SUPREME COURT OF YUKON

Citation: *H. Coyne & Sons Ltd.* v. *Yukon (Government of) and Eagle Whitehorse LLC*, 2014 YKSC 13

Date: 20140312
S.C. No. 13-A0036
Registry: Whitehorse

Between:

H. COYNE & SONS LTD.

Petitioner

And

GOVERNMENT OF YUKON AND EAGLE WHITEHORSE LLC

Respondents

Before: Mr. Justice L.F. Gower

Appearances:

Meagan Lang	Counsel for the Petitioner
Mike Winstanley	Counsel for the Respondent, Government of Yukon
Grant A. Macdonald, Q.C.	Counsel for the Respondent, Eagle Whitehorse LLC

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application by the petitioner, H. Coyne & Sons Ltd. ("HCS") to quash a decision by the respondent Government of Yukon ("YG") on September 21, 2012 to issue an addendum to a land lease between YG and the co-respondent Eagle Whitehorse LLC ("Eagle"). HCS claims that, in making this decision, YG breached its duty to treat HCS with procedural fairness. In particular, HCS submits that it had a legitimate expectation that YG would contact HCS and seek its input before making the decision.

[2] The standard of review applicable to issues of procedural fairness is simply a standard of fairness. In *Seaspan Ferries Corporation v. British Columbia Ferry Services Inc.*, 2013 BCCA 55, at para. 52, the British Columbia Court of Appeal commented on the standard of review, as follows:

> "52 I agree with the submissions of Seaspan (with which BCFS is in substantial agreement) that the standard of review applicable to issues of procedural fairness is best described as simply a standard of "fairness". A tribunal is entitled to choose its own procedures, as long as those procedures are consistent with statutory requirements. On review, the courts will determine whether the procedures that the tribunal adopted conformed with the requirements of procedural fairness. In making that assessment, the courts do not owe deference to the tribunal's own assessment that its procedures were fair. On the other hand, where a court concludes that the procedures met the requirements of procedural fairness, it will not interfere with the tribunal's choice of procedures."

[3] The duty of procedural fairness arises whenever an administrative decision by a public body potentially affects individual rights, privileges or interests: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 20; and *Dalziel v. Watson Lake (Town), et al*, 2008 YKSC 4, at para. 56.

[4] Although the content of the duty of procedural fairness will vary with the context of the particular statute and individual rights which are affected, the underlying objective is to ensure a fair, appropriate and open process, with an opportunity for those affected by the administrative decision to be heard and considered by the decision-maker: *Baker*, para. 20. Having said that, five factors have been recognized in the jurisprudence as relevant to the content of the duty:

1) the nature of the decision;

2) the nature of the statutory scheme in which the decision-maker operates;

3) the importance of the decision to the individual(s) affected;

4) the legitimate expectations of the party challenging the decision; and

5) the choices of procedure made by the decision-maker, particularly when the statutory scheme provides the decision-maker with discretion to choose its own procedures.

See also *Dalziel*, cited above, at para. 57.

[5] In particular, the doctrine of legitimate expectations is based on the principle that the circumstances affecting procedural fairness take into account the regular practices of the decision-maker and any representations made by it as to procedure: *Baker*, at para. 25. The Supreme Court further commented on the doctrine in the more recent case of *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, at paras. 94 to 96:

> "94 The particular face of procedural fairness at issue in this appeal is the doctrine of legitimate expectations. This doctrine was given a strong foundation in Canadian administrative law in *Baker*, in which it was held to be a factor to be applied in determining what is required by the common law duty of fairness. If a public authority has made representations about the procedure it will follow in making a particular decision, or if it has consistently adhered to certain procedural practices in the past in making such a decision, the scope of the duty of procedural fairness owed to the affected person will be broader than it otherwise would have been....
>
> 95 The specific conditions which must be satisfied in order for the doctrine of legitimate expectations to apply are summarized succinctly in a leading authority entitled *Judicial Review of Administrative Action in Canada*:

> The distinguishing characteristic of a legitimate expectation is that it arises from some conduct of the decision-maker, or some other relevant actor. Thus, a legitimate expectation may result from an official practice or assurance that certain procedures will be followed as part of the decision-making process, or that a positive decision can be anticipated. As well, the existence of administrative rules of procedure, or a procedure on which the agency had voluntarily embarked in a particular instance, may give rise to a legitimate expectation that such procedures will be followed. Of course, **the practice or conduct said to give rise to the reasonable expectation must be clear, unambiguous and unqualified**. [Emphasis added.]
>
> (D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at s.7:1710; see also *Mount Sinai Hospital Centre v. Quebec (Minister of Health and Social Services)*, 2001 SCC 41, [2001] 2 S.C.R. 281, at para. 29; *Canada (Attorney General) v. Mavi*, 2011 SCC 30, [2011] 2 S.C.R. 504, at para. 68.)

96 In *Mavi*, Binnie J. recently explained what is meant by "clear, unambiguous and unqualified" representations by drawing an analogy with the law of contract (at para. 69):

> Generally speaking, government representations will be considered sufficiently precise for purposes of the doctrine of legitimate expectations if, had they been made in the context of a private law contract, they would be sufficiently certain to be capable of enforcement." (underlined text is my emphasis; bold text was previously emphasized)

FACTS

[6] HCS owns or controls the northern portion of the Whitehorse Copper Belt, which consists of approximately 376 claims, 13 Crown grants of mineral rights and nine mineral leases (collectively referred to as "the property"). The mineral leases include three quartz claims known as the "Oro claims". HCS has spent over $2 million developing the

property, including approximately $50,000 to explore the Oro claims, and the immediately surrounding claims, through trenching, sampling, mapping and drilling.

[7] In September 2010, YG issued a surface lease of land adjacent to the Oro claims to Eagle (the "Eagle lease"), which permits it to work tailings and waste rock to extract minerals. The lease was issued under the *Lands Act*, R.S.Y. 2002, c. 132. This land was previously leased by a Yukon corporation owned by Brian Scott. Mr. Scott also had quartz mineral leases for the subsurface property underlying the leased land. When Mr. Scott transferred the land leases to Eagle, YG, through its Minerals Resources Branch ("MRB"), decided to issue a new land lease to Eagle subject to a requirement that Eagle first obtain ownership of the mineral leases from Mr. Scott.

[8] Bryony McIntyre, an MRB manager, deposed in her affidavit that:

> "The MRB was also involved in ensuring that the underlying quartz claims were included in the context of the [land] lease. The quartz claims were transferred to Eagle Industrial as part of the private arrangement between Mr. Scott and Eagle Industrial." (para.11)

[9] At or about the time the land lease was issued to Eagle, it determined that it wanted to place tailings on the surface of the Oro claims, on vacant land immediately adjacent to Eagle's leased property. To that end, Eagle entered into discussions with HCS which resulted in a one-page document, dated November 25, 2010 and drafted by Eagle, which I will refer to as the memorandum of understanding or MOU. Given the significance of the MOU to this application, I am appending a scanned copy of the document to these reasons. For present purposes it is sufficient to note that the MOU was an agreement to agree, in the sense that HCS was willing to accept the placement of tailings on the lands overlying Oro claims, providing that Eagle rented certain mining

equipment from HCS to process the tailings, or made cash payments to HCS in lieu of such rentals. The parties specified that they would later set out the particulars of the terms agreed to in that regard in a "separate letter agreement" which they would keep confidential. This subsequent separate agreement was never consummated.

[10] On June 29, 2011, the Eagle lease was amended to increase the surface area slightly, but the amended boundary did not overlap the Oro claims.

[11] In late 2011, Eagle submitted its plans for the tailings reprocessing project to the Yukon Environment and Socio-economic Assessment Board ("YESAB") for evaluation. The project was described as including the placement of processed tailings on various lands, including those overlaying the Oro claims. YESAB published a public notice of the proposed project. The notice called for comments to be submitted by January 5, 2012.

[12] HCS made no submissions to YESAB in response to the public notice.

[13] On June 15, 2012, the Whitehorse designated office of YESAB produced its assessment of the project, recommending that it be allowed to proceed, subject to certain terms and conditions.

[14] On July 10, 2012, the acting manager of YG's Lands Client Services Branch ("LCSB"), being a "decision body" under the *Yukon Environmental and Socio-economic Assessment Act*, S.C. 2003,c. 7 ("*YESAA*") issued a decision document authorizing the project, but with certain variations to the YESAB assessment.

[15] On July 12, 2012, Eagle emailed the LCSB manager's office requesting a second amendment to the Eagle lease. It sought to expand the southern boundary to include lands overlying Oro claims, where it planned to place the re-worked tailings. Eagle's principal, Mr. Chuck Eaton, attached a copy of the MOU to the email and stated:

> "We have a written agreement (attached) from the holder of the adjacent quartz claims which allows us to place tailings on his claims."

[16] On September 21, 2012, the LCSB manager, Mr. John Cole, approved the second amendment, extending the southern boundary of the Eagle lease to include lands overlying the Oro mineral claims. Mr. Cole deposed in his affidavit, at paras. 18 to 20, that his decision to issue the second amendment, was based upon four considerations:

1) in his opinion, land leases under the *Lands Act* "cannot affect the rights of QMA mineral rights holders";
2) he accepted the MOU "as evidence of [HCS's]...consent" to the placement of Eagle's tailings on the surface of the Oro claims;
3) he relied upon the fact that HCS had not provided any comments or concerns to YESAB during its assessment process; and
4) he also relied upon the fact that HCS made no submissions with respect to the project at a public hearing before the Yukon Water Board on January 16 and 17, 2013.[i]

[17] Subsequent to the second amendment, Eagle continued to negotiate with HCS with a view to finalizing the terms of the separate confidential agreement referred to in the MOU. According to the affidavit material, emails were exchanged between the parties from October 23rd to December 6th, 2012. On the latter date, Eagle wrote to HCS indicating that it had mistakenly thought the relevant legislation required HCS's permission for Eagle to place tailings on the lands overlying the Oro claims. Mr. Eaton stated on Eagle's behalf that, upon a closer reading of the legislation, he was of the opinion that he no longer required such permission. Nevertheless, he continued to

indicate that Eagle would still require some equipment from HCS and that he wanted to work towards negotiating "a mutually acceptable arrangement".

[18] Further emails were exchanged between the parties in May and June 2013. On May 10, 2013, Eagle informed HCS that its land lease extension included the surface area overlying the Oro claims. Until this date, HCS was unaware of Eagle's surface lease boundary extension through the second amendment.

[19] Ultimately, on June 27, 2013, Eagle wrote to HCS confirming that the separate subsequent agreement referred to in the MOU had never been reached. In particular, Mr. Eaton stated on Eagle's behalf:

> "Because the letter referenced in the Nov. 25 letter [the MOU] has never been completed, the Nov. 25 "agreement" is not a completed agreement..."

[20] On May 15, 2013, HCS met with YG to discuss the second amendment, and subsequently received disclosure of certain related documents.

[21] On June 28, 2013, HCS commenced this petition to quash YG's decision to issue the second amendment.

[22] At all material times, HCS was aware of a public document published by YG, through MRB and the Land Management Branch, dated August 27, 2010, entitled "Surface and Subsurface Rights Management". The document refers to itself alternately as a "fact sheet" and an "information sheet". It also contains a disclaimer that it "should not be relied upon for legal purposes." I will refer to this document as "YG's information sheet".

[23] At p. 2, under the subtitle "**How do surface and subsurface rights interact?**", YG's information sheet states:

" ...

> Both the Land Management Branch (LMB) and the Minerals Resources Branch, through the registration and recording of interests, ensure that a thorough review of existing or overlapping rights is completed and that any holder of rights are [as written] contacted when there may be a conflict."

Later, at p. 3, under the subtitle "**Issuance of a surface land interest**", the document states:

> "The Land Management Branch is responsible for surface land interests and before issuing authorizations, will confirm both surface and subsurface ownership to determine any overlaps. If a mineral claim or claims are in place, the Land Management Branch will advise the mineral claim owner directly of the surface interest application and request comments. Before a decision is made on the disposition, consideration of the rights held by an affected claim holder along with any existing development plans will be examined." (my emphasis)

ANALYSIS

[24] I return to the five factors arising from *Baker*, cited above, relevant to the content of the duty of procedural fairness.

1. **The Nature of the Decision**

[25] There is no dispute that YG's decision to issue the second amendment to Eagle's land lease was an administrative one. Nevertheless, that is sufficient to trigger the application of the duty of fairness: *Baker*, para. 20.

2. **The Nature of the Statutory Scheme**

[26] YG issued the second amendment under the *Lands Act*, which does not provide for an appeal process. In such cases, where the decision made by the public body is

determinative of the issue and further requests cannot be submitted, "[g]reater procedural protections" are required: *Baker*, at para. 24.

3. The Importance of the Decision to HCS

[27] YG has not challenged the significance of HCS's financial investment in developing the property, and the Oro claims in particular. This would also seem to have been apparent to Eagle, as it was Eagle who sought out HCS's agreement by drafting the MOU. Finally, the fact that Mr. Cole relied, albeit mistakenly, on the MOU as evidence of HCS's consent, is further evidence of the importance of the decision on the second amendment to HCS.

4. The Legitimate Expectations of HCS

[28] At a minimum, HCS submits that it had a legitimate expectation that prior to issuing the second amendment; YG would notify it of Eagle's application and seek HCS's comments. HCS says that this expectation is based upon the written representations in YG's information sheet, as well as YG's usual practice in disposing of surface rights that conflict with subsurface rights.

[29] In my view, the written representations made by MRB and the Land Management Branch in YG's information sheet did give rise to a legitimate expectation by HCS that it would be contacted by YG for input before any decision was made on the disposition of lands above the Oro claims. As originally noted in *Baker*, at para. 26, the doctrine of legitimate expectations:

> "... as applied in Canada, is based on the principle that the "circumstances" affecting procedural fairness take into account the promises or regular practices of administrative decision-makers, and that it will generally be unfair for them to act in contravention of representations as to procedure, or

> to backtrack on substantive promises without according significant procedural rights." (my emphasis)

[30] YG's counsel failed to squarely address this issue, other than to submit that YG's information sheet did not constitute a "policy". However, whether the document rises to the level of a policy or not misses the point. In my view, it clearly constitutes a written representation as to the procedure which YG will follow whenever there is a potential conflict arising from the disposition of lands overlying sub-surface mineral claims. Further, the representations are "clear, unambiguous and unqualified", to use the language in *Agraira,* cited above, at paras. 95 and 96:

> "... the Land Management Branch will advise the mineral claim owner directly of the surface interest application and request comments. Before a decision is made on the disposition [of the surface interest], consideration of the rights held by an affected claim holder along with any existing development plans will be examined." (my emphasis)

[31] Instead of dealing with this issue of written representations directly, YG argued that the doctrine of legitimate expectation did not apply, and therefore the duty of procedural fairness did not arise, because:

1) *Lands Act* surface leases do not affect the statutory rates of quartz mineral claim holders; or

2) in the alternative, if they do, then HCS was effectively given notice of Eagle's application for the second amendment through the public notice published by YESAB in relation to its assessment of Eagle's tailings reprocessing project.

[32] YG's first argument here is based on its reading of s. 2 (2) of the *Lands Act*, which states:

> "Nothing in this Act shall be construed as limiting the operation of the *Yukon Quartz Mining Act* (Canada)..."

Further, although he did not say so expressly, it would appear that this was the rationale for Mr. Cole deposing in his affidavit that, prior to deciding to issue the second amendment, he:

> "...was fully aware that Lands Act land leases cannot affect the rights of QMA mineral rights holders."

[33] I disagree with this interpretation. The prospect that there can be adverse effects on mineral rights holders would seem to be the very reason for the existence of YG's information sheet on surface and sub-surface rights management. Indeed, the document expressly refers to the potential for "conflict" (p. 2) and resolving "access disputes" (p. 4). Similarly, s. 17 of the *Quartz Mining Act*, S.Y. 2003, c. 14 ("*QMA*") provides that the Yukon Surface Rights Board is to determine any "dispute" between a person entering upon lands for mining purposes, were those lands are lawfully occupied by another person, and the parties are unable to agree upon the compensation to be paid by the miner to the occupier.

[34] Further, the apparent rationale for MRB insisting that Eagle obtain both the land and mineral leases from Mr. Scott, before issuing the Eagle lease, was to avoid exactly this type of potential conflict. As Ms. McIntyre deposed at para. 17 of her affidavit:

> "MRB works to ensure that there is an understanding of the rights provided by claims or leases under the mining acts [as written], this goes for both the rights holder and the potential 3rd party or other government agency potentially making a permitting or disposition decision. We do not represent the rights holder other than to ensure that the right is recognized. MRB does not indicate that a mineral right or claim takes precedence over another right holder or decision by another department or branch to use their authority to

> issue a decision. In most cases it is to raise awareness of potential impacts on considerations that should be discussed. If an issue is raised between two external parties MRB's position is to advise that the parties should look to their own private solutions to the issues."

[35] I interpret this explanation as an attempt by MRB, whenever possible, to ensure that there is harmony between the respective rights of land lessors and mineral lessors, where the mineral leases underlie the land leases. The purpose for aspiring towards such harmony seems self-evident. While a mineral claim lessor has the right to enter the land above the mineral claim for the purpose of mining for minerals (McIntyre affidavit, para. 16), there are restrictions on that right arising in sections 16 and 17 of the *Quartz Mining Act*.

[36] Section 16(1) provides:

> "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." (my emphasis)

[37] Section 17 of the *QMA* states:

> "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..." (my emphasis)

[38] Thus, in the context of land and mineral leases, any mineral rights holder wanting to enter lands lawfully occupied by another person for the purpose of mining their subsurface claim must provide "adequate security" and "full compensation" to the occupier "for any loss or damage" caused by the entry.

[39] Also, s. 125 of the *QMA* would seem to anticipate conflict between the holders of adjoining mineral claims, where one causes damage to the other, particularly by allowing the flow of water from one claim to another. In such case, the aggrieved miner can seek a monetary penalty and costs from the offending miner, and the latter even risks imprisonment in default of payment of same. Finally, notwithstanding the payment of a penalty and costs, the offending miner may also be liable for damages. While the section does not specifically address the point, it is entirely conceivable in such a scenario that one of the two mineral rights holders may also possess surface rights pursuant to a land lease. Specifically, s. 125 provides:

> "125(1) Any person who causes damage or injury to the holder of any mineral claim other than their own by throwing earth, clay, stones, or other material on the other claim, or by causing or allowing water that may be pumped or bailed or that may flow from their own claim to flow into or on the other claim is liable to a penalty of not more than fifty dollars and costs, and in default of the payment of the penalty and costs the person may be imprisoned for any period of not more than one month.
>
> (2) Subsection (1) does not deprive any person of rights to damages. S.Y. 2003, c.14, s.125."

[40] HCS further submits that YG's specific practice "in ensuring" that the Scott mineral claims were transferred to Eagle as a condition of issuing the Eagle lease for the lands (McIntyre affidavit, para. 11) is consistent with YG's "usual practice in disposing of surface rights that conflict with subsurface rights" (my emphasis). That submission was not contradicted by YG. Furthermore, it is consistent with the representations made by YG in its information sheet. Therefore, I have no difficulty in making this finding of fact, i.e. that it is YG's usual practice to attempt to ensure harmony between the rights of

mineral claim holders and those seeking leases of the land overlying such claims, before making a decision on the disposition of such land.

[41] Thus, with such land dispositions, both the written representations made by YG as to procedure and its regular practice in that regard give rise to a legitimate expectation on the part of HCS that it would be contacted by YG prior to the disposition of lands under the second amendment for the purpose of providing a response.

[42] I will now turn to YG's alternative argument, which is that the public notice published by YESAB pursuant to its assessment process constituted notice to HCS of Eagle's intentions, as well as an opportunity to provide a response. YG's submission seems to be that, if HCS had a legitimate expectation that it would be contacted regarding Eagle's application for the second amendment, then the public notice effectively satisfied YG's obligation in that regard.

[43] I reject this argument also. First, I accept as both logical and correct the evidence of HCS that it did not submit comments during the YESAB assessment process because it knew that YESAB could not "dispose of surface rights", and that at that stage, Eagle had not yet "obtained a right to use or enter the surface of the Oro claims".[ii] Once again, this evidence is unchallenged by YG.

[44] Second, it is apparent from the overall timeline I addressed in the facts portion of these reasons that negotiations between HCS and Eagle seem to have continued through the time period of the YESAB assessment, and afterwards. Indeed, even after Mr. Eaton indicated to HCS in Eagle's email of December 6, 2012 that he no longer believed he required HCS's permission to place tailings on the lands overlying the Oro claims, he still wanted to negotiate "a mutually acceptable arrangement" regarding the

use of certain of HCS's equipment. Finally, it was not until May 10, 2013 HCS became aware of Eagle's surface lease boundary extension through the second amendment. In this context, it is not reasonable to expect that HCS ought to have interpreted the YESAB public notice as its final opportunity to come to terms with Eagle on the use of the land above the Oro claims.

5. YG's Choices of Procedure

[45] It would appear that there are two facets to this aspect of the duty of procedural fairness. First, one must look to established choices of procedure by YG prior to the decision on the second amendment. These are found in the procedural representations made by YG in its information sheet, coupled with the evidence of its usual or regular practice in that regard, and I have dealt with them in my reasons under the topic of legitimate expectations.

[46] The second facet of this aspect of the duty of procedural fairness is the actual choice of procedure employed by YG prior to issuing the second amendment. The only evidence here is that of Mr. Cole, the manager of Lands Client Services for YG. Obviously, he did not "advise the mineral claim owner directly of the surface interest application and request comments", as represented in YG's information sheet, before making his decision on the second amendment. Rather, he deposed in his affidavit that he had four reasons for making his decision:

1) he did not believe that a land lease under the *Lands Act* could adversely affect the rights of those holding mineral leases under the *Quartz Mining Act;*
2) he accepted the MOU as evidence of HCS's consent;
3) HCS had not provided any response during the YESAB assessment; and

4) HCS had made no submissions to the Yukon Water Board on January 16 and 17, 2013.

[47] I am unable to accept any of these reasons as justification for the decision.

[48] First, for the reasons I have already given, I disagree with Mr. Cole's opinion that mineral lessors under the *QMA* cannot be adversely affected by overlying land leases under the *Lands Act.*

[49] Second, Mr. Cole incorrectly interpreted the MOU as evidence of HCS's consent to the placement of tailings on the Oro claims. On the contrary, the MOU clearly indicated that it was subject to a subsequent agreement being reached between the parties, which was not provided by Eagle with its application for the second amendment. Further, by the time Mr. Cole considered the application, the MOU was almost 2 years old. Both of these facts ought to have prompted Mr. Cole to contact HCS to confirm the status of their relationship with Eagle. As HCS's counsel put it in the hearing, "One phone call could have clarified everything."

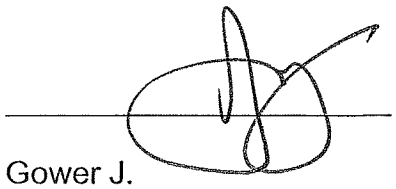
[50] Third, for the reasons I have already given, I conclude that it was not reasonable for Mr. Cole to rely on the fact that HCS had not provided any comments or concerns to YESAB during its assessment process. The deadline for such comments was January 5, 2012, over nine months earlier, which was not an insignificant period of time in the overall context of this matter. Further, YESAB had no authority to dispose of surface rights, therefore there was no reason for HCS to make any submissions to it. Both of these factors, together with the prospective wording of the MOU, ought to have prompted Mr. Cole to contact HCS before making his decision on the second amendment.

[51] Finally, Mr. Cole was clearly wrong in deposing that he relied upon the fact that HCS made no submissions to Yukon Water Board in January 2013 as justification for his decision to issue the second amendment on September 21, 2012, as the Water Board hearing had not yet taken place at the time of that decision. Here, I agree with HCS's counsel that this appears to be an attempt by Mr. Cole to make an "after-the-fact justification" for his decision. Further, as Mr. Cole swore to this explanation under oath, it significantly undermines his credibility overall in explaining his rationale for the decision.

CONCLUSION

[52] I conclude that YG breached its duty of procedural fairness by not advising HCS of Eagle's application for the second amendment, and failing to provide HCS with any opportunity to make comments on the application. In particular, YG failed to confirm whether the parties had reached an agreement pursuant to the terms of the MOU. Thus, the process was not fair and open and YG's decision to issue the second amendment is hereby quashed.

[53] Costs are awarded to HCS. If counsel are unable to agree on costs, the parties may request an opportunity to make further submissions, and I will remain seized of the matter for that purpose.



Gower J.

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[i] This was obviously an error by Mr. Cole in his affidavit, as the Water Board hearing did not take place until after Mr. Cole had made his decision to issue the Second Amendment to Eagle's original lease.

[ii] Affidavit of Jim Coyne, #2, para.4.

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APPENDIX

November 25, 2010

Mr. Jim Coyne
H. Coyne & Sons Ltd.
14 MacDonald Rd
Whitehorse, YT Y1A 4L2

Dear Jim:

Pursuant to our previous conversations, this letter constitutes our agreement regarding potential placement of tailings on your Oro 1, Oro 2 and Oro 3 mineral claims adjacent to the Whitehorse Copper site. As we have discussed, we are developing a project to reclaim and rehabilitate the site and re-process the tailings to remove the magnetite. As part of our reclamation plan, we may want to put the barren tailings (after removing the magnetite) in the existing open pit and the adjacent subsidences and valleys. Placement of tailings on your claims will allow us to increase the usefulness of the area as an industrial site, remediate the public safety risks in the pit and subsidence areas, reduce the overall surface area of the tailings, and substantially increase the green-space at the site. We believe these results will be very beneficial for the Whitehorse community and environment and we very much appreciate your support of these goals.

As you know, under the *Quartz Mining Act*, tailings from a mineral claim cannot be placed on another person's claim without the other person's permission, so we have asked for, and you have generously provided, your permission. As an incentive for providing your permission, we have agreed to rent from H. Coyne & Sons Ltd. the equipment necessary to excavate and haul our raw tailings to our processing plant, including an excavator and several haul trucks. Additionally, in order to keep our options open in case we decide to use a single contractor to run our entire operation, or we decide to pump the tailings as a slurry instead of trucking, we may reduce the amount of equipment we rent from you. If so, we will make cash payments in lieu of renting some or all the equipment. The equipment specifications and in-lieu-of cash amounts will be as described in a separate letter agreement between us, and we both agree to keep that separate letter agreement confidential.

If the foregoing reflects your understanding of our agreement, please sign in the place provided below and return a copy to me. We have been asked by the Yukon Government (Energy, Mines and Resources) to demonstrate that you have given us permission to put tailings on your claims, so we will forward a copy of this letter to them.

Again, we very much appreciate your support of our project as we endeavor to reclaim the site to a more useful and environmentally friendly area.

Sincerely,

C. Eaton

Charles E. Eaton
President

Accepted and Agreed:

J Coyne
Jim Coyne

Dec 1, 2010
Date