

Mining Case Comment



FRASER MILNER CASGRAIN LLP

Bepple v. Western Industrial Clay Products Ltd., 2004 BCCA 497

A recent decision of the British Columbia Court of Appeal has confirmed principles of valuation that apply to claims for compensation by surface owners for loss or damage caused by exploitation of mineral rights. The Court of Appeal in *Bepple v. Western Industrial Clay Products Ltd.* makes clear that in most cases the maximum compensation available to a surface owner will be the market value of the property, taking into account depreciation. Only in special circumstances will compensation ever exceed this.

Background

Section 19(2) of the *Mineral Tenure Act*, R.S.B.C. 1996, c. 292 provides that a free miner or recorded holder is liable to compensate the owner of a surface area for loss or damage caused by the entry, occupation or use of that area for location, exploration and development, or production of minerals or placer minerals.

Western Industrial Clay Products Ltd. (“WICP”) holds mineral claims which overlie a 40 acre parcel of land in the Kamloops area, the surface of which is owned by Mrs. Carolyn Bepple (the “Property”). WICP mines diatomaceous clay next to the Property and wished to gain access to the entire Property to continue and expand its mining activities. WICP and Mrs. Bepple could not agree on the amount of access to be given to WICP or the amount of compensation to be paid to Mrs. Bepple. Mediation before the

Gold Commissioner was unsuccessful and so a hearing was held before the Mediation and Arbitration Board (the “Board”). Mrs. Bepple argued that she and her husband, who operated a farm approximately 15 km north of the Property, used the Property. She argued that they occasionally took trees from the Property and also used it for four to six weeks per year as part time pasture for their cows/calves. The log cabin on the Property was used for storage, and electric power running to the building was used to operate a welder and deep freezer.

An appraisal of the Property concluded that the market value of the Property was \$60,000 (land and improvements). The appraiser reached this evaluation based on the direct comparison approach (i.e. by comparing it to similar properties). However, elsewhere in the report the appraiser estimated that the replacement cost of the building was \$48,825.

On two occasions the Board awarded Mrs. Bepple, the surface owner, more than the appraised value of the property and also ordered that WICP make annual payments to Mrs. Bepple. Each time WICP appealed to the BC Supreme Court, which it had an automatic right to do. Both appeals dealt with the issue of the appropriate measure of compensation to a surface owner. The second appeal also dealt with certain extraordinary rights granted by the Board to Mrs. Bepple to access the property once the mining activity began.

Intervention on behalf of the Mining Industry

Concerned about the excessive compensation awarded and the Board's granting of access rights to the surface owner, the Mining Association of British Columbia (the "Association") and the British Columbia and Yukon Chamber of Mines (the "Chamber") sought leave to intervene in the second appeal to the BC Supreme Court. Leave was granted and these associations together made submissions through their counsel, Susan Griffin of Fraser Milner Casgrain, seeking a ruling that would set a general cap on compensation at no greater than market value, except in special circumstances. As well, counsel for the Association and Chamber explained to the Court the many regulatory provisions governing mine safety, which were contradicted when the Board gave the surface owner rights of access to the property during periods when mining activities could be carried out.

Court Results

Chief Justice Brenner of the BC Supreme Court, who heard the first appeal also heard and determined the second appeal: *Western Industrial Clay Products Ltd. v. Mediation and Arbitration Board et al*, 2003 BCSC 1510 ("WICP 2").

In WICP 2, the Court accepted the submissions of WICP and the interveners and held that the Board had erred in its decision and had over compensated Mrs. Bepple by awarding her more than the market value of the land, namely more than \$60,000. The Board had erred in awarding compensation on an approach which factored in the cost of replacing the building on the property and in failing to account for depreciation. The Board compounded its errors by awarding additional annual payments.

In addition, the Court in WICP 2 agreed with WICP and the Association and Chamber that the Board had no jurisdiction to require WICP to allow Mrs. Bepple such rights of access as the right to inspect the Property or to be given keys to locks on the fenced mining site. The Court noted that allowing Mrs. Bepple the key to any lock would interfere with the authority of the manager of the mine and would be contrary to the Health, Safety and Reclamation Code of the *Mines Act*, R.S.B.C. 1996, c.293.

Mrs. Bepple then brought an appeal from WICP 2 to the Court of Appeal on the issue of compensation alone. Again, the Association

and Chamber sought and were granted to leave to intervene in the appeal.

In its recent decision, the British Columbia Court of Appeal dismissed Mrs. Bepple's appeal. The Court of Appeal held that Chief Justice Brenner was correct in his conclusion that the Board's award of compensation above market value of the Property was an error of law that exceeded the Board's jurisdiction. The Court noted that there was no evidence of any intention by Mrs. Bepple to replace the building on the Property and as such, the Board erred in basing its award on the replacement costs of the improvements. The Court of Appeal affirmed that in the absence of special circumstances, compensation should not exceed the market value of the property.

Conclusion

The court decisions in *WICP* have restored certainty to the mining industry in dealing with claims for compensation by surface owners pursuant to s. 19(2) of the *Mineral Tenure Act*. This certainty should make it easier for surface owners and mineral rights holders to reach agreement on compensation in the future, and to avoid the kind of lengthy litigation history that occurred in this case.

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The statements contained in this publication are not legal opinions and readers should not act on the basis of such statements without first consulting a lawyer. Fraser Milner Casgrain LLP is committed to assisting its clients with respect to the important changes outlined above. If you have any questions, please contact one of the lawyers listed below.

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