COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Christmann v. New Nadina Explorations Limited,*
2015 BCCA 243

Date: 20150602
Docket: CA42398

Between:

C. Donald Christmann and 0712249 BC Ltd.

Appellants
(Petitioners)

And

New Nadina Explorations Limited and Cheryl Vickers in her capacity as Chair of the Surface Rights Board

Respondents
(Respondents)

Before: The Honourable Mr. Justice Groberman
The Honourable Mr. Justice Goepel
The Honourable Mr. Justice Savage

On appeal from: An order of the Supreme Court of British Columbia, dated November 19, 2014 (*Christmann v. New Nadina Explorations Limited*, 2014 BCSC 2165, Kamloops Registry Docket 49418).

Counsel for the Appellants: J.G. Frame

Counsel for the Respondents: S.M. Hirji

Place and Date of Hearing: Vancouver, British Columbia
May 5, 2015

Place and Date of Judgment: Vancouver, British Columbia
June 2, 2015

Written Reasons by:
The Honourable Mr. Justice Savage

Concurred in by:
The Honourable Mr. Justice Groberman
The Honourable Mr. Justice Goepel

Summary:

The matter came before the Surface Rights Tribunal when the Chief Gold Commissioner was unable to resolve a dispute between the surface rights holder and the mineral rights holder regarding entry onto lands. The Surface Rights Tribunal determined that entry could occur on a hay meadow once seasonal cultivation activities ceased. The Petition for judicial review was dismissed by the court below. Held: Appeal Dismissed. The Surface Rights Tribunal and the court below did not err in finding that, in the context of the Mineral Tenure Act the phrase "land under cultivation" connotes a present and active state of cultivation.

Reasons for Judgment of the Honourable Mr. Justice Savage:

I. Introduction

[1] This case concerns the interpretation of the term "land under cultivation" as it occurs in s. 11 of the *Mineral Tenure Act*, R.S.B.C. 1996, c. 292 (the "*MTA*"). The matter arose when the Chief Gold Commissioner was unable to resolve a dispute between the mineral rights holder, New Nadina Explorations Limited ("New Nadina") and Mr. Donald Christmann and 0712249 B.C. Ltd. (the "Petitioners") concerning entry onto lands comprising a ranch near Houston, B.C.

[2] New Nadina entered certain lands without objection by the Petitioners to explore a promising find between 2010 and 2012. In June of 2012, New Nadina gave notice to the Petitioners that it intended to enter an area of the ranch known as the "Hay Meadows" to conduct various mining activities. The Petitioners objected on the basis that the Hay Meadows are protected from entry as "land under cultivation" within the meaning of s. 11(2) of the *MTA*. The Petitioners say that the exceptions on a free miner's right to enter and explore land contained in s. 11(2) also restrain a recorded holder's rights under s. 14(1) of the *MTA*.

[3] When the Chief Gold Commissioner was unable to resolve the issue, the matter came before the Surface Rights Board (the "SRB"). The issue as framed before the SRB was to what extent or whether the Hay Meadows were "lands under cultivation" and therefore, the Petitioners argued, not open to entry by New Nadina pursuant to s. 11 of the *MTA*. The SRB determined that certain lands were not lands

under cultivation, and that once seasonal farming activities ceased, the remaining lands under review were not under cultivation and therefore subject to entry by a free miner.

[4] On judicial review, the decision of the SRB was affirmed by Madam Justice Donegan for reasons indexed as 2014 BCSC 2165. This dispute arises from the conflicting interests and rights of the parties with respect to the use of privately held lands. Both parties before us argue that the scheme of the *MTA* informs that interpretation, in particular the provisions dealing with free miners, recorded holders, rights of entry, and compensation, as well as the history of legislative change.

II. Background

[5] The Petitioners own lands comprising a ranch known as the Mission Outpost Ranch, New Nadina Unit (the "Ranch") which is approximately 45 kilometres south of Houston, B.C. The Petitioners purchased the Ranch in 2001. The Ranch lands include 3,000 acres held in fee simple. Another 40,000 acres are held under grazing permits.

[6] New Nadina is a publically traded junior mining company that holds mineral tenures with respect to minerals beneath the surface of the Ranch and adjacent parcels. New Nadina and its corporate predecessors have held mineral tenures in the area since 1915.

[7] The SRB set out the background facts as follows:

> [1] The Applicants, Donald Christmann and 0712249 BC Ltd. (of which Mr. Christmann is a part owner), own the Lands comprising the Mission Outpost Ranch, New Nadina Unit (the Ranch). The Ranch is located approximately 45 kilometers south of Houston, BC in a beautiful wilderness setting. The Respondent, New Nadina Explorations Limited (New Nadina) is a publically traded junior mining company that holds mineral tenures with respect to the minerals beneath the surface of the Lands and other adjacent parcels. This dispute arises from the conflicting interests and rights of these parties with respect to the use of these privately owned Lands.
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> [2] Mr. Christmann is a rancher and has been involved for many years in various aspects of the ranching industry. In early 2001, Mr. Christmann (and the numbered company with respect to some parcels) purchased the Ranch, formerly known as the Owen Lake Ranch, at the time comprising

> approximately 2,000 acres. Over time, he purchased additional neighbouring properties and obtained the Crown grant for an adjacent area that was previously a grazing lease. The Ranch now comprises approximately 3,000 acres. Additionally, Mr. Christmann holds grazing licenses over approximately 40,000 acres of Crown land in the area.
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> [3] Mr. Christmann moved to the Ranch in the summer of 2001. He typically resides at the Ranch from some time in the spring until into the fall and spends the winter in Arizona.
>
> [4] In recent years, the Mission Outpost Ranch has been operated as a cattle ranch in conjunction with another ranch property near Smithers, known as the Hudson Bay Unit. Generally, in the summer, although not for the last two summers, the New Nadina Unit of the Ranch is used to graze cow/calf pairs and yearlings. At the end of the season, the cattle are sent to market or overwintered in Smithers.
>
> [5] New Nadina's President and CEO is Ellen Clements. The corporate predecessor to New Nadina has held mineral tenure in the area since 1915. New Nadina and its corporate predecessors have engaged in mineral exploration activity in the area for many years. Since his purchase of the Ranch in 2001 and until recently, Mr. Christmann has given New Nadina permission to enter the Lands to conduct exploration activities.
>
> [6] Until his death in 2005, New Nadina was run by Ms. Clement's husband, George Stewart. Just prior to Mr. Stewart's death, New Nadina obtained test results indicating promise of a significant find. After taking some time to reflect upon her options following her husband's death, Ms. Clements decided she would take over the company and continue its exploration work. She visited the site in 2006 and 2007. In 2009, the company did some reclamation work from historical activity. New Nadina started exploration again in 2010. Mr. Christmann gave New Nadina permission to enter the Lands for this purpose.
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> [7] New Nadina conducted geophysical work during the summer of 2011 and did some drilling commencing in September of 2011 until mid October 2011. Mr. Christmann was not happy with the amount of disturbance created by this drill program.
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> [8] In June 2012, New Nadina provided notice, as required, to the landowners of its intention to enter the Lands to conduct various activities including surface drilling and trenching. Mr. Christmann objected to New Nadina entering portions of the Lands described as the Hay Meadows. The Chief Gold Commissioner was unable to resolve the dispute, and the landowners brought this application to the Board.
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> [Emphasis added].

[8] The Petitioners argued that the scheme of the *MTA* is to exempt from any mining activity, including entry by free miners, "land under cultivation" pursuant to s. 11(2) of the *MTA*. The Petitioners argued that the term "land under cultivation" includes land which is seasonally inactive.

[9] The SRB disagreed with the proposition that once cultivated, land continues to be "land under cultivation" and thus protected from entry by a free miner regardless of the seasonal nature of cultivation. It relied on the cases *Cofrin v. Bicchieri* (1977), 3 B.C.L.R. 122, *Janes v. Her Majesty the Queen*, 2006 NLCA 4, dictionary definitions, and its interpretation of the scheme of the *MTA*. Regarding the latter, it said:

> [40] The *Mineral Tenure Act*, in setting out exceptions to a miner's right of entry, and providing a dispute resolution mechanism where private landholders are affected by mining activity, is attempting to balance the interests of surface and subsurface rights holders engaged in competing uses of land. In that context, it does not make sense to deprive one right holder from making use of land that is not actively being used by the other right holder. The *Mineral Tenure Act* does not protect land "put" into cultivation, but land "under" cultivation, which as I have found above and in accordance with *Cofrin, supra*, implies a present and active state of cultivation and current activity contributing to the raising of a crop.
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> [Emphasis added.]

[10] The SRB held that "[g]iven the seasonal nature of activities for the purpose of raising a crop, it will only be on a seasonal basis that land will be presently and actively subject to activities for that purpose". It reasoned as follows:

> [42] While I agree the harvesting of a crop need not occur for land to be "under cultivation", I disagree that once cultivated, land continues to be "land under cultivation" and thereby protected from entry by a free miner, regardless of the seasonal nature of cultivation. While such a result makes sense in the context of determining whether there has been a discontinuance of a non-conforming use thereby rendering the non-conforming use no longer legal, it does not make sense in the context of the *Mineral Tenure Act* providing a legislative scheme to balance the rights and interests of competing legal uses of land. If it had been the legislature's intent to exclude from a free miner's right of entry to private land any cultivated or once cultivated land, the legislature could have easily chosen to exclude "cultivated land". Rather, it chose to exclude "land under cultivation", or land subject to a present and active state of cultivation for the purpose of raising a crop, acknowledging the seasonal nature of cultivation activities. Given the seasonal nature of activities for the purpose of raising a crop, it will only be on a seasonal basis that land will be presently and actively subject to activities for that purpose.
>
> [43] I find that the *Mineral Tenure Act*, in excluding "land under cultivation" from entry by a free miner, is intending to exclude land that is presently and actively subject to activities on the land for the purpose of nurturing and harvesting a crop and with the intent that a crop will be harvested in the

> present season. Once the crop is harvested, or is no longer capable of being harvested because of poor weather, infestation or disease, the land is no longer "under cultivation" until such activities begin on the land again the following season for the purpose of nurturing and harvesting a crop. In the context of a hay crop, it should not matter whether the hay is harvested and fed to the cattle later, or whether it is fed to the cattle *in situ* while they are turned out on the pasture, as long as the pasture can be said to be currently under cultivation for the purpose of improving the quantity and quality of the hay, as opposed to natural pasture. This interpretation not only gives the words their ordinary meaning and conforms to the interpretation set out in *Cofrin, supra*, but takes into consideration the purpose and intent of the legislation to provide a scheme to deal with the conflicting interests of rights holders engaged in conflicting uses of land.
>
> [Emphasis added.]

[11] In dealing with the property at issue the SRB distinguished between the Main Meadow, the South Meadow, and the West Meadow. With respect to the Main Meadow, the SRB found that it was currently land under cultivation but would lose that status later in the year. It reasoned thus:

> [44] Mr. Christmann's evidence was that he intended to hay the Main Meadow this season before the rattlebox goes to seed. He has rested and fertilized the Main Meadow in an effort at controlling the rattlebox and thus improving the quantity and quality of the hay, and has managed weeds and rose bushes for the same purpose. These are current activities to support the raising of a crop carried out with the intent of harvesting a crop. I find that as of the date of this arbitration, in early June 2013, the Main Meadow was "land under cultivation" within the meaning of the *Mineral Tenure Act*, and that the Main Meadow is "land under cultivation" for this growing season until either a crop is taken or the opportunity to harvest a crop has passed. Whether the Main Meadow will be "land under cultivation" next season will depend on whether it is subject to activities for the purpose of nurturing the hay either for harvest or for pasture at that time.
>
> [Emphasis added.]

[12] With respect to the West Meadow and South Meadow the SRB reasoned as follows:

> [45] The evidence does not disclose any recent activity on either the West Meadow or the South Meadow for the purpose of raising a crop either for harvesting or for pasture. The evidence discloses annual activity repairing fences, but I do not consider the building, repair, or maintenance of fences to fit the definition of cultivation, as these activities are not for the purpose of raising [a] crop, but for the purpose of separating and containing livestock. Mr. Christmann does not presently own any cattle and he did not provide evidence of any intent to turn cattle out onto the Hay Meadows this summer.

> As of early June 2013, and for this growing season, I find the West Meadow and the South Meadow are not “land under cultivation” within the meaning of the *Mineral Tenure Act*. Whether they will be “land under cultivation” next season will depend on whether they are subject to activities for the purpose of nurturing the hay either for harvest or for pasture at that time.
>
> [Emphasis added.]

[13] In the result, the SRB held that to be exempt from entry by a free miner for exploration purposes land must be presently and actively subject to activities for the purpose of raising a crop with the intent to harvest or pasture the crop in the current season. Thus, once the seasonal opportunity to harvest or pasture a crop has passed, land is no longer land under cultivation until such time as cultivation activities for the purpose of raising and harvesting or pasturing a crop begin again the following season. The land would therefore be subject to entry by a free miner for the limited purpose of exploration.

III. Legislative History

[14] Esson C.J.B.C., as he then was, described the purpose of the *MTA* in *Tagish Resources Ltd. v. Calpine Resources Inc.* (1991), 56 B.C.L.R. (2d) 286 as follows:

> The Mineral Tenure Act is the most recent version of a long line of statutes, beginning in the last century, regulating mining claims. There have been many amendments but the basic elements and the basic approach, particularly as they relate to staking and recording of claims, have not changed much in substance. In applying these statutes, the courts have consistently recognized the difficulties inevitably encountered by those who search for minerals in a wild and inaccessible land. The principal purposes of the Act are to encourage such activity and to provide a reasonably safe tenure for those who take risks and incur the expenses of exploration and development, all to the end that productive mines will come into being. …

[15] Saunders J.A., in *Klippert v. British Columbia (Gold Commissioner)*, 2003 BCCA 510 found:

> [32] The *Mineral Tenure Act* accomplishes the objectives described in *Tagish* through the free miner system. In his book *Canadian Law of Mining* (Calgary: Canadian Institute of Resources Law, 1993), Barry Barton describes the free miner system at p. 151:
>
>> The free entry system, also called the free miner or location system, permits the mineral operator to enter lands where minerals are in the hands of the Crown and obliges the government to grant exploration

> and development rights if the miner applies for them. ... If the applicant has met all the prerequisites for a claim or a mining lease, the minister has no discretion, but instead has a duty to issue the disposition.

[16] The history of mining legislation in British Columbia reflects ongoing shifts in the balance between the interests of mineral rights holders and surface rights holders. Early legislation granted expansive rights to miners. Pursuant to s. 35 of the *Gold Mining Ordinance*, 1867, a free miner had the exclusive right of entry upon his claim for "miner-like working thereof" and was entitled to all the proceeds. However, pursuant to s. 23, free miners were required to compensate prior occupants or owners for any damages sustained due to the free miner's entry.

[17] The Legislature soon bifurcated the mining regime, creating different rights for free miners and mineral claim holders. Under the *Mineral Act,* R.S.B.C. 1897, c. 135, while a free miner had the right to enter, locate, prospect, and mine on land, it was the holder of the mineral claim that was entitled to any minerals that were found. It was also at this time that the Legislature began to introduce restrictions on mining activities and protections for surface rights holders.

[18] Mining legislation in British Columbia underwent much iteration over the twentieth century, with the passage of the *Mineral Act*, R.S.B.C. 1948, c. 213, the *Mineral Act*, R.S.B.C. 1960, c. 244, the *Placer-mining Act*, R.S.B.C. 1960, c. 285, and the *Placer-mining Act*, S.B.C. 1974, c. 63, among others.

[19] By the mid-1980s, the balance between mineral and surface rights holders, as established in the *Mineral Act*, R.S.B.C. 1979, c. 259 ("*Mineral Act*"), and the *Mining (Placer) Act***,** R.S.B.C. 1979, c. 264 (the "*Mining "Placer" Act*"), had shifted in favour of surface rights holders. Both of these acts contained broad restrictions on exploration and mining activities on private land, including restricting access to "land under cultivation".

[20] The *Mineral Act* provided that:

> 6(1) Subject to this section, <u>a free miner may enter ... land in which minerals are reserved to the crown and prospect and explore for, locate, mine and produce minerals ...</u>

> 6(2) The right of entry under subsection (1) does not extend to
>
> (a) land occupied by a building;
>
> (b) the curtilage of a dwelling house;
>
> (c) orchard land;
>
> (d) land under cultivation; or
>
> (e) land lawfully occupied for mining purposes other than placer mining.
>
> [Emphasis added.]

[21] The *Mining (Placer) Act* similarly provided that:

> 2(3) Subject to this Act, the regulations and his free miner certificate, a free miner may enter and acquire a location on waste land within designated placer land to explore for, develop and produce ... a mineral in respect of which the right to develop and produce the mineral is reserved to or invested in the Crown in right of the Province …
>
> 2(5) For the purposes of subsection (3) waste land does not include land
>
> (a) reserved by the Province for a townsite;
>
> (b) occupied by a building;
>
> (c) falling within the curtilage of a dwelling house or orchard;
>
> (d) occupied as a military reservation; or
>
> (e) under cultivation.
>
> [Emphasis added.]

[22] In 1988, however, the regime underwent a significant overhaul. These two statutes were consolidated in the *Mineral Tenure Act*, S.B.C. 1988, c. 5, the precursor to the *MTA* now in effect. When the two statutes were combined, the language of s. 6 of the *Mineral Act* (now s. 11 of the *MTA*) was changed in a material way. The listed land uses in s. 6(2) remained protected from entry during exploration by free miners, but not during mining activities undertaken by recorded holders.

[23] Chief Justice Brenner noted in *Western Industrial Clay Products Ltd. v. British Columbia (Mediation & Arbitration Board),* 2001 BCSC 1458 at para. 46 that “[i]n the 1988 *MTA* there was no equivalent protection of the listed land uses during the

mining and production phase as had existed in the long-standing predecessor statute".

[24] The balance shifted again in 1995, when what became s. 20 was added to the *MTA,* creating a significant prohibition in relation to private land for all mining purposes. A free miner or recorded holder could not "…obstruct or interfere with an operation or activity…". When enacted, s. 16.1 (which became s. 20 in 1996) provided that:

> 16.1 A free miner or recorded holder must not obstruct or interfere with an operation or activity, or the construction or maintenance of a building, structure, improvement or work, on private land.

[25] As observed by Brenner C.J. in *Western Industrial Clay Products Ltd.*:

> [49] S. 20 does appear to be consistent with the longstanding historical protection given to surface land owners in respect of mining as well as exploration activity on their land. Although broadly crafted the section nonetheless seems to represent an attempt by the Legislature to balance the conflicting interests of the miner holding the subsurface rights and the private landowner holding the surface rights to land.

[26] Section 20 was repealed in 2002. At the same time, s. 19 was amended to add subsections 19(7), 19(8), and 19(9), to provide opposing holders with recourse to the Mediation and Arbitration Board (now the SRB).

[27] Subject to the arguments of the Petitioner herein, these new provisions appear to allow the SRB to determine what parts of the land will be affected by entry, to specify conditions of entry, and to specify appropriate compensation. In so doing, the SRB must consider the extent of the obstruction and interference with respect to a number of factors, including "land under cultivation". The 2002 amendments removed the provisions designed to prohibit entry and use, and replaced them with provisions designed to establish conditions and compensation for such use.

[28] In 2004 the Legislature introduced the *Mineral Tenure Amendment Act*, *2004*, S.B.C. 2004, c. 22 (*MTAA*), which provided a statutory basis for the implementation of the Mineral Title Online Project (MTO). Under the MTO, instead of erecting claim posts, free miners can acquire claims through a "point and click" online system.

With the introduction of the MTO, free miners no longer need to physically enter available lands to stake or locate their claims. However, s. 11 of the *MTA* continues to refer to free miners entry to land to explore for minerals.

[29] I have set out a brief summary of the legislative history above. In my view this history illustrates that in balancing the interests of surface and subsurface rights holders, the Legislature has intentionally shifted the fulcrum at various times in accordance with the policy of the day.

IV. Discussion and Analysis

[30] The Petitioners have two main grounds of appeal. First, they submit that the limitations to entry by free miners enshrined in s. 11 of the *MTA* also curtail the rights of recorded holders subject to s. 14, including land under cultivation. Second, they submit that “land under cultivation” remains under cultivation regardless of seasonal inactivity, contrary to the interpretation preferred by the SRB and the judge below. For reasons to follow, I find neither of these arguments convincing.

A. Scheme of the Act

[31] The *MTA* differentiates between free miners and recorded holders. The respective definitions in s. 1 of the *MTA* are as follows:

> **“free miner”** means a person who holds a valid and subsisting free miner certificate issued under this Act or any of the former Acts;
>
> …
>
> **“recorded holder”** means a person whose name appears as the owner of the mineral title on the record of that title in the registry;

[32] A free miner has a right to “enter mineral lands to explore for minerals or placer minerals” (s. 11(1)). Mineral lands are defined as:

> **“mineral lands”** means lands in which minerals or placer minerals or the right to explore for, develop and produce minerals or placer minerals is vested in or reserved to the government, and includes Crown granted 2 post claims;

[33] The right of entry of a free miner does not extend to certain listed exceptions (s. 11(2)) including “land under cultivation” (s. 11(2)(d)):

> 11(1) Subject to this Act, only a free miner or an agent of a free miner may enter mineral lands to explore for minerals or placer minerals.
>
> (2) The right of entry under subsection (1) does not extend to
>
> (a) land occupied by a building,
>
> (b) the curtilage of a dwelling house,
>
> (c) orchard land,
>
> (d) land under cultivation,
>
> (e) land lawfully occupied for mining purposes, except for the purposes of exploring and locating for minerals or placer minerals as permitted by this Act,
>
> (f) protected heritage property, except as authorized by the local government or minister responsible for the protection of the protected heritage property, or
>
> (g) land in a park, except as permitted by section 21.
>
> (h) [Repealed 2004-22-9.]
>
> [Emphasis added.]

[34] On the other hand, a recorded holder has the following rights:

> 14(1) Subject to this Act, a recorded holder may use, enter and occupy the surface of a claim or lease for the exploration and development or production of minerals or placer minerals, including the treatment of ore and concentrates, and all operations related to the exploration and development or production of minerals or placer minerals and the business of mining.
>
> [Emphasis added.]

[35] An important caveat on a recorded holder's exercise of these rights is a required permit:

> 14(2) Despite subsection (1), no mining activity may be done by the recorded holder until the recorded holder receives the permit, if any, required under section 10 of the *Mines Act*.
>
> [Emphasis added.]

[36] Both free miners and recorded holders are liable to compensate the owners of a surface area for loss or damage:

> 19(2) A free miner or recorded holder, or any person acting under or with the authority of a free miner or recorded holder, is liable to compensate the owner of a surface area for loss or damage caused by the entry, occupation or use of that area or right of way by or on behalf of the free miner or

> recorded holder for location, exploration and development, or production of minerals or placer minerals.
>
> [Emphasis added.]

[37] The Petitioners emphasize the opening words of s. 14(1) "[s]ubject to this Act". The Petitioners say that this phrase incorporates the exceptions on a free miner's right to explore contained in s. 11(2) into a recorded holder's rights under s. 14(1).

[38] The Petitioners advance three main arguments: (1) the language of the statute supports their interpretation; (2) unless the exclusions in s. 11(2) are incorporated into s. 14(1) of the *MTA* the exclusions in s. 11(2) are meaningless; and (3) their position is supported by an historical analysis of the *MTA*.

[39] I do not think the language of the statute assists the Petitioners in their proposed interpretation. The statute expressly differentiates between free miners and recorded holders in the definitions contained in s. 1 of the *MTA*, in the rights conferred in s. 11 and s. 14, and in affording compensation in s. 19(2). Expressly differentiating between free miners and recorded holders suggests that rights or restrictions on one rights holder do not necessarily apply to a different rights holder.

[40] Moreover, if the Legislature had intended that the exceptions to a free miner's activity contained in s. 11(2) applied to a recorded holder under s. 14(1) of the *MTA* it could have said so expressly. This interpretation does not leave the phrase "[s]ubject to this Act" without meaning. The recorded holder's rights are circumscribed by s. 14(2) of the *MTA,* which requires a permit before "any work" can be undertaken on a mine by recorded holders.

[41] The Petitioners argue that unless the exclusions in s. 11(2) are incorporated into s. 14(1) of the *MTA*, the exclusions in s. 11(2) are "meaningless". I disagree.

[42] A free miner has a right only to enter on lands and explore. A recorded holder may "use, enter and occupy the surface of a claim … for the exploration and development or production of minerals" in accordance with s. 14. Prior to any

mining activity the recorded holder must receive a permit as required under s. 10(1) of the *Mines Act*, R.S.B.C. 1996, c. 293, pursuant to s. 14(2) of the *MTA*.

[43] To obtain a permit and thus start "any work in, on or about a mine" a recorded holder must file plans outlining details of the proposed work and a program for protection and reclamation of the land. Section 10(1) of the *Mines Act* reads as follows:

> 10(1) Before starting any work in, on or about a mine, the owner, agent, manager or any other person must hold a permit issued by the chief inspector and, as part of the application for the permit, there must be filed with an inspector a plan outlining the details of the proposed work and a program for the conservation of cultural heritage resources and for the protection and reclamation of the land, watercourses and cultural heritage resources affected by the mine, including the information, particulars and maps established by the regulations or the code.
>
> [Emphasis added.]

[44] The terms and conditions of the permit may include the following:

> 10(2.01) Without limiting subsection (1.1) or (2), terms and conditions imposed under those subsections may include terms and conditions respecting any or all of the following:
>
> (a) the provision of security in the manner and for purposes similar to those described in subsections (4) and (5);
>
> (b) notification and reporting requirements;
>
> (c) the use of qualified professionals;
>
> (d) environmental protection and reclamation;
>
> (e) public health and safety.
>
> [Emphasis added.]

[45] Thus, while a free miner has the right to explore lands subject to the exclusions listed, it is only once a free miner becomes a recorded holder and does what is required under the *Mines Act* that a permit to start "any work" can be obtained. Both a free miner and a recorded holder are subject to terms and conditions and the paying of compensation. Any differences arising between rights holders are subject to dispute resolution by the Chief Gold Commissioner and the

SRB. The appellants' argument that works by a recorded holder merely requires paying a "token registration fee" is not supported by the statutory provisions.

[46] The Petitioners' second argument is that the new online registration system renders entry by a free miner unnecessary. The online registration system replaces an on-the-ground system of staking a claim, such as two-post claims, with the ability to locate a claim to an area of land electronically with the use of digitized maps.

[47] First, this argument, in my opinion, is one that would require factual findings which are simply not part of the record before us. There is no suggestion in the findings below that a free miner's right of physical exploration has somehow become unnecessary because of an online system of registering or 'locating' claims. That does not mean an online system lacks utility. Such a system may avoid the pitfalls referred to in *Klippert* (a lost post) or challenges referenced by Crease J. in *Granger v. Fotheringham* (1894), 3 B.C.R. 590 (an argument that the length of a claim invalidated it) or Hunter C.J.B.C. in *Docksteader v. Clark* (1903), 11 B.C.R. 37 (mislocation).

[48] Ancillary to this argument the Petitioners say that "entry" in s. 11 is not physical entry but notional entry by the location through the online registration system. I am unable to conclude that the use of the terms "enter" and "entry" in the *MTA* are now restricted in the manner suggested simply by the creation of an online registration system. In my view there is nothing in the statutory language that compels an interpretation which departs from the ordinary meaning of these words.

[49] The third argument of the Petitioners is that the history of the statutory provisions supports the interpretation it advances. As I have said, in my view the legislative history indicates that the balancing between the rights of surface holders and sub-surface holders is something that has changed over time. Regard must be had to the enactment as it now reads.

[50] The high water mark favouring surface rights brought about by the introduction of s. 20 in the 1995 statute has been replaced by a system of permits,

arbitration, and compensation. Although I agree that legislation should be considered in context, there is nothing in the historical legislative context here that requires an interpretation different from the ordinary meaning of the words employed.

B. Land Under Cultivation

[51] As the matter comes to us, the central issue in the case is the meaning of the phrase "land under cultivation" as it occurs in s. 11(2) of the *MTA.* Both the SRB and the judge below considered and accepted the interpretation of that phrase used by Fulton J. in *Cofrin v Bicchieri* (1977), 3 B.C.L.R. 122.

[52] In *Cofrin*, the contest was between an owner of property near the Quesnel River and a free miner under the *Placer Mining Act*, S.B.C. 1974, c. 63. Under that statute a free miner could "enter and acquire a location on waste land" but the term "waste land" specifically excluded land under cultivation. Fulton J. said at p. 139:

> Turning then to the effect of the exclusions from the land on which the right of entry and operation is given, in my view the only specific exclusion which needs to be considered here is land "within the curtilage of a dwelling-house". There are no orchards here, no land occupied by a building has been entered, and apart from Addy's garden — which was not entered — the land is not actually under cultivation. With respect to that exclusion, the words used are not "arable land" or "land capable of being cultivated" or "farm land" or any other such words of general import: the expression is land "under cultivation". In my view these words clearly denote not a past state or a potential or planned use, but a present actual state of being cultivated. The lands entered here are not in that category.
>
> [Emphasis added.]

[53] The SRB and the judge below also made reference to the decision of Welsh J.A., speaking for the court in *Janes v. Her Majesty the Queen*, 2006 NLCA 4. In that case, the Crown granted Mr. Janes a lease for agricultural land which required him to "put in cultivation" portions of the lease area according to a schedule. The court opined that for land to be put in cultivation some activity was required to nurture soil and plants with a view to producing a crop, and would include land lying fallow for a period of time as part of an agricultural plan. The SRB and judge below

found that the phrase "land under cultivation" has a more narrow meaning than "land put in cultivation".

[54] The appellant argues that land under cultivation does not lose its status as such in the off-season. It argued that non-conforming use cases in municipal law should be applied to the concept of cultivation in the *MTA*. The SRB and the judge below rejected that notion. The judge below said this:

> [106] Ms. Vickers also considered another argument advanced by the petitioners in favour of their interpretation that the status of land as "land under cultivation" is not lost during the "off-season". Again, I agree with her analysis that such a result makes sense in the context of determining whether there has been a discontinuance of a non-conforming use of land, thereby rendering that non-conforming use no longer legal, but it does not make sense in the context and scheme of the *MTA*. The scheme set out in ss. 11 through 19 of the *MTA* is much different. It is directed at balancing competing legal uses of land and addressing potential conflicts between surface and subsurface rights holders. If the Legislature had intended to exclude a free miner's entry for exploration to private land on any "cultivated" land, it could have chosen to use the phrase "cultivated land". Rather, the Legislature specifically chose the phrase "land under cultivation", words that, in my view, clearly connote a present and active state of cultivation for the purpose of raising a crop.
>
> [Emphasis added.]

[55] Both the SRB and the judge below considered the phrases "land put in cultivation", "cultivated land", and "land under cultivation". In this case the Legislature chose to exclude only land "under cultivation" from exploration by free miners.

[56] In my view the court and tribunal below did not err in finding that, in the context of this statute, the phrase "land under cultivation" connotes a present and active state of cultivation.

[57] Whether any particular land is land under cultivation for the purposes of these statutory provisions must be examined at a point in time and is highly context driven. That is the focus of the reasoning of the SRB as quoted above in paras. 11 and 12 of these reasons with respect to the seasonal use of ranch lands and hay fields. I

see no error in the reasoning of the SRB as it was applied in this case to these lands.

V. Conclusion

[58] In the result, I would dismiss the appeal.

"The Honourable Mr. Justice Savage"

I agree:

"The Honourable Mr. Justice Groberman"

I agree:

"The Honourable Mr. Justice Goepel"