COURT OF APPEAL OF YUKON

Citation: *H. Coyne & Sons Ltd. v. Whitehorse (City)*, 2018 YKCA 11

Date: 20180716
Docket: 17-YU817

Between:

H. Coyne & Sons Limited

Appellant
(Plaintiff)

And

City of Whitehorse, Corvus Corax Holdings Ltd., and Raven's Ridge Developments (2011) Ltd.

Respondents
(Defendants)

Before: The Honourable Chief Justice Bauman
The Honourable Madam Justice Cooper
The Honourable Mr. Justice Fitch

On appeal from: An order of the Supreme Court of Yukon, dated October 18, 2017 (*Coyne v. Whitehorse (City)*, 2017 YKSC 57, Whitehorse Registry No. 13-A0073).

Counsel for the Appellant:	B.M. Shaw E. Snow
Counsel for the Respondent City of Whitehorse:	D.R. Bennett, Q.C.
Counsel for the Respondents Corvus Corax Holdings Ltd. and Raven's Ridge Developments (2011) Ltd.	M.J. Leitch
Place and Date of Hearing:	Whitehorse, Yukon May 8–9, 2018
Place and Date of Judgment:	Vancouver, British Columbia July 16, 2018

Written Reasons by:
The Honourable Chief Justice Bauman

Concurred in by:
The Honourable Madam Justice Cooper
The Honourable Mr. Justice Fitch

Summary:

The owner of subsurface mining rights under a property zoned for a residential subdivision sought declarations respecting ancillary implied rights of access to the surface. Those declarations challenged the applicability of restrictions under Yukon mining legislation to the mining rights in question, and the validity of local land use bylaws which permitted the subdivision and prohibited mining. The judge declined to declare that Yukon's mining legislation was inapplicable or that the bylaws were invalid. Held: appeal dismissed. The judge was correct to conclude the land use bylaws validly prohibited the owner from using the surface to access its subsurface mining rights. Nor did the judge err in exercising his discretion to not grant declarations respecting the mining legislation or any rights the owner had at common law as the bylaws would prohibit the exercise of such rights in any event, and Yukon was not given notice of the proceedings.

Reasons for Judgment of the Honourable Chief Justice Bauman:

Overview

[1] This appeal engages difficult legal issues involving the relationship between the holder of subsurface mineral rights and the owner of the surface of the relevant lands. It invites the Court to consider the applicability of sundry Yukon mining legislation and regulations, and the ability of the City of Whitehorse ("City") to regulate and/or prohibit the mining of subsurface minerals under its planning, land use and development powers delegated by the *Municipal Act*, R.S.Y. 2002, c. 154.

[2] The owner of the subsurface rights sought five declarations regarding those rights in the Supreme Court of Yukon before Justice Veale. The judge granted a declaration acknowledging ownership of the subsurface rights, which was uncontested, and a declaration that the claim was within the limitation period, but declined to grant three declarations that addressed the scope of the mining rights and municipal powers in dispute. Only the judge's treatment of the three declarations he declined to grant are at issue before us. For reasons that follow, I would dismiss the appeal from his order.

Facts

[3] The property in dispute is designated as Lot 1280. Lot 1280 consists of a portion of the land formerly part of Lots 49 and 50. Lot 1280 has subsequently been

subdivided into smaller lots, but for ease of reference, the property shall be referred to as Lot 1280.

[4] In 1905, Canada granted the surface rights in Lot 49, as well as the sub-surface right in the lot to mine copper ore, or other minerals that could be combined with copper ("Copper Plus interest"), to a third party pursuant to the 21 March 1898 *Quartz Mining Regulations*, (1898) C. Gaz., 2439 [*1898 QMR*]. A similar grant was issued in 1906 for Lot 50.

[5] On 1 June 1971, the boundaries of the City expanded to include Lots 49 and 50.

[6] On 31 January 1992, a previous owner of Lots 49 and 50, Hudson Bay Mining and Smelting Co., Limited, sold the lands, but reserved to itself the Copper Plus interest in them.

[7] On 8 December 1998, the Copper Plus interest was transferred to the appellant H. Coyne & Sons Limited ("Coyne").

[8] On 22 April 2013, Raven's Ridge Developments (2011) Ltd. ("Raven's Ridge") acquired title to Lot 1280. The respondent Corvus Corax Holdings Ltd. ("Corvus") is a related company to Raven's Ridge, and at one time held title to Lot 1280, but no longer has a direct interest in the property.

[9] Raven's Ridge has completed a rural residential subdivision on property neighbouring Lot 1280, and has begun preliminary work to develop Lot 1280 including building roads and subdividing lots. However, none of the subdivided lots making up Lot 1280 have been sold to third parties. Coyne has conducted preliminary mining exploration on the property, but Coyne's access rights were terminated by Raven's Ridge once the litigation commenced.

[10] Since Lots 49 and 50 came within City boundaries, the City has passed four different Official Community Plan ("OCP") bylaws, and eight zoning bylaws, none of which contemplated or permitted mining on the lots. Coyne has never applied to

change either the OCP or zoning bylaws to permit mining. However, Coyne objected to a change in the 2010 OCP that permitted residential development on Lot 1280. Coyne also objected to a 2012 zoning bylaw ("Zoning Bylaw 2012") that zoned Lot 1280 as "Country Residential 2", permitting manufactured homes, parks and single detached housing, but not mining. On 12 September 2012, the City approved a subdivision request from Raven's Ridge ("the Subdivision Resolution").

[11] Coyne commenced the action after the City approved the Raven's Ridge subdivision, and Raven's Ridge denied access for Coyne to conduct further exploratory mining activity.

Decision under appeal

[12] After setting out the factual and statutory background for the dispute, Justice Veale then addressed each of the five requested declarations sought by Coyne. The judge granted the first declaration which stated that Coyne was the owner of the Copper Plus interest in Lots 49 and 50, which Raven's Ridge did not oppose.

[13] The second requested declaration was that Coyne's Copper Plus interest included an ancillary and necessarily implied right to use the surface of Lot 1280 to mine the Copper Plus, subject to certain conditions:

> Coyne's Mineral Rights on or under former Lot 1280 now the Further Subdivided Parcels includes an ancillary and necessarily implied right for Coyne to, at its own risk, enter on, use and occupy the surface of Lot 1280 and the Further Subdivided Parcels to work, mine, extract and carry away the Copper Plus by all reasonable means provided that in exercising such right, Coyne does not cause a permanent loss of surface support, destruction to the surface or destroy the road constructed thereon.

[14] The judge held that Coyne had a common law right of access to the surface of Lot 1280, despite the fact that Hudson Bay did not expressly reserve such an access right when it transferred ownership of the lots. In the alternative, the judge concluded that the *1898 QMR* provided a source of the right to enter and use the surface.

[15] However, the judge noted that there are two limitations on the right of a miner to access the surface. First, the mining activity must be conducted in a "reasonable manner", and was subject to the statutory requirements of the *Yukon Environmental and Socio-economic Assessment Act*, S.C. 2003, c. 7 [*YESAA*], and the *Quartz Mining Act*, S.Y. 2003, c. 14 [*2003 QMA*]. Second, the surface owner has the right to support for their property in its natural position and condition without interference or disturbance due to mining.

[16] The third requested declaration stated that Corvus and Raven's Ridge could not prevent Coyne from exercising its ancillary right of access to the surface, and that the residential development on Lot 1280 had the effect of preventing exercise of that right:

> Raven's Ridge, in exercising its surface rights to former Lot 1280 now the Further Subdivided Parcels cannot prevent Coyne from exercising Coyne's Mineral Rights, including Coyne's ancillary right of access to Coyne's Mineral Rights from the surface of the Further Subdivided Parcels. Raven's Ridge Phase 2 residential subdivision on the surface of Lot 1280 and the Further Subdivided Parcels has the effect of preventing Coyne from exercising its ancillary right of access to Coyne's Mineral Rights from the surface of former Lot 1280 now the Further Subdivided Parcels.

[17] The judge agreed that Raven's Ridge could not prevent Coyne from exercising its right of access, though Raven's Ridge could rely upon the *2003 QMA* to demand security before granting Coyne entry, and request compensation in the event of damage. Moreover, Raven's Ridge may require Coyne to obtain any necessary statutory approvals from the City, or other authorities pursuant to the *YESAA*, and the *2003 QMA*. However, whether the Raven's Ridge development prevented Coyne from exercising its right, was linked to the validity of the 2010 OCP and Zoning Bylaw 2012, which were addressed by the fourth declaration.

[18] The judge declined to grant the second and third declarations on the grounds that while they might be correct statements of law, they are contingent on approval of applications that were not before the Court. The judge also dismissed the claim for declarations as against Corvus as it no longer had any interest in the property.

[19] The fourth requested declaration stated that the City's 2010 OCP and Zoning Bylaw 2012 were invalid and of no force and effect to the extent that they impaired Coyne's right to mine the Copper Plus interest in Lots 49 and 50:

> The City's 2010 Official Community Plan, Zoning By-law 2012-20, Zoning By-law 2012-06 and the City's approval of the subdivision of Lot 1280 into the Further Subdivided Parcels are invalid and of no force and effect to the extent that they prohibit, limit or impair Coyne from working, mining and extracting, and carrying away the Copper Plus underlying the surface of Lot 1280 and the Further Subdivided Parcels.

[20] The judge held that the City had jurisdiction to prohibit mining activity pursuant to its broad grant of power to regulate the uses and development of land under the *Municipal Act*, and distinguished similar cases that adopted a narrower approach to municipal jurisdiction as either involving more narrow legislation, or inconsistent with the Supreme Court of Canada's interpretive approach in *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19.

[21] The judge also held that the 2010 OCP and Zoning Bylaw 2012 did not impair Coyne's rights, analogizing to cases involving expropriation, and adopting the acknowledgment by Justice Cromwell, as he then was, in *Nova Scotia (Attorney General) v. Mariner Real Estate Ltd.,* 1999 NSCA 98, that valid legislation may significantly restrict enjoyment of land without amounting to expropriation. While Zoning Bylaw 2012 significantly restricted Coyne's right to mine given the need for regulatory procedures to be followed, that was not an impairment and was a limitation contemplated by the *1898 QMR* and the *2003 QMA*.

[22] The judge therefore declined to grant the fourth declaration.

[23] The fifth requested declaration was that Coyne was not barred from bringing its claim on the basis of expiry of a limitation period. The judge granted this declaration, since a void bylaw can be attacked at any time, and the cause of action did not arise until Raven's Ridge prevented Coyne from accessing Lot 1280 in 2013, and the statement of claim was filed that same year. Alternatively, the adoption of Zoning Bylaw 2012 would be the triggering event for the cause of action, and the claim would still have been filed in time.

Issues on appeal

[24] In total, Coyne raises five issues on appeal. In refusing to grant the second and third declarations, Coyne alleges that the chambers judge erred by:

1. Concluding that Coyne's mineral rights were subject to the *2003 QMA,* and

2. Exercising his discretion to decline to grant the second and third declarations.

[25] In refusing to grant the fourth declaration, Coyne alleges that the chambers judge erred by:

1. Concluding that the *Municipal Act* gave jurisdiction to the City to regulate subsurface mining, and

2. Concluding that the 2010 OCP, Zoning Bylaw 2012, and approval of the subdivision of Lot 1280 did not impair Coyne's mineral rights, including any ancillary right to access the surface.

[26] Coyne also alleges that the chambers judge erred by failing to grant declarations against Corvus because it no longer held an interest in Lot 1280.

Analysis

[27] I would begin with the issues raised by the fourth declaration requested. Again, it seeks a declaration to this effect:

> Declaration #4:
>
> The City's 2010 Official Community Plan, Zoning By-law 2012-20, Zoning By-law 2012-06 and the City's approval of the subdivision of Lot 1280 into the Further Subdivided Parcels are invalid and of no force and effect to the extent that they prohibit, limit or impair Coyne from working, mining and extracting, and carrying away the Copper Plus underlying the surface of Lot 1280 and the Further Subdivided Parcels.

[28] This declaration requires the court to consider the *vires* of the City's 2010 OCP, Zoning Bylaw 2012, and the 2012 Subdivision Resolution.

[29] The bylaws affect Lot 1280 in this way: the 2010 OCP contemplates a residential development of Lot 1280. Zoning Bylaw 2012 in turn zones Lot 1280 as "Country Residential 2" which provides for single detached housing providing an urban lifestyle in a rural setting on large lots. Mining is not permitted in the zone, and the bylaw would restrict any use by Coyne of its claimed ancillary surface access rights.

[30] The 2012 Subdivision Resolution authorized the subdivision of Lot 1280 into a number of lots. That subdivision and the eventual construction of homes on the lots would also obviously impair Coyne's ability to exercise any surface access rights to engage in mining it may possess.

[31] I will focus on the 2010 OCP and Zoning Bylaw 2012.

[32] The general thrust of Coyne's complaint with these bylaws in their application to Lot 1280 is that they purport (in their effect) to prohibit, limit or impair Coyne from working, mining, and extracting minerals from the lands, or accessing the surface in the exercise of its subsurface rights.

[33] Coyne's position is essentially two-fold. First, with respect to both bylaws, it points to s. 283(3) of the *Municipal Act* and says that a municipal council is specifically not empowered "to impair the rights and privileges to which an owner of land is otherwise lawfully entitled."

[34] Second, and with specific reference to Zoning Bylaw 2012, Coyne says that the City's power to regulate and prohibit the use of land for certain "uses" is constrained by venerable case law so as to exclude the jurisdiction to regulate or prohibit the mining of lands.

[35] I will address both submissions in some detail, but I say in summary that Coyne's first submission fundamentally misconstrues the very nature and effect of OCPs under Yukon's and other provinces' land use regulatory schemes and its second submission invites the Court to explain away some hoary case law that has

been overtaken by the modern approach to the construction of municipal statutory powers.

The issue of "impairment"

[36] Part 7 of the *Municipal Act* contains the city's powers in respect of planning, land use and development within its boundaries. Importantly, it is divided into Divisions. But before the Divisions are set out, we find this statement as to the "purposes" of Part 7:

> **Purposes of this part**
>
> 277 The purposes of this Part and the bylaws under this Part are to provide a means whereby official community plans and related matters may be prepared and adopted to
>
> (a) achieve the safe, healthy, and orderly development and use of land and patterns of human activities in municipalities;
>
> (b) maintain and improve the quality, compatibility, and use of the physical and natural environment in which the patterns of human activities are situated in municipalities; and
>
> (c) consider the use and development of land and other resources in adjacent areas
>
> without infringing on the rights of individuals, except to the extent that is necessary for the overall greater public interest.

[37] I note that the thrust of Coyne's position is that the bylaws wrongfully infringe its rights and privileges. Coyne submits that s. 277 creates an absolute prohibition on the use of municipal planning powers to "infringe on the rights of individuals", which is applicable to the exercise of all powers delegated by Part 7. Section 277, however, not only merely speaks to the general purposes of the provisions which follow and does not itself create any prohibition on municipal action, but it implicitly suggests that at least some of the Part 7 powers when exercised will legitimately lead to the infringement of the rights of individuals, albeit only "to the extent that is necessary for the overall greater public interest."

[38] Division 1 of Part 7 deals with OCPs. By s. 278 an OCP must be adopted by a municipality within a specified period of time. Section 279 describes the necessary content of the plan:

279(1) An official community plan must address

(a) the future development and use of land in the municipality;

(b) the provision of municipal services and facilities;

(c) environmental matters in the municipality;

(d) the development of utility and transportation systems; and

(e) provisions for the regular review of the official community plan and zoning bylaw with each review to be held within a reasonable period of time.

(2) An official community plan may address any other matter the council considers necessary.

[39] Section 283 is a critical section. It deals with the effect of OCPs. It provides:

Effect of plans

283(1) Council shall not enact any provision or carry out any development contrary to or at variance with an official community plan.

(2) No person shall carry out any development that is contrary to or at variance with an official community plan.

(3) Despite subsection (2), council is not empowered to impair the rights and privileges to which an owner of land is otherwise lawfully entitled.

(4) The adoption of an official community plan shall not commit the council or any other person, association, organisation, or any department or agency of other governments to undertake any of the projects outlined in the official community plan.

(5) The adoption of an official community plan does not authorize council to proceed with the undertaking of any project except in accordance with the procedures and restrictions under this or any other relevant Act.

[40] I make a number of observations as to the scheme of s. 283. The OCP acts to constrain the municipal council in subsection (1). It also acts to constrain individuals (including land owners) in subsection (2), but subject to the important qualification set out in subsection (3), that council, in and through the OCP itself is not empowered "to impair the rights and privileges to which an owner of land is otherwise lawfully entitled."

[41] The exception in subsection (3) is consistent with the typical scheme of community planning powers set out in other municipal statutes. In British Columbia, for example, historically, community plans (similar in content to Yukon's plans) could

be adopted under s. 709 of the *Municipal Act*, R.S.B.C. 1979, c. C-290. Section 712 of that Act was worded in a manner very similar to s. 283 of the Yukon legislation:

> 712(1) The council or the trustees of an improvement district shall not enact a provision or undertake a work contrary to, or at variance with, an official community plan.
>
> (2) Subsection (1) does not empower the council to impair, abrogate or otherwise affect the rights and privileges to which an owner of land is otherwise lawfully entitled.

[42] I will have more to say about the BC legislation below, but the point I make here is that community plans primarily qualify what a municipal council can subsequently do in the exercise of its planning and other powers. Council must exercise its powers in conformance with the official plan; that is, in the words of the Yukon Act, council cannot "enact any provision or carry out any development contrary to or at variance with" the plan.

[43] This statutory direction to comply with the OCP applies to individuals as well by virtue of s. 283(2), but it is subject to the saving proviso in subsection (3). The effect of that proviso (in Yukon and historically in British Columbia) is this: the OCP deals primarily with "the future development and use of land in the municipality" (s. 279(1)). The plan looks to the future, and does not by itself affect present rights. It may be that an OCP contemplates the future use of some land as greenbelt or a highway corridor, while the existing zoning bylaw contemplates the present use of that same land for residential purposes. However, the land owner in question still enjoys the present right under the zoning bylaw to develop his land for residential purposes. Notwithstanding the terms of the OCP, until that zoning bylaw is amended to conform to the plan, the owner continues to enjoy the right to develop the lands for the purposes presently contemplated by the zoning bylaw. That, in my view, is the proper construction of the text in s. 283(3) which states that a municipal council is "not empowered to impair the rights and privileges to which an owner of land is otherwise lawfully entitled"; that is to say, by virtue of adopting a new OCP, a municipal council cannot and does not impair any rights to which an owner is lawfully entitled under the extant zoning bylaw.

[44] This observation on the relationship between OCPs and zoning is also made in Stanley M. Makuch, Neil Craik, & Signe B. Leisk, *Canadian Municipal and Planning Law*, 2d ed. (Toronto: Thomson Canada Ltd., 2004) at 175–177:

> In all provinces a plan is given legal effect. The nature and extent of the effect varies from province to province and largely depends on the relevant planning legislation and judicial construction thereof. The most common effect of a plan is to restrain the municipality in the exercise of its powers rather than to directly control land uses.
>
> Under the *Planning Act* in Ontario, for example, there is no provision for the plan to regulate land uses directly. Rather, where an official plan is in effect, "no public work shall be undertaken and ... no by-law shall be passed for any purpose that does not conform therewith." The effect of the plan is, therefore, limited to restricting municipal action. As the Court stated in *Southwold (Township) v. Caplice*, an official plan in Ontario is little more than a statement of intention and is not an effective instrument in restricting the use of land.
>
> ...
>
> While the effect of most plans is to restrain the municipality in the exercise of its powers, the plans, be they regional or local, may also directly regulate land use or have a substantial impact on land use. Under the *Planning Act* of Manitoba "[n]o development shall take place unless (a) the development conforms with an adopted zoning by-law and this Act; (b) the development generally confirms with an adopted development plan; and (c) a development permit has been issued for the development by a board, where the land is within a planning district, or a council." Under the *Planning and Development Act* of Saskatchewan a basic planning statement or development plan is "binding on the municipality and all other persons, associations or other organizations and no development shall be carried out that is contrary" to these plans. The *Vancouver Charter* provides that the Council cannot authorize, permit or undertake any development contrary to or at variance with the official development plan and that "it shall be unlawful for any person to commence or undertake any development contrary to or at variance with the official development plan." It may be argued, therefore, that in contrast to planning Acts generally, in these jurisdictions plans alone may operate to control land uses. However, even in these jurisdictions it is envisaged that the plan will be implemented through the passing of by-laws or regulations.
>
> The scheme of planning legislation, therefore, is that a plan setting out the goals and policies for municipal physical land uses is legally approved. That plan is then brought to fruition by other land use regulations — zoning, development control and subdivision control — and by municipal undertakings in conformity with the plan.
>
> [Emphasis added. Footnotes omitted.]

[45] That is the official plan scheme. The critical point, lost in the submission of Coyne, is that s. 283(3) and its prohibition on impairment of existing rights is found in

Division 1 of Part 7. It has no application to the powers found, in particular, in Division 2 of Part 7 dealing with zoning bylaws. Section 289 of the Yukon *Municipal Act* provides:

> **Scope of zoning bylaw**
>
> 289 A zoning bylaw may prohibit, regulate, and control the use and development of land and buildings in a municipality.

[46] I note of course the breadth of the power: "prohibit, regulate, and control". The power to "prohibit" a particular use of land is too clear to permit of the argument advanced by Coyne to the effect that such bylaws cannot "impair" Coyne's subsurface rights. As I say, the "no impairment" proviso in s. 283(3) has no application to the zoning power generally described in s. 289. It qualifies only the planning power in Division 1 of Part 7. Nor does the proviso even indirectly affect the zoning power. Here the argument advanced by Coyne is essentially this: if the OCP cannot impair private rights (s. 283(3)), and if the zoning bylaws cannot be inconsistent with the OCP (s. 288(3)), then zoning bylaws cannot impair private rights. Or to put it another way, a municipal council cannot do indirectly what it cannot do directly. The simple answer to this proposition is that it is not the OCP impairing Coyne's rights. As I have explained, it is the zoning bylaw, specifically Zoning Bylaw 2012. To conclude otherwise, and to say that the prohibition on impairment applies indirectly to zoning would be nonsensical and rob the broad powers set out in s. 289 of their force. As the City submits, the impairment of private rights lies at the core of the zoning power.

[47] That s. 283(3) has no application to the zoning power in Division 2 of Part 7 is implicit when we look to the equivalent of s. 283 in Division 2, that is s. 297. It is headed "Effect of zoning bylaws" (mirroring s. 283 which is headed "Effect of plans"). It reads:

> 297(1) Council shall not enact any provision or carry out any development contrary to or at variance with a zoning bylaw.
>
> (2) No person shall carry out any development that is contrary to or at variance with a zoning bylaw.

[48] I note that while it is similar to s. 283, it is telling that s. 297(2) is not followed by the “no impairment” proviso found in s. 283(3).

[49] How then is the confiscatory effect of a zoning bylaw, to the extent it can prohibit various uses of lands (but not sterilize it for all uses), muted by considerations of fairness? It would appear as if the interpretation I have adopted unfairly advantages municipalities if there is no protection against impairment from zoning bylaws, and if by virtue of s. 288 a Yukon municipal council must eventually adopt a zoning bylaw that conforms to an OCP that in future intent, if not in present effect, impairs the rights of landowners. The answer lies in the protections afforded to so-called “non-conforming uses” that were lawful before the amendment of a zoning bylaw, but that in turn are rendered unlawful going forward by that amendment, which are provided in s. 301 of the *Municipal Act*:

> 301(1) If the lawful use of land or of a building or other structure existing at the date of the adoption of an official community plan or zoning bylaw or amendments does not conform to the official community plan or bylaw, that use may be continued, but if the non-conforming use is discontinued for a period of 12 months, or any longer period as council may by bylaw allow, any subsequent use of the land or building or other structure must conform with the official community plan and zoning bylaw then in effect.
>
> (2) A bylaw to allow a longer period under subsection (1) may include conditions which must be complied with; if those conditions are not complied with, the bylaw is annulled.
>
> (3) If at the date of adoption of an official community plan or zoning bylaw a building or other structure is lawfully under construction or all required permits have been issued, the building or other structure shall be considered to be a building or other structure existing at the date the official community plan or zoning bylaw is adopted, but the erection of the building or other structure must be begun within 12 months of the date the last permit was issued.

[50] That is the overall scheme. To summarize, standing alone the OCP does not impair Coyne’s rights. To the extent that the OCP might not contemplate a mining use of Lot 1280, but a zoning bylaw in force might, Coyne would still enjoy the right to mine until such time as the zoning bylaw was amended. When a zoning bylaw amendment affecting Lot 1280 was passed by municipal council (as it would have been in this scenario within two years after the adoption of the OCP pursuant to s. 288(1)) that zoning bylaw would have had to be consistent with the plan and not

permit mining. But in that case it was the zoning bylaw impairing Coyne's rights, not the OCP. Similar legislation has been in place in British Columbia as I noted above. Again, under s. 807 of the former *Municipal Act*, plans were "a general scheme without detail for the projected uses of land within the affected area". In *Re Rogers and District of Saanich* (1983), 146 D.L.R. (3d) 475 (B.C.S.C.), the Court was considering the planning power under that earlier legislation, and arrived at this conclusion (at 487):

> So, in the result, plans they all are. The reality comes with zoning.

[51] This captures the point I have been trying to make. The 2010 OCP is a plan for future uses of lands within the City of Whitehorse. The actual "reality", and any impairment of rights, only comes with the zoning bylaw. However, there is no prohibition on impairment of rights through zoning under the Yukon *Municipal Act*, except with respect to certain non-conforming uses and Coyne has not argued before this Court that any alleged surface access rights are a protected non-conforming use.

[52] It follows that the 2010 OCP and Zoning Bylaw 2012, to the extent that the former does not contemplate mining uses of lot 1280 and the latter, by its terms, prohibits them, are not invalid. This would extend of course to the 2012 Subdivision Resolution as well.

[53] The judge upheld the 2010 OCP and Zoning Bylaw 2012 on the basis of a different theory. He appears to have accepted the proposition that s. 283(3) indirectly qualifies the zoning power in s. 289. He relied on his decision in *Lobo Del Norte Ltd. v. Whitehorse (City of)*, 2015 YKSC 40, to hold that the 2010 OCP and the 2012 Zoning Bylaw did not effect an expropriation of Coyne's subsurface rights and in that light the City did not impair these rights contrary to s. 283(3). It will be seen that I respectfully disagree with that particular analysis. Zoning Bylaw 2012 indeed impairs Coyne's rights, but that is the essence of the zoning power if exercised lawfully, and as I have explained s. 283(3) does not apply in this context.

[54] This is not to say that where a zoning regulation may amount to an expropriation it still cannot be challenged. In *Lorraine (Ville) v. 2646-8926 Québec inc.*, 2018 SCC 35, the Supreme Court of Canada recently affirmed that:

> Where a municipal government limits the enjoyment of the attributes of the right of ownership of property to such a degree that the person entitled to enjoy those attributes is *de facto* expropriated from them, it therefore acts in a manner inconsistent with the purposes being pursed by the legislature in delegating to it the power "to specify, for each zone, the structures and uses that are authorized and those that are prohibited"

[55] But before this Court Coyne did not take the position that the bylaws at issue amounted to a *de facto* expropriation, and so it is unnecessary to address this point further.

Is mining a "use of land" that may be prohibited?

[56] Then Coyne argues that the zoning power in the Yukon *Municipal Act* does not include the power to prohibit or regulate the mining of lands. That is a submission of more substance. It finds its genesis in an old Ontario case: *Pickering (Township) v. Godfrey* (1958), 14 D.L.R. (2d) 520 (Ont. C.A.).

[57] The question in *Pickering* was whether the zoning bylaw there could prohibit the digging or transporting of gravel or other substances from certain lands. The relevant Ontario legislation was reproduced by Justice Morden in his reasons for the majority (at 523) and the zoning power under that legislation was stated in these terms :

> 390 (1) By-laws may be passed by the councils of local municipalities:
>
> 1. For prohibiting the use of land, for or except for such purposes as may be set out in the by-law, within the municipality or within any defined area or areas or abutting on any defined highway or part of a highway.

[58] In his judgment, Morden J.A. said that the issue before the court was whether the making of a quarry or pit fell within the meaning of the words "use of land" appearing in s. 390(1) (at 524). Justice Morden continued (at 524–525):

> Counsel did not refer to any decisions interpreting the words "use of land" as they appear in s. 390 and I could find none. The dictionary definitions of "use" are numerous and diverse. An examination of them and some authorities, to

> which I will refer, has led me to the opinion that the word when used in conjunction with such commodities as food and water connotes the idea of consumption, but when applied to more durable forms of property means the employment of the property for enjoyment, revenue or profit without in any way otherwise diminishing or impairing the property itself. For example, in the civil law, usufruct is defined as "the power of disposal of the use and fruits, saving the substance of the thing": Stair's Institutes, (1681), xvi, 327. The same distinction was made by Falconbridge, J., in *Re Davis et al. & Toronto* (1891), 21 O.R. 243, in interpreting another section of the *Municipal Act*. At p. 247, he is reported as saying: "'Using' applied to land cannot mean wasting, consuming or exhausting by employment, as, *e.g.,* to use flour, beer, or water, for food or drink. It means holding or occupying, and so must be read with the rest of the section."
>
> The gravel and other substances which this defendant is removing from the lands is part of the land itself. If he granted this right to another, it would be a *profit á prendre* and the grant would be a grant of part of the land itself: Armour, Real Property, 2nd ed., p. 47. It could not be successfully argued that a municipality could by by-law passed under s. 390 lawfully prohibit an owner from selling his land or any part of it. This is illustrated by *Brake* v. *Inland Revenue Com'rs*, [1915] 1 K.B. 731. Under the *Finance Act*, 1910, land used "*bonâ fide* for any business, trade or industry other than agriculture" was exempt from undeveloped land duty. Brake carried on the business of developing and selling land. It was argued on his behalf that this business brought the land within the exemption. Rowlatt, J., rejected this argument saying, at p. 733: "It seems to me to be too clear for argument that the use of land for any business, trade, or industry means the employment of this land as land. That means, of course, its physical employment, not because one reads in the word 'physically' before 'used' in the statute, but because the use of land means the use of land as land, and that brings in the idea of physical use. The use of it meant by the statute is not the use of it as a saleable article held in a condition in which, regarded as land, it is unused for business, trade, or industry, whether it is so held as a marketable commodity, or as a sample, or as serving any ulterior commercial purpose."
>
> In my opinion the making of pits and quarries is not a "use of land" within the meaning of s. 390 and it therefore follows that a by-law passed under it cannot prevent a land owner from digging and removing gravel or other substances from his lands.

[59] The Court in *Pickering* therefore concluded that the "use of land" does not include the consumption of it (even consumption in a noisy, dusty and intrusive way I add). It is a conclusion, I say respectfully, only lawyers could love. I venture to suggest that no layperson would have much difficulty concluding that a gravel extraction operation is an industrial use of land. In any event, the Court's conclusion in *Pickering* was a construction of the narrow power in s. 390(1); a power to be

contrasted with the broader power here in s. 288 of the Yukon *Municipal Act* to "prohibit, regulate and control the use and development of land".

[60] The construction in *Pickering* was driven by what I will characterize as the old approach to the interpretation of municipal powers. Justice Morden began his analysis so (at 524):

> It is trite law in Ontario that a municipal corporation is the creature of statute and its only legislative powers are those delegated to it by the legislature. It is also well established that the common law right of every subject to employ himself and his property in a lawful manner can not be taken away, restricted or affected except by statute, or by-law passed pursuant to statutory authority and expressed in clear language: *R. v. Stronach*, [1928] 3 D.L.R. 216 at p. 219, 49 Can. C.C. 336 at p. 39, 61 O.L.R. 636 at p. 640.

[61] The City on the contrary stresses the modern approach to construing municipal powers set out in cases like *United Taxi Drivers' Fellowship of Southern Alberta*. There Justice Bastarache writes of "the proper approach to the interpretation of municipal powers" (at para. 6):

> The evolution of the modern municipality has produced a shift in the proper approach to the interpretation of statutes empowering municipalities. This notable shift in the nature of municipalities was acknowledged by McLachlin J. (as she then was) in *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231, at pp. 244-45. The "benevolent" and "strict" construction dichotomy has been set aside, and a broad and purposive approach to the interpretation of municipal powers has been embraced: *Nanaimo*, *supra*, at para. 18. This interpretive approach has evolved concomitantly with the modern method of drafting municipal legislation. Several provinces have moved away from the practice of granting municipalities specific powers in particular subject areas, choosing instead to confer them broad authority over generally defined matters: *The Municipal Act*, S.M. 1996, c. 58, C.C.S.M. c. M225; *Municipal Government Act*, S.N.S. 1998, c. 18; *Municipal Act*, R.S.Y. 2002, c. 154; *Municipal Act, 2001*, S.O. 2001, c. 25; *The Cities Act*, S.S. 2002, c. C-11.1. This shift in legislative drafting reflects the true nature of modern municipalities which require greater flexibility in fulfilling their statutory purposes: *Shell Canada*, at pp. 238 and 245.

[62] In my view, construing s. 289 and its words "use and development of land" in a broad and purposive manner leads to only one conclusion: it means what it says, and it includes the power to regulate or prohibit the mining of lands within the City of Whitehorse (subject to any superior Territorial legislation).

[63] I would decline to follow *Pickering* for two reasons. It concerned a narrower grant of zoning power and that power was construed in a manner not countenanced by the modern approach to interpreting the scope of municipal powers.

[64] I must still address some further aspects to Coyne's submission on this point.

[65] First it is argued that *Pickering* has been followed more recently by courts in British Columbia and elsewhere.

[66] The cases include among others:

> *Vernon (City) v. Okanagan Excavating (1993) Ltd.* (1993), 84 B.C.L.R. (2d) 130 (S.C.);
>
> *Falkoski v. Osoyoos (Town)*, [1998] B.C.J. No. 719 (S.C.); and
>
> *Dexter Construction Co. Ltd. v. St. John (City)* (1981), 126 D.L.R. (3d) 39 (N.B.C.A.).

[67] Both *Vernon* and *Dexter Construction Co. Ltd.* simply adopted *Pickering* without reference to the modern approach to construing municipal powers and are distinguishable on that basis. Furthermore, in the case of *Vernon*, the authorizing legislation allowed the municipality to regulate the "use of land including the surface of water, buildings and structures." It is a narrower wording of the zoning power like that found in *Pickering*; it is not as broad as the wording in the Yukon legislation.

[68] Importantly, the British Columbia *Municipal Act* contained another section (s. 930.1) that expressly gave the municipality power to pass a soil removal bylaw with the approval of the Minister of Energy, Mines and Petroleum Resources. The Court in *Vernon* concluded (at 134):

> In my view, s. 930.1 of the *Municipal Act* of British Columbia supports the conclusion that a municipality is not authorized to regulate the removal of sand, gravel and rock from land under its power to regulate the "use of land" within a municipality. Rather to regulate such conduct, a municipality must specifically pass by-laws pertaining to the removal of these substances – these by-laws first being approved by the minister with the concurrence of the Minister of Energy, Mines and Petroleum Resources.

[69] Obviously, the zoning power would not be construed as permitting such regulation or prohibition where another section of the legislation permitted it to do so subject to the approval of a Minister of the Crown.

[70] That brings us to an interesting nuance here. Section 290 of the Yukon *Municipal Act* expands upon the general zoning power granted by s. 289. In part it provides in s. 290(1)(l):

> 290(1) Without restricting the generality of section 289, a zoning bylaw may establish districts, areas, or zones in the municipality and regulate any one or more of the following matters in any or all of the districts, areas, or zones
>
> …
>
> (l) the removal from the ground of soil, gravel, sand, silt, aggregate, or other surface materials;

[71] Section 290 begins with the phrase "Without restricting the generality of section 289". Courts are frequently endeavouring to discern from the words used a legislature's intent. Here it is obvious. The power to regulate the removal of soil, gravel and so on (clarified by s. 290(1)(l)) is part of the zoning power under s. 289 because s. 290 does not restrict the former's generality. If that is so, the regulation or prohibition of other types of mining, including subsurface mining even if not expressly set out in s. 289 or 290, must be within the contemplation of the legislature as being within the general zoning power. The reasoning in *Vernon* simply has no application to the legislation in Yukon.

[72] In the circumstances of the Yukon *Municipal Act*, the identification of specific powers in s. 290 does not serve to limit the general zoning power in s. 289. It rather serves to indicate its considerable breadth.

[73] *Falkoski* is a further victim of the legislation's particular wording in British Columbia. Again, we are concerned with the zoning power to regulate the use of "land". Justice Macdonald made this observation (at para. 33):

> The definition of "land" in the *Municipal Act* has long excluded mines and minerals. That definition applies to all enactments relating to municipal matters. A municipality has no jurisdiction to pass a zoning bylaw that directly or indirectly prohibits mining or mining activity (see *Union Gas v. Township of Dawn* (1977), 15 O.R. (2d) 722; and *Vernon v. Okanagan Excavating* (1993),

> 84 B.C.L.R. (2d) 130). The zoning authority in the *Municipal Act* is "general" legislation and must be read as subject to "special" legislation such as the several mining statutes.

[74] A power to regulate the use of "land" hardly includes the regulation of mining when "mines and minerals" are excluded from the definition of "land". Indeed, the current BC legislation still exempts mines from the definition of land: see *Cowichan Valley (Regional District) v. Cobble Hill Holdings*, 2016 BCCA 432. However, the statute before this Court has no such exclusion. In my view, the judge was therefore correct in concluding as follows:

> [87] I conclude that exploration and mining are uses and development of land under s. 289 of the Yukon *Municipal Act* and therefore may be prohibited. By the same token, s. 290 does not restrict the generality of s. 289 and explicitly in para. (b) refers to "the location of any or all classes of business, industry, residence, or other undertaking" and in para. (l) "the removal from the ground of soil, gravel, sand, silt, aggregate, or other surface materials". It is also of some interest that the Energy, Mines and Resources Department of Yukon Government has prepared a document entitled "Quartz Mining Land Use Application Process Within Municipal Boundaries" which requires proponents to "discuss municipal zoning and official community plan impacts" as well as to "acquire advice or direction of municipal development permitting requirements".

[75] I have concluded that the judge was correct to decline to grant Declaration 4. OCP 2010 and Zoning Bylaw 2012 do not suffer from the legal infirmities alleged. They stand in the way of Coyne's enjoyment of any surface access rights. Those alleged rights are academic in that light absent a change in the bylaws that Coyne has never pursued. This fact and the conclusion of the judge that Coyne faced other legal obstacles (in the form of the *YESAA* and the *2003 QMA*) caused the judge to decline to grant Declarations 2 and 3:

> [106] I decline to grant Declarations 2 and 3, on the ground that, although they may describe the applicable law, they involve a number of applications under the 2010 OCP, the 2012 Zoning Bylaw, *YESAA* and the 2003 *Act* that were not before the Court. See *Kwakiutl First Nation v. British Columbia (District Manager, North Island Central Coast Forest District),* 2015 BCCA 345, at para. 62.

[76] In its factum, Coyne impugns this exercise of discretion:

> 69. *Kwakiutl* concerned a declaration issued on an interim application by a chambers judge at his own discretion without request by the parties,

> regarding the Crown's duty to consult with the Kwakiutl First Nation. *Kwakiutl* does not stand for the principle that declarations may not be granted where the dispute between the parties sought to be resolved through a declaration may later require the party seeking the declaration to fulfill further legal requirements. Rather *Kwakiutl* simply reiterates that a declaration will not be granted where it does not address a cognizable threat to a legal interest, and found that the declaration at issue was inappropriate as it was intended to describe the duty to consult in relation to decisions that were not before the Court. Where there is a cognizable threat, a Court may exercise its discretion to address it, even for "*matters involving a prejudice to eventual rights*."
>
> [Footnotes omitted.]

[77] Quite apart from the facts in *Kwakiutl*, it is clear that the granting of declaratory relief is discretionary. The judge was concerned that Coyne faced a number of applications before Declarations 2 and 3 might prove timely. Here I have concluded that Coyne at least faced the uncertainty of obtaining amendments to the municipal bylaws. That is enough in my mind to support the judge's exercise of discretion not to grant the relief sought in Declarations 2 and 3. It follows that the argument concerning whether the declarations should apply to Corvus is academic and moot.

[78] Yet, I would go further. Declarations 2 and 3 call for the construction of mining legislation and regulations going back many decades in Yukon. They require the court to opine on the meaning and scope of important legislation and regulations in Yukon. I asked counsel if the Government of Yukon was served with notice of the application for declaratory relief. It was not. In my view, the Yukon government is a very interested party in proceedings that fundamentally involve Yukon legislation and regulations. Indeed, Rule 47 of the *Yukon Court Rules* requires that an application in a proceeding must be served "on each other person, other than a party, who may be affected by the order sought". Clearly Yukon might be affected by Declarations 2 and 3. In *Gook Country Estates Ltd. v. Quesnel (City of)*, 2008 BCCA 407, the Court said:

> [10] Nothing in the court's statements in *Hornby Island Trust v. Stormwell* should cast any doubt on the general proposition that declaratory relief *per se* is discretionary. (see Sarna, *The Law of Declaratory Judgments* (3rd ed.) Toronto: Thomson Carswell, 2007, particularly at chapter 3; and Zamir, *The Declaratory Judgment* (2nd ed.) London: Sweet & Maxwell, 1993, particularly at chapter 4). When an action is brought by a plaintiff seeking a declaration,

> the court may deny relief on several discretionary grounds, including standing, delay, mootness, the availability of more appropriate procedures, the absence of affected parties, the theoretical or hypothetical nature of the issue, the inadequacy of the arguments presented, or the fact that the declaration sought is of merely academic importance and has no utility. I do not suggest that this list is exhaustive.
>
> [Emphasis added.]

[79] The absence here and below of an affected party is a compelling reason to support the exercise of the judge's discretion not to grant the declarations in the circumstances. It is also a compelling reason not to opine on the scope and applicability of the legislative schemes touched by Declarations 2 and 3, and since I would uphold the exercise of the judge's discretion on other grounds I do not embark upon that consideration for this reason.

[80] I would dismiss the appeal.

[81] The respondents are entitled to their costs of the appeal.

_____
The Honourable Chief Justice Bauman

I agree:

_____
The Honourable Madam Justice Cooper

I agree:

_____
The Honourable Mr. Justice Fitch