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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

Supreme Court of British Columbia (C8038l9) Vancouver Registry

Before: MR. JUSTICE A.A. MACKOFF

Vancouver, March 19 and 20, 1981

J.W. Elwick for the Plaintiff
J.E.D. Savage for the Defendants

Reasons for Judgment June 3, 1981

The plaintiff is the holder of certain Crown granted mineral claims, located mineral claims and mineral leases (to be referred to as the "Claims") which are located near Princeton, British Columbia.

The defendants have assessed the Claims on the basis that the plaintiff is an occupier of the Claims and is assessable pursuant to the provisions of the *Assessment Act*, R.S.B.C 1979 c. 21.

On June 15, 1980 taxes in the aggregate amount of $58,363.10 were levied against the plaintiff under the *Taxation (Rural Area) Act*, R.S.B.C. 1979 c. 400 and the *School Act* R.S.B.C. 1979 c. 375 in respect of the Claims.

The plaintiff's position is that the assessments and the taxes levied are based in respect of the plaintiff's use of the surface of the claims and since the plaintiff is not an “owner" or "occupier" of the surface of the Claims as those terms are defined in the *Assessment Act*, the *Taxation (Rural Area) Act* and the *School Act*, therefore the plaintiff claims:

(a) A declaration that it is not assessable under the *Assessment Act*.

(b) A declaration that it is not assessable for tax under the *Taxation (Rural Area) Act*.

The question for my determination therefore is: Is the operator of a mine assessable and taxable in respect of the surface of Crown land used for mining purposes when the only rights to use the surface flow from holding mineral claims and leases?

The definition of "occupier" appears in section 1 of the *Assessment Act* and the relevant portions read as follows:

> "'occupier' means
>
> (a) a person who, if a trespass has occurred, is entitled to maintain an action for trespass;
>
> (b) 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;"

This definition is also used in the *Taxation (Rural Area) Act* and the *School Act*.

Is the plaintiff an "occupier" as defined in part (a) of the definition, that is, if a trespass has occurred, is the plaintiff entitled to maintain an action for trespass?

The rights of the holder of located mineral claims and mineral leases are only those derived under the *Mineral Act* R.S.B.C. 1979 c. 259. The rights of a Crown granted mineral claim are not set out in the *Mineral Act*, they are contained in the Crown grant itself. An examination of one of these Crown grants appended to the Agreed Statement of Facts indicates that the rights of a holder of a Crown granted mineral claim are virtually identical with those of a holder of a located mineral claim or mineral lease.

By section 10 of the *Mineral Act* the holder of a mineral claim or lease may use and possess the surface of the claim or lease for certain specific purposes. The purposes are: exploring for, developing and producing minerals, including the treatment of ore concentrates and all operations related to the exploration, development and production of minerals and the mining business.

The holder is not only subject to the restriction contained in section 10 as to his use and possession of the surface area but he is also subject to contrary rights. This is not in dispute and in fact in paragraph 16 of the Agreed Statement of Facts herein the following is set out:

> "The Crown is entitled to grant other rights for the use of the lands covered by the Claims to third parties and has done so in connection with Placer claims over parts of the Magnetic and Princeton claims and also in connection with a grazing permit over the Claims located on or near Copper Mountain."

Such contrary rights to surface area may be obtained, inter alia, under the *Coal Act* R.S.B.C. 1979 c. 51; the *Range Act* R.S.B.C. 1979 c. 355; the *Forest Act* R.S.B.C. 1979 c. 140; the *Mining (Placer) Act* R.S.B.C. c. 264.

The restricted surface rights given under section 10 of the *Mineral Act* are further restricted by section 11 which reads:

> "11. (1) Notwithstanding this or any other Act, the minister may restrict the use of surface rights by a person who holds a mineral claim, mining lease or certified mining lease where, after inspection and giving reasonable notice to that person, he is of the opinion that the surface is so situated that it should be used for purposes other than mining."

From the foregoing it is evident that the Crown has reserved its rights and is therefore free to grant rights to other parties for the use of the lands covered by the Claims for purposes other than those given exclusively to the plaintiff.

In *Construction Aggregates Ltd.* v. *Corporation of the District of Maple Ridge* (1971) 4 W.W.R. 214, Gould, J. examined the word "occupier" which was defined in the *Municipal Act* R.S.B.C. 1960 c. 255 in terms almost identical to the definition here being considered. In that case the Crown entered into an agreement with the predecessor in title of the plaintiff giving it the sole and exclusive right during the life of the agreement to use certain Indian reserve lands for the purpose of extracting gravel, rock, sandstone and aggregates. Under the agreement was reserved the

right for the Indians to carry on logging over the land and as well the Crown could grant an interest in the land, including a lease, to a third party, subject only to the permittee's rights under the agreement (Exhibit No. 22) to come onto the land for the purpose of removing gravel, etc. Gould, J. held that the plaintiff did not possess any interest in the land by way of exclusive occupancy under its agreement with the Crown and so could not maintain an action for trespass.

In my view the plaintiff's rights in the present case are very similar to the plaintiff's rights in the *Construction Aggregates* case. In both cases the plaintiff has only an exclusive right for certain specific purposes but does not have an exclusive right to use or occupy the land. As well, as in the *Construction Aggregates* case, the Crown here, as previously stated, has reserved its right and is free to grant rights to other parties to use the lands covered by the Claims for other purposes. Since the plaintiff does not have the exclusive right of occupation it cannot maintain an action for trespass and is therefore not an "occupier" as defined in Part (a) of the definition.

Is the plaintiff an "occupier" as defined in Part (b) of the definition as one who is “in possession" or as one "who simply occupies the land"? In answering the same question in reference to an almost identical definition Gould, J. in the *Construction Aggregates* case stated at page 214:

> "There remains the question of whether the land was and is 'occupied' by or through the plaintiff.
>
> The British Columbia *Municipal Act*, section 2, defines 'occupier' as:
>
> (a) one who is qualified to maintain an action for trespass; or
>
> (b) the person in possession of land of the Crown that is held under any 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.
>
> The plaintiff Permittee does not qualify as an occupier under subsection (a) (supra), because it could not maintain an action for trespass. Nor is it in possession of the land, as required by the first part of (b) (supra). The question remains, does the plaintiff come under the second part of (b) (supra), as one "who simply occupies the land”? To “occupy" land for the purpose of municipal taxation there must be an element of exclusive occupancy. See Re City of Oshawa and Loblaw Groceteria Company Limited (1963) 38 D.L.R. (2d) 216; 1 O.R. 605. There is, and has been, as an agreed fact, logging over the land in question, being lawfully carried out by an Indian or Indians, and in the light of Exhibit 22 I find that the Crown Dominion could grant an interest in this land, including a lease, to a third party, subject only to the Permittee's rights under Exhibit 22 to come onto it for the limited purpose of removing gravel, etc. I hold that the plaintiff Permittee is not an "occupier" of the land within the definition of section 2 of the *Municipal Act*, nor is the land "occupied" by the plaintiff within section 335 or section 327(1)(f) of the same Act."

Gould, J. was upheld on appeal. Maclean J.A. after adopting the portion of the foregoing beginning with the words "To 'occupy' land" to the end of the above quoted passage stated:

> "If this statute were to be interpreted as taxing a restricted and limited interest such as held by the respondent here an absurd situation would result. If a person is taxable as an occupier section 335 (2) (of the *Municipal Act* which is identical to section 34 (2) of the *Assessment Act*) authorizes assessment of the occupier at 'the actual value of the lands and improvements'.
>
> In the present case, unless "occupier" means exclusive occupier, the lands could be assessed for their actual value against a person having the right to occupy for the purpose of cutting and removing timber as well as assessing and taxing for the actual value for persons having other non exclusive rights such as the present respondent."

Construction Aggregates Ltd. v. *Corporation of the District of Maple Ridge* (1972) 6 W. W. R. 335 at 363.

Maclean J.A. held that in that case the expression "occupied by a person" should be interpreted as referring to an exclusive right of occupation.

As in that case, for the reasons earlier set out, the plaintiff herein has neither an exclusive right of possession nor an exclusive right of occupancy and is therefore not an "occupier" within the definitions of the applicable Acts.

Counsel for the defendants seeks to distinguish the present case from the *Construction Aggregates* case on the fact that in that case an Indian or Indians were logging over the land in question.

In that case there were two findings of fact, either of which, in my view, supports the conclusion reached that the plaintiff did not have an exclusive right of occupation. First was the fact above stated. Second was the fact that the Crown reserved the right to grant an interest in the land to a third party subject only to the plaintiff's rights under the agreement to use it for the limited purpose of removing gravel, etc. Since the latter finding of fact in that case is indistinguishable from the facts herein, the distinction pointed out by counsel for the defendants does not affect the conclusion that the plaintiff in that case and in the present case does not have an exclusive right of occupation.

Counsel for the defendants submits that the Ontario case followed by Gould, J. and the B.C. Court of Appeal majority in their decision was wrongly decided since the trial judge in the Ontario case misinterpreted a House of Lords decision upon which he based his judgment. Counsel therefore urges that I not follow the *Construction Aggregates* decision. This submission would be more appropriately made to the Court of Appeal and not to a trial judge who is bound to follow the law as stated by the Court of Appeal.

Having reached the conclusion that the plaintiff is not an "occupier" within the definition section, it is unnecessary for me to deal with the secondary argument advanced on behalf of the plaintiff.

The plaintiff is entitled to the declarations sought.