

File No. MA 006-95

B. Goodman)
Deputy Mining and Lands Commissioner)

Friday, the 26th day
of January, 1996.

THE MINING ACT

IN THE MATTER OF

A dispute against Mining Claim L-1202866, situate in the Township of Macmurchy, in the Larder Lake Mining Division, hereinafter referred to as the "Mining Claim";

AND IN THE MATTER OF

Mining Claim L-1199000, situate in the Township of Macmurchy, in the Larder Lake Mining Division, marked as "filed only";

B E T W E E N:

WILLIAM CHARLES KERR

Disputant

- and -

STRIKE MINERALS INC.

Respondent

AND IN THE MATTER OF

An appeal by the Disputant from the decision of the Mining Recorder for the Larder Lake Mining Division dated the 7th day of February, 1995 under subsection 112(3) of the **Mining Act** for a declaration that Mining Claim L-1202866 be cancelled and for the recording of Filed Only Mining Claim L-1199000.

ORDER

1. THIS TRIBUNAL ORDERS that this Dispute and Appeal from the Decision of the Mining Recorder for the Larder Lake Mining Division are hereby dismissed.

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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 6th day of June, 1994, be removed from the abstract of the Mining Claim.

3. THIS TRIBUNAL FURTHER ORDERS that the time during which the Mining Claim was pending before the Mining Recorder and the tribunal, being the 6th day of June, 1994 to the 26th day of January, 1996, a total of 600 days, be excluded in computing time within which work upon the Mining Claim is to be performed.

4. THIS TRIBUNAL FURTHER ORDERS that the 23rd day of January, 1998, be fixed as the date by which the next unit of prescribed assessment work shall be performed and filed on the Mining Claim and all subsequent anniversary dates shall be deemed to be January 23 pursuant to subsection 67(2) of the **Mining Act**.

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

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

Reasons for this Order are attached.

DATED this 26th day of January, 1996.

Original signed by
B. Goodman

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DEPUTY MINING AND LANDS COMMISSIONER

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REASONS

This is an appeal under subsection 112(3) of the **Mining Act** ("the **Act**") from the Order dated February 7, 1995 of the Mining Recorder ("the Recorder") for the Larder Lake Mining Division, dismissing the Dispute filed on the mining claim of record, Mining Claim L-1202866 and verifying its validity, and refusing to record the "filed only" application to record Mining Claim L-1199000.

The parties have agreed that no hearing would be held by the tribunal, which would render its decision following a review of the record of the proceedings before the Recorder, including the transcript of the hearing held by the Recorder on January 27, 1995 and the exhibits produced at that hearing. The tribunal has also reviewed the Notice of Appeal dated February 15, 1995 and the material received by the tribunal in response to its Order to File dated February 28, 1995 and its Amended Order dated May 11, 1995 rescinding the earlier Order, dismissing the Dispute naming the Minister of Northern Development and Mines as the respondent, and adding Strike Minerals Inc. as a respondent in these proceedings.

Background:

On June 1, 1994, James Moyer completed an application to record Mining Claim L-1202866 for the recorded holder Strike Minerals Inc ("the Moyer Claim"). The application (Exhibit 6) indicates that the staking commenced at 8:00 a.m., and was completed at 8:20 a.m. on June 1. On Part B of the application, next to paragraph 7 which indicates that the staking is valid and should be recorded, the following appears in handwriting: "Witnessed by=George Young". Paragraph 9 indicates that Larry Salo, Dave Enouy and Matt Paavola assisted in the staking. The application contained a sketch of the Moyer Claim. Mr. Moyer paid the prescribed fee, and the Recorder entered the Moyer Claim pursuant to subsection 46(1) of the **Act**, having determined that the claim had been staked in accordance with the **Act** and Ontario Regulation 115/91 ("the Regulation").

Later that same morning, the appellant, William Kerr, completed an application to record Mining Claim L-1199000 ("the appellant's Claim") for essentially the same lands that were the subject of the Moyer Claim. The application (Exhibit 3) indicates that the staking commenced at 8:01 a.m. and was completed at 9:25 a.m. on June 1, 1994. Paragraph 9 of Part B lists Ellen Kerr, Michelle Hutchings, Robert Rousseau and Maureen Rousseau as persons who assisted with the staking.

The Recorder determined that the Moyer application should prevail over the appellant's application pursuant to subsection 44(2) of the **Act**, because Moyer had completed his staking first. In accordance with subsection 46(2), the Recorder did not record the appellant's application, but received and filed it at his request, upon the payment of the prescribed fee. On June 6, 1994, the appellant filed a Dispute of the Moyer Claim, verified by affidavit, with the Recorder pursuant to subsections 46(2) and 48(1) of the **Act**. In the Dispute (Exhibit 1), the appellant alleged that the Moyer Claim was illegal or invalid because it was:

1. Not in substantial compliance due to starting staking in advance of opening time.
2. Staking is illegal due to prestaking.
3. Not a continuous action as claim lines were cut before #1 post erected.

4. Defendant did not blaze east boundary subsequent to official opening.
5. False application to record.

In the Dispute, the appellant asked that his claim should be accepted instead. The appellant attached a schedule to his Dispute, also signed and dated June 6, 1994, which was a four page summary of his Dispute. The appellant paid the prescribed fee and the Recorder noted the Dispute on the record of the Moyer Claim in accordance with subsection 48(1) of the **Act**.

At the Recorder's request pursuant to subsection 75(3) of the **Act**, an inspection was carried out on July 29, 1994 by Ron Orchard, a Lands Technician with the Ministry of Northern Development and Mines. Mr. Orchard prepared a report of his inspection in memorandum form dated December 22, 1994 to the Recorder ("the Inspection Report"). The Report (Exhibit 9) indicates that the purpose of the inspection was to document the staking evidence of the appellant's Claim and the disputed Moyer Claim, and that Messrs. Moyer and Salo attended the inspection. The Report includes seven pages of post data and observations of the claim lines, topography and the remaining inscriptions on claim post faces.

Pursuant to subsections 110(1) and (2) and section 111 of the **Act**, the Recorder heard the Dispute on January 27, 1995. As previously indicated, it is the resulting Order of the Recorder dated February 8, 1995 which has been appealed to this tribunal. The Recorder's Order is followed by Reasons in accordance with subsection 111(2) of the **Act**, which have also been reviewed by the tribunal.

In his Reasons, the Recorder found that Moyer had substantially complied with the requirements of the **Act** as to the staking out of mining claims. He also determined that, by virtue of the earlier completion time of his staking, Moyer had established priority of his Mining Claim over that of the appellant.

Issues:

1. Did Moyer comply with the requirements of the **Act** as to the staking of his Mining Claim?
2. If not, did he substantially comply?
3. Should the Moyer Claim have priority over the appellant's?

Facts:

On the morning of May 25, 1994, the appellant attended the Office of the Mining Recorder for the Larder Lake Mining Division in Kirkland Lake (the "Recorder's Office") and met with the Recorder. He showed him a sketch of the subject land that he intended to stake to ensure that he did not make any mistakes. The Recorder agreed that he should visit the site to orient himself in advance of the land becoming open for staking. He cautioned the appellant not to blaze or put any permanent markings on trees or shrubs in advance of the land becoming open, which could be cause for a Dispute under the **Act**.

The appellant visited the site on the afternoon of the same day, and oriented himself, using a hip chain thread, flagging tape and a compass. He cut two posts and hid them near some of the proposed corners of the land which he proposed to stake. According to the appellant, there were no lines cut on the subject land at that time, although he saw some hip chain thread, which was down, near the south boundary.

On May 31, 1994, the day prior to the lands becoming open for staking, the appellant returned to the site at 9:30 a.m. and saw two workers, whom he believes to be Messrs. Moyer and Court, walking down the eastern boundary of the disputed claim to the road. Mr. Moyer confirmed, in his evidence, that he had met the appellant on the road, and then walked the eastern boundary with Mr. Court. According to the appellant, the eastern boundary of the land had been clear cut to a width of five to ten feet, and had been blazed and picketed. Mr. Moyer testified that the eastern boundary was an old road and had been clear cut. There were a few pickets that had fallen down on the eastern boundary line. The appellant, who did not actually see anyone blazing, called the Recorder's Office, and told the Recorder that there were some people out pre-blazing. The Recorder told him to try to find the inspector who was in the area, and that he would notify the coordinator of staking. The appellant could not find the inspector and drove back to the property, arriving between 1:30 p.m. and 2:00 p.m. Between then and approximately 7:00 p.m., he walked the subject land with his hip chain thread, measuring the lines. According to the appellant, each line was approximately 400 metres and was well cut out and blazed. This had been done in the previous week. The appellant cut two more posts and hid them. He met Mr. Salo, who showed him a claim sketch of the same lands, that evening on the property. Mr. Salo testified that he had just completed staking the land to the south of the subject property. He saw some lines cut, and saw "turnings" on trees, but he did not see any blazing or picketing, other than pickets on the ground. He stated that there were definitely other parties in the area because he had seen different trucks parked in the area for a day over the previous week, although he had not seen anyone personally.

In his evidence, Mr. Moyer admitted that he had been on the property a day or two before the land became open for staking getting located and putting up ribbons, but denied having pre-blazed any lines. He acknowledged that at that time there were old lines on the claim boundaries and some blazes and pickets, some of which were fairly recent. Mr. Paavola testified that the crew had been in the area doing orientation work on the claims they were going to stake

for several days before the land became open, and there were indications of pre-blazing and the use of hip chain. The day prior to the claim becoming open, he saw a vehicle in the area that he had not seen before.

At 5:20 a.m. on June 1, 1994, the day that the subject land became open for staking, the appellant arrived at the site with his crew, namely his wife Ellen Kerr, Robert and Maureen Rousseau and Michelle Hutchings. The appellant showed his crew the eastern and part of the northern boundaries of the land to be staked. He noted that it was cut. At the January 27, 1995 hearing before the Recorder, the appellant produced ten photographs of the area of the mining claim, taken by himself and his wife on the morning of June 1, 1994. The photos were collectively entered as Exhibit 4. All but two (namely Exhibits 4b and 4j) of the photos were taken by the appellant and his wife between 5:45 a.m. and 6:45 a.m. on June 1, 1994. The land became open for staking at 8:00 a.m. The eight photos are of part of the eastern and northern boundaries of the land that is the subject of the disputed claim, and were introduced to substantiate the appellant's submission that the boundary lines of the claim had been cleared and that there had been blazing and picketing prior to the legal opening time for the land.

In his evidence before the Recorder, Mr. Rousseau stated that the eastern boundary, which he walked with Mr. Moyer before 8:00 a.m. was fairly open, was flagged, and had been recently blazed. He did not know who had done the pre-blazing. Mrs. Rousseau testified that picket lines had been cut before the opening time, although she did not see who had done this. At the hearing before the Recorder, the appellant introduced into evidence as Exhibit 5 a Statutory Declaration dated January 20, 1995. Attached to this was an affidavit also dated January 20, 1994 signed by Michelle Hutchings, who was unable to attend the hearing, and was therefore not available for cross-examination. In her affidavit, Ms. Hutchings indicated that, while the appellant's crew was waiting for opening time, the appellant showed them two cut, well cleared lines that became the northern and eastern boundary of the disputed claim. The first 50 metres or so of the northern boundary, which she walked, were well blazed. There were some cut posts lying on the ground at the No. 1 location. Once it became light, you could almost see all the way from the No. 1 location to the No. 2 location, because the bush was cleared out so well.

The appellant testified that he decided that morning prior to 8:00 a.m. that, since he did not know who else was going to stake the claim, he would not use the previously cut lines, that he considered to be illegal. He reasoned that, if he and Mr. Moyer both staked using the pre-cut lines, a third staker could have won the claim by not using the existing lines, staking on the inside of the lines. After speaking with his crew, this is what the appellant decided to do.

The Moyer crew, namely Messrs. Moyer, Court, Paavola, Ienouy and Salo, and their witness Mr. Young, arrived at the property in two trucks at about 7:00 a.m. on June 1. Mr. Moyer and his crew had planned in advance of the staking, who would help Mr. Moyer with the staking of the claim. It was pre-arranged that Mr. Paavola would assist with the staking of the eastern boundary from the No. 1 to the No. 2 posts, Mr. Ienouy would help Mr. Moyer on the southern boundary between the No. 2 and No. 3 posts, and Mr. Salo would help with the staking

of the western boundary from the No. 3 to the No. 4 posts and continue with the northern boundary from the No. 4 post back to the No. 1 post. The helpers took their appointed stations prior to 8:00 a.m. The witness, Mr. Young stood with Messrs. Moyer, Paavola and Court and counted down the seconds to 8:00 a.m. He stayed at the No. 1 location until the Moyer claim had been staked. It had been arranged that once the staking began, Mr. Court would run the claim with Mr. Moyer and his various helpers.

At about 7:55 a.m., Mrs. Kerr and Mrs. Rousseau were on the road near the eastern boundary and waited for the staking to begin. The appellant and Mr. Rousseau and Ms. Hutchings, who would assist him with the staking, took up their positions at the No. 1 location.

Mr. Young testified that when he finished his countdown at 8:00 a.m., and said "go" Mr. Moyer took off running, and that he was cutting and blazing as he was going. Mr. Court was right behind him. He also saw Mr. Paavola cutting the line behind him. Mr. Paavola testified that after he saw Mr. Moyer establish his No. 1 post and take off down the line, he followed behind him with an axe, blazing, and in some instances putting up picket stakes. Mr. Paavola confirmed Mr. Moyer's evidence that he saw Mr. Moyer blazing several times, and that he (Moyer) made approximately 20 blazes with his machete. Mr. Moyer testified that he was running down the edge of the line so that he could mark a tree or shrub every 50 or 60 feet. Mr. Paavola stated that it was difficult to find material to blaze on the eastern boundary because the growth was small, but that he (Paavola) also made at least 20 blazes on the shrubbery. It seemed to him that some of the pickets stakes that he had pre-cut and left lying in the bush the previous day or so had been put up, in which case he put another blaze on the same stake, but also put up more stakes of his own.

Mr. Rousseau, who helped the appellant with his staking, testified that he saw a young man with a short axe take off down the eastern boundary which was all blazed, that he did not see him do any blazing, but did see him stand up a post and write something on it. In her affidavit, Ms. Hutchings states that she helped the appellant and Mr. Rousseau with their No. 1 and No. 2 posts and lines, that they cut their line ten feet inside of the cut line that the other two stakers ran; that she saw the other two stakers running, but did not see them blazing. Mrs. Kerr, who was standing on the road close to the eastern boundary when the staking began, testified that she saw two men run down the hill, cross the road and keep running. Mrs. Rousseau's evidence was to the same effect. Mrs. Kerr did not see them do anything else. She took a photo at 8:03 a.m. (Exhibit 4j) of a man in a red jacket running south of the road between the No. 1 and No. 2 posts. She and Mrs. Rousseau then returned to the No. 1 post.

When Mr. Moyer arrived at the No. 2 location, he erected his post and signed it, and continued to the No. 3 location, with Mr. Ienouy as his helper. Mr. Paavola left after he arrived at the No. 2 post to stake his other claim to the northeast. It was Mr. Moyer's evidence that he put approximately 20 blazes on the southern line, between the No. 2 and No. 3 posts.

When he arrived at the No. 3 post, Mr. Ienouy left, and Mr. Salo helped Mr. Moyer erect his post. Mr. Salo served as his helper to the No. 4 post, and back to the No. 1 post.

Mr. Salo gave evidence that he saw Mr. Moyer running and blazing between the No. 3 and No. 1 posts. He was never very far behind him, and caught up to him in many places. Every time Mr. Moyer put a blaze, he put a few more. Mr. Moyer erected his No. 4 post, and Mr. Salo held it up while Mr. Moyer wrote on it. Mr. Salo stated that there was some blazing on the northern boundary from the day before, and surmised that it had been done by the appellant. The north line was a well beaten trail. According to his evidence, Mr. Salo was a little more than a minute behind Mr. Moyer, between 50 and 100 feet. He indicated that he was no more than 50 feet behind Mr. Moyer the last little bit up the hill to the No. 1 post. Mr. Moyer thought it was about 100 or 200 feet. He could hear him but could not see him. Mr. Salo estimated that he put 15 blazes on the western and northern lines that he did with Mr. Moyer.

Mr. Young saw Mr. Moyer about 20 to 30 feet before he returned to the No. 1 post. He indicated that Mr. Moyer tripped over a hump of earth and fell down and scraped his knees and threw his axe off. He was coated with sweat. When Mr. Moyer reached the No. 1 post, he marked down the completion time of 8:22 a.m. Mr. Court was 20 feet behind Mr. Moyer, according to Mr. Young. Mrs. Rousseau, who had returned to the No. 1 post with Mrs. Kerr, recalled two gentlemen coming out of the bush, exhausted, with sweat dripping from them, and that one of them had stumbled.

In the meantime, the appellant and his crew, who had started staking the land at about 8:00 a.m., continued with their staking. Ms. Hutchings helped with the line between the No. 1 and No. 2 posts, and then went back to the appellant's truck because it was raining. In his evidence, Mr. Rousseau indicated that the appellant's crew did not run, but just walked blazing everything. According to him, part of the lines used by Mr. Moyer had been cleared using a chain saw, making it easier for the Moyer crew to run. According to Mr. Rousseau, it took one hour and fifteen or twenty minutes for the appellant and Mr. Rousseau to complete the staking of their claim. The appellant marked his completion time as 9:25 a.m.

Ron Orchard, the Mining and Lands Technician who conducted the inspection on July 29, 1994 at the Recorder's request, was called as a witness at the hearing before the Recorder on January 27, 1995. His memorandum to the Recorder of December 22, 1995, containing his inspection report, was introduced as Exhibit 9. The report indicates that Station #1 to Station #2 was located in a clear cut area, and that this line served as a common boundary with the tie on staking. Moyer's Claim Line passed through second growth trees, not exceeding 1.5 metres in height. Within the second growth, the lines passed through small open areas thought to be the remains of skidder trails. The width of the line varied from 1.5 to 3 metres. There were four pickets observed south of Station #1.

The appellant's line was found to have started out 9 metres to the west of the Moyer line, then ran southerly and easterly, converging with Moyer's line about 60 metres north

of Station #2. The line was defined by blazing and ribbon. The report notes that blazing by itself would have been difficult to follow. The report notes the inscriptions and dimensions of the posts erected by the appellant and Mr. Moyer. It indicates that the appellant's No. 2 post was found to be 6 metres to the west of Mr. Moyer's No. 2 post. In his evidence, Mr. Orchard accounted for the apparent contradiction in his report by indicating that the appellant's line, which converged with Mr. Moyer's north of Station #2, did not lead directly to the appellant's No. 2 post. The sketch attached to the report drawn by Gary Hubley and checked by Mr. Orchard, and dated December 1, 1994 appears to show the lines converging and leading to the same Station #2 within 100 metres of this location. Mr. Orchard also testified that he did not recall seeing any evidence of chain saw cutting on any of the lines.

The report notes that Station #2 to Station #3 was located in an area undisturbed by the tree harvesting, and that the claim line remained the same throughout, except where the line went over rock outcrops. The inspector indicated that the appellant and Mr. Moyer had used the same line, which was found to be well blazed and underbrushed. The width of this line was 0.5 metre to 1 metre.

The report noted that Mr. Moyer's claim line between Station #3 and Station #4 ran along higher ground over rock outcrop and in undisturbed bush. The claim line was well brushed out. The line opened up to 0.5 to 0.75 of a metre in width. The inspector found that the appellant's line ran parallel to Mr. Moyer's line and was generally only 2 feet apart. The appellant's line was found to be well blazed and underbrushed. According to the report, the name of the staker was not on the appellant's No. 4 post.

The report indicated that the first half of Mr. Moyer's claim line between Station #4 and Station #1 was found to be well blazed, with some underbrushing. This part of the line had a width of 0.5 to 1 metre. The balance of this line for 180 metres was in clear cut similar to that observed between Stations #1 and #2, and was comparable to the appellant's line, to which it ran parallel. The line was defined more by ribbon for both the appellant and Mr. Moyer, with blazing observed on the small trees along the line.

Submissions:

In the schedule accompanying his Dispute, Mr. Kerr alleged in his "Summary" that the staking carried out on June 1, 1994 by Mr. Moyer and his helpers was actually started by them prior to the authorized opening. Mr. Kerr submitted that Mr. Moyer made use of this prior illegal staking, and that his claim should be ruled invalid. He contended that, after the claim became open, Mr. Moyer and his helpers did not blaze at least one complete claim line, from the No. 1 post to the No. 2 post. He argued that the claim staked by himself made use of newly cut lines during staking, was completely started and finished after the authorized opening time, and should be accepted.

At the hearing before the Recorder on January 27, 1995, Mr. Kerr made oral submissions, the transcript of which has also been reviewed by this tribunal. He argued that it was not possible, following the opening of the land for staking, for Mr. Moyer and his helpers to have blazed the land that was the subject of his claim in 20 minutes. He suggested that, including the time for writing on posts, this would mean that Mr. Moyer would have had to travel 5 feet per second. He further contended that no account should be taken of any blazing done by Mr. Salo after Mr. Moyer signed his completion time on the No. 1 post. He submitted therefore there was insufficient blazing done on the last 500 feet of the north line.

In support of his position, Mr. Kerr relied on the following decisions of the Mining and Lands Commissioner: **Labine v. Leahy** 6 M.C.C. 523, **Comba et al. v. St. Louis** 7 M.C.C. 88, **McChristie v. Rousseau; Culhane v. Guiho** 5 M.C.C. 433, **Parres v. Skead Holdings Ltd.** (unreported) June 17, 1991, and **Clark et al. v. King** 4 M.C.C. 106.

With his letter of March 10, 1995 to the Mining and Lands Commissioner, the appellant attached a schedule 2, consisting of a two page argument detailing why he believed that the Recorder erred in his decision.

In his oral submission before the Recorder, Mr. Forbes, who appeared on behalf of Strike Minerals Inc. acknowledged that there was some evidence of pre-blazing, but argued that there was no direct evidence of who was responsible. In particular, there was no direct evidence of Mr. Moyer or of any of his crew having pre-blazed this claim. He submitted that Mr. Moyer had staked the claim in substantial compliance with the **Act**, and that the claim should be considered valid. He further contended that, since the appellant noted his starting time for the staking as 8:01 a.m., he was not in a competitive situation with Mr. Moyer. He also relied on Mr. Orchard's inspection report to dispute the appellant's assertion that he had not used existing lines in staking his claim.

In the "Summary" to his "Statement of Particulars" dated May 11, 1995 and sent to the Mining and Lands Commissioner, Mr. Forbes argued that the appellant's evidence before the Recorder demonstrated his staking procedure as a prelude to a "premeditated dispute". He further submitted that, pre-blazing, whether or not done in this instance, had no bearing on the validity of Mr. Moyer's claim, since Mr. Moyer and his helpers physically blazed the claim at the time of actual staking commencing at 8:00 a.m., and that the evidence attests to this fact.

Findings:

It is apparent from the oral evidence before the Recorder that part of the land staked by Mr. Moyer and his helpers after the 8:00 a.m. opening time on June 1, 1994, had recently been pre-blazed and pre-picketed. Some part of the lines had also been cleared. That this is so is confirmed by the photographs taken by the appellant and his wife, and in particular Exhibits 4a, c, e, f, g and i, which show part of Mr. Moyer's eastern line, and Exhibits 4d and h, which show part of his northern line.

The appellant has alleged that Mr. Moyer and/or his helpers were responsible for this pre-staking, but has produced no direct evidence to substantiate this assertion. Mr. Moyer and his helpers have denied that they were responsible. This tribunal is unable to conclude from the evidence adduced before the Recorder, the identity of the person or persons responsible for this staking prior to the legal opening time. Both the appellant's and Mr. Moyer's crews had visited the land to be staked prior to June 1, 1994 to orient themselves, locate the lines to be staked and make preparations in advance of the opening time. There was also evidence of other people being in the area at the time.

Section 28 of the **Act** provides, in part, that a licensee may stake out a mining claim on any land open for prospecting. Section 38 of the **Act** stipulates that a mining claim shall be staked in such size, form and manner as is prescribed by the regulations. Section 8 of the Regulation sets out the manner by which a claim is to be staked. Subsection 8(1) requires that the staking out of a mining claim be a continuous action. Subsections (2) and (3) set out the requirements for corner posts. Subsections (4), (6), (7) and (9) are reproduced in their entirety:

8.--(4) Where there are standing trees on the area being staked, the perimeter of the mining claim shall be clearly marked during 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.

(6) Where there are no standing trees on the area being staked, the perimeter of the mining claim shall be clearly marked during staking by erecting durable pickets or monuments of earth or rock along the perimeter so that the boundary lines of the claim are clearly outlined.

(7) A licensee staking out a claim may use other persons to assist him or her in constructing posts and marking the perimeter of the claim.

(9) If the area to be staked has been open to staking for less than twenty-four hours,

- (a) the staking shall commence in the northeast corner of the mining claim and proceed in a clockwise direction;
- (b) a single licensee shall erect and inscribe all posts; and
- (c) the date and time of commencement and completion of the staking shall be inscribed on the No. 1 post.

Section 12 of the Regulation sets out the requirements for claim posts, and stipulates that they are to be erected only by a licensee. Section 13 prescribes the requirements for licensees using metal tags, and as in this case, licensees staking claims without using such tags.

Section 43 of the **Act** addresses "substantial compliance". It provides that:

43.--(1) Substantial compliance as nearly as circumstances will reasonably permit with the requirements of this Act as to the staking out of mining claims is sufficient.

(2) The staking out of a mining claim shall be deemed to be in substantial compliance with the requirements of this Act and the regulations even if there is a failure to comply with a number of specific staking requirements if,

- (a) the failure to comply is not likely to mislead any licensee desiring to stake a claim in the vicinity; and
- (b) it is apparent that an attempt has been made in good faith by the licensee to comply with the requirements of this Act and the regulations.

Did Mr. Moyer comply with the staking requirements of the **Act** and Regulation?

In his written Decision dated February 7, 1995, the Recorder has correctly noted that there is no specific section in either the **Act** or the Regulation that prohibits blazing lines before the land comes open for staking. He is also right that, likewise, there is no specific section that would indicate that the marking of boundary lines before land opens is fatal to subsequent staking. He has correctly pointed out, based on his review of prior decisions of the Mining and Lands Commissioner, that the key is that when land is restaked, only the work that is done **after** the land is open can be considered towards satisfying the legal requirements.

It is unfortunate that it was not possible to locate the inspector who was in the area on May 31, 1994, so that he could have conducted an inspection on that day to determine the state of the land on the day prior to opening. The subsequent inspection carried out on July 29, 1994 would clearly have been unable to distinguish the clearing and fresh blazing done prior to June 1, from that done by Mr. Moyer and his crew after the land became open.

Based on the evidence before the Recorder, the tribunal agrees with his finding that the appellant's wife and Mrs. Rousseau were in a position to see only a small part of Mr. Moyer's staking procedure, namely part of the distance between the No. 1 and No. 2 posts, and

part of the distance between the No. 4 and No. 1 posts. Although they did not see him blazing, both Mr. Moyer and his helpers and witness have sworn that he did so. The Recorder has found that, after 8:00 a.m. on June 1, 1994, Mr. Moyer did some blazing himself, and that his helpers did some as well. The tribunal also agrees with the Recorder's finding that any blazing done by Mr. Salo returning to the No. 1 post following Mr. Moyer's completion of the staking does not count towards the legal requirement for blazing. The tribunal concurs with the Recorder that, at worst, there may have been part of the line between the No. 1 and No. 2 posts and part of the line between the No. 4 and No. 1 posts that were not blazed or poorly blazed. The Recorder has indicated in his Reasons that he was not certain that the facts were as severe as this worst case scenario. It is important to recall from the evidence that much of these parts of the lines were on relatively clear land with sparse vegetation and few trees. The Recorder found that, even in this worst case scenario, his opinion would be that Mr. Moyer substantially complied with the requirements of the Regulation concerning staking. The Recorder has indicated that none of the other unspecified minor defects in Mr. Moyer's staking convinced the Recorder that the staking did not substantially comply, as reasonably as circumstances would permit. In particular, the Recorder has concluded that Mr. Moyer made an attempt in good faith to comply, and no one was misled. Having reviewed the evidence before the Recorder, and taking into account the expertise and experience of the Recorder in these matters, this tribunal finds no reason to disagree with these findings.

The tribunal did consider the cases cited by the appellant in his submissions before the Recorder, but has concluded that they were decided on facts substantially different from this case. In **Labine v. Leahy**, the respondent and his assistants, on the day prior to the morning on which the lands came open for staking, completely blazed the westerly and northerly boundaries of the mining claim. In his evidence, the respondent admitted that such blazing had been done and stated that he had reblazed during his staking the blazes that had been made on the day previously, but admitted that he had not reblazed all of the blazes. The Mining and Lands Commissioner found that, with the combination of both the failure to blaze the eastern boundary and the doubt as to the adequacy of the blazing of the westerly and northerly boundary of the respondent's mining claim, the respondent's staking could not be validated on the basis of the substantial compliance doctrine.

In **Comba et al. v. St. Louis**, the respondent failed to inscribe the time of commencement on his No. 1 post, which the tribunal found was a fundamental requirement of the staking process, since priority of commencement of staking prevails over priority of recording. In addition, the preliminary activities of the respondent went well beyond the placing of directional markers and included the preparation of stump posts and inscriptions with the exception of the date and hour of commencement of staking. The tribunal was satisfied that the omission in that case to insert the time of commencement was fatal to the staking by the respondent, particularly when it was consistent with a commencement of staking prior to the time the land came open for staking. The appellant relied on blazing that was done on a prior

occasion and failed to blaze more than one boundary. The Mining and Lands Commissioner relied on the **Labine** decision to allow the dispute, but dismiss the "filed only" application.

In **McChristie v. Rousseau; Culhane v. Guiho**, Mr. Culhane admitted that the eastern boundary was not blazed at the time of staking, but had been blazed two days prior to the staking. The Mining and Lands Commissioner determined that Mr. Culhane had substantially complied with the staking provisions of the **Act**. In **Clarke et al. v. King**, cited in the aforementioned decision, the Mining and Lands Commissioner did not disturb the mining recorder's cancellation of Mr. Clarke's claim on the basis that Mr. Clarke could have completed his staking in one day, rather than over two days. In **Parres v. Skead Holdings Ltd.**, Mr. Lacasse erected his No. 1 post and made a partial inscription on it prior to the time that the land came open for staking. His helper also did some blazing on one of the lines some minutes before the opening time. The Mining and Lands Commissioner allowed Mr. Parres' appeal of the decision of the mining recorder to dismiss his dispute of Mr. Lacasse's claim, finding that all three of the integral parts of staking were started before the land became open.

In this case, the Recorder was not prepared to find, on the evidence before him, that Mr. Moyer started the staking of his claim prior to the legal opening time. The Recorder also found that Mr. Moyer and his helpers did some blazing on each line after the land became open, and that Mr. Moyer substantially complied with the staking requirements in the **Act** and Regulation. This tribunal is not prepared to disturb these findings.

Subsection 44(2) of the **Act** provides that priority of completion of staking shall prevail where two or more licensees make application to record the staking of all or a part of the same lands. The Recorder determined in this case that Mr. Moyer completed his staking at 8:22 a.m., the time inscribed on the No. 1 post or 8:20 a.m., the time included on his application to record his claim. In the Reasons to his Order, the Recorder advised Mr. Moyer to clear up this "innocent discrepancy or mistake" with him. The Recorder determined that, since the appellant completed his staking at 9:25 a.m., Mr. Moyer's claim should prevail. This tribunal sees no reason to disagree with the Recorder's finding in this regard.

Since this tribunal has found that Mr. Moyer substantially complied with the staking requirements in the **Act**, and that Mr. Moyer's claim has priority over the appellant's, it is unnecessary for the tribunal to determine whether the appellant complied with the staking requirements concerning his own claim.

Exclusion of Time:

Pursuant to clause 67(1)(b) of the **Act**, the time during which the Mining Claim was pending before the Recorder and the tribunal, being June 6, 1994 to January 26, 1996, a total of 600 days, will be excluded in computing time within which work upon the Mining Claim is to be performed.

Pursuant to subsection 67(2) of the **Act**, January 23, 1998 shall be deemed to be the date for filing the next unit of prescribed assessment work on the Mining Claim. All subsequent anniversary dates shall be deemed to be January 23.

Conclusions:

Based upon the findings set out above, the appeal from the Decision of the Recorder is dismissed. The time during which the matter was pending before the Recorder and the tribunal will be excluded. There are no costs payable by either party to this appeal.

The Decision of the Recorder pursuant to subsection 110(6) of the **Act** remains in full force and effect.

This Appeal and Dispute are accordingly dismissed without costs.