File No. MA 025-94

L. Kamerman) Thursday, the 20th day
Mining and Lands Commissioner) of July, 1995.

THE MINING ACT

IN THE MATTER OF

Mining Claim SSM-1099482, situate in the Township of Ryan, in the Sault Ste. Marie Mining Division, marked as "cancelled" and hereinafter referred to as the "Ryan Mining Claim";

AND IN THE MATTER OF

An appeal under subsection 112(3) of the **Mining Act** from the decision of the Acting Mining Recorder for the Sault Ste. Marie Mining Division for a declaration that the Ryan Mining Claim be declared valid and be recorded with the proper tag as Mining Claim SSM-1099483.

B E T W E E N:

FRANK DORAN

Appellant

- and -

MINISTER OF NORTHERN DEVELOPMENT AND MINES

Respondent

ORDER

1. THIS TRIBUNAL ORDERS that the application to record for the Ryan Mining Claim be amended **nunc pro tunc** to the 12th day of August, 1994 to reflect tag number SSM-1099483.

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2. THIS TRIBUNAL FURTHER ORDERS that the time during which the Ryan Mining Claim was pending before the Mining Recorder and the Commissioner, being the 20th day of June, 1994 to the 20th day of July, 1995, a total of 396 days, be excluded in computing time within which work upon the Ryan Mining Claim is to be performed.

3. THIS TRIBUNAL FURTHER ORDERS that the 7th day of August, 1996, be fixed as the date by which the first and second units of prescribed assessment work shall be performed and filed on the Ryan Mining Claim and all subsequent anniversary dates shall be deemed to be August 7 pursuant to subsection 67(2).

4. THIS TRIBUNAL FURTHER ORDER that no costs shall be payable by either party to this appeal.

IT IS FURTHER DIRECTED that upon payment of the required fees, this Order be filed in the Office of the Mining Recorder of the Sault Ste. Marie Mining Division.

DATED this 20th day of July, 1995.

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

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REASONS

This matter was conducted by telephone conference call on March 28, 1995, with Frank Doran, the appellant, appearing on his own behalf and John Norwood appearing as Counsel for the Minister of Northern Development and Mines ("MNDM").

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Summary:

On June 8, 1993, Mr. Doran staked a mining claim in the Township of Ryan ("the Ryan Mining Claim"), using tags numbered 1099483. In the application to record, the Ryan Mining Claim was erroneously listed as 1099482 and recorded as such.

On June 14, 1994, Mr. Doran staked a mining claim in the Township of Palmer ("the Palmer Mining Claim"), using tags numbered 1099482. Mr. Doran attempted to record the Palmer Mining Claim as SSM-1099482, but on June 20, 1994, the Mining Recorder for the Sault Ste. Marie Mining Division ("the Mining Recorder") discovered the error that Mining Claim SSM-1099482 was an existing claim of record. Mr. Doran inspected the Ryan Mining Claim and confirmed that the tags bore number 1099483. Therefore, the application to record for the Ryan Mining Claim bore an incorrect tag number, characterized by him as a numerical or typographical error.

On August 5, 1994, an inspection was carried out by Mining Inspector Paul Morra who filed an inspection report (Ex. 7). The Ryan Mining Claim was cancelled by the Mining Recorder, on October 5, 1994, on the basis that the application to record bearing the correct information was not made within 31 days of staking, pursuant to subsection 44(1) of the **Mining Act** ("the **Act**"). This resulted in non-compliance by Doran with the requirements of the **Act** under subsection 71(1).

Issues:

The issue is whether the Ryan Mining Claim may be considered valid or whether its cancellation was proper. The following matters must be considered:

1. Do the substantial compliance provisions under subsection 43(2) apply to errors in the application to record?

2. Does the Mining Recorder have the authority under the **Act** to correct a numerical or typographical error on the application to record or does it constitute a fundamental error which goes to the root of title, being beyond MNDM's power to correct? The tribunal's guidance concerning MNDM practice, described as conservative in matters of title, was sought.

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3. An error in the application to record may constitute a failure on the part of the licensee to comply within the terms of the **Act**, as set out by subsection 71(1), and more particularly, may constitute a failure to record the mining claim within the 31 days contemplated by subsection 44(1). Does the phrase "deemed abandonment" for failure to comply with the provisions of the **Act** under subsection 71(1) mean conclusively adjudged to be so or is it a rebuttable presumption?

4. Where a mining claim has been staked for over a year, even though it is conclusively deemed to have been staked in accordance with the requirements of the legislation pursuant to subsection 71(2), the Minister may challenge its validity at any time pursuant to subsection 76(5). What is the scope of this power and how must it be acted upon?

Facts:

The facts surrounding the stakings of the Ryan and Palmer Mining Claims are not disputed. The bulk of contention surrounds the actions of MNDM. Similarly, much of the evidence presented by MNDM witnesses deals with mining lands administration and with respective opinions on how the **Act** should be interpreted in this case. The witnesses' evidence is summarized below.

Frank Doran gave evidence on his own behalf. The bulk of Mr. Doran's evidence raised issues of irregularity in the manner in which MNDM proceeded with this matter.

Although Mr. Norwood had mentioned that the application setting out the correct number on the application was not filed within the 31 days prescribed by subsection 44(1), Mr. Doran pointed out that there was no mention in the documentation from MNDM that this is the reason for the cancellation.

Mr. Doran pointed out that the request for the inspection was made by the Acting Mining Recorder. However, the wording of subsection 76(5) suggests that this decision is the jurisdiction of the Minister. Mr. Doran stated that there was no order of the Minister to this effect, a fact which is admitted by the Acting Mining Recorder.

Mr. Doran stated that he staked the Ryan Mining Claim in good faith, and his only crime is in having copied down the last digit of the claim incorrectly in his

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application to record. A mining claim can be cancelled only in circumstances where there is a violation of the **Act** or regulations. The Mining Recorder has failed to indicate where such a violation has occurred.

Mr. Doran suggested that, while the Mining Recorder does have the power to cancel a mining claim pursuant to subsection 76(5), the proper procedure was not used in this case, as the order was not sent by registered mail. Furthermore, he suggested that the procedure for the posting of an order by the Mining Recorder withdrawing the lands from staking as set out in subsection 35(3) was incorrect. Mr. Doran stated that the initials shown on the posting are VB, those of Vivian Beck, who is not now nor has ever been a Mining Recorder.

Under cross-examination, Mr. Doran was referred to the Order of the Mining Recorder dated October 20, 1994 (Ex. 8) which sets out that Mining Claim SSM-1099482 recorded in the Township of Ryan does not exist in the field, ordering that it be cancelled and ordering that the "filed only" Mining Claim bearing the same number staked in the Township of Palmer be recorded effective October 20, 1994. Mr. Doran agreed that Mining Claim SSM-1099482 in the Township of Ryan does not exist in the field, but reiterated that it does exist at that location as SSM-1099483. Mr. Norwood pointed out that subsection 44(1) requires that it be recorded within 31 days. Mr. Doran again stated that the failure to comply was due to his not realizing that an error had been made in the number. Upon being asked by Mr. Norwood, Mr. Doran agreed that the error had occurred on the application to record and the sketch as well as on the Notice to do Assessment Work.

Notwithstanding the numerical error, Mr. Norwood questioned whether the application to record is not a basic title document, to which Mr. Doran replied that he felt that MNDM had also failed to comply with legislative provisions, such as ordering the inspection. Mr. Norwood suggested that the Minister's authority to direct an inspection under subsection 76(5) had been delegated to the Chief Mining Recorder and Senior Manager of the Mining Lands Branch. Further discussion occurred concerning whether the subsection requires an order or direction and whether it had been validly carried out. Mr. Norwood pointed to subsection 4(5) of the **Act** which empowers the Minister to delegate any of his or her powers to any officer or employee of the Ministry.

Mr. Norwood also suggested that Mr. Doran was not prejudiced by the failure to receive notice of the inspection by registered mail.

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Under re-direct, Mr. Doran stated that he cannot understand why MNDM does not have to abide by the procedures set out in the **Act**.

Christina Ann Kurylo, Acting Mining Recorder for the Sault Ste. Marie Mining Division, gave evidence on behalf of MNDM. She stated that she first discovered the conflict regarding two mining claims bearing the same number on June 20, 1994, when a clerk entering the second mining claim, Vivian Beck, brought it to her attention. As a result, Ms. Kurylo brought it to Mr. Doran's attention at 8:30 a.m. on the following morning.

Mr. Doran went to inspect the claims with Dan MacDougall immediately, and brought his findings in a letter to her on June 22, 1994 (Ex. 5). It states in part:

> . . . I received a call from Vivian Becks (**sic**) on June 21-94 that 1099482 had already been recorded on June 8-93. I went up to Palmer Twp that afternoon with Dan MacDougall and we checked the tags on #3 post and #2 post of 1099482. Also #3 post and #4 post of 1099481. These matched with the claim numbers on the application to record these claims. We then went up to Ryan Twp. and checked the #2 post of the claim that I recorded on June the 8-93 as 1099482. I should have recorded it as 1099483.

The matter was discussed with Sheila Lessard, Mark Hall and Ron Gashinski. On June 27, 1994, Ms. Kurylo prepared a request for inspection to Mark Hall, having been directed to do so, in order that a decision could be made.

The inspections were done by Paul Morra, Mining Inspector for MNDM, and Ms. Kurylo had assumed that both were done on the same date when in fact the Palmer Mining Claim was inspected on August 5, 1994, confirming that it was 1099482 and the Ryan Mining Claim was inspected on August 11, 1994, confirming that it was 1099483. Based on the Inspection Report (Ex. 7), Ms. Kurylo issued her decision cancelling the Ryan Mining Claim on the basis that it did not exist in the field. The decision to do so was based upon the fact that the claim as recorded did not exist, nor had there been compliance with subsection 44(1) requiring recording within 31 days of staking.

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Concerning the alleged errors made by MNDM, Ms. Kurylo agreed that no prejudice resulted from the failure to mail the notice to Mr. Doran by registered mail, as she knew his address was current. Ms. Kurylo did take exception to the allegation that the posting of the order withdrawing the lands from staking was not done. In fact, the order was received July 7, 1994 and posted the same day. This is not always done by the Mining Recorder, but has been done by a senior person who makes the entries. However, Ms. Kurylo was certain that it was properly shown on the map. She was uncertain whether this constituted a proper delegation of authority.

Under cross-examination, Ms. Kurylo stated that the meaning of posting an order withdrawing of lands forthwith pursuant to subsection 35(3) means immediately. Mr. Doran asked about the applicability of subsection 75(1), which allows the Commissioner or the Mining Recorder to order an inspection up to one year after recording. Ms. Kurylo stated that subsection 76(5) allowed the Minister or a delegate to direct an inspection to challenge the validity of a mining claim even if it is more than one year old. Ms. Kurylo stated that there is no requirement that the Minister's delegate make the direction in writing, and the practice has been for Mark Hall or Ron Gashinski to contact the inspectors directly. The order to withdraw lands from staking, however, is written because it is an order.

Mark Dixson Hall, Chief Mining Recorder, gave evidence on behalf of MNDM, and was accepted by the tribunal as an expert in mining lands administration. He stated that the matter of the misdescription of the Ryan Mining Claim came to his attention through either Sheila Lessard or Chris Kurylo, with whom he discussed ramifications. It was his recommendation, as was that of Ron Gashinski, Senior Manager, Mining Lands Branch, that the Ryan Mining Claim be cancelled. Mr. Hall stated that his concern was that, after one month in the field without having been properly recorded, the Ryan Mining Claim did not exist.

Mr. Hall agreed that there had been no intention through the misdescription of the Ryan Mining Claim to mislead, and that a numerical error had been made on the application to record and sketch. Regarding the provisions of subsection 43(2) and substantial compliance with staking requirements, there is a concern that the curative provisions do not cover issues of recording but are confined to staking. In Barton, B.J. **Canadian Law of Mining** (1993; Canadian Institute of Resources Law, Calgary) it is clear that the cases in British Columbia differ from those of Ontario, as the substantial compliance curative provisions of the former will apply to recording as well as staking.

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Further to evidence of Ms. Kurylo, Mr. Hall stated that the Minister does have the authority to challenge the validity of staking more than one year after recording. The delegation of this authority to himself was recent, and previously had been limited to the senior manager.

Concerning MNDM practice with respect to rectification of errors, Mr. Hall stated that if the error is caught at the time of presentation, they ask the staker to rectify it. If the application is received by mail or facsimile, the staker is asked to rectify it and an explanation is given as to why. If an error occurs on an assessment work report, the document is sent to the recorded holder by facsimile with a request for corrections, and a copy returned by facsimile will be accepted. It is MNDM practice to refuse transfer documents where the numbers are clearly wrong or where corrections have been made using white out.

Mr. Hall stated that if a mining claim number was allowed to be changed unilaterally, it could affect agreements of which MNDM has no knowledge, thereby affecting the position and legal rights of others.

Under cross-examination, Mr. Hall indicated that applications to record would be returned to the applicant for rectification, if the nature of the error were minor. He was unsure whether an incorrect address would invalidate a mining claim. He agreed that there are examples where errors are not sent back.

Mr. Hall stated that the computer system tracking mining claims employed by MNDM is not set up to change a mining claim number and the only means by which this could be done is to cancel the claim and bring up a new number from scratch.

Findings of Fact and Reasons for Decision:

Opinion Evidence of Witnesses

It is a general rule that expert witnesses having applicable training, extensive on-the-job experience or even having a hobby in the relevant area, may be recognized as an expert by the courts and by the tribunals. The purpose of the expert witness is to give opinion evidence in their area of expertise based on examples with underlying factual assumptions on proven facts or hypothetical situations.

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The Supreme Court of Canada in **R. v. Abbey**, [1982] 2 S.C.R. 24 at page 42 stated that:

> . . . (in) the law of evidence 'opinion' means any inference from observed fact, and the law on the subject derives from the general rule that witnesses must speak only to that which was directly observed by them . . . It is not always possible [to separate fact from inference] . . . and the "law makes allowances for these borderline cases by permitting witnesses to state their opinion with regard to matters not calling for special knowledge whenever it would be virtually impossible for them to separate their inferences from the facts on which those inferences are based."

In determining the scope of assistance to a tribunal which the role of expert evidence is designed to accomplish, it is pointed out that, unlike the courts, tribunals and the Mining and Lands Commissioner are assumed to possess a high degree of expertise in the subject matter under consideration. Therefore, it must be reiterated that the expert witness can assist but should not usurp the decision-making function.

With respect to offering opinion evidence on the interpretation of the **Act** from MNDM staff, some direction may be taken from consideration of the common law doctrine of "ultimate issue" which traditionally held that an expert could never give evidence on the issue to be decided by the decision-makers. The position in Ontario is somewhat eroded through the decision of **R. v. Gratt**, 5 [1961] O.W.N. 94 (CA), 34 C.R. 320 aff'd [1961] S.C.R. 535 where Howland, C.J.O., stated:

> "In Canada the ultimate issue doctrine may now be regarded as having been virtually abandoned or rejected. Where evidence has been rejected on the basis of the doctrine, such rejection can be explained on other grounds. In some instances the opinion evidence should be rejected because the trier of fact . . . is just as well qualified as the witness to draw the necessary inference.

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> Accordingly, the non-expert testimony is superfluous, as it is of no appreciable assistance to the judge or jury. Alternatively, the admission of evidence on the ultimate issue can be justified on the basis that the witness is an expert and the judge or jury required his assistance. In the final analysis, even with the benefit of the expert's evidence the jury still has to make the final determination of the issue, so that the expert is not really usurping the jury's function."

Based upon the foregoing, while the tribunal has permitted MNDM witnesses to offer opinions on the interpretation of the **Act**, such opinions should properly be left to argument by counsel. This is distinct from expert evidence on the practices and administration of MNDM, which the tribunal finds invaluable and will continue to welcome and consider.

Substantial Compliance

Mr. Doran stated that he had staked the Ryan Mining Claim in good faith and had substantially complied with the requirements of the **Act**. Mr. Norwood submitted that an error in an application to record cannot be remedied through the application of subsection 43(2), which deals only with the substantial compliance of staking requirements. It does not encompass errors in recording and cannot be used to rectify such errors.

It must be stated at the outset that the requirements for a valid mining claim involve both staking and recording. The tribunal agrees with submissions made by Mr. Norwood that the substantial compliance provisions set out in subsection 43(2) relate exclusively to the staking, as evidenced by the opening words of subsection, "(2) The staking out of a mining claim shall be deemed to be in substantial compliance . . .".

The tribunal finds that the substantial compliance test cannot be used to determine whether the application to record is in accordance with the requirements of the **Act**.

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The Scope of a Mining Recorder's Authority to Correct Errors

Mr. Doran stated that he had staked the Ryan Mining Claim in good faith, having substantially complied with the requirements of the **Act**. His only crime is the numerical error found on three documents, the application to record, accompanying sketch and Notice of Intention to Perform Assessment Work. As the staking was done in good faith, and as Mining Claim SSM-1099482 is now out of the system in respect to the Township of Ryan, it can be properly recorded as 1099483 in the computer.

According to Mr. Norwood, the crux of the appeal comes down to whether this type of error can be described as numerical or typographical. The failure to properly describe the Ryan Mining Claim in Mr. Norwood's submission is a fundamentation to the root of title or the application to record. MNDM is prudent with respect to such title documents, having adopted the practice that rectification of documents should not be allowed on a fundamental document such as the application to record.

Mr. Norwood asked that, in the event the tribunal disagrees, he requested that mining recorders be told how they could allow rectification of such errors. Notwithstanding that MNDM feels that mining recorders cannot and should not interpose their own opinions on matters of title, any direction in similar matters would be appreciated.

Subsection 71(1) refers to the consequences of non-compliance with the requirements of "time or manner of the staking out and recording of a mining claim". The phrase which immediately follows, namely, "or with a direction of the recorder in regard thereto" poses an interesting interpretation question. Grammatically speaking, the word "thereto" refers to the direction of the recorder in connection with the requirements regarding both staking and recording.

Subsection 110(6) empowers a mining recorder to make an order directing one of a number of measures which can be described as curative in respect of the requirements of staking. In this regard, many stakings which have been deemed to substantially comply with the requirements of the **Act** and regulations, as contemplated by subsection 43(2), can nonetheless be changed, if the mining recorder determines that it is necessary. There is further power in subsection 110(8) to extend time for compliance with the order or to cancel the mining claim.

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There are no provisions in the **Act** which expressly provide for such curative provisions in respect of the recording of a mining claim. Yet, it is the evidence of the Chief Mining Recorder, that it is the practice of all mining recorders to catch whatever errors may be apparent from the applications to record and sketches and request that changes be made.

The wording of subsection 71(1) emphatically refers to directions of the mining recorder in connection with both staking **and recording** [emphasis added]. What meaning is to be given to this phrase in relation to recording? Related powers of mining recorders include: the power to determine at first instance whether the provisions of the **Act** and regulations have been complied with [subsection 110(2)]; the power to enter in the proper book the particulars of every mining claim considered to be in accordance with the **Act** [subsection 46(1)]; make the determination that an application to record is not in accordance with the **Act** or is for lands a substantial portion of which are included in another claim which has priority [subsection 46(2)].

Clause 28(b) of the **Interpretation Act**, R.S.O. 1990, c. I. 11, provides that:

> **28.** In every Act, unless the contrary intention appears,
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> (b) where the power is given to a person, officer or functionary to do or to enforce the doing of an act or thing, all such powers shall be understood to be also given as are necessary to enable the person, officer or functionary to do or enforce the doing of the act or thing;

A similar provision is contained in the federal **Interpretation Act**, R.S.C. 1985, c. I. 23, subsection 31(2). The meaning of these provisions has been largely interpreted in the context of criminal proceedings involving police powers in relation to wiretaps, search and seizure, rights of entry (see **R. v. Lyons** [1984] 2 S.C.R. 633; **R. v. Colet** [1981] 1 S.C.R. 2; **R. v. Landry** (1981), 34 O.R. (2d) 697, 24 C.R. (3d) 300, 63 C.C.C. (2d) 289, 128 D.L.R. (3d) 726 (C.A.); **R. v. Dedman** (1981), 32 O.R. (2d) 641, 10 M.V.R. 59, 23 C.R. (3d) 228, 59 C.C.C. (2d) 97, 122 D.L.R. (3d) 655 (C.A.)). In these cases and others, implied powers consistently been narrowly construed.

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In **Milk Board v. Birchwood Dairy Farm Ltd. et al.** [1968] 3 W.W.R. 481, the British Columbia Court of Appeal considered the meaning of the subsection 26(2) of the federal **Interpretation Act**, R.S.C. 1970 c. I-23. The relevant issue to this appeal was whether the Canadian Dairy Commission could receive funds from the Provincial Milk Board as agent for the federal Crown, in the absence of express powers permitting it to do so. At page 500, the Court of Appeal quoted at length from the decision of Hogg J.A. in **Nelson v. Stoneham**, [1957] O.W.N. 109, 7 D.L.R. (2d) 39 at 42:

> "As to the submission of counsel for the appellant that the agreement to pay a commission to the respondent was *ultra vires* of the appellant municipality for the reason that the statute did not authorize the payment of such commission, it is true that a municipal corporation is wholly a creature of the Legislature and derives all of its power from statute, either by express grant or by necessary implication; also, that the right of a municipality to exercise a particular power is not implied unless it is clear that the powers conferred by the Legislature cannot otherwise be reasonably and effectively exercised: *Imperial Varnish & Colour Co.* v. *Toronto* [1927] 2 D.L.R. 860 at p. 863. 60 O.L.R. 240 at p. 243. We have concluded that in the present case the power to pay a commission to an agent to whom such commission has been promised is incidental to the power given to sell land.
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> "It is stated in 8 Hals., 2nd ed., p. 72, that where a corporation is created by statute, its powers are limited by the statute creating it and extend no further than is expressly stated therein or is necessarily and properly required for carrying into effect the purposes of its incorporation or may be fairly regarded as incidental to or consequential upon those things which the Legislature has authorized. In Craies work on Statute Law, 5th ed., p. 105, the following passage is to be found: '*If a statute is passed for the purpose of enabling something to be done, but omits to mention in terms some detail which is of great importance (if not actually essential) to the proper and effectual performance of the work which the statute has in contemplation, the Courts are at liberty to infer that the statute by implication empowers that detail to be carried out*.'"

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The tribunal finds that the powers exercised by the mining recorders in relation to their determinations of whether applications to record comply with the requirements of the **Act** and regulations include the ability to make directions requesting that either errors be corrected and all requirements are met.

Does the "Deemed Abandonment" in Subsection 71(1) Mean Conclusively Adjudged or is it a Rebuttable Presumption?

Mr. Doran disputed that the Ryan Mining Claim should be "deemed abandoned" pursuant to subsection 71(1).

Mr. Norwood submitted that the Ryan Mining Claim as staked was never recorded, as the application to record indicates 1099482 instead of 1099483. This means that Mr. Doran failed to record the Ryan Mining Claim within 31 days of staking, as required by subsection 44(1). The error on the application to record also means that Mr. Doran failed to comply with the requirements of the **Act** and regulations as far as recording is concerned. The amounts to a "deemed abandonment" as set out in subsection 71(1) . This, in Mr. Norwood's submission, amounts to a fundamental error which goes to the root of title of the mining claim.

Subsection 71(1) uses the words, ". . . shall be deemed to be an abandonment . . ." in connection with the failure to comply with either staking or recording requirements. Subsection 71(2) uses the words, ". . . conclusively deemed to have been staked out and recorded in compliance . . .".

The use of the word, "deemed" in legislation may mean either conclusively presumed adjudged or determined or it may mean that it is taken to be conclusive until it is disproved, in other words, a rebuttable presumption. In E.A. Driedger, **Construction of Statutes**, 2nd ed. (Toronto: Butterworths, 1983), Chapter 1 entitled "The Ordinary Meaning" devotes an entire heading to the meaning of "deemed" at pages 22 through 28. This discussion and the cases referred to will be quoted at length below.

Driedger deals with a deeming provision which is impersonal at page 23:

> Frequently, however, the word is used impersonally. The statute says that something is *deemed* or *shall be deemed* to be something. In this use the word means something other

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> than just to think or be of opinion; it raises a statutory presumption, but the question then arises whether the presumption is conclusive or rebuttable.

The first rule to interpret the meaning of the word "deemed" is to consider it within the context of the legislation. Driedger at page 23:

> Since, in construing a deeming clause, we begin with an ambiguity, the procedure outlined in a subsequent chapter applies.[95] The first step if to consider the clause in the context of the whole Act. Thus, in *St. Leon Village Consolidated School District v. Ronceray*[96] Schultz J.A. said that
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> > in deciding whether or not the use of the words "deem" or "deemed" establishes a conclusive or a rebuttable presumption depends largely upon the context in which they are used, always bearing in mind the purpose to be served by the statute and the necessity of ensuring that such purpose is served.

Commencing at page 24, Driedger discusses a number of diverse principles of interpretation along with quoting extensively from the cases involved. These are reproduced at length:

> In *Credit Foncier Franco-Canadian v. Bennett*[97] the statute provided that the registered owner of a charge against land should "be deemed" to be entitled to the estate or interest in respect of which he was registered. Another section of the statute provided that
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> > Every certificate of indefeasible title . . . shall be conclusive evidence at law and in equity . . . that the person named in the certificate is seised of an estate in fee-simple . . . .

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95 *Infra*, chapter 6.

96 (1960), 31 W.W.R. 385, at p. 391.

97 (1963). 43 W.W.R. 545.

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The deeming clause was held to be rebuttable. Sheppard J.A. compared the two provisions and said:[98]

> In sec. 38(1) the words are "shall be conclusive evidence"; in sec. 31 the words are "shall be deemed." The omission of "conclusive" from sec. 41, together with the use of the word "deemed," which is capable of meaning "rebuttably presumed" implies that the legislature intended such omission to be observed by assigning a meaning not "conclusive" and raising only a rebuttable presumption.

In *Hopper v. Municipal District of Foothills No. 31 and Lancaster*[99] an Expropriation Act stated that a document might be served by registered mail and "shall be deemed to be served on the date it is so mailed". The deeming clause was construed to mean deemed until the contrary was proved. MacDonald J. compared the consequences of both constructions, and held that his construction of the clause was what the legislature intended. He said:[100]

> If the word "deemed" in s. 51 is to be taken as "deemed conclusively" a municipality could deliberately wait until the owner was on holidays or out of the province when it would be unlikely that he would receive the notice and be able to make representations. Such an interpretation would permit the intention of the Legislature as expressed in s. 24 to be flouted.
>
> On the other hand if the word "deemed" is to be taken as "deemed until the contrary is proven", service of the notice by registered mail is considered effective unless it is proven that the service contemplated by s. 24 was not in fact made. This interpretation, I feel, permits the continued observance of the rule of natural justice, in the sense that compliance with the condition precedent that the owner be given an opportunity to make representations is not to be dispensed with.

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98 *Ibid.*, at p. 548.

99 [1975] 2 W.W.R. 337.

100 *Ibid.*, at p. 343.

> It takes little imagination to appreciate that the laws meant to protect the personal and property rights of owners would be meaningless if those rights could be readily overridden or ignored because of disability or temporary absence. As a man cannot be condemned for an offence without an opportunity of knowing the charge and being given an opportunity to make his defence, it seems equally just that he should not be deprived of his property nor have it destroyed without notice and the opportunity of making representations. This must have been the intention of the Legislature and I so find.

In *Hickey v. Stalker*[101] Middleton J. suggested a line of division between conclusive and rebuttable deeming. He said:

> the word "deemed" . . . is not inflexible. It may but does not always mean "adjudged and determined." Certainly, when the doing or abstaining from doing a particular thing is to be "deemed" to have a particular consequence, this is a very natural meaning, though the same result might be attained by attributing to it the meaning "shall be regarded as." So, when an appeal which is not set down in time is to be"deemed to be abandoned," it does not require much imagination to find an intention on the part of the Legislature to say that such an appeal shall be regarded as abandoned, and make it the duty of the Court to "adjudge and determine" that it was abandoned . . . .

The decisions indicate that where a deeming clause states the legal consequences that are to flow from described circumstances, it is **prima facie** conclusive; but where it merely states a fact that is to be presumed in described circumstances, it is **prima facie** rebuttable.

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[101] (1923), 53 O.L.R. 414, at p. 418, citing *Re Rogers and McFarland* (1909), 19 O.L.R. 622; see also *Canadian Imperial Bank of Commerce v. Haley* (1979), 25 N.B.R. (2d) 304, where this decision was applied to a deeming clause in a contract.

The tribunal has extracted the following principles and made determinations, based upon the foregoing:

1. The fact that the statute uses the impersonal form means that there is a statutory presumption. From the use of the impersonal alone, it is not possible to determine whether it is conclusive or rebuttable.

2. While both subsections 71(1) and (2) have the word "deemed", in the latter does the use of the word "conclusively" in the one strongly implies that the legislature intended by the absence of the word "conclusively" in the other that it is a rebuttable presumption.

3. The issue of whether the abandonment which is deemed in subsection 71(1) constitute a legal consequence or is it a fact that is to be presumed and is rebuttable is considered.

Section 70 deals with abandonment at the option of the recorded holder and the term is understood to have a statutory meaning. Subsection 73(4) sets out that the mining recorder shall ". . . upon a forfeiture or abandonment of or loss of rights in a mining claim, . . ." mark the record of the claim with "Cancelled/Annulé" suggesting that those types of losses of rights listed constitute legal consequences, rather than a question of fact.

Although application of the principles outlined by Driedger suggest that this presumption means conclusively adjudged, this would be in direct conflict with the provisions of subsection 43(2), which deems substantial compliance with staking requirements even where the requirements of the legislation are not met, provided that the tests set out are met. Considered in conjunction with the presumption in subsection 71(1), the latter must be regarded as rebuttable in cases involving staking. This is both internally consistent with the meaning of the phrase "with a direction of the recorder in regard thereto" and consistent with the **Act** in terms of sections 43 and 110.

As stated above, some meaning must be given to the phrase "with the direction of the recorder in regard thereto" as it concerns recording. The implied powers of a mining recorder discussed above support the position that this presumption is rebuttable.

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4. The tribunal must determine how the context of the meaning of the word "deemed" in subsection 71(1) fits into the **Act** as a whole. The purpose of the **Act** is set out below:

> **2.** The purpose of this Act is to encourage prospecting, staking and exploration for the development of mineral resources and to minimize adverse effects on the environment through rehabilitation of mining lands in Ontario.

According to subsections 5(6) through (10) of Ontario Regulation 115/91 (the staking regulations) a mining claim in surveyed territory must be staked to be a portion of a lot in a township, corresponding in the prescribed way to lot and concession lines. In fact, according to clause 5(5)(b), upon surveying such a mining claim, the existing survey fabric and not the corner posts are to establish the basis of the mining claim.

In the Application to Record, Form 4, the mining claim is identified by the claim or tag number, which is not a necessity, as tags may be affixed as soon as possible but not later than six months after recording (see staking regulation subsection 14(2)). This tag number becomes the mining claim number and is used in all mining lands and tribunal documentation to identify a mining claim.

Also required on the application is the name of the mining division, the township, and the part of the lot and concession, if located in a surveyed township.

The tribunal finds that the purpose of the **Act** and regulations is to encourage the staking of lands for purposes of mineral exploration. There are a number of provisions which allow for problems in staking to be corrected. The wording of subsection 71(1) implies that the mining recorder may direct changes to an application to record. While the tag number on the application to record is of significant importance, the mining claim can be identified by means of its location on the survey fabric in a surveyed territory. From this, the tribunal finds that the "deemed abandonment " for failure to comply with the requirements of the **Act** and regulations is a rebuttable presumption.

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Conditions to Rebut Presumption of Deemed Abandonment

Within surveyed territory, any error in the lot or concession number listed in an application to record should be quite apparent from the accompanying sketch and would be one the mining recorder could catch at the outset. However, an error in the tag number is more difficult to detect, particularly where the same staker holds the tags which correspond to the number recorded in error. Only where the error in the application to record is a duplicate of an existing mining claim number could the error be detected upon recording. And if the tag which corresponds to the erroneous number has not yet been used to stake a mining claim, it could be quite some time before the error is detected.

The facts of this case are undoubtedly unique. What would the outcome be if the facts were different? For example, if Mr. Doran had staked two mining claims in one day and inadvertently switched the tag numbers on the application form, it could have been years before the problem was detected, particulary in an area which is not active or which is fully staked. Taken to an extreme, Mr. Doran could have unwittingly performed years of assessment work on these two hypothetical mining claims before the problem was detected. At worse, this situation could have come to light when he applied for lease and the mining claims were surveyed.

There are numerous cases where the Commissioner has allowed errors in recording to be corrected.

In **Re Haight & Thompson and Harrison**, 1 M.C.C. 32, in addition to an issue of whether the staking substantially complied with the requirements of the legislation, the Commissioner considered whether, by improperly taking out a second license in one year and putting this invalid number on the posts and on the application to record would invalidate the mining claim. The Commissioner found that the incorrect license number on the posts was a defect which could be cured by the provisions of section 137 of **The Mines Act, 1906**, relating to substantial compliance in staking. The issue of the mistake on the application to record was dealt with by means of allowing the staking itself to be valid.

In **Re Thompson and Harrison**, 1 M.C.C. 35, the date of the discovery on a restaked mining claim was incorrectly stated. The Commissioner found that the mistake was explained in the circumstances and no one was misled. An affidavit setting out the correct date ". . . sufficiently correct any misapprehension that might otherwise arise."

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In **Re Reichen and Thompson** 1 M.C.C. 88, the Commissioner, after finding that the staking itself was valid, went on to consider defects in the application: the sketch did not have the word "discovery" written in or identified, even though the discovery post was properly planted on the ground. The length of the line running from the discovery post to the No. 1 post was not shown on the sketch and was erroneously marked on the application, although correctly marked on the posts in the field. The Commissioner stated at page 98:

> . . . In the absence of any suggestion of bad faith, or of any probability that any one could be misled or prejudiced by these things, I cannot, in my view of the principles which should govern such matters, hold these discrepancies, which are apparently merely clerical slips, fatal to the validity of the claim.

In **Re Gosselin and Gordon**, 1 M.C.C. 254, involved a dispute where the application erroneously stated that the discovery and staking occurred on March 4 instead of the correct date of February 12. The Commissioner stated at page 255:

> . . . I am satisfied from this and from the other circumstances of the case that there was no object or intention of deliberately putting in a wrong date, and I have no doubt that it was merely a slip or mistake in some way on the part of the solicitor or clerk who drew up the application. The mistake was not one that in any way misled or injured the disputant or other prospectors.

The tribunal finds that the presumption in subsection 71(1) is rebuttable. Based upon the peculiar facts of this case, namely, that the staking and recording has been done in good faith, that the nature of the error is typographical or numerical and that there is no evidence of a third party interest which may be affected by directing that the application to record be corrected, the tribunal finds that the presumption has been rebutted. In the future, a mining recorder wishing to be certain that there are no intervening third party interests may require a sworn affidavit or statutory declaration to that effect from the staker.

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The Nature and Scope of the Minister's Challenge Under subsection 76(5)

While this issue is no longer relevant to this appeal, sufficient evidence and submissions were presented that it will be addressed.

Mr. Doran stated that there are numerous problems with the procedures used by MNDM in connection with this issue, namely that the inspection pursuant to subsection 76(5) should be ordered, ie. in writing, by no one other than the Minister and this was clearly not done. The procedures used in posting the order withdrawing the lands from staking pursuant to subsection 35(3) were not followed.

Mr. Norwood made several points on what he termed the tangential points to the appeal. He submitted that the allegation that the withdrawal order was not posted in a timely manner, that there was no notice by registered mail of the order cancelling the mining claim and the lack of written documentation on the Minister's delegate's direction to inspect are irrelevant. As to the issue before the tribunal, he submitted that no prejudice has resulted from any of these matters, should they in fact be true.

Notwithstanding that one year has passed since the date of staking, the Minister pursuant to subsection 76(5) may challenge the validity of a mining claim at any time. There should be no question of the Minister's jurisdiction to do so.

Subsection 76(5) empowers the Minister to challenge **the validity of a mining claim**, notwithstanding provisions which essentially place the mining claim above suspicion one year after recording or if the first unit of assessment work has been performed and approved. This potential challenge is taken to encompass the inquiry as to staking requirements as well as recording requirements.

The wording of subsection 75(1) is interpreted by the tribunal as follows. The Commissioner or mining recorder may cause an inspection of a mining claim at any time to determine whether the requirements of the **Act** have been complied with. However, any such inspection which occurs after one year or after the first unit of assessment work cannot question the validity of staking unless it is ordered by the Minister.

Taken together, it would appear that, to be authorized to actively challenge the validity of a staking after one year of assessment work, the Minister must order an

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inspection if the staking is to be the basis of the challenge. However, if it is the application to record the mining claim which is being challenged, the Minister may direct the inspection in accordance with subsection 76(5). Therefore, Mr. Doran's concerns that the Minister failed to order the inspection appear to be without merit.

With respect to the procedures involving the posting of the withdrawal of lands from staking, the tribunal finds that this was done properly. Furthermore, no prejudice has resulted from the failure to advise Mr. Doran by registered mail.

Conclusions:

The tribunal finds that the Mining Recorder is empowered to direct changes to an application to record, on the basis of subsection 71(1) and clause 28(1)(b) of the **Interpretation Act**. As the Mining Recorder did not exercise this jurisdiction, the tribunal orders that the application to record the Ryan Mining Claim be amended **nunc pro tunc** to the date the inspection report was received, namely August 12, 1994 to reflect tag number SSM-1099483.

The tribunal further finds that the deemed abandonment in subsection 71(1) as it relates to a failure to comply with the requirements of the legislation in respect of the application to record constitutes a rebuttable presumption. This presumption is rebutted on the facts of this case through the direction that the application to record be amended **nunc pro tunc** to the date the inspection report was received, August 12, 1994.

On the peculiar facts of this appeal, it is quite clear that error which was made in writing down the tag number of the Ryan Mining Claim was done without intent to mislead. Furthermore, any concerns of the mining recorder as to the existence of third party interests, such as unrecorded transfers or option agreements, can be dealt with through a direction to execute an affidavit or statutory declaration by the recorded holder setting out whether such interests exist.

Based upon allowing the application to record to be corrected **nunc pro tunc** to August 12, 1994, there is no requirement that the Ryan Mining Claim be relieved from forfeiture as, retroactively effective August 12, 1994, the application will be corrected and the forfeiture will not have happened.

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Exclusion of Time

The tribunal notes that the notation "Pending Proceedings" was never noted on the abstract of the Ryan Mining Claim. However, pursuant to clause 67(1)(b) of the **Act**, the time during which the Ryan Mining Claim was pending before the Mining Recorder and the Commissioner, being June 20, 1994 to July 20, 1995, a total of 396 days, will be excluded in computing time within which work upon the Ryan Mining Claim is to be performed.

Pursuant to subsection 67(2) of the **Act** August 7, 1996 shall be deemed to be the date for filing the first and second units of prescribed assessment work on the Ryan Mining Claim. All subsequent anniversary dates shall be deemed to be August 7.