Ontario

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The Mining and Lands Commissioner
Le Commissaire aux mines et aux terres

File No. MA 026-02

L. Kamerman)
Mining and Lands Commissioner)

Friday, the 16th day
of August, 2002.

THE MINING ACT

IN THE MATTER OF

Mining Claim SO-1234712, situate in the Township of Bedford, in the Southern Ontario Mining Division, recorded in the name of Graphite Mountain Inc., (hereinafter referred to as the "Mining Claim");

AND IN THE MATTER OF

An application for leave of the Commissioner to file a dispute, pursuant to paragraph 48(5)(a) and clause 48(5)(c)(ii) of the **Mining Act**;
(Amended August 16, 2002)

AND IN THE MATTER OF

Subsections 32(1) and 44(1.2) of the **Mining Act** and Subsections 8(4), 8(5) and 13(1) and Section 20 of Ontario Regulation 7/96.

B E T W E E N:

KENNETH McCARTNEY AND CLARE McCARTNEY

Applicants

- and -

GRAPHITE MOUNTAIN INC.

Respondent

ORDER AND DIRECTION

PURSUANT TO paragraphs 116(1)(c) and (e) and section 121 and upon reading subsection 48(5) of the **Mining Act**;

. . . . 2

1. **THIS TRIBUNAL HEREBY ORDERS AND DIRECTS** the Provincial Mining Recorder to receive and enter against Mining Claim SO-1234712, as if it were received in the Provincial Recording Office on the 17th day of July, 2002, the dispute of Kenneth McCartney and Claire McCartney, the applicants in this matter, leave having been obtained pursuant to clause 48(5)(c)(ii) of the **Mining Act**, on the 5th day of June, 2002 and received in the Provincial Recording Office on the 18th day of July, 2002.

DATED this 16th day of August, 2002.

Reasons for this Order and Direction are attached.

ORIGINAL SIGNED BY
L. KAMERMAN

L. Kamerman
MINING AND LANDS COMMISSIONER

Ontario

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B E T W E E N:

KENNETH McCARTNEY AND CLARE McCARTNEY

Applicants

- and -

GRAPHITE MOUNTAIN INC.

Respondent

REASONS

The tribunal granted leave to the applicants, Kenneth McCartney and Clare McCartney, on the 5th day of June, 2002 to file a dispute against Mining Claim SO-1234712 (the "Mining Claim"), which had been recorded in the name of Graphite Mountain Inc. on the 17th of July, 2001. The authority for the granting of leave was clause 48(5)(c)(ii) of the **Mining Act**,

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which provides that the tribunal may grant leave after a dispute has already been entered against the claim. In fact, eight disputes had been filed against the Mining Claim, seven with leave of the tribunal, prior to receipt of the initial request by the applicants. Since that time, leave has been granted on a further three requests to file disputes.

After having been granted leave on June 5th, 2002, the applicants apparently attempted to file their dispute with the Provincial Mining Recorder. They have filed facsimile copies of the following documents with the tribunal. An "Expresspost" receipt is dated in Perth on July 15th, 2002, purporting to be from "McCartney" and addressed to "Mr. R. Spooner/Prov Recorder". A Delivery Confirmation from the Canada Post Corporation, setting out that the item was received in Perth on July 15th, 2002, that an attempt to delivery the item to the recipient was made on July 16th, 2002 and that the item was successfully delivered on July 18th, 2002. There was no explanation as to what occurred between the 16th and 18th, being a Monday and a Wednesday, as to why the item could not have been delivered on the Tuesday, although no apparent attempt was made to do so. Also attached to this is a Dispute Against Recorded Claim, signed by Clare McCartney, filed on her own behalf and on behalf of Kenneth McCartney.

Subsection 48(5) of the **Mining Act** is reproduced:

(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.

The issue which the tribunal must determine is whether the use of the word "or" at the end of paragraph 48(5)(b) serves to make the various conditions listed in paragraphs (a), (b) and clauses (c)(i) and (c)(ii) conjunctive, i.e., occurring together, or disjunctive, namely occurring in the alternative?

In Driedger E.A., **Construction of Statutes**, 2nd ed. (Toronto: Butterworths, 1983) the inherent problems of interpretation involved in the use of "*and – or*" are discussed, commencing at the bottom of page 15:

> The effect of the decisions on *and* and *or* problems is stated by Maxwell as follows:[64]
>
> > In ordinary usage, "and" is conjunctive and "or" disjunctive. But to carry out the intention of the legislation it may be necessary to read "and" in place of the conjunction "or", and vice versa.

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[64] **The Interpretation of Statues**, 12th ed. (London: Sweet & Maxwell, 1969), pp. 232-233.

As pointed out by Professor F. Reed Dickerson, however, [65] this explanation does not answer all the problems.

> One problem is that each of these two words is semantically ambiguous. It is not always clear whether the writer intends the *inclusive* "or" (A or B or both) or the *exclusive* "or" (A or B, but not both) ... [T]here is a corresponding ... uncertainty in the use of "and". Thus, it is not always clear whether the writer intends the *several* "and" (A and B jointly or severally) or the joint "and" (A and B jointly but not severally) ...
>
> Observation of legal usage suggests that in most cases "or" is used in the inclusive rather than the exclusive sense, while "and" is used in the several rather than the joint sense.

Applying only this part of the analysis to the use of the word "or" at the end of paragraph(b), the resulting meaning would be "exclusive". Through this analysis, no dispute can be filed after one year, paragraph (a), or after a lesser time where the first unit of assessment work is performed, filed and accepted, paragraph (b), or by obtaining leave of the Commissioner in one of the two conditions set out. These conditions are (i), when the validity of the claim has already been adjudicated upon or (ii) when the mining claim has been on record for more than sixty days and has a dispute already entered against it.

Returning to the commentary in Driedger, at page 16:

> *Or* does not mean *and*, and *and* does not mean *or*. But in normal usage, *and* and *or* can produce the same result. Thus, in an enumeration of power to make regulations, for example, if the separate items are joined by *and*, the powers are normally regarded as joint and several, and the authority may exercise all or any of them; but if the conjunction is *or* the powers are normally regarded as inclusive and the authority may exercise any or all of them.
>
> There are situations where the enumerated items are mutually exclusive; in that case *and* must be read as several but not joint, and *or* must be read as exclusive.[66]
>
> In *Re Davisville Investment Co. Ltd. and City of Toronto*[67] the statute in issue was the Ontario Municipal Board Act, which provided that within a prescribed time after an order or decision of the Municipal Board,

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[65] **The Fundamentals of Legal Drafting** (Boston-Toronto: Little, Brown & Company, 1965) pp. 76-85. This material is reprinted by permission of Little, Brown & Co.

[66] As to the use of *and* and *or* in the drafting of statutes, see E.A. Driedger, *Composition of Legislation*, 2ne ed. (Ottawa: Department of Justice, 1976), pp. 20, 49, 86-88, 130-131.

[67] (1977), 15 O.R. (2d) 553; see also *Nothman v. Barnet Council*, [1978], 1 W.L.R. 220, aff'd [1979] 1 W.L.R. 67, where *or* was read as exclusive.

> The Lieutenant Governor in Council may,
> (a) confirm, vary or rescind the whole or any part of such order or decision; or
> (b) require the Board to hold a new public hearing. ...
>
> On a petition under this provision the Lieutenant Governor in council rescinded an order of the Board and ordered a new hearing. It was argued that the Lieutenant Governor in Council had power to do one or the other, but not both – *i.e.*, the exclusive meaning. The Court of Appeal, however, held that the word "or' must be read 'conjunctively" as well as "disjunctively" – *i.e.* the inclusive meaning.
>
> Blair J.A., dissenting, held that *or* should be given its "disjunctive' meaning – *i.e.* exclusive – since to read *or* as "conjunctive" would be to confound the legislative intent of creating two quite separate methods of disposing of appeals.

In *R. v. Welsh and Iannuzzi (No. 6)*[68] the statute considered provided that

> An authorization may be given if the judge to whom the application is made is satisfied that it would be in the best interests of the administration to do so and that
>
> (a) other investigative procedures have been tried and have failed;
> (b) other investigative procedures are unlikely to succeed; *and*
> (c) the urgency of the matter is such that it would be impractical to carry out the investigation of the offence using only other investigative procedures.

The court held that to render the provision intelligible, *and* should be read disjunctively to mean *or*. Zuber J.A. of the Ontario Court of Appeal, who delivered the judgement of the court, pointed out that only far-fetched and unrealistic examples could be imagined of cases in which it could be said that all grounds could be satisfied; also that another provision of the section used identical language in terms clearly alternative.

It is difficult to say whether the court merely gave to *and* in this context one of the meanings it naturally can have – several but not joint – or whether this is a case where the court corrected an error, for surely the normal way of writing these additional factors as alternatives would be to write *or*. However, it is not quite enough to read the lettered paragraphs separately; there would need to be implied in the opening words something like *and that any of the following circumstances obtain, namely*.

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[68] (1977), 15 O.R. (2d) 1.

In the decision of the House of Lords in *Federal Steam Navigation Co. Ltd. v. Department of Trade and Industry*[69] the statute there considered provided that

> If any oil . . . is discharged . . . into a part of the sea which is a prohibited sea area . . . the owner or master of the ship shall . . . be guilty of an offence . . . .

The question there was whether either only owner or master, or both owner and master, should be liable. The majority held that the word *or* should be construed conjunctively, and should be replaced by *and.* Lord Wilberforce came close to Professor Dickerson's analysis. He refers to an *exclusionary* alternative (*i.e.*, one but not the other) and to a *non-exclusionary alternative*,[70]

> in modern logic symbolized by "v". In lawyer's terms this may be described as the course of substituting "and" for "or", or rather the course of redrafting the phrase so as to read: "the owner and the master shall each be guilty" . . . .

He regarded the substitution of *and* for *or* as a drastic change, but he made the change since the alternative led to results so arbitrary and contrary to legal principle, and itself requiring such a degree of rewriting, as not merely to commend but to impose the change.

If the analysis of Professor Dickerson had been followed, the House of Lords could have reached the conclusion it did without professing to be substituting *and* for *or*.

The inclusive *or* and the several *and* produce the same result, and it remains for the context to indicate in what sense these two little words are used. In the *Federal Steam Navigation* case, *or* in the inclusive sense mans *both* the owner and master are liable; reading *and* in the several sense means *each of* the owner and master is liable. Having regard to the context of the statute here, no change in language, no "correction" and no substitution was necessary to reach the conclusion arrived at by the House of Lords.

But in *R. V. Croft*[71], *or* was changed to *and* in the expression *knowledge and consent.* The reason was that although knowledge does not necessarily include consent, consent always implied knowledge. Hence, if knowledge alone satisfied the statute then the words *or consent* are unnecessary and rendered meaningless.

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[69] [1974] 1 W.L.R. 505.
[70] *Ibid.*, at p. 522.
[71] (1979)N.S.R. (2d) 344.

Returning to the wording of the statute, the tribunal notes that the refusal of the Provincial Mining Recorder to accept and file the dispute was made on the day after the first anniversary of the recording of the Mining Claim. The tribunal is left making the assumption that the refusal of the Provincial Mining Recorder to accept the dispute was on account of the statutory condition set out in paragraph (a) of the elapse of greater than one year since the date of recording. This assumption is made, as leave had already been given to the applicants, the McCartneys by the tribunal pursuant to clause 48(5)(c)(ii) on the 5th of June, 2002.

Paragraph 48(5)(b) refers to the performance, filing and approval where necessary of the first prescribed unit of assessment work. Although further discussion concerning parallel provisions will be addressed below, it is noted that paragraph 71(2)(b) provides that where the first prescribed unit of assessment work is performed and filed, the mining claim will be conclusively deemed to have been staked out and recorded in accordance with the legislation, in cases where there are no disputes. Referring to the assessment work requirement, and reading the table set out in section 2 of Ontario Regulation 6/96, the first prescribed unit of assessment work is $0, with cumulative values accruing thereafter of $400 per year. Although the drafting of paragraph 48(5)(b) appears to indicate that it is necessary to file the first unit of $0 of assessment work, in fact, the tribunal is under the impression that it is the first two units of assessment work which are generally filed at one time.

There is a presumption of statutory interpretation that the legislature did not intend an absurdity. Therefore, it is found that paragraph (b) sets out a shorter period of time for protection than the one year in paragraph (a). Should the first and second units be filed after the first anniversary, paragraph (b) would provide no earlier protection to the recorded holder than paragraph (a). However, should the filing take place prior to the one year anniversary date, clause 48(5)(b) provides that a dispute shall not be received and entered against a claim, where the necessary work has been completed on that earlier date.

The third paragraph, which provides for leave of the Commissioner (the tribunal) does not give a time frame. The opening words of subsection 48(5) still apply, however, namely, "A dispute shall not be received or entered against a claim,'. The two events found in paragraph (c), which are separated by the word "or" are mutually exclusive. These are when the validity of the claim has already been adjudicated *or* when one dispute has already been filed.

The question is whether the provision is drafted such that the one year limitation provided for in paragraph (a) would continue to apply to any of the provisions set out in paragraph (c). Clause (i) does not have a time limit specified. Clause (ii) similarly does not set a time frame, although, by its wording, it is implied that the first dispute filed is within the statutory year's time frame.

Subsection (5) commences with words, in the imperative, that "A dispute shall not be received...". For any dispute to be received and entered against a claim, the dispute must be received prior to the one year anniversary of recording [(a)] or before the first unit of assessment work is performed and filed [(b)]. For a second dispute to be received and entered, it can only

occur with leave of the Commissioner and upon one of two sets of circumstances. These are if the validity of the claim has been adjudicated [(c)(i) *or* if a dispute has already been entered against the claim [(c)(i) or (c)(ii)]. This raises the question of whether the two sets of circumstances outlined in (c) are exclusive, according to the discussion by Professor Dickerson, or inclusive to those outlined in (a) and (b).

As an aside, it is noted that the legislation only provides for one dispute at a time to be considered. This is discussed in Barton, B.J. **Canadian Law of Mining** (Calgary: Canadian Institute of Resources Law, 1993) at pages 378 and 379:

> A different sort of restriction on staking disputes is the arrangement of the recording and dispute processes so that there can only be one claim at a time, or more correctly, one claim, one overstaking to challenge it, and one dispute at a time. In Ontario, this is achieved where a recorder refuses to record a claim that he or she considers to be for lands or mining rights that are included in a subsisting recorded claim that has priority in time. If requested, the recorder instead accepts it on a "filed only" basis, which permits a dispute to be adjudicated, although it is not itself a dispute.[158] The filing lapses automatically without right of appeal after sixty days unless dispute proceedings are commenced.[159]

Returning to the issue of whether the use of the word *or* at the end of clause 48(5)(b) is inclusive or exclusive, the ordinary meaning of the provisions suggest that the alternatives are mutually exclusive. There is a one year limit, which may be modified by the performance and filing of work to shorten the time frame. The reference to the leave of the Commissioner implies that it operates notwithstanding the one year limit and notwithstanding the filing of assessment, but only under one of the two circumstances specified. In fact, it would be difficult to imagine how the provisions might otherwise operate. For example, if the first dispute is received on the 364th or 365th days, with the inclusive reading of the provision, how could a second dispute comply with the requirement that the first one be entered within the year? Finally, it is noted that the leave of the Commissioner would be required *even when less than a year has passed or the first unit of assessment work has not been filed*, if the validity of the claim has already been adjudicated or if there is already a dispute filed.

Similar provisions, found in subsections 71(2), 75(1) and 76(5) are reproduced and considered:

> **71.** (1) Non-compliance by the licensee or holder of a mining claim with any requirement of this Act or the regulations as to the time or manner of the staking out and recording of a mining claim or which a direction of the recorder in regard thereto, within the time limit therefore, shall be deemed to be an abandonment, and the claim shall, without any declaration, entry or act on the part of the Crown or by any officer, unless otherwise ordered by the Commissioner, be forthwith opened to prospecting and staking out.

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[158] An overstaking of mining rights included in a mining lease does not allow one to obtain a filing: *Ackerly v. Chance Mining & Exploration Co.* (1977), 5 M.C.C. 362 (Ont. M.C.)

[159] On. s. 46(3); *Parres v. Minister of Mines (No. 2)* (1990), 7 M.C.C. 659 (Ont. M.C.).

(2) Despite subsection (1), where in respect of a mining claim, no dispute is on file and,

(a) one year has elapsed since the day of the recording of the claim; or

(b) the first prescribed unit of assessment work has been performed and filed, and, where necessary approved,

the mining claim shall be conclusively deemed to have been staked out and recorded in compliance with the requirements of with the requirements of this Act and the regulations.

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 for the purpose of ascertaining whether this Act has been complied with, but after one year from the 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 the purpose of ascertaining whether the claim has been staked out in the prescribed manner.

76. (5) Despite subsections 48(5) and 71(2), the Minister may challenge the validity of a mining claim at any time during the life of the claim and may direct the recorder or any other person to inspect the claim in accordance with section 75.

The foregoing provisions do not display an outright prohibition against any challenge to a mining claim after one year has elapsed. Rather, these provisions, along with clause 48(5)(c), are crafted in a manner which points to legislative authority to address unusual situations. These situations are where the Commissioner has given leave or where the Minister wishes to challenge the validity of the staking of a mining claim. It is noted that the wording in subsection 71(2) does not reflect all of the paragraphs in subsection 48(5). Rather, it picks up those two which occur through the passage of time or the actions of the recorded holder. Subsection 71(2) does not conclusively deem a mining claim to be validly staked where the Commissioner has given leave to file a dispute, because the deeming provisions only apply to those instances when no dispute has been filed.

It is worth noting that the provision has changed from its predecessor R.S.O 1980, c. 268, which read:

56. – (5) A dispute shall not be received or entered against a claim after a certificate of record thereof has been granted, nor, except by leave of the Commissioner, after the validity of the claim has been adjudicated upon by the recorder or by the Commissioner, or after it has been on record for sixty days and has already had a dispute entered against it.

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With the redrafting of the **Mining Act** in 1989, S.O. c. 62, the provision for a certificate of record was eliminated. The meaning of the old provision was considered in **Pacquette v. Morissette et al. No. 3**, 6 M.C.C.447, where Commissioner Ferguson noted that the wording of subsection 56(5) contained an absolute prohibition after the certificate of interest had been issued. He stated at page 452:

> The reason for the opinion that the present case is not a proper case for application for leave to file a dispute flows from subsection 56(5). It will be noted that the first principle contained in subsection 5 is an absolute prohibition of filing a dispute where a certificate of record has been granted. Such is not the case in the particular fact situation nor if such a case existed is it a matter on which the Commissioner is granted power to make an exception under the subsection. The Commissioner's jurisdiction to control the filing of disputes arises in two situations, namely, where the validity of the mining claim has been adjudicated upon by the recorder of the Commissioner or where, after the mining claim has been on record for sixty days a dispute is already entered against it. As neither of the latter two situations exist, the tribunal has no jurisdiction to deal with the application....

Subsection 48(5) as it is currently drafted does not contain the outright prohibition of its predecessor 56(5). The use of the word, "nor" after the prohibition in the earlier version serves to emphasize that the preceding prohibition applies absolutely. The question of whether this was intended by the legislature is addressed in section 10 of the **Interpretation Act** R.S.O. 1990, c. I.11:

> **10.** Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of any thing that the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

The remedial purpose behind the new provision of subsection 48(5) was purportedly addressed in **Ontario's Mines and Minerals Policy and Legislation**, A Green Paper, published by the Ministry of Northern Development and Mines on December 12, 1988. The following excerpt appears in Chapter 1, at pages 8 and 9:

> *Security of Tenure*
>
> Poor quality staking is something that can often be seen on a visit to the ground by a potential purchaser. The fact that few choose to exercise their right to examine claims prior to paying for them is a matter that is difficult to deal with.

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Recommendations

Introduce a provision that a claim is not disputable after it has been in good standing for a year and apply this provision to all claims staked under the current Act.

During the first year: raise the fee for filing a dispute, require a detailed statement of claim to accompany any dispute, and consider the right of the purchaser to re-stake the claims.

There arises the issue of the extent to which the tribunal can make use of the information contained in the Green Paper. The use of what are considered "extrinsic aids" for purposes of statutory interpretation was discussed in **Palahnuk v. Murgor Resources Inc./Ressources Murgor Inc.** (unreported) File MA 015-99 (March 30, 2000) at page 17:

> ...However, the use of what are called "extrinsic aids" for the interpretation of legislative amendment, as found in R. Sullivan, *Driedger on the Construction of Statutes (3rd ed.)*, (Toronto: Butterworths, 1994) commencing at page 432, the use of Commission reports and other background papers are governed by what is called the *partial exclusion rule*. Commencing at the bottom of page 432:
>
> > ...It is permissible to look at commission reports to discover the mischief at which the legislation is aimed, or the conditions to which it responds; in other words, it is permissible to use the report as evidence of external facts. But reports cannot be looked at as direct evidence of legislative meaning or purpose.[11] As Lord Denning explained in *Etang v. Cooper* speaking of a report that preceded the legislation under consideration:
> >
> > It is legitimate to look at the report of such a committee, so as to see what was the mischief at which the Act was directed. You can get the facts and surrounding circumstances from the report so as to see the background against which the legislation was enacted. This is always a great help in interpreting it. But you cannot look at what the committee recommended, or at least if you do look at it, you should not be unduly influenced by it. It does not help you much for the simple reason that Parliament may, and often does, decide to do something different to cure the mischief.[12]
>
> This approach has been affirmed by the Supreme Court of Canada. In *Morguard Properties v. City of Winnipeg,* Estey J. wrote:

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[11] See *Assam Railways and Trading Co. Ltd. v. Commrs. of Inland Revenue*, [1935] A.C. 445, at 458 (H.L.). See also *A.G. for British Columbia v. A.G. of Canada*, [1939] A.C. 468 (P.C.). Although it is often said that commission reports may be used as evidence of legislative purpose, this evidence is indirect. The report is admissible as evidence of the external facts from which the purpose is then inferred.

[12] [1965] 1 Q.B. 232, at 240 (C.A.).

> It has, of course, been long settled that, in the interpretation of a statute ..., the report of a commission of inquiry such as a Royal Commissioner may be used in order to expose and examine the mischief, evil or condition to which the Legislature was directing its attention. However, in the interpretation of a statute, the court, according to our judicial philosophy, may not draw upon such reports and commentaries, but must confine itself to an examination of the words employed by the Legislature in the statutory provision in question and the context of that provision within the statute.... The logic, is of course, inexorable that the Legislature may well have determined not to follow the recommendations set out in the report ....[13]

> By reading the words of the legislation against the facts and surrounding circumstances examined in the report, the court may draw inferences about the purpose of the legislation and the meaning of particular provision. But the report cannot be used as direct evidence of the legislature's intended purpose or meaning.

Based upon the application of the partial exclusion rule, the tribunal finds that it must look beyond the recommendations set out above to understand the mischief which the legislative changes sought to address. These are found in the commentary, which is picked up at page 7:

> *Security of Title*
>
> According to Section 84 of the **Mining Act**, non-compliance with any requirements of the Act as to time or manner of staking is deemed an abandonment and the ground is open for staking. But Section 50 provides that substantial compliance with the requirements of the act is sufficient.
>
> To complicate it further, Section 56 provides that a dispute may be filed by another licensee who alleges that a claim is invalid. Such rules place a considerable burden on the Mining Recorder's judgement.
>
> A purchaser of a claim or group of claims is not likely to know the manner in which the claims were staked and runs the risk of assuming potential title to claims which may not have been staked in the proper manner (i.e. grid staked) or do not substantially comply with the staking requirements. Inspection of the ground prior to purchase is a protective measure that could mitigate some of the risk. And inspection, however, might do nothing to alert a purchaser to problems of improper staking.
>
> Section 57 provides for a certificate of record which, if obtained, protects the claim from dispute in the absence of mistake or fraud. The procedure involved in applying for and issuing a certificate of record requires field inspections and, therefore, is time consuming. In the heat of a staking rush, delays in establishing title to mining claims may be unac-

.... 12

[13] (1983), 3 D.L.R. (4th ed.) 1, at 4-5 (S.C.C.).

> ceptable to the licensee. Concern has also been expressed over the power of the Mining and Lands Commissioner to revoke a certificate. In an effort to assure title to claims, it has been the practice to restake them completely and file "friendly" disputes. In such cases, if the original staking is cancelled and the restaking recorded, assessment work applied to the original staking is cancelled and the restaking recorded, assessment work applied to the original claims may not be applied to the restaked claims and legal agreements between interested parties may be breached and require rewriting, all at considerable expense.
>
> A requirement under Section 57 for a certificate of record is that surface rights compensation under Section 92 must be paid. As compensation must also include payment for any possible future damage, the requirement becomes an unreasonable impediment to obtaining the assurance a certificate provides.

The foregoing discussion highlights a number of problems with the pre-existing legislative provisions concerning staking deficiencies, security of tenure, the almost entirely open-ended nature of potential for disputes, including the revocation of a certificate of record. Mention is made of friendly disputes with the attendant potential loss of assessment work credit when attempting to overcome the deficiencies inherent in that legislative structure.

The tribunal notes that numerous changes were made to a number of provisions, not the least of which was what is now subsection 48(5). The Green Paper sought to address the need to give stakers a clear path to perform their mining activities once the first year had passed. If no dispute is entered at the end of that year, then no dispute can be entered thereafter, not even with leave of the Commissioner. This is indicative of level of certainty which has been achieved. But, should other stakers or surface rights owners wish to exercise their legal rights, then it has become necessary to commence that first dispute before the year is up. Without one dispute on record and beyond the one year's time frame, the ability to challenge the staking is limited to the Minister, who may exercise such powers pursuant to subsection 76(5). The tribunal concludes that the legislation, while maintaining vigilance around the limit of one year, sought to leave the door open to challenges for exceptional circumstances, being those for which leave is sought and those originated by the Minister.

The Green Paper indicates that the mischief which required correction was the numerous problems associated with open ended challenges to stakings and security of tenure. The issue is whether the resulting broad based changes captured the extraordinary circumstance where leave of the Commissioner is sought after one year has elapsed. If this had been the intent, it was not captured on a plain reading of the language used. Because legislation must speak for itself, this being the cornerstone of legislative intent, courts and tribunals should not and cannot be swayed from the ordinary meaning of a provision even if there is extrinsic commentary to suggest that the intent was otherwise. The tribunal, however, is of the opinion that there is no error, that the wording captures the extraordinary circumstances in which leave is sought *at any time*, but only where there has been one dispute already entered.

The tribunal finds that it does have jurisdiction to grant leave to file a dispute pursuant to either of clauses 48(5)(c)(i) or (ii), should events described in either be met, even after the one year from the date of recording has passed. Paragraphs (a),(b) and (c) are found to be exclusive, and this is the meaning given to the use of the word, "or" at the end of paragraph (b). Leave was given to the applicants and the Provincial Mining Recorder will be ordered and directed to receive and enter the dispute of Kenneth McCartney and Clare McCartney against Mining Claim SO-1234712.

The tribunal notes that this decision is made without the benefit of submissions from either of the parties, the McCartneys or Graphite Mountain Inc. Moreover, the interpretation is one which undoubtedly the Ministry of Northern Development and Mines would have wished to have been heard on, in keeping with the rights provided to the Minister as outlined in subsection 112(2) of the **Mining Act**.

Although an application for leave is arguably a matter which is finally disposed of, the actual dispute is one which would go to the Provincial Mining Recorder and may be appealed by either party to this tribunal. This being the case, the tribunal is of the opinion that its findings fall into the meaning of section 117 of the **Mining Act**, which reads:

> **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 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.

Despite its determination, the tribunal will provide alternative authority for the making of its order and direction, arising under the particular circumstances of this case.

The tribunal has examined the facts surrounding the delivery of the dispute. There is evidence that it was sent via Expresspost on July 15th, with an attempt at delivery on July 16th, with delivery secured on July 18th. It is difficult to understand what an "attempt at delivery" on a public institution having normal business hours means, and again, no explanation is available. The lack of attempt to serve the item on July 17th it troubling, in that it was the last date in which the Provincial Mining Recorder would have, of his own accord, accepted the dispute, without the intervention of the tribunal. One wonders whether this particular courier utilizes the practice of making one delivery, leaving a notice and does not attempt a second delivery until it hears from the intended recipient. However, without evidence, this is mere speculation, however common the practice.

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Subsection 16.05(2.1) of the *Rules of Civil Procedure*, which deals with service on a solicitor of record:

> 16.05(1) Service of a document on the solicitor of record of a party must be made,
> (e) by sending a copy to the solicitor's office by courier,
>
> 16.05(2.1) Service of a document by sending a copy by courier under clause (1)(e) is effective on the second day following the day the courier was given the document, unless that second day is a holiday, in which case service is effective on the next day that is not a holiday.

While the *Rules of Civil Procedure* do not apply in matters involving the Provincial Mining Recorders or the Commissioner, there are times when the principles are used by the tribunal in making its determinations or as direction on how to exercise its discretion.

Paragraph 116(1)(e) of the **Mining Act** states:

> **116.** (1) Sections 114 and 115 apply despite the *Statutory Powers Procedure Act* and subject to that Act, the Commissioner may,
>
> (c)give such other directions respecting the procedure and hearing as he or she considers proper;
> (e) order or allow such substituted service as he or she considers proper;

The tribunal finds, in the alternative, that, it is prepared to adopt the provisions of Rule 16.05(2.1), given that there is nothing under the **Mining Act** which assists it in dealing with the filing of a dispute by courier. In the alternative to the reasons set out above, the tribunal finds that it will Order that the dispute filed with the Provincial Mining Recorder on the 18th day of July, 2002 be deemed to have been filed on the 17th day of July, 2002, *nunc pro tunc*, pursuant to clauses 116(1)(c) and (e) and section 121 of the **Mining Act** and Direct that the Provincial Mining Recorder receive and enter the aforementioned dispute against Mining Claim SO-1234712.

Conclusion

The Provincial Mining Recorder will be directed and ordered to receive and enter against Mining Claim SO-1234712 the dispute of Kenneth McCartney and Clare McCartney, for which leave to file the dispute was given by this tribunal on June 5, 2002 pursuant to clause 48(5)(c)(ii). The meaning of clause 48(5)(c)(ii) is not limited to the one year prohibition, which applies exclusively to paragraph 48(5)(a). In the alternative, on the facts of this case, the tribunal is prepared to rely on the provisions of section 16.05(2.3) of the *Rules of Civil Procedure* and clauses 116(1)(c) and (e) and section 121 of the **Mining Act**. Based upon these provisions, the dispute is to be regarded as having been received on the 17th day of July, 2002, *nunc pro tunc*.