

CANADA / JUDGMENT

Young v. British Columbia

2014 BCSC 2445

COURT

Supreme Court of British Columbia

DECIDED

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2014 BCSC 2445 Young v. British Columbia

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Young v. British Columbia,

2014 BCSC 2445

Date: 20141229

Docket: S141625

Registry: Vancouver

Between:

Timothy Young and Seamus Young

Plaintiffs

And

Her Majesty the Queen in Right of the Province of British Columbia

and the Minister of Environment

Defendants

Before: The Honourable Mr. Justice Truscott

Reasons for Judgment

Counsel for Plaintiff Timothy Young:

D.B. Kirkham, Q.C.

Counsel for Defendant Her Majesty the Queen in Right of the Province of British Columbia:

B. Carmichael and

E. Ross

Place and Dates of Hearing:

Vancouver, B.C.

October 6-7, 2014

Place and Date of Judgment:

Vancouver, B.C.

December 29, 2014

- [1] The plaintiffs commenced this claim for injurious affection by way of a Notice of Civil Claim filed February 27, 2014, claiming the defendants expropriated 12 of their 28 mineral claims under s. 11 of the Park Act, R.S.B.C. 1996, c. 344, and had thereby rendered the 16 contiguous unexpropriated claims of theirs worthless because there is no longer any practical means of accessing these unexpropriated claims.
- [2] The plaintiffs allege the Province, by expropriating these 12 claims and cutting off any access by land to the unexpropriated claims, has caused loss to the unexpropriated claims and is liable to compensate the plaintiffs for injurious affection to those claims.
- [3] The plaintiffs seek by their Notice of Application, filed July 3, 2014, judgment in the amount of \$3,000,000 plus interest under the Court Order Interest Act, R.S.B.C. 1996, c. 79, or in the alternative, compensation for injurious affection, with damages to be subsequently proven.
- [4] At the hearing on October 6, 2014, however, the plaintiffs confined their remedy to a determination (declaration) by the Court that they are entitled to advance their claims for compensation to be determined subsequently.
- [5] The plaintiffs submit the decision of the Court of Appeal in *Rock Resources Inc. v. British Columbia*, 2003 BCCA 324; 229 D.L.R. (4th) 115 [Rock Resources] determines that a mineral title owner is entitled to compensation for mineral claims that are injuriously affected by an expropriation of other claims, and no legislation or other law of British Columbia has subsequently expressly changed the law as set out in this decision.
- [6] It is submitted this claim is on "all fours" with the decision in *Rock Resources* as the facts are much the same as the facts in that case and in its successor decision of *Adroit Resources Inc. v. British Columbia*, 2010 BCCA 334; [2010] B.C.J. No. 1282; 6 B.C.L.R. (5th) 244 [Adroit Resources].
- [7] *Adroit Resources Inc.* was the new name of *Rock Resources Inc.*, and the decision deals with the compensation awarded to *Rock Resources Inc.* by the decision of the Court of Appeal in *Rock Resources*.

- [8] In *Adroit Resources*, the Court of Appeal awarded damages for injurious affection in respect of the unexpropriated claims that were rendered valueless because the expropriation of other claims removed economic access to the unexpropriated claims.
- [9] The Province submits the legislative scheme enacted subsequently to *Rock Resources* and *Adroit Resources* has the effect of eliminating any claim for injurious affection to other claims arising from the expropriation of mineral claims.
- [10] This is the second claim the plaintiffs have brought over these 28 mineral claims they initially owned. Originally they sought compensation for the 28 mineral claims as a "group of titles" within the meaning of s. 6(1) of the Mining Rights Compensation Regulation, B.C. Reg. 19/99 [Compensation Regulation] which was enacted pursuant to the Mineral Tenure Act, R.S.B.C. 1996, c. 292.
- [11] The plaintiffs argued before Madam Justice Russell of this Court that their claim for compensation should not be confined to the expropriated titles alone but should include compensation for their unexpropriated mineral titles as well, because it was now impractical after expropriation to access the remaining mineral titles for the purpose of developing a mine.
- [12] The right to group titles was repealed when s. 32 of the Mineral Tenure Act was repealed under the Mineral Tenure Amendment Act, 2004, but the plaintiffs argued s. 32 was replaced by s. 7(4) of the Mineral Tenure Act Regulation, B.C. Reg. 529/2004, which dealt with "adjoining claims" and on application of s. 36(1)(f) of the Interpretation Act, R.S.B.C. 1996, c. 238, a "group of titles" covered by s. 6 of the Compensation Regulation should be considered as "adjoining claims" not requiring registration as a group or to be held by the same holder. They pointed out the definition of "group of titles" in the Compensation Regulation means "group of adjoining titles".
- [13] The Province argued before Russell J. that a "group of titles" by definition had to be owned by a single holder and be registered as a group, and s. 7(4) of the Mineral Tenure Act Regulation did not replace s. 32 of the Mineral Tenure Act, because s. 24.2 of the Mineral Tenure Amendment Act, 2004 dealing with amalgamations of mineral cell claims was a better analogy.
- [14] Madam Justice Russell concluded that the plaintiffs' mineral claims do not form a "group of titles" within the meaning of s. 6(1) of the Compensation Regulation as the Province had preserved the effect of grouping of titles under the amalgamation provision of s. 24.2 of the Mineral Tenure Amendment Act and a holder that owns an amalgamated claim is entitled to seek compensation under s. 5 of the Compensation Regulation.
- [15] The plaintiffs' claim was dismissed by Madam Justice Russell in reasons for judgment on September 19, 2012 under 2012 BCSC 1369.

[16] Subsequent to the decision of Madam Justice Russell, compensation for the 12 expropriated claims was settled for \$450,000 with the proviso in the release executed by the plaintiffs that the release was: "not intended to apply to the releasors' common law claims for injurious affection to" the 16 unexpropriated claims.

[17] The release released the Crown:

"from all claims, suits, actions, causes of action, or demands whatsoever, which the releasors or their heirs, executors, directors, agents, successors or assigns had, have or may have against the Crown pursuant to the Park Act, R.S.B.C. 1996, c. 344, the Mineral Tenure Act, R.S.B.C. 1996, c. 292, the Mineral Rights Compensation Regulation, B.C. Reg. 19/99 and/or the Expropriation Act, R.S.B.C. 1996, c. 125, and any amendments made to these enactments, by reason of, arising out of, or in any way directly or indirectly connected with" the expropriation of the 12 claims.

Consideration of Rock Resources

[18] The plaintiffs rely heavily on the decision of the Court of Appeal in Rock Resources.

[19] While they agree that the legislative scheme that applies to their claims here for compensation for injurious affection to the unexpropriated claims is a different legislative scheme than existed and was considered by the Court of Appeal in Rock Resources/Adroit Resources as being applicable to the circumstances there, they submit the new legislative scheme that was enacted after the expropriation in Rock Resources/Adroit Resources has not adversely affected their claim for compensation for the unexpropriated claims in the least.

[20] The portion of the judgment they focus on in Rock Resources begins under the heading prior to para. 115 that states: "Was the taking of the plaintiff's rights in the mineral claims without compensation authorized by statute?" The Province had denied that any compensation at all was payable on the wording of the statute.

[21] Under this sub-heading, the majority decision written by the Chief Justice considered the rights to compensation where legislation does not expressly grant any compensation. He began with quoting a passage from the judgment of Mr. Justice Lambert in *British Columbia Medical Assn. v. British Columbia* (1983), 58 B.C.L.R. 361 (C.A.) at p. 365 where he said:

I think the rule may be divided into three parts. The first is that the property of the subject cannot be taken by the Crown without some form of authorization. The second is that the authorization must be clear. If there is any ambiguity about whether the Crown may take the subject's property, the authorization must be construed in favour of the subject. The third is that, even if the authorization clearly permits the taking of the subject's property, there is a presumption, based on justice and fairness, that the Crown will pay compensation to the subject. That presumption can only be rebutted by a clear contrary intention in the authorization.

I have used the word "authorization" in order to indicate the generality of the rule, in all three parts, but in the usual cases the authorization will be contained in some form of legislative enactment. In such cases, the rule, in its second and third parts, could properly be described as a rule of statutory construction. It is an aid in determining the intention of the legislature.

[22] The Chief Justice also made reference to Mr. Justice Lambert's comments in his reasons where he said at p. 366:

The rule is not a purely mechanical matter of examining the legislation and asking whether there is an express written reference to the fact that the taking is to be without compensation, in words that say "without compensation of any kind", or some equivalent; and that, failing such words, compensation must be paid.

Rather, it is the intention of the legislature that is being sought. The legislature will not be presumed to have countenanced an injustice, unless the contrary intention appears. But the rule does not override the legislative intention. It is not a device by which the courts can enable a claimant to outwit the legislature.

[23] The Chief Justice considered whether the presumption that the Crown will pay compensation was rebutted by a clear contrary intention in the authorization for the expropriation.

[24] On July 13, 1995, the Province had enacted the Park Amendment Act, 1995, that amended the Park Act, 1979, and the 1995 Act had created 80 new parks including the Goat Range Park in southeastern British Columbia.

[25] The effect of the legislation was to prevent the plaintiff in Rock Resources from doing any more mining work on portions of two of its mining claims that fell within the park's boundaries. The plaintiff had owned these two claims since December 31, 1994.

[26] The issue at first instance, and on appeal, was whether the plaintiff was entitled to any compensation from the Province for the loss of its rights to exploit those parts of the claims falling within the new park's boundaries. The chambers judge at the trial level had determined that the plaintiff was not entitled to any compensation.

[27] On appeal, subsidiary issues were considered to include whether there was a "taking" of a property interest, whether that property interest was land or personalty, whether the "taking" was authorized by the Park Amendment Act, 1995, and if it did, whether the plaintiff was entitled to compensation.

[28] The Province argued that when the Goat Range Park was created in 1995 and mining was excluded by the Park Amendment Act, 1995, this did not take from the plaintiff anything of value because all the plaintiff had prior was a contingent right under the Mineral Tenure Act, 1988, to exploit a mineral title, dependent upon the government's consent. Accordingly, the creation of the park did not amount to a "taking" of any property interest of the plaintiff at all.

- [29] This submission was rejected by the Chief Justice in finding that the two mineral claims in the park added value to the plaintiff and the fact that it was a contingent mining right only did not mean that those rights did not have value and that nothing was "taken".
- [30] He determined that a plain reading of s. 11(c) of the Park Act, 1979, was not conclusive on the issue of compensation for mineral claims, as the provision was silent in that respect. He said mineral claims were excluded from s. 11(c) of the Park Act, 1979, only indirectly, through an amendment to s. 21(2) of the Mineral Act, S.B.C. 1977, c. 54 that deemed mineral claims to be a chattel interest and not an interest in land, and he said if the legislature had intended not to pay compensation for an expropriated mineral claim after 1977, it would have done so in a more direct and explicit fashion.
- [31] For those reasons, he determined that there was nothing in the Park Amendment Act 1995, read in the context of the legislative scheme as a whole, nor in the circumstances in which the legislation was introduced, that would clearly rebut the presumed intention that compensation would be paid.
- [32] His conclusion was the presumption of full compensation should prevail and the authorized taking of the plaintiff's rights in the mineral claims required the Crown to pay full compensation for the value of those lost rights.

The legislative scheme applicable to the plaintiffs' application

- [33] Madam Justice Russell determined that on January 11, 2006, the plaintiffs began acquiring mineral titles in the Morice Range of BC, known as the "New Moon Project", clustered near Morice Lake. The mineral titles were registered in the names of the plaintiffs.
- [34] The Province expropriated several of these mineral titles on July 11, 2008, pursuant to s. 11(2) (c) of the Park Act.
- [35] Section 11(2)(c) of the Park Act states:

11(2) For the purpose of establishing or enlarging a park, conservancy or recreation area, the minister may expropriate

- (c) rights under a claim, as defined in the Mineral Tenure Act, of the recorded holder of the claim.

- [36] Subsection 2.2 of s. 11 of the Park Act was added by Parks and Protected Areas Statutes Amendment Act, 2007 and says:

The holder of a right expropriated under subsection (2) is entitled to compensation

- (a) in relation to a right referred to in subsection (2)(b),(c) or (d) in accordance with section 17.1 of the Mineral Tenure Act.

[37] Section 17.1 of the Mineral Tenure Act, as amended by the Mining Rights Amendment Act, 1998 states:

17.1 (1) If, after the coming into force of this section, the minister responsible for the administration of the Park Act expropriates under section 11 of the Park Act the rights of a recorded holder of a lease or claim or of an owner of a Crown granted 2 post claim, compensation is payable to the recorded holder or owner, as the case may be, in an amount equal to the value of the rights expropriated, to be determined under the regulations.

(2) If the minister responsible for the administration of this Act and the recorded holder or owner, as the case may be, do not agree as to the amount of compensation that is payable under subsection (1), the minister or the recorded holder or owner may require the dispute to be settled by a single arbitrator who has the prescribed qualifications and is to be appointed by the minister.

[38] The "regulations" became the Compensation Regulation.

[39] In the Compensation Regulation:

"expropriated mineral title" means rights under all or part of a claim, lease or Crown granted 2 post claim that are expropriated, after the coming into force of this regulation, under s. 11(2) of the Park Act.

[40] Section 5 of the Compensation Regulation states as follows:

5 (1) The value of an expropriated mineral title must be determined by estimating the value that would have been paid to the holder of the expropriated mineral title if the title had been sold on the date of expropriation, in an open and unrestricted market between informed and prudent parties acting at arm's length.

(5) The value of an expropriated mineral title must not include consequential damages caused to the expropriated mineral title holder as a result of the expropriation or the expenditures incurred in acquiring or operating an equivalent mineral title elsewhere.

[41] The Province firstly submits the plaintiffs have confined their claims to a common law right for injurious affection as set out in the release they executed in favour of the Province for the \$450,000 they received for the 12 expropriated claims. This also appears in the Notice of Civil Claim as a common law claim for injurious affection and as well in their Notice of Application.

[42] The Province submits there is no right at common law that exists for damages for injurious affection and cites *R. v. Sisters of Charity of Rockingham*, [1922] 67 D.L.R. 209 [Sisters of Charity], as authority for this proposition.

- [43] Secondly, the Province submits the new legislation following after Rock Resources/Adroit Resources, being the Park Act adding ss. 2.2, together with s. 17.1 of the Mineral Tenure Act and the Compensation Regulation, constitutes a complete code that does not allow for any compensation for injurious affection.
- [44] The Province submits the only claim possibly left for the plaintiffs is a claim for damages for injurious affection to the 16 unexpropriated claims independent of the expropriation of the 12 claims because under the release executed for the \$450,000 compensation for the expropriated claims, the plaintiffs released all claims and causes of action "by reason of, arising out of, or in any way directly or indirectly connected" to the expropriated claims.
- [45] The Province submits this is not a case of a partial taking of 12 claims out of 28 claims but a claim of injurious affection where there is no taking. The plaintiffs have been paid their compensation for the expropriation of the 12 claims and they retain the 16 unexpropriated claims in the same condition they were in prior to the expropriation of the 12 claims, with the same access as they had prior.
- [46] The Province submits the access prior was only by helicopter with no over land access and the expropriation of the 12 claims does not change that access to the remaining 16 unexpropriated claims in the least.
- [47] The Province submits that with the expropriation of the 12 claims having been completed and the plaintiffs paid their compensation, there is no basis for any claim for partial taking.
- [48] The Province submits that any claim for injurious affection must be found within the four corners of the statutory scheme and there can only be a presumption of full compensation for an expropriation to the degree the presumption is allowed by the statutory language.
- [49] The Province agrees with the plaintiffs that there is no statutory authorization for injurious affection damages for unexpropriated claims and the Province submits the wording of the applicable statutes and regulation dealing with the issue of compensation do not admit of any claim for injurious affection for the unexpropriated claims.
- [50] By way of reply to the submissions of the Province, the plaintiffs say that their reference to "common law claim" referred to in their release and in the Notice of Civil Claim was not particularly artful, but it is clear the release was not intended to give up the very claim the plaintiffs have always advanced in respect of the unexpropriated titles, which is that they should be entitled to injurious affection damages as part of the full compensation they are entitled to for what they say was the partial taking of their 28 claims by the expropriation for the park of the 12 claims.
- [51] They dispute the Province's submission that because compensation for the 12 expropriated claims has been paid, the remaining 16 unexpropriated claims should be considered independently and since there is no taking of those claims, the plaintiff's claim for injurious affection should be considered on the basis of "no taking".

- [52] The plaintiffs submit that because the legislative scheme since Rock Resources permits expropriation for the creation of a park, but provides for no compensation in respect of any injurious affection claim where there are adjoining claims adversely affected, the principle of full compensation should be applied to the injurious affection of the 16 unexpropriated claims.
- [53] They rely upon the statutory principle that full compensation can only be excluded by very express and clear language which would eliminate their claim and they submit this express and clear language is not present in the legislative scheme enacted since Rock Resources.
- [54] They do acknowledge that the issue for determination is whether the statutory scheme that presently exists is sufficiently clear that the statutory presumption of full compensation has been eliminated by the legislature for these 16 claims.

Analysis and decision

- [55] The result in Rock Resources, on appeal, turned on the application of the principle of statutory interpretation that in the absence of a clear legislative intention, a provision that takes away the statutory rights of a subject should not be interpreted to deny compensation to that subject for the loss of that statutory right.
- [56] In Rock Resources the portions of the two claims at issue of the plaintiff that were involved in the decision were both within the park the legislature had created and the Province was taking the position that the legislation at that time did not contain any provision for compensation to be paid for this "taking".
- [57] The Court of Appeal granted a declaration that the plaintiff's rights in those portions of the two claims had been taken by the Park Amendment Act, 1995 and the plaintiff was entitled to compensation for the taking of those rights, and the compensation payable was the value of the rights lost to the plaintiff by the taking.
- [58] It appears thereafter both parties accepted that the value of the rights lost to the plaintiff by the taking should include injurious affection damages to the remainder of the two claims and two other adjacent claims of the plaintiff outside the park area, because the Province on appeal from a compensation award by the trial court conceded the plaintiff was entitled to compensation for any reduction in value of the remaining portion of the four claims that were injuriously affected.
- [59] The plaintiffs before me acknowledge that the new compensation scheme enacted after the expropriation in Rock Resources clearly did not apply at the time of the decisions in Rock Resources/Adroit Resources.

- [60] Accordingly, the answer to whether the plaintiffs are entitled to claim damages for any injurious affection to their 16 unexpropriated claims in addition to the \$450,000 they have already received for their 12 expropriated claims taken on the creation of the park, depends once again on the issue of the proper statutory interpretation of the new legislative scheme.
- [61] As noted above, the Province firstly submits that the plaintiffs have confined their claims to a common law right to injurious affection damages as set out in the release they executed in favour of the Province.
- [62] The Province submits there is no right at common law that exists for damages for injurious affection and cites *Sisters of Charity* as authority for this submission.
- [63] The Province also points out the plaintiffs here agree there is no common law right for damages for injurious affection.
- [64] The Province also submits that the new legislative scheme following *Rock Resources/Adroit Resources*, being the *Park Act Amendment* to add s. 11(2.2), the *Mineral Tenure Act* amended under the *Mining Rights Amendment Act, 1998*, and its associated *Compensation Regulation*, constitutes a complete code that does not allow any longer for compensation for injurious affection to adjoining mining titles that are not expropriated.
- [65] The Province relies for its submission that "consequential damages" within s. 5(5) of the *Compensation Regulation* includes damages for injurious affection, on the statement of E.C.E. Todd, *The Law of Expropriation and Compensation in Canada* (2d ed.) 1992, where he says at p. 331 that:

Damage by injurious affection, sometimes referred to as "consequential damage", may arise in three different situations, two of which involve the expropriation of a portion of the claimant's land and a third which involves no such expropriation.

- [66] The plaintiffs say that none of the new legislative or regulatory provisions can affect the existing law of *Rock Resources/Adroit Resources* when *Adroit Resources* allowed injurious affection damages for unexpropriated claims caused by the expropriation of other claims, under the principle of full compensation.
- [67] On the interpretation to be given to s. 5(5) of the *Compensation Regulation*, the plaintiffs submit the "consequential damages" that are not included do not include injurious affection damages for the 16 unexpropriated claims because:
- (a) The wording of s. 5(5) refers only to the value of an expropriated mineral title and has no application to unexpropriated titles;
 - (b) Section 6 of the *Compensation Regulation* allows injurious affection damages in the case of groups of title, so all claims to injurious affection as consequential damages are not eliminated;

- (c) Consequential damages in s. 5(5) apply to disturbance damages or costs in locating a replacement mining claim, loss of good will, etc., and should be confined to damages flowing directly from the expropriated claims and not to damages flowing from the unexpropriated claims that have sustained injurious affection;
 - (d) The legislature has already dealt with injurious affection damages directly in the Expropriation Act, R.S.B.C. 1996, c. 125 without referring to them as a consequential damages; and
 - (e) "Consequential damages" is too vague a term to overcome the presumption that a claimant is entitled to full compensation when their rights are taken away.
- [68] Here the plaintiffs say, as they said before Madam Justice Russell, that it is now impractical for them to access the remaining 16 mineral titles for the purpose of developing a mine.
- [69] The Province submits that the 16 unexpropriated claims are in the same condition they were in prior to expropriation with the same access they had before. The Province says the access prior was by helicopter as they had no land access and the expropriation of the 12 claims has not changed their access in the least.
- [70] This issue of whether the plaintiffs had practical land access to the 16 unexpropriated claims prior to the creation of the park or only had helicopter access is a factual issue that I am not able to resolve on this application.
- [71] I propose to determine whether the new legislation since Rock Resources/Adroit Resources evidences a clear legislative intention to deny compensation for injurious affection damages for unexpropriated mineral claims in the presence of the expropriation of other claims, by focusing on s. 5(5) of the Compensation Regulation which states:

The value of an expropriated mineral title must not include consequential damages caused to the expropriated mineral title holder as a result of the expropriation or the expenditures incurred in acquiring or operating an equivalent mineral title elsewhere.

- [72] The wording of s. 5(5) deals with what the value of an expropriated title must not include by way of consequential damages, but the consequential damages not to be included are those caused to the expropriated mineral title holder (not to the expropriated title) as a result of the expropriation or the "expenditures incurred in operating an equivalent mineral title elsewhere."
- [73] Accordingly, the wording supports the plaintiff's submission that this issue is to be determined on the basis of a "partial taking" and not a "no taking", following Adroit Resources.
- [74] Section 6 of the Compensation Regulation deals with a separate category of "groups of titles"; a category that the plaintiffs cannot fit into, so it is distinguishable as applicable only to that situation.

- [75] The legislature may have dealt with injurious affection damages in the Expropriation Act, but as part of an expropriation of land and not a personalty or chattels. Section 28(2) of the Mineral Tenure Act states: "The interest of a recorded holder of a claim is a chattel interest", so it is distinguishable for that reason as well.
- [76] In addition to the passage in E.C.E. Todd's *The Law of Expropriation and Compensation in Canada* relied upon by the Province, there are other legal precedents that also refer to damages for injurious affection as "consequential damages".
- [77] Mr. Todd's definition was adopted by the Federal Court of Appeal in *Semiahmoo Indian Band v. Canada*, [1997] F.C.J. No. 842 (C.A.) where the Court dealt with the issue of whether the surrender to the government of 22.4 acres of the Band's reserve impeded development on the remainder of the reserve. The Court pointed out, in reliance on Mr. Todd's book, that:
- Damage by injurious affection, also known as "consequential damage", recognizes inter alia that, "[w]here part of an owner's land is expropriated, the piece or pieces of land remaining may be rendered less valuable as a result of their severance from the expropriated portion. Here a claim may be made for 'injurious affection by severance'."
- [78] In addition, George Challies in *The Law of Expropriation* (2d ed.) Wilson and Lafleur, 1963, defines injurious affection at p. 131 as follows:
- Compensation is recoverable not only for the value of land taken, but for consequential damage to other property. Such consequential damage is termed injurious affection in England and the common law Provinces of Canada.
- [79] In *Lamb v. Manitoba Hydro-Electric Board*, [1966] S.C.R. 229 the Supreme Court of Canada dealt with lands and buildings of the appellant in low lying land expropriated by the Board pursuant to the Manitoba Hydro Act, 1961 (Man.), c. 28.
- [80] The appellant was not satisfied with the amount offered as compensation and arbitration proceedings followed. The parties reached an agreement as to the compensation payable for injurious affection but the arbitrator had to concern himself with fixing compensation for the value of the lands and buildings expropriated.
- [81] The appellant was not content with the compensation awarded for the lands and buildings.
- [82] In the Supreme Court of Canada, the judgment of the majority was written by Hall J. and during the course of his judgment at p. 233, he said the following:

Meanwhile, as a result of negotiations between the parties, an agreement had been reached whereby compensation payable under the heading of injurious affection or consequential damage and the cost of relocating the sewage disposal field was agreed upon in the sum of \$18,000.

- [83] On the strength of these decisions it is my determination that s. 5(5) of the Compensation Regulation evidences a clear legislative intention to deny compensation for injurious affection as "consequential damages" to an expropriated mineral title holder.
- [84] The determination or declaration sought by the plaintiffs that they are entitled to advance their claims for compensation related to the 16 unexpropriated claims to be determined subsequently, is denied.
- [85] The plaintiffs' claim to the orders sought by their Notice of Application of July 3, 2014 is also dismissed.
- [86] In closing, I raise an issue that was not argued before me by either party which I believe should have been argued.
- [87] Before Madam Justice Russell, the plaintiffs sought the same compensation for the unexpropriated 16 claims, on the same basis for injurious affection, although on the argument their mineral titles should be considered as "a group of titles" under s. 6 of the Compensation Regulation.
- [88] By the time of the hearing before Madam Justice Russell on June 6, 2012, the decision of the Court of Appeal in Rock Resources had been in existence for approximately nine years, and the decision in Adroit Resources for approximately two years.
- [89] I have no idea why the plaintiffs did not make this alternative claim they are now making before me at the same time they made the "group of titles" claim, in front of Russell J., or why the Province did not force the plaintiffs to bring this alternative claim at the same time.
- [90] The circumstances that I have outlined sound to me that they may fall within the rule of cause of action estoppel which requires a party to bring forward their whole case at one time and not attempt to litigate by pieces.
- [91] If the circumstances do not meet the exact requirements for application of cause of action estoppel, they appear to be appropriate to apply the principle of abuse of process by re-litigation.
- [92] I bring the parties' attention to a fairly recent decision of the Court of Appeal in *Erschbamer v. Wallster*, 2013 BCCA 76 where these principles of cause of action estoppel and abuse of process by re-litigation, are discussed.

"The Honourable Mr. Justice Truscott"

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