Appeal No. MA 010-92

L. Kamerman
Mining and Lands Commissioner

Tuesday, the 6th day
of July, 1993.

THE MINING ACT

IN THE MATTER OF

A dispute against Mining Claim SO-1150997, situate in the Township of Lake, in the Southern Ontario Mining Division (the "Mining Claim").

B E T W E E N:

MICHAEL OSIEL

Disputant

-and-

ULDIS ABOLINS

Respondent

AND IN THE MATTER OF

An appeal by the disputant from the decision of the Acting Mining Recorder of the Southern Ontario Mining Division dated the 22nd day of April, 1992 dismissing the dispute.

ORDER

WHEREAS the tribunal received the appeal on May 27, 1992 and a hearing was held in Toronto on January 7 and 8, 1993;

UPON hearing from the parties and reading the material filed both prior to and at the hearing;

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1. THIS TRIBUNAL ORDERS that the appeal from the decision of the Acting Mining Recorder of the Southern Ontario Mining Division dated the 22nd day of April, 1992 in respect of the Mining Claim is dismissed and the matter is referred back to the Mining Recorder of the Southern Ontario Mining Division for an order pursuant to subsection 110(6) of the **Act** for the movement of posts to create claim boundaries of 605 metres on the east and west claim line and 660 metres on the north and south claim line, and reblazing where necessary.

2. THIS TRIBUNAL FURTHER ORDERS that the time during which the Mining Claim was under pending proceedings, being November 19, 1991 to July 26, 1993, is excluded in computing time within which work upon the Mining Claim is to be performed.

3. THIS TRIBUNAL FURTHER ORDERS that July 4, 1995 is fixed as the date by which the first and second prescribed units of work shall be performed and filed.

4. THIS TRIBUNAL FURTHER ORDERS that costs fixed in the amount of $1,250 be paid to the respondent by the disputant.

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.

DATED this 6th day of July, 1993.

Original signed by
L. Kamerman

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MINING AND LANDS COMMISSIONER.

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REASONS

Background

The subject matter of this appeal is the staking of the west half of Lot 17, Concession IV, in the Township of Lake, in the Southern Ontario Mining Division.

Facts which are not in dispute are that an application to record, concerning

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the lands set out above, made out by Uldis Abolins, the respondent, was stamped received by the Southern Ontario Mining Division on October 18, 1991, and recorded as Mining Claim SO-1150997 ("claim 997"), in the Township of Lake, in the Southern Ontario Mining Division. Michael Osiel, the disputant and appellant in these proceedings, attempted to file an application to record with the Mining Recorder of the Southern Ontario Mining Division ("Recorder") for the subject lands, and an equal portion directly to the south, on October 18, 1991. The application was marked "filed only". The portion of the application for the land immediately to the south of the subject lands was also not recorded.

A dispute was filed by Osiel against claim 997 on November 19, 1991, in accordance with subsection 48(1) of the **Mining Act**. The Acting Mining Recorder (the "Acting Recorder") held a hearing of the dispute and issued a decision on April 22, 1992 dismissing the dispute. Abolins was ordered to move his No. 1 and No. 4 post to be in accordance with a survey pin which had been discovered during an inspection by the mining claims inspector (the "Inspector"), to re-blaze the lines where necessary, and provide written notice of compliance by July 3, 1992.

A notice of appeal dated April 30, 1992 was received by the Recorder on May 1, 1992. The notice sets out two matters on appeal, being the dismissal of the dispute, which is the subject matter of this appeal, and the decision to cancel the southern portion of Osiel's mining claim bearing tag number 115216 (the southern half of Osiel's staking). The second issue is the subject matter of another appeal between Osiel and the Minister of Northern Development and Mines.

The reasons for the appeal are as follows:

1. "Recorder lacked objective judgement which resulted in a prejudiced application of the **Mining Act**."

2. "Claim inspector's report flawed."

3. "Recorder's disregarded and or mischaracterized Mr. Osiel's facts."

A statement of particulars with documentation to be relied upon at the hearing was received by the tribunal on May 27, 1992.

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Preliminary Matters

An appointment for hearing dated December 2, 1992 was sent by registered mail to Osiel and Abolins and acknowledgement of receipt was returned by the post office for both parties. At the commencement of the hearing on January 7, 1993, the tribunal determined that the parties had notice of the hearing and having complied with the requirements of the **Mining Act** and the **Statutory Powers Procedure Act**, R.S.O. 1990, c. S.22 (the **S.P.P.A.**) took jurisdiction to hear the appeal.

Listed on the appointment for hearing to be determined as a preliminary issue was whether the hearing of this appeal and the appeal in the case of **Osiel v. The Minister of Northern Development and Mines** should be heard together.

Relying on correspondence from the Acting Mining and Lands Commissioner dated June 26, 1992, Osiel stated that his understanding had always been that the two appeals would be heard separately. Initially, appointments for hearing for the two matters were three weeks apart. When subsequently rescheduled, the matter of a common hearing was raised. Osiel indicated that he was not adequately prepared to deal with the second appeal on January 7, 1993. He also submitted that Abolins has no right to be heard on the second appeal as no dispute had been filed with respect to the southern half of Osiel's staking. He submitted that without having filed a dispute under section 48 of the **Mining Act,** Abolins could have no standing in the second appeal.

Osiel submitted that the letter of the Ministry of the Attorney General dated **June 18, 1992** from John Norwood determined the manner in which the two appeals would be heard and that at no time had he been advised differently. It was also a possibility that, depending on the outcome of the first hearing there might not be need for a second hearing.

John Norwood, appearing from the Ministry of the Attorney General on behalf of the Minister of Northern Development and Mines indicated that, while he had initially indicated to the Acting Mining and Lands Commissioner that the two appeals should be heard separately, he was, at the time of the hearing prepared to proceed on the basis of having the matters heard one after the other, but not together. However, he submitted adequate notice had been given by the two appointments for hearing, and Osiel should be prepared to proceed. As all witnesses were present, considerable time and expense had been spent in preparation and adequate and clear notice had been given, the Minister of Northern Development and Mines was prepared to proceed.

Speaking to the manner of proceeding, Mr. Norwood submitted that,

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although he had precipitated the division of the notice of appeal into two separate appeals, by considering the matter at a common hearing, problems could arise in controlling the testimony as it might relate to the separate appeals.

Abolins stated that he had understood from the appointment for hearing which he received that he would be entitled to speak to both appeals stating that he wished to be heard in regard to the southern half of Osiel's staking, being the northwest and southwest quarters of Lot 16. With the matter tied up by pending proceedings, further staking and exploration of that part of Lot 16 was closed to him and the provisions of what he termed the "new **Mining Act**" did not allow him to file a dispute against Osiel's "filed only" application as it concerned part of Lot 16.

The tribunal determined that it would hear the two appeals separately and sequentially. This second determination became moot, as there was insufficient time to commence the second hearing within the time scheduled.

Issues

Two issues were put forth for the tribunal's determination:

1. Was the mining recorder in error in exercising her jurisdiction pursuant to subsection 46(1) of the **Mining Act** in determining that Abolins' claim 997 should be recorded?

2. Was the acting mining recorder in error in determining that the staking of Abolins' claim substantially complied with the requirements of the **Mining Act** within the meaning of section 43?

Evidence

Evidence of Michael Osiel

Osiel gave sworn testimony on his own behalf. He stated that he had staked six mining claims in Concession IV of the Township of Lake and did some work on the claims. In 1991 he noticed that two mining claims were staked by Abolins which he

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regarded as an attempt to surround his claims, one being north and one being southwest of his existing claims . On October 17, 1991, Osiel staked the west half of lots 16 and 17 in Concession IV.

Osiel stated that twelve days before his staking he made inquiries concerning the changes to the **Mining Act**, more particularly concerning the new rules and procedures for staking. On the day of staking he went to the property with James Cuddy, and at no time did either of them see any evidence of the Abolins' staking. Osiel stated that while at his No. 4 post he did see the No. 1 post of Abolins' claim SO-1150995, which had been staked on August 9, 1991. However, Osiel stated that he saw no indication on the ground that the land comprised of the west half of Lot 17 in Concession IV, Abolins' claim 997, had been staked.

Osiel stated that on October 17, 1991 he and Cuddy had gone in six miles by canoe and walked another mile on foot carrying all equipment necessary, being tags necessary to the staking, an axe and a gasoline powered chain saw. Cuddy had carried food, the compass and water. Osiel stated that they had only two hours supply of provisions.

Osiel's application indicates a time of commencement of staking of 11:10 a.m. and a completion time of 4:36 p.m. Osiel stated that he had completed the staking in accordance with the **Mining Act**, R.S.O. 1990, c. M14 and Ontario Regulation 115/91 to the best of his ability. According to his observations, the area was full of timber which were of correct size to make legal sized posts, as evidenced in the last paragraph of page two of the inspection report of Douglas Leaper (ex. 4).

Osiel stated that he had proceeded to stake his claim in full compliance with the legislation and his application to record (ex. 2) was stamped by the mining recorder on October 18, 1991, when he was informed that there was another application to record. Osiel stated that, while in the recorder's office he saw that the other application had not been stamped and did not bear the hand written notice concerning the time received, which had been put on his own application. Osiel stated that he did not know how Abolins' application had got to the mining recorder's office, but he had been told that it had been mailed in.

According to Osiel, before Abolins' application to record was stamped, Osiel asked to see it, and pointed out deficiencies. The application did not show the distance in metres and did not show the distance between the line posts, having only one witness

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post between the No. 1 and No. 2 posts. Osiel stated that he had been told that where an applicant had not cut down a witness post, an application to record had been denied, this being a fundamental element of staking.

Osiel stated that priority of completion of staking prevails, and staking includes proper recording. In his own application, all distances are shown in feet and metres and all posts which are required by the **Act** and regulation are shown on the map and on the ground. He submitted that his staking was as good as was possible under the circumstances.

Osiel stated that he had suspected that the distances shown on Abolins' claim map were not correct. He submitted that the No. 2 post of mining claim 1150995 should correspond to the witness post between the No. 3 and 4 posts of Abolins' 997 claim, which is not the case. In his statement of particulars dated July 31, 1992, Osiel raised his intention to challenge the mining recorder's decision to record Abolins' application. By response of the Deputy Commissioner, dated August 10, 1992, it was set out that this was not an appropriate matter to be considered in the appeal. However, at the hearing, evidence and submissions concerning this issue were received and considered.

Osiel submitted that his letter of July 31, 1992 challenged the decision of the Recorder at the time of filing to accept Abolins' application. He submitted that the Recorder has discretion to determine whether all of the requirements of the **Act** and regulations have been met and submitted that this had not been done.

Osiel stated that, due to the inconsistencies in staking, he went to great effort to see the No. 4 post of Abolins' 1150995 claim, which he had been unable to find.

Under cross-examination, Osiel stated that he did not know if he informed the Recorder of his intention to stake the lands contained in the west half of Lot 17 in Concession IV in the Township of Lake. When asked how he proceeded, Osiel was challenged as to whether he went one kilometre by canoe, as opposed to six, and 200 metres by foot, as opposed to one kilometre. His purpose in overshooting the east/west boundary of his claim was to initially locate his Mining Claim SO-1042048, which is comprised of the northeast quarter of Lot 16 in Concession III in the Township of Lake.

Under questioning by Derek McBride, agent and witness for Abolins, Osiel was asked, if he had proceeded down to the rapids, a distance of one and one-half miles,

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and then headed back north to locate the No. 1 post of claim 995, when he could have used the blazed line of claim 995, which crosses the river and is clearly marked at the bank by flagging and blazing to locate the No. 1 post. Osiel responded that there are many disputes in Lake Township, and he preferred to position himself with his own mining claims SO-1042048 and SO-1042049 located to the south to ensure that he was in the same area. Osiel stated that they first went down to the first rapids, and then proceeded northward to look at the terrain. Upon finding the No. 1 post for claim 995, they proceeded inward. When asked how the No. 1 post of claim 995 was located, Osiel stated that they had looked for it. He stated upon locating it, he deliberately checked the surrounding land for a No. 4 post, to ensure that the lands in question had not been staked. McBride submitted that Osiel's evidence could not be reconciled on this point. The tribunal asked Osiel why he had not lined up his No. 3 post and the line post between the No. 3 and No. 4 posts with his mining claims bearing numbers SO-1042048 and SO-1042049 to which Mr. Osiel responded that the area was swampy and he could not locate them. Osiel stated that he had staked his other claims in the area 3 or 4 years ago.

McBride asked what a magnetic declination is which Osiel initially declined to answer, then responded that it is North 10 degrees West. When asked what the true direction of the township lines is, Osiel responded that there are great arguments on this issue and that all surveys are in dispute and have not been settled. McBride stated that one must know the direction of the township lines to properly stake a claim.

Concerning Osiel's evidence of locating the No. 1 and 2 posts of claim 995, Osiel stated that he found the line between the posts and was able to locate the posts. He walked a distance of 579 metres to the east to locate his No. 1 post. When asked what the forest was like in the area, Osiel stated that the forest was dry, not wet and contained all kinds of timber. There had not been any kind of harvest in the area. Abolins suggested, in fact, that the area had been cut over. Osiel stated that there is a dispute concerning the property to the north of Lot 17 and only the property on Lot 18 is cut over.

Osiel stated that his No. 4 post is within 30 to 50 feet of the No. 1 post of claim 995. When asked whether he saw the north-south claim line between the number 1 and 2 posts of claim 995, which were flagged, Osiel stated that he could not recall whether the line was blazed. Asked to describe the country between the No. 1 post of claim 995 and his own No. 1 post, a distance of 25 to 30 metres, Osiel stated that it

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was the same as all around, with some timber missing or wood strewn around. When asked whether it was open land or forest, Osiel stated that it was a matter of interpretation.

When asked about the type of country between the No. 1 post of claim 995 and his own No. 1 post, Mr. Osiel stated that it was not easy to describe. His line was not straight due to fallen trees. He stated that it was swampy. There was no evidence of human activity. He stated that there may have been some trails for the harvesting of trees or for hunting.

Evidence of Douglas Leaper, Inspector, called by Mr. Osiel

Leaper stated that he had been a mining claims inspector for 29 years, and prior to that had been involved in exploration for a further 10 years. He was asked to explain what he meant in his inspection report #91-23 (ex. 4) on page 1, last paragraph, referring to Abolins' staking, what was meant by, "[a]ll of Abolins' posts were a **little** undersize with the exception of his # 4 post...". Mr. Leaper stated that the posts were 3/4 of what they should be. When asked whether he was aware that in many cases 3 inch posts were found to be undersized and not in compliance with the requirements of the legislation, Leaper responded that the determination was up to the tribunal. Osiel suggested that the use of the word, "little" was prejudicial, and pointed out that, for five out of six posts, the measurements were 7 or 7.5 centimetres. Leaper responded that the inscriptions on the posts were nonetheless very clear. Referring to page two of the report, Osiel read into the record, "There is timber consisting of poplar, birch and spruce available to make legal size posts."

Osiel asked about the trees used in his own staking which Leaper could not specifically recall with the exception of a spruce used at Osiel's No. 2 post, a rotten poplar at Station 10 (the line post between the No. 1 and No. 2 posts), maple at the No. 1 post and a hardwood at the No. 4 post. Osiel questioned whether there was, in fact, a problem in finding trees large enough to meet the requirements of the legislation. He postulated that one must start with a larger tree in order to arrive at a post of the correct size. Leaper responded that an experienced staker could take a tree with a 6" diameter and end up with a 3 1/2 " face on a post, by using an axe. Abolins used poplar and spruce in his posts. Osiel suggested that by starting with a 6" as opposed to a 12" tree, it would take less time to cut a post. Leaper stated that it is not necessary to use a 12" tree, and that

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most prospectors use an axe to make their posts. He agreed that they are not precluded from using a chainsaw. Osiel suggested that, if a prospector wanted to be completed quickly, he would be hampered by using a 12" tree rather than a 6" tree. Leaper responded that there was no law to prohibit the size of the tree used to make the posts.

When asked whether he could recall discussions with Osiel concerning whether there was any way to determine whether Abolins' No. 4 post had been erected after Osiel's No. 4 post went up, Leaper stated that he could not recall such a conversation with Osiel and the first time he had been asked the question was at the hearing before the acting mining recorder. In response to the question, Leaper stated that he could not tell whether the posts had been constructed a week apart, but it may be possible to tell where the posts had been constructed two weeks apart.

Abolins' No. 4 post of claim 997 was 50 metres north of the No. 1 post of claim 995. Leaper had no difficulty seeing the post, as it was located in a clearing on a bald rock. Osiel suggested the visibility would depend on the direction one was facing and whether there were leaves on the surrounding trees.

When asked about the undersized nature of Abolins' posts, Leaper replied that the posts used were the only suitable trees in the area without going 200 to 300 feet into the bush.

When asked about the importance of marking posts adequately, Leaper responded that the posts used for Abolins' staking of claim 997 are recognizable. He stated that the area will dictate the type of posts used. For example an area of birch might necessitate a different type of post.

On the day of inspection Leaper met McBride at the cheese factory in Eldorado, and when Osiel did not show up and after leaving a message, they left. They proceeded in Leaper's vehicle on a road to Whetstone Lake, located northwest of claim 997. They drove right into claim 997, turning off on a logging road. Driving along the logging road, they crossed the north boundary of Abolins' claim, where Leaper observed that it had been both blazed and flagged, with the width of the blaze being 10 centimetres, measuring 30 centimetres from the top down and was on four sides of the tree.

Leaper stated that a properly inscribed post will have the tag number, name, licence number, the date and time of the staking, and the lot and concession numbers

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of the township under staking, which should be visible for a period of at least one year. While some pencils fade after six months, the better ones will last. Line posts are to be placed along the claim line, showing the distance from the corner post from which the staker is proceeding.

A number of photographs (ex. 8A through 8M) taken by Leaper, were referred to on cross-examination, illustrating stations 1 through 6 of Leaper's Inspection Report. It was pointed out that Leaper had been summonsed as Abolins' witness, but called by Osiel. Osiel stated that, in the interests of saving time, he had no objection to introducing the pictures at this time as long as he had the opportunity to cross-examine. He pointed out that the pictures do not address the issue of the missing witness post between Abolins' No. 1 and No. 2 posts.

Referring to stations 4, 5 and 6, which correspond to Abolins' No. 3 post, the line post between his No. 3 and No. 4 posts and his No. 4 post, Osiel noted that there is no distance noted between stations 5 and 6, although a distance of 300 metres is shown on the line post denoting the distance between stations 4 and 5. Leaper stated that the distance between stations 5 and 6 is 450 metres and between 4 and 5 is 300 metres. He obtained these distances by scaling the location of the posts from the 1982 Ontario Base Map, (ex. 30), which shows lots and concessions taken off an air photo. Osiel asked the authority upon which the lines showing lots and concessions were marked. Leaper stated that it was established by survey and could contain a 100 to 200 foot margin of error.

Leaper stated that the lines plotted on the map were not absolutes, and that he had actually inspected the distances and measured them. In response to Osiel's question, he responded that 300 metres had been marked on the post as the distance between the No. 3 post and the line post at station 5. Again in response to the question, Leaper stated that the distance between station 5 and 6 is not marked. Osiel pointed out that this discrepancy does not show on the Inspection Report, and was information relevant to the mining recorder in her determination to accept Abolins' application to record at the time it was filed.

Evidence of Uldis Abolins

Uldis Abolins stated that during October 11, 12 and 13, 1991, he had been

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in the area conducting geochemical surveys with Derek McBride and McBride's son.

On Sunday, October 13, 1991, the three of them came down the river and started at post No. 1 of claim 995, which was easy to locate as every 100 metres shows a flag line on the boundary through to the river. He stated that he noted at this location, which was to be his No. 4 post for the claim 997, that there was a strong magnetic influence in the area and that blazes were turning to the right. There was a dead tree beside the No. 1 post of claim 995.

Abolins stated that the No. 4 post of claim 997 is in an open area, as is the No. 1 post of claim 995. He stated that there was a lot of brush at the No. 1 post and to the east along with an evergreen thicket.

Abolins agreed that he had not gone along for the inspection, as McBride had attended. As proof that he had been in the area, Abolins stated that he relied on the field notes taken by McBride, and his receipts (ex. 9A, B and C) in the amounts of $25.00, $96.00 and $53.76 respectively. Also, either he or McBride had filed OPAP reports as required by their grant, which were filed with the Ministry of Northern Development and Mines in Sudbury and became public files one year later.

Abolins stated that McBride's son had been in charge of the compass. McBride followed with a hip chain, which measured the meters travelled. McBride cut the trees, with Abolins helping. Abolins had completed the cutting to the best of his ability, as he had surgery on his hand and could not easily wield an axe. However, as the tags had been in his name, the claim was staked to be in his name.

Abolins stated that all required data had been inscribed on the posts. He submitted that if Osiel disputes his claim, Osiel should be held to a better standard of staking.

Concerning the allegations made by Osiel that Abolins and McBride had not been in the area, Abolins questioned the manner in which Osiel attempted to locate their mining claim, namely that if Osiel had paralleled his line, as he stated or claims to have done, there would be no way he could have done it, and in fact, no way to show that he was even in the area. The opinion was expressed by Abolins that Cuddy, who does not have a licence, did the staking.

Abolins stated that the sketch attached to his application to record shows the 12

topography of the claim, culture, access and location. As proof of the accuracy of locating the claim, Osiel stated that a cairn post was subsequently found on the claim line.

Concerning the filing of his application to record, Abolins stated that he attended at the Office of the Southern Ontario Mining Recorder at 8:50 a.m. on the morning of October 19, 1991 and has a stamped receipt showing payment for recording of his mining claim. The tribunal directed that the receipt be filed. A copy of a receipt sent by facsimile from the mining recorder was tendered at the completion of the hearing, but was not entered into evidence. A photocopy of the same receipt, showing #1150997 in the amount of $40.00, was filed after the hearing. The receipt shows a time of 8:54 a.m., but does not show a date.

Abolins stated that his application to record is stamped with the time it was submitted. He had been told by the Recorder that there had been a problem with the stamp, in that it had not been moved forward. However, it was his evidence that he submitted the application in person and not by mail.

While Abolins acknowledges that there is an error concerning the distance between the line post between corner posts No. 3 and No. 4, the inspection report gives the actual distance. Abolins stated that the areas between stations 4 and 5, being his No. 3 post and line post, comes upon an open area of water. He stated that they had flagged along side of the water. With respect to the witness post used to mark the line post between his No. 1 and No. 2 posts, Abolins stated that it was a good birch post and was visible from the pond.

Abolins stated that the scale bar used is representative of the mining claim staked. It shows the magnetical north at 10 degrees. He stated that there is easy access to the mining claim through the logging road which runs through it and submitted that the photographs to be produced will show that Osiel missed it.

After the dispute was received, Abolins stated that he could not believe that anyone could not see the signs of his staking. On November 24, 1991 he went to the site with McBride and an independent witness and took photographs of the location of the mining claim. He stated that nothing was touched at that time. He made the following observations, which were evidenced by the slides. He stated that from Abolins' No. 4 post, Osiel's No. 4 post can be seen and the opposite is also true. He stated that anyone in the

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area would have noticed the old blazed line which heads north from the No. 1 post of claim 995. He assumed that this was an old logging blaze. Abolins stated that the logging line carries on over the No. 1 post of claim 995 and that the area was obviously logged. He stated that claim 995 was west of where it should be due to the blazed logging line, and that the actual surveyed lot is much narrower.

Under cross-examination, Abolins was asked what the dates were on the bills submitted as evidence that he had been in the area, to which he replied October 11 and October 12, 1991. Osiel asked why he had no receipts for the 13th. Abolins stated that he had one motel bill and one hotel bill and had gone home on the Sunday night. Asked what he had done in the area, Abolins stated that on the 11th and 12th, he had been prospecting on claim 995, which included rock mapping, lines, soil geology and vertical loop electromagnetic survey.

Abolins stated that he had stayed at McBride's cottage for one night, which is one hour from the area and as he had filled the car with gas, he did not need to fill his tank again. He got gas the next day, being the Monday, although he did not have a receipt. When asked to show what evidence he had to prove he had been in the area, Abolins stated that he had field notes and two witnesses. When asked what the bill for $96.02 was for, he responded that it was for supper and lunch for the next day.

For purposes of clarification, Abolins stated that he had not filed for work done on October 11 and 12 as he had filed an OPAP grant. He filed a geological report with the mining recorder. The OPAP grant requires that a copy of the field notes be filed. It does not require that the days of work be established.

Osiel submitted that one would be able to see whether work had been done. Abolins stated that he had worked from August to late December, 1991, when work on the grant was due. It was filed in January of 1992. Abolins stated that he had worked from August, 1991 to late December, when the geophysical was due. The report filed was not on claim 997, but was with respect to the grant.

Concerning the application to record, Abolins stated that he brought it to the mining recorder's office around 9:00 a.m. Osiel asked why he did not have his receipt at the hearing. Concerning the date stamp on the application, Abolins stated that he heard the application being stamped. The tribunal asked why time was an issue, to which Osiel responded that he had been told it had been mailed. Abolins stated that he had

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paid cash for the filing, and he only noticed that the time stamp was incorrect at the hearing before the acting mining recorder.

Abolins stated that he has had his prospector's licence since 1970. Asked whether he had taken time to familiarize himself with the new **Mining Act**, he responded that he had, and in fact had staked his block claim backwards. In response to the question of who staked the claim, Abolins stated that he had staked it, but McBride had helped. McBride had assisted with the cutting of each post which Abolins had finished and on which he inscribed the required information. Abolins stated that Jeremy McBride's contribution was irrelevant, that he took a compass bearing, had assisted with the prospecting on previous days and did not touch a claim post. When asked by Osiel whether the younger McBride took measurements, Abolins responded that it had been Derek McBride who wore the hip chain.

When asked why distances had not been recorded on the sketch, Abolins stated that they were irrelevant as the bar scale represents distance and is adequate for purposes of survey work.

Asked about the discrepancy in the distance between the No. 4 post and the line post on the way to the No. 3 post, Abolins stated that the staking is correct, while the sketch is not. Osiel asked whether 400 metres had been covered in the field, but represented as 300 metres in the sketch. Abolins stated that the claim should be 450 metres to the witness post.

Pointing out that there was only one witness post between the No. 1 and No. 2 posts to indicate the location of the line post which is in a pond, Osiel asked whether Abolins had checked with the Recorder concerning the use of witness posts, and suggested that the staking was incomplete as a result of the missing witness post. Abolins stated that he had not memorized the changes in the **Mining Act** and now understood that two witness posts were required. Osiel asked why he had not consulted with the Recorder prior to going to the field.

Viewing the sketch filed with Abolins' application, Osiel asked why a witness post is shown in the middle of the pond between the No. 1 and No. 2 posts. Abolins responded that a line post is indicated in the middle of the pond and the witness post is

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indicated south of the pond. He stated that the line post and witness post is the same symbol, except that the witness post has a "wp" beside it.

Asked why he thought Cuddy had staked Osiel's claim, Abolins responded that he had formed his opinion based upon the fact that Osiel knew nothing about the ground around his No. 4 post. He also based his comment upon Osiel's knowledge of the area and drew his conclusion when comparing Osiel's sketch with the field. Osiel stated that Abolins was alleging fraud. Abolins pointed out that the No. 1 post of claim 995 was visible from the No. 4 post of either Abolins' or Osiel's claim. Osiel questioned whether the leaves were at least half on and half off the trees at the time, so that visibility had been obscured, and once again stated that he had not seen Abolins' No. 4 post.

Abolins stated that his sketch had been prepared from McBride's field notes. He stated that there had been no reason to further measure the lines. Responding to evidence that the possibility existed that the Abolins' staking had not taken place, Abolins stated that Leaper took his evidence from the field. With reference to the particular measurement which is incorrectly shown on the sketch, Abolins stated that the line is representative of a claim line of 400 metres, while the sketch shows 300 metres. Osiel submitted that Abolins had knowingly misrepresented his distances on his sketch, to which Abolins responded that the line required that he walk around a pond, and that evidence from the field shows that they had walked 400 metres more or less.

When asked whether, because someone knows the topography of an area, would it be taken that a staking should be granted greater validity, Abolins responded that it simply shows that he had been in the area. He pointed out that Osiel's sketch does not even show a pond.

Asked about his disability and whether he is prevented from chopping trees, Abolins stated that it does not prevent him from doing so, either now or in 1991. Osiel then asked why Abolins' posts were undersized. Abolins stated that while he agreed that his blazes were not 10 centimetres across, he felt that his posts are large enough to conform to the law. He reiterated that, to the best of his ability, he has conformed with all requirements of the law. When asked why a number of his posts were undersized, Abolins stated, "who knows?", and said that he used the available trees on the land. In deference to the surface rights holders' interest in the larger trees, Abolins stated he would be reluctant to use saleable timber, where possible. When asked why he did not use a chain saw, Abolins stated that he did not feel it was an appropriate field tool. Generally,

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it was his practice to use timber on the ground, and he did so with the exception of his post No. 4, where the tree used was the only one of stature in the area.

Again, Abolins stated that he placed his No. 4 post north of the No. 1 post of claim 995 because of the magnetic anomaly in the area.

Asked about his relationship with Cuddy, Abolins reiterated that he had not worked on trenches on Osiel's other claims or taken any samples from those trenches. He stated that Osiel's mining claims SO-1042048 and SO-1042049, to the west of the southern half of Osiel's staking, show trenches. In an attempt to locate Osiel's mining claims on the ground Abolins relied on information filed by Osiel which indicated trenches. He attempted to locate those trenches on the ground, which he could not do. He then tried to locate Osiel's lines, which he also could not do. He then relied upon the topography in the area to locate the claims, so that he could stake his claim SO-1150996. Osiel asked several questions as to whether Abolins had spoken to either Cuddy, the mining recorder or someone in the recorder's office about him. Abolins denied that he had made any derogatory comments about Osiel, as was suggested.

Evidence of Derek McBride

Derek McBride stated that, where a dispute has been filed, he believed that a displacing claim should be shown to have been staked equally well if not better than the claim under dispute. This matter is dealt with by the tribunal under "Findings" below, although at the hearing no evidence concerning the Osiel staking was allowed.

McBride stated that he obtained information in Madoc conserning the Township of Lake. He and Abolins chose to prospect in this area because funds granted by OPAP are not sufficient to finance prospecting in northern Ontario.

McBride stated that he had a copper showing south of Tomahawk.. He indicated that there was a showing on Osiel's property, being claims SO-1042048 and SO-1042049, the original work of which was done by Mr. Sophia in the 1950's. After claim 995 had been staked, with very clear flagging and blazing, the claim was evaluated using an east to west grid with a 100 metre line spacing. Afterwards, Mining Claim SO-1150996 was staked to the south of the southern half of Osiel's staking, that is, in the west half

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of Lot 15 in Concession IV. Evidence of the geological map of Mining Claim SO-1150996, part of the OPAP submission for 1991, shows the top along the north of the claim line.

Due to the interest this prior work created and owing to the magnetic anomaly, McBride and Abolins decided to stake lands directly east of claim 995. McBride stated that they staked in a counter-clockwise direction, which is only permitted in a block claim. He stated that there was no activity in the area, except for along Osiel's six mining claims which were situate along the Crow River.

On November, 19, 1991, McBride became aware that Osiel had filed a dispute in connection with the mining claim. Believing that the dispute showed a serious problem on the property, he and Abolins were concerned that someone could be on the property and not see the posts and blazes. McBride stated that on November 24, 1991, he, Abolins and a witness, Mary Kierney went to the property to see what was there. They took along a camera and McBride took photographs.

McBride stated that he was concerned that the line post along the west of the claim may have been removed, because if Cuddy and Osiel had been where they said they were, there was, in his estimation, no way they could not see it. McBride stated that the post was where they had left it, clearly marked. Slides 30 and 31 (ex. 11 and 12 respectively) show the No. 4 post of claim 997, including a close-up of the writing on the post. Slide 32 (ex. 13) shows McBride in the distance at Abolins' No. 4 post, looking south to the #1 post of claim 995. He stated that an estimate of the distance is 50 metres, and shows a blazed tree half way between and while Osiel stated that he had walked 30 feet north of the No. 1 post of claim 995, the slide shows that the tree had been blazed.

Slide 35 (ex. 14) taken from Osiel's No. 4 post shows flagging tape hanging in a tree near the No. 1 post of claim 995, a distance of 25 metres. Slide 34 (ex. 15) shows blazes on the claim line running south from Abolins' No. 4 post towards his line post, being coincident with No. 2 post of claim 995. Behind the trees, one can see the head of the pond, which is shown on the sketch. Slide 29 (ex. 16) shows the canoe at Whetstone Lake. Slide 38 (ex. 18) shows the proximity of the No. 1 post. Slide 33 (ex. 19) shows the No. 4 post of claim 997 which was taken from the #1 post of claim 995. Scrub forest is seen in the area, and clear blazing is shown on the trees. Again, McBride questioned how Osiel could have walked north of the No. 1 post of claim 995 and missed this field evidence. Slide 20 (ex. 20) shows the No. 1 post of claim 995 taken from Osiel's

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No. 4 post. Slide 39 (ex. 21) shows the line post between Abolins' No. 3 and No. 4 posts, located at the south side of the pond. McBride stated that, at the time of staking, the requirements of the **Act** were exceeded with the flagging and blazing of the lines and that no one in the bush could mistake what was written on the posts of the Abolins claim. A slide not filed as an exhibit shows a red tag on a line post. Mr. McBride explained to Osiel that this is required for claims of greater than one unit. The use of the red tags was unfamiliar to Osiel.

McBride then offered as exhibits photographs (ex. 22 through 26) taken during the inspection with Leaper on December 18, 1991. He stated that the inspection started at Abolins' No. 4 post of claim 997. Access was by road, which went into the property from the north. McBride stated that it is a logging road which runs from the northeast to the southwest of the Abolins claim. He explained that the area had been logged for pine. Exhibit 22 shows Abolins' No. 1 post of claim 997. McBride reiterated that the red tag is visible and the post is squared on two visible sides. Exhibit 23 shows Abolins's No. 2 post with the claim tag on the upper portion of the post and the inscription clearly visible. Exhibit 24 shows the southwest corner of the claim, and again, all information is legible and the claim tag is visible. Exhibit 25 shows the line post between posts No. 3 and No. 4. McBride described it as a stump post four feet above the ground, which is made of an angled birch. He pointed out that in the right of the photograph is a blazed tree. Behind the tree, the No. 2 post of claim 995 can be seen. McBride pointed out the flagging tape used on the No. 2 post and suggested that anyone wanting to tie onto claim 995 would have no difficulty in locating it. Exhibit 26 shows an old wagon. McBride stated that a walking trail is mentioned on Abolins' sketch, near the No. 4 post. He stated that this is 15 to 20 metres away from Osiel's claim line and, being a point of culture, establishes that Abolins was in the area. McBride stated that the old wagon, dating back to the 1930's, is shown on the sketch of Mining Claim SO- 1150996.

Referring to the original survey done in the Township of Lake, McBride stated that it had been done in the 1800's, most likely between 1830 and 1860, with the concession lines being between 168 degrees to 170 degrees true azimuth. He stated that he had checked who the owner of the surface rights was, and attempted to get a complete background. Explaining that there are several generations of surveys in the Township,
Mr. McBride stated that the first survey resulted in a stone cairn erected on the corner of each lot, with no intermediate lot line having been marked. The cairn found is the only evidence of the original survey, having been placed along the concession line. A second cairn was found 20 metres east of Osiel's No. 4 post on his north claim line, being a metal

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post measuring one inch by one inch and is twelve inches high. McBride stated that this part of the area had been re-surveyed and the surrounding stone cairn had been knocked down.

Looking at Leaper's evidence, McBride stated that the corner of the lot should be next to the post, or 100 metres east of Osiel's No. 4 post. In fact, McBride stated, the cairn is 50 metres west of the pond. McBride pointed out that this is indicative of the levels of precision.

Referring to Ontario Regulation 115/91, the tribunal pointed out that subsections 5(6) through (10) contemplate the various types of original surveys and asked what type of survey had been done in the Township of Lake. McBride stated that the corresponding units of a mining claim for the township would be 160 hectares, with 80 metres to a side. He stated that, due to poor chains used, what had been reflected on the ground was not this accurate.

Under cross-examination, McBride agreed that the photographs he took were not the same as those of Leaper. McBride stated that the slides were taken for purposes of establishing Abolins' integrity, showing that the mining claim had been staked as was indicated on the application to record and confirming the affidavit in support of the application. Osiel asked whether the slides and photographs were tendered as evidence of what took place on October 13, 1991. McBride responded that they confirm the position of the posts and the claim lines. Osiel stated that the affidavit cannot confirm the staking which took place. When asked about the difference between the slides of November 24, 1991 and the photographs of December 18, 1991, McBride stated that the slides were proof that Abolins had been in the field on October 13, 1991. Osiel asked how this proof was arrived at, to which McBride responded that the slides substantiate the location of the posts and therefore, substantiate the diagram attached to the application. He stated that for something to be shown accurately on the map, one would have had to be in the field. Topographical features shown on the sketch could not have been filed with the application if Abolins had not been in the field prior to filing.

McBride stated that he did not direct any questions to the Recorder concerning the interpretation of the new **Mining Act**.

Concerning the staking itself, McBride reiterated that he and his son had run the line. He stated that he was at each post taking notes. Turns were taken doing the

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blazing and the flagging, as swinging an axe is not easy. McBride could not recall whether he or his son attended to the compass the whole time. McBride stated that he chopped the posts, although they were finished by Abolins. McBride stated that it was his name which appears in the certification of application to record. Asked about his input in the application, McBride stated that his field notes had been used, and that he had probably drawn the original sketch.

Osiel asked for an explanation of the field notes. McBride stated that there is a road across the line between the No. 4 and No. 1 posts running north to south, which is drivable. He stated that there is a hill to the east, being 4 metres high, which is located at a distance of 240 metres from the No. 1 post. At the 450 metre point, there is a pond to the south. He measured 617 metres to the No. 4 post, arriving at 3:25 p.m. He noticed that the rocks were magnetic, and the post was established 100 metres away. He stated that this had been a major concern during the staking, and the lines were run parallel to the 1150995 claim. Asked why there was the 100 metre difference, McBride stated that for the last 100 metres, he could not follow the compass. He had measured this distance with the hip chain, which he stated was accurate to 2 to 3 percent. McBride explained the operation of the hip chain, which is a ball on a spool, which winds over a counter. Any discrepancy between the amounts noted in his field notes and what was ultimately recorded was due to compensation for dodging around trees or for going up or down hills. Asked about the discrepancy between the No. 4 and No. 3 posts, where 300 metres had been marked and it was actually 450 metres upon inspection, McBride stated that they had gone down the east side of the pond and had to break off the string. Walking from the No. 2 to the No. 1 posts, McBride stated that the witness post markings indicate that it was 150 metres from the No. 2 post and that the line post should be 310 meters from the No. 2 post. They walked around the pond, as it had not been possible to go through it, and therefore, he did not chain. The distance was estimated through air photos. McBride stated that he had not been aware that 2 witness posts were required to mark a post located in a body of water. He stated that this was a novelty with the introduction of block staking, and under the previous requirements, it had been sufficient to witness a post from one side.

McBride stated that he had found it difficult to read the changes involving the new **Mining Act**. He had informed himself of the changes by perusing the documents and speaking to the acting mining recorder. He stated that he had not clarified the requirements concerning the witness post, and admitted that he had made an error.

Asked about whether he had discussed any disputes with Cuddy or Huxter, McBride stated that he was unaware of any dispute concerning the placement of the original survey cairns, but that there was a dispute involving a cabin restoration.

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McBride stated that he had no receipts for his attendance at the site on November 24, 1991. When asked whether he had been in the area between October 13, 1991 to November 24, 1991, McBride stated that he had occasionally accompanied Abolins or had gone with his son to complete work for the OPAP grant. McBride stated that Abolins had possibly done some of this work alone in the bush. McBride stated that near the end of December he had carried out some geophysical and UHF electromagnetic surveying, which he flagged with red ribbon. He stated that he saw Huxter at the cabin, as it was accessible to the north boundary of claim 997, being 150 metres north of the post. Osiel asked how it was possible to do assessment work when the ground was frozen.
McBride stated that with geophysical surveying, one measures low frequency fields on the mining claim from submarines located around the world. He stated that there was no need to examine the rocks. He also reiterated that he had been nowhere near the disputed mining claim until the inspection on December 18, 1991, except on November 24, 1991.

At the reconvened hearing on January 8, 1993, the tribunal asked McBride to clarify the location of the two survey cairns he had located. The first was at the north west corner of Mining Claim SO-1150996, located near the post being the southwest corner of the pond. The second cairn was located 25 to 30 metres east of the No. 1 post of claim 995, and was comprised of the rocks having been scattered and only the 12 inch high post remaining intact.

McBride was asked his reason for assuming that the Township of Lake was surveyed into 160 acre lots, with one half mile to a side. He stated that he had not been directly informed of this. The tribunal showed McBride a copy of a survey, referring to the Township of Lake, dated 1822. He stated that the map possibly could be the original survey, although he thought it could possibly be what was intended by the survey and not what actually was surveyed. Asked to read what had been written into Lot 1 in Concession I, McBride stated that it was 200 acres. The tribunal showed a copy of instructions dated November 15, 1821, under the authority of the Surveyor General's Office. McBride read portions of the document and agreed that they had been the original survey instructions for the Township of Lake, which was to be surveyed into 66,000 acres of land. Reading again from the third and fourth pages, it stated, "... and lay out the several Consefions, Lots and Roads in each of the said Townships ... leaving one chain between each Township and Consefion, and every fifth and sixth Lot... as allowance for

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Roads from the centre line of which said Consefion road, the Lots are to be posted marked and numbered with a marking iron." With no objection from the parties, the Instructions for the Surveying of the Township of Lake, dated November 15, 1821 was marked as Exhibit 28. The tribunal showed McBride a copy of **Crown Surveys in Ontario**, W.F. Weaver 1962, revised 1968, put out by the Department of Lands and Forests. Reading from page eleven, McBride read, "Township Survey Systems in Ontario After the first township survey had been made in 1783, the following seven different systems of township surveys were adopted by the executive governments: [seven types of surveys are listed]." At page fourteen, "Typical section of a double-front system, 1815 - 1829.....A "double front township" means a township where the usual practice in the original survey was to survey the township boundaries, the proof lines and base lines, if any, and the concession lines forming the front boundaries of the half lots and to establish the front corners of the half lots. Each lot contained 200 acres and measured 30.00 chains by 66.67 chains with an allowance for road one chain in width in front of each concession and every fifth or sixth lot." A photocopy of the relevant pages of **Crown Surveys in Ontario** was marked as exhibit 29. The tribunal showed McBride a Plan Re-survey for the Township of Lake, dated 1949, and asked him to examine the widths of the lots. The tribunal showed McBride a plan for retracement of the northerly boundary of the Township of Marmora, located immediately south of the Township of Lake, completed February 16, 1965 and asked him to read the concession widths off the map. Based on the two re-surveys and the exhibits, McBride stated that in his opinion, the Township of Lake was a double-front township.

Under cross-examination, McBride stated that the document dated 1822 was a proposed plan of survey, being an idealized document. Osiel asked why the No. 4 post of claim 997 had not been placed near the survey cairn. McBride responded that the staking had been done on October 13th and the cairn had been located on December 18th. He also stated that it was illegal to move a corner post. The tribunal limited Osiel's cross-examination to the newly introduced evidence, being the original survey. Osiel objected to this.

Evidence of Douglas Leaper

Leaper was recalled as a witness for Abolins and was questioned by McBride. He stated that, in his experience of thirty years, he seldom saw a chainsaw used, and in only one other claim out of approximately 1000 inspections was a chainsaw used. Leaper explained that it was simpler to carry an axe. After using a chainsaw the surface

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of the wood was rough compared to when an axe was used, but as long as the correct pencil was used, writing could still appear legible.

Leaper stated that he advised Osiel of the inspection in writing by registered letter. He never had been approached by Osiel, nor had he spoken to him in the mining recorder's office. He never heard back from Osiel concerning the inspection.

On the day of the inspection, Leaper stated that there was 15 centimetres of snow on the ground, but that he and McBride had been able to drive into the site, via a turn off from the main road. The rough road went in a southwesterly direction. They were able to park at a place that McBride had told him about. Leaper stated that he was able to identify the northern boundary of the claim because it was well flagged and blazed.

From the road, Leaper proceeded with McBride to Abolins' No. 1 post. He noticed that the claim line swung east along the eastern shore of the lake. At station 2, being the line post between posts No. 1 and No. 2, Leaper took pictures. He stated that the information on both the tag and post was in excess of what had been required by the legislation.

At station 5, being the witness post between the No. 3 and No. 4 posts of Abolins' claim, Leaper stated that he could see the No. 2 post of claim 995, and took picture(s) to show this. They proceeded past station 7, being the No. 1 post of claim 995, on their way to station 6, which was Abolins' No. 4 post. Leaper stated that they walked an approximate distance of 2.5 kilometres, which took approximately 2 hours. He stated that it took less time to inspect than what was usual, as the lines were well blazed. He noted that 150 metres were not blazed, being a rock outcrop about half way between Abolins' No. 4 post and the road.

Asked his opinion, Leaper stated that he had no trouble following the claim lines, and that with the addition of flagging, he could see 200 to 300 feet ahead. He agreed that the sketch fairly represented the topography and the post location. He agreed that Abolins had been there and had staked, as one would have to have been on the ground to have made the sketch.

Asked about the dates on the claim posts, Leaper stated that they all

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indicated October 13, 1991. While there was no way to tell whether the staking had been done on the 13th, there was no reason to suspect that they had not.

Asked about the survey cairn, Leaper stated that he could not remember it. However, he did recall a survey pin located to the east of Osiel's No. 4 post. On his inspection map he judged that the pin would have been located half way between the shore of the lake and station 8 being Osiel's No. 4 post. McBride suggested that the surveyed township line is off by 40 metres. Mr. Leaper stated that it could be up to between 40 and 50 metres off relative to the township line. Asked about the accuracy of the map for the Township of Lake, County of Hastings, Southern Ontario Mining Division, bearing Plan No. M110 (ex. 6) and the Ministry of Natural Resources Map 10 18 2750 49500 (ex. 30) generally referred to as a base map, Leaper stated that the base map was more accurate.

Under cross-examination, Osiel asked for the basis for the discrepancy using the Mining Division map as opposed to the base map. Leaper stated that the base map is done from aerial photography, and the lot and concession lines are superimposed. He stated that over 7 or 8 years, he has found the mining division maps to be off by 200 feet and has heard of cases where they are off by 400 feet.

Leaper did not know how much a chainsaw weighs, but stated that it is very heavy to carry and it is easier to carry an axe. He agreed that he had not been in the area on either October 13th or October 18th, having conducted his inspection on December 18th, 1991. He agreed that all foliage was gone at the time of his inspection. Osiel stated that, as concerned visibility, there were still some leaves on October 18th.

He asked why Abolins' No. 4 post was 150 feet north of the No. 1 post of claim 995. Leaper stated that it was due to the magnetic attraction. Osiel suggested that there was nothing to stop a staker who had other claims in the area from walking around, and that an accurate sketch could be made from information so gathered. Leaper responded that on the 18th of December, 1991, the claims were well lined and blazed, as shown on the sketch. Osiel stated that there was a rock mound located and if he had been sure it was a cairn, he would have tied on. He therefore gave the opinion that it was not the corner of the lot.

Asked about the length of time between when the Recorder orders

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an inspection and the date of the inspection, Leaper stated that at least 15 days would transpire. There is generally no reason to wait the 60 days as had been done in this case. Osiel asked whether there was anything to stop a person from altering their claim.

Under re-direct, Leaper stated that the letter of the Recorder dated November 19, 1991 cautioned the parties not to disturb any indications of staking. There was no caution to avoid the area.

McBride pointed out that the initial staking by Abolins had taken place on October 13, 1991, the notice of dispute being received on November 19, 1991, with Abolins and McBride visiting the claim on November 24th. He postulated that, had the actual blazes had been done on the 24th of November, 1991, as opposed to the 13th of October, 1991, could Leaper tell the more recent blazes, being three weeks instead of six weeks old. Leaper stated that he could see no difference between the Abolins' and Osiel's blazes to indicate such a difference in time. Asked whether there was any possibility of moving posts, Leaper stated that all posts were stumps. Leaper maintained that he had no verbal contact with Osiel between October 13 and December 18th. He heard only that Osiel would not go into the bush or that he was sick at the time, as Osiel said as much during the hearing before the acting mining recorder.

Submissions

Mining Recorder Mistaken

Osiel stated that he would challenge the Recorder's decision to record Abolins' claim on two counts. He asked that the tribunal clarify and give guidance to the Recorder as to the consequences of the interpretation of the **Mining Act**. Referring to subsection 46(1), Osiel stated that an application is deemed to be recorded if all the requirements have been complied with. He stated that the evidence available to the Recorder is the application to record, the certification and the sketch, all accompanied by the fee of $40.00.

Osiel submitted that the evidence is contradictory as to whether Abolins had in fact been at the mining recorder's office at 9:50 a.m. He submitted that the stamp

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shows October 18, 1991, with the pointer showing noon. Osiel's evidence was that Abolins' application had been stamped in Osiel's presence.

Asking when the application was received, Osiel submitted that the only way a mining recorder can know is to see whether the application is filled out in the prescribed manner. This must include all required information, a signature, the fee and the sketch. Part D of the application, where the sketch is to be drawn, states at the top:

> **Group Sketch** of claims listed on Part A.
>
> Sketch or plan of the mining claim(s) must show the corner post, witness posts and line posts and the distances between the posts in metres.
>
> Include topographic features such as lakes, rivers, creeks ponds, etc. and developments such as hydro lines, highways, railways, pipelines, buildings, etc.

Subsection 44(1) sets out that the information contained in the application as well as the sketch is prescribed.

Osiel reviewed his evidence of inconsistencies to the Recorder. First, he stated that the witness post is missing. Osiel's submission is that claim 997 should be cancelled because common posts were used and one witness post was missing. Secondly, he pointed out that there is no distance shown between post No. 1 and the witness post, which was drawn into a pond and is misleading. He stated that he could find no reason for having done this. Pointing out that the sketch did not disclose any distances between the various posts, Osiel submitted that there was nothing in the law and cases which would support a bar scale being the equivalent of showing specific distances.

Osiel submitted that at this point the Recorder should have found the application to record to be incomplete. He referred to **Connell and Cockeram** v. **Wright**, 2 M.C.C. 51, which he alleges dealt with "some idea" of staking, setting out three elements necessary to record, being the discovery, a written application and a sketch. Osiel submitted that the case stands for the proposition that completion of staking must include the completion of the sketch. He submitted that the sketch is integral to staking. Osiel did not submit any cases on this point, stating, that the cases refer to a "missing" post as

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one which had been there at some time. In those cases, the staker was allowed to reconstruct the missing post. This would have to be distinguished from a case where there was no witness post in the first place. Osiel submitted that, without the witness post, the staking was incomplete and the application to record should have been neither submitted nor accepted. Osiel stated that the Recorder failed to apply subsection 46(1), as she could have determined at the time the application was received that it was not complete.

Osiel pointed out that all distances are not shown, and submitted that a bar scale should not be acceptable. He submitted that the absence of distances leads to the conclusion that the staking is not complete. Referring to subsection 44(2), Osiel stated that priority of completion should prevail where there are two or more stakers. Based on his evidence of what took place at the office of the mining recorder, Osiel submitted that the doctrine of completion should apply. He submitted that Abolins' application was not complete. Referring to section 11 of Ontario Regulation 115/91 and more specifically to subsection (2), he submitted that if a body of water prevents the erection of a line post, a witness post must be erected on the boundary line on each side of the body of water. Osiel submitted that it is well established that two witness posts are required. Ontario Regulation 115/91 was filed on April 15, 1991 and gazetted in June of 1991 and therefore the contents of the regulation should be well known.

He submitted that with a missing post, the staking cannot be found to be complete. The Recorder could have applied subsection 44(2) and given priority to the time of completion of staking. He submitted that there was nothing in his own application to record [not the subject matter of this hearing] to preclude it from being given priority.

Referring to **Sutherland** v. **Meunier** 6 M.C.C. 205, at p. 205, reading from the headnote, Osiel submitted that the case stands for the proposition that nothing with respect to the time of recording gives any precedence and that the case must be decided on its merits.

Referring to **Morgan** v. **Bradshaw** 5 M.C.C 82, Osiel stated that it stands for the proposition that where a common post was used at two corners, it cannot be valid under substantial compliance. The case states that one common post was doing what two posts should have done. He submitted that the case should have some bearing on the outcome. In the case under appeal, the regulation requires that there be two witness

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posts, and as in **Morgan**, the requirement for two posts resulted in the staking being found to be invalid. He reiterated that substantial compliance cannot save a staking where two posts are required and only one is used.

Osiel submitted that, based on the above, the Recorder should not have accepted the application to record, and that subsection 44(2) should prevail. He submitted that Abolins' claim should be cancelled and that priority should be given to his application, being the staker who has priority of completion.

Substantial Compliance

Osiel submitted that the validity of staking should be found to include the recording of the application and the intention of the stakers. Referring to the recording, Osiel stated that he was motivated by nothing other than having believed that it was open for staking. He has disputed Abolins' claim 997 because there were, in his submission, no markings on the ground to indicate otherwise.

Referring to **Gonzalez** v. **Pilon** (unreported), a decision of the Acting Mining and Lands Commissioner dated May 27, 1991, which, in his submission sets out the essentials for substantial compliance, Osiel quoted from p. 5:

> 1. A staking does not have to be perfect to be valid but standards must be maintained. The standard, without relying on the curative provision (section 50) cannot be one that is impossible for the ordinary staker to meet.
>
> 2. A staking that does not meet the statutory standard may be valid if all of the following conditions are met:
>
> a. There is substantial compliance, as nearly as circumstances reasonably permit, with the Act.
>
> b. An honest attempt has been made to comply with the Act
>
> c. Imperfections are not the result of an attempt to take an unfair advantage or to gain an unfair position over other stakers.

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d. There is no attempt to mislead other stakers.

3. The best staking doctrine does not apply as between competing stakers.

4. The staker who records a staking first has title to the claim unless a staker who subsequently files an application to record can show the recorded staking to be invalid. A recorded staking that does not meet the statutory standard is invalid if any of the four conditions set out in paragraph 2 are not met.

5. In determining whether there is substantial compliance, as nearly as circumstances permit, the Tribunal may look at what other stakers did in the same location under the same condition.

Osiel submitted that it is not the intention of his dispute to question the credibility of the staker. Rather, he is advancing the question of how the staking took place, within the spirit of substantial compliance. He submitted that to fall within the definition of substantial compliance, a staker, ..."tries his best, knows the Act, decides to fully comply, with intent and knowledge playing a large role..." to protect against unfair advantage. Concerning the purpose of the **Act**, Osiel submitted that Abolins was not in substantial compliance with the principles of substantial compliance.

Referring to McBride's statement that they had trouble finding his trenches, he submitted that this activity was contrary to the **Act** and should be taken as evidence that it had been Abolins' desire to surround his claims. He submitted that an inference can be drawn from the fact that the trenches were found goes to Abolins' intent and credibility.

Concerning the reliability of the evidence of Leaper, Osiel pointed out that the inspection had taken place 60 days after the dates of staking, and the ground was markedly different, with increased visibility. Referring to the inspection report, five out of six posts were undersized. Only one witness post was placed on the boundary line between the No. 1 and No. 2 posts. He submitted that this renders the staking incomplete. Also, the distances along the boundary line between the No. 3 and No. 4 posts were inaccurate. The placing of the No. 4 post and the reasons for it, being due to

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alleged magnetic interference, which was what Leaper had told McBride. Osiel submitted that the reason was the subsequent locating of the survey cairn.

Concerning the use of an axe or powersaw, Osiel submitted that this allowed Abolins to cut undersized posts and attempt to justify them. Concerns about the rights of surface rights holders is immaterial, as section 12(4) of Ontario Regulation 115/91 allows for the use of commercial timber. Referring to Abolins' reference to a disability as justification for the undersized cutting of the posts, Osiel stated that he could not ascertain what the disability was. He submitted that, pursuant to subsection 8(7) of the regulation, someone could have been hired to help with the erection of the posts and that it had been Abolins' intent to use undersized posts.

Conjecturing on what could be gained by the use of undersized posts, Osiel submitted that it takes twice as long to chop a twelve inch tree than a six inch tree. He stated that Abolins gained an unfair advantage over others, and referred to the regulation, which requires that posts be 10 cm. across and 30 cm. down where faced. He referred to the case of **Hodge** v. **Canadian Nickel Company Limited** 7 M.C.C. 604, where the headnote states that posts should be four inches where squared and stated that the only way to arrive at a 10 cm. face is to start with a larger tree.

Concerning the meaning of staking, with respect to the sketch, Osiel submitted that topographic features and culture may be included but are not required. The definition of staking should be, in his submission, just that. He stated that all that is required is that the boundary be marked, and other features which might later improve access are not necessary. He also submitted that it was a waste of time to make notes on such extraneous features. Osiel submitted that all of his own posts had been of legal size and is proof of conduct on the ground. The same could not be said for Abolins.

Osiel submitted that Abolins displayed obstinacy by not becoming informed of the changes to the requirements of staking, the way that he had. Osiel questioned what bearing looking at maps in the County of Hastings could have on the staking and suggested that McBride's evidence was contrary to that of Abolins.

Osiel suggested again that Abolins included information beyond what was required by the application to record in making the sketch, stating that additional data

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could be added if requested. Abolins should have known what was strictly required, which would have been the case had he familiarized himself with the legislation.

Osiel suggested that there was a discrepancy between the evidence of McBride and Abolins concerning the work that had been done in the area.

Osiel stated that it was possible to have altered the mining claim, and pointed to the fact that he did not see Abolins' No. 4 post. The tribunal was drawn to observe that this was the only legal size post in Abolins' claim.

The question of why the No. 4 post of claim 997 was located 150 feet north of the No. 1 post of claim 995 was answered unsatisfactorily, in Osiel's submission. Abolins stated that he found the survey pin and put it there, while McBride stated that it had only been found when he was there the second time. Osiel questioned McBride's reason for the placement of the post according to the magnetic field and suggested that this evidence was after the fact.

The main question, according to Osiel, was when the staking was completed, and in his submission, it was at the time when it was before the mining recorder. Osiel denied that he had been nowhere in the area of the mining claim and stated that, although Abolins, McBride and Leaper could access the claim using a four wheel drive, there was no evidence that there were no other trails or roads in the area.

Osiel submitted that the substantial compliance doctrine requires knowledge, which is evident through intent of the parties. He pointed to the evidence concerning the length of the west boundary, where Abolins had thought it was 300 metres, Leaper said it was 450 metres and the bar scale said it was 300 metres.

Osiel submitted that it was not appropriate for Abolins to work off McBride's sketch in filling out the application to record. Referring to subsection 8(7) of the regulation, he stated that, while other persons could be used, this did not apply to the making of the sketch. As the claim was only in Abolins' name, the conduct of McBride and Abolins in regard to the staking must be assessed to determine what bearing it should have. In **Leach** v. **Wilson** 5 M.C.C. 368, the Commissioner held that prior preparation of a sketch may constitute a false statement. He concluded by suggesting that chaos would

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result if another person were allowed to prepare a sketch, as it could readily be prepared beforehand.

Osiel pointed out discrepancies in the making of the sketch, such as the measurement of the west boundary, the field notes stating 617 metres along the north boundary, with the sketch showing 610; the field notes showing 610 metres for the south boundary with the sketch being representative of 615 metres.

Osiel submitted that these activities on the part of Abolins, who was not new to the industry and had twenty years of experience, intended to gain an unfair advantage, and should be taken to know the law. Similarly, McBride, whose evidence it had been that he had attended in Sudbury to help draft the regulations, had adequate knowledge to form the intent to gain an unfair advantage.

Referring to paragraph 2 of the "doctrine" of substantial compliance, Osiel stated that (a), concerning the posts, Abolins did not comply with the law as nearly as circumstances would reasonably permit; (b) on the application to record, by completing it in his own way, Abolins did not make an honest attempt to comply; (c) that cutting undersized trees allowed Abolins to gain an unfair advantage; and concluded that all of these shortcomings and others enumerated above, should lead the tribunal to conclude that none of the requirements of substantial compliance had been met. Referring to the cumulative defects doctrine outlined in **Hodge**, Osiel submitted that Abolins' staking should not be allowed to stand. **Hodge** referred to the principles in the case of **Leduc** v. **Grimston** 2 M.C.C. 285 as not being applicable and the tribunal asked what these principles were. Osiel stated that he had misplaced that reference. The tribunal notes in the copy of the **Hodge** case provided, only a select few pages of the case were reproduced, and the page on which **Leduc** was referred to, being 631, was not among the pages received.

Osiel referred to **Sherritt Gordon Mines Limited** v. **Perry No. 1** 6 M.C.C. 170, where, with four of eight posts being undersized, similar to the Abolins' staking, along with other inconsistencies, the cumulative defects doctrine was applied. Due to the problems outlined above with the Abolins staking, Osiel submitted that the result should be the same. He submitted that the question posed by Abolins was whether he should

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take the legal steps to comply with the legislation or should he take an unfair advantage.

In conclusion, Osiel stated that all of the evidence points to why Abolins claim should be cancelled. He also stated that he wanted the record to show that he asks that his claim be recorded.

McBride delivered the submissions on behalf of Abolins. While not initially wishing to spend a great deal of time on summation, he stated that the summary of Osiel, with its inaccuracies, calls for further comments to be made.

McBride's opening comments refer to Osiel's request that his claim be recorded. He reminded the tribunal that throughout the hearing, any attempt to raise issues on Osiel's staking were met with objections from Osiel, and that the tribunal indicated that it was not the proper subject matter for the hearing.

McBride also indicated, that while Osiel had provided copies of cases with his original statement of particulars, neither had been referred to in summation. When asked whether he required additional time to prepare, he advised that he would not.

McBride addressed the statements made by Osiel questioning the integrity and intent of Abolins and McBride.

Referring to the mining recorder's decision to accept Abolins application to record, Osiel relies on his own evidence in contrast to the factual evidence available before the tribunal, such as the time of the stamp, indicating 12 o'clock as well as the cash register receipt, which shows 8:56 a.m. McBride submitted that Abolins had a four hour advantage over Osiel.

Referring to Osiel's version of what took place at the Recorder's office, McBride pointed out that she had not been called as a witness and as there was no substantiation of Osiel's allegations, they should be inadmissible as undocumented heresay.

Referring to **Connel and Cockeram v. Wright**, McBride submitted that the facts of the cases could be distinguished, as there was no block staking at the time when **O'Connel** had been decided.

Referring to numerous accusations of Osiel concerning the timing of events,

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McBride took exception to suggestions that he and Abolins had lied or adjusted their claim. Again making reference to being unable to question Osiel's staking, McBride stated that all of Osiel's comments should be rejected by the tribunal, as the Abolins' staking had been completed prior to the Osiel staking. At the time when the alleged conversations with the Recorder took place, the Abolins' claim had been recorded. Therefore, the only avenue of challenge was to dispute it.

McBride distinguished the **Morgan** case, stating that it involved use of a common post, where there had been a series of stakings done at different times, as opposed to the justified use of a common post where one post was used in connection with four claims staked as a group in a continuous action, and should be found to have no application to the facts before the tribunal.

McBride once again challenged the assertions by Osiel that his staking was done in accordance with the requirements of the **Mining Act** and regulations.

The intent of stakers questioned by Osiel was not supported by the facts. McBride submitted that any suggestion that the intent was motivated by a desire to surround Osiel's existing claims rather than an interest in the ground itself, cannot be supported, as Abolins would have to stake 16 claim blocks of two units to accomplish this, whereas only one and a half such blocks had been staked in the area prior to Abolins' staking of claim 997. McBride submitted that the land was simply open for staking and that any suggestion of such activities should be found to be false.

The decision concerning whether Abolins had substantially complied with the **Act** was the Mining Recorder's decision, in the first instance when she recorded the mining claim, and the Acting Recorder's decision when he dismissed the dispute.

Referring to **Gomez**, McBride suggested that paragraph 5 at page 7 allows the tribunal to look at what other stakers did in the same area and suggested that the staking of claim 997 could be compared with other claims in the general vicinity or even those of Osiel to answer this question.

McBride submitted that the purpose of the provision for substantial compliance was to protect the honest prospector from the land grabber, and took exception to the allegations by Osiel that Abolins fell within the latter category.

McBride submitted that there was no evidence to suggest that there were

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trenches on Osiel's other mining claims to the south, let alone that they had been visited by either Abolins or McBride. Rather, during discussions with Cuddy, McBride had been told that there were trenches next to the rapids, which is south of Osiel's claims, and there is no evidence that they visited the trenches. McBride suggested that Osiel's statements in this regard are hearsay.

McBride commented on Osiel's lack of knowledge of mining practices. Osiel seemed unaware of how to proceed in the most logical way around claim lines or that one could stake counterclockwise. Referring to the No. 4 post of Abolins being 150 metres north of the No. 1 of claim 995, McBride questioned Osiel's ability to take notes at a hearing, stating that the evidence was that it was 60 metres north or 150 feet. The statement that the magnetic declination was off due to magnetic interference of some kind, points to Osiel's apparent lack of recognition that the only way this phenomena can occur is if there are magnetic rocks underfoot. Commenting on Osiel's questions concerning measuring devices being affected by the magnetic influences, McBride stated that two instruments were required to stake a claim, and that Osiel did not appear to know how a hip chain worked.

As to the accuracy of instrument readings, McBride stated that his field notes clearly indicate that the compass reading was affected by the magnetic rocks. This cannot be used to substantiate the suggestion that Abolins used this fact to move his claim, in an effort to deceive Osiel or others. McBride further submitted that the No. 4 post was quite apparent, from the flagging ribbon being placed in the tree.

Concerning when the survey pin had been located, McBride submitted that Osiel had suggested that the location was known prior to the staking of claim 997, which is not what the evidence indicated. Therefore, the failure to move the post to the cairn was not due to a desire to mislead. McBride pointed out that the survey pin had not been found until November 24, 1991, and Leaper did not recall having seen it.

Commenting on Osiel's "idea of how things are done in the forest" McBride submitted that only one in one thousand use a chainsaw, and no attempt to deceive can be inferred from this. McBride submitted that Osiel's submissions on how a staking should be carried out displays a clear lack of understanding of how this activity is carried out in Ontario, and is an attempt to discredit a normal staking. McBride also drew attention to Osiel's disregard to the owner of the surface rights, indicating that to proceed

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as Osiel had suggested would be an abuse of privilege. Referring to the use of commercial timber at the required 10 cm by 10 cm, having an estimated weight of 4 to 6 kilograms each, which would have to be carried, while at the same time blazing and running a compass indicates the degree of Osiel's working knowledge.

Concerning the issue of whether Abolins did have a disability, McBride stated that he was not aware that medical records would be required before the tribunal to substantial the staking of a claim. However, even with a disability, Abolins was present. Abolins did stake the claim in the legal sense of the word, in his submission.

McBride questioned how one could conclude that Abolins had used undersized posts with the intent to mislead, when Leaper could recognize the posts and follow the claim. McBride submitted that, even if they had been a little undersized, they would not be misleading to anyone who knew what a mining claim looks like.

McBride submitted that, while Osiel could read the **Mining Act**, he ignores the particulars of the sections. Further, his notes on matters at issue suggest that he cannot distinguish between what is relevant and what is irrelevant. Referring to comments that culture and topography are irrelevant, McBride submitted that they must be included as anyone who has staked would be aware. McBride stated that, while Osiel questioned the time wasted in notetaking, he was precluded from even questioning whether Osiel had even taken notes. Therefore, he requested that the tribunal take Osiel's comments into consideration in reaching a decision, although not relying on them in reaching a decision. He submitted that a comparison of the two inspection sketches should also be used in arriving at a decision.

McBride requested that the record show further inaccuracies of Osiel's submissions, namely, that he had never been in Sudbury to write regulations, having been in Timmins and not being involved in the drafting of the regulations. Similarly, when obtaining information about the County of Hastings, he had gone to the Tweed, not the Belleville office, as alleged by Osiel.

Concerning the problem of the missing witness posts, McBride submitted that there was no evidence to support Osiel's version of events. In retrospect, McBride agrees that he can see where the missing witness post was a problem, but he submitted that it

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would be unreasonable to call the Recorder for clarification on every detail of staking.

McBride submitted that there is no evidence to support the allegations of Osiel that Abolins' claim had been done in a manner other than what was presented by Abolins and McBride or shown on the application to record. Osiel's suggestions of possibilities of what might have taken place in contrast to this evidence only serves to confuse the issues.

Concerning the placing of the No. 4 post, McBride submitted that Osiel did not understand the impact of the difference in timing of the staking of mining claims SO-1150995, SO-1150996 and SO-1150997, and submitted that nothing incorrect had been done in locating the post.

McBride again referred to the allegations of fraud concerning the survey pin, and questions Osiel's recollections of the facts as they had been presented over the course of the hearing.

McBride suggested that there was no evidence to support that the staking had not been done at the time Abolins reported. Concerning the measurement of the west boundary between the No. 4 post and the line post, McBride submitted that Osiel was unfamiliar with the existence of the lake, and his comments should be discounted.

As to who drew the sketch in the application, McBride pointed out that the handwriting in his field notes bears no resemblance to the application to record, or particularly the sketch filed.

In referring to **Sherritt Gordon**, McBride submitted that Osiel only referred to some of the facts and pointed out that there were numerous other defects which rendered the staking invalid, such as missing inscriptions.

In conclusion, McBride stated that the decision of the Acting Recorder that the staking substantially complied with the **Act**. The attempts made to properly stake the claim were demonstrated. Abolins obtained a government claim map. While possible shortcoming exist, McBride submitted that a perfect staking is impossible. The claim was easy to locate in the field by the inspector. This was verified in the field by the subsequent location of the 1830 survey cairns. McBride submitted that there was no

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concrete evidence of impropriety in the case as presented by Osiel and that his contentions were unsubstantiated, except by the affidavit of Cuddy. He stated that Abolins had not been permitted to call Cuddy as a witness.

McBride questioned Osiel's ability to stake a claim, stating that he did not appear to know what a magnetic declination was, although he could read it off a document. He also stated that he went five or six miles down river, when the map showed he had gone 1/2 mile. Osiel seemed unable to follow a claim line, even though this was a time honoured way of locating oneself in the bush and was the only way to locate the No. 1 post of 995. Mr. McBride stated that it was a mystery as to how Osiel had succeeded in locating the claim. McBride made a number of references to Osiel's inability to see blazes in the forest. Yet, Osiel's claims are said to parallel those of Abolins, and in fact those of claim 995. He pointed out that Osiel was unable to describe whether the land within the mining claim or outside of the claim had been logged. Osiel did not know that a red disc on a line post was a line tag. McBride questioned how a person with such a complete lack of knowledge could locate and stake a claim correctly.

Referring to the detail contained in Abolins' sketch, McBride submitted that it would be impossible to draw such a sketch without having been in the area at some time before.

McBride requested that the tribunal award costs in the appeal, owing to the time delays incurred in being unable to perform work on the mining claim and the cost of attending the hearing and the inspection. When asked for the specific amount, McBride stated that OPAP recognizes his services at a rate of $100 a day, $150 a day, and on a professional basis at $350 a day.

Osiel was given opportunity to respond. He submitted that the receipt showing the time of recording of 9:54 a.m. only shows that the application was received at that time, not that it had been brought in by Abolins. This should distinguish between the time it was received and time it was recorded. The **Bradshaw** case was authority for common posts for witness posts, not line posts. Osiel questioned McBride's version of what field work had been done or what instruments had been used in the staking. Osiel stated that he had gone 5 miles as opposed to 1/2 mile to verify the position of his staking through his other claims.

Osiel concluded his submission, alleging that the staking of claim 997 was not in substantial compliance with the **Act**.

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With respect to costs, Osiel submitted that McBride had not been paid by Abolins and that no legal fees were incurred. He submitted that only minor costs such as transportation should be taken into account.

Findings of Fact

Time for Determination of Priority of Staking

Subsection 44(2) of the **Mining Act** reads as follows:

> **44.**-(2) Priority of completion of staking shall prevail where two or more licensees make application to record the staking of all or a part of the same lands.

Subsection 8(1) of Ontario Regulation states:

> **8.**- (1) The staking out of a mining claim shall be one continuous action.

Osiel advanced the argument that the absence of a witness post in Abolins' staking renders the staking incomplete. The scheme of the legislation provides that staking must be a continuous action.

In **Raine v. The Minister of Mines** 7 M.C.C. 462, Commissioner Ferguson considered the meaning of "continuous" at page 465 and its implications for staking at pages 465 and 466:

> ...Black's Law Dictionary, Third Edition, provides the following definition of the word "continuous":
>
> > CONTINUOUS. Uninterrupted; unbroken; not intermittent or occasional; so persistently repeated at short intervals as to constitute virtually an unbroken series. ...
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> . . . . .
>
> There have been cases determined under the **Mining Act** with

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> reference to the time of completion of staking. These cases were fully reviewed in the case of **Boland v. Juby** 5 M.C.C. 158. ...

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> The tribunal is of the opinion that the Legislature would have had this principle in mind and that, in the absence of any evidence to show reason for such delay, a delay of twelve days would have the result that the staking could not be said to be a "continuous action".

There is no evidence that Abolins delayed in carrying out the staking of his claim. Osiel would see deficiencies in staking such as missing witness posts characterized as an incomplete staking. This clouds the issue, which is a determination of whether the deficiencies render the staking invalid. This issue is dealt with in detail below.

Best Staker Doctrine

At several times throughout the hearing, Abolins expressed frustration that the tribunal did not allow him to question the validity or quality of Osiel's staking. Osiel was adamant throughout that the issue was not properly a part of this appeal. Yet it was quite evident that Abolins' frustration reached its zenith when Osiel submitted that the recording of Abolins' claim should be cancelled and his claim should be recorded.

Considering the decision of Rand J. in **Dupont et al. v. Inglis et al.** [1958] S.C.R. 535, 3 M.C.C. 237, Commissioner Ferguson states in **Mealy v. Peplinsky et al.** 7 M.C.C. 134 at page 139,

> It would seem to follow that, as the opposing parties to a dispute must be construed to be the staker and the Crown and the role of the disputant is merely an exercise of the rights of a licensee to institute that legal issue, the conduct of the disputant should not defeat a consideration of the situation as between the staker and the Crown. ...
>
> In considering these submissions it must be kept in mind that a dispute may include two distinct matters. The right to institute a dispute in [sic] contained in subsection 56(1) of the **Mining Act** [now subsection 48(1) is set out in full] ...
>
> It will be noted from the subsection that the preliminary and

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> overriding inquiry in a dispute is toward the illegality or invalidity of a recorded mining claim and that secondly, there may be coupled with that issue the issue of whether the disputant may be recorded for or entitled to any right or interest in the lands comprised in the disputed mining claim. While the argument of the agent for the respondents referred to the doctrine of strict compliance which arises from the decisions, **inter alia**, of **Whiting v. Mather** 2 M.C.C. 318 and **Martin v. Arrowsmith** 5 M.C.C. 115, it does not follow that the failure of the restaker to strictly comply with the requirement of the **Mining Act** prevents the first issue from being determined but that the significance is that two different standards of staking are applicable to the stakings which in the concept of Rand J. must be considered separately and independently.

Osiel's application to record was marked "filed only". The tribunal notes that Osiel's application includes four units, namely those two which are identical to claim 997 plus an equal portion to the south. Subsection 46(2) of the **Mining Act** contemplates two instances where an application would be marked as "filed only". Where "the recorder considers [the application to record the staking of a mining claim] to be not in accordance with this Act" or where the application to record, "is for lands or mining rights which or any substantial part of which are included in a subsisting recorded claim that has priority under subsection 44(2)", the recorder may receive and file the application.

Subsection 46(2) has historically involved staking of a mining claim of sixteen hectares, more or less. The interpretation given to the wording, "or any substantial part of which are included in a subsisting recorded claim" has necessarily involved substantially the same lands, namely the same sixteen hectare claim or a large portion thereof. In this way, the mining recorder was not required to record the application for that portion of the second staking which did not overlap with the first.

The issue of whether that portion of a mining claim which involves units in the block claim additional to the unit or units which are included in a subsisting recorded claim cannot be recorded must be considered.

"Substantial" is defined in Webster's New International Dictionary of the English Language, 2nd unabridged edition, G. & C. Merriam Company, Springfield, Mass., in part, as, "Considerable in amount, value or the like; large; Of or pertaining to the substance or main part of anything;".

At the time of filing of Osiel's application to record, it was open to the mining recorder to accept that portion of the application which deals with the two units

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to the south. This was not done. The subject matter of the appeal between the Minister and Osiel is consideration of whether his application to record the staking of the mining claim is "in accordance with this Act" as set out in subsection 46(1).

Osiel's staking has raised the very issues raised in **Mealy v. Peplinsky**, namely the validity of disputant's staking and the validity of the recorded holder's staking. The Minister has already determined, through marking all of Osiel's application as "filed only" that it does not accept any portion of Osiel's staking. The issue of Osiel's staking remains between him and the Minister, regardless of the outcome of the appeal with Abolins. Should Osiel succeed in having Abolins staking declared invalid, the subject matter of his appeal with the Minister will be all four units of his claim. Should he fail in the Abolins matter, the subject matter of his appeal with the Minister will be the validity of his staking of the remaining two units to the south.

The tribunal has determined that the two appeals, that between Osiel and Abolins and that between Osiel and the Minister would be heard separately. The validity of Osiel's staking will be determined regardless of the outcome of the matter as between himself and Abolins. There is no question that Osiel could be entitled to an automatic recording of his application in the event that Abolins' staking is found to be invalid; clearly he would not. Evidence concerning Osiel's staking is therefore found to be unnecessary for the determination of the dispute. Had the matter simply been as between Abolins and Osiel, with no involvement of the Minister, the issue of Osiel's staking of the lands under dispute would indeed be considered in the hearing of the dispute.

Owing to the extreme scrutiny to which Abolins has been subjected during the appeal of this dispute, the tribunal is sympathetic to his desire to have the same right to call into question Osiel's staking. However, given the involvement of the Minister, this is not only redundant but would serve to cloud the issue. The tribunal has noted the gall of Osiel in seeking to have a portion of his claim recorded, notwithstanding that at every juncture he objected strenuously to any evidence being introduced concerning the staking of his claim.

Mining Recorder Mistaken

The issue of whether or not the Recorder was mistaken in recording Abolins' mining claim forms part of the enquiry into the staking of Abolins' claim resulting from the dispute filed by Osiel. In **Dupont et al. v. Inglis et al.** (ante), Rand J. states at pages 537 and 538,

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> Up to this point the functions of the recorder are ministerial and administrative, that is, possessing some measure of discretion. But in the competition of licensees challenges to alleged stakings and other required acts are inevitable which must be settled without delay, more or less informally, in some proximity to the situs of the claims, and by persons made familiar by experience with the substance of those practical details. They are what the history and the exigencies of the prospecting and mineral discovery have shown to be best suited to the orderly and efficient utilization of the resources, and in large measure are embodied in the statute. At the same time that experience has furnished a similar acquaintance with the practices, attitudes and tendencies of those who push discovery into these remote and difficult regions.
>
> Provision is therefore made for the filing with the recorder a "dispute" alleging the invalidity of a recorded claim; if the disputant claims to be entitled to be recorded in whole or in part, a note of the filing is entered on the record of the claim. Unless it is otherwise ordered by the Commissioner or a transfer is made to the Commissioner by the recorder, the controversy is, in the first instance, decided by the recorder, whose decision, unless an appeal is taken to the Commissioner, is, by s. 123(5), "final and binding". By s. 124, as re-enacted by 1956, c. 47, s. 6, "the recorder may give directions for the ... carrying on of proceedings before him, and in so doing he shall adopt the cheapest and simplest methods of determining the questions raised before him".

And at pp. 544 and 545,

> It was urged that the issue was in reality between the respondents and the individual appellants, but that confuses the matter. The question is the validity of the alleged first staking, and that is a matter between the licensee and the

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> Crown. Its adjudication may affect a subsequent staking by another licensee; but there is no **vinculum juris** and no **lis** between the two licensees, and the disputant is before the tribunal only as he is permitted by the statute to have the claim of another put in question before the recorder. In the enquiry the subsequent staking is irrelevant, and the decision should be the same as if no such action had taken place.

At the time an application for recording is received the mining recorder must make a finding of whether the staking of the mining claim is considered to be in accordance with the **Act** and regulations. Any challenge of a finding by a mining recorder that an application to record the staking of a mining claim is not in accordance with the **Act** will form the subject matter of a hearing at which the staker whose staking is challenged will be a party. As challenges to alleged stakings and other required acts are contemplated within the scope of the enquiry, the impact of deficiencies or errors on the application to record will be considered at a hearing before the mining recorder, or on appeal to the Commissioner.

The tribunal finds that the Recorder was not incorrect, at the time Osiel filed his application, in refusing to consider Osiel's submissions with respect to whether Abolins application was in accordance with the **Act**. The time for such a determination to be made is fairly and properly at a hearing with Abolins present.

The Supreme Court of Canada dealt with the duty to act fairly in **Nicholson v. Haldimand-Norfolk Police Commissioner Board.**, [1979] 1 S.C.R., 88 D.L.R. (3d)13, which reversed 9 O.R. (2d) 481, 61 D.L.R. (3d) 36. D.P. Jones and A.S. de Villars, **Principles of Administrative Law**, (1985) state at page 164,

> Two principle issues underlie the majority decision of the Supreme Court, written by Laskin C.J.C.:
>
> (a) Was the status of a probationary constable sufficient to attract principles of natural justice to termination proceedings?
>
> (b) Is there a general duty to be fair even if the principles of natural justice do not apply?

and again at page 165,

> On the other hand, Laskin C.J.C. equally clearly recognized a distinction between the "duty to be fair" and the principles of natural justice. He specifically adopted Megarry J.'s **dictum** in **Bates v. Lord Hailsham of St. Marylbone**:[1]
>
> > that in the sphere of the so-called quasi-judicial the rules of natural justice run, and that in the administrative or executive field there is a general duty of fairness.
>
> The chief justice also referred to de Smith's explanation[2] of the relationship between fairness and natural justice, and to the[3]
>
> > realization that the **classification of statutory functions as judicial, quasi-judicial or administrative is often very difficult,** to say the least; and to endow some with procedural protection while denying others any at all would work injustice when the results of statutory decisions raise the same serious consequences for those adversely affected, regardless of the classification of the function in question...

The dispute filed by Osiel will examine all aspects of the staking and the application to record **at the hearing** to determine whether both are in accordance with the **Act**. The tribunal is satisfied that the acting mining recorder did entertain questions concerning the application to record at the hearing but quite correctly did not call into question the actions of the mining recorder on the day Osiel was in the office.

Application to Record

Sketch

Subsection 44(1) sets out that an application in the prescribed form must be

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1. [1972] 1 W.L.R. 1373 at 1378 (Ch.D).
2. S.A. de Smith, **Judicial Review of Administrative Action**, 3rd ed. (1973), pp 208-209.
3. (1979) 88 D.L.R. (3d) 671 at p. 681, emphasis added.

accompanied by the prescribed fee and a sketch or plan showing the prescribed information.

O.Reg. 111/91 prescribes the forms to be used. Section 4 reads,

> **4.** An application to record a staked mining claim under subsection 44(1) of the Act shall be in Form 4.

Form 4 has three parts. Part A is entitled, "Application to Record Staked Mining Claim(s)". Part B is the Certificate of the Applicant. Part D is for completion of the sketch in ink. Reference is made to Part C.

Part C is entitled, "Sample Sketches". At the top of the page is stated, "Complete the group sketch in Part D using this as a guide. Where applicable, the items below must be shown in the sketch."

While the information subsequently contained is illustrative, it is clear that all items found in the claim are to be noted under location of claims, developments, claim information and topographic features.

Part D requires a sketch of the claims which "must show corner posts, witness posts and line posts, and the distances between the posts in metres." Topographic features and development are to be included. Reference is made to the sample sketch in Part C.

The tribunal finds that topographic features and developments are prescribed by Form 4. Certainly, it can be argued that corner posts, line posts and witness posts are integral to the multi unit mining claim. However, the noting in the sketch of topographic features and developments cannot be considered as extraneous information which may or may not be entered on the sketch as time may permit. They are integral to the staking process, not only as a way of locating claim information such as posts in the field, but as a means of verifying that the staker had in fact been where he or she alleges.

Osiel made several references to time wasted noting such features. At no

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time during the hearing was it suggested that this was a competitive staking; indeed, the date on which Osiel stated he performed the staking was several days after Abolins. The tribunal has difficulty in comprehending Osiel's arguments concerning the time wasted in noting important features and would consider such an omission only in compelling circumstances in a staking which was not competitive.

With respect to whether Abolins is precluded from working from McBride's sketch in completing his application to record, the tribunal fails to appreciate the impropriety alleged. It is quite clear from the evidence of Abolins and McBride that both are competent prospectors, either one of whom could have completed the staking in its entirety on their own. As the tags were in Abolins' name, they each took on tasks such that the staking could validly be in Abolins' name, notwithstanding the disability Abolins had with his hand. There is no evidence to suggest that Abolins was not present at the time the staking took place or that he is seeking improperly to be involved in a staking for which he was not present. The fact that McBride took field notes and roughed out a sketch of the claim from his own notes prior to the completion of the sketch in the application to record is of no consequence. On the face of it, there is no suggestion that this can be construed as misleading. There is no legislative prohibition from making a sketch from the field notes and drawings of a person assisting in the staking. Subsection 8(7) of O. Reg. 115/91 sets out that, with respect to the physical staking of the claim, assistants may assist in constructing the posts or marking the perimeter of the claim. The tribunal finds that there is nothing improper, let alone misleading, in relying on McBride's field notes, accepting that Abolins did in fact comply with the requirements of completion, marking and affixing tags to the posts.

The tribunal finds that it accepts the reasons given by Abolins and McBride for the inaccuracy of the distances along the west claim line. Owing to the presence of the lake and inability to use the hip chain, the tribunal finds it is satisfied by the explanation given. As to whether another staker in the vicinity is likely to be misled, owing to the flagging and blazing along the water's edge, another staker in the vicinity would be apprised of the proximity of Abolins' claim. It should be noted that Osiel was not in fact misled by the inaccuracy which he asserts should defeat Abolins' claim.

The discrepancy between the field note distances and what was ultimately taken to be the length of the sides of the claim, being a matter of metres on the north and south boundaries is found by the tribunal not to be indicative of an attempt to mislead. McBride was very convincing in his explanation that adjustments are made for

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terrain, namely going up and down hills or around trees. Discrepancies of five and seven metres in this regard cannot be attributable to anything other than estimates of necessary adjustments for terrain.

Distances

The use of the bar scale is unfortunate. Parts C and D of Form 4 clearly indicate that distances between the posts must be shown in metres. While a bar scale allows one to determine the distance illustrated, the tribunal finds that actual distance in metres next to the corresponding portion of the claim line is what is contemplated by the form.

However, the issue to be determined is whether the use of the bar scale to show distances on the prescribed sketch renders the staking invalid. The tribunal notes that the failure to note the distances in the sketch to correspond to the claim lines does not have any effect on a staker in trying to obtain his bearings in the bush. As a subsequent staker would not have access to the sketch, there is no likelihood that a staker could be misled.

Having heard from McBride and Abolins, the tribunal is satisfied that the decision to use the bar scale was made in good faith, both honestly believing that by doing so, the requirements of the **Act** and regulations had been fully complied with.

Osiel has advanced the proposition that proper completion of the application to record is an integral part of the staking of a mining claim. There is no legislative support for this. Form 4 is meant to reflect the actions of the staker in the bush. Any oversights in completing the form can be corrected at the time the application to record is received by the mining recorder by directing the staker, either in person or through the mail, to make necessary changes.

Clause 17(b) of Ontario Regulation 115/91 reads:

> **17.** If it appears that a licensee has attempted in good faith to comply with the Act and this Regulation, a mining claim of the licensee is not invalidated by,

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> (b) the failure of the licensee to describe or set out the actual area or parcel of land staked out in the application to record the claim or the sketch or plan accompanying the application.

The tribunal finds that, being satisfied that there has been no attempt to mislead on the part of Abolins, the use of the bar scale and failure to correctly show the distance on the west side of the claim line does not invalidate the staking of the mining claim by Abolins.

Staking Requirements

Undersized Posts

The use of undersized posts was admitted by Abolins. Leaper advised that Abolins used trees available in the immediate vicinity without which he would have had to move a distance of 200 to 300 feet in the bush. Concerning whether an unfair advantage could be gained by using undersized posts, again, there is no evidence that this was a competitive staking or that time was of the essence.

The effect of undersized posts did not cause any problem in the inspection of the mining claim. Leaper testified that he had no problem finding the posts and all required information was legibly inscribed. The fact that Osiel did not locate the posts in the field, given that the posts were found by Leaper and given the quality of blazing of the lines is puzzling. However, the test is not that the staking is of a quality that Osiel was misled, but rather, whether it is likely that a licensee in the area is likely to be misled. The fact that Osiel believes he was, in fact, misled, speaks more to Osiel's level of skill and not to the quality of the staking itself.

The tribunal finds Abolins to have honestly proceeded to use trees which were adequate to the task, notwithstanding that the facing on the posts was as little as 7 centimetres across in some cases.

Similar concern is raised through Osiel's submission that use of commercial timber would allow proper staking in the absence of which larger trees are the only means of obtaining a face 10 centimetre across. The tribunal prefers the approach of Abolins

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in respecting the interest of surface rights holders by using available trees in the immediate vicinity of the claim line, so long as the inscription is accurate and legible. It should be noted that commercial timber 4 x 4 lumber, which refers to inches and not centimetres, is in fact 3 3/4 inches to a side. Notwithstanding that the legislation allows use of such timber, the consequences of having timber not meet the size requirements was not foreseen in drafting the regulation.

Axe or Chainsaw

Argument that the use of an axe on undersized trees was to gain an advantage is not supported by the evidence. This was not a competitive staking. The use of a chainsaw for staking is unusual in the extreme and it is quite clear that prospectors do not regularly take chainsaws into the field. It requires a considerable leap to impart improper motives to a staker who prepares the only standing trees in the vicinity of his claim line posts with the method employed by virtually all of the prospectors in the province. The tribunal finds that nothing in this argument can call into question the method used by Abolins. There is no indication of a likelihood to mislead others or that Abolins did not act in good faith.

Location of No. 4 Post

The location of Abolins' No. 4 post was reasonably explained in the circumstances. The magnetic declination indicated in Abolins' claim 995 is 10 degrees west, whereas in claim 997 it is north 10 degrees west, supporting the evidence of Abolins and McBride that they detected a magnetic anomaly.

The tribunal finds that it accepts the evidence of Abolins and McBride concerning the placement of the No. 4 post of Claim 997 and is satisfied that there was no attempt to mislead stakers in the field. Abolins commenced staking at this No. 4 post, so that its placement would be critical to the orientation of his remaining posts. The tribunal finds Abolins and McBride to have been credible concerning the reasons for placement of the post.

As to why Osiel failed to notice either the No. 4 post, the flagging and blazing in the area, the tribunal finds that Osiel has not demonstrated expertise in orienting himself in the bush. He was unable to find his own mining claims to the south and he overestimated distances travelled. His evidence concerning having only two hours

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of food, while rather melodramatic, supports the finding that Osiel is not comfortable in the bush and that his observations in this matter are not reliable. The evidence of Abolins and McBride is preferable.

Missing Witness Post

In **Esso Resources Canada Limited et al. v. Canadian Nickel Company Limited et al.** 7 M.C.C. 641, Commissioner Ferguson reproduces in full subsection 131(6) of the **Mining Act** R.S.O. 1980, and says at page 652,

> It may be arguable from clause 131(6)(d) of the **Mining Act** that the **Act** itself recognizes that there can be substantial compliance where a post is not erected. However it is equally arguable that the key phrase is "missing corner posts" and that the adjective "missing" involves a situation where a post existed but at the time of inspection was missing. In the view of the tribunal, the dichotomy is semantic and in our opinion the curative provision is intended to cover a situation where a post is or tags are missing at the relevant time, whether such time be the time of staking or inspection.

The wording of clause 131(6)(d) was amended, and is reproduced as it now reads,

> **110.** - (6) The recorder may make an order directing a holder,
>
> (d) to place or replace missing or defective posts and to affix tags to such posts,
>
> and the recorder shall set out in the order the time within which the work shall be completed and reported to the recorder.

The legislation clearly deals with the issue of a missing post which was not placed at the time of staking. On the facts of this case, the tribunal is satisfied that Abolins was unaware at the time of staking of the need to have two witness posts in

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accordance with subsection 11(2) of Ontario Regulation 115/91. It is accepted that the prior need for two witness posts was not an issue as a group of units in a mining claim was not possible until June 3, 1991.

Morgan v. Bradshaw refers to the use of a common witness post as set out in subsection 64(9) of the **Mining Act**, R.S.O. 1970, which has been replaced by section 15 of Ontario Regulation 115/91. Common posts are understood by the mining community to mean, with respect to contiguous mining claims, one post is used in the place of two, so long as the direction of the tag or inscription faces the direction of the mining claim to which it applies in a clockwise manner and the accompanying sketch indicates that common posts have been used. The term in no way is meant to support the argument that it stands in the place of a missing post and the tribunal is satisfied that Abolins did not take such a position.

The tribunal finds that the failure to place a second witness post at a time when the amendments to the **Act** were new and not fully understood or appreciated should not result in a declaration that the staking is invalid.

Referring to Osiel's submission that the failure to place a second witness post makes the staking incomplete, the tribunal finds that subsection 8(1) of Ontario Regulation 115/91 requires that the staking of a mining claim must be a continuous action. Therefore, it cannot be argued that a staking is incomplete. The tribunal does not accept Osiel's argument that the missing post renders the staking incomplete. Therefore, it is not necessary to determine whether **Sutherland v. Meunier** is applicable.

Substantial Compliance

Osiel cited a number of factors as evidence of why Abolins' staking should not be deemed to be in substantial compliance with the **Act**. Subsection 43(3) is reproduced

> **43.** - (2) The staking out of a mining claim shall be deemed to be in substantial compliance with the requirements of this Act and the regulations even if there is a failure to comply with a number of specific staking requirements if,
>
> (a) the failure to comply is not likely to mislead any licensee desiring to stake a claim in the vicinity; and

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(b) it is apparent that an attempt has been made in food faith by the licensee to comply with the requirements of this Act and the regulations.

Osiel asked the tribunal to rely on the cumulative defects doctrine to defeat Abolins' claim. However, the tribunal is bound by the decision in **Ramsay v. Fernberg**, 7 M.C.C. 385 (Div. Ct.), where Saunders J. states at page 388,

> The learned Commissioner in his reasons refers to the cumulative effects doctrine or principle. By that, I take it he means that while individual defects taken alone might not invalidate a staking the cumulative effect of a number of such defects may result in invalidity. In the course of his reasons, the learned Commissioner said:
>
> > With reference to the question of the relationship between the cumulative defects doctrine and the doctrine of substantial compliance, it is the opinion of this tribunal that the effect of the **Burns** case is that regardless of whether there are grounds to upheld the validity of the staking on the substantial compliance doctrine that doctrine cannot be applied in the face of numerous technical inconsistencies. In other words, as a practical matter where there are problems that prevent a staker from complying with the Act, must be taken to ensure that the matters which can be complied with are dealt with.
>
> 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

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> 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 because of a number of consistencies 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 number of technical inconsistencies.

Since **Ramsay v. Fernberger** the substantial compliance section of the **Act** has been amended with the addition of subsection 43(2). In addition to the test of substantial compliance, there is a new provision for "deemed substantial compliance" where the deficiencies are not likely to mislead and where there has been an honest attempt to comply.

Therefore, notwithstanding the technical defects of posts being less than 10 centimetres across where faced, absence of distances between posts or the missing witness post, the question to be determined is whether there can be "deemed substantial compliance" in the circumstances. As set out in the findings above, the quality of Abolins' staking is not such that a staker would be misled in the field. His lines are well blazed and flagged. The inscriptions are legible and the information contained exceeds the requirements of the **Act**. The missing witness post can be erected through the curative provisions of the legislation. Clearly, Abolins sought to comply with the requirements to the best of his ability. The fact that he did not attend at the Recorder's office to ask questions concerning the new staking requirements does not detract from this fact. The absence of the witness post and use of the bar scale are honest mistakes.

The tribunal finds that there is no indication that Abolins proceeded to stake in a manner intended to mislead. Osiel failed to make his case that there was no indication on the ground of Abolins' staking at the time of his own. The tribunal finds that it was not persuaded by Osiel's observations. The fact that his perception of distances travelled immediately prior to his own staking, apparently having been exaggerated by a factor of at least four if not six times the actual distances on the ground, leads the tribunal to place minimal weight on his alleged observations. Osiel had the opportunity to present Cuddy, his assistant, as a witness. The absence of corroborating evidence has hurt Osiel's case considerably. There is no evidence that Abolins was attempting to surround mining

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claims held by Osiel. The land was open for staking and the evidence shows that Abolins staked first. Osiel has not succeeded in disproving this fact.

The standard of proof to which Osiel sought to have Abolins' staking placed was that of beyond a reasonable doubt. However, the tribunal finds that the standard of proof of evidence to be applied to the staking is one of a balance of probabilities. While Abolins could not produce receipts showing that he staked claim 997 on October 13, 1991, he did produce receipts showing he was in the area immediately prior to that date. McBride's evidence of corroboration is accepted. On the balance of probabilities, the tribunal finds that Abolins performed the staking of claim 997 at the time and manner he sets out in his evidence.

The tribunal does not find itself bound by the four principles of substantial compliance set out in **Pilon v. Gonzalez** set out above. In an unreported decision of the Divisional Court, March 24, 1992, Campbell J. specifically does not make any findings with respect to the view expressed by the tribunal at that time. Rather, the decision of the tribunal in the case of Abolins' staking, is based upon an interpretation of the meaning of "deemed substantial compliance" and the impact of the Divisional Court's decision in **Ramsay v. Fernberger**.

"Deemed" Substantial Compliance

The word "deemed" may mean either to be conclusively presumed, adjudged or determined or it may mean that it is taken to be conclusive until it is disproved. As there is no technical or legislative significance in its use, the meaning must be determined from a reading of the **Act** as a whole.

Subsection 43(2) of the **Act** sets out certain conditions to be met for there to be deemed substantial compliance, being the unlikelihood of misleading a staker in the vicinity and good faith in attempting to meet the requirements of the **Act** by the staker wishing to rely on the subsection.

The tribunal finds that the scheme of the **Act** is very explicit as to when a staking shall be deemed to be in substantial compliance, through satisfaction of the criteria set out in clauses 43(2)(a) and (b). Having met these criteria, the tribunal finds that the meaning of "deemed", when read in connection with the section and the curative provisions set out in subsection 110(6), means to be conclusively presumed, adjudged and determined.

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The tribunal, satisfied that having reasonably attempted to comply with the requirements of the legislation and performed the staking which is not likely to mislead any competent licensee actually in the vicinity, finds the appeal of Osiel in the matter of mining claim 1105997 should be dismissed.

Claim Boundaries

Based upon the evidence filed at the hearing, namely the Certificate of the Surveyor General's Instructions for surveying the Township of Lake (ex. 28), dated November 15, 1821 and reference to double front townships in **Crown Surveys in Ontario** (ex. 29), and the evidence of McBride given in response to these exhibits and certain resurveys in the Township of Lake, it is found that Lake Township is a double-front township, with north-south boundaries measuring 30 chains and east-west boundaries measuring 66.67 chains. The double front township corresponds to subsection 5(8) of Ontario Regulation 115/91, which reads,

> **5.** (8) In a township surveyed into lots of approximately 80 hectares, a mining claim of minimum size shall contain 20 hectares, more or less, and shall consist of the northeast, northwest, southeast or southwest quarter of a lot.

Converting the measurements from chains to metres and applying them to the northwest and southwest quarter lots of claim 997, the tribunal finds that the north and south boundaries should have a measurement of 605 metres and the east and west boundaries should have a measurement of 670 metres.

The tribunal finds that it will refer the matter back to the Recorder for an order pursuant to subsection 110(6) of the **Act** for the movement of posts to conform with the length of boundaries set out above, commencing at the surveyor's pin located near the northwest corner of the claim and reblazing lines where necessary. While it is not a condition of this Order, it is recommended that Mr. Abolins consider having the mining claim surveyed by a registered surveyor. It is unfortunate that such a survey cannot be considered for purposes of assessment work, as there would be advantages to having a recent survey in this area of Lake Township for purposes of future stakers locating themselves on the ground with any degree of accuracy.

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Exclusion of Time

Based upon the authority of clause 67(1)(b) of the **Act**, the tribunal finds that the time during which the hearing of this dispute has been pending before the mining recorder and the tribunal is excluded. Allowing sufficient time for the recording of this Order, the tribunal finds that the period of November 19, 1991 to July 26, 1993 is excluded and the date by which the first and second units of assessment work are to be performed and filed is fixed as July 4, 1995.

Costs

While there is no allegation that the dispute was frivolous, the tribunal questions whether Osiel's own staking could withstand the scrutiny to which he put Abolins' staking. Abolins and McBride did an exemplary job of defending allegations of bad faith.

In **Guiho v. Amax Potash Ltd. et al.**, 6 M.C.C. 1, Commissioner Ferguson noted at page 10 that, "hearings before this tribunal have historically been conducted without the aid of counsel or other legal advice." Both respondents were awarded costs on a party and party basis, including Larche who represented himself.

Based upon the discretion given to the tribunal in section 126 of the **Act**, the tribunal finds that Abolins is entitled to costs and disbursements fixed in the amount of $1,250.00.