File No. MA 006-07

M. Orr) Friday, the 5th day
Deputy Mining and Lands Commissioner) of October, 2007.

THE MINING ACT

IN THE MATTER OF

Filed Only Mining Claims 4210410 to 4210413, both inclusive, situate in the Township of Lastheels, in the Sault Ste. Marie Mining Division, staked by and to be recorded in the name of Mr. Richard Rene Thibodeau, (hereinafter referred to as the "Filed Only Mining Claims");

AND IN THE MATTER OF

Ontario Regulation 7/96, Claims Staking;

B E T W E E N:

RICHARD RENE THIBODEAU

Appellant

- and -

MINISTER OF NORTHERN DEVELOPMENT AND MINES

Respondent

AND IN THE MATTER OF

An appeal from the decision of the Provincial Mining Recorder, dated the 15th day of February, 2007, for the recording of the Filed Only Mining Claims.

O R D E R

1. **IT IS ORDERED** that this appeal be and is hereby dismissed.

2. **IT IS FURTHER ORDERED** that no costs shall be payable by either party to this appeal.

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THIS TRIBUNAL FURTHER ADVISES that, pursuant to subsection 129(4) of the **Mining Act**, R.S.O. 1990, c. M. 14, as amended, a copy of this Order shall be forwarded to the Provincial Mining Recorder **WHO IS HEREBY DIRECTED** to amend the records in the Provincial Recording Office as necessary and in accordance with the aforementioned subsection 129(4).

Reasons for this Order are attached.

DATED this 5th day of October, 2007.

Original signed by M. Orr

M. Orr
DEPUTY MINING AND LANDS COMMISSIONER

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REASONS

Appearances:

Mr. Richard Thibodeau – representing himself
Ms. Catharine Wyatt – representing the Ministry of Northern Development and Mines
Mr. C. Stephenson – Provincial Mining Recorder

Background:

This matter was heard by telephone conference call on October 1, 2007. The evidence (which was not in dispute and was filed beforehand) consisted of the Application to Record, the sketch map and staker's notes accompanying that Application, correspondence from the Provincial Mining Recorder, various topographical maps, and the parties' written submissions. Both sides made oral submissions at the hearing.

The appellant submitted an Application to Record four mining claims on January 30, 2007. The Application indicated that the staking of all four claims commenced at the number four post of the first claim on January 14, 2007. The staking of the first claim 4210410, consisting of ten units, was commenced at 1:00 pm and completed at 1:20 pm.; the second claim (ten units) was commenced at 1:20 pm. and completed at 1:40 p.m.; the third claim (sixteen units) was commenced at 1:40 p.m., and completed at 2:00 p.m.; the fourth claim (sixteen units) was commenced at 2:05 p.m. and completed at 2:25 p.m.

All corners of all four claims were witnessed from the number four post of claim 4210410. All witness posts for all of the claims were erected at this corner post. The appellant stated that "the nature or conformation of the ground [made] the erecting of corner posts impracticable." The Provincial Mining Recorder accepted the claims on a "Filed Only" basis, saying that it was "unacceptable to have four mining claims staked by erecting witness posts in one location." The appellant disputes that decision.

Issues:

1. Were the claims staked in accordance with the **Mining Act** and its regulations?
2. If there are any deficiencies in the staking, does the effort substantially comply or can it be deemed to substantially comply pursuant to section 43 of the **Act**?

Evidence and Submissions of the Parties:

Richard Thibodeau (Appellant)

The appellant has been staking for the past five or six years, mostly in the summer. He indicated that he has been employed as an "Initial Attack Forest Fire Fighter" for the past 21 years. The nature of this work is such that he must assess the safety of the "bush work environment as it pertains to my self and subordinate co-workers".

In addition to the Application to Record and accompanying sketch map, Mr. Thibodeau provided written reasons for his appeal. The total area covered by the appellant's claims is over 800 hectares. At the hearing, he elaborated on his staking methods and the reasons for using the approach that he did. He arrived at his starting point on January 14, 2007. The weather was "snow blown blustery". There was a foot or two of snow on the ground, the terrain was rugged and his foray in an easterly and southerly direction (a hundred to two hundred meters in either instance), led him to conclude that the whole area was very dangerous. In the immediate area or starting point, he observed "icy rock cliffs covered by deep snow". It was also very cold that day (minus twenty degrees Celsius) and the appellant decided that it would not be

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safe to cross the terrain to put his posts into the ground. According to the appellant, he made an assessment of the area of the claims by referring to topographic maps, aerial 3D photographs, and "Google Earth" applications of the "specific area to be staked prior to commencing". His conclusion was that it was "generally steep snow covered icy terrain that would result in very dangerous and unsure footing in very thick tangled vegetation." He stated that "… an attempt to blaze lines, erect line posts and corner posts … would entail significant safety considerations." The fact was that the appellant did not leave any signs of his having been in the area of the claims, aside from the posts he put in the ground at the starting point for claim 4210410. When asked about the twenty minute intervals between the time taken to commence his method of staking and the time it was completed, he indicated that this was the time he took to inscribe the posts and put them in the ground. His lines on his sketch map were the result of GPS readings.

The appellant relied on the **Act** and Claim Staking Regulations (Ontario Regulation 7/96, Claims Staking) to support his method of staking. He referred this tribunal to various subsections of the staking regulations – namely 17(1), 12(1, 2 & 6), and 13(1). He argued that he had substantially complied with the requirements and that the "Guide to Staking Mining Claims" (a government publication) supported his method as well. He directed the tribunal to Item 13 in that publication which deals with the use of line posts. The example is of a mountain ("Wolf Mountain") and the guide says that "line posts may be erected on either side of Wolf Mountain if it cannot be safely traversed." As he indicated in his Notice of Appeal, he relied on the phrasing found in these subsections and the Guide – phrases like "impracticable to stake because of the nature or conformation of the ground" and "where applicable" to provide a flexible approach to the staking requirements.

The appellant also stressed the need for safety and the fact that his knowledge of the terrain was first hand (as opposed to the government and its representative the provincial mining recorder). His work as a fire fighter gave him "knowledge and experience in judging unsafe working conditions in Ontario wilderness." Indeed, in his opinion, "claim staking under adverse winter condition and in difficult terrain should merit similar safety considerations." He said he at least had been at the scene and knew what the conditions were, unlike the government and the Provincial Mining Recorder. He made the point that the government was sending stakers out in unsafe working conditions (through not accepting his claims).

The appellant was confident that the **Act** and its regulations allowed him to place all of his witness posts in one place as he did. The unsafe conditions, the impracticableness of staking as required, all made his method excusable and acceptable. He was not going to take his life into his hands and postulating the conditions was acceptable as it was not safe to stake in the "traditional way". The **Act** should be changed if it did not already accommodate his method. For him, the whole staking area was "Wolf Mountain" and he was not prepared to jeopardize his life even going around the area, as the guide indicates.

Ministry of Northern Development and Mines (the "Ministry") (Respondent)

The Ministry provided documentation, case law and made oral submissions.

The Ministry's position was that while staking doesn't have to be "perfect" but that there must be an attempt made in good faith to stake. Good faith was lacking here; indeed,

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there had been an "absolute failure" to stake. The Ministry described the appellant's actions as constituting "virtual staking" and said that such a method ran contrary to the intent of the **Mining Act**, which intended staking to be an activity that required the staker to be on the ground in the area of the claims being staked. This was not even imperfect staking – there was an absence of staking. Eight posts had been "clustered" in one spot.

Ministry counsel pointed out that the government does not send out stakers to do their work and that this was not a workplace safety issue. Staking was not "a walk in the park", and the appellant had other options available to carry out staking. Hiring professional stakers, having someone to assist him on the ground as he carried out staking, employing a helicopter to drop him at the various post locations were some options. As well, since this was not a competitive staking scenario, he could have waited for a better time to stake, perhaps when the weather was slightly more accommodating.

The resulting lack of blazing and line posts was misleading to others in the field. There was no good faith demonstrated by the appellant.

The letter from the Provincial Mining Recorder to the appellant setting out the Provincial Mining Recorder's reasons for accepting the claims as "filed only" states that the Provincial Mining Recorder had reviewed the claim map for the area as well as applications to record surrounding claims. In the Provincial Mining Recorder's words, he found it "unacceptable to have four mining claims staked by erecting witness posts in one location." That while "there may be some areas where it would have been impractical to erect posts, the greater part of the claim boundaries could have been delineated as set out in Section 8 of the Claim Staking Regulation."

Findings and Conclusions

The commonly accepted view in the mining community is that staking is the foundation for the root of title to a claim. It is not an exaggeration then to say that the rules of staking "demand obedience".[1] "The curative provision provides an exception in particular circumstances and does not itself lay down the statute's requirements as to staking."[2]

The tribunal could not find any previous case to compare this case to and probably for good reason. No one has ever thought to stake in a virtual manner, or if they did, they most likely dismissed the idea as being alien to the intent of the **Mining Act** and its regulations. The appellant in this case traveled to a starting point of land, made a foray of a few hundred meters on either side of a starting point to assess conditions and then proceeded to rely on technical aids to mark his claims. The tribunal notes that the distance across the two northern claims in this group of four would be close to two miles. When asked about how others would know he had been in the area, he replied that other prospectors could look at maps before they began staking to see where his lines were. To him, the fact that there was no evidence of his having been in the area (aside from the cluster of witness posts) was not misleading and was acceptable under the **Act** and regulations.

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[1] "Canadian Law of Mining", Barry J. Barton, Cdn Institute of Resources Law, Calgary 1993, page 285
[2] Barton ibid. at page 285

The tribunal cannot agree with the appellant's interpretation and finds that such an approach would have to be supported by clear wording in the **Act** and accompanying regulation so as to have his method constitute a specific exception to the general staking rules. There is no wording in either the **Act** or its regulations to support the appellant's staking method, which does in effect amount to "virtual staking". Taking the appellant's method to its extreme, in many areas of the Province where terrain and weather are a factor, then one may start on the ground at any one point and then using GPS, topographical maps, air photos and "Google" create virtual lines on a map. The Tribunal refers to the decision in *Royal Oak Mines Inc. v. Strike Minerals Inc.* [3] where Commissioner Kamerman stated that the legislature has "clearly not taken [the] step" of eliminating "the concrete staking elements, i.e., the posts, inscriptions, erecting of posts, demarcation of boundaries during the staking itself…."

The tribunal agrees with the Ministry's view that the **Act** and regulation anticipate that the staker is physically on the ground in the area of staking. How else would one be able to calculate distances between posts for example? The staking regulation has anticipated the possibility of water being in the way of staking; the fact that trees may not be available for post-making, that the nature or confirmation of the ground might make the erecting of a post in a particular location "impracticable". If the legislators thought that all of these things could be circumvented or addressed by taking a series of GPS readings and by referring to topographical maps thereby ending up with lines on a map, they would have said so. Some of the lands open to staking in this Province are known to be rugged and when weather is a factor, it makes for a very strenuous outing to put it mildly. These are accepted hazards; they are not the basis for exceptions to the rules of staking. The staking rules must be obeyed.

Nor does the curative wording of section 43 of the **Act** help to make this staking method acceptable under the **Act**. Do the appellant's excuses for failing to put any posts in the ground (beyond the cluster of posts) constitute matters of reasonable excuse? The appellant did not produce any evidence to support his claim that it was not reasonable for him to attempt to go out on the lands in question and blaze lines or put posts in the ground. He simply decided to not go out. He cannot rely on section 43 to deem his lack of effort as being in substantial compliance with the staking requirements. Section 43 cannot be made to work in this way. The appellant has failed to demonstrate that he made a good faith attempt to comply with the requirements. Section 43 anticipates that staking has actually occurred before it will consider the efforts in question. Subsection 43(2), which deals with "deemed substantial compliance", anticipates that physical effort has been made to stake and that there has been a "failure to comply with a number of specific requirements". If there is any flexibility in the wording of the section, it comes only after a good faith attempt has been made to comply. The tribunal will look at what's required and determine if the actual effort came close to the requirement. In the case at hand, the appellant's efforts did not come close to what is required. Furthermore, the appellant's efforts at staking are likely to mislead a licensee staking a claim in the vicinity. It is clear to the tribunal that the legislation anticipates the possibility of another staker being physically on the ground and being misled. In the case at hand, another staker would not even know from being in the field whether the appellant had staked anything and he might go ahead and stake for himself. Following this train of thought, this new staker would have no post to tie on to. The tribunal can

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[3] MLC File No. MA 012-98, October 2, 1998, p. 23

only imagine the chaotic consequences should these claims be allowed to stand. If this isn't acting on misleading information (since posts are totally absent), then the tribunal cannot think of another example.

In other words, as the quotation from Barton notes, the rules must be obeyed or the attempt be made in good faith to obey them before any deficiencies can be cured. The appellant has instead applied his own staking requirements – safety in his workplace being one of them. The Ministry has pointed out that this is not a workplace safety matter and the tribunal agrees. Nor does the government send stakers out to stake claims.

The appellant emphasized the point that the terrain and weather conditions made his work impossible. His evidence consisted of his recollection of conditions a few hundred meters on either side of his starting point, which was at the bottom of a cliff. He produced no photos of the terrain, or the weather conditions or the ground cover. He did not produce any documentation from the internet – the tribunal has no evidence that this area is even visible on a Google site. More importantly, the appellant made no effort to actually attempt to stake under the rules. In contrast to the appellant's assessment of the conditions on the ground, the tribunal considered a large Mining Land Tenure Map produced for the hearing, it is evident from that map that others have been in the area and that they have been staking the land. There is a cluster of patented claims lying within the boundaries of the appellant's claim lines. A quick review of the information pertaining to these claims shows that they were staked in 1939 – well before the current use of GPS. Their lines are slightly askew and their shapes could very well be a reflection of the topography. The Ministry pointed out in its written submissions that the appellant's claims did not tie on to these patented lands as they are required to do under the Regulation.

In its review of previous decisions on the impact of weather and ground conditions, the tribunal could find no case that supported the appellant's view that in certain conditions he did not have to go on the land at all. The weather and surface conditions may provide an excuse for a poor staking effort. They do not excuse a complete lack of staking.

In conclusion, the tribunal agrees with the Ministry in that this is not a case of having to consider certain defects in a staking exercise; there has not been any staking at all. The legislation is not intent on treating an effort as being in compliance if there was no effort made at all to comply.

For the aforementioned reasons, this appeal will be dismissed.

There will be no costs awarded to either party.