Date: 19980330
Docket: A941019
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

JOSEPH EDWARD FALKOSKI

PLAINTIFF

AND:

**TOWN OF OSOYOOS,
OSOYOOS DIVIDEND RIDGE DEVELOPMENTS LTD.,
DONALD LEBETER,
ELIZABETH LEBETER,
KEVIN PRIMEAU,
CINDY PRIMEAU,
GARTH LESLIE LANGFORD,
SHANNON CATHERINE LANGFORD,
BALDEV SINGH SIDHU, and
SWARAN KAUR SIDHU**

DEFENDANTS

AND:

**HER MAJESTY THE QUEEN IN RIGHT OF THE
PROVINCE OF BRITISH COLUMBIA**

THIRD PARTY

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE MACDONALD

Counsel for the Plaintiff: Louis J. Zivot

Counsel for the Town of Osoyoos (Defendant): Ian J. Stirling

Counsel for Osoyoos Dividend Ridge Developments Ltd. (Defendant): J. Peter Young

Counsel for the Attorney General of British Columbia (Third Party): Richard J. Meyer

Place and Date of Hearing: Vancouver, B.C.
February 2 to 13, (inclusive)
and March 18 and 19, 1998

[1] The plaintiff is the holder of mineral rights in an area southwest of and immediately adjacent to the Town of Osoyoos (the "Town") known as the West Bench or Dividend Ridge. The latter name is derived from a former gold mine which was located on one of the claims now owned by the plaintiff, but which ran out of ore and closed in 1940.

[2] During the 1980's the Town became landlocked due to the lake and the agricultural land reserve which surrounded it. Expansion onto the West Bench, where a golf course and a racetrack already existed, was the logical alternative. In the 1980's, two expansions of the Town's boundaries finally extended far enough west and south to encompass the eastern portion of the plaintiff's mineral holdings.

[3] The Town then purported to prohibit mining activity within its boundaries by the exercise of its zoning power under the ***Municipal Act***. The development of residential subdivisions, first adjoining or abutting and then over some of the plaintiff's mineral claims ensued.

[4] Osoyoos Dividend Ridge Developments Ltd. (the "Developer") acquired title from the Crown to lands within the Town which (in part) overlap the plaintiff's mineral rights. The title acquired by the Developer was subject to the plaintiff's surface rights, his relevant crown granted mineral claims appearing as a charge on the Developer's titles.

[5] Building lots have since been developed, serviced, subdivided and sold which are located on the surface above the plaintiff's mineral claims. The individual defendants, none of whom were represented at this trial, were the purchasers of four of those lots at the time this action was commenced in 1994. The claim against those defendants was severed, largely on the basis that each of them are indemnified by the Developer.

Claims of the Plaintiff

[6] The plaintiff, who acquired (*inter alia*) in 1982 the three crown granted mineral claims directly affected by the residential development on the West Bench, claims that his "surface rights" (i.e.: to use and possess the surface for the purpose of extracting minerals) have been destroyed by the development of a residential subdivision thereon.

[7] He sues the Town, which encouraged and permitted that development, and the Developer, which actually constructed the

subdivisions, for damages. His claim is based in nuisance and trespass against both, and on "effective expropriation" against the Town.

[8] The plaintiff seeks damages equal to the value of his total mineral holdings in the area, of which the three crown granted mineral claims within the Town boundaries (in whole or in part) comprise only 10%. He argues that the rest of his holdings are "injuriously affected" by the present proximity of urban development. It is somewhat troubling that the plaintiff also seeks an order enjoining the Town and the Developer from any further expansion of residential development onto his other mineral titles, leases or claims. That latter request suggests to me that the plaintiff attributes a residual value to the remaining 90% of the area covered by his mineral rights which is not acknowledged in his claim for damages.

The Defences

[9] The Town initially defended on the basis of its statutory authority to extend its boundaries and to prohibit mining activity therein by zoning bylaws. During argument, that defence was no longer being advanced with any force for the reasons set out below.

[10] Instead, the Town sought to distance itself from the actions of the approving officer who accepted the Developer's

subdivision plan, even though that individual was also a Town employee (initially as a planner, and currently as deputy clerk and director of development services). The Town also points to the Developer as the one whose construction and development work actually impaired the plaintiff's access to the surface above his claims. It argues that its desire for the development of housing on the West Bench does not link it into a joint venture with the Developer.

[11] The authorities which the plaintiff relies for its "effective expropriation" argument, the Town submits, bear only a superficial resemblance to this case. Here, the Town never owned or sold either title to the minerals or the surface, and the water reservoir and the services now under the roads are "nothing more than a reflection of the Town's right to require development costs in respect of such facilities."

[12] Finally, the Town strenuously attacks the basis on which the plaintiff calculates his claim for damages and denies that this is a case for exemplary damages.

[13] The Developer, on the other hand, takes a rather realistic (and somewhat refreshing) approach. On his examination for discovery on June 18, 1997 as an officer and director of the Developer, Robert Knight gave the following evidence:

326 Q. ...the concern that the people in the government had...was that there's potential for a lawsuit, and therefore...[they are] going to let you buy this potential for a lawsuit by way of an indemnity?

A. That's right. I mean the indemnity basically said that I would save the province harmless. ...When Mr. Falkoski can prove the damages he's lost in his under-surface rights, then we've got a deal, haven't we?

327 Q. So, you're saying you recognize the right of Mr. Falkoski to compensation; its just a question of how much.

A. Exactly.

Mr. Knight gave evidence at this trial to the same effect.

[14] Thus, the emphasis throughout this trial by the Developer was on the issue of the quantum of damages, with an acceptance of liability on its part in nuisance, but a rejection of trespass as an appropriate remedy where the plaintiff owns mineral rights but not the surface. The Developer concedes that the development of residential housing on the surface over the plaintiff's mineral claims restricts his rights of access to that surface for the purpose of mining activity.

Third Party Proceedings

[15] The Town claims over against the provincial Crown for contribution in respect of any judgment which the plaintiff may

recover against it on the grounds that the Crown breached its duty to the plaintiff and should share in the payment of any damages awarded to him. I pause to note that the plaintiff himself advances no such claim.

[16] The Town argues that the Crown owed a duty to the plaintiff not to sell the surface above his mineral claims without either notice to him or a requirement that any purchaser thereof first obtain a quit claim or release of his mineral rights. The Crown denies any such duty and points to its statutory authority in section 23 of the ***Mineral Act*** and to the land title system which permits the registration of crown granted mineral claims as a charge against the surface title.

The Background

[17] The plaintiff holds three different types of mineral tenures on the West Bench. In April of 1982, he acquired (50% for himself and 50% in trust for an American partner) a total of 11 crown granted mineral claims and mineral leases. Among the former are three over which the development of residential building lots or services (such as a water reservoir and water lines) have been completed or is in process. Those three are the Osoyoos-Heclar Fraction, the Dividend and the Dividend Fraction. The latter two were crown granted in 1900 and the former in 1943, after the closure of the Dividend mine.

[18] All those crown grants carry with them the right to use and possess the surface for the purpose of extracting the minerals therefrom (See, ***Mineral Act***, R.S.B.C. 1948, c. 213, s. 23). The same section (s. 23) contains this provision:

> ...all remaining surface rights shall be deemed to be vested in the Crown...and may...be...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...

[19] There is a provision in the crown grants themselves permitting the Crown or anyone authorized by it to take from or carry water over the area covered by the mineral claim "upon paying reasonable compensation". Failing all else, that proviso may form the basis for a claim against the Town in respect of the water reservoir located on the Osoyoos-Heclar Fraction.

[20] As early as 1981, the Town began to investigate the possible use of the West Bench for residential development. Very early in that process, the Town became aware that the Osoyoos-Heclar Fraction was the subject of a privately-owned, crown granted mineral claim. On February 12, 1982, the Town was advised by the then Minister of Energy, Mines and Petroleum Resources that:

> ...It would probably be necessary for the Village [now the Town] to acquire these claims from the present owners....I would suggest that you negotiate

> the purchase of the mineral claims that are involved."

[21] On March 25, 1982, the month before it was acquired by the plaintiff, the Town started the process of expanding its boundaries to include (*inter alia*) a portion of the land overlying the Osoyoos-Heclar Fraction. Letters Patent for that expansion were granted on November 25, 1982. However, the Town's ability to develop the area on its own disappeared with a change in provincial government policy in 1984.

[22] Advertising for prospective developers in 1985 produced no results, but in 1986, a company operated by Mr. Knight was the successful bidder for phase one of the proposed development on the West Bench (Lot 1007). Phase one was not over any of the plaintiff's claims, but was adjacent to them. Late in that same year (1986) at the urging of the Town, land for a second phase (some 6.38 ha.) was advertised by the Crown for "expressions of interest." Discussions between the Crown and Mr. Knight led to the size of the phase two parcel being substantially increased (to some 21 ha.). Phase two would encroach substantially on both the Osoyoos-Heclar Fraction and the small Dividend Fraction, as well as a portion of the Dividend claim.

[23] The Crown advised Mr. Knight and the Developer that they would have to obtain a release or quit claim from the

plaintiff of his mineral rights underlying phase two. Mr. Knight contacted the plaintiff accordingly. What transpired is the subject of considerable conflict in the evidence. The plaintiff says he was subjected to a "tirade of abuse." Mr. Knight says that the plaintiff used one excuse or another to avoid dealing with him and did not respond to a specific offer for his mineral rights under phase two.

[24] I find that Mr. Knight did contact the plaintiff on more than one occasion (starting in late 1987) in an effort to obtain the necessary release, and that the plaintiff refused to enter into negotiations with the Developer in that regard. The result was Mr. Knight's "colourful" language and a statement to the plaintiff that he would "develop around him". While Mr. Knight created the impression with the Crown for some time that he was still negotiating with the plaintiff, it eventually became clear to the Crown that the necessary release would not be forthcoming.

[25] By that time (1991) development work on phase two had started and the services on phase one had been designed and built with the capacity to support phase two. To resolve the impasse, the Crown agreed to convey phase two (the 21 ha. lot 1015) to the Developer subject to the plaintiff's prior underlying mineral rights and the express indemnity to which Mr. Knight referred in his evidence quoted above. It is clear

that the Crown would not proceed in that manner again, whatever its statutory authority, for policy reasons (See the Information Letter No. 17 re Mineral Titles issued in September of 1997 for the information of municipal authorities, at Exhibit 1, Tab 22, p. 53).

[26] By the fall of 1992, the Developer had received preliminary approval for the first lots to be located in phase two (lot 1015). At the same time, the Town started the process for obtaining a right-of-way for and constructing a water reservoir and pipelines on the Osoyoos-Heclar Fraction outside of the then Town boundaries and the phase two lands.

[27] The first 67 lots in phase two were finally approved in September of 1993. By then, all were fully serviced. Of those 67 lots, 22 are wholly or partially over the Osoyoos-Heclar Fraction. In August of 1994, a further 47 lots in phase two were finally approved, 35 of which are over the Osoyoos-Heclar Fraction. Since the commencement of this action, the Developer has arranged to acquire two further lots (1017 and 1018) which include most of the small Dividend Fraction and part of the Dividend claims. In due course, as was last done in 1997 to include current residential development, the Town boundaries will be extended as necessary.

Discussion

[28] There is an important distinction between crown granted mineral claims and mining leases on the one hand and mineral claims on the other. Crown grants and leases of mineral rights are an interest in land. A mineral claim is a chattel interest only. In addition, the current ***Mineral Tenure Act***, S.B.C. 1988, c. 5, and in particular the dispute resolution procedures therein, does not apply to crown grants as the definition of "mineral title" therein includes only a "(staked) claim or a lease".

[29] The plaintiff submits that both the Developer and the Town have undermined his prior right to surface access and use by impairing (and even eliminating in certain locations) his ability to explore and exploit the subsurface for mining purposes. He says that the Town has "effectively expropriated" his rights to use the surface of his crown granted claims which lie within present (or planned) Town boundaries. In response to the plaintiff's own estimate that no more than 10% of the total area covered by his mineral holdings are or will be so affected (with the addition of the right-of-way over the Osoyoos-Heclar Fraction for the reservoir and pipelines), he argues that the area taken is on the "contact between the intrusive rock and the limestone" where valuable minerals would be most likely to precipitate out and form deposits. I reject that argument.

[30] While the residential development on the West Bench to date, and that contemplated within lots 1017, 1018 and the remainder of lot 1015, has and will eliminate the plaintiff's ability to use the surface in those locations, a major part of the Dividend claim is not so affected. The "effective expropriation" argument goes no further than the boundaries of lots 1015, 1017 and 1018. In that regard, its coincides precisely with the claim in nuisance, and for that reason I find it unnecessary to deal with the application of the ***Queen (B.C.) v. Tener*** [1985] 1 S.C.R. 533 and ***Casamiro Resource Corp. v. A.G.B.C.*** (1991) 55 B.C.L.R. (2d) 346 (C.A.) cases to this situation, except to note that what the Crown did in those cases was a far cry from the ineffective zoning bylaw of the Town's which purported to prohibit any mining activity within town boundaries.

[31] This is perhaps the point to discuss that bylaw. When the plaintiff tried to bring matters to a head in late 1993 by applying to the Inspector of Mines for permission to drill 5 diamond drill holes on his properties, the Town was notified. It responded by noting that 4 of the 5 proposed holes were within Town boundaries, and that its official community plan and zoning designations did not permit mining activities in those locations.

[32] When authorization was nevertheless forthcoming and the Town received notice that the plaintiff intended to

commence the work, he received a letter from the Town which denied him access to any Town property on the basis that "no mining activity of any kind is permitted within the Town boundaries." I am satisfied on the argument advanced by the plaintiff that the Town has no jurisdiction over mining and cannot, through the use of its zoning powers, control or prohibit such activity. That authority remains in the province which regulates mining activity by various mining legislation.

[33] The definition of "land" in the ***Municipal Act*** has long excluded mines and minerals. That definition applies to all enactments relating to municipal matters. A municipality has no jurisdiction to pass a zoning bylaw that directly or indirectly prohibits mining or mining activity (See, ***Union Gas v. Township of Dawn*** (1977) 15 O.R. (2d) 722; and ***Vernon v. Okanagan Excavating*** (1993) 84 B.C.L.R. (2d) 130). The zoning authority in the ***Municipal Act*** is "general" legislation and must be read as subject to "special" legislation such as the several mining statutes.

[34] However, the very existence of the Town's invalid bylaw purporting to prohibit mining activity within its boundaries is a factor in this case. It was sufficient to deter the plaintiff from proceeding with his drilling program, assuming that he sought authorization for reasons other than to bring matters to a head. I am not prepared to make that assumption because of his refusal to negotiate with Mr. Knight,

his insistence on dealing with the Crown and the Town in the Developer's absence, his refusal to settle regarding the water reservoir alone, and his obvious interest in becoming involved in any future subdivision activity on the West Bench.

[35] Prior to 1993, the plaintiff was well aware that the proximity of urban development associated with the Town was a substantial impediment to the development of a mine on his holdings, even if sufficient mineralization to support such a development could be found. He was trying to use his mineral rights as a lever to create an opening for himself in the residential development on the surface of the West Bench. Ultimately, the Crown simply refused to give him preferential treatment in exchange for his mineral rights. In 1987, the plaintiff granted a mining lease and option agreement to the subsidiary of a major American mining corporation ("Duval"). That agreement was cancelled by Duval in 1989. In large part, that cancellation was due to Duval's concern over the proximity of urban development and the growing threat presented by the Town's expansion activity.

[36] The plaintiff cannot complain about the proximity of the Town at the time he acquired the 11 crown grants and leases in 1982. He may not have been aware of the steps which began, only a month earlier, to extend the Town's boundaries onto the West Bench immediately adjoining his mineral rights, but he cannot complain about such an expansion either. It was fully

within the rights of the Town to do so, and of Fairway Hills to acquire, develop and subdivide lands outside the plaintiff's mineral claims. The plaintiff's desire to shift from mining to land development is not difficult to understand.

[37] On the other hand, the "urban proximity problems" which existed prior to the sale by the Crown of lot 1015 to the Developer, and the further extension of both the Town boundaries and urban development onto the three crown granted mineral claims directly affected thereby, are two different matters. They cannot be added together to enhance the plaintiff's damages arising out of the nuisance created by actual development and subdivision of the surface of those three claims.

[38] The real issues in this case are two:

a) Is the Town, as well as the Developer, liable to the plaintiff for his loss flowing from the present and planned development in Lots 1015, 1017 and 1018?

b) What is the quantum of that loss?

Liability of the Town

[39] As early as 1981, the Town sought to extend its boundaries over at least the easterly portion of the Osoyoos-

Heclar Fraction (See Exhibit 2, Tab 25, pp. 11 to 21). In early 1982 the Town was advised to negotiate a quit claim of the plaintiff's interest therein before proceeding with development. That advice was ignored, and the Town cannot entirely escape the consequences on the basis that the actual development work was done by the Developer.

[40] In ***Royal Anne Hotel v. Ashcroft*** [1979] 2 W.W.R. 462 (B.C.C.A.) at p. 466, the following definition of the tort of nuisance was adopted:

> ...a person then may be said to have committed the tort of private nuisance when he is held to be responsible for an act indirectly causing physical injury to land or substantially interfering with the use or enjoyment of land or an interest in land, where, in light of all the surrounding circumstances, this injury or interference is held to be unreasonable."

I find both the Town and the Developer to have committed nuisance in respect of the plaintiff's surface rights.

[41] The Town controls the development process. It has the authority to fix servicing requirements. Without the approval of the Town, the Developer could not have created residential building lots over the plaintiff's crown granted mineral claims. Both the Town and the approving officer were fully aware, through actual notice and title searches, of the plaintiff's registered mineral rights. It is unnecessary to

decide in this case whether the approving officer had "a duty to consider the interest" of the plaintiff (under s. 86(1)(b) of the ***Land Title Act*** R.S.B.C. 1979, c. 219) as a "person affected".

[42] Even had he done so, the approving officer was aware that the crown grant of phase two to the Developer was expressly subject to the plaintiff's prior registered mineral rights, and that the Town's zoning bylaw prohibited mining activity within its extended boundaries. In addition, he understood from Mr. Knight that negotiations with the plaintiff were ongoing.

[43] I reject, however, the argument that what the Town did was an effective expropriation of the plaintiff 's mineral rights, even insofar as the surface of the three directly affected crown granted mineral claims is concerned. This situation must be distinguished from what occurred in the ***Tener*** and ***Casamiro*** cases cited above. What the Town has done in this case is to condone, encourage, permit (and in the case of the water reservoir, require) the Developer's nuisance.

[44] On that basis, I find the Town jointly and equally responsible for the plaintiff's loss arising out of that nuisance. The surface rights of the plaintiff over the three crown granted mineral claims directly affected by the current residential development on lots 1015, 1017 and 1018 were not

compromised until the Town approved the subdivision thereof with full knowledge of those prior rights. Indeed, it is of considerable assistance to the Developer on the issue of aggravated damages that successive mayors of the Town assured Mr. Knight that there "would never be mining in the Town of Osoyoos!" Nor would the Developer have purchased from the Crown without assurances regarding subdivision and development permits.

Quantum of Damages

[45] This issue is by far the most difficult aspect of this case. There are inherent difficulties in determining the value of a mining prospect. The apparent value may be largely a function of the promotional effort expended, rather than any hard information concerning mineralization.

[46] Value, in respect of a mining property, may very much be "in the eye of the beholder". In this case, the opinion evidence as to the value of the plaintiff's mineral rights on the West Bench is at opposite poles. Mr. Glanville, for the plaintiff, says $500,000.00 (See Exhibit 19). Mr. Semeniuk, for the Developer, says $35,000.00 (See Exhibit 20). Each of those opinions is assailed by the opposing expert, and in argument by counsel for the opposing parties. What is clear is that the valuation process is a highly subjective one.

[47] While, in general terms, I prefer the approach taken by Mr. Glanville, I am simply unable to accept as proof of value in this court some of the methods which he has employed, despite assurances that they are used regularly in connection with activities on the Vancouver Stock Exchange.

[48] For example, the so-called "Market Capitalization Method" utilizes the total value at a particular point in time of the outstanding shares of a publicly traded company with similar properties. But, the method entirely ignores current market conditions (such as the price of gold) and the promotional abilities, efforts and methods of those promoting the company. Perhaps the recent Bre-X disaster is the most extreme example of the dangers inherent in the market capitalization method.

[49] The "Past Expenditures Method" also raises some serious concerns because it purports to include a proposed budget for future expenditures as well. How the value of the plaintiff's mineral holdings in this case can be escalated to $600,000.00 by the self-serving recommendation of a mining engineer that $400,000.00 should be spent on diamond drilling in the future, simply escapes me.

[50] The Crown aptly characterized the evidence on value as "a lot of smoke and mirrors". It suggests that the only "hard evidence" of value is what the plaintiff paid for the 11

crown grants and leases in 1982, a total of some $20,000.00. That is not much different than the amount paid to the plaintiff over a 5 year period in the 1980's by Golden Dividend Resources, although that $25,000.00 was later consumed in legal fees defending a claim by Golden Dividend for title.

[51] It must also be kept in mind that the large area surrounding the 11 original claims and leases (staked claims Div. 1 to 19 and Div. A, B and C) was not staked by the plaintiff until 1992 and 1993, long after this dispute had surfaced in 1987 and 1988, and about the time that the Town approached the plaintiff regarding construction of the water reservoir and pipelines on the Osoyoos-Heclar Fraction. The expenditures incurred by the plaintiff since that staking have (except for taxes on his crown granted claims and annual mineral lease charges) been for inconclusive assessment work on those claims.

[52] I find that 15% of the plaintiff's total mineral holdings on the West Bench have been directly impacted by the activities of the Town and the Developer. Because those activities have moved "urban development" in the form of residential housing even closer to the remainder of his holdings, thereby impairing the prospect of finding a public company willing to acquire or option the properties and expend the monies necessary to determine whether enough mineralization is present to justify the development of a mine, I regard the

plaintiff as having suffered a total loss equal to 25% of his holdings.

[53] I fix the present value of those holdings at not more than $150,000.00 At one time (until 1940) there was an operating mine on the West Bench. The property is located between two major gold skarn mines (one at Hedley to the northwest, and one 25 miles to the southeast in Washington State). It is located in an area with the highest gold skarn potential in the province (See Exhibit 18).

[54] However, no serious efforts have been made to explore that potential since 1971. The plaintiff has had access to his own diamond drill rig since these properties were acquired, yet no drilling has been done, despite authorization in 1994 in that regard. No impediment then existed to drilling just outside Town boundaries, rather than just inside.

[55] I cannot discount the prospect that the positive indications for this property might have attracted a promoter for it at a price ranging from $100,000.00 to $200,000.00 when the price of gold was (or becomes) more favourable than it is today. I have chosen the middle ground as the basis for my assessment of the plaintiff's damages.

[56] The result is a damage award of $37,500.00 ($150,000.00 x 25%) which is payable jointly and in equal

shares, by the Developer and the Town. There will be no right of set-off in favour of the Town arising out of the limited indemnity in respect of the water reservoir which it took from the Developer at the time of approving subdivision of the second group of lots in phase two.

[57] Since that award is based upon a continuing nuisance which effectively denies access to the surface of lots 1015, 1017 and 1018 by the plaintiff, payment of his damages will be conditional upon the execution and delivery by him of a release or quit claim of his mineral rights thereunder and therein in a form satisfactory to the Town, the Developer and the Crown. There will be liberty to apply in that regard if the form of that document cannot be settled between the parties.

The Claim Over (*Town v. Crown*)

[58] This claim is dismissed. I am troubled by the concept of basing a claim for contribution on an alleged duty which the plaintiff himself does not recognize. On the other hand, the plaintiff may have unstated reasons for not pursuing the Crown directly which should not prejudice the Town.

[59] In the end. I have concluded that s. 23 of the ***Mineral Act*** is the complete answer to the third party proceedings. The Crown had the express right to dispose of the surface, subject to the plaintiff's prior rights. I can find

no duty on the Crown to advise the plaintiff of its intention to do so. The notice to any purchaser of the plaintiff's mineral rights arising by virtue of registration under the land title system is "the way the system works".

[60] Here, both the Town and the Developer had actual notice of those mineral rights. The Crown went further than it was required to by encouraging first the Town and then the Developer to obtain a release from the plaintiff. Unfortunately, the plaintiff refused to participate at all in negotiations with the Developer or in a meaningful way with the Town. In the words of Mr. Elenko, he was looking for resolution on a "bigger scale", based on a "substantial ore deposit - a mother lode - under the reservoir site." What the plaintiff knew about his properties, then and now, does not justify that stance.

[61] Just because the Crown would not do again what it did in this case (to avoid litigation such as this arising) does not render actionable its decision to "hand off" to the Developer the problem created by the plaintiff's mineral rights.

Exemplary Damages

[62] While not an absolute bar, this claim was not pleaded and notice of it was not given to counsel for the defendants

until after all the evidence had been heard (See, ***Nicholas v. Guiel*** (1983) 44 B.C.L.R. 155 (S.C.) at p. 158 - not followed in ***Boe v. Hamilton***, unreported, February 16, 1990, B.C.S.C. No. 864925, Vancouver Registry).

[63] There is blame on both sides in this case. This is not like the tree cutting cases where a defendant has deliberately committed a trespass and nuisance to increase the value of his own lands and the plaintiff is entirely innocent.

[64] Finally, the honest belief of both the Town and the Developer in the efficacy of the zoning bylaw which prohibited mining, while mistaken, takes this case out of those where "outrageous or scandalous conduct and the circumstances call for an award of retributory damages as an expression of the court's strong aversion to the defendant's conduct." (See, ***Denison v. Fawcet*** (1958) 12 D.L.R. (2d) 537 (Ont. C.A.) at pp. 547/8).

Costs

[65] As counsel were advised, there will be liberty to apply in respect of costs, despite the "interim" award below. No argument or submission were addressed to the issue of costs at trial.

Judgment

[66] 1. The Town and the Developer are jointly and equally liable for the plaintiff's loss.

2. Damages are assessed at the sum of $37,500.00.

3. The provision of a release or quit claim by the plaintiff in respect of any mineral or surface rights on or under lots 1015, 1017 and 1018 is a condition precedent to his recovery of those damages and costs. There is liberty to apply in that regard.

4. The plaintiff will recover 50% of his costs as assessed (or agreed) on Scale 3 from each of the Town and the Developer.

5. The Crown will recover its costs of the third party claim against it from the Town, also on Scale 3.

6. There is also liberty to apply in respect of costs and the issue of prejudgment interest (if any) on the award of damages, to the extent that agreement cannot be reached on those questions.

"B.D. Macdonald, J."

Vancouver, British Columbia
March 30, 1998