

File No. MA 016-98

L. Kamerman)
Mining and Lands Commissioner)

Thursday, the 4th day
of February, 1999.

THE MINING ACT

IN THE MATTER OF

Mining Claim L-1045810, having expired on the 5th day of April, 1998 and Mining Claims, L-1045837 and L-1045838, having expired on the 6th day of April, 1998, situate in the Township of Garrison, in the Larder Lake Mining Division, the lands of which came open for staking on April 7, 1998 and are contained in the various stakings which are the subject matter of two appeals (hereinafter referred to as the "Cancelled Mining Claims");

(amended February 4, 1999)

AND IN THE MATTER OF

Mining Claim L-1227765, staked by Jacques Robert, and recorded in the name of Michael A. Tremblay, hereinafter referred to as the "Tremblay Mining Claim 1227765", and Mining Claim L-1227766 staked by Michael A. Tremblay and recorded in the name of Michael A. Tremblay, hereinafter referred to as the "Tremblay Mining Claim 1227766";

AND IN THE MATTER OF

An application to record Mining Claim 1235357, situate in the Township of Garrison, in the Larder Lake Mining Division, staked by Wayne Pearson, to have been recorded in the name of Moneta Porcupine Mines Inc., marked "Filed Only", hereinafter referred to as the "Moneta Filed Only Mining Claim 1235357";

AND IN THE MATTER OF

An application to record Mining Claim 1222279, situate in the Township of Garrison, in the Larder Lake Mining Division, staked by Thomas A. O'Connor, to have been recorded in the name of Thomas A. O'Connor, marked "Filed Only", hereinafter referred to as the "O'Connor Filed Only Mining Claim L-1222279";

AND IN THE MATTER OF

Subsection 44(2) and clause 43(2)(a), of the **Mining Act** and Ontario Regulation 7/96;

B E T W E E N:

MONETA PORCUPINE MINES INC.

Disputant of the First Part

- and -

THOMAS A. O'CONNOR

Disputant of the Second Part

- and -

MICHAEL A. TREMBLAY

Respondent

(amended November 24, 1998)

AND IN THE MATTER OF

An appeal dated May 28, 1998 by Thomas A. O'Connor pursuant to section 112 of the **Mining Act** from the decision of the Provincial Mining Recorder dated April 30, 1998, ordering the recording of the Tremblay Mining Claim 1227765, and ordering that the O'Connor Mining Claim be marked as "filed only";

(amended February 4, 1999)

AND IN THE MATTER OF

An appeal dated May 25, 1998 by Moneta Porcupine Mines Inc. pursuant to section 112 of the **Mining Act** from the decision of the Provincial Mining Recorder dated April 30, 1998, ordering the recording of the Tremblay Mining Claim 1227766, and ordering that the Moneta Mining Claim be marked as "filed only".

(amended February 4, 1999)

O R D E R

1. THIS TRIBUNAL ORDERS that the appeal of Thomas A. O'Connor, dated the 28th day of May, 1998, be and is hereby dismissed.

2. **THIS TRIBUNAL FURTHER ORDERS** that the appeal of Moneta Porcupine Mines Inc., dated the 25th day of May, 1998, be and is hereby dismissed.

3. **THIS TRIBUNAL FURTHER ORDERS** that the notation "Pending Proceedings" which is recorded on the abstracts of Mining Claims L-1227765 and 1227766 effective from the 25th day of May, 1998, be removed from the abstracts of the Mining Claims.

4. **THIS TRIBUNAL FURTHER ORDERS** that the time during which Mining Claims L-1227765 and 1227766 were under pending proceedings, being the 25th day of May, 1998, to the 4th day of February, 1999, a total of 256 days, be excluded in computing time within which work upon the Mining Claims is to be performed.

5. **THIS TRIBUNAL FURTHER ORDERS** that the 21st day of December, 2000, be fixed as the date by which the first two prescribed units of assessment work, having a minimum total value of \$400 for each claim, must be performed and filed on each of Mining Claims L-1227765 and 1227766, respectively, pursuant to subsection 67(3) of the **Mining Act** and all subsequent anniversary dates are deemed to be December 21 pursuant to subsection 67(4) of the **Mining Act**.

6. **THIS TRIBUNAL FURTHER ORDERS** that no costs shall be payable by any party to this appeal.

7. **THIS TRIBUNAL FURTHER ORDERS** that this Order be filed without fee in the Office of the Provincial Mining Recorder in Sudbury, Ontario, pursuant to subsection 129(4) of the **Mining Act**.

DATED this 4th day of February, 1999.

Original signed by
L. Kamerman

L. Kamerman
MINING AND LANDS COMMISSIONER

File No. MA 016-98

L. Kamerman)
Mining and Lands Commissioner)

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IN THE MATTER OF

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(amended February 4, 1999)

AND IN THE MATTER OF

Mining Claim L-1227765, staked by Jacques Robert, and recorded in the name of Michael A. Tremblay, hereinafter referred to as the "Tremblay Mining Claim 1227765", and Mining Claim L-1227766 staked by Michael A. Tremblay and recorded in the name of Michael A. Tremblay, hereinafter referred to as the "Tremblay Mining Claim 1227766";

AND IN THE MATTER OF

An application to record Mining Claim 1235357, situate in the Township of Garrison, in the Larder Lake Mining Division, staked by Wayne Pearson, to have been recorded in the name of Moneta Porcupine Mines Inc., marked "Filed Only", hereinafter referred to as the "Moneta Filed Only Mining Claim 1235357";

AND IN THE MATTER OF

An application to record Mining Claim 1222279, situate in the Township of Garrison, in the Larder Lake Mining Division, staked by Thomas A. O'Connor, to have been recorded in the name of Thomas A. O'Connor, marked "Filed Only", hereinafter referred to as the "O'Connor Filed Only Mining Claim L-1222279";

AND IN THE MATTER OF

Subsection 44(2) and clause 43(2)(a), of the **Mining Act** and Ontario Regulation 7/96;

B E T W E E N:

MONETA PORCUPINE MINES INC.
Disputant of the First Part

- and -

THOMAS A. O'CONNOR
Disputant of the Second Part

- and -

MICHAEL A. TREMBLAY
Respondent

(amended November 24, 1998)

AND IN THE MATTER OF

An appeal dated May 28, 1998 by Thomas A. O'Connor pursuant to section 112 of the **Mining Act** from the decision of the Provincial Mining Recorder dated April 30, 1998, ordering the recording of the Tremblay Mining Claim 1227765, and ordering that the O'Connor Mining Claim be marked as "filed only";

(amended February 4, 1999)

AND IN THE MATTER OF

An appeal dated May 25, 1998 by Moneta Porcupine Mines Inc. pursuant to section 112 of the **Mining Act** from the decision of the Provincial Mining Recorder dated April 30, 1998, ordering the recording of the Tremblay Mining Claim 1227766, and ordering that the Moneta Mining Claim be marked as "filed only".

(amended February 4, 1999)

REASONS

This matter was heard by telephone conference call on November 24, 1998. Mr. Fran P. Yungwirth appeared on behalf of Moneta Porcupine Mines Inc. ("Moneta Mines"), with Mr. Skeries in attendance. Mr. Thomas A. O'Connor appeared on his own behalf. Mr. Michael Tremblay appeared on his own behalf.

Background

The Ministry of Northern Development and Mines was initially made a party to this proceeding, but at the request of Mr. Roy Spooner, Provincial Mining Recorder and with the consent of the remaining parties, did not appear at the Telephone Conference Hearing.

The facts upon which this appeal turns are complex and unique. The lands involved cover lands which were part of three mining claims which had just lapsed into forfeiture, thus rendering the lands upon for staking.. Mining Claim L-1045810 was allowed to expire on April 5, 1998. Mining Claims L-1045837 and L-1045838 were allowed to forfeit on April 6, 1998. It should be noted that the abstracts for these Cancelled Mining Claims notes that they were all forfeited on April 7, 1998, a discrepancy of one day for Mining claim L-1045810 which was not explained. The orientation of these cancelled Mining Claims is of interest. They are contiguous, from west to east, with L-1045819 being in the middle.

The lands immediately to the south of these claims and to the west of Mining Claim L-1045837 had also recently come open for staking. These were staked on April 4, 1998, by Mr. Thomas O'Connor as Mining Claim L-1222282 and were accepted and recorded by the Provincial Mining Recorder. To date, as far as has been indicated to the tribunal, the staking of that particular mining claim has not been disputed.

The lands involving the three cancelled mining claims were staked by a number of parties on April 7, 1998:

- o Wayne Pearson, on behalf of Moneta Porcupine Mines Inc., staked the lands encompassed by the easternmost cancelled mining claim, not deviating from the western boundary, in particular, as the lands to the north, south and east were not open for staking. The completion time is shown on the application to record as 9:12 am. The application record Mining Claim (1235357) was marked as "filed only" by the Mining Recorder.
- o Jacques Robert, who transferred his claim to Mr. Tremblay, staked the same lands as Mr. Pearson **plus** a portion, perhaps half, of the central cancelled mining claim. The completion time was 9:13 a.m., Mining Claim L-1227765 was recorded by the Mining Recorder.
- o Thomas O'Connor staked those lands which corresponded to the eastern 2/3 of the central cancelled mining claim. The completion time was 9:14 a.m., and ("1222279") was marked as "filed only" by the Mining Recorder.
- o Jacques Legault staked those lands which correspond to the westernmost and a third of the central cancelled mining claims. The completion time was 10:00 a.m., and ("1235359") was marked "filed only" by the Mining Recorder.

- o Michael Tremblay staked all of the lands encompassed by the westernmost cancelled mining claim plus half of the central cancelled mining claim, so that his eastern boundary and the western boundary of Robert coincide. The completion time is listed as 10:04 a.m. and Mining Claim L-1227766 was recorded by the Mining Recorder.
- o Thomas O'Connor also staked those lands corresponding to the western 1/3 of the central cancelled mining claim. The completion time was 4:45 p.m. and (L-1222283) was marked "filed only".

The size of the cancelled mining claim is of interest in this matter, insofar as it is indicative of the challenges faced in attempting to stake in accordance with the provisions of sections 2 and 3 of O.Reg. 7/96. It would appear that the three cancelled mining claims were not of the legislated dimensions at the time (1986) of 20 chains square, or 1320 feet, or 40 acres. It will be noted below that not one of the stakings which is the subject matter of this appeal has the regulated dimensions of a mining claim unit of 16 hectares. This is due to the fact that the subject lands are completely surrounded by lands not open for staking and are irregular in shape.

The tribunal has compiled information gleaned from the various sketches in the applications to record to ascertain the dimensions of the lands open for staking. Based upon the sketches of the Tremblay and Robert stakings, who were acting in partnership and thus did not overtake one another's lands but have a common boundary, the southern dimension of the land appears to be 980 metres, with Robert's claim at the east end having a south boundary of 400 metres and Tremblay's claim at the west end having a south boundary of 580 metres, with a line post at the 400 metre mark.

This is compared with the dimensions of the south boundary, commencing from west to east, of Legault, being 325 metres, of O'Connor's two, being 100 metres and 325 metres respectively, and of Pearson, being 200 metres, for a total of 950 metres.

At the west end, the boundary shown on Tremblay's staking is 150 metres, contrasted with the same boundary of 140 metres for Legault.

The northern boundary moves diagonally northwards from west to east, changes direction to move dramatically more northward, coming to a peak, and then moves down in a southeasterly fashion. The northern boundary of the Tremblay staking is 600 metres, with a line post at the 400 metre mark, and that of Robert is 220 metres to the change in direction, 180 metres to the peak and then 25 metres to the eastern boundary for a total of 1025 metres. Compared with the other stakings, Legault shows this northern boundary as moving directly east to west, with his claim running a distance of 325 metres. It is met on the east boundary by O'Connor, who carries it a further 100 metres, where it meets the second O'Connor staking, having a northern boundary of 350 metres. The roof-like peaked portion is then also staked by Pearson, showing the dimensions to be 180 metres on the incline running east and 100 metres on the decline running east. This calculation gives a northern boundary of 1055 metres.

The eastern boundary on the Robert staking is shown as 380 metres, contrasted with 400 metres shown on the Pearson staking.

Issues

1. Is there a requirement to follow "grandfathered" lines from an earlier, cancelled staking, or do the current staking rules apply?
2. What are the current rules on the ground when a licensee encounters the lines of another staker? Should these lines be treated as an existing mining claim and not be crossed, or is the land under staking to be treated as open?
3. What rules govern land in unsurveyed territory involving an irregular area coterminous with lands not open for staking?

Evidence

The following information is contained in a document entitled **Summary of Facts** submitted by Moneta Mines (Ex. 3):

1. 3 mining claims came open for staking as noted on the attached sketch map.
2. Wayne Pearson was contracted via Gergex Exploration contractors to stake for Moneta Porcupine Mines Inc.
3. he commenced his staking at 9:00 a.m. on April 7, 1998 as noted in the Application to Record.
4. He staked from # post (**sic**) to #2 post, and commenced staking westward towards a #3 post when he ran into a N-S line completed by another staker. At that point he placed his #3 post as that was all the remaining ground open for staking.
5. His E-W line was only 200m, and he noted the reason therefor right on his application.
6. He then completed staking the remainder of the open ground tying on the N-S line of the second staker (O'Connor), as that was all the ground that was open for staking. His closing time was 9:12 a.m.
7. According to verbal information from Mr. Pearson, he had not made an arrangement with any competitive staker as to where to commence their respective staking as he had no authority to do so.

8. He had adequately marked his lines, and they were as clearly marked as the competing staker (Tremblay).

9. The Mining Recorder misunderstood his story in a telephone conversation and inaccurately reported that the lines were not properly blazed, as well as that there was an alleged "deal" with a competitive staker (O'Connor) about location to commence staking.

The following information was provided by Mr. Tremblay at Tab 1 of his book of documents submitted (Ex. 10). It is noted that the following constitutes both evidence and submissions, and although the two have not been separated for purposes of writing these Reasons, the tribunal has considered each in the appropriate manner, being either evidence or submissions:

At approximately 4:35 PM April 6, 1998, Jacques Robert and I decided to be present and to stake the subject area, when those lands became open for staking the following morning.

We hastily packed our gear with plans to begin prepping that day and to overnight in Matheson and complete our prepping at first light on the morning of April 7th.

Upon arrival at the access road to the area, we noticed a pickup truck belonging to David Clement, with three sets of footprints heading off in the direction of the subject ground. At this point we decided to wait further up the road until such time as they exited the area. After which we could determiner exactly how they were prepping the ground and whether or not they would be staking legal sized claims (i.e., as close as practicable to 16 ha claims).

After they had exited the scene we proceeded to the area and located ourselves. By this point it was close 7:00 p.m. and light was beginning to wane so we hurriedly inspected the layout of the prepping in the northeast part of the subject area. We noted that there were a number of posts at what was to become the clement and O'Connor post #1 and the Pearson Post #4 location. We knew that this location was roughly but 200 m west of the northeast corner of the area and that there were at least two other competing parties. We travelled westward along the north boundary to a point that was approximately 400 m west of the northeast corner. At this point we slit up with Mr. Robert travelling westward to see what other preparations had been made by the other parties, while I headed southward along what would be Robert's west boundary and my east boundary to see if the 'L' shaped claim to the south (L.1222282) was still open for staking. Before I could ascertain whether this ground was open it became too dark to do anything further and we made our way back to the highway.

Over the evening we had to devise two layouts for the morning of the 7th, depending on whether or not the 'L'-shaped wedge was open or not.

Upon our return the next morning we realized that the wedge was staked and that we would be confined to the area of the three claims opening that morning.

We prepped the eastern claim, cutting posts and walking the perimeter to familiarize ourselves. We also cut posts for the western (staked by Tremblay) claim at the #1 and #2 locations.

We then waited out of sight, Robert at the northeast corner and myself near O'Connor's #1, to see who exactly was lining up where and to decide whether to each stake a claim or for Robert to stake the eastern claim with myself as a helper.

As opening time approached, and seeing that O'Connor was staking with at least one helper, we decided to go for the one claim as a priority of completion was paramount.

Robert and Pearson lined up against each other at the northeast corner of the area. I called time for them and blazed and ribboned along Robert's east, south and west boundaries. Upon my arrival at his post #4 he radioed to ask what time it was and to find out if I had reached the post #4 location. I told him the time and that I was at his post #4.

At this point Dave Clement passed me heading eastward to his #1, I located by post and carried it to Robert's #4 and commenced to stake the western part of the subject area, staking at 9:16 AM and finishing at 10:04 AM.

Upon our arrival back at the highway we met Thomas O'Connor and his two helpers. During our conversation he informed us that he had staked the middle ground so that whoever got the rest would have to deal with him.

Once back in Porcupine we decided that we should see who recorded what and ordered faxes of all filed claims at that time.

We noted that, where Monetal was concerned, Pearson and Legault had recorded but that Clement hadn't. Both of these recordings were for small claims and Pearson had gone so far as to write an excuse for the size of his. We also noted that O'Connor had recorded and that his claim 1222279 was under sized.

Because Pearson finished ahead of Robert and O'Connor was undersized, we felt it might be to our advantage to know the exact dimensions of everybody's claim.

We therefore determined to inspect (measure by hip-chain) the boundaries of all the claims on the morning of the 8th of April. The results of which inspection are attached and the video tape of which is enclosed. We then took the measurements and calculated the area of all of the claims, with the exception of O'Connor's 1222283 that he staked the afternoon of April 7th.

The calculations of the area were determined by multiplying the average of the east and west boundaries by the average of the north and south boundaries and dividing this figure by 10,000 to give the area in hectares. The results of these calculations were as follows.

J. Robert	L1227765	12.46 ha
M. Tremblay	L1227766	13.77 ha
T. O'Connor	1222279	8.93 ha
W. Pearson	1235357	6.15 ha
D. Clement	1235358	13.27 ha
E. Legault	1235359	6.02 ha

With regards to the appeal put forward by Moneta Porcupine Mines Inc. they allege that Pearson in the heat of a staking rush comes to O'Connor's post #2 and decides at that point that he should head north, which means he has to find and cut a post and then travel northward to his post #4 location and cut another post before heading east to his turning post and back to his post #1 to close off, all in the span of 12 minutes, while blazing in accordance with the act.

I strongly suggest that Pearson put his post #3 where he did because his partner Clement had his post #2 with O'Connor's and that is how they (Moneta) prepped the ground, their intent all along being to restake the original configuration of claim 1045838 et al. Further I witnessed his running of his east perimeter and at no time did I see him blaze of ribbon along that line.

Moneta, I believe, prepped the ground on the 6th of April, at which time they would have known that O'Connor had staked the L-shaped wedge and would have seen his prepping of 1222279 and they therefore could have laid out their ground in accordance with the regulations, knowing full well that O'Connor was staking small. Instead they chose to stake three small claims, of which only Clement's could be considered as being in reasonable compliance with the act, where size is concerned. Clement, however did not use line posts on his north and south boundaries, both of which are close to 500m long, and would therefore not be in compliance.

It is therefore my view that Spooner's Decision of April 30, 1998 was correct and that the Moneta appeal is without merit and should be dismissed.

With regards to O'Connor's appeal, he suggests that his fractions should be allowed because of the Commissioner's Interlocutory Order dated October 6, 1997, in the matter of files MA 24-96, MA 29-96, MA 32-96 and MA 6-97, I do not agree that this fraction should qualify under that Order.

Firstly, O'Connor's recording sketch shows an area smaller than that allowed under the Act. My calculation of the area indicated on his sketch is $(360 + 340)/2 \times (350 + 325)/2 = 118125/10000$ which equals 11.8125 ha. My field measurements indicate an even smaller claim which is barely half the size of that prescribed in the legislation.

My field measurements indicate that the wedge that O'Connor is appealing represents an area of only $-(92 + 125)/2 \times (265 + 285)/2/10000 = 2.98375$ ha. This translates in to only 18.65% of the prescribed 16 ha.

In O'Connor's submission he states that he was in the area several days prior to the 7th of April. He therefore had plenty of time to lay out his claim in accordance with the regulations. His failure to stake a claim that could be deemed in reasonable compliance with the act overrides his claim to the non-overlapping portion of 1222279. Furthermore, his sketch of the dimensions of 1222279 on his Application to Record, is misleading in that it show boundaries which are exaggerated to the point of being misleading. Had he used the true dimensions, the Recorder would likely have dismissed his claim as being too small and not in reasonable compliance, as he had for Pearson and Legault.

Lastly, should O'Connor be successful it would be difficult to efficiently explore the two claims, that Robert and I staked in full compliance with the Act, which would no longer be contiguous.

I therefore submit that the O'Connor appeal should also be dismissed.

In Summary, it is my contention that both appeals should be dismissed. Although the O'Connor appeal is somewhat similar to that which he argues, paragraph 10 of that Order also suggests that other cases should be judged on their merits, and since he clearly staked undersized, his arguments should be dismissed.

In the case of Moneta, their stakers clearly intended to stake undersized claims, in view of which their arguments are without merit. Their appeal should be considered a 'nuisance appeal', with costs awarded to the Respondent.

The following information was provided by Thomas O'Connor in his letter to the tribunal dated May 28, 1998, which was not marked as an exhibit:

As you are aware, there were three parties competing for an area in Central Garrison Township, Larder Lake Mining Division on April 7, 1998. Prior to 9:00 a.m., I competed against one of Mr. Pearson's stakers for the centre of the three irregular claims that had come open that day. As it turns out, I completed my claim 3 minutes prior to my competitor, unaware of Mr. Robert's presence. As it turns out, Mr. Robert's claim 1227765 was recorded by Mr. Spooner. My claim 1222279 which was only completed one minute later than Mr. Robert's 1227765 was placed as file only. In Mr. Spooner's decision he stated, "Mr. O'Connor's 122279 appears to overlap 1227765 (Robert) by approximately 50%. I find that it would not be appropriate to move posts to eliminate the overlap in this case."

There was no explanation why 1222279 could not be recorded in whole or in part. I feel that if Robert's claim 1227765 is allowed to stand then why not the remaining half of 1222279. After all, 1222279 was completed some 46 minutes earlier then Mr. Tremblay's 1227766 (which

is to the west of Mr. Robert's 1227765). It seems that a double standard exists in his decision.

I would request that if the Robert's claim 1227765 is allowed to stand, then 1222279 east boundary should be moved 175 to 200 metres west to the western limit of 1227765. Also Tremblay's staking of 1227766 should be modified and have his east boundary moved to the west boundary of 1222279 (approximately 200 metres).

In brief, if 1222279 is not recorded in whole or in part, neither should 1227766. Claims 1222283 should be recorded along with 1235359, since no overlap exist on these two units.

During the course of the Telephone Conference Call, **Wayne Nelson Pearson**, the staker of the Moneta Filed Only Mining Claim provided evidence about his staking. Mr. Pearson stated that he left his #1 post at the same time as Mr. (Jacques) Robert. He followed his claim along in a clockwise fashion from the #1 to #2 to #3 to #4 posts. Earlier that day he had walked his line, pre-blazed his lines and cut posts. At the # 3 post, both at the preparation phase and at the staking phase, he noted the blazed line running north-south from the mining claims which had expired causing these lands to come open for staking. Mr. Pearson figured that the lands to the west of this north-south line were being staked by Mr. Clement on behalf of Moneta. There were no lands to the north, south or east of the Pearson claim which were open for staking. Mr. Pearson stated that he did not know that Mr. O'Connor was involved in the stakings at the time as well. He did not know whose line was along what became his 3 to 4 west boundary; nor did he see J. Robert's name on anything in the vicinity of where he placed this #3 post.

Under cross-examination by Mr. O'Connor, Mr. Pearson stated that he had not met Mr. O'Connor before that day and did not have a prior agreement with him as to which lands to stake.

Under cross-examination by Mr. Tremblay, when asked what he used for a #3 post if he encountered the fresh blazed north/south line, Mr. Pearson clarified that he had prepared a post at this location, as this was all that was available for him to stake, the lands to the west being part of another claim [albeit staked that morning].

Mr. Pearson reiterated that he had intentionally staked on the mining claim fabric which had elapsed. There were three Moneta stakers, Clement, Legault and himself, each to stake a unit claim, or in Pearson's case, the remaining portion of a unit. Mr. Clement made no attempt to record as Mr. O'Connor had beat him.

Submissions

Mr. Fran Yungwirth commenced by stating that it is trite to say that advanced planning is often complicated by actual circumstances and conditions encountered in the bush. At the time Pearson staked, he staked all of the available land to the east, south and north, with

the ground to the west not being open. Mr. Pearson then proceeded to close his claim. Mr. Yungwirth submitted that Pearson just reacted to what he found on the ground at the time, meaning that when he encountered O'Connor's eastern boundary as well as that of Tremblay, he had no choice but to head north. If he staked overtop of these earlier stakings, he would be jeopardizing his own staking. Therefore, he reacted to what he found in the field. Mr. Yungwirth submitted that Mr. Pearson did not know at the time whether or not it was a valid staking which he encountered. When in the field, Mr. Yungwirth submitted, one must respond to what one sees.

Pursuant to subsection 2(3) of O.Reg. 7/96, it states that in unsurveyed territory, a boundary may change direction where it is coterminous with land not open for staking, such as a valid claim. Pearson didn't see any markings on it to let him decide whether or not the staking was valid.

Mr. O'Connor referred the tribunal to paragraph 3 of the tribunal's Interlocutory Order on overlapping stakings (unreported, October 6, 1997, Files MA-024-96, MA-029-96, MA-032-96 and MA-006-97) which sets out:

3. If a non-overlapping portion of a single unit mining claim having an area of less than 85 percent of the regulated area has a boundary which is contiguous with another mining claim of the holder, which has been recorded, the recording of the non-overlapping portion will be allowed.

Mr. O'Connor pointed out that he is the recorded holder immediately to the south of his Filed Only Mining Claim.

Mr. O'Connor referred to the technical error on the Robert staking indicating that he commenced staking at 8:00 am. If all technical errors were scrutinized Mr. O'Connor submitted, the recording of the Robert staking should not be allowed.

Mr. O'Connor made an impassioned plea for his interests in attempting to acquire land which involves the porcupine break as a high gold structure. He also stated that the area which was staked was a very irregular shape. Mr. O'Connor had no option but to stake the claim to the south in the configuration which he did.

Mr. Tremblay, with respect to Pearson's staking submitted that in staking, one must stake boundaries of 400 metres or multiples of 400 metres, so that units would be as close to 16 hectares as possible. There are three other stakers involved in this matter, having staked three small claims.

Mr. Tremblay urged the tribunal to keep the spirit of the staking regulations in mind. It was not done here, in his submission. By staking less than 1/4 mile, an advantage was gained. Mr. Tremblay submitted that the Provincial Mining Recorder was correct to disallow the Pearson staking.

With respect to Mr. O'Connor's staking, Mr. Tremblay submitted that he had been on the ground three days prior to April 7, 1998 and found that the north/south boundaries are less than 400 metres. It should have extended closer to the west, to enable the mining claim to be closer to 16 hectares. Instead, it is a mere 8 or 9 hectares. He submitted that the Mining Recorder's decision should stand.

With respect to the interlocutory decision relied upon by Mr. O'Connor, Mr. Tremblay stated that he was not sure why the tribunal is being asked to apply it in this case, which involves the staking of a very small portion of land.

In answer to the question posed by the tribunal regarding the Provincial Mining Recorder removing the lands of cancelled mining claims from staking which have areas of under 16 hectares, until such time as the land accumulates to allow the staking of a regulated unit size, Mr. Tremblay stated that he was against such an action, feeling that the stakers could stake according to the regulations as circumstances would permit.

Mr. Fran Yungwirth replied, by concluding that Mr. O'Connor is in the same position, of having run into the staking of another staker while staking. The staker is left on the ground attempting to determine what should happen. Also, Mr. Yungwirth inquired as to the treatment of this issue by previous Commissioners, namely whether the old mining claim lines were grandfathered, meaning that new stakings should stick to the pre-existing lines.

Findings

This appeal raises several interesting issues which, to the tribunal's knowledge, have not been dealt with in detail in past decisions. The first is whether there is some requirement to follow what Mr. Yungwirth has called "grandfathered lines" from prior stakings of mining claims. The second issue is how land under staking is to be treated. In other words, does a licensee coming across a line in the bush treat that line and the lands which it defines a valid mining claim, within the meaning of the **Act** and regulations or, insofar as the land may be under staking at the same time, treat it as land which is under competition. The third issue involves a determination of the rules for staking in an unsurveyed township when the lands open for staking are irregular, coterminous with lands not open for staking and may be insufficient to allow for standard 16 hectare mining claim units.

Another question was touched on during the hearing of this matter, which was not formally set out as an issue, but does raise policy questions with respect to the manner in which irregular lands in unsurveyed territory comprised of less than a unit may come open for staking. The question was put to the parties as to whether the land encompassed by irregular mining claims approaching forfeiture should be withdrawn from staking by the Mining Recorder until such time as sufficient land is available to more closely coincide with the regulated size of unit boundaries, or whether they should be allowed to remain open for staking, notwithstanding the difficulty in staking such areas in compliance with the requirements of the regulations.

Dealing with the question of the manner in which lands in unsurveyed territory may come open for staking, there was no consensus between the parties on what would be the best approach. Indeed, nothing the tribunal could say in this regard would be the least binding on the Provincial Mining Recorders in any event. However, this is a matter which might be raised and addressed by them to attempt to best achieve the objectives of the **Act**. Where mining claims of an irregular shape forfeit over a period of days, should the lands be removed from staking and be allowed to accumulate into an area which might lend itself to a more regular staking fabric? If nothing else, greater certainty could be achieved when staking in the field. However, the right to compete when staking on the ground remains paramount, and the Provincial Mining Recorders would be best situated to balance the interests on either side of such situations.

One matter which was not raised by the tribunal and not addressed in the course of the hearing, was that a reading of the abstracts would indicate that one of the Cancelled Mining Claims was recorded on April 5, 1985 while the other two were recorded on April 6, 1985. This suggests that the days when the lands came open for staking should have been April 6, 1998 for the former and April 7, 1998 for the latter. In actual fact, they all came open on April 7, 1998.

Grandfathered Lines

Mr. Yungwirth raised the issue of whether there is an obligation on a staker in unsurveyed territory to follow the lines established by the cancelled mining claims. A thorough search of previous cases reveals but one, and the matter was dealt with only briefly. In *Therriault v. Wilson*, 7 M.C.C. 335, Commissioner Ferguson dealt with the matter very briefly at page 337:

...With reference to the evidence of the respondent that he followed old staking, the respondent produced no evidence by way of claim maps or applications to record to show that the accumulation of corner posts marked a corner or witnessed a corner and it cannot be concluded that in establishing the point as a witness point that the respondent was in fact following previous stakings. Keeping in mind that there was an error of forty-one percent, this tribunal cannot conclude that the error was insignificant.

Apparently, the Commissioner did not accept the fact that the lines followed were those of a previous staking. The Commissioner apparently took the position that the assertion that the staker followed previously staked lines would have to be proved with evidence of the prior staking and provide further evidence concerning why the lines followed would vary so greatly from what was required by the statute.

The tribunal obtained the applications to record of the three cancelled mining claims, which were staked by two individuals on April 1, 1988 and two were recorded on April 5, 1988 and one on April 6, 1988. The sketch attached to the applications to record show an

aggregate south boundary of 3300 feet, at a time when subsection 42(1) of the **Mining Act**, R.S.O. 1980, c. 268, provided that in unsurveyed territory, a mining claim should be a square of 40 acres, being 20 chains or 1320 feet on each side. Subsection 43(1) provided that an irregular area in unsurveyed territory should be staked with coterminous boundaries "to conform as nearly as practicable to the form and area **and shall not exceed the prescribed area**" [*emphasis added*].

Whether rightly or wrongly, it would appear that these lands had been staked out so that not one of the southern boundaries of the three cancelled mining claims exceeded the 1320 feet specified. It is unclear that, while it will be seen that the irregular area comprised of the three cancelled mining claims does not exceed 80 acres, why the licensees did not stake this area into two mining claims, so as to more closely conform with the area requirement of subsection 43(1). What is not clear is whether a boundary of 1320 feet was historically regarded as an insurmountable barrier to a mining claim boundary, even though the available lands along the north/south direction varied from 340 feet to 1320 feet, thus rendering the total area more comparable to two rather than the three mining claims actually staked at the time.

There is no available information to indicate whether these cancelled claims were staked under competitive circumstances, nor has the tribunal heard any evidence concerning the practice of the mining recorders of the day concerning the limits of irregular boundaries for mining claims in unsurveyed territory.

The tribunal does not have the same problem as Commissioner Ferguson did in *Theriault* and is willing to accept Mr. Yungwirth's assertion that Pearson was following the lines of the old cancelled mining claim on his west boundary. As to whether this was the best staking that could have been done at the time is irrelevant, but the tribunal finds that the current staking rules are sufficiently expansive that a determination as to how the staking should occur under current rules can be made.

The headnote in *Theriault*, at page 334, offers greater assistance in how Commissioner Ferguson regarded such grandfathered lines:

...The argument that prior stakings were followed was not relevant.

While this headnote appears to offer more extensive findings than are found in the body of the Order, the tribunal does, nonetheless, agree with its substance. Reference to the **Act** and regulations offers clear guidance as to the manner in which lands are to be staked and this must necessarily take precedence over what is found on the ground. While there may be room for future argument regarding grandfathered lines when both earlier and later stakings take place under the same rules, that is not the case under the current circumstances and the tribunal has no choice but to apply the staking rules as they currently exist to the irregular area of land staked in this unsurveyed territory.

What Does it Mean When Encountering the Line of Another Staker

The definition of a mining claim is set out in section 1 of the **Act**:

. . . . 15

"mining claim" means a parcel of land, including land under water, that has been staked **and recorded** in accordance with this Act and the regulations;

Clause 27(d) of the **Act** states as follows:

27. Except where otherwise provided, the holder of a prospector's license may prospect for minerals and stake out a mining claim on any,

- (a) Crown lands, surveyed or unsurveyed;
- (b) lands, the mines, minerals or mining rights whereof have been reserved by the Crown in the location, sale, patent or lease of such lands where they have been located, sold, patented or leased after the 6th day of May, 1913,

not at the time,

- (c) on record as a mining claim that has not lapsed or been abandoned, cancelled or forfeited; ...

This is contrasted with the wording of clause 28(c) of the 1980 R.S.O., which stated,

- (c) **under staking** or record as a mining claim that has not lapsed or been abandoned, cancelled or forfeited; ...

It is clear from this change in wording, that land under staking is no longer considered as a mining claim, for purposes of all the protections provided by the **Act**. Therefore, how is a licensee desiring to stake in an area to protect him or herself and come to a decision as to what to do?

Subsection 44(1) of the **Act** states:

44. (1) A licensee who has staked out a mining claim shall, not later than 31 days after the day on which the staking out was completed, make an application to record the claim to the recorder for the mining division in which the claim has been staked out.

The matter raised by Mr. Fran Yungwirth, in reference to what his staker, Mr. Pearson encountered in the bush, raises several issues in respect to the staking of lands recently opened for staking, or any staking, for that matter. If the lands had been open for staking for a period of time, one would assume that the licensee would be in possession of a recent copy of the claim map from the Mining Recorder's Office. With this in hand, prior to the commencement of staking, a wise licensee should perform a reconnaissance of the lands he

intends to stake, to search for blazes, clearing of underbrush and most particularly, posts which would either coincide with the claim map or be recent stakings. It would be foolhardy to commence staking without being armed with the prior knowledge of what might actually have occurred on the ground.

When staking on a day other than when lands have just come open for staking, the purpose of such reconnaissance would be for the licensee to better inform him or herself of the likelihood of winning the land proposed for staking. If all or part of it was visibly staked recently, such that the 31 day period had not elapsed for the deadline for recording, the licensee could make an informed decision as to whether the staking was in substantial or deemed substantial compliance with the staking regulations, from which an informed decision regarding any staking thus encountered could be made, and determining whether to proceed with his or her own staking or alternatively to concede that the opportunity had been lost.

In a competitive situation, when the lands have just opened for staking, particularly when the licensee has commenced immediately at the hour when the lands have come open for staking, coming across a recently staked line or recently erected posts, should be taken as nothing more than an indication that the lands are under competition. Clause 27(c) makes this clear, namely that the lands are to be considered as open for staking and it must be implied from what has been found, under competition. Similarly, the definition of mining claim is clear, that it includes the recording of the claim and until such time as a claim has been recorded, its staking does not constitute a mining claim. This is more particularly so in the competitive situation, when the eastern line of a claim crosses or joins the licensee's south boundary, it can be regarded only as actual notice that the lands to the west are under competition and indeed the whole staking may be in jeopardy. Moreover, the licensee encountering such a line under competition has no way of knowing whether it has been abandoned further along due to circumstances of which he or she may be unaware. The best and only way to proceed under competition is to attempt to stake in accordance with the requirements of the regulation and see how the competition plays out in the end. This determination will be made according to the applications to record and accompanying sketches which are filed with the Provincial Mining Recorders, as well as those which are not. As is seen from this case, there may be stakings for which an application to record has not been filed, and it would be extremely unfortunate for a licensee to base his actions on those of another licensee who did not seek to establish his rights in the Office of the Provincial Mining Recorder.

To turn north, when encountering such a line, is misguided. It presupposes that the licensee of the staking will actually complete the staking first and be entitled to priority. In unsurveyed territory in particular, the relative finish times of mining claims several units away can dictate which licensees might ultimately be successful in their stakings. However, to take such a line as an indication of a mining claim, as defined, would be to defeat the requirements of a properly staked mining claim - that each unit staked be 16 hectares more or less. It is one matter for the Provincial Mining Recorder or the tribunal to exercise jurisdiction under subsection 44(4) of the **Act** and allow non-overlapping portions of overlapping claims. It is quite another to eliminate such overlapping portions before they may come into existence. By turning half way through a proposed line, the resulting size of the mining claim would be half

of what is required under ideal circumstances and the staking of this substantially smaller portion of land would create a distinct unfair advantage to the licensee in competition with others.

As the rules have now changed to make completion time of utmost importance, unfair advantages taken where it is not necessary to do so, must be taken to be a staking which cannot be either in substantial compliance or be deemed to be in substantial compliance with the requirements of the regulation.

One matter of concern is the comment that Mr. Pearson could not read whose post was encountered. With the relaxing of the staking requirements from substantial compliance to deemed substantial compliance, the tribunal has seen an increasing carelessness in the manner in which claims are staked. For example, posts are not erected with any effort that they should remain vertical, as seen in a recent case (*Royal Oak Mines Inc. v. Strike Minerals Inc.*, unreported October 2, 1998, File MA 012-98). The comment that inscriptions are illegible is of little comfort to the quality of staking which is taking place. In the words of Judge Godson of the Mining Court in *McGill v. Brookbank and Brookbank* (1931) 3 M.C.C. 76 at page 77:

"The root of title of a mining claim depends upon staking. Stakes, blazes and markings from visible evidence of the ground staked and by whom, who for, and when. The application has attached to it a plan showing the ground applied for and with which the staking should coincide. The ground is then plotted on maps of the Recorder showing it is under staking, and these several acts are integral parts and for present and future reference form a history of the claim. Stakes become important monuments as evidence and guides in disputes to determine lines and corners and old posts are at times of much value in fixing the true corners of a claim.

While the rules governing what will be considered a valid staking have changed and been loosened, staking remains a visual indicator of what has taken place on the ground, the inscriptions of which should at least be readily apparent and comprehensible on the day that it takes place, if not for several days or weeks to come.

How Staking Should be Done

Section 38 sets out that the manner of staking is as is prescribed. Sections 2 and 3 of O.Reg. 7/96 sets out the rules for staking in unsurveyed territory and in particular, section 2 offers direction. Clearly, where not limited by being coterminous with lands not open for staking, subsection 2(1) will govern, in that a unit will consist of 16 hectares, in the form of a rectangle, with boundaries running astronomically north, south, east and west. Subsection 2(2) sets the rule for those mining claims coterminous to lands not open for staking, namely to conform as closely as possible to the requirements of subsection 2(1), except for the coterminous boundary, or in this case, boundaries. Subsection 2(5) also provides direction, namely that, as nearly as practicable, units should be 16 hectares, *with the exception of an irregular area described in section 3. [emphasis added]*.

Interestingly enough, the rules governing any claims in unsurveyed territory do not require that the minimum length of a boundary be 400 metres. Rather, the units must be 16 hectares and line posts must be erected at 400 metre intervals **on those claims which are more than 16 hectares, in other words, two units** [cl. 2(1)(a), ss. 2(4)]. It will be discussed below whether this implies that line posts at 400 metre boundaries are necessary for a one unit claim or less.

Subsection 3(1) sets out the rules for an irregular area of land lying adjacent to lands not open for staking, whose boundaries coterminous to the land not open for staking and coterminous is reproduced.

3(1) An irregular area of land lying adjacent to land ... that is not open for staking may be staked with boundaries coterminous to the land ... that is not open for staking if the mining claim otherwise conforms, as nearly as practicable, to all the requirements set out in section 2, **except subsection 2(7)** [*emphasis added*].

Subsection 2(7) provides that the larger boundary of a mining claim cannot exceed 3,200 metres and whatever its length, it should be no more than four times the length of the shorter boundaries.

An analysis of section 2 shows that the rules for mining claims not otherwise limited will be ultimately regular and symmetric, with subsection 2(7) being the ultimate in formulaic prescriptions, that govern the relative dimensions. Without it, a mining claim could be 400 metres wide and 6,400 metres long. Section 3 gives direction to the staking of irregular areas adjacent to lands not open. The specific exclusion of subsection 2(7) is an acknowledgement that the irregular land may not lend itself to, not so much the dimensions, as the proportion prescribed.

Therefore, a licensee desiring to stake in the area is left with attempting to adhere as closely as possible with the remaining provisions of section 2. Subsection 3(1) requires that section 2, excepting subsection 2(7) be complied with as nearly as is practicable. The requirement that the longest boundary of a mining claim not exceed 3,200 metres and be no more than four times the length of any other boundary is the sole exception regarding compliance with respect to staking an irregular piece of land in unsurveyed territory.

It is interesting to note that, notwithstanding that subsection 2(7) does not apply to the staking of these lands, the Tremblay staking has a south boundary of 580 metres, just shy of four times the west boundary of 150 metres, and a north boundary of 600 metres, in compliance with subsection 2(7). Had this requirement applied, the Tremblay staking would be in compliance.

Returning to the prescribed rules, section 3 operates to import and modify all of the requirements of section 2, with the exception of subsection 2(7), so that they are to be applied as nearly as possible.

Subsection 2(5) provides that the mining claim should be in multiples of 16 hectares which or to be attempted as nearly as is practicable, with the exception of an irregular piece of land coterminous to land not open for staking. What the subsection **does not** do is provide direction as to size where an irregular piece of land is involved. Where the land involved in total is less than 16 hectares, that would be all that could be staked and that would be the end of the matter.

What is to be done where the land can be divided into units of nearly, but not quite 16 hectares? What if there is some amount substantially less than 16 hectares left over? The 1980 **Act** provided that the mining claim **could not exceed 40 acres or 16 hectares**. However, with the 1989 amendments, effective June 3, 1991, this was changed, so that mining claim units could exceed the 16 hectare requirements (see cl. 20(a), as well as the wording "as nearly as practicable" found in ss. 2(5) and 3(1)). The only logical interpretation which can be given to subsection 2(5) is that for irregular areas, units of 16 hectares may be impossible, so that there is no requirement to do the impossible or the absurd. However, as subsection 3(1) takes one back to all of the requirements in section 2 **including subsection 2(5)**, with the added words, "as nearly as practicable" it must be implied that, while units of 16 hectares will not be rigidly adhered to, nonetheless, the available land must be approached first by seeing that 16 hectares may not be possible and then determining what else can be done which is as close to 16 hectares as circumstances will permit.

Subsection 2(5) is interpreted by the tribunal to mean that, where restricted by contiguous lands not open, a mining claim should be as near as possible to 16 hectare units, given the land available. In other words, subsection 2(5) excuses the requirement for units or claims contiguous to lands not open that they be 16 hectares, but it is reinstated by subsection 3(1), which requires that subsection 2(5) be complied with as much as it is possible to do so.

Given the available land and configuration, according to the authority of subsection 3(1), the tribunal finds that it is not possible to stake rectangles [cl. 2(1)(d)]. It will be possible to stake east, west and southern boundaries astronomically and all of the stakers indeed did so [cl. 2(1)(c)]. Only the lands on the northern boundary will not be astronomic, but all of the stakers ran their northern boundaries contiguous to the lands not open, so that this is not an issue.

The tribunal has considered the submissions generally and finds Mr. Tremblay's comment that to allow the staking of a boundary of 200 metres, where 980 is available, so that, at a minimum, 400 metres is available, in keeping with the generally accepted length of a unit, would be to allow an unfair advantage in a competitive staking situation, where a number of stakers' efforts and success will be determined by their relative completion times to be compelling.

Without regard to the issue of what should be done when encountering a claim line, a licensee planning to stake this land or any in unsurveyed territory, **must** include the entirety of any boundary which is less than the 400 metres.

The requirement that line posts be erected at 400 metre intervals, found in subsection 2(4) applies in cases where there are more than two units staked. Therefore, it is

arguable that the placing of such line posts is unnecessary in the staking of irregular areas of one unit or less, notwithstanding that one boundary may exceed 400 metres. This fact is disturbing to the tribunal, as this practice appears to be accepted and would be of assistance to a licensee desiring to stake in the vicinity, carrying out a reconnaissance of what has taken place before.

Although not specifically stated in the regulation, The words of clause 2(1)(a) imply that the length of a unit will be 400 metres, taken from the requirement of square units of 16 hectares. The clause specifies units of 16 hectares, but implies boundaries of 400 metres, so that it is the former and not the latter which governs this requirement.

The tribunal interprets this provision, with the modifier "as nearly as practicable" from subsection 3(1) to mean that, where a side of the available land measures less than 400 metres, the entire length must be encompassed in the unit staked. Turning to the actual staking in this matter, this was clearly done by **all** of the stakers, as none of them purported to split the land along its narrow sides, being the east and west boundaries.

Reading the provisions of sections 2 and 3 as a whole, it cannot be taken to mean that any staking can divide the northern and southern boundaries into less than 400 metres in total length. There is insufficient length in the height of this land on the western boundary to conform with the standard 400 metre length of a mining claim unit, with the eastern boundary being approximately 400 metres, so that the entire height must be staked in any prospective mining claim. All of the stakers did so.

Which of the staking requirements should determine the manner in which this particular irregular piece of land should be staked? Examining the dimensions of the land which was open for staking, the tribunal finds that it will accept the range of distances shown, as between the various stakings, as there is no significant difference.

West boundary	140 to 150 metres
North boundary	1025 to 1055 metres
East boundary	380 to 400 metres
South boundary	950 to 980 metres

Based upon the dimensions outlined above, using the figures gleaned from the Tremblay/Robert combined stakings and the configuration of the ground shown on the claim map, the tribunal has calculated the area of the available ground to be 281,042.8 square metres or approximately 28.1 hectares.

The tribunal has considered the provisions of section 2 and in particular subsections 2(1) and 2(5) and has determined that the only manner in which a mining claim unit staked in an irregular piece of land can conform to the requirements set out, as nearly as practicable, is to divide the available land up into near 16 hectare units.

Clearly, irregularly shaped lands do not lend themselves to being divided up into 16 hectares and the manner in which this may be accomplished would vary both with the size

of the available land and its configuration. However, where the entire portion of land is less than 16 hectares, that should be the end of the matter, as it should all be staked as one unit.

Where the available land cannot be readily divided into equivalent 16 or near 16 hectare units, the question arises as to how the land should properly be divided. Much appears to rest on the number of hectares which would remain, should the land initially be divided into 16 hectare units. This can be illustrated through the following examples:

76 hectares could be divided into four 16 hectare units, with 12 hectares remaining. 12 hectares could be regarded as sufficiently close to 16 hectares as circumstances permit to allow it to be staked as the fifth unit. Alternatively, the 76 hectares could be staked into approximately equal units of 19 hectares. Both would be acceptable, it would appear, from the requirements of the regulation.

70 hectares could be divided into four units of 16 hectare units with 6 hectares remaining. In a competitive situation, it would create an unfair advantage to allow the four 16 hectare units for recording along with one six hectare unit. Arguably, circumstances dictate that those six remaining hectares should in some way be incorporated into the four 16 hectare units, so that each may be 17.5 hectares, or that there be three 16 hectare units and one 22 hectare unit.

This second example illustrates, that although a case can be made for both approaches being in accordance with clause 2(1)(a), there will be difficulties encountered in attempting to plot the best strategy as between competitors. Those stakers electing to stake 16 hectare units would clearly have a size/distance advantage over those staking 17.5 hectares. And any staker electing to stake 22 hectares would be unlikely to have an earlier completion time than those staking 16 or 17.5 hectares contained wholly within the 22 hectare parcel. The best bet would be for partners to stake the 16 hectare claims and aim for earlier completion of staking.

The examples cited above are not challenges faced in the current appeal, and the tribunal finds that it cannot conclusively deal with the broader issues raised without adequate input from parties affected. It is unfortunate that the Provincial Mining Recorder sought to be removed as a party in this matter, to which the tribunal agreed, as his input and experience on the broader issue would have been timely and of considerable assistance.

In the current appeal, the lands available for staking involve approximately 28 hectares. There are three alternatives for the staking of these lands in compliance with clause 2(1)(a). The first would be the staking of a 16 hectare unit and of a 12 hectare unit. The second would be of two 14 hectare units. Indeed, given the wording of subsection 3(1), there would be nothing to prevent staking of combined 15 and 13 hectare units as well. On the facts of this case, the tribunal finds that any of these configurations would be in accordance with the requirements of sections 2 and 3, although it is recognized that the staking of a 12 hectare unit, in partnership with a 16 hectare unit would create something of an advantage to that team over a team staking two 14 hectare units. However, the merits of such an advantage appear to be beyond the scope of this appeal, for the strategic manner in which available land is staked by

that team carries with it a calculated risk that it might not result in the earliest completion time as among competitors who have carved up the land differently in their staking.

Pearson's staking is calculated to involve approximately 8 hectares which, if found to be in compliance with the requirements of the regulation, would yield another 20 hectares for staking by some other party or parties. Given that his staking is 8 hectares, if allowed, the tribunal would be hard pressed to deny two other stakings of approximately 10 hectares each. It is quite clear that the 28 hectares of lands involved lend themselves to larger units of nearly 16 hectares, the staking of which would be more equitable in a competitive situation.

Given the circumstances involving equitably applying sections 2 and 3 to irregular pieces of land in unsurveyed territory, the tribunal finds that the irregular area of land available for staking, being 28 hectares, can be staked as either two units of 16 and 12 hectares respectively, two units of 14 hectares each or two units of 15 and 13 hectares. Any such stakings are found to comply with the requirements of sections 2 and 3, applied to this land, being an irregular area in unsurveyed territory.

While the past stakings of these lands as cancelled mining claims have not been sufficiently explained, they do not appear to conform with the requirements of the legislation at the time and cannot form the basis of acceptable stakings under the current regulation.

Conclusions

The staking by Mr. Jacques Robert of Mining Claim L-1227765, having an area of 14 hectares, thus complying with the requirements of the regulation, and having a completion time of 9:13 a.m., thus being the first staking of a size within the allowable limits, should properly be accepted for recording. The Tremblay staking of Mining Claim L-1227766, having an area of 14 hectares, similarly in compliance with the size requirements of the regulation and having not only the second completion time, but not overlapping with the Robert staking, should properly be accepted for recording.

The Pearson staking does not conform to the size requirements of the regulation to which this area of land readily could be staked and is disallowed as not being in substantial compliance or deemed substantial compliance with the **Act** and regulations, notwithstanding the earlier completion time of 9:12 a.m. and is not acceptable for recording. The appeal of Moneta Porcupine Mines Inc. will therefore be dismissed.

Similarly, the O'Connor staking of L-1222279 does not conform to the size requirements of the regulation to which this area of land could readily be staked and is disallowed as not being in substantial compliance or deemed substantial compliance with the **Act** and regulations, notwithstanding that it had an earlier completion time of 9:14 a.m., as compared with that of Tremblay of 10:04 a.m.

The arguments as to non-overlapping portions of overlapping mining claims do not apply to the facts of this case, as the actual stakings of the O'Connor and Pearson mining claims were not made in an attempt to conform with the minimal size requirements of sections 2 and 3 of the regulation. Therefore, the provisions of subsection 44(4) are found not to apply,

as the stakings of O'Connor and Pearson are not found to be in compliance with the requirements of an irregular area of land contiguous to lands not open for staking.

There are no costs payable by any party to this appeal.

Exclusion of Time

Pursuant to subsection 67(2) of the **Mining Act**, the time during which Mining Claims L-1227765 and 1227766 were pending before the tribunal, being the 25th day of May, 1998 to the 4th day of February, 1999, a total of 256 days, will be excluded in computing time within which work upon Mining Claims L-1227765 and 1227766 is to be performed and filed.

Pursuant to subsection 67(3) of the **Mining Act**, as amended by S.O. 1996, c. 1, Sched. O, s. 18, December 21, 2000 is deemed to be the date for the performance and filing of the first and second units of prescribed assessment work, having an aggregate minimum value of \$400, on Mining Claims L-1227765 and 1227766. Pursuant to subsection 67(4) of the **Mining Act**, all subsequent anniversary dates are deemed to be December 21.