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IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

THE ATTORNEY GENERAL FOR BRITISH COLUMBIA AND HER MAJESTY THE
QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA

PLAINTIFFS

AND:

PERRY RIDGE WATER USERS ASSOCIATION, GUENTHER RETTERATH, FRANK
NIXON, AUSTIN GREENGRASS, PAM STEVENSON, SANDY BLAIKIE, JOHN
DOE AND JANE DOE

DEFENDANTS

ORAL REASONS FOR JUDGMENT
OF THE
HONOURABLE Mr. JUSTICE PARRETT

Counsel for the Plaintiff:

Mr. J. D. Eastwood

Counsel for the Defendant:

Ms. M. E. Sanford and
Mr. R. Brooks

Place and Date of Hearing:

Nelson, B.C.
November 10 - 14, 1997

INTRODUCTION

[1] In the present application Austin Greengrass, Frank Nixon and Pamela Stevenson seek an order setting aside or alternatively rescinding the injunction granted in Vancouver on July 28, 1997 and varied on August 1, 1997.

BACKGROUND

[2] Perry Ridge is an unusual landform which is located generally in the Selkirk Mountains in southeastern British Columbia. The mountain or ridge is a dome-like structure bordered on the east by the Slocan River and on the west by the Little Slocan river. Perry Ridge has a rounded gentle top with abrupt and steep side slopes that drop, at the southern end some 4500 to 5500 feet to the valley floor.

[3] The ridge is approximately 15 miles long and some five miles wide and runs generally from the southwest to the northeast. At its highest point it reaches some 6800 feet above sea level. The lowest point of the Slocan Valley below is some 1600 feet above sea level.

[4] On July 23, 1997 the present action was commenced. The statement of Claim in paragraph 4 describes the defendants as:

. . . members of the Perry Ridge Water Users Association . . . an association of persons concerned about water quality issues in the area of Perry Ridge, B.C. and/or their supporters and/or residents and water licence holders in the vicinity of Perry Ridge.

[5] In the prayer for relief the plaintiffs seek (a) a Declaration that the defendants have trespassed on Crown land (b) a declaration that the defendants conduct constitutes a Public Nuisance, (c) damages for trespass and (d) both an interlocutory and a permanent injunction.

[6] On July 28, 1997 the plaintiffs appeared before the court in Vancouver, where the action had been commenced and sought an interlocutory injunction. Mr. Roberts who in the oral reasons is styled as Counsel for the defendants appeared on behalf of the Perry Ridge Water Users Association only.

[7] After hearing submissions an injunction was issued. The order incorporated a provision which gave the defendants liberty to apply to set aside or vary the order on two clear days notice.

THE APPLICANT'S SUBMISSIONS

[8] The applicant's ask that the injunction in this action be set aside or rescinded. In seeking this result they advance three primary submissions.

- 1) With respect to the present applicants they submit that the order was ex parte and that no real attempt was made to serve them as named defendants but rather to deal with the Perry Ridge Water Users Association through their counsel Mr. Roberts.

In any event, they submit that the material placed before the court on July 28, 1997 by the Crown was inadequate and misleading.

- 2) The second basis advanced is somewhat novel. In essence, Ms. Sanford submits that the authorities make it clear that to resort to civil injunctions is an extraordinary remedy to be utilized in very limited situations and, in particular, not where there are criminal or statutory remedies available, as there are here. The limited exceptions to this general rule include situations where the Attorney General has chosen not to invoke the criminal process. The applicants here submit that these exceptions can never apply where the Attorney General is a party for it is his choice whether or not the criminal process will be invoked.

- 3) Finally, the applicants seek to set aside the injunction on its merits. In this respect they submit that they have placed before the court a body of evidence which clearly demonstrates that the balance of convenience favours the setting aside of the injunction.

THE ORIGINAL ORDER

[9] At the time of the original application there were six affidavits before the court. Four of these affidavits were of relatively limited importance. The affidavits of Paul Rasmussen, William Sproule, George Emile Commandeur and Andy Evin though significant were limited in the factual issues they addressed.

[10] The two principal affidavits were those of Ian Hamann, the Manager of Resource Operations for the Arrow Forest District and Susan Hammond, a director of the Perry Ridge Water Users Association.

[11] In contrast, there are now more than twenty additional affidavits before the court. Not surprisingly, the information before the court is now both more extensive and more complete.

[12] A plaintiff who comes before this court seeking interlocutory injunctive relief is bound by a positive obligation to act in good faith and to make full disclosure to the court. *Champion International Corp. v. Merrill & Wagner Ltd.* (1974) 15 C.P.R. (2d) 190 at p. 194. The positive obligation is imposed because of the nature and potential effect of the interlocutory relief sought. An even more stringent requirement is imposed where the relief sought is both interlocutory and ex parte for in those circumstances the court is being asked of act on the basis of information presented by one party to the dispute.

[13] Where material facts have been suppressed the injunction will ordinarily be set aside, even if the party who obtained it would otherwise be entitled to the order. The rationale for this result can be found in *Rex v. Kensington Income Tax Commrs; Ex Parte Depolinac (Princess)* [1917] 1 K.B. 486 at p. 495 where Viscount Reading, C.J. writes:

If the court comes to the conclusion that the affidavit in support of the application was not candid and did not fairly state the facts, but stated them in such a way as to mislead the court as to the true facts, the court ought, for its own protection and to prevent an abuse of its process, to refuse to proceed any further with the examination of the merits.

[14] The burden cast on the applicant is onerous and the results of any failure to discharge that onus is extreme for the process itself is one that is vital and must be safeguarded.

[15] The reasoning of Viscount Reading has been approved in British Columbia in *Re Canada Rice Mills Employees Association* (1957) 23 W.W.R. 236 at p. 239 and it is of importance that such an omission need be neither malicious nor deliberate so long as it is material. *Monocrest Kitchens Ltd. v. Evans* (1967) 63 D.L.R. (2d) 553.

[16] In examining the material originally placed before the court, in retrospect, there are a number of features of that material which are of concern.

[17] In the statement of claim the defendants are described as ". . . persons concerned about water quality issues. . ." This theme is picked up by Mr. Hamann in his affidavit and juxtaposed to the economic need of accessing the timber, and more importantly the lengthy and extensive process the Ministry has carried out in reaching the decision to construct this access road.

[18] The introduction of this theme begins in paragraph 4 of Mr. Hamann's affidavit where he states in part:

The Arrow Forest District SBFEP program is in critical need of timber. The Arrow Forest District SBFEP program currently has the largest undercut in the Nelson Forest Region. of approximately 368,507 m³. As a result, the Arrow Forest District is committed to opening up new areas of Crown Land to provide merchantable timber for this program and to ensure that timber harvesting in the District is well distributed.

[19] The same theme continues in paragraph 5:

Since 1978, the Ministry of Forests has considered it desirable that a branch road be built off of an existing forest service road, known as the Little Slokan Road in order to access a large quantity of timber contained within Provincial Crown land on Perry Ridge.

(emphasis added)

[20] In paragraph 6 the two themes merge when Mr. Hamann states that:

In the late 70's the Ministry advertised in local newspapers hoping to establish a public advisory committee to assist the Ministry in carrying out its planning for potential timber harvesting activity within Perry Ridge. At that time, local

citizens concerned about the potential effects of timber harvesting on water quality issues formed a watershed committee known as the Perry Ridge Water Users Association. The Association was generally opposed to logging of any type taking place within Perry Ridge.

(emphasis added)

[21] Mr. Hamann goes on to discuss planning and studies including "hydrological impact assessments" carried out between 1979 and 1982. He then discusses the moratorium on harvesting in the Slocan Valley while "extensive public consultations" took place.

[22] In paragraph 9 Mr. Hamann again returns to the need for the timber:

In the mid 1990's it became clear to staff at the Arrow Forest District that timber located on Provincial Crown Land on Perry Ridge would have to be accessed in order to meet the Districts commitment regarding timber allocation for the SBFEP program.

[23] In the next two paragraphs Mr. Hamann describes requesting a meeting with the Association and the Slocan Valley Watershed Alliance and the presentation of the Ministry's proposal for the formation of a technically - based joint planning team and goes on to describe their refusal to participate. In paragraph 11 he refers to a "Backgrounder" he exhibits to his affidavit which he suggests:

. . . sets out the history of the attempts by the Ministry . . . to accommodate the concerns of the SVWA. . .

[24] The entire presentation of this material outlined a process whereby repeated efforts by the ministry to take into account these groups concerns were rebuffed by these interested groups.

[25] In paragraph 13 the affidavit returns to the main theme:

In order to access the merchantable timber located on Crown land within Perry Ridge, the Ministry has contracted with a local contractor to build the Road.

[26] In light of the numerous express references to the purpose of building this road it is more than a little surprising that on the present application counsel for the Crown wishes to restrict the focus of this application to evidence of the environmental impact of the road construction alone. In his submissions he suggested that although logging may take place "eventually" the only concern at present is the environmental effect of this road construction.

[27] With the greatest of respect, that submission is a considerable retreat from the submissions made on July 28, 1997 in Vancouver and from what is contained within the material filed in support of that application.

[28] I will deal initially with the applicant's submission that the material on July 18, 1997 was both inadequate and misleading. The first part of that submission is the

applicant's characterization of the injunction as being ex parte.

[29] It is regrettable that events obscured that real issue of service at the time of the original application. Mr. Eastwood in his dealings with the Perry Ridge Water Users Association had been put in touch with their counsel Mr. Roberts. When Mr. Roberts appeared at the original application he did so solely for the Association. I have before me the affidavit of Austin Greengrass, who is a named defendant in these proceedings, he asserts, and I accept, that he had no knowledge of that application until July 29, 1997 when he saw a copy of the order at the site of the blockade. I see no option but to conclude that so far as Mr. Greengrass at least is concerned this order was made on an ex parte basis.

[30] In reaching this conclusion I do not wish to be taken as being critical of Mr. Eastwood. The problem here flowed in no small measure from his attempts to deal openly with counsel, but where a party resorts to injunctive relief they must be scrupulous in their efforts to insure that the requirements are met. When the decision is made to commence action and bring the application in Vancouver, a site far removed from the location of the events and the defendants, even more care is required to ensure that those parties rights to appear, participate and be heard is not precluded by time and distance.

[31] I have already traced what I have described as two themes in the affidavit of Mr. Hamann. It is time to turn to a third. It is on these two paragraphs of his affidavit that much of the applicant's submissions on this point are centered. Those paragraphs 14 and 15 are best set out in full:

14. Prior to awarding the contract to build the forest service road to Wesley Contracting Limited ("WCL") the Ministry conducted numerous hydrological, slope stability and engineering assessments. The studies which have been conducted meet, and in most cases exceed, the stringent requirements set out in the Forest Practices Code for the construction of a new forest service road. Attached and marked as Exhibit "C" to this my Affidavit is a true copy of a list of reports, plans and assessments which have been undertaken to ensure that both road construction and future timber harvesting within Perry Ridge are as environmentally sensitive as possible.

15. Our contractor WCL has been made aware of the studies which have been done in respect of the Road construction. Some of these studies have been made as appendices of the contract entered into with WCL. Attached and marked Exhibit "D" to this my Affidavit is a true copy of the front page of a study prepared by D. J. Grant Engineering Ltd. which sets out the stability assessment and engineering prescriptions for the Road and which study is Schedule D to the contract between WCL and the Ministry.

(emphasis added)

[32] Exhibit "C" is a list of some 17 reports, plans and assessments dating back to 1979. The reports themselves were not presented to the court and, indeed, in the case of the D. J. Grant Engineering Ltd. study the only portion of it presented was the title page.

[33] I do not go so far as to say that such an approach is never appropriate but it is an approach which in this case created a very specific impression within the context of the themes introduced in the balance of Mr. Hamann's affidavit.

[34] The impression can be fairly characterized, in my view, in this way, the Arrow Forest District is in critical need of timber, we have been studying this matter since 1978, we have sought public input and postponed logging while we consulted the public and extensively studied the matter now we are ready to proceed and these groups won't co-operate. The impression was also created that these opponents were concerned with "water quality" issues and that any concerns in that regard had been attended to by the "numerous hydrological slope stability, and engineering assessments" all of which had been "undertaken to ensure that both road construction and future timber harvesting within Perry Ridge are as environmentally sensitive as possible."

[35] This impression hardly does justice to the concerns of Austin Greengrass. Mr. Greengrass is a 50 year old licensed heavy duty mechanic. He owns 7.5 acres at 6988 Perry's Back road, a road that runs along the base of Perry's Ridge in the Slocan Valley. It is inconceivable that Mr. Greengrass's name and his concerns were not known to the Ministry or Mr. Hamann on July 28, 1997. On October 4, 1996 Mr. Greengrass's property and home had an assessed valued of \$104,000 by the end of that

day or the next it had an assessed value of \$6,900. During the course of that date Mr. Greengrass's property suffered a rotational land slump that dropped approximately 5 acres of his land and the front 1/3 of his house nearly 3 meters.

[36] Mr. Greengrass in his affidavits speaks eloquently of his concerns for the effect road construction and logging on Perry Ridge will have on the many people living below the ridge both as to the quality and quantity of their water supply and the stability and safety of their property. I don't consider it either fair or accurate to characterize Mr. Greengrass as a person concerned with "water quality". While that is certainly one of his concerns it is far from his only or even his major concern.

[37] In the material produced by the applicant's I have seen for the first time some of the technical studies conducted in the Slocan Valley some of which were listed in Exhibit "C" to Mr. Hamann's affidavit. Amongst the studies listed as having been "conducted by the Ministry and having been undertaken to ensure that the road building and timber harvesting are as environmentally sensitive as possible" are the February 1994 and April 1996 Hydrology reports of J. Allen Isaacson.

[38] Neither of these reports was undertaken by the Ministry nor, by any stretch of the imagination is it accurate to suggest that they were undertaken to make sure road building

and timber harvesting was as environmentally sensitive as possible.

[39] Mr. Isaacson's 1994 report was commissioned by and prepared for the Slocan Valley Watershed Alliance. As was apparently, his April 1996 report. Mr. Isaacson is a consulting hydrologist who is in the process of completing his Masters thesis on landslide effects on streams.

[40] The following extracts are representative of the two reports listed in Exhibit "C" of Mr. Hamann's affidavit.

[41] In his February 1994 report Mr. Isaacson writes:

In my opinion, logging the Perry Ridge mountain system would result in irreparable damage to the valley below and to the water users' systems. There may be some sites in the upper basins that are stable or flat enough to be logged. However, to get access to these areas would mean crossing some very unstable slopes that are at the headwaters of very steep entrenched streams. The mid and lower slope elevations of the streams draining from Perry Ridge are very unstable. and would be subject to mass failure with the increased stress of cutting in the headwaters.

[42] His conclusions on page 4 of this report are even more pointed:

It is important to remember that road locations and logging are planned above very steep gradient streams that are going to bring any sediment or mass wasting directly to the valley floor. There is no discussion in any of the reports examined of the impacts downslope of the channeled water and sediment created through activity in the high basins. This critical point for water protection is missing.

In summary, I would recommend against any road building or logging activity on Perry Ridge. If these recommendations are not followed, I would like of have the opportunity to complete a watershed analysis and site specific analysis of the proposed activity sites.

[43] Mr. Isaacson's April 1996 report is more extensive. At one point on page 18 he refers to the SIL 3 Terrain analysis, which was one of the listed reports, he writes:

The SIL 3 terrain analysis states: "There is much greater potential for erosion and sediment than for mass wasting." Sixty percent of Perry Ridge is high to extreme hazard rating for sediment yield or induced mass wasting. These basins are directly above 56 licensed water sources. There are many sites of natural mass wasting and avalanche paths, especially in the Talbot to Watson area. The erosions that will occur from any ground disturbance will flow directly into the incised drainages discussed above. This will cause increased channel erosion and high rates of sediment and sluiced out channels.

[44] I will set out here only one additional quote from this report. His final recommendation reads:

RECOMMENDATION: Do not enter Perry Ridge with road construction, especially the area above an elevation of 4400 feet. Any wetland, bog area, active stream course, and high elevation steep headwater landtypes should be avoided.

[45] I will now turn to two reports which are not contained within Mr. Hamann's list. Both of these reports relate to the investigation of the October 1996 landslide which affected Mr. Greengrass's property and each was presented to the court by Mr. Greengrass.

[46] The first of these reports is dated November 27, 1996 and is prepared by Dwain Boyer the Engineering Section Head for the Ministry of Environment Lands and Parks.

[47] Two extracts from the Executive Summary contained in this report are, in my view, significant:

- 5) Other landslide prone areas have been identified in the area. There is a need to map unstable terrain, in the valley, to make residents aware of unstable areas and to guide future development.

- 9) Although timber harvesting activities were not found to be a contributing factor in this landslide, it is well known that timber harvesting activities can have impacts on surface drainage and near surface groundwater flow. Tree removal, especially larger clearcuts, can result in increased runoff during the snowmelt. Roads, trails and landings can intercept water and cause concentrated flows in areas previously not subjected to such silt flows. Timber harvesting on the east side of Perry Ridge has the potential of increasing runoff and/or altering drainage patterns. Changes such as these could alter the flow patterns on the valley bottom which could result in increased landslide hazard. All timber harvesting proposals on the east side of Perry Ridge should take these concerns into consideration.

[48] The second report is that of Vandine Geological Engineering Limited dated December 10, 1996 and was prepared for Mr. Boyer, and his Engineering section.

[49] In his report Mr. Vandine notes on page 3 "Very little information exists on the subsurface geology of the area." On page 5 he notes that "Several types of terrain instability were noted in the Slocan Valley between Lemon Creek and Winlaw : landslides, debris flows and sinkholes."

[50] The last portion of Mr. Vandine's recommendations are significant:.

For the purpose of land use planning, I recommend that detailed terrain and terrain stability mapping should be carried out for the general area at a minimum scale of 1:20,000, and preferable larger (for example 1:10,000 or 1:5,000 scale). Such mapping is based to a large extent on airphoto interpretations, supported by field checking, and is therefore a cost effective method to map a relatively large area. Such mapping can identify most terrain stability hazards and can be used to classify them as to their relative hazard.

To better understand the correlation between surface water and groundwater in the valley bottom, I recommend that a hydrological study of the valley bottom, investigating the surface water and groundwater flow patterns be undertaken. The detailed terrain map, discussed above, would be useful as the basis of such a hydrological study.

Logging and the associated forest roads likely had little, if any, effect upon the occurrence of the October 1996 landslide. Logging activities, however, can have an effect on landsliding and other terrain stability hazards. Future logging on the east slope of Perry Ridge should only be carried out after all potential downslope and downstream effects are considered.

[51] Next the D. J. Grant Engineering Ltd. report of which the first page only was produced in July, contains an extensive exclusionary clause related to possible landslide problems.

This report was received by the Ministry of Forests on August 20, 1996.

[52] Four of the five technical reports to which I have referred were prepared and delivered within approximately one year preceding the injunction application.

[53] Finally there is the Interim Report of David J. Putt. This report was listed in Exhibit "C" in July 1997 as "ongoing" and is entitled Perry Ridge Hydrologic (Channel And Debris Flow Potential) Assessment. The report is brief and consists of an examination of a number of creek channels which flow from Perry Ridge to the Slocan Valley.

[54] Amongst David Putt's interim conclusions is the following:

- These creeks flow in narrow gullies over angular colluvium and rock in the steeper upper sections and over sandy and gravelly glaciofluvial terraces in their lowermost reaches. Much of the flow from these creeks is either diverted by water diversion works (and eventually infiltrates) or naturally infiltrates into the glaciofluvial terraces. Increasing peak flows and total discharge could contribute to increased downslope instability including piping and slumping in the Jerome and Avis Creek area. d. VanDine describes the instability problem in the area below Jerome and Avis Creeks in his Dec. 1996 report. Little is known about the potential for slides or inducing similar instability in the glaciofluvial terrace area below Rice, Richards and Nelly Creeks.

(emphasis added)

[55] Mr. Putt's report is dated October 28, 1997 yet it is endorsed below that date with the notation that "Original draft submitted January 30, 1997".

[56] There is found within these expert reports a disturbing consistency. Each raises significant concerns and each directly or by implication calls for or recommends more detailed study. It is not my task on the present application to reach general or specific conclusions as to the implications of these various reports. I have taken the time I have to set out these passages because in my view those reports coupled with the incidents of landslides detailed by the various affidavits represent a significant area of concern which was almost entirely absent from the court application in July.

[57] It is true that Susan Hammond's affidavit touched on these concerns and in fact in my reasons I commented on the concerns expressed by the Association, but there was within the control and knowledge of the plaintiff's an extensive body of knowledge that was not brought forward. As importantly, the information that was presented was packaged in a manner which had the effect of obscuring significant and material issues.

[58] I reject Mr. Eastwood's submissions that the issue on this application must be restricted to whether or not this evidence ties danger to private property rights to the construction of this road. In my view these reports raise legitimate concerns

about even the construction of that road itself, but it is clear from Mr. Hamann's original affidavit that the construction of this road is only a part of a plan to access the timber on Perry's Ridge. That broader longer range plan brings home all of the concerns expressed in these reports.

[59] I do not suggest on the evidence before me that the omission of this information was deliberate or malicious, but I find the information was material and that its absence created a misleading picture of events.

[60] I am equally satisfied that on the basis of the more complete material now before me that the balance of convenience favours the setting aside of the injunction.

[61] My findings on these first two issues make it unnecessary for me to address the somewhat novel argument addressed by Ms. Sanford as to the alleged restrictions on the Attorney General's ability to resort to the civil injunction process. The answer to that submission may well lie within the recent decision of the Supreme Court of Canada, but such a decision is not required in the present case.

[62] The order of July 28, 1997 as varied on August 1, 1997 is set aside.

[63] In closing I wish to add one further comment, I am deeply disturbed by the suggestions made in argument that there have been incidents of tire and hydraulic line slashing and tree spiking. The courts are there to deal with issues of this kind but there is a narrow line between legitimate protest and acts that could lead to serious injury and death. The rights which we cherish in this country and which, whether you believe it or not these courts protect, extend not just to members of the Perry Ridge Water Users Association or the Slocan Valley Watershed Alliance but to all members of our society. Where the rule of law collapses anarchy begins.

[64] Is there anything further, gentlemen? Mr. Eastwood.

[65] MS. SANFORD: Costs, My Lord?

[66] MR. EASTWOOD: I thought I might hear that from my friend.

[67] THE COURT: Do you have any submissions, Mr. Eastwood?

[68] MR. EASTWOOD: Well, My Lord, insofar as my friend was acting for more than Mr. Greengrass in this application, I would submit that they had an opportunity to bring these concerns to the court initially. They haven't put any affidavit material before you suggesting that the other -- by the other parties themselves suggesting that they weren't aware of this application, and they could well have brought that

material before the court at an earlier time, and, therefore, the necessity for this hearing wouldn't have taken place. So in my submission, costs should be in the cause, at any event, after a full hearing of all of the issues before the court, because this is a case of public nuisance and there wa an interlocutory injunction, which has now been set aside, but the Crown, were it to proceed with the action, may be able to, on a full hearing, with experts, establish its legal right to build that road.

[69] THE COURT: I don't need ot hear from you, Ms. Sanford.

[70] The three-named defendants to whom I referred, are entitled to their costs of this application on scale 3. I will make no immediate order for payment. They will be taken into account in the action generally.

[71] Thank you, counsel. Mr. Justice Parrett
