File No. MA 037-00

L. Kamerman)
Mining and Lands Commissioner)

Monday, the 29th day
of April, 2002.

THE MINING ACT

IN THE MATTER OF

Mining Claim S-809104, recorded on the 20th day of August, 1984, in the name of Flag Resources (1985) Limited, having been recorded as being comprised in part of the SW 1/4, S 1/2 portion of Lot 8, Concession I, situate in the surveyed Township of Rathbun, but being alleged to also be located in part in the unsurveyed Township of Scadding, in the Sudbury Mining Division, hereinafter referred to as the "Flag Mining Claim";

AND IN THE MATTER OF

Mining Claim S-1230297, recorded on the 29th day of September, 1997, in the name of Terry Loney and transferred (100%) on the 21st day of September, 2000, to Solitaire Minerals Corp., situate in the unsurveyed Township of Scadding, in the Sudbury Mining Division, and purportedly covering that portion of the Flag Mining Claim which is located within the unsurveyed Township of Scadding, hereinafter referred to as the "Loney Mining Claim" (*amended, April , 2002)*;

AND IN THE MATTER OF

An application to record Mining Claim 1244793, situate in the Township of Scadding, in the Sudbury Mining Division, staked by Raymond Levi Lashbrook, to have been recorded in the name of Flag Resources (1985) Limited, involving that part of the Flag Mining Claim located within the unsurveyed Township of Scadding, and marked "filed only", hereinafter referred to as the "Filed Only Mining Claim";

B E T W E E N:

FLAG RESOURCES (1985) LIMITED

Applicant

- and -

TERRY LONEY.

Respondent
(*amended, April 29, 2002)*

- and -

MINISTER OF NORTHERN DEVELOPMENT AND MINES

Party of the Third Part

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AND IN THE MATTER OF

An application pursuant to section 105 of the **Mining Act** for a declaration that the portion of the Flag Mining Claim located within the Township of Scadding has been staked in accordance with the **Act** and regulations, or in accordance with the **Mining Act** R.S.O. 1980, c. 268;

AND IN THE MATTER OF

An application for an Order pursuant to section 105 of the **Mining Act** directing the Provincial Mining Recorder to issue an Order in accordance with subsection 110(6) for the erection of the #4 corner post and line posts and performance of blazing along the north boundary of the Solitaire Mining Claim to coincide with the location of the #2 and #3 posts of the Flag Mining Claim;

AND IN THE MATTER OF

In the alternative, an appeal pursuant to subsection 112(1) of the **Mining Act** from the decision of the Provincial Mining Recorder, dated the 11th day of October, 2000, for the recording of the Filed Only Mining Claim.

INTERLOCUTORY ORDER

UPON hearing from the parties and reading the documentation filed;

1. THIS TRIBUNAL ORDERS that the application for a declaration pursuant to section 105 of the **Mining Act** that the portion of the Flag Mining Claim 809104 located within the Township of Scadding has been staked in accordance with the **Act** and regulations be and is hereby dismissed.

2. THIS TRIBUNAL FURTHER DECLARES that Flag Mining Claim 809104 is deemed to have been validly staked, as shown on the Application to Record, in the Township of Rathbun, pursuant to subsection 70(2) of the **Mining Act** and its predecessors.

3. THIS TRIBUNAL FURTHER ORDERS that the dispute against the Loney Mining Claim 1230927 be and is hereby dismissed.

4. THIS TRIBUNAL FURTHER DIRECTS Flag Resources (1985) Limited to provide to the tribunal, with copies to the Respondent, Terry Loney, and to the Party of the Third Part, the Minister of Northern Development and Mines, within 45 days of the date of this Declaratory Order:

(a) photocopies of all invoices for assessment and exploration work carried out on the ground location of the Flag Mining Claim 809104;
(b) a breakdown of those invoices which support existing assessment work reports filed and applied to Mining Claim 809104;
(c) a breakdown of those invoices which have not been used in the filing of assessment work reports to date, including a total of the amount spent;

5. THIS TRIBUNAL FURTHER DIRECTS Flag Resources (1985) Limited undertake a survey by an Ontario Land Surveyor, in accordance with the general principles for surveys of unpatented mining claims, as set out in section 95 of the **Mining Act**, and Revised O. Reg. 768/00, excepting those provisions which require the written consent of the Provincial Mining Recorder or Order of the Minister, of that portion of its Mining Claim 809104 on the ground, such

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as is located in the Township of Scadding, one copy of which is to be filed with the tribunal and one copy each served on the Respondent, Terry Loney and the Party of the Third Part, MNDM, within 45 days of the date of this Interlocutory Order, **WITH THE PROVISO** that, in the event such required survey may not be done within the timeline directed, to advise the tribunal through its Registrar, Mr. Daniel Pascoe, of such additional time as may be required to conduct the required survey in a timely and expeditious manner, in which case, this Interlocutory Order will be amended accordingly.

6. THIS TRIBUNAL FURTHER ADVISES the parties of its intention to issue a Declaratory Order to Flag Resources (1985) Limited of a Special Equitable Lien in the amount disclosed by Flag Resources (1986) Limited under paragraph 4(c) on those lands found in the Township of Scadding circumscribed on the ground by the Jerome staking of Mining Claim 809104, and further set out in the survey referred to in paragraph 5 above, on the condition that the amounts disclosed pursuant to the aforementioned paragraph 4(c) reflect the substantial amounts claimed by Flag as having been expended.

7. THIS TRIBUNAL FURTHER ADVISES that in its Declaratory Order of Special Equitable Lien, the lien may be extinguished in one of the following two ways:

(a) by the forming of a joint venture arrangement between Terry Loney and Flag Resources (1985) Limited for the further development of the Loney Mining Claim 1230927, whereby Flag is required to develop and support only that portion of the aforementioned Mining Claim which coincides with the lands which have been surveyed, pursuant to paragraph 5, above, and Terry Loney is required to develop and support the remaining portion of the aforementioned Mining Claim; or

(b) (1) by the partial abandonment by Mr. Loney, pursuant to subsection 70(2) of the **Mining Act** of that portion of his Mining Claim S-1230927 which coincides with the survey carried out under paragraph 5 above;

(2) by the reimbursement to Mr. Loney by Flag Resources (1985) Limited of the value of assessment work recorded and lost as a result of the suggested abandonment in clause 7(b)(1) above; and

(3) by the issuance by the Minister of Northern Development and Mines, pursuant to subsection 176(3) of the **Mining Act** and payment by Flag Resources (1985) Limited, of the required fee, if any, of an unpatented mining claim or lease for the lands circumscribed by the survey, as outlined in paragraph 5 above, upon such terms and conditions as the Minister determines are appropriate under the circumstances, including but not limited to the surrender of Mining Claim 809104, as recorded in Rathbun Township, with the assignment of assessment work credits to the newly created mining claim, or the acceptance of the value of the assessment and exploration work set out in paragraph 4(c) as assessment work on the newly created mining claim, *nunc pro tunc*; or such further and other conditions which the Minister of Northern Development and Mines determines is reasonable under the circumstances.

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8. THIS TRIBUNAL FURTHER ADVISES that, depending on the completion of Directions set out above, and further to the actions of the parties in connection with the Declaratory Order of Special Equitable Lien, it may direct the Provincial Mining Recorder to order the moving of posts, marking of inscriptions, and blazing of lines of Mining Claims 809104, as recorded in Rathbun Township, and Mining Claim 1230297, as may be appropriate to the outcome chosen by the parties, if any, as set out in paragraph 7, above, or, in the event that no such outcome is chosen, to circumscribe Mining Claim 809104 to coincide with its recorded location of part of the SW 1/4, S 1/2 portion of lot 8, Concession I, and so that the north line of Mining Claim 1230297 be moved south sufficient distance to coincide with the Rathbun Scadding Township Boundary.

9. THIS TRIBUNAL FURTHER DIRECTS that the Provincial Mining Recorder issue an order pursuant to subsection 110(6) of the **Mining Act** for the moving of posts numbers one and four and all line posts along the northern boundary, in connection with Loney Mining Claim 1230297, a distance of 70 metres south, more or less, to coincide with the location of the Rathbun Scadding Townships boundary.

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 this tribunal to the Provincial Mining Recorder **WHO IS HEREBY DIRECTED** to amend the record in the Provincial Recording Office as necessary and in accordance with the aforementioned subsection 129(4).

REASONS for this Interlocutory Order are attached.

DATED at Toronto, this 29th day of April, 2002

Original signed by L. Kamerman

L. Kamerman
MINING AND LANDS COMMISSIONER

File No. MA 037-00

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AND IN THE MATTER OF

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AND IN THE MATTER OF

An application to record Mining Claim 1244793, situate in the Township of Scadding, in the Sudbury Mining Division, staked by Raymond Levi Lashbrook, to have been recorded in the name of Flag Resources (1985) Limited, involving that part of the Flag Mining Claim located within the unsurveyed Township of Scadding, and marked "filed only", hereinafter referred to as the "Filed Only Mining Claim";

B E T W E E N:

FLAG RESOURCES (1985) LIMITED

Applicant

- and -

TERRY LONEY

Respondent
(*amended April 29, 2002)*

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MINISTER OF NORTHERN DEVELOPMENT AND MINES

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AND IN THE MATTER OF

An application pursuant to section 105 of the **Mining Act** for a declaration that the portion of the Flag Mining Claim located within the Township of Scadding has been staked in accordance with the **Act** and regulations, or in accordance with the **Mining Act** R.S.O. 1980, c. 268;

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An application for an Order pursuant to section 105 of the **Mining Act** directing the Provincial Mining Recorder to issue an Order in accordance with subsection 110(6) for the erection of the #4 corner post and line posts and performance of blazing along the north boundary of the Solitaire Mining Claim to coincide with the location of the #2 and #3 posts of the Flag Mining Claim;

AND IN THE MATTER OF

In the alternative, an appeal pursuant to subsection 112(1) of the **Mining Act** from the decision of the Provincial Mining Recorder, dated the 11th day of October, 2000, for the recording of the Filed Only Mining Claim.

REASONS

The hearing of this matter took place commencing the 3rd day of October, 2001, in the Brookview Room of the Travelodge Hotel – Sudbury, 1401 Paris Street, Sudbury, Ontario.

The applicant, Flag Resources (1985) Limited ("Flag") was represented by Mr. Richard Guy as counsel. Solitaire Minerals Corp. ("Solitaire") was represented by Mr. Terry Loney, acting on his own behalf and on behalf of the company. The Ministry of Northern Development and Mines ("MNDM") was represented by John Norwood as counsel.

Mr. Loney transferred his Mining Claim S-1230927 to Solitaire in September, 2000, and it was transferred back to him in August, 2001, on account of funds owing. At the time of the Appointment for Hearing, the transfer had not taken effect. Therefore, although this proceeding commenced naming Solitaire as the respondent, in fact it is Mr. Loney who is the current holder of beneficial interest. The title of proceedings has been amended accordingly and the tribunal will refer to Mr. Loney as respondent in these Reasons.

Background

This appeal arises out of the staking of various overlapping mining claims, occurring over a period of years, commencing in 1982. The mining claims are located on either side of, or straddle, the boundary which runs east to west between Scadding and Rathbun Townships.

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One of the major difficulties faced by the parties in this appeal is that the northern portion of Scadding is an annulled Township and Rathbun is a surveyed Township. The rules for staking in surveyed territory differ substantively from those in a surveyed township. In a surveyed township, the actual location of the staking must follow the survey fabric. As per clause 5(1)(b) of Ontario Regulation 7/96, "a mining claim in surveyed territory must be staked so that it, …(b) has boundaries coincident with or parallel to section, lot concession or range lines established by the original survey;". In unsurveyed townships, as per subsection 2(1) of O.Reg 7/96, the mining claim must "(a) consist of one or more 16 hectare units; … (c) having boundaries running only north and south and east and west astronomically;".

To pick up on the terminology used by MNDM, in a surveyed township, the staker gets what he or she calls for, meaning that, despite the location of posts on the ground, the actual claim will be according to that portion of the Lot and Concession specified on the Application to Record. In an unsurveyed township, it will be the posts on the ground, or what was actually staked, which will govern what constitutes the mining claim.

On August 5th, 1984, Albert Jerome, staked Mining Claim 809104, one of ten mining claims staked in a single block. Over a period of time, he also staked certain blocks of claims both to the southwest and to the east and south east. As was required by the **Mining Act** provisions governing at the time, each mining claim was what is now referred to as a single unit of 40 acres or 16 hectares. On Jerome's sketch of the Application to Record (ex. 3b, Tab Exhibit 2), Mining Claim 809104 is described as being the SW 1/4 of the SW 1/2 of Lot 8, Concession I, in Rathbun Township.

The various other claims shown on the Application to Record, having been staked on August 5th and 6th, 1984, comprise areas described as various portions of Lots 8 and 9, Concession I. For purposes of the layout of the lands staked, Mining Claim 809104 is at the south end of the ten claim group, with one full claim located to the east and a longer, narrow claim which skirts the shore of Lake Wanapitei to the west.

At the time of the Jerome staking, the lands in Scadding Township shown on the map as immediately south and coincident to the boundary were covered by existing mining claims of record. On May 10th and 11th, 1982, Robert Graham staked a block of ten mining claims. There is an inadequate description of surrounding features in Graham's sketch forming part of his Application to Record [Ex. 3b, Tab Exhibit 4], as Lake Wanapitei is not shown, so that the tribunal experienced some difficulty in orienting itself. However, the orientation of the Graham mining claims is such that those bearing numbers 647663 through 647667 run east to west along the Scadding Rathbun boundary, with another, bearing number 647668, located immediately to the south of 647667, at the west end of the group. Graham's staking of 647667 and 647668 are shown as tying on to

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two mining claims to the west, bearing numbers 606185 and 606186, also running north to south.

On September 17th, 1997, Terry Loney staked Mining Claim 1230297, which he indicated in his Application to Record was an 8 unit claim, ostensibly located in the northwest corner of Scadding Township. The Mining Claims is shown as being 1,800 metres along its northern boundary, 800 metres along both east and west boundaries and 1,700 metres along its south boundary. Base upon these dimensions, the area of this claim would be 148 hectares, or 9.25 units. The dimensions are further discussed in the inspection evidence and will be dealt with below. Loney's sketch depicts the northern boundary as coinciding with the Rathbun and Scadding Township boundary. Beyond the western boundary, the shoreline of Scadding Bay, at the south end of Lake Wanapitei, is shown. Mr. Loney did not show the Jerome (now Flag Resources) mining claims to the north on his sketch. Mr. Loney also staked a 16 unit claim to the east of his 1230297, numbered 1230298, which also is depicted as running along the Rathburn Scadding township boundary a distance of 1,600 metres, and being 1,600 metres along each of its sides.

Albert Jerome transferred 100 percent of his interest in Mining Claim 809104 to Flag Resources on September 28th, 1987. The abstract (Ex. 3b, marked as Tab Exhibit 2) shows that work was performed in 1986, although it is unclear whether this was performed by Jerome or Flag. The Mining Claim forfeited on four occasions, once while held by Jerome and three times while held by Flag. In addition to extensions associated with orders relieving the Mining Claim from forfeiture, time for performance of assessment work was extended on seven occasions, once for Jerome and six times for Flag. The last of these occurred in 1999. The quantity of assessment work shown on the abstract is sufficient to keep it in good standing, largely on an annual basis. Despite whatever exploration work may have taken place, with evidence that it was in the neighbourhood of $80,000 to $100,000, any work above the minimum required is not shown on the abstracts. With the exception of $13,450 performed and $12,000 assigned in 1993, the annual applications of assessment work have largely been in the range of $400 to $800.

There may have been recurring problems locating the boundary between Scadding and Rathbun Townships. This is due to problems locating the original survey and the disorienting effect of a magnetic anomaly acting in the area. In addition to Jerome's staking of Mining Claim 809104 being largely in Scadding, the evidence showed that Loney's staking of Mining Claims 1230297 commences some distance north of the boundary.

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Issues

1. Of what significance is the staker's intent, if any, when the lands staked on the ground differ from what is shown on the Application to Record? Does intent become a determining factor when the staker thought the ground was in a surveyed, but in fact was in an unsurveyed township?

2. Does Jerome's staking of Flag Mining Claim 809104 substantially comply with the **Act** and regulations, such that it may be recorded for the lands staked on the ground as opposed to the lands claimed in the Application to Record?

3. Can the 1984 staking of Flag's Mining Claim 809104 be in substantial compliance, notwithstanding that there is record of an existing 1982 mining claim, bearing number 647667, for which no evidence was found by inspectors in the field, although the inspectors had no specific instructions to locate evidence of this claim?

4. Is there any other legal or equitable principle by which the Flag Mining Claim 809104 can be declared to have been validly staked and recorded as found on the ground, namely in the Township of Scadding?

5. If the answers to #2, 3 and 4 above are no, notwithstanding subsection 71(2), does Loney's staking of Mining Claim 1230297 substantially comply with the requirements of the **Act** and regulations? Are such matters as the location of the #1 and #4 posts in Rathbun, as opposed to Scadding, and the failure to locate on the ground the posts of Flag's Mining Claim 809104 material to a determination of substantial or deemed substantial compliance, or can they errors of the type that can be corrected through the issuance of an Order pursuant to subsection 110(6)? If the staking of Loney Mining Claim 1230297 does not substantially comply or is not deemed to have substantially complied, does subsection 71(2) override any potential declaration that the staking is invalid?

6. If Loney's staking of Mining Claim 1230297 is declared to be not in substantial compliance or deemed substantial compliance, does the Filed Only staking of Lashbrook comply with the legislative requirements, such that it should be recorded?

7. Are there other considerations which are brought to bear in a situation where a mining claim is improperly located on the ground, kept in good standing with respect to the lands shown on record in the Provincial Recording Office, with substantial additional amounts of assessment work performed and leading to a substantial discovery? Is the issue of the problem of locating the boundary material, when it was known to the Mining Recorder as early as 1985?

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Evidence

Mr. Murdo McLeod, principal of Flag Resources, started his company in Calgary in 1954. Flag has been conducting mineral exploration in the Sudbury area north beyond the Quebec boundary, for the last 40 years.

Although Mr. Jerome was not brought as a witness, Mr. McLeod stated that Jerome had staked Mining Claim 809104 after locating an interesting surface mineral showing involving and copper diabase. Jerome staking of ten mining claims, including Mining Claim 809104, took place on August 5th and 6th, 1984. It was not clear whether Mr. Jerome had conducted the staking on behalf of Flag, or sold the claims to Flag shortly after staking, based upon his showing, but all were transferred to Flag on September 28th, 1987. An indication of Flag's interest is shown in the Robin Goad (Consulting Geologist) Report (Ex. 3c, Tab 1), dated March - June, 1986, which was done for Flag.

All of Jerome's mining claims were shown in the sketch accompanying his Application to Record to be in Rathbun Township. Evidence later disclosed that on the ground, a substantial part of Mining Claim 809104 was in Scadding Township. This did not become a problem until after the staking of the northwest portion of the Township by Terry Loney, who has also made an unrelated discovery on the southern portion of his Mining Claim 1230927.

Mr. McLeod reiterated time and again that Jerome was staking a showing and was not attempting to blanket the southern portion of Rathbun Township for further exploration. Mr. McLeod insisted that the particular showing of interest, which further exploration and assessment work was to confirm in 2000, was located on Mining Claim 809104. In cross-examination by Mr. Norwood, it was suggested that, had there been anything of interest on Mining Claim 809104, Jerome would have been more likely to have staked all the lands surrounding the Mining Claim, and not just a broad swath heading due north. Asked whether it was Jerome's intent to record all of Lot 8 in Rathburn Township, seeing as this is what was shown, Mr. McLeod stated that it was the mineral showing only which governed the staking. According to Mr. McLeod, there was nothing on the ground to guide Jerome as to where his showing was located. The only way to do so was to look at claim posts. Mr. McLeod did not agree with Mr. Norwood's suggestion that Jerome's Application to Record plainly indicates an intent to stake all of Lot 8. Mr. McLeod explained why Jerome staked an additional nine mining claims in one direction only, stating that the plan had been to connect with mining claims already held by Flag to the north. McLeod felt that the showing was well covered. In retrospect, they would have staked south if they thought the showing was located further south.

In another Application to Record from Mr. Jerome (Exhibit 3b, Tab marked as Exhibit 5) in which six mining claims (809097 to 809101) had been recorded on August 3rd, 1984, Mr. Norwood noted that Jerome indicated in his sketch that he had tied onto the west side

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three of Graham's mining claims, numbered 647667, 647668 and 647682. Mr. Norwood stated that this illustrates Jerome's intent to tie onto to those of Graham. Mr. McLeod's response was that the sketch is not correct. He stated that the #3 post of 809104 was actually found on the ground at the #4 post of 647668. The inspection done by MNDM shows no indication of Graham's mining claim 647667.

While Mr. McLeod continued to insist that there was no proof that Graham's 647667 existed, he did not know whether Jerome's #3 post of 809104 overstaked Graham's 647667 claim. Mr. Norwood suggested that a mining claim which completely overstakes a pre-existing mining claim is not valid.

Referring to the sketch accompanying Graham's Application to Record (Exhibit 3b, Tab marked as Exhibit 4) Mr. Norwood pointed to the distances marked on the posts for the boundaries. Mining Claim 647667: north - 1320'; east - 1300'; south - 1320'; and west - 1500. Mining Claim 647668: north - 1320'; east - 1200'; south - 1320'; and west - 1000'. Mr. McLeod stated that he didn't care what took place in 1982, as it might well have been shown on the sketch, but it was strange not to have found it on the ground. The tribunal notes that Graham's mining claim 647667 was cancelled on August 10th, 1988, with Mining Claim 809104 having been staked in 1984.

Mr. McLeod stated that work continued on the Flag Mining Claims until his discovery in 2000, when it came to his attention that the boundary between Scadding and Rathbun Townships was not well marked. Mr. McLeod make passing reference to his knowledge that there were problems with the boundary in 1984. Mr. McLeod alleged that the former Mining Recorder for the Sudbury Mining District, was well aware in 1984 that the boundary between Scadding and Rathbun had grown in and there has been no retracement. One question posed by Mr. McLeod was why, if MNDM knew of the problems with the boundary, it failed to act for a period of 16 years.

Mr. McLeod did not deal with this allegation directly in his evidence. However, there was sufficient information filed that the tribunal is able to note the following. Mr. Jerome continued to stake in this area on August 8th and 9th, 1984 (Exhibit 3b, Tab Exhibit 7), purportedly in Scadding Township, having staked eight further claims (809112 through 809119).

At Exhibit 3b, tab marked as Exhibit 7i, are field notes of an inspection carried out on January 19th, 1985 involving this staking of Jerome and that of D. Ashick. At issue was whether Jerome's stakings of his mining claims 826230 and 826231, done on September 12th, 1984 was overstaked by Ashick's mining claim 830818, on December 18th, 1984. While the relevant Applications to Record were not included, the claims in question were located to the east of Jerome's 809104.

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Jerome had purportedly staked these claims, along with several to the north and west, in Rathbun Township, but his claims were found to intrude a considerable distance into Scadding. Ashick's 830818 covers the south east and southwest portions of claims 826230 and 826231. Mr. Ashick did not have his northern boundary exactly coincide with the township line, but like the others involved in the current appeal, it sits marginally to the north of the line.

Also noted in this inspection is the #4 post of Jerome's 809118, from August, 1984, located at the same place as Mr. Ashick's #1 of 830818. Looking to Jerome's Application to Record, it is noted that Mining Claim 809118 is shown as being along the township boundary.

Apparently, as a result of the inspection, V.C. Miller issued an Order (Ex. 3b, tab marked as Exhibit 8), indicating that Mr. Ashick was concerned that Jerome's 826230 and 806231, recorded in Rathbun, may overstake into Scadding. He found that Jerome had overstaked into Rathbun Township. He noted that, with no retracement survey having been carried out, confusion was created on the ground. He also found that there is no adverse interest, so that corrections would be required of the staking. Mr. Miller ordered that the #4 post of 809118 be moved +- 100 feet to the south, to a location at the northeast corner of the claim in Scadding. However, he does not mention either of 826230 or 826231, which apparently also extend into Scadding.

Returning to Mr. McLeod's evidence, he stated that Flag has invested between $80,000 and $100,000 on the land where the showing exists. There have been 15 drill holes. In September, 2000, Flag found a significant new occurrence. Assays were put in. Mr. McLeod stated that he visited Mr. Roy Spooner, the Provincial Mining Recorder, on September 22nd, 2000, who advised that he would check the status of the Mining Claim to determine whether it was in good standing. Mr. Spooner left Mr. McLeod with a number of telephone numbers where he could be reached. However, two hours later, Mr. Spooner called and informed Mr. McLeod that the Mining Claim had gone from Rathbun to Scadding Townships. This was significant, as Rathbun was a surveyed township and Scadding was in an unsurveyed township. From this discussion, it appeared that Flag's area of interest and activity actually on the ground was on open land. Mr. McLeod called Ray Lashbrook and advised him of the problem. They determined that it would be best to re-stake 809104; however, once on the ground, it was discovered that the area had been staked by Mr. Terry Loney.

Mr. McLeod's evidence was that Mr. Spooner didn't say how he knew that the portion in Scadding was open. However, he later denied that it was open. Apparently, it was overstaked as Mining Claim 1230927 on September 17th, 1997 by Terry Loney, who transferred it to Solitaire on September 11th, 2000. Solitaire's assessment work efforts were concentrated on the south portion of the claim, so that Mr. McLeod had no knowledge of this until he spoke with Mr. Spooner.

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Mr. McLeod referred to several provision in O.Reg. 7/96, which are reproduced, and for which he is relying to have Mining Claim 809104 found to be validly staked, but in Scadding Township:

> **11.** (1) The staking of a mining claim in not invalidated for the sole reason that it encompasses land that is not open for staking unless the land encompassed in the claim constitutes an unpatented mining claim recorded prior to the time of the staking.
>
> (2) Land that is not open for staking that is encompassed in a valid mining claims does not form part of the area of the mining claim .

Subsection 71(2) of the **Mining Act** states that if one year has elapsed since the day of recording, it shall be conclusively deemed to have been staked out and recorded in compliance with the **Act**. However, Mr. McLeod referred to section 20 of O.Reg. 7/96, which states:

> **20.** If it appears that a licensee has attempted, in good faith, to comply with the Act and this Regulation, a mining claim of the licensee is not invalidated by,
>
> (a)the inclusion in the area of the claim of an area of more or less than the applicable size; or
>
> (b)the licensee's failure to describe or set out the actual area or parcel of land staked in the application to record the claim or in the sketch or plan accompanying the application.

Mr. McLeod stated that this is fundamental to principles underlying staking under the **Mining Act**.

Referring to the subsequent inspections which took place, Mr. McLeod was of the opinion that Loney's staking should have been invalidated, when it was discovered from the inspection that Mining Claim 809104 had been completely overstaked.

Mr. McLeod engaged Mr. Raymond Lashbrook, both to inspect the area and subsequently, to stake open land and land staked by Loney which McLeod sought to challenge through the dispute which is the subject matter of this appeal. The inspection disclosed that both Flag's Mining Claim 809104 and Loney's Mining Claim 1230297 had their #1 posts in Rathbun. In fact, Loney's #1 was located further north than that of Flag. However, it is clear that both Mining Claims are located in two townships.

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Mr. McLeod correctly pointed out that the **Mining Act** provides that a mining claim cannot go from a surveyed to an unsurveyed township. If this is the case, then Loney's staking must also be held to be invalid from the boundary on south.

To cover Flag's equity, Lashbrook staked the lands covered by that portion of Mining Claim 809104 located in Scadding Township. Provincial Mining Recorder, Blair Kite, stated that Loney's Mining Claim 1230297 had not been challenged for a period of over one year, so that a dispute could not be filed without leave of the Commissioner.

One matter of particular concern to Mr. McLeod was the redrawing of the Disposition of Crown Lands Map for Scadding Township, which occurred after his September, 2000 discussion with Mr. Spooner. Two Disposition Maps, filed as Exhibit 3, Tab 3, A (dated September 8th, 2000) and B (dated September 27th, 2000) depict the "before" and "after" situation with lands open for staking. Map A depicts lands open for staking along the top of the Loney/Solitaire's Mining Claims 1230927, 1230928 and 1244754. Relying on the legend, its dimensions appear to be about 150 metres wide and 5000 metres long. On Map B, the open lands have been eliminated from the Loney/Solitaire Mining claims, and are only found along the north end of mining claim 1244754. Surprised by the redrafting, Mr. MacLeod stated that he could not discover what had happened.

Mr. McLeod reiterated Jerome intended to stake *that* land. It was the geological features he was interested in and not the survey fabric. He referred to Robin Goad's hand drawn map entitled "Southern Boundary Diamond Drill Plan Claim 809104" (Ex. 8) and Report on Geophysics and Diamond Drilling at Rathbun Lake by Robin E. Goad, Consulting Geologist, March – June, 1986 (Ex 3c, Tab1), which both depict Mining Claim 809104 and describe it as being in the southern portion of Rathbun Township. Mr. McLeod stated that it is a common practice to include a claim map with an assessment work report, but doing so is not evidence of proper location on the ground. The report shows 3 drill holes located on 809104, but this was not material to the drill program because the work was concerned only with geology.

According to MNDM, Jerome's staking of 809104 overstaked Robert Graham's Mining Claim 647667. However, Mr. McLeod pointed out that two inspectors were unable to find any of the posts used in this staking. They did find the #4 post of 647668 (located south of 647667) beside the #3 of 809104. If 647667 had actually been staked as shown, there should have been evidence of its staking on the ground, but it has never been found. If one of its posts had been on the ground, Mr. McLeod insisted that Jerome would have found it. There is no evidence on the ground, no stakes or posts, no proof of any claim posts. Mr. Lashbrook also never saw any such evidence during his inspections and staking. Mr. McLeod insisted that if Mr. Jerome had seen evidence of an existing staking, he never would have proceeded to stake.

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Mr. McLeod attempted to uncover more about the initial surveys of Rathburn and Scadding townships. In discussions with Ministry of Natural Resources employee, Allan Day, of Survey Records, he was apparently told that although Scadding was surveyed in the 1890's it is not recognized as a surveyed boundary for MNR purposes. After speaking with his supervisor, Mr. Day now denies saying that the boundary was not recognized as an official boundary. In answer to Mr. Guy's question, Mr. McLeod stated that the boundary is both surveyed and unsurveyed. Under cross-examination, it was clarified that Mr. Day was actually a clerk. Despite what occurred in his attempts to discuss the matter, there had been some indication later that there was supposed to be a lot of retracement work. However, whatever had been done, it was not recognized as official survey boundary.

In conclusion, Mr. McLeod stated that he never spend a cent on assessment work in Rathbun. The Jerome staking had been done in good faith. He posed the question that if one relies on a boundary which is not recognized, how does one go about ensuring one's rights to the land actually staked on the ground.

Under cross-examination by Mr. Loney, it was stated that the strength of Flag's case is on where Jerome intended to stake, and yet he was not brought forward as a witness. Mr. McLeod stated that the events took place 17 years ago. Jerome spent his whole life staking, so it would be difficult to recall the particulars of this single staking. However, Jerome sold Flag the claims on the strength of the showing. Mr. Jerome is a well qualified staker. Asked how such a big mistake could have been made, Mr. MacLeod stated that it was not a mistake. Jerome thought he was in Rathburn. Jerome thought all of the feature was in Rathbun. There were no physical landmarks to tie onto. As justification he stated that mistakes are made occasionally and that the terrain involved was difficult, being marshy and wild.

Mr. McLeod stated that in 1984, there had been a significant mineral discovery of platinum and palladium, which was shown as .06 oz in a 1986 assay. Drilling took place in 1986 and again later on. Mr. McLeod reiterated that he did not know his drill holes were located in Scadding.

Mr. MacLeod was not aware that the Loney's Mining Claim 1230297 was a restaking of 1198288. Flag did not tie on to the south of its claim as McLeod felt that Flag had all it needed in Rathburn. The Assessment Reports did Goad show mineralization south of 809104. Flag carried out three to four drill holes 1 mile south in MacLaren Lake – in the same claim block as was covered by the 647667 and 647668.

No re-direct took place.

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Raymond Levi Lashbrook has been involved in mining exploration since 1969, with experience in mining, line cutting and prospecting. He reviewed the events of September, 2000, when he became aware of a claim problem and open ground to the south of what was recorded on paper as 809104. He was shown the Disposition of Crown Lands Map (Exhibit 3, Tab 3 (dated September 8th, 2000) Map A). He went to the site and tried to find the location of the north boundary of 809104 as shown on the map. He followed the road south down towards the lake. He found the #4 post of 1230297 on the lakeshore, north and west of where it was shown on Exhibit 3, Tab 3 Map B. Based on his view of the area, he realized that all lands to the south of the #4 post were overstaked. This would have encompassed all of Flag's Mining Claim 809104.

Based upon his view of the property and discussions with McLeod, Mr. Lashbrook believed that the Flag Mining Claim 809104 was invalid, meaning that it was invalid as it was staked on the ground, rather than how it appeared in the sketch. They assumed that the Loney Mining Claim 1230927 was also invalid, as such a large portion of it had been staked north of the Rathburn Scadding boundary, moving from surveyed to unsurveyed lands. Together, they determined that Lashbrook would stake a mining claim and dispute Loney's staking of 1230927. Therefore, Mr. Lashbrook staked Filed Only Mining Claim 1244798 ("FO 1244798").

MNDM sent inspectors into the field twice, and Mr. Lashbrook attended the second time. He had located the posts of Mining Claim 809104 and Loney's Mining Claim 1230297. He had already staked and filed his FO 1244798. During his time in the field, he had also located the survey rock cairn post, which he showed to the inspector. Mr. Lashbrook stated that he used GPS to locate the cairn on the township line.

Mr. Lashbrook described his observations of the various posts, boundaries and GPS findings. The #4 post of 809104 is on the drill road; Solitaire's #4 is located to the north and west of it. At Flag's #3 post was the #4 post of 647668. Mr. Lashbrook did not see any tags for 647667, but was unaware during the time he was in the field that there had been an overlap between the times when Graham held 647667 in good standing and Jerome staked 809104. During the inspection tour, the #1 post of 647668 was not located; only the #4 post of 647668 was found laying on the ground and rotting.

Referring to Jerome's Application to Record mining claims 809097 and 809096, Mr. Lashbrook pointed out that Jerome had indicated that he ran these claims along the western boundary of 647667 and 647668. Mr. Lashbrook pointed out that Jerome depicted where he thought the southerly boundaries of the Graham claims were through the use of a dotted line. Had he actually found a corner post or even a line in the field, he would have shown this on his sketch, but according to Mr. Lashbrook, since it was absent, there is no documentary evidence that Jerome located any of the posts.

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Referring to Graham's Application to Record, and the irregularly shaped mining claims, Mr. Lashbrook stated that in unsurveyed territory, each side of a mining claim must be 1320 feet, unless the staker was tying on to something smaller. In this case, Graham appears to have tied on to the # 3 and #4 posts of mining claims 606185 and 606186. In a surveyed township, one can stake any open ground, without being required to tie onto anything.

Referring to Map 5 (Exhibit 3e, attached to these Reasons as Schedule "A"), Mr. Lashbrook stated that the pink area, showing Flag's 809104 on the ground is more or less correct. But in the field, there was no gap between it and the north boundary of 647668, located to the south. There is a faint line of green shading where the #4 of 647668 was found on the ground.

Mr. Lashbrook stated that he knew Mr. Bud Graham, an engineer with whom he prospected. Mr. Lashbrook could not guess as to whether Graham's 647667 was a phantom claim. Like Mr. McLeod, Mr. Lashbrook doesn't know whether 809104 covers the land covered by 647667, because he doesn't actually know where that claim is. However, Mr. Lashbrook assured the tribunal that if Murdo McLeod had been working on Graham's mining claim, Mr. Graham would have not been quiet about it.

Under cross-examination by Mr. Loney, Mr. Lashbrook stated that he used a GPS to accurately stake his FO1244798 He started one mile east where he thought the boundary was located and blazed west. One mile away he found a survey pin where he established the north boundary of his claim, going from the #1 to #4 posts. It was a monument, quite overgrown, located near a red pine with markings. There were old rotted posts, one with numbers. Asked whether he was aware that north boundary runs into Rathbun, Mr. Lashbrook indicated that he was, as there was a magnetic variance pulling about 25 to 30 metres north. The pin sulphides with magnetite and plymetite caused a magnetic variance, the problem putting one off to a factor of 10 degrees, within 200 metres.

Mr. Lashbrook stated that he never met Mr. Jerome, but was certain that Jerome couldn't have known he was in Scadding. There was a discussion of whether there were features from which one could measure, with Mr. Loney insisting that one can see Lake Wanapitei from the top of the showing. Using the islands would have created a variance of 200 metres.

According to Mr. Lashbrook, Mining Claim 809104 overlaps into Scadding by a distance of 250 metres. The showing found by Mr. Jerome is located about mid-claim, approximately 180 metres north of the south boundary of the claim as staked on the ground. Mr. Lashbrook stated that it was possible for Jerome to have mistaken Rathbun for Scadding, given the difficulty in establishing the township line. However, he insisted that Jerome's intent had been to stake the showing.

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Mr. Lashbrook described what he found in the area. He located the #4 post of Loney's 1230297 near the lakeshore, being a loose post lying on the ground. Mr. Lashbrook stated that he stood it up. According to him, its location was odd in that he was unable to locate any fresh blazes, despite following what should have been the line both north and south. He found a line post, which indicated the direction of the #4 post, leading to his conclusion that the #4 post had been moved, as it was not in the correct location. The other lines of 1230927 were easy to locate, and Mr. Lashbook concluded that the #4 post was not deliberately moved. It was his conjecture that no one knew what was going on on the ground, due to the magnetic variation and difficulty establishing the Township boundary, but he did not believe that there had been tampering.

Mr. Lashbrook located the north boundary line of 1230297 approximately 75 to 80 metres north of the Township boundary line. According to his assessment, using GPS, the claim was well staked. There is a problem, however, with larger claims. He followed from the #1 to #2 post, whose line was good. Then, he went west and followed the tie on to the claim to the south. After turning north, heading to the #4 post, Mr. Lashbrook found a great distance between the line post and the #4 post. He found the length of the west boundary to have been approximately 1000 to 1025 metres, instead of the required 800 metres. Mr. Lashbrook did not think the variation was due to where the line was brought across. Rather, he thought that it was due to the magnetic variance.

Referring to the 809104 Mining Claim, Mr. Lashbrook stated that a variance of 100 feet on a 1320 foot square claim is not unreasonable. However, 900 feet in variation is very serious.

Referring to the Map for Rathbun Township (Exhibit 3, Tab 5), and asked whether he looked for any indications of mining claims 1211038 or 1198334, Mr. Lashbrook stated that he saw the #3 post for 1198334 north of the Township boundary. Mining claim 1211038 is located along the shoreline of Wanapitei Lake, to the east of where 809104 is shown on the map, being a long narrow claim, extending from the township boundary northward. Mining claim 1198334 is a larger, four unit claim, located one claim unit east of where 809104 is shown on the map, extending from the township boundary northward. Mr. Lashbrook stated that 1211038 had been staked recently, but he could not say whether it was tied on to 809104.

Mr. Lashbrook stated that he had not looked for Graham's 647667 when he staked his FO 1244798. It was possible that it was on the ground, as he had seen a lot of rotting posts. However, he conceded that he could have missed it. Describing his sketch, Mr. Lashbrook stated that 809104 is west of 1211038 and is in Rathbun Township. It was staked February 28-29, 1996, having been staked prior to 1230297.

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Concerning the restaking of mining claim 1191288 as Loney's 1230297, Mr. Lashbrook was aware that it was a re-staking of the prior mining claim, although he was not sure of the date. In was feasible in 1996 for Charron to tie on to the 1995 claim. However, he did not inspect these claims and cannot be sure if the tie on occurred.

Under cross-examination by Mr. Norwood, he referred to the 809 series mining claims located to the west of the Graham claims. He suggested that it is standard procedure to put existing mining claims alongside those under staking for demarcation purposes. He notes that this was done to the south and east of the recorded mining claims in the 809 series. When asked whether there is any indication that the 809 claims tied on to other claims, Mr. Lashbrook stated, "not to any claim posts". Asked to show on the sketch where he was in relation to the other claims, Mr. Lashbrook stated that the map is effective for the Mining Recorder in the Mining Recorder's Office. However, Mr. Lashbrook didn't find the posts for those particular mining claims. For example, his own line was 1450 feet long, while the line for Graham's 647667 was 1320.

Referring to Map 5 (Ex. 3e, Claim Locations as per Application to Record Sketch and Description vs. Physical Location of Staking), the actual location of Graham's #4 post of 647668 is in the same position as Flag's #3 post of 809104. This is significant as Rathbun is a surveyed township where land is referred to by Lot and Concession. Jerome applied to record the southwest ¼ of the south ½, Lot 8, Concession I. This is red box on Map 3e. Mr. Lashbrook agreed, but stated that there were no boundaries to tie on to.

Anthony Tyrone James Scarr, Mining Lands Technician with MNDM gave evidence for the respondent, recognized by the tribunal as an expert in technical lands issues under the **Mining Act**.

He prepared Exhibit 3b, entitled "Technical Review Flag Resources Limited vs Solitaire Mineral Corporation Rathbun and Scadding Township Boundary". The following is reproduced from his technical review:

> Mr. Scarr summarized the methodology used to illustrate his findings. His conclusions were that the majority of Mining Claim 809104 was located sought of the Rathburn Scadding boundary. As for Mining Claim 1230297, the majority of its northern limits were located 60 to 70 metres north of the same boundary
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> **SUMMARY**
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> **Township Survey Fabric**
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> 1. Rathbun Township is a surveyed township
> 2. Scadding Township is an annulled or unsurveyed township.
> 3. The actual township boundary was found to be 30 metres south of the boundary as illustrated on the claim maps.

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4. The area is undeveloped and the forest cover is mainly small stunted mixed timber being thick in areas and the result of acid burn as well as forest fires. The locating of survey evidence on the ground is difficult. However, the proximity of Lake Wanapitei and its shoreline features provides sufficient landmarks to estimate the location of the township boundaries in this area using compass and chain and available maps.

Mining Claim 809104 (Flag Resources Limited)

1. Mining Claim 809104 is essentially physically displaced 1 claim unit south of the location indicated on the Application to Record.
2. Mining Claim 809104 (Flag) was recorded as a single unit claim being the southwest ¼ of the south ½ of Lot 8, Concession 1, Rathbun Township.
3. Mining Claim 809104 is substantially physically staked in Scadding Township and on lands apparently not open at the time of staking.
4. The lands contained within Mining Claim 809104 had been staked prior by B. Graham in 1982 and the graham claims were valid at the time 809104 was staked.
5. Mining Claim 809104 is completely over-staked by Mining Claim 1230297.
6. Claim staking records and physical evidence from inspections for the area confirm the A. Jerome, the staker of 809104 staked other claims in the area, in the same time frame, in general conformance with the township fabric. Futher, the staker of Mining Claim 809104 was apparently aware of the prior staking and recording of Mining Claim 647667, which was over-staked by Mining Claim 809104.

Mining Claim 1230297 (Solitaire Mineral Corp)

1. Mining Claim 1230297 was recorded as being a block claim of 8 units being in the northwest corner of Scadding Township.
2. Mining Claim 1230297 is substantially physically staked in Scadding Township and is estimated at 11.3 units in size.
3. Mining Claim 1230297 encroaches 75 metres into Rathbun Township, completely over-stakes Mining Claim 809104, and encroaches up to 75 metres into Mining Claims 1198334 and 1211026, both also held by Flag Resources.

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SCOPE OF THE REVIEW

1. Inspection reports of 2 inspections conducted in October 2000 were reviewed.
2. Physical evidence of staking by Graham (1982), Jerome(1984), Charoon (1995/6) and Loney (1997) was found during 2 the field inspections in October 2000 and claim post locations were recorded using GPS. Also a survey monument demarcating the township boundary was also found and its location was recorded using GPS.
3. GSP units used in the field during these inspections were Farmin 12XL and Magellan Promark II handheld units. All points were differently averaged for a minimum of ten minutes.
4. All features recorded and located with GPS were plotted on digital base maps using AutoCAD Map software.
5. The actual township boundary was plotted on the digital base map using the surveyor's field notes for original township surveys for Scadding and Rathbun Township and the known location of the survey monument planted by J. Deardon. O.L.S., in 1959.
6. Filed notes from a Ministry inspection in 1985 (NER –86-01)SUD)) and a subsequent Mining Recorder's Order dated June 12, 1985 were reviewed as they pertained to a similar staking along the township boundary, in the same general area and east of the disputed claims. This inspection and Order confirmed physical staking evidence by the same staker as Mining Claim 809104, and the staking occurred in the same time frame (August 1984).
7. Applications to record and claim abstracts on record in the Provincial Mining Recorders' Office were reviewed.

SALIENT FACTS

Township Boundary between Rathbun and Scadding townships

1. The township boundary between Rathbun and Scadding townships was found on the ground during the October 12, 2000 inspection by locating a survey monument plated by J. Deardon, O.L.S. in 1959 (**Sta 2a**, Photos 5,6,7, and 9).
2. The survey monument was planted in 1959 to replace the original post for the northeast corner of Lot 9, Concession 1, Scadding Township (**Exhibit 1**, Survey Plan of Location JD 612).
3. The survey monument is 39.83 metres west of the southwest corner of Lot 8, Concession 1, Rathbun Township.

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4. The survey monument location was recorded on the ground using GPS.
5. The original township boundary was found to be approximately 30 metres south of the boundary as shown on the claim maps. (**Map 1**, Mapped township boundary vs GPS boundary location.
6. The 30 metres discrepancy and degree of accuracy between the mapped and actual boundary is consistent with currently available mapping standards of township survey lines in Ontario.
7. With the exception of Mining Claim 809104, the claim posts in the area erected for the Flag and Solitaire claims as the limits of Rathburn and Scadding, were found from within 11 metres to 87 metres north of the township boundary. This is with reference to the boundary shown on the claim maps.
8. Conversely, Mining Claim 809104 which was recorded as part of lot 8, Concession 1, Rathbun Township, can be described as being displaced one claim unit to the south relative to the adjacent claim fabric. Its southeast (#2) and southwest (#3) posts demarcating its south limits are located 300+ metres south of the relative location of the township boundary.

Mining Claim 809104 (Flag Resources)

1. Mining Claim 809104 was recorded August 20, 1984 as being the Southwest ¼ of the South ½ of Lot 8, Concession 1, Rathbun Township, being part of a block of staked claims comprising the whole of Lots 8 and 9, Concession 1, Township of Rathburn. (**Exhibit 2**, Application to Record/Abstract, A. Jerome, 809104 et al).

2. Mining Claim 809104 was physically staked by A. Jerome on August 5, 1984 primarily in Scadding Township and on lands apparently not open for staking. (**Map 2**, Application to Record vs Physical Staking)

3. The area was staked prior as Mining Claim 647667 by B. (Robert) Graham on May 11, 1982. (**Map 3**, Jerome claim staking 809104 vs Graham claim staking 647667, 647668)

4. Mining Claims 647667 and 647668 were staking in 1982, prior to 809104 (1984) and were valid at that time and until 1988. (**Exhibit 4**, Application to Record, B. Graham, 647667 et al)

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5. All four corner posts were located and the coordinates were recorded with GPS. (**Sta 4**, Photo 7; **Sta 1a**, Photos1, 2; **Sta 4a**, Photo 14; **Sta 5a**, Photo 19 **Sta 6a**, Photos 22, 24)

6. The #3 post of 809104 was coincidental to the #4 post for Mining Claim 647668, both of which were found and recorded. (**Sta 6a**, Photos 22, 23)

7. Mining Claim 647667 was recorded as contiguous to Mining Claim 647668, and occupied the lands from the north boundary of Mining Claim 647668 to the north boundary of Scadding Township.

8. Mining Claim 809104 was substantially physically staked in Scadding Township, excepting the northern 60-70 metres portion of the claim being in Lot 8, Concession 1, Rathbun Township.

9. A. Jerome's application to record the block of claims, including Mining Claim 809104, included Lots 8 and 9, Concession 1, Rathbun Township. The application demonstrates an acknowledgement of the relative geographic location of the township boundaries and lot lines. The recording sketch illustrates the shoreline features of Lake Wanapitei adjacent to Lot 9, the posts erected along the shore, and staking boundaries corresponding with the township boundary and lot lines.

Mining Claim 1230297 (Solitaire Resources)

1. Mining Claim 1230297 was recorded as a block claim consisting of 8 units being in the northwest corner of Scadding Township. **Exhibit 3**, Application to Record, T. Loney, 1230297 and 1230298)

2. Mining Claim 1230297 was physically staked by Terry Loney, commencing on September 17, 1997 and completed on September 18, 1997.

3. Mining Claim 1230297 is substantially within Scadding Township.Mining Claim 1230297 was record (sic) as 8 claim units or 128 hectares.

4. Mining Claim 1230297 was estimated to be physically staked as 11.3 units or 182 hectares on the ground. This estimate is qualified as the southwest (#2) corner post location was not investigated and

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its location is estimated. (**Map 4** , Application to Record 1230297 vs Physical Staking of 1230297 and 809104)

5. The #1, #3, and #4 corner posts and one line post were found in the field and the coordinates recorded with GPS. (**Sta 1**, Photo 1; **Sta 3a**, Photos 11, 12, **Sta 7a**, Photos B1, B2, **Sta 8a**, Photo B3)

6. The northeast corner post (#1) and northwest (#4) corner post are within the Township of Rathbun and are respectively 72. 5 metres and 75.5 metres north of the mapped township boundary.

7. The northwest (#4) post is erected in proximity to the #3 post of Mining Claim 1211038 (Flag Resources) and the northwest portion of the boundary approximates the south boundary of Mining Claim 1211038.

8. The remaining portions of the north boundary to the east then cross lands of prior recorded staking, including approximating the boundary between claims 809104 and 809107, and up to 62 metres of encroachment into Mining Claims 1211026 and 1198334, both also held by Flag Resources.

9. Excepting Mining Claim 809104, the degree of encroachment into Flag Resources claims varies from nil in respect to claim 1211038 to 62 metres with respect to claim 1198334.

10. Conversely and due to the displacement of 809104 one unit south of the relative surrounding claim fabric, Mining Claim 809104 is completely overstaked by Mining Claim 1230297.

Mining Claim 647667 and 647668 (Robert Graham)

1. Mining Claims 647667 and 647668 were valid from May 10, 1982 to August 16, 1988 and were in existence and valid when Mining Claim 809104 (Flag) was staked in 1984. (**Exhibit 4**, Application to Record, B. Graham 647667 et al)

2. Mining Claims 647667 and 647668 were recorded as being in the northwest corner of Scadding Township.

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3. Mining Claim 647667 and 647668 were physically staked on May 10, 1982 as part of a block of claims in Scadding Township, and were recorded on June 7, 1982.

4. Mining Claim 647 had its northern boundary along the north boundary of Scadding Township, was contiguous to Mining Claim 647668, and occupied the lands from the north boundary of Mining Claim 647668 to the north boundary of Scadding Township.

5. The #4 post of Mining Claim 647668 was found and the location recorded with GPS.

6. The #4 post of 647668 was found coincidental to the #3 post for Mining Claim 809104, both recorded with GPS. **(Sta 6a**, Photos 22, 23, and 24)

7. Mining Claim 647667 was apparently over-staked by Mining Claim 809104. (**Map 3**, Jerome claim staking 809104 vs Graham claim staking 647667, 647668)

Mining Claim 809096 and Mining Claim 809097

1. Mining Claims 809096 and 809097 were recorded as being in the northwest corner of Scadding Township. **(Exhibit 5**, Application to Record, A. Jerome, 809096 et al.)

2. Mining Claims 809096 and 809097 were physically staked by A. Jerome on August 3, 1984 west of and adjacent to Graham's Mining Claims 647667 and 647667.

3. A. Jerome demonstrated an acknowledgement of the location of the Graham staking (Claim 647667 and 647668). On the application to record sketch, A. Jerome illustrates the relative location of the Graham claim adjacent to his staking and along the north boundary of Scadding Township. On the sketch A. Jerome labels the Graham Claim as "647667, recorded; 647448, recorded". The staking of these claims by A. Jerome occurred 2 days prior to the staking of Mining Claim 809104 and recorded on the same date.

4. A. Jerome demonstrated an acknowledgement in his application to record of the geographic location of his staking relative to the boundary between Rathburn and Scadding Townships. A. Jerome illustrates the shoreline of Lake Wanapitei along which he erected

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his posts as well as the point where the Township boundary meets the shoreline. Further, the sketch projects the boundary to the west to the head of land opposite Scadding (Cochrane) Bay. The boundary projection and other shoreline features provide reasonable landmarks for orientation. The staking of these claims occurred 2 days prior to the staking of Mining Claim 809104 and recorded on the same date.

Mining Claim 809118

1. Mining Claim 809118 was recorded as being in Scadding Township with its north boundary along the north boundary of Scadding Township. (**Exhibit 6**, Application to Record, A. Jerome, 809118 et al.)

2. Mining Claim 809118 was located approximately 1600 metres, or 4 claim units east of the east boundary of Mining Claim 809104.

3. Mining Claim 809118 was physically staked by A. Jerome on August 8, 1984, being 4 days after the staking of Mining Claim 809104.

4. On January 29, 1985, Mining Claims Inspector M.D. Thibault conducted an inspection involving Mining Claim 809118 and found the northwest (#4) post to be located 100 feet (30.5 metres) north of the township boundary and physically in Rathbun Township. (**Exhibit 7**, Mining Claim Inspection Report NER-85-01 (SUD))

5. Subsequent to the inspection, a Mining Recorder's Order, dated June 12, 1985, was issued to correct the staking and move the #4 post 100 feet south to the township boundary. (**Exhibit 8**, Mining Recorder's Order dated June 12, 1985)

6. This inspection and order demonstrate A. Jerome's knowledge on the ground and at the time of staking, of the relative location of the township boundary, i.e., within 100 feet.

Under cross-examination by Mr. Guy, it was suggested that the illustrations showing the locations of the mining claims on the map which were not to be confused with where the stakers thought they were when staking on the ground. Mr. Scarr stated that he never looked for the posts from Graham's 647667. Loney overstaked five or so of the Flag claims - including 809104, 1211038, 809107, 1211026 and 1198334.

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In Jerome's sketch of his August 3rd staking, he shows the Graham claims. What is not clear is whether he was tying onto those claims or on to the Rathbun Township boundary. Similarly, he was abutting the township boundary. Mr. Scarr suggested that the intent was to leave no land open between Jerome and that to the east. Whether he physically tied on and found evidence of pre-existing mining claims would be conjecture.

Mr. Scarr stated that Scadding Bay is a good landmark. There are strong features from which to orient oneself. There is also a summer resort location, a cottage lot, which would be a significant feature to tie on to. Asked whether it was common to stake a perimeter, then set the claim lines, Mr. Scarr stated that it is possible, but he was not sure. It is not common to do so.

On re-direct, Mr. Scarr stated that, of the overstaking which occurred in the area, only the Flag Mining Claim 809104 was completely overstaked. The others had about a 60 to 70 metre incursion. While this does not invalidate the staking, it is not valid on that portion which is overstaked. This can be rectified by a Mining Recorder's Order to move the posts.

David Vallilee, a mining lands technician with MNDM, was recognized as an expert witness in staking procedures and practices. In October of 2000, Mr. Vallilee was required to inspect the mining claims in this appeal. He attended with Phil Brown and Ray Lashbrook, to inspect 801904, being able to drive directly along a bush road to the #4 post. Mr. Vallilee described his inspection, which was conducted using GPS and a hip chain. He stated that he did not walk between all of the posts, but confirmed the locations of the posts found. The following is a summary of comments found for photographs corresponding to the various stations, which are set out in the map labeled as Map 4 (Ex. 3b), with photographs included, marked according to station:

> **Station 1**: **Photograph 1** of common post, being #1 post for 1230297 and #4 post for 1230298. **.Photograph 2** of common post #1 of 1129288 [forfeit, which was overstaked by 1230297] and #4 of 1198289.
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> **Station 1a**: **Photograph 1**, Common post #3 of 809107 and #4 of 809104. **Photograph 2** of tag #4 of 809104. **Photograph #3**, tag #3 of 809107.
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> **Station 2a**: **Photograph 9** of a carved wood post in stone mound and very old cared post. These match the survey monumentation for Lot 9 of Scadding Township, as shown on the survey plan of Summer Resort Location J.D.> 612, surved in 1959 by J.D. Deardon, O.L.S. **Photograph 5** west face. **Photograph 6** south face. **Photograph 7** east face.

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Station 3a: approximately 9 metres east of Wanapitei Lake: **Photograph 11** of a stump post (illegible inscriptions on east face) and loose post #4 of Claim 1230927. **Photograph 12** of loose post #4 of claim 1230297. **Photograph 13** of post #3 of claim 1211039.

Station 4: **Photograph 7** #4 post 809104.

Station 4a. **Photograph 14** of a common stump post south face #1 tag of 809104. **Photograph 15** of a common stump post west face #2 tag 809107. **Photograph 16** of a common stujm post north face #3 tag of 809106. **Photograph 17** of a common stump post east face #4 tag 809105.

Station 5a: **Photograph 15** of a common stum post west face #2 tag of 809104. **Photograph 20** of a common stump post north face #3 tag 809105.

Station 6a: **Photograph 22** of two loose posts, post #3 claim 809104 and post #4 claim 647668. **Photograph 24** tag #3 claim 809104. **Photograph 23** tag #4 claim 647668.

Station 7a: **Photograph B1** common stump post west face, line tag inscribed "1200 m west #2 post 1230297". **Photograph B2** common stump post east face, line tag inscribed "400 m east #4 post 1230799".

Station 8a: **Photogarph B3** common loose post; north face, tag #3 of 1230297. **Photograph B4** common loose post; east face tag #4 of 1230299. **Photograph B5** loose post; north face, tag #3 of 1244793.

Mr. Vallilee stated that he looked to the Summer Resort Location JDD 612 (see Ex. 3b, Tab marked as Exhibit 1), which is located in Broken Lot 9, Concession I, bordering on Lake Wanapitei. This is a surveyed cottage lot, from whose surveyed location, it was possible to tie into the township fabric. He found the Scadding Township Trial Line at 579.58 B. Mr. Vallilee stated that he found the original post for the lot line, which was a planted iron bar in a stone monument [station 2a]. Mr. Vallilee noted that at one time, Scadding had been a surveyed township. He then went out to the lakeshore [station 3a], and proceeded to the #1 of 809104, at which he found the other posts and tags noted. From there, he proceeded to the #2, and confirmed its location. At station 6a, Mr. Vallilee found a standing stump post, with no writing, and no recent tampering. They

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were ready to fall over, and there were two more posts lying on the ground. However, Mr. Vallilee only looked for the #3 of 809104.

Looking to the assessment work reports filed, Mr. Vallilee attempted to determine where the work took place on the ground as a guide to where the work had been done. He used the geophysical work as a guide. He concluded from Graham's sketch in his Application to Record that the chaining of the mining claims had been done very carefully, but concluded that the angles were all wrong. They actually plotted further north than the sketch indicated where they were on the ground.

Under cross-examination, Mr. Vallilee admitted that he was not looking for other stakers' efforts. He did locate the #4 post of 647668 at the #4 of 809104. He didn't ever see the #3 post for 647667. All of the records in the MRO show the locations of claims 647667 and 647668. The northern part was in Scadding Township. He would have expected to find the #3 post of 647667 at the #4 post of 647668. Scadding is staked in aliquot parts of lots and part annulled. The partial survey fabric was done in September 16, 1952. According to him, the survey fabric is simply not there.

Under cross-examination by Mr. Loney, the anomaly on the map was discussed. However, Mr. Vallilee stated that there was no reason for the proton magnetometer survey not to be accurate.

In Re-direct, Mr. Vallilee confirmed that all of the mining claims he inspected were located in the unsurveyed township.

Mr. Frederick Roy Joseph Spooner gave evidence, having been recognized as an expert in the administration of Part II of the **Mining Act**.

Mr. Spooner described events commencing on September 22nd, 2000, when Mr. McLeod approached him with questions concerning the location of Mining Claim 809104 and whether it was properly located in Scadding or Rathbun Township. Relying on the Application to Record, Mr. Spooner advised that the Mining Claim had been recorded as being in Rathbun.

Based on the Application, maps and abstracts, Mr. Spooner was of the opinion that Mr. McLeod was entitled to the area comprised of part of Lot 8, Concession 8. Mr. Spooner stated that he had no idea at the time of the physical location of the Mining Claim on the ground, but that the operation of the **Mining Act** puts it in Rathbun and not Scadding. Drawing his conclusions for the records from 1984, the intent was to claim those lands in Rathbun. Subsection 42(3) of the 1980 RSO provides that a mining claim in a surveyed township surveyed into lots of 320 acres, which encompasses Rathbun, must be the southwest 1/4 of the south 1/2 lot. With the doctrine of substantial compliance, the validity of staking was never an issue made by the Mining Recorder.

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With changes to the **Mining Act**, effective June 3rd, 1991, the matter is deal with through Ontario Regulation 115/91 and now 7/96, subsection 5(11), applicable to surveyed townships. These provisions make it clear that staking in surveyed territory is governed by the lot and concession lines and not by the corner posts, which would govern for staking in unsurveyed territory. Also, where a claim has been on record for a period of one year, according to subsection 71(2), it is conclusively deemed to have been staked and recorded in compliance with the legislative requirements.

Mr. Spooner stated that it is difficult to determine the intent of Mr. Jerome, without his being present to ask him. As matters exist, one must turn to the Application to Record to determine his intent. Looking to subsection 97(2) the manifest intention as sworn to on the Application to Record is relied upon when a survey discloses fractions or gores not covered by the staking.

As to what occurred between the gap of land at the north end of Rathbun, shown in Map A and the absence of the gap in Map B, Mr. Spooner stated that it was necessary to re-establish the land boundaries, based on physical evidence on the ground. On September 26th, he returned and reviewed the historical maps of Scadding, along with Loney's Application to Record, which was for Scadding. The original survey for Scadding had been annulled for part of the township. Mr. Spooner noticed that Loney's Mining Claims 1230297 and 1230298 show an intention to tie onto the township line. Having that line illustrated on the sketch, Mr. Spooner felt that the maps in the MRO were misleading and asked that they be changed to accurately reflect the information in the file.

Mr. Spooner once again reiterated that the rules for surveyed and unsurveyed townships differ. Jerome showed his intent to be in Scadding by the way he recorded his claim. His failure to have done so would raise a question of validity of his staking. In 1980, a mining claim holder would enquire how to stake land. For example, can a legal description be prepared from the original survey. Subsection 5(11) of O. Reg 7/96 requires that any survey of a mining claim will be governed by the lot and concession numbers, as did section 42 of the **Mining Act**, R.S.O. 1980, which applied at the time of Jerome's staking.

In unsurveyed territory, the 1980 **Mining Act** required staking of 40 acres, being 1320 feet squared. Section 50 of the 1990 R.S.O. sets out the rights of a licensee. The mining claim was governed by the location of the four posts. Now, concerning the issuance of a lease, there are 32 diagrams setting out the surveyed boundaries of a mining claim, moving from post to post. Therefore, with a surveyed township, the inscription on the posts refers to the part of the Lot.

Concerning Jerome's staking of Mining Claim 809104, Mr. Spooner indicated that the implication of allowing it to be recorded where it sits on the ground, the shift would impact on over 70 other mining claims in Rathbun Township. Without dismissal of the

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appeal, it would end up in a hodge podge of endless possibilities of gores and overlapping claims affecting other grants and dispositions as well. An example is the **Public Lands Act**. It would be difficult to have good title. There would be a mix and match of title done by lot and concession and survey.

Under cross-examination, Mr. Guy questioned whether it was ever the case in a surveyed township that a staking would be governed by the posts. Mr. Spooner indicated that this staking occurred before 1991 and was thereby governed by the 1980 RSO. At that time, the location of the stakes did not govern. The Application to Record contains a sworn statement as to what the staker called for. In Jerome's case, this does not include what he staked. The system showed what one got in a surveyed township. This approach tried to reflect what the MRO had on paper. This included taking into account Mr. Loney's Application to Record.

In Re-direct by Mr. Norwood, Mr. Spooner read into the record the wording of s. 49 of the **1914** Act, stating that from that time forward, one gets what one called for. "A mining claim in unsurveyed territory is laid out north, south , east west, in a township surveyed into lots, a mining claim shall be such part of a lot or quarter section."

Terrence Patrick William Loney has worked in the mineral sector for 35 years. He staked over the lands formerly staked by Dwight Martin, namely 118289. In 1995, the map at the MRO showed Flag's 809104 tied onto Martin. In staking 1230297 and 1230298, he found the lines easy to follow. During the years 1997 to 2000, Mr. Loney performed the required assessment work on the mining claims, and in September, 2000, he transferred the claims to Solitaire. In August, 2001, Mr. Loney bought back what he called his Scadding/Davis interest, although the transfer has not yet been made.

In late September, 2000, Mr. Loney received a telephone call from the MRO. Apparently, he was told by a friend working in the office that Mr. McLeod was upset concerning a recent boundary change involving Scadding and Rathbun.

Referring to Maps A and B, Mr. Loney stated that they had staked their two mining claims to the Rathbun Scadding boundary and didn't think there was a problem. Then, he looked after hearing that there was a problem, and noticed the new line drawn in. Mr. Loney discussed the matter with Mr. Spooner, who said he moved the boundary to make it more accurate, but would not comment further as proceedings were pending.

The Director of Solitaire, Bill Ing, was apparently contacted by Mr. McLoed. As a result of Mr. McLeod's agitation, Mr. Loney was asked by Ing to look into the matter further. He inspected the area with Michael Loney. Together, they found that the posts of 1230297 and 118289 looked "okay". He also found some of the posts of 809104 inside of his 1230297. He was able to locate the Lashbrook FO staking, along with Jerome's

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work, and the south boundary of Charron's 1211038, which was slightly north of the north boundary on 1230297.

Mr. Loney stated that he had staked many times according to the accuracy of the map. From the map, it looked like Charron also thought 809104 stopped at the Rathbun Scadding boundary. Mr. Loney stated that he used his best effort to tie onto 809104. He went to the MRO for an Application to Record and asked about it. He was told that Jerome only staked in Rathbun. That was what Jerome intended. Ed Jerome, Albert Jerome's father, was staking up the area north of the Rathbun Scadding boundary. They staked along the boundary and north of it. He may have intended to stake the Jerome showing, but his staking was effective north of the boundary.

Under cross-examination by Mr. Guy, Mr. Loney stated that he was unaware of the Jerome showing until the problem came to light. He is aware of mineralization which he presumes is the Jerome showing. There was some discussion concerning what Jerome was trying to stake and the location of the line. Mr. Loney stated that it has been 16 years since the Jerome staking, and Jerome could have believed that the line was further than it was.

Mr. Loney stated that he tied on to the ground. He thought that he had tied on to all the ground north of them, although Mr. Guy stated that Mr. Loney had in fact overstaked portions of five or six mining claims. Mr. Loney explained that he was interested in the south part of Mining Claim 1230927, where there is a mine and shaft, being the Alvin Porcupine Mine, Kirkland Right. Asked about the gap in his staking, he stated that he didn't look for other posts. He felt that it was a good staking, easy to do. Answering the fact that he staked over five or six Flag claims, he stated that they were not shown on the map, so he wasn't looking for them. His staking was not done with GPS. The staking of 809104 was a rare error on the part of Jerome.

Asked about his financial interest in the Mining Claims, Mr. Loney said that he attempts to get his costs back, being that spent on geological assessments, maps, sampling and assays. However, despite the find, this land is not worth anything until the litigation is settled. Once the matter with Flag is determined, Mr. Loney conceded that he might sell it.

Under cross-examination, Mr. Norwood asked whether, when he tied onto the Martin staking to the north. Mr. Loney followed the Charron line of 1211038. Mr. Norwood asked whether the problem with the line and instrumentation is an old problem with the original surveys or not.

In re-direct, Mr. Loney said that Mr. McLeod was told that MNR didn't recognize the Scadding Township boundary. Mr. Loney stated that in his experience in dealing with mining and timber, that the Ministry is very definite about township boundaries.

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Mr. Lashbrook was called in rebuttal evidence. He stated that the Robert Graham map has been taken as gospel. Yet, his map shows squares, and the distances between the #3 and #4 posts is 1500 ft. The survey pin, measured the #4 post of 647668 as 1000 feet, when measured by GPS. He questioned who was right, between the survey line and the GPS line. He stated that it was possible that the line was just as obliterated when Graham staked. The GPS survey pin points 647668 and the #3 post of 809104, but there are still 500 feet which are unaccounted for or missing.

It was Mr. Loney's evidence that he tied on and he recorded accordingly. Loney indicated that he went 800 metres north to the #4 post. However, the line is actually less than 800 metres. Mr. Lashbrook stated that he walked the line with GPS and stated that there was no mystery as to why the gap existed. Then Spooner noticed the gap and raised the line.

Under cross-examination by Mr. Loney, referring to Mr. Graham's Ex. 10 assessment work survey, Mr. Lashbrook explained that the survey is not exact on the ground, that there could be inaccuracies. The use of a hip chain is accurate, except on the hills. Along the west line of 1230297, there is swamp in the southwest, with rolling hills, pine and open ground, thick swamp. The change to the swamp is a distinctive feature. There is a loose post placed in the swamp. The staking was done before GPS, and with use of hip chain, it might be out by a factor of 50 to 100 feet.

Under cross-examination by Mr. Norwood, Mr. Lashbrook was asked whether it was his opinion that 647667 existed only on paper, to which the reply was that he didn't know, although it exists on file. Graham demarcated all of his posts, and was a professional engineer. He could not say what happened with the staking, although Graham had a bad back. There is no reason to believe the posts weren't put on the ground. Mr. Lashbrook stated that the MRO would send him back into the field with an Order to move posts, if he ever had similar distances, but Graham was allowed to record. Mr. Lashbrook concluded by stating that one cannot stake from surveyed to unsurveyed lands, but that the reverse is also true.

Mr. McLeod was also called for rebuttal evidence. He stated that he wished to make three points.

1. Jerome only intended to stake to the north of his showing. Jerome had approached him with staking ground for the showing. All of the assessment work has been done with respect to that showing and $0 have been spent on Rathbun.
2. Mr. Day spent 15 minutes explaining that the 1890's survey of the Scadding Rathbun boundary is not accepted as official.

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3. Mr. Scarr found that 1230297 couldn't be touched by the claims by Lashbrook. 1914 legislation had parallel rules to those of 1996 regulation. Namely that a staking is not invalidated by the fact that it encompassed lands not shown.

The Minister acknowledged that 809104 is valid. Also that it was completely overstaked. Unless there is disregard for the **Mining Act**, incorporated prior to staking. Mr. McLeod submitted that Lashbrook's mining claim should be recorded and Mr. Loney's disallowed.

Concerning the field evidence of Mr. Vallilee, Mr. McLeod stated that he was unable to find any evidence regarding 647667. He stated that there was no right to put in that evidence, as he considered it wrong.

Under cross-examination by Mr. Loney, Mr. McLeod was asked what right he had to stake the lands where Loney's claim was. The reply was that where the staking was improper.

There was no interest in the land from 1986 to 2000. In 1995, the area to the south, in Rathbun, was staked by Charron, with the sketch indicating that it tied on to 809104. Mr. Loney raised the issue of why no questions were raised, if MacLeod had known what he had on his property. Mr. McLeod posed the rhetorical question as to what questions and that the same problem existed at the time, but no one knew it. Mr. Loney suggested that if Charron's 1211038 were actually tied on, keeping in mind where the township boundary was, he would have discovered that Flag's Mining Claim was not there. Mr. McLeod reiterated that all of this was based on the assumption that Charron knew where the township boundary was, but in fact, no one knew where it was.

Under cross-examination Mr. Norwood referred to the difficulties with Jerome's stakings of 826230 and 825231, shown in Rathbun but extending 840 feet south into Scadding. Mr. McLeod indicated that Jerome did what any prospector does, he tied on to 809104. Mr. Norwood asked again whether Mr. McLeod didn't know that the stakings done all called for the aliquot parts of the Lots. In the Order to move posts of 825231, there was reference by Vic Miller regarding the confusion, that MNDM was waiting for the retracement. Mr. McLeod insisted that, had the boundary been retraced at that time, everything would have been fine. He also stated that he felt Mr. Spooner should have given Flag the opportunity to restake it 809104.

Submissions

Mr. Guy summarized the facts relevant to his client's position. He submitted that Mr. Loney must have been aware of Flag's drilling program and must have seen Flag's claim

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while staking his own. The issue in this case is defined by an inability of any of the stakers to properly locate themselves in the field. He invited the tribunal to look at the location of Loney's #1 post, which is similarly located some distance to the north of the township line. Mr. Guy submitted that neither Jerome nor Loney knew where they were.

According to MNDM, Jerome, and therefore Flag, intended to stake in Rathbun, although in fact, Jerome merely thought that was where he was. If intent is relevant, then it is telling that 3/4 of Jerome's staking was in Scadding. Flag has spend $100,000 in exploration work on 809104, yet nothing was spent in Scadding. There has been no retracement of the boundary. Mr. Guy submitted that Mining Claim 809104 cannot be invalid because the staker failed to describe the ground staked. Loney's claim extends even further into Rathbun than that of Flag. Mr. Guy suggested that Flag's claim would have been seen by Loney.

If the test which governs whether a mining claim has been properly staked rests on intent, Mr. Guy submitted that it should be what the staker intended on the ground.

With respect to the MNDM view that the Jerome staking overstaked Graham's 647667 and is therefore invalid, he pointed out that no one has found Graham's posts. There is no field evidence giving certainty as to where that claim was staked. Jerome is a veteran staker, who would have seen the posts, had they been there.

Mr. Guy stated that, even with the legal argument that the ground staked by Jerome was part of a validly staked mining claim, Flag was also entitled to the benefit afforded by subsection 71(2), that the staking is conclusively deemed to be valid after the expiration of one year.

Taken from the bureaucratic view, this is an easy case, with the distinction being between surveyed and unsurveyed territory. The difference in the governing rules between surveyed and unsurveyed provide a forceful intellectual argument, but is of little account when Flag staked open ground 15 years ago and spent tens of thousands of dollars on assessment work. It cannot now be faulted that it holds land according to what is on paper as opposed to what is on the ground.

Mr. Guy submitted that section 20(b) of O. Reg. 7/96 is a section of the heart, wherein it states that failure to describe or set out the actual area or parcel of land does not invalidate a mining claim. It is simply not fair to allow all of Flag's work to be overtaken by another who doesn't deserve to hold the mining claim.

There is authority and jurisdiction to make sure that inequity and injustice does not happen. When looking to the general staking rules, there is no distinction between staking in surveyed and unsurveyed townships. Flag is seeking relief in an unfair situation. All of the stakers did their best, yet they overlapped the township boundary.

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Allowing the relief sought by Flag would not jeopardize other claims in the area. MNDM accepted the assessment work expenditures, and meanwhile Flag has had adverse possession of this land. Its possession has been open and notorious, not merely implied. If Flag were to lose the land over a narrow point of interpretation, it would imperil the objects of the **Mining Act**. Subsection 11(1) of O.Reg 7/96 should be held to apply to the staking of Loney, that it encompasses land not open for staking, being recorded prior to the time of staking. Therefore, Loney's staking should be held invalid and Lashbrook is entitled to the recording of his claim.

Mr. Norwood submitted that this has been painted as a decision of great divide, that of the head and that of the heart, with it being inequitable where one word would govern the outcome. As to the potential inequities, there are other words, which in his submission, should govern. At the time of the Jerome staking, the applicable law was that of a surveyed township, found in subsection 42(3) of the 1980 R.S.O. and now found in section 11(b). That provision establishes a mining claim by the lot and concession numbers of the survey and not by the location of the corner posts.

Mr. Norwood referred to the decision of **Ireson v. Mason** (1914), 2 M.C.C. 389, which was decided on provisions of section 50(d) of the 1914 **Act**, which was almost identical to the 1980 R.S.O. ss.42(3). The case involved very similar facts. The mining claim was not accepted where it was staked and was regarded as a nullity. There was found to be no substantial compliance with the requirements of staking, as this required reasonable conformity to the staking requirements. What was actually done was not found to be an attempt to comply with requirements in good faith.

Mr. Norwood submitted that if the tribunal were to extend the meaning of section 20, the **Ireson** case is authority to look at the staking such as it was. Mr. Norwood submitted that Jerome's staking should be rejected here as well.

With respect to submissions made on behalf of Flag as to the intent of the staker, Mr. Norwood submitted that there has been contradictory evidence as to Jerome's intent. However, he further submitted that subjective intent is not material. What is material is the Application to Record. Jerome's Application refers to Rathbun Township, which is governed by Lot and Concession number. This is the required law for staking in a surveyed township.

Answering the question of why Flag is not given the benefit of section 71, with respect to what was staked on the ground, Mr. Norwood highlighted the distinction between stakings. Mr. Loney had intended to be in Scadding. Simply put, the rules differ when a staker intends to be in an unsurveyed township. Loney's position is not prejudiced by the fact that his #1 post was in Rathbun. This deviation can be easily rectified by a Mining Recorder's clause 110(6)(a) Order to move posts. This was in fact done with respect to another of Jerome's claims dating back to 1985.

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Looking to Jerome's staking at the time, 80 percent of it overstaked Graham's claim. Mr. Vallilee found the #4 post of 647668. There are geophysical assessment work files of Graham showing the location of the posts. While there have been no explicit inspections of Graham's claims, there is nonetheless an old paper record. MNDM contends that there was a valid and existing claim on the ground at the time 809104 was staked.

Morgan v. Bradshaw (1972) 5 M.C.C. 82 stands for the proposition that a mining claim which overstakes part of an existing claim will not be invalidated for that reason alone. Map 3e shows that 809104 overstakes Graham and is invalid with respect to Scadding Township. Factually, Graham was overstaked. Possibly legally as well.

The staking rules constitute an impenetrable barrier between surveyed and unsurveyed townships, and a valid claim cannot exist in one which was called for in another.

Mr. Norwood referred to **Re Olmstead and Exploration Syndicate of Ontario Limited** (1913) 5 O.W.N. 8, which he suggested involved claims which did not appear to be in a surveyed township. The staker drew a sketch of his claim, depicting 20 chains by 20 chains. However, in the field, his east boundary was acknowledged on his post to be 25 chains. To complicate matters, the staker appeared to be incorrect as to the location of the river, and the Mining Recorder implied that he intended to encompass the water's edge. The Court of Appeal, in fact, found that the staker's mistake was the opposite, that he believed that the river at that point was wholly encompassed within the claim. The Court ruled that the claim boundary would stand as it was shown on the sketch. Mr. Norwood suggested that the commentary found in Barton, B.J. **Canadian Law of Mining**, Calgary: Canadian Institute of Resources Law, 1993 is accurate as far as he takes it. However, Mr. Norwood stated that he didn't see it as significant.

Mr. Norwood stated that there are significant issues of precedent which arise if Flag's appeal were allowed as staked on the ground. This would affect the policy orientation and land management practices of the government. Looking at other statutes, there would be chaos and a significant degree of displaced interests throughout the province. It would also affect the orderly blending of rationalization of the **Mining Act** with other statutes. If it were opened up to what was staked, it would defeat the purpose of having other rules. If Flag's position were accepted, what are the rules governing staking between a surveyed and an unsurveyed township? This would create new problems of administration.

Mr. Loney stated that he supported the position of the Provincial Recording Office. In his opinion, anyone wishing to capture a showing would surround it with staking. As to the facts, not only was ground to the south not staked, even when it subsequently came open, Flag did not seek to stake it for over a period of 15 years.

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When he staked his claim, Mr. Loney stated that he wanted to capture open ground. It was never his intent to stake over an existing claim and in fact, he did not know it even existed there on the ground.

Mr. Loney stated that the framework of the **Mining Act** is clear and it has always been clear that there is a difference in staking between surveyed and unsurveyed townships. He submitted that Mr. McLeod should accept his mistake and move on.

While there may be exceptions to the rules, the exceptions being advocated on behalf of Mr. McLeod would upset many claims, as they would have to be restaked or lose the land. In his submission, Mr. Guy placed undue emphasis on Jerome's intent. While his imputed memory after 15 years is nothing short of amazing, he was not asked to appear to prove he staked his showing and not the boundary. There has also been a great deal of talk about how much money Flag spent on this claim. However, there is no proof that this money was spent. Mr. Loney wonders if the imputed money wasn't spent elsewhere and applied to this claim.

He invited the tribunal to look at the true intent and stated that he was willing to rely on its discretion.

Findings

The facts in this case are unique and the tribunal has been unable to find a case, either in this jurisdiction or elsewhere, which is directly on point or in fact the two points which are raised in issue. The first is the applicable rules to a mining claim which was staked on the ground primarily in unsurveyed territory but recorded in a surveyed township. The second is the equity of the situation in which the recorded holder, who obtains transfer of the mining claim, not knowing of the problem with its location, puts considerable work into it and makes a significant find.

In the existing case law, there is ample discussion of staking rules, for either surveyed or unsurveyed townships, but nowhere is there a discussion of the staker's mistaken impression that he is staking in a surveyed township, when in fact he is staking in an unsurveyed township. Considerable discussion can be found as to what rules apply when the land staked differs from that shown on the Application to Record, but not as between these two vastly different types of townships. None of the discussion in the aforementioned cases centers on a staking whose dimensions and features are largely as shown on the sketch, but which are actually found at a different location in the field.

What makes the situation particularly compelling is the assertion by Flag that it spent between $80,000 and $100,000 in assessment work on the ground where its claim was staked. The tribunal notes that Flag did not file evidence concerning this work, but the

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tribunal nonetheless finds that it is persuaded by Mr. McLeod's testimony on this matter as well as his conduct. The defence of Flag's interest in this ground, however tenuous it might prove to be, is in keeping with a significant find of the sort alluded to by Mr. McLeod.

Relief Sought

Whatever the relief sought, by way of dispute of Loney's staking and restaking by Lashbrook, essentially, Mr. McLeod, on behalf of Flag, is asking the tribunal to uphold Flag's interest based on the fact that it has worked and proven a significant area of interest in those lands. At first instance, Flag is seeking a declaration that the original Application to Record filed by Jerome, concerning Mining Claim 809104 was in respect of those lands located in Scadding and not Rathbun Township.

Intent

Only Albert Jerome can testify as to what was in his mind during his staking in 1984. He did not attend to give evidence of his intent. There was no suggestion that he was infirm or unavailable. Rather, due to the passage of time, Flag believed that Jerome was unlikely to have been able to recall details of having located himself in the field.

MNDM has asserted that Jerome's intent is set out on his Application to Record. This is a rather circular argument. If Jerome was mistaken as to what ground he was on, whatever is shown on the Application must reflect this error. There is no evidence that his error was due to fraud or an intent to mislead. As to whether he intended to stake the southerly portion of Scadding, as opposed to the northerly portion of Rathbun, any finding as to his intent would be speculation and not a determination. MNDM has asserted that the licensee must certify that the information shown on the Application to Record is correct. While certification may be binding on the recording licensee, absent demonstration of an error uncovered within a short time frame, and for which no adverse interests arise, on its face, certification cannot illuminate the otherwise murky distinction between belief and intent.

However, the tribunal may be able to determine whether Jerome intended to stake a showing, as opposed to all open ground in an area of interest to him. Given that there is no first-hand evidence of Mr. Jerome's intent, and recognizing that any evidence concerning one's intent would still have to be assessed on the basis of credibility, there is no alternative but to look to the facts of what actually did take place.

On August 3rd, 1984, Mr. Jerome staked six mining claims. In his sketch, he indicates that he has located Mr. Graham's claims 647667 and 647668 in the field along the east side, although Mr. Lashbrook created some doubt as to whether these lines were actually

located, or merely reproduced from available mapping from the Provincial Recording Office. Nonetheless, the sketch on this staking is evidence of the fact that Jerome attempted to locate the Scadding Rathbun Townships boundary. Similarly, he either did see evidence of Graham's staking of the illusive 647667 claim in the field or acknowledged its existence. Mention was made of assessment work reports filed on the Graham claim. Mr. McLeod testified that Jerome's sketch of August 3rd was an error, but failed to provide his rationale for this assertion. The tribunal finds this evidence by Mr. McLeod to have been self-serving and given with the benefit of hindsight.

When Jerome staked the ten claims on August 5th and 6th, he failed to note the location of Graham's 647667 claim along his south boundary. This failure cannot be explained, since there is existing evidence that Mr. Jerome knew the Graham mining claim was there and he should have located it in the course of his staking. His failure to do so resulted in stakings which, during the normal course of time, could well have been open to successful dispute, particularly as it largely overstakes the existing mining claim of record of Graham. It is quite clear, despite other provisions which may serve to excuse staking errors, errors of location and the like, a valid mining claim cannot overstake an existing claim of record unless that earlier claim is challenged by a dispute. This was not done. This fact alone will prove fatal to any assertion that Mining Claim 809104 is a valid claim *at the location staked on the ground*.

The activities which took place to the east, involving Ashick and Jerome serve to further point out the difficulties in Jerome's staking of Mining Claim 809104. There was a complaint then that Jerome's Rathbun mining claims bearing numbers S-826230 and 826231 overstaked that of Ashtick's S-830818 into Scadding. In fact, the Mining Recorder found that this was so, and ordered the moving of posts. This should have alerted Jerome to the possibility, with the finding that the township line had grown in, that his other stakings along the purported boundary, and in particular 809104 were similarly suspect. The importance of this suspicion is even greater, if Mr. MacLeod is to be believed that Jerome had intended to stake a showing on 809104.

However, the Mining Recorder at that time, Vic Miller, should have also had questions concerning stakings along this boundary. He noted in his Order that Jerome had overstaked into Rathbun and that the Scadding Rathbun boundary line had grown in. He further stated, "…there has been no retracement survey carried out to date, therefore creating confusion on the ground." The tribunal finds that the Recording Office knew as far back as 1985 that there were problems with the boundary of such degree that confusion was being created on the ground. Yet no retracement had been done. Nor did Mr. Miller seek to have all of Jerome's stakings inspected.

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Status of 809104

During the time in and about when Jerome staked Mining Claim 809104, believing himself to be in Rathbun Township, he was also obviously busy in the area in 1984 staking along both sides of the Scadding Rathbun township boundary. Although he thought he did know, it is obvious that he did not know exactly where the boundary was. There is nothing from the considerable activity undertaken by Jerome to indicate that he intended to stake that land on the ground covered by 809104 because of the ground itself. If there were such evidence or information, undoubtedly, Mr. Jerome would have served as a credible witness to this fact.

The status of 809104 is problematic. On his Application to Record, Jerome has certified that he has staked out the lands as described, that description being the S/W 1/4 of the S 1/2 Lot 8 Con I, in Rathbun. For over 17 years, the Mining Claim has remained in good standing in relation to that description. Although it is absurd, given that Mr. MacLeod doesn't have hopes of mining success in relation to this particular piece of ground, subsection 71(2) provides that a mining claim of record for more than one year, having its first prescribed unit of assessment work performed is conclusively deemed to have been recorded in accordance with the **Act**. Although its predecessor must apply to this Flag claim, the tribunal finds that the wording in the provision means the mining claim as it is shown on the Application to Record and as it is recorded in the Provincial Recording Office.

In **Kaczanowski v. The Director of the Lands Management Branch of the Ministry of Natural Resources**, (1983) 6 M.C.C. 401, Commissioner Ferguson disallowed the staking of the claim involved. It involved problems associated with attempting to stake in an area with magnetic interference. The staker incorrectly compensated for, and ran his lines at 16 degrees off true bearings. At page 403:

> The Mining Recorder outlined a number of practical difficulties arising from the error of the appellant. He referred to the practice of the Ministry of Natural Resources to bring the boundaries of mining claims into conformity with the principles of the *Mining Act*, particularly where staking is done in unsubdivided areas that are not adjacent to existing mining claims. He pointed out that if such staking is permitted the end result is that other stakers would tie onto the same boundaries and perpetuate the error across the entire township unless fractional or triangular mining claims which did not conform with the principles of the Act were staked. Such claims would not conform to the size or shape requirements of the Act and, if oversized, would result in additional assessment work being required … This raises the question as to the reason for subsequent stakers having to assume the consequences of the errors of the appellant. The Mining Recorder also pointed out that the

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> improper bearings could result in difficulties of staking in the field particularly for stakers who did not have a claim map in their possession at the time they staked. The failure to run the boundaries in the statutory directions could result in difficulties for future stakers.

And at page 404:

> In the case of *Haberer v. Millar et al.,* Decisions of the Quebec Mining Judge, 1967-1972 at p. 116 as a result of incorrect pacing of the land parts of the mining claim and the preparation of the sketch on the basis that the lines were run on the astromonic bearings rather than on the magnetic bearings as they in fact were run, …it was held on p. 122,
>
> …
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> We believe the petitioner has made a real effort to comply with the provisions of the Act but in view of the important difference between the area of 40 acres prescribed by the Act and the actual area of 29 acres of the claim, we cannot conclude that the staker has observed the provisions of section 39 in substance, and as nearly as circumstances permitted. The staker has made a mistake in computing the length of the sides of his claim and had this been known when the notice of staking was filed with the recorder, the application would have been non-acceptable.

Under the **Mining Act** the licensee must perform certain activities, as set out, in order to obtain the rights set out. Those right may eventually lead to the right to acquire a lease, but do not do so at first instance.

Flag's Mining Claim 809104 is not found on the lands shown in the Application to Record. Mr. Guy and Mr. McLeod would have the tribunal rely on subsection 20(1) of O.Reg. 7/96 to override all other considerations. However, nothing in this provision can save a claim which is staked on lands forming part of an existing claim of record. Nothing can save a mining claim which, if examined critically, is likely to mislead another wishing to stake in the vicinity. The Provincial Mining Recorder is correct in his assertion that, to allow Mining Claim 809104 to exist as it is found in the field, would skew other claims in the vicinity. The tribunal has not examined the sketches of existing mining claims in the vicinity to determine how many, or how far the problem might extend. However, it is satisfied that it will rely on his expertise and adopt his concerns with respect to permitting the movement of this claim.

Land Staked not as set out in Application to Record

Mr. McLeod maintained throughout his testimony that one of the tenets of mining law is that a staker is entitled to claim that which he marks out on the ground. This is found in clause 20(b) of O.Reg. 7/96:

> **20.** If it appears that a licensee has attempted, in good faith, to comply with the Act and this Regulation, a mining claim of the licensee is not invalidated by,
>
> …
>
> (b) the licensee's failure to describe or set out the actual area or parcel of land staking in the application to record the claim or in the sketch or plan accompanying the application.

The use of this provision is useful only where the Provincial Mining Recorder or tribunal has before him or her an Application to Record which stands a chance of being held to be related to a validly conducted staking, for lands which are open to staking. This is not the case with Mining Claim 809104, as the lands were not open because of the pre-exiting Graham claim on record. While this does not, in any way impugn either Mr. Jerome's competence or integrity, it is quite clear from all of the evidence filed, that he was very confused as to where it was exactly in the field in relation to the boundary between the two townships.

The tribunal concludes that, in applying the law to the facts of the Jerome's staking of 809104, he would not have been entitled in 1984 to record his claim for those lands in Scadding Township which he has circumscribed by his posts. Graham had a valid and subsisting claim for that land, so that it was not open to staking. There is no conclusive proof that Graham's claim did not exist on the ground at that location and in fact this was not even examined by the inspection carried out in 2000. The only thing which could have allowed Jerome's staking to survive would have been instituting a dispute of Graham's staking. However, Jerome was not in a position to do this, because he believed himself to be at another location, clearly shown on his Application to Record, being Rathbun Township.

The **Act** precludes the Provincial Mining Recorder and the tribunal from canceling Mining Claim 809104; by which is meant the claim listed in the Provincial Recording Office, shown on the map and certified in the Application to Record. One wonders whether an order to move or erect posts, conduct blazing etc. would be in order. No one appears to have any interest in the lands in Rathbun, so unless otherwise advised, the tribunal elects to leave this matter of a section 110 Order open to the Provincial Mining Recorder's discretion.

Jurisdiction under Section 121

There are broad and general powers found in sections 105 and 121 of the **Mining Act**. Mr. Guy has implored the tribunal to make its findings based on section 20 of O.Reg. 7/96. The provision serves to protect the validity of a mining claim, despite the failure to describe or set out the actual area staked in the Application to Record. Sections 105 and 121 are reproduced:

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> **105**. Except as provided by section 171, no action lies and no other proceeding shall be taken in any court as to any matter or thing concerning any right, privilege or interest conferred by or under the authority of this Act, but, except as in this act otherwise provided, every claim, question and dispute in respect of the matter or thing shall be determined by the Commissioner, and in the exercise of the power conferred by this section the Commissioner may make such order or give such directions as he or she considers necessary to make effectual and enforce compliance with his or her decision.
>
> **121.** The Commissioner shall give a decision upon the real merits and substantial justice of the case.

Given Mr. Guy's impassioned plea that this case should be decided with the heart rather than the head, the tribunal has examined a number of statutory and equitable provisions, to determine whether there is any basis to grant the relief sought by Flag.

Limitations

Sections 3, 4 and 15 of the **Limitations Act**, R.S.O. 1990, c. L.15, state:

> **3.**(1) No entry, distress, or action shall be made or brought on behalf of Her Majesty against any person for the recovery of or respecting any land or rent, or of land or for or concerning any revenues, rents, issues or profits, but within sixty years next after the right to make such entry or distress or to bring such action has first accrued to Her Majesty.
>
> …
>
> **4.** No person shall made an entry or distress, or bring an action to recover any land or rent, but within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to some person through whom the person making or bringing it claims, or if the right did not accrue to any person through whom tht person claims, then within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to the person making or bringing it.
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> **15.** At the termination of the period limited by this Act to any person for making an entry or distress or bringing any action, the right and title of such person to the land or rent, for the recovery whereof such entry, distress or action, respectively, might have been made or brought within such period, is distinguished.

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> **31.** No claim that may lawfully at the common law, by custom, prescription or grant, to any way or other easement, or to any water course, or the use of any water to be enjoyed, or derived upon, over or from any land or water of the Crown or being the property of any person, when the way or other matter as herein last before-mentioned has actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years shall be defeated or destroyed by showing only that the way or other matter was first enjoyed at any time prior to the period of twenty years, but, nevertheless the claim may be defeated in any other way by which it is not liable to be defeated, and where the way or other matter as herein last before-mentioned has been so enjoyed for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it appears that it was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing.

In **Beaudoin et al. v. Aubin et al.** (1981), 33 O.R. (2d) 604, Anderson J. provides a thorough analysis and historical review of the applicable principles governing possessory title, including a discussion of a case where the principles were misapplied. Beginning at page 609:

> "Although the Act neither expressly nor by necessary implication confers a right upon the plaintiffs to bring such an action as this, it was not contended on behalf of the defendants that such an action would not lie. There is authority that it does: see, for example, *Babbit v. Clarke* (1925), 57 O.L.R. 60, [1925] 3 D.L.R. 55; affirmed [1927] S.C.R. 148, [1927] 2 D.L.R. 7. A similar conclusion is established or to be inferred from numerous other cases here considered.

In **Babbit v. Clarke**, *supra*, the Appellate Division and then the Supreme Court of Canada do not deal specifically with the question of whether a plaintiff may use sections 4 and 15 of the **Statute of Limitations** to bring an action for title to property which is alleged to have been under adverse possession. Rather, both courts, by their issuing declaratory orders, recognize that this form of action has merit, with the effect that it extinguishes the right of the legal title holder.

Returning to Anderson's reasons in **Beaudoin et al. v. Aubin et al**, at page 611:

> Before embarking on a review of these and other cases it is appropriate to make some reference to the historical development of limitation statutes.
>
> In 1833 the *Real Property Limitations Act*, (U.K.), c. 27, was passed in England. Similar legislation followed in Upper Canada in 1834

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(U.C.), c. 1. From 1834 to 1939, when significant changes were made in England, the Statutes of Limitations in England and in Upper Canada were similar in all respects material to the statute under consideration in this case.

Prior to the passage of these enactments, the law both in England and in Upper Canada gave a technical meaning to the words "adverse possession". Wrongful possession *per se* did not ripen into a claim to extinguish the owner's remedy unless there had been an ouster of the legal owner, an ouster of *seisin*: see *Cheshire's Modern Law of Real Property*, 12th ed. (1973), at p. 887 fn. This was likewise the law in Upper Canada prior to the passage in that Province of 1834 (U.C.), c. 1.

The first of the judgements which bear directly on this case was *Martin v. Weld et al.* (1860), 19 U.C.Q.B. 631. This was a judgement of the Court of Appeal which expressly reflect the change in the law and deals explicitly with the point which has been raised by the defence in this case.

The action was for trespass and assault. The plaintiffs claim to title rested upon possession. The appeal was from judgement upon the verdict of a jury. The misdirection complained of on appeal was in regard to the evidence upon the point of possession by the plaintiff of the *locus in quo* and the effect of such possession under the circumstances of an alleged common error respecting the true boundary. In the course of his judgement Robinson C.J. had this to say [at pp. 632-3]:

> We do not consider that the fact (if the truth was so) that the plaintiff and defendant were under a common error in regard to the true line of division between them, would prevent the new Statute of Limitations running, though it might and has been allowed to do so under the former law, when it was necessary to make it appear that the possession for twenty years was adverse, and not with acquiescence or permission . . . Here, according to the true line of division, if that alone should given under the circumstances, the defendants would seem entitled to a verdict, but the evidence of possession being held by the plaintiff for more than twenty years of the *locus in quo*, does seem to be sufficient to warrant the verdict, and we have determined that upon the evidence given at the trial it ought not to be disturbed.

The change in the law effected by the statutes was the subject of helpful comment in 1892 in Banning, *The Statute Law of the Limitation of Actions*, 2nd ed. (1892) at pp. 101-2:

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> By this section the doctrine of adverse possession in the old sense is abolished; but the term adverse possession is so convenient that it is better, perhaps, still to retain it, though with a variation of meaning. It will, therefore, in this volume mean any possession inconsistent with the title of the lawful owner. The doctrine which formerly prevailed implying a constructive authority from the owner, and thus excluding the operation of efflux of time in numerous cases, for example in the case of *possessio fratris,* is now abolished, and *all possession without the direct authority of the owner may not be considered as adverse.*

(Emphasis added.) The reference in this quotation from Banning is to what was first enacted as s. 2 of the *Real Property Limitations Act*, 1833 (U.K.), c. 27, which was in the following terms.

> 2. After the thirty-first day of December, 1833, no person shall make an entry or distress, or bring an action to recover any land or rent but within the first twenty yers next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims, or if such right shall not have accrued to any person through whom he claims …

It is significant that the language of this section does not differ in any material way from that of s. 16 of 1834 (U.C), c. 1, which was under consideration in *Martin v. Weld*, nor save by difference in the period of limitation, from that of s. 4 of the present Act.

In *Babbit v. Clarke, supra*, a judgement of the Appellate Division, affirmed by the Supreme Court of Canada, the plaintiff claiming a possessory title was successful. There was a mutual mistake as to the location of the true boundary. It is nowhere suggested that this factor was material, much less fatal, to the claim of the plaintiff.

In *Nourse v. Clark*, [1936] O.W.N. 563, the Court of Appeal sustained a judgement at trial dismissing the plaintiff's action upon the ground that the defendant had acquired a possessory title. Again, there was a mutual mistake as to the location of the true boundary. No reference was made to that as being significant.

Martin v. Weld, supra, was cited and followed by Smily J. in *McGugan et al. v. Turner et al.,* [1948] O.R. 216, [1948] 2 D.L.R. 338. This was an action for declaration as to the ownership of lands and included in the defences was title by possession. This defence had not been pleaded but amendment was permitted. The defendants contended that any acts of ownership performed by predecessors in title of the plaintiffs were performed in ignorance of the true and proper construction of the will upon which the rights of the parties depended and in an erroneous interpretation of such will. In dealing with this aspect of the defence, Mr. Justice Smily had this to say, at p. 221 O.R., p. 342 D.L.R.:

> As to the first contention, no authority was submitted on behalf of the defendants on the point, and I know of no principle which would support such contention. The matter is now governed by *The Limitations Act*, R.S.O. 1937, c. 118, and the relevant sections are 4 and 15. No exception is made in the statute, in the said sections or any other, of ignorance or mistake as to the true ownership. In fact it has been held that a common error by the owners in regard to the true line of division between their properties does not prevent the statute running where the statute does not require it to be shown that the possession was adverse and not with acquiescence or permission: see *Martin v. Weld et al.* (1860), 19 U.C.QU.B. 631. *This, of course, applies to the present statute.*
>
> …

But there are other cases, which in fairness to the defence I must explore, to make explicit my reasons for conclusing that they do not lead to any different result than I have proposed.

The first of these other cases is *Kosman et al. v. Lapointe* (1977), 1 R.P.R. 119. In it, Stark J. held that there were no acts of adverse possession because the alleged possessors believed themselves to be the owners. Again, the action was for a declaration as to the ownership of lands and a defence based on possession was raised. There was a mutual error as to the legal boundary involved. Stark J. held that there was no adequate evidence to indicate that the defendant and his predecessors exercised rights of ownership by way of undisturbed possession. However, he goes on to say, at p. 125:

> The evidence of the defendant, and other witnesses called on his behalf, is that in fact there are no acts of adverse possession, because the previous alleged possessors stated that "they at all times believed" that they were the true owners of the land.

No authority is cited for this proposition. There is no reference in the reasons for judgement of Stark J. to any of the cases to which I have just referred, or the words of the statute. There is a critical editorial annotation at 1 R.P.R. at p. 120 with which I find myself in substantial agreement. With the greatest deference to Stark. J., I am forced to conclude that he imported and implied a concept of adverse possession which was not appropriate, having regard for the Act which he was obliged to apply. I prefer to be governed in my disposition by *Martin v. Weld, Babbitt v. Clarke, Nourse v. Clark* and *McGugan v. Turner, supra.*

In support of the defence argument that the mutual mistake as to the true boundary is fatal to the plaintiffs' case, I was referred to *Lutz v. Kawa* (1979), 98 D.L.R. (3d) 77, 9 Alta L.R. (2d) 151, 17 A.R. 288 [affirmed 112 D.L.R. (3d) 271, 13 Alta. L.R. (2d) 8, 23 A.R. 9], an Alberta decision given by Belzil D.C.J. It was conceded, of course, that the decision was not binding on me, but it was submitted that as a considered judgement, directly on point, it was of persuasive value. It dealt with, and purported to follow, a number of cases, including some

from Ontario. Among the latter are some relied upon by the defence in this case, which are binding upon me, if they apply. In my view they do not, and I do not agree with the result in *Lutz v. Kawa*.

As introduction and background to my review of these cases, I propose to attempt here a brief comment on some of my conclusions arising from that review.

Two concepts recur which must be the subject of careful scrutiny, and which tend to merge or blur.

The first is the concept of adverse possession. In my view, it should, in Ontario, be given only the meaning ascribed to it by Banning *supra* [any possession inconsistent with the title of the lawful owner]. In some instances I am inclined to think that continued use of the term "adverse possession" has imported considerations relevant under the law before the limitations Acts but no longer so. In any event, adverse possession is not really at issue in this case. Given its broadest interpretation, it requires proof that the true owner has been dispossessed or has discontinued possession. In any case at bar it has been conceded, and had there been no such concession it must have been found as a fact upon the evidence, that the true owner was out of possession for a period substantially exceeding the period of limitation.

The second concept is of *animus possidendi*, including an intention to exclude the true owner. This latter intention has been, properly, the focus of considerable attention in cases where the possession was doubtful or equivocal. In this case, the possession is certain and unequivocal and the *animus possidendi* is to be presumed. Cases examining in detail the nature and components of that *animus* are at best of only peripheral interest and, more probably, quite irrelevant.

In argument, counsel for the defendants placed great reliance upon *Re St. Clair Beach Estates Ltd. v. MacDonald et al.* (1974), 5 O.R. (2d) 482, 50 D.L.R. (3d) 650, a judgement of the Divisional Court delivered by Pennell J. … The question for determination in the case was whether the appellants had established their claim to a possessory title. Pennel J. says, correctly in my respectful view, that possession is a matter of fact depending on all the particular circumstances of the case. The Judge of first instance had held that the acts relied upon to establish possession were not sufficient to effect that result. However, he dealt specifically with a contention that the appellants required an *animus possidendi*, with the intention to exclude the title holders from the property, in order to acquire title by possession. In this respect he was sustained by Pennell J. who explored , in some detail, a number of the multitude of cases dealing with these sections of the Act and similar enactments elsewhere. He quotes, with apparent approval, the criteria enumerated by Wells J. in

Pflug et al. v. Collins, [1952] O.R. 519. [1952] 3 D.L.R. 681; affirmed [1953] O.W.N. 140, [1953] 1 D.L.R. 841. Those criteria may be expressed in the following terms:

(1) actual possession for the statutory period by the claimants and those through whom they claim;
(2) that such possession was with the intention of exclusding from possession the owners or persons entitled to possession, and
(3) discontinuance of possession for the statutory period by the owners and all others, if any, entitled to possession.

…The defence relies upon the definition of *animus possidendi* as it appears from the reasons for judgement of Pennel J. commencing at the bottom of p. 489 O.R., p. 657 D.L.R., quoting from *Littledale v. Liverpool College*, [1900] 1 Ch. 19 at p. 23:

> "They could not be dispossessed unless the plaintiffs obtained possession themselves; and possession by the plaintiffs involves an *animus possidendi* - i.e., occupation with the intention of excluding the owner as well as other people."

In considering what was said by Pennel J. concerning *animus possidendi* it is essential to consider first the context in which it was said. He concluded that the respondents remained in possession of the land. At pp. 488-9 O.R., pp. 657-8 D.L.R., he says:

> If this conclusion be right, it is enough to decide the case in the respondent's favour. I note, however, that a point much agitated before this Court was whether the learned trial Judge erred in law in finding that the appellants required an intention to defeat or exclude the true owners from the land. I think I ought to deal with this point, though the careful judgment of the trial Judge, with which I agree, absolves me from attending to the matter in great detail.
>
> It is, I think, beyond the reach of controversy that the appellants never had any intention, nor claim any intention of excluding the Grants [predecessors in title of the respondents]. The dominant feature in the case is the fact that as late as 1969 the appellants offered to purchase the land from the Grant estate for the sum of $1,000. Counsel for the appellants, however, contended that the concept of adverse possession does not involve an intention on the part of the person in possession to acquire a right against a particular person.

Not only could it not have been found that the intention to exclude the true owners had been shown, but it might well have been found, affirmatively, that such intention was absent. Proof of possession was both doubtful (lacking, in fact) and equivocal. It is instructive to note that upon examination of the facts in *Littledale v. Liverpool College, supra*, the acts relied upon to establish possession were in their nature equivocal and at p. 23 of the judgement of Lindley M.R., we find this: "when possession or dispossession has to be inferred from equivocal acts, the intention with which they are done is all-important".

Considered with the facts of the cases in which they were expressed, especially the equivocal nature of the acts of possession, the

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views concerning the necessity of an intention to exclude the true owner are readily understood. It is thus that the words of Pennell J., as of any Judge in any case, must be considered. Taken in that way they are not inconsistent with the conclusion that where there is possession with the intention of holding for one's benefit, excluding all others, the possession is sufficient and the *animus* is presumed. If it were necessary to say so, one could say of such a situation that the intention *ipso facto* included the intention to exclude the true owner even if his rights were unknown to the person in possession.

In considering *Re St. Clair Beach Estates Ltd. v. MacDonald et al., supra*, as it relates to *animus possidendi*, it is instructive to examine *A.- G. Can. v. Krause*, [1956] O.R. 675, 3 D.L.R. (2d) 400, to which Pennell J. refers, and *Hamilton et al. v. The King* (1917), 54 S.C.R. 331, 35 D.L.R. 226, which is referred to in *A.-G. Can v. Krause*. The reference there is to the judgement of Duff J. in *Hamilton et al. v. The King* and the relevant passage is at p. 371 S.C.R. p. 253 D.L.R. It reads:

> The crown cannot be disseized by a mere intrusion. The occupation, the holding or enjoying, therefore, contemplated by the statute as attracting the benefit of its provisions cannot be technically possession; but it seems reasonable to read the statute as contemplating such occupation as, if the question arose between subject and subject would constitute civil possession as against the subject-owner. On this assumption two elements are involved in the occupation required, exclusive occupation, in the physical sense, "detention", and the *animus possidendi*, that is the intention to hold for one's own benefit which be it observed, is presumed to exist from the fact of "detention " alone. Given an occupation possessing these features the statutable conditions are, I think, fulfilled.
>
> The first element is admittedly present. Are there circumstances disclosed by the evidence which rebut the *presumption* of the existence of the *animus possidendi*? the answer to this last question turns upon the point whether or not the land was "held or enjoyed" in a character inconsistent with the existence of the intention on the art of the occupants to hold for themselves?

Applying the language of Duff J. to the facts of the case at bar, it is clear that there was ". . . . exclusive occupation, in the physical sense, 'detention'". The *animus possidendi* is therefore presumed to exist and there is not a tittle of evidence to rebut that presumption.

I turn now to *Lutz v. Kawa* and a review of the cases to which the Judge refers and upon which he relies. The action was one to quiet title by reason of possession. There was a mutual error as to the location of the true boundary. The judgment proceeds upon the premise that the provisions of the *Limitations of Actions Act*, R.S.A. 1970, c. 209, are essentially the same as those of England and Ontario.

In holding that the plaintiff had not established possessory title, the Judge says, at p. 81:

> It is not sufficient for the plaintiff to show actual occupancy or possession of the locus by her. What must be shown is a special kind of possession described by Lord Ormrod in *Wallis's Cayton Bay Holiday Camp Ltd. v. Shell-Mex & P.P. Ltd*., [1974] 3 All E.R. 575, a clear case of occupancy for the statutory period.

In basing himself on this case, the Judge, in my view, erred, and it would appear that the error was fundamental to his judgement.

He does not appear to have recognized the change in the English law which occurred in 1939 and which imports new considerations and renders English cases since 1939, dealing with the topics under consideration here, of doubtful assistance. I do not propose to explore those differences in detail because, in any event, the case was one of those where the possession was doubtful or equivocal and the Court was not prepared to conclude that the true owner had been dispossessed or discontinued possession.

…

He also refers to *Pflug et al. v. Collins, supra*. The criteria enunciated by Wells J. in that case were derived from *Wright v. Olmstead* (1911), 3O.W.N. 434, a decision of the Divisional Court. It was held that there had not been continuous user and not throughout the statutory period. Speaking of the nature of the land and of the user, Mulock C.J. has this to say at p. 436:

> Thomas Herbert Colledge knew that the strip was intended to be used as a public way, and that he had no right to except as one of the public. He admits that he was using it only until it was required for the purpose for which it was laid out. Thus his attitude was not that of a person claiming to be in possession to the exclusion of others having the right to use it; and, for this reason alone, the plaintiff fails.

Once again, the facts must be considered when one considers his statement, at p. 435, that a plaintiff must show, *inter alia*: ". . . the intention of excluding from possession the owner or persons entitled to possession".

A reading of *Pflug et al., supra*, shows that the alleged acts of "adverse possession" were ambiguous: there were doubts as to whether occupation had been continuous; there was doubt as to whether al those claiming under the true owner had been out of possession. Once again, one must bear the facts in mind when considering the statement concerning the necessity to show intention to exclude the true owner.

Reference is also made to *Keefer v. Arillotta* (1976), 13 O.R. (2d) 680, 72 D.L.R. (3d) 182, a judgment of the Court of Appeal which refers with approval to *Re St. Clair Beach Estates Ltd. v. MacDonald, supra* and to *Pfulg et al. v. Collins, supra*. In *Keefer* the plaintiff was on a neighbour's property so that their acts were a challenge to the constructive possession of the true owner. As in *Re St. Clair Beach Estates Ltd. v.*

> *MacDonald et al., supra*, it might almost have been found, affirmatively, that the intention to exclude the true owner was lacking.
>
> Next referred to by Belzil D.C.J. is *Sherren v. Pearson* (1886), 14 S.C.R. 581. As to this case, it must first be observed that it had to do with isolated acts of trespass, committed on wild lands. Ritchie C.J. says, at p. 586, in a passage quoted by Belzil D.C.J. [at pp. 84-5 D.L.R.]: ". . . there was nothing sufficiently notorious and open to give the true owner notice of the hostile possession begun". That certainly cannot be said of the case at bar, nor could it be said on the facts in *Lutz v. Kawa. Sherrin v. Pearson* is no authority for the proposition that ignorance of the legal position prevents possession which is open and notorious form ripening into title.
>
> The case of *Doe d. Des Barres v. White* (1842), 3 N.B.R. 595, as referred to by Ritchie C.J. in *Sherrin v Pearson*, is expressly limited to possessory title of wilderness lands.
>
> The final authority referred to by Belzil D.C.J. is *Willaims Bros. Direct Supply Stores, Ltd. v. Raftery* [1957] 3 All E.R. 593. This turns on the new and different language of the English statute of 1939. More cogent for purposes of this review is that, when one examines the facts of the case, to which Belzil D.C.J. makes no reference, not only was the user upon which the possessor relied doubtful and equivocal, but there were minor acts of user by the true owner, such as to make it clear that there had been no discontinuance of possession.
>
> The application of judicial statements, without due regard for the facts of the case in which the statement was made, is a pregnant and perennial source of error. Upon such statements the defence has propounded the argument that, before a party can successfully rely on ss. 4 and 15 of the statutue, he must establish a subjective intention, with knoledge of the rights of the plaintiff present to his mind, to occupy in difiance or denail of those rights. No case which I have considered, when one looks to the facts, supports that proposition and it is utterly inconsistent with the decisions in *Martin v. Weld, Babbitt v. Clarke, Nourse v. Clark,* and *McGugan v. Turner, supra*.
>
> …

In determining what could constitute possession of lands to constitute the equivalent of a mining claim, the tribunal has considered **Smith v. Hill** (1909) 1 M.C.C. 349 [also 19 O.L.R. 577; 14 O.W.R. 881], wherein the Commissioner states commencing at 356:

> It was also urged by the respondent;'s counsel that whatever my findings as to the validity of the original staking and recording - and I think it cannot be disputed that the claim would not be valid unless at the time of staking a sufficient discovery had been made - I should in any event

> decide in favour of the respondent under sec. 140 [now section 121] of the Act, the real merits and substantial justice of the case being with him. Disputant's counsel, however, contended that any discretion given by sec. 140 must at least fall short of overriding any specific provision of the Act. In the latter view of the law I think I must concur, though without doubt the real merits and substantial justice of the case are on the side of the respondent, and if I considered sec. 140 enough to justify or require it I would have no hesitation as between the two parties to the present proceeding in deciding in the respondents' favor upon that ground. The foundation principle of our law regarding the acquisition of mining claims and the granting thereof by the Crown is the encouragement of discovery and opening up of valuable mineral, the granting of property upon which the mineral is situated being intended as the reward for the miner's industry in disclosing the mineral and thus conferring benefit upon the country. The price per acre exacted for the land is but a trifle compared with the value of the mineral, and bears no relation to it.

The question of what constitutes adverse possession of mining rights is discussed in numerous American Law journals. The tribunal relies on *Adverse Possession of Subsurface Minerals,* (1983) Kentucky Law Journal, 71, Ky. L.J. 83, Paul N. Bowles as a competent summary on what may constitute possessory title of mining rights. Adverse possession of subsurface minerals can be gained, according to the author, through possession of the surface incidental to the subsurface. However, the necessary activity requires that there be some form of extraction or possession for it to constitute the requisite adverse possession. In most cases in claims for possessory title, some sort of enclosure, such as fencing, is required. However, in relation to both wild lands and minerals, it may be sufficient to stake and blaze the boundaries of the area for which possession is claimed.

Although not a case of mineral extraction, the tribunal questions whether the performance of drilling and other assessment work may constitute sufficient notice to the legal title holder that possession is threatened. While MNDM has stated that this is merely a case of trespass on the part of Flag, in fact, a claim for possessory title is a form of trespass, which serves to extinguish the rights of the legal holder, so the tribunal finds that it is not persuaded by this argument.

The most telling feature of Flag's activities on the ground is that it was unable, through its actions, to exclude other licensees wishing to stake in the area. While Mining Claim 809104 may be blazed, with corners marked, it is not on the ground as shown in the Provincial Recording Office. A licensee, such as Lowney, would not be precluded from staking the ground, although he might be somewhat confused, if he were to believe his bearings. However, it could occur, as it did here, that Mining Claim 809104 was encompassed in a much larger claim, so that the overlap of areas claimed remained

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unknown to all involved for a period of years. Clearly, Flag was unable to exclude others from displaying an interest in prospecting on these lands, without asserting its rights through an action such as a dispute or for a declaration of rights, pursuant to section 105 of the **Mining Act**.

Finally, although the **Limitations Act** provides that ten years possession is necessary to acquire possessory title under most circumstances, by section 3, possessory title from the Crown may be acquired only after 60 years of adverse possession. Therefore, Flag's occupation of Mining Claim 809104 on the ground, arguably, may be sufficient to constitute adverse possession, it having been marked with posts and blazed, rather than enclosed by fencing, but nonetheless sufficient to signal anyone in the field who crosses its line that something is claimed on the ground. Similarly, the activity of conducting drilling and other assessment work may be sufficient to constitute adverse possession of the subsurface minerals, the statutory limitation of 60 years precludes development and further consideration of these arguments.

The tribunal finds that Flag is not able, under the circumstances, to claim possessory title as against the Crown, as the limitation period is still running for the Crown to oust Flag.

Loney's Staking of Mining Claim 1230297

This appeal is in fact a dispute against Loney's staking. This attack of the Loney staking is merely a secondary means of attempting to have the lands on the ground within the four posts of 809104 be available to Lashbrook's staking. It is otherwise of little merit.

Loney's staking is of eight units. The tribunal does not deny that locating the boundary between Scadding and Rathbun is problematic. This is clear from Loney's staking, which is about 100 metres north of the boundary and also north to some extent of Mining Claim 809104.

Mr. Loney is not caught by the same unfortunate circumstances which plagued Mr. Jerome's various stakings. Most importantly, he intended to stake in Scadding. By virtue of this fact, he is permitted a whole host of concessions not allowed to one staking outside of not only the township, but the type of township one is intending.

The case of **Royal Oak Mines Inc. v. Strike Minerals Inc.** (unreported), October 2nd, 1998, File No. MA 012-98 involved several in a series of competitive staking situations and required the examination of the degree of rigor previously applied to such stakings with emerging decisions and legislative change. The tribunal noted at the bottom of page 21:

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> The rules surrounding the staking of a mining claim have substantially changed with changes to the **Mining Act** made effective June 3, 1991, although the trend was already laid down by the decision of the Divisional Court (Southy J. in **Ramsay v. Fernberg**, (1989), 7 M.C.C. 385 Essentially, there has first been a judicial move, followed by a legislative move away from the strict compliance with a set of fairly rigorous rules and procedures involved in staking captured by the cumulative defects doctrine, to the increasingly flexible and forgiving legislative standard of both substantial and deemed substantial compliance found is section 43 of the **Mining Act** as it currently exists.
>
> The staking of a mining claim is both a procedure to be undertaken as well as a series of demarcations of the fabric of the land. … The fact that the Mining Recorder has discretion to exercise jurisdiction to order remediation of deficiencies after the fact (ss. 110(6)) has been preceived as supporting this move away from adherence or compliance (as in **Canadian Gems** [**and Minerals Ltd. v. Raven Resources Inc.** MA 023-97, July 14, 1997 (unreported)].
>
> The fact of the matter is that the staking of a mining claim is more than a simple foot race. There must be a good faith attempt to adhere to the myriad of legislative requirements. Clause 43(2)(b) states that the licensee must attempt to comply.
>
> The tribunal has come to the conclusion, regarding the seemingly liberating tests of substantial and deemed substantial compliance, that the staking of a mining claim must remain to be regarded as a serious enterprise, one in which going through the motions cannot be found to be sufficient.

The new provisions of substantial compliance, deemed substantial compliance and now the conclusive deeming provisions of subsection 71(2) make it very difficult to attack a staking on technical deficiencies. The test is not one of the attempt made in good faith to comply and the unlikelihood that the staking will mislead others in the vicinity desiring to stake.

The deficiencies in the Loney staking noted by the inspection report are as follows. It was recorded as 128 hectares. However, taken its dimensions shown on the Application to Record of 1,800 metres along the north boundary, 800 metres on the east and west boundaries and 1,700 metres along the south boundary, Mr. Loney calculated his area in error. According to his staking, his lines, if correct, would have resulted in an area of 148 hectares. Mr. Scarr's inspection estimated the area to be to be 180.3 hectares, although he did not inspect the south line. This is greater than than what is claimed by Loney by a factor of 41 percent, but merely 22 percent more than what is shown on his Application.

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The #1 and #4 posts are located north of the township line by 72.5 and 75.5 metres. Taken over the entire length of the boundary, this amounts to an area of approximately 13.5 hectares. Given that this type of error is exactly the type contemplated by subsection 110(6) for the moving of posts, the resulting excess in size is 12.5 percent.

The tribunal finds that there is nothing in the size of this staking which fits either of the tests to defeat deemed substantial compliance with staking requirements. The tribunal has found Mr. Loney to have been a credible and forthright witness. There was nothing in his testimony or demeanor to suggest that he did anything other than use his best efforts, in the required good faith, to comply with staking requirements. Similarly, despite its excess in size, neither Mr. Loney nor the Provincial Mining Recorder caught this error. Rather than being a false statement for which Mr. Loney could be called to account, the tribunal, in noting that he revealed what he believed his north and south boundary lines to be, disclosed all that was required in contemplation of substantial compliance.

As to whether a person desiring to stake in the vicinity would be misled, the tribunal also noted that the inspector had no difficulty in locating and following the lines. Anyone with a claim map in hand would be required to locate Loney's lines before proceeding or risk overstaking. The tribunal is satisfied that the excess in size, once posts are moved, will be 12.5 percent, a factor which is not insignificant, but not fatal.

The provisions of clause 20(a) of Ontario Regulation 7/96 are found to apply to this situation:

> **20.** If it appears that a licensee has attempted, in good faith, to comply with the Act and this Regulation, a mining claim of the licensee is not invalidated by,
>
> (a) the inclusion in the area of the claim of an area of more or less than the applicable size;

Perhaps one of the consequences of the new staking rules, along with the considerable changes into what may constitute a valid mining claim, such as the staking of up to 254 hectares in units of 16 hectares, is that the impact of an excess in size on the validity of the claim diminishes with the increased size of the claim or number of units. Large claims are becoming increasingly common and while there may be difficulties associated with staking such claims accurately, the staking will not be defeated on the basis of size alone.

Failure to Locate 809104

The real point pressed by Mr. MacLeod on behalf of Flag was that Loney failed to look for Mining Claim 809104 and therefore did not properly locate himself in the field. It is

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interesting to note that Loney did run his north line near that of 809104. It was near the south boundary, not the north boundary, which Loney would have expected to find. Should Mr. Loney's staking fail because of failure to locate what was present in the field, particularly as Loney also overstaked other Flag claims to the east, namely 1211026 and 1198334?

The requirement to list features and existing claims is not found in the staking regulation (O. Reg. 7/96), but rather in Form 1, Part B of O.Reg. 111/91. At the top of the illustration entitled "Example Sketch" it states, "Complete the group sketch in Part D using this as a guide. Where applicable, the items indicated must be shown in the sketch."

Mr. Loney did not indicate whether he staked with a claim map in hand, nor whether he performed a reconnaisance of existing claims on the ground. However, his sketch does show claims to the south, as well as features characterizing the land. McLaren Creek, Scaddding Bay, a swamp which was described by various witnesses, a circular road with off-shoots as well as a trail are all shown.

Quite frankly, had Mr. Loney located Mr. Jerome's lines in reference to 809104 in the field and followed these lines as those of a validly staked and recorded mining claim, it would have been Mr. Loney who would have been misled in attempting to accurately locate himself in the field. The tribunal finds that Flag cannot have the benefit of the existence of an improperly located mining claim in the field, which would have been held to be invalid and not recorded had its actual location been known at the time of recording, to unseat Mr. Loney's credible attempts to stake his claim.

The tribunal finds, despite the failure to show the existing mining claims along his north boundary in his sketch that Mr. Loney's staking of Mining Claim 1230927, would not be defeated by this fact. The staking of Mining Claim 1230297 would be in deemed substantial compliance with the requirements of the legislation. The tribunal will direct the Provincial Mining Recorder to issue an Order to move posts of the north boundary to coincide with the Rathbun Scadding Township boundary.

However, notwithstanding the above, the provisions of subsection 71(2) are found to apply. Mr. Loney's Mining Claim 1230297, a claim with no dispute having been filed prior to the elapse of one year after recording and with the first unit of assessment work having been performed and filed, is conclusively deemed to have been staked in accordance with the requirements of the legislation.

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Gap in Map A Eliminated in Map B

It was Mr. McLeod's evidence that something improper took place when the map in the Provincial Recording Office was changed, from showing a gap, in Map A to it having been eliminated in Map B. With the considerable confusion existing for almost all stakers as to the location of the township boundary, the size of Loney's Mining Claim being in excess of what was claimed, and Mr. Lashbrook's evidence that there were 500 feet unaccounted for, the tribunal is satisfied that nothing untoward took place in the re-drawing of the map. Clearly, the Provincial Mining Recorder is charged with maintaining records, which are plotted on maps for purposes of showing ground which is open to staking as well as not open. The tribunal is satisfied that Mr. Spooner's actions are those of an administrator attempting to keep the records up to date and accurate, despite problems which came to light. The concern raised was whether the land found in the gap was removed from staking by a sleight of hand, ostensibly making open land "disappear". This position might have been more compelling had Lashbrook only staked the pre-existing gap, rather than Loney's entire Mining Claim. This issue raises questions concerning the actions of the Provincial Mining Recorder, which is not the subject matter of this appeal. However, although it is not material to these Findings, the tribunal is satisfied that the actions were in keeping with management of records based upon new information.

Lashbrook Staking

Given that the Loney staking has been allowed to stand, there is no need to rule on the validity of the Lashbrook Filed Only Mining Claim.

Other Consideration

Do the facts of this case give rise to any other possibility of Mr. MacLeod being entitled to lands, which he appears to have acquired in good faith and without notice of defects, and more particularly lands on which he is alleging that he has spent considerable expenditure? His evidence is that he has spent in the neighbourhood of $100,000, although this is not borne out by the actual prescribed assessment work filed to date. The tribunal notes that the abstracts reveal only the minimum required assessment work filed to keep 809104 in good standing. This does not mean that the work has not been done as claimed, but merely that Mr. MacLeod has not to date provided evidence of that fact.

Equitable Liens

Section 15 of the **Proceedings Against the Crown Act**, R.S.O. 1990, c. P.27, states

> **15.** In a proceeding against the Crown in which the recover or real or personal property is claimed, the court shall not make an order

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> for its recovery or delivery but in lieu thereof may make an order declaring that the claimant is entitled, as against the Crown, to the property claimed or to the possession thereof.

Section 37 of the **Conveyancing and Law of Property Act**, R.S.O. 1990, c. C. 34 states:

> **37.(1)** Where a person makes lasting improvements on land under the belief that it is the person's own, the person or the person's assigns are entitled to a lien upon it to the extent of the amount by which its value is enhanced by the improvements, or are entitled or may be required to retain the land if the Ontario Court (General Division) is of opinion or requires that this should be done, according as may undre all circumstances of the case be most just, making compensation for the land, if retained as the court directs.
>
> (2) An appeal lies to the Divisional court from any order made under this section.

In **Byron v. Hilton Beach (Village)** [2000] O.J. No. 50 Court File No. 18527/98, (Superior Court of Justice), Stortini J. noted at paragraph 6, that the provision "involves an honest mistake. In order to adjudicate on the issue of honest mistake, the court would have to consider whether or not due diligence was exercised by the purchasers."

Lepore v. Girolami Estate [1994] O.J. No. 528, DRS 95-0442- Action No. 11856/88, (Ontario High Court of Justice) was a case of a claim for adverse possession. At paragraph 7, Sullivan J. referred to the test for adverse possession:

> 7.The Court of Appeal of Ontario clearly sets out the law in Keefer v. Arillotta 13 O.R. (2d) 680 at 692 where Wilson J.A. states:
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> 9. The defendants claim a lien under Section 37 of the Conveyancing and Law of Property Act. It is a requirement that the party claiming the lien must have a bona fide belief that the land is his own. As I have said, I find that the defendants knew the garage and greenhouse was not on their land.

The lien provision applies to lands in which a person has the honest belief that he or she is the owner of the land. Flag's situation is the case of the holder of a mining claim, however incorrectly situated in the field, or recorded on the application to record. Clause 50(1)(a) of the **Mining Act** states:

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> **50.**(1) The staking out or the filing an application for or the recording of a mining claim, or the acquisition of any right or interest, to record, or the acquisition of any right or interest in a mining claim by any person or all or any of such acts, does not confer upon that person,
>
> (a)any right, title interest or claim in or to the mining claim other than the right to proceed as in this Act provided to perform the prescribed assessment work or to obtain a lease from the Crown and, prior to the performance, filing and approval of the first prescribed unit of assessment work, the person is merely a licensee of the Crown and after that period and until he or she obtains a lease the person is a tenant at will of the Crown in respect of the mining claim;

Section 50 applies to Flag, in that it acquired the right as a recorded holder of Mining Claim 809104 from Albert Jerome. The tribunal cannot recall any convincing evidence that Jerome staked on behalf of Flag. Rather, the evidence was that he believed that he had located a showing which would be of interest to Flag. The abstract indicates that assessment work was performed prior to the transfer in September, 1987, although the report by Robin E. Goad, Consulting Geologist, carried out between March and June, 1986, was done for Flag, not Jerome. Also, the assessment work recorded prior to the transfer does not give dates and may not be reflective of this time frame, but rather of the conversion between days of work and monetary value, which took place after amendments were made to the **Mining Act** in 1989, effective June 3, 1991.

Despite the work shown, time for the performing of assessment work was extended twice, in 1988 and 1989 and then the claim was cancelled in July, 1990 and relieved from forfeiture in September, 1990. Time was further extended to June, 1991. In June, 116 days, which was converted to $2552 was applied to the claim.

Despite its dubious beginnings as a viable claim, wherever located, the tribunal finds that Flag has acquired this claim in good faith and is entitled to the benefit of the doubt in this regard. However, Flag cannot be strictly considered an owner of the claim. The **Mining Act** only defines "owner" when used in Parts VII, IX and XI in connection with mine rehabilitation, statistical filings and offences.

In **Werner Lake Developments Ltd. and Hopely v. AEC West Ltd and Aquafor Beeh Limited**, MA 013-98, (unreported) the tribunal relied upon the definition in **Black's Law Dictionary** to determine the meaning of the phrase as it is used in 79:

> **Owner** The person in whom is vested the ownership, dominion, or title of a property; proprietor. He who has dominion of a thing, real or personal, corporeal or incorporeal, which he has a right to enjoy and do with as he

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> pleases, even to spoil or destroy it, as far as the law permits, unless he be prevented by some agreement or covenant which restrains his right.
>
> The term is, however, a **nomen generalissimum**, and its meaning is to be gathered from the connection in which it is used, and from the subject-matter to which it is applied. The primary meaning of the word as applied to land is one who owns the fee and who has the right to dispose of the property, but the term also includes one having a possessory right to the land or the person occupying or cultivating it.
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> The term "owner' is used to indicate a person in whom one or more interests are vested for his own benefit. The person in whom the interests are vested has "title" to the interests whether he holds them for his own benefit or for the benefit of another. Thus the term "title" unlike "ownership", is a colourless word; to way without more that a person has title to a certain property does not indicate whether he holds such property for his own benefit or as trustee.

The tribunal finds that Flag does not meet the strict statutory requirements to be considered an owner for purposes of the provisions of the **Conveyancing and the Law of Property Act**. However, the **Mining Act** is a unique and complex piece of legislation, which serves to create certain rights in Crown lands which are not given with such overriding blanket authority in other law related to property rights. The right to work on existing mining rights can interfere with the rights of surface rights owners and adjacent landowners, as evidenced by compensation and easement provisions of sections 79 and 175.

The tribunal finds that it does have statutory authority to make its determinations based upon the real merits and substantial justice of the case. In doing so, it can issue a declaration regarding those rights. The tribunal finds, that notwithstanding the specific words of the legislation, section 105 of the **Mining Act** empowers it to make findings in connection with every question and section 121 cloaks it in equitable powers.

In this case, the tribunal notes the following facts. Former Mining Recorder, Vic Miller, knew in 1985 that there was a problem with the Scadding Rathbun boundary. His statement in his order, that, "…there has been no retracement survey carried out to date, therefore creating confusion on the ground." The problems on the ground were known as far back as 1985.

In fact, the problems were known at the time of the original field surveys carried out in 1892. In a copy of the field notes for the surveying of Scadding Township [Ex. 13], it is noted at the bottom of page 3, that the surveyor had difficulty with magnetic variation.

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He stated, "The variation of the magnetic needle not being uniform, the compass was generally unreliable, the lines were therefore run by the transit or Solar Compass." Although no magnetic anomaly was discussed in the notes for the original Crown survey for Rathbun Township, dated February 13, 1894 [Ex. 12], the surveyor displayed some need to correct his lines. Starting at the bottom of the first page of his report, he stated,

> "On the morning of the 8th of August I proceeded to the South East corner of the Township and opened up a range of about three quarters of a mile of the east boundary of Scadding and carried said range to and across a bay of Kookagaming Lake where I observed Polaris the same night at Eastern *Elong?* (time 10h-17m Azimuth 1B50' 45") and corrected my work and continued the Survey of the Township to completion observing Polaris frequently for correction of my work."

Mr. McLeod pointed out correctly that the annulment of Scadding took place in 1953 and no retracement took place. MNDM and MNR were aware that there were problems with the survey of the boundary, both from the initial surveys conducted as well as from the Jerome's problematic staking and resulting Order in 1985. The tribunal also finds that these problems were such as to have, without the benefit of GPS, created confusion on the ground. Despite faith in Mr. Jerome's staking abilities, there is ample evidence to support the fact that Mr. Jerome had considerable difficulty locating himself in the field in staking all of the mining claims which straddled either side of the Scadding Rathbun boundary.

It is not certain what steps Mr. McLeod could have taken to ensure that this claim was properly staked, in the absence of GPS locating equipment, which was not available. For example, Mr. McLeod could have checked its actual location within the survey fabric. The steps to resurvey a boundary are limited to owners and to the Minister of Natural Resources, under the **Surveys Act**, R.S.O. 1990, c. S. 30, as well as the **Public Lands Act**, R.S.O. 1990, c. P.43, for purposes of annullment. There does not appear to be an easy route for an interested citizen in bearing the cost of a resurvey. The process involved, however initiated, is lengthy and costly, involving notices, public hearings and potential appeals to the Superior Court. It is not for the tribunal to speculate whether this process is open to Flag, or whether its costs should be borne by Mr. McLeod. Rather, the tribunal finds that there are problems with the township boundary, having been acknowledged, if not from the original surveys which noted technical difficulties, then since the annullment in 1953 and again in the Mining Recorder's Order of 1985.

The provisions of the **Conveyancing and the Law of Property Act** cannot directly apply to the holder of a mining claim who performs assessment work in the mistaken belief that he holds a valid mining claim in relation to that land, as the holder does not fit within the parameters of the statute.

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Nonetheless, Flag asserts that it performed extensive exploration work on these lands, some of which show up through the filing of assessment work reports, which are of benefit to MNDM on behalf of the public interest. There is also additional exploratory work which has not been filed, and it is unclear whether this was on account of uncertainty as to title or whether it was for proprietory reasons.

The time frames when Flag performed this work were, according to Mr. McLeod's evidence, after Loney's staking, so that he too has an interest in the lands, albeit one afforded by section 50 of the **Mining Act**. Whether this constitutes an unjust enrichment of the Ministry, or even potentially the holder of the mining claim covering those lands, is a valid question.

The benefit of the assessment work performed and filed, absent any declaration or realization of rights in favour of Flag, will cause a benefit to accrue to the Ministry and potentially Loney as well. While Loney may not have access to that assessment work not filed, he is well aware of the area of interest, has access to it, can discover the location of existing drill holes, and may even be able to determine through discussions within the industry the type and extent of surveys carried out, with a view to duplicating the very results which Mr. McLeod is interested in.

The tribunal finds that it is prepared to issue a declaration that Flag is entitled to an special equitable lien on the property, equal to the value of the exploration work done on the ground, but not recorded. Mr. McLeod's evidence was that in the neighbourhood of $80,000 to $100,000 was done, but only approximatly $12,000 was filed. Therefore, the tribunals' determination is conditional upon being satisfied that Flag has done the substantial work in excess of what was filed, as has been asserted in this matter.

The tribunal has found that its powers under section 105 and 121 extend to the issuance of declaratory orders and has done so in **Sheridan v. The Minister of Mines,** (1988) 7 M.C.C. 405; **Gryba and St. Andrew Goldfields Ltd. v. 297 3090 Canada Inc.** (1998) (unreported) File MA 035-97; **Werner Lake Developments Ltd. & Hopley v. AEC West Ltd.**, (1999) (unreported) MA 013-98; **W. Johnson Mining and Oil Field Services Ltd. v. Randsburg International Gold Corporation & Lake Superior Resources Corporation et al.** (2000) (unreported) MA 038-99; and others.

There is also precedent for this type of order found in **Davis v Matheson, Matheson v. Hancock** (1913), 2 M.C.C. 98. This was a case involving stakings in what were thought to be surveyed territory, but were in fact in unsurveyed territory. This is confusing in reading the case, because lands in question were referred to as "the south-west quarter of the west half of the north-east quarter of block 8 in the Gillies Limit" etc. Between Davis and Matheson, it was found that only Matheson's mining claim number 957 complied with the legislative requirements and the dispute was dismissed. With Matheson and

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Hancock, the situation was more complex. Hancock staked the same night as the claims in the Davis Matheson dispute, and Matheson subsequently, staked the what was intended to be the adjacent quarter section to Hancock and filed his dispute. For clarity, Matheson had two claims, numbers 957 and 1162, and it was against this claim that Davis filed his dispute and similarly, it was in favour of this claim that Matheson filed his dispute against Hancock. At page 102,

> He stated that the reason he staked this [1162] particular block of land was because he "found that Hancock's eastern boundary embraced nearly half of the adjoining quarter section which he (Matheson) had previously staked, known as the south-east quarter of the west half of the north-east quarter of the said block, and in that respect the Hancock staking would conflict with his (Matheson's) recorded claim 957,and his dispute was filed with the sole idea of having Matheson's eastern line or boundary moved to his western boundary, so that the two stakings would not conflict.

It was determined that neither staking was invalid and, as between Matheson's 957 and Hancock's 938, that of Matheson had priority. In addition, Matheson's claim 1162 was also found to be valid. However, Hancock's claim was found, commencing at page 101, to:

> practically split in the middle by the boundary line between the two quarter sections, or in other words, Hancock only succeeded in staking one half of the lands applied for, and consequently embraced nearly one-half of the territory previously staked by Matheson, known as mining claim 957
>
> If it was surveyed territory then there would be very little difficulty in disposing of the Matheson and Hancock stakings. In surveyed territory where the discovery is outside the limits of the claim as applied for, but within the boundaries as actually staked out on the ground, the claim would be invalid, but in unsurveyed territory if the discovery is within the 4 corner stakes and in other respects the claim had been staked in accordance with the Mining Act, then the staking would be held to be valid.

Commissioner Godson declared Hancock's properly staked claim 938 as invalid due to the priority of Matheson, but noted that the discovery was outside of Matheson's claim. He continued at page 105:

> **The result so far has been to give Matheson what he sought by his application, and I think upon the facts that he is justly entitled to succeed. But by finding priority of discovery I have unhorsed**

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> **Hancock, who becomes a victim of time. I am not satisfied that Hancock should lose what he intended to, and thought he was staking and applying for, through a finding of priority based upon the slender facts in this case, and I intend that Matheson's application No. 1162 for the south-west quarter of the north half, etc., shall be applied in relief of Hancock's position** (emphasis added)

Continuing on page 106:

> This decision is given upon what I consider the real merits and substantial justice of the case, and in an endeavour to carry out the intention of the parties, which I believe I can do, as there are no other parties adversely interested. I will allow the application of James e. Matheson, now on file as No. 1162, for the sourth-west quarter of the north half, etc., and direct the Mining Recorder to place it on record, **and concurrently therewith order the said Matheson to execute a transfer to the said mining claim to T.R. Hancock, who will become the vested holder of the same.** (emphasis added)

Commissioner Godson, therefore, found, notwithstanding that Hancock's staking could not be recorded for lack of priority, that he did have jurisdiction to order Matheson to transfer one of his claims to Hancock.

The tribunal is of the opinion that it has jurisdiction under section 105 to order that Loney abandon that portion of Mining Claim 1230297, upon the terms set out below. However, the tribunal does not have the power to order the Minister, with the approval of the Lieutenant Governor in Council, to issue an unpatented mining claim or lease pursuant to subsection 176(3). If it had this power, it would do so, on the facts of this case, and based upon the real merits and substantial justice.

As an alternative, the tribunal strongly urges the parties to consider this manner of disposing of this matter. As set out above and below, the suggested course would not prejudice the parties, nor would it set a precedent, as the facts of this case are very narrow. As there is no adverse interest which arises, this solution would permit both Mr. Loney and Flag to proceed to deal with their substantial finds in the manner intended by the **Mining Act**. The failure by the parties to reach some sort of resolution concerning the Special Equitable Lien will result in its remaining on the lands indefinitely, thereby impeding the rights of any recorded holder from dealing with his mining claim in such manner as he or she may wish.

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Directions to Flag

The tribunal is prepared to issue a Declaratory Order to Flag, setting out that it has a special equitable lien on the lands on which Mining Claim 809104 is staked on the ground. To do so, the tribunal requires any and all information concerning the value of the assessment work performed which does not appear on the abstract for the Recorded Mining Claim 809104 in Rathbun. It will therefore Direct Flag to provide to the tribunal copies of all expenditures made on Mining Claim 809104 to date and to further provide a breakdown of what amounts are shown as validly accepted assessment work recorded on the abstract, and what amounts are not yet claimed.

In exercising this discretion, the tribunal must be satisfied that the amounts spent by Flag are in excess of the amount shown on the abstract for Mining Claim 809104. According to the evidence of Mr. McLeod, this would be in the range of $80,000 to $100,000, less the amounts already on file.

In addition, the tribunal is compelled, for purposes of certainty, to require that this special lien apply to only those lands which are within the four corner posts of the original staking of Mining Claim 809104. Flag will be further directed to obtain a survey of the land by an Ontario Land Surveyor, in the manner as set out in section 95 of the **Mining Act** and Revised O.Reg. 768/00, with the exception of the requirement of any permission of the Provincial Mining Recorder or Minister.

The time for the providing of the financial expenditures and survey shall be set for not later than 45 days from the date of this Order. However, Flag is urged to proceed with all haste, as the field season is well underway at this time.

Rights of Mr. Loney, Flag, MNDM and the Tribunal's Recommendation

It should be quite clear that Mr. Loney has done nothing wrong in his staking of Mining Claims 1230297, except perhaps fail to accurately locate his north line. Nonetheless, he will be put in a position, as a result of the impending tribunal's Declaration, of holding his Mining Claim subject to an equitable lien for an amount of potentially up to $100,000, although the exact amount has yet to be proved.

Mr. Loney will have several options on how he may wish to proceed. He could consider forming a joint venture with Flag, allowing both to work their substantial finds at opposite ends of the Loney Mining Claim 1230297, in a manner that is otherwise independent one of the other, so long as they maintain their obligations under the **Mining Act**.

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Alternatively, Mr. Loney could elect to abandon that portion of his Mining Claim 1230927 which coincides with the location of the Flag surveyed area, being where 809104 is located on the ground. This can be done in accordance with subsection 70(2) of the **Mining Act** and section 6 of O.Reg 113/91, which is reproduced:

> **6.** The following conditions apply with respect to the partial abandonment of a mining claim under subsection 70(2) of the Act:
>
> 1. Before the notice of partial abandonment is filed, the first prescribed unit of assessment work for the claim must be completed and the report of assessment work must be filed and approved.
>
> 2. The notice of partial abandonment shall be filed at least sixty days before the anniversary date of the claim.
>
> 3. The portion of the claim remaining after partial abandonment must be contiguous.
>
> 4. Any assessment work performed on the portion of the claim being abandoned lapses upon the filing of the notice of partial abandonment unless the report of assessment work for that work has been filed and approved.
>
> 5. The amount of assessment work credits applied to the claim shall be reduced by the proportion that the area of the portion of the claim being abandoned bears to the total area of the claim

If Mr. Loney should chose to abandon part of Mining Claim 1230927, he would lose the value of the assessment work attributable to this land. Although, in this case, there is no clear power to award compensation, Flag should consider itself morally bound to compensate Mr. Loney for the lost value of assessment work in relation to the abandoned portion of his claim.

Should Mr. Loney determine that it would be in his best interests to not have a portion of his Mining Claim with a special lien, and chose to abandon that portion, the tribunal is of the opinion that the Minister of Northern Development and Mines is in a position to invoke his powers under subsection 175(3) of the **Mining Act**, to issue either an unpatented mining claim or lease to Flag for the surveyed lands. The tribunal strongly urges the Minister to consider this solution as a reasonable means of extinguishing Flag' s special lien on the land. The terms and conditions under which such an unpatented mining claim or lease can be issued would have to be determined, given that Flag is the recorded holder of an existing Mining Claim, 809104, along the north boundary. It may well be that cancellation of that claim and the assignment of assessment work would be

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demanded by the Minister for purposes of exercising this special jurisdiction. Or, it may be that the Minister will determine that the value of the assessment work which will form part of the Declaration of the Special Equitable Lien will be recognized as duly performed assessment work and allow it to be recorded *nunc pro tunc*, that is, as if it were done following the issuance of the mining claim.

In all events, it is pointed out to Flag that a fee is associated with the issuance of any interest by the Minister, pursuant to subsection 175(3) of $765, for the issuance of a license of occupation, patent or lease, pursuant to paragraph 22 of section 1, O. Reg 382/93. No mention of a fee is made in connection with the issuance of an unpatented mining claim.

Precedent

The tribunal has made the above-mentioned findings as a means of exercising its equitable jurisdiction in a case so unique, unusual and compelling, that it was moved to do so. There is precedent for this type of Order in **Matheson v. Hancock**, (*supra*). Any attempt to declare the existing Mining Claim 809104 as validly staked in Scadding would go against all principles of staking and recording a claim under the **Mining Act**. The tribunal believes the ramifications from such a course would have affected numerous other claims staked in the vicinity in a detrimental fashion.

As to this case setting a dangerous precedent for trespassers to gain an interest in lands which they have not validly staked, the tribunal is of the opinion that this would be so remote as it does not bear further consideration or concern. The fact is that work performed on a mining claim serves to keep it in good standing and provide the recorded holder with the opportunity of obtaining a lease, should exploration efforts prove successful. It would be hard to imagine a licensee deliberately trespassing on lands in order to obtain some right not provided for by the **Mining Act**.

This case is clearly distinguishable in that the trespass and assessment work done flow from the original error of location of Mining Claim 809104 on the ground. This error was not deliberate, but was one of which the former Mining Recorder should have known, or at least suspected. The current recorded holder, who did not perform the staking, was completely unaware that there could have been a problem with the location of the staking. It is unknown how he could have checked the claim adequately, without employing an Ontario surveyor or walking the line with GPS, something not readily or cheaply available at the time.

The tribunal is satisfied that the exercise of its equitable jurisdiction in this case is limited to the unique and compelling facts of this case.

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Conclusions

Flag's Mining Claim 809104 is declared to exist, as recorded, in the Township of Rathbun. The tribunal will leave it to the discretion of the Provincial Mining Recorder to issue an Order pursuant to subsection 110(6) of the **Act** for the moving of posts, blazing and marking of lines, should such action become necessary, depending on the actions of the parties, to be determined by them, as set out below.

The dispute against Loney's Mining Claim 1230927 is dismissed. The tribunal will direct the Provincial Mining Recorder to issue an Order pursuant to subsection 110(6) for the movement of the posts and blazing of the north boundary of the claim to coincide with the Scadding Rathbun Township boundary.

The tribunal is prepared to issue a Declaratory Order that Flag has a Special Equitable Lien on those lands which are found on the ground at the location where Mining Claim 809104 is staked. To assist with the drafting of this Order, Flag is directed to provide the tribunal with photocopies of all assessment and exploration work performed on these lands, sorting out those amount separately for which assessment work reports have been prepared, filed and applied, and noting the balance of monies which will form part of the Special Equitable Lien. Flag is also directed to undertake a survey of the lands circumscribed by its Mining Claim 809104 on the ground, so far as it be permitted to extend only from the Township Boundary between Scadding and Rathbun, and south into Rathbun. Such survey shall not encompass those lands which exist under the deemed validly staked and recorded Mining Claim 809104 which is shown to exist in Rathbun.

The tribunal advises the parties that it recommends one of two courses of action, so that the Special Equitable Lien may be extinguished. The first is that Flag and Loney form a joint venture to work their respective finds, whereby Flag is given an interest in the Loney Mining Claim 1230927. The second is that Loney abandon that part of Mining Claim 1230927, pursuant to subsection 70(2) of the **Mining Act**, which coincides with the location of the ground staked by Jerome in Scadding as Mining Claim 809104, to be properly set out in a survey by an Ontario Land Surveyor, which shall be supplied by Flag to Loney. If such abandonment does take place, the tribunal further recommends to the Minister that he consider the issuance of an unpatented mining claim or lease to Flag for the lands surveyed by an Ontario Land Surveyor in Scadding, pursuant to subsection 176(3) of the **Mining Act** on such terms or conditions as he deems appropriate.

The parties are further advised that the tribunal will be seeking to remove notations of "pending proceedings" (and exclude time and set new anniversary dates pursuant to section 67 of the **Act**) from the abstracts of Mining Claim 809104 and 1230927 as soon as it has been advised that this matter has been satisfactorily resolved by the parties, failing which, the tribunal will remove the notations upon ten days notice to the parties.