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

File No. MA 022-11

M. Orr)
Deputy Mining and Lands Commissioner) Wednesday, the 1st day
L. Kamerman) of February, 2012.
Mining and Lands Commissioner)

THE MINING ACT

IN THE MATTER OF

Filed Only Mining Claims 3015952 and 4210986, situate in the Township of Ogden, in the Porcupine Mining Division, staked by and to have been recorded in the name of Mr. Hermann Daxl, (hereinafter referred to as the “Daxl Filed Only Mining Claims”);

AND IN THE MATTER OF

Ontario Regulation 196/06, as amended, Claims Staking;
(Amended February 1, 2012)

B E T W E E N:

HERMANN DAXL
Appellant

- and -

THE MINISTER OF NORTHERN DEVELOPMENT
AND MINES
Respondent
(Amended February 1, 2012)

AND IN THE MATTER OF

An appeal from the Decision of the Provincial Mining Recorder, Ministry of Northern Development and Mines, dated the 8th day of June, 2011, for the recording of the Daxl Filed Only Mining Claims, pursuant to subsection 112(1) of the **Mining Act**.
(Amended February 1, 2012)

ORDER

WHEREAS THIS APPEAL was received by this tribunal on the 27th day of June, 2011;

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AND WHEREAS with the consent of the parties, this matter was determined through written submissions, pursuant to the Appointment For Written Hearing, issued by this tribunal on the 25th day of August, 2011;

1. **IT IS ORDER THAT** this appeal be and is hereby dismissed.
2. **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. M14, as amended, a copy of this Order shall be forwarded by the tribunal to the Provincial Mining Recorder **WHO IS HEREBY DIRECTED** to amend the records in the Provincial Recording Office as necessary and in accordance with the aforementioned subsection 129(4).

DATED this 1st day of February, 2012.

Original signed by M. Orr

M. Orr
DEPUTY MINING AND LANDS COMMISSIONER

Original signed by L. Kamerman

L. Kamerman
MINING AND LANDS COMMISSIONER



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REASONS

With the consent of the parties, this matter was determined through written submissions. Documentation on behalf of Mr. Hermann Daxl, the appellant in this matter, was received from Mr. Daxl and documentation for the Minister of Northern Development and Mines (MNDM) was received from Mr. Michael Mercer, counsel for the respondent.

Introduction

The Appellant in this hearing, Mr. Hermann Daxl was a Disputant in an earlier hearing held before the Provincial Mining Recorder, MNDM, in Timmins, Ontario, in March, 2009. The 2009 hearing dealt with a number of mining claims staked in June, 2006. In that hearing, Mr. Daxl, along with other parties, took issue with certain aspects of the staking of two mining claims. He was also an interested party in his own right as two mining claims that he had staked had been marked “Filed Only”. His mining claims, along with other “Filed Only” mining claims, were refused by the Provincial Mining Recorder, effective June 8, 2011, on the basis that they were undersized. Mr. Daxl appealed this decision. The MNDM of has responded to his appeal. Both parties to this matter agreed to present their cases by way of written submissions.

Issues

Should Filed Only Mining Claims 3015952 and 4210986 (the “Daxl Filed Only Mining Claims”) be recorded despite the fact that they are each less than 16 hectares in size?

Overview of Facts Not in Dispute

While the decision of a Provincial Mining Recorder plays no part in the decision to be made by this tribunal, (this being a hearing *de novo*), there are occasions where the decision does provide some useful background information. This is such an occasion.

The hearing before the Provincial Mining Recorder dealt with a total of seven mining claims. Disputes were brought against two of them; the disputes were allowed and the mining claims were cancelled. Two other mining claims which had overstaked the disputed claims and which had been marked “Filed Only” were recorded. Three mining claims, including the two Daxl Filed Only Mining Claims, were refused for being undersized.

Based on the materials filed with this tribunal, which included the Provincial Mining Recorder’s decision, it can be said that Mr. Daxl staked two mining claims that did not meet the minimum size requirement of 16 hectares on June 1 and June 3, 2006. Both mining claims were staked in the afternoon. The lands over which the Daxl Filed Only Mining Claims were staked had come open for staking at 8:00 a.m. on June 1, 2006.

Mr. Daxl was not the only person staking the lands in the time period of June 1 – 3, 2006; however, there is no indication that he encountered any other stakers while he was going about his own business in the afternoon of either the 1st or the 3rd days of June, 2006. As it happened, by reason of the fact that Mr. Daxl staked when he did (in the afternoon), his mining claims partially covered land that had been staked either in the morning or on a previous day. None of the lands he over staked contained recorded mining claims that had been recorded as of 8:00 a.m. on June 1, 2006.

As mentioned, there were a number of mining claims staked on June 1, 2006, in both the morning and the afternoon. The largest mining claim (P-4211059), which was staked in the morning of June 1, garnered the most disputes and while it was noted by the Provincial

Mining Recorder's office as having "priority of completion time" in relation to Daxl Filed Only Mining Claim 4210986, it was cancelled by the Provincial Mining Recorder as a result of the hearing held in 2009. A neighbouring mining claim (P-4211058), which had been staked on June 1st in the morning, was similarly cancelled despite its having "priority of completion time" in relation to the second Daxl Filed Only Mining Claim 3015952. The grounds for its cancellation were its size (under 16 hectares) and the lack of a barrier to prevent staking a mining claim in a size required by the **Act** and regulations. The phrase "priority of completion time" is used in relation to a mining claim whose completion time precedes a mining claim that over stakes it. As has already been mentioned, both Daxl Filed Only Mining Claims had overstaked parts of larger claims that had been staked prior to his mining claims.

Just as Mining Claim P-4211058 was cancelled on the basis of its size, so too both Daxl Filed Only Mining Claims were refused on the basis that they were not staked in 16 hectare units. The Daxl Filed Only Mining Claims measured 2.5 hectares (4210986) and 1.3 hectares (3015852). Furthermore, just as with Mining Claim P-4211058, it was found that no "barrier" stopped Mr. Daxl from staking claims in the size required by the legislation.

Analysis

Statutory Context and Parties' Positions

The **Mining Act** is the starting point for understanding what lands are considered open for staking and what lands are closed to staking. Section 27 is the starting point for this understanding. It states:

- 27.** Except where otherwise provided, the holder of a prospector's licence may prospect for minerals and stake a mining claim on any,
- (a) Crown lands, surveyed or unsurveyed;
 - (b) lands, the mines, minerals or mining rights whereof have been reserved by the Crown in the location, sale, patent or lease of such lands where they have been located, sold, patented or leased after the 6th day of May, 1913,
not at the time,
 - (c) on record as a mining claim that has not lapsed or been abandoned, cancelled or forfeited; or
 - (d) withdrawn by any Act, order in council, or other competent authority from prospecting, location or sale, or declared by any such authority to be not open to prospecting, staking or sale as mining claims. R.S.O. 1990, c. M.14, s. 27; 1996, c. 1, Sched. O, s. 8; 2009, c. 21, s. 101 (1, 4).

A "mining claim" is defined in the **Act** as "... a parcel of land... that has been staked *and recorded* in accordance with [the] **Act** and the regulations". (emphasis added)

While in the past, prior to 1996, the **Act** did in fact allow for the staking of lands "not at the time ... under staking", such was not the case at the time Mr. Daxl staked his claims. The **Act** removed this wording in 1996. Today, as in 2006, lands open for staking are those

lands not covered by a “**recorded**” mining claim (assuming they are not subject to other restrictions imposed by the **Act** (such as Sections 29, 30, 31 and 32). These four sections have no bearing on this matter.

The chief basis for Mr. Daxl’s appeal was that he is of the view that “verified completed staking in the field should not be overstaked [sic]”. As he stated, “is this not the essence of ground staking?” In other words, the size of his claims were affected by the fact that they were surrounded by both recorded claims and claims that had been staked, but not yet recorded. It did not matter to him that certain claims had not yet been recorded. They were off limits to him. In fact, he states in his appeal that “I do not see in the rules why I should have over staked any of the four adjacent properly staked and completed claims for the mere purpose of making my claim 16 [hectares]...” He states further, “Rule 27 of the **Mining Act** states when a claim cannot be staked, which does not mean that otherwise the land is considered open.” Indeed, Mr. Daxl argued that Section 27 of the **Act** did not even apply to his claims. “It merely says that one cannot stake a claim that is already recorded. Nobody has done that.”

The Respondent MNDM took the position that the fact that certain neighbouring lands were covered by staked but not yet recorded mining claims was not a limiting factor and that Mr. Daxl could not rely on the presence of “staked lines” or “recently erected posts” to restrict the size of his claims. These factors were “nothing more than an indication that [the lands were] under competition...” The MNDM also asserted that there was nothing that Mr. Daxl could rely on to say that his claims were in substantial compliance with the **Act** and its regulations and that he could have staked mining claims of the requisite size. In reply, Mr. Daxl made the point that at the time he staked the lands, there was no one around and that there was no competition.

The rules for claim staking as they applied at the time these mining claims were staked (June 2006) are set out in Ontario Regulation 196/06, made under the **Mining Act**.

While Mr. Daxl relied on various sections of the regulation, he paid particular attention to subsection 11(1) which says:

11. (1) The staking of a mining claim is not invalidated for the sole reason that it encompasses land that is not open for staking unless the land encompassed in the claim constitutes an unpatented mining claim recorded prior to the time of the staking. O. Reg. 7/96, s. 11 (1).
- (2) Land that is not open for staking that is encompassed in a valid mining claim does not form part of the area of the mining claim. O. Reg. 7/96, s. 11 (2).
- (3) Land that is not open for staking that is wholly encompassed in a valid mining claim is not required to be marked out. O. Reg. 7/96, s. 11 (3).

He referred to this section in support of his position that at the time he staked his claims, “all claims around me had been completed, and there I was allowed to consider them as a “barrier”...” He went on to state that “[t]his becomes further clear by O. Reg. 7/96 ... 11(1), whereby land does not need to be recorded to be “not open” and therefore a barrier.” In Mr.

Daxl's opinion, subsection 11(1) "makes a clear difference between "not open" versus "recorded"." He then referred to subsection 2(2) of the Regulation stating that it "applies regarding size". The tribunal finds this argument to be completely without foundation. As the MNDM asserts, subsection 11(1) "stands for the opposite proposition" to what Mr. Daxl is proposing. The tribunal agrees with the Ministry. This section of the Regulation is intended to address those instances where recorded mining claims and land not open for staking do not work to invalidate an otherwise valid mining claim. The **Act** and its regulations are not intended to obstruct the staking of mining claims that are valid but for these particular features. Furthermore, the wording of clause 2(1)(a) of the Regulation is absolutely clear and says that "a mining claim in unsurveyed territory must be staked so that it consists of one or more square 16 hectare units". Anything less than that measurement must find its validity within the legislation. Mr. Daxl's mining claims started out being invalid by their size because of Mr. Daxl's incorrect interpretation of the legislation and they remained in that state.

Findings and Conclusions

The tribunal is of the view that the issues presented in this matter are not complicated. The question to be asked is whether the Daxl Filed Only Mining Claims should be recorded and the answer is simply "no".

The tribunal finds that the Daxl Filed Only Mining Claims do not meet the requirements of the **Act** and its regulations in that they are not the minimum 16 hectares in size. They are therefore refused. The tribunal further finds that the Daxl Filed Only Mining Claims were staked to the sizes mentioned earlier in this decision on a deliberate basis - solely on the view that neighbouring staked (but not recorded) mining claims presented a legal barrier to Mr. Daxl's efforts. In other words, according to Mr. Daxl's interpretation of the legislation, no one is allowed to stake over lands that have been staked. It does not matter to him that neighbouring mining claims are not yet recorded. According to Mr. Daxl, section 27 of the **Act** has no role to play in this matter and in his view, subsection 11(1) and subsection 2(2) of the staking regulation operate to exempt him from staking in 16 hectare units. The tribunal emphatically disagrees with this view.

Section 27 of the **Act** is one of the **Act's** "lynchpin" sections and takes precedence over the staking regulation and rules. Section 27 cannot be ignored – it applies to every act of staking. It follows that the staking regulation cannot be used to validate something that the **Act** does not. Mr. Daxl's use of the staking regulation is wrong. The legislation recognizes that there will be occasions where boundaries and certain geological and man-made features present barriers in the way that recorded claims present barriers. It also recognizes the occasional need to obtain orders to move posts. There is absolutely nothing in the reading of section 27 or the relevant staking regulation to support Mr. Daxl's interpretation.

It is clear to the tribunal that Mr. Daxl has incorrectly interpreted the legislation and for that there might be a certain amount of sympathy extended but for the vexation the tribunal feels when faced by the inconsistencies in Mr. Daxl's approach to the law. Based on his own submissions, it is apparent that while he argues that staked lands present a "barrier", this did

not, in fact, prevent him from over staking the mining claims that were ultimately cancelled (P-4211058 and P-4211059) with his undersized parcels. This was made apparent by the fact that his application to record both mining claims clearly made reference to the fact that his mining claims overstaked previously staked mining claims.

Furthermore, he tried to justify his decision to stake small claims by saying that he could find no support in the “rules” to say that he should have over staked “any of the four adjacent properly staked and completed claims....” Again, this sentiment did not stop him from both overstaking and later disputing at least two of these mining claims (P-4211058 and P-4211059).

Despite the MNDM’s capable reference to the use of section 43 of the **Act**, the tribunal finds that this is simply not a case for its application. The **Act** recognizes the possibility of prospectors making errors while going about their business. The intention of this section is to give validity to those mining claims that come within its ambit. These mining claims should not even be considered under this section. There is no issue dealing with anyone likely to be misled by Mr. Daxl’s staking efforts. Nor is this a case of someone attempting (in good faith) to comply with the legislation. These mining claims fall outside the ambit of section 43 in that Mr. Daxl mistakenly interpreted the legislation and acted upon his interpretation to his detriment. As far as he was concerned, the 16 hectare requirement did not apply in his case. He is presumed to know the law, as are all of his fellow stakers.

There will be no costs payable by any of the parties to this appeal.