File No. MA 002-97

L. Kamerman	)	Tuesday, the 27th day
Mining and Lands Commissioner	)	of January, 1998.

THE MINING ACT

IN THE MATTER OF

Mining Claim 1215605, situate in the Township of Clement, in the Sudbury Mining Division, marked "filed only", hereinafter referred to as the "Tenajon Mining Claim";

AND IN THE MATTER OF

Mining Claim S-1223081, situate in the Township of Clement, in the Sudbury Mining Division, having been recorded in the name of Albert Joseph Leblanc, hereinafter referred to as the "Leblanc Mining Claim";

AND IN THE MATTER OF

Mining Claim S-1223083, situate in the Township of Clement, in the Sudbury Mining Division, having been recorded in the name of D & H Consulting Services Inc., hereinafter referred to as the "D & H Mining Claim";

AND IN THE MATTER OF

Clause 43(2)(a), subsections 44(2) and 44(4) of the **Mining Act**, (the "**Act**"), and Ontario Regulation 7/96;

AND IN THE MATTER OF

An appeal from the decision of the Mining Recorder for the Sudbury Mining Division, dated the 18th day of December, 1996, that the Tenajon Mining Claim is not in substantial compliance with the requirements of the **Act** and the regulation in that the staking is likely to mislead any licensee desiring to stake a claim in the vicinity within the meaning of clause 43(2)(a) of the **Act**;

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AND IN THE MATTER OF

An application for a declaration that the Tenajon Mining Claim is deemed to be in accordance with the **Act** and regulation and having priority under subsection 44(2), for the recording of the Tenajon Mining Claim;

AND IN THE MATTER OF

An application for the cancellation of the Leblanc Mining Claim S-1223081 and that part of the D & H Mining Claim S-1223083 which is covered by the Tenajon Mining Claim, pursuant to subsection 44(4) of the **Act**.

B E T W E E N:

TENAJON RESOURCES CORPORATION

Appellant

- and -

ALBERT JOSEPH LEBLANC

Respondent of the Second Part

- and -

D & H CONSULTING SERVICES INC.

Respondent of the Third Part

- and -

THE MINISTER OF NORTHERN DEVELOPMENT AND MINES

Party of the Fourth Part

O R D E R

AND PURSUANT TO an appeal received by this tribunal on the 23rd day of January, 1997.

1. THIS TRIBUNAL ORDERS that the appeal from the decision of the Mining Recorder for the Sudbury Mining Division dated the 18th day of December, 1996, be and is hereby dismissed.

2. THIS TRIBUNAL FURTHER ORDERS that the notation "Pending Proceedings" which is recorded on the abstracts of Mining Claims S-1223081 and 1223083, to be effective from the 10th day of January, 1997, be removed from the abstracts of those Mining Claims.

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3. **THIS TRIBUNAL FURTHER ORDERS** that the time during which proceedings were pending before the recorder and the tribunal concerning Mining Claims S-1223081 and 1223083, being the 10th day of January, 1997, to the 27th day of January, 1998, a total of 383 days, be excluded in computing time within which work upon these Mining Claims is to be performed and filed.

4. **THIS TRIBUNAL FURTHER ORDERS** that the 8th day of October, 1999 be fixed as the date by which the first and second units of prescribed assessment work must be performed and filed on Mining Claim S-1223081 pursuant to subsection 67(3) of the **Mining Act** and all subsequent anniversary dates are deemed to be October 8 pursuant to subsection 67(4) of the **Mining Act**.

5. **THIS TRIBUNAL FURTHER ORDERS** that the 5th day of January, 2000, be fixed as the date by which the first and second units of prescribed assessment work must be performed and filed on Mining Claim S-1223083 pursuant to subsection 67(3) of the **Mining Act** and all subsequent anniversary dates are deemed to be January 5 pursuant to subsection 67(4) of the **Mining Act**.

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

7. **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 27th day of January, 1998.

Original signed by

L. Kamerman
MINING AND LANDS COMMISSIONER

File No. MA 002-97

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Mining Claim S-1223081, situate in the Township of Clement, in the Sudbury Mining Division, having been recorded in the name of Albert Joseph Leblanc, hereinafter referred to as the "Leblanc Mining Claim";

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Mining Claim S-1223083, situate in the Township of Clement, in the Sudbury Mining Division, having been recorded in the name of D & H Consulting Services Inc., hereinafter referred to as the "D & H Mining Claim";

AND IN THE MATTER OF

Clause 43(2)(a), subsections 44(2) and 44(4) of the **Mining Act**, (the "**Act**"), and Ontario Regulation 7/96;

AND IN THE MATTER OF

An appeal from the decision of the Mining Recorder for the Sudbury Mining Division, dated the 18th day of December, 1996, that the Tenajon Mining Claim is not in substantial compliance with the requirements of the **Act** and the regulation in that the staking is likely to mislead any licensee desiring to stake a claim in the vicinity within the meaning of clause 43(2)(a) of the **Act**;

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B E T W E E N:

TENAJON RESOURCES CORPORATION

Appellant

- and -

ALBERT JOSEPH LEBLANC

Respondent of the Second Part

- and -

D & H CONSULTING SERVICES INC.

Respondent of the Third Part

- and -

THE MINISTER OF NORTHERN DEVELOPMENT AND MINES

Party of the Fourth Part

REASONS

The hearing of this matter was conducted by telephone conference call on December 16, 1997, with Mr. Gary Clark appearing on behalf of Tenajon Resources Corporation, Mr. Doug Edmondson appearing on behalf of D and H Consulting Services Inc. and Mr. Albert J. Leblanc and Mr. John Norwood appearing as counsel for the Minister of Northern Development and Mines ("MNDM").

Background and Facts Not in Dispute

The facts contained in the following Agreed Statement of Fact (Ex. 16) were agreed to by all parties:

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AGREED STATEMENT OF FACT

1. Mining Claim S-1223081 was staked on September 18, 1996 and recorded on September 20, 1996 in the name of the Respondent of the Second Part, Albert Joseph Leblanc. Mr. Leblanc maintains that there was no indication of any other claim posts in the area at the time of his staking.

2. Mining Claim 1215605 was staked on September 17, 1996 and filed on October 4, 1996, to be recorded in the name of the Appellant, Tenajon Resources Corporation and was marked as "Filed Only".

3. Mining Claim S-1223083 was staked on September 28, 1996, filed on October 11, 1996, accepted as "Filed Only" on December 18, 1996 and recorded on December 18, 1996 in the name of the Respondent of the Third Part, D & H Consulting Services Inc.

4. The Mining Recorder for the Sudbury and Southern Ontario Mining Divisions reviewed Mining Claims S-1223081 and S-1223083 to determine priority of staking pursuant to subsection 44(2) of the **Mining Act** and to determine the validity of Filed Only Mining Claim 1215605 pursuant to subsection 43 of the **Mining Act**.

5. The Mining Recorder for the Sudbury and Southern Ontario Mining Divisions found that Mining Claim 1215605 had staking priority over overlapping Mining Claims S-1223083 and S-1223081 and that there was no overlap between Mining Claims S-1223081 and S-1223083.

6. The Mining Recorder for the Sudbury and Southern Ontario Mining Divisions also found that the staker of Mining Claim 1215605 made a bonified attempt to comply with the staking regulations however, the southern boundary of this claim was not in his opinion properly established and would likely mislead other licensees staking in the vicinity. Therefore, the Appellant, Tenajon Resources Corporation did not satisfy clause 43(2)(a) of the **Mining Act** and therefore Mining Claim 1215605 was not considered to be in substantial compliance with the **Mining Act** and Ontario Regulation 7/96.

7. In his Order of December 18, 1996, the Mining Recorder for the Sudbury and Southern Ontario Mining Divisions ordered that Mining Claim 1215605 would not be recorded but would remain on file as "Filed Only" and by way of priority, Mining Claim S-1223083 would be recorded and Mining Claim S-1223081 would remain on record.

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8. It is the position of the Appellant, Tenajon Resources Corporation, that the north boundary of Mining Claim 1215605 was not found to be in question and that if Mining Claims S-1223081 and 1223083 (which overstake Mining Claim 1215605) were staked properly, their stakers would have encountered the posts and the north boundary of Mining Claim 1251605 and would have stopped staking.

9. It is also the position of the Appellant, Tenajon Resources Corporation, that the Mining Recorder for the Sudbury and Southern Ontario Mining Divisions could have issued a Mining Recorder's Order to correct any deficiencies with the shape of Mining Claim 1215605 and to move or re-inscribe posts, amend descriptions, blaze, etc.

Sketch C of the MDNM Submission (Ex. 13) depicts the manner in which the various mining claims are located on the ground and is useful from an overview perspective. Had the Tenajon Mining Claim been staked as a rectangle, it would have been a four unit square claim. The easternmost portion of the units on the east boundary occur wholly within Manitou Lake. The D & H Mining Claim is located in part within the northwestern quarter of the Tenajon Mining Claim. It is a two unit claim which straddles the MacBeth and Clement Township boundaries, so that the eastern half is wholly contained within the northwest quarter of the Tenajon Mining Claim. The Leblanc Mining Claim is a one unit claim, located within the northeast quarter of the Tenajon Mining Claim.

The staking of the Tenajon Mining Claim, as shown on the sketch accompanying the application to record (Ex. 2) delineates the claim as follows. The northern boundary is comprised of 800 metres. There is a line post on land 400 metres east of the #4 post and a witness post 150 metres further east, witnessing the #1 post 250 metres east into Manitou Lake. The western boundary is shown as 550 metres in length, with a line post shown 400 metres north of the #3 post, delineating a further 150 metres to the #4 post. The southern boundary, as far as it exists, occurring 550 metres south of the #4 post, shows a line post 400 metres east of the #3 post and a witness post is located 100 metres further east, which witnesses the #2 boundary a further 300 metres east and 250 metres south. The eastern boundary is shown as being 800 metres in length. From the features shown on the sketch, it would appear that the staker believed that all of the land in what should have been the southwest portion of the mining claim was alienated from the Crown. An arrow is shown pointing to this area, describing it as "Private Property".

Issues

There was also agreement as to the issues to be determined, which is reproduced:

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1. Did the staking of the Tenajon Resources Corporation Mining Claim 1215605 substantially comply with the requirements of the **Mining Act** within the meaning of subsection 43(1) or alternatively, be deemed to have substantially complied, within the meaning of subsection 43(2)?

2. If the answer to #1 is no, can a Mining Recorder's order rectify staking deficiencies?

3. If the Tenajon Resources Corporation Mining Claim 1215605 failed to comply with the requirements of section 43 of the **Mining Act**, is the failure fatal? What is the impact of the MNDM Guidelines For Staking In The Lake Temagami Skyline Reserve on this finding?

4. In the event that the Tenajon staking is found not to either comply or be deemed to comply with the **Act** and that a Mining Recorder's order cannot rectify the deficiencies found, what are the specific staking requirements for this particular tract of land in the Township of Clement, given the fact that alienated rights and the MNDM Guidelines For Staking In The Lake Temagami Skyline Reserve have to be in accordance with Ontario Regulation 7/96.

Evidence

Roy Anthony Denomme, Provincial Mining Recorder and former Mining Recorder for the Southern Ontario and Sudbury Mining Divisions, was recognized as an expert witness, having been so recognized in the past by this tribunal, qualified to give expert testimony regarding mining lands administration.

Mr. Denomme recounted the information concerning the stakings of the subject lands by the various parties to these proceedings. Essentially, once all of the applications to record had been filed, the Tenajon Mining Claim had priority of completion, but it was determined that the staking did not substantially comply with the requirements of the legislation and therefore it was marked "filed only". The Leblanc Mining Claim was already recorded, having been filed first and was allowed to remain so. As there was no overlap between the Leblanc and the D & H Mining Claims, the latter was recorded. (See Mining Recorder's Order, Ex. 5).

Mr. Denomme was asked his opinion on the issues agreed to by the parties:

1. In Mr. Denomme's opinion, the staking of the Tenajon Mining Claim, did not comply with the requirements of either subsection 43(1) or 43(2) of the **Mining Act**. In this regard, the staking did not substantially comply with the requirements of O.Reg. 7/96.

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Nor could it deemed to be in substantial compliance in accordance with one of the two tests set out in subsection 43(2). Mr. Denomme stated that he had no doubt as to the **bona fides** of the staking. However, the uncertainty surrounding the staking of the southwest portion of the Tenajon Mining Claim was such that it was likely to mislead stakers desiring to stake in the vicinity. Mr. Denomme underlined the fact that, in his opinion, the test regarding the misleading of stakers was an objective test and not a subjective one. As such, it did not merely concern those known to be in the area at the relevant time, but extended to anyone wishing to stake in the area, being on the ground and attempting to determine what had gone on before.

Mr. Denomme referred to Sketches A and B included in the MNDM Submission (Ex. 13). Sketch A depicts the Tenajon staking. In the comments included, is the following note:

> Shaded Area: Unclear whether this area was to form part of claim. South and southwest boundaries cannot be determined based on the placement of the #3 and #2 post.

The sketch goes on to show the Tenajon Mining Claim as taken from the application to record. Essentially, the boundaries shown depict a configuration which is unclosed, meaning the lines do not meet. The south boundary does not extend as far east as the north boundary. The east boundary extends further south than the west boundary. The shape resembles a squat, squared-off base clef in musical notation.

Sketch B in the MNDM submission depicts an alternative method of staking the lands in question, proposed by Mr. Denomme as acceptable. The configuration is a square, with the #3 and #4 posts shown, along with a line post in between along the west boundary and two witness posts denoting the #1 and #2 posts. The witness post for the #1 post is along the lakeshore on the northern boundary of the claim. The witness post for the #2 post is to the west of the alienated patented and surface rights. The location of what is described as "MN7", being the surface and mining rights patent, is shown by an area depicted in black. The depiction of the south boundary would eliminate one line post and be less visible to local traffic, as the post is located to the west of the road which runs north to south, crossing the south boundary within Location MN7. Mr. Denomme suggested that staking in this manner would have met all of the requirements of the legislation and would impact minimally on the site, which was a consideration of the Tenajon staker.

Mr. Denomme described the problems in the Tenajon staking. Not only were there shortfalls with respect to the requirements of the legislation, there was confusion on the ground was to how and whether the south boundary exists. Part of the south boundary was found 250 metres north of where it should be. Mr. Denomme reiterated his opinion that objectively speaking, a staker would be misled on the ground.

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2. Mr. Denomme stated that generally, a Mining Recorder's Order pursuant to subsection 110(6) can rectify deficiencies. However, in his opinion it could not do so on the facts of this case. It was explained that the mining recorders are not bound by other sections of the legislation, such as section 43, when determining whether to issue such an order. The orders are purely discretionary and the particulars of each case must be weighed, as the impact of an order can be significant.

The two determining factors in this case are whether the minimum requirements of section 43 have been met and the fact that there is an adverse interest in the lands. The effect of section 43 not being met is found in subsection 71(1) and is deemed to be an abandonment. The effect of a subsection 110(6) order would be to take the Tenajon Mining Claim out of abandonment and rectify the deficiencies in staking. Pursuant to subsection 110(7), when the requirements of subsection (6) have been met, the staking will be deemed to be in compliance with the legislation. To this the other issues must be factored in. There is an adverse interest involved. To allow the deemed compliance would effectively take a mining claim out of abandonment in preference to one which is second in priority and would invalidate the second claim. The would, in effect, penalize the second staker whose staking was in compliance.

Mr. Denomme stated that, in different circumstances, subsection 110(6) could be applied. If, for example, both stakers had substantially complied with the requirements of the legislation, so that the tests in section 43 had been met, it would create a level playing field. Alternatively, if there were no adverse interest, so that a decision did not impact on others complying with the legislation, subsection 110(6) could be used.

Simply stated, Mr. Denomme pointed out that the Tenajon staking did not comply with the requirements of the legislation, and due to the existence of an adverse interest, the mining recorder did not exercise his discretion in Tenajon's favour.

3. Mr. Denomme gave the opinion that the deficiencies in the Tenajon staking were fatal to their position on the facts of this case.

4. With respect to the Skyline Reserve Guidelines (See Guidelines For Staking In The Lake Temagami Skyline Reserve, Exhibit 12), Mr. Denomme stated that this has no impact on the facts of this case. The lands involved in this Guideline are six miles away from the subject lands. The Skyline Reserve involves the fringe around Lake Temagami, which varies in width and is delineated by the lands surrounding the lake which are visible from the lake itself. There is absolutely no application to the subject lands.

Asked by Mr. Norwood what staking requirements are applicable to the subject lands, Mr. Denomme stated that it is the general staking regulations found in O.Reg. 7/96. In answer to the tribunal's questions regarding Sketch B in the MNDM Submission, Mr. Denomme explained that the manner in which the sketch was laid out was to meet with Tenajon's concerns

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for minimal impact and minimal visibility in the vicinity. There is no absolute requirement to do so, but stakers were generally attempting to minimize impacts in the land caution area.

Mr. Edmondson had no questions on cross-examination.

Mr. Clark referred to section 3 of O.Reg 7/96, particularly subsections (1), (3), (4) and (5), which deal with staking an irregular area of land or land under water which is adjacent to land that is not open for staking. He suggested that the Tenajon staking complied with these requirements. Mr. Denomme stated that the latter subsections deal with boundaries along a body of water, the land under which is not open for staking. Mr. Clark asked whether this would allow a staker to refrain from placing a post along the lake, which is likely to impact on the staking.

In answer to Mr. Clark's question regarding intent to deceive, Mr. Denomme clarified that the test was not one of deceit, but one of likelihood of misleading. As the Tenajon staking was done, one might be likely to think that the south boundary was 250 metres north of its actual location. There is uncertainty as to where a staker could tie onto the south boundaries, although the north, east, and west boundaries are fine. It was suggested by Mr. Clark that Mr. Leblanc should have been aware of the Tenajon boundaries and tied onto them. Mr. Clark also asked whether there is an overlap in the D & H and Leblanc stakings, to which Mr. Denomme replied that there is no overlap.

The issue of the visibility of the staking was discussed and a means of making it be set back so as not to be visible was discussed. Mr. Clark, in passing made a comment regarding the southwestern portion of the Tenajon Mining Claim, to the effect that his staker thought that the entire 25 acres was not open for staking. The Skyline Reserve Guidelines were also discussed, with Mr. Denomme stating that when they came out, it was possible that stakers thought they should be extra careful in general when staking in the newly opened caution lands, although the Guidelines did not specifically apply to these lands.

Under re-direct, Mr. Norwood sought clarification of the Skyline Reserve matter. The matter of how staking should be undertaken in the lands covered by the Reserve was an issue for MNDM and it was assumed that when the lands would be opened for staking the Guideline would be released. The Guidelines are a result of a cautionary report, proposing special rules for staking in that area. The report was taken into account in drafting the guideline, to ensure that minimal damage would be incurred during staking. Two weeks before the land caution was lifted, it was determined that the Skyline Reserve lands would not be opened for staking without a special staking regulation. Mr. Denomme reiterated that the Guidelines were intended to have application to the Lake Temagami Skyline Reserve only which is a distance of six miles from the subject lands.

Mr. Denomme also reiterated that deceit is not part of the test under section 43 with respect to deemed substantial compliance.

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Mr. Clark stated that the Skyline Reserve Guidelines heightened the concerns of landowners involved in the blockade. When his staker went into Manitou Lake, it was dotted with cottages. The MN7 location is a 32 person lodge with a helicopter pad associated with it. His staker tried to not impact generally on the shoreline and tried to witness the #2 post in the lake at a distance from the shore, in an attempt to not impact on the lodge lands. The claim was attempting to circumvent patented lands along part of the south boundary of the Tenajon Mining Claim. There was never any attempt to mislead.

Mr. Edmondson stated that his staker, Mr. Albert Leblanc from Hager, Ontario, was familiar with the area and found problems with the staking. He stopped and spoke with Mr. Clark. It was confusing to him. Mr. Edmondson suggested that if it was not otherwise possible to determine the quality of the Tenajon staking, the tribunal should go out and look at the lines.

Mr. Norwood submitted that the issues in this matter relate to whether the Tenajon staking was in substantial compliance, the environmental sensitivity in the area, the need to stake around MN7 and a heightened awareness of the Skyline Reserve Guidelines. The legal situation with respect to the Guidelines is that they are of no consequence. The environmental concerns raised can be achieved in other ways, such as set out in the MNDM Submission Sketch B. In this regard, the south boundary should extend across the south of MN7, with a witness post to be located on the west side of MN7, to witness the #2 post location to the east.

The staking of the Tenajon claim has its southern boundary 250 metres north of where the #2 post is witnessed. In his submission, the way that it was staked was open to confusion. The #2 post is 800 metres south of the #1 post and yet the #3 post is 550 metres south of the #4 post. There are 250 metres of confusion on the west boundary. There is no solid line drawn along the south boundary. The conclusion is that the staking along the southern portion of the Tenajon Mining Claim will likely mislead stakers in the vicinity. He submitted that the test in subsection 43(2) has not been met, and there can be no deemed substantial compliance. Added to this, on the facts of this particular case, while subsection 110(6) might normally be available, it should not be used where there is an adverse interest, and where there is no deemed substantial compliance with the legislation.

In answer to the tribunal's questions, Mr. Norwood distinguished the facts in **Scott E. Harper v. Bancroft and District Chamber of Commerce**, MA-007-94, January 15, 1996 (unreported), where the facts in that case involved only a deficiency in demarcation and not errors of complete omission. Here, the fundamental architecture of a mining claim has not been complied with. The location of the #3 post is completely out of sync with the #2 post.

Findings

It would have been useful to hear evidence from Mr. Anthony J. Maciejewski, the staker on behalf of Tenajon, if only to be certain what was in his mind regarding the southwest portion of the Tenajon Mining Claim. This information, however informative it might

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have been, would not have been of substantial assistance to the Tenajon appeal.

Although it is purely speculative on the part of the tribunal, it would appear that the Tenajon staker had thought that all of the land not covered by water to the south and southwest of witness post #2, located north of MN7, was alienated from the Crown and not available for staking. Mr. Clark made a statement to this effect, although it is recognized that he was not giving evidence.

The Tenajon application to record shows that the staker was attempting to stake a four unit claim. However, only a distance of 150 metres of the southwest unit was staked. The notation of "private property" pointing to the area not included in the Tenajon Mining Claim, all leads to the conclusion that the staker believed all of the lands contained along an extension to the south of the line created by the #3 and #4 posts was not available for staking. If the staker had not believed this, surely he would have somehow attempted to capture a substantial portion of land, more than one half unit, of the claim he was purporting to stake.

There is no evidence that the staker was careless, but based upon comments made by Mr. Clark in the hearing, although not evidence, the tribunal makes the assumption that the staker was misinformed as to the configuration of the alienated lands. This is the reason for the staking having occurred as it did, as opposed to the manner in which Mr. Denomme has suggested would be acceptable, as set out in Sketch B (Ex. 13).

The fact is that there is nothing in the way of alienated rights located on the land immediately south of the Tenajon #3 post and nothing to prevent the staker from having proceeded further south for a distance of 250 metres. The staking and corresponding sketch of the Tenajon Mining Claim does not accurately conform to the alienated rights which occur along the south boundary.

There are a number of cases where patented or otherwise alienated lands were incorrectly staked as part of a mining claim (see for example **Re Hayes and Bachmann**, 3 M.C.C. 83 and **Leach v. Wilson**, 5 M.C.C. 368), the stakings were otherwise found to be in substantial compliance and a mining recorders order was issued and the dispute was dismissed. The distinguishing feature of these cases was the inclusion of lands which should not have been staked, rather than the failure to stake lands which were open and conformed to the configuration corresponding to the number of units which the staker was purporting to stake.

It is the failure to stake the correct lands which are open for staking which leads to confusion. A staker on the ground seeking to tie onto an existing mining claim knows the regulated dimensions of a unit, namely 400 metres in unsurveyed territory and between 375 and 500 metres in surveyed territory, depending on the orientation of the survey fabric. Any staker desiring to stake in the area who comes across an existing mining claim will know what the

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dimensions of a unit for that particular township must be. Deviation from the fabric or from the 16 hectare unit in unsurveyed territory will confuse a staker wishing to tie on, particularly where the staker is aware of the dimensions of the lands alienated from the Crown and the existing staking does not conform to that configuration.

This failure is fatal to the test of deemed substantial compliance found in clause 43(2)(b). By not having accurate information as to the shape and extent of the lands covered by MN7, the staker has created a situation which will confuse a well informed staker in the area. Furthermore, there is no way for a staker in the area to tie onto the southwest portion of the west boundary or the southern boundary with any accuracy.

The tribunal does not doubt that the Tenajon staker did not seek to deceive stakers in the area. The staking depicts someone who is proceeding on less than accurate or incomplete information as to the size and configuration of the MN7 lands. The test in clause 43(2)(b) of the **Mining Act** is not one of deceit, but one of likelihood to mislead. It is the confusion created through the inaccurate information, leading to the inaccurate depiction of the lands within this four unit claim which are open to staking, which is fatal to the test.

With respect to whether a curative order is available pursuant to subsection 110(6) of the **Mining Act**, there are a number of cases which deal with this issue.

In Re Thomas Martindale, 4 M.C.C. 183 involved poorly staked mining claims, with improper tags, poorly blazed lines, some too small and some too large and also not conforming to aliquot parts of lots in surveyed territory. The Commissioner stated at the bottom of the page:

> While the Mining Recorder was no doubt justified in holding that the claims were not staked in accordance with the provisions of The Mining Act, consideration should have been given to the fact that there is no adverse interest and the lot lines would no doubt be difficult to follow, having been surveyed seventy-five years ago.
>
> It seems to me the ends of justice will be satisfied if the staker is allowed to adjust his staking to conform with the staking requirements set out in The Mining Act.

Similar comments were made in In **Re Lewinski**, 4 M.C.C. 15, where the mining recorder found there was no substantial compliance where an old post previously used in a mining claim was reused and not refaced. The Commissioner stated at page 17:

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> No adverse interest exists in this appeal and the Mining Recorder might have given the appellant the benefit of the doubt. Even if he was convinced there was a minor violation of the Act, he would well have afforded him an opportunity of rectifying such an unimportant detail. In order that justice and equity shall prevail the appeal must be allowed and the claim restored to good standing.

Another case which drew the same conclusion is **In Re Idziak**, 4 M.C.C. 92, where the last paragraph on page 93 states:

> There is no adverse interest and if there a minor discrepancies in this staking, I see no reason why the Recorder should not direct that the same be rectified within a period of thirty days of the date of this order.

From these cases and others, it is quite clear that the Commissioner has allowed the use of the corrective provisions of predecessors to what is now subsection 110(6) of the **Mining Act** in many cases, where the staking did not substantially comply with the requirements of the legislation.

However, it must be noted that these three cases refer to the fact that there is no adverse interest. This is a very important detail. The tribunal has found examples involving adverse interest in two cases which deal with stakings under dispute which were found to not substantially comply with the requirements of the legislation and the tribunal refused to direct the issuance of a mining recorder's order.

One example is **Leduc v. Grimston**, 2 M.C.C. 285, where the Commissioner stated on pages 286 and 287:

> ... I prefer to uphold the original staker if conditions permit, but this is not a case of substantial compliance with the requirements nor can I see how it is possible to allow Grimston to change the position of his No. 3 post without in the result invalidating his staking on the ground that his discovery is without the lands staked.

Another example is found in Lacasse v. Phillips, 7 M.C.C. 560 at pages 570 and 571:

> Dealing with the first submission and assuming the staking of the respondent is in substantial compliance with the Mining Act, the tribunal is satisfied that this approach is not the proper

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> approach [that the staking is valid and an order to move posts should issue]. Such action may be taken under subsection 131(6) of the Act by the Mining Recorder and presumably by this tribunal where the Mining Recorder has transferred his jurisdiction. Also the Commissioner has a broad power under section 126 of the Act. However it may be noted firstly that the power of a mining recorder is discretionary. In exercising the discretion it must be kept in mind that the northerly three-quarters of the area that would normally have been staked was not dealt with by the respondent and this area was properly staked by the disputant. Also to permit a practice of allowing a wedge to be staked and enlarging it over the available area would create an unfair advantage to one of a group of competing stakers. Further the area staked by the respondent covered approximately five or six acres and the basic size of mining claims prescribed by the Act is 40 acres.

Subsection 43(1) of the *Act* reads,

> (1) In unsurveyed territory, an irregular area of land lying between land not open to be staked out, or bordering on water, may be staked out with boundaries coterminous thereto, but the claim shall be made to conform as nearly as practicable to the prescribed form and area and shall not exceed the prescribed area.

> It may be noted that the subsection requires the boundaries of a mining claim staked under the subsection to be coterminous with the land covered with water or not open for staking. The respondent did not comply with this provision and the tribunal is satisfied for these several reasons that the discretion should not be exercised.

The number and extent of staking irregularities in the **Lacasse** case far exceeds those in the Tenajon staking, and the tribunal found that, as only 20 percent of staking requirements had been met, there was no substantial compliance with the **Mining Act**.

The making of a subsection 110(6) order is discretionary. To exercise that discretion in the case where there is no substantial or deemed substantial compliance, taking the mining claim out of abandonment in preference to a mining claim which has second priority would create a prejudice to the second staker. On the circumstances of this case, namely that the failure in staking involved not including lands which should have been included, causing problems for other stakers wishing to tie onto the Tenajon staking, the tribunal finds that this is not a proper case to exercise its discretion in favour of Tenajon.

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Therefore, the tribunal finds as follows. While staking of lands not open for staking might otherwise be considered to be in substantial or deemed substantial compliance, the failure to stake lands which are open and fit the dimensions of the mining claim purporting to be staked are found to be not in either substantial or deemed substantial compliance with the legislation. When this is the case, and there are intervening adverse interests for the same land, the tribunal will not exercise its discretion to allow the recording of the claim. In other words, a claim will not be taken from deemed abandonment in preference to one which is second in priority and properly staked. Once other parties enter into the picture, the staking must be above reproach. This should be regarded as fundamental.

The facts in this case can be distinguished from **Harper v. Bancroft and District Chamber of Commerce** in that the staking in that case had posts placed properly and boundaries clearly discernable and the issue was one of flagging in place of blazing. In Mr. Norwood's words, the facts in this case involve the underlying architecture of the mining claim, not the elements of staking which are imposed onto that architecture.

The issue of the Skyline Reserve Guideline has little or no impact on the facts of this case. Whether confusion was created by MNDM having issued them, it is clear that whatever confusion may have impacted on the Tenajon staker was not the cause of the problematic staking. The fact that Mr. Denomme's Sketch B is sensitive to Tenajon's desire to not to be visible from the lake, road or lodge is taken into consideration in that alternative staking and it is clear that had Tenajon's staker included the correct lands in the mining claim, but attempted to minimize impacts, Mr. Denomme would have had no problem with that. The fact is that the problem with the Tenajon staking had nothing to do with minimal impacts at the site, but rather were based solely on not knowing the dimensions and extent of the alienated lands in MN7.

Exclusion of Time

The tribunal finds that Mr. Leblanc and D and H Consulting are not responsible for any delay in having this appeal heard, but rather are necessary parties to an appeal of the mining recorder's refusal to record the Tenajon Mining Claim because if it was successful, their mining claims would have been cancelled. Based upon this finding, the time during which the Leblanc and D & H Mining claims have been pending before the tribunal will be excluded.

Pursuant to subsection 67(2) of the **Act**, as amended by S.O. 1996, c. 1, Sched. O., s. 18, the time during which Mining Claims S-1223081 and 1223083 were pending before the tribunal, being a total of 383 days, will be excluded in computing time within which work upon Mining Claims S-1223081 and 1223083 is to be performed and filed.

Pursuant to subsection 67(3) of the **Act**, as amended, October 8, 1999 is deemed to be the date for the performance and filing of the first two units of prescribed assessment work on Mining Claim S-1223081. Pursuant to subsection 67(4) of the **Act**, as amended, all subsequent anniversary dates are deemed to be October 8.

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Pursuant to subsection 67(3) of the **Act**, as amended, January 5, 2000 is deemed to be the date for the performance and filing of the first two units of prescribed assessment work on Mining Claim S-1223083. Pursuant to subsection 67(4) of the **Act**, as amended, all subsequent anniversary dates are deemed to be January 5.

Conclusions

The appeal of Tenajon Resources Corporation will be dismissed, on the basis that the staking of Mining Claim 1215605 is neither substantially nor deemed to be in substantial compliance with the legislation. Where the problem with the staking lies in the fact that lands which should have been staked were not staked and where there is an intervening adverse interest, the tribunal will not exercise its discretion in directing the mining recorder to issue an order pursuant to subsection 110(6) of the **Mining Act** to take such a mining claim out of deemed abandonment in favour of one having second priority.

The time during which the appeal was pending before the tribunal will be excluded for purposes of determining when the first and second prescribed units of assessment work shall be performed and filed on Mining Claims S-1223081 and 1223083.

There are no costs to any party on this appeal.