IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Christmann v. New Nadina Explorations Limited,* 2014 BCSC 2165

Date: 20141119
Docket: 49418
Registry: Kamloops

Between:

C. Donald Christmann and 0712249 B.C. Ltd.

Petitioners

And

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

Respondents

Before: The Honourable Madam Justice Donegan

On judicial review from: An order of the Surface Rights Board, dated September 4, 2013

Reasons for Judgment

Counsel for the Petitioners:	J.G. Frame
Counsel for the Respondent, New Nadina Explorations Limited:	S. Hirji
Place and Date of Hearing:	Kamloops, B.C. June 11, 2014
Place and Date of Judgment:	Kamloops, B.C. November 19, 2014

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INTRODUCTION

[1] The petitioners own a ranch near Houston, British Columbia. The respondent, New Nadina Explorations Ltd. ("New Nadina"), a mining company, holds mineral tenures with respect to minerals beneath the surface of certain portions of that ranch. In June of 2012, New Nadina gave notice to the petitioners that it intended to enter an area of the ranch to conduct various mining exploration activities. The petitioners objected to New Nadina entering an area of the ranch described as the "Hay Meadows", as the petitioners felt those lands were protected from entry as "land under cultivation" under the *Mineral Tenure Act*, R.S.B.C. 1996, c. 292 [*MTA*].

[2] Unable to resolve this issue, the petitioners brought it before the Surface Rights Board ("SRB") for determination. Following a three-day hearing, the SRB issued written reasons on September 4, 2013, determining that two portions of the Hay Meadows (the south and the west meadows) were not "lands under cultivation", but that the main meadow was (the "Decision").

[3] The petitioners have applied for judicial review of the Decision, but are not seeking to set aside the findings of the SRB in relation to the Hay Meadows. Rather, they seek to have the court set aside the SRB's interpretation of s. 11 of the *MTA* as incorrect and have the court define the phrase "land under cultivation", as used in the *MTA*.

[4] New Nadina takes the position that the SRB's interpretation of the legislation was correct and the petition ought to be dismissed. The Attorney General of British Columbia ("AGBC") also filed a response to this petition, but limited its response to the form of relief sought and how the issues ought to properly be framed. Counsel for the AGBC did not attend the hearing of this petition.

FACTS

[5] The facts are not in dispute.

[6] The petitioners, C. Donald Christmann and 0712249 B.C. 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 kilometres south of Houston, British Columbia. 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.

[7] Mr. Christmann is a rancher. In early 2001, he (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.

[8] Mr. Christmann moved to the Ranch in the summer of 2001. He typically resides there each spring through fall and spends the winter in Arizona. In recent years, the Ranch has been operated as a cattle ranch in conjunction with another property near Smithers, known as the Hudson Bay Unit. Generally, in the summer,

although not for the summers of 2011, 2012 and 2013, 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.

[9] The President and Chief Executive Officer of New Nadina is Ellen Clements. The corporate predecessor to New Nadina has held mineral tenure in the area since 1915. New Nadina and its corporate predecessor have engaged in mineral exploration activity in the area for many years. Since his purchase of the Ranch in 2001 and for the next years, Mr. Christmann gave New Nadina permission to enter the Ranch to conduct exploration activities.

[10] Until his death in 2005, New Nadina was run by Ms. Clements' husband. Just prior to his death, New Nadina obtained test results indicating promise of a significant find. Ms. Clements decided to take over the company and continue its exploration work. In 2009, New Nadina conducted some reclamation work from historical activity and then started exploration again in 2010. Mr. Christmann gave New Nadina permission to enter the Ranch for this purpose.

[11] New Nadina conducted geophysical work during the summer of 2011 and did some drilling in September and October of 2011. Mr. Christmann was not happy with the amount of disturbance created by this drilling program.

[12] In June of 2012, New Nadina provided notice, as required, to the petitioners of its intention to enter the Ranch to conduct various activities, including surface drilling and trenching. Mr. Christmann objected to New Nadina entering portions of the Ranch described as the "Hay Meadows", as he felt this area was protected from entry as "land under cultivation", pursuant to s. 11(2) of the *MTA*. As required, the parties took their dispute to the Chief Gold Commissioner, who was unable to resolve it. The petitioners then brought an application before the SRB for a determination of this issue.

THE SRB DECISION

[13] The Decision was made by the Chair of the SRB, Cheryl Vickers. For ease of reference, she divided the lands at issue, the Hay Meadows, into three areas - the Main, South and West Meadows. She ultimately found that the South Meadow and the West Meadow were not “land under cultivation”, but that the Main Meadow was “land under cultivation”, as of the time of the hearing.

[14] In reaching these conclusions, Ms. Vickers provided organized and thorough reasons. Ms. Vickers’ analytical framework saw her answering three questions:

1. What is meant by the words “land under cultivation” in the *MTA*?
2. What is the evidence of “cultivation” on the Hay Meadows?
3. Applying the meaning of “land under cultivation” in the *MTA* to the evidence, are all or part of the Hay Meadows “land under cultivation?”

[15] In considering the first of these questions, Ms. Vickers began her analysis with reference to the well-known functional and pragmatic approach to statutory interpretation set out in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27. She then went on to consider the plain and ordinary meaning of the words used, judicial interpretation of the phrase, and the purpose and scheme of the *MTA* to interpret the meaning of “land under cultivation” in this context. Ms. Vickers wrote at paras. 15-21 of the Decision:

> **ANALYSIS OF LAW AND EVIDENCE**
>
> [15] I start my analysis by considering what is meant by the words "land under cultivation"' in the *Mineral Tenure Act.* It is well established that the words of an enactment must be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament (*Rizzo & Rizzo Shoes Ltd. v. Zibbler, Siblin & Associates, Inc.. et* at, [1998] 1 SCR 27). Next I will discuss the evidence of cultivation on the Hay Meadows. Finally, I will consider whether all or part of the Hay Meadows is land under cultivation” within the meaning of the *Mineral Tenure Act.*
>
> What is “land under cultivation" within the meaning of the *Mineral Tenure Act*?
>
> [16] I start with the meaning of “cultivation”. According to the Dictionary of Canadian Law, Fourth Edition, “cultivation* is "the preparation and use of land

to raise a crop". The Oxford English Dictionary offers "the tilling of land; tillage, husbandry" and "the bestowing of labour and care upon a plant, so as to improve its qualities; the raising of a crop by tillage". Cultivation, therefore, may involve a number of activities including preparing the land, seeding, fertilizing and controlling weeds, all for the purpose of raising a crop.

[17] As to the phrase "land under cultivation", the only judicial authority considering this phrase is the 1977 decision of the Supreme Court of British Columbia in [*Cofrin*] *v. Bicchieri,* 1977 CanLii 354. That case involved an interpretation of the then in force *Placer Mining Act,* which provided that a free miner may enter and acquire a location on waste land within designated placer land for the purpose of exploring for, developing and producing a mineral. The Act went on to provide that

> "waste land does not include land...
>
> b) occupied by a building; or
>
> c) falling within the curtilage of a dwelling house or orchard; or...
>
> b) e) under cultivation

[18] In that case, the Plaintiff landowner sought an injunction to prevent the Defendants, miners and holders of placer leases, from entering the land and conducting exploration activities. The Plaintiff had allowed two individuals, Addy and Matthews, to rehabilitate and move into two old cabins on the land. Both individuals planted gardens, and Addy kept chickens and horses. The Defendant had entered and conducted mining activities on the land only 50 yards from Addy's cabin. In considering whether the land was excluded from the right of entry by virtue of the restrictions in the legislation, Fulton J. said:

> **"...** 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)

[19] Fulton, J. went on to conclude that the mining activity had been conducted on land within the curtilage of a dwelling house and was, therefore, excluded from right of entry by a miner

[20] The scheme of the *Mineral Tenure Act* is to set out the rights and obligations of free miners and recorded holders of mineral tenure with respect to their mining activities on crown and private land, and to provide a mechanism for resolving disputes between private land owners and free miners or recorded holders arising from their competing interests and

> conflicting uses of private land. I note that section 11 of the *Mineral Tenure Act* only deals with the rights and restrictions of free miners to explore for minerals. The restriction on a free miner's right to enter "land under cultivation'' to explore for minerals does not necessarily apply to mining activity inclusive of exploration, development and production of minerals Section 19 of the *Mineral Tenure Act,* deals with disputes between persons and private landowners when terms of access to private land for mining activities, including exploration, development and production of minerals, is not agreed. Section 19(7) provides that where a landowner opposes entry to land by a recorded holder on the grounds that the intended activity would obstruct or interfere with an existing operation or activity on the land, the Surface Rights Board must determine the impact and which parts of the land would be affected. Section 19(8) requires the Board to make an order specifying conditions that will minimize obstruction or interference with the existing circumstances of the land when it determines it is not possible to enter the land without obstruction or interference. Section 19(9) requires that the Board take into account the extent of the obstruction or interference with land under cultivation.
>
> [21] In the context of this legislative scheme, Fulton J. 's conclusion that the words "land under cultivation" import a temporal element and "denote not a past state or a potential or planned use, but a present actual state of being cultivated" is compelling. I find that to be "land under cultivation" within the meaning of the *Mineral Tenure Act,* the land must be presently and actively subject to activities for the purpose of raising a crop.

[16] Having determined the meaning of "land under cultivation" in the *MTA*, Ms. Vickers then turned to the second issue - a review of the evidence. It is clear from the record the facts were not all that contentious. Although the petitioners do not take issue with the factual findings, I will review them for context and completeness.

[17] The Hay Meadows, described as the "heart" of the Ranch, comprise approximately 400 acres. They are fenced off into three areas, which Ms. Vickers referred to as the "West Meadow", the "Main Meadow" and the "South Meadow".

[18] A number of witnesses testified before the SRB about the history of and activities performed on the Ranch. Prior to being purchased by Mr. Christmann, the Ranch (then known as the Owen Lake Ranch) was owned by Mr. and Mrs. Vandenburg. The Vandenburgs purchased it in 1991, and used it to raise cattle and grow hay. They had a cow/calf operation until 1998 and then a yearling operation until they sold to Mr. Christmann. The Vandenburgs regularly took hay crops off the Hay Meadows. Once their operation reached about 140 head of cattle, they no

longer took hay off the West Meadow, but did use it for grazing. They had soil analyzed and fertilized the Main Meadow in accordance with soil test results to maximize hay production, but did not fertilize the West Meadow. Mr. Vandenburg constructed most of the existing fences creating three separate pastures for grazing and breeding. He seeded some of the area with oats that were cut and baled for silage, and later seeded with different grasses. The Main Meadow produced really well and he never had to seed it. He sprayed daisies as necessary and removed rocks from the meadows.

[19] Lori Engelhart lived at Owen Lake Ranch from 1979 until 1982, when it was used to run cattle. She explained that the Ranch was hayed from June to September in order to put up feed for the cattle. The Hay Meadows were disced, harrowed, and seeded with either oats or grass during that time and rocks were removed. Mrs. Englehart and her husband continued to hay the Owen Lake Ranch in the late 1980s and early 1990s when they owned another nearby ranch, High Lonesome. Mrs. Engelhart explained that High Lonesome was infected by rattlebox as a result of hay being brought over from Owen Lake Ranch. High Lonesome was eventually purchased by Mr. Christmann, and is now part of the Ranch.

[20] Dave Jaarsma ran cow/calf pairs on the Ranch in approximately 2000 and 2001. In 2001, Mr. Jaarsma hayed the Main Meadow. Charlie McClary, Mr. Christmann's ranch manager and a part owner of 0712249 B.C. Ltd., cropped some of the Hay Meadows in the ensuing couple of years. He confirmed that a hay crop has not been harvested from the Hay Meadows since 2003 or 2004.

[21] From 2003 until 2012, Jessie Vandenbroek worked summers at the Ranch as a general ranch hand. She was involved with repairing fences, spraying weeds, and moving cattle around.

[22] Mr. Christmann testified that he had used the West Meadow as a yearling steer pasture and has not had the need to hay it. The Main Meadow was typically used to pasture cow/calf pairs while they "mother up" and before being sent out onto the range lands to graze. The South Meadow had been used for heavy steer

pasture. Typically, the cattle went out on the Ranch in May and were taken in in September; however, at the time of the SRB hearing, Mr. Christmann no longer owned any cattle. He testified was that he was in the process of dissolving his business partnership and that the cattle were owned by his business partner. He further testified that he did not put cattle out in 2011 in order to allow New Nadina to do some geophysical and exploration work. In 2012, he could not put cattle out because of extensive surface damage from the 2011 mining operations and concerns about traffic, containment, and keeping the cattle quiet so as to promote weight gain. Mr. Christmann did not provide evidence of his intention with respect to use of the Hay Meadows for cattle in 2013 and 2014.

[23] Since purchasing the Ranch, Mr. Christmann made a number of improvements to structures, including redoing the barn, adding living quarters, and upgrading the shop. He also built a new house and maintained the perimeter and internal fencing, extending some internal fencing in a swamp area.

[24] Mr. Christmann also described work he has done to the land itself. He has applied fertilizer to portions of the Main Meadow to combat rattlebox in one area and low production in another. He re-seeded damaged areas and every year for the last eight years, has treated areas of the Main Meadow for invasive weeds. He mows areas of the Main Meadow to keep rose bushes from getting out of control.

[25] Rattlebox has been a particular concern. It “chokes out” hay. Mr. Christmann testified that three areas of the Main Meadow are infected by rattlebox. He has tried to eradicate it by fertilizing and then resting the land. He has not hayed the fields while infected with rattlebox for three reasons: (1) he feels it is not worthwhile in light of the reduced yield; (2) haying just spreads the rattlebox seed; and (3) he has not had the need of hay as he has not run yearlings. He has taken advice that it is better to let the fields rest until the rattlebox “runs its course” and eventually chokes itself out. Mr. Christmann indicated he was planning to hay the infected areas this year before the rattlebox went to seed in another effort at eradication.

[26] Mr. Christmann has not seeded the Hay Meadows other than to re-seed damaged areas, such as areas where the mineral feeders for the cattle are put out.

[27] Ms. Vickers summarized the evidence with respect to activities on the Hay Meadows at paragraph 34 of the Decision:

> [34] The evidence discloses the Hay Meadows were disced, harrowed and seeded in the 1980s. They were hayed in the 1970's and were regularly cropped during the 1980's and 1990's and occasionally seeded. They were hayed in the early 2000s, the last crop being taken in either 2003 or 2004. Although no crop has been taken for approximately 10 years, the meadows, and in particular the Main Meadow has been recently fertilized and is maintained for weeds continuing until the present time. All of the meadows have been used for pasture, although not in the last two seasons.

[28] On the basis of this evidence, Ms. Vickers concluded that the Hay Meadows are "cultivated", but recognized that this finding did not go far enough. She went on to consider the third issue - whether part or all of the Hay Meadows are "land under cultivation" in the *MTA*. In doing so, Ms. Vickers fully considered the arguments advanced by the petitioners, which I will set out now.

(a) "Cultivated Land" vs. "Land Under Cultivation"

[29] In concluding that these phrases encompass two different concepts in the *MTA*, Ms. Vickers wrote at paragraphs 35-36:

> [35] I find that all of the Hay Meadows are cultivated in the sense that they have been tilled and seeded, fertilized and managed for weeds, for the purpose of harvesting a crop, namely hay, and in earlier years for oats. They are not natural pasture as assumed by Ms. Clements. The Statistics Canada Glossary of agricultural terms describes "natural land for pasture" as "Areas used for pasture that have not been cultivated and seeded, or drained, irrigated or fertilized...." In accordance with this definition, while used for pasture, the Hay Meadows are not natural pasture, but have been cultivated.
>
> [36] The exemption from the right of entry does not apply to "cultivated land" however, but to "land under cultivation". Relying on the interpretation of "land under cultivation" in *Cofrin, supra,* New Nadina argued that the land is not actively under cultivation because no crop had been taken for approximately 10 years. The landowners, on the other hand, argued a crop is not necessary for the land to be actively under cultivation, but is only a component of cultivation. In support, counsel referred me to judicial interpretation of a similar phrase.

(b) "Put in Cultivation" vs. "Land Under Cultivation"

[30] Ms. Vickers reached the same conclusion in considering these two phrases. The meaning of the phrase "put in cultivation" was considered by the Newfoundland and Labrador Court of Appeal in *Janes v. Newfoundland*, 2006 NLCA 4, in the context of a Crown lease requirement. The petitioners sought to have "land under cultivation" interpreted in a similar fashion in the case at bar. In concluding the phrases mean different things, Ms. Vickers wrote:

> [37] In *Janes v. Her Majesty the Queen in Right of Newfoundland,* 2006 NLCA 4, the Newfoundland and Labrador Court of Appeal considered the meaning of the phrase "put in cultivation" in a Crown lease. Under the lease, the lessee was required to "put in cultivation" a minimum portion of the leased area within specified time frames in order to be entitled to receive a Crown grant of the land in accordance with the *Crown Lands Act.* The only activity undertaken by the lessee to satisfy the lease criteria was to spread manure on the land. While the Court found that "[t]he phrase 'put into cultivation' carries with it a connotation beyond mere preliminary activity on the land, such as the spreading of manure," "[t]he actual harvesting of a product is not an essential component of putting land into cultivation since, for example, crops may fail." In concluding that "taking sufficient steps with the reasonable objective of harvesting is a necessary component" to putting land into cultivation, the Court said:
>
> > The phrase "put into cultivation" incorporates...a consideration of a product to be produced. In my view, while planting crops would be sufficient to constitute putting land into cultivation, it is not necessarily an essential component. For example land may be put into cultivation using plants already established such as wild blueberries or grasses harvested for hay. However, in either case, putting land into cultivation would require activity by the farmer to nurture the soil and plants in the process of producing a product. This may, of course, include land lying fallow for a period of time as part of an agricultural plan. However, the spreading of manure, by itself, is simply an activity undertaken on the land, which may improve the fertility of the land, but which, in the absence of something more, would not produce a product.
>
> [38] Although not binding upon me, this consideration of the phrase "put in cultivation" or "put into cultivation" is instructive. Cultivation is a state of being as a result of purposeful activities to produce a crop. Land can be said to be "under cultivation", if activities are presently and actively being conducted on the land for the purpose of producing a crop. I agree that a crop may not necessarily result, but the activities on the land must be for the purpose of producing a crop and collectively capable of achieving that result,
>
> [39] I do not agree, however, that "under cultivation" has the same meaning as "put in cultivation" and imports a continued state of being in the

> absence of current purposeful activity. I am not convinced, as suggested in *Janes,* that land lying fallow as part of an agricultural plan, will constitute "land under cultivation" within the meaning of the *Mineral Tenure Act.* I agree that it makes sense in the context of determining whether sufficient activity constitutes putting land into cultivation for the purpose of obtaining a crown grant, that leaving land lying fallow as part of an agricultural plan should be considered land that has been “put in cultivation." In that way, a farmer whose land happens to be in fallow in accordance with an agricultural plan at the relevant time for determining whether he is eligible to obtain a crown grant will not be deprived of the opportunity to obtain the grant. That context is very different, however, from the context of the *Mineral Tenure Act.*
>
> [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.

(c) The “Off-Season” - *Local Government Act*

[31] Next, Ms. Vickers considered the petitioner’s argument that the law of discontinuance and commitment to use under the *Local Government Act*, R.S.B.C. 1996, c. 323 could be instructive support for the argument that land does not lose its status as “land under cultivation” in the “off-season”. In rejecting this argument, Ms. Vickers wrote:

> [41] Mr. Christmann relied on the law of discontinuance and commitment to use under the *Local Government Act* to argue that land under cultivation did not cease to be land under cultivation as a result of short periods of discontinued use or because of seasonal use. The *Local Government Act* provides that uses of land that do not conform to a bylaw when the bylaw is enacted may continue unless the non-conforming use is discontinued for a specified period of time. In that context, the Court of Appeal has held that a commitment to use is equivalent to the use itself and that use is not discontinued because one activity of many that constitutes the use has ceased temporarily (*Cowichan Valley (District of) v. Ward,* 1994 CanLII 427, and *Cowichan v.Yole* [1988] BCJ No 2448). Counsel argued failure to undertake specific activities involved in cultivating land, including failure to harvest a crop, did not take away from the land’s status as “land under cultivation". He referred to the specific exception in the *Local Government Act* to the loss of permission for a non-conforming use if discontinuance is part of a normal seasonal or agricultural practice.

> [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.

(d) Meaning of "Land under Cultivation"

[32] In the end, Ms. Vickers concluded the phrase "land under cultivation" in the *MTA* means:

> [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.

[33] In applying that meaning to the evidence, Ms. Vickers concluded at paragraphs 44-45:

> [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.
>
> [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 of 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.

[34] Ms. Vickers summarized her conclusions at paragraphs 46-48 of the Decision:

> [46] To be exempt from entry by a free miner for exploration purposes, "land under cultivation" 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. In the absence of current cultivation activities with intent to harvest or pasture a crop, land is not “land under cultivation” within the meaning of the *Mineral Tenure Act.* Once the seasonal opportunity to harvest or pasture a crop has passed, the land is no longer “land under cultivation" within the meaning of the *Mineral Tenure Act* until such time as cultivation activities for the purpose of raising and harvesting or pasturing a crop begin again the following season.
>
> [47] As the Main Meadow is presently subject to cultivation activities for the purpose of harvesting a crop, it is presently “land under cultivation” and not presently subject to right of entry for exploration purposes. The West Meadow and the South Meadow are not presently and actively subject to cultivation activities for the purpose of harvesting a crop and are not, therefore, land under cultivation within the meaning of the *Mineral Tenure Act*.
>
> [48] The Board has not been asked in the context of this application to determine terms and conditions of New Nadina’s use of the Lands that are not land under cultivation. Nor has the Board been asked to make orders specifying conditions that will minimize obstruction to or interference with respect to land under cultivation, pursuant to section 19 of the *Mineral Tenure*

> *Act*, or to resolve compensation payable for entry to and use of these privately held Lands. I expect that the parties will attempt to resolve between themselves any such issues that may arise. If they are not able to, either party is at liberty to seek the Board's assistance.

ISSUE AND RELIEF SOUGHT

[35] Unusually, the petitioners do not seek to set aside the orders made by the SRB in relation to the Hay Meadows. Rather, they seek an order setting aside the SRB's interpretation of "land under cultivation" pursuant to s. 11(2) of the *MTA* on the basis that its interpretation was incorrect. The petitioners further ask the court for an order defining "land under cultivation" as used in the *MTA*, in accordance with the petitioners' interpretation.

[36] The respondent, AGBC, supported by New Nadina, submits that the relief sought by the petitioners is ill-framed. With respect, I agree. The *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 does not allow a reviewing court to set aside, *per se*, conclusions of law expressed in the order under review. In other words, the reviewing court's power to grant declaratory relief does not enable the petitioner to seek an opinion from the reviewing court on the proper interpretation of a statute.

[37] However, a reviewing court does have the power to make a declaration in relation to the SRB's exercise of its statutory power. In this case, the SRB's exercised statutory power was pursuant to s. 19(4) of the *MTA* to "settle the issues in dispute". A reviewing court has the power to make a declaration in relation to whether the exercise of that power in settling the issue in dispute is invalid due to an error in interpreting the law.

[38] As expressed by the AGBC at paragraph 12 of its response to petition, in granting such declaratory relief, a reviewing court will necessarily reach conclusions regarding the correct interpretation of the law. However, those conclusions remain part of the court's reasons for judgment and do not become part of or comprise an order of the court. A reviewing court cannot order a statutory decision-maker to interpret the law in a certain way, but as the AGBC points out, practically speaking, a declaration of invalidity usually has that same effect.

[39] For these reasons, I will approach the issue to be decided this way: whether the SRB's exercise of its power to settle this issue in dispute is invalid due to an error in its interpretation of the *MTA*.

STANDARD OF REVIEW

[40] The legislative standards of review described in s. 59 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 [*ATA*] applies to decisions of the SRB. Section 59 of the *ATA* provides as follows:

> **59** (1) In a judicial review proceeding, the standard of review to be applied to a decision of the tribunal is correctness for all questions except those respecting the exercise of discretion, findings of fact and the application of the common law rules of natural justice and procedural fairness.
>
> (2) A court must not set aside a finding of fact by the tribunal unless there is no evidence to support it or if, in light of all the evidence, the finding is otherwise unreasonable.
>
> (3) A court must not set aside a discretionary decision of the tribunal unless it is patently unreasonable.
>
> (4) For the purposes of subsection (3), a discretionary decision is patently unreasonable if the discretion
>
> (a) is exercised arbitrarily or in bad faith,
>
> (b) is exercised for an improper purpose,
>
> (c) is based entirely or predominantly on irrelevant factors, or
>
> (d) fails to take statutory requirements into account.
>
> (5) Questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly.

[41] The parties agree that the standard of review in this case is one of correctness. On a correctness standard, the court substitutes its opinion for that of the tribunal. On pure questions of law, such as the question in this case, the task for the court should be fairly straightforward: *Kinexus Bioinformatics Corporation v. Asad*, 2010 BCSC 33 at para. 30.

POSITIONS OF THE PARTIES

[42] The petitioners submit that the SRB's interpretation of "land under cultivation" in s. 11(2) of the *MTA* is incorrect. In general terms, they say the SRB interpreted

this provision so narrowly, incorporating a "seasonality" component, that it defeats the purpose of the legislation and renders some aspects of it pointless or futile. Advancing many of the same arguments presented to the SRB, the petitioners submit the correct interpretation of "land under cultivation" in the *MTA* should be:

> …land that is improved or is being improved for the purposes of crop production for so long as that purpose has not been discontinued and includes:
>
> a) land lying fallow for a period of time as part of an agricultural plan;
>
> b) land being rested in order [to] deal with invasive weeds;
>
> c) land on which the present season's crop has been harvested; and
>
> d) land on which the opportunity to harvest the present season's crop has been lost due [to] weather, disease, or the like.

[43] The petitioners submit that this broad interpretation gives the words their grammatical and ordinary sense in the context of the *MTA*, consistent with the object of the *MTA* and the intention of the Legislature.

[44] New Nadina submits the SRB's analysis and interpretation of the phrase "land under cultivation" in the *MTA* was thorough, clear, and correct. It argues that the SRB's interpretation is consistent with principles of statutory interpretation and the only applicable jurisprudence. New Nadina further says that to accept the petitioners' interpretation would significantly expand the ambit of "land under cultivation" beyond its ordinary and grammatical sense in the context of the *MTA*, defeat the purpose of the *MTA*, and run contrary to the intention of the Legislature.

ANALYSIS

[45] Earlier in these reasons, I set out the entirety of Ms. Vickers' analysis because, for reasons I will discuss, I can find no flaw in her analysis. I am not persuaded the SRB erred in its interpretation of the phrase "land under cultivation" as it is used in the *MTA*.

a) Statutory Interpretation - General

[46] The proper approach to statutory interpretation is well known, namely that:

> …the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament [Elmer A. Driedger, *Construction of Statutes*, (2d ed., 1983) as cited in *Rizzo & Rizzo Shoes (Re)* at p. 41]

[47] This modern principle of statutory interpretation emphasizes the importance of a purposive analysis. The bases of the purposive analysis are threefold:

1. All legislation is presumed to have a purpose. It is possible for courts to discover or adequately reconstruct this purpose through interpretation.

2. Legislative purpose should be taken into account in every case and at every stage of interpretation, including the determination of a text's meaning.

3. Insofar as the language of the text permits, interpretations that are consistent with or promote legislative purpose should be adopted, while interpretations that defeat or undermine legislative purpose should be avoided.

   Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, (4th ed., Markham: Butterworths, 2002) at 195.

[48] The words used in a statute are the express intention of the Legislature. A pragmatic approach to statutory interpretation is, then, to begin by examining the language of the provision itself. When assessing the language of the provision, the court will consider whether it is clear and unequivocal in its meaning. If the language used gives rise to different meanings, evidence demonstrating the Legislature's implied, declared, or presumed intent can be accorded more weight. This expands the scope of the interpretation exercise beyond the plain meaning of the words themselves: *Young v. British Columbia (Energy and Mines)*, 2012 BCSC 1369 at paras. 28-29.

[49] As noted by Madam Justice Russell in *Young* at para. 30, the above approach was endorsed by the Supreme Court of Canada in *Canada Trustco Mortgage Co. v. Canada*, 2005 S.C.C. 54. In that case, the court made it clear that when words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretation process. However, where the words support more than one reasonable meaning, the ordinary meaning of the words play a lesser role. The relative effects of ordinary meaning, context, and purpose on the interpretative analysis may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole: at 610.

[50] The "grammatical and ordinary sense" of words in a statute is the meaning actually understood by the reader in its immediate context or the "natural meaning" which appears when the provision is simply read through: *Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn*., [1993] 3 S.C.R. 724 at 735.

[51] "Immediate context" of the words has both internal and external aspects. The internal aspect is literary, consisting of as much of the surrounding text as is needed to make sense of the words being read. The external aspect comes from the reader - her knowledge of language and of the words in general: *Sullivan and Driedger* at 22.

[52] "Ordinary sense" of a word or phrase is not necessarily its dictionary definition. Dictionary definitions may be instructive, but they have their frailties. Definitions may vary between dictionaries. As well, dictionary definitions generally contain list a full range of potential meanings of a word or how a word may be used in different contexts. The concept of "ordinary sense" must go beyond a dictionary definition. It is the meaning a word or phrase bears in the context of a particular sentence as read by a particular reader: *Sullivan and Driedger* at 22-23.

[53] The history of a statute can sometimes provide insight into how its current version should be interpreted: *R. v. Ambrosi*, 2014 BCCA 325 at para. 21.

[54] Of course, the court must also be mindful of the remedial construction rule found in s. 8 of the *Interpretation Act*¸ R.S.B.C. 1996, c. 238:

> **Enactment remedial**
>
> **8** Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

b) The Current Legislative Framework and its Evolution

[55] Under the system of land ownership in British Columbia, the owner of the legal title to surface lands does not own the subsurface mineral rights, unless those rights have been transferred expressly to the owner of the land. Generally, the Crown in right of the Province of British Columbia owns the subsurface mineral rights. The acquisition of mineral title is governed by the *MTA*, in force since 1988, with many amendments. The mineral tenure system in British Columbia is a free entry system.

[56] In *Klippert v. British Columbia (Gold Commissioner*), 2003 BCCA 510, Saunders J.A. described the purpose of the *MTA* as follows:

> [31] One must start, I think, from a consideration of the purpose of the *Act*, which is to allow exploration for and development of mines in the Province. In *Tagish Resources Ltd. v. Calpine Resources Inc.* (1991), 56 B.C.L.R. (2d) 286, Esson C.J.S.C. described the purpose of the *Mineral Tenure Act* and its predecessors, at p. 293:
>
> > 15 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. . . . [My emphasis]

[57] Recognizing that the *MTA* accomplishes the objectives described above through the free miner system, Saunders J.A. continued at paras. 32-33:

> [32] … 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.
>
> [33] The system in its present form operates through two classes of tenure for both hardrock and placer mining, the claim and the lease. The lease, superior in tenure, is a reward for the risk and initiative recognized in the free miner concept, and promotes investment in and development of mines on ground that has passed through the exploratory phase of claim. Based upon the title, significant sums and energy are spent. Security of tenure is a fundamental requirement of the mining industry and, in my view, interpretation of the *Act* should recognize the paramount place of tenure in the mineral title system.

[58] From time to time, disputes will arise between the owner of the land surface and the owner of the subsurface mineral rights, as a mineral rights holder may require access to the surface in order to exploit the mineral claim. The *MTA* sets out a comprehensive framework of rights and obligations that apply to free miners, recorded holders, the Crown and land owners.

[59] Under s. 11 of the *MTA*, a free miner is allowed to enter mineral lands to explore for minerals or placer minerals. This right of entry for exploration applies to private lands, but does not extend to certain listed lands. Section 11 provides:

> **Land on which a free miner may enter**
>
> **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.]

[60] Certain words and phrases found in s. 11 of the *MTA* are defined in the *MTA*, but others are not.

[61] A “free miner” is defined in s. 1 of the *MTA* as:

> **"free miner"** means a person who holds a valid and subsisting free miner certificate issued under this Act or any of the former Acts;

[62] To acquire a free miner’s certificate, a person, corporation or partnership must first meet certain defined requirements and pay a prescribed fee.

[63] “Mineral lands” is defined in s. 1 of the *MTA* 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;

[64] “Mineral” and “placer mineral” are also defined:

> **"mineral"** means an ore of metal, or a natural substance that can be mined, that is in the place or position in which it was originally formed or deposited or is in talus rock, and includes
>
> (a) rock and other materials from mine tailings, dumps and previously mined deposits of minerals,
>
> (b) dimension stone, and
>
> (c) rock or a natural substance prescribed under section 2 (1),
>
> but does not include
>
> (d) coal, petroleum, natural gas, marl, earth, soil, peat, sand or gravel,
>
> (e) rock or a natural substance that is used for a construction purpose on land that is not within a mineral title or group of mineral titles from which the rock or natural substance is mined,
>
> (f) rock or a natural substance on private land that is used for a construction purpose, or

> (g) rock or a natural substance prescribed under section 2 (2);
>
> …
>
> **"placer mineral"** means ore of metal and every natural substance that can be mined and that is either loose, or found in fragmentary or broken rock that is not talus rock and occurs in loose earth, gravel and sand, and includes rock or other materials from placer mine tailings, dumps and previously mined deposits of placer minerals, but does not include a mineral substance or the substances described in paragraphs (d) to (g) of the definition of "mineral" in this section;

[65] The words “enter” and “explore” are not defined in the *MTA*, nor is the phrase “land under cultivation”.

[66] A free miner, at this stage, where entry is permitted for exploration purposes, is not required to be a recorded holder. If a free miner wishes to engage in work on the lands that goes beyond what is permitted by s. 11 of the *MTA*, the free miner must first become a recorded holder. A “recorded holder” is defined in s. 1 of the *MTA* as:

> **"recorded holder"** means a person whose name appears as the owner of the mineral title on the record of that title in the registry;

[67] Once a recorded holder, he or she must then obtain a permit as set out in s. 14 of the *MTA* and s. 10 of the *Mines Act*, R.S.B.C. 1996, c. 293, in order to engage in work that goes beyond what is permitted by s. 11 of the *MTA*.

[68] “Mineral title” is defined in s. 1 of the *MTA* as:

> **"mineral title"** means a claim or a lease;

[69] A “claim” is defined in s. 1 of the *MTA* as:

> **"claim"** means a mineral claim or a placer claim and includes a legacy claim;

[70] A “mineral claim” is defined in s. 1 of the *MTA* as:

> **"mineral claim"** means a claim to the minerals within an area which has been located or acquired by a method set out in the regulations and includes a claim to minerals recorded under one of the former Acts;

[71] A “lease” is defined in s. 1 of the *MTA* as:

> **"lease"** means a mining lease or a placer lease and includes a legacy lease;

[72] A “mining lease” is defined in s. 1 of the *MTA* as:

> **"mining lease"** means a mining lease issued under section 42 and a legacy mining lease;

[73] Section 14 of the *MTA* sets out what a recorded holder may do. It provides:

> **Surface 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.
>
> (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*.
>
> (3) Subject to the terms and conditions set by the issuing authority under the *Forest Act*, a recorded holder of a mineral title that is not in production must on request be issued either a free use permit or an occupant licence to cut under that Act at the option of the government.
>
> (4) The recorded holder of a mineral title that is in production or being prepared for production must on request be issued an occupant licence to cut under the *Forest Act*, subject to terms and conditions set by the issuing authority.
>
> (5) Unless the location is one of the following, a land use designation or objective does not preclude application by a recorded holder for any form of permission, or approval of that permission, required in relation to mining activity by the recorded holder:
>
> (a) an area in which mining is prohibited under the *Environment and Land Use Act*;
>
> (b) a park under the *Park Act* or a regional park under the *Local Government Act*;
>
> (c) a park or ecological reserve under the *Protected Areas of British Columbia Act*;
>
> (d) an ecological reserve under the *Ecological Reserve Act*;
>
> (d.1) an area of Crown land if
>
> (i) the area is designated under section 93.1 of the *Land Act*, for a purpose under that section, and
>
> (ii) the order under that section making the designation, or an amendment to the order,

> precludes the application by the recorded holder;
>
> (e) a protected heritage property.

[74] It is readily apparent from the plain language of ss. 11 and 14, that s. 14 of the *MTA* provides a separate or distinct right of entry to recorded holders that is much broader than the right of entry afforded to a free miner under s. 11 of the *MTA*. One can see this in three ways. First, a recorded holder is permitted to not only enter lands, but to use and occupy them. Second, a recorded holder is permitted to not only enter, use, and occupy lands for purposes of exploration, but also for purposes of "exploration and development or production of minerals or placer minerals". Third, and significantly, there are no excluded lands listed in s. 14 of the *MTA*.

[75] If the recorded holder obtains the permits required by the legislation to conduct mining activity on private land, then s. 19 of the *MTA* applies to any subsequent entry to those lands. Section 19 of the *MTA* provides:

> **Right of entry on private land and compensation**
>
> **19** (1) A person must not begin a mining activity unless
>
> (a) the person first serves notice, in the prescribed form and manner, on
>
> (i) the owner, other than the government, of every surface area,
>
> (ii) the holder of a lease of Crown land under section 11 of the *Land Act* granting the holder exclusive surface rights to the leased land, and
>
> (iii) the holder, under Part 5 of the *Land Act*, of a disposition of Crown land, on which the person intends to work or intends to utilize a right of entry for that purpose, and
>
> (b) the prescribed period has elapsed from the date that notice was served under paragraph (a).
>
> (1.1) The chief gold commissioner, in the prescribed circumstances, may exempt a person from the requirements of subsection (1).
>
> (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.

(3) On receipt by the chief gold commissioner of an application from a free miner, recorded holder, owner or other person who, in the opinion of the chief gold commissioner, has a material interest in the surface, the chief gold commissioner must use his or her best efforts to settle issues in dispute between them arising from rights acquired under this Act in respect of entry, taking of right of way, use or occupation, security, rent or compensation.

(4) If the chief gold commissioner is unable to settle the dispute to the satisfaction of the parties to the dispute, the Surface Rights Board under the *Petroleum and Natural Gas Act* has, on application by a party to the dispute, authority to settle the issues in dispute and, for this purpose, Part 17 of the *Petroleum and Natural Gas Act* applies.

(5) In an arbitration under subsection (4) involving a conflict between rights acquired under this Act and rights acquired under the *Land Act*, the Surface Rights Board must take into account which of the rights was applied for first and, unless injustice would result, must give the holder of those rights due priority in its consideration of the dispute between the parties.

(6) A copy of an order made by the Surface Rights Board under subsection (4) may be filed at any time in a Supreme Court registry and enforced as if it were an order of the court.

(7) If an owner of private land opposes entry on the land by a recorded holder on the grounds that the intended activity would obstruct or interfere with an existing operation or activity on the land or with the construction or maintenance of a building, structure, improvement or work on the land, the Surface Rights Board must determine the impact of the intended entry and must determine which parts of the land would be affected by that entry.

(8) If, under subsection (7), the Surface Rights Board determines that it is not possible to enter the land or a part of it without obstruction or interference, in addition to any other order it makes, the board must make an order

> (a) specifying conditions of entry that will minimize the obstruction to or interference with the existing circumstances of the land, and
>
> (b) specifying compensation for obstruction to or interference with enjoyment of the land.

(9) Without limiting the factors that the board may consider in making a decision under this section, in making a determination under subsections (7) and (8) the board must take into account the extent of the obstruction or interference with respect to the following:

> (a) land occupied by a building;
>
> (b) the curtilage of a dwelling house;
>
> (c) orchard land;
>
> (d) land under cultivation.

[My emphasis]

[76] Notably, s. 19(2) of the *MTA* requires both a free miner and a recorded holder to compensate a private land owner for a full range of loss, encompassing any loss or damage caused by entry, occupation or use in respect of the location, exploration and development, or production of minerals or placer minerals. However, s. 19(7) of the *MTA* only allows an owner to oppose entry to a recorded holder if the owner believes intended mining activity would interfere with an existing operation or activity on the land. In such a situation, the owner may refer the issue to the SRB. The SRB must then determine the impact of the intended entry and which parts of the lands might be affected by it.

[77] Subsections (8) and (9) are key. There is no ambiguity. These subsections make it clear that the SRB cannot deny or prohibit a recorded holder's entry on the land if the mining activity interferes with an activity or operation on the land. All the legislation permits is the setting of conditions on the entry (s. 19(8)(a) of the *MTA*) and the setting of compensation to the land owner (s. 19(8)(b) of the *MTA*).

[78] It is in the context of setting the appropriate conditions of the recorded holder's entry and/or the landowner's compensation for the obstruction or interference with the surface lands that the SRB must consider the existing circumstances of the land, including if it is "land under cultivation": *MTA*, s. 19(9)(d).

[79] The *MTA*'s primary purpose is to allow exploration for and development of mines in the province, but in advancing this purpose, the Legislature seeks to balance the rights of the surface and subsurface owners. In the context of this case, it is my view that the Legislature's current intention to have that balance tip in favour of the subsurface owners is evident from not only a review of the language used in the current provisions, but from a review of the statute's history.

[80] In *Western Industrial Clay Products Ltd. v. Mediation and Arbitration Board*, 2001 BCSC 1458, Brenner, C.J.S.C. canvassed legislative changes to the *MTA* up to that point in time at paras. 38-39. He began first by discussing changes that occurred in 1988 which had the effect of reducing protection to surface owners:

[38] Exploration and mining activities on private lands in British Columbia have historically been restricted. The predecessors to the *MTA*, the *Mineral Act* R.S.B.C. 1979, c. 259, and the *Mining (Placer) Act* R.S.B.C. 1979 c. 264, contained the following provisions:

> *Mineral Act*:
>
> S. 6(1) Subject to this section, a free miner may enter... land in which minerals are reserved to the crown and prospect and explore for, locate, *mine and produce minerals* ...
>
> 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.
>
> *Mining (Placer) Act*:
>
> 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)

The foregoing provisions or their equivalents can be found in earlier legislation going back to 1896.

[39] In 1988 these two statutes were combined into the *MTA*. However, the restrictions in s. 6 of the 1979 Mineral Act were changed. The listed land uses in s. 6(2) became protected from entry during exploration but not during mining. In 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 statutes. [My emphasis]

[81] Brenner C.J. went on to consider a further legislative change in 1995 which had the effect of restoring the historical protection given to surface owners in certain circumstances. This change appeared in s. 20:

> 20. 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.

[82] This provision was considered to be "consistent with the longstanding historical protection given to surface land owners" found in s. 11 of the *MTA* for the exploration phases for the mining and production phases: *Western Industrial* at para. 42.

[83] I agree with Brenner C.J., when he wrote, at para. 42, that the addition of s. 20 of the *MTA* in 1995 seemed to, at that time:

> …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.

[84] However, legislative intent quickly changed again in 2002. Section 20 of the *MTA* was repealed shortly after *Western Industrial* by virtue of the *Miscellaneous Statutes Amendment Act (No. 2), 2002*, S.B.C. 2002, c. 48. At the same time as this protective provision for land owners was repealed, the Legislature added what we now see at ss. 19(7), (8), and (9) of the *MTA*.

[85] By removing the protection afforded in s. 20 and adding new provisions designed not to prohibit entry and use, but to only set conditions of and compensation for such use, it is readily apparent the Legislature intended to once again lessen the historical protection given to surface owners for the mining and production phases. The Legislature repealed the very broad provision that prevented a free miner or recorded holder from obstructing or interfering with an operation or activity (including improvement or work) on private land, and chose to replace it with a provision that allows mining activity, despite such interference or obstruction, subject only to conditions of entry and proper compensation.

[86] The Legislature's continued commitment toward prioritizing mining rights and encouraging mining in this province was again demonstrated in 2004. In that year, with the *Mineral Tenure Amendment Act*, 2004, c. 22 [*MTAA*], the Legislature changed the mineral tenure acquisition system which had been in effect in British Columbia for roughly 150 years. The *MTAA* came into force on January 12, 2005. It contained the statutory foundation for implementation of the Minerals Title Online Project ("MTO").

[87] The MTO created an Internet-based mineral title administration system. The title acquisition component of the MTO introduced map selection to replace the historical method of staking claims and recording them in a Regional Gold Commissioner's office. Now, instead of erecting claim posts, a free miner selects ground on a computer system by "pointing and clicking" on available "cells" on a digital map grid covering the entire province and then registers the claim by forwarding the required fee electronically. All new claims under the MTO became known as "cell claims", acquired through map selection: Gregory G. Blue, Q.C., *Annotated British Columbia Mineral Tenure Act*, 2nd ed., (Toronto: Thomson Reuters 2d) at 233-234.

[88] By virtue of the MTO, a free miner no longer has to physically enter available lands to stake a claim; it can be done online. However, s. 11 of the *MTA* still permits a free miner to enter lands for exploration unless those lands fall within the enumerated list.

[89] The *MTA* was amended again in 2008 to give land owners additional rights regarding notification processes for access to their land for mineral exploration purposes.

[90] Nothing in the MTO changed the legislative provisions at issue in this case, but the Legislature's intention in introducing this new system is illustrated clearly in its introduction of the bill at second reading: British Columbia, Legislative Assembly, *Debates of the Legislative Assembly (Hansard)*, 37th Parl., 5th Sess, vol. 24, No. 2 (22 April 2004 at 10389-90 (Hon. R. Neufeld). After discussing the government's

ongoing vision and steps it had taken to enhance and improve mineral exploration in British Columbia, including the reduction of taxation for the mining industry and the creation of a "two-zone system" in 2003 to simplify where one can mine and one cannot, the Honourable R. Neufeld said:

> We have this opportunity with *Mineral Titles Online* to move through to another new step, and it is going to be a tough step for some. There has been consultation across the province to a huge degree over the last two years on building this bill that will move us to the e-commence world. Both e-commerce and staking will be more accurate. It will be quicker. It will be better for industry. It will be better for the prospector. It will be better for the mining companies, and at the end of the day it will also be better for government, because we'll be able to adjust the lease sizes to what's required for that person who wants to stake that claim. They will be able to do that electronically. They will be able to amalgamate leases. They will be able to put them together, take them apart. They will actually be able to go on line and see where they're at. It's a wonderful system.

[91] Emphasizing that the MTO changed nothing substantive, the Minister further said:

> It changes nothing in the way that it actually was done before, other than we go from the two-post system to a new system that's called *Mineral Titles Online*. I think it's a great thing for us in British Columbia to move towards that and to actually encourage this industry back here in the province so that we can continue to enjoy that great industry, the jobs it produces and the economic value that comes to the province from mining and mining alone.

[92] Through this review of the current *MTA* in the context of its recent historical evolution, it is my view that the Legislature's intent and the overall purpose of the *MTA* are readily apparent.

[93] The overall purpose of the *MTA* remains as it was found to be by Saunders J.A. in 2003 - to allow exploration for and development of mines in the Province of British Columbia: *Klippert* at para. 31. In my view, the current overall scheme of the *MTA* reflects a general balancing of the rights and obligations of subsurface and surface owners, but in respect of the balance between mineral tenure holders and private land owners, the Legislature has clearly prioritized the rights of the mineral tenure holders.

[94] I find that the current legislation operates as Ms. Vickers outlined at paragraph 20 of the Decision and as argued by New Nadina. The limited protection provided to certain private land owners is part of a comprehensive framework of rights and obligations that applies to free miners, recorded holders, and land holders alike.

[95] A free miner is allowed to enter onto land for the purposes of exploration only, unless the land falls within an enumerated list, including “land under cultivation”. The free miner may choose to forego exploration by using MTO to register his or her claim. If, however, the free miner wants to go further than the exploration permitted by s. 11, he must become a recorded holder, which means obtaining some form of mineral rights, such as mineral tenure and then obtaining permits pursuant to s. 14 of the *MTA* and s. 10 of the *Mines Act*. Once that recorded holder has the necessary permits, other provisions of the *MTA* come into play.

[96] The legislation clearly allows a recorded holder to enter private lands for mining activity. No exceptions are listed. Rather, s. 19 of the *MTA* applies, allowing the land owner to apply to the SRB for the setting of entry conditions and compensation if the mining activities interfere with the use of the land. If the land at issue is “land under cultivation”, the statute requires that the SRB take that into account in setting conditions and/or compensation.

[97] Clearly, if the Legislature intended for entry to be denied at all stages of mining activity with respect to “land under cultivation” as submitted by the petitioners, it would have no need for s. 19(9) of the *MTA*. The SRB is not permitted to deny entry to a recorded holder with respect to “land under cultivation”; it can only take that fact into account in setting conditions and compensation.

[98] It is within this overall purpose and context that Ms. Vickers considered the meaning of the phrase “land under cultivation”.

c) Interpretation of "land under cultivation" in the *Mineral Tenure Act*

[99] It is in light of the overall purpose and scheme of the *MTA* that Ms. Vickers interpreted the phrase "land under cultivation". She ultimately concluded that to be exempt from entry by a free miner for exploration purposes, "land under cultivation" must be land presently and actively subject to activities for the purpose of raising a crop with the intent to harvest or pasture the crop in a current season.

[100] In reaching this conclusion, Ms. Vickers first considered dictionary definitions of the word "cultivation". She then relied upon the only applicable jurisprudence: *Cofrin v. Bicchieri* (1977), 3 B.C.L.R. 122 (S.C.). She then addressed the arguments advanced by the petitioners and distinguished each of them from the unique legislative scheme and context of the *MTA*. In my view, Ms. Vickers was correct in her analysis.

[101] In *Cofrin*, Fulton J. was tasked with interpreting the phrase "the curtilage of a dwelling house" within the meaning of ss. 2(3) and (5) of the *Placer Mining Act*. The relevant portions of those sections were reproduced at 136 as follows:

> "(3) Subject to this Act, the regulations, and his free miner's certificate, a free miner may enter and acquire a location on waste land within designated placer land for the purpose of exploring for, developing, and producing
>
> "(a) a mineral . . .
>
> "but no free miner shall develop or produce a mineral unless he is the holder of a placer lease on the location on or from which he develops or produces the mineral ...
>
> "(5) For the purposes of subsection (3), 'waste land' does not include land…
>
> "(b) occupied by a building; or
>
> "(c) falling within the curtilage of a dwelling-house or orchard; or
>
> "(e) under cultivation."

[102] In considering whether the land at issue in *Cofrin* was excluded from the right of entry by virtue of the restrictions in s. 2(5), Fulton J. held at 139:

> …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. [My emphasis]

[103] In the context of the overall scheme of the *MTA*, I agree with Ms. Vickers that Fulton J.'s conclusion that the words "land under cultivation" import a temporal element and "denote not a past state or a potential or planned use, but a present actual state of being cultivated". Her conclusion that "land under cultivation" within the meaning of the current *MTA* requires land to be presently and actively subject to activities for the purpose of raising a crop is, in my opinion, consistent with both the ordinary and grammatical sense of the words used and with Fulton J.'s interpretation of that phrase in *Cofrin*.

[104] In rejecting the petitioner's broader interpretation of the phrase, Ms. Vickers considered a similar phrase "put in (or into) cultivation" considered in *Janes v. Newfoundland*. In that case, the Newfoundland and Labrador Court of Appeal considered the meaning of the phrase "put in cultivation" in circumstances where a lessee of certain lands was contractually required to "put in cultivation" a minimum portion of the leased area within specified time frames in order to be entitled to receive a Crown grant of the land in accordance with the *Crown Lands Act*. The only activity taken by the lessee had been the spreading of manure. In that factual and legislative context, the court focussed on the actions of the lessee and found that to "put land into cultivation" required more than preliminary activity such as the spreading of manure. The spreading of manure would not, on its own, produce a product. Rather, the court concluded that to "put land into cultivation" requires the taking of sufficient steps, with the reasonable objective of harvesting, as a necessary component to putting land into cultivation. In this way, the lessee farmer is required to undertake activity on the land in consideration of a product to be produced, such as planting crops, using plants already established, or activity to nurture the soil and

plants in the process of producing a product. This may include land lying fallow for a period of time as part of an agricultural plan.

[105] I agree with Ms. Vickers' conclusion that the phrase "put in (or into) cultivation" used in the context of *Janes* is distinguishable from the phrase "land under cultivation" in the context of this case in the scheme of the *MTA*. The petitioners argue that the two phrases should bear the same meaning and that "land under cultivation" should import a continued state of being in the absence of current purposeful activity. With respect, I disagree. Having land lie fallow as part of an agricultural plan fits with the phrase "put in cultivation" in the context of determining sufficient activity for the purpose of obtaining a Crown grant; however, it does not make sense in the context and scheme of the *MTA*. In this regard, I agree with Ms. Vickers when she wrote at paragraph 40 of the Decision as follows:

> [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.

[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.

[107] The petitioner further submits that the Decision is incorrect because the SRB’s interpretation of the phrase “land under cultivation” would permit “claim jumping”, an absurdity which would defeat the purpose of the statute. I agree here with New Nadina, that the Decision, in the context of the overall legislative scheme as it stands today, would not permit “claim jumping”. In this regard, I largely adopt New Nadina’s written submissions found at paragraphs 40-43.

[108] First, the MTO does not allow a recorded holder to “over-stake” another’s claim. As a result, there is no possibility, as claimed by the petitioner, of a recorded holder “proceeding with development and production within the boundaries of the prior claims”. If a prior claim were to lapse, the free area is not automatically subsumed into the subsequent claim as suggested by the petitioner.

[109] Moreover, the exceptions set out in s. 11(2) of the *MTA* do not affect the area of mineral tenure. A free miner may choose to forego exploration under s. 11 of the *MTA* and simply choose to register a mineral tenure over an open area. As New Nadina points out, that area might be entirely comprised of “land under cultivation”, but that only limits the ability of the free miner to enter, it does not change the actual boundaries of the mineral tenure that has been registered by the free miner.

[110] Finally, the purpose of s. 11(2) of the *MTA* is not to protect prior claims or prevent “claim jumping”. Prior claims are protected by other mechanisms in the *MTA* - namely, a combination of s. 6.7 which prohibits overlapping claims and s. 14 which requires a recorded holder to obtain permits for mining activities. Pursuant to s. 14 of the *MTA*, a permit can only be issued to a recorded holder. It is implicit that the permit area will be limited by the recorded holders’ mineral rights.

CONCLUSION

[111] In conclusion, it is my view that Ms. Vickers’ interpretation of the phrase “land under cultivation” is consistent with the principles of statutory interpretation I have

outlined and the applicable jurisprudence. Such an interpretation does not produce consequences that defeat the purpose of the *MTA* or render some aspect of it futile or pointless. To the contrary, such an interpretation is consistent with and promotes the object of the *MTA* and the intention of the Legislature. The interpretation was correct.

[112] On the other hand, the interpretation advanced by the petitioners would expand the scope of the phrase “land under cultivation” in the *MTA* beyond its ordinary and grammatical sense in the context of the overall legislative scheme in a manner that would be inconsistent with the object of the *MTA* and the intention of the Legislature. Specifically, interpretation of the phrase “land under cultivation” in the manner sought by the petitioners would render much of ss. 14, 16, and 19 of the *MTA* unnecessary and would effectively undermine New Nadina’s mineral rights entirely.

[113] It follows that the petition is dismissed, with costs to New Nadina to be assessed at Scale B of Appendix B of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009.

“S.A. Donegan J.”

DONEGAN J.