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The Mining and Lands Commissioner
Le Commissaire aux mines et aux terres

File No. MA 019-98

M. Orr Deputy Mining and Lands Commissioner	))	Friday, the 11th day of February, 2000.

THE MINING ACT

IN THE MATTER OF

Mining Claims 1226390 and 1231497, situate in the Township of Turnbull, in the Porcupine Mining Division, staked by Robert Roger Rousseau, Vital Joseph Larche and Luc Pierre Gagnon, to have been recorded in the names of Charles Robert Morgan, A. Maureen Rousseau and Reginald T.J. Barnes, each as to a 33 1/3% interest marked "Refused and Filed Only" hereinafter referred to as the "Morgan Mining Claims";

AND IN THE MATTER OF

Mining Claims 1223524 and 1223525, situate in the Township of Turnbull, in the Porcupine Mining Division, staked by Steven Dean Anderson, to have been recorded in the name of Steven Dean Anderson, marked "Filed Only" and "Refused and Filed Only" hereinafter referred to as the "Anderson Mining Claims";

AND IN THE MATTER OF

Subsection 46(2) of the **Mining Act** and Ontario Regulation 7/96;

B E T W E E N:

CHARLES ROBERT MORGAN, REGINALD T.J. BARNES AND A. MAUREEN ROUSSEAU

Appellants and Disputants of the First Part

\- and -

STEVEN DEAN ANDERSON

Appellant and Disputant of the Second Part

\- and -

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MINISTER OF NORTHERN DEVELOPMENT AND MINES

Respondent

AND IN THE MATTER OF

Three appeals pursuant to subsection 112(1) of the **Mining Act** from the decision of the Provincial Mining Recorder, dated the 15th day of June, 1998, to not record the Morgan Mining Claims, on the basis that they were not in compliance with clause 10(2)(2) of Ontario Regulation 7/96;

AND IN THE MATTER OF

An appeal pursuant to subsection 112(1) of the **Mining Act** from the decision of the Provincial Mining Recorder, dated the 6th day of July, 1998, to not record the Anderson Mining Claims, on the basis that an application to record the Morgan Mining Claims had been filed with the Provincial Mining Recorder.

ORDER

WHEREAS these appeals and disputes were received by this tribunal on the 23rd day, 25th day and 30th day of June and on the 14th day of July, 1998, respectively;

AND WHEREAS a hearing was held by telephone conference call on the 30th day of November, 1999;

1. **THIS TRIBUNAL ORDERS** that the appeals and disputes of the Appellants and Disputants of the First Part, being Charles Robert Morgan, Reginald T.J. Barnes and A. Maureen Rousseau, dated the 19th day, 25th day and 26th day of June, 1998, respectively, be and are hereby granted insofar as the Provincial Mining Recorder's ability to accept two corrected applications to record.

2. **THIS TRIBUNAL ORDERS** that the two applications to record two Mining Claims 1226390 and 1231497 (the Morgan Mining Claims), be refused.

3. **THIS TRIBUNAL FURTHER ORDERS** that the appeal and dispute of the Appellant and Disputant of the Second Part, Steven Dean Anderson, be and is hereby granted.

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4. **THIS TRIBUNAL FURTHER ORDERS** that Mining Claims 1223524 and 1223525 be recorded effective the 11th day of February, 2000, being the date of this Order.

5. **THIS TRIBUNAL FURTHER ORDERS** that the 11th day of February, 2002, be fixed as the date by which the first and second units of prescribed assessment work must be performed and filed on Mining Claims P-1223524 and 1223525, in the amount set out in Schedule "A" attached to this Order and all subsequent anniversary dates are deemed to be February 11.

6. **THIS TRIBUNAL FURTHER ORDERS** that no costs shall be payable by any party to these appeals and disputes.

7. **THIS TRIBUNAL FUTHER ORDERS** that this Order be filed without fee in the Office of the Provincial Mining Recorder in Sudbury, Ontario, pursuant to subsection 129(4) of the **Mining Act**.

DATED this 11th day of February, 2000.

ORIGINAL SIGNED BY MARIANNE ORR

M. Orr
DEPUTY MINING AND LANDS COMMISSIONER

SCHEDULE 'A'

Mining Claim	# Units	Amount of Work In Dollars	Due Date
P-1223524	3	$ 1,200	Feb. 11, 2002
P-1223525	3	$ 1, 200	Feb. 11, 2002

Box 330
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24th floor, 700 Bay Street
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The Mining and Lands Commissioner
Le Commissaire aux mines et aux terres

File No. MA 019-98

M. Orr) Friday, the 11th day
Deputy Mining and Lands Commissioner) of February, 2000.

THE MINING ACT

IN THE MATTER OF

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AND IN THE MATTER OF

Subsection 46(2) of the **Mining Act** and Ontario Regulation 7/96;

B E T W E E N:

CHARLES ROBERT MORGAN, REGINALD T.J. BARNES AND A. MAUREEN ROUSSEAU

Appellants and Disputants of the First Part

\- and -

STEVEN DEAN ANDERSON

Appellant and Disputant of the Second Part

\- and -

MINISTER OF NORTHERN DEVELOPMENT AND MINES

Respondent

AND IN THE MATTER OF

Three appeals pursuant to subsection 112(1) of the **Mining Act** from the decision of the Provincial Mining Recorder, dated the 15th day of June, 1998, to not record the Morgan Mining Claims, on the basis that they were not in compliance with clause 10(2)(2) of Ontario Regulation 7/96;

AND IN THE MATTER OF

An appeal pursuant to subsection 112(1) of the **Mining Act** from the decision of the Provincial Mining Recorder, dated the 6th day of July, 1998, to not record the Anderson Mining Claims, on the basis that an application to record the Morgan Mining Claims had been filed with the Provincial Mining Recorder.

REASONS

These appeals and disputes were heard by Telephone Conference Call on November 30, 1999. The hearing was held in two parts; the first part dealing with the recorder's refusal to accept the "Morgan Mining Claims" (1226390, 1231497), under section 44 of the Mining Act, the application having been filed by someone other than that required by clause 10(2)(2) of Ontario Regulation 7/96.

The second part of the hearing dealt with Mr. Anderson's dispute concerning the Morgan Mining Claims. Mr. Anderson had staked two claims and these were referred to as the "Anderson Mining Claims" (1223524, 1223525).

In the first part, Mr. Francis Yungwirth appeared as counsel on behalf of Mr. Morgan. Mr. Roy Spooner appeared for the Ministry of Northern Development and Mines. Mr. Reginald Barnes spoke on his own behalf and Mr. Robert Rousseau spoke on behalf of Maureen Rousseau.

In the second part, Messrs. Morgan, Barnes and Rousseau represented themselves. Mr. Steve Anderson represented himself as well.

All the parties filed documents and materials and gave oral evidence. The documents and materials were referred to in both parts of the hearing.

Background

These matters arose as a result of two decisions made by the Provincial Mining Recorder in June and July of 1998. The Mining Recorder decided to not record both sets of affected mining claims.

With respect to the Morgan Mining Claims, the decision to not record was made on the basis that the application to record had not been made by one of the stakers, but had been made by someone who had not actually carried out the staking. Clause 10(2)(2) of Regulation 7/96 requires that where lands are open for twenty-four hours or less, then the staking must be carried out by the recording licensee.

With respect to the Anderson Mining Claims, the decision to not record was made on the basis that the application to record the Morgan Mining Claims had been filed with the Provincial Mining Recorder, and the Recorder found that there was overlap between the two sets of claims. The issue of the "wrong" applicant (in the eyes of the Mining Recorder) having filed the application for the Morgan Mining Claims would have to be settled first.

Both sets of mining claims dealt with lands found in the Township of Turnbull, in the Porcupine Mining Division. Certain lands, including the subject lands, came open for staking on April 17, 1998.

Issues

1. For lands which have been open for staking less than 24 hours, can an application to record which is completed and signed by someone other than the person required by the regulation be corrected to reflect the correct person after the time for filing the application has passed?

If the issues stopped with the correctness of the application, the tribunal could complete the course of events and put its mind to the recording of the subject claims. However, a dispute was filed against the claims and this fact led to the tribunal's subsequently determining the merits of the staking of the subject claims in terms of substantial compliance and thereby dealing with the second issue which is as follows.

2. If the answer to #1 is yes, thereby permitting the acceptance of two applications with two recording licensees on them, and the claims are disputed, can they then be accepted under section 43 as being in substantial compliance or deemed substantial compliance with the requirements of the **Act** and regulation?

Evidence

The tribunal considered both the parties' written material and documentation (which had been pre-filed) as well as the oral evidence given at the hearing.

Certain lands in the Township of Turnbull, Porcupine Mining Division, came open for staking on April 17, 1998, pursuant to an order made under section 35 of the **Mining Act** and described in the Ministry's document book as "O-P-10/98". These lands are further described in the Ministry's document book as being "formerly patented as P 11395, P 12144, P 12163, P 12228, P 18985 and P 18986" and totalling 80.19 hectares in size. These lands are surrounded by irregularly shaped mining claims to the east, west and south.

The staking of both Morgan Mining Claims began at 9:00 a.m. on April 17, 1998. Claim 1226390 was completed at 11:00 a.m., and measured twelve hectares (going by the application) and Claim 1231497 was completed at 11:05 a.m., and measured sixty hectares (going by the application). Mr. Morgan's evidence was that he had not actually staked the Morgan Mining Claims, but was "on the ground" at the time of the staking and was there to locate the position of the Claims, including the number one post for Claim 1226390, as he had twenty years of staking experience in the area. He waited at the number one post for his staker (Mr. Gagnon) to return, which he did at 11:00 a.m. Mr. Morgan stated that there was no competition while the staking was being carried out.

When questioned by the tribunal as to his signing the certificate accompanying the application and his interpretation of the words "I was personally on the ground during the staking of the lands", Mr. Morgan said that he could say that he "caused to be staked out" because he was "personally on the ground". In that way, he could sign and file the application. When questioned by the tribunal as to why Messrs. Larche or Gagnon could not or did not have the applications recorded, Mr. Morgan made reference to the weather and the fact that both men were wet while he was dry after the staking had been completed.

Mr. Rousseau, was waiting at the number one post for Claim 123497. The staker of that claim was Mr. Larche. As noted, the staking for that claim started at 9:00 a.m. and ended at 11:05 a.m. Both Messrs. Larche and Gagnon provided written evidence to the effect that they did not encounter any competition while staking.

Mr. Rousseau also indicated that even with his forty years of experience he was not aware of the Regulatory requirement that the "Recording Licensee" also be a staker where the lands have been opened for twenty-four

hours or less. Mr. Rousseau indicated that at "around eleven o'clock", he noticed a truck in the area, and when asked by its occupants, "Did you get the ground?", he replied in the affirmative. He said that at the time of this question Mr. Morgan had left to record the application.

Mr. Morgan said that he filed the application to record the Claims on the 17th of April, 1998, and that he was in Sudbury on the 23rd of April to file an application for a triangular section which, based on the exhibits, is land located between Claim 1231497 and the Claim to the east being Claim 1228613. A copy of a letter from Mr. Morgan dated April 23, 1998, addressed to Mr. Spooner is contained in the material filed by Mr. Morgan (Exhibit 1, Tab 6). This letter asks Mr. Spooner to move Mr. Morgan's line posts on the west side of Claim 1228613 westerly to coincide with the East limit of 1231497. This letter is followed by a fax dated April 27, 1998 and addressed to Mr. Dale Messenger, at the Ministry office. In this letter, Mr. Morgan asks that the measurements on Claim 1226390 be shown as 300 meters +/- as they were apparently not shown on the sketch. He also indicates that the westerly limits of Claim 1231497 were to coincide with the east limit of Patent 1152 and with the east and south limits of Patent 3383 (also a claim). He wrote that it was his intention to correct the discrepancies on instructions from the Recorder when conditions were more favourable as there was flooding. Mr. Morgan said that he spoke with Mr. Dale Messenger, the Deputy Mining Recorder on his April 23rd visit. He asked Mr. Messenger why his application was not being processed and asked to see Mr. Spooner, who was returning from Montreal that day. The meeting never took place as Mr. Spooner did not arrive, and Mr. Morgan left.

Mr. Barnes also gave evidence with respect to the attempts made by him to contact Sudbury after hearing in early April that the application was marked "Filed Only". He began calling on May 11th, 1998, and the notes he took (which were entered as evidence and not disputed), indicate that he eventually made contact with Mr. Roy Denomme, Provincial Mining Recorder, on May 29th, when Mr. Denomme returned Mr. Barnes' phone call of May 28th. Mr. Denomme indicated that the application was on Mr. Spooner's desk and that he would call back once he had checked it. Mr. Barnes' query as to why the application was "Filed Only" was not actually answered until June 15th, 1998, (with Mr. Spooner's decision) well outside the thirty-one day time period within which the Applicant would have had an opportunity to correct the application. In this case, the Application could have been corrected only by having one of the actual stakers (Gagnon and Larche) sign and file individual applications for each claim as "Recording Licensee" under the Regulation.

Mr. Spooner gave evidence relating to the processing of the Morgan Mining Claims. The Morgan Mining Claims were filed on April 17, 1998. The length of time taken to process the Claims was due to a number of administrative reasons. He indicated that his staff were facing "confusing issues

of tie-on mining claims that were difficult to understand in terms of the location for the area that came open for staking and where all the claims actually were located, and whether they were overlapping at that time...." He said that his staff "were without the necessary information to make it possible for them to deal with the application quickly." Furthermore, the fact that the issues were "confusing" meant that senior staff had to be consulted and this took time as well. The result of all of this delay was that his "administration failed to respond to the application to record from Mr. Morgan within the thirty one (31) days....[and] failed to recognize that the wrong person applied to record the mining claim." Mr. Spooner also said that had he known about it within the 31 days, he would have asked Mr. Morgan to have the correct people file the application to record.

The Tribunal heard from Mr. Spooner that he was "apprehensive" about the "possibility" of adverse interest, and that there were questions from Mr. Anderson "in terms of the recording of Mr. Morgan". When queried by the Tribunal as to whether the Ministry had anything to contradict the evidence of the applicants – namely that at the time of the staking there was no adverse interest, Mr. Spooner agreed that "if there was no foot race for the mining claims at the time the staking was done on behalf of Mr. Morgan, that they could make the assumption and correctly say that there was no adverse interest. No other evidence with respect to an adverse interest of any sort was produced by the Ministry. Mr. Spooner also distinguished an actual foot race from a case where someone stakes over top of someone else (on a "premeditated basis") with the intention of attacking the first staking and defeating it on "technical deficiencies". His point was that in a foot race situation, the rules are strictly applied.

With respect to the staking carried out by Mr. Morgan's stakers, Messrs. Larche and Gagnon, Mr. Spooner noted in his written material (Exhibit 3) that "there does not seem to be a defect in the staking procedure". However, he made it clear in his evidence that the staking of the Morgan Mining Claims was not the basis for his decision to "not record". He had "no legal authority to accept the application". The Ministry chose to not appear for the second part of the hearing which dealt with the dispute filed by Mr. Anderson against the Morgan Mining Claims.

An inspection of the Morgan Claims was requested by the Office of the Mining and Lands Commissioner on December 14, 1998. A report (Report Number C1-98/99) was filed (Exhibits 4 and 5). The Report describes an inspection carried out on the Morgan and Anderson Mining Claims.

The staking of Anderson Claim 1223525 began on April 19, 1998 at 10:00 a.m. and was completed at 3:30 p.m., and consists of three units, (going by the application). This claim includes lands which Mr. Morgan asked to have included in his claim on April 27, 1998.

The staking of Anderson Claim 1223524 began on April 22, 1998 at 10:00 a.m, and was completed at 12:30 p.m. that same day and consists of three units, (going by the application). This claim covers the triangular piece of land which Mr. Morgan asked to have included on April 23, 1998.

Mr. Anderson's evidence was that prior to staking, he had consulted with the Ministry as to how to stake the claims. He said that the Ministry told him that it was "critical" to locate the patents to be tied on to, as the claim map was just a "general reference". He said that on opening morning, he was in the area locating survey pins in order to tie on to the neighbouring patents. He ran into the Morgan staking and went back the next day to stake around it. The application filed by Mr. Anderson says that he staked his claims on the 19th and 22nd of April, 1998, or two and four days after Mr. Morgan had had his claims staked.

The Anderson Mining Claim 1223524, staked on the 22nd of April, 1998, covers all of Morgan Mining Claim 1226390 and nearly all of Morgan Mining Claim 1231497 as well as extending eastward in a triangular fashion along the east boundary of Morgan Mining Claim 1231497. This is also the portion identified by Mr. Morgan in his April 23rd letter to Mr. Roy Spooner, referred to above. The Anderson Mining Claim 1223525, staked on the 19th of April, 1998, covers a small portion of 1231497 at the south as well as the gap between the Morgan Mining Claims and the patents referred to by both Mr. Anderson and Mr. Morgan (the latter in his fax to Dale Messenger dated April 27th, 1998, and referred to above).

Mr. Anderson noted a series of discrepancies in terms of the staking of the Morgan Claims and described them to the Tribunal as follows. With respect to Claim 1226390, Mr. Anderson noted that the distances are "known to be approximately 300 metres north-south. Those distances are 180 metres." He also noted that the number one tag was on the north side of the post. The Inspection Report also notes this position of the number one tag on the number one post for this claim. Mr. Anderson could not find the witness post between the number two and number three posts. This part of the claim is abutting the Morgan claim to the south being 1231497. The Report notes the line from the number two post is blazed and flagged with a post tagged and inscribed as being 400 metres east of number four – 1231479. The Report notes that this inscription should probably read 1231497. It may be that Mr. Anderson was actually referring to the line between the number three and number four posts which is the line that crosses Robb Creek as shown on the Inspection Report. Robb Creek also factors in to the line from the number three to the number four post for Claim 1226390. The Report notes that it could not locate the witness posts for the number four post for this Claim. It notes the depth of the snow and posits that the posts may be under the snow.

With respect to the southern claim or Morgan Mining Claim 1231497, Mr. Anderson noted that it was irregular without showing why it was irregular. Mr. Anderson said that irregular claims should be "tied on all the way around". He noted the presence of the patents and noted that Claim 1231497 was not tied on to these patents.

With respect to whether there was "competition" at the time of the Morgan staking, Mr. Anderson said that "there was competition". He did not elaborate but in reply to questioning by Mr. Morgan, said that he (Mr. Anderson) was "in the bush", although Mr. Morgan "may not have seen us". His presence the Morgan staking had been completed. Mr. Morgan, in questioning Mr. Anderson, referred to the events of the day as "staking in a rush" and commented that "you don't go surveying claims when you're staking them in a rush or when they just come out. You survey by a surveyor afterwards." This appears to contradict Mr. Barne's version of events. In questioning Mr. Anderson following some comments made by Mr. Anderson ("slapped claims in as fast as you could"), Mr. Barnes asked "why would we be in any rush to stake ....?"

Mr. Anderson said that he had intended to stake that day (meaning the 17th of April), but that he came across the Morgan staking and did not stake until the next day. When questioned by the tribunal, he indicated that on the 17th he was in the area west of the Morgan Mining Claims locating survey pins. As mentioned earlier, the Anderson applications note that Mr. Anderson's takings actually took place on the 19th and the 22nd of April. Mr. Anderson described how he took the time to figure out what had been done by the stakers for Morgan with regards to where the actual patents were located. He made the decision to stake his claims based on a belief that the Morgan Mining Claims would not be accepted by the recording office as they had not been tied on to the patents lying to the west. In being questioned by Mr. Rousseau, who indicated that the Morgan Claims were "square", Mr. Anderson elaborated on his reason for "going in" and staking his claims was that the Morgan Mining Claim 1231497 was irregular in shape, that it had distances that were not 400 metres and that it had no tie-ons to justify those distances.

In being questioned by Mr. Morgan, Mr. Anderson said that he staked Claim 1223525 first. As noted, this claim lies to the west of the Morgan Mining Claims and takes in the area noted in Mr. Morgan's April 27th fax to Mr. Messenger. Then he staked his claim 1223524 which covers the Morgan Mining Claims and the triangular area noted in Mr. Morgan's letter of April 23rd to Mr. Spooner, also referred to earlier.

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When questioned by the Tribunal as to his whereabouts in terms of the number one post for Claim 1226390, Mr. Anderson said that he was "approximately a claim and a half to the west of that, because that's where the patents are....the problem with this is the patents are about a quarter mile northwest of where they're shown to be on the map....And that's what we were attempting to tie on to...." He also noted after being questioned by the tribunal, that he became aware of the area to be opened for staking "a couple of weeks prior to the actual date".

Mr. Morgan, when questioned by the Tribunal, had no comment about the tag on the number one post for Claim 1226390 facing north. With respect to the lack of witness posts pointed out by Mr. Anderson, Mr. Morgan blamed flooding, and the presence of two to three feet of water. He did say that Lands the one post was put down at the edge of an access road which appears in all of the applications. The Inspection Report requested by the Mining and Commissioner notes that the southerly line for Claim 1226390 goes through thick cedar swamp and was well blazed and flagged. The inspection for this Report was actually carried out on January 26th, 27th and 28th, 1999 and much of the area was covered with snow, thereby making it difficult for the Tribunal to compare the descriptions of the parties with those contained in the Report. For example, the Report notes that it could not locate the Number 4 witness posts, but noted that they may have been under several feet of snow. The Report neither verified nor contradicted either Mr. Morgan or Mr. Anderson in terms of the terrain.

When questioned by the Tribunal as to the reason for the 300 meter distances shown along the south and west boundaries of Claim 1231497, Mr. Morgan had no information. Mr. Rousseau, who was present at the number one post for that claim could offer only a possible explanation as to Mr. Larche's reasons for doing what he did along those lines. Mr. Rousseau could only speculate as to the reasons for Mr. Larche's actions, including whether Mr. Larche had attempted to find something to tie on to before heading north. Mr. Rousseau blamed the weather (rain and snow) for the discrepancies in distance. He also indicated that the Morgan Mining Claims were inside the patented claim and "[I]f there are any little wedges in there, we were not aware of it, but it looked like we were inside the patents...."

The Provincial Mining Recorder refused the Morgan Mining Claims on June 15, 1998, and the Anderson Mining Claims on July 6, 1998. Mr. Morgan filed an appeal on June 23, 1998 and Mr. Anderson filed his appeal on July 14, 1998.

Submissions Respecting Issue #1

Mr. Spooner indicated to the Tribunal that his reason for not accepting the Morgan application was that it had not been filed by the correct licensee. The Ministry took no part in the Anderson dispute. Mr. Spooner said that Subsection 44(1) of the **Mining Act** deals with the requirement to file an acceptable application to record within 31 days. The actual staking of the Morgan Claims had not been carried out by Mr. Morgan, but by other people. In Mr. Spooner's opinion, since Mr. Morgan could not describe himself as the "staking licensee" for purposes of the Regulation, he could not file the application. The actual stakers are required pursuant to Clause 10(2)(2) of Ontario Regulation 7/96 to file the application where the staking takes place on lands that have been open for less than twenty-four hours.

Mr. Spooner, when questioned by the Tribunal, indicated that the delay experienced by Messrs. Morgan and Barnes was due to administrative matters, including volume of applications and confusing issues which needed the input of senior staff. While he described this as an unfortunate situation and while he also said that if he had known about "it" within the thirty one days, he would have asked Mr. Morgan to have the correct people file the application to record. He also indicated that he was of the opinion that the applicant bore responsibility "to know the rules" and to file correct applications, as well as to carry out proper staking.

When asked by Mr. Yungwirth about the application of Section 43 to the circumstances, as in the case of Gryba v. Obradovich, (Decision of the Mining Recorder, Larder Lake Mining Division, November 30, 1994), Mr. Spooner's response was that section 43 could not be used to cure a severe defect in the application to record and that the issue in Obradovich related to staking.

When asked by the tribunal about the attempts made by Messrs. Barnes and Morgan to find out about the status of the application made by Mr. Morgan, Mr. Spooner summarized the situation as follows. "[M]y administration failed to respond to the application record from Mr. Morgan within the 31 days. My administration failed to recognize that the wrong person applied to record the mining claim." Mr. Spooner also agreed that had he known about this within the thirty-one day time period, he might very well have had Mr. Morgan correct the situation by having a new application submitted by the correct applicant.

Mr. Yungwirth's position on behalf of his client was that there was no competition, that several attempts to contact the mining recorder's office were made but to no avail, and that with new rules like that in Clause 10(2)(2) of the Regulation, cases like Obradovitch point to the recorder (in this case the Commissioner) having a discretion which could be exercised to validate or amend an application that does not meet the regulated requirements.

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Mr. Yungwirth also made reference to the reliance that Mr. Morgan placed on the Office of the Provincial Recorder and indicated that some work had been done on the claims (although this was not put into evidence and there was no record of this in the written materials).

He relied on section 121 of the **Mining Act** to ask that the application be upheld on the real merits and substantial justice of the case, and the case of Re Campbell, Vol. 5, M.C.C. 155, in which Commissioner Ferguson directed the late recording of mining claims on the real merits and substantial justice doctrine. The point Mr. Yungwirth was making was that "but for" the fact that his client could not get a decision from the Recorder's office, his client could have ensured that the correct licensee was making the application pursuant to the **Act** and Regulations.

Submissions Regarding Issue #2

With regards to the second part of the hearing and Mr. Anderson's dispute with the Morgan Mining Claims, Mr. Anderson's argument centered on the position of the Morgan Mining Claims in relation to the existing patents. His position was that the Morgan Mining Claims (among other things), did not rely on anything like existing patents for their distances. He contrasted the approach of the Morgan team with his approach which was to talk to Messrs. Spooner and Korpela at the Ministry beforehand. The result was that he paid close attention to the issue of the neighbouring patents. After talking to these two gentlemen at the Ministry, Mr. Anderson felt it was necessary to locate patent boundaries and tie on to those patents.

In Mr. Anderson's opinion an irregular mining claim has to have a reason for being irregular. In the case of the Morgan Mining Claims, the only reason for irregularity as far as Mr. Anderson was concerned, was related to the location of the neighbouring patents, having seen them beforehand on the claim map. In the field though, because Mr. Anderson could not find what the Morgan Mining Claims had tied on to, (i.e., no survey pins for patents), then there was no excuse for the irregular claims. This argument also applied to the fact that the distances for the south Morgan Claim were not supported by some irregularity (i.e., a patent) in the field.

Mr. Anderson also took issue with the fact that the tag for the number one post for Claim 1226390 was facing to the north, and with the distances for both claims. In Mr. Anderson's opinion, the **Mining Act** is "written for a reason" and staking is not only about "finishing first". Mr. Anderson said that he was trying to stake in accordance with the **Act**, the implication being that others should be trying to stake with the same care.

On the other hand, Mr. Morgan and Mr. Rousseau summed up their position as being that they could stake open ground, stay within the patent boundaries and move posts at a later date, which in fact, Mr. Morgan asked to do in his correspondence of April 23rd and 27th.

Findings of Fact and Reasons for Decision

With respect to Issue #1, the tribunal finds that but for the delays experienced by Mr. Morgan, the Morgan Mining Claims application might very well have been corrected to reflect the correct licensees. (The tribunal notes that for the Morgan Mining Claims there should have been two recording licensees as there were two stakers – one for each claim.) However, whether that administrative delay is a basis for accepting an application filed by the wrong person is another matter. Mr. Yungwirth submitted the case of Re Campbell 5 M.C.C. 155, to assist on this point. In the case of Re Campbell, the applicant had filed an application which met the requirements of the **Act**. There was no adverse interest involved in that case. The problem lay in the fact that postal delays got in the way of its being received in time by the mining recorder. In that case, the Commissioner used the real merits and substantial doctrine to direct a late recording of the claim.

The tribunal does not find any support for the appellant through Re Campbell. While the Morgan application experienced a delay in being processed, it was not a correct application from the start. In fact, as noted above, there must be two correct applications filed for the Morgan Mining Claims.

The tribunal finds in the case of the Morgan Mining Claims that the applicant Morgan mistakenly, or through ignorance of the law, assumed that he could name himself as applicant. This was not a clerical or typographical error on anyone's part.

As to Mr. Yungwirth's request that section 43 be applied to cure the defect, the tribunal cannot agree in applying that section to cover what really is an "application" as opposed to a "staking" issue. The case of Obradovitch is one that deals with a staking exercise only, and in this tribunal's view cannot be used to justify the correction and acceptance of an application filed by the wrong individual. The tribunal refers to the case of Frank Doran v. Ministry of Northern Development and Mines (July 30, 1995) (Ont. M.C.) [unreported], in which that section was put forward as an answer to the wrong tag number having been put on an application to record. The tribunal in that case determined that "the substantial compliance test cannot be used to determine whether the application to record is in accordance with the requirements of the **Act.** "

The tribunal finds instead, that Mr. Morgan, through his mistaken interpretation of the law or through possible ignorance of the law, failed to comply with the **Act** and its regulation in terms of filing the correct applications. Non-compliance is dealt with by the Act in subsection 71(1) which reads:

> **71.(1)** Non-compliance by the licensee or holder of a mining claim with any requirement of this Act or the regulations as to the time or manner of the staking out and recording of a mining claim or with a direction of the recorder thereto, within the time limited therefore, shall be deemed to be an abandonment, and the claim shall, without any declaration, entry or act on the part of the Crown or by any officer, unless otherwise ordered by the Commissioner, be forthwith opened to prospecting and staking out.

The issue of non-compliance and the discretion afforded the recorder when confronted by this issue is dealt with in the case of Doran v. MNDM (July 25, 1995) (Ont. M.C.) [unreported]. Besides referring to various cases wherein the Commissioner allowed errors in recording to be corrected, the Doran case also sets out a three-pronged test which a recorder and the tribunal could apply in this case.

That test is set out on page 20 of the Doran decision. While the issue of abandonment is not at issue here, it is of interest to note that the tribunal in Doran found that deemed abandonment is a rebuttable presumption. In Doran, the tribunal looked to the good faith exhibited in terms of the staking and the recording (the wrong tag number had been put on the application and subsequently recorded), the nature of the error (typographical or clerical), and whether there was evidence of a third party interest (unrecorded transfers or option agreements) which could be affected by the tribunal's directing that the application to record be corrected.

It is the tribunal's view that the principles found in Doran work in favour of correcting the application made by Morgan so that two applicants who actually carried out the staking of the two Claims can file applications to record. These would be Messrs. Larche and Gagnon. While Mr. Morgan may have been misguided or careless in his approach to interpreting the law, there is no evidence that he acted in bad faith in submitting the application signed by himself. Further, while the facts in Doran dealt with clerical or typographical errors, there is no reason that the tribunal is aware of to prevent applying the test to errors of interpretation, given that the test is three-pronged. Finally, while there is evidence of a dispute having been filed with respect to the Morgan Mining Claims, there is no evidence that a third party interest of the sort described in Doran, (unrecorded transfers, option agreements), would be affected here.

For the above reasons, this tribunal finds that the Morgan application can be corrected so that two applications to record bearing the names of the actual stakers Larche and Gagnon for the respective claims (1231497 and 1226390) can be filed.

As for the dispute filed by Mr. Anderson with respect to the Morgan Mining Claims, the tribunal finds that the Morgan Mining Claims do not substantially comply with the requirements of the **Act** and regulations and that the staking efforts further fail to meet the test set out in section 43(2) of the **Act.**

Section 43 allows for "substantial compliance" with staking requirements. Section 43 will grant "deemed compliance" if the failure to comply is not likely to mislead any licensee desiring to stake a claim in the vicinity and 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.

The tribunal finds that Mr. Morgan's approach to the staking exercise (stake something now and make up the difference later) cannot be condoned through substantial compliance as it fails to reflect an intention to attempt to comply in good faith with the legislated requirements. It is an approach that simply ignores the staking requirements. Both Messrs. Morgan and Rousseau believed that they could make up the difference after the fact. The tribunal finds that this is pushing the limits for the application of section 43. There is no evidence that Mr. Morgan was concerned about trying to comply in good faith with the legislated requirements. There is evidence that claim maps were available prior to the lands coming open (as they were for Mr. Anderson) and that the ministry was available to advise the prudent staker as to the existence of neighbouring patents. The tribunal is concerned that acceptance of this type of approach in these circumstances will only lead to similar lack of effort on the part of other stakers.

Mr. Morgan chose to rely on others to carry out staking that proved to be complicated by the location of patents which as Mr. Anderson said, were not in the place they appeared to be on the claim map. The Inspection Report noted the incorrect placement of a number one tag (asserted by Mr. Anderson) on the number one post for the Morgan Claim 1226390. Instead of facing south, it faced north. This is a requirement of Section 8 (3) of Regulation 7/96. When questioned by the Tribunal, Mr. Morgan had no comment to make with respect to this fact.

The Report also bore out the assertions made by Mr. Anderson and confirmed by Messrs. Morgan and Rousseau that the distances for the southerly Claim 1231497 were not calculated as a result of tying on to existing claims or patents on the southwest and westerly boundaries. Again, neither Mr. Morgan or Mr. Rousseau could say why the lines along these boundaries measured 300 to

meters. The tribunal wonders how much supervision Mr. Morgan was actually exercising during the staking of the Morgan Claims. Instead, Mr. Morgan and Mr. Rousseau both seemed to be of the opinion that what they missed in the field could be addressed after the fact. There was no evidence that they attempted carry out any type of investigation with respect to the location of the patents. This tribunal finds that there was no reason for the failure to comply with the regulatory requirements for staking, and that the failure to place a tag on the correct side of the corner post could mislead other licensees in the field.

Conclusions

The application filed by Mr. Morgan can be corrected so that two applications bearing the names of Messrs. Larche and Gagnon can be filed for the appropriate claims.

The applications so corrected are refused as the staking of the Morgan Mining Claims is not in substantial compliance with section 43 in its entirety for the reasons given above.

The staking by Mr. Anderson of Mining Claims 1223524 and 1223525, should properly be accepted for recording.