

Ministry of
Northern Development
and Mines

Ministère du
Développement du Nord
et des Mines

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

**IN THE MATTER OF: Mining claim SSM 3002575 in Ryan Township,
Sault Ste. Marie Mining Division**

AND IN THE MATTER OF: “Filed only” mining claim 1192233

ALSO IN THE MATTER OF: a dispute filed by

**DANIEL SHELLY
Disputant**

-against the mining claim of record held by-

**3814793 Canada Inc.
Respondent**

WHEREAS: The parties were given opportunity to present material and make representations at a hearing before the Provincial Mining Recorder December 15, 2004

AND: Although due notice was provided, no one attended on behalf of 3814793 Canada Inc. so the hearing proceeded in their absence.

I FIND: That there were no fatal errors in the staking and the standard of substantial compliance is satisfied therefore,

I ORDER:

- **The dispute be dismissed, SSM 3002575 remain on record and “ filed only “ claim 1192233 is refused.**
- **After and only after the 30 day appeal period has elapsed the claim holder is to improve the claim boundary by completing work indicated below:**
- **Completely blaze the boundary line between corners #one and #two.**
- **Erect line posts and affix the appropriate line post tags 400 meters south of corner #one, 1200 meters south of #one, on the east shore of Mamainse Lake, on the west shore of Mamainse Lake, and 400 meters north of #three.**

- **On or before March 11, 2005 the claim holder is to submit to the Provincial Recording Office written confirmation of compliance with this order regarding the boundary improvements.**
- **The application to record for SSM 3002575 (Part A and sketch on Part D) is to be amended by Joe Leadbetter to indicate the staking of a sixteen-unit mining claim.**
- **If an appeal in this matter is filed with the Mining and Lands Commissioner, do not improve the claim boundary, as indicated in this order, without direction of the Commissioner.**

AND THE PARTIES PLEASE TAKE NOTE THAT SECTION 112 OF THE MINING ACT ALLOWS 30 DAYS FOR AN APPEAL OF THIS DECISION. AN APPEAL IS BEGUN BY FILING THE NECESSARY DOCUMENTS IN THE OFFICE OF THE MINING AND LANDS COMMISSIONER AND SERVING THE PROVINCIAL RECORDING OFFICE WITHIN 30 DAYS OF THE DATE OF THIS DECISION.

"Original signed by Roy Spooner"
Roy Spooner
Provincial Mining Recorder

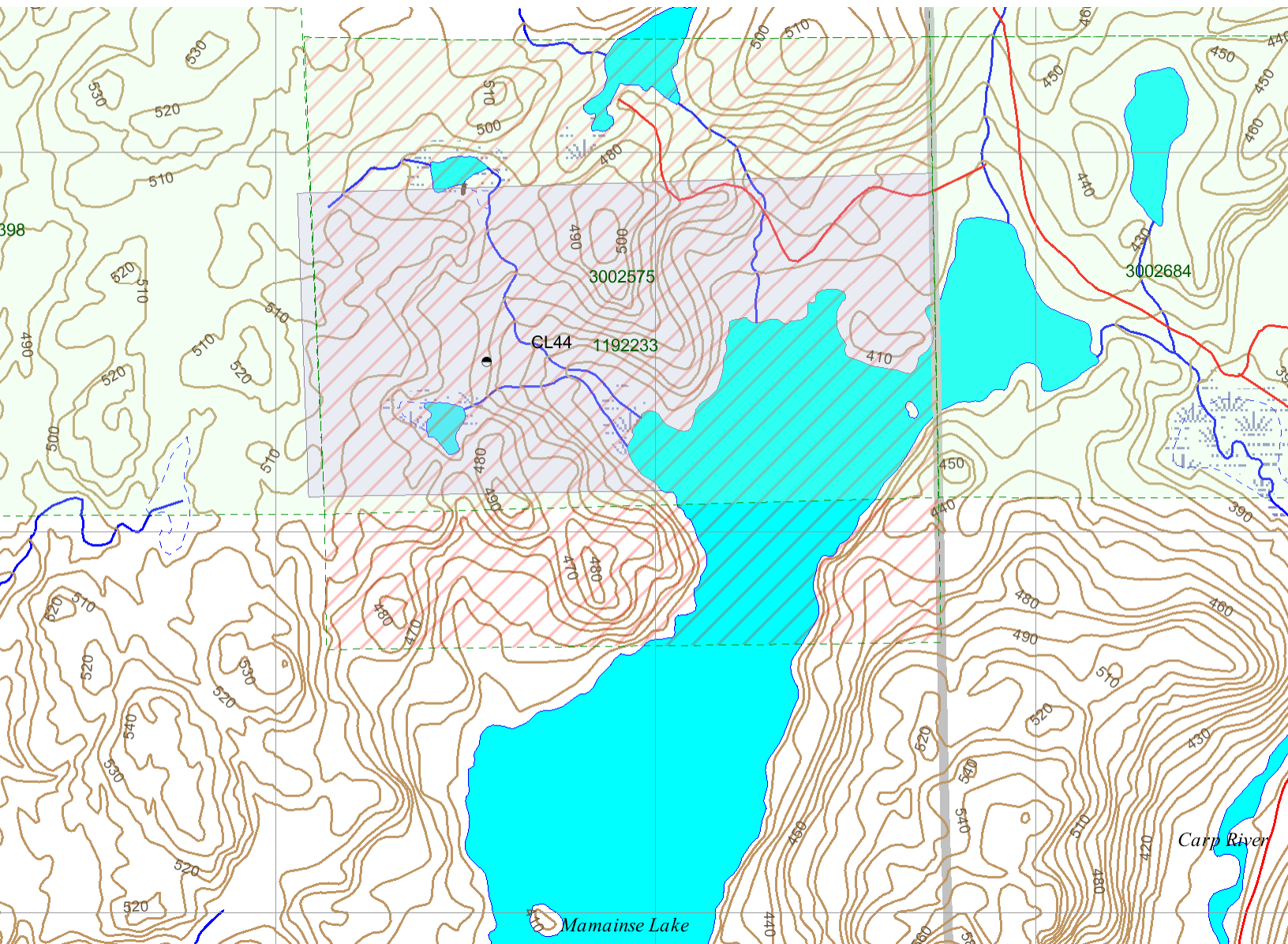
Dated this 11 day of January, 2005

THE HEARING

Daniel Shelly, the Disputant
38114793 Canada Inc., the Respondent, absent

The hearing was scheduled for 2 p.m. December 15, 2004 at the Ministry of Labour Boardroom, main floor Willet Green-Miller Centre, Sudbury. As no one was present for the respondent, the hearing was delayed one half-hour. At 2:30 p.m. the hearing proceeded in the absence of the Respondent.

According to Mr. Shelly, he first staked the sixteen-unit mining claim as 1192246, in Ryan Township, on June 10, 2004. The land was not open for staking until June 11 therefore Mr. Shelly's staking was refused. According to an application to record filed by Joe Leadbetter, mining claim 3002575 was completed on June 11, 2004. On the following page is a portion of the Ryan Township claim map illustrating the staking:



The Disputant explained a chronological order of events following his first staking June 10:

- **June 12 Mr. Shelly and Ron Fenelon return to the claim to retrieve a boat that was tied to a cedar tree on the claim boundary between corners #two and #three (west shore of Mamainse Lake).**
- **June 13 Mr. Shelly and Bruce Dear go fishing Lake Trout on the same lake and see that the cedar tree (where boat was tied) remains standing. They also see and talk to a man walking along the west shore of Mamainse Lake.**

- **June 17 the Provincial Recording Office advises Mr. Shelly that his claim is refused since the land was not open for staking until June 11. He is also advised that someone else has staked the ground.**
- **June 18 Mr. Shelly returns to check the #one post. At the boat landing he meets Joe Leadbetter who is the same man he saw on the west shore of the lake June 13.**
- **June 19 Mr. Shelly stakes the ground once again (“filed only” claim 1192233) documenting discrepancies in the Leadbetter staking and taking photographs.**

Fifteen photographs, taken by Ron Fenelon on a digital camera June 19, were submitted as Exhibit #one. Exhibit #two is a written statement signed by Ron Fenelon. The statement indicates that Mr. Fenelon accompanied Mr. Shelly on June 10 and June 19 and that Mr. Fenelon took the photographs. Observations of the Leadbetter staking are included in the statement. The Disputant was cautioned that Mr. Fenelon’s evidence could not be given as much weight as it would had Mr. Fenelon attended the hearing and given evidence under oath.

Bruce Dear appeared as a witness for Mr. Shelly. Mr. Dear’s evidence was that on June 13 at 2 p.m. he saw a man walking on the west shore of the lake. He returned to the lake with Mr. Shelly on June 16 and June 17 and saw that there was now tops of cedar trees lying in the lake and a “ round claim marker “ that was not there on June 13. The evidence seems clear that Mr. Dear went fishing with Mr. Shelly on June 13 and did not see anything but flagging tape on the west shore of the lake where the Shelly claim boundary runs between corners #two and #three. On June 16 and or on June 17 Mr. Dear now sees a post that was not there on June 13. The witness was asked if he had ever staked mining claims and he answered in the negative.

Mr. Shelly summarized the alleged deficiencies in the Leadbetter staking:

- **Claim 3002575 is a sixteen unit claim on the ground yet the application to record indicates only twelve units**
- **The staking was not completed on June 11 as posts were being erected after 2 p.m. June 13**
- **The time was not inscribed on the #two corner post**
- **There is a line post inscribed “1200 meters north of 3 post” inferring a sixteen unit claim yet the application to record illustrates a twelve unit claim**
- **No line post erected 400 meters north of corner #three**
- **No line posts found 400 or 1200 meters south of corner #one**

The application to record first filed by Mr. Leadbetter apparently contained a discrepancy as a correction was made to the application June 21. Mr. Leadbetter indicated he had made a mistake on the application and that he had completed the staking at the #one corner, not the #2 corner. The claim was recorded as containing 12 units.

MY REASONS

It is unfortunate that no one appeared for 3814793 Canada Inc. I was advised by Joe Leadbetter that he represents the company but could not appear at the hearing due to other business responsibilities. No one should assume that this decision automatically is made against Mr. Leadbetter simply because he chose not to attend the hearing. In Clark v. Lacasse, MCC. Vol. 5, page 393, Mining and Lands Commissioner G. H. 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 itself should not automatically result in his mining claim being struck from the record...”

Also in Clark v. Lacasse, page 394:

“ Further, the evidence of the appellant was self serving being that of himself and his son. Although a witness who might have been independent was mentioned he was not called ... Notwithstanding the inconsistencies and lack of corroboration, no significantly contradictory evidence was produced and I have no alternative for the purposes of this appeal than to accept the evidence of facts as related by the appellant and his son ... “

Mr. Leadbetter takes the risk, in the words of Commissioner Ferguson, of not being present to rebut attacks on his staking. I have no alternative but to give fair consideration to evidence provided by Mr. Shelly and his witness Mr. Dear.

Aside from the various technical staking defects alleged by the Disputant there are two fundamental questions in this issue:

- **If someone applies to record a twelve unit mining claim when the claim actually contains sixteen units, has there been false statements knowingly made in the application to record?**
- **Is it fatal to the staking where intermediate line posts are erected after the completion date and time indicated on the #one post and the application to record?**

Subsection 44 (1.2) Mining Act R.S.O. 1990 (MA):

False statement

[\(1.2\)](#) The recorder or the Commissioner may, after a hearing, cancel the recording of a licensee or holder who knowingly made a false statement in the application to record the claim. 1996, c. 1, Sched. O, s. 12 (1).

Mr. Shelly indicates that he staked a sixteen-unit mining claim and that Mr. Leadbetter staked the same area of land. Also according to Mr. Shelly, there are

inscriptions on Mr. Leadbetter's line posts (e.g. " 1200 meters north of 3 ") that infer the staker would be aware of staking a sixteen unit mining claim. The staking on the ground is not consistent with the certified information in Mr. Leadbetter's application to record. Part C of the Application to Record Staked Mining Claim(s) requires a recording licensee to place their signature certifying in part :

"4. The distances given in my application and sketch or plan on Part D are as accurate as could reasonably be ascertained."

"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."

"6. At the time of staking there was nothing upon the lands to indicate that they were not open to be staked and I believe they were so open."

Mr. Leadbetter's application to record for SSM 3002575 states that he is applying to record a twelve unit claim (in Part A) and his sketch on Part D illustrates a claim having dimensions of 1200 meters (north – south) X 1600 meters (east – west). Mr. Shelly asserts the claim is 1600 meters X 1600 meters. Also, the application does not offer any details of claim 1192246 staked by Mr. Shelly the day before Mr. Leadbetter exercised his right to stake open ground. From the evidence it would appear that the Leadbetter posts were placed close to the Shelly posts therefore Mr. Leadbetter must have realized he was staking over a competitor. Perhaps some note concerning the invalid staking (1192246) should have been included in the Leadbetter application.

If claim SSM 3002575 is a sixteen-unit claim, having dimensions of 1600 meters X 1600 meters, then there are false statements in the application to record. Subsection 44 (1.2) MA, however, provides for the cancellation of a claim only where the false statement was made " knowingly ". In *McChristie v. Rousseau*, 5 M.C.C., page 433 Commissioner Ferguson discussed " knowingly " as it relates to false statements in applications to record. The Commissioner found that (page 448):

" ... There are a number of decisions interpreting the word "knowingly". The majority of such decisions deal with the word in the context of a criminal or penal provision wherein it has been held to import an element or degree of mens rea ... "

Commissioner Ferguson concluded on page 449 of the *McChristie* case:

"... It follows that the element of mens rea attached to the word in penal and criminal enactments is not significant in civil issues ... "

Commissioner Ferguson did not find any court decisions that assisted in legal analysis of " knowingly " as it would relate to false statements in an application to record. Similarly, I cannot find any Mining and Lands Commissioner's cases that are helpful in deciding if the false statements were made knowingly in Mr.

Leadbetter's application to record. Certainly it is a perilous practice to submit inaccurate information in an application to record. One obvious method of tracking details is by keeping field notes. In addition to some record of activities available for hearings, the recording licensee would then have a reliable reference to depend on when indicating all the details of the staking (e.g. time of commencement, time of completion and actual paced distances between posts). I would think that all the details of staking a sixteen-unit mining claim would be difficult to keep track of by memory further complicated if more than one licensee participated in the staking.

The practical significance in this case is that the annual assessment work requirement for a twelve-unit claim is \$4800 where a sixteen-unit claim requires performance and reporting of \$6400 in assessment work annually. The claim would be held in good standing while the holder enjoyed the benefit of performing of 25 % less work each year. That does not seem fair. On the other hand, there may be some explanation of a clerical slip rather than an intent to provide false information. The burden of proof, to establish that false statements were " knowingly " made is carried by the Disputant. I do not have sufficient proof.

I caution the recording licensee to avoid false statements. While I cannot condone such a serious discrepancy in the application to record I do not find that I can cancel the claim in this particular case. Statements in the application to record may be false however there may also be reasonable doubt that false information was filed " knowingly ". The record will be amended to indicate that SSM 3002575 contains 16 claim units. I do so based on the evidence of the Disputant.

The second fundamental issue relates to the post that was apparently erected some time during or after June 13. Mr. Leadbetter indicates in his application to record that he completed the staking of claim SSM 3002575 on June 11. If, in fact, additional work was done to monument the boundary after the completion date filed, should the claim be cancelled?

I find, under the circumstances, that Bruce Dear is a credible witness. He attended the hearing and delivered his evidence under oath. He appears to be neutral in that he has never staked a mining claim and there is no evidence that he has an interest in Mr. Shelly's claim. Mr. Dear's observation was that the post in question was not there on June 13. I know not how Mr. Dear could be so precise about the time of day on June 13 (2 p.m.) if he was enjoying a leisurely fishing trip on the lake however there is no reason for me to speculate further. The point is that a good witness asserts the post was not there on June 13 and then the post appeared sometime after. Therefore, the post was not in place when Mr. Leadbetter indicates he had completed the staking.

The post in question is actually a line post. Subsection 13 (1) O.Reg. 7/96 Claim Staking:

13.(1) If the nature or conformation of the ground at a particular location, incumbent surface rights or water is an obstacle that makes the erecting of a line post at that location impracticable, a line post must be erected on each side of the obstacle. O. Reg. 7/96, s. 13 (1)

The 400 meter interval west of the # two corner (southeast corner SSM 3002575) falls in Mamainse Lake (see map on page 3). Subsection 13 (1) of the Staking Regulation requires, in such a circumstance, that a line post be erected on both sides of the obstacle (the lake). 13 (3) of the Staking Regulation requires that line post tags be affixed to the line posts and the tag is to be inscribed with the direction and distance to the last corner post erected. Neither the Disputant nor the Respondent seems to understand this particular staking rule. In Mr. Shelly's (the Disputant) application to record, he does not illustrate a line post on either shore of Mamainse Lake. The post that may have been erected by Mr. Leadbetter is inscribed " 3002575 WP to #2 Ryan ". The post is not a witness post. Line posts bearing the appropriate tags and inscriptions were required. Although this is a defect in Mr. Leadbetter's staking, it is also a defect in Mr. Shelly's staking.

It has long been a principle, concerning claim disputes, that the Disputant's staking should be examined with the same vigor that the Disputant expects applied to the mining claim of record. In 1916, Mining Commissioner T. E. Godson said in *Whiting v. Mather* 2 M.C.C. 318:

"What Whiting did must be judged by the same standard that he expects him to apply to the Mather staking. He who seeks equity must do equity."

Mining and Lands Commissioner Ferguson went beyond the principle established in *Whiting v. Mather*. For some time Commissioner Ferguson expected a standard of strict compliance in the Disputant's staking. In *Parres et al. v. Baylore Resources Inc. et al.* 7 M.C.C. 2, the Commissioner said:

*"Turning to the staking by the disputants, there is a line of authorities going back to the decision of *Whiting v. Mather* 2 M.C.C. 318 and being more recently illustrated by the decision of *Martin v. Arrowsmith* 5 M.C.C. 115 that places a high standard of staking on a staker who overstakes a recorded staking on the basis that the recorded staking does not comply with the requirements of the Mining Act."*

In this case, I have little or no evidence concerning the Disputant's staking.

Subsection 72 (1) (b) MA:

Forfeiture of mining claim

72.(1) Except as provided by section 73, all the interest of the holder of a mining claim before a lease has issued ceases without any declaration, entry or act on the part of the Crown or by any officer, and the claim is open for prospecting and staking out,

(a) if, without the consent in writing of the recorder or Commissioner, or for any purpose of fraud or deception or other improper purpose the holder removes or causes or procures to be removed any stake or post forming part of the staking out of such mining claim, or for any such purpose changes or effaces or causes to be changed or effaced any writing or marking upon any such stake or post;

The above section of the Mining Act provides for an automatic forfeiture of a mining claim under certain circumstances. Those circumstances do not apply to this case. If Mr. Leadbetter placed the line post on the west shore of Mamainse Lake after the completion date of June 11 he did not do anything that is identified to be fatal to the staking. He did not remove any stake or post nor did he change or efface any writing or marking on a post.

There may be two different “ trains of thought “ in this particular issue. The first approach might be that if a post was added to the claim boundary after June 11, then the completion date changes. The staking was completed on the day the new post appeared. The second approach would be to discount the post and apply the standard of substantial compliance as if the post was not there at all. I prefer the second approach in this case. On June 11 Joe Leadbetter failed to erect the two line posts required by 13 (1) of the staking Regulation to be placed on the east shore and the west shore of Mamainse Lake.

There were also inferences in Mr. Shelly’s evidence that Mr. Leadbetter erected the # two corner post after June 11. I do not find the evidence clear enough to arrive at a finding of fact concerning the # two corner post.

I must caution the Respondent once again. It is not wise to change any part of the staking after the completion date indicated on the application to record unless an order issues from the Recorder or the Commissioner.

On the first two fundamental issues I find that SSM 3002575 will stand. I turn now to the technical deficiencies in the staking and the question of compliance with the substantial compliance standard.

Section 48 MA:

Substantial compliance with Act and regulations sufficient

43. (1) Substantial compliance as nearly as circumstances will reasonably permit with the requirements of this Act and the regulations as to the staking out of mining claims is sufficient. R.S.O. 1990, c. M.14, s. 43 (1); 2000, c. 26, Sched. M, s. 5.

Deemed substantial compliance

(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,

- (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).

According to the Disputant the line between corners #one and #two is poorly blazed, the time was not inscribed on the #two post, there are two line posts missing between #one and #two and one line post missing north of #three.

If Mr. Shelly is correct, with regard to missing line posts, there are actually four line posts that Mr. Leadbetter failed to erect. In addition to the three posts not found by Mr. Shelly there is a line post required on east shore of Mamainse Lake between corners #two and #three. However, I cannot ignore the possibility that the competitors' lines meander and separate in places. Perhaps the missing blazes and missing posts are there but remain undetected.

Having given the evidence due consideration I find that the staking of SSM 3002575 satisfies the standard of substantial compliance. This decision, however, includes direction to Mr. Leadbetter to improve the blazing between corners #one and #two as well as the placement of line posts if they are missing. Mr. Leadbetter is not to proceed with any such improvement on the claim boundary until the appeal period has elapsed (30 days) or, where an appeal is filed, until the appeal is decided by the Mining and Lands Commissioner.

Roy Spooner