

CANADA / JUDGMENT

Lawrence v. British Columbia

2010 BCSC 309

COURT

Supreme Court of British Columbia

DECIDED

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2010 BCSC 309 Lawrence v. British Columbia

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Lawrence v. British Columbia

(Attorney General),

2010 BCSC 309

Date: 20100311

Docket: S088411

Registry: Vancouver

Between:

Garth J. Lawrence

Petitioner

And:

Attorney General of British Columbia

and The Corporation of the District of

West Vancouver

Respondents

Before: The Honourable Madam Justice Baker

Reasons for Judgment

The Petitioner:

Appeared on his own behalf

Counsel for the Attorney General

of British Columbia:

Counsel for The Corporation of the District of

West Vancouver

E.W. Hughes

G. Cockrill

Place and Date of Hearing:

Vancouver, B.C.

June 2-5, 2009

Place and Date of Judgment:

Vancouver, B.C.

March 11, 2010

- [1] Mr. Lawrence is the owner of an ocean front residential property in West Vancouver. He purchased his property on June 13, 1975 and registered his title on June 20, 1975. The legal description of his land is: Parcel Identifier 011-240-539, Lot B, Blocks 28 and 29, District Lot 556, Plan 5136.
- [2] On the ocean-ward side of Mr. Lawrence's property a rock retaining wall has been constructed. The area behind the wall has been filled with soil and planted to grass. Mr. Lawrence treats this area as part of his property.
- [3] The foreshore in the vicinity of the properties belonging to Mr. Lawrence and those of his neighbours belongs to the Province of British Columbia ("the Crown") but has been leased to the District of West Vancouver ("the District") since 1984. The leased lands are subject to a registered right of way in favour of the Crown.
- [4] On December 29, 2003, Mr. Lawrence received a letter from the District stating that the District had hired land surveyors to undertake inspections and conduct survey work at a number of residential waterfront properties believed to be encroaching on the foreshore, and therefore encroaching on Crown land. Gordon Reid, the Land and Property Agent for the District deposed that the District has identified approximately 190 instances in which improvements constructed by owners of properties encroach on Crown land.
- [5] On January 6, 2004, Hobbs, Winter & MacDonald, land surveyors, prepared a survey of Mr. Lawrence's property. This survey indicates that Mr. Lawrence's retaining wall and filled area does encroach on Crown land.

- [6] On November 26, 2004, Land and Water British Columbia Inc., a corporation of the government of British Columbia, wrote to Mr. Lawrence (and to other land owners in a similar position) offering to sell the encroached on Crown land to him. Included with the letter was a Land Assessment Report indicating the current market value of the land encroached on to be \$247,200.
- [7] Mr. Lawrence does not wish to have to pay this sum, or to remove the improvements that are encroaching on Crown land.
- [8] In this Petition, Mr. Lawrence seeks:
1. a declaration that the definition of "natural boundary" as stated in the Land Act of British Columbia cannot be construed to be applicable to the determination of the boundary that separates Crown foreshore from the petitioner's property; and
 2. a declaration that the boundary separating Crown foreshore and the petitioner's property is the high water mark or mean high tide line, which is neither fixed nor a straight line but rather undulates and moves either seaward by accretion or landward by erosion; and
 3. a declaration that Surveyor General Andrews erred by declaring in his letter dated May 9, 1886 to the Vancouver Land Registry Office that the right of way referred to in the letter was across Crown land.
- [9] Although the Petition does not clearly articulate this, I understand Mr. Lawrence's position to be that the court should determine the boundary between his lot and Crown land to be that line he calls the "mean high tide line". He says that the Court should calculate this boundary by taking the average of the daily high tide measurements recorded near Atkinson Point, a geographic feature that can be seen from Mr. Lawrence's property. Mr. Lawrence proposed taking the average of the 365 daily high tide readings at Atkinson Point for four of the years since tidal records have been maintained, and then applying that average to the area between his home and the ocean. Mr. Lawrence says that the application of this method of determining the ocean-side boundary of his property would result in the boundary falling approximately 11 metres seaward of the survey posts. He submits that as a result his improvements do not encroach on Crown land. In fact, if Mr. Lawrence was correct, it would mean that a Crown right of way and a sewer line constructed by the District would both be encroaching on his property.
- [10] It may be useful to review briefly the history of the creation of the parcel of land that is currently owned by Mr. Lawrence. Originally, of course, the land belonged to the Crown in right of the Province of British Columbia.
- [11] On April 8, 1866, the Surveyors Act, 49 Victoria, Ch. 20 (called "An Act respecting Land Surveyors and the Survey of Lands") came into force. Paragraph 1 of that Act provided:

1. All boundary lines of townships, ranges, sections, or legal subdivisions of sections, blocks, gores, lots and commons, surveyed and run; and all mounds, posts or monuments, marked, erected, placed or planted at the angles of any townships, ranges, sections, or other legal subdivisions, gores, lots, commons, or other parcels of land, under the authority of the Government, heretofore or hereafter, shall be the true and unalterable boundaries of such townships, ranges, sections, or other legal subdivisions, blocks, gores, lots, commons, or other parcels of land respectively, whether the same upon a measurement be or be not found to contain the exact area or dimensions mentioned or expressed in any patent, grant, or other instrument, in respect of any such township, range, section, or other legal subdivision, block, gore, lot, common or parcel of land.

[12] The original Crown grant - Grant 154 - was issued on October 17, 1886. The Crown granted to Alfred King:

All that Parcel or Lot of Land situate in New Westminster District, said to contain One Hundred and Sixty acres, more or less, and more particularly described on the map or plan hereunto annexed and coloured red, and numbered Lot Five Hundred and Fifty Six (556) Group One (1) on the Official Plan or Survey of the said New Westminster District in the Province of British Columbia...

[13] In 1913, District Lot 556 was subdivided and Plan 4613 was filed in respect of the subdivision. The subdivision resulted in the creation of 32 blocks of land, including Blocks 28 and 29.

[14] On October 1, 1918, a further subdivision of Blocks 23 and 28 occurred, resulting in Registered Plan No. 4613, and reference Map No. 1340. This subdivision created lots B, C, D, E, F, and G. On March 7, 1919, a further subdivision of Block 29 and Lot C of Block 28 was created by Registered Plans Nos. 4619 and 4818. This subdivision created lots 1 to 9 inclusive, as shown on Plan 4836.

[15] Finally, in May 1922, a subdivision of lots 4, 5 and 6 of Block 29, and Lot C, Block 28 was approved, creating Lots A, B, C, and D as shown on Plan 5136. Lot B is the lot that now belongs to Mr. Lawrence.

[16] On May 16, 1966, the Surveyor General registered Reference Plan 8891, together with a letter, in the Vancouver Land Registry. This Reference Plan created a right of way through Crown lands lying to the South of Lots 555 and 586; a right of way later utilized for the construction of a sewer line.

[17] Mr. Lawrence did not purchase his property until June 10, 1975. As stated earlier, he purchased:

Lot "B", Blocks 28 and 29, District Lot 556, Plan 5136.

[18] There can be no doubt, in my view, that the boundaries of Mr. Lawrence's land are those boundaries specified by Plan 5136. This is not a case involving accretion or erosion.

[19] There can also be no doubt, in my view, that Mr. Lawrence cannot own more land than was originally granted by the Crown grant in 1886. That is, Mr. Lawrence's property - Lot B - cannot have an ocean-ward boundary that extends further than the original ocean-ward boundary of District Lot 556, the District Lot created by the 1886 Crown Grant.

[20] In my view, the issue raised by this petition is:

Whether the seaward boundary of Lot B is the line of mean high tide as the petitioner asserts, or the "natural boundary" as that term was understood and used in 1886; and as it is defined in the Land Act, R.S.B.C. 1996, c. 245.

[21] Mr. Lawrence did not file any expert opinion evidence in support of his submission that the ocean-ward boundary of DL 556 in 1866 was determined by reference to a mean high tide line.

[22] The respondents rely on opinion evidence from two surveyors – Jeffrey Beddoes, the Senior Deputy Surveyor General in the Surveyor General Division of the Land Title and Survey Authority of British Columbia, and Cam MacDonald, a land surveyor and partner with a North Vancouver survey firm.

[23] Mr. Beddoes was commissioned as a British Columbia Land Surveyor in 1985 and has extensive experience as a surveyor, and administrator. Mr. Beddoes examined the survey plans relevant to this dispute, including Plan 5136, the subdivision plan filed in 1922. These plans refer to the ocean-ward limit of the lands, including the lot that eventually came to belong to Mr. Lawrence, as the "H.W.M." for "high water mark"; "ordinary high water mark", abbreviated as "OHWM"; and also "bank"; and "natural boundary".

[24] Mr. Beddoes deposed that the current practice in B.C. is that land surveyors define the location of natural boundaries on both coastal and inland waters by applying the term "natural boundary" as defined in the Land Act. A surveyor defines or locates this natural boundary by looking for established upland vegetation and change in soil type caused by sea or fresh water acting upon the soil. For example, he said, to locate a natural boundary on the coast, a surveyor will look for the limits at which the sand stops and brown organic soil begins, because that indicates that at that level, soil is washed by the waves only infrequently and results in decaying vegetation building up over the years. The surveyor would also look for changes in the vegetation as some plants are not tolerant of salt water and only grow above the regular wave action.

[25] Mr. Beddoes then turned his attention to the likely practice at the time the land that includes Mr. Lawrence's lot was originally surveyed. He noted that it is important for a surveyor to fix the boundary markers (corner posts) of a property in a location as permanent as possible. Therefore, he stated, a land surveyor would be unlikely to set a post - wood posts were likely used in 1886 - at the point suggested by Mr. Lawrence, because if placed at the average or mean high tide level, the posts would be underwater much of the time and would quickly be destroyed by the "wind and wave action of the sea".

- [26] Mr. Beddoes pointed to various reasons for his opinion that land surveyors as far back as 1866 did not set posts at the mean high tide line. He has reviewed many modern plans showing that land surveyors have found old wood survey posts at the point he calls the "natural boundary". He has personally observed old posts set at the "natural boundary". He also deposed that the location of these posts can generally be confirmed mathematically when a parcel is re-surveyed.
- [27] In the case of Mr. Lawrence's property, Mr. Beddoes actually inspected the property on March 23, 2007. He was unable to find evidence of the natural boundary, or the original survey posts on Mr. Lawrence's land because of the retaining wall and in-fill that has been placed on the property. However, he was able to locate original posts on adjoining properties and this evidence was used to verify that the ocean-ward boundary of Mr. Lawrence's property accords with the "natural boundary" as that term was used in 1886, and as it is used in current survey practice.
- [28] Mr. Beddoes disagrees with Mr. Lawrence's theory that survey posts were placed at a point determined by the "mean high tide line". He points out that if Mr. Lawrence's theory was correct, one would expect to see reference to tide tables or measurements that could have been used by the 1886 surveyors to calculate the boundary. Mr. Beddoes deposed that he had never seen a reference to tidal tables in old field notes despite having reviewed hundreds of sets of field notes in his career. Mr. Lawrence did not provide any evidence establishing that such records were kept in 1886.
- [29] Mr. Beddoes did extensive research to see if he could find references to "tidal lines" in General Instructions for Government Surveys provided to surveyors in the past. He candidly revealed in his affidavit a reference in a 1929 Letter of General Instructions about measuring the landward boundary of a foreshore lease in reference to "tidal lines". He deposed that he was very surprised to find this reference as he had never seen any other directive, manual or instruction referring to this practice. He considers it unlikely that it ever influenced the practice of land surveyors in this province.
- [30] I have not attempted here to reproduce all of the facts relied upon by Mr. Beddoes to arrive at his opinions. However, I consider those facts to have been reliably established by the evidence, and conclude that his opinions should therefore be accepted and given considerable weight. Mr. Beddoes' opinions may be summarized as follows:
1. In or about 1886, B.C. land surveyors used the terms H.W.M., high water mark, ordinary high water mark, bank, and natural boundary, synonymously.
 2. B.C. land surveyors at all times relevant to this lawsuit followed the current practice of applying the definition of natural boundary as it is now defined in the Land Act, that is, by reference to the visible high water mark, even before the Land Act Amendment Act, 1961; and
 3. B.C. land surveyors followed this practice when surveying both coastal and inland waters.

- [31] Mr. Beddoes' opinion is supported by the opinion of Cam MacDonald. Mr. MacDonald deposed that he has been a practicing surveyor since 1981 and that he has performed many surveys, including surveys of ocean front boundaries; and has also reviewed many Crown grants, and field notes and plans accompanying Crown grants. Mr. MacDonald obtained and reviewed the field notes of the land surveyor who surveyed District Lot 556 as well as the adjoining lots in order to ascertain what line was surveyed as the ocean-ward boundary of the lots being surveyed. In particular, he reviewed the field notes with a view to forming an opinion about whether that boundary was intended to be the mean high tide line, or the "visible natural boundary line", now defined in the Land Act as the "natural boundary".
- [32] Mr. MacDonald's opinion is that it is extremely unlikely that the 1886 surveyors meant "mean high tide line" when they recorded "H.W.M." on their field notes. Mr. MacDonald says this is unlikely because a mean high tide line is an elevation line, determined by tidal observations taken over a long period of time, but there is no mention in the field notes of any tidal observations at all, or of any record of reference to or use of elevations supplied by some authority.
- [33] Like Mr. Beddoes, Mr. MacDonald considers it unlikely that the surveyor would have chosen a location for the survey posts that would frequently be covered by water. Wood posts set at the mean, or "average" high tide line, he opined, would frequently be covered by water.
- [34] Mr. MacDonald also points out that the surveyor conducting the original survey must have been recording distances from a feature that he could observe, and therefore that it is likely that the surveyor was using the visible high water mark as his reference point.
- [35] Mr. Lawrence has not provided any evidence capable of rebutting the opinions of Mr. Beddoes and Mr. MacDonald. He retained surveyor William Chapman to prepare a survey plan utilizing the mean high tide line to determine the ocean side boundary of Lot B. As stated earlier, Mr. Chapman was instructed to utilize mean high tide data recorded for Point Atkinson, and to take the average of those measurements. The plan prepared by Mr. Chapman utilizing this method results in a theoretical boundary line falling more than nine metres closer to the ocean than the boundary shown on Plan 5136. The very large discrepancy between this survey result, and the Plan offers, I conclude, further evidence that the original boundary was not determined by reference to tidal measurements.
- [36] By contrast, a survey conducted by Mr. MacDonald in May 2009 determined that the high water mark "HWM" determined by the surveyor in 1886 corresponds much more closely with the "natural boundary" or visible high water mark as determined by Mr. MacDonald.
- [37] As stated earlier, Mr. Lawrence did not provide any expert opinion evidence in support of his theory that the original ocean-ward boundary of his Lot was determined to accord with the mean high tide line. Mr. Lawrence did make various submissions in reliance on authorities in which courts have considered where, at common law, the boundary should be drawn in disputes between the owner of upland and Crown foreshore. I do not propose to review these authorities here because, in my view, they are not relevant to the current

dispute. I am not persuaded that there is any uncertainty or ambiguity about the location of the boundary. I agree with the submissions of the respondents that Mr. Lawrence's title to Lot B cannot include more land than was included in the original Crown grant from which his title is derived. I conclude that the evidence, and in particular the opinion evidence of Messrs. Beddoes and MacDonald, overwhelmingly supports the conclusion that the ocean-side boundary of Mr. Lawrence's property, when it was originally surveyed in 1886, and in subsequent plans, was not determined in reference to the mean high tide line, but rather by reference to the visible high water mark, or "natural boundary" as that term was used by surveyors at the time, and as that term is currently defined in the Land Act.

[38] I am also persuaded that, in any event, s. 55 of the Land Act, R.S.B.C. 1996, c. 245 is applicable in the circumstances of this case.

[39] Section 55 reads:

55 (1) If Crown land is, or has, before March 27, 1961, been disposed of by the government by Crown grant, and the map or plan attached to the grant shows a lake, river, stream or other body of water coloured, outlined or designated in a colour other than red, no part of the bed or shore of the body of water below its natural boundary passes or is deemed to have passed to the person acquiring the grant unless

- (a) there is express provision in the grant to the contrary, or
 - (b) the Minister endorses a declaration on the plan under section 58.
- (2) Nothing in any Act or rule of law to the contrary is to be construed to vest or to have vested in any person the land that comprises the bed or shore of the body of water below the natural boundary, and despite an indefeasible or absolute title to land, the title must be construed accordingly.
- (4) Despite a rule of law to the contrary, if Crown land bordering on a lake, river, stream, or a body of water is or has been granted by the government, in the absence of an express provision in the Crown grant to the contrary, no part of the bed or shore of the body of water below its natural boundary passes or is deemed to have passed to the person acquiring the land, and the Crown grant must be construed accordingly.

[40] "Natural boundary" is defined in section 1 of the Act as follows:

'natural boundary' means the visible high water mark of any lake, river, stream, or other body of water where the presence and action of the water are so common and usual, and so long continued in all ordinary years, as to mark on the soil of the bed of the body of water a character distinct from that of its banks, in vegetation, as well as in the nature of the soil itself.

[41] The respondents submit that although s. 55 does not expressly include seas or oceans in the bodies of water specified, the section applies to seas and oceans, as both fall within the general term "other body of water". Mr. Lawrence submits that s. 55 of the Act should not be interpreted to apply to oceans or other salt water bodies. He points out that this court has

held that s. 55 was enacted as a response to the decision of the Supreme Court of Canada in *Rotter v. Canadian Exploration Ltd.* [1961] S.C.R. 15, in which the Court had held that the owner of land bordering a river was deemed, at common law, to own the soil to the middle of the river. See *McLeay v. City of Kelowna*, 2004 BCSC 325, at paras. 24 and 25.

- [42] At first blush, it does appear unusual that the Legislature would expressly refer to bodies of water smaller than oceans, and include the largest body of water - the Pacific Ocean - only by inclusion in the term "other body of water".
- [43] Mr. Lawrence relies on the decision of the Alberta Court of Queens Bench in *Alberta v. Very*, (1983) 27 Alta. L.R. (2d), [1983] 6 W.W.R. 143, 29 R.P.R. 179, 149 D.L.R. (3d) 688, 47 A.R. 340. In that case, the Province had applied for an order declaring that it held title to a slough located on land registered to Mr. and Mrs. Very. The lands had originally been surveyed in 1883. The surveyor's field notes indicated that there was a "large swamp" located on the lands. A later surveyor's field notes referred to a hollow lake "surrounded with grassy swamp". Evidence before the court indicated that the area of land covered by water varied from year to year; generally being larger in spring than in summer and fall; that the water did not flow; that it was created by accumulation from rain snow and run-off and not from any living source; that it did not discharge into any river, stream, lake or other body of water; that in some years there had been no water present at all and the land was completely dry and had been planted to crop.
- [44] The Alberta Public Lands Act, R.S.A. 1980, c. P-30 contained a section with wording similar to s. 55(1) of our Land Act. The issue for Justice Egbert was whether the slough on the Verys' farm fell within the definition of "other bodies of water" such that title to the slough was vested in the Province. Justice Egbert reviewed numerous decisions relating to the construction of statutes. He stated his conclusions at paragraph 80 as follows:

From the above it can be seen that where general words, such as "other bodies of water", are found in a statute immediately following specific words, such as "rivers, streams, watercourses, lakes", which all fall into the same category or genus, the general words should be restricted to the same category or genus of (sic) the specific words provided that the specific words do not exhaust the category or genus and provided further that it is not clear from the statute read as a whole that the legislature intended that the general words be given a broad interpretation. If the same category or genus cannot be found for the specific words, the *eiusdem generis* rule does not apply. Also, if the wording of the statute is clear and unambiguous, there is no room for application of the rule.

- [45] Justice Egbert concluded that the words "other bodies of water" were ambiguous, and that he could not find anything in the Act as a whole to indicate that the words were intended to have a broad interpretation. He concluded that rivers, streams, watercourses and lakes all contain water which is of benefit or value to society as a whole, for fishing, navigation or recreation. Sloughs, he concluded, could be considered to be "nuisance" waters which may have counter-productive effects on society. He also concluded that the bodies of water

enumerated in the Act have common features, being the presence of beds and well-defined banks; and reasonable permanence of water. The slough on the Verys land, he concluded, lacked these features. In the result, he decided that the land under the slough located on the Verys' land was not vested in the Province.

- [46] I have carefully considered the decision referred to, but given the difference between oceans and sloughs, and the reasoning by which Justice Egbert reached his conclusion, it is of little assistance on the issue raised by the case at bar.
- [47] I agree with the respondent Crown that the proper approach to statutory interpretation is to read the words of an Act in their entire context, and give to those words the grammatical and ordinary meaning that accords with the scheme of the Act, the object of the Act, and the intention of the legislating body.
- [48] I accept that s. 55 may have been enacted by the Legislature in response to a decision that related to land under a river. That does not, in my view, provide a reason to exclude oceans or seas from the term "or other body of water".
- [49] An ocean or sea clearly falls within the ordinary meaning of "body of water". In the Land Act, the term "natural boundary" is defined in s. 1 and is used in sections 55, 18 and 69. The respondents point out that s. 55(1) refers to "the bed or shore of the body of water". I agree that the term "shore" is generally used in relation to lakes, seas and oceans. The use of the term in these sections does not indicate that oceans were intended to be excluded.
- [50] Section 18 of the Act is the current version of a section first enacted in 1906 which prohibited the Crown from granting "foreshore lands, tidal lands, the bed of the sea, or lands covered by any navigable water". One might reasonably expect that if the Legislature intended to exclude tidal lands, the bed of the sea, or oceans in subsequent enactments, they would have done so expressly.
- [51] Similarly, s. 69 covers subject matter that originally appeared in the Land Ordinance in 1865. It referred to "salt water", but the term was eventually replaced by the phrase "other body of water" in 1970. Counsel for the Crown points out that earlier versions of the Act also specifically referred to "salt water" in reference to a natural boundary.
- [52] I have been unable to conceive of a reason why the Legislature would have chosen to enact legislation to clarify and codify the law in relation to fresh water bodies, but have omitted to legislate in relation to the largest bodies of water bordering the land mass of the Province. Nothing in the Act indicates that the application of the legislation to oceans and seas is inconsistent with the intention of the Legislature, except perhaps, as earlier noted, the unexplained omission of specific mention of these large bodies of water, when smaller bodies are specifically mentioned. I conclude that seas and oceans are included in the grammatical and ordinary meaning of the phrase "other bodies of water". I am satisfied therefore, that s. 55 is applicable to the determination of the boundary between Mr. Lawrence's lot and Crown land.

CONCLUSION

- [53] I am satisfied that the original Crown grant of the land that included the lot now owned by Mr. Lawrence placed the ocean-ward boundary of the granted land at the visible high water mark, or "natural boundary", and not at a line determined by reference to the mean or average high tides at Point Atkinson, or elsewhere. Mr. Lawrence cannot own more land than was originally included in the Crown Grant. Accordingly, the ocean-ward boundary of his property is that boundary shown on Plan 5136, and not the boundary determined by Mr. Chapman utilizing the tide records.
- [54] I am also satisfied that the Land Act, R.S.B.C. 1996, c. 245, and in particular, s. 55 of the Act, is applicable to the boundary separating Mr. Lawrence's property from Crown land.
- [55] It is not necessary to consider whether Surveyor General Andrews incorrectly declared that the 1886 right of way was across Crown land.
- [56] The Petition is therefore dismissed.
- [57] The parties did not make submissions about costs. If any party is seeking an order for costs, it or he may make submissions in writing, or arrange with the Registry to appear before me to make oral submissions about costs. If no written submissions have been received by May 1, 2010, and no oral hearing date obtained before that date (the hearing need not be scheduled for a date prior to May 1, but the arrangements for a hearing must be made before May 1), then there shall be an order that the petitioner pay the respondents' costs, on Scale B.

"W.G. Baker J."

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