

File No. MA 038-97

L. Kamerman)
Mining and Lands Commissioner) Tuesday, the 9th day
of June, 1998.

THE MINING ACT

IN THE MATTER OF

Mining Claim P-1218639, situate in the Township of Whitney, in the Porcupine Division, staked by Joel Marcel Ruel and recorded in the name of Royal Oak Mines Inc., hereinafter referred to as the "Mining Claim";

AND IN THE MATTER OF

An application to record Mining Claim 1218670, situate in the Township of Whitney, in the Porcupine Mining Division, staked by Ed Korba, to have been recorded in the names of Chris Coyne, Ken Pye, Randy Salo and John Simon, each as to a 25% interest, marked "filed only", hereinafter referred to as the "Filed Only Mining Claim";

AND IN THE MATTER OF

Ontario Regulation 7/96;

B E T W E E N:

CHRISTINA M. COYNE
Disputant

- and -

ROYAL OAK MINES INC.
Respondent

AND IN THE MATTER OF

An appeal by the Disputant pursuant to subsection 112(1) of the **Mining Act** from the decision of the Mining Recorder for the Porcupine Mining Division, dated the 4th day of November, 1997, for a declaration that Mining Claim P-1218639 be declared invalid and for the recording of the filed only Mining Claim 1218670.

ORDER

WHEREAS this tribunal issued its Order To File in this matter on the 19th day of November, 1997;

AND WHEREAS additional information was provided on behalf of the Appellant and Disputant by Ms. Christina M. Coyne on the 27th day of April and the 12th and 15th days of May, 1998;

AND WHEREAS additional information was provided on behalf of the Respondent by Mr. Paul Coad on the 15th day of April and the 13th, 14th and 15th days of May, 1998;

UPON READING AND VIEWING the submissions and materials filed by the parties:

1. THIS TRIBUNAL ORDERS that this appeal and dispute be and is hereby dismissed.

2. THIS TRIBUNAL FURTHER ORDERS that the notation "Pending Proceedings", which is recorded on the abstract of the Mining Claim, to be effective from the 13th day of November, 1997, be removed from the abstract of the Mining Claim.

3. THIS TRIBUNAL FURTHER ORDERS that the time during which the Mining Claim was under pending proceedings, being the 13th day of November, 1997, to the 9th day of June, 1998, a total of 208 days, be excluded in computing time within which work upon the Mining Claim is to be performed.

4. THIS TRIBUNAL FURTHER ORDERS that the 28th day of December, 1998, be fixed as the date by which the first and second units of prescribed assessment work must be performed and filed on the Mining Claim pursuant to subsection 67(3) of the **Mining Act** and all subsequent anniversary dates are deemed to be December 28 pursuant to subsection 67(4) of the **Mining Act**.

5. THIS TRIBUNAL FURTHER ORDERS that no costs shall be payable by either party to this appeal and dispute.

6. 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 9th day of June, 1998.

Original signed by

L. Kamerman
MINING AND LANDS COMMISSIONER

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REASONS

The hearing of this matter was done through written submissions pursuant to subsection 5.1(1) of the **Statutory Powers Procedure Act**, R.S.O. 1990, c. S.22, as amended by S.O. 1993, c. 27, Sched.; and S.O. 1994, c. 27, s. 56 and pursuant to paragraph 11(1) of the tribunal's **Procedural Guidelines for Proceedings under the Mining Act**.

Appearances:

Christina M. Coyne

Royal Oak Mines Inc.

Paul Coad, Chief Geologist, Eastern Canada Exploration,
made written submissions on behalf of Royal Oak.

Background

The facts surrounding this appeal are somewhat complex in that originally, disputes involving three separate areas on which claims were staked were heard by the Mining Recorder for the Porcupine Mining Division, of which only one was appealed to the tribunal.

All three disputes involved stakings of lands contained in Broken Lot 4, Concession V, situate in the Township of Whitney. In all three cases, the mining claims were recorded in the name of Royal Oak Mines Inc. ("Royal Oak"). Mining Claim 1218644, being the south east part of the south part of the said Broken Lot 4, Con.V, was disputed by Christina Coyne. Mining Claim 1218642, being the south west part of the south part of the said Broken Lot 4, Con. V, was disputed by William Kerr. Mining Claim 1218639, being the north east part of the south part of the said Broken Lot 4, Con. V, was disputed by John Simon and Christina Coyne. In all cases, the Mining Recorder dismissed the disputes, and it is Christina Coyne's appeal of the dismissal of the dispute of Mining Claim 1218639 which gives rise to this matter before the tribunal. Joel Ruel was the staker of the Royal Oak Mining Claim. Freeman Rogers was the staker on behalf of Christina Coyne. It should be noted that John Simon did not appeal the dismissal, and also that there was a fourth staker who did not file a dispute before the Mining Recorder, being Jacques Legault.

Royal Oak cleared the lines of the subject mining claim prior to staking. While the extent of blazing required was not in issue in this matter, facts surrounding the completion time of the Royal Oak staking were put in issue. In particular, the Royal Oak staker, Joel Ruel, completed and erected his #4 post prior to the Royal Oak helper, Andre Martel, exiting the bush.

Also, evidence surrounding the completion times of staking was unusual, in that no in person hearing took place before the tribunal. A video tape of the staking does not catch the completion of inscriptions of the two stakers, Ruel and Rogers, so that which of them finished first was brought into issue by the tribunal.

Issues

1. The Applications to Record of Joel Ruel, for Royal Oak, and Freeman Rogers for Christina Coyne, John Simon, Ken Pye and Randy Salo, both indicate completion times of 9:08 a.m. Which of the stakers in fact finished first?
2. There is no dispute of the fact that Andre Martel exited the bush to the #1 post of Ruel's claim some time after Ruel inscribed the completion time on his post. Was Ruel's mining claim completed at the time inscribed on his #1 post, or should the time have been shown as the time when Martel arrived at the #1 post?
3. If it was a tie, what rules should govern who should first be entitled to have their respective claim recorded? If the rule should be one of substantial compliance with the requirements of the **Mining Act**, which of the stakers, as between Ruel and Rogers substantially complied? or could be deemed to have substantially complied, within the meaning of subsections 43(1) or (2)?
4. Is the requirement to erect posts a necessary element in staking? Is the need to carry an axe? What impact does blazing after completion time has been inscribed have on the outcome? What are the implications of clearing the line ahead of the staking?

Evidence and Submissions

Christina Coyne set out her position in documents attached to her undated letter received by the tribunal on December 18, 1997 (Ex. 10), which are reproduced below:

Statement of Ed Korba (dated December 15th, 1997):

This note acknowledges the fact that on June 1st, 1996, I assisted Freeman Rogers in staking a claim in Whitney Twp., Porcupine Mining Division.

My assistance consisted of blazing the claim line between the no. 4 post and the no. 1 post.

I commenced the blazing at the no. 4 post at 9:00 a.m. and finished at the no. 1 post ahead of Mr. Rogers, at approximately 9:06 a.m.

I am ready willing and able to attest to the above facts under oath.

Statement of Patrick Coyne:

I Patrick Coyne of the City of Timmins, make a statement herein, as to the facts as I am directly involved with this claim.

On June 1st, 1996, I was located at the number four post of the aforementioned claim, to observe (**sic**) the progress of the staking. In observing I did clearly witness that Joel Ruel did not at any time attempt to erect his number 4 post, nor was he in possession of an axe as recorded on tape, submitted.

Before Joel Ruel arrived at the number 4 post Freeman Rogers had already arrived and erected his number 4 post as recorded on tape which as been submitted.

Subsection 8(4) of Ontario Regulation 7/97 is set out:

8(4) Where there are standing trees on the area being staked, the perimeter of the mining claim shall be clearly marked during the staking by plainly blazing the trees on two sides only in the direction of travel and by cutting the underbrush along the boundary lines of the claim.

Summary of Facts Alleged

As per original dispute:

1. Joel Ruel staker for Royal Oak mines in above matter did not wait for the blazer to complete blazing of the claim before recording finish time.
2. Royal Oak did not attempt to erect a number 4 post.
3. After completion time was recorded on the number one post, it was one minute and 40 seconds before Joel Ruel blazer was seen coming in.
4. Joel Ruel was not carrying an axe and as such was incapable of blazing himself.
5. Freeman Rogers completed claim before Joel Ruel as clearly visible on video tape submitted.

Royal Oak set out its position in documents attached to its letter dated January 16, 1998 (Ex. 11), which are reproduced below:

Schedule B Facts Agreed to by Royal Oak

1. Roland Collins was hired by Royal Oak to co-ordinate the staking rush on the morning of June 1, 1996. Roland Collins has 37 years of bush experience and knows the importance of properly staking a claim.
2. Mr. Joel Ruel was hired as a runner and Mr. Andre Martel was hired as a blazer to complete the staking of claim 1218639. Mr. Paul Otis and Mr. Gregoire de Blois were hired as witnesses and to guard posts. Mr. Otis and Mr. de Blois were both present at the hearing on July 23, 1997.
3. Royal Oak could have had the minesite security block the pumphouse road, leading south off of Highway 101 to the edge of Three Nations Lake, to prevent the competition from having easy access to the claims coming open for staking on June 1, 1996. Royal Oak exploration chose not to do this.
4. Royal Oak paid to have the claim lines for claim 1218639 properly cut out prior to the staking rush on June 1, 1996. The competition used these same lines to stake their claims on the morning of June 1, 1996.
5. The claims lines were properly marked out and it was not required that Mr. Andre Martel (blazer) terminate his staking help by finishing or closing at the no. 1 post. His last blaze could be done more or less 100 feet from the no. 1 post, provided the line is open and visible to the runner Mr. Joel Ruel. In this regard there was substantial compliance with the Mining Act.
6. Mr. Joel Ruel erected all of his posts as required by the Mining Act. Most importantly, Joel Ruel erected his no. 1 post. The initial act of properly erecting the starting no. 1 post was not completed by the disputant's staker. Therefore the disputant never officially started to stake on the morning of June 1, 1996 and all actions after that were therefore without merit. The disputant's staker, similarly, did not attempt to erect his no. 4 post.
7. Royal Oak contends, as previously mentioned at the hearing that there was substantial compliance with the Mining Act and that if the claim was inspected, one would see that there is sufficient blazing marking out the respective claim lines on claim 1218639.
8. The video, as presented as evidence by the disputant, illustrates that Mr. Joel Ruel was the first individual to complete the staking of the claim.
9. Christina Coyne's filed only claim 1218670 is jointly owned twenty-five percent each by Christina Coyne, Ken Pye, Randy Salo and John Simon. John Simon also staked a separate claim in the same area on June 1, 1996 and similarly filed a dispute against Royal Oak's recorded claim 1218639. John Simon's filed only claim 1218636, is jointly

owned twenty-five percent by John Simon, Christina Coyne, Ken Pye and Randy Salo. Both disputes have been responded to by Royal Oak in writing and verbally at the July 23rd and 24, 1997 hearing. It would seem that two apparently separate groups were actually working together, in an attempt to discredit Roland Collin's claim staking.

10. Finally, a decision was made by the Mining Recorder on November 4, 1997 to dismiss the disputes by Christina Coyne and John Simon which were reviewed at the hearing on July 23 and 24, 1997.

Schedule C Alleged Facts which Royal Oak does not agree with

1. In the formal dispute filed by Christina Coyne (P9660.00004), Royal Oak does not agree with the statement "not properly prepared due to overly blazed and cut out lines". The same individuals who make this accusation, completed the same identical exercise of preparing claims for staking during the September 17, 1996 staking rush in Tyrrell Twp. One cannot have it both ways.
2. In the formal dispute filed by Christina Coyne (P9660.00004), Royal Oak does not agree with the statement "Freeman Rogers completed claim before Royal Oak Mines, as shown on the video tape". The video tape does show that Joel Ruel did finish the staking before Freeman Rogers.
3. Royal Oak does not agree with Mr. Pat Coyne's statement "that Joel Ruel did not at any time attempt to erect his number 4 post,". Mr. Joel Ruel did erect his no. 4 post, as shown in the video. Freeman Rogers did not attempt to erect any of his posts, as shown in the video.
4. Royal Oak similarly does not agree with a portion of the statement made by the Mining Recorder ".... that Mr. Ruel, as well as others, made no attempt to erect their no. 4 posts". Mr. Joel Ruel did erect his no. 4 post, however he did not secure the post. This is illustrated on the video.

Schedule D Summation of Dispute

1. Royal Oak paid to have the site of claim 1218639 properly cut out prior to the staking rush. These cut lines were used by all of the competition on June 1, 1996.
2. Royal Oak's runner, Mr. Joel Ruel erected all of his posts. The no. 4 post was not secured, however it was erected momentarily, after the proper inscribing of the post.
3. Freeman Rogers did not erect or *attempt* to lift off the ground, either the no. 1 or the no. 4 post.

4. The claim boundary for claim 1218639 was properly marked out and sufficiently blazed to allow for anyone to locate the claim boundary in the field.
5. Royal Oak's runner, Mr. Joel Ruel and the blazer, Mr. Andre Martel, together, substantially complied with the Mining Act. There was no intent not to comply with the Mining Act.
6. The disputant's runner, Freeman Rogers, did not complete his staking before Mr. Joel Ruel.
7. The initial hearing date was postponed a number of times to accommodate the disputant. When a date was finally agreed upon (July 23 and 24, 1997), the disputant Christina Coyne did not show up to present her case.
8. The Mining Recorder made his decision on November 4, 1997 which ruled in favour of Royal Oak. The disputant than (**sic**) decides to appeal the case again.
9. Royal Oak contends that there was sufficient compliance with the Mining Act and that the decision of the Mining Recorder should be upheld.
10. Royal Oak also contends that there should be some type of compensation for the time spent by Royal Oak to repeatedly defend itself against separate parties who are actually working together to discredit legitimate claim staking.

Owing to the fact that the parties chose to proceed with written submissions only, and also due to the fact that the Mining Recorder's Order does not contain extensive findings of fact, the tribunal determined that it required additional particulars from the parties. In this regard, further submissions were received and are reproduced in their entirety:

Christina Coyne filed the following statement, dated April 24, 1998, which was received by the tribunal on April 27, 1998:

During the last week of May 1996, Pat Coyne and Randy Salo conferred with Gary White in regard to whether the staker running the claim had to have an axe with him during the staking.

Gary White informed them that the Mining Act did not specify that the runner staking the claim needed an axe. However any blazing had to be completed before the runner could complete the staking and record the finish time.

As such Ed Korba, S. Greenaway and T. Jeffery were hired to blaze the claim, and keep in contact via radio so that Freeman Rogers, the runner who was staking the claim would be kept informed of the status of the blazing, before completing his staking.

Summary of Events

At 9:00 a.m. Freeman Rogers was writing his post start time at the number 1 post. Upon finishing his start time Freeman Rogers jumped on a Sea Doo and proceeded along shore to the number 2 post. S. Greenaway began his blazing from the number 2 post to the number 3 post, using an axe, and when completed he contacted Pat Coyne via radio to inform him that his blazing was completed. T. Jeffrey began his blazing from the number 3 to the number 4 post, using an axe and personally informed Freeman Rogers as he approached that the blazing was completed. Ed Korba blazed from the number 4 to the number 1 post, using an axe. When Freeman approached the number 1 post he could clearly see that Ed Korba was already completed his blazing, and therefore wrote his completion time as the first runner in.

Details of Events

Freeman Rogers after dismounting the Sea doo jumped ashore and wrote up his number 2 post and erected it, he then proceeded to run from the 2 to the 3 where he wrote up and erected his post. Freeman then proceeded to run from the 3 to the 4 where he wrote up and erected his post, and when leaving the number 4 post was instructed by Pat Coyne that the blazing was complete and that he was disorientated and had to be redirected by Pat Coyne, at this time Joel Ruel passed Freeman Rogers only to fall, and have Freeman overtake him on the way to the number 1 post. Upon arriving at the number 1 post Freeman wrote up his finish time as 9:08 a.m. As witnessed on video tape Andre Martel blazer for Royal Oak came in one and a half minutes after Joel Ruel who was staking for Royal Oak. Therefore had Mr. Martel completed his blazing he would have had to cover three quarters of a mile in under 10 minutes, which is questionable if he was carrying an axe and blazing his way through the bush.

Royal Oak filed the following statement, dated April 15, 1998, which was received by the tribunal on April 23, 1998:

In response to your request of April 14, 1998 (your file no. MA 038-97), Royal Oak had claim P-1218639 staked on June 1, 1996 by Mr. Joel Ruel (staker) who was assisted by Mr. Andre Martel (helper) who completed the blazing of the claim. Mr. Paul Otis (helper) and Mr. Gregoire de Blois (helper) were hired as witnesses and to guard the posts. Royal Oak paid to have the claim lines properly cut out prior to the staking rush of June 1, 1996. The competition *also* used these previously prepared lines. Royal Oak has made reference to the activities of the various parties involved with the staking in the correspondence of January 5, 1997. Royal Oak would like to emphasize the following points: Mr. Joel Ruel, staking for Royal Oak, first inscribed his no. 1 post while it lay on the ground and then erected the post into a vertical position. The posts utilized during the staking were pre-cut posts. No metal tags were used during the staking (affixed at a later date). This staking all commenced at 9:00 a.m. on June 1, 1996. The competitor staker (ie. Mr. Freeman Rogers working for Ms. Coyne) did not attempt to erect any of his posts. Inscriptions were made while the post lay horizontally on the ground and no attempt was made to erect the post. Mr. Andre Martel (helper working for Royal Oak) commenced blazing at 9:00 a.m. and completed the necessary blazing commencing at the no. 2 post and moving clockwise around the claim. No parties blazed from the no. 1 to the no. 2 post because this area is marked by the shoreline of the lake. All parties travelled this portion of the claim either utilizing a boat or seadoo. The video shows that Mr. Joel Ruel did erect his no. 4 post and the mining recorder made a mistake in stating that Mr. Ruel did not attempt to erect his no. 4 post. Because the claim lines were properly marked out prior to the staking rush, it was not required that Mr. Andre Martel (blazer for Royal Oak) terminate his staking help by finishing or closing at the no. 1 post. His last blaze could be done more or less 100 feet from the no. 1 post provided the line is open and visible to the runner Mr. Joel Ruel. In this regard there was substantial compliance with the Mining Act. Please refer to all the documentation submitted by Royal Oak on January 6, 1997 to your office and to Mr. Gary White's (Porcupine Mining Recorder) November 4, 1997 review of the facts concerning the dispute against P-1218639.

It was Royal Oak's intent to properly stake claim P-1218639 and comply with the Mining Act. Royal Oak believes that this was done and reminds the Commissioner that Royal Oak completed fairly and professionally with the competition on June 1, 1996.

Please refer to clause 3 in Schedule B, in the correspondence of January 7, 1997. Made up allegations and false statements which were submitted and then subsequently withdrawn at the hearing on July 23 and 24, 1997 all point to inappropriate behaviour and a desperate attempt to try and win a claim, after it was lost in fair competition.

Video Tape

Along with the written submissions of the parties, a video tape during the time of the staking, at the location of the various #1 posts, was taken by an individual acting on behalf of either Christina Coyne or Patrick Coyne. There are a number of difficulties encountered in viewing the videotape and drawing conclusions from what was seen. First of all, the person handling the video machine is not identified. Nor is there a description of what is shown, which has inherent difficulties, since the people shown, with the exception of one individual, are not identified.

Viewing is further complicated by the fact that there are a number of individuals appearing who are neither runners nor helpers. Finally, the tone of the video is misleading in that there appears to be a challenge implied to the stakings of two of the individuals, Joel Ruel and Freeman Rogers, the latter of which is staking on behalf of Coyne and others. This challenge of Mr. Rogers in particular, is puzzling, given that Ms. Coyne is advancing the position that Mr. Roger's staking should be accepted over that of Mr. Ruel. Whether or not this confusion arises out of Royal Oak's allegations concerning deals having been made between several of the people on behalf of whom the other stakings of this land on June 1, 1996, wherein the various competitors have elected to divide the spoils of a combined effort to defeat the staking on behalf of Royal Oak is unclear.

Viewing the video also posed technical problems. Unlike the steady and well edited clips one is accustomed to seeing on television and the movies, this video falls prey to the vagaries of the unsteady handling, lack of wide angle lens, movement over uneven ground and periodic communication during which she loses her focus to speak into a two way radio. The results of these activities make it extremely difficult to discern in places exactly what has taken place. This uncertainty extends to the identity, and indeed a physical description of the four runners involved in the staking, let alone their actions. Similarly, when the first runners are making their way along the north boundary of the claims, only repeated viewing discloses that there are two runners involved. The unsteady camera, which moves from runners to the surrounding trees and to the ground, creates an illusion of a third runner. Only by rewinding, rerunning and pausing every few seconds can it be discerned that the phantom head looming behind the two runners are in fact either trees in the distance or the head of the second runner bobbing from side to side behind and along either side of the head of the first runner. It is abundantly clear that these two runners do not wield axes, a point which has been made repeatedly by Christina Coyne.

When the second group of those involved in the staking activity are filmed along the north boundary running to the #1 posts, it is clear that there are three, that they all have axes, and blazes are being made by two individuals, who the tribunal concludes are helpers. While the first in the line has been compared to the beginning of the tape, and bears similar long dark pants, which are possibly jeans, and white t-shirt with a pattern to one of the runners, John Simon, the fact is that the clip at the beginning of the staking does not focus sufficiently on the four runners to be certain of this fact. Only with repeated viewing does it become clear that this individual marks one of the #1 posts, and therefore the tribunal was able to conclude that he was John Simon. It is also not known who the two helpers running behind Mr. Simon are, namely which staking team they belong to. Finally, the fourth staker, who commences the staking wearing an orange tank top is not filmed completing his staking, but is later filmed sitting recovering from his run. By rewinding and repeatedly viewing the beginning of the tape, one of the four #1 posts shown in close-up after the stakers have taken off across the water discloses this individual's name as J.E. Legault. This fact was confirmed by a telephone call by the tribunal to a deputy mining recorder in the Sudbury office, who was able to locate the application to record of Jacques Legault.

One item of note, upon which no findings are based, is that after the completion of staking, an unidentified individual lifts one of the posts off the ground, appears to attempt to lean it against a tree which is far too spindly and narrow in girth to support it, whereupon it falls back to the ground. The post appears to be that of the Simon staking, although the tribunal cannot state with certainty that it is John Simon who is observed in the tape at this moment.

Comments Arising Out of Viewing the Video Tape and Reviewing Materials Filed

It bears noting that, in addition to the comments to the effect "not properly prepared due to overly blazed and cut out lines" found on the Notice of Appeal of Christina Coyne (Ex. 4), she asserts, "Freeman Rogers completed claim before Royal Oak Mines, as shown on video tape. Video can be viewed on request."

Another confusing item is carried through several of the documents filed, including the Order of the Mining Recorder, where the parties discuss the happenings at the #4 post, when it is apparent from viewing the tape that all filming took place at the #1 posts location. For example, in the paragraph found immediately under the heading **The Dispute against P-1218639**, approximately half way through the paragraph, he states, " The video portion taken at the #4 Post location however shows that Mr. Ruel, as well as others, made no attempt to erect their #4 posts. ... If it was determined that this one blaze counts as part of the staking and therefore the completion time of Mr. Ruel is incorrect, then the failure of the disputants blazers to blaze must be considered in addition to their (Mr. Rogers and Mr. Freeman) failure to erect the #1 and #4 Posts."

Similarly in its Schedule B, paragraph 6 (Ex. 11), Royal Oak has as its final statement, " The disputant's staker, similarly, did not attempt to erect his no. 4 post." Again,

in the Statement of Patrick Coyne, forming part of Christina Coyne's submission (Ex. 10), Mr. Coyne's final paragraph states, "Before Joel Ruel arrived at the number 4 post Freeman Rogers had already arrived and erected his number 4 post as recorded on tape which has been submitted."

This confusion is further compounded by the bald assertion by both Christina Coyne and Royal Oak that their respective stakers are seen completing staking first. This is implied from the Statement of Patrick Coyne, reproduced above, in which references to the "no. 4 post" should be replaced with "no. 1 post", which is clearly the only place in which the video taping took place. The Royal Oak position is clearly stated in its Schedule B, paragraph 8 (Ex. 11), which states, "The video, as presented as evidence by the disputant, illustrates that Mr. Joel Ruel was the first individual to complete the staking of the claim."

What is not clear from this latter assertion is whether Mr. Coad, on behalf of Royal Oak, genuinely sees Mr. Ruel as completing his staking first, or whether this is a statement of semantics, based upon his earlier assertions that, without having erected his #1 post upon commencement of staking, Joel Ruel's staking cannot have been regarded as having taken place, or whether, as Andre Martel is seen blazing the north line approximately 1 1/2 minutes after Mr. Ruel is seen completing his run to his #1 post, that the completion time must necessarily be implied to be 1 1/2 minutes after the stated time on the application to record.

Unless the tribunal is missing something, upon viewing the video tape countless times, what is seen is the following. At 9:07 a.m. and then 9:08 a.m., two individuals are seen running down what is assumed to be the north boundary. The first individual is wearing orange shorts and a white t-shirt, and later identifies himself on tape as Freeman Rogers. The second individual is assumed to be Joel Ruel, based upon the completion time. While the runners are coming in virtually simultaneously, it is quite clear that Freeman Rogers is first. However, the #1 posts of the two are located in such a manner that Joel Ruel appears to be a greater distance from the person filming the event, giving the impression that Ruel must run a short distance further to complete his staking than Freeman Rogers. What is not captured by the filming is the time when these two individuals mark their completion time on their posts. Rather, the filming appears to capture them already standing after the inscription was completed. The lighting is such that it is impossible to discern at this moment whether either of the posts have been erected.

Based upon the fact that the filming did not capture the actual completion, the tribunal directed the parties to make further submissions of what took place. Its letter to them of May 11, 1998 is reproduced in part:

In reviewing the materials filed, and particularly after viewing the video tape filed, I find that I am having difficulty separating out the facts which actually occurred, or which the parties are alleging as having occurred, from the arguments of the

parties as to what this might mean in law. In this regard, I am seeking clarification of the priority in which the two stakers, Joel Ruel and Freeman Rogers, inscribed their respective completion times on their #1 posts.

In the written statement on the Dispute filed by Christina Coyne (Ex. 4), there is the statement, "Freeman Rogers completed claim before Royal Oak Mines, as shown on video tape...." In Royal Oak's written submissions, dated January 6, 1998 (Ex. 11), paragraph 8 of Schedule B states, "The video, as presented as evidence by the disputant, illustrates that Mr. Joel Ruel was the first individual to complete the staking of the claim."

I was able to observe the following on the video tape. At 9:08 a.m. two individuals are seen running towards the camera towards their #1 posts. The first is Freeman Rogers; the second Joel Ruel. After they pass, the camera does not focus on their progress, and catches up to Mr. Rogers, standing from his #1 post. At this point, Mr. Ruel is not yet within the camera's view. Then, Mr. Rogers takes several steps and reaches out to shake hands with Mr. Ruel, who is at this point standing. Clearly, the moments of inscribing the #1 posts with the completion time for the Rogers and Ruel staking have not been captured on film.

While the issues of erection of the #1 post and the position of the Rogers' blazer [this should have stated "Ruel's blazer"] remain, the matter of the facts of completion of staking as between Messrs. Ruel and Rogers must be dispensed with first, before I can proceed to deal with issues of substantial compliance which flow from the facts.

Therefore, I am requesting your written comments on the relative completion of inscribing the #1 posts of Ruel and Rogers. Please provide this information in writing to this Office and to the other party by fax by Friday, May 15, 1998.

Ms. Coyne responded by letter May 12, 1998, with accompanying affidavit and handwritten statement, relevant portions which are reproduced:

...I enclose the sworn Affidavit of Freeman Rogers as to the sequence of events that occurred after the completion of staking and during the course of inscribing the completion times on the #1 posts.

Mr. Rogers had no difficulty in recalling the incident even through it was two years ago, he had staked previously to this and was not overwhelmed by the commotion going on around him.

Being the gentleman that he is in making the effort to shake hands with his competitor Mr. Rogers remembers quite well his competitor still inscribing his post.

I also enclose a statement by Ed Korba who unfortunately was unable to access a commissioner to swear his statement as he is in Marathon working. He did however agree to do so if necessary when he is able.

I am hoping that this will suffice as Mr. Korba is a well respected citizen and well known in the mining exploration field.

The following constitutes the body of the Affidavit of Freeman Rogers, sworn May 12, 1998:

2. I was hired by Christina Coyne to stake the Mining Claim P-12186444 being the South East part of the South part of broken Lot 4, Concession V situate in the Township of Whitney in the Porcupine Mining Division.
3. I completed staking the said claim and commenced to write my finish time on my #1 post as 9:08 a.m. upon completion of the finish time, I stood up to approach my competition being Joel Ruel as he was still writing his finish time on his #1 post. When he completed I walked up to him and shook his hand.
4. I am completely confident that I completed the staking of the claim and the writing of the finish time first. I have already been paid in full for the services I provided for Mrs. Coyne on June 1st, 1996. An as such have no financial interest in this matter.

The note of Ed Korba dated May 11, 1998 states:

Re: claim no. 1218644 in Whitney Twp., Porcupine Mining District.
I assisted Freeman Rogers in the staking of this claim on June 1st 1996, by blazing the claim line from the no. 4 claim post to the no. 1 claim post.

At the no. 1 post location I witnessed Mr. Rogers complete the inscription of his no. 1 post before anyone else. If you would require me to swear under oath to these facts, I will gladly comply. Further to that, I did not have, do not have, nor will I have any beneficial interest in the mining claim.

The letter of Paul Code of Royal Oak, dated May 13, 1998, is reproduced in part:

Royal Oak ... would like to present additional information to the Commissioner concerning the final completion of the staking of claim P-1218639 (Joel Ruel for Royal Oak) and filed only claim P-1218670 (Freeman Rogers for C. Coyne). Firstly, I would like to clarify two points referred to in the letter of January 6, 1997 to the Commissioner re: MA 038-97. I do not personally know either Joel Ruel or Freeman Rogers and was not present at Three Nations Lake on June 1, 1996. I was advised by parties hired by Royal Oak that the video shows that Mr Joel Ruel was the first individual to complete the staking of the claim, hence point no. 8 in Schedule B and point no. 2 in Schedule C (January 7, 1997). I now realize that I made an error in these two statements and apologize for misrepresenting the facts. It would appear that Ms. Christina Coyne was also misinformed as she states that the video shows how Freeman Rogers clearly completed the Claim before Royal Oak (clause no. 2 in Schedule C (January 6, 1997). Clearly, the video does *not* show the final completion of the staking as mentioned in your letter of May 11, 1998. Royal Oak has asked Mr. Gregoire DeBlois to provide a written statement as to what occurred near the end of the claim staking. This statement is attached, along with a sketch map which represents exhibit no. 3 from the hearing on July 23 and 24, 1997 concerning file MA 038-97.

Royal Oak would ask the Commissioner refer to all the available information that has been provided to your office Importantly, the Commissioner should recognize that the same individuals involved in this particular file (ie. C. Coyne, Pat Coyne, Freeman Rogers, Ken Pye) are the same group involved with file MA 012-98. These individuals completed the staking for Strike Minerals and deliberately harassed and stole a post from Royal Oak and falsified a recording by using the same helper on two different recordings. Clearly, acts of dishonesty, unprofessional behaviour and improper procedures (ie. not erecting posts, presenting false allegations in a dispute and then withdrawing them immediately at

the start of a hearing, not personally showing up for the hearing etc.) must be dealt with by your office. It is important that the companies who are striving to comply with the Mining Act, not be adversely effected by individuals who are deliberately trying to win claims by intentionally not complying with the provisions of the Mining Act.

The witnessed statement of Gregoire DeBlois, dated May 12, 1998 states:

I, Gregoire DeBlois, was a witness and guarded the posts for the staking of claim P-1218639 on June 1, 1996 at Three Nations Lake east of Timmins. I was positioned at the no. 1 post for P-1218639. This claim was staked by Joel Ruel, who was staking the claim for Rolland Collins, who in turn was hired by Royal Oak Mines. The two different stakers, Joel Ruel and Freeman Rogers completed the inscription of their finish times at the same time. Joel did not have to travel as far along the line to reach his no. 1 post which was erected, therefore he was able to start writing his post before Freeman Rogers, who had to travel further to reach his no. 1 post which was lying on the ground. Both stakers finished the claims at the same time. Freeman Rogers did not erect his post after writing it up. His no. 1 post was left lying on the ground as it was at the beginning of staking at 9 o'clock.

Three additional unsolicited letters were received from the parties, relevant portions of which are reproduced:

Mr. Coad sent a letter dated May 14, 1998:

Royal Oak just received Mrs. Christina Coyne's response concerning file MA 038-97 by fax. Royal Oak would like to add the following comment. It is important to understand that Joel Ruel's no. 1 post was erected and located further to the west along the line which would run from post no. 1 westward to post no.4. When one is looking south, Ruel's post would appear on the right side of the picture as viewed on the video camera, if the video shot was taken looking south. One would presume that it was. I do not personally know Joel Ruel or Freeman Rogers and therefore cannot comment on what is seen in the video concerning handshaking etc., however it is important to realize that Ruel's post should be located on the right if the video shot was taken looking south. Royal Oak does not have a copy of the video but had the opportunity to view the video most recently at the July 23 - 24, 1997 hearing. One has to wonder why the video which was

provided as evidence by Mrs. Christina Coyne did *not* show the entire process of the two competitors inscribing their respective posts. For some reason the operator of Coyne's video did *not* want to capture this important detail.

Ms. Coyne sent a letter dated May 15, 1998:

In response to Royal Oak's letter of May 14, 1998, submitted after they received our copy of information sent to your office by your request, may I first say, I am terribly insulted and upset at the nature of Royal Oaks response to the said information.

Royal Oak clearly infers wrong doing on the part of the videographer, and unfortunately this is matter that would have quickly and easily been resolved if Royal Oak had just taken the time to ask me a few questions.

I would not at any point attempt to assume what Mr. Coad was thinking when he appeared on my doorstep at 5:45 p.m. on May 14th with this letter, as there are several courier services as well as fax services in town he could have used. I was left feeling rather intimidated and insulted. I would have gladly informed Royal Oak that the person who shot the actual video footage was in fact not working for me.]

Sue Lomax is a geologist who was hired by Ken Pye, at the time this staking took place her job was to film John Simon, his arrival, his post inscription and his completion. It is rather obvious that her concern was not on Freeman Rogers or Joel Ruel or which one finished first. As at the time of staking this claim Pat Coyne and I were not in a partnership with Ken Pye. This video tape is not my property but the property of Ken Pye. With this I close and say thank you for your extended time and understanding at helping me to cope with this matter.

Mr. Coad's further submission is dated May 15, 1998:

Royal Oak just received Mrs. Christina Coyne's fax response dated May 15, 1998, concerning file MA 038-97. Royal Oak would like to add these additional comments. I personally delivered the two separate letters to the Coyne residence to make sure they had ample opportunity to respond to the correspondence faxed to the Commissioner. I am not an intimidating type of person. This letter will definitely be puolated to Mrs. Christina Coyne, however it will probably not arrive on May 15, 1998. To set the

record straight, the recording of filed only claim P-1218636 staked by John Simon on June 1, 1996 indicates that the ownership on this claim is 25% John Simon, 25% Randy Salo, 25% Ken Pye and 25% Christina Coyne. Similarly the recording of filed only claim P-1218670 staked by Freeman Rogers on June 1, 1996 is owned 25% by Christina Coyne, 25% by Ken Pye, 25% by Randy Salo and 25% by John Simon. There would appear to me that there is a definite connection here as previously put forward at the July 23 - 24, 1997 hearing and referred to in subsequent correspondence. I do not recall the video showing John Simon inscribing the completion time of his post. In discussion with Mr. and Mrs. Christina Coyne, last evening it was stated that the party to the left side of the video was John Simon. I am not sure what the handshaking implies but was the handshaking between Rogers and Simon? Importantly, Joel's erected post was closest to the west in the field and it was the only erected post in the video which was observed by Royal Oak at the July 23 - 24, 1997 hearing. Attempts have been made to contact Joel Ruel ..., however I have only been able to leave messages on his answering machine....

To set the record straight as told to me last evening, Mrs. Christina Coyne advised that she was not present in Tyrrell Township on September 17, 1996. I apologize for this misrepresentation.

Findings of Fact

While there may be advantages in many cases to having a hearing take place exclusively by telephone conference or through written submissions, this particular appeal perhaps better illustrates an instance when an in-person hearing would be preferable. The original hearing before the Mining Recorder was marred by the absence of parties and some witnesses. This leads to the supposition that in hiring an individual or individuals to stake on behalf of others, once paid, some of the individuals may not wish to invest further time to give evidence concerning their activities. More likely is that these individuals are involved elsewhere in gainful employment, and owing to the nature of mining generally, may not be at a location convenient to the hearing. However, if witnesses reluctance to come forward is just that, there are always avenues of acquiring Summonses from the tribunal, which, if not complied with, could lead to contempt charges being brought in the Courts.

This written hearing is plagued by relatively confusing facts, resulting from deals made after the staking. There is nothing improper in this fact, only that it is difficult to sort out without direct information. Innuendo and suspicions are not helpful in this regard. In fact, serious allegations of improper activity can only be handled through an in-person hearing, as

there are profound questions of truth of allegations and credibility of witnesses to be addressed; every legislative protection must be used before a person can be deprived of their rights, such as the right to stake a claim. There is nothing improper in the videotape and the tribunal is convinced that there were no attempts by the videotaper to confuse matters. Rather, due to lack of focus, lack of perspective, and most importantly, not knowing ahead of time where the issues would lie and what those issues would be, it was impossible for that individual to capture all of the desired information on tape.

Lastly, the two individuals who have carriage of their appeals, Ms. Coyne on behalf of herself and her partners, and Mr. Coad on behalf of Royal Oak, were not present at the staking. In the case of Mr. Coad, he did not know the individuals involved, so that their attempts to clarify what actually took place on the ground were clouded by their uninformed perspectives. The fact that the video tape was not made for Mrs. Coyne, and the fact that Mr. Coad does not have a copy but only viewed it the once during the hearing before the Mining Recorder on July 23rd and 24, 1997 is one example of this.

The actual evidence, such as it was, is marred by unsworn statements, hearsay, absence of opportunity not only to cross-examine those actually present, but to also clarify ambiguities in their written perceptions. The tribunal has attempted to sift through copious representations and statements, as well as the findings of the Mining Recorder, to determine what actually took place with respect to the stakings of Freeman Rogers and Joel Ruel. For it will be based on such facts that actual findings of fact can be made, and proper conclusions in law can be drawn.

Therefore, unless there is a strong case for doing otherwise, the tribunal is indicating its preference to having an in-person hearing in matters of staking disputes. Only in this way can those present be observed, their credibility assessed, and the extent of their observations be determined. This is the job of triers of fact. To the extent that the tribunal itself has encouraged parties to agree to a written hearing, it was clearly misguided in this regard. Nonetheless, with the considerable efforts of the parties in compiling several sets of additional submissions, repeated viewing of the video tape, the tribunal had determined that it has sufficient information on which to base its findings. In this regard, the efforts of the parties in attempting to clarify outstanding facts is sincerely appreciated.

Based upon its repeated viewing of the tape and the many filings of the parties and their witnesses, the tribunal is able to make the following findings of fact. There were four stakers of the lands involved in this dispute on the morning of June 1, 1996, being Freeman Rogers, Joel Ruel, John Simon and Jacques Legault. At the commencement of staking, all erected or attempted to erect their #1 posts, with the exception of Freeman Rogers, who was observed running from his post without any attempt to erect it. John Simon leaned his post against a small sapling, so that it leaned precariously.

At approximately 9:03 a.m. to 9:04 a.m., a man wearing a red plain shirt, vest and hat is observed blazing along the north boundary between the #4 and #1 posts. From the written submissions, the tribunal has inferred that this was Ed Korba, helper to Freeman Rogers.

At 9:08 a.m. two runners not carrying axes are observed on the same boundary, being Freeman Rogers and Joel Ruel, with Rogers in the lead. The exact moments of inscription do not appear on the tape. Mr. Rogers wrote that he was able to see that he completed his inscription first and was moving to stand up while Joel Ruel was still writing. While I do not doubt that this is Mr. Freeman's belief, it does not coincide with observations from the tape, which show him standing, stepping westward and reaching out to shake hands with Mr. Ruel, who by the time the camera catches him, has also finished his inscription on his post. The tribunal finds that it prefers the evidence of Monsieur DeBlois, who states that the inscriptions were completed at the same time. Monsieur DeBlois was better situated to observe both, and as he was not caught up in the heat of the moment with his own staking activities, his observations are found to have the calm clarity of the inactive observer. This is stated recognizing that, even though Monsieur DeBlois is partisan, having been involved in the one staking, at the critical moment he was standing back.

It should be stated that nothing is suggested by the handshake of Mr. Rogers after the completion of his staking. In describing it in its correspondence to the parties, the tribunal used it as a description of fact for a given moment in time.

After the stakings had been completed, the posts were observed on tape. That of Ruel had been erected, as had those of Simon and Legault. Mr. Simon's continued to lean precariously. Mr. Rogers lay on the ground.

The tribunal finds that it accepts that Ed Korba had completed blazing the north line of Rogers' Mining Claim P-1218670 at approximately 9:03 a.m. to 9:04 a.m. There is nothing to suggest that this blazing was improper in any way. The tribunal has considered the blazing having been undertaken by Andre Martel on Ruel's Mining Claim P-1218639, which shows Mr. Martel returning to the vicinity of the #1 post of the claim at approximately 9:10, described in the documentation as one and a half minutes after Ruel had completed inscribing his completion time. That the lines were cleared in advance of the staking is not disputed. Nor do the parties disagree that everyone availed themselves of the same line. The tribunal finds that it agrees with the conclusion of the Mining Recorder that no blazes were required on the last 100 feet or so on the north boundary. Therefore, the tribunal finds that Mr. Ruel's completion time of 9:08 a.m. must stand, that there is nothing to suggest that staking, through the blazing of the helper, had not been completed, at the time the inscription was made.

There are no cases of the tribunal, or even of the Mining Recorders' that the tribunal is aware of, since the amendments to the **Mining Act** effective June 3, 1991, in which there have been findings of simultaneous completion times. This being the case, the tribunal will consider the essential elements of staking to determine actual compliance before moving to the question of substantial compliance or deemed substantial compliance.

There is no question that both mining claims are the requisite size, as set out in section 2 of Ontario Regulation 7/96. Both were staked without tags, which is properly allowable. There is no question, as well, that all four posts were properly located and inscribed,

although the tribunal does not have the benefit of evidence on this fact. The perimeter of a mining claim must be blazed, except along a water body, which exists here between the # 1 and 2 posts, and the underbrush must be cut and cleared. The fact that this clearing took place prior to the staking is somewhat problematic, in that it is understood from the regulation that this is an integral part of the staking. However, as all parties were to take advantage of this same cleared line, the tribunal is satisfied that no advantage was gained by one party over the other stakers.

The stakers used pre-cut posts, which is also not prohibited. Subsection 8(2) requires that a claim is staked by **erecting** a post at each of the four corners. Section 14 expands on this, giving the dimensions of the posts. Most interesting in these requirements is clause 14(1)(a), which states that the post must "stand 1.2 metres above the ground when erected" and clause 14(1)(b), which states that the post must "be squared or faced on four sides for 30 centimetres on the top". Erection of the posts, in the same vein as blazing and clearing of underbrush, appear to be essential elements in the staking. From the perspective of an individual in the field attempting to locate such a claim through posts and other markings in the field, a standing post, if only leaning on another tree, would be more visible among the growth or regeneration of growth in the vicinity of post locations.

Subsection 15(3) similarly mentions, in cases of staking without tags, inscription details to be put on the post, **including the time of erection of the post**.

Concerning the essential elements of staking, the tribunal finds that, in the absence of more detailed evidence, both Ruel and Rogers complied with all of the essential elements with one exception. Ruel not only erected his #1 post at the commencement of his staking, but also erected it after he inscribed his completion time. Indeed, the video tape has the appearance of his having inscribed the post with his completion time in the erect position. Rogers, on the other hand neither erected his #1 post at the commencement of his staking nor did he attempt to erect his #1 post after inscribing his completion time.

Applying the test in subsection 43(1) of the **Mining Act**, the tribunal finds that Ruel substantially complied with the requirements of the **Act** in his staking. Rogers did not substantially comply, in that he made no attempt to erect his #1 post at the commencement or completion of his staking, an action which is found to be an essential element of staking.

The test for deemed substantial compliance is two-pronged, namely that the failure to comply is not likely to mislead others wishing to stake in the vicinity and it being apparent that the staker has attempted in good faith to comply with the requirements. There is nothing in the actions of Freeman Rogers to suggest that he did not make a *bona fide* effort in his staking. It is not clear whether he did not know that erection of the post was a requirement of the legislation or whether he was attempting to gain a competitive advantage. The tribunal finds that, in the absence of evidence to the contrary, it prefers the former explanation, as there is nothing to indicate that Mr. Rogers was anything but sincere in his efforts. However, posts lying on the ground cannot be readily seen, which is a problem for stakers wishing to tie on.

In a competitive situation, such as a staking rush, not so much at this location, but for example in the later rush in Temagami, there were many locations at which there were not groups of stakers, helpers and observers milling around to point the way to the posts. And in the days subsequent to initial opening of the ground, before applications to record were filed, posts lying on the ground would pose a serious challenge to those in the field attempting to find open ground, and more particularly, attempting to find the corners of the claims staked. With the passage of time, locating such posts would become even more difficult, due to the revegetation which would naturally take place.

For these reasons, the tribunal finds that the staking of Freeman Rogers cannot be deemed to be staked in substantial compliance with the requirements of the **Mining Act**.

The staking of Joel Ruel, having been found to be in substantial compliance, will remain as the recorded mining claim. The appeal will be dismissed.

General Comment

One matter of concern to the tribunal in this appeal is the extent of clearing of the line and possibly pre-blazing which occurred prior to the staking of the claims. The issue has been touched upon recently in several decisions (see **Kerr v. Strike Minerals Inc.**, January 26, 1996, (unreported) MA 006-95; *Royal Oak Mines Inc. v. Clark*, March 27, 1998 (unreported) MA 014-97). Blazing and clearing are essential elements of staking. While it has not been the case in this recent appeal, nonetheless, parties who perform a substantial portion of this activity prior to the actual staking leave themselves open to serious challenges to not having actually complied with the essential elements of the staking. While it cannot be said without hearing the facts of the prospective case what the outcome will be, staking is a time-honoured profession which should not be usurped by amateurs seeking to circumvent these essential elements by crossing into this grey area prior to commencement of staking. Any serious challenge to pre-staking activities will require significant evidence to demonstrate that what took place was actual staking, and not a quick walk in the bush, with time taken out to mark a couple of downed, cut trees.

Exclusion of Time

Pursuant to subsection 67(2) of the **Mining Act**, the time during which Mining Claim P-1218639 was pending before the tribunal, being the 13th day of November, 1997, to the 9th day of June, 1998, a total of 208 days, will be excluded in computing time within which work upon Mining Claim P-1218639 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 28, 1998, is deemed to be the date for the performance and filing of the first and second units of prescribed assessment work on Mining Claim P-1218639. Pursuant to subsection 67(4) of the **Mining Act**, all subsequent anniversary dates are deemed to be December 28.

Conclusions

The appeal from the decision of the Mining Recorder for the Porcupine Mining Division is dismissed and the time under which Mining Claim P-1218639 was under "pending proceedings" will be excluded in computing time for the performance and filing of assessment work.

No costs are payable by either party to this appeal.