

File No. MA 014-03

M. Orr )  
Deputy Mining and Lands Commissioner )

Tuesday, the 9th day  
of December, 2003.

**THE MINING ACT**

**IN THE MATTER OF**

Mining Claim TB-1248099, staked by Herb G. Goodman, situate in the Township of Walters, in the Thunder Bay Mining Division, recorded in the names of Ontex Resources Limited as to a 74 percent interest and Metalore Resources Limited as to a 26 percent interest, hereinafter referred to as the "Ontex Mining Claim";

**AND IN THE MATTER OF**

Ontario Regulation 7/96;

**B E T W E E N:**

LYLE HOLT

Appellant

(amended December 9, 2003)

- and -

ONTEX RESOURCES LIMITED

Respondent

(amended December 9, 2003)

**AND IN THE MATTER OF**

An application to record Filed Only Mining Claim 3009521, staked by Carey Lance, situate in the Township of Walters, in the Thunder Bay Mining Division, to have been recorded in the names of Lyle Holt, Myron Nelson and Nolan Cox, marked "Filed Only", hereinafter referred to as the "Filed Only Mining Claim";

**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 12<sup>th</sup> day of June, 2003, for the recording of the "Filed Only Mining Claim".

## O R D E R

**WHEREAS** this appeal was received by this tribunal on the 9th day of July, 2003;

**AND WHEREAS** the Tribunal, at the request of St. Anthony Resources Inc. during the hearing of this matter on the 2nd day of December 2003, removed it as a Party of the Third Part.

**AND WHEREAS** the Tribunal has also decided to delete the names Myron Nelson and Nolan Cox as Appellants, to reflect the appeal which was in the name of Lyle Holt only;

**1. THIS TRIBUNAL DIRECTS** the Provincial Mining Recorder to issue an Order pursuant to subsection 110(6) of the **Mining Act** for the moving of post number two of Mining Claim TB-1248099, along the eastern boundary in connection with Mining Claim TB-1204967, a distance of 15 metres north, more or less, to coincide with the location of post number one of the aforementioned claim.

**2. THIS TRIBUNAL ORDERS** that this appeal be and is hereby dismissed.

**3. THIS TRIBUNAL FURTHER ORDERS** that the notation "Pending Proceedings", which is recorded on the abstract of Mining Claim TB-1248099, to be effective from the 9th day of July, 2003, be removed from the abstract of Mining Claim TB-1248099.

**4. THIS TRIBUNAL FURTHER ORDERS** that the time during which the Mining Claim was under pending proceedings, being the 9th day of July, 2003, to the 9th day of December, 2003, a total of 154 days, be excluded in computing time within which work upon the Mining Claim is to be performed.

**5. THIS TRIBUNAL FURTHER ORDERS** that the 13th day of November, 2005, be fixed as the date by which the first and second units of prescribed assessment work, as set out in Schedule "A" attached to this Order, must be performed and filed on Mining Claim TB-1248099, pursuant to subsection 67(3) of the **Mining Act** and all subsequent anniversary dates are deemed to be November 13 pursuant to subsection 67(4) of the **Mining Act**.

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

**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 9th day of December, 2003.

Original signed by M.Orr

M. Orr  
DEPUTY MINING AND LANDS COMMISSIONER

**SCHEDULE "A"**

**Mining Claims #**

**Due Date**

TB-1248099

November 13, 2005

File No. MA 014-03

M. Orr )  
Deputy Mining and Lands Commissioner )

Tuesday, the 9th day  
of December, 2003.

**THE MINING ACT**

**IN THE MATTER OF**

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**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 12<sup>th</sup> day of June, 2003, for the recording of the "Filed Only Mining Claim".

## REASONS

This matter was heard on December 2, 2003, by telephone conference call and all the Parties were located in Ontario. Those appearing were Mr. Lyle Holt, (“Holt”) Mr. Myron Nelson, (a business associate of Mr. Holt), and Mr. Armen Chilian, representing Ontex Resources Limited (“Ontex”). The Party of the Third Part, St. Anthony Resources Inc. (“St. Anthony”) requested the Tribunal’s permission to be removed as a Party at the time of the hearing as it no longer had an interest in the property. Its representative, Mr. Colin Bowdidge, kindly provided information to the Tribunal as a witness whose evidence was in support of Mr. Holt. Ontex did not call any witnesses.

### Background

The Parties held various claims abutting each other (Ontex to the north; Holt and other joint owners of the “Bearskin Property” to the south.). A rectangular east-west gap was created between the claims at some point in the past. This gap, being land open for staking, became the subject of staking activity in 2002. Ontex staked the ground first. Mr. Holt’s group staked it second. Mr. Holt alleged that Ontex had, in staking its claim, made improper use of information it obtained when its representative (Mr. Chilian) talked to Mr. Bowdidge of St. Anthony, the holder of an option on the Bearskin Property. Mr. Holt and his associates further alleged that the staking of the Ontex claim itself was deficient. Amongst other things, three of the four posts did not have a date and time marked on them.

### Issues

Did Ontex owe a fiduciary duty to Mr. Holt (or anyone associated with Mr. Holt)? If the answer is “yes”, does that affect the validity of the Ontex Mining Claim 1248099?

Can the staking of the Ontex Mining Claim 1248099 be deemed to be in substantial compliance with the requirements of the **Mining Act**?

### Evidence

The Parties provided evidentiary materials which were relied on for this hearing. No one took issue with the facts that were set out in the materials. However, the Parties did disagree on the interpretation of the facts as well as the effect that those facts had on the staking of the subject claim. The materials submitted by the Parties were used by the Tribunal to understand the background to the appeal. For the purposes of this decision, the Tribunal referred to the filed documentation as the source for evidence, as the Parties had little to add at the hearing.

Mining Claim TB-1248099 (the “Ontex Mining Claim 1248099”), in the Township of Walters, in the Thunder Bay Mining Division, was staked on September 11, 2002. It was to be recorded in the name of Ontex Resources Limited (“Ontex”). It covers land that was open for staking at the time of the staking; however, the exact dimensions of that land had to be determined after the staking, as there appeared to be some overlap with land not open for staking.

The land in question formed what is best described as an elongated rectangular-shaped wedge between other recorded claims. Holt (and other joint owners) own claims to the south of the subject land (the “Bearskin Property”); Ontex owns claims to the north. Correspondence from the Provincial Recording Office dated September 25, 2002, was sent to surrounding claimholders and they were given until November 8, 2002, to provide evidence to show that the subject land was not open for staking. On November 6, 2002, an application to record mining claim 3009521 (the “Holt Mining Claim 3009521”) was received in the Provincial Mining Recorder’s office. This claim had been staked on October 30, 2002, and was to be recorded in Holt’s name, as well as in the name of other joint owners (Messrs. Nolan Cox and Myron Nelson).

There does not seem to be any dispute to the fact that the Ontex Claim 1248099 covers land that was open for staking at the time of its staking. It can also be inferred from the materials that at some point in time, the claim holders on either side of the Ontex Claim 1248099 became aware of the gap of open land between their claims. The Tribunal notes that in the document entitled “Dispute Against Recorded Claim” dated October 31, 2002, the Appellant, Mr. Holt states:

“Claim 1248099 is not properly staked. There are no dates or times on the #1, #2, and the #4 posts. The #2 post is over staked by aprox. 15 meters and the claim are recorded as being 800 meters x 50 meters. The actual length is aprox. 985 meters, the west boundary is aprox. 60 meteres and the east boundary is aprox. 70 meters. **Also please note on my recording of claim # 1217196 I was unable to locate the tie in posts of claim # 747036 and claim # 747037 and my intention was to be tied on to these claims.**” (Emphasis added)

The Tribunal notes in looking at a map provided by Mr. Holt, that the posts in question lie roughly to the northeast of the #4 post of claim 1217196. The Ontex Claim 1248099 is located in the gap that the Tribunal can infer was created when the posts for 747036 and 747037 were not found. However, it is the evidence of Mr. Holt that his group thought that the land was part of their claim holdings (described by them as the “Bearskin Lake Property”). In fact, believing the subject land to be part of their claims, Mr. Holt says in his materials that “St. Anthony freely shared information [including data not yet filed as assessment work] with Ontex Resources ..., invited Ontex to examine mineralized zones on our claims, and gave Ontex permission to use an access trail on our claims....” The Tribunal notes from materials supplied by Ontex through Mr. Chilian that he claims to have been made aware of the gap on September 9, 2002, by Ontex’s staker, Goodman, who had been “given the job to locate all claim posts that separated the Bearskin Lake Property from the Ontex/Metalore claim group.” He was then asked to stake the gap.

Mr. Holt also states that the Bearskin claims were held under option to St. Anthony Resources Inc., the company to which Mr. Bowdidge is connected. A statement provided by Mr. Bowdidge states that St. Anthony held the claims until December 2002, under option. According to Mr. Bowdidge, St. Anthony carried out certain exploration work on the property “including line cutting, geophysical surveys, geological mapping, stripping and trenching.”

In hearing from Mr. Bowdidge and Mr. Chilian, the Tribunal was provided with information describing conversations that took place between those two individuals (apparently before the disputed staking.) Mr. Bowdidge stated that information concerning the gold-bearing qualities of the land was shared with Mr. Chilian. Mr. Holt says that this information was “freely” shared. The reason given by Mr. Bowdidge at the hearing was that Ontex’s lands (which were located to the north) might share similar characteristics. Presumably, Mr. Chilian might be able to use the information from the subject lands for his own benefit, as the so-called “mineralized zone” crossed the area from “east-southeast to west-northwest”. In his statement (part of the Holt material), Mr. Bowdidge gave the impression that Mr. Chilian actively sought him out (“several telephone communications and at least two in-person meetings”); however, this was disputed by Mr. Chilian. Mr. Bowdidge admitted to a possibly faulty memory and agreed that only one meeting had taken place and that it had been happenstance in nature. Mr. Chilian was given permission to access the subject land to view these things for himself and to use the property to transport a diamond drill to his company’s claims. Mr. Bowdidge admitted at the hearing that because St. Anthony did not own the surface rights, this access permission was probably unnecessary. Mr. Bowdidge also claimed (as did Mr. Holt and his associates) that Mr. Chilian owed it to them to make them aware of the existence of the open land. He (as did Mr. Holt) described this obligation as a “fiduciary duty” and as reflective of “normal standards of behaviour in the Canadian mining industry”.

The deficiencies of the Ontex Mining Claim 1248099 were set out in the materials provided by Mr. Holt. Mr. Holt relied on first-hand information obtained both by the person who staked the Filed Only Claim (Carey Lance) and by Mr. Bowdidge prior to the staking by Mr. Lance. Mr. Bowdidge had reported on October 26, 2002, that the Ontex Claim covered an area of “open ground”; that claim posts were “properly sized and the boundary lines [were] well blazed”. He noted certain “deficiencies”, in particular the fact that dates and times were missing on posts 1, 2 and 4, and that while the claim measured “almost exactly 1000 metres in an east-west direction, there is only one line post on each of the north and south boundaries”. Mr. Holt’s own staker made note of a missing line post as well and attributed this to the Ontex Mining Claim’s having been staked at two 400 metre intervals (thereby coming up with 800 metres for the north and south boundary lines. Neither Messrs. Bowdidge nor Lance described the Ontex Mining Claim 1248099 as overstaking other claims, specifically, mining claim 1204967. However, the materials do refer to the fact (and the maps show) that the number two post of the Ontex Claim 1248099 is found 15 metres to the south (along the eastern boundary) of the number one post of claim 1204967. Mr. Chilian’s evidence with respect to the positioning of the #2 post for the Ontex Claim 1248099 and the #1 post for 1204967 was that the latter post was located “in an area of alders, 11.25 meters east of Post #2 of TB-1248099”. His position was that this “relationship between claim posts proves that no ‘over staking’ occur[ed] between the two mining claims”. He also stated (in response to the allegation that the #2 post of TB-1248099 was not directly tied on to the #1 corner post of 1204967), that “[I]n the field, the north-south claim line between Post #3 and Post #4 of TB-1186774 is to the west by several meters of the common post area where Post #1 of TB-1204967 is located.... TB-1186774 was staked before TB-1248099, and so its claim line location takes/has precedence over and above any claim staked after it.” His position was augmented by photographs depicting the posts in question and by a detailed map, none of which was contradicted by information from the appellants.

The Respondent's version of the circumstances under which Mr. Chilian met with St. Anthony's Mr. Bowdidge depicts a picture of two geologists comparing and sharing information. Mr. Chilian denied ever asking to visit or inspect the subject land (also described by both sides as the "Whiskey Zone"). He also denied having received any written information or maps from Mr. Bowdidge and claimed to have acquired knowledge of the Bearskin Property using information available to the public (assessment files). His recollection of his chance lunch meeting with Mr. Bowdidge in August 2002, was that they viewed maps supplied by Mr. Chilian and that there was no sharing of confidential information. Rather he had asked Mr. Bowdidge about his option interest in the Bearskin Property. Furthermore, he said that no contractual arrangement had resulted from their meeting.

### **Findings**

Subsection 43(1) and clause 43(2)(a) and (b) of the **Mining Act** state:

- (1) Substantial compliance as nearly as circumstances will reasonably permit with the requirements of this Act and the Regulations as to the staking out of mining claims is sufficient.
- (2) The staking out of a mining claim shall be deemed to be in substantial compliance with the requirements of this Act and the regulations even if there is a failure to comply with a number of specific staking requirements if,
  - (a) the failure to comply is not likely to mislead any licensee desiring to stake a claim in the vicinity; and
  - (b) it is apparent that an attempt has been made in good faith by the licensee to comply with the requirements of this Act and the regulations.

Subsections 5(5) and 5(6) of Ontario Regulation 7/96 state:

- (5) If the mining claim consists of two or more units, line posts must be erected along the perimeter of the claim at 400 metre intervals and at all locations where the corner of a lot or subdivision of a section lies on the perimeter of the claim.
- (6) Where irregular boundaries exist, the line posts must be erected to mark out the boundaries as nearly as practicable.

Subsection 10(1), clause 3, states, for the staking of mining claims in areas that have been open for staking for 24 hours or more.

3. The date and time of completion of the staking must be inscribed on one of the corner posts after all of the required work of staking the claim has been completed.

Among other things, subsection 15(1) states:

- (1) A licensee staking a claim using metal tags must affix to each corner post the appropriately numbered tag and inscribe on each such post his or her name and license number and the date and time of erecting the post.

In answer to the first question as to whether there was a fiduciary duty owed by Ontex to Mr. Bowdidge or to the Appellant, the Tribunal finds that there was no duty of any sort owed by Ontex arising of the contact between Mr. Chilian and Mr. Bowdidge. Fiduciary relationships arise in the mining industry on a frequent basis. Someone is entrusted, on a confidential basis, with information (not his own) to be used to further the interests of another; or, is entrusted to obtain information (which is not considered his own) for the use of another. For example, consultants, hired for their expertise, can act as agents for their principals and owe a fiduciary duty in the process. Fiduciary duties can emerge as a result of joint venture agreements and partnerships. The entrusted person is the fiduciary; the person doing the entrusting is the beneficiary. The Tribunal can find no such relationship between the Respondent and the Appellant, or Mr. Bowdidge, (who held an option at the time). Rather, the Tribunal finds that the relationship between the Parties was one of equal competitors, and the information in question (namely that a gap existed between claims) was out in the public domain for anyone to discover. Ontex was faster off the mark in taking action to close the gap created by the staking of earlier claims. There is no evidence to support the argument that the conversations or sharing of information between Mr. Bowdidge and Ontex created a relationship of any sort. Neither is there any basis for arguing that Ontex owed a duty to Mr. Holt to either warn him of the existence of the gap in the claims, or a duty that would have prevented Ontex from taking advantage of the situation.

As the first question of the first issue is answered in the negative, there is no need to deal with the second half of that issue.

In answer to the second issue, the Tribunal finds that while one, and possibly two staking deficiencies occurred, they fall under clause 43(2)(a) and (b) of the **Act** and are thereby deemed to be in substantial compliance with the requirements of the **Act**. The substantial compliance test is one that is applied to the facts of individual cases. The finding of compliance for one case does not necessarily make that finding a precedent for any cases that might follow. Indeed, the same case facts found to be in substantial compliance in one situation, might, in another be found to not be in substantial compliance.

The Tribunal finds that in this instance, the circumstances of the staking of the Ontex Claim 1248099 are such that a failure to comply with staking requirements would have to be so drastic as to practically nullify the staking altogether. The reason for saying this is that in staking its claim, Ontex was staking a gap between already staked lands. It fills a piece of a staking “puzzle” created when previous surrounding claims were staked. (The order of those previous claims is not important to this issue.) In other words, one would be hard pressed to say that failing to mark a date and time on three of the four posts would be misleading to anyone, as there

appears to be nothing else in the way of open land to stake. Furthermore, there is no evidence to say that Ontex's staking attempts were not made in good faith. The photographs in the exhibits submitted by both sides show that care is taken in terms of the condition of the posts, their positioning, and their markings, (aside from fading). The Tribunal finds that both tests of clause 43(2)(a) and (b) are met as far as the staking of the Ontex Mining Claim 1248099 is concerned.

### **Conclusion**

For the reasons noted, this appeal will be dismissed without costs. As the proper Appellant is Mr. Lyle Holt, the names of Nolan Cox and Myron Nelson will be removed as Appellants. Also, St. Anthony Resources Inc. will be removed as Party of the Third Part.