File No. MA 007-94

L. Kamerman	)	Monday, the 15th day
Mining and Lands Commissioner	)	of January, 1996.

THE MINING ACT

IN THE MATTER OF

A dispute against Mining Claim SO-1040715, situate in the Township of Monteagle, in the Southern Ontario Mining Division, hereinafter referred to as the "Mining Claim";

AND IN THE MATTER OF

Mining Claim SO-1150874, situate in the Township of Monteagle, in the Southern Ontario Mining Division marked as "filed only";

B E T W E E N:

SCOTT E. HARPER

Disputant

- and -

BANCROFT AND DISTRICT CHAMBER OF COMMERCE

Respondent

AND IN THE MATTER OF

An appeal under subsection 112(3) of the **Mining Act** by the disputant from the decision of the Mining Recorder for the Southern Ontario Mining Division dated the 14th day of February, 1994 dismissing the dispute.

O R D E R

1. **THIS TRIBUNAL ORDERS** that the appeal is dismissed.

2. **THIS TRIBUNAL FURTHER ORDERS** that the notation "Pending Proceedings" which is recorded on the abstract of the Mining Claim be removed from the abstract.

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3. THIS TRIBUNAL FURTHER ORDERS that the time during which the Mining Claim was pending before the Mining Recorder and the tribunal, being the 6th day of May, 1993 to the 15th day of January, 1996, a total of 924 days, be excluded in computing time within which work upon the Mining Claim is to be performed.

4. THIS TRIBUNAL FURTHER ORDERS that the 9th day of November, 1996 be fixed as the date by which the first and second prescribed units of assessment work shall be performed and filed on the Mining Claim and all subsequent anniversary dates shall be deemed to be November 9 pursuant to subsection 67(2) of the **Mining Act**.

5. THIS TRIBUNAL FURTHER ORDERS that no costs shall be payable by either party to the appeal.

IT IS FURTHER DIRECTED that upon payment of the required fees, this Order be filed in the Office of the Mining Recorder for the Southern Ontario Mining Division.

Reasons for this Order are attached.

DATED this 15th day of January, 1996.

Original signed by

L. Kamerman
MINING AND LANDS COMMISSIONER

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REASONS

The hearing of this matter was held on May 17, 1995, in the Conference Room of the Sword Motor Inn, 146 Hastings Street North, Bancroft, in the Province of Ontario.

Appearances:

Patrick J. Cummins	Counsel for Scott E. Harper, the disputant and appellant in these proceedings.

D. Gordon Mackey, Donald J. Vance and Christopher R. Spout	Agents, on behalf of the Bancroft and District Chamber of Commerce.

Facts Not in Dispute:

Mining Claim SO-1040715 (the "Mining Claim") was staked on April 30, 1992 by John Everest, assisted by Tom Lielbardis, Amy Pronovich and Jerry Woodcox. The Mining Claim was recorded in the Office of the Mining Recorder for the Southern Ontario Mining Division (the "Mining Recorder") on May 7, 1992. On August 12, 1992, Mr. Everest transferred 100 percent of the Mining Claim to the Bancroft and District Chamber of Commerce.

On May 4, 1993, Mr. Scott Harper restaked the same area. Mr. Scott Harper filed a dispute with the Mining Recorder on May 6, 1993. The dispute was heard by the Acting Mining Recorder who rendered his decision on February 14, 1994, dismissing the dispute. On February 15, 1994, the disputant appealed this matter to the tribunal.

There were a number of deficiencies in the staking of the Mining Claim alleged by Mr. Scott Harper which were not disproved by evidence:

- All claim posts were undersized.
- No blazing was done between any of the claim posts.
- The line between the Nos. 2 and 3 posts, which coincides with the Township Road, has neither blazing nor flagging.
- Whatever demarcation does exist on the claim lines was done exclusively with flagging tape.
- The No. 1 post is 50 metres north of the claim line intersection.
- A swail located on the eastern boundary was not demarcated.

Issues:

At a Pre-Hearing Telephone Conference Call held on March 2, 1995, the parties agreed that the following were the issues to be determined:

1. Did the Acting Mining Recorder err in finding that there was substantial compliance with the requirements of the **Mining Act** and Ontario Regulation 115/91 ("O. Reg. 115/91"), despite certain failures to comply with a number of

specific staking requirements, in that such failures were not likely to mislead any licensee desiring to stake in the area?

2. Did the Acting Mining Recorder err in finding that there was substantial compliance with the requirements of the **Mining Act** and O. Reg. 115/91, by finding that it is apparent that an attempt had been made in good faith by the licensee to comply?

3. Can the mandatory staking requirements to blaze lines under subsection 8(4) of O. Reg. 115/91 be circumvented through the express request of the surface rights holder that trees not be blazed, notwithstanding that the use of the surface rights does not fall within the exemption contemplated by subsection 8(5) of O. Reg. 115/91 and the uses outlined in subsection 32(1) of the **Act** or can flagging be allowed in the place of blazing at the discretion of the Mining Recorder and, under appeal, at the discretion of the tribunal?

4. In the event that the appeal is successful, does the staking of the "filed only" mining claim by the disputant substantially comply with the requirements of the **Act** as to staking, so that it may be recorded?

Preliminary Matters:

At the time of the Pre-Hearing Telephone Conference Call, preliminary objections arose in connection with the evidence of one of the witnesses on behalf of the Bancroft and District Chamber of Commerce, Joseph Stocking, who is a retired mining recorder.

While no special deference would be given by the tribunal to the opinions of a retired mining recorder, which would be tantamount to bias, the tribunal found that it would consider the evidence of Mr. Stocking concerning industry standards and whether or not a licensee in the field would be likely to be misled by Mr. Everest's staking.

Mr. Cummins also pointed out that Mr. Everest would not be called as a witness and therefore would not be subject to cross-examination. It was indicated that the Bancroft and District Chamber of Commerce would bear the risk in presenting a less than complete case before the tribunal. However, it was not precluded from presenting its case through other witnesses.

Evidence:

Mark Howard Harper was called as a witness on behalf of Mr. Scott Harper and stated the following:

- He had considerable experience as a prospector and has held a licence since he was 18, having been an avid mineral collector from the age of ten.

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- On July 29, 1992, he attended the property with Mr. Scott Harper and Oliver Bolton and observed the undersized No. 3 post of the Mining Claim which was poorly marked, observed some flagging to the north and none to the east.

- Difficulty was experienced in locating the No. 2 post, which was not vertical and was undersized. The inscriptions were illegible. There was no flagging or blazing to either the west or the north. They proceeded 100 metres along the eastern perimeter but could find no indication of blazing or flagging for a further 40 metres.

- The area surrounding the No. 2 post was wilderness, with forested vegetation being neither trees nor scrub. The No. 2 post is located in a swampy area. There is an old fence row going north from the No. 3 post, with no indication of either agricultural or logging activity, but only the old mine itself.

- He was confused along the southern perimeter as mining claims must be demarcated along each of their boundaries with blazing required between five and 25 metres.

- There were sufficient standing trees to properly blaze the perimeter.

- Upon checking with the Mining Recorder, it was determined that Mr. Everest had staked the Mining Claim.

- Upon cross-examination, he stated that the posts had claim tags but the inscriptions were unclear and did not disclose either the time of staking or the name of the staker.

Scott Edward Harper gave the following evidence on his own behalf:

- He has bachelors and masters degrees in geology, spent 3/4 of his life looking at mining properties and has seen thousands of mining claims.

- He was present during Mr. Mark Harper's inspection of the Mining Claim and had wanted to stake it himself, being aware of the presence of an old mine on the property.

- The inspection started at the No. 3 post moving to the No. 2 post. The No. 3 post was located by using two survey posts. Also observed were old mining claim posts, an old stone fence, and metal and wood fences.

- He reiterated the absence of blazing and flagging described by Mr. Mark Harper. The inspection was not continuous around the perimeter.

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- The No. 2 post was located lying in a ditch with no other indications of staking. Both Nos. 2 and 3 posts were undersized. In spite of going north for 100 metres, there were no other indications of staking, which left him with no idea what was going on.

- It was only by inquiring at the Mining Recorder's office in Toronto that he was able to determine that Mr. Everest had staked the property in April 1992 and recorded it on May 7, 1992.

- In consultation with the then Mining Recorder, Raili Charnesky, and Bruce Perry, it was suggested that he dispute the staking. However, owing to demands of attending university, he was unable to go up until the following spring.

- Prior to his own staking, he determined that no assessment work had been filed on the Mining Claim.

- On May 4, 1993, he and Mr. Bolton restaked the Mining Claim, commencing with the No. 3 post made from commercial lumber, and moving northwards.

- His No. 4 post was poplar.

- His No. 1 post was located in heavy bush, but he was unable to find that of Mr. Everest in spite of looking for quite a while.

- Part way along the north boundary the orange flagging tape changed to lime green. When it crossed a steel fence it went south along the fence. He could not tell it was a mining claim except that it was coincident with where they were staking. It could have easily been demarcation of the surface rights holder, a logging stand or a deer stand.

- Although there had been no flagging on the east boundary on June 29, 1992, on May 4, 1993 it was flagged with lime green flagging tape. There was no order of the Mining Recorder requiring such flagging after the staking of the Mining Claim.

- All of Mr. Everest's posts were undersized.

- Ultimately, he found Mr. Everest's No. 1 post 50 metres north of the intersection of the north and east boundaries.

- While blazing his own north boundary, he noticed that Mr. Everest's flagging deviated from the compass reading. He reblazed his line and moved his No. 1 post north to coincide with Mr. Everest's.

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- Between the Nos. 1 and 2 posts, there was a swampy area which was not flagged, although green tape was apparent on the northern part of the perimeter. South of the swamp the flagging recommenced, but it had not been there during his inspection in 1992.

- Mr. Scott Harper's southern boundary was blazed with initials put on all blazes to document his staking. The blazing itself was ten feet inside the perimeter not to confuse it with that of Mr. Everest.

- In Mr. Scott Harper's opinion, the property was such that its perimeter should be blazed, as it did not meet any of the exceptions contemplated by subsection 32(1) of the **Mining Act**.

- He filed his application to record in Toronto, which was marked as "filed only" at which time he filed a dispute.

- The Mining Claims were inspected in June 1993 by Paul Morra.

- He noted several errors in the report which he outlined to Raili Charnesky in writing on October 12, 1993 (Ex. 2, Tab 4), including that blazing found on the northern boundary was not that of either Mr. Scott Harper or Mr. Everest; that it was not clear under the Station 2 heading whose blazing and whose flagging was involved; that the distance through the swail on the eastern boundary is not given; and that all of his flagging and blazing had been initialled.

- He felt that the lime green flagging tape was misleading as the ground was not marked in such a way to let one know there was a mining claim. There is no where to tie on, no eastern boundary and a post metres away from where the north and east lines intersect.

- He reiterated that he could not find Mr. Everest's No. 1 post on his first visit, but did locate it when he staked.

- Under cross-examination he agreed that his claim map was not up-to-date. He was doing work in the area and had set June 29, 1992 aside to stake several claims, but was so thrown by Mr. Everest's staking that he ended up not doing any staking at that time.

- On June 29, 1992, he spent several hours on the property. He expected to stake the aliquot part of the lot. The corner post found was found next to a survey post but had no legible writing to indicate what had been staked.

- He had been misled by the two posts he found and the absence of demarcation on the southern perimeter. The fact that it was to coincide with the road between

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Concessions VI and VII was not determinative, as in his experience, road allowances could deviate from what is on the mining claim map.

- He was challenged that, if he had an up-to-date claim map which was available from the Ministry of Natural Resources in Bancroft, he would have been aware of Mr. Everest's staking. He indicated that a staker has 30 days to apply to record, so that this would not necessarily be true.

Donald Gordon Mackey gave the following evidence on behalf of the Bancroft and District Chamber of Commerce:

- In 1991, he was hired as the general manager of the Bancroft and District Chamber of Commerce to oversee staff and programs. His role involves over 300 businesses paying a fee to promote and develop the Town of Bancroft as a place to work, live and visit.

- In undertaking the Corporate Plan implemented in 1990, he was involved in fiscally responsible tourism, promotion of events and promotion and development of business.

- Tourism is very important to Bancroft, as the last uranium mine closed in 1982, lumber has closed down and agriculture is non-existent.

- The rock collecting industry brings $5.5 million per year to the service industry.

- In 1992, Mr. Everest was on staff with the Bancroft and District Chamber of Commerce. He was hired in the summer of 1991 as a recent graduate of geology from Carleton University.

- Funding was received prior to the end of 1991 to keep Mr. Everest on and add a training component. As a result, Mr. Everest and the three assistants named in the staking received training.

- Part of the program included the staking of the Mining Claim, also known as the MacDonald mine site due to its value from a tourism point of view. There are few remaining mine sites left intact in the area, and most mineral collecting sites are just a pile of rocks.

- Mr. Everest obtained a license, staked the Mining Claim and transferred it to the Bancroft and District Chamber of Commerce.

- After the dispute was filed, Mr. Morra inspected the Mining Claim on June 25, 1993, at which time Mr. Mackey was present. This was Mr. Mackey's first time seeing a mining claim.

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- He experienced no difficulty in either finding or following the Mining Claim perimeter. Commencing at the No. 2 post, the boundary to the No. 3 post is delineated with a fence. From the Nos. 3 to 4 posts there is a fence with flagging on the fence. Most of the area between was soft wood such as spruce, balsam and poplar. There is a portion with an open pit and the area surrounding the No. 4 post was an open area.

- From the Nos. 4 to 1 posts he followed flagging to a fence, which was also flagged. There was no visible post, but heading north a ways, the No. 1 post was located. East of the No. 1 post is an open field, with heavy woods to the west.

- Heading south to the No. 2 post, the area is swampy and they encountered a beaver dam.

- In his opinion, the Mining Claim was easy to follow because of the fence surrounding it, except through the marshy area.

- Under cross-examination, Mr. Mackey stated that he was leading the group as he wanted to see for himself whether it would be difficult to follow and found that it was not.

- Concerning the location of the No. 1 post, there was an easily identifiable intersection with flagging to the left and right. It was obvious that the No. 2 post was to the right and the No. 1 post was to the left. However, he agreed that there was no visible post at the intersection.

- He had not been on the property prior to the inspection and could not comment on the manner of staking. Nor does he have any professional knowledge of staking.

- Mr. Mackey stated that the Bancroft and District Chamber of Commerce did not avail itself of the provisions of subsection 48(8) of the **Mining Act** which allows a transferee who has acquired a mining claim in good faith to have it restaked.

Hans D. Meyn gave the following evidence on behalf of the Bancroft and District Chamber of Commerce:

- In 1992, he was employed by the Ministry of Northern Development and Mines (the "MNDM") in the capacity of a regional specialist. He started in 1983 as a resident geologist.

- Mr. Scott Harper attended at his office in June 1992 and asked about the staking in Lot 19, Concession VII in Monteagle Township. He advised that it had been staked and by whom. Then they proceeded to discuss other matters.

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- He had considerable contact with Mr. Everest, as Mr. Everest was interested in information on mineral deposits and mineral collecting sites. Mr. Everest had led many field trips.

- He did not provide advice or assistance to Mr. Everest concerning the staking, as Mr. Meyn had never staked a mining claim in his life. However, he did provide Mr. Everest with a copy of the **Mining Act**.

- Mr. Everest and his assistants obtained their licences from Mr. Meyn approximately two or three weeks before the staking of the Mining Claim.

- He could not recall whether they specifically discussed the issue of blazing versus flagging, but if they had, he would have suggested flagging wherever possible, being a tree-loving urbanite. He stated that he now realizes that this advice would have been incorrect.

- After the staking, Mr. Everest discussed his concerns with him, particularly that the line from the Nos. 4 to 1 posts did not follow the compass line. He apparently tried to do it twice, but ended up south of where he wanted to be.

- Upon clarification from the tribunal, Mr. Meyn stated that he could not say with assurance whether or not he advised Mr. Everest to change his line.

- Under cross-examination, Mr. Meyn stated that Mr. Everest was troubled by not arriving at the correct location upon completion, his No. 1 post being 50 metres north of his flagging. Mr. Meyn advised him to not try to change his line now that the staking had been completed.

- Mr. Meyn indicated that Mr. Everest had not done anything wrong, but that his staking simply had not come out right. Mr. Meyn advised that he had done the best he could, and that he could not change it.

- Mr. Everest had never discussed with Mr. Meyn whether he had put additional lime green flagging tape on his line after completion of the staking.

John Lielbardis gave the following evidence on behalf of the Bancroft and District Chamber of Commerce:

- He was employed by the Bancroft and District Chamber of Commerce during the spring and summer of 1992, with duties in its mineral development program.

- He obtained his licence in mid to late April 1992 and proceeded to the MacDonald mine to stake the south half of Lot 18, Concession VII with three others, Mr. Everest, Mr. Woodcox and Ms. Pronovich.

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- They located an iron survey bar at the southwest corner of the Mining Claim, where there were also old mining claim posts.

- Mr. Everest started to pace to where the staking should be. They walked the Mining Claim, moving clockwise. At the northeast corner, they came to a stone fence and did not see any posts. They moved northward until they found the old posts. On the eastern boundary, they followed a fence until they came to a beaver dam, which they skirted around, and resumed to the southeast corner. A lady came out and showed them the boundary.

- They retraced their steps and placed their No. 1 post at the northeast corner near the other posts, and then proceeded clockwise. Mr. Lielbardis did the flagging at Mr. Everest's direction to the No. 2 post. No flagging was done between the Nos. 2 and 3 posts because the boundary ran along a road.

- The No. 3 post was planted at the location of the iron survey bar.

- He continued flagging between the Nos. 3 and 4 posts.

- Mr. Everest worked the compass and they ended up, as before, some 50 metres south of their No. 1 post.

- They did not change their northern line, as they remembered that staking must be a continuous action.

- Mr. Lielbardis could not recall the requirements in the Mining Act for the size of faced posts, but he remembered Mr. Everest writing on them in black marker.

- Under cross-examination, Mr. Lielbardis indicated that he had been present for the inspection.

- The staking of the Mining Claim had all been completed in one day. Notwithstanding that their northern boundary came out south of their No. 1 post, the post itself was to the north.

- Mr. Lielbardis' recollections were not complete, but he believed that he flagged the entire eastern boundary.

- He did some of the flagging with Mr. Woodcox doing the cutting with Ms. Pronovich doing the carrying. Mr. Everest flagged a bit too.

- They had two rolls of flagging tape, one orange and one green, and switched colours when they ran out.

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- Mr. Lielbardis indicated that he had staked to the best of his ability.

- He speculated that the flagging might have been further apart owing to the absence of leaves on the trees, but did not know how close the flagging would need to be with leaves present.

- The surface rights holder came out to them during their perimeter walk prior to staking and showed them exactly where the boundary should be. They were 40 yards off in their estimations. From there, they retraced their way to the No. 1 post and commenced staking.

- Mr. Lielbardis indicated that he flagged the Mining Claim because Mr. Everest was working the compass. In retrospect, he realized that the Mining Claim should have been blazed. No one was consulted on what to do. He started flagging because Mr. Everest told him to.

Sonia McAllister gave the following evidence on behalf of the Bancroft and District Chamber of Commerce:

- Mrs. McAllister and/or her husband have owned the surface rights of Lot 18, Concession VII for 15 years and have resided on the property for ten. The tribunal notes that there is a building lot on the central portion of the south half of the lot (Part 1 of Plan 21R-13132) and the MacDonald mine is located on the west portion of the south half of the lot (Part 1 on Plan 21R-5190). (See Exhibit 4, Tab 4 and Exhibit 11)

- During the spring of 1992, she encountered a group on her property and spoke with the leader who told her that they were staking. She asked him as a favour to not hurt the trees. He indicated that he would do the best he could.

- Under cross-examination, Mrs. McAllister indicated that she does not own the MacDonald mine lot. As a vacant lot, there are trees and a stream, but no buildings or agricultural uses. Mrs. McAllister indicated that there is a timber operation ongoing.

- Mr. and Mrs. McAllister own the building lot together, which has a house 250 feet from the road. There is also a double garage, barn and outhouse. No farming is conducted on this property.

- Mrs. McAllister agreed that she had asked Mr. Everest to not cut the trees. When mineral rights are acquired, according to her, they hurt the trees, which she finds upsetting. However, she has no objections to flagging. She recalled asking Mr. Everest to not hurt her trees, but did not indicate that he could not flag along the road.

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Paul Morra, a Mining Claims Inspector for the MNDM during 1993, gave the following evidence on behalf of the Bancroft and District Chamber of Commerce:

- Mr. Morra inspected Mining Claim SO-1040715 and produced Report 93-15 dated July 2, 1993 (Ex. 2, Tab 3), which included information, post and tag data and a sketch. There is nothing he wishes to add to the evidence contained in his report.

- Portions of the report are reproduced:

  In attendance for the disputants were: Scott Harper, Oliver Bolton and Robert Galloway. The respondents were: John Everest (staker), Don Vance, Tom Leilbardis (**sic**), and John MacKey (**sic**). Mr. Vance did not attend in the field, however, Mr. Hans Meyn, Geologist with MNDM attended as an observer.

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  Inspection:

  The inspection began at the #3 corner of the claims. This is referred to as Station 1 in the Post and Tag Data, appended to this report. The inspection then proceeded in a clockwise direction around the claims.

  All posts and tags were found. The inscriptions on the posts of Everest's staking (SO 1040715) were for the most part not readable. The inscriptions were on the posts but fading and a type of fungus growth made the letters and numbers impossible to read.

  The inscriptions on Harper's posts of course were readable being less than two months old.

  Everest chose to flag his lines. The north boundary has in addition to the flagging, some blazing. The south boundary of 1040715 has neither blazing or flagging, using the Township Road as a boundary. Harper blazed all lines. Some flagging was used to enhance the blazing.

  The north boundary of the Everest claim does not quite close on the #1 post of 1040715. The flagged line hits the east boundary of the claim about 50 meters (164 feet) south of the true corner. The #1 post was placed at the true corner.

  The north boundary of the Harper claim followed the Everest north boundary, however Harper planted his #1 post at the true corner

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then reblazed the north boundary from his #1 post back toward the #4 post converging with his original line. The two lines meet at 291 meters (955 feet) west of the #1 posts. The attached sketch shows this convergence.

Post sizes for the Harper claim all exceed 10 cm. (4") on each side.

Everest post sizes were as follows:
Dimensions show overall width of posts, then face widths. All posts exceeded the height requirements.

#3 post 9cm x 9cm, (3 1/2" x 3 1/2") 5.7cm (2 1/4") faces.
#4 post 10cm x 9cm, (4" x 3 1/2") 7.6cm (3") faces.
#1 post 10cm by 10cm (4" x 4") 9cm (3 1/2") faces.
#2 post 10cm x 10cm (4" x 4") 7cm (2 3/4") faces.

Complete details of each station will be found in the post and tag data portion of this report.

The East and West boundaries are well defined by stone fences and wire fences. The Township road has been surveyed and 1" SIB's placed at each lot line.

A portion of the MacDonald mine open cut continues on to Lot 19. The open cut lied approximately 183 meters (600 feet north of the Township road. The area has been fenced as a safety measure.

- There are in fact two iron bars located near the No. 3 post.

- There was no difficulty experienced in following the perimeter of Mr. Everest's Mining Claim, which is delineated by fences, a stone wall and the road.

- Even though there was no post at the northeast intersection of the flagging, Mr. Morra experienced no difficulty in locating the No. 1 post. He went north, as it was clear that the No. 2 post was to the south.

- Mr. Morra has inspected mining claims since 1955 and has inspected several thousand since that time. In his experience, no mining claim was totally in accordance with the legal requirements and he encountered many technical deficiencies.

- Under cross-examination, he agreed that Mr. Scott Harper's staking included adequate posts, inscriptions and blazing.

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- Mr. Everest's staking contained blazes along only part of the north boundary, which were higher than those of Mr. Scott Harper. One would not confuse blazes a year old with those done more recently.

- Mr. Morra stated that, even with a two month old map and the 31 day window of time to record a mining claim, one could obtain as up-to-date as possible information by telephoning the mining recorder's office.

- Mr. Morra suggested that it would be indicative of inexperience to arrive at a site without up-to-date information. If staking is evident, one cannot stake the area. However, one can tie onto the boundaries of an existing staking.

- Although blazing is essential to staking, many areas cannot be blazed. Where a surface holder requested it, one could use a combination of pickets and blazes. However, blazing will not harm the trees, although they would be discarded, except for birch.

- Mr. Morra stated that blazing is mandatory, save for the exceptions contained in the legislation. Mr. Cummins suggested that the wording in section 8 of O. Reg. 115/91 is mandatory.

- Mr. Morra stated that he would have blazed the entire perimeter including the road, which does not form a boundary, which some might not realize.

- Mr. Morra indicated that it was not unusual to use whatever colour flagging tape one had available, so that use of multiple colours was possible.

- He agreed that the Mr. Scott Harper's staking was demarcated on every boundary, while the Mr. Everest's staking was not.

Christopher Richard Fouts called as a witness on behalf of the Bancroft and District Chamber of Commerce gave the following evidence:

- He is a geologist employed by the Bancroft and District Chamber of Commerce, being a rock collector and member of rock collecting clubs in the province.

- In his opinion, mineral collection is an enjoyable hobby which happens to add $5 million to the local economy. His job is to lead field trips, locate sites and also evaluate a site to determine its value and the value of the hobby itself to the local economy.

- There are a number of problems in the Bancroft area which may hinder the success of mineral collection. Many new landowners, unlike hunters, have a city

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mentality and do not like people on their property. Also, there are a number of instances of people attempting to stake property for their personal use and have it excluded from mineral hobby collectors.

- Mr. Fouts proposed that Bancroft have a mineral collection program so that its income would not dry up completely. The MacDonald mine site is a very popular feldspar magnetite mine, which gives a flavour of mining from the turn of the century. School children are taken on tours as well.

- Mr. Fouts described a series of pictures taken by him in November 1994 (Ex. 3, Tab 5, 1 through 8).

  1. Taken at the No. 3 posts from the road a distance of 25 or 30 feet, with both Harper's and Everest's visible.

  2 and 3. Taken along road and facing north, respectively, at east boundary. Shows posts of each and iron bar.

  4 through 8. Shows a number of undersized posts.

- Mr. Fouts described his search of ownership at the land registry office, stating that the property was first patented in 1879.

- Under cross-examination, Mr. Fouts stated that he had done a number of stakings on behalf of the Bancroft and District Chamber of Commerce over the past year. At all times he has blazed, as required by the **Mining Act**. However, he recognizes that Mr. Everest's staking was an attempt to retain the goodwill with the surface rights holders.

- Mr. Fouts described how he would proceed with a staking, first checking with the mining recorder to ensure that the lands were open. Then, if there were no objections, he would blaze his lines.

- Iron bars do not necessarily denote the corners of lots.

Joseph Addison Stocking called as a witness on behalf of the Bancroft and District Chamber of Commerce gave the following evidence:

- Mr. Stocking has 50 years of experience in claims staking, including that of a former mining recorder.

- He was invited by the Bancroft and District Chamber of Commerce to visit Mr. Everest's staking during the previous fall and form his opinion.

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- The No. 3 post was located at the intersection of a stone fence and the Township Road. It was of good height, although undersized, and the inscription was no longer visible. A 1" iron survey bar was located nearby.

- The No. 4 post was made of a maple tree, having good height. The post for Mining Claim SO-1150874 was lashed onto Mr. Everest's. There were several very old posts in the vicinity.

- Flagging and blazing ran along the northern boundary to the east. Mr. Stocking crossed a dirt road and then proceeded along a stone and wire fence, 20 or 21 chains east of the road. There was flagging and blazing to the fence.

- Mr. Everest's No. 1 post was located 100 feet north of the intersection, made of balsam and of good height. The post of Mining Claim SO-1150874 was lashed onto Mr. Everest's post. No survey bar was apparent and blazing ran from the post due west.

- Mr. Stocking followed flagging and blazing south to the beaver dam, with flagging visible south of the dam.

- 16 chains south of the No. 1 post, a fence intersected the line and a barn and house could be seen.

- The No. 2 post, located across a small creek, was made of poplar, and was of good height, although the inscriptions were gone.

- Mr. Stocking stated that he had no difficulty in following Mr. Everest's staking and in his opinion, an experienced prospector would similarly have little difficulty.

- Under cross-examination, Mr. Stocking clarified that he observed flagging south of the No. 1 post.

- There were, in his opinion, three ways to end up south of the No. 1 post, being a compass deviation, a side hill where one would edge down the hill, or, given no other frame of reference, a person tends to turn to the right. While there is a slope in the northern boundary, he could not recall a side slope which could account for the deviation. He did not use a compass, so could not speak to a compass deviation.

- While he agreed that blazing requirements are set out in the legislation, they must be balanced with the requirements for substantial compliance.

- Good relations with the surface rights holder, including respect for their wishes, is an issue, as the relationship will continue during the assessment work phase. There are essentially two choices, namely to do as one pleases or attempt to co-exist in a manner which is not disruptive.

- Given that two of the posts are located on the Township Road, Mr. Stocking had no difficulty in determining that Mr. Everest's line ran along the road, notwithstanding the absence of demarcation.

- It is not, in his opinion, all that important to demarcate all four boundaries in a surveyed lot. What one is supposed to be describing is the aliquot part of the lot. There is no means to ensure accuracy, but one must try to be as close as possible. The steel bar at the No. 3 post is clearly the southwest corner of the lot and the steel bar at the southeast corner of the Mining Claim denotes the corners and helps to demarcate the boundaries.

Submissions:

Subsection 32(1) of the **Mining Act** and subsection 8(5) of O. Reg. 115/91 are reproduced in full:

> **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.
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> **8.--(5)** Despite subsection (4), the perimeter of a mining claim or portion of a claim located in an area referred to in subsection 32(1) of the Act may be clearly marked by securely affixing durable flagging tape to standing trees and underbrush along the boundary lines of the claim.

Mr. Cummins submitted that, if not contemplated by subsection 32(1) of the **Act** or subsection 8(5) of O. Reg. 115/91, there is no other reference in the legislation to the situation

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of balancing the interests of the surface rights holder with that of the staker. There is no section in the legislation which allows a staker to circumvent the requirements of staking. The reason given for the flagging on behalf of the Bancroft and District Chamber of Commerce was not to damage trees. Evidence from Mr. Morra, the Mining Claims Inspector, is that blazing does not damage trees per se, as the area of blazing eventually grows over and the tree survives.

The fact that the surface holder requested that no blazing be done gave rise to a number of options on the part of the staker. Subsection 110(6) of the **Mining Act** provides a curative provision whereby the mining recorder may order the doing of certain activities. The staker could have sought the Mining Recorder's direction on this matter. There is no evidence that this was done.

The evidence shows that the staker, Mr. Everest, was anxious about the matter of the flagging and was advised by the Mining Recorder of the time, Raili Charnesky, to not tamper with the Mining Claim. However, it was possible to obtain an order. This was made clear to Mr. Everest within days of his staking.

There is conflicting testimony concerning how much flagging was done at the time of staking. It is the evidence of both Messrs. Harper that no lime green flagging was observed at the No. 2 post. However, Mr. Lielbardis stated that the lime green flagging was done at the time of staking. It was a finding of fact by the Acting Mining Recorder in his order that Mr. Everest had reflagged after the staking of the Mining Claim.

Notwithstanding the issue of flagging, the evidence shows that there was no demarcation between the Nos. 2 and 3 posts. Clearly, demarcation was not consistent.

It should be noted that Mr. Everest was not present at the hearing to give his evidence. His absence goes to the issue of credibility. The issue of the lime green flagging tape added after the staking has not been addressed satisfactorily.

Mr. Cummins submitted that corner posts do not in and of themselves constitute a validly staked mining claim. It is essential that one look to the legislation to determine what is required for a validly staked mining claim. Subsection 8(4) of O. Reg. 115/91 makes it quite clear that staking requires that one bring an axe for blazing.

There have been suggestions of problems with the surface rights holder in reference to blazing. However, subsection 32(1) of the **Act** is equally clear on what areas can be flagged. Both Messrs. Harper thought that this area did not qualify as an exception. Mr. Morra was not sure.

Mr. Cummins referred to the findings of the Acting Mining Recorder at page 3, 2nd paragraph, of Exhibit 2, Tab 9, wherein he states:

> . . . While it was apparent there were portions of the claim that were occupied by a dwelling etc. there was no compelling

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> argument made to convince myself that 32(1) applied to the whole lot. It should be noted however that the staking of the claim does not convey any rights to the minerals under those improvements.

Mr. Cummins submitted that the surface rights holder never suggested that the Mining Claim should be flagged instead of blazed as there are adequate trees of a non-commercial nature present on the property.

Mr. Cummins submitted that a licensee should have known that any flagging surrounding a dwelling should not have applied to the whole of the mining claim. The fact that there was no blazing and the southern perimeter was not flagged was confusing to Messrs. Harper. These constitute problems in the staking which would be likely to mislead other stakers in the vicinity, as they did Messrs. Harper. There are also problems encountered in trying to tie onto the claim, as there is no apparent southern boundary.

With respect to the concerns and rights of the surface rights holder, it was open to Mr. Everest to obtain an order of the Mining Recorder clarifying his rights and obligations.

Part of the staking, however, involved a vacant lot, where there is no clear reason to not blaze. This and the failure to demarcate the southern boundary by any means constitute misleading deficiencies. In addition, the posts were undersized.

Mr. Cummins referred to subsection 43(1) of the **Mining Act** wherein it states that an imperfect staking shall be deemed to be in substantial compliance, even if not staked within the letter of the law. The drafting of subsection 43(1) of the **Act** requires substantial compliance with legislative requirements as nearly as circumstances will reasonably permit is deemed to be compliance. He submitted that circumstances require that the staking be as good as possible. The reasons for the deficiencies offered by the witness, Mr. Lielbardis, are not good enough, and no other witnesses to the original staking were called. There is no cause or reason for the absence of adequate markings along the southern and part of the eastern boundary or for the undersized posts. While Mrs. McAllister told them she did not want her trees damaged, she did not give alternatives.

There were sufficient trees of a non-commercial variety to allow for compliance. The fact that trees must be used for corner posts defeats any concern regarding timber.

Mr. Cummins submitted that the good faith required in staking must be apparent in the field and referred to "Substantial Compliance in Staking Mining Claims", by Albert C. Gourley and David R. Reid, June 1992 at pages 5 and 6:

> Insofar as the new deeming provision is concerned, only a few of the above examples would fit within paragraph 50(2)(b) [now 43(2)(b)]. Most of the examples do not illustrate instances

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> where, in the words of paragraph 50(2)(b), "it is apparent" that an attempt was made in good faith to comply with the staking requirements. The staker's good faith must be apparent in the field in order to fit within paragraph 50(2)(b). It should be noted that had the Legislature simply intended that the Commissioner have regard to whether good faith is demonstrated (i.e. without regard to other stakers and prospectors in the field), the words "it is apparent" would be rendered redundant in paragraph 50(2)(b).30 Consequently, although the staker's good faith is relevant in the determination of substantial compliance, it is irrelevant for the purposes of the new deeming provision unless it is apparent in the field.
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> 30. Sloan v. Taplin (1913), 2 M.C.C. 22, at 29; Re Dupont and Cole, note 6, supra, at 74-75; Re Munro and Downey (1908), 1 M.C.C. 193, at 202; aff'd (1908), 1 M.C.C. 205 (Ont. Div. Ct.); In Re Lewinski (1961), 4 M.C.C. 15, at 17; Marshall v. Resell, note 29, supra. In Rinaldi v. Hill, note 8, supra, it was stated at page 21 that this section would not validate any staking which was otherwise invalid. Cf. Maher v. Sheridan, note 28, supra, at 167. It is submitted, however, that this cannot be interpreted as meaning that the consideration of equity will never invalidate or validate a staking which would otherwise be valid or invalid, as the case may be.

Accordingly, the cause for non-compliance should be apparent in the field. An attempt suggests that one must at least make the attempt, and where one makes a mistake in the attempt, it may be deemed to be in substantial compliance.

Mr. Cummins submitted that it is clear that the absence of blazing does not constitute an attempt to comply with the requirements of the legislation and precludes substantial compliance in the circumstances.

Due to the absence of blazing, Mr. Cummins directed the attention of the tribunal to subsection 71(1) of the **Mining Act** and submitted that the failure constitutes a deemed abandonment of the Mining Claim. Such total disregard for the requirements of staking should be held to be a deemed abandonment.

Mr. Cummins submitted that the Bancroft and District Chamber of Commerce had a second chance to remedy its position, being a transferee in good faith within the meaning of subsection 48(8) of the **Act**. It could have caused the Mining Claim to be restaked, in which case it would have preserved its interest. It should have been clear that Mr. Everest's concerns, as addressed to Mr. Meyn, would have also come to the attention of Mr. Mackey when it was transferred in June, 1992. However, no steps were taken to remedy the situation.

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Referring to the case law, Mr. Cummins reiterated comments made by the Acting Mining Recorder referred to **Lacasse v. Phillips** 7 M.C.C. 560, and specifically drew the attention of the tribunal to page 570 where Commissioner Ferguson states:

> . . . It might be argued that there were no "circumstances" to make the section applicable and which would justify non-compliance with one or more requirements of the Act. There were no circumstances such as weather, unusual terrain or lack of trees to give rise to a reduced standard of staking, assuming that such is the effect of the section. The only potential circumstance is the inexperience of the respondent. This issue has been recognized in the case of *Sutherland v. Rose* 5 M.C.C 144 where there was no competition at the time of the staking. This tribunal said at p. 154,
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> > A minor consideration that has influenced my conclusions is the apparent lack of experience of the respondent in the staking practices of this province. While the issue of experience is not conclusive, it has on occasion been used by my predecessors as one of several standards of measuring the performance of a staker. A higher standard of performance is expected from the experienced staker than from the novice and the inexperienced staker has been given some latitude in the application of the Act to his staking.

Mr. Cummins submitted that the principle of the inexperienced staker should not be extended beyond minor circumstances and in the case of flagging instead of blazing, should not constitute a staking which substantially complies with the requirements of the **Mining Act**.

In **Sutherland v. Rose** 5 M.C.C. 144 the tribunal considered the absence of blazing and stated at page 153:

> . . . Rose did not give evidence of any circumstances which provided a reasonable ground for not blazing plainly but stated that there was obscurety in this area as he wished to return later to stake additional claims to the south. In my view, this approach is in direct conflict with the general principle of the purpose of staking, that is, to mark the boundaries of the area staked on the ground in order that all future prospectors and others may readily see and observe such boundaries. Had the whole group of claims or a substantial part thereof been staked in this fashion, I would have had no hesitancy in declaring that they were invalidly staked.

Mr. Cummins submitted that considerations involving a novice staker should not be the overriding consideration under the circumstances.

The case of **Arnott v. Walli** 3 M.C.C. 170 involved undersized posts, errors in inscriptions and the absence of blazing. It was found that the staking was not in accordance with the requirements of the **Mining Act** and was held to be void **ab initio**.

In **Asher Gold Mines Limited v. Larson** 3 M.C.C. 175, the tribunal found that he would give the benefit of the doubt to a staker where the area had been burned by forest fires both prior to and after the staking, notwithstanding that the evidence of staking could not conclusively be found to be in substantial compliance. The Court of Appeal upheld the decision.

In **Clarke v. King** 4 M.C.C. 106, the mining recorder cancelled the claim of Clarke, based upon the fact that Clarke only blazed on the east line. In upholding the decision, the tribunal found that Clarke failed to complete the staking in one day, citing darkness, but found that there were three hours of daylight remaining after the No. 2 post had been erected.

In **Clark and Babcock** 4 M.C.C 85, posts were undersized, the lines were not marked by either blazes or pickets, with a 100 foot exception and inscriptions were not as required by the legislation. The tribunal found that there was non-compliance with the **Act** and that it constituted an **ipso facto** abandonment.

Mr. Vance submitted that the evidence heard did not substantiate a finding that there was no flagging between the Nos. 1 and 2 posts, but suggested that it might have been difficult for Messrs. Harper to see on their initial inspection.

As far as flagging and ownership of the ground is concerned, it was suggested that the Mining Claim could be divided into thirds according to the ownership of the surface rights. However, the **Act** states that a mining claim must be the aliquot part of the lot, which would be confusing if it were partially blazed and partially flagged. Mr. Vance does not wish to suggest that the staking is perfect. However, on the southern half of the lot, the boundaries are clearly demarcated. Based on evidence dating back to the 1879 patent, it is clear that there has been continuous occupation of this part of the lot. It is fronted by the Township Road, with fences on the east, west and north sides. Survey bars are found at the southeast and southwest corners.

Mining Claims Inspector Morra had no difficulty following Mr. Everest's lines. Mr. Stocking had no difficulty. Even Mr. Mackey, who has no experience in the field, could follow the lines. It becomes hard to believe that someone as experienced as Mr. Scott Harper would have experienced such difficulty.

The evidence of the inspection and photographs shows that Mr. Everest's posts are not grossly undersized.

It was only after encountering the surface rights holder that Mr. Everest decided to flag the Mining Claim. Mr. Vance submitted that, pursuant to subsection 8(5) of O. Reg.

115/91, flagging should be permitted if it is used for a proper purpose. Trees are a crop which could be damaged. Even where the surface rights holder thought that this was the case, it was necessary to flag to remain on good terms with the holder.

Mr. Vance submitted that Mr. Everest had good reason to listen to Mrs. McAllister. It has been suggested that blazing trees may cause minor damage which will not kill them. However, they can never again be used as saw logs and may be used only as pulp. Therefore, the consequences of blazing are far more severe than the tribunal has been led to believe.

Notwithstanding the lack of blazing, the **Mining Act** provides a remedy through clause 110(6)(b), wherein the mining recorder can order the blazing or reblazing of a line. Therefore, Mr. Everest's staking should be allowed to avail itself of this remedy.

There has been no reason given why Mr. Scott Harper or any other staker would be misled by posts of less than 10 cm where faced.

Most of the requirements for staking have been codified. However, in determining whether there has been substantial compliance as nearly as circumstances will reasonably permit, it is useful to note that past stakings also used undersized posts. The tribunal found in **Osiel v. Abolins** (unreported) July 6, 1993, that it preferred the use of undersized posts to respect the interest of surface rights holders.

The cases cited by Mr. Cummins disclose other serious deficiencies and were not based solely on the absence of blazing.

In conclusion, Mr. Vance submitted that there is no evidence that a staker would be misled by Mr. Everest's staking, nor of an absence of good faith on his part. There may be a question of good faith on the part of Mr. Scott Harper who knew of Mr. Everest's staking and waited until the last possible day to file his dispute.

Mr. Cummins replied that Mr. Vance was not qualified to give evidence of the effect of blazing on trees. Nor is there evidence that the trees on the McAllister's property are a crop. However, he submitted that blazing has been an essential element in staking which has been true since 1906.

There is evidence that the staking was misleading, in that the flagging was inconsistent, especially on the line between the Nos. 2 and 3 posts. All boundaries should be marked and were not. Both Messrs. Morra and Stocking agreed that all boundaries should be marked.

Mr. Vance countered that Mr. Scott Harper should have been aware that it was the Township Road, which demarcated the boundary between the Nos. 2 and 3 posts.

Mr. Cummins submitted that posts alone do not suggest a valid mining claim. It is essential to look to the **Act** to determine how to demarcate the boundaries of a mining claim.

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There is evidence that the staking was confusing and also, evidence that it was as good as it can be. There should be no such confusion. The only way to demarcate a mining claim is to bring an axe and blaze the perimeter.

Mr. Vance was afforded the opportunity to review the cases provided by Mr. Cummins at the hearing. On May 26, 1995, the following written comments were received:

> **. . . Sutherland v. Rose** is, we think, worthy of note. In 1974, the amendments to the Mining Act now numbered Section 43(2)(a) and (b) did not exist, but the Commissioner in his summation applied the principles of unlikely to mislead and in good faith as part of the reasons for his decision. Sutherland was not misled in that he could, and did, tie to the corner of a surveyed claim, in spite of his failure to find claim posts or blazed lines. In MA 007-94 we submit that Harper had the same opportunity to tie to a definite, easily visible, survey post. As well, the Commissioner considered the inexperience of Rose, particularly since this was a non-competitive staking situation. Even greater inexperience existed in Everest's case, and it was also non-competitive.
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> 1. The article by Gourlay (sic) and Reid entitled *Substantial Compliance in Staking Mining Claims*. This article attempts to make two points: a) that "as nearly as circumstances will reasonably permit" must only apply to circumstances on the ground, and b) that "it is apparent that an attempt has been made in good faith....to comply" must be apparent in the field. In Everest's staking of Mining Claim SO 1040715 we argue both these conditions were met. The circumstance on the ground that led him to flag instead of blaze was his encounter with Mrs. McAllister, the surface rights owner, who did not want her trees damaged. It is, and was apparent on the ground that the property had been staked. Claim posts, properly inscribed and tagged were easily visible along the road, with flagged lines running northwards from each post along the lot lines. Finally, the failure by Harper to check whether the land was open for staking before going to the area was inexcusable, and does not speak well for his competency.
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> 3. **Clark and Babcock**, Nov 20th, 1961
> This was another undefended dispute. George H. Babcock recorded on July 31st, 1961 two claims in Eby Township.

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The disputant, M.G. Clark gave evidence, corroborated by two other witnesses and the Mining Claims Inspector, that a post was missing on each claim, that the other claim posts were in the neighbourhood of two inches square, and the lines between posts were not marked in any manner. The inscription on the posts was not in accordance with the Act. Since no defence was offered the Commissioner accepted the evidence presented as an ipso facto abandonment of the claims. Again, since Mr. Babcock chose for one reason or another to offer no explanation for the errors, apparently considerably more serious than those in MA 007-94, no other alternative existed.

4. **Lacasse v. Phillips**, Dec 22nd, 1989

This was a competitive staking situation in which it is evident that the respondent made numerous errors in staking in attempting to be first to record. He apparently commenced staking prior to the lands coming open by preparing a stump post as his No. 1 post. On the morning the lands did become open he commenced staking at his No. 2 post. He did not erect a No. 4 post. He did no blazing, but did place some flagging. The inscription on his No. 1 post was later amended. The entire action appeared to be an attempt to gain an advantage, so the Commissioner, perhaps foreseeing the changes to the Act now proclaims in section 43(2)(b), decided the mining claim in question to be abandoned. In the circumstances of major defects and apparent attempt to seek an unfair advantage we submit it is not at all comparable to Dispute MA 007-94.

5. **Wellington and Ricketts**, Aug 8th, 1907

In this case the property in question was in the very poorly surveyed Township of Lake. Ricketts purported to stake a claim using pegs or short pickets with none of the requisite markings, instead of the required stakes, and no blazing or other marking of lines. Further, he staked with an expired prospector's licence. His claim was cancelled. Wellington purportedly staked the same area but no reference to the lot number was placed on the claim posts, no lines were blazed or marked and the application to record was not for the area which he had staked. So his claim was also declared invalid. Since the Township of Lake was very poorly surveyed, and almost uninhabited, it was a necessity that a

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claim should be properly delineated on the ground and on the map. Confusion still arises from survey problems in this township, (see **Osiel v. Abolins**, July 6th, 1993). The errors in staking and recording were much more serious than those alleged in MA 007-94, and the circumstances in Monteagle Township in 1994 are quite different from those in Lake in 1907. We therefore do not see much relevance to this citation.

6. **Arnott and Walli**, Oct 25th, 1956
One Currie and one Holmes staked ten claims in the North Spirit Lake area, and according to the Mining Claims Inspector there was either a line not blazed, the proper name of the staker not on the posts, or the date and hour of staking on the No. 1 post did not coincide with the date and hour of staking as shown in the abstracts of the claim. Holmes name was misspelled on certain of the posts and there were different names on the posts of the same claim. The Commissioner deduced from this that Holmes had not personally inscribed the posts or probably even seen them, so he declared the stakings invalid. The relevance of this citation is obscure, although it is cited in **Sutherland v. Rose** 5 M.C.C 152.

7. **Asher Gold Mines Limited and Larson**, Dec 10th, 1956
A group of nine claims were staked in 1955 by one Clarke and one Kennelly and transferred to Asher Gold Mines. The area had been burned over before staking, and was burned again after staking. As a result the staking was difficult to find, and was restaked by Larson in 1956. Inspections show that many posts were missing and blazing was not complete around the claims. However metal tags were found in the ash where some of the posts should have been. On the evidence the Commissioner decided the original staking should be held valid. On appeal to the Court of Appeal the Commissioners (sic) decision was upheld. Again, the relevance of this case is limited but it is cited in **Sutherland v. Rose**.

8. **Clarke et al v. King**, Feb 15th, 1963
In this competitive staking situation Clarke and his associate Pape staked three claims on Sep 27th, 1962. On the same day Marvin King was staking the same ground. A number

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of errors and discrepancies occurred in both stakings, including lack of blazing, knowingly inscribing the wrong time on a post, and partly staking a claim one day and only completing it on the next although plenty of time was available the first day. As well, there was much confliction of evidence, so the Commissioner decided that where there is a contest of staking "the licensee who adheres most closely to the staking regulations must succeed." This case again has limited relevance but is cited in **Sutherland v. Rose**.

9. **Sutherland v. Rose**, May 10th, 1974

This is rather an intriguing case in that it calls into issue the power of the Commissioner to go beyond evidence presented at a hearing before the Mining Recorder. As well, there are some similarities with MA 007-94, in that Rove, the respondent, was a novice staker, and that it was a non-competitive staking situation. Briefly, Rose staked six claims on August 26th, 1973 in Hyman township, an unsubdivided township in Sudbury District, two of which were side by side and partly south of John Creek. The easterly claim was bounded on the east by a surveyed claim. On Oct 31st Sutherland went into the same area to stake, and was unable to find any sign of staking south of John Creek. He staked 22 claims south, west and north of Rose's claims, and restaked and disputed the two Rose claims which extended south of John Creek. On inspection the Mining Claims Inspector found the two missing posts. The No. 2 post which should have been close to the No. 3 post of the surveyed claim to the east was some 200 feet north and 400 feet west of its proper location, obscured under a large spruce tree. No inscriptions were legible, but the posts were tagged. No blazing was found south of John Creek, although blazing north of the creek was adequate, and there was some question that the posts might have been erected later. However, the Mining Claims Recorder dismissed the dispute. On appeal a second inspection was made, by this time Rose had blazed the southerly lines of the two claims. Evidence was given before the Commissioner that Rose did not visit the area between the notice of inspection and the actual inspection, and that the tree from which the posts were cut had likely been felled in August. In his considerations the Commissioner reviewed

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> a number of previous cases, (mentioned above), and noted that the staking inadequacies did not significantly affect the staking of adjoining claims by the appellant, and also noted the apparent lack of experience of the respondent, stating "A higher standard of performance is expected from the experienced staker than from the novice and the inexperienced staker has been given some latitude in the application of the Act to his staking." Accordingly, he affirmed the decision of the Mining Recorder that the Rose staking was in substantial compliance.

Findings:

The facts in this case are not largely in issue, but the real question to be determined is how far a staking which does not comply with the technical requirements of the legislation will be sufficient to, in the case of subsection 43(1) of the **Mining Act**, substantially comply with the requirements and in the case of subsection 43(2) of the **Act**, be deemed to be in substantial compliance.

Section 43 of the **Act** as it is now drafted, heavily favours the first staker and moves from a technical analysis of the staking, referred to in the Gourley and Reid article as the mathematical approach, to an examination of the **bona fides** of the first staker, and to the question of whether the technical deficiencies would be misleading to another licensee wishing to stake in the area.

This approach appears to run through many of the cases cited. The extent to which technical deficiencies would disallow a finding of substantial compliance was dealt with in the 1988 decision of **Ramsay v. Fernberg** 7 M.C.C. 385, where the Supreme Court of Ontario, Divisional Court considered the meaning of what is now subsection 43(1) of the **Act**. The Court stated at page 389:

> In my opinion, s. 50 requires a mining recorder or the Commissioner to consider the issue of substantial compliance when considering the sufficiency of the staking out of a claim. Substantial compliance is not a doctrine, it is a statutory standard that must be considered. With respect, I consider that the learned Commissioner wrongly directed himself in the above quoted statement. Relying on the Burns case, the learned Commissioner said, in effect, that substantial compliance cannot be considered if there are numerous technical inconsistencies. Again with respect, the Burns case, in the quoted passage, does not go as far as stated by the learned Commissioner. In that case, it was decided that

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> because of a number of inconsistencies of non-compliance, there was not substantial compliance. Each case must be dealt with on its own facts. In my opinion, there could be substantial compliance notwithstanding a great number of technical inconsistencies.

The result of the **Ramsay** case was to shift the focus from strictly technical analysis of whether each of the requirements of staking had been met. The addition of subsection 43(2) of the **Mining Act**, which Gourley and Reid suggest is a codification of some of the case law, moves the focus to the conduct of the staker and the effect of the staking in the field.

Subsection 43(1) of the **Act** is interpreted to mean that substantial compliance in the circumstances will be sufficient, so that technical deficiencies themselves will not defeat the staking. The circumstances surrounding the technical deficiencies will have to be examined so that it can be determined if they are reasonable.

In the case of Mr. Everest's staking, the deficiencies found are the undersized posts, the location of the No. 1 post, the flagging instead of blazing of all but the southern boundary and swail on the eastern boundary, and the total absence of demarcation of the southern boundary. Notwithstanding the deficiencies, the tribunal finds that it will accept the evidence of the Mining Claims Inspector that it was not difficult to follow the perimeter of the Mining Claim, nor to find and identify the posts, even though the inscriptions were no longer legible.

There is little or no evidence explaining the undersized posts, although there is some indication that past stakings were done with equally undersized posts. The location of the posts was not a problem for the Mining Claims Inspector. This included the No. 1 post, the location of which was adequately explained. The tribunal finds that it accepts the location of the No. 1 post as reasonable in the circumstances. There is evidence that Mr. Everest attempted to properly locate his post. The issue of the undersized posts is another matter. In the absence of evidence, the tribunal must consider whether an attempt was made in good faith regarding the posts, or whether a staker in the field would be likely to be misled, pursuant to subsection 43(2) of the **Act**.

Concerning flagging instead of blazing, the tribunal finds that it accepts that a novice staker like Mr. Everest would have been persuaded by the interests of a surface rights holder. While these considerations would not have deterred the experienced staker, it is quite clear from the circumstances that Mr. Everest was moved to not blaze following his conversation with Mrs. McAllister. The tribunal disagrees that the reason or circumstances for the absence of compliance must be apparent in the field. A simple inquiry with the Mining Recorder would have made it clear that the land was staked. The circumstances do not necessarily have to be apparent in the field to be valid. This is in keeping with the tribunal's jurisdiction pursuant to section 121 of the **Act**, which is equitable in nature. This is clearly an instance where there is substantial compliance sufficient to allow a staking to stand, but would be subject to an order by

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the Mining Recorder to blaze the lines properly in compliance with the legislation, pursuant to an order under subsection 110(6) of the **Mining Act**.

The tribunal finds that no reasonable explanation was given for the absence of demarcation of the Township Road, although it accepts that this was the action of a novice staker, who incorrectly assumed that the road itself was sufficient.

The tribunal finds that the exceptions created by subsection 32(1) of the **Act** are not within the facts of the current case to allow flagging in the place of blazing. However, considering the tests set out in subsection 43(2) of the **Act**, the tribunal first is strongly persuaded that there is a significant reason for this, being the interests of the surface rights holder expressed at the time of staking. The tribunal further finds that there is nothing to suggest an absence of **bona fides** on the part of Mr. Everest in this component of his staking, as well as that of the demarcation of the southern boundary. As to whether a staker in the field would be misled, it is clear from the testimony of Messrs. Harper, that they were disturbed and puzzled by this flagging and lack of demarcation. The tribunal does not, however, accept that they were misled by it. This is supported by the evidence of the Mining Claims Inspector and Mr. Stocking. While such deficiencies must clearly be corrected through an order of the Mining Recorder, the tribunal finds that they are not sufficient to be considered misleading.

Concerning the question of whether flagging tape was added after the time of staking, there was no persuasive evidence at the hearing to suggest that this was the case. The tribunal finds that it was not proved.

Given that the deficiencies in demarcating the perimeter are not indicative of an absence of **bona fides** on Mr. Everest's part, and that there was no likelihood of a staker being misled in the field, the tribunal finds that there is deemed substantial compliance with the requirements of the **Act** and regulations pertaining to staking. Therefore, Mr. Everest's staking of the Mining Claim is found to be valid.

Dealing with the questions in issue, the tribunal finds, in reference to the first question that the answer is no; the Acting Mining Recorder did not err in finding that the failures to comply with certain requirements were not likely to mislead any licensee in the area.

The tribunal similarly finds that the answer to the second question is no; the Acting Mining Recorder did not err in finding that there was an apparent attempt in good faith by Mr. Everest to comply.

The tribunal finds that the answer to the third question, concerning whether mandatory blazing requirements can be circumvented is no. However, where there is a finding of deemed substantial compliance through good faith attempts to comply and no likelihood to mislead, the deficiency is one which can be corrected by an order of the mining recorder made pursuant to subsection 110(6) of the **Act**.

There is no need to determine the fourth question.

Exclusion of Time

Pursuant to clause 67(1)(b) of the **Mining Act**, the time during which the Mining Claim was pending before the Acting Mining Recorder and the tribunal, being May 6, 1993 to January 15, 1996, a total of 924 days, will be excluded in computing time within which work upon the Mining Claim is to be performed.

Pursuant to subsection 67(2)of the **Act**, November 9, 1996 shall be deemed to be the date for filing the first and second units of prescribed assessment work on the Mining Claim. All subsequent anniversary dates shall be deemed to be November 9.

Conclusions:

Based upon the findings set out above, the appeal from the decision of the Acting Mining Recorder is dismissed. The time during which the matter was pending before the Acting Mining Recorder will be excluded. There are no costs payable by either party to this appeal.

The order of the Mining Recorder pursuant to subsection 110(6) of the **Act** remains in full force and effect.