File No. MA 025-97
File No. MA 026-97

M. Orr) Tuesday, the 23rd day
Deputy Mining and Lands Commissioner) of November, 1999.

THE MINING ACT

IN THE MATTER OF

Mining Claim P-1222832, having been recorded in the name of Reginald James Charron, hereinafter referred to as the "Charron Mining Claim" and an untagged mining claim staked by Frank Racicot, to have been recorded in the name of Frank Racicot, marked "refused", hereinafter referred to as the "Racicot Mining Claim", all of which are situate in the Township of Chester, in the Porcupine Mining Division;

AND IN THE MATTER OF

The appeal of Frank Racicot from the decision of the Mining Recorder for the Porcupine Mining Division, dated the 17th day of June, 1997, to not record a mining claim staked without tags, on the basis that it was not in compliance with clause 2(1)(a) of Ontario Regulation 7/96 and for an Order cancelling the Charron Mining Claim on the basis that its staking was second in priority to the Racicot staking, which forms the subject matter of File No. MA-025-97;

B E T W E E N:

FRANK RACICOT

Appellant

- and -

THE MINISTER OF NORTHERN DEVELOPMENT AND MINES

Respondent

- and -

REGINALD JAMES CHARRON

Party of the Third Part

AND IN THE MATTER OF

Mining Claim P-1215188, situate in the Township of Chester, in the Porcupine Mining Division, to have been recorded in the name of Edward J. Korba, marked "filed only", hereinafter referred to as the "Korba Mining Claim";

AND IN THE MATTER OF

A revised Application To Record Mining Claim P-1222822, situate in the Township of Chester, in the Porcupine Mining Division, staked by Jerry E. Jerome and Reginald James Charron, to be recorded in the name of Reginald James Charron should the Charron Mining Claim be cancelled, hereinafter referred to as the "Charron Restaked Mining Claim";

B E T W E E N:

EDWARD J. KORBA

Applicant and Disputant

- and -

REGINALD JAMES CHARRON

Respondent

AND IN THE MATTER OF

Leave of the tribunal to Edward J. Korba, to file a dispute, pursuant to subclause 48(5)(c)(i), in the event that the appeal is dismissed and the hearing of the dispute to be transferred to the tribunal pursuant to subsection 110(2) of the **Mining Act**, through consent or alternatively order of the tribunal;

AND IN THE MATTER OF

The hearing of the dispute of Edward J. Korba against the Charron Mining Claim, should the appeal of Frank Racicot in File No. MA 025-97 be dismissed.

O R D E R

1. **THIS TRIBUNAL ORDERS** that the appeal of Frank Racicot dated the 10th day of July, 1997, be and is hereby dismissed.

2. **THIS TRIBUNAL FURTHER ORDERS** that the dispute of Edward J. Korba be and is hereby dismissed.

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3. **THIS TRIBUNAL FURTHER ORDERS** that the notation "Pending Proceedings" which is recorded on the abstract of the Charron Mining Claim to be effective from the 10th day of July, 1997, be removed from the abstract of the Mining Claim.

4. **THIS TRIBUNAL FURTHER ORDERS** that the time in which the Charron Mining Claim was under pending proceedings being the 10th day of July, 1997 to the 23rd day of November, 1999, a total of 867 days, be excluded in computing time within which work upon the Mining Claim is to be performed and filed.

5. **THIS TRIBUNAL FURTHER ORDERS** that the18th day of October, 2001, be fixed as the due date for the performance and filing of prescribed assessment work on the Charron Mining Claim, in the amount set out in Schedule "A" attached to this Order, pursuant to subsection 67(3) of the **Mining Act** and that subsequent anniversary dates are deemed to be October 18 pursuant to subsection 67(4) of the **Mining Act**.

6. **THIS TRIBUNAL FURTHER ORDERS** that this Order be filed without fee in the Office of the Provincial Mining Recorder in Sudbury, Ontario, pursuant to subsection 129(4) of the **Mining Act**.

DATED this 23rd day of November, 1999.

Original signed by M. Orr

M. Orr
DEPUTY MINING AND LANDS COMMISSIONER

SCHEDULE "A"

Mining Claim	# Units	Amount of Work In Dollars	Due Date
P-1222832	1	$400	October 18, 2001

File No. MA 025-97
File No. MA 026-97

M. Orr) Tuesday, the 23rd day
Deputy Mining and Lands Commissioner) of November, 1999.

THE MINING ACT

IN THE MATTER OF

Mining Claim P-1222832, having been recorded in the name of Reginald James Charron, hereinafter referred to as the "Charron Mining Claim" and an untagged mining claim staked by Frank Racicot, to have been recorded in the name of Frank Racicot, marked "refused", hereinafter referred to as the "Racicot Mining Claim", all of which are situate in the Township of Chester, in the Porcupine Mining Division;

AND IN THE MATTER OF

The appeal of Frank Racicot from the decision of the Mining Recorder for the Porcupine Mining Division, dated the 17th day of June, 1997, to not record a mining claim staked without tags, on the basis that it was not in compliance with clause 2(1)(a) of Ontario Regulation 7/96 and for an Order cancelling the Charron Mining Claim on the basis that its staking was second in priority to the Racicot staking, which forms the subject matter of File No. MA-025-97;

B E T W E E N:

FRANK RACICOT

Appellant

- and -

THE MINISTER OF NORTHERN DEVELOPMENT AND MINES

Respondent

- and -

REGINALD JAMES CHARRON

Party of the Third Part

AND IN THE MATTER OF

Mining Claim P-1215188, situate in the Township of Chester, in the Porcupine Mining Division, to have been recorded in the name of Edward J. Korba, marked "filed only", hereinafter referred to as the "Korba Mining Claim";

AND IN THE MATTER OF

A revised Application To Record Mining Claim P-1222822, situate in the Township of Chester, in the Porcupine Mining Division, staked by Jerry E. Jerome and Reginald James Charron, to be recorded in the name of Reginald James Charron should the Charron Mining Claim be cancelled, hereinafter referred to as the "Charron Restaked Mining Claim";

B E T W E E N:

EDWARD J. KORBA

Applicant and Disputant

- and -

REGINALD JAMES CHARRON

Respondent

AND IN THE MATTER OF

Leave of the tribunal to Edward J. Korba, to file a dispute, pursuant to subclause 48(5)(c)(i), in the event that the appeal is dismissed and the hearing of the dispute to be transferred to the tribunal pursuant to subsection 110(2) of the **Mining Act**, through consent or alternatively order of the tribunal;

AND IN THE MATTER OF

The hearing of the dispute of Edward J. Korba against the Charron Mining Claim, should the appeal of Frank Racicot in File No. MA 025-97 be dismissed.

REASONS

This matter was heard on October 14, 1999, in the Palladium Centre Room at the Ramada Inn, Sudbury, Ontario. Those appearing were Mr. Frank Racicot, Mr. Edward Korba, Mr. Reginald James Charron, (representing themselves) and Mr. Roy Spooner representing the Ministry of Northern Development and Mines. Mr. Korba had one witness, Mr. Derrick Reed. Mr. Edward Blanchard gave information on behalf of Mr. Charron.

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Background

Leave to file a dispute was granted to Mr. Edward J. Korba by Commissioner Kamerman on June 14, 1999. The Commissioner further ordered and directed that the appeal of Mr. Frank Racicot and the dispute of Mr. Korba would be heard in common. These are the Reasons for the Order resulting from that hearing.

A pre-hearing telephone conference call was conducted by Commissioner Kamerman on July 13, 1999 and all of the Parties were present. As a result of that pre-hearing and amongst other things, the Commissioner directed Mr. Racicot to provide evidence to this Tribunal of having paid the prescribed fee required pursuant to subsection 46(2) of the **Mining Act** to the Provincial Mining Recorder. Mr. Racicot did provide same in the form of a receipt for $22.74 and this was accepted by the Tribunal as evidence of payment.

During the pre-hearing conference, the Commissioner identified three issues that could be addressed at this hearing. They were noted by the Commissioner as being "the way one stakes the 22-hectare irregular land in unsurveyed territory; … compliance where … any number of the stakings commenced before nine o'clock, … and … Mr. Charron's blazing." The determination of these issues would of course rest on the nature of the evidence presented at this hearing and the credibility of the witnesses.

There are also certain historical peripheral facts which are of interest as they set the stage for the actions of the parties to this hearing. The parties made reference to these facts throughout the course of their testimony. The Ministry kindly provided a chronological outline that everyone was able to follow and which no one took issue with on an evidentiary basis.

Mining Claim S-121594, Chester Township, came open for staking on June 1, 1997. Lease 102945 for that claim (mining and surface rights), had expired on June 30, 1995. The land surrounding this claim was not open for staking.

According to the Ministry's information, the dimensions of the land that was open for staking were 1310.10 feet (399.3 meters) x 1654.35 feet (504.2 meters) x 1317.50 feet (401.6 meters) x 1970.50 feet (600.6 meters). The conversion to meters is approximate. The area was 21.98 hectares of land and land under water.

The Ministry of Northern Development and Mines (MNDM) provided this Tribunal with information regarding the applications which had been filed in the Mining Recorder's Office in Timmins, Porcupine Mining Division and Mr. Roy Spooner described the staking as "competitive overlapping staking". The MNDM's information was uncontested. It indicated the following:

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- Frank Racicot began his staking for his "untagged" claim at 9 a.m. on June 1, 1997, and that he completed his staking at 9:14 a.m. His staking involved the westerly portion of the land open for staking and comprised 8 hectares.

- The staking of claim 1222832 was commenced by Mr. Charron on June 1, 1997 at 9:00 a.m., and completed at 9:23 a.m., having staked all the lands open for staking, or approximately 22 hectares.

- Mr. Korba carried out two staking efforts on June 1, 1997. One was done in the morning and one in the afternoon. Both efforts involved the same land – the easterly portion of the land open for staking and comprised 16 hectares or one unit. However, the only claim filed by Mr. Korba was 1215188, being the one staked on June 1, 1997 beginning at 1 p.m. and completed at 1:40 p.m.

- The effect of Mr. Charron's staking was that his claim encompassed both Mr. Racicot's and Mr. Korba's claims. Mr. Charron had his June 1st efforts re-staked on June 12th and filed claim 1222822.

Issues

1. Can Mr. Racicot's staking of an eight (8) hectare claim be considered to be in substantial compliance with the **Mining Act** if it is carried out concurrently with another staker (Mr. Korba) who would be staking an adjacent sixteen (16) hectare claim? Put another way, does section 43 of the **Mining Act** work to validate Mr. Racicot's claim, given that at the time of the staking, the adjacent claim was being staked and therefore had not been recorded?

2. Is a claim for which an application to record has not been filed within the time required by Section 44 of the **Mining Act** valid?

3. Does Section 43 of the **Mining Act** operate to validate Mr. Charron's staking which is deficient in that he failed to blaze at least one of his lines?

4. Can a recorded claim be re-staked?

Evidence

In addition to referring to documentation that he had filed with the Tribunal, Mr. Racicot stated that he and Mr. Korba had come to a "gentleman's agreement" in the bush prior to June 1st to carry out stakings on claim S-121594. He indicated that he met Mr. Korba at the site and that Mr. Korba was engaged in the same activity as Mr. Racicot – that of preparing to stake the area. According to Mr. Racicot, "[w]e reached a gentleman's agreement and decided to stake it in a fashion that would be appropriate for the area and to get the job done as quickly and honestly

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and as fairly as we could in trying to comply with all the regulations of the **Mining Act.**" He also added, "… what the arrangement was, … because that claim was only 600 metres wide, I would stake the western portion of the claim and Mr. Korba would stake the eastern portion of the claim. And rather than have an overlapping of the claims we agreed that we'd have a common boundary where Mr. Korba's posts from three to four would be my posts one and two which would be applied along the same common boundary."

Mr. Racicot indicated in his written material that "overlapping" was considered "irregular " and "unethical", given that "Korba's claim … would have officially been completed before [Racicot's] claim".

Mr. Racicot indicated that the lines he followed in his staking were "prepped" ahead of time and that he started his staking at 9:00 o'clock. He moved from the number 1 to the number 2 post with a boat taking him from the number 2 post to the number 3 post. He staked around the perimeter and ended up at his number 1 post at 9:14 a.m. He also says that he thought he was substantially complying with section 43 of the **Act** as he thought Mr. Korba was staking his portion at the same time, although he (Racicot) had no way of knowing and apparently never did know what Mr. Korba was doing. Mr. Racicot said that when he was erecting his number 1 and number 2 posts, he did not see Mr. Korba's number 3 or number 4 posts.

Mr. Racicot also provided the Tribunal with a sketch of certain claims located in Tyrrell Township in support of his having staked a claim which was not the size required by the regulations. The abstracts accompanying the sketch indicate that while all the claims were staked in the morning of September 17, 1996, that some were recorded on the same day and others on October 2, 1996. There was no evidence to say why these claims had been staked in the size or shape they were depicted. At least one of the undersized claims (staked at 11:45 a.m.), had been staked by the same person who had staked a neighbouring claim (staked at 10:00 a.m.), of the required size earlier in the morning. Claim 1223928, to which Mr. Racicot made specific reference in his written material, was recorded on September 17, 1996. It had been staked at 9:55 a.m. that same morning.

Mr. Racicot agreed with the MNDM written account of why his claim was not regulation size. "There apparently was a plan to have a regular, 16 hectare mining claim staked to the east of Racicot. The staking began at 9:00 AM on opening morning. This office has no record of the staking adjacent to Mr. Racicot. Mr. Korba apparently failed to file the application to record. The staking of claim 1215188, by Mr. Korba, did not begin until 1:00 PM in the afternoon."

As Mr. Racicot stated in his materials which were pre-filed with the Tribunal "I was limited to extending my claim further to the west because of an existing claim." He also included a letter from the then Mining Recorder for the Porcupine Min-

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ing Division, Mr. Gary White (as did the MNDM) which was addressed to Mr. Racicot and dated June 17, 1997. In the letter, Mr. White explained that the application to record was being refused, noting in addition to the fact that the staking did not meet the regulations, that "at the date and time of starting to stake there was no reason why you could not adhere to this Regulation." Mr. White had referred to Regulation 7/96 Subsection 2(1)(a) under the **Mining Act**. The evidence of the Ministry was that Mr. White went to the next "in line" claim, going by the time of completion. This claim (1222832) belonged to Mr. Charron.

Mr. Korba also described the agreement he and Mr. Racicot had come to prior to June 1st. In his words, the claim that had come open (S-121594) was an "oversize claim". He told this Tribunal that Mr. Racicot had suggested that "it would be best if we staked the small claim and a regular size claim, and that way we have a chance." Mr. Korba said he told Mr. Racicot that he "wasn't sure if they could do a small claim" but that they decided to go ahead.

Mr. Korba submitted his evidence orally and through one witness, Mr. Derrick Reed. In addition, he also provided the Tribunal with written materials including three letters from three people whom he says were present at certain points of the area on the day in question. These three people were Mr. Gerald Boissonault, Mrs. Wendy Korba, (his wife), and Mr. Bailey Farrell. Both Messrs. Farrell and Boissonault claim in their letters that everyone agreed to inscribe their number 1 posts prior to the starting time. Mr. Boissonault said that it was he who actually made the suggestion in the belief that inscribing, tagging and erecting a No. 1 post prior to 9:00 a.m. did not constitute commencement of staking. He was at the No. 1 post on June 1st as he was staking a mining claim on his own behalf. Neither of these gentlemen indicated who was present and precisely who they saw carrying out this pre-inscribing exercise. Mr. Korba had contacted Mr. Boissonault after going back to his claim and finding Mr. Boissonault's name on a tag.

As far as Mr. Korba was concerned, he believed that his morning efforts had been improperly staked. He came to this conclusion after leaving the area and being told by his helper Bailey Farrell that "everyone" inscribed and tagged their posts prior to 9:00 a.m. He says that he confirmed this by talking to his sprinter Derrick Reed. Mr. Korba then turned around, headed back to the area, and staked another claim beginning at 1:00 p.m. the same day and ending at 1:40 p.m. This latter claim 1215188 is the claim he wants this Tribunal to treat as valid in preference to that staked by Mr. Charron on June 1st. Mr. Korba did not file a claim for his morning staking and the MNDM confirmed the lack of any record of same.

Mr. Korba submitted the three aformentioned letters as well as a video which he says was taken by his wife, Mrs. Wendy Korba. Mr. Korba says that the video was taken the morning of June 1st and shows a boat crossing an expanse of water, which is apparently Arethusa Lake. The boat contained two people who Mr. Korba says were Mr. Charron and

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another unnamed individual. The boat crosses the expanse of the Lake twice, first in a westerly direction and then back in an easterly direction. Mr. Korba claimed that Mr. Charron exited on the north side of the lake where he got into a truck driven by Mr. Blanchard to be taken in a northwest direction to Mr. Charron's number four post.

In her letter, Mrs. Wendy Korba stated that on June 1st she was an observer, and at 9:00 o'clock, she was on top of the "tailings pile, just east of the top end of the line from the number three to the number four posts of [the Korba] claim". At approximately fifteen minutes past the start time of 9:00 o'clock, she saw a truck driven by Mr. Blanchard coming up the tailings pile, stop and let Mr. Charron out. Mr. Charron is then said to have "continued on foot down the face of the pile and into the bush" in a direction which took him northwest of Mr. Reed's No. 3 to No. 4 claim line for the Korba claim. There is no indication on the video as to how she came to know the names of people she was capturing on film.

Mr. Korba presented the video in support of his contention that Mr. Charron did not walk the entire perimeter of his claim. Mr. Korba claims that Mr. Charron crossed the lake, from his number 2 post to his number three post and part-way back again. He says that Mr. Charron left the boat to cross a wet area made up of bog, muck and tailings in a truck to a point southeast of his number four post. He traversed from that point to his number 4 post in a diagonal and therefore did not move from his number three post to his number four post. In questioning Mr. Charron, Mr. Korba described the area as "muskeg" and " a floating bog". Mr. Korba also put it to Mr. Charron that he (Korba) had no problem getting on the muskeg and cutting a line from number three to number four post. Mr. Korba did not indicate exactly when he had carried out this cutting, but did say that originally he was going to take the full size claim. Mr. Korba described the bog as "pretty scary" but that he had "made it out of there without any problem". Mr. Charron replied that he had not been prepared to take the same "chance" that Mr. Korba had taken. Mr. Korba provided a map in the documents he filed with this Tribunal before the hearing which sets out the route taken by Mr. Charron and the wet parts of the terrain that both he and Mr. Charron referred to in their evidence.

Mr. Reed, who had been a runner for Mr. Korba, stated that prior to 9:00 o'clock ("maybe around ten minutes"), he was with a "small" group of people near the number one post when someone made the suggestion that everyone write up their posts before the starting time. When questioned by the Tribunal he said that he saw less than ten people present. Mr. Reed said that he asked if whether it was "all right to do that kind of thing". He says that "everyone seemed to agree". Rather than be left out, he decided to write his post up as well, wait until nine o'clock and then do his staking. His staking took him ten minutes. In being questioned by Mr. Charron, Mr. Reed was unsure of the actual time he saw people writing up their posts and could not remember the names of the people he saw that day, although he "probably" knew their names the day of the staking. When asked directly whether he saw Mr. Charron or Mr. Blanchard inscribing a post prior to nine o'clock, Mr. Reed could not answer one way or the other, neither "yes" nor "no".

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In giving his evidence, Mr. Charron did not dispute Mr. Korba's version of the facts. He did dispute Mr. Korba's opinion regarding the risk in crossing the wet area. Mr. Charron gave evidence regarding his reasons for having taken the path described by Mr. Korba (i.e., over the pilings towards the number four post). He said that the characteristics of the land were such that he was not able to walk, there was water and it was a wet area. He described it as muskeg and water. His reason for taking the route Mr. Korba says he took was to "come down at the edge of [the] wet area to pick up my claim line and carry it through to four." He said he could not "get back to the number three by foot". He went on to say, [y]ou can get there, but you can't walk, there's water and it is all wet area". Mr. Charron submitted an air photo to support his reason. Mr. Charron said that the air photo had been taken recently and his observer, Mr. James Blanchard, agreed. This was disputed by Mr. Korba who through questioning, claimed that it did not depict current conditions on the ground.

Mr. Charron's point was that the conditions made it impossible for him to start at the number three post and go to his number four post. He made a decision as a result of the conditions to go back in the boat across the lake and pick up his line on the edge of the swamp. According to Mr. Charron, the **Mining Act** it is not necessary to "mark a line on water or in an area that is inaccessible".

Mr. Charron indicated that he had re-staked the claim on June 12, 1997, thinking that the size of the claim (22 hectares) made it necessary to erect posts every 400 meters. He later came to the conclusion that his first interpretation was correct and that "unless two units are involved, which is 32 hectares, you don't need line posts." The Ministry agreed with this interpretation.

There was no evidence presented by any of the parties in opposition to Mr. Charron to suggest that he had not blazed anywhere else along the perimeter of his claim.

Mr. James Blanchard gave testimony on behalf of Mr. Charron. Mr. Blanchard was present as an observer at the staking. Mr. Charron was actually staking for Mr. Blanchard. Mr. Blanchard's evidence regarding the air photo referred to by Mr. Charron was that it had been taken in 1998 as part of a geological programme in the area. It was submitted to show the muck piles that had deterred Mr. Charron from taking his line up from his number three post directly to his number four post.

In his cross-examination of Messrs. Blanchard and Charron. Mr. Racicot took exception with the date of the air photo and subsequent to the hearing (with the Tribunal's permission), submitted information which he said supported his allegation that the air photo was not of recent vintage. This information was circulated to the parties as well.

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Mr. Blanchard also said that he could not recall anyone marking their posts before the 9:00 o'clock starting time. He does recall that everyone decided to start when Mr. Boissonault gave a yell. He says that everyone lifted up their posts and started to mark when Mr. Boissonault gave his yell.

The Ministry filed written materials and Mr. Spooner, Provincial Mining Recorder, gave oral evidence. The evidence presented by the Ministry reiterates the evidence presented by the parties with the exception of the dispute over the actual staking methods used by the parties and the dispute regarding the nature of the terrain between the number three and number four posts.

Mr. Spooner did say that the Ministry's interpretation of Section 44 of the **Act** would mean that Mr. Korba's morning staking, since it had not been filed, could not be considered valid as the 31-day time limit had passed.

In its written materials, the Ministry said that with respect to Mr. Racicot's claim, "[i]n order for Racicot's staking to be acceptable there must have been adjacent staking that would restrict the dimension of the more westerly mining claim. Without a partner or competitor staking the adjacent ground at the same time there is no circumstance, as mentioned in Section 43, that would make it reasonable for Racicot to stake a claim one half the prescribed area. The area east of Racicot was open for him to create a claim having a dimension of 400 meter by 400 meters approximately." The Ministry went on, "[i]f Korba did stake adjacent to Racicot there should have been an application to record presented to the Recorder. How else would the recorder be in a position to understand the sequence of events? … The recorder can only decide the matters properly if all evidence is available."

The Ministry made a reference to "overlapping staking" but aside from describing it as not being a new development in competitive staking, raising extensive and complex issues with respect to legal rights, said nothing else about that topic.

It was also Mr. Spooner's opinion, upon being questioned by the Tribunal, that any part of the staking action commenced prior to the opening time would invalidate the staking. The Tribunal is aware that this has been an issue in the past and is aware of the fact that there is case law to support Mr. Spooner's opinion.

Findings

Mr. Racicot stated that his undersized claim was staked in concert with Mr. Korba. If the Tribunal understands his position correctly, it is that two individuals can come to an agreement to simultaneously stake two claims, one of which does not comply with the size requirements of the regulation. Mr. Racicot also argues that sec-

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tion 43 will work to validate the efforts involved in staking an undersized claim. The **staking** of the correctly sized claim is intended apparently to act as a "barrier" to the staking of the undersized claim. In his written materials, Mr. Racicot relied on the use of Section 43 of the **Mining Act** to say that his claim should be recorded. Section 43 is set out below.

> **43.** ***(1)*** *Substantial compliance as nearly as circumstances will reason- ably permit with the requirements of this Act as to the staking out of mining claims is sufficient.*
> ***(2)****The staking out of a mining claim shall be deemed to be in substantial compliance with the requirements of this Act and the regulations even if there is a failure to comply with a number of specific staking requirements if,*
>
> ***(a)*** *the failure to comply is not likely to mislead any licensee desiring to stake a claim in the vicinity; and*
> ***(b)****it is apparent that an attempt has been made in good faith by the licensee to comply with the requirements of this Act and the regulations.*

The Tribunal finds that Mr. Racicot's argument fails for a number of reasons. Concerning his point of "simultaneous staking", Mr. Racicot has to deal with the fact that Mr. Korba staked his claim twice. If Mr. Racicot wishes to rely on the morning staking efforts of Mr. Korba, then he must agree with Mr. Korba's belief that they were invalid for the pre-inscribing incident. It follows that there was no impediment to his obligation to stake a claim of a prescribed size (16 hectares).

If he chooses the afternoon staking, then his "simultaneous" argument simply does not exist.

This points to a fundamental flaw in Mr. Racicot's argument if one were to choose adjacent "staking" as a reason for limiting the size of one's claim. As can be seen by the facts of this case, there are a number of intervening factors which can neutralize or remove such a barrier. In his testimony, Racicot admitted that he did not know what Mr. Korba was doing in terms of his claim. The Tribunal asks, what if Mr. Korba had taken ill or had simply walked away from his staking. If one were to accept Mr. Racicot's argument, none of that would matter - one could stake a small claim and rely on repeated adjacent stakings until that adjacent staker "got it right". Clearly the **Act** and its regulations do not intend for this to happen.

Another point that is not in Mr. Racicot's favour is the fact that the **Act** and its regulations provide a clear picture of what stakers can consider as "barriers". In particular the Tribunal notes the relevance of section 2 of Regulation 7/96 to this matter.

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This section, besides setting out the requirement that in unsurveyed territory a mining claim must be staked so that it consists of one or more 16 hectare units, also paints a very clear picture of what will go to determining the boundary of a claim. In particular, subsection 2(2) reads as follows:

> *(2) A mining claim may have a boundary that is coterminous with the **boundary of an area that is not open for staking** as long as all other boundaries of the claim are staked so that the claim conforms as closely as possible to the requirements set out in subsection (1).*
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> (emphasis added)

In the Tribunal's opinion, the reference to areas "not open for staking" is crucial to understanding why Mr. Racicot cannot rely on "simultaneous staking" to validate his claim. This takes the Tribunal to section 27 of the **Act**.

Before January 1996, section 27 read as follows:

> *27. Except where otherwise provided, the holder of a prospector's licence may prospect for minerals and stake out a mining claim on any,*
> *(a) Crown lands, surveyed or unsurveyed;*
> *…*
>
> *not at the time,*
>
> *(c) under staking or record as a mining claim ….*
>
> (emphasis added)

The **Act** was amended in January of 1996 and the amendment removed the words "under staking or" and substituted "on" in their place. Subsection 27(c) now reads "***on record** as a mining claim.…"*

(emphasis added)

In the Tribunal's opinion, this works to remove the **staking** barrier that Mr. Racicot would like to have the Tribunal accept as the reason for his undersized claim. Read in connection with the aforementioned subsection 2 of Regulation 7/96, Mr. Racicot's easterly boundary would be valid if it ran up against a recorded claim. There was no question that his other three boundaries were stopped by lands not open for staking (i.e., they were recorded claims).

With respect to Mr. Racicot's sketch of Tyrrell Township, some of the claims appear to be undersized, and they run up against other claims which appear to be regulation size. There was no information as to how these claims came to be rec-

orded and the Tribunal did not find the sketch on that point helpful. They were staked on September 17th and recorded in September and October of 1996. However, there is no indication as to what time of day they were recorded.

The Tribunal does not agree that section 43 of the **Act** works to validate Mr. Racicot's staking, as this would conflict with both Regulation 7/96 and section 27 of the **Act**.

Section 43 has the effect of granting a certain leniency to the efforts of the members of the mining community in their efforts to stake in accordance with the requirements of the legislation. To say that the deliberate creation of undersized claims via concurrent staking is acceptable as far as section 43 is concerned, is highly unlikely. For one thing, it ignores the possibility of one staker not being able to complete his or her staking or of having their staking found wanting in terms of compliance with the **Act** and the regulations. In the Tribunal's opinion, there must be something already in existence which restricts the staker's ability to comply with the size requirements. Under the **Mining Act**, the only relevant example for Mr. Racicot's purposes of something "already in existence", would be a recorded claim. To accept Mr. Racicot's argument is to say that despite the existence of the words "areas not open to staking" that section 43 will override and allow undersized claims of any size. Mr. Racicot's appeal is consequently denied.

With respect to Mr. Korba's dispute against the claim of Mr. Charron, he is relying on his afternoon staking efforts and asking the Tribunal to accept that claim as valid in preference to Mr. Charron's claim. The claim staked by Mr. Korba in the morning was never filed as Mr. Korba believed that it had been improperly staked. Whether that was in fact the case or not, there is no opportunity to revive the morning claim as it is out of time by virtue of section 44 of the **Mining Act**. This Tribunal finds that Mr. Korba's morning claim has no status in terms of the **Mining Act**.

With respect to his staking activities, Mr. Korba's position is that the claim he staked in the afternoon (P-1215188) is valid, while Mr. Charron's is not as Mr. Charron did not comply with the **Act** and regulations and Mr. Korba did. Mr. Korba alleges that Mr. Charron was one of the people who inscribed, tagged and erected their number one posts prior to 9:00 AM, and that this invalidates his claim. He also argues that Mr. Charron's actions in backtracking across the lake to a point on the shore and then being driven at a diagonal across the boggy terrain was not a continuous action as required by the **Act**. He also argues that in failing to go directly from his number three post to his number four post Mr. Charron's claim fails as he could not have blazed his complete line. He also argues that since the distance between the Charron number four and number 1 posts was 600 meters, that Mr. Charron should have been erecting line posts every 400 meters. Mr. Korba also says in his written material that since this was a competitive staking ("rush"), that the onus was on Mr. Charron to stake according to the letter of the **Act**.

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The Tribunal makes the following findings with respect to Mr. Korba's arguments.

With respect to the allegations that Mr. Charron pre-inscribed his post, the evidence of Mr. Reed is of little help to Mr. Korba's case as he had trouble identifying Mr. Charron and he could not definitively say that he actually saw Mr. Charron inscribing his post prior to the starting time. The Tribunal made an effort to have this question put to Mr. Reed but his response was that he could not say one way or the other whether he had seen Mr. Charron doing what had been alleged by Mr. Korba. Mr. Reed's evidence was vague at best.

The letters put forward by Mr. Korba from Mr. Boissonault and Mr. Farrell does not offer any definitive assistance either. Neither writer appeared to testify and neither writer identifies who was actually present at the number one post. Furthermore, neither writer identifies Mr. Charron as having pre-inscribed his post. A letter is of lesser evidentiary weight than an actual witness who can be questioned by the Tribunal and cross-examined by opposing parties. The Tribunal had set aside two days for this hearing and Mr. Korba was asked whether Mr. Boissonault was going to appear since Mr. Korba had intimated that he would attempt to have him present. Mr. Korba declined saying that Mr. Boissonault's work precluded his appearing to give evidence.

Mr. Korba's argument with respect to Mr. Charron's not having erected line posts at 400 meter intervals also fails. Subsection 2 (4) of Claim Staking Regulation 7/96 states that line posts are required in unsurveyed territory at 400 metre intervals if the claim consists of two or more 16 hectare units. The evidence is that Mr. Charron's claim is 22 hectares and is one unit. There is nothing to indicate that Mr. Charron could not stake one unit 22 hectares in size.

With respect to the evidence of Mr. Korba regarding Mr. Charron's activities on the day in question, it is vague, inconclusive and periodically conflicting. Mr. Korba was a helper from his number two post and his number three post. There is no indication that Mr. Korba saw anything having to do with Mr. Charron's activities after Mr. Charron entered the truck driven by Mr. Blanchard. Mr. Korba could not have seen what Mr. Charron did once he got to his line. In fact, it seems that no one actually saw Mr. Charron on the line in question. Mr. Racicot, in support of Mr. Korba's case, admitted that he did not follow Mr. Charron from his number three post to his number four post. Again, his evidence offers no help on this point as he could not be sure that Mr. Charron had not walked the line. Like Mr. Korba, he could say only that he had walked the line from number three to number four.

It is only by Mr. Charron's admittance that the Tribunal understands that he may not have gone back to his number three post to take his line completely up to his number four post. His reason for not going back appears to be that he was not going to take a chance crossing the bog or swamp that Mr. Korba had crossed when he prepared the claim.

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Should Mr. Charron's failure to go back to his number three post in order to bring his line up to his number four post amount to the invalidation of his claim? The general rules for staking are found at section 8 of Ontario Regulation 7/96 and state that a mining claim must be staked as a continuous action. The meaning of the word "continuous" is uninterrupted, connected through space or time. The section speaks about an "action" as being continuous. There is no evidence to indicate that Mr. Charron's actions in staking his claim were interrupted and that he broke off his staking activities for any period of time. His actions in backtracking across the lake after placing his number three post have been attributed by him to his decision to not tackle the wet terrain. The act of staking is one that requires the staker to deal with a variety of terrain and conditions on the ground. The **Act** anticipates that the mining community will have to make decisions in the field, and will make allowance for claims that may not comply precisely with the **Act** and its regulations if they can come within the ambit of section 43. Mr. Charron's decision to avoid going through what has been described as muskeg, bog and swamp and his resulting failure to connect his three to four line completely did not mislead anyone in the area. Nor is there any evidence that Mr. Charron was not acting in good faith. The evidence is that both he and Mr. Korba saw something in the field and decided to take individual actions with respect to the terrain. Mr. Korba alleged that Mr. Charron had taken his action in order to save time. The Tribunal found no evidence to support this allegation. The evidence is that Mr. Charron did not blaze for some part of his line between his number three and number four posts. The part of the line not blazed was the swamp or bog or muskeg area, depending on the witness giving evidence. There is no evidence to show that Mr. Charron deliberately avoided blazing his entire line in order to save time. In the Tribunal's opinion, Mr. Charron's claim substantially complies with the **Act** and for the aforementioned reasons, the Tribunal finds that Mr. Korba's dispute fails.

The Tribunal has already found that Mr. Korba's morning staking in not having been filed in time has lost any right to validity under the **Act**.

The video and the air photo submitted by Messrs. Korba and Charron respectively offered no help to the Tribunal with respect to the issue of the nature of the area which Mr. Charron says he chose not to cross. The video, the air photo and Mr. Racicot's subsequent air photo information simply did not depict the disputed terrain in a way that the Tribunal cold rely on it with any confidence. The Tribunal preferred to consider the oral evidence of the witnesses themselves.

While the Racicot staking was completed before the Charron staking, the Racicot staking relied on the Korba staking to give it a reason for being undersized. The Tribunal has already noted that the Korba staking of the morning, being out of time under section 44 and therefore not valid, cannot somehow be revived to justify Mr. Racicot's undersized claim.

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The Tribunal makes no finding, for obvious reasons, regarding the re-staked claim of Mr. Charron. However, the Tribunal does note that section 27 (c) of the **Act** does not permit the staking of land which is on record as a mining claim. Mr. Charron's June 1st claim was recorded on June 4th. The **Act** makes no allowances for anyone to go in and re-stake land once it is recorded, even if it is their own recorded claim. The Tribunal notes that there are occasions when stakers can work with the recorders in order to clear up any imperfections that might have occurred during staking.

Exclusion of Time

Pursuant to subsection 67(2) of the **Mining Act**, the time during which Mining Claim P-1222832 was pending before the Tribunal, being the 10th day of July, 1997, to the 23rd day of November, 1999, a total of 867 days, will be excluded in computing time within which work upon the Mining Claim is to be performed and filed.

Pursuant to subsection 67(3) of the **Mining Act**, as amended by S.O. 1996, c.1, Sched. O, s.18, October 18, 2001 is deemed to be the date for the performance and filing of the first and second units of assessment work on the Charron Mining Claim.

Pursuant to subsection 67(4) of the **Mining Act**, all subsequent anniversary dates for the Charron Mining Claim are deemed to be October 18.

Conclusions

The appeal of Mr. Frank Racicot and the dispute of Mr. Edward J. Korba are hereby dismissed.

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