the Corporation's choice to have the Letter declared a requirement from which a Notice to Require a Hearing could be taken. There is a strong tint of disingenuousness to this line of argument.

[276] The Corporation also suggested that the yet-to-be negotiated formal indemnification agreement to "keep whole" the MNDM from any future cost of remediation - provided a separate contractual basis for the underlying statutory obligation. Such a contract would be better protection than would be afforded by statute and would not require litigation to recover the debt to the Crown. The Director would not become disadvantaged, ranking behind secured and unsecured creditors.

[277] In the event the tribunal were to accept that the Director should have considered and allowed the conversation to continue regarding the proffered vehicle, it would be necessary to hear further submissions and thus the requirement that this matter could not be determined at this stage of proceedings. The tribunal does not accept this line of reasoning. The Corporation cannot appeal a moving target. Was it a letter? Was it an appeal? Is it now not an appeal but merely a stage in discussions? Is this all a misunderstanding? Is what the tribunal has before it but an inchoate proposal for something yet to be determined – shut down by the Director's letter?

[278] Can the tribunal's decision at this first Stage now serve to resurrect something in mid-stream? The tribunal does not think so.

[279] All that the tribunal has before it is a promissory undertaking to formalize a statutory obligation, which adds nothing of substantial or substantive value. There is no backstop.

[280] In default, the Director would be required to sue for the debt, enter into a protracted process and gain an uncertain ranking in a line of creditors.

[281] This is nothing more than an attempt to straddle the change in legislation and cherry pick between the two versions. The tribunal has already made its findings on this and will not repeat itself.

[282] Concerning its interpretation of "security", the tribunal gives the following reasons to support its conclusion.

[283] In the event that there is a failure or anticipated failure on the part of the proponent, requiring the Director to carry out the work specified in the approved closure plan pursuant to ss. 145(2), then cl. 145(5)(c) requires that the security will be realized. The word "security" in cl. 145(5)(c) must have a meaning which anticipates an asset which backstops the obligation and not the right to pursue a statutory right or worse, have to embark on litigation.

[284] To realize upon security anticipates that there is a resource available for the necessary conversion. This means that the Corporate Financial Assurance has already been converted into a form of a hard security at some earlier point in time. Otherwise, the inability to carry out the required rehabilitation would be simultaneous with the drop in credit rating and funds would be unavailable for the conversion.

[285] There is no guarantee of protection to the Director under this scenario – it is tenuous as best whereas the legislation anticipates that it should not be tenuous. It anticipates a quality of security to satisfy the Director. Interestingly, Mr. Eadie states at page 13 of his report that, advocating that no guarantee or self-security should be considered for closed-out mines, that there is no ability for such mines to generate income. Even if there is hard security in place, if the initial calculations were not correct, there is no way in which this can later be fixed.

[286] Moreover, the tribunal does not accept that for the next fifty years, the Corporation can assure the Director that it will continue to exist and operate in a form which continues to specialize in Canadian commodities exploration and extraction, that it can weather the marketplace with its highs and lows. Nor is the tribunal satisfied that a bond rating company can predict the future sufficiently far in advance to allow the Director to convert the proffered soft assurance into hard assurance at a time when assets are available for conversion.

[287] Perhaps bond ratings will provide enough lead time to give the Director sufficient time to require hard security should times become so dire as to become necessary. However, realistically, can one achieve a similar degree of certainty when it comes to hostile takeovers, selling off assets, mergers and other corporate machinations over which the Director frankly does not have the means to monitor nor the expertise to be on top of on a daily basis? He requires something far more certain, particularly in the sunset years of a closed out mine, when the only resource available as recourse will be the financial assurance, should all else fail.

[288] The wording of the post-June 30, 2000 legislation expands upon what is acceptable as financial assurance beyond security, using such terms as "other guarantee or protection, including a pledge of assets, a sinking fund or sinking fund or royalties per tonne that is acceptable to the Director."

[289] Much was made of fifth paragraph of the new ss. 145(1), that of compliance with the corporate financial test – which is set out in regulation. The evidence is that the Director was applying this test after the auditor's report in 1999 and would no longer consider forms of self-assurance for mines no longer in production.

[290] Despite promises made by senior MNDM officials during the early days of the mine rehabilitation program, the tribunal recognizes that the Ministry did not have an adopted guideline in place for financial assurance for the pre-June, 2000 legislation. It had the draft guideline, which was attached to Ex. 3(g). While it is unfortunate, the circumstances were also unfortunate. It did not have the resources to devote to the two programs in terms of formalizing the guideline. That much is clear.

[291] The Director must have recourse in a fluid marketplace to meet any set of conditions which can change rapidly, in a matter of days, moment, perhaps hours. One simply does not know.

[292] Insofar as his determination that the Corporate Financial Assurance was not security within the meaning of ss. 145(1), the tribunal finds that it is a correct interpretation. There is discretion, had he found that it did constitute security, for him to determine whether or not it was an acceptable form of security, but the question did not arise and does not arise before the tribunal.

[293] The conclusion was that the proffered vehicle did not constitute security as the legislation was at the time the appeal was filed and prior to changes that did not come into effect in time to be applicable. The tribunal has reached the same conclusion. It will confirm the Director's requirement.

[294] The Corporation is not without recourse. It is able to apply to have the amount held by the Director pursuant to conditions set out in ss. 145(6).

Conclusions

[295] The requirement of the Director of Mine Rehabilitation, dated April 5, 2000, that Glencore Canada Corporation (successor entity to Noranda Inc.) post an acceptable financial assurance instrument in connection with the Closure Plans will be confirmed, excepting that the date by which the said Closure Plan shall be filed will be altered to be within six months of the date of this Order, or, in the event of any further appeal, within six months of the final disposition of this matter.

Costs

[296] The Director shall be entitled to his costs in this matter. Accordingly, the tribunal will direct that such costs be assessed by an assessment officer. Alternatively, if the parties are unable to agree as to quantum, they will be directed to apply to the Mining and Lands Tribunal (from April 1, 2018 onwards) to have the aforementioned costs of the Director be assessed pursuant to s. 126 of the **Mining Act**.