

**IN THE MATTER BEFORE THE PROVINCIAL
MINING RECORDER**

IN THE MATTER OF: Mining Claims 1243389 and 1243391 located in Galway Township Southern Ontario Mining Division;

AND IN THE MATTER OF: “Filed Only” Mining Claim 1221759 staked by Daniel Bedard and which significantly overstakes 1243389

AND IN THE MATTER OF: a dispute filed by

ELLIOT FEDER

Disputant

-against recorded claim 1243389 and 1243391 held by-

RHONDA G. SMERCHANSKI

Respondent

UPON: consideration of the evidence submitted by the parties,

I ORDER: that the dispute is hereby allowed.

I FURTHER ORDER THAT: Mining Claims 1243389 and 1243391 are hereby cancelled as of the date of this order.

I FURTHER ORDER THAT: “Filed Only” application to record 1221759 is hereby recorded as of the date received and that the time for which it was pending before the recorder being 314 days will be excluded;

I FURTHER ORDER: pursuant to Section 67(3) of the Mining Act, the 17th day of February 2006, be fixed as the date by which the first unit of assessment work must be performed and filed on Mining Claim 1221759 and all subsequent anniversary dates are deemed to be February 17th.

I FURTHER ORDER THAT: an Order of the Mining Recorder to fix any deficiencies in Mining Claim 1221759 will be issued after the 30 day appeal period pursuant to Section 112 of the Mining Act has expired.

Dated at Sudbury this 17th, day of February 2004

Originally signed by Roy Denomme

Roy Denomme

Provincial Mining Recorder

Provincial Mining Recorder

Note: Parties have the right of appeal to the Mining and Lands Commissioner as indicated in Section 112 of the Mining Act RSO 1990. An appeal must be filed within 30 days of the date of this decision.

A hearing was held on Wednesday December 3rd, 2003 to determine this matter. Ulrich Kretschmar attended in person and made submissions on behalf of the disputant. Daniel Bedard, Tim Steven Corbeil, Thomas David Wraight attended in person as witnesses for the disputant.

Fred Archibald attended in person and made submissions on behalf of the respondent.

John Joseph Leadbetter attended in person as a witness for the respondent.

BACKGROUND AND FINDINGS:

On April 3rd, 2003 Mining Claims 1191967 and 1235233 located in Galway Township, Southern Ontario Mining Division, cancelled pursuant to Section 72(1)(b) of the Mining Act R.S.O. 1990 c. M14 (*Mining Act*). These two mining claims were posted on April 4th, 2003, and the lands encompassing the two mining claims came open for staking on April 5th, 2003 at 8:00 a.m. standard time pursuant to section 72.1(2) of the Mining Act.

The Mining Claims which form the basis of this dispute include all of the lands encompassed by mining claim 1191967 or a portion of the land covered by Mining Claim 1235233.

On April 8th, 2003 an application to record was received in the Provincial Recording Office, which documented the staking of two mining claims by John Joseph Leadbetter, to be recorded in the name of Rhonda G. Smerchanski. Mining Claim 1243391 was documented to be nine units, commencing at the #1 post at 9:05 a.m. on April 5, 2003 and completed at the #1 post at 2:45 p.m. on the same day. **(the initial filing showed a completion time at the #4 post at 1:30 p.m. on April 5, 2003. However the application to record was amended and initialed by the staker on April 16th, 2003 to read a completion of 2:45 at the #1 post).** Secondly, Mining Claim 1243389 was documented to be a 6 unit mining claim, commencing at the #1 post at 9:15 a.m. on April 6th, 2003 and being completed at the #4 post at 1:00 p.m. on the same day.

On April 9th, 2003, an application to record was received in the Provincial Recording Office for Mining Claim 1221759 staked by Daniel Bedard, to be recorded in the name of Blue Marble Mining Corp. The mining claim was documented to be an 8 unit mining claim commencing at the #4 post at 8:40 a.m. on April 6th, 2003 and being completed at the #4 post at 1:55 p.m. on the same day. Mining Claim 1221759 appeared to completely overtake 1243389 which had a prior completion time and was therefore taken as "Filed Only" pursuant to Section 46 (3) of the Mining Act.

On April 15th, 2003 Elliot Feder filed a dispute against Mining Claims 1243389 and 1243391. In his statement of claim filed on April 15th and supplemented on May 8th,

2003, the disputant alleged that 1243389 and 1243391 were invalid for the following reasons:

1. *That the staker, (Leadbetter) could not have been on the property at the time of staking due to bush conditions.*
2. *That 1243389, #1 post states a finishing time of 2:15, while mining claim 1221759 was finished at 1:55 p.m. (and therefore has a prior completion time).*
3. *That 1243391, #1 post is located 800m NE of its correct location.*
4. *That the staker walked from his #2 to his #1, and did not finish the staking of 1243391.*
5. *There are numerous errors and inconsistencies both on the ground and in the application to record for both 1243389 and 1243391.*

At the hearing held on December 3, 2003, a total of 36 exhibits as well as testimonies from 6 witnesses were heard. This tribunal has reviewed the exhibits and submissions of all parties. However, for the purposes of clarity in this decision only the evidence and testimonies relevant to determining this matter are referred to.

Findings:

Witnesses for both the disputant and respondent gave submissions indicating that the other party was not present in the field on April 6th, 2003 when mining claim 1243389 and 1221759 were staked. Although both claims encompass the same general area, are staked within the same timeframe and have coterminous boundaries along the north and east claim lines, neither stakers nor helpers encountered each other in the field. No evidence or submission was made by either party to provide conclusive evidence that the other was not present and staking on April 6th, 2003. However, Mr. Archibald did present evidence (exhibit #23) in the form of a Visa statement, gas receipts and a hydro bill, to show that he was in the vicinity of Galway Township during the period of April 2, 2003 to April 8th, 2003. Subsequent to testimony and evidence presented by Mr. Archibald, Mr. Kretschmar conceded that he was satisfied that Mr. Archibald and Mr. Leadbetter were on the lands during April 6th.

Without conclusive evidence to the contrary, this Tribunal must conclude that both parties were present on the lands on April 6th, 2003 when the staking of 1243389 and 1221759 occurred.

Mining Claim 1243389 and “Filed Only” Claim 1221759:

The application to record for Mining Claim 1243389 indicates staking commenced at the #1 post of April 6th/03 at 9:15 a.m. and a completion at the #4 post at 1:00 p.m. on the same day.

Exhibits #1, #6, #7 and #8 submitted by the disputant, are photographs showing various views of the #1 post for 1243389. The inscription has been placed on two sides of the

post and is quite visible in the photographs. Firstly, on the post face which is affixed the tag for the #1 of 1243389 (south face) the inscription reads:

POST #1
1243389
LOT 33/34
CONC. 9/10
J LEADBETTER D20566
April 6 2003 915 AM
Galway twp

On the post face adjacent to the tagged face (east face) the inscription reads:

J. LEADBETTER
Galway twp
April 6 2003
915
finished
215
april 6 2003
D20556

Mr. Corbeil, for the disputant, questioned Mr. Leadbetter about his inscription and asked questions to clarify the discrepancy between the completion time of 1:00 p.m. shown on the application to record and the finish time of 2:15 shown on the #1 post. The following interaction was recorded.

Mr. Corbeil:

...the 215 on the post, is that just some kind of mechanical error that happened that day you believe or is the error on the recording..

Mr. Leadbetter:

We got 215 on the #1 post when I finished

Mr. Corbeil:

Correct, is that the correct time?

Mr. Leadbetter:

Well what does it say on the thing

Mr. Corbeil:

Well on your post it says 215

Mr. Leadbetter:

Well than why wouldn't it be the correct time, if it says that on the post.

Mr. Corbeil:

Well I'm just saying is that the correct time on the post

Mr. Leadbetter:

What does it say?

*Mr. Corbeil:
It says 215 on the post*

*Mr. Leadbetter:
What does it say in the recording*

*Mr. Bedard:
On the recording it says 1 o'clock*

*Mr. Leadbetter:
Maybe you better read the recording again. It says the #4 post at one o'clock. I think you boys better get your direction and figures figured out.*

*Mr. Corbeil:
Well there's commenced and there's completed.*

*Mr. Leadbetter:
Yes, I completed the #4 post at 1 o'clock, and I completed #1 post at 2:15 that's wrote there*

*Mr. Corbeil:
So, the claim was actually completed at 2:15, is your finished time, than is what your saying right, correct, well OK than this is resolved, our finish time is clearly stated on our post and its in here, so its our claim that's all I need to say*

Later in the hearing, Mr. Archibald in his summation further clarifies the completion time for Mining Claim 1243389. He states:

... So in fact there is no dispute here as far as ending times, I know the recording sheets they have the time that post #4 was complete and on the post they have the time when he went around from the #4 to the #1 post, and the time was put on, so if you notice on #4 post he has 1 p.m., on the #1 post he had 2:15 p.m., which is when he went around from the 4 to the 1, and that's on April the 6th, for the claim 1243389. So I think you are a little mixed up there.

Section 10(1)(3) of the staking regulations 7/96 states:

10(1) The following rules apply to the staking of a mining claim in areas that have been open for staking for 24 hours or more:

(3) The date and time of completion of the staking must be inscribed on one of the corner posts after all of the required work of staking the claim has been completed.

It is clear from the evidence presented by the disputants and the testimony of both Archibald and Leadbetter that the actual completion time for Mining Claim 1243389 is 2:15 p.m. on April 6th, 2003 and not 1:00 p.m., as documented in the application to record. It is clear that 1:00 p.m. was the time of the erection of the #4 post for 1243389 which is not relevant in the completion of the application to record.

Section 44 of the Mining Act states:

- (2) *Priority of completion of staking shall prevail where two or more licensees make application to record the staking of all or part of the same lands.*

The completion time for Mining Claim 1221759, staked by Daniel Bedard, which encompasses the same area as 1243389 has a completion time of 1:55 p.m. on April 6th, 2003 (20 minutes earlier than the completion of 1243389). Pursuant to Section 44 (2) 1221759 has priority over 1243389 and assuming it meets the criteria for recording should be the claim of record.

Mr. Archibald put forward three arguments in an attempt to demonstrate 1221759 was not a valid mining claim.

- (1) Exhibit #28 is a sketch drafted by Archibald using GPS readings, to describe the location of Mining Claim 1243389 in relation to the disputants staking (1221759) and other mining claims in the area. He submitted that 1221759 overstakes active mining claim 1191461 to the west by 150 metres. He further submits that the south boundary of 1221759 erroneously follows the boundary of previous claim 1235233 and is some 50 metres north of its proper location at the west boundary and 200 metres north of its proper location at the east boundary.
- (2) Exhibit #26(4) a photo of Bedard's #1 post for 1221759 shows an inscription: *Lots 31, 32, 33 Con 9*, however the proper inscription should read the location where the #1 post is situate and not what is being staked.
- (3) That the staker commenced the staking of 1221759 at 8:40 a.m. on April 6th, 2003. Mr. Archibald submits that the land was not open for staking until 9:00 a.m. on the morning of April 6th, 2003.

On review of these arguments the Tribunal provides the following comments;

In reference to the first argument, the Tribunal notes that both parties provided evidence to clarify staking was carried out with the benefit of GPS, as well as using topographic features and by tying into existing staking where possible. It was further submitted by Archibald that readings on the GPS unit were inaccurate by as much as 700 metres on the days that staking occurred. Archibald also confirmed, when asked, that the road allowances and other survey fabric relating to lots and concession fabric in the area were non-existent and could not be relied on.

Section 43 of the Mining Act States:

- (1) *Substantial compliance as nearly as circumstances will reasonably permit with the requirements of this Act and the regulations as the staking out of mining claims is sufficient*

(2) The staking out of a mining claim shall be deemed to be in substantial compliance with the requirements of the Act and regulations even if there is a failure to comply with a number of specific staking requirements if,

(a) the failure to comply is not likely to mislead any licensee desiring to stake a claim in the vicinity;

(b) it is apparent that an attempt has been made in good faith by the licensee to comply with the requirements of this Act and the regulations.

Assuming that the sketch provided by the respondent is accurate, the tribunal is satisfied that the staking of 1221759 by Bedard would meet the criteria set out in section 43 of the Mining Act and any deficiencies could be corrected through an order of the Provincial Mining Recorder.

In reference to argument #2, the Tribunal notes that Mr. Archibald is referencing subsection 13(3) of the Staking regulation 115/91, which reads:

(3) If a mining claim is located in a township surveyed into lots, quarter sections or subdivisions of a section, the licensee staking the claim shall inscribe on the No.1 corner post a description of the part of the township comprising on the claim, mentioning the lot and concession or the section by number.

Regulation 115/91 was repealed in 1996 and replaced with regulation 7/96. This subsection and requirement does not exist in the current staking regulations and therefore does not apply to current staking practices in Ontario.

In reference to argument #3, the Tribunal has reviewed all documentation within the Provincial Recording Office and has verified the land in which 1221759 was staked, was open and became available for staking on April 5th, 2003 at 8:00 a.m. standard time. Therefore at the time of commencement of the staking for 1221759 on April 6th, 2003 at 8:40 a.m. the land was open and available for staking.

Based on these findings Mining Claim 1221759 is acceptable for recording and will be recorded by way of this order.

Mining Claim 1243391:

The following evidence and submissions were presented by Mr. Kretschmar to support his allegation that 1243391 was improperly staked.

Exhibit #20, a sketch, shows the location of the #1 post and #2 post for Mining Claim 1243391. The sketch indicates the location of the #1 post to be approximately 700 metres northeast of its proper location and the #2 post to be located approximately 550 metres northeast of its proper location.

Exhibit #12 (pages 6, 7 and 8 from a report, prepared by Kretschmar) outlines an inspection of 1243391 on April 7th, April 19th and April 20th. The exhibit provides two pages of GPS readings (UTM co-ordinates) for the #1 and #2 posts for 1243391 as well as other way-points documented during the inspection. The co-ordinates, when plotted, relate accurately to the Exhibit #20 sketch.

Mr. Archibald also provides a sketch showing the post locations for Mining Claim 1243391 (Exhibit #24). This sketch confirms the location of the #1 post to be the same as submitted by the disputant in Exhibit #20. However Archibald's sketch shows the #2 post for 1243391 to be properly located and not as shown in the Kretschmar's submission. The respondent did not provide any other evidence to corroborate the location of either post.

On the strength of both submissions the Tribunal is satisfied that the #1 post is 700 metres northeast of its proper location and will not make any determination on the #2 post location.

Mr. Archibald submits that at the time of staking GPS signals were being scrambled by the US military because of the initiation of the Iraq war, resulting in false reading and therefore the mis-location of the #1 post for 1243391. No evidence was presented to confirm this submission. However the Tribunal notes that all stakers for the claims in question used GPS to locate their claim boundaries. Of the documented 22 posts that were erected in the staking of the three mining claims only the #1 of 1243391 (and possibly the #2 of 1243391) significantly deviate from their proper location. It seems highly improbable that only one (or two) post(s) would be affected by this phenomenon and the Tribunal must dismiss this argument.

Mr. Kretschmar submits that tracks were seen going from the #2 to the #1 post, suggesting that Mr. Leadbetter had not complied with section 10(2)(1) of staking regulation 7/96 which states:

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 manner.*

No evidence was submitted to further substantiate this allegation. Mr. Archibald states in his testimony that it was his tracks and not those of Leadbetter that were seen and noted by the disputant. Based on the lack of evidence the Tribunal must dismiss this submission.

The disputant further submits that the completion time on the claim post for 1243391 does not match that shown on the application to record. Exhibits #14 and #16 are photos showing the #1 post for 1243391. The inscription on the post is clearly visible and shows a commencement time of 9:15 a.m. and a completion time (finished) of April 5th, at 2:30 p.m. The application to record as submitted on April 8th, 2003, indicates a

commencement time of 9:05 a.m. and a completion time at the #4 post at 1:30 p.m. On April 16th, 2003 the applicant submitted an amended application to record with a commencement time of 9:05 a.m. on April 5th, 2003 and a completion time at the #1 post of 2:45 p.m. **Neither the original nor the amended application to record indicates the commencement or the completion time inscribed on the #1 post.**

Further submissions were made that line posts as well as other corner posts were missing from mining claim 1243391 when inspected on April 7th. Witnesses for the disputant further corroborated this, however no conclusive evidence was submitted in this regard and the Tribunal must dismiss these arguments.

Based on all the evidence presented, the Tribunal must conclude that deficiencies have been clearly identified regarding Mining Claim 1243391.

1. The #1 post is some 700 metres east of its proper location and overstakes recorded Mining Claim 1235236.
2. The time of commencement and completion on the #1 post for 1243391 does not reflect the original or amended application to record for this claim.

The question is whether these deficiencies constitute non-compliance with the provisions of Section 43 of the Mining Act.

Section 43(2)(b) of the mining Act states;

43(2) The staking out of a mining claim shall be deemed to be in substantial compliance with the requirements of this Act and the regulations even if there is a failure to comply with a number of specific staking requirements if,

(b) it is apparent that an attempt has been made in good faith by the licensee to comply with the requirements of this Act and the regulations.

The records in the Provincial Recording Office show that Mr. Leadbetter has staked and recorded 351 mining claims within the Province of Ontario since 1996. This is a substantial amount of staking and in the opinion of this Tribunal constitutes a seasoned staker. Mr. Leadbetter himself stated at the hearing that he started in the bush when he was thirteen and knows his way around. The Tribunal finds it very difficult to imagine that a seasoned staker such as Mr. Leadbetter would not realize the significant discrepancy in the location of his #1 post and not have taken measures to correct the deficiency at the time of staking.

On this discrepancy alone the Tribunal must conclude that Mr. Leadbetter did not attempt in good faith to comply with the requirements of the Mining Act and regulations and the test of substantial compliance has not been met and Mining Claim 1243391 must be considered invalid.

Further the Tribunal must comment on Mr. Leadbetters haphazard approach to the process of recording a mining claim. On two occasions Mr. Leadbetter certified in writing to this Ministry in “Part C” of his application to record “*All other statements and particulars herein set forth in my application and shown on the sketch or plan on Part D are true and correct.*” On both occasions the information provided regarding commencement and completion times for staking were inconsistent and not correct. It appears from his testimony and the evidence presented, that Mr. Leadbetter, at best, has a limited concept of the requirements for recording a mining claim in Ontario and at worst has knowingly made false statements on his application in order for his claim to be recorded. The latter conclusion would, in effect, give further reason for the cancellation of 1243391 pursuant to Section 44(1.2), which states:

44 (1.2) The recorder or the Commissioner may, after a hearing, cancel the recording of a licence or holder who knowingly made a false statement in the application to record the claim.

However the Tribunal will not review this case in reference to Section 44, as it has used section 43 in order to consider the validity of the mining claim. The tribunal considers the use of Section 44, to be an extreme test and one which would also trigger a review pursuant to Section 26 (3) of the Mining Act to determine if a suspension or revocation of Mr. Leadbetter’s prospectors Licence is warranted.

Finally, the tribunal must address application to record Mining Claim 3004224 staked by Mr. Tim Corbeil. This mining claim was the restaking of Mining Claim 1243391. An application to record for this mining claim was filed in the Provincial Recording Office on April 25th, 2003. Mining Claim 3004224 was commenced on April 20, 2003 at 9:15 a.m. The dispute against Mining Claim 1243391 was filed in the Provincial Recording Office on April 15th, 2003 at which time proceedings were initiated.

Section 30(1)(f) of the Mining Act states:

30(1) No mining claim shall be staked out or recorded on any Land,

(f) while proceedings in respect thereto are pending before the Commissioner or a recorder or until those proceedings are finally determined;

The staking of 3004224 after the initiation of proceedings made the staking invalid and the mining claim was refused at the time of filing.

In order to protect these lands from adverse interest until such time that the appeal period for this decision has passed, the lands occupied by the North ½ of Lots 14, 15, and 16 Concession 5 and all of Lots 14, 15 and 16 Concession 6, will be withdrawn from staking out or prospecting pursuant to Section 35 of the Mining Act.

Roy Denomme
Provincial Mining Recorder

