

File No. MA 024-96

L. Kamerman ) Monday, the 22nd day  
Mining and Lands Commissioner ) of December, 1997.

**THE MINING ACT**

**IN THE MATTER OF**

Mining Claim L-1220095, staked by Dennis James Crowley, hereinafter referred to as the "Crowley Mining Claim" and Mining Claim L-1221719, staked by Michael George Caron, hereinafter referred to as the "Caron Mining Claim", both recorded in the name of Battle Mountain Canada Ltd., and situate in the Township of Knight, in the Larder Lake Mining Division;

**AND IN THE MATTER OF**

An application to record Mining Claim L-1221670, situate in the Township of Knight, in the Larder Lake Mining Division, staked by Michael Perello, to have been recorded in the name of David V. Jones, marked "filed only", hereinafter referred to as the "Filed Only Mining Claim";

**AND IN THE MATTER OF**

Subsections 44(2) and 46(2) of the **Mining Act**;

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

DAVID V. JONES  
Appellant  
- and -

BATTLE MOUNTAIN CANADA LTD.  
Respondent  
- and -

MINISTER OF NORTHERN DEVELOPMENT AND MINES  
Party of the Third Part

**AND IN THE MATTER OF**

An appeal pursuant to subsection 112(1) of the **Mining Act** from the decision of the Mining Recorder for the Larder Lake Mining Division dated the 23rd day of October, 1996 for the recording of the Perello Filed Only Mining Claim which is not part of the Caron Mining Claim and for the amending of the application for the Perello Filed Only Mining Claim to delete those lands covered by the Caron Mining Claim;

**AND IN THE MATTER OF**

A declaration pursuant to section 105 of the **Mining Act** to amend the Application To Record the Crowley Mining Claim to exclude those lands covered by the Perello Filed Only Mining Claim;

**AND IN THE MATTER OF**

A direction to the Mining Recorder for the Larder Lake Mining Division for an Order pursuant to subsection 110(6) of the **Mining Act** for the movement of posts of the Crowley Mining Claim and Perello Filed Only Mining Claim in accordance with the relief sought above.

**ORDER**

**WHEREAS** the tribunal issued its Interlocutory Order in this matter on the 6th day of October, 1997 setting out by declaration the circumstances under which the non-overlapping portion of an overlapping staking may be allowed, pursuant to subsection 44(4) of the **Mining Act**, R.S.O. 1990, c. M. 14, as amended;

**AND WHEREAS** additional information as required was provided to the tribunal and the other parties by the appellant, David V. Jones on the 1st day of November, 1997;

**UPON** hearing from the parties and reading the material filed both before and after the Interlocutory Order;

**1. THIS TRIBUNAL ORDERS** that the appeal from the decision of the Mining Recorder for the Larder Lake Mining Division, dated the 23rd day of October, 1996, for the amending of the application to record of the Perello Mining Claim L-1221670 to record those lands not covered by the Caron Mining Claim L-1220095 is hereby allowed, that Mining Claim L-1221670 will be recorded effective the 23rd day of October, 1996 and the matter is referred back to the Provincial Mining Recorder responsible for the Larder Lake Mining Division for an Order pursuant to subsection 110(6) of the **Mining Act** to move the #1 post of the Perello Mining Claim L-1221670 to the south a distance of 180 metres to coincide with the location of the #2 post of the Caron Mining Claim L-1221719; to move the #4 post of the Perello Mining Claim L-1221670 to the south a distance of 150 metres to coincide with the location of the #3 post of the Caron Mining Claim L-1221670; and to blaze the newly created line.

2. **THIS TRIBUNAL FURTHER ORDERS** that the application to record the Crowley Mining Claim L-1221719 be amended, and the matter is referred back to the Provincial Mining Recorder responsible for the Larder Lake Mining Division for an Order pursuant to subsection 110(6) of the **Mining Act** to move the #1 post of the Crowley Mining Claim L-1221719 to the south a distance of 210 metres to coincide with the new location of the #2 post of the Perello Mining Claim L-1221670; to move the #4 post of the Crowley Mining Claim L-1221719 to the south a distance of 210 metres to coincide with the location of the newly created #3 post of the Perello Mining Claim L-1221670; and to blaze the newly created line.

3. **THIS TRIBUNAL FURTHER ORDERS** that the notation "Pending Proceedings" which is recorded on the abstracts of Mining Claims L-1220095 and 1221719, to be effective from the 13th day of November, 1996, be removed from the abstracts of the Claims.

4. **THIS TRIBUNAL FURTHER ORDERS** that the time during which the issues concerning Mining Claims L-1220095 and 1221719 were pending before the tribunal, being the 13th day of November 1996, to the 22nd day of December, 1997, a total of 405 days, be excluded in computing time within which work upon the Mining Claims is to be performed and filed.

5. **THIS TRIBUNAL FURTHER ORDERS** that the 24th day of October, 1999, be fixed as the date by which the first and second units of prescribed assessment work must be performed and filed on Mining Claims L-1220095 and 1221719, pursuant to subsection 67(3) of the **Mining Act** and all subsequent anniversary dates for the Mining Claims are deemed to be October 24 pursuant to subsection 67(4) of the **Mining Act**.

6. **THIS TRIBUNAL FURTHER ORDERS** that the time during which the issues concerning Mining Claim L-1221670 were pending before the tribunal, being the 23rd day of October 1996, to the 22nd day of December, 1997, a total of 429 days, be excluded in computing time within which work upon Mining Claim L-1221670 is to be performed and filed.

7. **THIS TRIBUNAL FURTHER ORDERS** that the 23rd day of January, 2000, be fixed as the date by which the first and second units of prescribed assessment work must be performed and filed on Mining Claim L-1221670 pursuant to subsection 67(3) of the **Mining Act** and all subsequent anniversary dates are deemed to be January 23 pursuant to subsection 67(4) of the **Mining Act**.

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

**9. 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 22nd day of December, 1997.

Original signed by

L. Kamerman  
MINING AND LANDS COMMISSIONER

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

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- and - Appellant

BATTLE MOUNTAIN CANADA LTD.  
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MINISTER OF NORTHERN DEVELOPMENT AND MINES  
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**AND IN THE MATTER OF**

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**REASONS**

In its Interlocutory Order dated October 6, 1997, the tribunal set out in a declaration the criteria under which the recording of the non-overlapping portion of an overlapping staking of a mining claim would be considered for recording.

The first criteria was to require the party wishing to have an overlapping mining claim return to the field to obtain detailed information concerning the non-overlapping portion of the mining claim. The rationale behind this was that this information was not available at the time the original staking had occurred.

In his letter sent via facsimile dated November 1, 1997, Mr. Jones, the appellant in this matter, provided additional information in a sketch which did not form part of his original Application to Record. The sketch shows the dimension of Mining Claim 1221670 as being 400 metres on the east boundary, with 180 metres overlapping with the Caron Mining Claim 1221719 to the north and 210 metres overlapping with the Crowley Mining Claim 1220095 to the south. The south boundary of the Jones' Mining Claim is 400 metres. The west boundary, being a total of 360 metres, has 210 metres overlapping with the Crowley Mining Claim and 150 metres overlapping with the Caron Mining Claim. (It is noted that both the Crowley and the Caron Mining Claims have been recorded in the name of Battle Mountain Canada Ltd., the respondent in this matter).

The submission filed by Mr. Jones goes on to state:

This sketch illustrates that the non-overlapping part of my claim 1221670, is completely surrounded by lands which are not open for staking, and as outlined in the Interlocutory Order, the Commissioners parameters stipulate that these circumstances allow this portion of my claim to be recorded.

I also understand that the non-overlapping portion of the Crowley claim 1220095 will be allowed to be recorded, along with the entire Caron Claim 1221719.

The tribunal contacted Mr. Jones through its Registrar, Mr. Daniel Pascoe, and advised that, according to its criteria set out in paragraphs 1 through 9 of its Interlocutory Order, the non-overlapping portion of the Perello Mining Claim 1221670 may not be eligible for recording. However, there was still the issue of "compelling circumstances" referred to in paragraph 10. In this regard, Mr. Jones filed an additional submission on December 9, 1997. Portions of his submission are set out:

You indicated that after applying the 10 criteria that were outlined for the 15% rule, it was interpreted that my claim would be rejected. I use the word "interpreted" because according to several mining exploration colleagues who reviewed the same criteria, we unanimously thought that paragraph #9 clearly described my situation and it was expected to result in the recording of the south half of the Perello claim (I realise that this is our "interpretation").

Paragraph #9 states that a claim that is less than one unit can be recorded if it is completely surrounded by lands which are not open for staking. This is **exactly** the scenario of the Perello claim so I am confused on the interpretation that results in the claim being rejected.

Consequently, it seems that the circumstances in my case are quite unique and should be dealt with on an individual basis.

**Priority of completion overlooked in favour of having fewer fractional claims**

If the specifics of my situation are looked at, I think that the extremely important issue of **priority of completion** has been pushed aside in favour of the desire for the mining recorder to have clean maps with no fractional claims. The mining industry has been taught that priority of completion is one of the main issues in competitive staking and if the entire Crowley claim is

recorded in favour of the Perello claim then this is telling the industry that one of the most important issues is the size of the claim and not completion time. I realize that this may be the case in some circumstances but in this case it is blatantly obvious that both Crowley and Perello staked in good faith, and in extremely similar manners, **both unintentionally overtaking** someone else by more than 15%, and both putting most thought and energy into prior completion time. Be contradicting this historical staking procedure, which the staking fraternity presently understands, a situation will result that will cause quite a bit of confusion and frustration in future staking rushes.

The Commissioners rulings indicate that fractional claims will be accepted in several situations, so it is that important to reject the fractional portion of the Perello claim at the cost of disregarding such and **(sic)** important issue as priority of completion?

**Mining recorder arbitrarily decided to cancel the Perello claim first instead of the Crowley claim**

Another point, specific to this case, which is very contradictory and confusing is the issue of how the Mining Recorder has decided on the pecking order of cancellations when dealing with each of the three claims. As I have repeatedly stated, Crowley committed the **SAME OFFENCE** as Perello did (ie. overstaked by more than 15%) but the Recorder decided to cancel the Perello claim first, which then left the Crowley claim appearing to have no infraction of overtaking. **Why shouldn't the Crowley claim be subjected to the same overtaking rules as Perello was, particularly when he had the last completion time?** The only answer seems to be that the acceptance of his claim would result in a full size claim, so cancel the Perello claim first, for the convenience of having a neater map, after, with no fractional claims, **even though Perello beat him fair and square!**

This rationale seems to have no logical basis and appears to be quite discriminatory against the Perello staking. All three of the claims involved in this appeal should be subjected to the same rules since there **were all staked at the same time and under the same circumstances.** If Perellos claim is to be rejected because of overtaking Caron by more than 15%, then Crowley's claims should be rejected for overtaking Perello by more than 15%. In an industry that has been programmed to put incredible amounts of time and money into the process of "priority of completion", isn't it more logical to subject the adverse judgments to claims with the **slowest** completion time first, and then deal with the other claims in order of completion time. The only reasons that I can

think of why this wasn't done in this case is that the Mining Recorder knew what the end result was and consequently picked the process that fit his desires first, rather than one that would follow historical staking logic or rationale. This seems to be dangerously arbitrary, especially when priority of staking is clearly illustrated in this case and disregarded by the Recorder.

### **Proximal claims may warrant closer examination in this case**

I was quite surprised to see that the issue of contiguous claims was important in deciding on whether to reject fractional claims or not, and up to this point in time, did not pay much attention to the situation. I cannot find anywhere in the Mining Act which suggests that we will have a better chance of our claims being accepted if we stake many claims contiguously, but from the Interlocutory Order, it appears that now it will be an issue to be reconciled with. I agree with, and understand that it is not in the best interest to have small fractional claims within larger blocks of someone else's claims, and I realize that this criteria might have to be used in tricky judgements. Consequently, I feel that it is noteworthy to inform the Commissioner that if the Perello claim is accepted, it would not be the small nuisance claim that it might appear to be on the previous maps that have been submitted. Reference to the attached copy of the Knight Twp. And Natal Twp. Claim map illustrates that I am the claim holder of a large land package adjacent to the subject claims. Although these claims are not technically contiguous to the Perello claim, they are within 100 metres of each other. Was the criteria favouring contiguous claims stipulated to only favour technically contiguous claim holders or **was it derived to help discourage small nuisance claims from occurring?** If it was the latter then the Perello claim could for all intensive (**sic**) purposes be considered close enough to be treated as contiguous claims. In this situation, unfortunately, I could not compete with the staking budget that Battle Mountain had access to, and I had to concentrate my money on a small but extremely desirable claim that was almost contiguous to my original block.

If my claims is not accepted because of this small gap in contiguity, would this not set an example that seems to favour large corporations who can afford to stake larger blocks of claims during staking rushes and consequently end up with more contiguous claims, which inadvertently results in an advantage when any staking overlaps have occurred?

As stated in paragraph #10 of the Interlocutory Order, consideration must be given to each appeal individually and the foregoing comments are meant to serve as material for such consideration.

No additional submissions were received from Battle Mountain to Mr. Jones' comments.

## **Findings**

The compelling and impassioned submissions made by Mr. Jones, have given the tribunal pause concerning the manner in which it was, prior to hearing from Mr. Jones, proposing to apply the criteria in its Interlocutory Order to the facts of this particular appeal. In essence, the approach which the tribunal was proposing to take involved applying criteria 1 through 9 to the southern portion of the Perello staking, being that portion which did not overlap with the Caron staking, having been allowed in full. Given that the non-overlapping portion of the Perello staking vis-a-vis Caron amounted to only approximately 50 percent of a single unit claim, the size limitations would have applied unfavourably to the Perello southern portion.

The manner in which the ten criteria were being considered with respect to the Perello southern half was to place the Perello claim in abeyance after the 9th criteria, thus far not meeting the tests, to apply those same criteria to the north half and indeed all of the Crowley claim, finding it met the tests and allowing its recording in preference to Perello. Upon further consideration, the tribunal is persuaded that this would have been an incorrect manner of proceeding, particularly given the 10th criteria of compelling circumstances, and the jurisdiction of the tribunal pursuant to section 121 of the **Mining Act**, of making its findings based upon the real merits and substantial justice of the case.

Leaving the question of Perello's southern/Crowley's northern portion aside for the moment, the position of the non-overlapping portion of the Crowley claim, namely its southern portion is considered in isolation. Although criteria #1 was not complied with, as the claim had been allowed, sufficient information was provided by the Mining Recorder and Mr. Jones to provide adequate field information for purposes of proceeding with further considerations. Criteria #2 is applied and found to not be met, as the overlapping portion is essentially 50 percent of a single unit claim. Criteria #3, which considers a claim of less than 85 percent of a single unit size, which is contiguous to another claim of the recorded holder, in this case Battle Mountain. The tribunal notes that Battle Mountain is indeed the holder of the triangular claim to the west (1221717), and those regularly shaped claims to the east (1221718, to the south (1220094) and incidentally, to the southeast (1220092). Therefore, based upon this method, the southern half of the Crowley claim 1220095 meets criteria #3 and could be recorded pursuant to subsection 44(4).

The foregoing analysis, which is clearly out of sequence, creates the anomalous situation of placing the southerly portion of the Perello claim in a position of meeting criteria #9, namely that all of the lands surrounding the non-overlapping portion vis-a-vis Caron have been staked. Based upon its priority over Crowley for the same lands, it would meet subsection 44(2) of the **Act**.

In considering this scenario and the vastly different result, the tribunal is persuaded that it had lost sight of an element which Mr. Jones rightfully pointed to as one of the fundamentals of staking rules, namely that priority of completion is of primary importance when competing claims are considered. In this regard, the tribunal is persuaded that a compelling factor which it will consider favourably under criteria #10, is successive overlaps of an area, such as has occurred in the facts of this case. So as not to have this Order seen as a negation of its Interlocutory Order and the criteria therein, in taking this approach, the tribunal considers the following factors compelling in this case:

- 1 In the circumstances of this case, the successive stakings have occurred on the same grid, moving south, each being half of a unit removed from the one to the north. Therefore, the overlap in each case encompasses from the west to the east boundary, so that no steps are created. Effectively, these can be considered simple overlaps, with the resulting overlaps occurring over rectangular areas, such that any area under consideration as between competitive stakers is similarly a rectangle.
2. The third staker in this scenario, Crowley, was clearly working in coordination with the first, Caron. Both stakers had their respective claims transferred to Battle Mountain. In this situation, it can only be expected that such stakers were not competing with each other, but had laid out their respective claims to incur no overlap one with the other.

In such a situation, the decision-maker would be faced with two possible results. He or she could record the entire mining claim which has priority and then, given the 50 percent overlap of the truly competitive staker in the second priority position, allow the recording of the entire claim of the staker having third priority. In such a scenario, an entire team, working in concert would be able to obtain recording of a whole area, based solely on the fact that they had one staker entitled to overall priority.

The other scenario, which is proposed by Mr. Jones, returns the decision-maker to the matter of priority of completion time, found in subsection 44(2). The subsection does not deal with successive overlapping claims, such as occurred here. In this case, for any single half unit area, there are indeed two stakers, but overall, given the three stakers, there are two areas of overlap. The decision to allow the Caron recording is based upon the priority of completion. For the half unit involving the Perello/Crowley overlap, based upon priority of completion, the Perello half unit would be recorded.

3. If the tribunal were to regard only the southerly portion of the Crowley claim based upon the criteria in its Interlocutory Order, that southern half would qualify to be recorded. If such were the case, the south half of the Perello claim would become completely surrounded by lands no longer open for staking and would qualify to be recorded under the 9th criteria.
4. The tribunal notes that Jones has considerable mining claim holdings in the immediate vicinity, the closest being a distance of 200 metres to the west. Although strictly speaking, the Perello claim would not qualify on the basis of contiguous mining claims, there is sufficient proximity to persuade the tribunal that Mr. Jones would be in a position of working this half unit area in a reasonable manner or adding it to the lands he holds and may seek to option.
5. Based upon the real justice and merits of this case, the tribunal is persuaded that the relative merits of having the second priority of completion time should be determinative as between the Perello southern half and the Crowley northern half as to who should be the successful staker for those lands.

Based upon the foregoing considerations, the tribunal finds that Mr. Jones is successful in his appeal and that it will allow the recording of the southern half of the Perello Mining Claim. The application to record the Perello Mining Claim L-1221670 will be amended to reflect the non-overlapping portion of that claim, according to the information recently provided by Mr. Jones. Similarly, the application to record the Crowley Mining Claim L-1220095 will be amended to reflect the non-overlapping portion of that claim, reflecting the information provided by Mr. Jones. The Provincial Mining Recorder responsible for the Larder Lake Mining Division will be directed to issue an Order to move posts, change inscriptions and blaze lines in accordance with the two amended applications and the findings of this Order.

It is noted on the facts of this case that the area of overlap of the Perello Mining Claim as it relates to the Crowley Mining Claim is approximately 56%. As such, the tribunal has also determined that this percentage does not amount to a sufficiently substantial an overlap to be more appropriately encompassed in a dispute of the type contemplated by subsection 46(2).

The tribunal extends its appreciation to the parties and their representatives for their considerable efforts in working towards having this complex and challenging matter resolved expeditiously.

### **Exclusion of Time**

Pursuant to subsection 67(2) of the **Mining Act**, the time during which Mining Claims L-1220095 and 1221719 were pending before the tribunal, being the 13th day of November, 1996 to the 22nd day of December, 1997, a total of 405 days, will be excluded in computing time within which work upon the Mining Claims is to be performed and filed.

Similarly, the time during which Mining Claim L-1221670 was pending before the Mining Recorder and the tribunal, being the 23rd day of October, 1996 to the 22nd day of December, 1997, a total of 426 days, will be excluded in computing time within which work upon Mining Claim L-1221670 is to be performed and filed.

Pursuant to subsection 67(3) of the Act, as amended by S.O. 1996, c. 1, Sched. O, s. 18, October 24, 1999 is deemed to be the date for performance and filing of the first and second units of assessment work on Mining Claims L-1220095 and 1221719 and January 23, 2000 is deemed to be the date for the performance and filing of the first and second units of assessment work on Mining Claim L-1221670. Pursuant to subsection 67(4) of the **Act**, all subsequent anniversary dates for Mining Claims L-1220095 and 1221719 are deemed to be October 24 and all subsequent anniversary dates for Mining Claim L-1221670 are deemed to be January 23.

### **Conclusions**

The appeal is allowed. The application to record Mining Claim L-1221670 will be amended to reflect that portion of the Perello Claim which does not overlap with the Caron Mining Claim. The application to record Mining Claim L-1220095 will be amended to reflect that portion of the Crowley Mining Claim which does not overlap with the Perello Mining Claim. The Provincial Mining Recorder responsible for the Larder Lake Mining Division will be directed to issue two Orders pursuant to subsection 110(6) of the **Act** for the moving of posts, as necessary, changing of inscriptions and blazing of newly created lines. There are no costs to any party in this appeal.