

SUPREME COURT OF YUKON

Citation: *Takhini Hotsprings Ltd. v.
Government of Yukon*, 2013 YKSC 21

Date: 20130328
S.C. No. 12-A0069
Registry: Whitehorse

Between:

TAKHINI HOTSPRINGS LTD.

Petitioner

And

GOVERNMENT OF YUKON

Respondent

Before: Mr. Justice R.S. Veale

Appearances:

Meagan Lang
Mark Radke

Counsel for the petitioner
Counsel for the respondent

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application by Takhini Hotsprings Ltd. for a declaration that the exception and reservation of “the land forming the bed or shore of such waters” in Crown Grant 18693 are void. The Government of Yukon is the respondent in this case, because it has stepped into the shoes of the federal Crown in this matter pursuant to the Devolution Transfer Agreement dated October 29, 2001. The Government of Yukon takes no position with respect to the declaration sought, so long as it does not prejudice the rights of the Commissioner under the *Territorial Lands (Yukon) Act*, S.Y. 2003, c. 17 and the *Waters Act*, S.Y. 2003, c. 19.

BACKGROUND

[2] Takhini Hotsprings Ltd. is the registered owner of lands legally described as Lot 1094, Quad 105 D/14, Plan 65422, Yukon Territory (the “Land”). The Land was granted by the Crown on August 13, 1949 (the “Crown Grant”), in fee simple subject to the following exception and reservation as set out in the Crown Grant:

Saving, excepting and reserving nevertheless unto Us, Our Successor and Assigns, all navigable and other waters that now are or may be hereafter found on, under or adjoin, or flowing through, upon or alongside of the said Parcel or Tract of Land or any part thereof, and the land forming the bed or shore of such waters, together with the free uses, passage and enjoyment of, in, over and upon such waters, including the right at Our and their pleasure to divert and use, and to grant to other the right to divert and use, the same for any purpose free from any claim of the grantee as riparian proprietor or otherwise however; (emphasis added)

[3] Plan 40380 CLSR, dated November 14, 1947, depicts a hotspring that was diverted by way of a pipe into a log swimming pool. A trickle of water also flowed from the hotspring, which was joined by the overflow from the pool before flowing out of the Land.

[4] Since the issuing of the Crown Grant, the trickle of water has dried up. The water from the spring continues to be diverted to a swimming pool, from which it flows into a pond created by a dyke in or about 1991 and then into a creek that flows out of the Land.

[5] Takhini Hotsprings Ltd. wishes to subdivide the Land and, as part of the process, it must file a subdivision plan with the Land Titles Office. However, the Surveyor General Branch has advised that it cannot approve a plan because the Crown Grant is not clear as to whether the beds or shores underlying historical or existing bodies of water, or both, are to be excluded from the plan as being Crown lands.

DISPOSITION

[6] The specific uncertainty arises because the Crown Grant purports to reserve or except from its operation the beds or shores of waters on the Land at the time of the Grant, “or” the beds or shores that may be found on the Land at a later date. This could be interpreted as granting certain lands to Takhini Hotsprings Ltd. which could be removed from the Grant at a future date if the navigable or other waters were to change course. In my view, that interpretation cannot stand, as it is not permissible to derogate from land contained in the original Crown Grant at a future date. Thus, the proper interpretation is that the use of all navigable and other waters is reserved to the Crown but that the Crown Grant must be interpreted in a manner that the words “and the land forming the bed or shore of such waters” is void.

[7] The Devolution Transfer Agreement dated October 29, 2001, between the Government of Canada and the Government of Yukon agreed to repeal the *Yukon Act* and replace it with a statute that granted the Commissioner of Yukon the administration and control of all Public Land and of all rights in respect of Waters. The *Yukon Act*, S.C. 2002, c. 7, which came into force on April 1, 2003, granted the administration and control of all rights in respect of Waters in Yukon to the Commissioner of Yukon, while retaining the rights in respect of all Waters to Her Majesty in Right of Canada. (s. 48)

[8] In s. 3 of the *Waters Act*, cited above, under the title “Water belongs to Government”, the following is stated:

3(1) The Commissioner has the administration and control of all rights in respect of water in Yukon, other than waters in a federal conservation area as defined in the Yukon Act.

(2) Subsection (1) is subject to any rights granted by or under an Act of Parliament in respect of waters.

(3) Subsection (1) does not apply to the right to the use and flow of waters for the production or generation of waterpower to which the Dominion Water Power Act applies

[9] In my view, it is trite law to say that the Crown cannot grant land at the time of the Grant on terms that derogate that land from the Grant at a future date. As counsel for Takhini Hot Springs Ltd. points out, this would result in great uncertainty, as the land vesting in the grantee would be continually subject to change. To this end, I note the reasoning by Stark J. in *Walker et al. v. Ontario (Attorney General)*, [1971] 1 O.R. 151 (H.C.J.) (aff'd [1972] 2 O.R. 558 (C.A.), [1975] 1 S.C.R 78):

I do not, however, believe that this evidence [about the practice of establishing boundaries on neighbouring lots] assists us in the determination of the particular question at hand. The fact that almost 100 years later, a series of water lots based on a high water mark boundary are granted by the Crown, cannot in any manner adversely affect prior grants made since obviously the Crown could not derogate from its own grant.

[10] The Crown is entitled to reserve its use of all navigable and other waters that are found on the land, but it cannot grant and then take away land forming the bed or shores of such waters.

[11] I therefore declare that Crown Grant 18693 shall be read as not including the phrase “and the land forming the bed or shore of such waters”.

VEALE J.