

File Nos. MA 014-06 &
MA 015-06

L. Kamerman)
Mining and Lands Commissioner) Tuesday, the 4th day
of November, 2008.

THE MINING ACT

IN THE MATTER OF

Mining Claim SSM-1235757, situate in the Township of Chabanel, in the Sault Ste. Mining Division, recorded in the name of Paulette A. Mousseau-Leadbetter, on the 22nd day of November, 2002 and transferred to the name of 3814793 Canada Inc., on the 21st day of April, 2006, hereinafter referred to as the "Leadbetter Mining Claim";

AND IN THE MATTER OF

Filed Only Mining Claim 3009900, situate in the Township of Chabanel, in the Sault Ste. Marie Mining Division, staked by Mr. Richard Daigle, to have been recorded in the names of Pele Diamond Corporation and 2098680 Ontario Inc., each as to a 50% interest, respectively, hereinafter referred to as the "Pele Diamond Filed Only Mining Claim";

AND IN THE MATTER OF

Filed Only Mining Claim 3017484, situate in the Township of Chabanel, in the Sault Ste. Marie Mining Division, staked by Mr. Richard Daigle, to have been recorded in the names of Pele Diamond Corporation and 2098680 Ontario Inc., each as to a 50% interest, respectively, hereinafter referred to as the "Pele Diamond Filed Only Mining Claim 3017484";

AND IN THE MATTER OF

Ontario Regulation 7/96, Claims Staking;

B E T W E E N:

PELE DIAMOND CORPORATION AND
2098680 ONTARIO INC.

Appellants

- and -

PAULETTE A. MOUSSEAU-LEADBETTER AND
3814793 CANADA INC.

Respondents

- and -

MINISTER OF NORTHERN DEVELOPMENT AND MINES
Party of the Third Part

AND IN THE MATTER OF

An appeal from the decision of the Provincial Mining Recorder, dated the 13th day of April, 2006, for the recording of all or that portion of the Pele Diamond Filed Only Mining Claim that does not overlap the 3814793 Canada Inc. Mining Claim.

O R D E R

WHEREAS these appeals, with documentation filed in support, were received from Mr. Michael J. Bourassa, co-counsel for the appellants, Pele Diamond Corporation and 2098680 Ontario Inc., by this tribunal on the 18th day of April, 2006 and on the 5th day of May, 2006, respectively;

AND WHEREAS the tribunal Ordered the Provincial Mining Recorder to note “Pending Proceedings” on the abstract of Mining Claim SSM-1235757, to be effective from the 18th day of April, 2006, *nunc pro tunc*;

AND WHEREAS these matters were heard by the tribunal on the 17th and 18th days of September, 2007 and continued on the 6th and 7th days of December, 2007;

1. **IT IS ORDERED** that these appeals be and are hereby dismissed.
2. **IT IS DECLARED** that Mining Claim SSM-1235757 encompasses all of the lands under water within patented former mining claim SSM-18639 **AND THE PROVINCIAL MINING RECORDER IS HEREBY DIRECTED** to amend the appropriate map in the Provincial Recording Office accordingly.
3. **IT IS FURTHER ORDERED** that the notation “Pending Proceedings” which is recorded on the abstract of Mining Claim SSM-1235757, to be effective from the 18th day of April, 2006, *nunc pro tunc*, be removed from the abstract of the Mining Claim.
4. **IT IS FURTHER ORDERED** that the time during which Mining Claim SSM-1235757 was under pending proceedings, being the 18th day of April, 2006 to the 4th day of November, 2008, a total of 932 days, will be excluded in computing time within which work upon the Mining Claim is to be performed.
5. **IT IS FURTHER ORDERED** that the 11th day of June, 2013, be fixed as the date by which the next unit(s) of prescribed assessment work, as set out in Schedule “A” attached to this Order, must be performed and filed on Mining Claim SSM-1235757, pursuant to subsection 67(3) of the **Mining Act** and all subsequent anniversary dates are deemed to be June 11 pursuant to subsection 67(4) of the **Mining Act**.
6. **IT IS FURTHER ORDERED** that no costs shall be payable by any of the parties to these matters.

THIS TRIBUNAL FURTHER ADVISES that, pursuant to subsection 129(4) of the **Mining Act**, as amended, a copy of this order shall be forwarded by this tribunal to the Provincial Mining Recorder **WHO IS HEREBY DIRECTED** to amend the records in the Provincial Recording Office as necessary and in accordance with the aforementioned subsection 129(4).

DATED this 4th day of November, 2008.

Original signed by L. Kamerman

L. Kamerman
MINING AND LANDS COMMISSIONER

SCHEDULE "A"

MINING CLAIM #

NEW DUE DATE

SSM-1235757

June 11, 2013

File Nos. MA 014-06 &
MA 015-06

L. Kamerman)
Mining and Lands Commissioner) Tuesday, the 4th day
of November, 2008.

THE MINING ACT

B E T W E E N:

PELE DIAMOND CORPORATION AND
2098680 ONTARIO INC.

Appellants

- and -

PAULETTE A. MOUSSEAU-LEADBETTER AND
3814793 CANADA INC.

Respondents

- and -

MINISTER OF NORTHERN DEVELOPMENT AND MINES
Party of the Third Part

R E A S O N S

Appearances

Mr. Steven Rosenhek	Counsel for the Appellants
Mr. Michael J. Bourassa	Counsel for the Appellants
Mr. C. Bruce Willson	Counsel for the Respondents
Ms. M. Catherine Wyatt	Counsel for the Party of the Third Part

Introduction

On November 11, 2002, Mr. Joseph Leadbetter staked underwater Mining Claim 1235757 at the south end of Mildred Lake over some portion of lands under water which had come open earlier that year following the forfeiture of several Mining Licences of Occupation (M.L.O.s). His claim was accepted for recording by the Provincial Mining Recorder, Ministry of Northern Development and Mines, in the name of Mousseau-Leadbetter, one of the respondents in this matter.

Well after the limitation on disputes by prospective third party stakers and challenges by Ministry officials or the tribunal on the basis of not staking in accordance with prescribed standards following one complete year after recording and the processing of the first prescribed unit of assessment work, the Mousseau-Leadbetter Mining Claim was challenged by Pele Diamond.

Pele Diamond caused two mining claims to be staked at the extreme south end of Mildred Lake comprised of approximately 1.84 hectares of lands under water, both of which were disallowed on the basis of total or partial overlap with Mining Claim SSM-1235757. Pele Diamond appealed this decision, asserting that its two claims were both south of the Mousseau-Leadbetter Mining Claim SSM-1235757, or alternatively, that the non-overlapping portion of its southern claim should be accepted for recording.

As comprehensive and detailed as the staking rules may be, they are silent when it comes to dealing with only a portion but not all of a long, narrow irregular area of lands under water in unsurveyed territory open for staking and coterminous with lands not open for staking. With such a legislative gap, one must rely on the sketch accompanying the application to record to determine the lands under staking.

The sketch is ambiguous or lacks clarity at the location in question, a fact which is not captured or saved by the curative or deeming provisions. It was necessary to conduct a purposive analysis of the legislation in relation to acquiring and holding title to mining claims to determine its overall purpose and objectives. It was also necessary to apply its equitable jurisdiction under the circumstances and make its decision on the real merits and justice of the case. The staker was in full compliance with the ground staking requirements. Any shortcomings or ambiguities in his sketch were not clarified at the time of recording. This situation arose due to an existing gap in the legislation which did not require definitive markings on the ground. This was compounded by the illustration in the sketch accompanying the application to record which failed to provide sufficient detail at the location in question. In unsurveyed territory, a staker cannot be awarded more ground than can be substantiated by his staking or sketch. Where the original staker has complied with all existing staking standards required, the real merits and substantial justice favour including the area at issue in his staking, so as long as such a finding can be supported by the sketch as drawn.

The Pele Diamond appeals will be dismissed.

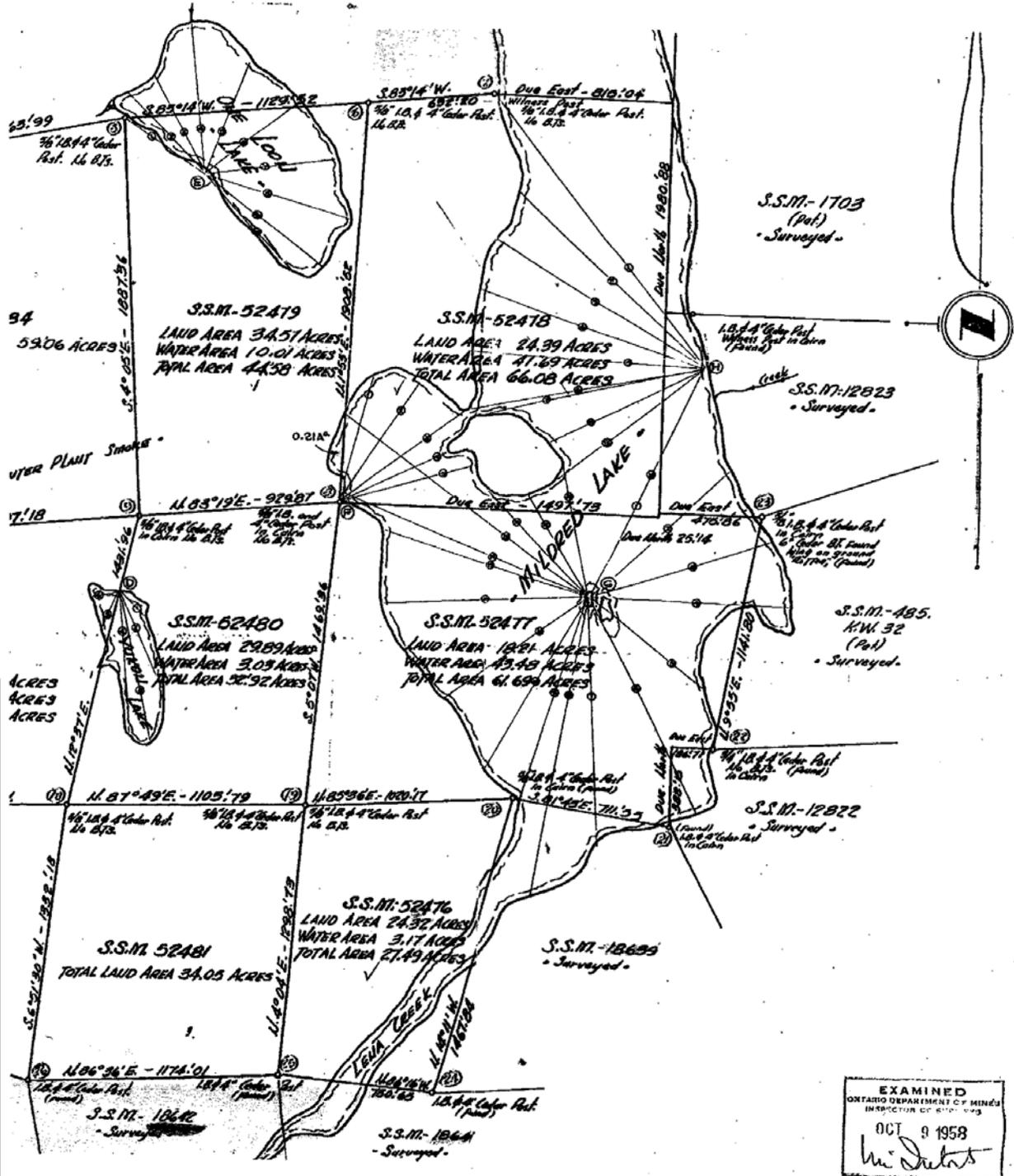
Analysis

a) Mining Licences of Occupation (M.L.O.s)

In the May 28, 2002, issue of the Ontario Gazette, the lands under water involving eleven M.L.O.s came open for staking on June 1, 2002. The lands under the waters within portions of two of these M.L.O.s at the south end of Mildred Lake are of concern in this matter. Former mining claim numbers which were used in the M.L.O.s, the Gazette and original survey plan map have been adopted in this analysis for ease of common reference.

In 1953, M.L.O. 12101 was issued for the underwater portions of former mining claims SSM-18639, 18641 and 18642, described as being Mildred Lake. In 1960, MLO 13252 was issued for waters under what was described as Mildred Lake and Lena Creek, being the underwater portion of patented former mining claims, SSM-52476 through 52478. Only the lands under water within patented former mining claim SSM-52476 are referred to in the M.L.O.s and in the Gazette as Lena Creek, notwithstanding that 18641 and 18642 are further downstream along the creek. The area in which Mildred Lake becomes Lena Creek, when viewed on a map, is more ambiguous than described within the M.L.O.s, with the outflow of the lake to the creek visibly occurring within SSM-18639.

Part of Exhibit 10, being a plan and field notes for these former mining claims is reproduced:



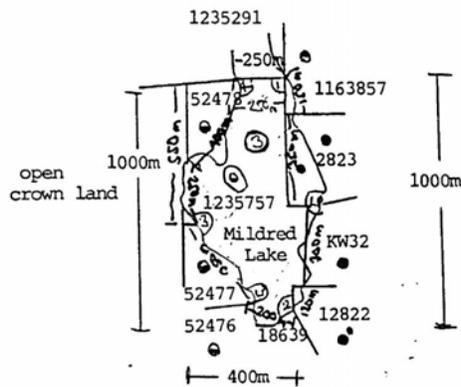
The underwater portion of SSM-52478 is the northernmost area which came open for staking, being located fully within Mildred Lake, as is SSM-52477, located directly to the south. At the south end of SSM-52477, the lake narrows, flowing into SSM-18639, then westward into SSM-52476, southerly into SSM-18641 and west into SSM-18642. The lands under waters described in each of M.L.O.s 13252 and 12101 are not internally contiguous in that the flow of water within M.L.O. 13252 is interrupted by that of SSM-18639, being within M.L.O. 12101. The M.L.O.s and corresponding former mining claim numbers are grouped based on the timing of the original stakings.

The following is the acreage of lands under water which came open and a rough conversion into hectares.

SSM-52476 – 3.17 acres or 1.28 ha	SSM-18639 – 4.52 acres or 1.83 ha
SSM-52477 – 43.38 acres or 17.6 ha	SSM-18641 – 1.29 acres or .52 ha
SSM-52478 – 41.69 acres or 16.87 ha	SSM-18642 - .66 acres or .27 ha

b) *Staking, Application to Record and Sketch*

Mr. Joseph Leadbetter staked Mining Claim SSM-1235757 (the Leadbetter Mining Claim) in Chabanel Township on behalf of Paulette Mousseau-Leadbetter and 3814793 Canada Inc. on November 11, 2002. He also staked several other claim groups and all were recorded on November 22, 2002. The following sketch accompanied his application to record:



Chabanel Township
2 units

- PATENT (mining only)
- PATENT (surface only)
- PATENT (surface & mining)

Mining Claim SSM-1235757 is an irregularly shaped mining claim, being comprised of lands under water. The sketch accompanying the application to record depicts the requisite four “corner” posts plus two additional line posts. It is incontrovertible that corner posts cannot be placed at cardinal corners on a wholly irregular claim whose boundary coincides with that of a lake or other water body.

Mr. Leadbetter’s #1 and #4 posts were placed at the northern most end of his claim, which bisects the lake at the location where former mining claim SSM-52478 ends. His #3 post is on the west boundary of the lake, at the common boundary of former mining claims SSM-52477 and 52478. The #2 post is located at the boundary between SSM-18639 and patented mining claim 12822 to the east, although subsequent inspection revealed that its actual location was somewhat further north. His #2 post and second line post represent his southernmost posts for Mining Claim SSM-1235757.

In his sketch, Mr. Leadbetter referred to each of the interests in the lands surrounding Mining Claim SSM-1235757 by their corresponding patent or former mining claim numbers, specified the nature of the interest and drew on-shore boundaries perpendicular to the lake. He failed, however, to draw in a perpendicular boundary between SSM-52476 and 18639, notwithstanding that it involves the exact location at which he now asserts his Mining Claim SSM-1235757 bisected the lands under water open for staking.

Along the western shoreline between each respective alienated boundary line, Mr. Leadbetter’s indicated measurements are taken to be linear distances of each respective portion of irregular shoreline. Along the eastern boundary, straight line distances depicting actual boundaries between alienated interests, which extend into the water in places, are shown. If one adds up the linear distances along the east and west sides of the sketch, one arrives at totals of 930 metres for the east side and approximately 900 metres for the west side. Outside of the sketched area additional distances appear to depict the overall outside dimensions of Mining Claim SSM-1235757. On both the east and west sides, between bars and straight lines, Mr. Leadbetter has typed in 1000 metres, although the lines themselves are not equal in length, being 3.8 and 4 cm respectively.

Although there was considerable attention at the hearing regarding details and quality at the south end, the sketch in fact contains other errors or distortions. Mildred Lake, as shown in the surveyed plan, is “narrower” east to west whereas it appears shorter in its north-south length in the sketch. Along the western boundary between the #4 and #3 posts, the peninsula on the land portion of former SSM-52478 is shown as being located half way between those two posts rather than 2/3 of the distance from the #4 post shown on the surveyed plan. The small island shown alongside the peninsula does not bear sufficient detail to distinguish its distinctive shoreline. There is a marked lack of east to west alignment in the sketch between the #3 post and first line post across the lake, when compared with the surveyed line between SSM-52478 and 52477 with that between SSM-52477 and the underwater portion of SSM-12823. The very small area of land under water within SSM-52479 on the survey plan is missing from the area in the sketch shown as crown land.

The eastern boundary of the sketch between the #1 post and first line post is drawn further into Mildred Lake than is shown on the survey plan. The small bay located within SSM-485 KW 32 on the survey plan is shown on the sketch as being wholly within the misnamed 2823. The narrow, crescent moon shape depicted on the surveyed plan within SSM- 485 K.W. 32 is much smaller and of different dimensions on the sketch.

All of the foregoing observations are material in weighing the significance of Mr. Leadbetter’s depiction of the southern boundary of Mining Claim SSM-1235757.

The 200 metre line between SSM-52477 and 18639 on Mr. Leadbetter's sketch is shown at a greater angle northwest to southeast than the boundary on the survey plan, whose distance is 711.55 feet or just over 200 metres. The southern shoreline land to water boundary within former patented mining claim SSM-18639 depicted in the Leadbetter sketch is not accurate as to its length, angle or configuration.

It was argued by Pele Diamond that this 200 metre line represented the southern boundary of Mining Claim SSM-1235757, a position which was not accepted by the Provincial Mining Recorder. When contrasted with the northern boundary between the #4 and #1 post, the line is shown squarely across the location of the posts. This "squaring" of the line is not shown at the south. The overall style of sketch depicts linear distances across land and water on the west side and depicts straight line boundaries corresponding to common boundaries between alienated interests on the east side.

The tribunal is satisfied that the style of sketch is internally consistent in what is shown on the north, east and western boundaries. The tribunal is satisfied that this same internal logic must be applied to the 200 metre stretch at the bottom which is the surveyed distance between SSM-8639 and SSM-2477. To have indicated an actual boundary of Mining Claim SSM-1235757 would require that the 200 metre line solidly and squarely meet the line and corner post locations, which it does not. Therefore, it is found to depict in the sketch a known distance at this location and not the southern boundary of Mining Claim SSM-1235757.

The sketch of the boundary of Mining Claim SSM-1235757 extends into SSM-18639. It does not run straight from east to west, but rather depicts a meandering line reflecting the shape of the shoreline depicted on the survey plan. However, the narrow area at the south end is either inaccurately drawn or entirely omitted. This area should properly have been drawn in roughly a triangular shape, with its point facing downward. It is completely absent from the sketch for Mining Claim SSM-1235757.

The tribunal is satisfied that the sketch depicts a shoreline boundary at this location. This is consistent with the above finding that the 200 metres merely depicts a distance and is not the southern boundary of the claim. This finding is also consistent with the fact that a staker does not have the option of drawing a boundary across water which meanders but runs parallel to the shoreline. There cannot be non-linear boundary running through water parallel to the shoreline. Leadbetter's meandering boundary must therefore be shoreline. This finding is also consistent with its earlier finding that Mr. Leadbetter's sketch has flaws, errors and distortions throughout and not merely at this location. He is found to have depicted a shoreline, but not captured the exact minutiae of each detail of the shoreline at this location, consistent with other erroneous details throughout his sketch.

Mr. Leadbetter's sketch does not show a perpendicular line clearly depicting the existing boundary between SSM-52476 and 18639 which runs almost due south from his second line post. However, what is shown in the sketch is a solid line across open water, which does run almost due south from his second line post with no distance or measurement shown. SSM-52476 and 18639 meet on the ground corresponding with the location shown in the sketch as the second line post.

At some point the southern boundary of Mining Claim SSM-1235757 must cross open water. It must bisect the lands under water open for staking. This north/south line at this location provides evidence that the sketch depicts the crossing of open water south from the second line post.

It is only within the context of the staking requirements for the facts of this case, or more particularly the gap in requirements, that a poorly drafted line on a poorly detailed sketch, can take on greater significance under the circumstances.

c) *Adverse Inference*

During the course of this hearing, which took place over several re-convenings, Mr. Leadbetter did not attend. The initial hearing on the merits was adjourned due to the last minute filing of documentation by Pele Diamond which counsel for the respondents did not have an opportunity to view. In the absence of Mr. Leadbetter, counsel was unable to obtain instructions regarding the documents and their importance to the Mousseau-Leadbetter case. An adjournment, with attendant costs, was granted to allow counsel to obtain instructions and to adequately prepare.

In response to comments made concerning the requirement that counsel be able to receive instructions from their clients, at the reconvened hearing, Mr. Paul Morra attended on behalf of Ms. Mousseau-Leadbetter; however, Mr. Leadbetter did not attend.

At the time of the initial convening on the merits, comments were made from the bench indicating that Mr. Leadbetter's attendance, while not required, was nonetheless cause for concern due to the inability to assist and instruct counsel. The comment was also made concerning whether this represented a pattern of conduct for Mr. Leadbetter based upon what occurred in front of the tribunal in a previous and unrelated matter.

The hearing on the merits proceeded. Two witnesses were heard from. Mr. Michael Weirmeir gave evidence as the tribunal's own witness and Mr. Robert Bailey was called on behalf of Pele Diamond. They were qualified as experts in mining lands administration, having been a former Mining Recorder in the case of Mr. Weirmeir and an acting Mining Recorder in the case of Mr. Bailey. Both were former MNM employees.

The Mousseau-Leadbetter case relied on materials filed and the affidavit of Mr. Leadbetter; no witnesses were called. Prior to the final reconvening of the hearing, the tribunal issued a notice setting out that a decision may be made which is adverse in interest to the recorded holders of Mining Claim SSM-1235757, Paulette A. Mousseau-Leadbetter and 3814793 Canada Inc., concerning the southern boundary of the claim. Counsel for Pele Diamond made considerable additional submissions on this issue of adverse inference.

The leading case in Canada on adverse interest is *Levesque v. Comeau* [1970] S.C.R. 1010, 16 D.L.R. (3d) 425, which was summarized in *Gerber Scientific Instrument Co. v. Bell-Northern Research Ltd.* (1991), 5 B.C.L.R. (2d) 20 (Ont. C.J. (Gen. Div.) at page 30:

...that when a material witness is not called to give evidence on a contested issue, then an adverse presumption will be drawn. This decision alters the general principle that a party has complete control over its own case. In determining the materiality of the witness, regard can be had to what is the best evidence available and whether the evidence has been adduced in another equally reliable way. ...

Objections had been raised by counsel on behalf of Mousseau-Leadbetter during the course of hearing evidence each time a witness purported to speak to the issue of what Mr. Leadbetter *intended* to stake as his southern boundary. The basis of these objections was that no one, except Mr. Leadbetter, could speak to his intentions and the adverse inference. It was in connection with this issue of what Mr. Leadbetter intended to stake as his southern boundary that the tribunal issued its notice concerning adverse inference.

Under normal circumstances, Mr. Leadbetter's staking should comprise the root of title of this claim. His application to record represents the next step in perfecting his claim.

The Mousseau-Leadbetter case elected to rely on materials filed in this appeal and in particular on Mr. Leadbetter's affidavit (Ex. 2, tab 1, paragraph 3) which states that this sketch is clear in its depiction of his *intention* to stake all of the lands at the south end of Mildred Lake which were open for staking. Mr. Leadbetter's counsel attempted to place the responsibility for not having called Mr. Leadbetter as a witness on Pele Diamond, who he maintained should have provided notice concerning cross-examination on the Leadbetter affidavit. Otherwise the affidavit speaks for itself and the information is uncontested. This position is not accepted. Counsel is deemed to know the law and in this case, the applicable provision is section 113(a) of the **Mining Act** which provides that this is a new hearing.

In retrospect, it has become apparent that raising Mr. Leadbetter's intention concerning the drawing of this boundary and attaching to his failure to appear an adverse inference regarding its location is not helpful to the resolution of the issues in these appeals. This is based upon the ensuing discussion on the legislative requirements and shortcomings.

The tribunal finds that to make an adverse inference on the facts of these appeals concerning the location of the boundary in question would cause unfairness created by a legislative gap not of the staker's making. The challenge by Pele Diamond four years later served to shed light on the nature of the legislative shortcomings. Normally, a challenge to the validity of a mining claim or even to the location of its boundaries arises from some action or omission attributable to its staker. However, when those shortcomings are not the fault of the initial staker but of the legislation itself, the tribunal finds that it is reluctant to deprive that initial staker of the right to the land at issue without careful consideration of the evidence.

The equities require that the failure to address the exact location of this boundary upon staking and submitting the sketch accompanying the application to record, along with the failure to address the location at the time of considering the application for recording must be more fully examined. The tribunal believes that the fact that the location of a mining claim boundary was simply not addressed at any point in time leading up to recording is significant.

As will become apparent, as a result of the total absence of statutory requirements on how to definitively mark this boundary on the ground and the failure of the Provincial Mining Recorder to even know that this was an issue which required clarification at the time the application to record was filed, the tribunal finds that a measured approach to the adverse inference to be drawn is warranted.

d) Requirements of Staking Regulation for Irregular Water Boundary in Unsurveyed Territory

O. Reg. 7/96, as amended, provides considerable, painstaking detail when staking mining claims, either in surveyed or unsurveyed territory. Many of the rules, however, are suspended for the irregular claims which have as their boundaries the shorelines of lakes or other

lands under water. The remaining rules normally would be sufficient to assist in defining the boundaries of a claim which coincide with the shoreline of a lake where the land is not open for staking. There is, however, no staking rule on how to show a change of direction from a shoreline boundary to cross water to bisect the area open to staking, whereby only part of it forms part of the mining claim. The prescribed standards assume that the staker will stake *all* of the open lands under water coterminous with lands not open for staking and do not address the staking of only a portion of those lands under water.

This situation appears to arise when one or more mining licences of occupation forfeit or are surrendered to the Crown involving a vast span of open lands under water but which involve a small actual surface area, such as with a river or stream. How does one show on the ground that one wants to stake some of but not all of an open area? Under these circumstances staking rules require nothing to be indicated on the ground other than the four corner posts.

This issue apparently is not that common, given that it has not arisen until now. When one is confronted with open lands under water within a lake bed, it is not a problem to stake a substantial claim unit. A large lake can readily be carved up through staking in such a fashion. However, that is not the case in narrow river or stream beds or the narrow outflow of a lake.

Subsection 2(1), of the Regulations, for a claim in unsurveyed territory, sets out requirements for rectangular claims comprised of one or more 16 hectare units. Subsection 2(2) suspends these requirements for any boundary which is coterminous with lands not open for staking. Mining Claim SSM-1235757 does not conform to the rectangular requirements. Except for the line at which the water is bisected somewhere on its southern boundary, it is coterminous with boundaries of areas which are not open for staking, within the meaning of subsection 2(2).

Subsection 2(3) provides that a mining claim may change direction where it is coterminous with land not open for staking, such as at the intersection of the existing survey fabric, a claim boundary, at a claim post or surveyed monument post. In Leadbetter's staking, there was one monument found on the boundary between Patented Mining Claims SSM-12822 and 18639. Although the inspection revealed he was off the mark here, Mr. Leadbetter placed his #2 post at this intended change in the survey fabric.

Subsection 2(4) requires line posts at 400 metre intervals, which is suspended by 3(5) which sets out that an irregular claim boundary which is a water boundary need be marked only through the erection of corner posts at interface between the claim boundary and water boundary.

Subsection 3(1) sets out that an irregular area of land that is adjacent to land or to land under water that is not open for staking may be staked with boundaries coterminous to the land or land under water that is not open for staking if the mining claim otherwise conforms to all requirements in subsection 2 except subsection 2(7) which sets out that the length of a boundary may not exceed 3,200 metres and may not exceed four times the length of any other boundary.

Subsection 3(2) sets out that an irregular area of land under water which is adjacent to land or land under water which is not open for staking may be staked with boundaries coterminous to the land or land under water that is not open for staking if the mining claim otherwise conforms to the requirements of section 2 with the exception of subsection 2(7).

Subsection 3(3) provides that the boundaries of the irregular claim described in either subsections 3(1) or 3(2) must be marked by line posts at 400 metre intervals. This requirement is suspended for claims that are a water boundary, as set out in subsection 3(4). Subsection 3(5) elaborates that an irregular claim boundary that is a water boundary need be marked only by the erection of corner posts along the boundary line as close as practicable to where the claim boundary meets the water boundary. Again, this provision is silent on the issue of the bisection of an irregular area of land under water.

Subsection 3(6) sets out a definition for water boundary as used in subsections (4) and (5) being the high water mark unless otherwise defined in the existing alienation.

Under the general staking rules, commencing at section 8, one must stake as a continuous action [8(1)]; erect corner posts at the four corners [8(2)]; and have the affixed tag facing the next corner post [8(3)]. It is in this section that the requirement to otherwise mark the boundary through blazing or erection of pickets or monuments [ss. 8(4) and (6)] does not apply for an irregular claim boundary that is a water-to land boundary intended to be coterminous with land or land under water not open for staking.

Under subsection 13(2), if a mining claim being staked is coterminous with land not open for staking and its boundary changes direction other than at a corner, a line post must be erected at the point of change of direction. Ideally, the change in direction at whatever point in Mr. Leadbetter's staking at which his Mining Claim SSM-1235757 leaves the southern shoreline to bisect open water, would have been of great assistance in demonstrating on the ground the southerly extent of the claim. However, the placement of a line post to mark the change of direction is not required where, on bisecting water, the land on the other side of the line remains open for staking. It is perhaps this single omission in the staking regulation which has led to the difficulty experienced in this case.

Subsections 3(2), (4), (5) and (6), subsections 8(4) and (7) and 13(2) must be read together to determine how this southern boundary should properly be marked. There is no requirement that a water boundary be blazed. This means essentially that the shoreline boundary of Mildred Lake need not be blazed. It also means that Mr. Leadbetter was not required to walk the ground to cover the far reaches of his claim under staking. Nor is there a requirement for the erection of line posts every 400 metres where there is an irregular area of land under water adjacent to land or land under water that is not open for staking. There is simply no requirement to mark this southern boundary on the ground in any of the usual ways. The tribunal has no doubt that had Mr. Leadbetter been required to perform any one of these typical staking requirements on the ground, a corresponding notation would have appeared in his sketch.

The lack of adequate transitional provisions to deal with the forfeiture of mining licences of occupation in unsurveyed territory encompassing the under water portions of multiple mining claims which were not limited to the bed of a single lake has led to this situation. The failure within the ambit of the regulation to recognize that a staker could wish to stake part of but not all of the irregular area of lands under water open for staking and make provision for how to bisect it means that nothing more is required on the ground except to post the four corner posts whose placement will depend on the shape of the irregular area open for staking.

Had Mr. Leadbetter staked Mildred Lake in smaller units, it may have been possible to choose more meaningful locations for the corner posts so that they could bear some resemblance to the requirement for cardinal corners, but this was not required of him. Moreover, the staking

scheme is geared towards rectangular units of 16 hectares; it does not encourage a myriad of considerably smaller units which would permit one to discern from the placement of those four cardinal corners the relative extent of the boundaries. The provisions for the staking of an irregular area contemplate that the entire irregular area be under staking which points to their inadequacy. With the forfeiture and surrender of these former mining licences of occupation, particularly involving the beds of creeks or narrow portions of lakes, unless the surrounding lands are also open for staking, the irregular areas of land under water which may be staked simply bear no resemblance to anything recognizable within the rules. They cannot conform to the rules in any meaningful way.

There was no requirement to erect a line post depicting the point at which the claim under staking moves from the shoreline to cross open water. There is no requirement in unsurveyed territory to maintain the pre-existing lines of the surrounding survey fabric. There is no prescription for where the claim under staking should end or how to show the area under staking on the ground. There is also no requirement for blazing a shoreline boundary.

The absence of prescribed standards is likely the major cause of the failure on the part of the Provincial Mining Recorder to have asked questions of clarification concerning the extent of the boundary at the time of recording, since he did not have the benefit of hindsight as to the impact of the legislative gap. This gap caused a complete absence of requirements to mark the ground in any way. This lack of indicators on the ground been transposed onto the sketch and in the absence of any sort of red flag, remained unaddressed at the pertinent time of recording.

e) *Curative and Deeming Provisions*

Mr. Leadbetter's sketch contained all of the requirements to mirror his staking on the ground. Due to his lack of faithfulness in drawing the actual shoreline within SSM-18639 or including a distance at the point where his claim purports to cross open water, questions are raised regarding what his staking depicts or is meant to depict.

Curative provisions governing deficiencies do not extend to errors or ambiguities when the sketch itself is the only available evidence at the time of recording as to what lands under water were under staking. Deeming provisions that a claim has been staked in accordance with the legislation, which have the effect of removing a claim from challenge as to its validity under certain conditions, do not explicitly extend to challenges to actual boundaries. This results in leaving a portion or boundary of a conclusively deemed valid mining claim subject to challenge. No direction is provided to the Mining Recorder or the tribunal in the legislation for how to treat an ambiguous or poorly detailed sketch.

Subsection 110(6) allows the Mining Recorder to order certain changes on the ground in relation to the staking, such as the movement, alteration or replacement of posts and extends to the information inscribed on those posts. Missing lines, tags or posts may be replaced, blazed or reblazed.

Section 20(b) of O.Reg. 7/96, provides that, as long as an attempt in good faith was made to comply with legislative requirements, the claim is not *invalidated* by having failed "to describe or set out the actual area ... staked in the application to record the claim or sketch or plan accompanying the application." This does not address this staking on the ground, carried out in compliance with all staking requirements for an irregular claim in unsurveyed territory comprised of

lands under water. No staking element is missing on the ground. What is missing is detail in the sketch. This provision is limited to addressing the validity of the claim, but it provides no guidance on how to determine the extent of the lands under staking.

The substantial and deemed substantial compliance provisions found in subsections 43(1) and (2) address whether the staking itself is in compliance. Subsection 46(1) does provide greater flexibility than found elsewhere, in that the Mining Recorder, upon receiving an application to record, will consider whether it complies with all requirements for staking and recording before determining whether or not to record the claim. However, the wording does not here, or anywhere else, cause the Mining Recorder to hone in on this particular boundary in order to determine whether the exact location has been accurately or more particularly adequately depicted.

Section 75 allows the tribunal or the Minister to inspect or order the inspection of a mining claim for purposes of determining whether there has been compliance with the legislation. This power rests in the tribunal for time frames similar to those found in the dispute provisions in section 48.

The Minister's powers are not limited but extend to the lifetime of the claim, as provided by subsection 76(5). There is some ambiguity within these provisions in that they suggest that invalidity is caused by problems with the staking, which can be ascertained through inspection. Subsection 75(1) specifically deals with inspection to ascertain whether the staking has been carried out in the prescribed manner, but subsection 76(5) refers to challenge by the Minister of the validity of a mining claim at any time.

Subsection 71(2), except if otherwise challenged by the Minister, conclusively deems the staking out *and recording* of a claim in accordance with the legislative requirements if one year has elapsed or the first unit of assessment work has been performed and filed. This one year limitation on disputes is extended to the realm of inspections on the part of the Minister or tribunal [s. 75(1) & 76(5)], except that the Minister is able to challenge the *validity* of a claim during its lifetime.

Mr. Leadbetter asserted in his affidavit that it was his intent in November, 2002, to stake all of the land under water which had come open for staking. This is not particularly helpful as he actually staked the lands coming open within these two M.L.O.s over the course of several years. He staked Mining Claim SSM-1235757 in November, 2002 and staked a large claim to the west encompassing the lands under water and surrounding open lands in 2003. He staked lands under water within former patents SSM-18641 and 18642 in 2006. There is no indication that his statement was intended to mislead the tribunal, nor is the tribunal inclined to find that he did. Perhaps his statement was meant to reflect the naming of the lands under water at this location in the original M.L.O. and Gazette as Mildred Lake. Given that the land under water within former SSM-52476 is referred to as Lena Creek, it may well be that by stating that he sought to encompass in his staking all of the open land under the water of Mildred Lake, it can be understood to mean all of the open land under water within SSM-18639.

The tribunal prefers to place no weight on the statements in Mr. Leadbetter's affidavit concerning his intent. There is considerable ambiguity as to what is meant by Mildred Lake. Moreover, whatever Mr. Leadbetter *intended* to stake must be supported by the sketch

accompanying his application to record, however remotely. Finally, his stated intentions in his affidavit come only with the benefit of hindsight. The best evidence is that created at the time of recording, namely, the sketch itself.

On the first page of his application to record, five claim groups are listed. Notwithstanding that Chabanel is an unsurveyed township, Mr. Leadbetter completed the column reserved to provide information on parts of lots and concessions within surveyed townships. Mining Claim SSM-1235757 mentions only patented former mining claims SSM-52477 and 52478 but not SSM-18639. An abbreviated mention is unclear whether it refers to one or two M.L.O.s, encompassing the south end of Mildred Lake.

Of the five claim groups listed, two others also involve staking of land under water under former M.L.O.s listed in the May 28, 2002 Gazette. Mining claim SSM-1235747 lists all of the former mining claim numbers which correspond with the five M.L.O.s encompassing Lena Lake. Mining claim SSM-1235759 which ostensibly was to have encompassed the lands under water of two former M.L.O.s for Arliss or Francis Lake, lists only nine of the twelve former mining claim numbers corresponding with the M.L.O.s listed in the Gazette and lists a tenth which does not appear at all.

This is information which is not required on the application for unsurveyed territory. Similar to the problems with the sketch, there are clearly errors and possible omissions in this information. It *could* have served a useful purpose to the Provincial Mining Recorder to clarify the area under staking.

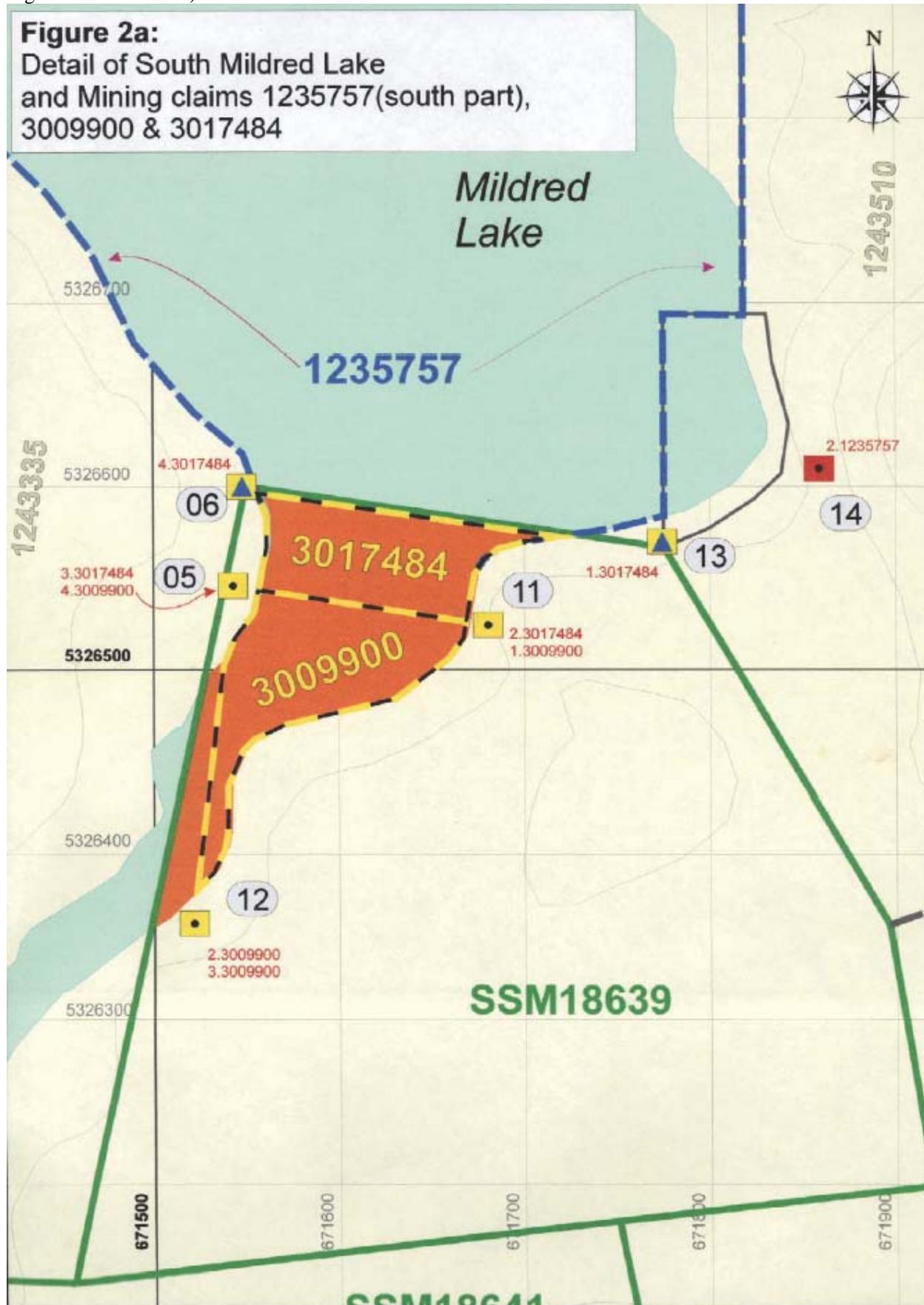
Having to go back through old M.L.O.s to determine the extent of what is meant by a statement not required at the time of recording should not govern the extent of Mr. Leadbetter's staking. It is simply too remote, too nebulous and open to many more questions than answers. An error made in the context of providing information which is not required, namely the failure to name SSM-18639 on the first page cannot be taken as definitively setting out the area under staking. The tribunal finds that such information may be used for purposes of eliciting clarification on the part of the Provincial Mining Recorder, but will not be used to deprive the staker of that to which he may otherwise be legally entitled.

f) *Inspection & Evidence*

Inspection

At the direction of the tribunal, Mr. Michael Weirmeir conducted an inspection of Mining Claim SSM-1235757 and the filed only Pele Diamond claims which had been staked in April, 2006, by Mr. Richard Daigle. Mr. Weirmeir is a former Mining Recorder, now a private consultant, who was recognized as being an expert in mining lands administration. His evidence was given as the tribunal's own witness. His report was filed as an exhibit.

Figure 2a is an enlargement of the relevant portions of the map produced by Mr. Weirmeir following his ordered inspection of the three mining claims, conducted on November 8, 2006 (being Part 2, Figure 2a of Exhibit 4):



Through this inspection, several discrepancies became apparent. Although Mr. Leadbetter's sketch shows his #2 post in the vicinity of station 13, it was in fact found further north and east at station 14. Mr. Leadbetter's second witness post could not be located so it is merely believed to have been in the vicinity of station 06 of Mr. Weirmeir's map. The first Pele Diamond claim, filed only 3009900 was staked by using three posts, at stations 11, 12 and 05, with the #2 and #3 posts both being located at station 12. Subsequently, the staker on behalf of Pele Diamond staked filed only claim 3017484, as depicted by stations 13, 11, 05 and 06.

As can be seen from Figure 2A, this inspection reveals that Pele Diamond's staking of its two small mining claims within SSM-18639 did not encompass all of the land under water within patented former mining claim SSM-18639 along its boundary with former patented mining claim SSM-52476. A small sliver of land remained unstaked.

The presence of yet another, even smaller area of land open for staking which is surrounded by land or land under water not open for staking underscores the further potential problems created when old mining licences of occupation come open for land under water which have almost no surface area, being river or stream beds.

Witnesses

The evidence of the two witnesses as experts in mining lands administration was, in retrospect, of limited assistance and will not be reviewed in detail.

As a former Mining Recorder, Mr. Weirmeir was in a position to provide considerable expertise in mining lands administration. Given that he carried out his inspection at the direction of the tribunal, he was able to provide information on discrepancies between the ground and the sketch, such as Mr. Leadbetter's second line post which could not be located or the location of his #2 post further north than was shown on the sketch. Mr. Leadbetter's #2 post should have been in the vicinity of a survey pin located at his station 13, which he presumed to be the northeast corner of SSM-18639; instead the #2 post was found at station 14, located to the north and east. Of most assistance was Mr. Weirmeir's discovery that in attempting to stake all of the lands under water within SSM-18639, the two Pele Diamond Filed Only Mining Claims failed to encompass a small sliver of lands under water along the boundary between SSM-18639 and 52476.

While Mr. Bailey's experience as a former acting mining recorder proved too remote under the circumstances to be of assistance, he did bring certain documentary evidence filed by Pele Diamond to the tribunal's attention. The Mining Land Tenure Map for Chabanel Township as of May 5, 2004, a copy of which was filed with two assessment work reports filed with MNDM on behalf of Mousseau-Leadbetter [Ex. 5a, tabs 1 & 2, enlarged at tab 3; enlarged photocopy produced as Ex. 14a] shows a dotted line at the south end of Mining Claim SSM-1235757 which corresponds with the boundary between the former SSM-52477 and 18639. Also, page 5 of the Technical Report on the Leadbetter Project conducted for Dianor Resources Inc. [ex 5a, tab 8], lists the various unpatented mining claims in Chabanel township. The area for Mining Claim SSM-1235757 is shown as 31.15 hectares. Based upon the original M.L.O.s, the total area of lands under water of SSM-52477 and 52478 is 34.47 hectares, which does not include the disputed 1.84 hectares within 18639.

The two individuals qualified by the tribunal to give opinion evidence in mining lands administration were specifically precluded from giving evidence on Mr. Leadbetter's intentions. The evidence did stray into the matter of intention and the proceeding became disjointed

through hearing numerous objections. Mr. Weirmeir also gave evidence of how he would have treated the information in Mr. Leadbetter's application to record and sketch and in particular how it would have caused him to ask more questions of clarification, that it raised more questions than provided answers.

What is clear now in these appeals, is that the gap in prescribed staking standards governing this situation was material at the time the staking took place, in the information thought relevant to be captured in the sketch and at the time the application was considered for recording by the Provincial Mining Recorder. Mr. Roy Spooner, the Provincial Mining Recorder who, in 2006, considered whether there was any open lands under water when the Pele Diamond two Filed Only claims were submitted for recording was first confronted with the gap in the legislation. There is no evidence that anyone in the Provincial Recording Office realized its significance prior to 2006. As a consequence, Mr. Spooner sought some applicable legislative authority to direct how he should come to a decision as to what constituted the southern boundary of Mining Claim SSM-1235757. Both Mr. Weirmeir and Mr. Bailey understood this issue with the benefit of hindsight. They had the benefit of Mr. Spooner's perspective and his approach to the situation. With this in hand, they were able to suggest questions of clarification should have been asked at the time of recording.

This is the situation at the material time. The legislation provided no direction to the staker on the ground. Everything required on the ground for an adequate staking was addressed in the sketch. The sketch is of mixed quality. It provides considerable detail in certain areas, and less than adequate detail in others. It contains errors and inaccuracies, particularly in depicting the shoreline to water boundary as between existing alienated interests and open areas. It is erroneous in that it fails to accurately reflect a stretch of shoreline, or perhaps omits a level of desirable detail, which the passage of time has revealed to be material in these appeals. It is ambiguous at the location or locations which analysis has revealed will actually matter, being where the boundary leaves the shoreline to cross open water and purports to bisect two areas of lands under water the whole of which are coterminous with lands not open for staking.

g) *Mining Recorder's Reasoning & Applying Provisions by Analogy*

This is a hearing de novo and the Provincial Mining Recorder's reasons do not play a role in the tribunal's findings. However, in this case, the Provincial Mining Recorder's analysis does shed some light on just how difficult this analysis has been. He went to inordinate lengths in his attempt to make some sense of Mr. Leadbetter's intent when staking Mining Claim SSM-1235757. It is one approach which offers some accord with existing principles under the legislation.

Not surprisingly, the Recorder was unable to find clear direction within the **Mining Act** or O. Reg. 6/96 for the staking of what he characterized as an irregular area to allow him to conclusively determine the mining claim's boundaries. He instead inferred that the **Mining Act** provided authority through provisions of s.s. 110(6) empowering him to make orders for the marking of boundaries, and through s. 95 being Ministerial delegated authority for perimeter surveys, for him to determine Mr. Leadbetter's intentions regarding the location of the southern boundary of the claim.

The Recorder concluded, through analysis of the scale depicted on the sketch accompanying the application to record, that Mr. Leadbetter had intended to stake a considerable portion of the lands under waters found within former mining claim SSM-18639. His finding placed Mining Claim SSM-1235757 a distance of 190 metres south of the boundary of SSM- 18639 with SSM-52477.

Based on the extent of the overlap and the precedent set out in the tribunal decision of **Jones v. Battle Mountain & MNDM**, (December 22, 1997) MA 024-96 (unreported), the Recorder determined that he would not allow the recording of the non-overlapping portion of Daigle's filed only claim 3009900 because more than 50% of it was involved in the overlap.

The discretion exercised by the Mining Recorder pursuant to section 95 involving consent to perimeter surveys is a delegated power of the Minister. It is well established that the tribunal cannot hear appeals from decisions of the Minister (see for example, **Wallbridge Mining Company Limited v. MNDM & Inco Limited**, (unreported) MA 040-99 July 8, 2002). Assuming such powers are available to the Provincial Mining Recorder, it is highly questionable whether the tribunal could resort to that provision. However, as of the time of that decision, section 28(b) of the **Interpretation Act**, R.S.O. 1990, c.I.11 implied that the Provincial Mining Recorder had the power to make such necessary determinations as to what constituted compliant staking and an application to record which complied with all of the requirements of the legislation. This power is now found in section 78 of the **Legislation Act, 2006**, S.O. 2006, c. 21, Sched. F.

h) Purpose of Legislation

It is understood within our judicial system that the courts and statutory decision makers have no jurisdiction to cure gaps in legislation. While the legislative gap in the case of staking lands under water involving old mining licences of occupation may be inadvertent, there is always the possibility that it is intentional on the part of the legislators.

One approach which is taken in such cases is to examine the overall purpose of the legislation.

The general purpose of the **Mining Act** is found in section 2 which states that it is "to encourage prospecting, staking and exploration for the development of minerals...". Acquisition of mining claims through staking and the performance of assessment work is balanced with the right to challenge a mining claim. As discussed above, the curative and deeming provisions provide no direction is provided concerning a challenge not to the validity of a mining claim but what is encompassed within it.

The exploration portion of the purpose of the legislation deals with the performance of prescribed assessment. Performance of the first unit of assessment work removes the claim from challenge by dispute and from ordering an inspection by the Minister or tribunal for purposes of determining compliance with the legislation. These relatively new provisions, [S.O. 1989, c. 62] were enacted to ensure a degree of security of tenure upon meeting certain conditions.

Prescribed assessment work must take place within regulated time frames. The assessment work requirements found in O. Reg. 6/96, as amended, presuppose mining claim units of 16 hectares. All assessment work requirements are based upon 16 hectare units. There is no provision for reduction of assessment work if the claim is less than 16 hectares. Rather, subsection 81(16) which governs making applications for lease under the **Act**, makes provision for performance of additional assessment work or payment of money in lieu for a claim unit which exceeds the prescribed area by more than 15 per cent.

The assessment work may entail eligible physical work, which is comprised of manual and mechanical overburden stripping, bedrock trenching, shaft sinking, driving adits, open

cutting, digging pits and recutting boundary claim lines once every five years [not applicable when boundaries need not be blazed] It may entail a geotechnical survey relating to geological, geochemical, geophysical, airborne geophysical or regional survey work [s 10 - 15]. It may entail exploratory drilling by core or non-core method [s.16].

Whatever else is meant by required assessment work, it surely must be required to be meaningful, keeping in mind the overall purpose of furthering exploration for minerals. One wonders how meaningful required assessment work could be on an area of substantially less than one unit in size involving lands under water, wholly coterminous with land held by another. Access would be a problem, particularly if the relationship with the adjoining holders is not cooperative or amicable. Activity could be a problem, given that the lands under water themselves would only be accessible when the water is frozen. Running grids for purposes of conducting surveys would be challenging; at best, the shoreline could be marked with monuments at required intervals, but given the lack of linear configuration of a shoreline, this work would likely be highly marginal and of limited use.

Fractional areas are addressed in subsection 97(2). This provision comes into play when a survey is conducted before a lease or licence of occupation is issued. When a fraction or gore is discovered, the Minister may simply deem it to be part of the surrounding claim or claims if there is apparent a manifest intention to have included it in the original staking by one single claim holder. Where there is more than one holder of surrounding claims, the Minister is to withdraw such fraction or gore pending a report of the Surveyor General upon receipt of which he may award it to either or both of the surrounding holders of other claims, or he may lease it, sell it or otherwise dispose of it as he sees fit.

Subsection 97(2) is pertinent to this discussion in one other respect. Counsel for the Ministry asked that Mousseau-Leadbetter not be given a greater area than that which was staked. This reflects a fundamental principle under this legislation concerning staking in unsurveyed territory, namely that the staker acquires the right to that which is staked, or in this case shown on the sketch, and cannot be awarded more than those lands under staking. Subsection 97(2) is the one departure from this principle and is one which may occur well after the staking has occurred, namely upon a survey prior to issuance of a lease disclosing that a fraction or gore exists. No outcome contemplated in this discussion concerning the purpose of the legislation would be allowed to undermine this principle.

Counsel on behalf of the Ministry asked how small should be too small for a mining claim. This was posed in connection with the issue of whether to allow the Pele Diamond non-overlapping portion of its southerly overlapping Filed Only claim. However, the question is relevant for examining the overall purpose of the legislation. There is provision for the Minister to withdraw lands from staking, generally [s. 35] in addition to after discovering a fractional area pursuant to subsection 97(2).

As a general principle, however, there is nothing in the legislation addressing the withdrawal of forfeited or surrendered M.L.O. lands under water indefinitely. There is no provision for placing such lands in abeyance until such time as the surrounding lands may be forfeit or are surrendered to the Crown. There is certainly no provision whatsoever for the tribunal to make any such withdrawal order. The circumstances under which lands should be withdrawn are policy decisions for the Minister to assess and determine. Discussion leading up to such a policy, if implemented, could include whether such lands under water should be withdrawn indefinitely due to a size which is not viable or practical to develop, withdrawn until the surrounding lands come open

to create a viable area for staking or even to sell, lease or otherwise dispose of to surrounding interest holder(s) at a specified time or under specified circumstances.

Currently, there is nothing in the overall legislative requirements to strictly preclude the staking of multiple, miniscule mining claims. With no rules on how to carve up the open area which extended from the north end of SSM-52478 to SSM-18642, one runs the risk in unsurveyed territory, not only of overlapping miniscule mining claims but of intermittent miniscule gaps of land under water which remain open to staking. In these appeals, if the tribunal were find that it agrees with the findings of the Mining Recorder that Mining Claim SSM-1235757 encompasses *some but not all* of the open waters within SSM-18639, if it were to allow the recording of the non-overlapping portion of Filed Only 3009900, there would remain the small sliver open lands under water along the boundary of SSM-52476. This is regarded as an absurd result which serves no useful purpose to the legislative scheme as a whole.

When examined as a whole, the various provisions point to an overall intent to uphold the validity of staking where there is no intent to mislead or improper conduct on the part of the staker. Claims are removed from challenge under certain circumstances and unless their actual validity is an issue, not even the Minister may challenge them. Security of tenure is featured in the legislative provisions discussed. Viability of exploration to support mineral discovery is also highlighted.

How, then, does one deal with extent of a claim boundary rather than overall validity of the claim itself?

This leads to the question of what mining-related purpose this miniscule tract of land under water could actually be used for. The obvious conclusion is to gain some sort of economic advantage from the efforts of the major land-holder in the area. While business is business and there is nothing which disallows operating in this fashion, the principles of the **Mining Act** should not be so subverted, when there is a choice which is what the tribunal finds itself faced with in these appeals. Section 2 of the **Mining Act** sets out that the purpose of the legislation is to *encourage* prospecting, staking and exploration for the development of mineral resources. The tribunal can think of nothing less likely to encourage this objective than making a finding against the original staker in this case. The existing staking standards did not raise this issue in any meaningful fashion. The Provincial Mining Recorder did not raise it as an issue at the time of recording. The staker himself, on the basis that he did all that was asked of him in the circumstances, should not be deprived of this miniscule area of land under water on the basis that he cannot definitively prove through his actions (none of which are raised by the legislation itself at the relevant time) that it was land under staking at the relevant time.

i) Real Merits and Substantial Justice

It is found to be of significance that the shortcomings in quality of the sketch in its detail and ambiguity, all internally consistent and not particular to the location at issue, were not raised at the time of recording. Due to the gap in staking standards on the ground, any indicators which would have served to focus the mind of the staker to this location or served to focus the mind of the Provincial Mining Recorder to depict this crucial boundary area, were absent in the legislation itself.

The tribunal finds that the quality of the sketch must be evaluated in light of this finding and tempered by the purposes supported by the brief analysis of the **Mining Act**. There is a preference to support security of tenure where there has been no intentional violation of staking

principles. There is not even an unintentional violation or omission of staking standards in Leadbetter's staking. There is a preference for mining claim units of viable size. Doubt has been raised concerning the total acreage under staking in this claim based upon the assessment work report filed. The area shown is insufficient to include even that portion of Mining Claim SSM-1235757 which is not disputed.

The tribunal is required to make its findings on the real merits and substantial justice of the case, pursuant to section 121. This section does not permit the tribunal to create a legislative scheme where none exists [see for example **581355 Ontario Ltd. v. 80 St. Clair Avenue East (Tenants of)** (1991), 49 O.A.C. 74 (Ont. Div. Ct.)] nor does it permit the tribunal to fill in legislative gaps. This provision, does, however, permit the tribunal to assess the equities of the case before it.

Any vagueness in the accompanying sketch must be weighed in light of what was known at the relevant times based upon the real merits and justice of the case. The staker complied with all existing staking standards on the ground. Inadequacies and gaps, which became apparent only in hindsight should not govern the outcome in these appeals. The material times for determining the area under staking are the time of staking, preparation of the sketch and consideration of the application to record. The Provincial Mining Recorder did not question the extent of the southern boundary or point of bisection of the open area because the prescribed staking standards did not raise it as an issue at the time. The vagueness and adequacy of the sketch must be assessed in light of what was known at the time of recording.

A careful examination of the style of drafting and specific details found on the sketch reveals that Mining Claim SSM-1235757 encompasses the southern shoreline boundary within patented former mining claim SSM-18639. There is bisection of the open water which runs directly south from the second witness post, which corresponds to the western boundary of SSM-18639. Although vague, missing detail and containing errors in depicting the shoreline, the finding that the boundary crosses open water at the westerly limit of SSM-18639 is consistent with the style used throughout the sketch.

The equities in this case favour the original staker. A purposive analysis of the **Mining Act** reveals an overall intent to uphold an original staking, where there was no intent to mislead and all attempts are made to comply with legislative requirements. There is within the legislative scheme a preference for a viable-sized claim for purposes of performance of assessment work to further mineral exploration work.

The tribunal is satisfied that the sketch accompanying the application to record for Mining Claim SSM-1235757 can be interpreted to encompass all of the open lands under water within former patented mining claim SSM-18639 and in the very narrow circumstances of this case, should be so interpreted.

Mining Claim SSM-1235757 will be ordered to encompass all of the open lands under water within SSM-18639. Pele Diamond's appeals will be dismissed.

Exclusion of Time

Pursuant to subsection 67(2) of the **Mining Act**, the time during which Mining Claim SSM-1235757 was pending before the tribunal, being the 18th day of April, 2006 to the 4th day of November, 2008, a total of 932 days, will be excluded in computing time within which work upon the Mining Claim is to be performed and filed.

Pursuant to subsection 67(3) of the **Mining Act**, June 11, 2013 is deemed to be the date for the performance and filing of the next unit(s) of assessment work on Mining Claim SSM-1235757.

Conclusion

Pele Diamond's appeals concerning its Filed Only mining claims 3009900 and 3017484 will be dismissed.

Mining Claim SSM-1235757 will be delineated on the records and maps within the Provincial Recording Office as encompassing all of the lands under water within patented former mining claim SSM-18639.

No costs shall be payable by any party to these appeals.