

File No. MA 024-99

L. Kamerman )  
Mining and Lands Commissioner ) Wednesday, the 31st day  
of January, 2001.

**THE MINING ACT**

**IN THE MATTER OF**

Mining Claims L-1076929, 1076932, 1220348 to 1220351, both inclusive, 1222527, 1225634, 1225635 and 1227311, recorded in the names of David F. Burda and Marty Ed Thurston, each as to a 50% interest as Joint Tenants, situate in the Township of Knight, in the Larder Lake Mining Division, hereinafter referred to as the "Mining Claims";

**AND IN THE MATTER OF**

An application under section 105 of the **Mining Act** for the transfer of ownership of 17.5% of the Mining Claims from the Respondents to the Applicant pursuant to an Agreement between the Applicant and the Respondent Marty Ed Thurston, witnessed by Veronica Thurston, dated April 18, 1999.

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

RENE BOURQUE

Applicant

- and -

DAVID F. BURDA and MARTY ED THURSTON

Respondents

(amended, October 4, 2000)

**ORDER**

**UPON** hearing from the parties in this matter and upon reading the material filed;

**1. THIS TRIBUNAL DECLARES** that Mining Claims L-1076929, 1076932, 1220348 to 1220351, both inclusive, 1222527, 1225634, 1225635 and 1227311 were transferred to David F. Burda and Marty Ed Thurston as tenants in common in the transfer dated the 12th day of July, 1999 and recorded the 19th day of July, 1999, each as to a 50 percent interest *nunc pro tunc*.

2. **THIS TRIBUNAL FURTHER ORDERS** that the application of Rene Bourque for a 17.5 percent interest of Marty Ed Thurston in the Mining Claims be and is hereby allowed.

3. **THIS TRIBUNAL FURTHER ORDERS** that Mining Claim L-1227299 be and is hereby cancelled.

4. **THIS TRIBUNAL FURTHER ORDERS** that the notation "Pending Proceedings", which is recorded on the abstracts of the Mining Claims to be effective from the 24th day of August, 1999, be removed from the abstracts of the Mining Claims.

5. **THIS TRIBUNAL FURTHER ORDERS** that the time during which the Mining Claims were under pending proceedings, being the 24th day of August, 1999 to the 31st day of January, 2001, a total of 527 days, be excluded in computing time within which work upon the Mining Claims is to be performed and filed.

6. **THIS TRIBUNAL FURTHER ORDERS** that the 12th day of May, 2002, be fixed as the due date for the performance and filing of the first and second units of prescribed assessment work on Mining Claims L-1076929, 1222527 and 1076932, as set out in Schedule "A" attached to this Order, pursuant to subsection 67(3) of the **Mining Act** and subsequent anniversary dates are deemed to be May 12 pursuant to subsection 67(4) of the **Mining Act**.

7. **THIS TRIBUNAL FURTHER ORDERS** that the 23rd day of April, 2002, be fixed as the due date for the performance and filing of the first and second units of prescribed assessment work on Mining Claims L-1220348 to 1220351, both inclusive, 1225634, 1225635 and 1227311, as set out in Schedule "A" attached to this Order, pursuant to subsection 67(3) of the **Mining Act** and subsequent anniversary dates are deemed to be April 23 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 the tribunal to the Provincial Mining Recorder **WHO IS HEREBY DIRECTED** to amend the records in the Provincial Recording Office as necessary in accordance with the aforementioned subsection 129(4).

**DATED** this 31st day of January, 2001.

Original signed by  
L. Kamerman

L. Kamerman  
MINING AND LANDS COMMISSIONER

**SCHEDULE "A"**

| <b>Mining Claim</b> | <b>Due Date</b> | <b>New Due Date</b> |
|---------------------|-----------------|---------------------|
| 1076929             | Dec. 1, 2000    | May 12, 2002        |
| 1222527             | "               | "                   |
| 1076932             | "               | "                   |
| 1220348             | Nov. 12, 2000   | April 23, 2002      |
| 1220349             | "               | "                   |
| 1220350             | "               | "                   |
| 1220351             | "               | "                   |
| 1225634             | "               | "                   |
| 1225635             | "               | "                   |
| 1227311             | "               | "                   |

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### B E T W E E N:

RENE BOURQUE

Applicant

- and -

DAVID F. BURDA and MARTY ED THURSTON

Respondents

(amended, October 4, 2000)

## REASONS

This matter was heard over a period of months. The hearing commenced by Telephone Conference Call on February 8, 2000. One of the Respondents, Marty Ed Thurston was available only by radio phone, the limitations of which impeded an orderly hearing. The electronic hearing was therefore adjourned and continued in person at the Royal Canadian Legion in Kirkland Lake, Ontario on March 7, 2000, with the other Respondent, David F. Burda appearing by telephone.

On March 7, 2000, the parties requested a brief adjournment, during which a tentative settlement was reached. The hearing was adjourned *sine die* pending the completion of staking and recording of certain lands by Marty Ed Thurston to be transferred to Rene Bourque. The alternative to this required staking will be outlined more fully below, but it is sufficient to state that the proposed course of action could not be accommodated by the **Mining Act**.

Prior to the issuance of a final order on consent, matters were further complicated by an allegation that Marty Thurston staked Mining Claim L-1227299 as a paper staking which did not take place in the bush.

The matter was reconvened in Kirkland Lake on October 4, 2000, at which time a hearing was held pursuant to section 26, involving the issue of wilful contravention of provisions of the **Mining Act** and regulations, which resulted in No Recommendations to the Minister concerning the license of Marty Ed Thurston due to extenuating circumstances. The tribunal also made Alternative Recommendations that it be suspended for a period of ninety days. As of the date of these Reasons, the Minister's delegate has advised that he has accepted the Alternative Recommendations of the tribunal and the License of Marty Ed Thurston will be suspended for a period of ninety days, commencing March 14, 2001.

The tribunal also recommended on October 12, 2000, that the paper staking of Mining Claim L-1227299 be cancelled, but the Minister's delegate was silent with respect to the cancellation of this or any other mining claim.

At the reconvened hearing on October 4, 2000, the tribunal received an overview of the earlier evidence, and continued with the hearing on the merits.

### **Appearances**

Rene Bourque, Applicant                      Appearing on his own behalf

David F. Burda and  
Marty Ed Thurston                              Appearing on their own behalf

### **Background**

This matter arose out of a hearing before the Commissioner pursuant to section 105 of the **Mining Act** for the transfer of a 17.5% interest in the Mining Claims to the applicant, Mr. Rene Bourque. The Mining Claims which are the subject matter of the action were, at the time of the application and hearing, held by Mr. Thurston and Mr. David Burda as joint tenants.

### **Facts and Evidence**

Mr. Bourque and Mr. Thurston met socially and Mr. Bourque stated that he was drawn into the mining game by their discussions. Mr. Bourque referred to his letter of September 18 (Ex. 1, cover page), which sets out the basis of his application.

Mr. Thurston had told Mr. Bourque that he knew of some good property for staking. The situation leading up to the staking by Messrs. Thurston and Bourque was that Mr. Burda apparently owed Mr. Thurston \$4,000. Mr. Thurston had staked certain lands on behalf of Mr. Burda and was to continue staking open land within close proximity. Mr. Thurston was waiting for his money and was short on funds. He also did not have any means of staking the additional lands for Mr. Burda.

Initially, Mr. Thurston stated that he would be in a conflict of interest in picking up these areas in his own name, so he proposed to pick them up with Mr. Bourque. Mr. Thurston apparently spoke with Mr. Burda during this time, and was directed by Burda to pick up the claims any way he could, that there would be no conflict in doing so, as Burda could not afford to provide the necessary money.

Acting on Mr. Thurston's advice, Mr. Bourque obtained his Prospector's License on December 10, 1998 (Ex. 1, Tab 2) and provided the funds for staking lands identified by Burda to Thurston. Mr. Bourque's vehicle was also used. Staking by Mr. Bourque and Mr. Thurston started on December 11, 1998 in Leonard Township. Mr. Bourque stated that he and Mr. Thurston intended to stake 60 claims (or units).

Mr. Bourque referred to several hand-drawn maps (Ex. 1, Tab 3) with areas identified as #1 and #2, which were targeted for staking. According to Bourque, Thurston told him Burda also wanted him to stake other lands around a bull's eye which was identified on the map, having been taken from a valuable airborne survey MAG map. There are several mining claims noted on one of these MAG maps, from which it can be concluded that areas #1 and #2 are in Knight Township in close proximity to the Mining Claims which are the subject matter of this application.

Mr. Bourque agreed that he would advance the money for staking, initially with the understanding that Mr. Thurston would reimburse him for his half when Thurston received money owing from Mr. Burda. This reimbursement didn't take place and in fact Mr. Bourque gave Thurston additional money. At the time of staking in December, 1998, Bourque and Thurston had agreed to split the *profit* 50/50.

In December, Thurston staked 22 units with Bourque providing transportation and some staking assistance. These lands were chosen as being conveniently located near the highway. According to Mr. Thurston, these lands in Leonard were at the other end of lands he believed to contain significant minerals, as disclosed by the airborne survey and MAG mapping. The staking of areas #1 and #2 in Knight Township never took place prior to the bringing of this action. It is noted that area #1 corresponds with the paper staking by Thurston in June, 2000, being claim 1227299.

Over the ensuing months, Mr. Bourque was waiting for Thurston to come up with his share of the money, so that they could continue staking the rest of the 60 units discussed initially, which were to have been split 50/50 between them. This staking did not take place, nor was Mr. Bourque reimbursed for half of the expenses for the 22 claims which were staked.

Since Burda had not paid Thurston and Mr. Bourque decided that he had already spent enough money, in April, 1999 Mr. Bourque was anxious about his situation. It was clear to him that Thurston would be unable to finance the staking of the rest of the 60 units or make good on his promise to pay half of the expenses incurred up to that time.

On April 8, 1999, Mr. Bourque met with Mr. Thurston. Thurston showed Bourque a note signed by Mr. Burda which stated that Mr. Burda was giving Mr. Thurston a 35 percent interest in the Mining Claims. The tribunal was not provided with a copy of this agreement by any of the parties. At this meeting, Mr. Thurston signed the following (Ex. 1, Tab 5), agreeing to give Mr. Bourque 50 percent of his 35 percent, being 17.5 percent of the Mining Claims:

I Marty Thurston made a deal for 50% of my 35% of claims in Knight Twp. Shining Tree Area, claim no. 1225634, 1227311, 1225635, 1220351, 1220349, 1220350, 1220348, 1076929, 1076432, 1222527.

The exact terms of this "Agreement" are not clear from its face. According to Mr. Bourque, this was by way of compensation for money owed by Thurston for his share of the 22 units staking in Leonard, plus the failure of Mr. Thurston to come up with his share so that the remaining 38 units could be staked. As far as Mr. Bourque was concerned at all times, the agreement was for an interest in the Mining Claims, without his being required to provide anything in addition to the money he had already paid out.

Mr. Thurston stated that he intended for Bourque to give him some cedar and four tires in exchange for the interest. Bourque never did so, but he disputes that this was even a factor. Mr. Thurston maintains that Bourque was to earn his interest through the money which changed hands, but Bourque was also told he would have to apply for and receive an OPAP grant on the Mining Claims, to enable the drilling program to take place. Mr. Bourque denies that this was a condition of the "deal" referred to in the agreement set out above. Finally, when there was no OPAP from Bourque, Messrs. Burda and Thurston continued to allow Mr. Bourque to acquire an interest in the Mining Claims through performance of assessment work, it being understood that he could either earn an interest or be paid for his work, but not both. Mr. Bourque denies that this condition was attached to his interest. The various activities surrounding the parties respective positions are set out in further detail below.

Mr. Bourque stated that Thurston told him when the OPAP money came, Bourque's interest in the Mining Claims would be registered. In May, 1999, when the OPAP money still had not come through, Thurston told Bourque they had no money to start the work, so, according to Mr. Bourque, he borrowed more money to enable line cutting to take place. Mr. Bourque stated that he did so with the belief that he had an interest in the ground. Mr. Thurston and Mr. Burda took the contrary position that they had allowed Mr. Bourque to choose between getting paid for line cutting or earning an interest. According to Mr. Thurston, if the OPAP money had come through earlier, he would have scrapped the grids [line cutting] and started drilling, as there were considerable showings on the lands.

Mr. Thurston stated that Mr. Bourque did not seem to pay attention to being urged to apply for an OPAP grant. Thurston maintained that Bourque was entitled to a 17.5 percent interest in the Mining Claims if only he had applied for a grant. With three grants, there would have been sufficient funds for drilling work Burda had hired to be performed. Mr. Thurston said that he informed Mr. Bourque that he would have to come up with 17.5 percent for the cost of drilling in order for them to hold 17.5 percent in the property. Up until the drilling was ultimately cancelled, according to Mr. Thurston, Mr. Bourque was still eligible to earn his 17.5 percent, according to the terms of their agreement.

A FAX transmission of March 7, 1999 (Ex. 6) to the attention of D. Burda, signed by Mr. Kosy, sets out details of a 1,300 foot four hole drilling program for Brush Lake. It is to include mobilization, demobilization, drilling four holes and related undertakings, for a total of \$15,000 plus 16 percent interest in 77 - 40 acre unit claims in Knight Township, the transfer to take place July 12, 1999. A balance of \$5,000 is due upon submitting the report to the OPAP program.

The Mining Claims of interest to Mr. Bourque are located in Knight Township; his own claims, held jointly with Thurston, were in Leonard. Mr. Bourque maintained through the hearing that he didn't apply for OPAP because he didn't have any of the Mining Claims in either the Pigeon Lake or Brush Lake Areas in Knight Township. Mr. Thurston maintained that Bourque "had enough property on strike with everybody else and with me and Dave he could have got his grant". It is not clear whether Mr. Thurston meant the 17.5 percent interest in the Mining Claims or the 50 percent interest with Thurston in the Leonard claims.

Mr. Thurston stated that he later provided Mr. Bourque with the opportunity to earn a 10 percent stake in the Brush Lake Mining Claims by doing line cutting and geo-physics. A hand-written note was left by Mr. Thurston in Bourque's door: "10% my word you on title. It will never sell. See ya in a few days, Marty". This is in support of a further change in Bourque's percentage.

In May, 1999, Mr. Bourque stated that Burda and Thurston still didn't have any money. Bourque borrowed more money into the effort and went to work the ground doing line cutting. Mr. Thurston, on the other hand, maintained that they needed either the grants or Bourque to put in a portion of the drilling costs on his own for the drilling to take place.

Mr. Bourque stated that he had been paid for the line cutting, being for 21 days plus the \$1500 he advanced for supplies, plus a bit more. That had all been money which he was owed, because he paid for gas and expenses. Attached to Exhibit 3 is a hand-written note dated July 8, 1999, which states, "Paid in full Rene Bourque 3755 dollars" signed by Messrs. Bourque and Thurston and witnessed by Mrs. Thurston. Mr. Bourque agreed that he had been paid in full for his work on the claims.

There was considerable animosity between the parties when recounting the line cutting. Mr. Bourque's line cutting was said not to have been sufficiently straight. He maintains that he followed a runner and did cut lines. There was an acrimonious discussion

concerning the time when Mr. Bourque cleared out, as to what he took with him, who it belonged to and the fact that the camp had been left without certain supplies, such as a tent and food, which belonged to Mr. Bourque. The difficulty arising out of this situation was lost time in the bush, amounting to 5 man days.

According to Burda and Thurston, they tried to impress upon Bourque that he could either be paid for the line cutting or earn an interest. This had made Bourque angry and he packed up the gear and left. However, he had been reimbursed for the related expenses and his time in the bush. Burda maintained that there was no basis for the application.

At all times during the hearing of this matter, Mr. Bourque continued to state that his application had nothing to do with the line cutting. Rather, it was based on his initial transactions with Thurston for staking 60 units with money supplied by Bourque. Mr. Bourque had paid for staking and helped Mr. Thurston financially at a time when Mr. Thurston could not come up with a means to continue staking and received no support or back payments from Burda. Mr. Bourque maintained that he has not received anything by way of reimbursement or interest for the money he originally paid to stake the 22 units, particularly when 60 were promised.

Mr. Thurston stated that Mr. Bourque knew what was intended and what was required. He reiterated that he had repeatedly told Mr. Bourque that he had to apply for a grant. Mr. Bourque felt that as long as he didn't have title to any properties, he could not obtain a grant. He was anxious to see his name on the abstracts for the Mining Claims.

According to Mr. Thurston, at the time drilling was to have commenced, Mr. Kosy, who was not a witness to this hearing, approached Mr. Bourque for his portion of the drilling funds, which Mr. Bourque did not have. As a result of Bourque's lack of funds and failure to apply for OPAP, the property was never drilled.

At the reconvened hearing on October 4, 2000, Mr. Burda gave evidence. He stated that he staked ground in Knight with Mr. Thurston and ran out of money. The decision was that if Mr. Thurston staked the ground to the west, with Mr. Burda paying to record, Mr. Thurston would earn a 35 percent interest. Subsequently, with Mr. Thurston doing the line cutting on the Mining Claims, his interest was raised to 50 percent. However, Mr. Burda pointed out that he held the Mining Claims with Mr. Thurston as joint tenants.

Mr. Burda maintained that Bourque had been paid for the line cutting work and that he could not expect to be paid for his work and also obtain an interest. Mr. Burda did also confirm that the proposed drilling program with Mr. Kosy "went nowhere" because of the situation with Mr. Bourque. Mr. Burda, however, did not refer to needing money from Mr. Bourque for drilling, but rather, referred to the freeze put on the ground by Mr. Bourque. Mr. Burda stated that he felt it was unfair to be asked to pay the kind of money Mr. Bourque was being paid plus asking for an interest in the ground.

Mr. Bourque questioned that the original deal was supposed to have been 65/35, and now it is 100 percent as joint tenants.

#### Information Concerning Claims

The tribunal requisitioned copies of the Applications to Record for the Mining Claims and notes the following information.

| <b>Claim Number</b> | <b>Staker</b> | <b>Date of Staking</b> | <b>Units</b> | <b>Helper</b> | <b>Township</b> |
|---------------------|---------------|------------------------|--------------|---------------|-----------------|
| 1220351             | Dutrisac      | October 14, 1998       | 15           | None          | Knight          |
| 1076932             | Thurston      | November 3, 1998       | 1            | None          | Knight          |
| 1076929             | Thurston      | November 3, 1998       | 2            | None          | Knight          |
| 1222527             | Thurston      | November 4, 1998       | 2            | None          | Knight          |
| 1225634             | Thurston      | October 22, 1998       | 16           | Mike Dutrisac | Knight          |
| 1225635             | Thurston      | October 21, 1998       | 16           | Mike Dutrisac | Knight          |
| 1227311             | Thurston      | October 20, 1998       | 4            | Mike Dutrisac | Knight          |

The Township of Leonard is the second township to the south of the Township Knight, with the Township of Tyrrell in between.

The Applications to Record for the Leonard claims were filed at the hearing on October 4, 2000:

| <b>Claim Number</b> | <b>Staker</b> | <b>Date of Staking</b> | <b>Units</b> | <b>Helper</b> | <b>Township</b> |
|---------------------|---------------|------------------------|--------------|---------------|-----------------|
| 1076928             | Thurston      | December 11, 1998      | 6            | None          | Leonard         |
| 1076926             | Thurston      | December 11, 1998      | 4            | None          | Leonard         |
| 1227312             | Thurston      | December 16, 1998      | 6            | Bourque       | Leonard         |
| 1227307             | Thurston      | December 17, 1998      | 6            | Bourque       | Leonard         |

Three were recorded in the names of Marty Thurston and Rene Bourque, each as to a 50 percent interest. The tribunal made further inquiries and has found that L-1076928 was cancelled January 12, 2001 and L-1227307 and L-1227312 were cancelled on January 16, 2001. Mining Claim L-1076927 was listed as "Filed Only" by the Mining Recorder, as the claim number is already recorded. The Mining Recorder also noted that the claim would be recorded if replacement tags were affixed to posts. There is no further mention on the Application as to whether new tags were affixed, or whether the claim was simply allowed to lapse.

#### Final Submissions

Mr. Bourque submitted that, owing to the lack of help from Mr. Burda from the beginning, he should be given 100 percent of claims L-1227311 and L-1225635, which amounts to 20 units. The money received from Burda was for work done in the bush at \$100 per day. That work was done in accordance with Burda receiving the OPAP grant. Mr. Bourque stated that he supplied the food, gas and a \$800 repair bill to his truck. The \$2100 was for work and the rest was for supplies and repairs.

Mr. Burda submitted that he had dealt with Mr. Thurston in good faith. He was hoping to present the most attractive package to mining companies. The original agreement changed when Mr. Thurston did assessment work. It was Mr. Thurston who brought in Mr. Bourque and Mr. Burda stated that he had not agreed to it. The matter of Mr. Bourque doing line cutting was never discussed, except perhaps in a casual way in passing. Mr. Burda reiterated that he and Mr. Thurston were anxious to get under way and this whole matter with Mr. Bourque had hurt their chances.

Mr. Burda concluded that Mr. Bourque had been adequately paid. However, Mr. Bourque simply does not understand how the mining business works. Mr. Burda submitted that the case amounts to an abuse of the system. Mr. Burda also asked the tribunal to award him his costs as a result of the action, according to amounts he has submitted in the past and at the hearing.

Mr. Thurston submitted that the purported partnership with Mr. Bourque was based on the latter applying for OPAP. Mr. Thurston submitted that Mr. Bourque was focusing all of his interest on the properties upon which airborne surveys were done by Mr. Burda. Mr. Bourque demonstrated no interest in anything else going on in the area or in acquiring other properties. Mr. Bourque may have spent time in the bush over the years, but there is nothing that he wasn't paid for. The rest of his time accomplished nothing. Mr. Bourque did not do the work for which he was seeking his percentage.

Mr. Bourque submitted that he was the only one coming up with money in all of this matter.

## **Findings**

This hearing and the facts presented have been very confusing. Parties did not provide specific dates, chronologies or sufficient details from which to piece together what actually occurred. Mr. Bourque failed to give exact dollar figures for the money used by Thurston and him in the staking of claims in Leonard, nor for the additional support provided. Nor were any receipts produced setting out how much money had changed hands. Most of the information provided in these reasons was found in documentation filed in support. The tribunal remains unclear as to whether drilling was to have taken place prior to the line cutting which occurred, or whether the line cutting occurred as a result of the aborted drilling program. Much of the information provided, such as the deal concerning the cedar roofing was of absolutely no assistance.

The tribunal was initially puzzled as to why Mr. Thurston managed to interest Mr. Bourque in spending money for the staking of claims in the Township of Leonard, some considerable distance to the south - six miles was mentioned - of the original Mining Claims in Knight Township. After reviewing the transcripts several times, the tribunal has come to a conclusion regarding the staking in Leonard. Mr. Thurston did not display a disinterest in acquiring additional claims in Leonard. Rather, he was quite firm in stating that he did not want to work with Bourque any more. The tribunal continues to have the impression from Thurston that the Leonard area is of long-term interest. In his final submissions, Mr. Thurston reiterated that Mr. Bourque was not interested in picking up other targets in the Township of Leonard.

Apparently, Knight Township was of greater interest because of the MAG mapping. Mention was made of \$90,000 having been spend on airborne surveying. The witnesses failed to tie in this mapping with Leonard Township, but yet did mention that they had identified targets in Leonard as well.

Despite his inexperience in mining, the tribunal concludes that Mr. Bourque became focused on the Mining Claims in Knight Township. He showed no interest in his own claims in Leonard acquired with Mr. Thurston in December, 1999. No work was ever performed on the three which were recorded and the fourth was never pursued sufficiently to be recorded. One question which does arise is whether Mr. Bourque formed the impression that the Knight Mining Claims were of greater promise than those held in part by him in Leonard was as a direct result of Thurston's inability or reluctance to continue working with him on the Leonard claims.

Mr. Bourque's application is based upon his assertion that his initial dealings with Mr. Thurston were not satisfactory. According to Bourque, he was owed money or claims, neither of which Mr. Thurston provided. Thurston's failure to comply lead to the note giving him an interest in the Mining Claims.

#### Acquisition of Mining Claims

The tribunal finds that the Knight Mining Claims were acquired by Mr. Burda prior to Mr. Bourque's involvement with Mr. Thurston.

#### Acquisition of Interest in the Mining Claims by Mr. Thurston

Mr. Thurston was involved in the staking of most of the Mining Claims, having been in the field with Mr. Mike Dutrisac. The claims were recorded 100 percent in the name of Mr. David F. Burda.

In December, 1999, when discussions apparently took place between Messrs. Bourque and Thurston, Mr. Thurston was not one of the recorded holders of the Mining Claims, those 56 units staked by Mr. Thurston and Mr. Dutrisac.

Based upon the oral evidence of Mr. Bourque that in April, 1999 he saw a document signed by Mr. Burda promising Mr. Thurston a 35 percent share, which is clearly where the number of 35 percent first came up. It is entirely clear, based upon the documentary evidence, as to how Mr. Thurston came to have earned this portion of his interest. He stated that Mr. Burda gave him this interest in exchange for staking open ground.

The tribunal searched the other claims held in Knight Township by Mr. Thurston and Mr. Burda. This revealed that there are two such claims, with one was staked by Thurston. Mining Claim L-1230958 was staked on October 28, 1999 and recorded on November 29, 1999. The Application to Record discloses that the staker, Mr. Thurston, recorded it in the name of Mr. Marty Thurston and Mr. David Burda as joint tenants. Its date of staking indicates that it

falls between the dates of staking of the various Mining Claims. Mr. Thurston's staking of the Mining Claims, not counting one by Mr. Dutrisac, were between October 20, 1999 and November 4, 1999.

This is unusual, as the evidence was that Mr. Thurston would obtain a 35 percent interest of the claims staked and only later would be able to earn another 15 percent, based on line cutting. This was clearly not the case. Another possibility is that Thurston was asked to acquire ground of interest to prevent it being staked by third parties. By staking any such ground, including that in Leonard Township, was sufficient to earn the 35 percent interest.

The third possibility is that Mr. Thurston at all times was entitled to the 50 percent interest, although ultimately the interest purported to vest in him as a joint tenant.

Prior to the execution and recording of the transfer in July, 2000, the tribunal finds that Mr. Thurston had an equitable interest in the Mining Claims and that they were transferred by Mr. Burda to himself and Mr. Thurston. The notation on the abstract and transfer indicates that the transfer was intended to be as joint tenants on July 12, 1999.

#### Joint Tenancy

The matter of the joint tenancy of Mr. Burda and Mr. Thurston is troubling to the tribunal. Mr. Burda has correctly asserted that a property held by joint tenants cannot legally have a portion transferred to a third party. That is to say, Mr. Thurston was not free to deal with the Mining Claims in the manner in which he did. As to whether the Mining Claims were in fact held in this manner is dependent on the facts, as well as the common law.

There are, in the creation of a joint tenancy *four unities*, namely possession, interest, title and time. To successfully vest an interest in joint tenancy, it must arise out of one deed [with an unpatented mining claim, a transfer to two individuals as joint tenants]. This transfer of the joint tenancy must take place simultaneously, meaning that the two joint tenants must be listed in the single transfer. The creation of a joint tenancy cannot take place through a succession of transfers involving the same property. Each of the joint tenants must take the same interest, namely the claim. Unity of possession means that each takes an undivided moiety (equal half) of the whole.

One right which flows from a joint tenancy is that of survivorship. When a joint tenant dies, his or her interest does not form part of the estate; it goes to the other joint tenant through a right of survivorship.

This is contrasted with tenants in common, where an undivided interest in a portion of the *estate* is held separately by each joint tenant, who can, in turn, transfer the undivided interest or any portion of it to a third party. The 50/50 interests found on the Bourque/Thurston Leonard Township mining claims are examples of claims held as tenants in common.

There is considerable and complex case law as to whether a joint tenancy can be severed and extinguished (ended) by the unilateral act of one of the joint tenants, including a transfer to him or herself. One example is that a joint tenancy may be severed by one of the joint tenants entering into an option to purchase.

#### Chronology of Events

On March 7, 1999, Mr. Burda received a FAX transmission from Mr. Gary Kosy setting out that the proposed drilling would be for cash and an interest in the Mining Claims. This raises a presumption that Mr. Burda does not intend to deal with the Knight Township Brush Lake Mining Claims as joint tenants. At the time of this FAX, the July 12, 1999 transfer, which would have created the joint tenancy, had not been completed and filed with the Recording Office. In order for Mr. Kosy to earn his 16 percent interest, the July 12, 1999 transfer would have to be to Mr. Burda, Mr. Thurston and Mr. Kosy as tenants in common. There was no evidence filed in response to Mr. Kosy's FAX from Mr. Burda indicating that he accepted Mr. Kosy's terms to support the presumption.

In Mr. Burda's letter to the tribunal dated February 5, 2000, (Ex. 3) he states the following:

Mr. Bourque phoned me collect twice, asking when he would get paid. The only line he cut in the bush had to be re-cut.

Since the ground had been frozen, we were unable to continue with our agreement with Mr. Kosy to drill our property in where he would receive an interest in the property. This would have allowed us to file for final OPAP payment sooner. Mr. Bourque's freeze on the ground forced us to change our work program, causing delays in our final submission.

It is possible to perform assessment work while an obligation is pending. There is no statutory provision in the Act to prohibit such activity. However, the risk is that of losing the claims, should the action be one of seeking 100 percent interest in the claims. That is not the case here. The only thing which could have prevented the drilling would have been if Mr. Kosy declined to perform the work with the cloud hanging over the title. Neither Mr. Kosy nor the parties provided any evidence to that effect.

Mr. Burda's letter confirms that Mr. Kosy was effectively given an opportunity to earn a 16 percent interest in the Mining Claims. The date of Mr. Kosy's FAX to Mr. Burda is March, 1999, which is the month before Mr. Thurston purportedly made a deal with Mr. Bourque for an interest in the Mining Claims. Both of these dealings are not those of joint tenants but of tenants in common.

The tribunal has formed the impression that Mr. Burda did not want Mr. Thurston to deal separately with an interest in the Mining Claims. In other words, he did not want Mr. Thurston to enter into agreements with and used the joint tenancy as a means to control Mr.

Thurston's actions. However, prior to Mr. Thurston receiving legal title, during which the tribunal has found Mr. Thurston had an equitable interest, Mr. Burda had already set in motion an opportunity for a third party to acquire an interest.

The tribunal finds that there is sufficient evidence to indicate that the purported creation of the joint tenancy is not supported by the actions of Mr. Burda. Mr. Burda may have been attempting to control Mr. Thurston's actions regarding his own interests, but coincidental with Mr. Thurston's efforts, Mr. Burda too was making deals for allowing a third party to acquire an interest in the Mining Claims. The tribunal finds that it will apply its equitable jurisdiction found in section 121 of the **Mining Act** that its decisions be on the real merits and substantial justice of the case and its powers found in section 105, permitting the tribunal to make such orders to give effect to this decision. The tribunal will declare that the interests of Mr. Burda and Mr. Thurston are as tenants in common, each as to an undivided half interest in the Mining Claims.

#### Bourque's Application

There is no dispute that Mr. Bourque provided Mr. Thurston with \$3,000. Sixty units were targeted and 22 were staked. Mr. Bourque's evidence supports the finding that Mr. Bourque was expecting to acquire the #1 and #2 areas contiguous with the Mining Claims in Knight Township in addition to those picked up in Leonard.

There was no evidence as to whether the money provided by Bourque to Thurston was sufficient to stake 60 units. It is pointed out that there is a difference between paying a contractor to stake a claim at the going rate and financing one's time, equipment and provisions in the bush during staking. However, the only evidence that the tribunal has before it is that the money ran out prior to completing the stakings.

For his money, Mr. Bourque had received a 50 percent interest in the 22 units which were staked, although the steps necessary for the recording of the fourth mining claim were never taken, and it was not recorded. Mr. Bourque and Mr. Thurston appeared to agree that the total involved was \$3,000, but the tribunal also heard that more money was provided by Mr. Bourque, in the manner of a loan at some time after December, 1998. When it became apparent that Thurston was unable to complete the stakings as agreed or repay Mr. Bourque, the "agreement" was written up and signed.

The tribunal finds that Mr. Bourque provided Mr. Thurston with \$3,000, although he has no written receipts or cancelled cheques to verify the exact amount. In exchange, Mr. Bourque received only part of what had been agreed to, namely the staking of 60 units to encompass targets identified by Burda and Thurston, of which at least half would be in Knight Township in or around areas #1 and #2 on the map found at Exhibit 1, Tab 3.

On April 8, 1999, when Mr. Thurston wrote and signed the "agreement" involving the Mining Claims, there is no dispute that Mr. Thurston had failed to live up to the original agreement with Bourque. The issue then becomes whether, in exchange for releasing

Mr. Thurston from his earlier obligation to deliver the 60 units, Mr. Thurston promised an interest in the Mining Claims. Contract law is clear that where there is an earlier promise which is enforceable, a new agreement for payment of the old obligation is equally enforceable. [see S.M Waddams, **The Law of Contracts**. Toronto: Canada Law Book Limited, 1977, p. 119].

Subsection 58(1) of the **Mining Act** deals with agreements prior to staking:

**58.** (1) No person is entitled to enforce any claim, right or interest, contracted for or acquired before the staking out, to or in or under any staking out or recording of a mining claim or of any mining lands or mining rights done by another person unless the fact that the first mentioned person is so entitled is made to appear by a writing signed by the holder of the claim or by the licensee by whom the staking out or recording was done or the evidence of the first-mentioned person is corroborated by some other material evidence, and, where a right or interest is so made to appear, the *Statute of Frauds* does not apply.

Mr. Thurston admitted that Bourque gave him the \$3,000. The tribunal finds that this is other material evidence of the staking agreement between him and Thurston, needed by the **Mining Act** to avoid the **Statute of Frauds**. The tribunal finds that there was an enforceable agreement between them as to the staking of 60 units in Knight and Leonard Townships, at least half of which were to be contiguous to the Mining Claims or areas #1 and #2 as identified in the map filed.

Mr. Thurston agreed that the April 8, 1999 hand-written note was to discharge his earlier obligation with Mr. Bourque. However, he has asserted that Mr. Bourque agreed to several obligations of his own to receive this promise. Mr. Thurston mentioned cedar roofing, four tires, line cutting and the obligation to apply for an OPAP grant. Mr. Bourque denied that any one of these was agreed to.

In law, anything given or promised by Mr. Bourque in exchange for a new obligation would be called "consideration". The April 8, 1999 agreement is silent as to consideration, if any. The agreement itself, however, is in writing, signed by Mr. Thurston, and therefor meets the requirement of subsection 58(2) of the **Mining Act** concerning enforcement of a contract made after staking. The tribunal finds that any purported agreement concerning cedar and roofing has not been proved. As to line cutting, Mr. Bourque was clear that he did not earn an interest through line cutting, for which he was paid.

It is possible that Mr. Thurston could have proved that he relied on the obligation to apply for OPAP funding, although this is speculative. He could have produced a copy of his OPAP application for 1999. Had it been completed after April 8, 1999, Mr. Thurston would have been obligated to indicate that the other interest holders in the Mining Claims were Messrs. Burda and Bourque. However, Mr. Thurston's OPAP application is confidential, and protected by the **Freedom of Information and Privacy Act**. The tribunal did not pursue obtaining a copy of the application.

The tribunal finds that there was no need for new consideration for the April 8, 1999 agreement of Mr. Thurston to give Mr. Bourque 17.5 percent interest in the Mining Claims. This agreement is found to be a subsequent promise, replacing an earlier obligation. Therefore, the tribunal finds that it will allow the application.

#### General Comment

The tribunal recognizes that Mr. Bourque has demonstrated a lack of understanding of the mining industry, evidenced in particular through his statement mentioning his profit in the Mining Claims (Ex. 1, covering letter). Through being successful in his application, Mr. Bourque is entering into the first stages of mining exploration. He should not expect to see profit from his investment until he and the respondents can interest a mining company in the Mining Claims.

Until such time as this occurs, Mr. Bourque will have an obligation to either perform his share of annual assessment work, namely 17.5 percent of the work valued at \$400 per unit, or to reimburse either or both Mr. Burda and Mr. Thurston for the value of assessment work actually performed. Mr. Bourque should be aware that any failure on his part to carry his portion of such expenses would entitle the other co-holders to make an application for an order vesting Bourque's interest in them.

#### Mining Claim L-1227299

The Minister's delegate's suspension of the License of Mr. Thurston does not cancel this Mining Claim, despite recommendations of this tribunal. An illegal staking cannot be allowed to remain in existence, and therefore the tribunal ordered the cancellation of Mining Claim L- 1227299 in its Recommendations of November 15, 2000.

#### Costs

Mr. Burda has claimed costs in this application. While the various items may be legitimate expenses born by him, it would have to be Mr. Thurston and not Mr. Bourque who should be paying such costs. The tribunal finds that it would be inappropriate to award costs payable from one respondent to the other on the facts of this case. No order as to costs will be made.

#### Exclusion of Time

Pursuant to subsection 67(2) of the **Mining Act**, the time during which Mining Claims L-1076929, 1076932, 1220348 to 1220351, both inclusive, 1222527, 1225634, 1225635 and 1227311 were pending before the tribunal, being the 24th day of August, 1999 to the 31st day of January, 2001, a total of 527 days, will be excluded in computing time within which work upon the Mining Claims 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, May 12, 2002, is deemed to be the date for the performance and filing of the next unit of assessment work on Mining Claims L-1076929, 1076932 and 1222527. Pursuant to subsection 67(4) of the **Mining Act**, all subsequent anniversary dates for the aforementioned Mining Claims are deemed to be May 12.

Pursuant to subsection 67(3) of the **Mining Act**, as amended by S.O. 196, c.1, Sched. O, s.18, April 23, 2002, is deemed to be the date for the performance and filing of the next unit of assessment work on Mining Claims L-1220348 to 1220351, both inclusive, 1225634, 1225635 and 1227311. Pursuant to subsection 67(4) of the **Mining Act**, all subsequent anniversary dates for the aforementioned Mining Claims are deemed to be April 23.

### **Conclusions**

The Mining Claims will be declared to be held as tenants in common and not as joint tenants, *nunc pro tunc*, meaning as of July 18, 2000.

The application of Rene Bourque is allowed. The tribunal will order the vesting of a 17.5 percent interest in Rene Bourque.

Mining Claim L 1227299 is hereby cancelled.

No costs are payable by any party to this proceeding.