Appeal No. MA 019-93

L. Kamerman) Friday, the 15th day
Mining and Lands Commissioner) of July, 1994.

THE MINING ACT

IN THE MATTER OF

An application under section 105 of the **Mining Act** in respect of Mining Claims TB-1120989 to 1120994, both inclusive and 1121734, situate in the Blair Lake Area and Mining Claims TB-1120995 to 1120999, both inclusive, situate in the Cosgrave Lake Area, in unorganized territory, in the Thunder Bay Mining Division, hereinafter referred to as the "Mining Claims".

B E T W E E N:

COSTY BUMBU and JAMES A. MARTIN

Applicants

- and -

NORANDA EXPLORATIONS COMPANY, LIMITED,
(NO PERSONAL LIABILITY)

Respondent

INTERLOCUTORY ORDER

UPON hearing from Albert C. Gourley, Counsel for the Respondent and Steven W. Lukinuk, Counsel for the Applicants;

1. THIS TRIBUNAL ORDERS that the motion made by the Respondent pursuant to section 122 of the **Mining Act**, seeking a declaration that the application is vexatious and requiring the giving of security for costs, is dismissed.

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2. THIS TRIBUNAL FURTHER ORDERS, on agreement of both Counsel, that the tribunal will select Thunder Bay as the place for the hearing of the application on the merits.

3. THIS TRIBUNAL FURTHER ORDERS that the time during which Mining Claims TB-1099916 to 1099935, both inclusive, situate in the Cosgrave Lake Area, Mining Claim TB-1148205, situate in the Cosgrave Lake and Blair Lake Areas and Mining Claims TB-1148206, 1148215 to 1148217, both inclusive and 1148225 to 1148227, both inclusive, situate in the Blair Lake Area, in unorganized territory, in the Thunder Bay Mining Division were the subject matter of an application before the tribunal, being June 8, 1993 to July 15, 1994, a total of 403 days, is excluded in computing time within which work upon the aforementioned Mining Claims is to be performed and filed.

4. THIS TRIBUNAL FURTHER ORDERS that October 29, 1995 is fixed as the date by which the next prescribed unit of assessment work shall be performed and filed on Mining Claims TB-1099916 to 1099935, both inclusive, situate in the Cosgrave Lake Area, in unorganized territory, in the Thunder Bay Mining Division.

5. THIS TRIBUNAL FURTHER ORDERS that May 27, 1996 is fixed as the date by which the next prescribed unit of assessment work shall be performed and filed on Mining Claim TB-1148205, situate in the Cosgrave Lake and Blair Lake Areas and Mining Claims TB-1148206, 1148215 to 1148217, both inclusive and 1148225 to 1148227, both inclusive, situate in the Blair Lake Area, in unorganized territory, in the Thunder Bay Mining Division.

6. THIS TRIBUNAL FURTHER ORDERS that the certificate of pending proceedings as it concerns only Mining Claims TB-1099916 to 1099935, both inclusive, situate in the Cosgrave Lake Area, Mining Claim TB-1148205, situate in the Cosgrave Lake and Blair Lake Areas and Mining Claims TB-1148206, 1148215 to 1148217, both inclusive and 1148225 to 1148227, both inclusive, situate in the Blair Lake Area, in unorganized territory, in the Thunder Bay Mining Division dated June 10, 1993, is hereby vacated.

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IT IS FURTHER DIRECTED that upon payment of the required fee, this order be filed in the Office of the Mining Recorder for the Thunder Bay Mining Division.

Reasons for this order are attached.

DATED this 15th day of July, 1994.

L. Kamerman
MINING AND LANDS COMMISSIONER

Appeal No. MA 019-93

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Mining and Lands Commissioner	)	of July, 1994.

THE MINING ACT

IN THE MATTER OF

An application under section 105 of the **Mining Act** in respect of Mining Claims TB-1120989 to 1120994, both inclusive and 1121734, situate in the Blair Lake Area and Mining Claims TB-1120995 to 1120999, both inclusive, situate in the Cosgrave Lake Area, in unorganized territory, in the Thunder Bay Mining Division, hereinafter referred to as the "Mining Claims".

B E T W E E N:

COSTY BUMBU and JAMES A. MARTIN

Applicants

- and -

NORANDA EXPLORATIONS COMPANY, LIMITED,
(NO PERSONAL LIABILITY)

Respondent

REASONS

The hearing of this matter was conducted by telephone conference call commencing at eleven o'clock in the forenoon on July 12, 1994.

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Appearances:

Albert C. Gourley	Counsel for the respondent, Noranda Explorations Company Limited (No Personal Liability).
Steven W. Lukinuk	Counsel for the applicants, Costy Bumbu and James A. Martin.

Preliminary Matters:

The tribunal raised several preliminary matters before hearing from Mr. Gourley on his motion.

Mr. Lukinuk had served a Motion to Amend Application, dated October 13, 1993, which requested that all of the Mining Claims listed in his original application be deleted except those listed on Schedule "B" to the July 11, 1989 and March 15, 1990 documents, filed in evidence in support of the original application. Mr. Lukinuk indicated that this was still his intention, and the tribunal found that it would amend the Title of Proceedings to encompass only Mining Claims TB-1120989 to 1120994, both inclusive and 1121734, situate in the Blair Lake Area and Mining Claims TB-1120995 to 1120999, both inclusive, situate in the Cosgrave Lake Area, in unorganized territory, in the Thunder Bay Mining Division.

The tribunal noted that paragraph 2 of the Notice of Motion dated July 6, 1994, states that the purpose of the motion was to "hear and determine the issue of costs associated with the application". It was clarified that the motion was brought under section 122 of the **Mining Act**, which states:

> **122.** Where the Commissioner considers the matter or proceeding vexatious or where it is brought by a person residing out of Ontario, the Commissioner may order that such security for costs as he or she considers proper be given and that in default of such security being given within the time limited or in default of speedy prosecution the matter or proceeding be dismissed.

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Although Mr. Lukinuk did not have notice that this was in fact the issue, it was determined that Mr. Gourley would present his submissions, at which time Mr. Lukinuk would indicate if he had difficulty in proceeding.

Finally, the tribunal noted that paragraph 3 of the Notice of Motion dated July 6, 1994, states the motion would "discuss and determine any other matters raised by the parties at the Pre-Hearing Conference." Both Counsel agreed that they were aware that the matter was in fact a motion and not a Pre-Hearing Conference.

Submissions:

Mr. Gourley submitted that in an application for a declaration under section 122, a matter can be considered "vexatious" referring to **Black's Law Dictionary** as an action which has been brought "[w]ithout reasonable or probable cause or excuse".

At issue in the application is the determination by the tribunal of which of the two documents referred to above, namely that of July 11, 1989 or that of March 15, 1990, constitute the agreement between the parties. It is the position of Noranda that the March 15, 1990 document constitutes the agreement, with the document of July 11, 1989 being a letter of intent. Messrs. Bumbu and Martin contend that the July 11, 1989 document governs.

While acknowledging that consideration of the motion was not an examination of the merits, Mr. Gourley made several general submissions concerning the applicants' case.

Mr. Gourley contends that the July 11, 1989 document is merely a letter of intent, and as such does not have sufficient information concerning which mining claims comprise what are to be considered the Area of Interest Claims, nor does it clarify the nature of the applicants' interest in the aforementioned Area of Interest Claims.

The applicants' position on the March 15, 1990 document is that it was made without consideration, which Mr. Gourley submits is overcome by the fact that it was executed under seal.

Mr. Gourley submitted that the applicants' position concerning the July 11, 1989 document is defeated by the parole evidence rule, which can be summarized as being

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where there is a written contract between two parties, evidence of discussions which took place prior to or after the agreement was reduced to writing, as a means of clarifying the parties' intent, will not be permitted.

The **Statute of Frauds**, R.S.O. 1990, c. S.19 and section 58 of the **Mining Act** requires that the applicants fully corroborate the July 11, 1989 document by some material evidence, proving a binding contract. Mr. Gourley submitted that all evidence provided by the applicants serves to corroborate the March 15, 1990 agreement instead.

Mr. Gourley submitted that the equitable doctrine of laches applies to the conduct of the applicants, whereby the conduct complained of arose in 1991, but allegations did not surface until 1993. Having failed to diligently prosecute their case, by their conduct they should not be permitted to succeed at this time.

Finally, Mr. Gourley submitted that the respondent was likely to experience difficulty collecting costs after the fact, and requested that the application be granted.

Mr. Lukinuk submitted that the respondent's position completely ignores the initial agreement between the parties, having been dated July 11, 1989 and signed back July 14, 1989, wishing to rely on the contract drawn up by its counsel. This approach, in his submission, completely ignores the agreement made between the parties in the bush.

Mr. Lukinuk submitted that it is not the law to ignore a valid agreement because a more professionally drawn up agreement is subsequently drafted. Had it been the case that only the July 11, 1989 agreement had been executed and Mr. Bumbu had tried to sell the option in the Mining Claims elsewhere, Mr. Lukinuk suggested that the position taken by Noranda on the validity of the July 11, 1989 document would be quite different.

By virtue of the July 11, 1989 document being a valid and binding agreement, the respondent's argument concerning the March 15, 1990 document being under seal is overcome. As to the issue of the parole evidence rule and the requirements of the **Statute of Frauds** and the **Mining Act**, Mr. Lukinuk submitted that there is ample evidence to support the earlier document, including the payment of $3,000 to the applicants, the taking of physical possession by Noranda and the execution of valid transfers by Messrs. Bumbu and Martin, having been recorded on August 22, 1989, well before the second document came into existence.

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Mr. Lukinuk submitted that there is no issue of laches at law where a trust is found to exist, which is clearly the case concerning the parties with respect to the Mining Claims.

Mr. Gourley responded by stating that the March 15, 1990 document is a contract under seal which clearly supersedes the earlier letter of intent, and the terms of both documents spell this fact out clearly.

Preliminary Findings:

Based upon its finding that the title of proceedings would be amended to remove certain mining claims which are no longer the subject matter of this application, the tribunal, by its own motion, determined that the Certificate of Pending Proceedings (on this application which was received by the tribunal on June 8, 1993), dated June 10, 1993, recorded on June 16, 1993, and continued on June 21, 1993, would be vacated in respect of Mining Claims TB-1099916 to 1099935, both inclusive, situate in the Cosgrave Lake Area, Mining Claim TB-1148205, situate in the Cosgrave Lake and Blair Lake Areas and Mining Claims TB-1148206, 1148215 to 1148217, both inclusive and 1148225 to 1148227, both inclusive, situate in the Blair Lake Area, in unorganized territory, in the Thunder Bay Mining Division.

Pursuant to its jurisdiction under clause 67(1)(b) of the **Mining Act**, the tribunal finds that Noranda is not responsible for a delay in settling the matter before the tribunal in respect of the mining claims listed in the preceding paragraph. Therefore, the time during which the aforementioned mining claims were under pending proceedings, being June 8, 1993 to July 15, 1994, being the date of this order, a total of 403 days, will be excluded for purposes of determining when the next prescribed unit of assessment work is due.

October 29, 1995 is fixed as the date when the next prescribed unit of assessment work shall be performed and recorded on Mining Claims TB-1099916 to 1099935, both inclusive, situate in the Cosgrave Lake Area, in unorganized territory, in the Thunder Bay Mining Division.

May 27, 1996 is fixed as the date when the next prescribed unit of assessment work shall be performed and recorded on Mining Claim TB-1148205, situate

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in the Cosgrave Lake and Blair Lake Areas and Mining Claims TB-1148206, 1148215 to 1148217, both inclusive and 1148225 to 1148227, both inclusive, situate in the Blair Lake Area, in unorganized territory, in the Thunder Bay Mining Division.

Findings:

The tribunal notes that it considered the issue of whether a matter was vexatious and ordered security for costs in the case of **Osiel v. The Minister of Northern Development and Mines**, MA 015-92, April 26, 1994 (unreported), wherein it applied **Re Lang Michener et. al. and Fabian et al.** 59 O.R. (2d) 353.

The **Lang Michener** case sets out principles drawn from three Ontario cases [**Foy v. Foy (No. 2)** (1979), 26 O.R. (2d) 220 at page 226, 102 D.L.R. (3d) 342 at p. 348, 12 C.P.C. 188 (Ont. C.A.); **Re Kitchener Waterloo Record Ltd. and Weber** (1986), 53 O.R. (2d) 687 at p. 693 (Ont. S.C.); **Re Law Society of Upper Canada and Zikov** (1984), 47 C.P.C. 42 (Ont. S.C.)] concerning what can be considered a vexatious proceeding:

1. The bringing of one or more actions to determine an issue which has already been determined by a court of competent jurisdiction constitutes a vexatious proceeding.

This is found not to apply to the current application.

2. Where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain relief, the action is vexatious.

The tribunal finds that there is a justiciable issue and as such, it cannot be stated with certainty, without a hearing of the merits, that the action cannot succeed.

3. Vexatious actions include those brought for an improper purpose, including the harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights.

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The tribunal finds that there is no evidence that the application was brought for an improper purpose.

> 4. It is a general characteristic of vexatious proceedings that grounds and issues raised tend to be rolled forward into subsequent actions and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in the earlier proceedings.

The tribunal finds that there is no evidence of a multitude of proceedings, nor of actions against the lawyer acting for the respondent.

> 5. In determining whether proceedings are vexatious, the court must look at the whole history of the matter and not just whether there was originally a good cause of action.

The tribunal finds that there is nothing in the history of the matter to suggest that the proceedings are vexatious. An allegation of laches is insufficient for purposes of finding that proceedings are vexatious.

> 6. The failure of the person instituting the proceedings to pay the costs of unsuccessful proceedings is one factor to be considered in determining whether proceedings are vexatious.

The tribunal finds that there is no evidence of a failure to pay the costs of other proceedings with the respondent on the part of the applicants.

> 7. The respondent's [in this case the applicants'] conduct in persistently taking unsuccessful appeals from judicial decisions can be considered vexatious conduct of legal proceedings.

The tribunal finds that there is no evidence to meet this test.

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The tribunal notes that Mr. Gourley questioned the likelihood, in the event of an unsuccessful application, that the applicants would be able to pay costs, which he will be seeking. The tribunal finds that section 122 can be applied only in instances of impecunious parties where those parties reside outside of Ontario, and is not a factor in consideration of whether a matter is vexatious.

Based upon the above test, the tribunal finds that there is no evidence to support the motion that the application is vexatious. It should be noted that the proof required for a proceeding to be found vexatious is onerous. Nothing, excepting the most persuasive and serious of circumstances, should be used to deprive a party of having their matter heard on the merits. This is particularly so where the tribunal is being asked to pre-judge the relative strengths of a case prior to its hearing, so that if the only principle of those outlined above which might apply is number 2, the tribunal notes that it will be inclined to err on the side of caution.

Conclusions:

The tribunal advised the parties during the telephone conference call that the motion for security of costs would not be allowed. This being the case, Mr. Gourley withdrew his request that the matter be heard in Toronto and agreed that it should be heard in Thunder Bay.

The motion of the respondent will be dismissed. The certificate of pending proceedings will be vacated against those mining claims which no longer form part of the subject matter of this application. Time during which the aforementioned mining claims were under pending proceedings will be excluded for purposes of calculating when the next prescribed unit of assessment work shall be performed and filed.