

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

IN THE MATTER OF:

Mining claims of record TB 4228164 and TB 4228165, McBean Lake Area, Map G-0321, Thunder Bay Mining Division

AND IN THE MATTER OF:

Filed only applications to record mining claims 4220411, 4220412 and 4219658 staked for more or less the same area of land, in the McBean Lake Area.

AND IN THE MATTER OF:

A Dispute filed by

PATRICK GRYBA
Disputant

-against the mining claims of record held by-

DANIEL MACDOUGALL
Respondent

IN CONSIDERING:

All the information available to me including material submitted by the Disputant at a hearing in Sudbury on June 3, 2010.

I ORDER:

That the dispute is allowed, the mining claims of record are cancelled pursuant to Sections 71 and 110 of the Mining Act, and the filed only application to record 4219658 is accepted for recording effective the date of this order.

I ALSO ORDER:

That filed only applications to record claims 4220411 and 4220412 remain refused as the claims were staked while the land was under “pending proceedings”.

AND:

Pursuant to Section 35 of the Mining Act, the lands intended to be staked within filed only claims 4220411 and 4220412 is withdrawn from staking until the appeal period in this matter has lapsed (30 days) or until the Mining and Lands Commissioner makes further decisions in this matter should an appeal be filed. Please note that the lands will not be re-opened for

staking until an additional order under Section 35 of the Mining Act is signed by the appropriate authority making it so.

AND PLEASE TAKE NOTICE:

That according to Section 112 of the Mining Act, the parties have a right of appeal to the Mining and Lands Commissioner within 30 days of the date of this order. An appeal is begun by filing the necessary documents in the Office of the Mining and Lands Commissioner, Toronto.

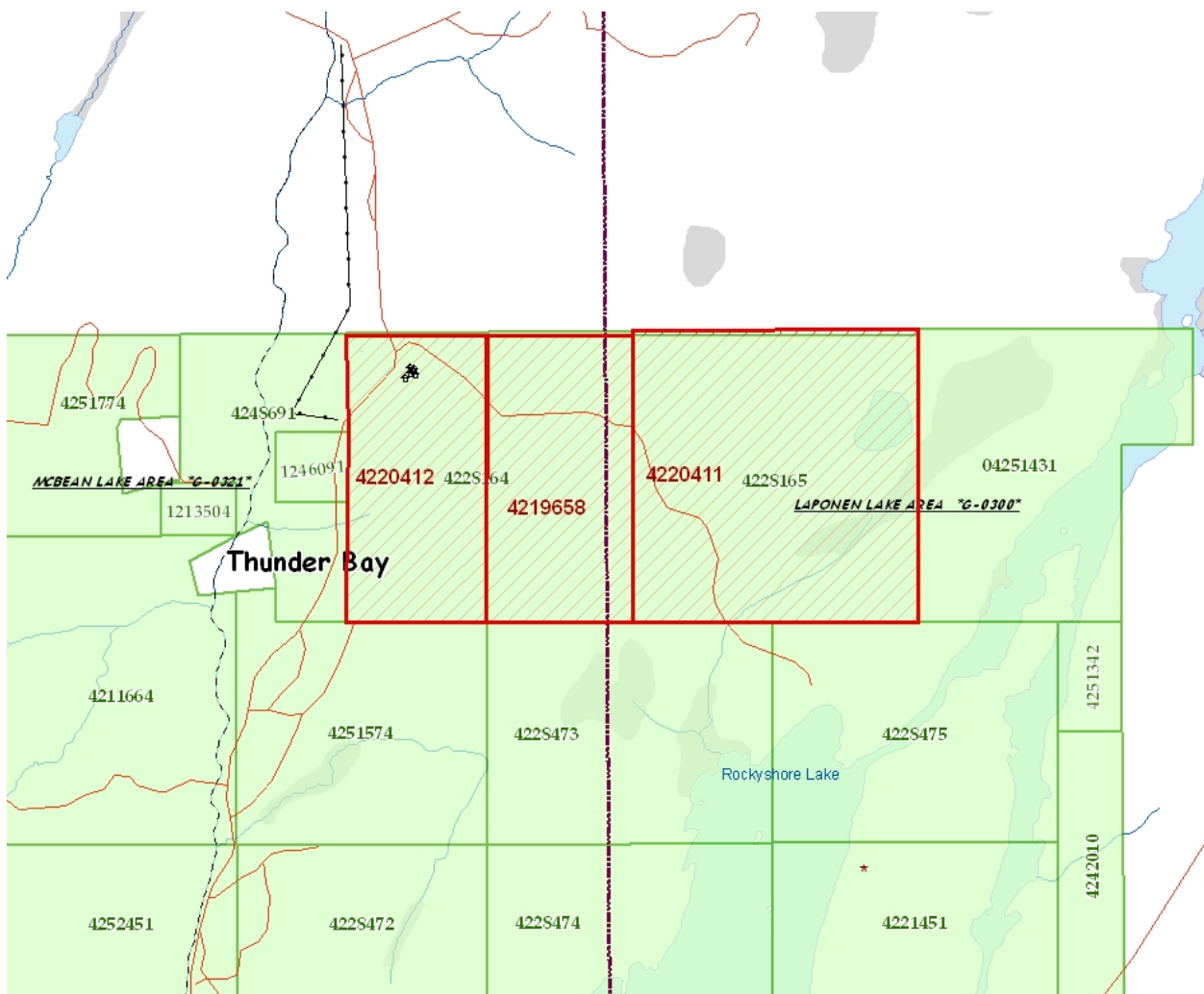
ORIGINAL SIGNED BY ROY SPOONER

Dated at the Provincial Recording Office
this 10th day of June, 2010

Roy Spooner
Provincial Mining Recorder

BACKGROUND

The mining claims of record and “filed only claims” are illustrated in the following image:



The area at issue in this dispute was the site of a past producing mine know as “The Theresa Mine”. The mining claims are approximately 10 kilometres south of the Town of Long Lac and immediately south of the Long Lake Indian Reservation (I.R. 77) now known as the Ginoogaming First Nation.

The land was open for staking for months before the mining claims of record were completed (October 31, 2007). This issue does not appear to be the usual competitive event that sometimes arises following the posting of forfeited mining claims (lands open less than twenty-four hours). It may be random coincidence that competing stakers showed up to stake the same land on or about October 31, 2007.

THE HEARING

Patrick Gryba, the Disputant
No one for the Respondent

Only the Disputant appeared at the hearing of June 3, 2010. The hearing was delayed twenty minutes waiting for the Respondent, Daniel MacDougall however he did not appear. The Disputant was then given opportunity to state his case and the following is a summary of the Disputant’s allegations:

- 1) The staking was not completed on October 31 as stated on the application to record.
- 2) The completion date stated on the MacDougall application to record was fabricated to ensure priority for recording the two mining claims now of record.
- 3) The staking of the MacDougall mining claims of record continued on November 1.
- 4) Daniel MacDougall was not on the ground when the staking was performed and someone else did the staking although Mr. MacDougall asserts himself as the staking licensee on the application to record.
- 5) Mr. MacDougall is not physically capable of completing the staking in the short time indicated on the application to record.

When questioned the Disputant (Mr. Gryba) answered that he was not on the ground on October 31 or November 1. The Disputant did not bring any witnesses to corroborate his allegations therefore most of Mr. Gryba’s evidence must be considered hearsay and/or circumstantial therefore bears very little weight.

Mr. Gryba clarified that he did not attend the land personally to conduct the staking. He had hired a contract staker who later explained to Mr. Gryba that someone else been seen staking the same land. It was not until days later that Mr. Gryba actually visited the site and much later when he decided to file a dispute. Mr. Gryba did not personally witness anything on October 31 or November 1, 2007 as he was not there.

However, there must be some weight given to photographs entered as exhibits by the Disputant. The photos illustrate that Mr. MacDougall’s name was misspelled in a claim post inscription (“McDougall”). Also, a photo showing metal claim tag 3-4228164 illustrates that the inscribed date on the post has been changed from Oct. to November 1 or November 7.

MY REASONS

No one should assume that this decision is automatically made in favour of the Disputant and against Mr. MacDougall simply because he failed to appear at the hearing. In *Clark v. Lacasse*, MCC. Vol. 5, page 393, Mining and Lands Commissioner Ferguson said:

“With respect to the last mentioned point, I know of no authority that would require the respondent to appear and give evidence. Obviously the respondent, in not appearing, takes the risk of not being present to rebut any attacks that are made on his staking but his failure to appear in it should not automatically result in his mining claim being struck from the record.”

The Disputant usually carries the burden of proof. Without a witness and without an opportunity to ask Mr. MacDougall questions at the hearing, the Disputant’s evidence is weak. The photographs, however, cannot be ignored as they present obvious questions:

Why is Mr. MacDougall’s name misspelled on the post?
Why was the date changed on the post?

It is extremely unlikely that anyone would misspell their own name. Also, it makes no sense that the date on post 3-4228164 reads November 1 or November 7 when the application to record by Mr. MacDougall asserts a completion date of October 31. The evidence presented in the photographs may be circumstantial but it does cause me to seek additional information. I am left with the thought that perhaps Mr. MacDougall’s helpers caused the confusion. How many individuals assisted Mr. MacDougall in the staking of the two mining claims of record? For answers I turn to the application to record.

In reviewing the application to record I note that Mr. MacDougall had only one helper for the staking of TB 4228164 and TB 4228165 completed on October 31, 2007. I also note that staking for the mining claims of record, containing 16 units each, began at the # one posts at 9 a.m. and finished at the # four posts at 12 p.m. (3 hours elapsed staking time). The staking of two sixteen unit mining claims in three hours by two people seems to be an incredible accomplishment.

In an unreported case of the Mining and Lands Commissioner (MCC MA 012-98 Royal Oak Mines Inc. vs. Strike Minerals Inc., Oct. 1998, pages 20 and 21) Commissioner Kamerman said:

“Findings

*The written evidence and submissions made in this matter warrant comment. It cannot be sufficiently stressed that the tribunal requires facts, as opposed to opinions, accusations and rhetoric upon which to reach its findings. It is not sufficient to say that one staked in accordance with the requirements of the **Mining Act**. Rather, one can describe the actual steps which were taken. It will be the decision-maker, either the Provincial Mining Recorder or the Commissioner, who will ultimately determine whether the **Act** has been complied with to a degree to constitute substantial compliance or deemed substantial compliance, within the tests outlined in section 43.”*

Also, Commissioner Kamerman made the following comments in another unreported case (MCC MA 014-97 March 27, 1998, Royal Oak Mines Inc. vs. Alexander Harris Clark, page 23):

“In addition, the tribunal would require detailed evidence from the staker concerning what occurred on the ground. A seven minute staking is considered extreme, in terms of the degree of physical ability of the staker, coordination of helpers, as well as amenability of the ground such as density of bush, type of ground and the like, to bringing the

facts of the particular case within the realm of believable. The tribunal does not hesitate in finding that a seven minute staking is one in which the staker must make a thorough and organized effort at convincing the tribunal that the staking took place within the time frame recorded. In so doing, the tribunal would require extensive details of the staking with satisfactory answers to all questions put to him or her, before the tribunal will consider the evidentiary burden on the staker favourably discharged.”

The comments of Commissioner Kamerman apply, of course, to a Disputant as he or she carries the burden of proof and must prove their case with detailed credible evidence. The Commissioner’s comments also apply, however, to anyone in general who expects a decision-maker to believe that any mining claim could have been properly staked within a surprisingly short period of time. The first test in determining compliance with the Claim Staking Regulation occurs in the process for recording a mining claim at the Provincial Recording Office. The MacDougall staking was placed on the record however no one can assume that the recording of their mining claims is final and conclusive evidence of compliance with the requirements for the staking and recording of any mining claims. There may be further tests. There is a right of dispute that extends up to one year from the date of recording. A Disputant has the right to have the staking of another licensee analyzed by the Provincial Recorder through the dispute process. With this dispute, legally filed and pursued by Mr. Gryba, I must consider obvious questions that apply to Mr. MacDougall’s staking.

In this particular case the photographs presented at the dispute hearing drew my attention to obvious questions. The staker, Mr. MacDougall, carries some responsibility to explain how he could have properly staked two sixteen unit claims in three hours with only one helper. While Mr. MacDougall has no legal obligation to attend a Recorder’s dispute hearing he has taken the risk that I will make a decision based only on his application to record.

Referring to the application to record, Mr. MacDougall placed his signature on “Part C” certifying, in part:

“2. I staked out or caused to be staked out in accordance with the Mining Act and the regulations the mining claim(s) on the lands described and shown in my application and on the sketch or plan on Part D.”

“3. I was present in each area under staking for a mining claim at the time the area was being staked for the purpose of recording the mining claim.”

“5. 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.”

If one was to sign the standard certification on an application to record mining claims and the statements and particulars were not true and correct there can be very serious consequences that go beyond the cancellation of the mining claims. Given the circumstances as presented to me in this particular case I accept Mr. MacDougall’s application to record and therefore his certification that his staking was completed on October 31, 2007 and that the staking of the two mining claims was completed at 12 noon on that date. The next consideration, however, is whether or not there could have been substantial compliance with the Claim Staking Regulation in the time Mr. MacDougall took to stake his claims.

Section 43 of the Mining Act:

Substantial compliance with Act and regulations sufficient

43. (1) Where claims are staked by ground staking, substantial compliance as nearly as circumstances will reasonably permit with the requirements of this Act and the regulations as to the ground staking of mining claims is sufficient. 2009, c. 21, s. 21 (1).

Deemed substantial compliance

(2) The ground staking 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 ground staking requirements if,

- (a) the failure to comply is not likely to mislead any licensee desiring to stake a claim in the vicinity; and
- (b) it is apparent that an attempt has been made in good faith by the licensee to comply with the requirements of this Act and the regulations. R.S.O. 1990, c. M.14, s. 43 (2); 2009, c. 21, s. 21 (2).

Since the land had been open for staking for months prior to the MacDougall staking, there is no reason to believe that the ground was prepared for competitive claim staking ahead of time. Mr. MacDougall would likely be faced with the usual staking conditions where in three hours he would be required to cut trees to create new corner posts and line posts, cut underbrush along the claim boundary and clearly mark the boundary by blazing trees or erecting pickets between each of the corner and line posts. The work involved is time consuming. The accomplishment, according to the application to record, represents approximately 8 miles of boundary line (2800 meters) and 27 claim posts by two people in three hours. Mr. MacDougall and his helper Larry Bishop each staked one sixteen unit claim at a sustained rate (for three hours) of one new post and 400 meters of newly marked line every 11.25 minutes (180 minutes divided by 16).

Again referring to the application to record, the staking of both claims of record began at 9 a.m. at the # one posts then finished at the #4 posts at 12 noon. Obviously Mr. MacDougall and his helper were separated in order to begin staking both claims at the same time. They were then staking, more or less, without assisting each other excepting for the one common boundary between the two claims where common corner posts and common line posts were authorized. The completion of the staking at corner # four is problematic with regard to the speed of the staking process. In order to finish the staking at corner # four they had to “double back” to the corner if they had completed the rectangle by returning to corner # one where the process had begun. According to the application to record they either failed to erect the line posts and blaze the entire boundaries between corner # four and corner # one or they took extra time for some unknown reason to “double back” to finish at the # four corners.

Whether or not the staking involved one common boundary (therefore common posts), it is probable that either Mr. MacDougall or his helper established the line and posts ahead of his partner. That being the case, that individual would travel and stake a full claim without assistance. Without accounting for the need to “double back” to the # four corner for completion, the work involved one new post and 400 meters of newly blazed line in 11.25 minutes. That speed of work had to be maintained over a period of three hours.

One of the most time consuming aspects of the claim staking process is clearly blazing and brushing out each 400 meter line between the corner and line posts. Again in the Royal Oak vs. Clark case Commissioner Kamerman agreed on page 25 (MA 014-97) that it would take ten minutes to adequately blaze one boundary line:

*“Given Commissioner Ferguson's comments about the four minute mile, and the Mining Recorder's own comments in this regard, the tribunal finds that it will adopt the Mining Recorder's reasoning, namely that it would take a helper approximately 10 minutes to adequately blaze one boundary. This does not mean, however, that it should take an aggregate of 40 minutes to stake a one unit claim, using one staker and four helpers. However, it does mean that a lone staker, acting without assistance, has a substantial evidentiary burden to discharge in persuading the tribunal that the staking which took place is adequate to the legislative standards set out in section 43 of the **Mining Act**.”*

In this case I believe that it is reasonable for Mr. MacDougall to carry his evidentiary burden to explain how the staking was done so rapidly while satisfying the legislative standard of substantial compliance. As also stated by Commissioner Kamerman in Royal Oak vs. Clark (page 24):

“What is fatal is the total absence of quality evidence upon which to draw sufficient facts from which findings can be made. That Mr. Pigeon did not appear in person before the Mining Recorder has prevented that Mining Recorder from assessing accuracy of what is described, credibility of the witness, general physical stamina and knowledgeability of the relevant legislation, to name just several of the considerations which come to mind.”

I take Mr. MacDougall at his word as certified in the application to record. With the assistance of one licensed helper (Larry Bishop) he completed the staking of TB 4228164 and TB 4228165 (two sixteen unit mining claims) in three hours. If they did it I can only draw one conclusion. The staking was done in such a hurry that it was haphazard in the extreme and could not comply with the statutory standard of substantial compliance. The mining claims are therefore deemed to be abandoned according to Section 71 of the Mining Act:

Deemed abandonment of claim

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 and recording of a mining claim or with a direction of the recorder in regard thereto, within the time limited therefor, 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. R.S.O. 1990, c. M.14, s. 71 (1); 2009, c. 21, s. 101 (4).

Concerning Mr. Gryba's filed only applications to record for mining claims 4220411 and 4220412, they were staked by Vital Larche, January 28, 2008 and Clayton Larche, January 30, 2008 respectively. Mr. Gryba had filed his dispute on January 14, 2008 thereby causing the lands not to be open for staking according to Subsection 30(1) (f) of the Mining Act:

Lands upon which claim may not be staked out

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;

Note that this decision may result in lands open for further staking however that is prevented at this time since this decision includes a withdrawal of the lands pursuant to Section 35 of the Mining Act.

Roy Spooner
Provincial Mining Recorder