File No. MA 024-96
File No. MA 029-96
File No. MA 032-96
File No. MA 006-97

L. Kamerman) Monday, the 6th day
Mining and Lands Commissioner) of October, 1997.

THE MINING ACT

IN THE MATTER OF

Mining Claim L-1220095, staked by Dennis James Crowley, hereinafter referred to as the "Crowley Mining Claim" and Mining Claim L-1221719, staked by Michael George Caron, hereinafter referred to as the "Caron Mining Claim", both recorded in the name of Battle Mountain Canada Ltd., and situate in the Township of Knight, in the Larder Lake Mining Division;

AND IN THE MATTER OF

An application to record Mining Claim L-1221670, situate in the Township of Knight, in the Larder Lake Mining Division, staked by Michael Perello, to have been recorded in the name of David V. Jones, marked "filed only", hereinafter referred to as the "Perello Filed Only Mining Claim";

AND IN THE MATTER OF

Subsections 44(2) and 46(2) of the **Mining Act**;

B E T W E E N:

DAVID V. JONES

Appellant

- and -

BATTLE MOUNTAIN CANADA LTD.

Respondent

- and -

THE MINISTER OF NORTHERN DEVELOPMENT AND MINES

Party of the Third Part

. . . . 2

AND IN THE MATTER OF

An appeal pursuant to subsection 112(1) of the **Mining Act** from the decision of the Mining Recorder for the Larder Lake Mining Division dated the 23rd day of October, 1996 for the recording of the Perello Filed Only Mining Claim which is not part of the Caron Mining Claim and for the amending of the application for the Perello Filed Only Mining Claim to delete those lands covered by the Caron Mining Claim;

AND IN THE MATTER OF

A declaration pursuant to section 105 of the **Mining Act** to amend the Application To Record the Crowley Mining Claim to exclude those lands covered by the Perello Filed Only Mining Claim;

AND IN THE MATTER OF

A direction to the Mining Recorder for the Larder Lake Mining Division for an Order pursuant to subsection 110(6) of the **Mining Act** for the movement of posts of the Crowley Mining Claim and Perello Filed Only Mining Claim in accordance with the relief sought above.

- AND -

IN THE MATTER OF

Mining Claims L-1220084 and 1220085, situate in the Township of Tyrrell, in the Larder Lake Mining Division, to have been recorded in the name of Michael Taylor, marked "filed only", hereinafter referred to as the "Taylor Filed Only Mining Claims" or "Taylor Filed Only Mining Claim L-1220084" and "Taylor Filed Only Mining Claim L-1220085";

AND IN THE MATTER OF

Those parts of the lands included in the Filed Only Mining Claims which are not part of Mining Claim L-1221669, recorded in the name of Alexander H. Clark (the "Clark Mining Claim"), being a mining claim whose priority under subsection 44(2) of the **Mining Act** is not challenged;

AND IN THE MATTER OF

Mining Claim L-1220359, situated in the Township of Tyrrell, in the Larder Lake Mining Division, staked by Marco Joseph Chouinard and recorded in the name of Battle Mountain Canada Ltd., hereinafter referred to as the "Battle Mountain Mining Claim";

AND IN THE MATTER OF

Subsections 44(2), 44(4) and 46(2) of the **Mining Act**;

. . . . 3

B E T W E E N:

MICHAEL TAYLOR

Appellant

- and -

BATTLE MOUNTAIN CANADA LTD.

Respondent

- and -

THE MINISTER OF NORTHERN DEVELOPMENT AND MINES

Party of the Third Part

AND IN THE MATTER OF

An appeal from the decision of the Mining Recorder for the Larder Lake Mining Division dated the 13th day of November, 1996 for the recording of that part of the Taylor Filed Only Mining Claim L-1220085 which is not part of the Clark Mining Claim, and for the amending of the applications for Taylor Filed Only Mining Claim L-1220085 to delete those lands covered by the Clark Mining Claim;

AND IN THE MATTER OF

An application for an order pursuant to subsection 105 of the **Mining Act** for the cancellation of the Battle Mountain Mining Claim, for the recording of those parts of the Taylor Filed Only Mining Claim L-1220084 which are not part of the Clark Mining Claim and for the amending of the application to record the Taylor Filed Only Mining Claim L-1220084 to delete those lands covered by the Clark Mining Claim.

- AND -

IN THE MATTER OF

Mining Claim L-1223904, situate in the Township of Haultain, in the Larder Lake Mining Division, marked "filed only", hereinafter referred to as the "Filed Only" Mining Claim";

AND IN THE MATTER OF

Those parts of the lands included in the Filed Only Mining Claim which are not part of Mining Claim L-1217824, being a mining claim entitled to priority under subsection 44(2) of the **Mining Act**;

AND IN THE MATTER OF

Subsection 44(4) of the **Mining Act**;

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B E T W E E N:

LAKE SUPERIOR RESOURCES CORPORATION

Appellant

- and -

THE MINISTER OF NORTHERN DEVELOPMENT AND MINES

Respondent

AND IN THE MATTER OF

An appeal from the decision of the Mining Recorder for the Larder Lake Mining Division dated the 6th day of December, 1996 for the amending of the application for the Filed Only Mining Claim to record those lands not covered by Mining Claim L-1217824.

- AND -

IN THE MATTER OF

Mining Claims S-1219180 and 1219182, staked by Lanny Wayne Anderson and Mining Claim S-1219184, staked by Teddy Allen Anderson, hereinafter referred to as the "Anderson Mining Claims" of "Anderson Mining Claim 1219180", "Anderson Mining Claim 1219182" and "Anderson Mining Claim 1219184", all recorded in the name of Steven Dean Anderson and situate in the Township of Afton, in the Sudbury Mining Division;

AND IN THE MATTER OF

An application to record Mining Claim S-1184528, situate in the Township of Afton, in the Sudbury Mining Division, staked by Ewen S. Downie, to have been recorded in the name of William Ferreira, marked "filed only", hereinafter referred to as the "Downie Filed Only Mining Claim";

AND IN THE MATTER OF

Clause 43(2)(b), subsections 44(2), 44(4) and 46(2) of the **Mining Act**, the **"Act"** and Ontario Regulation 7/96;

B E T W E E N:

EWAN S. DOWNIE

Appellant

- and -

STEVEN DEAN ANDERSON

Respondent

- and -

THE MINISTER OF NORTHERN DEVELOPMENT AND MINES

Party of the Third Part

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AND IN THE MATTER OF

An appeal from the decision of the Mining Recorder for the Sudbury Mining Division, dated the 11th day of January, 1997, for the amending of the Application to Record the Downie Filed Only Mining Claim to record those lands covered by Anderson Mining Claim 1219180;

AND IN THE MATTER OF

A declaration pursuant to section 105 of the **Mining Act** to amend the Application to Record Anderson Mining Claim 1219180 to exclude those lands covered by the Downie Filed Only Mining Claim;

AND IN THE MATTER OF

A direction to the Mining Recorder for the Sudbury Mining Division for an Order pursuant to subsection 110(6) of the **Mining Act** for the movement of posts of Anderson Mining Claim 1219180 and the Downie Filed Only Mining Claim in accordance with the relief sought above;

AND IN THE MATTER OF

A declaration that Anderson Mining Claim 1219182, having not been staked in good faith by the licensee and not in compliance with the requirements of the **Mining Act** and regulation, within the meaning of clause 43(2)(b) of the **Mining Act**, be cancelled;

AND IN THE MATTER OF

A declaration that Anderson Mining Claim 1219184, being a mining claim not entitled to priority within the meaning of subsection 44(2) of the **Mining Act**, be cancelled.

INTERLOCUTORY ORDER

UPON READING the submissions filed;

1. THIS TRIBUNAL DECLARES pursuant to its jurisdiction under section 105 of the **Mining Act,** that an appeal from a decision of a mining recorder as to the proper exercise of the discretionary jurisdiction to record the non-overlapping portion of a mining claim pursuant to subsection 44(4) of the **Mining Act** will be considered using the following criteria:

1. Any and all recordings which may take place pursuant to subsection 44(4) will require additional information from the field which does not normally form part of the usual application to record and sketch. The provision of such information will be a prerequisite to the exercise of the discretion. Any recording will require both an order to amend to the application to record and a direction to the mining recorder pursuant to subsection 110(6). Therefore, the holder will be required to re-visit in the field and provide detailed particulars of all coterminous boundaries to enable accurate findings as to eligibility to be made. From this, (should eligibility be found) the resulting order and direction will follow.

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2. In the single unit claim, no more than a 15 percent overlap will be considered for recording under its discretion under subsection 44(4), with the exception of circumstances outlined in paragraphs 3 and 9 below (see also paragraphs 6 and 7 below with respect to multi-unit claims). In unsurveyed territory, this denotes an overlap of 60 metres, so that the resulting non-overlapping portion must be at least 340 metres in width. This proportion will also form the basis for findings of overlap in multi-unit claims, discussed in greater detail below.

3. If a non-overlapping portion of a single unit mining claim having an area of less than 85 percent of the regulated area has a boundary which is contiguous with another mining claim of the holder which has been recorded, the recording of the non-overlapping portion will be allowed.

4. A non-overlapping claim must be contiguous. Split claims will not be considered under any circumstances. Such splitting of claims is outside of the ambit of exceptions allowed generally by O.Reg 7/96 and would create a new class of mining claim not contemplated by the legislation.

5. There is clearly provision in section 13 of O.Reg 7/96 for the staking of an irregular mining claim, as long as the irregular boundaries are marked out with line posts at each directional change of the coterminous boundary, denoting the direction and distance to the last corner post erected.

   An irregular boundary may occur along one of the boundaries of a single or multi-unit staking, which has minor encroachments from a number of single unit or smaller multiple unit claims, so that it resembles a squared off saw tooth, can be readily adjusted through the provisions of the regulation. Once the requisite information is received, a direction to the mining recorder will be issued for the erection of line posts to coincide with each directional change along the boundary, having particulars of the claim number and distance and direction to the last corner post to be inscribed thereon.

   A saw tooth boundary showing minor deviations from a straight line is a deviation from the staking rules which is of a minor nature. This type of deviation is expressly dealt with in the regulation, with the method to be used for marking such a boundary explicitly spelled out. As such, permitting recording in cases having one such boundary will be considered in addition to one other encroachment of the type described in 6 below, being of a nature and complexity which does not defeat what ultimately will constitute a mining claim, within the meaning of the regulation.

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6. Irregularly shaped multiple unit claims, having the configuration of an "L" or a "C", may be recorded, with the proviso that they meet the following condition. In unsurveyed territory each arm of an irregular shaped claim must be at least 340 metres in width, being consistent with the 15 percent overlap rule established for single unit claims. In surveyed territory, each arm of an irregular shaped claim must be at least 85% of the regulated width of the township survey.

   Where any arm of the "L" or "C" configuration is less than the 340 metres or corre-sponding 85% figure, the tribunal will not exercise its discretion in allowing the recording of the claim. This determination is based upon the primary premise that single unit claims must be at least 85 percent of the regulated size of such claims to come within the confines of the exception created by clause 20(a) of O.Reg. 7/96, which allows the recording of a claim of the regulated size "more or less". All contiguous units of an "L" or "C" shaped mining claim must reflect this 85 percent rule for each arm of the irregular shape.

7. An exception to this rule will be allowed in circumstances which are similar to those described in paragraph 3 above, where the entire arm of the configuration having less than the requisite 85 percent size as regulated is contiguous with another mining claim of the holder.

8 With respect to irregularly shaped multi-unit claims involving "S", "Z" "7" or "T" shaped configurations, the tribunal has applied the exceptions provided for in O.Reg. 7/96 to the general staking rules as to size and shape. A reading of the various provisions is found to mean that they involve one boundary or one major encroachment which is coterminous. The regulation does not extend potential major exceptions to the staking of a mining claim to be cumulative. In other words, it will not be possible to allow the recording and adjustment of a claim to accommodate every possible major encroachment and still have a mining claim.

   Therefore, the tribunal will not exercise its discretion with regard to claims having configurations of "S", "Z" "7" or "T" which cannot be reconciled with the staking requirements of O.Reg. 7/96. The instances of accommodation are not cumulative, and therefore, can be found to have no applicability to the stakings in these cases.

9. If the situation should result, based upon the application of the foregoing criteria, that a non-overlapping portion of a mining claim which is less than one unit is completely surrounded by lands which are not open for staking, the resulting mining claim will be

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allowed and a direction to the mining recorder to order the moving of posts and boundaries will be issued. This will apply to cases involving rectangles, parallelograms, rhombuses and "C" and "L" configurations.

Upon reading all of the relevant legislative and regulatory provisions concerning the powers of the mining recorders, the tribunal concludes that there is no power in the mining recorder to return to the previously disallowed mining claim. The tribunal will base its determination that such a claim be recorded pursuant to its powers found in section 121 of the **Mining Act**, that its decisions will be on the real merits and substantial justice of the case. Having regard to the circumstances described, thetribunal notes that the lands which would result in land open for staking under these circum-stances would be the same lands that the holder would have been entitled to pursuant to subsection 44(4). This being the case, it would be a substantial injustice to require the holder to compete in another staking rush for the same lands and the tribunal will exercise its further jurisdiction to allow the recording.

10. The forgoing criteria may not encompass all possibilities in cases of non-overlapping portions. Also, as each appeal must be considered on its individual facts, there may be compelling circumstances where the tribunal is persuaded to deviate from the criteria in this declaration for applying its jurisdiction pursuant to subsection 44(4) of the **Act**.

THIS TRIBUNAL DIRECTS that the provisions of the foregoing declaration be considered by the parties to the various appeals within no more than a 45 day time frame from the making of this Interlocutory Order for provision of the additional information as may be required pursuant to clause 1(1) above, so that further adjudication, as may be necessary, may be commenced or final disposition, based upon the foregoing requirements and parameters, may be made.

THIS TRIBUNAL FURTHER DIRECTS 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**.

Reasons for this Order are attached.

DATED this 6th day of October, 1997.

Original signed by

L. Kamerman
MINING AND LANDS COMMISSIONER

File No. MA 024-96
File No. MA 029-96
File No. MA 032-96
File No. MA 006-97

L. Kamerman) Monday, the 6th day
Mining and Lands Commissioner) of October, 1997.

THE MINING ACT

IN THE MATTER OF

Mining Claim L-1220095, staked by Dennis James Crowley, hereinafter referred to as the "Crowley Mining Claim" and Mining Claim L-1221719, staked by Michael George Caron, hereinafter referred to as the "Caron Mining Claim", both recorded in the name of Battle Mountain Canada Ltd., and situate in the Township of Knight, in the Larder Lake Mining Division;

AND IN THE MATTER OF

An application to record Mining Claim L-1221670, situate in the Township of Knight, in the Larder Lake Mining Division, staked by Michael Perello, to have been recorded in the name of David V. Jones, marked "filed only", hereinafter referred to as the "Perello Filed Only Mining Claim";

AND IN THE MATTER OF

Subsections 44(2) and 46(2) of the **Mining Act**;

B E T W E E N:

DAVID V. JONES

Appellant

- and -

BATTLE MOUNTAIN CANADA LTD.

Respondent

- and -

THE MINISTER OF NORTHERN DEVELOPMENT AND MINES

Party of the Third Part

. . . . 2

AND IN THE MATTER OF

An appeal pursuant to subsection 112(1) of the **Mining Act** from the decision of the Mining Recorder for the Larder Lake Mining Division dated the 23rd day of October, 1996 for the recording of the Perello Filed Only Mining Claim which is not part of the Caron Mining Claim and for the amending of the application for the Perello Filed Only Mining Claim to delete those lands covered by the Caron Mining Claim;

AND IN THE MATTER OF

A declaration pursuant to section 105 of the **Mining Act** to amend the Application To Record the Crowley Mining Claim to exclude those lands covered by the Perello Filed Only Mining Claim;

AND IN THE MATTER OF

A direction to the Mining Recorder for the Larder Lake Mining Division for an Order pursuant to subsection 110(6) of the **Mining Act** for the movement of posts of the Crowley Mining Claim and Perello Filed Only Mining Claim in accordance with the relief sought above.

- AND -

IN THE MATTER OF

Mining Claims L-1220084 and 1220085, situate in the Township of Tyrrell, in the Larder Lake Mining Division, to have been recorded in the name of Michael Taylor, marked "filed only", hereinafter referred to as the "Taylor Filed Only Mining Claims" or "Taylor Filed Only Mining Claim L-1220084" and "Taylor Filed Only Mining Claim L-1220085";

AND IN THE MATTER OF

Those parts of the lands included in the Filed Only Mining Claims which are not part of Mining Claim L-1221669, recorded in the name of Alexander H. Clark (the "Clark Mining Claim"), being a mining claim whose priority under subsection 44(2) of the **Mining Act** is not challenged;

AND IN THE MATTER OF

Mining Claim L-1220359, situated in the Township of Tyrrell, in the Larder Lake Mining Division, staked by Marco Joseph Chouinard and recorded in the name of Battle Mountain Canada Ltd., hereinafter referred to as the "Battle Mountain Mining Claim";

AND IN THE MATTER OF

Subsections 44(2), 44(4) and 46(2) of the **Mining Act**;

. . . . 3

B E T W E E N:

MICHAEL TAYLOR

Appellant

- and -

BATTLE MOUNTAIN CANADA LTD.

Respondent

- and -

THE MINISTER OF NORTHERN DEVELOPMENT AND MINES

Party of the Third Part

AND IN THE MATTER OF

An appeal from the decision of the Mining Recorder for the Larder Lake Mining Division dated the 13th day of November, 1996 for the recording of that part of the Taylor Filed Only Mining Claim L-1220085 which is not part of the Clark Mining Claim, and for the amending of the applications for Taylor Filed Only Mining Claim L-1220085 to delete those lands covered by the Clark Mining Claim;

AND IN THE MATTER OF

An application for an order pursuant to subsection 105 of the **Mining Act** for the cancellation of the Battle Mountain Mining Claim, for the recording of those parts of the Taylor Filed Only Mining Claim L-1220084 which are not part of the Clark Mining Claim and for the amending of the application to record the Taylor Filed Only Mining Claim L-1220084 to delete those lands covered by the Clark Mining Claim.

- AND -

IN THE MATTER OF

Mining Claim L-1223904, situate in the Township of Haultain, in the Larder Lake Mining Division, marked "filed only", hereinafter referred to as the "Filed Only" Mining Claim";

AND IN THE MATTER OF

Those parts of the lands included in the Filed Only Mining Claim which are not part of Mining Claim L-1217824, being a mining claim entitled to priority under subsection 44(2) of the **Mining Act**;

AND IN THE MATTER OF

Subsection 44(4) of the **Mining Act**;

. . . . 4

B E T W E E N:

LAKE SUPERIOR RESOURCES CORPORATION

Appellant

- and -

THE MINISTER OF NORTHERN DEVELOPMENT AND MINES

Respondent

AND IN THE MATTER OF

An appeal from the decision of the Mining Recorder for the Larder Lake Mining Division dated the 6th day of December, 1996 for the amending of the application for the Filed Only Mining Claim to record those lands not covered by Mining Claim L-1217824.

- AND -

IN THE MATTER OF

Mining Claims S-1219180 and 1219182, staked by Lanny Wayne Anderson and Mining Claim S-1219184, staked by Teddy Allen Anderson, hereinafter referred to as the "Anderson Mining Claims" of "Anderson Mining Claim 1219180", "Anderson Mining Claim 1219182" and "Anderson Mining Claim 1219184", all recorded in the name of Steven Dean Anderson and situate in the Township of Afton, in the Sudbury Mining Division;

AND IN THE MATTER OF

An application to record Mining Claim S-1184528, situate in the Township of Afton, in the Sudbury Mining Division, staked by Ewen S. Downie, to have been recorded in the name of William Ferreira, marked "filed only", hereinafter referred to as the "Downie Filed Only Mining Claim";

AND IN THE MATTER OF

Clause 43(2)(b), subsections 44(2), 44(4) and 46(2) of the **Mining Act**, the **"Act"** and Ontario Regulation 7/96;

B E T W E E N:

EWAN S. DOWNIE

Appellant

- and -

STEVEN DEAN ANDERSON

Respondent

- and -

THE MINISTER OF NORTHERN DEVELOPMENT AND MINES

Party of the Third Part

. . . . 5

AND IN THE MATTER OF

An appeal from the decision of the Mining Recorder for the Sudbury Mining Division, dated the 11th day of January, 1997, for the amending of the Application to Record the Downie Filed Only Mining Claim to record those lands covered by Anderson Mining Claim 1219180;

AND IN THE MATTER OF

A declaration pursuant to section 105 of the **Mining Act** to amend the Application to Record Anderson Mining Claim 1219180 to exclude those lands covered by the Downie Filed Only Mining Claim;

AND IN THE MATTER OF

A direction to the Mining Recorder for the Sudbury Mining Division for an Order pursuant to subsection 110(6) of the **Mining Act** for the movement of posts of Anderson Mining Claim 1219180 and the Downie Filed Only Mining Claim in accordance with the relief sought above;

AND IN THE MATTER OF

A declaration that Anderson Mining Claim 1219182, having not been staked in good faith by the licensee and not in compliance with the requirements of the **Mining Act** and regulation, within the meaning of clause 43(2)(b) of the **Mining Act**, be cancelled;

AND IN THE MATTER OF

A declaration that Anderson Mining Claim 1219184, being a mining claim not entitled to priority within the meaning of subsection 44(2) of the **Mining Act**, be cancelled.

REASONS

This Interlocutory Order and Reasons do not deal with the specific fact situations which arise from the appeals noted above. Rather, with the agreement of all the parties, this involves preliminary determination being made by the tribunal concerning what has become known as the mining recorders' "15% Rule". This issue arises in connection with the competitive staking situations experienced following the lifting of the Temagami Land Caution, where a large number of townships came open for staking on the morning of September 17, 1996.

While not a generic determination in the strictest sense, with the agreement of the parties, the tribunal is making a determination regarding the interpretation of relevant portions of the **Mining Act**, on the basis of written submissions from the parties. The situation which gives rise to application of the 15% Rule by the mining recorders is limited to the competitive staking where partial overlap of claims occurs. The proper statutory sequence for determining whether an overlapping claim will be recorded in part as well as the proper exercise of the discretion is considered.

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The basis for proceeding to consider this issue in common with all of the appeals is found in clause 9.1(1)(a) of the **Statutory Powers Procedure Act**, R.S.O. 1990 c. S.22, as amended by 1993, c. 27; 1994, c. 27, s.56, which allows the tribunal, with the consent of the parties, to combine parts of two or more proceedings which involve the same question(s) of law or policy.

The 15% Rule was developed by the mining recorders as a rule of thumb to determine eligibility for recording where a staking overlaps another having priority. The approach taken by MNDM is explained in greater detail below. However, in essence, priority of staking has prevailed, allowing the first staking to be recorded. Where a second staking overlaps the prior staking by more than 15 percent, subsection 46(2) has been used by the mining recorders in most cases to disallow the second staking in its entirety. The mining recorders have interpreted the words, "substantial part" in subsection 46(2) to be 15 percent, relying on assessment work and application for lease provisions of the **Mining Act** which see general rules of applicability modified once the threshold of 15 percent is reached.

The mining recorder has used this interpretation of the phrase "for lands or mining which or **any substantial part of which** are included in a subsisting recorded claim "found in subsection 46(2) as pivotal, before determining whether the discretionary power found in subsection 44(4) can save a portion of these second stakings.

Although several of the appeals also involve disputes which attack whether the earlier stakings meet the requirements of the **Act**, for purposes of this Interlocutory Order, the issues concerning these disputes are not considered. The position taken by the appellants is that, while those lands for which there is overlap and the staking meets the legislative requirements, priority should be given to the first staker, the remaining portion of the second mining claim should be recorded. Subsection 44(4) provides the mining recorders with the discretion to do so, and the mechanics involved would entail amending the application to record to delete those lands covered by the previously completed claims, and require a further order of the mining recorder pursuant to subsection 110(6) for the moving of posts and alteration or moving of claim lines.

The application of the 15 percent rule by the mining recorders has resulted in the disallowing of those mining claims having been completed secondly **in their entirety** in some cases in favour of third mining claims which overlap the second which were completed later in time than the second mining claim.

Those sections of the **Mining Act**, R.S.O. 1990, c. M.14, as amended by S.O. 1996, c. 1 Sched. O which are directly involved in this matter are reproduced:

> **44.** (2) Priority of completion of staking shall prevail where two or more licensees make application to record the staking of all or a part of the same lands.

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(3) Where one of the applications made by two or more licensees to record the staking of a mining claim is entitled to priority under subsection (2), the recorder shall cancel the other application or applications and shall by registered mail not later than the following day notify the other licensee of the recorder's actions and the reason therefore.

(4) Despite subsection (3) and section 46, if the other application or applications to record a mining claim cover any land that is not part of the mining claim that is entitled to priority under subsection (2), the recorder may record a mining claim with respect to that part of the land and shall amend the application or applications with respect to the land covered by the previously completed claims. 1996, c. 1, Sched. O, s. 12(2).

46. (2) If an application is presented that the recorder considers to be not in accordance with this Act or that is for lands or mining rights which or any substantial part of which are included in a subsisting recorded claim that has priority under subsection 44(2), the recorder shall not record the application, but shall, if desired by the applicant, upon receiving the prescribed fee, receive and file the application, and any question involved may be adjudicated as provided in this act, but such filing shall not be deemed a dispute of the recorded claim nor shall it be noted or dealt with as such unless a dispute verified by affidavit is filed with the recorder by the applicant or by another person on the applicant's behalf as provided in section 48.

110. (6) The recorder may make an order directing a holder,

(a) to move, remove or alter corner posts, line posts or witness posts and the writing or inscribing thereon;

(b) to blaze, re-blaze, move or alter existing or missing claim lines;

....

and the recorder shall set out in the order the time within the work shall be completed and reported to the recorder.

One comment which bears noting at the outset is that clause 113(a) requires that hearings before the Mining and Lands Commissioner are to be new hearings, formerly known by the latin phrase hearings **de novo**. Therefore, the result of this consideration will be findings of the Commissioner as to what this Tribunal will do, or how it would exercise its jurisdiction in the place of the mining recorders, rather than a discussion of whether the mining recorders were correct in their interpretation or whether they were in error.

Issues

1. Which sections of the **Mining Act** are applicable, and more importantly in what order, when considering the issue of overlapping stakings?

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2. Do the opening words of subsection 44(4), "Despite subsection (3) and section 46..." make this section an overriding section to be applied where there are overlapping stakings?

3. If the answer to #2 is yes, and the provision is discretionary rather than mandatory, how should this discretion be applied?

4. Does the meaning given to the words "substantial part" found in subsection 46(2) have any relevance to the issues before the tribunal?

MNDM's Position

The following excerpts from the documentation filed by MNDM represents its position concerning the 15 percent rule. (These excerpts have been edited for ease of reading while attempting to retain the salient rationale of the arguments).

Backgrounder

A Mining Recorder's Approach to the Administration of the Ontario Mining Act With Regard to the Problems of Partially Overlapping Mining Claims

The system of Crown land and Crown mining rights acquisition for mining exploration purposes is provided in the Mining Act (and Regulations) currently in the Revised statutes of Ontario 1990 Chapter M.14 as amended in 1996 ("MA"). The system allows for the possibility that more than one licensee under the Mining Act may compete for the same are of land. The mining exploration industry itself is very competitive and there have been a multitude of instances in the past decades where various individuals and/or companies have aggressively pursued the acquisition of high potential mineral properties through competitive claim staking procedures. Competition occurs whenever there is more than one party interested in acquiring the same area of land. The competing legal rights come into conflict (Sections 6, 7, 8, 9, 15, 44, 46, 110, 111 MA). Decisions of the mining recorder may be appealed to the Mining and Lands Commissioner. The Mining Act (sec. 110{5}) considers the recorder's decision final and binding unless appealed.

There are a number of different situations where competitive claim staking may occur. Unpatented mining claims automatically forfeit and the land is open for staking the day after forfeiture if prescribed assessment work is not performed or filed with the mining recorder (sec 72 MA). Patented land may forfeit to the Crown for non payment of taxes (Sec 197 MA). Leased lands may forfeit for non payment of rent (Sec 81). Lands withdrawn from staking by order of the Minister may be reopened (Sec 35 MA). In all these examples the land is open for staking on a specific day and specific time of day as provided by the MA. Anytime land first becomes available for staking more than one party may be interested in staking claims on the

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opening morning. It is not always predictable if competition will occur on day one or at any time afterwards. Sometimes only one licensee will stake on opening morning. At other times no one stakes and the land remains available until someone does stake a mining claim and records it with the appropriate mining recorder.

Where more than one licensee applies to record a claim for the same land the mining recorder applies specific sections of the Mining Act in deciding which claim is to be recorded. After the initial decision by the recorder the licensees/claim holders involved have a legal right to file disputes as indicated in Section 48 MA or file appeals to the Mining and Lands Commissioner as provided in Section 112. Decisions of the recorder are relatively straight forward when the situation is covered by a specific section of the statute or regulations. However, not all questions are answered in this fashion. If a situation arises that is not specifically covered by the Mining Act, the Regulations or past decisions of the Mining and Lands Commissioner the recorder is sometimes left to provide interpretation and may exercise certain discretions allowed by the legislation. (Subsections 110[2] 110[5] MA).

Until June 3, 1991 the Mining Act required all claims to be staked in square or rectangular configuration with boundaries having a dimension of 1,320 square feet where possible. The present Mining Act allows for claims which are variable in size ranging from 16 hectares (one unit) to 256 hectares (sixteen units) in area. The current system with variable size claims has compounded the problems of overlapping staking as smaller claims are sometimes staked entirely within larger ones at the same time without the participants realising they are competing.

If two parties compete for more or less the same area of land subsection 44(2) MA proves the mining recorder with an answer to the question of competing rights:

[ss. 44(2) and (3)]

The mining recorder would simply refer to the "completion times" indicated on the applications to record and the applicant indicating the earliest completion time for the staking would be recorded.

As only one claim may be recorded the recorder is directed by Subsection 46(2) MA to refuse to record another application for the same area of land indicating a later completion time. That section provides for an administrative measure where, at the request of the applicant, the application is held by the recorder as "filed only". A "filed only" application would be considered invalid and of no effect if the applicant does not commend an action such as a dispute or appeal. An appeal is begun by filing a form in the recorder's office within 15 days of a decision or within a further 15 days if allowed by the Commissioner. The filing of a dispute may occur at any time within the 60 days. The 60 day period may be extended by the recorder or Commissioner. In some instances the recorder may use the time period to further investigate or to research the situation before making further decision. The recorder may also hold an application "filed only" pending some remedial action by the staking licensee (e.g. comply with an order of the recorder to move boundaries).

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[ss. 46(2) and (3)]

DISCUSSION

The first question is whether or not there is a specific section of the Mining Act or Staking Regulation that applies to all the scenarios. There is not. Although he new Subsection 44(4) MA and Subsection 110(6) MA allow the recorder to accept and record the part of a claim that does not overlap another claim having priority, Subsection 46(2) MA infers that the recorder should not record a claim if, ".... any ***substantial part*** *of which are included in a subsisting recorded claim that has priority under subsection 44(2) .....". Also, 44(4) MA infers the recorder is to exercise some discretion as the words "may record" leave the recorder with a decision to make and do not create an automatic right for the licensee to be recorded for the residual area. In adopting a reasonable approach there will be fractional areas far less than the prescribed area which should not be recorded. Perhaps 46(2) MA provides a statutory authority for the recorder to refuse to record the residual of a claim in some instances of partially overlapping staking. If a claim* ***SUBSTANTIALLY*** *overlaps a priority claim 46(2) MA infers the second claim is invalid.*

It is only practical that the recorder issue an order to adjust boundaries (eliminate overlap) if the residual portion of a conflicting claim is to be recorded. The recorder issues the order to move posts etc. under authority of Section 110 MA. It has long been a principle in the application of the recorder's discretionary authority (Section 110), that an order for the boundary adjustment be issued only if the required changes are "minor". Refer to Roy v. Ross 1962, 4 MCC 102. Prior to 1991 it was theoretically necessary for the recorder to be satisfied that there was substantial compliance before issuing an order to alter the staking (see Subsection 131(6) MA RSO 1980). In practice there was not always a determination of substantial compliance prior to issuance of a recorder's order. The amendments in 1991 eliminated the statutory qualification to have substantial compliance as a prerequisite for an order to alter the staking. In exercising the discretion, however, the recorder is left with the same subjective decision. How much of a licensee's staking is it be reasonable to alter?

Looking to past cases of the Mining and Lands Commissioner there is very little direction in the matter of partial overstaking and the recording of residual parts of claims. When an appeal is heard it may very well be a "case in the first instance". Prior to direction coming from the Commissioner (through a decision in an appeal) the recorders are left to adopt their own approach. With regard to the concern that the Commissioner may adopt any entirely different approach, past decisions of the recorder and validity of mining claims are safeguarded by Subsection 110(5) ...

Any new direction from the Mining and Lands Commissioner would be of great assistance. One case that resembles the current situations of partial overstaking appears in ***Jolette et. al. v. The Minister of Mines et al****, 7 MCC 520. The appeal was heard in 1989 therefore the Mining Act RSO 1980 was applied and there was no concern over variable size claims nor did Subsection 44(4) exist.*

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*Although the then Subsection 54(2) MA RSO 1980 was worded much the same as the current 46(2) MA there was no argument offered the Commissioner (in **Jolette**) which would clarify the fundamental question of "substantial" overstaking. In other words, it was not submitted that 54(2) MA RSO 1980 prevented the recording of a claim when it was found to substantially overlap another claim. The Crown simply argued that the overstaking of another unpatented claim together with inaccurate illustration on the application to record constituted a non compliance that was not "substantial compliance". The Commissioner did not address the issue of substantial overstaking but rather noted that the area of overstaking (approximately 200 feet= 61 metres) equalled roughly the extent that the same claim had been staked in excess of the required dimension. If the overlap was 200 feet (referred to by the Commissioner in **Jolette**) I note that it would represent approximately 15% of the area of a perfect claim of the day which was 1,320 feet square or 40 acres. (200' x 1320' = 6 acres; 6 div 40 = 15% overstaking)*

*In **Jolette** the Commissioner ordered the recorder to accept the claim where there had been a 200 foot overlap and for the recorder to issue an order to move the boundary. The staker had indicated that he had overstaked his competitor on purpose. The staker's rationale was that he knew his competitor had overstaked a patent and was speculating that the competitor's staking would be invalidated because of overstaking the patent. Perhaps **Jolette** is a case where Commissioner Ferguson decided on the specific circumstances of the day and not necessarily to offer any general direction other than to point out that there is discretion to be exercised.*

***Jolette** also discussed overstaking of patents. The claims inspector estimated 40-50% overlap on the patents however the Commissioner pointed out that surveyed boundaries were almost impossible to find. Again the Commissioner ordered the recorder to accept the claim and authorise post movement off the patent.*

*The Commissioner also decided on overlapping claim boundaries in **Esso Resources Canada Limited et al. v. Canadian Nickel Company Limited et al.,** April 3, 1990, 7 MCC 641. In that case new staking overlapped adjacent recorded claims by up to 70%. The Commissioner ordered the mining recorder to record the claims that had overlapped the claims of record and also directed the recorder to issue an order to move posts thereby eliminating the conflict. Again, the Commissioner was providing remedy to particular circumstances. The boundary of the initial claims of record were difficult to locate on the ground and the Commissioner points out that the applications to record for the second claims were detailed in the absence of the boundary line they attempted to "tie on" to. In **Esso** the Commissioner referred to **Hayes and Bachmann**, 41 O.W.N. 431 where the Court of Appeal upheld a decision by Judge Godson. In **Hayes** a claim encompassed the right-of-way for the T&NO Railway which was not open for staking. The Court indicated the area not open should simply be excluded from the claim.*

*In **Morgan v. Bradshaw**, March 1972, 5 MCC 82 Commissioner McPharland (**sic**) indicated that overstaking of subsisting claims does not necessarily invalidate the staking. In that case, however, the possible overlap was a result of witnessed corners over water. The Commissioner explained, on a practical basis, that it is always difficult to accurately project witnessed distances over water. I note the Commissioner did not address Subsection 63(2) RSO 1970 (procedure when refused-substantial part of which are included in a subsisting recorded claim).* 12

*In **Kaczanowski v. The Director of Land Management Branch MNR,** Sept. 2, 1983, 6 MCC 401 Commissioner Ferguson indicated that the application to record is the recorder's first test of the validity of any staking (see last paragraph, page 400). In that case the Commissioner took into consideration the recorder's concern for practical problems as well as the legal issues. Commissioner Ferguson's approach in Kaczanowski supports the suggestion that a recorder may consider the practical and administrative issues as well as the law when making discretionary decisions. On the other hand Commissioner Ferguson was clear in other cases that the recorder cannot make totally arbitrary decisions. In **River of Gold Mining Corporation Limited v. Black**, March 26, 1980, 6 MCC 11, the Commissioner stated:*

"In the opinion of this tribunal the jurisdiction of a mining recorder under subsection 143(2) is not a discretionary matter. A mining recorder must make the decision under this section in accordance with the law whether it be The Mining Act or some other principle of law. The rights of appeal flowing from such a decision through the court system clearly indicate that where there are legal issues, a mining recorder must give effect to the legal positions and cannot exercise a broad discretion based on practicality or expediency."

Subsection 143(2) mentioned by Commissioner Ferguson appears in The Mining Act RSO 1970 and is now Subsection 110(2) ...

*In **Sheridan v. The Minister of Mines,** April 26, 1988, 7 MCC 405, Commissioner Ferguson referred to legal text entitled "Principles of Administrative Law", Jones and de Villars, pp. 137 and 138:*

> *"Because Administrative Law generally requires a statutory power to be exercised by the very person upon whom it was conferred, there must necessarily be some limit on the extent to which the exercise of a discretionary power can be fettered by the adoption of an inflexible policy, by contract, or by other means. After all, the existence of discretion implies the absence of a rue dictating the result in each case; the essence of discretion is that it can be exercised differently in different cases. Each case must be looked at individually, on its own merits. Anything, therefore, which requires a delegate to exercise his discretion in a particular way may illegally limit the ambit of his power. A delegate who thus fetters his discretion commits a jurisdictional error which is capable of judicial review.*
>
> *On the other hand, it would be incorrect to assert that a delegate cannot adopt a general policy. Any administrator faced with a large volume of discretionary decisions is practically bound to adopt rough rules of thumb. This practice is legally acceptable, provided each case is individually considered on its merits."*

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Refer to Attachment P. On Sept. 17, 1996 in excess of 50 townships were opened for competitive staking in the Larder Lake Division. The land had not been available to mining exploration for over 20 years and from the level of interest I take it that some townships have very high mineral potential. The opening generated a great deal of new claim staking. Reportedly there were 300 people involved in the staking of claims in Tyrrell Township on the morning of Sept. 17, 1996. Attachment P illustrates the extent of partially overlapping staking between competitors in one township. In order to practically approach the volume of decision making it was necessary to adopt a flexible rule of thumb. Each application to record was carefully considered and the rule of thumb was utilised when deciding if residual parts of conflicting mining claims would be recorded or refused. The rule of thumb adopted was that an overlap in excess of 15 percent could be considered substantial.

The purpose of the Mining Act is to encourage the development of mineral resources. Section 2 states:

[***2.*** *The purpose of this Act is to encourage prospecting staking and the exploration for the development of mineral resources and to minimize adverse effects on the environment through the rehabilitation of mining lands in Ontario.]*

The general idea in the staking system is to encourage orderly staking of mining claims. Without order to the staking it would be increasingly difficult to retrace boundaries. There would be no practical advantage to a physical staking system unless claim boundaries can be found in order to define the limits of the property on the ground or for another staking licensee to find in order to stake adjacent open ground. Irregular claim boundaries are difficult to find. In keeping with a practical system that promotes orderly staking the MA and Staking Regulations set a standard for minimum size claims having astronomic boundaries (north, south, east and west). When partial overlaps occur in competitive staking the recorder is left with a decision regarding the recording of the "parts' of mining claims that do not conflict. Those "parts" may be smaller than the minimum area set as a standard in the rules for staking. Also, the "parts' may not be rectangular in configuration. It would not seem to be consistent with the general purpose and intent of the staking rules to allow the recording of claims that are much smaller than prescribed in the Staking Regulation and/or that are irregular in configuration. Once again, subjective questions arise in defining what is acceptable as a minimum area for a mining claim and how irregular a claim may be before it is rendered impractical.

Usually viable grass roots exploration properties contain far more than one minimum size mining claim. It is the right of a licensee under the Mining Act to stake a minimum size claim. The licensee may not be able carry out any meaningful exploration activities on only one claim unit however. If the purpose of the Mining Act is to encourage the development of mineral resources, in many cases it would defeat the purpose to allow the recording of claims less than the minimum set by Regulation. That is not to say that there are instances where undersized claims are staked and recorded. If the recorder has a discretionary authority to exercise, generally it supports the purpose of the legislation to discourage the recording of less than the minimum area of 16 hectares.

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Quite likely a great deal of claim staking occurs on a purely speculative basis. The staking licensee may have no other intention than to vend the claim to a willing purchaser. Meaningful exploration activities and mineral development may be more likely in the hands of those planning exploration rather than those speculating. The smaller the claim the more likely it has only speculative value. The speculation aspect of the business is healthy to the general competitive nature of mining exploration. Once again, however, if the purpose of the Mining Act is to encourage mineral development, fractional mining claims should be discouraged where there are discretionary decisions to be made.

In competitive staking events the participants all understand or should understand that there may be other parties in the vicinity that may be interested in staking the same area. It would be unreasonable for anyone staking high mineral potential land on opening morning to expect that they alone will be interested and that they are guaranteed the recording of their claim. Every licensee has the right to stake but only one claim will be recorded. Subsection 44(2) provides for the recording of the claim first completed thus the parties competing will stake as quickly as possible in order to win their claim. The decision of the recorder will be predictable when the competitors line up to stake on the same lines and corners. Obviously someone will finish first and will be recorded. Those that "stagger" their staking away from the competitors, by accident or by design, cannot raise their expectations for recording. The first claim completed will be recorded. If the competitors do not begin and finish at the same place they only make it more difficult to understand the conflicting rights both for themselves and for the recorder who is responsible to make discretionary decisions.

Usually the competitors who do the best job in planning and preparation for the competition are most likely to win the claim. They will visit the site long before the event to find their corners, place their loose posts in the vicinity of the corners, put up directional markers, etc. The best prepared also visit the mining recorder and ask advice before the opening. My advice to anyone asking for it was to start at the same time and at the same place as the competitors. To do otherwise would create complex situations difficult to decide on. Prior to Sept. 17, 1996 a number of licensees asked questions of me. If anyone asked how partial overlaps would be dealt with I offered the 15% rule of thumb and explained that I would likely refuse to record a claim entirely if it substantially overstaked another claim having priority. The MNDM provided information at an "open house" held at Temagami a few days before the Caution area was opened for staking. The mining recorder for Sudbury explained the 15% rule of them at that public information session.

There should not be any strategic advantage to a competitor who offsets his corners from the competition. To record small residual parts of claims resulting from partial overlaps is to encourage disorderly staking competition. There is nothing in the Staking Regulation that insists everyone start at the same place but the recorder is more likely to make the right decision if there are less complications.

Competing licensees will often stake without using the metal corner tags as they can save some time if they do not nail tags on the corner posts. The corners are then identified only by the

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inscriptions on the posts. It is not unusual that inscriptions quickly fade or wash off the corner posts. If the area has been covered by a maze of partially overlapping staking with staggered corners it becomes next to impossible for anyone to find the correct claim line. Again, there is nothing in the Staking Regulation that insists everyone start at the same place in unsurveyed territory however those making discretionary decisions should keep in mind it is advisable to encourage orderly competition.

There are two "ends" in the spectrum of partially overlapping claims. The small end where one unit claims (16 hectares) are involved and the larger end with sixteen unit claims (256 hectares). The above remarks concentrate on the recording of part claims less than 16 hectares. Subsection 46(2) directs the recorder not to record if there is a ***SUBSTANTIAL*** *overstaking on another claim having priority.*

A dictionary definition of the term "substantial" as appears The Houghton Mifflin Canadian Dictionary is"

substantial *. . . . . 5. Considerable in importance, value, degree, amount, or extent . . . . . .*

When I look to the Mining Act for some quantifiable indication of "substantial area" I find that additional assessment work or fees in lieu are required on discovery that a claim exceeds the prescribed area by more than 15%.

[81(16) and 95(5)]

Since the Mining Act requires extra assessment work if the claim exceeds the prescribed size by more than 15 per cent I think it reasonable to consider 15 per cent to be a "substantial area". If a mining claim partially overlaps another claim by more than 15 per cent, therefore, the overlap may be considered ***SUBSTANTIAL*** *within the meaning of Subsection 46(2) MA. As a rule of thumb a 15 per cent overstaking is substantial.*

Subsection 46(2) MA instructs the recorder not to record where the overlap is substantial. THE ***RULE OF THUMB*** *WAS NOT APPLIED AS AN ABSOLUTE GUIDELINE BUT AS A FLEXIBLE BENCHMARK ON WHICH TO CONSIDER EACH SITUATION INDIVIDUALLY. In many cases the staking of the second claim completed was refused as the overlap was considered substantial. In other cases the recorder allowed the recording of the subsequent overlapping claim subject to an order to move posts. First a determination was made under 46(2) MA then the recorder exercised the discretion in 44(4) MA to either allow the recording of part of the claim or refuse depending on the circumstances of each case. Situations were, at times, confusing to the parties as the second claim was refused and a claim finished third was recorded. If the second claim was considered to substantially overlap a priority claim, that second claim would be considered invalid and the recorder refused to move posts or allow remedy under 44(4) MA allowing for the recording of the third claim that did not conflict with the first.*

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Other complex issues arise after the recorder makes the discretionary decision (or, perhaps, even before). If the recorder decides to refuse the second claim recorded because it substantially overstakes a prior claim, the result may be that there appears to be land open for staking. If those involved with the second claim choose to exercise their right of appeal to the Mining and Lands Commissioner they create "pending proceedings' on filing the appeal with the recorder. Once an appeal is filed the land is not open to further staking according to Section 30(f) of the Mining Act. Unfortunately, there may be a window of opportunity for another party to stake the open ground before the appellant files with the recorder. This would not effect the right of appeal however there would be adverse interest. In any appeals to the Commissioner on these particular issues there must be clear communication as to the known situation (i.e. is there or is there not adverse interest of any kind).

> *[**30.** No mining claim shall be staked out or recorded on any land,*
>
> *...*
>
> *(f) while proceedings in respect thereto are pending before the Ontario Court (General Division) the Commissioner or a Recorder.*

The "15 per cent rule of thumb" is mostly applicable when applying Subsection 46(2) MA and 44(4) MA to one unit mining claims. The recorder could also keep the rule of thumb in mind for questions concerning larger claims however circumstances may be entirely different (generally) with larger claims. In keeping with the premise that discretion can be exercised differently in different cases the recorder need not be "fettered" by the application of the 15 per cent rule whether there are one unit claims or sixteen unit claims. The recorder need only make a rational decision that can be explained if appealed. Otherwise, how is the Commissioner to understand the case if there is no opportunity to communicate how the individual exercised the discretion and made the decision?

2) The issue of partially overlapping staking is not necessarily isolated to a but a few occurrences in a competitive situation. Refer to Attachment P" in the Backgrounder which attempts to illustrate the extent of partially overlapping staking in Tyrrell Township beginning Set 17, 1996. On that date Tyrrell was one of over 100 townships reopened for staking within the Temagami Land Caution area. There will be a maze of crossing claim lines and not all ideally marked for ease of retracement. Many of most of the competitors will have staked without using metal claim tags and the inscriptions on many posts will quickly fade or wash off. Most or all of the corner posts will be loose posts (not the more readily found "stump post") which are likely to have fallen on the ground making them difficult to find.

There is a wide variety of skill and effort used by the staking licensees to illustrate their staking on the applications to record. The sketches on the applications are often useless as a tool to retrace the staking on the ground. Soon after the competitive staking (e.g. in Tyrrell Township) it becomes extremely difficult to find the lines and corners of the original staking.

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It is not practical to allow the recording of residual parts of staking (Subsection 44{4}) without moving posts and boundaries by an order of the mining recorder. The task of deciding the issue and writing the orders can be a large one but, more importantly, any extensive effort to provide remedy by adjusting original boundaries would add further confusion to retracement in a maze of boundaries with little or no possibility of field policing or arbitration by MNDM.

3) The legal rights of the individual staking licensees are of the highest priority. However, the recorder must have a simple, effective and timely method to decide and proceed. The recorder would be seriously challenged to issue orders for boundary adjustment and ensure compliance in the case of a multitude of partially overlapping staking especially when no one is certain of the relative location of boundaries.

4) While there are situations where small, irregular areas of land are open for staking the Mining Act generally encourages orderly staking of square/rectangular areas of land having a minimum area of 16 hectares. It does not follow the general theme of the Mining Act for the mining recorder to create something (through discretionary authority) that the statute and the regulations attempt to avoid.

5) In partially overlapping staking the parts not conflicting are often irregular in configuration as well as less than the prescribed area.

6) There are indications in the Mining Act that the general principle is to discourage the recording of claims for small fractional areas of "gores":

> *Subsection 97(2) Mining Act*
> *Diagrams 31 and 32 Survey Regulation Mining Act*
> *Section 20 claim Staking Regulation Mining Act*

7) The application to record is a poor indicator of the actual ground situation. Most of the applications to record do not illustrate how the boundaries of one claim relates to another on the ground. This suggestion is supported by comments from the competitors that they did not actually see each other during the staking. Unless the parties return to the site and provide further information by relative measurement of the conflicting staking the true situation is largely unknown. If the recorder has no other information than the sketch on the application to record the extent of partial overlap is a question. The recorder is then face with making a discretionary decision, including the movement of boundaries, when the existing location of the boundaries are unknown. Actual field measurements should be considered a reasonable prerequisite to the application of Subsection 44(4).

MNDM expects that the applicant for the "filed only" will provide additional information to the mining recorder if a decision is to be reconsidered. The responsibility lies with the perspective claim holder/staker to add or adjust details on the application. New evidence would warrant reconsideration and the recorders would consider each case in a new light should it become apparent that there is no conflict between claims, for example.

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8) The adoption of a general rule of thumb for partial overstaking may provide some small incentive, in competitive situations, for the licensees to stake the same area of land rather than creating the "maze" of partially overlapping staking. If the competitors stake the same are the rules of the Mining act are simplified for the benefit of the competitors as well as the recorder who must decide on the conflicting rights.

9) Prior to the September opening of the Temagami Land Caution area the recorders in Kirkland Lake and Sudbury were available for consultation. Anyone who asked questions regarding partially overlapping staking was advised of the general rule of thumb (15%) that would be applied. An open house was held in Temagami close to the Sept 17 event and the Sudbury mining recorder explained how partially overlapping claims would be administered.

Submission

1) The Mining Act provides for an exclusive right to explore for minerals where a mining claim is legally staked and recorded. It is not legally possible for two mining claims to exist for the same area of land. In Section 27(c) the Mining Act prevents staking on land where there is already a recorded mining claim. Where there is conflicting staking before the recording of any mining claim Subsection 44(2) gives priority to the claim completed first. There is no doubt procedurally in dealing with the claims that stake the same area of land. Once a mining claim is accepted as directed by Subsection 44(2) or 44(3) other applications to record are to be dealt with by the recorder as directed by Subsection 46(2). That section is mandatory in wording with the clear direction that the recorder shall not record the application.

Subsection 46(2) is clear that there are three situations where the recorder shall not record the application:
a) the recorder considers the application not to be in accordance with the Mining act

b) the land staking is included in a subsisting recorded claim that has priority under Subsection 44(2)

c) a substantial part of the land staked is included in a subsisting recorded claim that has priority under Subsection 44(2).

The application of 46(2) is fundamental to the principle that a licensee, through the staking procedure, establishes those exclusive rights explained by Section 50 and Section 51 of the Mining Act. The mandatory application of 46(2) does not, however, provide any quantitative definition for "substantial part". The recorder, in the first instance, must decide in each case where the overstaking is substantial. There are no past cases of the Mining and Lands Commissioner that offer direction in application of Subsection 46(2) for partial overstaking.

Procedurally, where there is a total overstaking, 46(2) is clear that the second claim completed is not to be recorded but the application to record may be "filed" and adjudicated on as provided in the Mining Act. Section 48 provides for disputes to be filed and Section 112 provides for appeals to the Mining and Lands Commissioner.

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In the case of a claim that partially overstakes another having priority there is an additional avenue of adjudication (beyond dispute or appeal) in the recorder's discretionary application of Subsection 44(4). The recorder may record a mining claim for part of the land that does not conflict with the prior claim.

In the case of total overstaking the situation is fatal to the second claim unless it is proven the first claim completed is legally invalid. Likewise, in the case of partial overstaking where the area of overstaking is substantial, the situation is fatal to part of the second claim completed. This determination is fundamental to the application of the Mining Act with regard to the rights of the licensee and must be applied in a sequence prior to any remedial sections that provide for any other discretion to be exercised by the recorder. Step one is a determination under 46(2) and step two is the discretionary decision required of the recorder under 44(4) and 110(6).

2) There are two Subsections of the Mining Act that offers the mining recorder discretion to eliminate overlapping staking. Subsection 110(6) allows the recorder to issue orders for the adjustment of boundaries. Subsection 44(4) allows specifically for the recording of parts of land that are not included in a prior claim. As both subsections direct the recorder with the word "may" it is obvious that their application is discretionary and not mandatory. The two subsections do not give a licensee an automatic right to be recorded for residual parts of claims which do not conflict with prior claims. In the sequential application of the Mining Act the recorder must first apply 46(2) before 110(6) or 44(4) may be considered.

3) If the application stands the test of Subsection 46(2) there is then a second decision to be made by the recorder. The decision of substantial overstaking is the first consideration and secondly the remedy provided in 44(4) may be granted. Even if the overstaking is not substantial the recorder may decide, in some circumstances, that the application of 44(4) will be denied. Since 44(4) is discretionary it provides for both a positive or negative decision.

4) There is no quantitative definition in the Mining Act for "substantial" overstaking. There is no direction offered in past cases of the Mining and Lands Commissioner which directly address the question. Specific cases of the Commissioner are outlined in the accompanying "Backgrounder" however the cases seem to skirt the issue.

There are, however, sections of the Mining Act that may indirectly infer what the statute considers to be a substantial area. There are additional requirements expected of a claim holder applying for lease when land survey by an Ontario Land Surveyor confirms that a claim exceeds the prescribed area by more than 15%. Subsections 81(16), 81(17) and 95(5) of the Mining Act all refer to a 15% threshold where the statute demands additional assessment work beyond normal requirements before the lease will issue. The Mining Act, therefore demonstrates that 15% of the prescribed area is significant. An area of land exceeding 15% of the prescribed area is significant enough to require a claim holder to perform and/or report additional assessment work or pay fees in lieu of. While the Mining Act attempts to be practical in allowing that

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compliance with the Staking Regulation will not be absolute, the statute also attempts to discourage the staking of claims exceeding the prescribed area. If the threshold was set at 15% the drafters of the legislation have considered that area of land to be significant. One definition of the word "substantial" in the Houghton Mifflin Canadian Dictionary is: "...5. Considerable in importance, value, degree, amount or extent." By inference, the Mining Act considers an area of land amounting to 15% the prescribed area of a mining claim to be substantial.

5) The mining recorders have adopted the 15% threshold as a rule of thumb but not as absolute rule blindly administered in every situation. Each case is considered on its own merits and the following are reasonable, practical and legal criteria considered:
a) what is the sequence of completion of staking according to the applications to record?
b) does the application to record provide any details relating to competing or surrounding staking?
c) by plotting conflicting claims, what is the extent of overlap as indicated on the application?
d) has the applicant offered any additional information with regards to the relative position of conflicting staking?
e) is the overlap substantial within the meaning of 46(2)? Is more of the second claim insider the prior claim than outside?
f) if there is a part of the second claim that does not conflict with the prior claim is there any other adverse interest? If the recording of the second claim overlaps other finished third how would the entire situation result with regard to encouraging rectangular claims having a minimum area of 16 hectares, more or less?
g) if a residual part of a claim is to be recorded is it practical for exploration purposes? What is the area of the residual part?
h) if the conflicting area is not substantial is it reasonable and practical to adjust boundaries and allow the remedy provided for in 44(4)?
i) if there is a decision to refuse the second claim completed (by discretionary authority given the recorder) there is no legal prohibition to recording the third claim providing it does not substantially overstake the first

6) The detailed application of the 15% rule of thumb was used in the determination of substantial overstaking within the meaning of 46(2) but also in exercising the discretion under 44(4). In other words, if the recorder interpreted a substantial overstaking then it was unlikely their would be remedy allowed under 44(4) or 110(6). The recorders acknowledge the need to exercise the discretion in 44(4) but decided not to allow the recording of a residual part of a claim where there was a substantial overstaking.

*Subsection 46(2) MA instructs the mining recorder not to record where the overlap is substantial. The **RULE OF THUMB** is not applied as an absolute guideline but as a flexible benchmark on which to consider each situation individually. It is submitted that the Commissioner should acknowledge this **RULE OF THUMB** as a reasonable guide for recorders' decisions under Subsection 46(2) MA.*

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Appellants' Position

The following represents the appellant, Ewan S. Downie's position, as set out in a letter to the Mining Recorder for the Sudbury Mining Division, dated December 28, 1996 (MA-006-97, Ex. 5).

...There are several reasons why I feel that this claim should be recorded moving perhaps the West boundary to the East 400 metres. These reasons are as follows:

1. When I staked this claim starting at 9:00 am on opening day, all these grounds and lake were open to staking with no previously staked claims in the area covered by claim 1184528. While staking this claim, I crossed no other claim boundaries and saw no evidence of other staking in this area. Therefore, I had no reason to believe that I had overlapped other mining claims in the process of staking my claim. The other claims in question were staked from the other shore.

2. Prior to this "staking rush", Roy had talked of the 15% rule, where if a claim overlapped another by 15%, it would not be recorded. Claim 1184528 covers the only known showing in this area. On the day previous to opening day, we were practising the staking of claim 118428 with the boat and all other parties had a good idea of what our plan was for staking on opening day. Claims 1219180, 1219181, and 1219182 cover only lake and no land, and are not staked covering any of the "favourable geology". It is quite reasonable to assume that the sole purpose of putting these claims where the other party did was to cover the "15% rule" and render my claim invalid rather than compete for the showing area against or well equipped team (Quad and speedboat were used to aid us in completing our claims quickly).

[Items 3 and 4 are more in the nature of evidence in support of a dispute and do not impact on the preliminary determination to be made by the tribunal at this time.]

5. At 9 a.m. there were no other claims in the area. Under Section 43 of the Mining Act - Substantial compliance as nearly as circumstances will reasonably permit with the requirements of this Act as to the staking out of a mining claim was not likely to mislead any licensee desiring to stake a claim in the vicinity, and that I attempted in good faith to comply with the requirements of the Act and the regulations. Claim 1184528 should therefore be deemed to be in substantial compliance.

In addition to the submission of Mr. Downie, the tribunal received a letter dated June 24, 1997 from Donald E. Wakefield, a solicitor retained to represent the interests of Messrs. Downie and Ferreira and Canmine Resources Corporation (MA-006-97, Ex., 13) a copy of which was provided to all of the parties interested in this matter. The following excerpts were considered by the tribunal in its deliberations of the 15 percent issue:

1. In our view, the statements at the top of the second page, paragraph 1 of the MNDM's Submissions reading "Likewise, in the case of partial overstaking where the area of overstaking is substantial, the situation is fatal to the part of the second claim completed. This determination is fundamental to the application of the Mining Act with regard to the rights of the licensee and

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must be applied in a sequence prior to any remedial sections that provide for any other discretion to be exercised by the recorder. Step one is a determination under 46(2) and step two is the discretionary decision required of the recorder under 44(4) of 110(6) ..." are not supported by the important objectives of the Mining Act.

This Appellant submits that, if one of the objectives of the Mining Act is to allow licensees to acquire open ground for exploration purposes, each applicant should have recorded the maximum land area not overstaked that is properly staked, subject to their being a compelling reason not to permit such recording.

In the competitive staking situations such as Downie v. Anderson and MNDM, such an approach would avoid the present situation where over three quarters of the area sought is open for staking if Downie's appeal is rejected. This, it is submitted, leads to a renewal of the competitive staking situation. In this case, if there were no pending proceedings, Downie and Canmine Resources Corporation would restake exactly what can be awarded them by the exercise of the Mining Recorder's discretion.

Nowhere in the MNDM Submission does Mining Recorder Spooner deal with the explicit wording of Subsection 44(4) to the effect that it is "despite" Section 46. In our view, the issue should be approached in numerical sequence from the positive perspective of what impediments there are to the exercise of the Mining Recorder's discretion under Subsection 44(4) rather than from the negative position of substantial overstaking is fatal under Subsection 46(2). How else can true meaning be given to the word "despite" in the sequential context of the staking rules of the Mining Act?

Thus, in our view, the issue of overstaking should be approached from the position of what impediments and how substantial are they to the applicant staker obtaining the maximum amount of ground properly staked in the context of surrounding lands and events.

2. We are also concerned that the backgrounder" portion of the MNDM Submissions is unduly concerned with the difficulties anticipated by Mining Recorders in writing orders to move posts and boundaries in cases of partially overlapping staking, especially based on the information contained in applications to record. We accept point number 7 in the backgrounder to the effect that actual field measurements should be considered a reasonable prerequisite to the application of Subsection 44(4).

Undoubtedly, there may be situations where too small a non overlap area would remain to be recorded, if the Mining Recorder exercised the discretion given by Subsection 44(4) to permit recording, so that the purposes of the Mining Act as set forth in the discussion portion of the MNDM Submissions would not be achieved. It is submitted, however, in the Downie case that the non overlap area being 8 or 9 units out of 12 units is clearly not such a case.

The Appellant Downie endorses the approach suggested to some extent in the MNDM Submissions of first determining the situation on the ground in some detail. For example, as the

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Mining Act and Regulations thereunder permit work done on patented lands to be applied to unpatented claims, it would seem important in a case like Mr. Bourassa's clients whether the applicant for recording held adjoining lands before the Mining Recorder determines that the non overlap portions of any staking were too small to be recorded. If the facts are to govern in each exercise of the discretion provided by Subsection 44(4), which is the submission of this Appellant, we do not think that the recorder can limit his or her knowledge to the particular application without regard to tie-on claims that expand the total area held for exploration and development by the applicant.

3. Alternatively, we would submit that if the word "substantial" is to be applied and defined for purposes of deciding when the discretion can be exercised, then 15% is far too low. We question, from the perspective of a purposeful interpretation of the provisions of the Mining Act, why a provision dealing with the amount of assessment work required to bring a mining claim to lease, should have anything to do with the amount of ground sought under an application to record a mining claim in the first place. It seems to use that the application to record ground is dealing with the issue of obtaining from the Crown the exclusive right to explore land for the purpose of evaluating its mineral potential. Whereas the second section, dealing with leasing, is designed to require a substantial amount of work before the holder of the exclusive exploration license can convert it to an extraction right.

<u>Summary</u>

In summary, the appellant disputes the position of MNDM to the effect that substantial overtaking is fatal to the second claim completed. We dispute that the proposition that Subsections 110(6) and 44(4) of the Mining Act should be considered subsequently after applying the mandatory test of 46(2). We agreed that each case must be considered on its own merits and that the submissions of MNDM have indicated problem areas related to the application of the discretion.

Secondly, we dispute that the Mining Act infers that an area of land amounting to 15% of the prescribed area of a mining claim is substantial.

The staking by Downie (which involved 12 units the greater part of which was land under water through the use of witness posts) in a competitive situation with another staker on the other side of the body of water commencing at the same time, is a case where the 15% overstaking marking should be expanded as neither staker has any idea of what units the other staker is intending to acquire. There was no possibility of either staker crossing a boundary line of another staker and being warned that the ground being sought might already have been staked. Thus, if any percentage rule is to be applied, it is the appellant's submission that is this case, a case where the competing staking from the opposite shores of a body of water, the discretion be exercised in a more liberal fashion. Even without survey, which may be quite difficult having regard to the use of witness posts and the over water situation, it is apparent that approximately 8 of the 12 units staked by Downie have no overlap and would be open ground should his appeal fail.

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The following excerpts are taken from the Submission of Michael Bourassa, solicitor for Lake Superior Resources Corporation, dated February 18, 1997 (MA-023-96, Exhibit 7):

Appellant's Submissions

6. ... It is the Appellant's understanding after discussions with the Recorder and on the basis of the Appellant's solicitor's discussions with the Recorder and with the Chief Mining Recorder that the Recorder is unwilling to apply the provisions of section 44(4) of the ***Mining Act****, R.S.O. 1990, as amended, to the facts of this case, on the basis of what has become known as the "15% rule".*

7. Subsection 44(4) of the ***Mining Act*** *is a relatively recent provision which came into effect on January 30, 1996. To the knowledge of the Appellant, no decision has yet been rendered by the Mining and Lands Commissioner with respect to subsection 44(4). ...*
...

It is the Appellant's position that the Recorder correctly recorded Mining Claim L-1217824 using the provisions of subsection s 44(2) and (3), and the Appellant does not dispute that aspect of the Recorder's decision. However, the Recorder denied the Appellant of its rights by ignoring or refusing to apply the provisions of subsection 4494) to that portion of the Filed Only Mining Claims which lies outside of Mining Claim L-1217824.

8. A sketch showing the overlay of the Filed Only Mining Claim and Mining Claim L-1217824 is attached hereto ... The total area of Mining Claim L-1217824 is roughly 29 hectares while the total area of the Filed Only Mining Claim is roughly 25 hectares. The Filed Only Mining Claim overlaps Mining Claims L-1217824 by roughly 14 hectares, leaving a northerly 11 hectare portion lying outside of Mining Claim L-1217824.

9. Applying the facts of the Appellant's case to subsection 44(4), the section would read as follows:

> *(4) Despite subsection (3) and section 46, if the Filed Only Mining Claim (****the other application or applications to record a mining claim****) covers any land that is not part of Mining Claim L-1217824 (****the mining claim that is entitled to priority under subsection (2)****), the recorder may record the northerly 11 hectare portion of the Filed Only Mining Claim (****a mining claim with respect to that part of the land****) and shall amend the Filed Only Mining Claim application with respect to the 14 hectares of the Filed Only Mining Claim which overlap Mining Claim l1217824 (****the land covered by the previously completed claims****).*

10. The said 14 hectare overlap portion referred to in paragraph 9 above represents 56% of the Filed Only Mining Claim and 48% of Mining Claim L-1217824.

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11. The Recorder has apparently applied the provisions of subsection 46(2) in denying to record the Filed Only Mining Claim. The subsection reads as follows:

...

The Recorder has apparently taken the position that he cannot record the Appellant's application because a "substantial" part of the Filed Only Mining Claim is included in Mining Claim L-1217824.

12. In order to draw upon a benchmark for what is "substantial", it is the Appellant's understanding that the Recorder has used subsection 81(16) of the ***Mining Act*** *which reads as follows:*

...

13. The Appellant asserts that subsection 81(16) makes no mention of the relationship between the concept of "substantial" and "15 per cent", and therefore contends that there is no basis for making such an interpretation.

14. It is therefore, the Appellant's understanding that the Recorder has set a rule, namely the 15% Rule, which equates "substantial", as it concerns the amount of overlap permissible under subsections 44(4) and 46(2), with 15%. The Appellant further understands the Recorder's position to be as follows Where an applicant's mining claim overlaps a subsisting recorded claim by more than 15% of the applicant's mining claim, then the so-called 15% Rules is to be applied blindly as a means to refuse an application to record, without any regard to the lead-in language to subsection 44(4) and without any regard to the merits of a particular case.

15. The Appellant does not deny, but in fact acknowledges, that the said 14 hectare overlap portion referred to in paragraph 8 above represents more than 15% of the Filed Only Mining Claim. In fact, it represents roughly 56%.

16. The Appellant asserts that the Recorder is improperly utilizing the provisions of subsection 46(2), which sets out a two staged process. The first question to be determined is: Does a mining claim which forms part of the application overlap or "substantially" overlap a subsisting recorded claim. If the Recorder concludes "yes" to this question (by utilizing whatever rule he chooses for determining "substantial", including the so-called 15% Rule), he must then treat the claim as "filed only". The section does not provide that the "filed only claim is to be refused on the basis that it "substantially" overlapped another claim. Rather, the section states that after receiving and filing the application, "any question involved may be adjudicated as provided in this Act". The Appellant contends that subsection 44(4) provides the recorder with complete discretion to resolve such an issue.

17. The Appellant contends that subsection 44(4) provides the Recorder with discretion to record or not record that portion of a mining claim that is not part of a subsisting recorded claim, by the use of the work"may" in the third line of that subsection. Nevertheless, by the very lead in language of the subsection, namely "despite subsection (3) and section 46" the Recorder should be precluded from using section 46 as a means of restricting that discretion. Moreover, the Recorder should be precluded from applying a hard and fast rule based on section 46, in the exercise of that discretion. 26

18. The Appellant asserts that the 11 hectare portion of the Filed Only Mining Claim is vital to its interests in the area. The Appellant holds mining Claims L-1223901, L-1223902 and L-1223903 which lie to the north of, and are contiguous to such 11 hectare portion. ...

19. The Appellant seeks an order providing for the recording of the northerly portion of the Filed Only Mining Claim.

20. The Appellant seeks relief to section 121 of the ***Mining act*** *and requests that the Commissioner giver her decision based upon the real merits and substantial justice of the case.*

The following represents the appellant, David V. Jones, submissions in this matter, as set out in a document dated December 19, 1996 and amended January 28, 1997 (MA-024-96, Exhibit 9):

...
After referencing the Mining Act it appears to me that the Mining Recorder did have the option to accept my claim and issue a work order for me to amend my application to record and issue a work order for me to move my posts so that I would retain the section of my claim that does not overlap the Caron claim ....
...
Alternatively, I also realize that the Recorder did have the right to refuse my claim if it "substantially" overlaps a claim with a prior completion time. ...
...
*Consequently, it appeals that my appeal rests on the definition and use of the word "**Substantial**". The mining recorder considers 15% to be substantial and I do not.*

One note that I would like to clarify is that at first glance it may appear that the result of my appeal is for the Mining Recorder to record a portion of my claim which would represent a small land area as compared to the adjoining newly staked claims that were staked during the lifting of the land caution, and possibly represent a "nuisance claim". However, I also am the recorded holder of large land package to the west of the subject claim (within 100 metres) and of which is presently under option. Consequently, the subject claim represents a new portion of a much larger land package in the area. If the 15% rule were not used, this ground would be contiguous to my block via the filed only claim 1076924 which would also have been optioned to the same company by another party. This claim was also rejected because of the 15% rule but the staking principles did no pursue the decision with the appeal process.

My arguments against the 15% rule will be broken down into the following three sections:

1) *Definition of the word "substantial".*

2) *Use of the rule will cause unfair staking scenarios and new problems that the mining industry will have problems adapting to.*

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3) *The 15% Rule was not widely known within the mining industry and was not defined clearly in the Mining Act.*

1) *<u>Definition of the word "substantial"</u>*

1(a) *Upon initial discussion with Roy Spooner as to how he decided that the phrase "substantial overlap" meant "more than 15% overlap", he indicated to me that it was not clearly defined in the Mining Act, however he was partially using Section 81(16) ...*

*Although this section does make reference to something occurring after the size of the claim is in excess of 15% it does not refer to the word "substantial" or even remotely resemble the situation that occurred in the refusal of my claim. This section deals with money having to be paid out if the size of the claim is more than 15%. It **<u>does not</u>** deal with land title and as in my case the complete refusal to obtain title to land that I had staked while following all the rules of the Mining Act.*

The payment of extra money for assessment is trivial as compared to the actual refusal of land title and both areas should be dealt with separately. I feel that during the writing of the Mining Act the mention of 15% in section 81(16) was never intended to be used to help define the word "substantial" in section 46(2).

I feel that the reference to this section for obtaining definition on what is "substantial overlap" for use in determining actual land title and rejection of staked ground, is comparing apples to oranges.

1(b) *Reference to the word "substantial" in the dictionary results in such definitions as:*

SUBSTANTIAL- considerable; ample; large; (Compton's Interactive Encyclopedia, 1994)

SUBSTANTIAL- significantly large
- being largely but not wholly that which is specified (Webster's New Collegiate Dictionary)

I found it quite surprising that someone could possibly suggest that 15% fits these definitions. All of my discussions with people in the mining industry resulted in everyone being quite amazed that the Mining Recorder could state that 15% is a "substantial" amount, especially when dealing with such a powerful issue as acceptance of a claim.

As was suggested by Roy Spooner during our initial discussions, the 15% rule may be more true to the definitions of the word "substantial" if it were taken inversely. In other words "substantial overlap" would occur if more than 85% overlap were present (ie. 'significantly large', 'considerable', 'being largely but not wholly that which is specified').

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I think a good analogy which show that 15% is not a substantial amount would be as follows: Assume that I were to make a deal with you where you were to put up the money for a business venture that I had planned, and I said to you that I would share with you a substantial amount of the profits that may be realized from the venture. If after acquiring a profit I returned to you and gave you 15% of the profits would you feel that this was a fair representation of the promised "substantial amount"? I think very few people would!

Probably anyone reading this analogy would immediately say to themselves that the definition of "substantial amount" should have been spelled out. Well this is exactly how I feel where the mining recorder is imposing an unfair definition of the word " on me and at the same time did not make it clear prior to a major staking rush.

1(c) *By using the 15% rule to reject overstaked claims, a significantly large portion of ground (up to 85% of the claim) that did not overstake the prior completed claim, will also be rejected. This seems to imply that this remaining portion of the claim is insignificant. I can understand the rationale that the mining recorder was using where he was attempting to stop small portions of claims being recorded, however, 85% of a claim can represent a significant value, especially if there is an ore body found on the claims. Even parcels of land that are less than 85% can represent huge values.*

A quick example of this is in the Hemlo ore body where the famous fraction of land in the centre of the deposit has to date produced millions of dollars worth of ore, even though its size represents a very small portion of a 16 hectare claim. In the end, the worth of a claim (or portion of on) is not representative of who owns the largest land package, but who owns the most ore. In other words a small portion of a claim can be extremely valuable if staked over an ore body as compared to several hundred claims staked over ground that is barren of ore.

Some people might suggest that if small portions of claims were allowed to be recorded then they would present problems or become a "nuisance" to surrounding claim holders. However, I feel that the subject of claim worth and substantiality should be left up to the industry to find a balance. There is a general industry acceptance that if one participates in competitive staking situations there is a very good chance that you will not get the whole land package desired and negotiations with adjoining land holders (including those with small parcels of land) might be necessary.

A tried and tested method has already evolved to deal with this situation where the worth of a claim (or portions of a claim) are determined by a fair market value. In other words if a small piece of a claim were viewed by someone in the industry as being substantial, then there would be a value applied to it and then agreements could be negotiated for the ground. If the piece of ground were not taken to be substantial then the claim would not be vended or worked and the claim would eventually come open for future staking.

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I feel that the MNDM should only be involved in this process up to the point of enforcing the basic rules of the Mining Act, and in regards to the technicalities of proper staking procedures. It does not seem to be in the right context for government representatives to be making discretionary judgements on which claims (or portions of claims) are of value and which parts are not. This should be left up to the mining industry.

2) *Use of the rule will cause unfair staking scenarios and new problems that the mining industry will have problems adapting to.*

Recently, it seems that the MNDM has made "priority of completion" to be one of the main criteria for accepting a claim, and the industry has gone along with this rational, as it is fairly well defined in the Mining act and it can be accurately measured if all parties involved follow the rules. However, if the 15% Rule is to be used there will be completely new criteria taking precedence over prior completion time and some very unfair staking scenarios will emerge.

2(a) *The most apparent unfair scenario that occurred in my situation can be seen by looking at the staking sketch ... The Crawley claim had the latest completion time but ended up with over half of the Perello claim, even though Perellow beat crawley in the rush. Both Perello and Crawley staked similarly where they both staked claims that overlapped other people. In other words they staked in quite equal manners except for the fact that perello had the earlier completion time which was supposed to imply that Perello would be entitled to the claim. However, by using the 15% rule both Crawley and Perello were subject to an event which they had no control of during staking (ie. the Caron claim cancelled the Perello claim and the Crawley claim was recorded). I was quite perplexed with this as the Crawley claim also overlapped the Perello claim by more than 15% but it was not effected since the Recorder decided that the Perello claim would be cancelled first! Crawley performed the same type of overlap infraction on Perello, as Perello did on Caron, but Crawley won the claim, even with a slower completion time!*

I described this scenario to many other people in the mining industry and every one responded with complete surprise and the general consensus was that this was ludicrous. ***Everyone seemed to think that all three parties would be entitled to that portion of their claim that they had earlier completion time on.***

2(b) *In essence, the use of the 15% rule will result in a completely new method of claim staking procedures that will have to be performed, particularly during competitive staking. Not only will it be important to have extremely fast stakers (for prior completion) but now you will need a team of reconnaissance staff. these people will be needed upon completion of the claim to immediately search around the surrounding area and map out all the claims with "overlap". They will then have to calculate what percent of overlap is present and then see if this would result in the cancellation of any claims due to the 15% rule. At this point there may be ground still available to stake and it would have to be restaked before anyone ceils also figures it out.*

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Ironically, in most situations this would result in the staking of a small parcel of land which is what the 15% rule was originally intended to prohibit.

An example of this scenario would be to use the sketch in Appendix A, only have Creels' #1 post located at the #2 post of Perello. This would be a realistic situation if Perello and Crawley were working for the same party. If the 15% rule were applied then Perellos' claim would be rejected due to the overlap with Carons' claim and there would be open ground between Carons' #2 post and Crawelys' #1 post (even though the ground had been covered by Perellos'claim).

Although this type of reconnaissance may seem a simple procedure to perform, it is extremely difficult to walk around in an area that has just experienced a staking rush and systematically plot out all the details that had just took place, let alone to sit down in the bush and start calculating what percent overlaps have occurred! A significant amount of time would pass which would leave room for other parties to enter the scene and possibly stake the resulting open ground, ***even though the ground had already been legitimately staked by the original stakers!***

Granted, even without using the 15% rule you would still search for areas of open ground after a staking rush, however, by using the "percent overlap" rule, the situation becomes extremely complicated to sort out in the field, particularly when combined with a competitive scenario as in a staking rush. New disputes would also arise as to the accuracy of the overlap measurement.

2(c) *It was suggested by Roy Spooner, after I described some of these scenarios to him, that many of these problems could be avoided if all the parties that were competing for the same area would meet beforehand and come to a mutual agreement on where to position their claims (ie. so there would be no overlap). This is completely unrealistic in regards to what actually goes on "in the bush". This thought assumes that agreements in the bush during (or before) a staking rush are honestly lived up to, or alternatively, it implies that we should be writing up private legal agreements for all competitors to sign before the day of the rush (both scenarios not being very realistic). It also forces a staker to position his claim in a manner that suits all parties and not necessarily his original choice, which may have had more geologically sound rationale.*

One scenario that immediately became apparent to me if this procedure were followed, which would result in more damage than would have occurred if the 15% rule were not applied, is as follows:

Assume that an area of ground were coming open at a specific time, and it would have room for many single unit claims. If all the interested parties did as Roy suggested and went into the field in the days preceding the opening and actually all agreed to position their claims in the same locations, they would just have to concentrate on having the fastest staker for their claims. If they wanted 4 key claims they would have to get four very fast stakers.

But, since there is no law that says this has to happen, one morally dishonest staker could then, on the day of the opening, move his #1 post position just 155 metres north and 155 metres west

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(resulting in at least 15% overlap on 4 adjoining claims). He would have to pay for only one very fast staker and several easily available helpers to blaze (industry experience has shown that very fast stakers are expensive and rare, while "helpers" that are used to blase lines are cheaper and more available). As long as this one staker had priority of completion time he would cancel out ***four other claims*** *by using the 15% rule, which along with using the element of surprise, he could then proceed to retake these four cancelled claims with slower stakers before the other parties realized what happened (since they all assumed that their previous day agreement was still in place). By doing this he was eligible to get 4 key claims with only one very fast staker while at the same time he "used up" at least 4 of the competitors very fast stakers in the process. By repeating this scenario over a larger area a morally dishonest staker could acquire a large area of land and take advantage of everyone who followed the mining recorders wish to agree on positioning their claims beforehand.*

2(d) *The use of the 15% rule would result in a very difficult means of verification of actual staking events, other than to specifically have the ground surveyed by an Ontario Land Surveyor, who would then be able to calculate the true overlap of claims. Obviously this would bring a brand new significant expense to the ground acquisition costs of companies.*

Without using the 15% rule, the field situations are very easy to measure and are specifically referred to in the Mining Act. Post locations delineate actual claim boundaries and the completion times that are affixed to the posts are easily prioritized in order of precedence. Why should there all of a sudden be anew concept introduced that leaves a very grey area with respect to actual claim boundary and ownership as implied by the use of the "percent overlap" rule?

Can you imagine the frustration (and possibly the legal implications?) of a party who accepted a mining recorders use of the 15% rule which resulted in the rejection of his claim, only to find out at some point in the future that the actual field situation was less than 15% overlap and had he surveyed the land he would actually have been entitled to the claim. Imagine if this area of ground had resulted in an ore body being discovered before the original party realized the situation.

3) *The 15% Rule was not widely known within the mining industry and was not defined clearly in the Mining Act*

I realize that the MNDM does not have a legal obligation to delineate every grey area that occurs in the Mining Act before I go out and stake a claim, however it seems to me that there may be some moral obligations that should prevail when certain "undefined" areas of staking are encountered. As previously stated I have the utmost respect for Roy Spooner as he seems to make several "personal" calls with respect to "grey areas" within the mining act. Many of these calls seem to clear up areas of potential problems, however as in this case, some of the decisions do not go over well with those involved.

In many of these situations the industry seems to accept the decisions without adjudication from

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the Mining Commissioner, however as in this case I feel that many of the situations are so contentious that they should have been dealt with previous to a major staking rush rather than just quietly applying them and waiting for someone to appeal the decision "after the fact".

Regardless, my complain is that the 15% rule is not defined anywhere in the mining act and the industry had been led to believe that priority of completion is one of the main concerns for claim staking.

Any previous incidences where the 15% rule was used were not readily made available to the staking fraternity. It could not have been expected that a person could have anticipated Roys' interpretation of Section 46(2) to have included this rule.

Many staking interpretations of "grey" areas in the Mining act are made in the field where even if they became apparent, it would not be realistic to stop operations and go see the recorder to ask for his advice. Apparently the recorders advice does not always hold ground anyway, as appeals can still take place. I have been refused claims on previous occasions where other mining recorders interpretations were different than mine, however, reference to the Mining Act did not clearly define the proper coarse to take (as in this case). This is where I feel that a certain amount of respect or benefit of the doubt must be given to the staker as many of the decisions have to be made in the field under less than ideal conditions for detailed though process. If the area concerned is not plainly defined, and there is no third party disputing the decision, then why not give the benefit of the doubt to the staker and at the same time make it aware to the associated parties that the subject is loosely defined in the Mining Act and that there may or may not be future implications.

In this specific case I sincerely believed that we were staking as strictly as possible within the rules of the Mining act, and it seems that the other parties involved also accepted the situation that I was to have title to the portion of Perellos' claim that overlapped the Crawley claim which had a slower completion time. Nobody disputed this situation and it was quite a shock to find out that the Mining recorder decided he didn't like the situation and would step in and reject my claim.

Mr. Jones concludes his submission under the heading of **SUMMARY** which outlines the following suggestions as an alternative to the 15 percent rule of thumb as an interpretation of the meaning of "substantial overlap" which are reproduced below:

a) *The merits of the 15% rule do not override the pitfalls that will result if it is used so why proceed with it? If it is not used, no changes or new interpretations of the mining act would have to take place as the industry has already accepted the consequences that may occur with overlapped claims.*

b) *If it is felt that the definition of "substantial overlap" must be addressed and that reference to the Mining act is necessary (ie 15%) then why not use this rule inversely where substantial refers to more than 85%. This would imply that the remaining 15%*

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is insubstantial and I think that there are very few people who could argue against this. At present I get an overwhelming response from anyone that I discuss this with that 15% is not a substantial amount, contrary to the Mining Recorders suggestion that it is.

c) *If the above two suggestions don't seem appropriate then I would ask that **at least** the democratic standard of "majority rules" should apply. In other words if there is more than 50 % overlap with a claim that has a prior completion time then the claim is deemed to have substantial overlap and Section 46(2) would apply.*

Michael Taylor made the following submissions in his Notice of Appeal (MA-029-96, Exhibit 6) dated December 4, 1996:

The ruling that claim 1220084 substantially overlaps 1221669 is in question. The overlap is small. When 1220084 was begun (9:00 AM) the overlap did not exist. Both parties started staking at the same time. With respect to 1220085, the general overlap ruling is questioned.

Mr. Taylor continued with the following entitled "Additional Information" appended to his Notice of Appeal:

When Mr. Gauthier started staking claim 1220084 at 9"00 am at his No. 1 post, presumably the other party was at their No. 1 post almost 400 metres to the east. Since the claims were being staked simultaneously and the parties were unaware of each other, the overlap was unavoidable by Mr. Gauthier. In actuality, the other party crossed our east boundary. The existence of claim 1221669 should not invalidate the non-overlapping portion of claim 1220084.

Note that the overlap of 1220084 with 1221669 is small. It may be 15% or 20% but this is unclear from the staking sketch.

The non-overlapping portion of claim 1220085 should be recorded. There is no clause in the mining act that states a claim shall be invalid because it overstakes a previous claim by 15% or more.

Our Staking crew made every attempt to stake our claims according to the Mining Act. The portion of these claims which do not conflict with prior claims should be recorded.

Parties of the Third Part

In three of the four appeals under consideration, the overlapping lands which were denied recording were staked by third parties, who became the recorded holders. Their submissions on the issue of the 15 percent rule are set out.

John W. Londry, Senior Geologist, Eastern Canada, for Battle Mountain Canada Ltd. provided the following submission dated February 20, 1997 (MA-024-96, Exhibit 10):

Battle Mountain accept the staking times and claim positions as indicated in Mr. Jones' sketch which agrees to within 10 metres or so of Battle Mountain's sketch that was submitted to Mr. spooner. Both of these sketches indicate that approximately 45% of Mr. Jones' claim 1221670 overlaps onto BMC's claim L 1221719.

Although we may not agree with the 15% figure presently being applied by Mr. Spooner to overlapping claims, Battle Mountain is in agreement with his decision to record the two above mentioned claims. It was our understanding from discussions with Mr. Spooner going into the September 17, 1996 staking that he would be applying this 15% figure in any decision regarding overlapping claims. This same benchmark figure is used - although in a different context, on at least two other occasions elsewhere in the Mining Act (sections 95(5) and 81(6)) indicting that this specific number has an accepted significance in respect to mining lands and the application of mining regulations to them.

We would agree that such criteria for refusing a claim might inspire some to disruptive staking practices in a rush, but we did not encounter such deliberate actions on September 17th. On the other hand a number of irregularities were noted that have caused us problems. This illustrates that the system is not perfect for any of us, but at present it governs the process by which we acquire ground in this province.

In summary, although we sympathize with Mr. Jones and agree that problems exist with the 15% rule of thumb, we contend that the Land Caution presented unique staking conditions in a rush environment. Parties interested in participating were free to consult with Mr. Spooner on this matter to determine if special discretionary rulings might apply where claims were determined to be overlapping by 15% or more. Battle Mountain did so and willingly took part in the staking under these terms. We therefore agree with the mining recorder's ruling in this case.

Don T. Fudge of DTF Consultants, the agent for Steven Dean Anderson, in his submission dated April 10, 1997, (MA-006-97, Exhibit 11), makes no comment on the issue of the 15 per cent rule of the Mining Recorder. He takes the position that the stakings on behalf of his client comply with all legislative requirements and the focus of his documentation is on the issue of the dispute of those stakings. The tribunal confirmed by telephone on September 4, 1997 that Mr. Fudge had nothing to add with respect to this first issue.

George Kolezar, Lands Manager, Eastern Canada, for Battle Mountain Canada Ltd. provided the following submission dated March 13, 1997 (MA-029-96, Exhibit 9):

Our position in this appeal is that of a passive defendant as we have merely profited by the 15% overstaking rule imposed by the Mining Recorder. We are not prepared to defend this particular number but unless there is a point at which overstaking results in refusal, numerous livers of land could result that would be too small toot work effectively. We have no arguments to favour one particular number over another as long as it was made very clear as to what that number was.

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1) The overstaking was not physically done by the party that is being punished for the overstaking. Mr. Clark's staker appears to have gone beyond the claim line established by Mr. Taylor's staker and caused the overlap. It seems unjust that Mr. Taylor should lose his claim through no actual fault of his own. Clark's staker perhaps should have respected Taylor's east boundary of 1220084.

2) With regard to the proceedings, it might be preferable to hear the argument for and against the 15% rule and establish a % overstaking benchmark prior to hearing any individual appeals.

Additional Submissions

On July 3, 1997, the tribunal, through its Registrar, posed the following additional questions to the parties in this matter:

(1) If the Commissioner disagrees with the 15% rule and if the result is a claim(s) that is not rectangular, what finding should be made and how should/could the stakings be dealt with under the Staking Regulations?

(2) Should the 15% rule be allowed in disallowing a claim that is less than one unit?

(3) (The Commissioner has informed me that she is prepared to make her decision based on the written materials which have and will be filed up to and including July 10, 1997.) Do you take the position that a telephone conference call on "Part A" is still required after that date? If so, please outline the reasons for your position.

The following responses were received from the parties or representatives indicated.

David V. Jones

(1) I feel that this question has already been dealt with by the mining recorders in light of the fact that they have been accepting claims that are not rectangular, for quite some time. I realize that as Roy Spooner has indicated, regular claim fabric should be encouraged, but since irregular claim shapes have been accepted frequently, particularly with the last changes in the Mining act, it seems to be of overriding importance that consistency of interpretation in discretionary judgement by the mining recorders is much more important. In other words since the mining industry has been led to believe that in certain circumstances, irregular shaped claims are legitimate, thus the policy should not be different in other cases such as with the 15% rule, where it should also be consistent and accept irregular shaped claims if circumstances result in such.

Roy Spooner has indicated that the practical consideration for rejecting irregular claims is

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because they are harder to find as time passes. With all due respect, I have to chuckle at this since in reality, most claims have extremely irregular boundaries in the field, even though they are shown as being perfectly square on the recording forms. Speaking from extensive personal field experience in claim inspecting and staking, it is no harder to find an irregular shaped claim as it is to find a rectangular one, as long as their proper dimensions are correctly shown on the original recording forms, as required by the Mining Act.
(This may actually be a more important issue where the recorders should be encouraging stakers to "admit to" and show all irregular boundaries, rather than leave a air of doubt or fear that is presently in the industry with respect to how much can the staker show the recorder, as far as how irregular their staking turned out, before he rejects his staking!)

I am not suggesting that all staking be allowed to end up with irregular shapes, but as Roy Spooner has indicted, discretionary judgement must be made in each circumstance and I strongly feel that consistent judgement and rational should be added to this line of thinking. At the present irregular shaped claims are accepted on a routine basis for various reasons. It seems the most common situation arises if an area of land is surrounded by ground not open for staking, and is less than 16 units in size, then it can be staked up as one claim with any shaped boundary that is necessary to do so. I have personally had at least a dozen such claims accepted by mining recorders in the last 6 months. It appears to be such a common issue that most times the recording office clerks do not even question the shapes any more, as long as the basic conditions for such are present.

I realize that this criteria does not fit the circumstances that may arise with the acceptance of the 15% rule, however, if the stakers intent was to stake a claim as per the regulations and provide regular claim fabric, and then due to adjudication or other circumstances, the remains of his claim becomes irregular in shape, then there doesn't seem to be much "stretching" of the present policies to accept this resultant claim shape. In my mind it seems to actually be more consistent with the present policies than it would be to cancel the claim, due to its irregular shape.

2) I feel that the rule should not be allowed to disallow a claim that is less than one unit, under certain circumstances.

I think that it is important to stick to the Mining Act as closely as possible in order to maintain the order and rationale that was initially intended when writing up the Act, and there are several reasons why staking of undersized claims should not be allowed. However, discretionary judgement has to prevail in unusual circumstances to keep an air of fairness and order during situations such as staking rushes.

As in the previous question, as long as the intent of the staker was to follow the rules of the Mining Act, and as in this case, the intent was to stake a claim of regular fabric and size, and then due to unforeseen circumstances or judicial decisions, the claim becomes less than one unit in size, I feel it is only fair to award the remainder of the claim to the staker since he acted in good faith when performing the original staking. If the staker purposely staked the

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claim to be less than one unit then that is when I feel the judgement should be as stated in the Act and the claim should be rejected.

3) No telephone conference call is required.

Battle Mountain

1) if the Commissioner disagrees with the 15% rule, there shouldn't be an problem with any resultant non-rectangular claims. The present Regulations make allowance for this in Section 3 (1) and (2) and the Mining Recorders are accepting non-rectangular or irregular claims for recording. I have even seen a recorded claim with an L-shape to it. The industry has lived with irregular claims for a long time now and are used to them. Sometimes there is no other way to record a claim except in an irregular form, especially in the case of small lakes that are not included in a lot in a surveyed township and that are open for staking.

2) No. That would further fraction a fraction of a unit. Those areas could be divided up and included in the neighbouring claims.

3) No telephone conference call is required.

Don Wakefield on behalf of Ewan Downie

1) I believe that the Commissioner should indicate to the Mining Recorders that they should make a determination as to whether the overstaker has shown an intention to mislead and if there is no intention to mislead, the staker should be allowed the maximum rectangular area plus an irregular remainder that would avoid fractions.

2) If the staking covers less than one unit the Mining Recorder should review the surrounding holdings and decide if a reduced claim of less than one unit which is adjacent to other holdings can be reasonably explored and developed along with he adjacent holdings.

3) No telephone conference call is required.

Michael Taylor

1) When a claim is found to overlap a claim which has priority under sub-section 44-2, the part of the claim which is not covered by the prior claim should be valid. This is supported by the substantial compliance rule (ss 43(1) and the overlapping staking rule (ss. 44(4))

The substantial compliance rule applies if the claim was staked as nearly as circumstances would permit in compliance with the requirements of the Mining Act .

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Where both stakers may have started from different point, unaware of each other's activity, circumstances did not allow the staker to prevent the overlap. Under ss. 43(2)(a), the non-compliance was not likely to mislead any licensee desiring to stake a claim in the vicinity. Under ss. 43(2)(b), it is quite apparent that the overlapping claim was staked in good faith. Most stakers would not purposely overlap another claim since it is much easier to use a common boundary.

The shape or size of the resulting claim should not be a factor in determining the validity of an overlapping claim. If the claim was properly staked in other respects, the Recorder should simply rule that the claim is valid for the portion which does not lie inside of a claim with priority. Where necessary, the Recorder could order the relocation of posts and/or the erection of new posts to define the irregular common claim boundary.

2) *The 15% rule should not be used to disallow a claim which is less than one unit. Small claims can be dealt with and adjusted as easily as large ones. The amount of overlap is not an important factor.*

The important issue here is priority of staking. A properly staked claim should never be disallowed in favour of a claim staked at a later time. When a claim overlaps a prior claim, the staker should have title to the portion of the claim which lies outside the prior claim.

3) No telephone conference call is required.

MNDM

1) *It is the position of MNDM that regular "claim fabric" should be encouraged wherever possible. Subsection 2(1)(d) of the claim Staking Regulation OR 7/96) requires the form of a rectangle. As the Regulation encourages regular rectangles it follows that where there is a discretionary decision to allow or disallow the recording of a claim, irregular configurations should be a negative factor in considering all the circumstances.*

It is acknowledged that the Regulation and the Mining act itself do not require absolute compliance with Subsection 2(1)(d) Staking Regulation. Refer to subsections 2(3), 2(5) and 3(1) of the Staking Regulation. Refer to section 43 Mining Act RSO 1990. The Regulation and Statute both infer that the irregular claims may be recorded under some circumstances.

There is a practical consideration for irregular claim boundaries. The more irregular the boundary on the ground, the more difficult to find it as time passes.

2) *Yes. The Staking Regulation encourages the staking of regular rectangles having a minimum area of 16 hectares. If discretion is to be exercised the decision should be consistent with the general rules outlined in the Staking Regulation.*

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3) No telephone conference call is required.

Findings

A major overhaul of the **Mining Act**, found in S.O. 1989, c. 62, which became effective June 3, 1991 affected the rules governing the staking and recording of a mining claim. Prior to the relevant date, all of the rules were found in the statute. Two fundamentals of staking prior to the amendments were that priority was given to commencement of staking and mining claims were limited in size to 40 acres, with some exceptions in surveyed territory varying in size from 37 1/2 to 50 acres.

After June 3, 1991, the rules governing staking were moved to regulation (see section 38) while the rules governing recording remained in the statute. Included in the changes, priority was given to the mining claim which was completed first and mining claims could be staked in units of between one and sixteen, each comprised of 16 hectares. (The exceptions in surveyed territory continue, ranging from 15 to 20 hectares. It should be noted that a unit size of 16 hectares corresponds to the prior mining claim size of 40 acres and there is similar correspondence between 15 hectares and 37 1/2 acres and 20 hectares and 50 acres.)

Under this regime where there was overlap, the mining recorders would proceed on the basis of subsection 44(2) giving the mining claim which was completed earlier priority and pursuant to subsection 44(3), cancelling the application(s) for any overlapping mining claim(s). With the new provision of staking of up to 16 units, in a competitive situation where stakers started at the same time, a mining claim comprised of one unit could displace an entire mining claim comprised of up to sixteen units.

Meaning of Substantial:

An interesting situation arises with respect to the difference in wording between subsections 46(2) and 44(2), where the former uses the words, "lands ... any substantial part of which ..." and the latter uses the words, "... all or a part of the same lands". As subsection 44(2) does not use the words, "any substantial part", the imperative requirement that such mining claims be cancelled remained unaffected and there could be no implied jurisdiction in the mining recorder to allow recording of an overlapping mining claim which involves an insubstantial overlap. A better explanation for the wording is found in the subsequent wording of subsection 46(2) which allows the holder to commence what will ultimately become a dispute, should the provisions of section 48 be exercised. Therefore, the wording simply means that there may be a right of adjudication, which can be deemed a dispute through the filing of a dispute in the prescribed form, not only in cases where all of the same lands are covered by two applications, but also where the one not having priority covers "any substantial part" of the lands or mining rights. The tribunal finds that the use of "substantial part" in subsection 46(2) sets out the extent to which proceedings which may end up as a dispute may be commenced, namely in cases where all or a substantial part of the lands or mining rights are included in a claim having priority.

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Doctrine of Merger and Subsection 44(4)

It has been a principle of staking, long accepted by the prospecting community that, in a competitive staking situation, there would be a winner and potentially one or several losers. It is unclear whether the loss of multiple units to a prior, smaller mining claim, not specifically provided for in the amendments effective June 3, 1991, was an impetus to change the **Act** through the addition of subsection 44(4), which is worded to allow discretion to the mining recorder in cases where an application covers some lands for which priority in another mining claim exists.

Subsection 44(4) along with O.Reg. 7/96 represents the latest in a series of statutory amendments to the **Mining Act** governing staking. It creates a new provision in Part II of the **Act** which must be read as an integrated provision into the whole of the Part which the subsection amends. This form of statutory interpretation is known as the doctrine of merger which is explained in Sullivan, Ruth, **Driedger on the Construction of Statutes** (Toronto: Butterworths, 1994) commencing at page 506:

> **Doctrine of merger.**[81] Where a statute or regulation is amended, under the doctrine of merger the new law that is added becomes an integral part of the amended legislation and, except for the date of commencement, has the same operation as the amended legislation. ...
>
> .....
>
> Under the doctrine of merger, the text of the amendment is integrated into the text of the amended legislation and, except for its commencement date, the new provision is treated as if it had always been there. This explains why references to "this Act" in the text of an amendment are taken to refer to the amended and not the amending act. [82]

and on page 507:

> **Application of the doctrine of merger.** The doctrine of merger

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[81] The account of merger in the text is based on the scholarship of A.C. Lovgren, “How to Amend a Statue: The drafting and Interpretation of Amending Legislation:, unpublished LL.M. thesis, University of Ottawa, 1991, pp. 133ff”.

[82] The doctrine has not been codified (by statute) in Ontario ….

> applies to all aspects of the operation of legislation with the sole but important exception of commencement dates. As noted above, when a new provision is introduced through amendment it commences at the same time as the amending legislation. In all other respects, however, the amendment merges with the legislation that receives the amendment.

Merged with the rest of Part II, the word "Despite" which begins subsection 44(4) means "in spite of" or "notwithstanding"(the latter being the legislative drafting convention which it has replaced through initiatives to use more straightforward language). Essentially, what the addition of subsection 44(4) does is create a new legislative scheme providing for potential recording of those portions of overlapping lands in an application which does not have priority and which would otherwise not be recorded.

This interpretation is supported by the commentary in Driedger, E.A. **Construction of Statutes** (Toronto: Butterworths, 1983) at page 71:

> In **Re Assessment Equalization Act**[89] internal conflict was resolved by the application of the principle *generalia specialibus non derogant*.[90] One section dealt specifically with assessments of occupants of Crown lands, and another section dealt generally with assessment of leasehold interests. It was held that the special provision prevailed over the general. The scope of the subject-matter was therefore reduced by subtracting from it the subject-matter of the special provision.
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> The same principle was applied in **Re Van Allen**,[91] where the court adopted this quotation from **Pretty v. Solly**:[92]
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> The rule is, that wherever there is a particular enactment and a general enactment in the same statute, and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment must be operative, and the general enactment must be taken to affect only the other parts of the statute to which it may properly apply.

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89 (1963), 4 W.W. R. 604

90 See “Implied Repeal”, infra, pp. 226. et seq.

91 (1953) 3 D.L.R. 751.

92 (1859), 26 Beav. 606. See also **R. v. Townshlip of North York** (1965), 50 D.L.R. (2d) 31.

Therefore, subsection 44(4), although limited in scope to the overlapping mining claims, overrides the imperative and unequivocal directions to the mining recorder, and upon appeal the Commissioner, to cancel the overlapping claim(s) [ss. 44(3)] and to not record the application where any substantial part of the lands or mining rights are included in a subsisting recorded claim [ss. 46(2)]. In other words, for these overlapping claims, the mining recorder is no longer to immediately cancel the claims without priority which overlap.

While this overriding provision is straightforward with respect to cancellation found in subsection 44(3), its significance is not similarly so with respect to section 46 which is the scheme by which a mining recorder determines whether an application will or will not be recorded, as well as the rights and requirements flowing therefrom.

Section 46 is extensive, setting out a procedure when applications are recorded (46(1)); a procedure for refusal to record, including the circumstances (46(2)); a limit to the "filed only" status of an application, including the circumstances under which it may be continued (46(3)); the procedure to be filed by the recorder when an application is invalid, including notice provisions (46(4); and a provision denoting that a division prefix will be allotted to the claim number corresponding to the division in which the mining claim is located (46(5)).

Subsection 46(2) itself contains considerable detail, including the three situations where an application will not be recorded: 1) where the application is considered not to be in accordance with the **Act**; 2) where there is a subsisting claim for the lands or mining rights which has priority under ss. 44(2); and 3) where a substantial part of the lands or mining rights are included in a subsisting recorded claim which has priority under ss. 44(2). Under any of these circumstances, and where the applicant so desires to pay the prescribed fee, the applicant may have the recorder receive and file the application, which may be adjudicated as provided for by the **Act**, but in so doing, such filed only application is not considered a dispute, unless the process for filing a dispute pursuant to section 48 is commenced.

After thorough consideration of the provisions of section 46, and having regard to the specific wording of subsection 44(4), the tribunal finds that the legislative scheme created is specific to cases involving "any land that is part of the mining claim that is entitled to priority...", both in relation to subsection 44(3) and to those provisions of section 46 which flow from the mining recorders action in relation to an application "that is for lands or mining rights which or any substantial part of which are included in a subsisting recorded claim that has priority under subsection 44(2)". Therefore, the scheme which existed prior to the enactment of subsection 44(4) was that a mining recorder is directed in the imperative in the legislation not to record a claim not having priority where there is substantial overlap. The applicant had the right to pay the prescribed fee whereupon the mining recorder would receive and file the application. Any question could then be adjudicated as provided for by the **Act**. Such an application would have to be continued pursuant to subsection 46(3), or bear the consequences of subsection 46(4), with attendant notice required from the mining recorder.

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However, with the new scheme created by subsection 44(4), there is discretionary power in the mining recorder to record the non-overlapping portion of the application and to amend the application to reflect the allowed portion of non-overlapping lands. Where this discretion is exercised in favour of recording, the provisions of section 46 as they apply to the filing of an application which is not recorded, but to be adjudicated on, with the commencement of an action or order of continuation, failing which the cancellation and notice set out therein, are not followed, but rather the application will be amended and recorded. Where the discretion is not exercised, the provisions of section 46 outlined above would continue to apply. Therefore, there is no longer the automatic requirement that applications involving lands which partially overlap must see the commencement of an action by the holder.

Therefore, it is established that subsection 44(4) operates in preference to those provisions of section 46 which deal with overlapping mining claims, which is how the use of the word "Despite" is interpreted. There remains the issue of the use of the discretionary power in the mining recorder as found in the phrase, "the recorder **may** record a mining claim with respect to that part of the land".

Both subsections 46(1) and (2) are imperative in their direction, namely that "[t]he recorder shall forthwith enter ... the particulars of every application to record a mining claim that the recorder considers to be in accordance with this Act" and "[i]f an application is presented that the recorder considers to be not in accordance with this Act ... the recorder shall not record the application...". In the case of the newly created right to have considered for recording those applications for overlap involving "any land that is not part of the mining claim that is entitled to priority...", both imperatives, namely that such application be in accordance or that is not in accordance with the **Act** must be considered.

The Role of the Mining Recorder in Considering Whether an Application Is or Is Not In Accordance with the **Act**

By the use of the discretionary word "may", it is clear that the legislature had not intended applications whose overlapping portions do not have priority to be recorded without the mining recorder turning his or her mind to compliance with the legislation. This is what is done with all applications which are considered under section 46, whether or not they are ultimately recorded.

Many of the functions of the mining recorder may be classified as purely administrative or ministerial, while others may be judicial. This is recognized in the wording of subsection 112 (1) which states:

> **112.** (1) A person affected by a decision of or by any act or thing, whether ministerial, administrative or judicial, done, or refused or neglected to be done by a recorder may appeal to the Commissioner. 44

In the Supreme Court of Canada's decision in **Dupont v. Inglis** reported in 3 M.C.C. 237, it discusses the nature of the mining recorder's function in the filing of a mining claim, commencing on page 238, which is reproduced:

> ...Within a fixed time the staking is to be recorded at the Office of the Recorder for the district within which the claim lies. A sketch or plan of the claim showing the posts and distances is forwarded with the application together with other information sufficient to enable the Recorder to indicate the location of the claim on the office map, and to record the day and hour when staked, the date of the application, and the inscriptions or markings made. ... Particulars of every application which the Recorder "deems to be in accordance with this Act " are entered unless a prior application is already recorded and subsisting for the lands or "any substantial portion" of them. The application, with its accompanying documents, is filed with the office records; and the recording is deemed to be made as of the moment when the application is received in the Office. ...
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> In case of rejection, if the licensee desires it, the Recorder under ss. 61(2), shall "file" the application pending adjudication of its sufficiency. For that purpose, the licensee must, within 60 days, bring the matter before the Recorder or the Commissioner, but this step is not deemed a "dispute" of a recorded claim to which particular reference appears later.
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> Up to this point the functions of the Recorder are ministerial and administrative, that is possessing some measure of discretion. But in the competition of licensees challenges to alleged stakings and other required acts are inevitable which must be settled without delay, more or less informally, in some proximity to the situs of the claims, and by persons made familiar by experience with the substance of those practical details.

A discussion of a discretionary decision which is based upon policy rather than law is found in Reid, R.F. and David, H., **Administrative Law and Practice** (Toronto: Butterworths, 1978) on page 158 is reproduced. Of particular importance are the footnotes:

> DECISION BASED ON POLICY RATHER THAN LAW
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> The proposition that a decision based on policy rather than law constitutes an exercise of "administrative" rather than "judicial" power was formulated by

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Mr. D.M. Gordon.[306] It has been strongly endoresed by Canadian Courts.[307]

Law, as used in the Gordon test, is seen as a grid against which facts be measured, and includes fixed objective standards set out in legislation.[308] The obligation on a tribunal to apply such standards will result in the classification of the tribunal's function as judicial or quasi-judicial.[309]

Reid continues at the bottom of page 159:

THE DECISION IS "DISCRETIONARY"

"Discretionary" power is frequently held to be administrative; or ministerial or executive used in the same sense.[320] Even a brief acquaintance with administrative law will disclose, however, that the term 'discretionay' is used in two senses. In one sense, the foregoing, it implies "absolute" discretion. In another sense it implies a limited discretion. The importance of the difference

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306 See "'Administrative Tribunals and the Courts'", 49 L.Q. Rev. 94.

307 Apparently for the first time in **Re Ashby**, (1934) O.R. 421, at p. 428, (1934) 3 D.L.R. 565, 62 C.C.C. 132 (C.A.) see Masten J.A., saying: "The distinction between a judicial tribunal and an administrative tribunal has been well pointed out by a learned writer in 49 Law Quarterly Review at pp. 06, 107 and 108: 'A tribunal that dispenses justice, i.e. every judicial tirubnal is concerned with legal rights and liabilities, which means rights and liabilities conferred or imposed by 'law'; and 'law' means statute or long-settled principles. These legal rights and liabilites are treated by a judicial tribunal as pre-existing; such a tribunal professes merely to ascertain and give effect to them; it investigates the facts by hearing 'evidence' (as tested by long-settled rules), and it investigates the law by consulting precedents. Rights or liabilities so ascertained cannot, in theory, be refused recognition and enforcement, and no judicial tribunal claims the power of refusal. In contrast, non-judicial tribunals of the type called 'administrative' have invariably based their decisions and orders, not on legal rights and liabilities, but on policy and expendiency. **Leeds (Corp.) v. Ryder**, (1907) A.C. 420, at 423, per Lord Loreburn, L.C. 76 L.J.K.B. 1032, 97 L.T. 261 (H.L.O.; **Shell Co. of Australia v. Federal. Commr. Of Taxation**, (1931) A.C. 275, at 295 (P.C.); **Boulter v. Kent JJ.**, (1897) A.C. 556 at 564 (H.L.). A judicial tribunal looks for some law to guide it; an 'administrative' tribunal, within its province, is a law unto inself."

308 See Masten J.A. in **Ashby** at p. 428.

309 As in **Ashby**, where the duty of the Board of examiners in Optometry was to decide whether there had been a failure to comply with the standards for prescribing set out in the Act; see also **Shanoff v. Glanzer**, (1949) O.W.N. 1, at p.6; 1 D.L.R. 414, where the court of rental appeals was governed by a "fixed objective standard" set forth in an Order in Council. On the other hand, a statute which does not set out principles to govern a decision but leaves it in the discretion of the tribunal confers an administrative function: **Composers, Authors and Publishers Assoc. of Canada Ltd. v. Maple Leaf Broadcasting**, (1953) Ex. C.R. 130; affd (1954) S.C.R. 624. On the significance of unfettered discretion, which is the result of an absence of objective standards, see heading 'The Decision is "Discretionary" ', **infra**, and for a reflection of the concept under discussion in the English cases see **Robinson v. Minister of Town and Country Planning**, (1947) 1 K.B. 702, (1947) 1 All E.R. 851.

320 See, for instance **Re Coles Sporting Goods Ltd. (1965),** 50 D.L.R. (2d) 290, at p. 296, power in Provinical Secretary to require a change of corporate name, and see also **Re Universal Asbestos Cement Ltd. and Supercrete Ltd.** (1959), 66 Man. R. 210, 16 D.L.R. (2d) 51, 26 W.W.R. 411 (C.A.) to the same effect. See also, **R. v. Liquor Licensing Commn. (Sask.); ex p. Thorpe (1969)**, 1 D.L.R. (3d) 488; 8 D.L.R. (3d) 186 (Sask. C.A.).

lies in the fact that the court may refuse to supervise the decisional element in the exercise of an absolute discretion, which for the purpose, it will likely call "administrative", "executive" or "ministerial", but it will supervise the exercise of a limited discretion, which for the purpose, it will likely call "judicial" or "quasi-judicial". The other end of the spectrum, little or no discretion resting with tribunal, also indicates that the function is administrative.[321]

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The freedom of the exercise of such power from supervision by the courts was what Gordon emphasized in observing that a tribunal exercising a truly administrative power was a "law unto itself".[323] The practical reason for this is, of course, the impossibility of supervising a purely subjective decision. As has been observed: "No objective test is possible."[324] The essence of absolute, and therefore, administrative discretion, and the practical impossibility of supervising it has been lucidly set forth by Masten J.A.:

> "...The distinguishing mark of an administrative tribunal is that it possesses a complete, absolute and unfettered discretion and, having no fixed standard to follow, it is guided by its own ideals of policy and expediency. Hence, acting within its proper province and observing any procedural formalities prescribed, it cannot err in substantive matters because there is no standard for it to follow and hence to standard to judge or correct it by."[325]

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321 **McKinnon v. A.-G. (Canada)** (1974), 11 N.B.R. (2d) 119 (C.A.); **Re Denson and City of Saskatoon** (1974), 51 D.L.R. (3d) 158 (Sask. C.A.).

323 See **Brown and Brock**, (1945) O.R. 544, at p. 564, (1945) 3 D.L.R. 324 (C.A.), where this view was adopted.

324 Lord Greene, in **Robinson v. Minister of Town & Country Planning**, (1947) 1 All E.R. 851.

325 **Re Ashby**, (1934) O.R. 421, at p. 428, (1934) 3 D.L.R. 562, 62 C.C.C. 132 (C.A.). For further examples see **Composers, Authors and Publishers Assoc. of Canada Ltd. v. Maple Leaf Broadcasting**, (1953) Ex. C.R. 130, at p. 139, judgement approved on appeal, in reference to power in Copyright Appeal Board to fix rates held administrative because, **inter alia**, no principles specified in Act: "absolute" discretion in a Minister of the Crown to consent to a prosecution held "administrative", **Re Otjes and General Supplies** (1964), 49 W.W.R. 488. The concept is reflected in English decisions, both early and late: an unfettered discretion to revoke a cabman's licence held "administrative" in **R. v. Metro Police Commr.; ex p. Parker**, (1953) 1 W.L.R. 1150; a discretion in respect of procedure held administrative in **Abergavenny (Marquis) v. Llandaff (Bishop)** (1888), 20 Q.B.D. 460, 57 L.J.Q.B. 233, 36 W.R. 859; an "unfettered choice" of ground on which to certify a union held to be "ministerial or administrative" in **R. v. Bd. of Industrial Relations (Alta)' ex p. Tanner Building Supplies** (1965), 48 D.L.R. (2d) 259, at p. 266.

Once a mining claim is actually recorded, a decision to cancel it has been determined to be quasi-judicial: Reid at page 151:

> Various actions and functions of various tribunals have been classified as judicial or quasi-judicial, including ... a mining court or recorder cancelling claims or rights in claims; [249]

While the Supreme Court of Canada describes the acts leading up to the recording of a mining claim as ministerial or administrative, the discussion of the Gordon test sees the law, in this case the regulation on what constitutes a mining claim, as the grid of objective standards against which the facts are measured, as quasi-judicial.

There was a substantive change in the legislation effective June 3, 1991 which may shed light on the nature of the function as between administrative or quasi-judicial. Prior to that time, pursuant to section 57 of the **Mining Act**, R.S.O. 1980, c. 268, a certificate of record was issued by the recorder sixty or more days after the recording of an application, under certain conditions, one of which was that the recorder be satisfied that the requirements of the **Act** had been met. Certificates of record are no longer issued, and the determination of accordance with the legislation is made at the time of recording.

The determination of being in accordance with the legislation involves the application by the mining recorder of objective standards set out in the legislation and regulation. As such, according to the analysis set out above, this would be in the nature of a quasi-judicial function. However, the tribunal finds that it is exercised in largely an administrative manner. There are no facts to be ascertained and determined, save those contained in the application to record and accompanying sketch, although the mining recorder may require that additional information from the field be obtained and provided. There is no provision for an adjudication, unless the determination to not record is made. The initial decision of the mining recorders is routine, made on numerous applications over the course of a year, relying on the expertise of the mining recorders to be able to make quick, efficient determinations on whether an application complies with the **Act**. As such, it is part of the greater administration of the statute which takes place without regard to adverse interests. In making a determination of whether an application does or does not comply with the **Act** (ss. 46(1) & 46(2)), the mining recorder does not hold an informal hearing. While it may be quasi-judicial, having to be based upon what the law objectively has set out in great detail to be a mining claim, the process itself is administrative.

Nonetheless, the quality of the determination by a mining recorder, being quasi-judicial in that the applications and sketches are compared to objective standards set out in the regulation, do anticipate a degree of supervision, rather than completely unfettered discretion. While the decision of the Commissioner, in this regard, is not made as a true appeal, being

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[249] **Denny v. Austin and Hefferon,** (1953) O.W.N. 640 (C.A.); **Re Cole and Knowles** (1929), 60 O.L.R. 638, (1929) 3 D.L.R. 950; **Re Kasal and Morgan et. al.** (1966), 55 D.L.R. (2d) 758, 55 W.W.R. 421.

considered **de novo**, nonetheless, it has the effect of reviewing the parameters set by the mining recorders for the exercise of their discretion. The tribunal finds that, in exercising jurisdiction under subsection 44(4), the mining recorders are bound to consider objective standards, and in so doing cannot consider matters of expediency or otherwise exercise unlimited discretion.

Scope of 44(4)

Subsection 44(4) appears to be deceptively straightforward in its application. Consider the situation for two competitive stakers in a surveyed township, one staking a 16 unit claim and one staking a one unit claim in the northeast corner of the larger staking. Under the rules as they existed prior to the 1996 amendment, the one unit claim could defeat the entire remainder of the sixteen unit claim, if it has priority of completion. It is arguable that this type of scenario, and its myriad of variations, is the type of inequitable situation which the new subsection 44(4) seeks to address. In allowing the overlapping portion of the second, larger staking, the mining recorder would have to issue an order pursuant to subsection 110(6) requiring the moving of posts, boundaries etc. Nonetheless, this is a straightforward process which does not have unforseen or inherent complications attached. It may be suggested that a mining recorder would have no compelling reason for refusing to exercise his or her discretion in such a situation.

However, this scenario is based upon the presumption that there are but a few places to commence the staking of a claim and nothing could be further from the truth. The situation in surveyed townships does not cause unmanageable fractions of overlap. The location of the minimal size mining claim for surveyed townships is set out in subsections 5(12) through (16) to correspond to the various quarter lots, quarter of a quarter section, subdivision or half lot. The units themselves must form some aliquot part of the lot, as set out above. However, multiple unit claims are to be comprised only of units set out in particular contiguous orientations, with firm rules for comparative proportions between the north/south and east/west boundaries. They may involve "contiguous lots, or parts of lots, quarter sections or subdivisions of a section according to the township fabric, but must not deviate from the township fabric" (O.Reg. 67/96, ss. 5(10)). Therefore, if done properly, non-overlapping portions of such stakings should end up with configurations which are at least a whole unit in width.

The situation in unsurveyed territory is far more complex and random, as additional complexities may be experienced in the overlapping situation. One of the peculiarities associated with these lands, particularly where pre-existing mining claims do not exist, is that the location of the mining claim is not dependent on the survey fabric. Unless stakers have met with competitors ahead of time, which is not a requirement of the **Mining Act**, not only are they even less likely to be staking and blazing any identical boundaries or crossing others as would be the case with surveyed townships. Therefore, the likelihood that stakers will be aware of competitors for portions of the same land is significantly more remote. In situations involving large tracts of land under water, which can be witnessed from the nearest shore, where the selection of the shore is dependent on the orientation of the mining claim as it relates to the nearest land mass, the likelihood of awareness of competitors may be even more remote. The types of parallel lines which can occur in the unsurveyed township can, through no fault of the stakers, involve lines which are irregular distances apart, as there is no superimposed grid upon

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which to base the staking. The resultant non-overlapping portions will not be one unit or a number of units in width. Rather, there may be experienced slivers of units which can be of any width imaginable. Slivers of 100 metres, for example, would not be uncommon.

The following situations are only several of the multitude which may be created through overlapping stakings:

1. In multiple-unit stakings, overlap may occur in a variety of different configurations. This can result in non-overlapping portions of mining claims having "C" or "L" shapes. In the case of more than two overlapping claims, "T", "S", "7" or "Z" configurations are possible. (It should be understood that these configurations can be oriented in any direction, such as upside down or on their side.) As well, there may be instances when a larger claim is cut in two by one or more having priority, leaving two non-contiguous non-overlapping portions. It is even possible to cut a 16 unit claim in two across the diagonal through a series of one unit claims, with the resulting non-overlapping portions resembling two sets of stairs.

2. In unsurveyed townships, particularly where there are no existing claims, the corner posts can occur virtually anywhere. The types of configurations described above are as likely to occur, but due to the absence of the grid-like survey fabric underlying the claims, these "C", "L", "T", "S", "7" and "Z" configurations, as well as the stairs may also, with the added characteristic that the "legs" of these non-overlapping portions are unlikely to be 400 metres in width, more or less, so that what can only be described as true slivers of land may result.

3. The situations described above may be further complicated by additional claims which overlap the non-rectangular non-overlapping portions of mining claims. The result may be that, in a given area, there may be one central rectangular claim surrounded by a series of overlapping non-overlapping portions which, accounting for priority, would result in numerous "C", "L", "T", "S", "7", "Z", and stair configurations radiating from the nucleus represented by the one single rectangle.

4. All of the above assumes that the sketches to record accurately depict the locations and dimensions of the mining claims described, so that there would be no difficulty for a mining recorder to plot them on a claim map. In actuality, there is no locating technology required to be used by stakers in the field. The sketches included in the various applications to record do not orient themselves with respect to the competitive stakings. A mining recorder, attempting to overlay the various sketches in the applications to record, is at considerable disadvantage in attempting to accurately depict what has taken place on the ground.

   Where there are a number of applications to record which have the appearance of potential overlap, there is little or no information contained which provide a frame of reference to the overlapping claims, such as extent and orientation of overlap. Before

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a mining recorder would be able to plot the appended sketches on a map, better information, including detailed distances regarding the orientation to the overlapping claims would be required.

5. In cases in which slivers of land which are created through priority of staking surrounded by competitive stakers, should they be of so minuscule a width as to be impractical to work, let alone locate without aid of a survey, there is no direction provided in the legislation as to whom the mining recorder should award these slivers to, through the mechanism of an order to move boundaries (ss. 110(6)).

   The powers of the mining recorder in subsection 44(4) are, relatively speaking, quite limited, when it comes to amending applications or recording non-overlapping portions. There is no provision to amend the application and only allow a portion of the non-overlapping lands to be recorded, should the mining recorder chose to so exercise his or her jurisdiction. There is no provision to award the sliver portion of the non-overlapping portion to the holder whose claim has priority. It would appear to be going well beyond the jurisdiction contemplated by subsection 110(6) to order the holder having priority to move his or her posts to encompass such a sliver. One can only imagine the impact within the community if such orders were to take place and involved at least a portion of the very ground the overlapping staker felt contained the geology of interest.

6. It has been suggested that, if the overlapping staking not having priority is not recorded pursuant to subsection 44(4), that in opening up the lands for staking again, the resultant mining claim would encompass the same land as is represented by the non-overlapping portion of the disallowed mining claim. If this were to be the case, the equities would dictate that the non-overlapping portion should be recorded.

   However, the lands surrounding the disallowed non-overlapping portion may also be open, which would permit the staking of a claim which more closely conforms with the regulation, namely that it be rectangular.

   The lands surrounding the staking may be similarly embroiled in an overlapping situation, which if disallowed, would render the resultant lands open for staking to be of such a configuration, with step-like or saw tooth boundaries. The issue becomes whether anything would be accomplished by requiring the resultant new stakings to be of similarly non-conforming shapes as would have been the case had the non-overlapping portions been allowed in the first place.

7. It is unclear how the issue of being able to locate claims of varying configurations could take place, given the extreme difficulty in the bush under the best of conditions. As has been pointed out, the evidence of staking in the field will fade with time, as undergrowth regenerates. Also, should boundaries be moved by order of the mining recorder, or even where there are numerous overlapping claims which are disallowed, there will be blazes delineating lines in the field which will no longer serve any purpose. Any deviation from

the principle of rectangularity of pre-determined size will pose difficulty to those attempting to located themselves in hopes of staking open land.

8. The issue of what lands will ultimately be included in an application for lease, based upon an actual survey undertaken at the time, may disclose additional errors in boundary locations. Once surveyed, these errors may pose problems for adjoining mining claim holders, particularly where there is a find.

9. The mining recorder raised the issue of whether small tracts of land less than one unit can be worked satisfactorily. While the issue of speculative value does not appear to be a consideration under O.Reg. 7/96, nonetheless, there is considerable concern associated with the difficulties in locating one's potentially minuscule and irregularly shaped mining claim in the bush. Again, if there ultimately is a find, what actually belongs to whom will become a serious problem.

10. There were no submissions made on the issue of prejudice to the stakers who informed themselves as to the overstaking rule of 15 percent applied by the mining recorders and who governed themselves accordingly.

Included as "Appendix A" to these Reasons is "Attachment P" of the MNDM submission, which demonstrates the extent of overlapping mining claims which occurred in Tyrrell Township as a result of the lifting of the land caution. While not disclosing which of the various mining claims has priority of completion, one can begin to appreciate the extent to which the issue of sorting out overlapping mining claims not having priority is somewhat less than straightforward.

Governing Principles

In considering whether a staking complies with the **Act**, the mining recorder is bound by certain regulatory parameters. There is no separate and discrete regulatory scheme to guide the mining recorders and Commissioner in the exercise of discretion under subsection 44(4), as to which of the staking principles should be upheld and which may be disregarded when considering whether to allow the recording of the non-overlapping portion of a claim.

Consider section 38 of the **Act** which states:

> **38.** A mining claim shall be staked in such size, form and manner as is prescribed and may be staked on any day.

It should be noted that subsection 44(4) does not include section 38 in its "notwithstanding" provisions. Therefore, the provisions of O.Reg. 7/96 will apply to non-overlapping portions of mining claims. That this section was excluded is only logical, for what is a mining claim? The

definition, found in section 1 also incorporates the regulation and the imperative found in section 38:

> **1.** In this Act,
>
> "mining claim" means a parcel of land, including land under water, that has been staked and recorded in accordance with this Act and the regulations.

According to O. Reg. 7/96, it is a series of 16 hectare rectangles* which are contiguously laid out to create a greater rectangle, having boundaries running only north, south, west and east, whose length of boundaries may not exceed 3,200 metres and must not exceed four times the length of any other boundary. Within a mining claim, there are corner posts, cut and faced to certain dimensions, with prescribed particulars written on a prescribed side, there may be line posts, witness posts, each with prescribed inscriptions on a prescribed side, blazing, and in certain circumstances flagging, durable pickets or monuments.

There are certain blanket provisions in O. Reg. 7/96 which may give certain direction overall to whether the staking is rendered invalid through non-compliance with the general scheme:

> **11.** (1) The staking of a mining claim is not invalidated for the sole reason that it encompasses land that is not open for staking unless the land encompassed in the claim constitutes an unpatented mining claim recorded prior to the time of the staking.
>
> **20.** If it appears that a licensee has attempted, in good faith, to comply with the Act and this Regulation, a mining claim of the licensee is not invalidated by,
>
> (a) the inclusion in the area of the claim an area of more or less than the applicable size;

There are also a number of exceptions which provide direction generally to the mining recorder as to acceptable exceptions to the general staking rules:

In unorganized townships:

- ss. 2(2): where a boundary is coterminous with an area not open for staking, as long as the remaining boundaries comply with the regulation, the staking will not be defeated;
- 2(3): a boundary may change in direction of boundaries where coterminous with land not open for staking;

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* under certain prescribed circumstances, sizes will differ.

- 2(5): claims must consist of units being multiples of 16 hectares, except where there are irregular areas of land described in s. 3;

- 3(1): an irregular area of land lying next to land or land under water may be staked with coterminous boundaries so long as the remainder of the staking complies with section 2, excepting 2(7);

- 3(2): an irregular area of land under water adjacent to similar lands may be staked with coterminous boundaries, so long as the remainder complies as in ss. 3(1); the boundaries or an irregular claim must be marked with line posts every 400 metres;

- 3(4): an irregular boundary need not be marked by line posts where it is a water boundary;

- 3(5): an irregular water boundary need only be marked with a corner post along the boundary line as close as possible to where the claim and water boundary meet;

And in surveyed territory:

- 5(2): if there is insufficient land open for staking, the minimum size of between 15 and 20 hectares is not required to allow for compliance as long as all other requirements are met;

- 5(3): if, due to the configuration of surrounding lands not open for staking makes it impossible, the claim need not be in the shape of a rectangle or parallelogram as long as the staking otherwise meets the other requirements;

- 5(4): requirement for marking of boundary coterminous with land not open for staking;

- 5(6): irregular boundaries are to be marked with line posts as nearly as is practicable;

- 6: where impossible to comply with requirements due to land covered by water or irregular in form, or other reason relating to the nature of the lot or subdivision, it may be staked out as nearly as is practicable in form and size with section 5, except 5(8) and must either coincide with lot or subdivision of a section, or if not possible, run parallel to same;

- 7: land under water or for some other reason excluded from a lot or subdivision may nonetheless be staked as if it were part of same;

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And general staking rules:

- 11: if there is included in the staking land which is not open for staking which is not part of a claim having been recorded at the time of the staking, the staking is not invalidated; such land does not form part of the mining claim, and if wholly encompassed within the claim, it need not be marked out;

- 13(2): Line posts must be used to mark the coterminous boundary of land not open for staking at every direction change;

- 13(3): Such line posts must have inscriptions of the claim number, and the direction and distance from the last corner post erected to the line post;

- 20: if staking is in good faith and attempting to comply with the Act, it is not invalidated through the inclusion of more or less area or failure to describe or set out the actual area.

The tribunal finds that the minimum requirements, along with the exceptions, for the valid staking of a mining claim contained in O. Reg. 7/96 must apply to all mining claims, including overlapping claims under consideration pursuant to subsection 44(4). To find otherwise would be to create two separate classes of mining claims, those which overlap and those which do not. This would result in a class of mining claims being treated differently under the **Act**. Not only would such a result be outside of the contemplation of section 38 of the **Act** and O.Reg. 7/96, but it would be discriminatory to stakers who, through non-overlapping circumstances, are bound by the confines of the regulation. Consider the commentary in Driedger, commencing at page 211:

> There is said to be a presumption that the Legislature does not intend to make any substantial alteration of the law beyond what it explicitly declares, either in express terms or by clear implication. ...

and on page 214:

> ...Again, it may only be a matter of choice in situations where two reasonable constructions are open. Thus, in **George Wimpey & Co. Ltd. v. B.O.A.C.**[124] Lord Reid said:
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> This is therefore an example of the not uncommon situation where language not calculated to deal with an unforeseen case must

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[124] (1955) A.C. 169 at p. 191.

> nevertheless be so interpreted as to apply to it. In such cases it is, I think, right to hold that, if the arguments are fairly evenly balanced, that interpretation should be chosen which involves the least alteration of the existing law.

The determination that whatever non-overlapping portions of a claim considered under subsection 44(4) must still comply with what is considered by the **Act** and regulation to be a mining claim is consistent with the wording used in that provision. Had it been the intention of the legislature that every fraction, gore and geometric configuration which resulted from non-overlap would automatically be recorded, the word "shall" could have been used in the subsection instead of the discretionary "may". As this is not the case, the tribunal finds that, in applying its discretion to determine which non-overlapping portions of applications will be recorded, it is bound to apply the provisions of O.Reg. 7/96 as to what constitutes a mining claim.

As stated above, the tribunal does not agree with the legal reasoning employed by the mining recorders. Subsection 46(2) is not the limiting factor in how the discretion found in subsection 44(4) should be exercised. Nonetheless, the tribunal is persuaded by the underlying theme of the mining recorders' rationale, namely that anything less than a certain aggregate percentage of a mining claim, particularly with regards to a single unit claim, is so far less than what is considered by the legislation that it cannot be a claim.

There is clearly a need for a determining factor, a cut-off point, beyond which non-overlapping portions of lands staked cannot be seen to meet the requirements of the regulation. Such a cut-off fits with the general scheme of the **Act**, in that an application to record, whether for overlap or not, will involve a relatively straight-forward quasi-judicial determination made in an administrative manner on the part of the mining recorder as to whether there is compliance with the **Act**.

The words which govern the acceptable degree of deviation from the prescribed size are found in clause 20(a), being, "an inclusion in the area of a claim of an area of more or less than the applicable size". The tribunal has been able to locate several cases which discuss the meaning of the phrase "more or less" in **Words & Phrases** (Canada: Carswell; Thompson Canada Limited, 1993), Volume 5, commencing at page 5-813:

> The phrase "more or less" has of course no fixed quantitative significance. Its precise import and bearing upon the meaning and effect of any instrument in which it occurs must depend upon the subject matter and circumstances of the transaction... It has sometimes been treated as manifesting simply an intention that the figure given should be regarded as an estimate only... and in other cases it has been considered to denote that the quantitative expression which qualifies though not mathematically exact is accepted as expressing an approximation to which the number or other magnitude in relation to which the parties are contracting as

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> closely as the particular business in a [practical] way admits of ... I think these words "more or less" must be considered to contemplate only such departure from the estimate (of 150) as should be regarded as reasonably arising from exigencies of publication which in the circumstances might naturally be unforseen or overlooked...
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> **Canada Law Book Co. v. Boston Book Co.** (1922), 64 S.C.R. 182 at 188, 189, 66 D.L.R. 209 Duff J.

and on page 5-814:

> In the absence in the case now before the Court of any description by metes and bounds from which the purchaser could have checked upon the quantity for himself, I think the words "more or less" are not to be construed as the equivalent of "as estimated, " or "as supposed," but are to be construed to mean, "about the specified number of acres" as designed to cover such small errors as sometimes occur in surveys: **Winton v. McGraw** (1906). 60 W. Va, 98. (Sale of land)
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> **Murphy v. Horn** (1929), 64 O.L.R. 354 at 358, [1929] 4 D.L.R. 693 (H.C.) Raney J.

and on page 5-815:

> The deed describes the lot as containing 200 acres, "be the same more or less," and refers for a description to the original grant from the Crown...
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> ...
>
> The cases do not define the precise effect of the words "more or less" but it was held in **Winchv. Winchester** [(1812), 1 V. & B. 375 (H.K)], that these words in a contract disentitled a purchaser to claim compensation for a deficiency of five acres out of forty-one, there being no intentional misrepresentation proved.
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> [Where a deficiency of 24 out of 200 acres was discovered] I am clear that [the purchaser] has no right to compensation from the plaintiff.
> (Sale of Land; Specific Performance)
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> **Folis v. Porter** (1865), 11 Gr. 442 at 442, 443 (U.C.Ch.) Mowat V.C.

The tribunal has considered the cut-off of 15 percent used by the mining recorders and finds it reasonable. Clearly, a non-overlapping mining claim which constitutes 50 percent of the unit size is found to be sufficiently deficient in size that it cannot meet the test of "more or less". Without the practice of the mining recorders, the tribunal would have found that in the neighbourhood of 12 to 15 percent would denote the limits of the description "more or less", based upon the cases set out above. Given that the mining recorders have already expressed willingness to record a claim with up to 15 percent overlap, the tribunal finds that this is within the bounds of a reasonable finding and will adopt this limit, being within the confines contemplated by the case law set out above.

The tribunal finds that, given the wording of clause 20(a), in cases involving greater than 15 percent overlap, there is sufficient deviation from the statutory requirements of what constitutes a mining claim, that the remaining portion may no longer be able to be considered for recording under certain circumstances. This finding is conclusively so, with two exceptions, in cases involving overlap in single unit claims and will also have application to oddly configured claims where one or more units along one arm have slivers whose width measures less than 85 percent of prescribed dimensions. The exceptions involve a contiguous mining claim owned by the same holder, or where the claim is completely surrounded by lands that are not open for staking. These exceptions are discussed in greater detail below.

With respect to the issue of single unit claims, it is reiterated that it has long been accepted that not everyone who stakes open ground can expect to win their claim. Subsection 44(4) has created an unsupportable sense of entitlement, which is not supported through application of the legislation, and particularly the regulation. In this regard, it is found that the wording of clause 20(a) of O.Reg. 7/96 can overcome the overriding principles of the size governing a mining claim up to a limit of 15 percent. The tribunal finds that, in the single unit claim, no more than a 15 percent overlap will be considered for recording under its discretion under subsection 44(4). This denotes an overlap of 60 metres, so that the resulting non-overlapping portion must be at least 340 metres in width.

It is clear that, in a situation where there is a 50 percent overlap, had the overlapping staker been aware of the priority well in advance, he or she would have staked a non-overlapping portion which would have been comprised of an entire unit. In this regard, the overlapping staker of 50 percent of one unit must be found to lose to the staker having priority, in the same manner as would have been the case had the staking been for the same lands.

In situations involving non-overlapping portions of more than one unit, referring back to the regulation, there is clearly room for a degree of movement away from the rectangular or parallelogram principle, as seen in several of the subsections paraphrased above. In such cases, the tribunal would consider allowing recording of the non-overlapping portions of the staking under the following circumstances:

1. Any and all recordings which may take place pursuant to subsection 44(4) will require additional information from the field. The provision of such information will be a prerequisite to the exercise of the discretion. As any recording will require both an amendment to the application to record and a mining recorder's order pursuant to

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subsection 110(6), the holder will be required to revisit in the field and provide detailed particulars of all coterminous boundaries to enable such an order to be made. The resulting information will be used by the mining recorder, or the tribunal, to determine whether the non-overlapping portions meet the requirements and exceptions in the regulation and the details will be used as the basis for an order to move existing posts, erect new line posts and provide lengths and directions for the blazing of new boundaries. While the information required may vary with the facts, in complex situations, the distances and direction should conform with the requirements of section 13 of O.Reg 7/96, so that they reference both the length and direction of the last change as well as the distance from the last corner post of the mining claim itself.

2. As set out in detail above, the tribunal finds that, in the single unit claim, no more than a 15 percent overlap will be considered for recording under its discretion under subsection 44(4), with the exception of circumstances outlined in paragraphs 3 and 9 below (see also paragraphs 6 and 7 below, with respect to exceptions for multi-unit claims). This denotes an overlap of 60 metres, so that the resulting non-overlapping portion must be at least 340 metres in width. This proportion will also form the basis for findings of overlap in multi-unit claims, discussed in greater detail below.

3. If a non-overlapping portion of a mining claim of a single unit in size having an area of less than 85 percent of the regulated area has a boundary which is contiguous with another mining claim of the holder which has been recorded, or will be found to have priority for recording, when completion times of all claims in the vicinity are considered for recording, the tribunal finds that it will allow the recording of the non-overlapping portion.

4. In all cases under subsection 44(4) the non-overlapping claim must be contiguous. Split claims will not be considered under any circumstances. Such splitting of claims is outside of the ambit of exceptions allowed generally by the regulation and would create a new class of mining claims not contemplated by the legislation. It is hard to imagine how the existing rules regarding corner posts could be modified to accommodate such claims, and the existing exceptions do not contemplate such a possibility. The tribunal finds that it will not exercise its discretion under subsection 44(4) where the lands are not contiguous.

5. There is clearly provision in O.Reg 7/96 for the staking of an irregular mining claim, as long as the irregular boundaries are marked out with line posts at each directional change of the coterminous boundary, denoting the direction and distance to the last corner post erected.

   The tribunal finds that an irregular boundary which may occur along one of the boundaries of a single multi-unit staking, which has minor encroachments from a number of single unit claims, so that it resembles a squared off saw tooth, can be readily adjusted through the provisions of the regulation. Once the requisite information is received, a direction to the mining recorder will be issued for the erection of line posts to coincide with each directional change along the boundary, having particulars of the claim number and distance and direction to the last corner post to be inscribed thereon.

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The tribunal finds that a "saw tooth" boundary (for want of a better description) showing minor deviations from a straight line is a deviation from the staking rules which is of a minor nature. As such, permitting recording in cases having one such boundary will be considered in addition to one other encroachment of the type described in 6 below, being of a nature and complexity which does not defeat what ultimately will constitute a mining claim, within the meaning of the regulation.

6. Irregularly shaped multi-unit claims, having the configuration of an "L" or a "C", may be recorded, with the proviso that they meet the following condition. Each arm of an irregular shaped claim must be at least 340 metres in width, being consistent with the 15 percent overlap rule established for single unit claims. In surveyed townships, this figure will vary according to the survey fabric involved.

   Where any arm of the "L" or "C" configuration is less than the 340 metres or corresponding figure for township fabric, the tribunal will not exercise its discretion in allowing the recording of the claim. This determination is based upon the primary premise that single unit claims must be at least 85 percent of the regulated size of such claims. All contiguous units of an "L" or "C" shaped mining claim must reflect this 85 percent rule for each arm of the irregular shape.

7. The tribunal finds that it will allow an exception to the guideline set out in 6 above where one entire arm of the configuration having less than the requisite 85 percent size as regulated is contiguous with another mining claim of the holder.

8. Given that, notwithstanding whatever may be done in the bush to mark out the boundaries of an irregular multi-unit claim, time will cause it to fade or the undergrowth to regenerate, the tribunal has considered the situation involving "S", "Z" "7" or "T" shaped configurations. It would seem that a staker seeking to stake out such land if it were open for staking in a non-rush situation, would be obliged to stake a series of single unit claims. Depending on the dimensions of the configuration, it could involve one or more one to three unit claims.

   Upon consideration of the exceptions provided for in O.Reg. 7/96 to the general staking rules as to size and shape, a reading of the various provisions suggests that they involve one boundary or one major encroachment which is contiguous. The tribunal finds that regulation does not operate to extend potential major exceptions to the staking of a mining claim to be cumulative. In other words, it will not be possible to allow recording and adjustment of a claim to accommodate every possible major encroachment and still have a mining claim.

   Therefore, the tribunal finds that it will not exercise its discretion with regard to multiple unit claims having configurations of "S", "Z" "7" or "T", as being irreconcilable with the staking requirements of O.Reg. 7/96. The instances of accommodation are not found to be cumulative, and therefore, can be found to have no applicability to the stakings in these cases.

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9. If the situation should result, based upon the application of the foregoing principles, that a non-overlapping portion of a mining claim which is less than one unit is completely surrounded by lands which are not open for staking, the resulting mining claim will be allowed and a direction to the mining recorder to order the moving of posts and boundaries will be issued. This will apply to cases involving rectangles, parallelograms, rhombuses and "C" and "L" configurations.

Upon reading all of the relevant legislative and regulatory provisions concerning the powers of the mining recorders, the tribunal concludes that there is no power in the mining recorder to return to the previously disallowed mining claim. The tribunal will base its findings that such a claim be recorded pursuant to its powers found in section 121 of the **Act**, that its decisions will be on the real merits and substantial justice of the case. Having regard to the circumstances described, the tribunal notes that the lands which would result in land open for staking under these circumstances would be the same lands that the holder would have been entitled to pursuant to subsection 44(4). This being the case, it would be a substantial injustice to require the holder to compete in another staking rush for the same lands, and the tribunal will exercise its further jurisdiction to allow the recording.

10. The forgoing criteria may not encompass all possibilities in cases of non-overlapping portions. Also, as each appeal must be considered on its individual facts, there may be compelling circumstances where the tribunal is persuaded to deviate from its criteria for applying its jurisdiction pursuant to subsection 44(4).

By way of general comment, anything which can be done to assist with subsequent location of the newly created lines pursuant to a mining recorder's order under subsection 110(6) must be of the highest quality. The newly erected posts should be stump posts and not loose, unless standing trees are not available. The distances between blazes should be spelled out in detail, as should be the case for monuments or pickets, where they may be necessary. The clearing of the undergrowth should be nothing less than pristine. If there were such discretion found in either subsection 110(6) or in O.Reg. 7/96, the tribunal would also recommend the use of flagging tape of a single colour to be used on the entire perimeter of an irregularly bounded claim recorded pursuant to subsection 44(4). A holder could voluntarily use flagging tape as an aide both to him or herself and coterminous holders for locating themselves in the bush when it becomes time to perform assessment work.

Meaning of Substantial in subsection 46(2)

Although the findings of the tribunal do not ultimately turn on the meaning of the word "substantial" in subsection 46(2), as stated above, this provision will govern the entitlement to commence proceedings under section 46 which ultimately may become a dispute. In this regard, the meaning of the word has some significance, and since the mining recorders purported to deal with it, the tribunal will make the following comments.

The various definitions of "substantial" found in the **Webster's New International Dictionary of the English Language**, 1960, G.& C. Merriam Company Publishers, Springfield, Mass are set out:

substantial ...

1. Consisting of, pertaining to, the nature of, or being, substance, existing as a substance; material ...
2. Not seeming or imaginary; not illusive; real; true. ...
3. That is of moment; important; essential; material.
4 Having good substance; strong; stout; solid; firm ...
5. Possessed of goods or an estate; moderately wealthy; responsible; ...
6. That is such in substance or in the main; ...
7. Considerable in amount, value, or the like; large ...
8. Nourishing; esp., of food, plentiful; abundant; ...
9. Firmly established; solidly based; of statements, arguments, etc., susceptible or being substantiated. ...
10. Of or pert. to the substance or main part of anything.

Of the various definitions, those dealing with the realm of illusory are of little assistance. Given that the phrase in subsection 46(2) refers back to "lands or mining rights", the meaning of "substantial part", it must have a relationship to both. A substantial part of lands is a concrete concept, having physical dimension. Definitions found in items 6, 7 and 10 are of assistance. The use of the words, "mining rights" refers to the nature of the interest which is contained in the lands, which is clear from the definition found in section 1 of the **Act**, to mean ..."the right to minerals on, in or under any land". Again, items 6, 7 and 10 are of assistance in determining meaning.

This is in contrast to the definition favoured by the mining recorder, which relate to value or importance, which corresponds to the meaning found in items 3 and 4 above.

The tribunal finds that it prefers those definitions which are more concrete. The application to record involves a physical demarcation of lands which corresponds to the mineral rights in those lands circumscribed. As an application involves land whose boundaries are set out and an application to become a licensee of the Crown (cl. 51(1)(a)) the tribunal finds that a substantial part of the lands and rights must mean a large, main portion of those lands and rights. Clearly, when compared with the whole, something that is large or in the main must be in excess of 50 percent. As it relates to the right to have an adjudication under the **Act** and ultimately under section 48 as a dispute, the tribunal finds that the concept of a dispute would involve essentially (or substantially) all of the same lands as are to be disputed. In this regard, this figure could extend as high as 75 or 85 percent.

As to the inquiry as to whether those provisions of the **Act** (ss. 81(16), (17) and 95(5)) which change the rules for assessment work when the size of a mining claim exceeds that

which is permitted by 15 percent should be applied to a determination of what is meant by substantial, the selection of those provisions as providing a rule of thumb is not supported by principles of statutory interpretation. It is recognized that, in looking to other sections of the **Act**, the mining recorder attempted to find guidance within the legislation itself and may have been misled as to the degree of weight which should be given to provisions which did not use identical language. It is a principle of statutory interpretation that the same words have the same meaning (see R. Sullivan, **Driedger on the Construction of Statutes**, 3rd ed. (Markham: Butterworths Canada Ltd. 1994), p. 163). However, this principle cannot be readily generalized to support the proposition that a numerical figure which is repeated in several places has the identical meaning to a word which is used in a section whose operation is independent of those other sections. Nothing in this comment should take away from a mining recorder's attempt to take a creative step in discerning a meaning for a provision which is undefined; however, there is no basis upon which this interpretation for this provision can find support from within the statute. What may be significant for purposes of protecting the public interest regarding the compilation of a good body of technical information from adequate assessment work, relative to the lands held in a mining claim or the correlating value of assessment work for lands which are to become subject to lease, and thus further alienated from the Crown, bears no relationship to what may be eligible for recording when, without intending to do so, overlap with another staking occurs.

It should be noted that, as these appeals involve the exercise of discretion pursuant to subsection 44(4) and not the meaning of "substantial" in subsection 46(2), having been found to be inapplicable to the issue before the tribunal, all of the above constitute mere comments, or **obiter dicta** in legal language. As such, the tribunal has made no finding as to the exact percentage required. This issue may arise on a subsequent appeal.

Conclusions

The tribunal has found that, upon exercising its discretion pursuant to subsection 44(4), it must follow the various staking regulation exceptions set out in O.Reg. 7/96 and apply them to the circumstances of the case. With the exception of a squared-off saw tooth line along one of the boundaries, which is considered minor in nature, the tribunal has found that the regulation contemplates only an aggregate total of one major deviation from the staking rules.

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The mining recorders' 15 percent rule, which is based upon the wording of subsection 46(2) is found to have no basis in law and to have no effect on the jurisdiction to be exercised pursuant to subsection 44(4). However, the tribunal finds that the meaning of "more or less" found in clause 20(a) of O.Reg. 7/96 means that deviation of up to 15 percent from the prescribed size will be allowed. There are several exceptions to this finding. With a claim of less than one unit in size, it will be recorded where there is a contiguous boundary with a mining claim of the same holder. With a claim having a "C" or "L" configuration where one arm is less than 340 metres in width, the recording will be allowed where the entire length of that arm is contiguous with mining claim(s) held by the same holder. In the case where the resulting subsequent recording of any mining claims surrounding the lands would render those under consideration as the only lands which would remain open for staking, the tribunal will exercise its equitable jurisdiction and allow the recording.

Split mining claims will be disallowed in their entirety.