

## Mining Claim Disputes in Ontario

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Article abstract

1. General. Mining claim disputes in Ontario usually arise where a restaker attempts to dispute the validity of a claim under the provisions of the *Mining Act*.

2. Staking and Recording Requirements. Most mining claim disputes turn on whether there has been substantial compliance with the statutory staking requirements. A number of rules of thumb have evolved to assist the Mining Commissioner in making his decision as to whether there has been substantial compliance. These include the purpose test, the cumulative errors test, the reasonable excuse test, the equitable approach, the application of different staking standards and different circumstances, and classification of the seriousness of errors. The text also contains a discussion of the statutory staking and recording requirements.

3. Procedural Requirements in Disputes and Appeals. Staking disputes are ordinarily heard at first instance by the Mining Recorder, and then by the Mining Commissioner on appeal. The decisions of the Mining Commissioner may be appealed to the Divisional Court, a branch of the Supreme Court of Ontario. Specific emphasis is placed on the strictness of the time limits under the statute.

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## Mining Claim Disputes in Ontario \*

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### ABSTRACT

1. *General. Mining claim disputes in Ontario usually arise where a restaker attempts to dispute the validity of a claim under the provisions of the Mining Act.*

2. *Staking and Recording Requirements. Most mining claim disputes turn on whether there has been substantial compliance with the statutory staking requirements. A number of rules of thumb have evolved to assist the Mining Commissioner in making his decision as to whether there has been substantial compliance. These include the purpose test, the cumulative errors test, the reasonable excuse test, the equitable approach, the application of different staking standards and different circumstances, and classification of the seriousness of errors. The text also contains a discussion of the statutory staking and recording requirements.*

3. *Procedural Requirements in Disputes and Appeals. Staking disputes are ordinarily heard at*

### RÉSUMÉ

1. *En Ontario, les litiges sur les claims miniers surviennent généralement lorsqu'un jalonneur tente de contester la validité d'un claim en vertu de la loi ontarienne sur les mines.*

2. *Exigences de fond. La plupart de ces litiges tournent autour de la question de savoir si les exigences de fond concernant le jalonnement, que prévoit la loi, ont été respectées. Afin d'aider le juge des mines (Mining Commissioner) à trancher des litiges, certaines règles se sont développées dans la pratique : la recherche de l'intention, le test des erreurs cumulatives, celui de l'excuse raisonnable, l'équité, l'application de différentes normes de jalonnement, l'examen des circonstances, enfin un classement des erreurs commises en fonction de leur sérieux. L'auteur analyse par ailleurs les exigences de fond de la loi et en fait la critique.*

3. *Exigences de procédure. Les litiges sur le jalonnement sont*

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\* Paper presented to the *Prospectors and Developers Association* on March 11, 1986 in Toronto.

*first instance by the Mining Recorder, and then by the Mining Commissioner on appeal. The decisions of the Mining Commissioner may be appealed to the Divisional Court, a branch of the Supreme Court of Ontario. Specific emphasis is placed on the strictness of the time limits under the statute.*

*généralement entendus en première instance par un registraire des mines, puis, en appel, par le juge des mines. Par ailleurs, il peut être appelé des décisions rendues par ce dernier à la Cour divisionnaire qui est une division de la Cour suprême de l'Ontario. L'auteur souligne en particulier la rigueur des délais prévus par la loi.*

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## INTRODUCTION

This paper explores the law on mining claim disputes in Ontario. The law is taken from the *Mining Act*,<sup>1</sup> and the decisions of the Mining and Lands Commissioner (the "Commissioner") and the Courts.

The bulk of that law is found in the five volumes of the Mining Commissioner's Cases (M.C.C.). The cases since 1980 have not yet been reported, and since these new cases show the current law, they are clearly the most important ones in many respects. The unreported cases can only be obtained from the offices of the mining recorders and the Commissioner.

For readers who may come upon this paper later, I add three qualifications. First, this paper is not complete, and not all the cases on mining claim disputes have been mentioned or even accounted for. Secondly, the law is always changing. A new Mining Act<sup>2</sup> is in the works, and the Commissioner is continually refining the principles on which he decides cases. Finally, the viewpoints expressed in this particular paper are my own.

I hope this paper will give you a useful overview of the law.

## I. STAKING REQUIREMENTS

### A. STATUTORY PROVISIONS

The basic staking requirements are found in section 47 of the *Mining Act* (see also sections 40–43, 45 (size and form of mining claims), 54(5) to (8), 55 and 86 (tags)). The requirements of section 47 are quite precise, but must be read with section 50, which provides :

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1. R.S.O. 1980, c. 268.

2. *An Act to revise the Mining Act*, Bill 29, 1<sup>st</sup> Session, 33<sup>rd</sup> Legislature, 1<sup>st</sup> Reading, June 18, 1985.

50. Substantial compliance as nearly as circumstances will reasonably permit with the requirements of this Act as to the staking out of mining claims is sufficient.

Unless the staking complies with the Act, or is saved by section 50 or 142, the claim is deemed to be abandoned under section 84, and the land is open for restaking.

#### B. SUBSTANTIAL COMPLIANCE

The Act does two things : It sets the standards to be met in staking, and it creates an exception to those standards. Consequently, since most stakings are deficient in some respects, mining disputes are usually fought on the ground of whether there has been substantial compliance. Generally speaking, section 50 is an acknowledgement that the Act must apply to the real world. Absolute conformity with the statutory standard is not required.<sup>3</sup> In *Clark v. Dockstader*<sup>4</sup> MacLennan, J. said :

The object of the mining Acts is to promote the discovery of minerals in the lands of the Crown, and an inducement is held out to persons to search for them by enabling them to secure the exclusive possession of ground or rock in which they may have found minerals and to take the minerals for their own use. The essential thing to secure that privilege is the directions to enable the discoverer to describe and to secure his location, and to obtain the reward offered by the legislature for his industry.

Such being the object and purpose of the Act, I think in construing it every reasonable intendment ought to be made to uphold the validity of a claim where there has been actual discovery and an honest attempt to comply with the directions of the legislature in staking and describing the location of the discovery.

These words are still appropriate although the *Mining Act* no longer requires an actual discovery.<sup>5</sup>

The purpose of section 50 is further reflected in *Millar v. McIntosh* :<sup>6</sup>

While a reasonable standard of care must be set, the Court must be careful not to set up an unnecessarily high standard which might be construed as being impracticable or unduly severe.

In any particular case the Commissioner is faced with the stark choice of whether to enforce the *Mining Act* in all its rigour, or to

3. *Dupont v. Cole*, (1929) 3 M.C.C. 59.

4. (1905) 36 S.C.R. 622, at 637.

5. *Comba v. St. Louis*, October 8, 1985, pp. 5-6.

6. (1956) 3 M.C.C. 162, at 163.

grant relief from that rigour and uphold a staking. His choice depends most on the facts of the particular case, but over the years a number of principles or “tests” have evolved to guide the Commissioner’s thinking.

Since these principles are merely guides to thinking, it is not surprising that some of them appear to contradict each other. This is a reflection of the fact that there is a fundamental opposition between the reasons for strict compliance with the statute, and the reasons for forgiveness of strict compliance. Keeping in mind Emerson’s comment that “a foolish consistency is the hobgoblin of little minds”, absolute consistency in decisions would mean that justice was not being done in individual cases.

The principles I will discuss are :

- 1) the purpose test;
- 2) the cumulative errors test;
- 3) the reasonable excuse test;
- 4) the equitable approach;
- 5) different staking standards;
- 6) classification of errors.

### 1) The Purpose Test

On this test, if the purpose for the provision has been met, then there is substantial compliance. See for example *Re Reichen and Thompson* :<sup>7</sup>

Though a safe and impartial administration of the law will in the end be best secured by uniform enforcement of the statutory requirements as they stand without regard to hardship in special cases, I think in the interpretation of these provisions their object and purpose should not be lost sight of. They are undoubtedly intended to secure the claim to the first discoverer who plants his post and marks off his claim in such a way as to make known to other prospectors that he has found valuable mineral upon the property and has set it apart for himself. The manner of so appropriating the claim and notifying others that he has done so cannot in the abstract signify so long as it is done effectively; nevertheless, when a method is laid down in the Act prospectors have a right to expect that it will be done in that way and to insist that the provisions of the Act shall be reasonably carried out. *But when the purpose of the provisions has been accomplished and there has been substantial compliance with the Act, I do not think that a claim should be held bad on a merely technical or trifling and unimportant detail.* The more important and meritorious act of discovery should not be overshadowed by non-substantial formality and detail in the marking out, provided of course that the marking out is reasonably sufficient and in substantial compliance with the Act. (emphasis added)<sup>8</sup>

7. (1907) 1 M.C.C. 88, at 94.

8. This same approach is seen in *Clark v. Dockstader*, referred to above.

On a more general level, it is helpful in considering the cases to keep in mind the general purpose of the *Mining Act*, which “is to provide for the finding and development of bodies of ore that will lead to mines.”<sup>9</sup>

## 2) The Cumulative Errors Test

As MacLennan, J., said in *Clark v. Dockstader*, upholding an imperfectly staked claim depends in part on the staker’s “honest attempt to comply with the direction of the legislature in staking”. Where the “omissions were intentional and were part of an objective that was common to the staking by the respondent and his associates of obtaining an unfair advantage over other stakes,” the staking will be invalid.<sup>10</sup>

Similarly, substantial compliance does not exist if the appellant is at all times aware that something is wrong but makes no attempt to correct it.<sup>11</sup>

In most cases the staker does not have a deliberate plan or a conscious knowledge of the deficiencies in staking. Nonetheless, where there is an accumulation of small errors, none in itself particularly bad, section 50 will not be used by the Commissioner to validate the staking. In *Maher v. Sheridan*,<sup>12</sup> he said :

This tribunal is ever willing to hold that there has been substantial compliance where there is evidence of a bona fide attempt to meet the staking requirements, but equity must follow the law. [...]

Each omission or violation taken in isolation might not be of compelling significance, but cumulatively the facts which I have related leave me no alternative but to conclude that no serious or determined effort was made to comply with the staking requirements nor with the proper tagging of the claim posts. While The Mining Act allows a maximum of six months in which to affix the claim tags to the corner posts, this does not mean that the claims may be improperly or wrongly tagged, nor that the recorded holder has until six months from the date of recording in which to return and correct such errors. Tags and other markings are required so as to indicate to prospectors and others that the land has been staked and recorded as mining claims. Failure to carry out these requirements in the proper manner is misleading to others and cannot be condoned. Furthermore, I am concerned with the careless and haphazard manner in which staking is

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9. *Re Ramsay and Yellowknife Bear Mines Ltd.*, (1975) 11 O.R. (2d) 216, at 230 per Osler, J.

10. *Comba v. St. Louis*, note 5, at pp. 7-8.

11. *Arrowsmith v. Schwartz*, (1960) 4 M.C.C. 11 (failure to locate the claim accurately).

12. (1964) 4 M.C.C. 163, at pp. 167-168.

done, and then relief sought under the guise of substantial compliance. The staking regulations are provided for the protection of the staker and a reasonable attempt must be made to comply therewith.

I do not agree with the contention of Counsel for the respondent that "those who stake first should be allowed to keep their claims, not those who stake best". If such was the case, there would be no point in specifically setting out in The Mining Act the manner in which a claim shall be staked.

In *Watson v. Monahan*,<sup>13</sup> the Commissioner said :

The evidence disclosed a considerable number of mistakes in staking, none of which isolated the standing by itself would in my opinion constitute an invalid staking, but taken as a whole requires to be considered in the light of the strict requirements of the Mining Act.

The requirements of the Act with respect to staking a mining claim may appear to be rather technical and unimportant, but a standard must be set and maintained, and where there are two applicants for the same claim the staking of each must be carefully considered and weighed, having in mind priority of discovery and thoroughness of staking.<sup>14</sup>

On the other hand, the Commissioner weighs the cumulative errors against the total number of claims in the block.<sup>15</sup> In other words, the cumulative effects of the errors can be diluted. Conversely, a claim which would be acceptable taken alone may be rejected as part of an unsatisfactory block.<sup>16</sup>

### 3) The Reasonable Excuse Test

Apart from the problem of cumulative errors, section 50 can also be read as requiring that the error be something reasonably unavoidable in the circumstances.<sup>17</sup>

There is no catalogue of reasonable excuses for the failure to meet the statutory standards. Some examples include the fact that the staker was a novice.<sup>18</sup> Others may include the existence of a staking

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13. (1917) 2 M.C.C. 407, at 408.

14. And see the extensive discussion in *Martin v. Arrowsmith*, (1974) 5 M.C.C. 115.

15. *Burns v. Jones and Clarke*, (1969) 4 M.C.C. 302; *Parres v. Baylore Resources Inc.*, February 25, 1985; and *Mealey v. Peplinski*, December 19, 1985.

16. *Parres v. Baylore*, note 15, pp. 4-5.

17. *Labine v. Leahy*, July 20, 1984, at p. 3 (no reason for failure to blaze); *Clark v. Nahanni Mines Ltd.*, June 18, 1984, at pp. 4-5 (wood for pickets available); *Kaczanowski v. Director of Land Management Branch*, September 2, 1983, at p. 5. But see *Sutherland v. Rose*, (1974) 5 M.C.C. 144, where this requirement is not expressly addressed by the Commissioner.

18. *Sutherland v. Rose*, note 17.



rush, and the physical condition of the land being staked that was unknown to the staker beforehand (for example, inadequate timber on site for the cutting of posts).<sup>19</sup>

#### 4) The Equitable Approach

Section 142 of the Mining Act provides :

142. The Commissioner shall give his decision upon the real merits and substantial justice of the case.

It is fair to say that the extent of the Commissioner's jurisdiction under this section as it relates to mining claim disputes has not yet been fully explored. An extensive discussion is found in *Martin v. Arrowsmith*.<sup>20</sup> There Commissioner Ferguson said :

The legal problem that exists is whether the specific provisions of section [50] applying to a staking situation precludes the application of section [142], the latter being of broad and general application. Having regard to the decisions that have been made in the past, I have concluded that, in a proper case, section [142] could be used to assist a licensee failing to bring himself within section [50]. [...]

I shall not attempt to refer to all judgments that have provided relief on the basis of section [142]. The interesting thing in regard to these judgments is that I have not been able to find any legal analysis of the phrase "real merits and substantial justice" and that the application of the section has reflected a variety of elements of individual cases related to hardships, fairness, or travesties of justice.

After a review of the cases, and the evidence, Commissioner Ferguson concluded :

I have considered the evidence and I find no evidence of issues of hardship, improper advice from public servants, lack of experience, deceit or collusion to bring the case within the reported cases.

In my view, section 142 invites a careful consideration of two issues corresponding to the separate branches of "real merits" and "substantial justice". The phrase "real merits", relates to the appropriateness of a particular decision to the purpose and object of the statute, which is to develop mines. The phrase "substantial justice" requires that the relative positions of the parties be balanced.

Both issues in part underlie the results in *Machin v. Hopkins*,<sup>21</sup> where the disputed claims had been in existence for two and a half years

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19. *Parres v. Roxmark Mines Limited*, February 25, 1985, at p. 10.

20. (1974) 5 M.C.C. 115, at pp. 130-131.

21. (1963) 4 M.C.C. 126.

and the holder had performed three years' assessment work. See also *Langthorne v. Pressman*<sup>22</sup> (70 days' work recorded). And see *Parres v. Roxmark Mines Limited* (claims on record for four years, enough work to bring claims to lease). In these cases, as in cases on relief from forfeiture, the Commissioner is apparently reluctant to eject holders whose rights are long-standing, and who have worked the claims, thereby achieving the purpose for which the *Mining Act* exists.

The phrase "real merits and substantial justice" also has a positive aspect. The Commissioner can refuse the disputant's case if the disputant has himself behaved inequitably. For example, in *Parres v. Roxmark Mines Limited*, Commissioner Ferguson said :

Here the evidence indicates that the appellant had at least two years knowledge of his opportunity to institute the remedy but delayed the institution until after the expenditure of not only significant but massive amounts of corporate and public funds. To permit or require unsuspecting shareholders in a public company to lose the benefit of approximately \$2,600,000 and to destroy the contribution of approximately \$600,000 in public funds cannot be considered as other than a miscarriage of justice. The argument that it is a fundamental right of a licensee to play a role in the self-discipline of the staking fraternity must be conditioned by the overall principles of the objective and purpose of the *Mining Act* of finding and development of ore bodies and where such conduct patently destroys the extensive efforts taken in this case, the conduct cannot be classified as being taken in a reasonable length of time or as being in furtherance of such purpose and objectives. In the opinion of the tribunal, the failure to institute the remedy while such extensive expenditures were being incurred relates to the injustice of the delay and gives rise to these equitable defences.

Commissioner Ferguson apparently takes the view that the enquiry under section 50 on substantial compliance proceeds independently of the enquiry under section 142 on the real merits and substantial justice of the case. In other words, the recorded holder may lose under section 50 but may be saved by section 142.

With respect, that viewpoint seems to be inconsistent with the wording of section 142. This section requires the Commissioner to "give his decision upon the real merits and substantial justice of the case". If one asks "which decision?", the conclusion can only be "the decision on whether there has been substantial compliance". Section 142 can therefore be rephrased : "The Commissioner shall give his decision on whether there has been substantial compliance on the real merits and substantial justice of the case".

It could be argued that this rephrasing of section 142 would not lead to different results in the cases, but I am not so sure. I believe it would lead to a greater flexibility in the determination of whether there

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22. (1960) 4 M.C.C. 5.

has been substantial compliance. It would also lead to a more individualized approach to the cases.

### 5) Different Staking Standards

It appears that the Commissioner will impose different staking standards in different circumstances. In a dispute, the staking of the recorded holder will be assessed for compliance with the statutory requirements of the *Mining Act*.

However, where an overstaker disputes a claim under section 56, he must comply *strictly* with the staking provisions of the *Mining Act*.<sup>23</sup>

In *Mealey*,<sup>24</sup> Commissioner Ferguson said at :

The strict compliance doctrine arises from the *Whiting* case (above) where Commissioner Godson, as he then was, said at pp. 324 and 325,

I feel forced to judge the Whiting staking strictly. He was not the first discoverer, as far as the year 1915 is concerned, at which time the land was in the Crown, and it is only by a successful attack upon Mather's staking that he would have succeeded upon going upon record for the same land, provided his application and staking were regular. If I condone Whiting's many imperfections of staking and applied the saving clauses of the Act, I feel I would be doing Mather an injustice.

What Whiting did must be judged by the same standard that he expects me to apply to the Mather staking : "He who seeks equity must do equity."

Two principles are apparent in the quotation. Firstly, it is noted that the principle is derived from the law of equity. Secondly, the principle does not call for complete or perfect compliance but calls for strict compliance.

For example, in *Clark v. Lacasse*,<sup>25</sup> the only error was that one post was undersized by  $\frac{1}{4}$  inch. The restaking was upheld.

In *Comba v. St. Louis*,<sup>26</sup> Commissioner Ferguson concluded that : "It may well be that there are only two such standards, one of compliance and the other of strict compliance where the licensee attempts to attack an existing recorded mining claim."

In *Clarke v. King*,<sup>27</sup> Commissioner McFarland held :

While section 58 of the Mining Act provides that substantial compliance as nearly as circumstances will reasonably permit with the requirements of the

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23. *Whiting v. Mather*, (1916) 2 M.C.C. 318; *Martin v. Arrowsmith*, note 14; *Mealey v. Peplinski*, note 15; *Parres v. Baylore Resources Inc.*, note 15.

24. Note 23, p. 14.

25. (1978) 5 M.C.C. 387.

26. Note 6, at p. 6.

27. (1963) 4 M.C.C. 107, at 109.

Act as to the staking out of mining claims shall be sufficient, it seems to me that where there is a contest of staking and as much confliction of evidence as there is in this case, the licensee who adheres most closely to the staking regulations must succeed.

However, this approach has since been rejected by Commissioner Ferguson in *Meunier v. Larche*,<sup>28</sup> where he said :

If the staking is valid either in itself or through the curative doctrine, there is no method of striking down the staking merely because another has staked in a manner that may be more perfect than the adequacy of the staking of the recorded holder. To create a principle of comparative perfection of staking would only lead to confusion in respect of varying degrees of perfection of staking and proliferation of litigation. The significance of recording has long been recognized by stakers and as was evident in this case, as well as many of the reported cases, the industry is aware of the position of the staker who records first. In the view of this tribunal there is no principle, or basis for a principle, that might be referred to as the best staking principle.<sup>29</sup>

There is one variation on staking standards which ought to be mentioned. Where the recorded holder is asking for relief from forfeiture in the face of a restaking, the validity of the restaking cannot be attacked. In *Clark v. Nahanni Mines Ltd.*,<sup>30</sup> Commissioner Ferguson said :

The Bench pointed out at the outset that the matters of restaking, the dispute and the validity of the staking on behalf of the respondent, Nahanni Mines Ltd., are not relevant in accordance with the cases of *Argyle Consolidated Mines Limited and Thompson*, 3 M.C.C. 79 and *Victory Gold Mines Limited and Cross* 3 M.C.C. 12.

The validity of a restaking can only be challenged in a dispute, but there is no reason why the applicant for relief from forfeiture should not file a dispute under section 56 of the Act and apply to have the matters heard together.

## 6) Classification of Errors

It seems remarkable that over the many years that claim disputes have been heard, no attempt has been made to classify the seriousness of errors, until the case of *Comba v. St. Louis*<sup>31</sup> in late 1985. The respondent failed to inscribe the time of commencement of staking

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28. (1979) 5 M.C.C. 485, at 506.

29. Note 5, at p. 5.

30. January 20, 1983, at p. 2.

31. Note 5, at p. 6.

on his No. 1 post. Because priority of commencement of staking prevails over priority of recording,<sup>32</sup> Commissioner Ferguson held that the failure was fatal. He said :

Having regard to the principles outlined by MacLennan, J. [in *Clark v. Dockstader*] and the significance of the non-compliance by the respondent and keeping in mind that some of the requirements of staking are technical standards and others are basic or fundamental requirements, a common example of which is the prohibition of posts previously used as was discussed in the case of *Martin v. Arrowsmith* 5 M.C.C. 115, it is apparent to the tribunal that the requirement of the insertion of the date and time of commencement of staking is a fundamental requirement of the staking process.

The classification of errors into technical breaches and fundamental breaches is in some respects implicit in the existing case-law. Such a classification seems sensible but how it affects cases under section 50 of the Act remains to be seen. It would be unfortunate if it were held that in all cases a fundamental breach meant that neither the substantial compliance doctrine, nor the equitable approach under section 142, could be used to validate the staking. This seems to be the implication of the holding in *Martin v. Arrowsmith*,<sup>33</sup> where the Commissioner held neither doctrine could be used to validate a staking against an express prohibition in the *Mining Act*. In that case the staker had erected a used post which is contrary to subsection 47(4) of the *Mining Act*. There may be very good reasons why a used post is used in a staking, and in my view there is really no statutory mandate for refusing to consider those reasons. What about, for example, the situation in *Re Asher Gold Mines Ltd. and Larson*<sup>34</sup> (area burned over — suitable timber not available)?

The statements in *Comba v. St. Louis* set out above clearly represent a departure for Commissioner Ferguson. In *Morgan v. Haahiti*,<sup>35</sup> he had said :

With reference to the argument of counsel for the applicant respecting section 59 [section 50] of the Mining Act and the application of the substantial compliance doctrine, it is the opinion of this tribunal that in the application of this doctrine one does not weigh the inadequacy of the irregularity, but one weighs the adequacy of the staking itself, assuming that an irregularity is established. Generally speaking, the approach of the application of the substantial compliance doctrine has been to ameliorate against the failure to comply with the statutory standards rather than to assess the degree of compliance with the individual statutory requirements

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32. *Re Boyle and Young*, 1 M.C.C. 1.

33. Note 20.

34. (1956) 3 M.C.C. 175.

35. December 15, 1980, at p. 10.

and it would seem to follow that the existence of the doctrine would be a factor against the granting of an order sought rather than in support thereof, because with the doctrine, the need to establish compliance with the statutory standards is not as significant as it otherwise would be with the result that an appearance of non-compliance is not as significant as it would be if the rule were to require strict compliance. In other words, with such a doctrine, there is an area of latitude in determining the validity of the staking and it is not as essential to establish with precise accuracy the degree of compliance or conversely the degree of non-compliance with a particular statutory standard.

Time will tell whether this new approach of classifying errors takes root, or whether the Commissioner retreats to his previous position that a staking should be assessed as a whole. In most cases the difference in approach will not make any difference in the result.

### C. SPECIFIC STAKING REQUIREMENTS

In this section I will discuss some of the more interesting cases on deficiencies in staking.

In reading what follows, it is important to remember that very few cases involve only isolated errors. In most cases there are a number of deficiencies of varying degrees of importance. Most cases are therefore decided on whether there has been substantial compliance with the *Mining Act*, or whether the cumulative errors invalidate the staking.

It must also be kept in mind that the staking is measured as of the date on which it took place. There is no obligation to maintain the staking by, for example, recutting underbrush along the boundary lines, or replacing pickets which have fallen down.

There is also continuing controversy about the role of industry standards in the decisions of the Commissioner. It is fair to say that the Commissioner will not condone industry practices if he feels they are inconsistent with the *Mining Act*. In *Sherritt-Gordon Mines Limited v. Perry*,<sup>36</sup> Commissioner Ferguson said :

With respect to the allegations respecting the practice of the staking industry [...], such a consideration is not relevant. The validity of staking is dependent on the judicial interpretation of the *Mining Act* by the appropriate judicial authorities and not by the industry.<sup>37</sup>

In my view, the Commissioner's position on the use of industry standards is inconsistent with the approach suggested by the

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36. November 19, 1981, at pp. 11-12.

37. And see also *HRC Hemlo Resource Corporation v. Dunes Explorations Corporation*, July 30, 1984.

purpose test. If no one has been misled by the manner of staking, say, where flags have been used, why should the staking fall because there has not been strict compliance with the provisions of the *Mining Act*? Further, when the Commissioner makes a decision rejecting industry usage, he is automatically bringing into question the validity of many claims which were staked with that usage. Some of those claims may be long standing, as may be the industry usage itself. Perhaps it would be more appropriate for the Commissioner to uphold stakings which meet the purpose of the Act while using industry standards which he rejects, but at the same time warn in the decision that future use of the industry practice will not be tolerated.

### 1) The Purpose for Staking and Blazing

The purpose for staking and blazing is discussed in *McGill v. Brookbank* :<sup>38</sup>

The root of title of a mining claim depends upon staking. Stakes, blazes and markings form visible evidence of the ground staked and by whom, who for, and when. The application has attached to it a plan showing the ground applied for and with which the staking should coincide. The ground is then plotted on maps of the Recorder showing it is under staking, and these several acts are integral parts and for present and future reference form a history of the claim. Stakes become important monuments as evidence and guides in disputes to determine lines and corners and old posts are at times of much value in fixing the true corners of the claims.

In *Re Wellington and Ricketts*,<sup>39</sup> the Commission said :

The proper staking and marking of a mining claim might seem at first view to be a rather technical and not a very important matter, but the circumstances of the present case well illustrate the purpose and the necessity of having the boundaries of a claim very plainly blazed and marked and having proper posts planted and marked with the particulars as required by the Statute. Had Mr. Ricketts... properly run his lines and planted his posts and put the proper markings thereon so that all could be unmistakably seen by anyone coming upon the property, the present litigation would probably have been avoided. As it was, persons who came upon the land subsequently seemed not to have seen his staking. On the other hand, Mr. Ricketts... and other licensed prospectors are entitled to know with certainty, either from a view of the markings on the property or from an examination of the application filed, just what land Mr. Wellington is claiming.<sup>40</sup>

38. (1939) 3 M.C.C. 76, at 77.

39. (1907) 1 M.C.C. 58, at pp. 59-70.

40. And see *Sutherland v. Rose*, note 17.

In *Morgan v. Haahti*,<sup>41</sup> Commissioner Ferguson approved *McGill* :

The existence of the staking fabric on the ground is essential for the operation of the staking system and the removal of the evidence of staking can lead to considerable confusion where other licensees might attend upon the land and assume that by reason of the absence of posts the area was open for staking.<sup>42</sup>

Although the purpose test is used occasionally in assessing claims, it appears that the Commissioner wants stricter compliance with the standards of the *Mining Act* than the purpose test would otherwise suggest. For this reason the staker should be guided by the letter of the *Mining Act* wherever possible.

## 2) Time of Staking

Claims may not be staked before the land is open for staking. Subsection 86(6) of the *Mining Act* provides :

Where forfeiture or loss of rights has occurred, the lands, mining rights or mining claims concerned are not open for staking until 7 o'clock in the forenoon of the day immediately following that upon which forfeiture or loss of rights occurred.

Under the *Time Act*,<sup>43</sup> that means Standard Time, and not Daylight Saving Time.

In addition, section 31 provides :

No mining claim shall be staked out or recorded on any land, [...]

(f) while proceedings in respect thereto are pending before the Supreme Court, the Commissioner or a recorder.

The staking of a claim may not be discontinued and recommenced without a certificate of the mining recorder under section 48 of the *Mining Act*.<sup>44</sup>

Finally, in staking competitions, it is the time of the *commencement* of staking and *not* the recording of the claim which determines the priority of claims,<sup>45</sup> despite section 74 of the Act which provides

41. December 15, 1980, at p. 7 and added at p. 9.

42. And see *Re Reichen and Thompson*, (1907) 1 M.C.C. 88, at 94.

43. R.S.O. 1980, c. 501.

44. See also *Kasner v. Vesich*, November 14, 1980, at p. 14; *Clarke v. King*, (1963) 4 M.C.C. 106, at 110; and *HRC Hemlo Resources Corporation v. Dunes Explorations Corporation*, note 37, at p. 13.

45. *Re Boyle and Young*, note 32; *Comba v. St. Louis*, note 5.



that, "Priority of recording prevails...". The reason is that under subsection 51(2) the staker may record at any time within 31 days from the date of staking.

### 3) Orientation and Size of Claims

The orientation and size of claims is governed by sections 40, 42, 43 and 45 of the *Mining Act*. The staker's failure to orient himself properly, to accurately describe the location in the inscription on the posts, and to improperly size the claim can be fatal.<sup>46</sup>

### 4) Grid Staking

Section 47 contemplates the placing of stakes in a certain sequence. Grid staking is inconsistent with section 47 and, despite industry practice, is invalid.<sup>47</sup>

In my view the Commissioner's reading of section 47 on the matter of grid staking is too narrow, particularly where there is no staking rush. If the staking is otherwise adequate and serves the purpose, why should the sequence of placing the stakes make any real difference? Why should the staking not be found in substantial compliance under section 50?

### 5) Proxy Staking

In *Arnott v. Walli*,<sup>48</sup> Commissioner McFarland cancelled a claim because the staker had not personally inscribed the corner posts. His certificate to the effect that "I staked out in accordance with the *Mining Act*..." was therefore false.

Three years later in *Pilon v. Poutanen*,<sup>49</sup> Commissioner McFarland held that a licensee could employ "an assistant or assistants to help whether in a clerical or manual capacity provided always that he himself was at all times present on the ground".

Following *Pilon*, the Act was amended to add, "Notwithstanding section 59, the writing or inscribing required on the posts by

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46. *Tittley v. Tesluk*, June 13, 1984, and cases cited therein; *Arrowsmith v. Schwartz*, note 11.

47. *HRC Hemlo Resources Corporation v. Dunes Explorations Corporation*, note 37, at p. 13; *Mealey v. Peplinski*, note 15, at p. 12.

48. (1956) 3 M.C.C. 170.

49. (1959) 3 M.C.C. 260, at 263.

clauses (b) and (s) of subsection (1) shall be done, at the time that the posts are erected, by the licensee staking out the mining claim". However, in 1972 this subsection was repealed. In *Meunier v. Larche*,<sup>50</sup> Commissioner Ferguson concluded that the repeal of this subsection did not revive the *Pilon* decision. In other words, the permitted use of assistants does not extend to the inscription of posts. There the law stands.

## 6) Posts

There are a great many cases discussing the adequacy of posts when measured against the standards set out in section 47 of the *Mining Act*. I touch on only some of the issues.

### a) Prior Preparation of Posts

The concern here is that if the degree of prior preparation for staking is not strictly controlled, a staker may obtain an unfair advantage over his competitors. In *Meunier v. Larche*,<sup>51</sup> Commissioner Ferguson said :

[...], the legal issue arose as to whether, [...] preinscription of corner posts would invalidate the staking by Larche. The reason for such invalidity would be that the staking commenced prior to the time that the mining rights came open for staking. This principle has long been recognized as a fundamental principle in respect of competitive staking. In the decision of *Whelan v. MacGregor* 5 M.C.C. 97 by Commissioner Horan in 1973 a staking was held invalid because the No. 1 post was erected twenty minutes before the land came open. In the case of *Yost v. Chorzeпа* 5 M.C.C. 222 this incumbent held in 1975 that staking commenced one hour before the land came open could not be validated on the substantial compliance doctrine contained in section 59 of the Act or the real merits and substantial justice principle contained in section 152 of the Act. This approach was again endorsed in the decision of *Leach et al. v. Wilson* 5 M.C.C. 368.

There is a distinction between the validity of the time of staking and the method of staking. Matters relating to the former are associated with the principle of affording all licensees an equal opportunity of acquiring mining rights in Crown lands and the decisions requiring strict adherence to the time at which the lands came open for staking are based on the desirability of preserving such an opportunity. Accordingly, the performance of any of the essential parts of staking prior to such time is crucial and staking has been held invalid where the planting of the No. 1 post is prior in time to the

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50. Note 28.

51. Note 50, at p. 491.

opening moment. Similarly the other acts expressly required as part of staking fall within a similar principle and in my opinion the preinscription of a corner post would invalidate the staking.<sup>52</sup>

However, stakers are entitled to place “directional markings” before the ground is open. In *Robinson v. Gracie*,<sup>53</sup> Commissioner McFarland held that “I see no objection to such a procedure provided that the lines are properly blazed again at the time of staking”. This position may be compared to the statement of Commissioner Ferguson in *Labine v. Leahey* :<sup>54</sup>

This incumbent has considerable difficulty in treating a complete blazing of a line as a directional marking. The complete blazing of the line is more consistent with an attempt to complete part of the staking in order to save time during a competitive situation.

[...]

Keeping in mind that the respondent admitted in his evidence in chief that he had completely blazed the line on the previous day and that he had not reblazed all the blazes that he had made on the previous day it cannot be concluded that all of the blazes had been remade at the time of staking and hence, with doubt existing as to the identity and number of blazes made on the second occasion, the staker who adopts this practice of blazing prior to staking creates areas of concern as to the sufficiency of the blazing done as part of the staking. In the opinion of this incumbent, stakers would be well advised to adopt only the concept of directional markers, using some device other than complete blazing for directional guidance and should refrain from performing, prior to the commencement of staking, any of the acts that the Act requires to be done as part of staking. The concept of reblazing raises not only issues of reduction of the required steps in the interests of obtaining a time advantage in recording but also issues as to what constitutes reblazing. Does it require a mere touching of the old blaze or a touching up of the old blaze by removing a small portion of wood thereby reducing the time required to stake? Where it is difficult to establish, even after a few hours, the date of making the blaze, why should such an equivocal practice be permitted as part of the staking process. In my view the integral parts of the staking process should not be performed prior to the time the land comes open for staking.

The more recent statement by Commissioner Ferguson is an important warning.

#### b) *Missing Posts*

The fact that a post cannot be located shows that the purpose for the staking is not being accomplished. No one can tell that the claim

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52. See also *Comba v. St. Louis*, note 5.

53. (1963) 4 M.C.C. 120, at 121.

54. July 20, 1984, at pp. 3-4.

has been staked. Thus, the absence of posts is normally fatal.<sup>55</sup> On the other hand, the fact that a post is now missing is not proof that there never was a post.<sup>56</sup>

c) *Moved Posts*

Paragraph 94(1)(b) of the *Mining Act* provides for automatic forfeiture of a claim if a post is removed without the written consent of the recorder or the Commissioner. The statute does not permit the Commissioner to grant relief from this particular forfeiture.<sup>57</sup>

d) *Used Posts*

Subsection 47(4) of the *Mining Act* provides that :

Every post shall be a post [...] not before used as a post for a mining claim.

As mentioned above, it may be that the provisions of section 50 regarding substantial compliance cannot be used to save a claim staked with a used post.<sup>58</sup>

e) *Posts Not Cut Off*

Subsection 47(3) of the *Mining Act* provides that : “[...] a standing stump or tree may be used as a post if cut off and squared and faced to such height and size”. The purpose of this provision is to avoid the use of standing trees as posts because they are not obviously posts. In *Smith v. Pinder*,<sup>59</sup> the Commissioner said :

Instead of making or planting a post in accordance with the Act, a tree which stood some ten feet or so from the proper corner was blazed, or partly squared or faced, but upon the side of the tree near the proper location of the corner, was only a slight blaze. The tree was not cut off as expressly required by section 2(20) of the Act, and I find that this tree did not in the circumstances reasonably answer the purpose of a stake. It was not such a thing as the ordinary prospector or miner would take, unless he made a close examination, to be a post of a mining claim. I also find that Pinder, though he saw the tree and a slight blaze on it, did not know that it

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55. *Parres v. Baylore Resources Inc.*, note 15.

56. *Fernholm v. Sproat*, (1938) 3 M.C.C. 92.

57. *Kasner v. Vesich*, note 44, at p. 13.

58. *Martin v. Arrowsmith*, note 14.

59. (1908) 1 M.C.C. 241, at 247.

was a post belonging to a mining claim. I am averse to holding claims invalid for what may be considered technical defects, or for slight deficiencies in the posts, but in the case of No. 1 post, as to which special care should always be exercised, I think this tree falls short of what may upon even a liberal interpretation of the Act, be held to be a substantial compliance.<sup>60</sup>

#### f) *Undersized and Short Posts*

The same concern underlies the treatment of undersized and short posts. See, for example, *Wellington v. Ricketts* :<sup>61</sup>

The stakes he planted were little more than pegs or short pickets, not at all such as the Mining Act (section 2(20)) requires nor such as a person passing through the bush would take to be stakes belonging to a mining claim [...]

There are many cases on deficient posts<sup>62</sup> which will not be discussed here.

### 7) **Blazing and Picketing**

Since the purpose of blazing and picketing is to give public notice of the fact that a claim has been staked, efforts which fail to serve the purpose are usually found to be inadequate.<sup>63</sup> I discuss below particular instances of improper blazing and picketing.

#### a) *Lines and Posts Do Not Meet*

The best recent example of this problem is found in *Kasner v. Vesich*<sup>64</sup> where Commissioner Ferguson said :

The running of a line at a location east of the posts not only indicates a subsequent running of the line [from the time the post was planted] but also causes considerable confusion to mining claims inspectors and other prospectors on the ground. A line that does not pass through the posts is indicative of some staking other than the staking represented by the posts and the purpose of staking is to demark on the ground the land that the staker is purporting to stake out.

60. And see *Meunier v. Gilman*, (1978) 5 M.C.C. 379, at 382.

61. (1907) 1 M.C.C. 58, at 59.

62. See *Martin v. Arrowsmith*, note 14, at p. 138.

63. See generally *Sutherland v. Rose*, note 17.

64. November 14, 1980, at pp. 10-11.

b) *The Use of Old Blazes*

In *Reichen v. Thompson*,<sup>65</sup> the Commissioner said :

While I think it permissible and sufficient in law to make use of old posts and adopt the old markings and blazings on a claim so far as they are appropriate, it would no doubt be safer and wiser for a licensee who desires to avoid trouble to do all anew.

(As mentioned, the use of old posts is now prohibited by the Act.)

“Touching up” blazes may be permitted.<sup>66</sup> But see the doubting comments of the Commissioner in *Labine v. Leahey* above. Given the approach of Commissioner Ferguson, it would be safer to reblaze the boundary lines than to rely on retouching old blazes.

c) *Flagging*

In *Clark v. Nahanni Mines Ltd.*,<sup>67</sup> Commissioner Ferguson held that flagging was not an acceptable substitute for blazing or picketing. The primary reason for his decision was that flagging is used by so many persons apart from stakers, for example, timber operators, etc., that it is not an unequivocal indication of a staking. It does not tell other stakers that the ground has been claimed.

d) *Natural Boundaries*

In the field there are many natural boundaries such as roadways, hydro rights-of-way, water bodies and other features of the terrain. Must a staker picket and blaze along the natural boundary? If the lines are reasonably clear, the absence of pickets does not seem to be fatal,<sup>68</sup> particularly where, as a practical matter, neither pickets nor mounds would survive.<sup>69</sup>

Natural boundaries may be acceptable.<sup>70</sup> However, Commissioner Ferguson has not adopted these cases accepting natural boundaries, nor has he overruled them. On balance, prudence suggests that natural boundaries should be blazed and picketed where possible.

65. Note 7, at p. 99.

66. *Millar v. McIntosh*, (1956) 3 M.C.C. 162; *Sutherland v. Rose*, note 17.

67. June 18, 1984, at p. 5.

68. *Leduc v. Grimston*, (1915) 2 M.C.C. 285.

69. *Richardson v. Geisler*, (1965) 4 M.C.C. 184, at 185.

70. *Richardson v. Geisler*, (shoreline), note 69; *Pilon v. Poutanen*, (1959) 3 M.C.C. 260, at 261 (roadway); *Machin v. Hopkins*, (1963) 4 M.C.C. 126 (shoreway).

## II. RECORDING REQUIREMENTS

The requirements for recording a claim are set out in section 51 of the *Mining Act*. Essentially the staker must file a sketch or a plan of the claim, an application in the prescribed form, and a certificate in the prescribed form with the mining recorder within 31 days of the staking. Section 50 of the Act does not apply to the recording of the staking, but subsection 51(5) performs the same function :

51(5) Where it appears that there has been an attempt made in good faith to comply with this Act, the inclusion of more or less than the prescribed area in a mining claim or the failure of the licensee to describe or set out in the application, sketch or plan furnished to the recorder the actual area or parcel of land staked out does not invalidate the claim.

As with staking requirements, the failure to comply with the Act results in a deemed abandonment of the claim under section 84 of the Act.

The recorder is required “forthwith” to record the claim : subsection 54(1). If the application is not in accordance with the Act, or if the claim covers part or all of a subsisting recorded claim, the recorder may file the application as a “filed-only claim” : subsection 54(2). The staker must then take steps to perfect the application within 60 days : subsection 54(3).

If the claim has been recorded in the wrong division, the error must be rectified within 15 days of the date of the discovery of the error : section 53.

If the recorder or the Commissioner is satisfied that a staker has “knowingly” made a false statement in his application or certificate, he may cancel the recording of the claim : subsection 51(4).

In a dispute brought under section 56, proper compliance with the recording requirements can be raised to challenge the validity of the claim. To some extent, defects under section 51 are also defects under other provisions of the Act. For example, staking before the land has come open is fatal.<sup>71</sup> At the same time, filing a certificate under subsection 51(3) setting out the wrong time is a false statement under subsection 51(4) for which the Commissioner will cancel the staking.<sup>72</sup>

A related problem is that of proxy-staking (as to which, see above). Anyone who does not personally inscribe the posts yet swears out a certificate is making a false statement and is risking the cancellation of his claim.

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71. *Whelan v. MacGregor*, (1973) 5 M.C.C. 97; *Mealey v. Peplinski*, note 15, at p. 7.

72. *McChristie v. Rousseau*, (1978) 5 M.C.C. 433; *Comba v. St. Louis*, note 5, at p. 9.

A false statement is also made if the applications to record are completed before the staking is performed.<sup>73</sup>

An additional issue arises respecting paragraph 51(1)(a) which requires the staker to file “a sketch or plan of the mining claim showing the corner posts and the witness posts, if any, and the distance between the posts in feet”. How accurate must the sketch be? Undoubtedly it does not have to be as accurate as a survey.

Some idea of the degree of accuracy can be taken from the purpose for which the sketch is provided. I believe this is stated in subparagraph 51(1)(b)(i), which requires the staker to provide the recorder with enough “information as will enable the recorder to indicate the claim on his office map”. If the sketch can be used for this purpose by the recorder, it ought to be sufficiently accurate. So long as there is “no attempt to deceive or obtain an advantage by misrepresentation in the preparation of the application” strict accuracy in measuring distances between posts and entering those distances on the sketch is not required.<sup>74</sup>

### III. PROCEDURAL REQUIREMENTS IN DISPUTES AND APPEALS

The relevant statutory provisions respecting procedure in disputes are found in section 56 (filing a dispute), sections 89–91 (inspection), and sections 126–159 (the jurisdiction of the recorder and the Commissioner), among others.

#### A. THE COMMENCEMENT OF A DISPUTE

A claim dispute is commenced by the service and filing of a dispute with the mining recorder in accordance with section 56 of the *Mining Act*. Although the section permits any licensee to bring the dispute, practically speaking only those who claim an interest in the same ground do so. Normally the dispute is filed with a “filed-only” application to record submitted under subsection 54(2).

#### B. WHO HEARS THE DISPUTE AT FIRST INSTANCE

In theory, a dispute can be heard at first instance by the mining recorder, the Commissioner, or a judge of the Supreme Court of

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73. *McChristie v. Rousseau*, note 72, at pp. 447–449.

74. *Parres v. Roxmark Mines Ltd.*, note 19.



Ontario. In fact most disputes are first heard by the mining recorder under section 131 of the Act. The hearing is informal in nature.

However, under the combined provisions of section 126, subsection 131(2) and paragraph 134(b), the Commissioner may agree to take jurisdiction over a dispute before the mining recorder had held a hearing. The Commissioner will accept jurisdiction where doing so would be more expedient. For example, some claims in a block may be disputed, while others may be subject to applications for relief from forfeiture, and the mining recorder may have already decided disputes on yet others. In those circumstances the Commissioner might take jurisdiction.

Otherwise the Commissioner resists the transfer of a dispute from a mining recorder because the hearing before the recorder gives the parties an opportunity to learn about the case. There is no pre-hearing disclosure of information prescribed by the *Mining Act*, and the hearing before the recorder process performs that function.

Once the Commissioner has jurisdiction, he may hear the dispute himself, or either party may then apply to the Supreme Court of Ontario for an order transferring the proceedings there : section 128. The Court can refuse the application, or it can refer any question in the proceedings to the Commissioner : section 129. Generally the Court is reluctant to take jurisdiction over claim disputes, undoubtedly recognizing that the Commissioner is experienced and is the proper tribunal for hearing the matter.

### C. THE MINING RECORDER'S JURISDICTION

The mining recorder's jurisdiction in hearing a dispute is set out in section 131. He may give directions as to how the matter is to proceed : section 132. The mining recorder can order the inspection of a claim under a dispute : section 89. The holder of the claim or the disputant is entitled to a copy of the inspector's report : section 91. He may also take a view of the claim himself.

After the hearing, the recorder must enter the decision in his books and notify the parties of it : subsection 131(3). He is required to give reasons for his decision : subsection 132(2). He must enter the order on the record of the claim : section 75.

### D. APPEALING THE DECISION OF THE MINING RECORDER

A person affected by the decision of the mining recorder may appeal to the Commissioner under section 131 of the *Mining Act*. The time provisions are quite critical and are set out in subsection 133(3),

which I have edited below for the purpose of clarity; you may still find yourself puzzling over the subsection :

An appeal to the Commissioner shall be by notice in writing in the prescribed form,

- [1] *filed* in the office of the recorder from whom the appeal is being taken *and served upon all parties interested within fifteen days from the entry of the decision on the books of the recorder or the doing by the recorder of the act or thing appealed from,*
- [2] or within such further period of *not more than fifteen days* as the Commissioner may allow,
- [3] but
  - [a] if the notice of appeal has been filed with the recorder within such time, and
  - [b] the Commissioner is satisfied that it is a proper case for appeal, and
  - [c] that after reasonable effort any of the parties entitled to notice could not be served within such time,

the Commissioner may extend the time for appealing and make such order for substitutional or other service as he considers just, or

- [4] if a person affected has not been notified as provided in sections 90 and 131, and appears to have suffered substantial injustice and has not been guilty of undue delay, the Commissioner may allow such person to appeal.

Clearly it is important to decide immediately whether to appeal and to take steps quickly to serve and file the notice of appeal.

Failure to serve a notice of appeal renders the appeal a nullity.<sup>75</sup>

#### E. THE MINING COMMISSIONER'S JURISDICTION

Whether the dispute comes to the Commissioner without, or after, a hearing before the mining recorder does not matter. The Commissioner must hear the whole matter over again from the beginning : paragraph 134(a).

The Commissioner's powers on the appeal are essentially the same as those of the mining recorder. The hearing is, however, conducted like a court proceeding, with a few variations.

Under section 137, the Commissioner has jurisdiction to make a number of procedural orders including, theoretically at least, orders for examination for pre-hearing disclosure or "discovery" of the

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75. *Mealey v. Peplinski*, note 15, at p. 3; *Maher v. Sheridan*, (1964) 4 M.C.C. 163; *Morrison v. McKinnon*, (1976) 5 M.C.C. 339.

parties, although he has not yet made such an order without the consent of all the parties to a dispute.

The Commissioner's decision must be in the form of an order. His order together with the exhibits and reasons for the decision are sent back to the mining recorder : section 150. Upon receipt of the proper fee (from the party interested in recording the order) the mining recorder will enter the order on the record of the claim under dispute : section 75. If the parties fail to have the order recorded, a Commissioner may do so if it is "in the public interest" : section 193.

If the effect of the Commissioner's order is to cancel the recorded claim and dismiss the filed-only claim, then he will ordinarily follow the practice in *Robinson v. Gracie*<sup>76</sup> and stay the decision so that the land will not come open until a certain date in the future at 7:00 a.m. (Standard Time).<sup>77</sup> The stay allows the parties time to decide whether to appeal (which extends the stay automatically), and sets up a staking competition on a fair basis if there is no further appeal.

The Commissioner may award legal costs and disbursements to the parties to a mining dispute : section 147. Ordinarily those costs would be awarded to the successful party. If the success is divided there would ordinarily be no costs awarded to either party. If the successful party had behaved inequitably in some fashion the Commissioner has the discretion to refuse to award costs. Such costs as the Commissioner awards are not normally a full indemnity for the legal costs incurred by the successful party.

#### F. APPEALS FROM THE DECISION OF THE MINING COMMISSIONER

The Commissioner's decision can be appealed to the Divisional Court, which is a branch of the Supreme Court of Ontario : section 154. The time provisions are again critical. The procedure is set out in section 155. The edited version appears below :

[...], the order or judgment of the Commissioner is final and conclusive unless,

[...]

[1] it is appealed from within fifteen days after the filing thereof in accordance with section 150, or

[2] within such further period of not more than fifteen days as the Commissioner or a judge of the Divisional Court may allow.

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76. Note 53.

77. *Mealey v. Peplinski*, note 15; *Parres v. Baylore Resources Inc.*, note 15.

The appeal shall be begun by

- [1] filing a notice of appeal with the recorder with whom the order or judgment appealed from is filed under section 150 [...]
- [2] paying to him the prescribed fee and
- [3] filing the notice of appeal with the Registrar of the Supreme Court and,
- [4] unless
  - [a] the notice of appeal is filed with the Registrar of the Supreme Court and
  - [b] a certificate of such filing is lodged with the recorder or Deputy Minister within *five days after the expiration of such fifteen days*, or any further time allowed under subsection (1),
 the appeal shall be deemed to be abandoned.
- [...]

Subsection 155(5) provides :

- (5) The practice and procedure on an appeal including the form of notice of appeal, service of the notice of appeal on the parties, and the disposition of costs on an appeal, shall be governed by the rules of court.

The effect of subsection 155(5) is that the notice of appeal must be served on the other parties within 30 days of the decision appealed from : Rule 61.04 of the *Rules of Civil Procedure*.

Section 156 states that no proceeding may be brought more than 30 days after the filing of the Commissioner's order under section 150; no Court may extend the time for appeal, nor will a mistake assist a party.<sup>78</sup>

#### G. APPEALS FROM THE DECISION OF THE COURT

If a judge hears a claim dispute under section 128 of the *Mining Act* at first instance, his decision may be appealed to the Court of Appeal without the need of permission from the Court of Appeal.<sup>79</sup>

However, the decision of the Divisional Court sitting on appeal from the Commission may only be appealed to the Court of Appeal with the permission of the Court of Appeal.<sup>80</sup> Such permission is granted infrequently. Permission to appeal is sought by way of a notice

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78. *Stringer v. Nyman*, [1956] O.W.N. 182 (C.A.); *Re Maher and Sheridan*, [1966] 2 O.R. 284 (C.A.). See also *McChristie v. Rousseau*, (1979) 5 M.C.C. 454 (Div. Ct.); *id.*, p. 456 (C.A.); *Re Leach and Roy*, (1982) 15 A.C.W.S. (2d) 180 (Div. Ct.).

79. S. 17(1)(b) of the *Courts of Justice Act*, S.O. 1984, c. 11.

80. S. 17(1) of the *Courts of Justice Act* and Rule 61.03 of the *Rules of Civil Procedure*.

of motion for leave to appeal which must be served on the other parties within 15 days of the date of the decision appealed from, and must be filed with the Registrar of the Court of Appeal within five days after service.

The time periods involved in all of these appeals are critical.

#### IV. AVOIDING PROBLEMS

It should be reasonably obvious that the way to avoid the problems discussed above is to stake properly in the first place. Similarly, a purchaser of claims should inspect them to ensure that they meet the standard required by the Act. A purchaser stands in the same shoes as the seller of the claim as Commissioner McFarland said in *Maher v. Sheridan* :<sup>81</sup>

The root of title to an unpatented mining claim is in the staking and if a purchaser makes no attempt to ascertain whether or not the claim has been validly staked, there is no way in which relief can be obtained from this tribunal. It is realized that in a staking boom there is necessity for speed, but surely prudence dictates that before substantial consideration is parted with, an attempt should be made to ascertain whether the staking is valid or not.<sup>83</sup>

Where the claim is valuable, thought should be given to obtaining a certificate of record under section 57 of the *Mining Act* which provides the benefits of section 58 :

58. The certificate of record, in the absence of mistake or fraud, is final and conclusive evidence of the performance of all the requirements of this Act, except working conditions, in respect of the mining claim up to the date of the certificate, and thereafter the mining claim is not, in the absence of mistake or fraud, liable to impeachment or forfeiture except as expressly provided by this Act.

#### CONCLUSIONS

Four obvious but helpful conclusions may be drawn from this paper :

- (1) It is better to stake and record in full compliance with the *Mining Act* than to rely on the saving provisions of the Act and the grace of the recorder or the Commissioner to validate the staking;

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81. (1964) 4 M.C.C. 163, at 167.

82. See also *Apple v. Nyman*, (1955) 3 M.C.C. 146; and *Parres v. Baylore Resources Inc.*, note 15.

- (2) the purchaser of a claim should carry out an inspection before closing the transaction;
- (3) if a claim is valuable, a certificate of record should be obtained at the earliest opportunity;
- (4) the Act must be read and followed closely in matters of appeal from the recorder, the Commissioner, or the Court. Failure to pay close attention to the time provisions in the Act is fatal.