

File No. MA 021-95

B. Goodman) Monday, the 17th day
Deputy Mining and Lands Commissioner) of June, 1996.

THE MINING ACT

IN THE MATTER OF

A dispute against Mining Claim P-1198988, situate in the Township of Wark, in the Porcupine Mining Division, hereinafter referred to as the "Mining Claim";

AND IN THE MATTER OF

An application to record a mining claim staked by Ken Pye, situate in the Township of Wark, in the Porcupine Mining Division, bearing no tags and marked "filed only", hereinafter referred to as the "Filed Only Mining Claim";

AND IN THE MATTER OF

Ontario Regulation 115/91 concerning Claims Staking;

B E T W E E N:

KEN PYE

Disputant

- and -

FALCONBRIDGE LIMITED

Respondent

AND IN THE MATTER OF

An appeal by the Disputant from the decision of the Mining Recorder for the Porcupine Mining Division dated the 8th day of September, 1995 under subsection 112(3) of the **Mining Act** for a declaration that Mining Claim P-1198988 be cancelled and for the recording of the Filed Only Mining Claim.

ORDER

UPON HEARING from the parties and reading the documentation filed;

1. THIS TRIBUNAL ORDERS that the Dispute and Appeal from the Decision of the Mining Recorder from the Porcupine Mining Division is hereby dismissed.

2. THIS TRIBUNAL FURTHER ORDERS that the notation "Pending Proceedings", which is recorded on the abstract of the Mining Claim to be effective from the 8th day of June, 1994, be removed from the abstract of the Mining Claim.

3. THIS TRIBUNAL FURTHER ORDERS that the time during which the Mining Claim was pending before the Mining Recorder and the tribunal, being the 8th day of June, 1994 to the 17th day of June, 1996, a total of 741 days, be excluded in computing time within which work upon the Mining Claim is to be performed.

4. THIS TRIBUNAL FURTHER ORDERS that the 12th day of June, 1998, be fixed as the date by which the next unit(s) of prescribed assessment work must be performed and filed on the Mining Claim pursuant to subsection 67(3) of the **Mining Act** and all subsequent anniversary dates shall be deemed to be June 12 pursuant to subsection 67(4) of the **Act**.

5. THIS TRIBUNAL FURTHER ORDERS that costs shall be payable by the disputant, Ken Pye to the respondent, Falconbridge Limited in the amount of \$500.00.

IT IS FURTHER DIRECTED that upon the payment of the required fees, this Order be filed in the Office of the Mining Recorder for the Porcupine Mining Division.

Reasons for this Order are attached.

DATED this 17th day of June, 1996.

Original signed by
B. Goodman

B. Goodman
DEPUTY MINING AND LANDS COMMISSIONER

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REASONS

This is an appeal under subsection 112(3) of the **Mining Act** ("the **Act**") from the order dated September 8, 1995 of the Mining Recorder ("the Recorder") for the Porcupine Mining Division, dismissing the dispute filed on the mining claim of record, Mining Claim P-1198988 and verifying its validity, and refusing to record the "Filed Only" application to record a mining claim staked by Ken Pye.

This appeal was heard by telephone conference call on April 16, 1996. Ken Pye represented himself. Falconbridge was represented by counsel Earl Stewart, with Ray Band, Dan Brisbin, Julia Sievwright and Ed Brunet also on the line. Although evidence was given by Mr. Pye, Mr. Brunet and Mr. Brisbin, the parties agreed that the tribunal should review the record of the proceedings before the Recorder, including the transcript of the hearing held by the Recorder on December 7, 1994 and the exhibits produced at that hearing. The tribunal has also reviewed the Notice of Appeal dated September 19, 1995, and the material received by the tribunal in response to its Order to File dated September 27, 1995. The tribunal has also reviewed Mr. Stewart's letter sent by facsimile on April 16, 1996 and the attached extracts from the transcript referred to.

Background:

On June 1, 1994, Edward Brunet completed an application to record Mining Claim P-1198988 for the recorded holder Falconbridge Limited. ("the Brunet claim"). The application (Ex. 1) indicates that the staking commenced at 8 a.m. and was completed at 8:21 a.m. on June 1, 1994. The application contained a sketch of the Brunet claim. Mr. Brunet paid the prescribed fee, and the Recorder entered the Brunet claim pursuant to subsection 46(1) of the **Act**, having determined that the claim had been staked in accordance with the **Act** and Ontario Regulation 115/91 ("the Regulation").

On June 8, 1994, the disputant, Ken Pye, completed an application to record a claim ("the disputant's claim") for the same lands that were the subject of the Brunet claim. The application (Ex. 2) indicates that the staking commenced at 8 a.m. and was completed at 8:30 a.m. on June 1, 1994.

The Recorder determined that the Brunet application should prevail over the disputant's application pursuant to subsection 44(2) of the **Act**, because Brunet had completed his staking first. In accordance with subsection 46(2), the Recorder did not record the disputant's application, but received and filed it at his request, upon the payment of the prescribed fee. On June 8, 1994, Mr. Pye filed a dispute of the Brunet claim, verified by Affidavit, with the Recorder pursuant to subsections 46(2) and 48(1) of the **Act**. In the dispute (Ex. 3) Mr. Pye

alleged that the Brunet claim was illegal or invalid because "staker (Ed Paul Brunet) failed to blaze any part of the claim, and failed to erect #2 & #3 posts #4 post was erected by George Fournier". The appellant paid the prescribed fee and the Recorder noted the dispute on the record of the Brunet claim in accordance with subsection 48(1) of the **Act**.

At the Recorder's request pursuant to subsection 75(3) of the **Act**, an inspection was carried out on August 24, 1994 by David Korpela, Mining Lands Technician, Porcupine Mining Division. Robert Bailey, Deputy Mining Recorder for the Porcupine Mining Division assisted in this inspection. Mr. Pye, Mr. Brunet and Dan Brisbin and Stewart McDougall from the respondent Falconbridge were also in attendance for the August 24, 1994 inspection. A preliminary inspection had been conducted on May 31, June 1 and July 13, 1994 by Mr. Korpela. Mr. Bailey assisted Mr. Korpela with the preliminary inspection conducted on May 31 and June 1, 1994. Mr. Korpela prepared a report of his inspection in memorandum form dated September 16, 1994 to the Recorder ("the Inspection Report"). The report (Ex. 3 before the Recorder) indicates that the purpose of the inspection was as a result of the dispute that had been filed by Mr. Pye. The five page Inspection Report contains information concerning the topography and observations concerning staking, including blazing and post inscription and erection. The report notes that photographs were taken at all stations, and that they were available for viewing at the Recorder's Office. It has attached a sketch of the claim.

Pursuant to subsections 110(1) and (2) of the **Act**, the Recorder heard the dispute on December 7, 1994. As previously indicated, it is the resulting Order of the Recorder dated September 8, 1995, which has been appealed to this tribunal. The Recorder's Order is followed by Reasons in accordance with subsection 111(2) of the **Act**, which have also been reviewed by the tribunal. The Recorder concluded that the dispute should be dismissed, and so ordered.

Issues:

1. Did Mr. Brunet comply with the requirements of the **Act** as to the staking of his mining claim?
2. If not, did he substantially comply?
3. Should the Brunet claim have priority over the disputant's?

Facts and Evidence:

The subject land became open for staking on June 1, 1994. On May 31, 1994, Mr. Korpela and Mr. Bailey were requested to perform spot inspections of the subject lands. While performing these inspections, they encountered Mr. Pye on the highway just west of the disputed claim. Mr. Pye indicated to them that the claim lines for the claim he was preparing to stake on

June 1, 1994 had been pre-blazed. The two Ministry of Northern Development and Mines employees accompanied Mr. Pye into the bush, and observed that some claim lines had been pre-blazed, including the north boundary of the claim that Mr. Pye disputed. Fresh blazing could also be seen south from the proposed No. 1 post and No. 4 post. The east, south and west boundaries of the land that Mr. Pye was preparing to stake were not inspected on May 31, 1994. An ATC was seen parked on the east side of Boundary Lake, but Messrs. Korpela and Bailey did not meet anyone else while they were in the bush. A number of loose, pre-cut claim posts were found lying on the ground at various locations. Mr. Brunet visited the area on May 31, 1994 to orient himself, cut and hide his claim posts, and do some brushing. He did not do any pre-blazing.

Early on the morning of June 1, 1994, Messrs. Korpela and Bailey proceeded to the area where they had observed freshly blazed lines the day before. They arrived early enough to be able to talk to a number of stakers that were on their way to stake the lands coming open. They informed the stakers to abide by the staking regulations and that they would remain in the area to watch the staking out of the lands. Ken Pye, Edward Brunet and Edward Ludwig were the stakers competing for the area now recorded as the mining claim, and were among the stakers that Messrs. Korpela and Bailey spoke with prior to 8 a.m. on June 1, 1994. At the hearing before the Recorder, Mr. Bailey testified that the pre-blazing of the land was pretty obvious, and that he had told the competing stakers "Well, you realize that pre-blazing is not considered to be part of the staking of a claim. What you have to do is when you stake a claim, you're gonna have to re ..., blaze the claim as you go along". **Edward Ludwig**, an experienced staker, testified that he had met Mr. Pye at the gas bar at about 7:30 a.m. on the morning of June 1, 1994. Sometime later, but prior to the commencement of staking, the two made a "handshake deal" that if either of them finished staking first, the other would be entitled to a 50 percent interest in the claim. They also suggested to Ed Brunet that he come in second, but he declined.

The terrain of the subject claim is flat and typical of a Black Spruce swamp. Black Spruce and Tag Alders are the primary vegetation. The terrain was generally fairly clean and easily walkable. The west boundary of the claim is along the Wark-Kidd Township Line which was slightly grown in but still very visible. According to the evidence of Mr. Korpela, it was about eight to ten feet wide. The south boundary of the claim followed a well-cut line which is the concession line between Concessions V and VI of Wark Township, and was about 20 feet wide.

Just prior to 8 a.m., Mr. Bailey proceeded to the northeast angle of the subject land, where he observed the commencement and completion of the staking of the area now recorded as the mining claim. He observed all stakers for the disputed claim inscribe and erect their No. 1 posts and blaze south. He could see about 50 metres down the No. 1 line, and saw all three stakers blazing. At this point, Mr. Ludwig was first, Mr. Pye was second and Mr. Brunet was third.

The parties inscribed and erected their No. 2 posts. Mr. Brunet had taken a plastic baggy with him, containing information concerning post inscription requirements under the **Act**

and Regulation. He removed this information from the baggy and reviewed it before erecting each post. At the hearing before the Recorder, Mr. Brunet testified that he stuck the No. 2 post in the moss, and this was confirmed by Mr. Ludwig, who leaned his up against a tree. At the formal inspection on August 24, 1994, Mr. Pye conceded that he had failed to inscribe the date and time on his No. 2, No. 3 and No. 4 posts. The line between the No. 2 and No 3. posts was a concession line and well cut out. Mr. Brunet passed Messrs. Ludwig and Pye somewhere along the 2 to 3 line. At the hearing before the Recorder, Mr. Ludwig testified that Mr. Brunet was lighter than he was, so he would not sink as deep into the bog, and that Mr. Brunet was able to walk more quickly. Mr. Brunet testified that he did some blazing along the 2 to 3 line, but could not recall how many blazes, especially since the line was well cut and had been pre-blazed. Mr. Ludwig recalled that, as soon as Mr. Brunet passed him along this line, he (Mr. Ludwig) virtually ceased to blaze. He testified that he had blazed maybe once along this line and claimed that Mr. Brunet had done the same "maybe one blaze between that line, maybe two".

Mr. Pye yelled to Mr. Ludwig that, if he should "go for it or run for it" (i.e. finish first) that he should not worry about the blazing, because they were already in 50/50 each. He should keep up to him and be a witness. Mr. Ludwig then decided that he would try and beat Mr. Brunet.

Mr. Brunet erected his No. 3 post by forcing it into the wet ground and continued along the 3 to 4 line towards Boundary Lake. Mr. Ludwig, after he erected his No. 3 post, only saw Mr. Brunet once along this line but confirmed at the hearing before the Recorder that he did see him blazing. According to Mr. Ludwig, this was a cleared out township line, and there was no problem to keep Mr. Brunet in sight, who had gained 60 to 80 metres on him. Mr. Brunet arrived first at the No. 4 post. Georges Fournier was waiting for him, holding up his post and telling him what to write on it so that he would not have to remove the paper from his baggy. Mr. Ludwig testified that the post was leaning against a tree, and that Mr. Fournier was holding it so that Mr. Brunet could clearly write on it. Mr. Ludwig could not find the post that he had cut the day before, and in the meantime Mr. Brunet took off before him down the 4 to 1 line, and Mr. Ludwig could not see him after that. At the hearing, Mr. Ludwig said "I blazed sufficiently the claim, as he did as well -- as Ed Brunet did as well".

Mr. Bailey, who had remained at the No. 1 post, observed all stakers finishing at the No. 1 post. At the hearing before the Recorder, he testified that he could see the last 30 metres or so to the No. 1 post, which was more of an open area, and that he saw Mr. Brunet first. He did not think he blazed during this last 30 feet because it was an open area. Mr. Brunet finished at 8:21 a.m., Mr. Ludwig at 8:24 a.m., and Mr. Pye at 8:30 a.m. Mr. Pye told Mr. Bailey that neither Mr. Brunet nor Mr. Ludwig had blazed their claims.

On the formal inspection on August 24, 1994, both Mr. Brunet and Mr. Pye stated that the entire claim had been pre-blazed prior to them arriving on the property on May 31, 1994. Both stated that they had blazed their lines properly in the course of staking their claims. The entire claim was found to be well blazed with frequent double blazing. At the hearing before the

Recorder, Mr. Pye asserted that all the double blazing had been done by him (i.e. that he had put a second blaze on virtually every tree that had been blazed prior to the claim becoming open). Mr. Pye claimed that his blazes could be distinguished from the others, because his axe made certain grooves which were discernable from the photographs. Messrs. Korpela, Bailey and Ludwig testified that it was not possible to determine which staker made which blazes. Between the pre-blazing and the blazing that occurred during staking, approximately 80 percent of the trees were blazed.

In his Inspection Report to Mr. White dated September 16, 1994, Mr. Korpela indicated that the overall staking out of Mr. Brunet's claim was good except for inscriptions that were partly illegible, and that his name could not be found on the face of his No. 1 post. Mr. Pye's staking was also found to be good. It was indicated that most of his inscriptions were already badly weathered, but all visible inscriptions were legible. As previously indicated, Mr. Pye stated during the inspection that the date and time were not inscribed on his Nos. 2, 3 and 4 posts.

Mr. Korpela's report indicates that Mr. Brunet stated at the formal inspection that he did erect all posts. Mr. Korpela notes that, since all posts were loose posts which could fall or be picked up at any time, it was difficult for anyone, other than actual witnesses to the act, to say which posts were or were not erected at the time of staking.

In his written Reasons to his Order dated September 8, 1995, the Recorder noted that it was evident that Mr. Pye's statements and testimony must be given little weight unless supported by stand alone evidence or testimony from an uninterested party. He indicated that Mr. Brunet had stated that he did some blazing on all of the boundaries but did not keep track of how many blazes he made. The Recorder found that it was unlikely that either Mr. Pye or Mr. Ludwig, in the course of their own blazing, would have been in a position to see all of the blazing done by Mr. Brunet. As a consequence, he found insufficient evidence to rule that Mr. Brunet's blazing was indeed deficient. Based on the testimony of both Mr. Brunet and Mr. Ludwig to the effect that Mr. Brunet did attempt to properly erect the No. 2 and No. 3 posts, he found substantial compliance by Mr. Brunet with the Act and Regulation. After referring to Mr. Ludwig's evidence concerning the erection of Mr. Brunet's No. 4 post, the Recorder found insufficient evidence to rule, as a fact, that Mr. Brunet did not erect this post.

Submissions:

In his Notice of Appeal signed September 19, 1995, Mr. Pye stated the reasons for his appeal as follows:

The recorder gave no credibility to my statements during the hearing and over looked (**sic**) all the evidence. I do not believe that I should have lost this case due to the fact that I did not have a (**sic**) independent witness.

In his written submission dated October 24, 1995 to the tribunal (Ex. 8), Mr. Pye indicated that he would prove that Mr. Brunet misled or lied under oath during the hearing of the dispute by the Recorder. As will be referred to later in these Reasons, Mr. Pye took issue with Mr. Brunet's evidence before the Recorder as to his staking experience. He argued that Mr. Brunet had overstated his staking experience to bolster his credibility before Mr. White, who had found that his own (i.e. Mr. Pye's) statements and testimony must be given little weight unless supported by stand-alone evidence or testimony from an uninterested party.

In its written submission (Ex. 9) Falconbridge argued that the key issue was whether Mr. Brunet staked the claim in compliance with the Act and Regulations, and that there was sufficient evidence to confirm that he staked in substantial compliance. In response to Mr. Pye's assertion that Mr. Brunet had lied about his staking experience, Falconbridge submitted that it was abundantly clear from the hearing before the Recorder that Mr. Brunet was a novice staker, and that he did not intentionally mislead the Recorder. In any event, the issue was not the experience level of the stakers prior to June 1, 1994.

At the hearing by telephone conference call on April 16, 1996, Mr. Pye, who it was conceded was an experienced staker, expanded upon the basis of his appeal. At the hearing before the Recorder, the following questions were asked by Mr. Pye and answers given by Mr. Brunet:

- Q. For my benefit, Ed, would you tell me how many years you've been staking claims?
- A. Two years.
- Q. Two years?
- A. Two years roughly. That's just a guess; I'm not quite sure what it is.
- Q. Over that period of time, could you tell me approximately how many claims you staked?
- A. Eight, five -- I couldn't give you an exact number, I'm not sure.

Mr. Pye argued that it was impossible for Mr. Brunet to have been staking claims for two years, since he only received his prospector's licence on October 4, 1993 (Ex. 11). During the telephone conference hearing, Mr. Brunet indicated that, although he could not give an exact number, he believed that he had staked five or eight claims as primary or secondary staker or contractor prior to June 1, 1994. The two years and number of claims staked referred

to included the time prior to receiving his licence when he assisted with the staking of claims. Exhibit 12 contains information about one staking done in January 1994 after he received his licence. It was Mr. Brunet's evidence that he did not have a record of applications in relation to the other stakings, because he was not the primary staker. He indicated that he had staked 20 or 30 more claims as primary or secondary staker since June 1, 1994, and that he did not stake them any differently than this claim. Although he could not recall how many blazes he made while staking the claim, he indicated that he had substantially complied with the **Act** and Regulation concerning both staking and post erection requirements. He stated that he thought that he had been hired by Falconbridge as a staker because of his physical condition and his size.

Mr. Brisbin gave evidence that he had spoken to the contractor Frank Renaudat, who knew that it was important to get young, fast runners as stakers. He also indicated that he had been present at the formal inspection on August 24, 1994, and because of the pre-blazing and number of stakers, there was no way of judging who had blazed what. Mr. Brisbin agreed with Mr. Brunet that the blazing was sufficient that a person subsequently visiting the claim could clearly follow the claim line by following the blazes. The blazes could be further apart if the lines were cleared, and it was feasible to finish staking a claim in such circumstances in 21 minutes.

In his oral submission, Mr. Pye asserted that his dispute before the Recorder was dismissed because he had no independent witness, not because he was not believed. He argued that Mr. Brunet could not recall how many blazes he made and that he misled the Recorder as to his staking experience. He contended there were only two sets of blazes around the claim, when there should have been four, and that he had made the second set (the first being the pre-blazing by Mr. Ludwig). He argued that it was not possible for Mr. Brunet to have blazed this claim in accordance with the **Act** and Regulation and complete it in 21 minutes.

Mr. Stewart, on behalf of Falconbridge, submitted that the issue of Mr. Brunet's evidence before the Recorder as to his staking experience was a red herring, and that the real issue was whether Mr. Brunet had substantially complied with the staking requirements of the **Act**. He referred to those parts of the transcript of the hearing before the Recorder which he suggested supported the fact that Mr. Brunet did substantially comply with the staking requirements. He argued that Mr. Brunet had no reason to lie, particularly since the Mining Inspectors had warned all the stakers to comply with the staking regulations and that they would remain in the area to watch the staking out of the lands. The fact that Mr. Brunet had taken a baggy with him containing written information about staking requirements confirmed that he was intent on complying. He knew that this was a competitive staking, that he was going to win, and that there would likely be a dispute. Mr. Pye had attempted to "bribe" Mr. Brunet to share the claim, regardless of which of them finished first. As opposed to Messrs. Pye and Ludwig, Mr. Brunet is a contractor with Falconbridge, and accordingly had no financial interest in the outcome.

Findings:

It is apparent from the oral evidence before the Recorder, the photographs and the Inspection Report that the subject land had been substantially blazed prior to the 8 a.m. opening time on June 1, 1994. Mr. Ludwig admitted that he was responsible for much of this pre-blazing, which he did on May 31, 1994. There was also evidence of other people being in the area at the time.

Section 28 of the **Act** provides, in part, that a licensee may stake out a mining claim on any land open for prospecting. Section 38 of the **Act** stipulates that a mining claim shall be staked in such size, form and manner as is prescribed by the Regulation. Section 8 of the Regulation sets out the manner by which a claim is to be staked. Subsection 8(1) requires that the staking out of a mining claim shall be a continuous action. Subsections (2) and (3) set out the requirements for corner posts. Subsections (4), (7) and (9) are reproduced in their entirety:

8.--(4) Where there are standing trees on the area being staked, the perimeter of the mining claim shall be clearly marked during staking by plainly blazing the trees on two sides only in the direction of travel and by cutting the underbrush along the boundary lines of the claim.

(7) A licensee staking out a claim may use other persons to assist him or her in constructing posts and marking the perimeter of the claim.

(9) If the area to be staked has been open to staking for less than twenty-four hours,

- (a) the staking shall commence in the northeast corner of the mining claim and proceed in a clockwise direction;
- (b) a single licensee shall erect and inscribe all posts; and
- (c) the date and time of commencement and completion of the staking shall be inscribed on the No. 1 post.

Section 12 of the Regulation sets out the requirements for claim posts, and stipulates that they are to be erected only by a licensee. Section 13 prescribes the requirements

for licensees using metal tags and licensees staking claims without using such tags.

Section 43 of the **Act** addresses "substantial compliance". It provides that:

43.--(1) Substantial compliance as nearly as circumstances will reasonably permit with the requirements of this Act as to the staking out of mining claims is sufficient.

(2) The staking out of a mining claim shall be deemed to be in substantial compliance with the requirements of this Act and the regulations even if there is a failure to comply with a number of specific staking requirements if,

- (a) the failure to comply is not likely to mislead any licensee desiring to stake a claim in the vicinity; and
- (b) it is apparent that an attempt has been made in good faith by the licensee to comply with the requirements of this Act and the regulations.

Did Mr. Brunet comply with the staking requirements of the **Act** and Regulation? There is no specific section in either the **Act** or the Regulation that prohibits blazing lines before the land comes open for staking. Likewise, there is no specific section that would indicate that the marking of boundary lines before land opens is fatal to subsequent staking. It is evident from a review of prior decisions of this tribunal that the key is that when land is restaked, only the work that is done after the land is open can be considered towards satisfying the legal requirements. This, in essence, was the advice given by the Mining Inspectors to the stakers prior to the 8 a.m. opening time for staking on June 1, 1994.

Mr. Brunet stated before the Recorder that he did some blazing on all the boundaries, but did not keep track of how many blazes he made. Both Mr. Bailey and Mr. Ludwig confirm that Mr. Brunet did some blazing, and that a large part of the boundary lines was on open land, which had already been cleared.

The inspections carried out on June 1, July 13 and August 24, 1994, were unable to determine who was responsible for the various blazes which had been made on approximately 80 percent of the trees. Despite Mr. Pye's theories, the Mining Inspectors and Mr. Ludwig confirmed that it was impossible to distinguish between blazes.

Based on the evidence before the Recorder, the tribunal agrees with his finding that it would not have been possible for either Mr. Pye or Mr. Ludwig to see all of Mr. Brunet's staking procedure, and it is quite possible that they missed seeing some blazes. Having reviewed

the evidence before the Recorder, and taking into account the expertise and experience of the Recorder in these matters, this tribunal finds no reason to disagree with his finding that there was insufficient evidence to rule, as a fact, that Mr. Brunet's blazing was deficient. Nor can the tribunal find reason to disagree with the Recorder's finding that Mr. Brunet substantially complied with the requirements of the **Act** regarding the erection of the No. 2 and No. 3 posts. The tribunal also agrees with the Recorder's finding that there was insufficient evidence before him, as there is before this tribunal, to rule that Mr. Brunet did not erect his No. 4 post.

Having reviewed the evidence before the Recorder, the tribunal is unable to agree with Mr. Pye that the Recorder gave no credibility to his statements during the hearing and overlooked all the evidence. Nor did the Recorder say that in order to succeed, Mr. Pye would have to have an independent witness. What Mr. White said in his Order was that Mr. Pye's statements and testimony must be given little weight unless supported by stand-alone evidence or testimony from an uninterested party.

Subsection 44(2) of the **Act** provides that priority of completion of staking shall prevail where two or more licensees make application to record the staking of all or a part of the same lands. The Recorder determined in this case that Mr. Brunet completed his staking at 8:21 a.m., the time inscribed on the No. 1 post and in his application to record his claim. The Recorder determined that, since the disputant completed his staking at 8:30 a.m., Mr. Brunet's claim should prevail. This tribunal sees no reason to disagree with the Recorder's finding in this regard.

Since this tribunal has found that Mr. Brunet substantially complied with the staking requirements in the **Act**, and that Mr. Brunet's claim has priority over the disputant's, it is unnecessary for the tribunal to determine whether the disputant complied with the staking requirements concerning his own claim.

Costs:

At the conclusion of the hearing of this appeal, submissions were made on the issue of costs. Counsel for Falconbridge argued that, should the appeal be dismissed, Falconbridge was entitled to its costs for preparation for this hearing and for the hearing itself. Mr. Pye submitted that he had a right to appeal, and that were an order for costs to be against him, it would in essence discourage disputants from appealing a recorder's order.

Section 126 of the **Mining Act** vests the Commissioner with the discretion to award costs to any party. The tribunal has determined that Mr. Pye should pay to Falconbridge the sum of \$500.00 towards its costs in these proceedings. In making this Order, the tribunal has taken into account the grounds of this appeal, the evidence and submissions, and the result.

Exclusion of Time:

Pursuant to subsection 67(2) of the **Act**, the time during which Mining Claim P-1198988 was pending before the Recorder and the tribunal, being June 8, 1994 to June 17, 1996, a total of 741 days, will be excluded in computing time within which work upon Mining Claim P-1198988 is to be performed

Pursuant to subsection 67(3) of the **Act**, June 12, 1998 is deemed to be the date for the filing of the first and second units of prescribed assessment work on Mining Claim P-1198988. Pursuant to subsection 67(4) of the **Act**, all subsequent anniversary dates shall be deemed to be June 12.

Conclusions:

Based upon the findings set out above, the appeal from the Decision of the Recorder is dismissed. The time during which the matter was pending before the Recorder and the tribunal will be excluded. Costs in the amount of \$500.00 are awarded to the respondent to paid by the disputant.

The Decision of the Recorder pursuant to subsection 110(6) of the **Act** remains in full force and effect.

This appeal and dispute are accordingly dismissed with costs as ordered.