C952594
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

Oral Reasons for Judgment
Mr. Justice Low
Pronounced in Chambers
May 26, 1995

BETWEEN:

DOUGLAS LAKE CATTLE COMPANY LTD.

PLAINTIFF

AND:

FRED "SCOTTY" HOLMES
THE UPPER NICOLA INDIAN BAND
JOHN DOE
MARY ROE

DEFENDANTS

R. Hamilton H. Maconachie	Appearing for the Plaintiff
L. Mandell E. Gilmour	Appearing for the Defendants
P. Foy B. Edwards	Appearing for the Attorney General of British Columbia
J. Haig	Appearing for the Attorney General of Canada

1 **THE COURT:** Time does not permit me to say an awful lot about the application to add the Attorney General of Canada and the Attorney General of British Columbia and Her Majesty the Queen in Right of the Province of British Columbia as represented by the

Minister of Transportation and Highways.

2 The argument made against them being added as parties really begs the question; it is that because this injunction application cannot succeed on the basis that there is no triable issue to be argued, that there is no position to be taken by the Attorneys General for the country and for the province. I do not agree with the position taken by the defendants in that regard.

3 The issue here is whether the Provincial Government in particular has the legal power or authority over the roads in question, either in whole or in part. That is an issue that they must be heard on if the issue is to be resolved and it is the principal issue in this case, and so I think for that reason the Provincial Government is properly a party through the Attorney General, and I think the Federal Government is properly a party through the Attorney General because the Federal Government is affected by the issue. It may well become a constitutional issue and they should be heard on it and so for those reasons, as brief as they are, I am going to make the order that the parties sought to be added, be added, and I will hear counsel representing those parties on the merits of the injunction application if they wish to be heard.

(SUBMISSIONS)

4 **THE COURT:** The plaintiff seeks an interim injunction restraining the defendants from in effect impeding passage over a road which crosses two reservations occupied by the defendant band and continues to the plaintiff's large cattle ranch and beyond.

5 The defendants have re-established blockades of the road on each reservation after removing them, following earlier temporary restraining orders of the court. The road which is referred to as a "highway" is the only connection between the plaintiff's ranch and the city of Merritt. I understand that the blockades have been selective; the defendant's target being the plaintiff's substantial commercial activities. The blockades are prompted by an ongoing dispute with the plaintiff, not related to the road or its use.

6 The plaintiff uses the road to truck cattle to market, to bring in supplies, to bring in tourists, and for many other reasons connected with its business. Unavailability of the use of the road to the plaintiff interferes with the plaintiff's business in a substantial way and will no doubt lead to high damages if the blockades continue for any appreciable period of time. In addition, the blockades interfere with the use of the road by other ranchers in the area and many other members of the public.

7 The defendants contend that the plaintiff has not made out a fair question to be tried, namely that the road in question is a

public road and not merely part of the reservation lands of the defendant band. I disagree. The evidence shows that the road has been in existence for more than 100 years and is being used as a public road by many people in the area, including the defendants and no doubt their predecessors. It is a main thoroughfare, a major, and indeed the only, road link with the outside world for many people, again including the defendants.

8 The evidence now before the court shows that the road is at least arguably, if not on a *prima facie* basis, a public road which the defendants cannot lawfully blockade and over which they cannot lawfully impede public traffic. It is arguably a public road under the lawful jurisdiction and authority of the province for many reasons:

(1) The legal effect of Order-in-Council 208 passed in 1930, and Order-in-Council 1036 passed in 1938.

(2) The province's constitutional right to build roads in the province.

(3) The effect of s. 4 of the ***Highway Act*** and the expenditures by the province of public monies on the road for many years, including the portions on the reservations.

(4) The effect of the status quo that has existed for many years and the public interest.

(5) An easement of necessity.

(6) The lawfulness of total or partial closure of the road without reasonable notice, if indeed it is a private road.

9 Many of these issues require further development of the evidence, particularly historical research of the use and location of the road and how it came under provincial *de facto* jurisdiction and control. The issues can be resolved only at trial but they are issues of substance, particularly the first one. There is a fair question to be tried as to the plaintiff's claim that its right to use the road for public access to its property has been breached by the blockades and would be breached by continuation of them.

10 The defendants contend that the road lost any public nature it had because of partial relocations of it on the reservations since 1938. The province says that any relocations do not change the public nature of the road as a whole. That is an arguable issue which stands in the way of permitting blockades, selective or otherwise, at the road re-location points.

11 The balance of convenience clearly favours the granting of the injunction sought and it will go in the terms set out in the notice of motion.

"Mr. Justice Low"