

File No. MA 012-03

M. Orr)
Deputy Mining and Lands Commissioner)

Friday, the 30th day
of April, 2004.

THE MINING ACT

IN THE MATTER OF

Mining Claim TB-3006106, staked by Jason Heilman on the 29th day of October, 2002 and recorded in the name of Tony Robert Yozirovic, situate in the Township of McCoy, in the Thunder Bay Mining Division, hereinafter referred to as the "Yozirovic Mining Claim";

AND IN THE MATTER OF

Mining Claim TB-3006043, staked by Stephen Stares on the 29th day of October, 2002 and recorded in the name of Michael Stares, situate in the Township of McCoy, in the Thunder Bay Mining Division, hereinafter referred to as the "Stares Mining Claim";

AND IN THE MATTER OF

Mining Claims TB-3006084, 3006085, 3006107 and 3006109, staked by Robert John Heilman, on the 2nd day of November, 2002, the 31st day of October, 2002, the 2nd day of November, 2002 and the 1st day of November, 2002, respectively, to have been recorded in the name of Tony Yozirovic, marked "Filed Only", situate in the Township of McCoy, in the Thunder Bay Mining Division, hereinafter referred to as the "Yozirovic Filed Only Mining Claims";

AND IN THE MATTER OF

Sections 27, 44, 46 and 105 of the **Mining Act** and Ontario Regulation 7/96;

B E T W E E N:

ANTHONY ROBERT YOZIPOVIC

Appellant/Applicant

- and -

MICHAEL ROBERT STARES

Respondent

AND IN THE MATTER OF

An appeal pursuant to subsection 112(1) of the **Mining Act** from the decision of the Provincial Mining Recorder, dated the 16th day of June, 2003 and for the recording of the Filed Only Mining Claims.

(Amended April 30, 2004)

ORDER

WHEREAS this application was received by this tribunal on the 9th day of July, 2003;

UPON reading the documentation and hearing from the parties;

1. THIS TRIBUNAL ORDERS that the Title of Proceedings in paragraph one, page 2 be amended by adding “and” before the word “for”.

2. THIS TRIBUNAL FURTHER ORDERS that the Title of Proceedings be amended by deleting paragraph two on page 2.

3. THIS TRIBUNAL FURTHER ORDERS that the appeal from the decision of the Provincial Mining Recorder, dated the 16th day of June, 2003, be and is hereby dismissed.

4. THIS TRIBUNAL FURTHER ORDERS that the notation “Pending Proceedings” which is recorded on the abstract of Mining Claim TB-3006043, to be effective from the 9th day of July, 2003, be removed from the abstract of the Mining Claim.

5. THIS TRIBUNAL FURTHER ORDERS that the time during which the Mining Claim was under pending proceedings, being the 9th day of July, 2003 to the 30th day of April, 2004, a total of 297 days, be excluded in computing time within which work upon the Mining Claim is to be performed.

6. THIS TRIBUNAL FURTHER ORDERS that the 24th day of August, 2005, be fixed as the date by which the next unit(s) of assessment work, must be performed and filed on Mining Claim TB-3006043, as set out in Schedule “A” attached to this Order, pursuant to subsection 67(3) of the **Mining Act** and all subsequent anniversary dates are deemed to be August 24 pursuant to subsection 67(4) of the **Mining Act**.

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

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 the 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 30th day of April, 2004.

Original signed by M. Orr

M. ORR
DEPUTY MINING AND LANDS COMMISSIONER

SCHEDULE "A"

**MINING CLAIM
NUMBER**

**NEW DUE
DATE**

TB-3006043

August 24, 2005

File No. MA 012-03

M. Orr)
Deputy Mining and Lands Commissioner)

Friday, the 30th day
of April, 2004.

THE MINING ACT

IN THE MATTER OF

Mining Claim TB-3006106, staked by Jason Heilman on the 29th day of October, 2002 and recorded in the name of Tony Robert Yozirovic, situate in the Township of McCoy, in the Thunder Bay Mining Division, hereinafter referred to as the "Yozirovic Mining Claim";

AND IN THE MATTER OF

Mining Claim TB-3006043, staked by Stephen Stares on the 29th day of October, 2002 and recorded in the name of Michael Stares, situate in the Township of McCoy, in the Thunder Bay Mining Division, hereinafter referred to as the "Stares Mining Claim";

AND IN THE MATTER OF

Mining Claims TB-3006084, 3006085, 3006107 and 3006109, staked by Robert John Heilman, on the 2nd day of November, 2002, the 31st day of October, 2002, the 2nd day of November, 2002 and the 1st day of November, 2002, respectively, to have been recorded in the name of Tony Yozirovic, marked "Filed Only", situate in the Township of McCoy, in the Thunder Bay Mining Division, hereinafter referred to as the "Yozirovic Filed Only Mining Claims";

AND IN THE MATTER OF

Sections 27, 44, 46 and 105 of the **Mining Act** and Ontario Regulation 7/96;

B E T W E E N:

ANTHONY ROBERT YOZIPOVIC

Appellant/Applicant

- and -

MICHAEL ROBERT STARES

Respondent

AND IN THE MATTER OF

An appeal pursuant to subsection 112(1) of the **Mining Act** from the decision of the Provincial Mining Recorder, dated the 16th day of June, 2003 and for the recording of the Filed Only Mining Claims.

(Amended April 30, 2004)

REASONS

This matter was heard on April 20, 2004 in the City of Thunder Bay, Council Chambers, City Hall. Those appearing were Mr. Anthony Yozipovic (representing himself) and Mr. Stephen Stares (representing his brother Mr. Michael Stares). Neither party brought witnesses.

Background

The appellant Mr. Yozipovic had been the owner of certain mining claims that expired, leaving the lands open to staking in the fall of 2002. Wanting to preserve an interest in the lands that had once been covered by his claims, Mr. Yozipovic decided that the best way to go about protecting his interest would be to stake a one-unit claim of 16 square hectares roughly in the middle of the old expired claim. His intention was to follow this action by staking the surrounding lands, the idea being to cover the previously held lands with new claims.

The Stares brothers were also interested in the same lands. On the very day that Mr. Yozipovic was having his centre claim staked, Stephen Stares was staking as well. Unlike Mr. Yozipovic's staker, Mr. Stares was staking the entire land once covered by the old expired claim. The effect of the staking carried out by Mr. Stares was to include the work done by Mr. Yozipovic's staker, albeit unknowingly. Mr. Stares had started his work an hour earlier and he finished an hour later. The Stares claim (TB-3006043) would therefore cover all of the lands that Mr. Yozipovic wanted to cover with his second set of claims (and which he did achieve but after the Stares claim had been staked and filed).

This Stares claim was accepted as "filed only" until the ministry satisfied itself as to the issue of "donut staking". The Provincial Mining Recorder did eventually record the Stares claim as of the date it had been filed. Mr. Yozipovic in the meanwhile (in December 2003) had filed a dispute of the decision to accept the Stares claim 3006043 as "filed only". He was advised by the Provincial Mining Recorder in response that once a decision had been made regarding the status of the Stares claim 3006043, then, the Yozipovic dispute would either be dealt with or dismissed – depending on whether the Stares claim 3006043 was recorded. The status of the Stares claim 3006043 was changed to "recorded" as of the date it was received (October 31, 2002) in February 2003. Mr. Yozipovic's dispute was eventually dismissed on June 16, 2003, and thereafter he appealed to this Tribunal.

At the hearing, Mr. Yozipovic made it clear that he was disputing the recording of the Stares claim TB-3006043, and seeking to have his four claims recorded in its stead. It was also clarified for the Tribunal that Mr. Yozipovic was not asking the Tribunal to declare that the

Stares claim had been staked on Mr. Yozipovic's behalf. At one point prior to the hearing, it seemed that Mr. Yozipovic wished to summons two witnesses – being Mr. Stephen Stares and his staker, Scott Mortson. As it turned out, Mr. Stares appeared on his own volition, and the summons was not made out for Mr. Mortson. The tribunal is of the view that Mr. Mortson's evidence would not have had an impact on its decision.

Issues

There is really only one issue and that is, is the Stares claim TB-3006043 a valid claim? If this question is answered in the negative, then the consequences are obvious with respect to the Yozipovic claims that were staked and filed (and marked “filed only” by the Provincial Mining Recorder) subsequent to the Stares claim.

Evidence and Submissions

Mr. Yozipovic produced a number of documents and written information for the hearing. His testimony and his documentation indicated that he once owned a 16-unit claim (1205132), which had forfeit on October 24, 2002. He spoke of his desire to “protect” that former interest by staking a “centre unit” claim (in the middle of the old claim's lands) in the fall of 2002. The land in question was a source for black granite. The exhibits indicate that the old 16-unit claim was one of a group of claims. Mr. Yozipovic was made aware of the fact that others were interested in the same lands and since he did not have enough manpower at his disposal (to stake) he decided to stake a centre claim, thereby creating what he called a “priority of staking time”. His interpretation of the **Mining Act** and its regulations, together with his reliance on certain past decisions of this tribunal, convinced him that the centre claim's existence (as a recorded claim) would prevent others from going in and staking the old claim's lands as one new claim. It would be his position at the hearing that his claim 3006106 would act as the “hole” of a donut – the rest of the donut consisting of the balance of lands from the old claim.

Mr. Jason Heilman staked Mr. Yozipovic's centre claim (3006106) on October 29, 2002. He commenced at 9:05 a.m. and completed the staking at 11:20 a.m. the same day. This centre claim was recorded a day later October 30, 2002. Mr. Yozipovic's instructions to his staker were to stake the centre claim (consisting of one unit) and then to “come back”, presumably so Mr. Yozipovic could have it recorded. As to the surrounding lands, Mr. Yozipovic claimed that he had intended to wait to see if anyone showed up to stake them. He assumed that the potential stakers would see the centre claim already in existence. Depending on the direction that the other stakers might take, Mr. Yozipovic's staker would then stake whatever lands were not being staked around the centre claim, going in the opposite direction. It is not clear from what Mr. Yozipovic said (when compared to the documentation provided at the hearing), just how long he intended to wait. It is not relevant to this decision. In any event, when no one showed up, according to Mr. Yozipovic, he had Mr. Heilman stake the rest of the subject lands and stake around the “donut hole” claim 3006106. This staking took place over a four-day period from October 30, 2002, to and including November 2, 2002.

Mr. Heilman staked four claims of various sizes around the centre claim 3006106 as he had been told. These claims were received at the Mining Lands Consultant's Office in Thunder Bay on November 6, 2002. Mr. Yozipovic claimed that he waited until the 6th of

November before filing these four claims because he wanted to see if the Stares claim 3006043 would get recorded. The Tribunal would assume from this statement that Mr. Yozipovic came to know of the existence of the Stares claim some time between the time his centre claim was staked and before the 6th of November 2002. According to Mr. Yozipovic, at the time, had the

Stares claim 3006043 been recorded, he would not have staked his claims. There is no indication on the Application to Record for the four Yozipovic claims that Mr. Heilman had been aware of Mr. Stares' staking efforts. However, in looking at the filed maps for all the claims and the boundaries for all them, the Tribunal notes that the boundary lines are similar. Documentation provided by Mr. Yozipovic indicates that Mr. Heilman did see the Stares staking work. However, this too is not relevant to the tribunal's decision.

Mr. Heilman was advised in a letter dated December 2, 2002, from the Provincial Mining Recorder, that the claims he had staked were taken as "filed only", as per subsection 46(3) of the **Act**, since they over-staked the Stares claim 3006043 (described below), and it had been completed earlier. (The Stares claim had also been taken as "filed only". The reason for this is also described below.) Mr. Heilman was further advised of his options under the **Act** in terms of disputing the "filed only" status of the Yozipovic claims pursuant to section 48 or appealing it to the Mining and Lands Commissioner under section 112. It appears from the testimony of Mr. Yozipovic and from the documentation he filed, (including the abstract for the Stares claim 3006043), that Mr. Yozipovic took this letter to mean that he had until January 5, 2003, to file a dispute with respect to the Stares claim 3006043. Hence his numerous references to it not making any sense that he had to dispute a "filed only" claim. In any event, his dispute was directed at the validity of the Stares claim 3006043 and that is what this hearing was about.

The Stares claim (TB-3006043), covers or overlays the Yozipovic centre claim 3006106 and essentially comprises the lands once covered by the old expired claim. Stephen Stares staked his claim the same day, being October 29, 2002, (and practically at the same time) as the Yozipovic centre claim 3006106 was being staked. He started at 8 a.m., and finished at 12:35 p.m. He indicated that he did not see anyone in the area when he proceeded to stake the ground. Mr. Stares (who was representing his brother Michael Stares) said that he researched claims to see when they might be coming open. He got information by word of mouth and by assessment files. He was made aware of the fact that the old Yozipovic claims would be coming open.

The Stares claim TB-3006043 was received at the Thunder Bay Mining Lands Consultant's office on October 31, 2002. Mr. Stares discovered a week later that his claim was marked as "filed only" and was advised that the reason for that was that a claim was found to exist inside his claim. The Application to Record the Stares claim notes at the bottom "Filed only, pending review of the Ministry's policy regarding "donut staking" – policy UC – 303-5." The initials "BK" follow as well as the date, November 29, 2002. Mr. Stares claimed to not be aware of the existence of the Yozipovic (centre) claim at the time he was staking his claim. After calling the Mining Recorder's office and being told that his claim was taken as "filed only", and not open to staking, Mr. Stares decided to leave things up to the Provincial Mining Recorder.

An Order of the Provincial Mining Recorder dated December 30, 2002, indicates that the “filed only” status was renewed pursuant to subsection 46(5) of the **Act**, pending resolution of the issue. In reviewing the “Mining Claims Transaction Listing” (or abstract) for the Stares claim TB-3006043, (provided by Mr. Yozipovic) the Tribunal notes the following. The Application to Record was accepted as “Filed Only” on November 29, 2002; a dispute was filed by Mr. Yozipovic on December 20, 2002; “pending proceedings” status commenced as of December 20, 2002; on February 10, 2003, the Provincial Mining Recorder recorded the filed only application first received on October 31, 2002, and the dispute filed by Mr. Yozipovic was dismissed on June 16, 2003. It appears that Mr. Yozipovic was advised that the Provincial Mining Recorder had a discretion under subsection 44(4) of the **Act** which had been exercised to allow the Stares claim 3006043 to be recorded. A letter from the Provincial Mining Recorder dated December 23, 2003, and addressed to Mr. Yozipovic provided notice that his dispute would be dealt with only if the claim was recorded. It was recorded and Mr. Yozipovic’s dispute was dismissed on June 16, 2003.

Mr. Yozipovic disputed the recording of the Stares claim 3006043 on a number of levels. For one thing, he argued that the claim itself ran afoul of the policy against donut stakings. The Stares claim had been staked around his own recorded centre claim and it did not comply with the regulation in that it had not been staked in a “contiguous” fashion. His own four claims (those surrounding the centre claim) by contrast, had been staked in a contiguous fashion. In referring to the issue of “donut” staking he pointed to the case of Maciejewski v. MNDM. (Tribunal file MA 029-95 unreported). In that case, the appellant knowingly staked his claim around an already existing and recorded claim. (The Tribunal notes that this matter was dismissed on consent, so it considers the case of limited use here. It appears to be distinguishable on its facts in any event as in this case, Mr. Stares staked a claim unaware of the fact that a claim was being staked in the centre of his claim).

Mr. Yozipovic also took issue with the number of 16-hectare units in the Stares claim (15) and with its shape saying that it could not have a hole in it. He referred to Ministry policy U.C. 304-1 (issued April 3, 2003), on this point. (The tribunal notes that this policy is entitled “Partial Abandonment of Unpatented Mining Claim: Conditions”). There is no evidence to indicate that this was such a situation. He argued that the claim had to be a rectangle or a square and that the ratio of the sides could not be greater than 4:1. Furthermore, one could not get 15 units into a square claim. In addition, he referred to the case of Racicot v. MNDM & Charron (Tribunal file MA 025-97, unreported), and argued that the Stares claim could not use the centre claim’s boundaries to delineate itself and that it had to have its own common boundary. (The tribunal notes that the Racicot case dealt with, amongst other things, the question as to what goes into determining a boundary.) He also took issue with the length of time taken to actually record the Stares claim, arguing that while it was marked as “filed only”, he could go out and stake the same ground for himself. He also questioned the length of time taken by the Ministry to record the Stares claim and the notice that was given to him to dispute a claim that was “filed only”.

Mr. Yozipovic also criticized Mr. Stares for watching and waiting for his old claims to expire. He referred to the case of Skead Holdings Ltd. v. Foster David Marshall (August 10, 1990, unreported) where the Commissioner gave relief to someone who had been making a genuine attempt to comply with the **Act** as opposed to someone who “waits for the opportunity to profit from a technical contravention of the Act.”

Mr. Stares was content to abide by whatever decision was made regarding his claim. He noted that he had offered to sell the claim to Mr. Yozipovic twice (after finding out that his claim was “filed only”), and that on the second occasion he had offered the claim for \$2,000.00 and was not looking for royalties. Mr. Yozipovic did not accept his offer. Mr. Stares took exception to the criticism leveled at him for keeping an eye out for claims coming open and criticized Mr. Yozipovic in turn for trying to create an unfair advantage for himself by staking his centre claim as he did.

Findings

The Tribunal is satisfied that this was not a case of competitive staking as the lands in question had apparently come open before October 29, 2002.

Mr. Yozipovic posed a number of questions regarding the manner in which both the Stares claim and his claim were processed. He also drew the Tribunal’s attention to what he considered various deficiencies of the Stares claim TB-3006043. The Tribunal was not persuaded by Mr. Yozipovic’s arguments and finds that his arguments are based on interpretations that serve his interest but which do not reflect the purpose and objectives of the **Act**. While at first this appeal appeared to present a complicated picture, the Tribunal is satisfied that the only complicating factor was the approach taken by Mr. Yozipovic to the facts and the legislation in a fruitless attempt to have the Tribunal reinstate an interest he had lost with the expiry of his old claims.

The **Mining Act** is legislation that serves a competitive industry. Keen stakers are always on the lookout for expired claims, and they pay attention to what they hear by word of mouth and what they read in public documents. This type of behaviour cannot be described as claim jumping or lying in wait for technical glitches to appear in the honest work of others. The tribunal is of the view that the Stares claim (TB-3006043) is a valid claim that surrounds the Yozipovic centre claim TB-3006106. The Tribunal is also of the view that the **Mining Act** and its regulations in this case can, and should be interpreted to allow for the recording of the Stares claim TB-3006043. As the **Act** has anticipated in section 44, there will be occasions where more than one application will be made to record one or more claims on the same land and priority will be given to the one that can say it was completed first. The **Act** in subsection 44(4) also recognizes that the “other” application may cover land that is not part of the claim that is entitled to priority.

As for the fact that the Stares claim TB-3006043 surrounds the Yozipovic center claim TB-3006106, the Tribunal does not agree with Mr. Yozipovic that this is a fatal flaw for the Stares claim TB-3006043. The Stares claim TB-3006043 was staked at roughly the same time as the centre claim TB-3006106 was being staked. The centre claim was not recorded until

after the Stares claim had been staked. Mr. Yozipovic's attempt to save his old claims through the staking of what he considered to be the "hole" in the donut failed to take into account the possibility of someone going out and staking the entire area (including the center of the donut) at the same time. Mr. Yozipovic's cases and his interpretation of the **Act** and its regulations were not persuasive. In fact, the idea of staking a centre claim in order to preserve some priority to the lands around it is not supportable. How far would that perimeter of priority extend? It could be limitless, and the result would be a "freezing" of the surrounding land, preventing others from coming in and staking. While Mr. Yozipovic had his eyes focused on his old claim in its entirety, there would be nothing in the Act to prevent others from staking around his centre claim as he eventually did. His argument about staking the donut hole to give himself some sort of timing advantage makes little sense given the competitive nature of the industry and the wording of the **Mining Act**. Furthermore, there is nothing about the Stares claim's measurements that stand in the way of its being recorded. For example, Mr. Yozipovic's point that the Stares claim consisted only of 15 units and that it should fail on that basis is based on an incorrect interpretation of the applicable regulation [Ontario Regulation 7/96]. It is clear in section 2 of that regulation that a mining claim in unsurveyed territory is to consist of "one or more square **16 hectare** units." (Emphasis added) The Stares claim TB-3006043 consists of 15 such units (each being a 16-hectare square unit). Furthermore, the Stares claim TB-3006043 had been staked in a contiguous fashion at the time.

The tribunal also finds that section 11 of Ontario Regulation 7/96 does not provide Mr. Yozipovic with a basis for invalidating the Stares claim TB-3006043. The Tribunal finds that the facts come within section 44 of the **Act** and that the answer lies in the careful reading of that section. The sequence of events is such that two licensees made application to record the staking of a part of the same lands. The Yozipovic claim TB-3006106 was entitled to priority (to the lands staked for that claim) insofar as it was completed first. The Stares application to record covered land that was not part of the mining claim that was entitled to priority (the Yozipovic claim TB-3006106). The Stares application to record could be accepted and recorded and the application can be amended with respect to the previously completed claim. The Provincial Mining Recorder interpreted the section to apply to the events that have been described to this Tribunal. The Tribunal finds that the section fits the facts and that the Stares claim TB-3006043 is valid. Furthermore, the Stares claim TB-3006043 does have a proper boundary and there is no need to indicate an "internal" boundary. The Tribunal is of the view that section 11 of Ontario Regulation 7/96 does not apply in this instance, as Mr. Stares' staking did not encompass a claim that had been recorded prior to his staking.

Mr. Yozipovic's interpretations were essentially flawed in every respect and his criticism of the processing of the various claims (including the times for filing disputes) appeared to stem from either misreading the various pieces of correspondence or a single-minded purpose to support his staking efforts, or both. For example, he took issue with what he considered to be an unreasonable need to file a dispute regarding the Stares claim while it was in a "filed only" status. The letter he pointed to as advising him of this need clearly refers to the "filed only" status of his own four later claims. Mr. Yozipovic referred to various sections of the **Act** to support his having staked the lands covered by the Stares claim TB-3006043. Since his appeal is being dismissed, there is no need to review those arguments. Nor is there anything in the evidence or testimony of the parties to indicate that any of the applications referred to by Mr. Yozipovic were not processed in accordance with the **Act**.

Exclusion of Time

Pursuant to subsection 67(2) of the **Mining Act**, the time during which Mining Claim TB-3006043 was pending before the Tribunal, being the 9th day of July, 2003, to the 30th day of April, 2004, a total of 297 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**, as amended by S.O. 1996, c. 1, Schedule O, s. 18, August 24, 2005, is deemed to be the date for the performance and filing of the first and second units of assessment work on Mining Claim TB-3006043.

Pursuant to subsection 67(4) of the **Mining Act**, all subsequent anniversary dates for Mining Claim TB-3006043 are deemed to be August 24.

Conclusions

For the reasons given, the appeal is dismissed. No costs will be payable by either party.