

Appeal No. MA 029-93

L. Kamerman ) Thursday, the 16th day  
Mining and Lands Commissioner ) of June, 1994.

**THE MINING ACT**

**IN THE MATTER OF**

Mining Claims SSM-937765 to 937768, both inclusive, 937770 to 937772, both inclusive, 1043693 to 1043698, both inclusive, 1043701 to 1043712, both inclusive, 1043715 to 1043721, both inclusive, 1043724 to 1043727, both inclusive, 1043731 to 1043771, both inclusive, 1043774 to 1043776, both inclusive, 1043779 to 1043786, both inclusive, 1043789 to 1043791, both inclusive, 1043799 to 1043803, both inclusive, 1043806 to 1043812, both inclusive, 1043814 to 1043828, both inclusive, 1043994 to 1043997, both inclusive, 1044084 to 1044086, both inclusive, 1044094 to 1044097, both inclusive, 1044100 to 1044103, both inclusive, 1044389 to 1044392, both inclusive, 1069354 to 1069376, both inclusive, 1069378 to 1069391, both inclusive, 1078265 to 1078277, both inclusive, 1078307, 1078308, 1078313, 1078314 and 1078319, situate in the Township of Odlum; Mining Claims SSM-1055500 to 1055543, both inclusive, 1069200 to 1069291, both inclusive, 1069300 to 1069350, both inclusive, 1069352, 1069353 and 1069377, situate in the Township of Hambleton; Mining Claims SSM-1044359 to 1044361, both inclusive, 1044372, 1044378, 1044379, 1044388, 1044393 to 1044401, situate in the Township of Tedder; Mining Claims SSM-1044362 to 1044371, both inclusive, 1044374 to 1044377, both inclusive, 1044380 to 1044387, both inclusive, 1044402, 1044403, 1078305, 1078306, 1078309 to 1078312, both inclusive and 1078315 to 1078318, both inclusive, situate in the Township of Strickland, in the Sault Ste. Marie Mining Division, hereinafter referred to as the "Ternowesky Mining Claims".

**AND IN THE MATTER OF**

JOHN EDWARD TERNOWESKY

Applicant Of The First Part

**AND IN THE MATTER OF**

An application for an order that time during which the Ternowesky Mining Claims were the subject matter of an action in the Ontario Court of Justice (General Division), bearing Court File No. 91-CQ-5365 be excluded in computing time within which the next prescribed unit of assessment work upon these mining claims is to be performed and fixing a date by which the fifth and sixth prescribed unit of assessment work shall be performed and filed pursuant to clause 67(1)(b) of the Mining Act, R.S.O. 1990, c.M.14;

**AND IN THE MATTER OF**

Mining Claims SSM-1055550 to 1055555, both inclusive, 1055557 to 1055561, both inclusive, 1055563 to 1055589, both inclusive, 1069100, 1069120, 1069121, 1069186 to 1069194, both inclusive and 1069196 to 1069199, both inclusive, situate in the Township of Hambleton; Mining Claims SSM-1024809 to 1024837, both inclusive, situate in the Township of Tedder; SSM-1024801 to 1024808, both inclusive, 1078215 to 1078219, both inclusive, 1069174 and 1069175, 1078236, 1078237, 1078239 and 1078243 to 1078259, both inclusive, situate in the Township of Odlum; SSM-1069101 to 1069106, both inclusive, situate in the Township of Cooper; SSM-1069107 to 1069119, both inclusive, 1069122 to 1069172, both inclusive, 1069177 to 1069184, both inclusive, 1078220 to 1078235, both inclusive, 1078238 and 1078240 to 1078242, both inclusive, situate in the Township of Strickland; and SSM-1069173, 1069176 and 1069185, situate in both the Townships of Odlum and Strickland, in the Sault Ste. Marie Mining Division, hereinafter referred to as the "Nabigon Mining Claims".

**AND IN THE MATTER OF**

PETER JOSEPH NABIGON

Applicant Of The Second Part

**AND IN THE MATTER OF**

An application for an order that time during which the Nabigon Mining Claims were the subject matter of an action in the Ontario Court of Justice (General Division), bearing Court File No. 91-CQ-5365 be excluded in computing time within which the next prescribed unit of assessment work upon these mining claims is to be performed and fixing a date by which the fifth and sixth prescribed units of assessment work shall be performed and filed pursuant to clause 67(1)(b) of the Mining Act, R.S.O. 1990, c.M.14.

**ORDER**

**WHEREAS** the Ternowesky Mining Claims for which John E. Ternowesky is the recorded holder and the Nabigon Mining Claims for which Peter J. Nabigon is the recorded holder were the subject matter of an action in the Ontario Court of Justice (General Division), bearing Court File No. 91-CQ-5365, with the action having commenced on September 27, 1991 and having been disposed of by a Consent Judgement issued by Mr. Justice Ewaschuk on July 9, 1993;

**AND WHEREAS** an application for an order pursuant to clause 67(1)(b) of the **Mining Act**, R.S.O. 1990, c. M.14 was received on August 11, 1993;

**AND WHEREAS** 83 Mining Claims of which John E. Ternowesky is the recorded holder, as set out in Appendix A to this Order, excluding Mining Claim SSM-1069351, were placed under "pending proceedings" by Order of the Mining Recorder for the Sault Ste. Marie Mining Division on October 3, 1991;

**AND WHEREAS** Mining Claim SSM-1069351 was cancelled by Order of the Mining Recorder for the Sault Ste. Marie Mining Division on November 9, 1992;

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**AND WHEREAS** 16 Mining Claims of which Peter J. Nabigon is the recorded holder, as set out in Appendix B to this Order, were placed under "pending proceedings" by Order of the Mining Recorder for the Sault Ste. Marie Mining Division on October 3, 1991;

**AND WHEREAS** 53 of the Ternowesky Mining Claims, as set out in Appendix C, forfeit on March 10 and March 11, 1994, respectively;

**UPON READING** the application filed,

**1. THIS TRIBUNAL ORDERS** that the 53 Ternowesky Mining Claims, as set out in Appendix C, are hereby relieved from forfeiture.

**2. THIS TRIBUNAL FURTHER ORDERS** that the time during which the Ternowesky and the Nabigon Mining Claims were the subject matter of an action in the Ontario Court of Justice (General Division), being September 27, 1991 to June 16, 1994, excluding those set out in Appendix A and Appendix B, a total of 995 days, is excluded in computing time within which work upon the Mining Claims is to be performed and filed.

**3. THIS TRIBUNAL FURTHER ORDERS** that the time during which the Mining Claims set out in Appendix A and Appendix B attached hereto, be placed under pending proceedings from the date of the Order of the Mining Recorder for the Sault Ste. Marie Mining Division, being October 3, 1991 to June 16, 1994, a total of 988 days, is excluded in computing time within which work upon these Mining Claims is to be performed and filed.

**4. THIS TRIBUNAL FURTHER ORDERS** that the dates as set out in Appendix D are fixed by which the next prescribed unit of work shall be performed and filed on all of the Mining Claims.

**5. THIS TRIBUNAL FURTHER ORDERS** that the certificate of pending proceedings against 83 Ternowesky Mining Claims and 16 Nabigon Mining Claims dated October 3, 1991, is hereby vacated.

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

Reasons for this Order are attached.

**DATED** this 16th day of June, 1994.

Original signed by

L. Kamerman  
MINING AND LANDS COMMISSIONER

#### APPENDIX A

Mining Claims SSM-1044096, 1044097 and 1069354 to 1069360, both inclusive, situate in the Township of Odlum, 1055514 to 1055520, both inclusive, 1055522 to 1055525, both inclusive, 1055528 to 1055531, both inclusive, 1055534, 1055539 to 1055542, both inclusive, 1069300 to 1069350, both inclusive, 1069352 and 1069353, situate in the Township of Hambleton.

#### APPENDIX B

Mining Claims SSM-1069100, 1069120 to 1069121, both inclusive, 1069186 to 1069194, both inclusive and 1069196 to 1069199, both inclusive, situate in the Township of Hambleton.

#### APPENDIX C

Mining Claims SSM-1069232 to 1069252, both inclusive, 1069254 to 1069260, both inclusive, 1069263 to 1069265, both inclusive and 1069271 to 1069275, both inclusive, in the Township of Hambleton, which forfeit March 10, 1994 and were cancelled on April 14, 1994.

Mining Claims SSM-1069378, 1069379, 1069382 to 1069385, both inclusive, 1069388 and 1069389, situate in the Township of Odlum, which forfeit March 10, 1994 and were cancelled on April 21, 1994.

Mining Claims SSM-1055512, 1055513, 1055521, 1055526, 1055527, 1055532, 1055533, 1055535 and 1055538, situate in the Township of Hambleton, which forfeit March 11, 1994 and were cancelled on April 14, 1994.

## APPENDIX D

<u>Claim Number</u>	<u>Due Date</u>
SSM-1069300-50 incl.	February 15, 1996
SSM-1069352-60 incl.	February 15, 1996
SSM-937765-68 incl.	July 2, 1997
SSM-937770-72 incl.	July 2, 1997
SSM-1043693-98 incl.	July 2, 1997
SSM-1043701-12 incl.	July 2, 1997
SSM-1043715-17 incl.	July 2, 1997
SSM-1043718-21 incl.	July 2, 1997
SSM-1043724-27 incl.	July 2, 1997
SSM-1043731	July 2, 1997
SSM-1043732-42 incl.	July 2, 1997
SSM-1043743-71 incl.	July 2, 1997
SSM-1043774-76 incl.	July 2, 1997
SSM-1043779-86 incl.	July 2, 1997
SSM-1043789-91 incl.	July 2, 1997
SSM-1043799-802 incl.	July 2, 1997
SSM-1043803 incl.	July 2, 1997
SSM-1043806-12 incl.	July 2, 1997
SSM-1043814-28 incl.	July 2, 1997
SSM-1043994-95 incl.	July 2, 1997
SSM-1043996-97 incl.	July 2, 1997
SSM-1044084-86 incl.	July 2, 1997
SSM-1044094-95 incl.	July 2, 1997
SSM-1044096-97 incl.	August 7, 1996
SSM-1044100-03 incl.	July 2, 1997
SSM-1044359-72 incl.	July 10, 1997
SSM-1044374-403 incl.	July 10, 1997
SSM-1069361-91 incl.	October 6, 1997
SSM-1078265-77 incl.	October 6, 1997
SSM-1078305-07 incl.	October 6, 1997
SSM-1078308-19 incl.	October 6, 1997
SSM-1069232-91 incl.	October 6, 1997

<u>Claim Number</u>	<u>Due Date</u>
SSM-1055500-13 incl.	October 7, 1997
SSM-1055514-20 incl.	November 12, 1996
SSM-1055521	October 7, 1997
SSM-1055522-25 incl.	November 12, 1996
SSM-1055526-27 incl.	October 7, 1997
SSM-1055528-31 incl.	November 12, 1996
SSM-1055532-33 incl.	October 7, 1997
SSM-1055534	November 12, 1996
SSM-1055535-38 incl.	October 7, 1997
SSM-1055539-42 incl.	November 12, 1996
SSM-1055543	October 7, 1997
SSM-1069200-31 incl.	December 8, 1997
SSM-1069100	February 15, 1996
SSM-1069120-21 incl.	February 15, 1996
SSM-1069186-94 incl.	February 15, 1996
SSM-1069196-99 incl.	February 15, 1996
SSM-1024801-37 incl.	June 18, 1997
SSM-1055550-55 incl.	September 26, 1997
SSM-1055557-61 incl.	September 26, 1997
SSM-1055563-89 incl.	September 26, 1997
SSM-1069101-06 incl.	October 6, 1997
SSM-1069167-85 incl.	October 6, 1997
SSM-1078215-42 incl.	October 6, 1997
SSM-1078243-59 incl.	October 6, 1997
SSM-1069107-19 incl.	December 1, 1997
SSM-1069122-66 incl.	December 1, 1997



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**AND IN THE MATTER OF**

JOHN EDWARD TERNOWESKY

Applicant Of The First Part

**AND IN THE MATTER OF**

An application for an order that time during which the Ternowesky Mining Claims were the subject matter of an action in the Ontario Court of Justice (General Division), bearing Court File No. 91-CQ-5365 be excluded in computing time within which the next prescribed unit of assessment work upon these mining claims is to be performed and fixing a date by which the fifth and sixth prescribed unit of assessment work shall be performed and filed pursuant to clause 67(1)(b) of the Mining Act, R.S.O. 1990, c.M.14;

**AND IN THE MATTER OF**

Mining Claims SSM-1055550 to 1055555, both inclusive, 1055557 to 1055561, both inclusive, 1055563 to 1055589, both inclusive, 1069100, 1069120, 1069121, 1069186 to 1069194, both inclusive and 1069196 to 1069199, both inclusive, situate in the Township of Hambleton; Mining Claims SSM-1024809 to 1024837, both inclusive, situate in the Township of Tedder; SSM-1024801 to 1024808, both inclusive, 1078215 to 1078219, both inclusive, 1069174 and 1069175, 1078236, 1078237, 1078239 and 1078243 to 1078259, both inclusive, situate in the Township of Odlum; SSM-1069101 to 1069106, both inclusive, situate in the Township of Cooper; SSM-1069107 to 1069119, both inclusive, 1069122 to 1069172, both inclusive, 1069177 to 1069184, both inclusive, 1078220 to 1078235, both inclusive, 1078238 and 1078240 to 1078242, both inclusive, situate in the Township of Strickland; and SSM-1069173, 1069176 and 1069185, situate in both the Townships of Odlum and Strickland, in the Sault Ste. Marie Mining Division, hereinafter referred to as the "Nabigon Mining Claims".

**AND IN THE MATTER OF**

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**REASONS**

The application for an exclusion order pursuant to clause 67(1)(b) was received on August 11, 1993. In a telephone discussion with Peter Jervis, lawyer for the applicants John Ternowesky and Peter Nabigon, the tribunal was asked to consider an exclusion order for all of the mining claims involved in the action in the Ontario Court of Justice (General Division) bearing Court File No. 91-CQ-5365. Mr. Jervis explained that, at the time the pending proceedings were placed on 99 of the Mining Claims, further described in Appendices A and B, his clients could not afford to have certificates of pending proceedings placed on all 651 Mining Claims. The tribunal notes that, pursuant to section 1, paragraph 9 of Ontario Regulation 112/91, the cost for recording a certificate of pending proceedings was \$10.00 per mining claim. At the time the 99 certificates of pending proceedings were applied for, being October 3, 1991, the cost to the applicants for placing all 651 of the Ternowesky and Nabigon Mining Claims under pending proceedings would have been \$6,510.00.

Paragraph 30(f) of the **Act** states:

- 30.** No mining claim shall be staked out or recorded on any land,

....4

- (f) while proceedings in respect thereto are pending before the Ontario Court (General Division), the Commissioner or a recorder.

Subsection 64(2) of the **Act** states:

**64. - (2)** In a proceeding calling in question an interest in an unpatented mining claim or other recorded right or interest, the Commissioner or recorder may issue a certificate in the prescribed form and, upon receipt thereof and payment of the prescribed fee, the recorder shall file and note it as above directed.

Clause 67(1)(b) of the **Act** states:

**67. - (1)** In computing the time within which work upon a mining claim is required to be performed or within which application and payment for a lease may be made,

- (b) the time during which proceedings in respect of the mining claim are pending before the Ontario Court (General Division), the Commissioner or the recorder, where the Commissioner is satisfied that any delay in settling the matter is not the fault of the holder,

shall be excluded, and the Commissioner may make an order fixing the date or dates by which the next or any prescribed units of worked shall be performed and reported or by which an application and payment for lease may be made.

Based upon Appendix II attached to the Statement of Claim bearing Court File No. 91-CQ-5365, the tribunal determined that those Mining Claims which were the subject matter of the proceedings in the Ontario Court (General Division) were the same Mining Claims as form the subject matter of the application, save and accept for Mining Claim SSM-1069351, which was cancelled by Order of the Mining Recorder for the Sault Ste. Marie Mining Division on November 9, 1992.

The issue of what constitutes a "proceeding" was considered by the tribunal. The wording of clause 67(1)(b) does not mention the certificate of interest which is provided for in subsection 64(2). The word "proceeding" was considered in various jurisdictions in Canada where the Rules of Practice and Procedure refer to the term. In **McDougall v. Groat** (1916), 10 W.W.R. 375, it was determined that under English Marginal Rule 973, where no "proceeding in an action could be taken without one month's notice, where one year has elapsed since the last proceeding in the action", the Court held that an application for a garnishee summons could be made before judgement and without notice is a "proceeding" within the meaning of the rule. In **Hannah v. Municipal District of Flagstaff**, [1926] 4 D.L.R. 470; [1926] 3 W.W.R. 301, Rule 257 empowers a judge "at any stage of the proceedings" to allow either party to "amend his pleadings or other proceedings", it was held that a "proceeding" is a step in an action. In **Royce v. Municipality of Macdonald** (1909), 12 W.L.R. 347 (C.A.), the word "proceeding" was found to have a very wide meaning and to include steps or measures which are not in any way connected with the action or suit. In **Neil v. Almond** (1897), 29 O.R. 69, it was determined that under section 23 of the **Limitations Act**, R.S.O. 1887, c. 111, that a proceeding means the performance of an act as distinct from consideration of an abstract right.

The tribunal finds that clause 67(1)(b) raises two questions of fact. The first is whether the subject matter of the application was the subject matter of a proceeding. In this case, based upon the Court documents, the tribunal finds that it is satisfied that all of the Ternowesky and Nabigon Mining Claims were the subject matter of proceedings before the Ontario Court (General Division). This finding of fact is not altered by the fact that only those Mining Claims listed in Appendices A and B to this order were under a certificate of pending proceedings.

The second question of fact which the tribunal must determine is whether any delay in settling the proceeding is the fault of the holder of the mining claim. The matter of determining this issue was delayed due to circumstances which require explanation.

Contrary to common belief, the power of the tribunal under clause 67(1)(b) is limited by subsection 67(2) to a counting of the number of days during which the affected mining claim(s) was/were under pending proceedings and to calculate and set the new date by which the assessment work must be performed and recorded. There is no general power in the tribunal to pick one date for all affected mining claims which may

appear reasonable under the circumstances, unlike the broader powers contained in section 74 of the **Act** upon the death of a recorded holder, where the setting of the date is discretionary.

Subsection 67(3) is reproduced below:

**67.** - Despite anything in this Act, where in the opinion of the Minister special circumstances exist, the Minister may exclude the time within which work upon a mining claim is required to be performed or within which application and payment for lease may be made, and may by order fix the anniversary date or dates by which the next or any subsequent periods of work shall be performed and reported or by which application and payment for lease may be made.

Given the limited powers of the tribunal in connection with the application, and having regard to the considerable powers vested in the Minister under subsection 67(3) of the **Act** to set one date for an exclusion of time, the tribunal approached staff within the Ministry of Northern Development and Mines to consider exercising the Minister's jurisdiction under subsection 67(3). This request was denied. The tribunal then requested the assistance of the Ministry in calculation of the various dates after the exclusion of time, as the Ministry has access to a computer model for this purpose which the tribunal does not.

On December 31, 1993, the tribunal received a letter dated December 29, 1993 from Mark Hall, Chief Mining Recorder, with dates for the 651 Mining Claims calculated and attached.

The letter raised the issue of whether the beneficial holder of the Mining Claims, Noranda Exploration Company Limited ("Noranda") would have retained its position of beneficial ownership whether the action in the Ontario Court (General Division) was won by either Broad Horizon Inc. and Broad Horizon Trust, the plaintiffs in the action, or by John Ternowesky and Peter Nabigon, the respondents in the action.

According to Mr. Hall, in its Statement of Particulars regarding an appeal from a decision of the Mining Recorder which refused to extend time for the performance

....7

and filing of assessment work, Noranda held other mining claims known as the "Sugar Vein Claims" which were the claims with a showing of mineral. It was Noranda's intention at all times only to perform assessment work on the Sugar Vein Claims and have the assessment work credits applied to the 651 Mining Claims.

Peter Jervis, acting on behalf of the applicants, had not been copied with Mr. Hall's letter. The tribunal caused its counsel to write to the solicitor for the Ministry of Northern Development and Mines, John Norwood, on February 15, 1994, raising questions concerning the Ministry's position in the application.

On May 2, 1994, a second letter from Mr. Hall was received by the tribunal, indicating that the Ministry did not wish to be made a party to the application. He indicated that his intention had been to bring certain facts to the attention of the tribunal.

Due to the fact that it did not become an issue, the tribunal makes no determination on whether the Minister could be added as a party to the application, pursuant to subsection 112 (2) of the **Act**, as the application is not an appeal to the tribunal from a decision of the mining recorder referred to in subsection 112(1).

On June 3, 1994, the tribunal contacted Mr. Jervis to discuss the issue raised by Mr. Hall. Mr. Jervis indicated that, while Noranda was the recorded holder of the Sugar Vein Claims, it was of the belief that it held these mining claims in trust for whichever party was successful in the Ontario Court (General Division) matter. Mr. Jervis indicated that, notwithstanding the Statement of Particulars filed by Noranda in its application for an exclusion of time, the outcome of the Court matter was not a certainty. Mr. Jervis explained that there was some doubt as to whether the option agreement with Broad Horizon Inc. and Broad Horizon Trust was enforceable, such that Noranda was advised not to risk its position and carry out assessment work until the matter was resolved. Mr. Jervis offered to put his comments in writing, but the tribunal determined that this was not necessary.

The tribunal finds Mr. Jervis to have been forthcoming and credible with respect to the questions raised by Mr. Halls' letters and determined that it will rely on Mr. Jervis' comments in reaching its determination.

The tribunal finds that it will grant the request for the exclusion of time, as the delay was in no way the fault of the recorded holders.

For purposes of calculation, those Ternowesky and Nabigon Mining Claims set out in Appendices A and B, will have time from the date of the Certificate of Pending Proceedings, being October 3, 1991 to the date of this Order, being June 16, 1994 will be excluded. This determination is based upon the fact that the application to the tribunal for an Order excluding time has been found to be a proceeding within the meaning of clause 67(1)(b). The lengthy time in making this order is found to be in no way the fault of the applicants.

The Certificate of Pending Proceedings dated October 3, 1992 and continued on that date will be vacated.

During the time that these proceedings were before the tribunal, those Mining Claims listed in Appendix C were forfeited. Notwithstanding that these Mining Claims were not under a Certificate of Pending Proceedings, as a question of fact, the tribunal has determined that an application pursuant to clause 67(1)(b) is a proceeding. The mining recorder was aware of the application to the tribunal and could not be certain of the outcome, in spite of the position taken by Mr. Hall. The tribunal finds that the Mining Claims listed in Appendix C will be relieved from forfeiture.

Those Ternowesky and Nabigon Mining Claims which were not under pending proceedings, as further set out in the Title of Proceedings, excepting those Mining Claims listed in Appendices A and B, will have time from the date of the commencement of the Court Action, being September 27, 1991 to the date of this Order, being June 16, 1994, will be excluded.

The dates by which the next unit of assessment work shall be filed are set out in Appendix D. It should be noted that, pursuant to subsection 67(2), the anniversary date changes to the day and month listed to correspond with each Mining Claim. This new anniversary date, being the day and month, will be the date in subsequent years when the assessment work will be due.