

Appeal No. MA 008-94

L. Kamerman)
Mining and Lands Commissioner)

Tuesday, the 28th day
of June, 1994.

THE MINING ACT

IN THE MATTER OF

Mining Claims P-1181230 to 1181235, both inclusive and 1181237 to 1181250, both inclusive, situate in the Township of Nova, in the Porcupine Mining Division, hereinafter referred to as the "Mining Claims";

AND IN THE MATTER OF

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

AND IN THE MATTER OF

Ontario Regulation 116/91 concerning assessment work.

B E T W E E N:

DAVID V. JONES

Appellant

- and -

MINISTER OF NORTHERN DEVELOPMENT AND MINES

Respondent

ORDER

WHEREAS this appeal was received by this tribunal on the 10th day of March, 1994;

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AND WHEREAS a hearing was held by telephone conference call on June 14, 1994;

UPON hearing from the parties and reading the documentation filed;

1. THIS TRIBUNAL ORDERS that the appeal from the decision of the Mining Recorder for the Porcupine Mining Division reducing value of assessment work filed for credit to the Mining Claims is hereby dismissed;

2. THIS TRIBUNAL FURTHER ORDERS that the time during which the appeal concerning the Mining Claims was pending before the tribunal, being March 10, 1994 to June 28, 1994, be excluded in computing time within which assessment work upon the Mining Claims is to be performed.

3. THIS TRIBUNAL FURTHER ORDERS that October 20, 1994 is fixed as the date when the next unit of assessment work shall be performed and reported on Mining Claims P-1181230 and 1181231.

4. THIS TRIBUNAL FURTHER ORDERS that September 19, 1994 is fixed as the date when the next unit of assessment work shall be performed and reported on Mining Claims P-1181232 to 1181235, both inclusive, and on Mining Claims P-1181237 to 1181250, both inclusive.

5. THIS TRIBUNAL FURTHER ORDERS that no costs shall be payable by either party in respect of this appeal.

IT IS FURTHER DIRECTED that upon payment of the required fees, this Order be filed in the Office of the Mining Recorder for the Porcupine Mining Division.

Reasons for this order are attached.

DATED this 28th day of June, 1994.

Original signed by

L. Kamerman
MINING AND LANDS COMMISSIONER.

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MINISTER OF NORTHERN DEVELOPMENT AND MINES

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REASONS

The hearing of this matter was conducted by telephone conference call commencing at 11 o'clock in the forenoon on June 14, 1994.

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Appearances:

John Kevin Filo	Speaking on behalf of the appellant, David V. Jones
John Norwood	Counsel for the respondent, the Minister of Northern Development and Mines

Mr. Filo was on the telephone from Porcupine, Ontario. He indicated that he was both agent for Mr. Jones and a partner in the Mining Claims, having a beneficial interest in the Mining Claims. Mr. Norwood spoke from his office in Toronto, Ontario. Mark Dixson Hall, Chief Mining Recorder and witness on behalf of the Minister of Northern Development and Mines ("MNDM"), spoke from his office in Sudbury Ontario.

Evidence and Submissions:

The issue for determination is one of interpretation. This being the case, the following Statement of Facts was prepared by the office of the tribunal and sent to the parties for their agreement. Once all parties were in agreement with the facts as set out, the tribunal determined that it would be prudent to proceed to the hearing by Telephone Conference call.

The Statement of Fact is reproduced in full below:

1. Mining Claims P-1181230 and 1181231 were staked on June 3, 1991 and recorded on July 2, 1991.
Mining Claims P-1181232 to 1181235, both inclusive and 1181237 were staked on May 7, 1991 and recorded on May 31, 1991.
Mining Claims P-1181238 to 1181244, both inclusive, were staked on May 6, 1991 and recorded on May 31, 1991.
Mining Claims P-1181245 to 1181250, both inclusive, were staked on May 5, 1991 and recorded on May 31, 1991.
2. Each of the Mining Claims was recorded in the Office of the Mining Recorder for the Porcupine Mining Division in the name of David V. Jones (Client Number 149868).

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3. The first Report of Work Conducted After Recording Claims ("First Work Report") concerning the Mining Claims was received in the Office of the Mining Recorder for the Porcupine Mining Division on May 5, 1993. The entire work report was approved on July 27, 1993.
4. The second Report of Work Conducted After Recording Claim ("Second Work Report"), Form 0241 (03/91) concerning the Mining Claims sets out that work was performed between October 1, 1991 and November 4, 1991, having a value of \$5,901.00. The Form is certified by David V. Jones as being the recorded holder and having a beneficial interest in the Mining Claims. The Certification of the Work Report is signed by John Kevin Filo.
5. The second Work Report, which is the subject matter of the appeal, is dated October 25, 1993 and was received in the Office of the Mining Recorder for the Porcupine Mining Division on October 25, 1993.
6. On January 24, 1994 David V. Jones was notified by the Mining and Lands Branch of the Ministry of Northern Development and Mines, that the assessment work credit which he had claimed on the Mining Claims in the October 25, 1993 Second Work Report had been reduced pursuant to subsection 4(3) of Ontario Regulation 116/91 which states that:

Assessment work filed for credit after twenty-four and before sixty months after the date of performance shall be credited at 50 per cent of the value.

Other relevant subsections of Ontario Regulation 116/91 are reproduced:

4. - (1) Subject to sections 8 and 21, assessment work performed on a mining claim in any assessment year is eligible for assessment

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work credit if filed within sixty months after the date of performance.

(2) Assessment work filed for credit within twenty-four months after the date of performance shall be credited at 100 per cent of the value.

7. John Kevin Filo, agent for the appellant and recorded holder David V. Jones, filed a Notice of Appeal dated March 10, 1994.
8. It is the appellant's position that all of the assessment work should be credited to the claims because the **Mining Act** and specifically Ontario Regulation 116/91, is not specific with regards to the meaning of the word "performance" relative to a twenty-four month period of time.
9. It is the Ministry's contention that the appellant filed the work report after twenty-four and before sixty months after the date the work was performed in the field. Therefore, in compliance with subsection 4(3) of Ontario Regulation 116/91, the eligible amount of work to be credited against the Mining Claims should be reduced by 50 per cent of the value.

Mark Dixon Hall, Chief Mining Recorder, Mining and Land Management Branch, gave evidence on behalf of MNDM. Mr. Hall stated that MNDM interprets subsection 4(2) of Ontario Regulation 116/91 to mean that assessment work which has been physically performed within twenty-four months of the date the assessment work report is filed will be recognized at a rate of 100 per cent of the value of the work.

Mr. Hall stated that the invoice from Excalibur International Consultants dated November 5, 1991 (Ex. 3) indicates that the interpretation of existing air data took place on October 18, 19, 20, 28, 29 and 30, 1991. Based upon the date of the

Report of Work Conducted After Recording Claim (Ex. 5), which is dated October 22, 1993 and was received in the office of the Mining Recorder for the Porcupine Mining Division on October 25, 1993, twenty-four months was calculated back in time from October 24th, 1993.

As a result of the dates upon which the work was performed, and MNDM's application of subsections 4(2) and 4(3) of Ontario Regulation 116/91, 50 percent of the work was credited at 100 percent of its value having been completed within the last twenty-four months, and 50 percent of the work was credited at 50 percent, having been completed within twenty-four and sixty months of the date of filing. Calculations for the assessment work credit are set out in a January 24, 1994 letter from Ron Gashinski (Ex. 6) as \$4,426.00. This calculation recognizes 100 percent of half of the work, or \$2,950.00 plus 50 percent for the other half of the work, or \$1,475.00.

Mr. Hall testified that section 4 of Ontario Regulation 116/91 has been consistently applied since changes to the **Mining Act** became effective on June 3, 1991. Recognizing that there were possible slips in its application, Mr. Hall stated that MNDM has recognized assessment work on the basis of completion of the physical work within twenty-four months for recognition of 100 percent of its value, and that the mining community is aware of and has accepted this approach.

The meaning of the word "performed" in subsection 4(2) and 4(3) of the regulation, when applied to reinterpretation of data, as was done in the case of the appellant, is the date of the reinterpretation and not the date of signing off on the contract or date of invoice.

Mr. Hall explained that MNDM's interpretation was to prevent a recorded holder from filing assessment work six years after the physical work had been done. The date of signing off on assessment work could be controlled by a recorded holder's refusal to pay for the work for unreasonable periods of time. If this type of conduct on the part of the recorded holders was allowed through recognition and crediting of assessment work which had been done in the more distant past, the purpose behind section 4, being to augment MNDM's data base, would be defeated and rendered meaningless.

The tribunal asked Mr. Hall about the wording concerning filing discounts

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of the Statement of Costs for Assessment Credit (Ex. 1), Form 0212 (04/91), which is reproduced:

1. Work filed within two years of completion is claimed at 100% of the above Total Value of Assessment Credit.
2. Work filed three, four or five years after completion is claims at 50% of the above Total Value of Assessment Credit.

Mr. Hall admitted that the wording of the form is problematic and misleading in using the word "completion". He indicated that MNDM was planning on changing the wording at such time when it would be reprinted. However, as the form is not regulated, but only used as a model, and recorded holders are allowed to base their report on a similar format, it must be the wording of the regulation and not the form which must govern the extent to which assessment work will be recognized.

Mr. Filo did not wish to call any witnesses, relying on the agreed statement of fact. His final submissions were contained in his letter of April 29, 1994 (Ex. 12), addressed to D.E. Pascoe, Registrar of the tribunal, which is reproduced in part below:

I would like to take this opportunity to comment on what has transpired to date on this issue including statements presented by yourself on behalf of the commissioners office. I believe the facts stated in your short brief are reasonably accurate and to the point. However, I would like to expand a little on items eight (8) and nine (9) to plead my case.

As you are aware a new mining act has only recently been enacted and many new terms and phrases are subject to interpretation. The current dispute is over one specific section quoted as follows:

Assessment work filed for credit after twenty-four
and before sixty months after the date of

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performance shall be credited at 50 per cent of the value.

(Mining Act, Ont. Regulation 116/91 4(1))

More accurately the portion of the previous section that is not specifically defined and is the major point of contention is "date of performance."

It is my opinion that performance means having completed something; Websters dictionary defines it as " the fulfilment of a request." Thus, a report with the signature and date by the author is the final culmination of assessment work. To further support this point, one may examine the ministry's very own form for filing assessment costs entitled statement of costs. (enclosed) It can be seen that under the section filing discounts, the following is stated: "work filed within two years of completion is claimed at 100% of the above total value of assessment credit."

It has been stated in section nine (9) by Mr. Pascoe in his summary, that it is the Ministry's contention that the work was filed after twenty-four, and before sixty months after the work was performed in the field. Once again, the work performance is subject to interpretation here. I refer you to the quote from the mining act just quoted previously; it does not mention anything whatsoever regarding field work. In any event even if it did, it would not be relevant as there was no field work involved in this case. This work was re-interpretation carried out in a consultant's office.

With respect to the current case, it is fairly obvious from the statements above that the ministry believes that the "date of performance" occurs some time after the field person or consultant pushes a button or picks up a pencil respectively. This nebulous definition makes for a difficult interpretation of when work for assessment is complete, or to be handed in to attain 100% credit.

I might also add, that the mining act shows that set reports are required for field work, with a set format before the work is accepted; these reports have to be performed. This author once again points out that the assessment is performed when a report is completed, meaning the date is put on the report and signed by the author when finished.

Lastly, I would like to make a few closing comments on this issue for the record. You will note that I filed this work Oct. 25/93 or ten days prior to what I thought was the due date or the second year anniversary. At the time I truly felt that I was acting within the scope of the regulations, such that I would receive 100% credit for the work. I personally feel because of the terminology used in the act I have been unjustly penalized; and because of this I have taken this issue to the commissioner. Perhaps since this term "date of performance" is so non-specific, perhaps an amendment to the regulations should be considered to make this term more specific or straightforward.

Mr. Norwood submitted that the working of subsections 4(2) and 4(3) of the regulation are quite specific. The Oxford Public Dictionary defines "performance" as the "act of process of performing or carrying out". On that basis, the application of the regulation requires that, where work is done in an office, each date must be examined to determine which subsection of the regulation is applicable. Mr. Norwood submitted that this approach is reasonable, whereas the approach advocated by Mr. Filo is perverse and if his interpretation were found to govern, it would render the subsections meaningless. Mr. Norwood submitted that, to allow the interpretation advocated by Mr. Filo would put control of the applicable date within the control of the recorded holder according to when the assessment work report was finalized.

Mr. Filo asked that the tribunal consider an extension of time in regard to the Mining Claims as the mining recorder was not prepared to consider his request while the matter was before the tribunal.

Mr. Norwood indicated that his client would have no objections to the tribunal considering an exclusion of time, pursuant to clause 67(1)(b) of the **Act**.

Mining Claims P-1181230 and 1181231 were staked on June 3, 1991 and recorded on July 2, 1991. Mining Claims P-1181232, 1181233, 1181234, 1181235 and 1181237 were staked on May 7, 1991. Mining Claims P-1181238, 1181239, 1181240, 1181241, 1181242, 1181243 and 1181244 were staked on May 6, 1991. Mining Claims P-1181245, 1181246, 1181247, 1181248, 1181249 and 1181250 were staked on May 5, 1991. All Mining Claims staked on May 5, 6 and 7 were recorded on May 31, 1991.

Findings:

Conceptually, the **Mining Act** requires that assessment work be done, the results of the work be reduced to a report and that the report be filed for purposes of obtaining assessment work credit. While work, reporting and filing must be done to comply with the requirements of the legislation, the issue under appeal focuses on the use of the word, "date of performance" in section 4 of Ontario Regulation 116/91. More specifically, does "performance" of assessment work mean that it must be completed and the report of work prepared.

Subsection 65(1) of the **Mining Act** uses the word "perform" in relation to annual units of assessment work. Subsection 65(2) sets out that to comply with subsection (1), a report of the assessment work "done" must be filed. It is arguable that the use of the word "done" as opposed to "performed" in subsection (2) suggests that "perform" in subsection (1) has a broader meaning than just doing the work and must include the preparation of the report. The tribunal prefers the interpretation which would recognize the word "done" as part of the clause used to refer back to subsection (1), namely, "of the assessment work done for the purpose of complying with subsection (1)". The relevant sections of the **Act** are reproduced:

65. - (1) The holder of a mining claim shall, following the recording of the claim, perform such annual units of assessment work as are prescribed.

(2) Subject to subsection (3), every mining claim holder shall, not later than the anniversary date, file in the office of the recorder or such other location as is prescribed a report in the prescribed form of the assessment work done for the purpose of complying with subsection (1), together with such other information as may be prescribed.

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Subsection 73(1), which deals with extensions of time, mentions both "performing and filing the report of assessment work". There are no words included to connote preparation of the report, although arguably, it is implied by referring back to subsection 65(2). If this is the case, then the preparation of the report, although necessary to obtain assessment work credit, is not part of what constitutes its performance.

Prior to June 3, 1991, assessment work was done pursuant to sections 76 and 77 of the **Mining Act**, R.S.O. 1980, c. 268. It is interesting to note that assessment work was determined on the basis of days worked. The work was to be done within one year time frames, but could be reported not later than ten days after the expiration of the time period. Portions of the 1980 **Mining Act** are reproduced:

76. - (3) The recorded holder of a mining claim shall, not later than ten days after each of the periods specified, make a report in the prescribed form as to the work done or caused to be done by him during such period, verified by certificate in the prescribed form, and the report shall show in detail,

.....

- (b) the names and addresses of the men who performed the work; and
- (c) the dates upon which each man worked in its performance,

.....

From this, it can be seen that in the prior legislation, there was a clear separation between assessment work done and preparation and filing of the work report.

The wording used in various sections of Ontario Regulation 116/91 retain the separation of work done and reporting. Clause 9(a) provides that prospecting work "performed" is eligible for assessment work credit if a detailed report is submitted. Subsection 10(1) sets out the types of physical assessment work eligible for assessment

work credit. Clause 10(2)(a) sets out that such physical work must be accompanied by a report. Subsection 11(1) provides that geotechnical surveys in respect of geological, geochemical, geophysical, airborne geophysical or regional survey work will be eligible if a typewritten survey report is submitted. Sections 12, 13, 14 and 15 refer back to the requirements of the report in subsection 11(2).

Clause 28(j) of the **Interpretation Act**, R.S.O. 1990, c. I.11 states:

28. In every Act, unless the contrary intention appears,

- (j) words importing the singular number or the masculine gender only include more persons, parties or things of the same kind than one, and females as well as males and the converse;

Within the context of subsection 4(1) of Ontario Regulation 116/91, is it the intention of the legislation that there be a series of "dates of performance", or is there only one "date of performance" which includes completion of physical or interpretive work and may or may not include the report preparation of same.

Turning to the evidence of Mr. Hall, it is clear that MNDM considers the time frames of the carrying out of assessment work and its reporting to be within the control of the recorded or beneficial holder. Depending on the willingness to pay for assessment work, the preparation of the report can be withheld pending security of payment. The mischief which MNDM is seeking to avoid is the blatant manipulation of the relevant date for purposes of assessment work credit which bears no relationship to the time the physical work is done in the field or the interpretation work is done in a consultant's office.

The tribunal finds that there is sufficient basis in the legislation to separate the date or dates of doing the work, be it physical or interpretive, from the date of signing off on a contract, which could be evidenced from the date of the final report or date of invoicing. The object of the assessment work provisions of the **Act** is

clearly to have regular work undertaken and reported on to augment the provincial data base. To have the final date of a project govern the date of performance would run contrary to this object. The tribunal finds that the intent of the legislation remains unchanged, and that each date on which work is performed will be considered separately for purposes of calculation of assessment work credit.

In the current appeal, the assessment work would have had to be filed by October 20, 1993 to receive 100 per cent credit. Although Mr. Filo is acknowledged to have filed within days of the twenty-four month cut-off period, he is deemed to know the law. It is also true that he has had the report from Excalibur International Consultants Ltd. in his possession for almost a full two years, and was not precluded from filing it earlier. The tribunal finds that it will place no weight on the wording of form 0121 (04/91) which refers to date of completion of assessment work, being an administrative form of MNDM and not having been regulated.

The tribunal finds that the appeal of the appellant will be dismissed.

On the matter of exclusion of time, pursuant to clause 67(1)(b) of the **Act**, the tribunal finds that neither Mr. Jones nor Mr. Filo were responsible in any way for delay in settling the matter before the tribunal. Therefore, the time during which this matter was under appeal, being March 10, 1994 to June 28, 1994, being 109 days, will be excluded for purposes of determining when the next prescribed unit of assessment work is due.

October 20, 1994 is fixed as the date when the next unit of assessment work shall be performed and reported on Mining Claims P-1181230 and 1181231. September 19, 1994 is fixed as the date when the next unit of assessment work shall be performed and reported on Mining Claims P-1181232 to 1181235, both inclusive, and on Mining Claims P-1181237 to 1181250, both inclusive. Pursuant to subsection 67(2), October 20 and September 19 become the new anniversary dates for future years of assessment work.

The tribunal notes that the dollar amount for the assessment work filed, before discounting, was not sufficient to keep all of the Mining Claims in good standing, so that additional assessment work would have had to been done whether or not the appeal was successful. The appellant is referred to subsection 73(1) of the **Mining Act**, whereby an application for an extension of time to perform and file an

assessment work report can be applied for to the Mining Recorder within thirty days before the dates fixed above.

Conclusions:

The appeal from the decision of the Mining Recorder will be dismissed.

The time during which the appeal concerning the Mining Claims was before the tribunal will be excluded for purposes of determining when the next prescribed unit of assessment work will be performed and filed. New anniversary dates for all of the Mining Claims have been fixed as set out above.