

Citation: ☀ K'omoks First Nation v. Thordarson and Sorbie  
2018 BCPC 114

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File No: 40041-1  
Registry: Courtenay

**IN THE PROVINCIAL COURT OF BRITISH COLUMBIA**  
(Criminal Division)

**IN THE MATTER OF AN APPLICATION TO ISSUE  
PROCESS ON A PRIVATE INFORMATION**

**K'OMOKS FIRST NATION**

**CLAIMANT**

v.

**RYAN THORDARSON AND AMELIA SORBIE**

**DEFENDANT**

**EX PARTE**

**RULING  
OF THE  
HONOURABLE JUDGE P.M. DOHERTY**

**IN CAMERA**

Appearing for K'omoks First Nation:  
Appearing for Thordarson and Sorbie  
Place of Hearing:  
Date of Hearing:  
Date of Judgment:

J.T. Burns and A. Scherman  
No Appearance  
Courtenay, B.C.  
March 29, 2018  
March 29, 2018

[1] THE COURT: This is an unusual application and, from representations made by Mr. Burns, counsel for the Applicant K'omoks First Nation, unprecedented.

[2] By way of background, K'omoks First Nation, hereinafter referred to as 'K'omoks' or the 'Band', is located in the Comox Valley on Vancouver Island. Rebecca Hardy, one of the affiants, is a member of K'omoks, and as such is in possession of Lot 19, Number 1 Diayeesh Street located on K'omoks land.

[3] Under the *Land Code* adopted by K'omoks, a Certificate of Possession gave the affiant the right to lease the property to non-Band members. Such a lease was entered into by way of a Residential Tenancy Agreement form. Although the *RTA* does not come into play here, it was utilized, I take it, as a matter of convenience to produce a contract-type relationship with tenants.

[4] The renters are Ryan Thordarson and Amelia Sorbie. Under the contract, they were to pay rent of \$1200 a month. They have not paid rent since December 2017, and K'omoks wants them off Band land. After giving them a Notice to Vacate, the Band now considers these people trespassers.

[5] In June of 2016 K'omoks First Nation adopted a *Land Code* in accordance with federal legislation; *The Framework Agreement on First Nations Land Management*.

Section 31.1 of the *Land Code* says:

Any person who resides on, enters or remains on KFN lands other than in accordance with a residence or access right under this *Land Code* or under a Law is guilty of an offence.

[6] Since the renters remain on K'omoks land without approval, they are considered by the Band to be trespassers, and guilty of an offence under the *Land Code*.

[7] Section 47 of the *Land Code* provides:

[1] Unless some other procedure is provided by a Law, the summary conviction procedures of Part XXVII of the *Criminal Code*, R.S.C. 1985, c. 46, apply to offences under this *Land Code* or under a Law.

[8] The Framework Agreement between various First Nation Bands, including K'omoks, was initially signed in 1996 and modified several times over the years. It provides in the preamble:

"First Nations Law" means a law enacted by a First Nation in accordance with its land code.

[9] Section 10.5 provides:

Once a land code is certified by a verifier and takes effect, the land code has the force of law and will be given judicial notice.

[10] Mr. Burns assures me that the *Land Code* has been both certified and verified as contemplated in the Agreement.

[11] In s. 19.2 and 19.3 of the Framework Agreement, the following provisions appear:

19.2 First Nation laws may adopt or incorporate by reference the summary conviction procedures of the *Criminal Code* for the purpose of enforcement.

19.3 Persons may be appointed by the First Nation or the Governor in Council to act as justices of the peace for the purposes of enforcement. *If no justice of the peace is appointed, then First Nation laws will be enforced through the provincial courts.* [Emphasis mine.]

[12] Within the *Land Code* itself, as I have already noted, reference is made to the *Criminal Code*.

[13] In his submissions on this point, Mr. Burns states, starting at page 4:

In addition, ss. 22.1 and 22.2 provide First Nations with the power to create summary conviction offences under their land codes which follow the procedures for the same set out in the *Criminal Code*.

22 (1) a First Nations law may create offences punishable on summary conviction, and provide for the imposition of fines, imprisonment, restitution, community service, or any other means for achieving compliance.

22 (2) a First Nations law may adopt or incorporate by reference the summary conviction procedures of Part XXVII of the *Criminal Code* as amended from time to time.

[14] The *First Nation Land Management Act*, S.C. 1999, c. 24, amended as recently as March 24, 2017, contemplates a prosecution of an offence contrary to a First Nations *Land Code*. Section 22(3) states:

A First Nation may, in relation to prosecutions of contraventions of First Nation laws,

- (a) retain its own prosecutors;
- (b) enter into an agreement with Her Majesty and a provincial government for the use of provincial prosecutors;  
or
- (c) enter into an agreement with Her Majesty for the use of agents engaged by Her Majesty.

[15] K'omoks First Nations makes an application to prosecute the trespassers by way of a *Criminal Code* Information. K'omoks says this is necessary because the local RCMP, having no experience with this sort of thing, is wary of pursuing the matter by way of an investigation and perhaps a Report to Crown Counsel that might result in a prosecution. I am not sure that would do any good, even if it transpired, because both the Provincial Prosecution Service and Crown Federal have declined to assist K'omoks. I expect that is because unlike, for example the recently signed, *Tla-amin Final Agreement Act* that would invoke 22[3] [b] and [c], K'omoks has yet to sign such an

Agreement.

[16] This leaves the K'omoks First Nations in a situation where their case must be pursued under 22[3] [a]. The Band has a law on the books that may give relief from trespass, by way of a court order, but no ability to enforce the law without the cooperation of authorities outside the Band, unless it assumes the burden of prosecution.

[17] K'omoks First Nations, therefore, has applied to this Court pursuant to s. 508 of the *Criminal Code* for what has been deemed as a private prosecution or prosecution by the Band. That section of the *Criminal Code* provides a justice who receives information laid under s. 505 shall hear and consider ex parte the allegations of the informant and the evidence of witnesses where he considers it desirable to do so.

[18] I have not had to hear witnesses. The information provided by the affiant is extensive and satisfactory.

[19] Where it considers that a case for doing so is made out, the Court may confirm the appearance, notice, promise to appear, recognizance, cancel the appearance notice or, if a case has not been made out, cancel all of it.

[20] In my respectful view, K'omoks First Nations is entitled to a remedy. It seems to me, one way to provide that remedy is to permit the laying of the Information sworn January 17, 2018. That says the informant has reasonable and probable grounds to believe that the two individuals who were leasing the property:

. . . are living on K'omoks First Nation Land, Indian Reserve #1, Lot 19, at 3260 Diayeesh Avenue, Courtenay, British Columbia, V9N 5S6 (the "K'omoks Land") without a lawful residence or access right, in violation of s. 31.1 of the *K'omoks Land Code* . . .

[21] I think what is contemplated here in the long term is a *Criminal Code* action that would, upon successful prosecution, permit the Court to make an order, perhaps by way of probation, to force these individuals off the property. That remedy would be available as well as other relief referred to in the *Land Code*.

[22] The Information may go forward.

[23] As I said to Mr. Burns during the course of his submissions, this case cries out for an opposing argument. Unfortunately, at this juncture that argument is not available to the Court and will only be presented should the Information itself be attacked at a later date.

[24] I recognize the Band may be entitled to pursue injunctive or other relief in another arena, instead of using the very blunt instrument of the *Criminal Code* to solve, what currently seems to them an unsolvable problem. My role is not to second guess their approach to the problem, my role is to determine whether, in all the circumstances, the Band may prosecute the Information that is before me. I am of the view the Band has established a case that should go forward in Provincial Court.

[25] Reading the material in support of the Application, the Court has been made aware that the people currently living on band land at #1 Diayeesh Street are quite hostile. Of special concern is that one of these individuals has a serious criminal record.

[26] As a result, I am going to direct that the Information, accompanied by a Summons with a return date, be served by a peace officer. I am going to suggest, Madam Clerk, that the summons that should be now drawn with a return date two

weeks from today at 9:00 a.m., April 19.

[27] Judgment accordingly.

(Reasons concluded)