

File No. MA 014-97

L. Kamerman )  
Mining and Lands Commissioner ) Friday, the 27th day  
of March, 1998

**THE MINING ACT**

**IN THE MATTER OF**

Mining Claim L-1221665, situate in the Township of Tyrrell, in the Larder Lake Mining Division, staked by Jean-Claude Pigeon and William Bisailon, respectively, recorded in the name of Alexander Harris Clark, hereinafter referred to as the "Clark Mining Claim";

**AND IN THE MATTER OF**

Mining Claim 1220395, situate in the Township of Tyrrell, in the Larder Lake Mining Division, staked by Paul Collins, to have been recorded in the name of Royal Oak Mines Inc., marked "filed only", hereinafter referred to as the "Royal Oak Mining Claim";

**AND IN THE MATTER OF**

Subsections 44(1.2) and 71(1) of the **Mining Act**, the "Act" and Ontario Regulation 7/96;

**B E T W E E N:**

ROYAL OAK MINES INC.  
Appellant and Disputant of the First Part  
Respondent of the Second Part

- and -

ALEXANDER HARRIS CLARK  
Appellant and Disputant of the Second Part  
Respondent of the First Part

(Amended October 16, 1997)

**AND IN THE MATTER OF**

Two appeals pursuant to subsection 112(1) of the **Mining Act** from the decision of the Mining Recorder for the Larder Lake Mining Division, dated the 3rd day of June, 1997, cancelling the Clark Filed Only Mining Claim and refusing the Royal Oak Filed Only Mining Claim.

**ORDER**

**UPON READING** the submissions and materials filed by the parties:

**1. THIS TRIBUNAL ORDERS** that the appeal concerning the Clark Mining Claim L-1221665 be dismissed.

**2. THIS TRIBUNAL FURTHER ORDERS** that the appeal concerning the Royal Oak Mining Claim 1220395 be dismissed.

**3. THIS TRIBUNAL FURTHER ORDERS** that these matters are referred back to the Provincial Mining Recorder responsible for the Larder Lake Mining Division for an Order pursuant to section 35 of the **Mining Act** to reopen the lands for staking.

**4. THIS TRIBUNAL FURTHER ORDERS** that no costs shall be payable by either party to this appeal.

**5. THIS TRIBUNAL FURTHER ORDERS** that this Order be filed without fee in the Office of the Provincial Mining Recorder in Sudbury, Ontario, pursuant to subsection 129(4) of the **Mining Act**.

**DATED** this 27th day of March, 1998.

Original signed by  
L. Kamerman

L. Kamerman  
MINING AND LANDS COMMISSIONER

File No. MA 014-97

L. Kamerman )  
Mining and Lands Commissioner )

Friday, the 27th day  
of March, 1998

**THE MINING ACT**

**IN THE MATTER OF**

Mining Claim L-1221665, situate in the Township of Tyrrell, in the Larder Lake Mining Division, staked by Jean-Claude Pigeon and William Bisailon, respectively, recorded in the name of Alexander Harris Clark, hereinafter referred to as the "Clark Mining Claim";

**AND IN THE MATTER OF**

Mining Claim 1220395, situate in the Township of Tyrrell, in the Larder Lake Mining Division, staked by Paul Collins, to have been recorded in the name of Royal Oak Mines Inc., marked "filed only", hereinafter referred to as the "Royal Oak Mining Claim";

**AND IN THE MATTER OF**

Subsections 44(1.2) and 71(1) of the **Mining Act**, the "Act" and Ontario Regulation 7/96;

**B E T W E E N:**

ROYAL OAK MINES INC.

Appellant and Disputant of the First Part  
Respondent of the Second Part

- and -

ALEXANDER HARRIS CLARK

Appellant and Disputant of the Second Part  
Respondent of the First Part

(Amended October 16, 1997)

**AND IN THE MATTER OF**

Two appeals pursuant to subsection 112(1) of the **Mining Act** from the decision of the Mining Recorder for the Larder Lake Mining Division, dated the 3rd day of June, 1997, cancelling the Clark Filed Only Mining Claim and refusing the Royal Oak Filed Only Mining Claim.

## REASONS

The hearing of this matter was done through written submissions pursuant to subsection 5.1(1) of the **Statutory Powers Procedure Act**, R.S.O. 1990, c. S.22, as amended by S.O. 1993, c. 27, Sched.; and S.O. 1994, c. 27, s. 56 and pursuant to paragraph 11(1) of its **Procedural Guidelines for Proceedings under the Mining Act**.

### Appearances:

Alexander H. Clark                      Made written submissions on his own behalf.

Royal Oak Mines Inc.                  Paul Coad, Chief Geologist, Eastern Canada Exploration, made written submissions on behalf of Royal Oak.

### Background

This appeal arises from the staking of two mining claims on September 17, 1996, when the Temagami Land Caution was lifted from lands in Tyrrell Township, among others.

A mining claim with no tags, subsequently given tag number L-1221665, was staked by Jean-Claude Pigeon, commencing at 9:00 am and completed at 9:06:50 am. According to the application to record (Ex. 6) Mining Claim L-1221665 was recorded in the name of Alexander H. Clark.

The second mining claim, 1220395, was staked by Paul Collins on behalf of Royal Oak Mines Inc., which has a start time of 9:00 am and a completion time of 9:20 am. (See Ex. 3). It was marked "filed only" by the Mining Recorder for the Larder Lake Mining Division and ultimately refused for recording, owing to the priority given to the Clark Mining Claim.

Royal Oak filed a dispute on December 4, 1996 (see abstract for mining claim L-1221665, Ex. 5). While the lands covered by the Clark and Royal Oak Mining Claims are not exactly identical, the Mining Recorder determined that the degree of overlap was such as to preclude consideration for recording of non-overlapping portions pursuant to subsection 44(4) and made his determinations as though the stakings were substantially for the same lands. The Order of the Mining Recorder, dated June 7, 1997 (see Ex. 10, *exhibit no. 17*) dismissed the dispute against the Clark Mining Claim L-1221665, but also disallowed the recording of the "filed only" Collins Mining Claim 1220395.

As a result of the filing of the dispute, the lands covered by mining claims 1220395 and L-1221665 were removed from staking by order of the acting Senior Manager, Mining Lands Section on May 30, 1997 (Ex. 7).

[Note: The tribunal has established a numbering system for Exhibits filed. Within this system, it is sometimes necessary to accommodate the pre-existing numbering of materials filed by the parties. In this case, Royal Oak filed the bulk of its evidence and submissions, involving 24 tabs, in what the tribunal has labelled as Exhibit 10. For clarity, the tribunal will italicize the numbers and letters within Exhibit 10 used by Royal Oak.]

The westernmost boundary of a leased mining claim in Tyrrell Township, CLM 296, also known as the Juby claims, is shown on a perimeter survey (Ex. 10, *Exhibit no. 3*), having a total north to south length of 475 + 809.68 + 1278.48 feet (2563.16 feet) which are available for staking. The Clark Mining Claim occurs approximately within the centre portion of this Juby land boundary, while the Royal Oak Mining Claim coincides with the southern portion of the Juby land boundary. In both cases, there is a portion of the Clark Mining Claim, amounting to approximately 20 percent at its north end, which does not overlap with the Royal Oak Mining Claim and similarly, a portion of approximately 20 percent of the Royal Oak Mining Claim at its south end which does not overlap with the Clark Mining Claim.

Both parties allege that the other was not seen on the ground on the morning of September 17, 1996, so that each party is alleging that the opposing parties' staking could not have occurred in the manner indicated on the respective applications to record.

### Issues

1. Does the tribunal accept the facts put forward concerning the staking of the Clark Mining Claim, purportedly staked in just under seven minutes? These facts include the use of a trail bike, and the existence of a cleared survey line and road allowance.
2. What is the effect of the helper completing the blazing of the Clark Mining Claim three minutes after the finish time is noted?
3. If the appeal of the disallowing of the Clark Mining Claim application to record is dismissed, was the Royal Oak Mining Claim staking in substantial compliance or deemed substantial compliance, within the meaning of section 43 of the **Mining Act**?
4. What are the implications of the fact that neither of the parties or their crew saw the other at the date and time in which the stakings are alleged to have occurred?

### Facts, Evidence and Submissions

As the parties agreed that the tribunal should proceed on the basis of materials filed, the tribunal has selected certain portions of the evidence and submissions filed to set forth their respective positions.

Alexander Clark has filed the following statement in connection with his appeal (Ex. 9):

I have filed a request for an appeal on the following basis:

- a) Mr. Spooner does not take into consideration the fact that the eastern boundary (from the #1 to the #2 post) is a cleared survey line which is 8 feet wide with hundreds of existing blazes and requires little time to traverse as is the northern boundary (from the #4 to the #1 post) a chain sawed line by other parties as well as partial roadway, thereby being only 1/2 mile of normal bush on this claim. a)i) this normal bush is fairly good going compared to the swamp to the south that Royal Oak's staker would encounter when he eventually staked.

- b) The ground claimed by the disputant is fundamentally different that the ground staked by the respondent by virtue that the northern east - west boundaries of both areas are 1/2 of a claim apart as admitted by Bob Bailey in the May 1997 hearing before the recorder.
- c) That Alex Clark was at the #1 post of 1221665 until 8:40 A.M. on September 17, 1996 and did not observe all of Royal Oaks (**sic**) stakers heading north from the heli-pad as stated by Paul Collins at the outset of the hearing. (Alex Clark did not question that a helicopter was involved other than that it is a redundant fact). Mr. Paul Collins has admitted to being elsewhere by virtue that he headed northward while his claimed location was southward.
- d) That the motorcycle utilized in the staking of 1221665 is a four-stroke cycle Honda which would not interfere with a conversation occurring in the same room, thus the reason for someone 650 feet distant would not hear this machine. Had any of Mr. R. Collin's stakers been in the vicinity at 9:00 A.M. on September 17, 1996 they would have seen this vehicle. There were no less than a dozen vehicles traversing this area on the morning of September 17, 1996.
- e) That Alex Clark stated in the hearing that Alex Clark contacted 3 mining recorders and had 2 employees contact mining recorders prior to September 17, 1996 to verify the finishing time to be marked on the # 1 posts and that all mining recorders instructions were to mark the staker or runners time as the completion time as opposed to when the helper arrived. No attempt was made to alter reality.
- f) That Alex Clark spoke with the foreman of Royal Oak prior to the opening and that the foreman stated that Royal Oak would leave the 1221665 area alone on the basis that Clark would not go to the north of the Juby leases. That Royal Oak staked hundreds of claims without interference and came back later to claim ground staked by others.
- g) That Royal Oak has not acted in good faith by attempting to dispute everything in the area that they did not acquire, after already obtaining the lion's share.
- h) That Royal Oak has filed assessment work ( physical, which amounts to non information) on all of their claims to prevent disputes from occurring while Clark had assessment work to file and which was not filed on the basis that an explanation could be given with respect to the speed by which this claim was staked.

i) That J.C. Pigeon did indeed stake the claim 1221665 in good faith and did not attempt to act improperly. Mr. Pigeon attempted to comply with the staking regulations to the best of his ability under the extreme tensions of the moment and that the bulk of his work constitutes substantial compliance within the meaning of the **Mining Act**.

j) That a gaping hole exists in Royal Oaks staking plan as they staked all the way around the Juby leases and for some reason did not stake out the 1/8 mile section that was most accessible and on strike with the geological structure. The reason for this is they realized by conversation and verbal agreement as well as visual observation that they could not win this ground in a fair or honest manner with a cross-country runner and experienced woodsman on the ready at the number one post. Royal Oak chose to utilize a helper as a staker and commence staking later in the day at a point less obvious and out of harms way. This is deceit. Mr. Rolly Collins admitted in the earlier hearing that his son was inexperienced and could not remember what he must have done. It is obvious that Paul Collins did not know how to stake a claim in May of 1997 and the mining recorder should have ruled the dispute in favour of the respondent when Paul Collins stated he walked northward upon exiting the helicopter which landed north of the disputed ground.

I believe from the foregoing explanation, this claim (1221665) should be reinstated.

Following is a brief of my experience. I have personally staked more than 5,000 mining claims and managed in excess of 20,000 claims with crews. [Mr. Clark sets out his industry-related experience covering the period of 1966 to the present.]

In its submissions, Royal Oak provided several documents which list the facts which it agrees with, disputes and further information regarding disagreement with Mr. Clark's position. These are reproduced in their entirety:

Exhibit 10 - *Schedule B, exhibit no. 20*, is entitled "Facts Agreed to by Royal Oak":

1. Royal Oak Mines was present on the morning of September 17, 1996, in the area in question in Tyrell Twp., specifically along the west side of lease claim CLM 296.
2. Roland Collins was hired by Royal Oak to coordinate the staking rush on the morning of September 17, 1996. Roland Collins has 37 years of bush experience and knows the importance of properly staking a claim.

3. Royal Oak Mines used two helicopters to transport stakers throughout Knight and Tyrell Twp. on September 17, 1996. More than 10 helicopter pads were used to facilitate this transport. The location of two of these pads is shown in *Exhibit no. 1*. Helicopter pad B was the one used by Paul Collins.
4. Paul Collins who has over 5 years of bush experience was assigned to stake claim 1220395. Paul Collins has helped stake a number of claims but only acquired his own prospectors license prior to June 1, 1996, upon turning 18 years of age (no. M-25629). Paul Collins staked a claim during the June 1, 1996 claim rush in Timmins and subsequently staked some more claims that summer prior to the September 17, 1996 rush in Tyrrell Twp. Paul Collins is an excellent athlete and has numerous track and field records (*exhibit no. 13*).
5. Paul Collins had no competition when claim 1220395 was staked at 9:00 a.m. on September 17, 1996.
6. Peter Harvey, a geologist for Royal Oak, walked along the trail in the vicinity of the alleged north claim boundary of claim 1221665 and did not observe any other competitor stakers (other than stakers employed by Royal Oak) in this area on the morning of September 17, 1996.
7. John Levesque, a helicopter pilot for Skytek, was located at helicopter pad A (*exhibit no. 1*) at 9:00 a.m. on September 17, 1996 and did not observe any other competitor stakers in the area of the alleged north boundary of claim 1221665 and did not see or hear a motorbike on that morning. Note: the helicopter was shut down at this time.
8. Roland Collins who was positioned at the northern helicopter pad marked A in *exhibit no. 1* did not see any competitor stakers in the area of the alleged north boundary of claim 1221665 and did not see or hear any motorbike on the morning of September 17, 1996.
9. Mary Stocker, who was instructed to videotape posts for any of the staked claims along the west side of leased claim CLM 296, walked along the west boundary of leased claim CLM 296 south of the trail after the morning staking rush and did not see any competitor posts. However, on May 24, 1997 claim posts for 1221665 were observed in this area as illustrated on *exhibit no. 2 (Schedule A)*.
10. The videotape taken by Mary Stocker on September 17, 1996 illustrates the posts observed on the morning of September 17, 1996.

11. Royal Oak completed a stripping program on leased claim CLM 296 on September 18, 1996 after all of the staking had been recorded and filed an assessment report on September 19, 1996. Work was applied to claims which Royal Oak thought might be disputed or where there was competitive staking and the rest of the work to claims near CLM 296 (*exhibit no 12*). No work was filed on Royal Oak's staked claim 1220395 because there was no competitive staking on this claim on September 17, 1996. Royal Oak filed the work on the other claims because from experience on the April 4, 1995 staking rush in Matachewan and subsequent staking rush on June 1, 1996 in Timmins it is obvious that some individual stakers deliberately falsify the facts to win claims and Royal Oak wanted to avoid having to deal with any unscrupulous individuals if at all possible.
12. Royal Oak Mines believes in fair play. On the June 1, 1996 staking rush in Timmins at Three Nations Lake south of the Pamour Mine, Royal Oak could have blocked off an access road south of highway 101 (a private road owned by the company to service a pump house on Three Nations Lake) to impede the progress of the competitor stakers but Royal Oak did not do this. On the early morning of September 17, 1996 at the Lakeview Motel in Gowanda, Royal Oak was questioned about the disappearance of some pre-cut claim posts hidden behind a garage. Royal Oak advised the party that Royal Oak was not involved in this action and that it is not our way of doing things. Later on the afternoon of September 17, 1996, Battle Mountain advised that their stakers took some of Royal Oak's pre-cut posts during the staking rush. Royal Oak accepted the apology from Battle Mountain.
13. The integrity of Mr. A. Clark and his various alleged stakers and the presence in the area on September 17, 1996, is questioned by another separate party, Mr. Carl Forbes of Strike Minerals (*exhibit no. 11*). Although the outcome of this dispute is still pending one must wonder about the similarities between the separate disputes involving the same individual Mr. A. Clark.
14. Mr. A. Clark attempted to negotiate a deal with Royal Oak prior to the hearing (*exhibit no. 19*).
15. Mr. A. Clark offers no witness statements or phone numbers whereby his staker on claim 1221665, Mr. Jean-Claude Pigeon, his helper Mr. William Bisailon or Mr. Foster, who allegedly cut a stump post (no. 2 post of 1221665) when tags were being attached later in the fall, can be questioned.
16. During the May 7, 1997 hearing in Kirkland Lake it was disclosed by Mr. A. Clark that Mr. Jean-Claude Pigeon had received his prospectors (**sic**) license just days before the staking rush and that he could not remember exactly when the actual date was. One would wonder how such an inexperienced individual could

stake a claim in such a quick time of 6:50 minutes. During the hearing it was established by the Larder Lake Mining Recorder that Mr. Pigeon had apparently indicated the wrong completion time on his application to record. Also during the hearing it was established in a written statement by Pigeon that his helper William Bisailon completed his blazing and arrived at post no. 1, 3 minutes after Pigeon had completed his staking. After the hearing Mr. A Clark advised the Mining Recorder that the stump post had been constructed by a Mr. Foster, and action not authorized by the Mining Recorder. All these points do **not** comply with the requirements of the **Act**. All these points are actually redundant when one remembers that Mr. Jean-Claude Pigeon and Mr. William Bisailon were not observed in the area on September 17, 1996 and similarly (**sic**) no posts were observed for claim 1221665 on that morning as witnessed by separate individuals. Interestingly, Mr. Pigeon was not present at the May 7, 1997 hearing and has not been represented in recent evidence provided by Mr. A. Clark on August 12, 1997.

17. Royal Oak supports the testimony and actions of Paul Collins and believes that Paul Collins complied with all of the said requirements of the **Mining Act** and regulations with respect to staking, the inscribing and erection of posts and the blazing of claim 1220395. On detailed review of Bob Bailey's report it was noticed by Mary Slaker and Paul Coad that there was a discrepancy between the measurements of the claims in the text of the report based on pace and compass readings and the 1:5000 scale plan. Bob Bailey was asked to explain the reason for this on September 11, 1997 and Bob advised that the 1:5000 scale plan in the original report is based on the post locations given by the Garmin GPS unit and not the pace and compass readings. By the pace and compass readings Paul Collin's claim 1220395 measures 434 x 365 x 435 x 365 m [note: only given measurements on one NS and one EW line, hence other measurements by inference] and not 390 x 285 x 345 x 265 m as reported in *exhibit no. 10*. The original measurements reported in *exhibit no. 10* were measured off the 1:5000 scale plan and not checked against the written text at that time. *Exhibit no. 5* is an additional copy of the 1:5000 scale plan showing the location of the respective claims and posts based upon the more accurate pace and compass measurements. Importantly, all measurements are tied into the surveyed claim CLM 296 (*exhibit no. 3*). Paul Collin's completion time of 20 minutes is quite reasonable considering his athletic ability. It is important to note that the Larder Lake Mining Recorder did accept claims elsewhere in Tyrrell Twp which were staked in less than 20 minutes on September 17, 1996. Refer to the claim map which is included in *exhibit no. 10*.

Paul Collins completed sufficient blazing while staking claim 1220395 as he had been taught by Roland Collins who has staked 110's of claims during his career. The claim had been cutout with directional lines prior to September 17th and this specific matter has been dealt with in an unreported case before the Deputy Mining and Lands Commissioner dated January 26, 1996 between William Charles Kerr vs. Strike Minerals Inc. The Larder Lake Mining Recorder makes mention of this in his reasons on June 3, 1997 on page 6 and 7 (*exhibit no. 17*). Paul Collins was understandably quite nervous during the May 7, 1996 hearing and leading questions by the Mining Recorder undoubtedly resulted in the number of about 5 blazes between each corner post being arrived at. The Larder Lake Mining Recorder in his response of June 3, 1997 (*exhibit no. 17*) states that "It is probable that Collins did not sufficiently blaze his boundary lines in the time he indicates he ran around the claim:. Royal Oak contends that there was substantial compliance with the **Act** with respect to his blazing. Paul Collins in his testimony (attached in *Schedule D*) states that there was enough blazing completed on these well marked out lines and Paul Collins will be available for questioning if required by the Commissioner. Bob Bailey, who inspected the claims, states in his evidence that there was sufficient blazing on claim 1220395 to facilitate the inspection of the claim in December of 1996 (*exhibits no. 4, 6 and Schedule E*).

18. Royal Oak submits the decision by the Deputy Mining and Lands Commissioner, Brian Goodman, in the case of Pye v. Falconbridge (*exhibit no. 18*) whereby the Porcupine Mining Recorder and subsequently a Tribunal from the Mining and Lands Commissioner found that "... there is insufficient evidence to rule, as a fact, that Mr. Brunet's blazing was indeed deficient". Mr. Brunet who was staking for Falconbridge did comply with the staking requirements of the **Act** and regulations and accordingly was awarded the claim. Royal Oak similarly argues that Paul Collins substantially complied with the **Act** and regulations and therefore asks the Mining and Lands Commissioner and this Tribunal to be consistent in its rulings. Interestingly, the Brunet claim was staked within a time of 21 minutes.
19. Paul Coad, who works for Royal Oak as Chief Geologist, Eastern Canada Exploration and is a Fellow with the Geological Association of Canada and a Fellow with the Society of Economic Geologists, has never and will never act dishonestly in any matter relating to the mineral industry or everyday life. Furthermore, he expects and supports the honest and professional actions of all the employees and contractors who work for Royal Oak Mines Inc.. Their testimonies are factual and valid.

*Exhibit 21, Schedule C* (Exhibit 10), entitled, "Alleged Facts which Royal Oak does not agree with" is reproduced:

1. Most of A. Clark's statements in his correspondence of August 12, 1997 are false. They are dealt with on an individual basis in *Schedule F*.
2. A. Clark's statement at the May 7th hearing that Royal Oak was not present at the vicinity of claim 1220395 on September 17, 1996. This is false.
3. A. Clark's statement at the May 7th hearing that "...Paul Collins did not do the staking on the morning of September 17 but may have been there later that day or the next day". This is false.
4. A. Clark's statement that Royal Oak filed assessment work on claim 1220395. This is false.
5. A. Clark's comment to the Larder Lake Mining Recorder that Bob Bailey cannot be considered as a neutral witness because he was hired by Royal Oak. This is false.
6. A. Clark's comment at the May 7th hearing that dimensional lumber posts were used on claim 1221665 and that two posts went missing prior to the opening so two new poplar posts were used. This statement is false as the photographs taken by Bob Bailey do not show posts of this type on claim 1221665. A. Clark then made the statement that all of Pigeon's corner posts had gone missing and had been replaced by parties unknown. This is complete fabrication of a situation which is riddled with untruths from the start.
7. A. Clark's statement at the hearing that "The Collins crew was in contravention of Section 35 of the Act as lines were cut out prior to the land coming open ...." is not true and has been addressed by the Larder Lake Mining Recorder in the case *Kerr vs. Strike Minerals (exhibit no. 17)*.
8. A. Clark's statement at the hearing that "The stump post was planted by some other party who wanted the ground". Later, in a letter to the Mining Recorder after the hearing, A. Clark tells the story that a Mr. Foster cut the stump post to replace a post which had apparently gone missing. Again, fabrications being presented at different times as need be to cover up the truth.
9. A. Clark's statement at the hearing that Paul Collins is a "green horn". This is false.
10. A. Clark's statement that Paul Collins was a helper on other mining claims and did not stake 1220395. This is false.

11. A. Clarks' statement at the hearing that "...the helper always finishes after the staker as a helper is required by the staking rules to follow the staker". This is obviously false. In the August 12, 1997 correspondence A. Clark attempts to confuse this important aspect of staking/blazing by quoting clause "e)That Alex Clark stated in the hearing that Alex Clark contacted 3 mining recorders and had 2 employees contact mining recorders prior to September 17, 1996 to verify finishing time to be marked on the #1 posts and that all mining recorders instructions were to mark the staker or runners time as the completion time as opposed to when the helper arrived. No attempt was made to alter reality". Certainly, the Commissioner must wonder about the integrity of the other claims staked by Mr. A. Clark in Tyrrell Twp. on September 17, 1996, if this was the procedure followed by Mr. A. Clark.
12. A. Clark's statement at the hearing that a helicopter did not arrive at the pad marked *A in exhibit no. 1*. is false. All the various Royal Oak personnel and the Skytech helicopter pilot have given testimony to the contrary. Royal Oak can provide an invoice from Skytech if required for services rendered on September 17, 1996.
13. A. Clark's statement in his correspondence of August 12, 1997 [part j] that infers that Paul Collins did not walk northward upon exiting the helicopter pad (marked *B in exhibit no. 1*) is false. Interesting that in this correspondence of August 12, 1997 [part j] A. Clark acknowledges that a helicopter landed north of the disputed ground but at the hearing on May 7th, 1997, stated that he observed no helicopter (see point no. 12 above).
14. The statement by the Larder Lake Mining Recorder in his June 3, 1997 response that "It is probable that Collins did not sufficiently blaze his boundary lines in the time he indicates he ran around the claim" is false. How can the Mining Recorder make this statement when he was not present at the staking and did not make a site visit. Also, how can he make this statement about this claim while at the same time accepting other claims in Tyrrell Twp. which were staked on September 17, 1996 in less than 20 minutes? Refer to *exhibit no. 10 in Schedule A*.

*Exhibit 23, Schedule F* (Exhibit 10), entitled "Response to points made by A. Clark in August 12, 1997 Correspondence" is reproduced:

1. a) The east and north boundary marking Clark's claim L-1221665 is not as well cleared out as indicated by Mr. Clark and most of the north boundary could not be easily traversed by a motorbike, even if one did actually exist and was used to traverse this area. The bush in the area of claim 1220395 is mixed with some good and some not so good areas.

2. b) As reported by the Larder Lake Mining Recorder in his response of June 3, 1997 (*exhibit no. 17*), "Mr. Bailey's information confirms that the two claims are more or less for the same area of land".
3. c) Mr. A. Clark would have indeed seen other Royal Oak stakers moving northward from the helicopter pad marked *A in exhibit no. 1* to stake claims to the north, *if he had actually been there*. However, Paul Collins moved northward from a helicopter pad marked *B in exhibit no. 1* to reach the no. 1 post area of claim 1220395. As previously reported, Mr. Clark and his alleged stakers were not seen by any of the Royal Oak people in the area at any time on September 17, 1996. Similarly, Strike Minerals people did not see any of the other alleged A. Clark's people in the vicinity of claim 1221668 on September 17, 1996.
4. d) None of the Royal Oak personnel and contractors (Peter Harvey, Mary Stocker, Roland Collins, Paul Collins, John Levesque) or Strike Minerals people heard or saw a motorbike in the area on September 17, 1996. It is unbelievable that all these people provide this testimony and yet only one person, Mr. A. Clark, states otherwise and no other witnesses on his behalf or otherwise can come forward to make this allegation under oath.
5. e) This point is meaningless and the reader is asked to refer to *part no. 11 in Schedule C*.
6. f) Roland Collins did for a few minutes, on the evening of September 16th, speak with an individual at a chopper pad located immediately south of highway 560 in NW Tyrrell Twp. However, Roland did not negotiate any deal with this individual and did not realize that this individual was a Mr. A. Clark until the May 7, 1997 hearing in Kirkland Lake.
7. g) Royal Oak only disputes claims which are not honestly or properly staked. Claims which were acquired in the area of Tyrrell and Knight Twps. by Royal Oak on September 17, 1997 (**sic**) were acquired fairly and honestly. Royal Oak did not dispute claims 1221622 and 1221621 which it had also staked since another staker completed the staking first. Royal Oak does not dispute claims which were staked properly and honestly by competitor stakers and this is illustrated by *exhibit no. 14 and 15 in Schedule A*. It is interesting to note that other parties who do not have a large land position in Tyrrell Twp. are also disputing some of Mr. A. Clark's claims staked on September 17, 1996.
8. h) Royal Oak did not file work on claim 1220395 as there was no competition on that claim. Assessment work was filed on other claims to avoid the needless exercise of responding to fraudulent claims by dishonest stakers. Interestingly, A. Clark filed assessment work on claim 1221668 which was allegedly staked on September 17, 1996 and Royal Oak is still attempting to have its dispute against this claim heard.

9. i) If J.C. Pigeon did indeed stake the claim why hasn't he come forward and why wasn't he observed by any of the different parties working in the bush on September 17, 1996? Why were his claim posts not seen on September 17, 1996 by Mary Stocker and why were the posts photographed by Mr. Bob Bailey different then (**sic**) the ones reported by Mr. A. Clark at the hearing? Why was a stump post used for post no. 2?
10. j) This statement is completely false and typical of the responses made by Mr. A. Clark in writing prior to and verbally at the hearing on May 7, 1997. Royal Oak did loose (**sic**) some claims to the competition in the vicinity of Indian Lake but also won some claims in this area. Some claims in this area are still under dispute and will not be commented upon here. Mr. Roland Collins did not say that his son was inexperienced and during the hearing testimony it actually came out that Mr. Pigeon was inexperienced and had just acquired his prospectors license a few days prior to the staking rush on September 17, 1996. Paul Collins on the other hand acquired his license before June 1, 1996 and had helped in staking prior to acquiring his license and had subsequently staked claims prior to September 17, 1996. Paul Collins did indeed walk northward from helicopter pad marked *B in exhibit no 1* in order to proceed to the area of the no. 1 post for claim 1220395.

Mr. A. Clark's comment that he has staked more than 5000 claims is rather irrelevant, however one has to wonder why Mr. A. Clark would have to ask three different mining recorders about the finishing time to mark on the no. 1 post [clause no. e in his August 12, 1997 response]. If he had truly personally staked this many claims in say a 30 year career it would amount to 166 claims per year and surely he would know about the regulations re blazing and staking and the marking of the finishing time.

reproduced: *Exhibit 24, Schedule G* (Exhibit 10), entitled "Summation of Dispute" is

1. Paul Collins, working for Royal Oak Mines, staked claim 1220395 on September 17, 1996 in Tyrrell Twp.
2. There was no competition in the area and Paul Collins was able to take his time and properly complete the claim in a time of 20 minutes.
3. Other Royal Oak personnel in the area of helicopter pad marked *A (exhibit no., 1)* did not see any individuals in the area of the alleged north boundary of 1221665.
4. John Levesque, the helicopter pilot working for Skytech, did not see any individuals in this area. No motorbike was heard or seen on the morning of September 17, 1997.

5. Neither Paul Collins or other Royal Oak personnel saw or heard a motorbike at any time on September 17, 1996.
6. Strike Minerals personnel working immediately further to the north did not see any of A. Clark's alleged stakers in that area on September 17, 1996 at 9:00 a.m. These individuals, likewise, did not see or hear a motorbike on the morning of September 17, 1996.
7. Mary Stocker walked the west boundary of leased claim CLM 296 after the 9:00 a.m. staking and did not see any posts from 1221665. These posts were observed later in May, 1997. There was no competitive staking in the area of claim 1220395 on the morning of September 17, 1996.
8. The Larder Lake Mining Recorder accepted the recording of claim 1221665 over 1220395 because it had a faster completion time of 6:50 minutes.
9. Royal Oak Mines has demonstrated in the past that if its claims were improperly staked or fairly won by the competition, then it will withdraw any filed disputes. This has been illustrated in the April 4, 1995 Matachewan staking rush, the June 1, 1996 staking rush in Timmins and the September 17, 1996 staking rush in Gowganda-Shiningtree (*exhibit no. 14 and 15*).
10. Royal Oak did not file any assessment work on claim 1220395 because it was won without competition at 9:00 a.m. on September 17, 1996.
11. Royal Oak Mines chose to file a dispute on claim 1221665 vs. Mr. A. Clark because it was quite clear that his staking was fraudulent.
12. Mr. A. Clark called Royal Oak Mines (P. Coad) after Royal Oak filed its dispute against 1221665. The exact date unfortunately was not recorded, however the post-it note which recorded the message taken by Peter Harvey is included here as *exhibit no. 19*. Royal Oak (Paul Coad) called Mr. A. Clark and talked with him and after learning of his desire to negotiate a deal prior to the hearing Paul Coad advised Mr. A. Clark that no deal would be discussed because Royal Oak had honestly and properly staked 1220395 and the truth would come out in the hearing.
13. At the hearing on May 7, 1997 in Kirkland Lake it was learned that no witnesses involved with the staking of 1221665 showed up other than Mr. A. Clark who was not in the vicinity of 1221665 when it was allegedly staked. It was stated by Mr. A. Clark that a helper did help Mr. Pigeon in the alleged staking and that

for some reason some party must have switched the posts, using a different type to that originally used in the staking and also replaced the no. 2 post with a stump post. It was deciphered by the Larder Lake Mining Recorder that Pigeon must have placed the wrong completion time on his post and that the helper came in 3 minutes after Pigeon. It was learned after the hearing that a Mr. Foster cut the stump post for Mr. A. Clark when he affixed the tags on the posts. This was the explanation offered by Mr. A. Clark to the Mining Recorder after the hearing.

14. Because of all the non-compliances with the **Mining Act** concerning 1221665 and various questionable aspects about claim 1221665 and the lack of any witnesses for this claim, the Larder Lake Mining Recorder chose to have this claim disallowed in his hearing response of June 3, 1997.
15. The Larder Lake Mining Recorder also chose to disallow claim 1220395 staked by Royal Oak stating that the time of completion of 20 minutes would not have allowed for sufficient blazing, however, the same Mining Recorder accepted other claims staked in Tyrrell Twp. on September 17, 1996 with shorter completion times (*exhibit no. 10*). Royal Oak paid to have an independent consultant locate the claims in question and this work illustrated that 1220395 was properly staked and that the lines were traceable in the field. The choice of Mr. Bob Bailey, an ex-government employee with experience in claim matters, was approved by the Larder Lake Mining Recorder prior to Royal Oak awarding the contract to Bob Bailey.
16. There was more than substantial compliance with all aspects of the **Mining Act** in the staking of claim 1220395 and for this reason Royal Oak could not accept the decision by the Larder Lake Mining Recorder and accordingly has taken this case to the Mining and Lands Commissioner. Royal Oak sites previous unreported cases before the Mining and Lands Commissioner concerning pre-blazing of directional lines and concerns about adequate blazing [ie. Kerr vs. Strike Minerals in 1996 and Pye vs. Falconbridge in 1995, both referenced in other *Schedules* in this document]. Both of these previous cases compare in many respects to the current situation involving 1220395. Royal Oak would suggest that consistency with previous decisions should prevail and that the Tribunal and the Mining and Lands Commissioner accept the facts and information presented in this case and acknowledge that claim 1220395 was staked within substantial compliance of the **Mining Act**.

17. Royal Oak has spent considerable time and energies in this case because Royal Oak won the claim honestly and properly and is upset that an individual can attempt to win a claim by fraudulent actions. Royal Oak would appreciate some type of compensation for this effort should the ruling of the Tribunal and Mining and Lands Commissioner rule in Royal Oak's favour.

### **Evidence Considered, Comments and Findings of the Mining Recorder**

#### **The Clark Mining Claim**

The evidence used in support of these findings, based upon the fact that the parties were agreeable to a written hearing, is found in the Mining Recorder's Order dated June 7, 1997, as well as the submissions of the parties.

There was little or no direct evidence concerning the Pigeon staking of the Clark Mining Claim. The tribunal, in these circumstances, believes that it is relevant to set out substantial portions of the Mining Recorder's decision. On page 3 of the Order, which commences with the heading, "THE HEARING", beginning with the sixth paragraph, Mr. Spooner's summary of evidence, and thereafter his findings, are reproduced:

It should be noted that Mr. Clark did not bring any witnesses to the hearing. As Mr. Clark was busy staking his own claim on the morning of Sept 17 he was not present on Pigeon's claim when it was staked. The evidence Mr. Clark offered was based on the planning and layout before the staking began, hearsay evidence and a written statement by Jean-Claude Pigeon submitted as evidence in the hearing (exhibit #10). Mr. Clark was advised that, because Mr. Pigeon was not present as a witness for the disputant to cross examine, Pigeon's written statement could not be given much weight as evidence. Likewise hearsay evidence can not be given much weight.

The written statement by Pigeon details the staking of a mining claim in less than 7 minutes. Apparently a trail bike was used to travel from corner 4 back to corner 1 in completing the last line. Mr. Pigeon's statement also indicates that the helper arrived at the completion point (corner #1) 3 minutes after Pigeon was there.

Mr. Clark explained that a Honda 110 2 wheel trail bike was used by Pigeon from corner 4 to corner 1 and that Pigeon would have stopped along the trail to do some blazing. According to Mr. Clark another company had cleared a good trail which was used, for the most part, as the north boundary of claim L 1221665 and the travel route for the trail bike.

and on page five:

Mr. Clark submitted that the helper always finishes after the staker as a helper is required by the staking rules to follow the staker. ... Mr. Clark's final submission was that the Pigeon claim was staked properly and should stand.

In his findings, commencing at the bottom of page eight, the Mining Recorder states:

Mr. Clark questions the rules regarding the finishing time of a staker when the finishing time of the helper is later. I can find nothing in the **Mining Act** that specifically states a helper must proceed behind the staking licensee. Subsection 10(2) of the Staking Regulation states the rules for staking when the land is open for less than 24 hours:

"(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 north-east 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."

In applying the above rules and by process of elimination, considering all the staking actions, the only tasks left for a helper to perform are the blazing of lines and the constructing of claim posts. Note that the helper in the first twenty-four hours does not require a license as they cannot inscribe posts. A license is always required if, in any situation, someone erects a post, inscribes a post or affixes a tag to a post (see subsection 10(1)(2) Staking Reg). Loose claim posts may be placed in the vicinity of the corner before the land is open but no tags or inscriptions can be affixed or written until the land is open. Stump posts may not be erected before the land is open. A stump post is an erected post. The boundary lines may be somehow marked however if blazing is done before opening time that blazing does not count to satisfy

the requirements of the staking regulation and the blazing must be completely done after the land is open. Tags may be affixed at the time of staking or time may be saved during the staking action by staking without tags. The metal claim tags would then be assigned by the recording office after the staking and affixed to the posts within six months.

There are two ways of thinking about the situation where the helper finishes after the staking licensee:

1) If the helper is not finished blazing when the staking licensee marks the completion time on the post then the completion time is incorrect because the staking is not completed.

OR

2) If the helper is not finished blazing when the staking licensee marks the completion time on the post then the part of the boundary lines blazed after the completion time (as indicated on the #1 post) does not count towards satisfying the staking regulation.

When there is a highly organized effort to compete for a mining claim on opening morning there are often five people staking a single claim. This provides for rapid completion time. One licensee is responsible as the "staking licensee" to erect and inscribe all the posts starting in the NE corner and running clockwise around the claim ending back at the NE corner. There could be four helpers (one at each corner) who, after opening time, blaze one line each between two corner posts. In this situation I prefer to think in terms of 2) above as it is likely that there is a reasonable amount of blazing done on all the lines.

In this situation, however, I prefer to consider that Mr. Pigeon WAS NOT finished his staking as he indicated on his #1 post and on the application to record. By Mr. Clark's evidence the helper returned to the #1 post 3 minutes after Pigeon. Also a written statement by Pigeon confirms the helper was three minutes behind Pigeon. I am not certain if I can accept as evidence from either Mr. Clark or the written statement from Pigeon when the helper finished. Mr. Clark was not at the corner when Pigeon or the helper finished and Mr. Pigeon was not available as a witness at

the hearing. I do believe, however, that the situation is probably factual in that the staking licensee returned to the starting point before the helper. I cannot be certain, in the fashion the evidence was presented to be, when the helper did actually arrive back at the #1 post.

The Mining Recorder goes on to discuss the cancellation of a mining claim, pursuant to subsection 44(1.2) of the **Mining Act**. He then states:

Mr. Pigeon has indicated the wrong completion time on his application to record. I am not certain how one establishes "knowingly" however, I suggest that there has been a false statement made and therefore the claim should be cancelled for it. There are other reasons why I feel the claim should be cancelled.

Commissioner Ferguson makes comments regarding an indicated completion time of four minutes in *Helbig v. Korpela*, 6 M.C.C., page 142. In that case there was an appeal filed from a decision of the recorder. The recorder had refused to record a claim where the application was delivered to the recording office at 8:15 AM only 15 minutes after the land was opened for staking. By process of time study it was determined that the staker would have completed the staking of a claim in four minutes. The Commissioner states on page 149:

'...WHILE IT MAY BE A MATTER OF JUDICIAL NOTICE THAT THE FOUR MINUTE MILE HAS BEEN BROKEN BY A PROFESSIONAL RUNNER IT IS BEYOND ACCEPTATION UNDER THE CIVIL STANDARD OF PROOF THAT A PERSON DRESSING IN BUSH CLOTHING AND CARRYING STAKING EQUIPMENT WOULD NOT ONLY ACHIEVE AN ANALOGOUS SPEED BUT ALSO BLAZE LINES, INSCRIBE POSTS AND AFFIX TAGS AT THE SAME TIME. IN THE LIGHT OF CIVIL STANDARD OF PROOF, NAMELY BALANCE OF PROBABILITIES, THIS TRIBUNAL CANNOT FIND THAT THE FACTS ALLEGED BY THE APPELLANT HAVE BEEN ESTABLISHED TO THAT STANDARD BY THE EVIDENCE."

I believe it is within the realm of possibility that Mr. Pigeon ran around the claim, inscribed his posts, rode the trail bike and returned to the #1 post within the time he indicates. I have no proof that he did not.

Mr. Pigeon's helper, however, could not have possibly completed properly his responsibility in the staking action. The most time consuming action during the staking is the blazing of lines. There is no possibility that a helper can properly blaze a boundary line as fast as a person can otherwise run around the claim inscribing posts. Mr Pigeon's objective in riding the trail bike was to save time. How much time? Surely he saved minutes. To say that the helper arrived 3 minutes after the staking licensee on foot is to suggest that the helper went almost as fast as Mr. Pigeon around most of the claim. If the helper arrived three minutes after Pigeon he could not have done very much blazing. To add three minutes on to the time of 9:06:50 results in the helper arriving at the completion point at a suggested time of 9:09:50. In other words the suggestion is that the helper blazed all four lines in just under 10 minutes. He blazed approximately 1600 metres or 1 mile of boundary line in 10 minutes.

Again the Commissioners in past cases have confirmed that blazing is definitely an integral part of the staking action. The blazing must be done. A competition is not fair unless reasonable compliance with the rules is expected of all the competitors. In the past if it was established that the blazing was done before the land was open and not after, it constituted a non compliance that was, in some cases, severe enough to cancel the claim (not substantial compliance). If the line was marked before the opening time and not after, the interpretation was that the line was not done.

I have questioned several experienced stakers independently and they respond consistently that it would take ten minutes approximately for an experienced staker in good physical condition to blaze properly one 400 meter boundary line between two corners as quickly as possible. At that rate it would take 40 minutes for one helper to properly blaze completely around an entire claim. The ten minute rule seems to make sense in that most experienced competitors have five people on the claim indicate a completion time of ten to twelve minutes.

Allowing that there is an exception in every case and that poor blazing, to a degree, may constitute substantial compliance I find it within the realm of possibility that the helper could have cut the time in half. Perhaps if he blazed the lines poorly so that there was some semblance of a boundary he may have accomplished his task at a rate of 5 minutes/ 400 meter line. Then he would have returned to the #1 post at approximately 9:20 which is the time the disputant indicates was his completion time.

I have no alternative but to accept the suggestion of Mr. Clark and Mr. Pigeon that the helper arrived back at the #1 corner at 9:09:50. If he did arrive at the completion point that quickly he did not blaze the boundary lines in a sufficient manner that would constitute compliance with Subsection 8(4) of the Staking Regulation.

The **Mining Act** does not require absolute compliance with the Staking Regulation. Section 43 only requires "substantial compliance: and goes on to say that it will be deemed to comply if there is no likelihood anyone will be misled and there has been an attempt made to comply in good faith. In my opinion any licensee who attempts to "tie on" to staking should expect to see blazing between corner posts otherwise they may be misled to think there is not a mining claim there. Also a Boundary line that cannot be followed does not constitute an attempt made in good faith to establish a boundary "clearly marked".

In competition there is nothing in the **Mining Act** or Staking Regulation that infers that the rules for the first twenty-four hours should be applied differently than any other staking rules. In competitive situations, however, there must be some degree of strict application of the rules or there will be no order to the competition and it will be impossible to decide on conflicting rights. Likewise there must be fair staking standards expected of the competitors otherwise some will take advantage by doing less work and therefore completing the task more quickly without compliance. Although the blazing of boundary lines is the most time consuming part of the staking action it must be considered an integral aspect of the staking and time must be taken to accomplish it.

If Mr. Pigeon's helper finished at 9:09:50 the staking does not substantially comply with the staking requirements because all four lines are insufficiently blazed. Claim L-1221665 is "deemed abandoned" according to Section 71(1) of the Mining Act

## **Findings**

Were Both Stakers in the Field at 9:00 am on September 17, 1996

In reviewing the evidence submitted, there is insufficient material upon which the tribunal can base an assessment of what took place in the field. Indeed, much of the evidence and particularly the lengthy submissions dealt with this issue.

It was the choice of the parties to proceed before the tribunal without an in-person hearing and it is safe to say that the allegations of dishonesty and perhaps even fraud alleged by either side could not possibly be adjudicated upon without the benefit of hearing directly from **all** of those involved in order to make findings of credibility as well as plausibility. Indeed, the tribunal notes, that notwithstanding the fact that the Mining Recorder conducted an in-person hearing, he was unable to come to any conclusion as to what actually took place in the field as between the two stakers.

Despite Mr. Clark's assertions to the contrary, the tribunal finds that Paul Collins was at the location of his mining claim on the morning of September 17, 1996. While, based upon the evidence filed, there is no satisfactory explanation as to why the Clark and Royal Oak teams did not encounter one another's stakers on that day, the tribunal finds that there is insufficient evidence to make findings concerning the issues raised. In this regard, the tribunal is unable to come to the conclusion that either Mr. Pigeon or Mr. Collins were not present at the times they have indicated. Indeed, if the tribunal were to make such a finding, the implications would be quite serious indeed, for it would involve considerations of wilful contravention of the **Mining Act** and regulation pursuant to subsections 26(1) or (7) with the possible attendant suspension of the license or cancellation of all mining claims, should the recommendations so suggest and should the Minister act upon such recommendations. Rules of Natural Justice and procedural fairness require that anyone suspected of such wilful contravention be advised of such and be given full opportunity to present their case. As there was no hearing before the tribunal, notwithstanding the serious allegations on either side, the inquiry here will be limited to whether either of the Clark or Royal Oak stakings are such that they should be recorded.

With respect to the extensive evidence tendered on this issue, the tribunal will not deal with any of it insofar as it may impact upon this issue. Therefore, although the video tendered by Royal Oak was reviewed, there was nothing in it which constituted evidence which the tribunal **did** take into account in these Reasons.

### The Clark Mining Claim

There are several issues surrounding the staking of the Clark Mining Claim which the tribunal must address. The second involves the relationship between the completion time of the licensee and his helpers. The first involves a more fundamental inquiry into the nature of the staking of a mining claim and the speed with which it can be accomplished.

### The Seven Minute Claim

The matter of the rapidity of the staking of mining claims generally, arising out of the rush situation in the caution lands in Temagami, has caused this tribunal concern. Former Commissioner Ferguson's comments regarding the four minute mile form the basis for this concern.

The tribunal has no doubt that there are cases where a mining claim can be staked in a matter of minutes. The first example which comes to mind is that staking of land covered by water, such that it can be witnessed from a single location. Clearly, the time required for such staking would be as long as it would take to inscribe a loose post, should one be readily available.

In cases involving motorized trail vehicles, such as the case which Mr. Clark alleges was used for the Clark Mining Claim L-1221665, the tribunal finds that it would require fairly extensive evidence concerning the use of such vehicle. Although not exhaustive, the following lists provides examples of the type of evidence which might be considered persuasive. At the very least, registration of ownership or a rental agreement involving the vehicle must be filed. There must be clear evidence that the vehicle was available and utilized on the date the staking took place. In support of such evidence, there must also be information on access to the site, namely by what means, such as on the bed of a truck and detailed mapping of which route was used.

There must be clear and unrefutable evidence of the lines which are traversable by off-road vehicles. In these days of no MND&M inspectors, extensive photographic evidence of such lines would be required at a minimum, to establish the ease with which the line can be traversed. In this regard, the state of the surveyed line and bush line requires photographic evidence for the tribunal to make a finding as to whether a trail bike would be of any assistance to the staker.

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.

Mr. Pigeon did not attend the hearing before the Mining Recorder. The fact that the parties elected to proceed in the appeal to the tribunal based upon written submissions is unusual in circumstances involving the evidentiary-based nature of such a hearing. However, the absence of an in person hearing before the tribunal need not be fatal to presenting an appeal, where there has been evidence presented before the Mining Recorder involving a seven minute staking. 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.

As stated above, with the incredible situation of a seven minute staking, the appellant has a considerable burden to discharge in convincing the tribunal that such a staking was possible in the circumstances of this land and that the particular staker involved was up to the challenge. The tribunal finds that this burden has in no way been discharged by Mr. Clark.

#### Impact of the Finish Time of the Helper

The second matter involves the finish time of the helper relative to the completion time set out on the application to record. The tribunal has dealt with this issue most recently in **Kerr v. Strike Minerals Inc.**, January 26, 1996 (unreported), MA-006-95, where Deputy Commissioner Goodman states within the first paragraph on page 13 of his Reasons:

... The tribunal concurs with the Recorder that, at worst, there may have been part of the line between the No. 1 and No. 2 posts and part of the line between the No. 4 and No. 1 posts that were not blazed or poorly blazed. The Recorder has indicated in his Reasons that he was not certain that the facts were as severe as this worst case scenario. It is important to recall from the evidence that much of these parts of the lines were on relatively clear land with sparse vegetation and few trees. The Recorder found that, even in the worst case scenario, his opinion would be that Mr. Moyer substantially complied with the requirements of the Regulation concerning staking. The Recorder has indicated that none of the other unspecified minor defects in Mr. Moyer's staking convinced the Recorder that the staking did not substantially comply, as reasonably as circumstances would permit. In particular, the Recorder has concluded that Mr. Moyer made an attempt in good faith to comply, and no one was misled.

Perhaps the words of the Mining Recorder himself, as set out elsewhere in these Reasons, best describe the situation. This is namely that there can be one of two implications to the helper finishing after the staker has inscribed his or her completion time. It can either mean that the completion time is incorrect and does not show the true time when staking was completed,

including all elements of the staking which necessarily includes inscription of completion time on the last post **done after** all blazing is completed. Or alternatively, it can mean that the staking is in substantial compliance (based upon other facts of the particular case), but that there is a blazing deficiency in the last line, due to the fact that the final minutes of blazing are not included in considerations which make up the acceptability of the staking.

In either case, the situation for Mr. Clark's Mining Claim is that it will fail. If the final three minutes of blazing are to count towards the adequacy of meeting the staking requirements, then the inscription of completion time, as recorded on the application to record is false, and therefore, the mining claim is deemed abandoned. If the final three minutes of staking are not to be counted towards the adequacy of staking requirements of this seven minute claim, the tribunal finds that the appellant, Mr. Clark, has otherwise not discharged his evidentiary burden of showing that Mr. Pigeon was able to stake the claim in the seven minutes and more particularly, demonstrating just how Mr. Pigeon accomplished such a feat in such a short time. The evidence concerning use of a trail bike, it is noted, only goes so far, as the trail bike was not said to have been used on the entire mining claim, and Mr. Pigeon would have also had to inscribe and erect posts. In fact, it is not clear whether Mr. Pigeon was doing some of the blazing as well, but if he was, he would have had to stop the trail bike every so often to blaze, which would have further slowed him down.

All of this is without even mentioning the problem of the stump post which appeared after the staking and was made by a person not involved in the staking, but done some time after when tags were affixed to the posts. The tribunal will adopt the comments of the Mining Recorder in connection with this activity.

For these reasons, the appeal concerning the Clark Mining Claim L-1221665 will be dismissed.

### The Royal Oak Mining Claim

The issue of how long it takes to properly stake a one unit claim has not been the subject matter of recent disputes before the Commissioner, so that there is little factual evidence speaking to this matter. The tribunal has considered the comments of the Mining Recorder, which are based upon years of vast experience in receiving and assessing the adequacy of stakings, including the issue of elapsed time. 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**.

The tribunal finds that Paul Collins was present on the ground and staked Royal Oak Mining Claim 1220395 on September 17, 1996, commencing at 9:00 a.m. and finishing at 9:20 a.m. He worked alone, without helpers. Therefore, in attempting to discern what actually took place on the ground, the tribunal has extrapolated from the known information that an average of five minutes would be available to the staker to erect a corner post and blaze one adjoining boundary.

The issue to be determined is whether, through staking in such a short time frame without helpers to blaze lines, Paul Collins was able to perform sufficient of the requisite elements of staking to constitute either a valid staking, or to be deemed to substantially comply with the requirements of the **Act** and regulation Section 38 requires that the staking be performed in the prescribed manner. Ontario Regulation 7/96 sets out detailed elements of staking, involving a myriad of situations and exceptions. Subsection 43(1) of the **Act** requires that substantial compliance "as nearly as circumstances will reasonably permit" will be sufficient. Subsection 43(2) will deem substantial compliance in certain instances where there may be a "failure to comply with a number of specific staking requirements".

Subsection 8(4) of O. Reg. 7/96 speaks to the issue of the amount of blazing required in staking:

8(4) If there are standing trees on the perimeter of the area being staked, **the perimeter of the mining claim must be clearly marked during the staking by plainly blazing the trees on two sides only** in the direction of travel and **by cutting the underbrush along the boundaries of the claim.** (*emphasis added*)

The legislative requirements are not to do "some" blazing. The legislation quite definitively sets out what the purpose of the blazing is, namely to mark the boundary clearly, as well further delineate the boundary through the clearing of underbrush. In **McChristie v. Rousseau; Culhane v. Guiho**, 5 M.C.C. 433, commencing at page 438, Commissioner Ferguson sets out the provisions of the legislation, which he characterizes as the statutory standard, and then goes on to state:

It may be noted in reading section 56 in its entirety that there is no previous reference in the section to the word "trees" and accordingly the use of the definite article coupled with the word cannot refer back to trees mentioned previously in the section. If the comma were not used after the word "trees" in the second line or an additional comma were inserted after the word "underbrush" it would be clear that the use of the definite article would be fulfilled by conditioning the meaning of the word "trees" to those trees "along the boundary lines of the claim". On the other hand it cannot be expected that every tree on the mining claim must be blazed and I conclude that, in spite of the comma or the absence of

a comma, the intent is to require the blazing of "the trees ... along the boundary lines of the claim." The plain meaning of the words is that every tree on the boundary should be blazed.

The wording upon which Commissioner Ferguson based his analysis, although now found in O.Reg 7/96, is essentially unchanged, and the tribunal finds that it adopts this approach, namely that staking requires a clear marking of the boundary through blazing of all trees along the perimeter of a mining claim.

The tribunal has considered the amount of blazing which Paul Collins would have been able to perform in what was left of the five minutes after he inscribed and erected his corner posts, and finds that approximately four minutes of blazing would have been available per boundary. While Paul Collins was vague in his evidence, the Mining Recorder questioned him to draw the conclusion that approximately five blazes were made on each boundary. Collins' evidence before the Mining Recorder appears to have been uncertain and tentative, and may be inconclusive. However, his filed statement with the appeal (see Ex. 10, *Exhibit 22, Schedule D*) simply states, " I completed the necessary staking, blazing and inscription of the four posts as required by the **Mining Act** ..." is of no assistance to the tribunal, owing to its absence of details regarding the blazing or staking in general. The burden of providing evidence to persuade the tribunal rests with Royal Oak and it did not discharge this evidentiary burden. The opinion of Paul Collins does not constitute evidence. The absence of facts is damaging in this regard.

The tribunal finds that the number of blazes per boundary found by the Mining Recorder is reasonable in the circumstances and it will adopt this finding.

There is a serious question raised by the findings of the Mining Recorder and the actual time elapsed which suggests that inadequate blazing was performed by Mr. Collins. While he was hampered by the fact that he was working alone, there is nothing in that fact which constitutes a circumstance which would excuse him from this basic staking requirement. Nor was there evidence that the ground was so swampy-like that it was impossible to traverse. Indeed, his completion time indicates quite the contrary regarding the nature of the ground traversed. The tribunal finds that, without question, in a reasonably wooded area, in the case of the Collins staking that the number of blazes found by the Mining Recorder (5 per line), or even the number of blazes which a lone staker acting as his own helper could reasonably perform in possibly four minutes per line, falls far short of those required by O. Reg 7/96. Therefore, the tribunal finds that the staking by Paul Collins of Royal Oak Mining Claim 1220395 does not substantially comply with the requirements of the legislation, within the meaning of subsection 43(1) of the **Act**.

The manner in which the test created by subsection 43(2) of the **Act** for deemed substantial compliance is to be viewed with respect to a less than perfect staking is not entirely clear, and continues to evolve. Certainly, the decision of the Divisional Court in **Ramsay v. Fernberg et. al.** (1989) 7 M.C.C. 385 has moved the issue of substantial compliance towards greater leniency, disallowing the application of the cumulative defects doctrine. Since that time, the legislation has changed with the addition of the "deemed substantial compliance" tests found in subsection 43(2). The subsection is set out:

- 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,
- (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.

It must be stated at the outset that the tribunal has no doubt that Paul Collins was acting in good faith. However, the lack of attention to the elements of staking, namely quantitative blazing sufficient to mark the boundary, is of concern to the tribunal. The case of **Pye v. Falconbridge Limited**, June 17, 1996 (unreported) MA-021-95 was cited by Royal Oak as an example of a staking allowed by the tribunal, where the time required to complete the staking was 21 minutes. The tribunal has reviewed the facts of that case and notes that there were large tracts of cleared land which did not require blazing, allowing the stakers to proceed more quickly. Also, in that case, Mr. Bailey was present on the ground and was able to observe at least part of the blazing, and while the disputant Mr. Pye challenged the quality of Brunet's blazing (for Falconbridge) the Mining Recorder found that there was no evidence of inadequate blazing. Therefore, the tribunal finds that the facts in the **Pye v. Falconbridge** case can be distinguished from the current appeal, in that there is adequate explanation concerning both the time it took to stake and both the degree and need for blazing, given the character of the land.

There is also no doubt that Mr. Collins was put in this position by Royal Oak, as the overriding message to this and all stakings is "finish fast, finish first". The only problem in proceeding in this manner at all costs is that there comes a threshold in the quality of staking which, if crossed, renders the staking unsupportable.

Therefore, in reviewing the two legs of the test of deemed substantial compliance, taking the second one first, there is no doubt concerning Paul Collins' **bona fides**. He was at the location on the date and at the time in question, he inscribed posts, he ran fast. The tribunal

has no difficulty in recognizing that Paul Collins is an exceptional athlete, for which he has received public recognition (see Ex 10, *Exhibit 13*).

However, the first leg of the test for deemed substantial compliance is that the failure to comply is not likely to mislead any licensee desiring to stake in the vicinity. It is uncertain from the cases seen by this tribunal since the legislative changes in 1991 whether, in a competitive situation, the rushing through the staking process which may result in poor or inadequate blazing or clearing of underbrush, can constitute circumstances in the bush which may mislead stakers wishing to stake in the vicinity.

There is a comment contained in the Bailey Inspection Report (Ex. 10, *Exhibit 4*) to the effect that "Generally, the blazing and flagging of the claim lines made them easy to follow." The inspector goes on to mention several specific lines, none of which are applicable to the Paul Collins staking. The Mining Recorder did not rely on the inspection report as a copy was not given to Mr. Clark. However, in its Order to File, the tribunal required all documents to be relied upon to be both filed and served on Mr. Clark.

The Mining Recorder found that the blazing along any one of the boundaries was not sufficient to denote a blazed line which would tell stakers in the vicinity that a persisting mining claim exists. A staker could readily cross one of Collins' lines and owing to the distances between the blazes, not even know that the line was crossed, until he or she seeks to record the staking in the Office of the Provincial Mining Recorder.

However, the issue of adequacy of blazing is further clouded by the directional lines having been cut out prior to September 17, 1996. Therefore, the remarks of Mr. Bailey concerning the quality of the lines may apply to the blazing coupled with the directional lines cut. The question then becomes complex, as the tribunal agrees with the Mining Recorder that it would not be possible to locate oneself in the field on the basis of 5 blazes per 400 metre boundary, but the directional lines which do in fact exist would aid in being able to discern that a mining claim exists, notwithstanding that they do not form part of the act of staking.

The tribunal finds that five blazes along a 400 metre boundary is sufficiently inadequate in meeting the elements of staking that it would likely mislead a licensee desiring to stake in the vicinity. Furthermore, when directional lines or pre-blazing is done prior to the staking, not only do they not count towards the staking, which is understood, but their existence will impact negatively on the attempt to discern in the field whether there is adequate blazing such that a licensee will not be misled. In other words, as the test is focused on adequacy of staking, including blazing, and there may have been activities on the ground prior to when the lands came open for staking which interfere with the objective application of this test, where the party seeking to have his staking upheld is responsible for the interference, such as is the case with Royal Oak's directional lines, this will impact adversely when applying the test to their fact situation. While the inspection may actually indicate that the lines could be located in the bush, it is impossible to remove the directional lines which do not form part of the staking when making the judgement as to whether the line can be found.

Therefore, the tribunal finds that it must return to the situation described by the Mining Recorder, who is quite correct in his finding that a blaze located every 100 metres or so, taken alone, is not sufficient to locate oneself in the field. The tribunal finds that the staking by Paul Collins was such that, due to inadequate blazing, the test set out in clause 43(2)(a) is not met, as there will be inadequate indication in the field for a staker to tie on, and therefore would be likely to mislead a staker desiring to stake in the vicinity.

As found in **Tenajon Resources Corporation v. Leblanc, D & H Consulting Services Inc. and MND&M** January 27, 1998 (unreported), MA-001-97, where there is no substantial or deemed substantial compliance and there is adverse interest, the tribunal will not apply the discretionary power of subsection 110(6) to direct that the Mining Recorder issue an order to correct staking deficiencies. As was discussed there, this would effectively result in the removal of a staking from deemed abandonment in preference to a claim which has second priority. In the facts of the case currently before the tribunal, while the adverse interest was equally unsuccessful in his appeal, the tribunal finds that it is not the intent of the **Act** to allow it to chose as between two parties, neither of whom is in substantial compliance.

The tribunal finds that the dispute and appeal of Royal Oak will be dismissed.

#### Comments Concerning Assessment Work

The tribunal is disturbed to note that comments made in this case, and indeed comments from other cases, show that there has recently evolved the practice of performing assessment work immediately upon completion of staking and recording, which take place in one day, for the sole purpose of preventing a dispute, through the provisions of clause 48(5)(b) of the **Act**. In this case, Royal Oak has suggested that it uses this avenue to prevent fraudulent stakers from challenging its mining claims.

While the desire to prevent fraud from occurring in the first place is understandable, the fact is that staking disputes are largely not the product of fraud, but a questioning of the application of objective staking standards to the individual situation. More often than not, stakings which fail to substantially comply or be deemed to substantially comply with the legislative requirements are due to carelessness, ignorance and inadvertence.

The practice of performing assessment work in short order after staking followed by immediate recording for the sole purpose of circumventing opportunities for disputes is of concern to the tribunal. The **Act** is drafted such that only the Minister has the power to re-examine these stakings pursuant to subsection 76(5) of the **Act**, where there is a belief that the staking is not in accordance with the legislation. This is markedly different from the challenge of a dispute filed by another staker or another individual interested in the land under the mining claim, and it raises the question of under what conditions the MND&M would enter into situations of the nature described here, given that the initial recording has been allowed by a Provincial Mining Recorder.

The concerns of the tribunal centre around the matter of sufficiency of staking and

who decides. In most cases, the Provincial Mining Recorders, or upon referral or appeal the tribunal, provide a neutral third party assessment of the adequacy of staking. However, it is through the filing of the dispute that the issue of adequacy is brought into question in the first place. This is, of course, beyond the initial determination by the Mining Recorder that he or she considers the staking to be in accordance with the legislation, upon being presented with the application to record for filing. By filing assessment work for the sole purpose of preventing disputes, believing in the adequacy of one's own staking, it becomes the recorded holder who initially decides on this adequacy. The burden of challenging the staking is moved to MND&M. While the legislation exists, and the tribunal is not questioning the wisdom of the legislature, it is suggested that MND&M would do well to flesh out the issue of challenges pursuant to subsection 76(5), given that it is the only entity which can do so, as neither another staker nor the tribunal is empowered to raise this question under these circumstances. Otherwise the roles set out in the **Act** concerning who decides and who may challenge become reversed. Should this become commonplace, it is questionable as to whether the intent of the legislation will be achieved.

#### Withdrawal From Staking

The status of the lands in which the Clark Mining Claim L-1221665 and the Royal Oak Mining Claim 1220395 is that they have been removed from staking by the Mining Recorder. In the event that no action has been taken by either of the parties pursuant to sections 134 or 135 of the **Act** within the time frames set out therein, it will be a matter for the Mining Recorder to issue a Reopening Order pursuant to section 35 of the **Act**.

#### Conclusions

The appeal from the decision of the Mining Recorder to cancel the Clark Mining Claim L-1221665 is dismissed. There is insufficient evidence presented in this case upon which to support credibility in a six minute staking. In any event, the fact that the helper finished three minutes after the completion time renders the statement in the application to record inaccurate.

The appeal from the decision of the Mining Recorder to refuse recording of the "Filed Only" Royal Oak Mining Claim 1220395 is dismissed. The time involved in the staking is such that insufficient blazing was necessarily involved. Where there are directional lines or pre-blazing done prior to the commencement of staking, such that it interferes with the determination of whether a licensee in the vicinity is likely to be misled, there is an adverse inference drawn from the available field information that the blazing is inadequate, as there remains no objective means of testing the adequacy of blazing. The tribunal is reduced to relying on its extrapolations in these circumstances.

The Mining Recorder is directed to Order that the lands be opened for staking pursuant to section 35 of the **Act**.

No costs are payable by either party to this appeal.