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CANADA / JUDGMENT

## Chieftain Metals Inc. v. Tulsequah Wilderness Adventures Inc.

2014 BCSC 1251

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COURT

Supreme Court of British Columbia

DECIDED

8 July 2014

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2014 BCSC 1251 Chieftain Metals Inc. v. Tulsequah Wilderness Adventures Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Chieftain Metals Inc. v. Tulsequah Wilderness Adventures Inc.,

2014 BCSC 1251

Date: 20140708

Docket: S128638

Registry: Vancouver

Between:

Chieftain Metals Inc.

Plaintiff

And:

Tulsequah Wilderness Adventures Inc. and William Karman

Defendants

Before: The Honourable Madam Justice Adair

Reasons for Judgment

Counsel for the Plaintiff:

Salim M. Hirji

Counsel for the Defendants:

Jennifer Millbank

Place and Date of Trial:

Vancouver, B.C.

March 24-28, 2014

Place and Date of Judgment:

Vancouver, B.C.

July 8, 2014

## Introduction

- [1] This action involves mineral tenure No. 513807 (the "Mineral Tenure") and other assets located in a relatively remote part of north-west B.C., on the Tulsequah River and near the Taku River. The closest town in B.C. is Atlin. There are no roads in the area. However, there is an airstrip (the "Airstrip") and, during the barging season, the area is also accessible by barge. The Mineral Tenure and other assets were previously owned by Redcorp Ventures Ltd. and Redfern Resources Ltd. (collectively "Redfern"). Redfern was developing a mine known as the Tulsequah Chief Mine.
- [2] In March 2009, Redfern declared bankruptcy.
- [3] In September 2009, the defendant Tulsequah Wilderness Adventures Inc. ("TWA") purchased certain chattels from Redfern's receiver, pursuant to the terms of a written agreement. I will refer to the items purchased as the "Camp Assets." The Camp Assets were physically located on Crown land covered by the Mineral Tenure (the "Mineral Tenure Land"). The agreement set a deadline (in August 2010) for TWA to remove the Camp Assets from the Mineral Tenure Land.
- [4] The defendant William Karman, who is a businessman and an experienced helicopter pilot, is a director and the principal of TWA. Mr. Karman has lived in Haines Junction, Yukon, for over 50 years.
- [5] The plaintiff, Chieftain Metals Inc., acquired the balance of Redfern's assets (including the Mineral Tenure) pursuant to the terms of a vesting order pronounced in Redfern's bankruptcy proceedings on September 22, 2010.
- [6] As of trial, the Camp Assets remain on the Mineral Tenure Land. Chieftain is using them.
- [7] In this action, Chieftain seeks a declaration that TWA abandoned the Camp Assets and has lost title as a result of the abandonment. Alternatively, Chieftain seeks relief against TWA either on the basis that Chieftain is an involuntary bailee of the Camp Assets or that the presence of the Camp Assets within the boundaries of Chieftain's mine operations constitutes an ongoing trespass. In addition, it seeks an injunction and damages against TWA and Mr. Karman for trespass, on the basis that they have entered the mine site without

authorization and threaten to continue to do so, unless enjoined.

- [8] The defendants say that Chieftain's action must be dismissed. In particular, they say that Chieftain's rights under the Mineral Tenure are insufficient to support a claim for either abandonment or trespass, or as involuntary bailee, either in relation to the Camp Assets or in relation to any other of the defendants' activities. The defendants say further that even if Chieftain can prove a trespass, it has failed to prove that it suffered any damages as a result.
- [9] TWA has counterclaimed for damages for conversion in respect of Chieftain's use of the Camp Assets since June 2011, and says that damages should be assessed in the sum of \$425,000.00. The defendants also seek an order that they be permitted to retrieve certain items with sentimental value from the Mineral Tenure Land. A claim for punitive damages was abandoned at trial.
- [10] Chieftain says that TWA's counterclaim must be dismissed. Alternatively, Chieftain says that even if TWA can make out a conversion of the Camp Assets, TWA cannot prove that it has suffered any damages.

## Background Facts

- [11] In February 2008, prior to Redfern's bankruptcy, the Chief Inspector of Mines for B.C. issued a permit to Redfern, pursuant to s. 10 of the Mines Act, R.S.B.C. 1996, c. 293. The permit approved a limited work plan for pre-construction site clean-up "as specified in the Mines Act Application" in connection with Redfern's Tulsequah Chief Mine project. The permit was subsequently amended in September and November 2008, July 2011 and June 2012. I will refer to the permit and its amendments, collectively, as the "Permit." The Permit included a number of conditions, including that Redfern deposit security with the Minister of Finance for its reclamation obligations. As of June 2012, the total security required was \$3.5 million. The Permit does not mention the Mineral Tenure, although it specifically mentions other mineral titles held by Redfern (and, subsequently, by Chieftain).
- [12] I conclude that the construction of the Airstrip, and the clearing of the area near the Airstrip, was probably approved when the Permit was initially issued in February 2008, although the Airstrip is not mentioned specifically in the February 27, 2008 permit document. I draw this conclusion because Redfern's March 24, 2008 permit amendment application mentions (at p. 8-41) the "airstrip . . . currently under development" and also (at p. 9-83) that "The Tulsequah Chief project airstrip was originally built as part of the Big Bull/Tulsequah Chief Exploration access project." These statements indicate that activities in relation to the Airstrip have already been approved. The Airstrip is also mentioned in Redfern's Reclamation Plan, which, based on the evidence of Mr. Doug Flynn, a mine inspector for the Province, is considered to form part of the Permit. I accept Mr. Flynn's evidence in this respect.

[13] In May 2009, the court appointed an interim receiver and receiver-manager (the "Receiver") over all of Redfern's property.

[14] In September 2009, TWA purchased the Camp Assets from the Receiver for \$60,000.00 (including GST). The Camp Assets are listed in Exhibit 18, and include: several trucks, a D-3 Cat backhoe, generators, equipment for a commercial kitchen, sleeping quarters and a laundry, lumber, tools and hardware, and office furniture and equipment. The agreement between TWA and the Receiver included the following terms:

The Purchaser [TWA] shall forthwith and in any event not later than 330 days of the date hereof [September 10, 2009], take possession of the [Camp] Assets and remove the Assets from the location where they are situated as at the date hereof to premises or a location under the control of the Purchaser provided, however, that if the Purchaser intends to remove the Assets by air transport, the Purchaser shall be entitled to retain the Assets at a location adjacent to the airstrip at Taku provided that the Purchaser has obtained from Her Majesty the Queen in right of the Province of British Columbia a licence to use such area on terms which release the Vendor [the Receiver] from and indemnifies the Vendor against any liability in respect thereof.

Upon removal of the Assets, the Purchaser shall repair any damage or waste caused to any lands and premises arising from such removal so as to not cause any decrease or diminution in their value, and leave the lands and premises in a reasonably orderly and clean condition and state of repair.

[15] 330 days from September 10, 2009 was August 6, 2010.

[16] The defendants admit that, when TWA purchased the Camp Assets from the Receiver, they were located on the Mineral Tenure Land, and the defendants also admit that TWA did not remove the Camp Assets by August 6, 2010. They admit further that, apart from a few assets that they have removed, the vast majority of the Camp Assets remain on the Mineral Tenure Land.

[17] The Mineral Tenure Land is adjacent to the Airstrip. The Airstrip and Mineral Tenure Land are about five to seven kilometres from the actual mine site.

[18] Mr. Karman explained that, as of August 2010, he was in the process of applying for a licence from the Province for the Mineral Tenure Land that would allow TWA to operate a commercial lodge there. He had hired a consultant, Mr. Don Van der Horst, to assist TWA in that regard. If TWA obtained the licence, as Mr. Karman hoped, the Camp Assets could be left where they were, since they would be used in the lodge operations. Mr. Karman explained further that moving the Camp Assets required either a massive helicopter or a barge. In short, removing the Camp Assets was very expensive and difficult to organize, and, as Mr. Karman explained, it was neither feasible nor cost effective.

[19] As I noted above, on September 22, 2010, the court approved the sale to Chieftain of Redfern's remaining assets. The assets purchased by Chieftain included the Mineral Tenure, Redfern's rights under the Permit, certain real property and a number of additional mineral

titles. The order provided that "vacant possession of the Purchased Assets, including any real property, shall be delivered by the Receiver and the Trustee, as applicable, to the Purchaser [Chieftain] at 12:00 noon on the Closing Date," subject to permitted encumbrances.

[20] As of September 2010, TWA had not obtained a licence from the Province permitting it to use the Mineral Tenure Land for a commercial lodge. Indeed, Mr. Van der Horst has been advised that the Ministry of Mines was opposed to a lodge at that location, and that an application would be rejected on that basis.

[21] In October 2010, representatives of Chieftain, including Mr. Terry Zanger (Chieftain's mine manager and formerly Redfern's mine manager), visited the proposed Tulsequah Mine site. They arrived by air, using the Airstrip. Their visit included the Mineral Tenure Land, where the Camp Assets remained.

[22] On October 18, 2010, Mr. Victor Wyprysky, Chieftain's president and chief executive officer, wrote to Mr. Van der Horst (as TWA's representative) and said in part:

Chieftain Metals Inc. has acquired the Tulsequah Chief project and all claims and rights and assets from [Redfern]. The BC Supreme Court has given Chieftain a vesting order providing VACANT possession of all of the associated lands. We visited our site on Thursday and were extremely disappointed to see that you have not fulfilled your legal agreement to move the camp building you purchased from the Receiver . . . . We are starting project work immediately and will not contemplate any trespassing on our site and lands. If you do not move the camp buildings you acquired by Oct 31 we will cause them to be moved off site the following week . . . . Alternatively we will acquire all camp buildings from you for \$85,000 and contract you to at least \$30,000 of helicopter time in 2011. I look forward to your reply by 12 noon PST Wednesday October 20. If we do not hear from you and receive acceptance of either alternative offered we will proceed immediately to arrange removal of any camp buildings you acquired.

[23] On November 10, 2010, Chieftain's lawyers wrote directly to TWA. Their letter said in part:

As is set out in our client's letter [dated October 18, 2010], our client has acquired all of the claims, rights and assets of [Redfern]. Included among those assets is the land on which the camp buildings you acquired from the receiver by way of the Bill of Sale . . . now sit. Pursuant to the terms of the Bill of Sale, you were to have removed those buildings from our client's land by mid-August. You have failed to do so, and our client advised you in its letter that if those buildings were not removed from its land by October 31, 2010, it would remove them itself. You have still not removed the buildings. Accordingly, our client will now take whatever steps it deems necessary with respect to those buildings, including removal and/or destruction of them, without further notice to you.

- [24] In fact, Chieftain had not acquired "the land on which the camp buildings you acquired from the receiver by way of Bill of Sale . . . now sit," i.e., the Mineral Tenure Land, as a result of the court order. The Mineral Tenure Land remained Crown land. Chieftain had acquired the Mineral Tenure only.
- [25] Mr. Karman said that he remembered receiving this letter, but he did not respond. TWA (with Mr. Van der Horst's assistance) was still pursuing the application for a licence to operate a commercial lodge on the Mineral Tenure Land, and, as Mr. Karman explained, he did not feel any obligation to inform Chieftain's lawyers about TWA's plans.
- [26] At the end of November 2010, TWA entered into an agreement (the "Procon Agreement") with Procon Mining and Tunnelling Ltd. ("Procon") to rent most of the Camp Assets to Procon until May 31, 2011, at a monthly rent of \$8,500.00. Procon was one of Chieftain's shareholders and contractors, and the Procon Agreement was made with Chieftain's knowledge. Indeed, as Mr. Keith Boyle (Chieftain's chief operating officer) testified, Chieftain agreed to pay Procon \$8,500.00 per month, plus a 15% fee, to have access to the Camp Assets from December 2010 to May 2011. Mr. Boyle acknowledged that it likely would have cost Chieftain about \$1 million to replace the Camp Assets.
- [27] According to Mr. Karman, he did not find out about Procon's arrangements with Chieftain until the Spring of 2011.
- [28] Mr. Karman placed limits on the Camp Assets that Procon was permitted to use pursuant to the Procon Agreement. For example, a "coverall" structure containing a shop and equipment was not part of the Procon Agreement. It was to be left locked and considered off-limits. Procon acknowledged the existence of the limits in its November 26, 2010 purchase order confirming the Procon Agreement. However, as far as Mr. Karman was concerned, Procon (and Chieftain) did not respect these limits, something that Mr. Boyle and Mr. Zanger conceded in their evidence. Mr. Boyle, for example, explained that Procon's (and Chieftain's) position was that they were entitled to use what was in the coverall shop, because the tools and equipment in the shop were there to maintain the camp.
- [29] In March 2011, Mr. Karman visited the site and met with Mr. Zanger. The meeting did not go well. Mr. Karman was very unhappy to learn that Mr. Zanger had broken into the coverall shop, and used materials from it, although Mr. Zanger explained that, as far as he was concerned, what he did was justified in order to properly maintain the camp.
- [30] Later that month, Procon wrote to Mr. Karman, making a formal offer to buy all of the Camp Assets from TWA for \$200,000.00. However, the offer was unacceptable to TWA, and Mr. Karman remained upset about what he had seen at the site a few weeks earlier.

[31] On April 15, 2011, Mr. Karman sent two e-mail messages to Mr. Boyle concerning the Camp Assets. He advised Mr. Boyle that, at the end of the Procon Agreement, TWA would sell Chieftain the Camp Assets (minus some items such as the dining room table and benches, and a large custom map) for \$425,000.00. Mr. Karman said this was a fair price and "well below" replacement value.

[32] Mr. Boyle responded by e-mail on April 18, 2011. He rejected Mr. Karman's proposal, and advised that he was contacting Chieftain's lawyers about next steps.

[33] On April 29, 2011, Chieftain's lawyers sent a letter to Mr. Karman, which said in part:

. . . We write further to our letter of November 10, 2010.

Subsequent to our letter, on November 26, 2010, you entered into an agreement with [Procon], pursuant to which Procon, acting in concert with Chieftain, agreed to rent certain equipment you had purchased from the receiver of [Redfern] (the "Equipment"). That agreement will come to an end at the end of May, 2011.

. . . On March 25, 2011, Procon offered to purchase the Equipment from you for \$200,000 (the "March 25 Letter"). . . . You did not accept that offer, and on April 15, 2011, you sent an email to Chieftain offering to sell it the Equipment for \$425,000 plus transportation of certain items to Juneau.

We are instructed to convey to you that Chieftain does not accept your offer. However, Chieftain is prepared to purchase the Equipment from you on the terms set out in the March 25 Letter. Chieftain's offer to do so will remain open for acceptance until 5:00 p.m. on Friday, May 6, 2011. . . .

Should you determine that this offer is not acceptable, Chieftain expects that you will immediately remove the Equipment from its property when your rental agreement with Procon comes to an end at the end of May, failing which Chieftain will deem you to have abandoned the Equipment and will sell or use it as Chieftain sees fit.

Again, the demand that TWA remove the Camp Assets "from its property" overstates Chieftain's ownership interest in respect of the Mineral Tenure Land, which was not Chieftain's "property."

[34] Mr. Karman responded by e-mail dated May 3, 2011, and said (emphasis in the original):

Let me make this very clear that Under no circumstances are we abandoning any of our assets in the Tulsequah Valley. It would appear that Chieftain wants everything for nothing, we have turned this over to the lawyer and all the lawyers fees will be added to our end price.

Is it good business on Chieftains [sic] part to blow shareholder money on bullying tactics and lawyers or step up to the plate and pay well below what they have told us it is going to cost to replace the camp?

We have always been open to reasonable offers and still are.

[35] Chieftain's lawyer responded by e-mail on May 10, 2011, and said:

You have been advised of the price our client is prepared to pay for these assets. Should you wish to accept that price, please advise Mr. Boyle. If that price is not acceptable, then the obvious course for you to follow is to remove the assets from our client's property. If you do not do so promptly after the end of this month, our client will take whatever legal steps are necessary to have the Court bar you from entering onto its property (other than to remove the assets) and compel you to remove the assets, which you were supposed to have done many months ago.

Once again, the reference to "our client's property," to the extent it implies an interest in land, overstates the facts.

[36] The Procon Agreement ended as of May 31, 2011. Chieftain and TWA were now at an impasse. Chieftain continued to use the Camp Assets, which remained on the Mineral Tenure Land. Officially, its position was that TWA had abandoned the Camp Assets.

[37] In July 2011, TWA received a letter from the Ministry of Forests, Lands and Natural Resource Operations concerning its application for a Crown licence to operate a commercial lodge. The letter read in part:

Early in the referral process, the former Ministry of Energy and Mines and Petroleum Resources . . . indicated that the application overlapped a Mines Act permit area where active mining development was scheduled to occur in the near future. . . .

The overlap with the Mines Act permit is a conflict with an existing authorized use of Crown land and therefore your application has been disallowed.

[38] Both Mr. Karman and Mr. Van der Horst had been aware for some time that TWA's application would have a better chance of success with a letter of support from Chieftain, the holder of the Mineral Tenure. However, Mr. Karman explained that he never bothered asking because he knew that he would never get such a letter from Chieftain. Mr. Karman's assumption was correct.

[39] Despite that, in January 2012, Mr. Van der Horst wrote to Mr. Wyprysky concerning TWA's application and the possibility of TWA and Chieftain working together. Mr. Van der Horst's letter read in part:

In 2011, I prepared and submitted an application, on behalf of TWA, to the Ministry of Forests, Land and Natural Resource Operations (MFLNRO), for [the] parcel of Crown land that includes an existing mining camp and air strip, along the east side of the Tulsequah River.

That application was disallowed, primarily due to the fact that the camp, and airstrip, are located on existing mineral claims owned by [Chieftain], but also due to the fact that Chieftain is using the camp and airstrip, as part of their work on the nearby Tulsequah Chief mine. I had several discussions with the Ministry of Mines on this matter. Their position on the application . . . was that the mining camp (and airstrip) was part of an "active mineral claim", therefore the Min of Mines was not supportive of the application of TWA. . . .

The Min of Mines did make the point that if Chieftain determines that production of the Tulsequah mine is to proceed, then they (Min of Mines) expect a camp for the employees would likely be constructed at or near the mine itself, not where the camp is currently located, which [is] approximately 7 kms away from the actual mine site. That said, although the camp for employees is likely to be relocated, the airstrip would continue to be used.

My question to you today is around the long term use of the current mining camp. I had, in my discussions with the MFLNRO and Mines, . . . inquired about the possibility of both TWA and [Chieftain] jointly using the camp, etc. I understood that [Chieftain] was not supportive of that proposal, but I was not advised as to the specifics of [Chieftain's] objections.

In a recent follow up with both the MFLNRO and Mines, I was advised that TWA's application (wilderness lodge) could be reconsidered, but only if TWA and [Chieftain] were to come up with a joint agreement for use of the mining camp and associated facilities.

. . .

As you can appreciate, the construction of a new lodge site for TWA will be costly. However, if [TWA] is able to use the facilities at the existing mining camp, rather than create a new facility, from the ground up, elsewhere, it would make a lot more sense, from a financial and business perspective for [TWA] in the long term. All of this is predicated on the assumption that Chieftain creates a new camp, in the near future, at the mine and the current camp facilities (on the understanding that the airstrip would continue to be required by the mine) are no longer required.

If that is the long term plan and view of Chieftain, then my proposal, on behalf of TWA, is to open up a discussion between the two parties on how the camp, in the short term, could be used by both parties. If there is a willingness to consider such an arrangement, then that arrangement would be the basis for an amended application to the MFLNRO by TWA.

[40] Mr. Boyle recalled seeing a copy of Mr. Van der Horst's letter. But Chieftain's response was that it was not interested.

[41] On April 10, 2012, Chieftain's lawyers again wrote to TWA. The letter read in part:

As you are aware from previous correspondence, our client acquired all of the claims, rights and interests of [Redfern] in relation to the Tulsequah Chief Mine. Included among those assets is the land on which the camp buildings and other equipment that you acquired from the Receiver . . . continue to sit. As you know, . . . you were to have removed those buildings and all equipment

from our client's land in 2010. You failed to do so, and our client advised you in its previous correspondence that they considered all such buildings and equipment to have been abandoned and would take such steps as it deems necessary. This was further confirmed to you in our letter of November 10, 2010. We are now writing to make the position of our client clear with respect to matters going forward.

. . .

We are instructed to advise that you will have one last opportunity to remove any and all buildings and equipment on site, which our client is prepared to allow until May 5, 2012. Thereafter, our client will consider all buildings and equipment to be legally abandoned so that title transfers to our client giving our client all legal rights and entitlement with respect to same. In the event that legal proceedings are necessary to confirm the transfer of legal title, we will commence such without further notice to you which will include a claim for costs and significant damages associated with your conduct. . . .

- [42] Again, the statement to the effect that the Mineral Tenure Land was land Chieftain had acquired by way of the court order, and the reference to "our client's land" did not accurately reflect the facts.
- [43] With respect to their attendance at the Mineral Tenure Land, the defendants admitted the allegations in paras. 21, 22 and 25 of the amended Notice of Civil Claim, as follows:
21. On April 9, 2012 and May 15, 2012, William Karman entered onto the [Mineral Tenure Land] without prior authorization, by landing a helicopter on the [Mineral Tenure Land]. On each occasion, Mr. Karman was asked to leave by representatives of Chieftain, and informed that he was entering an operating mine site without proper authorization or approval.
  22. Mr. Karman was also advised on each occasion that by entering onto the [Mineral Tenure Land] by helicopter, without providing prior notice, Mr. Karman was endangering the safety of Chieftain's employees working in the area in which the helicopter landed, as well as the pilot and occupants of the helicopter.
  25. On October 18, 2012, Kyle Karman, a representative of TWA and William Karman's son, entered onto the [Mineral Tenure Land] without prior authorization, by landing a helicopter on the [Mineral Tenure Land]. Kyle Karman was asked to leave by representatives of Chieftain, and informed that he was entering an operating mine site without proper authorization or approval.
- [44] The impasse between Chieftain and TWA continued. TWA prepared and sent to Chieftain a series of invoices, beginning in June 2011 and continuing into 2012, billing Chieftain \$14,250.00 per month for "Camp Rental," and issued other invoices to Chieftain. Chieftain did not pay any of the invoices issued by TWA.

- [45] This action was filed in December 2012. An application by Chieftain for an interim injunction was dismissed by Madam Justice Gerow: see *Chieftain Metals Inc. v. Tulsequah Wilderness Adventures Inc.*, 2013 BCSC 406.
- [46] As of Mr. Boyle's examination for discovery in October 2013, Chieftain continued to use some of the Camp Assets to house people during its exploration campaign.
- [47] In early December 2013, Mr. Karman and Mr. Boyle exchanged e-mail. Mr. Karman's messages, although brief, were inflammatory and provocative, indicative of Mr. Karman's frustration at the situation. Mr. Karman said that he intended to visit "our facilities" to "assess the situation and take inventory of what Chieftain has stolen and possibly shut the camp down." Mr. Boyle's responses were much more measured. He repeated Chieftain's position that Chieftain controlled the Mineral Tenure Land through the Permit and that the Camp Assets had been abandoned. Mr. Boyle signed off by saying "See you in court to prove our ownership."
- [48] In March 2014, just before the start of the trial, Mr. Karman sent a much more businesslike e-mail to Mr. Boyle, saying that he would be flying in the following day with one or possibly two contractors "to inspect our facilities and equipment for possible purchase and removal," and that "I will be landing on Province of British Columbia 'Crown Land'." This is a reference to the Airstrip.

## Discussion and Analysis

- [49] I will first set out the legislative context relevant to the parties' claims and defences. Next I will address Chieftain's trespass claim, following which I will address the questions of whether the Camp Assets have been abandoned, or whether they have been wrongfully converted. Finally, I will deal with Chieftain's claim for injunctive relief.
- (a) The Legislative Context
- [50] Both Chieftain and the defendants rely on various statutory provisions to support their respective positions.
- [51] Chieftain relies on the combination of: the definition of "mine" under the Mines Act; the fact that it holds the Permit; and provisions of the Health, Safety and Reclamation Code for Mines in British Columbia, 2008, published under the authority of s. 34 of the Mines Act (the "Code"), in particular the provisions concerning the authority to enter a mine. Chieftain says the result is that it has sufficient possessory rights in relation to the Airstrip and the Mineral Tenure Lands to support not only a claim for damages for trespass and an injunction, but also a claim that it is entitled to title to the Camp Assets on the grounds that they have been abandoned by TWA.
- [52] The defendants say that the definition of "mine" does not assist Chieftain in view of the exclusions, and that a review of the Mineral Tenure Act, R.S.B.C. 1996, c. 292, makes it clear that rights under a mineral title such as the Mineral Tenure are insufficient to support a

claim by Chieftain for damages for trespass. The defendants say that those rights are also insufficient to support a claim to title to the Camp Assets on the grounds they have been abandoned by TWA. TWA says that, on the contrary, it plainly has not abandoned the Camp Assets. Rather, Chieftain has wrongfully converted them to its own use.

[53] Under s. 1 of the Mines Act, a mine is defined as follows (underlining added):

"mine" includes

- (a) a place where mechanical disturbance of the ground or any excavation is made to explore for or to produce coal, mineral bearing substances, placer minerals, rock, limestone, earth, clay, sand or gravel,
- (b) all cleared areas, machinery and equipment for use in servicing a mine or for use in connection with a mine and buildings other than bunkhouses, cook houses and related residential facilities,
- (c) all activities including exploratory drilling, excavation, processing, concentrating, waste disposal and site reclamation,
- (d) closed and abandoned mines, and
- (e) a place designated by the chief inspector as a mine;

[54] A permit is defined as "a permit issued under section 10."

[55] Section 10 of the Mines Act provides in relevant part:

10 . . .

- (1) Before starting any work in, on or about a mine, the owner, agent, manager or any other person must hold a permit issued by the chief inspector and, as part of the application for the permit, there must be filed with an inspector a plan outlining the details of the proposed work and a program for the conservation of cultural heritage resources and for the protection and reclamation of the land, watercourses and cultural heritage resources affected by the mine, including the information, particulars and maps established by the regulations or the code.

. . .

- (3) If the chief inspector considers the application for a permit is satisfactory the chief inspector may issue the permit, and the permit may contain conditions that the chief inspector considers necessary.
- (4) The chief inspector may, as a condition of issuing a permit under subsection (3), require that the owner, agent, manager or permittee give security in the amount and form, and subject to conditions, specified by the chief inspector
- (a) for mine reclamation, and

- (b) to provide for protection of, and mitigation of damage to, watercourses and cultural heritage resources affected by the mine.

[56] With respect to authority to enter a mine, the Code provides that:

1.3.1 Other than an inspector, only persons authorized by the [mine] manager shall enter or be permitted to enter a mine.

1.3.2 Notice to this effect shall be posted at all road entrances to the mine by the manager and, for non-operating mines, the contract information of a qualified person shall be included in the notice.

1.3.3 Unless authorized by the manager, no persons shall enter or leave a mine except by a recognized means of entry or exit.

[57] The relevant provisions of the Mineral Tenure Act are as follows:

#### Definitions

1 In this Act:

...

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

...

"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;

...

"mineral title" means a claim or a lease;

...

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

...

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

...

#### Independence of mineral titles

12 The following are individual and distinct mineral titles constituted, acquired and maintained independently:

- (a) a mineral claim;

...

(c) a mining lease;

...

## 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.

[58] The Mineral Tenure Act draws a distinction between the nature of the interest created by a mineral claim, and that created by a mineral lease. The interest of a recorded holder of a mineral claim is a chattel interest: see s. 28(2). On the other hand, a mineral lease is an interest in land: see s. 48(2). A recorded holder who wishes to replace a mineral claim with a mineral lease must take the steps described in s. 42(1) and must pay the prescribed rental (see s. 50(1)).

(b) Chieftain's Trespass Claim

[59] I turn then to Chieftain's trespass claim.

[60] There can be little doubt that the Mineral Tenure is a mineral claim, not a lease. There is no evidence that Chieftain ever took the steps described in s. 42(1) of the Mineral Tenure Act or that it ever paid rent. As such, Chieftain's interest is a chattel interest, not an interest in land. The Mineral Tenure does not confer the exclusive right to possess the surface of the land, and therefore cannot sustain Chieftain's claim for trespass: see *Carnahan v. Canadian Mountain Holidays* (1995), 131 D.L.R. (4th) 409, 1995 CanLII 3391 (B.C.S.C.), at para. 16. Chieftain's letters to TWA, implying that the Mineral Tenure created an interest in the Mineral Tenure Land, were misguided.

[61] However, on behalf of Chieftain, Mr. Hirji submits that the Airstrip and the Mineral Tenure Land are part of a mine, as that term is defined in the Mines Act, and that the Code therefore applies to them. The result (Mr. Hirji says) is that Chieftain's mine manager (Mr. Zanger) has the right to control entry and the authority to refuse entry if necessary. Mr. Hirji argues that this is sufficient to show that Chieftain has an exclusive right of occupancy of the Mineral Tenure Land and the Airstrip, and therefore provides the proof necessary to sustain an action in trespass, as described by Mr. Justice Spencer in *Carnahan*, at para. 16.

[62] In response, Ms. Millbank, on behalf of the defendants, argues that Chieftain's rights in respect of the Mineral Tenure Land are narrow and are circumscribed by s. 14 of the Mineral Tenure Act and s. 10 of the Mines Act. Ms. Millbank points out that the Permit does

not authorize the surface disturbance of the Mineral Tenure. She notes that the Mineral Tenure is not mentioned in the Permit at all, even though the Permit lists all of the tenures where activity is authorized. Ms. Millbank also notes that bunkhouses, cook houses and related residential facilities are specifically excluded from the definition of "mine," and says that it is common ground among the witnesses that the Camp Assets (and, by extension, the Mineral Tenure Land on which they are located) were and are being used for residential and related purposes. Therefore, Chieftain cannot acquire any possessory rights, sufficient to support a claim in trespass, to the Mineral Tenure Land.

[63] I agree with Ms. Millbank.

[64] The Camp Assets have been and are being used to house individuals during Chieftain's exploration campaign, as Mr. Boyle conceded. Accordingly, the Camp Assets are being used for residential and related purposes, and they - and the Mineral Tenure Land on which they are located - are therefore excluded from the definition of "mine." I do not think it makes sense to say that the immediate area where the sleeping quarters, kitchen and dining area are located are not part of the mine (in view of the exception in the definition of "mine"), but the rest of the Mineral Tenure Land is part of the mine and therefore is subject to the mine manager's control. At the trial, no detailed maps, showing the area covered by the Mineral Tenure Land and identifying more precisely where sleeping quarters etc. were located, were tendered in evidence, although Chieftain was in a position to do this. Without knowing what area is in fact covered by the Mineral Tenure Land, I am not prepared to segregate it in the way Mr. Hirji suggests.

[65] I find therefore that the Mineral Tenure Land, on which the Camp Assets are located, is excluded from the definition of "mine," and Chieftain has failed to show that it has an exclusive right of occupancy as against the defendants.

[66] What of the Airstrip? It is located on Crown land, and Chieftain does not therefore have an ownership interest in this land.

[67] However, is the Airstrip part of the mine?

[68] I conclude that the Airstrip is part of the mine, on the basis that it falls within "all cleared areas . . . for use in servicing a mine or for use in connection with a mine." In that light, the mine manager controls the use of the Airstrip, by virtue of the Code.

[69] However, in my opinion, the evidence at trial does not support the conclusion that TWA or Mr. Karman were guilty of trespass in relation to the Airstrip. Rather, TWA and Mr. Karman admitted landing a helicopter on the Mineral Tenure Land. The evidence, especially given the lack of a detailed map of the area covered by the Mineral Tenure Land, is inconclusive on the question of whether or not the Airstrip is part of the Mineral Tenure Land.

[70] I find, therefore, that Chieftain has failed to make out its claim of trespass in relation to the Airstrip.

[71] Finally, even if I had been persuaded that TWA or Mr. Karman (or both of them) were guilty of trespass in relation to the Mineral Tenure Land or the Airstrip, Chieftain has failed to prove that it suffered any damage as a result.

(c) Were the Camp Assets abandoned, or were they wrongfully converted?

[72] In *Stewart v. Gustafson*, [1999] 4 W.W.R. 695, 1998 CanLII 14001 (Sask. Q.B.), Klebuc J. summarized the basic principles relating to abandonment, at paras. 13-17:

[13] R.A. Brown in *The Law of Personal Property*, 2nd ed. (Chicago: Callaghan, 1955) defined "abandonment" as follows:

Abandonment occurs when there is "a giving up, a total desertion, and absolute relinquishment" of private goods by the former owner. It may arise when the owner with the specific intent of desertion and relinquishment casts away or leaves behind his property . . . .

[14] Black's Law Dictionary, 5th ed. (St. Paul Minn.: West Publishing Co., 1979) provides the following definition:

The surrender, relinquishment, disclaimer, or cession of property or of rights. Voluntary relinquishment of all right, title, claim and possession, with the intention of not reclaiming it.

. . .

"Abandonment" includes both the intention to abandon and the external act by which the intention is carried into effect.

[15] Professor Ziff, in *Principles of Property Law*, 2nd ed. (Toronto: Carswell, 1996) at p. 127 noted that abandonment involves the converse of possession-taking in the sense that there must be an intention to relinquish title, "that is, an indifference as to the fate of the chattel, coupled with sufficient acts of divestment. . . ."

[16] The act of abandonment is essentially a question of fact to be proven by the party relying on the principle of abandonment [citations omitted]. The burden of proof is an onerous one where the owner's actions do not clearly manifest an intention to surrender ownership of the chattel in issue. In the result, intention often must be inferred by using the approach commonly employed in criminal law where intention is of paramount importance.

[17] The authorities reviewed suggest that the following factors in the appropriate factual context support an inference of intention to abandon: (1) passage of time; (2) nature of the transaction; and (3) the owner's conduct. I am of the view the nature and value of the property also may be an indicator of intent.

See also *Dean v. Kotsopoulos*, 2012 ONCA 143, at para. 18.

[73] Abandonment is a defence to an allegation of conversion: see *Dean*, at para. 17.

- [74] The tort of conversion involves the wrongful interference with another person's chattels, such as taking, using or destroying the goods in a way that is inconsistent with the owner's ownership of or title to the goods. The elements that must be proven to establish the tort of conversion are: (a) a wrongful act by the defendant involving the goods of the plaintiff; (b) the act must consist of handling, disposing, or destroying the goods; and (c) the defendant's actions must have either the effect or intention of interfering with (or denying) the plaintiff's right or title to the goods. See *Ast v. Mikolas*, 2010 BCSC 127, at paras. 125-126.
- [75] A plaintiff may base its right to sue in conversion on: (a) the ownership of goods; (b) the right to immediate possession of goods; or (c) actual possession of goods. Where ownership is the basis for the action, the fact that the plaintiff was out of possession at the material time will not bar the bringing of the action. See *Columere Park Developments Ltd. v. Enviro Custom Homes Inc.*, 2010 BCSC 1248, at paras. 26-27.
- [76] I will deal first with Chieftain's assertion that TWA abandoned the Camp Assets.
- [77] On behalf of Chieftain, Mr. Hirji submits that, since acquiring the Camp Assets in September 2009, TWA and Mr. Karman have made no genuine effort to remove the Assets from the Mineral Tenure Land, despite receiving specific written requests from Chieftain to do so. Mr. Hirji argues that the reason is clear: because of the very significant expense involved in moving them, the Camp Assets are not assets in any meaningful sense, and have no market value; rather, they are a liability. Mr. Hirji submits that, if TWA attached any value to the Camp Assets, it had a duty, in the face of Chieftain's requests to remove the Camp Assets, either to remove them or (if it could) to make arrangements with Chieftain for the care of them.
- [78] Mr. Hirji argues that, when the four factors described by Klebuc J. in *Stewart* are applied to the facts here, the logical inference to be drawn is that TWA abandoned the Camp Assets. With respect to the passage of time, Mr. Hirji points out that the agreement with the Receiver was made more than four years ago, and required TWA to remove the Camp Assets by August 2010. Nothing was done. Mr. Karman has visited the Mineral Tenure Land a few times since, but never with the express purpose of removing the Camp Assets or arranging for their removal. On the other hand, Mr. Karman did make arrangements to remove some sawmill equipment, demonstrating that when he wishes to remove property, he makes arrangements to do so. Despite having years to do so, TWA and Mr. Karman have done nothing to remove the Camp Assets, and Mr. Hirji says this supports the inference the Assets have been abandoned.
- [79] Mr. Hirji argues that the nature of the transaction also supports the conclusion that TWA has abandoned the Camp Assets. He points out that Chieftain took over possession of the Camp Assets on the expiry of the Procon Agreement at the end of May 2011, and that Chieftain gave TWA written notice requiring removal of the Camp Assets. Despite this, TWA did nothing. Mr. Hirji argues further that Mr. Karman's conduct - his failure to do anything to remove the Camp Assets or to prevent anyone from using them - is consistent with TWA

having abandoned the Camp Assets. Finally, with respect to the nature and value of the Camp Assets, Mr. Hirji submits that the Assets have little or no market value, and likely have a net negative value when the removal costs are taken into account. That is also consistent with the inference the Camp Assets have been abandoned, in Mr. Hirji's submission.

- [80] Mr. Hirji submits further that, when the factual matrix is considered in the light of the four factors set out in *Stewart*, a clear inference of TWA's intention to abandon the Camp Assets can be drawn. He argues that TWA cannot have it both ways. It cannot continue to claim that it is the owner of the Camp Assets, while denying that it has any responsibility to remove the Assets from their current location.
- [81] However, in my view, the weight of the evidence does not support the inference that TWA intended to abandon the Camp Assets.
- [82] It is true that TWA and Mr. Karman had not taken steps by August 2010 to remove the Camp Assets from the Mineral Tenure Land, as required under the agreement with the Receiver. However, the Receiver never took any steps to enforce that obligation, and Chieftain (who is not a party to the agreement) was never in a position to do so. Moreover, Mr. Karman provided a reasonable explanation for his conduct, namely, his plan to obtain a Crown licence to operate a commercial lodge in which the Camp Assets could be used in their existing location. For some period of time (with Mr. Van der Horst's assistance), into 2012, Mr. Karman pursued the plan of obtaining a licence from the Crown. Chieftain, who had been using the Camp Assets and who enjoyed a net benefit from doing so, presented a significant barrier to TWA and Mr. Karman moving forward with that plan.
- [83] In addition, given the location, many of the Camp Assets would be difficult to move, and the "passage of time" factor needs to be considered in that context. If items can be picked up and moved easily, it might be reasonable to consider them abandoned after a short time passes and nothing is done. However, the nature of the assets, and their location, may require a significant period of time to pass before it is reasonable to consider them abandoned. I find that is the case here. Although a number of years have passed since TWA acquired the Camp Assets, I consider that, given the nature of the Assets and their location, the passage of time is a neutral factor. I do not see it as supporting an inference that TWA abandoned the Camp Assets.
- [84] Turning next to the nature of the transaction, in my opinion, this factor also favours TWA. In one of the cases mentioned in *Stewart* to illustrate the point, the question was whether, on purchase, price tags on clothing had been "abandoned" by the merchant to the customer. Given the nature of the transaction, that was the obvious inference. Here, however, TWA acquired the Camp Assets with a view to using them at a commercial lodge that Mr. Karman hoped to set up on the Mineral Tenure Land. Whether or not he was successful in obtaining a Crown licence, the Camp Assets clearly had a use where they were situated. Moreover, Mr. Karman advised Chieftain (through its lawyers) in very strong terms, by his e-mail message of May 3, 2011, that TWA was not abandoning the Camp Assets. Although this is simply one

piece of evidence, it is a firm statement of Mr. Karman's intentions, and taken together with his other conduct, I find it is consistent with the conclusion that he (on behalf of TWA) did not intend to abandon the Camp Assets.

- [85] With respect to Mr. Hirji's submission that Mr. Karman needed to do more than he in fact did in order to rebut the inference that TWA intended to abandon the Camp Assets, I have not been persuaded that Mr. Karman's conduct supports the inference Mr. Hirji wishes me to draw. In my view, Mr. Hirji's argument ignores the practical realities of the situation.
- [86] Perhaps Mr. Karman could have done more - perhaps send more communications reaffirming TWA's position or visit the site more frequently - but to what end? The Camp Assets simply could not be moved easily or quickly. No one disputes this. The relationship between Chieftain's representatives and Mr. Karman started off badly in October 2010 and never improved. Chieftain's written demands that the Camp Assets be removed - or else - misrepresented the facts and the nature of Chieftain's interest in the Mineral Tenure Land. Mr. Karman visited the property from time to time, but Chieftain made it quite clear that, as far as it was concerned, he had no legal right to be there and was trespassing. Shortly after filing this action, Chieftain sought an injunction against TWA and Mr. Karman. In the circumstances, Mr. Karman's reaction to Chieftain's conduct was predictable and not unreasonable.
- [87] I do not view Mr. Karman's conduct in the period between October 2010 and trial as demonstrating an intention on his (and TWA's part) to abandon the Camp Assets.
- [88] I turn finally to the nature and value of the property. The Camp Assets have a value, and have a real value where they are currently located. They have a value to TWA, who paid the Receiver \$60,000.00 to acquire them in 2009. They also clearly have a value to Chieftain. Chieftain was prepared to pay Procon a premium on the rent Procon was paying to TWA, in order to have access to them in the period from December 2010 to May 2011. Chieftain continues to use them. Mr. Boyle conceded that Chieftain has enjoyed a net benefit from being able to use the Camp Assets, and conceded that it would probably have cost Chieftain about \$1 million to replace them. In my opinion, the nature and value of the Camp Assets are inconsistent with the inference that TWA intended to abandon them.
- [89] Accordingly, I find that Chieftain has failed to prove, on a balance of probabilities, that TWA abandoned the Camp Assets.
- [90] I will add that, even if I had been satisfied that TWA had abandoned the Camp Assets, it would not in my view provide a justification for the remedy Chieftain sought in respect of them, namely, an order that title to the Camp Assets has passed to Chieftain. I do not see any legal basis on which such relief could be granted on the facts. The cases cited by Mr. Hirji in argument were cases where the party asserting abandonment had an interest in the land on which the chattels had been abandoned, and the interest in land supported the claim to the abandoned chattels. Those are not the facts here.

- [91] I turn then to TWA's counterclaim for damages for conversion.
- [92] Until May 31, 2011, TWA received rent from Procon for use of the Camp Assets. However, as of June 1, 2011, Chieftain's position was that the Camp Assets had been abandoned and it was entitled to use them however it saw fit. That is what Chieftain has done. However, I have found that the Camp Assets were not abandoned by TWA, who remained the owner of the Assets. Accordingly, Chieftain's use of the Camp Assets beginning in June 2011 was wrongful and had the effect of both interfering with and denying TWA's right and title to the Camp Assets. TWA has, therefore, made out the essential elements of a claim for conversion, and is entitled to damages.
- [93] Conversion will result in a "forced sale," which allows the plaintiff to recover the market value of the chattel at the time of conversion. In addition to receiving the value of the converted chattel, the plaintiff may be entitled to additional damages for the loss of use of the chattel. See, for example, *R.F. Fry & Associates (Pacific) Ltd. v. Reimer* (1993), 83 B.C.L.R. (2d) 199, 1993 CanLII 300 (C.A.), at para. 23, and *Columere Park*, at paras. 31-33.
- [94] Mr. Hirji argues that TWA's case sounds in detinue, not conversion, and submits on that basis that damages should be assessed as of the date of trial. However, I do not agree with Mr. Hirji's characterization of TWA's claim. The claim advanced by TWA was for damages for conversion, not a claim in detinue.
- [95] Mr. Hirji then argues that damages should not be assessed on the basis of a "forced sale," because Chieftain warned TWA that it would consider the Camp Assets to be abandoned and gave TWA the opportunity to re-take possession of the Assets. He argues further that damages should be calculated as if Chieftain was renting the Camp Assets from June 2011 to April 2012 only, because after that date, TWA in effect relinquished its rights in relation to the Camp Assets, likely to avoid the high cost of removing them. However, I do not consider these arguments are open to Chieftain, based on my conclusion that TWA did not abandon the Camp Assets.
- [96] Mr. Hirji submits, in the alternative, that if I find Chieftain converted the Camp Assets as of June 2011 and that Mr. Karman's conduct thereafter has no bearing on the assessment of damages, then the only reliable evidence of value as of June 2011 is the offer of \$200,000.00 made by Chieftain (through Procon) in March 2011 and repeated in the letter from Chieftain's lawyers dated April 29, 2011. In Mr. Hirji's submission, \$200,000.00 should be treated as an absolute upper limit.
- [97] Ms. Millbank submits that damages should be assessed on the basis of the value of the Camp Assets to Chieftain, as the person who has acquired the property, and that this should be treated as a market value. She submits that \$425,000.00 is a fair assessment of TWA's damages. Ms. Millbank argues that an award in this amount is supported by the terms of a more detailed agreement between TWA and Procon (dated March 9, 2011), which, in the event of overholding beyond the lease term, provided for rent equal to 200% of the ordinary rent. She also relies on Mr. Boyle's evidence that it would cost Chieftain about \$1 million to

replace the Camp Assets.

[98] I am not persuaded that TWA's figure of \$425,000.00 represents a reasonable assessment of the market value of the Camp Assets. Here, the "market" consisted of a single buyer - Chieftain - who was prepared to pay \$200,000.00. There is no evidence anyone else was prepared to purchase the Camp Assets for any price, and, in particular, there is no evidence that anyone was prepared to pay \$425,000.00 for them. Indeed, TWA paid only \$60,000.00 for them in September 2009, and there was no evidence it was prepared to pay more.

[99] Accordingly, I assess TWA's damages at \$200,000.00. The evidence does not, in my view, support any additional award for consequential losses.

(d) Chieftain's Claim for Injunctive Relief

[100] In the light of my conclusion concerning TWA's claim for damages for conversion of the Camp Assets, I do not see any need to make an order enjoining Mr. Karman and other representatives of TWA from entering onto Chieftain's real property or the mineral tenures held by Chieftain or areas (including the Airstrip) that would qualify as a "mine" covered by the Permit. Since Chieftain has acquired the Camp Assets by virtue of the forced sale, and since the presence of the Camp Assets on the Mineral Tenure Land was the main reason for Mr. Karman (and other TWA representatives) attending at the site, the risk of Mr. Karman or other representatives of TWA visiting the site unannounced - a risk that could justify an injunction - has essentially been eliminated.

[101] However, I will remind the defendants of my finding that the Airstrip is part of the mine, and of the provisions of s. 1.3.1 of the Code: "Other than an inspector, only persons authorized by the manager shall enter or be permitted to enter a mine."

[102] Moreover, it is not unreasonable for Chieftain to require those intending or who wish to visit the site to provide Chieftain with advance notice and seek its consent.

### Summary and Disposition

[103] In summary:

- (a) Chieftain's action is dismissed; and
- (b) with respect to the counterclaim, I award damages to TWA in the sum of \$200,000.00 in relation to the conversion by Chieftain of the Camp Assets.

[104] In addition, the defendants seek an order for the return to them of certain property, some of which has sentimental value. The items are a wooden dining table and benches made by Mr. Karman's partner, radio repeaters, sawmill equipment and ski equipment. Based on the evidence at trial, I conclude that, prior to trial, Mr. Karman made arrangements to retrieve the sawmill equipment, and I make no order with respect to it. I also make no order with respect to the radio repeaters and the ski equipment. Chieftain should be permitted to retain these items in consideration of the damages it has been ordered to pay.

[105] However, I accept that the wooden dining table and benches have sentimental value to Mr. Karman. TWA and Mr. Karman are permitted to recover possession of the dining table and benches, at their own expense, provided they make suitable arrangements with Chieftain to do so within 90 days of the date of this judgment. The parties have liberty to apply if there are difficulties working out those arrangements.

[106] If the parties are unable to agree on costs, they may make submissions in writing, provided those submissions are filed within 30 days of the date of these reasons.

"Adair J."

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