File No. MA 035-97

L. Kamerman) Wednesday, the 4th day
Mining and Lands Commissioner) of February, 1998.

THE MINING ACT

IN THE MATTER OF

Mining Claim L-1205682, situate in the Township of Taylor, in the Larder Lake Mining Division, staked by George Daniel Harkin and recorded in the name of 297 3090 Canada Inc. carrying on business as Trinity Explorations, hereinafter referred to as the "Cancelled Trinity Mining Claim";

AND IN THE MATTER OF

Mining Claim 1224106, situate in the Township of Taylor, in the Larder Lake Mining Division, staked by Patrick Len Gryba, to be recorded in the name of St. Andrew Goldfields Ltd., marked "Filed Only", hereinafter referred to as the "St. Andrew Filed Only Mining Claim";

AND IN THE MATTER OF

Crown Land Sale Number 110613, dated the 3rd day of August, 1954, registered as Parcel 23575, Cochrane SEC, in the Township of Taylor, situate in the District of Cochrane, registered in the name of St. Andrew Goldfields Ltd., (hereinafter referred to as "the Patented Lands");

AND IN THE MATTER OF

Subsection 61(3) of the **Public Lands Act**;

B E T W E E N:

PATRICK LEN GRYBA

Applicant of the First Part

- and -

ST. ANDREW GOLDFIELDS LTD.

Applicant of the Second Part

- and -

297 3090 CANADA INC.

Respondent

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AND IN THE MATTER OF

A preliminary determination pursuant to section 105 of the **Mining Act** for a declaration concerning the location of Wabbler Lake within Patent 23575 Cochrane SEC, if any and a declaration of whether there are any lands contained within boundaries of the said Patented Lands by virtue of being contained within Wabbler Lake which are not alienated from the Crown and thereby available for staking;

AND IN THE MATTER OF

An application pursuant to section 105 of the **Mining Act** for a determination that 297 3090 Canada Inc., carrying on business as Trinity Explorations, was misled by the Mining Recorder concerning the status of the lands in the Cancelled Trinity Mining Claim thereby allowing it to forfeit through the non-performance of assessment work, and for reinstatement of the Cancelled Trinity Mining Claim;

AND IN THE MATTER OF

An appeal pursuant to section 112 from the decision of the Mining Recorder for the Larder Lake Mining Division, dated the 15th day of September, 1997, marking the St. Andrew Mining Claim as "Filed Only" and for the recording of the St. Andrew Mining Claim.

O R D E R

UPON reading the materials filed:

1. THIS TRIBUNAL DECLARES pursuant to its jurisdiction under section 105 of the **Mining Act**, that those lands found in Broken Lot 9, Concession II, in the Township of Taylor, more particularly described in Letters Patent granted on the 3rd day of August, 1954 by Her Majesty under the **Public Lands Act** to Mr. Walter Morin, comprised of the North-East Part of the said Broken Lot conveyed all of the lands described including the lands purportedly under the waters of the non-existent Wablers Lake, and therefore, there are no lands within the North-East Part of the said Broken Lot which are available for staking.

2. THIS TRIBUNAL FURTHER DECLARES pursuant to its jurisdiction under section 105 of the **Mining Act**, that those lands found in Broken Lot 9, Concession II, in the Township of Taylor, more particularly described in Letters Patent granted on the 25th day of October, 1962 by Her Majesty under the **Public Lands Act** to Mr. Lucien Lachappelle, comprised of the South-East Part of the said Broken Lot conveyed all of the lands described including the lands purportedly under the waters of the non-existent Wabbler Lake and therefore, there are no lands within the South-East Part of the said Broken Lot which are available for staking.

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3. THIS TRIBUNAL ORDERS that the appeal of Mr. Patrick Len Gryba from the decision of the Mining Recorder for the Larder Lake Mining Division, dated the 15th day of September, 1997, marking the St. Andrew Mining Claim as "Filed Only" be and is hereby dismissed.

4. THIS TRIBUNAL FURTHER ORDERS that the application of 297 3090 Canada Inc. pursuant to subsection 105 of the **Mining Act** for a reinstatement of the Cancelled Trinity Mining Claim be and is hereby dismissed.

IT IS FURTHER DIRECTED that upon the payment of the required fees, this Order be filed in the Land Titles Office in Cochrane, Ontario.

DATED at Toronto this 4th day of February, 1998.

Original signed by
L. Kamerman

L. Kamerman
MINING AND LANDS COMMISSIONER

File No. MA 035-97

L. Kamerman) Wednesday, the 4th day
Mining and Lands Commissioner) of February, 1998.

THE MINING ACT

IN THE MATTER OF

Mining Claim L-1205682, situate in the Township of Taylor, in the Larder Lake Mining Division, staked by George Daniel Harkin and recorded in the name of 297 3090 Canada Inc. carrying on business as Trinity Explorations, hereinafter referred to as the "Cancelled Trinity Mining Claim";

AND IN THE MATTER OF

Mining Claim 1224106, situate in the Township of Taylor, in the Larder Lake Mining Division, staked by Patrick Len Gryba, to be recorded in the name of St. Andrew Goldfields Ltd., marked "Filed Only", hereinafter referred to as the "St. Andrew Filed Only Mining Claim";

AND IN THE MATTER OF

Crown Land Sale Number 110613, dated the 3rd day of August, 1954, registered as Parcel 23575, Cochrane SEC, in the Township of Taylor, situate in the District of Cochrane, registered in the name of St. Andrew Goldfields Ltd., (hereinafter referred to as "the Patented Lands");

AND IN THE MATTER OF

Subsection 61(3) of the **Public Lands Act**;

B E T W E E N:

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Applicant of the First Part

- and -

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A preliminary determination pursuant to section 105 of the **Mining Act** for a declaration concerning the location of Wabbler Lake within Patent 23575 Cochrane SEC, if any and a declaration of whether there are any lands contained within boundaries of the said Patented Lands by virtue of being contained within Wabbler Lake which are not alienated from the Crown and thereby available for staking;

AND IN THE MATTER OF

An application pursuant to section 105 of the **Mining Act** for a determination that 297 3090 Canada Inc., carrying on business as Trinity Explorations, was misled by the Mining Recorder concerning the status of the lands in the Cancelled Trinity Mining Claim thereby allowing it to forfeit through the non-performance of assessment work, and for reinstatement of the Cancelled Trinity Mining Claim;

AND IN THE MATTER OF

An appeal pursuant to section 112 from the decision of the Mining Recorder for the Larder Lake Mining Division, dated the 15th day of September, 1997, marking the St. Andrew Mining Claim as "Filed Only" and for the recording of the St. Andrew Mining Claim.

REASONS

To hear and determine the preliminary issue of whether there are lands within the Patented Lands which are available for staking, or whether all of the said lands have at all times relevant to these proceedings been alienated from the Crown through the issuance of Crown Patents which are currently the interest of St. Andrew Goldfields Ltd.

Background

The facts in this matter are set out in greater detail below. The issue arises out of an error in the original survey of Taylor Township, where the land surveyor incorrectly plotted a lake, known alternatively as Wablers, Wabblers or Wabbler's Lake, as being found in Lot 9, Concession II, when in point of fact, the lake exists in Lot 8, Concession II, with possibly a minute portion crossing the lot line into Lot 9.

From this error, there were two Crown Land Sales involving the north-east and south-east parts of Lot 9 which purported to grant in fee simple the lands described therein, both of which circumvented the lake which did not exist on those lands.

In the Office of the Mining Recorder for the Larder Lake Mining Division, the lands which are described as being covered by the waters of the lake were staked from time to

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time. The second to last staking involved 297 3090 Canada Inc., carrying on business as Trinity Explorations, of which Mr. Glenn J. Mullan is a principal. Mining Claim L-1205682 was staked on March 17, 1995 by Mr. George Daniel Harkin and recorded and transferred to 2973090 Canada Inc. on April 11, 1995.

The matter of the lands under the lake became an issue before the Mining Recorder and based upon the fact that the lands were found to have passed with the original patent, therefore being alienated from the Crown, Mining Claim L-1205682 was cancelled on August 26, 1997 (See abstracts appended to Ex. 23). This decision was not appealed by Mr. Mullan.

On September 11, 1997, the lands were subsequently staked by Mr. Patrick Gryba and on September 15, 1997 were filed in the Office of the Mining Recorder, having been marked as "filed only" (Ex. 19). Mr. Gryba appealed the decision of the Mining Recorder by Notice of Appeal dated September 30, 1997 (Ex. 20)

On November 13, 1997, Mr. Mullan wrote to the tribunal (Ex. 23), and pointed out that his company's mining claim had been cancelled owing to the situation with the patented lands. He stated that the Mining Recorder should not have accepted the Gryba mining claim as "filed only". He further requested that the tribunal determine the standing of the lands and the respective rights of the parties, taking the position that, should the lands be available for staking, Mining Claim L-1205682 should be reinstated. The contents of this letter are set out in greater detail below.

Facts not in Dispute

The circumstances which give rise to the facts in this case date back to the original survey of the Township of Taylor. In a document entitled "Report and Field Notes of the Survey of the Township of Taylor" dated December 30, 1904 (Ex. 2), Mr. A.S. Code, Ontario Land Surveyor reported on his survey to the Commissioner of Crown Lands. In the attached Index Map, there is a lake shown on Lot 9, Concession II, which is named Wabblers Lake. Further particulars of the metes and bounds of the lake are included in the attachment entitled, "Wabbler's Lake Compass Survey", being comprised of approximately 19 acres.

On the Plan of the Township of Taylor in the District of Nippissing (Ex. 1), Wabbler's Lake is again shown in Lot 9, Concession II.

In a document entitled "Crown Sale of Land" bearing File Number 33519, Reference Number 110613, dated September 24, 1930, (Ex. 3) granted to Mr. Walter Morin:

> ... the North-East Part of Broken Lot Number 9, 2nd Concession
> of the said Township of Taylor, described as follows:

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> Commencing at the north-east angle of said Broken Lot 9; Thence Westerly along the north limit, of the said lot, 20.34 chains; Thence southerly parallel to the east limit of the lot, 45.76 chains; Thence East astronomically 12.00 chains, more or less, to the high water mark along the westerly shore of Wablers Lake; Thence in a general north-westerly, northerly, easterly, southerly, south-easterly and easterly direction following the said high water mark in all its windings to the intersection with the east limit of said Broken Lot 9; Thence Northerly along the said East limit 45.76 chains, more or less, to the point of commencement.
> SAVING AND EXCEPTING and RESERVING any public or colonization roads or any highways crossing the said land at the date of these Letters Patent containing 75 acres more or less.

When compared with the Plan of the Township, the description corresponds with the northeast part of the lot, more or less, with the exception that the lands covered by Wabbler's Lake as shown on the Plan are excluded.

On June 17, 1954, Walter Morin applied for a Patent for 75 acres (Ex. 4). Letters Patent were granted on August 3, 1954 (Ex. 5) pursuant to the **Public Lands Act**. The legal description provides the same metes and bounds as above, with the following reservations:

> SAVING, EXCEPTING and RESERVING unto Us, Our Heirs and Successors, the free use, passage and enjoyment of, in, over and upon all navigable waters which shall or may hereafter be found on or under, or be flowing through or upon, any part of the land hereby granted, and reserving also right of access to the shores of all rivers, streams and lakes for all vessels, boats and persons.
>
> ALSO SAVING, EXCEPTING and RESERVING any public or colonization roads or any highways crossing the said land at the date of these Letters Patent.
>
> ALSO SAVING, EXCEPTING and RESERVING five per cent of the acreage hereby granted for roads, and the right to lay out the same where the Crown or its officers may deem necessary.

The Parcel Register (Ex. 6) similarly contains the exclusion of land covered by Wabler's Lake.

On October 25, 1962, Lucien Lachapelle obtained Letters Patent for the southeast part of broken Lot 9, Concession II (Ex. 7). The description of the lands in this second patent is reproduced:

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> All that Parcel or Tract of Land in the Township of Taylor, in the District of Cochrane, in the Province of Ontario, containing by admeasurement sixty-six and fifty four one-hundredths acres, be the same more or less, being composed of The southeast part of broken lot number nine, in the second concession of the said Township of Taylor, described as follows:
>
> BOUNDED on the east by the easterly limit of the said broken lot 9;
>
> BOUNDED on the south by the southerly limit of said broken lot 9;
>
> BOUNDED on the west by a line drawn parallel to the east limit of the said lot from a point in the north limit thereof distant 20.34 chains measured westerly along the northerly limit from the northeast angel of the said lot 9;
>
> BOUNDED on the north by the southerly limit of the high water mark of Wabbler Lake and a line drawn east astronomically across the said lot from a point distant 45.76 chains measured southerly parallel to the east limit of the lot from a point in the north limit thereof distant 20.34 chains measured westerly along the northerly limit of the said lot from the northeast angel of the said lot 9.

Commencing September 30, 1964, the matter of the location of Wabbler Lake became an issue with the then Departments of Mines and Lands and Forests. On that date, in a letter to Mr. G.H. Ferguson, a solicitor for the Law Branch, from S.J. Antoinette, also a solicitor (Ex. 8), the following comments are made with respect to Wabbler's Lake, first briefly on page one and then at length commencing on page two states:

> The original plan of the Township of Taylor dated 1904 shows Wabbler Lake to be in Lot 9, Concession II, whereas later surveys and the topographic map show the Lake to be in Lot 8, Concession II.
>
> . . . . .
>
> 2. Wabbler Lake - this lake (as noted above) is in Lot 8, Concession II and not in Lot 9, Concession II as shown on the original township plan.
>
> I have examined the original letters patent for both lots 8 and 9 and find as follows:
>
> (a) Lot 9, Concession II

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(i) Northeast part of Broken Lot 9 - 75 acres - patented August 3rd, 1954 - metes and bounds description given of the part lot - description goes to the high water mark of Wabbler Lake and along the high water mark.

(ii) Southeast part of Broken Lot 9 - 66.54 acres - patented October 25th, 1962.

See (i) above.

(b) Lot 8, Concession II.

(i) North half of Lot 8 - 156 1/2 acres - patented October 9th, 1923 - no mention of any water on the half lot - no metes and bounds description.

(ii) South half Lot 8 - 156 1/2 acres - patented December 12th, 1947.

see (i) above.

As mentioned before, through an error made in the original township plan, Wabbler Lake was shown in Lot 9, Concession II and patents issued before the error was discovered. This error was not discovered until some patents were issued for the northerly part of Lot 9, Concession II. There is a sketch of the southeast Part of Broken Lot 9, Concession II, dated September 17th, 1962, which shows the true position of the lake and its relation to the outline of the lake as incorrectly shown on plan of survey dated 1904.

Accordingly, unless Wabbler Lake is navigable, the bed of which is in Lot 8, Concession II, would have passed with the original grant, notwithstanding the error in the original township plan and the subsequent issuance of letters patent without reference to the lake within the boundaries of the lot.

Further correspondence on the subject ensued (See Exhibits 9 through 11) culminating with a Memo addressed to Mr. S.B. Panting, Supervisor of the Surveys Section from Mr. Robert G. Code, Surveyor General, Department of Lands and Forests, dated December 15, 1964 (Ex. 12), referring to the previous correspondence and stating the following:

Re: Lot 9, Con. 2, Twp. of Taylor
Dist. of Cochrane

For consideration of issuance of correcting Letters Patent for Lot 8 and 9, Concession 2, the above Township, kindly confirm that Wabbler Lake is actually on Lot 8, Concession 2 and determine if the said lake is navigable.

If the lake is navigable and subject to Section 1 of The Beds of Navigable Waters Act, may a plan and/or description be necessary and sufficient for issuance of correcting Letters Patent for the South half of Lot 8.

Regardless of navigability and if necessary for issuance of correcting Letters Patent for the North-East and the South-East parts of Lot 9, kindly prepare a plan and/or description if necessary for the respective parts, to include the area of approximately 8 acres which now stands in the Crown by erroneous exclusion in the original patent for each part.

The issue of navigability was handled through the dispatch by Mr. R.S. Panting, Supervisor, Surveys Section to the District Forester, in Cochrane, Ontario, a Memo dated February 12, 1965 (Ex. 13), which states in part:

We have been requested to determine whether Wabbler Lake in Lot 8, Concession II, should be considered navigable for administrative purposes.

Would you make an inspection of the lake and determine if it has an inlet and outlet that could be used for navigable purposes and whether the lake and the connecting waters are presently used by the public.

Your report should also cover the uses and history of Wabbler Lake, the width, depth and type of bottom of the connecting waters and whether you think this Department should consider these waters navigable for administrative purposes.

A response shortly thereafter, dated March 5, 1965, from Mr. J.D. Hughes, District Forester, Swastika Office to the Surveys Section (Ex. 14) states:

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> As requested in your memorandum of February 12th, 1965, we have inspected Wabbler Creek and find that there is not an outlet from Wabbler Lake, but the Creek starts from a lake to the north and east of Wabbler, this lake being approximately 5 feet lower than Wabbler. Wabbler Creek is mostly fed from Anderson Lake which is south of Highway #101 and is a spring on lot 7, con. 1, Taylor Township. The Creek is not navigable and is only 2 feet to 5 feet wide and normally about 2 feet deep with a silt bottom.
>
> Wabbler Lake is about 22 acres in area and is used to a limited extent for swimming and fishing by local residents.
>
> You will note on the sketch returned that the road now follows the lot line and passes at waters edge. Aerial photo # 104, Roll 59-28, Strip #4822, Base Map #485803 shows the spring and creek.

There is no evidence filed that there was any follow up to this information from the Surveys Branch.

The lands in lot 9 which purportedly are covered by Wabbler Lake were the subject matter of a letter from Mr. Martin Cuda, the Mining Recorder for the Larder Lake Mining Division, dated April 8, 1991 (one of the documents included in the Correspondence from Glenn J. Mullan to the tribunal, dated November 17, 1997, Ex. 23) wherein Mr. Cuda states,

> 2) Lot 9, Con. II
>
> Wabbler lake is excluded from the area of this lot and therefore, the bed of this lake is Crown with the exception of that part of Wabbler lake contained in leased mining claims L74186 and L 74185. As I am unaware of anything that would inhibit the staking of this part of Wabbler Lake, I have no problem with the recording of your mining claim L1169008.

Subsequently, Mr. Roy Spooner, the next Mining Recorder for the Larder Lake Mining Division, appeared to have misgivings as to the situation involving the subject lands, having been made aware of the error in the original survey. On July 31, 1997, Mr. Spooner wrote to the Surveyor General (Ex. 17). This is reproduced in full:

> We request your advice in the matter of a "Crown Land Sale" dated Sept. 24, 1930 (75 acres). The existing parcel is 23575 SEC. Our question is whether or not the land described in the original patent as "Wablers Lake" is included or excluded from the grant. We presently have a mining claim recorded for the land and we are apprehensive that it was not open for staking as there is an error on the original township plan.

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> Enclosed is a portion of G-3718 illustrating the land in question.
>
> In reviewing the legal description we note that the patent seems to exclude the bed of Wablers Lake by describing the boundary along the shore of the lake. We have recently been advised by Gary Sherman and Rob Fulton that Wablers Lake does not exist in Lot 9. The lake is actually located in Lot 8. It would appear, therefore, that there was an error in the original patent as a result of an error on the original township plan.
>
> If the original patent describes the boundary following a lakeshore that does not exist is all the land included in the patent for the part of Lot 9?
>
> We have verbal opinion from Gary sherman and Rob Fulton that the lake does not exist therefore that all the land was included in the patent. The consequence to this office is that the mining claim may be invalid and the claim holder should be advised before they spend money performing assessment work.
>
> Your early assistance in this matter would be greatly appreciated.

The reply from the Surveyor General is found in an electronic mail letter to Mr. Spooner, dated August 14, 1997, from Mr. Robert Stocker (appended to the Mining Recorder's Order, Ex. 18), which states:

> This is to reply to your July 31st memo regarding Wablers (Wabbler's) lake as described in the September 24th, 1930 Crown Land Sale (Ref. No. 110613)
>
> This is to confirm that, with the possible exception of a very tiny portion of it, Wabbler's Lake does not exist in Lot 9, Concession 2 of Taylor Township. (Refer to the enclosed Lands and Forests Sketch dated September 17th, 1962 which suggests that this lake was misplotted on the original township plan.)
>
> In our opinion, only that part of the lake, if there is any, which was actually included in Lot 9, is excluded from the patent. If no part of the lake was actually within the lot, then no part of the lake was excluded by the patent. (In addition, Section 11 of the Surveys Act seems to only apply to land covered by the water of a lake.)

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> It appears from the OBM sheet 20 17 5200 53700 that Wabbler's Lake actually exists in Lot 8, Concession 2. If the patent for Lot 8 did not exclude it, and the lake is also not navigable (which it does not appear to be), then it would seem that the lake was granted as part of Lot 8.

Relying on this opinion, Mr. Spooner issued the following Order concerning the subject lands (Ex. 18):

> **Whereas**: Wabblers (Wabbler's) Lake does not exist in Lot 9 Concession II Taylor Twp. On Sept 24, 1930 a Crown Land Sale (Ref. No. 110613; Currently parcel 23575 Cochrane SEC) granted both surface and mining rights for "The North-East Part of Broken Lot Number 9 in the 2nd Concession of the said Township of Taylor". Mining rights were granted as indicated in Subsection 61(3) of the Public Lands Act R.S.O. 1990. The legal description for the land excluded the bed of Wablers Lake however it would appear that the original township plan of survey and the Crown Land Sale were incorrect with reference to the location of the lake. As indicated in Mr Stocker's opinion, the lake does not exist in Lot 9 therefore there was no exclusion of the bed of the lake and all the land was included in the now parcel 23575 SEC.
>
> **I Find:** that mining claim L 1205682 is invalid as the land is included in freehold title for surface and mining rights. The land was not open for staking nor is it open for staking now, therefore,
>
> **I Order:** that mining claim L 1205682 be removed from the record as recorded in error.

As discussed above, the subject lands were subsequently staked by Mr. Patrick Gryba and marked as "filed only". Mr. Gryba appealed this decision to the tribunal. The tribunal was subsequently made aware that Patrick Gryba staked these lands on behalf of St. Andrew Goldfields Ltd., the President of which is Mr. Charles Gryba, his brother.

Mr. Mullan became aware of this situation and wrote to the tribunal on November 13, 1997 (Ex. 23). His letter is reproduced in part:

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Further to our conversation earlier today regarding cancelling claim #L-1205682, Taylor Twp., Ontario I would ask that your office make a determination of the location of this previously recorded claim under Section 105 of the Mining Act of Ontario

Note that the subject claim falls entirely within patent parcel @23575 (NW Part of Wabbler Lake, Lot 9, concession 2, Taylor Twp.)

I have no objection to your office making such determination using materials already in your possession.

Specifically, in the event the patent does not form part of our cancelled claim (and vice versa), then I would ask that it be immediately reinstated with all of our rights and privileges. The order issued by the *Mining Recorder* (Larder Lake Mining Division), Mr. Roy Spooner, on August 26, 1997 followed our request for clarification of the above, prior to our undertaking a planned work program.

Mr. Spooner had previously cautioned me about proceeding with work programs prior to obtaining such clarification.

I am now informed that at approximately the same time the cancellation was issued, another mining claim was staked and recorded as "filed only". This would appear to be inappropriate given that we did not appeal the decision based on the understanding the order and its determination were all issued in good faith. In fact, Mr. Spooner's order clearly states that "... nor is it open for anyone to stake at the present time." And further more that "Any further staking will not be recorded."

I should mention that I find it hypocritical on the part of *St. Andrew Goldfields Ltd.* who initiated the proceedings regarding the status of this claim, which only followed the expiry of the same lands held by themselves (see transfer dated August 14, 1989 on previous claim #L-622515).

Having lost title under the Mining Act they now appear to have found a new forum to acquire mining rights.

It is also worth noting that he claim was originally staked by myself in 1991 and that I had originally asked the mining recorder at that time (Martin Cuda) to confirm that the claim was properly open for staking (see letter dated April 8, 1991 - attached).

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Issues

The tribunal must determine the status of the lands in Lot 9, Concession II which are excluded within the words of the original patents, being circumscribed by Wabbler's Lake, which in fact does not exist at this location.

Should the determination above be that the lands are indeed available for staking, the tribunal must determine who, as between 297 3090 Canada Inc. and St. Andrew Goldfields Ltd. is entitled to be the recorded holder.

Findings

The matter of lands included in a patent involving water was discussed at length in **Canadian Nickel Co. Ltd. and Abitibi Power and Paper Co. Ltd. et al.** 4 M.C.C. 224. It involved an appeal from the refusal of the mining recorder to accept applications involving the staking of land under the water of three small lakes, within two patents issued pursuant to 1 Edward VII, c. 6, being An Act to Provide for the Appropriation of Certain Lands for the Volunteers who served in South Africa and the Volunteer Militia who served on the Frontier in 1866. Under that statute, applicants were entitled to 160 acres. However, the patents in question each contained 152 1/2 acres.

At page 225, the tribunal discussed the relevance of whether the lakes were navigable, referring to the **Beds of Navigable Waters Act**, which provided then, as it does to this day, that unless a grant specifically states that such navigable waters are to pass with title, they will be deemed to not pass. The significance of this is to retain in the Crown title to whatever land is necessary for the construction of highways, including those which may be found over water.

In **Canadian Nickel**, there had never been a survey of the lakes, but they were determined to be non-navigable. The principle involving patents which do not specifically pass title to non-navigable waters, was addressed in **The King v. William Henry Fares et al.** (1932), S.C.R. 78. The tribunal discussed this case, as presented by counsel for the appellant at page 227:

> Counsel for the appellant submits that it is a well-established and historic presumption of law that where non-navigable lakes lie within the limits of a grant of land, such lakes are regarded as being included in the grant or patent, but it is a rebuttable presumption and was so held to be by the Supreme Court of Canada in *The King v. William Henry Fares et al.* (1932), S.C.R. 78 *et seq.* In this case, which dealt with land under the water of a non-navigable lake, then situate in the Northwest Territories (within what is now the Province of Saskatchewan), it was held that under

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English law the presumptive rule for construing a conveyance as a grant *ad medium filium aquae [to the middle thread of the stream]* is rebutted if an intention to exclude it is indicated in the language of the conveyance or is reasonably to be inferred from the subject matter or the surrounding circumstances. It was also held that in patents and agreements under which the lands were acquired from the Crown and the circumstances of the purchase (all interpreted in the light of the statutory provisions indicated, or the reasonable inference therefrom) there was no intention that the *ad medium filum* rule should apply, but that the patents to the property in question should be granted and accepted as covering only the acreage therein set out.

In the course of his judgement Lamont, J. observed:

> Now it has long been settled law in England that the prima facie application of the rule would be rebutted if there was anything in the language of the conveyance indicating an intention to exclude it or anything in the subject matter or the surrounding circumstances from which such an intention might reasonably be inferred. Dwyer v. Rich, (1871) I.R. 6 C.L., p. 144; City of London Tax Commissioners v. Central London Railway Company, (1913) A.C. 364, p. 371; Maclaren v. Attorney-General for Quebec, (1914) A.C. 258, p. 273.

Counsel also referred to the remarks of Duff, J. (as he then was) in the same case at p. 85, which are as follows:

> In Marquis of Salisbury v. Great Northern Railway Company (1858) 5 C.B.N.S. 174, the presumption was held to be rebutted where there was a conveyance to a railway company, purchasing under their statutory power, on the grounds that before the conveyance the company had, in their deposited plans and book of reference, treated the road as being vested in turnpike trustees and that the conveyance exactly carried out that view.

It is contended by Counsel that this common law presumption may be rebutted in three ways:

(a) By the terms of the Grant itself;
(b) By the surrounding circumstances;
(c) By the provisions of statutory law.

Also relevant to the tribunal's determination was the issue of acreage in the parcel and that conveyed in the deed. The relevant legislation at the time was An Act to Amend the Surveys Act, 3-4 George V., c. 33, which contained the following subsections:

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> 2. (2) Where in any survey of crown lands made under the authority of the Minister, any lot or other subdivision bordering upon a lake or river is given an acreage covering only the land area, such lot or other subdivision shall include the land area only and not any land covered by the water of such lake or river.

[Similar provisions are contained in the current **Surveys Act**, R.S.O. 1990, c. S. 30:

> **11.** - (1) Where a lake or river is shown on an original plan of Crown lands and a parcel of land shown thereon is given an acreage covering the land area only, such parcel of land does not include any land covered by the water of the lake or river.
>
> (2) Subsection (1) does not affect the rights of any person where such rights were determined by a court before the 8th day of July, 1913.]

The facts in the **Canadian Nickel** case differ in one other way to the current case involving Gryba, St. Andrew Goldfields and 297 3090 Canada Inc. The issue of the **Surveys Act** was further complicated by the fact that the legislation came into force after the patent was issued, but it was nonetheless determined to be retrospective, meaning the legislation would apply to a patent prior to the legislation being in place.

The tribunal considered a previous case before the tribunal with similar facts. In **C.D. Stevenson and Pamour Porcupine Mines Limited v. Bingham Mines Limited**, (unreported), June 13, 1938, which was appealed to the Court of Appeal. In that case, involving a grant under the same statute, 142 acres more or less, passed in the patent. The Court of Appeal found that, although the intention of 1 Edward VII, c. 6 was not carried out, nonetheless, the Court found that the patent was explicit in stating that it was 142 acres, and that was the amount which passed. The land under water was not included.

The tribunal concluded in **Canadian Nickel** that the grants did not contain 160 acres, but rather 152 1/2, and no more than the latter amount passed. Had it been intended for the land under water to pass, the patent would have stated 160 acres. The tribunal concluded that the lands under the three lakes were open for staking.

The facts of this case differ from **Canadian Nickel** and those referred to therein in one material sense. The issue to be determined is not whether the legal description in the patent includes lands under water which are not dealt with in the body of the patent. Rather, the issue is one of mistake within the words of the patent, by excluding certain lands under a lake which does not exist within that land. This gives rise to consideration of cases which consider the principle of *falsa demonstratio non nocet [a false description does not vitiate a document]*. This principle is set out in the text of **Latin for Lawyers** (Toronto: The Carswell Co., Ltd., 1915) at page 157:

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> 263. *Falsa demonstratio non nocet* (6 T.R. 676). A false description does not vitiate a document.
>
> > This rule signifies that where the description is made up of more than one part, and one part is true, but the other false, there, if the part which is true describes the subject with sufficient legal certainty, the untrue part will be rejected and will not vitiate the devise: The characteristic of cases within the rule being, that the description, so far as it is false, applies to no subject at all, and so far as it is true, applies to one only. The rule has sometimes been stated to be that "if there be an adequate and sufficient description, with convenient certainty of what was meant to pass, a subsequent erroneous addition will not vitiate it" (4 Exch. 604).

The headnote in **Re Finucane and Peterson Lake Mining Co. Limited**, (1914) 32 O.L.R. 128 (A.D.) states:

> A tract of land granted to the respondents by letters patent from the Crown was described therein as being in a certain township, containing a certain number of acres, and being composed of mining location S.V. 476, being land covered with the water of Peterson Lake, in front of certain other mining locations names, as shown on a plan of survey by W. of record in the Department of Lands Forests and Mines. W's plan shewd that the whole of Peterson Lake was included in mining location S.V. 476.
>
> *Held,* that the controlling words of the description were those referring to the mining location by its number as shown on W's plan; and the other part the description, if it was not an accurate description of the mining location as so shown, must be rejected as *falsa demonstratio*.
>
> Decision of the Mining Commissioner affirmed.

Similarly, **Lincoln Pulp and Paper Co. v. Austin** (1926) 30 O.W.N. 60, involved a patent from the Crown granted on April 9, 1798. The issue involved whether the words of the patent included the waters of Twelve Mile pond. At page 61, Latchford, C.J. states:

> > The patent contained, in the first place, an adequate, definite, and complete description of the lot. If the added words, "then southerly along the bank of the Twelve-Mile pond" were repugnant - which was not certain, as it was impossible to say where the bank of the pond was at the time (the field-notes affording no information) - those words must be rejected according to well-established rules of construction.

A number of cases are then listed. Three are discussed below.

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In **Brantford Electric and Operating Company v. Brantford Starch Works**, (1901) 3 O.L.R. 118, Armour C.J.O. states at page 119:

> And in construing it we have to apply to it the established rules of construction.
>
> "One of these rules is Falsa demonstratio non nocet; another is, Non accipi debent verba in demonstrationem falsam quae competunt in limitationem veram. The first rule means, that if there be an adequate and description, with convenient certainty of what was meant to pass, a subsequent erroneous addition will not vitiate it. The characteristic of cases within the rule is that the description, so far as it is false, applies to no subject at all' and so far as it is true, applies to one only. The other rule means, that if it stand doubtful upon the words whether they import a false reference or demonstration, or whether they be words of restraint that limit the generality of the former words, the law will never intend error or falsehood": Morrell v. Fisher (1849), 4 Exch. 591, R P. 604.
>
> "The distinction is between those cases in which there has been a complete description of the thing given, and a subsequent misdescription as to some particular connected with it, and cases in which that which is subsequently connected with the description is so connected as to form part of the description of the thing given.": *per* Lord Cransworth, *Slingsby v. Grainger* (1859), 7 H.L.C. 273, at p. 283.

In **Attrill v. Platt** (1884) 10 Can. S.C.R. 425, Strong, J. states, commencing at page 471:

> ... Mr. Justice *Patterson* in his judgement refers to the case of *Iler v. Nolan et al* [1] , as applicable to this point, and I am willing to abide by that case as containing a correct exposition of the law and as being a governing authority to be applied here. Then what does *Iler v. Nolan et al*, which is only one among a great number of cases both here and in *England*, decide? It determines that where a close or parcel of land is granted by a specific name, and it can be shown what are the boundaries of such close or parcel, the governing part of the description is the specific name, and the whole parcel will pass, even though to the general description there is superadded a particular description by metes and bounds, or by a plan which does not show the whole contents of the land as included in the designation by which it is generally known.

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[1] *2 U.C.Q.B. 319*

Cowen v. Truefitt Ltd., [1989] 2 Ch. 551, 554, [1899] 2 Ch. 309 involved a case where there was a mistake in an underlease in the description where a plan of the premises indicated that there was a staircase in Number 13, whereas in point of fact there was none, but Number 14 had two staircases, and the parties had intended that use of the back staircase form part of the underlease. In the lower court, the principle of *falsa demonstrario non nocet* was applied. Lindley, M.R., for the Court of Appeal, states commencing at page 311:

> I must, however, protest against the way in which the doctrine was stated by the appellants' counsel - that the maxim "*Falsa demonstratio non nocet*" only applies when there is some incorrect description at the end of the sentence. That is whittling away the doctrine and making it ridiculous: it is a misapprehension. I do not know that the principle can be better put than it is in Jarman on Wills, 5th ed. p. 742, where it is said the rule means "that where the description is made up of more that one part, and one part is true, but the other false, there, if the part which is true describe the subject with sufficient legal certainty, the untrue part will be rejected and will not vitiate the devise. 'The characteristic of cases within the rule is, that the description, so far as it is false, applies to no subject at all, and so far as it is true, applies to one only.' Thus, in *Day v. Trig* ([2]), where one devised ' all his freehold houses in Aldersgate Street, London,' having in fact only leasehold houses there, it was held that the word, 'freehold' should rather be rejected than the will be wholly void, and that the leasehold houses should pass."
>
> To limit that doctrine in the way that counsel suggested is to deprive it of half its merit. The ru
> construction of the underlease, I should feel some difficulty in coming to the conclusion that the plaintiff was entitled to the use of this staircase; but on the question of rectification I see no difficulty whatever. On the evidence I think the learned judge was quite right: when once it is ascertained that it was intended that the plaintiff should have access to her rooms by a staircase, and it was found that there is only one staircase by which such access can be had, it follows that it was right to make an order giving her the use of that staircase. The order should, however, be amended by adding the word "back" before "staircase," as everyone agrees that it was the back staircase that she was to use. 18

[2] (1715) 1 P. Wms. 286.

The tribunal has examined Lot 9, Concession II of the Plan of the Township of Taylor (Ex. 1). There is clearly no issue between the parties that the lake does not actually exist as shown on the Plan, but rather exists in Lot 8, Concession II, with the exception of a small tail at the south end which may cross the lot line. The configuration of the lake as erroneously shown is such that it appears wholly within the east half of the Lot 9. It also straddles the mid-point between the north and south halves of Lot 9, with most of it appearing in the northeast quarter of Lot 9.

The legal description in the Morin patent uses the words, "North-East part of Broken Lot Number 9". This may be indicative of a distinction between part of the quarter lot and the north east quarter. Clearly, the words denote a portion of the quarter broken lot. The description goes on to start at the north east limit of the quarter lot, moving west a distance of 20.34 chains. As the width of Lot 9 shown on Exhibit 1 is 40.00 chains, this width denotes half the width of the lot. The description changes direction to the south, going a distance of 45.76 chains. From Exhibit 1, the length of the lot appears to be 78.73 chains, so that this portion denotes more than half. The description changes direction again, heading east 12 chains to where it purportedly meets the high water mark of Wablers Lake, whereupon it follows the purported highwater mark to the point where it meets the east limit of broken lot 9. At this point it changes direction again, heading north a distance of 45.76 chains to the point of commencement.

The boundaries circumscribed by this description define three sides of a rectangle, whose proportions are 20.34 chains in width and 45.76 chains in length. It is quite clear from the description that all of the north-east part of Broken Lot 9 is included in the description, save for those portions covered by the non-existent Wabbler's Lake. Therefore, given that there is an error in the description of the boundary, what is it actually in law?

Calculating the area of the rectangle, if the south boundary were closed with a straight line renders an acreage of 93.07 acres

(20.34 chains x 66 feet/Gunter's chain) = 1342.44 feet
(45.76 chains x 66 feet/Gunter's chain) = 3020.16 feet

1342.44 feet x 3020.16 feet = 4,054,383.5 square feet

4,054,383.5 square feet divided by 43,560 square feet/acre =

93.07 acres

This is compared with the 75 acres more or less mentioned in the patent.

The legal description of the Lachappelle patent (Ex. 7) limits the conveyance of 66 54/100 acres, more or less. This is composed of the southeast part of the broken lot 9, again

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using the words "part" and not "quarter". The limits of the patent involve the east boundary and the south boundary of broken lot 9. The west line runs a distance of 20.34 chains drawn from the east boundary. The north limit is said to run at the southerly limit of Wabbler Lake the location of which is found to be 45.76 chains south and 20.34 chains west of the north-east angle of lot 9.

The acreage which would be contained in this patent, if the lines were drawn as a rectangle, is not immediately apparent. The actual distance of the north-south lines is not stated. However, relying on the Plan (Ex. 1), this north-south line is shown to be 78.83 chains. Therefore, the length of this line should be 78.83 chains less the 45.76 chains conveyed to Lachappelle = 78.83 - 45.76 = 33.07 chains. The area is estimated:

(20.34 chains x 66 feet/Gunter's chain) = 1342.44 feet
(33.07 chains x 66 feet/Gunter's chain) = 2182.62 feet

1342.44 feet x 2182.62 feet = 2,930,036.3 square feet

2,930,036.3 square feet divided by 43,560 square feet/acre =

67.264 acres

Taking the case of the Lachappelle patent for the southeast part of Broken Lot 9, Concession II, Township of Taylor, the tribunal finds that the patent conveyed all of the southeast part of Broken Lot 9. The boundaries which circumscribe this part lot are accurate insofar as three of the boundaries (east, south and west) are certain. The words which circumscribe the north boundary are accurate insofar there is mention of a line drawn atronomically east across from a definite starting point (being 20.34 chains east and 45.76 chains south of the north east corner) to a definite ending point, the boundary of the lot line. The tribunal finds that the reference to Wabbler Lake must be omitted from this description on the principle of *falsa demonstraio non nocet*, meaning that the false reference to Wabblers Lake will be rejected, but will not vitiate the remaining words in the patent.

The tribunal bases this finding on the fact that the Lachappelle patent also refers to the conveyance being 66 54/100 acres more or less, which does not differ materially from the 67.264 acres calculated as being in the rectangular configuration of this part lot. Therefore, the lands within the Lachappelle patent under the location of the improperly plotted Wabbler's Lake are alienated from the Crown and as such are not open for staking.

Considering the matter of the Morin patent, the metes and bounds in the legal description can be ascertained on three sides (north, west and east). It is the south boundary which is uncertain, as it contains the reference to a distance of 12 chains, and then to follow the meandering of the high water mark of Wablers Lake to the point where it intersects

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the lot line between Broken Lot 9 and Lot 8. What is most interesting about this point of intersection is that it implies that this north shore of the lake ends on the east boundary of Broken Lot 9 at a point exactly 45.76 chains south of the northeast corner of the lot, which is the exact length of the western boundary.

The tribunal finds that the legal description has circumscribed three sides of a rectangle. On the fourth, south side, the tribunal finds that, but for the high water mark of the non-existent lake, the south boundary moves east astronomically the named distance of 12 chains. The tribunal finds that it is quite clear that this line would continue east, but for this non-existent lake. Given that three sides of the rectangle can be drawn from certainty, the fourth line is commenced with certainty, the tribunal can reach no other conclusion than the words referring to Wablers Lake import a false reference as to how the line is to be drawn. The tribunal also finds that the drawing of the south line "Thence east astronomically ... to the intersection with the east limit of said Broken Lot 9", thus deleting the words, "12.00 chains, more or less, to the high water mark along the westerly shore of Wablers Lake; Thence in a general north-westerly, northerly, easterly, southerly, south-easterly and easterly direction following the said high water mark in all its windings" will be disregarded on the basis of the principle of *falsa demonstraio non nocet*. Similarly, the description of the area as 75 acres, more or less, is repugnant to the actual area described by the rectangle circumscribed by the metes and bounds laid out in the patent and as such will be disregarded on the principle of *falsa demonstraio non nocet*.

From these findings, a declaration will be made to the effect that there are no lands within these two patents which are not alientate from the Crown, and as such, there is no land available for staking.

Flowing from this finding, the appeal of Patrick Gryba and St. Andrew Goldfields Ltd. from the decision of the Mining Recorder dated September 15, 1997, will be dismissed.

In addition, while the application of 297 3090 Canada Inc. for a declaration is allowed in part, as set out in the previous paragraph, as there are no lands available for staking, the application regarding a determination of the rights to be the recorded holder of the subject lands as between Patrick Gryba and 297 3090 Canada Inc. will be dismissed.

Conclusions

The tribunal has determined that all of the land covering what was erroneously described as Wabbler, Wabbler's and Wablers Lake in two patents, was conveyed with those patents. As such, there are no lands available to be staked. A declaration to this effect, pursuant to subsection 105 of the **Mining Act** will be issued pursuant to these Reasons.

There is no need to determine the second issue in this matter, and therefore the appeal and second portion of the section 105 appliciation will be dismissed.

There are no costs to any party as a result of this application.