

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Hegel v. British Columbia (Ministry of Forests)*,
2009 BCCA 527

Date: 20091125
Docket: CA037270

Between:

Ronald Edward Hegel and 449970 B.C. Ltd.

Appellants
(Appellants)

And

**Her Majesty the Queen in Right of the Province of British Columbia as
represented by the Ministry of Forests, and
The Forest Appeals Commission**

Respondents
(Respondents)

Before: The Honourable Madam Justice Kirkpatrick
(In Chambers)

On appeal from the Supreme Court of British Columbia, June 29, 2009,
(*Hegel v. British Columbia (Forests)*, 2009 BCSC 863, 40669)

Counsel for the Appellants: J.G. Frame

Counsel for the Respondent, Ministry of Forests E.W. Hughes

Counsel for the Respondent, Forest Appeals Commission M.G. Underhill

Place and Date of Hearing: Vancouver, British Columbia
October 26, 2009

Place and Date of Judgment: Vancouver, British Columbia
November 25, 2009

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COURT OF APPEAL
REGISTRY

Reasons for Judgment of the Honourable Madam Justice Kirkpatrick:

[1] The appellants, Ronald Edward Hegel and 449970 B.C. Ltd., seek leave to appeal from the order of a Supreme Court judge pronounced 29 June 2009. The proceeding in the Supreme Court was a statutory appeal from the 12 October 2007 decision of the Forest Appeals Commission (the "Commission"), which upheld a decision of a district manager of the Ministry of Forests, who found that the appellants had harvested Crown timber without authority, contrary to the *Forest Practices Code of British Columbia Act*. The district manager held the appellants jointly liable for an administrative penalty of \$132,897.40. The penalty consisted primarily of a stumpage rate of \$61.25 per cubic metre, together with estimated costs to reforest, and included a \$5,000 penalty assessed for the breach of s. 97(2) of the *Forest Practices Code*. The Commission confirmed the district manager's determination with the exception of making a minor adjustment to the stumpage calculation at the request of the Crown.

[2] The Supreme Court judge dismissed the appeal and awarded costs to the Respondent, Her Majesty the Queen in Right of the Province of British Columbia as represented by the Ministry of Forests (the "Ministry"). The judge upheld the penalties levelled against the appellants, finding no error in law in the Commission's decision. The dispute is essentially whether the Commission made any error in law in its determination of the appropriate boundaries of the appellants' property and whether the Commission should have accepted the appellants' defences of mistake of fact and due diligence.

TEST

[3] Section 150(3) of the *Forest Act*, R.S.B.C. 1996, c. 157 states:

An appeal from a decision of the Supreme Court lies to the Court of Appeal with leave of a justice of the Court of Appeal.

In determining whether leave to appeal should be granted, the court must consider the criteria set forth in *Queen's Plate Dev. Ltd. v. Vancouver Assessor, Area 09* (1987), 16 B.C.L.R. (2d) 104 (C.A.) (Taggart J.A. in Chambers), namely:

- (a) whether the proposed appeal raises a question of general importance as to the extent of jurisdiction of the tribunal appealed from ...
- (b) whether the appeal is limited to questions of law involving:
 - (i) the application of statutory provisions ...
 - (ii) a statutory interpretation that was particularly important to the litigant ...
 - (iii) interpretation of standard wording which appears in many statutes, for example the in-force provisions of retroactive legislation ...
- (c) whether there was a marked difference of opinion in the decisions below and sufficient merit in the issue put forward ...
- (d) whether there is some prospect of the appeal succeeding on its merits ... although there is no need for a justice before whom leave is argued to be convinced of the merits of the appeal, as long as there are substantial questions to be argued;
- (e) whether there is any clear benefit to be derived from the appeal ...

SUPREME COURT DECISION

[4] The judge described the grounds of appeal from the Commission's decision at para. 6 of his reasons [*Hegel v. British Columbia (Forests)*, 2009 BCSC 863]:

1. The Commission erred in law by concluding that the north boundary of Lot 2535 is a straight line that proceeds from the North Thompson along the southern boundary of Lot 546, and, therefore, that Area A is on Crown Land.
2. The Commission erred in law by concluding that Mr. Hegel started his on-site investigation of the boundaries of Lot 2535 from a wooden fence post.
3. The Commission erred in law by concluding that the Appellants did not exercise due diligence in their efforts to determine the location of the northern boundary of Lot 2535.
4. The Commission erred in law by concluding that the defence of mistake of fact did not apply to the Appellants' efforts to determine the location of the northern boundary of Lot 2535.

[5] As to the first ground of appeal, the trial judge noted:

[8] The conclusion about the location of the northern boundary that is set out in the first ground of appeal is, as submitted by the respondent, a finding of fact, but the appellant argues that the Commission came to the wrong conclusion because it misapprehended and misapplied the law regarding the hierarchy of evidence concerning boundaries. [a reference to *Hawkes Estate v. Silver Campsites Ltd.* (1991), 179 D.L.R. (4th) 677 (B.C.C.A.)]

[6] The error alleged in the second ground was essentially that the Commission misapprehended the evidence of Mr. Hegel.

[7] In the Supreme Court, the Ministry argued that the first two grounds of appeal challenged pure factual findings and the third and fourth grounds challenged mixed findings of law and fact. Since the appeal was brought pursuant to s. 150(1) of the *Forest Act*, R.S.B.C. 1996, c. 157, which provides for an appeal from the decision of the Commission to the Supreme Court on a question of law or jurisdiction, the Ministry submitted that the appeal should therefore be dismissed.

[8] The judge reviewed in detail the “convoluted surveying evidence” and, in particular, the August 2002 investigation by Ivan Royan, a B.C. land surveyor retained by the Ministry of Forests, as to whether the appellants had harvested outside of their property boundaries.

[9] Following that extensive review, the trial judge stated:

[33] Having said all that, the function of the court on this ground of appeal is not to retry the factual issue of the location of the northern boundary, but rather to determine if the Commission panel made any errors of law in coming to the factual conclusion that it did. It was acknowledged by the respondent that an error of law is made if relevant evidence is not considered, or if irrelevant evidence is considered which could have affected the factual decision. I also understand it to be non-contentious that where palpable and overriding errors in findings of fact are made as a result of clearly misconstruing the evidence, those are within the ambit of appellate review as errors of law.

[10] Ultimately, the trial judge concluded with respect to the first ground of appeal before him as follows:

[35] Mr. Royan was not questioned about the hierarchy of evidence used by surveyors, which was referred to in *Hawkes Estate v. Silver Campsites Ltd.* (B.C.C.A.), *supra*, and the Commission may well have had some of the concerns this court has expressed about Mr. Royan's conclusions if such questioning had occurred, or if that hierarchy had been mentioned in argument, but I do not accept the appellants' argument that it was an error of law for the Commission not to apply that hierarchy. Clearly the Commission accepted the expert opinion of Mr. Royan as to the location of the north boundary, an opinion which the appellants' own surveyor agreed with.

[11] As to the second ground of appeal, the judge agreed that the Commission misstated Mr. Hegel's evidence as to the starting point of his investigation of the boundary of his property. However, the judge concluded that the Commission's decision would not and should not have been any different since the boundary in question was not the northern boundary and the starting point of the investigation was at the southern boundary.

[12] The judge found that the Commission did not misapprehend the evidence concerning the appellants' exercise of due diligence in their efforts to determine the location of the northern boundary.

[13] Lastly, the judge found that the Commission did not err in law in its approach to the defence of mistake of fact.

POSITIONS OF THE PARTIES

[14] The appellants framed their leave argument on the basis of the decision in *Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp.*, [1988] B.C.J. No. 1403. That decision, and many others, set out the criteria to be considered on an application for leave to appeal:

- a. whether the point on appeal is of significance to the practice;
- b. whether the point raised is of significance to the action itself;
- c. whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and
- d. whether the appeal will unduly hinder the progress of the action.

[15] However, applications for leave to appeal from specialized tribunals established by provincial legislation have developed modified criteria to be considered as explained in *Queen's Plate*.

[16] Applying the *Queen's Plate* criteria to the positions stated by the appellants, it appears that four criteria are applicable in this application for leave: (1) whether the appeal is limited to questions of law involving a statutory interpretation that was particularly important to the litigant or an interpretation of standard wording; and (2) whether there is some prospect of the appeal succeeding on its merits. There is no need for the justice before whom leave is argued to be convinced of the merits of the appeal as long as there are substantial questions to be argued.

[17] As to statutory interpretation, the *Forest and Range Practices Act*, S.B.C. 2002, c. 69, s. 72, provides three statutory defences to a contravention of the *Forest Practices Act*. The two relevant to this case are ss. 72(a) (due diligence) and (b) (mistake of fact). The appellants submit that the Commission and the Supreme Court judge conflated the two defences by requiring due diligence as a precondition of establishing a mistake of fact. They argued that, in the result, this would make mistake of fact a moot defence.

[18] As to the prospect of success on the merits, the appellants submit that the Supreme Court judge erred by ignoring or failing to give primacy to a document that should govern according to the hierarchy of evidence in interpreting a deed: *Hawkes Estate v. Silver Campsites Ltd.* (1994), 91 B.C.L.R. (2d) 126 (B.C.C.A.).

[19] The appellants submit that the Supreme Court judge erred when he upheld the Commission's findings of fact, which relied not on the original field notes, but on later expert opinion that created a "blended" survey, instead of relying exclusively on the actual location of the original monuments.

Forest Appeals Commission

[20] The Commission submits that this application should be denied on the basis that it raises a jurisdictional issue of significant importance to the Commission. In

particular, the Commission submits that the grounds of appeal advanced in the Supreme Court did not raise pure questions of law and thus there was no proper appeal to the Supreme Court under s. 150(1) of the *Forest Act*, since an appeal to the Supreme Court is limited by that section to questions of law and jurisdiction alone. Questions of mixed fact and law are not appealable: *Cascadian International Resources Inc. v. Nova West Resources Inc.*, 2008 BCSC 679. Thus, since no errors of pure law were raised in the Supreme Court, this appeal cannot be considered *prima facie* meritorious.

[21] In the alternative, the Commission submits that the standard of review should be reasonableness *simpliciter* in accordance with the decisions of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, and *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12. The Commission submits that if these are questions of pure law, then they fall within the specialized expertise of the Commission and the appellant bore the burden of establishing in the Supreme Court that the Commission's decision is unreasonable.

Ministry of Forests

[22] The Ministry submits that the appellants are barred from revisiting the factual findings of the Commission and leave is therefore not warranted.

[23] The Ministry further submits that the trial judge in fact dismissed the appeal because it did not raise an issue of law and no legal issues are raised in the proposed appeal to this Court.

[24] The Ministry submits that the appellants seek to elevate the question as to the hierarchy of evidence set out in *Hawkes* to a question of law. The Ministry submits that the hierarchy of evidence is a rule under which surveyors operate and is not a legal principle.

DISCUSSION

[25] The appellants contend that the Commission's failure to follow the hierarchy of evidence was an error of law, relying on the decision in *Kirkpatrick v. British Columbia (Registrar of Land Titles)*, 2002 BCCA 669 at para. 33:

[33] When lands conveyed in a grant are described by reference to a plan, the description of the lands is a question of legal construction: see *Grasett v. Carter* (1884), 10 S.C.R. 105, per Strong J. at p. 114:

When lands are described, as in the present instance, by a reference, either expressly or by implication, to a plan, the plan is considered as incorporated with the deed, and the contents and boundaries of the land conveyed, as defined by the plan, are to be taken as part of the description, just as though an extended description to that effect was in words contained in the body of the deed itself. Then, the interpretation of the description in the deed is a matter of legal construction and to be determined accordingly as a question of law by the judge, and not as a question of fact by the jury.

[26] However, the determination in issue in this case was the northern boundary of the appellants' property as measured on the ground. The question for the district manager, and on appeal to the Commission, did not concern the legal construction of the lands conveyed to the appellants. Rather, it concerned whether the appellants, in harvesting timber, went beyond the northern boundary of their property. The question of the existence of a boundary is a question of law. The question of its extent and location is a question of fact or mixed fact and law.

[27] I am not persuaded, nor do I think was the Supreme Court judge, that the determination of the location of the northern boundary on the ground was an error of law.

[28] As to the question of statutory interpretation, I do not accept that the Commission conflated the defences of due diligence and mistake of fact. The appellants submit that the Commission rejected the defences of due diligence and mistake of fact for the same reason, namely that Mr. Hegel did not act reasonably because he did not find corner pins, measure all of the boundaries of the property and, finding a discrepancy, order a professional survey.

[29] The trial judge found that the Commission was "entitled to consider the reasonableness of Mr. Hegel's efforts to ascertain his boundaries generally". The appellants submit that this goes to Mr. Hegel's due diligence in ascertaining the location and length of all of the property's boundaries, two of which Mr Hegel had no reason to doubt, and not to the reasonableness of Mr. Hegel's belief.

[30] At para. 40 of his reasons, the trial judge reproduced the Commission's findings in respect of the defence of mistake of fact:

The Commission concludes that the defence of mistake of fact has not been established by the Appellants. While there is evidence that the Appellants mistakenly believed in a set of facts regarding the boundaries, the Commission finds that the Appellants did not act reasonably. Specifically, it was not reasonable for Mr. Hegel to conclude that he had properly ascertained the boundaries of Lot 2535. The Commission finds that a reasonable person in his circumstances would have looked for corner pins and would have measured all of the boundaries of Lot 2535, instead of relying on a fence post and then measuring only some of the boundaries. If Mr. Hegel had taken those steps, he would have realized that there were discrepancies between his observations in the field and Mr. Beauchamp's survey notes. He could have obtained a professional survey, but he did not do so.

Accordingly, the Commission finds that the Appellants have not established that the defence of mistake of fact applies to the contraventions.

[31] In my opinion, the Commission made a finding of mixed fact and law in determining whether the defence of mistake of fact was made out. It essentially said that while there may have been a mistake of fact, it was not reasonably held. That finding accords with the wording in the statute and the proposition cited by the appellant from *R. v. Sault Ste Marie (City)*, [1978] 2 S.C.R. 1299, *per* Dickson J., that, for strict liability offences, a person will not be liable if he can show that he "reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event." The Commission's finding was a finding of mixed fact and law that was not appealable in the first instance.

[32] I agree with the submission of the Commission that the four grounds of appeal alleged by the appellants in their amended notice of appeal from the decision

of the Commission do not raise questions of law and the right of appeal on a question of law does not include a right of appeal on a question of mixed law and fact. As such, the appeal was not properly before the Supreme Court in the first instance: see *Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp.* (1988), 19 C.P.C. (3d) 396 (C.A.).

[33] Lastly, a relevant consideration under the *Queen's Plate* test is whether the issue on appeal has been considered by a number of appellate bodies, citing *In the Matter of the Commercial Appeals Commission Act*, [1985] B.C.J. No. 1774, and *Telep v. The Superintendent of Insurance, Brokers and Real Estate* (1985), 67 B.C.L.R. 242 (C.A.) (Chambers). In reference to *In the Matter of the Commercial Appeals Commission*, Mr. Justice Craig stated,

I reiterate the view which I have already expressed, namely, that when there has been, in effect, three hearings involving the presentation of evidence and submissions, the latter two hearings being an appeal from the initial hearing, a judge of this Court should be slow to grant an application for leave to appeal.

[34] Similarly, in this case, the appellants were found by the district manager to have harvested Crown timber outside the boundaries of their property. The appellants appealed to the Commission and then appealed to the Supreme Court. I am not persuaded that the appellants have established an error of principle, either of the Commission or the Supreme Court judge that would justify leave to appeal being granted.

[35] The application for leave to appeal is dismissed.


The Honourable Madam Justice Kirkpatrick