File No. MA 016-94

L. Kamerman	)	Friday, the 23rd day
Mining and Lands Commissioner	)	of June, 1995.

THE MINING ACT

IN THE MATTER OF

Mining Claims K-1196095 and 1202294, situate in the Township of Watten, in the Kenora Mining Division, hereinafter referred to as the "Mining Claims";

AND IN THE MATTER OF

An appeal under subsection 112(3) of the **Mining Act** from the decision of the Mining Recorder for the Kenora Mining Division to reduce the value of assessment work filed for credit to the Mining Claims;

AND IN THE MATTER OF

Ontario Regulation 116/91 concerning assessment work.

B E T W E E N:

AUBREY J. EVELEIGH, DAVID J. GLIDDON and
TIMOTHY J. TWOMEY

Appellants

- and -

MINISTER OF NORTHERN DEVELOPMENT AND MINES

Respondent

- and -

NORANDA EXPLORATION COMPANY INC.

Party Of The Third Part

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ORDER

1. THIS TRIBUNAL ORDERS that the appeal is dismissed.

2. THIS TRIBUNAL FURTHER ORDERS that the notation "Pending Proceedings", which is recorded on the abstracts of the Mining Claims, be removed from the abstracts of the Mining Claims.

3. THIS TRIBUNAL FURTHER ORDER that the time during which the Mining Claims were under "Pending Proceedings" being the 23rd day of June, 1994 to the 23rd day of June, 1995, a total of 366 days, be excluded in computing time within which work upon the Mining Claims is to be performed.

4. THIS TRIBUNAL FURTHER ORDERS that the 6th day of May, 1997, be fixed as the date by which the next unit of prescribed assessment work shall be performed and filed on the Mining Claims.

5. THIS TRIBUNAL FURTHER ORDERS that no costs shall be payable by any 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 for the Kenora Mining Division.

DATED this 23rd day of June, 1995.

Original signed by
L. Kamerman

L. Kamerman
MINING AND LANDS COMMISSIONER

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REASONS

The hearing was held by telephone conference call with the consent of the parties.

Appearances:

Aubrey J. Eveleigh	Agent for David J. Gliddon and Timothy J. Twomey, and appearing on his own behalf.
John Norwood	Counsel for the Minister of Northern Development and Mines.
Albert C. Gourley	Counsel for Noranda Exploration Company Inc.

Preliminary Matter:

As evidenced by the abstracts for the Mining Claims (Ex. 11), the interest of each of the appellants in the Mining Claims was transferred to Noranda Exploration Company, Limited, being recorded on November 23, 1994. On January 1, 1995, there is an entry on the abstracts indicating that Noranda Exploration Company, Limited has changed its name to Noranda Mining and Exploration Inc.

On January 5, 1995, Noranda Exploration Company Limited was added as a party of the third part to these proceedings. Based upon the abstracts, this was an error, as the proper name is Noranda Exploration Company Inc. ("Noranda"). The tribunal finds that the title of proceedings is amended to reflect the proper name.

Mr. Gourley indicated at the commencement of the hearing that Noranda would not be introducing evidence, but wished to confine its participation to making submissions on the issues. His written material indicates that submissions will be confined to the question of assessment work performed between staking and recording and will not touch upon the issue of whether, on the facts of the appeal, the assessment work filed constitutes a regional survey.

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Background and Facts Not in Dispute:

Mining Claims K-1196095 and 1202294, situate in the Township of Watten in the Kenora Mining Division (the "Mining Claims") were staked on April 10, 1994 by Todd Maitland. The Mining Claims were subsequently recorded in the names of Tim Twomey, David Gliddon and Aubrey Eveleigh (the "appellants") each as to a 33.33 percent interest on May 5, 1994.

Exploration work commenced on the Mining Claims immediately after the staking of another mining claim (K-1202293) was completed on April 11, 1994. This work was comprised of line cutting and geophysics. The field crew returned to Thunder Bay on April 13, 1994 and proceeded to work on the Geophysical Report on the Rice Bay Property (Ex. 2), which was completed on May 17, 1994.

As set out in the first paragraph of the Statement of Facts dated August 21, 1994 (Ex. 7), the staking of all three mining claims listed above was based upon a decision "to expand on a previous geophysical survey on the original claim 1196249."

On June 16, 1994, in addition to the Geophysical Report on the Rice Bay Property, Mr. Eveleigh filed a Report of Work Conducted After Recording Mining Claim (Ex. 3)(the "Work Report"). On the third page of the Work Report, the four mining claims discussed above are listed for having assessment work applied.

There was no evidence concerning the changes made on page three of the Work Report, but it is apparent that a number of changes were made in the columns setting out "Value of Assessment Work Done on this Claim", "Value Applied to this Claim" and "Value Assigned **from** this Claim", including in the totals at the bottom.

The result of what evidently transpired in the mining recorder's office is that Mr. Eveleigh received a letter from Mr. Scott Rivett, Mining Recorder for the Kenora Mining Division dated June 20, 1994 (Ex. 5), which sets out that geophysical work could not be recorded against Mining Claims K-1196095 and 1202284, being the Mining Claims in this appeal. Similarly, in the letter from the Mining Recorder to the tribunal, also dated June 20, 1994 and accompanying Notice of Appeal (Ex. 6), no mention is made of Mining Claim K-1202293, upon which the submitted assessment work was apparently also not recorded. However, this mining claim does not form the subject matter of this appeal.

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Of the $6,540.95 in assessment work claimed in the Work Report, $4,579 was allowed to be applied only to Mining Claim K-1196249 as a reserve to be claimed at a future date.

Issues:

1. Is assessment work which is performed after staking but before recording of the Mining Claims eligible to receive credit pursuant to section 65 of the **Mining Act** and Ontario Regulation 116/91?

2. Does the geophysical survey conducted in the case of this appeal, involving 60 hectares, constitute a regional survey within the meaning of subsection 66(2) of the **Mining Act**? This subsection permits regional surveys and prospecting done before the staking of a mining claim to be eligible for assessment work credit.

3. What meaning is to be given to clause 8(1)(a) of Ontario Regulation 116/91, which refers to work done before recording in contrast to the words used in subsection 66(2) of the **Mining Act**, which refers to work done before staking?

Evidence:

Aubrey Eveleigh gave evidence on his own behalf. He stated that the basis of his appeal is the seeming incongruity of the changes to the **Mining Act** which took effect on June 3, 1991. According to the position taken by the Minister of Northern Development and Mines ("MNDM"), prospecting and regional surveys done prior to staking or after the recording of a mining claim are eligible to be recorded. Yet, after staking and prior to recording, such work is not eligible.

Mr. Eveleigh stated that he was told by the Mining Recorder for the Kenora Mining Division, Scott Rivett, that ground geophysics could qualify as a regional survey. The amount of land necessary to be surveyed is not set out in the legislation, is not defined, nor are distances given, so that whether the work done in this case would qualify as a regional survey is open to interpretation. Mr. Eveleigh stated that he had

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assumed that the work done in this case would fall within the meaning of "regional survey", referred to in subsection 66(2) of the **Mining Act**.

Under cross-examination by Mr. Norwood, Mr. Eveleigh was asked to clarify what had been told to him by the Mining Recorder concerning regional surveys. Mr. Eveleigh responded that he was interested in knowing whether line cutting and geophysical surveys would qualify as a regional survey, to which he had been told that there was precedent for work of this type having been so recognized. Mr. Norwood suggested that the answer of the Mining Recorder was qualified, limited to work which is regional in nature. Mr. Eveleigh stated that, in his opinion, a geophysical survey conducted on 60 hectares of land is regional in nature and had assumed that this had been accepted by MNDM in the past. Mr. Eveleigh agreed that Mr. Rivett had not actually told him 60 hectares would qualify as a regional survey.

In the Work Report, the work was not reported as a geophysical survey, but listed under the work group entitled "Geotechnical Survey" as "Geophysics". Asked why the work was refused, Mr. Eveleigh read part of Mr. Rivett's June 20, 1994 letter into the record:

> Please be advised that I am unable to record the geophysical work performed on mining claims K1196095 and 1202294.
>
> According to your report, the survey was performed April 11 to 13 which is prior to the recording of claims K1196095 and 1202294. Section 65(1) of the Mining Act requires the holder of a mining claim to perform assessment work <u>following</u> the recording of the claim.

Mr. Norwood pointed out that this refusal does not mention a regional survey, suggesting that the reason for this was that it was not mentioned in the Work Report.

Scott Albert Rivett, Mining Recorder for the Kenora Mining Division, gave evidence on behalf of MNDM. According to Mr. Rivett, the geophysical survey in this appeal involved an area of approximately 600 metres by 1,000 metres, being 6.2 square kilometres or 60 hectares. Mr. Rivett stated that he accepted $4,579 worth of work and

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applied it to pre-existing Mining Claim K-1196249. $1,308 was not accepted with respect to Mining Claim K-1202294 and $654 was not accepted with respect to Mining Claim K-1196095.

Asked to comment on subsection 65(1), Mr. Rivett stated that it speaks for itself. Following the recording of a mining claim, prescribed units of assessment work shall be performed. Implied in this subsection is that such work shall be done for credit. It is possible to do other assessment work prior to recording which does not receive credit. Mr. Rivett stated that he has worked with MNDM since 1981 and is not aware of any previous appeals on this issue.

The first two paragraphs of part III of Noranda's Legal Argument (Ex. 13), found at page 3, was read into the record:

> **III. THE PURPOSE OF SUBSECTION 65(1)**
>
> At the heart of the WWCC [When Work Can Commence] issue is the purpose of subsection 65(1). The respondent would say, we believe, that subsection 65(1) mandates the commencement of work after the recording of a claim and, therefore, precludes work from being performed *for credit*[1] prior to that date.
>
> In our view, there is a persuasive alternative to such a construction of subsection 65(1). We do not believe that subsection 65(1) should be taken as *impliedly precluding* assessment work credits for work performed before a claim is recorded. In Noranda's view, subsection 65(1) merely points out that assessment work is an obligation of a claim holder and that the obligation is *assumed* by the holder of a mining claim *upon the recording of the claim*. The reference to the performance of assessment work after recording of the claim draws attention to the fact that the obligation does not crystallize or ripen until the claim is recorded.

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1. Amended at the hearing with the consent of the parties.

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Mr. Norwood stated that the first paragraph is not MNDM's position. Mr. Rivett disagreed with these statements and pointed out that subsection 65(1) refers to "[t]he holder of a mining claim" which is a necessary condition before one can be eligible for assessment work credit. The exception to this is found in subsection 66(2), which applies to prospecting and regional surveys done prior to staking. Mr. Rivett stated that this provision, while new in its current form since June 3, 1991, existed prior to that time in another form in predecessors to the current legislation.

Mr. Rivett stated that the interpretation given by him concerning the principle in subsection 65(1) and exception in subsection 66(2) are also the understanding of the mining community and that the members of the community govern themselves accordingly.

Mr. Rivett was asked to consider the wording of subsection 66(2) and of subsection 8(1) of Ontario Regulation 116/91 which are reproduced below:

> **66.**--(2) Prospecting and regional surveys performed on Crown lands before the staking of a mining claim in the prescribed manner.

> **8.**--(1) Regional surveys and prospecting work performed on Crown land before the recording of a mining claim are elegible for assessment work credit if,

Mr. Rivett suggested that the word "staking" used in the regulation would mirror the wording in the **Mining Act** if the word "recording" were used. Mr. Norwood suggested that the wording of a statute would take precedence over the wording of a regulation, and that where there is a conflict, the words in the statute would prevail.

Asked whether the geographic survey done by Mr. Eveleigh and the appellants would constitute a regional survey, Mr. Rivett stated that 60 hectares is very small, and that he had never accepted work on an area this small as a regional survey. Mr. Rivett stated that he noticed the problem when the Work Report was filed by Mr. Eveleigh and had indicated that he would attempt to get as much credit for the assessment work done as was possible, given the facts. At that time, however, Mr. Rivett did not believe that the work done constituted a regional survey, which he understood meant

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something larger in scope. Considering that the possibility did exist that this work did constitute a regional survey, Mr. Rivett stated that he contacted Blair Kite, Supervisor of the Geoscience Approvals Office in Sudbury. After conferring on the matter, Mr. Rivett stated that he still did not believe that the work filed by the appellants constituted a regional survey.

Mr. Rivett stated that he did not believe that he had misled Mr. Eveleigh; he had simply tried to get more of the work credited and failed.

Under cross-examination by Mr. Eveleigh, Mr. Rivett was asked what he thought the reference in subsection 66(2) to "in such manner as is prescribed" means, to which he responded that it meant something larger, such as a township. Mr. Rivett acknowledged to Mr. Eveleigh that he did not disclose what he was thinking at the time, although this was not done intentionally.

Considering their discussions on whether there were precedents with respect to surveys of "this type", Mr. Rivett stated that what he had meant by "this type" was ground surveys generally and did not mean ground surveys which were limited to areas of 60 hectares.

Dr. Johial Walter Newsome gave evidence on behalf of MNDM, having been accepted by the tribunal as an expert on regional surveys, having eighteen years combined mineral exploration industry and MNDM experience in the field of geoscience. Dr. Newsome stated that there is no fixed definition of a regional survey, although the scope is generally understood within the practice of the industry.

For purposes of the Ontario Geological Survey (the "OGS"), a regional survey is done on mapping of a scale of either 1:20,000 or 1:50,000. Minimally, for OGS purposes, a regional survey of one township, constituting 400 mining claims or 6,400 hectares, would be recognized. The rule of thumb within the private sector is to survey a broad geographic area in order to select a location to concentrate specific types of assessment work. For example, a regional survey of all or portions of a greenstone belt can extend from three townships to 100. This represents the accepted industry standard.

With respect to the facts of this appeal, Dr. Newsome stated that line cutting and ground geophysics involving 60 hectares does not constitute a regional survey either for OGS or industry purposes, but must be regarded as a site specific property survey.

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Under cross-examination by Mr. Eveleigh, although reiterating that 60 hectares would not qualify, Dr. Newsome agreed that some geological surveys could be considered as regional surveys, depending on how they are done and the extent of the area involved. This would also be true of surveys done on a geochemical basis, using a scintometre or a magnetometer.

Mark Dixson Hall, Chief Mining Recorder with the Mining and Land Management Branch gave evidence on behalf of MNDM, having been recognized as an expert in mining lands administration. Mr. Hall has been with MNDM for 14 years.

Referring to subsection 65(1), Mr. Hall indicated that the wording of this section has not substantively changed at least in 25 years and to his knowledge, there have been no previous challenges of this provision or of the meaning of the words used in subsection 66(2), which refers to work done before staking.

In Mr. Hall's opinion, it is the view of the Ministry and is understood by the industry that the time for performing work for assessment credit is after the recording of a mining claim, with the exception of regional surveys and, prior to 1991, airborne surveys. Mr. Hall stated that the Ministry regularly refuses work which was performed prior to the recording of a mining claim, which can arise where there are previously held contiguous mining claims.

Asked to comment on whether the alternative interpretation offered by Mr. Gourley at page 3 of Exhibit 13 was acceptable, Mr. Hall gave a number of reasons why he disagreed.

Mining Recorders keep track of title on the map, which involves other uses in addition to mining. Problems which might arise involve staking land already staked, land which has been withdrawn from staking or land for which there may be special concern or restrictions.

An example would be staking over an old native burial ground which could not be ascertained if the staker does not apply to record before commencing assessment work. Where particularly disruptive work is involved, such as bulldozing, the Ministry would hope to avoid the disruption of grave sites.

With the rules involving application of assessment work to contiguous mining claims, where a situation is further complicated by a transfer, the Ministry would be in a difficult situation attempting to sort out what work could be applied to what claim, and more particularly, against the interest of which owner.

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The foregoing are examples only, and while Mr. Hall could not anticipate all of the possible scenarios, the result which would flow would be to cause problems with the legal title to the mining claim.

Mr. Hall stated that the conflict between the words used in subsection 66(2) and section 8 of Ontario Regulation 116/91 is known, and was not given priority for change in the government's recent omnibus legislation.

Under cross-examination, Mr. Hall was asked whether the concerns he had enumerated concerning title did not apply equally to open ground. Mr. Hall distinguished between disruptive and non-disruptive assessment work, with examples of the latter being an airborne survey, prospecting which entails knocking moss off a few rocks, or stream sediment samples in several townships.

Submissions:

Mr. Eveleigh reiterated that in his submission it is unfair to allow assessment work done both before staking and after recording, but disallow work done during the period between. He referred to a depiction of this, set out in Exhibit 7 and reproduced here:

* OPEN GROUND	STAKED CLAIMS	RECORDED CLAIMS
WORK PERFORMED	WORK PERFORMED	WORK PERFORMED
ACCEPTED	NOT ACCEPTED	ACCEPTED

* Regional Surveys

Mr. Eveleigh stated that the precedent has already been set where ground geophysics and line cutting have been accepted as regional surveys.

Mr. Eveleigh referred to two matters which are confusing, namely the contradiction between the wording of subsection 66(2) and section 8 of Ontario Regulation 116/91, which refer to work done before staking and work done before recording, respectively. Secondly, he expressed concern over the suggestion that ground geophysics

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could not be considered as a regional survey, which was contrary to what he had been led to believe.

Mr. Eveleigh submitted that the position taken by the Minister also impacts financially on the recorded holder and quoted from the last paragraph of his submission contained in Exhibit 7:

> Another point that should be made, is one of financial concern. If, for example, a prospector was faced with the same scenario but is (**sic**) property was in a very remote area of the province, it becomes entirely infeasible to carry out such a program because of the transportation costs. The prospector would, first of all, have to fly in to stake the claims and fly back out to record them. He would, then, have to fly back in to carry out the exploration program. This program of exploration, under these circumstances, would probably not be carried out. This is not the goal of the new Mining Act.
>
> > "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."

Mr. Gourley submitted that the interpretation submitted by the Ministry is not absurd, but the question which should be addressed is whether a better interpretation exists.

Mr. Gourley led the tribunal through a two stage process, first referring to the purpose of the **Mining Act** as quoted in Mr. Eveleigh's submission above. The general provision in subsection 65(1) provides that assessment work **shall** be done after recording is a mandatory provision insofar as the failure to do the prescribed assessment work within the time set out will result in a deemed abandonment of the mining claim pursuant to subsection 71(1). However, he submitted that the window of time during which assessment work must be done to prevent such deemed abandonment does not preclude work being performed before the recording of the claim.

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In his written submission (Ex. 13) at page 3, Mr. Gourley refers to the meaning of the words "**following the recording of the claim**" in subsection 65(1), which sets out the limits of the window for purposes of deemed abandonment. He submitted that the definition of "assessment year" in section 1 of Ontario Regulation 116/91, which is either the year between the date of recording and the first anniversary date or the year between anniversary dates. Outside of this assessment year, the only other parameter is the requirement in subsection 44(1) that a mining claim be recorded within 31 days of staking.

Mr. Gourley submitted that the only reason why subsection 65(1) mandates that work be done after recording is due to the limitation imposed by subsection 71(1) which deems abandonment after time has run out. According to this view, there are no consequences of performing work before recording, so that this time frame is not addressed by subsection 65(1).

Other sections of the **Mining Act**, in Mr. Gourley's submission, support this approach, such as paragraphs 176(1).8 and 176(1).11. In paragraph 8, the Lieutenant-Governor in Council is permitted to prescribe "the annual units of assessment work to be performed by the holder of a mining claim", which does not limit the performance to after the recording of the claim, which it could have done. This is contrasted with paragraph 11, which does specify that regulations may be made concerning prospecting and regional surveys performed before staking and is linked to subsection 66(2). Mr. Gourley argues that the only specific words of limitation are found in subsection 66(2) and paragraph 176(1).11. To the extent that there are none in either subsection 65(1) nor paragraph 176(1).8, none should be implied.

The tribunal was referred to an excerpt from E.A. Driedger, **Construction of Statutes**, 2nd ed. (Toronto: Butterworths, 1983) at page 78, which is reproduced:

> In **McBratney v. McBratney**[13] the Supreme Court made a selection between two possible constructions and reduced the power of a court to make a discretionary order under the

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13. (1919), 59 S.C.R. 550, at p. 559.

Married Women's Relief Act on the basis of the object of the Act. The construction rejected was the more literal one. Duff C.J. said:

> Of course where you have rival constructions of which the language of the statute is capable you must resort to the object or principle of the statute if the object or principle of it can be collected from its language; and if one finds there some governing intention or governing principle expressed or plainly implied then the construction which best gives effect to the governing intention or principle ought to prevail against a construction which, though agreeing better with the literal effect of the words of the enactment runs counter to the principle and spirit of it.

Mr. Gourley concluded that the interpretation advocated by the appellants and Noranda furthers the purposes of the **Mining Act**, whereas that of the respondent MNDM does not. He submitted that section 8 of Ontario Regulation 116/91 should not be considered invalid but rather demonstrates that the approach suggested has been accepted by the Lieutenant-Governor in Council. The fact that the section refers to prospecting and regional surveys done **before recording** indicates that there is a willingness to recognize not only the assessment work done prior to staking, but that done prior to recording.

In the second footnote to Noranda's written submission, Mr. Gourley relied on an earlier decision of this tribunal in support of his position, with respect to the meaning of the words used in subsection 65(2). That subsection requires a report to be filed of the assessment work "done" for the purpose of complying with subsection 65(1). The meaning of the words "perform" and "done" in these contexts was considered in **Jones v. Minister of Northern Development and Mines** (Mining and Lands Commissioner), (June 28, 1994) [Unreported] at page 9:

> It is arguable that the use of the word "done" as opposed to "performed" in subsection (2) suggests that "perform" in subsection (1) has a broader meaning than just doing the work and must include the preparation of the report. The tribunal prefers the interpretation which would recognize the word

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> "done" as part of the clause used to refer back to subsection (1), namely, "of the assessment work done for the purpose of complying with subsection (1)".

Mr. Gourley concluded by submitting that a contrary interpretation makes no sense and leads to inefficiencies. Such an interpretation should not be upheld.

Mr. Norwood submitted that subsections 65(1) and 66(2) should be viewed as part of a legislative scheme. The specific provisions of subsection 66(2), provides the exception to the general rule stated in 65(1). Accordingly, the exception allowing some specified types of assessment work prior to staking proves the general rule that all other types of assessment work can only be accredited if performed after recording. This has long been the Ministry interpretation and has been accepted by the industry.

The wording of subsection 65(1) supports this interpretation by the words used, which allow no room for confusion: "The claim holder shall, following the recording of the claim, ...". This provision has been in the statute for 25 years or more. While Mr. Norwood acknowledges the right to challenge Ministry interpretation, he pointed out that the process which leads to the recording of a mining claim runs well. To change it would lead to the types of problems discussed by Mr. Hall. However, problems aside, the subsection should be seen to speak for itself through a literal interpretation of the words used.

With respect to the issue of whether the assessment work done constituted a regional survey within the meaning of subsection 66(5), Mr. Norwood invited the tribunal to favour the expert evidence of Dr. Newsome that to qualify, an area of at least one township of 6,400 hectares would be necessary. It is pointed out that the area involved in this case is less that 1 percent of the minimal threshold outlined by Dr. Newsome. Mr. Norwood submitted that the appeal should fail on the regional survey issue because of the minuscule area involved.

Mr. Norwood stated that he understands that Mr. Eveleigh had misunderstood the information provided by Mr. Rivett, but submitted that this was not intentional. The misunderstanding was further compounded by poor drafting in the regulation. However, when there is a conflict between the **Mining Act** and a regulation, it is the **Mining Act** which must prevail.

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Findings:

Is Assessment Work Performed After Staking But Before Recording Eligible?

A literal reading of subsection 65(1) lends itself to the interpretation asserted by Mr. Norwood. This is found through the definition of the word "holder" found in section 1 as:

> "holder", when referring to the holder of an unpatented mining claim, a boring permit or a licence of occupation issued under this Act, means the holder of record;

Similarly, subsection 65(1) specifically contains the words, "following the recording of the claim", which the tribunal finds supports the broad rule from which any exceptions must be specifically detailed.

The nature of the interest held is characterized in clause 50(1)(a):

> **50.**--(1) The staking out or the filing of an application for or the recording of a mining claim, ... does not confer upon that person,
>
> (a) any right, title, interest or claim in or to the mining claim other than the right to proceed as is in this Act provided to perform the prescribed assessment work ... and, prior to the performance, filing and approval of the first prescribed unit of assessment work, the person is merely a licensee of the Crown and after that period and until he or she obtains a lease the person is a tenant at will of the Crown in respect of the mining claim;

This reflects a change from subsection 60(1) of the **Mining Act**, 1980 R.S.O. c. 268, where the change in status occurs upon the issuance of a certificate of record by the mining recorder, a provision which no longer exists.

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The meaning of neither "licensee" nor "tenant at will" have been considered in reported cases of this tribunal. Their meaning at common law, however, has been dealt with on numerous occasions, examples of which are given below. However, it is not entirely clear how the following meanings may be applied to the interest acquired in an unpatented mining claim. It is open to parties in future appeals to explore this issue further.

In **Smiles v. Edmonton (Board of Education)** (1918), 43 D.L.R. 171 at page 180 Hyndman, J. states:

> A licensee is a person who is neither a passenger, servant nor trespasser, and not standing in any contractual relation with the owner of the premises, and is permitted to come upon the premises for his own interest, convenience, or gratification.

A "tenant at will" is defined in **Osborne's Concise Law Dictionary**, 6th Ed. (1976) and was referred to by Scott L.J.S.C in discussion of the meaning of the phrase in the **Veterans' Land Act**, R.S.C. 1970, c. V.4, s. 14, in the case of **Stenning v. Douglas** (1983), 35 R.F.L. (2d) 429 at 434 (Ont. H.C):

> Tenant at will is where lands or tenements are let by one man to another, to have and to hold to him at the will of the lessor, by force of which lease the lessee is in possession. In this case the lessee is called a tenant at will, because he hath no certain nor sure estate, for the lessor may put him out at what time it pleaseth him.

The staking of a mining claim encompasses that which takes place on the ground, a kind of open and conspicuous possession. However, the interest which is acquired through the act of staking must be "perfected" through the application and subsequent recording thereof, which must be done within 31 days (subsection 44(1)). Aside from ensuring that the interest in the unpatented mining claim will continue beyond the 31 days, there is no change in the nature of the interest as a result of the recording, as is seen from clause 50(1)(a). Therefore, what is the significance of this time?

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Recent changes to the **Mining Act** which took effect on June 3, 1991 to the time of the completion of staking for priority had a very practical effect, as well as the consequence seen in this appeal. There is no longer any reason to rush to the recording office to ensure that title to a mining claim is not lost. Undoubtedly, this has led to the conclusion in the mind of the staker that he is free to proceed with assessment work on the mining claim immediately. After all, if there is no threat of doing the work, only to lose the claim, what is the risk?

While this sense of security may have been created through the legislative changes which no longer make it imperative to ensure that the mining claim is duly recorded to ensure that the interest will be retained, the failure to make comparable changes with respect to the time of performance of assessment work suggest that this cannot be so.

Clearly, it was within the power of the legislature to change the time for the performance of assessment work to commence after staking. This corresponding change was not made. The reasons for it are clear. There remains a role for the mining recorder and other government agencies to play prior to the commencement of assessment work, with the exception of prospecting and regional surveys. Mr. Hall pointed out just some of the other interests which may be involved and would be watched for by the Ministry at the time of the recording of mining claim. The damage which could occur to native burial sites must be dealt with. Similarly, the interests of other stakers covering a portion of a claim, not so unlikely in a situation of multiple units, must be brought to the attention of the staker.

There is another reason for the delay between the time of staking and recording of a mining claim, as set out in section 37 of the **Mining Act**. This provision, changed from its predecessor, section 39 to include reference to a second piece of legislation, provides as follows:

> **37.** Before beginning or carrying on any prescribed assessment work on a mining claim, the holder thereof, in addition to any other requirement, shall obtain a written permit entitling the holder to do so as provided in the **Forest Fires Prevention Act** or the **Public Lands Act**.

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The permit which may be required is obtained from the district office of the Ministry of Natural Resources (the "MNR"). Like the mining recorder, the MNR has a map of the area involved, only this one will delineate other interests held on Crown lands, such as timber rights, recreation interests including snowmobile and ski trails, rights of way for public highways, and resource concerns. The latter may involve the **Lakes and Rivers Improvement Act** and other legislation implemented by MNR. If the proposed assessment work will involve a watercourse, special provision may be required so that fish habitat and water quality due to increased sedimentation are not impeded.

It becomes clear through an examination of the process of not only acquiring a mining claim, but also obtaining a permit for purposes of performing some types of assessment work, that although recent legislative changes have eliminated the urgency to record, another kind of tension has been created, namely that in the mind of the staker, there is a sense that nothing pressing exists within the **Mining Act** to prevent him or her from proceeding with assessment work immediately.

In addition to consideration of the submissions of the parties, the tribunal has reviewed the history of mining legislation in the province in relation to staking, recording and performance of work. What emerges is a complex tapestry of the interrelated provisions which have not remained static, but rather have been changed by the Legislature from time to time. Examples of changes include the requirement for a discovery or the issuance of a certificate of record by the mining recorder. The successive changes are reflective of the development of mining law in the province and of principles embodied in the legislation which have been changed by statute, in other words, pursuant to deliberate changes made by the legislators. The conclusion which must be drawn is that the rights and the obligations of a staker or a mining claim holder are set out in the statute applicable at the relevant date.

Having considered all of the submissions and explored the role of those public servants charged with a supervisory role in the administration of Crown lands, the tribunal finds that the proper interpretation of subsection 65(1) is a literal one, namely that prescribed assessment work for credit cannot be performed until after the mining claim has been duly recorded.

Through this decision, it is noted that the recent legislative provisions governing priority of mining claims have had their impact, if not on practice, at least on the perception of respective rights and obligations of the staker, by the elimination of the

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sense of urgency to record. Generally, however, the Legislature is assumed to have appreciated the consequences of legislative change. Insofar as there may be difficulty in interpreting legislation, principles of statutory interpretation will be explored and applied in appropriate circumstances. The tribunal is satisfied that there is no wrong in this case which must be corrected through the application of another principle of interpretation. The tribunal has sympathy with stakers who are left with the additional economic burden of travel costs as matters currently exist. The best way to alleviate this would be to resort to grid staking, something which the Legislature was not prepared to do in its 1989 amendments to the **Mining Act**.

In conclusion, it is not the role of this or any tribunal or court to write legislation and to the extent that recent changes to the **Mining Act** may have created changes in practice, the tribunal will not do so.

Does a Geophysical Survey of 60 Hectares Constitute a Regional Survey Within the Meaning of Subsection 66(2) of the **Mining Act**?

The tribunal has considered the evidence of the witnesses on the subject of regional surveys and finds the evidence of Dr. Newsome most persuasive in this regard, describing a regional survey as encompassing at least one if not multiple townships.

Webster's New International Dictionary (2nd Edition, Unabridged 1959; G. & C Merriam Co. Springfield, Mass.) defines "regional" as:

> **1.** Of or pertaining to a region, or a territory, esp. a geographical region; -- often opposed to *local*; as *regional* geography. **2.** Of or pertaining to a region or division, as of a country or of the body; sectional; local; as *regional* governments; *regional* symptoms.

"Region" is defined as:

> **3.** A large tract of land; one of the large districts or quarters into which any space or surface is conceived of as divided; hence, in general, an indefinite area; a country; province; district; tract.

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It is recognized that the term "regional survey" has a specialized meaning within the mining industry. In this regard, while dictionary definitions may be helpful and do provide a general sense of how this term might be understood by the layman, the evidence of Dr. Newsome is that of an expert in geoscience and must be given considerable weight by the tribunal.

It is Dr. Newsome's evidence concerning the purpose of the regional survey which is the most helpful, namely that it provides an opportunity to survey a broad geographic area in order to select a location to concentrate on specific types of assessment work. Coupled with Mr. Hall's evidence that prospecting and regional surveys are considered unintrusive means of mining exploration, the tribunal is satisfied that this interpretation best accords with the specific exception in subsection 66(2) to the general rule in subsection 65(1).

The tribunal has noted the unfortunate miscommunication between Mr. Eveleigh and Mr. Rivett and is satisfied that efforts to attempt to accommodate Mr. Eveleigh's assessment work should it prove allowable by the **Mining Act** and regulations, were misunderstood as a certainty. In weighing the applicability of subsection 66(2) to the facts of this case, undoubtedly the mining recorder, and certainly the tribunal must be aware of the precedential implications of providing too loose an interpretation to an exception to a general rule, the result of which would certainly be to see attempts to have other site specific surveys which properly belong within subsection 65(1) applied for under this subsection. The tribunal is satisfied that there was no deliberate attempt to mislead Mr. Eveleigh.

Clause 8(1)(a) of Ontario Regulation 116/91 vs. Subsection 66(2) of the **Mining Act**;
Before Recording vs. Before Staking?

As the appeal must fail based upon the findings of the tribunal on the first two issues, it is unnecessary to determine this issue at this time.

As a matter of general practice, tribunals are reluctant to declare provisions within regulations as **ultra vires**, being in contradiction to the provisions of the constituent legislation. The practice is rather, to declare on a case by case basis that the regulatory provisions will not be applied owing to the apparent conflict.

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Exclusion of Time

On the matter of exclusion of time, pursuant to clause 67(1)(b) of the **Mining Act**, the tribunal finds that Messrs. Eveleigh, Gliddon and Twomey are not responsible in any way for delay in settling the matter before the tribunal. Therefore, the time during which this matter was under appeal, being June 23, 1994 to June 23, 1995, being 366 days, will be excluded for purposes of determining when the next prescribed unit of assessment work is due.

May 6, 1997 is fixed as the date when the next unit of assessment work shall be performed and reported on the Mining Claims. Pursuant to subsection 67(2), May 6 becomes the new anniversary date for future years of assessment work.

Conclusions:

For the reasons set out above, the appeal is dismissed. The order of the Mining Recorder reducing the value of assessment work on the Mining Claims is affirmed.

There were no submissions as to costs. Due to the fact that this appeal involves a novel issue of interpretation, it is not an appropriate case for costs in any event.