

CANADA / JUDGMENT

Klippert v. Hosking

2002 BCSC 400

COURT

Supreme Court of British Columbia

DECIDED

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Citation: Klippert v. Hosking et al

Date: 20020318
2002 BCSC 400Docket: L013095
Registry: Vancouver
IN THE SUPREME COURT OF BRITISH COLUMBIABETWEEN: WAYNE KLIPPERT
PETITIONERAND: BYRON HOSKING, GOLD COMMISSIONER,
DENIS LIEUTARD, CHIEF GOLD COMMISSIONER, AND
HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA
RESPONDENTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MADAM JUSTICE H. HOLMES

Counsel for the Petitioner:

M.J. Leitch, Esq.

Counsel for the Respondents:

L. Mrozinski

Date and Place of Hearing:

February 1, 2002

Vancouver, BC

INTRODUCTION

- [1] This is an application to set aside the decision of the respondent Gold Commissioner amending the Petitioner's two placer leases to reduce their area. The Petitioner argues that having issued the leases to the Petitioner, the Gold Commissioner had no jurisdiction to amend them, and in any event acted without the required procedural fairness in amending them without notice to or consultation with the Petitioner.
- [2] The Respondents argue that the Gold Commissioner's jurisdiction to amend the leases consists in a proviso included in the leases by which the Petitioner-lessee acknowledges that the survey plan defining the area of the lease may be amended if found to be inaccurate.
- [3] The Respondents concede that the Gold Commissioner's unilateral amendment of the leases without consultation with the Petitioner should result in the matter being remitted to his office for reconsideration in accordance with the rules of procedural fairness.

Preliminary matters

- [4] The parties agree that the petition should be dismissed as against the respondent Denis Lieutard, Chief Gold Commissioner. "The Respondents" refers therefore to the respondent Byron Hosking, Gold Commissioner, and the respondent Her Majesty the Queen in Right of the Province of British Columbia.
- [5] The parties addressed the concern raised by Madam Justice Southin in *Rustad Bros. & Co. v. B.C. (Min. of Forests)* (1988), 23 B.C.L.R. (2d) 188 (S.C.) about proceedings seeking judicial relief which name Her Majesty the Queen as a respondent. Submissions proceeded on the basis that Her Majesty is named in her capacity as a party to the leases, and not in her capacity as a party against whom judicial relief is sought.

THE FACTS

- [6] The facts are not in dispute.
- [7] The Petitioner Wayne Klippert, a miner living in Whitehorse, Yukon, is the lessee under two placer leases issued by the respondent Gold Commissioner for the Atlin Mining District under the Mineral Tenure Act.
- [8] The process of application for and issuance of each of the two leases followed the procedure set out in the Act. In each case, shortly after acquiring legal title to a placer claim, the Petitioner applied for a placer lease in respect of the claim. With his application he provided a survey plan for the area he proposed to lease. The respondent Gold Commissioner issued the leases on April 22, 1999, and August 9, 2000, respectively.

- [9] During the application process in respect of the second proposed lease, and after the issuance of the first lease, the Gold Commissioner received an informal challenge from a third party with respect to the area of the proposed second lease. As a result, the Gold Commissioner wrote to the Petitioner identifying three concerns relating to the survey plan submitted with the Petitioner's application for the second lease.
- [10] The Petitioner submitted a revised survey plan addressing the matters identified by the Gold Commissioner, and the Gold Commissioner issued the second lease in favour of the Petitioner based on the revised survey.
- [11] Both leases contain the following proviso:
- Should the technical survey plan be found to be inaccurate, then the lessee agrees that the plan shall be amended accordingly.
- The leases themselves are simple, each appearing on one sparse page. The proviso is a prominent feature.
- [12] The proviso in the Petitioner's leases appears in all placer leases issued by the Gold Commissioner on the basis of a "technical survey plan", as opposed to a "legal survey". A technical survey plan is prepared by a B.C. Land Surveyor and has the features stipulated by Regulation 14.1(a)-(d). A legal survey must be approved by the Surveyor General and is more accurate than a technical survey. It is also more expensive to prepare.
- [13] After issuing the leases, the Gold Commissioner received further evidence from the third party disputing the position of an "initial post" indicated on the Petitioner's survey plan and affecting the boundaries of the area covered by the plan. The Gold Commissioner concluded that the evidence supporting the third party's position was more accurate and reliable than that supporting the Petitioner's. After following the procedures set out in the Act, he granted a lease to the third party on the basis of that evidence. This in turn required adjustment of the area subject to the Petitioner's leases.
- [14] Without notice to or consultation with the Petitioner, the Gold Commissioner approved an amendment to the Petitioner's leases reducing their area. The area covered by the lease issued on April 22, 1999, was reduced from 48 to 33.01 hectares. The area covered by the lease issued on August 9, 2000, was reduced from 30.37 to 26.34 hectares.

ANALYSIS

1. The Gold Commissioner's Jurisdiction

- [15] It was common ground that any jurisdiction in the Gold Commissioner to amend the leases resided in the proviso contained in the leases.
- [16] The issues before me with respect to the Gold Commissioner's jurisdiction are these:

- (a) Whether the Gold Commissioner had jurisdiction to place a proviso on the leases he issued, and
 - (b) Whether the proviso by its terms permitted the Gold Commissioner to amend the leases as he did.
- [17] The Respondents submit that the Gold Commissioner's decision to amend the leases was properly based on the proviso. The Crown, as the owner of the property, may impose any restriction or stipulation on the sale or lease of land unless constrained by statute: *Rustad*, supra. The Respondents submit that the proviso is such a limitation, and properly grounded the Gold Commissioner's decision to amend the Petitioner's leases.
- [18] The Petitioner submits that provisions of the Act and its Regulation are inconsistent with an ongoing jurisdiction in the Gold Commissioner to amend an issued lease, and that accordingly the proviso is not validly included in the leases or, alternatively, should be read as reserving to this Court, rather than the Gold Commissioner, any power to amend a lease.
- [19] In this regard, the Petitioner argues that the Gold Commissioner's decision to amend the leases amounted to the adjudication of an adverse possession dispute, a function reserved by s. 49 of the Act to this Court, and therefore outside the Gold Commissioner's jurisdiction.
- [20] Mr. Leitch for the Petitioner reviewed with care and insight the history of the legislation governing mining claims and leases in British Columbia. He noted the shift over the decades in the jurisdiction to determine adverse possession disputes arising from over-staking of mining and placer claims. By 1981, with the enactment of the current Act, this jurisdiction was lodged with the Chief Gold Commissioner. However, his jurisdiction extended to mining and placer claims only, and not to mining or placer leases. The jurisdiction to determine adverse possession disputes in relation to mining or placer leases is reserved to this Court by s. 49 of the Act: *B.J. Barton, Canadian Law of Mining* (Calgary: Canadian Institute of Resources Law, 1993) at 351.
- [21] Section 49 of the Act allows for the resolution of an adverse possession dispute in relation to an application for a lease, as follows:
- 49(1) If a person claims a right of any kind, either to the minerals or placer minerals in, or possession of, all or part of a mineral title which has formed the basis of an application for a lease, that person must commence a proceeding in the Supreme Court,
- (a) in the case of a claim to minerals, within 80 days after the date of posting of the notice under section 42, or
 - (b) in the case of a claim to placer minerals, within 21 days after the date of posting of the notice under section 45

unless the court, on being satisfied that the failure to proceed in time was not within the plaintiff's control, orders otherwise.

- (2) The plaintiff must promptly send a copy of all documents filed in court to the appropriate gold commissioner.
- (3) After the filing of the final court order and after complying with all survey requirements, the person named in the order as the person having right to the lease is entitled to the issue of it for all or part of the claim duly specified in the order.
- [22] It was common ground that no proceedings under s. 49 were taken in respect of either of the Petitioner's two leases.
- [23] The Petitioner argues that s. 49 clearly reserves to this Court the jurisdiction to determine adverse possession disputes in relation to mining or placer leases, and therefore removes from the Gold Commissioner any jurisdiction to resolve conflicting claims of entitlement as he did here.
- [24] I do not agree that s. 49 of the Act should be interpreted so as to give this Court exclusive authority over all disputed matters giving rise to adverse claims in relation to a lease. Determination of the accuracy of, for example, the survey plan supporting an application for a lease -- including the location of initial posts and final posts which serve to identify boundaries -- is a highly technical matter going to the core of the regulatory function of the Gold Commissioner's office. In my view, a pragmatic and functional approach to the assessment of the Gold Commissioner's jurisdiction finds him, rather than this Court, responsible for the resolution of complex and technical issues within his specialized expertise: *Dupras v. Mason* (1994), 99 B.C.L.R. (2d) 266 (C.A); *Pezim v. B.C. (Superintendent of Brokers)*, [1994] 2 S.C.R. 557.
- [25] I read s. 49 as addressed to the resolution of adverse or competing claims based on different sources. The Court would be well situated to, for example, resolve a challenge to a lease issued under the Act based on rights said to arise under another statute. However, the Court is not well situated to resolve adverse claims which each arise under the Act but are based on disputed boundaries in competing survey plans. I conclude that the Legislature did not in s. 49 intend this last result.
- [26] The Petitioner notes that s. 49 confines its effect to disputes raised during the application process for a lease, and that once a lease is issued there remains only a very limited opportunity for challenge to it. The right to challenge an issued lease resides in s. 51 and is confined to allegations of fraud:

51 A person may not challenge the validity of a lease in any court unless that person establishes that the lease was obtained through fraud.

He submits that the limited opportunity to challenge an issued lease flows logically from the security of title that a mining lease offers in comparison with a mining claim: B.J. Barton, *Canadian Law of Mining*, supra, at 333. This higher security of title is, he argues, inconsistent with the Gold Commissioner reserving a power to amend. He submits that the inclusion of the proviso in the leases is therefore outside the Gold Commissioner's jurisdiction.

[27] In a similar vein, the Petitioner reasons that the Gold Commissioner lacks jurisdiction to refuse a lease to one who meets the requirements of s. 45, and therefore necessarily lacks jurisdiction to effectively reserve to himself the authority to refuse or amend a lease in the future. Section 45 reads as follows:

45(1) Subject to this Act, on application, in the prescribed form and payment of the prescribed fee, to the gold commissioner for the mining division in which the appropriate land is situated the gold commissioner must issue a placer lease of placer minerals over mineral lands which are designated as placer lease lands under section 46.

The requirements for a lease are set out in s. 45(2) and (3), and include a plan of survey of the area of the lease, prepared in accordance with s. 14.1(1) of the Regulations.

[28] I cannot agree that s. 45 requires the Gold Commissioner to automatically issue a lease to a person applying under that section in accordance with the terms of their application and supporting survey. Such a result would leave the only discretion to review the survey plan's accuracy with the Court under s. 49, a situation which I have already noted to be unworkable and inconsistent with the Legislature's creation of the Office of the Gold Commissioner and his duties. Moreover, the Court's jurisdiction under s. 49 arises only if a proposed lease is formally challenged by another party. I do not agree that the Legislature intended to deny authority to the Gold Commissioner to -- of his own initiative or in response to the submissions of others -- scrutinize and possibly reject a survey plan submitted in support of an application for a lease.

[29] I conclude that the Gold Commissioner's inclusion of the proviso in the leases is consistent with the statutory scheme and within his jurisdiction.

[30] I turn now to consider the Petitioner's submission that in any event the Gold Commissioner's amendment of the leases was not properly based on the proviso.

[31] The Petitioner submits that the proviso should be construed so as to permit only (1) correction of a technical error apparent on the face of a lease, or (2) revision of a survey plan to accord with the result of a Court ruling under s. 51 (in relation to allegations of fraud). In particular, the Petitioner submits that the proviso should not be interpreted so as to permit the Gold Commissioner to effectively adjudicate a dispute as to adverse claims.

[32] In my view, the interpretation offered by the Petitioner is unworkable and inconsistent with the overall scheme of the Act. I have expressed above my conclusion that the Gold Commissioner is not precluded in the statutory scheme from the correction of an inaccuracy where the correction may affect another party. Also, even the most undeniable

technical or even typographical error on the face of a survey plan may nonetheless affect the interests of a third party insofar as survey plans define boundaries and the area of lease interests granted.

- [33] I therefore conclude that the proviso explicitly reserved to the Gold Commissioner the ability to adjust the area of the leases granted if inaccuracy in their supporting survey plans came to his attention.

2. Procedural Fairness

- [34] The Respondent concedes, and I find, that the Gold Commissioner failed to act in accordance with the requirements of fairness and natural justice when he amended the leases without notice to the Petitioner and without giving the Petitioner an opportunity to respond: *Dupras v. Mason*, *supra* at 275.
- [35] I do not agree with the Petitioner that the Gold Commissioner's decision to amend the leases is therefore void *ab initio*. Rather, I conclude that the matter should be remitted to the Gold Commissioner for reconsideration in accordance with the requirements of fairness and natural justice.
- [36] I decline the Petitioner's invitation to specify the particular procedures required for a fair hearing in the circumstances.

CONCLUSION

- [37] The petition is allowed in that the decision of the Gold Commissioner on October 16, 2001, to amend the Petitioner's two leases is set aside as made without the required procedural fairness and in breach of natural justice, and is returned to the Gold Commissioner for reconsideration.
- [38] I dismiss the Petitioner's request for a declaration that the Gold Commissioner acted without jurisdiction in amending the Petitioner's two leases on the basis of a proviso allowing for amendment should the technical survey plan be found to be inaccurate.
- [39] I decline the Petitioner's request for special or increased costs. Nothing in the material before me suggests any bad faith or high-handedness on the Gold Commissioner's part. Nor is there any evidence of disparity between the Petitioner's actual legal costs and those available under the tariff. The Petitioner will have the ordinary costs of the event.

"H.Holmes, J."

The Honourable Madam Justice H. Holmes

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