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NEWMONT MINES LIMITED

v.

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA, ATTORNEY GENERAL OF BRITISH COLUMBIA, MINISTER OF FINANCE, BRITISH COLUMBIA ASSESSMENT AUTHORITY AND SURVEYOR OF TAXES

British Columbia Court of Appeal (CA810686) Vancouver Registry

Before: CHIEF JUSTICE N.T. NEMETZ,
MR. JUSTICE P.D. SEATON
MR. JUSTICE E.E. HINKSON
MR. JUSTICE J.D. LAMBERT
MR. JUSTICE H.E. HUTCHEON

Vancouver, March 2, 1982

John E.D. Savage for the Appellant, H.M. the Queen in Right of the Province of British Columbia, et al
J.W. Elwick and R.B. Carrothers for the Respondent, Newmont Mines Limited

Reasons for Judgment of Mr. Justice Lambert March 2, 1982

Per Curiam

The trial judge granted Newmont Mines Limited a declaration that it was not assessable under the *Assessment Act* nor taxable under the *Taxation (Rural Area) Act* or the *School Act* in respect of the mineral claims and leases upon which it works its open pit copper mine in the Similkameen Valley about ten miles from Princeton. This is an appeal by the Crown from that decision.

Newmont has been operating an open pit mine on the claims since 1971. In 1980 the operating mine consisted of the Ingerbelle Pit on the west bank of the Similkameen River near the Hope-Princeton highway, Pit No. 2 at Copper Mountain on the east bank of the Similkameen, a crusher plant at each of those pits and a single concentrator plant near the Ingerbelle Pit.

The ore is blasted from the walls and bottom of the pit and carried in large pieces to the crusher plants. It is there broken down to pieces about nine inches across. Those pieces are carried from the crusher plants to the concentrator where they are ground up and the mineralized material, copper sulphide, is separated from the non-mineralized waste material.

At the pits and crushers there is waste rock. It is disposed of by piling it on the hillside in waste dumps. The waste material from the concentrator is the consistency of sand or mud and it is pumped from the concentrator across a bridge over the Similkameen to a tailings disposal pond from which the water is pumped back across the bridge to be used again in the concentrator.

A second bridge has recently been built. It is a suspension bridge and it carries a conveyor belt on which the crushed ore is carried from the crusher plant at Pit No. 2 across the river to the concentrator on the west bank.

There is a truck repair shop on each side of the river, there is a pump house and there are water tanks. Campsites have been built from time to time using portable camp trailers. Roads connect the various locations to each other and to the Hope-Princeton highway. Areas that are to be used for waste dumps or for camps or other purposes have been cleared of timber.

Pit No. 1 and Pit No. 3 on the east bank of the river have been cleared of timber but were not being worked in 1980.

Newmont's title to the mine site consists of a patch-work of mineral claims coupled with a title to the surface of the land on which all or a majority of the permanent buildings are located. There is no dispute about the land to which Newmont holds the surface title.

The mineral claims are of three types, Crown granted mineral claims, mineral leases, and located mineral claims.

The Crown granted mineral claims grant "all minerals . . . found in veins, lodes or rock in place . . . and the right to the use and possession of the surface of such mineral claim, including the use of all the timber thereon for the purpose of winning and getting from and out of such claim the minerals contained therein, including all operations connected therewith or with the business of mining." (my underlining)

The mineral leases and located mineral claims confer on the holder the rights set out in s. 10 (1) of the *Mineral Act*:

> 10 (1) The holder of a mineral claim, 2 post claim, lease, mining lease or certified mining lease may use and possess the surface of his claim or leasehold for the purpose of exploring for, developing and producing minerals, including the treatment of ore and concentrates, and all operations related to the exploration, development and production of minerals and the business of mining. (my underlining)

In short, the ownership of the mineral claims, no matter of which type, confers on Newmont a right or a power to use the surface, and a right or a power to possess the surface. There is no deemed possession or use. Possession and use remain questions of fact. Ownership of the claims only puts Newmont in a position where it can take possession of the surface if it wishes to do so. The ownership does not put Newmont into possession. This distinction is important and I will return to it.

In January 1980 Newmont was assessed under the *Assessment Act* on the actual value of the land covered by some, but not all, of its mineral claims. The ones which were not assessed were claims where the surface was not being used in any way by Newmont. The 37 claims which were assessed were used in whole or in part in the mining operations at that time. The uses may be summarized as mining in the open pits, dumping waste rock, storing mine tailings, the building and operation of a pumping system and bridge for tailings, the building and operation of a conveyor system and bridge for carrying crushed rock, the erection and maintenance of construction camp-sites, field offices and security buildings, and the building and operation of roads. In some cases the whole claim was in use, as for example, by being a part of the open pit or the waste dump, and in other cases only a very small part of the claim was in use, as where a roadway crossed a corner of a claim that was otherwise in a state of nature.

In due course tax was levied in the amount of $58,363.10 under the *Taxation (Rural Area) Act* and the *School Act*. The tax was paid under protest and this action was begun for a declaration that Newmont was neither assessable nor taxable, and for a refund of the tax paid under protest.

Mr. Justice Mackoff granted the relief that was claimed by Newmont. His decision is reported in (1981) 30 B.C.L.R. 331 and (1981) 124 D.L.R. (3rd) 710. He was invited by the Crown to distinguish, or not to follow, the decision of this Court in *Construction Aggregates* v. *Maple Ridge* (1972) 6 W.W.R. 335. But Mr. Justice Mackoff felt unable to distinguish that decision and said that the argument that it should not be followed should more appropriately be addressed to this Court.

In bringing this appeal, the Crown requested that the Court sit in a division of five. It is, of course, the correct practice in British Columbia to make such a request when counsel proposes to invite the Court to reconsider one of its own previous decisions. It is not, however, necessary in this case to digress as to the limits that this Court places upon itself with respect to overruling one of its own previous decisions. This is so because there are two other decisions of the Court on the point that may broadly be said to be in issue and, since they are contrary to the *Construction Aggregates* decision, we must, of necessity, make a choice. The other decisions are *B.C. Telephone Company* v. *West Vancouver* (unreported, 5 April, 1955, Victoria Registry, No. 160/54) which reversed the decision of Wilson, J. reported at (1955) 9 W.W.R. (N.S.) 468, and *Sammartino* v. *Attorney-General of British Columbia* [1972] 1 W.W.R. 24. Mr. Justice Mackoff was not referred to those decisions.

I now turn to the statutory provisions which raise the principal point in issue in this appeal. Section 34 of the *Assessment Act* provides that land and improvements, the fee of which is in the Crown, but which are held or occupied by someone other than the Crown, shall be entered on the assessment roll in the name of the holder or occupier, whose interest is to be valued at the actual value of the land and improvements. The *Taxation (Rural Area) Act* provides in s. 2 and s. 16 that every occupier of Crown land is to be assessed and taxed on the land and improvements held by him as an occupier. The *School Act*, in s. 204, makes the *Taxation (Rural Area) Act* apply to the assessment and levying of taxes for school purposes.

In the result, therefore, the *Assessment Act* provides for assessment if the land is either held or occupied by Newmont but the *Taxation (Rural Area) Act* only provides for taxation if the land is held by Newmont as an occupier. Counsel for both parties argued this appeal on the basis that if Newmont was an occupier it was assessable and taxable, and if it was not an occupier it was not taxable. I am content to treat the appeal on that basis.

The word "occupier" is defined in the *Taxation (Rural Area) Act* as being "occupier" as defined in the *Assessment Act*. So it all comes back to the definition of "occupier" in the *Assessment Act*. That definition reads in this way:

> "occupier" means
>
> (a) a person who, if a trespass has occurred, is entitled to maintain an action for trespass;
>
> (b) <u>the person in possession of Crown land that is held under a homestead entry, pre-emption record, lease, licence, agreement for sale, accepted application to purchase, easement or other record from the Crown, or who simply occupies the land</u>;
>
> (c) a person in possession of land the fee of which is in a municipality and that is held under a lease, licence, agreement for sale, accepted application to purchase, easement or other record from the municipality or who simply occupies the land; *or*
>
> (d) a person in possession of land the fee of which is in, or held on behalf of, a person who is exempted from taxation under an Act and that is held under a lease, licence, agreement for sale, accepted application to purchase, casement, or other record from the person exempted from taxation or who simply occupies the land;

(my underlining)

Newmont's position is that only a holder of an exclusive right of occupation is subject to assessment and taxation.

Counsel for Newmont seeks to support that position by saying that in order to be an occupier under the definition, Newmont must meet both the test in paragraph (a) of the definition and the test in paragraph (b) of the definition. That argument arises from the fact that the conjunction "or" only appears after paragraph (c). But that is the customary technique of legislative counsel in British Columbia when all the paragraphs are intended to be disjunctive alternatives.

If, in any particular case, possession was based on an exclusive right of possession then an action in trespass could be maintained if the possession was disturbed. Accordingly, if Newmont's position were correct there would be no purpose in paragraphs (b), (c) and (d). The presence of those paragraphs therefore tends to indicate what I think is the correct position, that is, that possession in fact, or occupation in fact, based on an exclusive or on a non-exclusive right to possession or occupation, or even on no right at all, is sufficient to make the person in possession or occupation subject to assessment and taxation.

On each of its claims Newmont is given a right to possess and use the surface of the land. The Crown is not seeking to assess or tax Newmont merely because Newmont holds those rights. No assessments were issued and no taxation levied on the claims where Newmont has done nothing on the surface. But in the exercise of those rights on some of the claims, Newmont has removed the surface completely and dug a hole in the ground; in the exercise of those rights on other claims it has completely covered the surface of the claims with a pile of waste rock; and in the exercise of those rights on still further claims it has cleared the land and built a road or a conveyor or a construction camp or the footings for a bridge. To suggest that those uses of the land amount to anything less than exclusive possession and occupation in fact, of the land so used, would be absurd.

Perhaps Newmont would not have done so had it not been for the fact that the Crown has sought to assess and tax the whole of every claim on which Newmont has exercised its right of possession by occupying a small part. To the extent that the Crown has done that, in my opinion it has done so wrongly.

Newport says that it is being assessed and taxed on land to which it does not have an exclusive right of possession. It is conceded by the Crown that a grazing permit under the *Range Act* has been issued and that it confers certain rights of use for grazing purposes over part of the surface on which Newmont is being assessed and taxed. It is also conceded by the Crown that a lease under the *Mining (Placer) Act* has been issued and that it confers rights of possession to part of the surface on which Newmont is being assessed and taxed.

The Crown's approach has required its counsel to advance an intricate argument to the effect that where part of the surface of a parcel of land, whose boundaries are the boundaries of a mineral claim, is occupied by one occupier with non-exclusive rights and another part of the surface of the same parcel of land is occupied by another occupier with non-exclusive rights, then one occupier is subject to assessment and tax on the actual value of the whole parcel and the other occupier is not assessable or taxable at all. Counsel for the Crown then says that the selection of which of the contiguous occupiers is to bear the tax depends on which of them is paramount, a test he seeks to support on the basis of English decisions on the rates for the relief of the poor, which is a levy on occupiers, not on owners. Those cases had to solve the problem that arose when two persons simultaneously occupied the very same premises, as in the case of a home owner and his lodger, and it was decided that the home owner should be rated as the paramount occupier. But those cases adopt a different solution where the occupation is of the same parcel of land but the two occupiers each has exclusive occupation of part of the parcel, as in the case of a bookstall in St. Pancras railway station. In that case the House of Lords decided that each of the

occupiers should be rated on the piece of the parcel which he actually occupied. *City of Westminster* v. *Southern Railway Company* [1936] A.C. 511. That approach to the problem of contiguous occupancy is not adopted by the Crown in this case, perhaps because it was not what was done when Newmont was assessed and taxed for 1980. But in my opinion, it is the correct approach. And, of course, it should apply whether there is a contiguous occupier on the same mineral claim or not. That is, Newmont should be assessed and taxed only on that part of the surface of the claim that it actually occupies. If part of the remainder of the surface of the claim is actually occupied by someone else, then that someone else should be taxed on the part which he actually occupies. If the remainder of the surface of a claim is not possessed or occupied by anyone, then no one should be assessed or taxed on that remainder, even though Newmont or others may have a right to possession or occupancy, exclusive or non-exclusive.

The theory of the Crown requires the addition to the statutes of a complex body of law that would be required to determine which occupier is the paramount one. It could also lead to absurd results. For example, it was said by Crown counsel that if 'Newmont built a road over a mineral claim in 1979 then it would be assessed and taxed on the actual value of the whole claim in 1980; but if a placer miner started to work the other end of the mineral claim in 1980, under the authority of overlapping rights, and became the paramount occupier by reason of doing so, then in 1981 Newmont would cease to be assessable and taxable and would cease to be an occupier notwithstanding that no change had occurred in its operation and its use of the road.

By contrast, the opinion that I have expressed as to the manner in which the assessment and taxation ought to operate is supported by the words of the statutes. Under paragraph (b) of the definition of "occupier" it is the person in possession of Crown land or the person who simply occupies Crown land who is subject to assessment and tax. Surely the question of possession and the question of occupation must be questions of fact. The paragraph does not purport to refer to persons who have rights of possession or rights of occupation, exclusive or otherwise. It refers to possession itself and occupation itself, though in relation to possession it limits the application of the paragraph to those cases where the possession is coupled with the holding of a right, exclusive or non-exclusive, the exercise of which could give legitimacy to the possession. Consequently, I conclude from the definition of "occupier" that possession or occupation in fact is sufficient to make Newmont assessable and taxable whether the right that is exercised by Newmont to carry out the possession or occupation is an exclusive right or not.

The definition of "occupier" refers to "the person in possession of Crown land" or "the person . . . who simply occupies the land". It says nothing about land that is part of the same parcel for registration purposes under real property legislation or mining legislation but which is not possessed or occupied by the person who has the right to possess or occupy it. The same is true under the *Taxation (Rural Area) Act* and the *School Act*. In the words of the *Taxation (Rural Area) Act*, "Every occupier of Crown land shall be assessed and taxed on the land and improvements on it held by him as an occupier." Nothing is said about land that he does not occupy but which is part of the same parcel as the land which he does occupy.

In my opinion Newmont is assessable and taxable on the land and improvements of which it has possession in fact, and which it holds by reason of the exercise of its rights under its Crown granted mineral claims, mineral leases and located mineral claims.

In my opinion Newmont is not assessable or taxable on land which it has not is reduced to possession and which it has not occupied, even if that land is within the boundaries of the same mineral claim as land on which Newmont is assessable and taxable.

There is no reason in this appeal to explore the question of what happens when the very same land is occupied simultaneously by two different occupiers for two different purposes. There are no cattle grazing in the open pits or browsing on the waste dumps. No placer miner is hosing away the foundations of the bridge towers. I would leave that question until it arises.

I do not think that it is necessary to discuss *Construction Aggregates* v. *Maple Ridge, B.C. Telephone Company* v. *West Vancouver*, and *Sammartino* v. *Attorney- General of British Columbia*. I do not think that they can be reconciled with each other. There is nothing in *Sammartino* that is inconsistent with the conclusion that I have reached in this case, and to the extent that it can be said to apply to this case I would follow it. To the extent that *B.C. Telephone Company* says that an occupier of land can be taxed on land in the same parcel which he has a right to occupy but which he does not occupy in fact, I would not follow it, and to that extent I would overrule it. *Construction Aggregates* may be distinguishable from this case on the ground that, being land held in trust for a band of Indians, only paragraph (a) of the definition of "occupier" in the *Municipal Act* at that time was applicable. But if *Construction Aggregates* decides that only a person who holds an exclusive right to possession can be assessed and taxed as an occupier, I would not follow it.

Counsel for Newmont raises two secondary arguments. The first is that the open pits are within the exemption from taxation that is conferred by S 13 (n) of the *Taxation (Rural Area) Act* on "tunnels and similar excavations of a mine". If the exemption had been for "excavations of a mine" then the open pits would have qualified. But once excavations of a mine are divided into two classes, those which are similar to tunnels and those which are not, in my opinion the open pits must fall into the category of those which are not. I suppose those that are similar to tunnels would be shafts, drifts and other underground workings.

The secondary argument is that the waste dumps are within the exemption that is conferred by s. 13 (r) of the *Taxation (Rural Area) Act* on " land used . . . for control or abatement of . . . pollution". In my opinion the land on which the waste rock is dumped is polluted by the rock in that the rock "is of a character to substantially alter or impair the usefulness of the land". See s. 1 of the *Pollution Control Act*. The fact that the pollution is somewhat ameliorated by the management of the dumping of the waste and the eventual covering of the waste with top soil and vegetation, does not mean that the land is used for control or abatement of pollution. It is the very land that is being polluted.

I would allow the appeal in part. I would grant the plaintiff only a declaration that it is not assessable or taxable on land that it does not possess or occupy in fact, even if it has a right to possession of that land under a Crown granted mineral claim, a mineral lease or a located mineral claim, and even if it possesses or occupies another part of the land covered by the same claim or lease. I would grant a further declaration that the plaintiff is entitled to recover from the Crown the tax that the Crown was not entitled to levy in accordance with the first declaration. If the parties can not agree on interest on the amount to be refunded then I would permit that matter to be spoken to. Success has been divided. I would not award costs of the appeal or costs of the trial to either party.