

Court of Queen's Bench of Alberta

Citation: Andriet v. County of Strathcona No. 20, 2005 ABQB 848

Date: 20051122
Docket: 0203 12759
Registry: Edmonton

Between:

Douglas B. Andriet and Jacqueline M. Andriet

Plaintiffs

- and -

**The County of Strathcona No. 20, Peter Brian Todd, Lynn Francis Forsythe,
Gary Alexander McGowan, Kenneth Schley, Patricia Schley,
Brian Allan Dawson, Judy Loraine Dawson,
William Johansson, Frances Johansson,
Donald Mills, Sheila Mills and
Her Majesty the Queen in the Right of the Province of Alberta**

Defendants

**Reasons for Judgment
of the
Honourable Mr. Justice D.W. Perras**

Introduction

[1] The plaintiffs, Andriets, claim as riparian owners of land in Grandview Bay on Cooking Lake, certain lands that they allege have accreted to their land as a result of the water of Cooking Lake receding over a number of years.

[2] The various defendants also claim the accreted lands as riparian owners.

[3] The defendant McGowan claims accreted land as a riparian owner and as well claims a portion of the accreted land based on the concept of adverse possession.

[4] The various claims of all the parties overlap extensively, such that none of the usual survey techniques can offer up a rational solution to the competing claims.

The Andriet Claim

[5] The Andriets acquired their land from the Lerbekmos and the Certificate of Title reads:

ALL THAT PORTION OF THE NORTH WEST QUARTER OF
SECTION THIRTEEN (13)
TOWNSHIP FIFTY ONE (51)
RANGE TWENTY TWO (22)
WEST OF THE FOURTH MERIDIAN, NOT COVERED BY ANY OF THE
WATERS OF COOKING LAKE, AS SHOWN ON A PLAN OF SURVEY OF
THE SAID TOWNSHIP SIGNED AT OTTAWA ON THE 19TH DAY OF MAY
A.D. 1903, WHICH LIES NORTH OF THE NORTH BOUNDARY OF THE
LAND SUBDIVIDED UNDER PLAN 2611 ET, AND EAST OF THE
EASTERLY LIMIT OF THE ROAD AS SHOWN ON ROAD PLAN 5255CL,
CONTAINING 4.36 HECTARES (10.77 ACRES) MORE OR LESS

Then follow several exceptions. Plan 2611ET showed the bank of Cooking Lake to be as surveyed by R.W. Lendrum in 1902. Plan 2611ET also set the bank for the new subdivision as of 1936.

[6] The registered subdivision plan 2611ET was completed by surveyor C.B. Atkins in July of 1936 and the bank of Cooking Lake in Grandview Bay was accepted as set by surveyor R.W. Lendrum in 1902. At the time, i.e. 1936, the 1902 bank as found by Lendrum became the easterly boundary for some properties along the lake in Grandview Bay.

[7] The various lots from the subdivision in plan 2611ET are now owned by various defendants.

[8] The Lerbekmos acquired the land in October of 1957 from Effie Flowers. In August of 1979 the Lerbekmos sold a portion of their land to the County of Strathcona and adopted as one of the boundaries for the land, the boundary as shown on plan 5231 NY as surveyed by C.H. Weir in 1967 (Ex. 5, Tab 101).

[9] Further, a registered plan 802-1713 for road widening purposes, was registered after survey in 1980, again adopting in part, boundaries as established by plan 5231NY.

[10] In fact, while the plan was categorized as a road widening plan, it was really a method to lay claim to the property sold by Lerbekmos to the Strathcona County in August of 1979 without going through the process of subdividing.

[11] Both surveyors Allred and Gillmore gave evidence about their understanding of how riparian land owners are entitled to accreted properties.

[12] The problem is that trying to adhere to the common law principles associated with riparian owners and accretion in this case, would end up in creating a maze of overlapping interests incapable of resolving to the point of registerability in land titles.

[13] In fact both Allred and Gillmore agree that there is no satisfactory way to satisfy the competing claims using the common law principles, and current surveying techniques.

[14] In my view the Andriets are entitled to the land as set out in their Certificate of Title which, when read carefully, fixes the easterly boundary as set out in plan 2611ET, which adopts the easterly boundary as found by R.W. Meldrum in 1902. The description on the title to the property has been consistent throughout its history since plan 2611ET, which in my view must be given substantial weight when addressing a boundary issue since the title gives a clear picture of the properties within the boundaries. I therefore find that the Andriets are limited by the boundaries set out in their title and are therefore not entitled to any accreted land as they are not riparian owners.

COUNTY OF STRATHCONA #20

[15] The County of Strathcona owns several pieces of property in Grandview Bay including lots 1 and 13, and a parcel as shown on plan 5231NY and plan 8021713 wherein the south easterly boundary is shown on both plans and is in keeping with what the Lerbekmos intended to sell to Strathcona in 1979. I find that Strathcona is limited to the boundaries set out in the two plans and is therefore not entitled to any accreted land related to the parcel delineated in plan 5231NY and plan 802-1713, both of which, in my view, must be given substantial weight in determining the disputed boundaries as the plans are quite precise so that proper dimensions can easily be ascertained.

[16] In so far as lots 13 and 1 are concerned these two lots along with lots 12 through to 2 were originally set out in subdivision plan 2611ET. The easterly boundary was fixed by subdivision survey where the survey adopted the easterly boundary that coincided at the time with what had been the bank of Cooking Lake as found in 1936. The plan was registered in May of 1938.

[17] Exhibit 7, the Wesolowsky Report, confirms the east most boundary of the lots as the 1936 bank line.

[18] In my view since the titles to lots 1 and 13 make reference to subdivision plan 2611ET the boundaries are governed by the survey plan which must be given substantial weight in determining the boundary lines of the lots. Hence, the County of Strathcona has no claims for accretion to lots 1 and 13 since I find the County of Strathcona not a riparian owner.

OTHER LOT OWNERS IN SUBDIVISION PLAN 2611ET

[19] All of the lot owners in subdivision plan 2611ET have reference to the subdivision plan in their legal titles and, in my view, are bound by the description which sets the eastern boundary at what was the 1936 bank of Cooking Lake which was ascertained by survey.

[20] In my view then the lot owners have no riparian claim to accreted land as their easterly boundary is fixed and not subject to movement and they are therefore not riparian owners.

McGOWAN CLAIM

[21] Gary McGowan advances two claims. First, he seeks, as a riparian owner, accreted lands to lot 2, block 3, plan 862 2863 which is located in the S.W. 24-51-22-W2nd.

[22] Accreted lands had previously been added to the title to lot 2, block 3 by plan 867-2863.

[23] There is no contention to the McGowan claim for accretion to lot 2, block 3 and accordingly there will be a finding that Gary McGowan is entitled as riparian owner to title to all accreted lands to the east of his property; even though the potential accretion from 1986 to present does not appear to be great, nevertheless, it is conceded that such has slowly and imperceptibly increased over the last 19 years.

[24] The second claim by McGowan is for land that is south of his lot and that lies in NW 13-51-22-W4th.

[25] The basis for this claim is that of adverse possession. Over the years Gary McGowan and his family have created and maintained a path from the southwest corner of the McGowan lands extending in more or less of an arc into the NW 13-51-22-W4th rejoining the McGowan land at approximately the southeast corner.

[26] McGowan called considerable evidence to demonstrate adverse possession through himself and John McEwen and Eugene Leich.

[27] I adopt the test for adverse possession as used by Justice Dea in *Edwards v. Edmonton Beach Resorts Ltd.* (1992), 130 A.R. 375.

[28] There is other evidence from area residents that the land in question was commonly used and, indeed, McGowan agreed that others used the path from time to time. The element of exclusive possession, I find, has not been proven on a balance of probabilities and I therefore deny this aspect of McGowan's claim.

MISCELLANEOUS MATTERS

[29] The first matter to be considered is the Crown lease found at Tab 1 of Exhibit 22. The lease is between Her Majesty the Queen and County of Strathcona and ran from the 1st of June 1980 for 21 years and covered:

TOWNSHIP 51 RANGE 22 WEST OF 4TH
ALL THOSE PORTIONS OF LEGAL SUBDIVISIONS 13 AND 14 OF
SECTION 13 OF THE SAID TOWNSHIP WHICH COMPRISES THE
EXPOSED BED AND SHORE OF COOKING LAKE 18.67 ACRES MORE OR
LESS.

The lease contemplated that the County of Strathcona would use the land for open space recreational purposes.

[30] If indeed the Crown claims to be able to lease section 13 which comprises the exposed bed and shore of Cooking Lake, then perhaps the land sought as accreted land by the land owners in and around Grandview Bay is indeed Crown land. In my view it is Crown land to deal with as the Crown sees fit. As well this being Crown land adjacent to McGowan's but in a different quarter section, applying the law as I understand it from *Johnson v. Alberta (Minister of Public Works)* [2004] A.J. No. 1592, such land is not capable of forming a part of McGowan's land as McGowan is limited to his own quarter section.

[31] The next matter to deal with is the claim by the Plaintiff Andriets in trespass as against the defendants Peter Brian Todd and Lynn Francis Forsythe. It is alleged they erected a fence running diagonally across the accreted land allegedly belonging to the Andriets.

[32] The evidence suggests that the Andriets built a fence on their property and that Todd and Forsythe may have put up a countering fence line on the Andriet property. However, having reviewed the pertinent evidence, and in view of my earlier findings I am not satisfied to the required standard that the plaintiffs have established their case for trespass in identifying who trespassed, if anyone, or, more particularly, that it was on the plaintiffs' property. In short this aspect of the plaintiffs' claim is not established and the claim is dismissed.

TENANTS IN COMMON

[33] Counsel for Gary McGowan proposed a rather unique solution that would in a sense recognize everyone's claim to some extent. The submission is that all the parties to the litigation be accorded riparian rights to the meadow with McGowan having rights based on adverse possession and that all parties then hold the land as tenants in common; thus preserving certain of the claimants riparian rights, for example, access to the water, etc.

[34] This submission is intriguing but at this stage it is too early to invoke such a process. The parties themselves could arrive at a solution similar to the tenants in common proposal, but it would have to be voluntary and ultimately registerable.

[35] Lastly all counsel agreed that whatever decision was reached by the Court with respect to the various claims that consultation would be undertaken with counsel for the Crown, who took no part in the trial, with a view to working out a plan for registration with all parties agreeing to use the Wesolowsky Report and his 2005 survey as a springboard to a registerable plan.

[36] Each party will be responsible for their own costs, in light of the difficulty and necessity of resorting to the Court to determine the boundaries before registration of titles could be affected.

[37] In giving consideration to my decision I have considered the many authorities referred to by counsel.

[38] Some cases deal with natural boundaries occasioned by reference to rivers for example: *Clarke v. Canada Attorney General* [1930] S.C.R. 137; *Chuckry v. Manitoba (Minister of Public Works)* [1973] S.C.R. 694; *Robertson v. Alberta South Alberta Land Registration District* [2000] A.J. No. 551, 2000 ABQB 1020; while other cases deal with sections, quarter sections or legal subdivision plans or surveys and their impact on boundaries: *Johnson v. Alberta (Minister of Public Works supply and Services)* [2004] A.J. No. 1592, 2005 ABCA 10 Docket: 01-00398; *Nastujus v. Alberta (North Alberta Land Registration District)* [1989] A.J. No. 12, Appeal No. 8703 0476 AC.

[39] Invariably the context in the reported decisions involved several parties claiming the same land, however, either the common law rights of riparian land owners offered up an answer, or resorting to the integrity of the survey system coupled with the Torrens system of registering title offered up an answer, and occasionally disputes could be settled by having regard to various survey techniques. However, in the peculiar circumstances of this case none of the usual methods for determining disputed boundaries brought about a fair and equitable conclusion, hence my resort to giving significant weight to the various plans to establish boundaries.

[40] I wish to thank counsel for their briefs which aided me significantly in coming to my decision.

Heard on the 21st day of October, 2005.

Dated at the City of Edmonton, Alberta this 21st day of November, 2005.

**F.F. Slatter for
D.W. Perras, pursuant to Rule 391.
J.C.Q.B.A.**

Appearances:

Brian Doherty
Doherty Schulhaus
for the Plaintiffs Douglas and Jacqueline Andriet

Thomas D. Marriott
Brownlee Fryett
for the County of Strathcona, William Johansson, Brian and Judy Dawson, Lynn
Forsythe and Peter Todd

Kevin P. Feehan
Fraser Milneer Casgrain LLP
for Gary McGowan

David Kinloch
Alberta Justice, Civil Litigation
For the Crown

Donald and Sheila Mills
On own behalf

Kenneth and Patricia Schley
On own behalf