



# From the Centre of the Earth to the Big Blue Sky:

Land Ownership,  
Mining and Air Rights

Matthew Dorreen  
Cox & Palmer

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## Introduction

- Interpretation of air rights
- Forms of mineral tenure
- Interaction between mineral rights and “surface rights”

## Evolution of Mining and Air Rights

Prior maxim: *Cuius est solum, eius est usque ad coelum et ad inferos*

- “... all the way to Heaven and all the way to Hell”
- These broad rights have been gradually superseded
- Guided by provincial statute as well as judicial interpretation

## Air Rights

Property rights in and to the air space above the ground

- Previously, the owner of land owned everything above and below it to an indefinite extent
- Canadian cases have recited history of English case law dating back to the 1600s
- However, this broad interpretation has been curtailed at common law

## Air Rights

- English case, *Bernstein (Lord) of Leigh v Skyviews & Gen Ltd* (1977), [1977] 3 WLR 136 [*Skyviews*]
- An owner of land has rights in the air space above its land only to such a height as is necessary for the ordinary use and enjoyment of its land and the structures upon it
- “The maxim cannot go further than to direct the owner or occupier of land in his enjoyment of the land and also to prevent anyone else from acquiring any title or exclusive right to the space above such land so as to limit a person to whatever proper use he can make of his land.”

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## Canadian Interpretation

*Didow v Alberta Power Ltd*, 1988 ABCA 257 [*Didow*]

- Public utility constructed transmission line
- Fifty-foot poles were located two feet away from the boundary of the appellants' lands
- Cross-arms protruded six feet over the property boundary
- Appellants complained that they could not plant tall trees or operate tall machinery near the cross-arms

## Didow Continued

- Chambers judge determined that the protrusion did not interfere with the appellants' airspace
- “[The Appellants] do not claim any diminution in their right to full enjoyment of their property. Indeed, the facts are that they are not making use of the air space occupied by the cross arms and wires and they have no intention of doing so.” (cited in appeal decision at para. 4)

## Didow Continued

Court of Appeal disagreed:

- Rather than examining whether a property owner is actually using or enjoying the airspace at the time of trespass, the key distinction is between transient and permanent trespass
- Air traffic, as an example:
  - “Predicated on sound logic and common sense both case law and statute law now decree that a landowner cannot object to air traffic which does not interfere with the use and enjoyment of his property.” (para. 25)

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## Didow Continued

- Test adopted from *Skyviews* decision:
- “[A] land owner is entitled to freedom from permanent structures which in any way impinge upon the actual or potential use and enjoyment of his land...” (para. 40)
- As applied in the case under appeal:
- “The cross arms constitute a low level intrusion which interferes with the appellant’s potential, if not actual, use and enjoyment. This amounts to trespass.” (para. 40)

## Air Rights in Nova Scotia

- Common law largely continues to guide interpretation of airspace rights
- Note section 33(2) of the *Real Property Limitations Act*:
  - “From and after the fifteenth day of April, 1931, no person shall acquire a right by prescription or by virtue of subsection (1) to the access and use of light or air to or for any building situate in any city or in any incorporated town...”

## Air Rights in Nova Scotia

- Have cases such as *Didow* been followed in Nova Scotia?
- *Maxwell Properties Ltd. v Mosaik Property Management Ltd.*, 2017 NSCA 76 [*Maxwell*]
  - Appellant developing property in downtown Halifax
  - Respondents owned adjacent property
  - Temporary walkway or scaffolding was supported by a fence on the respondent's property
  - “Cranes, hoists and building materials were overhanging [the respondent's] building”

## Maxwell Continued

- Staging materials would overhang the respondent's property for several months
- Respondent requested injunctive relief
- Nature of trespass vs. nuisance was considered at trial and appeal
- Court of Appeal reviewed *Didow* principles of transient and permanent intrusions

## Maxwell Continued

- Court of Appeal disagreed with Alberta Court of Appeal in *Didow* in respect of nuisance/trespass threshold
- Outcome:
  - The appellant's encroachment was correctly characterized as a trespass
  - Appeal was allowed on the basis that the threshold for an injunction was not met

## Other Applications of Air Rights in Nova Scotia

- *Atlantic Aviation Ltd v Nova Scotia Light*, 55 DLR (2d) 554, 1965 CarswellNS 30
- A land owner has the right to erect structures on his land in exercise of his use and enjoyment of his land, even if said structures interfere with the free passage of aircraft taking off and landing on an adjoining airfield
- Nova Scotia Supreme Court held that a landowner should not be prevented from making a *bona fide* use of their land
- Such rights are now limited by statute

## Other Considerations?

- Other conveyances, grants or agreements with respect to air rights?

## Overview of Mineral Rights

- Governed principally by statute – the *Mineral Resources Act* [MRA]
- Other jurisdictions may permit mineral rights to be vested in private landowners and held as a form of fee simple or leasehold title
- In Nova Scotia, all minerals in or upon land are reserved to the Crown
- Common law maxim of ownership is inapplicable

## Section 4 of the *MRA*

- 4 (1) All minerals are reserved to the Crown and the Crown owns all minerals in or upon land in the Province and the right to explore for, work and remove those minerals.
- (2) Every grant of Crown lands made on or after the twenty-second day of April, 1910, shall, whether the same is so expressed therein or not, be construed and held to reserve to the Crown all the minerals in or upon the land so granted and the right to explore for, work and remove those minerals.
- (3) Every grant of Crown lands made at any time on or before the twenty-second day of April, 1910, shall, whether the same is so expressed therein or not, and notwithstanding the provisions of such conveyance or of any enactment or law, be construed and held to have reserved to the Crown all the minerals in or upon the land so granted and the right to explore for, work and remove those minerals.
- (4) Every person who has acquired Crown lands by conveyance or prescription is deemed not to have acquired the minerals in or upon the Crown lands or the right to explore for, work and remove those minerals and no person is entitled to acquire minerals or such right by conveyance or prescription.

## What is a Mineral?

- The *MRA* provides:
  - "mineral" means a natural solid inorganic or fossilized organic substance and a substance prescribed to be a mineral, but does not include
    - (i) ordinary stone, building stone or construction stone,
    - (ii) sand, gravel, peat, peat moss or ordinary soil,
    - (iii) gypsum,
    - (iv) limestone, except that which is vested in the Crown, and
    - (v) oil or natural gas,unless declared to be a mineral by the Governor in Council;

## Forms of Mineral Tenure

- **Mineral License**
  - Provides for the right to prospect and search for minerals, and extract minerals for test purposes, within a designated area
- **Mineral Lease**
  - Provides an exclusive right to minerals in a designated area, subject to the lessee paying rents and royalties, and any other conditions that might be imposed on the lessee

## Title to Mineral Rights

- Registry of Mineral and Petroleum Titles
- Online registration portal:  
NovaROC, **Nova** Scotia's **R**egistry of **C**laims
- <https://novaroc.novascotia.ca/novaroc/page/home.jsf>
- Intended to comprise a searchable database of active and inactive mineral licenses and leases in Nova Scotia
- Coupled with interactive mapping

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## Title to Mineral Rights

- NovaROC can present practical problems for parties intending to search title to mineral rights
- Per section 87(1) of the *MRA*, “A mineral right holder shall file with the Registrar, a summary, as prescribed, of an agreement that results or may result in a transfer or assignment of a mineral right, part of a mineral right or any interest in a mineral right.”
- For example, a debenture or option agreement

## Title to Mineral Rights

- Per section 87(3) of the *MRA*: “A transfer or an assignment of a mineral right or non-mineral registration or an agreement that results or may result in the transfer or assignment of a mineral right or non-mineral registration is ineffective against a person who, for valuable consideration and without notice of the transfer, assignment or agreement, acquires an interest in the mineral right or non-mineral registration, unless a notice of the transfer, assignment or agreement is filed with the Registrar in the prescribed manner and in the prescribed form.”

## Title to Mineral Rights

- These registrations, if submitted in NovaROC, can only be viewed by the holder of the mineral right (or parties they have designated to have access)
- Any third party wishing to search title to a mineral right (or wishing to review registrations made prior to the implementation of NovaROC) must request a manual search of records from the Registry of Mineral and Petroleum Titles
- Other nuances associated with NovaROC and searching mineral titles

## Interaction with Fee Simple or “Surface Rights”

- NovaROC mapping may provide an indication of whether a fee simple interest overlaps a mineral license or lease
- Mineral rights are generally subservient to the rights of private or Crown land owners
- Per sections 39 and 40 of the *MRA*, mineral right holders are prohibited from entering upon, passing over or working private or Crown lands without consent

## Interaction with Fee Simple or “Surface Rights”

- Exceptions to consent requirements:
  - Section 100 of the *MRA* allows a licensee to apply for a surface rights permit if they cannot agree with the private land owner or tenant
  - Section 70 allows a lessee to apply for a vesting order where certain lands are required for a mine or any purpose incidental thereto, by way of expropriation

## Mineral Rights and the *Land Registration Act*

- Per section 3(1)(g) of the *Land Registration Act* [*LRA*], “interest” means “any estate or right in, over or under land... but excludes any interest under the ... Mineral Resources Act...”
- Also reflected in prior caselaw
- Mineral interests should not be recorded pursuant to the *LRA*, and prior reservations or grants of mineral rights may be void (refer to the *MRA* for procedures to transfer mineral rights)

## Mineral Rights and the *Land Registration Act*

- Certain rights ancillary to the mineral right, such as options to purchase surface title, rights of access or other easements, may indeed be registrable interests under the *LRA*
- Grants or conveyances of non-mineral interests, such as gypsum rights, may also be registrable under the *LRA*
- Profits à prendre

## Title Insurance

- Certain title insurers may expressly address rights accruing to mineral right holders or any damage to improvements caused by the extraction or development of minerals

## Other Considerations

- Nova Scotia protected areas program
- Geothermal Resource Area Designations
- *New Mineral Resources Act*

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