

CANADA / JUDGMENT

Minor v. Van Ewyk

2008 BCSC 558

COURT

Supreme Court of British Columbia

DECIDED

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2008 BCSC 558 Minor v. Van Ewyk

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Minor v. Van Ewyk,

2008 BCSC 558

Date: 20080502

Docket: 8929

Registry: Rossland

Between:

Christa Minor

Plaintiff

And

Juliet Ann Van Ewyk, Freddy Cornelis Van Ewyk,

and Diane Eleanor Bojecho

Defendants

Before: The Honourable Mr. Justice McEwan

Reasons for Judgment

Counsel for the Plaintiff

J. Gelber

Counsel for the Defendants

K.J. Ihas

Date and Place of Hearing:

April 14, 2008

Rossland, B.C.

- [1] The plaintiff seeks a declaration that the riparian rights incidental to her ownership of waterfront property at Christina Lake, British Columbia, entitle her to restrict the defendants from using the foreshore on the western boundary of her property, on the grounds that they are obstructing her right to access.
- [2] The issue has its genesis in a 1982 subdivision of the property now owned by the plaintiff. Its previous owners were her parents, Max and Emma Scholz. They created two lots in the back (eastern) half of their property, the first of which they sold to the defendant, Diane Eleanor Bojechko and her husband in 1985. Ms. Bojechko has since acquired title solely in her name. Attached to these Reasons and marked "Schedule A" is the subdivision plan showing Lots "A" (the part retained by the plaintiff's parents); "B", the lot now owned by the Bojechkos; and "C", the lot now owned by the Van Ewyks.
- [3] Just before the first sale, the solicitor who acted for both parties prepared and registered an easement and right-of-way over lot "A" that provided a passage from both the lot the Bojechkos acquired and the one to which the Van Ewyks are now the successors in title. Attached and marked "Schedule B" is a copy of the plan of easement.
- [4] As can be seen, the lots owned by the defendants are divided by a passage that is part of the plaintiff's lot, which sits between the defendants' properties and Christina Lake, and extends the full width of the old lot from which the new lots were created. The easement extends from the eastern boundary of the plaintiff's property (which is the road access for all three lots) to the western boundary, which is the natural high water mark of the lake. It begins on the east or roadway side, in the central area where the plaintiff's existing driveway between the defendants' lots is, and then angles to the southern boundary of the plaintiff's property to the edge of the foreshore. The defendants' access to the foreshore or the beach is therefore limited to a 3-metre strip on the southern boundary of the plaintiff's (approximately 50 metre) frontage. The plaintiff insists that, having reached the foreshore, the defendants are restricted, in using it, to a 3-metre strip immediately between the edge of the easement and the lake, as if the width of the easement defines the area of the foreshore they are permitted to use.
- [5] I think it important to set out the significant parts of the easement and right of way document. As I indicated, it was prepared immediately before the transfer of the Bojechko lot, while the Scholzs owned all three of the subdivided lots. The dominant tenements are the lots ultimately sold to the defendants:
- (3) The Grantees intend to sell the Dominant Tenements for single family residential uses;

- (4) The Servient Tenement abuts upon the foreshore of Christina Lake along its westerly boundary and the parties desire that the Dominant Tenements shall have access thereto;
- (6) That part of the Servient Tenement over which this Easement, Right-of-Way and Licence is granted is hereinafter described and designated as the "Right of Way Lands" and is an actual roadway intended and convenient for the purposes herein as an access to, between and from any and all of the Dominant Tenements, the Servient Tenement, Christina Lake and the said public road;
- [6] It is obvious from the terms of the document itself that "the foreshore" is used to describe the land that runs along the western boundary of the property, in the same way that, elsewhere, "Tambellini road" describes the public highway that runs along the eastern side. In clause 4, the reference to the access of the dominant tenements (the defendants, now) is to "the foreshore," not to a portion of the foreshore. This is reinforced later in the document where the right-of-way lands are dedicated to a number of purposes, including:
 - (a) for the purposes of ingress, egress and passage to between and from each of the said Dominant Tenements, the said Servient Tenement, the said foreshore of Christina Lake and the said public road; ...

Again, the foreshore is not restricted and the right to access is effectively equated to that to the public road.

- [7] The easement and right-of-way also makes it clear that successors in title will retain these rights:

The Grantors and the Grantees hereby further mutually covenant, agree and acknowledge that the easements, rights-of-way, and licences herein granted and assigned are intended to be granted in perpetuity and shall therefore run with the land; and to that end, this agreement shall enure to the benefit of and be binding upon the parties hereto, their respective heirs, executors, administrators, successors and assigns; and FURTHER the parties hereto shall respectively and from time to time make, do and execute or cause to be made, done or executed, all such further, better and other lawful acts, deeds, things, devises, documents and assurances as are necessary or incidental to give full force and effect to this agreement and to each and every covenant, condition and proviso herein contained.

- [8] This is only to say that there is nothing in the easement and right-of-way document itself that purports to limit the defendants' use of the foreshore. It is defined as the area running across the western boundary of the property, and that definition is never reduced or restricted. Nothing in the easement and right-of-way itself leads to any inference that the width of the access easement has anything to do with the use of the foreshore or the road to which it connects. The plan is typically drawn so as to provide the least interference with the servient tenement consistent with the purposes of the grant, which is to allow the owners of the dominant tenements to traverse land they do not own (the servient tenement belonging to the plaintiff) in order to reach public land at each end (the foreshore and the public road).

The three metre width and its placement along the south boundary of the property is designed to restrict the defendants from passing through the plaintiff's land along its entire width, but nothing in the easement and right-of-way itself purports to restrict access at either end.

- [9] There is an affidavit from a neighbour, David Merry, that includes observations that before his death Mr. Scholz told him he "did not in any way intend to give [subsequent] owners a legal right to use the beach." He further deposes that Mr. Scholz "stated that the new owners of Lots B and C (the defendants) had not been given any legal rights to use the beach because he recognized that this would impair the resale of Lot A (the plaintiff's property)."
- [10] The plaintiff, for her part, deposes, among other things, that:
21. The Easement does not give any foreshore rights to the owners of Lot B or Lot C. Nor was it the intention of either of my parents to grant foreshore rights to the owners of Lot B or Lot C. My father in particular was very specific regarding this issue.
 22. The "access" and "ingress, egress and passage to, between and from" described above (particularly in subparagraph (a)) were intended to be access to the waters of Christina Lake where the Easement abuts Christina Lake at its westerly end. In other words, the Easement allows a right of access that extends from the frontage of the Easement (with a width of approximately 3 metres) in a straight line to the waters of Christina Lake.
 23. The right of access described above (as contemplated by Emma Maria Scholz and by Max Scholz, and as described by the Easement), does not include the right to promenade freely or pursue recreation across the entire foreshore (alternately the littoral zone or lacustrine zone) between the frontage of Lot A and Christina Lake. Nor does said right of access include the right to enter or otherwise be present on any part of Lot A that is not contemplated in the Easement. Nor does said right permit access to or entrance upon the Wharf.
 24. Rather, the right of access to Christina Lake defined in the Easement, is specifically limited to the three metre zone between the frontage of the Easement and the waters of Christina Lake, and is specifically limited to "ingress, egress and passage to, between and from".
 25. The above was communicated explicitly to the owners of Lot B and Lot C (the Defendants in this action) by Emma Maria Scholz and by Max Scholz on numerous occasions.
 26. All of the Defendants were made aware of the Easement prior to their respective purchases of Lot B and Lot C.
 27. All of the Defendants were made aware, prior to their respective purchases of Lot B and Lot C, that their rights under the Easement do not allow for recreation on or access to the entire foreshore between the frontage of Lot A and Christina Lake or to Lot A itself, or to the Wharf.

28. During his lifetime, Max Scholz allowed the various owners of Lot B and Lot C to use the three metres of the foreshore in front of the Easement as beach, and also allowed them to regularly occupy another three or four metres of the foreshore of Lot A. He did so to be "neighbourly" but also explicitly stated that no riparian rights were being granted to the owners of Lot B or Lot C.
32. Due to the increasing trespass and nuisance, and false claims of the Defendants, the Defendants were told by representatives of Emma Scholz, and myself, that they could not continue to use the entire foreshore between the frontage of Lot A and Christina Lake and must limit their use of the beach area to the three metre portion between the Easement and the shore of Christina Lake. The Defendants have disregarded my requests in this regard.
- [11] The Merry material is of no assistance whatsoever. It is inadmissible parole evidence as to the interpretation of the easement and right-of way itself. It amounts to hearsay as to the subjective intentions Mr. Scholz, which would, in any event, be of no assistance in interpreting the objective meaning of an agreement reduced to writing. There is no ambiguity in the agreement that could be explained or amplified by such evidence, even if it were properly given.
- [12] The material filed by the plaintiff suffers from the same defects, where it is not merely argument. The affidavit correctly states the law, in paragraph 21, where it says "the easement does not give any foreshore rights to the owners of Lots B and C," although not in the sense intended. This is because the easement and right-of-way creates a passage through the plaintiff's land to land the plaintiff does not own or control. The easement and right-of-way does not grant "foreshore rights" because no party to it was in a position to do so.
- [13] The owner of the foreshore is the Crown. Unless the Crown asserts its ownership in the manner set out in the sections 59 and 60 of the Land Act, R.S.B.C. 1996, c. 245, or in some other legitimate manner, the foreshore is open to public use. The only rights the plaintiff may assert are her common law riparian right to unrestricted access to and from the water frontage, and the right conferred under a "License of Occupation" (Disposition No. 858505), which authorizes the construction, operation, and maintenance of a private moorage on the northern half of the foreshore, on the explicit condition that the holder "acknowledge[s] this license of occupation does not grant [her] exclusive use and occupancy of the Land."
- [14] Elsewhere in the licence it is particularly stipulated that the plaintiff "must not interfere with public access over the land." (Emphasis added).
- [15] There is no evidence that the plaintiff's riparian rights or the limited right granted under the Licence have had a moment's interference from the defendants. The use of the foreshore for recreational purposes is open to the defendants as well as the plaintiff, and indeed to any other member of the public. The easement and right-of-way allows the defendants to exercise this public right, by getting to it through the plaintiff's land. It is permissive only in that sense. The plaintiff's riparian rights do not, in any sense, allow the plaintiff to assert dominion over the foreshore as if it were a private beach, or as if they have any priority,

except that they may insist that their access across the foreshore not be impeded. I will not attempt to describe the circumstances in which that might be pertinent, except to say that it does not include the ordinary recreational uses of a beach.

- [16] The plaintiff has also asserted the provisions of the Land Act, R.S.B.C. 1976, c. 245 which appear to make "use" of Crown land an offence. It is not necessary to address this in any detail, except to say that the Crown would have to assert itself in this regard. The plaintiff is not a delegate or an agent of the Crown, and is in no position to assert what may be the Crown's ultimate right to control the use of the foreshore for the plaintiff's own purposes.
- [17] In summary, the plaintiff has not demonstrated any unlawful interference with either her riparian rights or her rights under her Licence of Occupation. Except for these rights, and the privilege granted under the licence, she has no better claim to the foreshore than the defendants. The easement and right-of-way has nothing to do with the foreshore. It merely provides access through the plaintiff's property, permitting the defendants to exercise their rights to the foreshore by that means rather than by boat, or by entering from the north or south along the adjacent foreshore. Even if the easement and right-of-way purported to restrict the use of the foreshore, it would not be effective for that purpose. The plaintiff cannot give or withhold what is not hers to give or withhold.
- [18] The plaintiff's prayer for a declaration, and her action in toto, is dismissed with costs.

"The Honourable Mr. Justice McEwan"

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