File No. MA 011-06

L. Kamerman	)	Wednesday, the 11th day
Mining and Lands Commissioner	)	of July, 2007.

THE MINING ACT

IN THE MATTER OF

Mining Claim SSM-3018108, situate in the Township of Lendrum, in the Sault Ste. Marie Mining Division, staked by and recorded in the name of Leon Bruce Staines, hereinafter referred to as the "Staines Mining Claim";

AND IN THE MATTER OF

Cancelled Mining Claim SSM-3015690, situate in the Township of Lendrum, in the Sault Ste. Marie Mining Division, staked by and recorded in the name of Daniel Roger Klassen, hereinafter referred to as the "Klassen Cancelled Mining Claim";

AND IN THE MATTER OF

Ontario Regulation 7/96, Claims Staking;

B E T W E E N:

DANIEL ROGER KLASSEN

Appellant

- and -

LEON BRUCE STAINES

Respondent

AND IN THE MATTER OF

An appeal from the decision of the Provincial Mining Recorder, dated the 28th day of February, 2006, for a declaration that the Staines Mining Claim be declared invalid and for the recording of the Klassen Cancelled Mining Claim.

O R D E R

1. IT IS ORDERED THAT the appeal of Daniel Roger Klassen, dated the 29th of March, 2006, be and is hereby dismissed.

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2. IT IS FURTHER ORDERED AND DECLARED THAT the portion of the 19 acres which comprise the Staines Mining Claim SSM-3018108, upon which are located the lodge and cabins, are excluded from the aforementioned Staines Mining Claim SSM-3018108, on the basis that access to those lands require permission of either the surface rights owners or an Order of the Provincial Mining Recorder or tribunal (Mining and Lands Commissioner), pursuant to section 32 of the **Mining Act**.

3. IT IS FURTHER ORDERED AND DIRECTED THAT no Order to move posts or further demarcation of new boundaries occur as a result of Paragraph 2 of this Order.

4. IT IS FURTHER ORDERED that the notation "Pending Proceedings", which is recorded on the abstract of the Mining Claim, to be effective from both the 15th and the 29th days of March, 2006, respectively, be and are hereby removed from the Mining Claim.

5. IT IS FURTHER ORDERED that the time during which the Mining Claim was under pending proceeding, being the 15th day of March, 2006 to the 11th day of July, 2007, a total of 484 days, be excluded in computing time within which work upon the Mining Claim is to be performed and filed.

6. IT IS FURTHER ORDERED that the 12th day of April, 2009, be fixed as the date by which the next unit(s) of prescribed assessment work, as set out in Schedule "A" attached to this Order, must be performed and filed on Mining Claim SSM-3018108, pursuant to subsection 67(3) of the **Mining Act** and all subsequent anniversary dates are deemed to be April 12 pursuant to subsection 67(4) of the **Mining Act**.

7. IT IS FURTHER ORDERED that no costs shall be payable by either party to this appeal.

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

Reasons for this Order are attached.

DATED this 11th day of July, 2007.

Original signed by

L. Kamerman
MINING AND LANDS COMMISSIONER

SCHEDULE "A"

MINING CLAIM #	NEW DUE DATE
SSM-3018108	April 12, 2009

File No. MA 011-06

L. Kamerman) Wednesday, the 11th day
Mining and Lands Commissioner) of July, 2007.

THE MINING ACT

IN THE MATTER OF
Mining Claim SSM-3018108, situate in the Township of Lendrum, in the Sault Ste. Marie Mining Division, staked by and recorded in the name of Leon Bruce Staines, hereinafter referred to as the "Staines Mining Claim";

AND IN THE MATTER OF
Cancelled Mining Claim SSM-3015690, situate in the Township of Lendrum, in the Sault Ste. Marie Mining Division, staked by and recorded in the name of Daniel Roger Klassen, hereinafter referred to as the "Klassen Cancelled Mining Claim";

AND IN THE MATTER OF
Ontario Regulation 7/96, Claims Staking;

B E T W E E N:
DANIEL ROGER KLASSEN
Appellant
- and -
LEON BRUCE STAINES
Respondent

AND IN THE MATTER OF
An appeal from the decision of the Provincial Mining Recorder, dated the 28th day of February, 2006, for a declaration that the Staines Mining Claim be declared invalid and for the recording of the Klassen Cancelled Mining Claim.

REASONS

Background

At its heart, this appeal pits the interests of surface rights landowner, Daniel Klassen, against prospector and mining claim holder, Bruce Staines. Both have staked a mining claim over Mr. Klassen's (and his partner, Valerie Palmer's) surface rights. Mr. Klassen's stak-

ing was challenged and found wanting; that of Mr. Staines was subsequently allowed for recording. Mr. Klassen is challenging the findings of the Provincial Mining Recorder in disallowing the staking and recording of his claim in favour of that of Mr. Staines.

There are a number of misconceptions held by Mr. Klassen regarding the rights of prospectors wishing to stake his lands and his own entitlement to stake and hold an unpatented mining claim within his surface rights.

Mr. Klassen does not own the mining rights under his surface rights. They are held by the Crown. Since his purchase of the surface rights in 1989, these mining rights have been variably held by Mr. Klassen, now Mr. Staines and by the Crown. Mr. Klassen made a point of stating that since its inception as an unpatented mining claim, the mining rights on this property have been held by the owner of the surface rights. That is irrelevant however, a historic artefact, as owning the surface does not give one a greater entitlement to hold or to acquire the rights to the Crown held mining rights. No one has a greater right to stake and hold this interest as an unpatented mining claim beyond that which is permitted by the **Mining Act.** Stated another way, Mr. Klassen is entitled, as is any licensed prospector, to stake the lands in accordance with the legislative requirements and upon completion of this statutory requirement, to hold the claim, upon performance of his statutory obligations in connection with it.

In most situations, other stakers wishing to stake these lands do not owe Mr. Klassen any courtesy in connection with their staking beyond that of not wasting timber or causing property damage. They can certainly notify him that they are on his surface rights, but he does not have the right to forbid them access. I say in most situations because very clearly, the presence of buildings on the lands raises the question of whether section 32 is applicable. In cases where there are improvements on lands where surface rights are alienated from the Crown, the landowner(s)' permission or an order of the Provincial Mining Recorder or Commissioner may be required.

I mention that Mr. Staines does not owe Mr. Klassen any additional courtesy for the following reason. Mr. Klassen has implied that there was something nefarious in Mr. Staines hovering and watching his staking. Nothing could be further from the truth. In fact, Mr. Staines would have been well within his rights to have launched a competitive staking of the lands, essentially working to stake shoulder to shoulder with Mr. Klassen. This land came open for staking on the morning when Mr. Klassen staked it for the second time within a period of days. In many cases when there is such an opening of lands, these competitive stakings can see any number of stakers competing for the same interests. They will chop or erect milled lumber corner posts, blaze trees along boundaries and clear the underbrush, each working to complete their respective stakings before the others. This is a completely normal situation.

I understand that the prospect of this having occurred and continuing to occur is highly distressing to Mr. Klassen and that fact is the subject matter of this appeal. However, in the normal course of mining activity, it must be stressed that where mining rights are held by the Crown, the right of stakers to enter onto property whose surface rights are privately held is not untoward. It is mining-based activity sanctioned by the legislation as it currently exists.

In 1989, Daniel Klassen and Valerie Palmer purchased the surface rights to 19 acres of land along the shores of Lake Superior, which overlook Michipicoten Harbour, between

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Wawa and Sault Ste. Marie. The mining rights are held by the Crown and throughout the period of their ownership, those mining rights have either been staked as unpatented mining claims or were open for staking.

The Klassen/Palmer lands are typical of Northern Ontario along the shores of Lake Superior. The lands are in somewhat of a natural or semi-wild state and contain cross country ski trails. All of the shore along the immediate area has been developed, albeit in a rustic, non-intrusive manner, either as residences or cottages and the Klassen/Palmer land is no exception. They occupy a building which is a renovated hunting lodge and own other unoccupied cabins which are no longer rented in connection with the lodge. However, these cabins do have a history as hunting cabins and were occupied in connection with the Helen Mine at one time. They also form part of the Klassen/Palmer plans for the future for their property.

Notwithstanding that the alienation of the original 33 acres from the Crown (subdivided at the time of their purchase in 1989) occurred in 1948 as a Mining Lands Patent (meaning that the mining and surface rights were granted for mining purposes to the then purchaser) a hunting lodge and a number of cabins were built, purportedly in 1933 and 1939, respectively, on the property. This fact does not appear to have been taken into account at the time the original unpatented mining claim was accepted for recording. What should have happened is that the sketch of the mining claim should have contained all of the existing buildings. The then mining recorder would have been called upon to make a determination of whether the lands within which the buildings were located should have been included in the mining claim. While the reasons for recording of lands including this historic lodge remains a mystery, its operation after the issuance of the Mining Lands Patent can be understood from the history described below.

Both Klassen and Palmer are artists. I was not made privy to the nature of Mr. Klassen's craft, but based upon information provided, photographs of Ms. Palmer at work and a catalogue of some of Ms. Palmer's work at a juried show (Ex. 1Q), it is clear beyond any doubt that Ms. Palmer uses the 19 acres and undoubtedly all portions of the lands, buildings and even Lake Superior on occasion, as backdrops and in the background of her work.

So much does the landscape and actual physical property form part of her "outdoor workshop" that Ms. Klassen is shown in several photographs painting inside a square, portable "Florida room", although it could be called a "Northern Ontario Room". It is constructed of two by fours over which have been nailed screening sufficient to keep out black flies, horse flies, mosquitoes and the like. There is nothing elegant about this structure – its roof is square and flat screened just like the sides. There is an entrance door on one of the sides. The "room" would afford absolutely no protection from bears, badgers or any other threatening wildlife, should they happen across Ms. Palmer's path. Clearly, this structure is designed for her comfort and ease, but not for her overall safety.

Although not specifically stated, it seems that the existing structures were somewhat run down when Klassen/Palmer purchased the property. They have refurbished the hunting lodge as their primary residence and have plans to refurbish the cabins, but not for use in connection with hunting. Instead, it is their hope to create a type of artists' retreat, allowing use of the cabins and the lands for artistic purposes.

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Mr. Staines owns the mining claim to the north of the Klassen/Palmer holdings and lives in a home on one of the "cottage lots" along the shore of Lake Superior a short distance to the north. There are a few other homes between that of Mr. Staines and the Klassen/Palmer property.

Mr. Staines' relationship with Klassen/Palmer is not a happy one for several reasons. Apparently, Mr. Klassen holds Mr. Staines responsible for the "excessive" cutting of trees on the survey line of their property in December, 2003. More particularly, an uneasy relationship has developed between Mr. Staines and Superior Aggregates Company on one hand and local landowners such as Mr. Klassen and Ms. Palmer, on the other. Mr. Staines is the site manager for Superior Aggregates Company whose proposed activities are described in his letter to the editor of the local [unnamed] newspaper, as being "to revitalize the harbour (which has been an industrial site for over a hundred years), mine and process aggregate, which would begin to stimulate the local economy. A commercial port and an aggregate production facility would likely attract other industries such as concrete products manufacturing and decorative stone production…." [Ex. 1, Tab G-2)

While irrelevant to the issues in this appeal, Mr. Staines' view of mineral potential in the area, its potential beneficial economic effects on the community and his steadfast belief that lands which were originally alienated from the Crown as mining lands should so remain runs directly counter to those of Mr. Klassen and Ms. Palmer. They have apparently clashed before the Ontario Municipal Board on the matter of the aggregates development and bring this animosity to their mutual dealings concerning the appeal of the staking dispute before me. Normally, I would not highlight these two world views. However, they collide on this property in connection with the issues raised in the dispute and whether the land should properly be open for staking.

The Dispute

This is an appeal from a decision of the Provincial Mining Recorder ("Mining Recorder") concerning a dispute filed by Mr. Staines against the staking of Mr. Klassen. The result before the Mining Recorder was the cancellation of the Klassen Mining Claim and by allowing the dispute, the recording of the Staines Mining Claim. Mr. Klassen appealed that decision and the appeal hearing was held in Sault Ste. Marie on September 12, 2006.

Ostensibly, this appeal arose because of the quality of Mr. Klassen's staking and Mr. Staines' stated concern that if he didn't stake it, the mining rights could easily fall into the hands of a third party. Underlying this was concern on the part of Mr. Staines that these mining rights not be removed from the Crown lands available for exploration. Conversely, Mr. Klassen was concerned that whatever mining activity take place on the property not interfere with its relatively pristine nature as a backdrop for the canvasses painted by Ms. Palmer.

Mr. Klassen's Staking

In 1995, prospector Clifford Clement and his father Mickey, sought Mr. Klassen's permission to stake the property. Apparently quite surprised at this, Mr. Klassen and Ms. Palmer asked that the property be staked on their behalf instead and the Clements were apparently agreeable to this. According to Mr. Klassen, the 1995 staking took 50 minutes.

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Although it is not clear what occurred in the interim, apparently Mr. Klassen staked his property on December 4, 2003, but did no assessment work, whereby the claim came open for staking in late 2005. Mr. Klassen indicated that on December 2, 2005, he decided to restake his claim. He was not aware that it could not be staked before it came open for staking. He indicated that he did not want to take any chances that someone would stake it before him. Apparently, when Mr. Klassen sent his application to record in to be recorded, he was advised that the land was not open for staking until December 8, 2005. Mr. Klassen indicated that he would be there before 8:00 a.m. on December 8, 2005, ready to stake and put new tags on.

When Mr. Klassen proceeded to the location of his #1 post on December 8 at 7:55 a.m., Mr. Staines was present, carrying an axe, near the scenic lookout, which would have corresponded with Klassen's #2 post. When he saw Mr. Klassen, he apparently returned to his truck. When asked whether he intended to stake the property, Mr. Staines indicated that he would stake if Mr. Klassen did not "defend" his claim and that he was waiting for his helper to arrive. Mr. Staines, on the other hand, stated that he had warned Mr. Klassen that commencing staking prior to 8:00 a.m. would create an invalid staking, a fact which Mr. Klassen could not recall. What is clear is that Mr. Klassen did not trust Mr. Staines and was not prepared to take his comments within the context which they were offered.

Mr. Klassen described his staking in considerable detail. In so doing, he made no issue about the various ways in which he did not comply with the statutory requirements for staking, but rather, sought to justify them under the guise of deemed substantial compliance, where Mr. Staines would not have been misled by what he encountered on the ground.

Mr. Klassen removed the tag from his old #1 post at 8:00 a.m. on December 8. On December 2, he had planed down the two year old post on that day, nailed on a new one and inscribed the post. He then wrapped the post with red flagging tape to denote that it was, notwithstanding the use of an old post, a new staking. As Mr. Klassen describes it, since he had already walked the lines several days before and determined that the survey lines were clearly visible and since he did not wish to cut or slash (or blaze) trees on their property, he was of the opinion that he did not need to perform any further blazing. Mr. Staines asked him whether he would like a new post, which Mr. Klassen viewed as an attempt to distract him from his efforts and declined. Instead, he prepared his #2 post in a similar manner to the used #1 post. Mr. Klassen admitted to driving part of his lines. He admitted that he neither blazed trees along his line nor cut the underbrush. At every post, Mr. Klassen re-used the pre-existing posts in a similar manner.

Mr. Klassen submitted that his staking had satisfied the legislative requirements in that one could readily follow the perimeter of his claim and, based upon the inscriptions on his used posts, no one would have been misled by what took place or when. In fact, the line between his own and the Staines property to the north had been cleared rather starkly in 2003, when numerous trees corresponding to the survey line were felled onto his property.

Mr. Klassen pointed out what he felt were certain errors in the Mining Recorder, Mr. Spooner's, description of the evidence presented before him. For example, he reiterated that he had quite clearly stated that he had driven between posts rather than walk the lines. Mr. Klassen seemed to regard as very important to his case that he was staking as the owner of the surface rights.

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Mr. Klassen's #1 post had been knocked down in the interim, a fact which he regarded with great suspicion. In fact, this is not an uncommon occurrence in the field and one which carries no great weight. An experienced staker or mining claim inspector, working from a sketch, would be able to find felled posts with little difficulty, assuming they had not been carted away. Even then, animal intervention such (for example, beavers) is not unheard of. Outright vandalism is prohibited by the **Mining Act,** but I am satisfied that nothing untoward of sufficient gravity to merit additional examination, had occurred.

Mr. Klassen stated that he would undertake non invasive, non intrusive assessment work on the lands, thereby ensuring respectful use of the surface rights. He could not, however, specify what this might entail.

Mr. Staines' Staking

On the morning of December 8, 2005, it was Mr. Staines intention to stake the mining claim in question with a helper. He gave Mr. Klassen the benefit of the doubt, having advised him that the staking, as being carried out, was illegal, but gave him a day or so to "clean it up." Anyone could have disputed Mr. Klassen's efforts, having used old posts and pre-used nails.

Mr. Staines stated that he could not leave the mining claim vulnerable to staking by a third party. He carried out his staking without trespassing and blazed the line between the #4 and #1 post, noticing that there were no fresh blazes or markings on the trees. He explained the different location of his #3 post and indicated that he didn't want to trespass or cut down a tree. Instead, he marked his corner from the edge of the clearing.

It was submitted that Mr. Klassen could not rely on ignorance of the law to support his staking. The nature and extent of activities which are necessary to support a valid staking is a matter of law. It is not a question of whether a boundary is invisible or not, but a question of law that one must properly mark one's boundaries. Substantial compliance comes into play when there is a minor variance between statutory requirements and that which has taken place in the field, such as facing a post 1/4 inch too narrow. It is not designed to make that which is illegal legitimate.

According to Mr. Staines, what he does for a living or his association with Superior Aggregates Company should be regarded as irrelevant for purposes of the staking in question. It is his profession to acquire and develop properties. Mr. Spooner looked at all aspects of Klassen's staking with the assumption that omissions were fatal to the legal recording of that claim.

Mr. Staines explained that there is "good looking rock" on the Klassen property. Holding the mining claim protects his own minerals on his lands to the north and that it would not be in his best interests to keep the land open. The mineral potential is described as industrial minerals.

Mr. Staines expressed considerable concern for the loss of mining lands through other uses. He pointed out that the lands were originally patented as mining lands. If they had been leased instead, failure to maintain their mining use would result in a cancellation of the Crown lease.

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For the moment, Mr. Staines indicated that he had carried out considerable assessment work on the property to the north. He would be content to have the work apply to the claim that is the subject matter of this dispute so that he would not enter onto the lands.

Findings concerning the Klassen Staking

The staking of a mining claim is a physical activity which occurs on the surface to mark the land in question according to a statutory scheme, thereby giving notice to all who pass by indicating a potential mining claim. Only through recording and acceptance for recording by the provincial recording office can it become a validly recorded mining claim.

The act of staking is more than relying on what is found on the ground to mark the corners and perimeter of a mining claim. It is the physical act which proclaims an understanding and attempt to adhere to the legislative requirements and a visual representation of compliance with those statutory standards. In a competitive situation, it is the requirement that each staker must undertake the same or a like amount of work in order to "stake his claim" to the land. It is not for the individual to discount the requirements for staking on the basis that there is no need for compliance. Individually, standards of adequacy do not replace legislative requirements.

In **McGill v. Brookbank and Brookbank** (1931) 3 M.C.C. 76 (Ont. M.C.), Godson, J. stated at page 77:

> The root of title of a mining claim depends upon staking. Stakes, blazes and markings form visible evidence of the ground staked and by whom, who for, and when. The application has attached to it a plan showing the ground applied for and with which the staking should coincide. The ground is then plotted on maps of the Recorder showing it is under staking, and these several acts are integral parts and for present and future reference form a history of the claim. Stakes become important monuments as evidence and guides in dispute to determine lines and corners and old posts are at times of much value in fixing the true corners of the claims.

The Ontario legislation has relaxed not the statutory requirements of staking, per se, but the rigour with which they are applied in certain circumstances through the added provision under subsection 43(2), that there can be deemed substantial compliance in cases where there are a number of technical staking deficiencies as long as another staker in the area is unlikely to be misled and there has been an apparent attempt by the staker to comply with the regulatory requirements in good faith.

The effect of this deemed substantial compliance test was recognized in **Harper v. Bancroft and District Chamber of Commerce**, (File MA 007-94) January 15, 2006 (unreported). In that case, after speaking with the surface rights holder, the staking team, which was highly inexperienced, elected to flag (i.e. use flagging tape) on one of the boundaries of their mining claim. This absence of blazing was not found to be fatal to the staking under the circumstances, given the equitable jurisdiction of the Commissioner. In other words, the flag-

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ging of the boundary was recognized as an honest attempt to comply with legislative requirements. However, it did not detract from the legislative requirements themselves and the staker was still required to comply with a further Order of the Mining Recorder to return to the claim and properly blaze the lines. In other words, the staking was permitted to stand, but the staker had to go back, under Order, and redo those portions of the staking in accordance with the legislative requirements, failing which the claim would be cancelled.

What distinguishes Mr. Klassen's case from that of the staker in **Harper** was that Mr. Klassen did not mark the boundary in any way, instead choosing to rely on an old survey line, feeling that it was adequate in the circumstances. In fact, Mr. Klassen's conduct is more in keeping with a surface rights owner who was particularly concerned with and focused upon the appearance of the surface. Although this question was not put to him, I have no trouble finding that Mr. Klassen would not have used flagging tape as an alternative to blazing the trees, as he was at the time most concerned with obtaining or preserving his interest in the mining rights with the absolute minimum of intrusion.

The situation with re-used posts is somewhat more complex, from a historical perspective. Continuing with the judgment of Godson in **McGill,** (*supra*),

> A *bona fide* attempt to comply with the provisions of the Act does not mean an endeavour to stake a claim of the size and form but rather an attempt to comply with the formalities designated by the Act. Mr. Price in *Re Blye and Downey*, 1 M.C.C. 120 at 125, said, 'It is to me obvious that the requirements of the statute in regard to staking out were intended to be more than directory. They prescribe conditions upon which the statute confers important and valuable rights on the miner. Reasonably strict compliance with these prescribed conditions must be exacted if they are at all to serve the purpose for which they have been enforced….
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> In *St. Laurent v. Mercier (Yukon)* 33 S.C.R. 314, a staker was allowed to adopt his *previous markings* as boundaries for subsequent staking. The Mining Commissioner of Ontario in *Henderson and Ricketts* said 'I think the principle of adoption of old markings is rather a dangerous one, and one that may easily be extended too far." In the case before him he allowed the sufficiency of a new staking to be sustained by former markings of the *same staking.* The licensee in that case had personally erected or planted his posts and personally blazed his lines. The adoption in part by the same staker of an immediately previous staking which had been or became abandoned in on quite different grounds from the adoption of the staking of an adversely interest person…

Essentially, between 1931 and 1959, this was the standard for the use of old posts in Ontario, namely that, while frowned upon, it was tolerated in those circumstances where the same staker reused posts from his own abandoned staking. This has been described in Barton, B., **Canadian Law of Mining**, (Calgary: 1993, Canadian Institute of Resources Law) at page 245 – 246:

> An issue that is peculiar to Ontario … is the prohibition of staking out a claim with posts that have previously been used as posts for a mining claim. [O. Reg. 7/96, ss. 14(2)] This prohibition did not appear in Ontario until 1959. Earlier cases there on the subject were decided in the light of the prohibition against defacing existing posts. A number of decisions allowed used posts where the staker was adopting his or her own previous posts and markings, [*Re Reichen and Thompson* (1907), 1 M.C.C. 15 (Ont. M.C.); *Re Henderson and Ricketts* (1908), 1 M.C.C. 214 (Ont. M.C.). Also *St. Laurent v. Mercier* (1903), 33 S.C.R. 314 (Y.T.)] as distinct where the junior staker was a different person. [*Rochon v. Lawrence* (1921), 3 M.C.C. 15 (Ont. M.C.); *Re Tyson* (1956), 3 M.C.C. 160 (Ont. M.C.) *McGill v. Brookbank*(1931), 3 M.C.C. 76 (Ont. M.C.). Also *Re Burns and Hall* (1911) 25 O.L.R. 168 (Div. Ct.)]…. In 1958, the Ontario Court of Appeal excused use of old posts by agents of the beneficial owner of previous claims. [*Fisher v. Koski* (1958), 3 M.C.C. 187 (Ont. C.A.)] The decision led to the enactment of the express prohibition. Subsequently, the Mining Commissioner held that the amendment was intended as a special rule that absolutely required compliance. [*Martin v. Arrowsmith* (1974), 5 M.C.C. 115 (Ont. M.C.)] However, there is also authority that this rule, like others, is subject to the substantial compliance provision of the legislation.

Essentially, what occurred after 1959 following the Court of Appeal decision in **Fisher v. Koski** and the subsequent amendment to the **Mining Act**, the requirement for a new tree or post was set out clearly: "Every post shall be a post, staking stump or tree not before used as a post for a mining claim." Use of the imperative "shall" meant that there was no discretion in the Recorder or Commissioner concerning previously used posts. The entire history and a survey of those relevant cases are very ably set out in the decision of Commissioner Ferguson in **Martin v. Arrowsmith,** (*supra),* who noted that the initial decisions of the then Commissioner after 1959 were done without benefit of the principles of statutory interpretation. He stated at page 128:

> In reviewing the decisions prior to the [1959] enactment of the relevant subsection, it is noted that there was a growing practice of widening the acceptability of the use of used posts. The cases had permitted the extension of this use of used posts from the position in the *Knox* case where the then Commissioner condemned the practice as being dangerous and ought not to be encouraged, to the *Fisher* case where the use of 56 out of 60 posts was accepted. Following this trend, the Legislature enacted a provision in negative wording, in effect prohibiting the practice that had developed. I can only conclude that, by the enactment of a subsequent provision, which was special as contrasted with the general provision of substantial compliance and negative in form, the Legislature intended to reverse the practice that had developed and to prohibit the use of used posts.

As alluded to by Barton, the outright prohibition to the use of previously used posts has changed, where it now states, "Only a post or a standing stump not previously used for staking a mining claim may be used as a claim post." [ss.14(2) O. Reg. 7/96]. Coupled with the introduction of the "deemed" substantial compliance described above, which became effective in 1991, one can no longer predict with certainty that the re-facing and the re-using of old posts will prove fatal to a staking.

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In the end, it will be the sum total of Mr. Klassen's activities both before and during the morning of December 8, 2005, which I find are determinative of whether his staking can stand. In highlighting these activities, I want to note for the record that Mr. Klassen was at all times truthful, forthright and direct in his evidence.

I find that Mr. Klassen's staking activities throughout were for the sole purpose of preventing anyone associated directly with mining exploration activities from gaining access and license to the mining rights which underlie his and Ms. Palmer's surface rights. I base this on three discrete actions.

The actual staking of December 8, 2005, can be followed on the ground so that one could readily ascertain the intended boundaries, based upon existing boundary markings. This is different from Mr. Klassen having actually gone through the actions of a competent and complete staking, that is, marking his boundaries in compliance with the statutory standard. Mr. Klassen took it upon himself to dismiss the requirement to mark the boundaries of his own staking based upon existing information on the ground. However, that information could readily have been attributed to the staking of another, to a legal survey or the activity of an adjacent individual to mark a boundary. The age of the blazes is as important as the action of making them. Had Mr. Staines not staked immediately after Mr. Klassen, a stranger to this situation would have been well within their rights to assume that there was either no valid staking on the lands or such staking as was present had been abandoned, owing to the absence of blazes flowing from Mr. Klassen's attempts. This would have been the classic instance of one being misled in the field as to what was apparent from the ground.

Mr. Klassen's actions of attempting to stake before the land came open for staking, during the first week of December, 2005, were in substance, solely for the purpose of precluding others with a direct interest in mining from gaining a foothold on these lands. Mr. Klassen by his own admission was completely unaware that acquisition of mining rights is a wholly competitive process. Nonetheless, it is an anathema to the statutory scheme to provide temporal priority or preference for commencement of staking to one party or type of party over others.

His failure to perform assessment work on the 2003 mining claim does lead me to wonder whether Mr. Klassen believed he could indefinitely go through cycles of claim acquisition and forfeiture with no outside interference or challenge. However, one instance of this occurring is insufficient from which to generalize a pattern of behaviour. Nonetheless, at this hearing, after having held a claim on this land for two years and seeking to challenge that of Mr. Staines for almost another entire year, Mr. Klassen was completely uninformed of what could possibly constitute non-invasive assessment work and how to go about performing that work. He does not have an exploration plan in place, but rather has the intention to proceed as he began, in a non-intrusive manner, however that might be put into practice on the ground with respect to assessment work.

Based on the foregoing reasons, I find that there is ample evidence that Mr. Klassen's motive in staking these lands was to prevent their acquisition by another individual or company for mining purposes. In substance, this acquisition was either for non-mining purposes

or to circumvent mining purposes. Although this case does not involve a referral of the Minister, section 54 of the **Mining Act** raises this very question, namely whether a mining claim should be cancelled where the lands are being used for purposes other than those of the mining industry.

Based upon the real merits and substantial justice of this case, pursuant to the jurisdiction of the Commissioner as outlined in section 121 of the **Mining Act,** I find that Mr. Klassen's appeal as it concerns the non-recording of his mining claim will be dismissed.

History of the Land

I obtained documentation from Land Titles and from the Ministry of Natural Resources Crown Land Registry to shed some light on the history of this land.

The original staking of this land was performed by H.D. Raines early in 1926 as Mining Claim SSM-4645. This number is significant because the Deputy Minister of Mines shortly thereafter caused this and several other mining claims to be surveyed by an Ontario Land Surveyor, thereby creating an official reference for the land for registration purposes. Throughout the documentation, despite the subsequent mining claim numbers, SSM 4645 appears.

A Mr. Mike Fenlon staked this land as Mining Claim 13196 on July 22, 1943 and it was filed and recorded on July 30, 1943. In his affidavit of staking out a mining claim, Mr. Fenlon swore that there were no buildings or improvements thereon. This is a fact which later comes into question. Prior to 1945, there were two orders of the Judge of the Mining Court extending time for the performance of assessment work. The Report of Work filed shows that 150 days of manual labour in stripping or opening up mines, sinking shafts or other actual mining operations was filed against the claim on August 29, 1945. A further 50 days of similar work was filed on August 14, 1946.

Commencing in 1945, Mr. Fenlon started in motion the process to acquire these lands as patented mining lands, which normally would require a survey to be undertaken. The correspondence on file shows that it was determined by the Mining Recorder, through questioning Mr. Fenlon, that he followed the same lines as the surveyed claim 4645. On July 12, 1948, the Mining Recorder came to the conclusion that the Department could rely on the existing survey. He set out that Mr. Fenlon's application would be for the 33 acres of lands not covered by the waters of the Magpie River. On July 15, 1948, Mr. Fenlon applied for a patent at a cost of $2.50 per acre, being a total of $82.50.

The mining lands patent was issued on July 28, 1948, to Mr. Fenlon for 33 acres of mining land, comprised of that part of Mining Claim SSM-4645, also referred to as SSM 13196, excepting the land under the waters of the Magpie River and two hundred feet beyond the high water mark along each shore. There is mention in the correspondence that the 200 foot extension was on account of anticipation of the construction of some sort of water power facility. There was also an exclusion of five percent for roads.

To be clear, as a "Mining Lands Patent", these lands were alienated from the Crown as fee simple in both mining and surface rights.

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The mining rights forfeit to the Crown on January 1, 1953, for failure to pay mining lands taxes. What this meant is that those mining rights were available for staking independently of the surface rights. At all times between that date and December 8, 2005, those mining rights were either held by the Crown and open for staking, or were held by prospectors upon completion of the statutory staking requirements.

In what amounts to a historic anomaly, the provincial lands taxes were also in arrears, but owing to the then recent incorporation of the Township of Michipicoten on January 1, 1952, any arrears in provincial lands taxes moved into the municipal taxation system for collection. However, the forfeiture provisions of the provincial lands tax system remained in place concerning these arrears.

In 1953, Mr. Edwyn Fenlon attempted to acquire the lands on which the lodge and cabins were located as a summer resort location. The **Act** then (as now) treated such lands as not open for staking.

The documentation during this period is sparse and confusing. For example, it appears that Mr. Edwyn Fenlon of Jamestown, Ontario, had applied for a summer resort location for a 450 foot strip fronting on Lake Superior. In a letter dated February 23, 1953, from R.H. Hambly, District Forester to W.D. Cram, Chief, Division of Land and Recreational Areas, he noted that "the Fenlons" operated a commercial resort which was licensed as being located on Mining Claim SSM-13196, although the buildings were located on Crown lands. Mr. Cram then wrote to Edwyn Fenlon on March 9, 1953, in which he requested a sketch of the buildings in question in relation to the boundary of "his" patented claim. Apparently, Mr. Cram was under the impression that Edwyn Fenlon owned both.

In a letter dated October 15, 1953, from Mr. Edison M. MacQuarrie, Consulting Engineer and Ontario Land Surveyor to F.W. Beatty, Surveyor General, concerning Summer Resort Location application for E. Fenlon, he referred to permission to survey the mining claim in question and goes on to state:

> We have made a survey of this parcel but find that the mining claim includes most of the frontage that he requires, and upon which his buildings are now located. We enclose a print of our survey and show the overlapping. Will you kindly advise if this claim has lapsed, or whether we may include any of this claim in the parcel. Fenlon has a lodge and 4 cabins constructed within the limits of our survey, and they have been there for a considerable number of years. To my knowledge, when we did considerable work in opening the Helen Mine, which had dinners served at the lodge, which was almost 20 years ago. It would appear that the original staker, wrongfully included the buildings in staking this claim, as I believe at that time the Mining Act required an affidavit that no other interests or buildings would interfere with recording of his claim.

On April 22, 1954, Mr. Cram wrote to Mr. MacQuarrie and advised that the lands which Edwyn Fenlon had applied for were almost entirely within the limits of Mike Fenlon's mining claim. As a result, Mr. Cram's department was forced to cancel his application. Mr.

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Cram further noted that the Abstract of Title discloses that the existing improvements, namely the lodge and cabins, are situate on lands owned by Mr. Mike Fenlon and that Mr. Edwyn Fenlon is advised to deal with him directly in this matter.

Edwyn Fenlon apparently made a second application for lands further to the north, perhaps including those lands on which Mr. Staines currently resides. However, he was unable to pay for the survey of this land and this second application was subsequently withdrawn.

In what can only be described as an unusual twist, the Ministry of Natural Resources, Crown Land Registry file disclosed a letter dated September 7, 1955, to W.A. Chappel, Clerk & Treasurer, Municipality of Michipicoten from J.G. McMillen, Chief, Division of Accounts, in which Mr. Chappel advised that taxes pertaining to certain lands are still outstanding under the **Provincial Land Tax Act**. In his letter he notes:

> 2. Roll Number "WH- M.L. 13196- A". this is a part of Mining Location SSM 13196, comprising 2 acres under parcel 2905 A.W.S. This stands in our records in the name of Michael Fenlon but on looking over your recent correspondence we are today sending a notice to Mr. Ted Fenlon of Jamestown, Ontario, whom you claim in the owner in your records. Our present assessment shows a value of $150., for land and $3,332, for buildings and the amount outstanding is $59.63.

The next day, Mr. McMillen wrote to Michael Fenlon advising that he was the owner of the property according to the Local Master of Titles and that there are taxes owing.

On October 7, 1955, Mr. Chambers Michael Fenlon wrote to the Department of Lands and Forests in his capacity as Administrator of the Estate of Michael Fenlon, having heard indirectly that there were taxes owing and offering to pay the outstanding amount. Although the machinations involved are not clear, Mr. McMillen acknowledged payment of the outstanding balance on October 25, 1955, with the $25 fee for purchase of Crown lands apparently paid by Edwyn Fenlon having been put towards the outstanding taxes. How this credit was arrived at, namely how a direct relationship was established, remains unclear. The caution on the lands as result of the outstanding taxes was withdrawn some time in early 1956.

One final note concerning this history is revealed by a search of the Abstract of Title, which discloses that Mike Fenlon died on November 3, 1948, just a few months after he purchased the mining lands patent from the Crown.

Mining Lands and Section 32

Mr. Staines quite correctly asserts that these lands are now and always were, legally speaking, mining lands. He expressed considerable concern that encroaching development and interest groups were eroding the land base available for prospecting and exploration.

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His interest in these particular lands is to protect his adjoining claim, should anything of interest be found. He also expressed his intention not to work directly on these lands, but rather to have assessment work applied to them from his adjoining claims to keep them in good standing.

At the hearing, I posed the question of whether subsection 32(1) of the **Mining Act** should be applied to all or a portion of these lands. Although this was not dealt with by the Mining Recorder in the initial hearing, based upon the jurisdiction of the Commissioner under section 105 and section 113(a) of the **Act**, I am not precluded from considering this issue at this time.

Subsection 32(1) states:

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

In this case, two areas have been considered by me in determining whether subsection 32(1) applies: the lodge and cabins and the entire landscape. With respect to the latter, it is not the actual growing of crops or a garden which I am considering, but rather, whether use of the landscape itself can qualify as a use requiring the permission of the surface rights owner or an Order permitting staking and mining activity.

The Lodge and Cabins

The circumstances surrounding the construction and operation of the original lodge are historically confused, but several things are clear. The existence of the lodge and cabins pre-date the issuance of the mining lands patent. Had proper and full disclosure been provided with the sketch and staking in 1943, I question whether some of the lands would have been excluded from the original 33 acre mining claim on the basis that the then predecessor of subsection 32(1) would have been applicable and prior consent or an Order granting permission would have been required. I also question whether a mining lands patent would have been issued for those lands on which there were pre-existing surface rights structures, notwithstanding that the lands were still held by the Crown.

It would seem that reliance on the 1926 survey at the time the patent was may have been the original cause of the error in that the existence of the lodge and cabins was never noted in the Recording Office, thereby bringing the predecessor of subsection 32(1) into play.

That Edwyn Fenlon was able to operate the lodge for a period of years, even showing up on the local tax rolls as an owner supports the conclusion that patenting the land on

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which the lodge and cabins are found was made without full knowledge of the situation on the ground. The fact that Mike Fenelon died mere months after the issuance of the patent has served to compound the confusion arising from the original error.

According to the wording of what is now subsection 32(1), private and public buildings are one grouping which are given special status. That status is not outright exclusion from lands which are otherwise not open for staking, [for a list of those lands, see sections 29 and 30], but rather that consideration be given to whether and how such prospecting, staking and mining may take place.

The effect of having those self same buildings in existence today is that subsection 32(1) is applicable to that portion of Mr. Klassen's 19 acres on which they are found.

Entire Landscape for Artistic Use

What Mr. Klassen and Ms. Palmer acquired in the severed off 19 acres, including a lodge and cabins was more than a run down business opportunity. They purchased a lifestyle and a tool vital to their artistic expression, which has been recognized in numerous private collections.

Mr. Klassen and his partner, Ms. Palmer, described their use of these lands in great detail. Effectively the entire landscape forms the background to Ms. Palmer's many canvases.

I have no doubt of the value of this land in its austere, semi-wild state to Mr. Klassen and Ms. Palmer. I have perused the catalogue provided, along with the photographs and find that it is the whole of their lands which form part of their artistic expression. In the Foreward to the catalogue, which was organized and curated by Michael Burtch, Director of the Art Gallery of Algoma, Sault Ste. Marie and written by Marilyn Powell, she describes the importance of the northern landscape to Ms. Palmer's work:

> … But cities aren't for her, not as an artist, at any rate. She belonged in the north. With her companion, who's also an artist, she now lives and works out of an old resort lodge on Lake Superior, built in the 1930's. …she depends for her inspiration on the isolation, the extremes of climate, the unforgiving and essential elementalism of the north. In her work, there are always figures, aboriginal and European-always set in a northern landscape. You will recognize them from painting to painting. Their psyche is embedded in the rocks and water and trees. As indigenous as the silver birches, they situated in the one place they can be that will speak eloquently for them, breaking the silence of what is suppressed or lies beyond the reach of words.

Mr. Klassen and Ms. Palmer have refurbished the Lodge to house their studio. Furthermore, it is their intention to create an artist's retreat. I understand this to mean a venue which offers not only the necessary aesthetic backdrop to interested artists but also a place where one can withdraw into solitary, tranquil, meditative artistic activity.

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I considered submissions on whether section 32 could be found to be applicable to all of the 19 acres owned by Mr. Klassen and Ms. Palmer and not just that land on which the buildings are located. While I am very sympathetic to their situation, upon reflection and analysis of section 32, I have come to the conclusion that it is beyond the intent of the legislation to make a finding that all of the lands used as an artistic backdrop to their craft can be captured by the provision.

I find that subsection 32(1) prohibits prospecting or staking without prior consent or an Order on lands which have actual improvements on them, be they agricultural or structural or having to do with water, whether improved or not. I have considered whether the near fallow lands found on the Klassen/Palmer property could be considered as a type of pleasure ground, given their artistic and recreational uses. The overall subject matter captured by the drafting clearly delineates lands upon which improvements have been made [with the exception of water, which appears as a general category, whether involving improvements, such as artificial dams or natural, such as a spring]. However, I am not persuaded that the drafting and intent of the legislation goes so far as to capture an entire landscape for its artistic merits and associated uses.

Just to be clear, subsection 32(1) does not contemplate that the improvements described will automatically preclude mining activity, but rather, it requires that there be permission of the owner, an Order of the Mining Recorder or an Order of the Commissioner with terms. Essentially, both the permission of the owner and the terms set by the Commissioner set out the manner in which the activity can be allowed to take place. This could extend to hours of operation, seasonal operations, access restrictions and the like.

Mining Lands

I cannot help but conclude that my findings with respect to the applicability of subsection 32(1) will not be particularly satisfactory to Mr. Klassen and Ms. Palmer. Again, I am sympathetic to their situation and to the value they place on their lifestyle at this particular location.

The fact remains that what Mr. Klassen and Ms. Palmer purchased was the surface rights only of these 19 acres. What that means is that they share that footprint with the Crown or whomever the Crown awards the mining rights to at a particular point in time. The actual minerals cannot be explored for or extracted without a point of access on the surface. The legislation recognizes this and defines mining rights as “the right to minerals on, in or under any land” [s. 1]. It further recognizes that sufficient access is required, as found in subsection 50(2), which states:

> **50.**(2)The holder of a mining claim does not have any right, title or claim to the surface rights of the claim other than the right to enter upon, use and occupy such part or parts thereof as are necessary for the purpose of prospecting and the efficient exploration, development and operation of the mines, minerals and mining rights therein.

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While all land within the province will involve mining rights and surface rights, not all lands are considered mining lands. The definition of mining lands requires that there be a mining purpose involved and that acquisition as mining lands occur under a current or prior statutory scheme.

When one is looking to purchase land outside of southern Ontario or most Ontario urban centres (Timmins would be one exception to this statement, as would land located in other mining towns), there are several types which will be on the market. The first is land which is called "fee simple" whereby one would purchase the surface and mining rights together and moreover, the original alienation from the Crown was not mining lands. These lands would not have associated with them a separate mining lands tax and would run no risk of having the mining rights forfeit to the Crown for failure to pay that mining lands tax. The second type is "mining lands fee simple". Such lands include both the surface and mining rights, but associated with the mining rights is the obligation to pay the mining lands taxes. Failure to do so could result in forfeiture of those rights back to the Crown. The third type of land is "surface rights only". This will occur forevermore after the mining rights were forfeit to the Crown. It is not possible to acquire the mining rights again (for non-mining purposes) and the purchaser/owner is legally obligated to "share" those lands with the owner or holder of the mining rights according to the statutory obligations set out above.

A misconception exists about having mining activity occurring on one's property. In this third grouping, one does "own" the property in that one owns the surface rights. But there are "limits" to this ownership. One does not own the whole body of rights which are located beneath the surface. Nor does one have outright exclusive right to the surface so as to preclude the necessary access to the below ground minerals on that land.

The moral indignation concerning mining occurring on one's property is unfortunate and misplaced, given that one does not own the entire bundle of rights associated with the particular footprint. One wonders whether the acquisition price reflects the fact that less than full fee simple was acquired. Whatever the circumstances of acquisition, does not detract from the fact that what is owned is the surface rights only, not the full fee simple. As such, the owner of those surface rights is not entitled to exclusivity which was not part of the bundle of rights acquired.

Where to go from Here?

Under normal circumstances, what should occur at this juncture is the following. The lands on which the buildings are situate should not form part of the Staines Mining Claim. This would normally require an Order requiring that those lands be removed from the Claim and that the new boundaries be marked on the ground by further blazing and clearing of underbrush.

I am not insensitive to the fact that, despite being unsuccessful in their appeal and in the outcome of allowing the bulk of the Staines Mining Claim to remain on record, the last thing Mr. Klassen and Ms. Palmer would wish to see is further surface activity on any of their property. This being the case, I will Order that those lands be removed from the claim without the need for any additional demarcation of boundaries in the field. Further, I will Order that any future staking of that portion of the Klassen/Palmer lands cannot encompass these buildings without meeting the requirements of section 32.

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Surface Rights Compensation

At the hearing, Mr. Staines provided assurances that his intention was to protect the mining rights under the Klassen/Palmer surface rights which are located adjacent to his existing holding. Mr. Staines did not intend to conduct assessment work on the property itself, nor did he anticipate surface extraction activity, should minerals be found. The proximity of development would likely preclude any aggregate extraction activities being acceptable to the adjacent cottage and home owners. However, he would like the right to protect what is beneath the surface and have the right to extract should economically viable minerals be discovered. Throughout, he expressed his concern that mining rights in the province not be neutralized by denying the mining industry the right to acquire them.

I have no power to compel this behaviour from Mr. Staines. I do strongly encourage him to continue along these lines for as long as he holds the Staines Mining Claim and adjoining lands. I would further encourage him to ensure that this continues beyond his tenure, should he chose to option the lands or bring them to lease and sell them.

Mr. Staines and Mr. Klassen should be aware that they are afforded certain rights to surface rights owners where mining associated activities take place on those surface rights and cause damage. I would be prepared to hear in such a case, if it were to arise, that the surface rights damage which may occur to lands such as these extends beyond damage to improvements made to the surface.

The value of these lands to Mr. Klassen and Ms. Palmer are derived from their natural state which is used as backdrop to Ms. Palmer's artistic craft and, should they materialize, to their aspirations to create an artistic retreat. The lands are associated with livelihood, recreation and pleasure. They capture an elemental spirituality which is part of human involvement in Northern Ontario. The value of this backdrop would be greatly diminished should any further scarring of the surface be allowed to occur.

There is further value in these lands to the Township of Michipicoten for which there is evidence in the form of the scenic lookout that it constructed along the road which borders the Klassen/Palmer property. The view of Lake Superior and Michipicoten Bay at this point is apparently a highlight to the townsfolk, sufficiently so that it has invested in the roadside space and lists it on its map of scenic attractions. Obviously, the combined effect of the historic lodge and cabins, the majestic Lake Superior cliffs and shores, and the effective stewardship of Klassen and Palmer in maintaining this remote and austere landscape as a backdrop to their lifestyle and art, speaks profoundly to the absolute beauty of this stretch of land.

The parties are referred to section 79 of the **Mining Act** which I have reproduced:

> 79.(1) In this section and in section 78,
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> "owner of the surface rights" means a person to whom the surface rights of land have been granted, sold, leased or located.

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(2) Where there is an owner of surface rights of land or where land is occupied by a person who has made improvements thereon that, in the opinion of the Minister, entitles that person to compensation, a person who,

(a) prospects, stakes out or causes to be staked out a mining claim or an area of land for a boring permit;

(b) formerly held a mining claim or an area of land for a boring permit that has been cancelled, abandoned or forfeited;

(c) is the holder of a mining claim or an area of land for a boring permit and who performs assessment work; or

(d) is the lessee or owner of mining lands and who carries on mining operations,

on such land, shall compensate the owner of the surface rights or the occupant of the lands, as the case may be, for damages sustained to the surface rights by such prospecting, staking out, assessment work or operations.

(3) Every person who damages mineral exploration workings or claim posts, line posts, tags or surveyed boundary markers delineating mining lands shall compensate the holder of the mining claim or the owner or lessee of the mining lands, as the case may be, for damages sustained.

(4) In default of agreement and upon application made in the prescribed form by either party, the amount and the time and manner of payment of compensation under subsection (2) or (3) shall be determined by the Commissioner after a hearing and, subject to appeal to the Divisional Court where the amount claimed exceeds $1,000, the Commissioner's order is final.

(5) The Commissioner may order the giving of security for payment of the compensation and may prohibit, pending the determination of the proceeding or until the compensation is paid or secured, further prospecting, staking out or working by any person.

(6) The compensation is a special lien upon any mining claim or mining lands, as the case may be, and no further prospecting, staking out or performing of work, except by leave of the Commissioner, shall be done by any person after the time fixed for the payment or securing of the compensation, unless the compensation has been paid or secured as directed.

(7) The Commissioner, on notice to all interested parties and for good cause shown, on such terms as seem just, may by subsequent order or award at any time change, supplement, alter, vary or rescind any order made under this section

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(8) In a hearing under subsection (4), the Commissioner shall take into account which of the rights was applied for first and, except where injustice would result, shall give the holder of those rights due priority in the consideration of the dispute between the parties.

(9) Where unpatented mining claims are affected by an agreement entered into in respect of the compensation referred to in subsection (2), or by an order made under subsection (4), the agreement or a certified copy of the order, as the case may be, may be filed by the person to whom the compensation is payable in the office of the recorder upon payment of the required fee.

(10) Where an unpatented mining claim is subsequently leased, the Minister shall cause any agreement or order filed in the recorder's office under subsection (9) that affects the leased lands to be registered against the lands in the proper land registry office and the person to whom the compensation is payable is entitled to enforce the terms of the agreement or order against the lessee and, subject to the Registry Act and the Land Titles Act, against any subsequent lessee of the land.

When both parties are open to unusual, novel and creative ways in which to co-exist, there are any number of solutions which can be hammered out fitting the particular circumstances of the case.

Once example of this can be seen in a consent order issued by this Office involving lands where section 32 was in fact applicable throughout. In **Minescape Exploration Inc. v. MNDM, Nickel District Conservation Authority & Yenway Golf Inc.** (File MA 030-98) June 22, 1999 (unreported), I approved a Conditional Order whose terms were negotiated by all of the parties with the very considerable and able assistance of the Registrar, Mr. Daniel Pascoe. The result was that a mining claim was permitted to be recorded on lands housing not only a golf course but which also came under the jurisdiction of the local conservation authority. Originally, the Mining Recorder had disallowed outright the recording of the mining claim. However, the parties were able to negotiate terms upon which the required assessment work could be carried out in a manner which maintained the visual impact away from the public areas, to be carried out on either a seasonal basis or a non-intrusive auditory basis. This permitted the claim to be recorded.

I strongly encourage the parties to have a look at the terms and conditions of that consent order, which can be found on our website. Further, if they wish to establish future dealings in relation to the Staines Mining Claim, I encourage them to make use of the services of the tribunal Registrar and avoid the need to resort to an application under section 79.

Exclusion of Time

Pursuant to subsection 67(2) of the **Mining Act**, the time during which Mining Claim SSM-3018108, was pending before the recorder and the tribunal, being the 15th day of March, 2006 to the 11th day of July, 2007 a total of 484 days, will be excluded in computing time within which work upon the Mining Claim is to be performed and filed.

Pursuant to subsection 67(3) of the **Mining Act**, R.S.O. 1990, c. M.14, as amended, April 12, 2009, is deemed to be the date for the performance and filing of the next unit(s) of assessment work on Mining Claim SSM-3018108.

Conclusions

The appeal of Mr. Klassen will be dismissed.

A declaration that the lands on which the buildings are located within the Staines Mining Claim are subject to the requirements of section 32 will be issued. However, the Staines Mining Claim will not be cancelled because to do so would subject Mr. Klassen and Ms. Palmer's surface rights to staking activity on the surface. Similarly, no Order will issue requiring the changed demarcations of the Staines Mining Claim to reflect these findings.