

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Hegel v. British Columbia (Forests)*,
2011 BCCA 446

Date: 20111108
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)

And

The Forest Practices Board

Intervenor

Before: The Honourable Mr. Justice Donald
The Honourable Madam Justice D. Smith
The Honourable Madam Justice Bennett

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

Appearing on his own behalf and on behalf
of 449970 B.C. Ltd.:

R. E. Hegel

Counsel for the Respondent, Her Majesty the
Queen in right of the Province of British Columbia:

E. W. H. Hughes

Counsel for the Respondent,
Forest Appeals Commission:

M. G. Underhill

Counsel for the Intervenor,
Forest Practices Board:

J. R. Pennington

Place and Date of Hearing:

Kamloops, British Columbia
October 19, 2011

Place and Date of Judgment:

Vancouver, British Columbia
November 8, 2011

Written Reasons by:

The Honourable Mr. Justice Donald

Concurred in by:

The Honourable Madam Justice D. Smith

The Honourable Madam Justice Bennett

Reasons for Judgment of the Honourable Mr. Justice Donald:

Introduction

[1] This appeal examines land survey law in the forestry context.

[2] Ronald Edward Hegel, the principal of 449970 B.C. Ltd., logged Crown land without permission. This happened because he performed his own survey of land the company acquired for timber harvesting, District Lot 2535. He located what he believed were the western and northern boundaries. He was found to be mistaken about the northern boundary which adjoined Crown land. He and the company were assessed \$132,897.40 for unlawfully harvesting Crown timber.

[3] The appellants' position throughout this matter has been that Mr. Hegel properly relied on the title documents for DL 2535 and either he was correct in locating the northern boundary and there was no trespass or he acted reasonably and was entitled to the statutory defences of due diligence and mistake of fact.

[4] Both the District Manager representing the Ministry of Forests, who made the initial decision, and the Forest Appeals Commission, which conducted a *de novo* appeal, found on the evidence that Mr. Hegel did not locate the northern boundary correctly. They further held that he did not act reasonably in relying on his own survey and, accordingly, the defences of due diligence and mistake of fact were not available to him.

[5] The procedural history begins with a hearing conducted by the District Manager for the relevant forestry region upon a report of unlawful logging. The District Manager decided that the appellants contravened the *Forest Practices Code of British Columbia Act*, R.S.B.C. 1996, c. 159 (now the *Forest and Range Practices Act*, S.B.C. 2002, c. 69), for failing to ascertain the boundaries of DL 2535 and by logging Crown timber without authorization. The penalty of \$132,897.40 was mostly for stumpage, but it also included a fine of \$5,000.00 and something for habitat remediation.

[6] On appeal, the Forest Appeals Commission affirmed the decision (12 October 2007), Decision No. 2005-FOR-009(a), online: <http://www.fac.gov.bc.ca/forestPracCode/2005for009a.pdf>.

[7] The appellant took the matter to the Supreme Court on an appeal provided by s. 150(1) of the *Forest Act*, R.S.B.C. 1996, c. 157. The right to appeal is limited:

150 (1) The appellant or the minister, within 3 weeks after being served with the decision of the commission, may appeal the decision of the commission to the Supreme Court on a question of law or jurisdiction.

[Emphasis added.]

[8] The appeal was dismissed by Mr. Justice Meiklem on 29 June 2009: 2009 BCSC 863.

[9] The appellants applied for leave to appeal to this Court. On 25 November 2009, Madam Justice Kirkpatrick refused leave: 2009 BCCA 527 (Chambers).

[10] A division of this Court reviewed that decision and, on 10 June 2010, granted leave: 2010 BCCA 289. Two questions of law were framed:

THIS COURT ORDERS that:

...

- 2) leave to appeal the order of Mr. Justice Meiklem is granted on the following questions of law:
 - a) were the Applicants/Appellants entitled to rely on the descriptive measurements of the length of the western boundary as set out in the field notes from the original survey in 1911?; and
 - b) did the Forest Appeals Commission err in interpreting the statutory defences of due diligence and mistake of fact in sections 72(a) and (b) of the *Forest and Range Practices Act* as being equivalent?

[11] In giving reasons for the review decision, Madam Justice Saunders wrote:

[15] On the application for leave to appeal the applicants sought to raise the same issues. The respondents opposed the application, contending the grounds raised either issues of fact or issues of mixed law and fact and were without merit, and thus did not satisfy the criteria for leave to appeal. On the issue of application of the two defences, exercise of due diligence and mistake of fact, Madam Justice Kirkpatrick held that the questions were ones

of mixed fact and law, and thus were not properly before the Supreme Court of British Columbia. She declined to grant leave.

[16] The applicants addressed us at length concerning the errors they see in the administrative decision and that of the Commission, and perhaps it may be said they have not clearly isolated factual issues from legal issues. This may be due to their strong exception to some of the findings of fact. Nonetheless, in the hearing of this review application it became clear that two legal issues trouble the applicants, and they seek to have them resolved by this court.

[17] The first arises from the conclusion implicit in the decisions that they were not entitled to rely upon the area of the property reflected in the Crown grant, or the descriptive measurements found in the field notes. It is, of course, given in this case that there has been no process to inquire into title to the disputed northern swath of land. As I understand the case, the disputed area arises largely, if not entirely, from shortening the western boundary by about 136 metres from the 50.22 chains (1010.26 metres) described in the original 1911 survey. While criticism was levelled at Mr. Hegel by the Crown's experts concerning the location from which he started his measurements, it appears clear that if he was entitled to rely upon the length of the western boundary set out in the field notes, he would have been entitled to harvest as far north as he did, as the controversy over the starting point related not to the latitudinal location of the northern boundary, but to its longitudinal reach. The effect of these descriptive measurements on the applicants' status as trespassers, and upon the application of the twin defences of exercise of due diligence and mistake of law, is a question of law.

[18] There is to a land owner perhaps nothing more important than security of title and reliance upon boundaries as established in the original title. While this aspect of the case was hidden from plain view in the manner in which the issues have been presented to the court, and thus was not addressed by the justice in chambers, I am satisfied that this aspect of the case lies at the root of the proposed appeal. It is a question of law. It is, in my view, important to the community, and there is sufficient merit to the issue to warrant the granting of leave to appeal.

[19] Likewise, in my view, the correct interpretation of s. 72 of the *Forest and Range Practices Act* providing defences of exercise of due diligence and mistake, is a question of law. While the application of these defences to a particular case is a question of mixed fact and law, the legal characteristics of the two defences themselves is a matter of law. As I understand the applicants, they complain that the Forest Appeals Commission viewed the two defences as equivalent, and say in law this is an error. I conclude, respectfully, that the nugget of the complaints as to the application of s. 72 is a question of statutory interpretation, fitting within the criteria for appeal to the courts. The question raised is important to the parties and the community, and in my view is of sufficient merit to justify the granting of leave.

[12] The circumstances of the case are set out fully in the earlier decisions and need not be repeated at any length. For the purpose of considering the two questions before us, it will be sufficient to refer to the following facts.

[13] Before embarking on his survey, Mr. Hegel looked at the land grant for DL 2535 dated 5 March 1909 giving title to 130 acres “more or less” and he also looked at “Field-Notes of Purchase” filed by the surveyor who did the first survey in 1911. The notes include a map describing a trapezoid parcel with the east boundary roughly parallel with and running northeast up the west bank of the North Thompson River, and the west boundary 50.22 chains directly north from the southwest corner. These and related documents comprise the original filings in the Land Title Office.

[14] Mr. Hegel testified that he located what he thought was an old survey stake roughly where the southwest corner should be and measured 50.22 chains north using a compass. He satisfied himself that he could define the northern boundary of DL 2535 by going due east from the end of his measurement to the river. He did not find any other corner posts nor did he measure all four sides of the parcel. He found a brass monument part way along the western boundary marking a utility right-of-way which confirmed his belief that he was on the correct line for the west boundary.

[15] The preponderance of the survey evidence adduced at the Forest Appeals Commission hearing, including that of Mr. Hegel’s own surveyor, was, and the Commission found, that the actual northern boundary was south of the line Mr. Hegel used for logging.

[16] The Commission also heard expert opinion on the industry standard of care for small and intermediate logging operations. This was to the effect that if the logger cannot find all four corner posts, he should engage a B.C. Land Surveyor to conduct a formal survey before cutting timber.

[17] The evidence before the Commission also established that if Mr. Hegel had measured all four sides, said to be a prudent thing to do when corner posts cannot

be found, it would have been obvious to him that the field notes could not provide a reliable basis for locating the boundaries.

[18] The Commission made this finding, at 13:

The Commission accepts the evidence of Mr. Royan [Crown surveyor] and the survey prepared by Mr. Kidston [Mr. Hegel's surveyor] with respect to the northern boundary of the Appellants' property. This means that, based on their surveys, Area A [the trespass area] is located completely outside of Lot 2535 and on Crown land. The Commission finds that the Appellants' investigation of the boundaries was incomplete, and resulted in an unauthorized harvest of Crown timber from Crown land.

Additionally, the Commission finds that the Crown grant for Lot 2535 did not guarantee that Lot 2535 was actually 130 acres. Rather, it was "more or less" 130 acres.

[19] As mentioned, Mr. Hegel pleaded the defences of due diligence and mistake of fact provided in the *Forest and Range Practices Act*:

- 72 For the purposes of a determination of the minister under section 71 or 74, no person may be found to have contravened a provision of the Acts if the person establishes that the
- (a) person exercised due diligence to prevent the contravention,
 - (b) person reasonably believed in the existence of facts that if true would establish that the person did not contravene the provision, ...

[20] The Commission dealt with the defences separately. As to due diligence, it made these findings, at 17-18:

In terms of the "gravity of the potential harm", the Commission notes that the Appellants were aware that there was Crown land above the northwest boundary of Lot 2535. They were also aware of the streams and wetland located in and around that area, which contained fish and fish habitat. Accordingly, a failure to properly determine the boundaries could have serious consequences.

Regarding "likelihood of potential harm", the Commission found Mr. Pagdin to be a credible witness who was experienced in ascertaining boundaries for small and medium harvesting operations. His testimony indicated that based on standard and reasonable practices for operations of this kind, Mr. Hegel should have realized that there was significant uncertainty as to the locations of the boundaries, and that, without further clarification, the likelihood of potential harm was high.

Additionally, the Commission finds that having a professional survey by a BC Land Surveyor was an "available alternative" to protect against the potential

harm to Crown timber (and possibly the environment). The Commission acknowledges that being duly diligent may not require a survey by a BC Land Surveyor in every case. It depends on the circumstances. In this case however, it should have been apparent to Mr. Hegel that there was uncertainty over the boundaries when he was unable to locate all of the corner pins. The Commission finds on the facts of this case that a professional survey would have been reasonable in the circumstances, and would not have been an unreasonable cost compared to the potential harm to the Crown, and penalties facing the Appellants, associated with erring in ascertaining the boundaries.

Thus, although Mr. Hegel made an effort to ascertain the boundaries, the Commission finds that his actions were inadequate to establish the defence of due diligence, given his failure to locate corner pins and measure all boundary distances against Mr. Beauchamp's survey notes, and the serious consequences that can flow from erring in ascertaining the boundaries.

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

[21] As to the mistake of fact defence, the Commission made these findings, at 18:

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.

[22] These are determinations of mixed fact and law and if the Commission got the law right, they are not open to attack on this appeal.

The Field-Notes

[23] Once again, the first issue framed by the review division is:

- a) were the Applicants/Appellants entitled to rely on the descriptive measurements of the length of the western boundary as set out in the field notes from the original survey in 1911?

[24] Mr. Hegel's argument is that the original title documents determine his title and cannot be questioned. Hence, the survey evidence generated in this case cannot contradict what the title documents say belongs to him. He cites various enactments in support of his submission: ss. 20, 23(2) and 60 of the *Land Title Act*, R.S.B.C. 1996, c. 250; s. 1 of the *Land Survey Act*, R.S.B.C. 1996, c. 247; and s. 53(1) of the *Land Act*, R.S.B.C. 1996, c. 245.

[25] These provisions address the issue of title. But the appellants' title to DL 2535 is not in question. We know what they own, the problem in this case is where it is situated.

[26] As Ms. Hughes, for the Province, argued, ss. 1 and 2 of the *Land Survey Act* provide a complete answer to Mr. Hegel's submission on the first issue. They provide as follows:

- 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, blocks, gores, lots, commons or other parcels of land, under the authority of the government, are the true and unalterable boundaries of the townships, ranges, sections or other legal subdivisions, blocks, gores, lots, commons or other parcels of land respectively, whether they, on measurement, are or are not found to contain the exact area or dimensions mentioned or expressed in any patent, grant or other instrument, in respect of any township, range, section or other legal subdivision, block, gore, lot, common or parcel of land.
- 2 Every township, section or other legal subdivision, block, gore, lot, common or parcel of land consists of the whole width included between the mounds, posts, monuments or boundaries, respectively marked, erected, placed or planted under the authority of the government, at the several angles of them, and no more or less, despite any quantity or measure expressed in the original grant or patent.

[Emphasis of counsel.]

[27] The registered instruments give title, but the location of the subject property is determined not by them but by what is on the ground. I refer in this regard to *Survey Law in Canada*, (Toronto: Carswell, 1989):

§4.95 No system of title by registration guarantees the boundaries in the sense of parcel dimensions; for two lots abutting, it is a certainty that the division line is the lot line for that is the basis of the two titles, but the dimensions to and along the lot line are not guaranteed. The corner markers as physical things, including surveyors' monuments, are matters for evidence evaluation in the field.

[28] And so, the dimension of the western boundary of DL 2535 given in the Field-Notes is not conclusive as a matter of law. It follows that the Commission did not err in law by failing to give it dispositive effect. Unless the Field-Notes were dispositive, the Commission could only treat them as one factor among others in determining the reasonableness of Mr. Hegel's conduct, which is what the Commission did.

Due Diligence and Mistake of Fact

[29] The second question on which leave was granted is:

- b) did the Forest Appeals Commission err in interpreting the statutory defences of due diligence and mistake of fact in sections 72(a) and (b) of the *Forest and Range Practices Act* as being equivalent?

[30] As I read the Commission's decision, it found that Mr. Hegel did not do enough to locate the boundaries of DL 2535 (due diligence) and his belief that he found the northern boundary was not reasonably held because he did not locate the corner posts or run all four sides of the property (mistake of fact). Each defence was discussed separately. The reasonableness of his efforts was a necessary element in each defence. Consideration of the common factor did not, in my view, amount to treating the defences as equivalent.

Standard of Review

[31] Counsel for the Commission argued for reasonableness as the appropriate review standard. I prefer not to express an opinion on the standard for two reasons.

[32] First, Mr. Hegel was not equipped to argue for the more stringent standard of correctness and he did not attempt to do so. The Commission’s argument was supported by the other respondents. We heard only one side of the issue.

[33] Second, there is such a ready answer to the two questions of law that the choice of standard makes no difference.

[34] It was decided in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, that prior decisions defining the standard appropriate for a tribunal should have considerable precedential effect:

[62] In summary, the process of judicial review involves two steps. First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.

[Emphasis added.]

[35] Given the precedential effect, I am reluctant to decide the standard of review question where it was not fully argued and the points of law are such that the choice of standard would be inconsequential.

Conclusion

[36] For the foregoing reasons, I would dismiss the appeal.

“The Honourable Mr. Justice Donald”

I agree:

“The Honourable Madam Justice D. Smith”

I agree:

“The Honourable Madam Justice Bennett”