File No. MA 011-98

L. Kamerman	)	Tuesday, the 29th day
Mining and Lands Commissioner	)	of June, 1999.

THE MINING ACT

IN THE MATTER OF

Mining Claims L-961253 to 961257, both inclusive, 1097076, 1097080 to 1097082, both inclusive, 1097084, 1111046, 1118532, 1118533, 1118587, 1118591, 1118593, 1132023, 1132024, 1130968, 1130969, 1145821, 1145856, 1145857, 1146075, 1146076, 1147154 to 1147156, both inclusive, 1167853 to 1167857, both inclusive, 1168043 to 1168045, both inclusive, 1168672, 1168673, 1178980, 1179097, 1179146, 1179147, 1185652, 1186147, 1186148, 1198560, 1198569, 1198588, 1198637, 1198716, 1202648 to 1202650, both inclusive, 1202652 and 1212005 situate in the Townships of Bryce and Tudhope, in the Larder Lake Mining Division, hereinafter referred to as the "Mining Claims";

AND IN THE MATTER OF

An application under section 105 of the **Mining Act** for a declaration concerning the ownership of the Mining Claims and their transfer from the Respondent to the Applicant and such other relief as the tribunal deems just.

B E T W E E N:

DIAMOND ROCK RESOURCES INC.

Applicant

- and -

JOHN R. EWANCHUK

Respondent

ORDER FOR SECURITY FOR COSTS

WHEREAS pursuant to a written request dated the 30th day of November, 1998, from Mr. Robert B. Cohen, counsel for the Respondent, that the Respondent was requesting, pursuant to section 122 of the **Mining Act,** that security for costs be posted by the Applicant prior to the hearing of this matter;

AND WHEREAS the motion for security for costs was heard by this tribunal on the 12th day of January, 1999, with Mr. Geoffrey R. Kubrick, counsel, appearing for the Applicant and the aforementioned Mr. Cohen appearing on behalf of the Respondent;

UPON hearing from the parties and considering the written materials and subsequent submissions filed in support and in opposition to the motion;

1. **THIS TRIBUNAL ORDERS** that the Respondent's motion is allowed.

2. **THIS TRIBUNAL FURTHER ORDERS** that security for costs in the amount of $17,500.00 be posted and filed by the Applicant, Diamond Rock Resources Inc. no later than Tuesday, the 3rd day of August, 1999, failing which the Application will be dismissed.

3. **IT IS FURTHER ORDERED** that this Order be filed without fee in the Office of the Provincial Mining Recorder in Sudbury, Ontario, pursuant to subsection 129(4) of the **Mining Act**.

DATED this 29th day of June, 1999.

Reasons for this Order are attached.

Original signed by

L. Kamerman
MINING AND LANDS COMMISSIONER

File No. MA 011-98

L. Kamerman) Tuesday, the 29th day
Mining and Lands Commissioner) of June, 1999.

THE MINING ACT

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Mining Claims L-961253 to 961257, both inclusive, 1097076, 1097080 to 1097082, both inclusive, 1097084, 1111046, 1118532, 1118533, 1118587, 1118591, 1118593, 1132023, 1132024, 1130968, 1130969, 1145821, 1145856, 1145857, 1146075, 1146076, 1147154 to 1147156, both inclusive, 1167853 to 1167857, both inclusive, 1168043 to 1168045, both inclusive, 1168672, 1168673, 1178980, 1179097, 1179146, 1179147, 1185652, 1186147, 1186148, 1198560, 1198569, 1198588, 1198637, 1198716, 1202648 to 1202650, both inclusive, 1202652 and 1212005 situate in the Townships of Bryce and Tudhope, in the Larder Lake Mining Division, hereinafter referred to as the "Mining Claims";

AND IN THE MATTER OF

An application under section 105 of the **Mining Act** for a declaration concerning the ownership of the Mining Claims and their transfer from the Respondent to the Applicant and such other relief as the tribunal deems just.

B E T W E E N:

DIAMOND ROCK RESOURCES INC.

Applicant

- and -

JOHN R. EWANCHUK

Respondent

REASONS

Preliminary Matters

Mr. Cohen raised the issue of production of certain documents as requested by Mr. Kubrick. Mr. Kubrick had also requested a summons of certain telephone records for the purpose of investigating contact with other shareholders. While these matters were not abso-

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lutely necessary to resolve prior to the hearing of the motion, the tribunal offered its assistance and that of its staff in resolving the stalemate.

Motion for Security for Costs

Mr. Cohen submitted for the tribunal's consideration two arguments with respect to his application for a section 122 Order for security for costs, namely first, that the proceedings brought by Diamond Rock Resources Inc. ("Diamond Rock") are vexatious, and secondly, that Diamond Rock is not resident in Ontario. He invited the tribunal to conclude that both grounds apply.

Facts

On February 16th, 1996, a company named *Diamond Rock Resources* entered into an option agreement with John R. Ewanchuk (Ex. 1 to the Motion, Tab A) involving the Mining Claims which are the subject matter of this application. Included in the consideration payable, found at paragraph 3 of the agreement, in addition to money are shares from the Optionee capital stock valued at $100,000, the number of which is to be determined from the value of the closing market price on the first day the Optionee's stock trades publicly. The terms of this portion of the consideration provide: "Upon the completion of a public listing on a stock exchange, the Optionee shall ensure that the Optionor granted block of shares is trading freely without any restriction, limitation or incumbrance."

As set out in his Affidavit at paragraph 2 (Ex. 1 to the Motion), Mr. Ewanchuk states:

> 2. Prior to February of 1996, I had various conversations with Robert Saikaley with respect to an option to acquire various claims. In those various conversations, we discussed the issuance of shares of Diamond Rock Resources Ltd. ("Diamond Rock") to me in exchange for granting Diamond Rock an option in various claims held by me situated in Bryce and Tudhope Townships. In discussing the possibility of me taking shares in exchange for an option in these claims, Mr. Saikaley advised me that Diamond Rock would be trading publicly by August of 1996 if everything went according to plan, and by no later than December 31, 1996 in any event.

At paragraph 4 of his Affidavit, he states:

> 4. Consistent with the representations of Mr. Saikaley, I understood paragraph 4 of the Option Agreement to require Diamond Rock to deliver "unrestricted common shares" of a publicly trading company; otherwise, the shares to be delivered

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> and which were in fact delivered (as attached hereto and marked as Exhibit "B" to this my Affidavit) were valueless and, to my mind, could not be traded, contrary to what was represented and contemplated by the Option Agreement.

And at paragraph 6:

> 6. Over the last year or so, I have received audited statements of Diamond Rock Resources Ltd. (attached and marked as Exhibit "D" to this my Affidavit), Diamond Rock Resources Inc. (attached and marked as Exhibit "E" to this my Affidavit) and 3302379 Canada Inc. (attached hereto and marked as Exhibit "F" to this my Affidavit). These financial statements appear to reflect the following:
>
> (a) The only exiting corporation as at February, 1996 of these three (3) corporations and with whom I could execute the Option Agreement was Diamond Rock Resources Ltd. As such, I am supposed to receive shares from Diamond Rock Resources Ltd. The only share certificates which I in fact received were those of Diamond Rock Resources Inc. (attached at Exhibit "B" hereto);
>
> (b) Diamond Rock Resources Ltd. initially assigned the Option Agreement to Diamond Rock Resources Inc., who in turn assigned the Option Agreement to 3302369 Canada Inc., all without prior written notice and without my consent in breach of the Option Agreement;
>
> (c) The plaintiff in this application, Diamond Rock Resources Inc. who does not ever (**sic**) appear to hold the rights to the Option Agreement any longer, is a holding company incorporated under the State of Nevada on August 19, 1996.

And at paragraphs 8 through 10:

> 8. Based upon the foregoing, I believe that the claim of Diamond Rock Resources Inc. in these proceedings is unreasonable and without merit. As well, I believe that the plaintiff resides outside of Ontario (in Nevada). In fact, I received a Notice of Shareholders Meeting for Diamond Rock Resources Inc. dated August 11, 1998 in which the meeting of shareholders was scheduled to be held in Las Vegas, Nevada, as attached hereto and marked as Exhibit "H".

> 9. I have spoken with Paul Bertrand, who advises me and I do verily believe that he is a shareholder of Diamond Rock. He has also advised me that he has commenced an application as a result of significant concerns he and other shareholders have about the spending practices of Mr. Saikaley with investors' funds, and I therefore attach hereto and mark as Exhibit "I" to this my Affidavit a true copy of those proceedings and the affidavit of Mr. Bertrand filed in support thereof.
>
> 10. To date, my legal bills in dealing with the conflict with Diamond Rock are approximately $20,000.00. I am advised by my counsel, Robert B. Cohen, and do verily believe that I can anticipate legal bills of approximately $15,000.000 more should this matter proceed to a full hearing ...

A review of the financial statements for Diamond Rock Resources Ltd. discloses that its current assets for 1995 and 1996 indicate $278,704 in cash, a receivable from a shareholder for $196,585 and a mining property for $15,000, all for 1995. For 1996, the investment in mining properties is $18,788. The schedule of mining properties indicates additions of mining claims in the Townships of Bryce, Strathy and Tudhope in the amounts of $37,960, 5,000 and 10,000, respectively, for 1995. These are shown as partially written off, in the case of Bryce in the amount of $11,162, and sold for $26,798, $5,000 and $10,000, respectively, in 1996.

In the financial statements for Diamond Rock Resources Inc. for August 19 to December 31, 1996, the capital assets list mining properties valued at $27,210, with schedule 1 itemizing this information. Mining claims were acquired by its subsidiary. Item 7 of the financial statement sets out:

> On September 30, 1996, Diamond Rock Resources Inc. then known as Gold Hill Exploration Ltd. bought all the assets of Diamond Rock Resources Ltd. in exchange for .... common shares of Diamond Rock Resources Inc.

The claims and stakes are set out in the itemized accounting as valued at $30,691.00. Schedule 1 itemizes three option agreements for mining claims in the Townships of Bryce, Strathy and Tudhope, setting out the manner of payments over a period of years. The first clause of this itemization for some of the claims in Bryce and the Tudhope claims sets out part of the payment, being certain "unrestricted shares of the Corporation in addition to a block of unrestricted shares valued at $72,960 the first day the Corporation goes public".

The financial statement for 3302369 Canada Inc. discloses that it was incorporated on October 3, 1996. On that date it purchased certain assets of Diamond Rock Resources Inc. in exchange for a promissory note in the amount of $1,228,025.00. Included in the itemized

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listing are mining properties valued at $41,798.00. Schedule 1 sets out that the mining properties are located in the Townships of Bryce, Strathy and Tudhope, which it sets out were acquired by "the Corporation", used to denote the numbered company. Each of the specific clauses commences with the phrase, "The Corporation entered into a Mineral Property Option agreement for certain unpatented mining claims ... The Corporation shall own a 100% interest in the mining claims if all the specified payments and program of exploration are performed." The first clause, involving some of the Bryce and the Tudhope claims goes on to say, "The payments over a period of .. years amount to .... and 130,000 unrestricted hares of the company in addition to a block of unrestricted shares valued at $100,000 the first day the holding company goes public".

Mr. Cohen pointed out that Diamond Rock Resources Ltd. shows a deficit at the end of 1996 of $434,784, the deficit of Diamond Rock Resources Inc. for the same date as $147,120, and that of 3302369 Canada Inc. as $186,559. His point was that these companies are all doing so poorly that they were in no position to go public.

In addition to this situation, there is an ongoing proceeding in the Ontario Court (General Division) (now the Superior Court of Justice) involving an application under section 241 of the *Canada Business Corporations Act* (details of which are set out at Exhibit 1, Tab I). He referred to the affidavit of Paul Bertrand in that application, and in particular paragraphs 16 through 20, which alleges certain activities by principal of the various companies, Robert Saikaley, including allegations of squandering assets, unauthorized securities trading, losses and unauthorized drawing of consulting fees and remuneration. These allegations raise the question of whether Diamond Rock Resources Inc.'s ability to pay costs may be affected, should costs of the action be awarded against it.

Mr. Kubrick objected to the presentation of documentation involving the Ontario Court proceedings, submitting that none of the documents referred to in Mr. Bertrand's affidavit are appended. He submitted that through cross-examination of Mr. Bertrand, his client was able to show that the financial matters are of no concern to dealings with Mr. Ewanchuk. If it were Mr. Ewanchuk's concern, he should have sought to join with Bertrand's action. Furthermore, Mr. Kubrick had advised Mr. Cohen in the second week of December that he had wished to cross-examine Mr. Bertrand on this affidavit in that proceeding. As that has not been completed, the parties are not here to discuss that matter.

Mr. Cohen responded that the reason the documentation is being tendered is to demonstrate that significant alleged losses were incurred by the Diamond Rock group of companies, and so the situation involving whether or not the company or companies would be listed on a publicly traded stock exchange cannot be seen to be the fault of Mr. Ewanchuk. After hearing submissions from Counsel, the tribunal found that it would admit the affidavit of Mr. Bertrand, but absent the supporting documentation, it would be given limited weight.

Mr. Cohen submitted that the assignments of the Option Agreement with Mr. Ewanchuk between the various corporations took place without notice and without his prior written consent. Currently the party holding the Mining Claims is 3302369 Canada Inc. This

runs contrary to paragraph 3 of the Option Agreement, which provides for notice and consent. Also, paragraph 21 provides that if the optionee is in default of the terms of the Option Agreement, the optionor may give written notice, whereupon if the optionee fails to cure the default, the optionor is entitled to seek any remedy he may have.

Referring to Exhibit 1, Tab 6, being a series of four letters from Mr. Ewanchuk and his solicitor, dated January 12, 1998, February 17, 1998, March 13, 1998 and July 6, 1998, respectively, which set out a demand for issuance of stock and notices of default. According to the February letter, the shares issued are not unrestricted freely trading shares and cannot be sold in any brokerage house. The March 13 letter sets out that required assessment work reports have not been filed, according to the terms of the agreement, nor have the resultant reports been provided to Mr. Ewanchuk, in default of paragraphs 11 and 19 of the Option Agreement.

As set out in paragraph 6, if the optionee fails to remedy any of its obligation upon receipt of notice in writing within 30 days, Mr. Ewanchuk is at liberty to terminate the agreement. Mr. Cohen submitted that it is clear that Mr. Ewanchuk is entitled to do so.

As to the motion that these proceedings are vexatious, Mr. Cohen referred to the tribunal's decision in **Osiel v. Minister of Northern Development and Mines** ("MND&M") unreported, April 9, 1994, File MA 015-92, where MND&M was successful in its application for costs on this basis. Of the grounds which the tribunal set out in that decision, Mr. Cohen submitted that only one ground applies, being that no reasonable person can expect to obtain the relief sought.

Mr. Cohen pointed out that even if Diamond Rock did not require Mr. Ewanchuk's consent to assign the Mining Claims, they are now in fact held by 3302369 Canada Inc., which is not the applicant in this matter. Diamond Rock Resources Inc. is the applicant, seeking a declaration that it be the recorded holder of the Mining Claims, having completed its obligations under the Option Agreement, and yet it assigned those claims. Mr. Cohen submitted that it therefore has no standing to bring the application.

Mr. Cohen submitted that his second reason for bringing the application is that Diamond Rock Resources Inc. is an out of province entity, having received its charter from the State of Nevada. As a result of the fact that Diamond Rock Resources Inc. has an out of town residence, there is jurisdiction in the tribunal to make the order for security for costs. Evidence of its residency is set out in Mr. Ewanchuk's affidavit, paragraph 8, which refers to an August, 1998 meeting of shareholders in Las Vegas, Nevada. There is, in his submission, no evidence to suggest that its residency is otherwise.

As to the matter of quantum, Mr. Ewanchuk's legal bills to date in this matter are $20,000. A conservative estimate of the costs of the hearing in this matter are $15,000 and given the complexity of the issues, three days were initially scheduled for the hearing of this matter. Mr. Cohen submitted that this would appear to be optimistic, as it could likely take longer. Therefore, he is seeking an order for the posting of $35,000 as security for costs.

Mr. Kubrick started his submissions by pointing out that the evidence presented by Mr. Cohen was not uncontradicted and that despite the indication that Mr. Ewanchuk would be available for cross-examination on his affidavit, he submitted that the assertions in the applicant's motion materials are irrelevant and contradict the evidence found in the record on the merits.

Mr. Kubrick submitted that a finding of vexatious should not be made on the basis of disputed facts. Mr. Ewanchuk bases his position, as stated in his affidavit, that the option agreement involves shares which are publicly traded. Diamond Rock Resources denies that the agreement was for publicly traded shares, but rather maintains that the agreement was for shares whose trade would be unrestricted. Mr. Kubrick points out that subsection 58(2) of the **Mining Act** requires that for any agreement for the transfer of mining claims after staking to be enforceable, it must be in writing. Mr. Kubrick maintains that publicly traded shares were never part of the agreement and this purported fact does not appear in writing in the agreement itself.

Mr. Kubrick pointed out that the shares which were issued to Mr. Ewanchuk are not restricted as to trading, which is clear from their face. A corporation which has restrictions on its activities may assist its affiliates to qualify over a period of time. The fact is that Mr. Ewanchuk's shares are not restricted, that they can be transferred to a broker, and upon being listed on a public stock exchange, the shares shall be capable of trading freely without restriction, all of which is clear from the face of the agreement. In paragraph 3 of the mineral property option, Mr, Kubrick submitted that it was possible for Mr. Ewanchuk to have seen this paragraph as worded differently, to reflect the concerns which he now states exist. The fact is that the paragraph is not so worded. As to the matter of shares which are to be traded publicly, it is beyond the control of those involved to have this happen, given the circumstances.

With respect to the allegations of Mr. Ewanchuk that the shares are in some way defective, Mr. Kubrick submitted that there is no evidence of this fact, and he maintains that in any event this is not the case. In the context of the agreement not reflecting the name of the company in this proceeding, it is pointed out that there is no company name reflected in the agreement. It was submitted by Mr. Kubrick that Mr. Ewanchuk's affidavit purports to offer a legal opinion, which he is not qualified to make, which is incorrect as to corporate law and successor rights. Mr. Kubrick submitted that Mr. Ewanchuk was fully aware of what was contemplated and agreed to. He accepted the shares of the corporation, being Diamond Rock Resources Inc. He accepted and cashed the cheques.

Mr. Cohen objected to this line of submissions, as the respondent has not filed a motion book upon which Mr. Kubrick may rely. Mr. Cohen pointed out that the only evidence filed in the matter of this motion is his own. Mr. Kubrick should have compiled an affidavit of his own client which asserts those facts upon which he is seeking to rely. Apart from making allegations, Mr. Kubrick is not in a position, as a result of failing to file documents, to speak to what facts exist. Mr. Kubrick countered by pointing out that the application was to consider whether the action was vexatious. Filed in support of the action are the statement of claim, counterclaim, and the applicant's documents, which include cancelled cheques. It should be clear from those documents filed that Mr. Ewanchuk was paid for the

Mining Claims, referring to the letter of Mr. Cohen found at Tab G of Exhibit 1, which admits that two cheques issued by Diamond Rock pursuant to the Option Agreement have been cashed. Mr. Cohen stated that it was his purpose to demonstrate that Mr. Ewanchuk was not responsible for the matter of Diamond Rock Resources Ltd. not having gone public over the last years.

The tribunal recognized the position taken by Mr. Cohen and pointed out to Mr. Kubrick that there is risk in not filing an affidavit with supporting documentation in response to a motion. On the other hand, the contents of the affidavit of Mr. Ewanchuk have not been conclusively proven as true and it is not the purpose of this motion for the tribunal to weigh the case. Mr. Kubrick seized on these comments and submitted that what Mr. Cohen was attempting to do is make his case. Mr. Cohen again reiterated that his intention in having these documents brought forward was to demonstrate that his client was not at fault in the matter of the failure to go public and that the evidence shows not only that there has been repudiation of the agreement but that the companies stand in a deficit position. Mr. Kubrick stated that such statements are clearly prejudicial, and where a company is involved in raising money for exploration, being its only income, deficits are to be expected. As to the assignment of the option as between the various companies without proper and prior consent, Mr. Kubrick submitted that this was a question to be determined after a hearing on the merits.

As to the succession of owners of the option agreement, Mr. Kubrick submitted that Mr. Ewanchuk does not understand successor rights, where if the same persons own the various companies involved, consent to assignment is not necessary. Furthermore, prior consent to any assignment does not constitute one of the grounds to permit termination, which can be seen from paragraphs 6 and 13 of the Agreement. Furthermore, there has been no evidence from Mr. Ewanchuk that the assignments of the Option Agreement are unreasonable.

Referring to the Independent Auditor's Report (Exhibit 1, Tab E), Diamond Rock Resources Inc. (at page 4) is a holding company with investments in 3302369 Canada Inc., the latter of which is a wholly owned subsidiary. It is in Canada to facilitate the business of the Nevada company, which is not prejudicial to Mr. Ewanchuk. Also, the financial situation of all of the companies, that is the deficits shown, is indicative of the activity of the companies, to raise money for mineral exploration and dispensing of those funds. Their only income at this time is from raising capital and deficits under such circumstances are to be expected.

As to the matter of residency, even though Diamond Rock Resources Inc. is a Nevada company, it is a wholly owned subsidiary of a company incorporated under the **Canadian Business Corporations Act**. It has its head office in Canada, a point which Mr. Cohen immediately challenged as there is in his submission no evidence as to the location of the head office. Mr. Kubrick submitted that 3302369 Canada Inc., which has its offices in Ottawa, uses the same address as Diamond Rock Resources Inc., with all correspondence coming from an Ottawa address. As shown at Tab H of Exhibit 1, the Notice to Shareholders of Diamond Rock Resources Inc. of its annual meeting discloses an Ottawa address. As can be seen from the case of **McDougall & Christmas Ltd. v. Genser** (1963) 2 O.R. 737, the residency requirement was met by a Quebec corporation where it had a branch office.

Mr. Kubrick referred to the tribunal's decision in **Osiel v. MND&M** with respect to the matter of a vexatious proceeding, pointing out that the only ground considered vexatious was the point that the action could not succeed. On the facts of this case, shares were given and payments were made to Mr. Ewanchuk, who is attempting to dispute the value of the shares or their type. What is being presented by Mr. Cohen are arguments of fact, which are in support of his case on the merits, in place of argument that the matter is vexatious. The facts of this case do not lend themselves to a finding of vexatious, but rather serve to show only that the case must be decided on its merits. Ewanchuk's position as set out in the counterclaim is that the shares issued were insufficient to meet the terms of the agreement. As to whether the facts asserted on behalf of Mr. Ewanchuk are agreed to by the tribunal and whether this would amount to a right of termination is to be determined. The counterclaim amounts to the real dispute in the action and is not such that should be found to warrant security for costs. Mr. Kubrick submitted that there are important issues to be considered for determination in the action.

Mr. Kubrick also submitted that Mr. Cohen has not submitted a draft bill of costs to substantiate his client's position in this matter. As an alternative, Mr. Kubrick requested that Mr. Cohen be required to submit a draft bill of costs. As can be seen from the case of **Paul v. General Magnaplate Corporation** (1995) 27 O.R. (3d) 314, which involved a case for security for costs pursuant to the Rules of Civil Procedure, where in determining the issue of being an out of province party, the Court determined that all circumstances of the case had to be examined. The Court found that the counterclaim amounted to the real dispute in the action, so that it could be regarded as the true plaintiff in the matter and as such, security for costs was not ordered.

Mr. Kubrick submitted that this application for security for costs was brought late in the day, at the time when the matter was already set down for hearing, notwithstanding that the filings were completed in July of 1998, with the motion having been brought during the time when preparations for the hearing itself were taking place.

Returning to the Affidavit of Paul Bertrand, Mr. Kubrick pointed out that none of the documents referred to in the affidavit were attached or filed with Mr. Ewanchuk's motion, nor has Mr. Bertrand been made available for examination on his affidavit for purposes of this motion. Referring to portions of the transcript of Mr. Bertrand's cross-examination on his affidavit in the Court matter, at page 47, Mr. Bertrand could not provide written evidence that the shares of Diamond Rock Resources (either Inc. or Ltd.) would be publicly traded. At page 74, with discussion of the shares of Anne Dagenais, the role of Mr. Bertrand in the action was challenged. At page 94, the issue of whether other documents were available from KPMG to substantiate allegations made by Mr. Bertrand was raised. Mr. Cohen objected to the introduction of the transcript, but Mr. Kubrick submitted that a number of issues were dispelled under cross-examination, thereby showing that unproven allegations are merely allegations and cannot be considered to have any weight. He pointed out that it would be an error for the tribunal to consider the contents of the affidavit of Paul Bertrand, without proper cross-examination, as the issues raised in the affidavit need airing.

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In summary, Mr. Kubrick stated that the onus on an application for costs rests with the applicant, which Mr. Cohen has failed to discharge. The evidence presented does not substantiate a finding of frivolous or vexatious, but rather highlights the fact that there is a reasonable case to be made and it involves a case where the real issues are those in the counterclaim. The shares issued are in good standing, the monies required to be paid have been paid. Finally, Mr. Ewanchuk is aware that Diamond Rock Resources Inc. resides in Ontario. It is late in the day to be seeking an Order for security for costs, so that in Mr. Kubrick's submission, the matter should be set down for hearing.

Finally, Mr. Kubrick submitted that there is no breakdown of the costs claimed and the tribunal cannot know how they relate to the various efforts in defence of the claim or counterclaim. Also, the costs submitted are in the nature of being on a solicitor and client basis. Mr. Kubrick concluded by submitting that the application should be dismissed and costs awarded to his client on a solicitor and client basis in the amount of $2,000.00. He further requested that such costs be paid before the matter be allowed to proceed.

Mr. Cohen submitted that Mr. Kubrick's case was made without the benefit of an affidavit and materials filed in opposition. He submitted that the onus was on Mr. Kubrick to put in admissible evidence. There was no evidence put forward that the agreement was honoured by Diamond Rock and the evidence in the motion record is of a company incorporated in Nevada, although the motion record does show that a letter was sent from an Ottawa address. The letter advising of the annual meeting does not constitute evidence of an office in Ottawa.

Mr. Cohen submitted that Mr. Ewanchuk has met the onus of showing that Diamond Rock Resources Inc. is not resident in Ontario. All of the evidence shows it to be a Nevada corporation and there is no evidence that it has an office in Ontario.

As to the matter of the failure to produce a bill of costs, it should not be regarded, in Mr. Cohen's submission, as material. There is a sworn affidavit of Mr. Ewanchuk as to what his solicitor's costs have been and of what they are likely to be following the hearing. In looking at the pleadings to date, Mr. Cohen suggested that the length of the hearing, which is certain to be drawn out, is in excess of what was estimated in costs. Mr. Cohen submitted that the affidavit of his client should stand in the stead of a bill of costs and is of greater weight than a bill of costs.

As to the issue of whether there can be an award of costs where there is a counterclaim, Mr. Cohen submitted that the Mining Claims are currently held by Mr. Ewanchuk and there is no need for Mr. Ewanchuk to attend to seek their return. Rather, he is before the tribunal as a respondent to the action of Diamond Rock to have the Mining Claims transferred to it. That is his defence, and Mr. Cohen submitted that the case referred to of **Paul v. General Magnaplate Corporation** is of no application to these facts.

As to the matter of the timing of the application, it is brought in advance of the hearing, and it is pointed out that it could not be brought once the hearing has commenced. Further, the hearing itself has been rescheduled to accommodate the motion, so the argument is of little assistance.

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As to the matter of the request for costs on a solicitor and client basis, Mr. Cohen submitted that it is quite appropriate in the circumstances. The submission that Mr. Ewanchuk himself is responsible for Diamond Rock Resources Inc. not going public is, in his submission, egregious and high handed. Mr. Cohen stated that the tribunal is free to adjust it downward as it may deem appropriate. If a decision were made to require security for costs on the basis of party and party costs, then an appropriate amount would be 50 percent of the amount requested.

Mr. Kubrick stated that his initial submissions stand. The powers of the tribunal are similar to those exercised by the Courts under Rule 127(2) of the Rules of Civil Procedure, and that it is required to requite itself in the exercise of those powers in the same manner as the Courts. Mr. Kubrick ended by stating that the pleadings should properly be regarded as part of the motion.

Mr. Cohen's final comment with respect to the pleadings is that they may play a role in the motion for purposes of assessing security for costs. They cannot, however, be taken as evidence. Any suggestion that they be used to prove Diamond Rock's position is without merit.

Further Evidence

Through its own efforts, the tribunal obtained through a Request for Corporation Information from the Ministry of Consumer and Commercial Relations, a showing of "No Record" for Diamond Rock Resources Inc. and Diamond Rock Resources Ltd. It further obtained from the Ministry of Northern Development and Mines, pursuant to a client search, that Diamond Rock Resources Inc. is not found. The parties were advised of this search and counsel was given the opportunity to make submissions.

Mr. Cohen submitted the following in writing on February 4, 1999:

1. The Statement of No-Record" from the Ontario Ministry of Consumer and Commercial Relations in respect of "Diamond Rock Resources Inc." reinforces the non-resident status of Diamond Rock Resources Inc. in Ontario. This supports Mr. Ewanchuk's request for security for costs.

2. With respect to the search of the Ministry of Northern Development and Mines' "Claims Client System under which Diamond Rock Resources Inc. is not listed, this search result reinforces the vexatious nature of Diamond Rock Resources Inc.'s claim and its non-resident status, both of which are grounds to award the security for costs requested by Mr. Ewanchuk.

Mr. Kubrick's response, dated February 19, 1999, states in part:

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We would respectfully submit that the registration of Diamond Rock Resources Inc. as an extra provincial corporation doing business in the province of Ontario is irrelevant to these proceedings. The motion materials of the applicant Mr. Ewanchuk indicate that Diamond Rock Resources Inc. does business through its wholly owned subsidiary company 3302369 Canada Inc. (see Tab F of applicant's materials), and accordingly, in our submission, does not require registration. Diamond Rock Resources Inc. has, according to the evidence provided by the applicant, assets in Ontario through its wholly owned subsidiary. Furthermore, the evidence of the Applicant at Appendix H to the affidavit of Mr. Ewanchuk is that Diamond Rock Resources Inc. does not have an office in the province of Ontario.

In any event, the law indicates that a physical presence in the province is only one of a number of factors that a court must consider when making a decision on a motion for costs. In other words, the lack of a physical presence in Ontario (which is not the case in these proceedings) does not, of itself, give rise to a right to security for costs (see Paul v. General Magnaplate Corp. (1995), 27 O.R. (3d) 314, at 321, (Ont. Ct. (Gen. Div)).

In this regard, it is again noted that the applicant has not established the prerequisites for, nor provided the Commissioner with the information necessary to justify an order for security for costs. The attempt to obtain costs on a solicitor-client-basis on the basis of a simple estimate of quantum of costs cannot permit a court to make any determination as to the reasonableness of costs claimed; particularly in the face of the neglect or refusal to answer an express request, by letter dated December 22, 1998, for a copy of bills provided to date as evidence of expenses alleged in paragraph 10 of the Affidavit of Mr. Ewanchuk. It is the applicant's case to make, and that case has not been made by any reasonable standard.

Turning to the allegation that the status of Diamond Rock Resources Inc. somehow reinforces the applicant allegation that the claim of the Plaintiff is "vexatious", we note, once again, that the cost issue must be decided on the sufficiency of the allegations in the Statement of Claim, and not in the Counterclaim of the Defendant. To base a decision on vexatiousness on the basis of issues raised in the Counterclaim is inappropriate as described in the case law provided to the Commissioner at the hearing of January 12 (see: Paul v. General Magnaplate Corp., *supra*). This

> is an entirely reasonable view since to do otherwise would require that the Commissioner make a finding of fact on the allegations of the Defendant (sic) in its Counterclaim. The trial is the only appropriate place to make such findings of fact.

Findings

Mr. Cohen, on behalf of the Respondent, Mr. Ewanchuk, brought this motion for security for costs. In doing so, he filed his motion, the affidavit of Mr. Ewanchuk and supporting documentation. Mr. Kubrick chose to not file any motion materials and sought to rely on his filings on the merits as well as Mr. Cohen's motion documents.

The tribunal was initially contacted by Mr. Cohen with respect to a Motion on November 30, 1998. Pursuant to this request, an Appointment for Preliminary Motion for Telephone Conference Call was issued by the tribunal on December 3, 1998, appointing December 17, 1998 as the time for the hearing of the Motion. In response to this motion and discussions between Counsel and Mr. Daniel Pascoe, tribunal Registrar, this Appointment for Hearing was subsequently rescinded. There was some discussion of additional preliminary matters such as production of documents and more particularly, Mr. Kubrick indicated that he would be seeking to cross-examine Mr. Ewanchuk on his affidavit filed in support of the Motion on December 8, 1998. On December 16, 1998, the tribunal rescinded it earlier Appointment and issued a new one in its place, appointing January 12, 1999 in the tribunal's Courtroom. No mention is made in that Appointment regarding production of documents, its being limited to the section 122 application for security for costs. The error was on the part of the tribunal, although the parties are not precluded from requesting a motion or pre-hearing conference to deal with the production of documents.

Under its ***Procedural Guidelines for Proceedings under the Mining Act***, Part X, paragraph 10 states:

> **10.** (1) Any party wishing to make a motion shall notify the Registrar in order to obtain a date and shall serve all affected parties with notice of same at least ten (10) business days before the motion date.
>
> (2) Parties involved in the motion shall provide a copy of all affidavits and other material necessary for the hearing of the motion to each other and to the Commissioner prior to the hearing date.

The tribunal has intervened in cases where the filing of documents voluntarily in support or opposition to a motion did not go smoothly, particularly where counsel could not agree. Frankly, it was outside this tribunal's experience that counsel would not seek to file materials in opposition to the motion, having in the past only been subject to issues of sufficiency of time to do so.

That Mr. Kubrick did not seek to file an affidavit and supporting documentation is troubling insofar as materials filed in support of the application under section 105 of the **Mining Act** cannot be considered as proved or as anything more than evidence upon which his client is seeking to rely. This being the case, as indicated at the hearing of the motion, Mr. Kubrick proceeds on this basis at the risk of not sufficiently persuading the tribunal of his client's position.

It is also noted that the purpose in having an in person hearing of the motion was to afford Mr. Kubrick the opportunity to cross-examine Mr. Ewanchuk on his affidavit. The tribunal was advised at the commencement that Mr. Ewanchuk was not in attendance, but that he would be available to be brought by telephone into the hearing, an offer which Mr. Kubrick declined, stating that he wished to put certain documents to Mr. Ewanchuk and allow the tribunal the opportunity to observe Mr. Ewanchuk's demeanour.

All of this serves to form an unfortunate set of circumstances for the course of the hearing. Mr. Kubrick has failed to file motion documents upon which he could rely, and therefore, certain facts which the tribunal would seek to know are not available. Mr. Cohen failed to produce Mr. Ewanchuk for cross-examination, and indeed, the tribunal would also have benefited from observing Mr. Ewanchuk and hearing his answers to questions. However, counsel are entitled to present their cases as they wish, and accept the consequences.

While matters leading up to the hearing of the motion have the appearance of tactical and strictly legalistic manoeuvring on the part of Counsel, the tribunal is nonetheless bound by its jurisdiction, found in clause 116(1)(a) and section 121 of the **Mining Act**:

> **116.** (1) Sections 114 and 115 apply despite the *Statutory Powers Procedure Act* and, subject to that Act, the Commissioner may,
>
> . . . .
>
> (a) five directions for having any matter or proceeding heard and decided without unnecessary formality;
>
> **121.** The Commissioner shall give a decision upon the real merits and substantial justice of the case.

Based upon the latter, the tribunal finds that it cannot make a finding that the application is vexatious based solely on the case of the Respondent/Applicant in the motion, where the Applicant/Respondent in the motion has failed to file documentation. Rather, it must look to the merits, such as they can be ascertained without the benefit of documents or an in-person witness. However, it is the absence of motion-related documentation which will hurt the position of Mr. Kubrick's client. The failure to produce Mr. Ewanchuk for cross-examination, while not the best situation, is not fatal to the motion, as adequate documentation has been filed to provide the tribunal with the necessary facts to make the findings that are made.

Vexatious

The test for whether a matter is vexatious which has been adopted by the tribunal is set out in **Osiel v. Minister of Northern Development and Mines** (unreported), MA 015-92, April 9, 1994. In that case the test used in **Re Lang Mitchener, et al. v. Fabian et al.** 59 O.R. (2d) 353, was adopted and the various considerations, which are reproduced, were set out:

> 1. The bringing of one or more actions to determine an issue which has already been determined by a court of competent jurisdiction constitutes a vexatious proceeding.
> 2. Where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain relief, the action is vexatious.
> 3. Vexatious actions include those brought for an improper purpose, including the harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights.
> 4. It is a general characteristic of vexatious proceedings that the grounds and issues raised tend to be rolled forward into subsequent actions and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in the earlier proceedings.
> 5. In determining whether proceedings are vexatious, the Court must look at the whole history of the matter and not just whether there was originally a good cause of action.
> 6. The failure of the person instituting the proceedings to pay the cost of unsuccessful proceedings is one factor to be considered in determining whether proceedings are vexatious.
> 7. The respondent's conduct in persistently taking unsuccessful appeals form judicial decisions can be considered vexatious conduct of legal proceedings.

Mr. Cohen indicated that he was bringing this motion with respect to a vexatious proceeding under the second ground listed above, namely that it is obvious that the action will not succeed. The tribunal has considered the evidence presented by Mr. Cohen and finds that, while many questions have been raised as to the dealings of the three companies involved, Diamond Rock Resources Ltd., Diamond Rock Resources Ltd. and 3302369 Canada Inc., it would be premature to state or declare that the action has no likelihood of success.

The main issue involves whether the terms of the Option Agreement have been fulfilled or not in relation to the shares which form part of the consideration. On the facts presented to the tribunal, it becomes clear that considerable introduction of evidence and argument is required to determine the nature of the shares agreed upon in the Option Agreement, and whether that quality of shares has been delivered. The tribunal would be making findings as to whether "freely traded" does or does not mean the same as "trading on a publicly listed stock exchange". Similarly, the tribunal would be called upon to determine whether it was shares in Diamond Rock Resources Inc. or Diamond Rock Resources Ltd. which Mr. Ewanchuk had contracted to receive. Further, there is the issue of whether failure to obtain the consent of Mr. Ewanchuk to the various assignments constitutes a fundamental breach of the Option Agreement entitling Mr. Ewanchuk to terminate it.

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The tribunal has considered the facts and argument presented by Mr. Cohen and has come to the conclusion that the outcome in this matter is by no means a certainty. The issue of payment of money up to the date of the hearing does not appear to be denied. Rather, it is the quality of the shares provided which is in issue. Quite frankly, the tribunal is not in a position to declare with any certainty or supporting findings of fact or law at this time as to what its findings on the above-noted issues will be. These are issues requiring full adjudication to interpret the terms of the Option Agreement with regard to the applicable law, be it section 58 of the **Mining Act**, applicable provisions of the **Ontario Securities Act**, and any other legislation the tribunal may find applicable.

The summary facts and law introduced by Mr. Cohen on the motion, frankly do not replace a full hearing on the merits. His case has not, on this ground of vexatious, been hampered by the absence of documentation due to the failure of Mr. Kubrick to file documents in response to the motion. Rather, it is a serious allegation that a proceeding be considered vexatious and this ground requires that, upon relatively cursory presentation of the alleged facts, it becomes clear that there is no likelihood of success and that there is no case to be made.

Mr. Cohen has failed to persuade the tribunal that the action of the Applicant cannot succeed. However, the evidence provided by Mr. Cohen raises questions as to whether Diamond Rock Resources Inc. would have the ability to pay costs, should costs be awarded.

Resident Outside Ontario

Diamond Rock Resources Inc. is a Nevada Corporation, a fact which has been admitted. The tribunal finds that there is no evidence to support a position that it is resident in Ontario and finds that it is not a resident in Ontario for purposes of section 122 of the **Mining Act**. Correspondence from an Ottawa address regarding a meeting of shareholders in Nevada is insufficient to establish residency without an accompanying affidavit setting out what is behind the address, and more particularly setting out the assets of Diamond Rock Resources Inc. in Ontario. Mr. Kubrick failed to file an affidavit on behalf of his client setting information supporting a finding of residency. Mr. Kubrick has also alleged that 3302369 Canada Inc. is a wholly owned subsidiary of Diamond Rock Resources Inc.

The Financial Statements for Diamond Rock Resources Inc. and 3302369 Canada Inc. found in the motion materials filed by Mr. Cohen do seem to suggest that 3302369 Canada Inc. is a wholly owned subsidiary, by virtue of the fact that the 100 common shares issued by 3302369 Canada Inc. form part of the consideration for the purchase of the assets and liabilities from Diamond Rock Resources Inc. However, they are not signed by the Directors and involve the calendar year 1996. It is now 1999, and while the unsigned Financial Statements do raise questions such as whether they been approved by shareholders, there is absolutely no information before the tribunal to indicate that what may have been true in 1996 remains the case in 1999.

It would have been prudent for Mr. Kubrick to have provided a sworn statement of one of the principals of his client setting out exactly what the situation regarding the operation of Diamond Rock Resources Inc. in Canada was. It would have also been useful to be provided with information as to why Diamond Rock Resources Inc. and not 3302369 Canada Inc., the apparent current holder of the Mineral Property Option Agreement, chose to initiate this action.

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While the tribunal is not prepared to make a finding at this time, without the benefit of full argument on the matter, as to whether Diamond Rock Resources Inc. is the proper entity to bring the application on the merits, this can readily be dealt with in a preliminary motion to the hearing on the merits. This, allowing for an amendment to the title of proceedings if found to be necessary, would be preferable to an outright dismissal, only to have the matter reinstituted by the numbered company, at considerable additional time and cost to the parties.

The tribunal finds that there has been insufficient evidence and argument as to the status of the numbered company as a wholly owned subsidiary of Diamond Rock Resources Inc. as of the date of the application. In particular, it is unknown whether more than the initial 100 common shares issued by 3302369 Canada inc. upon the purchase of some of the assets of Diamond Rock Resources Inc. (or Diamond Rock Resources Ltd., if in fact this is what is meant by the Financial Statement) in 1996 have been issued since that time and if so, were the shares issued to anyone other than Diamond Rock Resources Inc. These questions raise the issue of whether Diamond Rock Resources Inc. would have ability to pay costs, should costs be awarded.

The tribunal's inquiries have disclosed that there is no record of Diamond Rock Resources Inc. with the Ministry of Consumer and Commercial Relations which, according to the provisions of the **Extra-Provincial Corporations Act**, is required as an extra-provincial corporation having been incorporated under the laws of a jurisdiction outside of Canada. Also, there is no client number for Diamond Rock Resources Inc. with the Ministry of Northern Development and Mines.

As to the residency of 3302369 Canada Inc., there is no evidence that it is resident in Ontario found in the Financial Statements at Exhibit 1, Tab F. While one has the impression that 3302369 Canada Inc. has assets in Ontario in the form of unspecified short-term investments and its interest in three Mineral Property Option Agreements, given that the status of that company as a wholly owned subsidiary of Diamond Rock Resources Inc. at the time of the application has not been proved to the satisfaction of the tribunal, it is unclear as to whether Diamond Rock Resources Inc. would have the ability to redeem such assets owned by 3302369 Canada Inc. in satisfaction of its own debts. In other words, would Diamond Rock Resources Inc. have the ability to pay costs. Mr. Kubrick, while suggesting that Mr. Cohen's reference to Diamond Rock Resources Inc.'s operating loss position in 1996 of $147,120 was prejudicial, at the same time stated that a mining company raising money for exploration would have investment in that company as its only source of income. The tribunal notes this statement with interest. If the Option Agreement is held by 3302369 Canada Inc., then how is it that Diamond Rock Resources Inc. is able to raise the funds directly, if the assets are held by another company, albeit one allegedly being a wholly owned subsidiary?

Referring to the case of **McDougall & Christmas v. Genser**, the tribunal noted that the Court had reference to **Ashland Co. v. Armstrong**, (1906) 11 O.L.R. 414, where a mining company was found to not meet the residency requirements where it was found to be a small agency acting in mining operations for mere months. The tribunal notes that there are many questions unanswered as to the nature of the Diamond Rock Resources Inc. activities and business and while its unconsolidated assets today, let alone in 1996, are not known, the tribunal notes that ownership of all of the assets of Diamond Rock Resources Ltd. was for only a period of four days.

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As to the argument by Mr. Kubrick that the counterclaim of Mr. Ewanchuk is the real dispute in this action, based upon the authority of the Rule 56.01((1)(a) of the Rules of Civil Procedure and the case of **Paul v. General Magnaplate Corp.**, which held that the Court is required to go beyond a strict application of this provision to ascertain whether, on all of the circumstances of the case, whether justice demands the posting of security. The tribunal has considered the circumstances of this case as follows. The assets of the Mining Claims are currently in the name of John Ewanchuk or Ewanchuk with James Morris and Frederick Swanson. The Option Agreement rests with one of the three Diamond Rock companies (ie. Ltd, Inc. or 3302369 Canada Inc.), one of whom is in a position to raise money on the basis of this Option for purposes of exploration. Until this matter is resolved, frankly neither Ewanchuk nor Diamond Rock can deal with the Mining Claims. Ewanchuk cannot enter into a new Option Agreement until notice of the existing Agreement is removed from the abstracts. Diamond Rock cannot option the Mining Claims without owning them and ultimately, they would require transfer of the Mining Claims to proceed to a lease. Little would be gained by a further assignment, which seemingly would require Ewanchuk's consent.

The tribunal finds that the equities rest with Mr. Ewanchuk, and accepts the argument of Mr. Cohen that Mr. Ewanchuk's position could be furthered without the counterclaim, in that if Diamond Rock Resources Inc. were not to succeed on the application, the result would be the same for Mr. Ewanchuk as if he were to succeed in his counterclaim. There has been raised in this motion the very real concern that Diamond Rock Resources Inc.'s financial situation is such that it may not be in a position to pay any costs awarded against it. The relationship between Diamond Rock Resources Inc. and 3302369 Canada Inc. as of the date of the application is not clear, nor is it clear that there are assets available to Diamond Rock Resources Inc. which would satisfy such an Order.

Diamond Rock Resources Inc., or whichever company owned the rights to the Option Agreement, has not been precluded from raising money since its signing. **Paul v. General Magnaplate Corp.** does not stand for the proposition that motions for security for costs where there is a counterclaim will fail in all cases, but simply directs the Court to look beyond the residency and vexatious requirements, looking to the real merits and justice of the case. In this case, the tribunal finds that Mr. Ewanchuk is disputing the action for a transfer of the Mining Claims, due only to the passage of time. The result of this motion has been to persuade the tribunal that Diamond Rock Resources Inc. may not have sufficient assets to satisfy an Order for costs, should such an Order be made.

Clause 3 of the Option Agreement sets out that the initial block of shares will be in capital stock valued at $100,000, the number to be based upon the closing market price on the first day the shares are traded publicly. Mr. Ewanchuk would appear to have a complaint with this provision, owing to the fact that events did not play out as he believes he was led to believe, but as to whether this is in fact and law the case, only a final adjudication will reveal. Without closer examination, nothing can be further said regarding the merits of Mr. Ewanchuk's position, but on the surface, it would appear he has cause for complaint.

Also, costs have accumulated in this matter, which has not yet gone to hearing, at a considerable pace. The tribunal finds, on the equities, that owing to Diamond Rock Resources Inc.'s having failed to provide its residency in Ontario, its ability to raise capital and the ongoing cost of litigation to Mr. Ewanchuk, that this is a proper case for the ordering of security for costs.

Quantum

The evidence before the tribunal is the affidavit of Mr. Ewanchuk as to the quantum of costs, rather than actual billings. The tribunal finds that it will accept this evidence. There is nothing to suggest that the costs to date were not incurred, given the activities of Counsel in dealing with the matter. The tribunal also finds that the estimate of costs with regard to a hearing on the merits may be somewhat low. The tribunal is left with the impression that the projected length of the hearing will be low, not to mention the ongoing matter of disclosure.

However, it is noted that the submitted costs are on a solicitor and client basis, rather than on the basis of party and party costs. While the matter has not be thoroughly argued, and the tribunal has on one occasion awarded costs on a solicitor and client basis, there is considerable doubt as to whether it has the authority to do so. Absent direction from the Superior Court of Justice on this issue, and owing to the passage of time preventing this matter from being heard on the merits, the tribunal finds that it will fix costs to be given as security on a party and party basis. Based upon the material contained in the affidavit of Mr. Ewanchuk, the quantum is fixed at $17,500.

Time

The tribunal has considered the submissions of Mr. Kubrick asking for a lengthy period for the posting of security for costs, his having mentioned the **Osiel** case, which afforded three and a half months. With the greatest of respect, the tribunal finds that nothing could be gained by affording such a lengthy time. The facts in the **Osiel** case were unique, and the tribunal had been persuaded that owing to the particular facts of that case and Mr. Oseil's circumstances, three and a half months were warranted. No such finding can be made here. Diamond Rock Resources Inc. claims to be in the business of raising funds for mining investment and exploration, and insofar as it actively seeks investors, must necessarily have access to funds to conduct its day to day business.

The tribunal finds that it will allow a period of thirty-five (35) days for the posting of security for costs. Failure to post security for costs within the time frame provided will result in a dismissal of the application.

Other Matters

The tribunal has been flexible in many cases by allowing witnesses to attend by telephone, with a telephone jack having been installed in the hearing room for that purpose. Given the nature of the issues between these parties, the tribunal must state that this is a case

where the in-person attendance of witnesses is necessary, given not only the need to be cross-examined on a myriad of complex documents, but also to allow the tribunal to observe any witnesses providing their evidence, given the extremely contentious nature of the facts involved. The tribunal finds that there are issues which require a full hearing on the merits and therefore, the Respondent/Applicant to the motion has failed to meet the test that this action is vexatious.

The parties are also advised that, the Commissioner is not seized of this matter. Should it proceed to a hearing on the merits, it will be scheduled before a Deputy Mining and Lands Commissioner

Conclusions

Diamond Rock Resources Inc. has been found to not be resident in the Province of Ontario. Based upon its jurisdiction under section 122 of the **Mining Act**, the tribunal has ordered that costs fixed in the amount of $17,500 be posted as security by Diamond Rock Resources Inc. within thirty-five (35) days of the date of this Order, being August 3, 1999. Failure to do so will result in the dismissal of the application.