



The Mining and Lands Commissioner Le Commissaire aux mines et aux terres

File No. MA 025-98

M. Orr)
Deputy Mining and Lands Commissioner)

Tuesday, the 9th day
of February, 1999.

THE MINING ACT

IN THE MATTER OF

Mining Claim L-1225092, situate in the Township of Skead, in the Larder Lake Mining Division, staked by Martyn Spencer Harrington and recorded in the name of Gary Douglas Kosy, hereinafter referred to as the "Kosy Mining Claim";

AND IN THE MATTER OF

An application to record Mining Claim 1220009, situate in the Township of Skead, in the Larder Lake Mining Division, staked by Leo Kosowan, to have been recorded in the name of Kelnick Resources Ltd., marked "Filed Only", hereinafter referred to as the "Filed Only Kelnick Mining Claim";

AND IN THE MATTER OF

Ontario Regulation 7/96;

BETWEEN:

KELNICK RESOURCES LTD.

Appellant & Disputant

- and -

GARY DOUGLAS KOSY

Respondent

AND IN THE MATTER OF

An appeal by the Disputant pursuant to subsection 112(1) of the Mining Act from the decision of the Provincial Mining Recorder, dated the 8th day of June, 1998, for an Order declaring that the "Kosy Mining Claim" L-1225092 be declared invalid and for the recording of the "Filed Only Kelnick Mining Claim" 1220009.

ORDER

1. **THIS TRIBUNAL ORDERS** that the appeal and dispute from the decision of the Provincial Mining Recorder dated the 8th day of June, 1998, be and is hereby allowed.
2. **THIS TRIBUNAL FURTHER ORDERS** that the notation "Pending Proceedings" which is recorded on the abstract of "Kosy Mining Claim" L-1225092, effective the 2nd day of July, 1998, be removed from the abstract of the Mining Claim.
3. **THIS TRIBUNAL FURTHER ORDERS** that "Kosy Mining Claim" L-1225092 be and is hereby cancelled.
4. **THIS TRIBUNAL FURTHER ORDERS** that the "Filed Only Kelnick Mining Claim" 1220009 be recorded effective the 30th day of May, 1997, the date of receipt of the "Filed Only Kelnick Mining Claim" 1220009 by the Mining Recorder, Larder Lake Mining Division.
5. **THIS TRIBUNAL FURTHER ORDERS** that the time during which the Mining Claim was Filed Only, being the 30th day of May, 1997 to the 9th day of February, 1999, a total of 621 days, be excluded in computing time within which work upon the Mining Claim is to be performed.
6. **THIS TRIBUNAL FURTHER ORDERS** that the 9th day of February, 2001, be fixed as the date by which the first two units of prescribed assessment work, having a minimum total value of \$400, must be performed and filed on Mining Claim L-1220009, pursuant to subsection 67(3) of the **Mining Act** and all subsequent anniversary dates are deemed to be February 9 pursuant to subsection 67(4) of the **Mining Act**.
7. **THIS TRIBUNAL FURTHER ORDERS** that no costs shall be payable by either party to this appeal and dispute.
8. **THIS TRIBUNAL FURTHER ORDERS** that this Order be filed without fee in the Office of the Provincial Mining Recorder in Sudbury, Ontario, pursuant to subsection 129(4) of the **Mining Act**.

DATED this 9th day of February, 1999.

ORIGINAL SIGNED BY M. ORR

M. Orr
DEPUTY MINING AND LANDS COMMISSIONER



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REASONS

Appearances

This matter was heard by way of oral presentation. The appellant, Kelnick Resources Ltd. was represented by counsel and its presentation was made in the Mining Court in Toronto. The respondent, Gary Douglas Kosy, was not represented by counsel and made his presentation via telephone conference call. The respondent was offered the opportunity to ask for an adjournment in order to attend in Toronto, but chose to not do so. Both parties submitted documentary evidence, including photographs. The appellant, Kelnick Resources Inc., had two witnesses, Mr. Leo Kosowan and Mr. David Zabudsky. Mr. Kosy gave evidence and provided his staker, Mr. Martyn Harrington, as a witness on his behalf.

Background

This appeal was filed as a result of certain staking activities carried out in Skead Township in the Larder Lake Mining Division on May 26, 1997. The respondent Kosy staked a claim (referred to as claim L-1225092 or the Kosy claim), on that day. Kelnick also staked a claim (referred to as claim 1220009 or the Kelnick claim) on the same day. The Kelnick claim was marked as "filed only", the Kosy staking having been completed prior to the Kelnick claim.

Kelnick entered a dispute against the Kosy claim and the matter came before the Mining Recorder. A decision was made by the Mining Recorder on June 8, 1998 to dismiss the dispute, leaving the Kosy claim as the recorded claim.

The Recorder's decision was appealed to the Mining and Lands Commissioner on July 2, 1998 and the matter was heard on January 26, 1999, at Toronto.

Both the appellant Kelnick and the respondent Kosy provided documentary evidence as well as the testimony of witnesses. Not all of the documents were referred to by the parties; however, all evidence was accepted and considered by the tribunal. No objections were made to the admission of any of the documents.

Issues

- Did the respondent substantially comply with the requirements of the **Mining Act**?
- Was the Kosy staking saved by the deeming provisions of Section 43?
- Was the failure by Kosy to erect a post or to ensure that a post remained erect upon staking cured or saved by the provisions of Section 43 of the **Mining Act**?

Evidence and Submissions

Kelnick's main witness was Mr. Leo Kosowan, who is the president of the company and has spent 25 years in the mining business. It was Mr. Kosowan's evidence that he had staked claims over that 25 year period. Mr. Kosy, in examining Mr. Kosowan, questioned his experience and drew the tribunal's attention to a newspaper article included in his exhibits. The article dealt with an experience that Mr. Kosowan had had in the bush.

Mr. Kosowan told the tribunal that Kelnick and Kosy had a business relationship based on an agreement dated October 7, 1994. The agreement at that time was between Kosy and "Ryan Lake Metals Ltd." In the cross-examination of Kosy it was revealed that at some point before the disputed staking, Ryan Lake Metals Ltd. became Kelnick Resources Ltd. While Mr. Kosy claims to not have received notice of this change, he did say he became aware that he was staking for Kelnick. Mr. Kosy identified the agreement as the one he had with the appellant.

In reviewing the agreement, the tribunal notes that it anticipated that Kosy would stake claims; that Kelnick would carry out work on the claims and in so doing, would build up an interest in the claims. Kelnick would also report to Kosy periodically under the agreement in terms of the work that was being carried out by Kelnick. Mr. Kosy agreed that the agreement submitted by Kelnick was the agreement he had been working under for Kelnick.

Mr. Kosowan went on to tell the tribunal how both parties came to be in the vicinity of the disputed claim on May 26, 1997. Apparently, Mr. Kosy had made a decision to abandon two claims he had previously staked under the agreement with Kelnick. Mr. Kosowan said that the company had expended money on the claims. There is an abundance of correspondence between the two parties in the documents submitted to the tribunal. Correspondence from Kosy shows that he felt that he was not getting the information he expected under the agreement. Kelnick's correspondence shows that it attempted to persuade Mr. Kosy to transfer the abandoned claims to the company.

When Mr. Kosy was asked in cross-examination about his and the company's relationship to the abandoned claims, it was put to him that the company had a beneficial interest. He, in turn, replied that his relationship to the abandoned claims was that of a registered holder. Mr. Kosy went on to say in cross-examination that the reason for his abandonment of the claims was due to his belief that he was not getting the information he expected pursuant to the agreement. Items such as engineering reports were given as an example. His response when questioned by Kelnick's counsel about the company's "beneficial" interest was that he was a registered holder, meaning a registered holder under the **Mining Act**. As a registered holder he could abandon claims.

Mr. Kosowan told the tribunal that Kelnick was told by the Mining Recorder that the claims had been abandoned. A notice to that effect is found in the Kelnick documentary evidence. The notice says that the "abandoned" claims (L-1200147 and L-1200168) were to come open on May 26, 1997.

Mr. Kosowan said he put a crew together with the intention of reclaiming the abandoned claims and showed up at the site on May 26, 1997 between 8:00 a.m. and 8:30 a.m. Mr. Kosowan said that he saw Mr. Kosy on the site around 8:30 a.m. and that Mr. Kosy acted as though he had not anticipated anyone else showing up on the site that day. As Mr. Kosowan put it, Mr. Kosy began "yelling" for his people to get going. Mr. Kosy's staker that day was Mr. Martyn Harrington. The tribunal notes in the documentation that Kelnick erroneously referred to him as "Mike" Harrington.

Mr. Kosowan described the ground conditions in the area as being "swamp" and said that with a "couple of taps", a post could go in. Mr. Zabudsky, a witness for Kelnick who was staking for Kelnick to the north of the disputed claim, described the ground as swampy and said that a post could be driven in a foot or more. Mr. Kosy described the conditions as "lots of water" and "mud". Mr. Harrington, for Mr. Kosy, described the ground as "cedar swamp bog".

Mr. Kosy told the tribunal that he and Mr. Harrington had shown up early to prepare the site for staking. Mr. Kosowan took a photo of Mr. Kosy standing over a post that Mr. Kosowan claims is Mr. Kosy's post after it had fallen. Mr. Kosy disputed that and said that the photo depicted him standing over a post that was going to be used for staking. The tribunal is unable to tell from the photo what post is actually being shown.

Mr. Kosowan told the tribunal that when it came time to stake the claim, Mr. Harrington wrote on post #1 and then he "just dropped it". Mr. Harrington then sped off to post #2, making the distance of approximately 400 meters in three minutes. The time taken by Mr. Harrington to go between posts is noted by looking at the photos of the inscriptions on the posts themselves. In his testimony, Mr. Kosy had described how Mr. Harrington was working for him because of his speed, knowledge and experience.

Mr. Kosowan went on to relate how after returning to the #1 post, that Mr. Harrington inscribed his finishing time and "dropped the post again". Mr. Kosowan also said that Mr. Kosy came by and lifted the post and put it across a fallen log or "windfall". Mr. Kosy could not recall how the #1 post ended up lying on a log. Mr. Kosowan referred to a photo which shows a post (identified by Mr. Harrington as his #1 post) lying across a log. It shows what appears to be fresh wood showing at both ends. Mr. Kosowan claimed that the "butt end" of the post was clean, saying that it had never been put in the ground. Mr. Kosy said that this was how wood looked after being in the sun.

When Mr. Kosowan was asked during evidence-in-chief about the importance of erecting posts, he replied that erecting posts is "top priority" and that they are then visible 75-100 feet away. Along these lines, Mr. Zabudsky, in testifying for Kelnick, made much of the fact that when he came down the line from his #1 post towards his #2 post (which would have been in the area of Mr. Kosy's #1 post) that he did not see the Kosy #1 post. Mr. Zabudsky talked about his past business relationship with Mr. Kosy. Both Mr. Kosy and Mr. Zabudsky left the tribunal with the impression that there were unsettled matters between them.

Mr. Harrington acknowledged that the post pictured in the Kelnick photograph lying across a log was his #1 post. He maintained that the post had been "erected". When asked by the tribunal, he could not recall how far into the ground the post might have gone. He did describe the ground as "very soft" and said that he did not use anything to drive the post into the ground. He also said that when he returned to his #1 post to put his finishing time on it, that it was "leaning" on a log at a 30 degree angle. He also told the tribunal that the Kelnick #1 post was approximately 50-75 feet to the south on the same type of ground. The tribunal notes that the Kelnick #1 post is depicted in a photograph taken by Mr. Kosowan and is taped with red tape to a standing tree.

Mr. Harrington's position under cross-examination when questioned as to how the post had come out of the ground, was that he could not control what happened to a post once he had erected it. When asked about the other three posts, he said that as far as he knew they were still standing. No issue was made by Kelnick as to the status of the other posts.

Mr. Kosy agreed that Mr. Harrington's #1 post was not standing when Mr. Harrington returned to it by 9:20 a.m., but says that this was due to the "swamp" conditions. When Mr. Kosy was questioned by Kelnick's counsel he maintained that the post had been erected but did not know how long nor how it had come to be lying on the log. In his final submission, he told the tribunal that he had no control over the ground conditions and that the claim had been staked in good faith.

Kelnick's counsel, besides asking the tribunal to find that the claim was not valid and to not apply the concept of substantial compliance, also argued that at least one person (Mr. Zabudsky), had been misled with regard to the #1 Kosy post.

Findings

The tribunal makes no findings as to the issue that was alluded to by Kelnick's counsel regarding the action taken by Mr. Kosy to abandon the claims. While questions were asked and the issue of competing interest was touched on, Kelnick's counsel did not pursue it or provide the tribunal with any argument as to which interest should prevail. It is clear to the tribunal that on May 26, 1997, both parties were on the site of

the abandoned claims at the same time. They even noted each other's presence. Both parties knew that the lands involved claims previously abandoned by Mr. Kosy were to be reopened for staking on that day and both parties had previous interests in those claims. The tribunal makes no findings as to those interests or as to the claims the parties made against each other with regard to their agreement. Both parties gave the tribunal the impression that they approached the staking of their respective claims from the perspective that speed was going to be very important.

There is no doubt in the mind of the tribunal that both parties were intent on being the first to stake new claims on the site. Both parties gave the tribunal the impression that they were keen to make up for something they both felt they had lost for whatever reason.

After considering all of the evidence relating to the state of the respondent Kosy's #1 post, the tribunal finds that it was not standing upright at the time of completion of staking by Mr. Harrington. Mr. Harrington took 20 minutes to complete his staking. This is noted by the inscriptions on the photographs taken by Mr. Kosowan and identified by both Mr. Kosy and Mr. Harrington. The #1 post was either on the ground or had come to lean on, or fall across, a dead log. The tribunal finds that the #1 post for Kosy was not erect at the time staking was completed and that it had probably fallen either directly upon Mr. Harrington's inscribing on it the first time or very soon thereafter.

The tribunal is of the opinion that the effort used by Mr. Harrington to "erect" his #1 post can be measured by the time it took him to inscribe the starting time, "erect" the post, and get to the #2 post - a distance of approximately 400 meters across swampy cedar bog. These actions took three minutes.

Mr. Harrington said that he could not remember how far the #1 post had gone into the ground. The tribunal believes this failure to recollect is connected to the speed at which he must have been moving between posts. As far as the tribunal is concerned, the evidence could easily point to the #1 post as not having been planted or having been planted with such little force, that it might not have been planted at all. In Mr. Kosowan's eyes, Mr. Harrington appeared to throw the post down after inscribing on it. It may very well have appeared to someone watching Mr. Harrington that he was "throwing" the post down, since he was moving rapidly.

The regulations call for the staking of a mining claim to be done as a continuous action, for *erecting* a corner post at each of the four corners, and for every claim post to *stand* 1.2 metres above the ground when *erected*. (emphasis added) [O. Reg. 7/96, ss. 8. 14(1)(a)]. The tribunal is of the view that "erecting a corner post" means that the post is being made to stand in a vertical position. The act of erecting something like a post is intended to provide a visual point of reference for other stakers.

Under the regulations, there are compensating actions that can be taken when a post is not available. For example, the regulations anticipate certain features of the ground to cause problems when it comes to staking. Hence the use of witness posts for watery places, rock monuments and pickets for areas where there are no trees. However, in the tribunal's opinion, there is no alternative to replace the fact that the marker must be "erected".

Staking is intended to provide a visual reference point for other stakers. Reference points are of no use if they are lying on the ground. Whether one is talking about a post or a rock monument, one is talking about a visual aid to others desiring to stake in the vicinity. Mr. Harrington and Mr. Kosy said that they do not have control over the ground conditions and the tribunal believes that the Act is not expecting stakers to go to the extent of controlling ground conditions. However, the Act does expect that stakers can exercise control over the means they use to compensate for ground conditions. The Kelnick #1 post for example, was tied to a standing tree beside it. It is apparent to the tribunal that the respondent's party made no effort to either comply with the requirements or to attempt to comply. The #1 Kosy post fell even before staking was completed. It is the tribunal's impression that speed was more important to the respondent than compliance.

In reviewing cases on the point, the tribunal could not find any which made allowances for posts that fell while staking was being carried out. It is the tribunal's opinion that this approach to staking would diminish its use and importance as a visual aid. The act of erecting must have some permanence to fulfill the objectives of the legislation.

The tribunal did review a recent case of Commissioner Kamerman wherein she noted the importance of erecting posts. In *Royal Oak Mines Inc. v. Strike Minerals Inc.* October 2, 1998, unreported at page 21 and following, Commissioner Kamerman reviews the staking requirements of the **Mining Act** and on page 25 she reviews the importance of an erected post.

The securing of a claim post is clearly not a necessity, is not contemplated by the use of the word "erecting", as nestling a post within the lower branches of a tree in an erect position would meet the wording as well as the intent in having erected posts. However, the lifting of a claim post to vertical position, with nothing to lean or tie onto, is nothing more than going through the motions. The action has no substance, no lasting effect, and a claim post held in such a fashion, only to be released and fall to the ground, serves no useful purpose to the act of staking. It is an empty gesture, devoid of providing most of the visual information which identifies the post as being a vital element of a mining claim.

This tribunal is of the view that taking minimal effort to erect a post, to the point where it immediately falls to the ground, brings the Kosy efforts at staking fully within the above quoted description. The respondent's efforts were "empty" efforts and the tribunal finds that they resulted in a failure to comply with one of the essential elements of the staking exercise - namely, to erect a post.

The tribunal finds that the failure to erect the #1 post was a failure to comply with the **Mining Act** and its regulations. The tribunal further finds that the respondent's staking efforts are not saved by subsection 43(2) and the substantial compliance deeming provisions therein.

Section 43(2) calls for a dual test to be met before substantial compliance can be deemed to apply. This is that the failure to comply is not likely to mislead any licensee desiring to stake a claim in the vicinity, and it is apparent that an attempt has been made in good faith by the licensee to comply with the requirements of the Act and the regulations.

The tribunal is of the opinion that the first half of the test is addressing the future, and not just the present. Otherwise, one could argue that anyone present that day might not have been misled by the failure to erect the #1 post. The tribunal is not satisfied that Mr. Zabudsky was misled by the respondent's failure to comply. However, the staking of a claim has the visual importance described earlier and it is intended to tell the world from the point of staking that there is a claim to be found within the area of the corner posts. Other stakers use these posts as visual points of reference. There is no doubt in the tribunal's mind that as a visual point of reference, Mr. Harrington's #1 post would have been of no use to another staker either on that day or any other day for that matter unless that staker actually came across it. The Kosy staking fails to meet the first half of the test.

In considering the second half of the test, the tribunal finds that it was not apparent that there had been an attempt made to comply in terms of erecting the #1 post, let alone an attempt in good faith. The respondent chose to lay the blame for non-compliance on ground conditions, saying that he could not control them. The respondent made no effort to ensure that the #1 post could be described as being "erect". If the post happened to fall over, it was no fault of his, as he had no control over the ground conditions. Ground conditions were used by the respondent as an excuse for non-compliance. For these reasons, the tribunal orders that the appeal by Kelnick Resources Inc. be granted and that the Kosy Mining Claim L-1225092 be cancelled. The tribunal further orders that Mining Claim 1220009 recorded in the name of Kelnick Resources Ltd. be recorded as of May 30, 1997.

No costs will be payable by either party to this appeal and dispute.

Exclusion of Time

This tribunal has Ordered that the "Filed Only Kelnick Mining Claim" 1220009 is deemed to have been recorded on May 30, 1997.

Pursuant to subsection 67(2) of the **Mining Act**, the time during which Mining Claim L-1220009 was pending before the Mining Recorder and the tribunal, being the 30th day of May, 1997, to the 9th day of February, 1999, a total of 621 days, will be excluded in computing time within which work upon Mining Claim L-1220009 is to be performed and filed.

Pursuant to subsection 67(3) of the **Mining Act**, as amended by S.O. 1996, c. 1, Sched. O, s. 18, February 9, 2001, is deemed to be the date for the performance and filing of the first and second units prescribed assessment work, having a total minimum value of \$400, all subsequent anniversary dates are deemed to be February 9.