



Box 330
C.P. 330
24th floor, 700 Bay Street
24^e étage, 700, rue Bay
Toronto, Ontario
Toronto (Ontario)
M5G 1Z6

The Mining and Lands Commissioner Le Commissaire aux mines et aux terres

File No. MA 019-96

L. Kamerman)
Mining and Lands Commissioner)
Wednesday, the 6th day
of August, 1997.

THE MINING ACT

IN THE MATTER OF

Mining Claim SSM-1099075, situate in the Township of Galbraith, in the Sault Ste. Marie Mining Division, recorded in the name of Albertower Mines of Canada Ltd. and cancelled on the 7th day of May, 1996, hereinafter referred to as the "Albertower Cancelled Mining Claim";

AND IN THE MATTER OF

Mining Claim SSM-1164090, situate in the Township of Galbraith, in the Sault Ste. Marie Mining Division, having been recorded on the 25th day of July, 1996, hereinafter referred to as the "Coutts/Eels Restaked Mining Claim";

B E T W E E N:

ALBERTOWER MINES OF CANADA LTD.

Appellant

- and -

MINISTER OF NORTHERN DEVELOPMENT AND MINES

Respondent

and -

VINCENT GEORGE EELS AND ALLAN WILLIAM COUTTS

Party Of The Third Part

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 Sault Ste. Marie Mining Division (the "Mining Recorder") cancelling the Albertower Cancelled Mining Claim pursuant to clause 72(1)(b);

. . . . 2

AND IN THE MATTER OF

An application for a declaration pursuant to section 105 of the **Mining Act** that the Mining Recorder failed, in accordance with section 67 of the **Mining Act**, to properly calculate time for the performance and filing of assessment work on the Albertower Cancelled Mining Claim;

AND IN THE MATTER OF

An application pursuant to section 105 of the **Mining Act** to reinstate the Albertower Cancelled Mining Claim and cancel the Coutts/Eels Restaked Mining Claim upon whatever terms or conditions the tribunal deems just.

O R D E R

UPON hearing from the parties and reading the documentation filed;

1. **THIS TRIBUNAL ORDERS** that the application of Albertower Mines of Canada Limited is hereby dismissed.

2. **THIS TRIBUNAL FURTHER ORDERS** that the notation "Pending Proceedings" which is recorded on the abstract of the Coutts/Eels Restaked Mining Claim, to be effective from the 2nd day of October, 1996, be removed from the abstract of the Restaked Mining Claim.

3. **THIS TRIBUNAL FURTHER ORDERS** that the time during which the Coutts/Eels Restaked Mining Claim was under pending proceedings, being the 2nd day of October, 1996 to the 6th day of August, 1997, a total of 309 days, be excluded in computing time within which work upon the Coutts/Eels Restaked Mining Claims is to be performed.

4. **THE TRIBUNAL FURTHER ORDERS** that the 30th day of May, 1999 be fixed as the date by which the first two units of assessment work must be performed and filed on the Coutts/Eels Restaked Mining Claim pursuant to subsection 67(3) of the **Mining Act** and all subsequent anniversary dates are deemed to be May 30, 1999 pursuant to subsection 67(4) of the **Act**.

5. **THIS TRIBUNAL FURTHER ORDERS** that no costs shall be payable by any party to this application.

IT IS FURTHER DIRECTED that upon payment of the required fees, this Order be filed in the Office of the Provincial Mining Recorder, Sudbury, Ontario.

DATED this 6th day of August, 1997.

Original signed by
L. Kamerman

L. Kamerman
MINING AND LANDS COMMISSIONER



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B E T W E E N:

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Appellant

- and -

MINISTER OF NORTHERN DEVELOPMENT AND MINES

Respondent

- and -

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Party Of The Third Part

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AND IN THE MATTER OF

An application for a declaration pursuant to section 105 of the **Mining Act** that the Mining Recorder failed, in accordance with section 67 of the **Mining Act**, to properly calculate time for the performance and filing of assessment work on the Albertower Cancelled Mining Claim;

AND IN THE MATTER OF

An application pursuant to section 105 of the **Mining Act** to reinstate the Albertower Cancelled Mining Claim and cancel the Coutts/Eels Restaked Mining Claim upon whatever terms or conditions the tribunal deems just.

REASONS

This matter was conducted by telephone conference call on June 12, 1997, with Libero C. Paci appearing on behalf of the appellant, Albertower Mines of Canada Ltd. ("Albertower Mines"), John Norwood on behalf of the respondent, the Minister of Northern Development and Mines ("MNDM") and the parties of the third part, Vincent George Eels and Alan William Coutts appeared on their own behalf.

Background and Facts Not in Dispute

The facts from which this matter arises predate the staking of the Cancelled Mining Claim. The lands which form the Coutts/Eels Restaked and Albertower Cancelled Mining Claim form part of a group of claims which were staked initially during March and April, 1987 and recorded on April 6, 1987, having been subsequently transferred to Richard Wayne Mori ("the Mori Mining Claims"). The time for the performance and filing of assessment work for the Mori Mining Claims was extended to May 4, 1992. For reasons which were never adjudicated, the Mori Mining Claims were cancelled on May 5, 1992. The Mining Recorder's Order cancelling the Mori Mining Claims was dated June 23, 1992.

Those lands which form the Albertower Cancelled Mining Claim were restaked by Paul Michael Meyer on May 5, 1992 and subsequently transferred to Albertower Mines on October 7, 1992. In the meantime, Mr. Mori appealed the cancellation of the Mori Mining Claims on June 25, 1992 and pending proceedings were placed on his claims including the Albertower Cancelled Mining Claim.

The commencement of the Mori appeal predates the tenure of the current Mining and Lands Commissioner. This is mentioned as practice at that time differed from current procedures. In that case, the Title of Proceedings involved only Mr. Mori and MNDM. As is reflected in the current appeal, a third party staker is now listed as a party in the proceedings, and given notice, with an opportunity to make submissions.

By letter dated September 4, 1992, Mr. Paci advised the tribunal that Albertower would be opposing the Mori appeal. On October 14, 1992, Mr. Mori advised the tribunal that

he wished to withdraw his appeal. MNM and Mr. Paci, on behalf of Albertower, consented and the appeal was dismissed. The Order of the tribunal, dated November 10, 1992, amended December 1, 1992, and filed on the abstract of the Cancelled Mining Claim on November 27, 1992, dismissed the appeal.

The date upon which the first two units of assessment work had to be performed and filed on the Albertower Cancelled Mining Claim, based upon the date of recording, was May 4, 1994. On April 14, 1994, the Mining Recorder for the Sault Ste. Marie Mining Division, pursuant to a request of the recorded holder, issued an extension of time to November 7, 1994 for the performance and filing of assessment work. Adequate assessment work was performed and filed to keep the Cancelled Mining Claim in good standing up to and including the 4th day of May, 1996. No additional assessment work was performed prior to that date, and on May 7, 1996, its cancellation took place. Albertower Mines filed its Notice of Appeal with the Office of the Mining Recorder on October 2, 1996.

On July 20, 1996, the lands which form the Restaked Mining Claims were staked by Alan William Coutts, and were recorded on July 25, 1996. A 50 percent interest in the Coutts/Eels Restaked Mining Claim was transferred to Vincent George Eels on that same date.

It is the position of Albertower Mines that, pursuant to subsection 67(1) of the **Mining Act** (the "Act"), as it was on November 10, 1992, provides that time during which proceedings are pending before the Commissioner shall be excluded, where failure to settle the matter is not the fault of the recorded holder. Mr. Paci takes the position that this subsection should have operated automatically to exclude time for the performance of assessment work. MNM maintains that to qualify for the exclusion, application must be made to the tribunal. Messrs. Coutts and Eels take the position that an exclusion of time must be applied for, and does not automatically flow, according to the words used in the statute.

Relevant portions of section 67, as it was prior to the 1996 amendments, are reproduced:

67.-(1) In computing the time within which work upon a mining claim is required to be performed or within which application and payment for a lease may be made,

- (b) the time during which proceedings in respect of the mining claim are pending before the Ontario Court (General Division), the Commissioner or the recorder, where the commissioner is satisfied that any delay in settling the matter is not the fault of the holder,

shall be excluded, and the Commissioner may make an order fixing the date or dates by which the next or any prescribed units of work shall be performed and reported or by which an application and payment for lease may be made.

(2) Where the time for doing something under this Act is excluded, the next anniversary date after the exclusion in respect of the mining claim involved shall be deemed to be the date that falls after the anniversary date that would have occurred, except for this provision, by the number of days that equals the number of days of the exclusion, and all subsequent anniversary dates shall be adjusted accordingly.

For purposes of clarification, it should be noted that the wording of section 67 has been amended by S.O. 1996, c. 1, Sched. O, s. 18. The issues in this case involves interpretation of the legislation as it was prior to the amendment.

Issues

1. Does the exclusion of time provided for in clause 67(1)(b) of the **Mining Act**, R.S.O. 1990 c. M.14 operate automatically or does it require a finding by the Commissioner concerning delay?
2. Does the exclusion of time specified above require that application be made by the party seeking the exclusion? If the answer is yes, is this so for all cases, including those which are before the Commissioner?
3. Do the Commissioner's powers of review extend to a previous decision of the Commissioner?

Evidence

Sheila Theresa Lessard, the Mining Recorder for the Sault Ste. Marie Mining Division and newly appointed Provincial Mining Recorder, gave evidence on behalf of MNDM, having 20 years experience in mining lands and four years in public lands with MNDM, was recognized as an expert witness qualified to give opinion evidence on the administration of mining lands.

Ms. Lessard reviewed the facts of the case as set out above. Some time prior to May 5, 1994, Mr. Paci applied for an extension of time. Ms. Lessard stated that she reviewed the application and determined that she would allow a six month extension, owing to the fact that the Cancelled Mining Claim had been caught up in pending proceedings before the Commissioner for the period of June 25, 1992 to November 10, 1992. According to the administration of the Act, an extension of time does not change the anniversary date for

the performance and filing of assessment work. Rather, it provides an extension of the due date for a single instance, after which the due date reverts to the regular anniversary date in the subsequent time frame. At the time of the making of her Order, there was no jurisdiction in a mining recorder to exclude time, within the meaning of section 67. The power to do so rested with the Commissioner. With recent changes, S.O. 1996, c. 1, Sched. O, this power now rests with both the Commissioner and Mining Recorders.

Ms. Lessard described the practice of MNDM concerning the issue of exclusions of time. Referring to General Administration Policy GA 802-1, (the "Policy") issued November 19, 1994 (Ex. 2), on page 4, the second last paragraph indicates that an application for an exclusion of time is to the Commissioner, and will be decided on the merits. The Policy specifically states that the exclusion is not automatic.

Under cross-examination, Mr. Paci invited Ms. Lessard to show him where a party is required to apply for an exclusion pursuant to section 67 to which she relied that the wording does not refer to an application. She clarified that not all matters which might be eligible for consideration of an exclusion would be before the Commissioner, as proceedings before a recorder or the Ontario Court (General Division) also qualify.

Ms. Lessard explained, in answer to a question concerning the Policy, that it was designed to deal with the issue of pending proceedings generally, and section 67 exclusions of time are only mentioned as they touch on the issue of pending proceedings. The Policy outlines the options to the mining claim holder while a matter is under pending proceedings.

Messrs. Coutts and Eels clarified that Albertain Mines had not applied for an exclusion, but rather for an extension and should have known that the anniversary date does not change.

Mr. Norwood clarified with Ms. Lessard that page 4 of the Policy sets out under the heading of "Risk" includes the option of applying to the Commissioner for an exclusion. Ms. Lessard stated that the Policy supports the practice of the Commissioner and it was her understanding that there had to be an application, as the Commissioner must make a finding concerning the delay before an Order for exclusion can be made. In this case, there was no application before the Commissioner.

Submissions

Mr. Paci submitted that, although the Policy refers to section 67, it implies that the only way to obtain an exclusion of time is through an application to the Commissioner, which flies in the face of the wording of the section, which states, "shall be excluded". Mr. Paci submitted that there is no option in that regard, in that where there have been proceedings pending, that period must be excluded. In connection with this, the Commissioner may make an Order fixing the dates, and the formula for doing so is set out in subsection (2).

The margin note for the subsection, which states, "Computing time for performance of assessment work" does not indicate that an application to the Commissioner must be made. Mr. Paci submitted that it becomes effective any time there are pending proceedings and the only time in which the Commissioner needs to make a finding is where there is a delay which is the fault of the recorded holder, whereupon the calculations according to subsection (2) are performed.

Mr. Paci submitted that the subsections do not provide that new anniversary dates will be set. Rather, subsection (2) provides for when the next anniversary date will be.

Mr. Paci contrasted the provisions of section 67 with subsection 73(1), the opening words of which are, "On application therefore being made to the recorder ...". Based upon the contrast in wording, Mr. Paci argued that there is no option to discretion in the Commissioner to determine whether time should be excluded. He submitted that this issue should have been looked at the time of the Mori appeal. He invited the Commissioner to conclude that Albertower Mines was not required to apply for an exclusion of time, based upon the wording of section 67, to which he suggested that Ms. Lessard agreed. The section speaks for itself, and the only question which need be raised is whether there were indeed proceedings which were pending. That issue is not in dispute.

The Policy does not even refer to section 67, but only discusses options available where there are pending proceedings. The only time when the Commissioner gets involved is when it takes longer, where delay may have been caused. Mr. Paci submitted that that is not the issue here. In conclusion, he invited the Commissioner to determine that subsection 67 does not require an application, but only requires that the mining claims be caught up in pending proceedings. Nothing requires an application once the matter is finished. The fixing of the date referred to in subsection (2) does not set a new anniversary date, but only the next date by which work is due.

Mr. Norwood submitted that the Policy was not intended to address the law, practice or procedure under section 67. Nevertheless, it is significant for the excerpts referred to, as it addresses the practice and procedure within the jurisdiction of the Mining Recorders and the Commissioner. The significance in a Policy on pending proceedings is that it will have an affect on sections 67 and 73, namely exclusions and extensions of time.

Section 67 requires that the issue of whether there has been a delay which may or may not be the fault of the recorded holder be addressed before the Commissioner may take jurisdiction to make an exclusion Order. Mr. Paci did not raise the issue of delay to be dealt with by the Commissioner. Mr. Norwood stated that in his opinion, the approach advocated by Mr. Paci is not the law in his opinion. It is not the accepted practice of the tribunal nor the approach accepted by the client group.

Mr. Norwood pointed out that the tribunal did not have the benefit of Mr. Paci's evidence, although he did reveal his state of awareness in his opening remarks concerning the difference between an exclusion and extension of time. In fact, there is no indication that Mr. Paci had been led down the garden path. Rather, he never checked the abstracts to confirm the anniversary date. Had he done so, he would have seen that the anniversary had remained as May 5th. Had he further pursued this subject, he would have become aware of the practice and procedure and made his application to the Commissioner for an exclusion.

Mr. Norwood also pointed out that even novices such as Messrs Coutts and Eels were familiar with the difference between and extension and an exclusion of time. As set out in the Policy, the extension provides for no change in anniversary dates.

Concerning the interpretation of section 67 advocated by Mr. Paci, Mr. Norwood submitted that he disagrees with the position of Mr. Paci. The section, in his submission, is unclear, and not unequivocal. While the wording partially implies an automatic exclusion through use of the words "shall be excluded" the Commissioner must supervise all such matters through the obligation to determine the delay issue prior to granting of the Order. Also, the use of the words, "may make an order fixing the date" implies discretion.

The Policy outlines the practice of the Commissioner, as that office must necessarily be involved in exclusion orders, which were exclusively within its mandate at the relevant time. This is not a delay by exception, where someone else must initiate the application, nor is it automatic, by operation of law. Mr. Norwood submitted that it is not the practice of the Commissioner, nor should it be the interpretation given in this case.

Mr. Norwood stated that it is clear from the Act and from the Policy that application for an exclusion must be made in matters involving pending proceedings, and that this is an option of the mining claim holder to do before the mining claim is forfeited. This is in keeping with the proper administration of the Act, as when a mining claim is forfeited, it will affect the interests and rights of third parties. In this case, Messrs. Coutts and Eels restaked, investing time and energy. The confusing aspect of this is its implications on the rights of and potential prejudice to third parties.

In conclusion, Mr. Norwood stated that, in matters after January 30, 1996, the power of exclusion of time has been given to Mining Recorders as well as the Commissioner. Mr. Norwood suggested that the changes to the legislation effectively tidied up the issue. The Policy was simply an attempt to deal with the administration of the section in a pre-1996 context.

Mr. Eels stated that he and Mr. Coutts were in agreement with Mr. Norwood's submissions. He stated that the mining claim was a difficult staking to undertake, being inaccessible, steep and dangerous. In an effort to ensure accuracy, they had to undertake a

survey. In all, a lot of effort was expended. If it is the result that the Alberttower Mines application is allowed and the Coutts and Eels mining claim is cancelled, Mr. Eels spoke to the issue of compensation. They attended at the office of the Mining Recorder on five occasions, experienced one hour's travel time to the site, required time to locate the mining claim. In being unable to locate the corders, they engaged the GPS to assist in finding the corners. Mr. Eels stated that every effort was made to ensure that things were done right, including the taking of a staking course. A great deal of time was spent in establishing the claim posts, and the #1 and #2 posts of the Meyer staking on behalf of Alberttower were never located.

Mr. Paci responded by stating that, if Mr. Norwood's position is accepted, what meaning could be given to the deeming of the anniversary date in subsection 67(2). Second, if the law and particularly the wording has been amended to allow discretion to both the Commissioner and Mining Recorders, he suggested that such discretion was absent prior to the amendment. Third, if the appeal is allowed and compensation is found to be owing, he submitted that the error was that of MNDM, as she was aware of the issue and should have amended the anniversary date.

Findings

The wording of clause 67(1)(b) is oblique in that, the circumstances which give rise to eligibility for an exclusion of time involve three separate forums, those of the Mining Recorders, the Commissioner and the Courts. This type of wording is designed to qualify a specific fact situation to include those instances which are not before the Commissioner.

The second condition which must be met is that the Commissioner must be satisfied that any delay in resolving the matter is not the fault of the recorded holder. This is a test and requires a finding on the part of the Commissioner. Just how this matter should be brought to the attention of the Commissioner is considered.

Subsections 64(2) through (4) provide for the issuance, filing and continuation of a certificate of pending proceedings. This can be obtained through an application to a Mining Recorder or the Commissioner. Vacation of a certificate requires an Order of the Commissioner obtained through an application [subsection 64(4)], before such a certificate can be removed from the abstracts. In a situation involving an application to vacate a certificate of pending proceedings, the Commissioner is made aware of its existence, and may raise the issue of exclusion of time pursuant to clause 67(1)(b) if the applicant does not do so.

In addition to certificates of pending proceedings, Mining Recorders on their own initiative, or through a request of the Commissioner, may make a notation on the abstract of a mining claim, indicating that it is the subject of pending proceedings. These are normally removed when an Order disposing of the matter is issued. There is no requirement for an application to remove this notation, but has evolved as practice of the Mining Recorders.

Generally, Orders of the Commissioner will require that the notation be removed from the abstracts upon final disposition. Pending proceedings for such cases have authority found in clauses 30(f) and 67(1)(b), being distinct from the issuance of a certificate of pending proceedings.

Consideration of whether the second test in clause 67(1)(b) is met is a requirement before exclusion of time can occur. It contemplates that a finding regarding delay must occur before the exclusion is allowed. The tribunal finds that, based upon the words "where the Commissioner is satisfied that any delay in settling the matter is not the fault of the holder" found in clause (b), that the potential for an exclusion is not automatic, but depends on the test being met. Therefore, the tribunal finds that it was not possible for the Mining Recorder to automatically change the anniversary date, as submitted by Mr. Paci. The Act does not require that the Mining Recorder second guess what is in the mind of the Commissioner, or make assumptions from which certain rights would flow.

The tribunal finds that clause 67(1)(b) requires that a finding be made by the Commissioner before the exclusion of time can occur. The use of the word "shall" immediately following clause (b) denotes that once there is a favourable determination of the delay issue, the exclusion will occur as a matter of law. The discretion to "make an order fixing the date or dates by which the next or any prescribed units of work shall be performed " is limited by subsection 67(2), which has rendered the calculation of a new anniversary date to a matter of formula. Essentially, the formula was that the anniversary date would be moved to the future by the exact number of days during which proceedings were pending.

The tribunal finds that for an exclusion of time to occur, there must be a finding concerning the issue of delay. No such finding was made in the matter at the time the Mori appeal was before the tribunal, and as a result, the circumstances at that time did not give rise to an exclusion of time within the meaning of subsection 67(1).

It is troubling that the wording does not specify who is responsible for bringing the matter before the Commissioner. Indeed, it must go without saying that the issue of an exclusion of time, where a matter is before the courts or a mining recorder, must be brought to the attention of the Commissioner by way of application. Submissions must be made by the applicant concerning the issue of delay, as the Commissioner will have no knowledge upon which to make such a finding otherwise.

Concerning the issue of proceedings which are before the Commissioner, the approach taken by the tribunal has evolved since the Mori appeal. In that case, the interest of the third party restaker was not listed in the title of proceedings nor was Paul Meyer or Albertower Mines listed as a party. Over the passage of time, it became clear to this Commissioner that in such cases where mining claims were cancelled and restaked by another party, these third party interests would have to be dealt with in the tribunal findings.

Similarly, once a final determination on the issues has been made, in cases similar to this one, and indeed in all cases involving unpatented mining claims, it became clear that the issue of removal of the notation of pending proceedings and findings concerning whether the successful party would be eligible for an exclusion of time, were an integral part of the hearings process. In this regard, this Commissioner has made findings concerning the question of delay based upon the facts presented at the hearing, and ordered exclusions of time where warranted as a matter of course.

Mr. Paci has not, in his submissions, suggested that he is asking the Commissioner to reconsider her earlier decision to dismiss the Mori matter and more particularly, to address the absence of a finding concerning the delay issue in connection with an exclusion of time. However, having found that the Mining Recorder could not have performed this calculation, the question arises as to whether there is anything that can be done at this late date.

The tribunal finds that the time for bringing this issue to her attention has passed. Ideally, having failed to be raised by the Commissioner, it should have been raised at the time the Mori matter was disposed of. There was still jurisdiction in the tribunal to address the issue up to the date upon which the Mining Claim would have expired. The extension of time order of the Mining Recorder muddies the issue, in that it is unclear whether this jurisdiction would have extended past May 5, 1994.

However, once the date upon which work on the Mining Claim has passed and the Mining Claim is forfeited, there is no longer jurisdiction in the Commissioner to exclude time, as the power to relieve from forfeiture no longer exists. Except as provided by section 117 of the Act, (which deals with hearing and disposing of a matter not involving the final determination, having been made without notice, which is reviewable) the tribunal does not have the power to review its earlier orders or make findings which it might have or arguably should have made a first instance. This power is reserved to the Divisional Court.

The issue of the Policy of MNDM is found to be irrelevant. Its issuance date is after the date when Mr. Paci applied for his extension of time. As such, it would not have been available for his consideration.

Concerning the issue of whether an exclusion of time could be confused with an extension of time, notwithstanding Messrs. Coutts and Eels position that the distinction is readily apparent, this has not been the experience of the tribunal. Indeed, in applications pursuant to section 74 vesting orders, which may be applied for upon the death of the recorded holder, the power of the Commissioner is limited to extensions of time. It became clear to this Commissioner that the mining community does not deal with this issue of distinctions between exclusions and extensions with great regularity and familiarity. Great attention has been paid to explaining the nature of an extension of time in its reasons, going so far as to spell out in clear terms that the anniversary date will remain its original day and month for the next unit of work following the extension and specifying the day, month and year for that next unit.

Finally, Mr. Paci and Albertower Mines must bear some responsibility for having failed to be vigilant following the granting of the extension of time by the Mining Recorder. A prudent mining claim holder would do well to obtain copies of abstracts and client reports from MNDM as a matter of course. Mistakes can be made on both sides and this can be compounded by assumptions on behalf of the client group which, as illustrated by this case, are erroneous.

The onus of "watching" ones abstracts can be taken one step further. The Albertower Cancelled Mining Claim was forfeited on May 7, 1996, but the Notice of Appeal was not filed with the Mining Recorder until October 7, 1996. This clearly contravenes the 15 day plus additional 15 day requirement for the filing of appeals set out in subsection 112(3). Mr. Norwood did not object to the hearing of this appeal, and so the matter has gone forward to be heard. However, had the tribunal found in favour of Albertower Mines, the issue of whether the tribunal had jurisdiction to hear an appeal filed outside of the time frames would have to be dealt with. Should the time limits become an issue in future appeals, this case in no way should not be regarded as a precedent for the extension of time for filing an appeal beyond the 30 day maximum allowable under the Act.

Exclusion of Time

The tribunal finds that Messrs. Coutts and Eels are not responsible for any delay in the determination of this appeal, but rather are innocent third party stakers without notice of a potential appeal at the time the Albertower Mining Claim was cancelled. Based upon this finding, the time during which the Restaked Mining Claim held by Messrs. Coutts and Eels has been pending before the tribunal is excluded.

Pursuant to subsection 67(2) of the Act, as amended by S.O. 1996, c.1, Sched. O, s. 18, the time during which the Mining Claim was pending before the tribunal, being a total of 309 days, will be excluded in computing time within which work upon the Mining Claim is to be performed.

Pursuant to subsection 67(3) of the Act, as amended, May 30, 1999, is deemed to be the date for the performance and filing of the first two units of assessment work on the Mining Claim. Pursuant to subsection 67(4) of the Act, as amended, all subsequent anniversary dates are deemed to be May 30.

Conclusions

There is no automatic exclusion of time deemed through the operation of clause 67(1)(b) of the Act. A finding of the Commissioner on the issue of delay is required before an exclusion may occur. No error was made by the Mining Recorder in failing to calculate an exclusion of time.

The issue of whether an error was made by the Commissioner at the time of the Mori dismissal is not one which is within the jurisdiction of the tribunal to make, but is reserved to the Divisional Court.

In cases involving either the Mining Recorders or the Courts, it is understood that there is a need to make an application to the Commissioner.

The only way this determination can be made is to have the question brought to the attention of the Commissioner, or the Commissioner, in exercising his or her jurisdiction in a proceeding, must look at the question as one of the matters which requires determination.