

IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20181207
Docket: S133488
Registry: Vancouver

Between:

Douglas Lake Cattle Company

Plaintiff

And

**Nicola Valley Fish and Game Club and Her Majesty
the Queen in Right of the Province of British Columbia**

Defendants

And

Attorney General of British Columbia

Defendant
By Way of Counterclaim

Before: The Honourable Mr. Justice Groves

Epilogue

[1] Having made the determinations that I have in this case, I feel I would be remiss if I did not address what in my view are the elephants in the courtroom, to use an appropriate modification to an old saying.

[2] This factually driven case involves a determination of whether or not a road is a public road. From what I have learned in hearing evidence in this case there is in British Columbia no level of certainty about that issue generally. There is apparently no full inventory of roads nor is there any survey of many rural roads that transverse the Province.

[3] This case involves, at least in part, the determination of the boundaries of lakes. There is no doubt in law that lakes in British Columbia are owned by the

Crown, but what does that mean in terms of the legal consequence of that ownership?

[4] This case is about access to lakes. As I say in my reasons in discussing the argument advanced about common law access, it makes no sense to me that the Crown would retain ownership of lakes, only for there to be no access because someone owns initially through Crown grant, or subsequently by purchase, all the lands surrounding the lake.

[5] These are broad issues of real significance that cannot be decided based on litigation between two primary protagonists about these two lakes.

[6] And the problem will simply get larger as time passes. Simply put, there is no more land to be created, and there are likely no more lakes to be created. Our province is growing and the legitimate demands of rural landowners who may make their living off the land will no doubt continue to come in conflict with the legitimate actions of citizens who desire to access lakes for recreation, fishing, or simple enjoyment.

[7] Within the confines of this litigation, in fact, there is an example of another dispute, now of a historical nature, involving access to Paradise Lake and the ownership of the road to it.

[8] It is not hard to conceive that litigation of this type will become commonplace, and litigation is an expense and time consuming. As there is no road inventory, if someone wants to dispute or prove the road's existence, those affected will have to litigate. If ownership of lands becomes consolidated around government owned bodies of water, and access to this water is denied, those affected will have to litigate. Though I do not know this with any certainty, I do not doubt that the same issues argued here are likely to be at play in other litigation currently underway in our Province.

[9] There is another elephant in the room, the *Trespass Act*, R.S.B.C. 1996, c. 462 [Act]. The Act on one interpretation says that if your land is flooded, and

someone crosses that water, that is still trespass. I can guess this *Act* was intended for circumstances of temporary flooding; that makes sense. This *Act* is an historic piece of legislation, no doubt original, passed in the 1800s, a time when the circumstances here may not have been in the reasonable contemplation of those who passed it. By the circumstances here, I mean the purposeful flooding of your own land, with government owned water, potentially for irrigation storage but with the added benefit of surrounding a government owned lake bed with water on your own land. This then could result under one interpretation of the *Act* with an ability to deny access. Then, as here, make a claim that the original lake is now your own. Is that really what the Legislative Assembly of British Columbia intended?

[10] Having raised a serious question, I wish to talk about something that we should all hold dear, the very good fortune we have as Canadians to live in a country in which the rule of law applies.

[11] The concept of the rule of law is sometimes a difficult one for those who are not legally trained, and frankly some who are, to wrap their minds around.

[12] The rule of law at its core guarantees certain principles. One principle it guarantees is that persons or parties have the opportunity in Canada, if they feel there is a wrong to right, to appear before an independent court to have their matter adjudicated on the basis of the evidence presented in court.

[13] An independent judiciary is fundamental to the rule of law. An independent judiciary is beholden to no government. It is beholden to no establishment figure, however you define it. An independent judiciary determines issues based on the evidence before it and the law as the presider interprets it or determines it to be.

[14] The rule of law and the independence of the judiciary requires that a judge make a determination based on facts found and law applied and essentially only on that. Judges are not permitted to change laws generally.

[15] Being a judge of a Superior Court in Canada is indeed a humbling experience and a great honour. It has with it however its responsibilities and its limitations.

[16] As judges, we speak in court through our judgements, we do not engage in partisan and political debate.

[17] As judges, we interpret the law and we apply the law, we do not make the law.

[18] The concepts of the rule of law and the independence of the judiciary require that judges play the role of independent arbitrator and do not get involved in setting the rules to the game, so to speak, directly.

[19] As a judge it is not uncommon, as it was in this case, to have one level of government, sometimes even both, as a direct participant in the litigation. As an independent arbitrator of the process, it is not a judge's role to direct governments, at any level, how to govern.

[20] Specifically, and perhaps this is not as universally accepted as I am purporting to say it is today, but it is definitely my view, that it is not the role of an independent judiciary to tell a government or governments how to spend the resources of government, or what laws to pass or to implement or to amend.

[21] Passing laws and spending taxpayers' money is the purview of those who are duly elected to serve, who may campaign on commitments to pass laws or change laws or implement laws and who promise in the electoral process to spend or not spend taxpayers' money as the case may be.

[22] I believe laws are passed in order to determine rights and responsibilities between individuals. Those who pass law no doubt consider their impact and their import, but as society changes and circumstances change, sometimes an unanticipated impact of a law becomes apparent. As the years go on, it sometimes becomes apparent that things have to be done by government to establish a sense of order and fairness of universal application for the citizens of the province.

[23] It is not the role of a judge to change the law. At most, a judge can suggest or urge those responsible for laws and expenditure to consider what a judge says. But ultimately, that is their responsibility and their choice.

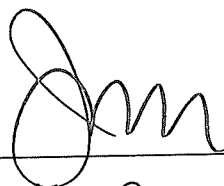
[24] I have been a presider in the superior courts of British Columbia, the BC Supreme Court, for close to 18 years and I have never felt the need until this case to comment to government through my reasons and through this epilogue on a circumstance that has come before me with the hope of urging politicians to act.

[25] The remedy I am urging on government is this. First off, look at the *Trespass Act*. Is that really what you intend in today's world.

[26] Secondly, if you own the lakes of the province, which you do, can you not regulate access? There really is no point to ownership otherwise. The ownership of lake beds is, no doubt in large part, intended to be collectively held for the benefit of all citizens of the province. As that is the case, consider doing what other jurisdictions have done and guarantee access to this precious public resource.

[27] As mentioned in my reasons for judgement, as the province grows, there are more and more competing demands for the use of land and the use of water. Those who make a living off the land should be entitled to do so and should be protected in that activity. Setting fair ground rule for access would provide them with the security they need to operate, live and conduct their business.

[28] My epilogue is done. Thank you counsel. We are dismissed.

A handwritten signature in black ink, appearing to read 'Groves J.', is written over a horizontal line. The signature is stylized and cursive.

Groves J.