

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Douglas Lake Cattle Company v. Nicola Valley Fish and Game Club*,
2018 BCSC 2167

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

Reasons for Judgment

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Place and Date of Trial/Hearing:

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May 23, 2017 (Judicial View)
September 8, 2017

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EVIDENCE: DLCC PERSONNEL

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Joe Gardner

EVIDENCE: THE CLUB

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Theodore Phillip Finnegan

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Richard Paul Heppner

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Earl Michael Stoessiger

Peter Carl Voigt

Earl Rodney Nygaard

Gary Wayne Watson

George Edward Hendricks

Allan Murdock

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EVIDENCE: THE EXPERTS

Jeffrey Holm

Viktor Lewynsky

Scott Rhodes

EVIDENCE: THE PROVINCE

Alan Martin

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Introduction

[1] As a society and a civilization, we are long-past the view that land resources and water resources are infinite. This case concerns the contemporary challenges between the interests of citizens to access government-held property and the interests of private landholders who operate agriculture endeavours, and other activities, on their landholdings. This is a type of conflict that, in the future, will continue to plague both landowners and citizens, in the absence of some clear judicial or legislative definition of rights and obligations.

[2] This case has its origin in land grants and government activities commencing in the late 1800s when British Columbia was remote and sparsely populated.

[3] Currently, in the modern economy, land use is organized very differently than in the late 1800s, as are those who make their living off the land. Small cattle operations have been replaced, perhaps by economic necessity, by larger cattle operations. In theory, water use is carefully and zealously monitored. The opportunity to fish in public waters has become a regulated privilege, as opposed to simply a way of life. Essentially, as both Canada and British Columbia have grown, the pressures on land and water resources have increased and significant conflicts have arisen.

[4] This case is demonstrative of these conflicts and shows the necessity of legislative action to resolve these issues. The courts can only settle individual problems and act on the matters litigated in front of them; they cannot remedy larger societal concerns.

The Lands in Question and the Parties

[5] At the heart of this dispute is a section of disputed road that traverses over lands now owned by the Douglas Lake Cattle Company (hereinafter referred to as “DLCC”). The road in question was referred to as “the Old Road”, “#64 Pennask Lake Road” and/or the “#281 Stoney Lake Road”. For the sake of ease and historical context, I am going to call this road the “Stoney Lake Road”.

[6] Historically, the road in question, the Stoney Lake Road, was, until sometime in or about the mid-1970s, part of a continuous road that ran from the Quilchena Ranch area of what is now Highway 5A, then Highway 5, through to Pennask Lake. Part of this road ran from where a controversial gate, the gate which gave rise to this litigation, was historically erected by DLCC. From the gate, the Quilchena-Pennask Lake Road ran in an essentially easterly direction past Minnie Lake. It ran in very close proximity to the natural boundaries of Minnie Lake. It continued east to what became over the years the Minnie Lake ranch headquarters,

subsequently owned by DLCC. However, prior to arriving at the homesite of the Minnie Lake ranch, the original Quilchena-Pennask Lake road turned and travelled northeast along and, I find, very close to the natural boundaries of Stoney Lake. The turn northeast happened at an old sawmill site, since abandoned. It continued past Stoney Lake in a generally north and somewhat easterly direction, eventually heading towards Pennask Lake.

[7] In the 1970s, a bypass was built. The bypass road continues to the north from the location of the gate for a few kilometres, rather than having the main portion of the road travel east. At some point, after a few kilometres of northerly travel on the way to the main ranch location of DLCC, and coincidentally the historical lands of the Douglas Lake Indian Band, the road then turns in an easterly direction for a distance of a few kilometres until it intersected where the original Quilchena-Pennask road had travelled northeast of Stoney Lake

[8] This road, which has been referred to as the bypass, was constructed to assist logging operations around Pennask Lake, and more generally past the Stoney Lake Road to the northeast. The suggestion in the evidence was that the portion of original road, now bypassed, which I refer to as the Stoney Lake Road, traversing as it did past two lakes, was less straight than the bypass, and was not conducive to the efficient movement of logs with a large logging truck due to its close proximity to Stoney Lake.

[9] Another noteworthy fact is that there are two significant Crown grants, which were given to the original fee simple owners of this property in the late 1800s. The Crown grant that concerns Minnie Lake, Crown Grant No. 790, is detailed in its depiction of the parameters of Minnie Lake and, I find, accurately sets out the natural boundaries of Minnie Lake, a road that existed on the Crown Grant, and a trail that existed from the road to the lake and beyond.

[10] The Crown Grant associated with Stoney Lake, Crown Grant No. 695, is less detailed in its depiction of the lake. I find that this is likely the result of when the survey was taken, prior to the high watermark, either before or shortly after the snow had cleared.

[11] The important details of these Crown grants, and my determinations that flow from the evidence before me related to these Crown grants, will be discussed in greater detail in these Reasons.

[12] Over time, DLCC has become the owner of the lands covered in Crown Grant No. 790 and Crown Grant No. 695, as well as numerous other properties in the area. DLCC, the evidence suggests, is the largest private landowner in British Columbia and operates the largest ranch in British Columbia.

[13] The Nicola Valley Fish and Game Club (hereinafter referred to as the “Club”) is a long established fishing and conservation organization in Merritt, B.C. It was originally called the Nicola Valley Rod and Gun Club.

[14] The dispute between the parties has its origins in two actions of DLCC, which prohibited the use of the Stoney Lake Road by anyone other than those approved by DLCC. The first action was to lock the existing gate, a gate which had, up until this point, been long-standing but generally unlocked. The second action included such act as the moving of rocks and timber, which decommissioned the access to the northeastern terminus of Stoney Lake Road, where it intersects the bypass and continues to Pennask Lake. The exact date is uncertain, but decommissioning occurred sometime around 1990.

[15] Since that date, there has been considerable dispute between DLCC and the Aboriginal communities in or around Douglas Lake, culminating in a blockade and resultant agreement between the Aboriginal peoples of Douglas Lake and DLCC. That resolution appears to be that Aboriginal persons would be entitled to access to Minnie Lake to fish, and Aboriginal persons were given a key or code pass to the lock on the gate to allow them access for fishing and other traditional activities.

[16] Despite the actions of DLCC commencing in 1990, and despite numerous attempts by the Club and citizens generally to resolve this issue, there has been no resolution. I am satisfied on the evidence that numerous individual members of the Club, either on their own behalf or ostensibly on behalf of the Club, have attempted to inspire the Attorney General of British Columbia (hereafter the “AGBC” of the “Province”), the government actor in this litigation, to act: to defend both the interests they perceive as those of the general public, and the Province’s ownership of the road and the lakes. Representatives of the AGBC have not responded to these attempts, prior to the commencement of this litigation.

Litigation History and Positions of the Parties

[17] This case has a somewhat unique origin by way of its court process. Litigation began on April 15, 2013, when the Club brought on a petition concerning access to Minnie Lake and Stoney Lake (collectively, the “lakes”), two lakes that are surrounded by lands owned by the DLCC, the respondent in that petition.

[18] On May 14, 2013, DLCC filed a notice of civil claim. All parties agreed that a petition was not the best means of proceeding and the petition was joined with the action.

[19] The basis of the Club’s petition, and subsequent defence in the action filed by the Club, is that both Minnie and Stoney Lakes are public water bodies, on which the general public has

a right to fish. Further, and a major focus in this litigation, they argue that the Stoney Lake Road, purportedly closed by DLCC, provided public access to Minnie Lake, along with a trail marked on the original Crown Grant No. 790. Further, they argue as fact that a public road, the Stoney Lake Road, ran immediately adjacent to Stoney Lake, providing public access. The Club seeks a declaration that the road is public road and seeks an order that the gate and other obstructions created by DLCC that have blocked Stoney Lake Road be removed, such that the public can again access Minnie Lake and Stoney Lake.

[20] DLCC disputes public ownership of the lakes. They are of the view that by owning all lands surrounding the lakes, they should be considered owners of the lakes. In the alternative, they argue there is no public access to the lakes.

[21] DLCC admits to engaging in geo-engineering in order to expand both Minnie and Stoney Lakes beyond their natural boundaries. It is conceded that their water licences allow for the storage of water. They maintain that the extended area of the lake should belong to them in any event, as the expanded lake now covers their private property. The expansion of the lake has resulted in the flooding of the Stoney Lake Road, and the Stoney Lake Road was replaced, near Minnie Lake at least, onto dry land. Additionally, the portion of the road that the Club argues provided direct access to Stoney Lake has, in fact, been flooded and, as a result of that and the closure of access, has been effectively decommissioned.

[22] DLCC seeks a declaration that the Stoney Lake Road is now private or, in the alternative, if the Stoney Lake Road is public, that there is no public right of access to either Minnie Lake or Stoney Lake by virtue of a trespass being necessary to access both lakes. They further claim that the expanded lakes, and the fish therein, are their own property and they seek a declaration that the public does not have a right to fish in those lakes. DLCC further denies that there was any expenditure of public funds on the road in question and they argue in their pleadings that the Stoney Lake Road was closed when the bypass was constructed. In response, the Club argues that the Stoney Lake Road was a public road that had considerable public use and was maintained by public funds. The Club submits that expanding the lakes through the use of water licences with public-owned water does not entitle DLCC to claim ownership over any or all of the lakes and that the fish in the lake are publicly owned, not the property of DLCC.

[23] The Province is a defendant in this action and, on June 28, 2013, filed a response to civil claim, disputing a number of the allegations put forth by DLCC. Most notably, the Province denies that there was no public expenditure on the Stoney Lake Road. Additionally, the Province disputes the suggestion that it intended to close the Stoney Lake Road when the bypass was constructed.

[24] The Province amended its response on September 18, 2014 to assert its opposition to DLCC's contention that both Minnie Lake and Stoney Lake were not suitable for fishing purposes. The Province elaborated that it stopped stocking Minnie Lake, in particular, due to it being inaccessible to the public. They also re-affirmed that the fish in the lakes are free from the control of DLCC.

[25] In its further amended counterclaim filed January 12, 2016, the Club amended its claim against the AGBC, and argues that the AGBC is entrusted and charged with the duty to enforce public rights, including the public right to access roads and lakes, and to fish in those lakes.

[26] In their response to counterclaim, the Province purports, to some degree, to take no position in regards to the claim made by the Club, but denies that the Province owe a fiduciary duty to the public as a whole in regards to bodies of water. Further, a generous reading of the response to counterclaim indicates that Province states that there is no public right of navigation in these lakes and there is no right to the public to fish, as the right to fish in non-tidal waters in B.C. is held by the owner of the bed of the lake, which in this case, is the Province.

Summary of Arguments

Arguments of DLCC

Stoney Lake Road is Private Property

[27] DLCC maintains that the Stoney Lake Road is situated on private property and that the Club's only goal is to make this road public such that it will allow the Club access to the lakes. DLCC bolsters this claim by referring to orders-in-council allowing for a gate to block access to the Stoney Lake Road. In addition DLCC claims that the government essentially ceded control over the Stoney Lake Road by allowing DLCC to lock the gate and by failing to maintain the Stoney Lake Road. This is somewhat disingenuous, as by locking the gate, flooding the road in part, and decommissioning it in part, DLCC has prohibited access to the original Stoney Lake Road to anyone.

Regarding the Crown Grants

[28] DLCC maintains that, while old surveys of the area seem to include a wagon road from Minnie Lake to Quilchena, this wagon trail does not follow the same path as that of the Stoney Lake Road. Yet the effect of recognizing the wagon trail on roughly the same trajectory as the Stoney Lake Road seems to indicate that it was intended as a public road. DLCC highlights the current state of the road (partially submerged due to geo-engineering) as well as other lines on

the survey that are clearly contemplated as roads. DLCC further states that there is no historical path providing access to Minnie Lake. Even if there were a trail, such a path would remain a trail and not a road for the purposes of the *Land Act*, R.S.B.C. 1996, c. 245 [*Land Act*]. Finally, DLCC submits that any purported trail to Minnie Lake was likely private at the time of the Crown grants, or was not designed to provide public access.

[29] Importantly, DLCC maintains that the Province did not reserve, or intend to reserve, the right to create a road, and that the road that would eventually become the Stoney Lake Road was created after the Crown grant came into effect. DLCC goes into great depth in discussing the “presumption against retroactivity” in regards to s. 13 of the *Land Act*’s possible effects on the wagon trail. Their interpretation is that, due to the confiscatory nature of the retroactive provisions in the *Land Act*, the court should read the *Land Act* narrowly and not designate the wagon trail as a road thereby. Finally, DLCC takes umbrage with the possible application of s. 50(1)(c) of the *Land Act*, arguing that its expansive definition of a “road” is not intended to be retroactive.

[30] DLCC also argues that there is no access to the lakes from Stoney Lake Road. This argument largely centers on similar arguments as detailed above, and particularly: that the Club has not shown a right of way which would allow access; that the old trail does not allow access; and that a trespass would have to occur to facilitate access. This analysis is bolstered by what DLCC claims is an “omission” to reserve the right of a person to pass over private land in order to reach navigable waters, a right that is found in Saskatchewan and Manitoba legislation. In any event, DLCC argues the lakes are not navigable waters or even “public” in the traditional sense.

Legislation and Jurisprudence Dealing with Roads

[31] DLCC submits that the portion of the Stoney Lake Road that moves north from the road going to the Minnie Lake ranch has essentially always been on private property. DLCC argues that this portion has never been well travelled, either factually or as defined in the jurisprudence; it has, at most, been “casually travelled”, such that the “travelled road” requirement in *Skutnik v. B.C. (A.G.)*, 2013 BCSC 195, is not met.

[32] DLCC also submits that the “public money” requirement is not met, as there is no proof of a capital expenditure of public moneys, or, in the alternative, that any actual expenditures are appropriately categorized as insignificant. DLCC has provided a table that purports to show all of the expenditures made from approximately 1930 until 1976. I note that, while the amounts of money do not seem grand, a lesser travelled road should necessarily result in less

maintenance and fewer expenditures. DLCC maintains that the significant work done on the Stoney Lake Road was done far from the vicinity of the lakes.

The Gate

[33] DLCC claims that, if the court finds the northeast-traveling section of the Stoney Lake Road was public at some point in time (and perhaps the entirety of the Stoney Lake Road, by extension), there is an agreement between the Province and DLCC to allow for the gate to the Stoney Lake Road to be locked. Unfortunately for DLCC, this is pure conjecture; it is unsupported by the evidence, and there is ample evidence to the contrary. While orders-in-council did allow the gates to be placed in certain locations, it is unclear whether these orders authorized locks on the gates to prevent public access. DLCC argues that the orders-in-council permitted locks to be placed on the gates.

Submissions on Flooded Land

[34] DLCC accedes to the contention that the areas of the lake below their natural boundaries are reserved by the Province. However, it demurs at the Club's suggestion that any of the land beyond the natural boundaries, which has been flooded through DLCC's geo-engineering, also belongs to the Province. DLCC explicitly denies that the flooded land is surrendered to the Crown.

[35] DLCC refers to various cases to indicate that changes in shorelines caused by intentional engineering do not affect the "natural boundaries" for the purposes of interpreting property boundaries. It also refers to a 1958 Ontario Supreme Court decision, *Gordon v. Hall and Hall*, 143 D.L.R. (3d) 608, which seems to indicate that a body of water can be partly private and partly public, but that the public can be effectively blocked from accessing the private area. This argument would seem to indicate that the flooded area creates a boundary the public is not allowed to cross. An easement or right of way would likely be necessary to allow public access. DLCC is opposed to the Club gaining access to Minnie Lake by travelling along Wasley Creek, which flows into Minnie Lake.

Issues Relating to "Navigability"

[36] There are a number of cases that relate to the right of crossing and accessing "navigable waters". DLCC maintains that there is no public right of navigation in the lakes, and that, even if the court finds the lakes to be navigable, such a finding would not give rise to a public right to fish in those lakes. This would be consistent with DLCC's position regarding the Province's ownership of the lake, but inconsistent with its contention that it is the owner of the fish therein.

[37] DLCC reiterates, on many occasions, that jurisprudence must be used to determine whether a body of water is navigable, but thereafter reiterates that the lakes have never been designated as such. DLCC cites *Coleman v. Ontario (Attorney General)* (1983), 143 D.L.R. (3d) 608, for its nine principles to assess whether a body of water is navigable. DLCC highlights that, as the lakes are surrounded by private property, they are not likely to be used to facilitate travel. Furthermore, the lakes have not historically been used as a navigable body of water (that is to say, there is no protracted history of its use in the context of travel, even though it is a lake and not a river, or other form of “aqueous highway”). Finally, given the size of the lake, DLCC contends that it is hard to apply equivalent cases to the facts at hand.

Ownership of Fish

[38] DLCC asserts that, in the case of a lake in which the Province controls the waters within the natural boundaries and DLCC controls the waters above the natural boundaries, there could be a duality of ownership over the fish in the waters. Despite this, it contends that all of the fish in the lakes are subject to their control and ownership. This is primarily evidenced by its assertions that the Province was unable to stock fish in the lakes prior to DLCC’s intervention and that the lakes were subject to regular “kill events” prior to its geo-engineering efforts.

[39] DLCC describes in great length its efforts to manage the lakes, in order to allow fish to survive. There appears to be an underlying inference that the ownership of the fish should vest in DLCC as, but for its intervention, no fish could survive. The Province denies that fish could not survive in the lakes but for DLCC’s actions. DLCC submits that the Province has “implicitly acknowledged” the unique characteristics of the lakes and the fact that the fish therein were purchased and placed in the lakes by DLCC. DLCC maintains that, at the very least, it has a *profit a prendre* over the fish by virtue of the efforts made in relation to their culture and control.

[40] DLCC asserts that, by virtue of the fish being unable to escape the lakes, it has, in effect, created a large private pond. This, by extension, gives them control and mastery over the fish therein, according to ancient property law principles. This is supposedly augmented by DLCC’s control over the fish’s ability to breed, the temperature and oxygen levels of the lakes, and the overall number and size of fish in the lakes. I note that at the Judicial View, it was clear that fish could and do escape the lake.

Arguments of the Club

Historical Evidence of Use

[41] A great deal of evidence was adduced in regards to the historical usage of the Stoney Lake Road and the lakes. In particular, the Club highlights documents which it believes show the history of public expenditures on the Road, the unilateral imposition of gates by DLCC, the

presence of Stoney Lake Road in government registers, and evidence of people using the road to access the lakes to fish. It submits that these factors, among others, make the Stoney Lake Road a public road, thereby granting access to the lakes. The Club also highlights the use of the trail by Aboriginal peoples as a means through which to preserve the trail as public rather than private.

[42] The Club characterizes the lakes as “popular fishing spots” that were in use prior to any geo-engineering by DLCC. This was established through the evidence of various witnesses and historical records in kind. This was disputed by DLCC’s experts, who claim, at least in regards to Stoney Lake, that it was barren prior to engineering efforts. The Club submits that the lack of continued use is, at least in part, due to DLCC’s intimidation of fishermen and use of underhanded tactics to convince the government to allow the blocking of public access with locked gates. They further submit that Joe Gardner, an employee of DLCC, knew both the lakes and the fish were public and, as such, conspired to mislead various government officials, in order to allow DLCC to control Stoney Lake Road.

[43] From this, the Club submits that Stoney Lake Road is a public road that would grant access to both lakes, and that the trail on the Crown grant is a public trail that would allow for access to the Minnie Lake. The Club refers to the trail primarily as a means to engender the Aboriginal right of fishing and argues that its inclusion on the original Crown grants renders the trail a form of statutory highway, which the Province retains as its property. It disputes DLCC’s claim that it took the land free of any obligation arising from the trail. Ultimately, the Club believes the trail and the Stoney Lake Road serve as evidence of an intention by the Crown to dedicate these paths as public easements or rights of way.

Concerns Relating to Water Boundaries

[44] The Club asserts that the water above the natural boundaries of the lakes (by virtue of DLCC’s geo-engineering) is owned by the Crown for the use of the public and that both the public and DLCC are allowed to travel across the water. It seems to argue that the water collected in the lake, by virtue of it being available for DLCC’s, under a water licence, does not transfer ownership of the water to DLCC; rather, it only permits them use and control. The effect of this is simply to treat the existing lake as an extension of what the Province owned by virtue of the original Crown grant. As such, the public has retained the rights to travel across the water and to fish in it, as in any other body of water, subject to applicable licensing requirements (such as an angling licence).

[45] The Club counters DLCC’s contention that no common law right of navigation exists by submitting that the Club has a “right of navigation by reason of the Crown’s ownership of the

water and the Crown's consent that all licenced anglers may use the water for the purpose of angling". This right of navigation is normally predicated on the Crown's ownership over water.

Ownership of Fish Stock

[46] The Club submits that the fish, which currently swim free in the lakes, are "free from captivity" and, due to the fact that fish are not wildlife as per the *Wildlife Act*, R.S.B.C. 1996, c. 488 [*Wildlife Act*], neither the Province nor DLCC has a proprietary right in the fish. This is in stark contrast to DLCC's assertion that the lakes effectively serve as private ponds, thereby giving them dominion and control over the fish and the necessary proprietary rights that flow from this control.

[47] The Club further submits that the various rights and licences granted to DLCC do not attach property rights to the fish once they are released into the lakes. Again, DLCC asserts that it has full control over the fish, whereas the Club suggests that DLCC has, at most, a qualified (or defeasible) right of property, which is lost once the fish are released.

The Crown Holds the Fishery for the Benefit of the Public

[48] The Club submits that the Crown grants, which serve to control the lakes, also serve to sever the asserted *profit a prendre* right from DLCC, thereby retaining the benefit of the fishery to the Province, and by extension, for the use of the public. The Club denies any ability for the *profit a prendre* right to attach to the water above the lakes natural boundaries, regardless of DLCC's hand in creating said water.

[49] The Club, asserts that a "statutory right of fishing" now exists, due to the passage of the *Hunting and Fishing Heritage Act*, S.B.C. 2002, c. 79. This Act thereby forces the Province to allow for fishing, subject to necessary licensing requirements.

[50] Finally, the Club asserts that the Province has not appropriately exercised its duty as a *parens patriae* representative of the collective interests of the public. It submits that it has fallen on the Club to be the steward for the rights that are being trampled upon by DLCC; namely, to allow access to what should be considered public roads and to allow access to the lakes for fishing purposes.

Ancillary Comments

[51] The Club discusses issues relating to a public nuisance and essentially asserts that the Club has become the vehicle through which DLCC's continuing nuisance efforts can be combatted. The Club asserts that inhibiting access to the Stoney Lake Road and the lakes constitute a public nuisance.

Arguments of the Province

[52] The Province, represented by the AGBC, does not appear to take a pronounced adversarial role in the proceedings. It has essentially sought to clarify its position with regards to the legal status of the roads and waterways, as well as what its other legal obligations may be.

Highway Status Issues

[53] The Province detailed, as all other parties had, the ways in which a highway comes into being. In contrast to DLCC, the Province denies that there was an agreement to close Stoney Lake Road, that there were representations made that the public may be precluded from using Stoney Lake Road, or that Stoney Lake Road was closed. It seems the matter was simply dropped for expediency purposes due to the construction of the bypass, which alleviated the necessity of the Stoney Lake Road. The Province cites a number of cases that show the traditional stance of the Province to not interject in matters relating to s. 42 of the *Transportation Act*, S.B.C. 2004, c. 44 [*Transportation Act*]. It does, however, comment that Stoney Lake Road would only cease to be a highway if closed pursuant to s. 60 of the *Transportation Act* and that the imposition of a gate does not affect a public highway's legal status. The Province expressly denies that it allowed DLCC to lock the gates in order to prevent public access.

Submissions on the Status of the Trail to Minnie Lake

[54] The Province is similarly non-adversarial with reference to the status of the trail, though it does state that, while the definition of highway in the *Transportation Act* does not apply to trails, a trail could become a highway by a common law dedication. The Province refers to an easement of necessity, something upon which the other parties touched briefly as well.

Ownership of the Fish and Control of the Fishery

[55] The Province submits that the fish are not domesticated animals and are wild in nature. They further submit that, whatever qualified rights DLCC may have prior to release, they are lost once the fish are released into the lakes, as the lakes are too large to be consistent with the concepts of confinement or control. This is exacerbated by DLCC's inability to monitor their population in comparison to the cattle they monitor and tag. Additionally, there is some concern that the fish are not truly contained and may have escaped, or at least have the ability to escape, the lakes. The only property right that should attach is that when the fishing is "complete" and someone has successfully "landed" and controls a fish.

[56] The Province adopts a construction of the rights over the fishery as a *profit a prendre*, which is connected to the ownership of the lake bed, something clearly owned by the Province. However, in contrast to the Club, the Province submits that DLCC would have control over the fishery beyond the natural boundary of the lakes; to suggest otherwise would be effectively serve as an expropriation of a right that is attached to the private land DLCC owns. That being said, the Province expressly deny the assertion that its conduct has granted DLCC a *profit a prendre* right over the entirety of the fish in the lakes.

Submissions on Navigability

[57] The Province is unequivocal in its submission that there is no public right of navigation in the lakes. It also touches on what it terms a “theory of traversibility”, which it asserts is novel and unknown in law. The Province focuses on the test as put forth by DLCC, in essence agreeing that the lakes do not have the character of an aqueous highway and that any travel that may be possible along the original alignment of Stoney Lake Road through Minnie Lake and Stoney Lake does not confer a general right of navigation in the lakes as a whole.

[58] The Province also takes issue with the Club’s submission that the water overlaying private land is automatically navigable. The Province takes further issue with the Club’s submission that s. 5 of *Water Sustainability Act*, S.B.C. 2014, c. 5 [*Water Sustainability Act*], grants a right of navigability in all Crown waters. Finally, they deny the Club’s argument that the *Hunting and Fishing Heritage Act* provides a statutory right of navigability or fishing, as there is nothing, upon a plain reading, in the legislation to indicate such a right was conferred.

Position on Parens Patriae obligations

[59] The Province states concretely that, based on a lack of authority, there is no reason to believe that the Province has the ability to own all freshwater fisheries in the Province “for the benefit of the public, whether in its role as *parens patriae* or otherwise”. This is irreconcilable with its earlier assertion that there may be areas in which a private right to control a fishery may exist.

[60] In general, the Province notes that the Club’s seeks to extend the concept of *parens patriae* to protecting rights concerning public recreation with no authority to support the contention.

[61] Despite the circumstance in which DLCC is the plaintiff and the Club and the Province are the defendants, the trial proceeded on the basis of the Club calling its evidence first, DLCC then calling its evidence, and finally the Province calling its evidence.

[62] Noted below is a summary of the evidence, classified in relation to the nature of the evidence.

The Evidence

[63] The hearing of evidence and initial closing submission ran in Kamloops from January 9, 2017, through to January 31, 2017. In addition to the oral evidence, there was a Judicial View undertaken on May 23, 2017. There was a further hearing on September 8, 2017, as to the consequences of that Judicial View.

[64] In discussing the evidence below, the main governmental player in this litigation is what I will refer to as the Ministry of Highways. At various times, this Ministry was called the Department of Transportation and Highway, the Department of Highways, the Ministry of Highways, the Ministry of Transportation and Highways and the Ministry of Transportation and Infrastructure. Though various witnesses used various names in describing this department, for the sake of convenience, I primarily refer to it as the Ministry of Highways, but in using any of the above-noted descriptions or names, I am referring to the same general governmental body.

Evidence: Aboriginal Witnesses

Daniel Manuel

[65] Daniel Manuel testified that he is very well acquainted with the lakes in the area, as it is his peoples' traditional territory. The Indigenous peoples from Spaxomin, Mr. Manuel's traditional territory, named the area around Minnie Lake Na-axaxsulx, meaning "place for rotting fish", because the fish would occasionally die from winter kill. The Indigenous peoples would come to fish after the ice had thawed, and every seven years or so, the majority of the fish would be dead and rotting due to winter kill.

[66] Mr. Manuel testified that the Indigenous peoples would get to Minnie Lake by walking, and then by horseback in the late 1800s. He testified that most of the area's roads were built where the Indigenous peoples' trails had originally been. He stated that there always had been a trail between Douglas Lake and Minnie Lake, and that he still goes into the area to gather traditional medicines. Of note, the trail noted on Crown Grant No. 790 is consistent with this evidence. He stated that it is a very important gathering area for the Indigenous peoples.

[67] Mr. Manuel stated that his first experience fishing in Minnie Lake was when he was five years old, in 1955 or 1956. Mr. Manuel stated that the fishery was always there for his people. He described how his people would gather fish in the springtime and would gill-net them in the adjoining creek as they were going up the creek to spawn. They would use a dip-net or a snare to catch an abundance of fish in the creek. They would fish both in the creek coming in from

Stoney Lake and the one on the outflow going towards Tommy Lake. Despite the importance of the fishery, he testified that his people were intimidated by the fear of being charged with trespass and stopped fishing in the area for awhile, until 1988.

[68] Mr. Manuel also recalled fishing on Stoney Lake, stating that he ice fished in the winter and gillnetted trout after the thaw. His first recollection of fishing on Stoney Lake was in 1966, at the age of 16. On cross-examination, he stated that his first time fishing on the lake was ice-fishing, when he was home on a break from residential school. He recalled seeing an old lumber pile and some scrap piles near the lake. He stated that he had missed earlier spring fishing trips because he was in residential school. He testified that the dam recently built by DLCC had benefitted the ecosystem, and the fish taste better with fresh water running through the lake.

[69] Mr. Manuel testified that he was elected Chief of the Upper Nicola Indian Band in 2000. He testified that he wrote a letter to Joe Gardner requesting the combination to the locked gate shortly after he was elected and that his Indian Band was given the combination. He testified that currently, not many of his members fish Stoney Lake because they respect the privacy of the lodge, and can catch the same fish in Minnie Lake.

Walter Archachan

[70] Walter Archachan testified that he was born in 1938, 14 kilometres from Minnie Lake and that he lived in the area exclusively, except for the time that he spent at residential school. He testified that, in his youth, he would go up to Tommy Lake, south of Minnie Lake, to fish. He testified that he learned the trails from the trappers who had traplines in the area, and who cut the trails through the bush. He recalled a number of trails in the region, covering an area from Merritt to the Okanagan. He testified that there was a wagon road to Steer Lake from the Okanagan, which was just east of Pennask Lake. Mr. Archachan recalled that there was a main route from Douglas Lake to Westwood.

[71] Mr. Archachan testified that he went to Minnie Lake when he was a child, and that this was also a main fishing ground. He recalled that Minnie Lake and Stoney Lake were public fishing and that the only time they were obstructed, prior to the actions of DLCC, was when there was a bird sanctuary declared. He testified that there were workers at Minnie Lake during his younger years who kept a cabin open to travellers. He testified that his great-great-great-foster-grandfather had a cabin approximately 15 miles east of Minnie Lake in order to maintain a trapline in the area.

[72] He testified that his people, and other indigenous peoples, regularly fished Minnie Lake. In clarifying his evidence for the Court, Mr. Archachan clearly stated that he fished both lakes

as a child, in the early 1940s. They would fish and then go home, taking what they could. He recalled that there was a large cave where his people would keep fresh game and fish, because it was covered in ice. He recalled fishing the mouth of Wasley Creek at Minnie Lake as a child, and would get there via a road called Minnie Lake Road from Quilchena. He did not recall being stopped from using a road or a trail to Minnie Lake or Stoney Lake.

[73] Archachan recalled attending a meeting in with the RCMP and the DLCC, because 10 of his people had been arrested for fishing. He recalled being “the only Indian at the meeting”, and that it was not due to a roadblock, but because people were trespassing to access the lakes. He recalled that they were released the next day.

Frederick Holmes

[74] Frederick Holmes was born in 1945, grew up in the Douglas Lake area. He was Chief of the Upper Nicola Indian Band for some time. He testified that he wrote a letter in 1986 to the Province, when he became aware of the fish farm licences being issued to DLCC, because he believed it directly infringed upon his Aboriginal rights.

[75] Mr. Holmes testified that there were numerous occasions where the Upper Nicola Indian Band challenged DLCC for barring their people from entering certain lands to exercise their Aboriginal rights. He agreed that there have been constant problems with DLCC in the 1950s, 1960s and 1970s, and, though he was not specific about what the issues were during these times, they were generally about access. He recalled specific instances where members of the Band were arrested for trespass while blockading roads, though the charges were generally stayed. Mr. Holmes recalled that, in 1995, the roads that come out of the Quilchena Reserve were blockaded, including Minnie Lake Road and Douglas Lake Road. The blockade did not end with an injunction, but rather through negotiations with DLCC, along with the federal and provincial governments. Mr. Holmes testified that, though the locked gate blocking access to Minnie Lake was a small part of this dispute, it was more generally about access to practice Aboriginal rights in the area.

[76] On cross-examination, Mr. Holmes agreed that DLCC recognizes the special rights of First Nations to access the property. He agreed that he was not aware of the DLCC impeding any Aboriginal individuals from fishing currently, since the Upper Nicola Indian Band has the combination to the locked gate.

Evidence: DLCC Personnel

Neil Woolliams

[77] Neil Woolliams testified that he was involved with DLCC from 1960 until December 1979. He cowboied for his first seven years at the ranch and was the general manager of the ranch from 1967 until 1979. He first cowboied in the area of Minnie Lake in 1961. He stated that in the 1960s, the DLCC was concerned primarily with cattle production, but began to diversify into areas such as fishing and logging in the late 1960s and early 1970s.

[78] Mr. Woolliams testified that, when he first came to DLCC, there was no fishing at Stoney Lake, because it does not have a catchment. He stated that it was a little puddle between two watersheds. He recalled hearing a story from a carpenter who had cowboied at DLCC in the 1930s, who told him that the cowboys would stop over for lunch at Stoney Lake, and the horses would lie down in the clover in the lake bed because there was no water. This is, of course, hearsay only and of no weight. This evidence also stands in sharp contrast to the photographic evidence, Exhibit 40 at trial, which shows a substantial body of water at Stoney Lake in 1948.

[79] Mr. Woolliams testified that DLCC's involvement in the recreational fishing industry was limited to Salmon Lake in the 1960s. Its only involvement at Minnie Lake was to provide the local people with a place to fish. He testified that it was only in the 1970s that DLCC decided that it had to do something to control a large number of people coming to fish at Minnie Lake, due primarily to large amounts of garbage.

[80] Referring to the original Pennask Lake Road, prior to the bypass construction, Mr. Woolliams testified that the road, though without a gravel bed, was good enough to haul lumber to Merritt. He testified that the road was barely wider than a single truck width, and was approximately 12 feet wide. This evidence stands in contrast to government employees who testified as to the tandem grading. He testified that government graders would come up the Pennask Lake Road from Quilchena and then turn north towards the Douglas Lake Indian Reserve, rather than continuing down the Pennask Lake Road towards Pennask Lake. This is in sharp contrast to later witnesses noted who claim to have graded the Stoney lake Road.

[81] He testified that the Pennask Lake Road, beyond the Minnie Lake turn-off, was kept in a lot different shape, because it was originally built by Mr. Dole, who took a proprietary interest in the road. This was odd evidence, as the road is continuous, and served as a path out from property owned by Mr. Dole to Merritt. Why one portion would be maintained, and another not, is not explained. Mr. Woolliams could not recall whether provincial crews maintained the road between the Douglas Lake turn-off and Stoney Lake. He testified that the Pennask Lake Road, between the Douglas Lake turn-off and Pennask Lake, could not have been plowed by the government in the winter during the 1960s, due to large boulders in the roadbed. He testified

that DLCC did no maintenance during this time either. Again, this is in contrast to other evidence, to which I refer later.

[82] Mr. Woolliams testified that in the early 1960s, there was a lot of traffic going past the Minnie Lake intersection to the mill at Stoney Lake. He testified that it was a large mill with a cookhouse and bunk houses. Though the mill did not store logs in the lake, he recalled that they pushed sawdust and slag into the lake. He recalled that the mill shut down sometime in the early 1960s and that DLCC hauled some of the buildings to various sites on the Ranch property.

[83] Mr. Woolliams stated that, during the 1960s, the Pennask Lake Road was approximately 50 meters from the edge of Minnie Lake. He testified that the road was a long way away from the edge of Stoney Lake, though he could not recall how far.

[84] Mr. Woolliams testified that his initial impression of Stoney Lake was that it was tiny, and didn't produce any fish, with insufficient sources of oxygenation. Mr. Woolliams testified that when he arrived to DLCC about 1960, an aquaduct had been leaking and flowing into Stoney Lake, which provided some fresh water. He testified that there was also a small diversion that someone had cut into the hillside, which tipped the water over a plateau and into Stoney Lake, though he did not know who had created the diversion. However, upon becoming general manager of the Douglas Lake ranch, he placed a proper diversion box in this location. He did not recall there being a connection between Wasley Creek and Stoney Lake.

[85] Mr. Woolliams testified that during the 1960s, an unknown employee of DLCC diverted some irrigation water into Stoney Lake, which caused the lake level to rise, so that the road along the edge of the lake became boggy and damp. Mr. Woolliams recalled meeting with the owner of the Quilchena Creek Cattle Company to bring him onsite with diverting Quilchena Creek into Stoney Lake, though by this point, the water had already been diverted. There was an application to dredge Stoney Lake, but this work was never carried out. In 1973, DLCC applied for a water licence to store 400 acre feet of water in Stoney Lake.

[86] When presented with recent photos of the lakes, Mr. Woolliams testified that the lakes look nothing like they did in the 1960s. He stated that Stoney Lake is much larger and deeper, and Minnie Lake is also quite a bit bigger, though not as noticeably much. However, he stated that the elevation in the lake in 1974 was only slightly higher than when he started working in 1960. He stated that Stoney Lake was "man-made" in the sense that it was contributed-to by man, but not because it was man-made in its entirety. On cross-examination, he agreed that he did not know what size the lake was in the 1890s, nor whether it was smaller than in the 1960s.

[87] Mr. Woolliams recalled applying for a fish farm licence to accompany an existing hatchery licence at another location. He agreed that DLCC applied to have a commercial fish farm licence renewed in 1978, but did not recall whether there were any licences prior to this renewal. He testified that DLCC's goal was to make Minnie Lake and Stoney Lake a sustained fishery.

[88] On cross-examination, he agreed that he was aware that the province would not allow the closure of access to Stoney Lake in 1976, when the bypass was built, and that he was aware that this may cause difficulties in controlling access to the fishery on Stoney Lake.

[89] He testified that DLCC brought electricity to the lakes in the early 1970s, and built a road to the existing Stoney Lake Lodge. Mr. Woolliams recalled that the province stocked Minnie Lake, though this started before he was the manager of DLCC. He did not know whether the province stocked Stoney Lake, but thought that, if they did, the fish would not have survived. On cross-examination, when presented with records of provincial fish stocking in Stoney Lake, he reiterated that his only doubt is whether they would have survived. On cross-examination, he agreed that he had seen people casting into Stoney Lake, but stated that he had never seen a boat on Stoney Lake.

[90] Mr. Woolliams testified that DLCC hired someone to take fish from Minnie Lake to put them in Stoney Lake. He testified that he was unaware of, and had not been contacted regarding, a plan by the Province to install garbages and washrooms on Stoney Lake.

[91] Mr. Woolliams recalled charging members of the public to fish at Minnie Lake for a number of years, though he could not recall when this began. He stated that the fee was \$10 per day for the right to fish on Minnie Lake, though the fees were simply kept by the collector, as he was unpaid by DLCC. Mr. Woolliams did not recall any conflict prior to the fees being implemented, though DLCC restricted access to the land surrounding the lake, and asked individuals to leave who were in undesirable areas. He testified that people would camp at Minnie Lake occasionally, and that they would not be charged an extra fee for camping, or for launching a boat. On cross-examination, Mr. Woolliams stated that the fenced-off area where they allowed fishing access to Minnie Lake was the same area as the trail in Crown Grant No. 790.

[92] On cross-examination, he stated that, as manager, his views were different than his predecessor, and he welcomed recreationalists and fishers. He reiterated that DLCC generally only obstructed people from fishing where there were issues with the fishing intensity, when DLCC would charge a fee or require catch-and-release. On cross-examination, he stated his belief that DLCC had the right to charge a licence fee and restrict fishing activities due to the

ownership of the land surrounding the lake. He stated that DLCC was not charging for use of the roads or lakes, but rather for access to the lakes, which were surrounded by private property.

[93] Mr. Woolliams recalled that he was contacted by Weyerhauser in the 1970s regarding the condition of the road near Stoney Lake, and possibility of building a road further from the partially flooded land. He recalled that Neville Hope, the District Highway Engineer at the time, assured him that there would not be any problem, as long as DLCC cedes the right to the new road to the Province. Mr. Woolliams recalled receiving a letter stating that the old road should remain in place and would not be de-listed, as it provided legal access to Stoney Lake and Minnie Lake. He testified to writing a letter to the Department of Highways in 1969, stating that, due to increased traffic on the Pennask Lake Road, DLCC was having trouble controlling these areas, as gates were being left open by members of the public. On cross-examination, Mr. Woolliams stated that one purpose of moving the road was to get the public away from Stoney Lake. He agreed that DLCC hoped that the new bypass would divert all of the traffic from the lakes. He agreed that some scenic amenity was lost when the road was moved.

[94] Mr. Woolliams testified that he charged a Mr. McGowan \$200 per year for access to Paradise Lake on what he called a private road, though he did not have direct contact with this Mr. McGowan. On cross-examination, he recalled that DLCC would help the owners of Paradise Lake Lodge access Paradise Lake Road, as it was not maintained in good condition. On cross-examination, he agreed that he did not have the documentation to prove that DLCC charged \$200 for access to Paradise Lake Road, but insisted that he recalled the McGowan family paying for access. On cross-examination, he recalled charging Weyerhauser for access to the private roads that were branching off of the Pennask Lake Road, but not for using the Pennask Lake Road itself. He agreed that he locked various gates around DLCC's property, but did not lock the specific gates on Minnie Lake Road, because he would not have felt comfortable locking the gates unless he had the authority to do so.

[95] Generally, I accept Woolliams as attempting to be a truthful witness. I do not, however, accept his evidence about Stoney Lake's size as he recalled it, as it is completely inconsistent with the photographic evidence of the lake from 1948, nor do I accept his evidence about maintenance on the Stoney Lake Road.

Joe Gardner

[96] Joe Gardner testified on behalf of DLCC. Joe Gardner has been the general manager of DLCC since 1979 and is currently the vice-president. He took over this position from Neil Woolliams.

[97] Mr. Gardner describes DLCC's operation as changing over time. In 1979, it was largely a beef-generating business with some timber and some recreation. Since that time, with the construction of the Salmon Lake Resort in 1990 and the Stoney Lake Lodge in 1996, the operations of DLCC have become more diversified, with some focus on recreational fishery.

[98] In regards to the roads, Mr. Gardner testified that the old road, specifically the portion that went by Stoney Lake, was narrow, sometimes wide enough for two vehicles but sometimes only wide enough for one. He testified that the section running along Stoney Lake was boggy with soft spots. He testified that he was not aware of the Stoney Lake Road being maintained by the Province since 1979. Again, this is inconsistent with the evidence of those who worked for the government and maintained it.

[99] Of note, Mr. Gardner is a pilot and has a helicopter licence and maintains a helicopter at the DLCC home ranch site.

[100] He described the fishing season in the area of Minnie and Stoney Lake as something that begins around May 1st. He testified that the ice is not off the lake until the middle of April generally, and that the "melt" happens later on in the year.

[101] Mr. Gardner's evidence was inconsistent with what others said as to the nature and size of Stoney Lake. He testified that the distance between Minnie and Stoney Lake is approximately a half mile or less. He described the distance from the Stoney Lake Road to the edge of the lake as 30 to 40 feet. This is inconsistent with the evidence in Exhibit 9, a survey done by the Department of Highways in 1996.

[102] In his testimony regarding the size of Stoney Lake, Mr. Gardner confirmed that, up until 1979, there was no direct diversion into Stoney Lake, but that there had been some leakage from two other diversions through the ranch property. He clarified that this leaking came from a diversion from the Minnie Lake ranch hayfield and a diversion from the Quilchena-Wasley bypass. He testified that in 1979, a direct diversion for the purposes of water storage was made into Stoney Lake. At the Judicial View, he pointed to a small trickle of water flowing naturally into Stoney Lake as the only natural water course.

[103] Mr. Gardner testified that, to his belief, there was winter kill in Stoney Lake prior to the water diversion. As the water improved and the depth of the lake increased, this was less of a problem. Winter kill was associated with the lack of oxygen in the waters.

[104] Mr. Gardner testified that over time, DLCC has stored water for agricultural purposes in both Stoney Lake and Minnie Lake. For this purpose, small dams had to be built to ensure that the water was maintained in the lakes. He testified that the most recent dam construction, on

Minnie Lake in 2004 and 2005, resulted in a considerable expansion of the lake, as did the dam construction related to Stoney Lake.

[105] Mr. Gardner testified as to commercial fish farming permits, which DLCC obtained starting in 1983, and fish culture permits, which the ranch obtained from 1984. These permits were suggestive of an authority to hold fish in DLCC-owned containment areas. The information as to where the fish would be “contained” properly was not disclosed. Nothing turns what was said or who, if anyone, was misled, but it appears that once the Province became aware that the fish to be commercially raised were, in fact, being released into Minnie Lake, and to a lesser extent Stoney Lake, it issued no further fish culture permits..

[106] Additionally, it is clear from the interrogatories that DLCC did not advise any government official that, when it would raise the water levels of Minnie and Stoney Lake, this would flood the Stoney Lake Road. This may have been an intentional oversight by DLCC, designed to assist it with its application, or it may reflect the fact that it believed that the road to be flooded was not, in fact, a public road.

[107] Mr. Gardner was directed to numerous pieces of correspondence between DLCC, or its solicitors, and the Province, in regards to fish and, more specifically, the Douglas Lake Indian Band’s claimed right to fish in Minnie Lake. These exchanged letters appear to have been predicated on a false assumption; that DLCC had valid aquaculture permits, commencing in 1983, which allowed it to essentially operate a commercial fishing operation. These permits, evinced by the Province’s subsequent refusal to renew once full information was received, appear to have been granted on the erroneous assumption that the fish being “farmed” were contained in pens owned exclusively by DLCC. This was not the case; the “farmed fish” were, in fact, released into both Minnie Lake and Stoney Lake. These farmed fish swam, up until subsequent dam construction, almost exclusively in waters, the bed of which is owned by the Province. After the construction of the dam, and the subsequent raising of the lake level, the fish swam over lands owned by the Province, as well as on lands owned by, and flooded by the actions of, DLCC.

[108] Having reviewed the numerous letters in evidence, I conclude that, on a balance of probabilities, the initial comments by government officials about DLCC’s ownership of the fish was based on a misunderstanding of the situation; a belief that DLCC was operating fish farm in either a private pond or in private water storage. That being said, nothing of consequence to this litigation turns on this fact.

[109] Mr. Gardner expressed his concern about public access to DLCC’s lands. He expressed concerns that travelling vehicles and occupants often assist in the spread of knapweed, and

that other vehicles, such as quads and snow mobiles, may cause soil erosion. He commented on the frustration of posting signs that are constantly torn down or shot at.

[110] In his evidence, Mr. Gardner admitted that there was at one point public access to Minnie Lake. This was done through an arrangement whereby a Peter McVey, the individual referred to by Mr. Woolliams, would charge the public nominal amount for use of Minnie Lake, and would maintain an area clean for public use and monitor fishing in the lake. Mr. Gardner denies that there was ever any fishing in Stoney Lake until the lodge was built. This is in contrast to the evidence of the Aboriginal witnesses and others. He testified that the water in the lake expanded and was improved by the actions of DLCC.

[111] Mr. Gardner testified that it was his decision to place the lock on the gate, in or about 1990, which cut off access to the Stoney Lake Road. He admitted that obstructions were placed at the north end of the road to make it impossible to pass, including a number of large rocks and some log pile. He essentially admitted that part of the reason for this was to prohibit public access, which would negatively affect their nascent recreational fishing operation at Stoney Lake Lodge.

[112] In regards to his communication in 1996 with Douglas Kirk, the District Highways Manager, Gardner acknowledged receiving a letter dated May 8, 1996, which suggested a revocation of "permission" to lock the gate. Mr. Gardner testified that Mr. Kirk's view on the locking of the gate changed regularly and he noted, fairly, that Mr. Kirk never pressed the issue. In regards to this issue, the letter of May 8, 1996 is key. In that letter, Mr. Kirk recommended that the locked gate be replaced with a standard eight-metre metal cattle guard, which the Province offered to install. Later in the letter, Mr. Kirk wrote "in the event you would like to have the gate remain, I would ask that you make application to have it remain on a public road under permit. In addition, I would request that public access not be restricted and that the main gate be unlocked." In his testimony, Mr. Gardner confirmed that he never made application for a permit, he never unlocked the gate, and that Mr. Kirk never pressed the issue.

[113] It is fair to conclude that, as of May 8, 1996, DLCC was on notice that the Province considered this road a public road, that it did not agree with DLCC's decision to put a locked gate on a public road, and that DLCC was invited, though it declined, to request for such a permit, if there was a need.

[114] Mr. Gardner also testified about his involvement with Sherry Eland, a now former District Highways Manager, and her assistant, Darren Lincoln, and any influence he or DLCC may have had over the Ministry of Highways policy. Specifically, he testified regarding the Quit

Claim, or transfer, that Darren Lincoln drafted regarding the Stoney Lake Road. It was referred to in evidence as a Quit Claim and I will do so in these Reasons.

[115] Of note here, it seems clear that this Quit Claim, drafted as an Offer to Purchase, would have essentially usurped this litigation. The Offer to Purchase, as proposed, appears to trade the Stoney Lake Road for the fully surveyed bypass road, which was to be established by survey at the Province's expense and subsequently deeded to the Province by DLCC. Mr. Gardner indicated in his testimony that this offer "was not enough". His explanation for that comment is uncertain, or at least not clear to the Court. I will deal with this issue later in these Reasons.

[116] Mr. Gardner also testified in regards to the existence of what is noted as the #281 Stoney Lake Road on the government road register (an inventory of all public roads); its existence and inclusion in the government highway contract; his knowledge of ownership of the road; his knowledge of the maintenance of the road by government graders; his knowledge of general governmental contribution to the road; and any permission or authority to close the Stoney Lake Road. I find his evidence on these points to be contrived, and not based in any rational analysis.

[117] Mr. Gardner presented himself as someone who was simply doing what he felt he was entitled to do, which was to protect the lands of DLCC from interference by the public, due to the fact that public access had the potential, through the spread of weeds or otherwise, to cause inconvenience and damage to DLCC. He admitted that this prohibition from access had economic benefit to DLCC's developing recreational fishing business, though seemed to downplay this fact.

[118] This ignores what I cannot help but see as the obvious: Mr. Gardner, in his evidence in chief, did not point to any document or conversation, or anything in terms of history, logic, or analysis that would justify the closure of what was clearly a public road, by locking the gate. He provided no explanation for DLCC's failure to advise government authorities when it was applying for licences to store water in both Minnie and Stoney Lake, through the construction of dams, that such raising of the water levels would flood a public road. He provided no explanation for his failure to advise, in obtaining what I would collectively call the fishery licences, that the fish were stored, not in ponds owned by DLCC, but in lakes, a substantial portion of which, at minimum, were owned by the Province.

[119] Additionally, Mr. Gardner's evidence was completely disingenuous when he attempted to portray himself and DLCC as the victims of the Province's action. When asked if he and DLCC receive special treatment, he replied emphatically that he felt government treated them

horribly. He talked about the expropriation litigation, and other actions of the Province related to the grazing leases and privately-held lands affected by the construction of the Okanagan Connector. He felt DLCC's claim to be worth \$13 million, for which they received \$1 million. Yet it is clear that Mr. Gardner has acted, as manager of DLCC, as someone who is above the law. He was informed in 1996 that he was blocking a public road, yet he did nothing. It was not in his or DLCC's interest to open the gate, so he ignored that clear direction.

[120] In cross-examination, Mr. Gardner was asked about the circumstances related to the Paradise Lake Road. Paradise Lake Road is not part of this litigation, but it was suggested in cross-examination that DLCC's action in closing a public road for its own purpose, regardless of any legal justification to do so, is in fact an historical pattern. The circumstances related to Paradise Lake Road appear to be as follows. The Paradise Lake Road appears to have provided access to a provincial forestry recreational campsite. Additionally, there was a private fishing lodge located at Paradise Lake, which had historically been owned and operated by the family of Richard McGowan. This is the same Mr. McGowan who testified on behalf of the Club, was employed with the Ministry of Transportation and Highways in the 1980s, reporting to Mr. Kirk, and who was involved in the final surveying of the Stoney Lake Road. At some point, DLCC blocked the usual road access by way of what appears to be forest service road to Paradise Lake. Mr. Gardner testified that this occurred because those who attended the recreational site and operated the lodge refused to pay an access fee. The legal basis for this access fee is uncertain. Mr. McGowan testified that he, as an employee of the Ministry of Transportation and Highways, raised this issue with Mr. Kirk, who asked him not to press the issue because of the then delicate negotiations between the Province and DLCC, related to Okanagan Connector construction and expropriation.

[121] The impression after an effective cross-examination on this point, though denied by Mr. Gardner, is that the reason for the road closure was that a large company, DLCC, exerted its influence to effectively end economic opportunities for a small resort owner, who would be in competition with DLCC's recreational fishing operation and in conflict with its expansion plans in this area.

[122] Also on cross-examination, Mr. Gardner was pressed on the issue of various fisheries permits and on the water licencing and storage permits, which had the effect of flooding a road. Mr. Gardner's evidence on this point was particularly insightful. He admitted that, as of at least 1996, Mr. Kirk advised him that the Province viewed the road that DLCC had closed as a public road. Mr. Gardner could not explain, with this knowledge, why he did not advise the Province that, in raising the water levels of the lakes, the road would be flooded in at least two locations.

[123] Mr. Gardner essentially admitted that he was aware of public interest and public concern about DLCC's actions. He was clearly aware of the local First Nations' concern about the actions of DLCC, in locking the gate. He essentially admitted to his knowledge that, if a public road were to be altered or flooded, that the public would have to be notified. It appears that his only justification for flooding what he knew to be a public road, was that the road in question had not been maintained for a few decades. This justification is completely disingenuous when one notes that the reason the road had not been maintained was due to DLCC prohibiting the government contractor from maintaining the road, by locking the gate. I note that the highway maintenance contracts for this period included maintenance of the Stoney Lake Road and included payment for the maintenance of the road. It was estimated, and I accept, that the annual cost was approximately \$10,000, for a total, at the time of trial, of close to \$300,000. These are expenditures paid by the government for maintenance of the Stoney Lake Road, a road that contractors could not access because of DLCC's actions.

[124] Another inconsistency that came out in Mr. Gardner's cross-examination was related to Exhibits 36 and 37, which depict a number of logs and rocks placed at the end of the road in question, where it approaches the intersection of the Pennask Lake Road. Mr. Gardner admitted that he placed these boulders on the road and placed the logs to block the road. It appears that his justification for doing so was his belief that this was, in fact, not a public road and therefore the land belongs to DLCC. Again, no justification was given to ground his determination of ownership.

[125] The inconsistency noted above related to a letter in evidence, a request to a Mr. Parkes with the Ministry of Highways from Mr. Gardner. This letter related to DLCC's concern in regards to members of the Club who were walking on what was Stoney Lake Road. Mr. Gardner was of the view that this was something in which Mr. Parkes and the Ministry of Highways should be involved.

[126] This is odd because on the one hand, Mr. Gardner seems to advocate that there is no public road and therefore the lands are those of DLCC. Yet, when he was faced with what he viewed as trespass, he requested the assistance of the Ministry of Highways. The only basis for requesting departmental involvement appears to be that the land was a road, thus under the control of the Ministry of Highways. If it is not a public road, but is rather DLCC's land, it is unclear why Mr. Gardner requested the help of the Ministry of Highways. This inconsistency detracts from his stated belief that the road was not a public road.

[127] In regards to the crucial issue of the actual or natural high watermark of Stoney Lake, Mr. Gardner testified that when he first came to the ranch, Stoney Lake was a body of water that had been affected by irrigation and had been enlarged by diversion. There is scant

evidence about this fact, other than rumour and conjecture. An aerial map of Stoney Lake in 1948 (Exhibit 40) was put to Mr. Gardner, with the suggestion that the lake was virtually the same size in that photograph as in a sketch map of the lake dated February 8, 1991 (Exhibit 3, p. 231). Mr. Gardner refused to accept this as accurate.

[128] Again, when pressed on cross-examination regarding DLCC's fish farming licences, Mr. Gardner could not identify any documents to show that DLCC disclosed to the Province where they intended to hold the fish. When the suggestion was put to him that their aquafarm licence was revoked in 2003 because the Province determined that the fish were being farmed in a government-owned lake, Mr. Gardner disagreed with that assertion, though he suggested no other reason for the revocation.

[129] There are numerous aspects of Mr. Gardner's evidence which, collectively, suggest that there was a very cozy relationship, for lack of a better term, between DLCC and various government officials, including those in the Ministry of Highways, and perhaps the local RCMP. These portions of his evidence suggest that DLCC had an advantageous relationship with governmental bodies and, for the most part, it received preferential treatment from those governmental bodies.

[130] In regards to the Ministry of Highways, there were numerous documents related to this advantageous relationship. Specifically, these documents suggest that Sherry Eland, the District Highways Manager, informed her superiors, specifically the Minister of Transportation and Infrastructure, Blair Lekstrum, that there were no plans to Quit Claim the Stoney Lake Road to DLCC. In spite of this, she apparently instructed Darren Lincoln, her assistant, to draft a Quit Claim in exchange for the dedication of the bypass road. It remains unclear why a Ministry of Highways employee would advise her Minister and the public of one thing, and then actively work contrary to this representation to benefit DLCC.

[131] Another concerning element of evidence of the cozy relationship between DLCC and governmental officials relates to details that DLCC obtained from someone, most likely the RCMP, about the persons that DLCC viewed were trespassing on its lands. Though I will say more on this later, it seems clear that in the early 1990s, DLCC issued citations and fines, at least one of which was paid, to persons that it viewed were trespassing on its lands, while ice fishing on Minnie Lake. The evidence suggest that a DLCC employee obtained their licence plate numbers and, within one or two days, Mr. Gardner sent letters to the alleged trespassers, informing them that they had been fined for trespass. In response to a question by the Court, Mr. Gardner indicated that he was likely able to obtain their specific addresses online. This is highly unlikely because, at the time in question, the internet, as we now know it, did not exist; obtaining this information online was not possible.

[132] Though this particular circumstance does not relate to the ownership of the road, the fishery, or the legitimacy of DLCC's actions in locking the gate, by obtaining information, likely from police authorities, in what appears to an advantageous manner, one cannot help but conclude that DLCC and Mr. Gardner benefit from the considerable influence they wield as an economic force in this region, and as the largest landowner in the Province.

[133] In regards to Mr. Gardner, I find his evidence to be evasive and self-serving at best. His demeanor in answering questions was that of someone who cautiously considers a question and gave a considered answer. Often, one draws the conclusion that someone behaving in such a way is attempting to be accurate. I conclude, having heard his evidence, having observed his demeanor on the witness stand, that Mr. Gardner, in answering questions, was more conscious of the consequences of an answer for the litigation, rather than displaying a desire to be accurate and truthful. He was evasive and uncertain when questions that could cast doubt on the position advanced by DLCC were posed to him. On the other hand, he purported to have excellent memory of matters which would advance the cause of DLCC if accepted.

[134] Additionally, on the totality of the evidence, I cannot help but conclude that DLCC's actions in closing this road were the acts of a corporation with immense power and regional influence that simply felt it could do what it wanted to advance its interests, regardless of ownership, public rights and the public good. They were successful in this from the early 1990s until this litigation began.

[135] The only action that is inconsistent with the general conduct of DLCC and Mr. Gardner, is the curious decision not accept the Quit Claim of this land when it was offered to them. In analyzing the manner in which Mr. Gardner dealt with this question, I cannot help but conclude that, to use the vernacular, DLCC overplayed its hand, believing, as he suggested, that there was more available on the table. Had DLCC accepted the Quit Claim, some aspects of this litigation would not have arisen. It seems clear, however, that this Quit Claim offer was a decision of Sherry Eland, of the Ministry of Highways, and was apparently not authorized by the Minister.

[136] On this point, I am drawn to a letter of January 31, 1997 (Exhibit 2 at p. 260). This is a letter to Mr. Kirk from D.S. Cunliffe, an engineer employed on behalf of DLCC. In this letter, D.S. Cunliffe purports to summarize issues related to the proposal by DLCC to close Stoney Lake Road. The items for discussion include No. 4 "Compensation to Douglas Lake" and No. 6 "Costs of Closure and Rehabilitation for Abandoned Sections". It would appear, in 1997 at least, in addition to its desire to close the road, DLCC had requested monetary compensation.

Evidence: The Club

Richard McGowan

[137] Richard McGowan testified that he worked in the Ministry of Transportation and Highways from 1973 until the end of 1997. He testified that he worked in a variety of surveying capacities, as the government of the day saw the need to survey all original Crown Grant roads and other existing roads that had not yet been surveyed, with the ultimate goal of having all roads gazetted.

[138] Mr. McGowan testified that the Road Register is a non-exhaustive record, and many roads are not in the Register because they have not yet been surveyed. He testified that all roads in the Register started as a road, lane or trail, and that, over time, the roads that were more travelled came to be maintained by the Ministry of Highways. He testified that there were many roads in BC that are not depicted in the Road Register, including some Crown grant roads. He testified that, in his experience, some roads in the Road Register would have much less documentation, depending upon use and relative importance.

[139] Mr. McGowan testified that gazetting is the recording of public expenditures, which would involve identifying which Crown grant roads need to be re-surveyed for public use, undertaking of a survey, acquisition of a new right of way, and registration of the payment in the Gazette. He emphasized his view that prior to gazetting the road is still public, but it means that public money has not been expended.

[140] Mr. McGowan testified that, in order to determine whether a particular road is public or private, the Ministry of Highways would go back to the *Land Act* and *Highways Act*, R.S.B.C. 1979, c. 167 (since repealed), as well as look at the original Crown grants. He testified that the original Crown grants would each have a road, lane, or trail to access the granted land, and these roads must be maintained as public. He testified that section 4 road (under the *Highways Act*, now s. 42 of the *Transportation Act*) is treated as 66-feet wide, prior to gazetting. On cross-examination, he expressly disagreed with Mr. Kirk's opinion that the width of a s. 42 road is the travelled portion. Mr. McGowan testified that the *Land Act* states that any road acquired prior to 1977 is 66-feet wide.

[141] Mr. McGowan testified that, in 1997, one of his last projects was to survey the #281 Stoney Lake Road (the road in question), as well as the bypass road. He testified that his purpose was to do a site plan of the road, using the Total Station Surveying technique, not to survey the location of the lake. He testified that he encountered a locked gate, but that the Ministry of Highways had the combination from DLCC. Mr. McGowan testified that he took road widths of Stoney Lake Road, and that these measurements were accurate to within 2 inches.

He testified that he also took measurements of the high water mark of Minnie Lake in March, though he stated that it was likely not the extreme high water mark. He testified that he took measurements of the edge of the ice on Stoney Lake, which he testified came right to the shoulder of the road. He testified that, in his opinion, if the old Stoney Lake Road were obliterated due to rising lake levels, the southernmost Crown grant lots would have no access. Mr. McGowan testified that an old wooden culvert had been dug out at one end of the road, and that he drove around this obstruction in his surveying vehicle.

[142] Mr. McGowan, in clarifying his evidence for the Court, stated that the road had been maintained until the gates were locked in the mid-1990s. He clarified that, when employed by the Ministry of Highways, his understanding was that the locked gate was supposed to be moved to ensure uninhibited travel along the Stoney Lake Road.

[143] Referring to the Road Register entry for #281 Stoney Lake Road, Mr. McGowan testified that a Class 7 summer road would entail minimal maintenance, and signals a very low-use road. He testified that a winter classification of Class F means that it would essentially never be plowed, unless there was a specific purpose. Mr. McGowan testified that the notation “#281 Stoney Lake Road” would not have been created until after the bypass was built. Mr. McGowan testified that changing the legal status of a road in the middle of a maintenance contract would be anomalous, in his experience, and that changes in the road register normally occur when roads were updated, changed or rebuilt.

[144] Mr. McGowan testified that, when highway maintenance was privatized, there was a road features inventory that was created such that road maintenance contractors would know exactly what to maintain. He testified that he wrote to Ms. Eland asking why #281 Stoney Lake Road was not considered a public road, as he knew that it was a part of the Road Register. Mr. McGowan testified that, according to the road features inventory, approximately \$300,000 of public funds have been expended in maintaining the road. He testified that he arrived at this figure by calculating that it was 4.62km long, two lanes wide, with 202 summer maintenance days per year, which were remunerated at \$4.65 per “lane km” per day, and this had been ongoing for 27 years.

[145] He testified that he received the Quit Claim document for #281 Stoney Lake Road through a Freedom of Information request. On re-direct examination, when presented with an interrogatory of the Province, which stated that the cost change per year was approximately \$10,000, he agreed that it was a couple thousand dollars higher than his calculation.

[146] Mr. McGowan testified that he had fished on both Minnie Lake and Stoney Lake, and that the Club had installed an outhouse at the Minnie Lake Fishing Camp in the late 1950s. He

testified that he has once seen a fish with a clipped fin, on a day when more than 50 fish were caught in total. On cross-examination, he agreed that he was aware that people were being charged to fish on the lake in the 1970s, but that he never paid, as his father was good friends with Mr. McVey, the person in charge of collecting the fees.

[147] On cross-examination, Mr. McGowan agreed that he had received a cease and desist letter from the DLCC for trespass prior to conducting the #281 Stoney Lake Road survey. However, he denied being in a conflict with DLCC and insisted that he had a good relationship up until that point with Mr. Gardner.

[148] Mr. McGowan testified that he would use the Pennask Lake Road to get to his family's fishing resort on Paradise Lake, which he father had bought in 1966. He testified that the Paradise Lake Road turned off of the Pennask Lake Road approximately three kilometers after Stoney Lake. Mr. McGowan testified that the Pennask Lake Road was a standard width in the 1970s, consisting of two lanes. He stated that it was two lanes as it went by Stoney Lake. He testified that, when he conducted his survey in 1997, the road was significantly different, as it was grown-in, with grass covering much of the road surface. Of course by the time of the survey, the gate had prohibited access for several years

[149] Mr. McGowan testified that the original Crown grant for the land upon which the fishing lodge was located shows the Paradise Lake Road, and that this means that it was a public road. This is the road noted earlier as closed by the actions of Mr. Gardner and DLCC. Mr. McGowan testified that there was no evidence in his parents' estate of any fee being paid for use of the road. He testified that his brother paid a \$200 fee a single time, and that he disapproved of paying for use of a public road. He testified that, shortly after he notified DLCC that he would not pay for access on the road, a gate was erected across a bridge, blocking access to the resort. He testified that the resort's customers had no access to the resort for two years, at which time the Province opened an access road from the newly constructed Okanagan Connector. On cross-examination, he agreed that the Ministry of Forests had authorized barriers to be placed on the bridge in 1986, as it had been previously broken by a truck. On cross-examination, he recalled a conversation with the MLA, during which he was told the bridge was rebuilt partially at public expense.

[150] Mr. McGowan testified that one could step off the Stoney Lake Road and onto the ice on Stoney Lake. On cross-examination, he stated that he has accessed Minnie Lake by walking down the ice on Wasley Creek, and that he has never accessed it during the non-frozen periods.

[151] On cross-examination, when presented with the original Crown Grant No. 790, Mr. McGowan testified that he has seen a road in the location of the double-hashed “trail”, and that there is a marking on the ground that is visible. He agreed that his sketch plan from 1996 did not reference the trail, and stated that he was uncertain if he saw it at this time. He was presented with an answer he had given in examination for discovery, in which he stated that he believed the trail was not visible, and that it had likely grown over 50 years ago. He reiterated that were tire tracks in this location when he attended the area in 2016.

[152] Although I will deal with this matter in some detail later in these reasons, Mr. McGowan is an impressive witness. He had a considerable and detailed knowledge of the issues before the Court. His answers were straightforward and direct. Although he had a clear preference in this litigation, at no time was the Court left with the impression that his answers were calculated or intended to provide litigation advantage to the Club rather than to provide truthful answers.

Douglas Kirk

[153] Douglas Kirk worked for the Ministry of Highways from 1970 until 2004. He worked as the Merritt Highways District Manager from 1989 until October 2004. He testified that he did not have any knowledge of the bypass construction, as it occurred prior to his Merritt posting, but was made aware of what had happened by going through the district road files and by speaking with others involved. He recalled a conversation with Mr. Gardner in 1996, who told him that the old road was supposed to be closed and vested back to DLCC, by virtue of a land swap. He testified that he did not find any confirmation of this land swap, and that he told Mr. Gardner about this. He testified that he had an appreciation for the concerns of DLCC, including damage to property, and that he suggested moving the gates to a less restrictive location on the Stoney Lake Road.

[154] Mr. Kirk testified that when there is a s. 42 non-gazetted road, the procedure for closing the road would be to simultaneously gazette both the establishment of the road and the closure of the road with identical copies in the BC Gazette. He testified that this would have been the case for the Stoney Lake Road, if that were to happen. He testified that there would be a public consultation portion of the road closure, which would be published in local newspapers. He testified that if there were public objections, due to issues such as providing access to a fishery or a lake, this would weigh heavily in the decision of whether or not to close the road.

[155] Mr. Kirk testified that the completion of a legal survey on the Pennask Lake Bypass was necessary to finalize the road. He testified that the reason for this was that, without a legal survey, the road is essentially a s. 42 road, and only includes the travelled width of the road rather than the entire 66-foot right-of-way. He stated that this is unduly restrictive, as this does

not include drainage ditches or space for potential hydro lines. Mr. Kirk insisted that spending public funds on the legal survey of the Pennask Lake Bypass was necessary for having road width, widening and ditching, despite the fact that the rest of the Pennask Lake Road is all s. 42 road.

[156] Mr. Kirk testified that he sent out preliminary public consultation to certain groups, and received generally negative feedback regarding the potential closure of the Stoney Lake Road. He testified that there were two separate processes, and that the process does not lend itself to trading one road for another. He later re-stated the two issues as a dedication by DLCC that public access be maintained for the Stoney Lake Road, and the actual land-for-land trade. He testified that the legal survey did not progress, and that it was his belief that it was not due to public opposition, as he saw the discontinuance of the Stoney Lake Road as a separate issue. However, he acknowledged that the property negotiator would be working on both of these issues simultaneously. He stated that negotiations with DLCC were stalled, and it did not go much further.

[157] Mr. Kirk testified that Mr. Gardner acknowledged to him that the Stoney Lake Road was a s. 4 public road. He testified that, in January 1996, he allowed the continued use of a locked gate on the road by virtue of his power that allowed temporary closures, and that he thought this was appropriate as they were in active negotiations with DLCC. He testified that he did not believe the matter of closing Stoney Lake Road had been brought to a close in 1996. Rather, he authorized a survey for the purpose of determining whether closure of the road would leave a lot landlocked, without road access, which would be contrary to the Ministry of Highways mandate. Mr. Kirk also surmised that where public access already exists to a public lake, it was his understanding that public access must be maintained. However, he stated that public access had not actually been established by the Stoney Lake Road to either of the lakes, though it would have been beneficial to establish it, if possible.

[158] Mr. Kirk testified that, in May 1996, he requested that the gate be replaced with a cattleguard, and that the gate be left unlocked. In clarifying his evidence for the Court, he agreed that this meant the gate was locked without authorization from this point forward.

[159] However, in subsequent testimony, the next day of trial, Mr. Kirk denied that the temporary authorization had expired. He stated instead that the expiration would only occur at the withdrawal of the application by DLCC, or a withdrawal from the initiative to proceed with a legal survey, or with a final discontinuance of the Stoney Lake Road. Mr. Kirk stated that the temporary closure authority can be extended in the broadest sense, as long as it takes to accomplish the task at hand. He stated that the task at hand was either a final closure of the Stoney Lake Road, or a withdrawal of the application to do so. Of note, there is no evidence

that there was an application. Mr. Gardner says he or DLCC never made such an application. There was discussion, nothing more.

[160] Mr. Kirk testified that the public right of access beyond the gate was not inhibited, as there was nothing to stop individuals from climbing over the gate and continuing further down the road. He testified that the Stoney Lake Road was not closed by definition, but rather, access was restricted by means of a locked gate. Mr. Kirk testified that he was unaware of any activity at the eastern end of the Stoney Lake Road, and was unaware of the road being dug out at this location, blocking access, or any rocks or logs being placed that prohibit access.

[161] Mr. Kirk acknowledged attending an “inter-agency liaison meeting” with the Ministry of Forests and the Merritt RCMP. When presented with meeting minutes, which stated that the gate is legal and allowed to be locked, Mr. Kirk testified that he was not the one who had made the statement, and stated that it was not entirely correct.

[162] When presented with a May 2000 letter he had written, which stated that the gate erected was locked with Ministry of Highways approval, via agreement five years previous, Mr. Kirk testified that he did not know why no written authorization had been given for the gate. He agreed that allowing the gate to remain in place was intended to enhance the province’s bargaining position. He recalled upgrading access to Paradise Lake from the proposed Okanagan Connector, but denied that this was to avoid dealing with the fact that the Paradise Lake Road had been blocked. He testified that this was to provide an essential source of gravel for the construction. This is inconsistent with the evidence of Mr. McGowan, who testified that he had raised the Paradise Lake road closure with his superior, Mr. Kirk, who asked him not to press the issue because of negotiations at the time with DLCC.

[163] Mr. Kirk acknowledged drafting an email in 1997 to the Ministry of Environment, which stated that the Stoney Lake Road provides access to Minnie Lake, though not to Stoney Lake. He agreed, when presented with a photo, that the ice on Stoney Lake was adjacent to the travelled portion of the road. However, he maintained that he could not verify the distance of the shoulder of the road to the edge of the ice, and had based this opinion upon the site plan survey that had been completed. On cross-examination, Mr. Kirk stated that there was no right-of-way established for the purpose of access to Minnie Lake or Stoney Lake. On cross-examination, he stated that the only legal access to Minnie Lake was through Wasley Creek, though he stated that he was aware that the Ministry of Environment considered it illegal to walk down Wasley Creek during non-iced times of the year.

[164] Mr. Kirk began testifying on January 13, 2017, a Friday, and continued his evidence on January 16, 2017, a Monday. The contrast between his evidence on the two days is stark and

confusing. The evidence of January 13 is in many ways inconsistent with that of January 16. On January 13, Mr. Kirk, when presented with his letter of May 1996, agreed that that letter revoked any temporary authorization for DLCC to lock the gate. However, on January 16, the tenor of his evidence is suggestive that DLCC had continuous authorization to lock the gate and prohibit access, while application were being processed and perhaps negotiations took place. There is really no evidence of any formalized discussions or negotiations. There is as noted no evidence of an application. There was no explanation provided by Mr. Kirk for his inconsistent testimony. One can only speculate that upon reflection, perhaps Mr. Kirk felt he might look bad for writing a letter in 1996 indicating DLCC had no authority to close a public road, yet he did nothing about it as the authorized person to take such action, the District Highways Manager. At the end of the day, Mr. Kirk gave inconsistent testimony and this fact considerably taints the reliability of his evidence generally.

[165] While Mr. Kirk was believable and straightforward in his evidence of January 13, 2017, he was evasive and somewhat self-serving, easily confused and contradictory in his evidence of January 16, 2017. Very little, if any, weight can be placed on his evidence of January 16, 2017.

[166] The parties agreed, for the sake of time, that a number of witnesses could provide their evidence by way of affidavit. Noted below is a summary of the affidavit evidence provided and their deponents:

Michael Frederick Shafer

[167] Michael Shafer was employed by the Ministry of Transportation and Highways from 1967 to 1988. He has worked for a private road maintenance contractor from 1988 to the date of his affidavit, in 2013. His job involved grading public roads. During the 1970s, he graded the entirety of the Pennask Lake Road. In 1976, Weyerhaeuser, a logging company, built a bypass around the Minnie Lake and Stoney Lake areas and the road to Minnie Lake and Stoney Lake became known as the 281 Stoney Lake Road. He personally graded the entirety of the Pennask Lake Road, including 281 Stoney Lake Road, from 1970 to 1976.

Theodore Phillip Finnegan

[168] Theodore Finnegan worked for the Ministry of Transportation and Highways from 1969 to 1988 and worked for a private road contractor from 1988 to the date of his affidavit, in 2013. He was responsible for grading public roads. He testified that he personally graded the Pennask Lake Road before the bypass was constructed and he graded on 281 Stoney Lake Road on a regular basis after the bypass was constructed, but not as frequently as the

Pennask Lake Road and the new bypass section was graded. He graded the Stoney Lake Road until the gate was locked.

Gerald Sanford

[169] Gerald Sanford worked for the Ministry of Transportation and Highways from 1989 to 2002 in Merritt. He was responsible for organizing maintenance reports for private maintenance contractors. This included a listing of road features and roads that private contractors would be obligated to maintain. He swears in his affidavit that, at all times during his employment, the Stoney Lake Road was listed as a public road in the road features inventory.

Brian Ellery Niehaus

[170] Brian Niehaus worked for the Ministry of Transportation and Highways from 1962 to 1997. Beginning in July 1973, his job was to ensure all roads in the road register were properly indexed and that road maintenance on roads was conducted. In 1973, he inspected the Pennask Lake Road for determining the road suitability for planned logging of surrounding forests. A bypass road was proposed and constructed by Weyerhaeuser in 1976. This involved straightening the Pennask Lake Road by removing the winding section located by Stoney Lake and Minnie Lake. After the bypass was created, the old section of the Pennask Lake Road became a “discrete section of road known as 281 Stoney Lake Road”. The register of public roads was amended to reflect the new bypass road created as well as the continued existence of the 281 Stoney Lake Road. In 1976, he did a personal inventory of the Stoney Lake Road. He deposes that, in March of 2012, when contacted by a lawyer for the Ministry of Transportation and Highways, he confirmed that he had the inventory document that was created. A meeting was arranged to discuss this, but the meeting never happened. Finally, Mr. Niehaus testified that he was involved in classifying all roads in the Merritt district for the purpose of providing directions to maintenance contractors about which roads were public and had to be maintained under the contract. He confirmed that the 281 Stoney Lake Road was classified in these documents as a s. 4 public road.

Richard Paul Heppner

[171] Richard Heppner is a resident of Merritt since about 1969. Since that time, he and his family would travel to fish at Pennask Lake and other lakes. He fished at Minnie Lake in the 1970s. He recalls a time when the Pennask Lake Road bypass was built, and he recalls travelling on the 281 Stoney Lake Road after the bypass was built. He further testified that despite the locked gate, he has travelled the road passed the gate by foot on and off since

about 1993 and in fact travelled by foot regularly on this road in the two years prior to swearing of his affidavit, in April of 2013.

Stephen Alan Soames

[172] Stephen Soames is a Merritt resident and states in his affidavit that since 1963, he travelled with his family on fishing holidays to Pennask Lake Road. He states that in 1995, he tried to travel the Stoney Lake Road and encountered a locked gate placed there by the DLCC. Despite this gate being there, he has travelled the road at least once a year by foot since about 2008, when he became aware that the road was a public road.

Earl Michael Stoessiger

[173] Earl Stoessiger, a resident of Merritt since 1979, testified that since 1963, he has travelled on 281 Stoney Lake Road when it was part of the Pennask Lake Road. He fished at Minnie and Stoney Lake in the 1960s, 1970s and 1980s. After the bypass was built, he continued to travel on the 281 Stoney Lake Road until it was gated and locked sometime in 1990. In 1988, the gate on the Stoney Lake Road existed but was not locked. He recalled a particular incident when he was fishing with his wife and his three-year old daughter on Minnie Lake, having parked his car near what was a public picnic site. He described that a helicopter hovered 30-feet above his head, blowing snow around him and his daughter. The helicopter then landed by his car, a person got out of the helicopter, walked around his car and the helicopter left.

[174] In 1989, Mr. Stoessiger drove to Minnie Lake with approximately 11 friends in four separate vehicles. Again, a helicopter hovered 30-feet or less above them, blowing snow and debris around. The helicopter landed by the cars and the person in the helicopter walked around the cars, the helicopter then left. Two weeks later, he received an invoice from DLCC for \$125, itemized as \$100 for fishing at Minnie Lake and \$25 for trespassing. He discussed this matter with Mr. Gardner and indicated his refusal to pay. Mr. Gardner indicated he would see him in court. Six months later, he received another invoice, which he did not pay. He was never brought to court. Mr. Stoessiger further states that despite the locked gate, he has travelled past the locked road by foot every year since the gate was locked.

Peter Carl Voigt

[175] Peter Voigt is a resident of Merritt and has been since 1963. Since that time, he has travelled on the Pennask Lake Road. He fished at Minnie Lake in the 1960s, 1970s and 1980s. He recalls the bypass being built and confirmed that he travelled on 281 Stoney Lake Road after the bypass was built, until the gate was locked. He has, since the gate was locked, travelled by foot on 281 Stoney Lake Road.

Earl Rodney Nygaard

[176] Earl Nygaard worked for the Ministry of Transportation and Highways from 1973 to 2009 and from 1992 to 2009, he was the District Area Roads Manager in the Nicola district, where he was responsible for the Merritt-Douglas Lake area. He states that the 281 Stoney Lake Road was always recognized by the Ministry as a public road. The road register indicates that this was a public road and its physical features were listed. He recalls the construction of the gate, though he does not recall when this occurred. One day in 1996, he and Mr. Kirk attended a meeting with Mr. Gardner. On that date, the gate was unlocked. As a result of this meeting, he attaches correspondence from Mr. Kirk to Mr. Gardner dated May 8, 1996, which confirms the Ministry of Transportation and Highways' offer to put in a metal cattle guard where the gate was located and confirms a request that public access not be restricted and that, if DLCC prefers a gate rather than a metal cattle guard, the gate remain unlocked. Mr. Nygaard further deposed that he recalls attending the gate, in late 1990s, at the direction of Mr. Kirk, and he determined that the gate was locked. Further, he and Mr. Kirk attended at the 281 Stoney Lake Road around that same time and Mr. Nygaard deposed that DLCC had used heavy machinery to move a portion of the road into a hayfield.

Gary Wayne Watson

[177] Gary Watson was employed by the Ministry of Transportation and Highways from 1971 to 1988 and worked for a private maintenance contractor from 1988 to 2003. He confirms that he operated graders during the 1970s on what was then the Pennask Lake Road. He confirmed that after the bypass was built, the 281 Stoney Lake Road was created as its own discrete road and he graded the 281 Stoney Lake Road on a few occasions until the gate was locked.

George Edward Hendricks

[178] George Hendricks was a conservation officer from 1964 until 1984. He gave oral evidence in this trial. During this time, he frequently attended at the Minnie Lake and Stoney Lake area. He described Minnie Lake as a fishing lake where he would check licences and limits. He regularly saw graders on the 281 Stoney Lake Road and noted lots of use, approximately 20-30 vehicles a day. He testified that he never had the thought that this road was not a public road, as everybody used it for access to the public lakes.

Allan Murdock

[179] Allan Murdock also gave oral evidence. Mr. Murdock was employed as a machine operator until 1988, when road maintenance privatization occurred. As a machine operator for the Ministry of Transportation and Highways, he, on occasion, would access a gravel pit near

Minnie Lake. This was in the early 1970s. This pit was not used often, but it was used occasionally to load ministry trucks with gravel. He recalls once loading a DLCC truck from the same pit. The materials taken from this pit were used to maintain roads in that area, the area of Minnie Lake and Stoney Lake, essentially to maintain the Stoney Lake Road.

Theodore Finnegan

[180] Theodore Finnegan also testified. Mr. Finnegan testified to having worked as a grader as of 1974 and having graded the Minnie Lake Road many times. He testified to grading this road both before and after the bypass was built and that this grading would usually happen once in spring and once again at the end of the summer. He testified that, on the road in question, the 281 Stoney Lake Road, the graders would run in tandem and would go fairly quickly. The inference from his evidence is that the road was at least two-grades-wide, as such a road that was capable of having vehicles pass each other.

Evidence: The Experts

Jeffrey Holm

[181] Jeffrey Hold was qualified as an expert in the area of engineering, land and resource development and water resource management. He testified to graduating from university in 1987, practicing in this area since 1989, receiving his professional engineering designation in 1991.

[182] Mr. Holm's evidence was that Stoney Lake was in fact not a lake, but rather was an ephemeral pond which would seasonally hold water in the spring, but was not a permanent lake.

[183] Upon reflection, I have a number of concerns about the credibility and reliability of the opinion evidence offered by Mr. Holm and I have concluded that I cannot accept his opinion evidence.

[184] It is clear, in my view, that Mr. Holm is an advocate for DLCC. He has regularly been employed by DLCC and appears to have been so employed in regards to the construction of the dams on both Minnie Lake and Stoney Lake in 2005 and 2006. Specifically, he was asked about his obligations as a professional engineer in considering the effect of any engineering of a dam, and the subsequent raising of the water levels, as it would affect a roadway. In this regard, he appeared to have been aware that there was a road that was about to be flooded, but his only inquiry as to whether or not that road was public was to ask Mr. Gardner. He testified that he appreciates the importance of determining if a road is a public road or not prior to its flooding. Yet in the case of this road, while working for DLCC, he made no such inquiry

other than to ask Mr. Gardner. Any inquiry with the Ministry of Highways would have noted that the road was a registered road with that Ministry and a review of any contract of road maintenance would show that this road is in the road inventory. Mr. Holm was candid in his testimony that he did not check with the Ministry of Highways at all, and, though he did not appear to be aware as to whether it was an offence of any sort to flood a public road, he was aware that it was not a good idea.

[185] Mr. Holm's explanation for his action was that he was working for DLCC, the general manager of DLCC told him not to worry about whether the road was public, and he simply did not. He admitted that he did turn his mind to whether this road was public. He further admitted that he was aware that this road's ownership was controversial. In his evidence, he referred to the road as a "track", rather than as a road. He testified that he confirmed with Mr. Gardner that flooding of this "track" would be of no consequence.

[186] I conclude that this witness, in failing to inquire further, has failed in his professional obligation to determine this issue. He simply followed Mr. Gardner's directions. I have serious doubt as to his objectivity in providing an opinion, when DLCC is his regular client.

[187] Mr. Holm appeared to be so ingrained in the position of DLCC in regards to the road in question, that he did deny the proposition, despite his alleged expertise in the area of land, water and roads, that the term "once a road always a road", has any legal significance. His demeanour during his testimony was argumentative and he very much appeared to be an advocate for DLCC. As such, I cannot accept his opinion as to the nature of Stoney Lake as an ephemeral pond. He relied primarily on the notes attached to Crown Grant No. 495, the survey of which was done in early April, as grounding his evidence of the high watermark of Stoney Lake. He did not consider that freshet regularly appears, at least according to the Mr. Gardner's evidence, sometime after the middle of April each year, and that therefore, the high watermark more likely occurs in May or June.

[188] Additionally, his explanation for Stoney Lake's size, particularly in the late 1940s, was diversion. There is, however, no evidence of diversion to Stoney Lake around that time. Mr. Woolliams' evidence suggested that diversion commenced sometime when he was ranch manager.

Viktor Lewynsky

[189] Viktor Lewynsky, a fish biologist, testified about oxygen levels in lakes the effects upon fish that have low tolerance to lack of oxygen, resulting in what has been referred to as winter kill. He explained the placement of triploid fish (having triplet chromosomes) in Stoney Lake

and Minnie Lake, which are sterile fish designed to grow fast and large to benefit catch and release sports fisheries.

[190] Unfortunately, Mr. Lewynsky also has been highly involved with the operations of DLCC. This compromises his credibility, and the reliability of his evidence. His work for DLCC began in the 1990s and he was retained by Kip Woodward, a previous owner, and Mr. Gardner, to come up with a proposal of which bodies of water in the area of the DLCC property would be suitable for “world class” sustainable fisheries. Mr. Lewynsky was evasive about the necessity of fishing licences for fishing in both Minnie Lake and Stoney Lake. He confirmed that it was generally not possible to get permission to stock a lake if one could not guarantee that the stocked fish could not escape. He seemed surprised when questioned about Minnie Lake having an established fisheries in 1870s and 1880s, as reported by the Indian Commissioner at that time. Generally, when challenged on cross-examination about questions which might affect the position of DLCC, he presented as reluctant to answer directly.

[191] His evidence was, however, helpful in regards to the issue of aquaculture licences. DLCC’s licences were discontinued in 2003. Mr. Lewynsky was of the view that it was customary for these licences to be issued when fish are kept in a pen where it is possible for the licensee to track the number of fish, to feed them and to harvest them. He conceded that DLCC’s actions in stocking Minnie Lake and Stoney Lake did not fit into that definition of aquaculture, as he understood it. He was of the view that historically, Stoney Lake was landlocked, and that it had no inlet stream, despite the Crown grant showing such an inlet. He was of the opinion that Stoney Lake never produced fish and was not a viable lake. This, of course, was inconsistent with evidence before the Court, particularly of Aboriginal fishers and other witnesses who testified about fishing in Stoney Lake. This casts a significant doubt on his expertise.

Scott Rhodes

[192] Scott Rhodes testified as a mapping expert who was able to plot the various water levels of Stoney Lake and Minnie Lake at various points in time based on various amounts of information available to him. This plotting was helpful in regards to Minnie Lake, as it showed that, post-2005 dam construction, the water stored in Minnie Lake extended over the natural boundaries of Minnie Lake and flooded lands owned by DLCC. In regards to Stoney Lake, however, his evidence was less helpful in that he did not consider aerial photographs that show a high water mark significantly greater than the result of his calculations.

[193] The bathymetric surveys of Minnie Lake and Stoney Lake prepared by Scott Rhodes were helpful to the Court. The survey shows clearly that the sketch of Stoney Lake on Crown

Grant No. 695 is nowhere near the maximum ephemeral pond noted on that map. Unfortunately, this analysis was lacking in regards to Stoney Lake, as it did not refer to the parameters of Stoney Lake as found in the 1948 photographs in evidence. In regards to Minnie Lake, the survey is helpful in showing what appears to be the trail demarcated on Crown Grant No. 790.

Evidence: The Province

[194] What is notable about the evidence tendered by the Province, which consisted solely of oral evidence, is the evidence that the Province chose not to call.

[195] Throughout this litigation, there is much conjecture raised about the actions of a former provincial employee, Sherry Eland, who, as noted, was the Regional Highways Manager around the time that the Quit Claim was offered to, and ultimately turned down by, DLCC.

[196] It is a profound understatement to say that during the trial, suspicions were raised as to the actions of Ms. Eland. Though it is true that Ms. Eland is no longer the Regional Highways Manager, nor apparently employed in any capacity by the Province, the Province chose not to call Sherry Eland as a witness.

[197] Additionally, documents were put before the Court that bring into question Darren Lincoln's actions, in a manner that suggested his complicity in Ms. Eland's actions. I cannot make any determination on the issue of his complicity. The only suggestion before me in regards to Mr. Lincoln is that he was Ms. Eland's subordinate and was acting upon her instructions when he drafted the Quit Claim documents. The Province confirmed that Mr. Lincoln was still employed by them but chose not to call him.

[198] Though it was not argued before me to any great degree, other than to raise suspicion and concern, it is possible that when a crucial witness is not called, to draw an adverse inference to the party who chooses not to call such witness. I have not been asked, nor do I make such a determination here. I simply note that it is unfortunate and odd that no party chose to call Ms. Eland or Mr. Lincoln to complete the puzzle that exists in regards to Ms. Eland's apparent rogue action in dealing with DLCC, by proposing a Quit Claim of the lands in question.

Alan Martin

[199] Alan Martin was an assistant deputy minister in the Department of Agriculture and Fisheries, and subsequently a director of the Fish and Wildlife branch until his retirement in 2010. Mr. Martin's evidence is of note in regards to the history of DLCC's aquaculture licencing by the provincial government. Mr. Martin confirmed that the licences that had originally been

issued were issued on the belief that DLCC was applying for licences to produce fish in water bodies which they owned. He testified, however, that as a result of a dispute with an Indian Band and subsequent research, the Province determined that the Province owned the lake in which DLCC's aquaculture operation was taking place. He described that most aquaculture permits exist exclusively on private lands, in pens, or in containers to control any contamination with, or the addition of, wild fish stock. Aquaculture, in that sense, is an undertaking where fish are reared in a closed facility or container, are fed and ultimately harvested for food. Mr. Martin confirmed that this was the policy during his time with the provincial government. This period included the time up to 2003 when he was an assistant deputy minister in the Department of Agriculture and Fisheries.

[200] Mr. Martin did not know of a policy developed or recommended during the time that he was with the provincial government where such an activity would take place in a lake bed.

[201] It is important to note that Mr. Martin apparently agitated, to some degree, in order to make his presence known and be called as a witness in this proceeding. Though he was cautious in his answers and in his choice of language, implicit in his evidence is the suggestion that lake-stocking is generally done with sensitivity to environmental concerns, including stocking that reflects the natural biodiversity, and when not, it is important to confirm a lack of escape possibility of non-natural fish stocks, which could commingle with natural fish populations. From his experience as a provincial employee, he testified that it was the government's general policy that stocking of fish was designed to enhance a public resource, namely fish; the question of who stocked the body of water did not change the public nature of the fish. He testified that the only circumstance in which one would "own" a fish is when one is stocking fish in a contained facility that is privately owned, as opposed to stocking fish in waters or a lake owned by the Province. Mr. Martin testified that this was communicated in his discussions with Mr. Gardner, though he could not recall if the actual question of who owns the fish was either asked or directly answered.

[202] One can glean from Mr. Martin's testimony that the Department of Agriculture and Fisheries had found it difficult to import a proper means of dealing with DLCC into its principled approach to fisheries management. It is clear from his evidence that, when it became clear to the Province that DLCC was not operating its aquaculture licences in contained ponds they owned, that those licences were terminated. It is equally clear, however, that the government never directly communicated to DLCC or to Mr. Gardner any concern as to the ownership of the fish. The government apparently took the view that the fish in these lakes remained public, though they were aware of the differing view of DLCC, which was of the view that the fish in these lakes were owned by it.

Discussion and Conclusions

[203] Having reviewed all of the evidence, and having reproduced the salient evidence in these Reasons, I will focus only on the legal dispute between the parties and apply the accepted evidence, as it is relevant to the dispute.

[204] Much evidence was called about the conduct and character of the various protagonists in this litigation. DLCC raised concerns in cross-examination of the main witness for the Club, Richard McGowan, suggesting that he has a historical grievance against DLCC, and perhaps against his former employer, the Ministry of Highways.

[205] Contrary to that, I found Mr. McGowan to be a sincere and credible witness who is motivated by a sense of moral right and wrong. This being said, he is evidently of the view that the interests of recreation enthusiasts have been sacrificed by the action of a large corporation with considerable political influence. Despite this, these are not motivations of revenge or payback for past wrongs.

[206] DLCC's main witness was Joe Gardner. The suggestion of the Club is that Mr. Gardner is a powerful individual in the region, owing to his many years at the helm of what was initially the largest cattle ranch in the region, now likely the largest cattle ranch in British Columbia. The Club suggests that his influence extends beyond the parameters of the ranch boundaries, and that he is able to influence police authorities to act and government authorities to not act, according to his whims.

[207] In that regard, I have considerable sympathy for this suggestion. I find specifically that Mr. Gardner was less than a direct and truthful witness, and is someone who clearly had strong influence with government officials. However, he still views himself and DLCC as victims of governmental decisions. Objectively, there is no reality in that view.

[208] Upon reflection, the totality of his testimony was calculated to provide answers which support DLCC's position, as opposed to the truth. Observing his testimony and responses to questions, it was evident he would hear a question, consider the consequences of a truthful answer and the desirability of an answer that was consistent with DLCC's position, then chose to answer a question based on litigation considerations. The quintessential example of this was during his testimony related to the troubling circumstance in late 1989 and 1990, regarding persons who were deemed, by Mr. Gardner, to have trespassed on what he viewed as DLCC's property, including Minnie Lake. What was particularly noteworthy was the speed at which Mr. Gardner was able to obtain address information and send out demand letters and fines, based solely on obtaining the licence plate numbers from vehicles found near Minnie Lake.

[209] To take a further step back, a number of witnesses called on behalf of the Club recounted a circumstance where they would be ice fishing on Minnie Lake. While ice fishing, they would be, harassed by a helicopter flying slightly over their head, so close as to cause the ground snow to swirl around them. Although no one raised this point at trial, such intimidation is very akin to an apprehension of harm, which of course, is the basis for a charge of criminal assault. A number of witnesses testified to having observed the helicopter then stop near their vehicles, someone exit it, walk around their vehicles, and re-board the helicopter, which would then leave.

[210] Mr. Gardner is a helicopter pilot. He is licenced as such and DLCC owns a helicopter.

[211] Additionally, by his own evidence, Joe Gardner has testified that on a number of occasions, he sent ranch employees to obtain licence plate numbers from people he deemed to be trespassing by fishing on Minnie Lake.

[212] What is then surprising is that, within a matter of days of retaining such information, Mr. Gardner was able to send to the civic addresses of individuals, letters enclosing warnings and fines related to allegations of trespass on DLCC property.

[213] Examples of this are as follows. Apparently, there were certain alleged trespassing offences noted on December 31, 1989, a Sunday, and trespass letters were sent out on January 2, 1990, a Tuesday. On January 7, 1990, a trespass was alleged to have been recorded and a letter was sent out on January 8, 1990. Again, trespass was allegedly noted on January 14, 1990, and a trespass letter was sent out on January 17, 1990 to five individuals.

[214] The Court raised with Mr. Gardner the surprising speed at which information was generally available to him. The Court questioned how any individual could obtain a licence plate number, for example on December 31, 1989, a Sunday, and have the address information for that licence plate by January 2, 1990, when one considers that January 1 is a statutory holiday. Again, the Court questioned how one may obtain licence plate information on January 7, 1990, and have address information for that licence plate by January 8, 1990, a one-day turn around. Mr. Gardner's explanation was that he did an online search. The Court's reply was to point out that in 1990, online search of this nature did not exist. He was then equivocal about how the information was obtained.

[215] As a judge, one brings their own experience to cases before them. My experience as a lawyer in the 1990s was that, if one wanted information about a licence plate number, it involved writing to the RCMP with an explanation as to why the licence plate number address information was required; one would eventually get a response if there was a legitimate reason. Example of legitimate reasons include a traffic accident, or a damage claim as a result

of an accident where the only particulars one had was a licence plate number. In my experience, it was never the case that one could simply get this information on a whim. Additionally, if one made a criminal complaint, such as trespass, in the usual course of events, it would be highly unlikely that the RCMP would release this information to allow one to effect one's own remedy. Yet, in Mr. Gardner's experience, information was somehow obtained immediately. All of this is suggestive that there was a cozy relationship between Mr. Gardner and RCMP, or other authorities, who had in their possession licence information, and that these authorities were apparently willing to give this to Mr. Gardner promptly.

[216] This is a rather lengthy explanation for a conclusion that I reluctantly draw: that the concerns raised about the inappropriate influence of Mr. Gardner and DLCC in the Merritt area have some foundation.

[217] An average citizen, who complained to the police that a vehicle has trespassed on their property, would most likely not be granted the address information associated with that licence plate within a 24-hour period. It appears that Mr. Gardner and DLCC were granted such favour.

[218] This lengthy discussion about Mr. Gardner's evidence, his and DLCC's influence in the Merritt area, and my conclusion of the veracity of the evidence called by DLCC is noted for specific reasons. One of those reasons is to dispel the idea put forth by Mr. Gardner that he and DLCC are somehow victims of governmental impropriety in this litigation.

[219] Mr. Gardner candidly testified to his belief that he and DLCC have been poorly treated by governmental officials. He relates this back to a failed claim in an expropriation litigation related to the Okanagan Connector.

[220] While that litigation was unsuccessful in DLCC's view, one cannot ignore the evidence regarding the considerable influence of Mr. Gardner and DLCC as it relates to government officials.

[221] One conclusion that is most notable from the evidence at trial is the unilateral actions of DLCC. It is shocking that any corporation could take for its own benefit, with no legal right, a road. This taking began with the locking of a gate. It was predicated on an alleged land swap for which there is no evidence. This was done to assist DLCC in the maintenance of its cattle operation, but it also seems clear that it was done for the express purpose of prohibiting access to two lakes, which DLCC determined they could modify and stock, in order to create a recreational fishing business. This, in spite of the fact that they did not own the lakes.

[222] It is concerning that a corporation, or an individual, could simply close a road without any consequence, despite government authority at least by 1996 determining, as the initial

evidence of Mr. Kirk confirmed, that there had been no deal to close the road by swap land when the bypass road was built. Additionally, and equally shocking, is that, on the evidence before me, it appears that a senior employee of the Ministry of Highways, Ms. Eland, acted contrary to the representation of the Minister of Transportation and Infrastructure, who had stated that the closure of the Stoney Lake Road was not being discussed. The evidence on this point is incomplete, as no one called Sherry Eland; however, this suggests an impropriety in which Mr. Gardner and DLCC were intimately involved.

[223] Despite this, the issues before the Court are not the credibility of Mr. Gardner directly, the propriety of DLCC's past actions as a corporate entity, nor the actions of Ms. Eland, DLCC, and Mr. Gardner related to the Quit Claim. However, where the evidence of Mr. Gardner conflicts with that of the Club, generally, I prefer the evidence of the Club witnesses over that of Mr. Gardner, for the reasons noted above.

Issues to be Determined

[224] From a review of the pleadings, there are a number of issues, which the Court is required to decide. In no particular order, what follows is my analysis and determination of those issues.

Issue 1: Is the Stoney Lake Road a public road?

[225] DLCC seeks a declaration the Stoney Lake Road, as I refer to it, is a private road that has no public access. It further seeks a declaration that all land above the natural boundaries of Minnie Lake and Stoney Lake are private lands, a declaration that all fish in the lake are domestic animals controlled by DLCC, and seek damages for conversion of personal property, trespass, and the like.

[226] I have concluded there is no basis for any declaration that the original Stoney Lake Road is in fact a private road. I have concluded this for a number of reasons. There is ample evidence from Crown Grant No. 790 that part of the road was dedicated by Crown grant, as was the trail from the road to the shore of Minnie Lake. In this regard, as it relates to the road. There is really no evidence to the contrary.

[227] Additionally, other neighbouring Crown grants or similar governmental documents are in evidence, which show the continuation of this road onto other lands.

[228] I accept the submissions of the Club, that if a road is found on a Crown grant, the Crown has reserved that road for itself. In regards to the portion of the Stoney Lake Road that is on the Crown Grant No. 790, I accept the Club's submissions that this portion of the road, pursuant to s. 13(1)(a) of the *Land Act*, is a road that is 20.1168 meters in width. The

application of this provision of the *Land Act* was not disputed in any argument advanced by DLCC.

[229] Additionally, what I will refer to as the second portion of the Stoney Lake Road, the leg that runs from the intersection of the Crown grant part of the road near the old mill site to the most easterly section of the Pennask Lake Road, is in fact a road that was maintained by government, with government expenditures, until the date at which DLCC closed the road by virtue of locking the gate and blocking the furthestmost exit onto the Pennask Lake Road. This is a road by virtue of the provisions of s. 42 of the *Transportation Act*, which states, and I paraphrase, that if government money is spent on a road that is not a highway, the travelled road is deemed to be a highway.

[230] It seems the consensus from submissions, and I have not found statutory or judicial authority to the contrary, that if a road is found to be a s. 42 road, it is the travelled portion of the road that is deemed to be a highway. The best evidence before me, on the width of the travelled portion of the road is that two grader trucks, each with a 12-foot blade, could drive in tandem down this road when it was fully operational. As such, I find that this portion of the road to be a road that is 24-feet wide.

[231] From DLCC's pleadings, as well as its opening argument, it appears that it relies on a commitment from the government that, when the bypass was established, the Province would abandon the Stoney Lake Road. That, upon reflection, was an "agreement" created only by DLCC or Mr. Gardner, which had no support from any independent evidence. There is no evidence of the Province ever agreeing to this.

[232] The alleged agreement to swap land was disputed by Mr. Kirk, on behalf of the Ministry of Highways, and it was disputed by Mr. Woolliams, who was Mr. Gardner's predecessor in his role as manager of DLCC. Mr. Woolliams was in charge of DLCC when the bypass was built. It is clear from letters written at that time that DLCC desired to close the Stoney Lake Road and it was equally clear from letters written in response by government authorities at that time that no such closure was contemplated by the owner of the road, the Province. Additionally, there are numerous letters and other documentary evidence that this swap was never the intended outcome prior to the bypass construction, nor an agreed result upon its completion.

[233] I have concluded that there is no basis in law for the declaration sought by DLCC. I find that there is a strong basis in the evidence for the declaration sought by the Club, namely, that the Stoney Lake Road is a public road.

[234] To conclude on this point, I agree with the submissions of the Club in regards to how a road is established.

[235] In the event that I am wrong in my determination as to the road on the Crown grant, it is my further determination that the entirety of the Stoney Lake Road, from the locked gate to where it joined the Pennask Lake Road, is in fact a public road by virtue of s. 42 of the *Transportation Act*.

[236] As noted earlier, s. 42 provides that if public money is spent on a travelled road that is not a highway, the travelled road is deemed to be a highway. The evidence before me is overwhelming that public funds were spent on the entirety of the Stoney Lake Road, as I have defined it, right until the time that the road was closed, and in part decommissioned, by the actions of DLCC.

[237] As such, if I am wrong in my interpretation of the Crown grant and the width of the road that is found on the Crown grant, then the entirety of the Stoney Lake Road would be a road that is 24-feet in width, which is the travelled portion of the road.

[238] In regards to the s. 42 analysis, numerous persons testified to either working on the road directly for the government or as government contractors. Numerous witnesses attested to traffic on the road. The road is a road on the regional highways road inventory, as the documentary evidence suggests, and, as a result, highway contractors were, and perhaps continue to be, paid for the maintenance of this road. These funds have been wasted, by virtue of the actions of DLCC. Numerous documents are in evidence confirming historical expenditure on the Quilchena Pennask Lake road, which includes the Stoney Lake Road.

[239] The evidence overwhelmingly leads to the conclusion that there have been public expenditures made on this road and, as such, it is a public road by virtue of s. 42 of the *Transportation Act*.

[240] I recognize that parts of this public road have been flooded due to DLCC's alterations of Stoney Lake and Minnie Lake. Further, part of this road has been decommissioned by the DLCC's actions, through the placement of rocks and timbers across the road and the digging up part of the road.

[241] As this litigation required a determination as to whether this was a public road, I have received no submissions from the parties regarding an appropriate remedy, or the expected order, if the Court were to find, as I do, that the Stoney Lake Road is a public road. The parties are free to attempt to resolve this issue through communications, discussions and compromise; however, they may require additional assistance of the court to resolve the issue.

[242] The consequences of this declaration may be ultimately a requirement that DLCC decommission the dams which they have constructed which have flooded the road. That is a

determination that the owner of the road, the government defendant, must ultimately make. It may be the case that a compromise can be reached through agreement to have the current road that travels to the Minnie Lake ranch portion of DLCC properties replaced as the public road.

[243] Additionally, there must be some determination, and again the parties are free to negotiate, of what is to be done in regards to the decommissioned portion of the Stoney Lake Road that ran generally north from the old mill site to, and ultimately intersected with, the Pennask Lake Road. No submissions have been made on this point, and thus the Court cannot determine this issue on the evidence before it in this trial.

[244] Until such further agreement between the parties is reached, or until a court orders otherwise, I am directing that the existing road from the gate to the mill site be opened to the public and be made available for public use.

[245] As such, the gate, which has blocked what I have determined is a public road, may remain in place, but must remain unlocked at all times so as to allow public access.

Issue 2: Is there public access to Minnie Lake?

[246] Having decided that the Stoney Lake Road is a public road, I turn now to the trail on the Crown grant, which travels from the Stoney Lake Road to Minnie Lake. This trail, on the original Crown grant, appears to then proceed in the direction of the Douglas Lake Indian Band reserve.

[247] I accept the Club's argument that a trail on a Crown grant is intended to be an exemption from the Crown grant. It is important to note that on the Crown grant, the trail is clearly marked, in a manner similar to that of the road. One can conclude from this, that at the time, this was a significant non-natural feature, which was readily apparent. One can conclude by the markings being the same, that the same intention, a reservation of the trail like the reservation of the road, was intended by the Crown, at the time of the grant. Additionally, the evidence of Aboriginal witnesses was that this was a well-marked and regularly travelled trail from the Douglas Lake reserve to their traditional fishery grounds at Minnie Lake. That I accept is what is noted on the Crown grant.

[248] In the event I am wrong on this issue as it relates an exemption in the Crown grant, I am satisfied that this trail, by its nature, its continued use, and its importance to the Aboriginal community, falls within the parameters of a common law dedication. As such, beginning with historical use and continuing with Crown Grant No. 790, there has always been trail access over lands now owned by DLCC to Minnie Lake.

[249] What really confirms the existence of a trail is the evidence of the local Aboriginal witnesses who testified to an historic trail from the traditional Indigenous village, now the location of the Douglas Lake Indian Band reserve, which is near Douglas Lake, and Minnie Lake. The trail noted on Crown Grant No. 790 is entirely consistent with these witnesses' testimony, which I have accepted as reliable evidence.

[250] I would be remiss if I did not comment here on the overwhelming evidence of historic fishing activities at Minnie Lake. Aboriginal witnesses who testified in this trial, particularly Walter Archachan, described how both Minnie Lake and Stoney Lake were main fishing lakes for his people, the members of the Douglas Lake Indian Band.

[251] Counsel for DLCC argues that the notations which give rise to the Crown grant note this trail as a fence as opposed to a trail. I do not accept this submission. I decline to do so because of the evidence before me regarding the manner in which Crown grants were obtained. The evidence suggests that someone would claim a portion of land and then would contact a land office to arrange for a survey. A surveyor would attend, survey the lands in question and create a Crown grant from the survey notes. As such, the evidence is suggestive that Crown grants would be made available almost immediately upon the claiming of land. In that sense, a partial fence, which does not run on the property line and does not appear to encapsulate or secure any particularly succinct area, makes no sense. A partial fence is no fence. As such, I conclude that the notations which are suggestive that this marking is a fence are in fact wrong and the Club's submission regarding it as a trail on the original Crown grant is correct.

[252] Additionally, trail access to Minnie Lake has a non-Aboriginal historical basis. There is ample evidence that, over the years, the Province encouraged fishing on Minnie Lake by stocking it, as they do with many other lakes in the area. Additionally, the Club has garnered numerous documents in evidence, including fishing maps, affidavits and oral evidence, confirming that fishers in the area regularly attended at Minnie Lake to fish, that fishing maps in the area featured Minnie Lake as a fishable and public lake, and at one point, the Club owner's predecessor, it appears, maintained a campsite with the consent of DLCC near the trail access to the lake, to facilitate those who chose to fish there.

[253] DLCC's position is that its use of water licence provision and the ability to legally store water, and its decision to store water in Minnie Lake essentially creates a barrier. The essence of its argument is that because it has taken government water under a water licence, which I note remains the property of government and only available to DLCC for its use, and stored it in Minnie Lake, raising the natural boundaries of Minnie Lake, that it can essentially prohibit access to Minnie Lake by flooding its land with government-owned water.

[254] On the face of it, the *Trespass Act*, R.S.B.C. 1996, c. 242 [*Trespass Act*], appears to condone such action. It would seem obvious to me that the drafters of the *Trespass Act* did not anticipate this exact scenario. The specific scenario in question is someone using a government water licence to extend the natural boundaries of a lake, take away the ability of the public to access the lake by virtue of flooding their own lands, and thus, essentially, expropriating for their own use the entirety of the lake by prohibiting public access.

[255] Despite this, I need not consider the provisions of the *Trespass Act* in regards to Minnie Lake because I find that, no matter what area of land DLCC flooded, there is still the road and the trail, which guarantee access to the lake. If in fact the *Trespass Act* is applicable, it is open to DLCC to mark with buoys, the land it owns that it has flooded with government water and, in doing so, prohibit those who fish on Minnie Lake from accessing over their land. They cannot however, block access to the lake, because in my view the Crown grant provides, by virtue of the road and trail, access to the waters of Minnie Lake.

[256] No arguments have been raised about the possible implementation of the court order if it were determined that there was access to Minnie Lake for the general public. Therefore, until further court order, or agreement of the parties, I direct that access to Minnie Lake be only by foot and with whatever fishing device one could carry along a cleared trail of no more than three-feet in width. Additionally, anyone who chooses to fish on Minnie Lake, other than Aboriginal fishermen, must do so on a catch and release basis, until such time as the owner of Minnie Lake, the Province, determines otherwise. The usual provisions for fishing must be in play, including the requirement of a licence. Again, the *Trespass Act*, as I read it, entitles DLCC to mark with buoys portions of the lake which are over its lands, and fishing by the general public is prohibited in those portions of the lake. Of course, DLCC must dedicate a portion of access consistent with the three-foot width of trail to the public portion of the lake.

[257] Additionally, it is of note that access to Minnie Lake can also be had by traversing along Wasley Creek. It appears to be the evidence of DLCC that since dam construction, the fish in Minnie Lake and Stoney Lake are no longer natural, but rather the stocked, non-reproducing fish they have placed there. As such, environment concerns about walking in Wasley Creek may be minimal.

Issue 3: Is there public access to Stoney Lake?

[258] While there is no dispute about the natural boundaries of Minnie Lake, there is a considerable dispute in regards the natural boundaries of Stoney Lake.

[259] The suggestion in the evidence of DLCC, through its expert, is that Stoney Lake is nothing more than an ephemeral pond, which comes and goes on occasion. The suggestion is that, at some points, Stoney Lake was in fact a dry piece of land.

[260] That evidence is completely inconsistent with the Aboriginal evidence about the historic nature of both Minnie Lake and Stoney Lake as natural fishing grounds for the Douglas Lake Indian Band.

[261] Additionally, it is hard to imagine how a pond that regularly dries up would miraculously be stocked again with fish for the benefit of Aboriginal fishers when, as suggested by DLCC, there is no natural creek that flows into the ephemeral pond.

[262] Unlike the Crown grants related to Minnie Lake, the Crown grants related to Stoney Lake appeared to have been surveyed at a time when water was low, before a time referred to in the evidence as “freshet”. The Crown grant in question related to Stoney Lake, Crown Grant No. 695, was actually surveyed in 1890, likely in April of that year. History known to me as a former resident of the area confirms that, as in a flood year of 1972 as an example, Kamloops experienced floods and highwater as late as June.

[263] Section 55(2) of the *Land Act* provides the following:

Bodies of Water

55 (2) Nothing in any Act or rule of law to the contrary is to be construed to vest or to have vested in any person the land that comprises the bed or shore of the body of water below the natural boundary ...

[264] The natural boundary is defined in s.1 of the *Land Act*:

"natural boundary" means the visible high water mark of any lake, river, stream or other body of water where the presence and action of the water are so common and usual, and so long continued in all ordinary years, as to mark on the soil of the bed of the body of water a character distinct from that of its banks, in vegetation, as well as in the nature of the soil itself;

[265] As such, it is necessary for me to examine the evidence to determine what the high watermark is of Stoney Lake.

[266] I start with the Crown grant. As I have noted, the Crown grant with notes taken likely right after the snow began to melt and before freshet, does not provide evidence of the natural high watermark of Stoney Lake.

[267] The Aboriginal witnesses' evidence about fishing in Stoney Lake does not assist the Court in determining anything other than the fact that Stoney Lake existed. Its high watermark cannot be determined from that evidence.

[268] DLCC's expert suggested that Stoney Lake has only become a significant water storage area, or something more than an ephemeral pond, by virtue of the movement of water by DLCC over the years. The evidence before me suggests that initial water licence for DLCC was issued in 1927. Neil Woolliams, who was the ranch manager for DLCC, confirmed in his testimony that the movement of water across ranch lands by DLCC had no impact or import on Stoney Lake until such time as, in the 1970s, someone diverted a water course to the north of Stoney Lake, and water began to flow to Stoney Lake.

[269] Mr. Gardner's evidence was that there was very little, if any natural water flow into Stoney Lake. He purported to confirm this during the Judicial View.

[270] The best evidence I find that I can rely on as to the natural high watermark of Stoney Lake is the photographic evidence provided, consisting of aerial photos photographs taken in 1948 (Exhibit 40). Again, this was before there was any significant water diversion towards Stoney Lake. These photos show a robust body of water.

[271] Based on those photographs and the totality of the evidence before me, it is reasonable to conclude for the following reasons that the portion of the Stoney Lake Road that ran near Stoney Lake essentially touched the shores of the lake.

[272] First, the evidence before me is that the waters of Stoney Lake were very close to a sawmill operation that abutted the lake. Sawdust and slag was apparently pushed into the lake. This suggests close proximity of the road to the lake. Second, the evidence before me suggests that one of the purposes of the bypass was to avoid the softness of the road as it passed close to Stoney Lake. One can conclude from this that the Stoney Lake Road ran so close to Stoney Lake that the waters of Stoney Lake affected the use of the road.

[273] Additionally, the evidence of fishers who testified as to fishing in Stoney Lake commented on the ability, prior to the geo-engineering and the raising of Stoney Lake and the subsequent flooding of the Stoney Lake Road, to stand on the road near Stoney Lake and flyfish. It was also stated in evidence that one could step off the road on to Stoney Lake when it was frozen.

[274] I find that the natural high watermark of Stoney Lake was immediately adjacent to the running of the Stoney Lake Road at some, or several, points on its north section, from the old

sawmill site to its intersection with the Pennask Lake Road. As such, there was access from the Stoney Lake Road to the waters of Stoney Lake.

[275] Having concluded that the Stoney Lake Road exists, though it has been flooded by the geo-engineering of DLCC, it stands to reason that access to Stoney Lake is available by virtue of traversing what remains of the Stoney Lake Road until one gets to the natural high water of Stoney Lake. The Stoney Lake Road, now flooded, provides access to the lake because the Stoney Lake Road, abutting the lake itself, did not require the traversing over DLCC property in order to obtain access to the lake.

[276] Again, in regards to the section of the *Trespass Act* noted earlier, I do not have to decide whether or not that provision is applicable to these circumstances, due to the ability to simply step off the Stoney Lake Road onto the lake. The Stoney Lake Road provided access to the lake prior to the geo-engineering, and in light of the declaration as to the public nature of the Stoney Lake Road in these Reasons, provides access to Stoney Lake today.

[277] Again, it would be open to DLCC to mark with buoys, or by other means, the area of land above this determined high watermark of the lake, which DLCC has flooded pursuant to its water licence.

[278] As in regard to Minnie Lake, I direct that, until either the Province determine otherwise, the parties agree or the court further orders, that fishing in Stoney Lake by the public be limited to fishing with a device that a person or persons can carry, such as a belly boat or a canoe, and that fishing be undertaken on a catch and release basis. In regards to both this and Minnie Lake, those fishing restrictions do not apply to Aboriginal fishers.

Issue 4: Who owns the fish in the lakes?

[279] Turning to the issue of the fish and the fisheries, I find the Club's submissions in regards to the ownership of the fish and the fisheries to be persuasive.

[280] I will not repeat the detailed submissions of the Club in regards to the constitutional basis for fisheries regulation in the Province. I find their submissions in their opening statement to be persuasive.

[281] As for the direct question of "who owns the fish in the lakes?", it is important to note that until DLCC had obtained aquaculture licences in the early 1990s, which continued until 2003, both lakes were, at various times, stocked by the Province. This is particularly true of Minnie Lake.

[282] As was noted earlier in these Reasons, when DLCC applied for aquaculture licences, it did not expressly indicate to the Province an intention to stock fish in Minnie Lake and Stoney Lake. I can make no determination as to whether or not this omission was intentional or inadvertent, but clearly, once the Province became aware that a private entity was stocking fish in something that was not a private pond, the aquaculture licences ended. I note in particular the evidence of Mr. Martin, which is persuasive on this point.

[283] After they became aware of this, the Province reviewed the licences and terminated their re-issuance. It seems the reason for this is obvious: the Province realized that DLCC's operations were not a legitimate aquaculture facility. The fish were being released into public water, not a private pond. As noted by Mr. Martin in his evidence, those licences required maintenance of fish in a stocked private pond to maintain ownership of the fish.

[284] Since DLCC closed off public access to Minnie Lake and Stoney Lake by closing Stoney Lake Road, DLCC has been stocking both lakes with fish for the purposes of their commercial enterprise. DLCC claims ownership of these fish.

[285] Ownership of animals or fish or any live being, suggests a certain act of husbandry. It suggests that one purchases the live being in question, tends to it by virtue of feeding it and caring for it, and one does so on one's own property or, in the case of livestock, with express rights of access to Crown lands for the purpose of grazing, on which land cattle are reared. The landowner, the Crown, gives permission to let your property roam on their land.

[286] One maintains a level of control over the "being" in question by virtue of maintaining it on land one controls or owns, by virtue of one's act in caring for it, and assisting in its growth, by controlling its behaviour and by subsequently harvesting it for whatever purposes one intends.

[287] As such, there is a distinction to be drawn between domesticated animals, which one controls, manages, feeds, and harvests, and feral beings, such as wild fish. Additionally, as the lakes are owned by the Province, akin to land and grazing animals, to maintain ownership a similar type of licence would, in my view, be necessary.

[288] That analogy about husbandry does not apply to the fish in question. Despite the assertions of DLCC, the mere act of stocking a lake does not create ownership of the fish. The majority of Minnie Lake and the majority of Stoney Lake, as I find it, are public bodies of water. The fish are released into a public lake, which is public water. They are public bodies of water to which DLCC has no greater claim than anyone. There is nothing akin to a grazing lease over Crown land in regards to these lakes.

[289] Noting that the majority of both lakes are public bodies of water, the fish that DLCC has released into these public bodies of water swim in public water. They swim in public water not only in the natural boundaries of Minnie Lake and Stoney Lake, but they continue to swim in public water as they traverse over lands that are above the natural high watermark of both lakes. The fish feed and grow in these public bodies of water. The actions of DLCC in releasing the fish into the public domain prohibits the assertion of ownership, particularly when the feeding and growth of these fish are facilitated by the fish feeding and growing in water which is owned by the Province.

[290] As such, I agree with the submissions of the Club and the Province that the act of releasing fish creates a circumstance where the fish do not remain the property of DLCC.

[291] DLCC further argues that it is able to control the fish in the lake by virtue of its geo-engineering and the inability of the fish to escape. This runs contrary to what was viewed by the Court at the Judicial View. There was clear evidence of fish escaping from Stoney Lake and coincidentally, there was clear evidence of very recent amendments to the fish-blocking techniques around the lakes. Nothing turns on that because, as I find that the act of releasing fish into government water, into a lake that is primarily public, and the act of those fish feeding and growing through the natural process in government water, prohibits any assertion of ownership.

[292] I find the fish in the lake are public fish, not the property of DLCC.

Issue 5: Navigable Waters

[293] In light of the findings that I have made that the road is public and that there is public access to both Minnie and Stoney Lakes by virtue, in regards to Minnie Lake the access provided under the Crown grant, and the access to Stoney Lake by virtue of the natural boundaries of Stoney Lake abutting the determined publicly funded road, it is not necessary for me to determine the issue of navigability of waters.

Issue 6: Common Law Right of Access

[294] I find the Club's argument in regards to a common law right of access to make logical sense.

[295] I accept the Club's submission that the government has, by virtue of the *Water Sustainability Act*, S.B.C. 2014, c. 15, and the *Land Act*, maintained ownership of lakes in British Columbia. Though there is no clear evidence before me, it would likely be the case that somewhere in British Columbia, a Crown grant was issued, which retained a body of water for the Crown but granted the land surrounding the body of water to a single landowner. It could of

course be argued that Crown Grant No. 695 does just that, had I not determined that the boundaries of the lake on that grant are not accurate. Regardless of that, there are likely numerous instances of a series of Crown grants that would give land to a limited number of landowners around a government retained body of water. This is true for Minnie Lake.

[296] It would be nonsensical for a government to retain the rights to a lake if, by virtue of a single owner purchasing all the land surrounding a lake, that owner could prohibit public use or ownership of the lake. It only make sense that government would have retained the ownership of bodies of water, lakes, with the intention of the public being allowed to access water they retained.

[297] By access, I am not suggesting that there exists a right to motorboat or other vehicular access to bodies of water, but it only makes sense that the government's intention in retaining ownership of lakes means that there is public access, as determined and regulated by government, to these lakes.

[298] That is the argument that gives rise to the claim of a common-law right of access, or so I understand it as argued by the Club.

[299] However, in light of my decision in this case, I need not determine that issue.

[300] Additionally, I recognize that the Club has *pro bono* counsel acting on its behalf and this is a relatively minor issue relative to the scope of the evidence and argument that had to be marshalled in this case. The submissions made by counsel for the Club, generally speaking, were thorough. Counsel's ability to marshal evidence was exemplary. However, I cannot help but find that the determination of this very important public law issue is an issue which requires further thought, argument, and evidence. As I have indicated, I do not specifically have to decide this issue and I find that it remains open to be argued in subsequent proceedings.

Issue 7: *Trespass Act* Considerations

[301] In light of the findings noted above, the provisions of the *Trespass Act* do not directly come into play with the issue of access to the lakes in question.

[302] However, DLCC's actions in raising the water level of Minnie Lake and Stoney Lake and flooding the existing road is of concern to the Court. While it is true that the *Trespass Act* purports to leave open a remedy when a trespass is committed over one's land that is covered by water, it is an open debate, in my view, whether what has happened in this action in what the *Trespass Act* was meant to apply to. If this issue needed to be resolved, further submissions from DLCC, the Club, and specifically the Province would be required.

[303] I raise now, in *obiter*, the question which remains, as to whether or not the use of public water, and the storage of water, that, even while under a licence is still owned by the Crown, on one's land, invokes the *Trespass Act* or not. Given my conclusions in these Reasons, I do not need to hear from counsel on this point.

Issue 8: The Province's Obligations and the Province's Actions

[304] In their pleadings, the Club has alleged that the Province has a public duty to allow access to roads and lakes, and to allow fishing in lakes. In support of this, they rely on the provisions of the *Hunting and Fishing Heritage Act*, as well as their argument about the historic nature of fishing, and its particular significance to British Columbia. I find that, in deciding the questions posed in this litigation, I need not directly decide whether the Province has such an obligation in regards to lakes and fisheries, because I have concluded, noting that both Minnie Lake and Stoney Lake have traditionally had public fisheries, that the Province has, in the past, stocked both lakes for the purpose of a public fishery. Further, by virtue of these Reasons, there is public access to both lakes. Thus, it stands to reason that in regards to these two lakes, there is a public right of access and a public right to fish.

[305] In regards to a public right to access roads, I have determined that Stoney Lake Road is a public road and have directed that the gate prohibiting access be unlocked, so as to allow access. I need not, as such, decide the broader issue as to whether or not there is a legal obligation on government to allow access to any road that, by virtue of s. 42 of the *Transportation Act* or a Crown grant, is a public road or highway.

[306] I now turn to the issues in this case as it relates to the actions, or lack thereof, of the Province.

[307] Earlier in these Reasons, I noted my very significant concerns about the action of DLCC and its ranch manager, Mr. Gardner, in their actions in, for a lack of a better term, taking the law in their own hands and closing, by virtue of a lock and intimidation, a public road. As critical as I am of Mr. Gardner, greater criticism may be levelled at the Province for its absolute lack of action in maintaining their property and enforcing the public good against a determined and bullying corporate entity and its manager.

[308] In particular, and with no disrespect intended, the evidence of Mr. Kirk regarding the actions of the Ministry of Highways under his watch, are actions which are frankly deplorable. Although Mr. Kirk may have had some strategic reason for doing so, he should have acted to enforce a public right and he did not. Mr. Kirk had determined in 1996 that the expression by Mr. Gardner to him, on behalf of DLCC, that the Stoney Lake Road had been traded for, the construction of the bypass road was not factually correct. He advised Mr. Gardner and DLCC

of this. As such, a representative of the Province had determined in 1996, with some certainty, that the closure of the Stoney Lake Road was unlawful.

[309] Yet, the Province did not respond to this apparent unlawful act.

[310] In fact, for over 20 years, it did nothing.

[311] Over 20 years, a privately-held corporation, owning a large swath of land, prohibited the public from driving on a public road and the Province did nothing.

[312] This is most unfortunate. I cannot find it to be a breach of law *per se*, but it is a breach of the reasonable expectations that citizens would have of their government. It ignores a basic concept of the rule of law, that laws apply equally to all regardless of their status, their position in society, their ability to influence, or their wealth. In this regard, the Province has continuously failed the citizens of British Columbia.

[313] As for my criticism of Mr. Kirk, as I have noted earlier, over the course of a weekend, his evidence changed considerably on a crucial issue. That being said, his change of evidence does not erase the fact that in 1996, by virtue of Mr. Kirk's knowledge, the Province was aware that a legal road existed and a corporate entity was blocking it for essentially their own convenience and economic benefit.

[314] As the evidence played out, I understand that there was, at some point, some concern in regards to provincial officials from the Ministry of Highways in dealing with DLCC and Mr. Gardner. Historically, they had concerns about expropriating lands for the purpose of the Okanagan Connector construction from Merritt to Kelowna in the 1980s. It appears that the Ministry of Highways developed a pattern of dealing with DLCC in a very tender or timid manner.

[315] I reluctantly conclude there was a breach of the Province's obligations to the citizens of British Columbia, when DLCC unilaterally closed a public road and no government official in the Ministry of Highways had the wherewithal to insist that the lock on the gate be removed, nor insist that a corporate entity respect the law.

[316] Mr. Kirk, on one occasion, wrote a letter asking Mr. Gardner to do that. That is simply not good enough. The Province's position has always been that this is a public road. I question why the Province's action on a public road in rural British Columbia differs from what it clearly would be if a public road in a more populated area were blocked.

[317] In my view, the Province has a public duty to maintain the ownership of public lands and roads and to prohibit those who, for their economic or personal benefit, choose to occupy public lands without licence, or interfere with public access to public roads.

[318] No explanation was provided to the Court for why the government did nothing when they clearly have an obligation to, in my view, enforce a public right to roads.

[319] The Province, in their defence, essentially agrees that they have this right, though they do not agree that they have an obligation to enforce a public right to lakes or fishing, or that there exists a public right to lakes or fishing.

[320] One of the very profound lessons of this litigation is that the Province has failed to protect the public interest. It has failed to ensure that a road it owns was not blocked, and subsequently destroyed by virtue of flooding, by a private land owner with economic interests aligned with the closure and destruction of the road. The Province's actions, in not protecting the public interest in that sense, are disappointing to say the least.

[321] That turns me to the issue of Ms. Eland. Again, Ms. Eland was the District Highways Manager in Kamloops. The evidence suggest that at public meetings, she stated that there was no intention to close the Stoney Lake Road. Her Minister made written representations to the same effect. Yet her actions differed from her words, and the statements of her Minister. She was clearly involved with DLCC and Mr. Gardner in an attempt to transfer the Stoney Lake Road to DLCC.

[322] Mr. Lincoln was mentioned as someone working with Ms. Eland, no doubt following her instructions, in negotiating and drafting these proposed the Quit Claim. The evidence before me suggested that Mr. Lincoln is still employed by the Ministry of Transportation and Highways, but the Province chose not to call him.

[323] The surprising thing about this duplicitous scenario is that for unknown reasons, DLCC, when offered these Quit Claims, decided not to accept them. Based on Mr. Gardner's testimony, it is likely that DLCC thought there was more on the table that it could extract from the Province, in light of the Province's offer. In any event, DLCC did not accept these Quit Claims of the lands, nor the offer of ownership of the lands, and, thus, the litigation continued.

[324] I recognize that the maintenance of rural roads is an expense to government for which there is no public adoration or glory. There is an economic cost to the maintenance of public roads for the benefit of citizens in rural British Columbia, which the government must bear. I also recognize that maintenance of rural public roads is not a high governmental priority and, as such, interference with access to public roads, despite notice to government of this illegal

act, may not result in demands from members of the legislative assembly that the government take action.

[325] I am also particularly cognizant of the fact that every political party that has governed the Province since 1990 has, to a greater or lesser degree, been responsible for the lack of action in maintaining the public's right to these roads. All governing parties have shown a lack of action to enforce the public good, in their failure to require a corporate entity, which has taken public roads and lands, to cease its actions.

[326] What I am saying is that there is plenty of blame upon all politicians and all political parties who have governed this Province since 1990.

[327] As such, I am not pointing a finger at any particular government individual but, again, it is most unfortunate that all governments holding the obligation of the public trust have failed to take any actions to prohibit what was an illegal obstruction of a public road by a corporate entity, for its own benefit.

Conclusions

[328] The exacting details of the orders made of this Court are set out in the body of these reasons. However, as is the tradition, a summary of the orders at the end of the reasons for judgment is appropriate.

[329] In answer to the question "is the Stoney Lake Road a public road?", it is a public road. The detail of the width of that road at its various locations are set out in the reasons. As the public road has been flooded, it is directed that the existing re-configured road from the gate to the old mill site is to be opened to the public and available to public use and the gate in question must remain unlocked at all times.

[330] In answer to the question "is there public access to Minnie Lake?", there is public access by virtue of the road and trail noted on the Crown grant and by virtue of access along Wasley Creek.

[331] In answer to the question "is there public access to Stoney Lake?", there is public access to Stoney Lake by virtue of the determination that the natural high watermark of Stoney Lake abutted the Stoney Lake Road and access was available on that basis.

[332] In answer to the question "who owns the fish in the lakes?", the fish stocked in both Minnie Lake and Stoney Lake by DLCC are feral beings, and as such, are wild fish. The act of releasing fish into a public body of water vitiates any claim of ownership by DLCC over the fish. I find the fish in the lakes are public fish.

[333] On the issue of whether or not Minnie Lake or Stoney Lake contain navigable waters, it is the determination of these reasons that it is unnecessary to answer that question because access to the lakes from a public road is available to the public.

[334] In answer to the question raised by the Club as to a common law right of access to lakes, again, I have determined that I need not consider this issue though I am strongly persuaded at an initial stage that there is substantial merit in that argument in light of the Crown's decision to retain lakes as public bodies, publicly owned.

[335] In regards to the considerations of the *Trespass Act*, I have determined that I need not make any determination in that regard, as regardless of whether or not the *Trespass Act* applies, there is by virtue of these reasons public access to both lakes.

[336] In answer to the general determination of the Province's obligations in regards to public access to road and lakes, though no legal public duty to maintain roads or to guarantee access to lakes have been proven, there is an overwhelming public duty on the Crown in maintaining ownership of public roads, public lands, and public waterways, to ensure that there is access to the public and that those who wish, for their own economic interest to limit public access to roads, lands, or water bodies be prohibited from doing so.

Costs

[337] The Club has been successful in this litigation and is entitled to their costs.

[338] If the parties cannot agree on the appropriate level of costs, they are free to arrange through SC Scheduling in Kamloops to attend in front of me so that that issue can be determined.

"J.R. Groves J."

Groves J.