Revue générale de droit

Mining Claim Disputes in Québec

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Volume 17, numéro 4, 1986

URI : https://id.erudit.org/iderudit/1059227ar
DOI : https://doi.org/10.7202/1059227ar

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Éditeur(s)

Éditions de l'Université d'Ottawa

ISSN

0035-3086 (imprimé)
2292-2512 (numérique)

Découvrir la revue

Citer cet article

Lacasse, J.-P. (1986). Mining Claim Disputes in Québec. *Revue générale de droit*, *17*(4), 703–721. https://doi.org/10.7202/1059227ar

Résumé de l'article

Les litiges relatifs à des claims au Québec se produisent généralement lorsque plusieurs personnes jalonnent un terrain de façon simultanée ou lorsqu'un ou plusieurs jalonneurs, tout en contestant la validité d'un claim déjà enregistré en vertu de la *Loi sur les mines*, jalonnent le même terrain.

Les demandes d'enregistrement qui soulèvent quelque contestation sont déférées au ministre de l'Énergie et des Ressources. Celui-ci peut, à son tour, déférer l'affaire au juge des mines. S'il choisit de ne pas le faire, il y a appel, de la part de celui dont les claims ont été refusés ou annulés, auprès du juge des mines. Les décisions de ce dernier peuvent être portées en appel devant la Cour d'appel.

Les dispositions de la *Loi sur les mines* se rapportant au mode de jalonnement sont obligatoires ce qui implique, par exemple, que le jalonnement en trécarré est illégal et que le jalonneur doit lui-même procéder à son jalonnement.

Lorsque le jalonneur d'un claim enregistré n'a pas jalonné conformément à la loi et qu'il a déclaré l'avoir fait dans son avis de jalonnement, le claim a été enregistré sous fausse représentation et est annulable. Cependant, cette règle ne s'applique pas si le claim est enregistré depuis un an au nom d'un tiers détenteur de bonne foi.

En vertu de la théorie de l'observation en substance, le jalonneur peut, selon les circonstances, déroger de façon non substantielle aux dispositions de la *Loi sur les mines* se rapportant au jalonnement de claims notamment quant à la superficie des claims et à la localisation des piquets.

Un litige peut se rapporter à la déchéance d'un claim et à la réouverture du terrain au jalonnement. Un détenteur de claims peut aussi contester ses propres claims de façon à prévenir, lorsque ceux-ci n'ont pas été bien jalonnés à l'origine, une contestation de la part d'un tiers. Pour ce qui a trait au processus d'adjudication, il est important que le jalonneur soit présent lors de l'audition sinon il risque de se voir préférer un jalonnement concurrent.

Les litiges relatifs au jalonnement de claims ont permis de mieux interpréter les dispositions de la loi à ce sujet. Toutefois, certaines lacunes du régime de règlement des litiges font en sorte que des modifications à la *Loi sur les mines* seraient appropriées.

Mining Claim Disputes in Québec *

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ABSTRACT

Mining claim disputes in Québec generally arise either when more than one staker carries out simultaneous stakings on the ground or when one or more stakers, while disputing the validity of a claim already recorded, under The Mining Act, *stake the same piece of ground.*

Applications for record that give rise to a dispute are referred to the Minister of Energy and Resources. He may in turn refer the case to the Mining Judge. If he chooses not to do so, an appeal of his decision, by the party whose claims are refused or cancelled, lies with the Mining Judge. Decisions of the Mining Judge may be appealed to the Court of Appeal.

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RÉSUMÉ

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Les demandes d'enregistrement qui soulèvent quelque contestation sont déférées au ministre de l'Énergie et des Ressources. Celui-ci peut, à son tour, déférer l'affaire au juge des mines. S'il choisit de ne pas le faire, il y a appel, de la part de celui dont les claims ont été refusés ou annulés, auprès du juge des mines. Les décisions de ce dernier peuvent être portées en appel devant la Cour d'appel.

Les dispositions de la Loi sur les mines *se rapportant au mode de*

* Paper presented at the annual convention of the *Prospectors and Developers Association*, Toronto, March 11, 1986.

illegal and that staking must be done personally.

If the staker of a recorded claim has not staked his claim according to the Act and has declared in his notice of staking that he followed the Act, then the claim was recorded under misrepresentation and may be cancelled. However, a limitation exists in favour of a third-party holder in good faith when the claim has been recorded in his name for a year.

Under the doctrine of substantial compliance, the staker may depart from the staking provisions of the Act in varying degree according to circumstances requirements. Applications of the doctrine to various situations of fact include non substantial discrepancies as to the area of the claim or the location of posts.

Disputes may also relate to forfeiture and the re-opening of the land to staking. One may also dispute his own claims in order to prevent others from eventually disputing them if the claims had not been initially well staked. In the adjudicating process, it is important for the staker to be present at the hearing lest the other party be favoured.

Disputes have provided for a better understanding of the Act's staking provisions. However, some drawbacks of the system would warrant changes to the Act for purposes of efficacy.

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Un litige peut se rapporter à la déchéance d'un claim et à la réouverture du terrain au jalonnement. Un détenteur de claims peut aussi contester ses propres claims de façon à prévenir, lorsque ceux-ci n'ont pas été bien jalonnés à l'origine, une contestation de la part d'un tiers. Pour ce qui a trait au processus d'adjudication, il est important que le jalonneur soit présent lors de l'audition sinon il risque de se voir préférer un jalonnement concurrent.

Les litiges relatifs au jalonnement de claims ont permis de mieux interpréter les dispositions de la loi à ce sujet. Toutefois, certaines lacunes du régime de règlement des litiges font en sorte que des modifications à la Loi sur les mines *seraient appropriées.*

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I. GENERAL

In the American case of *Nelson* v. *Smith* it was said that staking on ground, within the staked boundaries of another claim, because the law governing the manner of marking claims had not been complied with by the original staker was, as is known in mining parlance, claim jumping.[1] In another American case, that of *Mulkern* v. *Hammitt*, the judge looked at a mining claim dispute with a touch of euphemism; he stated that staking of the claim was a unilateral act by the staker indicating that it was done according to the law (in the

1. 176 P. 261, 265; 42 Nev. 302.

American context). He then went on to add the following : "that opinion may, of course, be, upon examination by less optimistic persons, regarded as ill-founded".[2]

While negligent staking may well give rise to claim jumping, not all mining claim disputes in Québec originate in this way. Indeed, a great number of disputes involve simultaneous rival stakings before any recording has taken place. Others occur when one party has staked land that he thought was open for staking through forfeiture while the other party disputes the forfeiture. On occasions, the dispute is between the Government and the claim holder, with the quality of staking at issue. In other instances, and for the same reason, one has disputed his own claims.

Generally speaking, however, a dispute arises either when

> 1) plusieurs jalonneurs se disputent entre eux par voie de jalonnement simultané ou quasi simultané la possession d'un même terrain ou
>
> 2) un ou plusieurs jalonneurs, tout en contestant la validité d'un claim déjà admis à l'enregistrement, désirent s'en porter acquéreurs par voie de jalonnement.[3]

The latter type of dispute, albeit not the only one, is the most spectacular as it usually occurs on a very hot piece of ground. "Claim-jumping" has become a dirty phrase, at least in the minds of those who, through their own neglect, have rendered their mining claims vulnerable and as a consequence, have lost their claims to a so-called claim-jumper. So as not to hurt their sensitivities, we could perhaps speak of staking by a prospector who's eyes are open as regards mining claims that have not been staked properly and who, in an altruistic decision, has decided that the law must be followed and that it is not good for the country that these claims continue to exist! Of course, the fact that he will become the eventual owner of the mining claims in question is of minor importance in view of the fact that he has seen to it that *The Mining Act* not be ridiculed!

Although courts in Québec and elsewhere have at times looked upon claim jumpers with disfavour and even abhorrence,[4] the practice has now become legal in Québec. In a landmark decision rendered in 1970[5] the Mining Judge stated that while a prospector is not allowed under *The Mining Act* to prospect on claims, nothing prevented

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2. (1964) 326 F. 2d, 896, 897.

3. *Ref. Groundstar Resources, Capri Mining et al.*, unreported decision of the Québec Mining Judge, July 12, 1978, file 161-168, p. 10.

4. See, for instance, *Demers* v. *Dalton et French*, [1954] C.S. 366, at 371 ; *St-Laurent* v. *Mercier*, (1903) 33 S.C.R. 314, at 319-320; and *Re Mineral Claims Doris 2, Theresa 3 and Takako 4*, (1983) 45 B.C.L.R. 145, at 152.

him from staking the same claims in order to cause a dispute under which the previous claims would be cancelled and his own claims would be recorded.

The Mining Judge has expanded on this question :

> [La] prohibition de jalonner sur un claim [...] rendrait quasi impossible l'application des articles de la Loi des mines concernant l'annulation d'un claim.
>
> Qui oserait contester la validité d'un claim s'il ne peut s'assurer au préalable que par son propre jalonnement il sera déclaré prioritairement titulaire du claim si les motifs d'annulation qu'il invoque s'avèrent bien fondés.
>
> Le législateur [a entériné] la procédure utilisée depuis plus de 50 ans et qui est consacré par l'usage, à savoir : celle qui consiste à contester la validité d'un claim par voie de jalonnement.[6]

This explains why almost all petitions to the Minister of Energy and Resources for the cancellation of mining claims are accompanied by a notice of staking that relates to new mining claims on the same ground.

Regarding mining claim disputes in general, one must bear in mind the true legal nature of such disputes. The Québec Mining Judge stressed, in the *Commander Nickel* case,[7] where two parties claimed the same piece of land that, while there was an apparent dispute between the two, the issue in reality was the right of one or of the other to have its claims recorded by the Crown. The Judge relied on the dicta of the Ontario case of *Dupont* v. *Inglis*, decided in the Supreme Court of Canada[8] in 1958 :

> The question is the validity of the first staking, and that is a matter between the licensee and the Crown. Its adjudication may affect a subsequent staking by another licensee ; but there is [...] 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 [...]

This bring us to the legal meaning of staking. The Québec Mining Judge has stated in the *Céré* v. *Sigouin* case[9] that "staking" meant :

> L'exécution de toutes les opérations décrites à l'article 33 et particulièrement de celles qui permettent au jalonneur d'attester de l'exactitude de tous

5. *Bélisle* v. *Umex and Mining Corp.*, reported in (1967-1972) D.Q.M.J. 66.
6. *Ref. Groundstar Resources, Capri Mining et al.*, note 3, pp. 7-8 ; *Bélisle* v. *Umex*, note 5, p. 69.
7. *Commander Nickel* v. *Zulapa Mining and Imperial Oil Enterprises*, unreported decision of the Québec Mining Judge, April 17, 1973, file 161-133, p. 9.
8. *Dupont et al.* v. *Inglis et al.*, [1958] S.C.R. 535, at 544-545.
9. Reported in (1967-1972) D.Q.M.J. 134.

et chacun des faits rapportés à la déclaration qu'il fait à son avis d'établissement.

The extent to which such operations are mandatory or have to be complied with in a substantial manner has given rise to a number of disputes that have been judicially settled. These decisions, in turn, offer guidance for the proper staking of mining claims and ideas of grounds for future disputes of existing claims along with statements of limitations involved in such actions.

II. Process and Procedure

Unlike the case in Ontario, mining recorders in Québec have no powers as regards the settlement of mining claim disputes. Under the Act, they must refer to the Minister any application for recording which gives rise to a dispute[10] such as rival applications for recording.

The Minister, through his public servants, may then agree or refuse to record the mining claim. If he refuses, an appeal lies to the Mining Judge within thirty days of the mailing of the decision.[11] The Minister may also directly refer the matter to the Mining Judge.[12]

If, as often happens, the application for recording is accompanied by an application for the cancellation of an existing claim, the latter application must set forth the facts upon which it is based, include a sketch of the alleged irregularities and enclose a deposit of ten dollars per claim.[13] Should the Minister cancel the claim or claims disputed, again an appeal lies to the Mining Judge.

As mining claims in Québec have a normal duration of one year unless the rights are renewed from year to year through the issuance and renewal of development licences, numerous possibilities of forfeiture exist if the holder does not comply with the Act. Thus other types of disputes occur. For instance, it may happen that mining claim lapse in the eyes of the Department and that, as the land becomes open, the area is staked again; on the other hand, the holder of the forfeited claims may have a more optimistic view of his rights and seek redressment with the Mining Judge; in such a case, the newly staked claims' recording would be held in abeyance and both parties would appear before the Mining Judge. Conversely, the Department may keep in force claims that in the opinion of others were forfeited; the latter

10. *The Mining Act*, R.S.Q. 1977, c. M-13 as am., s. 41.
11. *Id.*, s. 49.
12. *Id.*, s. 309(b).
13. *Id.*, s. 48.

would then stake the ground and, of course, their applications for recording will be refused; as they then appeal the decision to the Mining Judge, the question of the forfeiture of the previously held claims will be the issue.

One can also dispute his own claims because of staking irregularities. This is a well established practice in Québec and has occurred as a mining company acquiries claims only to find that the staking was of dubious value. While the dispute here is entirely different in nature and in effect only apparent, some pitfalls exist and the dispute may be most unsuccessfull if both the existing claims are cancelled and the newly staked claims are refused, because they were not properly staked. In such a case, the former owner is precluded from staking the same piece of ground as it becomes open for staking on the 31st day after the decision; rather he must wait until the 61st day[14] by which time others may very well have staked the ground.

The procedure for mining claim disputes before the Minister is rather occult. There are no hearings in the usual sense of the word. Parties are asked to attend an inspection if the Department decides to have one. In one case that was appealed, the Mining Judge commented that the absence of an inspection deprived him of objective data relating to the situation prevailing at the time on the ground.[15] Sometimes letters are sent to parties requesting further information on their contentions. It would seem that input for the draft decision comes jointly from the office of the chief claims recorder (with the help of the Department's inspectors) and from the Legal Services of the Department.

The procedure before the Mining Judge is in accordance with the principles of natural justice. The petition, either by the Minister or by the prospector or mining company, obeys to a set of rules provided for in the Act.[16] In order to simplify the suit and to shorten the hearing the Mining Judge assembles all the facts, consults with the parties and normally prepares "pre-trial minutes" that he sends to all parties involved for their approval.

He then sets a date for a hearing where parties may be heard and witnesses interrogated. At the hearing, the procedure is most informal with the judge taking an active part in the proceedings especially when parties are not represented by attorneys.

The decisions of the Mining Judge may be appealed to the Court of Appeal within 30 days from the mailing of the decision.[17] Such

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14. *Id.*, s. 30(2).
15. *Lacombe* v. *M.E.R. et al.*, unreported decision of the Québec Mining Judge, May 23, 1984, file 161-216.
16. *The Mining Act*, note 10, ss. 313-314.
17. *Id.*, s. 328.

an appeal has, in the past, provided opportunities for parties wishing to avoid further Court delays, to enter into out of court settlements.

III. Quality of Staking as an Issue in Claim Disputes

Sections 31 to 33 of *The Mining Act* provide for the general rules in claim-staking. These provisions have given rise to a good number of disputes which have enabled interpretation by the Mining Judge.

1) The Staking Process

The Mining Judge has affirmed, in a 1971 landmark decision [18] that the provisions of *The Mining Act* pertaining to the method of staking and the area of a claim did not constitute simple rules of conduct but, rather, were of a compulsory character. This has been repeated time and again and in various ways in cases decided by the Mining Judge. For instance, he said, in 1975,[19] that the provisions of the Act were imperative and that the onus is an the one who contends extenuating circumstances. In 1977, he added [20] that all staking operations provided in the Act were mandatory in order for the claim to be admitted for recording.

In the Haberer case,[21] he said that the requirements of the Act were intended to be more than directory and must be exacted if they are to serve the purpose for which they have been enacted.

Thus block staking is illegal. The Mining Judge has stressed the point in numerous cases.[22] In a 1977 case,[23] it was argued that block staking was a current practice when only one group was present and that the custom was so widespread that this was now an acceptable method of staking provided that there were no simultaneous stakings. The Judge said that this method was illegal since stakers must circumscribe each claim and that whoever uses the block staking method does it at his own

18. *Ref. St-Pierre, Bérubé, Audet et al.*, (1967-1972) D.Q.M.J. 97.
19. *Cloutier* v. *Champagne*, Jan. 10, 1975, file 161-144.
20. *Valiquette* v. *Thibault et al.*, Sept. 21, 1977, file 161-181.
21. *Haberer* v. *Minister of Natural Resources*, (1967-1972) D.Q.M.J. 116.
22. See, for example, *Menorah Mines and Lusko* v. *Dome*, March 22, 1974, file 161-138; *Municipalité de Labrecque* v. *M.E.R.*, Oct. 20, 1981, file 161-202; *Ref. Dubé, Lessard and Bérubé*, April 7, 1982, file 161-210.
23. *Larouche* v. *Vézina and Poirier*, Now. 8, 1977, file 161-186.

risks and perils. As he said in the *Menorah Mines* case,[24] the staker who commences the staking of a claim must complete it before staking another claim; two years later, he added that a staker could not plead good faith if he did not complete the staking of one claim before commencing the staking of another claim.[25] The rule against block staking applies in all circumstances. In one case, two stakers shared the work for both of them as one staked all nos. 1 and 4 posts and the other all nos. 2 and 3 posts. The judge said that each staker must stake each and everyone of his claims.[26]

Also, staking must be done personally. If it is not, the staker has, according to the Mining Judge, attempted to have the claim recorded under misrepresentation.[27] While the Mining Judge often said that the Act provided that the holder of a prospector's licence must stake the claim himself,[28] he has mentioned that the staker could be assisted; however, staking is valid only if he is present on the ground in order to supervise the work and to mark on posts the inscriptions provided in the Act.[29]

This is not to say that the Act prevents contractual arrangements under which prospectors personally stake while others, such as a mining company, then acquire the claims through a subsequent transfer. The Mining Judge stressed recently this point in the *J.A.G. Mines* case.[30]

2) Stakes

A whole body of case law refers to stakes and posts used in staking claims. For instance, in the *Gasse* case of 1982,[31] the Mining Judge stated that, under the Act, a staker could not use stakes planted the day before the land was open for staking, that a staker could not use stakes marking other claims and that a staker could not remove, change or mutilate a claim post.

In a 1976 case, the staker had used posts of expired or abandoned claims; the judge said that in doing so he had his claims

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24. *Menorah Mines and Lusko* v. *Dome*, March 22, 1974, file 161-138; see, also, *Thibault* v. *Harrisson*, Sept. 16, 1975, file 161-149.

25. *Audet* v. *Grenier*, Feb. 20, 1976, file 161-156; but nothing in the Act provides that the staking of a claim must be completed on the same day : *Côté et al.* v. *Beaubien et al.*, April 18, 1977, file 161-170.

26. *Décosse* v. *Vézina*, May 24, 1977, file 161-178.

27. *Thibault* v. *Harrisson*, Sept. 16, 1975, file 161-149.

28. *Ross* v. *Héroux*, Dec. 7, 1976, file 161-162; *Ref. Dumagami, Ferderber et al.*, June 25, 1981, file 161-184; *Mun. de Labrecque* v. *M.E.R. et al.*, Oct. 20, 1981, file 161-202.

29. *Valiquette* v. *Thibault et al.*, Sept. 21, 1977, file 161-181.

30. *Mines J.A.G.* v. *Robillard et al.*, May 14, 1985, file 161-224.

31. *Ref. Gasse, Gagné et al.*, Oct. 12, 1982, file 161-211.

admitted for recording under misrepresentation.[32] The use of former stakes is clearly illegal as the Mining Judge has repeatedly stated.[33]

Displacement or mutilation of stakes is also illegal under section 38 of the Act as the Mining Judge has stated[34] as is the mutilation of metal plates or tags.[35]

Regarding witness posts, a decision of the Mining Judge confirms the mandatory character of the Act's provisions. For instance, a decision by the Minister to refuse to record a claim was confirmed on the basis that witness posts were not located at their proper place.[36]

Section 31(k) of the Act enables the staker to use a single post for adjacent claims. In a 1979 case,[37] the Mining Judge stated that in order for this provision to apply continuous staking was required (in this case, there had been a 4-day interval).

3) Blazes and Marks

As the Mining Judge has stated in 1971,[38] since the Act compels the staker to mark or indicate his lines, it necessarily implies that he must circumscribe his claim. Indeed, marking is an integral part of the staking process and must be done simultaneously; thus, lines laid out prior to the opening of the ground to staking cannot be used.[39]

But the Act does not mention the word "blaze" (a marking on a tree). It simply provides (in section 33(f)) that the lines "shall be marked out or indicated on the ground in such a way that they may be followed from one stake to the next". Thus, other marking methods are not illegal in Québec. Some care should be taken, however, in order that the markings or indications be as much as possible of a permanent character. Flags, for instance, are not as permanent as paint or sticks. Flags are acceptable to the Department, of course, but are more vulnerable to removal.

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32. *O'Brien Rivard* v. *Roy*, June 10, 1976, file 161-165.
33. See, for instance, *Cloutier* v. *Champagne*, Jan. 10, 1975, file 161-144, and *Auger* v. *Carignan*, Oct. 17, 1979, file 161-145.
34. *Dumont* v. *Caya and M.R.N.*, (1967-1972) D.Q.M.J. 60; *Ref. Tuffy and Hollinger*, (1967-1972) D.Q.M.J. 169.
35. *Ref. Forbes*, April 23, 1975, file 161-152; *Bourret* v. *M.R.N.*, April 30, 1975, file 161-150.
36. *Haberer* v. *Miller and the Minister of Natural Resources*, (1967-1972) D.Q.M.J. 116.
37. *Valiquette et al.* v. *Vézina*, May 15, 1974, file 161-139.
38. *Ref. Bélisle, Audet and Bolduc*, (1967-1972) D.Q.M.J. 138.
39. *Corcoran* v. *M.R.N. and Lamaque*, (1967-1972) D.Q.M.J. 38; see also *Bourret* v. *M.R.N.*, April 30, 1975, file 161-150; lines *must* be marked at the time of the staking.

In the case of *Gendron* v. *Crites*,[40] the lines were not well marked or were not marked at all; because of this and other shortcomings such as the use of posts (trees in the occurrence) not squared off, the claims were declared recorded under misrepresentation.

As the Mining Judge has said in 1972,[42] if a dispute occurs, stakes, blazes and markings constitute the best evidence that the staker has or has not complied with the Act. On the other hand, although the holder of a prospector's licence must personally stake his claim, he may be assisted for the blazing of his lines.[42]

IV. THE DOCTRINE OF MISREPRESENTATION

The most common cause for the cancellation of claims is misrepresentation. The Act provides, in section 49, paragraph (b) that the Minister, of his own motion or at the request of an interested party, may cancel a claim if it has been admitted for recording through misrepresentation.

The doctrine of misrepresentation was perhaps most clearly explained in the *Audet and Grenier* case of 1976.[43] Here, the Mining Judge said that if the staker of a recorded claim has not staked his claim according to the provisions of the Act and has declared in his notice of staking that he has followed the provisions of the Act, then the claim has been admitted for recording under misrepresentation and is therefore subject to cancellation. Note that the declaration is printed on the notice of staking form which is in common usage.

In the *Maheux* case,[44] the Mining Judge, after repeating that the provisions of the Act as regards the method of staking were imperative, went on to specify shortcomings as regards to personal staking, posts, size of posts, marks on posts and blazing before proceeding to cancel the claim for misrepresentation. Because misrepresentation has such a wide meaning, "claim jumping" or, to put it in more polite terms, cancellation of a claim by the Minister at the request of an interested party, is much facilitated.

But in order for an existing claim to be open to cancellation for misrepresentation, the latter must be proven. For instance, in a 1975 decision,[45] the Mining Judge said that the simple fact that the posts were

40. *Gendron* v. *Crites*, April 13, 1978, file 161-179; see also *Céré* v. *Augmitto*, Nov. 5, 1976, file 161-157.
41. *Tuffy and Hollinger* v. *Kuttukkipic et al.*, (1967-1972) D.Q.M.J. 169.
42. *Céré* v. *Sigouin and M.R.N.*, (1967-1972) 134.
43. *Audet* v. *Grenier*, Feb. 20, 1976, file 161-156.
44. *Ref. Maheux*. Nov. 18, 1976, file 161-169.
45. *Clément* v. *Tourcomo*, Oct. 6, 1975, file 161-151.

not found at an inspection does not constitute positive proof that the staker did not plant them; here, the preponderance of evidence showed that the absence of stakes was due to considerable drainage development work on the ground.

The doctrine of misrepresentation also applies to the cancellation of development licences (that is claims in their second, third, fourth or subsequent year through the issue and/or renewal of development licences) under section 72(b) of the Act and has been extended to the assessment work provisions of the Act. In the *Céré* case in 1980,[46] the Mining Judge said that development licences had been issued under misrepresentation as required work had been falsely reported as having been done when such was not the case; thus, said the Judge, the claims (under development licence) could be legally cancelled. In a similar decision,[47] where rock excavation work had been filed by the licence holder but where evidence of such work was not found, the Judge decided that the licence had initially been issued under misrepresentation and had been legally cancelled by the Minister.

While this adds to the possibilities for the cancellation of claims at the request of a so-called "interested" party whose eyes are open, the Act provides for an important limitation : the mining claims or development licences cannot be cancelled if they have been recorded for a year in the name of a third-party holder in good faith.[48] The Mining Judge's interpretation of the provision may also be included in the doctrine of misrepresentation.

In the *Agar* case,[49] the third-party held the claims in good faith for more than one year; even though the claims had not been well staked, they were maintained as the shortcomings had occurred outside of the third party's knowledge. On the other hand it is well established[50] that a person who has had another person stake for his own eventual benefit, as he afterwards aquired the claim by transfer, is not considered to be a third party in good faith. The Mining Judge said, in 1984,[51] that bad faith required failings by the staker and knowledge of the failings by the transferee.

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46. *Ref. Céré*, Sept. 9, 1980, file 161-191.

47. *Rosenstrauss* v. *M.R.N. et al.*, (1967-1972) D.Q.M.J. 161, see also *Robillard* v. *M.R.N.*, Nov. 17, 1983, file 161-201.

48. *The Mining Act*, s. 47(b) and 72(b). By contrast, if a claim has been recorded by mistake, it may under s. 47(a) of the Act, be cancelled within 90 days of the date of recording.

49. *Ref. Agar*, Nov. 26, 1973, file 161-137.

50. See *Morin* v. *Céré*, Jan. 29, 1974, file 161-136.

51. *Lacombe* v. *M.E.R., Awde and Orwell*, May 23, 1984, file 161-216.

In the *Commander Nickel* case,[52] the rationale of the limitation was explained as the judge said that

> Le Législateur a voulu permettre au nouveau détenteur de claims d'effectuer des travaux de mise en valeur prescrits par la Loi en toute quiétude sans avoir constamment à craindre de perdre ses droits par suite d'irrégularités commises lors d'un jalonnement dont il n'est pas l'auteur et dont il ne peut apprendre l'existence que longtemps après le jalonnement [...].

On the other hand, as the judge stressed in another case,[53] the limitation does not apply when the third-party in good faith has held the claims for less than one year; in such a case he should take, upon acquiring the claims, the appropriate precautions in order to be sure of the quality of the staking and, if warranted, dispute his or its own claims.

V. THE DOCTRINE OF SUBSTANTIAL COMPLIANCE

Section 37 of the Act provides that

> When staking, it shall be sufficient to observe the provisions of the act in substance, and as nearly as circumstances permit.

This provision was raised in numerous mining claim disputes and has given rise to the doctrine of substantial compliance. The doctrine was perhaps best described in the *Commander Nickel* case[54] where the Mining Judge said that in order to alleviate the imperative staking provisions of the Act the Legislature introduced exceptional provisions that enabled the staker to depart from them in varying degree according to circumstance requirements. Thus, he added, section 37 of the Act implicitely authorizes the staking of claims of area and shape that may deviate in a non-substantial way from the area and shape provided in the Act. But, again, as the Mining Judge mentioned in a 1982 case,[55] the substantial compliance provision must receive a restrictive interpretation : it does not enable a method of staking that would exempt the staker from circumscribing the ground he stakes.

The doctrine of substantial compliance has been applied in various situations of fact. In the *J.A.G.* case of 1985,[56] a post located 28 meters from where it should have been was okayed as the discrepancy represented only 10 % of the width of the lot while a 22 % discrepancy

52. *Commander Nickel* v. *Zulapa*, April 17, 1973, file 161-133.
53. *Menorah Mines and Lusko* v. *Dome*, March 22, 1974, file 161-138.
54. *Commander Nickel* v. *Zulapa et al.*, April 17, 1973, file 161-133.
55. *Ref. Dubé, Lessard and Bérubé*, April 7, 1982, file 161-210.
56. *J.A.G.* v. *Robillard et al.*, June 6, 1985, file 161-224.

was declared not in substantial compliance with the staking provisions of the Act.

In another case,[57] it was decided that a claim of 61.7 acres (rather than the provided 40 acres) had an excessive area in regard with the provisions of the Act while another claim of 46.8 acres was considered as being not excessive. The Mining Judge explained that certain circumstances may be such that a staker errs in the calculation of the distances walked between posts which in turn increases or decreases the area of the claim; he added that, in this case, the fact that the claim had an area of 46.8 acres implied that the error was less than 10 % in the distances travelled. As well, a discrepancy of 11.5 % between the length of a claim and the length of a lot in surveyed territory was declared acceptable due to difficult terrain circumstances.[58] Speaking of claims staked in surveyed territory, the Mining Judge stressed in a 1973 case[59] that mistakes by stakers do not have the same importance as in unsurveyed territory since the recording of claims implies the standardization of the boundaries of the claim with the boundaries of the lot. In another case,[60] the Mining Judge okayed posts located 138 meters to the South of where there should have been because it was in surveyed territory, the stakers used former claims as reference marks and the lines of the original division could not be found.

Regarding witness posts, it was decided[61] that where the only short-coming was the absence of its distance from the apex of the claim, this was not sufficient to preclude recording.

On the other hand, it has been decided that there had been no substantial compliance in a case where a post was located 300 feet from where it should have been;[62] in this case there had been other shortcomings as well. Regarding area, it was decided[63] that in the case of a claim of 11.98 hectares (rather than the prescribed 16 hectares) there had been no substantial compliance. The area discrepancy was 26 %. In another case, an area discrepancy of 20 % was not allowed.[64]

Substantial compliance would appear to be a question of degree. In a 1976 case,[65] it was decided that there had been no substantial compliance because only 4 of the 8 posts were placed at the

57. *Vallée* v. *Preradovich et al.*, Oct. 29, 1976, file 161-158.
58. *Rivard* v. *Boisvert*, Oct. 4, 1977, file 161-187.
59. *Beecham* v. *Vézina*, Jan. 5, 1973, file 161-134.
60. *Ref. Tabréco et al.*, Feb. 10, 1984, file 161-214.
61. *Asselin* v. *M.R.N.*, Feb. 3, 1975, file 161-143.
62. *Gervais et al.* v. *Frigon*, May 5, 1972.
63. *Morand* v. *M.E.R.*, Nov. 14, 1980, 161-203.
64. *Gendron* v. *Crites*, April 13, 1978, file 161-179.
65. *Roy* v. *Bischoff*, Feb. 27, 1976, file 161-160.

right angles, the date of staking was not inscribed on 4 of the posts, three of the posts did not have the right dimensions and, finally, the ground was not circumscribed according to the Act. Regarding posts, it was decided[66] that there had not been substantial compliance where 3 of the 4 posts had a diameter of 2½ to 3 inches while posts of the required dimension (4 inches) were available and a post was located 180 feet from where it should have been.

Substantial compliance is often the issue when simultaneous rival stakings take place once lands become open for staking. Sometimes claims are staked in such a way that the doctrine would apply. However, as the judge must decide between rival and concurrent stakings, often of equivalent quality, he may refuse claims on the basis of specific shortcomings while the same claims may be viewed as having been substantially well staked were it not for the fact that there was a dispute. Thus, the question of substantial compliance may, in the case of a dispute, be brought down to very precise factual ground situations.

VI. SPECIFIC DISPUTE-RELATED TOPICS

1) Disputes Relating to Forfeiture and Lands Coming Open to Staking

Provisions of the Act for the conservation of mining rights are not simple guidelines but must be rigourously complied with; default is fatal as the law provides for automatic forfeiture.[67] In some specific cases the Act provides for possible relief of forfeiture[68] or for extensions for carrying out the required work.[69] But all deadlines are strict and the failure to comply with these entail the forfeiture of the rights of the holder of the claim or development licence.[70]

Once forfeiture has occurred, the land becomes open for staking on the thirty-first day.[71] But the land cannot be staked by the same person nor for the benefit of any person who held it or had an interest in it before the sixty-first day.[72] It should be noted that in the

66. *Michaud* v. *Boyd*, March 4, 1976, file 161-159.

67. *The Mining Act*, ss. 60 and 66; see *Selco* v. *M.E.R. and Serem*, June 1, 1982, file 161-206.

68. *Id.*, s. 68.

69. *Id.*, s. 71.

70. See, in the regard, *Ref. Richard*, (1967–1972) D.G.M.J. 126; *Mines d'Étain* v. *M.R.N. and Vézina*, March 20, 1984, file 161-198.

71. *The Mining Act*. s. 30(1).

72. *Id.*, s. 30(2); see *Ref. Aubé, Duval and Trudel et al.*, Nov. 19, 1977, file 161-180.

case of a refused or cancelled claim, an appeal lies and the land is not open for staking "before the final decision on the cancellation or refusal and in no case before seven o'clock on the day after the last day of appeal".[73] It was held that the decision of the Mining Judge, for the purpose of this provision, could not be final on a Sunday but only on the next day (if not a legal holiday).[74]

Holders of mining claims or development licences whose rights become forfeited often do, in fact, dispute the forfeiture before the Mining Judge. If the land is, when it allegedly becomes open, staked by others, the latter, while supporting the Minister's acknowledgment of the forfeiture, become effectively in dispute with the former holders. Thus, they should see to it that the hearing before the Mining Judge concerns not only the question of forfeiture but also that of the validity of the newly staked claims. In a 1984 case,[75] the Mining Judge, while rejecting the "appeal" from forfeiture, left it to the recorder to admit or refuse the new claims because the hearing dealt only with the question of forfeiture. This did not present any problem here as the new claims were then recorded. But if the Minister issues or renews in an illegal way a development licence when the rights have become forfeited by law and the same situation of newly staked claims as the land becomes open occurs, then the latter claims would be refused by the Minister and a consequent appeal would be made to the Mining Judge. If the hearing only deals with the forfeiture of the previous claims, the Mining Judge will not, under the actual precedents, deal with the subsequent staking, thus leaving the decision to the party (the Minister) who, in the first place, refused to record the claims.

2) Disputing One's Own Claims

Because, perhaps, of the fact that it is so easy for any astute prospector to enter into a claim jumping operation or, to put it more mildly, to take it upom himself that claims are staked properly albeit, per accident, this turns out to be to his own advantage, a practice of disputing one's own claims for precautionnary purposes has developped in Québec.

The practice has been accepted by the Department of Energy and Resources and the Mining Judge in numerous circumstances[76] and

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73. *Id.*, s. 30(3).
74. *Ref. Aiguebelle, Géola and Long Lac*, Oct. 24, 1984, file 161-213.
75. *Mines d'Étain* v. *M.R.N. and Vézina*, March 20, 1984, file 161-198.
76. See, for instance, *Ref. Dumagami, Ferderber, Long Lac et al.*, June 25, 1981, file 161-187; *Eno* v. *Dome*, Oct. 7, 1974, file 161-147.

has become law. It has been used, both successfully and unsuccessfully. In one case,[77] the claims disputed by its own holder were cancelled, but the newly staked claims were not recorded because they were not staked properly. In another case,[78] the Mining Judge stated that fear that claims may be disputed was not sufficient to cause a dispute of one's own claims if no proof is brought forward that the claims were recorded under misrepresentation. In this case, the restaking and ensuing dispute was done by Dome Exploration "solely an the basis of apprehension".

In other cases the disputes were successful and, of course, the Minister recorded the claims and no appeal was lodged as there was no loser. A company who disputes its own claims should be aware of two pitfalls. First, it should see to it that those who restake the ground do so properly lest they lose everything. Second, it should be aware of the claims' limited duration and dispute these, if warranted, before they lapse should this situation occur for lack of assessment work or for any other reason. In all cases, the purchaser of mining claims should check the quality of staking upon acquiring the claims and then decide if it should, for its own protection, dispute them.

3) Disputes and the Adjudicating Process

When a dispute occurs, it is very important that the prospector be present as a witness at an inspection or at a hearing before the Mining Judge. If the case is before the Minister, he should submit his contentions. This is especially true when simultaneous rival stakings are involved.

In one case before the Mining Judge,[79] one party was not present at the hearing. The Judge said that as his assertions were not confirmed by him at the hearing, these had to be put aside; the other party got the claims. In another case,[80] one staker was present at the hearing at which be confirmed the declaration contained in his notice of staking while the other was not. The Judge said that the first staker's testimony was thus preponderant.

Once a dispute occurs, it may be useless for a third party to get involved. As the Mining Judge said in 1981,[81] once the "decisional process leading to the acceptance or refusal of claim staking is commenced, any new staking should not be tolerated as this could lead to an

77. *Ref. Dumagami, Ferderber, Long Lac et al.*, June 25, 1981, file 161-184.
78. *Eno* v. *Dome*, Oct. 7, 1974, file 161-147.
79. *M.E.R.* v. *Audet and Allen*, May 16, 1983, file 161-215.
80. *Sup.* v. *Gagnon*, Feb. 23, 1977, file 161-174; see also *Sup.* v. *Descarreaux*, Feb. 25, 1977, file 161-173; and *Ref. Sup. Gagnon and Descarreaux*, March 2, 1977, file 161-172.
81. *Ref. Picard, Provost et al.*, Jan. 26, 1981, file 161-195.

infinite multiplication of disputes between the day when the Minister or the Mining Judge is seized with a case where more than one application for record is made and the date of his decision". He added that any other interpretation would go against the "scheme" of *The Mining Act.*

Where there is overlapping, the Mining Judge may change the area of a claim.[82] If there is a discrepancy between the situation on the ground and that illustrated by the Department's claim maps, the former will prevail in the mind of the Mining Judge.[83] In all cases before the Mining Judge, the initiative of the proceedings and their progress are left to the Judge rather than to the parties[84] even though input of the latter remains important. Hearings before the Mining Judge are informal, lawyers wear no gowns and parties often represent themselves. The decision is sent to the Department which then sends a copy to each party by registered or certified mail.[85]

VII. Effectiveness of the System

Mining claim disputes in Québec, as settled by the Mining Judge, have enabled prospectors to have a better view of the interpretation of *The Mining Act* and, especially, of its provisions as regards staking. Prospectors, mining companies and their attorneys are now in a better position to know what can or cannot be done relating to claim staking and disputes in general.

It would appear, however, that when disputes are brought before the Minister there is a lack of transparency in the judicial process. This being so, the Minister should perhaps defer all cases where a point of contention exists, as regards claim staking disputes, to the Mining Judge.

The Mining Judge should, on the other hand, be empowered to render equity decisions under which he could decide, as in the case of simultaneous rival stakings of equivalent quality and after trying to bring the parties into an agreement, to split the claims in dispute either on a territorial basis or on an interest basis rather than refusing all the claims.

Both of these measures would help to reduce the time it takes for the whole process to unfold as the number of possible appeals would be reduced.

The possibility of claim jumping could perhaps remain as it forms part of the free-mining tradition; it is indeed reasonable that

82. *The Mining Act*, s. 311.
83. *Sabourin* v. *M.R.N.*, May 10, 1973, file 161-140.
84. *Veilleux* v. *M.R.N.*, (1967-1972), D.Q.M.J. 9.
85. *The Mining Act*, s. 326.

someone who has caused his claims to be recorded as a result of staking done in the free-mining tradition but who has done so illegally be at risk. He had appropriated the land unilaterally under *The Mining Act*. It he acted wrongly, it is only natural, given also the possibility for him or for the transferee to correct the wrongdoings through a dispute of one's own claims, that he lose his rights to the benefit of a subsequent staker who has acted within the boundaries of the law.

As mining claims in Québec have an usual duration of one year (the rights may be preserved by applying for a development licence which also has a duration of one year and is renewable from year to year) the possibilities of forfeiture, cancellation, expiration, and abandonment are much more numerous in Québec than in Ontario. As lands become open for staking more often, the prospector whose eyes are open has enhanced opportunities to profit from the situation.

However, limits to claim jumping could be enacted in order to provide less uncertainty. It has been suggested, for instance, that one could not dispute a claim after it has been recorded for one year no matter the staking shortcomings. This would still enable a dispute of claims staked in a wrongful way within, of course, a specific time frame while ensuring that, passed this time, no problems relating to the initial staking could arise.

But, whatever becomes enacted, and as we continue in the free-mining tradition of the prospector's unilateral appropriation of Crown lands through staking, disputes as to who is entitled to the land will continue to occur and be dealt with in a judicial manner, thus providing prospectors with guidelines for their new ventures.