File No. MA 005-04

L. Kamerman	)	Monday, the 2nd day
Mining and Lands Commissioner	)	of May, 2005.

THE MINING ACT

IN THE MATTER OF

Mining Claim SO-1221759, situate in the Township of Galway, in the Southern Ontario Mining Division, staked by Mr. Daniel Bedard and recorded in the name of Blue Marble Mining Corp. as being in the Township of Cavendish, (hereinafter referred to as the "Blue Marble Mining Claim");

(Amended May 2, 2005)

AND IN THE MATTER OF

Cancelled Mining Claim SO-1243389, situate in the Township of Cavendish, in the Southern Ontario Mining Division, staked by Mr. John Joseph Leadbetter and recorded in the name of Rhonda Gail Smerchanski, (hereinafter referred to as the "Smerchanski Cancelled Mining Claim");

AND IN THE MATTER OF

Ontario Regulation 7/96, Claim Staking;

AND IN THE MATTER OF

An appeal by Rhonda Gail Smerchanski, pursuant to section 112(1) of the **Mining Act**, from the decision of the Provincial Mining Recorder, dated the 17th day of February, 2004, for a declaration that the Blue Marble Mining claim SO-1221759 be declared invalid and for the reinstatement of the Smerchanski Cancelled Mining Claim SO-1243389;

AND IN THE MATTER OF

Mining Claims SO-1191969 and 1191970, situate in the Township of Anstruther, 1104302 to 1104304, both inclusive and 1221759 to 1221761, both inclusive, situate in the Township of Cavendish, and 1191966 and 1235236, situate in the Township of Galway, in the Southern Ontario Mining Division, recorded in the name of Blue Marble Mining Corp., (hereinafter referred to as the "Supplementary Blue Marble" Mining Claims)

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B E T W E E N:

RHONDA GAIL SMERCHANSKI

Appellant

- and -

BLUE MARBLE MINING CORP.

Respondent

O R D E R

WHEREAS this appeal was received by this tribunal on the 2nd day of March, 2004;

UPON hearing from the parties and reading the documentation filed;

1. IT IS ORDERED that the appeal of the recording of the Blue Marble Mining Claim SO-1221759, in the Township of Galway, by Rhonda Gail Smerchanski be allowed and the aforementioned Blue Marble Mining Claim be and is hereby cancelled.

2. IT IS FURTHER ORDERED that the application for the reinstatement and recording of the Smerchanski Cancelled Mining Claim be and is hereby dismissed.

To the Respondent, Blue Marble Mining Corp.:

3. YOU ARE HEREBY DIRECTED to advise the tribunal within 30 days of the issuance of this Order (being on or before the 31st day of May, 2005), of your intention to perform or to not perform required assessment work on some or all of the Supplementary Blue Marble Mining Claims. Failure to do so may result in the tribunal not excluding the time during which the Supplementary Blue Marble Mining Claims were under "Pending Proceedings" pursuant to s. 67 of the **Mining Act**.

To the Minister of Northern Development and Mines:

4. YOU ARE HEREBY REQUESTED to withdraw from staking those lands which are comprised of all of Lots 31, 32 and 33, Con IX in the Township of Galway.

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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 by the tribunal 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 2nd day of May, 2005

Original signed by L. Kamerman

L. Kamerman
MINING AND LANDS COMMISSIONER

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B E T W E E N:

RHONDA GAIL SMERCHANSKI

Appellant

- and -

BLUE MARBLE MINING CORP.

Respondent

REASONS

Rhonda Gail Smerchanski, the appellant in this matter, was represented by Mr. Frederick Archibald and Blue Marble Mining Corp., the respondent, by Mr. Ryan Stewart Breedon, a lawyer with Lenczner Slaght Royce Smith Griffin LLP. The matter was heard in Toronto over a series of days in September and November, 2004.

Background

Mining Claim SO-1235322, in Galway Township, was cancelled on April 3, 2003, posted on April 4, 2003 and the lands, being Lots 31, 32 and 33, Con IX, Township of Galway, came open for staking at 8:00 a.m. eastern standard time on April 5, 2003. The mining claims which are the subject matter of this appeal were purportedly staked on April 6, 2003. The date when the lands were actually staked was in issue between the parties. The change from standard to daylight saving time took place at 2:00 a.m. on the morning of April 6. The legislation sets out different rules for staking in the first 24 hours and where the staking took place in the 23rd hour, it raises the issue of whether such staking can meet the compliance tests found in section 42 of the **Mining Act.**

There were two purported stakers on April 6. Mr. John Joseph Leadbetter claims to have staked Mining Claim 1243389 on behalf of the appellant, Rhonda G. Smerchanski, with Mr. Frederick Archibald having attended and remaining throughout the staking at the #1 post as a witness to the commencement and completion time. Mining Claim 1243389 was initially recorded. The Application to Record indicates commencement and completion times of 9:15 a.m. and 1:00 p.m. on April 6, 2003. The completion time was subsequently amended to 2:20, initialled and accepted by the Provincial Mining Recorder.

The second staking was that of Mr. Daniel Bedard, with Mr. Tim Corbeil as a helper. The Application to Record for Mining Claim SO-1221759 indicates that it was staked for Blue Marble Mining Corp., with commencement and completion times of 8:40 a.m. and 1:55 p.m. on April 6, 2003. It was accepted as “filed only”.

On April 15, 2003, Mr. Elliot Feder, a principal of Blue Marble Mining Corp. filed a dispute against Mining Claim 1243389 and a hearing was held before the Provincial Mining Recorder at which he determined that the Blue Marble Mining Claim 1221759, having priority of completion, would be recorded. Both Mr. Archibald and Mr. Leadbetter filed appeals from this decision.

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The hearing before the Provincial Mining Recorder involved another mining claim staked by Mr. Leadbetter on behalf of Blue Marble, on April 5, 2003, which had initially been recorded and was subsequently cancelled. The mining claim of Blue Marble was not recorded and the lands were removed from staking pending the elapse of adequate time for the filing of an appeal. No appeal was taken from this part of the Mining Recorder's decision, but that fact did not discourage Mr. Archibald's attempts to resurrect the status of this mining claim [SO 1243391] at various times throughout the hearing before this tribunal.

Witnesses on Behalf of Staking of Smerchanski Mining Claim

At the hearing before the tribunal, the appellant had proposed to call two witnesses, first Mr. Archibald and then Mr. Leadbetter. Before he was sworn in, Mr. Leadbetter asked to speak, explaining that he had not previously seen the title of proceedings and owing to the fact that the Township of Cavendish was listed in the Blue Marble Application to Record, he expressed concerned that he not be liable for perjury.

The error of listing Blue Marble Mining Claim 1221759 in Cavendish was not immediately evident to the tribunal, which noted both mining claims as having been in Cavendish in its Title of Proceedings. Nor, apparently, was the issue addressed by the Provincial Mining Recorder. Mr. Leadbetter stated that he did not stake any claims in the location set out in the documentation of the tribunal. He indicated that he was unable to speak about anything which occurred in Cavendish. Despite the tribunal indicating that it would amend the title of proceedings, Mr. Leadbetter was resolute in his position that he could not give evidence. He was given leave to further explain matters to his counsel and seek additional advice. He then went on to state that even the appeals were meaningless as they involved Cavendish.

The tribunal acknowledged Mr. Leadbetter's concerns but pointed out that it would be up to the witnesses on behalf of Blue Marble to convince the tribunal that their staking took place in Galway. Credibility would be a central issue, given that Mr. Archibald was to have been within metres of the Blue Marble staking at its completion, yet neither party saw the other in the field. The tribunal indicated that it was seeking Mr. Leadbetter's evidence as to what he had done at the time of staking the Smerchanski claim, which would not constitute perjury.

The hearing was adjourned to provide Mr. Leadbetter with an opportunity to consult with his counsel again. Before adjourning the hearing, Mr. Leadbetter maintained that if the other stakers were in Cavendish, that they could not be in Galway. He again asked how he could speak about a claim when he wasn't even there. The tribunal was unable to impress upon Mr. Leadbetter that it was seeking his information concerning what he saw in Galway, but nonetheless, he maintained his position that what was at issue amounted to two different things. The tribunal provided Mr. Leadbetter with the opportunity to contact his counsel again and adjourned.

The following morning, the tribunal was advised that Mr. Leadbetter was unable to contact his lawyer and would not be in attendance. The matter was adjourned to three days in

November. On the reconvening of the hearing on November 19, 2003, the tribunal was advised in a letter received via facsimile from Mr. Malcolm McLeod, counsel to Mr. Leadbetter, of the latter's admission to hospital. It was further advised that Mr. Leadbetter who was summonsed as a witness by this point had not been provided with conduct money and should not be sanctioned for non-attendance.

The tribunal was troubled that Mr. Leadbetter had left the September hearing without offering the courtesy of a further explanation for his actions. The tribunal was left with no choice at the time, but to adjourn the proceedings. The further non-attendance was regarded by the tribunal as unfortunate, since the facsimile was received at 3:35 the Friday prior to the Monday reconvened hearing. Although the tribunal understood Mr. Leadbetter's concerns, it did not agree with them. Mr. Leadbetter was the staker and the subcontractor for the appellant, Ms. Smerchanski. It was not for him to argue her case, a role which fell to Ms. Smerchanski's agent, Mr. Archibald.

Evidence of Smerchanski Staking – Motion for Non-Suit

Mr. Archibald told the tribunal of his activities and of Mr. Leadbetter's staking of the Smerchanski Cancelled Mining Claim.

Apparently, the staking of cancelled mining claim 1191967, over which the two claims in question were staked, had been done at the direction of Mr. Feder in 1997 by Shawn Clement, involving a declination of 24 degrees west, moving east to west. According to Mr. Archibald, the further west Mr. Clement went, the further out his staking became. The actual position of the #4 post is 1250 metres south of where it should be. As such, it was not reliable to tie onto for other groups wishing to stake in the vicinity.

Mr. Archibald described weather conditions on the morning of April 6 as having snowed all night. He and Mr. Leadbetter apparently encountered a snow plough on the Crystal Lake road and parked at the Loom Lake access road when they arrived between 7:30 and 8:30 a.m., which they encountered at the end of their day at 3:30 p.m. They took a snow mobile to the location of the #2 post, which they located with GPS and then used that position to find the spot for their #1 post. Mr. Archibald described in considerable detail the features and topography in the region, facts which he made much of in his challenge to the Blue Marble staking.

Mr. Leadbetter and Mr. Archibald arrived at the location of the #1 post for a starting time of just after 9:00 a.m. Mr. Archibald then remained at the #1 post [three metres away, remaining with the snowmobile] throughout the Leadbetter staking just in case anyone showed up. During his time of 9:00 a.m. to 2:30 p.m. he did not see anyone, either on foot or on snowmobile. Mr. Leadbetter proceeded clockwise and arrived back at 2:15 a.m. Mr. Archibald reviewed the north line for a distance of 300 metres to determine the quality of staking and confirmed that it had been done to his satisfaction. They then left the way they came in. The only people they encountered were a family near their truck on the way out and the second pass of the snowmobile. Mr. Archibald stated that the roads were treacherous.

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The remainder of Mr. Archibald's evidence concerned his return trip with Mr. Leadbetter on April 17, after having heard that someone had staked around the Smerchanski Mining Claim. The evidence was corroborated by witnesses for Blue Marble later in the hearing, after the motion for non-suit. Dr. Kretschmar, Mr. Corbeil and Mr. Wraight were in the area and stated that someone had tampered with Leadbetter's #1 post by chipping off inscriptions with a machete where it was then changed from the original. The flagging tape was also a different colour than elsewhere in the claim. This evidence, however, did not form part of the tribunal's determination of the non-suit issue.

According to Mr. Archibald, upon confronting Dr. Kreschtmar, he and Mr. Leadbetter then proceeded to walk the rest of the claim and were able to determine that it seemed to be properly located. They noticed a new line north of their south line, suspected to be that of Mr. Bedard for Blue Marble, which corresponded to Mr. Clement's line from 1997.

Mr. Breedon pointed out that many of the documents filed in support of the appeal refer to the two mining claims which were initially under dispute before the Provincial Mining Recorder. The result of that hearing was that both Smerchanski mining claims were cancelled and only one of Blue Marble's was allowed. It is this latter one concerning which this appeal was filed. The tribunal was cautioned to ensure that references in the documents referred to the correct mining claim and to this particular appeal, particularly as even the authors of those documents apparently got the claims confused.

The finding concerning the Smerchanski Mining Claim was that it was 700 metres east of its proper location, and that the completion time was incorrect. There was evidence concerning weather conditions for April 5 and 6, but Mr. Archibald maintained that local conditions could vary considerably from those shown in hourly weather reports from Environment Canada for Peterborough, which is approximately 40 kilometres or 30 miles southeast of the southern borders of Galway and Cavendish townships. Apparently, the weather was warm enough at – 10 degrees for Mr. Archibald to have a short sleep.

According to Mr. Archibald, the reason for his being a witness was because Mr. Feder had been caught staking ahead of the designated hour. Mr. Archibald apparently had been told of that by another Provincial Mining Recorder (not the one from which the appeal is taken). His role had been to witness who was in the vicinity and the completion time of Mr. Leadbetter's staking. There is no truth to the suggestion that he or Mr. Leadbetter erected a #4 post when they returned on the 17th. In any event, a post cannot be moved without an order and he was well aware of this fact. Mr. Archibald questioned the allegation that the ink on their #4 post was wet on that day.

At the commencement of the reconvened hearing on November 22, Mr. Breedon moved for a non-suit, alleging that the appellant has not made out her case on the evidence before the tribunal, which would make it unnecessary for the respondent to prove its case. While before the courts, the respondent would be put to an election as to whether to bring evidence. The process does not exist before a tribunal. Mr. Breedon pointed out that it is, however, appro-

priate for the tribunal to determine this issue before evidence is presented. [*Residential Roofing Contractors Association of Metropolitan Toronto,* [1996] O.L.R.D. 1352] The propriety of the methodology was endorsed, being more properly characterized as a motion of early dismissal. [[*Metropolitan Toronto (Municipality) v. Joint Board* (1991), 6 O.R. (3d) 88 Div. Ct.]. The right to consider such motions without election is analogous to section 16 of the **Statutory Powers Procedure Act**, where the tribunal is entitled to control its own process. This approach is cost effective and driven by economy, where such informality is endorsed by section 116 of the **Mining Act**. [*International Union of Bricklayers and Allied Craftsmen, Local 6,* {2203] O.L.R.D. No. 2326].

Mr. Breedon dismissed the characterization of the tribunal as an inferior court of appeal, stating that it is a matter of historical interest only, notwithstanding the words of Kurisko, J. in *Minescape Exploration Inc. v. Bolen*[1].

The burden in the application for the reinstatement of Mining Claim 1243389 is on Ms. Smerchanski to establish the fundamental features of her case. The primary question to be determined is whether there is any evidence that the Smerchanski Mining Claim was properly staked. It was submitted that the only evidence which exists are the exhibits which should be treated with caution and cannot be treated as evidence as to the truth of their contents. The only in-person evidence is that of Mr. Archibald, who stated several times that he did not witness the staking of the Smerchanski Mining Claim by Mr. Leadbetter on the date it purportedly occurred. He did not go around with Mr. Leadbetter, but merely sat at the number one post.

The only actual evidence of what took place would have been that of Mr. Leadbetter, upon which there is simply no evidence to make a finding. Mr. Breedon submitted that the burden of proof cannot be met. Had Mr. Leadbetter in fact given testimony, it was clear that it would have been necessary to lead evidence because he was so concerned about perjury. The summons was not properly served, in spite of Mr. Archibald's having the correct information on how to do so. Given Mr. Leadbetter's intervening surgery, it is unknown why Mr. Archibald did not seek an adjournment. Instead, he rested his case and was prepared to proceed with a deficient case.

Mr. Breedon submitted that it should be unnecessary for him to prove his own client's staking. The appeal was for the reinstatement of the Smerchanski Mining Claim. If the non-suit is successful, that should end the matter. In the alternative, the tribunal should allow the non-suit and hear evidence and submissions concerning only the Blue Marble Mining Claim.

Mr. Archibald indicated that he should be given the chance to test Blue Marble's witnesses and in particular, wanted to draw the tribunal's attention to various violations of the **Mining Act** perpetrated on behalf of Blue Marble. Mr. Breedon pointed out that the appellant could not use the evidence of the respondent to prove her case. There is no evidence that the Smerchanski Mining Claim was properly staked and it is safe to say that her case is not getting any better.

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[1] (1998), 39 O.R. (3d) 205

With respect to the Smerchanski Mining Claim staked by Mr. Leadbetter, the tribunal has not heard from Mr. Leadbetter, and despite his having a very compelling and reasonable excuse for not attending on November 22, 2004, based upon his earlier conduct and comments, the tribunal was not convinced that he would have attended. Indeed, his counsel pointed out in writing at the last possible moment and the Friday, late afternoon, before a Monday hearing, that aside from the matter of his surgery, the required attendance money had not been provided, so that the summons was rendered ineffective.

This was not the case of his counsel simply asking for indulgence and another date. By his own words, Mr. Leadbetter was most concerned about perjuring himself, albeit in relation to the Blue Marble staking not having been conducted in Cavendish Township. This was even after it was explained to him that, for purposes of the Smerchanski Mining Claim which he staked, all that was required was that he tell the tribunal, in a step by step description, the events of his own staking activities. Nowhere in this does the issue of whether Blue Marble's people were or were not in Cavendish Township arise.

It is Mr. Archibald's evidence that he attended at the Smerchanski Mining Claim on April 6. He stated that he did not see any stakers on behalf of Blue Marble. He remained at the #1 post of the Smerchanski Mining Claim, so could not have witnessed the entire staking which allegedly took place on April 6, 2003.

The tribunal referred to the case of **Clark v. Lacasse** (1978) 5 M.C.C. 387, wherein it was stated at page 393:

> In reply counsel for the appellant took the position that there was some onus on the respondent to personally appear and give evidence to establish the validity of his staking. He submitted that in the absence of such evidence there was no evidence on which the validity of the respondent's stakings could be established.
>
> With respect to the last mentioned point, I know of no authority that would require the respondent to appear and give evidence. Obviously the respondent, in not appearing, takes the risk of not being present to rebut any attacks that are made on his staking but his failure to appear in itself should not automatically result in his mining claim being struck from the record. Although counsel for the appellant failed to put this point in issue at the commencement of the hearing, it is always open to the appellant to establish that the second staking was invalid and in so doing may rely on a line of cases represented by *Whiting v. Mather* 2 M.C.C 318 wherein it was held that the staking of one who attempts to take over a prior staking by restaking must be judged strictly.

The tribunal noted in the course of Mr. Breedon's motion for non-suit that in the case of **Clark v. Lacasse** that the tribunal proceeded with the benefit of an inspection, whereas in this case there was no inspection by a known neutral official. The challenge to the stakings in **Clark** involved a number of deficiencies, whereas in the case of the Smerchanski appeal, what is being raised on behalf of Blue Marble was whether Mr. Leadbetter did his staking at the date and time(s) set out on the Application to Record and the #1 post.

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The tribunal has received no satisfactory explanation as to how two stakings, whose #1 posts were several metres apart, could have taken place on the same day. The only explanation would be if Mr. Archibald, contrary to his evidence, did not in fact remain at the #1 post throughout. Otherwise, one of the two parties was simply not at this location at the times indicated. There is no other conclusion which can be drawn.

What the tribunal was left with was Mr. Archibald's evidence that he attended on April 6, but not what occurred during the staking itself. The only evidence Mr. Archibald was able to provide in this regard, was that of his subsequent April 17 inspection. The tribunal was not able to make an assessment, at this early point in the hearing, as to whether or not it found Mr. Archibald's evidence credible, having no basis for comparison. What was fatal to the Smerchanski case, at this point, was that the tribunal was unable to observe Mr. Leadbetter through the giving of his evidence and make an assessment of his credibility as to his activities at this site in the Township of Galway on April 6, 2003.

Mr. Leadbetter's failure to return to the second day of hearing, his failure to provide adequate notice of his impending surgery and the indication from his counsel that he did not regard himself as having been properly served with the summons, are a pattern of behaviour which the tribunal regards as avoidance of attending at this proceeding and giving his evidence. Based on the failure on the part of Smerchanski to ensure that Mr. Leadbetter attend and give evidence material to the staking of that claim leads the tribunal to draw an adverse inference concerning his failure to appear, based upon **MacMaster (Litigation guardian of) v. York (Regional Municipality)** [1977] O.J. No. 3928 (Gen. Div.), commencing at paragraph 23, and the cases cited therein.

The motion for non-suit was allowed.

However, the quality of the Blue Marble staking was also an issue which was under consideration, based upon the appeal of Smerchanski of the decision that the Blue Marble Mining Claim be recorded.

Staking in Galway Township

There had been some suggestion in questioning by Mr. Breedon that Cavendish and Galway Townships were one and the same, a notion which was dispelled both by the tribunal and by information obtained by the tribunal from the Office of the Surveyor General. In correspondence dated October 1, 2004, the tribunal was provided with photocopies of the original Crown survey instructions, a print of the original Plan of Part of the township of Galway and a partial copy of one of the surveyor's field notes of the original survey. In addition, the tribunal was advised that Galway Township was surveyed under the 1000 acre sectional township with double fronts, as set out under section 31 of the **Surveys Act**, R.S.O. 1990, which states:

> **31.** (1) In this Part,
>
> "sectional township with double fronts" means a township divided into sections and lots where the usual practice in the original survey was to survey the township boundaries, concession lines and side lines of sections defining section boundaries and to establish the front corners of the lots and the section corners.

According to calculations performed by the tribunal, the Township lots were directed to be 20 chains by 50 chains (Gunther's), which is 4,356,000 square feet or 100 acres, which is equal to 40.47 hectares.[2] Section 5 of the staking regulation, O. Reg. 7/96, claim staking, sets out in subsection 16:

> (5) (16) In a township surveyed into lots of 40 hectares, a mining claim of minimum size must contain 20 hectares and consist of the north, south, east or west half of a lot.

Therefore, the proper proportions for the mining claim units in Galway Township should be staked in units whose dimensions are 400 metres by 500 metres. The manner of staking is further set out in subsection 5(5):

> (5) If the mining claim consists of two or more units, line posts must be erected along the perimeter of the claim at 400 metre intervals and at all locations where the corner of a lot or subdivision of a section lies on the perimeter of the claim.

The demarcation corresponding to the 500 metre unit side of the perimeter will be at 400 metre intervals, so that arguably, for mining claims of multiple units, there can be line posts at the 400 metre and 800 metre mark, with a corner post a further 200 metres along, should the mining claim be so oriented. Similarly, any mining claim which crosses over lot and concession lines will require posts at those locations, regardless of how many metres have been run from the last line post.

Also noted in the field note book of the surveyor, "the variation of the needle [was] about 4˚ 30' w by the small compass attached to a theodolite with which instrument all [..] lines were run and observations taken" which variation is interpreted by the Ontario Land Surveyor within the Surveyor General's office to mean the magnetic declination. Anyone wanting to stake in this vicinity may wish to compare any declination to this and make its adjustments accordingly.

The tribunal also notes that the orientation of Galway on township maps for the province depict a westerly declination. Its own measurements with a protractor show the lot lines to be 22 degrees west of north.

Time Act

Subsection 72.1(2) of the **Mining Act** provides that lands which are affected by forfeiture come open for staking at 8:00 a.m. standard time on the day after the posting of the notice of re-opening. There is no dispute between the parties that the lands underlying Mining Claim 1221759 came open at 8:00 a.m. standard time on April 5, 2003. Section 10 of O. Reg.

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[2] The tribunal attempted to do this conversion, providing the parties with a copy of its calculations. These were in error, showing 100 acres to be 42.28 hectares, whereas the amount should be 40.47 hectares, based upon 1 acre being .4047 hectares. The error appears to have been in the product of 402.34 metres x 1005.84 metres, which is shown to be 422,794.79 sq. metres instead of 404,689.66 square metres, which is rounded to 404,700 square metres or 40.47 hectares.

7/96 sets out rules for staking for the first 24 hours after opening and for staking which occurs any time after the first 24 hours. Under subsection (1), staking on lands which have been open 24 hours or less requires that staking commence at the northeast corner (#1 post), be carried out in a clockwise direction and that only the recording licensee may erect posts or inscribe them.

The only witness on behalf of Blue Marble who was present on the ground during the staking of Mining Claim 1221759 was Mr. Corbeil, as Mr. Breedon was unable to contact or ascertain the whereabouts of the staker, Mr. Bedard in time for the reconvened hearing. Mr. Corbeil testified that he arrived at the site for staking fairly early, parking around 8:00 a.m., having left his motel around 6:00 a.m.

Dr. Kretschmar, who acted in a supervisory fashion and hired the stakers, merely stated that his stakers were experienced with the **Mining Act** and that he assumed that they knew that knew of changes involved in compliance with the **Mining Act** arising from daylight saving time. Mr. Corbeil could not recall on the day of the hearing that there had been a time change on that date, but indicated that he relied upon his G.P.S. unit. There is no evidence to either confirm or contradict that the built-in clock changed over automatically. Unanswered questions include, once local time is entered, whether the GPS unit can switch over to daylight saving time automatically in some jurisdictions while remaining on standard time in others, such as Saskatchewan. Clearly, more evidence on the operation of the particular GPS unit was required.

Mr. Breedon conceded the time change which occurred on April 6. Mr. Corbeil was asked and answered that he was not aware of the time change now. It was his evidence that the time change would have occurred automatically on the GPS. The decision of **Whelan v. McGregor,** (1973) 5 M.C.C. 97 stands for the proposition that staking commencing at 7:40 a.m. daylight saving time on lands which come open at 7:00 a.m. is invalid. The decision, according to Mr. Breedon, is not entirely relevant, as the change from standard to daylight saving time occurred during the first 24 hours after lands came open in the case currently before the tribunal. In other words, the case does not shed light on what happens if the change to daylight saving time occurs during a mandated running of time being the first 24 hours after opening. He further submitted that the case is clearly wrong under current law, which states:

> **1.** Where an expression of time occurs in any Act, … regulation, ….. heretofore or hereafter enacted, … or any question as to time arises, the time referred to or intended shall, unless it is otherwise specifically stated, be held to be the time in effect as provided by this Act.
>
> **4.** The time in effect shall be,
>
> (a) daylight saving time during the period between 2 a.m. standard time on the first Sunday in April and 2 a.m. daylight saving time on the last Sunday in October; and
>
> (b) standard time during the rest of the year.

Section 10 of O. Reg. 7/96 states:

> **10.** (1) The following rules apply to the staking of a mining claim in areas that have been open for staking for 24 hours or more:
> …
> (2) The following rules apply to the staking of a mining claim in areas that have been open for staking for less than 24 hours:
> …

Mr. Breedon submitted that the time which is to be applied, according to the **Time Act** to avoid the confusion seen in **Whelan**, determined that the claim was open for staking at 7:00 a.m. daylight saving time.

It was pointed out that **Mining Act** provisions actually state standard time:

> **72.1**(2) Unless they have been withdrawn from prospecting or staking, lands mining rights or mining claims effected by forfeiture or a loss of rights are opened for staking from 8 a.m. standard time on the day after the posting of the notice of the reopening.

The **Time Act** purports to be all inclusive and specifically does not include words to the effect of "except where otherwise stated" or any kind of exclusion clause that would provide a way out that seems to be relied upon.

Blue Marble Mining Claim Staked Within 24 hours of Opening

Mr. Corbeil, Blue Marble's chief witness as to what took place on April 6, 2003, could not recall that the annual spring time change had taken effect on the morning of the staking. Mr. Breedon was willing to concede that this was the case. The tribunal keeps a chart of calendars from 1801 to 2025, from which it finds that April 6, 2003 was the first Sunday of that month.

Apparently, Mr. Corbeil was not the owner of the GPS system used for staking on that day. It was his assumption that the time change was automatically programmed into the unit. If this were the case, then the staking of the Blue Marble Mining Claim indeed would have occurred within the first 24 hours after opening, in which case the provisions of subsection 10(2) of O. Reg. 7/97 would have applied. This is because 8:40 a.m. daylight saving time would be the same as 7:40 a.m. standard time, which is less than 24 hours after the lands came open on the previous day at 8:00 a.m. standard time.

The fact that Mr. Bedard was not available as a witness to give evidence as to how the GPS unit used on that day operated leaves the tribunal with no information as to what actually occurred. Had it been the case that the GPS unit time changes must be input manually (and indeed, manual time setting appears to be necessary in certain instances, for example, when time zone boundaries are crossed) and the stakers failed to do so, then the time shown on the

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GPS unit would have been 8:40 standard time which is the same 9:40 a.m. daylight saving time. Had this been the case, then the staking would have occurred after the first 24 hours after opening and the manner of staking, counter-clockwise, starting at the #4 post, using a helper, would have been acceptable.

The tribunal finds that it has no choice but to assume that the staking took place at 8:40 a.m. daylight saving time, or 7:40 a.m. standard time, within the first 24 hours of the lands being open for staking.

Tests to Determine whether Blue Marble Staking Should be Recorded

It was submitted that there were three steps which the tribunal would have to undertake in reaching its decision whether to record the Blue Marble Mining Claim, the first phase being credibility. This was followed by the substantial compliance test and finally, what the effect of the errors will have on the staking.

The tribunal agrees that the first step in this determination is that of credibility, which will be dealt with immediately below. The next step will involve an analysis of the time issue through the application of the substantial compliance and deemed substantial compliance tests, as well as a determination of whether the real merits and substantial justice can be applied to save a staking which might otherwise not be recorded. The effect of the errors usually raises issues which form part of the substantial compliance question, but in this case return full circle to the issue of credibility and will be dealt with last.

Credibility – On the Land on April 6

Mr. Breedon threw down the gauntlet before the tribunal when he noted that the Provincial Mining Recorder failed to make a finding concerning the credibility of the witnesses, stating that he appeared to skirt around the issue of which of the parties was being truthful, given that their evidence was in direct contradiction of the other. Mr. Breedon strongly urged the tribunal to not do the same. Given the seriousness of what took place in this case, namely that two staking parties could not have been in the field at the same time at the locations indicated, it is of fundamental importance to establishing the Blue Marble Mining Claim that the credibility of its witnesses be established.

Mr. Breedon submitted that the law on the assessment of credibility is set out in two cases, **Faryna v. Chorney**[3] and **R. v. Gosick**[4], relevant portions of which he read into the record, from which certain parts are excerpted below. From **Faryna** at page 356:

> If a trial Judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection it becomes almost axiomatic that the appearance

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[3] [1952] D.L.R. 354 (B.C.C.A)
[4] [1999] O.J. No. 2357 (C.A.)

> of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness. Opportunities for knowledge, powers of observation, judgement and memory, ability to describe clearly what he has seen and heard as well as other factors, combine to produce what is called credibility and *cf. Raymond v. Bosanquet* (1919) 50 D.L.R. 560 at p. 566, 59 S.C.R. 452 at p. 460, 17 O.W.N. 295. A witness by his manner may create a very unfavourable impression of his truthfulness upon the trial Judge, and yet the surrounding circumstances in the case may point decisively to the conclusion that he is actually telling the truth. I am not referring to the comparatively infrequent cases in which a witness is caught in a clumsy lie.
>
> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial Judge to say "I believe him because I judge him to be telling the truth" is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.
>
> The trial Judge ought to go further and say that evidence of the witness he believes is in accordance with the preponderance of probabilities in the case and, if his view is to command confidence, also state his reasons for that conclusion. The law does not clothe the trial Judge with a divine insight into the hearts and minds of the witnesses. And a Court of Appeal must be satisfied that the trial Judge's finding of credibility is based not on one element only to the exclusion of others, but is based on all the elements by which it can be tested in the particular case.

And Findlayson, J.A. stated in **Gosick**:

> 15. The proper approach to the burden of proof is to consider all of the evidence together and not to asses individual items of evidence in isolation: see R. v. Morin [1988] S.C.J. No. 80; (1988), 44 C.C.C. (3d) 193 (S.C.C.). This is particularly true where the Crown's case depends solely on the unsupported evidence of the complainants and where the principle issue is those witnesses' credibility and reliability. As Rowles J.A. emphasized in R. v. R.W.B., [1993] B.C.J. No. 758, 40 W.A.C. 1 (B.C.C.A.), these issues are not to be determined in isolation. She said at p. 9:

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> Where, as here, the case for the Crown is wholly dependent upon the testimony of the complainant, it is essential that the credibility and reliability of the complainant's evidence be tested in the light of all of the other evidence presented. [Emphasis added.]

16. This court has twice adopted the above passage from R. v. R.W.B. In R. v. S. (W.) (1994), 90 C.C.C. (3d) 242, I wrote on behalf of the court. In relation to Rowles J.A.'s admonition to determine both credibility and reliability on the basis of "all of the other evidence presented", I stated at p. 250:

> The issue, however, is not the sincerity of the witness but the reliability of the witness' testimony. Demeanour alone should not suffice to found a conviction where there are significant inconsistencies and conflicting evidence on the record…

Due to the various problems with attendance of key witnesses, the tribunal was not able to compare and contrast the factual accounting of Mr. Archibald with that of Mr. Leadbetter or the Blue Marble staker, Mr. Beddard, thus leaving it with the benefit of the contrasting evidence of only Mr. Corbeil, a helper at the time.

It was Mr. Corbeil's evidence that Mr. Beddard started at the #4 post, proceeded counter-clockwise and they only found the #1 post of Mr. Leadbetter when they arrived at the location for their own #1. In his evidence, Mr. Corbeil stated that the post was back-dated. The post itself indicated 2:20 p.m., but the time was actually around noon. There was no one in the vicinity of the #1 post, but Mr. Corbeil alleged that there were crusted tracks which were most likely from the preceding day.

Mr. Corbeil was a taciturn witness who visibly resented having been twice compelled (before the Mining Recorder and before the tribunal) to come and give evidence. Although nothing was said at the hearing, it also appears that Mr. Corbeil may either been suffering a significant injury or otherwise been unwell. Notwithstanding his general demeanour and notwithstanding the fact the Mr. Corbeil did not seem to appreciate that, even as a contractor, his obligations in a staking dispute do not end until the adjudicative body or bodies reach their determinations, the tribunal finds that his evidence was believable and gave the most realistic accounting of what took place on April 6. In this regard, the tribunal found Mr. Corbeil to have been compelling and wholly believable in the various details he provided.

Much was made by Mr. Archibald about the contents of the April 15 e-mail from Dr. Kretschmar to Mr. Feder wherein he stated that certain lands could not be staked until April 9 as the lands were inaccessible without an ATV or snowmobile. Another point made was the absence of receipts demonstrating that the Blue Marble team was in the area.

Mr. Corbeil stated that his team arrived at their #1 post at 12:20 p.m. but found the Leadbetter #1 post marked with a completion time of 2:15 p.m. April 6. In the various photographs taken by Mr. Wraight on April 17, 2003 posts from both of the Leadbetter stakings were photographed. For the claim which is the subject matter of this appeal, the post clearly shows a completion time of 2:15 p.m., but Mr. Leadbetter's Application to Record shows a completion time of 1:00 p.m. A similar discrepancy is seen between the photograph and Application to Record for the other mining claim, 1243391, with the former showing 2:00 p.m. and the latter showing 1:30 p.m.

Filed with the Blue Marble materials (at Ex. 3, Tab. C) is a hand-written note dated April 8, 2003, apparently written by Mr. Bedard but signed by him and Mr. Corbeil, stating from their perspective what took place on April 6, namely that they encountered Leadbetter's #1 post with an inscription before that time had elapsed. The Bedard Application to Record was received in the Provincial Recording Office and marked as "filed only" on April 9, 2003.

The fact is that the two Leadbetter #1 posts depict different and earlier completion times from his Application to Record. The tribunal finds that this is a pattern of behaviour which has not been satisfactorily explained by Mr. Archibald but is confirmed by the direct evidence of Mr. Corbeil. Although the issue is now that of the Blue Marble staking, the tribunal finds that this evidence supports its earlier finding that it would not allow the Smerchanski Mining Claim to be recorded.

On the balance of probabilities, the tribunal finds that it prefers the evidence of Mr. Corbeil to that of Mr. Archibald as to what occurred at the relevant times on April 6, 2003. Mr. Corbeil's evidence is in keeping with the photographic and documentary evidence filed and despite his taciturn nature, the tribunal finds that it can give credence to what he said.

Granted, Mr. Archibald's role as a witness to competitive staking was impeded by the fact that the Blue Marble staker did not treat his staking as competitive, within the first 24 hours, thus depriving Mr. Archibald of his primary reason for purportedly being at that location. The two #1 posts, however, were sufficiently close in the field that, simply put, the individuals could not have all been there at the times indicated on April 6, 2003.

Substantial Compliance, Deemed Substantial Compliance and Real Merits and Substantial Justice

Section 43 of the **Mining Act** provides that "substantial compliance as nearly as circumstances will permit" is sufficient. Where there is a failure to comply with a number of staking requirements, if the failure is unlikely to mislead others in the field and if it is apparent that an attempt in good faith has been made to comply, the deemed substantial compliance provision will govern.

The law on substantial compliance has evolved over time. During the infancy of mining law in Canada, two cases were decided by the Supreme Court of Canada, for activities which took place in B.C, being **Collom v. Manley**[5] and **Clark v. Docksteader.**[6] In the former, the Court stated that the directions in the legislation were imperative so that any deviation would be fatal, unless it could be brought within the substantial compliance provision. It stated that the rules for staking are not for the benefit of the staker, but rather for the purpose of providing information to those who come after who wish to stake vacant land. In the latter, the Court appeared to backtrack, noting the impossibility of staking a perfect mining claim. At page 44, the Court comments on what would be an irreducible minimum for purposes of staking:

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[5] (1902) 32 S.C.R. 371 (B.C.)
[6] (1905) 36 S.C.R. 622 (B.C.)

> What is this irreducible minimum? I do not think it is constant, but varies, and was intended to vary with the local circumstances, and that it is indicated in subsection (g). The effect of that sub-section is that a free miner's [staker's] is good if (1) he has discovered mineral in place [no longer a requirement in Ontario]; (2) if he has *bona fide* tried to comply with the provisions as to marking and describing the claim; and (3) that his non-compliance (if any) was not calculated to mislead other persons seeking to locate in the vicinity.

Other members of the Court made comments to the effect that the provisions require a liberal interpretation, that the object of the legislation was to promote mineral discovery and to facilitate its exploitation and in a dissenting voice, that "[i]t is not so clear that this relaxation was ever intended to go to the length of sweeping away everything but a discovery and honest intent.[7] This liberal approach is also found in **Dupont v. Cole,**[8] where the Court, upon appeal from the Judge of the Mining Court, held that absolute conformity is not the standard which is required. Rather, it is substantial conformity.

Peter D. Lauwers, *Mining Claim Disputes In Ontario*, (1986) 17 R.D.G. 723 discusses the various principles or tests for substantial performance which have evolved over time, some of which may be mutually exclusive, but nonetheless provided some guidance for cases wherein the individual facts of which must be determined on their merits.

1. The Purposive Test – If the purpose behind the test is met, then there can be substantial compliance. Lauwers relies, as an example, on the case of **Re Reichen and Thompson,**[9] where Commissioner Price stated at page 94:

> Though a safe and impartial administration of the law will in the end be best secured by uniform enforcement of the statutory requirements as they stand without regard to hardship in special cases, I think in the interpretation of these provisions their object and purpose should not be lost sight of. They are undoubtedly intended to secure the claim to the first discoverer who plants his post and marks off his claim in such a way as to make known to other prospectors that he has found valuable mineral upon the property and has set it apart for himself. The manner of so appropriating the claim and notifying others that he has done so cannot in the abstract signify so long as it is done effectively; nevertheless, when a method is laid down in the Act prospectors have a right to expect that it will be done in that way and to insist that the provisions of the Act shall be reasonably carried out. But when the purpose of the provisions has been accomplished and there has been substantial compliance with the Act, I do not think that a claim should be held bad on a merely technical or trifling and unimportant detail. The more important and meritorious act of discovery should not be overshadowed by the non-substantial formality and detail in the marking out, provided of course that the marking out is reasonably sufficient and in substantial compliance with the Act.

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[7] **Clark v. Docksteader** (1905) 36 S.C.R. 622 at 633.
[8] (1930), 65 O.L.R. 526 (Ont. A.D)
[9] (1907), 1 M.C.C. 88

2. The Cumulative Errors Test – The less than perfect staking of a mining claim involving a number of errors could be valid upon an assessment of the staker's honest attempts to comply with the staking requirements[10]. Where the errors were part of an effort to obtain an unfair advantage, the staking would be invalid[11]. It was in **Maher v. Sherman**[12] that Commissioner McFarland articulated this test by noting that taken individually, each error might not be regarded as significant, but taken cumulatively and along with not having followed the subsequent tagging requirements, he concluded that no serious effort was used to comply with the legislative staking requirements. Commissioner McFarland characterized the staking as "careless and haphazard" and "[f]ailure to carry out these requirements in the proper manner is misleading to others and cannot be condoned." Mr. Lauwers also pointed out that the tribunal has tended to compare the cumulative errors with the total number of claims in the block staked, something which is less important with the staking of multiple units within a mining claim since the amendments which became effective in 1991.

In **Re Ramsay and Fernberg**, [13] the Divisional Court held that the cumulative errors test was not a doctrine which could regularly unseat the legislative standard of substantial compliance, nor could it be applied in a manner which served to fetter the Commissioner's discretion. It is assumed from this case that the cumulative errors test is not dead, but must be applied to the statutory test of substantial and deemed substantial compliance, upon the exercise of discretion. The **Ramsay** decision, along with the addition of the "deemed substantial compliance" amendments effective in 1991, however, has moved decisions towards acceptance of stakings which show a less than perfect technical compliance with the legislative requirements on a routine basis.

3. The Reasonable Excuse Test – For this test, the error is one which is something which is unavoidable, such as novice stakers, infirmity, unfamiliar terrain, inadequate timber or a recent fire.

6. The Equitable Approach – Based upon the subsection Mr. Breedon seeks to have apply to the determination of substantial compliance, "real merits and substantial justice", Mr. Lauwers suggests that its application has not been fully explored in the context of disputes. He states:

> In my view, the section invites a careful consideration of two issues corresponding to the separate branches of "real merits" and "substantial justice". The phrase "real merits", asks whether a particular decision is appropriate when measured against the purpose and object of the statute, which is to develop mines. The phrase "substantial justice" concerns the relative positions of the parties.

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[10] **Clark v. Docksteader**
[11] **Comba et al. v. St. Louis** (1985) 7 M.C.C. 88
[12] (1964), 4 M.C.C. 163
[13] (1989), 61 O.R. (2d) 589 (Div. Ct.)

Mr. Lauwers suggested that Commissioner Ferguson was of the view that an examination of substantial compliance should take place separately from any determination of the real merits and substantial justice. The Commissioner's comments in **Martin v. Arrowsmith**[14] regarded the potential to consider section 121 if a staker failed to meet the test for substantial compliance [there was no deemed substantial compliance test at that time]. Lauwers' article suggests that a determination of substantial compliance should be made on the real merits and substantial justice of the case, something which is echoed by Barton in Canadian Law of Mining (more on this below).

5. Different Staking Standards – The article notes that different staking standards have been imposed in different circumstances, such as that of a recorded holder assessed for compliance whereas an overstaker is assessed for strict compliance. This approach has been affirmed by the Divisional Court in **Re Parres and Baylore Resources Ltd.**[15], where it "held that the Commissioner was entitled to impose on the overstakers a higher standard of precision in staking. In doing so, he was looking not only at the quality of their staking, but at the real merits of the case and the objective of the *Mining Act* in promoting the discovery and efficient development of the hidden mineral wealth of the province."[16]

6. Classification of Errors – Lauwers observed that Commissioners have not classified the seriousness of errors until **Comba v. St. Louis**[17] in 1985. At a time when priority of commencement prevailed over priority of recording, the failure to do so caused the staking to be disallowed. The Commissioner stated at page 93:

> Having regard to the principles outlined by Maclennan, J. [in **Clark v. Docksteader**] and the significance of the non-compliance by the respondent and keeping in mind that some of the requirements of staking are technical standards and others are basic or fundamental requirements, a common example of which is the prohibition of posts previously used as was discussed in the case of **Martin v. Arrowsmith** …, it is apparent to the tribunal that the requirement of the insertion of the date and time of commencement of staking is a fundamental requirement of the process. … It has long been held that priority of commencement of staking prevails over priority of recording. This principle was established in the case of **Re Boyle and Young** 1 M.C.C. 1. In view of this fundamental principle respecting staking it is apparent that it is essential that each staker comply with the statutory requirement that the date and the time of commencement of staking, as it is found in clause 47(10(b) of the **Mining Act** …be complied with.
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> It is noted that my predecessors have permitted some exceptions to this rule but those exceptions fall within cases where there were inadvertent mistakes and no affecting of other licensees.

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[14] (1974), 5 M.C.C. 115, discussion at pages 130-131
[15] (1987), 58 O.R. (2d) 707 (Div. Ct.)
[16] Barton, B.J. **Canadian Law of Mining** (Canadian Institute of Resources Law: Calgary, 1993), p. 282
[17] (1985) 7 M.C.C. 88

Substantial Compliance and Deemed Substantial Compliance

The purpose of the distinction between in the staking requirements of "opening day" and any other day when lands are open to staking is to equalize the field of competition in a staking rush. The government of the day proposed a comprehensive review of the **Mining Act** in its Throne Speech of 1987, which resulted in the creation of a consultative document, **Ontario's Mines and Minerals Policy and Legislation, A Green Paper**, prepared by the Ministry of Northern Development and Mines in 1988, setting out policy directions and priorities. In fact, there is no reference to making different rules for the first 24 hours of staking in that document, which formed the basis for discussion and determination of the 1989 amendments to the **Mining Act**, made effective June 3, 1991. Rather, the time of completion of staking is to become the new standard for priority. The only mention of 24 hours is found at page 8 of the **Green Paper**, where it states in the second last recommendation in the first column:

> Amend the staking process to require that the time staking is completed be inscribed on the number one post. The recording process would also be changed so that the first application received in the office would be recorded unless, within 24 hours, another party presents an application indicating an earlier time of completion.

True competitive staking within the first 24 hours will actually occur only under several circumstances. One would be the competitive staking of one unit. Where stakers chose to stake different numbers of units in a competitive situation, the circumstances will not be equivalent, but the rules of priority of completion will nonetheless prevail. Where larger areas come open for staking, the likelihood that the same lands (single or multiple units) will be competed for depends on the areas of geological interest. Also, the practical applicability of the 24 hour period will have meaning only in the competitive situation where there is a large area of land which has come open for staking, where each staker seeks to secure a number of mining claims in that initial period and carries his or her competitive activity to the early morning of the second day, but still within the 24 hour window. What may also occur is that a number of separate mining claims come open at the same time, as is the case in this appeal, where it would be impractical for one staker to cover all of those lands within one day. At this point in the process, it may well be of greater strategic value to wait for the 24 hours to elapse so that staking may take place under rules which place less pressure and responsibility on the actions of the recording or other licensee, rather than on one sole staker.

On the facts of this appeal, the manner in which Blue Marble's staking was carried out clearly indicate that it intended the post-24 hour rules to apply and was in error for establishing its starting time. Therefore, do the facts of this case merit findings of either substantial compliance or deemed substantial compliance?

The rules for staking within the first 24 hours are markedly different from those thereafter, designed to provide a level field for competition. The starting post is dictated to allow multi-team observations of start and finish times, the direction is dictated, who may inscribe or affix tags to a post is limited to the recording licensee and the role of the helpers is severely circumscribed.

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Blue Marble's staking of 8:40 a.m. has limited capacity to mislead other stakers wishing to stake, not so much in the vicinity, but of the self-same lands. Taken alone, another staker in the field who was well aware of the time change on April 6 might possibly consider the staking as invalid and deemed abandoned, at least for the first 30 days after staking. After that date, Blue Marble will have either filed its Application to Record or abandoned the claim. Any staker seeking open lands would have confirmed what was available with the Provincial Recording Office or the corresponding website.

The test for substantial compliance provides that the staking must comply "as nearly as circumstances will permit". There is no question, but that there was nothing preventing the Blue Marble team from starting it's staking after 24 hours. The tribunal finds that the Blue Marble staking does not substantially comply with legislative requirements as reasonably as circumstances permit.

On the test of deemed substantial compliance, the tribunal finds that the error is not of the nature which is likely to mislead others wishing to stake in the vicinity. It also finds that the early start time was done through inadvertence. There is no indication that there was any conscious decision to circumvent the staking rules to gain a competitive advantage to anyone choosing to stake after 24 hours.

The tribunal finds, however, that it is not satisfied with the application of the tests in section 43 as being a complete answer to this issue, as there is a very serious matter which it does not address, namely an assessment of how essential the start times are to the legislative staking requirements.

Equitable Test - Real Merits and Substantial Justice or
Deemed or Substantial Compliance on the Real Merits and Substantial Justice

One advantage which must be considered is what occurs when Blue Marble's staking of 8:40 a.m. is compared with the staking which commenced at 9:00 a.m. or shortly thereafter. In this case, both Blue Marble and Mr. Leadbetter were attempting to stake the same ground. Normally, one could obtain an idea of whether there was a competitive advantage by looking to the relative completion times noted on the Applications to Record. In the case of Mr. Leadbetter, such examination is not straightforward.

The Blue Marble Mining Claim was completed at 1:55 p.m. whereas the Leadbetter/Smerchanski Mining Claim is shown to have been completed at 1:00 p.m. on the Application to Record. However, Leadbetter's #1 post shows a completion time of 2:15 p.m. If, for a moment, the latter time is accepted by the tribunal, the 20 minute advantage at the commencement of Blue Marble's staking translates into the exact same completion time. The result is that Blue Marble has obtained a competitive advantage through having commenced its staking within the first 24 hour window, but using the rules for staking after 24 hours.

In his article, Lauwers refers to the **Parres v. Roxmark** decision where Commissioner Ferguson considered the time elapsed since the disputed staking, being two years, during which the disputant had knowledge of deficiencies. This delay was seen as an attempt to

gain the advantage of having the benefit of over $3,000,000 invested in exploration. Commissioner Ferguson saw this as a miscarriage of justice, one which would have effectively destroyed the positive contribution of a considerable investment of public and private funds. Incidentally, notwithstanding this fact, neither the overstaking nor the initial staking was recorded.

Barton picks up Lauwer's reasoning, commencing at page 306. His analysis includes consideration of the "equitable" jurisdiction or power of the Commissioner. Barton states that this jurisdiction does not extend to the doctrines and remedies of equity developed by the Court of Chancery, but are discretionary statutory powers[18]. The equitable powers are limited to the superior courts and protected by section 96 of the **Constitution Act, 1867** (U.K.), 30 and 31 Vict., c. 3. This constitutional issue was further discussed in **Parres and Baylore Resources Inc.**[19] which was a dispute of a long-standing mining claim. The Court appeared to agree with the Commissioner that the later staking could be assessed solely on the basis of real merits and substantial justice without any consideration of substantial compliance. At page 309, Barton states:

> The Commissioner's jurisdiction as to the real merits and substantial justice of the case under Ontario's section 121 has still not been fully explored as it relates to mining claim disputes. This issue is complicated because *Re Parres and Roxmark* and *Re Parres and Baylore Resources Inc.* hold that section 96 of the *Constitution Act, 1867* prevents the Commissioner from applying it to the senior staking. It is only the conduct of the overstaker that can be considered.[232] … This questionable position is discussed in Chapter 15. The strict staking standard that is applied to overstakers has no specific warrant from statute and does not approach the real issues directly. There is a serious problem with the remedies available because an overstaker can succeed in challenging the senior staking, but fail to meet the high standards demanded for his or her own staking, with the consequence that the ground falls open for staking afresh.

Opening day start time is considered a fundamental rule whose sanctity cannot be breached. In Chapter 15 of the **Canadian Law of Mining,** entitled "Disputes", Barton is critical of the manner in which Rand's statements in **Dupont v. Inglis** concerning *lis inter partes* have in his opinion been taken out of context. He states at pages 372 and 373:

> The Court [in **Re Parres and Roxmark Mines Ltd.** and **Re Parres and Baylore Resources Inc.**] accepted the observations in *Dupont v. Inglis*, but confined them to the earlier of the two stakings in a staking dispute. They did not

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[18] It is not certain whether the current or past Commissioners agree with this assessment; see **Sheridan v. The Minister of Mines** (1988) 7 M.C.C. 405; **Fudge, Leo Alarie and Sons Limited v. Minister of Natural Resources et al.** (June 20, 2001) MA-015-98 (unreported) which Declaratory Order was appealed, to the Ontario Superior Court of Justice, Divisional Court, (October 10, 1004) #499/01, where the Court dismissed the appeal. The issue of whether the Commissioner could issue a Declaratory Order was not addressed; and **Werner Lake Developments Ltd., Hopely v. AEC West Ltd.** (July 30, 1998) MA 013-98 (unreported); and others.

[19] (1987), 58 O.R. (2d) 707

[232] Also see *Mealey v. Peplinski* (1985), 7 M.C.C. 134 (Ont. M.C.)

apply to the later staking and did not prevent the overall rights and wrongs of the case from being considered at that time. Therefore, in deciding the validity of the first claim, the acts of the second staker were completely irrelevant. However, in deciding whether the second staking should be recorded, regard could be had to the behaviour of the second staker as a claim-jumper, the way he had come to know of the defects of the first claims, and his delay while the first staker invested large sums in the property. This reasoning worked some degree of justice in the cases in hand. However, it may be less satisfactory where a first staking, when looked at on is inadequate and when the second staking is not bad enough to be rejected. The overstaker's "jump" of the claim would then be successful. Also unsatisfactory is the case where both stakings fail to come up to standard. Rand J.'s view, or this application of them, would deny consideration, in the assessment of the first staking, of sharp practice or misconduct.

When we get into possibilities like this we can see that, if we take Rand J.'s phrase about *lis inter partes* out of context and give it an unjustified status, it could put us on a road that will ultimately lead to a very flawed analysis of staking disputes. The proper view, it is suggested, is that there is no constitutional bar against treating a staking dispute as a dispute between two stakers in which competing merits can be considered. It is wrong to say that section 96 of the *Constitution Act, 1867* forbids the Commissioner to look at the overall circumstances of a staking dispute. It is even more wrong to say so in the case of an appeal or other hearing by a court. The Commissioner would not turn into a section 96 court if he or she did so. There is no indication from Rand's judgment as a whole that he meant such a thing, and certainly the notion would not fit at all into the current judicial thinking about section 96.

If the issue is approached in terms of the reasoning used in *Re Residential Tenancies*, it arises under the "judicial" inquiry; one of the indicia of a judicial power is the existence a private dispute between the parties i.e. Rand J.'s *lis inter partes*. But the dispute is not purely a private dispute or a dispute arising from a *vinculum juris* between the parties.[134] The government is involved as a "landlord"; the rights in dispute are founded in statute, not private law;[135] and (as Rand J. points out) the adjudication of disputes is an inseverable part of those rights. It would be a mistake to try to force this statutory adjudication into the mould of common law litigation in order to bring it within the ordinary jurisdiction of a superior court of 1867.[136] A staking dispute is much less a private dispute than the landlord and tenant or labour relations disputes that have been so prominent in section 96 cases.

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[134] The *vinculum juris* of Roman law is the legal bond or tie that is the basis of the law of private obligation , of the kind that in common law would be contract tort or liability; W.W. Buckland, *A Textbook of Roman Law*, 3d ed. (Cambridge: Cambridge University Press, 1966) at 405

[135] *Théberge v. Galinee Mattagami Mines Ltd.,* [1965] C.S. 384 (Que. S.C.) foll'g *Dupont v. Inglis*

[136] *Cf.* La Forest J.'s reasoning in *Sobeys Stores Ltd. v. Yeomans*, [1989] 1 S.C.R. 238 (N.S.) characterizing labout standards legislation as creating new obligations independent of the contractual relations existing between master and servant

> It would be mere formalism to insist that a staking dispute is not a dispute between two stakers, but is actually two separate disputes with the Crown. The two parties who come before the Commissioner are radically opposed in interest; if one loses the claims, the other, in virtually every case, will gain them.[137] Rivalry between explorationists is part and parcel of the staking system. Indeed, Rand J.'s judgment is full of references to competitions between licensees and their adjudication. The procedural requirements of the statutes reflect this reality.

It was Blue Marble which filed a dispute against the Smerchanski Mining Claim. Although Barton does a compelling job of challenging the application of this constitutional argument with respect to staking disputes, the fact is that Blue Marble's Mining Claim is the second in time and as such, the tribunal can proceed with its analysis without having to examine this larger issue.

The tribunal has found that the Smerchanski Mining Claim will not be recorded, as it has not heard convincing actual evidence of the staking for April 6, 2003. This was the senior staking at the time it was heard by the Provincial Mining Recorder. Before the tribunal, it was the cancelled mining claim whose cancellation was appealed and the recording of the Blue Marble claim was also appealed.

The Blue Marble staking was done pursuant to the post-24 hour rules, but commenced within the 24 hour window. But for this twenty minute early start, the stakings or purported stakings would have been completed at the same time. Despite the fact that the tribunal does not consider Blue Marble's start time to have been deliberate, done to mislead or likely to mislead, it finds that it must ask what would be the result if the early start time is deemed to substantially comply on the real merits and substantial justice. At page 299 in **Canadian Law of Mining**, Mr. Barry Barton sets out an analysis of what he considers core and non-core requirements of staking:

> *Core and Non-Core Requirements*
>
> The number of individual staking requirements suggests that they can be classified so as to distinguish between the core requirements, compliance with which is vital, and non-core requirements, compliance with which is not so important. The Ontario Commissioner reasoned along these lines in *Comba v. St. Louis,* … and distinguished between technical standards and fundamental requirements. He held that inscription of the date and time of commencement on the number 1 post was a fundamental requirement and observed that, in *Martin v. Arrowsmith,* he had determined that the prohibition against used posts was similarly basic or fundamental, and that neither the substantial compliance nor the real merits and substantial justice sections could be resorted to. The same reason-

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[137] See J.-P. Lacasses, "Mining Claim Disputes in Quebec" (1986) 17 R.G.D. 703 at 707 and P.D. Lauwers, "Mining Claim Disputes in Ontario" (1986) 17 R.G.D. 723 at 745 for the reality in Quebec and Ontario. In addition, few persons will have standing without adverse staking.

> ing is seen in *Bennett v. Lindgard,*[178] which held that the failure to inscribe on the number 1 post (under the two-post staking rules) the bearing and the distance to the number 2 post was the kind of error that was beyond the contemplation of the curative provision: "The Mineral Act regulations, s. 8(2) are specific in this regard and call for strict compliance. This is not merely a minor or technical omission."[179]
>
> Such a classification has the advantage of making it faster to determine substantial compliance; that is, if there is a failure to comply with one of the core or fundamental requirements, the staking is bad and cannot be saved. However, it is dangerous if it is applied rigidly. It puts the fundamental or core requirements into a category where they are untouched by the curative provision. In Ontario terms, it implies that, in every case where there is a fundamental breach, neither substantial compliance nor the real merits and substantial justice can be used to save the staking.[180] There is of course no mandate in the statute for the courts to decide that as a matter of law. Indeed, it would be tantamount to enacting a subsection to the effect that the curative provision does not apply to the particular staking rule. The overall factual context must be considered. One cannot rule out a situation where a court is driven to find that even with an omission in relation to this important staking rule, there is substantial compliance or a *bona fide* attempt to comply, not calculated to mislead. Room must be left for a court to decide that, even with a major failure, the staking as a whole can be found to meet the statutory test of forgiveness. This leads to the conclusion that classification of staking errors as either fatal or curable, as a matter of law, is not justifiable.

What has effectively become two separate starting times has clouded this issue somewhat, in that lands are open for staking within the first 24 hours. Nonetheless, some of the principles enunciated in earlier cases are useful.

In **Yost v. Chorzepa et al.**[20] at page 226, after considering the findings in **Whelan v. MacGregor**[21]**,** Commissioner Ferguson stated:

> Subsection 7 of section 95 of *The Mining Act* is clearly prohibitive in its nature and does not merely establish a standard to be observed in staking. By its wording it effectively prohibits staking before the stated hour and the obvious intent of the subsection is to fix a time at which all holders of prospector's licences may have an equal opportunity of acquiring an interest in mining rights which at that time are owned by the Crown. While the breach is minor in the circumstances and the appellant may deserve sympathy, the decided cases have illustrated a variety of attempts to frustrate the equality of opportunity afforded by the statute to all licensees and any sympathy must be tempered with the risk of creating exceptions to the equality of opportunity of all licensees.

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[178] (1974), 5 M.C.C. 115 (Ont. M.C.)
[179] *Ibid* at 8
[180] P.D. Lauwers, "Mining Claim Disputes in Ontario" (1986) 17 R.G.D. 723 at 734
[20] (1975) 5 M.C.C. 222
[21] (1973) 5 M.C.C. 97

In **Leach v. Wilson,**[22] Commissioner Ferguson makes certain findings concerning credibility, but stated that had the issue become one of start time, at page 371:

> …With respect to this argument I have considerable doubt that in a case that turned on this point I would be swayed that the doctrine of substantial compliance is acceptable. The sanctity of the time of opening for staking has been paramount for many years and nothing but confusion could arise is there were any permitted variations of such time. Adherence to the time of opening for staking is crucial to the entire staking system and there can be no modification of the basic requirement of not commencing to staking prior tot the time that the lands come open.

Finally, in **Meunier v. Larch,**[23] Commissioner Ferguson stated at page 491:

> … The reason for such invalidity would be that the staking commenced prior to the time that the mining rights came open for staking. This principle has long been recognized as a fundamental principle in respect of Competitive staking. In the decision of *Whelan v. MacGregor…* by Commissioner Horan in 1973 a staking was held invalid because the No. 1 post was erected twenty minutes before the lands came open. In the case of *Yost v. Chorzepa* … this incumbent held in 1975 that staking commenced one hour before the land come open could not be validated on the substantial compliance doctrine contained in section 50 of the Act or the real merits and substantial justice principle contained in section 152 of the Act. This approach was again endorsed in the decision of *Leach et al. v. Wilson* 5 M.C.C 368.
>
> There is a distinction between the validity of the time of staking and the method of staking. Matters relating to the former are associated with the principle of affording all licensees and equal opportunity of acquiring mining rights in Crown lands and the decisions requiring strict adherence to the time at which the lands came open for staking are based on the desirability of preserving such an opportunity.

Lands open within the first 24 hours are not of the same status as lands not open for staking, whose status is set out in subsection 72.1(1) and section 38 sets out the staking requirements:

> **72.1** (2) Unless they have been withdrawn from prospecting or staking, lands, mining rights or mining claims affected by a forfeiture or loss of rights are open for staking from 8 a.m. standard time on the day after the posting of the notice of re-opening.
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> **38.** A mining claim shall be staked in such size, form and manner as its prescribed and may be staked on any day.

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[22] (1977) 5 MC.C. 368
[23] (1979) 5 M.C.C. 484

Section 176, which is the general authority for making regulations provides:

> **176.** (1) The Lieutenant Governor in Council may make regulations generally,
>
> 4. prescribing the manner of staking and the size and form of mining claims and the time and manner of affixing tags in respect thereto;
>
> (2.2) A regulation made under subsection (1) or (2) may be general or particular in application, may be limited as to time or place or both and may provide that it applies only to the area or areas designated by the Minister.

The language of section 10 of O. Reg. 7/96 uses a mix of imperative and general language. In fact, all of the regulation appears to be a mix of imperative and somewhat more vague language. See for example the words in section 2: 2(1) "must"; 2(2) "may"; 2(3) "may"; 2(4) "must"; 2(5) "must"; 2(6) "extends down"; 2(7) "are".

Subsection 10(1) states in very general terms that "the following rules apply" for lands open for 24 hours or more. The specific details include both "may" (in relation to where to start and who may inscribe. Subsection 10(2) uses similar language, that "the following rules apply" to lands open for 24 hours or less. "Must" is used for the starting corner, direction and inscriptions for start and completion times and by whom. "May" is used for who may inscribe other posts, but since it is limited to "Only the recording licensee", in fact, this provision is similarly imperative.

The tribunal finds that the rules for the first 24 hours after opening are fundamental rules of staking, or core principles. The comments of Commissioner Ferguson cited above with respect to lands not open for staking are found to be equally applicable to the competitive situation during the first 24 hours. The tribunal finds the first 24 hours after opening to be the most important time for staking. Special rules have been set up, both honouring the competitive nature of the industry and establishing the ground rules to make that competition fair and equal.

The tribunal finds that the purpose and object of the **Mining Act,** as stated in section 2, is for the encouragement of prospecting, staking and development of mineral resources. It is a fundamental aspect that the acquisition of an interest in mining lands are based upon competition. This fact was noted in numerous decisions.[24]

These fundamental rules for staking within the first 24 hours cannot be cured by real merits and substantial justice. The real merits of this case require the upholding of the core manner in which title to mining claims may be acquired, namely to honour the start times after opening and the discrete rules for the first 24 hours.

The tribunal finds that the Blue Marble Mining Claim will be cancelled. In this respect, the appeal of Rhonda Smerchanski will be allowed.

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[24] See **Wallbridge v. MNDM & Inco**. (July 8, 2002) MA 040-99 (unreported)

Errors and Credibility

The Blue Marble staking was attacked on the basis of a number of other deficiencies and purported false statements on the Application to Record. Based upon its findings above, the tribunal will not deal with the minutiae of this evidence in great detail. However, the overall thrust of Mr. Archibald's evidence, cross-examination and argument is found to have considerable merit.

The tribunal has made a finding that it prefers the evidence of Mr. Corbeil over that of Mr. Archibald in relation to what occurred on April 6. However, Mr. Corbeil was not responsible for the drafting of the sketch attached to the Application to Record, and the tribunal is unable to overcome the many difficulties it finds with the sketch.

One of the issues raised by Mr. Archibald was the fact that the Blue Marble Mining Claim was 25 percent smaller than it should be. I believe this issue has been addressed under the heading, "Staking in Galway Township" above.

The nature of many of the errors cited was that the staking and sketch did not jibe with what was found in the bush. Mr. Archibald purported to do his own inspection of both the Blue Marble and Smerchanski claims, with the boundaries of the former shown in red on the Northeast Group map (Ex. 6, 1 to 10,000 topographic map of the relevant portion of Galway Township). His diagram of the Blue Marble Mining Claim falls well short of the Concession 8/9 boundary, being a distance of some 300 to 400 metres short of the required 1000 metres. The south line apparently cuts across at a 10 degree angle to what it should be, following the line of the 1997 staker, Clement. Apparently, the west boundary veers off-course and the location of the cottage shown on the sketch does not jibe with its location in relation to the line in the field.

The Northwest Group map, upon which the two stakings are sketched by Mr. Archibald according to his inspection, shows the Leadbetter staking as being centred four-square on the lot and concession lines, so that the Mining Claim is comprised of each of Lots 31, 32 and 33, Con 9. By comparison, the Blue Marble Mining Claim is shown to be short on the east boundary, change direction along the south boundary and be out of alignment on the west boundary.

The tribunal notes that the sketch attached to the Bedard staking is a perfect rectangle, whose water features are perfectly aligned with the relevant lot and concession lines on the 1 to 10,000 topographic map. This sketching is so perfectly aligned to the mapping so as to raise considerable concern. The tribunal is inclined to agree that the sketch appears to have been based upon existing mapping. The tribunal has only the evidence or Mr. Archibald's inspection as to where the various Bedard posts exist in the field. Mr. Wraight's evidence, although helpful in other regards did not, as pointed out by Mr. Archibald, relate what was found in the field to the 1 to 10,000 mapping to the sketch, which is where the concerns lay. Furthermore, the Application to Record claims that eight 16 hectare units have been staked in the field, but with purported dimensions of 1000 metres by 1200 metres, there is only sufficient area for six whole and two half 16 hectare units. However, based upon the layout of the lots in Galway Township, this staking should reflect six units of 20 hectares.

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Generally speaking, the liberal rules of substantial compliance and deemed substantial compliance have served to lessen the rigour with which a staking will be assessed, so long as there is an unlikelihood of being misled in the field and the staker was acting in a *bona fide* manner to comply. The evidence of Mr. Archibald and the various documents filed raise the very real possibility that the staking in the field is not as it is shown on the sketch. Where this is the case, there is a real possibility that the staking will not be found to be in substantial compliance. At this juncture, the tribunal feels that it cannot, nor is it necessary to make findings as to deemed substantial compliance, given that it has already disallowed the Bedard staking. Otherwise, the tribunal feels that it would be necessary to request an inspection through the Provincial Mining Recorder and reconvene the hearing. It would be only based on such further evidence, which the tribunal would find necessary in the circumstances, as to whether there were any false statements in fact made on the Application to Record.

The tribunal also finds that issues have been raised with the technical requirements of the staking of the Blue Marble Mining Claim which cannot be answered without a field inspection by a neutral third party. As neither claim is to be recorded, this will not be necessary at this time. I have no doubt that Blue Marble's staking took place on April 6, 2003, as described by Mr. Corbeil. However, I have serious doubts that the Blue Marble Mining Claim in the field bears any resemblance to that which is set out on the Application to Record. From a policy perspective, any such questionable behaviour might once again raise the attractiveness of map staking rather than bush staking.

The error as to the Township of either Galway or Cavendish was one which was not caught by the Provincial Mining Recorder. In his decision, the Provincial Mining Recorder listed in the title of proceedings the Smerchanski claims as being in Galway and that the Blue Marble Mining Claim overstaked all or a portion of one of them. There did not seem to be any confusion until the updating of the abstract for the Blue Marble Mining Claim which clearly indicates Cavendish. It is questionable as to whether the individual in the Recording Office who updated the claims map even noticed that the claim was stated to be in Cavendish or whether they merely replaced the Smerchanski Mining Claim on the Galway Township map with that of Blue Marble. Although this issue need not be decided, the tribunal is of the opinion that this error could be corrected in much the same way as was done in the case of **Doran v. Minister of Northern Development and Mines**[25] where the tribunal found that the Mining Recorder was empowered to direct changes to an application to record on the basis of subsection 71(1) of the **Mining Act** and clause 28(1)(b) of the **Interpretation Act**, R.S.O. 1990, c. I.11.

Pending Proceedings and Lands removed from staking

The tribunal was asked to place Blue Marble's Supplementary Mining Claims under pending proceedings until this matter had been determined. This is regarded as highly unusual, but the case was made that Blue Marble might not elect to continue working on the Supplementary Mining Claims unless it was successful in its appeal. Given that the Supplementary Mining Claims were due to expire without immediate work being carried out, the tribunal found this unusual request to be reasonable and allowed notations of pending proceedings to be placed on the Supplementary Mining Claims.

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[25] (July 20, 1995) MA 015-94 (unreported)

Now that Blue Marble has not been successful in having its claim recorded, the status of the Supplementary Mining Claims is left hanging. Therefore, the tribunal will direct that Blue Marble advise the tribunal within 30 days of the date of this Order of its intentions concerning the performance of the required assessment work. If it should arise that the Supplementary Mining Claims will not be retained, the tribunal will use its discretion to not exclude the time during which those claims were pending before it.

Status of Lots 31, 32, 33, Con IX

The tribunal has received a request for a notation of pending proceedings involving the parties to this proceeding as well as Mr. Archibald, Dr. Kretschmar and others in the Ontario Superior Court of Justice. Until such time as the lands are the subject of mining claims under adjudication before the Provincial Mining Recorder or the tribunal, they cannot be staked. However, upon disposition of this matter, the tribunal will request that the Minister remove these lands from staking pursuant to section 35.

Certification of Proceedings

The parties are further advised that it will exercise its jurisdiction under clause 30(1)(g) to certify that these lands, as well as the Blue Marble Supplementary Mining Claims and others, are the subject matter of proceedings in the Ontario Superior Court of Justice. [*]

Conclusions

The appeal of Rhonda Gail Smerchanski will be dismissed on the basis that it was unable to provide evidence of the staker. The evidence of the witness, Mr. Archibald, was found, on the balance of probabilities and based upon evidence of Mr. Corbeil, documents and photographs filed, to lack credibility. These serious issues of credibility arise from the fact that it was not possible for the two staking parties to be on the land at the times claimed without running into one another.

The Blue Marble Mining Claim will not be recorded due to its having been staked within the first 24 hours after opening using the post-24 hour rules. The time of commencement of staking is seen to be fundamental. Previously, commencing staking before opening was fatal. With the new dual staking rules, using the post-24 hour rules for a 23rd hour staking is found to be equally fatal.

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[*] tribunal file numbers MA 025-01, Blue Marble Mining Corp. v. Frederick Thomas Archibald, John Charles Archibald, Alan Alexander Archibald, J.T. Archibald Consulting Limited (its employees, agents and related parties including) Archibald Mining and Exploration Ltd., Sonic Soil Exploration Inc., Sonic Soil Sampling Inc. and Sonic Ontario Inc., being Ontario Superior Court of Justice file number 02-CV- 224184CMI; tribunal file number MA 027-01, Blue Marble Mining Corp. v. Frederick Thomas Archibald, also being Ontario Superior Court of Justice File number 02-CV-224184CM1; and tribunal file number MA 010-05, Regis Resources Inc. v. F.T. Archibald Consulting Ltd, the Estate of Charles William Archibald, Deceased, Alan Alexander Archibald, Frederick Thomas Archibald, John Charles Archibald, Blue Marble Mining Corp. Rhonda Gail Smerchanski, 3814793 Canada Inc., Sonic Soild Sampling Inc., and 1447136 Ontario Inc., being Ontario Superior Court of Justice file number 05-CV-287651 PD.

There are similarly serious issues arising with the Application to Record of Blue Marble which has the appearance of having been based upon the 1 to 10,000 map and features and not based upon what took place in the field. Findings of deemed substantial compliance cannot be made without an inspection by a neutral third party, which is not necessary due to the disposition of this matter.

Staking in Galway township must be done in 20 hectare units, pursuant to subsection 5(16) of O. Reg. 7/96. This fact should be noted and initialled on the Application to Record.