

File No. MA 024-99

L. Kamerman )  
Mining and Lands Commissioner )

Wednesday, the 15th day  
of November, 2000.

**THE MINING ACT**

**IN THE MATTER OF**

Mining Claim L-1227299, staked on May 31, and June 1, 2000 and recorded on June 2, 2000, by and in the name of Marty Ed Thurston;

**AND IN THE MATTER OF**

Ministry of Northern Development and Mines Inspection Report CI-00, dated the 20th day of July, 2000, such inspection carried out pursuant to subsection 75(3) of the **Mining Act**, of Mining Claim L-1227299 and calling into question the staking of Mining Claim L-1227299 as well as Mining Claims L-1225635 and 1227311;

**AND IN THE MATTER OF**

The original application pursuant to section 105 and the tribunal's own motion, pursuant to section 26 of the **Mining Act**;

**CONCERNING:**

MARTY ED THURSTON, PROSPECTOR'S LICENSE #K22599

**RECOMMENDATIONS**

**UPON** hearing from the parties, Ministry of Northern Development and Mines Mining Claim Inspector David Vallillee, and upon consideration of the conditions of settlement reached by the parties during the adjourned hearing of this matter on the 7th day of March, 2000;

**AND UPON** making a finding of wilful contravention by Marty Ed Thurston in his staking of Mining Claim L-1227299, with mitigating circumstances peculiar to the facts of this case;

**THE TRIBUNAL HEREBY RECOMMENDS** that Mining Claim L-1227299 be declared cancelled, pursuant to subsection 26(7).

**FURTHERMORE, THE TRIBUNAL MAKES NO RECOMMENDATIONS** concerning cancellation of other mining claims held by Marty Ed Thurston, either as sole recorded holder, or otherwise, pursuant to subsection 26(7).

**FURTHERMORE, THE TRIBUNAL MAKES NO RECOMMENDATIONS** concerning the revocation of the prospector's license of Marty Ed Thurston, bearing number K22599, pursuant to subsection 26(1).

**IN THE ALTERNATIVE**, and taking into consideration that the tribunal has no jurisdiction to make recommendations concerning suspension of the prospector's license of Marty Ed Thurston, bearing number K22599, **THE TRIBUNAL FURTHER RECOMMENDS** that any sanction imposed not exceed a period of ninety (90) days.

A summary of facts, evidence, submissions and my findings are attached.

**DATED** this 15th day of November, 2000.

Original signed by

Linda Kamerman  
MINING AND LANDS COMMISSIONER

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**CONCERNING:**

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**REASONS**

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

**Facts**

At the hearing which was convened in Kirkland Lake on March 7th, 2000, the applicant, Mr. Bourque and Respondents, Mr. Thurston and Mr. Burda, requested a brief adjournment of the proceedings and arrived at a tentative settlement of the application.

It was agreed that Mr. Thurston would stake and record a nine unit claim on lands contiguous with Mining Claim L-1227311 within a period of three weeks. Upon the elapse of 30 days after filing the application to record the newly staked claim, it and Mining Claim L-1227311, which was one of the Mining Claims listed in the application, would be transferred as to a 100 percent interest to Mr. Bourque in full satisfaction of his application, along with certain data applicable to those two claims.

In the event that the new mining claim was not staked, or that the lands had already been staked by an uninterested third party, it was agreed that all of Mining Claim L-1227311 and nine units of the sixteen unit Mining Claim L-1225635 (one of the claims in the original application) would be transferred as to a 100 percent interest to Mr. Bourque in full satisfaction of the application, along with certain data.

After the adjournment of the hearing and in discussions with the Provincial Mining Recorders, it became apparent to the tribunal that the transfer of nine of sixteen units could not be transferred or ordered transferred in the manner agreed upon by the parties. The legislation permits a partial abandonment, in accordance with subsection 70(2) and section 6 of Ontario Regulation 113/91. However, the parties were not seeking a partial abandonment, but, rather a division up of the existing claim.

The impossibility of the second alternative agreed upon was not communicated by the tribunal to the parties. The failure on the part of the tribunal to convey this information was at least in part a contributing factor to the actions of Mr. Thurston, whose conduct is being examined under section 26 of the **Mining Act**.

Owing to the impossibility of the second scenario, the tribunal sought to provide Mr. Thurston with sufficient time to complete the staking, notwithstanding that the parties had agreed and the tribunal ordered that it be done by March 28, 2000. In so doing, staff of the tribunal made many phone calls to Mr. Thurston to encourage his compliance with the agreed upon first set of conditions.

Mr. Thurston filed an application to record Mining Claim L-1227299 on June 2, 2000, some two months after the required date, purportedly staked on May 31 and June 1, 2000. The tribunal prepared to issue its final order on consent in this matter in early July, 2000, having waited for 30 days after the date of recording for potential third party claims to be filed, when it became aware of allegations that Mr. Thurston did not actually stake Mining Claim L-1227299 on the ground. In light of this development, an inspection was requested and duly performed by David Vallillee of Ministry of Northern Development and Mines ("MNDM").

Mr. Vallillee filed a report and gave oral evidence at the reconvened hearing on October 4, 2000, in Kirkland Lake, which will be summarized.

Mr. Thurston was provided with an Appointment for Reconvened Hearing, dated September 11, 2000, which set out the matters under consideration, as reproduced below:

1. Whether the licensee, Marty Ed Thurston, is guilty of wilful contravention of the provisions of the **Mining Act** and regulations in his staking and recording of Mining Claims L-1227299, 1225635 and 1227311;
2. Whether, if found to be guilty of such wilful contravention as set out in Paragraph 1, the tribunal should recommend to the Minister that the license of the licensee, Marty Ed Thurston, should be revoked within the meaning of subsection 26(1);
3. Whether the holder of Mining Claims L-1227299, 1225635 and 1227311, Marty Ed Thurston, is guilty of wilful contravention of the **Mining Act** and regulations in his staking of the aforementioned Mining Claims;
4. Whether, if found to be guilty of such wilful contravention as set out in Paragraph 3, the tribunal should recommend to the Minister that all mining claims held, in whole or in part, by Marty Ed Thurston, be declared to be cancelled and upon such cancellation, all his rights in such mining claims cease, within the meaning of subsection 26(7); ...

Mr. Vallillee conducted his inspection commencing on July 11th and continuing on July 12th, 2000. Through the use of a Location Sketch using the Magellan ProMarx X-CM GPS (geographic positioning system), Mr. Vallillee and his assistant, Mr. Brian Reeves, located the northern boundaries and corresponding posts for Mining Claims L-1217942 and 1217935, which should have taken them, moving eastward to the #3 post of Mining claim L-1227299. Mr. Vallillee found no trace of the #3 post, nor any signs of the staking between that location and what should have been the #2 post of L-1227299. The next day, Mr. Vallillee and his assistant attempted to locate the western boundary of the claim.

Essentially, Mr. Vallillee could find no trace of the purportedly newly staked Mining Claim L-1227299 on the ground, despite searching for tie-ons and the general vicinity of the purported posts and lines. This is reflected in his report to the tribunal dated July 20, 2000 and marked as Exhibit 7.

Mr. Thurston admitted that he did not stake Mining Claim L-1227299 on the ground prior to filing the Application to Record. He explained the situation in which he found himself at the time of the purported staking of L-1227299. It was his evidence that Messrs. Bourque and Burda were well aware that Mr. Thurston's driver's license had been suspended and that he was unable to get himself to the Township of Knight in any reasonable time to do the staking. The tribunal notes that Knight Township is located to the southwest of Kirkland Lake, approximately half way to Sudbury, some considerable distance from Mr. Thurston's place of residence. This information was at no time during the ensuing months communicated to the tribunal, which was not aware of the logistical difficulties experienced by Mr. Thurston.

Mr. Thurston admitted to paper staking L-1227299, which bears his signature. There was some discussion in the course of this portion of the proceeding as to whether Mr. Thurston engaged in the practice of using pre-signed applications to record; however, this allegation was not material to the matter of L-1227299.

Mr. Thurston, to his detriment, even went so far as to attempt to drive without a license in his effort to stake the nine unit claim. However, he was apprehended by the OPP, received a \$1,000 fine and had his driver's license suspension extended.

During the course of his explanation, Mr. Thurston demonstrated a lack of judgement in this matter. He did state that, had he been able to get to the ground and properly stake before the inspection was performed, the need for a hearing under section 26 would never have arisen. The tribunal finds that, although Mr. Thurston was remorseful concerning what took place, his judgement was somewhat clouded, as his statement also suggests that matters would have turned out fine if he had never been caught. Mr. Burda was unable to help him finance the required staking, as Mr. Burda was experiencing his own financial difficulties.

When faced with the consequences outlined in the section, namely the potential suspension or revocation of his license, the loss of his right to acquire unpatented mining claims through transfer, his right to an extension of time for performance of work or application for lease, or the cancellation of any or all of his mining claims or that his rights in such mining claims cease, Mr. Thurston clearly regretted his actions.

Mr. Thurston stated that he had never committed an activity which amounted to blatant or perhaps wilful contravention of the **Mining Act** in his 25 years as a prospector. He asked the tribunal to take his past record into account and asked for leniency. Mr. Thurston also advised the tribunal that prospecting was his livelihood, as he has no other means of support, so that any revocation or suspension would force him onto public assistance.

## **Findings**

### Jurisdiction of the Tribunal Under Section 26

At the outset, the tribunal must state that it is concerned with the drafting of section 26, which is rather convoluted and it is led to believe may be setting a double standard. All recommendations arising within the section take place after a hearing, either by the Commissioner or a Recorder, or on appeal to the Commissioner from the Recorder.

It is open to the Commissioner or the Recorder to commence a proceedings when it comes to their attention that there may be a case of contravention or wilful contravention of the **Act** or regulations in the normal course of the running of their respective Offices. However, allegations of such activities may also arise in the course of an ongoing proceeding. It is suggested that it is the latter in which the question is most likely to arise. Such was the situation in the case before the Commissioner involving Mr. Thurston.

The difficulty faced by the Tribunal is in the drafting. Subsection (1) enables the Commissioner to make recommendations to the Minister after a hearing that a license be **revoked**, upon making findings of **wilful contravention**. Subsection (3) enables the Recorder to make recommendations to the Minister after a hearing that a prospector's license be sus-

pending upon making findings of **contravention**. In other words, while the situation which arises before the Commissioner or the Recorder in the course of an ongoing hearing on another matter may be identical, the Commissioner is precluded from making recommendations for **suspension as opposed to revocation**.

This is pointed out as, in a situation such as the current one, the question arises whether fairness over expediency would have been served by adjourning the matter and referring it back to the Recorder for a determination on contravention as opposed to wilful contravention.

#### The Role of the Tribunal

The tribunal also finds that the tribunal itself played a role in the circumstances which led to Mr. Thurston's actions. First, the tribunal failed to advise the parties of the impossibility of implementation of their alternative settlement. The tribunal, through its repeated inquiries of Mr. Thurston by its Registrar, placed Mr. Thurston in the position where he may have unwittingly felt that he had no choice but to do something to make this matter come to an end. These factors, however, do not take away from the fact that Mr. Thurston's actions were in contravention of the legislation.

#### Revocation, Suspension and Prosecution

The **Mining Act** provides a number of different means of penalizing non-compliance with the legislative requirements. A prosecution pursuant to clause 164(1)(i) before either the Commissioner or the Ontario Court (Provincial Division) is in the nature of a criminal proceeding. The penalty imposed, if convicted, is a fine of up to a \$10,000. The resulting recommendation arising from section 26 of revocation or suspension, not to mention the cancellation of claims, may be regarded as more serious than a criminal matter, as the consequences of the findings and recommendations are economic, namely the loss of means by which to earn one's livelihood.

The consideration raised by subsection 26(1) is extremely serious, namely the recommendation of revocation of a prospector's license, upon a finding of wilful contravention. The seriousness imposes a high degree of procedural fairness and independence. Given the nature of the penalty proposed by the subsections listed, Mr. Thurston would have been better served to have appeared with a lawyer.

#### Findings Regarding Actions of Marty Thurston

The tribunal finds that Marty Ed Thurston did wilfully contravene the provisions of the **Mining Act** with respect to his purported staking of Mining Claim L-1227299. In so doing, the tribunal finds that Mr. Thurston showed want of good judgement and proper respect for the mining laws of the province. Despite being remorseful regarding his role in this matter, he nonetheless demonstrated an ongoing lack of regard for proper compliance with the legislation, having stated that if he could have gotten to the ground in time, he would have been able to stake after the fact and not be caught.

On the facts of this case, the tribunal must conclude, however, that its own failure to impose the three week period agreed upon by the parties in their settlement discussions, along with its failure to advise the parties of the impossibility of the second alternative, has led in part to what can only be described as the desperate actions of Mr. Thurston. It is clear that his judgement was impaired throughout, given his attempt to drive to the area while his driver's license was under suspension.

The decision regarding the original application of Mr. Bourque in this matter is still outstanding. The tribunal notes that the facts which gave rise to the application and the purported settlement are similarly fraught. Mr. Thurston has entered into an agreement with Mr. Bourque involving his interest in the Mining Claims, notwithstanding that he is a joint tenant with Mr. Burda. This joint tenancy, as opposed to a percentage interest in the Mining Claims, raises questions concerning Mr. Thurston's sole right at law to enter into an agreement for a portion of his interest. A joint tenancy passes in one conveyance or transfer and requires the signature of both joint tenants. Its primary purpose is one of survivorship, so that upon the death of one joint tenant, his or her interest will automatically vest in the other joint tenant, without intervention of the Estate.

The extreme acrimony observed between Mr. Bourque and Messrs. Burda and to a lesser degree Thurston, lead the tribunal to conclude that any attempt to have the parties work together borders on impossible.

Returning to the issues of recommendations pursuant to section 26, the tribunal finds that, while Mr. Thurston's actions may in fact amount to wilful contravention of the requirements of the legislation, there are mitigating circumstances which must impact on the resulting recommendations. These circumstances are the failure to impose the three week deadline on Mr. Thurston's requirement to stake, as set out by the parties themselves, and the failure of the tribunal to advise the parties of the impossibility of their second alternative in a timely fashion. Had the time frame been imposed, the situation in which Mr. Thurston found himself would never have arisen. Had parties been informed of the situation regarding their second alternative, in point of fact, the matter could have in all likelihood been reconvened well prior to any actions on the part of Mr. Thurston; at the very least, the need for such action would never have occurred.

As the tribunal is limited to making recommendations to the Minister pursuant to subsection 26(1) and 26(7) of the **Mining Act**, on the facts of this case and with the restrictive provisions of the legislation, that only the Recorder may recommend a suspension, which in the opinion of the tribunal would be more appropriate on the facts, the tribunal hereby advises the Minister that it makes no recommendations with respect to a revocation of Mr. Marty Ed Thurston's prospector's licence.

Had the tribunal been able to exercise jurisdiction under subsection 26(3), it would have made a recommendation of suspension of Mr. Thurston's prospector's licence for a period of ninety days. Should the Minister not accept the Recommendations set out herein, the tribunal would recommend to the Minister that any revocation not exceed ninety days.

With respect to cancellation of claims, the tribunal recommends to the Minister that Mining Claim L-1227299, which was purportedly staked by Mr. Thurston, be declared cancelled. The tribunal does not recommend that any of the remaining mining claims held by Mr. Thurston either alone, or as a joint tenant with Mr. Burda, be cancelled.

### **Conclusion**

The tribunal has made a finding of wilful contravention on the part of Mr. Thurston, but notes that there are mitigating circumstances peculiar to this case. Therefore, the tribunal makes no recommendations concerning revocation of Mr. Thurston's prospector's licence. Had the tribunal had the jurisdiction to do so, it would have recommended a suspension of Mr. Thurston's prospector's license for a period not exceeding ninety days; should the Minister not accept the recommendation of the tribunal, the tribunal would further recommend any revocation not exceed ninety days. The tribunal further recommends that Mining Claim L-1227299 be declared cancelled.