CITATION: Ontario (Transportation) v. 1520658 Ontario Inc., 2011 ONCA 373
DATE: 20110513
DOCKET: C52170

COURT OF APPEAL FOR ONTARIO

Feldman, Juriansz and LaForme JJ.A.

BETWEEN

Minister of Transportation

Applicant (Appellant)

and

1520658 Ontario Inc.

Respondent (Respondent)

Ronald Carr and Kevin Hille, for the appellant

Richard Butler and Neal Smitheman, for the respondent

Heard: November 9, 2010

On appeal from the order of the Divisional Court (Wilson, Lederman and Aston JJ.) dated October 16, 2009, with reasons by Lederman J. reported at (2009), 90 M.V.R. (5th) 253.

Juriansz J.A.:

OVERVIEW

[1] This appeal concerns the validity of a mining claim staked on Crown land upon which the Ministry of Transportation of Ontario ("MTO") was preparing to build a highway.

[2] Under the *Mining Act*, R.S.O. 1990, c. M.14 ("Act"), "land in the actual use or occupation" by the Crown or a ministry of the government of Ontario is excluded from the definition of "Crown land" that can be staked for mining. A tribunal of the Mining and Land Commissioner (the "Commission") found that the MTO was not making "actual use" of the land when it was staked and so the respondent's mining claim was valid. The Divisional Court dismissed the MTO's appeal and the MTO was granted leave to appeal to this court. On appeal, the MTO argues that the activities connected to determining the feasibility of constructing a highway on a particular route constituted an "actual use" of the land.

[3] I would dismiss the appeal for the same reasons as did the Divisional Court. The Commission's decision is to be reviewed on a reasonableness standard and its decision was reasonable.

FACTS

[4] The MTO intended to expand Highway 69 from Muskoka Road 5 in the south to Sudbury in the north. Planning studies for the reconstruction of the highway along a new route began in 1995. An environmental assessment completed in 1999 recommended alternative corridors for the route of the new expanded highway. Difficulties emerged with the route first considered and in 2002 the MTO began to consider a second proposed route. Beginning in January 2003, the MTO cut a narrow swath through the bush along the centre line, placed survey stakes at intervals of 25 to 50 metres along the line and

drilled boreholes to assess the foundation. On June 23, 2003, the MTO made an order under s. 35(1)(a) of the Act withdrawing the lands from "prospecting, staking out, sale or lease".

[5] Meanwhile in April 2003, before the withdrawal order was made, the respondent's representatives staked claims in lands that partially overlapped with those surveyed by the MTO. The respondent registered those claims with the Office of the Provincial Mining Recorder ("PMR") in Sudbury. On December 3, 2004, the MTO released a tender for the construction of the new highway. The respondent says it first became aware of the MTO's fieldwork on the lands through this tender.

[6] The MTO applied to the Superior Court of Justice for a declaration that the respondent's mining claims were invalid because the lands were in "actual use and occupation" of the Crown at the time of staking, pursuant to ss. 1(1) and 27(a) of the Act.

[7] Low J. of the Superior Court ordered a transfer of the proceedings in the Superior Court to the Commission under s. 109 of the Act, on consent of both parties. The respondent then cross-applied for dismissal of the MTO's application and for declaratory relief, including a declaration that the mining claims were validly staked.

The Decision of the Commission

[8] The Commission found that the MTO had failed to establish that the lands were in "actual use and occupation of the Crown" and that the mining claims were valid. It held that an "actual use" was one that "exists, that is recognizable as a use, that is describable,

and that is known to be a use". The MTO was not actually using the land. The mere intention to eventually use the land was not sufficient. The MTO's assessment of the lands' suitability for the highway was a preliminary use and not enough to withdraw the lands from being staked. The Commission observed that had the MTO wanted to withdraw the lands from staking, it could have formally done so under s. 35 of the Act.

The Decision of the Divisional Court

[9] The Divisional Court dismissed the MTO's appeal.

[10] After considering the statutory regime, the nature of the question at issue and the Commission's expertise, the court held that the standard that applied to the review of the Commission's decision was reasonableness. The Divisional Court decided that the Commission was owed deference both in the interpretation of the phrase "actual use or occupation" and in its application to the circumstances of this case.

[11] The MTO submitted that the work it was doing on the land, i.e. surveying, cutting swaths, planting survey stakes and digging up to 2,000 bore holes, constituted an actual, albeit temporal, use of the land.

[12] The Divisional Court observed that "[w]here one draws the line between preliminary and substantive use is a question of fact which may not in all cases be easy to discern" and went on to find that the Commission's decision fell within a range of reasonable outcomes. The Commission was reasonable in taking a contextual view of the

phrase “actual use or occupation”, having regard to other sections of the Act and the policies associated with it.

[13] The MTO now appeals to this court.

ISSUES

1. What is the standard of review?

2. Does the Commission’s decision meet the applicable standard?

ANALYSIS

The Standard of Review

[14] The MTO submits that the standard of review that applies to the Commission’s decision is correctness and not reasonableness.

[15] The MTO argues that the interpretation of the phrase “actual use or occupation” is a pure question of law that does not involve any special technical expertise, does not require any polycentric weighing of factors, and will set a precedent for all future cases involving the temporary use of Crown land. The MTO also points out that the Act provides a general right of appeal to the Divisional Court from any decision of the Commission. The MTO submits the Divisional Court was wrong to reason that the Commission’s “concurrent jurisdiction” with the Superior Court over certain kinds of claims “invites deference to the decision of the Commission”. Rather, the MTO submits,

concurrent jurisdiction runs counter to the suggestion that the legislature intended that the administrative agency have the exclusive jurisdiction to decide the questions.

[16] I agree with the Divisional Court that the standard of review is reasonableness.

[17] The Office of the Mining and Lands Commissioner is an unusual administrative body. The Commission is constituted by the *Ministry of Natural Resources Act*, R.S.O. 1990, c. M.31 and not by the Act. The Commission exercises jurisdiction under the Act, but also under the *Conservation Authorities Act*, R.S.O. 1990, c. C.27; the *Conservation Land Act*, R.S.O. 1990, c. C.28; the *Aggregate Resources Act*, R.S.O. 1990, c. A.8; the *Oil Gas and Salt Resources Act*, R.S.O. 1990, c. P.12 and regulations under the *Assessment Act*, R.S.O. 1990, c. A.31. Therefore, the Act may not be the "home statute" of the Commission in the sense that it is constituted by and has its functions governed exclusively by that statute.

[18] That said, Part VI of the Act, entitled "Land and Mining Commissioner", bestows broad jurisdiction on the Commission to exercise a number of functions and responsibilities. Perusal of the Act makes clear that the Divisional Court was correct in observing that the Commission has "expertise with respect to prospecting, mining claims and priorities under the Act", and "has a contextual understanding of the interests and practices of competing constituencies under the Act, including a familiarity with the practices of those who stake claims." One might add that the Commission, given its

responsibilities under other statutes, has the broad expertise to consider the Act's land use policy in a wider context.

Statutory right of appeal

[19] The right to appeal the Commission's decision to the Divisional Court is set out in s. 133 of the Act:

> Where not otherwise provided, an appeal lies to the Divisional Court from any decision of the Commissioner.

[20] Clearly, the existence of a broad unrestricted right of appeal is a factor that generally points towards less deference being owed to the administrative decision maker. However, the right of appeal must be considered in the context of the statute as a whole.

[21] The Act, while not giving the decision of the Commission the protection of a privative clause in this case, does contain strong indications that questions relating to mining claims are to be determined through the comprehensive administrative scheme created by the statute.

[22] In s. 4, the Act provides that all public lands for mining purposes and for the purposes of the mineral industry shall be administered by the Minister of Northern Development, Mines and Forestry. The Minister delegates authority to officials, such as provincial mining recorders, who approve applications for mining claims and manage the Provincial Recording Office. Recorders hear and determine disputes with respect to unpatented mining claims. Section 110(5) provides that their decisions are "final and binding" unless appealed to the Commission.

[23] The Act bestows exclusive general jurisdiction on the Commission to determine every claim, question and dispute concerning any right, privilege or interest conferred by or under the Act, subject to limited exceptions. It provides:

> 105. (1) No action lies and no other proceeding shall be taken in any court as to any matter or thing concerning any right, privilege or interest conferred by or under the authority of this Act, but every claim, question and dispute in respect of the matter or thing shall be determined by the Commissioner except as otherwise provided in section 171 or elsewhere in this Act and except for matters relating to consultation with Aboriginal communities, Aboriginal or treaty rights or to the assertion of Aboriginal or treaty rights.

[24] The Commission determines whether a licensee or holder of a mining claim has been guilty of a wilful contravention of the Act or its regulations and may recommend to the Minister the revocation of a licence or the cancellation of a mining claim (s. 26). The Commission may determine disputes about the extent to which land is exempt from staking (s. 32(2)) and may cancel the recording of a licensee or a holder who has knowingly made a false statement in the application to record the claim (s. 44(1.2)).

[25] The above provisions help to establish the statutory context in which the right of appeal from the Commission to the Divisional Court is found. When considered in this context, the right of appeal provides little support for the argument that the standard of review to be applied to the Commission's decision is correctness. On the contrary, the statutory context lends considerable support for the Divisional Court's observation that "the Act is intended to provide for the administration of mining resources owned by the province under the general direction of appointees of the Ontario government and to give

the Commission the exclusive jurisdiction over any matter involving interpretation of the provisions thereof."

Concurrent Jurisdiction

[26] The appellant's submission that, where the legislature has given the court and an administrative body concurrent jurisdiction, less deference is warranted is intriguing, at least in the abstract. The appellant, however, did not fully develop the argument. The appellant provided no assistance in situating what it describes as the court's "concurrent jurisdiction" in the context of the statute or the circumstances of this case.

[27] Section 105, set out above, does not seem to contemplate concurrent jurisdiction in the strict sense. Rather, it seems to contemplate that the Commission enjoys exclusive jurisdiction to determine every claim, question and dispute arising under the Act. Especially pertinent to this case is s. 32(2) that provides specifically that if a dispute arises between the intending prospector and the owner, lessee, purchaser or locatee regarding whether land is exempt from prospecting or staking out, it is "the recorder or the Commissioner" who shall determine "whether lands are exempt from staking".

[28] Section 105 is subject to s. 106 that provides that the Commission "has no power" to declare forfeited or void or to cancel or annul any Crown patent issued for lands, mining land, mining claims or mining rights; proceedings for such relief "may be brought or taken" in the Superior Court of Justice.

[29] The Act then provides for the transfer of proceedings between the Commission and the Superior Court in ss. 107 to 109. Section 107 allows a party to a proceeding brought before the Commission to apply to the Superior Court for an order transferring the proceeding to that court. Section 108 allows the court in which an action is brought to refer the action or any question therein "to the Commissioner as a referee". Section 109 provides for the transfer by the court to the Commission of "a proceeding that should have been taken before the Commissioner" but is brought in a court.

[30] As I read these provisions, it is the Commission that is granted general jurisdiction to decide matters under the Act, except for enumerated matters that the Commission "has no power" to decide. Proceedings to decide such matters are to be brought in the Superior Court. The court may also "refer the action or any question therein to the Commissioner" as a referee. The court may also transfer a proceeding to the Commission "that should have been taken before the Commissioner" in the first place.

[31] No matter how one describes this unusual arrangement, I agree with the Divisional Court that the arrangement "invites deference" to the Commission. The reason the statute permits the court to refer a particular question or even the entire action to the Commission is to be able to take advantage of the Commission's broad expertise.

[32] Before leaving this issue, it is worth noting that the appellant's application was commenced in the Superior Court, but was transferred to the Commission under s. 109 on

consent. The appellant must be taken then to recognize that this proceeding "should have been taken before the Commissioner" in the first place.

Question of general law

[33] The appellant is correct that the proper interpretation of the phrase "actual use or occupation" is a question of law. It is not, however, a question of general law "that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise": *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, at para. 60.

[34] I agree with the Divisional Court that the nature of the question in this case involves "the interpretation of the *Mining Act* and its application to the MTO's activities on the land." The Divisional Court was correct to observe that fact and law were inextricably mixed in the question. The Supreme Court has stated at para. 51 of *Dunsmuir* that such questions generally attract the standard of reasonableness.

CONCLUSION

[35] I agree with the Divisional Court's conclusion that the standard of review that applies to the Commission's decision in this case is reasonableness.

The Commission's decision

[36] The Commission set out the test they applied to determine whether the activities carried out on the land fell under "actual use":

> The word "actual" is used as an adjective, while the word "use" is a noun. "Actual" connotes an existence in reality;

> something really exists. It is real and not imaginary or potential, or possible or intentional; it exists in the present. The phrase "actual income" is an example familiar to taxpayers. The phrase "actual use" therefore must refer to a use that exists, that is recognizable as a use, that is describable, and that is known to be a use. It follows that an actual use of the Crown must have all of these features but should also have a recognizable "Crown" component.

[37] The appellant endorses this test and emphasizes that it does not require a "use" to be permanent. The appellant's argument is that, in applying the test, the Commission rejected the MTO's use of the land to plan the route of a highway because that use was not permanent. At law, the MTO says, it is only necessary that the lands be in "actual use" at the time it is intended to be staked.

[38] The appellant argues strenuously that its use was "actual". It argues it was actually using the land to plan the highway. It points out it was not merely considering the route for the highway in a government office or just consulting with the public about the route, but had physically entered upon the land, surveyed it, cut a one metre swath through the bush, placed stakes along the centre line of the route of proposed highway and drilled bore holes to determine the terrain's structure. The appellant submits that, although these activities made only temporary use of the land, they met the definition adopted by the Commission: the activities were not imaginary or potential, but existed in the present and were describable as a use. The MTO submits that, in applying the definition it had earlier set out, the Commission imposed the additional requirement that the use be permanent.

[39] I do not read the Commission's reasons as finding that the MTO's activities did not constitute an "actual use" because they were not permanent. On my reading, the Commission rejected the "use" the MTO put forward because its activities were preliminary; they were a precursor to the "actual use" of the land as a highway.

[40] What makes things tricky is that every use that is a precursor to another may be described as preliminary and is bound to be temporary. The use of land to actually construct the highway is preliminary, a precursor to the permanent use of the land as a highway. Yet there the parties are agreed that constructing a highway would constitute an "actual use" of the lands.

[41] There is no fault in the appellant's logic. The difficulty with it is that, carried to the extreme, it could be said that whenever Crown employees or agents are present on land they are making use of it. If Crown employees were doing nothing more than simply travelling across the land, it could be said they were actually using the land to reach their destination. The Divisional Court made the pivotal observation that the interpretation and application of the words "actual use" involve line drawing, and "where one draws the line between preliminary and substantive use is a question of fact which may not in all cases be easy to discern." According to the scheme of the Act, the tricky question of where one draws that line should be resolved by the Commission, subject to the right of appeal.

[42] In this case, the Commission drew the line with due regard for the Act's policy and purpose. The Act itself in s. 2 states that its purpose is "to encourage prospecting, staking and exploration for the development of mineral resources". Section 27(a) specifically allows staking on Crown lands whether they are "surveyed or unsurveyed". The Commission pointed out that the Head of Planning and Design for the MTO described the two sets of survey stakes and clear cuts as "engineering surveys" and remarked that his "approach is indicative of the Ministry's view of the work it was undertaking at the time and that is that the work connoted a preliminary stage. It could not be described as an actual use." The Commission's finding that the appellant's activities did not constitute "actual use" is not unreasonable but lies within the range of acceptable outcomes.

[43] I have had the opportunity to read the reasons of my colleague Feldman J.A. I agree with her that the Commission's reasons show an insufficient appreciation of the weight to be accorded to a statute's definitions. A statute's definitions should drive the interpretation of its provisions. I also agree that the fact the Crown has not taken the executive initiative to make an order withdrawing lands from staking under s. 35 of the Act does not preclude it from relying on its "actual use" of lands, where that is the case.

[44] However, I do not regard the Commission's comments on these issues to be as unequivocal as my colleague does or as germane to its decision. As I read its reasons, the Commission's decision turned on its conclusion that the MTO was not in "actual" use of the lands. Its comments on these other issues must be read in that light. For example, the

Commission's remark that it was not prepared to agree that the definition of Crown land should drive the operation of the Act had application only "insofar as it relates to the setting aside of lands for anticipated public works". As I read it, the remark is predicated on the Commission already having concluded the Crown's use was "anticipated" and not "actual".

[45] The word "actual" is pivotal in this case. As I have stated, it is my view that the line between an "anticipated" use and an "actual" use should be drawn by the Commission, acting reasonably. I see no grounds for interfering with where the line was drawn in this case.

The Respondent's Certificate

[46] MTO also submitted that the Commission erred by failing to cancel the respondent's staking certificate for making a false statement in the application to record its claim. The respondent's agent had seen the MTO's cut and its stakes when he first went on the land but had not disclosed them in the claim application. The Commission found that the clear-cutting and survey stakes that were seen would point to the fact that someone may have been on the land for some purpose, but these were not enough to constitute an "improvement" to the lands in the sense contemplated under the Act. What the respondent had seen was in the nature of evidence that engineering surveys had been carried out.

[47] This was a matter squarely within the Commission's jurisdiction. There is no reason to disturb its finding.

DISPOSITION

[48] I would dismiss the appeal. I would fix the respondent's costs on a partial indemnity basis in the amount of $11,000.00 for the application for leave to appeal, and $37,000.00 for the appeal, both amounts inclusive of disbursements and applicable taxes.

"R.G. Juriansz J.A."
"I agree H.S. LaForme J.A."

Feldman J.A. (Dissenting):

[49] I have had the opportunity to read the reasons of my colleague Juriansz J.A. and I agree with his conclusion that the standard of review of the decision of the Mining and Land Commissioner ("Commissioner") is the reasonableness standard. However, in my respectful view, the Commissioner's decision in this case is an unreasonable one within the meaning and applying the criteria set out by the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190. Two aspects of the Commissioner's interpretation of the *Mining Act*, R.S.O. 1990, c. M.14 ("the Act") are at the heart of the decision's unreasonableness. First, after interpreting the term "actual use" found in the Act's definition of "Crown land", the Commissioner failed to apply its own definition to the facts of this case. Second, the Commissioner has effectively read out of the Act the definition of "Crown land" that the legislature saw fit to include. This interpretation was not one that was available as coming within a range of possible, acceptable interpretations of the Act. The combined effect of these errors is to undercut and undermine the ability of the Crown to effectively protect lands it has properly and legitimately determined it may require for important public purposes, which ability is specifically provided within the Act and represents the intent of the legislature.

The *Dunsmuir* Analysis

[50] At para. 47 of their reasons, the majority of the Supreme Court of Canada explains the reasonableness standard and how courts are to apply that standard when reviewing decisions of administrative tribunals:

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[51] To summarize the process, in order to assess whether a decision is reasonable, a court examines both the tribunal's process of articulating the reasons for coming to its decision as well as the decision itself. The reasoning process must make the decision intelligible and transparent and must justify the outcome. Finally, the decision itself must fall within a "range of possible, acceptable outcomes" which are defensible on the facts and the law.

[52] The Supreme Court demonstrated this process in *Dunsmuir* itself, finding that the interpretation that the adjudicator gave to the home statute was an unreasonable one, that his decision was therefore fatally flawed and, as such, it did not "fall within the range of acceptable outcomes that are defensible in respect of the facts and the law": *Dunsmuir* at para. 74.

Relevant Provisions of the Act

[53] In order to discuss the decision of the Commissioner in context, it is essential to set out the relevant provisions of the *Mining Act*:

> 1. (1) In this Act,
>
> ...
>
> "Crown land" does not include,
>
> (a) land, the surface rights, mining rights or the mining and surface rights of which are under lease or licence of occupation from the Crown,
>
> (b) land in the actual use or occupation of the Crown, the Crown in right of Canada, or of a department of the Government of Canada or a ministry of the Government of Ontario,
>
> (c) land the use of which is withdrawn or set apart or appropriated for a public purpose, or
>
> (d) land held by a ministry of the Government of Ontario;
>
> ...
>
> "Minister" means the Minister of Northern Development, Mines and Forestry, except in Part IV where ''Minister" means the Minister of Natural Resources;
>
> ...
>
> Purpose
>
> 2. The purpose of this Act is to encourage prospecting, staking and exploration for the development of mineral resources, in a manner consistent with the recognition and affirmation of existing Aboriginal and treaty rights in section 35 of the *Constitution Act, 1982*, including the duty to consult, and to minimize the impact of these activities on public health and safety and the environment.
>
> ...
>
> PART II
> MINING CLAIMS
> LANDS OPEN
>
> Where licensee may prospect for minerals

27. Except where otherwise provided, the holder of a prospector's licence may prospect for minerals and stake a mining claim on any,

(a) Crown lands, surveyed or unsurveyed;

(b) lands, the mines, minerals or mining rights whereof have been reserved by the Crown in the location, sale, patent or lease of such lands where they have been located, sold, patented or leased after the 6th day of May, 1913,

not at the time,

(c) on record as a mining claim that has not lapsed or been abandoned, cancelled or forfeited; or

(d) withdrawn by any Act, order in council, or other competent authority from prospecting, location or sale, or declared by any such authority to be not open to prospecting, staking or sale as mining claims.

Claim may be staked

28. (1) A licensee may stake a mining claim on any land open for prospecting and, subject to the other provisions of this Act, may work such claim and transfer his or her interest therein to another person, but, where the surface rights in the land have been granted, sold, leased or located by the Crown, compensation must be made as provided by section 79.

...

LANDS NOT OPEN

Land not open for prospecting without consent

29. No mining claim shall be staked out or recorded upon any land transferred to or vested in the Ontario Northland Transportation Commission without the consent of the Commission nor, except with the consent of the Minister,

(a) upon any land reserved or set apart as a town site by the Crown;

(b) upon any land laid out into residential lots on a registered plan of subdivision; or

(c) upon any land forming the station grounds, switching grounds, yard or right of way of a railway.

Lands upon which claim may not be staked out

30. (1) No mining claim shall be staked out or recorded on any land,

(a) that, without reservation of the minerals, has been sold, located, leased or included in a licence of occupation; or

(b) for which an application brought in good faith is pending in the Ministry of Natural Resources under the *Public Lands Act* or any other Act, and in which the applicant may acquire the minerals that are included in the application; or

(c) where the surface rights have been subdivided, surveyed, sold or otherwise disposed of by the Ministry of Natural Resources for summer resort purposes, except where the Minister certifies in writing that in his or her opinion discovery of valuable mineral in place has been made; or

(d) where the Minister or the Minister of Transportation certifies that land is required for the development of water power or for a highway or for some other purpose in the public interest and the Minister is satisfied that a discovery of mineral in place has not been made thereon; or

(e) in an Indian reserve, except as provided by *The Indian Lands Act, 1924*; or

(f) while proceedings in respect thereto are pending before the Commissioner or a recorder or until those proceedings are finally determined; or

(g) until the proceeding has been finally determined, in the case of a proceeding that the Commissioner certifies is pending in a court in respect of the land.

...

Provincial parks

31. On and after the day subsection 16 (1) of the *Provincial Parks and Conservation Reserves Act, 2006* is proclaimed in force, prospecting or the staking of mining claims or the development of mineral interests or the working of mines in provincial parks and conservation reserves is prohibited.

Lands used or occupied as gardens, etc.

32. (1)Although the mines or minerals therein have been reserved to the Crown, no person shall prospect for minerals or stake out a mining claim upon the part of a lot that is used as a garden, orchard, vineyard, nursery, plantation or pleasure ground, or upon which crops that may be damaged by such prospecting are

> growing, or on the part of a lot upon which is situated a spring, artificial reservoir, dam or waterworks, or a dwelling house, outhouse, manufactory, public building, church or cemetery, except with the consent of the owner, lessee, purchaser or locatee of the surface rights, or by order of the recorder or the Commissioner, and upon such terms as to the Commissioner seem just.
>
> ...
>
> Withdrawal and reopening of lands
>
> 35. (1) The Minister may, by order signed by him or her,
>
> (a) withdraw from prospecting, staking out, sale or lease, or any combination of them, any lands, mining rights or surface rights that are the property of the Crown; and
>
> (b) reopen for prospecting, staking out, sale or lease, or any combination of them, any lands, mining rights or surface rights that have been withdrawn under this Act.

[54] The basic structure of the Act regarding the ability to prospect and stake, as provided in these sections, is that a licensed prospector may prospect and stake mining claims only on "lands open" to such activity. Two sources of such lands are provided for in the Act: Crown lands[1] (s. 27(a)) and lands the Crown has disposed of by sale or lease while reserving the mineral rights (s. 27(b))[2], as long as there is not already an existing mining claim and the lands have not been withdrawn from prospecting by legislation, order in council "or other proper authority", or so declared by such an authority.

[55] In s. 29, certain lands are declared to be "not open" for prospecting except with the consent of the Commissioner in some cases or the Minister in others, while ss. 30-32 set out a list of lands where mining claims cannot be staked or recorded at all. Finally, s. 35

[1] The s. 1 definition is of "Crown land", while the phrase "Crown lands" is referred to in s. 27. They appear to be treated interchangeably.
[2] These latter lands are excluded from the definition of Crown land by ss. (a) of the definition.

allows the Minister (defined as the Minister of Northern Development, Mines and Forestry), by way of a signed order, to withdraw any lands that are the property of the Crown from prospecting and then to reopen them.

[56] In the Act, the definition of "Crown land" is framed in the negative, and excludes four categories of land belonging to the Crown. One of those is "land in the actual use or occupation of the Crown". If the lands in question are in the "actual use or occupation of the Crown", they cannot be "open" lands available for prospecting under s. 27(a), and they do not need to be withdrawn or otherwise removed or excluded under ss. 29-35 of the Act.

[57] With that legislative background, I turn to the factual background and the decision of the Commissioner.

Factual Background

[58] The Ministry of Transportation is responsible for the construction and maintenance of provincial highways pursuant to the *Public Transportation and Highway Improvement Act***,** R.S.O. 1990, c. P.50. Highway 69, a two-lane highway with a 90 km per hour speed limit, is a strategic link between Highway 401 and Highway 17 in Sudbury and is one of only two corridors connecting northern and southern Ontario. In the 1990's, it was determined that reconstruction of Highway 69 was necessary due to major operational constraints arising from traffic congestion, delays and numerous collisions.

[59] As a result, in 1995 the Ministry commenced the planning process for reconstruction of the highway. The process involved planning studies for a new route for a four-lane highway and a process of consultation with the public in accordance with the *Environmental Assessment Act*, R.S.O. 1990, c. E.18. That process involved several public information sessions, which were held, following notice to the public, in Sudbury and at the Wanup Pit Community Centre between 1995 and 1999 and later in 2002. All of these sessions were advertised in local newspapers. The plan for the route went through some changes but, once the planning was finalized, the Ministry undertook the work on the ground to identify the proposed route through Ministry-identified staking, drilling of bore holes and cutting swaths through the vegetation. The Ministry representative described the work as "openly visible and notorious to any persons in the area."

[60] In April 2003, Mr. Bull of the respondent exploration company staked and recorded mining claims on the lands that had been identified by the Ministry on the ground and in the public meetings as the proposed new route for Highway 69. After the respondent's claims had been staked and recorded, on June 23, 2003, the lands identified as the route for the new four-lane Highway 69 were withdrawn from staking by an order under s. 35 of the Act.

The Commissioner's Decision

[61] The Ministry's position was that the lands that it had identified on the ground for the new four-lane Highway 69 were in the "actual use" of the Crown during the planning process that is required in order to finally determine an appropriate and acceptable route

for a highway. Thus, pursuant to the definition of "Crown land" in s. 1 of the Act, in April 2003, the lands were not "open lands" for prospecting under s. 27(a) of the Act.

[62] The Commissioner took a dual approach to the interpretation of the exclusion from Crown lands of "land in the actual use or occupation of the Crown".

[63] First, the Commissioner analyzed the adjective "actual" in the phrase "actual use", and concluded that the concept comprised six characteristics. The use must be: a) something that exists in the present, b) not imaginary or potential, c) recognizable as a use, d) describable, e) known to be a use and f) the use must have a recognizable Crown component.

[64] Having elaborated on the meaning to be applied to the word "actual", the Commissioner went on to find that, because the Ministry had not settled on the final route for Highway 69 and was not yet ready to withdraw lands from staking, the work it was doing was preliminary only. Therefore, it was not an actual use within the meaning the Commissioner had ascribed to the term "actual". The Commissioner also reasoned that because the stakes placed by the Ministry could fall over or be removed, the swaths cut through the foliage could grow back, and the drilled boreholes could fill with water or vegetation, this could cause confusion to prospectors in terms of notice of actual use of the lands by the Crown.

[65] The Commissioner refused to consider as part of the notice to the public of the actual use of the lands by the Crown, the lengthy process of public meetings and notices

together with all of the background work conducted by the Ministry in order to comply with the legislated mandatory process for widening or rerouting a highway. The Ministry's witness described this process in detail in his affidavit and testimony before the Commissioner. The process was lengthy, detailed, costly, and public.

[66] Second, the Commissioner concluded that the "lands open/lands not open" arrangement found in ss. 27, 29, 30 and 35, sets out a "comprehensive scheme for the removal of lands from staking", and found that the definition of Crown lands is essentially redundant (my word) or, at best, only there to cover any Crown lands that would otherwise "fall through the cracks of the legislation". In particular, the Commissioner's analysis of the meaning and effect of the definition concluded as follows:

> Given the comprehensive scheme set out in the Act, it may very well be that the definition for "Crown land" insofar as the phrase "actual use of the Crown" is concerned is primarily intended to catch and remove any Crown lands that might fall through the cracks of the legislation. A close look at the definition reveals that it is essentially reiterating what one would find in the Act. *It is extremely doubtful that it was intended to set up some new class of untouchable Crown land that was much different from what is set out in the various sections of the Act that deal with such land, especially section 30.* Indeed, the definition section appears to work in association with those sections of the Act that fall under the heading of "Lands Not Open" and section 30. [Emphasis added.]

[67] The Commissioner posed the question whether the Act expected the applicant "to formally withdraw lands from staking every time it shoots survey stakes for a highway".

The answer was yes; it was reasonable to expect the applicant to follow the scheme of withdrawing lands from staking that is set out in the Act. This would give notice to the staking world of the Crown's intentions where it could not "rely on the existence of an actual use."

[68] The Commissioner was not "prepared to agree that the definition for 'Crown land' should drive the operation of the Act insofar as it relates to the setting aside of lands for anticipated public works." The Commissioner stated that the Act's preference was to require activities that might affect staking to be as public as possible, and reasoned that if the lands were in the actual use or occupation of the Crown, then the Act would have provided an administrative mechanism to let its own officials, like the Provincial Mining Recorder, know.

Analysis

1. Is the reasoning transparent so that it justifies the outcome reached?

[69] Applying the first *Dunsmuir* criterion for reasonableness, is the Commissioner's process of reasoning logical and transparent and does it justify the outcome? In my view, the reasons are insufficient to satisfy either of these tests.

"Actual use" analysis

[70] The first area where the Commissioner's analysis is not logical and does not justify its conclusion is in the application of the definition of "actual use" to the facts of the case. The Commissioner defined "actual" as existing in the present, not imaginary or

potential, recognizable as a use, describable, known to be a use, and with a recognizable Crown component.

[71] Had the Commissioner tested the evidence against these criteria, it would have found that the Crown's activity in physically marking out a proposed new highway with stakes that were marked "Hwy 69", cutting swaths through the brush and drilling bore holes to designate the proposed route of the new highway, in conjunction with the public meetings where investigation and environmental reports were presented, was an actual, recognizable, present and known use with a clear Crown component.

[72] Instead, the Commissioner found that because the Ministry had not settled the alignment of the proposed highway, construction was therefore at a preliminary stage and the Ministry was not yet ready to withdraw the lands from staking. For that reason, the work could not be described as an "actual use." In other words, the test the Commissioner applied was whether the use was the *final* use, which was not one of the six criteria it described when it elaborated on the meaning of "actual use" just one paragraph above.

[73] In my view, although the Commissioner's reasons discuss the definition of "actual" in the phrase "actual use", their real focus is on the word "use". By finding that the use was not actual because it was not the final highway use, the Commissioner did not consider that the actual use that the Ministry was relying on was its use of the land

over a period of several years to locate and plan the correct route for the extension of Highway 69. The Ministry was actually using the land for that purpose.

[74] My colleague Juriansz J.A. suggests that the Ministry's position, taken to its extreme, would mean that "whenever Crown employees ... are present on land they are making use of it", and "[i]f Crown employees were doing nothing more than simply travelling across the land, it could be said they were actually using the land to reach their destination." To the contrary, such activity would not meet the Commissioner's definition criteria for "actual" as it would be merely transitory and insignificant.

[75] The Commissioner also referred to two cases decided by previous Commissioners, *Re Maher* (1964), M.C.C. 147 (Ont. M.C.), and *Re Juby* (1970), 5 M.C.C. 11 (Ont. M.C.). The Commissioner first dismissed *Re Juby* as irrelevant because the decision in that case was that the lands could not be staked because they, and their attendant mining rights, were already licensed. The issue in *Re Maher* was whether Mr. Maher could stake mineral claims on lands owned by Canada and used as an airport. The Commissioner observed that in that case, the then-Commissioner asked how the lands were being used. Based on that observation the Commissioner stated:

> Given the approach of at least one previous Commissioner in *Maher* and the tendency in both the *Maher* and *Juby* decisions to undertake a careful analysis of the state of the lands under scrutiny, it would be reasonable to expect the Applicant to follow the scheme set out in the Act for withdrawing lands from staking thereby giving notice to the staking world of its intentions in those instances where it cannot rely on the existence of an actual use.

[76] The reference to these previous cases does not support the conclusion in the Commissioner's reasons. Neither decision in the result turned on the "actual use" issue, nor did either case discuss the withdrawal process for removing lands from staking. The fact that when considering the actual use issue, the previous Commissioners seriously examined the "actual use", is more consistent with giving effect to "actual use" than with reading it out of the Act.

[77] The Divisional Court repeated the Commissioner's error in applying the test for "actual use." It concluded at paras. 39-40 that:

> The "Lands Not Open" provisions of the *Act* provide clear illustrations of the types of substantive land uses that would be in accord with the definition. In other words, actual use connotes a land use that is substantive in nature. ... Where one draws the line between preliminary and substantive use is a question of fact which may not in all cases be easy to discern.

[78] Again, the distinction between "preliminary" and "substantive" uses is neither rooted in the Act nor found in the test for "actual use" articulated by the Commissioner.

"Crown land" analysis

[79] The Commissioner's reasons are not transparent and do not justify the conclusion reached in another way, by their suggestion that no effect should be given to the exclusions from Crown land contained in the definition of that term in the Act.

[80] The Commissioner stated that the scheme of the Act for determining which lands may be available for staking and which excluded from staking, is contained in ss. 28, 30, 31, 32 and 35. The Commissioner reasoned that there was therefore no room for the

definition of "Crown land" to place any further limits on the available lands, except for any Crown lands "that might fall through the cracks of the legislation."

[81] However, the Commissioner gives no example of any such "cracks" or of how the definition would operate in such a case. Nor is it clear how this conclusion can live with one of the Commissioner's justifications for rejecting the efficacy of the actual use concept as unworkable, which was on the basis that there is no mechanism for written notice of the Crown's actual use to be given to the Provincial Mining Recorder. However, that same problem would exist in a situation where there was actual use and no other section of the Act to remove such lands from staking.

[82] The driving principle behind the Commissioner's decision to treat the exclusion of land in the actual use of the Crown as redundant in the staking scheme appears to be the fact that there is no provision for the Crown to give formal notice of its actual use to the Provincial Mining Recorder and, therefore, official notice to stakers. However, the Act simply does not require such formal notice in order for the "actual use" of land to remove it from the definition of "Crown land." That is likely because, when land is actually being used, the public, including stakers, has actual notice of that use.

[83] In this case, there was no real issue that the respondent's stakers, who lived in the area, knew that the Crown was using the lands for planning the extension of Highway 69. The "actual use" relied on by the Crown consisted not only of the physical staking with stakes marked "Hwy 69", the cutting of swaths through vegetation and the drilling of

bore holes on the ground, but the public process that accompanied it, including public notices printed in local newspapers, reports and information sessions.

[84] As the Commissioner stated, it was difficult to believe that all of the work done by and for the Ministry of Transportation, including the public meetings and all the investigative research and environmental reports costing many thousands of dollars, would not have been noticed by the respondent's stakers who were in the aggregate business. Those parties would, again as the Commissioner noted, be on the lookout for news of major road construction.

[85] Finally, the Commissioner referred to s. 30(1)(d), which appears in the Act under the heading "Lands upon which claim may not be staked out." That section prohibits staking on land "where the Minister or the Minister of Transportation certifies that land is required for the development of water power or for a highway or for some other purpose in the public interest and the Minister is satisfied that a discovery of mineral in place has not been made thereon".

[86] In this case, by April 2003, when the mining claims were staked by the respondent, the Minister of Transportation was not ready to certify that the lands were required for Highway 69 until the entire highway route planning process had been completed. Nevertheless, it was still very much in the public interest for the lands where proposed routes were being considered for public highway development, to be protected from prospectors until the final highway route was properly chosen. The Ministry of

Transportation clearly relied on the exclusion in the Crown land definition of land in the actual use of the Crown to protect its planned route from prospectors. The Commissioner's reasons failed to address how reading out the effect of the "actual use" exclusion from the definition of Crown land would affect this public interest and failed to take that important factor into account in holding that to protect such proposed routes, the Minister is required to use another process in the Act, the formal withdrawal of the lands from staking.

2. Is the decision within the range of possible, acceptable outcomes?

[87] The second *Dunsmuir* criterion for reasonableness is whether the decision of the Commissioner is within the range of possible, acceptable outcomes. The Commissioner's interpretation of the definition of Crown land was to give the definition virtually no effect on the staking process by rendering it essentially meaningless. This was not within the range of available interpretations of a provision of the Act that was open to the Commissioner in interpreting and applying the Act.

[88] One of the basic principles of statutory interpretation is that "every word in a legislative text must be given its own meaning": Ruth Sullivan, *Statutory Interpretation*, 2d ed. (Toronto: Irwin Law, 2007), at p. 184. In *Placer Dome Canada Ltd v. Ontario Minister of Finance*, [2006] 1 S.C.R. 715, at para. 45, the court stated:

> Under the presumption against tautology, "[e]very word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose": see R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 159. To the extent that it is possible to do so, courts should

> avoid adopting interpretations that render any portion of a statute meaningless or redundant: *Hill v. William Hill (Park Lane) Ld.*, [1949] A.C. 530 (H.L.), at p. 546, *per* Viscount Simon.

[89] The Supreme Court of Canada has stated on numerous occasions, "the legislator does not speak in vain": see *Quebec (Attorney General) v. Carrières Ste. Thérèse Ltée*, [1985] 1 S.C.R. 831, at p. 838, *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, at para. 37; and *Canada (Attorney General) v. JTI-Macdonald Corp.*, [2007] 2 S.C.R. 610, at para. 87.

[90] The scheme of the staking provisions of the Act is that staking is initially allowed only on Crown land, as defined in the Act, or land where the Crown has reserved the mineral rights, subject to the legislated exceptions and exclusions that are then set out. If land is not Crown land as defined, or land where the Crown has reserved mineral rights, then it is not initially available for staking and no exceptions are needed to exclude such lands from staking. Where land is in the actual use of the Crown, it is defined as not included in Crown land. In that case, there is no need for the relevant Crown official to take formal steps to withdraw such land from prospecting.

[91] Given this clear scheme of the Act, the decision of the Commissioner that the legislature did not intend the Crown land definition to limit the scope of lands open to staking (except where something has fallen through the "cracks" of the legislation) beyond the exclusions in ss. 30-32, is not within the range of available interpretations open to the Commissioner.

Conclusion

[92] In this case, based on the facts as found by the Commissioner and the legal definition of actual use as described in the Commissioner's decision, the lands in question were in the actual use of the Minister of Transport as the identified route for the planning of the proposed new Highway 69 extension. As a result, they were not Crown lands as defined and there was no need for the Minister to take any steps to withdraw those lands from prospecting. The Commissioner's decision that the proposed highway lands were not in the actual use of the Crown and that, in any event, the definition of Crown lands was not relevant to the analysis, was an unreasonable decision not available to the Commissioner. It is therefore not a decision to which the court need accord deference.

[93] I would therefore allow the appeal, set aside the decision of the Divisional Court and grant the application of the appellant. In light of my conclusion, it is unnecessary to address the second issue on the appeal, the validity of the respondent's staking certification.

"K. Feldman J.A."

RELEASED: May 13, 2011
"RGJ"