MACKENZIE VALLEY LAND

AND WATER BOARD

MIRAMAR CON MINE LTD.

CLASS 'A' WATER LICENSE EXTENSION APPLICATION

N1L2-0040

HELD BEFORE:

Board Chairperson	Todd Burlingame
Board Member	George John
Board Member	Violet Camsell-Blondin
Board Member	Elizabeth Biscaye
Board Member	Floyd Adlem

HELD AT:

Northern United Place

Yellowknife, NT

November 9th, 2005

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APPEARANCES

John Donihee	)	Board Counsel
Ron Connell John Hull Scott Stringer	)))	Miramar Con Mine Ltd
Wendy Bisaro Kevin O'Reilly Dennis Kefalas Loretta Bouwmeester	))))	City of Yellowknife
Emery Paquin Ken Hall Colleen Roche Jason McNeill	))))	GNWT - Environment & Natural Resources
Bill Enge Valerie Meeres	))	North Slave Metis Alliance

TABLE OF CONTENTS

LIST OF EXHIBITS

--- Upon commencing at 9:00 a.m.

THE CHAIRPERSON: Well, welcome and we will call the meeting to order here. We're going to begin with an opening prayer, and we'll ask our Board Member Zabeht Biscaye to lead us in a prayer, so...

(OPENING PRAYER)

THE CHAIRPERSON: Thank you, Zabeht. Well, welcome to the Public Hearing for the Miramar Con Mine Limited application for an amendment to the term of water license N1L2-0040.

Good morning, everyone, my name is Todd Burlingame, and I'm the Chairman of the Mackenzie Valley Land and Water Board. We were established under Part IV of the Mackenzie Valley Resource Management Act in March of 2000. Now, this Board exercises our authority over land use permitting and water licensing in the Mackenzie Valley under the Mackenzie Valley Resource Management Act and the NWT Waters Act respectively.

This Panel, which is responsible for issuing water licenses and land use permits outside of settled areas, was established in accordance with Section 99 of the Mackenzie Valley Resource Management Act.

Now over the course of the day Mackenzie Valley Land and Water Board will conduct this Hearing into Miramar Con Mine Limited's request to amend the term of their water license by extending it for two (2) years, changing the new expiry date from July 29, 2006 to September 30, 2008.

Now this Hearing has been constituted under the NWT Waters Act, and Section 24 of the Mackenzie Valley Resource Management Act.

Now, a letter from Miramar Con Mine dated July 20th, 2005 requesting the amendment was received by the Board on July 26th, 2005.

The Board advertised this Hearing on August 29th, 2005 in News North, as required by the NWT Waters Act. The intervention deadline was set for October 11th, 2005 with a performance reply to these interventions set at October 21st, 2005.

Now the Board has carefully reviewed and recorded, and strongly encourages participants to focus on the scope of this Public Hearing, which is the amendment for the term of the water license.

Now, there is another matter which has arisen in respect to the Miramar application, and it relates to the question of whether the application is

exempt from preliminary screening under Part V of the Mackenzie Valley Resource Management Act.

Now the Board circulated an e-mail and requested -- circulated an e-mail request to the registered parties to this Proceeding on November 1st, asking for submissions on the question of the application of the exemption list regulations to the Miramar application.

Written comments were received from Environment Canada, DFO, the City of Yellowknife and Miramar. Now, we do appreciate these comments that were provided on such short notice.

The City of Yellowknife has raised concerns in its letter of response about fairness, and has suggested that it has not had enough time to prepare and file a response.

Now, the Board, we do not want to proceed with the decision on the exemption question until there has been adequate time or opportunity for all parties to make full submissions. So consequently, the Board will provide another week for participants in this Hearing to make written submissions on the question of the application of the exemption list regulations to the Miramar application.

The deadline for such submissions to the Executive Director of the Board, Mr. Wooley, is November 17th, 2005, at 5:00 p.m.

Once this opportunity for additional comments is over, the Board will make its decision on the exemption question, conduct a screening, if one (1) is required, and issue separate reasons for those decisions as required by Section 121 of the Mackenzie Valley Resource Management Act.

Now subsequent to that decision the Board will, if warranted, make a decision on the application, which is the subject of today's hearing.

The Board will therefore appreciate it if parties to today's Proceedings, focussed their submissions on Miramar's request for the amendment to the term of the water license; that's what we're here to talk about.

I would like to make note that these Proceedings are being recorded and will be transcribed later. I therefore ask that when you speak, please precede your presentation with your name and who you represent.

Also, I ask that you please be mindful that we have an interpreter who will be used when necessary, to translate these Proceedings. So please pace yourself accordingly. And I guess I could take a

lesson from that, you know, we pace ourselves, let's be clear, let's let everyone have the opportunity to hear what's being said.

Now the order of the Proceedings will be as follows. The Board will first of all hear from the proponent Miramar Con Mine Limited, regarding their request before the Board.

Once they've completed their presentation the order of questions will be as follows. Registered Intervenors, registered speakers and the general public, and then the Board staff and counsel. After that, once they've had an opportunity, the Board Members themselves will have a chance to ask questions for clarification.

When the questions of the Applicant are completed, we'll proceed to the presentations from the Intervenors who have been registered. There will also be an opportunity for questions after each presentation. And the order for those questions will be as previously set out. Everyone will have a chance.

Those Members of the public who have registered here today will also be given an opportunity to address the Board after the registered Intervenors have done so. So if you haven't been able to register as an Intervenor, you'll still have a chance to present your comments or thoughts.

The Board wants to hear -- wants this Hearing to be as informal as possible, however, as a quasi judicial body we're bound by the rules of procedural fairness, and as Chair I'm responsible for the conduct of this Hearing, and I would ask that all comments and any requests be addressed through the Chair.

Once everyone has had the opportunity to speak, the proponent will then have an opportunity to present closing comments, and following that our Hearing will come to a close.

I'd like to take a moment here now to introduce our Board and staff. So perhaps I can start at my left here and ask the Board Members to introduce themselves, then we will go to the staff and we'll carry on.

MR. GEORGE JOHN: Thank you, Mr. Chair, good morning, my name is George John, Board Director of Mackenzie Valley Land and Water Board.

MS. VIOLET CAMSELL-BLONDIN: Violet Camsell-Blondin, Board Chair in the Unsettled Claim Area. Recently because of the Tencho (phonetic) Agreement, we recently got our Lands and Water Board established, the Wikisi Lands and the Water Board. I'm also the interim Chair in that, and our Board will be up and running February 2006. Massi.

MS. ELIZABETH BISCAYE: Good morning, my name is Elizabeth Biscaye, a lot of you I think know me as Zabeht, I live here in Yellowknife, I'm a Board of Director for the Mackenzie Valley Land and Water Board. Massi.

MR. FLOYD ADLEM: Good morning, everyone, Floyd Adlem.

THE CHAIRPERSON: Thank you. I'd like to also introduce our staff here. We have Bob Wooley, our Executive Director, we have Peter Lennie-Misgeld, our Senior Regulatory Officer and Lisa Hurley, Regulatory Officer on this file. And our Board Counsel, John Donihee.

Again, we'll try and keep this informal. We do have certain rules of procedure that we have to adhere to, but again, we're here to listen. So this Hearing is scheduled from 9:00 until 5:00 p.m. today. We'll be breaking for lunch and trying to take breaks as needed too. So we have coffee and refreshments at the back of the room, help yourself.

Before we proceed with the presentation by the proponent, I'd like to call for appearances from the spokespersons of the registered Intervenors. So if you would like to identify yourselves, the registered Intervenors, can we just go around the room and please, take a moment to grab a microphone and identify yourself.

MS. WENDY BISARO: Wendy Bisaro, Deputy Mayor for the City of Yellowknife, representing the City. With me today are a number of other people who are assisting in this presentation. Kevin O'Reilly, is a City Councillor, next to him is Dennis Kefalas, who is the Manager of Engineering in the Public Works Department and Loretta Bouwmeester, who is the Manager of Legal and Policy for the City.

THE CHAIRPERSON: Thank you.

Go ahead Emery.

MR. EMERY PAQUIN: Emery Paquin, I'm the Director of Environmental Protection with the Department of Environment and Natural Resources, and I'll be introducing my accompanying staff at the appropriate time.

THE CHAIRPERSON: Thank you, Emery.

Anyone else like to identify themselves just for the benefit of everyone in the room? Okay.

All right, then finally, the Board has had no notice of any preliminary issues, so we're going to proceed with the Miramar Con Mine Presentation. Mr. Connell...?

(BRIEF PAUSE)

MR. RON CONNELL: Good morning. My name is Ron Connell, I'm the Environmental Superintendent for Miramar Con Mine. With me I have Scott Stringer, our Mine General Manager and to his right, John Hull, Engineer for Golder Associates. And John has been very instrumental in helping us prepare the submission for the Water License.

This -- we are here to request a -- request an extension to our Water License, based on information that's come to light in the last little while.

We are processing and have been processing for some time, calcines and arsenic sludges that were laid down by our predecessors, previous to 1970. Initially back in 2000 we thought we had approximately thirty (30) to forty thousand (40,000) tons of material.

At present we've encountered closer to a hundred and forty/hundred and fifty thousand (140/150,000) tons of material. We've been processing this material more or less continuously until April of last year. We realized at that time that we were not going to be able to finish processing that material within the scope of the existing water license. And therefore we have requested this extension.

That's a brief outline of the presentation. I'll give you a little bit of background on Con Mine, and then our rationale for the request for the extension. The City of Yellowknife has identified some other issues in their presentation. I'll speak briefly to each of those, and finally, I will summarize with our final comments.

To begin with, as most of you know, Con Mine opened up in 1938, sixty-eight (68) years ago. Miramar purchased Con Mine in 1993, and shut down the operation, commercial operation at the mine in 2003, when the ore body finally ran out. Since that time, we've been working towards the closure plan in cooperation with the Mackenzie Valley Land and Water Board.

In 2001, we renewed the water license, actually for the third time. That's the third water license under Miramar and it is set to expire on July the 26th, 2006. A condition in that Water License requires us to process all of the arsenic sludges and calcines on site by 2003.

This, of course, we were incapable of doing, strictly and sheerly because of the volumes of material that we encountered. Cominco kept very, very good records of where the material was laid down, but

they did not keep records of the quantities, and thus we are in position that we find ourselves today.

Now, just as an aside, we also had a major incident on the -- on the mine site in the year 2003, when the oxygen plant roof collapsed and shut down the plant, and we lost an additional six (6) months of processing time when that happened. So that was a further set back.

In 1972, I believe it was. The Cominco shut down the roaster, because at that point they were mining deep ore, and it was free milling ore and no longer required roasting. When Nerco got involved, I believe it was in 1988, they looked -- they investigated the use of an autoclave, such as was used at Campbell Mine in Balmerton, Ontario. This would enable them to process refractory ores, because the gold prices at that time were quite attractive, and it also enabled them to begin processing these arsenic sludges and calcines that remained on site.

Nerco took -- or pardon me, Miramar took over the mine in 1993, and continued that work processing, certainly the refractory ores, plus the calcines and the arsenic sludges, and we are in the final stages of treating these. These are byproducts of the original roasting efforts pre 1970. We anticipate that we can complete roasting -- or complete treating these calcines and arsenic sludges, probably in the mid -- middle of 2007, I know that says early, but it looks as if it will be closer to the middle of 2007.

A little background on autoclave, for those of you who aren't technical people, it's a large cylinder that uses high pressure steam, 210 degrees Celsius. It -- at that temperature arsenic trioxide is converted to a substance called scorodite. It's actually a mineral. And scorodite is inert for environmental purposes. Once the arsenic is in the scorodite form, it is not released back to the environment.

The scorodite is then processed with the tailings and laid down in the tailings ponds, where it remains.

One (1) thing that's very, very critical in running an autoclave is the feed to the autoclave. There are very exacting requirements, the blend must contain sufficient sulphur, it must contain sufficient iron, and we have to minimize the, what we call country rock or waste rock, in order for that reaction to take place and form scorodite. If the reaction goes forward and doesn't form scorodite, we've just wasted our time and our effort.

It's a highly technical process, it

requires skilled operators, there's only two (2) autoclaves that I know of, running in Canada at this time, and that's the one at Balmerton and the one (1) here at Con Mine.

Currently as I said previously, we're processing the sludges and calcines that were buried by previous owners. The thirty thousand (30,000) to forty thousand (40,000) tons has now become a hundred and forty (140) to a hundred and fifty thousand (150,000) tons.

We've processed a total of a hundred and five thousand (105,000) tons at this point in time. It says we have remaining to process, twelve thousand (12,000) tons of calcine and five thousand (5,000) tons of arsenic sludge.

As of Monday, I had surveyors go out and survey the stock pile that's there. We actually have twenty-seven thousand (27,000) tons of calcine and five thousand (5,000) tons of arsenic sludge. We definitely require more time to process these byproducts.

Now, the autoclave is designed to handle about a hundred (100) tons of material per day, based on 100 percent efficiency. As most of you know, a 100 percent efficiency is not achievable on a plant like that. We're lucky if we can get 85 percent.

In April of 2005, just let me clarify that. The material that we're processing, the arsenic sludges and calcines have to be excavated. And in order to excavate them we can only do this during the summer months. It's -- it's almost impossible to excavate them from frozen ground. So we do this type of work during the summer.

In 2004, we excavated a sufficient, or all the material that we could, and as of April 2005, we ran out of the arsenic sludges. We still had calcines in place, but without the sludges to -- to form the blend for the feed to the autoclave, we had to shut down the autoclave at that time. The remaining arsenic sludges remain frozen in place, and that's where they stayed until they -- they thawed out.

At that time we informed INAC, and the Mackenzie Valley Land and Water Board of the situation we'd encountered. We were no longer able to feed the autoclave, and therefore we shut down the milling operation, which includes the blend plant and the autoclave.

Following a meeting with Paula Spencer, (phonetic) Inspector for INAC, it was determined that we should set forth an action plan of how we were going to deal with these arsenic trioxides and sludges, and at the same time, we reported our situation to Golder

Associates, who was in the process of preparing our application for a new water license, to replace the one (1) that's expiring on July the 20th -- or July 29th, 2006.

We submitted our action plan to the Mackenzie Valley Land and Water Board on June the 20th, and Golder came back to us and said, it's probably impossible for you to finish processing these sludges and calcines, therefore rather than apply for a new water license, we recommend that you apply for an extension to your existing water license, to allow you to process these remaining calcines and arsenic sludges.

At that point in time, July 20th, we requested an extension of the existing water license, which is why we're here today.

Further to the above, we have now completed excavation of all of the remaining calcines and arsenic sludges on site. They are all stockpiled in preparation for work to begin on them next year. One (1) thing with this sort of process...

(BRIEF PAUSE)

MR. RON CONNELL: Excuse me, we've encountered technical difficulties.

(BRIEF PAUSE)

MR. RON CONNELL: If everybody's ready, I will continue.

Now, our rationale for the water license extension, as I explained, it sits now at a total of thirty-two thousand (32,000) tons of arsenic sludge and calcines that remain to be processed. The water license, we're planning to start that early July or sooner next year, as soon as the frost is out of the ground.

Certainly the twenty-nine (29) days remaining in the water license will be insufficient to finish milling, blending and autoclaving that material.

We anticipate two hundred (200) days, and I think it's probably closer to three hundred (300) days, now that we know the true amount of material on site, and certainly once we do that, we expect to begin decommissioning the -- the blend plant and the -- and the mill. This will require washing down, high pressure washing of the equipment, actually the -- the wash water from that -- oh, here we go again.

THE CHAIRPERSON: Oh, perhaps we'll ask the staff (inaudible) technical thing running again. Are you comfortable in just proceeding with a verbal

presentation for the moment, or do you need (inaudible) to proceed?

MR. RON CONNELL: I can get my -- I have notes here from the other side.

THE CHAIRPERSON: Okay.

Are those notes also available for every (inaudible) that's here? Can you read off those notes then? (Inaudible) give you a little light and while our staff (inaudible)

MR. RON CONNELL: Oh it's just -- what I've got is just a copy of the -- a hard copy of the Presentation.

THE CHAIRPERSON: The Presentation, well the staff (inaudible) the presentation (inaudible) needs a copy, has a copy.

MR. RON CONNELL: I'll get my own. They're a little bit more readable.

THE CHAIRPERSON: Need a little bit more light here.

(BRIEF PAUSE)

THE CHAIRPERSON: Are you comfortable with proceeding with the hard copies?

MR. RON CONNELL: I am.

THE CHAIRPERSON: Okay. Does everyone have these copies that needs them? And, sir, again, this is over (inaudible) the same thing for (inaudible).

MR. RON CONNELL: All right. I'll continue on here.

As I said, after we finished processing the existing calcines and sludges, it is then our intent to begin decommissioning process of the plant, which requires washing down, high-pressure washing of all the equipment. All the wash water and residues that result from that process will also go through the autoclave in order to render those byproducts into scorodite.

This entire process is anticipated to take us approximately two (2) years, thus the request for a two (2) year extension, I believe it's actually a twenty-six (26) month extension to the water license.

That will enable us to treat all the water, all the effluent from the processing, through our water treatment plant, and from that point on, which would be September 2008, the only water on the mine site that would remain for treatment, would be as a result of precipitation, snow melt, rainwater, so on and so forth.

At that juncture, we are looking at an entirely different water license; we would expect that a new water license would be written at that time to

reflect the changing conditions on site.

That would mean in 2009, when we begin water treatment, for example, we would be under a new water license. Certainly an environmental impact assessment of that water license would not be out of the question.

In summary, we're -- we're requesting the extension of the water license to cover the period required to process the byproducts remaining on site. It's that simple.

The current water license was written specifically to handle milling, autoclaving, blending of the type of materials that we'll be dealing with for the next couple years. No, we will not be mining; mining is finished. But we will be using exactly the same process to handle these calcines and sludges as we did to handle the ores and so and so forth, in the previous ten (10) years.

And as I said, a new water license would focus on the conditions, starting in 2009.

Now the City identified, in their presentation, a few other issues. I'd like to speak briefly to them, as we don't have the presentation up on front, I will read the issues out.

The issues were water treatment, re-mobilization of arsenic, ground water and surface water, mercury and other contaminants, underground, the current water license requirements, the current security requirements, and the waste disposal capacity remaining on site.

Water treatment: Water treatment became mandatory in 1978. Under the water license at that time, we were required to, well, of course Miramar was not there, but Cominco was required to construct a water treatment plant which has remained in operation since that time.

The water treatment plant does meet the requirements, the water quality requirements, of the NWT Water License. To the best of my knowledge, I've been with Miramar six (6) years, I believe we've always been in compliance with the water license.

We also are regulated under the Federal Metal Mining Effluent Regulations, which were promulgated on June the 6th, 2002. These are the most current regulations in Canada, they apply to all metal mining operations that are -- that are active, and they're very stringent, they are actually more stringent than the water license.

The water license: The NWT Water License requires toxicity testing but there is no condition for

passing or failing, it's toxicity testing for monitoring purposes only.

Certainly there are toxicity test failures at Con Mine, where the -- the test organisms are rainbow trout and daphne magna, which is a water flea. The rainbow trout and the daphne magna are fresh water organisms, and Con Mine, the deep water from dewatering Con Mine, is what they call Canadian shield brine, it exhibits salinity about four (4) times higher than the ocean.

So we are dealing with salt water. The test organisms do not live very well in salt water, which is a key failure, key reason for failure of the toxicity tests.

The other items identified in a study that was done by a consulting firm for Con Mine, said that cyanide and ammonia also contributed to the toxicity failures. Since the study was done in 2003, we stopped dewatering the mine, we no longer bring the salt water up from underground, we're seeing a huge reduction in the salinity, which is helping us to get improved results on the Rainbow trout toxicity test failures.

We've also stopped using cyanide at the operation, since 2004, and without cyanide, you don't -- you no longer have the failure as a result of cyanide. Also, ammonia is a byproduct of the breakdown of cyanide in the chemical process, so we no longer have the ammonia.

Also on ammonia, we are no longer blasting underground, so we're not using the reagent's ammonium nitrate. So that is another reason why our water quality is continuously improving. We anticipate as early as next year, being able to pass all the toxicity tests required under the water license. We are seeing a constant improvement.

And I reiterate that we continue to operate in compliance with the water license. Our proposed water license extension includes the period up to September 2008. The reason for this is to allow us to process all the water that is produced by the washing and treating of the calcines in the arsenic sludges in 2007.

We anticipate that that process will take us until the fall of 2007, if not into the winter, so we would not be able to treat the water in the -- in the tailing spawns during the summer of 2007, we would have to treat the last of the water in the summer of 2008.

The extension takes us to September 30th, 2008, enabling us to treat all of the water resulting from the processing operations of the byproducts and the cleanup. Following that, 2009, we will be dealing with

rain water, snow melt, and certainly a very different effluent.

Remobilization of arsenic was mentioned. As many of you know there were no environmental regulations in Canada prior to 1950. Mines did deposit their various waste, tailings and so on and so forth, in any convenient location. This was certainly the case at Con Mine, at Giant Mine, so on and so forth. I'm not saying it's good, but it's a fact of life.

In the case of Con Mine, tailings decant, which is the supernatant, not the actual tailings, but the overflow from the tailings plant -- ponds, flowed down the Meg-Keg-Peg Lake system and has impregnated to a certain extent, the peats and the underlying soils in that area.

What we're seeing is a gradual release of the arsenic from those underlying soils, and especially the peat, over time. Fortunately, these releases are moderate, they're well within the scope of both the Northwest Territories Water License limits and the Federal Metal Mining affluent limits.

At this point they are not of a level of concern, and I don't anticipate that they ever will be. This release will be gradual and it will eventually peter itself out.

Just as an aside, the Federal Government has initiated the National Orphaned and Abandoned Mine Site Initiative, NOAMI, which has funding, I believe it's four and a half billion dollars to deal with situations such as this, should it be necessary.

The unfortunate thing about this situation is there is no economic technology available to achieve this cleanup. It's just about impossible at this point in time, with the technology that's available to -- to do anything about this gradual release of arsenic.

And this is not only our experience, the same scenario is encountered at the Campbell Mine in Balmerton, Ontario, and they've been looking into it for years, and haven't come up with a reasonable technology.

Ground water and surface water: I'm not sure that this is a water-license-extension issue, but since it's been identified, I will deal with it. Certainly Miramar manages the ground water and surface water and has done so during its ten (10) year tenure at the mine site.

Site drainage is engineered to control the flow of water on surface and certainly in the closure plan, as those of you who are sitting on the working group know, identifies an entire drainage pattern on surface engineered ditches to control the water on

surface take it all to the middle Pud tailings pond, where it can be treated through the effluent treatment pond. Any water that's in contacted with impacted areas of the mine site will be, and is now, directed to the water treatment plant.

The offsite flows, because we're in a natural basin, are minimal and they are monitored, they're not in contact with the impacted areas. I'm not saying there is not a small amount of arsenic in these, but they're well within license limits and they are monitored.

We also installed six (6) ground water monitoring wells at this point and we have plans in the closure plans, I believe there's an additional six (6) or eight (8), I have to refer to the plan for that level of detail.

These programs will all continue under the water license extension; assuming that the extension is improved, we will continue with the water -- ground water and surface water monitoring programs.

Mercury and other contaminants: Mercury has been looked for on the mine site in numerous test programs, under the Federal Regulations, under several other programs, programs initiated by our predecessor, it has never been detected at levels of concern.

That is why it is not in the current surveillance network program under the water license, simply because it has not been detected at any levels. It is monitored under the Federal Metal Mining Effluent Regulations, and again, it's at or near detection limits.

The other metals of concern, again, through the Environmental Effects Monitoring Program, which has been in effect since 2002, we do extensive testing and there's thirty-six (36) other metals that are part of that program, it's on the public record; these -- none of these metals have been identified at levels of concern in the water.

The Northwest Territories environmental guidelines for contaminated safe remediation are guidelines for soil, and as such, they are not part of the water license issue, or at least Miramar believes they are not part of the water license issue.

Underground: In 2003, INAC Inspector Ron Bredmore (phonetic), issued an order directing Miramar to conduct an underground risk assessment. As part of that, water-quality monitoring of the water flooding the underground workings, was required.

We completed that underground risk assessment, we contracted a company called URS Canada, the results, the report on that has been submitted to the

McKenzie Valley Land and Water Board, as well as INAC. It is also a support document for the closure plan that we're working on right now.

We conducted water testing in 2004 successfully, we were able to lower the cage at the mine, down into the shaft, and sampled from the bottom of the cage. The water quality of the sample taken in 2004 was actually excellent, the only substance noted above water-license limits was zinc, and it was just slightly above the water-license limit.

We, again, our URS again attempted to sample in 2005, but there has been some deterioration of the mechanism to lower the cage and we were unable to get the conveyance down below the seventeen hundred (1,700) foot level, we were -- it was impossible at that time to lower water-sampling equipment to reach the water level in the mine; we're assuming it's down around a fifty-six hundred (5,600) foot level.

At this juncture it does not appear we will be able to sample the mine water for about fifteen (15) years until it gets to within about a thousand feet of surface, where we can successfully lower sampling equipment.

In order to do this in the closure plan, we are putting hatches in three (3) of the deep shafts that will allow us to lower water-sampling equipment when the time comes, and give us plenty of time to deal with any conditions that we see at that time.

Again, this is a closure plan issue, it's really not part of the water license extension, it -- the water license as it stands, extended or not, will be long gone by the time we get around to checking the water quality in the underground workings.

Again, I reiterate that we continue to meet the -- Miramar continues to meet the water-license conditions. Our processing operations are consistent with the terms of the current water license. We will continue to use the mill, we will continue to use the blend plant, we will continue to use the autoclave. The only thing we won't continue to do is mine. Therefore, the current water license applies to that situation.

In cooperation with a working group that was organized by the MacKenzie Valley Land and Water Board, Miramar is preparing a closure plan that will meet the objectives of the majority of stakeholders. We're on track to complete the closure plan for final submission to the MacKenzie Valley Land and Water Board at the end of December, 2005. We're optimistic that we will have an approved closure plan in place by the first quarter of 2006.

An extension of the current water license will enable Miramar to meet the schedule outlined in that closure plan and the commitments under that closure plan, including processing of all the remaining calcines and arsenic sludges.

Current security requirements: Security, as you know, is required under our water license. We currently have the required security in place. We are revising the closure plan, as I mentioned, and we intend -- we expect to have the final revision of the closure plan into the Board at the end of December.

As part of that process, the cost of closure is under review. When the final closure plan is provided to the MacKenzie Valley Land and Water Board, it will include a summary of those costs. At that time the MacKenzie Valley Land and Water Board will determine the amount of financial security required.

There was a question in terms of the waste disposal capacity remaining on site. Each year we -- each year we ask Golder Associates to bring geo-technical engineers on site to review the water balance and the Tailings Management Plan.

The Tailing Management Plan prepared in 2003, it's a two (2) year tailing management plan that was submitted to the MacKenzie Valley Land and Water Board, shows that the mine had operating capacity to handle milling until the end of December, 2005. Of course, milling stopped in 2004, so we have tremendous capacity remaining to handle any materials from the sludges so on.

The middle Pud tailings pond has adequate capacity to store all the residues from the calcines and the arsenic sludges, it also has the capacity to store the water used in that process, as well as any rain water, storm water and so on and so forth, including a two hundred (200) year storm event; the design is for a two hundred (200) year storm event.

The water storage capacity is sufficient and the mine, I assure you, has no plans and no need to place tailings or water, or any other contaminants underground, we have no intention of doing that. We certainly do not want to compromise the water quality of the underground, which appears at this time to be quite good.

Now this has been confirmed, as I said, by Golder Associates in the two (2) year tailing plan that was submitted to MacKenzie Valley Land and Water Board.

In summary, I guess the first thing I need to say is, we are not doing anything different than we've done in the past five (5) years during the tenure of this

water license. No process changes are planned during the extension, we will not do anything different. We will continue to process the calcine sludges and the -- the arsenic sludges and the calcines.

The information we believe, that we supplied, it's consistent with the conditions at the mine site, for the progressive reclamation and closure work done to date. Under our water license, we are required to do progressive reclamation; that is a condition of the license, and that includes demolishing buildings, for example, cleaning up.

As we finish with any aspect of the mine we are required to reclaim that aspect, therefore, what we are doing on the mine site is consistent with the conditions in the water license.

Extension of the water license will allow us to complete processing the remaining calcines, and as I said, no process changes are planned. I have already said I believe that the closure plan will be submitted to the MacKenzie Valley Land and Water Board on or about the end of December of this year, and we anticipate having an approved closure plan early in 2006.

It's been some rumours that Miramar is going to leave Yellowknife and leave you high and dry; I will assure you on Miramar's behalf, that our future is in the north. Miramar intends to continue its operations in the north and we are committed to mining in the Canadian north. We're also committed to working with all the stakeholders to achieve the long term goals and objectives of the closure plan.

We will leave Miramar, we'll leave the site of the former Con Mine, in a condition consistent with the current guidelines for the reclamations of mine sites in the Northwest Territories.

And finally, Miramar has at this point in time, a fully funded trust with DIAND to accomplish this goal.

I'd like to thank you for allowing Miramar to present its rationale for the extension of the closure plan, and at this time I will resume my seat with my comrades.

THE CHAIRPERSON: Thank you very much for your presentation to the Board. And please accept our sincere apologies for the technical difficulties. Thank you for providing a hard copy of your presentation, so we were able to proceed, even though we did have no benefit of the overhead presentation.

Are you prepared now to field some questions, or do you wish to have a short break?

MR. RON CONNELL: Oh, let's go for some

questions while it's fresh --

THE CHAIRPERSON: Okay.

MR. RON CONNELL: -- in everybody's minds.

THE CHAIRPERSON: Well, what we're going to do here is I'll ask the Board Members to take their seats again up here, and once we get settled we're going to start going through the registered parties, they'll all have an opportunity to ask questions. Then other members of the public that may have questions to ask of you, and then we'll go to the Board and staff, and finally we'll go to the Board Members.

So get comfortable, and we'll start off here once our Members regain their seats with the City of Yellowknife and ask if they have questions for you regarding your presentation?

UNIDENTIFIED FEMALE SPEAKER 1: Yes, we do.

THE CHAIRPERSON: It might be helpful if you grabbed a seat with your friends there, and that way there will be more space available for those who may have questions with microphones.

(BRIEF PAUSE)

THE CHAIRPERSON: Please go ahead. And again, if you can help us out here with identifying yourselves.

And actually, before you go, I apologize for not introducing our translators. Mary Rose Sunberg (phonetic) and Margaret Mackenzie (phonetic) in the back there, thank you very much for being here, you're certainly welcome and your efforts are appreciated.

So on to questions please.

MS. LORETTA BOUWMEESTER: Good morning, my name is Loretta Bouwmeester, and again, I'm the Manger of Legal Services and Corporate Policy with the City of Yellowknife, and with me is Dennis Kefalas, our Manager of Engineering Division with our Public Works and Engineering Department.

I'd like to begin this morning by just posing one (1) question, and then it's my understanding that My Colleague would like to pose a number of questions also.

So, if I may, this question is of course directed to Miramar.

Can we just confirm that it's pursuant to Section 18.1(b) that you're putting forward your request for an extension to the term of your license, as opposed to it being -- sorry, is your request for an extension to

the term of the license as an amendment as opposed to a formal renewal, just so it's clarified on the record?

MR. RON CONNELL: It is a request for an extension, it's not a renewal.

MS. LORETTA BOUWMEESTER: Thank you.

MR. DENNIS KEFALAS: Thank you, Mr. -- Mr. Chair and Board Members, I'm Dennis Kefalas with the City of Yellowknife.

The City would like to ask Miramar Con some questions regarding its current operations and activities, particularly those related to water use and waste disposal, in comparison to what was originally applied for and carried out under the current water license.

Our questions relate to the application for renewal filed in June 1999, compared to the amendment request filed on July 20th, 2005. I believe everyone has a copy of the June 21st, 1999 application. If so, may -- may I proceed to ask some questions through the Chair? Thank you.

Our first question is to Miramar.

MS. LORETTA BOUWMEESTER: If I may just in advance of Mr. Kefalas proceeding to ask his questions, we have made a number of copies of that license renewal application.

Should we distribute those to our Colleagues, Miramar at the very least, and any members of the public who would appreciate receiving a copy so they can be attuned to the comments?

THE CHAIRPERSON: Perhaps I can take a moment and check with the staff here and distribute whatever information's appropriate. So if we can just pause for one (1) moment.

MR. JOHN DONIHEE: Mr. Chairman, the document appears to be just an application for the last license renewal, it's -- it's off the water register. There really wasn't any notice given to Miramar I guess that this might come up though, so I'm wondering whether they have any concerns about responding to -- this is the -- responding to the document that you filed in 1999.

MR. RON CONNELL: We'd certainly like an opportunity to review it. I wasn't with Miramar in 1999.

MR. JOHN DONIHEE: But I wonder if we could -- how does your questioning work? I mean, is it all based on this document?

MR. DENNIS KEFALAS: Well they're actually based on the current water license.

MR. JOHN DONIHEE: This is --

MR. DENNIS KEFALAS: And we hope that the proponent would have some idea of what's contained in

that water license.

THE CHAIRPERSON: Okay, well please bear with us for a moment here, you know, we must be fair to all parties. So let's make sure that we get our heads around the introduction of this new -- well, this document. And we'll just ask John to carry on with his--

MR. JOHN DONIHEE: Mr. Chairman, just -- I'm -- I'm sure that proponent who's sort of the applicant, is ready to answer questions about the existing water license. The actual -- the document that the City wants to file with the Board is the application, which I believe led to the current water license; is that -- is that correct? And it -- it just doesn't seem that the Miramar staff who are here are that familiar with that particular document.

If you want to ask questions about the current water license, there's absolutely no problem. If you want to ask questions about what's in this document, could we push those over and we'll take a break when you get to that stage, we'll let Miramar have a look at it and see what -- how they want to respond to it.

THE CHAIRPERSON: Go ahead.

MS. LORETTA BOUWMEESTER: That position is -- is acceptable to the City, we of course want our Colleagues to have an opportunity to review any documentation. We put it forward as it was previously made available on the -- the Board's website, so we deemed it to be a public document and accessible to all parties that were proceeding this morning, attending at the Proceeding. Thank you.

THE CHAIRPERSON: Well, thank you. And perhaps as our counsel has suggested, we'll, over the course of a break, make sure that people have an opportunity to take a look at this, and then we'll proceed accordingly, all right. Can we carry on then?

(BRIEF PAUSE)

MR. DENNIS KEFALAS: Thank you, Mr. Chair. This question's directed to Miramar Con.

Please describe the major activities that are taking place now in the mine site?

MR. RON CONNELL: None. We shut down the mill autoclave and blend plant in April of this year, and all we have been doing is some cleanup work, taking down buildings that are no longer in use, as required under the water license as part of the progressive reclamation.

Working diligently with the Mackenzie Valley Land and Water Board and the working group to get a closure plan, which is approved. Apart from that --

oh, we've been doing -- we're required to cap openings to surface under the Workmens' Compensation Board, the Northwest Territories Mining Act. We've capped several -- several of the openings to surface and done investigations on a number of those areas.

The only other activity we've done recently is a clean up of some tailings in Rat Lake that have been on the -- on the table I guess, as a directive, since 2003, we finally have got that work in progress. I think that sums up what's going on right now. We're not taking any water from Great Slave Lake, for example.

MR. DENNIS KEFALAS: Second question. Are any of these activities taking place under an improved A&R plan?

(BRIEF PAUSE)

MR. DENNIS KEFALAS: Are any of these -- are any of these activities taking place under an improved A&R plan?

MR. RON CONNELL: Under an approved A&R plan? We do not have an approved A&R plan right now. We're working under our water license, doing progressive reclamation.

MR. DENNIS KEFALAS: In the current water license, Part D, Section 12, indicates that:

"Processing of the calcine and arsenic sludges shall be completed by the end of 2003."

Miramar Con's current amendment requests -- states that the process of these sludges will be completed in 2006. Earlier you gave some indication as to why you were unable to complete it by the end of 2003.

We are looking for what assurances can Miramar Con give that this new schedule will be made, where sludges will be completed by the end of 2006?

MR. RON CONNELL: I believe based on the current information as of the survey yesterday, we see that we will have those sludges treated somewhere by mid 2007.

We've encountered considerably -- considerably more material than was estimated in 1999/2000. Approximately four (4) times as much as the original estimate. The blend plant is designed -- pardon me, the autoclave is designed for 100 tons per day at 100 percent efficiency, we've been processing this material continuously and we still have lots left to process.

The blend plant and the autoclave cannot be speeded up, that is maximum, 100 tons per day, and of course we have to shut it down for maintenance and so on

and so forth. In actual fact our efficiency is probably 85 percent.

MS. LORETTA BOUWMEESTER: Loretta Bouwmeester, if I may, Mr. Chair.

May I confirm that a copy of the survey results will be provided to the Board and made part of the public record?

MR. RON CONNELL: I have a copy with me.

MS. LORETTA BOUWMEESTER: Thank you.

MR. DENNIS KEFALAS: The remainder of our questions are regarding the application renewal for a renewal. So we'll wait until such time as they've had a chance to review it.

THE CHAIRPERSON: All right. Well thank you very much then. Shall we take a short break here and have a little bit of a sidebar to determine the introduction of that, to these Proceedings, and then we'll get back to the City of Yellowknife and then carry on with the other registered participants.

Let's take a five (5) minute break, if that's acceptable.

MR. DENNIS KEFALAS: Thank you, Mr. Chair.

THE CHAIRPERSON: Okay, thanks.

--- Upon recessing
--- Upon resuming

MR. JOHN DONIHEE: Coffees, and maybe grab some of that bannock there, and just to be clear for the record. The document which the City was hoping to use as a basis for some of their questions, was the Miramar application for the current water license. And it's a document addressed to Mr. Gordon Rae (phonetic), dated June -- or date stamped June 22nd, 1999.

So this is the application for the current water license, but it contains a fair bit of detail. It is actually on the water register, but that's not really the issue I guess. The difficulty that we have is that there is quite a bit of detailed material here, and upon discussion with the representatives from Miramar, they didn't feel that they could be in a position to answer questions on it sort of without having had an opportunity to go through it.

I spoke with My Friend from the City as well, and it appears that they can achieve their purposes without the necessity for filing this document and so I think the recommendation, Mr. Chairman, is that the City just proceed with their questions, we won't file the document on the record.

THE CHAIRPERSON: And again, this document is on the website, it's publicly available?

MR. JOHN DONIHEE: That's correct, it's actually part of the material that's on -- I believe it's on the website, it's part of the material that's on the water register.

The difficulty is just that the applicant's representatives just didn't have a chance to review it before coming. So rather than proceed that way and catch them off guard, the City has graciously agreed to proceed without filing the document.

THE CHAIRPERSON: Okay, well thank you for that clarification and thank you, representatives from the City of Yellowknife.

Would you like to carry on with your questions of the applicant please?

MR. DENNIS KEFALAS: Thank you, Mr. Chair. Dennis Kefalas with the City of Yellowknife, we just have one (1) remaining question.

Just to confirm with Con Mine, that no water's -- that it's no longer being pumped from Great Slave Lake for general purposes, or general usage, and that they're no -- no longer drawing water from the City of Yellowknife's water distribution system for fire protection?

(BRIEF PAUSE)

MR. RON CONNELL: Miramar is presently in the process and we've -- we've just finished the process of putting the -- the water supply line from the Great Slave Lake, we've -- we've shut down the pump system, we've gone to an internal water delivery system for our office complex.

So presently we are not taking any water from the Great Slave Lake, however, we will start up again in the spring time when it comes time to get our autoclave ready, get our wash plant ready and the water treatment plant ready for operation. We will then require the water to be pumped back again from the Great Slave Lake.

MS. LORETTA BOUWMEESTER: Thank you for an opportunity to pose the questions, those are our questions, thank you.

THE CHAIRPERSON: All right, thank you very much. And again, thank you for your cooperation.

What we're going to do now is ask if the Government of the Northwest Territories has any questions of the applicant. Emery...?

MR. EMERY PAQUIN: Yes, thank you, Mr. Chair. We've one (1) question for the applicant, and that is, in your presentation it states that MCML has a fully funded trust fund, fully funded trust with DIAND to accomplish this goal, the goal presumably being the clean up of -- of the mine site.

Our question is, what is the current value of this fully funded trust, and what is its current form?

(BRIEF PAUSE)

MR. RON CONNELL: The fund's basically made up of the sale of the Bluefish Hydro Facility and a sum of money, one and a half million dollars, I believe, that was put up by Miramar directly, for a total of ten and a half million dollars.

MR. EMERY PAQUIN: Thank you, and in what form is that security held?

MR. RON CONNELL: I believe the one and a half million dollars is cash, and the nine million dollars from the sale of Bluefish Hydro is a bond, held by the Minister of DIAND.

MR. EMERY PAQUIN: Okay, thank you very much.

THE CHAIRPERSON: Thank you, Mr. Paquin.

With respect to other registered speakers, those without intervention. Are there any representatives from the North Slave Metis Alliance that would like to ask questions? Please and again, if you could help us out by identifying yourself, that will help with the transcripts, thank you.

MS. VALERIE MEERES: Hi, Valerie Meeres, with the North Slave Metis Alliance. Thank you for your presentation.

I just had a question, the numbers appear to have significantly -- significantly changed since you've prepared your presentation, specifically the number of days required to process the sludges has increased from two hundred (200) to three hundred (300) days. And my understanding from your presentation that -- is that this can only occur in the summer months.

How confident is Miramar Con Mine that a two (2) year extension will be adequate, and if the two (2) year extension isn't adequate, will you be asking for another extension?

MR. RON CONNELL: The volume of material was just re-determined on Monday this week, we had surveyors go out and survey the actual volume of the pile. This is the document that was submitted and we will submit more detail on that. We needed that

information for our own purposes, but it certainly falls into the context of what we're doing here today.

You mentioned summer. We can only excavate the buried sludges and calcines in the summer, however, we can process them once they're excavated, all year round. Our purposes this year was to excavate all the materials remaining on site, which we've done. We now know exactly how much material we have.

These piles are now freezing or frozen. We will start up as soon as they thaw out in the summer, and we will continue non-stop until we finish. The next time we start up the mill, the autoclave, and the blend plant, will be the last time.

MS. VALERIE MEERES: Thank you. That's all.

THE CHAIRPERSON: All right. Thank you. What we're going to do now is see if any members of the public have any questions for you and then we're going to ask the staff and counsel, and then go to the Board Members. So this is an open call for anyone here to ask questions of the applicant.

(BRIEF PAUSE)

THE CHAIRPERSON: Anybody have anything? Then perhaps I'll ask the staff and counsel if they have any points of clarifications or questions for you.

MR. JOHN DONIHEE: Mr. Chairman, I just have one (1) housekeeping matter that we should take care of. And there was a reference made to a calculation of the volume of the calcines, and Mr. Connell has provided me with an e-mail from a George Friesen (phonetic) to Mr. Connell as a recipient, dated the 8th of November, 2005. And I'd like to file that as Exhibit number 1 in the Proceeding.

Other than that, I don't believe that I have any questions. No questions from staff or counsel.

MR. RON CONNELL: Ron Connell for Miramar, can I qualify that? George Friesen is our Chief Engineer and a Professional Engineer, these are calculations done based on the surveys of Monday.

--- EXHIBIT NO. 1:Letter from George Friesen to Ron Connell dated November 8, 2005.

UNIDENTIFIED FEMALE SPEAKER 2: Excuse me, Mr. Chair, may we just request a copy of that e-mail message during a break, or when there's an opportunity to make a copy.

THE CHAIRPERSON: Go ahead, John?
MR. JOHN DONIHEE: Yes, as soon as we find a photocopier we'll get one (1) to you.
THE CHAIRPERSON: We'll make sure you get a copy.
UNIDENTIFIED FEMALE SPEAKER 2: Thank you, Mr. Chair.
THE CHAIRPERSON: Sure. I'll ask the Board Members if they have any questions for the applicant at this time?

(BRIEF PAUSE)

THE CHAIRPERSON: Go ahead...?
MS. VIOLET CAMSELL-BLONDIN: Good morning, Violet Camsell-Blondin. I just want to see if -- if you can provide some comments on -- in your presentation where you stated, and I'm just looking for it, where you mention that, you know, the tailings that went into the -- into the environment, you're not able to -- to clean it up or there's no technology that's available to clean up?
Is there any kind of clean up that can be done in that -- in that area?
MR. RON CONNELL: You are referring to the Meg-Keg Lake -- Meg-Keg-Peg Lake system. It's not actually tailing that was deposited in that area. In the historical operations they corralled the tailings in tailings pond, they allowed the tailing to settle, but the supernatant or the clear water was allowed to flow over and go down the Meg-Keg-Peg Lake system.
What's happened over time, and -- and you've got to realize that this is over a period of almost seventy (70) years, the peat and the underlying soils there have taken up a certain amount of arsenic from the water that flowed through that system over the years.
What's happening now is a very gradual release of that arsenic, with the clean water, the fresh water, the treated water that's going down there. When it leaves our effluent treatment plant, for example, the arsenic level is .001 parts per million. By the time it gets to Great Slave Lake, it has picked up a little bit of arsenic going through that Meg-Keg Lake water system, and we're seeing levels of maybe point one/point two (.1/.2) arsenic, I believe it might be as high as point three (.3). Still well within water license limits.
The unfortunate thing is because we're dealing with such low levels initially, there's -- there's no economical treatment to take that last little

bit of arsenic out.

The other thing you have to consider, even if you could build a treatment plant, there's no water, there's no roads, there's no power, nothing down there. The cost of doing that type of treatment for the benefit you'd get, would be astronomical, short of something like reverse osmosis, again, not economical, you could not remove those traces of arsenic that we're seeing.

Certainly just further to that, we're doing some environmental effects monitoring studies under the Federal Government. We are showing very, very little low environmental effects actually on Great Slave Lake there, they're passing the fish toxicity tests, for example, and the -- the daphne magna toxicity tests, we're passing all of those.

So I think the impact on the receiving waters is very minimal.

MS. VIOLET CAMSELL-BLONDIN: And also there's a working group with -- with the Con Mine, the Miramar Con Mine, I'm just wondering, can you identify who's sitting on the working group?

MR. RON CONNELL: I'll leave that to my learned comrades from the Mackenzie Valley Land and Water Board.

MS. VIOLET CAMSELL-BLONDIN: Oh.

THE CHAIRPERSON: Is that something, Lisa, you can help us out with?

MS. LISA HURLEY: The Members that are currently sitting on the working group are Miramar Con Mine, normally we have Ron Connell and John Hull coming from there.

We have DIAND representatives from Water Resources and the South Mackenzie District Office.

We have representatives from the GNWT, both ENR and MACA.

We have representatives from the City of Yellowknife.

The North Slave Metis Alliance has participated in the past, so has the YK Dene. And I believe that's everybody that's sitting there. Oh, and Environment Canada, sorry, and the Department of Fisheries and Oceans.

THE CHAIRPERSON: Thank you. And thank you, Violet.

George, any questions at this time?

MR. GEORGE JOHN: Not at this time.

THE CHAIRPERSON: Not at this time. All right, well, thank you very much for your presentation, for responding to the questions.

What I'd like to do now is move on and ask

the City of Yellowknife if they're prepared to make their presentation and stand and respond to any questions from the applicant, registered parties, the public and the Board staff and Members.

(BRIEF PAUSE)

MS. WENDY BISARO: Okay, I think the Board has rearranged themselves, so good morning, my name is Wendy Bisaro, I'm Deputy Mayor for the City of Yellowknife.

With me today, as I mentioned earlier, on my immediate right is Loretta Bouwmeester, Manager of Legal Services and Corporate Policy for the City. And at the table further to my right is Kevin O'Reilly, a City Councillor, and Dennis Kefalas, who is the Manager of Engineering Division for the City's Public Works and Engineering Department.

Before we proceed with -- with our presentation, I'd like to add the following qualification with respect to our participation in this Hearing.

As the Board has not yet issued its decision with respect to whether a preliminary screening of the water license -- license amendment should take place, we are proceeding on a without prejudice basis, in that our participation is not intended to prejudice any action the City may be entitled to take with respect to the Board's decision on that issue.

Having said that, the City has a number of interests, there is a couple of interests in this particular Proceeding. The mine site is wholly located within the City's Municipal boundaries, and therefore is of vital concern to us.

The City is intervening in this Proceeding, because we believe that doing so is in the best interests of the residents of this community, and we are concerned that the closure activities may result in long term adverse effects on the environment.

This environment would include groundwater and water bodies both within and adjacent to the City's Municipal boundaries. Two (2) examples are Rat Lake and Yellowknife Bay or Great Slave Lake.

The City's concerns revolve around the potential for adverse effects on the environment within its boundaries, as a result of the closure and reclamation activities, both currently underway and planned.

This could involve accidents or malfunctions or movements of contaminated materials and so on. It could also include the removal of machinery

that is needed to process more contaminated material than Miramar is proposing to process.

All of this is taking place in the absence of an approved closure and reclamation plan and limited involvement of the City and the general public. The City has expressed concerns with the reclamation standards being proposed by various Government agencies and the company, and these need to be the subject of a public review process.

This is a community based issue that requires a community based vetting of information and that's why we're here. We're posing questions that with all due respect, the Board should feel comfortable answering before it grants the requested amendment. Okay.

Our position is that Miramar should not be granted its request for an extension of the water license, and that Miramar should be required to submit a new license application. And why do we feel this way?

Firstly, a new license to regulate closure activities on the mine site would be subject to relatively intense scrutiny and comment.

Secondly, in contrast, the license amendment request appears to be a more summary and abridged process, and I need to clarify that the slide is in error, it is indeed an amendment, not a renewal. And the amendment request has been put forward pursuant to Section 18.1(b) of the NWT Waters Act.

The process of obtaining a new license would allow all affected parties to vet information on how the water and land impacted by the development activities of Miramar at the mine site will be regulated in the closure phase, as opposed to either, one (1), it's former operational phase, or two (2), the post closure period that Miramar contemplates its next license will address.

A new license application can also be referred to the Mackenzie Valley Environmental Impact Review Board for an environmental assessment.

As mentioned by the proponent earlier, we have raised a number of issues. The water treatment is one (1) of them, and it's important to state that our issues as we present these issues, we don't propose to engage in a technical debate on them, but instead to highlight them as a means of demonstrating the basis for our concern, with respect to the license amendment request.

According to Miramar's second submission to this Board under its current water license, Miramar is not required to pass acute toxicity tests, only to

conduct them.

And discharge of treated water into Meg-Keg-Peg Lake system, results in re-contamination.

The current water license does not require groundwater monitoring wells to be in place. And the installation and monitoring of these wells should be both mandatory and required in advance of the closure plan being approved.

Underground works are currently flooding, and it's expected that it will take twenty (20) years for them to flood. Given the current state of the mineshaft, which has been alluded to, testing of water quality will not be possible for approximately fifteen (15) years.

This action, the flooding of the works took place without a closure plan being approved by the Board. And this concerns the City as it raises the question of what other irreversible action will take place during the requested extension term of the license.

A closure plan that is acceptable to the Mackenzie Valley Land and Water Board was to have been submitted by January 31 of 2001, the satisfaction of this license requirement remains outstanding.

It's now been almost five and a half (5 1/2) years since the satisfaction of this condition has remained outstanding, and this is unacceptable from the City's perspective, and is in and of itself, sufficient reason to deny Miramar's request for an amendment to the term of its license.

Miramar is not, in essence, coming forward with clean hands, as it has not met the terms of its current water license.

In the last half of 2006, Miramar proposes to complete the processing of arsenic and calcine sludges on site, and we understand that now that has been pushed forward to mid 2007. This is another example of an activity that was to have been completed during the term of the current water license in 2003, and we acknowledge that we have received information as to why that didn't happen.

The purpose of the license has changed. The current water license came into affect on July 30th of 2000 and was issued by this Board's predecessor, the NWT Water Board.

The purpose stated on the water license is for a mining and milling undertaking. There have been significant modifications made to the mining and milling undertaking since 2000 when the water license extension came into affect. Most of the activities on site today are really related to mine decommissioning, rather than an active mining operation.

Miramar's currently working towards a state of final closure, and this is a very different activity or development than was occurring when the present water license came into affect. And it is the City's position that the fundamental purpose of the water license has changed.

It's also the City's position that the policy decision behind establishing expiration dates after the passage of a number of years, in this instance six (6) years, was based on the recognition that situations, technology and the availability of key information changes, and that this reality warrants a vetting of a water license application on a regular basis.

To usurp this function -- function by extending the term of the existing water license in the absence of a compelling rationale, which is lacking in this instance, is both counter-intuitive and counter-productive.

The security deposit is an issue for us. The current water license requires nine million dollars to be posted and maintained as a security deposit. It's the City's position that the security deposit should be increased and secured, while the mine has the financial resources available to meet such a condition.

Given the extensing -- extensive undertaking that the abandonment and remediation of this mine site represents, nine million dollars is almost certainly not sufficient and should therefore be increased.

The City is also, frankly, concerned that there may be an issue of public liability from remediation costs if this issue is not addressed. And this is contrary -- contrary to both the Department of Indian Affairs, 2003 Mine Site Reclamation Policy, and is not in the best interests of the residents of this community or this Territory.

The City appreciates having the opportunity -- an opportunity to review the further information submitted by Miramar, and the information that was provided today as well. However, we remain convinced that a new license application being vetted at this time is in the best interests of the residents of both this community and the greater territory.

As a new license to regulate closure activities on the mine site is subject to relative -- relatively intense scrutiny and comment, including potentially a full environmental assessment by the Mackenzie Valley Environmental Impact Review Board, and pursuant to the Northwest Territories Mackenzie Resource

Management Act, as opposed to a license amendment, which appears to be a more summary and abridged process. We advocate for the former, as opposed to the latter.

I'd like to thank you for the opportunity to present the City of Yellowknife's views on the request for amendment to Miramar Con's water license, and we will do our best to answer any questions that anyone may have.

THE CHAIRPERSON: Thank you for your presentation. Perhaps if you want to get settled back at your table, or you can remain where you are, it would be nice if people do have questions to be available -- have a microphone available to them.

And what -- what I'd like to be able to do now is we're going to go through, you know, the -- the list of registered parties, let them ask questions. We'll then allow Miramar to ask for points of clarification, or -- or pose questions to you and then of course Members of the staff and Board.

So, once we all get settled here. Perhaps what we can do is go back to our original order here.

The Government of the Northwest Territories, Mr. Paquin, do you have any questions for the City of Yellowknife or any other representatives of the Government of the Northwest Territories?

MR. EMERY PAQUIN: No, Mr. Chair, we don't have any questions.

THE CHAIRPERSON: All right, thank you. Representatives from the North Slave Metis Alliance, do you have any questions for the City of Yellowknife that you'd like to pose at this time?

MS. VALERIE MEERES: No.

THE CHAIRPERSON: None, okay. Thank you.

Members of the public? Any points of clarification or questions you'd like to pose to the City of Yellowknife at this time? Doesn't appear to be so.

Miramar, representatives of Miramar, any questions for the City of Yellowknife, points of clarification?

MR. RON CONNELL: No, we have no questions. We've pretty much covered everything off on our presentation, thank you.

THE CHAIRPERSON: Okay. Thank you. I'll ask the staff and counsel if there's anything that they would like to try and get clarification on or questions they'd like to pose to you?

MR. JOHN DONIHEE: I don't believe so, Mr. Chairman.

THE CHAIRPERSON: So far -- now we'll go to the tough one (1) here, the Board Members here. We'll start down at the end here. Floyd, anything?

MR. FLOYD ADLEM: Thank you, Mr. Chair.

In your written submission, going through it, I -- I just have -- have a sort of an observation. Under the section called Water Treatment Plant, the terminology appears seven (7) times in that first two (2) paragraphs. I wondered if there was any -- is it -- is it just an appearance, or is there any facts associated with those statements?

It says, would appear that. And it appears that there's discharge of toxic water. I just wondered if there was any substantiation to those, or where that came from? Thank you.

MS. LORETTA BOUWMEESTER: If I may, Loretta Bouwmeester, for the City of Yellowknife.

One (1) reference, just quickly reviewing that section. We can refer to Miramar Con Mine Limited's presentation earlier today, when it comes to the Rainbow trout and daphne magna, I'm not a technical expert, but I believe that's how it's pronounced, that that has been lethal to those different organisms.

You are correct in your notation that that word 'appear' does present itself on a number of occasions I think that's a reflection of the fact that the City is expressing concern.

And that with every respect it's the Board that's going to have to satisfy itself based on the information available to it, that the questions we have posed in the course of our presentation today, and also in the written submission, are -- have properly been answered by the proponent, and that the information is available either on the public record or otherwise through regulat -- the regulatory bodies, some of which are in attendance today, that they are meeting the terms of their existing water license.

That the toxicity tests are lethal to these organisms, and whether or not that's relevant to the water license itself.

And again, we would just point to the presentations that were made earlier, where a number of these issues were addressed by Miramar Con Mine and confirmed. I hope that answer is satisfactory in -- in what you were looking for?

MR. FLOYD ADLEM: Yes, thank you. One (1) other comment I guess, or a question.

In that same -- one (1) of the facts that you do present there is that there's only one (1) treatment plant.

Is -- I guess I'm just curious. Is there a suggestion that there should be more than one?

(BRIEF PAUSE)

Mr. DENNIS KAFALAS: As indicated earlier, I mean, Mr. Connell's indicated that a second plant would help remove some of the toxicities entering the Great Slave Lake. I mean, whether or not it's feasible or not, there is a possibility that a second one (1) can be employed, and actually help treat the water that's being re-contaminated as it makes its way through the Meg-Keg Lake system.

Right now, like the City of Yellowknife, is -- our biggest concern right now is that we are going through a whole process of coming up with a new water treatment system, and possibly changing our new -- our location of our water source. Right now we draw water from the Great Slave Lake. We've conducted tests on Back Bay or Yellowknife Bay, which indicates the water in that area is extremely good for potable water. It'd be cheaper in the long run for the City to actually use this as our main source.

Now, we're just trying to safeguard our residents and looking at, we should maybe explore every possible option to ensure that toxicities aren't entering Great Slave Lake.

THE CHAIRPERSON: Excuse me, I've been reminded here, for the sake of the record, please just identify yourselves.

MR. DENNIS KEFALAS: Sorry, that was Dennis Kefalas from the City of Yellowknife.

THE CHAIRPERSON: Thank you, Dennis.

MS. LORETTA BOUWMEESTER: And if I may, Loretta Bouwmeester, for the City of Yellowknife, through you, Mr. Chair.

That's another question that we -- that we put to the Board or would like to propose the question that should properly be addressed in a new license application process, because it may very well be that it is feasible that a second water treatment plant be implemented on site, and that it might have a positive outcome on the effluent that's leaving the site, and again benefit the community at large, and the territory in the long run.

THE CHAIRPERSON: Okay. Thank you for your response. Thank you, Floyd, for your question. Zabeht...?

MS. ELIZABEHT BISCAYNE: I have a few comments, and I -- some of them, I don't know if this is following proper procedure, but, might require some clarification from Miramar.

In your presentation, you mention the current water license does not require ground-water-

monitoring laws to be in place. We just heard in the presentation from Miramar that there were six (6) ground water wells that were in stalled, and that there are several more included in the closure plan.

THE CHAIRPERSON: Does the City have any response to that comment and then perhaps Miramar may wish to comment on that as well so.

MS. LORETTA BOUWMEESTER: Loretta Bouwmeester for the City, Mr. Chair, through you.

Our understanding and based on a presentation that was made earlier by Miramar Con Mine, those monitoring wells are placed at their discretion currently, they're not a mandatory provision contained in existing water license.

And that is another area of concern for the city because if it's a discretionary placement and those are used for testing purposes on that basis, then they can be removed and that added benefit which we concede is -- is of benefit to everyone here today, is lost.

So the mandatory requirement of that provision is something that the City would like the Board to consider, and again, during the full vetting of either a new license application or a formal renewal application.

THE CHAIRPERSON: Go ahead, Dennis.

MR. DENNIS KEFALAS: Dennis Kefalas, Yellowknife. Just to give you some sort of comparison as -- as in terms of what may be needed in terms of ground water monitoring, sorry, we've had some indications or some concerns raised by Environment Canada regarding our old Gerry Murphy site, and possible contamination on that site, and -- and the actual migration and contamination to Frame Lake.

We ourselves are a small site like that, we installed three (3) monitoring wells. For a site the size of the Con Mine, just -- just the Con Mine operating area or the old mine site area, require a larger number of wells to get a good indication of what was actually happening within the groundwater system. Thank you.

THE CHAIRPERSON: We will allow Miramar just to make a comment on our Board Members information.

SCOTT STRINGER: Scott Stringer, with Miramar. We have installed six (6) monitoring wells, yes. We contacted Golder Associates to engineer the location and the installation of those six (6) existing monitoring sites and the next set of locations is included in the closure plan, and if that's approved then those next locations would be installed according to that plan.

THE CHAIRPERSON: Thank you. Zabeht, any further comments or observations or questions please?

MS. ELIZABETH BISCAYNE: Just a comment, I guess, I don't know if, it might require some clarification, but in your presentation you mention that the licensing requirement remains outstanding with regards to the closure plan.

Now I understand from the material that we've been provided with, that there was a closure plan that was submitted, and this is something my staff might want to clarify, that in this case, am I correct in assuming that Miramar cannot be held wholly responsible for the delay in not meeting this obligation?

THE CHAIRPERSON: I will ask the staff first to make a comment and then we will go back to the city and I think again that's a question that also warrants Miramar to have a chance to respond as well, so. Go ahead, Bob.

MR. BOB WOOLEY: The -- the plan has been submitted, has been submitted for quite some time now, actually, but has never been approved, so in fact they're not bound by that.

THE CHAIRPERSON: Okay. Would the City like to make a comment on that observation?

MS. LORETTA BOUWMEESTER: Loretta Bouwmeester, through you Mr. Chair, we would respectfully submit that I don't have the water license exactly in front of me, but I -- from memory, it is one of semantics, but I think it is very important.

It was -- an ANR plan was to have been our closure plan, was to have been submitted, it was satisfactory to the Board by 2001. So, I think that's an important issue to raise, because it could have been submitted in advance of that or with more detail or -- or more guidance having been obtained in advance of that date having passed. Thank you.

THE CHAIRPERSON: Any further comments from City of Yellowknife on that point? And then we'll ask Miramar to (inaudible). Anything else...?

Yeah, okay. Take your time.

(BRIEF PAUSE)

MR. RON CONNELL: Ron Connell, on behalf of Miramar. At this juncture, we are on Revision Number 5, of the Closure Plan. In my office, I have closure plans, copies of closure plans that had been submitted by Cominco in 1987, and I believe Nerco in 1990/'91, and I believe there's another submission from 1995.

Miramar is on Revision 5 of their

submissions. The difficulties that we seem to encounter, we submitted on January the 1st, 2001, that was handed back to us for various reasons, it was too much to cover all at once.

We resubmitted and went through public hearings in 2003. Again, there was issues raised in that closure plan that were not satisfactory to the Board.

At that time the MacKenzie Valley Land and Water Board determined that it would form a committee, or a working group, which has, I believe, fourteen (14) agencies involved, to deal with the very technical issues on the closure of the mine.

And we've been going through, for the last two (2) years, a process where we have reviewed the closure plan chapter by chapter, and each chapter is vetted by the working group. Once it's vetted by the working group, it goes through about three (3) iterations in order to get that far, it's then prepared as a final submission ready for the Board's approval.

At this juncture, we have submitted chapters 1 through 9; chapters 1 to 4 have received approval from the working group; chapters 5 and 6 have received tentative approval from the working group; and chapters 7, 8 and 9 are under final review by the working group.

This is a long, drawn out process, it's a very expensive process. From Miramar's perspective, we would love to have an approved closure plan, but we have been asked and are going forward with a process that the MacKenzie Valley Land and Water Board requested we go through, in order to get to a stage where we have an approved closure plan.

We anticipate that will take place early in 2006.

THE CHAIRPERSON: All right. Thank you very much. Zabeht, any other questions?

MS. ELIZABETH BISCAYNE: I have one more last question. In your presentation you state that the purpose stated on the water license is for milling and milling undertaken, and that there's been -- that there is significant changes to this.

Could you explain, because we were assured this morning that in the presentation for Miramar that there's been no changes to the conditions of the water license.

MS. LORETTA BOUWMEESTER: If I may, Loretta Bouwmeester, through you, Mr. Chair, I believe Mr. Kefalas will also add some additional comments.

The City made that point during its presentation, because it remains its position that it's

the -- not the same type of development undertaking operation that's occurring on site. It's no longer an active mining operation and a milling of ore that's been produced as a -- as a result of the underground works.

What's now occurring is the -- a decommissioning, or a closure activity, and it's our respectful submission that that's very different from what would be occurring on a mine site during an active mining operation.

There's fewer employees, there's long-term effects. If -- if the mine were continuing to operate, there would just be a different set of criteria that would apply and considerations that the Board, the licensee, different stakeholders would turn their attention to.

I hope that question, or that answer satisfies your question. Thank you.

THE CHAIRPERSON: Okay.

MR. DENNIS KEFALAS: Thank you, Mr. Chair. Dennis Kefalas, City of Yellowknife.

I think we're just worried that under the exist' -- (inaudible) proposed for the next year or next couple of years, there might be some irreversible actions taken, that -- that we won't have a chance to mitigate or -- or really be able to stop or to improve upon these actions to ensure that the safety and the health of the residents of Yellowknife and the surrounding communities is maintained. Thanks.

MS. LORETTA BOUWMEESTER: If -- if I may just follow up on that, Loretta Bouwmeester, through you, Mr. Chair, those are concerns that we raised in our presentation and I'm sure we'll address in our closing, but they're excellent examples of what would not happen during an active mining operation in most instances and that would be the permanent closure of a very deep shaft and the testing, the ongoing testing of that -- of that shaft.

And also, the removal of potentially very useful on-site improvements, because one of the issues that was raised earlier today is that the initial volume estimates are now -- they're not correct. The information that was previously put forward and I'm not speaking to the -- the basis for that essentially, but the information has now changed.

What if this isn't the end estimate? We haven't seen the terms of reference for the survey that -- that was completed, we don't know how inclusive or how wide the scope was. There may be additional surveys down the road that would indicate that the autoclave and other on-site improvements should remain on site for a further

term to be able to process any other existing materials that are of concern. Thank you.

THE CHAIRPERSON: I thank you. Zabeht, anything further?

MS. ELIZABETH BISCAYNE: No.

THE CHAIRPERSON: Violet, --

MS. VIOLET CAMSELL-BLONDIN: No questions.

THE CHAIRPERSON: -- nothing at this time?

Mr. John, any questions of the City of Yellowknife?

MR. GEORGE JOHN: Mr. Chair, thank you. George John, Board Director. A couple of observations. I don't see the brothers and sisters here, the Aboriginal people. I'm sure that they'll have concerns of their own, and I'm assuming that the City speaks for them, as well as the Health Department and other important organizations, and I'm sure the Metis can speak for themselves.

But how did you arrive at your consensus? Did you get technical assistance in your comments? That's my question. Just clarification, please.

MS. LORETTA BOUWMEESTER: If I may, Mr. Chair, Loretta Bouwmeester, for the City of Yellowknife.

We have limited resources; I think that's a recognized reality for municipalities across the country. But at the same time, we recognize how important this issue is and in our presentation, we referenced the fact that this is going to be an issue for all residents of this community, no matter what their lineages, or their decent, or how long their tenure on the land has been, it's going to affect us, as a community, for a very long time.

We have made efforts to notify all other stakeholders that we believe also are going to be affected by the activities on this mine site. We have also retained technical expertise and received feedback from a number of individuals that we believe to be better informed than -- than I, I'm a lawyer, I don't in any way claim to be a toxicologist or someone who has the technical expertise to comment more than just broadly on trout, magna delphinia (phonetic) toxicity levels, but we do endeavour, with the resources that we have, to canvass those out there who do have expertise on this issue.

And again, the key driver for our presentation today is to pose questions to you as a Board. You have the technical expertise, and we trust that you as a regulatory body, are going to fulfill your obligation and safeguard the interests of the

stakeholders that are relevant to this issue.

And I hope that answers your question. Thank you.

THE CHAIRPERSON: Well thank you very much. Let's take a short break, about ten (10) minutes, and let's move on then to our next presenters, and so again, ten (10) minutes, and we will reconvene. Let's take a recess. Thank you.

--- Upon recessing
--- Upon reconvening

THE CHAIRPERSON: If people take their seats again, we will ask the Government of the Northwest Territories to come forward with their presentation and then once again we will go through the same sequence and give everyone the opportunity to ask the GNWT for points of clarification, questions, or comments.

(BRIEF PAUSE)

MR. EMERY PAQUIN: Thank you very much, Mr. Chair and Board Members. Once again, my name is Emery Paquin, I'm the Director of the Environmental Protection Division, with the Department of Environment and Natural Resources.

On my -- on my left is Ms. Colleen Roche, she is a mining specialist with -- with my Division. On my immediate right is Mr. Ken Hall, he's the Manager of Environmental Protection. And on my far right is Mr. Jason McNeill, he's an Environmental Assessment Officer with -- with the Department.

For the record, I would simply like to read our -- our Intervention:

Environmental Protection Division is a division of the Territorial Government's Department of Environment and Natural Resources. Our goal is to protect and enhance the environmental quality of the North.

Departmental programs are designed to control the discharge of contaminants and reduce their impacts on the natural environment. This is a shared responsibility with the Federal, Territorial, Aboriginal and Municipal agencies, as well as every resident of the the Northwest Territories.

The Department has participated in the activities of the Miramar Con Abandonment and Restoration Working Group since the MacKenzie Valley Land and Water Board initiated the process in mid-2003.

Through our involvement in the Working

Group, we have reviewed the closure and reclamation methods proposed by Miramar, and have provided technical input related to our Department's regulations and guidelines on -- on waste management, air quality and contaminated site remediation.

Miramar has requested a two (2) year extension to the term of their current water license, set to expire on July 29th, 2006. It is Miramar's intention, as we understand it, to undertake the majority of final closure activities in the next two (2) years, and then apply for an initial post-closure water license in 2007.

We have no objections to this request by Miramar. It is our opinion that a two (2) year extension of the current license term, may in fact be beneficial in that it will allow the company to focus its attention on moving closure activities forward.

As the Board considers allowing the extension and the aspirations of the company over the next two years, it should be noted that progress towards finalization of the closure and reclamation plan, for Con Mine to date, has been slow.

Along with membership and staff changes within the working group and Miramar, the rate of progress, we believe is due in part, to the competing interests of the Working Group members, as well as the complex nature of this undertaking.

In the experience of E&R staff who participate on the Working Group, Miramar has made considerable efforts in the last two (2) years to participate in a transparent process, with the goal of finalizing their Closure and Reclamation Plan.

Given the Con Mine site location within the City of Yellowknife boundaries, the Working Group is facing complex issues. The manner in which they are resolved will have implications for future land use.

Miramar has attempted to incorporate the input of Working Group members and concerned citizens into their closure plans, through and iterative process of revisions and meetings. While this process has been effective in dealing with many issues, there are other issues that remain unresolved.

In order to help expedite the review and approval process, we encourage the Board to intervene as issues upon which the Group cannot reach consensus arise.

In conclusion, at the Public Hearing in April 2004, there was a consensus amongst those in attendance that the Closure and Reclamation Plan, or the closure and reclamation of Con Mine, should continue without unnecessary delay.

With this in mind, Environment and

Natural Resources does not object to the water license extension requested by Miramar, and will continue to work with the Company and other Working Group members, to ensure they meet their objective of completing major closure activities within the next two (2) years. Thank you.

THE CHAIRPERSON: Thank you, Mr. Paquin.

Now, if we can just make one microphone available, we're going to ask if people have questions for you, and the sequence that we'd like to go through is first with the Registered Parties, then we'd ask the Public, and then Miramar has an opportunity, and then Board Staff, and Members.

So, we will start with the City of Yellowknife. Do you have any questions for the Government of Northwest Territories regarding their presentation to the Board?

(BRIEF PAUSE)

THE CHAIRPERSON: All right. Thank you. Moving on, North Slave Metis Alliance, any questions for the GNWT, regarding their presentation?

MS. VALERIE MEERES: Not at this time.

THE CHAIRPERSON: Okay. Thank you. Other Members of the Public, any in attendance, anything they would like to get clarification on, or perhaps comment on the presentation of Mr. Paquin?

All right. We will ask Miramar. Oh, I am sorry, carry on. Can we ask you, there's a microphone right there. Let's not be too formal here, you can just...

MS. LORETTA BOUWMEESTER: No. Thank you. Loretta Bouwmeester, through you, Mr. Chair, for the City of Yellowknife.

The only comment that we would offer is, the City does concur that there's no merit in unnecessarily delaying the progress towards the approval of an Abandonment Reclamation Plan. However, we don't believe that our participation in this Proceeding or the request for a formal renewal application, or the vetting potentially through an environment assessment, is an unnecessary delay.

We would contend that it's completely appropriate and something that could be considered down the road. And that's the only point of position or clarification that we would offer at this time.

THE CHAIRPERSON: All right. Well thank you very much.

Mr. Paquin, do you have anything you would

like to comment on in response?

MR. EMERY PAQUIN: No. No, there's no -- no response to that clarification.

THE CHAIRPERSON: Well thank you. We will ask the representatives from Miramar if they have anything they would like to ask the GNWT regarding their presentation.

MR. RON CONNELL: No. Thank you very much.

THE CHAIRPERSON: All right. We will now turn to the staff and counsel.

MR. JOHN DONIHEE: Thank you, Mr. Chair. John Donihee. I just have one question.

Mr. Paquin, you indicate in your written submission, that the -- and -- and you read this into the record, it's Miramar's intention to undertake the majority of final closure activities in the next two (2) years, and then apply for initial post-closure water license.

So, it -- I guess it's my observation that you expect the major closure activities to take place in the next two (2) years within the scope of the -- the amendment requested by Miramar.

I wonder if you'd comment or have any -- any thoughts about the concerns that the City has raised, that the license as it's now constituted, wasn't really intended to be an -- an abandonment and decommissioning license, and whether in fact the your Department sees any risk associated with proceeding with the -- under the current license, without addressing those kinds of activities directly?

MR. EMERY PAQUIN: Mr. Chair. On -- under Part H, Clause 4, of the current license, I believe the license does currently envision or contemplate progressive reclamation. In fact that term is -- is both contained within that Section, as well as -- as being defined.

So we see no inconsistencies between the reclamation activities, the progressive reclamation activities currently being undertaken on the site, and -- and the current conditions contained in the water license.

As far as -- as far as a risk, we do -- we do believe that by undertaking this -- this reclamation work, prior to there being an approved Abandonment Plan, that the company is taking, or is acknowledging a certain level of risk.

We would expect that once the Plan is approved by the Board, with the technical input of the Working Group, that that Plan will be carried out, and if

the work that Miramar is undertaking right now is inconsistent with the final provisions of that Plan, we would expect the Company to either undertake further work, or ensure that -- that ultimately the work is consistent with the approved Plan.

MR. JOHN DONIHEE: John Donihee again. Thank you.

Is it fair, then, to say your -- your view is that the -- the risk is associated with activities which are undertaken before there's a final Closure Plan, as opposed to whether the license is extended or not extended?

MR. EMERY PAQUIN: Mr. Chair, it is -- it is the former, the risk is associated with undertaking the work prior to a Reclamation Plan being approved.

MR. JOHN DONIHEE: Thank you, Mr. Chair. John Donihee. I just have one final question.

And I've been wrestling with the difference between progressive reclamation and abandonment and decommissioning, and this may be one of those theoretical questions.

But I wonder if -- if you know -- do you know of any way of distinguishing those kinds of activities and -- and could you explain that if -- if you do, to the Board?

MR. EMERY PAQUIN: Mr. Chair. In -- in this case I think I would refer Mr. Donihee to the -- to the definition that is contained within the license itself, and that is that progressive reclamation means those activities conducted during the operating period of the mine, to modify and reclaim the land and water to the satisfaction of the Board.

As far as this Hearing is concerned, that's my understanding of -- of the term, progressive reclamation.

MR. JOHN DONIHEE: Thank you, Mr. Chair, for your indulgence. Just one follow-up then. I'm aware of the definition.

I guess my final question to you is: Do you understand what's happening now as being -- during the operating period of the mine?

MR. EMERY PAQUIN: While it is true that the mine is no longer conducting mining and milling operations, we do believe that -- that the current license did envision the processing of the calcines and the arsenic sludge, so therefore, while -- while it may not be entirely consistent with what is normally considered to be an operating mine, it is not inconsistent with the terms of the license.

THE CHAIRPERSON: Thank you very much.

Please go ahead.

MS. LORETTA BOUWMEESTER: Loretta Bouwmeester, through you, Mr. Chair. It's always dangerous to follow an eloquent speaker.

But if I may pose a question to the current Intervener: It's the City's understanding that the progressive reclamation that was referenced in the existing license, was placed there, that -- that term was placed because there was the reciprocal condition that a satisfactory Abandonment Reclamation Plan, was to have been submitted by 2001.

It's always been our understanding that the progressive reclamation work would have been subject to an approved plan, and wouldn't -- it was a condition precedent, is what we're trying to say, is that if that progressive reclamation were to rightfully proceed, then that condition precedent of the A&R Plan being approved, would have to be there.

Would you concur that this is one way, or the way of interpreting that provision of the license?

THE CHAIRPERSON: Mr. Paquin.

MR. EMERY PAQUIN: Thank you, Mr. Chair. That is -- that is one way it could be interpreted, yes. But there are -- there are obviously other ways as well that -- that it could be interpreted.

MS. LORETTA BOUWMEESTER: And -- and if I may, I just, I think it may -- Loretta Bouwmeester, through you, Mr. Chair, also be useful to read in the definition of "progressive reclamation," and that means that -- means:

> "Those activities conducted during the operating period of the mine, to modify and reclaim the land and water to the satisfaction of the Board."

Well the satisfaction of the Board is again, that condition precedent that an Abandonment Reclamation Plan be approved and be in place.

THE CHAIRPERSON: Is that a question for Mr. Paquin, or is that a statement, I'm sorry.

MS. LORETTA BOUWMEESTER: Do you agree?

THE CHAIRPERSON: Emery, can you respond?

MR. EMERY PAQUIN: I will attempt to respond. As I mentioned in response to -- to another question with respect to risk, ultimately -- ultimately the reclamation, the cleanup and reclamation of the land and water is going to have to be to the satisfaction of the Board.

Now, if the reclamation that's taking place right now is inconsistent, or does not go as far as the approved plan requires, then in my opinion, the

company would have to be prepared to undertake further work on those components of the property that they have already reclaimed.

Ultimately, every component of the mine site will have to be reclaimed to the satisfaction of the Board, whether it's done before the plan is approved or whether it's done after the plan is approved.

THE CHAIRPERSON: Thank you, Mr. Paquin. Anything else? And then, I see Mr. Enge's got a question. Just one moment, please, though. Go ahead.

MS. LORETTA BOUWMEESTER: This is a question that, Loretta Bouwmeester, through you, Mr. Chair, --

THE CHAIRPERSON: Yes.

MS. LORETTA BOUWMEESTER: -- a question that comes out of the previous questions to mine, and that is: You're conceding that there is some -- appear to be conceding that there is some additional processing of the calcines and arsenic sludge.

Would it be your Department's position that if an extension were to be granted, that the undertaking that would be allowed during that period, be limited to those activities? Is that question clearly enough stated?

THE CHAIRPERSON: Yes, I believe it is a clear question.

Are you able to respond to it at this point in time, Mr. Paquin?

MR. EMERY PAQUIN: Thank you, Mr. Chair. Maybe -- maybe I wasn't clear enough when I -- when I started this presentation, but we do not have an objection to the extension -- to an extension being granted of the current license.

We would not expect any further changes to be made to the license, only the -- the date upon which the license expires. So we would anticipate that the activities that are -- that are current, that are taking place currently under this license, would be allowed to continue under a license, if it was to be extended.

THE CHAIRPERSON: Thank you, Mr. Paquin.

Now, I know we have kind of diverted from our sequence, but this is good, we are here to hear, and, you know, everyone should have an opportunity.

So Mr. Enge, can we get a microphone to you and would you like to pose your question? Then I am going to ask the Board for their questions of Mr. Paquin and his associates.

MR. BILL ENGE: Thank you, Mr. Chairman. My name is Bill Enge, and I'm the President of the North Slave Metis Alliance and also the President of

Yellowknife Metis Nation Local 66. I represent over a thousand Metis that live in this City.

Now, I understand Mr. Paquin's support for the extension of Miramar -- Miramar's water license is based on his understanding and confidence in a Working Group that has been established to oversee Miramar's Reclamation Plan, as well as how the water is to be treated.

Now, what I'd like to ask Mr. Paquin today is, he -- he stated that if Miramar doesn't live up to the terms of the Working Group's conditions, or Work Plan, that he believes that steps can be taken to -- to ensure that they do live up to the spirt and intent of the Work Plan and water treatment.

I'd like to know from him: Does he have some kind of a binding document that will compel Miramar to live up to the Working Plan as agreed to by this Working Group?

THE CHAIRPERSON: Emery, are you able to respond?

MR. EMERY PAQUIN: Thank you, Mr. Chair. The -- the Government of the Northwest Territories, through the Department of Municipal and Community Affairs, does have a series, I believe there are five (5) land leases currently held with the mining Company.

So, while the Department of Environment and Natural Resources does not have any binding documents, there are land leases held between the Municipal and Community Affairs as well as -- as well as the Company.

The only other binding document that I'm aware of, would be the -- the water license that is issued by the Mackenzie Valley Land and Water Board.

MR. BILL ENGE: Thank you, Mr. Chairman. Just in response to that, I appreciate the great faith that Mr. Paquin places in the good word of Miramar, but I'd be a little more convinced that the support that the Government of the Northwest Territories is providing to Miramar for the extension, would be on something a little more binding than -- than what he has today. Thank you.

THE CHAIRPERSON: Thank you, Mr. Enge. I am going to now ask the Board Members, actually I should go back to the staff and see if Lisa, Peter or Bob have any questions, points of clarification. John, you are okay as well? All right.

Perhaps I will go to the Board then, and ask if the Members have any questions, starting with George.

MR. GEORGE JOHN: None at this time.

THE CHAIRPERSON: None. Violet...? No.

Zabeht ...?

MS. ELIZABETH BISCAYE: I do have a question. In your presentation, you mention that there have been a number of issues that have remained unresolved in terms of the working group. Would you be able to give us an example of some of those unresolved issues?

I don't want to go back and rehash any debates that have been undertaken by the Working Group itself, but I'd like to get into evidence, some of the delaying factors, I'll call them, that have come up that have delayed the approval of this A&R Plan. Thank you.

MR. EMERY PAQUIN: All right. My -- my understanding at this point is that there are three -- three (3) Sections of the Plan that have been submitted by the Company, that are currently under review by the Working Group.

These Sections include how to deal with the contaminated soils that are on site, environmental monitoring, as well as -- as water management. These are -- these are going to be some of the most complex issues, and I -- and I do believe from conversations with -- with our representative on the Working Group, that there are some -- there are some issues within these three (3) Sections that are going to be difficult to resolve.

Remediation methods, for example, of the contaminated soils, ground-water monitoring, long term water management, as well as the ultimate treatment of the plant sludges, are issues that are going to be difficult to resolve under water management.

The Negus Pond? who is ultimately responsible for Remediation of -- of that portion of the Negus Pond that is not on the -- on the mine lease. That again is -- is a very difficult issue that I understand the Working Group has been wrestling with.

So, for the record, those are some of -- some examples that -- that I believe have yet to be resolved.

MR. FLOYD ADLEM: Thanks for your presentation, Emery. Floyd Adlem.

The -- it's -- I guess for understanding, your -- your assessment is that the treatment of the sludges and calcites or whatever, whatever they are, is -- is something that was contemplated by this -- by the existing license; is that correct?

MR. EMERY PAQUIN: That is correct, Mr. Chair. We -- we believe that -- that those activities, the -- the treatment of the calcines, as well as the arsenic sludges, were contemplated within the existing license.

MR. FLOYD ADLEM: Thank you. So, so in other words, it's your contention that this particular license that's presently in existence, has all of the necessary terms and conditions in it to treat the water properly and manage the water from -- from those processes; is that correct?

(BRIEF PAUSE)

MR. EMERY PAQUIN: Mr. Chair. We -- we have a lot of confidence in -- in this Water Board. We have confidence in Indian and Northern Affairs who are tasked with ensuring that the -- that the terms and conditions of the current water license are -- are fully complied with by the Company.

Yes, we do believe that the terms and conditions of -- of this license are sufficient to enable the Company to continue with -- with activities that they have been undertaking over the last -- over the last several years with respect to the calcines and -- and the arsenic sludge.

Ultimately, we, along with everybody else in this room, as well as the citizens of Yellowknife and the Northwest Territories I believe, are looking forward to finalizing the Abandonment/Restoration Plan, so that over the long term, we can ensure that -- that there aren't environmental impacts as a result of -- of the seventy -- seventy (70) years of operation of this mine.

But in -- in answer to your question, Mr. Adlem, the Company has been undertaking this work under the terms and conditions of the existing license. We see no difference, we see no change in the -- in the scope overall, of the work, and we do believe that -- that the current license, if it were extended, would provide for adequate controls.

THE CHAIRPERSON: All right. Well, thank you very much, Floyd, Board Members, everyone. I think right now we are closing in on the noon hour. Thank you very much for your presentation.

What I would like to do is recess until a quarter past one, and when we return, we will ask Mr. Enge and the North Slave Metis Alliance to proceed with their presentation to the Board.

So that gives us an hour and a half, if we are quick, I would like to get underway again at a quarter past one. So we will recess until then, and thank you all very much for your participation to this point.

--- Upon recessing

--- Upon reconvening

THE CHAIRPERSON: All right. Well, welcome back. Hopefully everyone had a pleasant lunch. And we left off, we just finished with the Government of the Northwest Territories' Presentation, and people had an opportunity to ask questions of them, seek points of clarification.

Now we have a Presentation from the North Slave Metis Alliance, Mr. Enge, please.

MR. BILL ENGE: Thank you, Mr. Chairman. For the record, my name is Bill Enge, I'm the President of the North Slave Metis Alliance, and also President of Yellowknife Metis Nation Local 66, and I represent the interests of over a thousand Metis resident in Yellowknife.

I know I said that before, but in keeping with the protocol here, I thought I'd have to restate that.

As indigenous inhabitants of this region, and in of this community, Members of the North Slave Metis Alliance and Yellowknife Metis Nation Local 66, are directly affected by many activities at Miramar Con Mine Ltd.

The North Slave Metis Alliance and Yellowknife Metis Nation Local 66 do not support the extension of a water license renewal for Miramar Con Mine Ltd., without an environmental assessment. I will tell you why we wish for an environmental assessment to be undertaken.

It's necessary, as the original license, since it's renewed, dates back to at least 1977, and is now greater than twenty-five (25) years old. Although this license was renewed in July of 2000, the North Slave Metis Alliance and Yellowknife Metis Nation Local 66 do not believe it provides adequate environmental protection for this community and this region.

A few issues have been discussed here today, and again, I am not an environmental scientist, I have brought with me my environmental scientist, who I should have introduced. This is Valerie Meeres, and she works for the North Slave Metis Alliance.

What we've -- what she has discovered and reported to this Board and reported to the Yellowknife Metis Nation Local 66, is that the effluent parameters are not addressed, the toxicity and salinity issues.

With respect to Rainbow trout and daphne magna toxicity failures, is unacceptable. There are no economically-achievable technology available for the treatment of salt water; monitoring purposes only.

If the salinity of the Miramar Con Mine Ltd.'s effluent is causing toxic ecological effects, an environmental assessment must be carried out prior to any extension of current practices. There are no parameters set out in the current water license to monitor salinity. That needs to be done.

Effluent quality requirements must be reviewed and updated. The current water license does not meet the most recent metal mining effluent regulations with regards to total suspended solids. The updated guideline is 15 milligrams per litre, whereas the Miramar Con Mine Ltd. water license is set at 20 milligrams per litre.

The North Slave Metis Alliance and the Yellowknife Metis Nation Local 66 are unclear as to whether Miramar Con Mine Ltd. is in compliance with their current license. In Part D, Number 12 of the current License, it states:

> "The Licensee shall process all arsenic sludges and calcine sludges by December 31st, 2003."

I know this was discussed earlier today, but we are still unclear about that matter.

Now, I want to say something about living in this community: My family has resided in Yellowknife since 1969, and I have lived under the cloud of these diamond mines since then.

Back in the 1970's there was an arsenic study that was done here, because many people were concerned about being poisoned by the arsenic flowing out of the Giant Mine stacks and out of the effluent at Con Mine.

I remember as a child, going down to Letha Mile (phonetic) and seeing a great big sign down there saying, Do not swim or drink this water. Water is essential to the life of any human being and any animal species on this planet, it cannot be allowed to be polluted and poison human beings or other animals, for that matter.

The environment is extremely important to the aboriginal people. My ancestors have resided in this region and in this community for over a hundred (100) years, long before the advent of these gold mines.

The land was pristine, the land was clean. We want it back that way.

I don't know who came up with the idea that Miramar Con Mine Limited was only required to bring the clean up standards to the industrial standard levels, which is not fit for human use. That's not the -- that's not the position of the Metis and aboriginal people from

what I can see. And what I know.

We want to be able to use our lands, and we want those lands back to human habitation standards. That is not the way it is today.

So, we are uncomfortable, we're uncomfortable with the way things are right now. We want an environmental assessment, so that we can see what needs to be done to bring that land back to usable use.

I heard Mr. Paquin from the Government of the Northwest Territories make a presentation just before -- before mine, and he supports the issuance of a two (2) year renewal license on the grounds that the Government of the Northwest Territories is participating in a working group that is putting together a reclamation plan and water, as far as I can tell, is one (1) of the agenda items that they're dealing with.

Well, I think that's a good positive way to deal with the problem at Con Mine, but it is not the certainty way to do it. I invite the working group that is overseeing the recommendations and suggestions of how to clean up the mine, provide those to the environmental assessment panel, so that they can be incorporated into that environmental assessment water license, that will ensure that Miramar Con Mine is required to meet those standards.

I want to see a binding agreement that will make sure that Miramar Con Mine cleans up that mine site in a good way. Now, unfortunately the North Slave Metis Alliance and Yellowknife Metis Nation Local 66, have not been participating on a regular basis on that -- in that working group, because we don't have the capacity to do it.

Last year I can tell you the North Slave Metis Alliance alone processed over four hundred (400) mining applications, whether it be water applications or land use applications, exploration applications. The North Slave Metis Alliance is heading up these kinds of inquiries to make sure that mining companies and other organizations are in compliance with the rules and regulations, and the spirit and intent of making sure this environment is protected.

We have two (2) environmental scientists at the North Slave Metis Alliance, two (2). I know the MacKenzie Valley Land and Water Board, of which you oversee that bureaucracy has seven (7). And I can tell you the lion's share of what's going on in mining, in the Northwest Territories, is in this region. Probably 90 percent of all the applications that are being looked at, whether it be water licenses or exploration licenses, is in the North Slave Region.

We have a capacity problem, and unfortunately that capacity problem equals we're not sitting on this working group, with all the partners looking at how to do a good job; we'd like to, and I'd like to see what those recommendations are. I would like to say, "Yeah, this is a good plan."

But there's nothing that I know of that compels Miramar Con Mine to live up to that plan. That's where you come in; that's where the MacKenzie Valley Land and Water Board comes in. That's placed in the license that compels them to do it, which has legislative authority to make sure that they live up to it.

So, with that, I'll end my presentation and I'm open for any questions that anybody may have. Thank you.

THE CHAIRPERSON: Thank you very much, Mr. Enge.

Perhaps what we will do is we will go again through the list of Registered Parties and the Public, and then we will allow Miramar an opportunity to ask for points of clarification, if you are prepared to respond any questions.

Let us start with the City of Yellowknife; do you have anything?

(BRIEF PAUSE)

THE CHAIRPERSON: Okay. Well thank you. Government of the Northwest Territories; any questions?

MR. EMERY PAQUIN: No.

THE CHAIRPERSON: None whatsoever. All right. We will see if any Members of the Public in general have questions. All right. Representatives from Miramar, any points of clarification, questions or comments for Mr. Enge?

MR. RON CONNELL: Just, Ron Connell from Miramar, just a couple.

Mr. Enge mentioned that chlorides were not monitored. Yes they are, under the S&P Program and the water license, they are monitored.

The -- you mentioned total suspended solids as being either twenty (20) or fifteen (15). We are required under the Federal Metal Mining Effluent Regulations to meet a standard of 15 milligrams per litre, so both of those parameters are indeed monitored, and limited in the case of total suspended solids.

THE CHAIRPERSON: Please go ahead, Mr. Enge.

MR. BILL ENGE: Yes, thank you. Thank you for the clarification and I did qualify my statement

in regard to the two (2) issues that he just raised.

I -- I informed this Board that I'm a little hazy on that, but I can tell you that our researchers, and I do have my environmental scientist here, who assisted in the assessment, and her research indicates that the updated guideline is 15 milligrams a litre, has been set now at 20 milligrams a litre. It's -- it's a --

MS. VALERIE MEERES: It's (inaudible) their -- their license is twenty (20).

MR. BILL ENGE: Okay. Thank you. I misread this statement. Thank you.

THE CHAIRPERSON: Certainly. Anything else...? All right, perhaps we will ask the Board Staff and Council. Anything for Mr. Enge?

And then once again we will go to our Board Members. Floyd...?

MR. FLOYD ADLEM: No questions.

THE CHAIRPERSON: Zabeht...?

MS. ELIZABETH BISCAYE: Nothing.

THE CHAIRPERSON: No. Violet...? Nothing? Mr. John..?

MR. GEORGE JOHN: I will just make a (inaudible). Thank you, Mr. Chair. Thank you Mr. Enge. First a clarification for this morning.

Aboriginal people should be here in full force, and I herein share your feelings to the full extent. In my long life on this good earth, I know what it's like to have pristine territory, good drinking water and good land to live on. No question; I concur there.

But in today's developmental world, it's here, it's going to come in a bigger scale, and I guess the best thing we can do is find ways to protect. But information is crucial, and I needed to say that, yes. And thank you. Thank you for your remarks.

THE CHAIRPERSON: Please go ahead.

MR. BILL ENGE: I thank you, George, for your kind words. It's not always what I get in this role. In any case, I did want to say that the Aboriginal people should be here in full force, that means here in this community we share this -- this community with the Yellowknife Dene First Nations and also a significant number of Tli Cho People.

That said, as I eluded to earlier in my presentation, there is a capacity problem that the Aboriginal groups are facing, and in that respect, what's going on today in Fort Rae, is an Environmental Monitoring Board Agency, that's undertaking a workshop to discuss the pros and cons of whether or not they will support DIAVIK Diamond Mines Incorporated's fifteen (15)

year water license.

Now this Board knows about that, because we asked for an extension in time for the collective thoughts of the Aboriginal groups of this region, to get together and decide what their views are about a water extension that's going to last for fifteen (15) years.

So, many of the experts and leaders of the Aboriginal groups are in Fort Rae today, deciding whether or not they're going to support that Application or what exactly it is their positions are.

And fortunately for me, I have my other good environmental scientist handling that file, and is in Fort Rae today, so it freed me up to come here and do a presentation, because I wanted to do so, with two (2) of my hats, knowing that I've got over a thousand members who have an interest in making sure that this water is fit to drink, that this water is good to use, that this water can be swam in, and that there is some protection here against poisoning this water, or if it is indeed being polluted, that it stops, and is cleaned up. Thank you.

THE CHAIRPERSON: And thank you again, Mr. Enge. At this point in our Agenda, we now will go to any Registered Speakers that would like to make any Presentation and I will ask the Staff if we have any identified?

(BRIEF PAUSE)

THE CHAIRPERSON: All right. And in fact you are registered, you filled out the Notice there, and we appreciate that. So then we will ask if anyone else here has anything they would wish to make by way of a Presentation to the Board for comments. Thank you very much. Yes.

Anyone else...? Public in general, this is an opportunity to come forward. We will just give people a minute there to muster up courage if they are a bit hesitant. So, anyone else...? No...? All right.

Well, with that, then people have an opportunity now to make closing remarks, and what we are going to do is we are going to go through the list again, of people that have been registered, give them an opportunity to make any closing remarks, we are going to wind up with the Applicant, and then, of course, our closing remarks will then also be followed by a Closing Prayer, and then we will adjourn our Hearing.

But with that, I'd like to ask the City of Yellowknife if they have any closing remarks they wish to make.

MS. WENDY BISARO: Yes, we do.
THE CHAIRPERSON: Thank you. Please just take a seat.

MS. WENDY BISARO: Thank you very much, Mr. Chair. The purpose of this Hearing is to receive feedback from Registered Intervenors and the public on whether Miramar should be granted its requested amendment of the term of its current water license to September 30, 2008.

The questions we have posed today and our Presentation, make it clear that it's not in the public interest that this Board grant Miramar's request. As a community Government, we say this based on our concerns for the long-term well being of our residents and the environment.

As stated previously, we are concerned that there is a potential for

adverse impacts on the environment within the City's Municipal boundaries as a result of the closure activities and other work at the mine site, both currently underway and those planned for the future.

According to Miramar's July 20th, 2005 request for a two (2) year extension, Miramar Con has, quote, "ceased production," end quote, at the mine site and is carrying out, quote, "progressive reclamation and final cleanup in preparation for closure," end quote.

There is minimal water being used at the site for mining, milling, or as portable water. There is no milling, no discharge of cyanide from the mill, no chlorination for portable water, no dewatering of the mine, no tailings being produced or deposited as waste.

As the purpose of the activities on the mine site have changed from mining and milling to closure and reclamation, the instrument used to regulate it should also be changed to reflect this reality.

It appears to us that there's a serious policy question here that, sorry, a serious policy question here that requires some action. When is the new water license required for closure and decommissioning activities?

Given the work and the activities that are proposed to take place during the term of the requested extension, we submit that Miramar Con should be required to obtain a new license altogether, to reflect the decommissioning and closure activities that are proposed, as this would result in a thorough review of that undertaking.

Conducting progressive reclamation in the absence of an approved closure plan or other approval of the Board, is arguably not permitted under the current water license, and this is what Miramar Con is requesting.

The concern is that irreversible actions will be taken at the mine site, that are not just a risk to be assumed by the operator, but may also pose significant risk to our community, the public, the environment, and other orders of Government.

As an example, the Board asked Miramar not to proceed with flooding the underground works, but Miramar allowed it to proceed anyway. There is now no way that underground water quality can be assessed for the next fifteen (15) or so years.

However, if the Board in its wisdom does choose to grant an extension for the current license, we feel it should only be until mid-2007, based on the information provided by Miramar this morning, as long as that information is verified to the satisfaction of the

Board.

Miramar would then have -- have twelve (12) months in which to complete the processing of arsenic and calcine sludges on site. Just to be clear, the City does not oppose this activity, the processing of arsenic and calcine sludges, and supports its timely and safe completion. But the term of the license should not be extended to September 30, 2008, as requested by Miramar Con.

The City also requests that the scope of any amendment clearly include only the processing of arsenic and calcine sludges, not decommissioning or closure activities as requested by Con. The City is particularly concerned that the premature removal of the autoclave and related facilities...

Sorry, we did this quickly at lunchtime, and I think we missed a word.

The City is particularly concerned that the premature removal of the autoclave and related facilities would be needed if further contaminated materials are identified. Our position is that the proposed closure activities are substantively different, and that they should be the subject of a new License Application.

Furthermore, it's our position that approval of an A&R Plan is a condition precedent to progressive reclamation taking place.

THE CHAIRPERSON: Can I just ask you to slow down a little bit, I have been reminded we do have translations going on.

MS. WENDY BISARO: Yeah, I'm sorry.

THE CHAIRPERSON: Thanks.

MS. WENDY BISARO: As such, it properly belongs under the regulatory regime provided for when either a renewal or a new license altogether is applied for.

An amendment to the license term to mid-2007, would also give Miramar Con sufficient time to submit a new water application, sorry, a new Application for a water license that addresses the activity covering the closure phase.

Thank you for your attention while we've put forward our community-based position with respect to the Amendment Request before you.

THE CHAIRPERSON: Thank you very much for those comments.

Now I will ask Mr. Paquin, if you have any closing remarks you would like to make, on behalf of the Government of the Northwest Territories?

MR. EMERY PAQUIN: Yes. Thank you, Mr.

Chair.

I believe we've had a very good -- good discussion here this morning and early this afternoon, I think both sides of this question has been -- have been well presented and I'm confident that -- that this will assist the Board in making -- in making the right decision.

If that decision is to extend the -- the current license as requested by -- by Miramar, then I believe it is incumbent, clearly incumbent upon the Company, to take very seriously the obligations that -- that are placed upon them.

These obligations are to complete the drafting of an Abandonment and Restoration Plan, and to follow through with the -- with the statements that they made this morning, with respect to completing the treatment of the calcines and the arsenic sludges within -- within the two (2) year period.

I think it would also be incumbent upon Miramar to ensure that they are prepared to submit an Application to this Board, well in advance of the expiry of the license, and that they are prepared that at that point, to go into a post-closure operation.

The Government of the Northwest Territories supports, or I should say, it does not object, to this extension, however, it is -- it is questionable if -- if the Company comes forward in two (2) years time and requests another extension, then they should not count on the same position being taken.

Thank you very much.

THE CHAIRPERSON: Thank you very much for those comments, Emery.

Mr. Enge, do you have any closing comments you'd like to provide to the Board?

MR. BILL ENGE: Thank you, Mr. Chairman.

If this Board approves the renewal of this water license, I think and I would -- would wish for this Board to place certain conditions in it, and those conditions would be the ones that the stakeholders agree on through the Working Group.

I would not like to see a water license renewed without those amendments placed in it. However, I just wish to reiterate the position of the North Slave Metis Alliance and the Yellowknife Metis Nation Local 66, and that is: We want an environmental assessment and a new water license issued, considering it's twenty-five (25) years old, there has been changes since that time, and we want this license to have legislative authority to compel Miramar to live up to the conditions of the water license that is going to be issued.

The Government of the Northwest Territories does not have anything concrete that compels Miramar to live up to the conditions as the Working Group comes up with. So, is there a compromise position? I suppose the worst case scenario for the Metis would be to see those conditions placed in a way that has legislative authority behind it.

But that's not what we want; we want a new environmental assessment with a new water license issued, so all of those issues can be dealt with properly under legislative authority. Thank you.

THE CHAIRPERSON: Thank you again. That is it for our Registered Participants. That concludes the presentations to the Board. I am sorry, yes, we are going to get to Miramar.

You have your final comments now? Please provide them to the Board and then we will move on to our closing comments from the Board.

MR. RON CONNELL: Like everybody else, we took lunch hour to compile a few closing remarks.

I think we have adequately covered off all of the identified issues within the context of our presentation. Miramar Con Mine has been processing arsenic sludges and calcine since 1993, under three (3) successive water licenses. This process has not changed, and will not change, until all of these byproducts have been processed.

The technology employed at Miramar Con Mine to treat these byproducts is globally accepted as the best available technology environmentally achievable, that's in the world, and that's what we're using at Miramar Con Mine right now; there is none better.

This is the technology that's covered under the current water license and of course, would be covered under an extension. The action plan that was submitted and approved by INAC and the MacKenzie Valley Land and Water Board earlier this year, covers this process going forward.

Further to the above, our activities are regulated by, and subject to, routine inspection by officers from DIAND or INAC, from MACA, from the Workers' Compensation Board, and from Environment Canada. In response to Mr. Enge, the penalties for failure to comply with the rules under -- Regulations under Environment Canada are extreme, and actually amount to fines of millions of dollars per day.

Whether or not there is a water license in effect, or an approved closure plan, above all, we are, Miramar Con Mine is required to obey the law; it's that simple.

Many of the issues raised today by the City of Yellowknife are related to the closure-planning process. Let me reiterate we are very near the end of the closure-planning process, we anticipate having an approved closure plan in place by the first quarter of 2006, which will then allow the other closure activities to go forward.

Miramar cannot, and will not, commence the final closure process without an approved closure plan in place.

Last but not least, failure to grant an extension to the water license will result in a substantial delay of processing the calcines and arsenic sludges that are presently on site, and we, and I'm sure the rest of you, do not want that to happen.

That's it, thank you very much for paying attention and listening and being here. We appreciate it.

THE CHAIRPERSON: And thank you for those comments. Now I think I will put John on the spot just to explain what our next steps are, in our process, and John, can you just walk us through what people can anticipate for the next few weeks?

MR. JOHN DONIHEE: Yes, John Donihee for the Board.

As the Chair indicated in his Opening Comments, there is the outstanding question of the Application of, or not, I guess, of Part V of the MVRMA, that's the part that deals with environmental assessment or would establish a requirement for preliminary screening.

The Board has allowed some additional time for those parties who want to avail themselves of it, for further submissions on the -- on that question about the exemption regulations. November 17th, I believe, was the date; once that day passes, the Board will make a decision with respect to the requirement for an environmental assessment.

If there's a screening needed, one will be done, and the Board has indicated that it will issue written Reason for Decision to explain any decision taken in that -- that regard.

After that, it, unfortunately this is one of those decision trees that sort of forks off at that point, but if the decision is that, to proceed with the licensing process, the Board will then make a decision with respect to the -- to the content and the -- of the license to the -- deal with the Amendment Request made by Miramar Con.

The end result of that will be reason --

further reason for a decision as required by the Northwest Territories Waters Act, and ultimately, either an amended license in

some form, or not, but that -- whatever decision the Board makes, because this is an amendment to a Class A Water License, requires approval by the Minister from DIAND, so that's going to take a little bit of time as well.

So those are the -- the steps, I guess, both in terms of environmental assessment and the regulatory process that the Board will have to consider over the coming weeks.

THE CHAIRPERSON: All right. Thank you very much, John. We are outlining what those next steps are going to be.

Well, before we ask Zabeht to lead us in a closing prayer, I would like to thank everyone for participating, it makes our job much, much easier. People have been extremely helpful and very clear in their presentations to the Board, and believe me, we listen. And all their participation is what makes the process work.

So, thank you all for participating and please continue to do so throughout this process and the future processes that you will know, and unlikely or not unlikely, will likely be involved in with us and our work.

So with that, I will ask Zabeht to lead us in a prayer and I will also just say, come November 11th, take a moment and remember, Lest We Forget.

So, Zabeht, can you please lead us in Prayer?

(CLOSING PRAYER)

--- Upon adjourning

Certificate of Transcript

I, the undersigned, certify that the foregoing pages are a true and faithful transcript of the contents of the record recorded by means of a sound-recording machine.

_____
Wendy Warnock, Ms.
Digi-Tran Inc

Closing Remarks

- Purpose of the Hearing

  -The purpose of this hearing is to receive feedback from registered interveners and the public on whether Miramar should be granted its requested amendment of the term of its current Water License to September 30, 2008.

  -The questions we have posed today, and our presentation, make it clear that it is not in the public interest that this Board grant Miramar Con's request. As a community government we say this based on our concerns for the long-term well-being of our residents and the environment.

- Concerns

  -As stated previously we are concerned that there is the potential for adverse impacts on the environment within the City's municipal boundaries as a result of the closure activities and other work at the mine site,

both currently under way and those planned for the future.

- Different Operation

- According to Miramar's July 20, 2005 request for a two year extension, Miramar Con has "ceased production" at the Mine Site and is carrying out "progressive reclamation and final clean-up in preparation for closure". There is minimal water being used at the site for mining, milling or as potable water. There is no milling, no discharge of cyanide from the mill, no chlorination for potable water, no dewatering of the mine, no tailings being produced or deposited as waste.

-As the purpose of the activities on the mine site have changed from mining and milling to closure and reclamation, the instrument used to regulate it should also be changed to reflect this reality.

-It appears that there is a serious policy question, when is a new water license required for closure and de-commissioning activities.

- Our Position

  -Given the work and activities that are proposed to take place during the term of the requested extension, we respectfully submit that Miramar Con should be required to obtain a new license altogether to reflect the decommissioning and closure activities that are proposed, as this would result in a thorough review of that undertaking.

Conducting progressive reclamation in the absence of an approved closure plan or other approval of the Board is arguably not permitted under the current water license and this is what Miramar Con is requesting.

The concern is that irreversible actions will be taken at the mine site that are not just a risk to be assumed by the operator but may also pose a significant risk to our community, public, the environment and other orders of government.

As an example the Board asked Miramar not to not proceed with flooding the underground works but Miramar allowed it to proceed anyway.

And there is now no way that underground water quantity can be assessed for 15 years.

-However, if the Board does choose to grant an extension for the current license, it should only be until the mid 2007,based on the information provided by Miramar this morning, as long as the information is verified to the satisfaction of the Board. Miramar would then have a full 12 months in which to complete the processing of arsenic and calcine sludges on site.

For greater clarity, the City does not oppose this activity and supports its timely and safe completion. The term of the licence should NOT be extended to September 30, 2008 as requested by Miramar Con.

The City also requests that the scope of any amendment clearly include only the processing of the arsenic and calcine sludges, not decommissioning or closure activities as requested by Miramar Con. The City is particularly concerned that the premature removal of the autoclave and

related facilities should further contaminated materials be identified.

-Our position is that the proposed closure activities are substantively different and that they should be the subject of a new licence application. Furthermore it is also our position that approval of an a/r plan is a condition precedent to progressive reclamation taking place.

-As such it properly belongs under the regulatory regime provided for when either a renewal or a new license altogether is applied for.

-An amendment to the license term to mid 2007 would also give Miramar Con sufficient time to submit a new application for a Water License that addresses the activities covering the closure phase.

Thank-you for your attention while we have put forward our community based position with respect to the amendment request at issue.

Indian and Northern Affairs Canada
www.inac.gc.ca

Affaires indiennes et du Nord Canada
www.ainc.gc.ca

November 30, 2005

Mackenzie Valley Land & Water Board
c/o Todd Burlingame, Chair
P.O. Box 2130
Yellowknife, NT
X1A 2P6

Re: Clarification of Miramar Con Mine Water Licence activities

Dear Mr. Wooley,

I am writing in order to provide clarification to the Mackenzie Valley Land and Water Board (the Board) on the current activities undertaken at Con Mine. In our view, these activities were not clearly described at the public hearing held by the Board on November 9, 2005.

Since 1993, Miramar Con Mine Ltd. (Miramar) has been identifying and excavating calcines and arsenic sludges in order to facilitate processing of these materials through the autoclave. Despite cessation of mining and milling operations in November 2003, Miramar continued to locate and excavate remaining calcines and arsenic sludges, and continued to process them through the autoclave until May 2005. At the present time, Miramar has indicated that it has now identified and excavated all remaining sludges and have quantified these materials. Miramar has indicated, through an action plan submitted to the Indian and Northern Affairs Canada (INAC) Inspector and the Board, that it intends to begin processing the remaining calcines and arsenic sludges in the summer of 2006.

INAC wishes to clarify for the Board that these activities are authorized under Part D Item 12 of Water Licence N1L2-0040 and are included in the scope of the licence. These activities are not being authorized as progressive reclamation activities, but rather are a requirement of the current Water Licence contrary to some comments made during the hearing. If you have questions, please do not hesitate to contact me at (867) 669-2647 or Ms. Paula Spencer at (867) 669-4768.

Yours sincerely,

David Livingstone
Director, Renewable Resources & Environment

cc: Mr. Scott Stringer - Miramar Con Mine Ltd.
Mr. Jason McNeill – Environment and Natural Resources
Mr. Gordon Van Tighem – City of Yellowknife
Mr. Bill Enge - North Slave Metis Alliance

Canada

Indian and Northern Affairs Canada / Affaires indiennes et du Nord Canada

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FROM - DE

Name - Nom	Position title - Titre du poste
Charlotte Henry	Environmental Scientist
Directorate - Direction	**Branch - Direction générale**
RR & E	Environment & Conservatio

Room - Pièce	Facsimile no. - N° de télécopieur	Telephone no. - N° de téléphone
	(867) 669-2701	(867) 669-2616

TO - À

Name - Nom		
Mr. Todd Burlingame		
	Facsimile no. - No de télécopieur	**Telephone no. - N° de téléphone**
	(867) 873-6610	

Dear Mr. Burlingame;

The following letter provides clarification to the Mackenzie Valley Land and Water Board on activities undertaken by Mirimar Con Mine Ltd. under Water License N1L2-0040.

If you have any questions, please contact David Livingstone at (867) 669-2647 or Paula Spencer at (867) 669-4768.

Sincerely,

Charlotte Henry

Canada

Sharon Debler

From: Lisa Hurley [lhurley@mvlwb.com]
Sent: Wednesday, November 30, 2005 9:32 AM
To: 'MVLWB Permit'
Subject: FW: Calcines Volume Survey

Calcines Pickup Nov 7, 2005.pd...

File: N1L2-0040

This is a formal version of Exhibit 1 that was submitted by Miramar Con Mine at the Public Hearing - November 9, 2005

-----Original Message-----
From: Connell, Ron [mailto:rconnell@miramaryk.com]
Sent: Friday, November 25, 2005 11:10 AM
To: LHurley@MVLWB.com
Subject: FW: Calcines Volume Survey

Lisa:

For the record, here is something more formal in terms of the estimated amount of calcines remaining to be processed at Con Mine.

Ron

From: Friesen, George
Sent: Thu 11/10/2005 10:41 AM
To: Connell, Ron
Cc: Stringer, Scott; Keating, Douglas
Subject: Calcines Volume Survey

Ron,

PDF document attached.

George

INTERNAL MEMORANDUM

Miramar Con Mine, Ltd.

To: Ron Connell

From: George Friesen

CC: Scott Stringer, Doug Keating

Date: November 10, 2005

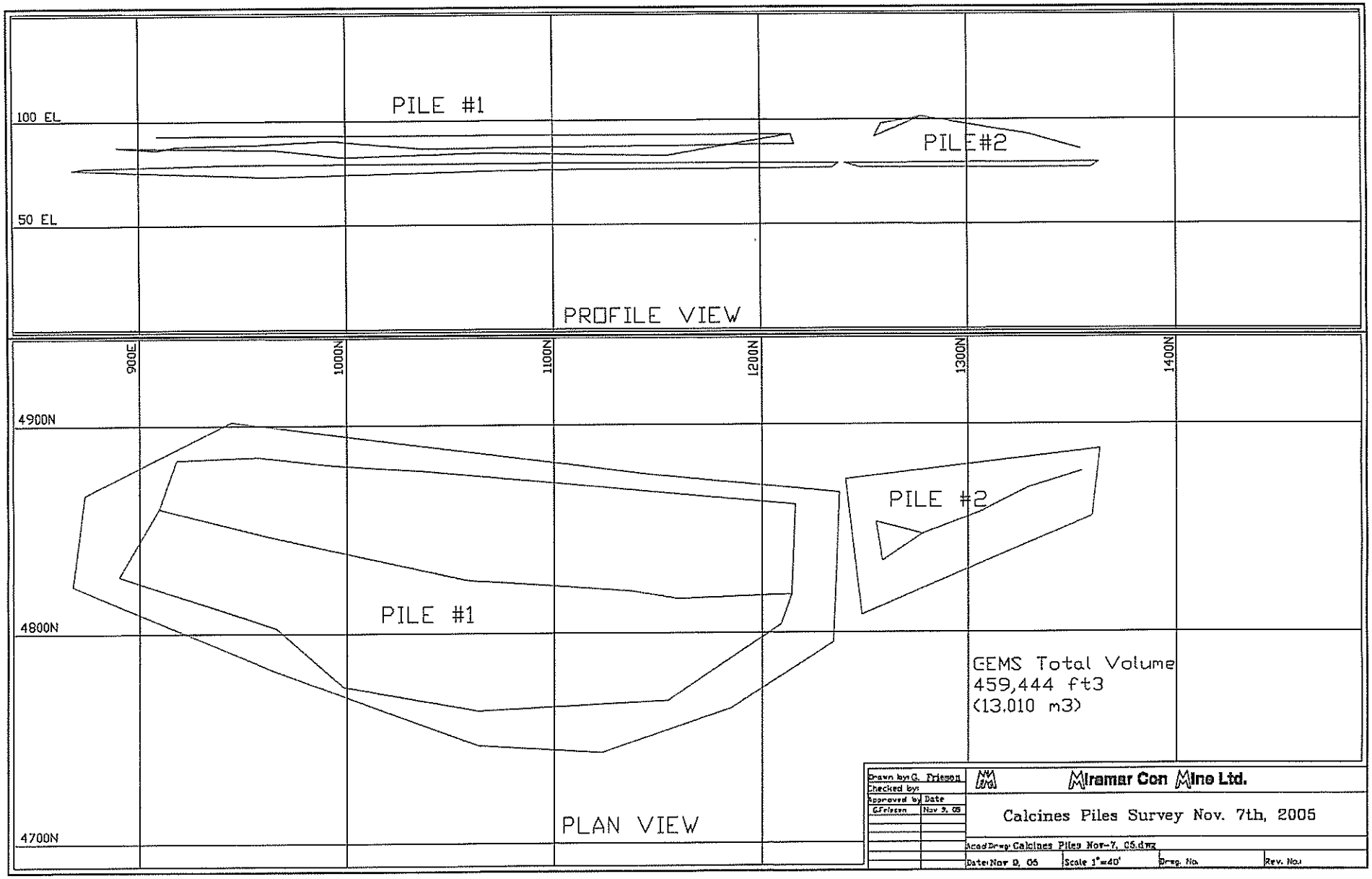
Re: Calcines Volume Survey

A total of two calcines piles were surveyed on Nov. 7th, 2005 by Mervin Mercer and Randy Fournier using a Leika total station instrument. The pickup was imported into GEMS mining software where solids were generated and volumes were calculated.

The total volume of calcines was calculated to be 459,444 ft3 (13,010 m3). Using a density of 2.1 g/cm3 this equates to 30,117 tons (27,321 tonnes).

Survey drawing is attached.

GF



Mackenzie Valley Land and Water Board
7th Floor - 4910 50th Avenue
P.O. Box 2130
YELLOWKNIFE NT X1A 2P6
Phone (867) 669-0506
FAX (867) 873-6610

FILE NUMBER: N1L2-0040

Date: November 9, 2005

Exhibit 1 – Survey Results for the volume of Calcines remaining on the Miramar Con Mine Site

Tabled by Miramar Con Mine at the Public Hearing on November 9, 2005

Exhibit 1

Connell, Ron

From: Friesen, George **Sent:** Tue 11/8/2005 2:36 PM
To: Connell, Ron
Cc: Stringer, Scott; Keating, Douglas
Subject: Calcines Volume
Attachments:

Ron,

Volume of calcines as surveyed on Nov 7th, 2005 is 459,444 ft3 (13,010 m3). Using density of 2.1 g/cm3 we get
30,117 tons (27,321 tonnes).

George

Sharon Debler

From: Lisa Hurley [lhurley@mvlwb.com]
Sent: Tuesday, November 08, 2005 9:11 AM
To: 'MVLWB Permit'
Subject: FW: Con Mine

File: N1L2-0040

NSMA participation in the Public Hearing re: Letter dated Oct 30, 2005

-----Original Message-----
From: Lisa Hurley [mailto:lhurley@mvlwb.com]
Sent: Monday, November 07, 2005 4:25 PM
To: 'valerie@nsma.net'
Subject: Con Mine

Hi,

The earliest dated Water License we have here in our Public Registry is dated March 1, 1977.

I also wanted to let you know that because the NSMA missed the October 11, 2005 deadline for interventions, they are welcome to participate in the hearing as a registered participant. When you arrive on Wednesday morning, someone will be standing at the door that you can register with, you will then be given the opportunity to present and ask questions of the applicant (Miramar), intervenors and other registered participants, as will they have the opportunity to ask you questions as well.

If you have any further questions, please do not hesitate to let me know.

See you Wednesday.

Lisa Hurley

Regulatory Officer
Mackenzie Valley Land & Water Board
Phone: 669-0506

Mackenzie Valley Land and Water Board
7th Floor - 4910 50th Avenue
P.O. Box 2130
YELLOWKNIFE NT X1A 2P6
Phone (867) 669-0506
FAX (867) 873-6610

FILE NUMBER: N1L2-0040

Date:	October 27, 2005
To:	Jennifer McKay for David Livingstone, DIAND (867) 669-2701
To:	Jason McNeill, GNWT – ENR (867) 873-4021
To:	Loretta Bouwmeester for Mayor Gordon Van Tighem, City of Yellowknife (867) 920-5649
To:	Ron Connell, Miramar Con Mine Ltd. (867) 920-4238
From:	Janna for Lisa Hurley

Number of pages including cover 1

Remarks:

Miramar Con Mine Ltd. Public Hearing

The Public Hearing will be held Wednesday, November 9, 2005 at 9 am at the Northern United Place.

Presentations (e.g. PowerPoint), if they are being used are due to the MVLWB office by Wednesday, November 2, 2005.

Please let me know if you have any questions.

Lisa Hurley

- ☐ Enclosures
- ☐ As requested
- ☒ For your information
- ☐ For your comment
- ☐ For your approval

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FAX (867) 873-6610

FILE NUMBER: N1L2-0040

Date: October 27, 2005
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Number of pages including cover 1

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Please let me know if you have any questions.

Lisa Hurley

- ☐ Enclosures
- ☐ As requested
- ☒ For your information
- ☐ For your comment
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Number of pages : 001

Start time : 27-Oct 10:35am

End time : 27-Oct 10:40am

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Fax numbers

☎6692701
☎8734021
☎9205649
☎9204238

Unsuccessful nbrs.

Pages sent

This document: 2001 SCC 44 (CanLII)
Citation: *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, 2001 SCC 44 (CanLII)
Parallel citations: (2001), 54 O.R. (3d) 214; (2001), 201 D.L.R. (4th) 193; (2001), 10 C.C.E.L. (3d) 1; (2001), 34 Admin. L.R. (3d) 163; (2001), 149 O.A.C. 1
Date: *2001-07-12*
Docket: *27118*

Mary Danyluk *Appellant*

v.

Ainsworth Technologies Inc., Ainsworth Electric Co. Limited, F. Jack Purchase, Paul S. Gooderham, Jack A. Taylor, Ross A. Pool, Donald W. Roberts, Timothy I. Pryor, Clifford J. Ainsworth, John F. Ainsworth, Kenneth D. Ainsworth, Melville O'Donohue, Donald J. Hawthorne, William I. Welsh and Joseph McBride Watson *Respondents*

Indexed as: Danyluk *v.* Ainsworth Technologies Inc.

Neutral citation: 2001 SCC 44. File No.: 27118.

2000: October 31; 2001: July 12.

Present: McLachlin C.J. and Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Administrative law -- Issue estoppel -- Employee filing complaint against employer under Employment Standards Act seeking unpaid wages and commissions -- Employee subsequently commencing court action against employer for wrongful dismissal and unpaid wages and commissions -- Employment standards officer dismissing employee's complaint -- Employer arguing that employee's claim for unpaid wages and commissions before court barred by issue estoppel -- Whether officer's failure to observe procedural fairness in deciding employee's complaint preventing application of issue estoppel -- Whether preconditions to application of issue estoppel satisfied -- If

so, whether this Court should exercise its discretion and refuse to apply issue estoppel.

In 1993, an employee became involved in a dispute with her employer over unpaid commissions. No agreement was reached, and the employee filed a complaint under the *Employment Standards Act* ("ESA") seeking unpaid wages, including commissions. The employer rejected the claim for commissions and eventually took the position that the employee had resigned. An employment standards officer spoke with the employee by telephone and met with her for about an hour. Before the decision was made, the employee commenced a court action claiming damages for wrongful dismissal and the unpaid wages and commissions. The ESA proceedings continued, but the employee was not made aware of the employer's submissions in the ESA claim or given an opportunity to respond to them. The ESA officer rejected the employee's claim and ordered the employer to pay her $2,354.55, representing two weeks' pay in lieu of notice. She advised the employer of her decision and, 10 days later, notified the employee. Although she had no appeal as of right, the employee was entitled to apply under the ESA for a statutory review of this decision. She elected not to do so and carried on with her wrongful dismissal action. The employer moved to strike the part of the statement of claim that overlapped the ESA proceeding. The motions judge considered the ESA decision to be final and concluded that the claim for unpaid wages and commissions was barred by issue estoppel. The Court of Appeal affirmed the decision.

Held: The appeal should be allowed.

Although, in general, issue estoppel is available to preclude an unsuccessful party from relitigating in the courts what has already been litigated before an administrative tribunal, this is not a proper case for its application. Finality is a compelling consideration and judicial decisions should generally be conclusive of the issues decided unless and until reversed on appeal. However, estoppel is a public policy doctrine designed to advance the interests of justice. Where, as here, its application bars the courthouse door against a claim because of an administrative decision made in a manifestly improper and unfair manner, a re-examination of some basic principles is warranted.

The preconditions to the operation of issue estoppel are threefold: (1) that the same question has been decided in earlier proceedings; (2) that the earlier judicial decision was final; and (3) that the parties to that decision or their privies are the same in both the proceedings. If the moving party successfully establishes these preconditions, a court must still determine whether, as a matter of discretion, issue estoppel ought to be applied.

The preconditions require the prior proceeding to be judicial. Here, the ESA decision was judicial. First, the administrative authority issuing the decision is capable of receiving and exercising adjudicative authority. Second, as a matter of

law, the decision was required to be made in a judicial manner. While the ESA officers utilize procedures more flexible than those that apply in the courts, their adjudicative decisions must be based on findings of fact and the application of an objective legal standard to those facts.

The appellant denies the applicability of issue estoppel because, as found by the Court of Appeal, the ESA decision was taken without proper notice to the appellant and she was not given an opportunity to meet the employer's case. It is clear that an administrative decision which is made without jurisdiction from the outset cannot form the basis of an estoppel. Where an administrative officer or tribunal initially possessed the jurisdiction to make a decision in a judicial manner but erred in the exercise of that jurisdiction, the resulting decision is nevertheless capable of forming the basis of an estoppel. Alleged errors in carrying out the mandate are matters to be considered by the court in the exercise of its discretion. This result makes the principle governing estoppel consistent with the law governing judicial review in *Harelkin* and collateral attack in *Maybrun*.

In this case, the pre-conditions for issue estoppel have been met: the same issue is raised in both proceedings, the decision of the ESA officer was final for the purposes of the Act since neither the employer nor the employee took advantage of the internal review procedure, and the parties are identical. The Court must therefore decide whether to refuse to apply estoppel as a matter of discretion. Here this Court is entitled to intervene because the lower courts committed an error of principle in failing to address the issue of the discretion. The list of factors to be considered with respect to its exercise is open. The objective is to ensure that the operation of issue estoppel promotes the orderly administration of justice, but not at the cost of real injustice in the particular case. The factors relevant to this case include the wording of the statute from which the power to issue the administrative order derives, the purpose of the legislation, the availability of an appeal, the safeguards available to the parties in the administrative procedure, the expertise of the administrative decision maker, the circumstances giving rise to the prior administrative proceeding and, the most important factor, the potential injustice. On considering the cumulative effect of the foregoing factors, the Court in its discretion should refuse to apply issue estoppel in this case. The stubborn fact remains that the employee's claim to commissions worth $300,000 has simply never been properly considered and adjudicated.

Cases Cited

Considered: *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248; **disapproved in part:** *Rasanen v. Rosemount Instruments Ltd.* 1994 CanLII 608 (ON C.A.), (1994), 17 O.R. (3d) 267; **referred to:** *Re Downing and Graydon* (1978), 21 O.R. (2d) 292; *Farwell v. The Queen* (1894), 22 S.C.R. 553; *Wilson v. The Queen*, 1983 CanLII 35 (S.C.C.), [1983] 2 S.C.R. 594; *R. v. Litchfield*, 1993 CanLII 44 (S.C.C.), [1993] 4 S.C.R. 333; *R. v. Sarson*, 1996 CanLII 200 (S.C.C.),

[1996] 2 S.C.R. 223; *Robinson v. McQuaid* (1854), 1 P.E.I.R. 103; *Bell v. Miller* (1862), 9 Gr. 385; *Raison v. Fenwick* (1981), 120 D.L.R. (3d) 622; *Wong v. Shell Canada Ltd.* reflex, (1995), 15 C.C.E.L. (2d) 182; *Machin v. Tomlinson* 2000 CanLII 16945 (ON C.A.), (2000), 194 D.L.R. (4th) 326; *Hamelin v. Davis* reflex, (1996), 18 B.C.L.R. (3d) 112; *Thrasyvoulou v. Environment Secretary*, [1990] 2 A.C. 273; *R. v. Consolidated Maybrun Mines Ltd.*, 1998 CanLII 820 (S.C.C.), [1998] 1 S.C.R. 706; *McIntosh v. Parent*, [1924] 4 D.L.R. 420; *British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc.* 1998 CanLII 6467 (BC C.A.), (1998), 50 B.C.L.R. (3d) 1; *Schweneke v. Ontario* 2000 CanLII 5655 (ON C.A.), (2000), 47 O.R. (3d) 97; *Braithwaite v. Nova Scotia Public Service Long Term Disability Plan Trust Fund* reflex, (1999), 176 N.S.R. (2d) 173; *Guay v. Lafleur*, [1965] S.C.R. 12; *Thoday v. Thoday*, [1964] P. 181; *Machado v. Pratt & Whitney Canada Inc.* reflex, (1995), 12 C.C.E.L. (2d) 132; *Randhawa v. Everest & Jennings Canadian Ltd.* reflex, (1996), 22 C.C.E.L. (2d) 19; *Heynen v. Frito-Lay Canada Ltd.* reflex, (1997), 32 C.C.E.L. (2d) 183; *Perez v. GE Capital Technology Management Services Canada Inc.* reflex, (1999), 47 C.C.E.L. (2d) 145; *Munyal v. Sears Canada Inc.* reflex, (1997), 29 C.C.E.L. (2d) 58; *Alderman v. North Shore Studio Management Ltd.*, 1997 CanLII 2053 (BC S.C.), [1997] 5 W.W.R. 535; *R. v. Nat Bell Liquors Ltd.*, [1922] 2 A.C. 128; *Harelkin v. University of Regina*, 1979 CanLII 18 (S.C.C.), [1979] 2 S.C.R. 561; *Poucher v. Wilkins* (1915), 33 O.L.R. 125; *Minott v. O'Shanter Development Co.* 1999 CanLII 3686 (ON C.A.), (1999), 42 O.R. (3d) 321; *Saskatoon Credit Union Ltd. v. Central Park Ent. Ltd.* reflex, (1988), 22 B.C.L.R. (2d) 89; *General Motors of Canada Ltd. v. Naken*, 1983 CanLII 19 (S.C.C.), [1983] 1 S.C.R. 72; *Arnold v. National Westminster Bank plc*, [1991] 3 All E.R. 41; *Susan Shoe Industries Ltd. v. Ricciardi* 1994 CanLII 1313 (ON C.A.), (1994), 18 O.R. (3d) 660; *Iron v. Saskatchewan (Minister of the Environment & Public Safety)*, reflex, [1993] 6 W.W.R. 1.

Statutes and Regulations Cited

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 23(1).

Employment Standards Act, R.S.O. 1990, c. E.14, ss. 1 "wages", 2(2), 6, 65(1)(a), (b), (c) [rep. & sub. 1991, c. 16 (Supp.), s. 9(1)], (7) [ad. *idem*, s. 9(2)] 67(1) [am. *idem*, s. 10(1)], (2) [rep. & sub. *idem*, s. 10(2)], (3) [ad. *idem*], (5) [*idem*], (7) [*idem*], 68(1) [am. *idem*, s. 11(1); am. 1991, c. 5, s. 16; am. 1993, c. 27, sch.], (3) [rep. & sub. 1991, c. 16 (Supp.), s. 11(2)], (7).

Employment Standards Improvement Act, 1996, S.O. 1996, c. 23, s. 19(1).

O. Reg. 626/00, s. 1(1).

Authors Cited

American Law Institute. *Restatement of the Law, Second: Judgments 2d*, vol. 2. St. Paul, Minn.: American Law Institute Publishers, 1982.

Brown, Donald J. M., and John M. Evans. *Judicial Review of Administrative Action in Canada*, vol. 2. Toronto: Canvasback, 1998 (loose-leaf updated 2001, release 2).

Handley, K. R. "Res Judicata: General Principles and Recent Developments" (1999), 18 *Aust. Bar Rev.* 214.

Holmested, George Smith, and Garry D. Watson. *Ontario Civil Procedure*, vol. 3 Supp. Toronto: Carswell, 1984 (loose-leaf updated 2000, release 3).

Lange, Donald J. *The Doctrine of Res Judicata in Canada*. Markham, Ont.: Butterworths, 2000.

Sopinka, John, Sidney N. Lederman, and Alan W. Bryant. *The Law of Evidence in Canada*, 2nd ed. Toronto: Butterworths, 1999.

Spencer Bower, George, and Sir Alexander Kingcome Turner. *The Doctrine of Res Judicata*, 3rd ed. by K. R. Handley. London, U.K.: Butterworths, 1996.

Watson, Garry D. "Duplicative Litigation: Issue Estoppel, Abuse of Process and the Death of Mutuality" (1990), 69 *Can. Bar Rev.* 623.

APPEAL from a judgment of the Ontario Court of Appeal 1998 CanLII 5431 (ON C.A.), (1998), 42 O.R. (3d) 235, 167 D.L.R. (4th) 385, 116 O.A.C. 225, 12 Admin. L.R. (3d) 1, 41 C.C.E.L. (2d) 19, 27 C.P.C. (4th) 91, [1998] O.J. No. 5047 (QL), dismissing the appellant's appeal from a decision of the Ontario Court (General Division) rendered on June 10, 1996. Appeal allowed.

Howard A. Levitt and *J. Michael Mulroy*, for the appellant.

John E. Brooks and *Rita M. Samson*, for the respondents.

The judgment of the Court was delivered by

1BINNIE J. -- The appellant claims that she was fired from her position as an account executive with the respondent Ainsworth Technologies Inc. on October 12, 1993. She says that at the time of her dismissal she was owed by her employer some $300,000 in unpaid commissions. The courts in Ontario have held that she is "estopped" from having her day in court on this issue because of an earlier failed attempt to claim the same unpaid monies under the *Employment Standards Act*, R.S.O. 1990, c. E.14 ("ESA" or "Act"). An employment standards officer, adopting a procedure which the Ontario Court of Appeal held to be improper and unfair, denied the claim. I agree that in general issue estoppel is

available to preclude an unsuccessful party from relitigating in the courts what has already been unsuccessfully litigated before an administrative tribunal, but in my view this was not a proper case for its application. A judicial doctrine developed to serve the ends of justice should not be applied mechanically to work an injustice. I would allow the appeal.

I. Facts

2 In the fall of 1993, the appellant became involved in a dispute with her employer, the respondent Ainsworth Technologies Inc., over unpaid commissions. The appellant met with her superiors and sent various letters to them outlining her position. These letters were generally copied to her lawyer, Mr. Howard A. Levitt. Her principal complaint concerned an alleged entitlement to commissions of about $200,000 in respect of a project known as the CIBC Lan project, plus other commissions which brought the total to about $300,000.

3 The appellant rejected a proposed settlement from the employer. On October 4, 1993, she filed a complaint under the ESA seeking unpaid wages, including commissions. It is not clear on the record whether she had legal advice on this aspect of the matter. On October 5, the employer wrote to the appellant rejecting her claim for commissions and eventually took the position that she had resigned and physically escorted her off the premises.

4 An employment standards officer, Ms. Caroline Burke, was assigned to investigate the appellant's complaint. She spoke with the appellant by telephone and on or about January 30, 1994 met with her for about an hour. The appellant gave Ms. Burke various documents including her correspondence with the employer. They had no further meetings.

5 On March 21, 1994, more than six months after filing her claim under the Act, but as yet without an ESA decision, the appellant, through Mr. Levitt, commenced a court action in which she claimed damages for wrongful dismissal. She also claimed the unpaid wages and commissions that were already the subject-matter of her ESA claim.

6 On June 1, 1994, solicitors for the employer wrote to Ms. Burke responding to the appellant's claim. The employer's letter included a number of documents to substantiate its position. None of this was copied to the appellant. Nor did Ms. Burke provide the appellant with information about the employer's position; nor did she give the appellant the opportunity to respond to whatever the appellant may have assumed to be the position the employer was likely to take. The appellant, in short, was left out of the loop.

7 On September 23, 1994, the ESA officer advised the respondent employer (but not the appellant) that she had rejected the appellant's claim for unpaid commissions. At the same time she ordered the employer to pay the appellant

$2,354.55, representing two weeks' pay in lieu of notice. Ten days later, by letter dated October 3, 1994, Ms. Burke for the first time advised the appellant of the order made against the employer for two weeks' termination pay and the rejection of her claim for the commissions. The letter stated in part: "[w]ith respect to your claim for unpaid wages, the investigation revealed there is no entitlement to $300,000.00 commission as claimed by you". The letter went on to explain that the appellant could apply to the Director of Employment Standards for a review of this decision. Ms. Burke repeated this advice in a subsequent telephone conversation with the appellant. The appellant did not apply to the Director for a review of Ms. Burke's decision; instead, she decided to carry on with her wrongful dismissal action in the civil courts.

8 The respondents contended that the claim for unpaid wages and commissions was barred by issue estoppel. They brought a motion in the appellant's civil action to strike the relevant paragraphs from the statement of claim. On June 10, 1996, McCombs J. of the Ontario Court (General Division) granted the respondents' motion. Only her claim for damages for wrongful dismissal was allowed to proceed. On December 2, 1998, the appellant's appeal was dismissed by the Court of Appeal for Ontario.

II. Judgments

A. *Ontario Court (General Division)* (June 10, 1996)

9 The issue before McCombs J. was whether the doctrine of issue estoppel applied in the present case. Following *Rasanen v. Rosemount Instruments Ltd.* 1994 CanLII 608 (ON C.A.), (1994), 17 O.R. (3d) 267 (C.A.), he concluded that issue estoppel could apply to issues previously determined by an administrative officer or tribunal. In his view, the sole issue to be determined was whether the ESA officer's decision was a final determination. The motions judge noted that the appellant did not seek to appeal or review the ESA officer's decision under s. 67(2) of the Act, as she was entitled to do if she wished to contest that decision. He considered the ESA decision to be final. The criteria for the application of issue estoppel were therefore met. The paragraphs relating to the appellant's claim for unpaid wages and commissions were struck from her statement of claim.

B. *Court of Appeal for Ontario* 1998 CanLII 5431 (ON C.A.), (1998), 42 O.R. (3d) 235

10 After reviewing the facts of the case, Rosenberg J.A. for the court identified, at pp. 239-40, the issues raised by the appellant's appeal:

This case concerns the second requirement of issue estoppel, that the decision which is said to create the estoppel be a final judicial decision. The appellant submits that the decision of an employment standards officer is neither

judicial nor final. She also submits that, in any event, the process followed by Ms. Burke in this particular case was unfair and therefore her decision should not create an estoppel. Specifically, the appellant argues she was not treated fairly as she was not provided with a copy of the submissions made by the employer and thus not given an opportunity to respond to those submissions.

11 In rejecting these submissions, Rosenberg J.A. grouped them under three headings: whether the ESA officer's decision was final; whether the ESA officer's decision was judicial; and the effect of procedural unfairness on the application of the doctrine of issue estoppel.

12 In his view, the decision of the officer in the present case was final because neither party exercised the right of internal appeal under s. 67(2) of the Act. Moreover, while not all administrative decisions that finally determine the rights of parties will be "judicial" for purposes of issue estoppel, Rosenberg J.A. found that the statutory procedure set out in the Act satisfied the requirements. He considered *Re Downing and Graydon* (1978), 21 O.R. (2d) 292 (C.A.), to be "determinative of this issue" (p. 249).

13 Lastly, Rosenberg J.A. addressed the issue of whether failure by the ESA officer to observe procedural fairness affected the application of the doctrine of issue estoppel in this case. He agreed that the ESA officer had in fact failed to observe procedural fairness in deciding upon the appellant's complaint. Nevertheless, this failure did not prevent the operation of issue estoppel (at p. 252):

> The officer was required to give the appellant access to, and an opportunity to refute, any information gathered by the officer in the course of her investigation that was prejudicial to the appellant's claim. At a minimum, the appellant was entitled to a copy of the June 1, 1994 letter and a summary of any other information gathered in the course of the investigation that was prejudicial to her claim. She was also entitled to a fair opportunity to consider and reply to that information. The appellant was denied the opportunity to know the case against her and have an opportunity to meet it: Ms. Burke failed to act judicially. In this particular case, this failure does not, however, affect the operation of issue estoppel.

14 In Rosenberg J.A.'s view, although ESA officers are obliged to act judicially, failure to do so in a particular case, at least if there is a possibility of appeal, will not preclude the operation of issue estoppel. This conclusion is based on the policy considerations underlying two rules of administrative law (at p. 252):

> These two rules are: (1) that the discretionary remedies of judicial review will be refused where an adequate alternative remedy exists; and (2) the rule against collateral attack. These rules, in effect, require that the parties pursue their remedies through the administrative process established by the legislature.

Where an appeal route is available the parties will not be permitted to ignore it in favour of the court process.

15 Rosenberg J.A. noted that if the appellant had applied, under s. 67(3) of the Act for a review of the ESA officer's decision, the adjudicator conducting such a review would have been required to hold a hearing. This supported his view that the review process provided by the Act is an adequate alternative remedy. Rosenberg J.A. concluded, at p. 256:

In summary, Ms. Burke did not accord this appellant natural justice. The appellant's recourse was to seek review of Ms. Burke's decision. She failed to do so. That decision is binding upon her and her employer.

16 The court thus applied the doctrine of issue estoppel and dismissed the appellant's appeal.

III. Relevant Statutory Provisions

17Employment Standards Act, R.S.O. 1990, c. E.14

1. In this Act,

. . .

"wages" means any monetary remuneration payable by an employer to an employee under the terms of a contract of employment, oral or written, express or implied, any payment to be made by an employer to an employee under this Act and any allowances for room or board as prescribed in the regulations or under an agreement or arrangement therefor but does not include,

(a)tips and other gratuities,

(b)any sums paid as gifts or bonuses that are dependent on the discretion of the employer and are not related to hours, production or efficiency,

(c)travelling allowances or expenses,

(d)contributions made by an employer to a fund, plan or arrangement to which Part X of this Act applies; ("salaire")

. . .

6. -- (1) No civil remedy of an employee against his or her employer is suspended or affected by this Act.

(2) Where an employee initiates a civil proceeding against his or her employer under this Act, notice of the proceeding shall be served on the Director in the prescribed form on the same date the civil proceeding is set down for trial.

65. -- (1) Where an employment standards officer finds that an employee is entitled to any wages from an employer, the officer may,

(a)arrange with the employer that the employer pay directly to the employee the wages to which the employee is entitled;

(b)receive from the employer on behalf of the employee any wages to be paid to the employee as the result of a compromise or settlement; or

(c)issue an order in writing to the employer to pay forthwith to the Director in trust any wages to which an employee is entitled and in addition such order shall provide for payment, by the employer to the Director, of administration costs in the amount of 10 per cent of the wages or $100, whichever is the greater.

. . .

(7) If an employer fails to apply under section 68 for a review of an order issued by an employment standards officer, the order becomes final and binding against the employer even though a review hearing is held to determine another person's liability under this Act.

. . .

67. -- (1) Where, following a complaint in writing by an employee, an employment standards officer finds that an employer has paid the wages to which an employee is entitled or has found that the employee has no other entitlements or that there are no actions which the employer is to do or is to refrain from doing in order to be in compliance with this Act, the officer may refuse to issue an order to an employer and upon refusing to do so shall advise the employee of the refusal by prepaid letter addressed to the employee at his or her last known address.

(2) An employee who considers himself or herself aggrieved by the refusal to issue an order to an employer or by the issuance of an order that in his or her view does not include all of the wages or other entitlements to which he or she is entitled may apply to the Director in writing within fifteen days of the date of the mailing of the letter mentioned in subsection (1) or the date of the issue of the order or such longer period as the Director may for special reasons allow for a review of the refusal or of the amount of the order.

(3) Upon receipt of an application for review, the Director may appoint an adjudicator who shall hold a hearing.

. . .

(5) The adjudicator who is conducting the hearing may with necessary modifications exercise the powers conferred on an employment standards officer under this Act and may make an order with respect to the refusal or an order to amend, rescind or affirm the order of the employment standards officer.

. . .

(7) The order of the adjudicator is not subject to a review under section 68 and is final and binding on the parties.

68. -- (1) An employer who considers themself aggrieved by an order made under section 45, 48, 51, 56.2, 58.22 or 65, upon paying the wages ordered to be paid and the penalty thereon, if any, may, within a period of fifteen days after the date of delivery or service of the order, or such longer period as the Director may for special reasons allow and provided that the wages have not been paid out under subsection 72 (2), apply for a review of the order by way of a hearing.

. . .

(3) The Director shall select a referee from the panel of referees to hear the review.

. . .

(7) A decision of the referee under this section is final and binding upon the parties thereto and such other parties as the referee may specify.

IV. Analysis

18 The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry. The appellant chose the ESA as her forum. She lost. An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided.

19 Finality is thus a compelling consideration and judicial decisions should generally be conclusive of the issues decided unless and until reversed on appeal. However, estoppel is a doctrine of public policy that is designed to advance the interests of justice. Where as here, its application bars the courthouse door against the appellant's $300,000 claim because of an

administrative decision taken in a manner which was manifestly improper and unfair (as found by the Court of Appeal itself), a re-examination of some basic principles is warranted.

20 The law has developed a number of techniques to prevent abuse of the decision-making process. One of the oldest is the doctrine estoppel *per rem judicatem* with its roots in Roman law, the idea that a dispute once judged with finality is not subject to relitigation: *Farwell v. The Queen* (1894), 22 S.C.R. 553, at p. 558; *Angle v. Minister of National Revenue,* [1975] 2 S.C.R. 248, at pp. 267-68. The bar extends both to the cause of action thus adjudicated (variously referred to as claim or cause of action or action estoppel), as well as precluding relitigation of the constituent issues or material facts necessarily embraced therein (usually called issue estoppel): G. S. Holmested and G. D. Watson, *Ontario Civil Procedure* (loose-leaf), vol. 3 Supp., at 21 § 17 *et seq.* Another aspect of the judicial policy favouring finality is the rule against collateral attack, i.e., that a judicial order pronounced by a court of competent jurisdiction should not be brought into question in subsequent proceedings except those provided by law for the express purpose of attacking it: *Wilson v. The Queen,* 1983 CanLII 35 (S.C.C.), [1983] 2 S.C.R. 594; *R. v. Litchfield*, 1993 CanLII 44 (S.C.C.), [1993] 4 S.C.R. 333; *R. v. Sarson,* 1996 CanLII 200 (S.C.C.), [1996] 2 S.C.R. 223.

21 These rules were initially developed in the context of prior court proceedings. They have since been extended, with some necessary modifications, to decisions classified as being of a judicial or quasi-judicial nature pronounced by administrative officers and tribunals. In that context the more specific objective is to balance fairness to the parties with the protection of the administrative decision-making process, whose integrity would be undermined by too readily permitting collateral attack or relitigation of issues once decided.

22 The extension of the doctrine of issue estoppel in Canada to administrative agencies is traced back to cases in the mid-1800s by D. J. Lange in *The Doctrine of Res Judicata in Canada* (2000), at p. 94 *et seq.,* including *Robinson v. McQuaid* (1854), 1 P.E.I.R. 103 (S.C.), at pp. 104-5, and *Bell v. Miller* (1862), 9 Gr. 385 (U.C. Ch.), at p. 386. The modern cases at the appellate level include *Raison v. Fenwick* (1981), 120 D.L.R. (3d) 622 (B.C.C.A.); *Rasanen, supra*; *Wong v. Shell Canada Ltd.* reflex, (1995), 15 C.C.E.L. (2d) 182 (Alta. C.A.); *Machin v. Tomlinson* 2000 CanLII 16945 (ON C.A.), (2000), 194 D.L.R. (4th) 326 (Ont. C.A.); and *Hamelin v. Davis* reflex, (1996), 18 B.C.L.R. (3d) 112 (C.A.). See also *Thrasyvoulou v. Environment Secretary,* [1990] 2 A.C. 273 (H.L.). Modifications were necessary because of the "major differences that can exist between [administrative orders and court orders] in relation, *inter alia*, to their legal nature and the position within the state structure of the institutions that issue them": *R. v. Consolidated Maybrun Mines Ltd.,* 1998 CanLII 820 (S.C.C.), [1998] 1 S.C.R. 706, at para. 4. There is generally no dispute that court orders are judicial orders; the same cannot be said of the myriad of orders that are issued across the range of administrative tribunals.

23 In this appeal the parties have not argued "cause of action" estoppel, apparently taking the view that the statutory framework of the ESA claim sufficiently distinguishes it from the common law framework of the court case. I therefore say no more about it. They have however, joined issue on the application of issue estoppel and the relevance of the rule against collateral attack.

24 Issue estoppel was more particularly defined by Middleton J.A. of the Ontario Court of Appeal in *McIntosh v. Parent,* [1924] 4 D.L.R. 420, at p. 422:

When a question is litigated, the judgment of the Court is a final determination as between the parties and their privies. Any right, question, or fact distinctly put in issue and directly determined by a Court of competent jurisdiction as a ground of recovery, or as an answer to a claim set up, cannot be re-tried in a subsequent suit between the same parties or their privies, though for a different cause of action. The right, question, or fact, once determined, must, as between them, be taken to be conclusively established so long as the judgment remains. [Emphasis added.]

This statement was adopted by Laskin J. (later C.J.), dissenting in *Angle, supra*, at pp. 267-68. This description of the issues subject to estoppel ("[a]ny right, question or fact distinctly put in issue and directly determined") is more stringent than the formulation in some of the older cases for cause of action estoppel (e.g., "all matters which were, or might properly have been, brought into litigation", *Farwell, supra*, at p. 558). Dickson J. (later C.J.), speaking for the majority in *Angle, supra*, at p. 255, subscribed to the more stringent definition for the purpose of issue estoppel. "It will not suffice" he said, "if the question arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument from the judgment." The question out of which the estoppel is said to arise must have been "fundamental to the decision arrived at" in the earlier proceeding. In other words, as discussed below, the estoppel extends to the material facts and the conclusions of law or of mixed fact and law ("the questions") that were necessarily (even if not explicitly) determined in the earlier proceedings.

25 The preconditions to the operation of issue estoppel were set out by Dickson J. in *Angle, supra*, at p. 254:

(1)that the same question has been decided;
(2)that the judicial decision which is said to create the estoppel was final; and,
(3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

26 The appellant's argument is that even though the ESA officer was required to make a decision in a judicial manner, she failed to do so. Although she had jurisdiction under the ESA to deal with the claim, the ESA officer lost jurisdiction

when she failed to disclose to the appellant the case the appellant had to meet and to give the appellant the opportunity to be heard in answer to the case put against her. The ESA officer therefore never made a "judicial decision" as required. The appellant also says that her own failure to exercise her right to seek internal administrative review of the decision should not be given the conclusive effect adopted by the Ontario Court of Appeal. Even if the conditions precedent to issue estoppel were present, she says, the court had a discretion to relieve against the harsh effects of estoppel *per rem judicatem* in the circumstances of this case, and erred in failing to do so.

A. *The Statutory Scheme*

1. The Employment Standards Officer

27 The ESA applies to "every contract of employment, oral or written, express or implied" in Ontario (s. 2(2)) subject to certain exceptions under the regulations, and establishes a number of minimum employment standards for the protection of employees. These include hours of work, minimum wages, overtime pay, benefit plans, public holidays and vacation with pay. More specifically, the Act provides a summary procedure under which aggrieved employees can seek redress with respect to an employer's alleged failure to comply with these standards. The objective is to make redress available, where it is appropriate at all, expeditiously and cheaply. In the first instance, the dispute is referred to an employment standards officer. ESA officers are public servants in the Ministry of Labour. They are generally not legally trained, but have some experience in labour relations. The statute does not set out any particular procedure that must be followed in disposing of claims. ESA officers are given wide powers to enter premises, inspect and remove documents and make other relevant inquiries. If liability is found, ESA officers have broad powers of enforcement (s. 65).

28 On receipt of an employee demand, generally speaking, the ESA officer contacts the employer to ascertain whether in fact wages are unpaid and if so for what reason. Although in this case there was a one-hour meeting between the ESA officer and the appellant, there is no requirement for such a face-to-face meeting, and clearly there is no contemplation of any sort of oral hearing in which both parties are present. It is a rough-and-ready procedure that is wholly inappropriate, one might think, to the definitive resolution of a contractual claim of some legal and factual complexity.

29 There are many advantages to the employee in such a forum. The services of the ESA officer are supplied free of charge. Legal representation is unnecessary. The process moves more rapidly than could realistically be expected in the courts. There are corresponding disadvantages. The ESA officer is likely not to have legal training and has neither the time nor the resources to deal with a contract claim in a manner comparable to the courtroom setting. At the time of these proceedings a double standard was applied to an appeal (or, as

it is called, a "review"). The employer was entitled as of right to a review (s. 68) but, as discussed below, the employee could ask for one but the request could be refused by the Director (s. 67(3)). At the time, as well, there was no monetary limit on the ESA officer's jurisdiction. The Act has since been amended to provide an upper limit on claims of $10,000 (S.O. 1996, c. 23, s. 19(1)). Had the ESA officer's determination gone the other way, the employer could have been saddled with a $300,000 liability arising out of a deeply flawed decision unless reversed on an administrative review or quashed by a supervising court.

2. The Review Process

30 The employee, as stated, has no appeal as of right. Section 67(2) of the Act provides that an employee dissatisfied with the decision at first instance may apply to the Director for an administrative review in writing within 15 days of the date of the mailing of the employment standards officer's decision. Under s. 67(3), "the Director may appoint an adjudicator who shall hold a hearing" (emphasis added). The word "may" grants the Director a discretion to hold or not to hold a hearing. The Ontario Court of Appeal noted this point, but said the parties had attached little importance to it.

31 It seems clear the legislature did not intend to confer an appeal as of right. Where the Director does appoint an adjudicator a hearing is mandated by the Act. Further delay and expense to the Ministry and the parties would follow as a matter of course. The juxtaposition in s. 67(3) of "may" and "shall" (and in the French text, the instruction that the Director "*peut nommer un arbitre de griefs pour tenir une audience*" (emphasis added)) puts the matter beyond doubt. The Ontario legislature intended the Director to have a discretion to decline to refer a matter to an adjudicator which, in his or her opinion, is simply not justified. Even the adjudicators hearing a review under s. 67(3) of the Act are not by statute required to be legally trained. It was likely considered undesirable by the Ontario legislature to give each and every dissatisfied employee a review as of right, particularly where the amounts in issue are often relatively modest. The discretion must be exercised according to proper principles, of course, but a discretion it remains.

32 If an internal review were ordered, an adjudicator would then have looked at the appellant's claim *de novo* and would undoubtedly have shared the employer documents with the appellant and given her every opportunity to respond and comment. I agree that under the scheme of the Act procedural defects at the ESA officer level, including a failure to provide proper notice and an opportunity to be heard in response to the opposing case, can be rectified on review. The respondent says the appellant, having elected to proceed under the Act, was required to seek an internal review if she was dissatisfied with the initial outcome. Not having done so, she is estopped from pursuing her $300,000 claim. The appellant says that the ESA procedure was so deeply flawed that she was entitled to walk away from it.

B. *The Applicability of Issue Estoppel*

1. Issue Estoppel: A Two-Step Analysis

33 The rules governing issue estoppel should not be mechanically applied. The underlying purpose is to balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case. (There are corresponding private interests.) The first step is to determine whether the moving party (in this case the respondent) has established the preconditions to the operation of issue estoppel set out by Dickson J. in *Angle, supra*. If successful, the court must still determine whether, as a matter of discretion, issue estoppel *ought* to be applied: *British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc.* 1998 CanLII 6467 (BC C.A.), (1998), 50 B.C.L.R. (3d) 1 (C.A.), at para. 32; *Schweneke v. Ontario* 2000 CanLII 5655 (ON C.A.), (2000), 47 O.R. (3d) 97 (C.A.), at paras. 38-39; *Braithwaite v. Nova Scotia Public Service Long Term Disability Plan Trust Fund* (reflex, (1999), 176 N.S.R. (2d) 173 (C.A.), at para. 56.

34 The appellant was quite entitled, in the first instance, to invoke the jurisdiction of the Ontario superior court to deal with her various monetary claims. The respondent was not entitled as of right to the imposition of an estoppel. It was up to the court to decide whether, in the exercise of its discretion, it would decline to hear aspects of the claims that were previously the subject of ESA administrative proceedings.

2. The Judicial Nature of the Decision

35 A common element of the preconditions to issue estoppel set out by Dickson J. in *Angle, supra*, is the fundamental requirement that the decision in the prior proceeding be a judicial decision. According to the authorities (see e.g., G. Spencer Bower, A. K. Turner and K. R. Handley, *The Doctrine of Res Judicata* (3rd ed. 1996), paras. 18-20), there are three elements that may be taken into account. First is to examine the nature of the administrative authority issuing the decision. Is it an institution that is capable of receiving and exercising adjudicative authority? Secondly, as a matter of law, is the particular decision one that was required to be made in a judicial manner? Thirdly, as a mixed question of law and fact, *was* the decision made in a judicial manner? These are distinct requirements:

It is of no avail to prove that the alleged *res judicata* was a decision, or that it was pronounced according to judicial principles, unless it emanated from such a tribunal in the exercise of its adjudicative functions; nor is it sufficient that it was pronounced by such a tribunal unless it was a judicial decision on the merits. It is important, therefore, at the outset to have a proper understanding of what constitutes a judicial tribunal and a judicial decision for present purposes.

(Spencer Bower, Turner and Handley, *supra*, para. 20)

36 As to the third aspect, whether or not the particular decision in question was actually made in accordance with judicial requirements, I note the recent *ex curia* statement of Handley J. (the current editor of *The Doctrine of Res Judicata*) that:

The prior decision judicial, arbitral, or administrative, must have been made within jurisdiction before it can give rise to *res judicata* estoppels.

("Res Judicata: General Principles and Recent Developments" (1999), 18 *Aust. Bar Rev.* 214, at p. 215)

37 The main controversy in this case is directed to this third aspect, i.e., is a decision taken without regard to requirements of notice and an opportunity to be heard *capable* of supporting an issue estoppel? In my opinion, the answer to this question is yes.

(a) *The Institutional Framework*

38 The decision relied on by Rosenberg J.A. in this respect relates to the generic role and function of the ESA officer: *Re Downing and Graydon, supra, per* Blair J.A., at p. 305:

In the present case, the employment standards officers have the power to adjudicate as well as to investigate. Their investigation is made for the purpose of providing them with information on which to base the decision they must make. The duties of the employment standards officers embrace all the important *indicia* of the exercise of a judicial power including the ascertainment of facts, the application of the law to those facts and the making of a decision which is binding upon the parties.

The parties did not dispute that ESA officials could properly be given adjudicative responsibilities to be discharged in a judicial manner. An earlier legislative limit of $4,000 on unpaid wages (excluding severance pay and benefits payable under pregnancy and parental provisions) was eliminated in 1991 by S.O. 1991, c. 16, s. 9(1), but subsequent to the ESA decision in the present case a new limit of $10,000 was imposed. This is the same limit as is imposed on the Small Claims Court by the *Courts of Justice Act,* R.S.O. 1990, c. C.43, s. 23(1), and O. Reg. 626/00, s. 1(1).

(b) *The Nature of ESA Decisions Under Section 65(1)*

39 An administrative tribunal may have judicial as well as administrative or ministerial functions. So may an administrative officer.

40 One distinction between administrative and judicial decisions lies in differentiating adjudicative from investigative functions. In the latter mode the ESA officer is taking the initiative to gather information. The ESA officer acts as a self-starting investigator who is not confined within the limits of the adversarial process. The distinction between investigative and adjudicative powers is discussed in *Guay v. Lafleur*, [1965] S.C.R. 12, at pp. 17-18. The inapplicability of issue estoppel to investigations is noted by Diplock L.J. in *Thoday v. Thoday*, [1964] P. 181 (Eng. C.A.), at p. 197.

41 Although ESA officers may have non-adjudicative functions, they must exercise their adjudicative functions in a judicial manner. While they utilize procedures more flexible than those that apply in the courts, their decisions must be based on findings of fact and the application of an objective legal standard to those facts. This is characteristic of a judicial function: D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (1998), vol. 2, § 7:1310, p. 7-7.

42 The adjudication of the claim, once the relevant information had been gathered, is of a judicial nature.

(c) *Particulars of the Decision in Question*

43 The Ontario Court of Appeal concluded that the decision of the ESA officer in this case was in fact reached contrary to the principles of natural justice. The appellant had neither notice of the employer's case nor an opportunity to respond.

44 The appellant contends that it is not enough to say the decision *ought* to have been reached in a judicial manner. The question is: Was it decided in a judicial manner in this case? There is some support for this view in *Rasanen, supra, per* Abella J.A., at p. 280:

As long as the hearing process in the tribunal provides parties with an opportunity to know and meet the case against them, and so long as the decision is within the tribunal's jurisdiction, then regardless of how closely the process mirrors a trial or its procedural antecedents, I can see no principled basis for exempting issues adjudicated by tribunals from the operation of issue estoppel in a subsequent action. [Emphasis added.]

45 Trial level decisions in Ontario subsequently adopted this approach: *Machado v. Pratt & Whitney Canada Inc.* reflex, (1995), 12 C.C.E.L. (2d) 132 (Ont. Ct. (Gen. Div.)); *Randhawa v. Everest & Jennings Canadian Ltd.* reflex, (1996), 22 C.C.E.L. (2d) 19 (Ont. Ct. (Gen. Div.)); *Heynen v. Frito-Lay Canada Ltd.* reflex, (1997), 32 C.C.E.L. (2d) 183 (Ont. Ct. (Gen. Div.)); *Perez v. GE Capital Technology Management Services Canada Inc.* reflex, (1999), 47 C.C.E.L. (2d) 145 (Ont. S.C.J.). The statement of Métivier J. in *Munyal v. Sears*

Canada Inc. v. reflex, (1997), 29 C.C.E.L. (2d) 58 (Ont. Ct. (Gen. Div.)), at p. 60, reflects that position:

> The plaintiff relies on [*Rasanen*] and other similar decisions to assert that the principle of issue estoppel should apply to administrative decisions. This is true only where the decision is the result of a fair, unbiased adjudicative process where "the hearing process provides parties with an opportunity to know and meet the case against them".

46 In *Wong, supra*, the Alberta Court of Appeal rejected an attack on the decision of an employment standards review officer and held that the ESA decision was adequate to create an estoppel as long as "the appellant knew of the case against him and was given an opportunity to state his position" (para. 20). See also *Alderman v. North Shore Studio Management Ltd.*, 1997 CanLII 2053 (BC S.C.), [1997] 5 W.W.R. 535 (B.C.S.C.).

47 In my view, with respect, the theory that a denial of natural justice deprives the ESA decision of its character as a "judicial" decision rests on a misconception. Flawed the decision may be, but "judicial" (as distinguished from administrative or legislative) it remains. Once it is determined that the decision maker was capable of receiving and exercising adjudicative authority and that the particular decision was one that was required to be made in a judicial manner, the decision does not cease to have that character ("judicial") because the decision maker erred in carrying out his or her functions. As early as *R. v. Nat Bell Liquors Ltd.*, [1922] 2 A.C. 128 (H.L.), it was held that a conviction entered by an Alberta magistrate could not be quashed for lack of jurisdiction on the grounds that the depositions showed that there was no evidence to support the conviction or that the magistrate misdirected himself in considering the evidence. The jurisdiction to try the charges was distinguished from alleged errors in "the observance of the law in the course of its exercise" (p. 156). If the conditions precedent to the exercise of a judicial jurisdiction are satisfied (as here), subsequent errors in its exercise, including violations of natural justice, render the decision voidable, not void: *Harelkin v. University of Regina*, 1979 CanLII 18 (S.C.C.), [1979] 2 S.C.R. 561, at pp. 584-85. The decision remains a "judicial decision", although seriously flawed by the want of proper notice and the denial of the opportunity to be heard.

48 I mentioned at the outset that estoppel *per rem judicatem* is closely linked to the rule against collateral attack, and indeed to the principles of judicial review. If the appellant had gone to court to seek judicial review of the ESA officer's decision without first following the internal administrative review route, she would have been confronted with the decision of this Court in *Harelkin, supra*. In that case a university student failed in his judicial review application to quash the decision of a faculty committee of the University of Regina which found his academic performance to be unsatisfactory. The faculty committee was required to act in a judicial manner but failed, as here, to give proper notice and an

opportunity to be heard. It was held that the failure did not deprive the faculty committee of its adjudicative jurisdiction. Its decision was subject to judicial review, but this was refused in the exercise of the Court's discretion. Adoption of the appellant's theory in this case would create an anomalous result. If she is correct that the ESA officer stepped outside her judicial role and lost jurisdiction for all purposes, including issue estoppel, the *Harelkin* barrier to judicial review would be neatly sidestepped. She would have no need to seek judicial review to set aside the ESA decision. She would be, on her theory, entitled as of right to have it ignored in her civil action.

49 The appellant's position would also create an anomalous situation under the rule against collateral attack. As noted by the respondent, the rejection of issue estoppel in this case would constitute, in a sense, a successful collateral attack on the ESA decision, which has been impeached neither by administrative review nor judicial review. On the appellant's theory, an excess of jurisdiction in the course of the ESA proceeding would prevent issue estoppel, even though *Maybrun, supra,* says that an act in excess of a jurisdiction which the decision maker initially possessed does not necessarily open the decision to collateral attack. It depends, according to *Maybrun*, on which forum the legislature intended the jurisdictional attack to be made in, the administrative review forum or the court (para. 49).

50 It seems to me that the unsuccessful litigant in administrative proceedings should be encouraged to pursue whatever administrative remedy is available. Here, it is worth repeating, she elected the ESA forum. Employers and employees should be able to rely on ESA determinations unless steps are taken promptly to set them aside. One major legislative objective of the ESA scheme is to facilitate a quick resolution of termination benefits so that both employee and employer can get on to other things. Where, as here, the ESA issues are determined within a year, a contract claim could nevertheless still be commenced thereafter in Ontario within six years of the alleged breach, producing a lingering five years of uncertainty. This is to be discouraged.

51 In summary, it is clear that an administrative decision which is made without jurisdiction from the outset cannot form the basis of an estoppel. The conditions precedent to the adjudicative jurisdiction must be satisfied. Where arguments can be made that an administrative officer or tribunal initially possessed the jurisdiction to make a decision in a judicial manner but erred in the exercise of that jurisdiction, the resulting decision is nevertheless capable of forming the basis of an estoppel. Alleged errors in carrying out the mandate are matters to be considered by the court in the exercise of its discretion. This result makes the principle governing estoppel consistent with the law governing judicial review in *Harelkin, supra*, and collateral attack in *Maybrun, supra.*

52 Where I differ from the Ontario Court of Appeal in this case is in its conclusion that the failure of the appellant to seek such an administrative review

of the ESA officer's flawed decision was fatal to her position. In my view, with respect, the refusal of the ESA officer to afford the appellant proper notice and the opportunity to be heard are matters of great importance in the exercise of the court's discretion, as will be seen.

53 I turn now to the three preconditions to issue estoppel set out by Dickson J. in *Angle, supra*, at p. 254.

3. Issue Estoppel: Applying the Tests

(a) *That the Same Question Has Been Decided*

54 A cause of action has traditionally been defined as comprising every fact which it would be necessary for the plaintiff to prove, if disputed, in order to support his or her right to the judgment of the court: *Poucher v. Wilkins* (1915), 33 O.L.R. 125 (C.A.). Establishing each such fact (sometimes referred to as material facts) constitutes a precondition to success. It is apparent that different causes of action may have one or more material facts in common. In this case, for example, the existence of an employment contract is a material fact common to both the ESA proceeding and to the appellant's wrongful dismissal claim in court. Issue estoppel simply means that once a material fact such as a valid employment contract is found to exist (or not to exist) by a court or tribunal of competent jurisdiction, whether on the basis of evidence or admissions, the same issue cannot be relitigated in subsequent proceedings between the same parties. The estoppel, in other words, extends to the issues of fact, law, and mixed fact and law that are necessarily bound up with the determination of that "issue" in the prior proceeding.

55 The parties are agreed here that the "same issue" requirement is satisfied. In the appellant's wrongful dismissal action, she is claiming $300,000 in unpaid commissions. This puts in issue the same entitlement as was refused her in the ESA proceeding. One or more of the factual or legal issues essential to this entitlement were necessarily determined against her in the earlier ESA proceeding. If issue estoppel applies, it prevents her from asserting that these adverse findings ought now to be found in her favour.

(b) *That the Judicial Decision Which Is Said to Create the Estoppel Was Final*

56 As already discussed, the requirement that the prior decision be "judicial" (as opposed to administrative or legislative) is satisfied in this case.

57 Further, I agree with the Ontario Court of Appeal that the employee not having taken advantage of the internal review procedure, the decision of the ESA officer was final for the purposes of the Act and therefore capable in the normal course of events of giving rise to an estoppel.

58 I have already noted that in this case, unlike *Harelkin, supra,* the appellant had no right of appeal. She could merely make a request to the ESA Director for a review by an ESA adjudicator. While this may be a factor in the exercise of the discretion to deny issue estoppel, it does not affect the finality of the ESA decision. The appellant could fairly argue on a judicial review application that unlike Harelkin she had no "adequate alternative remedy" available to her as of right. The ESA decision must nevertheless be treated as final for present purposes.

(c) *That the Parties to the Judicial Decision or Their Privies Were the Same Persons as the Parties to the Proceedings in Which the Estoppel Is Raised or Their Privies*

59 This requirement assures mutuality. If the limitation did not exist, a stranger to the earlier proceeding could insist that a party thereto be bound in subsequent litigation by the findings in the earlier litigation even though the stranger, who became a party only to the subsequent litigation, would not be: *Machin, supra*; *Minott v. O'Shanter Development Co.* 1999 CanLII 3686 (ON C.A.), (1999), 42 O.R. (3d) 321 (C.A.), *per* Laskin J.A., at pp. 339-40. The mutuality requirement was subject to some critical comment by McEachern C.J.B.C. when sitting as a trial judge in *Saskatoon Credit Union Ltd. v. Central Park Ent. Ltd.* reflex, (1988), 22 B.C.L.R. (2d) 89 (S.C.), at p. 96, and has been substantially modified in many jurisdictions in the United States: see Holmested and Watson, *supra*, at 21 § 24, and G. D. Watson, "Duplicative Litigation: Issue Estoppel, Abuse of Process and the Death of Mutuality" (1990), 69 *Can. Bar Rev.* 623.

60 The concept of "privity" of course is somewhat elastic. The learned editors of J. Sopinka, S. N. Lederman and A. W. Bryant in *The Law of Evidence in Canada* (2nd ed. 1999), at p. 1088 say, somewhat pessimistically, that "[i]t is impossible to be categorical about the degree of interest which will create privity" and that determinations must be made on a case-by-case basis. In this case, the parties are identical and the outer limits of "mutuality" and of the "same parties" requirement need not be further addressed.

61 I conclude that the preconditions to issue estoppel are met in this case.

4. The Exercise of the Discretion

62 The appellant submitted that the Court should nevertheless refuse to apply estoppel as a matter of discretion. There is no doubt that such a discretion exists. In *General Motors of Canada Ltd. v. Naken,* 1983 CanLII 19 (S.C.C.), [1983] 1 S.C.R. 72, Estey J. noted, at p. 101, that in the context of court proceedings "such a discretion must be very limited in application". In my view the discretion is necessarily broader in relation to the prior decisions of administrative tribunals because of the enormous range and diversity of the structures, mandates and procedures of administrative decision makers.

63 In *Bugbusters, supra*, Finch J.A. (now C.J.B.C.) observed, at para. 32:

It must always be remembered that although the three requirements for issue estoppel must be satisfied before it can apply, the fact that they may be satisfied does not automatically give rise to its application. Issue estoppel is an equitable doctrine, and as can be seen from the cases, is closely related to abuse of process. The doctrine of issue estoppel is designed as an implement of justice, and a protection against injustice. It inevitably calls upon the exercise of a judicial discretion to achieve fairness according to the circumstances of each case.

Apart from noting parenthetically that estoppel *per rem judicatem* is generally considered a common law doctrine (unlike promissory estoppel which is clearly equitable in origin), I think this is a correct statement of the law. Finch J.A.'s *dictum* was adopted and applied by the Ontario Court of Appeal in *Schweneke, supra*, at paras. 38 and 43:

The discretion to refuse to give effect to issue estoppel becomes relevant only where the three prerequisites to the operation of the doctrine exist. . . . The exercise of the discretion is necessarily case specific and depends on the entirety of the circumstances. In exercising the discretion the court must ask -- is there something in the circumstances of this case such that the usual operation of the doctrine of issue estoppel would work an injustice?

. . .

. . . The discretion must respond to the realities of each case and not to abstract concerns that arise in virtually every case where the finding relied on to support the doctrine was made by a tribunal and not a court.

See also *Braithwaite, supra*, at para. 56.

64 Courts elsewhere in the Commonwealth apply similar principles. In *Arnold v. National Westminster Bank plc*, [1991] 3 All E.R. 41, the House of Lords exercised its discretion against the application of issue estoppel arising out of an earlier arbitration, *per* Lord Keith of Kinkel, at p. 50:

One of the purposes of estoppel being to work justice between the parties, it is open to courts to recognise that in special circumstances inflexible application of it may have the opposite result . . . .

65 In the present case Rosenberg J.A. noted in passing at pp. 248-49 the possible existence of a potential discretion but, with respect, he gave it short shrift. There was no discussion or analysis of the merits of its exercise. He simply concluded, at p. 256:

In summary, Ms. Burke did not accord this appellant natural justice. The appellant's recourse was to seek review of Ms. Burke's decision. She failed to do so. That decision is binding upon her and her employer.

66 In my view it was an error of principle not to address the factors for and against the exercise of the discretion which the court clearly possessed. This is not a situation where this Court is being asked by an appellant to substitute its opinion for that of the motions judge or the Court of Appeal. The appellant is entitled at some stage to appropriate consideration of the discretionary factors and to date this has not happened.

67 The list of factors is open. They include many of the same factors listed in *Maybrun* in connection with the rule against collateral attack. A similarly helpful list was proposed by Laskin J.A. in *Minott, supra*. The objective is to ensure that the operation of issue estoppel promotes the orderly administration of justice but not at the cost of real injustice in the particular case. Seven factors, discussed below, are relevant in this case.

(a) *The Wording of the Statute from which the Power to Issue the Administrative Order Derives*

68 In this case the ESA includes s. 6(1) which provides that:

No civil remedy of an employee against his or her employer is suspended or affected by this Act. [Emphasis added.]

69 This provision suggests that at the time the Ontario legislature did not intend ESA proceedings to become an exclusive forum. (Recent amendments to the Act now require an employee to elect either the ESA procedure or the court. Even prior to the new amendments, however, a court could properly conclude that relitigation of an issue would be an abuse: *Rasanen, supra, per* Morden A.C.J.O., at p. 293, Carthy J.A., at p. 288.)

70 While it is generally reasonable for defendants to expect to be able to move on with their lives once one set of proceedings -- including any available appeals -- has ended in a rejection of liability, here, the appellant commenced her civil action against the respondents before the ESA officer reached a decision (as was clearly authorized by the statute at that time). Thus, the respondents were well aware, in law and in fact, that they were expected to respond to parallel and to some extent overlapping proceedings.

(b) *The Purpose of the Legislation*

71 The focus of an earlier administrative proceeding might be entirely different from that of the subsequent litigation, even though one or more of the same issues might be implicated. In *Bugbusters, supra*, a forestry company was

compulsorily recruited to help fight a forest fire in British Columbia. It subsequently sought reimbursement for its expenses under the B.C. *Forest Act*, R.S.B.C. 1979, c. 140. The expense claim was allowed *despite* an allegation that the fire had been started by a Bugbusters employee who carelessly discarded his cigarette. (This, if proved, would have disentitled Bugbusters to reimbursement.) The Crown later started a $5 million negligence claim against Bugbusters, for losses occasioned by the forest fire. Bugbusters invoked issue estoppel. The court, in the exercise of its discretion, denied relief. One reason, *per* Finch J.A., at para. 30, was that

> a final decision on the Crown's right to recover its losses was not within the reasonable expectation of either party at the time of those [reimbursement] proceedings [under the *Forest Act*].

A similar point was made in *Rasanen, supra*, by Carthy J.A., at p. 290:

> It would be unfair to an employee who sought out immediate and limited relief of $4,000, forsaking discovery and representation in doing so, to then say that he is bound to the result as it affects a claim for ten times that amount.

A similar qualification is made in the American *Restatement of the Law, Second: Judgments 2d* (1982), vol. 2 § 83(2)(e), which refers to

> procedural elements as may be necessary to constitute the proceeding a sufficient means of conclusively determining the matter in question, having regard for the magnitude and complexity of the matter in question, the urgency with which the matter must be resolved, and the opportunity of the parties to obtain evidence and formulate legal contentions.

72 I am mindful, of course, that here the appellant chose the ESA forum. Counsel for the respondent justly observed, with some exasperation:

> As the record makes clear, Danyluk was represented by legal counsel prior to, at the time of, and subsequent to the cessation of her employment. Danyluk and her counsel were well aware of the fact that Danyluk had an initial choice of forums with respect to her claim for unpaid commissions and wages. . . .

73 Nevertheless, the purpose of the ESA is to provide a relatively quick and cheap means of resolving employment disputes. Putting excessive weight on the ESA decision in terms of issue estoppel would likely compel the parties in such cases to mount a full-scale trial-type offence and defence, thus tending to defeat the expeditious operation of the ESA scheme as a whole. This would undermine fulfilment of the purpose of the legislation.

(c) *The Availability of an Appeal*

74 This factor corresponds to the "adequate alternative remedy" issue in judicial review: *Harelkin, supra*, at p. 592. Here the employee had no *right* of appeal, but the existence of a potential administrative review and her failure to take advantage of it must be counted against her: *Susan Shoe Industries Ltd. v. Ricciardi* 1994 CanLII 1313 (ON C.A.), (1994), 18 O.R. (3d) 660 (C.A.), at p. 662.

(d) *The Safeguards Available to the Parties in the Administrative Procedure*

75 As already mentioned, quick and expeditious procedures suitable to accomplish the objectives of the ESA scheme may simply be inadequate to deal with complex issues of fact or law. Administrative bodies, being masters of their own procedures, may exclude evidence the court thinks probative, or act on evidence the court considers less than reliable. If it has done so, this may be a factor in the exercise of the court's discretion. Here the breach of natural justice is a key factor in the appellant's favour.

76 Morden A.C.J.O. pointed out in his concurring judgment in *Rasanen, supra,* at p. 295: "I do not exclude the possibility that deficiencies in the procedure relating to the first decision could properly be a factor in deciding whether or not to apply issue estoppel." Laskin J.A. made a similar point in *Minott, supra*, at pp. 341-42.

(e) *The Expertise of the Administrative Decision Maker*

77 In this case the ESA officer was a non-legally trained individual asked to decide a potentially complex issue of contract law. The rough-and-ready approach suitable to getting things done in the vast majority of ESA claims is not the expertise required here. A similar factor operates with respect to the rule against collateral attack (*Maybrun, supra,* at para. 50):

> . . . where an attack on an order is based on considerations which are foreign to an administrative appeal tribunal's expertise or *raison d'être*, this suggests, although it is not conclusive in itself, that the legislature did not intend to reserve the exclusive authority to rule on the validity of the order to that tribunal.

(f) *The Circumstances Giving Rise to the Prior Administrative Proceedings*

78 In the appellant's favour, it may be said that she invoked the ESA procedure at a time of personal vulnerability with her dismissal looming. It is unlikely the legislature intended a summary procedure for smallish claims to become a barrier to closer consideration of more substantial claims. (The legislature's subsequent reduction of the monetary limit of an ESA claim to $10,000 is consistent with this view.) As Laskin J.A. pointed out in *Minott, supra,* at pp. 341-42:

. . . employees apply for benefits when they are most vulnerable, immediately after losing their job. The urgency with which they must invariably seek relief compromises their ability to adequately put forward their case for benefits or to respond to the case against them . . . .

79 On the other hand, in this particular case it must be said that the appellant with or without legal advice, included in her ESA claim the $300,000 commissions, and she must shoulder at least part of the responsibility for her resulting difficulties.

(g) *The Potential Injustice*

80 As a final and most important factor, the Court should stand back and, taking into account the entirety of the circumstances, consider whether application of issue estoppel in the particular case would work an injustice. Rosenberg J.A. concluded that the appellant had received neither notice of the respondent's allegation nor an opportunity to respond. He was thus confronted with the problem identified by Jackson J.A., dissenting, in *Iron v. Saskatchewan (Minister of the Environment & Public Safety)*, reflex, [1993] 6 W.W.R. 1 (Sask. C.A.), at p. 21:

The doctrine of res judicata, being a means of doing justice between the parties in the context of the adversarial system, carries within its tenets the seeds of injustice, particularly in relation to issues of allowing parties to be heard.

Whatever the appellant's various procedural mistakes in this case, the stubborn fact remains that her claim to commissions worth $300,000 has simply never been properly considered and adjudicated.

81 On considering the cumulative effect of the foregoing factors it is my view that the Court in its discretion should refuse to apply issue estoppel in this case.

V. Disposition

82 I would therefore allow the appeal with costs throughout.

Appeal allowed with costs.

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