



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

File No. MA 003-11

M. Orr)
Deputy Mining and Lands Commissioner) Friday, the 23rd day
A. MacKenzie) of September, 2011.
Deputy Mining and Lands Commissioner)

THE MINING ACT

IN THE MATTER OF

Filed Only Mining Claim 4258194, situate in the Township of Montgomery, in the Sault Ste. Mining Division, staked by Mr. Steve Harold Forbes to have been recorded in the names of Mr. Jim Harold Forbes, as to a 50% interest, Mr. James Bill Forbes and Mr. Steve Harold Forbes, each as to a 17% interest and Ms. Melissa Bernice Forbes, as to a 16% interest, (hereinafter referred to as the “Forbes Filed Only Mining Claim”);

(Amended September 23, 2011)

AND IN THE MATTER OF

Refused Mining Claim 4245820, situate in the Township of Montgomery, in the Sault Ste. Mining Division, staked by Mr. Yvon Gagné to have been recorded in the names of Mr. Yvon Gagné and Mr. Patrick M. Harrington, each as to a 50% interest, (hereinafter referred to as the “Gagné Refused Mining Claim”);

AND IN THE MATTER OF

Ontario Regulation 7/96, as amended, Claims Staking;

B E T W E E N:

YVON GAGNÉ and PATRICK M. HARRINGTON
Appellants

- and -

JIM HAROLD FORBES, JAMES BILL FORBES,
STEVE HAROLD FORBES and MELISSA BERNICE FORBES
Respondents

AND IN THE MATTER OF

An appeal from the Decision of the Provincial Mining Recorder, Ministry of Northern Development, Mines and Forestry, dated the 6th day of January, 2011, for a declaration that the Forbes Filed Only Mining Claim not be recorded and for the recording of the Gagné Refused Mining Claim, pursuant to subsection 112(1) of the **Mining Act**.

ORDER

1. **IT IS ORDERED** that this appeal be and hereby is dismissed.
2. **IT IS FURTHER ORDERED** that Filed Only Mining Claim 4258194, be and is hereby recorded effective the date of this Order.
3. **IT IS FURTHER ORDERED** that no costs shall be payable by either party to this appeal.

THIS TRIBUNAL FURTHER ADVISES that, pursuant to subsection 129(4) of the **Mining Act**, R.S.O. 1990, c. M. 14, as amended, a copy of this Order shall be forwarded to the Provincial Mining Recorder **WHO IS HEREBY DIRECTED** to amend the records in the Provincial Recording Office as necessary and in accordance with the aforementioned subsection 129(4).

Reasons for this Order are attached.

DATED this 23rd day of September, 2011.

Original signed by M. Orr

M. Orr
DEPUTY MINING AND LANDS COMMISSIONER

Original signed by A. MacKenzie

A. MacKenzie
DEPUTY MINING AND LANDS COMMISSIONER



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REASONS**Appearances:**

Mr. Yvon Gagné:	Appellant
Mr. Patrick M. Harrington:	Appellant
Mr. Jim Harold Forbes:	Respondent
Mr. Steve Harold Forbes:	Respondent
Mr. James Bill Forbes:	Respondent
Ms. Melissa Bernice Forbes:	Respondent

Introduction

The Forbes Filed Only Mining Claim 4258194 was staked on land that came open for staking on October 27, 2010. The respondent Jim Harold Forbes Sr. and appellant Gagné had worked together to stake the same land in 2008. Their claim was cancelled on October 25, 2010 pursuant to clause 72(1) (b) of the **Mining Act**.

Issue

Is the Forbes Filed Only Mining Claim 4258194 valid?

Overview of Facts Not in Dispute

The Forbes Filed Only Mining Claim 4258194 covers land that contains a large swampy area, two creeks or streams of some width and a part of what is known as Williamson Lake. The subject lands came open for staking on October 27, 2010 at 8:00 a.m. standard time as the notice of re-opening had been posted by the Ministry of Northern Development, Mines and Forestry (MNDMF) on October 26, 2010. The Forbes Filed Only Mining Claim 4258194 was one of two claims staked by the Forbes team (the respondents) on October 27, 2010.

Analysis**Statutory Context and Parties' Positions**

Section 72 of the **Mining Act** states that mining claims are open for staking from 8:00 a.m. standard time on the day after the posting of a notice of re-opening. A notice of re-opening was posted for the subject filed only mining claim on October 26, 2010. The land had therefore been open for less than twenty-four hours when the respondents began staking.

The rules for claim staking and recording are set out in Ontario Regulation 7/96, as amended to 43/11, made under the **Mining Act**. The Regulation sets out a detailed list of requirements that licensees must follow. In particular, subsection 5(2) sets out the requirements for staking on lands that have been open for less than twenty four hours. For example, only a post or standing stump not previously used for staking a mining claim may be used as a claim post. The term “mining claim” is a defined term under the **Act** and means “...a parcel of land, including land under water, that has been staked *and recorded* in accordance with this Act and the regulations”. (Emphasis added) The Regulation also sets out requirements dealing with inscriptions on line posts and claim posts. Lastly, again in reference to the **Act**, it is an offence under section 164 to deface, alter, remove or disturb any post, stake, picket, boundary line, figure, writing or other mark lawfully placed, standing or made under the **Act**. This reference to the **Act’s** offence section is made for interest’s sake only as no charge was laid under this section. It does however, point to the measure of respect that the claim posts command under the **Act**.

The appellant was asked to lead off with his case, which he did. On the day of staking (October 27, 2010), the appellant, Gagné, did not follow the respondent Forbes and his team around when they set out to stake their claims; however, he said that he was staking claims on lands to the north, but not in close proximity to the respondents. He said that he saw the three men of the Forbes’ staking team, but he did not see Melissa Forbes.

Mr. Gagné alleged that the Forbes team used posts that had been erected previously and that the Forbes team came back on October 28 to tidy up the inscriptions that had been made on October 27. The appellant Mr. Gagné carried out his investigation of the Forbes’ work either on October 27 or 28. Gagné’s assessment of what he saw on the ground led him to speculate that the Forbes team had staked the lands on October 26. He thought that they had made a mistake with the opening time and that they had staked the lands on October 27 using the posts that had been erected on October 26. However, Mr. Gagné was not present on October 26, it would seem. Mr. Gagné also surmised that Forbes’ went back on October 28 to add writing to the posts used in their staking on October 27.

Mr. Gagné questioned the speed of Steve Forbes’ staking of the Forbes Filed Only Mining Claim 4258194. He could not believe that Steve Forbes could carry out his staking activities as quickly as stated even taking into account the fact that the lines would have been fairly clear given that he and Mr. Forbes Sr. had staked the same lands in 2008. Mr. Gagné said that it had taken Mr. Forbes and himself seven hours to stake their claim in 2008. Steve Forbes had taken only three and a half hours.

As for the Forbes’ saying that they had prepared the lands on October 26, Mr. Gagné found that equally hard to believe. Mr. Gagné and his wife had seen Mr. Forbes Sr. in Kirkland Lake around 11:00 a.m. on October 26. It would have taken Mr. Forbes approximately seven hours to reach the site and by that time it was getting dark. He questioned how Forbes could carry out any preparation work in the dark.

Mr. Gagné also argued, (relying on photographs of the posts he investigated) that when James Forbes’ efforts to stake an eight unit mining claim failed, Steve Forbes used the posts already erected by James Forbes for his own work in staking Filed Only Mining Claim

4258194. Mr. Gagné said that his photos supported his allegation in that one could see shavings on the ground around the posts used for Steve Forbes' claim. These shavings had writing on them that could have been made by someone other than Steve Forbes. Mr. Gagné had found the shavings lying on the ground at the base of the posts. He surmised that James Forbes had tried to travel from his number one post south past the swampy area but got headed off by the diagonal creek. According to Mr. Gagné, while James Forbes had witnessed his number two and three posts, he found out later through his father that the witnessing was not acceptable (for the number two post) if the creek could be crossed at that particular point. Since Steve Forbes was "making good ground", his father told him to complete the claim as a sixteen unit mining claim by extending the boundaries to include the land being staked by James Forbes. James Forbes was ordered to stop his efforts and to take the tags off his posts.

To the west, Mr. Forbes Sr. had taken six hours to stake his mining claim. Mr. Gagné believed that Steve Forbes had taken short cuts in terms of the staking regulations in that he had used posts already standing through James Forbes' efforts, or that he and other members of the team had carried out some staking activities on October 26 (the previous day) when the claim was not yet open. Mr. Gagné also referred to the "Guide to Staking" that states that where claims are open for less than twenty four hours, only a single licensee can erect posts and inscribe them. He believed that Steve Forbes had relied on standing posts originally erected by his brother James.

Not surprisingly, the Forbes' deny all of the allegations made by Mr. Gagné and say that they prepared the lands for staking on October 26 – an activity that included the building of at least one bridge to deal with crossing a creek, the clearing of brush, and the cutting of loose or "lay-down" posts. On the day of staking, Mr. Forbes Sr. as team leader directed the efforts of his two sons and daughter. Their goal was to stake three mining claims. Mr. Forbes Sr. was to stake lands to the west of Filed Only Mining Claim 4258194. His two sons were initially going to stake the lands covered by the mining claim in two blocks measuring eight units each – thereby ending up with two mining claims. His son Steve was to work on the east half while his son James was to work on the west half. James' staking route started along the northern boundary and took him south to a pond or swamp. Following the edge of that feature took him south to the northern side of a creek that runs diagonally across the disputed mining claim from the north east to the south west. It empties into Williamson Lake at least 400 metres to the north of the claim's southern boundary. James was on the northern side of the creek and could not find a place to cross it in order to take his claim to its southern boundary. At this point he had finished his number one post only and decided to use his number two post as a witness post since he was unable to cross the creek. Whatever it was he was intending to witness is unclear. It was at this point that his father called him off. The witness posts were not acceptable according to his father as there were ways to cross or get around the creek (thereby leaving no excuse for witness posts) and his other son Steve was well on the way to covering the ground for one claim.

The tribunal notes that all of the parties described the two creeks found on the mining claim as being wide – Mr. Gagné noting that in parts the creek that diagonally crosses Filed Only Mining Claim 4258194 was wider than the hearing room itself – a width of more than 20 feet. They were wider than a two lane highway according to Mr. Gagné. While he had walked the length of the creek that crosses the claim in a diagonal fashion in 2008, he had not walked it in 2010.

Steve Forbes testified that he had constructed a bridge outside the north-east boundary of the claim and had used that bridge to cross the creek as he was proceeding south. He made good time. The tribunal took note of the fact that Steve Forbes is a young man and the tribunal believes that he could, as he asserted, “do a mile in fifteen minutes running”. He claims he took about thirty seconds to write his name and tag a post while carrying out his staking as the posts had been pre-prepared.

Apparently, the fact that Steve Forbes was making better headway than James Forbes prompted Mr. Forbes Sr. to decide that Steve Forbes should stake all 16 units and to call James Forbes off. James was told to remove his tags and to assist Mr. Forbes Sr. with his staking of Mining Claim SSM-4258196 to the west. Steve Forbes was asked by the tribunal if he had re-used posts erected by his brother James. In response he said that he re-used his brother’s posts only if they were lying down and clean – he believed he could use and erect posts that were found lying down. When questioned by Mr. Gagné about the use of posts, Steve Forbes said that it did not matter who made the posts, but that it mattered who erected them and made the marks on them.

All of the witnesses were affected by some memory loss. While the Forbes team members were confident as to their writing styles for the marking of posts, they could not identify specific posts or their placement and were unable to explain the existence of a post with a tag that was dated for October 26 – prior to the area coming open.

Findings and Conclusions

The tribunal finds that Filed Only Mining Claim 4258194 should be recorded.

The tribunal was asked to consider Filed Only Mining Claim 4258194 invalid on the basis of conjecture and supposition – some of which was based on testimony that the tribunal considered faulty or conflicting. For example, on the one hand the appellant theorizes that the respondent actually staked his claim on October 26, yet, at the same time, says that the respondent could not have prepared the land for staking on October 26 because of the lateness of the hour. The appellant’s evidence consisted of photographs (some of which were completely blurred), that did not conclusively point to some skullduggery on the part of the respondents. The appellant also disputes the construction of a bridge to cross the creek but admitted that he had not walked the entire creek. He last walked it in 2008 – before Steve Forbes says he built his bridge.

Steve Forbes on the other hand, as a respondent, presented himself clearly and in a forthright manner. His evidence made sense and his story was coherent.

The tribunal accepts that Filed Only Mining Claim 4258194 (which started out as having the potential of being an eight unit claim) came about after efforts to stake an adjoining companion mining claim of eight units were frustrated either by the terrain or the lack of competence of the companion claim’s staker James Forbes. The companion claim was never submitted for filing so it cannot come within the definition of a “mining claim” under the Act. It is clear that it was not staked and that it was never recorded. While this is a technicality, it is

important. Had the claim actually been staked and recorded, then doing anything to its posts might be considered an offence under the **Act**. That is not an issue here.

The tribunal also accepts that posts originally inscribed during efforts to stake the companion claim may have been shaved at some point and re-used – after the decision to abandon the companion claim was made. These posts may even have been lying on the ground before being re-used. The tribunal is unable to make any determination as to whether these posts were standing or not; whether they were actually re-used, or whether they may have been erected on the day before the lands came open for staking. The evidence from both parties simply does not provide a reasonable basis upon which the tribunal can determine any findings. The benefit of the doubt goes to Mr. Steve Forbes who was calmly confident and whose testimony was not contradicted. He stated that he used posts only if they were down and the tribunal heard nothing to contradict this statement. His presentation saved the day so to speak.

It may also be a fact that the posts once used for the companion claim were actually shaved of their markings and re-used by Mr. Steve Forbes in his work on Filed Only Mining Claim 4258194. While the tribunal has only his word that he used posts only if they were lying down (there is nothing to contradict his story) his efforts at clearing off the writing could be redeemed by the substantial compliance provisions of the **Act** and section 43. Furthermore, the regulatory requirement that “only a post ...not previously used for staking a mining claim may be used as a claim post”, depends on there being a “mining claim” as defined by the **Act** in actual existence. The uncompleted companion claim 4258195 was not a mining claim. For another, there is no indication that anyone was misled by the Steve Forbes staking or that his efforts were the product of bad faith. There is no indication that anyone else was in the area staking (aside from the Forbes team.)

However, the tribunal is concerned by the allegations raised by the appellant. The root of title of a mining claim depends upon staking. It must be carried out in accordance with the **Act** and not raise any suspicion.

Some licensees are content to tread a fine line when staking. They do so at their peril. The decision in this case was subject to poor evidence, faulty memories and conflicting testimony. Had this case arisen in the past, it would have warranted the investigation and report of an inspector. The tribunal had no such assistance. The Forbes team made a decision to back off staking land for one claim in order to have the land incorporated into another. It is quite understandable that the decision was carried out quickly and with some haste. This obviously allowed Mr. Gagné the opportunity to find reasons to criticize their efforts, leading to this hearing. The respondents should be forewarned and take care to be meticulous the next time they stake mining claims. If Filed Only Mining Claim 4258194 is considered to be of value and if litigation is to be avoided, then care and accuracy in the staking process are a necessity. There must be no room for doubt.

The tribunal will order that this appeal be dismissed and that Filed Only Mining Claim 4258194 be recorded effective the date of this Order.

There will be no costs payable by either party to this appeal.