

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

**IN THE MATTER OF: Mining Claim 3012963, located in Frecheville township,
Larder Lake Mining Division.**

AND IN THE MATTER OF: a dispute filed by

YVON GAGNE

Disputant

-against recorded claim 3012963 held by-

**MINES ET EXPLORATION NORANDA
INC./NORANDA MINING AND
EXPLORATION INC. (Noranda)**

Respondent

UPON: consideration of the evidence submitted by the parties,

I ORDER: that the dispute is hereby dismissed.

**I FURTHER ORDER: that an exclusion of time will not be considered in this case
considering the amount of time remaining on 3012963 to file assessment work.**

Dated at Sudbury this 28th day of July 2004

Originally signed by Roy Denomme

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**Roy Denomme
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 May 20th, 2004 to determine this matter.

Yvon Gagne and Gary Windsor attended in person and made submissions on behalf of the disputant.

Dean Rogers and Andre Dufresne attended in person and made submissions on behalf of the respondent.

BACKGROUND:

On November 26, 2003, at 10:00 a.m. eastern standard time, the Ministry of Northern Development and Mines released to the public, Ontario Geological Survey Map 81 787, which was an airborne magnetic and electromagnetic surveys (EM decay constant and electromagnetic anomalies) for the Kidd-Munro, Blake River area. The survey map showed an anomaly approximately 1 km square in size, located 1.5 kilometres northeast of Trollope Lake in Frecheville Township. Both the disputant and the respondent obtained copies of the survey release and based on the data made independent arrangements to stake the anomaly.

On December 2nd, Gagne and Windsor snow-machined into Frecheville Township to put in a four-unit claim block. They started to stake by erecting their #4 post and started south to complete their mining claim. On route they encountered fresh flagging tape. They followed this tape to a line post, then north to a #4 post (3013064). The #4 post indicated that it was erected 12:45 p.m. November 26th, 2003, by David Jones. At this point they assumed the area they wanted was staked and returned home.

The respondents waited for the mining claim to be recorded at the Provincial Recording Office but after 31 days the staking had yet to be indicated on the claim map. On January 6th, 2004, the disputants talked to Dale Messenger of the Provincial Recording Office to ascertain the status of the lands. Mr. Messenger indicated that the claim in question (3013064) did not appear to have been filed. On January 9th, a 16 unit mining claim (3012963) appeared on the claim map.

On February 3rd, 2004, Yvon Gagne filed a dispute against mining claim 3012963. In his statement of claim Mr. Gagne states in part, "Mr. Jones had the area staked twice making it illegal according to the Mining Act."

EVIDENCE:

The disputant presented eight photographs (six appeared to be of the #4 post for 3013064 however, the complete tag number was not clear in the photos), and two of a line post, (which could not be identified in the photographs). The disputants argued that if they had staked a 16- unit claim around 3013064, it would have been refused. It followed that the 16-unit mining claim (3012963) staked by Mr. Jones around his own four-unit claim was also invalid.

The disputant referred to Section 16 (1) and (2) of Mining Regulation 115/91 of the Mining Act, which states:

Section 16 115/91:

- (1) Subject to Section (3), a person who stakes out any land open to prospecting or erects or places any post or marking upon any land open to prospecting, in manner not in accordance with the Act and this Regulation, is not entitled to record a mining claim on the land or stake out the land again.*
- (2) Subject to subsection (3), a person who stakes out any land open to prospecting and fails to make application to record the claim within the time specified in subsection 51(1) of the Act is not entitled to record a mining claim on the land or to stake out the land again.*

Windsor indicated that they did not tie on to the 3013064 because they wanted to wait and see what had been staked. They waited for the claim to be recorded so its boundaries could be seen on the base map at the Ministry. However, 3012963 was the claim that was ultimately recorded and by this time it was too late.

Gagne further indicated that they waited for 3013064 to be shown on the map because, based on evidence in the field, it appeared that the mining claim was at least one claim length too far north. This would have provided an opportunity to add a two-unit claim to the south of 3013064.

Rogers for the respondent did not dispute the events put forward by Gagne regarding the staking by Jones. He provided testimony to further clarify Jones' actions.

Rogers commented that what is shown on the claim map is irrelevant, as the location of the claim in the bush is what takes precedent.

Rogers submitted that Noranda contracted Jones to stake ground based on data released by MNDM on November 26th, 2003. The data was purchased at 10:00 a.m. on November 26th, 2003, and the anomaly in question was identified as worthwhile to stake. Jones was sent by helicopter (based out of Ramore) to the staking location and was on site around noon on the 26th. Due to a late start and the short daylight hours he didn't complete the mining claim on that day, and went back on November 27th to finish. Rogers indicated

that there was no sign of competition on either of the two days (this may be speculation as there is no indication that Rogers was on the ground during the Jones staking).

After staking 3013064 Noranda instructed Jones not to record the mining claim because the company was acquiring more ground in the area and did not want to attract competition. Once Noranda had staked their area of interest it was decided they increase the land acquisition around the anomaly. Rogers suggested Jones not record the four-unit mining claim, but instead stake and record a 16-unit claim. Jones returned to the area on December 16th, 2003, and finding no sign of any other staking (again possible speculation on Rogers part), staked mining claim 3012963 that day. The claim was subsequently recorded on January 9th, 2004.

Rogers further submitted that because 3013064 was not recorded, the disputant had the opportunity to stake a 16-unit claim around it not knowing whether Noranda was going to record the claim or not. Neither was there any prohibition in the disputant tying on to the southern portion of the claim.

Rogers referred to Section 19 of the Mining Act regulation 7/96, which states:

(19) A person who stakes land open for staking and fails to apply to record the mining claim within the time set out in subsection 44(1) of the Act is not entitled to have a mining claim recorded on the land or to stake the land again, and a mining recorder may refuse or cancel any such staking.

He submits that the phrase “may refuse or cancel any such staking” implies that the act of staking over one’s own unrecorded claim does not automatically invalidate the later staking and that it would be at the recorder’s discretion whether the offending claim would be invalid or in substantial compliance.

He further submits that the staking of 3012963 should not be looked upon with strict compliance and should be considered to fall within the definition of substantial compliance. In this regard he refers to Section 43 of the Mining Act.

Section 43 of the Act states:

- (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 a mining claim is sufficient.*
- (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.

He argued that an attempt had been made in good faith on the part of the licensee to comply with the requirements of the Act and the Regulations, despite the omission of Section 19 of the staking regulations.

He also suggests that at the time that the disputant went to stake on December 2nd, 2003, they encountered a fully staked four-unit claim, and implied that this should not have misled them at that time.

Rogers then turned his attention to section 44(1) of the Act which states:

Section 44 (1) of the Mining Act states:

44(1) A licensee who has staked out a mining claim shall, not later than 31 days after the day on which the staking was completed, make an application to record the claim to the recorder.

Rogers submits that the Jones' staking falls into a gray area when it comes to the legislation and regulations because mining claim 3012963 was staked prior to the 31 day recording requirement ran out on mining claim 3013064 but was recorded after the 31 day period expired on the claim.

Rogers further argues that because the disputant did not stake any mining claim in the area to formalize their interest in the lands, the tribunal is left only to determine whether 3012963 is valid or not and cannot grant any rights to the disputant. A ruling in favour of the disputant would result in a land opening, creating a competitive situation. He further adds that a strict interpretation of wording in Section 19 of the staking regulation "*is not entitled to have a mining claim recorded on the land or to stake the land again*", may prohibit Noranda from staking the ground at any time

Rogers submits Korba vs Charron, (File No. MA 025-97, MA 026-97, November 23, 1999), to reference the fact that after the 31 day period an application that is not filed cannot be considered.

The Mining and Lands Commissioner states at page 13:

"The claim staked by Mr. Korba in the morning was never filed as Mr. Korba believed that it had been improperly staked. Whether that was in fact the case or not, there is no opportunity to revive the morning claim as it is out of time by virtue of section 44 of the Mining Act. This tribunal finds that Mr. Korba's morning claim has no status in terms of the Mining Act".

Findings:

The tribunal accepts as accurate, the events as both the disputant and the respondent told them.

The tribunal notes that Section 16 115/91 of the staking regulation was repealed in 1996 and replaced by Section 19/7/96 and constitutes the main argument for the disputant.

Section 19 of the Mining Act regulation 7/96 states:

A person who stakes land open for staking and fails to apply to record the mining claim within the time set out in subsection 44(1) of the Act is not entitled to have a mining claim recorded on the land or to stake the land again, and a mining recorder may refuse or cancel any such staking.

This section confirms that because 3013064 was not filed for recording within the 31 day period required under 44(1), the area encompassed by that claim cannot form part of another claim staked by the same individual.

The section also states that the Mining Recorder may refuse or cancel any such staking. The use of the word “may” suggests the Mining Recorder has discretion to accept or refuse any application presented for recording, notwithstanding a person cannot stake or have recorded the land again.

There appears to be some ambiguity in section 19 of the staking regulation which indicates that the lands cannot be restaked. However, if they are, the recorder has the discretion to determine whether or not they can be recorded.

The Provincial Mining Recorder has in the past chosen to validate mining claims where this situation has occurred. The question is whether the second staking meets the provisions of substantial compliance as set out in the provisions of Section 43 of the Mining Act.

The tribunal is satisfied from the evidence given that the staker made an attempt in good faith to comply with the provisions of the Mining Act and Regulations.

The more difficult question in this case is whether the staking and restaking of the area by Jones misled the disputants.

On arrival on December 2nd, 2003, the disputants came across a staked mining claim, which they determined was properly staked and encompassed the area they wished to acquire. It was evident from their testimony that the disputants were only interested in the area of the anomaly and not any surrounding land.

The disputants indicated that they believed the 4-unit claim of Jones' was positioned too far north and left some of the anomaly open for staking on the south border. The tribunal has difficulty with the argument of the disputants that they needed to see where the claim was situated on a claim map in order to determine its true location. It is well known that the true location of the claim is best ascertained in the field and the position on a claim map may be suspect as it is only a rendition of what has been staked in the field. The disputant was therefore in the best position on December 2nd, 2003, to make a proper determination of where the Jones' claim was in relation to the anomaly and to decide whether to stake a two-unit claim along the south boundary. On December 2nd, 2003, the tribunal is satisfied that the disputants were faced with a staked mining claim and would not have been misled by this staking. Further, no evidence was presented which indicated that there was any discrepancy in the staking of Jones' claim to indicate that it did not substantially comply with the Act or that the staking was misleading. The tribunal can only assume that the disputant felt it was not feasible to stake a claim along the south boundary.

It appears that the act of the second staking is what confused the disputant and not the physical staking of the first claim. The tribunal concedes that there may have been a window where the Jones' staking could have been misleading to a staker attempting to stake in the vicinity. This would have been the period after the staking of 3012963 on December 16th, 2003, and before the 31 day period for filing of 3013064 of December 29th, 2003. However, this is mute as there was no attempt to stake during this period.

The tribunal concludes that the staking of 3012963, by Jones does meet the test of substantial compliance outlined in Section 43, which provides the Mining Recorder to exercise discretion to allow the staking under Section 19 of the staking regulations. The tribunal will exercise its authority in this matter to not cancel 3012963, and dismiss the dispute in the matter.

Roy Denomme
Provincial Mining Recorder