

IN THE MATTER OF THE MINING ACT BEFORE THE  
PROVINCIAL MINING RECORDER

IN THE MATTER OF:

Mining Claim TB4212101 situate in the Metcalfe Lake Area, Thunder Bay Mining Division, hereinafter referred to as the "Bjorn claim";

AND IN THE MATTER OF:

Refused application to record mining claim 4210050 situate in the Metcalfe Lake Area, Thunder Bay Mining Division, staked for more or less the same area of land as the mining claim and hereinafter referred to as the "Daniel claim";

AND IN THE MATTER OF:

Refused application to record mining claim 4210051 situate in the Metcalfe Lake Area, Thunder Bay Mining Division, staked for more or less the same area of land as the mining claim and hereinafter referred to as the "Ted claim";

AND IN THE MATTER OF:

A dispute against the mining claim pursuant to Section 48 of the Mining Act, RSO 1990, filed by:

Daniel W. Cox (Disputant)

against the mining claim of record held by

Kenneth Robert Kukkee (Respondent)

WHEREAS:

The parties were given opportunity to present material and make representations at a hearing at Thunder Bay on April 3, 2007.

I FIND: upon consideration of the evidence of both parties that the dispute should be allowed, and therefore,

I ORDER: that mining claim TB4212101 is hereby cancelled as of the date of this Order.

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I FURTHER ORDER: that mining claim TB4210050 remain refused.

I FURTHER ORDER: that the refused application to record mining claim 4210051 is hereby accepted and recorded effective the date the application to record was first received.

Dated at the Provincial Recording Office  
this 19<sup>th</sup> day of November 2007

*"Original signed by Sheila T. Lessard"*  
Sheila T. Lessard  
Provincial Mining Recorder

NOTE: SECTION 112 OF THE MINING ACT, RSO 1990 PROVIDES THE PARTIES WITH A RIGHT OF APPEAL TO THE MINING AND LANDS COMMISSIONER. AN APPEAL MUST BE FILED WITHIN 30 DAYS OF THE DATE OF THIS DECISION.

AND TAKE NOTE THAT UNLESS AN APPEAL IS FILED WITHIN 30 DAYS OF THE DATE OF THIS DECISION, SUBSECTION 110(5) OF THE MINING ACT MAKES THIS DECISION FINAL AND BINDING.

## BACKGROUND

On August 10, 2006 mining claim TB1233887 cancelled due to non-filing of assessment work by the due date of the claim. Pursuant to Section 72.1(2) of the Mining Act R.S.O, lands mining rights or mining claims affected by a forfeiture or a loss of rights are open for staking from 8 a.m. standard time on the day after the posting of the notice of re-opening. The claim was posted on August 11, 2006 and therefore the ground within forfeited mining claim TB1233887 was open for staking at 8 a.m. standard time on August 12, 2006.

On August 21, 2006 an application to record mining claim 4210050, covering all or part of the same area contained within the forfeited claim, was received in the Provincial Recording Office. The recording licensee was noted as Daniel W. Cox who indicated on his application that the claim was to be recorded in the name of N.W.T. Copper Mines Limited. N.W.T. Copper Mines Limited had also been the recorded holder for the former forfeited claim TB1233887 which was also staked and recorded by Daniel Cox. On his application to record claim 4210050 Daniel Cox indicated that he commenced the staking of the 16-unit mining claim at 8:00 a.m. August 12, 2006 and completed the staking at 11:50 a.m. August 12, 2006. Mr. Cox was contacted and asked to confirm whether or not he commenced his staking at 8:00 standard time or 8:00 daylight saving time. Mr. Cox submitted a signed statement confirming that he commenced the staking of his mining claim at 8 a.m. daylight saving time. The application to record the "Daniel claim" was marked refused on September 14, 2006, as Mr. Cox had commenced staking of the ground one hour too early.

On September 1, 2006, an application to record mining claim 4212101, covering all or part of the same area contained within the forfeited claim, was received at the Provincial Recording Office. The recording licensee was noted as Bjorn Bjorkman who indicated on his application that the claim was to be recorded in the name of Ken Kukkee. On his application to record claim 4212101 Bjorn Bjorkman indicated that he commenced the staking of the 16-unit claim at 8:30 a.m. August 12, 2006 and completed the staking at 10:58 a.m. August 12, 2006. Mr. Bjorkman was contacted and asked to confirm whether or not he commenced his staking at 8:30 standard time or 8:30 daylight saving time. Mr. Bjorkman submitted a signed statement outlining that he commenced the staking of his mining claim at 8:30 a.m. eastern standard time. Mr. Bjorkman further stated that the time written as start and finish on the application form as well as on the claim posts is in eastern standard time (EST) and not the current daylight saving time (DST). The "Bjorn claim" was accepted effective September 1, 2006 and recorded in the name of Ken Kukkee.

On September 5, 2006, an application to record mining claim 4210051, covering all or part of the same area contained within the forfeited claim, was received at the Provincial Recording Office. The recording licensee was noted as Ted Cox who indicated on his application that the claim was to be recorded in the name of N.W.T. Copper Mines Limited. The application indicates that the staking occurred on August 31, 2006. The “Ted claim” was marked refused on September 28, 2006, pursuant to Section 44(2) of the Mining Act, being that the Recording Office had already recorded the “Bjorn claim” with an earlier completion of staking time.

On November 6, 2006, Daniel Cox filed a dispute against the “Bjorn claim” alleging that the claim was staked by Bjorn Bjorkman prior to the opening time and maintaining that the “Ted claim” is the only allowable claim.

### The Hearing

Appearances:

Daniel Cox -	Disputant
Angus McCready -	Witness for the disputant
Kenneth Kukkee -	Respondent
Bjorn Bjorkman -	Witness for the respondent
Eija Peltokangas, L.L.B. -	For the respondent

This matter was heard at Thunder Bay on April 3, 2007. A motion was made by Ms. Peltokangas for exclusion of the witnesses during testimony. There was no objection from the Disputant and the motion was granted.

### EVIDENCE

Mr. Cox presented three photos into evidence. The photos were of the No. 1 corner post for the “Daniel claim” 4210050, the No. 1 corner post for the “Bjorn claim” 4212101, and the No. 3 corner post for the “Bjorn claim” 4212101 and the “Daniel claim” 4210050. The No. 1 post of the “Daniel claim” indicates a start time of 8:00 a.m. and a finish time of 11:50 a.m. on August 12, 2006. The No. 1 post of the “Bjorn claim” indicates a start time of 8:30 a.m. and a finish time of 10:58 a.m. on August 12, 2006. There is a 1 crossed through the 0 (or a 0 written over the 1) on the 10:58 time inscription.

The No. 3 corner post of the “Bjorn claim” indicates a time of 9:50 a.m. August 12, 2006, and the No. 3 corner post of the “Daniel claim” indicates a time of 9:50 a.m. The “Bjorn claim” No. 3 post is tied to the No. 3 “Daniel claim” post with orange flagging tape. Mr. Cox has used pink flagging tape as evidenced in the photos.

Mr. Cox stated that during the staking of his claim he first encountered Mr. Bjorkman at the No. 3 post. He saw him erect his post and entered into a conversation with him. Cox informed him that he was re-staking the claim that was previously owned by the company N.W.T. Copper Mines Limited who he had worked a number of years for. He stated that he had a helper on the ground with him, to which Bjorkman replied he had a helper as well and that Cox wasn’t going to beat him. From then on

it became a race. They both got to the No. 1 claim corner at the same time and began to make their posts. Mr. Cox noticed that Mr. Bjorkman had written his time later on his No. 1 post and consulted his GPS. They both left the bush at the same time and became aware that they had staked the ground too early. Since neither of the claims were valid, another representative of N.W.T. Copper Mines was sent in to re-stake the ground. When the application to record the "Ted claim" was sent to the Recording Office, it was denied because the "Bjorn claim" was accepted. Mr. Cox stated that it was very clear to both parties that they were in the field together and that if he was too early in staking, then Mr. Bjorkman was too early as well.

Under questioning by Ms. Peltokangas, Mr. Cox was asked about his staking experience. He stated that he was 30 years old, and was a mining explorationist (mostly prospecting) for his entire older life, and had staked hundreds of claims in the last year and hundreds over the course of the last 12 years. When asked why he wasn't aware that he was staking too early, he replied it was because the ground was posted on a Friday and came open on Saturday and that his mother coordinated all of the staking for N.W.T. Copper Mines. He stated that there was no one that they could consult to find out exactly what time they were to start however it was some sort of a crazy mix-up.

Cox was asked about his arrival times at each of the claim corners and the amount of time it took him between each. He stated that he started at his post No. 1 at 8:00 a.m. daylight saving time and arrived at his No. 2 post at 8:50 a.m. being fifty minutes later. He got to his No. 3 about forty-five minutes later and noticed that there was competition for the ground at this time. He inscribed 9:50 on the post and remarked that Bjorkman was inscribing his post at the same time. From post No. 2 to No. 3 he took one hour. He arrived at post No. 4 at 10:40 being 50 minutes from the No. 3 location. He took one hour and 10 minutes to post No. 1 where he inscribed a completion time of 11:50 according to his GPS unit.

When asked about the terrain between the corner posts, Cox replied that from post No. 1 to No. 2 it was fairly bushed and was difficult however that was not the most difficult going. He explained that when you are in bushed area you have all of your old blazings that you could follow which makes it a lot easier. In the cut over areas, many of your blazes have been cut away and one does not have an established line to follow and would therefore need to take a lot more compass shots. He answered that someone following behind another staker could move faster as they would be able to follow the blazes. Cox believed the line between the No. 2 and No. 3 posts had a bit of clear cut but also a lot of bush which also made it difficult going. When asked if he would agree that going from post No. 3 to No. 4 was easier than going from post No. 2 to No. 3 or post No. 1 to No. 2, Cox replied that was not necessarily so. He agreed that there was a trail near the No. 3 post however one could only follow it for approximately 50 meters if they wanted to keep their line straight before encountering bush again and then a clear-cut area. He said that without a line to follow, it takes long to locate posts in the right spot and there is a need to take more compass shots. He stated he would call the entire claim pretty much average. Travelling from post No. 4 to No. 1 he encountered clear-cut for roughly the first two-and-a-half lengths before running into the bush again. Again he responded that the clear cut area was not necessarily the easiest going in terms of travel time because there was so much slashing and leftover debris of brush on the ground that one couldn't get good footing.

Mr. Cox stated that he knew at post No. 3 that he had competition and that speed of staking went up for both parties. Neither he nor his helper saw Mr. Bjorkman start his No. 1 or No. 2 post. He

responded that he first encountered Mr. Bjorkman at post No. 3 and had a conversation with him. He recalled that he offered to pay Mr. Bjorkman \$400 to desist from his staking so that it wouldn't make it a waste of time for him coming into the bush that day. Mr. Cox stated that he had a helper who was assisting him with flagging and blazing. He said he encountered Mr. Bjorkman periodically after this point during the duration of the remainder of the staking. The only other person he witnessed was Mr. Bjorkman's helper walking from the No. 1 to the No. 4 post as he and his helper were walking from their No. 4 to their No. 1 post.

Mr. Cox was questioned about a gun that he was carrying sloped across his shoulder during the staking. He responded that he was carrying it for protection and that it was a completely legal shotgun (Escort Defender) which he had purchased in Thunder Bay. He responded that it was visible to Mr. Bjorkman. When asked if he recalled making a remark to Bjorkman that accidents can happen in the bush, he responded that he said nothing of the sort.

It was at this point that Ms. Peltokangas was asked for the relevance of this line of questioning. Her response was such that the credibility of Mr. Cox was going to be called into question. She then continued and asked Mr. Cox if he recalled telling Mr. Bjorkman his name was Dan Smith or if he had told him that he had forgotten his prospector licence. The response was that he had said his name was Dan Cox and that he did not forget his licence and had it on him. Mr. Cox was then asked if he put a T. Cox on any of his posts. He was referred to Exhibit No. 1 (Photo of No. 1 post of the "Daniel claim") and asked if he agreed that the inscription on the post showed a T with a D drafted overtop and questioned whether or not he had made new posts when staking. The response was that he inscribed a "D. Cox" on the post and that he always made new posts when staking.

Mr. Cox testified that he arrived at the site using his helper's car and left it on the road near the No 2 post of the claim. He and his helper then walked along a trail to the No. 1 corner. They sat there until eight o'clock local time before proceeding with the staking. Later that day they accepted a ride from Mr. Bjorkman who drove them back to their vehicle.

Angus McCready was called by Mr. Cox to give evidence. Mr. McCready stated that he and Cox met Mr. Bjorkman at post No. 3 at approximately 9:45 or 10:00 and that he was visible to them for part of the day. He added that they encountered a young lady coming from post No. 1 to post No. 4 and that everything was ribboned off. He testified that he and Cox started staking at their post No. 1 and proceeded clockwise around the claim. They then accepted a ride from Mr. Bjorkman who drove them to their vehicle near the No. 2 post location.

Under cross-examination, Mr. McCready stated that he was not at the No. 1 or No. 2 post locations when Mr. Bjorkman was there. He encountered Mr. Bjorkman at post No. 3.

Mr. Bjorn Bjorkman was called to give testimony. He is 23 years old and has been prospecting and staking for five years as part of the family business. He was hired by his father to stake the "Bjorn claim". Mr. Ken Kukkee had hired his father. He has staked approximately five to ten block claims per week and estimated that he staked approximately 300 claims in a year. He drove to the area the night before the ground was open and slept in his vehicle. At about 6:30 on the morning of August 12, 2006, he saw a car drive by and was certain that they were stakers who would be staking the same ground. He checked his GPS and claim map and then drove along a road which took him

approximately 100 yards to the east of the No. 1 post location. He arrived at the property at approximately 8:00 a.m. He walked in with his sister who was there to prep the line from the No. 1 to the No. 4 post location by blazing the line, hanging ribbons and making "lay down" posts. Because she did not have a GPS unit, Bjorkman testified that she laid the posts in the wrong spot which wasn't much help to him when staking that particular boundary. It was then that he noted the other stakers had already started at 8:00 according to the inscription on the post. In preparation for the race, he removed some clothing so that he would be as light as possible. He started staking at a fairly brisk pace and thought he would catch up with Mr. Cox by the time he reached his No. 2 post location. When he reached the No. 2 corner, he realized from the time inscribed on the post that he was still 20 minutes behind. He then proceeded at a faster pace to the No. 3 corner. There was some clear-cut about halfway before he encountered bush. He pointed out that the line wasn't very good but it was still followable. When he approached his No. 3 corner, he saw Mr. Cox and Mr. McCready about 150 yards north along a trail. They came back as he was making his No. 3 post and spoke with him. They exchanged words and he testified that he was threatened during this conversation as he was told that he "might not make it out" of the area. He noticed that they had a shotgun.

Mr. Bjorkman then finished his No. 3 post as Cox and McCready continued ahead of him. He stated that he did not want to get too close to them as he was afraid of them. He caught up with them again at the line post located 400 meters south of the No. 4 corner. By the time Cox affixed his tag to his line post, he stated that he had his line post finished. At this point he spoke to Cox and made him an offer to split the claim. He said he made this offer because he wanted to be on good terms with Cox even though he knew he was going to win the ground. Mr. Cox rejected this offer. Mr. Bjorkman testified that he then proceeded north to erect his No. 4 post and was ahead of Cox and McCready for the remainder of the staking. He placed a finish time of 10:58 on his No. 1 post. He stated that it was about three, four or five minutes later that Cox showed up at the No. 1 corner and they spoke again.

When asked if he started his staking at daylight saving time or standard time Mr. Bjorkman testified that he inscribed his posts using Atikokan time. He said that the town used the same time all year and he had his GPS unit set to that time which he never changed. He did not have a watch. He started his staking at 8:30 a.m. Atikokan time which was 9:30 a.m. in the area where the claim was located. He testified that the time he inscribed on his other posts were also marked according to the time in Atikokan.

Mr. Bjorkman testified that he went back to the site in late August after the staking, and sometime in November after the dispute was filed, and took photographs which were introduced as evidence at the hearing. The photos were of each of the corner posts of the "Bjorn claim" 4212101. Mr. Bjorkman was asked to examine the times inscribed on his posts. He stated that he inscribed 8:30 a.m. on his No. 1 post, 9:10 on his No. 2 post, 9:50 on his No. 3 post, and 10:30 on his No. 4 post. He then inscribed a completion time of 10:58 on his No. 1 post. When asked if his times were in daylight saving time or standard time for the time zone he was staking in, Mr. Bjorkman stated that it was Atikokan time which he confirmed was one hour behind the local time in Thunder Bay and the area where the claim was located. Examining the photo, he stated that he finished his staking at 10:58 and said that when he went back into the area he noticed that the "0" in his "10" was crossed out and a "1" inscribed overtop of it. He pointed out that it was not the same colour of pencil that he had used in his staking. He added that the "1" had a purple tinge to it which was identical to the colour used on the "Daniel claim" inscriptions. The No. 1, No. 2, and No. 4 posts are stump posts; the No. 3 post was a takedown being

that he cut the tree and then made a post out of it. When asked how the line posts were made, Bjorkman stated that between the No. 1 and No. 2 corners he had one stump post and two take-downs, between the No. 2 and No. 3 corners he had two stump posts and one take-down, between the No. 3 and No. 4 corners he had two stump posts and one take down, and between the No. 4 and No. 1 corners he had two take-downs (one being made by his sister) and one stump post. He was uncertain about two of the stump posts but thought that was what he erected.

Mr. Bjorkman was asked about the terrain between the posts. He stated that between the No. 1 and No. 2 posts the first length was forest, the second length was clear cut and the third and fourth length was in bush. He described the first part as easy going and the second part as being average to hard. Between the No. 2 and No. 3 posts he encountered a skidder road for approximately 200 meters followed by a spruce swamp, clear cut and then brush. Between the No. 3 and No. 4 posts he encountered a trail for the first length, bush for the next one and a half to two lengths followed by clear cut for one and a half lengths to his No. 4 post. Between his No. 4 and No. 1 post locations he encountered mostly clear-cut and a bit of green and a creek before reaching his No. 1 post.

After completing his staking Mr. Bjorkman walked to his vehicle to change and have a beer and thought he would offer Mr. Cox and Mr. McCready one as well however when he went back to his No. 1 post he noted that the parties were gone. It was at this time that he noticed the change to his inscription. Mr. Bjorkman testified that as he was driving south he met the parties walking along the road and offered them a ride for the second time. This time they accepted both the ride and a beer.

Mr. Bjorkman testified that his time of staking was very fast between the No. 1 and No. 2 posts. He explained that he was in clear-cut and the line was already done and therefore he did not have to do very much in terms of blazing and flagging. When asked if he had blazed the line, he responded that he did. Under further questioning, he stated that the staking between his No. 2 and No. 3 posts was done in good time, and between the No. 3 and No. 4 it was really fast time.

When asked if he had anything else to add to his testimony, Mr. Bjorkman went on to say that when he got up at 6:30 a.m. he noted that Mr. Cox and Mr. McCready went by in their vehicle which would be 7:30 local time. He testified that after he made breakfast, it took him more than half an hour to get to the claim from where he was camped. His position was that he didn't believe Cox started at 8:00 since it would have taken him more than half an hour in travel time.

Under cross examination by Mr. Cox, Mr. Bjorkman agreed that he and Cox were at the No. 3 post location at the same time. Cox had already left but then came back. When asked if it took him 28 minutes to stake from his No. 4 to his No. 1 post locations Mr. Bjorkman stated yes.

Mr. Bjorkman was asked to specifically describe what assistance his sister provided in the staking and he explained that she travelled from the No. 1 west to the No. 4 post. She blazed the lines and used mostly ribbon. She made posts which she cut down however he was only able to use one because they were in the wrong spot as she did not have a GPS. He did use one line post, being a loose post, located 400 meters west of the No. 1 corner. He did not list her as a helper on his application to record because she did not have a prospector's licence being only 16 or 17 years of age at the time of staking.

Under further questioning, Mr. Bjorkman testified that he knew the ground to be staked was open for less than 24 hours and that there was a possibility there would be a competitive situation. When asked why he did not start at 8:00 a.m. eastern standard time, he indicated that he was late in getting to the site as he didn't think it was that far from where he had camped. He reached the south boundary of the claim at about 8:00 and noted a vehicle parked near this location and that there would likely be competition for the ground. He travelled along a rough road for about ten minutes to his No. 1 location and noted the time on the "Daniel claim" post. When asked if he realized that Mr. Cox had started his staking too early, Mr. Bjorkman responded yes that he thought Cox had started half an hour too early but it wasn't until he reached his No. 1 post and saw his zero cross out that he realized the inscriptions were in daylight saving time.

In his closing arguments, Mr. Cox stated that although he commenced staking the ground too early, he believed Mr. Bjorkman staked before the opening time as well, and that he believed he was at the No. 1 post a half an hour after him. He therefore believed that neither party should be awarded the claim. That is why they had someone else go into the area and re-stake the ground and the claim should be awarded to that person. He also expressed his amazement that Mr. Bjorkman could stake a one mile line in 28 minutes being from the No. 4 post to the No. 1 post.

In her closing arguments, Ms. Peltokangas stated that the burden of proof lies with the disputant, Mr. Cox. He must prove that the "Bjorn claim" was started before the ground was open. Mr. Cox relied on two things to prove his argument being that Mr. Bjorkman should not have caught up with him at post No. 3 at 9:50 daylight saving times because that would have been only giving him 40 minutes to reach that location, and Mr. Bjorkman's completion time was in the same hour as his claim. She pointed out that evidence showed that Mr. Cox took an hour and fifty minutes to stake from the No. 1 to the No. 3 corner and that they took their time because they did not know there was someone else behind them. They did not realize there was competition until they reached post No. 3 and then put the speed on. She pointed out that the evidence of both Cox and Bjorkman revealed that the first half of the staking was the more difficult. The easiest stretch, according to Mr. Bjorkman, was from post No. 4 to post No. 1. The Cox staking from post 3 to post 1 took two hours. Ms. Peltokangas suggested that the more logical time that Mr. Cox was at post No. 3 was at 10:50 daylight saving time and not 9:50, and that Mr. Bjorkman had inscribed his post correctly with 9:50 standard time. She said this made sense in that it actually took Cox two hours and fifty minutes from post No. 1 to post No. 3, and it only took Bjorkman one hour to finish from post No. 3 to post No. 1. She pointed out that the times presented by Mr. Bjorkman are remarkable however his experience, good physical conditions, and competition, account for this. In addition, he had a helper and was able to use the blazed trail that Mr. Cox made ahead of him and was therefore not having to do all the work. She pointed out that Bjorkman's evidence was that he used Atikokan time and his testimony was that Atikokan time during the summer is an hour behind Thunder Bay time. His GPS is set to Atikokan time. As for the amendment with respect to a number being changed on Mr. Bjorkman's No. 1 post, she stated that Mr. Bjorkman had no explanation as to who did it however he emphatically stated he did not. There was no reason in his evidence as to why he would have made that change. She further submitted that Mr. Bjorkman is a credible witness who was inspired by wanting to win the competition. He was going to be paid for his job regardless of the outcome.

## **FINDINGS/REASONS:**

The issue in this matter is whether or not the respondent commenced the staking of his mining claim (the “Bjorn claim”) prior to the time the ground came open pursuant to Section 72.1(2) of the Mining Act which reads as follows:

### **Re-staking**

[72.1\(2\)](#) Unless they have been withdrawn from prospecting or staking, lands, mining rights or mining claims affected by a forfeiture or a loss of rights are open for staking from 8 a.m. standard time on the day after the posting of the notice of re-opening. 2000, c. 26, Sched. M, s. 9.

Ontario has two time zones, the “Central Time Zone” west of the 90-degree west longitude meridian and the “Eastern Time Zone” east of the 90-degree meridian. The Eastern and Central time zones are on different times in that there is a one hour difference between them. The disputed mining claim is located in the Metcalfe Lake area and lies east of the 90-degree meridian. Consequently when staking in this area, one has to be cognizant of the fact that staking is either occurring during daylight saving time or standard time as daylight saving time is one hour ahead of standard time. In 2006, daylight saving time was in effect from April 2<sup>nd</sup> to October 29<sup>th</sup>. Mining Claim TB1233887 was posted on August 11, 2006. This meant that the ground came open at 8:00 a.m. standard time on August 12<sup>th</sup>. Since daylight saving time was in effect, one could not commence staking until 9:00 a.m. in that particular time zone.

The town of Atikokan is located west of the 90-degree meridian and as a “convenience” does not change its clock to conform with daylight saving time adjustments. During the period of the year when lands located east of the 90-degree meridian are on daylight saving time, Atikokan follows Central time and is one hour behind. Therefore, when it was 9:00 a.m. in the Metcalfe Lake area, it was 8:00 a.m. in Atikokan.

When the Provincial Recording office received the first application to record the staking out of the “Daniel claim”, it was noted that staking had commenced at 8:00 a.m. on August 12, 2006. Mr. Cox was contacted for clarification as to whether or not he commenced at 8:00 a.m. daylight saving time or 8:00 a.m. eastern standard time. He filed a statement indicating that he had commenced at 8:00 a.m. daylight saving time and his application was therefore refused. When the office received the application to record the staking out of the “Bjorn claim”, Mr. Bjorkman was also contacted for clarification as to whether or not he commenced at 8:30 a.m. daylight saving time or 8:30 a.m. eastern standard time. He filed a statement indicating that he had commenced at 8:30 a.m. eastern standard time and that the time written as start and finish on his application to record, as well as all his claim posts, was in eastern standard time and not the daylight saving time. His application was therefore accepted.

Mr. Bjorkman made the argument during the hearing that his GPS was always set to Atikokan time and that was the time he used when inscribing his claim posts. Mr. Cox made the argument that Mr. Bjorkman was visible to him during the course of staking and that Mr. Bjorkman had also commenced his staking prior to opening time. He presented that he first encountered Mr. Bjorkman at the No. 3 post at 9:50 daylight saving time (DST) and contended that if Mr. Bjorkman started his staking at 9:30

daylight saving time, as he claimed, he would not have had time to reach him at the No. 3 post given the size of the 16-unit claim.

There are special rules for staking a mining claim in areas that have been open for staking for less than 24 hours. These are outlined in Section 10, subsection 2, of Ontario Regulation 7/96.

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

1. The staking must start at the northeast corner of the mining claim and proceed in a clockwise direction.
2. Only the recording licensee may erect, inscribe or affix a tag to a corner post, line post or witness post.
3. The date and time of both the start and completion of the staking must be inscribed on the No. 1 corner post by the recording licensee. O. Reg. 7/96, s. 10 (2).

Both Mr. Cox and Mr. Bjorkman had a helper in the staking. These helpers were used to assist in marking out the line. Mr. Bjorkman stated that his sister assisted him only on the north boundary of the claim and although she cut some line posts on this line he was only able to use one as the others were located off the line. Mr. Cox stated that his helper assisted with marking out the lines.

Testimony from both Mr. Cox and Mr. Bjorkman indicate that both individuals are experienced stakers and I find they are relatively equal in that regard. Records in the Provincial Recording Office indicate that each have held their prospector's licence since 2002. Mr. Cox has been a mining explorationist for approximately 12 years and has staked hundreds of claims. Mr. Bjorkman has been staking since he acquired his licence and has staked hundreds of claims as well. The Bjorkman family is in the staking business and he was a helper for a number of years prior to obtaining his licence.

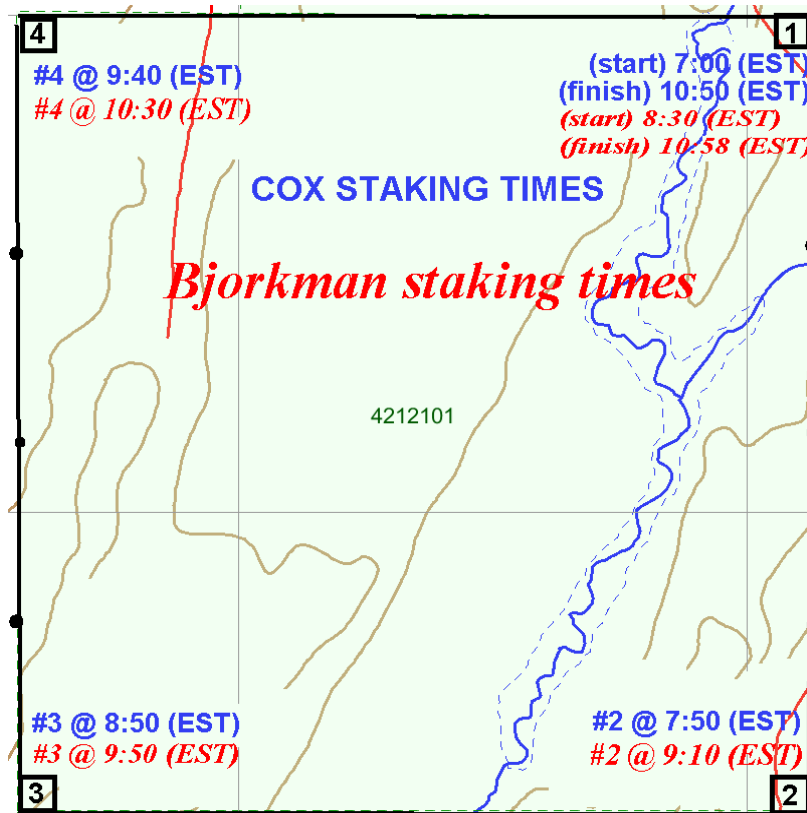
Ms. Peltokangas presented a number of questions to Mr. Cox to test his credibility. However I found the responses given by Mr. Cox to this line of questioning to be direct and without hesitation. There was no evidence presented that would call into question the credibility of Mr. Cox. I find it difficult to understand how Mr. Bjorkman felt "threatened" in the field when soon after the staking he offers Mr. Cox a ride and a beer. I also cannot find that giving a false name would provide any gain to Mr. Cox. His name was inscribed on his No. 1 post which was visible when Mr. Bjorkman commenced his staking. There was some inference that there was a T inscribed on the post with a D inscribed later overtop however upon viewing the photo one cannot accurately say if this occurred or not. Mr. Cox replied it was definitely a D and not a T. I believe Mr. Cox' credibility was initially tested at the Provincial Recording Office when he submitted that he staked the ground too early and thus lost his claim.

Much of the questioning and evidence in this case related to the terrain and the degree of difficulty between the corner posts of the mining claim thus affecting the speed at which one could stake their line and erect posts in accordance with the Mining Act. Mr. Cox found the time that Bjorkman took to complete his staking from his No. 1 to No. 3 post to be "remarkable" and did not believe he could accomplish this. Both parties staked a 16-unit mining claim measuring 1600 meters x 1600 meters.

When staking this size of a mining claim one must erect, tag and inscribe three line posts along each claim line between the corner posts.

To present a clearer picture and understanding of the location of posts and times inscribed by both Cox and Bjorkman on each of their corner post, I have inserted the following sketch.

To allow for an easier comparison in time between the two parties, times inscribed by Mr. Cox have been converted to standard time as the ground was open at 8:00 standard time.



Based on the times inscribed on the posts as given in oral testimony and supported by photographs, the following chart indicates the amount of time taken by each recording licensee to stake each boundary of the mining claim.

D. COX	B. BJORKMAN	
50 minutes	40 minutes	Post 1 to 2
60 minutes	40 minutes	Post 2 to 3
50 minutes	40 minutes	Post 3 to 4
70 minutes	28 minutes	Post 4 to 1
<b>3 hours, 50 minutes</b>	<b>2 hours, 28 minutes</b>	

According to the times presented, I find it within the realm of possibility for Mr. Bjorkman to race around the mining claim in two hours and 28 minutes. It took him the same amount of time mark out the east, south and west boundaries, being 40 minutes each. It took Mr. Cox an extra 10 minutes to mark out his east and west boundaries, and an extra 20 minutes to mark out his south boundary. Surprisingly however, it took Mr. Bjorkman only 28 minutes to run his north boundary while it took Mr. Cox 70 minutes to run the same line. This is the boundary on which Mr. Bjorkman stated his sister had provided assistance to him however in his own words he said she was not much help since she laid the posts in the wrong location and he was only able to use one. Most of this line is clear-cut and although it was presented that staking in a clear-cut area was easier than going through bush, Mr. Cox stated this often wasn't the case. He argued that in the bush area one would have all of their old blazings that they could follow however in a cut-over area many of the blazes have been cut away and there is no longer an established line to follow. One then is required to take a lot more compass shots without a reference point such as a tree, as well as find posts to place in the right spot. Mr. Cox further pointed out that it was also difficult in the clear-cut areas due to the slashing and leftover debris of brush on the ground which made it difficult to get a good footing. Mr. Bjorkman also testified that it was easier to stake behind someone, as much of the line has been marked out, however on the north boundary it was Mr. Bjorkman who had taken the lead and was required to mark out the line and yet he was able to accomplish this in much less time than it took him to run the other lines.

This was a competitive staking situation. Mr. Cox testified that he did not know this until he met Mr. Bjorkman at his No. 3 post and realized he was staking the same area of ground. Mr. Bjorkman testified that he was pretty certain there was going to be a race for the ground when he saw a vehicle go past the truck he was sleeping in at 6:30 a.m. When he arrived at the No. 1 post location, he saw the claim post belonging to the "Daniel claim" and noted the commencement time of 8:00 a.m. Mr. Cox erected his No. 1 post at 8:30 a.m which he testified was 9:30 a.m. for the time zone in which the claim is located. He thus commenced his staking an hour and a half later than Mr. Cox. I have considerable difficulty with the times put into evidence by Mr. Bjorkman through his testimony and as evidenced on his application to record. Mr. Bjorkman was adamant that he staked using standard time, or as he puts it "Atikokan time". This would mean that he is one hour later than the times put forward by Mr. Cox.

During his testimony Mr. Bjorkman said he was surprised he did not catch Mr. Cox at the No. 2 post location and really had to put the speed on after that point. According to the times presented, Mr. Cox was already an hour and half into his staking before Mr. Bjorkman even commenced. I cannot believe that Mr. Bjorkman would take only 40 minutes to travel from his No. 1 to his No. 2 post and expect that Mr. Cox would take in excess of one and a half hours to cover the same distance. He had no idea on the number of helpers or experience that Mr. Cox had. Evidence revealed that the parties met at the No. 3 post location whereupon Mr. Bjorkman noted Mr. Cox and Mr. McCready proceeding north along the line. They had a conversation at this point and each party proceeded to finish their staking aware of each other's presence. The photo of the No. 3 post belonging to the "Daniel claim" shows an inscription time of 9:50 a.m. The photo of the No. 3 post belonging to the "Bjorn claim" also indicates a time of 9:50 a.m. Since Mr. Bjorkman stated, and confirmed several times throughout the hearing, that he inscribed his posts using eastern standard time, this would mean that he was at this location at 10:50 a.m. local time and could not possibly have met up with Mr. Cox. Ms. Peltokangas suggested that the more logical time that Mr. Cox was at post No. 3 was at 10:50 daylight saving time and not 9:50, and that Mr. Bjorkman had it right at 9:50 standard time. She put forward that given the difficult

terrain between the No. 1 and No. 3 post locations it actually took Mr. Cox 2 hours and fifty minutes to stake, whereas it took him only one hour to stake the same distance between the No. 3 and No. 1 posts because the terrain was much easier. I do not find that this is logical at all when one reviews the time Mr. Cox was at each post location and the relatively equal amount of time he took to mark out each of his four lines. During his testimony, Mr. Cox stated that staking in a clear cut area could be more difficult than going through a bush area and provided his arguments for this. This is substantiated with the extra amount of time he used to mark out his north boundary. Mr. Cox inscribed his No. 4 post at 10:40 a.m. using daylight saving time. I do not find this physically possible if indeed he was at his No. 3 post at 10:50 as Ms. Peltokangas suggests. One would not only be required to blaze a line of 1600 meters, but also be required to erect, tag and inscribe three line posts at 400 metre intervals. Furthermore, Mr. Bjorkman testified that he followed behind Mr. Cox and his helper on the west boundary and caught up to them again at the line post located south of the No. 4 corner. It was at this point that he then passed them. Mr. Bjorkman inscribed his No. 4 post with 10:30 standard time which would equate to 11:30 daylight saving time. Mr. Cox inscribed his post with 10:40 daylight saving time. If the time given by Mr. Bjorkman was indeed correct, then Mr. Cox would have been well ahead at this point contrary to what Mr. Bjorkman stated. I also find that the completion times on the No. 1 post did not support the evidence put forward by Mr. Bjorkman as he stated he had finished approximately three to five minutes ahead of Mr. Cox. I find that the testimony and evidence put forward lends more logic and credibility if the times put forward by Mr. Bjorkman are in daylight saving time or, conversely, if the times put forward by Mr. Cox are in eastern standard time. However, if indeed Mr. Cox was using eastern standard time, his claim would be valid as he would have commenced his staking when the ground was open. However, I do not believe this to be true. There are major discrepancies between the times inscribed on the posts of the "Bjorn claim" and the actual events that took place in the field on August 12, 2006.

In a dispute the burden of proof is carried by the disputant. However I find that the testimony and evidence presented in this case support the disputant's allegation that Mr. Bjorkman staked the ground prior to opening. He was not at the claim corner locations at the times he provided as the events on that day could not have unfurled as they did.

## **CONCLUSIONS**

Based on the above findings, the "Bjorn claim" TB 4212101 is hereby cancelled as of the date of this order, and the "Ted claim" 4210051 will be accepted for recording.

Dated at Sudbury, Ontario, this 19<sup>th</sup> day of November, 2007.

*"Original signed by Sheila T. Lessard"*

Sheila T. Lessard

Provincial Mining Recorder