File No. MA 028-04

L. Kamerman	)	Wednesday, the 9th day
Mining and Lands Commissioner	)	of August, 2006.

THE MINING ACT

IN THE MATTER OF

Mining Claim L-3012963, situate in the Township of Frecheville, in the Larder Lake Mining Division, staked by David V. Jones and recorded in the name of Noranda Inc., which has been amalgamated with Falconbridge Limited, (hereinafter referred to as the "Falconbridge Mining Claim");

AND IN THE MATTER OF

Filed Only Mining Claim 3011755, situate in the Township of Frecheville, in the Larder Lake Mining Division, staked by Yvon Gagné, (hereinafter referred to at the "Gagné File Only Mining Claim");

AND IN THE MATTER OF

An appeal from the decision of the Provincial Mining Recorder dated the 24th day of June, 2005, for the recording of the Gagné Filed Only Mining Claim.

B E T W E E N:

YVON GAGNÉ

Appellant

- and -

FALCONBRIDGE LIMITED
(formerly Noranda Inc.)

Respondent

- and -

MINISTER OF NORTHERN DEVELOPMENT AND MINES

Party of the Third Part

O R D E R

WHEREAS an application for leave to file a dispute dated the 10th day of November, 2004 was received by this tribunal on the 16th day of November, 2004;

. . . . 2

AND WHEREAS this tribunal granted leave to file a dispute on the 6th day of January, 2005;

AND WHEREAS the dispute was the second challenge to Falconbridge Mining Claim L-3012963 and was considered by the Provincial Mining Recorder who issued his decision on the 24th day of June, 2005, dismissing the dispute;

AND WHEREAS Mr. Michael Bourassa, counsel on behalf of the holder of Mining Claim L-3012963, Falconbridge Inc., formerly Noranda Inc. and Noranda Mining and Exploration Inc., filed a motion on the 23rd day of June, 2005, seeking to have the leave to file a dispute rescinded and dismissed;

AND WHEREAS Mr. Albert Ristimaki, counsel on behalf of the disputant, Mr. Yvon Gagné, sought to appeal the decision of the Provincial Mining Recorder, dated the 24th day of June, 2005;

AND WHEREAS this tribunal proceeded to hear the motion of Mr. Bourassa on behalf of Falconbridge and did not proceed to hear the merits of the case, which procedure was objected to by Mr. Ristimaki;

1. IT IS ORDERED that the tribunal's decision, dated the 6th day of January, 2005, to grant Leave to File a Dispute be and is hereby rescinded.

2. IT IS FURTHER ORDERED that the application of Mr. Yvon Gagné, dated the 10th day of November, 2004, for Leave be and is hereby dismissed.

3. IT IS FURTHER DECLARED that the filing of the Dispute of Mr. Yvon Gagné dated the 13th day of April, 2005, is beyond the time frames allowable under the statutory frames contemplated by subsection 48(5) of the **Mining Act**.

4**. IT IS FURTHER DECLARED** that the appeal of Mr. Yvon Gagné dated the 20th day of July, 2005, from the decision of the Provincial Mining Recorder dated the 24th day of June, 2005, be and is hereby declared a nullity.

5. IT IS FURTHER ORDERED that the notation "Pending Proceedings" which is recorded on the abstract of Mining Claim L-3012963, to be effective from the 21st day of July, 2004, be removed from the abstract of the Mining Claim.

6. IT IS FURTHER ORDERED that the time during which Mining Claim L-3012963 was under pending proceedings, being the 21st day of July, 2005 to the 9th day of August, 2006, a total of 385 days, be excluded in computing time within which work upon the Mining Claim is to be performed.

. . . . 3

7. **IT IS FURTHER ORDERED** that the 29th day of January, 2008, be fixed as the date by which the next unit of assessment work, must be performed and filed on Mining Claim L-3012963, as set out in Schedule "A" attached to this Order, pursuant to subsection 67(3) of the **Mining Act** and all subsequent anniversary dates are deemed to be January 29 pursuant to subsection 67(4) of the **Mining Act**.

8. **IT IS FURTHER ORDERED** that no costs shall be payable by any party to this application.

THIS TRIBUNAL FURTHER ADVISES that pursuant to subsection 129(4) of the **Mining Act** as amended, a copy of this Order shall be forwarded by this tribunal to the Provincial Mining Recorder **WHO IS HEREBY DIRECTED** to amend the records in the Provincial Recording Office as necessary and in accordance with the aforementioned subsection 129(4).

Reasons for this Order are attached.

DATED this 9th day of August, 2006.

Original signed by

L. Kamerman
MINING AND LANDS COMMISSIONER

SCHEDULE 'A'

MINING CLAIM #	NEW DUE DATE
L-3012963	January 29, 2008

File No. MA 028-04

L. Kamerman	)	Wednesday, the 9th day
Mining and Lands Commissioner	)	of August, 2006.

THE MINING ACT

IN THE MATTER OF

Mining Claim L-3012963, situate in the Township of Frecheville, in the Larder Lake Mining Division, staked by David V. Jones and recorded in the name of Noranda Inc., which has been amalgamated with Falconbridge Limited, (hereinafter referred to as the "Falconbridge Mining Claim");

AND IN THE MATTER OF

Filed Only Mining Claim 3011755, situate in the Township of Frecheville, in the Larder Lake Mining Division, staked by Yvon Gagné, (hereinafter referred to at the "Gagné File Only Mining Claim");

AND IN THE MATTER OF

An appeal from the decision of the Provincial Mining Recorder dated the 24th day of June, 2005, for the recording of the Gagné Filed Only Mining Claim.

B E T W E E N:

YVON GAGNÉ

Appellant

- and -

FALCONBRIDGE LIMITED
(formerly Noranda Inc.)

Respondent

- and -

MINISTER OF NORTHERN DEVELOPMENT AND MINES

Party of the Third Part

REASONS

Appearances

Mr. Albert Ristimaki	Yvon Gagné, disputant and appellant

Mr. Michael Bourassa	Falconbridge Limited, formerly Noranda Inc. and Noranda Mining Exploration Inc.
Ms. Catherine Wyatt	Minister of Northern Development and Mines

The hearing in this matter took place in the Courtroom of the Tribunal on the 30th day of January, 2006.

Background

This matter arose out of circumstances which were not in the least straight forward. An application for Leave to file a dispute was received by the tribunal on November 16, 2004 and granted to Gagné without notice to Falconbridge on January 6, 2005. It was the second dispute by the disputant, Yvon Gagné. Falconbridge brought a motion on June 23, 2005, seeking to have the Leave to file a dispute reconsidered and rescinded. The Provincial Mining Recorder's decision for this second dispute was rendered without a hearing on June 24, 2005, whereby the dispute was dismissed. Mr. Gagné appealed this decision. The Ministry of Northern Development and Mines requested that it be added as a party to these proceedings, as is its right under clause 112(2)(a) of the **Mining Act**. It too brought a motion that the leave to file a dispute be rescinded on the grounds that the tribunal did not have jurisdiction to grant leave under subsection 48(5) on the particular facts of this case.

At the January, 2006 hearing before the tribunal, Mr. Ristimaki, stated that he was not prepared to proceed with the motion, having come prepared to argue his client's appeal. Despite the Appointment for Hearing not having specifically set out the preliminary issues which were to be considered, due to the materials filed by the other parties, the tribunal found that Mr. Ristimaki received adequate notice of the issues. Falconbridge [at the time of the staking in question, actions were conducted on behalf of Noranda Inc. or Noranda Mining Exploration Inc. both of which have been taken over by Falconbridge and continue under that name. For clarity, the respondent has been referred to throughout as "Falconbridge"] and the Ministry of Northern Development and Mines, through their counsel, complied with the Order of the tribunal that materials upon which they sought to rely be served on the disputant/appellant. The tribunal being satisfied that this was done, found that Mr. Ristimaki had adequate notice of the issues and that it would proceed to hear the motions.

Facts Not in Dispute

There do not appear to be any facts in dispute. As no evidence was taken in this matter, information has been taken directly from the Order of the Provincial Mining Recorder, Roy Denomme, dated July 28, 2004 and from documentation and correspondence filed:

- On November 26, 2003, at 10:00 a.m. eastern standard time, MNDM released an Ontario Geological Survey Map (OGS Map 81 787) of an airborne magnetic and electromagnetic survey for the Kidd-Munro, Blake River area. The OGS Map showed an anomaly of approximately 1 square kilometre in size.

. . . . 3

- Mr. Gagné, Mr. Gary Windsor and Falconbridge obtained copies of the Map and determined that they would stake the anomaly. Mr. David Jones would be doing the staking on behalf of Falconbridge.

- On November 26 and 27, 2003, David Jones staked four units, being 3013064, encompassing the anomaly.

- At a time which is unclear, Mr. Jones apparently on the instruction of Falconbridge was directed to stake a larger area around the anomaly and to not record the four unit claim.

- On December 2, 2003, Yvon Gagné and Gary Windsor proceeded to the anomaly intending to stake. Upon finding evidence of the Jones staking, they believed that the lands were no longer open due to the Jones staking.

- On December 16, 2003, David Jones staked a 16 unit mining claim 3102963. This was submitted for recording on January 9, 2004 and was recorded in Mr. Jones name. It was immediately transferred to Noranda Mining and Exploration Inc. On August 24, 2004, it was transferred to Noranda Inc.

- Messrs. Gagné and Windsor were waiting for the recording of the November 26th Jones staking or for the 31 days to expire for its recording. They, however, did nothing in the intervening period between December 28, 2003, which would have been the date when the 31 day statutory window expired, and the date when the 16 unit claim was recorded on January 9, 2004.

- Mr. Gagné filed a dispute on February 3, 2004. He alleged that the lands encompassed by the original four unit claim 3013064 were not open for staking at the time Jones staked his 16 unit claim 3102963.

- Provincial Mining Recorder (the "mining recorder") Mr. Roy Denomme dismissed the dispute on July 28, 2004, after a hearing at which Mr. Gagné appeared in person and representatives of what is now corporate Falconbridge appeared on behalf of the company. The mining recorder's reasons were based upon a finding that he had discretion to accept a second staking of the same lands by the same individual pursuant to section 19 of O. Reg. 7/96. He also found the second Jones staking of Mining Claim L-3102963 to have been in substantial compliance. Based upon the evidence heard, he found that Messrs. Gagné and Windsor did not need to wait to see the initial Jones staking recorded to determine what *other* lands were open at that time.

- Mr. Gagné did not appeal this decision. Instead he staked the four units on August 31, 2004 and sought to file a second dispute. It was his belief that having an adverse interest in the underlying lands would have an effect on the outcome of any potential dispute.

- Mr. Windsor staked the same four units on August 4, 2004. It was marked as "filed only" after filing.

. . . . 4

- The mining recorder wrote to Mr. Gagné twice. On September 14, 2004, Mr. Denomme wrote that the dispute could not be accepted as the validity had already been adjudicated and leave of the Commissioner was required pursuant to clause 48(5)(c)(i). The $51 fee was refunded.

- On September 17, 2004, Mr. Denomme advised Mr. Gagné that the application had been accepted as "filed only" which status would continue for only 60 days unless a dispute was filed or an appeal is filed with the Commissioner pursuant to section 112 of the **Mining Act**. The 60 day period would expire on November 12, 2004.

- On November 10, 2004, Mr. Ristimaki wrote to the tribunal seeking leave to appeal. This document was not received until November 16, 2004. Although the dispute filed is signed by Mr. Gagné, Mr. Ristimaki only mentions Mr. Windsor in his covering correspondence, in which he sought leave to appeal and not leave to file a dispute.

- The application for leave was found to be unclear and as a result the tribunal wrote to Mr. Ristimaki seeking further information and particulars on November 18, 2004. At the time of the receipt of the November 10, 2004 letter, Mr. Ristimaki did not ask for and the tribunal did not order that the filed only status of the Gagné Mining Claim be continued. As a result, no such order was made and it became invalid and ceased to have effect on November 12, 2004.

- Further information was received from Mr. Ristimaki on December 21, 2004. Mr. Ristimaki refers to his "clients" (presumably Mr. Gagné and Mr. Windsor) although this is not clear. Mr. Ristimaki reiterates that he is seeking leave to appeal the mining recorder's decisions to refuse the staking of the smaller mining claims in the center of the larger claim which was accepted for recording.

- The tribunal issued its Leave to File a Dispute on January 6, 2005. The Leave document did not contain a direction to the mining recorder to amend the records in the Provincial Recording Office. However, the covering letter attached to the Leave indicates that it was sent to Mr. Clive Stephenson, one of the Deputy Mining Recorders. A copy was also sent to Mr. Andre Dufresne of Noranda Mining & Exploration Inc, now Falconbridge.

- The first anniversary date of the recording of the Noranda Mining Claim was January 9, 2005.

- The first unit of assessment work was approved and applied on January 10, 2005.

- A Dispute signed by Mr. Gagné on April 13, 2005, was filed with the Provincial Recording Office by Mr. Ristimaki on April 13, 2004. Mr. Ristimaki questioned that he should even be required to do the filing, although apparently the confusion stemmed from whether Mr. Ristimaki should be required to file the Leave to File a Dispute as opposed to the Dispute itself.

. . . . 5

- On June 23, 2005, the tribunal received correspondence from Mr. Bourassa, seeking a hearing to present a motion to have the Leave to File a Dispute struck and to have the dispute itself declared a nullity. His principle reason was that Mr. Gagné had already filed a dispute which was decided in what was then Noranda's favour, which decision should have properly been appealed, had Mr. Gagné elected to not let the matter rest. It was Mr. Bourassa's position that seeking leave to file a second dispute by the same person was inconsistent with clause 48(5)(c) of the **Mining Act**. Mr. Bourassa also maintained that the Gagné application to record was invalid, pursuant to subsection 46(5)of the **Mining Act**, having become so after 60 days when it was not ordered otherwise by either the tribunal or a mining recorder.

- In the interim, a second mining recorder, Mr. Roy Spooner had considered the second dispute without holding a hearing. On June 24, 2004, it was dismissed. Mr. Ristimaki took great exception to the decision having been made in the absence of an actual in-person hearing.

- Mr. Spooner's decision noted that the dispute referred to subsections 16(1) and (2) of O. Reg. 7/96, although these provisions made no sense in the context of the matter before him. He speculated that Mr. Ristimaki was referring to section 16 of O. Reg. 115/91 which was superseded by the 1996 regulation.

- A site inspection was requested by the tribunal on August 28, 2005. It confirmed the various stakings described above and found them located on the ground ostensibly where they were supposed to be.

Pursuant to an Appointment for Hearing, the hearing of this matter was set for January 30, 2006. MNDM had requested that it be made a party to this proceeding on July 25, 2005.

Prior Interpretation of Clause 48(5)(c)

In 2002, through a spate of applications for Leave to file a dispute, the tribunal considered in **McCartney v. Graphite Mountain Inc.** (unreported), tribunal File No. MA 026-02 (August 16, 2002), whether the use of the word "or" between clauses 48(5)(b) and (c) was to be interpreted conjunctively, meaning occurring together, or disjunctively, meaning being in the alternative. In its analysis of the question, the tribunal reviewed inherent problems in statutory interpretation of "and" and "or" and quoted extensively from Dreadger E.A. **Construction of Statutes**, 2nd ed. (Toronto: Butterworths, 1983). The tribunal examined the composite parts of subsection 48(5) and considered different potential interpretations, namely, that the ordinary meanings of the three alternatives in clauses 48(5)(a) through (c) are mutually exclusive. The one year anniversary date precludes a dispute being filed, which may be further modified by performance of assessment work. The tribunal suggested that the discretion to grant Leave pursuant to clauses 48(5)(c) operates notwithstanding the foregoing two limitations. Pursuing this line of reasoning further, the tribunal speculated that the provision could be exercised where either one of subclauses 48(5)(c)(i) or (ii) occurred, whether or not the first year or first unit had passed or been performed and filed.

. . . . 6

The tribunal considered in its analysis the provisions of subsections 71(2), 75(1) and 76(5), concluding that these provisions did not mean that there was an outright prohibition to challenge a mining claim after one year had elapsed, but that clause 48(5)(c) had been crafted to provide legislative authority to address unusual situations which arise. The tribunal noted the changes to the former provision of subsection 56(5), which did not contain paragraphs, but the word "nor" between what is now paragraphs (b) and (c). Interpretation of this provision as considered in **Paquette v. Morissette et al. No. 3**, 6 M.C.C. 447 was referred to. The tribunal noted the differences in drafting. It also referred to the **Ontario's Mines and Minerals Policy and Legislation**, A Green Paper, published by the Ministry of Northern Development and Mines on December 12, 1988. Specifically, it was noted that mention was made of inserting a provision that mining claims in good standing for one year should not be disputable.

The tribunal concluded that, while the legislative changes of 1989, S.O., c. 62, included the element of certainty after one year, that this could be overridden for exceptional circumstances, being those originated by the Minister or where Leave was sought. It concluded that clauses 48(5)(a), (b) and (c) were exclusive, and found a corresponding meaning should be given to the "or" between paragraphs (b) and (c). Therefore, the tribunal interpreted subsection 48(5) as meaning that no dispute could be filed against a claim in those circumstances set out in (a) and (b), unless discretion was exercised to grant Leave under paragraph (c), pursuant to the specific circumstances set out in clauses (i) or (ii).

This interpretation was challenged by MNDM in the course of these preliminary proceedings and the tribunal has revisited its interpretation.

Submissions

At the commencement of the proceeding, the tribunal advised the parties of its concerns prior to hearing from them. This has been expanded upon following its Findings.

Falconbridge

Mr. Bourassa was seeking to have the Leave granted to the applicant/appellant rescinded, the dispute struck and declared a nullity. He submitted that clause 48(5)(c) of the **Mining Act** is not intended to be used where a potential disputant, Mr. Gagné, is the same person who has already filed one dispute which was heard in the summer of 2004 and was rejected and dismissed, following which Mr. Gagné who chose to not file an appeal. That Mr. Gagné chose not to exercise his rights within the appeal period means his rights under the legislation have expired. Mr. Bourassa submitted that the re-filing of a dispute by the same disputant to be re-heard by the Mining Recorder is an abuse of process. The facts for Mr. Gagné were not favourable the first time around so he attempted to create a better situation through an adverse interest. However, the time for having this matter heard passed with the expiry of the initial appeal period.

Mr. Gagne's application to record became invalid 60 days after it was received as "filed only" by the mining recorder, as no order as to its validity has been made which would have allowed it to survive. Subsection 46(5) requires that an application to record for lands

which are already the subject matter of a recorded mining claim, to remain valid, be ordered continued by the Commissioner or the mining recorder or for an appeal or dispute to be filed. None of the actions taken by Mr. Gagne or on his behalf served to constitute compliance with one of these requirements.

In the application made to the Commissioner's office for Leave, it was not clear from the documentation filed what the nature of the application was intended to be. The documentation appears to indicate a leave to appeal, but whatever it was, according to Mr. Bourassa submissions, it was a mishmash, ending with a decision by the Commissioner on January, 2005.

There was a failure to provide due process to Falconbridge regarding the application for Leave, as it was not given notice and had no opportunity to come forward and make arguments as to why it should not have proceeded further at that stage. Mr. Ristimaki's application was made *ex parte* and was granted. Falconbridge should have been heard prior to any decision having been made as to whether to grant the requested leave.

Mr. Bourassa submitted that the tribunal has incorrectly interpreted clause 48(5)(c), namely that in circumstances where one year had passed from the recording of the claim, a dispute cannot be accepted. After the first year's assessment work has been filed and approved, a dispute cannot be accepted. It is submitted that this section was not set up to allow the same person to come forward and make the same dispute again and again. If it has been heard once and had been rejected and further not appealed through the proper course, then that should be the end of the story.

Mr. Gagné exacerbated the situation even further by not filing his Dispute to the Provincial Recording Office until April 13, 2005, some four months after Leave had been granted. At that time, it was well after the year after the recording of the claim and after the first prescribed unit of assessment work had been completed and filed. Although the Commissioner's order was allegedly effective as of January 6, 2005, it was incumbent on Mr. Gagne to file the Dispute prior to January 9, 2005. Clause 48(5)(c) does not create a longer period of time within which a disputant can challenge the validity of a mining claim.

The mining recorder accepted the Dispute, presumably because it came from the Commissioner, but Mr. Bourassa submitted that it should not have been accepted. It was not a proper dispute. The recorder did "hear" it again [in point of fact it was "considered", but no hearing took place, which was one of the concerns raised by Mr. Ristimaki.]

What is now before the tribunal is an appeal from that second dispute which should never have been heard in the first place, so that there should be no proceeding before the tribunal. This entire matter was already heard once by the mining recorder and any substantive matters could have been heard with a properly constituted appeal the first time around, within the statutory time periods. This did not occur and the legislation does not intend that the matter can be heard again in the manner proposed by Mr. Ristimaki.

. . . . 8

Gagné

It was Mr. Ristimaki's position that there was a material change between the initial dispute filed by Mr. Gagné and the one which is the subject matter of this proceeding. Although no affidavits were filed in support of the facts presented by Mr. Ristimaki, the tribunal will refer to Mr. Ristimaki's factual statements.

Mr. Ristimaki maintained that Mr. Gagné acted upon the advice of someone in the Provincial Recording Office, when he had been told to file his first dispute without being advised to stake a claim.

Without such an adverse interest, the first dispute hearing or any subsequent appeal "meant nothing" because only one of the parties to the proceeding, Falconbridge, had some sort of interest in the lands. He suggested that the outcome of that dispute was based upon the equities, which demanded that Mr. Jones or Falconbridge be given the mining claim because there was no adverse interest. The only alternative would have been to throw the lands open for staking for all, which would have been unfair to Mr. Gagné. Falconbridge would have been precluded from staking a second time. So, the equities required that the only decision which could have been made by the mining recorder was to give Falconbridge the mining claim.

In reiterating his position that he was not prepared to proceed on the hearing of the motions, Mr. Ristimaki stated that the motions were in effect for the tribunal to change its mind and that was for a higher court to decide. Mr. Bourassa expressed surprise at Mr. Ristimaki's position, given that adequate notice had been provided through Falconbridge's materials. Ms. Wyatt also expressed similar astonishment, given the filing of her procedural materials and took the contrary position that she was not prepared to deal with the merits of the dispute. The tribunal advised that the matter would proceed.

Both Mr. Bourassa and Ms Wyatt challenged Mr. Ristimaki's assertion that assessment work cannot take place once a claim is under pending proceedings. Although lands cannot be staked once a mining claim is under the notation of pending proceedings, there is nothing in the legislation to prevent the carrying out of assessment work. Should the recorded holder undertake such assessment work, it would clearly be at his or her own risk, but one is not precluded from doing so. On the other hand, many chose not to do the assessment work while a matter is pending and will seek an exclusion of time at the conclusion of proceedings. The rationale for this is that they will not do work on ground for which they have no certainty of retaining. They may choose to work on the ground if they think the dispute is frivolous. It is suggested that Mr. Gagné's dispute is such a case.

Mr. Ristimaki vehemently disagreed with this position, advising that he has personally staked for close to 50 years and has been advised in a dispute situation by the Provincial Mining Recorder to not go on the property. There is a strong reason for this and that is that there is considerable temptation to tamper with evidence before an inspection could take place.

. . . . 9

Ms. Wyatt stated that there is nothing to prevent assessment work while lands are pending, it being more a matter of practicality associated with risk. There is nothing in the **Mining Act** to prevent such activity. The admonition to not go on the property arises out of concerns that the staking markings not be interfered with prior to an inspection; they should not be interfered with at all. Going out on the land could leave oneself open to such allegations.

The tribunal indicated that it agreed with Mr. Bourassa and Ms. Wyatt. It stated that the legislation does not preclude assessment work and indeed has shown a tendency through amendments within the last ten years to sections 30 and 67 of the **Mining Act** to encourage the performance of assessment work while matters are pending.

MNDM

Ms. Wyatt submitted that the appeal should be dismissed due to the fact that the dispute upon which it was based was invalid. The second dispute was not filed with the Provincial Recording Office until April 13, 2005, well after the Falconbridge Mining Claim L-3012963 had been on record for a year and after the first required assessment work had been filed. In either of these situations, a dispute is prohibited pursuant to subsection 48(5). It was submitted that this should be considered as a preliminary matter before considering the appeal.

It was submitted that Mr. Gagné was entitled to appeal the 2004 decision of the mining recorder but failed to do so. Therefore, the "Denomme decision" became final and binding. The second dispute raises the same issues regarding the validity of Mining Claim L-3012963 that were determined in the Denomme decision. The Appellant's apparent intent with the second dispute and this appeal is to try to re-litigate the same issues. MNDM submits that this is an inappropriate use of the Commissioner's process and should not be permitted.

As to the proper interpretation of clause 48(5)(c), Ms. Wyatt submitted that the French version deletes the use of "or" altogether, and instead uses the phrase "selon le cas" loosely translated as "as the case may be", which is distinct and different from the inclusive or exclusive interpretations and tensions which arise when interpreting the word "or" as used in the English version. In reading through the French version, Ms. Wyatt submitted that if the facts were found to apply to any one of the two itemized paragraphs (a) or (b), namely first anniversary after recording or first unit of assessment work, the subsection should be read to preclude consideration of paragraph (c). In her terms, paragraphs (a) and (b) were "show-stoppers".

The "equal authenticity rule" is discussed in **Sullivan and Driedger on the Construction of Statutes**, Sullivan, Ruth, (4th ed.) 2002, Butterworth's Markham, Ont. Citing the fact that Canada's legislation is bilingual and bijural in character, Ms. Wyatt submitted that case law has developed surrounding the issue of interpretation. This became the case in January, 1991, with the **French Languages Services Act** in Ontario.

The "equal authenticity rule" reflects the fact that legislation is not merely published, but is to be enacted in both English and French, which renders both versions official.

. . . . 10

In other words, neither version is considered a copy or a translation. This rule dates back to the late 19th century and was developed by the Supreme Court of Canada in **C.P.R. v. Robinson**[3]. It was held that where there was any ambiguity between the two versions, one must be interpreted by the other. Neither version is to have paramountcy over the other and any rule of interpretation which attempts to resolve conflicts or discrepancies in a manner which allows one version to have priority is inconsistent with the rule. Therefore, if there are two possible interpretations, the court is required to find an acceptable meaning which is common to both versions. In so doing, however, the interpretation applied cannot rely on a preference for one of the two languages. It is recognized in this analysis that the phrasing of two languages may not always be exactly identical and that minor differences can arise. The solution to the interpretation is to read both versions which are equally authoritative, and which must both be examined to determine the intent of the legislature.

The French language version of subsection 48(5) indicates that each of the paragraphs operates disjunctively, or independently. It uses the phrase "selon le cas" which translates as "according to the case" and the section goes on to list the three paragraphs. There is no equivalent word to the "or" in the French version. In any of the listed cases, a dispute is prohibited. With respect to paragraph (c), the circumstances set out in clauses (i) and (ii) are prohibited, except by leave of the Commissioner. Subsection 48(5) is reproduced in both English and French:

> **48**. (5) A dispute shall not be received or entered against a claim,
>
> (a) after one year from the recording of the claim;
>
> (b) after the first prescribed unit of assessment work has been performed and filed and where necessary, approved; or
>
> (c) except by leave of the Commissioner,
>
> (i) after the validity of the claim has been adjudicated upon by the recorder or by the Commissioner, or
>
> (ii) after a dispute has already been entered against the claim.
>
> **48**. (5) Nulle contestation ne doit être acceptée ou inscrite à l'égard d'un claim, selon le cas:
>
> a) plus d'un an après la date d'enregistrement du claim;
>
> b) après que la première unité de travail d'évaluation prescrite a été executée et deposée et, s'il y a lieu, approuvée;
>
> c) sauf autorisation du commissaire:

. . . . 11

[3] (1891), 19 S.C.R. 292; revd on other grounds [1892] A.C. 481 (P.C.).

(i) soit après que le registrateur ou le commissaire a statue sur la validité du claim;

(ii) soit après qu'une contestation a déjà été inscrite à l'égard du claim.

Ms. Wyatt's filings discuss the method to be used for determining the meaning of the word "or" in a statute, whereby presumptions about the inclusive "or" are easily rebutted and the history and manner in which the courts have interpreted "and" and "or" either disjunctively or conjunctively. As the tribunal had already indicated in **McCartney v. Graphite Mountain**, it is not clear when "or" is used in drafting what is meant by it. Ms. Wyatt submitted that excerpts from that decision indicate that much depends on the context within the legislation, its intent and what is reasonable under the particular circumstance.

Security of tenure is a long standing mainstay of limitations on disputes of the validity of mining claims as was acknowledged in **Re Heath and Rose**, (1925) 57 O.L.R. 67; [1925] O.J. No. 12 (Ont. C.A.) where the Court stated "Stability of title is essential to the success of the great mining industry…". Although the facts in that case involve the older system whereby a Certificate of Record could be obtained, the Court held that once such a Certificate is issued it should not be open to question in any way not provided for in the legislation. It further held that the proceedings instituted were improper and "might be treated" as a nullity. It further held that the Certificate of Record must stand, even if fraudulently obtained, unless attacked in some other way. Finally, it found that the right of appeal provided by the legislation was lost by delay.

It was submitted that the tribunal's reasoning and interpretation of subsection 48(5) in **McCartney v. Graphite Mountain Inc.** was incorrect, with respect to the interplay between paragraphs (a), (b) and (c). Ms. Wyatt submitted that if any of the events set out in paragraphs (a), (b) or (c) occur, there can be no dispute. In other words, if one year from recording elapses, or if the first unit of assessment work has been approved, there can be no dispute. This would be the case even if the tribunal granted leave to file the dispute and either of the events outlined in (a) or (b) happened before the dispute can be filed.

Ms. Wyatt submitted that the Green Paper and the **Heath v. Rose** decision made it clear that legislative changes which would take away from this security of tenure or lessen it would not have been intended. One of the things that is important to security of tenure is to have a time-limited period during which a claim is vulnerable.

This is supported by the French version of subsection 48(5), which indicates that no dispute can be brought if any of the three subparagraphs applies. The French version is applicable to interpret the meaning of the English version of a statute. In this case, the clear indication is that each of the subparagraphs is independent (disjunctive). As soon as any one of the events in (a), (b) or (c) occurs, there can be no dispute filed. A dispute filed before any of the events in the three subparagraphs occurs would be valid.

The tribunal had referred to the Green Paper in its decision MA 026-02, wherein it was confirmed that security of tenure was a key concern taken into account in the 1989 amendments to the **Mining Act**. Ms. Wyatt submitted that this intent supports the Ministry's

interpretation of subsection 48(5); whereas the Commissioner's interpretation would diminish the security of a mining claim holder by allowing a claim to remain forever vulnerable to challenge. The intent of subsection 48(5) is to preserve the absolute prohibition of one year, add a further prohibition once the initial assessment work has been filed, and allow a limited opportunity for more than one dispute against a mining claim to be brought with leave of the Commissioner. There is no indication that paragraph (c) is intended to operate "notwithstanding" paragraphs (a) or (b). Any differences in the drafting of the provision, from the pre-1989 version, is stylistic only and reflect trends in legislative drafting.

MNDM's position is further supported by subsections 71(2) and 75(1) of the **Mining Act**, whereby a claim is protected from deemed abandonment or prevents the inspection of a claim for purposes of ascertaining whether the legislative requirements have been met after one year or after performance of the initial unit of assessment work. Only through the operation of subsection 75(6) can the Minister challenge the validity of a claim. There is no reason to interpret clause 48(5)(c) as creating a special authority for the Commissioner to deal with special circumstances when the Minister is clearly authorized to do so in subsection 76(5).

Ms. Wyatt reiterated her point on having a date absent special circumstances beyond which no dispute can be received. She referred to this as a "drop dead" date, meaning that any potential dispute would be stopped dead in its tracks, should any one of the items outlined in paragraphs (a) through (c) take place. Special circumstances are found in subsection 76(5) which authorizes the Minister to challenge the validity of a mining claim at any time during its life and in so doing, he would not be bound by these other limits.

Ms. Wyatt reiterated Mr. Bourassa's statement that had Mr. Gagné objected to the first mining recorder's decision of July 28, 2004, he was entitled to appeal it pursuant to section 112 of the **Act**. He did not do so and therefore pursuant to subsection 110(5), that decision became final and binding with respect to his dispute of Mining Claim 3012963. Even though at the time he filed his own mining claim, Gagné may have characterized this as a new dispute, in substance it was the same as what was heard by the mining recorder. Based on the written materials filed, there were no "new" grounds raised to challenge the validity of 3012963. The second Gagné dispute has all the appearances of being an appeal, when time for appealing had run out. It was submitted that this constitutes an inappropriate use of the tribunal's process. It was also submitted that by the time leave to appeal was granted and filed, the application to record the filed only Gagné mining claim was no longer valid leaving Gagné in the very same circumstances as when he made the first dispute (i.e. with no adverse interest) and with no new issue to dispute before the recorder. It was noted that the Ministry was also not provided an opportunity to address the leave application whereby it could have provided assistance to the tribunal in its deliberations.

Gagné

Mr. Ristimaki reiterated those issues he wanted addressed in a hearing on the merits. He also questioned that the Jones' application to record had not been called into question outside of a dispute process, because he alleged that there were problems with the truthfulness of statements made in that application to record. He questioned how the original four Jones units could be regarded as open for staking within the 31 day window for recording.

. . . . 13

Mr. Ristimaki blamed MNDM for his client's predicament in that it didn't carry out its responsibility and advise that he needed an adverse interest before filing the initial dispute. He also suggested that MNDM was complicit with Falconbridge in the manner that the whole matter was handled whereby Mr. Gagné was advised to file a dispute instead of MNDM inspecting the Jones claims to ascertain whether a false statement had been made. By following that advice, Mr. Gagné ended up wasting his time. Even if Mr. Gagné had won his dispute, the lands would have been open for staking to all and sundry except Falconbridge. This would have been a total mess with all sorts of disputes and everyone chasing these four claims. Mr. Ristimaki stated that with an adverse interest, his clients, Mr. Gagné and Mr. Windsor "would have been going some place." What should have occurred was that MNDM should have withdrawn the four units, if not the entire 16, from staking. This along with statements on the applications to record were, according to Mr. Ristimaki, very serious matters.

Mr. Ristimaki challenged the tribunal to show him a case where there hasn't been an adverse interest. He submitted that it is a very basic principle, namely that a person does have standing to dispute a claim without an adverse interest, but they would derive no benefit. So the whole exercise would be a complete waste of time. Similarly, he suggested that speaking about time limits is nonsense, just trying to confuse the prospector, as is the lengths to which the English and French versions were discussed. Mr. Ristimaki suggested it would be worthwhile to have two English versions, one which is the regular version and one which represents a translation back from the French. He questioned why MNDM is even interested in this matter, suggesting that it was the cause of the problems.

A staker cannot stake the same lands twice. Once Mr. Jones staked 16 units around his original 4, the original staking became a nullity. Those lands were therefore open for staking. The situation created by this was exacerbated by the fact that Mr. Gagné was misled by what he found on the ground. Without the confusion created by Mr. Jones, Mr. Gagné would have staked the four units and there wouldn't be an issue. Therefore, at best, the 16 units minus the four units could be considered valid, but the four in the centre cannot because of the staking the same lands twice rule.

Mr. Ristimaki shared his opinion that all the rest of the arguments concerning orders and time periods is beside the point. He indicated that he was not ready to proceed beyond this question of whether Jones first staking was a nullity. However, if the tribunal were to accept the Jones recording, then limitation periods in the **Mining Act** would be rendered meaningless. Mr. Ristimaki reminded the tribunal that past Commissioners have always said to "keep it simple for the prospector". He submitted that the Jones application certified false statements and this fact must be dealt with.

Mr. Bourassa took umbrage with Mr. Ristimaki's position that the Ministry is the protector of his client as if it were its agent or some such thing. It was pointed out that there is no relationship with the Ministry and Falconbridge can conduct its own fights just as any other company in the same position.

As for the assertion of bad advice, nowhere in Mr. Denomme's reasons does he indicate that the dispute was rejected because there was no adverse interest. Other issues were

examined such as the validity of the Jones' claim. That was the subject of that hearing and it would have been the subject of an appeal had one been filed in a timely manner. Mr. Jones' actions are not the subject matter of the determination before the tribunal at this time.

The tribunal did note that if it didn't have jurisdiction to hear the appeal from the second dispute dismissed by the mining recorder, it nonetheless had considerable concerns about the Jones stakings, for which there was only power in the Minister to pursue. Given that two mining recorders found no problems, the tribunal expressed concerns that its own issues may well remain unaddressed with no viable way in which to air the issues arising out of its concerns.

Mr. Bourassa reiterated that the legislation provides the means for the Ministry to look at the validity of a claim. He believed this would extend to the Commissioner. There are certain mechanisms in the **Act** that says if there is fraud, it can be challenged. But what the **Act** clearly sets out is that third parties cannot come in and raise these issues and that the time limits apply. The time limits exist expressly for the purpose of security of tenure.

Mr. Bourassa submitted that the matter currently before the tribunal procedurally is one in which it does not have jurisdiction. The second dispute is a nullity and there should be no proceeding to hear it.

Mr. Bourassa indicated that, in future, it is hoped that such matters will be afforded full consideration following the submissions of the parties. He submitted that the mining recorder's decision to accept the second dispute was wrong and that it should be a nullity. The actual decision by the mining recorder should never have been heard nor seen the light of day. Due to the fact that the Dispute had not been brought to the mining recorder within the one year and before the filing and approval of assessment work, it was out of time. The **Mining Act** does not say it is the date of the decision of the Commissioner which applies, but rather it shall not be received and entered. It didn't get to the Recording Office in time. He stated that Mr. Ristimaki is free to make whatever allegations he wishes about silly procedural matters and appeals and that it should be kept simple for prospectors, but the **Mining Act** reads the way it does for particular purposes and that is to protect the rights of those who want to exercise and receive those same protections.

Ms. Wyatt pointed out that the mining recorders are not authorized to provide legal advice. It is untrue that not having an adverse interest in the lands was a waste and meant nothing. It is conceded that it would have been a tactical advantage to have that adverse interest had the staking of L-3012963 been found to be invalid. Not having such an adverse interest still left it open for them to dispute the validity of the Jones claim. The facts were known then as they are now with respect to whether any of those stakers might have made an untrue statement. At that initial dispute, no one was represented by counsel, so the benefit that counsel would have brought was afforded to neither.

Ms. Wyatt pointed out that all of Mr. Ristimaki's points about what was staked when were considered by Mr. Denomme. The issues were heard and disposed of. There could have been an appeal but there was no appeal. All manoeuvring since then has only been an attempt to essentially do what couldn't be done which was to appeal the original decision.

. . . . 15

As to allegations concerning the false application to record, at this point there have only been allegations and no proof. Having someone make such an allegation to the mining recorder and expecting that something should be done is not how matters operate. There would have to be some sort of a dispute or hearing.

Issues

1. Is the proper interpretation of subsection 48(5) that paragraphs (a) through (c) operate exclusively or inclusively? Does the use of the word "or" mean that once any one of those alternatives are met, no dispute can be entered? Or, is the "or" to be interpreted effectively as a "notwithstanding (a) or (b), if the facts in (c) apply and discretion is exercised, a dispute may be received and entered?

2. Does the tribunal have jurisdiction to entertain Falconbridge's motion to reconsider this matter pursuant to section 117?

3. Does the tribunal have jurisdiction to continue the Gagné application to record, effective November 10, 2004 *nunc pro tunc*?

4. Can the existence of an adverse interest materially affect the adjudicative outcome of a dispute or is it irrelevant? What would be the effects of allowing an intervening adverse interest on record to the exercise of discretion in determining whether to allow a second Dispute by the same disputant?

5. Should the tribunal exercise its discretion, pursuant to subsections 46(5) and 114(4) and sections 105 and 121 of the **Mining Act** in favour of Mr. Gagné and allow the filing of the application to record *nunc pro tunc* to November 10, 2004?

6. If the answer to #1 above is that no dispute can be entered, do the facts in this case apply to remove this matter from the tribunal's jurisdiction?

7. What is the status of the appeal from the second mining recorder's decision?

Findings

The following facts and circumstances have led this proceeding to this point:

- The tribunal granted Leave without hearing from Falconbridge.

- Although Falconbridge was given notice of the decision to grant Leave, it did not seek to overturn that decision until many months later, when the second dispute had been considered by the mining recorder and which decision was imminent.

- MNDM asserts that the tribunal had no jurisdiction to grant Leave under the circumstances, but nonetheless, the mining recorder considered it and rendered a decision from which there is an appeal.

. . . . 16

- The failure of Mr. Gagné to appeal the first mining recorder decision is blamed by him on his lack of an adverse interest, which situation he places squarely at the feet of someone in the Provincial Recording Office. While Gagné's status is one issue, the validity of the Jones' second staking was an issue which could have been determined upon appeal.

- At the time the tribunal granted Leave, it failed to order the continuation of the application to record, which expired two days after the application for Leave was dated (but not received until four days after it expired on November 16). This failure, if not remedied by the tribunal, puts Mr. Gagné in the same position he was in with the first dispute, namely not having an adverse interest.

- Mr. Ristimaki's application for Leave did not initially or upon providing the requested clarification disclose that Leave to file a dispute was sought, let alone ask for an order continuing validity of the application to record pursuant to subsection 46(5). Throughout it was referred to as Leave to file an appeal. Nor was Mr. Ristimaki clear on who his client was, whether it was Mr. Gagné or Mr. Windsor, despite being given the opportunity to clarify this fact.

- The Leave to file a dispute granted by the tribunal, dated January 6, 2005, did not order the continuation of the application to record, either at that time, or *nunc pro tunc* to the date the application was dated, namely November 10, 2003. Nor did the tribunal, in granting the Leave, direct the mining recorder to amend the records in the Provincial Recording Office. Obviously, sending a copy of the Leave to an individual in the Provincial Recording Office did not ensure compliance with the legislation.

- No date was set by the tribunal by which the dispute for which Leave was granted should have been filed.

- The actual second dispute was not filed by Mr. Ristimaki until April 13, 2005. Nor was it signed by Mr. Gagné until that date. This placed it beyond the dates set out in clauses 48(5)(a) and (b).

- Falconbridge was not given the opportunity to make submissions at the time the application for Leave was received. Notwithstanding this fact, and the fact that a copy was sent to an individual within the company when it was issued, Falconbridge's motion seeking to strike the dispute and having it declared a nullity was not received until June 23, 2004, at which time the mining recorder's decision on the second dispute, whose very existence is now challenged, was imminent, and was in fact issued on the next day.

- Notwithstanding MNDM's position that the dispute was filed after dates by which the statute prohibited its receipt and entry, the mining recorder considered the second dispute and issued a decision. It was submitted that this had been done without the benefit of legal counsel.

. . . . 17

Interpretation of Clause 48(5)(c)

The tribunal has set out the interpretation of subsection 48(5) which it has relied upon prior to this matter after the Facts set out above.

It was urged that examination of the French version of the **Mining Act** could be useful and proper in determining the interpretation to be placed on clause 48(5)(c). The French version does not involve an interpretation of the use of the word "or", but rather uses the phrase, "selon le cas" The subsection then goes on to enumerate what is found in clauses (a) through (c).

Perhaps the legislative intent can be gleaned as easily from subsection 48(6):

> **48.** (6) Where a dispute is entered against a claim after the first prescribed unit of assessment work has been performed and filed but before the assessment work has been approved, where approval is necessary, the dispute shall be deemed to have been resolved in favour of the holder or holders of the claim if the assessment work is subsequently approved and the note of the dispute entered on the record of the claim shall be struck out by the recorder who shall by mail sent not later than the following day notify the disputant of the record's action and the reason therefore.

Subsection (6) applies where a dispute is filed during the time between when assessment work has been filed and when it has been approved. While the provision does not cause the dispute to be rendered invalid, it does have the effect of halting its operation where the assessment work is subsequently approved. When applied, the approval of the assessment work becomes effective as of the date it was filed, for purposes of determining what to do with the dispute. The dispute is then struck.

The date the assessment work is filed becomes key. Once approved, it will have the effect of retroactively striking the dispute and the dispute is deemed to be resolved in favour of the holder. This operation is a close counterpart to clause 48(5)(b) and coincides closely with the interpretation advanced by Ms. Wyatt that clauses 48(5)(a) and (b) must be interpreted to mean "full stop" if either of the first year after recording or approval of the first unit of assessment work should occur. In other words, the time for seeking leave of the Commissioner to file a dispute, in those circumstances where a claim has already been adjudicated on or where there is already a dispute filed, will end at such time as the first anniversary occurs or the first unit of assessment work is filed and approved. Should doubt creep in that assessment work has been filed but not approved, subsection (6) clarifies that the effect of a subsequent approval will operate retroactively to preclude the receipt and entry of a dispute once the first unit of assessment work receives approval.

After careful consideration of Ms. Wyatt's submissions on the equal authenticity rule and shared meaning rule, the tribunal finds as follows. Reading the English version alone of subsection 48(5) gives rise to a possible interpretation that the Commissioner exercising discretion is an exception to the provisions of clauses (a) and (b). This is a very clear possibility on the plain meaning of the words used. It does not, however, accord with the history of this provision, its earlier treatment in case law or with the stated intent in the Green Paper. When

read as a whole, subsection 48(5) can also be interpreted that, should any one of the situations in paragraphs (a) through (c) be found to occur, there can be no dispute received and entered. Taken together with the French version, however, it is only the latter interpretation which makes sense for both English and French versions.

When one considers the impact of subsection 48(6) and the overall thrust of the 1988 Green Paper regarding definitive security of tenure after one year, the only logical interpretation and conclusion which remains is that the discretion of the Commissioner can be exercised in cases where the claim has been adjudicated upon or there has already been a dispute filed, but only if the one year anniversary date has not passed or the first unit of assessment work has not been filed and approved.

Relevant Dates and Applicable Legislation

There appeared to be confusion on the part of Mr. Ristimaki between a need to file the Leave to File a Dispute and the filing the actual Dispute itself. There is no requirement that the Leave be filed by the applicant in order for it to take effect. However, the filing of the Dispute is another matter.

The Leave to File a Dispute took effect immediately. The determination was made on January 6, 2004. Subsections 129(2) and (4) of the **Mining Act** state:

> **129** (2) Every order or judgment of the Commissioner shall take effect immediately upon its signing, subject to any express provision therein.
>
> (4) The Commissioner shall forward a copy of each order or judgment to the recorder who shall amend the records in the Provincial Recording Office as necessary.

Some confusion may have resulted from what took place. It is the usual practice of the tribunal to state within the body of its Orders to direct the mining recorder to amend the records in the Provincial Recording Office. Clearly, based upon legislative provisions, this is not necessary, as the legislation requires that this be done.

Taken together, subsections 129(2) and (4), when applied to the Leave to File a Dispute, which, being a decision is a type of order, means that it was effective on the date that it was signed, being January 6, 2005 and the mining recorder, whose Office was provided with a copy, was required to amend the records. The fact remains that the Leave was effective January 6, 2005 and there was no requirement for Mr. Ristimaki to do anything with it.

An examination by the tribunal of other recent cases wherein Leave to File a Dispute was granted reveals that the tribunal did not issue a Direction to the mining recorder within the body of the Leave so granted. While there may be no legislative requirement for inclusion of the Direction within the body of the document, it is clear that the mining recorders would have come to rely on such direction. The failure to include a Direction in this or other

. . . . 19

Leave documents does not excuse the fact that the statute requires that the records be amended to reflect any and all orders. While the tribunal accepts primary responsibility for having failed to notify the PRO in the manner which it is used to responding, the PRO also must accept responsibility for having failed to respond adequately according to the statute for the leave which was sent to the attention of one of its officials.

Incidentally, the Leave was issued before the first anniversary date and before the first unit of assessment work was filed and approved.

The actual filing of a Dispute, which Mr. Ristimaki ostensibly was seeking Leave for, albeit he did not so indicate in writing, did not take place until April 13, 2005 and no such document was even executed by Mr. Gagné until that date. This was after the last date in which a Dispute could be received and entered.

Where this left the matter, as of January 6, 2005, was that the Leave actually was not issued before the statutory events outlined in clauses 48(5)(a) and (b) occurred. In other words, at the time of the issuance of the Leave, the tribunal was within its jurisdiction to make a finding that it would grant Leave. Therefore, notwithstanding that the tribunal agrees with the "show stopper" argument made by Ms. Wyatt, on the facts of this case, the tribunal finds that it was within the proper statutory framework for making its determination as to whether it should exercise its discretion and grant leave.

However the filing of the Dispute itself is another matter, and will be addressed in due course.

Reviewing its Decisions – Section 117

The provisions of Part VI of the **Mining Act** and the **Statutory Powers Procedure Act** address this issue of reviewing a tribunal's own decision.

Section 117 states,

> **117**. Despite the *Statutory Powers Procedure Act*, the Commissioner may hear and dispose of any application not involving the final determination of the matter or proceeding, either on or without notice, at any place he or she considers convenient, and his or her decision upon any such application is final and is not subject to appeal, but where the Commissioner makes his or her decision without notice, he or she may later reconsider and amend such decision.

There is an inherent ambiguity in interpreting section 117 when considering an application for Leave. If Leave is granted, it is a decision which does not "involv[e] the final determination of the matter or proceeding". However, if Leave is not granted, it becomes a decision involving the final determination. Therefore, how is section 117 to be interpreted when viewed in this light?

Section 117 contemplates, among other things, just the kind of *ex parte* application as was made by Mr. Gagné. The **Mining Act** does not appear to frown on this, but

has provision for reconsideration and amendment. It is not preferable to proceed this way as a matter of course and indeed the tribunal indicated that it would be changing its future process for Leave applications so that the decisions can be made upon proper notice. Nonetheless, the tribunal derives some comfort from the fact that the legislation has made provision for circumstances such as in the current matter.

The **Statutory Powers Procedure Act**, which is referred to in several places in Part VI of the **Mining Act** makes provision for review of a tribunal's decisions in section 21.2. The requirements are that provision for reconsideration is made in the tribunal's rules. Part XXI of the Guidelines for Hearings under the **Mining Act** deals with reconsiderations:

> **PART XXI – REVIEW OF A DECISION**
>
> A request to review a decision is granted only in the most extraordinary circumstances. A request to review is not an opportunity to re-argue a case nor to rebut findings made in the decision. The Commissioner is not required to rehear a matter if (s)he is satisfied the outcome of the decision is not likely to change.
>
> The provisions governing the review of a decision will not apply to those matters which are not limited in time to appeal to **Divisional Court** or Judicial Review, as provided in sections 134 and 135.

Although this unnumbered rule does not specifically refer to section 117, subsection 21.2(3) of the **Statutory Powers Procedure Act** states:

> **21.2.** (3) In the event of a conflict between this section and any other Act, the other Act prevails.

Clearly, the provisions of section 117, which provide for straight forward reconsideration in the case of an interim decision made without notice, will prevail. There is no need to go further into the test set out in the Guideline, namely to make a determination of whether the Commissioner is satisfied that the outcome would be unlikely to change.

In attempting to obtain a sense of the types of matters which may proceed *ex parte* in the courts, the tribunal was unable to draw conclusions as to generally when such proceedings might occur. One instance is that of default judgment. Such is clearly the case where there had been earlier notices, and being in default, a plaintiff was able to proceed to judgment. Therefore, it is not an instance where there is no actual notice of an action. The **Rules of Civil Procedure** include such matters as appointment of a litigation guardian, change or variation of the debtor's name for a writ of seizure and sale, notice of discontinuance, certificates of pending litigation only upon full and fair disclosure.

Service of Notice of Motions is dealt with in the **Canadian Encyclopedic Digest (Ontario),** 3rd Ed., at paragraph 354:

. . . . 21

> § **354**. The notice of motion must be served on any person or party who will be affected by the order sought, unless the rules provide otherwise; however, where service is impracticable or unnecessary, the court may make an order without notice; where delay might entail serious consequence, the court may make an interim order without notice. Unless the court orders otherwise or the rules provide otherwise, an order made without notice must be served on the person or party affected by the order, together with a copy of the notice of motion and all affidavits and other documents used at the hearing of the motion. Where a notice of motion ought to have been served on a person who has not been served, the motion may be dismissed, dismissed only against the person who was not served or adjourned with a direction that the notice be served on the person, or a direction may be given that any order made on the motion be served on the person.

It makes sense that, when Leave is sought to commence an action such as a dispute, the holder of the mining claim should be heard from. This was a point which the tribunal heard quite clearly from Mr. Bourassa on behalf of Falconbridge and finds that it agrees.

Therefore, in a case such as the current one, where the Leave was considered and granted without notice, the tribunal finds that it is an appropriate case in which to apply the provisions of section 117, notwithstanding that the decision to revoke the leave granted would have the effect of being a final decision. Clearly, a party affected by a decision of the tribunal, one in which the end result may be the loss of the mining claim held, should have the right to be heard on whether the Commissioner's discretion should be exercised in granting the Leave requested.

Adverse Interest

There is one other discretionary decision which may or may not affect the outcome of this or other similar proceedings. Mr. Ristimaki has maintained that the failure to appeal the initial dispute was based upon the fact that Mr. Gagné had not staked a claim, without which the outcome had to be different than if he held an adverse claim at the time the dispute was under consideration.

The tribunal has looked into this issue of adverse interest and cannot find any substantiation for this position in law. While it is true that Mr. Gagné's position, should the outcome of any potential dispute be against the Falconbridge mining claim, would be far more favourable than it was at the time of the initial dispute, namely that no interest was held in the lands.

An examination of the decision of Mr. Denomme, the first mining recorder to consider the dispute, does not disclose that the absence of an adverse interest played a role in his decision. He noted the argument on behalf of Falconbridge that without the adverse interest, a ruling in favour of the disputant would result in the lands coming open for staking creating a competitive situation. He further noted that the provisions of section 19 of O. Reg. 7/96 suggest

. . . . 22

that Falconbridge would be ineligible to stake if such competition occurred. The decision of the mining recorder rests upon the exercise of his discretion under the aforementioned section 19 to not refuse or cancel the second staking which covers all of the lands encompassed by the first staking.

In exercising this discretion, the question which he asked himself was based solely on the second staking. There was nothing to indicate that the second staking was not in, strictly speaking, substantial compliance with the legislative requirements, meaning that the posts, blazing and distances were as required. On this basis, the dispute was dismissed. It is only when the impact of the first staking on the second staking is raised that the question becomes less clear.

In examining other cases in which an adverse interest arose, the tribunal was unable to find anything which suggested that it would be a factor in determining the validity of the first staking. Indeed, the legislative requirements are clear, in that the tests are those of substantial compliance, deemed substantial compliance and an unlikelihood that others wishing to stake in the vicinity would be misled on the ground.

Adverse interests have primarily played a role in the cases considered when there was a staking after the forfeiture of mining claims. In **McDonough v. Boyd**, (1914) 2 M.C.C. 246, the two stakers claimed the same discovery. Through error, McDonough purchased lands patented through the **Public Lands Act** settlement provisions, which he mistakenly thought included the mining rights. McDonough showed Boyd his discovery on the 2nd of July. On July 16th, Boyd staked the lands in question. On September 16, McDonough staked the lands, having discovered his error as to title.

At the time of his staking, Boyd's miner's licence had not been renewed. He obtained a special licence by Order in Council on August 18. The Commissioner found that Boyd obtained no rights during his staking of July 16 as he did not have a valid miner's licence at the time. The Commissioner did not rule on the validity of Boyd's purported discovery, having disallowed his claim, but did find as a fact that he adopted as his own the discovery of McDonough.

McDonough's own staking in September was not timely as required by the legislation, but in view of his mistaken understanding of the circumstances of ownership, he was the staker who availed himself of the earliest opportunity to stake his discovery and it was ordered to be recorded. The finding of the Commissioner was that in the circumstances, there was no adverse interest in Boyd.

In **Neilly v. Lessard**, (1917), 2 M.C.C. 332, 38 L.R. 440, 33 D.L.R. 634, two stakers staked conflicting and overlapping claims, each exceeding, with respect to some or all boundaries, the statutory requirements that their claims be 20 acres having dimensions of 20 chains by 10 chains. Each claimed the overlapping portions comprised of about one half acre. Neilly's claim constituted 19.5 acres while Lessard's was 24.13 acres. Each had surveyed one line of their boundary but failed to stake accurately from that surveyed line. Based upon the equities of the case the Commissioner found for Neilly, whose staking had been completed first.

The Court of Appeal reversed this decision, finding that each should be given the lands shown on their applications to record, which did not overlap. Essentially, the stakers were given what the **Act** allowed and not what was inaccurately laid out on the ground. The Commissioner's decision noted that in this case, there was an adverse interest, but the stakers had staked almost simultaneously and the adversely interested party, Lessard, was as much at fault as Neilly.

Nunc pro tunc

There are two questions which arise in connection with the November 10, 2004 leave application, where Mr. Gagné's application to record became invalid on November 12, 2004. The first question is whether the tribunal has the authority to order the continuation of the application to record *nunc pro tunc* to November 10, 2004, the date in which Leave was sought. The second issue is whether this is a proper case in the circumstances in which to exercise such discretion at this late date.

It has been noted that inferior courts lack the jurisdiction to make orders *nunc pro tunc*. [**NDM v. Huron-Perth Children's Aid Society** [2005] W.D.F.L. 2209; [2005] W.D.F.L. 2201; 15 R.F.L. (6th) 178, at page 4 of the LawSource version, where it was argued that the Ontario Court of Justice lacks such jurisdiction. That court was found to lack the inherent jurisdiction, which is found in the Ontario Superior Court of Justice and Court of Appeal through the **Courts of Justice Act**, which permits the granting of equitable relief unless otherwise provided. Although lacking inherent jurisdiction, the legislation under which the matter was considered was found to be a "complete code for [child] protection hearings", giving the Ontario Court of Justice jurisdiction to make the order *nunc pro tunc*.

The Mining and Lands Commissioner is not a court, judge or justice of the peace, within the meaning of the provision, to which the **Courts of Justice Act** applies. Although the tribunal was a court of record for a period in its history from 1924 to 1956, and indeed the origins of the original Mining Commissioner found in the **Mines Act** of 1906 provided that the Commissioner was an officer of the High Court who was required to be a barrister and solicitor of ten years standing at the bar. Although many of the overt legislative references to a court have been removed, many of the powers of the tribunal remain those of an inferior court of review or appeal. This fact has been recognized in **Dupont v. Inglis** [1958] S.C.R. 535 and in **Minescape Exploration Inc. v. Bolen**, 39 O.R. (3d) 205.

Notwithstanding its ambiguous or hybrid status, the Mining Judge and past Commissioners have made orders *nunc pro tunc*, as does the current Commissioner. **See Northbridge Mines Limited and Greenstone Mines Limited** 3 M.C.C. 180 at page 182, where Commissioner MacFarland stated:

> … it was a well established principle of common law that where a court or tribunal was seized of the matter within the time limited by statute it had power to make its judgment or order as of the date the issue arose. The claims had been forfeited on November 24, 1956 and the application for relief was under the date of January 16, 1957. There was therefore authority to issue an order *nunc pro tunc; Quebec Nickel Corp. Limited v. Venus et al.,* 3 M.C.C 145, (1955) O.W.N. 741; *Cameron et al v. Blair Holdings Corporation et al.*,(1955) O.W.N. 61

. . . . 24

The **Quebec Nickel Corp. Limited v. Venus** case was made by Godson, J., perhaps the last decision he rendered as Judge. The Mining Commissioners Cases, Volume 3, actually contains a synopsis or summary of the decision, edited by Registrar Desmond G.I. Horan. The Ontario Weekly Notes contains the actual word for word decision which will be referred to here.

The facts in **Quebec Nickel** were that certain mining claims held by a major mining development company had forfeited on May 27, 1954. Under previous legislation, prior to 1991, it was possible for the Judge and then the Commissioner to relieve such mining claims from forfeiture within a period of six months. In this case, the six months expired on November 27. On November 20 or 21, the claims were restaked and presented for recording on November 24. On November 23, Quebec Nickel applied orally to the Court for relief from forfeiture and an extension of time to apply for patents. Notations of "pending proceedings" were placed on the abstracts of the claim on November 24th.

The Court determined that, as there was an adverse interest, it would have to hear the matter. At page 734, Godson J. stated:

> When "pending proceedings" were placed against the claims it meant that for the present all matters remained as they were when presented to the Court prior to the expiration of the six months hereinbefore referred to. It is obvious that if that had not been done, and the facts had not been heard orally, the claims might have been transferred, and the Court would be faced with possible innocent purchasers for value without notice. In effect, then, the issue is now dealt with as of the date of the application for relief from forfeiture.
>
> If it could be said the "pending proceedings" which were placed against the claims, were not in the form of an order, but a direction from the Court, in my opinion it was the equivalent of an order.
>
> The remedial section, s. 150, of the Act` could be applied to the superficial defect, if any. This section states that: "No proceedings before the Mining Court or a recorder shall be invalidated by reason of any defect in form or substance or failure to comply with the provisions of this Act, where no substantial wrong or injustice has been thereby done or occasioned."
>
> I am of the opinion that, as no wrong or injustice has been done by delivering judgment at this time, the Court has the power to make an order granting relief *nunc pro tunc*. It is a principle of common law that the Court, being seized of a matter, may make its judgment or order as of the date that the issue arose, which was on or about the 24th of November 1954. I refer to a recent decision in the Court of Appeal in *Cameron et al. v. Blair Holdings Corporation et al.,* [1955] O.W.N. 61, which has bearing on the question of *nunc pro tunc.*

Subsection 114(4) states:

> In any matter or proceeding, other than an appeal, in any case where leave to take

. . . .25

> the proceeding is necessary, the Commissioner may give leave upon such terms as to security for costs or otherwise as the Commissioner considers just.

Such terms, it is found, include the power to make its granting of Leave *nunc pro tunc*.

Ordering Continuation of Application to Record nunc pro tunc – Exercise of Discretion

The decisions on whether to exercise discretion *nunc pro tunc* revolve around the concept that it should not be exercised except in special circumstances. **Weldon v. Neal** (1887), 19 Q.B.D. 394 (Eng. C.A.) stands for the proposition that amendments to pleadings are not admissible when they prejudice the rights of the opposite party as exist at the date of such amendments. Under very special circumstances, the court may have the power to allow such an amendment, but as a general rule, it will not do so. If the amendment were allowed which would be defeated by a limitation period, it would allow the applicant to take advantage of the application to defeat the limitation period and take away an existing right from the respondent. Under such circumstances, it would not be allowed.

An opposite view is that the courts have the power to make its records speak the truth and in so doing, has inherent power under the **Rules of Civil Procedure**, particularly Rules 1.04 and 2.01 to give effect to this principle. [See **General Electric Capital Canada Inc. v. Deloitte & Touche LLP** 73 O.R. (3d) 283 and **Gordon v. Deputy Minister of National Revenue (Customs & Excise)** 44 C.P.C. 2d) 129, 3 T.C.T. 5343]

> **1.04** (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.
>
> (2) Where matters are not provided for in these rules, the practice shall be determined by analogy to them.
>
> **2.01** (1) A failure to comply with these rules is an irregularity and does not render a proceeding or a step, document or order in a proceeding a nullity, and the court,
>
> (a) may grant all necessary amendments or other relief, on such terms as are just, to secure the just determination of the real matters in dispute; or
> (b) only where and as necessary in the interest of justice, may set aside the proceeding or a step, document or order in the proceeding in whole or in part.
>
> (2) The court shall not set aside an originating process on the ground that the proceeding should have been commenced by an originating process other than the one employed.

In the matter before the tribunal, Gagné has attempted to show that there is a new set of circumstances by reason of his staking, thus creating an adverse interest in the four units. This does not reflect the reality of his case.

. . . . 26

Examination of the Denomme decision discloses some discrepancies as to the issues raised. He noted that the dispute was made on the basis that Mr. Jones for Falconbridge staked the same area twice, which Mr. Gagné maintained was illegal under the **Mining Act.** There was conflicting evidence. Mr. Windsor indicated that he and Mr. Gagné waited for the recording of the first four unit claim because they wanted to see the boundaries on the map. What is not stated, but is supposedly the case, is that those boundaries would have some significance relative to the anomaly. Mr. Gagné stated that they waited for the initial four unit claim to be shown because there was a feeling that it had been staked at least one claim length too far north. This corroborates Mr. Windsor's statement, but does not support the reasons stated for the filing of the dispute. Falconbridge waded into this confusion by stating that what was shown on the map was irrelevant; that what was staked on the ground was what governed. Perhaps this caused some deflection from the underlying issue of whether the anomaly had been properly staked initially or not.

What is clear, however, is that the evidence either did not touch upon or concentrate on the purported illegality of the second Jones staking. There was merely confusion created by the circumstances.

Upon initial reading, it appeared that Mr. Gagné was not clear regarding the basis of his dispute, namely whether it was illegal or because he could not tell whether the anomaly had been staked. In the end, it amounts to the same thing. Had Mr. Jones recorded his first staking, it would have fallen to Mr. Gagné to determine whether there was still land available in which he had an interest. The fact that Mr. Jones did not record means that Mr. Gagné was deprived of this opportunity, one he had every right to expect, given what he observed in the field. It did not come. Instead, Mr. Jones effectively did an end run on a reasonable strategy of waiting to see by staking the entire 16 units. Therefore, although perhaps Mr. Gagné was not clear regarding the basis of his dispute, failing to focus on the issue of purported illegality and preferring to focus on the confusion created by the purported illegality, either tactic amounts to the same thing. Something was done which was purportedly not permitted, resulting in Mr. Gagné's confusion in the field. That something was held to be of no effect, yet the instigator, Jones, was able to gain the advantage of intervening with a further staking which Mr. Gagné would not have had the right to have considered had he done the same thing.

Mr. Denomme then found that the second Jones staking was in substantial compliance. He also found that he had discretion to allow this second staking, notwithstanding that the first staking could not be deemed abandoned, because it was within the 31 days allowed by the statute to file the application to record. Mr. Denomme relied upon the ambiguity he found in section 19 and exercised his discretion which he indicated the provision had granted him.

He did note that section 44(1) of the **Mining Act** prohibits this to occur:

> **44**.(1) A licensee who has staked out a mining claim shall not, no later than 31 days after the day on which the staking out was completed, make an application to record the claim to the recorder.

. . . . 27

The discretion is found in O.Reg. 7/96:

> **19**. A person who stakes land open for staking and fails to apply to record the mining claim within the time set out in section 44(1) of the Act is not entitled to have a mining claim recorded on the land or to stake the land again, and a mining recorder may refuse or cancel any such staking.

Exercise of Discretion in Granting Leave

Upon reconsideration of the application to file the second dispute, the tribunal has concluded the following. It does have the discretion to issue its leave *nunc pro tunc* to the date the application for Leave was received. Therefore, there is the possibility that Gagné could see a change in his circumstances to that of having an adverse interest in the lands. However, the tribunal does not consider this to be material to the outcome.

Whether or not Mr. Gagné had this adverse interest is of no importance to the questions the mining recorder should have been addressing in the initial dispute filed. Questions surrounding the second staking can only be raised after the status of the initial four unit staking by Mr. Jones was addressed. An adverse interest may provide a strategic advantage if a dispute is successful, but it does in no way change the questions which need to be asked regarding the validity of the staking under challenge.

The time for challenging the decision of the mining recorder was within the time limits for filing an appeal from the Denomme decision in July, 2003. Mr. Gagné did not file such an appeal. His challenges to the Jones mining claim must necessarily come to an end with his failure to file an appeal.

The tribunal finds that it will rescind its Leave to File a Dispute issued on January 6, 2005 and dismiss the application for Leave. This renders the second mining recorder's decision a nullity and the appeal therefore is also rendered a nullity. Should this determination of exercise of its jurisdiction not be correct, the tribunal finds that the issue of whether or not the Leave should be rescinded, owing to the lateness of filing the Dispute, is moot.

Filing of Dispute

The tribunal has concluded that the correct interpretation of subsection 48(5) is that the exercise of its discretion under paragraph (c) can only be exercised before the first anniversary after recording or the first unit of assessment work is filed and approved has not passed. These dates passed within days of the issuance of the Leave.

This would have put Mr. Gagné and Mr. Ristimaki in a quandary because time was so short, that they might have missed the deadline even had they acted hastily. The tribunal finds that this lack of time in which to act is as a result of Mr. Ristimaki's actions leading up to the issuance of the Leave. He wrote in November, to which the tribunal sought further information. He wrote again in late December, but quite frankly did not respond to the specific questions raised. The tribunal issued the Leave to File a Dispute on the assumption that Mr.

Ristimaki was seeking such an order and not the Leave to Appeal he requested. The tribunal also acted on the assumption that Mr. Gagné and not Mr. Windsor was the applicant.

The tribunal finds that the Dispute filed on behalf of Mr. Gagné on April 13, 2005, was beyond what is permitted by the statutory framework. This is so despite Leave having been initially granted to file that Dispute, although the tribunal has subsequently found that the Leave should be rescinded.

The appeal from the decision involving the second dispute is declared to be a nullity.

Second Dispute by Same Individual

The tribunal has not addressed the argument by Mr. Bourassa that subsection 48(5) was not intended to permit the same disputant to file a second dispute against a recorded holder. Although the tribunal cannot imagine what they might be at this time, there may well be circumstances in which an application for leave may be granted to the same disputant, where circumstances change or new evidence which was not available as to the invalidity of the staking is uncovered. However, it is clear that the granting of Leave is not appropriate in the circumstances where the case for the original dispute was not successfully or skilfully argued, following which there was a failure to avail oneself of the statutory right of appeal. The second leave cannot be an attempt to regain the standing which was not perfected by failing to file a timely appeal. The existence of an adverse interest is not found to be a material change.

Exclusion of Time

Pursuant to subsection 67(2) of the **Mining Act**, the time during which Mining Claim L-3012963 was pending before the tribunal, being July 21, 2005 to August 9, 2006, a total of 385 days, will be excluded in computing time within which work upon Mining Claim L-3012963 is to be performed and filed.

Pursuant to subsection 67(3) of the **Mining Act**, January 29, 2008, is deemed to be the date for the performance and filing of the next prescribed unit of assessment work on Mining Claim L-3012963. Pursuant to subsection 67(4) of the **Mining Act**, all subsequent anniversary dates on Mining Claim L-3012963 are deemed to be January 29.

Conclusion

The tribunal has reconsidered its interpretation of subsection 48(5) of the **Mining Act**. It finds that it agrees with MNDM's interpretation that either the first anniversary date of recording or filing and approval of the first prescribed unit of assessment work will operate to prevent a dispute from being received and entered, so that there is no longer an opportunity for the tribunal to determine whether it will exercise its discretion to grant Leave for a second dispute to be filed.

On the facts of this case, the application for Leave was received and granted prior to the occurrence of either of those events. Subsection 129(2) provides that an Order of the tri-

bunal takes effect immediately upon signing unless otherwise provided. The Leave was signed on January 6, 2005, with the anniversary date for recording being January 8, 2005 and the first unit of assessment work approved on January 9, 2005. Therefore, the facts in this case do not preclude consideration by the tribunal on whether to grant Leave.

The only new fact in this case was that Mr. Gagné attempted to have his adverse interest considered in a dispute, something which he did not have for the hearing of his first dispute. Although he did not request and the tribunal did not order that his application to record be continued as valid, the tribunal finds that it does have jurisdiction to order the continued validity of an application to record *nunc pro tunc***.** However, it found that an adverse interest was of no importance to the likely success of a dispute. Rather, it is merely a strategic advantage. As such, the tribunal declined to exercise its discretion and continue the application.

The tribunal finds that it does have jurisdiction under section 117 to reconsider an application for Leave, even if the fact that it may be dismissed would render such reconsideration as the final decision.

The tribunal finds that Falconbridge should have been heard from before the application for Leave was considered and this forms the basis for the reconsideration.

Upon reconsidering the application for Leave, the tribunal finds that it will not exercise its discretion to grant Leave and rescinds the Leave granted. The basis for this decision is that there are no new facts which are relevant to the attempt to dispute the Falconbridge Mining Claim. The time for challenging that claim would have been in a validly constituted and timely appeal from the first mining recorder's decision.

Notwithstanding its findings, the second Dispute was not filed until after the first anniversary date and first unit of assessment work was filed and approved. This being the case, it was beyond the statutory time frames for its being received and entered. The fact that the mining recorder did consider the second dispute and an appeal from that decision was made renders the appeal itself a nullity.

Notwithstanding the foregoing, the tribunal has continuing concerns regarding the circumstances leading up to the recording of the Falconbridge Mining Claim which are set out below.

Continuing Concerns of the Tribunal

The tribunal has had considerable difficulty with disposing of this matter. The reason is not because of numerous irregularities, missed deadlines, misunderstood proceedings. There is provision in the constituent legislation to effect corrections should the facts and circumstances warrant, so that the main issue in contention could be examined. [see sections 117, 121 & 136.] However, on the facts, the application for Leave is dismissed. Even if it were not dismissed, the Dispute was filed out of time, which renders the appeal a nullity. The result is that the merits of the appeal which was never launched from the first mining recorder's decision cannot be considered.

. . . . 30

At the heart of the tribunal's concern is that, upon this disposition, the most cogent issue in this matter as the tribunal sees it, remains unaddressed. That issue is "What lands were open for staking, either to anyone on December 2 or to David Jones on December 16, 2003?"

Behind this issue are many questions surrounding the abandonment within the 31 day window for the recording of a staking which was completed on the ground, the absence of clear legislative notice requirements of such abandonment to the mining recorder and an examination of what are the requirements for the exercise of the mining recorder's discretion under section 19 of O. Reg. 7/96 to permit the recording of a second claim which includes all of the abandoned lands by the same staker. The circumstances of this case have led the tribunal to question whether a recurrence of this situation might have the effect of substantially undermining the competitive staking practices upon which the **Mining Act** is based.

Commissioner's Jurisdiction

There are two general provisions in the **Mining Act** which govern the exercise of the Commissioner's powers:

> **105**. Except as provided by section 171, no action lies and no other proceeding shall be taken in any court as to any matter or thing concerning any right, privilege or interest conferred by or under the authority of this Act, but except as in this Act otherwise provided, every claim, question and dispute in respect of the matter or thing shall be determined by the Commissioner, and in the exercise of the power conferred by this section the Commissioner may make such order or give such directions as he or she considers necessary to make effectual and enforce compliance with his or her decision.
>
> **121.** The Commissioner shall give a decision upon the real merits and substantial justice of the case.

While the tribunal has certainly not heard any argument on this, it does not read section 105 as giving to the Commissioner the right to commence a proceeding or inquiry. There are not any inherent powers in the Commissioner beyond what is provided by statute. In **Dupont v. Inglis**, 3 M.C.C. 237, at page 241, Mr. Justice Rand does state that the decisions on disputes are only part of a general supervisory function.

> …This comprehensive administration taken with the provisions expressly excluding resort to the ordinary Courts, except by appeal under s. 144, indicates that the determinations by the statutory officers are integrated in the rights provided, that, including those given by the Court of appeal, there inhere in the rights as conditions of their creation: *Florence Mining Co. Limited v. Cobalt Lake Mining Co. Limited*, where at 475 Lord Collins uses this language:

> They [the plaintiffs] have completely failed to establish their claim to have made a discovery within the provisions of the Mines Act to the satisfaction of the officer charged with the duty of seeing that the regulations are duly observed.

In the end, it appears that there is no authority for the Commissioner to bring the issues of concern forward in any valid process at this late date, a fact which is deeply troubling. The tribunal entered into its own inquiry, without the benefit of submissions from the parties, as to whether the principles enunciated by the Supreme Court of Canada in **Borowski v. Canada (Attorney General),** [1989] 1 S.C.R. 342 (S.C.C.) was applicable. In that decision, Sopinka, J. outlined what is encompassed by the doctrine of mootness and under what circumstances a court should or could exercise its discretion to hear the matter. In looking at this issue, the tribunal put aside for the moment the question of whether the Mining and Lands Commissioner, with its varied history and current hybrid court/administrative tribunal status, could exercise this type of discretion.

Looking to the doctrine of mootness, Sopinka, J. describes it at page 353:

> The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. The cases do not always make it clear whether the term "moot" applies to cases that do not present a concrete controversy or whether the term applies only to such of those cases as the court declines to hear. In the interest of clarity, I consider that a case is moot if it fails to meet the "live controversy" test. A court may nonetheless elect to address a moot issue if the circumstances warrant.
>
> When is an Appeal Moot? – The Authorities
>
> The first stage in the analysis requires a consideration of whether there remains a live controversy. The controversy may disappear rendering an issue moot due to a variety of reasons….

An examination of the types of cases in which "there is no longer a live controversy or concrete dispute as the substratum of … [the] appeal has disappeared" [at page 357] involve cases where the underlying facts giving rise to the action no longer exist. Examples include legislation or by-laws which have been repealed in the interim, a challenge to the actions of members of a legislative assembly, when the house is no longer sitting, the death of a party or the sale of the asset which is the subject matter of the litigation. The Court noted that labour relations issues involving labour disruptions may be rendered moot by the time an appeal can be heard. In **Law Society of Upper Canada v. Skapinker**, [1984] 1 S.C.R. 357 (S.C.C.), Skapinker challenged clause 28(c) of the **Law Society Act** which required all members of the bar of the province to be Canadian citizens on the basis that it was inconsistent with clause 6(2)(b) of the Canadian **Charter of Rights and Freedoms**. In the time that it took for the appeal to come before the Supreme Court, Skapinker had become a Canadian citizen and so his appeal

was rendered moot but continued by an intervenor, Richardson. Skapinker nonetheless appeared without objection of the other parties and was represented by counsel. The Court permitted the matter to proceed as it was constituted, even though it noted that Skapinker's own application had become moot.

Regarding the circumstances of the Gagné case before it, the tribunal is doubtful that what has taken place would fall within the parameters of mootness. Instead, the tribunal is faced with an application for Leave which in the end was unsuccessful and an appeal, which has as a consequence become a nullity. Most significant is the fact that there had already been one dispute by Mr. Gagné which was heard and no appeal from that initial decision was made. Mootness does not appear to govern circumstances where there has been a complete failure in gaining the right to appear in front of the tribunal. Rather, it appears to be governed by a change in circumstances which have an impact on the proposed action.

In this case, the circumstances have not changed. The legislation does not give Mr. Gagné the right to launch a new dispute without Leave, which was not granted in these circumstances, and he failed to appeal the decision of the original dispute. In this sense, the determination of this tribunal is that Mr. Gagné no longer has a role to play in challenging the Jones second staking. That does not render the questions surrounding that second staking moot, but merely means that Mr. Gagné cannot raise them. Furthermore, since then the "show stopper" provisions of subsection 48(5) have precluded further applications for Leave being granted.

As a result of this analysis, the tribunal has concluded that, even if it were the type of court which would be entitled to exercise discretion under the mootness doctrine, there is no application of that doctrine to the circumstances of this case.

Notwithstanding the foregoing analysis, the tribunal is compelled to voice its continuing concerns in this matter. Perhaps the best and most overriding reason for this is the fact that, owing to the failure of Mr. Gagné to launch a timely appeal of the first mining recorder's decision, the tribunal has never had the merits of this matter before it for adjudication.

Only the Minister May Examine Mining Claim After One Year

The right of the Commissioner to examine issues involving a recorded mining claim are limited to subsection 75(1) so long as such inspection, "for the purpose of ascertaining whether this Act has been complied with" takes place within the year after recording or before the first unit of assessment work has been filed and approved. After that time, it is only the Minister who may raise the question of "ascertaining whether the claim has been staked out in the prescribed manner". The subsection states:

> **75.** (1) The Commissioner or the recorder may inspect or order an inspection of, and an inspector or other officer appointed by the Minister may inspect, a mining claim at any time with or without notice to the holder or for the purpose of ascertaining whether this Act has been complied with, but after one year from the

. . . . 33

> recording of the claim, or after the first prescribed unit of assessment work has been performed, filed and approved, no such inspection shall, unless ordered by the Minister, under subsection 76(5), be made for ascertaining whether the claim has been staked out in the prescribed manner.

The two phrases and provisions actually focus on the concrete actions on the ground. This is also the case with the Minister challenging the validity of a claim pursuant to subsection 76(5). The purpose of an inspection is to provide concrete fact based evidence of what appears in the bush. Neither of these provisions focus any attention on the impact of what exists on the ground with interpretation of legislative requirements concerning staking, recording, abandonment and exercise of discretion regarding abandonment within the 31 day window after staking on the ground.

Moreover, the tribunal notes that the Jones second staking has been "adjudicated" upon twice by two mining recorders. Subsection 76(5) allows the Minister to challenge the validity of a claim during its life and to direct a mining recorder or other person to inspect a claim. Again, the provision appears to be limited to ground-based fact finding. More troubling is the fact that the Minister may rely on those who have already decided this matter not once but twice, and have yet to address questions which concern the tribunal.

It is for this reason, and for the reason that the tribunal questions whether the underlying title of the Falconbridge Mining Claim could withstand through scrutiny, that the tribunal feels compelled to raise these questions at this time and in this manner. Although it is discretionary on the part of the Minister's delegate as to whether he will act on them, the tribunal will be satisfied that, at the very least, the Minister will be put on notice of the exact nature of its concerns.

Abandoned Staking on the Ground Within 31 Day Window for Recording

The questions with which the tribunal is concerned revolve around the issue of an abandoned staking on the ground within the 31 day window for recording. The tribunal questions whether abandonment without recording, without strict guidelines for such occurances, could become a strategy for neutralizing lands generally for competitors.

There are two potential scenarios, which are variations on the facts of this case, which illustrate that there does not appear to be a level playing field between the staker who stakes the same lands twice and others in the vicinity.

Scenario 1

X stakes a 4 unit claim on November 26. On December 2, Y not seeing any evidence of the claim on the ground stakes a 16 unit claim, which is recorded prior to December 16th. X intended to stake a second claim of 16 units, but either finding evidence on the ground or in the PRO, does not stake the "surrounding" claim.

It would then become possible for X to advance the position that he is entitled to have his initial 4 unit claim recorded, having priority.

. . . . 34

The problem which arises in this scenario is that X has not been required to actively declare his abandonment of a claim within the 31 day window after staking. Circumstances would permit him to disavow any intention of abandonment which was undeclared on the date he went out to stake his second, larger claim. In this scenario, the intention to abandon would never be discovered. Only X would know that it had been his intention to abandon the 4 units and stake the 16 which he could no longer successfully do once Y's claim was either staked or recorded.

Scenario 2

X stakes a 4 unit claim on November 26. On December 2, Y stakes an 8 unit claim surrounding that of X without seeing the markings on the ground or crossing X's boundaries. X proceeds with his 16 unit staking on December 16 in similar circumstances of being unaware of the staking of Y.

If Y is able to record his 8 unit claim first, followed by X attempting to record his 16 unit claim, then is X then precluded from then attempting to rely on his earliest staking of the 4 units, which failing any active abandonment, still has priority? The prohibition in section 19 is against the second staking, and while the mining recorder appears to have discretion to not record that second staking, does he have such discretion to refuse the first?

Questions on the Facts of this Case

Are the lands underlying the initial 4 unit mining claim open for staking after November 27th?

If they are considered, for purposes of the legislation, open for staking, how is a staker to treat them or similar lands staked on the ground when encountered in the field?

The notice to the mining recorder of abandonment of the initial 4 unit claim took place after the staking of the second 16 unit claim. Does this absence of a concrete process for abandonment within the 31 day window create an unfair advantage in the initial staker?

Were the Lands Open for Staking Within the 31 Day Window for Recording?

There has been a legislative change which may have an impact on how the activities of stakers in the field are to be regarded. Currently, section 27 of the **Act** states:

> **27.** Except where otherwise provided, the holder of a prospector's licence may prospect for minerals and stake out a mining claim on any,
>
> (a) Crown lands, surveyed or unsurveyed;
>
> (b) lands, the mines minerals or mining rights whereof have been reserved by the Crown in the location, sale, patent or lease of such lands where they have been located, sold, patented or leased after the 6th day of May, 1913,
>
> not at the time,

. . . . 35

> (c) on record as a mining claim that has not lapsed or been abandoned, cancelled or forfeited; or
>
> (d) withdrawn by any Act, order in council, or other competent authority from prospecting, location or sale, or declared by any such authority to be not open to prospecting, staking out or sale as a mining claims.

This was amended in 1996 by S.O. 1996, c. 1, Sched. O. Previously, the relevant provision stated:

> not at the time,
>
> (c) under staking or on record as a mining claim that has not lapsed or been abandoned, cancelled or forfeited; or

The tribunal has not adjudicated on the meaning of this legislative change. Aside from the question of whether "under staking" means land which is in the process of being actively staked, does the change mean that those lands which appear on the ground to have been staked, with completion of staking apparent from markings on the relevant post, are still open for staking?

In other words, are lands which have been staked but not recorded still "open" for staking?

The tribunal was under the assumption that a prospective staker coming across the markings of a mining claim which was completed on the ground would have been required to assess whether that the purported mining claim was deficient before commencing staking. Is it now the case that a staker should never assume that the staked mining claim they encounter on the ground will ultimately be recorded? Waiting for recording clearly creates a disadvantage, as the claim may never be recorded. Re-staking the same lands rather than merely tying on also carries disadvantages. Is the duplication of staking effort unnecessary or does it reflect what is required by the legislation?

The logical implication of the initial mining recorder's decision is that it is irrelevant what one finds on the ground; one can only rely on what has actually been recorded. This could be decidedly costly, propelling prospectors to stake lands and wait when they would have previously thought those lands were no longer open for staking.

Would the options open to the staker be different if that staker carries out an inspection where, according to his or her understanding of the standards set by legislation, the staking on the ground is adequate so that there is nothing in the field to indicate that the staking is problematic? When this situation is coupled with the fact that it is priority of completion and not priority of recording which governs, would such a second staker be misled by what is found on the ground? Or, should each staker disregard all that is found in the field and stake accordingly unless, of course, there is concrete proof of actual recording?

. . . . 36

Does the staking on the ground, with its adequacy of markings and blazing have an impact on the fabric of the lands which are open for staking or does it have no impact on what lands are open until that staking is recorded? Are all lands covered by any staked mining claim on the ground to be considered open for staking within the 31 day window for recording?

Failing prior notification to the mining recorder, the time in which there has been an "abandonment" only becomes clear when there is a second staking by that initial staker. Therefore, at all times until the second staking, one encounters in the field an abandonment which has ostensibly been abandoned without notice or without a declaration and without a warning to those in the bush to disregard whatever markings they find pertaining to that initial staking.

The legislation takes care of that situation in which a mining claim staked on the ground but not recorded within the 31 day window, by deeming it an abandonment, pursuant to subsection 71(1). In the repealed regulation, section 16 of O.Reg. 115/91 made provision for active abandonment which had to be done in writing to the mining recorder before one could become eligible to stake those lands again. Upon receiving such notice, the mining recorder had to certify that the person acted in good faith and for no improper purpose, in which case it would appear that a second staking would then be permissible. The provision stated:

> **16.** (1) Subject to subsection (3), a person who stakes out any land open to prospecting or erects or places any post or marking upon any land open to prospecting, in a manner not in accordance with the Act and this Regulation, is not entitled to record a mining claim on the land or to stake out the land again.
>
> (2) Subject to subsection (3), a person who stakes out any land open to prospecting and fails to make an application to record the claim within the time specified in subsection 44(1) of the Act is not entitled to record a mining claim on the land or to stake out the land again.
>
> (3) A person ceases to be disentitled under subsection (1) or (2) if the person notifies the recorder in writing of the staking out or post or marking and of the persons abandonment of it, satisfies the recorder that the person acted in good faith and for no improper purpose and obtains from the recorder a certificate stating that the recorder is satisfied that the person so acted.
>
> (4) A recorder who issues a certificate referred to in subsection (3) shall enter the certificate in his or her books with its date of issue.

The earlier section required an entry in the books in the PRO before a second staking could take place. There is no indication, however, that the certification must be posted within the PRO. Therefore, the tribunal is uncertain whether there was a general notice to the public and prospectors wishing to stake in the vicinity. Without a posting, it is uncertain whether the change in process would have any impact on those in the field. It may be the case that such a staker is none the wiser, whether he proceeded under the old regulation or the new, and in either case, would be unaware of the status of what he encountered in the field within the 31 day window.

. . . . 37

The unilateral after-the-fact abandonment by Mr. Jones in this instance is contrasted with the provisions of section 70, whereby a recorded holder can abandon all or part of a recorded mining claim. Subsection 70(1) provides that the procedure is at the instigation of the recorded holder. However, a notice of abandonment must be filed. Subsection 70(3) provides that the mining recorder must record the abandonment and post a notice. What is particularly telling are the reopening provisions. Both subsections 70(7) and (8) provide that the lands of an abandoned mining claim or partially abandoned mining claim come open on the 11th day after either the notice of abandonment is filed or after 11 days after the date set by the mining recorder by Order for the moving of posts.

Discretion under Section 19

The Jones second staking was recorded based upon the exercise of the mining recorder's discretion to permit the second staking of the same lands. There was no mention as to the test or parameters used by the mining recorder in exercising this discretion. Instead, Mr. Denomme focused on the issue of good faith and compliance with the legislative requirements. He then raises the issue of whether the disputant was misled by finding two mining claims in the area, when he stated:

> It appears that the act of the second staking is what confused the disputant and not the physical staking of the first claim. The tribunal concedes that there may have been a window when the Jones' [initial] staking could have been misleading to a staker attempting to stake in the vicinity. This would have been the period after the staking of 3012963 on December 16th, 2003, and before the 31 day period for filing of 3013064 of December 29th, 2003. However, this is mute (*sic*) as there was no attempt to stake during this period.

While the mining recorder essentially adopted the legislative tests in the exercise of his discretion, namely good faith, substantial compliance and whether the particular disputant would be misled, as opposed to whether anyone would be misled.

The exercise of this discretion failed to consider whether anyone or the disputant would be misled for the period between November 27 and December 16, when the second Jones staking occurred. This question is tied in with the question of whether the 4 units would be considered open for staking after November 27.

Even if it is determined that the lands must be regarded as open for staking, any staker encountering the Jones first staking after November 27 could make the assumption that those lands were staked and pending their recording. If one proceeded on this assumption, arguably, one would be kept waiting for something to happen until December 27/28, when the 31 days for recording expired, but with Jones staking again in the interim, waiting for the initial recording itself arguably may have been prejudicial to the second prospector. The tribunal questions whether the fact that what Jones knew was different from what anyone else in the vicinity knew was misleading. If it had been found to not be misleading, how does the legislation regard a situation where there are two sets of information and stakers will proceed differently depending on what knowledge they have and how should discretion be exercised in such a situation?

. . . . 38

The prejudice is not because the second staker may wish to tie on, but rather because he or she assumed that for 31 days, there already was a prior staking and he or she would not have staked those 4 units. On the assumption that Jones initial staking did not display in the field any marked deviations from the legislative requirements and a second staker inspected it before proceeding, the question remains unanswered as to whether that second staker would have been prejudiced by finding no problems in the field and electing to not stake those 4 units.

The tribunal questions the relevance of the finding that Gagné didn't elect on December 2 to tie onto the Jones 4 unit claim as indicative of confusion on the part of Gagné as to what land he wanted in the field. Rather, the fact that he did not regard that 4 unit claim as open remains an untested question at the conclusion of all the proceedings related to this matter. There does not appear to be provision in the **Mining Act** for what one's actions should be when confronted with a mining claim within the 31 day window for recording.

This question was not addressed by the mining recorder in the exercise of his discretion.

A second matter not addressed by the mining recorder in the exercise of his discretion is the reason that Mr. Jones simply did not tie on to his 4 unit mining claim. There apparently was nothing to prevent him doing so. Granted, it may have been more cumbersome to tie on in four directions, but this should not be regarded as prohibitive, given that the 4 units in the field were likely staked in compliance with the legislation. The mining recorder had clearly regarded it as being open to Mr. Gagné, who was found to be uncertain as to what lands he actually wanted, to tie on. In retroactively allowing Mr. Jones to have restaked rather than tying on, the tribunal questions whether Mr.Jones' reasons for proceeding as he did would not be material to the exercise of the mining recorder's discretion.

A third matter is that the mining recorder did not deal with the issue of timing of the restaking. The regulation, although initially prohibitive, does provide discretion to allow the second staking. It does not provide any direction as to the timing of the second staking. In this regard, the mining recorder did not inquire into the relevance of the timing of the restaking. He did not inquire into whether the restaking should take place only after he had been notified of the first staking, nor did he inquire as to whether this should be regarded as necessary or irrelevant.

A fourth matter is that the mining recorder did not inquire into the purposes of exercising discretion were the implications of a second staking taking place during the 31 day window for recording after the first staking. Relevant to this question is also the issue of the timing when the mining recorder was apprised that there was an earlier staking. This question remains unanswered.

Falconbridge raised the issue that, if the discretion found in section 19 had not been exercised in its favour, it would then forever more during this period be precluded from staking those lands. The mining recorder made reference in his decision to the fact that he or mining recorders in general have in the past chosen to validate mining claims in this situation. The difficulty with this broad based statement is that it does not provide sufficient information as

to what will be considered when a staker or company finds itself in the situation as Falconbridge did.

Falconbridge's concern that it would never be able to stake the lands again had the discretion not been exercised in its favour is very real. Although, arguably, it had other options, such as tying on or hiring a second staker, the fact remains that those wishing to stake in the field require some clear indication as to what will not be tolerated, given that there are many different scenarios which can play out in the field giving rise to a second staking, as the facts in this case illustrate.

In this case, the tribunal questions whether there was not arguably an advantage to Mr. Jones and Falconbridge by proceeding with abandonment and being in a position to ignore what every other staker would have encountered on the ground. That is that the 4 units had the appearance of having been staked in accordance with the legislation, leading to the conclusion that they were no longer available to staking so that only the surrounding lands were open? Are only the tribunal and Mr. Ristimaki on behalf of Mr. Gagné troubled by what appears to be different sets of rules on the ground for the same lands?

There is a discussion of what constitutes the proper exercise of discretion in Sara Blake, **Administrative Law in Canada**, 2nd ed. Toronto: Butterworths, 1997, commencing at page 81:

> **3,1 DISCRETION**
>
> Many administrative decisions involve an element of discretion. Legislators cannot contemplate all of the circumstances and conduct to be regulated within a specific field of activity, … Someone must be given the responsibility of applying the legislation to each situation as it arises. Also, legislation is ineffective if no one is appointed to ensure compliance. Such a person is granted discretion to determine whether a specific situation is covered by the legislation and whether some sort of compliance order or other remedy is warranted. Also, discretion is often conferred so that considerations of policy and the public interest can be taken into account.
>
> The exercise of discretion involves choice from among options. Some tribunals are empowered to choose whether to exclude from an activity someone who has behaved improperly. Tribunals that have broad discretion to regulate a particular sphere of activity may choose how best to go about that task and may enact rules to put these choices into effect. This chapter discusses how discretion may properly e exercised and the criteria that may be taken into account.
>
> **1. Promote the Objects of the Statute**
>
> Discretion is not absolute or unfettered. Decision makers cannot simply do as they please. All discretionary powers must be exercised within certain basic parameters. The primary rule is that discretion should be used to promote the policies and objects of the governing Act. These are gleaned from a reading of

> the statute as a whole using ordinary methods of interpretation. Conversely, a discretion may not be used to frustrate or thwart the intent of the statute. A discretionary power should not be used to achieve a purpose not contemplated by the Act that grants the power. This use is labelled as an "improper purpose."
>
> All discretionary decisions must be based upon a weighing only of factors pertinent to the policy and objects of the governing statute. "A public authority in the exercise of its statutory powers may not act on extraneous, irrelevant and collateral considerations". Nor may the public authority ignore relevant considerations. It must consider all factors relevant to the proper fulfillment of its statutory decision-making duties.
>
> It of course follows that discretionary decisions should be based on evidence relevant to the powers to be exercised. Selective use of facts is unacceptable. All relevant evidence should be considered and weighed before a conclusion is reached. A decision should not be based upon irrelevant evidence, but relevant evidence should not be ignored.
>
> Some tribunals have the power to make a decision where it is the tribunal's opinion that it would be in "the public interest" to do so. This is not an unfettered power. The decision must be based on facts proven in evidence and must serve the purposes of the statute granting the power.

The tribunal has no doubt that in the exercise of his discretion, the mining recorder was on the right track with respect to considering the objects and purpose of the **Mining Act**. This can be seen from the tests he used, namely essentially those found in section 43 on substantial compliance and deemed substantial compliance, attention to whether the actions were in good faith and unlikely to mislead the disputant. However, as set out above, the tribunal is not as certain that the proper facts and questions were asked in regard to how the tests which support the objects and purpose were applied. There are many questions which remain unanswered and this is of concern to the tribunal.