File No. MA 030-97

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| L. Kamerman | ) | Monday, the 8th day |
| Mining and Lands Commissioner | ) | of June, 1998. |

**THE MINING ACT**

**IN THE MATTER OF**

Mining Claim P-1160197, situate in the Township of Tully, in the Porcupine Mining Division, having been recorded by Richard M. Sproule on January 27, 1995 and transferred to Kinross Gold Corporation on May 30, 1997, and cancelled on the 25th day of July, 1997, hereinafter referred to as the "Kinross Mining Claim";

**AND IN THE MATTER OF**

An extension of time for performance of assessment work on the Kinross Mining Claim, dated January 23, 1997 extending time to January 27, 1998 and the subsequent determination by the Mining Recorder for the Porcupine Mining Division dated July 25, 1997 that the extension of time was issued in error and Order of the same date cancelling the Kinross Mining Claim;

**AND IN THE MATTER OF**

Mining Claim P-1219649, situate in the Township of Tully, in the Porcupine Division, having been staked on March 9, 1997 and recorded on March 10, 1997 in the names of Franklin Renaudat, Robert Roger Rosseau and Georges Fournier, hereinafter referred to as the "Fournier Mining Claim";

**AND IN THE MATTER OF**

Subsection 5(1) of Ontario Regulation 6/96;

**B E T W E E N:**

RICHARD M. SPROULE, HENRY HUTTERI AND EDWARD KORBA
Appellants and Disputants of the First Part

- and -

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KINROSS GOLD CORPORATION
Appellant and Disputant of the Second Part

- and -

FRANKLIN RENAUDAT, ROBERT ROGER ROSSEAU
AND GEORGES FOURNIER
Respondents

- and -

MINISTER OF NORTHERN DEVELOPMENT AND MINES
Party of the Third Part
(amended May 6, 1998)

**AND IN THE MATTER OF**
An appeal pursuant to subsection 112(1) of the **Mining Act** from the decision of the Mining Recorder for the Porcupine Mining Division (the "Mining Recorder") cancelling the Kinross Mining Claim pursuant to clause 72(1)(b);

**AND IN THE MATTER OF**
An application pursuant to section 105 of the **Mining Act** for a declaration that the Fournier Mining Claim is invalid, having been staked contrary to clause 27(c) of the **Mining Act**, at a time when the Kinross Mining Claim had not yet been cancelled by the Mining Recorder;

**AND IN THE MATTER OF**
An application pursuant to section 105 for an Order to reinstate the Kinross Mining Claim upon whatever terms or conditions the tribunal deems just.

**O R D E R**

**UPON READING** the submissions filed and hearing from counsel on behalf of the applicants, Richard M. Sproule, Henry Hutteri and Kinross Gold Corporation and counsel on behalf of the party of the third part, the Ministry of Northern Development and Mines, with no one appearing on behalf the appellant, Edward Korba, or the respondents, Franklin Renaudat, Robert Roger Rosseau and Georges Fournier:

**1. THIS TRIBUNAL ORDERS** that the Fournier Mining Claim P-1219649 be and is hereby cancelled.

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**2.** **THIS TRIBUNAL FURTHER ORDERS** that the Kinross Mining Claim P-1160197 be reinstated, effective the 27th day of January, 1997.

**3.** **THIS TRIBUNAL FURTHER ORDERS** that this Order shall be effective on the 22nd day of June, 1998, pursuant to subsection 129(2) of the **Mining Act**.

**4.** **THIS TRIBUNAL FURTHER ORDERS** that the time during which the Kinross Mining Claim P-1160197 was before the Mining Recorder and the tribunal, from the 23rd day of January, 1997 up to the effective date of this Order, being the 22nd day of June, 1998, a total of 516 days, be excluded in calculating time during which the first and second units of prescribed assessment work must be performed and filed.

**5.** **THIS TRIBUNAL FURTHER ORDERS** the 26th day of June, 1998, be fixed as the date by which the first and second units of prescribed assessment work must be performed and filed on Mining Claim P-1160197, pursuant to subsection 67(3) of the **Mining Act** and all subsequent anniversary dates are deemed to be June 26 pursuant to subsection 67(4) of the **Mining Act**.

**6.** **THIS TRIBUNAL FURTHER ORDERS** that no costs shall by payable by either party to this appeal.

**7.** **THIS TRIBUNAL FURTHER ORDERS** 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 8th day of June, 1998.

Original signed by

L. Kamerman
MINING AND LANDS COMMISSIONER

File No. MA 030-97

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**AND IN THE MATTER OF**

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**B E T W E E N:**

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KINROSS GOLD CORPORATION
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**AND IN THE MATTER OF**
An application pursuant to section 105 for an Order to reinstate the Kinross Mining Claim upon whatever terms or conditions the tribunal deems just.

## REASONS

This matter was heard on May 6, 1998 in the Courtroom of this tribunal, 24th Floor, 700 Bay Street, Toronto, Ontario. Messrs. Richard Sproule and Henry Hutteri attended in person, as did a representative of Kinross Gold Corporation, and all were represented by their lawyer, Ken Johnson. It was explained that one of the appellants and disputants, Edward Korba, did not retain counsel nor sought to represent himself. The Ministry of Northern Development and Mines "MND&M" was represented by its lawyer, John Ritchie.

Franklin Renaudat, Robert Rosseau and Georges Fournier were not able to attend the hearing.

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**Background**

Although at the commencement of the hearing, counsel consented to discussion of whether an Agreed Statement of Facts could be arrived at, and indeed the resulting document, which was circulated to Renaudat, Rosseau and Fournier, has been attached to these Reasons, essentially the facts in this case are not complex.

Mining Claim P-1160197, being a six unit claim, was staked by Henry Hutteri, with the assistance of Richard Sproule, on January 2, 1995. The Application to Record the Mining Claim was dated January 5, 1995, and filed with the Mining Recorder for the Porcupine Mining Division on January 27, 1995.

On January 23, 1997, Messrs. Sproule and possibly Hutteri attended at the Office of the Mining Recorder for the Porcupine Mining Division seeking an extension of time for the performance and filing of their first two units of assessment work. There are some minor differences in the testimony of Messrs Sproule, Hutteri and the Acting Mining Recorder, Dale Messenger, concerning what took place on that date. However, there is no disagreement that Mr. Messenger indicated that the extension of time would likely be granted. On January 23, 1997, an Order of the Acting Mining Recorder extending time for the performance of the deficiency in assessment work to January 27, 1998 was issued (See Ex. 4, Tab 2).

Under the terms of O. Reg. 116/91, section 5 provided that extensions of time pursuant to subsection 73(1) of the **Mining Act** would be allowed where there was no deficiency of assessment work under a previous extension of time, and where the extension would not exceed one year. On March 1, 1996, the regulation was replaced by O.Reg. 6/96, whereby the terms of section 5 changed, such that in addition to the conditions described above, no extension would be given for the first and second units of assessment work, essentially the first block of required work. As discussed below, Messrs. Sproule and Hutteri stated that they were unaware of the changes in the rules governing extensions of time when they attended at the Porcupine Mining Division Office in January, 1997.

On March 9, 1997, Georges Fournier staked Mining Claim P-1219649 (the "Fournier Mining Claim") over the same lands occupied by the Kinross Mining Claim, and on March 10, 1997 applied to record his claim in the names of Fournier, Robert Rousseau and Frank Renaudat. The application was refused by the Mining Recorder on the basis that the land was not open for staking.

By Agreement dated April 14, 1997, the appellants, Richard Sproule, Henry Hutteri and Edward Korba entered into an agreement with Kinross Gold Corporation, selling their interest in a number of mining claims, including the Kinross Mining Claim which forms the subject matter of this appeal.

On July 25, 1997, the Mining Recorder for the Porcupine Mining Division notified Mr. Sproule in writing that the Kinross Mining Claim forfeited on January 27, 1997 (See Ex. 4, Tab 7). He also advised that the lands had been restaked, and the application to record of the Fournier Mining Claim was recorded effective March 10, 1997.

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**Agreed Statement of Facts**

The parties agreed to the following Agreed Statement of Facts, which was discussed at the commencement of the proceedings, and prepared by the tribunal:

1. On the 2nd day of January, 1995, the Appellant Henry Hutteri, with the assistance of the Appellant Richard M. Sproule, staked Mining Claim P-1160197, being a multi-unit claim containing six (6) 16-hectare units, within the Township of Tully, in the Porcupine Mining Division.

2. On the 27th day of January, 1995, the Appellant Henry Hutteri submitted an Application to Record Mining Claim P-1160197 dated the 5th day of January, 1995, in which the Appellant Richard Sproule was listed as the recorded holder. This was received by the Office of the Mining Recorder for the Porcupine Mining Division at 12:30 p.m. on the 27th day of January, 1995.

3. The Appellants Richard M. Sproule and Henry Hutteri applied for an extension of time to perform and file assessment work on the 20th day of January, 1997 and were granted the extension by the Acting Mining Recorder's Order, dated the 23rd day of January, 1997. The extension was up to and including the 27th day of January, 1998.

4. On the 9th day of March, 1997 Georges Fournier staked Mining Claim 1219649 over P-1160197, the same area of land in Lot 8, Cons. I & II Tully Township.

5. On the 10th day of March, 1997, Georges Fournier applied to record Mining Claim 1219649 in the Office of the Mining Recorder for the Porcupine Mining Division in the name of Georges Fournier, Robert Rousseau and Frank Renaudat. The application was refused on the basis that the land was not open for staking.

6. On the 1st day of April, 1997, the Appellants Richard M. Sproule, Henry Hutteri and Edward Korba secured from the Porcupine Mining Recorder's Office a Claim Abstract with respect to Mining Claim P-1160197, confirming the extension of time had been granted.

7. The Appellants Richard M. Sproule, Henry Hutteri and Edward Korba sold their interest in a number of claims including Mining Claim P-1160197 to Kinross Gold Corporation, by an agreement dated the 14th day of April, 1997, following a letter of intent entered into in March, 1997. The consideration included a net smelter return royalty from the sale or other disposition of ores or concentrates produced from the property and an agreement to return the property if the Kinross Gold Corporation should decide to abandon the property.

8. On the 25th day of July, 1997, the Mining Recorder for the Porcupine Mining Division issued a letter cancelling Mining Claim P-1160197.

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9. By correspondence dated the 25th day of July, 1997 Sproule, Fournier, Rousseau and Renaudat were advised that Mining Claim P-1160197 was forfeit and that P-1219649 was recorded. The effective date of recording of P-1219649 was recorded as the 10th day of March, 1997.

**Issues**

1. Was the error of the Acting Mining Recorder in issuing the Order to extend time of January 23, 1997, described as a nullity by the parties, a clerical error within the meaning of section 49 of the **Mining Act** or an error *ab initio*?

2. What was the effect of the error in extending time by the Acting Mining Recorder on the Kinross Mining Claim? In other words, were the lands open for staking, within the meaning of clause 30(f) at the time of the Fournier staking?

3. Was the Acting Mining Recorder *functus officio* in dealing with the Kinross Mining Claim. If not, what is the effect of his continuing jurisdiction and what relief, if any, can the tribunal provide upon appeal?

4. Should the tribunal find that the Kinross Mining Claim is reinstated, what is the extent of its jurisdiction to exclude time, pursuant to section 67 of the **Mining Act**?

**Evidence**

**Richard Sproule** gave evidence on his own behalf and on behalf of Kinross Gold Corporation ("Kinross"). Mr. Sproule discussed his employment history, including his current position as project geologist with Kinross, of his association with Mr. Hutteri in staking claims, and their practice of performing sufficient work on mining claims to interest mining companies.

Mr. Sproule was personally involved in circumstances leading up to the application for the extension of time on January 23, 1997. He and Mr. Hutteri had been concentrating their efforts on other claims, and noticed that the six unit Kinross Claim would be due on the 27th day of January, 1997. While his recollections were that he had attended the Porcupine Mining Recorder's Office on January 20, 1997, the date of the Order extending time is January 23, 1997. He and Mr. Hutteri attended the office, and while Gary White, the Mining Recorder was away, they dealt with Dale Messinger, the Acting Mining Recorder.

According to Mr. Sproule, he filled out the application. Then Mr. Messenger indicated that everything looked fine but that he would have to check with Gary White. The result was the Order to Extend Time (Ex. 11) which he received by mail. Mr. Sproule was not aware of any problems involving the jurisdiction to extend time when he went into the office that day.

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After receiving the extension of time, Messrs. Sproule and Hutteri were in discussions with a number of companies concerning the Kinross Mining Claim and others which they held. When another mining company, Black Pearl, announced gold mineralization in its diamond drilling, negotiations were entered into with Kinross.

During this time frame, other mining claims held by Messrs. Sproule, Hutteri and Korba were coming due in Dundonald Township, and it was in attempting to apply for an extension of time for those claims that they became aware of the jurisdictional problems in extending time with the legislation, due to the recent amendments. As a result of this, he went out and restaked the lands in Dundonald Township.

Asked what he would have done had the erroneous extension of time not been granted, Mr. Sproule stated that, while he would have preferred to perform line cutting, he had two options. One would be to let time run out, allow the claim to forfeit and immediately restake the land. The other would involve doing a quick compass, flag and magnetometer survey, which would be sufficient to keep the claim in good standing.

Upon receiving notice that the claim had cancelled, he appealed.

Under cross-examination, Mr. Sproule stated, although he had been working in the industry since 1983, and was familiar with the **Mining Act**, he did not become aware of the changes to the extension of time rules until March, 1997. His work involved hundreds of mining claims and it had been his practice either to have the assessment work done in good time or to apply for an extension of time.

Asked about the ability to perform assessment work in such a short time frame as the seven days which would have been available, had the erroneous order not been made, Mr. Sproule stated that his partner, Ed Korba, makes his living staking claims and performing assessment work, and that he believes Mr. Korba could have done what was necessary. It was pointed out that the Kinross Mining Claim involved some 13 kilometres of lines on land near Timmins, in the heavy snow of January and Mr. Sproule was asked whether the work could actually be done. The response was that, without having to do the flagging, Mr. Sproule could perform up to 15 kilometres of magnetometer a day. With Mr. Korba to flag the lines, there would be no problem. As a matter of clarification, Mr. Sproule stated that there was no assessment work credit available on adjoining claims to apply to the Kinross Mining Claim.

Under re-examination, Mr. Sproule reiterated that, while time would have been tight, he was confident that the required assessment work could have been performed.

**Henry Peter Hutteri** reiterated much of the evidence given by Mr. Sproule concerning their partnership activities. He stated that the activity was done on a part-time basis, during weekends and vacations. The recent interest in the subject lands became heightened due to gold mineralization found in the area. Messrs. Sproule and Hutteri had performed $7,700 in assessment work on mining claims in the vicinity which were lost to them when the Crown reinstated the patent.

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Mr. Hutteri could not recall whether he attended the Mining Recorder's Office with Mr. Sproule at the time of the filing of the Application to Record. He was there, however, when the application to extend time was made. He could recall no discussions which ensued, and was not aware at the time of the new rules governing extensions of time.

Mr. Hutteri stated that he and Mr. Sproule became aware of the new rules only when they applied for an extension of time on other claims later in 1997, at which time Gary White told them there was a problem with the Kinross Mining Claim. They next heard about it when they received the letter advising that the Kinross Mining Claim had been cancelled, in July, 1997.

Under cross-examination, Mr. Hutteri reiterated that he could not recall the discussion on January 23, 1997, but that there had been little discussion in general. He agreed that it was a non-event. Mr. Hutteri indicated that, prior to applying for the extension, he and Mr. Sproule had determined that they would do a flag line survey with Ed Korba, if they did not obtain the extension. He stated that, while he did work for Kinross, he could have obtained the necessary time off to do the work. Also, there was a weekend between the day of the application and the expiry date, which would have provided additional time.

**Dale Ernest Messenger** gave evidence on behalf of MND&M. On January 23, 1997, he was the Acting Mining Recorder in the Porcupine Mining Division Recorder's Office. At 4:00 p.m. on that day, Louise Korpela of that office asked for his assistance with a subsection 73(1) application to extend time. He asked Mr. Sproule whether the first unit of assessment work had been done, to which the reply was "yes". He then asked Ms. Korpela to punch the claim number in the computer, and the abstract for the mining claim shown indicated that the first unit of assessment work had indeed been done.

From that point, Mr. Messenger was certain that the application was in order and decided to issue the extension. He indicated to Mr. Sproule that he would sign the application, as he had the authority to do so. Mr. Messenger could not recall even seeing Mr. Hutteri, although it was possible that he did not remember. He subsequently issued the Order extending time with the same date. Mr. Messenger indicated that he was aware that Mr. Sproule needed an answer, as he had only four days before the claim expired.

On March 10, 1997, Mr. Fournier applied to record his mining claim. Mr. White received it and indicated on a later date to Mr. Messenger that there was a problem. Mr. White was told that the extension was issued in non-compliance with the **Mining Act** and as far as Mr. Fournier and his partners were concerned, they wished to record their mining claim. Mr. White indicated to Mr. Messenger that he spoke to Messrs. Sproule and Hutteri two or three times that week (excerpts from Gary White's journal were filed as evidence of this fact, Ex. 17, which the tribunal admitted but indicated would give limited weight to, given the manner of proof tendered).

Mr. Messenger stated that he personally saw Messrs. Sproule and Hutteri the following week, and suggested to them to not perform the assessment work as there was a problem.

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Under cross-examination, Mr. Messenger reiterated his recollections of the 23rd. He stated that the mining claim number on the application to extend time was correctly shown as 1160197. There was discussion as to whether the information from the abstract was used to fill out the application, but Mr. Messenger indicated that the application had already been filled out when he was called to the counter, so that the information in the computer was not faulty. Responding to questions as to whether it might have been incorrect information on the correct abstract, Mr. Messenger indicated that was not possible. The regulation affecting extensions of time came into effect in 1996. Mr. Johnson suggested that Mr. Sproule was unaware of the change. Mr. Messenger indicated that the regulation was sufficiently recent that those serving the counter were drilled to ensure that they verify performance of the first two units of assessment work prior to entertaining an application for extension of time.

Mr. Messenger suggested that he might have read the number out wrong, or that Ms. Korpela might have input it incorrectly, or even that it had been the correct abstract, whose information he read incorrectly. He reiterated that the Order had been an error of his judgement, and was not in compliance with the regulation. Mr. Messenger agreed that individuals dealing with the Mining Recorder's office would rely on that information to ensure compliance with the legislation.

Under re-direct, Mr. Messenger could not recall all of his conversation with Mr. Sproule, but could only be certain that he asked about the first two units of assessment work, and that he had been told that they were done.

**Richard Sproule** was recalled, stating that he had known Mr. Messenger since August, 1995. He stated that, had Mr. Messenger asked him whether the first unit of assessment work had been performed and filed, he would have told him that it had not. This conversation simply had not taken place. Mr. Sproule agreed that Mr. Messenger indicated that he would expedite the Order extending time, as they needed to know the answer immediately. Mr. Sproule stated that he did not see the computer screen which Mr. Messenger referred to. Under cross-examination, Mr. Sproule indicated that he did not ask Mr. Messenger to check the information on the claim, nor did he recall Mr. Messenger looking at the screen, or discussing it with his assistant.

**Henry Hutteri** was also recalled. He stated that he had attended that day with Mr. Sproule, Mr. Messenger was at the counter with the two of them, and that there had been no discussion concerning previous assessment work. There was no background, and no discussion of the changes to the regulation. Under cross-examination, Mr. Hutteri reiterated that there had been no discussion as to the need to have work done before an extension would be entertained.

Although the Respondents did not elect to attend the hearing in person, they did comply with the tribunal's Order to File documentation. Their written account of facts and

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submissions is reproduced in its' entirety (Ex. 6) (It is noted that this submission was not read into the record, nor were Counsel for the parties asked to address its' contents):

> Referring firstly to the SUMMARY OF FACTS as filed by Kenneth Johnson on behalf of Sproule, et. al. and Kinross, the Parties of the Third Part agree with the facts with the following comments:
>
> **Paragraph 5** - If the Sproule extension request had been denied on January 20, 1997, we believe that it was not possible for Sproule and Hutteri to complete and file proof of the required assessment work in the time remaining.
>
> Sproule and Hutteri were employed full-time by Kinross as geologists in January 1977. Given their job situation, the shortness of daylight hours in december and January, cold temperatures and potential for winter storms, one would have expected the request for an extension in respect of claim P 1160197 to have been made as early as possible (December 30, 1996). To have done so would have allowed Sproule and Hutteri to take advantage of their employer's New Year's Holiday and the four weekends to January 25 - 26, 1997 if they had planned to work with their partner Korba in performing the required assessment work.
>
> Sproule and Hutteri have a previous history of doing their own assessment work. For example, between december 16, 1995 and January 30, 1996 Sproule and Hutteri had performed their own assessment work on claim P 1201345 (4 units) in N 1/2 Lot 12 Con I Tully Twp. This work, which took *six weeks to cover 160 acres*, was subsequently filed and accepted.
>
> Application for an extension in respect of P 1160197 was only made January 20, 1997, *leaving only the final weekend of January to perform the work if the application had been turned down.* Even if Sproule and Hutteri had secured leave of absences or vacation time from their employer, they would have only *six full days to cover 240 acres.* Nothing is impossible, but covering a 50% larger area in less than 1/7th of the time is a big stretch.
>
> If the Appellants of the First Part had planned to contract out the work in the event their request for an extension was denied, no evidence had been submitted by way of either tender documents or contracts indicating the urgency of the required work and reports.

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**RENAUDAT ET AL SUMMARY OF FACTS**

1) On March 7, 1997, in the course of determining what ground was open for staking in Tully Twp the writer and Georges Fournier reviewed the Township Report which indicated an extension had been granted for claim P 1160197, Lot 8 Cons I and II Tully Twp.

2) On March 8, 1997 while locating and then staking Claim P 1212880 in the S 1/2 Lot 9 Con I Tully Twp it became apparent to the writer that there was no evidence of field work having been done in the area for a long time, just the restaking of claims as they had lapsed. This field evidence was interpreted to mean that an extension was granted on claim P 1160197 where no assessment work had been done or filed in the first two years since recording.

3) On March 9, 1997, Georges Fournier and the writer staked claim P 1219649 over P 1160197, the same area of land in Lot 8, Cons I and II Tully Twp.

4) Georges Fournier applied to record P 1219649 on March 10, 1997 in the name of Georges Fournier, Robert Rosseau and Frank Renaudat. The application was accepted on the basis that the land was open for staking.

5) On March 11, 1997 the application was initially changed to a refused status, then subsequently "stroked out" and handled as a "filed only" claim by the MND&M.

**RENAUDAT ET AL SUBMISSIONS**

On March 6, 1997 favourable drilling results were released by Black Pearl Minerals Ltd ("Pearl") about a program then underway in the N 1/2 Lot 11 Con I Tully Twp. Rumours were circulating in Timmins, Ontario that the largest independently held **staked-claimholders** in the area (210 old claim units in Tully, Evelyn and Dundonald Twps), Richard Sproule, Henry Hutteri, and Edward Korba had received "special consideration" whereby they had been granted an extension of time to file assessment work on claim P 1160197 (6 units) which was the closest ground they had held to the Pearl strike.

The rumours were that the "special consideration" was by way of "compensation" for the loss of claim P 1201345 by Sproule and Hutteri. This 4 unit claim had been staked to cover the N 1/2

LOT 12 Con I Tully Twp ground which immediately adjoins to the west the Pearl strike. It was subsequently learned that the mining rights to the N 1/2 of Lot 12 Con I Tully Twp were patented and claim P 1201345 was cancelled. Although claim P 1201345 was not contiguous to claim P 1160197 the rumour mill had it that Sproule and Hutteri had been granted an extension of time in contravention of Section 5 of the Mining Act on P 1160197 as "compensation" for assessment work that they had personally done on P 1201345.

On March 7, 1997, in the course of determining what land was open for staking in Tully Twp and the contiguous townships of Prosser, Wark and Gowan the writer and staking partners reviewed the Township Reports and noted that claim P 1160197 had an 'E' for extension designation. In the preparation for staking claim P 1212880 in the S 1/2 Lot 9 Con I Tully Twp on March 8, 1997 (post #3 of claim P 1160197 is a common corner with post #1 of claim P 1212880) it became apparent in the field that no work of a recent nature (1 - 3 years) had been done on claim P 1160197 nor on any of the claims in Lot 8 Con I and II Tully Twp, nor could work have been filed from any of the relatively newly restaked adjacent claims held by Sproule et al. No work had been done anywhere in Lots 8 and 9 for a very long time, just restakings. The writer determined that the extension was likely invalid under Section 5, and that under Subsection 72(1) of the Mining Act claim P 1160197 had lapsed and the ground was open for staking.

On March 9, 1997, Georges Fournier and the writer staked claim P 1219649 over the ground previously held by P 1160197. The Claim Abstract for claim P 1160197 indicates the granting of an extension without any prior assessment work having been done or filed, confirming that claim P 1160197 had lapsed and that the ground had been open for staking since January 27, 1997.

Referring secondly to the **SUMMARY OF FACTS** as filed by the MND&M, the Parties of the Third Part agree with the facts as presented with the following comments:

**MND&M SUMMARY OF FACTS 3)** The application to record P 1219649 was accepted on March 10, 1997, initially refused on March 11, 1997, then subsequently treated as a "filed only" application.

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**Submissions**

Mr. Johnson submitted that most of the facts of this case were uncontested and clear. There was one issue of credibility, namely whether there had been discussion of the matter of the first two years' assessment work. Mr. Johnson submitted that the evidence of Mr. Sproule is preferable. Mr. Messenger's evidence in this regard focused on his practice, that the information on the screen was wrong, that work was shown as having been done and not that Mr. Sproule's evidence was incorrect.

Overlooking that one question, which is not critical to the matter to be determined, the Order extending time issued by the Acting Mining Recorder for one year was made in error. Mr. Johnson submitted that those coming to the Office of the Mining Recorder rely on the accuracy of Orders made and are entitled to rely on the accuracy of MND&M's work.

Mr. Johnson submitted that an administrative error had been made. He submitted that the tribunal could apply its broad jurisdiction under sections 112, 121 and gain some comfort from section 49. He submitted that the decision of the Acting Mining Recorder was a purely administrative error. The decision to extend time was an administrative decision, with the role of mining recorders under section 73(1) being purely administrative and subsection 49(1) includes the power to relieve claims from forfeiture. It was an error of the Crown which caused the problem in the first place. Section 49 provides mining recorders with the authority to correct errors and where there is an adverse interest that the matter could be referred to the tribunal. The framers of the legislation did have situations such as those captured by the facts of this appeal in mind, having given the tribunal power to correct the situation, including the power to relieve the claim from forfeiture.

Posing the question of whether the erroneous Order is a nullity, void or voidable, Mr. Johnson submitted that it is a voidable Order, which remains in effect until something can be done about it. Therefore, the Fournier staking must be regarded as invalid. At the time of the Fournier staking, the land was subject to a valid mining claim and as such was not open to staking by Fournier.

Mr. Johnson submitted that the tribunal is empowered to make its decisions on the real merits and substantial justice of the case. This is a situation where two men staked claims, applied for an extension of time, entered into an agreement with Kinross to develop a whole block of property; the appellants have a real and substantial interest in having the property developed. Kinross is proceeding with development on the adjoining claims. Mr. Johnson submitted that the equities are with the appellants.

In terms of Messrs. Renaudat, Rousseau and Fournier, they saw an opportunity and attempted to take advantage of it. Under the circumstances, it would be appropriate to order

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the reinstatement of the Kinross Mining Claim, granting limited time for the assessment work to be done. Mr. Johnson submitted that not a lot of time was required, but more than the four days remaining on the abstract at the date of the application to extend time. He submitted that the Fournier Mining Claim should be declared null and void.

Mr. Ritchie started out by stating that in many respects he agreed with Mr. Johnson. As to the matter of credibility of the witnesses, he was inclined to believe that the witnesses genuinely were honest in their recollections, but that those recollections simply ran counter to one another. This case also points to a gaping need for MND&M to change its application to extend time to indicate whether the first year's assessment work had been done.

Mr. Messenger recalled that he did ask the question and takes full blame for the error. MND&M accepts this blame. It is clear that these are serious clients with serious intent to develop their property. In fact, the respondents didn't show up at the hearing and didn't defend their right to the Fournier Mining Claim. Their position was, in Mr. Ritchie's submission, opportunistic - they found a flaw in the extension order and staked the land, attempted to record. The application to record is, in fact, unsigned, but in Mr. Ritchie's view, that is an irregularity which can be viewed as cured with the passage of time. Mr. Ritchie agreed that the equities rest with Mr. Johnson's clients and not with the respondents.

Once MND&M discovered the error, through consulting with the parties, their lawyers, internal deliberations, eventually, the mining recorders came to the view that the Order extending time was a nullity. There was, therefore, no authority to make it. It had no effect from its inception. Intervenors had come along when the land was open for staking, recorded their claim, and the Mining Recorder had no choice but to act upon it. Therefore, Mr. Ritchie submitted, that through the operation of law, the Kinross Mining Claim was forfeit through the operation of law and the second application was valid and had to be recorded.

The Mining Recorder was of the view that the error made was more than the type of administrative error contemplated by section 49. There is a fundamental problem with the application of statute. Section 5 of the regulation prohibits an extension of time in these circumstances. Administrative errors of the type contemplated by section 49 are in the nature of mechanical errors. Here there was an exercise of a statutory power of decision, as per the **Statutory Powers Procedure Act**. A cancellation of an abstract, by contrast, would be a purely administrative act.

Mr. Ritchie submitted that the legal issue here is not one of an administrative error but of a fundamental error. There is no power to correct or change anything in the Mining Recorder. It is not a reversible error, but a nullity. He referred to Osler J.'s decision in **Regina v. Bates** [1972] 2 O.R. 305, where the appointment by the Minister of a conciliation officer was held to be a nullity.

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Mr. Ritchie concluded by referring to Mr. Johnson's reference to section 121 of the **Act**, stating that while he was uncertain of its meaning, it did indeed give the tribunal a large measure of flexibility, although one would have to sort through section 105 and 121 to determine the equities. There are three options left to the tribunal, namely: 1) to reinstate the land; 2) to leave it with Messrs. Renaudat, Rousseau and Fournier; or 3) to throw the lands open for staking again. As a ministry, his client has no position as to which is the correct approach, although they have considerable sympathy with the appellants.

Mr. Johnson submitted that an administrative error may include interpretation of the wording of the legislation.

**Findings**

The facts of this case are largely uncontested, and to the extent that there may be disparity in the evidence of the appellants and that of the Acting Mining Recorder, no findings turn on these differences. Nonetheless, the tribunal finds that all of the witnesses were credible, and that their evidence, however contradictory, was given to the best of their recollections. It would seem that at the time Messrs. Sproule and Hutteri attended at the Porcupine Recording Office, they could not have anticipated the significance of the facts as they existed at that time, so that there was perhaps no burning need to commit the conversations and transactions to accurate memory and recall.

While the facts in this matter are relatively straightforward, the impact of the applicable law and its result is quite out of the ordinary.

There was much discussion concerning the actions of the Acting Mining Recorder. It appears to have been left, however, that it was through the operation of law and section 72, that the Kinross Mining Claim was cancelled, through its forfeiture by having been allowed to lapse.

Counsel for the parties only briefly touched on the issue of finality of decisions. It was suggested by Mr. Johnson that the Mining Recorder could revisit the decision, upon realizing that an administrative error, if that is what this was, had been made. However, it is this issue of finality of decisions upon which the findings of this tribunal turn, namely once the Mining Recorder, or in this case, Acting Mining Recorder, has made a decision which has no statutory basis in law, or an error outside jurisdiction, what is its implication. The principle of finality of decisions, also known as *functus officio*, means,

> As a general rule, once such a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances.[1]

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[1] ***Chandler v. Alberta Association of Architects*** [1989] 2 S.C.R. 848, 40 Admin. L.R.128, 70 Alta. L. R. (2d) 193,36 C.L.R.1, [1989] 1 W.W.R. 521, 62 D.L.R.(4th) 577,99 N.R.277, 101 A.R. 321, per Sopinka, J. at p. 589 in 62 D.L.R. (4th)

Although the mining recorders are not considered tribunals, they are nonetheless empowered with statutory power of decision-making. In their role of administering provisions of the **Mining Act**, the Mining Recorders perform quasi-judicial as well as administrative functions. An example of the former is in hearing disputes pursuant to section 48. Examples of the latter include non contentious issuance and renewals of licenses (subsections 19(5) and 21(3)).

It has been considered that administrative decisions are not subject to the principle of *functus officio*. However, the courts have recently departed from this approach. The evolution of this is discussed at length in MacCauley, Robert W. **Practice and Procedure Before Administrative Tribunals**, (Scarborough: Carswell, 1997), in Chapter 27A entitled, "Authority of An Agency to Rehear or Reconsider Decisions, commencing at page 27A-5:

> **27A.2(b) Application of Functus to Decisions of an Administrative Nature**
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> There is case law preceding *Chandler* to the effect that administrative (as opposed to quasi-judicial) decision-making is not subject to the functus principle.[8]
>
> However, this does not appear to have been universally adopted. See for example *Ontario (Ombudsman) v. R.*[9] where the Ontario Court of Appeal refused to lay down in definitive terms when the Ombudsman of Ontario was free to re-investigate a matter which he had already investigated and reported to the Legislature. Notwithstanding that the Ombudsman's function could not be seen as being quasi-judicial the Court was unwilling to simply exclude the functus principle. *MacMillan Bloedel Ltd. v. Mullin*[10] is another decision where the power to reconsider was decided, not

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[8] ***Rootkin v. Kent County Council,*** [1981] 2 All E.R. 227 (C.A.); ***Greenberg v. Canada (National Parole Board*** (1983), 48 N.R. 310 (Fed. C.A.); ***Canada (Minister de l'Emploie de L'Immigration v. Nabiye,*** [1989] 3 F.C. 424, 8 Imm. L.R. (2d) 190, 102 N.R. 390 (C.A.); Re Hanna(1988), 88 N.S.R.(2d) 315, 225 A.P.R. 315 (T.D.); ***McDonald's Corp. v. Canada (Reg. of Trade Marks)*** (1987), 10 F.T.R. 195, 15 C.P.R. (3d) 462 (T.D.), reversed [1989] 3 F.C. 267, 23 C.I.P.R. 161, 24 C.P.R. (3d) 463, 100 N.R. 396, 38 F.T.R. 240 (note)(C.A.). See the excellent pre-Chandler article by Michael Akehurst "Revocation of Administrative Decisions", [1982] Public Law 613.

[9] (1980), 3 O.R. (2d) 768, 117 D.L.R. (3d) 613 (C.A.)

[10] (1985), 61 B.C.L.R. 145, [985] 3 W.W.R. 577 (C.A.).

on the basis of the administrative or quasi-judicial nature of the power being exercised, but on the basis of statutory intent.[11]

The Supreme Court in *Chandler* discussed the functus principle in terms of all agency decisions. Decisions of an administrative nature were not included in the exceptions to the principle. In fact the reference by the Court to *Grillas v. Canada (Minister of Manpower & Immigration)*[12] as an example of functus principle being displaced by indications in the enabling statute removes any doubt that the Court, in applying functus to agency decision-making, was speaking of both quasi-judicial and administrative decision-making as *Grillas* involved essentially an administrative function.[13]

I suggest that *Chandler* affirms that the ability of a decision-maker to reconsider a final decision is not a general analysis of whether the power is administrative or quasi-judicial but a matter of statutory interpretation. The question to be addressed is not "What is the nature of the power being exercised?" but rather "Has the decision-maker, under *this* statutory scheme and in light of the ends to *this* statutory power, been empowered to reconsider or reopen the decision once it has

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[11] See also ***C.W.C. v. Canada*** (A.G.)(No. 2) (1988), [1989] 1 F.C.643, 34 Admin L.R. 8, 21 F.T.R. 56 (T.D.) at 62 where functus was said to be applicable to judicial, quasi-judicial and administrative decisions and ***Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries & Oceans),*** [1992]3 F.C. 54, 11 C.C.L.T. (2d) 241, 54 F.T.R. 20 (T.D.) (a post-Chandler decision) where the administrative nature of the Minister of Fisheries and Oceans discretionary power to licence appears to have been irrelevant in the Court's determination that once the Minister had authorized the issuance of a licence he had exhausted the authority granted by the statute and was unable to reconsider and decline to issue it. The decision of the ***British Columbia Court of Appeal in Westminster Mills Ltd. v. Anderson (1957),*** 21 W.W.R. 417, 118 C.C.C. 62 (B.C.C.A.) is sometimes cited for the authority that administrative decisions are not subject to the functus principle. I suggest however, that this overextends the principle for which the decision stands. This case appears to have been decided on the basis of the specific power in question rather than on the more sweeping basis of the general nature of the power in question. The Court was quite clearly focusing, not on the general nature of the power, but on the specific thing being done (the creation of log salvage districts). As noted in the concurring reasons of Mr. Justice Sidney Smith, it was "absurd to contend that once a minister had fixed the boundaries of a district the legislature intended that those boundaries must remain fixed and immutably final unless altered by a further [s]tatute (**sic**)". In my opinion, Westminster Mills does not stand for a general proposition that all administrative decisions are exempt from the functus principle.

[12] [1972] S.C.R. 577, 23 D.L.R. (3d) 1.

[13] The Federal Court of Appeal specifically referred to Grillas involving an administrative decision-making power in ***Longia v. Canada (Minister of Employment & Immigration),*** [1990] 3 F.C. 288, 44 Admin. L.R. 264, 10 Imm.L.R.(2d)312, 114 N.R. 280(C.A.), ***Canada (Minister de l'emploi de l'Immigration) v. Nabiye,*** 3 F.C. 424, 8 Imm.L.R. (2d) 190, 102 N.R. 390 (C.A.).

been made?".[14] The administrative or quasi-judicial nature of the function being performed is at best a rule of thumb which is likely no longer a useful exercise given the difficulty in determining that classification and the limited insight offered by it. [15]

**27A.2(c) Basis of Functus Rule**

In ***Grillas*** the Supreme Court stated that, historically, the roots of the functus principle were to be found in Parliamentary intent. If Parliament had provided an express route by which a matter could be reconsidered (i.e. an appeal) then that was the only way it could be done (***Re St. Nazaire Co.*** (1879), 12 Ch. D. 88). Provision of an express review power or failure to provide for any review or appeal route could equally be taken as indicative of Parliament's desire for a decision to be final. According to the Court in *Grillas* (at p. 10 D.L.R.) this reasoning was extended to administrative agencies by the Alberta Court of Appeal in *R. v. Edmonton (Development Appeal Board), Ex parte Canadian Industries Ltd.*[16] on the basis that as the legislature had made express provisions for rehearing in the statutes creating some provincial boards, its failure to do so in the case of the Development Appeal Board in question meant that no such reconsideration power had been intended.

The modern basis of the rule, according to the Supreme Court in *Chandler*, (at page 596 D.L.R.), is found however:

> on the policy ground which favours finality of proceedings rather than the rule which was developed with respect to formal judgements of a court whose decision was subject to a full appeal.

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[14] ***In R. v. Agricultural Land Tribunal (South Eastern Area), Ex p. Hooker,*** [1952] 1 K.B. 1 Lord Goddard C.J. in answering whether there was any power in an Agricultural Land Tribunal to reconsider a decision (to correct an error) answered " ... the answer ... depends entirely on the Agriculture Act, 1948, and the Orders which have been issued under it."

[15] Nonetheless, it is an addiction difficult to break. The reader will no doubt notice that I twice return to its embrace later in this section where I note that a provision of the **Interpretation Act** does not apply to adjudicative decisions and that legislative powers are not subject to the functus rule. This failing can partly be laid at the door of the courts which continue to use these terms as codes for more complex analysis. The administrative/adjudicative dichotomy still appears to linger on in some decisions of the Federal Court such as ***Longia v. Canada (Minister of Employment & Immigration),*** [1990] 3 F.C. 288, 44 Admin.L.R. 264, 10 Imm. L.R. (2d) 312, 114 N.R. 281 (C.A.) where the Court interpreted Grillas as standing for the general proposition that administrative (as opposed to adjudicative) decision-making was not subject to the functus principle. In my opinion the decision in Grillas was based, not on the fact that the decision-making power was administrative in nature, but on the fact that its purpose was to provide relief on compassionate grounds.

[16] (1969), 9 D.L.R.(3d)727, 71 W.W.R. 635 (Alta. C.A.), sub nom. ***Canadian Industries Ltd. v. Edmonton (Development Appeal Board).***

> The functus principle is peculiarly tied to administrative agencies by legal limitations on agency authority. If a decision-making power is not also in itself a power to reconsider (which it is not, according to *Chandler* and the application of the functus principle) then, if that authority is desired, a decision-maker must find it somewhere else. It has been argued that this authority can be found in the inherent jurisdiction of some superior courts of record which possess a general jurisdiction, however, administrative agencies, having no inherent jurisdiction, cannot look to that source of power for a reconsideration power.[17] Thus, an agency, lacking express jurisdiction, must rely on the exceptions to the functus principle if it wishes to reopen an earlier decision.

The powers of mining recorders generally are found in section 110 of the **Mining Act** are relevant to the matter of powers of mining recorders, and are set out below:

> **110.** (1) Subject to the right of appeal provided in section 112, a recorder has power to hear and determine disputes between persons as to unpatented mining claims situate in his or her mining division.
>
> (2) Any question as to whether the provisions of this **Act** regarding a mining claim have been complied with, unless the Commissioner otherwise orders or unless the recorder with the consent of the Commissioner transfers the question to the Commissioner for his or her decision, shall in the first instance be decided by the recorder.
>
> (3) The recorder shall enter forthwith in the book of his or her office a full note of every decision made by the recorder, and shall notify the persons affected thereby of the decision by registered letter mailed not later than the next day after the entry of the note.

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[17] ***Scivitarro v. British Columbia (Minister of Human Resources),*** [1982] 4 W.W.R. 632, 134 D.L.R. (3d) 521 (B.C.S.C); Re Lornex Mining Corp., [1976] 5 W.W.R. 554, 69 D.L.R. (3d) 705 (B.C.S.C.). In his case comment, ***"Reopenings, Rehearings and Reconsiderations in Administrative Law: Re Lornex Mining Corporation and Bukwa",*** 17 Osgoode Hall Law Journal 207, Prof. R. A. Macdonald discusses whether a rehearing power could be found in the Immigration Appeal Board's statutory grant of all the powers, rights and privileges as are vested in a superior court of record. This argument is predicated on the fact that such a grant makes the agency a court of record. However, it appears established now that such a grant does not do so (see the cases cited later in c. 29A.5(b)(i) and the reconsideration authority of the Immigration and Refugee Board has in a number of cases been restricted to its statutory grant ***(Grillas v. Canada (Minister of Manpower & Immigration),*** [1972] S.C.R. 577, 23 D.L.R. (3d) 1; ***Lugano v. Canada (Minister of Manpower & Immigration),*** [1977] 2 F.C. 605, 75 D.L.R. (3d) 625, 15 N.R. 254 (C.A.); ***Longia v. Canada (Minister of Employment & Immigration),*** [1990] 3 F.C. 288, 44 Admin. L.R.264, 10 Imm. L.R. (2d) 312, 114 N.R. 280 (C.A.). See also Claire A.H. LeRiche's paper ***"When Are Administrative Tribunals In the Immigration Context Functus Officio"*** presented at the Canadian Bar Association's seminar Advocacy Before Administrative Tribunals(June 25, 1993)).

> (4) Every person affected by the decision is entitled upon payment of the prescribed fee to receive from the recorder a certificate thereof which shall contain the date of entry of the decision in the books of the recorder.
>
> (5) The decision of the recorder is final and binding unless appealed from as provided in section 112.

Although subsection (1) appears to deal solely with the matter of disputes, further provided for in section 48, subsections (2) through (5) are of more general application, setting out procedures and administration for decisions and appeals. Most noteworthy for purposes of the current appeal is subsection (5) which provides that the decision is final, unless appealed. While Messrs. Sproule, Hutteri and Korba, as well as Kinross Gold Corporation, certainly appealed the Mining Recorder's letter of July 25, 1997, which sets out that the Kinross Mining Claim was forfeit on January 27, 1997, the fact of which the letter is notice of a decision, pursuant to subsection 110(5). It is this notice of the decision, whose effect the tribunal will examine.

Considering the discussion in MacCaulay, set out above, there is strong support for the position that the (Acting) Mining Recorder was functus in dealing with the matter of the Order Extending Time of January 23, 1997.

In *Chandler*, referenced and discussed at length in MacCaulay as set out above, the Court considered a situation which is not unlike that which occurred with the Acting Mining Recorder. The discussion in the headnote summarizes both the law, as it has evolved on the issue of *functus officio* and its applicability to the facts of that case, found at the bottom of page 577 [62 D.L.R. (4th)]:

> *Per* Sopinka J., Dickson, C.J.C. and Wilson J. concurring:
> As a general rule, once an administrative tribunal has reached a final decision in respect of a matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances. It can only do so if authorized by statute or if there has been a slip in drawing up the decision or there has been an error in expressing the manifest intention of the tribunal. To this extent, the principle of *functus officio* applies to an administrative tribunal. It is based, however, on the policy ground which favours finality of proceedings rather than on the rule which was developed with respect of formal judgements of the court whose decision was subject to full appeal. For this reason, its application in respect of decisions of administrative tribunals, which are subject to appeal only on a point of law, must be more flexible.

> Here the board failed to dispose of the matter before it in a manner permitted by the **Act**. The board held a valid hearing into certain practices of the appellants but instead of considering recommendations and directions it made *ultra vires* findings and orders. The board erroneously thought it had the powers of the complaint Review Committee, proceeded accordingly, and did not consider making recommendations as required by the legislation. While the board intended to make a final disposition on the matter before it, **that disposition was a nullity and amounted in law to no disposition at all. In these circumstances, the board should be entitled to continue the original proceedings to consider disposition of the matter on a proper basis.** [emphasis added].

The tribunal finds that the principle in **Chandler** as set out in the decision of Mr. Justice Sopinka are applicable to the facts of this case. The decision of the Acting Mining Recorder to extend time is found to be a nullity, void *ab initio*. However, the impact on the jurisdiction of the Mining Recorder of the fact of this nullity was unforseen by the parties.

Mr. Justice Sopinka states in **Chandler** at page 596 [62 D.L.R. 4th]:

> I do not understand Martland J. to go so far as to hold that *functus officio* has no application to administrative tribunals. Apart from the English practice which is based on a reluctance to amend or reopen formal judgements, there is a sound policy reason for recognizing the finality of proceedings before administrative tribunals. As a general rule, once such a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances. It can only do so if authorized by statute or if there has been a slip or error within the exceptions enunciated in *Paper Machinery Ltd. v. Ross Engineering Corp., supra* [[1934] 2 D.L.R. 239, [1934] S.C.R. 186]
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> To this extent, the principle of *functus officio* applies. It is based, however, on the policy ground which favours finality of proceedings rather than the rule which was developed with respect to formal judgments of a court whose decision was subject to a full appeal. For this reason I am of the opinion that its application must be more flexible and less formalistic in respect to the decisions of administrative tribunals which are subject to appeal only on a point of law. Justice may require the reopening of administrative proceedings in order to provide relief which would otherwise be available on appeal.

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> Accordingly, the principle should not be strictly applied where there are indications in the enabling statute that a decision can be reopened in order to enable the tribunal to discharge the function committed to it by enabling legislation. This was the situation in *Grillas, supra*.
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> Furthermore, if the tribunal has failed to dispose of an issue which is fairly raised by the proceedings and of which the tribunal is empowered by its enabling statute to dispose, it ought to be allowed to complete its statutory task. If, however, the administrative entity is empowered to dispose of a matter by one or more specified remedies or by alternative remedies, the fact that one is selected does not entitle it to reopen proceedings to make another or further selection. ...

and at page 597:

> ...The board intended to make a final disposition but that disposition is a nullity. It amounts to no disposition at all in law. Traditionally, a tribunal which makes a determination which is a nullity, has been permitted to reconsider the matter afresh and render a valid decision. In *Re Trizec Equities Ltd. and Area Assessor Burnaby-New Westminster* (1983), 147 D.L.R. (3d) 637, 45 B.C.L.R. 258, 22 M.P.L.R. 318 (S.C.), McLaclin J. (as she then was)summarized the law in this respect in the following passage, at p. 643:
>
> > I am satisfied both as a matter of logic and on the authorities that a tribunal which makes a decision in the purported exercise of its power which is a nullity, may thereafter enter upon a proper hearing and render a valid decision: *Lange v. Board of School Trustees of School District No. 42 ( Maple Ridge)*(1978), 9 B.C.L.R. 232 (B.C.S.C.); *Posluns v. Toronto Stock Exchange et al.* (1968), 67 D.L.R. (2d) 165, [1968] S.C.R. 330. In the latter case, the Supreme Court of Canada quoted from Lord Reid's reasons for Judgement in *Ridge v. Baldwin*, [1964] A.C. 40 at p. 79, where he said:
> >
> > > "I do not doubt that if an officer or body realises that it has acted hastily and reconsiders the whole matter afresh, after affording to the person affected a proper opportunity to present its case, then its later decision will be valid."

> There is no complaint made by Trizec Equities Ltd. with respect to the hearing held on March 19th. Accordingly, while the court exceeded its jurisdiction by purporting to increase the assessments on the morning of March 17, 1982, its subsequent decision of March 19, 1982, stands as valid.
>
> If the error which renders the decision a nullity is one that taints the whole proceeding, then the tribunal must start afresh. ... They involve a denial of natural justice which vitiated the whole proceeding. The tribunal was bound to start afresh in order to cure the defect.
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> In this proceeding the board conducted a valid hearing until it came to dispose of the matter. It then rendered a decision which is a nullity. It failed to consider disposition on a proper basis and should be entitled to do so. The Court of Appeal so held.
>
> On the continuation of the board's original proceedings, however, either party should be allowed to supplement the evidence and make further representations which are pertinent to disposition of the matter in accordance with the **Act** and regulation.

The implications of the Supreme Court of Canada's decision for the case before this tribunal are two-fold. With the decision of January 23, 1997 to extend time for the performance and assessment work being a nullity, according to **Chandler**, the matter continued to be before the Mining Recorder for determination. In fact, the matter was before the Mining Recorder from the date at which the application was made, with the likely result having been communicated to Messrs. Sproule and Hutteri, namely January 23, 1997.

Referring to clause 30(f) of the **Mining Act**, which provides:

> **30.** No mining claim shall be staked out or recorded on any land,
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> . . . . .
>
> (f) while proceedings in respect thereto are pending before the Commissioner or a recorder or until those proceedings are finally determined.

This provision is found to apply to the staking of the Fournier Mining Claim. While there was no direct evidence presented at the hearing, and indeed the provisions of clause 72(1)(b) would

appear to have been at play:

> **72.** (1) Except as provided by section 73, all the interest of the holder of a mining claim before a lease has issued ceases without any declaration, entry or act on the part of the Crown or by any officer, and the claim is open for prospecting and staking out,
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> . . . . .
>
> (b) if the prescribed work is not duly performed and reported as required by section 65 unless an application and payment for lease of the mining claim is made under section 81.

In fact, the provisions of clause 30(f) override those of clause 72(1)(b). This only makes sense, as if a decision of the mining recorder is in error outside jurisdiction, this matter must first be resolved before the lands can be deemed to come open for staking. This being the case, the tribunal finds that the staking of the Fournier Mining Claim is invalid, as it was done when the lands were not open for staking. Therefore, the tribunal finds that the Fournier Mining Claim shall be cancelled for the foregoing reason.

The appeal before the tribunal is of the decision of the Mining Recorder to cancel the Kinross Mining Claim. Although a number of different alternatives were proposed, in fact, the appeal is of the fact of its cancellation, as time had been available according to the evidence of Messrs. Sproule and Hutteri for the performance and filing of assessment work. This being the case, the tribunal finds that it will allow the appeal, and the Kinross Mining Claim will be reinstated.

**Exclusion of Time**

The tribunal has the jurisdiction to exclude time during which a matter was before the Mining Recorder or the tribunal, pursuant to the provisions of subsections 67(2), (3) and (4). The tribunal finds that it will exercise this jurisdiction, being satisfied that, while the appellants may share part of the blame for the problems which occurred on the original application and this appeal, they are not responsible for any delay in having this matter heard. On the facts of this case, the application for extension of time was made January 23, 1997, and the Kinross Mining Claim would have expired on January 27, 1997. In excluding the period of time between the date of the application to extend time and the making of this Order, only five days, which includes the first and last days, would remain for the performance and filing of assessment work, sufficient time, according to Messrs. Sproule and Hutteri, for the work to be done.

In considering the amount of time to be excluded in this appeal, the tribunal would prefer to add an additional period of 30 days to the time excluded, giving the appellants a total of 35 days to perform and file the assessment work. This is not so much to detract from keeping them to their word that the work could be performed in five, but for two totally unrelated reasons. First, it is clear that the appellants, having exercised their rights of appeal, have no intention of allowing the Kinross Mining Claim to lapse. It would be preferable to give

them sufficient time to perform a better quality of assessment work, rather than run the grid lines which they are proposing, the former of which would benefit both the Province and the objects of the **Mining Act**. Second, the tribunal has some concern about further appeals from this decision, and a contrary outcome, so that should the Kinross Mining Claim be cancelled as a result of appeal to the Courts, the time, effort and money spent might be lost to the appellants. In light of comments made concerning assessment work done at considerable expense on an adjoining claim, for which the lease was reinstated, this possibility would be unfortunate in the extreme.

However, the wording of subsection 67(4) is quite clear - namely that the exclusion of time is for a period of up to the number of days which have elapsed since matters came before the various decision-making bodies. Therefore, the tribunal finds that it has no jurisdiction, even given the provisions of section 121, that its decisions be on the real merits and substantial justice of the case, to override a statutory provision.

Given that the Order normally takes effect immediately upon signing, according to subsection 129(2) of the **Mining Act**, and the extremely short time frame thereafter in which to perform and file assessment work, the tribunal finds that it will exercise its jurisdiction under section 121 and makes its Order effective fourteen (14) days after its signing. While this will not adequately dispose of the issue of ongoing appeals, it will provide Messrs. Sproule and Hutteri, on behalf of Kinross, who is to become the recorded holder, the opportunity to have nineteen clear days in which to perform and file the assessment work.

Pursuant to subsection 67(2) of the **Mining Act**, the time during which Mining Claim P-1160197 was pending before the Mining Recorder and the tribunal, being the 23rd day of January, 1997 to the date upon which this Order will be made effective, being June 22, 1998, a total of 516 days, will be excluded in computing time within which work upon Mining Claim P-1160197 is to be performed and filed.

Pursuant to subsection 67(3) of the **Mining Act**, as amended by S.O. 1996, c. 1. Sched. O, s. 18, June 26, 1998 is deemed to be the date for the performance and filing of the first and second units of prescribed assessment work on Mining Claim P-1160197. Pursuant to subsection 67(4) of the **Mining Act**, all subsequent anniversary dates are deemed to be June 22.

**Conclusions**

The appeal is allowed. Fournier Mining Claim P-1219649 is cancelled, having been staked when the lands were not open for staking. Kinross Mining Claim P-1160197 will be reinstated. The effective date of this Order, pursuant to subsection 129(2) of the **Mining Act** will be June 22, 1998. The time during which the Kinross Mining Claim P-1160197 was before the Mining Recorder and the tribunal, up to the effective date of this Order, will be excluded in computing time for the performance and filing of assessment work, pursuant to section 67.

No costs are payable by any of the parties to this appeal