SUPREME COURT OF YUKON

Citation: *Coyne v. Whitehorse (City)*, 2017 YKSC 57

Date: 20171018
S.C. No. 13-A0073
Registry: Whitehorse

BETWEEN

H. COYNE & SONS LIMITED

PLAINTIFF

AND

CITY OF WHITEHORSE, CORVUS CORAX HOLDINGS LTD. AND RAVEN'S RIDGE DEVELOPMENTS (2011) LTD.

DEFENDANTS

Before Mr. Justice R.S. Veale

Appearances:

Blair M. Shaw	Counsel for the Plaintiff
Daniel R. Bennett, Q.C.	Counsel for the City of Whitehorse
Murray J. Leitch	Counsel for Corvus Corax Holdings Ltd. and Raven's Ridge Developments (2011) Ltd.

REASONS FOR JUDGMENT

INTRODUCTION

[1] H. Coyne & Sons Limited ("Coyne") applies for a declaration that the City of Whitehorse's 2010 Official Community Plan ("2010 OPC") and subsequent zoning by-laws ("2012 Zoning Bylaw"), permitting the rural residential development of Raven's Ridge are invalid. Coyne owns the title to a sub-surface mineral interest (called "Copper Plus" in this decision), the Crown having reserved all other minerals to itself. Coyne's title to Copper Plus arises from federal Crown Grants issued in 1905 and 1906 for Lots 49 and 50, respectively.

[2] The original Crown Grants included surface and sub-surface rights but the surface rights were severed in 1992. Part of the surface area, now named Lot 1280, was subsequently transferred to Raven's Ridge Developments (2011) Ltd. ("Raven's Ridge") in 2011. The Crown Grants, originally outside the City of Whitehorse (the "City") boundaries, came within the City boundaries on June 1, 1971.

[3] The City submits that it has the right to plan and zone Lot 1280 and also claims that this action is beyond the limitation period for bringing a claim.

[4] Coyne applies for a second set of declarations against Raven's Ridge claiming that Coyne has a right of access to the surface of Lot 1280 in priority to the surface title of Raven's Ridge to Lot 1280.

[5] Raven's Ridge has completed a rural residential neighbourhood subdivision and lot owners have constructed residences. Lot 1280 and the sub-surface Lots 49 and 50 are beside the residential development and have roads and subdivided lots but they have not been sold to third parties. Coyne has conducted some preliminary exploration work but Raven's Ridge terminated Coyne's access with the commencement of this court action.

[6] I dismiss the claim for a declaration against Corvus Corax Holding Ltd., as it no longer has an interest in Lots 49 and 50.

[7] This application is brought by way of summary trial under Rule 19 based upon affidavits, an agreed statement of facts, and a joint book of documents, subject to agreed terms and conditions that are not necessary to set out.

BACKGROUND

The Crown Grant of Copper Plus

[8] The *Yukon Act*, S.C. 1898, c. 6 carved the Yukon Territory out of the Northwest Territories during the Klondike Gold Rush. Jurisdiction over lands and resources remained with the federal Crown, and the *Dominion Lands Act*, S.C. 1886, c. 54, governed the transfer of land. Pursuant to s. 47, terms and conditions for grants of mining and mining lands were not addressed specifically in the *Dominion Lands Act* but were governed by the *Quartz Mining Regulations,* the relevant version of which was dated March 21, 1898 ("the 1898 *QMR*").

[9] The 1898 *QMR* created mining claims which were deemed to be a chattel interest of one-year duration, subject to annual renewal by payment of a fee or mining work of a certain value. The 1898 *QMR* also contemplated Crown Grants which gave the holder title to the sub-surface mineral interest as well as the surface right. The Crown Grant regime was attractive to a miner intending to mine in the long term as it gave permanent title to the claim without the annual renewal requirement.

[10] The 1898 *QMR* permitted a Crown Grant to be transferred in the same way as real estate. It is not necessary to set out the complete line of title for Lots 49 and 50. I will begin with the history of the Crown Grants and move to the severance of the surface and sub-surface of the Copper Plus title.

[11] The original Crown Grants were fee simple interests in Lots 49 and 50, including the surface and sub-surface copper minerals. The Crown Grants also reserved the Crown's right of access to other minerals as follows:

> … and excepting and reserving [to the Crown] also all mines and minerals excepting copper or other minerals that are

> combined or mixed with copper or copper ore which may be found to exist within, upon or under such lands together with full power to work the same, and for this purpose to enter upon and use and occupy the said lands or so much thereof and to such an extent as may be necessary for the effectual working of the said minerals or the mines, pits, seams and veins containing the same, … (my emphasis)

[12] Canada granted the surface and sub-surface Copper Plus title for Lots 49 and 50 to two third parties on July 31, 1905, and March 19, 1906, respectively. The payment required was $500 for each claim.

[13] Hudson Bay Mining and Smelting Co., Limited ("Hudson Bay") ultimately acquired title to both lots by way of amalgamation with Whitehorse Copper Mines Ltd. on December 3, 1979. Hudson Bay severed the Crown Grants for Lots 49 and 50 by a transfer of the surface right to the land dated January 31, 1992, to the Yukon Electrical Company Limited ("Yukon Electrical"). Hudson Bay retained the Copper Plus mineral right until it transferred on December 8, 1998 to Coyne. Raven's Ridge purchased an option for the surface rights to Lot 1280 in June 2004 and title was transferred to Raven's Ridge on April 22, 2013.

[14] Coyne states that he has conducted over $2 million worth of exploration work on a number of claims in this area and $360,000 on these specific claims in 2012 and 2013.

The Evolution of Yukon *Quartz Mining Legislation*

[15] The most comprehensive text on Canadian mining law is Barry J. Barton's *Canadian Law of Mining* (Calgary: Canadian Institute of Resources Law, 1993). Chapter 5, entitled "Evolution of Mining Legislation", is instructive in this case. The following is a short summary of the key points with updates on more recent legislation:

1. The Crown Grant of a mineral claim was an important feature of early legislation and remains significant as the origin of many private holdings of mineral rights.
2. The 1898 *QMR* were made under the *Dominion Lands Act* and applied to the Yukon, Northwest Territories and Manitoba. The 1898 *QMR* were essentially a copy of the British Columbia *Mineral Act*, S.B.C. 1896, c. 34, revised in *Mineral Act,* R.S.B.C. 1896, c. 135.
3. The 1898 *QMR* were re-enacted as the *Yukon Quartz Mining Act*, S.C. 1924, c. 74 ("the 1924 *Act").* Section 94 of the 1924 *Act* removed the right to obtain a Crown Grant of a mineral claim, substituting the right to obtain a renewable lease for 21 years (s. 94).
4. Section 121 of the 1924 *Act* stated that nothing in the 1924 *Act* should be construed so as to prejudicially affect any mining rights and interests acquired prior to July 19, 1924 "save where such intention is expressly stated."
5. The *Yukon Quartz Mining Act*, R.S.C. 1985, c. Y-4, contained similar wording to s. 121 in s. 129. As pointed out by Professor Barton (p. 147), the 1924 *Act*, as of 1993, held the honour of being the least-amended mining legislation in Canada.
6. That dubious honour has been forfeited by the passage 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 (the" 2003 *Act*").

> Section 154 of the 2003 *Act* continues the existing rights and duties accrued and accruing under the 1924 *Act.*

[16] Counsel for Coyne claims that Crown Grants are not subject to the *Quartz Mining Acts*. At this point, I should say that the 1924 *Act*, the 2003 *Act* and *YESAA* apply to Crown Grants by virtue of the transition provisions cited above. It is abundantly clear in the 2003 *Act* that the section defining mineral claims includes Crown Grants. Nevertheless, the common law certainly assists in determining the right of access and the requirement to ensure surface support.

[17] I also note that both the 1924 *Act* (s. 14) and the 2003 *Act* (ss. 16 and 17) have similar wording to s. 10 of the 1898 *QMR,* requiring security and compensation where a person enters land owned or lawfully occupied by another for mining purposes. Sections 16 and 17 of the 2003 *Act* read as follows:

> **Security**
>
> **16**(1) No person shall enter on for mining purposes or shall mine on lands owned or lawfully occupied by another person until adequate security has been given, to the satisfaction of a mining recorder, for any loss or damage that may be thereby caused.
>
> (2) any dispute respecting a decision of the mining recorder under subsection (1) as to the security to be given shall be heard and determined by the Yukon Surface Rights Board in accordance with the *Yukon Surface Rights Board Act* (Canada) on application by the person who is to give the security or the owner or lawful occupant of the lands.
>
> **Compensation**
>
> **17** Persons locating, prospecting, entering on for mining purposes or mining on lands owned or lawfully occupied by another person shall make full compensation to the owner or occupant of the lands for any loss or damage so caused, which compensation, in case of dispute, shall be determined

> by the Yukon Surface Rights Board in accordance with the *Yukon Surface Rights Board Act* (Canada).

[18] Typically, before the owner of a mining claim can actually mine, there must be a recommendation from the Yukon Environmental and Socio-economic Assessment Board ("YESAB") for the construction, operation, modification, decommission or abandonment of the mine which must also be approved by the government. *YESAA* was passed in May 2003 as part of the Umbrella Final Agreement signed on May 29, 1993, by Yukon First Nations, Canada and Yukon.

[19] The miner must subsequently obtain a licence under the 2003 *Act*, followed by a water licence from the Yukon Water Board.

[20] However, it is my understanding that no approvals are required for Class 1 activities, which are the only exploration activities that have been undertaken by Coyne to date.

[21] Coyne has not proceeded to Class 2, 3 or 4 activities, as it is still in the exploration stage. Raven's Ridge permitted access for a drilling and exploration program in 2012 and 2013. The two claims are part of the extensive Whitehorse Copperbelt and Coyne believes they present a viable mining prospect of significant value. It is common knowledge that Whitehorse Copper operated a mine within the City of Whitehorse boundaries for 84 years, closing the mine on December 31, 1982.

[22] I note that the City requires applications from Coyne to amend its 2010 OCP and the 2012 Zoning Bylaw to permit mining. But that is dependent on whether the OCP and Zoning Bylaw are valid with respect to Coyne's Copper Plus mineral interest.

[23] Coyne commenced this action when the City approved the Raven's Ridge development and the construction of a sub-division and Raven's Ridge denied access to Coyne for Class 1 exploration activities.

ANALYSIS

[24] I will follow the order of the five declarations applied for by Coyne, filed as Exhibit 2, which first address the dispute between the private parties, Coyne and Raven's Ridge, followed by a consideration of the City's rights. The order in which the five declarations are considered does not indicate any priority but is simply a convenient order as presented by counsel for Coyne.

Declaration #1:

That Coyne is the owner of the right, title and interest in and to:

> **(i) the copper or other minerals that are combined or mixed with copper or copper ore ("Copper Plus"):**
>
> > **A. which may be found to exist within, upon or under those lands formerly and now further subdivided parcels on Lot 1280 bearing certificates of title 2013Y0820 to 2013Y0838 for Lots 20 to 38, Raven's Ridge Subdivision, Whitehorse, Yukon, Plan 2013-0080, and certificate of title YR0319 for Road, Raven's Ridge Subdivision, Whitehorse, Yukon, Plan 2013-0080 (the "Further Subdivided Parcels'), and**
> >
> > **B. that are registered in the Yukon Land Registration District Land Titles Office as the Carlisle mineral claim Lot 49, Portion 1, Group 5, Plan 9540 and the Tamarac mineral claim Lot 50, Portion 1, Group 804, Plan 9540;**
>
> **("Coyne's Mineral Rights")**

[25] As counsel for Raven's Ridge concedes that Coyne owns the Copper Plus sub-surface interest in Lots 49 and 50, I grant declaration #1 and declare that Coyne is the

owner of the right, title and interest in and to Copper Plus which were known as the Carlisle Copper Mineral claim Lot 49 and the Tamarac Copper Mineral claim Lot 50.

Declaration #2:

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.

[26] There are two distinct issues to address. The first is whether Coyne has a right of access to enter and occupy the surface of Raven's Ridge land to explore and mine. I note that Coyne originally applied for a declaration that Raven's Ridge's rights were subject to Coyne's, or, put another way, that Coyne's mining right was in priority to Raven's Ridge's rights to Lot 1280. Declaration #2 does not contain the words "priority" or "subject to".

[27] The second issue, assuming that there is an ancillary right of access, is what conditions must be met in exercising that right, which includes the common law right of support.

Coyne's Right of Access

[28] Counsel for Raven's Ridge submits that the severance of the surface and sub-surface rights effectively terminated Coyne's right of access because there is no statutory or implied right of access and the transfer agreement between Hudson Bay and Raven's Ridge did not include an express right of access, although it did contain an acknowledgment that there was a sub-surface mineral title retained by a third party.

[29] Counsel for Raven's Ridge submits that *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619 ("*M.J.B.*"), applies to the interpretation of the Hudson Bay transfer agreement and supports the argument that there is no implied right of access.

[30] Counsel for Coyne submits that there is a common law right of access for the holder of a mineral right that does not require an express right of access to be reflected in a transfer agreement.

[31] I have concluded that there is a common law right of access to the surface for the holder of the sub-surface mineral and that such a right can also be inferred from the 1898 *QMR* provisions under which the Crown Grant was created. In my view, *M.J.B.* is not an appropriate case to determine the dispute between Coyne and Raven's Ridge. *M.J.B.* stands for the principle, at para. 27, that terms may be implied in a contract:

1. based on custom or usage;
2. as the legal incidents of a particular class or kind of contract; or
3. based on the presumed intention of the parties where the implied term must be necessary "to give business efficacy to a contract or as otherwise meeting the officious bystander test as a term which the parties would say, if questioned, that they had obviously assumed."

[32] The precise issue in *M.J.B.* was whether the inclusion of a clause in tender documents that the lowest or any tender would not necessarily be accepted would allow the party issuing the tender to disregard the lowest bid in favour of any other tender, including a non-compliant one.

[33] In *M.J.B.,* all parties had an opportunity to testify at trial on the issue of presumed intention in the third situation. In the case at bar, Hudson Bay is not a party and Coyne and Raven's Ridge have not sworn affidavits on that factor.

[34] In the event that *M.J.B.* does apply, I would rely on the custom or usage, or the legal incidents of mining agreements to imply the right of access for Coyne.

[35] The common law right of access has considerable case law support.

[36] In *Borys v. Canadian Pacific Railway Co*., [1953] UKPC 2 ("*Borys*"), the Judicial Committee of the Privy Council addressed a dispute between two private parties with interests in land; the surface owner and the owner of petroleum within, upon or under the lands. There was no express provision about the right to work the land to extract petroleum. The Court stated the following:

> 35 In their Lordships' opinion the absence of a clause giving a right to work does not abrogate or limit the powers of the respondents. Inherently the reservation of a substance, which is of no advantage unless a right to work it is added, makes the reservation useless unless that right follows the grant. The true view is that such a reservation necessarily implies the existence of power to recover it and of the right of working. … (my emphasis)

[37] Barton's *Canadian Law of Mining* directly addresses surface use questions with the absence of express powers of working at p. 55:

> However, surface use questions must often be decided in the absence of express powers of working. The instrument of severance may make insufficient provision for working, it may contemplate obsolete methods of working, or it may not mention working powers at all. The general principle of the rights of the mineral owner was stated by Lord Porter in *Borys v. C.P.R.* that "a reservation [of a substance] necessarily implies the existence of power to recover it and of the right of working". The principle is an old one: "When anything is granted, all the means to attain it, and all the fruits and effects of it, are granted also; and shall pass

> *inclusive*, together with the thing, by the grant of the thing itself … By the grant of mines, is granted the power to dig them …" [emphasis already added)

[38] There is no doubt that the instrument of severance, being the agreement dated October 1, 1998, between Hudson Bay and Coyne, did not expressly contain a right of access to the surface. Rather, at clause 3, Hudson Bay sold "all of its right, title and interest in and to the Mineral Disposition together with all of its mining rights. …". Nevertheless, I conclude that Coyne has the right to enter, use and occupy the surface of Lot 1280, subject to the appropriate approvals being obtained. The right of access is well established in the common law and does not depend on the terms of the instrument of severance.

[39] I am also of the view that the terms of the 1898 *QMR* provide an alternative source of the right to enter and use the surface.

[40] The following sections of the 1898 *QMR* are relevant, and in my view establish that the owner of a Crown Grant of a mineral claim has all the rights that a free miner had during the continuance of his claim:

> 1. "mineral claim" shall mean the personal right of property or interest in any mine.
>
> …
>
> "Free miner" shall mean a person or joint stock company, named in and lawfully possessed of a valid existing free miner's certificate, and no other.
>
> …
>
> "Real estate" shall mean any mineral land in fee simple under these regulations, or any Act relating to gold mines, or to minerals other than coal.
>
> …

10. Every free miner shall, during the continuance of his certificate, but no longer, have the right personally, but not through another, to enter, locate, prospect, and mine upon any vacant Dominion lands for all minerals other than coal, and upon all lands the right whereon to enter, prospect and mine all minerals other than coal, and upon all lands the right whereon to so enter, prospect and mine all minerals other than coal has been or hereafter shall be reserved to the Crown …and excepting also any land occupied by any building, and any land falling within the curtilage of any dwelling house, and any orchard, and any land for the time being actually under cultivation, … Provided that in the event of such entry being made upon lands already lawfully occupied, such free miner shall give adequate security to the satisfaction of the Mining Recorder for any loss or damage which may be caused by such entry if requested by the owner or occupant of such land, and should he refuse to give such security when so requested, his right to such claim or mine shall cease and determine. Provided that, after such entry, he shall make full compensation to the occupant or owner of such lands for any loss or damage which may be caused by reason of such entry if demanded to do so by the said occupant or owner, such compensation in case of dispute to be determined by the court of competent jurisdiction with or without a jury.

…

33. The holder of a mineral claim on vacant Dominion lands shall be entitled to all surface rights, including the use of all timber thereon for mining or building purposes in connection with the working of said claim for the purpose of developing the minerals contained therein.

…

41. The interest of a free miner in his mineral claim shall, save as to claims held as real estate, be deemed to be a chattel interest, equivalent to a lease, for one year, and thence from year to year, subject to the performance and observance of all the terms and conditions of these Regulations

42. Any lawful holder of a mineral claim shall be entitled to a Crown grant thereof on payment to the Dominion Government of the sum of five hundred dollars in lieu of

> expenditure on the claim, in addition to the amount payable as provided by Section 53 of these Regulations. The intending purchaser shall comply with all the provisions of these Regulations, except such as have respect solely to the work required to be done on claims.
>
> …
>
> 50. A Crown grant of a mineral claim located on any vacant Dominion Lands shall be deemed to transfer and pass the surface right and right to all minerals within the meaning of these Regulations (excepting coal) found in veins, lodes, or rock in place, and whether such minerals are found separately or in combination with each other, in, upon, or under the land in the said Crown grant mentioned.
>
> 51. Crown Grants of mineral claims located on lands the surface rights of which have been disposed of but the right whereon to enter, prospect, and mine all minerals (other than coal) has been reserved to the Crown, shall pass to the grantee all minerals within the meaning of these regulations (other than coal) found in veins or lodes, or rock in place, and whether such minerals are found separately or in combination with each other, which may be in, upon, or under the land in the said Crown grant mentioned, and including all the rights given to mineral claim holders of mineral claims so located.
>
> …
>
> 53. The price to be paid for a mining location on vacant lands of the Crown shall be at the rate of five dollars per acre cash and on other lands of which the surface rights are not available for sale, two dollars per acre cash. (my emphasis)

[41] I begin my interpretation of the *1898 QMR* by stating that the owner of a Crown Grant under ss. 42, 50 and 51 had all the rights given to a free miner and, in addition, assumed surface rights when the Crown Grant related to vacant Dominion lands, all on a titled or permanent basis. The owner of a Crown Grant therefore had a greater interest than the mere chattel interest of the free miner, whose interest in a claim

expired each year unless renewed. As is apparent from s. 42, the holder of a Crown Grant was also bound by the regulations applicable to a free miner.

[42] The rights granted under the *1898 QMR* have been preserved under successive *Quartz Mining Acts* to this day.

[43] According to s. 33 of the *1898 QMR,* a free miner was "entitled to all surface rights, … for the purpose of developing the minerals contained therein" on vacant Dominion lands.

[44] In terms of access to occupied (i.e. not vacant) land, the right of the holder of a Crown Grant was governed by s. 10. This provided the right of entry on lawfully occupied lands "provided that in the event of such entry being made upon lands lawfully occupied, such free miner shall give adequate security to the satisfaction of the Mining Recorder for any loss or damage which may be caused by such entry if requested by the owner or occupant of such lands …".

[45] Section 10 went on to provide that the free miner "shall make full compensation" for any loss or damage which may be "caused by reason of such entry if demanded to do so by the occupant or owner …" The point to be made is that the right of entry was presumed, subject to the right of the owner or occupant to security and, if requested, compensation for loss or damage incurred.

[46] Section 51 addressed Crown Grants of mineral claims when the surface rights had been disposed of but "the right whereon to enter, prospect, and mine all minerals (other than coal) has been reserved to the Crown". A Crown Grant in this circumstance passed to the grantee all minerals "… including all rights given to mineral claim holders of mineral claims so located".

[47] In my view, the limiting words of s. 51, which expressly state the Crown's right of access, do not need to be included in title documents generated when land including a mineral grant is transferred.

[48] Thus, I conclude that a right of access to the surface of Lots 49 and 50 owned by Raven's Ridge is implicit in the titled Crown Grant of Copper Plus owned by Coyne either under the common law, or alternatively through the provisions of the 1898 *QMR.* That right of entry is not absolute and is subject to *YESAA* and the 2003 *Act*, including the obligation to provide security and/or compensation. It will also require Coyne's application to amend the 2010 OCP and 2012 Zoning Bylaw.

The Ancillary Right of Access to and Support of the Surface

[49] My comments under this part are prefaced by the assumption that Raven's Ridge will request both security and compensation for damage. However, that issue is not included in this application.

[50] There are two limitations on the right of the miner to access the surface. The first is stated broadly in *Borys*, at para. 51, where Lord Porter quoted *Farquharson v. Barnard-Argue-Roth-Stearns Oil and Gas Co*., [1912] A.C. 864 (P.C.)

> The company are [sic] clearly entitled to search and work for oil in these springs of oil, and to win and carry it away from them, provided they do so in a reasonable manner, and do as little injury as is practicable. …

[51] The terms and conditions that might be required of a miner acting in a "reasonable manner" are beyond the scope of this judgment but subject to the statutory requirements of *YESAA* and the 2003 *Act.*

[52] The second limitation on the mineral owner's activities is the right of support of the surface. This is a specific right encompassed in the phrase "do as little injury as is practicable."

[53] The principle of the right of support was described in *Butterknowle Colliery Co. v. Bishop Auckland Industrial Co-operative Co.,* [1906] A.C. 305 at 313 (H.L. Eng.), as follows:

> The result seems to be that in all cases where there has been a severance in title and the upper and lower strata are in different hands, the surface owner is entitled of common right to support for his property in its natural position and in its natural condition without interference or disturbance by or in consequence of mining operations, unless such interference or disturbance is authorized by the instrument of severance either in express terms of by necessary implication. (my emphasis)

[54] Barton adds the following at p. 58:

> … As long as the miner avoids letting down the surface, the rule does not interfere with his or her working or methods. But it will prevent the miner from removing the support of the surface even if express working rights are thereby made worthless and effectively prevents the working of the minerals at a profit. (my emphasis)

[55] I conclude that the right of surface support as described in Declaration #2 adequately describes the right of support, again the details of which are beyond the scope of this application. Thus, Declaration #2 reflects the common law right of Coyne to pursue its mining interest, subject to applications to the City, and pursuant to *YESAA* and the 2003 *Act*.

Declaration #3:

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.

[56] This declaration raises two issues.

[57] The first is whether Raven's Ridge can prevent Coyne from exercising its right of access. The second issue is whether the residential subdivision and Further Subdivided Parcels in effect prevent Coyne from exercising its right of access to its Copper Plus claims.

[58] In my view, Raven's Ridge cannot prevent Coyne from exercising its right of access to the surface owned by Raven's Ridge. However, as I have indicated above, Raven's Ridge can rely upon s. 16 of the 2003 *Act* to have the Mining Recorder determine the security required before Coyne's entry on the claims. Similarly, s. 17 requires full compensation for any damage. Raven's Ridge may also require Coyne to obtain its statutory approvals from the City, *YESSA*, and the 2003 *Act*.

[59] Both ss. 16 and 17 of the 2003 *Act* provide for an application to the *Yukon Surface Rights Board Act*, S.C. 1994, c. 43, in the event of a dispute over the decision of the Mining Recorder.

[60] I conclude that Raven's Ridge cannot prevent Coyne from exercising its right of access to exercise Coyne's mineral rights. The question of whether the Phase 2 residential subdivision has the effect of preventing Coyne from exercising its right of access will be addressed below. In my view, this latter issue is inextricably tied to the validity of the 2010 OCP and 2012 Zoning Bylaw and therefore will be addressed under Declaration #4.

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.

City of Whitehorse Planning and Zoning

[61] The City has passed four different Official City Plans ("OCPs") that have applied to Lots 49 and 50 since these lots came within its geographical boundaries on June 1, 1971:

a) On March 9, 1987, the City adopted Bylaw 86-50, adopting the Official Community Plan (the "1987 OCP").

b) On August 22, 1994, the City adopted Bylaw 94-30, adopting the Official Community Plan (the "1994 OCP").

c) On October 15, 2002, the City adopted Bylaw 2002-01, adopting the Official City Plan (the "2002 OCP").

d) On October 12, 2010, the City adopted Bylaw 2010-01, adopting the Official City Plan (the "2010 OCP").

[62] None of the OCPs have contemplated mining with respect to Lots 49 and 50. The OCPs are planning documents and do not regulate land use. There is provision for some mining areas recently designated under the category of Industrial or Natural Resource Land Use Designation.

[63] Since 1973, eight zoning bylaws have applied to the area. None have permitted mining.

[64] The City and Coyne are well aware of each other's interests. Coyne has always objected to the Raven's Ridge development and the City has advised Coyne to participate in the OCP planning process, as it may affect its claims.

[65] Coyne considers its Crown Grant mining interest to be in priority to the City planning documents and the Raven's Ridge subdivision. Coyne has never applied for a change to the 2010 OCP or a zoning change under the 2012 Zoning Bylaw to permit mining.

[66] In 2002, when Raven's Ridge entered into an option agreement to purchase Lot 1280, the 2002 OCP did not contemplate residential use for Lot 1280. Coyne objected in a letter in January 2008 to Yukon Electric with a copy to Raven's Ridge.

[67] On February 12, 2009, Raven's Ridge requested that the City's OCP contemplate residential development. The 2010 OCP included residential development for Lot 1280 despite Coyne's objections.

[68] In May 2012, Coyne received notice of a public hearing to consider a zoning bylaw amendment to permit a proposed housing development by Raven's Ridge. Coyne objected in writing and at the public hearing process.

[69] On July 23, 2012, the 2012 Raven's Ridge Zoning Bylaw zoned the surface of a Lot 1280 as "Country Residential 2" which provides for a single detached housing zone providing an urban lifestyle in a rural setting on larger lots. The principal permitted uses are manufactured homes, parks and single detached housing. Mining is not permitted.

[70] On September 12, 2012, City Council approved a subdivision request form Raven's Ridge (the "2012 Subdivision Resolution").

Can the City of Whitehorse validly prohibit mining on surface Lot 1280?

[71] Part 7 of the Yukon *Municipal Act,* R.S.Y. 2002, c. 154, Part 7 sets out the scheme for planning, land use and development:

> 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.
>
> …
>
> 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. (my emphasis)

[72] As stated in *Whitehorse (City) v. Darragh,* 2009 YKCA 10, at para. 15, the OCP is a broad policy document that guides where future developments should take place.

[73] Zoning bylaws, on the other hand, are the instruments that the City uses to permit and regulate specific uses while prohibiting all other uses for that area. See *Darragh,* at para. 22, and *R. v. Cunningham,* [1994] S.J. No. 25 (Sask. C.A.), at paras. 12 and 13.

[74] The sections relating to zoning bylaws in the *Municipal Act* are:

> **Bylaw inconsistent with other legislation**
>
> 264 If there is an inconsistency between a bylaw and this or any other Act, the bylaw is of no effect to the extent of the inconsistency.
>
> …
>
> Division 2
> Zoning Bylaws
>
> 289 A zoning bylaw may prohibit, regulate, and control the use and development of land and buildings in a municipality.
>
> 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
>
> (a) the use of land, buildings, or other structures for business, industry, residences, or any other purpose after the passing of the bylaw;
>
> (b) the location of any or all classes of business, industry, residences, or other undertakings, buildings, or other structures;

> …
>
> (l) the removal from the ground of soil, gravel, sand, silt, aggregate, or other surface materials;
>
> …

[75] The Supreme Court of Canada has given direction on the proper approach to the interpretation of municipal bylaws in *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19, 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. (my emphasis)

[76] In deciding that Calgary had the power to limit the number of taxi licences even though there was no specific provision in the new *Act,* the Court added at para. 7:

> Alberta's Municipal Government Act follows the modern method of drafting municipal legislation. The legislature's intention to enhance the powers of its municipalities by drafting the bylaw passing provisions of the Act in broad and general terms is expressly stated in s. 9. Accordingly, to

> determine whether a municipality is authorized to exercise a certain power, such as limiting the issuance of taxi plate licences, the provisions of the Act must be construed in a broad and purposive manner. (my emphasis)

[77] Coyne submits three arguments in support of its position that the City cannot prohibit mining in areas with mineral claims. The first is based upon the express wording of s. 283(3) of the *Municipal Act* that "council is not empowered to impair the rights and privileges to which an owner of land is otherwise lawfully entitled". Secondly, counsel for Coyne submits that the City has no jurisdiction to prohibit mining through zoning bylaws. Counsel submits that the wording of s. 290 does not grant the City the jurisdiction to zone mineral claims. Thirdly, s. 264 provides that any inconsistency between a zoning bylaw and "any other Act" is of no force and effect, and Coyne says there is an inconsistency between the *Municipal Act* and the *Quartz Mining Act*. In effect, counsel for Coyne submits that a municipality has no jurisdiction to zone the surface of land when there is a mineral claim to the sub-surface.

[78] I will first address the jurisdiction issue because if there is no jurisdiction for the City to pass a zoning bylaw prohibiting mining, it will not be necessary to consider whether such a bylaw impairs the rights and privileges of the owner of a titled mineral claim.

[79] The City submits that it has the jurisdiction to prohibit mining pursuant to s. 289 of the *Municipal Act* and may pass a zoning bylaw that prohibits mining under s. 290(1), s. 290(1)(b) or 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

…

> (b) the location of any or all classes of business, industry, residences, or other undertakings, buildings, or other structures;
>
> …
>
> (l) the removal from the ground of soil, gravel, sand, silt, aggregate, or other surface materials;

[80] In *British Columbia v. Tener*, [1985] 1 S.C.R. 533 ("*Tener*"), British Columbia had granted Tener a mineral interest and then, in effect, took it away by refusing a permit to mine as the land had become subsumed in the boundaries of a provincial park. Wilson J. described the mineral claims as a '*profit à prendre',* which is defined in Stroud's Judicial Dictionary (4th ed.) vol. 4, at p. 2141, as "a right to make some use of the soil of another, such as the right to mine metals, and it carries with it the right of entry and the right to remove and take from the land the designated products or profit and also includes the right to use such of the surface as it necessary and convenient for exercise of the profit".

[81] I note also that Estey J. in *Tener* clearly distinguished the case of the Crown granting a mineral claim and, in effect, expropriating it to add value to a park from regulation by zoning:

> 61. This process I have already distinguished from zoning, the broad legislative assignment of land use to land in the community. It is also to be distinguished from regulation of specific activity on certain land, as for example, the prohibition of specified manufacturing processes. This type of regulation is akin to zoning except that it may extend to the entire community. … (my emphasis)

[82] Counsel for Coyne relies on two lines of authority. The first is *Pickering Twp. v. Godfrey*, [1958] O.R. 429 (C.A.) ("*Pickering"*). In *Pickering,* the court was considering an

injunction application by the municipality on the basis that the defendant was digging gravel on his land and selling it, in contravention of a bylaw. At paras. 8, 11 and 20, Morden J.A. wrote:

> [11] 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.
>
> …
>
> [20] What the municipality's intent was, must, of course, be gathered from the language of the by-law. While there is no express prohibition against using the land in question for commercial or industrial purposes, the by-law purports to do so inferentially, and I am prepared, for the sake of argument, to accept an implied prohibition as a good and sufficient exercise of the municipal power which is contained in s. 390 of the Municipal Act. So then the municipality's right to restrain the respondent from -- to adopt the language of the notice of motion -- -- "digging or transporting gravel and other substances", depends upon whether this activity involves a user of land for commercial or industrial purposes. The question is essentially one of fact, and, to put the matter bluntly, there are no facts before us, in my opinion, which would justify us in holding that the mere digging down into land and the transporting of gravel and other substances extracted therefrom -- even with a view to realizing the value of the gravel or other substance -- amounts to a user of land for commercial or industrial purposes. Authority to restrain the use of land for commercial or industrial purposes is not, in my opinion, the same as authority to restrain the sale or other disposition of the land itself or of any of its substances, components or minerals. And it is clear from the affidavit filed in support of the motion that the facts upon which the municipality relies are:-- "A number of loads of gravel and other substances (were) dug by mechanical equipment" and "Approximately 100 tons of gravel and other substances were removed from the land ... of which approximately 50% was sold to third parties." (my emphasis)

[83] In my view, the *Pickering* case is not an appropriate basis on which to interpret the Yukon *Municipal Act*. The 1958 Ontario *Municipal Act* did not have a section similar to s. 289. Furthermore, s. 290 in the Yukon legislation does not in any way restrict the generality of s. 289. To suggest that mining is not a use or development of land, in the context of the Yukon *Municipal Act,* is contrary to the modern broad and purposive approach to interpreting municipal statutes as set out in *United Taxi*, cited above. Courts no longer apply a strict construction approach like that taken in the *Pickering* case but rather interpret municipal powers broadly, based on general areas of jurisdiction. It is worth noting that the Minister introducing the *Municipal Act* stated:

> The second major change I'd like to address is the provision of municipal authority through general areas of jurisdiction.
>
> Previously, municipalities could only do things the act specifically allowed, and had to do them in a very specific way. …
>
> Municipalities will be able to respond in any reasonable manner they choose, within their area of jurisdiction, to solve problems and to provide services – without being bound by a rigid set of rules and procedures laid down by the Yukon government.
>
> Yukon, Legislative Assembly, *Hansard*, 29th Leg., 1st Sess. (24 November 1998) at 17 – 18.

[84] Another case relied on by Coyne is *Falkoski v. Osoyoos (Town)*, [1998] B.C.J. No. 719 ("*Osoyoos*"), where the Supreme Court of British Columbia awarded damages against a municipality for impairing the plaintiff's right to extract minerals, finding that the municipality had no jurisdiction to pass a zoning bylaw that directly or indirectly prohibited mining or mining activity. However, this was largely because the definition of

"land" in the relevant *Municipal Act* excluded "mines and minerals". No such exclusion exists in Yukon legislation.

[85] I am of the view that the use of the word "impair" in s. 283(3) refers to Official City Plans not bylaws. There is no impairment of mining rights in any of the relevant OCPs, but rather a recognition that there is mineral potential and specifically refers to the Whitehorse Copper Belt for potential mining. That reference cannot be an impairment.

[86] Section 277 of the *Municipal Act* refers specifically to bylaws which may infringe on the rights to individuals "to the extent that is necessary for the overall greater public interest". Section 289 specifically permits a bylaw to "prohibit, regulate and control the use and development of land".

[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".

[88] I conclude that the 2010 OCP, 2012 Zoning Bylaws and the City's approval of the subdivision of Lot 1280 are validly adopted or enacted instruments consistent with the City's jurisdiction in planning and zoning regulation.

Does the City of Whitehorse zoning impair the Crown Grant of the Copper Plus mineral claims or is it inconsistent with the interest granted in the *1898 QMR*?

[89] Having found that the City does have jurisdiction to prohibit mining under ss. 289 and 290 of the *Municipal Act*, I return to the issue of whether the 2010 OCP and 2012 Zoning Bylaws impair the rights and privileges to which an owner of land is otherwise lawfully entitled. Assuming, without finding, for this discussion that Coyne has full authority to mine and explore its claims under Lots 49 and 50, does the zoning prohibition from mining "impair" the rights and privileges to which it, as the owner of the claim, is entitled?

[90] The submission of counsel for Coyne is that the 1905 Crown Grant of the Copper Plus mineral interest makes Coyne an owner of land with the essentially unassailable right to mine the copper therein. Counsel for Coyne relies exclusively on the *Osoyoos* case, at para. 33:

> … A municipality has no jurisdiction to pass a zoning bylaw that directly or indirectly prohibits mining or mining activity … (my emphasis)

[91] Counsel for Coyne focusses on the issue of indirect prohibition of exploration or mining activities because the City zoning bylaw sets out expressly permitted uses, which do not include exploration or mining, thereby indirectly impairing the right to explore and mine. I have already indicated that the British Columbia statutory regime defining land as excluding mines or minerals diminishes the applicability of the *Osoyoos* principle stated above. However, the question that must be addressed is when an indirect prohibition becomes an impairment prohibited by s. 283(3).

[92] In the case of *Lobo Del Norte Ltd. v. Whitehorse (City of)*, 2015 YKSC 40, ("*Lobo*"), the plaintiff brought a claim for declaratory relief, taking the position that the City had expropriated or injuriously affected its right to mine within an area designated as "Greenbelt". The hearing proceeded on the basis that the 2010 OCP and the 2012 Zoning Bylaw were valid, and the issue was whether those instruments amounted to a *de facto* expropriation or injurious affectation of Lobo's quartz mineral claims registered under the 2003 *Act.*

[93] The facts in *Lobo* were that the Government of Yukon owned the land on which Lobo's quartz mineral claim were registered. The City's 2010 OCP and 2012 Zoning Bylaw designated the land as a park that was part of the City's Green Space Network Plan. Lobo had conducted Class 1 activities which did not require any permit or approval but had not applied for a zoning change to proceed to Class 2, 3 or 4 mining activities.

[94] I ruled in *Lobo* that the 2010 OCP and 2012 Zoning Bylaw were not an expropriation based on *Nova Scotia (Attorney General) v. Mariner Real Estate Ltd.*, 1999 NSCA 98 ("*Mariner"*). In *Mariner,* Cromwell J.A. set out two governing principles as follows:

> 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.

[95] The second principle does not need to be considered in this application. The first principle should be situated in the context of the view set out at para. 49 of *Mariner* that

regulation will be held to be expropriation only when virtually all of the aggregated incidents of ownership have been taken away.

[96] *Lobo* also distinguished *Tener*, which I have referred to above, on the basis that, in *Tener,* the expropriating and the granting authority were one and the same and a development permit had been applied for and denied. In my view, *Tener* is equally distinguishable from the case at bar. In *Lobo,* as here, the City is not the government that granted the land rights.

[97] I conclude that neither the zoning by the City nor the development of Raven's Ridge Phase 2 residential subdivision impairs Coyne's right to explore, mine and extract copper from Coyne's claims. There is no doubt that the zoning bylaw significantly restricts Coyne's right to mine in the sense that there are regulatory procedures to be followed before mining. However, that is not an impairment, and indeed such a limitation was contemplated in the 1898 *QMR* and the 2003 *Act.*

Declaration #5:

That the orders sought by Coyne are not barred by s. 361 of the *Municipal* Act, R.S.Y., 2002, c. 154, or s. 17 or 2(1)(j) of the *Limitation of Actions Act*, R.S.Y. 2002, c. 139, or another time limit on its legal action.

[98] Counsel for the City submits that Coyne's claim for declarations is beyond the limitation period in s. 361 of the *Municipal Act*:

> Except as otherwise provided in this Act, all actions against a municipality must be commenced within 12 months after the cause of the action first arose.

[99] I reject this submission on the ground that a void bylaw can be attacked at any time. See *United Taxi*, at para. 164 and *Wiswell v. Winnipeg (Greater),* [1965] S.C.R. 512.

[100] Counsel for Raven's Ridge submits that the limitation period for Coyne begins to run at the date of purchase of the Copper Plus mineral interest by Coyne on December 8, 1998.

[101] The relevant sections of the *Limitation of Actions Act* are:

> **Periods of limitations**
>
> 2(1) Subject to subsection (3), the following actions shall be commenced within and not after the times respectively hereinafter mentioned
>
> …
>
> (j) any other action not in this Act or any other Act specially provided for, within six years after the cause of action arose.
>
> **Recovery of land**
>
> 17 No person shall take proceedings to recover any land after 10 years from the time at which the right to do so first accrued to some person through whom the person claims, hereinafter called "predecessor" or if the right did not accrue to a predecessor then within 10 years after the time at which the right first accrued to the person taking the proceedings, hereinafter called "claimant".

[102] In my view, the cause of action for Coyne arose when Raven's Ridge prohibited Coyne's access to Lot 1280, which occurred in 2013. The statement of claim was filed on September 9, 2013. Alternatively, as Coyne submits, the passage of 2012 Zoning Bylaw is the triggering event for Coyne's cause of action.

[103] Coyne has filed its claim within the limitation periods under ss. 17 and 2(1)(j) of the *Limitation of Actions Act*.

[104] I therefore grant Declaration #5 that the declarations sought by Coyne are not statute barred.

CONCLUSION

[105] I have granted Declaration #1 that Coyne is the owner of the right, title and interest in and to Copper Plus and Declaration #5 that the Declarations applied for are not barred by s. 361 of the *Municipal Act* or ss. 17 or 2(1)(j) of the *Limitation of Actions Act*.

[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.

[107] I decline to grant Declaration 4. The 2010 OCP and the 2012 Zoning Bylaw are validly adopted or enacted instruments, consistent with the City's jurisdiction in planning and zoning regulation. While they may require Coyne to follow regulatory procedures before exercising its right to mine, this limitation was contemplated in the 1898 *QMR* and the *2003 Act* and is not an impairment.

[108] Counsel may speak to costs in case management if necessary.

_____

VEALE J.