

CANADA / JUDGMENT

Forty Ninth Ventures Ltd. v. British Columbia

2005 BCCA 213

COURT

British Columbia Court of Appeal

DECIDED

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2005 BCCA 213 Forty Ninth Ventures Ltd. v. British Columbia COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Forty Ninth Ventures Ltd. v. British Columbia, 2005 BCCA 213 Date: 20050413 Docket: CA031256 Between: Forty Ninth Ventures Ltd. Appellant (Petitioner) And Her Majesty the Queen in Right of the Province of British Columbia Respondent (Respondent) Before: The Honourable Mr. Justice Mackenzie The Honourable Mr. Justice Smith The Honourable Mr. Justice Lowry S.A. Griffin and T.D. Braithwaite Counsel for the Appellant A.V.W. Hincks Counsel for the Respondent Place and Date of Hearing: Vancouver, British Columbia March 23, 2005 Place and Date of Judgment: Vancouver, British Columbia April 13, 2005 Written Reasons by: The Honourable Mr. Justice Mackenzie Concurred in by: The Honourable Mr. Justice Smith The Honourable Mr. Justice Lowry Reasons for Judgment of the Honourable Mr. Justice Mackenzie:

- [1] The appellant, Forty Ninth Ventures Ltd., appeals from an order dismissing its petition for a declaration that it has a vested right to purchase the surface rights of six Crown-granted mineral claims owned by the appellant as successor in title to original grantees. The claims - International, Dividend, Dividend Fraction, Manx, Little Manx Fraction, and Osoyoos-Heclar Fraction - are located near Osoyoos, B.C. They were Crown-granted after 13 July 1899 and governed by the Mineral Act, R.S.B.C. 1897, c. 135, as amended by the Mineral Act Amendment Act, 1898, S.B.C. 1898, c. 33 and subsequent legislation. The appellant claims that under the applicable legislation it acquired a vested right to purchase the surface of the claims, subject only to part of the surface that has been already alienated by the Crown. The Relevant Legislative History
- [2] The entitlement to receive a grant of the surface rights was contained in section 12 of the Mineral Act Amendment Act, 1898 that amended s. 128 of the Mineral Act of 1897 to read:
128. The owner of a mineral claim (located on waste lands of the Crown, or on lands not already lawfully occupied for other than mining purposes) for which a Crown grant as issued or may hereafter issue, shall, so long as the surface rights thereof remain in the Crown unencumbered and unreserved, be entitled to receive a Crown grant of such surface rights, on payment to the Government of British Columbia of the sum of five dollars per acre for

such land, and a fee of five dollars for the Crown grant.[underlining added] With minor changes in wording, this provision evolved to become s. 118(1) of the Mineral Act, R.S.B.C. 1960, c. 244.

- [3] No mineral claims were Crown-granted after 1957 (Mineral Act Amendment Act, 1957, S.B.C. 1957 c. 37, s. 2) and the statutory mechanism for making Crown grants of mineral claims was repealed by the Mineral Act Amendment Act, 1959, S.B.C. 1959, c. 53. The entitlement to purchase surface rights for \$5 per acre on existing Crown-granted claims was retained by s. 118(1) of the Act until 1970 (except for an interval between 1957 and 1960 which the parties agree is not relevant). Section 118 was repealed by s. 8 of the Mineral (Amendment) Act, S.B.C. 1970, c. 25 and replaced with a new provision as follows: 118(1) Where a person is the owner of a mineral claim
- (a) for which a Crown grant is issued; and
 - (b) that is located on unreserved land owned by the Crown; and
 - (c) that is located on land not lawfully occupied for purposes other than for mining and the Minister certifies that the surface rights are or will be required by the owner of that mineral claim in connection with the business of mining, including the treatment of ore and concentrates, that person is entitled, upon payment of the unimproved land value per acre, as determined by the Minister of Lands, Forest, and Water Resources, to a Crown grant of the surface rights to the land.
- (2) The fee for a crown grant of the surface rights under subsection (1) is twenty-five dollars.
- (3) Where a person is the owner of a mineral claim
- (a) for which a Crown grant is issued; and
 - (b) that is located on unreserved land owned by the Crown; and
 - (c) that is located on land not lawfully occupied for purposes other than for mining and the Minister certifies that the surface rights are not, or will not be required by the owner of that mineral claim in connection with the business of mining, including the treatment of ore and concentrates, that person or any other person may apply to the Minister of Lands, Forests, and Water Resources, and,
 - (d) if it is in the public interest; and
 - (e) upon payment of such sum as may be fixed by the Minister of Lands, Forests, and Water Resources; and
 - (f) upon complying with such terms and conditions as the Minister of Lands, Forests, and Water Resources may impose, the Minister of Lands, Forests, and Water Resources may issue to the applicant a Crown grant, or a lease, of the surface rights. [underlining added]

- [4] Section 118 was replaced in 1988 by the Mineral Tenure Act, S.B.C. 1988, c. 5 which limited the use of surface rights by recorded holders of mineral claims to mining purposes (s. 11(1) & s. 13). Crown-granted mineral claims are registered in the Land Title Office and the application of the Mineral Tenure Act to Crown-granted claims is unclear. Counsel agree, however, that the issue before us turns on the 1970 amendment and the earlier legislation.
- [5] All of the Crown grants are stated to be grants of minerals and all of the grants with the exception of the Manx claim contain the following proviso: "PROVIDED, also, that the grant hereby made of the said minerals shall be subject to the laws for the time being in force respecting mineral lands held in fee simple." The comparable proviso in the Manx grant reads: "PROVIDED that the grant hereby made shall be subject to the laws for the time being in force respecting mineral claims." The proviso contemplates changes in the governing legislation from time to time and subordinates the grants to "the laws for the time being in force". Nothing appears to turn on the difference in wording between the Manx proviso and the others.
- [6] Surface rights on Crown-granted claims for mining purposes were governed by s. 26 of the Mineral Act, 1896, S.B.C. 1896, c. 34 as re-enacted by s. 6 of the Mineral Act Amendment Act, 1897, S.B.C. 1897, c. 28 and continued by the 1897 Mineral Act:
26. Notwithstanding anything to the contrary contained in any Act, every Crown grant hereafter issued of a mineral claim shall convey, and be deemed to convey, only the right to the use and possession of the surface of such 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, and the lawful holder by record of a claim shall, during the continuance of his record, be entitled to the same surface rights and no others, and all remaining surface rights shall be deemed to be vested in the Crown, and may be granted and disposed of as is provided by the Land Laws for the time being in force, but subject, always to the rights of free miners as aforesaid. [underlining added.] This later became s. 23 of the Mineral Act, R.S.B.C. 1948, c. 213 with the final subject clause expanded to read: "...but subject always to the rights of free miners as aforesaid and to the right to purchase such surface rights under section 161. With further inconsequential amendments, this provision became s. 21 of the Mineral Act, R.S.B.C. 1960, c. 244. Subsections 21(2),(3), & (4) were amended by S.B.C. 1973, c. 52, s. 12, and s. 21(1),(2), & (3) amended again by S.B.C. 1973 (2nd Sess.), c. 129, s. 6. The Issues
- [7] The appellant submits that s. 128 of the Mineral Act as amended in 1898 granted the owner of the Crown-granted mineral claims a vested right to purchase the surface rights of the claims for \$5 per acre and that this vested right remains despite the 1970 amendments. The Crown contends that the right to purchase under s. 128 was not a vested right and, whether vested or not, it was extinguished by the 1970 repeal and re-enactment of s. 118, as the earlier s. 128 was then numbered. The chambers judge concluded that the right to purchase was not a vested right and that it was extinguished by the 1970 repeal and re-enactment.

Analysis

- [8] The appellant relies on *Casamiro Resource Co. v. British Columbia* (1991), 55 B.C.L.R.(2d) 346 (C.A.) for the proposition that the s. 128 right to purchase was a vested right. In that case, Casamiro had been barred by an order in council from exploring for minerals on its Crown-granted claims in a provincial recreational area. It contended that the effect of the order was to expropriate its surface rights on the claims under the 1948 equivalent of s. 26 of the 1897 Act, set out above. Southin J.A., for the Court, held that the s. 26 surface rights were vested rights that had been effectively expropriated by the order in council. In the absence of a clear statement of legislative intention to the contrary, Casamiro was entitled to compensation for the compulsory taking of its rights. The Court followed *The Queen v. Tener*, [1985] 1 S.C.R. 533, which reached a similar conclusion where a grantee of mineral rights had been refused a permit for mineral exploration because the claims were within the boundaries of a provincial park established after the claims were granted. *Rock Resources Inc. v. British Columbia*, 2003 BCCA 324, followed Casamiro and held that it was not necessary to show an effort to engage in mineral exploration on the claims to support a claim for compensation after exploitation of the claims was barred by parks legislation.
- [9] Casamiro, Tener, and Rock Resources involved surface rights related to mining, and the right to purchase other surface rights was not considered. In the present case, the chambers judge concluded that the legislation made a critical distinction between surface rights associated with mining and other surface rights. He decided that the non-mining related surface rights, including the \$5 per acre right to purchase, were not vested rights. In the alternative, he held that even if the right to purchase was a vested right it was extinguished by the repeal and re-enactment of s. 118 in 1970. On this second issue he said:
- [56] The [1970] amendment applies to all existing Crown grants of mineral rights. No Crown grants of mineral rights were created after 1959, the legislation which dealt with the creation of Crown grants being amended in 1957. Neither the Crown nor Forty Ninth allege that the amended legislation acts retrospectively. However, the amendments can only have meaning if they apply to all Crown grants of mineral rights in which the holder has not yet applied for the Crown grant of the surface rights. The section itself is inconsistent with the earlier sections which allowed purchase for five dollars an acre and is meaningless unless it applies to all of the existing Crown grants of mineral rights. To hold otherwise would render the section meaningless and defeat the entire purpose of the section. The legislation itself clearly distinguishes the manner in which it deals with those limited rights to the use of the surface for mining purposes that attach and vest with the grant itself and the balance of the surface rights. The legislation has been consistent from 1897 to the present in dealing with these rights separately.
- [10] The appellant submits that this conclusion was incorrect. The appellant relies on s. 35(1)(c) of the Interpretation Act, R.S.B.C. 1996, c. 238 on the effect of repeal. That subsection reads: 35 (1) If all or part of an enactment is repealed, the repeal does not

- (c) affect a right or obligation acquired, accrued, accruing or incurred under the enactment so repealed,
- [11] The parties agree that an accrued right is synonymous with a vested right for the purposes of this analysis. The Interpretation Act codifies a common law presumption that the legislature does not intend to interfere with vested rights unless the legislation so states in clear terms: see Sullivan and Dreidger on the Construction of Statutes, 4th ed. 2002, pp. 568-9. The presumption applies "unless a contrary intention appears ... in the enactment": Interpretation Act, s. 2(1). The Crown submits that even if the \$5 per acre right to purchase was a vested right, it was clearly and unambiguously extinguished in 1970. The re-enactment of s. 118 not only repealed the former provision, it established an entirely new framework for the granting of surface rights on Crown-granted claims. Counsel contends that the re-enactment must have been intended to apply to existing Crown granted claims. No new mineral claims had been Crown granted after 1957 and the re-enactment would have been redundant if it did not apply to existing claims.
- [12] The appellant also placed some weight on s. 132 of the 1897 Act, R.S.B.C. 1897, c. 135, that provided:
132. Notwithstanding the repeal of any Acts relating to mineral claims, or the saving clauses of any such repealing Acts, all such repealing Acts shall be deemed to have contained provisions declaring the holders of records of mineral claims entitled to apply for Crown grants thereof under the provisions of the law in force at the time of such applications, and that the procedure upon any such application shall be that prescribed by the Statutes in force at the time of such applications, the grants thereafter vesting in the holders such rights as were declared by the Statutes in force at the date of record of such mineral claims: Provided, however, that nothing contained in this section shall impair or in any way restrict the rights and privileges conferred on owners of mineral claims by the preceding section of this Act. [underlining added.] The appellant submits that the effect of s. 132 was to vest the right to purchase as of the dates the mineral claims were recorded. The Crown submits that s. 132 is concerned only with a matter of timing, backdating the entitlement to mineral rights on Crown grants of mineral claims to the date of record of the claims. Only surface rights incidental to mining activity were included as is apparent from s. 26 as amended by the same 1896 Act. In my view, the Crown's position is correct and s. 132 was only intended to determine the rights granted according to the legislation in force as of the record date rather than the date of the Crown grant. It does not address the question of what rights were vested rights as of the date of record or preclude modification of those rights by subsequent legislation. I do not think that s. 132 has any bearing on the issues before us.
- [13] Finally, the appellant contends that the chambers judge failed to consider s. 24 of the Mineral Act, R.S.B.C. 1960, c. 244, that reads:

24. Nothing in this Act shall prejudice the rights of holders or owners of mineral claims acquired antecedent to the sixteenth day of March, 1898, or of Crown-granted mineral claims acquired at any time under this Act. The appellant submits that this provision is inconsistent with the extinguishment of the \$5 per acre right to purchase. Section 24 was later repealed by s. 7 of the Mineral (Amendment) Act, S.B.C. 1973, c. 129, effective 10 December 1973. While its three year legislative survival after the 1970 amendments remains unexplained, I do not think that its general language can overcome the specific provisions of the re-enacted s. 118(3). Those provisions require the responsible Minister to consider the public interest before authorizing the purchase of surface rights for non-mining purposes and, if in the public interest, to fix a purchase price. They are wholly incompatible with the retention of the earlier right to purchase. There are other examples of inconsistent legislative drafting of amendments to mining legislation during this period and the 1973 repeal of s. 24 suggests that it may simply have been overlooked in 1970. In any event, s. 118(3) would be meaningless if it did not apply to existing Crown grants and I think its provisions must prevail over any inconsistency with s. 24.
- [14] In the result, I agree with the chambers judge that the repeal and re-enactment of s. 118 in 1970 unambiguously extinguished the \$5 per acre right to purchase and the appeal must be dismissed on that ground. As that conclusion disposes of the appellant's only claim for relief, a declaration of entitlement to a right to purchase, it is unnecessary to address the chambers judge's alternative ground and decide whether the entitlement extinguished in 1970 was a vested right.
- [15] I would dismiss the appeal. "The Honourable Mr. Justice Mackenzie" I AGREE: "The Honourable Mr. Justice Smith" I AGREE: "The Honourable Mr. Justice Lowry"

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