

SUPREME COURT OF YUKON

Citation: *Dawson (Town of the City of) v. Carey*,
2012 YKSC 56

Date: 20120717
S.C. No. 10-A0040
Registry: Whitehorse

Between:

THE TOWN OF THE CITY OF DAWSON

Plaintiff

And

DARRELL CAREY

Defendant

Before: Mr. Justice R.S. Veale

Appearances:

James A. Dowler
Nicholas Weigelt

Counsel for the Town of the City of Dawson
Counsel for Darrell Carey

REASONS FOR JUDGMENT

INTRODUCTION

[1] The Town of the City of Dawson (the “City”) has brought an action in trespass against Darrell Carey (the “Miner”) who operates a placer mining operation within the municipal boundaries of the City. The precise claim is for trespass on two highways, the Dome Road and the Mary McLeod Road, portions of which are located within the placer mine.

[2] The facts alleging the trespass claim have largely been admitted. The broader legal issues relate to the interaction between the *Highways Act*, R.S.Y. 2002, c. 108, the *Placer Mining Act*, S.Y. 2003, c. 13, and whether the Water Board licence granted to the Miner provides a defence to the Miner.

[3] The presentation of the case was marred by an abuse of the case management procedure in this Court requiring additional written submissions of counsel. That issue will be addressed in a separate judgment.

The Agreed Facts

[4] There are a number of facts that have been agreed upon. In some instances the agreement carries legal implications.

[5] The City is a municipal corporation pursuant to the *Municipal Act*, R.S.Y. 2002, c. 154.

[6] The Miner operates a placer mine, known as Slinky Mine. A placer mine recovers gold in the form of flakes or nugget from sand or gravel of active or ancient stream or river beds.

[7] The original mining grants were issued in 1988 before the expansion of the Dawson Municipal boundaries. Since then, the claims have been in good standing with no lapses.

[8] Sections of the Dome Road and the Mary McLeod transverse the claims of the Slinky Mine. These sections have been within the legal limits of the City since the expansion of the municipal boundaries pursuant to Order In Council 1993/193, which passed on December 24, 1993.

[9] The Dome Road and the Mary McLeod Road have been highways since before 1979 under the *Highways Act*, S.Y. 1975, Ch-1.1, the *Highways Act*, R.S.Y 1986, c. 82 and now the *Highways Act*, R.S.Y. 2002, c. 108. On April 18, 1983, Order in Council 1983/78 classified the Dome Road and Mary McLeod Road as Class V highways

imposing a 60-metre right of way, which extends 30 horizontal metres from the centreline on each side of the highway.

[10] On November 21, 1995, Order In Council 1995/189 transferred jurisdiction over the Dome Road and Mary McLeod Road from the Government of Yukon to the City. The municipal area encompasses a tourist lookout, a cemetery and three residential subdivisions.

[11] The Yukon Territory Water Board issued the Miner a Type B Water Use Licence PM98-047 effective July 4, 2001, to expire on May 1, 2010, for placer mining subject to the following General Conditions, among others:

- (a) A leave strip shall be maintained that extends ten (10) horizontal metres from the right of way of the Dome Road. (G.C. 19)
- (b) Forest cover, gravel, vegetation, or any other material shall not be removed or disturbed within the leave strip of the Dome Road. (G.C. 11)
- (c) Nothing in this approval limits the application of any Federal, Territorial, First Nation law, local regulations, ordinances or bylaws. (G.C. 12)

The Trespass in April 2010

[12] In April 2010, the Miner entered onto the area where the Dome Road and the Mary McLeod Road intersect (Site A) and removed trees and organics from the area within 40 horizontal metres of the centreline of the Dome Road and within 30 horizontal metres of the centreline of the Mary McLeod Road.

[13] Of the area cleared of trees and organics on Site A in April 2010:

- (a) 160m² was located within the 10 horizontal metres of the centreline of the Mary McLeod Road;

- (b) 1950 m² was located within 30 horizontal metres of the centreline of the Mary McLeod Road;
- (c) 310 m² was located within 30 horizontal metres of the centreline of the Dome Road; and
- (d) 1013 m² was located within 40 horizontal metres of the centreline of the Dome Road.

[14] The Miner removed between 75 and 250 trees from Site A. The agreed-upon cost for remediation of Site A is \$2,200 for hydro seeding the damage within 30 horizontal metres of the centerline of the Dome Road and the Mary McLeod Road.

The Trespass from June to August 2010

[15] Effective June 19, 2010, to June 1, 2015, the Miner has a Type B Water Use Licence from the Yukon Water Board, subject to the following General Conditions, among others:

- (a) A leave strip shall be maintained that extends fifteen (15) horizontal metres from the centreline of the Dome Road, including the replacement section of the Dome Road when commissioned (G.C. 17);
- (b) A leave strip shall be maintained that extends ten (10) horizontal metres from the centreline of the Mary McLeod Road, including the replacement section of the Mary McLeod Road when commissioned (G.C. 18);
- (c) Nothing in this approval limits the application of any federal, territorial, or first nation legislation (G.C. 16).

[16] By August 31, 2010, the Miner had removed the following granular material from Site B:

- (a) 483m³ of material from within 30 horizontal metres of the Dome Road; and
- (b) 1115 m³ of material from within 40 horizontal metres of the Dome Road.

[17] The agreed-upon cost for replacing the granular material within 30 horizontal metres of the Dome Road, assuming it can be obtained from the placer mine is \$26,022, or \$44,690, if the granular material must be obtained from somewhere other than the placer mine area.

[18] The City and the Miner also agree that the City exercises jurisdiction, management and control over the Dome Road and the right of way in various ways, including:

- (a) posting signs, including speed limit signs, in the Dome Road right of way;
- (b) retaining an independent contractor to remove snow from and spread sand on the Dome Road;
- (c) piling snow in the Dome Road right of way;
- (d) during the winter, performing daily inspections to ensure the Dome Road is in a safe condition;
- (e) other than during the winter, performing weekly inspections to ensure the Dome Road is in a safe condition;
- (f) patching potholes on the road surface of the Dome Road;
- (g) patching slumping along the Dome Road and in the Dome Road right of way; and
- (h) maintaining the ditches in the Dome Road right of way.

[19] The City and the Miner also agree that the City exercises jurisdiction, management and control over the Mary McLeod Road and right of way by:

- (a) posting signs, including speed limit signs, in the Mary McLeod right of way;
- (b) retaining an independent contractor to remove snow from and spread sand on the Mary McLeod Road;
- (c) piling snow in the Mary McLeod Road right of way;
- (d) adding gravel surface material to the Mary McLeod Road to ensure it is in a safe condition;
- (e) grading the gravel surface of the Mary McLeod Road yearly, to ensure it is in a safe condition;
- (f) closing the Mary McLeod Road to traffic from approximately January to April of each year, due to hazardous conditions; and
- (g) maintaining the ditches in the Mary McLeod Road right of way.

[20] The surface of the Dome Road is chip-sealed and the surface of the Mary McLeod Road is gravel.

THE ISSUES

[21] The following issues shall be addressed:

1. Does the Miner have the authority to mine his claims pursuant to the leave strip terms of his water licence?
2. Is the action of the City an impermissible collateral attack on the water licence issued by the Water Board?
3. Does the *Yukon Surface Rights Board Act*, S.C. 1994, c. 43, apply to this dispute?

ANALYSIS

Issue 1: Does the Miner have the authority to mine his claims pursuant to the leave strip terms of his water licence?

[22] The Order In Council expanding the municipal boundaries of the City was passed on December 24, 1993, pursuant to s. 16 of the *Municipal Act*.

[23] In 1995, the Commissioner in Executive Council transferred jurisdiction over highways to the City pursuant to s. 5 of the *Highways Act*, S.Y. 1991, c. 7, which is identical to s. 5 of the current *Highways Act*.

5(1) The Commissioner in Executive Council shall transfer the jurisdiction over any highway or part thereof in the limits of a municipality, other than a highway or part thereof excepted by order, to that municipality subject to any conditions that the Commissioner in Executive Council considers appropriate.

(2) When a highway or part of a highway is transferred to a municipality pursuant to subsection (1),

(a) it vests in and is under the management and control of the municipality on and after the day set by the Commissioner in Executive Council;

(b) it is for all purposes subject to the jurisdiction of the municipality under the *Municipal Act*;

(c) any agreements made or permits granted by the Minister, the Government of the Yukon, or the Government of Canada in relation thereto shall continue in force as though made or granted by the municipality;
and

(d) all rights, privileges, and benefits conferred on or retained by the Minister or the Government of the Yukon in any agreement referred to in paragraph (c) shall enure to the benefit of and bind the municipality. (my emphasis)

[24] The City has the following powers and jurisdiction pursuant to the *Municipal Act*.

4(1) A municipality is a corporation and has, for the exercise of its powers under this or any other Act, all the rights and liabilities of a corporation.

(2) A municipality has, for the exercise of its powers under this or any other Act, the capacity and, subject to this Act, the rights, powers, and privileges of an individual.

...

[25] The issue is essentially whether the City's right to occupy and possess the highways is subject to a prior right of the Miner under the *Placer Mining Act* or his Water Use Licence. Counsel for the Miner submits that the Miner's grant of claims and permission to operate pursuant to a water licence supercedes the City's right to exclusive occupation and possession of the highway. Simply put, if the water licence prevails, the Miner is prohibited from entering the 10-15 metre leave strip. If the *Placer Mining Act* prevails, the Miner is prohibited from entering the 30 metre right of way from the centreline of the roads.

[26] Both Water Use Licences state that nothing in the Water Use Licence limits the application of a federal or territorial law. The precise issue is whether there is any federal or territorial law that applies to the City and the Miner regarding the roadway.

[27] The case is complicated by the fact that on April 1, 2003, the land and resource management responsibilities in the Yukon were transferred from the Government of Canada to the Government of Yukon pursuant to the Devolution Transfer Agreement. Although this means that there was a federal *Placer Mining Act* up to April 1, 2003 and a Yukon Act thereafter, the statutes are essentially the same.

[28] The Devolution Transfer Agreement provides the following:

TRANSITION

Existing Federal Rights

2.44 Subject to 2.46, any Existing Federal Right shall be administered and governed as of the Effective Date in accordance with territorial legislation.

2.45 As of the Effective Date, the Legislature shall have the power:

(a) to make laws providing for the modification, suspension or cancellation of Existing Federal Rights or any right under them in circumstances where, and to the extent that, prior to the Effective Date, such Existing Federal Rights or any right under them could have been modified, suspended or cancelled; and

(b) without limiting the generality of (a), to make laws that apply to the same extent to Existing Federal Rights as to similar rights and interests issued, granted or otherwise secured under territorial legislation, providing for

(i) the addition of requirements governing the manner in which Existing Federal Rights can be exercised; and

(ii) the modification, suspension or cancellation of Existing Federal Rights or any right under them, except claims granted pursuant to the Yukon Placer Mining Act (Canada) and the Yukon Quartz Mining Act (Canada) for failure to comply with requirements governing the manner in which they can be exercised.
(my emphasis)

2.46 Any Existing Federal Right shall continue in full force and effect:

(a) until the Existing Federal Right expires or is surrendered;

...

(e) unless the Existing Federal Right or any right under it, except a claim granted pursuant to the Yukon Placer Mining Act (Canada) and the Yukon Quartz Mining Act

(Canada), is modified, suspended or cancelled pursuant to territorial legislation made in accordance with 2.45(b)(ii); or (my emphasis)

...

[29] The Devolution Transfer Agreement also contains the following definition:

DEFINITIONS

Existing Federal Right: means

(a) any agreement for sale, lease, licence, permit, claim or other authorization, right or interest in effect immediately prior to the Effective Date in relation to Public Land that was issued, granted or otherwise secured under the *Territorial Lands Act* (Canada), the *Yukon Placer Mining Act* (Canada) or the *Yukon Quartz Mining Act* (Canada);

(b) any licence or other right in relation to Waters in effect immediately prior to the Effective Date that was issued, granted or otherwise secured under the *Yukon Waters Act* (Canada);

(c) any Encumbering Right in effect immediately prior to the Effective Date; or

(d) any renewal after the Effective Date of a claim in effect immediately prior to the Effective Date that was granted pursuant to the *Yukon Placer Mining Act* (Canada) or the *Yukon Quartz Mining Act* (Canada);

...

[30] The clear intent of the Devolution Transfer Agreement, as it pertains to placer mining, was to ensure that existing licences and claims would continue in full force and effect.

[31] As a result of the Devolution Transfer Agreement, consideration must be given to the federal *Yukon Placer Mining Act* for the period prior to April 1, 2003, and the Yukon's *Placer Mining Act* for the period following April 1, 2003.

[32] Both the federal and territorial legislation have the following provisions:

1. Both Placer Acts in s. 100 require that the placer mining industry operates “in a manner that upholds the essential socio-economic and environmental values of the Yukon.”
2. Both the federal and Yukon Acts in s. 2(2) retain the right of the Commissioner to construct roads through a claim without compensation.
3. Both Placer Acts prohibit a person from locating a claim within the boundaries of a city or town (see federal s. 17(2)(g) and Yukon s. 17(2)(e)), except under regulation approved by the Commissioner in Executive Council.
4. Finally, both Placer Acts prohibit a miner from entering on lands which are lawfully occupied by another person until adequate security is given, to the satisfaction of the mining recorder for any loss or damage that may be caused (federal s. 18, Yukon s. 18(1)).

[33] Counsel for the Miner submits that the Miner’s claims and Water Use Licence give him a superior right to operate a placer mine pursuant to the terms of the Water Use Licence. That would permit the Miner to enter the roads of the City to the extent permissible in the leave strip conditions of his Water Use Licence.

[34] In my view, a distinction must be made between the placer mining claims of the Miner and his Water Use Licence. His placer mining claims are clearly protected under s. 5(2)(c) of the *Highways Act* and continue in force as “agreements made” or “permits granted”.

[35] However, a water licence is subject to the following limitation in the *Waters Act*, S.Y. 2003, c. 19.

s. 4 Nothing in this Act, the regulations, or a licence authorizes a person to contravene or fail to comply with any other Act or any regulation or order made under it, except as provided in that other Act, regulation, or order.

[36] I conclude that the Miner retains his claims and the right to mine them, but the water licence and approved operating plan do not permit the Miner to contravene any other statute.

[37] As indicated above, section 18(1) of the *Placer Mining Act* states the following:

No person shall enter on for mining purposes or shall mine on lands owned or lawfully occupied by another person until adequate security is given, to the satisfaction of a mining recorder, for any loss or damage that may be thereby caused. (my emphasis)

[38] There is little doubt here that the City is in lawful occupation of the Dome Road and the Mary McLeod Road. The highways have been validly transferred from the Commissioner in Executive Council and are under the City's management and control, both in law and in fact.

[39] Counsel for the Miner admits that security was not posted but places the obligation to pursue the security issue with the City. Counsel submits that the City must either demand security or raise the issue with the Miner or the mining recorder in order to rely on this section.

[40] In my view, s. 18(1) can only be interpreted to require that the Miner provide security to the satisfaction of the mining recorder before entering on land lawfully occupied by the City. As a result, the Miner cannot rely upon the Water Use Licences and their leave strip conditions to operate within the 60-metre right of way of the roads.

Issue 2: Is the action of the City an impermissible collateral attack on the water licence issued by the Water Board?

[41] Some elaboration of the facts is required to address the issue of collateral attack.

[42] The Water Use Licence effective July 4, 2001 to May 1, 2010 applies to the trespass on Site A. The City did not participate in the Water Board process for that application.

[43] The Water Use Licence PM09-633, effective June 9, 2010 to June 1, 2015, applies to the trespass on Site B. The City intervened in this application. The Water Board in its Reasons for Decision noted it was specifically removing the word “municipal” from its “other laws” clause which normally states “no condition of the Water Use Licence limits the applications of any federal, territorial, first nation or municipal legislation.” The Water Board also commented on concerns that the City had about the effects the mining operation would have on its residents.

[44] The Water Board stated the following:

The City of Dawson and other interveners raised concerns about the effects of the project on local residents. The Board recognized that territorial legislation affords a claim owner the right to access the minerals on his/her claim(s). As it pertains to this application, adjacent property owners have concerns about the effect of the operation on their quality of life and property values. The City of Dawson may impose further conditions on the licensee.

The Board is satisfied that the conditions contained in the Decision Document, and those that are included in the licence and approval are over and above what is typically required of placer miners in the Dawson region, to provide an additional level of protection to the quality of life of residential home owners in the vicinity of the project. The additional conditions pertain to hours of operation, buffer zones, leave strips, noise buffers, notice to residents, signage, and fencing. To restrict activities further, either in spatial or temporal terms, would verge on refusing the claim holder access to the minerals on his claims, which is a right guaranteed to him under territorial legislation, and which the Board determined was not appropriate in this case.

The City of Dawson had concerns about the proposed use of city installed culverts under the Dome Road to convey a water pipeline from the dredge pond to new settling facilities. The licence prohibits the applicant from constructing new settling facilities inside the bend of the Dome Road (area “B” as described in appendix A of the licence). The Licensee has confirmed for the Board that water for new settling facilities above the Dome Road (area “C”) can be transported by pipeline without crossing the Dome Road, and that the culverts do not need to be used if the City does not want to grant permission to use them. The Board is satisfied that the updated proposal by the Licensee addresses the City’s concern. (my emphasis)

[45] The City did not appeal the Water Board’s decision. The Water Board clearly considers that it has the jurisdiction to protect certain areas by establishment of leave strips. The City did not challenge the leave strip conditions.

[46] The doctrine of collateral attack is fully explored in *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, at paras. 60-68. The doctrine is a judicial creation and must yield to a contrary legislative enactment. Simply put, and quoting from *Garland v. Consumers’ Gas Co.*, 2004 SCC 25, “the doctrine is intended to prevent a party from circumventing the effect of a decision against it.”

[47] In *TeleZone*, Binnie J. set out three factors to consider:

1. the doctrine of collateral attack may be raised as a defence (para. 63);
2. the doctrine of collateral attack does not apply where the object of the court action is not to invalidate or render the Board order inoperative (para. 64);
3. the doctrine of collateral attack does not just apply to cases of resistance to an order but also applies where a party asserting a civil claim attacks a law or order relied on by the other party to justify its impugned action.

[48] I have concluded that the doctrine of collateral attack does not apply to this case for the reason that the judicial doctrine yields to a contrary statutory enactment. The City brings a case in trespass against the Miner. There is no order of the Water Board against the City, so its trespass action stands or falls on its own merit. The Miner is entitled to raise the leave strip order of the Water Board in its defence, but I have already concluded that the Water Board licence conditions do not permit him to contravene the statutory requirement that he provide adequate security pursuant to s. 18(1) of the *Placer Mining Act* before entering on the Dome Road and Mary McLeod Road for mining purposes.

Issue 3: Does the *Yukon Surface Rights Board Act* apply to this dispute?

[49] Counsel for the Miner submits that the *Yukon Surface Rights Board Act*, S.C. 1994, c. 43, (the “Act”) applies to the claim of the City, and therefore the City is required to make an application to the Surface Rights Board for access to non-settlement land. Counsel submits that s. 65 of that Act applies here:

65. In the case of a dispute respecting access to non-settlement land between the following persons, the Board shall, on application of either person, make an order interpreting a provision described in paragraph (b) in relation to the right of access for purposes of the dispute:

(a) a person, other than Government, who has an interest or right in the surface of the land; and

(b) a person, other than Government, who has, in relation to a mineral right, a right of access on the land under any provision of a law of the Legislature of Yukon identified in regulations made pursuant to paragraph 78(f). (my emphasis)

[50] There are a number of reasons that the *Yukon Surface Rights Board Act* does not apply to this case. The first reason is that the *Act* was created to resolve disputes

between miners who require access to their claims across settlement and non-settlement lands. Unfortunately, the *Act* does not explicitly state that this is the extent of its intended application, but a close reading indicates that it is designed to provide a tribunal to resolve access rights of a miner where the surface owner and the mineral right owner have not been able to resolve a dispute. In the case at bar, there is no access dispute, as the City has the lawful right to use and occupy the roads in question. The issue is whether the Miner has trespassed on city roads.

[51] Secondly, *Yukon Surface Rights Board Act* is replete with references to category A settlement land, category B settlement land, non-settlement land, final agreements and self-government agreements. All this terminology arises from the *Yukon First Nations Land Claims Settlement Act*, S.C. 1994, c. 34, and the *Yukon First Nations Self-Government Act*, S.C. 1994, C. 35. The *Act* has no language specific to the circumstances of the case at bar.

[52] Arguably, this statute may have effects that were not contemplated in the Umbrella Final Agreement, but, in my view, explicit wording is required to remove the jurisdiction of the mining recorder under s. 18(1) of the *Placer Mining Act*. In this respect, consideration must also be given to s. 29 of the *Yukon Surface Rights Board Act*, which sets out the parties to a hearing before the Board:

The following are parties to a hearing before the Board:

...

(f) in the case of an application under section 65 in relation to a mineral right granted under the Yukon Placer Mining Act or the Yukon Quartz Mining Act, the mining recorder.

[53] The inclusion of the mining recorder under s. 65 disputes does not impair or in any way give the Board jurisdiction over s. 18(1) of the *Placer Mining Act*. Section 65 creates jurisdiction for the Board only in relation to access disputes between a person who has an interest in the surface of the land and a person who has “in relation to a mineral right”, a right of access on land identified pursuant to regulations made under s. 78(f) of the *Act*. No such right of access has here been identified by regulation.

[54] I conclude that s. 65 does not apply to oust the mining recorder’s jurisdiction under s. 18(1) of the *Placer Mining Act* and, in any event, neither the City nor the Miner made any application to the Surface Rights Board to proceed under s. 65 of that *Act*. The *Yukon Surface Board Rights Act* does not afford any defence to the Miner.

CONCLUSION

[55] As I understand the agreed facts, the Miner has acknowledged the acts of trespass and the damages claimed by the City, subject to the defences which I have rejected. I therefore find that the Miner has trespassed on the Dome Road and I award damages of \$2,200 for hydro seeding Site A. I also award damages for Site B in the amount of \$26,022 if the granular material is obtained from the placer mine, or alternatively \$44,690, if the granular material is obtained from sources other than the placer mine. I assume that the parties can resolve which damage amount is appropriate or return to case management to resolve any issues that arise.

[56] The City has claimed an injunction prohibiting the Miner from trespassing on the City roads. I do not consider this necessary, as the rights of the City and the Miner have been clarified by this judgment. Any further trespass is highly unlikely and would attract a claim of punitive damages.

[57] Costs will be addressed in the case management ruling cited as *Dawson (Town of the City of) v. Carey*, 2012 YKSC 59.

VEALE J.