

CANADA / JUDGMENT

TimberWest Forest Corp. v. 0768816 B.C. Ltd.

2020 BCSC 1184

COURT

Supreme Court of British Columbia

DECIDED

12 August 2020

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2020 BCSC 1184 TimberWest Forest Corp. v. 0768816 B.C. Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

TimberWest Forest Corp. v. 0768816 B.C. Ltd.,

2020 BCSC 1184

Date: 20200812

Docket: S156255

Registry: Vancouver

Between:

TimberWest Forest Corp.

Plaintiff

And

0768816 B.C. Ltd.

Defendant

Before: The Honourable Mr. Justice Skolrood

Reasons for Judgment

Counsel for the Plaintiff:

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Place and Date of Trial/Hearing:

Vancouver, B.C.

July 9 and 10, 2020

Place and Date of Judgment:

Vancouver, B.C.

August 12, 2020

Introduction

- [1] The plaintiff, TimberWest Forest Corp. ("TimberWest"), holds a statutory right of way (the "SRW") over a road (the "Road") that crosses portions of land (the "Lands") located near Courtenay, on Vancouver Island, owned by the defendant 0768816 B.C. Ltd. ("076").
- [2] Over the past number of years, disputes have arisen between the parties about 076's ability to control or regulate access to the Road.
- [3] By way of this summary trial application, brought pursuant to R. 9-7 of the Supreme Court Civil Rules, TimberWest seeks various orders to enforce its rights under the SRW.

Background

The Parties

- [4] TimberWest is a forest company that has logging operations in various locations in British Columbia, including on Vancouver Island.
- [5] 076 is a wholly owned subsidiary of 3L Developments Inc. ("3L"), a Vancouver Island-based real estate development company.

The Lands and the Road

- [6] The Lands are part of a larger parcel of property owned by 3L and 076. The Lands were originally owned by TimberWest; however, in September 2006, they were sold to 076.
- [7] The Road has been used by TimberWest since the 1950s to transport equipment, supplies, personnel and harvested timber to and from its forest lands located in the area. The Road provides an important link between TimberWest's logging operations and its processing facility located in Campbell River.

The SRW

[8] The SRW was entered into in or about June 2006, and was registered against the Lands on June 23, 2006. The original parties to the SRW were TimberWest and a related entity. TimberWest was the transferee or grantee under the SRW. Relevant provisions of the SRW include:

1. Grant of Right of Way

1.1 The Transferor hereby grants, transfers and conveys unto the Transferee the non-exclusive full, free and uninterrupted right, license, liberty, privilege, easement and statutory right of way, in common with the Transferor and other parties permitted by the Transferor, for the Transferee, its related companies, its successors and assigns and its and their contractors, subcontractors, employees, licensees, permittees, invitees, guests, agents, servants, and workmen, at all times hereafter, by night and by day and at their will and pleasure to enter upon, go across, pass over and repass over, within, upon and along the Lands, with or without vehicles, for the purposes of:

- (b) accessing lands in the vicinity of the lands;
- (c) Transporting equipment, logs, timber and all other things relating to the business of the Transferee across the Lands;
- (f) Generally doing all acts, things, and matters necessary for or incidental to the exercise of the rights granted in this section 1.1.

3. Covenants of the Transferor

3.1 The Transferor will:

- (c) permit the Transferee for the period during which this Agreement is in force to peacefully hold and enjoy the rights hereby granted without hindrance, molestation or interruption on the part of the Transferor or any person claiming by, through, under or in trust for the Transferor, except as expressly stated in this Agreement;
 - (d) not erect, or permit to be erected, any buildings or structures on the Lands which would, in the reasonable opinion of the Transferee, obstruct or preclude the Transferee's right to pass or repass in, under, over, through or upon the lands in accordance with this Agreement;
- [9] The contract of purchase and sale, pursuant to which 076 bought the Lands, identified the SRW as an existing encumbrance against the Lands and there is no issue that the SRW is binding on 076.

History of the Parties' Dispute

- [10] In the spring of 2011, 076 installed two sets of locking gates (the "Gates") approximately two kilometres apart on the Road and initially did not provide keys to TimberWest. Ultimately, the parties reached a compromise whereby 076 left the Gates open for the 2011 and 2012 logging seasons.
- [11] In the spring of 2013, 076 again locked the Gates and took the position that TimberWest drivers would have to open and close the Gates when passing through. However, 076 re-opened them in or about late May 2013 and kept them open through 2013 and 2014. Throughout the period of 2011-2014, TimberWest kept 076 advised of its logging schedule.
- [12] In or about July 2015, the Gates were again locked. TimberWest contacted 076 and was advised that one of the Gates was broken and could not be opened. 076 also reiterated its position that the Gates had to remain locked and that TimberWest's drivers could open and close them as needed.
- [13] On August 14, 2015, TimberWest commenced this action and brought an application for an interim injunction. Mr. Justice MacKenzie granted the application and issued an order restraining 076 from closing the Gates or otherwise impeding or interfering with TimberWest's rights under the SRW between the hours of 8:00 a.m. and 6:00 p.m., Monday to Friday of each week commencing August 17, 2015. Justice MacKenzie also ordered that TimberWest proceed to trial "with all dispatch and as soon as practicable".
- [14] Thereafter, 076 generally left the gates open until March 2017 at which time, 076 installed a tollbooth on the Road. In April 2017, 076 and TimberWest reached an agreement whereby TimberWest would provide 076 with the names of its contractors who would be permitted free passage through the tollbooth.
- [15] 076 found the process of verifying who was permitted to use the Road unworkable and in May 2018, 076 removed the tollbooth. The Gates remained open for the balance of 2018.
- [16] In January 2019, the Gates were again locked. 076 refused to unlock them but offered to provide TimberWest with keys. This led TimberWest to file a further application for an injunction on March 12, 2019. In late March 2019, the parties reached an agreement whereby 076 agreed to comply with Justice MacKenzie's 2015 order pending the hearing of TimberWest's further injunction application.
- [17] Since that time, according to TimberWest, 076 has continued to periodically impede its use of the Road.
- [18] At various times when, in TimberWest's view, 076 has impeded its access to the Road, it has rerouted vehicles along an alternate route via Marsden Road (the "Marsden Road Detour"). According to TimberWest, use of the Marsden Road Detour is impractical in that it adds considerable time to a round trip, is unsuitable for transporting large pieces of equipment and travels through a residential area thus creating unnecessary safety risks.

[19] In light of this history, TimberWest now seeks a permanent injunction requiring 076 to remove the Gates.

Legal Framework

[20] The principles governing summary trial applications are well-established and were summarized by Madam Justice Dardi in *Lougheed v. Wilson*, 2014 BCSC 2073, as follows:

[81] The seminal decision of the British Columbia Court of Appeal in *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.) identified a number of factors a court ought to consider in determining whether it would be unjust to proceed summarily in a particular case. These factors include: the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, and the course of the proceedings. These factors remain relevant in the current jurisprudence.

[82] Since *Inspiration Management*, the issue of the appropriateness of the summary trial procedure has garnered considerable judicial attention. The modern judicial approach in this province endorses the consideration of additional factors when evaluating suitability. These factors were helpfully summarized by Gerow J. in *Dahl et al. v. Royal Bank of Canada et al.*, 2005 BCSC 1263, (upheld on appeal 2006 BCCA 369) at para. 12:

- a) is the litigation extensive and will the summary trial take considerable time;
- b) is credibility a crucial factor - and have the deponents of the conflicting affidavits been cross examined;
- c) will the summary trial involve a substantial risk of wasting time and effort, and producing unnecessary complexity; and
- d) does the application result in litigating in slices. (see also: *Novin v. Novin*, [2004] B.C.J. No. 2082 (C.A.); *Bacchus Agents (1981) Ltd. v. Philippe Dandurand Wines Limited*, 2002 BCCA 138).

[21] The central issue in this action involves the interpretation of the SRW, which TimberWest submits is ideally suited to a summary trial. 076 did not oppose proceeding in this manner and I am satisfied that a summary trial is appropriate.

[22] The parties generally agree that determination of TimberWest's application involves a two-step analysis: first, the Court must determine the nature and extent of the rights granted to TimberWest under the SRW; and second, the Court must then consider whether those rights have been substantially interfered with by 076's actions.

[23] With respect to the first step, in *Avanti Mining Inc. v. Kitsault Resort Ltd.*, 2010 BCSC 1181 at para. 61, Mr. Justice Joyce set out a number of principles that apply to the interpretation of a right of way:

1. The Right of Way is limited in its scope to purposes that are necessary for the operation of the grantee's undertaking as a mining corporation.
 - s. 218 of the Land Title Act.
2. The following principles that apply to the construction of a contract also apply to the interpretation of the Right of Way:
 - (a) the intention of the parties is to be determined by looking first to the plain and ordinary meaning of the words used, in the context of the whole of a contract and in a manner that does not render one part of the contract ineffective.
 - (b) The words must be read in the context of the surrounding circumstances when the contract was made, including facts known to both parties but not negotiations or evidence of subjective intent.
 - (c) The standard is an objective one.
 - (d) If the words of the instrument are unambiguous that is the end of the matter. If there is ambiguity or if the plain language leads to an absurdity, a result that both parties could not have intended, then regard may be had to extrinsic evidence to assist in determining the parties' intent.
 - (e) Evidence of context or surrounding circumstances must not be allowed to overwhelm the plain language of the document.

0746727 B.C. Ltd. v. Cushman & Wakefield LePage Inc.; Water Street Pictures Ltd. v. Forefront Releasing Inc.

3. Thus, with regard to an easement in particular, the wording of the instrument creating the Right of Way should govern its interpretation unless (a) there is an ambiguity in the wording or (b) the surrounding circumstances demonstrate that both parties could not have intended a particular use of the easement that is apparently authorized by the wording of the document.

Granfield

4. The use to which the easement is intended to be put at the time of the grant is not a surrounding circumstance which shows a common intention of the parties that the easement was not to be put to any other use.

Granfield; White, Robinson; Laurie v. Winch; and Hillside Farms Ltd. v. British Columbia Hydro Power Authority

5. Evidence of negotiations or subjective evidence of the person who drafted the instrument purporting to explain the intent of the easement is not a "surrounding circumstance" and is not admissible as an aid to construction.

Kassell

6. To the foregoing, I would add this: where the instrument granting the easement contains an expression of the use for which the easement is intended, the court should be cautious about relying on extrinsic evidence as to use or purpose.

[24] The second step of the analysis was described by Mr. Justice Brundrett in *Smith v. Balen*, 2018 BCSC 918 at para. 85:

The test as to whether there has been an actionable disturbance on an easement is whether the way could be practically and substantially exercised as conveniently after as before the interference; to be actionable, the interference must be substantial: *Grenier v. Elliott*, 2007 BCSC 598 at para. 35; see also *Fallowfield v. Bourgault* (2003), 68 O.R. (3d) 417 at paras. 11 and 33 (Ont. C.A.).

Relevant Case Law

[25] Both parties acknowledge that each case involving an alleged breach of rights under a right of way turns on the specific facts of the case. Nonetheless, the parties both cite cases which they submit should inform the analysis in this case.

[26] TimberWest relies on the following authorities:

- a) *Livingston et al v. Millham et al*, 2005 BCSC 1292 - The plaintiff owned a resort that was accessed by way of a road passing through the defendants' property which was subject to an easement. In order to address the volume and speed of traffic along the road, the defendants proposed to erect two gates. Mr. Justice Blair held that the gates would impede the "full, free and uninterrupted access" to the access road in breach of the clear language of the easement (at para. 22). Justice Blair granted a permanent injunction precluding the erection of gates or other obstructions.
- b) *Halcyon Point Developments ULC v. Simon*, 2009 BCSC 1016 - The plaintiff sought an injunction preventing the defendant from obstructing the use of an access road passing through the defendant's property that was subject to an easement in favour of the plaintiff. The defendant argued that the plaintiff was using the road to transport large amounts of materials and equipment that interfered with her enjoyment of her property. Mr. Justice McEwan granted the injunction. He found that the easement contemplated the very things that the defendant was complaining about (at para. 11).
- c) *947745 Alberta Ltd. v. Allen*, 2016 BCSC 1379 - The shareholders of the plaintiff accessed their recreational property by way of a road passing along an easement on the defendants' property. The defendants took steps to impede the plaintiff's access by parking vehicles along the easement and by erecting a gate. They argued that the gate was put in place for safety and security reasons, but Madam Justice Hyslop rejected that explanation (at para. 25). She granted a permanent injunction precluding the defendants from erecting a gate or placing any other obstruction on the easement that would impede vehicle access (at para.

27).

- d) *Smith v. Balen*, 2018 BCSC 918 - The plaintiffs' only vehicle access to their property in the Shuswap lake area was by way of a road running along an easement on the defendants' property. The defendants blocked the plaintiffs' access to the easement by planting trees, placing objects such as large concrete blocks, and erecting a fence. The erection of the fence and installation of gates meant that the plaintiffs could only access their property at certain defined places. Mr. Justice Brundrett held that the various obstructions placed on the easement constituted an unreasonable and substantial interference with the intended use and enjoyment of the easement by the plaintiffs (at para. 88). Justice Brundrett granted a mandatory injunction requiring the defendants to remove the obstructions (at para. 92).

[27] 076 cites:

- a) *Lewko v. Budd*, 2019 ONSC 3594 - The defendants owned three lakefront lots. The middle lot was subject to an easement in favour of the plaintiffs to grant them access to the lake. The defendants installed a locked gate but provided the plaintiffs with a key. The plaintiffs sought an injunction requiring the defendants to remove the gate or leave it permanently open. Mr. Justice Conlan denied the application. He noted that the test for determining interference with rights under an easement is not whether the right of way may be exercised as conveniently as before, but rather whether it may be "substantially and practically exercised as conveniently as before" (at paras. 24-25, emphasis in original). He further noted that this test recognizes that convenience is a relative term and that it "gives weight to the well accepted legal principle that the owner has the absolute right to protect her property against crime and trespass" (at para. 25). While Justice Conlan did not use these exact words, it is apparent that he considered the gate, and the necessity of the plaintiffs unlocking it each time, as little more than a minor inconvenience.
- b) *Gardiner v. Robinson*, 2006 BCSC 1014 - The petitioners and respondents owned neighbouring properties. The most convenient way for the petitioners to access their property was by way of a dirt trail crossing the respondents' property. While there were other routes that the petitioners could take, they were much longer and were impassable in winter. Originally, the petitioners' use of the dirt trail was by way of an informal agreement with the former owners of the respondents' property, however they subsequently obtained an easement.

The former owners of the respondents' property operated a ranch on the property and much of the property was fenced for the purpose of controlling cattle. At the time the respondents purchased the property, there were three gates existing on the easement. When the respondents purchased the property, they also operated a ranch and at some point they installed a fourth gate on the easement. Two of the gates were perimeter access gates to the easement. These were locked by the respondents and the petitioners were provided with keys. The other two gates were located along the easement and were not locked.

The petitioners commenced a proceeding seeking to have all of the gates removed or left unlocked. Mr. Justice Ehrcke declined the relief sought. He found that the gates were reasonably necessary to limit public use of the easement (at para. 34), although he ordered that the two locked gates be made accessible either by a combination lock or a lock box with a key inside. 076 relies particularly on the following observations of Justice Ehrcke:

- [30] This leaves the question of locks on the two perimeter gates, Gates 1 and 4. The case law does not support the proposition that gates on an easement access may never be locked, nor do they say that they always may be locked. Each case depends on its own facts. How substantial is the inconvenience, and how necessary is the lock?
- [31] In this case, the respondents have not locked all four gates, but only the two perimeter gates. Clearly, their intention is not to impede the petitioners' access, but rather to control unauthorized entry onto their property by persons who do not enjoy easement rights.
- c) *Weidelich v. de Koning*, 2014 ONCA 736 - The parties were neighbours and part of a group of homeowners with properties that backed onto a private laneway. Each property was subject to a right of way that provided for the laneway. The respondents undertook a home renovation that resulted in an encroachment onto the right of way but that encroachment did not interfere with the ability of vehicles to travel on the laneway. The plaintiffs nonetheless commenced an action seeking removal of any structures that encroached on the right of way. The judge at first instance dismissed the application on the basis that the laneway remained as accessible and passable as it was before the construction commenced. The Court of Appeal upheld that decision, holding that encroachment on the right of way was not actionable absent actual, substantial interference with the granted right (at para. 30).

The Parties' Positions

- [28] Both parties led considerable evidence in support of their respective positions. The focus of TimberWest's evidence and argument was on establishing that the Gates constitute a substantial interference with its rights under the SRW. In contrast, 076 submits that the inconvenience to TimberWest of having to unlock and relock the gates is minimal and that the gates are necessary to limit public use of the Road and the potential liability that accompanies such use.
- [29] It is not necessary to review the evidence in detail but I will summarize the points advanced by the parties.
- [30] TimberWest raised the following issues:
- a) Requiring TimberWest drivers to unlock and relock the gates, either by way of providing TimberWest with keys or using a lockbox system, is cumbersome and adds considerable time and expense for its drivers. TimberWest estimates that for each trip down the Road, the process of unlocking, opening, closing and relocking the gates, would add approximately

4-10 minutes to a one-way trip, and 8-20 minutes to a round trip. It submits that since 2007, TimberWest logging trucks have taken approximately 46,000 one-way trips over the Road and that if the Gates had been consistently locked over that period, the delays resulting from having to deal with the locks would have been in the range of approximately \$475,000-\$1,200,000, based on an average cost of \$155 per driver hour. TimberWest also submits that using the Marsden Road Detour is impractical and the fact that an alternate route exists does not detract from its right to unimpeded access to the Road; and,

- b) Requiring drivers to unlock and relock the Gates creates safety risks, specifically risk of injury to drivers from exiting and re-entering their vehicles, from operating the Gates and from other vehicles on the Road when the drivers are outside their vehicles. TimberWest submits that there are also risks associated with drivers being stuck on the Road between two locked gates.
- [31] TimberWest submits that the Gates constitute a substantial interference with its rights under the SRW and must therefore be removed.
- [32] 076 submits that the Gates are necessary to limit public access to and use of the Road. It identifies numerous concerns arising out of such public use, including safety and liability risks associated with logging trucks sharing the Road with members of the public including cyclists, horseback riders, dirt bikers and other vehicle traffic; unsafe road conditions including potholes and fallen trees; excessive speeding by logging trucks; frequent garbage dumping and littering; and, transient camps and trespassers being injured and requiring emergency services.
- [33] Ms. Nestor, 3L's public relations manager, describes the intent and the effect of the Gates as follows in her second affidavit:

Since the Road was closed on 3 January 2019, there has been a significant reduction in the problems with garbage and litter on the Property. There are no longer upwards of two hundred vehicles a day travelling the Road, throwing litter out along the way. There is less opportunity for the public to illegally dump larger amounts of garbage brought to the Property with their vehicles. There is also a greater chance that our caretaker will be able to record the licence plate of an individual illegally dumping garbage when stopped at or near the Gates.

- [34] 076 submits that maintaining the Gates with access to TimberWest by way of keys or a lockbox strikes a reasonable balance between TimberWest's rights under the SRW and its rights as a property owner to control public access to the lands.

Discussion

TimberWest's Rights under the SRW

- [35] The SRW is broadly worded and grants TimberWest the "full, free and uninterrupted right, license, liberty, privilege, easement and statutory right of way" over the Lands. These rights are extended to its "related companies, its successors and assigns and its and their

contractors, subcontractors, employees, licensees, permittees, invitees, guests, agents, servants, and workmen" and are to be exercised "by night and by day and at their will and pleasure to enter upon, go across, pass over and repass over, within, upon and along the Lands".

- [36] The SRW also identifies a broad range of purposes for which the rights under the SRW may be exercised, including "accessing lands in the vicinity of the Lands", "transporting equipment, logs, timber and all other things relating to the business of [TimberWest] across the Lands" and "generally doing all acts, things and matters necessary for or incidental to the exercise of the rights" granted under the SRW.
- [37] The transferor's covenants, which are binding on 076, also reflect the extensive nature of TimberWest's rights under the SRW. Those covenants require 076 to permit TimberWest to hold and enjoy its rights "without hindrance, molestation or interruption" and further prohibit 076 from erecting "any buildings or structures on the Lands which would, in the reasonable opinion of [TimberWest], obstruct or preclude [TimberWest's] right to pass or repass in, under, over, through or upon the lands in accordance with [the SRW]".
- [38] The broad interpretation to be given the language of the SRW and TimberWest's rights thereunder is further supported by the surrounding circumstances existing at the time the SRW was executed (Avanti Mining at para. 61; Robb v. Walker, 2015 BCCA 117 at para. 31; Grant v. Lowres, 2018 BCCA 311 at paras. 20-21). Those circumstances here include the longstanding, unimpeded use of the Road by TimberWest.

Do the Gates Constitute a Substantial Interference with TimberWest's Rights under the SRW?

- [39] As discussed above, both parties identify adverse impacts and concerns arising out of the other party's proposed course of action. In my view, both overstate their respective concerns.
- [40] TimberWest again submits that requiring its drivers to unlock and relock the Gates has significant safety and cost implications. With respect to safety, I agree with 076 that getting in and out of a truck is one of the regular features of being a driver and TimberWest has not established that requiring drivers to do so in order to deal with the Gates creates new or different safety concerns. I note for example, TimberWest did not provide evidence about how often, on average, a driver gets in and out of his or her truck regardless of the Gates. I also do not accept that use of the Gates, which are similar to other gates erected on logging and other roads in the area, creates any additional safety risk and no evidence was adduced about any actual injuries sustained in relation to the use of the Gates.
- [41] With respect to TimberWest's claim about increased costs, its estimate of the costs that might or would have been incurred had the Gates been continuously locked since 2007 is entirely speculative and unhelpful. TimberWest has not pointed to any additional costs actually incurred during periods in which the Gates have been locked.

- [42] That said, there is no question that requiring TimberWest drivers to deal with locked gates is a departure from TimberWest's historical, unimpeded use of the Road.
- [43] In terms of 076's concerns, many of the incidents identified occurred in areas away from the Road, for example along the banks of a neighbouring river or at a local waterfall not accessed via the Road. Further, as TimberWest points out, the presence of the Gates does not preclude access by members of the public travelling on foot, by bicycle, motorbike or other similar means.
- [44] This is not to say that 076 has no valid interest in limiting public use of the Road. As Ms. Nestor states in her second affidavit, the Gates do act to reduce access to the public such that "[t]here are no longer upwards of two hundred vehicles a day travelling the Road" and some of the attendant problems associated with such use, like littering and garbage dumping, have also been reduced.
- [45] 076 makes the point that without the Gates, the Road, which remains its private property, effectively becomes a public road. It submits further that the SRW does not prevent it from using reasonable means to exclude the public from accessing the Road and that erection of the Gates with access to TimberWest by way of keys, a lockbox or some similar mechanism, represents a reasonable balance between the parties' competing interests.
- [46] I do not agree that resolution of this matter involves striking the appropriate balance between the parties' interests. Rather, it turns on the proper interpretation of TimberWest's rights under the SRW and the determination of whether those rights have been substantially interfered with. 076's motives or objectives in erecting the Gates are largely irrelevant to this determination.
- [47] None of the cases cited by the parties align completely with the facts of this case. In particular, none involve a large scale commercial operation like TimberWest nor do any involve the same degree of public use of, or trespass on, the property subject to the right of way. Many of the cases involve disputes between neighbours over access to residential or recreational properties.
- [48] As noted, 076 relies heavily on Gardiner, particularly in support of its position that the Court needs to balance the competing interests. However, in that case, there were gates in existence at the time the easement was granted that had been erected as part of the normal operation of the ranch property. Further, the court commended the respondents' "efforts to accommodate the wishes of the petitioners" with respect to the type of gate that was used (at para. 29).
- [49] In addition, it cannot be said that the court in Gardiner was balancing competing interests. Justice Ehrcke stated, at para. 22, "the effect of the easement is that the respondents must not do anything strictly for the purpose of interfering with the petitioners' rights of access, but if their legitimate use of the property, such as for ranching, requires them to take steps which cause some inconvenience to the petitioners' right of access, then the reasonableness

of that interference must be assessed to determine if it is a substantial interference."

Although the court did compare the gates at issue to the alternative put forward by the petitioners of erecting fences along both sides of the easement, saying the gates were a "relatively minor inconvenience" in comparison, this was said with specific regard to the rights and responsibilities of the respondents to manage their property as a cattle ranch (at paras. 27-28). This analysis merely "recognizes that convenience is a relative term" (Lewko at para. 25).

[50] I find that the locked Gates constitute a substantial interference with TimberWest's rights under the SRW. I reach this conclusion for the following reasons.

[51] TimberWest historically enjoyed unimpeded access to the Road and it is fair to infer that the intent of the SRW was to ensure that such unimpeded access would continue even if the Lands on which the Road is located were sold.

[52] Further, the SRW is worded in very broad terms and guarantees TimberWest the right of "full, free and uninterrupted" access to the Road without "hindrance, molestation or obstruction". I am satisfied that locked Gates constitute, at a minimum, an interruption, hindrance or obstruction of TimberWest's full and free access. When considered in light of the historical situation, I am also satisfied that the locked Gates prevent TimberWest from exercising its rights as substantially and practically conveniently as it did prior to the erection of the Gates (Lewko at para. 25).

[53] I therefore find that TimberWest has established an actionable interference with its rights under the SRW.

Remedy

[54] TimberWest seeks a permanent injunction requiring the Gates to be removed, as well as nominal general damages and punitive damages.

[55] With respect to the injunction, I am not satisfied that permanent removal of the Gates is necessary to permit TimberWest to fully exercise its rights. The evidence did not suggest that TimberWest's activities along the Road are continuous such that 24-hour access is required. Justice MacKenzie's order reflected this in that it required 076 to leave the Gates open for specified hours, namely 8:00 a.m. - 6:00 p.m.

[56] Further, an order requiring removal of the Gates would undermine any ability that 076 has to enforce its rights as owner of the Lands over which the Road passes. 076 has every right to limit access to its Lands, it simply cannot do so in a way that impedes TimberWest's access to the Road.

[57] The evidence led on this application does not permit me to fashion an order similar to Justice MacKenzie's order in that I do not know the details of TimberWest's use of the Road in terms of dates, times, etc. In the circumstances, an order in the following terms is appropriate:

076 shall keep the Gates unlocked and open as necessary to ensure TimberWest's full, free and uninterrupted access to the Road and 076 is prohibited from engaging in any conduct that impedes TimberWest from exercising its rights under the SRW.

[58] It will be for the parties to come to an agreement on the mechanism or process by which 076 knows when it is required to keep the Gates open to permit TimberWest's access. If the parties are unable to agree, they have leave to seek further directions. I will remain seized of any such application.

[59] In terms of damages, TimberWest has not adduced evidence to establish its claim to \$13,500 in nominal damages, nor has it established conduct on the part of 076 that would warrant an award of punitive damages. While 076's conduct has at time been suspect, particularly its breach of Justice MacKenzie's order, I am not satisfied that it reached the level of being "high-handed, malicious, arbitrary or highly reprehensible" (Bowen Contracting Ltd. v. B.C. Log Spill Recovery Co-operative Association, 2009 BCCA 457 at para. 23, citing Whiten v. Pilot Insurance Co., 2002 SCC 18 at para. 94).

Conclusion

[60] TimberWest is entitled to a permanent injunction in the following terms:

076 shall keep the Gates unlocked and open as necessary to ensure TimberWest's full, free and uninterrupted access to the Road and 076 is prohibited from engaging in any conduct that impedes TimberWest from exercising its rights under the SRW.

[61] The parties have leave to apply for further directions if they are unable to agree on how to implement the injunction. I will remain seized of any such application.

[62] TimberWest's application for general and punitive damages is dismissed.

[63] If the parties are unable to agree on costs, they may make arrangements to speak to the issue.

"Skolrood J."

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Prepared on 24 October 2026 · Esheria