

File No. MA 016-06

L. Kamerman )  
Mining and Lands Commissioner )

Friday, the 14th day  
of November, 2008.

**THE MINING ACT**

**IN THE MATTER OF**

Mining Claim SSM-3009901, situate in the Township of Chabanel, in the Sault Ste. Mining Division, recorded in the name of Pele Diamond Corporation and 2098680 Ontario Inc., each as to a 50% interest, (hereinafter referred to as the "Pele Diamond Mining Claim");

**AND IN THE MATTER OF**

Filed Only Mining Claim 3018118, situate in the Township of Chabanel, in the Sault Ste. Marie Mining Division, staked by Mr. Joseph Leadbetter, to have been recorded in the name of 3814783 Canada Inc., (hereinafter referred to as the "Leadbetter Filed Only Mining Claim");

**AND IN THE MATTER OF**

Mining Lands Patent "A" 7365, dated the 27th day of May, 1953, registered as Parcel 43 Michipicoten, situate in the Township Chabanel (formerly Township 29, Range 24), in the district of Algoma, Province of Ontario, being former Mining Claim SSM-18641; and Mining Lands Patent "A" 7366, dated the 27th day of May, 1953, registered as Parcel 44 Michipicoten, situate in the Township of Chabanel (formerly Township 29, Range 24), in the district of Algoma, Province of Ontario , being former Mining Claim SSM-18642 (hereinafter referred to as "Patented Mining Claims 18641 and 18642, respectively");

**AND IN THE MATTER OF**

Subsection 44(4) of the **Mining Act** and Ontario Regulation 7/96, Claims Staking;

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

3814793 CANADA INC. AND  
PAULETTE A. MOUSSEAU-LEADBETTER  
Appellants

- and -

PELE DIAMOND CORPORATION AND  
2098680 ONTARIO INC.

Respondents

**AND IN THE MATTER OF**

An application, pursuant to section 105 of the **Mining Act**, for a declaration that Mining Claim SSM-3009901 be declared invalid, and for the recording of the Leadbetter Filed Only Mining Claim;

**AND IN THE MATTER OF**

In the alternative, an appeal, pursuant to subsection 112(1) of the **Mining Act**, from the decisions of the Provincial Mining Recorder, dated the 20th and 24th days of April, 2006, respectively, for the recording of all or that portion of the Leadbetter Filed Only Mining Claim that does not overlap the Pele Diamond Mining Claim and includes those lands under the waters of Mildred Lake within Mining Lands Patent "A" 7365.

**ORDER**

**WHEREAS** this appeal, with documentation filed in support, was received from Mr. Malcolm G. McLeod, initial counsel (succeeded by Mr. C. Bruce Willson) for the appellants, 3814793 Canada Inc. and Paulette A. Mousseau-Leadbetter, by this tribunal on the 11th day of May, 2006;

**1. IT IS ORDERED** that the appeal from the decisions of the Provincial Mining Recorder, dated the 20th and 24th days of April, 2006, respectively, for the recording of that portion of the Leadbetter Filed Only Mining Claim 3018118 that does not overlap with the Pele Diamond Mining Claim SSM-3009901 and includes lands under the waters of Mildred Lake within Mining Lands Patent "A" 7633, be and is hereby allowed, that Filed Only Mining Claim 3018118 will be recorded effective the 20th day of April 2006 and the matter is referred back to the Provincial Mining Recorder for an Order pursuant to subsection 110(6) of the **Mining Act** that the posts correspond with the "thirdly" portion of the legal description and plan of survey regarding former Mining Licence of Occupation 12101 (as described in a legal document issued by the Minister of Mines on June 22, 1953) as follows:

- (a) The #1 post to be located at a point along the eastern boundary of Patented Mining Claim SSM 18642 which coincides with the south eastern side of the water body which transverses that boundary at that location, being either Mildred Lake or a river system whose flow is connected with Mildred Lake;
- (b) The #2 post to be located at a point along the southern boundary of Patented Mining Claim SSM 18642 which coincides with the south eastern side of the water body which transverses that boundary at that location, being either Mildred Lake or a river system whose flow is connected with Mildred Lake;

- (c) The #3 post to be located a point along the southern boundary of Patented Mining Claim SSM 18642 which coincides with the south western side of the water body which transverses that boundary at that location, being either Mildred Lake or a river system whose flow is connected with Mildred Lake; and
- (d) The #4 post to be located at a point along the eastern boundary of Patented Mining Claim SSM 18642 which coincides with the north eastern side of the water body which transverses that boundary at that location, being either Mildred Lake or a river system whose flow is connected with Mildred Lake.

**2. IT IS FURTHER ORDERED** that the time during which this matter was pending before the tribunal, being the 20th day of April, 2006 to the 14th day of November, 2008, a total of 940 days, be excluded in computing time within which work upon Mining Claim SSM-3018118 is to be performed and filed.

**3. IT IS FURTHER ORDERED** that the 16th day of November, 2010, be fixed as the date by which the next unit(s) of prescribed assessment work must be performed and filed on Mining Claim SSM-3018118, pursuant to subsection 67(3) of the **Mining Act** and all subsequent anniversary dates for the aforementioned Mining Claim are deemed to be November 16 pursuant to subsection 67(4) of the **Mining Act**.

**4. IT IS FURTHER ORDERED** that the appellants, 3814793 Canada Inc. and Paulette A. Mousseau-Leadbetter and the respondents, Pele Diamond Corporation and 2098680, each pay to the tribunal the sum of ONE THOUSAND FOUR HUNDRED AND TWENTY-EIGHT DOLLARS AND SIXTY THREE CENTS (\$1,428.63) by cheque made payable to the Minister of Finance, on account reimbursement to the tribunal for their proportionate share of inspection costs of Weirmeir Land Management Services within thirty days of the date of this Order.

**THIS TRIBUNAL FURTHER ADVISES** that, pursuant to subsection 129(4) of the **Mining Act**, as amended, a copy of this order shall be forwarded by this tribunal to the Provincial Mining Recorder **WHO IS HEREBY DIRECTED** to amend the records in the Provincial Recording Office as necessary and in accordance with the aforementioned subsection 129(4).

**DATED** this 14th day of November, 2008.

Original signed by L. Kamerman

L. Kamerman  
MINING AND LANDS COMMISSIONER

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Mining and Lands Commissioner ) Friday, the 14th day  
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**THE MINING ACT**

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

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Appellants

- and -

PELE DIAMOND CORPORATION AND  
2098680 ONTARIO INC.  
Respondents

**R E A S O N S**

**Overview**

This matter arises out of a staking dispute involving a mining licence of occupation which had forfeit to the Crown, whereby lands under the waters of Mildred Lake and part of the outflow from the lake, plus 200 feet from the high water mark, came open for staking. In this file, the open lands are located under Mining Lands Patent 12101 (the M.L.O.), issued in 1953, which corresponds with former mining claim numbers SSM-18641 and 18642. Former patented mining claim SSM-18639 was also part of the M.L.O., but is not the subject matter of this appeal.

The open lands within the patented lands encompassing former mining claim SSM-18641 were staked with priority on behalf of Pele Diamond Corporation and 2098680 Ontario Inc (“Pele Diamond”). The appellants, 3814793 Canada Inc. and Paulette A. Mousseau-Leadbetter (the appellants or “Leadbetter”), also attempted, through staking of one all-encompassing claim, to acquire an interest in the open lands under water within both patents. The provincial mining recorder (the “recorder”) allowed the staking on patented former mining claim SSM-18641 to be recorded in the name of Pele Diamond and disallowed the remaining portion on patented former mining claim SSM-18642. This decision was appealed in its entirety failing which, that portion of the staking dealing with patented former mining claim SSM-18642 be considered for recording.

Within several days of the recording of the Pele Diamond Mining Claim, assessment work was filed and accepted for recording which had the effect, pursuant to the deeming provisions in section 71 of the **Mining Act**, of being beyond any sort of challenge as to its validity. After a successful motion to disallow the appeal of the Provincial Mining Recorder's decision concerning that portion of the Leadbetter staking which overlaps the Pele Diamond staking, Leadbetter was granted further time to pursue other remedies concerning the validity of the Pele Diamond staking. On March 21, 2007, the Minister's delegate, Ms. Cindy Blancher-Smith issued a decision to the effect that certainty and security of tenure being paramount, no challenge to a mining claim would be entertained following recording of the first units of assessment work. Both Pele Diamond and the Ministry of Northern Development and Mines ("MNDM") determined that they would withdraw their opposition to the recording of the remaining portion of the Leadbetter Mining Claim, being that which covers lands under water within SSM 18642.

As there is no lingering objection to the recording of the remaining portion of the Leadbetter Mining Claim, SSM-3018118, it will be ordered to be recorded, the Provincial Mining Recorder will be directed to issue an Order for the moving of claim posts to coincide with all lands under water open for staking within patented former mining claim SSM-18642. The time up to the date of this Order for the filing of assessment work will be excluded.

### **Analysis**

Mining Licence of Occupation 12101 (the "M.L.O.") was issued on June 22, 1953, for lands under the waters of Mildred Lake. Not all the lands in the M.L.O. are the subject matter of this appeal, which is concerned with those lands under patented former mining claims SSM-18641 and SSM-18642.

M.L.O. 12101 forfeit to the Crown in 2002. Notice was published in the Ontario Gazette pursuant to subsection 41(3) of the **Mining Act** that the lands concerned would be open for staking on June 1, 2002.

On April 5, 2006, Mr. Richard Daigle, staking on behalf of Pele Diamond, staked Mining Claim 3009901, encompassing only those lands under water within patented former mining claim SSM-18641. On April 6, 2006, Mr. Joseph Leadbetter staked filed only Mining Claim 3018118, which encompassed the available lands under water on both former patented mining claims SSM-18641 and SSM-18642.

The decision of the Provincial Mining Recorder, made April 20, 2006, was to record Daigle's staking of SSM-3009901 on the basis that its staking was completed first in time, thereby having priority under subsection 44(2) of the **Mining Act**. In a further decision dated April 24, 2006, the Provincial Mining Recorder disallowed the non-overlapping portion of the filed only Mining Claim 3018118. Noting that the lands under water open for staking encompassed 1.29 acres within former SSM 18641 and .66 acres within SSM-18642, for a total of 1.95 acres, the overlapping portion staked by Daigle and claimed by Leadbetter was 1.29 acres or 66% of the total Leadbetter claim. Relying on the tribunal's decision in **Jones v. Battle Mountain**, (December 22, 1997) MA 024-96 (unreported), the Provincial Mining Recorder based his decision to disallow recording on the extent of the overlapping portion.

Of the criteria set out in **Jones v. Battle Mountain** governing the recording of non-overlapping portions of overlapping claims, the ninth one states:

9. If the situation should result, based upon the application of the foregoing criteria, that a non-overlapping portion of a mining claim which is less than one unit is completely surrounded by lands which are not open for staking, the resulting mining claim will be allowed and a direction to the Mining Recorder to order the moving of posts and boundaries will be issued. This will apply to cases involving rectangles, parallelograms, rhombuses and “C” and “L” configurations.

A review of the criteria in the **Jones** order reveals that they address a different set of facts than is experienced in the current appeal, a fact which was noted in the MNDM submission, found in Exhibit 5. The **Jones** criteria are based upon multiple stakings involving large tracts of land having come open at once which arose during a staking rush. Unforeseen problems had resulted from the transition in 1989 from single unit claims to multiple unit claims and guidelines were needed to govern the extent to which non-overlapping portions of claims could be recorded. The first criterion, which has not been reproduced, indicates that the tribunal would be seeking additional information from the field concerning the locations of overlap for purposes of ordering the placement of line posts. This is just one illustration of the shortfall of the criterion, in that it will not always be necessary to obtain additional information on the exact location of an overlap.

MNDM noted in its submission that the non-overlapping portion of the Filed Only Mining Claim 3018118 is contiguous with other mining lands held by Mousseau-Leadbetter and 3814793 Canada Inc. Allowing the recording of the non-overlapping portion would constitute an exception which allows for the consolidation of irregular claims into contiguous mining lands. The fact that the surrounding lands are held by the appellants in this appeal was not known to the Provincial Mining Recorder at the time of his decision. The information was supplied by the appellants in their filed documents. Based upon this information, it forms a valid reason for the recording of the non-overlapping portion of the claim, notwithstanding that proportion of the claim that does overlap another claim which has priority pursuant to the statute.

MNDM submitted that another exception should be allowed to exist where none of the surrounding lands remain open for staking, which is the case in this situation. By having opened the lands under water for staking, MNDM must have been aware and expected that unusual sizes and shapes of claims that could be staked in the area. This fact has led MNDM to support the recording of the non-overlapping portion of filed only Mining Claim 3018118.

The single most important factor which was not taken into consideration when drafting the criteria in **Jones v. Battle Mountain** was the unique set of circumstances created by the opening of lands under water previously held under M.L.O.s. Rather than numerous potentially overlapping stakings, these lands under water are irregular. As has been pointed out in the appellant’s materials, former patented mining claims SSM-18641 and 18642 are coterminous with lands not open for staking. All except the underwater portions within SSM-18641 are held by the appellants. Together, the under water areas within the two patented former mining claims represent an extremely small surface area of less than two acres. That of SSM-18642 is the smaller of the two, constituting an area of just over half an acre.

The additional information which the first criterion in **Jones** set out would only be necessary where the overlapping claims result in complex configurations or involve vast tracts of land. Such is not the case here where Pele Diamond staked a portion of the open lands under water and Leadbetter staked the whole area of open lands under water. Although the location of bisection of the open area was in question according to the handwritten note on the sketch accompanying the Pele Diamond application to record, in that Mr. Daigle stated that he sought to encompass all open lands under water, the final outcome was that only that open area under SSM-18641 formed part of the Pele Diamond claim.

Once the Pele Diamond Mining Claim 3009901 was recorded, the .66 remaining acres within patented former mining claim SSM-18642 was all of the open land or lands under water, having been completely surrounded by lands which were alienated from staking. To apply the principles governing the extent of overlap or non-overlapping area remaining, as set out in **Jones v. Battle Mountain**, would ignore the facts of the case, namely that there is nothing left to stake except the .66 acres remaining in Leadbetter's filed only mining claim 3018118. Nothing would be gained by forcing the lands to come open for staking, only to have the exact same area staked as was disallowed by the Provincial Mining Recorder in his decision of April 24, 2006.

Notwithstanding the subsequent inspection which uncovered errors in the location of placement of corner posts, overall, this case involved a total of 1.95 acres, 1.29 acres of which form part of the claim having priority in completion time, so that .66 acres remains. Those .66 acres become lands under water wholly coterminous with lands not open for staking upon acceptance for recording and recording of the first unit of assessment work.

The size of the lands under water open for staking may be questionable based upon its viability for purposes of performing required assessment work or even as an area to option out to a mining company for exploration purposes but frankly, those concerns can have no bearing on this matter. As set out in the MNDM submission, the Ministry must have been aware of the potential for resulting miniscule areas potentially constituting mining claims and did nothing to thwart their staking. Not only is the tribunal not empowered to make decisions as to whether lands should or should not be opened for staking on the basis of their viability as workable claims, but the opening of these lands under water for staking is tacit recognition on the part of the Ministry that the small tracts of lands under waters may be viable or serve some useful purpose under the overall objectives or purpose of the legislation. Although this is questionable, there is no means to challenge this fact.

The staking rules do not address miniscule areas coming open for staking. The prescribed standards for staking presuppose units of 16 hectares in unsurveyed territory, while in surveyed territory, units will either be 16 hectares or of a size whose increment accords with the underlying survey fabric.

The size of the area of lands under water coming open results from the original issuance of mining licences of occupation for the lands under water portions of various mining claims which were likely originally 40 acres in size when staked, having been staked prior to 1989. Up until 1964, a distinction was made whereby navigable bodies of water contained within a mining claim

were potentially treated differently at the time the claim went to lease or patent. The wording of the provision for issuance of a lease or licence is discretionary on the part of the Ministry. Subsection 52(5), of the **Mining Act**, R.S.O. 1960, c. 241, stated:

52.(5) Where a claim consists of or partly consists of land under navigable water, a lease or licence only to extract the mineral from the land under water may be granted.

The licences referred to were the mining licences of occupation or M.L.O.s. The practice of M.L.O.s ended in 1964 through S.O. 1964, c. 62, s. 4(1). Subsection 4(4) provided that the various repealed provisions continued to apply to leases and licences made before the date of repeal. Subsection 4(5) was enacted, which stated:

4.(5) Where a licence to extract mineral from land under navigable water that was applied for on or before the first day of September, 1963, is issued, the Minister may direct that the licensee, upon application in writing therefore and upon the surrender of his licence, be issued a lease under section 100a of The Mining Act, and the rental shall be that prescribed by the said section 100a for years subsequent to the first year of a term under that section.

Section 41 of the **Mining Act**, R.S.O. 1990, c. M. 14, continues the transition provisions for administration and surrender in exchange for a lease of these pre-existing M.L.O.s, although the practice of their issuance has not been resurrected.

The lands under water within patented former mining claims SSM-18641 and 18642 were captured by these earlier provisions. Rather than becoming patented, these lands under water formed part of M.L.O. 12101, issued in 1953, along with the underwater portion of patented former mining claim SSM-18639. Nothing in the surrender provisions, currently found in section 41, but also found in its predecessors dating back to 1964, serves to re-join the lands under water with the surrounding lands; they have effectively been severed and, notwithstanding a less than ideal tableau for prospective staking, these fragmented areas remain and must be dealt with under the existing rules.

Where such lands under water are forfeit or surrendered to the Crown, there is no requirement governing the amount of lands under water which should have been staked, given that substantially less than one mining claim unit of 16 hectares was open. To have staked along pre-existing former claim lines is but one of several options open to the staker(s). Pele Diamond chose to essentially restake along former boundary lines but it was not required to do so. Leadbetter chose to stake the entire open area. The fact that Pele Diamond then filed assessment work within days of submitting its application to record removes any potential challenge to its staking and closes the door on any discussion of whether it should have properly staked all of the lands under water which were open to attempt to comply with the requirement that a claim unit be 16 hectares in size or as near to that as circumstances would permit.

The tribunal will allow the recording of the non-overlapping portion of Filed Only Mining Claim 3018118. The resulting order will direct the Provincial Mining Recorder to issue an Order pursuant to subsection 110(6) for the movement of posts to coincide with the lands under water

that are open within SSM-18642. The facts in this case represent a variation of those criteria set out in **Jones** that the .66 acres is all that remains open for staking, notwithstanding the extent of the overlapping portion. It would be unfair to disallow its recording only to re-open the same lands for staking.

### **Inspection Costs**

The parties did not agree to the sharing of the cost of the inspection of the mining claims staked within SSM-18641 and 18642. As a result, the cost was split three ways, with each of the appellants, respondents and tribunal paying a third. The tribunal's share of the inspection cost for inspection by Mr. Michael Weirmeir of Weirmeir Land Management Services was \$2,857.26. It was understood between all parties that a determination for reimbursement of the tribunal would be made with the final disposition of this matter.

Although there was no actual adjudication of the merits of the first part of the Mosseau-Leadbetter appeal, based on the fact that the Pele Diamond Mining Claim was beyond challenge, having been deemed to have been staked in compliance with the legislative requirements pursuant to section 71, the fact remains that the inspection revealed that the actual staking took place outside of the actual lands under water which were open. As a result, an order for moving of posts was required so that the Pele Diamond Mining Claim would circumscribe the actual lands under staking. While this matter does raise issues as to whether the lands upon which the assessment work was performed were actually held by Pele Diamond, given that Mosseau-Leadbetter has title in one form or another to all of the surrounding lands, the issue is beyond the grasp of the tribunal. The Minister's delegate was satisfied that no issues existed upon which to proceed with a Ministerial challenge.

Given that Pele Diamond did receive a benefit from the inspection, the tribunal finds that a portion of the inspection costs will be reimbursed to it by Pele Diamond.

Similarly, the inspection further revealed that, while the #1 and #4 posts of the Mosseau-Leadbetter staking were within SSM-18641 and required movement, in fact, the #2 and #3 posts were located within lands to the south of SSM-18642 and also require a Provincial Mining Recorder's Order to be moved. As such, a portion of the inspection costs will be reimbursed to it by Mousseau-Leadbetter.

Due to the fact that both parties require movement of posts due to their own inaccurate stakings, the tribunal has determined that they will reimburse inspection costs equally. As such, it will be ordered that each reimburse the tribunal in the amount of \$1,428.63, to be paid within thirty days of the date of this Order, by cheque payable to the Minister of Finance.

### **Exclusion of Time**

Pursuant to subsection 67(2) of the **Mining Act**, the time during which Mining Claim SSM-3018118 was pending before the tribunal, being the 20th day of April, 2006 to the 14th day of November, 2008, a total of 940 days, will be excluded in computing time within which work upon the Mining Claim is to be performed and filed.

Pursuant to subsection 67(3) of the **Mining Act**, November 16, 2010, is deemed to be the date for the performance and filing of the next unit(s) of assessment work on Mining Claim SSM-3018118.

### **Conclusion**

The Mousseau-Leadbetter appeal will be allowed in part for the recording of the non-overlapping portion of its Filed Only Mining Claim 3018118, effective April 20, 2006, with a direction to the Provincial Mining Recorder for the moving of posts pursuant to subsection 110(6) of the **Mining Act**. Time during which this matter was before the tribunal will be excluded and a new anniversary date will be set. The parties will be ordered to reimburse the tribunal for its proportion of inspection costs on an equal basis.