File No. MA 004-03

L. Kamerman)
Mining and Lands Commissioner)

Friday the 24th day
of October, 2003.

THE MINING ACT

IN THE MATTER OF

Mining Claim 3000321, situate in the Township of Olden, in the Southern Ontario Mining Division, hereinafter referred to as the ("Filed Only Mining Claim");

AND IN THE MATTER OF

Subsection 32(1) of the **Mining Act**;

B E T W E E N:

WOLLASCO MINERALS INC.

Appellant

- and -

RONALD PRICE

Respondent

AND IN THE MATTER OF

An appeal pursuant to subsection 112(1) of the **Mining Act** from the decision of the Provincial Mining Recorder, dated the 21st day of January, 2003, to not record the Filed Only Mining Claim.

O R D E R

WHEREAS this appeal was received by this tribunal on the 14th day of February, 2003;

UPON hearing from the parties and upon finding that pasture is a crop which is unlikely to be substantially damaged by staking and prospecting with such damage as may occur readily compensable;

. . . . 2

1. THIS TRIBUNAL ORDERS that the appeal from the decision of the Provincial Mining Recorder, dated the 21st day of January, 2003, for the recording of the Filed Only Mining Claim 3000321, be and is hereby dismissed.

2. THIS TRIBUNAL FURTHER ORDERS that future staking of the East 1/2 of Lot 6, Concession VI, in the Township of Olden may be undertaken by or on behalf of Wollasco Minerals Inc., upon the following conditions:

1. Walking access to the property is permissible in any season but persons accessing the property will not interfere with any farming activity. Motorized access will require the prior approval of Price, not to be unreasonably withheld.

2. Geochemical, geophysical and drilling activity, if warranted, will be conducted to minimize any disruption of farming activity and minimize any noise that may be heard at the farm house. Work will be permitted from dusk to dawn. No drilling will take place within 100 meters of the house or barn.

3. In performing work described in (2):

   (1) Underbrush/saplings cutting is permitted at all times.
   (2) Cutting of any trees with diameter of 2 inches or greater will be avoided where possible.
   (3) Trees with greater than 4 inches diameter will not be cut without the prior consent of Price, not to be unreasonably withheld, but with fair market compensation for Price.
   (4) In the event that a production decision is made, Wollasco will have the option to purchase and Price has the obligation to sell the Price farm, being all of lot 6, Concession III, Olden Township and all buildings and improvements thereon, if Wollasco gives notice of its intent to make an offer for two hundred (200%) of its fair market value. Fair market shall be the average of two appraisals by appraisers selected; one by Wollasco and one by Price. Appraisers will have to be members in good standing of the Ontario Association – Appraisal Institute of Canada, have been in business for more than ten years and have had considerable experience appraising properties in this part of eastern Ontario. Appraisals will have to be completed within 50 days of Wollasco's notice of its intent to make an offer. Wollasco will then make an offer based on the average price of the two appraisals with closing in 60 days. If the difference in the two appraisals is more than 20% either party will have the right to invoke the **Arbitration Act of Ontario**, S.O. 1991, Chapter 17, to have a third appraiser chosen by the two appraisers. The third appraiser will have 30 days to complete the appraisal, which shall be final and set the sale price.

. . . . 3

(5) Wollasco and its contractors will not release deleterious substances or contaminants (as described in the **Environmental Protection Act**, R.S.O. 1990, c.E. 19, as amended) on the mining claim property.

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

THIS TRIBUNAL FURTHER ADVISES that, pursuant to subsection 129(4) of **the Mining Act**, 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).

DATED this 24th day of October, 2003.

Original signed by L. Kamerman

L. Kamerman
MINING AND LANDS COMMISSIONER

File No. MA 004-03

L. Kamerman) Friday the 24th day
Mining and Lands Commissioner) of October, 2003.

THE MINING ACT

IN THE MATTER OF
Mining Claim 3000321, situate in the Township of Olden, in the Southern Ontario Mining Division, hereinafter referred to as the ("Filed Only Mining Claim");

AND IN THE MATTER OF
Subsection 32(1) of the **Mining Act**;

B E T W E E N:

WOLLASCO MINERALS INC.

Appellant

- and -

RONALD PRICE

Respondent

AND IN THE MATTER OF
An appeal pursuant to subsection 112(1) of the **Mining Act** from the decision of the Provincial Mining Recorder, dated the 21st day of January, 2003, to not record the Filed Only Mining Claim.

REASONS

The Appeal

This matter arises out of a decision of the Provincial Mining Recorder, Mr. Roy Spooner, dated the 21st day of January, 2003, in which he refused to record the "filed only" Mining Claim 3000321. Mr. Spooner referred to subsection 32(1) of the **Mining Act** (the **"Act"**):

> **32.** (1) Although the mines or minerals therein have been reserved to the Crown, no person shall prospect for minerals or stake out a mining claim upon the part of a lot that is used as a garden, orchard, vineyard, nursery, plantation or pleasure ground, or upon which crops that may be damaged by such prospecting are growing, or on the part of the lot upon which is situated a spring, artificial reservoir, dam or waterworks, or a dwelling house, outhouse, manufactory, public building, church or cemetery, except with the consent of the owner, lessee, purchaser or locate of the surface rights, or by order of the recorder or the Commissioner, and upon such terms as to the Commissioner seem just.

Most of the mining claim was found to be comprised of grass for pasture. The ordinary meaning of the word, "crop" found in subsection 32(1) includes grass, according to the decision. Accordingly, as there was no consent of the surface rights owner, the lands were found to not be open to staking.

Wollasco Minerals Inc. ("Wollasco") appealed this decision by letter to the tribunal, dated February 12, 2003.

Background

On January 2, 2003, Mr. Campell James Laidlaw staked a two-unit mining claim, comprised of the East 1/2 of Lot 6, Concession III, in the Township of Olden. His Application to Record was received in the Provincial Recording Office on January 6, 2003. On his Certificate he states, under item 8, "Property is pasture land with electrical fencing for cattle as indicated".

His sketch depicts Tom Fox Road running diagonally through the claim, from the north east corner, to the mid-point of the southern line. The number 1 post is shown to be an actual post in the north east corner of the claim. The number 2 post is witnessed from the same location as a line post, which occurs on the road, 360 metres south of the number 1. The witness post indicates that the location for the number 2 post is 360 metres further south. The number 2 and 3 posts are witnessed by a witness post along the south boundary by a post on the road, indicating that the number 2 post is 330 metres to the east and the number 3 post is 330 metres to the west. The line for the west boundary is shown to be 690 metres long, and the number 4 post is witnessed at the number 1 post, indicating a distance of 760 metres. The sketch shows an electric fence immediately to the west and running in the same direction as the road. A creek is also shown, between the fence and the road. The notation along the bulk of the mining claim, to the west of all of the features, states, "pasture lands".

Appearances

Wollasco Minerals was represented by its President, Mr. Robert J. Opekar. Mr. Ronald Price, owner of the surface rights on which the filed only mining claims was staked, was represented by his wife, Mrs. Alva Price.

Evidence

Mr. Laidlaw, who staked the Filed Only Mining Claim, did not attend the hearing to give evidence. However, Mr. Robert Opekar and Dr. Colin Bowdidge were familiar with the property, the latter having been involved with assessment work on an adjacent mining claim.

The Filed Only Mining Claim had been staked from the roadway, being the township right of way, without being required to access the Price property. This particular land had been staked on two prior occasions, once in 1996 (1077300) and once in 2000 (3000321). On both of these occasions, Wollasco was the recorded holder, although Mr. Laidlaw was involved only in the 2000 staking. Both of Mr. Laidlaw's stakings were done from the road, so that the Price property was not accessed, although this was not the case with the 1996 staking, done by Mr. Anthony G. Menard. On November, 9, 1996, Mr. Menard also staked Mining Claim SO-1077301, which is immediately to the west of the Filed Only Mining Claim and remains in good standing. Apparently, the old posts from the previous 2000 staking by Mr. Laidlaw were reused, according to Mr. Opekar.

Mr. Opekar stated that he has no immediate plans to work on the mining claim, but felt it was in Wollasco's best interests to stake it. He did not elaborate on this statement or indicate the nature of Wollasco's interest in this particular land. Mr. Opekar stated that no damage had been done to the Price property and he believes that Wollasco has the right to do further work at such time as it chooses. He maintained that the staking itself was in compliance with the **Mining Act** (the "**Act**") and the regulations.

Subsection 12(1) 3 of Ontario Regulation 7/96 was referred to:

> 12. (1) One or two witness posts, instead of a corner post, must be erected in accordance with this section for a corner of a mining claim at which it is impracticable to erect a corner post for one of the following reasons:
> …
> 3. The true corner is inaccessible because of incumbent surface rights.

Dr. Colin Richard Bowdidge was familiar with the two mining claims. He was never advised of any disruptions which occurred on the land. He stated that he had a discussion with the Prices when he accessed the adjacent mining claim to perform assessment work, which comprised of laying out ribbon lines, geophysical surveys and geological mapping. There were never any complaints concerning damage to the property. Nor had he been told to stop working and to not enter the property. Dr. Bowdidge stated that the consent of the Prices was neither sought nor obtained prior to the stakings. He was aware that the surface rights were alienated from the Crown, but had not consulted with them previously.

Mrs. Price stated that she is in agreement with the Provincial Mining Recorder's decision. Neither she nor her husband had any contact with Wollasco when they staked the lands in November, 2000, nor were they aware of any assessment work having been done on the property.

. . . . 4

Mr. Price stated that there is a mining claim on the east side of the road, which would be in addition to the Filed Only Mining Claim under discussion and the second Wollasco claim to the west. Furthermore, there is a mining claim post on the subject property which is not a claim post identified in the staking, located in the south east area, to the east of the road, creek and fence. It was hidden behind a tree, in a wooded area, some 40 or 50 feet from the road. The post had Mr. Laidlaw's name on it, along with tags and inscriptions. The date of staking was January 3, 2003. Mr. Price also looked at the witness posts along the road, but could not recall their inscriptions. He did recall that the #1 [witness] post and #2 witness post did have tabs and Laidlaw's name.

Mr. Price stated that he was unaware that staking had been done on his property, either in 2000 or 2002, until he received a letter from the Provincial Mining Recorder. The property has been part of his farm operation for almost fifty years and is vital to his operation. It provides feed for sixty head of cattle. He stated that the noise bothers his cattle. It is quiet and he would like to keep it that way.

Mr. Opekar stated that Wollasco acted properly and adhered to the regulations in staking the mining claim. The farming operations were in no way interfered with, either with respect to this mining claim or the earlier, lapsed mining claim. He submitted that the land should be allowed to tolerate its dual purpose; that of farming for the surface rights and of mining for the mineral rights. To permit the claim to be recorded would provide the opportunity for farming to continue and for his company to capture the resource. He stated that his company is allowed to put posts on the land, as long as the farming operations were not interfered with. Mr. Opekar indicated that he would have preferred to have Mr. Laidlaw present, as he has an excellent record and is an experienced staker. However, he submitted that there is nothing which was done which would prejudice the Prices' farming operation.

Wolllasco has always taken the position that it would not unnecessarily cut trees. When performing assessment work, no trees with a diameter of more than 2 inches were cut. Trees greater than 4 inches would not be cut without prior consent. While it is not certain that a mine would be developed, Mr. Opekar stated that if it were, only a small portion of the land would be occupied. The operations should not interfere with the farm, but if they did, Wollasco was prepared to pay generous compensation. He submitted that his company is entitled to stake a claim, as the province owns the mineral rights. All laws were adhered to. He questioned how any company could proceed where the landowner would be able to prevent development by virtue of its forestry or farming operations.

Findings

The tribunal has acquired a copy of the Application to Record Mining Claims 1077300 and 1077031, which were staked on November 9, 1996 by Mr. Anthony G. Menard and recorded in the name of Wollasco Minerals Inc. on November 14, 1996. The subject Filed Only Mining Claim is an overstaking of the earlier 1077300, with 1077301 being located immediately to the west. Unlike the current staking, apparently the circumference of both mining claims was appar-

ently staked, with posts at the actual corners. However, this fact cannot be verified without an inspection. There are witness posts shown on 1077300, as the creek crosses the east and south boundaries, as well as one noted along the south boundary, where Tom Fox Road intersects the boundary. The electric fences noted on the sketch appear to coincide with the east and west boundaries of 1077300 and with the east and south boundaries of 1077301.

The tribunal has also acquired a copy of the Application to Record Mining Claim 1077439, which was staked by Campbell James Laidlaw on November, 15, 2000 and recorded in the name of Wollasco. This staking is virtually identical to the subject Filed Only Mining Claim, with posts 2, 3 and 4 having been witnessed. Mr. Laidlaw wrote the following information under item 8 of the Certificate of Recording Licensee:

> Property is pasture land, Electrical cattle fencing as indicated, and during the staking activity several Hunters observed on the property and gunshots were heard. Being surface rights involved #2, #3 and #4 posts were witnessed.

The application of what is now subsection 32(2) of the **Mining Act** was considered in another case of the tribunal, **Pokrupa v. Taylor**, (1988) 7 M.C.C. 420. In that case, Commissioner Ferguson noted that the section is found in the part of the **Mining Act** entitled "Lands Not Open [to Staking]", noting that the intent of the section is to restrict prospecting and staking. That case involved an application under subsection 32(2) for a determination of whether land which the prospector was intending to stake was exempt. Commissioner Ferguson noted that he was prepared to determine the matter, but that he would have also been prepared to issue a declaration pursuant to what is now section 105 of the **Act**.

Pukrupka involved consideration of the words found in the provision, namely plantation, orchard, pleasure ground and artificial dam. The lot had an eight foot well on it, which had not been used for many years. There was an old apple orchard, from which fruit had been harvested but was not pruned or otherwise managed. There were a number of beaver dams, which the applicant sought to have recognized as artificial reservoirs. A new home had been built in an area away from the mining claim, but raised the issue of use of lands surrounding the home. Finally, the applicant entered into agreements with the Ministry of Natural Resources under the **Woodlands Improvement Act**. Under one agreement, approximately six acres of the mining claim had been planted, with the Crown paying for the cost of planting and the owner [applicant] paying for the trees, although it was noted that the owner could also acquire subsidized trees. A second agreement had been entered into which, if carried out, would involve planting two additional areas.

In the decision, Commissioner Ferguson discussed the evolution of the multiple use concept of public lands, commencing at page 425:

> The tribunal has not been able to find any judicial interpretation of section 33 [now 32]. In a 1933 publication of the Department of Mines entitled "The Mining Laws of Ontario and the Department of Mines" written by the then Deputy Minister, Thomas W. Gibson, it is said at p. 14,

Minerals Reserved in Public Land Grants

> In the same year (1891) a radical change was made in the Public Lands Act (54 Vict., Chapter 7) by declaring that any letters patent for lands granted under that Act, the mines and minerals should be reserved to the Crown. Previously a patent for land purchased for agricultural purposes carried the mines and minerals, in this way practically withdrawing from prospecting all lands so granted, for naturally no one will look for minerals on land which belongs to another. The mines and minerals so reserved were constituted a property separate from the surface. State ownership of the minerals, as distinguished from the surface of the soil, is the rule in many parts of the world and in divesting itself of the mining rights, when parting with the surface, the Crown in Ontario had gone beyond the general practice.
>
> The Government had awakened to a livelier appreciation of the value of the Province's mineral resources; and the change in the law, while not restricting the area made available for settlement, enabled it to dispose of the mining rights in the same and so put them in the way of development. In the following year and amendment to the Mines Act gave the surface owner priority for obtaining a grant of the minerals in his own lands; and if the grant went to another, provision was made for compensation for damage or injury to the surface.

The above quotation indicates that there was an attempt on the part of the Legislature of Ontario to introduce a concept of multiple use of the resources of the Province.

It is interesting to note that in a footnote at the end of the case of *Re Dodge and Darke* 1 M.C.C. 44 at pp. 46 and 47 Commissioner Price commented,

> The importance of the question of compensation and the question of conflict of surface and mining rights generally is growing less in Ontario by reason of the amendments (8 Edw. VII., cc. 16 and 17) made in 1908, to The Public Lands Act and The Free Grants and Homesteads Act, by which (among other things) all reservations of minerals, the property of the Crown, in lands theretofore patented under those Acts were, except where such minerals had been staked out, recorded, leased or granted under any Mining Act or regulation, rescinded and made void and the minerals vested in the surface owners. This and the other provisions of these amendments show a general policy of in future avoiding as far as possible conflict between surface and mining rights in the same lands.

While Commissioner Price's opinion appears to be that there was a lessening of the multiple use concept, in recent decades that concept has been given the fullest application….

Commissioner Ferguson then proceeded to review portions of the **Mining Act** and changes to the **Public Lands Act**, over ensuing years before concluding at page 429:

> It can only be concluded with the legislative changes the principle of multiple use is fully adopted by the relevant statutes of Ontario. Section 4 of the *Interpretation Act* provides that the law shall be considered as always speaking and it is through this provision that where the context of an Act changes, the interpretation of a section which may not have been changed can vary.

Commissioner Ferguson stated at page 438:

> The tribunal is satisfied that the intention of the Legislature is not to withdraw from staking those areas that are reforested under the *Woodlands Improvement Act*. The right of compensation on a very broad basis still continues for the owner of the surface rights and having been introduced at the same time as the restriction under consideration, the tribunal is satisfied that it is not the intention of the Legislature to restrict the application of the multiple use doctrine and remove its application to those lands that have been reforested under the *Woodland Improvement Act*. In summation the reasons for such a conclusion include the statutory entrenchment of the multiple use doctrine accompanied by the generous provision for compensation, the broad and varying range of meaning of the word "plantation" contained in the various dictionaries, the absence of reference to "trees" in the legal dictionaries, the absence of the use of the word "plantation" in the statutes of Ontario dealing with reforestation both originally and today and the limited context of uses contained in subsection 33(1) [now 32(1)].

The exclusions set out in subsection 32(1) of the **Act** involving a garden, orchard, vineyard, nursery, plantation or pleasure ground are absolute, meaning that once there is a finding that one of these uses exists on the property, the staking or prospecting cannot take place without the consent of the owner or an order of the recorder or Commissioner. However, the subsection sets out a test with respect to lands used for crops: "…no person shall prospect for minerals or stake out a mining claim upon the part of a lot … *upon which crops that may be damaged by such prospecting are growing*…" [emphasis added.]

The Provincial Mining Recorder has determined that grass used for pasture is a crop. The tribunal finds nothing wrong with this and will adopt this finding. However, the larger question is whether a pasture may be damaged by prospecting for minerals. The tribunal finds that the staking is not problematic, as all but the first post were witnessed from the road and therefore did not damage the pasture/grass/crop.

The word "prospecting" is defined in section 1 as "… the investigating of, or searching for minerals;". The test anticipated by the provision is one of damage to crops. Pasture is defined in the **Concise Oxford Dictionary of Current English,** 8th edition, edited by R. E. Allen, Oxford: Carendon Press, 1990:

> **pasture… 1.** land covered with grass etc. suitable for grazing animals, esp. cattle or sheep. **2.** herbage for animals…

It is also useful to consider the definitions of "graze" and of "hay" to understand the difference between grasses grown for pasture and grasses grown for hay.

> **graze**…**1.** *intr.* (of cattle, sheep, etc.) eat growing grass. **2.** *tr.* **a**. feed (cattle etc.) on growing grass. **b.** feed on (grass)
>
> **hay** …grass mown and dried for fodder. … **1.** make hay …**2.** put (land) under grass for hay. …

Several pictures were shown at the hearing, although not taken in evidence, depicting the subject lands are covered with trees as well as grass. It was explained that the cows are able to graze between the trees. The use of the subject lands for pasture differs from a haying operation, where the grass would have to be cut and dried. Instead, the subject lands have cattle which are free to range within the confines of the electric fencing.

The test contemplated with respect to crops in subsection 32(1) of the **Act** requires that there be some damage to those crops resulting from staking and prospecting activities. Given the nature of pasture for grazing cattle, the tribunal has heard no evidence upon which to make a finding that a substantive damage to the crop would result from mineral exploration activities. Pasture does not involve tilling, planting or rows of crops which are harvested. Rather, pasture is a passive state of the land, albeit one which is beneficial for the grazing of cattle. In the event that some damage would occur from the prospecting, the tribunal finds that this can readily be compensated pursuant to the provisions of the **Act.**

The concept of the multiple use of lands has undergone significant changes throughout the tenure of mining legislation in this province, as can be seen from the excerpts from **Potrunka** reproduced above. However, there have been no recent legislative changes to alter the principles found and enunciated by Commissioner Ferguson. The tribunal finds that, at this time, the multiple use principle of Crown lands, or of Crown mining rights, continues to be in effect.

The tribunal could find no instance when subsection 32(1) has been considered by it in the past. The grammatical construction of the provision contemplates a prior consent of the owner of the surface rights or order of the recorder or Commissioner. The relevant phrasing, "no person shall prospect … except with the consent…or by order…" cannot be construed to allow for the consent or an order after the staking has occurred. Therefore, the tribunal finds that the appeal must be dismissed. However, notwithstanding this dismissal, the tribunal further finds that the crops are such that very little damage is likely to occur from prospecting and whatever damage does occur can readily be compensated.

The tribunal finds that it will, in the context of its Order, also make an Order granting permission for the future staking of the subject lands. The tribunal has had the opportunity to examine the proposed conditions discussed between the parties, when a consent order was being considered and finds that it will adopt those conditions as part of its Order.

Section 14 of Ontario Regulation 7/96 states:

> 14(1) Every claim post used for staking a mining claim must
>
> (a) stand 1.2 metres above the ground when erected;
> (b) be squared or faced on four sides for 30 centimetres from the top; and
> (c) be squared or faced for 10 centimetres across each side.
>
> (2) Only a post or a standing stump not previously used for staking a mining claim may be used as a claim post.

It was stated at the hearing that Mr. Laidlaw re-used the posts from the 2000 staking. Unfortunately, Mr. Laidlaw was not present, so this fact could not be confirmed. Also, there was no inspection conducted of the staking. If this assertion is true, given the provisions of section 14 of O. Reg 7/96, the tribunal would have had to consider the staking invalid as being not in substantial compliance with the legislative provisions and required its cancellation. Should Wollasco undertake to stake the subject lands again, its staker should be cautioned to use new posts which have not been used before.

Conclusions

The appeal will be dismissed. The tribunal will order that Wollasco be permitted to stake the subject lands, upon conditions. No costs are payable by either party in this matter.