

Ministry of
Northern Development
and Mines

Ministère du
Développement du Nord
et des Mines

IN THE MATTER OF THE MINING ACT BEFORE
THE PROVINCIAL MINING RECORDER

IN THE MATTER OF: Mining claim SSM 3015690, Lendrum Township.

AND IN THE MATTER OF: Filed only application to record mining claim 3018108 staked for more or less the same area of land in Lendrum Township.

ALSO IN THE MATTER OF: a dispute filed by

L. BRUCE STAINES

Disputant

-against the mining claim of record held by-

DANIEL KLASSEN

Respondent

WHEREAS: The parties were given opportunity to present material and make representations on their behalf at a hearing held before me February 15, 2006.

AND UPON CONSIDERATION: of all the evidence and arguments submitted by the parties.

I FIND: that the dispute should be allowed, therefore,

I ORDER:

- 1) Mining claim SSM 3015690 is deemed abandoned as provided in Subsection 71(1) of the Mining Act RSO 1990 (MA), and the record is to be marked cancelled.**
- 2) Filed only claim 3018108 is to be accepted and recorded effective the date first filed.**
- 3) Mining claim 3018108 is clearly subject to the provisions of Section 32 MA that would require consent of the owner prior to staking. If there is any further dispute between the parties as to the land exempt from prospecting the parties**

may apply to this recorder or to the Mining and Lands Commissioner for a determination of the extent of land so exempt.

PLEASE BE AWARE THAT SECTION 112 OF THE MINING ACT PROVIDES FOR A RIGHT OF APPEAL TO THE MINING AND LANDS COMMISSIONER. AN APPEAL IS BEGUN BY FILING APPROPRIATE DOCUMENTS IN THE OFFICE OF THE MINING AND LANDS COMMISSIONER AND SERVING THE PROVINCIAL RECORDING OFFICE WITHIN 30 DAYS OF THE DATE OF THIS DECISION.

“Original signed by Roy Spooner”

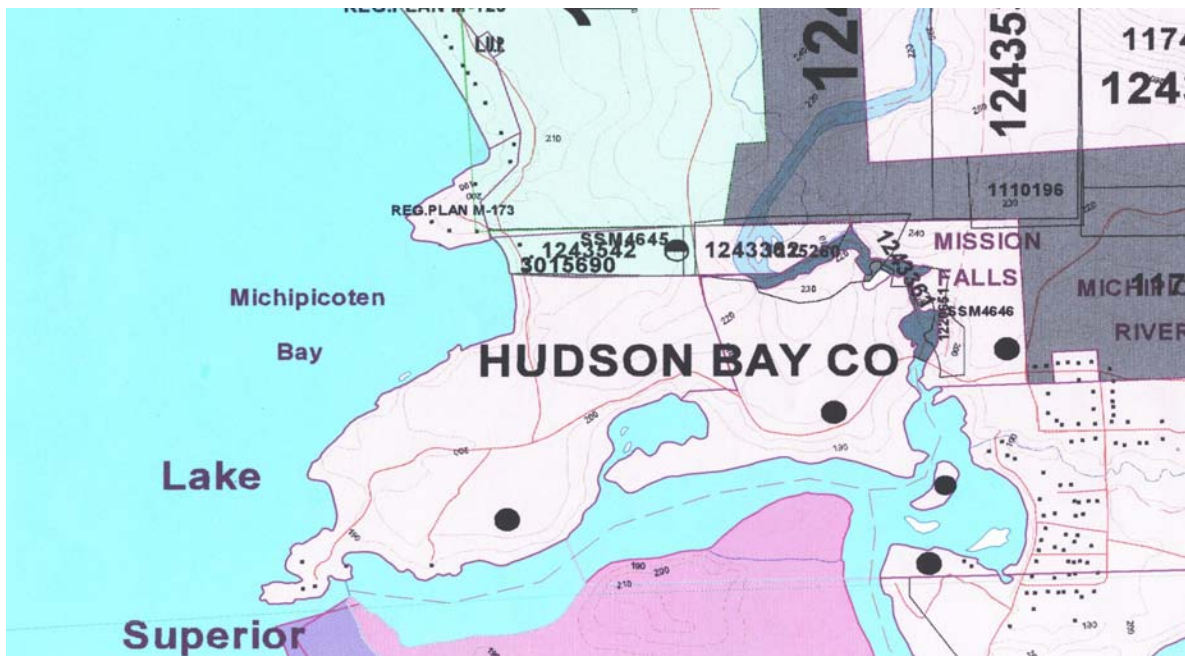
Dated this 28th day of February, 2006

Roy Spooner
Provincial Mining Recorder

BACKGROUND

On December 6, 2005 mining claim SSM 1243542 was cancelled, as Assessment Work had not been filed. The claim was “posted” December 7, 2005 and the land was open for staking December 8, 2005.

Below is a portion of the Lendrum Twp. claim map illustrating the area at issue. Note that SSM 3015690 is staked over forfeited claim SSM 1243542 and the claim boundaries are intended to follow the surveyed boundaries for surface rights patent SSM 4645 (north of private land labeled “Hudson Bay Co.”).



Although not confirmed by title search documents from the Land Registry Office, the Respondent, Daniel Klassen indicates he owns the surface rights for the 19 acre parcel designated as SSM 4645.

The history of Mr. Klassen's property is interesting in that the "root of title" begins with the Ontario Mining Act and mining claim staking. Although Mr. Klassen may hold registered title to the land for only surface rights, that title was originally granted as a mining patent for a staked mining claim in 1948.

Records at the Provincial Recording Office, Sudbury document the staking of mining claim SSM 4645 by H. D. Rains August 21, 1921. An Ontario Land Surveyor surveyed the claim and a plan of survey was dated May 25, 1926 however title did not issue. The mining claim cancelled in 1928 and then was staked again in 1933 as mining claim SSM 7741. The record for SSM 7741 indicates a substantial amount of assessment work was filed (429 "days") but the claim must have been cancelled for some reason as a new claim, SSM 12362 was recorded in 1941 but cancelled 1943. Finally, claim SSM 13196 was staked in 1943 and after recording of 200 days work a mining patent for surface and mining rights issued July 19, 1948. The legal description for the patent refers back to the original plan of survey for SSM 4645 (surveyed in 1926).

Mining patents have long been subject to a tax under the Mining Act. If Mining Act taxes are not paid the land may forfeit back to the Crown. On January 1, 1953 the mining rights only for SSM 4645 forfeited to the Crown for failure to pay the appropriate tax. The surface rights did not forfeit and remained in registered title held by the owner of SSM 4645. The mining rights were legally opened for claim staking once again effective June 1, 1953. It would appear, therefore, that mining claim staking and mining exploration work has been conducted intermittently on SSM 4645 for approximately eighty-five years.

THE HEARING

The Disputant alleges that Daniel Klassen staked his claim SSM 3015690, on the morning of December 8, 2005, using the old corner posts for forfeited claim SSM 1243542. According to the Disputant new posts were not erected and lines were not blazed for the new claim SSM 3015690. Mr. Staines waited until the next day (December 9, 2005) to see if Mr. Klassen would correct his deficient staking. As the staking remained to be as it was on opening day, Mr. Staines staked another claim over Mr. Klassen's with the intent of filing a dispute. The Disputant suggested that he proceeded in this manner as the Klassen staking was obviously not in compliance and someone else might file a dispute.

The Respondent, Mr. Klassen, submitted that he had walked the surveyed lines defining his property boundary (SSM 4645) many times during his ownership of the

surface rights. The boundary of the property is well marked and easily followed. He described his staking action in detail. He went first to the #one corner, removed the old corner tag and cleaned the old inscription off the post. He then affixed a new #one corner tag and wrote the required inscription. Mr. Klassen then walked south on the surveyed boundary line to the #two corner. He repeated the procedure followed at the #one corner then drove a vehicle to the #three corner. He walked to the #four corner then walked back out to his vehicle. He drove and walked back to #one via the #two corner. Back at the #one post he inscribed the completion time.

Mr. Klassen's explanation of his staking made it clear that:

- 1) Mr. Klassen utilized old claim posts for his new staking.
- 2) He did not blaze any of the claim lines.
- 3) He did not walk the claim line from corner #four to corner #one.

Mr. Klassen asserts that he staked the mining claim to the best of his ability and that, in so doing, Mr. Staines could readily identify the new claim and was not misled. Thus the staking met the standard required by Section 43 of the Mining Act. According to the Respondent, the staking was in substantial compliance with the requirements.

Also, according to Mr. Klassen, it is only common sense that it was not necessary to erect new posts when the existing corner posts were in excellent shape and well marked beside iron survey monuments. Likewise it was not necessary to identify boundary lines so easily followed. Mr. Staines watched Mr. Klassen stake the claim. There could be no doubt that ownership of the land and intent in the staking were well established.

Mr. Klassen indicated he was not experienced as a claim staker however he followed the example of an individual who had staked the same land in 1995. A Mr. Clement had filed an application to record with the Sault Ste. Marie Mining Recorder's Office in 1995. The application sketch had clearly illustrated that the south and west boundaries of the claim had not been blazed at the request of the "owner". Since the Mining Recorder had not made an issue of the boundary lines in 1995, Mr. Klassen took it that it was not necessary to blaze boundary lines.

The Respondent suggested that the Disputant, Mr. Staines was not acting in good faith. There was a suggestion that Mr. Staines was making this an issue as an intimidation technique. Apparently, Mr. Klassen and others are in public opposition to a "trap rock" development proposed by Mr. Staines.

MY REASONS

In support of his argument of substantial compliance Mr. Klassen (the Respondent) submitted a case of the Ontario Supreme Court of Appeal, July 3, 1958, Fisher v. Koski [1958] O.J. No. 241. In that case, out of a total of 60 corner posts, 56 posts had

been used previously as claim posts. The court allowed the 56 used posts. In fact, the Mining Act was amended in 1959 as a result of Fisher v. Koski.

The subject of “used posts” was analyzed in exhaustive detail by Grant H. Ferguson, then the Mining and Lands Commissioner, in Martin v. Arrowsmith, Volume 5 M.C.C., page 115, January 17, 1974. As early as 1919 the Mining Commissioner recognized that the re-use of old claim posts was not an advisable practice. In Knox v. Graham, Volume 3 M.C.C., page 4, April 23, 1919:

“...but the practice of using old posts, although not contrary to the Act, is dangerous and ought not to be encouraged...”

Between 1919 and 1959 there were a number of cases of the Mining Commissioner and Judge of the Mining Court where used posts were at issue. Although the Mining Act had not prohibited the use of old claim posts it was recognized as a poor practice.

The courts did allow the use of old posts in Fisher vs. Koski. Since the Mining Act was amended the following year, one might presume the amendment to Section 55 of the Mining Act was a direct result of the court decision. The amendment to the then Section 55 of the Mining Act R.S.O. 1950 was an additional subsection:

“(3a). Every post shall be a post, standing stump or tree not before used as a post for a mining claim.”

Concerning the Section 55 amendment in 1959 Commissioner Ferguson decided (in Martin v. Arrowsmith 1974, page 128):

“ In reviewing the decisions prior to the enactment of the relevant subsection, it is noted that there was a growing practice of widening the acceptability of the use of used posts. The cases had permitted the extension of this use of used posts from the position in the Knox case where the then Commissioner condemned the practice as being dangerous and ought not to be encouraged, to the Fisher case where the use of 56 out of 60 posts was accepted. Following this trend, the Legislature enacted a provision in negative wording, in effect prohibiting the practice that had been developed. I can only conclude that, by the enactment of a subsequent provision, which was special as contrasted with the general provision of substantial compliance and negative in form, the legislature intended to reverse the practice that had developed and to prohibit the use of used posts.”

In 1986, the Thunder Bay Mining Recorder cancelled a mining claim that was alleged to be staked for part of an island in Lake Superior. The claim had been staked by the owner of a Summer Resort Location on the same island. A Claims Inspector had provided a report of the claim staking to the Mining Recorder and the Recorder cancelled the claim for serious deficiencies in the staking. The individual who had filed the application to record for the claim staking (the surface

rights owner) filed an appeal with the Mining and Lands Commissioner. Again Commissioner Ferguson did not allow the use of a post previously used as a claim post. In *Hahn v. The Director of Land Management*, M.C.C. Volume 7, June 20, 1986, page 166, the Commissioner:

“...Further the evidence is consistent with the use of posts previously used in that the date on the No. 2 post referred to the date of the 1981 staking. Such use of previously used posts was held to invalidate the staking of a mining claim in the case of Martin v. Arrowsmith 5 M.C.C. 115.”

Also, on page 170 of *Hahn* the Commissioner said:

“...With regard to the former approach it is clear that the failure to blaze lines, particularly the southerly and westerly boundaries as shown on the sketch, the placing of the No. 3 post at the location of the No. 2 witness post and the use of a post previously used constitute a significant failure to comply with the staking requirements of the Mining Act..”

Then on page 175 and 176 of *Hahn*:

“ An issue was raised as to the purpose of the staking, it being alleged that it should be inferred as a matter of fact from the acquisition of ownership of part of the island and the staking shortly thereafter that the purpose was to protect a private land holding rather than a bona fide examination of the mineral potential of the mining claim...However it has long been held by the courts as well as the commissioners that the purpose or the object of the Mining Act is the finding and development of bodies of ore that will lead to mines, Ramsey v. Yellowknife Bear Mines Limited No. 3 5 M.C.C. 208, Osler J. Further section 98 of the Mining Act provides,

98. The lands, surface rights and mining rights held under a lease that has been or will be issued under this Act shall be used solely for the purpose of the mining industry, and, in default thereof and on the recommendation of the Commissioner, the Lieutenant Governor in Council may declare the lease void, and subsection 94(12), (13) and (14) apply. “

In 1991 there were significant amendments to the Mining Act. Prior to 1991, the rules for staking a mining claim were all contained within the Mining Act itself. In the amendments of 1991, the specific staking requirements were removed from the statute and replaced with the Claim Staking Regulation O. Reg. 115/91 (now O. Reg. 7/96). The present Commissioner has not analyzed the issue of used posts nor has there been any new interpretation since the major amendments of 1991.

Subsection 47 (4) of the Mining Act R.S.O. 1980 (before the 1991 amendments) was worded exactly the same as it was when it was first introduced in Section 55, 1959:

“ (4) Every post shall be a post, standing stump or tree not before used as a post for a mining claim.”

Subsection 14 (2) Claim Staking Regulation:

“(2) Only a post or standing stump not previously used for staking a mining claim may be used as a claim post.”

Subsection 14 (2) of the Claim Staking Regulation continues to prohibit the use of old claim posts by negative wording (consistent with the interpretation of Commissioner Ferguson). Therefore I find that Mr. Klassen’s use of old claim posts is fatal to the staking of SSM 3015690. As established also by Commissioner Ferguson, I find that the substantial compliance standard, in Section 43 of the Mining Act, does not remedy the use of old claim posts.

I would also find that the failure to blaze all four boundary lines for a mining claim would not constitute substantial compliance as there has not been a sufficient attempt to comply with the requirements. Certainly, the combination of four used corner posts together with failure to blaze all of the four boundaries would cause me to cancel the mining claim. Section 71 of the Mining applies to SSM 3015690:

Deemed abandonment of claim

71. (1) Non-compliance by the licensee or holder of a mining claim with any requirement of this Act or the regulations as to the time or manner of the staking out and recording of a mining claim or with a direction of the recorder in regard thereto, within the time limited therefor, shall be deemed to be an abandonment, and the claim shall, without any declaration, entry or act on the part of the Crown or by any officer, unless otherwise ordered by the Commissioner, be forthwith opened to prospecting and staking out. R.S.O. 1990, c. M.14, s. 71 (1).

Mr. Klassen argued that the Disputant, Mr. Staines, was not acting in good faith. There was an accusation that there was no intent to explore for minerals on Mr. Staines’ part. Mr. Klassen was not aware of any past or present exploration activity that indicate any mineral potential in the immediate vicinity. Mr. Staines simply offered that he had staked the claim to the north and the same rock extended south towards the Klassen property.

If Mr. Klassen opens the issue of good faith it is only fair that the same principles apply to both parties. Section 54 of the Mining Act:

Improper use of land

54. (1) Where land is staked out and applied for as a mining claim and it appears that the land is being used other than as mining land or for a purpose other than that of the mineral industry, the Minister may direct the Commissioner to hold a hearing. R.S.O. 1990, c. M.14, s. 54 (1).

Cancellation

(2) If, after a hearing held on notice to all interested persons, the Commissioner is satisfied that the land is being used other than as mining land or for a purpose other than that of the mineral industry, he or she may make an order cancelling the claim. 1999, c. 12, Sched. O, s. 23.

Beyond the standard of fair staking rules for all is the very question that Mr. Klassen raises regarding good faith. To stake a mining claim only to protect a private surface holding may be found by the Commissioner as a contravention of Section 54 of the Mining Act and therefore may result in claim cancellation.

When Mr. Klassen argues that the absence of past and present exploration activity points to no mineral potential, he raises questions regarding his own motives. Based on his defense of his claim staking action, and the detailed explanation of aesthetic values that require protection within SSM 4645, I would question the purpose of the Klassen staking. In the same context as the words of Commissioner Ferguson quoted above (Hahn v. the Director of Land Management) the facts of this case infer that the purpose of the Klassen staking is to protect a private land holding rather than a bona fide examination of the mineral potential of the mining claim.

Mr. Klassen's defense of his staking action is reasonable and logical. He indicates he did not want to cause further blemish to his surface rights by the repetitive blazing and slashing of trees. The explanation, however, indicates his intent to extend proprietary rights in the surface ownership through control of the Crown mining rights. Mr. Klassen has no prior legal right to the minerals once his mining claim forfeits. The land is open for any licensee to stake and the staking rules are designed to provide a level playing field for any competing licensees.

The staking of a new claim requires new posts to be erected with new metal claim tags and the required inscriptions. New boundary lines must be established. There are also special rules to be followed if the land is open for less than twenty-four hours. If more than one licensee races to stake the same land, priority goes to the staking first completed. In order for the competition to be fair there must be rules that apply to the competitors otherwise how would an adjudicator (e.g. the recorder) decide an issue arising between two parties in dispute?

The Staking Regulation offers staking alternatives that can be less intrusive on private surface rights. It is acceptable to use commercial timber for claims posts. In order to avoid cutting down standing trees to construct corner posts one could purchase 6X6 material at the local lumberyard and use that for corner posts. Where the line has been cleared so that there are no trees to blaze, Subsection 8 (6) of the staking Regulation authorizes the use of durable pickets or monuments of earth or rock. Subsection 8 (5) authorizes the use of flagging tape to mark the boundary but only where Section 32 of the Mining Act applies. One should consider Subsection 12 (1) 3. of the Claim Staking Regulation:

12. (1) One or two witness posts, instead of a corner post, must be erected in accordance with this section for a corner of a mining claim at which it is impracticable to erect a corner post for one of the following reasons:

3. The true corner is inaccessible because of incumbent surface rights. O. Reg. 7/96, s. 12 (1).

Referring to 12(1) above, in some instances it may be acceptable to stake a mining claim on private surface rights (incumbent surface rights) by placing four corner

posts at one corner. One post could monument the actual corner while the additional three posts would witness the other three corners. Where the practice is authorized it would eliminate the need to mark boundary lines whether blazed, picketed, monumented or flagged.

For the benefit of both parties I draw their attention to Section 32 of the Mining Act:

Lands used or occupied as gardens, etc.

32. (1) Although the mines or minerals therein have been reserved to the Crown, no person shall prospect for minerals or stake out a mining claim upon the part of a lot that is used as a garden, orchard, vineyard, nursery, plantation or pleasure ground, or upon which crops that may be damaged by such prospecting are growing, or on the part of a lot upon which is situated a spring, artificial reservoir, dam or waterworks, or a dwelling house, outhouse, manufactory, public building, church or cemetery, except with the consent of the owner, lessee, purchaser or locatee of the surface rights, or by order of the recorder or the Commissioner, and upon such terms as to the Commissioner seem just. R.S.O. 1990, c. M.14, s. 32 (1).

Disputes as to lands exempt

(2) If a dispute arises between the intending prospector and the owner, lessee, purchaser or locatee as to land that is exempt from prospecting or staking out under subsection (1), the recorder or the Commissioner shall determine the extent of the land that is so exempt. R.S.O. 1990, c. M.14, s. 32 (2).

Note that “prospecting” is prohibited on the part of the lot (in this case on the part of SSM 4645) where there is a dwelling etc. Prospecting is legally defined in Section 1 of the Mining Act. The plain language meaning is that prospecting is synonymous with mining exploration. Where Section 32 applies and there was not prior consent for staking by the surface owner, that part of the lot is excluded entirely from the mining claim.

The parties would be well advised to arrive at an agreement where Section 32 applies and where it does not. Mr. Staines needs to avoid entering on private surface rights where Section 32 applies as he can only enter on the private surface rights that are included in his mining claim. You will note that the recorder or Commissioner has authority to determine the extent of land that is excluded from the claim.

**Roy Spooner
Provincial Mining Recorder**