

File No. MA 018-04

L. Kamerman)
Mining and Lands Commissioner)

Tuesday, the 21st day
of March, 2006.

THE MINING ACT

IN THE MATTER OF

Mining Claim KRL-1244579, situate in the Township of Dome, in the Red Lake Mining Division, staked and recorded by Mr. Antony James Maciejewski on the 3rd day of June, 2002 and transferred to Goldcorp Inc. on the 2nd day of June, 2004, (hereinafter referred to as the “Maciejewski Transferred Mining Claim”);

AND IN THE MATTER OF

Mining Claim KRL-1244583, situate in the Township of Dome, in the Red Lake Mining Division, staked and recorded by Mr. Gerry Donald Strilchuk on the 3rd day of June, 2002 and recorded in the name of Goldcorp Inc. on the 3rd day of June, 2004, (hereinafter referred to as the “Strilchuk Transferred Mining Claim”);

AND IN THE MATTER OF

Filed Only Mining Claim 1230305, situate in the Township of Dome, in the Red Lake Mining Division, staked by Mr. David J. Meunier and to have been recorded in the name of David J. Meunier and cancelled by the Provincial Mining Recorder on the 26th day of May, 2004, (hereinafter referred to as the “Meunier Mining Claim”) cancelled by the Provincial Mining Recorder on the 26th day of May, 2004;

B E T W E E N:

DAVID J. MEUNIER

Appellant

- and -

ANTONY JAMES MACIEJEWSKI

Respondent of the First Part

- and -

GERRY DONALD STRILCHUK

Respondent of the Second Part

- and -

GOLDCORP INC.

Party of the Third Part

- and -

TREVOR JERSEY BOTEL

Party of the Fourth Part

AND IN THE MATTER OF

An appeal pursuant to subsection 112(1) of the **Mining Act** from the decision of the Provincial Mining Recorder, dated the 26th day of May, 2004, for a declaration that the Maciejewski Transferred Mining Claim and the Strilchuk Transferred Mining Claim be declared invalid and for the recording of the Filed Only Mining Claim;

AND IN THE MATTER OF

Mining Claim KRL-1244580, situate in the Township of Dome, in the Red Lake Mining Division, recorded in the name of Trevor Jersey Botel on the 3rd day of June, 2002 and recorded in the name of Goldcorp Inc. on the 16th day of January, 2004, (hereinafter referred to as the "Botel Transferred Mining Claim").

ORDER

WHEREAS this appeal was received on the 17th day of June, 2004 and heard in Thunder Bay, Red Lake and Toronto on the 17th and 18th days of January, 2005, the 6th and 7th days of June, 2005 and the 15th and 16th days of August, 2005;

UPON hearing from the parties, reading the documentation filed and viewing the videotapes filed;

1. IT IS ORDERED that the appeal of David Meunier be and is hereby allowed in part, in so far as it concerns the Maciejewski Mining Claim and dismissed in part, in so far as it concerns the Strilchuk Mining Claim.

2. IT IS FURTHER ORDERED that the Maciejewski Mining Claim KRL-1244579, situate in the Township of Dome in the Red Lake Mining Division, be and is hereby cancelled.

3. IT IS FURTHER ORDERED that the Order of the Provincial Mining Recorder dated the 26th day of May, 2006, which cancelled the Meunier Mining Claim be and is hereby rescinded **AND IT IS FURTHER ORDERED THAT** part of the "filed only" Meunier Mining Claim KRL-1230305, situate in the Township of Dome, in the Red Lake Mining Division, which does not overlap the Strilchuk Mining Claim KRL-1244583 be and is hereby recorded, effective the date of filing, being the 5th day of June, 2002.

4. IT IS FURTHER ORDERED that the overlap between the eastern boundary of the Meunier Mining Claim KRL-1230305 and the western boundary of the Botel Mining Claim

KRL-1244580 be and is hereby to form part of the aforementioned Meunier Mining Claim, having been found to have an earlier completion time, within the meaning of subsection 44(2) of the **Mining Act**, **AND THE PROVINCIAL MINING RECORDER IS DIRECTED** to amend the Application to Record of the Botel Mining Claim KRL-1244580 accordingly.

5. IT IS FURTHER ORDERED THAT pursuant to subsection 129(2) of the **Mining Act**, this Order shall take effect on the 20th day of April, 2006.

6. IT IS FURTHER ORDERED that the notation of "Pending Proceedings", which is recorded on the abstract of the Strilchuk Mining Claim KRL-1244583, to be effective from the 17th day of June, 2004, be removed from the abstract of Mining Claim KRL-1244583.

7. IT IS FURTHER ORDERED THAT the time during which the Strilchuk Mining Claim KRL-1244583 was under pending proceedings before this tribunal, being the 17th day of June, 2004, until the 20th day of April, 2006, a total of 673 days, be excluded in computing time within which work upon the Strilchuk Mining Claim KRL-1244583 is to be performed.

8. IT IS FURTHER ORDERED THAT the 8th day of January, 2008 be fixed as the date by which the next five units of assessment work, as set out in Schedule "A" attached to this Order, must be performed and filed on Mining Claim KRL-1244583, pursuant to subsection 67(3) of the **Mining Act** and all subsequent anniversary dates are deemed to be January 8 pursuant to subsection 67(4) of the **Mining Act**.

9. IT IS FURTHER ORDERED THAT the time between the filing of the Meunier Mining Claim KRL-1230305 and the effective date of this Order, being the 5th day of June, 2002, to the 20th day of April, 2006, a total of 1,416 days, be excluded in computing time within which work upon the Meunier Mining Claim KRL-1230305 is to be performed.

10. IT IS FURTHER ORDERED THAT the 21st day of April, 2008, be fixed as the date by which the next five units of prescribed assessment work, as set out in Schedule "A" attached to this Order, must be performed and filed on Mining Claim KRL-1230305, pursuant to subsection 67(3) of the **Mining Act** and all subsequent anniversary dates are deemed to be April 21 pursuant to subsection 67(4) of the **Mining Act**.

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 in accordance with the aforementioned subsection 129(4).

Reasons for this Order are attached.

DATED this 21st day of March, 2006.

Original signed by

L. Kamerman
MINING AND LANDS COMMISSIONER

SCHEDULE "A"

Mining Claim #	New Due Date
KRL 1244583	January 8, 2008
KRL 1230305	April 21, 2008

File No. MA 018-04

L. Kamerman)
Mining and Lands Commissioner) Tuesday, the 21st day
of March, 2006.

THE MINING ACT

IN THE MATTER OF

Mining Claim KRL-1244579, situate in the Township of Dome, in the Red Lake Mining Division, staked and recorded by Mr. Antony James Maciejewski on the 3rd day of June, 2002 and transferred to Goldcorp Inc. on the 2nd day of June, 2004, (hereinafter referred to as the “Maciejewski Transferred Mining Claim”);

AND IN THE MATTER OF

Mining Claim KRL-1244583, situate in the Township of Dome, in the Red Lake Mining Division, staked and recorded by Mr. Gerry Donald Strilchuk on the 3rd day of June, 2002 and recorded in the name of Goldcorp Inc. on the 3rd day of June, 2004, (hereinafter referred to as the “Strilchuk Transferred Mining Claim”);

AND IN THE MATTER OF

Filed Only Mining Claim 1230305, situate in the Township of Dome, in the Red Lake Mining Division, staked by Mr. David J. Meunier and to have been recorded in the name of David J. Meunier and cancelled by the Provincial Mining Recorder on the 26th day of May, 2004, (hereinafter referred to as the “Meunier Mining Claim”) cancelled by the Provincial Mining Recorder on the 26th day of May, 2004;

B E T W E E N:

DAVID J. MEUNIER
Appellant
- and -
ANTONY JAMES MACIEJEWSKI
Respondent of the First Part
- and -
GERRY DONALD STRILCHUK
Respondent of the Second Part
- and -
GOLDCORP INC.
Party of the Third Part

- and -

TREVOR JERSEY BOTEL

Party of the Fourth Part

AND IN THE MATTER OF

An appeal pursuant to subsection 112(1) of the **Mining Act** from the decision of the Provincial Mining Recorder, dated the 26th day of May, 2004, for a declaration that the Maciejewski Transferred Mining Claim and the Strilchuk Transferred Mining Claim be declared invalid and for the recording of the Filed Only Mining Claim;

AND IN THE MATTER OF

Mining Claim KRL-1244580, situate in the Township of Dome, in the Red Lake Mining Division, recorded in the name of Trevor Jersey Botel on the 3rd day of June, 2002 and recorded in the name of Goldcorp Inc. on the 16th day of January, 2004, (hereinafter referred to as the "Botel Transferred Mining Claim").

REASONS

This matter was heard over the course of six days in Thunder Bay, Red Lake and Toronto, Ontario on the 17th and 18th days of January, 2005, the 6th and 7th days of June, 2005 and on the 15th and 16th day of August, 2005, respectively.

Mr. David Muenier, the appellant, was represented by his lawyer, Mr. Lorenzo Girones. Mr. Antony ("Tony") Maciejewski and Mr. Gerry Strilchuk, respondents of the first and second parts, represented themselves. Goldcorp Inc., which is the current holder of the Maciejewski, Strilchuk and Botel Mining Claims, did not appear.

It was determined that Mining Claim KRL-1244580, which was staked and recorded by Trevor Botel might be affected by the potential outcome in this matter. The Botel Mining Claim overlaps a small portion of the northwest corner of the Meunier Mining Claim. It was further determined that Goldcorp is the recorded holder of Mining Claim KRL-1244580 and is aware of these proceedings, notwithstanding its decision to not attend. The tribunal added Mr. Botel as a party to these proceedings on June 10, 2005 and added the Botel Mining Claim to the title of proceedings.

Background

On June 1, 2002, a portion of lands under the waters of Red Lake in the Township of Dome came open for staking at 9 a.m. central daylight saving time. Although partially organized, for purposes of this appeal the lands are located within unorganized territory and as such, there was no requirement that mining claim units be staked from a fixed location. The boundaries of the Maciejewski, Strilchuk and Botel Mining Claims did not overlap, as there had been a prior agreement to not compete. However, the filed only Mining Claim of Mr. Meunier overlapped all three of the recorded Mining Claims.

There were a number of staking teams located along Rahill Beach or Rahill Bay on the morning of June 1, 2002. Those lands which comprise the Maciejewski, Meunier and Botel Mining Claims are located along the north shore of the Bay where there had been approximately 1175 metres running east to west of land under water available to be staked. That of Mr. Strilchuk was staked from a location to the south and east of Rahill Bay.

Mr. Maciejewski had a completion time of 9:04:02 a.m.; Mr. Strilchuk of 9:02:30 a.m.; Mr. Botel of 9:04:11 a.m. and Mr. Meunier of 9:04:23 a.m.. The Mining Claims of Messers Maciejewski, Strilchuk and Botel were recorded, while that of Mr. Meunier was not, having a later completion time.

The original Meunier dispute against the recording of the Maciejewski and Strilchuk Mining Claims was dismissed and the Meunier Mining Claim was cancelled. The history of Mr. Botel's Mining Claim is largely unknown. There was evidence of a dispute, but it appears to have been withdrawn or settled.

Mr. Maciejewski staked a one-unit mining claim at the western-most portion of Rahill Beach/Bay, with an eastern boundary of 450 metres, a southern boundary of 550 metres and a western boundary of 100 metres. The northern boundary is circumscribed by the shoreline which, as can be gleaned from the dimensions, cuts deeply into the western half of the Mining Claim.

The #1 post of Mr. Meunier's Mining Claim, comprised of two units, is approximately 100 metres due west of that of Mr. Maciejewski, and overlaps the eastern half of the Maciejewski Mining Claim. The Meunier Mining Claim has an eastern boundary of 800 metres, a southern boundary of 400 metres and a western boundary of 550 metres. Again, the discrepancy between the eastern and western boundaries is due to the northern boundary shoreline. On the east side of Mr. Meunier's Mining Claim is that of Mr. Botel, again, having an overlap of approximately 100 metres. Mr. Botel's Mining Claim is a two unit claim in the eastern portion of Rahill Beach/Bay, whose dimensions take up the whole of the available northern area not claimed by Mr. Maciejewski.

Mr. Strilchuk staked his claim from shore some distance south of Rahill Bay, from an area of land shown on the Mining Land Tenure Map as Cable Peninsula. Mr. Strilchuk was able to stake from the one location, which was his #2 post, and he witnessed the three other posts. His is a six unit claim. The north east corner of Mr. Strilchuk's Mining Claim coincides with the southern half of Mr. Meunier's Mining Claim, so that the Meunier Mining Claim circumscribes an area of one unit in size in the corner of Mr. Strilchuk's claim. The northern boundary of Mr. Strilchuk's Mining Claim also coincides with approximately 100 metres of Mr. Botel's southern boundary and all of Mr. Maciejewski's southern boundary.

There were other stakers in the vicinity during the staking rush. Two teams who were directed by Mr. Michael Desmeules gave evidence. One of those teams, of which Mr. Desmeules was a part, was staking from the same location as Mr. Botel. The other, comprised of Mr. Kehoe and Mr. Lamothe, was staking from the same location as Mr. Meunier. Mr. Kehoe can be seen on the videotape receiving instructions on a hand-held two way radio. As matters

unfolded on the videotape, it was apparent that these gentlemen were operating under similar time frames to Mr. Meunier's team.

Mr. Meunier's team operated a video camcorder which recorded the time leading up to the lands coming open at 9 a.m. This tape was the main piece of evidence relied upon on which Mr. Meunier based his assertion that Mr. Maciejewski commenced his staking prior to the lands coming open at 9 a.m. Shown on this tape was the global positioning system unit (GPS) and time which the Meunier team relied upon. The videotape itself shows time elapsed from the commencement of staking, so that it is possible to calculate the corresponding GPS or local time for all events shown on the videotape.

On the videotape, with between 40 and 50 seconds to go to 9 a.m., a boat was taped taking off from shore some distance away from a location later attributed to the #1 post and #2 witness post of Mr. Maciejewski's Mining Claim. There was no disagreement that it was Mr. Maciejewski who was observed.

In the course of the evidence presented by a significant number of witnesses, three factual issues were raised. The first was whether Mr. Maciejewski and Mr. Strilchuk had synchronized their watches "to the second" on the day prior to the staking or whether they merely compared times to ensure that they were around the same time. This evidence concerning the setting of Mr. Strilchuk's watch was key to the appeal of the recording of his mining claim, as it is the only available evidence that Mr. Strilchuk commenced his staking at a similar time to Mr. Maciejewski. The second was contradictory evidence from Mr. Maciejewski and Mr. Desmeules concerning whether they had synchronized their watches to satellite television on the evening before, May 30, 2002, in Mr. Maciejewski's home. The third was whether Mr. Desmeules was in fact observed speaking into a radio at the relevant time, or whether the times and instructions being heard over the two way radio operated by Mr. Kehoe in the video were received from someone else.

This third issue was only material insofar as it related to events at the Desmeules/Botel location, with evidence presented that Mr. Desmeules had not been observed using a two-way radio. The resulting conclusion which this evidence sought to support was that no one else in the vicinity had observed Mr. Maciejewski leaving prior to 9 a.m. local time.

The question of what time Mr. Maciejewski had in fact commenced his staking is the single most important issue in this appeal. If he commenced his staking prior to 9 a.m. central daylight saving time, the evidence raised the question of whether this was deliberate on his part. The tribunal further had its own issue, whether Mr. Maciejewski's staking, if found to have commenced early, or that of anyone staking, should be held to a strict standard of commencement, namely that of universal or "local time" which is supported by satellite technology. The opposite of this would be whether commencing a staking within minutes of opening time, albeit before lands open according to "local time" is permitted under section 121 of the **Mining Act**, according to the real merits and substantial justice of the case. The question which arises as a result of this early staking is whether Mr. Maciejewski or anyone staking should be held to a strict standard of commencement, namely that of universal time which is supported by satellite data.

A fourth issue arose in connection with the Botel Mining Claim. A second videotape was filed at the final convening of the hearing in Toronto in August, 2005. This tape purported to show segments of Mr. Botel's staking and was taken by his teammate and boat operator, Mr. Peter Irwin. Evidence from the videotape suggests that Mr. Botel's staking, instead of being completed at 9:04:11 a.m., as set out on the application to record, was not yet completed at 9:04:23 a.m.. Given that Mr. Meunier's staking was completed at 9:04:23 a.m., if accepted, this videotape would provide conclusive evidence that Mr. Meunier's staking had been completed prior to that of Mr. Botel. As such, if Mr. Maciejewski's Mining Claim is cancelled and Mr. Meunier's recorded, then for that portion for which there is an overlap between Meunier and Botel, it would follow that Mr. Meunier's staking would have priority.

Much was made of the synchronization of watches between Mr. Strilchuk and Mr. Maciejewski and between Mr. Maciejewski and Mr. Desmeules. In particular, the evidence of Mr. Maciejewski before the Provincial Mining Recorder (the "Recorder"), Mr. Roy Denomme, was raised. Mr. Denomme had used two types of recordings in the course of his hearing and that portion which would have captured the relevant testimony of Mr. Maciejewski was no longer available. Mr. Denomme had undertaken a trial with digital recording, and was dissatisfied with the result. Neither the recording nor the equipment was available any longer. During the course of the hearing, the evidence heard before Mr. Denomme was further disputed.

On this latter point, even the testimony concerning what did occur before the Recorder was in dispute, such as whether the tape could audibly be heard in the hearing. Similarly, there was no agreement as to what Mr. Denomme concluded, except with respect to the reference in his Order and Reasons.

Issues

1. What importance or relevance, if any, can be placed upon the purported synchronization of watches between Strilchuk and Maciejewski and Maciejewski and Desmeules?
2. Was it Mr. Desmeules who can be heard speaking on the two-way hand held radio with Mr. Kehoe? Does it matter whether or not it was him? What is the effect of the Irwin videotape on this question and on Mr. Irwin's evidence?
3. What is the best evidence as to the accurate time for when the lands came open for staking? Is the Meunier videotape and its purported recording of local time through use of the GPS unit reliable for purposes of this appeal?
4. If the best evidence of the time lands came open for staking is the Meunier videotape, it would follow that Mr. Maciejewski is captured on that tape as having commenced his staking before the lands came open according to "local time" or "universal time". Is the exact marking of time when lands come open for staking required, or could Mr. Maciejewski's early staking be saved by the provisions of section 121 that decisions of the Commissioner be on the real merits and substantial justice of the case, so long as Mr. Maciejewski's actions are not found to have been deliberate?

5. Does the Irwin videotape provide sufficient evidence that the Meunier Mining Claim was completed prior to the Botel Mining Claim, such that the eastern 100 metre portion should be awarded to Mr. Meunier?

Evidence

The operation of Global Positioning Systems or G.P.S was explained by **Dr. Bradley A. Wilson**, a local Thunder Bay specialist in geography and the use of radar imagery to measure structural aspects of the boreal forest. G.P.S. uses a set of two dozen satellites maintained and synchronized by N.A.S.A, each with two atomic clocks whose precision is to within one millionth of a second. The G.P.S receiver calculates the amount of time it takes for the signal to reach here from the satellite orbiting the earth. Most G.P.S. units require four satellites for triangulation to take place.

G.P.S units are in common usage now, but the cheaper ones are less accurate than the real time kinetic, being out by a fraction of a second. The self-synchronization ones are mid-range. Once a unit is turned on, it takes a minute to establish its position so that it can operate optimally. As it is initializing and continues to warm up, it improves its synchronization with the clocks on the satellites. The purpose of this synchronization is to improve on positional accuracy, but it does not detract from the accuracy of time displayed once initialization has taken place.

A legal description requires a better quality of G.P.S; one from a named major department store may not be able to provide the requisite precision. Positional accuracy can range, depending on the quality of the unit, within between 10 to 20 metres. Data loggers are of high quality with antennae, having average multiple signals, with positional accuracy of under a meter. The third is real time kinetic, used by the US military for very precise positioning, with accuracy of about a centimeter.

There were two teams at Mr. Meunier's #1 post location staking that day. Mr. Meunier's team consisted of himself as the staker; Mr. Kenneth Pye, who operated the hand-held GPS unit and the boat; Mr. Randy Burke, who operated the camcorder which was owned by Mr. Pye; and Mr. David Louis John Fenato, who was the driver of the land vehicle for purposes of recording. Also part of the team, according to Mr. Pye's testimony, was Mr. Peter Miner, although his role was not elaborated upon. The second team was Mr. Mike Lamothe and Mr. Michael Kehoe, who were operating under the instruction of Mr. Michael Desmeules. Mr. Desmeules was at another location and was, according to Mr. Kehoe and Mr. Desmeules, in radio contact with Mr. Kehoe.

The GPS unit used by Mr. Pye during the staking, which he brought to the hearing, was one of eight or ten units which he owns. Although there is a discrepancy in their quality, it does not interfere with the accuracy of time display, but rather is limited to the accuracy of location. Mr. Pye initialized and compared the GPS unit in question with others both in the week prior to staking and in the week after. However, he could not recall whether he had done so in the day immediately prior. On the day of staking, Mr. Pye had turned the GPS unit on one hour before commencement of staking to ensure that it was properly initialized. There was

consensus in the hearing among those present that the time shown on cable television, in this case Bell Expressvu, is accurate and reflects the same time shown on a GPS unit.

Mr. Pye could not recall whether the activity on June 1, 2003 took place during Central Standard Time or Central Daylight Time. He did confirm, however, that the GPS unit would have had to be adjusted manually, as it did not make the twice-yearly adjustment on its own.

In the intervening time, Mr. Pye had ran over the GPS unit with his truck. This had scratched the lens, but not otherwise interfered with the accuracy of its time display. Mr. Maciejewski challenged its accuracy after its mishap, but Mr. Pye maintained that either it would initialize or it would not; in his experience he had never seen a GPS which did not operate accurately. Mr. Maciejewski stated that his own unit of a similar type did not work after being struck by lightening, would not initialize and can only be shut down when the batteries are removed. He asserted that, like any mechanical device, it is susceptible to damage. The tribunal was able in the hearing to compare the time shown on Mr. Pye's GPS unit with the CBC Radio Dominion Observatory Time Signal, and found it to be accurate, within one second.

Mr. Burke operated the camcorder which captured events leading up to the commencement of staking, including the appearance of a boat leaving from the next bay, at a time which according to both evidence of several of the witnesses, was before the opening time of 9 a.m. It was his evidence, and there was nothing said to dissuade the tribunal of the truth of his statements, that with the exception of a three-second glitch at the commencement of his operation of the camcorder, he filmed continuously throughout until activity at the #1 and #2 Meunier posts was completed. He also indicated that the tape seen accurately reflects what he had taped. The videotape display indicated the time elapsed during taping and Mr. Burke confirmed that it had commenced at 0:00. However, the tape submitted stops at 11:20 elapsed VCR time, which is calculated to be approximately 9 a.m. GPS local time. This fact is also confirmed by the conversations taking place.

The videotape was watched a number of times throughout the course of the hearing and was described for the record. It was also stopped and frozen at various key intervals during the examination and cross-examination of witnesses. Mr. Pye testified that he instructed Mr. Burke to focus in on the GPS unit. The time shown on the GPS unit was 8:54:42 UTC time, with Greenwich Meridian Time being 13:54:42, this corresponding with 6:01 elapsed time on the camcorder screen.

Mr. Pye identified Mr. Kehoe as being in the boat adjacent at the Meunier staking. It was later established that Mr. Kehoe was the driver and Mr. Lamothe was the staker, acting under the direction of Mr. Desmeules, who was the boat operator for his staker, Luc Gagnon, at the same location as Trevor Botel. At one point, Mr. Kehoe was observed by Mr. Pye to have been holding a two-way radio in one hand and one hears the words "8:56:15" and "8:56:25". Mr. Pye explained that the Meunier and Lamothe/Desmeules teams did not synchronize their time, so that the observed discrepancy was due to this fact. In point of fact, the tribunal has reviewed this portion of the videotape and notes that the discrepancy was not large. Some of it may have been due to the time elapsed in speaking and further reaction time in response.

Mr. Pye stated that he observed a boat taking off prior to 9 a.m. This is shown on the videotape as occurring at between 10:26 and 10:33 elapsed VCR time, which corresponds with 8:59:08 and 8:59:15 local central daylight saving time. There is a reference to the driver being Tony, but his identity as Mr. Maciejewski only became known to several witnesses after the fact. Mr. Pye stated that it would have taken Mr. Maciejewski an additional minute or so to mark his #1 and #2 witness posts, although he admitted that he was not sure whether Mr. Maciejewski used tags in his staking or not.

Mr. Pye explained that it was not possible to capture again at that exact moment the GPS time to show how it corresponded to the boat seen taking off from down the lake prior to 9 a.m. The camera was being operated some 16 feet from where Mr. Pye was located in the boat with the GPS. Moreover, the time constraint was too tight, as Mr. Meunier's team was at that moment seconds away from commencing that staking. However, Mr. Girones, counsel for Mr. Meunier maintained, and the tribunal concurs, that it is possible to extrapolate quite readily from the GPS time shown as it related to the VCR time elapsed earlier in the videotape.

There was some discussion regarding the activities shown of Mr. Meunier on the tape, namely whether he was seen to be marking his post ahead of the commencement of his staking or whether he was just "air writing" in practice. Mr. Desmeules confirmed that many stakers do this sort of practice. He had instructed Mr. Kehoe to watch for that sort of activity, but Mr. Kehoe did not report back to him on it. Mr. Kehoe stated emphatically in his testimony that neither Mr. Lamothe nor Mr. Meunier marked their posts prior to the commencement of staking. When asked about that angle from which he was able to observe, Mr. Kehoe pointed out that due to his height, he had been able to see quite clearly. He also pointed out that he had no interest in the outcome of this matter and had no cause to deviate from the truth.

Mr. Desmeules had a contract to stake a claim on June 1, 2002 and was staking about 400 to 500 metres from the Meunier location. Mr. Desmeules confirmed that he was the individual in radio contact with Mr. Kehoe, who could be observed on the videotape speaking into a hand-held radio.

On the evening prior to the staking, Mr. Desmeules went to Mr. Maciejewski's home to ask what area he was interested in, much in the manner as is common in the industry. His main objective was to determine whether Mr. Maciejewski would be using a wristwatch or GPS to verify the nine o'clock start time. Mr. Desmeules stated that he was not concerned per se, but that it is common practice to set one's watch with the competition to avoid a dispute from occurring.

Mr. Desmeules stated that he distinctly remembered Mr. Maciejewski indicating that he would be using GPS. They also synchronized their watches with Bell Expressvu satellite TV. Mr. Maciejewski confirmed his ownership of a portable GPS unit, but he did not confirm its make. According to Mr. Desmeules, he synchronized his watch with Mr. Maciejewski, the satellite TV and his GPS, so that all coincided.

On June 1, Mr. Desmeules took his own time off his watch, but had his GPS unit nearby. He advised Mr. Kehoe of times over the radio. The use of GPS has only been common

in the industry over the last four or so years. Mr. Desmeules confirmed that it was his voice heard on the videotape speaking over the radio with Mr. Kehoe. During cross-examination, Mr. Desmeules stated that he and Mr. Trevor Botel, a competitive staker at his location, were taking their times from their watches. Although they did not synchronize their watches, the times were in fact identical.

Mr. Desmeules confirmed that he could be heard on the video at 10:24/25 VCR time stating that “Tony”, being Mr. Maciejewski, was on the move. Mr. Desmeules confirmed that he could physically see what was going on from his vantage point. He also confirmed that he instructed Mr. Kehoe not to allow Mr. Lamothe to commence staking because it was not yet 9 a.m.

The June 1, 2002 staking rush was the first Mr. Kehoe had experienced. At that time, he had been working for Mr. Desmeules during his days off from being an OPP officer from which he has since retired. Mr. Kehoe was working with the staker, Mr. Lamothe, and was charged with operating the boat. Mr. Kehoe was not in visual contact with Mr. Desmeules, because of the lay of the bush, but he was about 500 metres away and in constant radio contact.

Mr. Kehoe confirmed that an individual who was later identified as Mr. Maciejewski was observed taking off prior to 9 a.m. and that Mr. Desmeules could be heard over the radio saying “no go no go.” Mr. Kehoe explained that Mr. Maciejewski’s time was “way off” from the 9 a.m. opening time.

Mr. Maciejewski disputed the evidence of Mr. Desmeules as to what took place on the evening before staking at his home. Mr. Peter Irwin stated that he had been at Mr. Maciejewski’s home the evening before staking when Mr. Desmeules showed up. He did recall that Mr. Desmeules asked where Mr. Maciejewski would be staking. He did not recall any discussions about what boat Mr. Maciejewski would be using. He also could not recall that the two men synchronized their watches. Although he could see the television from where he was sitting, he could not really hear the conversation which took place. Mr. Girones brought a motion based upon **Browne v. Dunn** (1893), 6 R. 67, that questions of Mr. Irwin designed to impeach the testimony of Mr. Desmeules should properly have been put before Mr. Desmeules. It was determined that Mr. Desmeules could be recalled rather than discount the evidence of Mr. Irwin at that time. When recalled, Mr. Desmeules stated that on the night in question, Mr. Irwin had not been present, but had been present on another occasion involving a staking rush. Mr. Desmeules stated that he had both his watch and a GPS unit present with him on staking day, but used his watch, according to what he had agreed to with Mr. Maciejewski.

On June 1, 2002, Mr. Irwin could not recall that Mr. Desmeules was on the radio on that day. Both Mr. Gagnon and Mr. Botel started staking at the same time. However, it was Mr. Irwin’s evidence that Mr. Botel returned to the number one post first. He did not notice the finish times. The next day, Mr. Irwin returned to the site and noted that Mr. Desmeules’ team had shown a faster time on their post. Mr. Irwin recalled that a dispute had been filed in that matter, but could not recall the details. Several days afterwards, Mr. Irwin returned to that site and found their post burned in a fire pit beside their staking, although theirs was the only post burned.

Mr. Irwin had set his watch by the radio station for staking. He agreed that Mr. Botel and Mr. Gagnon left at exactly the same time or pretty close to it. He did not synchronize his watch with Mr. Desmeules. It was his evidence that he did not see Mr. Maciejewski leaving any earlier than he had, didn't see anything unusual and did not hear Mr. Desmeules speaking with anyone over the radio.

Mr. Irwin stated that on June 1, 2002, he had no interest in any of the claims in question but was present on the ground to assist Goldcorp. As far as he knew, Mr. Maciejewski and Mr. Strilchuk were under contract to Goldcorp as well. Goldcorp paid for Mr. Irwin's office and he ran their exploration office for three years. The particular office was charged with staking lands for Goldcorp and Mr. Irwin did confirm that he did hire Mr. Maciejewski and Mr. Strilchuk to stake on June 1, 2002. He was unaware of the particular financial arrangements made, however. Goldcorp paid for his attendance at the hearing.

Mr. Trevor Botel, who staked the land under water immediately to the west of Mr. Maciejewski's Mining Claim, stated that he had been hired by Mr. Maciejewski to stake and had been paid by him as well. He recalled seeing Mr. Desmeules at the #1 post, but Mr. Botel maintained that he and Mr. Irwin finished their staking first. The two staking teams left at approximately the same time. Mr. Botel could not recall that Mr. Desmeules was speaking on the radio at the time. As far as he could recall, all the boats left their respective locations [being the #2 and #3 posts] at approximately the same time.

Mr. Earl Gilles was present on the ground of Rahill Beach on the morning of June 1, 2002 as an interested by-stander and not participant in the staking rush. He was able to see Messers. Botel, Irwin, Desmeules and Gagnon. Mr. Irwin and Mr. Desmeules were in separate boats and he did not know who they were working with. From his vantage point, both boats left at the same time. He did not see the other boats in Rahill Bay or whether anyone left early. He did not see or hear Mr. Desmeules speaking on the radio nor did he hear him screaming or yelling. Mr. Gilles answered that he would have recalled had he heard Mr. Maciejewski's name mentioned. He estimated that he was about 100 feet from their location although Mr. Maciejewski suggested it was closer. Under cross-examination, the map setting out the respective locations of the claims and Mr. Gilles location relative to them was discussed. It was suggested that trees would have come down to the shore, impeding his view to where Mr. Maciejewski's #1 and #2 posts were located.

At this point in the hearing, Mr. Maciejewski requested permission to ask each person in the hearing room to read the time on their watches. Times varied between 11:05:03 and 11:10.

Mr. Irwin was recalled concerning times for his assistance of the staking of Mr. Botel at which time a videotape taken by Mr. Irwin of the staking was viewed. Apparently, Mr. Irwin had turned the tape on when he thought it was off and visa versa. This particular videotape is shown in apparent real time, but it was established by the witnesses that there was a two minute discrepancy between the time shown and real time, so that the tape shows 8:57:52 and his watch showed 8:59:53. The tape was apparently on, but not directed, and what can be heard was the idling of the motor. It was suggested that this took place during the inscription of the #2 wit-

ness post, next to the #1 post. The last time shown on the tape is 9:02:23 which would translate to 9:04:24 real time. Mr. Irwin can be heard on tape at that time saying “go, go, go.” It was suggested that the staking could not be completed if Mr. Irwin was spurring Mr. Botel on to hurry in this manner. It was suggested that the staking could not have been completed before 9:04:24 and would likely have been completed some time afterwards. There was discussion about whether it would have taken thirty seconds or five seconds to complete the inscription, there being an apparent misunderstanding on the part of Mr. Girones regarding what would be inscribed on the #1 post at completion. Mr. Irwin was not familiar with staking requirements in this regard. The completion time for Mr. Botel’s staking was 9:04:11, according to his application to record.

Mr. Maciejewski described events on the evening prior to and on opening day. On May 31, 2002, he was at home when Mr. Irwin showed up and stayed for dinner. It was Mr. Irwin’s first staking rush and Mr. Maciejewski was explaining matters to him. Mr. Desmeules did show up, but questioning concerned where Mr. Maciejewski was going to stake and whether he would be using his large boat with the 200 horsepower motor. Mr. Maciejewski did not disclose his location nor the type of boat he was using. Mr. Maciejewski stated that he did not synchronize his watch with Mr. Desmeules, that he never synchronized his watch with anyone.

Prior to staking, Mr. Maciejewski went out onto the water with depth finders so that he could gauge how to maneuver during staking and ensure that he could use his larger boat. He also rehearsed his positions from his #1 and 2 posts to his #3 and 4 posts and back again.

On staking day, Mr. Danny Strilchuk was his helper, whose sole job it was to hold the boat and to push him off from his locations. Mr. Maciejewski stated that he started at 9 o’clock using his watch for time. Mr. Maciejewski contradicted Mr. Kehoe’s testimony that he was on the two-way radio with Mr. Desmeules, pointing out that none of his three witnesses heard Mr. Desmeules speaking on the radio from the Gagnon/Botel location. He suggested that the only time Mr. Desmeules could have been speaking with Mr. Kehoe was from inside the boat, which would have been after staking had commenced. Mr. Maciejewski suggested that the words heard are “go, go, go.”

Under cross-examination, Mr. Girones referred to and questioned Mr. Maciejewski’s evidence that he and Mr. Strilchuk were not working for Goldcorp. This was clarified. Apparently, the terms of their contracted services with Goldcorp did not include staking services, which allowed them to act independently. Mr. Maciejewski maintained that he was not working in cooperation with Mr. Strilchuk, but neither was he working against him.

Mr. Maciejewski reiterated that he never synchronized his watch with Mr. Strilchuk, but after repeatedly attempting to gain a concession from him, with reference to the Provincial Mining Recorder’s decision, Mr. Maciejewski agreed that he had stated at that initial hearing that he and Mr. Strilchuk had indeed checked to see whether their times were close. This had been done the day before at the Goldcorp Exploration offices. They did not see each other’s watches, nor did they focus on the minute and second. It was just a casual conversation. Mr. Maciejewski stated that he further checked his watch that evening with Bell Expressvu and got it as close as he could to within a second. He maintained that he had done this alone, and not in the presence of Mr. Desmeules. The necessary adjustment might have been as little as a minute and as great as two minutes.

Mr. Strilchuk stated that he staked his claim some distance from the others described in this hearing. He commenced his staking at 9 a.m. and marked his posts in accordance with the configuration of the lands which had come open. He was essentially following the old lines. His location was that of the #2 post and all the rest of the posts were witnessed. He didn't see anyone else staking the lands in question.

As far as setting his watch was concerned, Mr. Strilchuk stated that he always sets his watch with the CBC's broadcast of the Dominion Observatory Official Time Signal at noon in Red Lake. He could not recall much about the day before staking, but he did recall checking his watch, which is something he always does before staking. He could not recall whether he had to make any adjustments. At that time, he had no GPS unit against which to check his watch. However, Mr. Strilchuk did believe he used a GPS to find his location, but the time function on it didn't work. Mr. Strilchuk could not recall his evidence before the Provincial Mining Recorder, having been on the telephone for that matter for four hours.

Under cross-examination, Mr. Strilchuk confirmed that he did do some assessment work on his mining claim, but maintained that it was not under dispute at the time he performed and filed the work. In the end, it did not matter, because the amount of assessment work performed would have been insufficient for the first two units of prescribed assessment work. Mr. Strilchuk confirmed that Mr. Maciejewski had filled out the form which bears his signature, the reason being that they had performed the work together, using an instrument Mr. Maciejewski had provided. This line of questioning was challenged, given that some of it dealt with Mr. Maciejewski's assessment work report and the questions had not been put to him. Mr. Girones explained that his intent was not to impugn Mr. Strilchuk's or Mr. Maciejewski's credibility through these documents but to demonstrate the degree to which they had coordinated their efforts in relation to these two mining claims and generally in doing contract work for Goldcorp.

Mr. Strilchuk recalled that the synchronization of watches issue did come up before the Provincial Mining Recorder, Mr. Denomme, apparently having been reflected in the notes of Mr. Meunier's observer, Mr. Fenato. Mr. Meunier had insisted that either Mr. Maciejewski or Mr. Strilchuk had stated that they had synchronized their watches, but Mr. Maciejewski had maintained that this was not the case. Mr. Denomme apparently had to go back and listen to his recording to determine what had been said. There was disagreement as to whether the replaying of his tape took place in open court or whether Mr. Denomme merely listened to it on his own through an earpiece and stated what he heard. Mr. Denomme didn't deal with this exact point in his findings, although apparently he did indicate that he heard evidence to the effect initially that the two gentlemen had synchronized their watches to the second and later that they did not synchronize but just confirmed that they were close. Apparently, in his actual findings, he found that Mr. Maciejewski had synchronized his watch to Bell Expressvu the day before. He also found that any link between Mr. Maciejewski's and Mr. Strilchuk's commencement time would be hard to substantiate without direct evidence.

After some discussion on whether Mr. Meunier could be called as Mr. Maciejewski's witness and whether he could be treated as a hostile witness, Mr. Meunier was called. The questioning centred on what took place at the hearing before Mr. Denomme. Mr.

Maciejewski maintained that Mr. Meunier had raised the point that Messers. Maciejewski and Strilchuk had synchronized their watches. Mr. Denomme was persuaded to review his tape recording, for which he had earphones. After some time, Mr. Denomme apparently turned to Mr. Maciejewski and told him that he had indeed said that he had synchronized watches with Mr. Strilchuk. Mr. Maciejewski maintained that the outcome had been the opposite and that Mr. Meunier had apologized for making a mistake. Mr. Meunier was cognizant of the fact that this was a key issue to winning the entire area claimed by him, as otherwise he would have no priority over Mr. Strilchuk's claim. He stated that there had been no apology made and that there had been no mistake made. There was some discussion as to whether this matter arose from what had been written down by Mr. Fenato. Mr. Maciejewski maintained that Mr. Denomme stated that Mr. Maciejewski had spoken the truth and Mr. Meunier stated that anyone could make a mistake. Mr. Meunier vehemently denied that this took place.

Findings

The time and manner in which Mr. Maciejewski and Mr. Strilchuk set their time keeping for the staking rush of June 1, 2002 has been made central to this appeal by Mr. Girones, counsel on behalf of Mr. Meunier. The evidence is conflicting. Also, much has been made by Mr. Maciejewski of what was said before the Provincial Mining Recorder, Mr. Denomme, and the unavailability of the recording he used for that hearing.

It was reiterated at the hearing itself that the hearing of an appeal to the Commissioner pursuant to clause 113(a) of the **Mining Act** is a new hearing, with evidence to be heard as if for the first time. Such recordings as may exist, made by the Provincial Mining Recorder are regarded as his own notes, effectively an aide to memory. The fact that the recording is no longer available, even to Mr. Denomme himself, underscores the problem in seeking to rely on something which does not form part of the record.

Much confusion can be and in this case has been created because of this attempted reliance on the evidence given before Mr. Denomme. In fact, the evidence about that evidence has taken on a life of its own and is seen as playing a central role to Mr. Maciejewski's case. There is not only disagreement as to whatever Mr. Maciejewski and Mr. Strilchuk said in evidence before Mr. Denomme. Now, there is further disagreement on how that disagreement played out before Mr. Denomme. He apparently went back through his recording to find the evidence in question. Everyone agreed to this fact. However, there was disagreement as to whether Mr. Denomme's tape or digital recording could only be heard by him through an earphone or whether everyone present at that hearing could hear the replay. Then, the outcome was also in dispute, with Mr. Meunier maintaining that Mr. Denomme stated to Mr. Maciejewski that he did in fact state that he had synchronized his watch to the second with Mr. Strilchuk. Mr. Maciejewski on the other hand remembers things quite differently, namely that Mr. Denomme agreed that he had been right, and that Mr. Meunier apologized and stated that anyone could make a mistake. Mr. Denomme does not make a finding of fact on this precise issue, so that the tribunal is at the very least, unable to note either his reasoning or observations as to the demeanor of the parties.

This issue was either already known to the parties at the time they appeared before Mr. Denomme or it has since become very clear that the only evidence which would tie

the timing of Mr. Strilchuk's staking to that of Mr. Maciejewski, and therefore potentially put the Strilchuk Mining Claim in jeopardy, is the evidence that their watches were synchronized to the second.

There is no available recording of this evidence, and if there were, the Provincial Mining Recorder would be perfectly within his rights to deny access, as it was created for his personal use.

For different reasons, the tribunal would be reluctant to call Mr. Denomme as a witness in this matter. As the adjudicator, his decision is intended to speak for itself. No adjudicator is required to appear before an appellate tribunal or court and answer for any omissions made in a decision. This is a fundamental principle of adjudication, where a party can appeal a decision, but not make the decision maker a witness or a party to the proceeding.

What complicates the matter here is the "new hearing" provision which can confuse matters. A hearing took place. Someone disagrees with the result. They appeal. It is hard for the inexperienced or unrepresented to remove themselves from what took place at that initial hearing. Moreover, it is a fact that observing the witnesses in giving their evidence at an initial hearing is the best way in which to assess their demeanor and obtain the earliest and best recollection of events. It also enables the decision-maker to make findings as to credibility of the witnesses, where that is an issue.

In the re-hearing situation, it is a second go for the parties. They can introduce new evidence and new witnesses, which clearly was done by both Mr. Meunier and Mr. Maciejewski. They are afforded certain additional protections by way of the **Statutory Powers Procedure Act**, although common law rules of fairness and natural justice will apply to those proceedings before the Provincial Mining Recorder, even with the comparative lack of formality.

In the end, the tribunal does not think that much turns on what took place before the Provincial Mining Recorder nor on what actually took place between Mr. Maciejewski and Mr. Strilchuk. Logically speaking, if the two gentlemen did synchronize their watches "to the second" on the morning or afternoon before staking, each of their watches would have to remain untouched from that time forward. For Mr. Strilchuk, he did not recall the time when he and Mr. Maciejewski "checked their watches", but according to Mr. Maciejewski, it had been the morning. If Mr. Strilchuk then synchronized his watch with the CBC Dominion Observatory Time Signal, the purported "synchronization to the second" with Mr. Maciejewski would have been overridden. The evidence for Mr. Maciejewski is that either he synchronized his watch with Mr. Desmeules or he synchronized it alone with Bell Expressvu. If either case is accepted, again, his actions with Mr. Strilchuk become irrelevant, as they would not be operating within the exact time frame. Indeed, when one considers the evidence surrounding the Botel staking, where both Mr. Gagne and Mr. Botel were operating within the same time frames, it adds further weight to the likelihood that Mr. Maciejewski either did not synchronize his watch with anyone or if he did, that only his watch malfunctioned. Otherwise, there is no reasonable explanation for why Mr. Desmeules was operating within the correct time frames as was Mr. Botel.

Evidence of Early Staking

The tribunal finds that the best evidence available to establish what took place on the morning of June 1, 2002 in Rahill Bay is the videotape made on Mr. Pye's camcorder by the Meunier team. The videotape captured activities in the immediate proximity to the Meunier and Lamothe staking, as well as the more powerful boat owned and operated by Mr. Maciejewski, both entering and taking off from the next small bay. Unfortunately, the video was cut off at the end, prior to commencement of Mr. Meunier's staking. The tribunal does not find that there is anything untoward in this having occurred as the very important evidence was already captured for all to see some seconds earlier.

Of primary importance to this appeal is the establishment and recording of "local time" through the use of Mr. Pye's hand-held GPS unit and camcorder. The tribunal accepts the evidence of Mr. Pye in regards to the two devices, particularly in the face of subsequent damage incurred by both pieces of equipment, which had potential to undermine their reliability. That the camcorder no longer works is irrelevant. However, notwithstanding that the GPS unit had been run over, it was shown to initialize and display local time. The tribunal was able to confirm this itself at the hearing in Thunder Bay by comparison with the CBC Radio Dominion Observatory Time Signal at noon and observed a difference of one second. Given the insignificance of a second, the tribunal finds that it could readily be explained by a certain delay in reaction time rather than a difference in the time shown and is not considered material to establishment of the relevant facts in this case.

The tribunal finds that the GPS unit used on June 1, 2002 and captured on the videotape showed the accurate time. The videotape shows time elapsed in the upper right hand corner. The tribunal accepts the evidence of the operator, Mr. Burke, that aside from the initial glitch, nothing interfered with his taping and the video shown represents what was taped by him. There is no evidence of tampering on the tape, the time display shown is clearly sequential and the tribunal is prepared to accept it as an unbroken record of what was captured on the tape.

At between 5:59 and 6:03 elapsed VCR time, the videotape captures the GPS unit held by Mr. Pye, showing "local time". The VCR elapsed and "local times" correspond as follows: At 5:59 VCR time, it is 8:54:41 a.m. "local time". At 6:03 VCR time, it is 8:54:45 a.m. "local time".

The tribunal finds that "local time" has been established in reference to the VCR time and can be relied upon for proof of ensuing events. However tedious it might be to extrapolate these available figures, all events observed on the tape correspond to a VCR time elapsed figure [or more accurately a range, as the events or words spoken take place over a period of several seconds] and can be established on the basis of "local time".

The reference to "local time" is related to the time shown on the GPS unit. Based upon the evidence presented at the hearing by Dr. Bradley, and experiential evidence of several of the witnesses, "local time" also corresponds with the noon or one o'clock CBC radio Dominion Observatory Time Signal and with the time display on satellite TV.

The tribunal noted that there was one instance when there was cross-over between the times used by Mr. Meunier's team and those of Mr. Desmeules. At 7:37 VCR elapsed time corresponding with 8:56:19 a.m. "local time", Mr. Desmeules can be heard speaking over the radio, effectively saying that it is 8:56:13 a.m. Mr. Kehoe repeats this at 7:39 VCR elapsed time which corresponds with 8:56:19 a.m., adding the words, "is his time". Mr. Kehoe's phrase is finished at 7:43 VCR elapsed time, which is 8:56:25 a.m. "local time". Mr. Pye then reported at 7:45 VCR elapsed time that his GPS unit showed 8:56:25 a.m., which corresponds with 8:56:25 a.m. "local time" extrapolated from the earlier coordination of GPS and local time. Again, the tribunal is satisfied that any discrepancy in the comparative times between Mr. Desmeules and that of the Meunier teams is insignificant. Undoubtedly, there may be a few seconds error, but much more time is observed elapsing due to the saying.

At 10:24 VCR time, corresponding with 8:59:06 a.m., a voice can be heard calling attention to someone. The tribunal finds that this is the voice of Mr. Desmeules speaking with Mr. Kehoe pointing out that Mr. Maciejewski is moving from his #1 post. In the ensuing moments, there is some confusion or perhaps merely reaction in the Meunier/Lamothe staking teams as they look up to see what is going on. The camcorder is focused on the next bay at approximately 10:29 VCR time, corresponding with 8:59:11 a.m. local time, when Mr. Maciejewski's boat is seen at the mouth of the next bay. Over the ensuing few seconds, he is seen on the tape taking off, with someone yelling that he is moving at 10:31 VCR time corresponding with 8:59:13 a.m. local time.

Mr. Maciejewski was observed by a number of witnesses and seen on the videotape made on Mr. Pye's camcorder, leaving his #1 post and #2 witness post and had moved his boat out into the Bay beyond the small inlet at around 50 seconds before 9 a.m. The tribunal finds that it accepts this as a fact, based upon the videotape evidence and the *viva voce* evidence of a number of witnesses. With approximately one minute being required to inscribe those posts and time to push off and move the boat into visibility in Rayhill Bay, it would mean that Mr. Maciejewski started his staking up to two minutes before the lands came open. Although it was not even suggested or discussed at the hearing, Mr. Maciejewski's staking appears to have coincided with one of the breaks in the Irwin videotape, when the camcorder was either turned off or the sequence was edited out.

The tribunal finds that Mr. Maciejewski commenced staking before 9 a.m. local daylight saving time. It is true that his misstep was recorded and calculated to be in the order of two minutes prior to opening time. The tribunal notes that Mr. Maciejewski raised the issue of whether he staked using tags. He did not give evidence that he did or did not use tags, but his application to record indicates that he did not use tags. Therefore, it is not unreasonable to assume that the inscriptions of his #1 and #2 witness posts took approximately the same amount of time as those of Mr. Botel, which can be calculated from the Irwin videotape. With the time it took to become visible in the bay, the tribunal finds that Mr. Maciejewski commenced his staking at 8:58 a.m. local time.

Time Lands Open for Staking

The legislation provides that lands come open for staking at 8 a.m. standard time [see subsections 70(7), (8), (9), 72.1(2), 76(4) and 197(7)]. The actual day lands may come open

will depend on the circumstances, but in this case, lands came open for staking pursuant to subsection 197(7), being at 8 a.m. standard time on June 1, 2002, having been published in the *Ontario Gazette* during the month preceding opening.

The **Time Act**, R.S.O. 1990, c. T9 provides as follows:

1. Where an expression of time occurs in any Act, proclamation, regulation, order in council, rule, order, by-law, agreement, deed or other instrument, heretofore or hereafter enacted, made or executed, or where any hour or other point in time is stated either orally or in writing, or any question as to time arises, the time referred to or intended shall, unless it is otherwise specifically stated, be held to be the time in effect as provided by this Act.
2. (1) Standard time in the part of Ontario that lies east of the meridian of 90° W. longitude shall be reckoned as five hours behind Greenwich time.
 - (2) Standard time in the part of Ontario that lies west of the meridian of 90° W. longitude shall be reckoned as six hours behind Greenwich time.
 - (3) Daylight saving time shall be reckoned as one hour ahead of standard time.

The time established by legislation for lands coming open for staking is 8 a.m. local standard time and 9 a.m. local daylight saving time. The tribunal could find nothing comparable in any laws outside of mining to the dual requirements within the **Mining Act** of an opening time coupled with competition for earliest completion. The earliest completion time is a relatively new aspect to the law in Ontario, having been enacted in 1989 and become effective in 1990. Nonetheless, it offers unique challenges which have become more complicated with the advent of portable technology. These portable technologies have allowed for an exact determination of local time through GPS and the recording of events as they occur through hand-held digital or video recorders.

Prior to the readily availability of portable GPS units, a staker would have relied on a wristwatch which was likely synchronized with the CBC Radio Dominion Observatory Time Signal to note the time of his or her staking. There are no reported cases in this or other Canadian jurisdictions where unsynchronized starting times of the stakers who are within visible range of one another was an issue. There are cases where activities associated with staking which were commenced prior to the lands coming open disqualified the stakings. It is assumed that groups of stakers would have agreed to a start time if they were working from a common location. Since 1990, if they were not working from a common location, the absolute “local time” would have been irrelevant and the time elapsed would have been of paramount importance.

With the rise of readily available technology, stakers in a competitive situation must be absolutely certain of how to mark “local time”. The use of a camcorder or now digital recorder along with a hand-held GPS can both ensure that a staking is in compliance with mandated opening rules just as easily as they can be used to prove that a staker commenced staking prior to when the lands came open for staking. “Local time” is no longer an abstract construct but real and readily verified through technology. Perhaps the only way around being

held to account by the technology is to obtain an agreement in advance of all wishing to stake in the vicinity that they will synchronize their start times. What becomes clear, however, is that any lack of cooperation in this regard will require that all concerned make use of the available technology, which is inexpensive but by no means cheap, and may be cumbersome to operate in a rush situation. The alternative is to risk being captured on tape leaving ahead of opening time with GPS confirming local time.

As to the illustration by Mr. Maciejewski in the hearing room that everyone's watches shown a different time, with discrepancies of five or so minutes at the extremes, the tribunal finds that this illustration was irrelevant. A better illustration of what could occur and go wrong would have required a synchronization of watches within the room to satellite time and a return to compare watches some 24 hours later. This wasn't done. However, the most this exercise could have shown was that watches will not remain synchronized over time, had that been the result. It would also have pinpointed those individuals whose watches were problematic. It does not thing to prove or disprove the matters at issue.

Maciejewski Staking

The tribunal has deliberated at some length on Mr. Maciejewski's actions surrounding his commencement of staking. In whatever manner he might have set up his time, it does not seem possible that he would have deliberately commenced prior to 9 a.m. There was evidence given at the hearing concerning other stakings involving Pine Island which are alleged to have taken place prior to those lands coming open, but the evidence was scant and no finding by this tribunal as to a pattern of conduct could be made.

The tribunal found believable and accepted Mr. Maciejewski's assertions that he had every advantage working for him in the staking. His was apparently the most powerful boat on the water that morning. He had a helper to push off his boat. There was no evidence to suggest that his completion time was not four minutes and two seconds after he started, compared with four minutes and twenty-three seconds for Mr. Meunier. Mr. Maciejewski convinced the tribunal that it would have been ludicrous for him to cheat under these circumstances.

Due to issues of credibility which arose in connection with both Mr. Botel's and Mr. Irwin's evidence, the effect of calling these witnesses in the end result has been to harm the credibility of Mr. Maciejewski. The evidence of Messrs. Irwin, Botel and Gilled introduced on behalf of Mr. Maciejewski was an attempt to throw doubt onto the time which he very obviously commenced his staking. Tied into this issue of commencement of staking was whether or not it was Mr. Desmeules speaking on the radio with Mr. Kehoe. Mr. Gilles' evidence actually was not particularly useful, as he is found to have been too far from the action to have been able to clearly observe whether Mr. Desmeules was indeed speaking into a radio.

The Irwin tape made of the Botel staking commenced at 8:32:59 a.m. and ended at 8:33:06 a.m. It started up again at 8:38:59 a.m. and ran until 8:39:26 a.m. It started again at 8:55:41 a.m. and ran until 8:56:19 a.m. It was during this last clip that Mr. Irwin taped his watch, showing the two minute disparity, so that his watch was shown at 8:57:53 and 8:57:54 a.m. corresponding with 8:55:53 a.m. on the tape. There is nothing further taped until the final 20 seconds or so countdown commencing at 8:57:41 a.m. on the tape corresponding with 8:59:41 and 8:59:42 a.m. on Mr. Irwin's watch.

The tribunal is able to accept that Mr. Irwin turned his tape off and on one half hour before staking. It frankly finds it more difficult to comprehend why Mr. Irwin would have turned off the tape after showing his watch in the two to three minutes before commencement of staking, particularly when continuity of taping would be very important at this point. What is most disturbing, however, is that the time which would have corresponded to the very excited and notable observations at the Meunier location heard on the Pye tape that Mr. Maciejewski was leaving early are not on the heavily edited or selectively presented Irwin tape. Moreover, Mr. Desmeules was located within close proximity to Mr. Irwin and could be heard yelling on the Pye tape that “Tony” was on the move. Mr. Desmeules instructed Mr. Kehoe not to move yet. Mr. Irwin purportedly didn’t hear this, even though Mr. Desmeules’ voice has been identified by Mr. Kehoe and is heard quite clearly on the Pye videotape. How could Mr. Irwin not have heard?

The omission of this key interlude on the Irwin videotape strikes the tribunal as very self-serving and is regarded as misleading. It frankly requires a suspension of belief that Mr. Irwin and Mr. Botel didn’t see Mr. Maciejewski’s boat take off *and* didn’t hear Mr. Desmeules shouting about it.

In a prior segment of the Irwin tape, 8:55:41 a.m. to 8:56:19 a.m., the camera is panned over the staking teams. There are several boats shown in the immediate vicinity, including one immediately adjacent and what appears to be one or two some distance off. It is unclear whether the near boat is that of Mr. Desmeules, as the person in that boat is not wearing the same colourful clothing observed earlier on the tape as being worn by Mr. Desmeules when he introduced himself. Similarly, the viewer must look through some scrub and trees to see the two other boats.

In being faced with two witnesses at or near the water’s edge who state that they didn’t hear Mr. Desmeules on the radio, they didn’t see Mr. Maciejewski’s boat take off and the videotape of one was either conveniently turned off or more likely under the circumstances spliced out, the tribunal finds that this evidence, taken collectively, this evidence defies believability.

Based upon the disturbing evidence of selectively taping on the Irwin video, where a key piece of evidence is conveniently missing from the tape, based upon the clearly audible voice on the Pye videotape which has been identified both by Mr. Desmeules and Mr. Kehoe as having been that of Mr. Desmeules, and based upon the testimony of both those gentlemen, the tribunal finds that it prefers the evidence of Mr. Desmeules, Pye and Kehoe over that of Messrs. Gilles, Botel and Irwin as to Mr. Desmeules having been on the radio during the time leading up to the staking rush. The tribunal also finds that the evidence of Messrs. Botel and Irwin that they did not see Mr. Maciejewski taking off before they commenced their staking is not believable in the circumstances.

As stated above, these findings also damage the credibility of Mr. Maciejewski. The tribunal has had occasion to observe Mr. Maciejewski and his demeanor throughout the hearing. Taken alone, the tribunal found itself willing to attribute considerable credibility to

what he said. However, it has done considerable damage to his case to introduce witnesses who dispute what is clearly shown and heard on the Pye videotape. It would be quite another matter had Mr. Maciejewski's actions not been captured on videotape along with the sound of Mr. Desmeules speaking with Mr. Kehoe.

Despite its willingness to accord a high degree of credibility to Mr. Maciejewski, it did find him hard to pin down on a number of points and perhaps protecting his relationship with behind the scene interests. He was impossible to pin down as to whether he worked for Goldcorp in general, had understaking the staking on behalf of Goldcorp in particular and the extent to which he was orchestrating the activities of Mr. Strilchuk and Mr. Botel, the latter of whom gave evidence that he had been hired by Mr. Maciejewski. Clearly, there is a great deal of animosity felt in the Red Lake community towards Goldcorp and Mr. Maciejewski wished to distance himself from any perceived alliance with Goldcorp for purposes of this competitive staking.

The tribunal does not have any difficulty in believing that Mr. Maciejewski and others work for Goldcorp on contract, generally. It also does not have difficulty in finding that he was not under contract from Goldcorp to stake these lands. However, it has no doubt in finding that his intention was to orchestrate the staking of his own Mining Claim and that of Mr. Strilchuk and Mr. Botel to be offered up to Goldcorp. In the end, there is no doubt for the tribunal that Mr. Maciejewski is profoundly private and guards his privacy in a town where loyalties in general and with Goldcorp in particular can be problematic for individuals. Whether he was working for the ultimate interests of Goldcorp or himself have nothing to do with the validity of Mr. Maciejewski's staking.

Taking the issue of credibility further, the tribunal finds that it prefers the evidence of Mr. Desmeules over that of Mr. Maciejewski and Mr. Irwin as to what took place on the evening before the staking rush. Mr. Desmeules introduced an element of doubt as to the occasion when Mr. Irwin was even present. Mr. Maciejewski sought to discount every fact in evidence presented, most particularly the evidence of Mr. Desmeules or others' reference to Mr. Desmeules. It could be, under most circumstances, a highly effective strategy, given the passage of considerable time. However, what Mr. Maciejewski has failed to do is discount the value of the Pye videotape which clearly shows his boat taking off prior to opening time or at the very least, opening time according to, when the Botel/Gagnon-Desmeules stakings are taken into account, four other staking teams.

In this regard, the evidence introduced on behalf of Mr. Maciejewski failed to persuade the tribunal that what was seen and obvious from the Pye videotape did not take place. While Mr. Maciejewski' has not persuaded the tribunal that the commencement of his staking did not take place prior to opening time, it must also conclude that there is no basis upon which to make a finding that Mr. Maciejewski's actions were deliberate or that he intended to commence his staking prior to the time when the lands came open.

The tribunal is convinced that Mr. Maciejewski was not acting out of a desire to deceive and in fact may have confused this particular occasion with Mr. Desmeules with another, as there appear to have been more than one occasion when Mr. Desmeules came calling prior to staking.

The tribunal concludes that Mr. Maciejewski commenced his staking prior to the lands coming open, but cannot go so far as to conclude that he deliberately planned to commence his staking prior to opening. From all appearances, his watch failed him and did not keep the correct time. This appears to have been a technical glitch, and albeit an unfortunate one. The tribunal agrees with Mr. Maciejewski that there would have been nothing to gain from leaving early.

If Mr. Maciejewski's actions were not deliberate, then should special consideration be given to his absolute time of four minutes and two seconds or should commencement prior to the "local time" set for opening be fatal to the staking? Should the provisions of section 121, namely that each decision of the Commissioner be on the real merits and substantial justice of the case, be brought to bear in this situation?

There is nothing comparable from which to draw an analogy to this situation. Hunting and fishing season cases do not offer assistance. The thought of any kind of race comes to mind, although for the most part, contestants leave from one location, such as a foot race, cross-country ski race, bicycle or even sailing. Where they don't and speed is the issue, their start time is clocked, so that simultaneous start times is not an issue. It seems clear that someone starting a foot race is either disqualified or the entire race must start anew. In a competitive staking situation, starting again is not an option.

The importance of the sanctity of the time lands come open for staking is one of profound importance to the **Mining Act**. The tribunal can think of no better reference to this treatment than what was quoted by Mr. Denomme in his decision in this matter, referring to page 371 of **Leach v. Wilson** 5 M.C.C. 368, where Commissioner Ferguson stated:

The sanctity of the time of opening for staking has been paramount for many years and nothing but confusion could arise if there were and permitted variations of such time. Adherence to the time of opening for staking is crucial to the entire staking system and there can be no modification of the basic requirement of not commencing to stake prior to the time that the lands come open.

The tribunal finds that, based upon the real merits and substantial justice of this case, no weight can be given to Mr. Maciejewski's absolute staking time, namely that from start to finish, his staking took less time than that of Mr. Meunier. The sanctity of the start time is a fundamental corner stone of staking in Ontario and as such, prior commencement will invalidate the claim. With the advent of technologies, stakers take considerable risk in the competitive situation if they do not adhere to a system to commence their staking time which cannot be disputed. Examples include use of GPS or synchronization with stakers in the vicinity. Failure to do so may result in being proved to have started prior to the time lands come open for staking. It defies comprehension that a staker, whose commencement is captured on video tape and who clearly has started before the others, could be allowed to keep his mining claim. That is the case here.

The tribunal finds that the Maciejewski Mining Claim must be cancelled as staking commenced prior to the time when the lands came open for staking. The tribunal finds

on the fact in this case that Mr. Maciejewski commenced his staking at approximately 8:58:06 a.m. or earlier, before the lands came open for staking. As such, the recording of his Mining Claim must be cancelled.

Strilchuk Mining Claim

The best evidence that the tribunal has with respect to the setting of the time by Mr. Strilchuk is that he did so according to the CBC Dominion Observatory Time Signal. The tribunal does not accept the submission of Mr. Girones that it would defy comprehension for Mr. Strilchuk not to have synchronized his watch with Mr. Maciejewski to the second. Why should he have? They were not staking from the same or even near locations. Mr. Strilchuk was located further east and south.

There is actually no reason for Mr. Strilchuk to have synchronized his watch with anyone except available technology. If the fact that there was some sort of cooperation between Messrs Strilchuk and Botel should be regarded as of greater importance, and particularly since it is Mr. Botel's evidence that he was hired by Mr. Maciejewski, then it would follow that Mr. Botel too would have synchronized his watch "to the second" with Mr. Maciejewski and as a result would have commenced his staking early. All evidence from the Botel and Gagne/Desmeules location is that their watches were more or less in sync. The most which can be concluded from the apparent facts is that Mr. Maciejewski's watch malfunctioned. That of Mr. Strilchuk did not.

The tribunal has been persuaded and is satisfied that Mr. Strilchuk synchronized his watch with available technology. It is not persuaded that Mr. Strilchuk and Mr. Maciejewski did in fact synchronize their watches "to the second" the day before, nor is it convinced that there was any reason for doing so.

The tribunal finds that the appeal from the decision of the Provincial Mining Recorder to allow the Strilchuk Mining Claim to be recorded should be dismissed as there is no evidence that this staking was not commenced at the proper time.

Botel Mining Claim

The tribunal added Mr. Botel as a party to the hearing. In retrospect, the original dispute was not against the Botel Mining Claim and owing to the less than fulsome notice given to Mr. Botel and Goldcorp with respect to the Botel Mining Claim, this may have been an error. It is certainly one which is made without notice and without hearing submissions of the parties affected, Botel and Goldcorp, within the meaning of section 117. As such, the tribunal finds that it has reconsidered the adding of the whole Botel Mining Claim to be an issue in this case. Although Goldcorp, as current recorded holder of this mining claim has received initial notice, it has not been provided with notice that the entire mining claim might be subject to cancellation. Despite it having been expedient at the time to continue the hearing, the tribunal is of the opinion that it does not have jurisdiction to raise the question of the Botel staking in this manner and at this time.

That having being said, the tribunal has considerable concerns about the Botel staking. Although the Irwin videotape was cut and spliced, the times shown on the video which are found to be accurate.

The Irwin tape is problematic in that it was turned off and on and in the camera was left on a seat in the boat marking the passage of time during the staking without recording any action after the initial marking of posts. What is clear is that Mr. Botel commenced staking at 9 a.m. on Mr. Irwin's watch, which corresponded with 8:58 a.m. on the tape.

Despite the camera having assumed to be off, one can glean what is taking place. One can tell when the boat is running and when it is stationary. It took off from what is taken to be the #3 witness and #4 post locations at 9: 01:33 a.m. VCR time, corresponding with 9:03:33 a.m. local time. At the time when the staking was purportedly completed, being 9:04:11 a.m., the boat was still running and stopped at 9:02:14 a.m. VCR time, corresponding with 9:04:14 a.m. The tape only runs to 9:02:22 a.m. VCR time but Mr. Irwin can be heard urging Mr. Botel to "go, go go". This corresponds with 9:04:23 a.m. local time.

The tribunal finds that it concurs that the staking was not completed when the tape ended or was deliberately cut off at what was 9:04:23 a.m. local time. As such, in competition with Mr. Meunier's staking, which overlaps with the Botel staking by a small amount, the tribunal finds that the Botel staking was not completed prior to the Meunier staking which was completed at 9:04:23 a.m. local time.

The tribunal concludes that the Meunier staking was completed before that of Botel, despite what is shown on the application to record. It will direct the Provincial Mining Recorder to order that Mr. Botel move his #1 and #2 witness posts to coincide with those of Mr. Meunier.

Conclusions

The Meunier Mining Claim will be ordered recorded, but only insofar as it does not overlap with the Strilchuk Mining Claim. That portion of the Meunier Mining Claim which overlaps with the Botel Mining Claim will be awarded to Mr. Meunier. The east boundary Botel Mining Claim will be ordered to be amended so that the overlap is shown to belong to the Meunier Mining Claim.

Pursuant to subsection 129(2), this Order will take effect on 21st day of April, 2006 as the western portion of the lands covered by the Maciejewski Mining Claim will come open for staking once the Order is effective. Since there is open ground, this will provide the parties with a reasonable opportunity to competitively stake that ground should they so wish.

Time during which this matter has been under appeal will be excluded from the Strilchuk Mining Claim. Time during between its filing and the effective date of this Order will be excluded from the Meunier Mining Claim.