

Summary of Potential City of Kamloops Regulatory Powers over the Proposed Ajax Mine

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Role and Authority of the City of Kamloops

To date, the City of Kamloops appears to have taken the position that it is simply a stakeholder (albeit an important one) and that the real decisions about the Project ultimately rest with the provincial and federal governments. This view may understate the potential role and authority of the City of Kamloops. The City of Kamloops may have the authority to exercise its bylaw and land-use planning powers in a manner that compels the Proponent to comply with the City's standards and requirements, failing which the Project cannot proceed.

The scope of municipal powers to regulate mining raises complex legal issues. Further research is required to reach a comprehensive opinion. At this stage, my preliminary review of the law suggests that the City may have some authority as a local government to challenge or regulate the operation of the Project or components thereof.

A. Bylaw Powers

The *Community Charter* sets out the powers of municipalities.²³ City Council has the power by bylaw to regulate, prohibit and impose requirements on various matters, including:²⁴ (a) the protection and enhancement of the well-being of its community in relation to nuisances, disturbances and other objectionable situations;²⁵ (b) public health;²⁶ (c) protection of the natural environment;²⁷ (d) removal of soil and deposit of soil and other materials;²⁸ and (e) explosives.²⁹

Bylaws enacted with respect to the above-mentioned matters could impact the operations of the Project that are within the municipal boundaries. There are some limits. The power of a municipality to enact bylaws with respect to (b), (c) and (d) are subject to approval by a Provincial minister and certain regulations under the *Community Charter*.³⁰ Also, a provision of a bylaw has no effect if it is inconsistent with a Provincial statute or regulation.³¹ However, a municipal bylaw is *not* inconsistent with another enactment if a person who complies with the bylaw does not, by this, contravene the other enactment – (i.e. there is only inconsistency if it is impossible to comply with *both* requirements).³²

Thus, for example, a municipal bylaw with respect to noise, dust, vibration, or illumination could be enacted that is *in addition to* or *adds certain requirements or conditions* to the provincial permit process or the EA certificate.³³ A bylaw can also provide for a system of licences, permits and approvals including the provision of security.³⁴ These are all potentially valuable tools in regulating or prohibiting certain aspects of Project operation.

B. Municipal Planning and Land Use Management

The *Local Government Act* governs municipal planning, zoning and land use management.³⁵

The definition of “land” in the *Community Charter*³⁶ which is incorporated into the *Local Government Act*³⁷ does not include “mines or minerals belonging to the Crown, or mines or minerals for which title in fee simple has been registered in the land title office”.

Whether a municipality can regulate land use or zoning with respect to mining has been considered by the British Columbia Court of Appeal in *Squamish (District) v. Great Pacific Pumice Inc.*³⁸ The Court of Appeal interpreted the words “mines or minerals” to mean substances in the ground or under the ground capable of severance from the ownership of the surface as a separate tenement; the word, “mines” is confined in meaning to an excavation or substances on or under the surface.³⁹ Therefore, a municipality cannot use its land use or zoning powers to prevent a mineral title holder from exercising its right regarding excavation of the minerals.⁴⁰

However, the Court concluded that the Legislature did not intend to broaden the meaning of “mines” so as to include *all* mining activities on the surface of the land.⁴¹ Thus, a municipality may regulate or prohibit storage or processing activities through its land use or zoning bylaws.⁴² The purpose of Provincial legislation with respect to mining is not to permit mining activity without regard to local needs or wishes; a municipal bylaw is one more regulation with which a mineral title holder must comply.⁴³ The Court held that such a zoning bylaw is not inconsistent with the Provincial mining enactments because the mineral title holder can comply with *both* the municipal bylaw and the Provincial enactment.⁴⁴

Accordingly, it appears the City of Kamloops may have the authority to regulate or prohibit certain storage and processing activities in those areas of the Project that fall within municipal boundaries. This could prove significant, given that the current proposal would situate the TSF, a waste rock management facility, a processing facility, fuel storage area and part of a process water pond all within city boundaries.

Again, there are potential limits to the City’s authority. For example, if the Minister⁴⁵ under the *Local Government Act* believes that that all or part of a bylaw is contrary to the public interest of British Columbia with respect to the Official Community Plan (“OCP”), zoning or other developmental regulation, the Minister may alter the bylaw.⁴⁶ Thus, the Minister could potentially alter the existing OCP and zoning of the City of Kamloops if they are in conflict with the operation of the Project in this location.

Nonetheless, existing OCP, zoning and municipal land use concerns are clearly important factors for a statutory-decision maker to consider in deciding whether to authorize a mine to proceed under the EA process.⁴⁷ And municipal bylaws provide a *third* level of regulation with which the Proponent must comply.

Accordingly, the City of Kamloops may have more authority than it presently contemplates to ensure that the environmental assessment process *and* its outcome are in the best interests of the people of Kamloops. Further areas for research include:

- researching City bylaws to determine whether use of the area as proposed by the Project conflicts with *existing* OCP or zoning bylaws of the City of Kamloops; and
- further legal research on the scope of the City’s authority to enact new bylaws (or amend the OCP) to regulate or prohibit certain storage or processing activities associated with the Project within City boundaries.

Footnotes

- 23 *Community Charter*, S.B.C. 2003, c. 26.
- 24 *Community Charter*, S.B.C. 2003, c. 26, ss.8 and 15.
- 25 *Community Charter*, S.B.C. 2003, c. 26, s.8(3)(g) and 64.
- 26 *Community Charter*, S.B.C. 2003, c. 26, s.8(3)(i).
- 27 *Community Charter*, S.B.C. 2003, c. 26, s.8(3)(j).
- 28 *Community Charter*, S.B.C. 2003, c. 26, s.8(3)(m).
- 29 *Community Charter*, S.B.C. 2003, c. 26, s.8(3)(d).
- 30 *Community Charter*, S.B.C. 2003, c. 26, s.9; *Spheres of Concurrent Jurisdiction – Environment and Wildlife Regulation*, B.C. Reg. 144/2004; *Public Health Bylaw Regulation*, B.C. Reg. 42/2005; *Responsible Minister Regulation*, B.C. Reg. 330/2003.
- 31 *Community Charter*, S.B.C. 2003, c. 26, s.10(1).
- 32 *Community Charter*, S.B.C. 2003, c. 26, s.10(2).
- 33 W. Buholzer, *Local Government under the Community Charter*, 3rd ed. (Vancouver: The Continuing Legal Education Society of BC; 2009) at 38.
- 34 *Community Charter*, S.B.C. 2003, c. 26, ss. 15 and 19.
- 35 *Local Government Act*, R.S.B.C. 1996, c. 323, part 2.
- 36 *Community Charter*, S.B.C. 2003, c. 26, Schedule.
- 37 *Local Government Act*, R.S.B.C. 1996, c. 323, s.5.1.
- 38 *Local Government Act*, R.S.B.C. 1996, c. 323, s.903(1)(c); *Squamish (District) v. Great Pacific Pumice Inc.*, [2003] B.C.J. No. 1567 (C.A.); *Vernon (City) v. Okanagan Excavating (1993) Ltd.* (1993) 84 B.C.L.R. (2d) 130 (C.A.).
- 39 *Squamish (District) v. Great Pacific Pumice Inc.*, [2003] B.C.J. No. 1567 (C.A.) at paras. 25 and 49.
- 40 *Nanaimo (Regional District) v. Jameson Quarries Ltd.*, [2005] B.C.J. No. 2566 (S.C.) at paras. 35 and 68; *Cowichan Valley (Regional District) v. Norton*, [2005] B.C.J. No. 1635(S.C.) at para. 11; The excavation activities can only be regulated by a removal of soil bylaw as discussed above in (a) – See *Vernon (City) v. Okanagan Excavating (1993) Ltd.* (1993) 84 B.C.L.R. (2d) 130 (C.A.); *Nanaimo (Regional District) v. Jameson Quarries Ltd.*, [2005] B.C.J. No. 2566 (S.C.) at paras. 46.
- 41 *Squamish (District) v. Great Pacific Pumice Inc.*, [2003] B.C.J. No. 1567 (C.A.) at para. 48.
- 42 *Nanaimo (Regional District) v. Jameson Quarries Ltd.*, [2005] B.C.J. No. 2566 (S.C.) at para. 35; *Squamish (District) v. Great Pacific Pumice Inc.*, [2003] B.C.J. No. 1567 (C.A.) at paras. 61-64; *Cowichan Valley (Regional District) v. Norton*, [2005] B.C.J. No. 1635(S.C.) at para. 14; I note that it is a factual issue as to whether the excavation activities can be separated from the processing activities – see the difference results in *Nanaimo* at paras. 47, 51, 53 and 68 and *Cowichan* at paras. 14 & 22.

43 *Squamish (District) v. Great Pacific Pumice Inc.*, [2003] B.C.J. No. 1567 (C.A.) at paras. 61-63.

44 *Community Charter*, S.B.C. 2003, c. 26, s.10(2); *Squamish (District) v. Great Pacific Pumice Inc.*, [2003] B.C.J. No. 1567 (C.A.) at paras. 51 and 64.

45 The Minister of Community, Sport and Cultural Development.

46 *Local Government Act*, R.S.B.C. 1996, c. 323, s. 874.

47 *Anning v. British Columbia (Minister of Energy and Mines)* [2002] B.C.J. No. 1320 (S.C.) at paras. 65, 67, 69-70, 77 and 93.