

KING'S BENCH FOR SASKATCHEWAN

Citation: **2024 SKKB 100**

Date: **2024 05 24**
File No.: QBG-RG-01210-2021
Judicial Centre: Regina

BETWEEN:

VILLAGE OF BUENA VISTA

APPLICANT

- and -

DAWN MARIE GARNER, NOLAN WILLIAM GROSS, LYLA MABEL PETERS, RANDY GRETER, ANITA GRETER, KEVIN DEAN FAREBROTHER, CHERYL LYNN FAREBROTHER, LEON ALEXANDER SCOTT, ELAINE MARIE SCOTT, BUENA VISTA LAKEFRONT HOLDINGS INC., THE GOVERNMENT OF SASKATCHEWAN and THE REGISTRAR OF TITLES

RESPONDENTS

Counsel:

Roger J.F. Lepage and Titli Datta

for the applicant

Jordan P. Hardy, K.C., Milad Alishahi and Shawna L. Sparrow for Dawn Marie Garner, Nolan William Gross, Lyla Mabel Peters, Randy Greter, Anita Greter, Kevin Dean Farebrother, Cheryl Lynn Farebrother, Leon Alexander Scott, Elaine Marie Scott and Buena Vista Lakefront Holdings Inc.

No one appearing for The Government of Saskatchewan and The Registrar of Titles

JUDGMENT
May 24, 2024

BALDWIN J.

The Application

[1] The Village of Buena Vista [village], by originating application, seeks

declaratory and other relief relating to the boundaries of certain parcels of land [parcels] on Last Mountain Lake [lake]. The represented respondents are the registered owners of those parcels [cabin owners]. The cabin owners oppose the relief sought by the village. The Government of Saskatchewan [provincial Crown] and the Registrar of Titles [Registrar] have been served with notice of these proceedings but have taken no part in them.

Litigation History

[2] The village’s originating application, returnable on July 8, 2021, was filed and issued on June 9, 2021. The relief being sought by the village is described as follows in the originating application:

- (a) A Declaration that the Crown in right of Saskatchewan is the lawful owner of the land forming the bed and shore of Last Mountain Lake, which lies within the SE, SW and NW 13-21-22 W2 and the NE and NW 14-21-22 W2 immediately to the northeast of the bank;
- (b) A Declaration that the right-of-way shown on Plan AO3251 includes those portions of the right-of-way that are covered by the waters of Last Mountain Lake;
- (c) A Declaration that those portions of the following parcels (the “Lake Shore Properties”) that lie, in whole or in part, northeast of the bank of Last Mountain Lake are owned by the Crown in right of Saskatchewan:

Parcel #	Reference Land Description
203828890	Parcel A, Plan 101405012, Ext 8 (NW 14-21-22-2)
203828902	Parcel G, Plan 101405012, Ext 11 (NW 14-21-22-2)
203828889	Parcel E Plan 101405012 Ext 7 (NE

	14-21-22-2)
110257848	Lot 3, Block 39, Plan 89R70332 Ext 0
111321560	Unit 1, Plan 99SE29813, Ext 1
111321560	Unit 2, Plan 99SE29813 Ext 1
152959405	SE 13-21-22-2 Ext 2
112496137	SW 13-21-22-2 Ext 94
145272056	NW 13-21-22-2 Ext 56

- (d) Boundaries of the right-of-way shown on Plan AO3251 and the parcels lying between the said right-of-way and the bank of Last Mountain Lake shall be determined in conformity with the foregoing declarations, *The Land Surveys Act, 2000*, and *The Land Surveys Regulations*;
- (e) The Village of Buena Vista is authorized to submit a Plan of Survey prepared by a Saskatchewan Land Surveyor in conformity with the foregoing declarations, *The Land Surveys Act, 2000*, and *The Land Surveys Regulations* to the Controller of Surveys for approval; and
- (f) The Registrar of Titles is directed to make all necessary corrections in the Registry of Titles, to cancel existing titles and to issue new certificates of title required to give effect to the above order based on the said Plan of Survey.

[3] The originating application was supported by a draft order, an affidavit of Lorna Davies, then the village's chief administrative officer, sworn March 25, 2021 and an affidavit of Barry Clark, a land surveyor, sworn May 4, 2021. Mr. Clark also executed a certificate of expert on June 9, 2021. This supporting material was filed on July 6, 2021.

[4] On August 13, 2021, the hearing of the originating application was adjourned *sine die* returnable on 30 days' notice.

[5] The matter was brought back before the court in June 2023. On June 28, 2023 Tochor J. (as he then was) granted a consent order relating to filing deadlines. He also directed that the matter be placed on the September 26, 2023 chambers list for the purpose of confirming that the filing deadlines had been met and that any preliminary applications were determined.

[6] Also on June 28, 2023, the cabin owners filed affidavits of Randy Greter, Kevin Farebrother, Leon Scott, Lyla Peters, Nolan Gross, Rob Duguid, Blake Wahl and Heather Bennett, sworn or affirmed between August 2021 and June 2023, in response to the originating application. The individual deponents, other than Mr. Wahl and Ms. Bennett, are cabin owners. Mr. Duguid is a representative of the corporate respondent. Mr. Wahl and Ms. Bennett are land surveyors. A supplementary affidavit of Mr. Duguid was filed on August 15, 2023.

[7] On September 1, 2023 the village filed an affidavit of Krista Manz, the village's current chief administrative officer, in reply, as well as a brief of law on the originating application.

[8] The cabin owners filed an application to strike portions of the affidavit of Ms. Manz on September 14, 2023. The cabin owners filed a draft order supporting the application to strike and a brief of law in response on the originating application on September 15, 2023.

[9] The village filed a reply brief of law on the originating application on September 27, 2023.

[10] On October 3, 2023 Tochor J. (as he then was) ordered timelines for the filing of briefs of law on the cabin owners' application to strike. Those briefs of law were filed on October 17, 2023 (by the cabin owners) and on October 25, 2023 (by the village).

[11] On October 31, 2023 Mitchell J. concluded that all preliminary steps and requirements had been fulfilled and directed the local registrar to schedule a one day hearing of the originating application and application to strike in consultation with the parties. On November 8, 2023 the local registrar scheduled a one day hearing for April 26, 2024.

[12] The originating application and application to strike came before me for hearing on April 26, 2024. At the outset of the hearing, I advised counsel that it was my intention to reserve judgment on both applications on the basis that, in the circumstances of this case, it did not seem necessary to have a determination of the application to strike in advance of arguments being made on the originating application. Counsel did not object to this course of action.

[13] I heard arguments from counsel on both applications and reserved my decisions. I also granted counsel for the village leave to file further submissions on case law raised by counsel for the cabin owners for the first time at the hearing. These further submissions were filed on May 8, 2024.

Application to Strike

[14] The cabin owners take issue with certain portions of the affidavit of Ms. Manz on the basis that they contain statements of opinion, argument and hearsay. The village maintains that the evidence contained in the affidavit is proper and admissible.

[15] I agree that there are statements of opinion and argument in the affidavit as alleged by the cabin owners. I do not consider those statements to be evidence before me. However, I note that most, if not all, of these statements were properly raised by the village in argument before me. As such, I do not find the inclusion of this material in the affidavit to be egregious or even of sufficient significance to warrant an application to strike.

[16] As for the impugned hearsay in the affidavit of Ms. Manz, I note that there is similar hearsay included in the affidavit of Mr. Duguid filed by the cabin owners, although no application to strike has been filed by the village. While two wrongs do not make a right, the fact that both parties have attempted to put this kind of evidence forward is relevant to my determination of the costs associated with the application to strike.

[17] The impugned portions of the affidavit of Ms. Manz are struck for the reasons proffered by the cabin owners. The parties will bear their own costs of the application to strike.

Originating Application

Evidence

[18] As noted above, both parties filed significant affidavit evidence in relation to the originating application. I have reviewed all of that evidence but do not find it necessary to recount most of it in any detail given the decision that I have reached on the originating application. I will refer to certain evidence in the analysis that follows.

Arguments

[19] Both parties filed extensive written arguments which were summarized in and supplemented by counsel's oral submissions to me. I have considered all of those arguments but will not analyze many of them given the decision that I have reached on the originating application. I will refer to certain arguments in the analysis that follows.

Analysis and Decision

[20] The originating application raises a number of complex legal issues.

[21] The land at issue was initially surveyed in 1882 and was the subject of grants by the federal Crown to individuals in 1891, 1893 and 1901 [grants]. Over the years since, the parcels subject to the grants have been transferred to subsequent registered owners. The cabin owners are the registered owners of the parcels at present.

[22] On a very basic level, the village takes the position that the bed and bank or shore of the lake belong to the provincial Crown and not to the cabin owners. The village has obtained a preliminary plan of survey from Mr. Clark which confirms the village's position. The village wishes to formalize the preliminary plan of survey as a final plan of survey for submission to Information Services Corporation [ISC]. The cabin owners take the position that they own portions of the bed and bank or shore of the lake as part of the parcels and are treating those portions of the lake accordingly.

[23] The village asked the cabin owners to agree to the formalization of the preliminary plan of survey as a final plan of survey for submission to ISC. The cabin owners objected to this course of action. The village then filed the originating application.

[24] The originating application is made pursuant to Rule 3-49 of *The King's Bench Rules* and s. 21 of *The Land Surveys Act, 2000*, SS 2000, c L-4.1 [LSA] which read as follows:

The King's Bench Rules

Actions started by originating application

3-49(1) An action may be started by originating application if the remedy claimed is:

...

(e) the declaration of an interest in or charge on land, including the nature and extent of the interest or charge of the boundaries of the land, or the settling of the priority of

interests or charges;

...

(2) An action may be started by originating application if an enactment or these rules authorize or require an application, an originating application, an originating notice, an originating summons, a notice of motion or a petition to be used.

(3) An action may be started by originating application if an enactment provides for a remedy, certificate, direction, opinion or order to be obtained from the Court without describing the procedure to obtain it.

(4) An originating application must:

(a) be in Form 3-49;

(b) state the claim and the basis for it;

(c) state the remedy sought; and

(d) identify the affidavit or other evidence to be used in support of the originating application.

The Land Surveys Act, 2000

Boundaries of parcels with natural monuments

21 Notwithstanding any other provision of this Act, where a natural monument that is a bank or centre line of a body of water has been used as a monument and its location has changed over time, the boundaries of the parcel may only be determined:

(a) by agreement of all the registered owners for any parcel that uses the natural monument to mark, reference or witness a boundary; or

(b) by court order.

[25] The village says that the bank or shore of the lake is a natural monument which has been used as a monument as contemplated in s. 21 of the *LSA* and that the location of the bank or shore of the lake has changed over time. Since the cabin owners have not agreed to the formalization of the preliminary plan of survey as a final plan of survey for submission to ISC, the village says that ss. 21(a) does not apply. The village

points out that ss. 21(a) refers to “agreement of” rather than “agreement among” all registered owners and argues that this choice of wording is significant. The village therefore applies for a court order under ss. 21(b) citing *TCRT Investments Inc. v Saskatchewan (Registrar of Titles)*, 2014 SKQB 415, 464 Sask R 205 [TCRT] as an example of the application of s. 21 of the *LSA* under similar circumstances.

[26] The cabin owners take the position that the boundaries of the parcels were never defined by the bank or shore of the lake. The cabin owners add that, even if the bank or shore of the lake was a natural monument which has been used as a monument, all registered owners agree as to the determination of the boundaries of the parcels. It therefore follows, say the cabin owners, that s. 21 of the *LSA* has no application to the parcels and cannot be used by the village as the basis for its application. Finally, citing *Regent v Registrar of Titles*, 2022 SKQB 102, the cabin owners say that the village has no personal or public interest standing to make an application under s. 21 of the *LSA*.

[27] The cabin owners characterize the issue of the ability of the village to make an application under s. 21 of the *LSA* as a threshold issue to any consideration of the substance of the originating application. I agree with this characterization and have approached my analysis on this basis.

[28] In order for s. 21 of the *LSA* to apply to the boundaries of these parcels, a natural monument must have been used as a monument and the location of the natural monument must have changed over time. The parties disagree as to whether this is the case here. The village notes that the grants specifically refer to the shore of the lake. The cabin owners counter that the grants specifically rely upon and reference the 1882 plan of survey which, the cabin owners say, is determinative of the boundaries without the need to consider the location of the bank or shore of the lake. A determination of which position should prevail on this issue would require a full analysis of the substance of the originating application. This type of analysis should only be done in the context

of a properly brought application and I conclude below that the originating application is not a properly brought application

[29] I will therefore assume for the purposes of the following analysis that there is a natural monument used as a monument here and that the location of the natural monument has changed over time. With this assumption, s. 21 of the *LSA* contemplates an application to the court for determination of the boundaries of a parcel where there is no agreement of the registered owners as to the boundaries.

[30] The cabin owners are the registered owners of the parcels at issue. There is no disagreement among the cabin owners as to their boundaries. The only other potential owner of any of the land contained in the parcels is the provincial Crown pursuant to *The Provincial Lands Act, 2016*, SS 2016, c P-31.1. The village is not and does not seek to be an owner of any of the property with which the originating application is concerned. Rather, it seeks a declaration as to the provincial Crown's ownership of the bed and shore of the lake. The village seeks relief for the provincial Crown that the provincial Crown does not seek for itself. The provincial Crown was served with notice of the originating application but has taken no part in these proceedings presumably confirming that there is no disagreement in relation to boundaries on the part of the provincial Crown that it sees fit to litigate at this time.

[31] The *TCRT* decision relied upon by the village does not assist the village on the issue of whether it can make application under s. 21 of the *LSA*. The parties in that case were registered owners of adjacent parcels who disagreed as to the boundaries of those parcels thereby directly engaging s. 21. That is not the case here.

[32] The village maintains that, notwithstanding the fact that it is not a registered or potential owner of any of the property at issue, it has an interest in the determination of the boundaries of the parcels that permits it to bring the originating

application. The village describes its interest as that of “the authoritative body tasked with the administration of the village” (village reply brief of law, para. 13) and says that determination of the boundaries will enable it to draft bylaws and make appropriate rules and regulations.

[33] The evidence tendered by the village identifies the following interest that the village has in the determination of the boundaries of the parcels:

- a. in recent years, it has been a subject of controversy in the village as to whether the cabin owners can rent out boat slips on the lake, mainly to other residents of the village (Ms. Davies affidavit, para. 4);
- b. in 2018 the boundaries of the village were altered by Ministerial Order to include the parcels for which the cabin owners are the registered owners following a notice to the public and a public meeting (Ms. Davies affidavit, para. 12); and
- c. the notice to the public which preceded the Ministerial Order described the reasons for expanding the boundaries of the village to include the parcels as:
 - i. other municipalities bordering the lake include portions of the lake within their boundaries;
 - ii. the addition of the lands will permit the village to adopt bylaws relating to the safety, health and welfare of people and to business activities involving the lands (Ms. Manz affidavit sworn August 30, 2023, para. 17 and Exhibit F).

[34] On the basis of the village’s evidence, the only clearly identified interest that the village has in the determination of the boundaries of the parcels is the village’s

desire to adopt bylaws including bylaws relating to the business activity engaged in by the cabin owners who are renting boat slips on the lake. There is no indication in the evidence before me that the village is not able to do this regardless of whether the land under and around the boat slips is owned by the cabin owners or by the provincial Crown. The evidence of the village falls short of establishing that the village has any legal or other interest at stake which would be affected by a determination of the boundaries of the parcels.

[35] I would be remiss at this juncture of my analysis in not mentioning an unusual aspect of the *LSA*. Although the entire statute received royal assent in 2000, there is a complete part relating to boundary confirmation which remains “not yet proclaimed” over 20 years later. Neither party was able to provide any insight as to why this is the case. The not yet proclaimed part of the *LSA* creates a procedure for applying to the Registrar to confirm the true location of the boundaries of a parcel where doubt exists as to the true location. It appears that the not yet proclaimed part contemplates that such an application could be made by or on behalf of the council of a municipality.

[36] I raised this observation about the not yet proclaimed part of the *LSA* with counsel for the parties at the hearing of the originating application. Counsel for the village did not advance any argument relating to the effect, if any, of the not yet proclaimed part of the *LSA* on my decision on the ability of the village to apply pursuant to s. 21 of the *LSA*. Counsel for the cabin owners suggested that the fact that the part has not been proclaimed means that it should simply be ignored. Alternatively, the cabin owners submit that the fact that the part has not been proclaimed should be seen as an indication that the process described in the part, including the possibility that an application could be made by an entity which is not a registered owner of a parcel, has been specifically considered and purposefully not pursued.

[37] In light of the submissions of the parties, I have not considered the not yet proclaimed part of the *LSA* in my determination of the authority and/or standing of the village to bring the originating application pursuant to s. 21 of the *LSA*.

Conclusion

[38] In my view, *TCRT* is authority for the proposition that boundaries are to be determined by the court under ss. 21(b) “where there is no agreement among the registered owners” as described by Rothery J. in para. 16 of that decision. Here there is agreement among the registered owners and a lack of disagreement from the provincial Crown and, therefore, no determination by the court is necessary. Further, the village has not established that it has any legal or other interest at stake which would be affected by such a determination by the court.

[39] The situation before me does not engage s. 21 of the *LSA*.

[40] On the basis of my conclusion on this threshold issue, it follows that the village’s originating application must be dismissed.

Costs

[41] The cabin owners are the successful parties on the originating application. As such, they are entitled to their taxable costs.

J.
M.A. BALDWIN