and procedure. (*Zellers Inc. Royal Cobourg Centres Ltd.*, [2001] O.J. No. 1470 (Div. Ct.), paras. 17, 18 and 24; and *Lafarge*, above, at paras. 4-14)

33 The Commissioner identified the appropriate test on a motion for party status in a fill permit appeal. She concluded the test was whether the applicant seeking party status could make a "useful contribution" to the technical matters at issue in the appeal. She identified these matters as the effect of the development on flood control, erosion, pollution and the conservation of land.

34 The applicants submitted to the Commissioner that Rule 13.01 of the *Rules of Civil Procedure* should be applied by analogy. After an extensive analysis, the Commissioner decided Rule 13.01 could be of assistance so long as it was not limited to the test as applied in court proceedings. In effect, she applied the view expressed by Dubin C.J.O., in *Regional Municipality of Peel* v. *Great Atlantic & Pacific Co. of Canada* (1990), 74 O.R. (2d) 164 (C.A.), at para. 10:

> Although much has been written as to the proper matters to be considered in determining whether an application for intervention should be granted, in the end, in my opinion, the matters to be considered are the nature of the case, the issues which arise and the likelihood of the applicant being able to make a useful contribution to the resolution of the appeal without causing injustice to the immediate parties.

35 Ontario courts have consistently adopted this approach when a tribunal is asked to grant party status. The tribunal is not restricted to the test that is applicable to court proceedings, but may consider other matters, including the subject-matter of the decision-making power, the nature of the issue to be decided at the hearing and the object of the governing legislation. (*M.(M.)* v. *Ontario (Child & Family Services Review Bd.)*, (1989), 70 O.R. (2d) 321; *Lafarge*, above, at paras. 11-12)

36 The Commissioner instructed herself that she should identify the applicants' interests and decide the relevancy of those interests to the appeal. The only evidence submitted was Mr. Roffey's affidavit, which spoke to the possible adverse effects to his lands should the appeal succeed. The Commissioner quite properly concluded the applicants were seeking to preserve amenities for privately-held interests, which did not fall within the scope and jurisdiction of the appeal, taken pursuant to s. 28 of the *CAA*.

37 The Commissioner concluded her analysis as follows:

> To allow the Neighbours to introduce elements of their own adverse economic impact in opposition to the proposed development would introduce a level of unfairness which cannot be justified. Economic impact which is irrelevant for an appellant must be equally irrelevant for those in opposition ... The decision to be made does not involve balancing economic interests with watershed concerns. It has not been allowed as an issue by the Commissioner for over thirty years for very good reason. Control of flooding, pollution and conservation of land are technical.

In concluding as she did, we find no procedural unfairness.

The Doctrine of Legitimate Expectation

38 The applicants submitted to the Commissioner that by virtue of their participation in the TRCA hearing, the applicants had a legitimate expectation to be heard on the Russell appeal.

39 The doctrine of legitimate expectation is an extension of the rules of natural justice and procedural fairness. It allows the court to cure an omission if the conduct of a public official leads a party to believe that their rights would not be affected without consultation.

40 The applicants' submissions misconstrue the doctrine of legitimate expectation. It is an aspect of procedural due process and not a source of substantive rights. The doctrine may not be used to compel a particular decision. (*Libbey Canada Inc.* v. *Ontario (Ministry of Labour)*, (1999), 42 O.R. (3d) 417 (C.A.), para. 57; and *Monsanto Canada Inc.* v. *Ontario (Superintendent of Financial Services*) (2002), 62 O.R. (3d) 305 (C.A.) at para. 91)

41 For the doctrine to be applicable, an applicant must demonstrate that it detrimentally relied upon a clear, unambiguous and unqualified representation of a government body or agency (either an explicit promise or long-standing practice) that certain procedural or participatory rights would be afforded the applicant. (*Baker* v. *Canada (Minister of Citizenship and Immigration*), [1999] 2 S.C.R. 817 (C.A.); and *Libbey*, above)

42 The Commissioner's response to the applicants' submissions was as follows:

> There has been nothing in the conduct of the Office of the Commissioner itself which has given rise to a reasonable or legitimate expectation that the Neighbours would be accorded party status before the TRCA; if they did, they would have the right to either appeal or to be heard on Mr. Russell's appeal. The only recourse left to them is to make a motion to the Commissioner seeking party status and convincing me that party status is warranted in the circumstances of the case.
>
> For the Commissioner to be bound by what can best be described as an informal proceeding before the TRCA, which in part was conducted like a town hall meeting in which deputations of neighbours and interested organization were heard, would frankly fetter the discretion of the Commissioner. There is nothing in this situation, and I could not find anything in any case law, which even hinted that the Commissioner could or should be bound by proceedings which took place in front of the TRCA, however they may be characterized.
>
> Commissioner's Reasons for Decision, p. 18

In concluding as she did, we find no procedural unfairness.

The Hearing *De Novo*

43 The applicants submit the Commissioner essentially converted an open and public process to a closed process when she determined that Mr. Russell's appeal would proceed by way of a hearing *de novo*. They submit they were deprived of their right to participate in the appeal of a matter in which they had taken a role at the hearing at first instance. We reject this submission.

44 Section 113 of the *Mining Act* provides:

> est in the subject matter of the litigation, which is the capacity of Mr. Russell's land and the surrounding ravine lands to withstand the proposed encroachment. There is, frankly, a difference between having an interest in law and being interested in the outcome. The Neighbour's interest, as far as I can determine, is that they do not want to lose the amenity of having Mr. Russell's undeveloped ravine land abutting their own ... Nothing raised by the Neighbours suggests that there is any issue in which they have profound concerns with the evidence of either Mr. Russell or the TRCA and over which the Commissioner has jurisdiction.

In her consideration of the evidence, we find no procedural unfairness.

Pre-Judgment of the Evidence

50 As to the allegation the Commissioner anticipated and pre-judged the applicants' evidence, the Commissioner was entitled to evaluate the usefulness of that evidence on Mr. Russell's appeal. She found the evidence, as noted earlier in these reasons, to deal with issues outside the Commissioner's task, which was to evaluate technical evidence with respect to the appropriateness of a fill permit viewed from the perspective of conservation principles. We find no procedural unfairness nor any pre-judgment of the evidence.

51 Our review of the Commissioner's decision discloses no procedural unfairness and no unreasonable conclusions. The application for judicial review is dismissed.

52 The respondent, Mr. Russell, shall have costs of $15,000, inclusive of fees, disbursements and GST, on a partial indemnity scale payable in thirty days. The intervenor does not seek costs.

J.D. CARNWATH J.
S.E. GREER J.
G.F. SPEIGEL J.

* * * * *

Corrigendum
Released: January 16, 2008

Counsel entry corrected to read: "*Amber Stewart*, for the Respondent, Derek Russell".

cp/e/qlttm/qlpxm/qlesm/qltxp/qlesm/qljxl/qlcas

Case Name:

Albino (Re)

IN THE MATTER OF the Securities Act, R.S.O. 1980, Chapter 466, as amended
AND IN THE MATTER OF George Albino
Decision
(Section 124)

1991 LNONOSC 27

Also reported at: (1991), 14 OSCB 365

Ontario Securities Commission

C. Salter, J.W. Blain, L.B. Hansen

Heard: September 6 and 7, 1990
Decision: January 29, 1991

COUNSEL:

J.D.G. Douglas, for Commission staff.

R. Bruce Pollock and Robert P. Wildeboer, for George Albino.

J.W. BLAIN:-- For the reasons hereafter stated, I am unable to agree with the conclusion reached by Vice-Chairman Salter and Commissioner Hansen.

Purpose of Hearing

This hearing was convened, by notice of hearing dated November 15, 1989, to consider:

(a) whether it appears to the Commission that George Albino (Albino) traded in securities of Rio Algom Limited (Rio Algom) with knowledge of an undisclosed material fact or material change with respect to Rio Algom; and
(b) whether, in the opinion of the Commission, it is in the public interest for the Commission to make an order pursuant to subsection 124(1) of the Securities Act, R.S.O. 1980, Ch. 466, as amended, (the Act), subject to such terms and conditions as the Commission may impose, that any or all of the

exemptions contained in sections 34, 71, 72 and 92 of the Act and the Regulation to the Act do not apply to Albino.

By a document entitled statement of case, dated October 13, 1989, which presumably accompanied the notice of hearing, brief particulars of the allegations against Albino which prompted the hearing were furnished.

Briefly summarized, the statement of case alleges that Albino exercised his right to encash certain award units received by him under the Long Term Incentive Plan (the Incentive Plan or the Plan) which formed part of Rio Algom's direct compensation program for its senior executives and senior management and that the realization of the gain on such award units as a result of such encashment was a sale of securities of Rio Algom or of a security, the market price of which varies materially with the market price of the securities of Rio Algom, with the knowledge of a material fact or material change with respect to Rio Algom that had not been generally disclosed. The nature of the Incentive Plan and the facts surrounding the exercise by Albino of his right to encash the award units which form the subject of this hearing are dealt with in detail below.

The Incentive Plan

The Incentive Plan, a copy of which was filed by Staff (Tab 3 - Exhibit 1) states in effect that Rio Algom's direct compensation program for its senior executives and senior management comprises a cash compensation plan and a long term incentive plan. The cash compensation plan, which is a combination of a salary plan and an annual incentive bonus plan, was approved by the board of Rio Algom on August 1, 1979. The Incentive Plan also states that it completes the direct compensation program as then envisaged and replaces two previous plans, the 1973 incentive performance plan and the 1978 stock option plan.

The Incentive Plan states that it has three main objectives:

(i) to focus executive attention on t@ose actions that will be of most benefit to Rio Algom's shareholders over the longer term,

(ii) to motivate senior executives and senior management by providing them with the opportunity to realize gains if the opportunity to realize such gains is also available to Rio Algom's shareholders,

(iii) to relate Rio Algom's total compensation for its senior executives and senior management to that of other corporations and to encourage participants to maintain continuity . of employment.

The Incentive Plan goes on to provide that, to achieve these objectives and to have full regard to the interests of Rio Algom's shareholders, the Incentive Plan should be based on changes in the market value of Rio Algom's common shares over a reasonable period and, to be consistent with commonizing the interests of plan participants with those of the shareholders, the Incentive Plan should include a dividend accumulation feature.

The Incentive Plan utilizes award units each of which is comprised of an incentive unit and a dividend unit. The Incentive Plan specifically provides that no Rio Algom shares are issued under it and no actual dividends are paid.

An incentive unit is the equivalent of one share of Rio Algom common stock. The Incentive Plan provides "it is a means of measuring gain and does not involve ownership of stock". The gain on an incentive unit is the excess of the "defined" market value of a common share on the exercise date over the "defined" market value on the award date. In each case the defined market value is the closing price of a Rio Algom common share on The Toronto Stock Exchange on the last trading day prior to the exercise date or the award date as applicable. The Incentive Plan, as originally approved by shareholders, provided that the defined market value was to be the average of the closing price of one common share on The Toronto Stock Exchange in the 30 calendar days preceding the award date or the exercise date, as the case may be. It is understood that the definition was amended on October 26, 1984 but no reason was given why the change was made. The timing of the amendment would indicate, however, that it had nothing to do with the matters before us nor was there any allegation made by staff that it did.

There is one dividend unit for each incentive unit. Each dividend unit has a value equal to the dividends declared on one share of Rio Algom common stock. The dividend units are accumulated until the exercise date; they do not bear interest and are not converted into incentive units.

An award under the Incentive Plan has a "live period" of ten years from the date of its commencement. Awards are usually made in February with the live period commencing on the following July.

A participant may exercise a right to gains as follows:

(i) the period in which the right to gain may be exercised commences one year after the live period has begun,

(ii) thereafter the participant may exercise any or all of the participant's rights to gains during a period commencing on the third business day and ending on the twelfth business day after the release of any financial results provided the participant has not during this period become privy to insider information that would make such action improper,

(iii) on the expiry date of the live period all rights to gains not previously exercised will be deemed exercised on such date.

There are then generally four "open windows" per year for the exercise of rights under the Incentive Plan based upon the release of the quarterly financial results of Rio Algom.

Payment of the full amount of gains arising upon an exercise or deemed exercise of a right to gains is to be deferred until retirement or termination of service prior to retirement unless the participant, under certain circumstances, specifically requests in writing to receive the full amount of the gains in cash or to receive one-half of the gains in cash and to defer one-half until retirement or termination prior to retirement. 177

The Incentive Plan provides that award units are not transferable other than by will or pursuant to the laws of descent in the case of the death of a participant.

Provision is made in the Incentive Plan for its administration and the procedure for granting award units under the Plan, including the size of the award units which may be awarded under the Plan to various classes of executives.

The Incentive Plan was approved by the shareholders of Rio Algom at the annual and general meeting of shareholders held on April 30, 1980 and the proxy statement and information circular which was furnished to shareholders in connection with that meeting contains a comprehensive description of the Plan sufficient to enable shareholders to arrive at an informed decision.

Incentive plans of the type adopted by Rio Algom, which are sometimes called phantom stock plans, appear to be not uncommon. Mr. John Bush, the vice-president, general counsel and secretary of Rio Algom, testified that a lot of larger companies used this type of plan and that in his estimate roughly a quarter of larger companies would have a phantom stock plan of some sort. Indeed, Craig C. Thorburn of Blake, Cassels & Graydon appeared in these proceedings and sought standing, which we declined to grant for the reasons set forth by Vice-Chairman Salter, with which I agree. He based his application on the fact that clients of his firm, who wished to remain unnamed, have similar plans and it would be helpful to the Commission to have before it a submission which addressed the larger issues at stake. While we have no evidence of the format of other phantom stock plans it can, I think, be assumed that they are similar in operation to the Rio Algom Incentive Plan, i.e., a payment to an executive based on the increase in market value of the company's stock, and that the Rio Algom Plan is by no means unique.

Albino was the recipient of award units under the Incentive Plan. It is the circumstances surrounding his encashment of certain of the award units on April 30, 1986 that result in the present proceeding.

The Ontario Hydro Contract

Mr. Bush testified with respect to certain discussions and negotiations which took place during 1985 and 1986 between Rio Algom and Ontario Hydro (Hydro) relating to a contract between Rio Algom and Hydro pursuant to which Rio Algom was supplying uranium to Hydro (the Hydro Contract). He said that in May of 1985 a meeting was held between senior management of Rio Algom and Hydro to examine various means by which Hydro's oversupply situation could be addressed. As a result of this and subsequent meetings, it was agreed that the parties would enter into negotiations in an attempt to arrive at a solution which addressed the oversupply situation and yet kept the Hydro Contract alive. At that time Hydro had the right to cancel the Hydro Contract on five years' notice. Bush testified that he led the Rio Algom team during negotiations. He stated that negotiations began in earnest about November 1, 1985 and continued until April of 1986 and that an understanding in principle was reached in late March or early April of 1986 but certainly prior to the middle of April, 1986. The understanding reached had not then been reduced to writing. While Albino was not directly involved in the negotiations with Hydro, it was the evidence of Bush that Albino was kept fully informed of developments in the negotiations in a very detailed way and that he had input into the negotiations as illustrated by the following excerpt from his evidence (page 66):

> "Q. What was the position held at that time by Mr. Albino in Rio Algom or at Rio Algom?

A. Mr. Albino was Chairman, Chief-Executive Officer.

Q. Was he involved at all in these negotiations with Ontario Hydro?
A. Not directly, but certainly in an overseeing role.
Q. Was he kept appraised of developments in those negotiations?
A. Yes, in a very detailed way.
Q. Did he have any input into those regotiations through you or any one else?
A. Yes, he did.
Q. And when you say he was kept advised of developments in a detailed way, how did that take place?
A. Usually by memo or by oral discussions between the two of us when I would outline the substance of the negotiations and the discussions on-going between the two parties. He also received minutes of the various negotiation sessions that were held.
Q. With respect to reaching agreement on any major points of principle, did Mr. Albino have input on those matters?
A. Yes, he did.
Q. Was he aware of the particulars of the agreement on major points of principle that were received (sic) in or about April of 1986?
A. Yes, he was.
Q. And did you inform him of that?
A. Yes."

The press release (the Press Release) which was ultimately issued by Rio Algom on April 29, 1986 describing the changes to the Hydro Contract reads as follows:

> "Rio Algom and Ontario Hydro reach agreement on uranium contract changes
>
> Rio Algom announced today that it has reached an agreement in principle with Ontario Hydro to make certain changes to the long-term contract for the supply to Ontario Hydro of uranium concentrates from the Stanleigh mine at Elliot Lake, Ontario. Signed in 1978, the Stanleigh contract provides for the supply of approximately 72 million pounds of U(3)O(8), in concentrates to Ontario Hydro. Deliveries from the Stanleigh mine began in 1983. The changes are to be incorporated into a formal amendment to the 1978 contract.
>
> Most of the changes are temporary and pertain primarily to the delivery schedule and to Ontario Hydro's right to terminate the contract on five years' notice.
>
> Rio Algom and Ontario Hydro have agreed that in addition to the uranium ore from the Stanleigh deposit, mill feed for Stanleigh will also be supplied from Rio's adjacent and higher grade deposits, Milliken, Lacnor and Nordic. These de-

posits will be accessed from the Stanleigh mine and will provide Ontario Hydro with lower priced uranium.

Although the proposed changes call for a deferral of deliveries from the Stanleigh mine of approximately 28 percent through 1993, total deliveries over the life of the contract will remain the same. The deferral represents approximately 10 percent of Rio Algom's total planned Ellict Lake production to the end of 1993.

The profit element payable to Rio Algom under existing contractual provisions remains unchanged except that there will be no escalation in 1991, 1992 and 1993 if world market price is below the base price being charged to Hydro in those years. Any cancellation notice given by Hydro prior to December 31, 1991 would not result in termination of the contract before December 31, 1993.

After 1993 all of the provisions of the 1978 contract which are changed by the proposed amendments will again apply, except that mill feed for Stanleigh will continue to be supplemented by higher grade ore from the Milliken, Lacnor and Nordic deposits.

When implemented, the contract amendments will result in a reduction of approximately 200 employees from the Stanleigh labour force in late 1986 and 1987. This represents 7.7 percent of Rio Algom's total Elliot Lake work force.

George R. Albino, Chairman of Rio Algom Limited, said that while it was unfortunate that a labour force reduction could not be avoided, the impact on the community of Elliot Lake will be significantly less in the long run than if Hydro had exercised its right of cancellation. The proposed changes, which were necessary over the short term in view of Hydro's uranium over-supply problem, should ensure that Rio Algom will remain a significant uranium supplier to Ontario Hydro over the longer term."

In addition to issuing the Press Release, Rio Algom also filed with the Commission a material change report dated May 7, 1986.

The Disclosure of the Amendments to the Hydro Contract

The first public disclosure that negotiations were taking place between Rio Algom and Hydro seems to have been made by Mr. Campbell, the chairman of Hydro, in his appearance before the Select Committee on Energy of the Ontario Legislature on April 2, 1986. During that appearance Mr. Campbell said "The status of the Rio Algom contracts - and this is on the public record - is that they are open for cancellation. We could cancel the Rio Algom contracts now." In answer to a question if the parties were negotiating Mr. Campbell said "Yes. We are negotiating. We have been for some time ... many months." Mr. Campbell did not go into any specifics of the negotiations. These statements prompted an article which appeared in the Globe and Mail on April 3, 1986. There was

also an article on the matter which appeared in the local paper at Elliot Lake on April 6, 1986. The stock of Rio Algom traded down by $1.00 on April 4, presumably as a result of this information. As a result of Mr. Campbell's remarks and subsequent press coverage, the investing public became aware that Rio Algom was negotiating, but not of the particulars of what was being negotiated, and that Hydro at that time had a right to cancel the agreement. The article which appeared in The Globe and Mail on April 3, 1986 stated that "Hydro chairman Thomas Campbell told a committee of the Legislature that for the past several months the utility had been negotiating price and production cuts with Rio Algom Ltd. of Toronto now that the eight-year old contract has reached the stage where it is open for cancellation."

At a meeting of the negotiating teams from Rio Algom and Hydro which took place on April 4, 1986 the matter of the timing of disclosure was discussed. A memorandum prepared by K.B. Culver (one of the negotiating team of Rio Algom) of what transpired at the meeting refers to the fact that Hydro would have a draft of the heads of agreement for review by Rio Algom on April 9. This indicates that the agreement in principle had been reached by at least April 4 and probably earlier. The memorandum also indicated that (i) a presentation would be made to Hydro's board on Monday, April 14, (ii) Rio Algom would go to its board on April 23 after the AGM (annual general meeting), (iii) comment would probably be made in Albino's address to shareholders at the AGM on the morning of April 23, (iv) on that basis it was recommended that press releases not be made until the week of April 28.

Mr. Bush testified at some length about disclosure of the amendments to the Hydro Contract. The following exchange took place between Mr. Bush and Mr. Douglas during examination in chief (page 65):

> "Q. With respect to having reached an agreement on the major points of principle with Rio Algom, was there an internal discussion at Rio Algom about the need or obligation to inform the public and, more particularly perhaps, the regulators who might be involved with Rio Algom as a reporting issuer of the fact that an agreement had been reached?
>
> A. There was discussion about that, yes.
>
> Q. And could you just explain that, who were the participants in those discussions and what transpired, and what was the outcome?
> A. The participants in those discussions were Mr. Albino and myself. I am not sure whether Mr. Turner (the then Secretary of Rio Algom) was present or not. The substance of the discussion was that initially it had been planned that following approval by Ontario Hydro's Board of Directors of the agreement in principal (sic), which was scheduled, I believe, for April 14th or 15th, 1986, we should make a press release at that time.
> Q. And was that agreed upon between all the participants to that discussion, namely, yourself and Mr. Albino?
> A. No, it was not. It was suggested that the press release should be made following Rio Algom's annual meeting.
> Q. And did Mr. Albino give you any reason for that?

A. Well, the reasons stated were that the Board should hear the specifics of the agreement in principle and that the matter of the changes was not a matter that he wanted to deal with at the annual meeting.
Q. Did you agree or disagree?
A. I agreed."

In addressing the memorandum outlining the gist of what had taken place at the April 4 meeting with Hydro, Mr. Bush testified as follows (pages 73 and 74):

"Q. If I can ask you again, we are again looking at the Memorandum of April 8th at Tab 4, and the second point attributes really two comments to you and perhaps you could just explain what you are referring to with respect to these two matters? I have to confess I can't read .....
A. It all goes back to paragraph 1 where we are talking about the question of when the press release would be made and we would go public. I am indicating we were going to take the matter to our Board on April 23, and that Mr. Albino would be saying something in his address to the shareholders at the AGM on the morning of the 23rd regarding the negotiations. However the Board .... I am not sure exactly what my words that I have written in there say, but I believe that they say "The Board will not consider the matter until after the AGM."
Q. And then it says, following that, "on that basis it is recommended that a press release not be made until the week of April 28." Why the gap between April 23 and April 28, do you have any recollection?
A. Yes, that was suggested by Mr. Albino.
Q. Did he give you any reason for that suggestion?
A. No."

The disclosure made by Albino at the annual general meeting was short and non-specific. There was no mention of the fact that an agreement in principle had been reached between the parties. The full text of what he said at the meeting as it relates to the Hydro Contract is as follows:

> "Rio Algom has had extended discussions with Ontario Hydro regarding adjustment of supply from the Stanleigh mine. A major part of the discussion involves a new production plan which will provide a higher grade ore to the Stanleigh mill thereby reducing operating costs on a per pound basis, and a lower price to Ontario Hydro. The discussions are constructive and hopefully will lead to a resolution that is in the long term interest of both the Company and Ontario Hydro and the community of Elliot Lake."

In his evidence, Mr. Bush stated that while he played a role in drafting the remarks under the heading "Uranium", including the remarks above quoted, the remarks above quoted did not fully reflect the state of the negotiations at that time and that Albino did not refer, at the meeting, to the understanding that had been reached with Hydro.

In any event, Hydro and Rio Algom agreed to release separate press releases at the close of markets on April 29. While Rio Algom's press release was not made public until after the close, for some reason Hydro "beat the gun" and its press release was made public before the close of the market. This prompted The Toronto Stock Exchange to halt trading in the common shares of Rio

Algom for the balance of the trading day on April 29. We understood that the Montreal Exchange and the American Stock Exchange also imposed a trading halt. The trading halt was lifted at the opening of April 30 and the stock on that day closed $1.00 lower than the last trade before the trading halt on April 29, although during the trading day on April 30 it was at one point $1.75 lower before moving up again.

While it is not unreasonable to conclude that a formal press release on the part of Rio Algom should be delayed until after its board of directors had met on April 23 and approved the agreement in principle, it is difficult to justify non-disclosure until April 29. Bush stated that it was Albino who deterimined the press release would be made following the close of business on April 29. There appears to be no reason on Rio Algom's part for any such delay. Yet there may have been a good reason from Albino's perspective for such a delay, which would enure to Albino's benefit as hereinafter stated. Albino was present throughout the hearing but chose not to testify. Thus we are left with the uncontroverted evidence of Bush that it was Albino who determined the date when the press release was to be made without any indication or explanation on the part of Albino why he chose to delay the release.

The Encashment by Albino of his Award Units under the Incentive Plan

Sometime during the day on April 23, Rio Algom issued a press release disclosing its consolidated net earnings and other financial information for the first three months of 1986 and commenting on certain segments of this information. Under the terms of the Incentive Plan, a participant could exercise any or all of the participant's rights to gains during a period commencing on the third business day and ending on the twelfth business day after the release of any financial results. The release of the quarterly financial information accordingly opened the window for the encashment of gains. In 1986, three business days after April 23, the day on which the quarterly results were released would have been April 28 (April 26 and 27 were Saturday and Sunday in that year). The press release announcing the amendments to the Hydro Contract was made after the close of markets on April 29 and on April 30 at 10:50 a.m. Albino gave notice of the exercise of his right to gains in respect of 52,200 award units under the Incentive Plan.

By a document which appeared to be a form document dated April 29, 1986, Albino elected, if he exercised his rights to gains during the next ensuing election period, to receive the full amount of the gains in cash. Noted on this form in writing, which Mr. Bush identified as Albino's, was the notation "52,200 units at exercise price of 14.61 at market price close on April 29, 1986". While this election might not, under the terms of the Incentive Plan, have been a valid exercise of an election to receive cash, nothing turns on this in the present proceedings since Rio Algom did in fact pay the gains to Albino in cash.

On April 30, 1986 Albino executed what appeared to be a form letter addressed to Rio Algom, confirming the exercise of his right to gains in respect of 52,200 award units granted to him on February 25, 1983. The letter stated that "(N)otice of such exercise was given to the Secretary by note on April 30, 1986 at 10:50 when it was aqreed that, for determining the gain on the Incentive Unit component, the defined market value on the date of exercise be the closing price on the Toronto Stock Exchange of a Rio Algom common share on April 29, 1986 which was $24.75." The underlined words and figures were blanks or, in the case of the word "note", a change, in the form and we were told that the blanks and change in this form letter were filled in by Mr. Turner, the then secretary of Rio Algom.

By letter dated April 30, 1986, addressed by Rio Algom to Albino, Rio Algom confirmed the amount of the gains to which Albino was entitled on the exercise of his rights to gains and enclosed a cheque payable to Albino in the amount of $281,925.00 representing the net amount of the gains after deduction of income tax in the amount of $350,478.00.

Mr. Bush testified that it was his understanding from Mr. Turner, Mr. Bush's predecessor as secretary of Rio Algom, that Mr. Turner had established a practice that, if the right to gains on award units was exercised during market hours, the person exercising would receive the market price at the close on the day of exercise rather than the market price at the close of the day before the day of exercise as provided in the Incentive Plan. Unfortunately Mr. Turner has passed away and we did not have the benefit of his evidence.

Mr. Pollock introduced in evidence a form letter dated December 9, 1985 advising participants in the Incentive Plan of the expected permissible periods of exercise during 1986. This letter contains a statement "You are reminded that the calculation of a gain is based upon the closing price of a Rio Algom Limited common share on the Toronto Stock Exchange on the last trading day before the exercise date." He also introduced a similar letter dated February 23, 1987 which contains an identical statement. In addition, Mr. Pollock introduced a letter from Rio Algom to Albino dated May 3, 1985 in respect of an earlier exercise by Albino of rights to gains which indicated that the closing price on the trading day before the day of exercise was used to calculate the gains. It is also to be noted that no amendment to the Incentive Plan itself was ever made with respect to this matter.

Based on all the evidence, I find that Albino was entitled to have the gains calculated based on the closing price on the trading day preceding the day of exercise, as provided in the Incentive Plan.

This, however, brings into focus the timing of the Press Release. There seems to be no reason why the Press Release could not have been made, and probably should have been made, on April 23 or April 24 at the latest. By this time the agreement in principle had been reached and the boards of both Hydro and Rio Algom had approved and there is no doubt that the agreement in principle resulted in a material change in the affairs of Rio Algom. The Press Release was not made until after the close of the market on April 29 and, according to Bush, it was Albino who determined this date. Had the Press Release been made on, say, April 24, then, under the terms of the Incentive Plan, Albino would not have been entitled to exercise his right to gains until April 28 and this would have been after the time when the market would have adjusted to the news. By delaying the Press Release until April 29, during the open window period, Albino was able to exercise his right to gains immediately at the closing market price the day the Press Release was issued and accordingly at a price which had no opportunity to adjust to the news contained in the Press Release. We can only conclude that Albino geared the time of the Press Release to satisfy his own ends and this resulted in a gain to Albino of some $50,000. Albino knew the terms of the Incentive Plan, the date when the window would open for the exercise of rights and the probable result in the market upon the Press Release being made. It was clearly in his interest to delay.

These then are the facts which gave rise to the notice of hearing in this matter and the allegation by staff, in its statement of case, that "(T)he realization by Albino of the gains on the award units .... was a sale of securities of Rio Algom or of a security, the market price of which varies materially with the market price of the securities of Rio Algom, with the knowledge of a material fact or a material change with respect to Rio Algom that had not been generally disclosed."

While it would appear from the evidence before us that Rio Algom probably failed to make timely disclosure of the specific amendments to the Hydro Contract, and that Albino was probably responsible for such failure, this is not the issue before us. Neither the notice of hearing nor the statement of case makes this allegation against either Rio Algom or Albino. The evidence and arguments of counsel might very well have been different if this allegation was in issue before us and we should not let this matter cloud our vision in reaching our conclusion based on the matters that are properly in issue before us.

Is the Incentive Plan a Security or is a Security otherwise involved in the Incentive Plan

This is a case of first impression for the Commission and, as far as I am aware, the Commission has not before had occasion to consider a so-called phantom stock plan and whether such a plan constitutes or otherwise involves a security, within the meaning of the Act. Both in his opening statement and in his final argument, Mr. Douglas said that in order for staff to succeed, we must find that the shares or units in the Incentive Plan are securities within the meaning of the Act and that the encashment of the units in the Incentive Plan was a trade within the meaning of the Act. For instance, in final argument the following exchange took place:

> "Mr. Blain: But you are saying we must first make a finding that he traded in the (a) security.

iv. any document constituting evidence of an option, subscription or other interest in or to a security,

v. any bond, debenture, note or other evidence of indebtedness, share, stock, unit, unit certificate, participation certificate, certificate of share or interest, preorganization certificate or subscription other than a contract of insurance issued by an insurance company licensed under the Insurance Act and an evidence of deposit issued by bank to which the Bank Act (Canada) applies or by a loan corporation or trust company registered under the Loan and Trust Corporations Act,"

It may be noted that the definition is not an exclusive definition; it is difficult, however, to visualize what might otherwise constitute a security given the extreme breadth of the various enumerated subsections, taken as a whole.

It is first necessary to determine the true nature of the Incentive Plan and this requires a review of the Plan in its entirety and not isolated parts thereof. The Incentive Plan recites that Rio Algom's direct compensation program for its senior executives and senior management comprises a cash compensation plan and a long term incentive plan and that the Incentive Plan completes the direct compensation program as currently envisaged. The Incentive Plan states that it has three main objectives (i) to focus executive attention on those actions that will be of most benefit to Rio Algom's shareholders over the longer term, (ii) to motivate senior executives and senior management by providing them with the opportunity to realize gains, if the opportunity to realize such gains is also available to Rio Algom's shareholders, and (iii) to relate Rio Algom's total compensation for its senior executives and senior management to that of other corporations and to encourage participants to maintain continuity of employment. The Incentive Plan further states that to achieve these objectives and to have full regard to the interest of Rio Algom's shareholders, the Incentive Plan should be based on changes in the market value of the common shares of Rio Algom and that to be consistent with commonizing the interest of plan participants with those of the shareholders the Incentive Plan should include a dividend accumulation feature.

To carry out these objectives the Incentive Plan utilizes award units each of which is comprised of an incentive unit and a dividend unit. An incentive unit is the equivalent of one share of Rio Algom common stock and is stated to be a means of measuring gain not involving ownership of stock. The method of measuring gain on an incentive unit has been set out above. Each dividend unit has a value equal to the dividend declared on one share of Rio Algom common stock. The dividend units are accumulated until the exercise date and do not bear interest.

A participant in the Incentive Plan is not entitled to receive Rio Algom shares on the exercise of his rights under the Incentive Plan. The participant is entitled only to receive from Rio Algom a sum of money. As Mr. Bush said in his cross-examination by Mr. Pollock there is no ownership of any shares of Rio Algom, there are no transfer rights for units in the Incentive Plan save for very limited rights upon the death of a recipient, and except for these very limited rights a participant may not transfer his units, there is no cost to an employee in participating in the Incentive Plan, holding incentive units in the Incentive Plan gives no voting rights and no right to participate in the liquidation of Rio Algom's assets. In answer to the following question put to him by Mr. Pollock:

"Q. It was part of his reward for services rendered as an employee of the company, correct?"

Mr. Bush answered:

"A. I think that is a fair statement."

This, I think, fairly categorizes the Incentive Plan. It is just that, an incentive compensation plan, part of the reward for services rendered by a senior executive or member of senior management as an employee of Rio Algom, with the amount of the incentive payment measured by the increase in market value of the common shares of Rio Algom and the dividends paid on common shares.

Does a plan of this type fall within the definition of the term security under any of the enumerated heads set out above, which in my opinion are the only heads which could be said to be applicable? Can it be said to fall within head (i), any document, instrument or writing commonly known as a security? Mr. Bush in cross-examination stated that he did not consider the units in the Incentive Plan to be securities under the Act. He also testified that he was not aware that other corporations which had adopted similar plans considered such plans to be securities which would trigger reporting requirements by insiders. Mr. Thorburn, who sought standing, advised that he represented certain clients who had adopted "phantom stock plans" and wished to express their concern that such plans might be categorized as securities. It would also appear that staff of the Commission, up until the present case, had not thought in terms of categorizing phantom stock plans as securities. I conclude from the foregoing that phantom stock plans, such as the Incentive Plan, cannot be said to be a document, instrument or writing commonly known as a security.

Enumerated head ii .... any document constituting evidence of title to or interest in the capital, assets, property, profits, earnings or royalties of any person or company .... is extremely broad and if given an absolute literal meaning would cover many things which the legislation could not have intended to be treated as a security. For instance a lease being a document constituting evidence of the interest of the lessee in the property of the lessor would technically come within the definition, but one would not think in terms of a lease as a security.

This heading was considered in Re Ontario Securities Commission and Brigadoon Scotch Distributors (Canada) Limited, [1970] 3 O.R. 7I4. Hartt J. held that the whisky warehouse receipts in question were securities under heading (ii) but he recognized that there must be some limitation placed upon the very broad language of the heading. At page 716 he said:

> "The definition would not include documents of title which are bought and sold for purposes other than investment, for example, bills of lading and receipts for goods purchased for inventory or consumption purposes. Such an intention on the part of the Legislature can be inferred from the basic aim or purpose of the Securities Act, 1966, which is the protection of the investing public through full, true and plain disclosure of all material facts relating to securities being issued."

The heading was also considered by the Ontario Divisional Court in Re Pacific Coast Coin Exchange of Canada Ltd. et al and Ontario Securities Commission (1975), 55 D.L.R. (3rd) 331. In that case Pacific carried on business of selling gold and silver coins, silver bullion or bars, platinum bars, German marks and Swiss francs. Silver coins constituted the largest part of its business and were sold by the "bag". A bag contained U.S. silver coins with a face value of $1,000. If a customer of Pacific paid in cash he could only purchase one bag of silver coins. If he bought on margin he was required to purchase a minimum of three bags and there appeared to be no maximum on the number that could be purchased. Most of the sales were made on margin. Customers in less than 15% of margin contracts exercised their right to pay the full amount and take delivery of the silver coins. Over 85% of customers liquidated their margin account without taking delivery by having

Pacific repurchase their coins. A customer buying on margin was required to sign a "Commodity Account Agreement". The matter at issue in the case was whether or not the Commodity Account Agreement constituted a security.

After reviewing certain authorities Houlden J. (as he then was) said at page 343:

> "Counsel for the OSC contended that in view of the wording of para 22(ii), the Commodity Account Agreement did constitute evidence of title to or interest in the bags of silver coins being purchased by customer of Pacific.
>
> However, the construction of a statute must not so strain the words as to include cases plainly omitted from the natural meaning of the language: Maxwell on Interoretation of Statutes 12th ed. (1969) at p. 92. And although securities legislation should be construed broadly: R. v. Great Way Merchandising Ltd. (1971), 20 D.L.R. (3d) 67 at p. 78, 3 C.C.C. (2d) 463, [1971] 3 W.W.R. 133 sub nom. A.G. Alta v. Great Way Merchandising Ltd., I do not think the words of para. 22(ii) can be construed so as to include the Commodity Account Agreement. I think on a fair reading of the agreement it does not constitute evidence of title to or interest in property. The Commodity Account Agreement is, therefore, not a security within the meaning of s. 1(1) para. 22(ii) of the Securities Act."

The court did however conclude that the Commodity Account Agreement was a security as being an investment contract not within the meaning of the Investment Contracts Act.

An appeal was taken from the judgment of the Divisional Court to the Court of Appeal for Ontario and subsequently to the Supreme Court of Canada. The Court of Appeal found that the Commodity Account Agreement was an investment contract and accordingly it was not necessary to determine whether the Commodity Account Agreement was a security within the meaning of Section 1(1), paragraph 22(ii) of the Securities Act. The majority of the Supreme Court of Canada also reached the conclusion that the Commodity Account Agreement was an investment contract and there was no need for it to determine whether the Agreement also fell within the definition of security under Section 1(1) paragraph 22(ii) of the Securities Act. Laskin C.J.C. in a dissenting judgment held the Commodity Account Agreement was not an investment contract. He would have allowed the appeal and seems not to have considered whether Section 1(1) paragraph 22(ii) was applicable. Presumably he felt it did not apply.

Mr. Douglas invited us to find that the Incentive Plan was a security within the meaning of heading (ii) but I did not find his argument compelling. He agreed that an employment contract providing for a base salary and a percentage of before or after tax earnirgs would not be a security, even though it is a document constituting an interest in the profits or earnings of a company, on the basis that such a contract gives rise to a simple debt. In his view it was not intended that simple debt obligations be included within the Act. Such an agreement, he submitted has no relation to the capital markets. He submitted that a phantom plan such as the Incentive Plan, which is a different form of compensation package is different. He submitted that under the Incentive Plan it was not a simple debt relationship because the amount of the debt is unknown and is determined by activity in the capital markets which in turn provides a nexus with the capital markets. Under the Incentive Plan, while the amount to be paid by Rio Algom is not known until encashment, it does nevertheless represent a debt in the sense of being an obligation of Rio Algom to pay an amount ascertainable upon

encashment. The fact that the amount to be paid is determined from the market price does not provide, in my view, a sufficient nexus with the capital market to say that the situation is different from the other type of compensation arrangement referred to above. This is simply the yard stick to determine Rio Algom's money obligation under the lncentive Plan and is basically no percentage of profits or sales.

On balance, I am not prepared to find that the Incentive Plan is a security within heading (ii).

Mr. Douglas did not seek to bring the Incentive Plan within any of the other enumerated heads, particularly heads iv, v and ix above quoted, nor do I think the Incentive Plan could be said to be a security within any of these headings.

Mr. Douglas submitted that if the Commission did not rely on Section 1(1)40(ii) of the Act to determine that the Incentive Plan is a security, it should find that the Plan is a security under the general section itself, namely, under the non-exhaustive "security includes". He submitted that the Commission should accept what he termed an invitation given by the Act to expand the definition of security, beyond the enumerated examples, and include within it a phantom stock plan for phantom stock, such as we have here in the Incentive Plan. He argued that if we did not accept this invitation (i) there would be strong incentive for corporate officers and directors to promulgate plans of this kind because they would be outside the Securities Act and away from any regulation, other than shareholders taking them to task through actions brought by them which might be a difficult task, and (ii) it would be an open invitat1on to corporatc officers and executives to promulgate such plans and effectively do what they cannot do in common shares of a company, namely trade on their inside information.

In support Mr. Douglas referred to the following statement of deGrandpre, J. in the Supreme Court of Canada in Pacific Coast Coin Exchange of Canada et al v. Ontario Securities Commission, [1978] 2 S.C.R. 112 at 132.

> "A last word. At the invitation of the parties, I have examined the facts in the sole light of the Howey and Hawaii tests. Like the Divisional Court, however, I would be inclined to take a broader approach. It is clearly legislative policy to replace the harshness of caveat emptor in security related transactions and Courts should seek to attain that goal even if tests carefully formulated in prior cases prove ineffective and must continually be broadened in scope. It is the policy and not the subsequently formulated judicial test that is decisive."

as an authority for us to broaden the definition of security so as to include the Incentive Plan.

In considering this matter one should also have regard to the dissenting judgment of Laskin, C.J.C. in Pacific Coast where he said at page 117:

> "It is easy, in a case like the present one, when faced with a widely-approved regulatory statute embodying a policy of protection of the investing public against fraudulent or beguilingly misleading investment schemes, attractively packaged, to give broad undefined terms a broad meaning so as to bring doubtful schemes within tho rogulatory authority. Yet if the Legislature, in an area as managed and controlled as security trading, has deliberately chosen not to define a term which, admittedly, embraces different kinds of transactions, of which

> some are innocent, and prefers to rest on generality, I see no reason of policy why Courts should be oversolicitous in resolving doubt in enlargement of the scope of the statutory control."

The term security has a very broad definition in the Act, and it seems to me the words of the then Chief Justice are appropriate when we are asked to determine that something is a security under the "security includes" portion of the definition.

I have difficulty in acceding to the submission of Mr. Douglas on this point. Phantom stock plans, like the Incentive Plan, are not new and the evidence before us was that they are fairly widely used. This is the first time that a consideration of such plans has come before the Commission. Apart from the present instance, no problem seems to have been present in other plans and no abuses thereunder have been brought to the attention of the Commission. It would be wrong in my opinion for us to sweep all phantom stock plans, which are really compensation schemes, under the umbrella of "security" at this time without knowing more about the ramifications of such a move. This, in my view, is a matter that should be handled in the Commission's normal way. Staff should initiate a study, formulate a position paper and expose that position paper for public comment. It may be as a result that the legislation should be amended to include as a security a phantom stock plan unless it complies with certain requirements of the Commission, i.e., shareholder approval, provisions for the calculation of market value, etc. In the language of the Chief Justice above quoted we should not be oversolicitous in resolving this aspect of the matter. I am also mindful of the position of the Securities and Exchange Commission of the United States (SEC), referred to below, in respect of similar plans.

Mr. Douglas also submitted that the Incentive Plan was not all that different from any other derivative product which tracks the behavior of a common share. He referred particularly to the Toronto 35 Index Participation Units (TIPS) created by and traded on The Toronto Stock Exchange. There are, however, substantial differences between the Incentive Plan and TIPS. TIPS are units of a trust created by The Toronto Stock Exchange. The underlying assets of the trust are shares of the 35 constituent companies which make up the Toronto 35 Index from time to time, held by the trust in the same proportion as these shares are reflected in the Index. The trust distributes to unitholders, quarterly, dividends received on shares held by the trust and under certain circumstances unitholders may instruct the trust to give the unitholder a signed proxy for the applicable portion of the shares of the constituent company held by the trust, based on the shares underlying the number of TIPS held by the unitholder. Under certain circumstances TIPS may be redeemed for baskets of shares. An investor makes an investment in or buys TIPS. He is free to sell his TIPS at any time. They are listed on The Toronto Stock Exchange and presumably there are no restrictions on the right of a unitholder to pledge his TIPS as security for loans or otherwise. Presumably TIPS can be purchased on margin. TIPS are clearly a security within the meaning of Section 1(1)40(ii) of the Act.

In contrast, a participant in the Incentive Plan makes no investment, the Plan does not require the participant to put up money to participate; the participant cannot deal with his award units, he cannot assign his award units and there is no market for them as there is for TIPS; under the Incentive Plan a participant has no right to receive and cannot receive stock of Rio Algom, has no ownership interest in any shares of Rio Algom, and cannot vote any shares of Rio Algom. A participant in the Incentive Plan is limited in the exercise of his right to encash the award limits to short periods following the release of financial information; this presumably would happen four times a year on the

release of quarterly financial information. The Incentive Plan is a compensation plan with a portion of the compensation measured by the increase in the market value of the stock of Rio Algom. I cannot accept that the Incentive Plan becomes a security simply by reason of this fact.

Vice-Chairman Salter in his reasons also relies heavily on the fact that so-called derivative securities are securities within the meaning of the Act and that the phantom stock plan should be seen as a derivative of the common stock of Rio Algom and therefore should be classified as a security and so regulated. An analysis of the types of derivative securities to which he refers lends one to the conclusion that most fall within enumerated heads of Section 1(1)40 of the Act. ADRs evidence an interest in the underlying shares and accordingly are a security under Section 1(1)40ii. or iv. So-called mortgaged-backed securities and assetbacked securities are instruments which evidence an interest in a pool of mortgages or assets, such as receivables, and are securities within the meaning of Section 1(1)40ii. Stripped bonds and coupons are now normally held by a custodian who issues a document to evidence the interest of an investor in the pool - again Section 1(1)40ii. or iv. Other derivative securities, such as those issued by B Corp are shares of B Corp, one class representing the capital gain on the underlying securities owned by B Corp and another class representing the right to the dividends received by B Corp on those shares. I cannot accept the argument of the Vice-Chairman on this matter. The derivative securities he refers to have attributes not found in the Incentive Plan, i.e., the right to sell and pledge at any time without restraint imposed by the instrument. They are truly securities.

Several United States decisions were cited to us by Mr. Douglas and Mr. Wildeboer as perhaps having a bearing on the matter. These cases involve the application of section 16(b) of the Securities Exchange Act of 1934 of the United States (the 1934 Act) which deals with the so-called "short swing transactions". This section reads, in part, as follows:

> "(b) For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner (of more than 10 per centum of any class of any equity securities of an issuer which is registered pursuant to section 12 of the 1934 Act) director or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer .... within any period of less than six months ...., shall inure to and be recoverable by the issuer .... This subsection shall not be construed to cover .... or any transaction or transactions which the Commission by rules and regulations may exempt as not comprehended within the purpose of this subsection."

The first of these American cases is Rosen v. Drisler et al 421 F. Supp. 1282 (1976). In this case the defendants Drisler and Whitmore, officers of Indian Head, Inc., were granted options to purchase shares of that company. The option to Whitmore was granted on December 1, 1961, the option to Drisler on October 18, 1966. During 1971 and 1972 it was determined that those individuals would no longer play a key role in the corporation's management. They were given an opportunity to surrender their options in return for the spread between the option exercise price and the market price of Indian Head stock on the day of approval of the transaction by the Indian Head board.

This was a shareholders' derivative action brought under section 16(b) of the 1934 Act on the basis that the purchase of the option rights was actually a device to conceal simultaneous exercise of the option at the exercise price and sale of the shares thus acquired at the higher market value

exercise of a SAR, the exercise of a SAR must involve a purchase of the total number of shares underlying the option and a simultaneous sale of the cost portion of the shares which, when matched together, are violative of Section 16(b). The court rejected this argument. At page 1152 it said:

> "Merely because the net result to the employee is the same as if some other transaction had taken place does not mean that other transactions have in fact occurred. Also there are important differences between the two situations which plaintiff seems to have overlooked. After the exercise of a stock option, the executive is issued an actual stock certificate representing the optioned shares. Upon obtaining physical possession, he may use the shares as collateral for a loan or he may endorse them and sell them or give them away. If sold, those shares will usually be bought by an unrelated third party on the floor of the stock exchange...
>
> In contrast, upon the exercise of an SAR, the executive does not receive possession of stock certificates representing the total number of underlying shares, and it is overly artificial to claim that the cost portion of the shares are in any way sold back to the corporation. .....
>
> The Court rejects this strained attempt to carve up the single SAR transaction by calling it something which it is not. The exercise of a stock appreciation right does not involve the sale of an equity security by the officer-director and thus there is no inherent or per se violation of section 16(b) in the exercise of an SAR as a result of the simultaneous receipt of shares thereunder, Cf. Rosen v. Drisler 421 F. Supp. 1282 (S.D.N.Y. 1976)."

In Matas v. Siess et al 467 F. Supp. 217 (1979), a shareholder of Apco Oil Corporation brought an action against Apco and various officers and directors claiming that the exercise by officers and directors of stock appreciation rights for cash violated section 16(b) of the 1934 Act. In 1972 Apco adopted a stock option plan. In connection with the plan, optionees were given stock appreciation rights. These SARs gave the optionee the right to receive, either in cash or in stock at their election, the increase in the value of the optioned shares from the date of the grant of the option to the date of the exercise of such rights. The plaintiff contended that each exercise of stock appreciation rights for cash constituted a simultaneous purchase and sale of a security by an insider within six months.

The Court found that the exercise of the stock appreciation rights for cash did represent a simultaneous purchase and sale. In reaching its conclusion the Court reviewed and distinguished Rosen v. Drisler and Freedman v. Barrow.

Whether the result would have been the same had there been no stock option plan is a matter for conjecture. In any event the decision in Matas has been criticized, particularly by the American Bar Association.

Vice-Chairman Salter, having categorized the Incentive Plan as a security, relies on Matas v. Seiss for the proposition that there was a constructive purchase and sale of securities of Rio Algom - presumably he is categorizing the encashment of the award units as a constructive sale and purchase of common shares of Rio Algom. I reject this concept and prefer to follow the reasoning in Freed-

man v. Barrow, particularly the statement above quoted: "(T)he court rejects this strained attempt to carve up the single SAR transaction by calling it something which it is not."

The SEC seems not to have expressed a clear position on whether stock appreciation rights are securities. The SEC has: from time to time set forth conditions for exemptions from section 16(b) of the 1934 Act with respect to the acquisition of stock options and the acquisition of stock pursuant to stock bonus, retirement incentive and similar plans. "Safe harbour" guidelines for cash settlements of SARs were added in 1976. It is to be noted that the Rio Algom Incentive Plan meets all these guidelines and so would not be subject to the provisions of section 16(b). The SEC has further recently published for comment proposed revised rules and forms under section 16 of the 1934 Act. These proposals include, in proposed rule 16(a)- 1(c), a definition of "derivative security" which would reach cash only stock appreciation rights. Despite the provisions of the safe harbour and the implications that a safe harbour provision assumes that the SEC has jurisdiction, which can only exist if a "security" exists, the SEC did not express a clear position on SARs as securities. The SEC stated:

> "The Commission's action in revising Rule 16b - 3 in order to provide a "safe harbour" for certain transactions in stock appreciation rights should not be construed as a statement by it that SAR transactions which do not satisfy the conditions of the rule necessarily are subject to section 16(b). In this regard, the Commission wishes to emphasize that because of the unsettled legal status of stock appreciation rights under section 16, it is expressing no view as to the applicability of that section to transactions in stock appreciation rights that are outside the scope of Rule 16b - 3 and that no inference in that connection should be drawn by the Commission's actions today (SEC Exchange Act Release No. 34 - 13,097 at page 755)."

The SEC apparently recognized the legal problems of defining SARs as "securities".

The American Bar Association responded to the SEC's request for comments in a letter dated October 31, 1989. This response contains the following:

> "Treatment of Cash-only Compensation Rights
>
> We reiterate our view, expressed in the March ABA Letter, that cash-only compensation arrangements, whether or not issued pursuant to a Rule 16b -3 qualified plan, are not, and should not in any circumstances be treated as, equity securities. To treat them as equity securities is to fly in the face of the plain language of the statute. Cash-only compensation arrangements give no present or potential right to participate in any of the attributes of equity ownership except for the right to participate for some specified time period in value appreciation measured by changes in market value for the measuring security. While this right may well have an economic resemblance to the appreciation potential of an equity security, it is hardly itself such a security and it carries with it none of the other normal attributes of equity ownership such as voting powers, liquidation rights and preferences, dividend, subscription, warrant and other distribution rights and the right of an equity holder to compel careful, loyal service by corporate managers. If the Commission wishes to bring cash incentive plans under Section 16 of the 1934

> Act simply because payments are determined by reference to equity markets, it should seek new legislative authority rather than engaging in an expansive reinterpretation of the present language. The Commission's proposal to reach cash-only rights, and label them "derivative securities" goes well beyond even the often criticized extension of Section 16 in Matas v. Seiss, 467 F. Supp. 217 (S.D.N.Y. 1979). There unlike the situation with cash-only rights, the option holder had the right to elect either cash or stock on exercise."

I have quoted extensively from the United States experience to indicate the difficulties which seem to exist with stock appreciation rights or so called phantom stock plans.

I agree with the quotation from the submission of the American Bar Association above referred to. I would not extend the definition of the term "security" in the Act under the "security includes" language to include a stock appreciation rights plan or a so called phantom stock plan and in particular the Incentive Plan. It may be that such plans should be classified as securities but this, in my view, will require a proper study by staff of the problems involved, the preparation of a position paper, the exposure of that position paper for comment and legislative action. I would hesitate to expand the definition based on the evidence and arguments we have heard in this case. More study is required.

Insider Trading and the Public Interest

Section 75(1) of the Act provides "(N)o person or company in a special relationship with a reporting issuer shall purchase or sell securities of the reporting issuer with the knowledge of a material fact or material change with respect to the reporting issuer that has not been generally disclosed." Section 71(6)(b) provides "(F)or the purposes of subsection (1) a security of a reporting issuer shall be deemed to include (b) a security, the market price of which varies materially with the market price of the securities of the issuer". (emphasis added). Since I have found that the Incentive Plan is not a security and that there was no actual, constructive or notional sale of the common shares of Rio Algom when Albino encashed his award units, the provisions of the Act relating to insider trading, no matter how tempting they may be to apply in the circumstances of this case, simply do not apply. There was no person who bought anything from Albino. Even accepting the concept of a constructive or notional sale and purchase, the constructive or notional purchaser could only be Rio Algom, and Albino would have no liability by reason of Section 156 d.(5) of the Regulation since Rio Algom had knowledge of the material fact or material change. However, I propose to examine the proposition that even if no security is involved there is some nexus to the capital markets which the Commission feels is prejudicial to the capital markets or in some way prejudicial to the public interest and in respect to which the Commission should take some action, even if such an a]legation is not specifically referred to in the notice of hearing and statement of case.

The Incentive Plan provides, in dealing with the rights of a participant in the Incentive Plan to encash award units, that the participant may do so in certain periods (referred to above) provided that the participant has not during such period become privy to insider information that would make such action improper. This is a difficult provision and not easy to interpret. Presumably if Rio Algom knew a participant had insider information at the time of encashment it would be justified in refusing to honour the attempt to encash. It might also entitle Rio Algom to bring an action, or a shareholder by way of derivative action, against the participant for any damage that could be shown by reason of encashment if the participant did have insider information at the time of encashment that would make that action improper. But the Incentive Plan, which was approved by shareholders