

File No. MA 015-99

L. Kamerman) Thursday, the 30th day
Mining and Lands Commissioner) of March, 2000.

THE MINING ACT

IN THE MATTER OF

Mining Claims SSM-1217084 and 1231918, situate in the Mishibishu Lake Area, in the Sault Ste. Marie Mining Division, recorded in the names of Jeff Paul Pinksen and Robert Heilman, respectively, and transferred to the name of Murgor Resources Inc./Ressources Murgor Inc., hereinafter referred to as the "Murgor Mining Claims";

AND IN THE MATTER OF

Two applications to record Mining Claims 1163529 and 1218496, situate in the Mishibishu Lake Area, in the Sault Ste. Marie Mining Division, staked by Robert Edward Palahnuk, to have been recorded in the names of Robert Edward Palahnuk and Daniel Milton MacDougall, each as to a 50% ownership, marked "filed only", hereinafter referred to as the "Palahnuk Filed Only Mining Claims";

AND IN THE MATTER OF

Ontario Regulation 7/96;

B E T W E E N:

ROBERT EDWARD PALAHNUK

Appellant and Disputant

- and -

MURGOR RESOURCES INC./RESSOURCES MURGOR INC.

Respondent

AND IN THE MATTER OF

An appeal by the Appellant and Disputant pursuant to subsection 112(1) of the **Mining Act**, from the decision of the Provincial Mining Recorder, dated the 6th day of May, 1999, for a declaration that the Murgor Mining Claims SSM-1217084 and 1231918 be declared invalid and for the recording of the Palahnuk Mining Claims 1162529 and 1218496.

**ORDER RESCINDING AND REPLACING
ORDER OF MARCH 22, 2000, *NUNC PRO TUNC***

WHEREAS the tribunal issued its final Order in this matter on the 22nd day of March, 2000 and certain errors were made in the Order, Schedule "A" and Reasons;

AND WHEREAS the tribunal has determined, rather than issue an Amending Order, it would be more expedient to rescind and replace the entire aforementioned Order and Schedule "A" and to further issue a new set of Reasons with amendments;

AND WHEREAS the tribunal has determined, for purposes of clarity that all changes made to those portions of its aforementioned Order, Schedule "A" and Reasons containing errors shall be italicized, with the italics serving no other purpose than to draw the readers' attention to the changes;

1. THIS TRIBUNAL ORDERS that its Order dated the 22nd day of March, 2000, and Schedule "A" attached thereto, be and is hereby rescinded and replaced with the following, *nunc pro tunc*:

1. THIS TRIBUNAL ORDERS that the dispute and appeal of Robert Edward Palahnuk against the recording of Murgor Mining Claim SSM-1231918, be and is hereby dismissed, *and that the application to record the Palahnuk Filed Only Mining Claim SSM-1163529 remain refused.*

2. THIS TRIBUNAL FURTHER ORDERS that of the dispute and appeal of Robert Edward Palahnuk be allowed in part, that the recording of Murgor Mining Claim SSM-1217084 be cancelled and that the Palahnuk Mining Claim *SSM-1218496* be recorded, effective March 22, 2000.

3. THIS TRIBUNAL FURTHER ORDERS that the notation "Pending Proceedings", which was recorded on the abstract of Murgor Mining Claim SSM-1231918, to be effective from the 19th day of May, 1999, be removed from the abstract of Mining Claim SSM-1231918.

4. THIS TRIBUNAL FURTHER ORDERS that the time during which the issues concerning Mining Claim SSM-1231918 were pending before the tribunal, being the 19th day of May, 1999 to the 22nd day of March, 2000, a total of 309 days, be excluded in

computing time within which work upon Mining Claim SSM-1231918 is to be performed and filed.

5. THIS TRIBUNAL FURTHER ORDERS that the *4th day of October, 2002* be fixed as the date by which the *third unit* of prescribed assessment work must be performed and filed on Mining Claim SSM-1231918, in the amount set out in Schedule "A" attached to this Order, pursuant to subsection 67(3) of the **Mining Act** and all subsequent anniversary dates are deemed to be October 4 pursuant to subsection 67(4) of the **Mining Act**.

6. THIS TRIBUNAL FURTHER ORDERS that this matter be referred back to the Provincial Mining Recorder for an Order pursuant to subsection 110(6) of the **Mining Act** to move the #1 post of the Murgor Mining Claim SSM-1231919 to the south, a distance of 100 metres, more or less, to coincide with the location of the #2 post of the Palahnuk Mining Claim SSM-1218496; to move the existing line post located 400 metres west of the #1 post of *Mining Claim SSM-1231919* south a distance of 100 metres, more or less, to coincide with the south line of Palahnuk Mining Claim SSM-1218496; to erect an additional line post to be located 800 metres west of the newly moved #1 post of *Mining Claim SSM-1231919*; to blaze the newly created line between the #1 post and the line post 800 metres to the west, then moving north a distance of 100 metres, more or less, to meet up with the existing line post for *Mining Claim SSM-1231919*; and to inscribe or make necessary changes to the inscriptions of all posts affected.

7. THIS TRIBUNAL FURTHER ORDERS that no costs shall be payable by either of the parties to this dispute and appeal.

2. THIS TRIBUNAL FURTHER ORDERS that the Reasons attached to its Order of the 22nd day of March, 2000 be replaced with the Reasons attached to this Order Rescinding and Replacing Order of March 22, 2000, *Nunc Pro Tunc*.

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

Reasons for this Order are attached.

DATED this 30th day of March, 2000.

Original signed by

L. Kamerman
MINING AND LANDS COMMISSIONER

**AMENDED SCHEDULE 'A' OF
ORDER RESCINDING AND REPLACING
ORDER OF MARCH 22, 2000, *NUNC PRO TUNC***

Mining Claim #	Claim Size	Due Date	Amount of Prescribed Work	Units of Assessment Work
SSM-1231918	2 units	<i>October 4, 2002</i>	\$ 800	3

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AND IN THE MATTER OF

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AND IN THE MATTER OF

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B E T W E E N:

ROBERT EDWARD PALAHNUK

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AND IN THE MATTER OF

An appeal by the Appellant and Disputant pursuant to subsection 112(1) of the **Mining Act**, from the decision of the Provincial Mining Recorder, dated the 6th day of May, 1999, for a declaration that the Murgor Mining Claims SSM-1217084 and 1231918 be declared invalid and for the recording of the Palahnuk Mining Claims 1162529 and 1218496.

REASONS

This matter was heard by telephone conference call on September 28, 1999 and reconvened on November 17, 1999.

Appearances

Robert Palahnuk, Appellant and Disputant, was represented by his agent, Francis (Frank) Doran.

Murgor Resources Inc./Ressources Murgor Inc., Respondent, was represented by its agent, Aubrey Eveleigh.

Background

This matter arises out of a non-competitive staking situation in the Mishibishu Lake area. On November 24 and 25, 1997, a party of stakers, including and on behalf of Robert Heilman, grid-staked a number of mining claims bearing numbers SSM-1231915 through 1231920, which were transferred into the name of Murgor Resources Inc./Ressources Murgor Inc. in May, 1998. This staking purported to fully surround recorded Mining Claim SSM-1163530, held by Messrs. Palahnuk and MacDougall. Of interest in this dispute and appeal is Mining Claim SSM-1231918, being a two unit claim staked due north of the Palahnuk claim.

On March 10, 1998, the Palahnuk/MacDougall Mining Claim SSM-1163530 was cancelled for lack of assessment work having been performed. On March 11, 1998, this area was restaked and recorded in the name of Jeff Pinksen bearing number 1217084. This claim was similarly transferred to Murgor in *December*, 1998 and it is Murgor who is the respondent to this dispute and appeal.

On May 14, 1998, Palahnuk restaked the lands covered by the forfeited mining claim 1163530 and the Murgor 1217084. On May 15, 1998 Mr. Palahnuk, with the help of Mr. MacDougall, staked a portion of the area covered by mining claim 1231918. The exact locations of the boundaries of these various stakings and the extent of overlap is at issue.

Issues

1. Is grid staking permissible under O.Reg. 7/96, or does the regulation require that each individual mining claim be staked to completion as one continuous action?
2. Does the regulation require that the recording licensee be present on each mining claim at its time of completion, or do the words, "present on the ground" have some other meaning?
3. If the regulation is found to permit grid staking, what obligations does the recording licensee have to determining the limits of pre-existing mining claims whose boundaries will be coterminous with the grid staking?
4. Is the failure to establish a line of a pre-existing mining claim such that it should lead to the cancellation of mining claim under staking?
5. The tribunal is asked to re-examine the tests for substantial and deemed substantial compliance under section 43: Does the test for "deemed substantial compliance" under subsection 43(2) require actual demonstration of the attempt to comply with each staking element under scrutiny, where the failure to do so would entitle the staker only to have the staking considered under subsection 43(1), for substantial compliance?
6. Can posts which are undersized be found to be in substantial or deemed substantial compliance?

Submissions

This matter was conducted by telephone conference call and the bulk of the submissions were contained in writing.

Mr. Doran's first argument is that there was more open ground available for staking with respect to the forfeited 1163530 than is shown on the claim map in the recording office. He points to the sketch filed with the application to record for 1163530 in support of this. Therefore, the sketches filed as part of the applications to record for the Heilman application 1231918 and Pinksen 1217084 appear as they would look on the claim map in the recording office and not as they are on the ground.

Mr. Doran's second argument, which refers back to the hearing before the Provincial Mining Recorder, *Ms. Sheila Lessard*, at which Mr. MacDougall presented evidence concerning various staking infractions in the staking of claims 1231918 and 1217084, to which Mr. Eveleigh had agreed but submitted that the stakings had complied with the tests set out in section 43 of the **Act**. Mr. Doran stated that section 43 would not and should not render such stakings as valid, as there were other infractions disregarded by the Mining Recorder.

Mr. Doran's third argument, as stated in his submissions, was that Messrs. Pinksen and Heilman made untrue statements in their Applications to Record. Upon being questioned by the tribunal, the essence of this argument was that, pursuant to the Certificate of the Recording Licensee, if any required elements of staking are not in accordance with the **Mining Act** and regulation, then it is not true that the staking was done in accordance with the legislation. Mr. Doran's further argument was that the sketches provided by Mr. Eveleigh pursuant to his inspection similarly were inaccurate, in that they did not show the piece of land jutting out into Mishibishu Lake relative to the claim lines in the manner in which this area appears on the ground.

Mr. Eveleigh responded to the first argument by stating that he had no comment as to the accuracy of the government's claim map. He submitted that, although there may be some discrepancy between Mr. Heilman's and Mr. Pinksen's sketch maps and the Mishibishu Lake Area claim map, there was no attempt to mislead in this case. Their stakings show tie-ons to previously recorded claims on all sides of this claim. Mr. Eveleigh goes on to quote section 20 of O.Reg 7/96.

In response to Mr. Doran's second argument, Mr. Eveleigh suggests that this appears to be directed at the **Mining Act** and the Mining Recorder and raises the issue of what are the other staking infractions referred to. Mr. Eveleigh ends by quoting the "deemed substantial compliance" provisions as set out in subsection 43(2).

In response to the third argument, Mr. Eveleigh submitted that the staking of claims 1231918 by Mr. Heilman and 1217084 by Mr. Pinksen were in a non-competitive situation. He submitted that the Applications to Record appear to be completed correctly and having been filed and deemed to be correct, were recorded. Mr. Eveleigh submitted that no gross errors can be found on these Applications and any existing errors should be regarded as minor in nature. Mr. Eveleigh concluded by referring to section 20(b) of O.Reg. 7/96, stating that it is apparent that no attempt was made to mislead and the applications were completed in good faith in compliance with the **Act**.

Mr. Eveleigh referred to his two sketches, done upon inspection and based upon information collected in the field and drafted so that the parties and the Recorder and Commissioner could clearly visualize the sequence of events. There was nothing found to explain the allegations of lying.

The initial telephone conference hearing in this matter saw Messrs. Doran and Eveleigh make additional comments on one another's written materials. Mr. Doran commenced, regarding his first issue, by stating that the mining claim map upon which the Mining Claims accepted by the Mining Recorder are drawn is not accurate. Looking to the stakings done on November 24 and 25, 1997 by or on behalf of Mr. Pinksen, the sketch accompanying the application to record simply reproduces the mining claim map, as opposed to depicting that which actually exists on the ground. Based upon the magnetic declination used, of 2 (degrees) east, there should be a discrepancy on their lines of 49 metres.

He submitted that with a 7 to 8 (degrees) of the true north/south line at the time, running a line of 1/4 mile (or approximately 400 metres) would be off the line of true north by 49 metres. Mr. Doran stated that the staker simply did not draw the lines as they were staked on the ground or as they were tied on.

In addition, Mr. Doran submitted that, Mr. Heilman did not tie onto the other lines on his claim 1231918. While his north and south lines would have been acceptable, as depicting running adjacent to existing mining claims, his east and west lines could not have tied onto lines of mining claims which had not yet been recorded.

Mr. Doran stated that his recent field inspection showed that the stakers overstaked lands to the north of claim 1231918 and the posts were undersized. He submitted that this demonstrates that the stakers did not attempt to comply.

Mr. Eveleigh stated that the amount of magnetic declination is irrelevant. The stakers were following the old fabric and tied onto the old claims. They used their compass as a tool, but followed the old lines and tied on. A discussion ensued between Messrs. Doran and Eveleigh as to whether they tied on to existing claims. Mr. Eveleigh stated that at the time of staking, they would have left out the claim numbers under staking. However, they did attempt to tie onto existing claims, although these cannot always be found. Mr. Eveleigh stated that as clearly as it is shown on the sketch, the stakers tried to tie on. By virtue of the fact that the stakers tried in good faith to tie on does not invalidate their stakings.

Mr. Doran referred to Mr. Eveleigh's inspection sketch and suggested that Mr. Eveleigh could not find the line because he did not run his compass at 2 (degrees) east. Mr. Eveleigh countered by stating that the post was missing, which both men agreed was strange. Mr. Doran stated that there had been evidence at the hearing before the Provincial Mining Recorder that there was adequate sized lumber in the vicinity to make adequate sized posts and therefore, there was not substantial compliance. Mr. Eveleigh stated that he could not recall that evidence. Mr. Doran referred to his photographs filed in support of this point. Mr. Eveleigh conceded that the posts showed faces of 3 1/2 inches as opposed to 4 inches. Mr. Doran referred to section 20 of O.Reg. 7/96 and submitted where there is adequate timber, there was no reason to not comply with the exact requirements. Mr. Eveleigh conceded that there appeared to have been adequate timber in the vicinity; however, one cannot spend all day selecting the right tree. Rather, the staker had selected a tree which he thought would give him a 4 inch face and it did not. However, the size was such, given that the required information could be printed on it, that it was in substantial compliance.

With respect to the third argument, Mr. Doran stated that the Mining Recorder also agreed that section 43 should not cover a situation where no attempt has been made in good faith to comply with the requirements of the Act and regulation. By signing the certificate, the staker is stating that he complied with the requirements and that everything contained in the application to record is correct. Mr. Doran stated that it is clear from the application to record that the staking was not continuous, that the stakers moved from one claim to another and therefore, were not in compliance with the requirements.

Mr. Eveleigh countered by stating, first of all, that the stakers signed the Applications to Record, having felt that they had done what was necessary to have staked the claims in compliance with the requirements of the legislation. Any deficiencies which may have occurred were and should have been caught by the provisions of section 43 of the **Mining Act**, namely that they were in substantial compliance. In effect, no one was misled by the staking on the ground and they had been done in good faith.

Mr. Doran stated that the staking did not demonstrate that an attempt had been made in good faith to comply and therefore, the tribunal could not apply the test for "deemed substantial compliance" in subsection 43(2), but would have to refer to the test for "substantial compliance" found in subsection 43(1).

Mr. Doran asked the tribunal to examine the words of section 43 closely. He submitted that it should be read in the following manner. Pursuant to subsection 43(2), the tribunal or the Mining Recorder is required to determine, in cases where there has been a failure to comply with a number of specific staking requirements, whether:

- (a) the failure to comply is not likely to mislead any licensee desiring to stake a claim in the vicinity; and
- (b) it is apparent that an attempt has been made in good faith by the licensee to comply with the requirements [of the **Act** and regulations].

He submitted that, if it cannot be shown that there was an attempt in good faith to comply, or where there is a likelihood of misleading a staker in the vicinity, then the test for deemed substantial compliance does not govern. Rather, it is the test under subsection 43(1) which must be applied, namely "substantial compliance as nearly as circumstance will reasonably permit... is sufficient".

In other words, to be entitled to the standard of "deemed substantial compliance" there must be demonstrated entitlement, such as the attempt. For example, if there is inadequate timber in the area of the corner or line posts, so that the faced area for inscriptions is smaller than required by application of section 14 of O.Reg. 7/96, such a deficiency would have been done in good faith with an apparent attempt to comply and as such the "deemed substantial compliance" provisions would govern.

Mr. Eveleigh submitted that Mr. Doran was trying to refine the meaning of "deemed substantial compliance", to which Mr. Doran responded that the meaning of substantial compliance is necessarily narrower than that of "deemed substantial compliance", which implies a certain relaxing of the standard. He asked under what conditions such a relaxing should occur. Where, for example, there is adequate timber to make the regulation sized posts and faces, but they were not used, does not demonstrate an attempt to comply in good faith and so it means that the test of "substantial compliance" will be applied instead.

With respect to the position taken by Mr. Doran that the sketch was copied off the claim map, Mr. Eveleigh stated that he could see this arising in a competitive situation, where more than one group is competing for the same claim, such as was the case recently in Temagami. In such circumstances, copying the claim map could serve to give one group of stakers an edge.

Mr. Doran submitted that the accompanying sketch should show how the claim was actually staked on the ground. If a line crossed a creek, this should be shown. The bays of Mishibishu Lake should be shown as they relate to the claim lines. Also, there should be an indication of the claim posts tied on to. In overstaking 1166330, there should have been a 280 metre line overlap. There were no tags located where they were supposed to be. Therefore, the staking did not comply with the **Mining Act**.

Mr. Eveleigh responded by stating that stakers should put on the map only that which they find in the field. Therefore, he can assume only that the sketch was the way they saw things in the field.

Mr. Doran raised another issue which involved the manner in which a group of claims could be staked, namely whether one mining had to be completed before another could be commenced. He pointed out the manner in which the various claims were laid out and the dates and times corresponding with the start and finish. Mr. Eveleigh stated that five individuals were involved and it was completely possible to stake in the manner indicated with this degree of help. Mr. Doran countered by suggesting that the times on the posts could have been pre-determined.

The tribunal crafted three questions arising out of the first hearing for consideration by the parties. The Provincial Mining Recorder also made submissions on these questions. All are reproduced below, commencing with the individual issue outlined by the tribunal, the written submission of Mr. Doran, Mr. Eveleigh and Sheila Lessard, Provincial Mining Recorder:

1. The dispute against 1231918 does not extend to the six mining claims which were staked on November 24th and 25th, 1997. However, it would appear from the various start and completion times listed on the Application to Record that these stakings did not involve continuous staking of one claim, but may have extended to continuous staking as between the group of claims. Does the regulation require that each individual mining claim must be staked to completion as one continuous action? Or does the regulation permit movement of staking between a group of mining claims, as long as the total staking is not interrupted?

Mr. Doran:

Yes, it does. Subsection 8(1) of O.Reg. 7/96 as written in the Act states that:
A mining claim must be staked as a continuous action.

...

2- Or does the regulation permit movement of staking between a group of mining claims, as long as the total staking is not interrupted (**sic**):

No the regulation does not permit this.

Subsection 9(1) of O.Reg. 7/96 as written in the Act states that; A mining claim must be staked under the direction of a recording licensee who shall be present on the ground during the staking of the claim.

No where in O.Reg. 7/96 as written in the Act state that the recording licensee may be any where on the ground during the staking or their group of claims, nor does it state that the recording licensee just has to be in the general area of the group of mining claims being staked.

Mr. Eveleigh responded to the first question:

One factor that must be kept in mind during this explanation is the fact that four (4) licenced stakers were involved in the staking out of this group of mining claims.

Mr. Eveleigh then quoted subsection 8(1) of O.Reg. 7/96 and went on to state:

... the way I interpret this section is a mining claim must be staked by a licensed staker without interruption. If a staker started a claim and finished without any unreasonable interruption, this should be considered a continuous action. For example if a staker started the claim and could not finish due to darkness and/or weather but came back the next day to finish the claim this would be considered a valid interruption and therefore a continuous action. If a claim is being staked but not finished and the staker comes back two (2) or three (3) days later after going to work and/or attending a party, for example, this would be considered an invalid interruption and therefore a non-continuous action. This section appears to be left open for interpretation by the mining recorder as to what is a valid or invalid excuse.

Those six (6) mining claims were stake from one day to the next which would be considered a continuous action. The individual claims were staked by four (4) licenced stakers and involved in a continuous action on

an individual basis. Under this scenario it is quite possible to get start and completion times that are the same for different claims. All of the claims, staked on behalf of Murgor Resources Inc. were staked by competent licensed prospectors who conducted them-selves to the best of their ability and the accepted practices of the industry based on interpretation of the act.

Sheila Lessard, responded to the first question by referring to subsection 8(1) of O.Reg. 7/96:

Continuous action is a staking requirement that has evolved in the Mining Act and Staking Regulations. Prior to 1991 the staking requirements were contained entirely within the Mining Act (MA) RSO 1980. There was then a requirement to inscribe only the date of commencing the staking on the #one post (subsection 47(1) MA 1980). It was not necessary, at that time, neither to inscribe dates on any other posts nor to inscribe the completion time. Section 51 MA 1980 then required an application to record to be filed within thirty-one days "from the date of staking". Since only one date was mentioned in the requirements to inscribe posts (commencement date) perhaps there was an inference that the staking was expected to be completed in the same day but there is no section, in RSO 1980, that required continuous action as a primary staking rule. Subsection 55(9) MA 1980, however, required continuous action as part of criteria authorizing the use of common posts at common corners.

Continuous action was a greater concern prior to amendments in 1994. Subsection 27(c) MA 1990:

27. Except where otherwise provided, the holder of a prospector's license may prospect for minerals and stake out a mining claim on any,

[Crown lands, or lands in which mining rights are reserved to the Crown]

not at the time,

(c) under staking or record as a mining claim that has not lapsed or been abandoned, cancelled or forfeited; or

The concern, prior to 1994, was that a licensee could unfairly prevent competitors from staking the land by establishing only part of the boundary line, whether or not the staking was completed. Under those circumstances it would be only fair of the mining recorders to encourage continuous action otherwise there could be unfair advantage taken and complex legal questions as to the competitors rights to proceed with stak-

ing on open crown land. Perhaps someone could prevent competitors from staking by only erecting the number one post and blazing a line 400 metres south. Until the 31 days were expired there would be legal question if the land west of the blazed line would be open for staking. Section 48 MA 1980 prohibited the same licensee to restake the land if it had been partially staked and the application to record had not been filed in the 31 days. The obvious intent in the Section 48 was to prevent "improper purpose". As the section only applied to staking where the application to record was not filed there may be another inference that the staking of a claim was not necessarily required to be a continuous action unless common posts were used between more than one 40 acre claim.

The continuous action required for common posts was analyzed by Commissioner Ferguson in *Raine v. the Minister of Mines*, MCC 7, page 462. The case was with regard to an appeal of a Mining Recorder's decision. In the summary on page 462:

"Where a mining claim was tied onto an unrecorded mining claim twelve days after the staking of the latter, it was not permissible to use common posts. The substantial compliance doctrine applies to the method of staking and does not apply to the time of staking".

The Commissioner's decision is dated October 5, 1988 and therefore deals with the MA 1980. The Commissioner does not refer to any section other than 55(9) MA 1980 - common posts. It is of interest to note the Commissioner went to length to explain that there was no evidence given as to why there be a twelve-day delay in the staking. Commissioner Ferguson states:

"The tribunal is of the opinion that the Legislature would have had this principle in mind and that, in the absence of any evidence to show any reason for such a delay, a delay of twelve days would have the result that the staking could not be said to be a continuous action."

In explaining the decision in that fashion perhaps the Commissioner suggests there can be reasons to allow for staking where there was not continuous action. Consideration of a "reason" by the Recorder or Commissioner could be a subjective matter where discretion is possible.

In 1991 the Mining Act underwent many changes. Priority of recording was replaced by priority by completion time. In 1994 a further amendment removed a restriction in 27(c) so that a licensee could cross boundaries for current staking. Land "under staking" was open for stak-

ing until someone was successful in recording a claim. If more than one claim was staked for the same land, the claim first completed is now given priority (44(2) MA 1990). The need to have continuous action in the staking is less of a concern as a competitor is not legally barred from crossing another licensee's claim line. If the claim is not being staked as a continuous action there is always a possibility the licensee may suffer the consequence of losing the claim to someone completing the staking first.

Subsection 8(1) of the Staking Regulation requires continuous action. The present Mining and Lands Commissioner has not decided any cases where continuous action was an issue. The present Commissioner may allow the application of substantial compliance to the question of continuous action. Also there is discretion indicated by Commissioner Ferguson as to acceptance of a reason that there was not continuous action.

The amendments of 1991 were intended to authorize "grid staking". If the land is opened for more than 24 hours, claims can be staked in any direction and sequence with numerous licensees erecting posts, inscribing posts and blazing lines. Claims are variable in size and may be staked several at a time so that a claim began today may not be finished until another day. The Provincial Recording Office (PRO) analyze applications to record to see if there appears to be staking of multiple claims on continuous days. PRO does not insist that individual claims be completed as a continuous action. The Regulation does allow for movement of staking between a group of mining claims, as long as the total staking in (**sic**) not interrupted. If there is an interruption, there may be a valid reason for it.

When PRO receives an application to record a single mining claim, part of the checking process involves reviewing the date of commencement and completion of the staking to ensure continuous action. When continuous action does not appear to be the case, contact is made with the staker for an explanation. Depending on the situation, the claim may be recorded or refused.

2. If the answer to the above issue is that multiple mining claims may be staked at the same time as one continuous action, then does the regulation require that the recording licensee must be present on each mining claim at the time of its completion?

Mr. Doran sets out that he has dealt with this issue in his answer to #1 above.

Mr. Eveleigh:

Section 9.(1) A mining claim must be staked under the direction of a recording licensee who shall be present on the ground during the staking of the claim.

This section does not state 'the recording licensee must be present on each mining claim at the time of its completion?'. Therefore it is my interpretation that '... a recording licensee who shall be present on the ground...'; On the ground meaning the group of claims being staked. The other licenced stakers were also involved in the staking of these claims as per section 10(1)2. Only the recording licensee or another licensee may erect, inscribe or affix a tag to a corner post, line post or witness post. These stakers were '...under the direction of a recording licensee...'. The recording licensee, Mr. Heilman, was present and directed the other three (3) stakers in the staking out of these mining claims. It is my understanding that the mining act allows for the staking out of a group of claims with the assistants and the Application to Record is designed in such a manner to reflect this. The claims in question were recorded, as a group, under the name of Mr. Heilman who both conducted some of the staking personally and simultaneously directed the staking conducted by his licensed assistants. Mr. Heilman was present 'on the ground' during the entire period in which the claims were staked. The claims were recorded as a group on a single application form. This is an accepted practice in the industry.

Therefore, the regulation does not require that the recording licensee be present on each mining claim but be on the group of claims being staked in a daily contact directing the staking.

Ms. Lessard:

The current requirement as indicated in Subsection 9(1) O.Reg. 7/96, and also as indicated in statements on the application to record, is for the recording licensee to be "on the ground". There is no requirement for the recording licensee to participate in the staking and nothing that states the licensee must be on each mining claim.

With the amendments in 1991 and intent to authorize grid staking MND&M instructed licensees that it was not necessary for the recording licensee to visit each mining claim. If the land is open for less than 24 hours there must be far more person participation by the recording licensee. Otherwise the recording licensee must only be on the ground.

3. The sketch forming part of the Application to Record for Mining Claim 1217084 depicts its south boundary as running along the north side of the arm of Mishibishu Lake, whereas the disputant is alleging that it actually runs south of this arm. If it can be shown in evidence that the location of the #2 post of 1217084 is actually south of the arm of the lake, is this fact misleading so as to cause the cancellation of the mining claim?

Mr. Doran:

(a) Exhibit #1 of appellant and disputant picture taken by Mr. Palahnuk of his #2 claim post of 1218496 taken at the time that he erected this post on May 15, 1998, this picture shows this claim post facing west also at this same location is the #2 post of Mr. Palahnuk's cancelled claim 1163530, also at this location is a common post of mining claims tags #4 of 872141 and #3 of 892139, **NOTE** the new and old blazing on the tree between these post locations and the claim post north of these post locations and the lake.

(b) Exhibit #2 picture taken by Mr. Palahnuk in Sept. of 1998 of his #2 post of 1218496 which show this post still in the same location as when erected on May 15, 1998 by Mr. Palahnuk.

These pictures show that this group of claim post are actually south of the arm of the lake.

(c) Exhibit A Mr. Palahnuk's sketch plan to record 1163530 and exhibit c of his sketch plan to record 1218496 clearly indicate both of his #2 claim post as going south of the arm of the lake.

(d) Exhibit I of the Respondent, sketch of situation on May 15, 1998 clearly indicates on the south boundary line of 1217084 the line post of 1217084, 1163430 and 1218496 as being at the same location 400 M west of #2 post of 1217084.

2. Is this fact misleading so as to cause the cancellation of the mining claim? Yes it is. As #2 post is shown on the sketch plan as being north of the arm of the lake, it would be misleading to another licensee who wished to stake in the area and wanted to use the #2 post of 1217084 as a starting location.

Mr. Eveleigh:

If it can be shown in evidence that the location of the #2 post of 1217084 is actually south of the arm of the lake it is not a misleading fact so as to cause the cancellation of the mining claim.

The recording licensee, Mr. Jeff Pinksen, drew the sketch to the best of his ability based on what he saw in the field and it appeared to be in agreement with the situation shown on the Ministry of Northern Development and Mines Mishibishu Lake Claim Map Sheet. The recording licensee has shown tie-ons to previously recorded claims on all sides and our field investigations proved no difficulty in finding the posts or claim lines. There was no intent to deceive or mislead anyone.

Findings

An appeal from a decision of the Provincial Mining Recorder is a new hearing pursuant to section 113(a) of the **Mining Act**, which entitles the parties to raise issues not raised at the first hearing. The issues in the matter appeared to evolve during the course of the hearing, so that the issue of grid staking was identified during the initial telephone conference. This issue was of sufficient significance that submissions were received from the Provincial Mining Recorder.

Another matter which arose during the course of the tribunal's deliberations was the exact dimensions of the pre-existing Palahnuk/MacDougall Mining Claim SSM-1163530 and its location on the ground.

Grid Staking

The tribunal regrets the time elapsed in reaching a decision in this matter. However, the unexpected issue of legitimacy of grid staking in Ontario, following amendments made in the **Mining Amendment Act**, S.O. 1989, c. 62, effective June 3, 1991 was a factor in the length of the tribunal's deliberations in this matter.

Grid staking involves staking a number of contiguous mining claims as one action, without adhering to the practice of changing direction at the corner(s) of the individual claim(s). Instead, a number of claims are partially staked when each line, forming part of the grid, is run the entire length of the group of contiguous claims before a change in direction.

As set out by the Provincial Mining Recorder in her submission, grid staking was not allowed prior to June 3, 1991, as the staking of a 40 acre mining claim was governed by rules which required moving around the claim from the #1 post in a clockwise fashion (See sub-section 47(1), of the **Mining Act**, R.S.O. 1980, c. 268). The focus of the Provincial Mining Recorder's discussion was that the requirement for continuous action in staking a single claim, (ie. a single unit or block of multiple units but one claim in all cases) was due to the fact that lands under staking were not open, according to the provisions of section 27 of the **Mining Act** (R.S.O. 1990, c. M.14).

The subsequent amendment in 1996 (section 8, S.O. 1996, c. 1, Sched. O, s. 8) deleted lands under staking, so that the mere commencement of staking would not effectively neutralize the lands, taking them out of the active mining sphere for the next 31 days. Therefore, the enforcement of the continuous action requirement was seen by the Mining Recorders as having a direct bearing on the status of the land (open vs. not open), rather than an issue of the validity of staking.

Grid staking is discussed in Barton, Barry J. **Canadian Law of Mining**. Calgary: Canadian Institute of Resource Law, 1993 at pages 250 and 251:

i. Grid Staking

Grid staking (or block staking) is the practice of staking a number of claims at once by moving in lines across the block of claims and placing all the claim posts that are required along each line in turn. It can be carried out by two persons moving along parallel lines. (It is not to be confused with staking large claims or claim blocks, which consist of a number of units that must be staked in the manner laid down by the legislation) ... Under the four-post system, however, grid staking is a much more rapid procedure than staking each claim in turn, starting with the number 1 post in the northeast corner, proceeding around back to the number 1 post, and then retracing one's steps to the number 4 post to start the next staking "tumbleweed" style. In fact, grid staking is a widespread practice in the industry.

...

In Ontario, grid staking was held invalid on the ground that the old Act required running the four boundaries in sequence.⁷² It could usefully be asked what harm could come out of grid staking if there was no staking rush and the staking was otherwise adequate,⁷³ especially since the statute was not unequivocal. The new Regulations under the 1989 amendment require a fresh look at the matter. Staking is to be carried out as a continuous action,⁷⁴ so a grid staker cannot take two passes at the claim. However, the provisions fall short of prescribing the time sequence in which corner posts and line posts are to be placed; they only prescribe

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⁷² *H.R.C. Hemlo Resources Corp. v. Director, Land Management Branch* (1984), 6 M.C.C. 527 at 538-539 (Ont. M.C.); *Tittle v. Tesluk* (1984), 6 M.C.C. 487 (Ont. M.C.); *Mealey v. Peplinski* (1985), 7 M.C.C. 134 at 146 (Ont. M.C.). Also see *Clark v. Lacasse* (1978), 5 M.C.C. 387 at 401 (Ont. M.C.).

⁷³ P.D. Lauwers, "Mining Claim Disputes in Ontario" (1986), 17 R.G.D. 723 at 738.

⁷⁴ Ont. Re. 115/91, s. 8(1). *Cf.* Sask. s. 29: staking shall be as continuous as possible but not take more than 15 days.

the location. The only exception is where the area to be staked has been open for staking for less than twenty-four hours, and where there will likely be competition. In this case, the Regulations are very capable of stating the time sequence to be followed; the staking is to commence in the northeast corner and proceed in a clockwise direction, and the time of commencement and completion of the staking is to be inscribed on the number 1 post in the northeast corner.⁷⁵

The matter of grid staking is also discussed in "Ontario's Mines and Minerals Policy and Legislation: A Green Paper" developed by the Ministry of Northern Development and Mines, dated December 12, 1988, following consultations which led to the changes to the **Mining Act**, found in S.O. 1989, c. 62, which became effective on June 3, 1991. At pages 7 and 8, it states:

Limitation of Claim Size to 40 Acres

The 40 acre size of a mining claim was decided at the beginning of the century (when it was also a requirement of the **Mining Act** that there be an actual discovery of a valuable mineral in place before the claim could be legally staked). The discoverer was limited in the number of claims that could be staked in a year. The discoverer also had to perform considerable manual work on the ground in order not to lose the claim. The exploration methods of the day were limited to the basics of uncovering and examining the rock by hand.

Elimination of both the requirement of discovery and the limit on the number of claims that could be staked in a year, together with advances in exploration technology, have created a situation where explorationists tend to have regional exploration programs. These require the acquisition of large land positions before the explorationists venture onto the ground to explore. In fact, it is becoming increasingly difficult to raise funds for the exploration of small groups of claims.

The provisions of the **Mining Act** have not kept pace with these changes in mineral exploration. The acquisition of large tracts of land involves the staking of many individual claims. The majority of these large-scale projects are done by staking contractors who employ licensees to stake claims. For the sake of a competitive price and efficiency of operation, prescribed staking methods are often ignored in favour of grid or block staking.

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⁷⁵ *Ibid.* Ont. ss. 8(2), (9).

Perimeter Staking

The concept of perimeter staking has been promoted by most who have made submissions on changes to the Act. It is seen as a method of acquiring lands more cheaply and conveniently, and one that also recognizes the modern tendency towards large land holdings. It is also seen as a method of overcoming some of the problems associated with grid staking. Compliance with perimeter staking requirements would involve about 75 percent fewer posts and lines and should therefore involve less risk of errors. However, as the distance between claim lines could be much greater, it will mean that it will be more difficult to determine what lands have been staked.

.....

The introduction of perimeter staking and better guidelines on the use of assistants may reduce the number of problems with grid staking and proxy staking. The reasoning is that many of the current rules are being broken not in any effort to maliciously defraud anyone but due to their impracticality or lack of efficiency. These new provisions, however, would do little to remedy problems associated with poor quality staking or with those individuals who seek to take advantage of the system at someone else's expense.

The foregoing reference suggests that the perimeter or block staking provisions of the 1989 amendments to the **Mining Act** were chosen in preference to grid staking, which was also under discussion. However, the use of what are called "extrinsic aids" for the interpretation of legislative amendment, as found in R. Sullivan, *Driedger on the Construction of Statutes (3rd ed.)*, (Toronto: Butterworths, 1994) commencing at page 432, the use of Commission reports and other background papers are governed by what is called the *partial exclusion rule*. Commencing at the bottom of page 432:

...It is permissible to look at commission reports to discover the mischief at which legislation is aimed, or the conditions to which it responds; in other words, it is permissible to use the report as evidence of external facts. But reports cannot be looked at as direct evidence of legislative meaning or purpose.¹¹ As Lord Denning explained in *Letang v. Cooper* speaking of a report that preceded the legislation under consideration:

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¹¹ See *Assam Railways and Trading Co. Ltd. v. Commrs. of Inland Revenue*, [1935] A.C. 445, at 458 (H.L.). See also *A.G. for British Columbia v. A.G. of Canada*, [1939] A.C. 468 (P.C.). Although it is often said that commission reports may be used as evidence of legislative purpose, this evidence is indirect. The report is admissible as evidence of external facts from which the purpose is then inferred.

It is legitimate to look at the report of such a committee, so as to see what was the mischief at which the Act was directed. You can get the facts and surrounding circumstances from the report so as to see the background against which the legislation was enacted. This is always a great help in interpreting it. But you cannot look at what the committee recommended, or at least if you do look at it, you should not be unduly influenced by it. It does not help you much, for the simple reason that Parliament may, and often does, decide to do something different to cure the mischief.¹²

This approach has been affirmed by the Supreme Court of Canada. In *Morguard Properties v. City of Winnipeg*, Estey J. wrote:

It has, of course, been long settled that, in the interpretation of a statute ..., the report of a commission of inquiry such as a Royal Commissioner may be used in order to expose and examine the mischief, evil or condition to which the Legislature was directing its attention. However, in the interpretation of a statute, the court, according to our judicial philosophy, may not draw upon such reports and commentaries, but must confine itself to an examination of the words employed by the Legislature in the statutory provision in question and the context of that provision within the statute ... The logic, is of course, inexorable that the Legislature may well have determined not to follow the recommendations set out in the report ...¹³

By reading the words of the legislation against the facts and surrounding circumstances examined in the report, the court may draw inferences about the purpose of the legislation and the meaning of particular provision. But the report cannot be used as direct evidence of the legislature's intended purpose or meaning.

Based upon application of the partial exclusion rule, the tribunal finds that the mischief which the Green Paper sets out relates to what are described in the text as inflexible staking requirements and the limited size of mining claims when compared with changes in mineral exploration requiring large tracts of holdings. As to the legislative remedies, the tribunal must look to the staking regulations, as they were in 1991, being O.Reg. 15/90 and in 1996, being O.Reg. 7/96.

The requirement for continuous action is found in both regulations (ss. 8(1) in both O.Reg. 115/91 and 7/96). Subsection 9(1) of O.Reg. 7/96 is new, not found in the earlier 115/91. It outlines the requirement that the recording licensee must be present on the ground during the staking and that the staking is to be under his or her direction. This departure from the earlier regulation, which did allow others (not necessarily licensees) to assist in constructing posts and marking the perimeter, mostly blazing or erecting pickets (see ss. 8(7) of O.Reg. 115/91). In O.Reg. 115/91, for lands open for less than 24 hours, clause 8(9)(b) provides that a single licensee must be the one to erect and inscribe all posts, from which the conclusion must be drawn that for those lands open for longer than 24 hours, any licensee may erect and inscribe

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¹² [1965] 1 Q.B. 232, at 240 (C.A.).

¹³ (1983), 3 D.L.R. (4th) 1, at 4-5 (S.C.C.).

the various posts involved. However, subsections 13(1), (2) and (5) of O.Reg. 115/91 state, in relation to corner, line and witness posts, that the licensee staking the claim shall inscribe his or her name and license number. Returning to subsection 8(7), O.Reg. 115/91 provides that the licensee who does the staking may use "other persons" to assist, and the activities specified are to mark the perimeter or construct posts.

The use of the phrase, "constructing claim posts" in subsection 9(2) is used instead of "erect, inscribe or affix a tag", found in clauses 10(1) or (2) 2. Given that different wording is used, their exact meaning is considered. In **Lacasses v. Phillips** 7 M.C.C. 560, at page 571, Commissioner Ferguson stated:

... The preparation of loose posts has been permitted in the past but the preparation of a stump post by cutting off the top of the tree and facing the posts constitutes the element of "planting and erecting" of the post which is the first requirement of section 47 of the *Act* which reads, ...

It would appear that the distinction is drawn between a stump and loose post in that a stump post will have already been "erected" when any facing, let alone inscription taking place, whereas with a loose post, it is possible to face the post prior to its being erected and inscribed. In fact with loose posts, the sequence is more likely to be inscribed and then erected.

O.Reg. 7/96 continues to use the same phrasing in relation to the inscription of corner and witness posts, namely that the licensee inscribes his or her name and license number on each post, along with date and time, and as appropriate, post number or tag (ss. 13(5), 15(1), (3)). Line posts now require less detail; only the claim number when metal tags are used or his or her license number when they are not and the corner post number and distance.

Subsection 9(1) of O.Reg 7/96 is a re-worded version of the former subsection 8(7), namely that the recording licensee must be the one directing helpers in the construction of posts or marking the perimeter, but now the helpers can be either licensees or non-licensees. What meaning should be given to the addition of "other licensees", particularly with the new subsection 9(1), which requires that the recording licensee must give direction and be present on the ground?

The wording of both regulations, at first glance, deals with the staking of "a [ie. single] mining claim" setting out the various requirements for doing so. This implies that the staking of claims should be taking place, one at a time. This is in keeping with the "plain meaning rule" or "literal meaning rule" of statutory interpretation.

In keeping with a finding that the plain meaning of the words used should govern, the tribunal has considered how the regulation could have been worded differently, had the legislature intended to allow grid staking. When examined in this light, the tribunal concludes

the drafting would not have been different to any degree, perhaps excepting a definitive statement that grid staking is permissible. The wording of the various sections would still be necessary in their current form, namely that the mining claims may be contiguous, that a claim, when completed must have the requisite posts, inscriptions and/or tags facing in the requisite directions, being of required dimensions. Save and except for some definitive statement as to grid staking, the actual claim, when completed in accordance with the regulation, would necessarily be described in the same manner. With the exception of subsection 10(2) for lands open less than 24 hours, the various provisions and requirements can also be read in the passive voice so as to be merely descriptive.

Section 10 of the Interpretation Act, R.S.O. 1990, c. I11 states:

10. Every act shall be deemed to be remedial, whether its immediate purport is to direct the doing of anything that the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

And at section 28:

28. In every Act, unless the contrary intention appears,

...

- (j) words importing the singular number or the masculine gender only include more persons, parties or things of the same kind than one, and females as well as males and the converse;
- (k) a word interpreted in the singular number has a corresponding meaning when used in the plural;

Taking these provisions of the Interpretation Act into consideration, the tribunal re-examined the meaning of O.Reg. 7/96. Can the regulation be given such a large and liberal construction and interpretation, so as to allow the references in the regulation to "the staking of a mining claim" be read to authorize the staking of several mining claims?

As discussed above, many of the staking provisions lend themselves to be read in the passive voice as well as the prescriptive voice. This is true with respect to the posts, dimensions and orientation on the ground.

Subsection 9(1) is considered. The recording licensee is to be present, not on the mining claim, but on the ground, which can be taken to mean the specific claim as well as one of the number of contiguous claims. Section 17 allows for use of common posts for contiguous

claims, and refers to the erection of one common post. There is no additional information as to when the inscriptions for common posts must take place, namely in sequence relating back to the single mining claim under staking, or at one time for all mining claims using that particular common post.

Subsection 10(1) permits any licensee to inscribe and erect the posts for stakings open more than 24 hours, while under the direction of the recording licensee who must be present on the ground, does not require that the recording licensee **must** erect and inscribe at least one of the posts. While the actual erection and inscription of posts is limited to those with licenses under the **Mining Act**, the fact that there is not even a minimum requirement for the activity of the recording licensee, in relation to post erection and inscription activities, strongly supports the finding that to be present on the ground does not mean present on the actual mining claim under staking, but merely on the ground, in the vicinity and possibly on one of several contiguous mining claims under staking. However, the staking of the contiguous mining claims must be a continuous action, as provided in subsection 8(1).

The tribunal has considered the two interpretations and although the individual staking of each mining claim can be read into the regulation, using the plain meaning rule, the tribunal finds that it prefers to apply the modern rule of statutory interpretation, that is, to determining the meaning of this provision within "its total context, having regard to the purpose of the legislation, the consequences of proposed interpretations, the presumptions and special rules of interpretation..." (R. Sullivan, *Driedger on the Construction of Statutes (3rd ed.)*, (Toronto: Butterworths, 1994) at page 131).

The purpose of the **Mining Act** is set out in section 2 as being, "to encourage prospecting, staking and exploration for the development of mineral resources". While either traditional single claim staking and grid staking are seen as furthering this purpose, the tribunal recognizes that modern exploration methods, namely all manner of technical surveys, favour larger mining claim holdings, which would see assessment work credit for this costly form of exploration being applied to a large number of contiguous mining claims in a more economically feasible manner.

The consequences of the proposed interpretations are more weighty, however. Although unclear from the Provincial Mining Recorder's submission, it would appear that Mining Recorders have been allowing grid staking since at least 1996, if not since 1991. Clause 71(2)(a) would serve to protect all but the most recent of such claims, but nonetheless, small and large exploration company budgets have been built around this understanding that grid staking is valid in Ontario. To require that the Province once again return to staking claims one at a time could prove to be economically devastating.

The tribunal finds for the foregoing reasons, that grid staking is permitted for lands open for more than 24 hours under the regulations made under the **Mining Act**, namely O.Reg. 115/91 and O.Reg. 7/96.

Grid Staking and Existing Mining Claims

Grid staking requires a large area of open ground, particularly as the grid may involve blocks of multiple unit mining claims although the staking regulation does make a degree of allowance for the overlap onto lands not open for staking, as can be seen from section 11.

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

In considering these provisions, the tribunal is led to draw several conclusions, which provide principles to be adhered to when grid staking (and perhaps even block staking single claims). Under subsection 11(1), if a staking encompasses land that is not open for staking, it will not necessarily invalidate the later staking. However, based on the word "unless", there is an exception when the land encompasses an unpatented mining claim. There is no mention of part of pre-existing unpatented mining claim. Under subsection 11(2), if the valid pre-existing mining claim is wholly contained within the inside of the new mining claim, the pre-existing mining claim is to be excluded, and under subsection 11(3), there is no requirement to mark out the pre-existing mining claim.

The situation is different, when a number of mining claims under staking are to use as their respective limits their common boundaries of the pre-existing mining claim. The regulation, and indeed subsection 44(4) of the **Mining Act**, do allow for the overlap of an existing claim to not defeat the second staking. The provisions under subsection 44(4) are however, discretionary to the tribunal and to the Provincial Mining Recorder.

In the situation where a grid staking is to occur which will surround or partially surround a pre-existing mining claim, the tribunal finds that the licensee in charge of the grid staking is expected to exercise a high degree of care in locating and marking out those lands which are not open for staking when a common boundary is to result. Notwithstanding what may be represented on the mining claim map available in the Provincial Recording Office, the tribunal points out the provisions of section 8 of the **Mining Act**:

- 8.** Every document filed and recorded in the recorder's office, as well as every application filed under subsection 46(2), shall be open to inspection during office hours by anyone who pays the required fee.

The Application to Record with the sketch is a public document. The tribunal finds that it is incumbent upon the licensee to establish the boundaries of a pre-existing staking to the best of his or her ability, through reconnaissance and if necessary, flagging. It is not sufficient to rely on the provisions of subsection 44(4), which is a post-staking "remedy" to establish lines which should properly have been established with due care and diligence at the time of the actual staking. Nor can the provisions of clause 43(2)(b) be used to side step the issue of locating boundaries on the ground. In the case of grid staking, the tribunal finds that the required good faith attempt extends to establishing the pre-existing limits of recorded unpatented mining claims with which there is to be a shared boundary. To do otherwise could lead to a progressive encroachment on the pre-existing claim, whose subsequent cancellation, should it occur, would lead to uncertainty as to the exact boundaries of the lands coming open for staking. In other words, is a staker desiring to stake in the vicinity looking to the boundaries of the original mining claim or the boundaries of the subsequent, overlapping claims? The situation facing prospective stakers from which to take direction becomes unclear. This is particularly true if there has not been a Recorder's Order pursuant to subsection 110(6) for the movement of posts to align with the first staking.

The tribunal does recognize that there may be situations where, owing to their age, lack of features on the ground, snow and the like, that it may not be possible to locate old lines and posts. However, the tribunal requires that the effort be made and notes in many cases, including the current appeal, the situation may more likely be a case of looking in the wrong place. While it is not known what happened to Messrs. Palahnuk and MacDougall's posts after their staking, the fact remains that those individuals were able to find sufficient information on the ground in May, 1999 of their 1996 staking to similarly locate their staking of Mining Claim L-1218496, being the southern one.

With respect to the issue of locating pre-existing mining claims on the ground through using the mining claim map available from the Provincial Recording Office as opposed to the sketch on the Application to Record, the tribunal offers the following direction. Not all sketches are an accurate representation of what appears on the ground. This may be particularly the case where helpers are used, or where the individual who has done the sketch is not the one who was moving over that particular piece of ground. Or, the sketch may simply be a direct or indirect copy of the mining claim map, for reasons either explored by the Provincial Mining Recorder or not. The corollary of this is that the mining claim map may be the best indication of what land is open for staking.

Setting aside all possible alternatives in comparing the two, it must be stated that when an Application to Record is both staked and recorded by the same individual(s), who also similarly staked all of the claims on that single Application to Record, and particularly without additional helpers, it carries a very strong presumption that any features shown and their orientation in relation to the mining claim subscribed, will be very close to accurate. This should particularly warn prospective stakers wishing to stake adjacent lands to exercise the precautionary principle when the sketch does not match the mining claim map.

It should go without saying that it is the original staking on the ground which governs, unless there has been an Order to move posts. The propensity to directly or indirectly copy the mining claim map and its features as a good template from which to draft the sketch on the Application to Record, regardless of what actually occurred on the ground, moves a step closer to map staking, which is not a reality in Ontario at this time.

Lands Circumscribed by Mining Claim 1163530

The tribunal has obtained the Applications to Record for the Murgor claims 1231915 through 1231920 and the more recent 1217084; the Applications to Record of the three Palahnuk/MacDougall stakings (cancelled 1163530, restaked and filed only as 1218496 and 1163529); and the inspection map drawn by Mr. Eveleigh and based upon his inspection of the area (Ex. 1, Tab 2, last page, also found as last page in Ex. 2). The following observations are made:

- ◆ The 1996 Palahnuk/MacDougall staking of 1163530 is listed in the accompanying Application to Record as a 3 unit claim. The sketch delineating this claim has as its south boundary a line which intersects a south arm of Mishibishu Lake or is otherwise south of this arm. There is no evidence of how this was shown on the mining claim map in the recording office at the time of recording.

Claim 1163530 has 90 degree angles at the #2 and #3 posts, with the east boundary running 753 metres and the west boundary running 400 metres. This necessarily means, as is shown, that the northern boundary runs at an angle from southwest to northeast. Its distance is shown as 800 metres on the sketch, which is mathematically unlikely as simple geometry would result in its length being 874 metres.

The Eveleigh inspection places the #4 post of 1163530 between 100 and 130 metres north of the #3 for 1231918, which would be 500 to 530 metres north of the #3 for 1163530, thus being different from what is shown on the sketch in the Application to Record for 1163530.

- ◆ The Palahnuk/MacDougall sketch for 1218496 (corresponding roughly with Murgor's 1217084) depicts a two unit claim, with 800 metre north and south boundaries, and 400 metre east and west boundaries.

The south portion of the sketch of 1218496 is similar to that of the south portion of cancelled claim 1163530, in that the southern boundary is shown as being south of the arm of Mishibishu Lake. There is another smaller arm, which coincides with the mouth of the missing tributary location, found along the east boundary and extending northwesterly, but not crossing the northern boundary.

- ◆ The Palahnuk/MacDougall sketch for 1163529, which is to the north of their 1218496, has a south boundary of 800 metres, an east of 310 metres, a west of 130 metres and a northern boundary, running at an angle, southwest to northeast, of 800 metres. Again, simple mathematics dictates that this north boundary should be 820 metres, if the other boundary distances are correct and the stakers had proceeded in a straight line.

This sketch does not show any creek or tributary flowing across either its north or south boundaries, although the meandering shoreline of Mishibishu Lake along the east boundary is depicted.

Finally, there is no explanation of why this mining claim was staked as it was. If 1163529 and 1218496 were intended to overtake the lands covered by 1163530, there is no explanation as to why the combined west boundary has grown from 400 metres to 530 metres. Similarly, there is no explanation of what is in place to the north, along the west line, which would have prevented this staking from having a boundary of 400 metres.

- ◆ Murgor's claim 1231918, shown on the appropriate sketch accompanying that Application to Record, depicts 1163530 as being a rectangle, and is located immediately to the north. The sketch shows this south boundary as having 800 metres, with a line post at the half-way point. Claim 1231918 is shown as having east and west boundaries of 400 metres.

The features which can be discerned from this sketch and all of those staked on November 24 & 25, 1997, are as follows. Palahnuk/MacDougall's 1163530 is shown as being completely to the north of the arm of Mishibishu Lake. At the northern boundary west of the 400 metre line post, and continuing southeasterly to the south boundary east of the 400 metre line post is a tributary which empties into Mishibishu Lake. It is noted that the tributary is not shown as running so far north on the Palahnuk/MacDougall 1163530 sketch, but is shown on the claim map, which dates after May 15, 1998.

- ◆ The north boundary of Murgor 1231919 follows the way in which 1163530 is drawn in on the sketch, namely as being located to the north of the arm of Mishibishu Lake, despite the fact that the actual sketch for 1163530 shows its southern boundary as being south of the arm of the Lake.
- ◆ The restaking of lands covered by cancelled claim 1163530 by Murgor claim 1217984 is shown on the sketch with its southern boundary located north of and in one place touching the arm of Mishibishu Lake.

- ◆ In his inspection sketch, Mr. Eveleigh has attempted to show the overlap between the Palahnuk/MacDougall 1218496 compared with the two Murgor claims 1231918 and 1217084. It is noted that he could not locate either the #2 nor the #4 posts of 1218496. He has also guessed at the location of the pre-existing but since forfeited Palahnuk/MacDougall 1163530 posts, but indicated that he could not locate either the #1 nor #2 posts. Mishibishu Lake features are not drawn in.

The Murgor (Heilman's November, 1997) Application to Record the various mining claims which are purported to circumscribe the Palahnuk/MacDougall Mining Claim 1163530 clearly delineate a two unit mining claim of the latter. When compared with the sketch for 1163530 as well as the abstract for the cancelled Mining Claim 1163530, which the tribunal has acquired from the Provincial Recording Office, this recorded unpatented mining claim was clearly recognized as having three units. Yet the staking surrounding 1163530 on behalf of Murgor, clearly delineate a two unit claim with boundaries of 400 metres and 800 metres.

Added to the discrepancy between the size of 1163530 and the Murgor claims, Palahnuk and MacDougall apparently found even more land to stake in 1998. The size of the triangular northern portion of Mining Claim 1163530 is calculated as 14.12 hectares. The size of Mining Claim 1163529 is calculated as 17.6 hectares.

It is important for the tribunal to determine the exact amount and dimensions of land in 1163530, which will have a direct bearing on the November 1997 and March, 1998 stakings on behalf of Murgor. The tribunal acquired the Application to Record for Mining Claims 1097952 and 1097953, which are mentioned in the 1996 Application to Record of 1163530, and are themselves restakings of mining claims 467707 and 467708.

Mining Claims 1097952 and 1097953 were staked by Daniel Carroll on March 18, 1990 and recorded on March 26, 1990. The accompanying sketch depicts two 40 acre claims, each with boundaries of 1320 feet. The orientation of the southern boundary of claim 1097952, being the eastern claim, shown as south of and touching in places, the south shore of the arm of Mishibishu Lake to within 200 feet of the east boundary. The arm widens to the south at this location and appears as being both to the north and south of the claim line. The #2 post of 1097952 is actually witnessed from the shores. The Application to Record sets out that these two mining claims are the restakings of mining claims 467707 and 467708.

The tribunal finds, on the basis of past Applications to Record and accompanying sketches, that the Palahnuk/MacDougall pre-existing Mining Claim 1163530 is a two unit claim, comprised of a total of 32 hectares, more or less. As to what Messrs. Palahnuk and MacDougall were intending or believed to be the configuration of the previous claims in their staking of 1163530 or, for that matter, what the Mining Recorder understood when entering the supposed three unit claim on the claim map are matters for conjecture.

However, the tribunal's findings do have implications for the actual lands available for staking surrounding Mining Claim 1163530, the location of its lines as they exist on the ground, the location of its lines as they should properly have been located and the obligations of a grid staker in locating these latter two when surrounding a pre-existing claim.

The south boundary of both Mining Claims 1163530 and 1097952 are quite clearly drawn along or near the south shore of the arm of Mishibishu Lake. The tribunal finds that this is the proper location of the boundary of this pre-existing claim and coincides with the boundary of the earlier claims, which it restaked. The tribunal finds that, despite what might have appeared on the claim map, there was an obligation on the grid stakers to find and mark out this boundary. Information as to its location could have been obtained by viewing the sketch attached to the Application to Record. It may have been the case that this line differed from the claim map, but the tribunal has no evidence of what the previous claim map depicted. The tribunal finds that the prudent licensee had two choices in the field to locate this line. The first would have been to locate the line as shown on the claim map. If there was no evidence of staking at this location, the licensee would have had to move south to find the location of the line shown on the Application to Record. In this case, that is where the line would have been found. The fact that Messrs. Palahnuk and MacDougall were able to locate this line from their earlier staking creates a strong inference that the line was there to be found by any licensee looking in the proper location.

The north boundary of pre-existing Mining Claim 1163530 is more problematic. The tribunal has attempted to recreate the situation on the ground when this claim was staked, namely what existed along the north boundary. A number of mining claims were staked by Stephan Savard on October 19th and 20th, 1985 and were recorded on November 4, 1985. These claims cover those lands directly to the north, east and southeast portion of 467707 and 467708, which became 1097952 and 1097953, which in turn became 1163530. The relevant numbers for circumscribing the north boundary are 872134 and 872135, with numbers 872136 through 872145 being located to the northeast, east, southwest and south.

The relevant information for purposes of this appeal is as follows. The various mining claims described on Mr. Savard's Application to Record partially surround the area of the two 40 acre units in the location of what would later become 1163530. The boundaries are shown as being 1320 feet on three sides of the eastern claim, corresponding with this size. Again, this sketch confirms the location of the southern boundary, being to the south of the arm of Mishibishu Lake, thereby agreeing with the sketch of 1163530. The northern claims 467707 and 467708 forfeit and were cancelled on November 21, 1997. Undoubtedly, the remaining claims similarly were cancelled on that day, as the lands correspond to some of those staked on behalf of Murgor on November 24 and 25, 1997.

Based upon the foregoing, the tribunal finds that the northern boundary of Mining Claim 1163530, despite being shown as a three unit claim, and despite the sketch, must be located some 400 metres to the north of its southern boundary, as this is all the land that was

open to staking in March, 1996. Only the rectangular bottom portion of this claim, equivalent to two side by side units, can be recognized as pre-existing. The remaining northern triangular portion of 1163530 is an overstaking of claims in good standing dating back to 1985.

The southeast post of 872135 is located just north of the small bay of Mishibishu Lake into which drains a small tributary. Examining the sketch accompanying 1163530, this corresponds with the line post of that staking, marking a distance of 353 metres from the north #1 and 400 metres heading south to the #2. The tribunal finds that this is the proper location for the #1 post of 1163530. The #4 post should be located 800 metres west of this location. The tribunal further finds that the lands lying north of this line were not open for staking on February 18, 1996, and in accordance with subsection 11(2) of O.Reg. 7/96 do not form part of 1163530.

Murgor Mining Claim 1231918

It is quite clear that Murgor could not be expected to accurately do reconnaissance on the northern boundary of pre-existing Mining Claim 1163530, as the northern portion of this claim was both staked and recorded in error. This being the case, the tribunal finds that the proper location for the #2 post of Mining Claim 1231918 is to the north of the bay into which the tributary drains.

The tribunal has examined the sketch accompanying the Application to Record 1231918 for the location of this #2 post. The sketch shows this post as being some distance north of the bay, but south of where the shore of Mishibishu Lake crosses the boundary a third time. The sketch for 1163530 shows the distance between the bay and the next crossing of the shore as being shorter, which reflects the 1985 staking sketch by Sevard. The claim map shows a more elongated reach of the Lake which extends into the lands covered by 1231918 for some distance along this east boundary. Finally, the inspection sketch from Mr. Eveleigh does not show features, but does show the juxtaposition of claim posts located and their numbers. The #1 post for 1231918 is found at the same location as the #1 post for 1217085 as well as the #2 of 1163529. The distance shown between the #1 and #2 posts for 1231918 is 400 metres (117 *metres* moving south to #1 of 1163529 plus 283 *metres* to the #2 post of both 1231918 and 1163529).

The tribunal finds that, in the absence of better evidence, it is satisfied that the #2 post of 1231918 was erected 400 metres to the south of the #1 post, more or less. Given that there are no accurate markers on the ground to provide guidance as to what the northern limits of 1163530 should be, the tribunal finds that there is insufficient information to lead to further conclusions regarding whether the post should have been erected at another location. It is strongly suspected that the Murgor 1231918 east boundary may be shorter than required, particularly as the south line of 1163530 is further south by approximately 100 metres, but the tribunal recognizes that this is speculation. The tribunal finds that there is no overlap with pre-existing Mining Claim 1163530.

As to the matter of undersized posts, there did not appear to be any dispute by Mr. Eveleigh that some of the posts may have been undersized. Owing to the changes to section 43, which was expanded effective in 1991, to include deemed substantial compliance, the tribunal has been of the opinion that the tests had been sufficiently expanded to allow for all but the most wilful or directionally incompetent deficiencies. That is to say, despite any failure to adhere strictly to technical staking requirements for the size, height and facing requirements of posts, if the required inscriptions could be read, the undersized posts did not constitute evidence that stakers in the vicinity would likely be misled and that the selection of undersized posts did not constitute the absence of an attempt in good faith to comply with the requirements.

Mr. Doran has asked the tribunal to reconsider the wording of section 43 in an intriguing manner. According to his submissions, the technical deficiencies in staking requirements may be deemed to be in substantial compliance under subsection 43(2) if it can be demonstrated that there was a good faith attempt to comply. Also, the technical deficiencies should not be misleading to another in the field. If this demonstrated attempt to comply cannot be shown in respect of the specific requirement in question, then the staking should be governed by subsection 43(1), which is the test for substantial compliance.

The wording of clause 43(2)(b) does not lead to the conclusions advanced by Mr. Doran. For the tribunal to require a demonstration of the attempted good faith in regard to each individual staking requirement, the words would have to indicate that each instance of a technical deficiency or specific staking requirement must meet the test of apparent or demonstrated good faith.

As to the undersized posts, it is noted that in **Ramsay v. Fernberg et al.** 7 M.C.C 385, the Divisional Court held that there was substantial compliance, notwithstanding several undersized posts, tags facing the wrong direction, a common witness post and inconsistencies between the inscriptions and the Application to Record. Saunders J. stated at page 389, "In my opinion, there could be substantial compliance notwithstanding a great number of technical inconsistencies." Given that the tribunal is bound by that decision, the use of undersized posts, in the absence of other technical deficiencies, must be regarded as being in substantial compliance within the meaning of subsection 43(1).

While each case must be determined on its own merits and in particular each staking compared with the various requirements, a dispute based solely upon undersized posts is unlikely to be successful. The Provincial Mining Recorder noted that the posts in this case were in the 3 1/2 inch range. This is clearly of sufficient size to allow for legible inscriptions. Based upon the relaxing of the judicial attitude towards technical requirements, as seen in **Ramsay v. Fernberg** followed by the widening of the test in section 43 to include deemed substantial compliance under certain conditions, it becomes clear that the purely technical deficiency of moderately undersized posts is not of the weight required to succeed in the cancellation of a mining claim.

Palahnuk Mining Claim 1163529

Palahnuk Filed Only Mining Claim 1163529 is irregular in shape, extending 800 metres along its south boundary, but of a size only somewhat larger than 16 hectares, or one unit. The tribunal finds that it is wholly contained within the two unit Murgor 1231918, which will remain recorded. For this reason, the appeal concerning Palahnuk Mining Claim 1163529 will be dismissed and the application to record will remain refused.

Although no longer an issue, the tribunal would have serious concerns in finding this staking acceptable for recording. Based upon the available evidence surrounding Palahnuk Mining Claim 1163529, there was no reason why this could not have been staked as a regular, two unit mining claim, except for the existence of Murgor 1231918 which was under challenge. Only where the lands under staking are wholly surrounded by lands not open (and this excludes those lands which are staked but challenged) can there be a reason for staking an irregular claim or a claim whose boundaries are less than the required increments of 400 metres.

Murgor Mining Claim 1231919

As set out above, the northern boundary of Murgor Mining Claim 1231919 overstaked into the southern limit of the pre-existing Palahnuk/MacDougall 1163530 to the extent of the width of the arm of Mishibishu Lake. Without accurate measurements, the tribunal estimates this to be a distance of between 75 and 100 metres.

This matter shall be referred back to the Provincial Mining Recorder responsible for the *Sault Ste. Marie* Mining Division for an Order pursuant to subsection 110(6) of the **Mining Act** to move the #1 post of Murgor Mining Claim 1231919 to the south a distance of between 75 and 100 metres. The location of the moved post should coincide with the location of the #2 post of 1163530. If that post cannot be located, then it should coincide with the location of the #2 post of the filed only mining claim 1218496. For greater certainty, this location should be on the shoreline of the south end of the arm of Mishibishu Lake, as it extends to the west.

The south boundary shall be moved south from post #2, erecting a new first and second line post, at 400 metre intervals moving west. The second line post should set out a change in direction, indicating that the line will move northward to the pre-existing second line post, whose inscription should change. The newly created south boundary shall be blazed. The remaining line post can remain as located, but require re-numbering to reflect their increase in number.

The changes will result in an irregularly shaped mining claim.

Murgor Mining Claim 1217084

The boundaries of the Murgor (Pinsken) staking of March 11, 1998 of 1217084, which fell on the heels of the cancellation of the Palahnuk/MacDougall Mining Claim 1163530, follow the lines of the November, 1997 staking, namely the location of the south line of Murgor's 1231918 and the north line of Murgor's 1231919. As the Provincial Mining Recorder dismissed the dispute of 1231918, the facts which were allowed to continue formed the basis for her finding that the staking of Pinsken's Mining claim 1217084 tied onto previously recorded claims on all sides.

The previously recorded claims are shown as initially being recorded in the name of Jeff Pinsken, the staker of Murgor's 1217084. It has been proven to the tribunal's satisfaction that the staking on behalf of Murgor of 1231919 overlapped the cancelled mining claim and was done without any form of reconnaissance and locating of the pre-existing claim on the ground before commencing the grid staking of that claim.

The staking by Pinsken on March 11, 1998 of Mining Claim 1217084 was based on the staking fabric laid down by Messrs. Heilman and Pinsken on November 24 and 25, 1997, which circumscribed an area of a recorded mining claim (1163530) of two units, which Pinsken then staked when the lands came open. However, it failed to properly circumscribe the south boundary, which the tribunal was there to be found, either on the ground, or through obtaining documents in the Provincial Recording Office.

To allow the staking of 1217084 to stand would be to further compound the error caused by failing to take all of the necessary steps in establishing the boundaries of the pre-existing mining claim. It is a two unit claim, whose east and west boundaries were staked to corners #2 and #3 which were some 75 to 100 metres short of where they should have been located properly.

The tribunal finds that the staking of 1217084 does not meet the requirements of section 38 of the **Mining Act**, which sets out that a mining claim must be staked in the size, form and manner prescribed. The lands which came open for staking on March 11, 1998 were sufficient to constitute a two unit claim, more or less. The tribunal finds that the failure to perform adequate reconnaissance when grid staking the prior fall has led Mr. Pinsken to stake his south boundary where he did. Based upon its jurisdiction under section 121 of the **Mining Act**, which requires that every decision shall be on the real merits and substantial justice of the case, the tribunal finds that the grid staking on behalf of Murgor required that actual pre-existing boundaries be established and marked. The failure to do so on the south boundary has led to its purportedly being redrawn by the north boundary of 1231919. The tribunal finds that this failure to accurately locate the boundary, although one step removed from the staking under which it occurred, does not meet the test of deemed substantial compliance under subsection 43(2) *and finds that it is deemed abandoned, pursuant to subsection 71(1)*. It would be unfair to allow Murgor to succeed in its staking, whose underlying fabric was based upon its own past error.

For these reasons, the tribunal finds that Mining Claim 1217084 shall be cancelled.

Palahnuk/MacDougall Mining Claim 1218496

The tribunal has reviewed Palahnuk/MacDougall's Application to Record Mining Claim 1218496 and is satisfied that the corners and lines follow the correct locations corresponding to the lands which would have come open in March, 1998 following the cancellation of their Mining Claim 1163530. The tribunal has compared the features shown on the sketch with those of previous claims staked both outside and within these lines, commencing in 1985 and is satisfied that this is a fair representation of the lands available for staking.

There is considerable case law which holds that a second staker must meet a higher standard when overstaking a recorded claim [**Whiting v. Mather** 2 M.C.C. 318; **Martin v. Arrowsmith** 5 M.C.C. 115]. In the absence of any evidence as to the quality of the staking by Messrs. Palahnuk and MacDougall, the tribunal finds that it will allow its recording.

The tribunal therefore finds that filed only Mining Claim 1218496 shall be recorded *effective the date of the tribunal's Order.*

Exclusion of Time

Pursuant to subsection 67(2) of the **Mining Act**, the time during which Mining Claim SSM-1231918 was pending before the Tribunal, being the 19th day of May, 1999, to the 22nd day of March, 2000, a total of 309 days, will be excluded in computing time within which work upon the Mining Claim is to be performed and filed. It is noted that 346 days were already excluded by the Provincial Mining Recorder in her decision of May 6, 1999.

The tribunal has been advised that the first two units of assessment work have been performed and filed on Mining Claim SSM-1231918. Therefore, the exclusion of time will apply to the next unit of assessment work due, being the third.

Pursuant to subsection 67(3) of the **Mining Act**, as amended by S.O. 1996, c.1, Sched. O, s.18, *October 4, 2002* is deemed to be the date for the performance and filing of the *third unit* of assessment work on Mining Claim SSM-1231918.

Pursuant to subsection 67(4) of the **Mining Act**, all subsequent anniversary dates for Mining Claim SSM-1231918 are deemed to be October 4.

The tribunal has ordered Mining Claim SSM-1218496 to be recorded, effective the date of its Order, being March 22, 2000, which becomes its date for recording. All subsequent anniversary dates will be March 22, with the first and second units of assessment work due March 22, 2002.

Conclusions

The dispute and appeal of Mr. Robert Edward Palahnuk against the recording of Murgor Mining Claim SSM-1231918 is hereby dismissed *and the application to record Palahnuk Mining Claim SSM-1163529 will remain refused.*

The dispute and appeal of Mr. Robert Edward Palahnuk will be allowed in part; the recording of the Murgor Mining Claim SSM-1217084 will be cancelled and the Palahnuk Mining Claims SSM-1218496 will be recorded *effective from the date of the Order of the tribunal.*

The tribunal will refer this matter to the Provincial Mining Recorder for an Order pursuant to subsection 110(6) to move posts as Ordered.