File No. MA 009-05

L. Kamerman	)	Thursday, the 22nd day
Mining and Lands Commissioner	)	of December, 2005.

THE MINING ACT

IN THE MATTER OF

Cancelled Mining Claim L-1217432, situate in the Township of Teck, in the Larder Lake Mining Division, staked and recorded on the 13th day of September, 1996, in the name of Eric Joseph Marion, cancelled by Order of the Mining Recorder for the Larder Lake Mining Division on the 28th day of August, 1997, (hereinafter referred to as the 'Marion Cancelled Mining Claim');

AND IN THE MATTER OF

Sections 29(a), 32 and subsection 49(1) of the **Mining Act** and Ontario Regulation 7/96;

AND IN THE MATTER OF

An appeal pursuant to subsection 112(1) of the **Mining Act**, from the decision of the Provincial Mining Recorder, dated the 29th day of March, 2005, to not relieve the Marion Cancelled Mining Claim from forfeiture.

B E T W E E N:

ERIC JOSEPH MARION

Appellant

- and -

MINISTER OF NORTHERN DEVELOPMENT AND MINES

Respondent

O R D E R

1. IT IS ORDERED THAT this appeal dated the 30th day of March, 2005, from the decision of the Mining Recorder for the Larder Lake Mining Division, dated the 13th day of September, 1996, be and is hereby dismissed.

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2. **IT IS FURTHER ORDERED** that the appeal and application, dated the 30th day of March, 2005, being in part an appeal from the decision of the Acting Provincial Mining Recorder pursuant to subsection 32(1) dated the 10th day of February, 2005, be and is hereby dismissed without prejudice to the applicant, Eric Marion, to bring an application directly to the tribunal pursuant to subsection 32(1) of the **Mining Act**.

3. **IT IS FURTHER ORDERED** that no costs shall be payable by either party in this appeal.

THIS TRIBUNAL FURTHER ADVISES that, pursuant to subsection 129(4) of the **Mining Act**, R.S.O. 1990, c. M14, as amended, a copy of this Order shall be forwarded by the 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).

DATED this 22nd day of December, 2005.

L. Kamerman
MINING AND LANDS COMMISSIONER

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B E T W E E N:

ERIC JOSEPH MARION

Appellant

- and -

MINISTER OF NORTHERN DEVELOPMENT AND MINES

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REASONS

With the consent of the parties, this matter was determined through written submissions. Documentation on behalf of Mr. Eric Joseph Marion, the appellant in this matter, was received from Mr. Marion and Mr. David Vallillee, retired Ministry of Northern Development and Mines ("MNDM") Mining Lands Technician, who acted as Mr. Marion's agent.

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Introduction

This matter was brought to the Mining and Lands Commissioner (the "Commissioner" or the "tribunal") on the 30th day of March, 2005. From the subsequent filings on behalf of the appellant, Eric Marion, there appear to be several separate matters which he sought to bring as part of this appeal, at least one of which was properly an application pursuant to subsection 32(1) of the **Mining Act**.

Mr. Marion purported in his appeal of March 30, 2005 to appeal a decision of the Mining Recorder of the Larder Lake Mining Division made on August 27, 1997. The basis of this appeal is that the decision was incorrect for two reasons and therefore amounted to an administrative error for which the tribunal had jurisdiction to relieve the Mining Claim in question from forfeiture.

The initial decision of the Mining Recorder concerning the staking of the 1996 Mining Claim was that Mr. Marion failed to obtain the consent of the Minister pursuant to section 29 and further failed to obtain either the consent of the surface rights owners or an Order of the Recorder or Commissioner (tribunal), pursuant to section 32.

Mr. Marion wrote to the Minister's delegate, the Senior Manager Mining Lands, Mr. Ron Gashinski, on August 27, 1997, requesting the consent of the Minister pursuant to section 29. Due to an intervening attempt to stake the subject lands (by another party, to be discussed later in these Reasons), they were withdrawn from staking on August 11, 1998. As part of the section 29 process, Mr. Marion was advised that he would require the consent of the surface rights owners, which he spent the next several years attempting to obtain. On June 14, 2004, Mr. Gashinski advised Mr. Marion in writing that the requested consent pursuant to section 29 would not be given, as Mr. Marion had failed to obtain the required surface rights holders' consent pursuant to section 32.

On January 21, 2005, Mr. Marion wrote to the Provincial Mining Recorder, in three separate letters, and requested consents of the Minister pursuant to clauses 29(a) and (b) and an Order of the Recorder pursuant to subsection 32(2) of the **Mining Act**. On February 10, 2005, Mr. Dale Messenger, Acting Provincial Mining Recorder, wrote to Mr. Marion advising that the response of Mr. Gashinski of June 14, 2005 remained in effect concerning the section 29 request and further that he denied the application for a section 32 Order.

Mr. Marion appealed this decision on March 30, 2005. In his appeal, he sought to have the 1997 Decision of the Mining Recorder rescinded on the basis that an administrative error had been made leading to its removal from the record. Mr. Marion also sought to either appeal the decision of the Acting Provincial Mining Recorder to not grant a section 32 Order or alternatively, to seek such an Order directly from the Commissioner.

The following is a more detailed account of what took place between September 13, 1996 and March 30, 2005.

On September 13, 1996, Mr. Marion staked Mining Claim 1217421, a two unit claim, in Teck Township. The application to record was received by the Provincial Recording Office on September 13, 1996 and the Mining Claim was recorded. The Mining Claim was removed from the

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record on August 25, 1997 as having been recorded in error by Order of Mr. Roy Spooner, then Mining Recorder for the Larder Lake Mining Division. This determination was made pursuant to sections 29 and 32 of the **Mining Act**, namely that the land was not open for staking without the consent of the Minister, being within the town of Kirkland Lake and laid out into residential lots on a registered plan of subdivision and further, that there were owners of the surface rights whose consent was required prior to the staking.

Sections 29 and 32 of the **Mining Act** state:

> **29**. No mining claim shall be staked out or recorded upon any land transferred to or vested in the Ontario Northland Transportation without the consent of the Commission nor, except with the consent of the Minister,
>
> (a) upon any land reserved or set apart as a town site by the Crown;
>
> (b) upon land laid out into residential lots on a registered plan of subdivision;
>
> (c) upon any land forming the station grounds, switching grounds, yard or right of way of a railway.
>
> **32.** (1) Although the mines or minerals therein have been reserved to the Crown, no person shall prospect for minerals or stake out a mining claim upon the part of a lot that is used as a garden, orchard, vineyard, nursery, plantation or pleasure ground, or upon which crops that may be damaged by such prospecting are growing, or on the part of a lot upon which is situated a spring, artificial reservoir, dam or waterworks, or a dwelling house, outhouse, manufactory, public building, church or cemetery, except with the consent of the owner, lessee, purchaser or locate of the surface rights, or by order of the recorder or the Commissioner, and upon such terms as to the Commissioner seem just.
>
> (2) If a dispute arises between the intending prospector and the owner, lessee, purchaser or locate as to land that is exempt from prospecting or staking out under subsection (1), the recorder or the Commissioner shall determine the extent of the land that is so exempt.

On August 29, 1997, Mr. Marion wrote to Mr. Ron Gashinski, Senior Manager, Mining Lands, MNDM, requesting the consent of the Minister "as indicated in Section 29" to stake the area in question. Senior Lands Technician, Mr. Pat MacDonald responded on November 14, 1997 and listed some of the steps which the Ministry would go through to acquire the required background information, agreement and approvals before it would consider the request for consent. These included comments from the Resident Geologist, the Corporation of the Town of Kirkland Lake, the Ministry of the Environment, the Ministry of Natural Resources and a compilation of responses and relevant background information for consideration by Senior Management. Mr. Marion was also cautioned that should consent be forthcoming, he would be required to meet specific conditions prior to staking and follow different guidelines for performing assessment work. Anticipating that Mr. Marion might find the requirements onerous, Mr. MacDonald asked that Mr. Marion advise if it was still his intention to stake. Mr. Marion was given until December 20, 1997 to advise, at which time the file would be closed. There is no evidence that a timely reply was received.

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The land was apparently staked by Mr. C. Jason Ploeger on behalf of Mr. Barry McCombe on July 30, 1998. As a result, the lands were withdrawn from staking by Order of the Minister on August 11, 1998 to clarify the land status and prevent adverse alienation.

On August 13, 1998, Mr. Marion wrote to the Mining Recorder and requested that his letter be considered as an application for consent pursuant to section 32 and further that he wished to maintain his earlier request of August 27, 1997 pursuant to clauses 29(a) and (b). The letter further stated:

> Secondly, entertaining the possibility that there would be a reinstatement of the claim #1217432 because of staking regs #7/96, 1, 2, 3, I would also like this to be an application order for extension under Schedule O amendments to the Mining Act [ss. 67(1), (2) and (5)] with provisions for lands covered under section 32 and 29 similar to the provisions given under the previous consent.

This letter was acknowledged by Provincial Mining Recorder Mr. Spooner on August 26, 1998, who advised that a response would be forthcoming once the status of the lands was determined. The subject heading of the acknowledgement is for an "Application for Recorder's Order to Stake, Section 32 Mining Act…"

On June 29, 2000, Mr. Vallillee wrote to Mr. Marion advising that the process required that the applicant first have permission of the owners of the surface rights pursuant to section 32 before it would issue its consent pursuant to section 29. Mr. Vallillee also advised that obtaining the consent of a large number of individuals with an interest in the surface rights might be unmanageable and an alternative was to apply to the Commissioner for ordered permission. At page two of his letter he stated:

> The process of acquiring consent under section 32, depending on the number of owners, locates, etc., may be unmanageable. In such circumstances referral to the Mining and Lands Commissioner is available. Should that happen, public notice or meetings may be part of the process. These meetings appear to be similar to the meetings that sometimes occur to satisfy the Mining Act prior to 'advanced exploration'. MNDM provides assistance to hold such meetings to the Exploration Industry, of which you are a part, through the Mineral Development Program. Should Public notification become part of your plan, I recommend that you make contact with Mr. Rob Ferguson ….

In his written materials submitted with his appeal to the tribunal, Mr. Marion indicated that he spent three years attempting to obtain the necessary consents of surface rights owners. He filed copies of his requests, each signed back, with four indicating their consent and twelve indicating that they did not consent. Included in his filings is a letter from Mr. Gashinski to Mr. Michael S. Aldred, Deputy Chief Building Official/Zoning Administrator, of the Corporation of the Town of Kirkland Lake. Mr. Gashinski apologizes that he had not responded to three faxes, written over a period of almost one year, indicating that the delay was as a result of the internal review of the appli-

cations of sections 29 and 32 of the **Mining Act**. The process is explained in considerable detail. Also included in the materials is a Ministry Guideline for Work Performed in Town Sites. Ultimately, on March 4, 2002 Mr. Marion obtained the approval of the Town for non-intrusive exploratory work which would have minimal impact on surface rights.

On June 14, 2004, Mr. Gashinski advised Mr. Marion in writing that, due to the fact that Mr. Marion had failed to obtain the required consents, he was not prepared to provide his delegated ministerial consent pursuant to clause 29(b) to stake those lands which are part of a registered plan of subdivision. Mr. Gashinski made several suggestions in the event that Mr. Marion wished to proceed. These were first, that Mr. Marion could stake the ground which was in fact open and did not form part of a registered plan of subdivision, provided that the requirements of section 32 have been fulfilled to the satisfaction of the Provincial Mining Recorder. The second alternative was to apply to the Provincial Mining Recorder for permission pursuant to section 32, failing which application to the Commissioner was a viable option. Mr. Marion was advised that the lands withdrawn in 1998 would be reopened forthwith upon due notice. Mr. Marion was further advised that, should he wish to continue to seek section 29 approval once he received the requisite permission or order pursuant to section 32, certain individuals within the Ministry would be pleased to work with him in developing supporting information as an aid to his efforts.

On January 21, 2005, Mr. Marion requested in three separate letters that the Provincial Mining Recorder consider his application for consent pursuant to sections 29(a) and (b) and for an order pursuant to section 32. Acting Mining Recorder, Mr. Dale Messenger advised on February 10, 2005 that he was not prepared to issue an order pursuant to section 32 with respect to those areas for which consent had not been received. He referred to the letter of June 14, 2004 from Mr. Gashinski concerning the section 29 applications. He also advised of his intention to re-open the lands for staking, which would permit Mr. Marion to stake those areas for which he already had the requisite permission.

On March 29, 2005, Mr. Valilee requested relief from forfeiture of Mining Claim 1217432 pursuant to section 49. On the same date, Mr. Messenger advised that the time of the relevant decision had been August 28, 1997 and referred to section 110 which provides that the order is final and binding unless appealed from to the tribunal within the time limits set out, pursuant to section 112.

Mr. Marion filed his appeal with the tribunal on March 30, 2005.

Appeal

Mr. Marion stated as his reason for appeal that he believed that the cancellation of his Mining Claim in 1997 constituted an administrative error. Mr. Marion alleged that he had been told within the Recording Office that an unrelated third party had told the Mining Recorder that Mr. Marion had not complied with the Ministry's established process which this third party had followed previously. It was alleged that due to this interference, what had up until that point in time been a validly recorded mining claim was cancelled. However, this was clarified by Mr. Marion indicating that the cancellation was due to the fact that consent of the Minister regarding a town site was required pursuant to clause 29(a).

Mr. Marion alleged that the subsequent actions of the Ministry which took place since June 14, 2004, led him to believe that it is not clause 29(a) which applied, being land reserved or set aside for a town site by the Crown, but rather that it is clause 29(b) which applied, being land laid out into lots on a residential plan of subdivision.

If this is the case, Mr. Marion alleged that the cancellation of his claim was in error and without justification. He submitted that his staking was in substantial compliance as a two unit claim, which could be reduced in size should the consent to stake under section 29(b) "registered plan" provision not apply to the claim. The only registered plan which would be involved in this case is M-20, which overlaps with the south boundary of the claim in a triangular area.

In other words, even if the failure to obtain consent from the Minister were fatal to a portion of the Mining Claim, this was not sufficient for it to be struck from the record. Instead, the Mining Recorder should have deleted those portions of the Mining Claim for which the Minister's consent was required and allowed the remaining lands to be recorded. The remaining portion of the Mining Claim constituted a substantial portion of the original Mining Claim, such that it would have been a viable mining claim, had this further error of cancellation not been made.

It was submitted that the Mining Recorder did not make a judicial decision to cancel the mining claim. Again, it was asserted that the decision was based upon the interference of the third party that past and then current practice and guidelines were valid and upon reflection removed the mining claim from the record. It was asserted that the Mining Recorded did not determine that clause 29(a) was applicable, as there was no other information available other than the Ministry's past practice which the third party had to follow twice to obtain the land circumscribed by the Mining Claim in the past.

Even taking into account that a portion of the Mining Claim did require consent, if removed, there would still be left a viable mining claim which should not have been cancelled or removed from the record. Had the Mining Recorder inquired into the matter, he would have determined that less than 15% of the lands staked as Mining Claim 1217432 were subject to a registered plan within the meaning of clause 29(b). Further, there was no indication that clause 29(a) applied to any lands within Teck township. For this reason, the decision to remove the Mining Claim from the record was made in error and relief from forfeiture should be granted.

In addition, there was no indication on the office control map in the Provincial Recording Office that the lands were different from any other lands which are open to staking. Documentation on the earlier third party staking do not indicate that Minister's section 29 consent is required. The process used to verify the status of the lands upon initial recording was questioned, particularly as none of the experienced staff raised questions at that time. It was argued that Mr. Marion should not be held to a higher standard of knowledge than was either possessed or applied by the Recording Office staff at the time of the recording, which it took eleven months to revise.

The issue of costs was raised in connection with this matter. In particular, it was submitted that consideration should be given for compensation for Mr. Marion for the time spent, costs expended and efforts made in pursuing this matter. It is suggested that the Ministry did not inform or attempt to adequately resolve this issue.

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Mr. Marion is also seeking a section 32 Order of the Commissioner. The Acting Mining Recorder had stated that his permission would not be forthcoming. Mr. Marion explained that he did not appeal that decision within 31 days because it never occurred to him that he should be appealing the actions of the Mining Recorder. What took place in this matter was a progression of following through the outlined steps in the **Mining Act**. Mr. Marion referred to the letter of June 14, 2004 from Mr. Gashinski in which he outlined the procedure which could be followed. Mr. Marion stated that it was his error to assume that that there was no time limit between the time of being refused consent of a landowner, being refused an order of the Mining Recorder and applying under section 32 for an Order of the Commissioner.

Mr. Marion also gave as a reason for delay the fact that he attempted to resolve this matter on his own within the Ministry but was impeded in his efforts by having been given the names of five different individuals who were charged with carriage of his file. Throughout this matter, Mr. Marion's health has been adversely affected, aggravated by the allegedly cavalier manner in which the Ministry has treated this matter.

Finally, Mr. Marion has performed much assessment work, most of it done by him personally or funded by him personally.

The following sections and cases were set out in support of the appeal:

Section 29. It was submitted that MNDM does not forfeit claims where staking occurs without section 29 consent, such as pursuant to clause 29(c) and railway right of way lands. Mining claims have been staked throughout Ontario which have railway rights of way running through them, but it is submitted that these have never been treated as fatal without the consent of the Commissioner.

In **Yost v. Chorzepha et al.,** 5 M.C.C 222, wherein it states at page 225:

> The *Hayes* case [**Re Hayes and Bachmann**, 3 M.C.C. 83] illustrates the distinction between standards of prohibitive enactments. The second under consideration in that case read:
>
> 38. No mining claim shall be staked out or recorded upon any land transferred to or vested in The Temiskaming and Northern Ontario Railway Commission, without the consent of the Commission.
>
> It is noted that the section creates a prohibition and does not set a standard for staking. While the Appellate Division endorsed the doctrine of substantial compliance, it is noted that the majority applied a doctrine of severance and the portions of the mining claims that were affective by the prohibition were held invalid. It is also noted in the dissenting judgment of Riddell, J.A. the distinction was recognized but in His Lordship's opinion applied to the particular facts of the case, the prohibition was not severable geographically and invalidated the entire staking. Suffice it for these purposes to point out that the decision clearly gives precedence to a statutory prohibition both in the majority and in the dissenting judgments.

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It was argued that clause 29(b) should also be a prohibition and does not set a standard for staking. As a result, those portions of Mr. Marion's staking which are affected by the section 29 prohibition does not invalidate the entire Mining Claim.

Section 32. It is argued that section 32 is a prohibition and does not set a standard for staking. Therefore, where portions of the Marion staking are affected by section 32, it should not cause the whole of the staking of the Mining Claim to be invalid. There are many instances in which staking in the Province, such as that of a building or outhouse without section 32 consent is generally ignored by the Crown unless the owner raises an issue, whereby the issue is addressed after the fact.

At MNDM's request, Mr. Marion received consent from the Town of Kirkland Lake, being owner of approximately 90 percent of the two unit claim area. Some of the lots were bush lots without improvements in 1996 and some remain so to this date. Therefore, the area requiring section 32 consent is estimated at approximately 10 percent of the two unit area.

All of the lots in question are situated at the perimeter of the former patents. Exploration could easily occur without damage to any of the surface rights of the residential lots. The small percentage of land could easily be omitted from the Mining Claim area.

Should relief be granted and due to the fact that clause 29(b) does apply to some of these lands, it is requested that the required section 32 Order be granted so as to allow the Minister to consider then granting his section 29(b) consent. Should it be determined that clause 29(b) applies, it is requested that the Mining Claim be relieved from forfeiture and an appropriate section 32 Order be granted so that the Minister may consider the required section 29 Order.

Section 121. The Commissioner is to give a decision based upon the real merits and substantial justice of the case.

Section 136. Where the validity of a proceeding before the Commissioner or a recorder is called into question in any court on the ground of any defect of form or substance or failure to comply with this Act or the regulations, although the defect or failure is established, the court shall not, if no substantial wrong of injustice has been thereby done or occasioned, invalidate the proceeding by reason thereof, but shall confirm the proceeding, and upon such confirmation, the proceeding shall be and be deemed to have been valid and effective from the time when it would otherwise have been effective but for such defect or failure.

This section is mentioned in regard to the failure of Mr. Marion to appeal the decision of the Mining Recorder concerning section 32 within 30 days of the Order.

In **Clark v. Docksteader**, 36 S.C.R. 622 MacLennan, J. held that when construing the **Mining Act**, every reasonable intendment ought to be made to uphold the validity of the claim where an honest attempt has been made to comply with the directions of the legislation in staking and describing the claim. In **Hayes and Bachmann,** 41 O.W.N. 31, Latchford, C.J. held that a liberal construction should always be given to the provisions of the Act with regard to staking.

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In Re Thomas Martindale, 4 M.C.C. 183 the Mining Recorder disallowed a staking which was not in accordance with the requirements. The Commissioner held that consideration should be given to the fact that there was no adverse interest and allowed the appeal and directed the Mining Recorder to instruct the appellant concerning required adjustments. It was submitted that similar reasoning should be applied in this case as there are no adverse interests.

MNDM

On behalf of MNDM, Ms. Catherine Wyatt, counsel, submitted a map which outlined the cancelled mining claim and the areas which are part of the registered plan of subdivision and those areas which are subject to a section 32 consent. For ease of reference, this map has been attached as Schedule A to these Reasons.

Ms. Wyatt submitted that the Mining Claim was cancelled by the Mining Recorder on August 28, 1997 and such cancellation became final when the appellant failed to file an appeal within the statutory 15 days. Once the Order became final, it could no longer be challenged through an appeal or indirectly through an application for relief from forfeiture as was made on March 29, 2005.

It is further submitted that the facts of this case do not lend themselves to relief from forfeiture pursuant to section 49. The facts do not support a claim for administrative error. An administrative error can be distinguished from an error in judgment, where the former is an unintended slip or oversight, a procedural error similar in nature to a clerical error, a typographical error or an accidental misfiling done without intention. An error in judgment is not an administrative error but a deliberate and intentional action or decision. It is made based on consideration of the circumstances and the exercise of discretion or judgment, where the judgment may be incorrect.

Ms. Wyatt argues that administrative action is distinguished from a judicial error. The concept of "administrative error" is the same as an administrative oversight as discussed in **McCunn Estate v. Canadian Imperial Bank of Commerce** 53 O.R. (3d) 304 (C.A.) wherein the Court held that it was an inadvertent omission or error and not an intended act. The court stated at page 7 of the Quicklaw version:

> … by inadvertently debiting the monthly premiums … subsequent to the termination date of the contract, the bank cannot be seen to have knowingly intended to make an offer to extend the contract.

Ms. Wyatt cited several examples of administrative error including incorrect calculation of government benefits;[1] rent default due to change in banking arrangements;[2] a court case improperly listed for trial;[3] court documents which were misfiled;[4] or payment applied to the wrong account.[5] The policy manual of the BC Ministry of Forests states, "administrative error" means an error in the administration of a determination, such as a mistake in spelling a person's name or mathematical error in calculating a penalty."

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[1] **Dionne v. Canada**, [2002] O.J. No. 128 (T.C.C.).
[2] **Triple 3 Hodlings Inc. v. N. Goldstein Holdings Ltd.** [2003] O.J. No. 2613 (O.S.C.J.)
[3] **R. v. Stasko** [2001] O.J. No. 3782.
[4] **Charlton v. Beamish** [2005] O.J. No. 1325 (O.S.C.J.).
[5] **Audziss v. Santa** [2003] O.J. No. 4987 (O.S.C.J.).

It is submitted that the Mining Recorder made a deliberate, substantive decision based upon his review of the facts and his understanding of the legislation applicable at the time in question. The decision of the Mining Recorder was that the lands could not be validly staked because they included lands for which prior consent was required and which had not been obtained. This was a deliberate exercise of judgment and whether or not it was a correct decision, it nonetheless cannot be construed as an administrative error. Accordingly, there is no jurisdiction in the Mining Recorder to grant the requested relief from forfeiture pursuant to section 49, nor is there any other authority in the Mining Recorder to relieve from forfeiture under the **Mining Act**.

Ms. Wyatt submitted that there is no need for further argument to deal with the appeal. However, since the tribunal is required to make a decision on the "real merits and substantial justice of the case" additional arguments are provided. Section 121 allows the tribunal to consider equitable principles in reaching its decision, which includes equitable defences such as the doctrine of laches and acquiescence. However, notwithstanding this equitable jurisdiction, there is no authority which permits the Commissioner to override or amend the **Mining Act**.

The tribunal's equitable jurisdiction has been described in **Evans v. Smith** 6 M.C.C. 292 as:

> … this section does not create in the Commissioner what might be referred to as "intestinal sensation justice" but merely clothes the Commissioner with the power to provide equitable remedies as well as common law remedies and the statutory remedies expressly created in the Act.

A similar phrase appeared in the **Residential Tenancies Act**, which was discussed in a **Reference** by that name found at 26 O.R. (2d) 609,

> The fact that the Commission is instructed to make its decisions on 'the real merits and justice of the case' does not, in our opinion, import by implication that the Commission may disregard the law or legal precedent. Nor does it suggest to us that the Commission, in complying with this instruction, is to act in a manner 'unlike' a Court. A Court, no less than the Commission, must function within the framework of the applicable law, yet so that "justice according to law' (which here includes the principles developed by the Courts of equity) will be achieved in the particular matters coming before it for decision.

Section 121 of the current **Mining Act** was also considered in **Wallbridge Mining Company Limited v. The Minister of Northern Development and Mines and Inco Limited** (May 30, 2001, tribunal file MA 040-99, unreported), wherein the Deputy Commissioner noted:

> The appellant has called upon the tribunal to exercise its powers under sections 105 and 121 of the **Act** and to rule on the "real merits and substantial justice of the case", applying equitable considerations. The tribunal finds that the effect of the appellant's requests is to amend the **Act** to permit the staking of unopened lands. Overriding the **Act** in this way could hardly be categorized as ruling on the "real merits and substantial justice of the case". The appellant's staking is invalid. It cannot rely on the **Act** for validation.

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Similarly, the Commissioner has jurisdiction with respect to equitable principles, where equitable defences such as laches and acquiescence are applicable, as found in **Parres v. Roxmark Mines Limited** 7 M.C.C 14, reversed on appeal on a different point. Laches is defined in Black's Law Dictionary:

> Doctrine of laches" is based upon maxim that equity aids the vigilant and not those who slumber on their rights. It is defined as neglect to assert a right or claim which, taken together with lapse of time and other circumstances causing prejudice to adverse party, operates as bar in court of equity. The neglect for an unreasonable and unexplained length of time under circumstances permitting diligence, to do what in law should have been done.

In **M.(K.) v. M.(H.)** [1932] 3 S.C.R. 6 (S.C.C.), LaForest J. stated:

> The leading authority on laches would appear to be **Lindsay Petroleum Co. v. Hurd** (1874), 5 L.R.P.C. 221 in which the doctrine is explained as follows, at pp. 239-40:
>
> > The doctrine of laches in Courts of Equity is not an arbitrary or technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, tough perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would not be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are the length of the delay and the nature of the acts done during the interval, which might affect either party [p.77] and cause a balance of justice or injustice in taking the one course or other, so far as it relates to the remedy.
>
> Acquiescence is also discussed:

> Acquiescence is a fluid term, susceptible to various meanings depending upon the context in which it is used. Meagher, Gummow, and Lehane, supra, at pp. 765-66, identify three different senses, the first being a synonym for estoppel, wherein the plaintiff stands by and watches the deprivation of her rights and yet does nothing. This has been referred to as the primary meaning of acquiescence. Its secondary sense is as an element of laches - - after the deprivation of her rights and in the full knowledge of their existence, the plaintiff delays. This leads to an inference that her rights have been waived … The final usage is a confusing one, as it is sometimes associated with the second branch of the laches rule in the context of an alteration of the defendant' position in reliance on the plaintiff's inaction. … It is not enough that the plaintiff knows of the facts that support a claim in equity; she must also know that the facts give rise to that claim. .. measured by an objective standard… [T]he question is whether it is reasonable for a plaintiff to be ignorant of her legal rights given her knowledge of the underlying facts relevant to a possible legal claim….

It is submitted that there is no unfairness to the appellant which would give rise to the right to have applied an equitable remedy. The appellants knew or ought to have known at the time of the cancellation of the Mining Claims that he had a right to appeal to the tribunal. Having failed to act on his legal right to appeal at that time, he should be required to live with the consequences of his actions.

Section 110 and 112 of the **Mining Act** which were in effect in 1997 provide that the decision of the Mining Recorder would become final if not appealed within 15 days after the appeal period elapsed. Mr. Marion acquiesced in the decision and proceeded as advised by MNDM to gather the required consents from surface rights holders. The first time in which Mr. Marion objected to the 1997 decision of the Mining Recorder was in 2005, when he sought relief from forfeiture.

It is submitted that any unfairness which might attach to the facts of this case and render the appellant entitled to equitable relief are barred by the doctrine of laches and acquiescence. MNDM and the industry would be prejudiced if decisions which are deemed to be final in law can be overturned many years later. There are no adverse interests in this case. However, any decision which would permit the overturning of a final decision would serve as a very dangerous precedent, leaving the decisions of the Provincial Mining Recorders forever vulnerable to challenge.

The actual substance of the appeal appears to rely upon the Mining Recorder's reference to consent being required with respect to a "town site" which is land not open for staking pursuant to clause 29(a). In actual fact, the 1997 decision refers to both sections 29 and 32. Moreover, the decision is not limited to clause 29(a) but refers to clause 29(b), namely "registered plans of subdivision."

It is submitted that no actual prejudice was experienced by the appellant resulting from the reference to clause 29(a) in that the underlying reason for cancellation of the Mining Claim did not change. It included lands which were not open for staking at the time due to the absence of the required consent. The wording of the Order is sufficiently clear in this regard.

The advocated approach is consistent with the treatment of a former mining claim 1222222 held by Mr. Leahy, which was not the subject matter of this appeal. In that case, the Mining Recorder refused to record the claim because the required consent pursuant to section 32 had not been obtained.

Although on the facts of Mr. Marion's appeal, it appears that there is not a "town site," there are in fact areas which are within a "registered plan of subdivision" falling within clause 29(b) and further lands which are subject to section 32, requiring consent of the surface rights holders or an Order of the Mining Recorder or tribunal. Either of such lands cannot be staked unless the required consents have been obtained.

It is submitted that the mapping shows that the areas in question form a significant portion of the Mining Claim.

In **Wallbridge Mining Company Limited v. The Minister of Northern Development and Mines and Inco Limited**, the tribunal considered lands which were not open for staking pursuant to what

was then clause 30(c), being a summer resort location. It was held that such lands are lands not open for staking. To come within the exception provided in clause 30(c), the discovery of a valuable mineral in place must precede the staking. The tribunal rejected the argument that staking could precede discovery and certification of the find by the Minister:

> Staking is a well-regulated activity under the Act and takes place under certain conditions. The land must already be open to staking or become open to staking through the operation of the Act before staking can actually be carried out.
>
> The staking of lands not open to staking is prohibited (even those actually due to come open) and has never been considered an acceptable practice under the **Act**. Short of amending the legislation, nothing can legitimize a prohibited act.

As to whether there was unfairness, the tribunal stated at pp 23-24:

> Access to land for staking purposes is based on the free entry system. The free entry system is premised on the subject lands being considered open for staking. Summer resort location lands are not open and therefore there is no free entry to those lands. The legislation intended to separate those lands from the "open" lands because the legislature has perceived the need to protect the associated use and enacted the means to do so.
>
> Since these lands are not open to staking and not subject to the free entry system, it goes without saying that anyone seeking to change their status to "open" must either acquire permission from the owner of the surface rights to enter them or must acquire the surface rights themselves.

Although the **Wallbridge** decision dealt with another provision, it is submitted that the same reasoning would apply to lands not open for staking in sections 29 and 32, as there is a pre-condition of consent similar to the precondition of discovery and certification required by what is now clause 30(1)(c). Such pre-conditions cannot be overridden or amended based upon the authority found in section 121.

It is further submitted that Mr. Marion has not lost the ability to stake the mining claim. Further, he has been advised by MNDM that once the withdrawal order is lifted, Mr. Marion would be free to stake any areas for which he has consent. Despite having the potential competitive staking blocked by a withdrawal order since 1998, he appears to allege unfairness having the order lifted. The withdrawal order must be lifted in order to permit Mr. Marion to stake in the area. He appears to be seeking to prevent competitive staking and retain a monopoly on the land for himself.

It appears the appeal is seeking to have the tribunal go beyond the issue of appeal and to make an Order under section 32 giving him consent to stake areas subject to that section. MNDM objects to this attempt to bring a section 32 application under the guise of this appeal. A section 32 application is a separate matter and ought not to be considered. The appellant did not appeal the Provincial Mining Recorder's decision of section 32, issued on February 10, 2005, not to grant an Order under that section. The extent of the areas subject to section 32 cannot be determined based on

the materials filed in this matter. Furthermore, the interests of the surface rights holders would also be at issue and fairness requires that they be heard from on such an issue as well.

As to the matter of costs, the materials filed disclose that the appellant is actually seeking compensation in the form of damages with respect to matters prior to and not part of his appeal. It is submitted that these do not constitute costs within the meaning of section 126 of the **Mining Act**. The tribunal does not have authority to entertain a claim for damages.

It was submitted that section 136 of the **Mining Act** was not intended to be applied in the case of an appeal to the Commissioner, but rather an appeal made to the courts. However, if it were applicable, it would support MNDM's contention that any reference to clause 29(a) which was incorrect did not cause a substantial wrong or injustice and would not invalidate the Order cancelling the Mining Claim.

The cases cited by the appellant (**Yost v. Chrozepha**, 5 M.C.C. 222 and **In re Thomas Martindale**, 4 M.C.C. 183) deal with the process of staking such as proper placing of posts, tags and blazing. They do not deal with staking claims on lands not open for staking. There are many reported cases dealing with staking errors and omissions. However, the staking of lands not open for staking is different and should be distinguished from staking errors.

Clark v. Docksteader, 36 S.C.R. 622 is a British Columbia case decided at a time when discovery was a pre-requisite to any staking. Its application should be limited to the context of staking cases, as has been done by the tribunal, and it should not be applied in the case of lands not open for staking.

The cases dealing with staking errors advocate a liberal consideration of errors that would preserve claims to the extent possible and where there has been substantial compliance or a simple overstaking, such that the matter could be corrected by moving of posts. The current appeal is not such a case, as it is not clear what lands are not open for staking.. Furthermore, the potential lands not open for staking are scattered such that there is no simple way of excluding them. According to the **Wallbridge** decision, the staking of lands not open for staking is a prohibited action. It is MNDM's submission that the failure of the Mining Recorder to record a Mining Claim on lands not open for staking is a prohibited action and as such cannot be considered a simple mistake.

Hayes v. Bachmann, 41 O.W.N. 431; [1932] O.J. No. 189 (C.A.) is a case in which lands staked encompassed an Ontario Northland Transportation Commission railway right-of-way, being land not open for staking. The case does seem to treat the matter of staking of lands not open as a case of simple staking procedures. It indicates that a claim containing lands not open for staking is not as a whole invalid, but rather that the irregularity can be cured by leaving those parts of the claim out which were not properly staked. The decision is not relevant to this appeal, as MNDM's case does not depend on the correctness of the Mining Recorder's decision. The tribunal took a different view in **Wallbridge**, which does not mention the **Hayes** decision.

The onus is on the appellant to establish its case in this appeal (**Carlson v. Redden**, 6 M.C.C. 119) and it is submitted that he has not done so.

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Findings

The facts in this case are unusual in that the events have taken place over a considerable period of time. Moreover, there are or have been a series of attempts to bring successive and overlapping applications and the matter of the application or appeal to the Commissioner pursuant to section 32 does not appear to be wholly resolved. By this, it is meant, Mr. Marion should receive a clear indication of where he stands with respect to the section 32 matter.

What has been allowed to occur and the resultant confusion has happened for two reasons. There is in Mr. Marion a mistaken understanding of how the **Mining Act** operates when it comes to the time for making an appeal from a decision of the Mining Recorder. This must be distinguished from a decision of the Minister (such as occurs in section 29), where there is no appeal to the Commissioner.

What has also confused matters is that the section 29 application has taken a long time to proceed through its various stages, with delays occurring on the parts of both Mr. Marion and the Minister. Woven into this is the fact that the section 32 application, which is to the Mining Recorder, appears to have been dependent on the decision of the Minister, and so also experienced the delays from the section 29 matter.

Initial Appeal of 1997 Mining Recorder's Decision to Remove the Mining Claim from Record

The 1996 Gagne staking in Teck Township took place within the town limits of Kirkland Lake. Some eleven months after recording the Mining Claim it was removed from the record as encompassing lands to which clauses 29(a) and (b) and section 32 of the **Mining Act** applied.

This decision of the Mining Recorder to remove the Mining Claim from the record was made on August 27, 1997. It was alleged that this occurred with the intervention of a third party, Mr. Michael Leahy pointing out that the appropriate process had not been followed. Whether or not this alleged intervention is relevant to what took place could only be determined in a hearing on the merits. However, the time for appealing the decision of the Mining Recorder was within fifteen days of the date it was entered on the abstract or within a further fifteen days if allowed by the Commissioner, in accordance with subsection 112(3) as it was in 1997. It has since been rewritten allowing for a straightforward 30 days, in accordance with subsection 112(4).

The time for appealing the decision of the Mining Recorder to remove the Mining Claim from the record expired on September 26, 1997. There is no power in the Commissioner to extend this time. This is a provision of the **Mining Act** which cannot be overridden, either by the Commissioner or by a higher court.

Administrative Error

The decision of the Mining Recorder to remove the Mining Claim from the record was determined on the basis of a factual finding that the required consents or Order pursuant to clauses 29(a) and (c) and section 32 had not been given or issued prior to the time when the staking took

place. If the Mining Recorder was mistaken as to which of the provisions of the **Mining Act** were applicable to his decision, it would constitute a mistake as to the applicable law. A determination which applies law to findings of fact can in no way be characterized as an administrative error. Rather, it is a decision of substance, one which goes to the merits of the matter. Any error in selecting the applicable law similarly does not constitute an administrative error.

The alleged intervention or interference of a third party, Mr. Michael Leahy, although not proved, causing the Mining Recorder to remove the Mining Claim from record similarly does not constitute an administrative error. Whatever decision was made, it was a deliberate decision of the Mining Recorder based upon the facts and law as he understood them.

The tribunal finds that on the facts of this case, there is no application of the provision for administrative error. There was no such administrative error and there can be no relief from forfeiture or reinstatement of the Mining Claim. The Mining Claim will remain removed from the record.

Real Merits and Substantial Justice

MNDM has referred to the jurisdiction of the Commissioner to make findings on the real merits and substantial justice of the case, pursuant to section 121 of the **Mining Act**. Reference has been made to the equitable doctrines of acquiescence and laches.

Mr. Marion has argued that not all of the lands within the Mining Claim require consent or an Order, so that the decision of the Mining Recorder was incorrect. In other words, a proper decision would have been to exclude those areas for which consent or an Order are required and permit the remaining portions of the Mining Claim to be recorded.

He has also argued that the Mining Recorder incorrectly referred to clause 29(a), when the lands do not fall within that clause. This has effectively caused the Mining Recorder to make an incorrect decision as well.

The Commissioner's jurisdiction under section 121, that decisions shall be on the real merits and substantial justice of the case, does not permit the Commissioner to override the legislation and make a finding which is outside of what is set down in legislation. In this case, there are two separate issues and section 121 cannot be applied to either of them.

First, there are statutory time limits for filing an appeal. There is no power within the legislation for any one of the Provincial Mining Recorder, the Commissioner or the Courts to extend this time. This is so, even in a case where an incorrect decision has been made, although the tribunal will not go so far as to make findings that the Provincial Mining Recorder's decision was in error.

Second, the staking of the Mining Claim was done without the requisite section 29 consent and without either the consent of the owners, lessees, purchasers or locatees of the surface rights or an Order of the Mining Recorder or Commissioner pursuant to subsection 32(1). These are pre-requisites to the staking. It does no good and is no answer for the staking of the Mining Claim to obtain some portion of consent after the fact. The consents must necessarily be obtained beforehand. To do otherwise renders the lands not open for staking. There is no mechanism, not by the equitable

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jurisdiction of section 121 or otherwise, whereby the Provincial Mining Recorder or the Commissioner can override a statutory requirement. There is sufficient case law to this effect, as was cited by MNDM.

The plain language of the legislation illustrates that this must be so. Section 29 commences with the words, "No mining claim shall be staked out or recorded upon any land … except with the consent of the Minister". Similarly, subsection 32(1) contains the words, "Although the mines or mineral therein have been reserved to the Crown, no person shall prospect for minerals or stake out a mining claim … except with the consent of the owner… or by order of the recorder or the Commissioner…"

It really does not matter that the Mining Recorder may have made reference in that first decision of September 13, 1997 to clause 29(a) involving a town site. Even where no lands are subject to that clause, taken as a whole either consent of the Minister, consent of the owners or an Order of the Mining Recorder or Commissioner were required before any staking could take place. Any of the subsequent consents received, and particularly that of the Town of Kirkland Lake for a substantial portion of the lands covered by the Mining Claim, do not operate retroactively.

The initial staking having been carried out prior to obtaining the necessary consents or order was an illegal staking. The application of section 121 has no effect to override the statutory conditions which render the lands not open to staking.

The appeal of the decision of the Mining Recorder made in August, 1997 must be dismissed.

Further Applications and/or Appeal

Mr. Marion made two further applications. On August 27, 1997, Mr. Marion wrote to Mr. Gashinski, who exercises delegated powers of the Minister, requesting consent pursuant to section 29. It appears that some time elapsed to allow Mr. Marion to obtain the consents of the various surface rights owners, lessees, locatees and purchasers. Also, it may be that MNDM needed to review the operation of section 29 in light of section 32. It is not clear what the course of a section 29 proceeding might normally be, but Mr. Marion received his reply in writing on June 14, 2004 in which Mr. Gashinski indicated consent would not be given pursuant to clause 29(b) because Mr. Marion failed to obtain the section 32 consents of all of the affected landowners. As stated above, there could be no appeal from this decision and indeed, Mr. Marion did not attempt to make such an appeal.

The second applications made by Mr. Marion were on January 21, 2005, where he wrote three separate letters addressed to the Mining Recorder, seeking the consent of the Minister pursuant to clauses 29(a) and (b) and an Order of the Recorder pursuant to section 32.

Mr. Marion received his reply in writing on February 10, 2005. Acting Provincial Mining Recorder Mr. Dale Messenger advised that the Ministry position concerning consent pursuant to section 29 was contained in the earlier letter of June 14, 2004. In that letter, it was indicated that the Minister would consider providing consent where section 32 consents had been obtained.

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The second paragraph of the letter of Mr. Messenger states:

> With respect to Section 29, this Ministry's position was set out in a letter dated June 14, 2004, which was sent to your attention. Furthermore, I am not prepared to issue an Order allowing staking in those areas where you have been unable to obtain consent from the property owners pursuant to Section 32.

The time for appealing the decision of the Acting Provincial Mining Recorder pursuant to section 32 was March 14, 2005. Mr. Marion's appeal was received by the tribunal on March 30, 2005. Once again, this appeal is outside the statutory time frame which must be strictly adhered to in the making of an appeal.

The appeal of Mr. Marion must be dismissed.

Section 67

Mr. Marion referred to the exclusion of time provisions under section 67 of the **Mining Act**. Such provisions apply to exclude time where a proceeding has been pending. The tribunal makes no finding with respect to the power of the Minister to exclude time pursuant to subsection (5). However, as for the rest, these provisions apply only where proceedings are pending concerning a mining claim which is a valid and subsisting claim of record. They have no application in this case, where there has been no finding to re-instate a mining claim which has been removed from the record.

Section 32

The February 10, 2005 decision of the Acting Provincial Mining Recorder, as was the application itself, was made without notice to those affected by a section 32 application. For a process to be fair, all those who may potentially be affected by an Order or decision of a statutory decision-making body such as the Provincial Mining Recorder or the Mining and Lands Commissioner, are entitled to notice that an application has been made and a decision will be pending which may affect their interests. The processes before the Provincial Mining Recorder are caught by section 111 of the **Mining Act.** Although the **Statutory Powers Procedure Act** does not apply to a Provincial Mining Recorder's proceedings, nonetheless, he or she must afford all interested persons an adequate opportunity of knowing the issues, presenting material and making representations, pursuant to subsection 111(1). In the case of section 32, it is any owner, lessee, purchaser or locatee of the surface rights who must receive notice.

The tribunal is not entirely certain what the process is before the Provincial Mining Recorder, namely whether the applicant is required pro-actively to serve notice on all the affected parties that an application has been made or whether the applicant is walked through the process by the Provincial Recording Office, including the giving of required notice.

Section 32 provides for an order of either the Provincial Mining Recorder or the Commissioner. On the one hand, it appears that Mr. Marion has the impression that he may be precluded from applying to the Commissioner, given that the time for appealing the decision of the

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Recorder has passed. On the other hand, Mr. Marion has requested that the tribunal issue a section 32 Order, apparently through a direct application.

The tribunal does not purport to make a finding that such direct application is disallowed where the person involved failed to appeal the decision of the Provincial Mining Recorder, without hearing from those affected. However, in a case where the process failed to provide notice to all affected before reaching a decision, the tribunal would be inclined to entertain an application made directly for consideration of a section 32 Order. This matter, being file MA 009-05 is not such an application. It is an appeal of an earlier 1997 decision of the Recorder. It is not even certain that this matter was also an appeal of the February 10, 2005 section 32 decision.

To bring an application, Mr. Marion must write directly to the tribunal, in effect to start a section 32 proceeding directly before the Commissioner. The process will necessarily involve notice to all affected owners, etc. If Mr. Marion or any other prospective applicant is not comfortable in providing such written notice, the tribunal will request the names and addresses of all affected and serve notice of the proceedings itself.

The request for a section 32 Order in this matter is found to be a matter which is not properly part of this appeal. Furthermore, the tribunal cannot consider such an application without ensuring that all affected have notice of the proceeding. The request will be denied at this time without prejudice to Mr. Marion to bring such an application in the future.

Section 29

The facts in this matter disclose that some of the lands in the Mining Claim were within a registered plan of subdivision. The surface rights of the lands were held by the Town of Kirkland Lake and some private landowners or interest owners as referred to in subsection 32(1). There is no disagreement that these two qualifications fit within sections 29(b) and 32 of the **Mining Act.** Of what relevance is the clause 29(a) to a town site?

Town site

The issue of the meaning of “town site” was considered by Commissioner Price in 1908 in **Re Western & Northern Lands Corporation and Goodwin** 1 M.C.C. 230; 18 O.L.R. 63, 13 O.W.N. 177, a decision which was confirmed by the Court of Appeal. Of particular interest is the analysis of the Commissioner and the Court, as it offers some insight into how section 29 came to be drafted as it is today. The first enactment of what is now section 29 was section 109 of **The Mines Act,** 1906, 6 Edw.. VII, chapter 11.

At page 233, Commissioner Price stated:

> The term "townsite" is not defined in the Act. Only in two places, other than sec. 109 of The Mines Act, is the term townsite used in the Ontario Statutes so far as I have been able to discover; First, in Cap. 7 of the Ontario Statutes of 1904, where provision is made (in sec. 3) for the transfer by the Lieutenant-Governor in Council for townsites of portions of the ungranted lands of Ontario along the line of the

Temiskaming and Northern Ontario Railway adjacent to stations or proposed stations. It is there provided that the registration of a certified copy of any such Order in Council in the Registry Office or Land Titles Office shall vest in the Railway Commission as trustees for the Province the lands described in any such Order in Council, and it is also provided in the same section that the Railway Commission may for the same purpose acquire other lands so situate by the same means as it is authorized to acquire lands for right of way and station grounds, which lands acquired for townsites are not, however, to exceed one thousand acres for any one site; Secondly, in Cap. 14 of the Ontario Statutes of 1906, which (in sec. 2) gives the Temiskaming and Northern Ontario Railway Commission the right to sell or lease lands, minerals and mining rights of townsites vested in the Commission.

The provisions governing the establishment of towns in the districts of Northern Ontario are contained in cap. 30 of the Ontario Statutes of 1902 [being **The Towns in Territorial Districts Act]**, and are in brief that upon petition signed by at least 75 male inhabitants of any locality of an area of not more than 750 acres having a population of at least 500 souls the Lieutenant-Governor by Order in Council may issue a proclamation under the Great Seal of the Province declaring that such inhabitants shall be constituted a body corporate as a town.

…

It is contended, however, that the term townsite must be given a wider meaning -- that it is not limited either to the formal establishment by the Lieutenant-Governor in Council of a townsite as technically so-called, or, much less, to a place upon which a town as defined in the Act respecting the establishment of towns in Northern Ontario is actually situate. In short it is contended that the word townsite simply means, as defined in the Standard Dictionary, the location where a town is or is to be built, and that at all events the survey, the registration of a plan of subdivision of township lots and the sale of lots in accordance with the plan, constitute all that is required to make the place in question a town site within the meaning of sec. 109 of The Mines Act;…

Counsel for Mr. Goodwin upon the other hand contends that even if the company is entitled to attack the recorded claim at all the term townsite must be confined to its strict meaning as the word townsite or the word town is specifically used and dealt with in our Statutes.

…the question at issue is purely one of interpretation of sec. 109, and there seems to be little or nothing in the way of direct authority that is of assistance in arriving at a conclusion.

The word "town" if taken alone has various meanings ranging from the statutory meaning of incorporated town as defined in our Municipal Act or in cap. 30 of the Statutes of 1902, to its widest generic signification of any collection of houses or inhabitants in close proximity to one another as distinguished from rural places or inhabitants.

The term "site" is defined in the dictionary as a place suitable or used for the permanent location of anything (Webster).

The combination of the wider meaning of the two words would clearly make a meaning entirely too wide and too indefinite to be applicable to the Statute in question. It could never have been intended that the place where a collection of dwellings might be built by reason merely of the suitability of the place for that purpose should be excluded from staking out or recording as mining claims, nor could there ever be any possibility of practically applying such a definition with the certainty necessary in legal matters.

Nor do I think the mere fact of a location or tract of land being spoken of or even advertised as a town site-- which any surface rights owner might do with no other intent than to keep prospectors off the property -- would bring it within the meaning of sec. 109.

There remains to be considered the matter of survey into small lots of the character of town or village lots and the filing in the Land Titles office of a plan of such subdivision and showing streets or roads upon it.

As to the matter of roads or streets being dedicated by the filing of the plan and sale of lots in accordance with it, I think that even though the roads might thereby be exempted from the mining claim, the mere fact that they were so exempted could not destroy the miner's right to have his claim staked out upon the parts of the property not comprised in the roads. It has as a fact been the common practice to allow mining claims to be taken up and patented in such cases, merely excepting the roads or other exempted land from the patent of the claim.

Though the matter to my mind is not free from doubt, I think I must hold that the filing of the plan even accompanied by the sale of lots and whatever else had been done up to the time of the staking out of the claim, did not bring the ground within the meaning of "townsite" as used in sec. 109. I am inclined to think that as a matter of fact the meaning of that term is confined to townsites properly so-called established by the Lieutenant-Governor in Council under cap. 7 of the Statutes of 1904, or as being land actually within the limits of a town established either under cap. 30 of the Statutes of 1902, or established under the Municipal Act, though the latter mode of establishment can, of course, have little application in Northern Ontario.

…

The filing of a plan to my mind does not, and did not as the law existed in November, 1906, establish anything which could be called a town or which could with any proper legal signification be called a townsite. …

If the filing of a plan of a subdivision of a property would constitute the establishment of a town site without any law or declaration providing that it should do so then the question might well be raised whether a survey by a surveyor or a mere

subdivision of the land by the owner himself into small pieces for the purpose of making more convenient sale would do the same thing. If the definite meaning attached to the term by Statute and in ordinary legal usage be departed from where can the line be drawn?

I think I must hold that the lands in question were not comprised in a town site within the meaning of sec. 109 when the mining claim now held by Goodwin was staked out and recorded.

The Company appealed from this decision to the Divisional Court.

The appeal was heard by Meredith, C.J., McMahon, J., Teetzel, J., the judgment of the Court being delivered on 2nd January, 1909, by *Meredith, C.J.*:

We are of opinion that the view of the Mining Commissioner as to the proper construction of the section was right.

In addition to the reasons given by the Commissioner for reaching his conclusion, which are set out in the award, it is to be remembered that the Act deals primarily and mainly with ungranted lands of the Crown, though it does also deal with mines which have been reserved by the Crown in lands granted by the Crown.

As the Commissioner points out, the expression "townsite" is used only in two enactments of the provincial legislature…

This Act and the Mines Act were passed in the same session, and it seems not unreasonable to infer that the townsites mentioned in sec. 109 were the townsites with which the legislature was dealing in the other Act. The proviso to sec. 109 does not, as it appears to me, displace this inference; it was added, no doubt, *ex majori cautela*, and to give legislative sanction to the transfer which before then had been authorized by Order-in-Council only.

The words "reserved or set apart" are more applicable to action taken by the Crown than to that of private persons.

It is also to be borne in mind that it was the practice in earlier times -- whether that practice is still followed I do not know -- in the original surveys of Crown lands to lay out what were called "town plots," and to reserve lands for town plots. Though the draftsman of the Mines Act does not use that term, he appears to have had in mind the same thing, to which he gave the name of "townsites."

Nowhere in the Surveys Act, R. S. O. 1897 ch. 181, under the authority of the 39th section of which the appellants' subdivision was made, is a townsite spoken of, and in the Registry Act, R. S. O. 1897 ch. 136, sec. 100, which deals with plans of subdivided lands, the provision is, that "where any land is surveyed and subdivided for the purpose of being sold or conveyed by reference to a plan ... the person making the subdivision. ..."

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To give to sec. 109 the meaning ascribed to it by the appellants would enable the mining districts to be covered with paper towns, the existence of which, though on paper only, would prove a handicap to prospecting and exploring the areas which they embrace, for they could be opened for that purpose only by the order of the Minister, the obtaining of which would involve delay and loss of time -- important considerations for the prospector and miner.

That I am not putting it too strongly when I speak of covering the mining districts with paper towns, is shown by the language of the section which exempts the land, whether divided into town lots or not, and there is besides, no provision that a plan shall have been registered or even made, and none that lots shall have been sold according to a plan.

I am unable to attribute any such intention to the legislature, as it would mean that the owner might exclude the prospector or miner, while holding in his own hands the power at will to wipe out his subdivision, for that he might do though a plan had been registered as to the whole subdivision, if no lots had been sold according to the plan, and as to practically all except the lots which had been sold, had lots been sold.

In my opinion, the appeal fails and should be dismissed with costs.

Note. -- S. 109 has since been amended. See present s. 36 (Act of 1908).

Section 109 of **The Mines Act**, 1906, 6 Edw. VII, chapter 11 stated:

109. No mining claim shall be staked out or recorded on any land included in or reserved to set apart as a town site whether the same shall have been subdivided into town lots or not, or upon any station ground, switching grounds, yard or right of way or any railway, or upon any colonization or other road or road allowance, except by order of the Minister. Provided that all mines and minerals of every nature and kind in any lands which have been or may hereafter be transferred by any Order-in-Council under authority of Chapter seven of the Legislature passed in the fourth year of the reign of His Majesty shall, unless expressly reserved therein, be deemed to have been and in the case of an Order-in-Council hereafter made, unless therein otherwise expressly stated, shall be deemed to be included as part of the said lands, and the said mines and minerals and the said lands are hereby declared to be exempt from the provision of this section.

This was transformed in 1908 to ostensibly the same wording in which it appears today:

36. No mining claim shall be staked out or recorded upon any land transferred to or vested in The Temiskaming and Northern Ontario Railway Commission, without the consent of the Commission, nor except with the consent of the Minister upon any land: -

(a) Reserved or set apart as a town site by the Crown;

(b) Laid out into town or village lots on a registered plan by the owner thereof;

(c) Forming the station grounds, switching ground, yard or right of way of any railway, electric railway or street railway, or upon any colonization or other road or road allowance.

The legislative reference in section 109 is to **The Temiskaming and Northern Ontario Railway Act, 1902**, 2 Edw. VII, ch. 9 as amended by **The Temiskaming and Northern Railway Amendment Act, 1904**, 4 Edw.VII, c. 7, the former having created the Temiskaming and Northern Ontario Railway Commission, now the Ontario Northland Transportation Commission (the "Commission").

An electronic search of the current e-laws finds the situation similar if not identical to what was the case in 1908, namely that, in addition to occurring in the **Mining Act,** the use of the term "town site" or "town sites" is found in only the **Ontario Northland Transportation Commission Act**, R.S.O. 1990, c. O. 32. Sections 29 through 32 are related to the current section 29 of the **Mining Act.** The Lieutenant Governor in Council may transfer to the Commission lands for town sites adjacent to and along proposed or existing railway stations. The Commission does have the authority to lay out the land. The Commission may sell, lease or otherwise deal with the mines, mineral and mining rights upon or on any portion of lands including town sites which are vested in it. Where land within a town site is laid out for public streets or highways, it does not revest in the Crown, nor does it serve to vest the mines, minerals or mining rights in the municipality or any other person. Any mining activity which does take place under such land must do so without interfering with the roads and highways laid out. However, before mining activity may take place, the person so doing must deal with the engineer appointed by the municipality involved and obtain approval for those activities.

From this, it can be seen that all of what was captured in section 109 appears in either the current **Mining Act** or in the **Ontario Northland Transportation Commission Act.** Land which is reserved or set apart as a town site requires the Minister's consent. Land which is laid out into residential lots on a registered plan of subdivision is no longer limited to lands which have been vested in the Commission. Land forming part of the station grounds, switching grounds, yard or right of way requires the consent of the Minister. The authority for road allowances has been changed to include public roads and highways and rests with the engineer of the municipality involved.

The conclusion drawn is that clause 29(a) is not relevant to the current situation. There is no application of this section to land within the existing Town of Kirkland Lake. Clause 29(b) does however apply in that the Ontario Northland Transportation Commission is not involved where land is laid out into residential lots within a registered plan of subdivision.

Costs

The tribunal agrees with the representations by MNDM that the appellant's application for costs is in fact on account of compensation. In a case such as this where the assessment work is done on an

invalid mining claim, the tribunal finds that it is not an appropriate case for the tribunal to exercise its jurisdiction to award costs. Given the lapse of time between the recording of the Mining Claim and its removal from the record, it may well be that MNDM should consider reimbursement to Mr. Marion for his out-of pocket expenses relating to assessment work performed, given that notice of the illegality of the staking was some time in coming. However, the Commissioner does not have jurisdiction to make findings for compensation of this nature.

Conclusions

The appeal dated March 30, 2005 from the decision of the Mining Recorder for the Larder Lake Mining Division dated September 13, 1997 is dismissed being beyond the statutory time limits for appeal prescribed by the **Mining Act**. That decision cannot be characterized as an administrative error and therefore, no relief is available through section 49. Furthermore, the jurisdiction of the Commissioner to make a finding on the real merits and substantial justice of the case does not allow the tribunal to override the **Mining Act.**

Notwithstanding its finding that this matter be dismissed, the tribunal notes that the required consent of the Minister pursuant to clause 29(b) and the required consent of the landowners or order of the Mining Recorder or Commissioner required by subsection 32(1) are pre-requisites to staking. Any staking which takes place without them is an illegal or invalid staking. There is no way in which such a staking can be corrected after the fact. Therefore, on the real merits and substantial justice of the case, the recording of such a mining claim could not be allowed to remain on the record.

To the extent that the appellant, Mr. Marion, attempted to appeal the February 10, 2005 decision of the Acting Provincial Mining Recorder that he would not issue an Order pursuant to subsection 32(1), such appeal is out of time. The tribunal makes no finding on whether an applicant who failed to appeal a section 32 decision within the statutory time period may bring an application directly to the tribunal. However, on the facts of this case, Mr. Marion will be allowed to do so without prejudice.

No costs will be awarded to either party in this appeal.