

File No. MA 023-94

L. Kamerman)
Mining and Lands Commissioner)

Friday, the 19th day
of January, 1996.

THE MINING ACT

IN THE MATTER OF

An appeal by the Disputant from the Decision of the Acting Mining Recorder for the Larder Lake Mining Division for a declaration that Mining Claims L-1200585, 1200587 and 1200588, be declared invalid and for the recording of filed only Mining Claims L-1200853, 1202692 and 1202694.

- AND -

IN THE MATTER OF

Mining Claim L-1200587, situate in the Township of Arnold, in the Larder Lake Mining Division;

AND IN THE MATTER OF

Mining Claims L-1200853, 1202692 and 1202694, situate in the Township of Arnold, in the Larder Lake Mining Division, marked as "filed only";

B E T W E E N:

STRIKE MINERALS INC.

Disputant

- and -

SUDBURY CONTACT MINES LIMITED

Respondent

AND IN THE MATTER OF

An appeal by the Disputant from the Decision of the Mining Recorder for the Larder Lake Mining Division for a declaration that Mining Claim L-1200587, be declared invalid and for the recording of "filed only" Mining Claims L-1200853, 1202692 and 1202694, hereinafter referred to as the "Filed Only Mining Claims".

ORDER

UPON hearing from the parties and reading the documentation filed;

1. THIS TRIBUNAL ORDERS that the time for appealing the Decision of the Mining Recorder dated the 30th day of September, 1994, as allowed by subsection 112(3) of the **Mining Act** by Sudbury Contact concerning Mining Claims L-1200585 and 1200588, is extended to within 15 days of the filing of this Order with the Office of the Mining Recorder and any decision concerning those Mining Claims and Filed Only Mining Claims L-1202692 and 1202694 shall be based upon a hearing of the merits involving all aspects of staking.

2. THIS TRIBUNAL FURTHER ORDERS that the appeal concerning Mining Claim L-1200587 be dismissed and the matter is referred back to the Mining Recorder of the Larder Lake Mining Division for an Order pursuant to clause 110(6)(b) of the **Mining Act** to re-blaze the lines and cut the underbrush of Mining Claim L-1200587.

3. THIS TRIBUNAL FURTHER ORDERS that the notation of "Pending Proceedings" be removed from the abstract of Mining Claim L-1200587.

4. THIS TRIBUNAL FURTHER ORDERS that the time during which Mining Claim L-1200587 was before the Mining Recorder and the tribunal, being the 17th day of May, 1994 to the 19th day of December, 1996, a total of 613 days, be excluded in computing time within which work upon Mining Claim L-1200587 shall be performed.

5. THIS TRIBUNAL FURTHER ORDERS that the 16th day of December, 1997 be fixed as the date by which the first and second prescribed units of assessment work shall be performed and filed on Mining Claim L-1200587 and all subsequent anniversary dates shall be deemed to be December 16 pursuant to subsection 67(2) of the **Mining Act**.

6. 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, this Order be filed in the Office of the Mining Recorder for the Larder Lake Mining Division.

Reasons for this Order are attached.

DATED this 19th day of January, 1996.

Original signed by
L. Kamerman

L. Kamerman
MINING AND LANDS COMMISSIONER

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L. Kamerman)
Mining and Lands Commissioner)

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B E T W E E N:

STRIKE MINERALS INC. Disputant

- and -

SUDBURY CONTACT MINES LIMITED Respondent

AND IN THE MATTER OF

An appeal by the Disputant from the Decision of the Mining Recorder for the Larder Lake Mining Division for a declaration that Mining Claim L-1200587, be declared invalid and for the recording of filed only Mining Claims L-1200853, 1202692 and 1202694.

REASONS

This matter was heard on August 29 and 30, 1995 in the Blue Room of the Royal Canadian Legion, Summerhays Avenue, Kirkland Lake, Ontario. Strike Minerals Inc. ("Strike Minerals") was represented by Carl Forbes; Sudbury Contact Mines Limited ("Sudbury Contact") by counsel Gary Sullivan with David Christie also in attendance.

Background:

The lands which form the subject matter of this appeal were originally staked on April 15, 1992 and recorded in the name of Strike Minerals. As a result of an option agreement with Wheaton River Minerals Limited, an assessment work program was undertaken, but due to circumstances beyond the scope of this hearing, the work was never recorded and the claims expired on April 15, 1992. The lands came open for staking at 7 a.m. Daylight Savings Time on April 16, 1994. The issue of a cause of action between Strike Minerals and Wheaton River Minerals Limited would have to be decided by the Courts.

Strike Minerals attempted to put forward the position that it had a superior right to the lands, owing to the circumstances which led to the forfeiture. However, it was indicated at the hearing that there is no such concept in law as a superior right to mining lands in the case of a dispute and that the matter would be determined based upon applicable staking principles.

On April 16, 1994, Sudbury Contact caused the lands to be staked as Mining Claims L-1200584 by Ghislain Frappier, L-1200585 and 1200588 by Luc Marois, and L-1200587 by Pierre Gervais. On April 16 and 17, 1994, Strike Minerals caused Mining Claims to be staked which correspond to the Sudbury Contact claims as follows: L-1202691, 1202692 and 1202694 by Patrick Harrington and L-1200853 by George Harkin. The Mining Claims of Sudbury Contact were recorded and those of Strike Minerals were received by the Mining Recorder (the "Recorder") as Filed Only.

According to the Decision of the Recorder, found in Part 1 of Exhibit 7, disputes were filed by Strike Minerals concerning Mining Claims L-1200585, 1200587 and 1200588 on April 29, 1994. Pursuant to a hearing held by the Recorder on August 18, 1994, a Decision was issued on September 30, 1994 which dismissed the dispute against Mining Claim L-1200587. The dispute against Mining Claims L-1200585 and 1200588 was allowed in part and dismissed in part, with the effect that those Mining Claims were cancelled, but those corresponding Filed Only Mining Claims of Strike Minerals were refused.

In two Notices of Appeal dated October 3, 1994, Strike Minerals appealed the decision of the Recorder. Document No. 9480.00117 refers to Mining Claim L-1200587 and

Document No. 9480.00118 refers to Mining Claims L-1202692 and 1202694 and states as follows:

The Mining Recorder refused to record claims 1202692 and 1202694 as he suggests they do not satisfy a requirement for strict compliance with the claim staking regulations under the Mining Act. His decision for refusal was not based on any physical evidence or testimony brought before him at the August 18, 1994 hearing. His reference to a comment in Mike Weirmeir's June 23, 1994 inspection report suggesting not enough blazing has not been substantiated by any evidence so the filed only applications to record claims 1202692 and 1202694 should be accepted and recorded.

This second appeal is not an appeal of the Decision of the Recorder regarding the dispute, **per se**, but is an appeal of the Decision of the Recorder to disallow recording of these Filed Only Mining Claims.

At the hearing, Sudbury Contact informed the tribunal it had been advised by the tribunal's office that an additional appeal of the Decision of the Recorder was unnecessary, as an appeal had already been filed by Strike Minerals. This information does not appear to have been correct as Strike Minerals' appeal relates only to the refusal to record the Filed Only Mining Claims. As a result Sudbury Contact proceeded on the erroneous assumption that it need not appeal the Decision of the Recorder.

During the course of the hearing, no evidence was presented on the validity of Sudbury Contact's staking of the corresponding Mining Claims L-1200585 and 1200588. Similarly, Strike Minerals did not present evidence concerning the staking of the Filed Only Mining Claims. This raises the issue of what must be done concerning these Mining Claims in light of the tribunal's original jurisdiction in these matters, based on misinformation provided by the tribunal which was relied and acted upon by Sudbury Contact.

Evidence was heard concerning what took place on the ground on the morning of April 16, 1994, as well as that of two Ministry of Northern Development and Mines inspections and one private inspection. Included in the evidence is the fact that Strike Minerals used the same lines as Sudbury Contact so that there was no way to discern between the blazing of the claims.

Issues:

1. What should the status of Mining Claims L-1200585 and 1200588 be, given that Sudbury Contact relied and acted upon erroneous advice of the tribunal that it need not file a Notice of Appeal?

2. Does the staking of Mining Claim L-1200587 as done by Pierre Gervais meet the requirements of the **Mining Act** and Ontario Regulation 115/91 ("O.Reg. 115/91")? Matters discussed include the length of time of the staking, the quality of clearing the brush and the number of blazes used.
3. What are the requirements of section 8 of O.Reg. 115/91 which the staker must personally perform, where mining claims are staked outside of the first 24 hours after the lands come open for staking? This issue, and that of the validity of the staking of Filed Only Mining Claims L-1202692 and 1202694 will depend on the finding of the tribunal in Issue #1 above.

Evidence:

Jacques E. Robert, a prospector and claims inspector, was called as a witness by Strike Minerals and gave the following evidence:

- o He was contracted by Strike Minerals to conduct a private claims inspection, the report of which is found at Part 22 of Exhibit 7 along with his field notes, having performed a dozen inspections. At the time of the inspection, he had no interest in Strike Minerals. His business card shows that he is also known as "Jack the Bear".
- o The purpose of the inspection was to inspect the quality of the staking of Strike Minerals only, including the posts and blazes.
- o According to the report and field notes, the number of old and new blazes, being before and after April 1994, respectively, red and pink flagging and double and triple blazes were counted. The results were 559 old blazes, 1,753 new blazes, 90 old axe cuts, 552 new axe cuts, 368 red flagging and 147 pink flagging.
- o He also took pictures (Part 22 of Exhibit 7) which are numbered to coincide with numbered commentaries set out on Schedule 3 to his report. The numbers caused some confusion as Mr. Robert used two rolls of film, numbered according to the negatives, and several numbers were duplicated. However, based upon the descriptions given, no difficulty was experienced by the tribunal in following.
- o He stated that based upon 12 years experience, these claim lines were as good or better than any he had seen, with the calibre of staking being quite fair.
- o In his opinion, the staking was adequately done to comply with the **Mining Act**.
- o Under cross-examination, Mr. Robert was challenged regarding the number of years he worked independently.

- o The retainer by Strike Minerals, whereby he was called on October 22, 1994 to do an inspection, was to walk the claim lines and count the old and new blazes, axe cuts and flagging, the purpose of which was to determine whether there were adequate markings along the claim lines.
- o New markings could be distinguished from old, based upon the absence of sap and hard gum with the latter, where the tree grows around the blaze.
- o The April staking was most likely done under conditions involving a few feet of snow.
- o It would be difficult, if not impossible, to distinguish stakings done within a few days of one another.
- o It took four or five days to go around the lines.
- o Upon questioning, Mr. Robert clarified that he was called on October 17 and completed his visual inspection on October 23. In total three or four days were taken up in the bush and a couple of days in the office.
- o The cost of the contract was between \$1,500 and \$2,000.
- o Mr. Robert stated that he owned some stock in Strike Minerals for a period of one or two months, due to staking some claims in the Hemlo greenstone belt as part of a joint venture. However, he received no stock for doing the inspection for Strike Minerals involving Sudbury Contact.
- o Mr. Robert stated that one picture #12 was beside a lake, the other in the bush. One picture #20 is one the north boundary and one on the west boundary, one being in the grassy area with a creek running through it, the other in the bush. One picture #21 is on the west boundary of Mining Claim L-1200588, the other on the east boundary, north of the creek.

Michael Barrette was called as a witness by Strike Minerals and gave the following evidence:

- o He was a helper to the staking of the Filed Only Mining Claims for Strike Minerals.
- o He and fellow stakers, George Harkin, Vaughan Renaud, Patrick Harrington and Leo Moffette, left the road at approximately 7 a.m., arriving from the west to a point between Mining Claims L-1200584 and 1200587, which correspond to the Filed Only Mining Claims of Strike Minerals numbered L-1202691 and 1200853, also referred to in the course of the hearing as Station #1.

- o George Sadoquis and Jerry Kanopka arrived at 7:20 a.m.
- o The line of the prior staking was visible.
- o He heard someone coming from the north, along the west line of Mining Claim L-1200584, blazing in a southerly direction. The staker proceeded to make a stump post at 7:30 a.m.
- o Mr. Barrette introduced himself and asked the name of the staker, who told him in French that it was Mr. Frappier. Mr. Frappier continued blazing to the south, in a counterclockwise direction.
- o Prior to cross-examination, Mr. Sullivan stated that the staking of Mining Claim L-1200584 is not the subject matter of the appeal, being out of time for a dispute. Any evidence related to this staking is irrelevant.
- o Mr. Barrette was 50 or 60 feet away when Mr. Frappier was cutting his post. Mr. Barrette never read what came to be inscribed on the post.
- o Mr. Frappier continued blazing south of his No. 3 post onto Mining Claim L-1200587 until he was out of site.
- o Upon redirect, Mr. Barrette confirmed that he saw Mr. Frappier before he reached the No. 3 post of Mining Claim L-1200584, which corresponded to the No. 4 post of Mining Claim L-1200587 at approximately 7:30 a.m.

Patrick Michael Harrington, a claims staker and prospector, was called as a witness by Strike Minerals and gave the following evidence:

- o He was present at the site on behalf of Strike Minerals on April 16, 1994.
- o He travelled to the location by skidoo, referred to as Station #1, which corresponds to the No. 3 post of Mining Claim L-1200584 and to the No. 4 post of Mining Claim L-1200587, located 300 feet west of the little cabin.
- o When he arrived at 7:20 a.m., he noticed fresh flagging tape and saw that the ground was staked.
- o He headed east along the claim line, past the south end of the pond, to the first line post, and then another 300 feet east to the No. 1 post of Pierre Gervais, of Mining Claim L-1200587.
- o He returned to Kirkland Lake to ask Carl Forbes of Strike Minerals whether he should overtake and was told that he should.

- o Without referring to the Application to Record, he could not recall details of his time of return.
- o He was accompanied by George Harkin, Vaughan Renaud and Jerry Kanopka.
- o Under cross-examination, Mr. Harrington stated that he arrived at Harker-Holloway Road at 7 a.m., having been told to commence staking at 8 a.m. The reason for the early arrival was that it would take a while to organize the men and get to the claims by skidoo, which took 10 or 15 minutes.
- o They arrived at the west line of the Mining Claims at 7:20 a.m. From there he travelled to the north boundary of Mining Claim L-1200587 to the pond by skidoo and then walked to the No. 1 post.
- o He did not see the No. 3 post of Mining Claim L-1200854 and No. 4 post of Mining Claim L-1200587, but did see fresh axe cuts and blazes.
- o It took 20 minutes to walk the trail from the east side of the pond to the No. 1 post. He noticed the blazes and flagging and saw fresh snowshoe tracks. The line was clean and easy to follow.
- o The No. 1 post of Mining Claim L-1200587 had a starting time inscribed of 7 a.m., showing the name of Pierre Gervais.
- o At this point, he determined he would have to seek further instructions, because he could not stake ground which was already staked, according to the **Mining Act**. He had been planning to start at 8 a.m., so that the question of the validity of the staking was in his mind.
- o Mr. Harrington knew that Mining Claim L-1200587 was staked to the south, because he examined the blazes for about 20 feet south of the No. 1 post.
- o When he returned from Kirkland Lake, he and Mike Barrette proceeded to stake what was recorded by Luc Marois as Mining Claim L-1200588, starting at the No. 1 post.
- o Although his recollection was vague as to time, Mr. Harrington stated that he staked the Filed Only Mining Claim clockwise, starting from the No. 1 post, executing fresh blazes and using flagging tape.
- o On April 17, 1994, he returned to the property and staked what has been recorded by Luc Marois as Mining Claim L-1200585. All of the claim lines were the same as those of Mr. Marois', even though the north line veered southeast to the No. 1 post.

George Harkin was called as a witness by Strike Minerals and gave the following evidence:

- o He attended at the staking with other Strike Minerals contractors on April 16, 1994.
- o When they arrived at Station #1, he noticed the new east-west line. Mr. Harrington went to investigate.
- o After they had waited at Station #1 for approximately ten minutes, they heard someone blazing. There were old and new blazes apparent, so that Mr. Harkin concluded that blazing had been done the day before.
- o They observed someone come down the west line and commenced making a poplar post and when Michael Barrette spoke to him. He took off blazing along the west line south of his mining claim. Mr. Harkin could not identify the staker.
- o This all occurred at 7:30 a.m. and afterwards. He was able to observe the staker for a 100 feet to the south, because there were no leaves on the trees.
- o Conditions were such that the snow was terrible. It was raining and there was build up on his snowshoes, making going difficult.
- o The underbrush was under snow, with some leafless tag alders showing above the snow line. Mr. Harkin stated that he always cuts the underbrush if it interferes with his line. However, this was under the snow.
- o Under cross-examination, Mr. Harkin stated that the staker observed at Station #1 did not write on his post or perhaps he did not see him inscribe the post.
- o Mr. Harkin drove in with two others. He could not recall how long the trip in on skidoo took, nor could he recall when they arrived at Harker-Holloway Road. He stated that it was important to remember details of the competitive staking, however.
- o He could hear the staker for several minutes before he saw him. The cutting of the post took four or five minutes. Mr. Harker thinks he may have asked the staker if he could take his picture and the answer was in French, which he did not understand.
- o The staker then proceeded south. Those on the "Strike Minerals team" agreed that they should return to Kirkland Lake and speak with Carl Forbes. They had lunch at Smitty's and returned to stake, he thinks, at around 1:30 p.m.

- o Mr. Harrington filled out the Application to Record. However, they all worked on them together and Mr. Harkin signed it.
- o The Application to Record of Filed Only Mining Claim L-1200853 appears to have a correction to the post where staking commenced. Mr. Harkin could not recall the nature of the error which had been corrected.
- o It took from 1:30 p.m. to 7:30 p.m. to complete the staking. Mr. Harkin stated that he had two helpers plus there was a common line. The reason that it took so long was that he staked it legally, ensuring that adequate blazing was done. The snowshoeing was terrible as it rained all day, having commenced the night before.
- o Mr. Harkin believed that some of the blazing on the line had been done the day before, based on the quality of the snowshoe tracks. He could not tell what other activity might have taken place on the previous day, although he thought perhaps blazing had also occurred.
- o It was easy to follow the line of the staking.
- o In redirect, Mr. Harkin reiterated that Mr. Harrington had filled out the Application, but he had signed it, having satisfied himself of its accuracy.
- o He was able to comment on the age of the snowshoe tracks, having snow shod from the age of two.

Ghislain Frappier, a staker on behalf of Sudbury Contact, was called as a witness by Strike Minerals and gave the following evidence:

- o Mr. Frappier identified himself as the staker of Mining Claim L-1200584 on April 16, 1994. He agreed that he arrived at Station #1 and cut a common poplar post for his #3 post. This, according to Mr. Frappier, occurred at 10 a.m.
- o He denied being at Station #1 at 7:30 a.m. However, he did encounter someone at that location during his staking, being there at 10 a.m.
- o He met some people at this location and could not communicate with them. He told them to wait 15 minutes. He did speak French with someone, but it was difficult to understand as too many people were speaking at once.
- o Mr. Frappier identified Messrs. Harkin and Barrette as the people he spoke with.
- o When he arrived at his No. 3 post, he made the post and Messrs. Harkin and Barrette spoke with him. He did not write on the post, but went off in search of Pierre Gervais.

- o Mr. Frappier stated that he proceeded south in search of Mr. Gervais, but did not blaze. He did, however, blaze upon his return heading north.
- o He wanted to find Mr. Gervais because he was his boss and perhaps he could reach an agreement with the men he had encountered. Mr. Gervais was five minutes away, and as far as Mr. Frappier had understood, the men were seeking someone who could speak English.
- o Messrs. Harkin and Barrette had said they were stakers for the same mining claims. Mr. Frappier wanted to avoid a dispute or conflict. Mr. Forbes suggested that, if Mr. Frappier were at the No. 3 post at 10 a.m., he would know that the staking was not competitive and should not have been concerned.
- o The reason that he blazed part of Mr. Gervais' line going north was simply to let them reach the men at Station #1 sooner.
- o Mr. Frappier could not state what kind of post Mr. Gervais made at his own No. 4 corner. Rather, Mr. Frappier proceeded north to his own No. 4 post.
- o When at Station #1 with Mr. Gervais, Mr. Frappier did inscribe his post before proceeding northward.
- o On cross-examination, Mr. Frappier confirmed that he had only blazed on Mr. Gervais' Mining Claim heading north.

Pierre Gervais, who staked Mining Claim L-1200587 on behalf of Sudbury Contact, was called as a witness by Strike Minerals and gave the following evidence:

- o In the course of staking his Mining Claim on April 16, 1994, he encountered Mr. Frappier about 300 metres from his No. 4 post on the west boundary of the claim line, while he was blazing in a northerly direction. Mr. Frappier did not come south to help with the blazing.
- o Mr. Gervais could not recall whether his No. 4 post was spruce or poplar, but did not think it was relevant.
- o He arrived at his No. 4 post at 10:25 a.m.
- o Under cross-examination, Mr. Gervais stated that they arrived at the road turn off at 5:50 a.m. It takes five or ten minutes to unload the equipment from the truck.
- o He arrived at his No. 1 post at 6:30 a.m., having gone by skidoo to the end of the trail, located 1,000 feet south of the northern boundary of his Mining Claim.

- o He walked back to make sure of the position of his No. 1 post and then waited for 7 a.m.
- o He encountered Mr. Frappier around 10:15 a.m. or 10:20 a.m. and reached his No. 4 post at 10:30 a.m.. There was no one else there. Mr. Gervais yelled out in the direction of the cabin, located near the pond, but no one answered.
- o Mr. Gervais has been staking claims since 1973. Approximately 50 percent of the claims he has staked are in Ontario.
- o Instructions from Sudbury Contact were that this was a competitive staking and to ensure that they were there on time.
- o Someone had been sent to locate the posts the day before.
- o The weather was not bad when they reached the Harker-Holloway turn off. However, it started to rain around 10 a.m.
- o There was no difficulty in either snowmobiling in or in snowshoeing, so that he had no difficulty in walking first off.
- o Mr. Gervais confirmed that his Application to Record indicated that he had commenced staking at 7 a.m. and completed it at 11:08 a.m.
- o Concerning the length of time it took to complete the staking, Mr. Gervais thought that it was reasonable, given that it was to be a competitive staking. Without competition, he agreed that he would have done better.
- o Stakers on behalf of Sudbury Contact came from Rouyn-Noranda, Quebec, and took about an hour to drive to the turn off.

Mark Dixson Hall, Chief Mining Recorder, conducted an inspection of the staking on behalf of Strike Minerals and Sudbury Contact, and was called as a witness by Strike Minerals and gave the following evidence:

- o There were five posts found at Station #1. He indicated that his inspection report, found at Part 13 of Exhibit 7, should be changed to show that Mining Claim L-1202691 was staked by V. Renaud instead of V. Reivard.
- o Mr. Hall confirmed that there were two stump poplar posts located at this station, being those of Messrs. Harkin and Gervais. Mr. Frappier's post is a loose poplar post.

- o Under cross-examination and referring to the pictures taken by Mr. Robert, Mr. Hall indicated that it was not possible to tell which of the stakings had been completed first, except by the inscription times.
- o Mr. Renaud's staking shows that the No. 3 post was inscribed at 8 a.m. The staking took place on April 17, 1994.
- o Mr. Gervais' No. 3 post was inscribed at 10:25 a.m. on April 16, 1994.
- o Questioned about the photographs found at Part 21 of Exhibit 7, Mr. Hall explained the reason for the post of L-1200584 leaning on that of L-1202991, which was staked later, was that someone had likely picked it up to look at it. It is an infraction to move posts. However, one is not precluded from looking and he did not believe that this was significant.
- o His inspection took place on May 26, 1994. He could not recall that the posts were this way. However, he agreed that it was common for newer posts to lean on the older ones.
- o Mr. Hall followed the lines of Mining Claims L-1200587 and 1200588. However, he did not look at the interior line between the two. He was accompanied by Mr. Harrington for Strike Minerals and Kevin Montgomery for Sudbury Contact.
- o Mr. Harrington told him that the dispute was to challenge only the length of time it took for the Sudbury Contact staking. He was not concerned about the posts or faces, but only the lines. This was made clear.
- o There were a number of stations where it appeared that the inscriptions had been blazed off and possibly reinscribed. However, Mr. Hall did not note this in his report, but just kept track of the posts.
- o He saw three lines of the Gervais staking. In his opinion, if snow conditions were good, a time of four hours and eight minutes was not unreasonable for the staking.
- o In his opinion, the staking of Mining Claim L-1200588, done in three hours and fifteen minutes was a rush job.
- o The Strike Minerals staking involved the same lines. However, the posts were a little off.
- o The northern boundary of Mining Claim L-1200585 slants down quite a bit, so that it is not a proper east-west line. In a properly staked claim, there should be units of 16 hectares. The line should have extended further north approximately 200 metres or half a claim width.

- o Mr. Hall stated that it was his understanding that, if not a competitive situation, if someone contemplates a dispute, he must strictly comply with the staking requirements in the legislation.

Michael Anthony Weirmeir, Mining Recorder for Thunder Bay, conducted an inspection of the various mining claims, was called as a witness by Strike Minerals and gave the following evidence:

- o His inspection report is found at Part 12 of Exhibit 7. The Comment found at page 3 of the report was read into the record:

Comment: The over all poor rating of the claim lines is a result of too few blazes and no apparent effort toward brushing out lines despite the thick underbrush. There is also an over reliance on the use of orange fluorescent flagging tape as a means of line marking. Simply put, where the bush conditions are termed as heavy and medium the sum of all of the efforts of the disputants, respondent and helpers do not constitute one properly marked out claim line. When normal summer foliage returns to the deciduous underbrush growth the lines would be all but impossible to follow except possibly for the orange flagging.

- o The inspection took place on May 24, 1994. At that time there was the odd patch of snow in the darker edges of the hillsides. However, there was no snow in the bush.
- o On April 16, 1994, there would have been snow on the ground.
- o Under snow conditions, the tag alders are pulled under the snow. However, this is not the case with the higher alders. Therefore, only some of the smaller brush would have been obscured by snow. Mr. Weirmeir has never seen snow conditions which totally obscure the brush.
- o Mr. Weirmeir developed his time element for assisted and unassisted staking. At page 4 of the report:

Using the times recorded for walking a time of staking was developed for scenarios (a) where the staking was completed unassisted and (b) a staker had assistants who blazed.

To develop these times the following amounts were added to my walking times:

- four minutes for each corner or line post erected

- two (2) minutes per minute of walking time for lines in heavy bush.
- one (1) minute per minute of walking time for lines in medium bush.
- one half (1/2) minute per minute of walking time for lines blazed in moderate bush.

- o The developed times were an effort to add to the inspection report of Mr. Hall.
- o Mr. Weirmeir walked all the claim boundaries except the common boundary between L-1200585 and 1200588.
- o Snowshoeing would be a factor in the developed times, depending on the quality of the snow involved. If it were heavy or a powder, it would be difficult going; a crust might be quicker; subject to rain would be different again.
- o Mr. Weirmeir was given an opportunity to look at Mr. Robert's inspection report but indicated that he would stand by his own comments.
- o While Mr. Robert's report indicates that lines are adequately blazed, Mr. Weirmeir stated that his comments are directed to the quality of the claim lines in general. Recognizing that some areas are blazed adequately, he found that all are not marked properly. This is a case where all lines must be marked properly.
- o If it had been the case that only a small portion were marked inadequately, it would have so stated in his report. Therefore, he would not dispute Mr. Robert's comments concerning the photographs indicating adequate blazing.
- o Mr. Weirmeir walked the claim lines noting details which are reflected in his report. He did not count old or new blazes. His judgement of the quality of the staking is based upon his ability to follow the lines.
- o Mr. Weirmeir would not refute the evidence of Mr. Robert, but only indicated that the photographs do not indicate the condition of the claim lines. He disagreed that 95 percent of the lines were satisfactory.
- o While Mr. Robert indicated that the claim lines are as good or better than many seen in his career, Mr. Weirmeir stated that there was no effort to blaze or clear brush.
- o Referring to the flagging observed by Mr. Robert, Mr. Weirmeir stated that it is not a legal form of claim demarcation in most cases. It certainly is not sufficient to mark the boundary when the foliage has grown in.

- o Mr. Weirmeir stated that it is impractical to flag brush.
- o Under cross-examination, Mr. Weirmeir indicated that he designed his developed time system to inspect this particular group of claims.
- o Referring to the common line between Mining Claims L-1200587 and 1200588, Mr. Weirmeir stated that it was irrelevant that there be a common boundary to staking and blazing times, because a staker is required to blaze, whether or not blazing already exists.
- o In the case of that line, the total blazing for the shared boundaries was totally inadequate. This was true of all of the boundaries examined.
- o Mr. Weirmeir indicated that, if he were asked to record these Mining Claims, and knew of the conditions of blazing, he would not accept them for recording.
- o Mr. Weirmeir clarified that the use of the compass did not significantly add to the developed times.

Mark Dixon Hall was recalled as a witness on behalf of Sudbury Contact and gave the following evidence:

- o Mr. Sullivan referred to Mr. Harrington's Applications to Record three mining claims, found at Part 23 of Exhibit 7, in particular to Filed Only Mining Claims L-1202692 and 1202691. The Application indicates that both were staked on April 17, 1994, commencing at the No. 3 post at 8 a.m. and finishing at 11 a.m.
- o Mr. Hall stated that he vaguely recalled that Mr. Harrington said that he did not stake Filed Only Mining Claim L-1202691. Mr. Hall concurred that it would be impossible to be in two places at one time.
- o One would need to know the circumstances to determine whether these Filed Only Mining Claims were staked properly. However, after the first 24 hours after land comes open for staking, the rules change in that helpers can be used more extensively in the staking.
- o Subsection 8(7) of O.Reg. 115/91 allows others to be used as helpers and subsection 8(8) only requires that the staker inscribe one corner post with the time of completion. This is contrasted with subsection 8(9), where within the first 24 hours, the staker must commence at the No. 1 post, erect and inscribe all posts and move in a clockwise direction.

- o Messrs. Hall and Sullivan discussed various interpretations of section 8. Mr. Hall indicated that it was not the intent of the regulation, nor a practice in the industry, to have one person in a group staking have no more participation than inscribing the time of completion on one corner post.
- o Conditions of the land were described as open field, swamp and tag alder. It was not, in Mr. Hall's opinion, as heavy bush as is found in some areas, in that the swamp was not deep and there were not a lot of rivers and dams.
- o Despite of assistance on the inspection from Mr. Harrington and the use of the compass, Mr. Hall occasionally did lose the line during the inspection. However, the intent of the inspection was verification of the time taken to stake.
- o Under cross-examination, Mr. Hall agreed that the drafting of O.Reg. 115/91 creates some confusion as to who must assume responsibility for the staking. It was suggested that it may be possible for a staker to do only what is necessary on a number of mining claims being staked simultaneously, with helpers carrying out the bulk of the staking. However, Mr. Hall stated that the staker must sign page two of the Application to Record, indicating that he or she was on the ground and that all information is correct. This can be done only with personal knowledge.
- o The purpose of the inspection is to evaluate what is found in the field. It is not typical for an inspector to note when a compass was necessary. More typical are comments regarding when a line was obscured.

Kevin Montgomery was called as a witness on behalf of Sudbury Contact and gave the following evidence:

- o Mr. Montgomery was employed by Mr. Hubachek for 2 1/2 years, holding a bachelors and a masters degree in geological science.
- o He accompanied Mr. Hall on the inspection of May 26, 1994.
- o They arrived at 8:55 a.m. at Station #1 and followed the line across around the pond. Mr. Harrington went ahead to locate the line.
- o Mr. Montgomery described the trail followed by the inspection. Some difficulty was experienced along the south line of L-1200587. They were on the road again by 5 p.m.
- o There was a discussion with Messrs. Harrington and Hall concerning the purpose of the inspection and the upshot was that there was no concern regarding the line posts, only the staking times.

- o Mr. Montgomery stated that the staking times for Mining Claims L-1200587 and 1200588 were reasonable. Mining Claim L-1200585, staked by Luc Marois, was not inspected.
- o Sudbury Contract hired a staking company from Rouyn-Noranda, whom it had dealt with for seven years. He rates the quality of their staking as excellent.
- o Under cross-examination, Mr. Montgomery clarified that he works for Mr. Hubachek. However, he was present on the inspection as an agent for Sudbury Contact.
- o There was no way to tell the difference in the lines of Strike Minerals and Sudbury Contact.

David William Christie was called as a witness on behalf of Sudbury Contact and gave the following evidence:

- o Mr. Christie has worked as a project geologist with Mr. Hubachek since 1986.
- o He is familiar with the Mining Claims in dispute, having contacted Ed Chartré of Rouyn-Noranda to do the staking. The assignment was to stake the four mining claims plus others to the east.
- o As a competitive staking was anticipated, it was arranged that two stakers would walk the land the day before the staking.
- o Mr. Christie reviewed the times involved with the Sudbury Contact staking and considered them normal for a rush staking.
- o Sudbury Contact has never been subjected to a dispute until now, even in rush situations.
- o Under cross-examination, Mr. Christie stated that, while it was anticipated that smaller units would have to be staked, due to the rush situation, when it became apparent that there was no rush, the multiple claim units were staked.

Submissions:

Mr. Forbes submitted that the evidence of Mr. Robert, which was given with no interest in the outcome, demonstrated that the claim lines substantially comply with the requirements of the **Mining Act** and regulations, being better than average. This refutes the

evidence of Mr. Weirmeir, whose evidence is biased in favour of a summer, rather than a winter, staking. In this staking, there were several feet of snow involved, which obscured the underbrush.

Based upon Mr. Robert's count of blazes, there was one blaze averaging every 27 feet. (Mr. Sullivan objected to this calculation, which was not performed by Mr. Robert in his report or given in evidence.) He submitted that the requirements for blazing, as set out in subsections 8(4) and (5) of O.Reg. 115/91 were met.

Referring to the Decision of the Recorder, which disallowed the staking of Luc Marois of Mining Claim L-1200585 due to false statements on the Application to Record, Mr. Forbes submitted that there should be no question of the cancellation of the Mining Claim. That Decision should stand, as there has been no appeal by Sudbury Contact within the 15 days required by legislation.

Mr. Forbes referred to the doctrine of strict compliance and quoted the Decision of the Recorder at page 10:

3) Turning to the staking of the disputant, it has long been considered a requirement that a disputant must satisfy a standard of strict compliance. The principal (**sic**) goes as far back as 1915 when the Commissioner said in *Whiting vs Mather* (MCC Vol. 2 page 324) "He who seeks equity must do equity". In *Hodge et al vs Canandian (sic) Nickel* (MCC Vol. 7 page 640) the Commissioner said, "...., the tribunal is satisfied that a higher standard of staking is required for those who overstate recorded mining claims."

It should be clear from these cases that a mining claim which is not in substantial compliance with the legislative requirements will be deemed abandoned pursuant to subsection 71(1) of the **Mining Act**, so that Strike Mineral's actions cannot be construed as overstaking, but one of staking lands which have been deemed abandoned. He submitted that the tribunal should overrule the Decision of the Recorder and allow the recording of the Strike Minerals Filed Only Mining Claims.

Witnesses on behalf of Strike Minerals should be found to be credible as to the times when Messrs. Frappier and Gervais were observed on the land, namely 7:30 a.m. The only discrepancy between the evidence of Messrs. Frappier and Gervais and those on behalf of Strike Minerals was the issue of time. Mr. Forbes invited the tribunal to prefer the evidence of witnesses on behalf of Strike Minerals.

Mr. Forbes pointed out that Mr. Frappier did admit to blazing north on Mining Claim L-1200587 with Mr. Gervais. This was corroborated by Mr. Gervais. Similarly, the inscription on Mr. Gervais's No. 4 post is 10:25 a.m., while the inscription on Mr. Frappier's No. 3 post is 10:28 a.m. No explanation for the discrepancy was given.

The issue of the origins of the stump post must also be addressed. Mr. Hall's report shows that there are two stump poplar posts, one stump balsam and one loose poplar post. The evidence of Strike Mineral's witnesses is that Mr. Frappier cut a stump poplar post. This raises the question of why the inspection uncovered that a loose post is attributable to Mr. Frappier. Mr. Forbes suggested that Mr. Frappier inscribed a stump poplar at 7:30 a.m., which is illegal.

There are many cases where stakers have erected stump posts prior to the commencement of staking, such as **Comba et al. v. St Louis** (7 M.C.C. 88); **Cunningham et al. v. Smolarczyk** (4 M.C.C. 178); and **Lacasse v. Phillips** (7 M.C.C. 560).

Mr. Forbes submitted that Mr. Gervais's staking of Mining Claim L-1200587 should be deemed abandoned for non-compliance, in that a post was used which was erected prior to the commencement of staking and a helper was used to blaze going counter clock-wise. Therefore, the Application to Record should be considered false.

Referring to the case of **Dupont et al. v. Inglis et al.** 3 M.C.C. 193, Mr. Forbes quoted the following passage of that decision from the body of the Decision of the Recorder:

"It was urged that the issue was in reality between the respondents and the individual appellants, but that confuses the matter. The question is the validity of the alleged first staking, and that is a matter between the licensee and the Crown. Its adjudication may affect a subsequent staking by another licensee; but there is no vinculum juris and no lis between the two licensees, and the disputant is before the tribunal only as he is permitted by the statute to have the claim of another put in question before the Recorder. In the enquiry the subsequent staking is irrelevant, and the decision should be the same as if no such action had taken place."

However, the Recorder should not have dismissed Strike Mineral's dispute and not allowed the recording of its three Filed Only Mining Claims.

Mr. Sullivan pointed out that the only issue raised by Strike Minerals was that of the time it took to stake by Sudbury Contact. This was confirmed by Messrs. Hall and Montgomery.

Strike Minerals called Messrs. Harrington, Frappier and Gervais as its own witnesses and the fact that the evidence conflicted must affect its case. However, the fact remains that these were Strike Minerals' witnesses and this is its evidence. The issue is one of credibility.

The report of Mr. Robert is made six months after the original stakings. Mr. Sullivan submitted that it is totally incorrect. He was hesitant, his cross-examination contradicted his evidence in chief. Mr. Sullivan submitted that the total report should be disregarded.

Similarly, the report of Mr. Weirmeir goes to the opposite extreme. Even though the inspection was executed shortly after the staking, it contradicts the inspection report of Mr. Hall.

Mr. Robert has indicated that the claim lines can be followed easily. While this is intended to apply to Strike Minerals' claim lines, the same can be said for that of Sudbury Contact. As the respective lines cannot be differentiated, the report should be disregarded.

It is the evidence of Mr. Hall that times mentioned in the Applications to Record are possible. The evidence of Mr. Weirmeir sets a very strict standard of staking, setting out rather arbitrary times. The variables cannot be given weight, as there is no basis for why two minutes or three minutes should be added to actual times. The entire report does not allow for variables in calculations.

Concerning interpretation problems with section 8 of O.Reg. 115/91, common sense should be applied. The reference to the licensee in subsection 8(8) refers back to the licensee in subsection 8(7). Mr. Sullivan agreed with Mr. Hall that a staker cannot be in two places at once. The statements on page two of the Application to Record must be truthfully admitted. This raises the question of how Mr. Harrington could be in two places at once.

The facts of the case must be governed by the substantial compliance requirements of section 43 of the **Mining Act**. The leading case regarding substantial compliance is **Clark v. Dockstader** 36 S.C.R. 622, involving British Columbia, with the interpretation to a provision similar to that contained in section 43 of the **Act**. The placement of the No. 2 post outside of the mining claim on lands already staked by another was held not to be invalid as it could be corrected by the curative provisions of the **Act**. The legislative test was one of **bona fides** and not of a character calculated to mislead.

Mr. Sullivan submitted that none of the deficiencies in the Sudbury Contact staking were calculated to mislead and that the sympathies of the tribunal should rest with the original staker.

Similarly, **Ramsay v. Fernberg et al.** 7 M.C.C. 385 dealt with the issue of whether there can be substantial compliance, notwithstanding a number of technical deficiencies. The Supreme Court of Ontario, Divisional Court held that the nature of the deficiencies was such that they could be cured by the curative provisions in the legislation.

Mr. Sullivan submitted that the object of the **Mining Act**, as stated in the **Clark** case, is to motivate the search for and to secure the discovery of minerals. Stakings should be upheld where there is an honest attempt to comply with the requirements of the legislation. Absolute compliance is not a requirement. It was submitted that the standard set by Mr. Weirmeir was too high. The Mining Claims were staked in good faith and there is nothing indicating an intent to mislead. All times of stakings were set out and the evidence of Messrs. Hall and Montgomery was that they were reasonable. Mr. Sullivan submitted that the appellant has not discharged the onus of proving that the stakings were invalid.

In the alternative, Mr. Sullivan submitted that Strike Minerals' Filed Only Mining Claims should not be recorded.

Concerning the issue of Mr. Marois' staking of Mining Claim L-1200585, Mr. Sullivan stated that the times were found to be reasonable by the inspection of Mr. Hall. The only issue raised by the dispute is that of the time involved and this had been satisfactorily dealt with.

Findings:

Status of Mining Claims L-1200585 and 1200588

The result of the Decision of the Mining Recorder was that neither of the two Sudbury Contact Mining Claims or the corresponding Strike Minerals Filed Only Mining Claims were recorded. In appealing this Decision insofar as it affected its interests only, the effect of the Strike Minerals' appeal was to appeal the refusal to record a mining claim. In order to have a full hearing on the merits of both stakings, it would have been necessary for Sudbury Contact to appeal the Decision of the Recorder insofar as it disallowed recording of its two Mining Claims.

The tribunal finds that Sudbury Contact relied on erroneous information from the tribunal that it need not appeal the Decision of the Recorder to disallow the recording of Mining Claims L-1200585 and 1200588. The result of this error is that the hearing itself did not involve a dispute of the two Sudbury Contact Mining Claims. The tribunal cannot consider the issue of the validity of the Strike Minerals Filed Only Mining Claims without first ruling on those of Sudbury Contact. The tribunal itself did not pick up on the consequences of this absence of appeal on the part of Sudbury Contact, and therefore, the matter was not resolved during the hearing.

If it is the case that the tribunal is incorrect, the result would be that, in failing to make a case against the Mining Claims, combined with the original jurisdiction of the tribunal

set out in clause 113(a) of the **Mining Act**, there is no evidence to support a dispute with the result that the dispute must be dismissed. This would allow the Mining Claims to be recorded where there is a Decision of the Recorder that the stakings do not meet the requirements of the legislation, notwithstanding that the Decision was based upon a hearing of the merits and no such hearing took place before the tribunal. Such a finesse is not contemplated by the procedural requirements of Part VI of the **Mining Act**. Each decision of the tribunal must be on the "real merits and substantial justice of the case".

It becomes clear that the origins of the problem rest with the tribunal itself, for having given incorrect advice to Sudbury Contact and for having failed to correct the situation created when opportunity presented itself at the hearing.

The tribunal finds that a substantial injustice has been suffered by Sudbury Contact by virtue of the incorrect advice which it received from the tribunal regarding the filing of a Notice of Appeal. Under the circumstances, it is clear that Strike Minerals' Notice of Appeal is filed within the time requirements provided in subsection 112(3) of the **Act**. Based upon its equitable jurisdiction under section 121 of the **Act** and the jurisdiction to extend time contained in that subsection in the case of inadequate notice and substantial injustice, as well as the jurisdiction to extend time found in section 137 of the **Act**, the tribunal finds that it will extend time to Sudbury Contact for the filing of its own appeal in conjunction with that already filed by Strike Minerals, contained on Document No. 9480.00118. The time for appealing the Decision of the Recorder shall be within 15 days of the filing of this Order of the tribunal.

It should be noted that, for purposes of any prospective appeal, the jurisdiction of the tribunal to inquire into the validity of the original staking extends to all issues of staking, and not merely the matter of time taken to stake. This is the approach taken by the Recorder and his Decision clearly raises issues aside from the matter of time.

In the event that Sudbury Contact does not appeal the Decision of the Recorder within the time frames set out, the tribunal will render its decision concerning the two Strike Minerals Filed Only Mining Claims in due course.

Validity of Staking of Mining Claim L-1200587

There are two versions of what took place at Station #1 on the morning of April 16, 1994. Details aside, the most glaring discrepancy is the time when the meeting of the two staking teams was alleged to have taken place.

With the greatest of respect to Mr. Forbes who sent out his team to commence staking at 8 a.m. Daylight Savings Time, the tribunal finds that it cannot accept the evidence of his witnesses. It might have been helpful to have Mr. Forbes' evidence of when he met with Mr. Harrington, upon his return from the lands to seek advice on whether or not to overstake.

The fact remains that Arnold Township is not far from Kirkland Lake. While evidence varied, it would appear to be approximately one hour away, including the trip by skidoo to Harker-Holloway Road from Station #1. The tribunal cannot fathom on how, if the team left Station #1 after 7:30 a.m., they would have arrived in Kirkland Lake for an early lunch and not returned until 1 p.m. or 1:30 p.m. There is lost time which is not accounted for in any of the evidence.

The tribunal finds that it far prefers the evidence of Messrs. Frappier and Gervais that the encounter took place closer to 10 a.m. or 10:30 a.m. Not only does this coincide with the inscriptions on the posts found in Mr. Hall's inspection report, but also is in keeping with the evidence presented.

The evidence of Messrs. Hall and Weirmeir does not indicate that Mining Claim L-1200587 could not be staked in the four hours and eight minutes indicated. Rather, the evidence is that the blazing and cutting of the underbrush could have been better.

The test for substantial compliance is set out in section 43 of the **Mining Act**. There are no circumstances which are persuasive to this tribunal to suggest that the staking was not in substantial compliance with the requirements of the legislation, save for the cutting of the blazes and underbrush. Similarly, there is no indication that the failure to perform these staking requirements adequately was due to an absence of good faith or likely to mislead. Therefore, the tribunal finds that there is deemed substantial compliance with the requirements of the **Act**. The Recorder is directed to make an Order pursuant to clause 110(6)(b) to re-blaze the claim lines and alter them so that the brush is adequately cleared.

Requirements of Section 8 of O.Reg. 115/91

Findings on submissions made concerning this section are reserved until such time as the staking of the two Strike Mineral Filed Only Mining Claims is considered.

Exclusion of Time

Pursuant to clause 67(1)(b) of the **Mining Act**, the time during which Mining Claim L-1200587 was pending before the Recorder and the tribunal, being May 17, 1994 to January 19, 1996, a total of 613 days, will be excluded in computing time within which work upon Mining Claim L-1200587 is to be performed.

Pursuant to subsection 67(2) of the **Mining Act**, December 16, 1997 shall be deemed to be the date for filing of the first and second units of prescribed assessment work on Mining Claim L-1200587. All subsequent anniversary dates shall be deemed to be December 16.

Conclusions:

The time for appealing the Decision of the Recorder by Sudbury Contact concerning Mining Claims L-1200585 and 1200588 is extended to within 15 days of the filing of this Order of the tribunal. Any decision concerning those Mining Claims shall be based upon a hearing of the merits of the staking and include all aspects of staking. In the absence of an appeal being filed in the time specified, the tribunal will issue its decision concerning the Strike Minerals Filed Only Mining Claims L-1202692 and 1202694 in due course.

The dispute against Mining Claim L-1200587 is dismissed. The time during which this claim was under pending proceedings is excluded.