SUPREME COURT OF YUKON

Citation: *Lobo Del Norte Ltd. v Whitehorse (City of)* 2015 YKSC 40

Date: 20150909
S.C. No. 13-A0003
Registry: Whitehorse

Between:

LOBO DEL NORTE LTD.

Plaintiff

And

CITY OF WHITEHORSE

Defendant

Before Mr. Justice R.S. Veale

Appearances:
Donald J. Smith — Counsel for the Plaintiff
Daniel R. Bennett — Counsel for the Defendant

REASONS FOR JUDGMENT

INTRODUCTION

[1] The plaintiff applies for a declaration that the City of Whitehorse ("the City") has expropriated or injuriously affected its right to develop and extract minerals from nine mineral claims registered under the *Quartz Mining Act*, S.Y. 2003, c. 14, and acquired by the plaintiff in 1998.

[2] The parties have agreed to first proceed on the issue of liability in this summary trial application.

[3] The plaintiff has withdrawn its claim that the 2010 Official Community Plan ("the 2010 OCP") and the Zoning By-Law 2012-20 ("the 2012 Zoning Bylaw") are invalid.

[4] The City pleads that the application is premature as the plaintiff has not applied to amend the 2010 OCP or the 2012 Zoning Bylaw. That application remains open to the plaintiff but does not prevent a ruling on the declaration applied for.

[5] The City also applied to have portions of the affidavit of Barry Ernewein, the owner of the plaintiff, struck on the grounds that they were inadmissible personal opinion or argument. I have chosen to ignore these aspects of the affidavit as they primarily concern the value of the mining claims which is really not relevant for this application.

BACKGROUND AND FACTS

[6] The plaintiff purchased the claims from Hudson Bay Mining & Smelting in April 1998. The claims are located in the City of Whitehorse in an area known as the Whitehorse Copper Belt, which has been mined historically and is known for its copper mineral potential. At the time of purchase, the zoning of the area did not permit mining.

[7] As the owner of the quartz claims, the plaintiff has the right to occupy the surface and extract minerals beneath the surface pursuant to the *Quartz Mining Act*. The plaintiff has maintained the claims in good standing.

[8] The Yukon Government has underlying control of the lands on which the claims are located ("the Lands"). In order to mine the claims, the plaintiff requires certain approvals and land use permits from the Yukon Government. At this stage, the plaintiff has not applied for or been issued approval for an exploration program. Because the claims are located within the municipal boundaries of Whitehorse, the City would necessarily be consulted about planning and zoning issues.

[9] Under the *Municipal Act*, R.S.Y. 2002, c. 154, the City is required to adopt an Official Community Plan ("the OCP") which, among other things, addresses the future development and use of land in the City. The OCP sets out the City's broad policy objectives with respect to development and environmental protection. The policy objectives are implemented in a zoning bylaw that must be submitted to the Yukon Government for its approval. The zoning bylaw establishes detailed regulations for the permitted uses of specific areas of land. The 2012 Zoning Bylaw implemented the 2010 OCP.

[10] Since 1973, there have been six zoning bylaws that have applied to the Lands. None of the zoning bylaws have permitted mining or related activity on the Lands. While zoning designations have changed over the years, the permitted uses have consistently restricted development to ensure the Lands are maintained in a natural state, with some limited recreation and associated use being permitted.

[11] Under the 2012 Zoning Bylaw, the Lands were zoned as "Greenbelt", with the stated purpose of providing a zone for areas of public land that are typically left in a natural state and used primarily for buffers, walking trails and for unorganized or passive recreation.

[12] The principal permitted uses for the Lands under the 2012 Zoning Bylaw are community gardens and greenhouses, nature interpretation facilities and trails. Permitted secondary uses include accessory buildings or structures. Conditional uses include day-use areas, day-use cabins, outdoor participant recreation centres and parks.

[13] In the same manner as previous zoning bylaws, the 2012 Zoning Bylaw does not permit mining or other activity related to natural resources as a permitted or discretionary use of the Lands.

[14] Under the 2010 OCP, the City established a Green Space Network Plan in 2014 consisting of five park areas. One of the park areas, the Wolf Creek Park, includes the Lands. The park designation means that future land use decisions must be consistent with the objectives of the designation. It is also clear that the designation of a park in the OCP does not commit the City or any other government to undertake any project or plan in the OCP.

[15] The Regional Parks Plan has an online Frequently Asked Questions section which notes that those who hold mineral claims within park boundaries "have the legal right to exercise that mineral claim." In the view of the City, the rights of the holder of a mineral claim are not affected by the park designation, although the holder is required to comply with all zoning bylaws in exercising those rights. This may require the claim holder to apply for an amendment to permit certain mining activity.

[16] Although the long-term goal of the City is to obtain the ownership and management of the Lands as set out in the 2012 OCP, the City has no current proprietary interest in the Lands.

[17] In correspondence between the City and the plaintiff, the City has indicated that the plaintiff is required to apply to the City to amend the 2010 OCP and the 2012 Zoning Bylaw in order to conduct certain mining operations on the claims in the Lands.

[18] In 2012, in the course of the City's drafting of the 2012 Zoning Bylaw, the Yukon Government recommended that certain low-level exploration activities, including those

designated as Class 1 activities under the *Quartz Mining Act* and *Quartz Mining Land Use Regulation*, O.I.C. 2003/64, be permitted without a re-zoning application from the City.

[19] Class 1 activities include construction of camps, storage of fuel, construction of lines, trenching, clearings and removal of vegetative mat.

[20] The City concedes that Class 1 activities do not meet the threshold of establishing a use or development and do not require a permit from the City under the 2012 Zoning Bylaw. The plaintiff has completed mineral assessments and states that it has performed drilling and geophysical work costing $353,900.33 between April and August 2008.

[21] The City states that further mining activity beyond Class 1 activities requires an amendment to the 2010 OCP and the 2012 Zoning Bylaw. The plaintiff treats the City's position as a denial of its right to mine. The City also says that the plaintiff's claim for expropriation is premature as the plaintiff has not secured the required territorial permits and authorizations necessary for mining. I also add, although it has not been raised in this case, that a Class 2, 3 or 4 exploration program requires assessment under the *Yukon Environmental and Socio-Economic Assessment Act*, S.C. 2003, c. 7, a decision document from the Yukon Government allowing the project to proceed, a water license and a license under the *Quartz Mining Act*, S.C. 2003, c. 14.

[22] The City maintains that it has no intention of prohibiting or frustrating all mining activities within City boundaries. It has continued to permit mining activity that is away from residential areas, significant wildlife corridors or other areas with conflicting land uses. The City states that mining activity continues to be allowed under both the 2010

OCP and 2012 Zoning Bylaw in areas designated as “Natural Resources” and “Heavy Industrial”.

THE ISSUE

[23] The issue before the Court is whether the City by virtue of the 2010 OCP and the 2012 Zoning Bylaw has expropriated or injuriously affected the plaintiff’s rights to develop and extract minerals on its mineral claims on the Land.

ANALYSIS

[24] The plaintiff claims that the following actions of the City have resulted in the *de facto* expropriation of the plaintiff’s claims or the extinguishment of its contingent right to mine the claims:

a) The establishment of the Wolf Creek Park by way of the 2010 OCP;

b) The implementation of the Wolf Creek Park by way of the 2012 Zoning Bylaw and the 2014 Regional Parks Plan;

c) The City’s refusal to amend the 2010 OCP and the 2012 Zoning Bylaw to enable the plaintiff to mine its quartz claims; and

d) The clear evidence that the City has no intention of amending the 2010 OCP and the 2012 Zoning Bylaw.

[25] I note that there is no evidence of (c) and (d) as there has been no amendment request filed by the plaintiff. Thus, I will proceed to analyze whether the establishment or implementation of the Wolf Creek Park via the 2010 OCP and the 2012 Zoning Bylaw has expropriated or injuriously affected the plaintiff’s right to develop or extract minerals from its claims.

De Facto Expropriation

[26] The plaintiff is claiming that the 2010 OCP and 2012 Zoning Bylaw resulted in a *de facto* expropriation of the Lands. In *Nova Scotia (Attorney General) v. Mariner Real Estate Ltd.*, 1999 NSCA 98, Cromwell J.A., as he then was, addressed a similar claim in the context of provincial legislation that limited the uses of land owned by Mariner and the other plaintiffs. In *Mariner*, the lands had been designated as a beach under the *Beaches Act* and the Minister refused to grant residential building permits. Mariner claimed that its lands had in effect been expropriated and it was entitled to compensation.

[27] In *Mariner*, Cromwell J.A. stated, at para. 38, that the scope of claims of *de facto* expropriation are constrained by two governing principles:

1. Valid legislation or action taken lawfully with legislative authority may very significantly restrict an owner's enjoyment of private land; and
2. Courts may order compensation for such restriction only when authorized to do so by legislation.

[28] For *de facto* expropriation to be made out, there must be a confiscation or removal of virtually all the aggregated incidents of ownership or all reasonable private uses (*Mariner*, paras. 48 and 49). Interference short of this can give rise to a claim for injurious affection where that is specifically contemplated by legislation.

[29] The plaintiff acknowledges that the 2010 OCP and 2012 Zoning Bylaw are valid municipal instruments enacted within the City's jurisdiction. That leaves only the question of whether the effect of the City's regulation has resulted in the taking or expropriation of the plaintiff's claims.

[30] At para. 42 of *Mariner*, Cromwell J.A. cited with approval *The Law of Expropriation in Canada*, (2nd, 1992) at pp. 22 – 23, where E.C.E.Todd states:

> … By the imposition, removal or alteration of land use controls a public authority may dramatically increase, or decrease, the value of land by changing the permitted uses which may be made of it. In such a case, in the absence of express statutory provision to the contrary an owner is not entitled to compensation or any other remedy notwithstanding that subdivision approval or rezoning is refused or development is blocked or frozen pursuant to statutory planning powers in order, for example, to facilitate the future acquisition of the land for public purposes. "Ordinarily, in this country, the United States and the United Kingdom, compensation does not follow zoning either up or down ... (but) a taker may not, through the device of zoning, depress the value of property as a prelude to compulsory taking of the property for a public purpose. (my emphasis)

[31] As Cromwell J.A. states at para. 42, ” extensive and restrictive land use regulation … has, almost without exception, been found not to constitute compensable expropriation.”

[32] Cromwell J.A. goes on to explain at para. 49:

> Considerations of a claim of de facto expropriation must recognize that the effect of the particular regulation must be compared with reasonable use of the lands in modern Canada, not with their use as if they were in some imaginary state of nature unconstrained by regulation. In modern Canada, extensive land use regulation is the norm and it should not be assumed that ownership carries with it any exemption from such regulation. As stated in Belfast, there is a distinction between the numerous "rights" (or the "bundle of rights") associated with ownership and ownership itself. The "rights" of ownership and the concept of reasonable use of the land include regulation in the public interest falling short of what the Australian cases have called deprivation of the reality of proprietorship: see e.g. Newcrest Mining (W.A.) Ltd. v. The Commonwealth of Australia, [1996-1997] 190 C.L.R. 513 at p. 633. In other words, what is, in form, regulation will be held to be expropriation only when virtually all of the aggregated incidents of ownership have been taken

> away. The extent of this bundle of rights of ownership must be assessed, not only in relation to the land's potential highest and best use, but having regard to the nature of the land and the range of reasonable uses to which it has actually been put. It seems to me there is a significant difference in this regard between, for example, environmentally fragile dune land which, by its nature, is not particularly well-suited for residential development and which has long been used for primarily recreational purposes and a lot in a residential subdivision for which the most reasonable use is for residential construction. (my emphasis)

[33] The plaintiff relies upon *British Columbia v Tener*, [1985] 1 S.C.R. 533. In that case, the court considered whether the owner of a mineral claim in a provincial park was entitled to compensation after being refused a permit to develop his claims.

[34] In *Tener,* the Crown granted the claims in question to the owner in 1937 before reserving and setting aside land for a provincial park in 1939. The establishment of the park did not take away the mineral claims and the owners were left with their rights intact.

[35] In 1973, a section was added to the *Mineral Act*, requiring anyone exploring for or producing minerals to be authorized by a permit. A letter in 1978 advised the claim owner that no new exploration or development work may be authorized in a provincial park. In the specific circumstances of that case, the claim owners were entitled to compensation, not because of the creation of the park, but rather because of the letter refusing access for any purpose connected with the claims.

[36] In *Mariner*, Cromwell J.A., at para. 51, interpreted *Tener* as follows:

> In my opinion, where a regulatory regime is imposed on land, its actual application in the specific case must be examined, not the potential, but as yet unexploited, range of possible regulation which is authorized. This point is demonstrated by the Tener case. The Court was clear in that case that the taking occurred as a result of the denial of the

> permit, not by the designation under the Park Act which required the permit to be obtained. (my emphasis)

[37] Cromwell J.A. explains the distinction between a designation and a refusal of permission to develop in para. 53 as follows:

> The declaration sought and granted by the trial judge in this case was that the designation of the lands pursuant to the Beaches Act constituted an expropriation within the meaning of the Expropriation Act. In my opinion, this was an error. While the act of designation imposes on the respondents' lands a regulatory regime, that does not, of itself, constitute an expropriation. One of the respondents' main complaints is that they were refused permission to build dwellings on the lands. That refusal was not an inevitable consequence of the designation of the lands as a beach, but flowed from the refusal by the Minister of permission required to develop the lands pursuant to s. 6 of the Regulations. If permission to build had been granted, would the designation have effected a de facto expropriation? The answer, I think, is self-evidently no. It was not, therefore, the designation alone that was crucial, but the designation in combination with the refusal of permission to develop the lands by building dwellings. (my emphasis)

[38] Cromwell J.A. also observed at para. 94 that in *Tener,* the Crown both granted the mineral interest and acquired the reversion of the mineral interest. Thus, the effect of the regulatory regime was not only to extinguish the mineral rights of the respondent but also to re-vest them in the Crown. In other words, the Crown had entirely derogated from its grant of a mineral interest.

[39] There is a further distinction between *Tener* and *Mariner* and the case at bar. In both of those cases, it was the Crown that granted the mining right and the Crown that took the right away. In the case at bar, the Yukon Government, although responsible for granting the mining interest, is not the expropriating authority and did not re-acquire this

mineral interest as a result of the City's zoning legislation. Neither has the City acquired an interest in the minerals.

[40] Here, the City has planned and regulated but the City neither granted the mineral rights nor derogated from them. The plaintiff submits that this distinction is only "superficially significant" as it is the effect of regulation that the courts consider. With respect, I disagree with that characterization because Cromwell J.A. was clear that regulation will only be held to expropriation when "all the aggregated incidents of ownership have been taken away". That is simply not the case with the 2010 OCP or the 2012 Zoning Bylaw. The property interest in the minerals continues to vest with the plaintiff.

[41] Finally, in *Tener,* it was the unequivocal refusal of the provincial government to consider authorizing new exploration or development that constituted the expropriation, rather than the legislation that required authorization before activities were undertaken. That is not the situation here. In this case, the City has a process for amending its Zoning Bylaw and the plaintiff has not made the necessary applications to engage with it. Although it submits that any such application is bound to fail, that is an untested assertion. As well, Yukon Government has the authority to permit mining. The plaintiff has not applied for any mining permits nor has it included the Yukon Government as a party to this action. In my view, the plaintiff has not established that it has been denied permission to mine, and it cannot be found that the City has expropriated the right. It is not at all clear that the plaintiff's rights in the Lands have been completely confiscated or taken away, given that the plaintiff has not followed through with an attempt to exercise them.

Injurious Affection

[42] In the alternative, the plaintiff claims compensation for injurious affection by way of the *Expropriation Act*, R.S.Y. 2002, c. 81 which provides in ss. 2(2) and 7 for compensation from an expropriating authority for injurious affection of land.

[43] The test for determining whether there has been an injurious affection of land where there has been no taking is set out in both *Tener* in the British Columbia Court of Appeal and *Petro Canada Inc. v Vancouver (City of)* (1996), 82 B.C.A.C. 299 as follows:

1. The damage must result from an act rendered lawful by statutory powers of the person performing such act;
2. The damage must be such as would have been actionable under the common law, but for the statutory powers;
3. The damage must be an injury to the land itself and not a person injury or an injury to business or trade;
4. The damage must be occasioned by the construction of the public work, not by its user.

[44] While the test may have been met in the *Tener* case as a result of the deprivation of the right of access and the use and possession of the surface of the claims, there has been no factual deprivation of the right of access, use and possession of the claims in the case at bar.

[45] In my view, the analysis of Cromwell J.A. in *Mariner* applies equally to injurious affection. Expropriation is the taking of all the aggregated incidents of ownership. Similarly, injurious affection involves damage or a taking away of some of the incidents of ownership. The 2010 OCP and the 2012 Zoning Bylaw do not take away any incident

of quartz claim ownership, even if they do lead to more scrutiny of activities pursuant to regulatory processes.

[46] Further, the zoning of the lands did not permit mining at the time of purchase of the claims in 1998 so the adoption of Zoning Bylaw 2012 has left the plaintiff in the same position it was at the time of purchase of the claims.

CONCLUSION

[47] For the reasons stated above, the plaintiff's application for a declaration of expropriation or injurious affection of its claims is dismissed with costs.

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VEALE J.