

File No. MA 001-01

L. Kamerman)
Mining and Lands Commissioner)

Friday, the 12th day
of October, 2001.

THE MINING ACT

IN THE MATTER OF

Mining Claim L-1239268, situate in the Township of Dokis in, in the Larder Lake Mining Division, staked on November 30, 2000, by Yvon Michael Gagne and Jim Harold Forbes, recorded on December 8, 2000, in the name of Yvon Michael Gagne, hereinafter referred to as the "Mining Claim";

AND IN THE MATTER OF

An application under section 105 of the **Mining Act** for the transfer of ownership of the Mining Claim from the Respondent, Yvon Michael Gagne to the Applicant.

B E T W E E N:

ERIC JOSEPH MARION

Applicant

- and -

YVON MICHAEL GAGNE AND JIM HAROLD FORBES

Respondents

ORDER

1. **THIS TRIBUNAL ORDERS** that the application be and is hereby dismissed.

2. **THIS TRIBUNAL FURTHER ORDERS** that the notation of "Pending Proceedings" which is recorded on the abstract of Mining Claim L-1239268, to be effective from the 10th day of January, 2001, be removed from the abstract of Mining Claim L-1239268.

3. THIS TRIBUNAL FURTHER ORDERS that the time during which Mining Claim L-1239268 was under pending proceedings, being the 10th day of January, 2001 to the 12th day of October, 2001, a total of 276 days, be excluded in computing time within which work upon the Mining Claim is to be performed and filed.

4. THIS TRIBUNAL FURTHER ORDERS that the 10th day of September, 2003 be fixed as the date by which the next unit of prescribed assessment work must be performed and filed on Mining Claim L-1239268, pursuant to subsection 67(3) of the **Mining Act**, and all subsequent anniversary dates are deemed to be September 10 pursuant to subsection 67(4) of the **Mining Act**.

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 recording in the Provincial Recording Office in accordance with the aforementioned section 129(4).

Reasons for this Order are attached.

DATED this 12th day of October, 2001.

Original signed by L. Kamerman

L. Kamerman
MINING AND LANDS COMMISSIONER

SCHEDULE "A"

Mining Claim Number	Current Due Date	New Due Date
L-123928	Dec. 8, 2002	Sept. 10, 2003

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B E T W E E N:

ERIC JOSEPH MARION

Applicant

- and -

YVON MICHAEL GAGNE AND JIM HAROLD FORBES

Respondents

REASONS

This hearing was held on the 22nd day of August, 2001 in the Larry Brown Room, Royal Canadian Legion, Summerhayes Avenue, Kirkland Lake, Ontario. Mr. Eric Marion, the applicant and Messrs. Yvon Gagne and Jim Forbes, the respondents, appeared in person and represented themselves.

Background

On November 30th, 2000, Mr. Yvon Gagne staked Mining Claim L-1239268 in Dokis Township (the "Mining Claim") with the assistance of Mr. Jim Forbes. The Mining Claim is recorded in the name of Mr. Yvon Gagne. In October, 2000, Mr. Forbes had been present, working on claims contiguous to the Mining Claim during diamond drilling when one of the cores displayed results which were of considerable interest to Mr. Marion's exploration program. According to Mr. Marion, Mr. Forbes had several opportunities to view the core, both in the bush and at his home. Although he did not immediately have funds to do so, the core was of sufficient interest to Mr. Marion that he planned on staking the Mining Claim with Mr. Forbes as soon as he was able to finance it. Pursuant to discussions with Mr. Forbes, Mr. Marion intended to go staking in the near future. As it turned out, funds became available at the same time as Mr. Forbes assisted Mr. Gagne with the staking of the Mining Claim.

It is Mr. Marion's position that any information which Mr. Forbes had concerning his interests in Dokis Township was proprietary. Further, Mr. Marion contends that Mr. Gagne was told this information by Mr. Forbes, so that the staking of the Mining Claim arose directly as a result of this proprietary information. Mr. Forbes position is that he did not disclose any information to Mr. Gagne, but merely was in the market to assist in staking with anyone who paid him. As Mr. Marion owed him money for earlier work, he was unwilling to take on additional work for which he did not expect to be paid. Mr. Gagne's position was that the lands in question had been open for three years and that there were no restrictions to preclude his staking, despite threats of legal action by Mr. Marion, which amounted to a kind of restriction, according to Mr. Gagne. Mr. Gagne further maintained that the reason for his staking was based upon earlier prospecting results and a copper showing within the lands in question.

Evidence

Evidence was given by Messrs. Eric Joseph Marion, Eric Arthur Pamplin and Alain Rene Carreau on behalf of the applicant. Ms. Wendy Sheila Martha Wilson, Messrs. Yvon Michael Gagne and Jim Harold Forbes gave evidence on behalf of the respondents.

Messrs. Eric Marion and Jim Forbes had a working relationship of long standing, where each would assist the other with his mining claims without compensation. During October of 2000, Mr. Forbes assisted Mr. Marion on certain mining claims in Dokis Township for which they apparently agreed to compensation, although at the hearing of this matter, they did not agree as to the terms of that compensation. Mr. Forbes stated that he was to construct 164 posts as a result of the area having been clearcut by logging. Mr. Marion was negotiating a deal with the logging company, Tembeck, for \$25.00 per post, of which Mr. Forbes was to be paid \$12.50 per post, for a total of \$2,050.00. During the period of October 10 to 20, 2001, Mr. Forbes worked a total of 43 hours, for which he was paid \$425.00. It was Mr. Forbes position that he was owed the remaining \$1,625.00 for work on the posts. While Mr. Marion's position was that Mr. Forbes had been paid \$10.00 per hour, in fact whether or not money was owing was immaterial to his application.

During the 10 days in October, 2000 when Mr. Forbes was making the posts, Mr. Marion and his partner, Mr. Alain Carreau, were conducting diamond drilling on their interests. The various mining claims in Dokis and Tannahill Townships are either held solely by Mr. Marion or each as to a fifty percent interest between Mr. Marion and Mr. Carreau. They were acquired between early 1997 and early 2000. The Client Report for Mr. Marion's holdings in the Larder Lake Mining Division (Ex. 8) discloses a total of \$86,273.00 worth of work performed on this group. The date shown suggests that this does not include the work done in October, 2000 by either Mr. Forbes or Mr. Marion working with Mr. Carreau. Mr. Marion wanted to impress upon the tribunal the considerable work and effort put into this property as showing its significance to him.

Coincidentally, it was Mr. Gagne who brought in the diamond drill in October, 2000 for Mr. Marion. While there was consensus that Mr. Gagne did see the cores, it was his position that Mr. Marion was eager to show him. Mr. Marion maintained that by being on the property, Mr. Gagne was in a position to note the cores and acquire information.

Mr. Marion asked Mr. Forbes to assist with the staking of two mining claims of six units each, as soon as he could finance it. These two units were the identical lands to those covered by the 12 unit Mining Claim. On November 24th, 2000, while Mr. Marion was working in his garage on his truck, Mr. Forbes came by and asked for an advance on the staking. Mr. Marion gave him \$40.00. This evidence was corroborated by Mr. Pamplin, who maintained that the request was an advance and not for monies owed. On November 27th, Mr. Forbes returned and asked for more money, which Mr. Marion did not have. This is also corroborated by Mr. Pamplin, although Ms. Wilson, Mr. Forbes companion stated that Mr. Forbes asked for money that was owing for work already performed. Later in the week, Mr. Marion stated that he saw Mr. Forbes in Mr. Gagne's company and became suspicious and concerned. Mr. Forbes maintained that he was only asking for money owed on account of the posts he constructed. Mr. Marion indicated that the \$425.00 was to have been payment in full for that work.

According to Mr. Gagne, not only had the lands in question been open to staking for a period of three years, but also, Mr. Marion was in possession of the file of the Provincial Resident Geologist's Office for a period of six weeks. It was only when Mr. Gagne asked for it, that the Office was aware that it was missing. It was finally returned and Mr. Gagne stated that he perused the report briefly. He was interested in a copper showing of 3.5 percent. Mr. Gagne stated that he even asked Mr. Marion to go into the staking of the Mining Claim as his partner, but Mr. Marion declined.

Mr. Alain Rene Carreau, Mr. Marion's partner, stated that he had been told of the \$40.00 advance on the staking to Mr. Forbes, but was not present. It was his evidence that he assisted with the drilling, but permitted Mr. Marion to conduct the day to day business. Asked why they had not staked the Mining Claim, given their interest in the area, Mr. Carreau indicated that he had thought they were staking it. Asked about the money owed to Mr. Forbes for erecting the posts, Mr. Carreau stated that Mr. Forbes knew that there would be no money until an agreement was reached with Tembeck. However, the deal with Tembeck fell through.

Ms. Wilson stated that Mr. Marion had called around noon or one o'clock on November 30th, the day Messrs. Forbes and Gagne had gone out to do the staking. Apparently he wanted to stake with Mr. Forbes on that day. However, as it takes two hours to get to the site, there was no way that it would have been possible to stake on that day. Ms. Wilson stated that she did not see the \$40.00 advance given to Mr. Forbes, but she was present when Mr. Forbes asked Mr. Marion to pay him for the post job. Apparently Mr. Marion refused to sign the deal with Tembeck and the deal fell through. As there was no money from Tembeck, that was the reason that Mr. Forbes did not go ahead with the staking for Mr. Marion. Under cross-examination, Ms. Wilson stated that Mr. Marion knew that Mr. Forbes had left at 5:30 a.m. to stake with Mr. Gagne. Ms. Wilson did not agree that \$10.00 per hour was a fair wage when the agreement had been to be paid by the post.

Mr. Forbes stated that he had worked for Mr. Marion erecting posts on land that had been clearcut to re-establish grids. With the underlying deal with Tembeck, he had agreed to do the work for \$12.50 a post, with Mr. Marion to receive \$25.00 per post. The problem with the deal was that Mr. Marion wanted to be paid for more posts than Tembeck was willing to pay for. Although he had discussed the further staking with Mr. Marion, Mr. Forbes indicated that he felt under no obligation to do so, as he was not paid in full for the work done on the posts.

Mr. Forbes stated that he kept the information concerning the critical intersection of Mr. Marion's drill core confidential. Mr. Gagne was interested only in the lands on which there was the copper showing. As far as Mr. Forbes was concerned, he was interested only in working for a wage which would be paid. Mr. Gagne always paid him by cheque for any work done. In fact, he has earned approximately \$5,000.00 over the last five or so years doing work for Mr. Gagne.

Mr. Forbes stated that he had no contract with Mr. Marion. Given that the Tembeck deal was not signed, he has not been paid to this day. Mr. Forbes stated that the whole thing was a matter of honour. He did not stake the claim because he had not been paid; rather he did it because it was a job. Mr. Forbes stated that \$10.00 per hour is an unfair wage for him, given his skills in the bush. The industry standard, which he can command, is in the neighbourhood of \$25.00 to \$30.00 per hour.

Mr. Gagne discussed the matter of whether it was a coincidence that Messrs. Gagne and Marion would want the same land on the same day, given that it was not a competitive situation. He pointed out that three other companies, Magusi River Explorations Inc., Xtra Developments Incorporated and Strike Minerals, had held exactly the same lands staked by him. Mr. Gagne was merely following in their footsteps, pursuing the copper showing. When challenged by Mr. Marion that the report showed, upon further testing, it recommended that no further work be done, Mr. Gagne indicated that he preferred to follow his own instincts and do his own testing before determining whether or not the showing held promise. Mr. Gagne reiterated that he was not interested in the same thing as Mr. Marion. Under cross-examination, Mr. Gagne indicated that he had thumbed through the Resident Geologist's files, and noted that the Mining Claim was the only property of interest in Dokis Township because of the copper showing. He reiterated that, despite whatever testing had been done, he preferred to conduct his own investigation. He also stated that not only had Mr. Forbes never mentioned the results in the core, but moreover, he did not stake lands on anyone else's say so, but based only on what he determined through his own inquiries.

Mr. Gagne pointed out that even when Mr. Marion was asked to return the files, which clearly indicated that someone else was interested in the lands, he was content to wait a further six days while the ground could have easily been staked. Mr. Gagne asked just when it was that Mr. Marion made up his mind that he even wanted this ground.

Mr. Gagne stated that he had offered to do the staking with Mr. Marion, which was refused. Further discussion ensued to the effect that Mr. Gagne had offered Mr. Marion the Mining Claim along with a payment for \$10,000.00, which Mr. Gagne indicated had been a joke.

It was suggested, with respect to the actual amounts owing to Mr. Forbes, that Mr. Forbes' earnings are closely supervised by and would be of interest to a third party to this proceeding. Mr. Marion appeared to be suggesting that any net amount owing to Mr. Forbes would be governed by a determination of this third party as to how much Mr. Forbes was entitled to earn.

Submissions

Mr. Marion submitted that he hired Mr. Jim Forbes to stake the Mining Claim. The industry standard involves no written contracts, no receipts and his engaging Mr. Forbes in this way was not out of the ordinary. It is a matter of honour, that Mr. Forbes should have been obliged to honour his agreement.

The case hinges on whether Mr. Forbes is bound by his agreement to do the staking for Mr. Marion. In **Noranda Exploration Company Limited v. Kondrat et al.** (1975) 5 M.C.C. 170, Commissioner Ferguson quotes extensively on the law of contract from Cheshire and Fifoot, Sixth Edition, *Law of Contracts*. Commencing at page 184, Commissioner Ferguson quotes extensively their theory "that the discussion of mistake other than common mistake, is really an application of the principles of offer and acceptance".

Mr. Marion referred to the following quote from Cheshire and Fifoot:

Again in another case, Pollock, C.B. said: -

"If any person, by a course of conduct or by actual expressions, so conducts himself that another may reasonably infer the existence of an agreement ... whether the party intends that he should do so or not it has the effect that the party using that language or who has so conducted himself, cannot afterwards gainsay the reasonable inference to be drawn from his words or conduct."

Mr. Marion submitted that the tribunal should find that there was a contract for the staking between himself and Mr. Forbes.

In a second case, **Tudale Explorations Limited v. Bruce et al.**, 5 M.C.C. 183, (H. Ct.), Mr. Marion relied at page 286 upon a quotation from Snell in his work on Equity, 27th ed. at page 563:

Where by his words or conduct one party to a transaction makes to the other an unambiguous promise or assurance which is intended to affect the legal relations between them (whether contractual or otherwise), and the other party acts upon it, altering his position to his detriment, the party making the promise or assurance will not be permitted to act inconsistently with it.

Mr. Marion proposed that he could pay Mr. Forbes the money he is owed for construction of the posts, such amounts to be determined by the third party alluded to in the proceedings and specifically identified in Exhibit 10. Mr. Marion also referred to a counter-claim in the amount of \$10,000.00. The objective of either approach would be to have the Mining Claim transferred to him. Mr. Marion had asked that the staking be nullified, but upon questioning by the tribunal, his request was that the Mining Claim be ordered transferred into his name.

Mr. Gagne submitted that rather than Mr. Forbes being under a contract to Mr. Marion to stake the Mining Claim first, it was him, Mr. Gagne who first asked Mr. Forbes to assist in staking. This took place four days prior to the actual staking, with Mr. Marion making his request two days later. At the relevant time, Mr. Forbes was under contract to work for Mr. Marion.

Looking at the overall picture, Mr. Gagne pointed out that the lands in question had been open to staking for three years. Mr. Gagne submitted that he had acted in good faith. He staked and recorded the Mining Claim in accordance with the **Mining Act** and therefore submitted that it should remain in his name.

Post Hearing Submissions

The tribunal determined that it would require additional evidence from the parties and on September 14, 2001, provided the following transcript evidence:

" Of all the years those companies were the only thing they were interested in the whole township was the copper showing.

So what I did, I just staked the same ground that these companies had. I got maps - I got part of the reports of their drawing, their trenching, their sampling, the work they did against those claims, So actually there were other people there prior to myself. And I'm sure Eric Marion was aware of this because he had the files in his possession for six weeks.

On page 28 [of his submission], on November 10th I went to the Mining Recording Office to buy six Township maps. And I noticed [Dokis] Township, that most of the ground is open. And I went to look at the file and the file was gone so I asked the girl, I said "Where's the file?" I thought maybe they misplaced them.

So she looked at the sign-out slip and she never told me who it was, but I found out later that Eric Marion had those files for six weeks.

When a person has those files for six weeks and he can't make up his mind whether he's going to go stake that copper showing or not.

Anyway, I got the files back and I looked at it and I decided the next day I think - that was a weekend - so I contacted Jim Forbes to go and help me stake the copper showings and Jimmy said "Sure." Come and stake with me - I didn't say where I was going, I just said I'm going to stake some claims and he says "Okay."

Prior to that Eric Marion got wind of it, that we were going out to stake some claims - somehow he found out where we were going so he had knowledge, two to three days prior to our staking, that we were going into Dokis Township. Eric even phoned my house two or three times about - "Are you guys going to go to stake the copper showing?" I said, "Yes, I hired Jimmy. Oh." I said, "Do you want to come in with me? Well, no I don't really want to." I said, "Do you want to go half with me to stake that property? No I don't mind, no you go ahead."

...

On the last page, 32, when the Mining Recording Office phoned Eric to bring those files back he still had six days to go stake those claims. When the Mining Recording Office phones you and tells you to bring the files back, well you know that somebody is looking at those claims. So what do you do? You bring the files back, you go home, grab your axe and you go stake them. You don't stay at home for six days and twiddling your fingers and "What am I going to do here?"

That's the main thing - that's why I went to stake it because there was a copper showing. It had nothing to do with Eric Marion's work up there. That's basically it."

And the tribunal further referred to the following evidence found at page 28 of Mr. Gagne's documents (Ex. 4):

" On November 20th, 2000, I went to the mining recording office in Kirkland Lake, to buy six township claim maps. Dokis township was one of these maps. I have a receipt for the purchase. I returned to the mining office on Friday November 24th to research some of the files, after viewing the plastic overlays of Dokis township. There was an area of diamond drilling I was interested in. I could not find the files. I asked the woman employee if the files had been misplaced. She checked and discovered that the relevant files were signed out on October 16th, 2000 and had not been returned. This represents a period of six weeks that the files were out. It is my understanding that they are not to be out of the office more than three days. The employee said that she would phone and would explain to client with files that another client was interested in them and request that he return them as soon as possible.

On Monday November 27th, 2000 I received a call from the mining office employee saying that the files had been returned. I went in early the next morning to look at them. The claims map indicated that the ground was open for staking.

I contacted Jim Forbes asking him to help me stake the ground. Jim and I have staked claims together for years, and to him it was just another job. He has no personal interest in that property."

The tribunal obtained information from the Resident Geologist's Office in Kirkland Lake and provided copies to the parties:

Attached to this Direction are Sign-Out documents for Assessment File KL-1716, relating to Dokis Township. Included are:

- a) Signing out of File KL-1716 by Eric Marion on October 16th, 2000, returned November 28th, 2000
- b) Signing out of File KL-1716 by Yvon Gagne on December 1st, 2000, returned December 4th, 2000; and
- c) Signing out of File KL-1716 by Yvon Gagne on February 20th, 2001, returned February 22nd, 2001.

The tribunal advised the parties of certain discrepancies notices between the dates shown and noted the following:

- a) that Mr. Gagne could not have seen the relevant files any time prior to November 29th, and most likely could have viewed them on the 28th or 29th;

- b) that Mr. Gagne stated that he decided after the day he viewed the file that he would stake the Mining Claim;
- c) that Mr. Gagne thought that the day after he viewed the file was the weekend, but in fact, November 28th, 2000 was a Tuesday and the staking took place on Thursday, the 30th day of November, 2000;
- d) that the Resident Geologist has advised the tribunal that it does not keep records or logs of those viewing files within their offices;
- e) that Mr. Gagne did not sign out the relevant file until December 1st, 2000, being the day after the day the staking took place;
- f) that Mr. Gagne indicated that Mr. Marion found out some several days before the staking took place that he intended to stake and yet it does not appear that there was sufficient time to view the files, thereby casting the chronology set out into doubt.

The tribunal then directed Mr. Gagne to explain through providing further evidence in writing and in particular required his evidence on the following in writing:

- a) Did Mr. Gagne view the file in the Office of the Resident Geologist prior to December 1st, 2000?
- b) If the answer to question 5(a) above is yes, then why did Mr. Gagne not sign out the file at that time?
- c) If the answer to question 5(a) above is yes, to whom did Mr. Gagne speak in the Resident Geologist's Office and did he attend the office alone?
- d) If the answer to question 5(b) is no, on what information did Mr. Gagne base his decision to stake the Mining Claim?
- e) Any further explanation or information which Mr. Gagne wishes to provide, including but not limited to how Mr. Gagne proposes the tribunal treat the newly provided information.

On September 21, 2001, Mr. Gagne provided the following information:

5(a) I viewed those files on November 28/2000. In the Commissioner's letter dated September 14/2001 page three (3) paragraph 3(a) those files were returned on Nov. 28/2000. I read those files on that date at the recording office. I was waiting for them for several days.

5(b) A prospector could enter the mining recording office at 8:30 A.M. and stay till 5:00 P.M. - read- study-photocopy files - make notes, nfive days a week and not sign out a single file. I went in on that day of 28th Nov., 2000 read the file and returned it to its proper place in the filing cabinet. If the Commissioner had viewed the files in question she would see that it could be read in half an hour, its about the thickness of a comic book not needing signing out. I signed the files out on December 1st 2000

the day after the staking of the property to photocopy the oversized maps that are too large for the copier at the mining office. These maps are at least 2 1/2 feet x 3 1/2 feet in size. I signed out the files again on February 20/2001 for the purpose of copying material for this case.

5(c) When I went to the mining recording office, I spoke to the regular employees and I was alone.

5(d) After reading the files I decided that the property deserves another try because of the copper results and the access to the property is improved by forestry operations:

VII CONCLUSIONS AND RECOMMENDATIONS

The presence of the chalcopyrite mineralization is encouraging as is the soil copper anomalies. Further work should be undertaken. A selected grab sample from one of the old pits gave an assay of 3.44% copper.

It is recommended that seven diamond drill holes be used to test the seven most promising copper soil anomalies. ...

Comments on the tribunal's observations are also provided:

4(a) When the files were returned on the 28th November, 2000 they were read that same day.

4(b) I decided to stake those claims on that very same day, Nov. 29th, 2000.

4(c) On Friday November 24th 2000 I was in the mining office researching files not associated with this case. That's the day before the weekend. That very same day I could not find the files of Dokis Township property. The first time I went to the office for this case was on Nov. 20/2000 not the 10th Nov. mentioned in your letter page tw (2) third paragraph.

4(e) The Mining Act states that a prospector has thirty-one (31) days to record his claims after staking. The Mining Act does not state that a prospector cannot sign out files of the property that he just staked to copy oversized maps. (Dec. 1/2000).

4(f) The Commissioner's comments as saying that it does not appear that there wasn't sufficient time to view the files. I had two (2) days to view those files as a matter of fact one half hour would be plenty, not like Mr. Marion signing out those files four years in a row and still not electing to stake.

Closing Comments

Mr. Marion signed the tiles out of the recording office for four (4) consecutive years.

FILE KL-1716

Borrowed ?/ 1997 Returned March 27/1997

Borrowed July 28/1998 Returned August 19/1998

Borrowed February 22/1999 Returned March 3/2000

Borrowed October 16/2000 Returned November 28/2000

I cannot put into words to describe how a man can look at the same property files for four (4) years and still not elect to stake. What's more incredible is that he wanted to stake that property the same day that I did. Am I the only one on this planet that could see something wrong with this picture? If the Commissioner would read Mr. Marion's letter of January 10/2000 (2001) his dates almost coincide with the dates that I have prior to staking and the staking date.

I honestly believe that if I had not staked those claims, they would still be open for staking today.

Example: Question: If a major mining company is diamond drilling on their property and the ground next to them is open for staking do you phone that company for permission to stake? Answer: You don't phone. Open ground. You stake it. Period.

PS: Mr. Marion had those files for six weeks. Would the Commissioner read the MNDM assessment file loan sheet, THE AGREEMENT 5th sentence.

The tribunal notes, in response to Mr. Gagne's post script, that the sign out sheet states the following: "Files are to be returned within 3 working days of sign out date. ...If borrower is in violation of this agreement, this document will not longer be deemed confidential after a two-week period."

Mr. Marion was given the opportunity to respond to the comments and evidence provided above by Mr. Gagne:

- A. On page 1 of part 2 of the Gagne letter of Sept 21/01, Comments on 4(c), Mr. Gagne states that the first time researching this area was Nov. 20/2000. On page 28 of Feb 26 submission b Yvon Gagne, para. 1, sentence 5 states, "There was an area of diamond drilling I was interested in." If Mr. Gagne is referring to my drilling, how and why is he interested as the hole in question is not yet submitted to the

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mining office? If he is referring to drilling done by Magusi River Exploration, from which file did he get this information?

- B. On Page 28, of Feb 26 submission by Yvone Gagne, paragraph 2, Mr. Gagne states that he went to see the file the day after its return. At the hearing (M. C. letter of Sept. 14/01 page 2, paragraph 6) Mr. Gagne seems to imply that he viewed the files on a Friday before staking. In this latest correspondence of Sept. 21/01, part 1, page 1, Mr. Gagne states that he viewed the files the day that they were returned.
- C. Mr. Gagne appears to place a lot of emphasis on the copper potential of the claims. He has submitted a proposal by a previous holder of the mining claims on page 23 and 24 of his submission of Feb. 26/01 and again as an addendum to his latest correspondence, where it would appear there was assumed, at the time, to be an interesting area that required follow up work. What Mr. Gagne has not submitted is the conclusion of the program run by those claim holders. As can be seen by the submission of Tom Gledhill dated 15/10/73, a full 8 months oafter the report referred to by Mr. Gagne, the program was a bust, and was stopped before completion.
- D. In reference to comments on page 2 of part 1, of letter dated Sept. 21/01, Mr. Gagne states that the file in question (#1716) is the size of a comic book and can be read n half an hour. This file is a 140 page compilation of reports with 4 folded maps in back. Without the maps the report is 1" thick. Since 1983 the mining office has been in possession of a photocopier, serial # 646003164, which can copy up to 3 1/2 feet wide and 8 feet long. Calling 1-800-939-3769 will put you in touch with the service contractor for this unit, whom can verify the capacities of this machine as well as the service records which will indicate that the unit was operational on Dec 1/01. This machine can be used by anyone requesting large, map sized copies.

In light of the above contradictions in Mr. Gagne's latest statement, I really don't know if any of the points he ha tried to make can be accepted with any certainty of validity. In reference to Direction #6 of the tribunal, I would respectfully defer to the tribunal to determine the best way to use Mr. Gagne's latest submission, to arrive at the truth.

- E. In reference to letter of Sept. 14/01, page 2, paga. 7., on Wednesday Nov. 29, I had observed Jim Forbes in the company of Yvon Gagne at approx. 2:00 p.m. When I stopped to talk to them, they appeared apprehensive or nervous about something and quickly got me on my way. Later that evening, this encounter was still not sitting well with me so I called Jim Forbes to try to find out what was up. He then told me that he was going to stake the claims that I had hired him to help me stake, for Yvon Gagne instead, and that it was just coincidence

that Yvon wanted the same claims that I did. I then phoned Yvon Gagne at approx. 9:00 p.m., which was the first of two only times that I phoned him pertaining to those claims. During this call, I informed Mr. Gagne that I had already hired Jim Forbes to stake for me. He seemed to disregard what I had said and then offered me to go partners with them. I told him that I could not and would not be a willing party to what they were doing to me and for him to go ahead and do whatever he feels he has to. The second call I made to Yvon Gagne was on Fri. Dec. 1/00. I inquired of him if had wend ahead and stated the claim and if it was his purpose to sell it. Mr. Gage stated that yes, he had staked the claim and if I wanted it, I was to pay them ten thousand dollars. After some contemplation I began a dispute process.

In closing, I have been actively prospecting tin this area for some time now. During this time, I have taken out file #1716 many times to correlate information around my claims, as my own work progressed. I have had contact with Yvon Gagne and Jimmy Forbes many times, both off and on my claims, and it was always portrayed to me that we were friends not competitors. As such much was seen and said that would be confidential. Jimmy Forbes also viewed file #1716 many times in the weeks prior to me returning it. Mr. Forbes and I went over the files in fact, just days before Mr. Gagne inquired at the mining office for it. We also viewed the core and assessed how it fit in. It was at one of these sessions that I made a commitment to stake. On Nov. 29/00 when Mr. Forbes accepted an advance on the staking to be done, I feel that he was officially hired.

Mr. Gagne claims that they were after copper in Dokis Twp. When they staked. When I withdrew my case in April [against Tembeck] for what I felt was a lack of evidence, it freed Mr. Gagne to go and prospect his ground. They refused to do so. Instead they chose to pursue me for money for costs, continuing on just as this all began, as an attempt by Jimmy Forbes and Yvon Gagne to extort ten thousand dollars from me. Is it mere coincidence that when a man whom I have hired to help me stake knos that my truck is down and he is suddenly hired by his partner to stake that same ground? I think not. Is it coincidence that the partner would want to sign out files on an area that no one else has even worked for almost 30 years, at this same time? I think not!

Mr. Marion has brought an application for the transfer of the Mining Claim based upon principles of breach of fiduciary duty and breach of trust, in addition to breach of contract. The leading case which deals with these principles is **Lac Minerals Ltd. v. International Corona Resources Ltd.** [1989] 2 S.C.R. 574 (Ont.). Commencing at page 476 of Barton, B. *Canadian Law of Mining* (Calgary: Canadian Institute of Resources Law, 1993), he states:

Whatever the underpinnings of the action for breach of confidence, the Supreme Court of Canada took for granted that there are three elements to be established in order to succeed in it. In doing so, they followed the lower courts in adopting the analysis of Megarry J. in *Coco v. A.N. Clark (Engineers) Ltd.*¹⁶ In terms of the dispute in *Lac v. Corona*, these elements were:¹⁷

1. confidentiality - did Corona supply Lac with information having a quality of confidence about it?
2. communication in confidence - did Corona communicate this information to Lac in circumstances in which an obligation of confidence arises?
3. misuse of information - did Lac, by acquiring the Williams property to the exclusion of Corona, misuse or make an authorized use of the information.

b. Confidentiality

In order to be protected, the information may not be something that is public property or public knowledge.¹⁸ Simply labelling the material as "secret" or "confidential" will not be a bar so long as relative secrecy remains.¹⁹ The conduct of a plaintiff in its efforts to preserve secrecy may be a factor; however, in *Lac v. Corona*, the willingness of Corona to disclose information to Lac, without any mention of confidentiality, was not a bar to an action for breach of confidence. ...

...

c. Communication in Confidence

The second of the elements of breach of confidence that the Supreme Court communicated is that the information must be imparted in circumstances that give rise to an obligation of confidence. ...

In *Lac v. Corona*, the courts spent little time asking why these particular circumstances imposed the obligation of confidence. The Supreme Court approved the use by the trial judge of the reasonableness test in *Coco v. A.N. Clark Engineers Ltd.*²³ if the circumstances are such that any reasonable person standing in the shoes of the recipient of the information would have realized that upon reasonable grounds the information was being given to him or her in confidence, it will suffice to impose the equitable obligation of confidence. ...

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¹⁶ [1969] R.P.C. 41 (Eng. Ch.)

¹⁷ *Supra* note 14 at 608.

¹⁸ *Salman*, quoted in *Lac v. Corona*, *supra* note 14 at 610.

¹⁹ D. Vaver, "Civil Liability for Taking or Using Trade Secrets in Canada" (1981) 5 Can Bus. L.J. 253 at 269.

²³ [1969] R.P.C. 41 (Eng. Ch.).

It is striking that the courts could so readily determine this even though they made a finding of fact that there had been no mention at all of the confidentiality of this information. What undoubtedly did influence the courts was the extensive evidence from experts about standard practice and expectations within the mining industry. The trial judge concluded that there was a practice in the mining industry that imposes an obligation when parties are seriously negotiating that one party is not to act to the detriment of the other....

d. Misuse of information

The third element of breach of confidence is unauthorized use of the information to the detriment of the plaintiff. In *Lac v. Corona*, it was clear enough that there had been such misuse, but there was disagreement about the nature and scope of the misuse. The trial judge found that the information that Lac acquired from Corona was of value in assessing the merits of the Williams property and that Lac made use of it in making an offer for the property. Lac was not authorized by Corona to bid on it. He concluded,³¹ "On a balance of probabilities I find that, but for the actions of Lac, Corona would have acquired the Williams property and therefore Lac acted to the detriment of Corona."

...In light of evidence about what was said at meetings between Lac and Corona, and in the light of the industry-recognized practice not to acquire a property that was being pursued by a party with whom one is negotiating, it strained credulity to suggest that either Lac or Corona contemplated that Corona had given Lac confidential information so that Lac could acquire the property either on its own behalf or on behalf of both parties jointly. La Forest J. then completed his analysis of Lac's arguments with a valuable insight into the burden of proof that lies upon the user of confidential information.³²

This entire inquiry appears, however, to be misdirected. In establishing a breach of a duty of confidence, the relevant question to be asked is "what is the confidant entitled to do with the information?", and not, "to what use is he prohibited from putting it?" Any use other than a permitted use is prohibited and amounts to a breach of a duty. When information is provided in confidence, the obligation is on the confidant to show that the use to which he put the information is not a prohibited use.

Once the confidential information has been communicated in circumstances of confidence, the burden lies on the confidant to show that his or her use of it is permissible.

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³¹ *Supra* note 25 at 543.

³² *Supra* note 28 at 642.

And at page 482:

4. Different Situations and Different Heads of Liability

At this point it is appropriate to depart from what might be called the *Lac v. Corona* fact situation, and make a brief review of misuse of information in some other contexts. Many of the cases resort to fiduciary duty and contract, largely perhaps because other prominence of the action for breach of confidence has been so recent. Confidential information often seems to be disclosed in circumstances where it is possible to allege a fiduciary relationship. It is commonplace for agents, consultants, partners, or directors to be held to owe fiduciary duties, and likely that a duty of confidence is among the duties of loyalty and good faith that a fiduciary owes⁴², but it is important to remember that the categories of fiduciaries are not closed; the courts will look to the reality of legal classification.⁴³ Often, it seems, the outcome of a case will be the same whether it is analyzed in terms of breach of confidence or of fiduciary obligation. However there are two major differences. First, a fiduciary cannot avoid liability on the ground that his or her breach has not caused the plaintiff actual detriment, whereas causing damage to the plaintiff is a necessary ingredient of breach of confidence. Second, the remedy against a faithless fiduciary is always to be measured in accordance with his or her gains. In breach of confidence, the losses of the plaintiff may be chosen as the measure instead.⁴⁴

...In brief, the majority view of Sopinka J. was that fiduciary duties only rarely arise in arms-length transactions of a commercial nature, and that, for a relationship to be fiduciary in character, it is essential that one party be vulnerable to the other.

And at page 485:

ii. *Employees and Consultants*

One of the most frequent complaints is the misuse of confidential information by a former employee; the employee is accused of using information that was acquired in the course of employment for his or her personal benefit or for the benefit of a subsequent employer. There is no doubt that the employee is obliged to preserve the employer's confidences, both during the term of the employment and after.⁵¹

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⁴² Generally, see J.C. Shepherd, *The Law of Fiduciaries* (Toronto: Carswell, 1981); P.D. Finn *Fiduciary Obligations* (Sydney: Law Book, 1977); M.V. Ellis, *Fiduciary Duties in Canada* (Don Mills; De Boo, 1988). With respect to the relationships established by common mining contracts, see Chapter 18.

⁴³ *Canadian Aero Service Ltd. v. O'Malley*, [1974] S.C.R. 592 (Ont.).

⁴⁴ See La Forest J. in *Lac v. Corona*, *supra* note 39 at 668 *et seq.*

⁵¹ *R.L. Crain Ltd. v. Ashton*, [1950] O.R. 62 (C.A.). As to the mineral context, see C.H. King, "Fiduciary Obligations of a Former Employee" in *17th Rocky Mountain Minearal Law Institute* (New York: Matthew Bender, 1972) 449.

An important case on the obligations of both consultants and employees in the mining context is *Pre-Cam Exploration & Development Ltd. v. McTavish*.⁵⁵ One Murtack owned mining claims and engaged Pre-Cam to carry out exploratory work on them, to follow up any anomalies that extended from the block, and to stake that ground for him. McTavish was an employee of Pre-Cam, and carried out a magnetometer survey that indicated a mineralized zone that extended north and east of the claims. Instead of staking them, he resigned from Pre-Cam and staked the indicated ground for himself. Murtack and Pre-Cam then sued successfully for the transfer of the claims. The Supreme Court of Canada held:⁵⁶

Neither Pre-Cam nor McTavish, its servant, could acquire these connected claims against the interest of Murtack. Contrary to the majority opinion in the Court of Appeal, I think that it was a term of his employment, which McTavish on the facts of this case understood, that he could not use this information for his own advantage. The use of the term "fraud" by the learned Chief Justice at trial was fully warranted. The severance of his employment on December 27 was an empty formality which could not improve his position. I do not mean by this that a simple-minded person with his own ideas of common honesty could do this sort of thing without having to answer. The constructive trust is imposed in a case of this kind because of the mere use of confidential information for private advantage against the interest of the person who made the acquisition of the information possible.

The facts in this case differ considerably from that of *Lac v. Coronal* although they bear some resemblance to the facts in *Pre-Cam Exploration & Development Ltd. v. McTavish*. Mr. Marion was in business with his partner, Mr. Carreau. Mr. Gagne is in business for himself and obviously provides some service to the mining industry, as evidenced by his delivery of the diamond drill to certain Marion mining claims in the fall of 2000. At all relevant times, Messrs. Marion and Gagne were not in business with each other.

Mr. Forbes is found by the tribunal to have provided assistance to Mr. Marion on several occasions. In the fall of 2000, he was under contract to Mr. Marion to provide certain services. The evidence also shows that Mr. Forbes has had a long-standing financial relationship with Mr. Gagne, providing staking services from time to time.

The relationships which Mr. Forbes had with both Mr. Marion and Mr. Gagne is that of a contractor for services. As such, he was in a position of trust with respect to activities and findings of Mr. Marion. The tribunal finds, based on the evidence of Mr. Marion, that information regarding the drill cores and prospective plans for staking arising from that work were communicated by Mr. Marion to Mr. Forbes. The tribunal also finds that the information regarding the cores was communicated to Mr. Forbes in confidence. However, there is no evidence which conclusively suggests that Mr. Marion supplied information in confidence to Mr. Gagne. Although Mr. Gagne was present at the site at some time during October, 2000, the

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⁵⁵ [1966] S.C.R. 551 (Sask). Also see *Guyer Oil Co. v. Fulton*, [1977] 2 S.C.R. 791 (Sask) consulting geologist only relied on information previously known to him or in the public domain and was not liable.

⁵⁶ *Ibid* at 555.

tribunal is unable to conclude that sufficient information of a relevant nature was communicated to Mr. Gagne, let alone with the expectation that such information be treated as confidential. The question then becomes whether Mr. Forbes misused his knowledge of Mr. Marion's findings in his subsequent staking for Mr. Gagne.

The fact that two stakers chose to or wish to stake the same lands which have been open for staking for a period of years is not sufficient to cast a light of suspicion on their activities. In the majority of cases, such coincidence is random and the lands go to the individual who completed the staking first, in accordance with legal requirements.

The timing of the staking by Mr. Gagne of the exact same lands targeted by Mr. Marion, coupled with the hiring of Mr. Forbes to assist in staking, given Mr. Forbes' confidential knowledge of Mr. Marion's interests, was sufficiently coincidental to cause the tribunal to obtain further information and seek additional representations from the parties. The window during which Mr. Gagne could have perused the relevant file in the Resident Geologist's Office was sufficiently narrow, that it wished to hear his explanation of his actions. Had Mr. Gagne hired any other contractor in the province, but Mr. Forbes, this step would not have been necessary. Not to impugn the reputation of Mr. Forbes in any way, but by the mere fact that he had confidential knowledge, the coincidence was too great that it not require further examination.

The tribunal has had occasion to observe the parties in person at the hearing and to consider the written submissions made after the hearing in response to its Direction. It finds Mr. Gagne to be an honest and credible witness. After hearing from him in person and reading his post-hearing submissions, the tribunal finds that there was nothing in his testimony, demeanor or written explanations of his actions to detract from this finding.

The tribunal also notes that, for whatever it is worth, the prospecting styles of Messrs. Marion and Gagne are diametrically opposite, such that, frankly, neither appears to have any sympathy for the others' manner of acquiring lands. Mr. Marion is very meticulous and studious. He documents his course and acquisitions. Based upon those abstracts of mining claims held in Dokis Township, once he holds claims, he performs considerable work not only to keep them in good standing, but to further his considerable exploration work. Mr. Marion appears to study the relevant files in the Resident Geologist's Office meticulously, going back again and again to augment his understanding of the ground based on his recent assessment work to glean new ideas and inspiration. If anything, Mr. Marion appears to be overly cautious with regards to lands which he might acquire. This observation is based on his failing to tie up lands surrounding his holdings to impede the threat of other interested prospectors coming too close to his work. Mr. Gagne, on the other hand, from his client report has, since 1992, acquired a large number of mining claims in numerous townships, a substantial portion of which he has allowed to lapse without performing any assessment work. Mr. Gagne's style of acquisition comes through very clearly in his giving of evidence. He is satisfied with a cursory examination of files in the Resident Geologist's Office prior to staking. Once he has the land, his more considerable work begins, much of which appears to lead him to abandon many of his claims.

The tribunal declines to make any comment as to which course is preferable. Neither is precluded by the **Mining Act**.

However, the tribunal concludes that Mr. Marion's course has led him to be slow in picking up lands which have been open for over three years in which he now demonstrates an interest. Clearly, when matters became critical during the last few days of November, 2000, Mr. Marion was hampered by his truck being out of commission. However, this does not account for the considerable time during which the lands were open and he did nothing. It is contrary to the principles of the **Mining Act** to suggest that certain lands can be staked only by individuals who have a prior interest in their acquisition. When lands are open to competitive staking, they are open to all licensees equally.

While the coincidence of Mr. Forbes being knowledgeable regarding Mr. Marion's recent find does provide grounds for closer examination of the dates and actions of those involved, the tribunal finds that there is nothing in the subsequent submissions of the parties to give credence to what arose from circumstances, coincidences and suspicion. Clearly, stronger evidence would be required to take from a recorded holder the lands which he acquired in proximity to another. Barring clear evidence that Mr. Forbes communicated confidential information to Mr. Gagne which Mr. Gagne used to stake the Mining Claims, there is no basis upon which the tribunal can find that Mr. Forbes misused the confidential information, either to his own benefit or to the detriment of Mr. Marion. This is a very serious matter and a successful application would require that there be clear evidence either that the confidential information was communicated by Mr. Forbes or that Mr. Gagne staked the Mining Claim on the basis of receipt of this information. Suggestion, innuendo and coincidence do not amount to such evidence. Had Mr. Gagne not viewed the relevant file in the Resident Geologist's office prior to staking, this would not in itself have been conclusive, but the tribunal would have considered looking further into the matter.

Examining the tests laid out in *Lac v. Corona*, the tribunal concludes as follows. While Mr. Marion did provide Mr. Forbes with information of a confidential nature, the evidence does not in any way suggest that Mr. Forbes communicated that information to Mr. Gagne. Mr. Gagne stated in his evidence and the tribunal believes him, that the Marion work was not discussed prior to their staking of the Mining Claim. Further, the tribunal finds that there is no information that Mr. Marion communicated anything in confidence to Mr. Gagne, let alone that Mr. Gagne misused this information. However, this is not a case of business partners betraying confidences. Rather, it is the case of a contract employee used by both who had proprietary knowledge regarding the interests of one and whether that employee misused that information for his own benefit. There is no evidence to link the assistance Mr. Forbes provided to Mr. Gagne with the proprietary information imparted by Mr. Marion. Surely, had Mr. Forbes sought to gain from his knowledge, he would have held out for an interest in the Mining Claim rather than a contract for \$250.00. The coincidences of time and location do not amount to such evidence, which if it were to be found, would damage the reputations of two individuals. To suggest that it is would be an error.

It is difficult to determine Mr. Marion's position with regard to whether he owed Mr. Forbes money on account of the grid. Much is made of the \$40.00 received by Mr. Forbes in the garage, as to whether it was on account of money owed or an advance on the staking. The tribunal has carefully considered the evidence presented and while witnesses on behalf of Mr.

Forbes denied that he had received an advance, the evidence of Mr. Forbes points to an intention by him to set off the advance against what was owed. The tribunal finds that the \$40.00 paid was an advance for staking. The tribunal further finds that, upon receipt of the \$40.00, Mr. Forbes intentions may not have been determined. However, upon requesting a further advance when Mr. Marion said that he had no funds, the tribunal finds that Mr. Forbes elected to set off the \$40.00 given as an advance against the money he believed owed to him on account of the grid.

With regard to whether he is in fact owed money for the grid, Mr. Forbes may be in a position to make a claim against those Dokis claims held by either Mr. Marion or Messrs. Marion and Carreau on which he constructed the grid, pursuant to section 69 of the **Mining Act**, which reads:

69. Where the holder of an interest in a mining claim has made default in payment for work performed thereon by a person not the holder of an interest in the mining claim, the Commissioner, upon the persons interested or such of them as appear, may make an order vesting the interest in the mining claim of the holder in default, or any part of such interest, in the applicant.

Mr. Forbes was in a unique position to know what areas were of interest to Mr. Marion. While he did not perform actual drilling, by virtue of being on the Dokis property, he was made well aware of the results of Mr. Marion's exploration efforts. He was also uniquely aware of the area of further interest to Mr. Marion, namely the Mining Claim. Mr. Forbes' closeness to the Marion camp should have governed his prospective activities. He indicated quite clearly that he was open to working for anyone who would pay him. Due to the knowledge which he acquired in working on the Marion claims, the only land in the province upon which he should not have been involved with anyone except Mr. Marion, was the exact same land he staked with Mr. Gagne, namely the Mining Claim at issue in these proceedings. However, he did not stake the Mining Claim for his own; rather, he accepted payment of \$250.00 for assisting Mr. Gagne in staking.

Exclusion of Time

Pursuant to subsection 67(2) of the **Mining Act**, the time during which Mining Claim L-1239268 was pending before the tribunal, being the 10th day of January, 2001 to the 12th day of October, 2001, a total of 276 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. 196, c.1, Sched.O, s. 18, September 10, 2003, is deemed to be the date for the performance and filing of the next unit of assessment work on Mining Claim L-1239268.

Pursuant to subsection 67(4) of the **Mining Act**, all subsequent anniversary dates for the Mining Claim are deemed to be September 10.

Conclusions

Based on the foregoing, the application is dismissed.