



# **Wild Places and Green Spaces: A Citizen's Guide to Proving Public Access**

Prepared for:  
Outdoor Recreation Council of BC

Law Student: Liam McGuigan (Fall 2019)  
Articled Students: Edith Barabash, Jack Jones  
Coop Student: Russell Chiong  
Supervising Lawyers: Erin Gray, Calvin Sandborn, QC



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## Caveat: Whose Laws are We Talking About?

This *Guide* only addresses colonial law: federal and provincial statutes and common law. It does not address the important rights of First Nations to exclude you from places pursuant to their own Indigenous legal orders, Aboriginal rights, Aboriginal title and treaty rights. First Nations rights under colonial law and Indigenous laws are beyond the scope of this *Guide*.

For convenience we use the common term “Crown Lands” to refer to lands over which the provincial and federal governments assert jurisdiction and management authority. However, those Crown landscapes in British Columbia are traditional territories subject to Indigenous legal orders and responsibilities held by First Nations and their members. The use and management of those lands as between First Nations and state governments is largely unresolved.

Before pursuing access to specific areas, particularly for organized or ongoing use, it is often expected that you seek permission from the First Nation who has responsibility for that area and provide appropriate compensation for that use.

## Disclaimer

This Guide is provided for general information as a public and educational resource. The law is complex and everchanging and this publication is not and cannot provide a complete and accurate statement of the current law and should not be relied upon as such. We attempt to ensure the accuracy of the material provided; however, much of the information is produced by students, not lawyers, and we cannot guarantee that it is correct, complete or up to date. The Environmental Law Centre does not warrant the quality, accuracy or completeness of any information in this document. Such information is provided “as is” without warranty or condition of any kind. Many factors unknown to us may affect the applicability of any statement or comment that we make in this material to your particular circumstances. The information provided in this document is not intended to provide legal advice and should not be relied upon. Please seek the advice of a competent lawyer.

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Photo Credit: Andrew Strain (Destination BC)

## Introduction

In recent years, British Columbians have increasingly been locked out of wild places and green spaces they previously enjoyed. Roads, trails, paths, lanes and other public ways have been gated and closed to fishers, hikers, kayakers and other nature-lovers. Long-time public routes to waterfront have been obstructed in both urban and rural areas.<sup>1</sup>

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<sup>1</sup> See Graham Litman *et al.*, *Enhancing Public Access to Privately Owned Wild Lands*, Environmental Law Centre, 2016 at <<https://elc.uvic.ca/wordpress/wp-content/uploads/2016/06/EnhancingPublicAccess-2016-01-03.pdf>> [<https://perma.cc/K7QW-5YTB>]; Amy Smart, “Gates block ventures in the wild: Landowners cutting off paths to public land” *Times Colonist*, June 26, 2016 at: <<https://www.timescolonist.com/local-news/gates-block-ventures-in-the-wild-landowners-cutting-off-paths-to-public-land-4638043>> [<https://perma.cc/T58Y-RZCU>]; and Jell Bell, “Encroaching on public land near Gorge ‘not acceptable,’ Esquimalt warns property owners,” *Times Colonist*, May 3, 2018 at: <<https://www.timescolonist.com/local-news/encroaching-on-public-land-near-gorge-not-acceptable-esquimalt-warns-property-owners-4661726>> [<https://perma.cc/Z75R-HTNJ>].

Such refusal of access is a loss for the individuals who are fenced out of wild places. However, it may also be a major loss to society as a whole. Loss of public access to the wild may have important long-term consequences for environmental protection – because people who know nature will defend it, and those who do not know nature may not care. In this sense, free public access to wild areas supports social engagement with the environment. People who spend time in wild areas develop a personal connection to them and are more likely to support measures to protect threatened wild areas. On the other hand, people routinely deprived of the wilderness experience may not learn to love – and want to protect – nature. This is a major reason why we have produced this *Guide*.

In addition, a basic human right is at stake. It is well-documented that people have a profound need for contact with nature in order to be healthy, creative and productive.<sup>2</sup> The right to access and experience nature is age-old. In medieval times, William the Conqueror and his heirs reduced public access to the forests and open spaces of England. The resulting public discontent impelled King Henry III to seal the *Charter of the Forest* in 1217 – as a companion document to the *Magna Carta*. The *Charter of the Forest* guaranteed commoners the right to access Crown forests and open spaces to gather wood and forage for food. Sir William Blackstone, author of *Commentaries on the Laws of England*, stated:

*There is no transaction in the ancient part of our English history more interesting and important, than ... the charters of liberties, emphatically styled THE GREAT CHARTER and CHARTER OF THE FOREST...*<sup>3</sup>

As we examine the current trend toward locking the public out of wild places across BC, there is often a valid legal basis for locking the public out. However, in many other cases the public is being deprived of a perfectly legal right to use the trail, road or public way.

The purpose of this *Citizen's Guide* is to assist British Columbians who want to prove a public right to access just such places. The *Guide* provides information about how citizens can begin to research the question of whether the public actually has a legal right to access a particular place.

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<sup>2</sup> See: Luov, Richard, "No More Nature-Deficit Disorder," *Psychology Today*, (January 28, 2009) at: <<https://www.psychologytoday.com/ca/blog/people-in-nature/200901/no-more-nature-deficit-disorder>> [<https://perma.cc/7CV7-GHHK>]; Gleiser, Marcelo, "Suffering from Nature Deficit Disorder? Try Forest Bathing," NPR, (April 4, 2018) at: <<https://www.npr.org/sections/13.7/2018/04/04/599135342/suffering-from-nature-deficit-disorder-try-forest-bathing>> [<https://perma.cc/DR5R-7JV2>]; and Dwyer, Vanessa, "Nature Deficit Disorder and the Need for Environmental Education" Fordham University Digital Research (Spring 2015) at: <[https://research.library.fordham.edu/cgi/viewcontent.cgi?article=1010&context=environ\\_2015](https://research.library.fordham.edu/cgi/viewcontent.cgi?article=1010&context=environ_2015)> [<https://perma.cc/VMU6-CX9S>].

<sup>3</sup> Jones, G. *The Charter of the Forest of King Henry III*, St John's College (University of Oxford) (accessed 15 December 2015), <<http://info.sjc.ox.ac.uk/forests/Carta.htm>> [<https://perma.cc/VYA7-EBBN>]; William Blackstone, *Tracts, chiefly relating to the antiquities and laws of England*. (Oxford 1771) at 283, online: <<https://babel.hathitrust.org/cgi/pt?id=njp.32101073365205&view=1up&seq=297&skin=2021>> [<https://perma.cc/UCL9-EN8J>].

The *Guide* is divided into two parts: one on how to gather the *evidence* you need, and the second on the *laws* you might invoke.

[Part I](#) describes how to find the evidence you will need to prove you have a right to use the trail, road or public way. The first step in proving a right of public access is to learn more about the facts – the history and status of the route you want to travel. This Part gives you tips on how to find the government maps, land registry documents, land grants, survey records, public works and other government records, orders-in-council, legal notices, community history accounts, archive documents, and other documents you may need to prove public access.

[Part II](#) then discusses the law – the legal principles you might invoke to prove a public right to travel the route. This Part provides a basic introduction to some of the laws governing public access – and specifically describes a number of different circumstances where the law **mandates** public access. We focus on some of the most common ways that public access rights can be established, such as the creation of public “highways” and creation of certain types of forestry and industrial roads.

In particular, you will find extensive discussion of how to prove that your route is a “highway.” In many cases, the most robust way to protect public access to a trail or road is to prove that it is legally a “highway.” But keep in mind that the legal term “highway” includes far, far more than just paved roads.

Indeed, the ancient legal concept of a “highway” is simply a route open to any traveller. For centuries, access to these routes has been legally protected. “Highways” can encompass everything from paved roads to unpaved roads; from laneways to undeveloped road rights of way; from trails to pathways to untouched routes through wilderness. For example, rough Gold Rush dirt trails can be legal “highways.” As another example, subdivided lands commonly encompass an entire network of legal “highways” – including many untouched, unpaved green spaces open to the public.

Thus, it is fundamentally important to understand the kind of fact patterns that may have already created a legal “highway” at your trail, road, etc. You will discover that in certain circumstances a “highway” public access may have been created:

- During the original Crown grant of land (*e.g.*, where the map/plan attached to the grant showed a “highway”);
- During subdivision (*e.g.*, where the subdivision plan showed a highway);
- By government publishing a *Gazette* notice declaring the area a highway, especially before 1987 (*e.g.*, after buying or expropriating a “highway” route);
- By government simply spending money on a travelled road sometime in the past;
- By the common law principle of “dedication” (*e.g.*, where a landowner in the past intended to dedicate the route to public use – and the public used it for many years);
- When a former forest service road was dedicated as a highway under the *Transportation Act*; or
- In various other circumstances.

In addition, under provincial forestry legislation<sup>4</sup> different types of forestry roads provide for a spectrum of public use. In particular, government-built “forest service roads” and forestry roads built under a “road permit” provide for public access.<sup>5</sup> Such forestry roads provide important public access routes across the province. Similarly, oil and gas legislation provides for some public use of industrial roads – and a variety of other statutes discussed below provide additional rules for public access.

Hopefully, this guidebook will help you:

- Find out more about the history and status of the route in question.
- Investigate whether the history and status of the route supports a legal argument that the route is public.

***Caveat:*** *If, based on the information provided in this Guide, you believe that you have found evidence of a right of public access, then you should contact a lawyer ASAP to determine the best way to proceed. Remember that the legal information in this guidebook is very general and a significant amount of further legal research would be required to establish a right of access to any one particular place.*

This *Guide* provides preliminary orientation to public access law. We hope it will give you a basic idea about how to research the history and status of your favourite trail or road. We also hope it will give you and your lawyer ideas for legal arguments to support public access to that place. However, this handbook does not purport to be a complete and comprehensive guide to the plethora of laws and principles that govern public access in BC.<sup>6</sup> Before you go forward, be sure to consult with a lawyer versed in this area of the law. We encourage you to contact the Environmental Law Centre, West Coast Environmental Law, or your own lawyer for more specific legal advice on your situation.

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<sup>4</sup> Including the *Forest Act* and *Forest and Range Practices Act*.

<sup>5</sup> Note that not all forestry roads are forest service roads. Other types of forestry roads built under the *Forest Act* include those built by licensee companies under road permits and special use permits. In general, forestry roads built and paid for by government are “forest service roads” – in contrast to those built by licensee companies under permits.

<sup>6</sup> Note that there are many potential legal arguments for asserting a right of public access. Although Part II briefly touches on some of the major ones, this handbook is not comprehensive. If your research into an area does not reveal any information that supports one of the rights of public access discussed in Part II, then there may still be other means of establishing such a right. In any case, you should discuss all your research with your lawyer before you act.





*Photo credit: Dave Anderson (Vernon area spring)*

## Part I

### HOW TO LOOK FOR FACTS AND EVIDENCE

#### Working Together

If you want to prove legal public access to a place, one of the first steps is to develop a team that is committed to the cause. Establishing and protecting your right of access can be difficult, frustrating and time consuming. You are more likely to be successful if you can create a strong network of individuals to share the tasks. In looking for allies, make a point of including local community members or organizations who have strong familiarity with the area's history, or who have organizational and research skills.

Developing a team is important for several reasons:

- The full history of your road or trail can be absolutely key to proving that your route is public.<sup>7</sup> Hopefully, members of your team will have knowledge of the route and its history. They may know about: the history of public use; whether government ever maintained the route; local archives and officials that may have key documents; the names that an area has been known by in the past; past owners of a piece of property; date ranges for important events; and so on. It is important to develop a strong foundation in such background knowledge at the outset. This background will help you narrow the focus of research – and help guide you to key evidence that otherwise might be missed.
- Your team may be able to provide affidavits and testimony (with old photographs, newspapers, club newsletters, records, etc.) to show the historic use of a road/trail.
- Your team can divide up the intensive work of searching for the many documents you may need to prove the right to public access. As you will see below, there are numerous sources of potential evidence to check out.
- Your team can collaborate on fundraising. Collecting evidence and building your case can cost money. If litigation is necessary, costs can be substantial.
- If your research fails to demonstrate an existing legal right of access, your team may go on to effectively *lobby* for creation of public access. It is often within the discretion of some government official or a private landowner to make a decision to create some form of public access. If this is the case, your research is not wasted. It can inform you who has the power to grant access – and provide valuable material for a public campaign to create a new public access.

## General Research Advice

### ***Keep a Research Journal***

Begin by listing everything you know about the potential public access route. As you talk to people and review documents, expand that list of facts until you hopefully have the facts necessary to prove a legal right to access. Keep comprehensive notes of all you learn. Remember, when you are working with many sources of evidence, you must be organized and systematic.

In particular, keep track of all of the databases and other sources you have reviewed – and keep track of exactly how you navigated through these sources of information. Make sure you keep track of exactly which search terms you entered, which filters you used, etc. This is necessary when working with many sources of evidence. Otherwise, it is easy to lose track of which specific information has been used to search through which database. And if you lose track, you may repeat work in vain or miss key evidence. Worse, when preparing final affidavits for your case, you may find yourself unable to retrieve evidence that you have seen.

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<sup>7</sup> See [Part II](#).

In addition, keeping a research journal will help you organize and cross reference different sources of information. For instance, if you find a document that refers to a road by an unfamiliar name in one database, this gives you a brand-new search term for all of the other databases.<sup>8</sup> Going back to previous data bases with the new search term can lead to further key information, which you can use to repeat the process.

### Quick guide on Boolean connectors

[https://www.mcgill.ca/caps/files/caps/gcs2014\\_linkedinbooleanssearchtips.pdf](https://www.mcgill.ca/caps/files/caps/gcs2014_linkedinbooleanssearchtips.pdf)  
[<https://perma.cc/JU5J-X4ZU>]

Keeping a shared research journal is essential if you are sharing research duties with others. The journal makes it easier to do research as a group, because you can build on one another's progress – and more easily identify areas that still require more research.

### ***Make a Timeline***

Organizing your research into a timeline can help you get a clearer picture of “what happened when.” In your timeline, include events and periods based on solid evidence, speculative rumour, and everything in-between. This schemata will help you to uncover potential relationships between events – and show you what essential evidence is still missing. A timeline is essential because in many cases the particular timing of events will be critical to your legal argument.

### ***A Note on Boolean***

Most databases use a kind of search language called Boolean. Using Boolean will make a search more specific. For instance, if you search for *public access* in the search bar, you will get all of the database's files that contain the words “public” *and* all of the files that contain the words “access.” However, if you enter the search term “*public access*” in quotation marks, then you will only get all of the files that actually have the full phrase “public access.” In most databases you can make your search more specific by using Boolean or by using the advanced search option.

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<sup>8</sup> Names may have changed historically. In addition, when old documents have been digitized with “text recognition,” this may result in a slightly different name, sometimes just off by a letter or two. You may need to search under this modified name as well.



*Photo Credit: James Wheeler (Unsplash)*

# SOME AUTHORITATIVE SOURCES OF EVIDENCE TO PROVE ACCESS

## Highways

Under the *Transportation Act*, a public highway exists if:

- It is shown in a subdivision plan, explanatory plan or reference plan deposited in the land title office;<sup>9</sup> or
- The highway is referenced in the original Crown grant, or was in existence at the time of the Crown grant.<sup>10</sup>

Obtaining evidence that a highway has been established through either of these means can be relatively straightforward. The Land Title Survey Authority (LTSA) has the plans, grants, and associated documents for each piece of land in the province of BC. If you carefully examine the original land grants and subdivision and other plans, an experienced person can readily determine what properties are privately owned – and what areas are public. Though accessing and reviewing these documents will in some cases require a fee or retaining a professional, such documents can provide simple, clear and authoritative evidence that a highway was established. (See below for more specific information on the LTSA and the GATOR website that accesses the Crown land registry.)

A public highway also exists if:

- It was declared a public highway by notice in the *British Columbia Gazette* before December 24, 1987;<sup>11</sup> or
- There was an agreement with the Ministry of Forests, Lands, Natural Resource operations and Rural Development that a forest service road become a highway.<sup>12</sup>

Again, it may be relatively straightforward to obtain authoritative evidence of a highway established through these means. One can find historic notices of the creation of the highway by searching the *BC Gazette*. The *Gazette* can be difficult to navigate, but it is free and many of its issues have been archived online. (See below for a discussion of how to search the *BC Gazette* – and for other sources that can help you find evidence that a forest service road became a highway.)

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<sup>9</sup> See Part II, “Creating a Highway... (a) Deposit of a Subdivision Plan.”

<sup>10</sup> See Part II, “Creating a Highway... (e) Exemption from a Crown Grant.”

<sup>11</sup> See Part II, “Creating a Highway... (d) Gazetted Roads.”

<sup>12</sup> See Part II, “Creating a Highway... (f) Section 56 Dedication of a Forest Service Road as a Highway.”

Finally, a public highway exists if:

- More than a trivial amount of public funds has been spent on it and it was travelled by the public (this applies to roads, likely not trails);<sup>13</sup>
- Before December 24, 1987, there was an “overt act of possession” by the Minister;<sup>14</sup> or
- The owner of the road intended to dedicate it to the public, and the public accepted this dedication (usually shown by decades of unhindered public use).<sup>15</sup>

These latter means of establishing public highways are more complicated – and can involve collecting extensive evidence from a wide variety of historical sources. For example, in the first bullet, you would look for compelling evidence that the road was substantially used by the public – and evidence that significant government funds were spent on it. In the second, you would look for evidence of overt possession by government. In the third, you would look for evidence that a past owner actually *intended* to dedicate the way as a public way – and evidence that the public at large *accepted* the dedication by using the route for a long time.

Thus, you may be looking for a wide-ranging array of evidence. You may need road maintenance records; evidence about past public use; evidence that government took possession of the route; evidence of the intentions of past landowners; evidence of the intentions and actions of past public users; statements and other records regarding intentions of all parties, documents related to the historical evolution of use, etc.

See “Other Sources of Key Evidence” below regarding the many rich sources of evidence available. Note that nuanced research may be required in the last category of above cases. For example, the requirements for establishing a public highway through expenditure of public funds have varied slightly over the years – so establishing a highway this way requires an understanding of the historic legal provisions in effect when public funds were spent on the highway.

## Forestry Roads

Under section 22.2 of the *Forest and Range Practices Act*, SBC 2002, c 69, there is a broad right of public access for both forest service roads and roads that are authorized under a road permit or a woodlot licence.<sup>16</sup> To see if your road fits into these categories of “public” roads, check out:

*Maps showing an official inventory of forest service roads in BC, along with forest service road closures:*

Forest Service Road Safety Information Map  
<https://usfs.maps.arcgis.com/home/webmap/viewer.html?webmap=d1feb2c7f16c4ac48e1a0a67432ebf46>

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<sup>13</sup> See Part II, “Creating a Highway... (b) Expenditure of Public Funds on a Travelled Road.”

<sup>14</sup> See Part II, “Creating a Highway... (h) Entering and Taking Possession.” Note that the relevant date could arguably extend beyond 1987 to 2004, as discussed below.

<sup>15</sup> See Part II, “Creating a Highway... (c) Common Law Dedication.”

<sup>16</sup> See Part II, “A Key Right of Public Access – Road Access Rights Under the *Forest and Range Practices Act*.”

<p><i>Additional resource for finding forest service road closures:</i></p>	<p>BC Resource Road Safety Information  <a href="https://www2.gov.bc.ca/gov/content/industry/natural-resource-use/resource-roads/local-road-safety-information">https://www2.gov.bc.ca/gov/content/industry/natural-resource-use/resource-roads/local-road-safety-information</a></p>
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Further detailed information about Forest Service Roads and other forestry roads should be available at the Natural Resource District Office for your region. Contact information for those offices, and a map showing which offices represent which districts is available here: <https://www2.gov.bc.ca/gov/content/industry/forestry/managing-our-forest-resources/ministry-of-forests-lands-and-natural-resource-operations-region-district-contacts> [<https://perma.cc/4NG7-LHM6>]

## OTHER SOURCES OF KEY EVIDENCE

As you review the law in [Part II](#) – and think about all the various circumstances where the law mandates public access – you will be able to identify the facts you must establish to prove public access. The following sources may help you find evidence to establish those key facts:

### Map Layers

**iMap BC:** <https://maps.gov.bc.ca/ess/hm/imap4m/>

iMapBC provides information compiled from many provincial ministries in the form of layers on a map of the province. Because of its accessibility and ease of use, iMapBC is a good starting point for an investigation into public access. You can navigate to the area you are investigating, and by looking at the different layers gain relevant information that will help your search for evidence from other sources. For example, you may find the names of roads, identification numbers of properties, whether the road passes through private or Crown land, road maintenance information, road structures (e.g., culverts), etc.

If you encounter any difficulties while trying to access this information, iMapBC also has a training manual: [https://www2.gov.bc.ca/assets/gov/data/geographic/web-based-mapping/imapbc/imapbc\\_training\\_manual.pdf](https://www2.gov.bc.ca/assets/gov/data/geographic/web-based-mapping/imapbc/imapbc_training_manual.pdf) [<https://perma.cc/5LEQ-D5FN>].

Other private mapping services, such as iHunter, provide maps of the province that use the same data sets from the provincial government as iMap BC. These maps may have features that make them easier to use for some users; features such as better mobile phone navigation. Thus, these private mapping services can be a valuable source of initial information.

Though iMap BC and private services such as iHunter provide accessible starting points for initial research, it is possible to obtain more detailed mapping information. Applying datasets directly from the government Data Catalogue into geographic information system (GIS) software can

offer more detailed and accessible mapping information. The Data Catalogue has many layers that may be helpful for investigating a public access right, some of which are not available through iMap BC. The Catalogue is available here:

[https://catalogue.data.gov.bc.ca/dataset?download\\_audience=Public](https://catalogue.data.gov.bc.ca/dataset?download_audience=Public)

There are also several free GIS platforms available. QGIS is a widely used free GIS platform and it has many instructional videos and other resources for beginner users: <https://qgis.org/en/site/> [<https://perma.cc/DF7H-PSWU>]

### ***Provincial Layers***

Layers that are viewable through iMap are also available as datasets that can be downloaded from the Data Catalogue and viewed with software such as QGIS. To view specific datasets in iMapBC, on the top left corner, click the tab labelled “data sources,” then click on “add provincial layers.”

The “Digital Road Atlas” layer is the most comprehensive authoritative database of roads in the province, whether public, private, or forest service roads. However, this layer is not being updated and is based on older photography.

The “Road Features Inventory” layer shows the province’s list of highways. If a road is listed on this layer, then it is very likely that the Ministry of Transportation considers it to be a highway and that you have a right to access it. This is because the Road Features Inventory forms a basis for contract prices for road maintenance. Thus, if a road is on the Road Features Inventory, it is likely that public funds have been spent on it and it is a highway.

The “Active Forest Road Sections - Colour Themed” layer shows all forestry roads including Forest service roads and road permits.

The “PMBC Parcel Cadastre,” “Surface Ownership,” and “Land Act Survey” layers provide information related to the title of the property – either the Crown grant, or the survey plan.

## **GATOR – Government Access Tool for Online Retrieval**

**GATOR:** [http://a100.gov.bc.ca/pub/pls/gator/gator\\$queryforms.menu](http://a100.gov.bc.ca/pub/pls/gator/gator$queryforms.menu)  
[<https://perma.cc/6QLR-BRT9>]

This provincial website provides access to the Crown land registry, including original Crown grants and related information.<sup>17</sup> In order to search through the information available through GATOR, first obtain search terms and identification numbers through iMapBC or GIS software. In searching

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<sup>17</sup> “The registry is a database of Crown land records for British Columbia, which has been maintained since the Hudson’s Bay Company first began surveying land in British Columbia in the 1850s. It maintains, records, and tracks the sale, survey, licence, access, return and restriction of Crown land in British Columbia.” GATOR can be used to track down such things as the existence and location of survey field notes, survey plans and Crown grant information, including original parcel survey structure and research history and survey type.



through GATOR it is important to note that the “Parcel Identification Number (or PIN)” is sometimes listed as a “Parcel SID” on iMapBC.

## Land Title and Survey Authority

**LTSA:** <https://ltsa.ca/> [<https://perma.cc/J7EJ-RPGA>]

Land titles, subdivision plans, surveyor documents and other documents related to property ownership are available from the Land Title and Survey Authority of BC (“LTSA”). The LTSA operates and administers the Land Title Office Register. The LTSA’s electronic search service allows registered users (for a fee) to perform title searches and obtain copies of registered documents and plans.

Note that the information regarding original Crown grants available through GATOR is not necessarily complete. If the original Crown grant and original survey information is not available from GATOR, you may still be able to access such documents through the LTSA. Accessing such documents may require a fee or retaining a professional such as a land surveyor.

The LTSA also provides a Map application (ParcelMapBC) that lists the Parcel Identifier (or PID) and the Parcel Identification Number (PIN) of all of the properties in BC, which you may find easier to navigate than iMapBC.

You can sign up for an LTSA Enterprise Account, which allows you to access or request information that the LTSA has on a property by navigating directly from ParcelMapBC.

## British Columbia Gazette

The *BC Gazette* includes records about the creation and discontinuation of highways and forest service roads, as well as agreements between ministers which designate a highway as a forest service road and vice versa. Historically, publishing a *Gazette* notice declaring a road to be a highway was a commonplace way of creating highways. (See the discussion of the *Gazette* in [Part II](#), below.)

Under the *Transportation Act*, gazetting stopped being as common a way to create a highway after 1987. However, agreements between ministers that change a highway into a forest service road and vice versa are still published in the *BC Gazette*, and closures of highways continue to be

published in the *Gazette*.<sup>18</sup> Note that the *BC Gazette* is divided into parts 1 and 2. Part 1 contains notices and agreements. Part 2 is where regulations and Orders in Council are published.<sup>19</sup>

The BC Laws website has issues of the *BC Gazette* published since 2003:

<http://www.bclaws.ca/civix/content/bcgaz1/bcgaz1/?xsl=/templates/browse.xsl>  
[<https://perma.cc/4SY2-5MQK>].

Searching to see if a highway has been closed since 2003 is straightforward because the name of the highway and other search terms related to the legal description of the highway's location can be entered into the search bar, and all issues published since 2003 can be searched simultaneously (make sure to use "quotation marks" around your search!)

The University of Victoria is currently in the process of digitizing historical issues of the *BC Gazette*. Currently there are issues dating back to the original 19<sup>th</sup> century colonies of British Columbia and Vancouver Island, up until the late 1940s: <https://archive.org/details/bcgazette?sort=-downloads>.

The digital record is difficult to navigate and as of now incomplete. However, print copies of the *BC Gazette* are also available at the University of Victoria Diane Priestly Law Library, the Legislative Library of BC, Vancouver Island University Library, the University of British Columbia Library, the University of the Fraser Valley and the Vancouver Public Library.<sup>20</sup> Do not be shy about asking a librarian for help. They can be of enormous assistance.

Whether by print or digitally, the best way to navigate the *BC Gazette* is to check the index for a particular year and search for notices from the relevant ministry. Digitally, this can be done by filtering by the year and then entering the search term "Index" in the text contents. This will take you to the index for that year.

Notices related to the creation of highways are at the back of the Index section under "Works Department."

While searching for information in the index of the *BC Gazette*, it is important to pay attention to possible changes in a particular ministry's name over the years. See footnote below for some of the Ministry names used historically.<sup>21</sup>

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<sup>18</sup> Note that the ability of the province to close highways by publishing notice in the *BC Gazette* was first legislated in 1917 and gazetting continues to be a legislated requirement for closing a highway. See *Transportation Act Regulation*, BC Reg. 546/2004, s. 5.

<sup>19</sup> Crown Publications, *Gazette* (accessed 21 June 2022), online: <<https://www.crownpub.bc.ca/home/gazette>> [<https://perma.cc/3K8U-TAHC>].

<sup>20</sup> World Cat, *British Columbia Gazette* (accessed 13 March 2021), online: <<https://www.worldcat.org/title/british-columbia-gazette/oclc/1081155081/editions?editionsView=true&referer=br>> [<https://perma.cc/KJ7U-ZNSN>].

<sup>21</sup> Ministry names that have been used include:

Department of Lands, Forest Branch	Feb. 1912 - April 5, 1945
Department of Lands and Forests, Forest Service	April 5, 1945 - March 30, 1962
Department of Lands, Forests and Water Resources, Forest Service	March 30, 1962 - Dec. 11, 1975
Ministry of Forests, Forest Service	Dec. 11, 1975 - Nov. 6, 1986

This is one place where having deep background knowledge about the area being researched is vital. For example, the names of highways listed in the Index might be antiquated or unclear, and your background knowledge can clarify name confusion. Also, general background knowledge can help you limit the date range of your search – and make search results more manageable.

## More Sources of Background Information

Below are some other sources of information that can help you build background knowledge – and prove such vitally important things as:

- Whether public funds were ever spent on a road;
- Historical public use of a road or trail;
- Whether a landowner ever intended to dedicate a route to public use;
- Etc.

**Community Members:** Remember that members of your community may have valuable evidence that can support a right of public access. Find out what old-timers know about the road. Consider who might have worked maintaining the road in question, or who has personally used the road for an extended period of time. As always, consider whether you know someone who might know someone – or who might have relevant information in family archives?

**Local Archives:** Are there local archives at your library, city hall, a local museum, school or elsewhere? Important historical material that may be relevant to your road or trail exists in local repositories all across the province. Information relating to a local road’s historic use – or public expenditure on a road – could exist in any local archive. Those running the archive will likely be the most helpful, as they will intimately know the scope and type of their archival material. In addition, if they are a research enthusiast, they may be willing to help with the work.

Note that **MemoryBC.ca** (<https://www.memorybc.ca/> [<https://perma.cc/3TZ9-9Y29>]), run by the Archives Association of BC, provides a keyword searchable, easy to navigate database of the materials available at nearly 200 archival repositories throughout the province of British Columbia. While looking through material, think broadly—evidence could exist in government documents, photographs, reports, maps, newspapers or even diary entries.

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Ministry of Forests and Lands, Forest Service	Nov. 6, 1986 - July 6, 1988
Ministry of Forests, Forest Service	July 6, 1988 - June 16, 2005
Ministry of Forests and Range, Forest Service	June 16, 2005 - October 25, 2010
Ministry of Forests, Mines and Lands	October 25, 2010 - March 14, 2011
Ministry of Forests, Lands and Natural Resource Operations	March 14, 2011 – 2020

Source: British Columbia Forest Service History (updated April 2013), online: <https://www.for.gov.bc.ca/hfd/library/History.htm#Name> [<https://perma.cc/P6UT-83EU>].

Note that in 2020 the Ministry split into the current Ministry of Forests and the separate Ministry of Land, Water and Resource Stewardship.

**University Archives** (<https://guides.library.ubc.ca/foresthistoricalandarchives>)

[<https://perma.cc/W8D7-VC95>]: Most universities in BC have extensive archives containing historic material from all over the province. These collections are often keyword searchable – and many are in the process of digitization. One potentially helpful collection is the Forestry History and Archives collection at UBC.

**BC Archives** (<https://royalbcmuseum.bc.ca/archives/what-we-have/government-records>): BC Archives is the provincial records repository for the government of British Columbia. It has physical copies of many useful historical documents, useful finding aids, and staff who can help you navigate them. Useful documents here could include maps, evidence of public expenditure on roads, photographs, interviews from earlier residents, and other records that indicate public use. Particularly useful files at BC Archives include those that relate to the department of highways.

For example, “Department of Highways selected general files 1909-1963”<sup>22</sup> and, “Department of Highways general administrative files 1910-1970,”<sup>23</sup> are good places to start. However, note that some of the documents catalogued in BC Archives have been returned to the Ministry.<sup>24</sup>

Also, BC Archives hold Pre-emption records which may include some reports from early settlers that mention the existence and location of roads, trails and other public ways.

**Digital Air Photos of BC** (<https://www2.gov.bc.ca/gov/content/data/geographic-data-services/digital-imagery/air-photos> [<https://perma.cc/DAH9-TULK>]): The BC government houses over 2.5 million air photos of BC, dating back to the 1930s. These historic air photos may show existence and location of roads, trails, etc.

**Sessional Papers** (<https://open.library.ubc.ca/collections/bcsessional> [<https://perma.cc/QXX9-6W4Q>]): These include official committee reports, orders of the day, petitions and papers presented, records of land sales, correspondence, budgetary estimates, proclamations, maps, voters lists by district, and departmental annual reports. Perhaps most important for our purposes is the collection of sessional papers of the Ministry of Public Works. Beginning in 1925, these sessional papers include an inventory of roads in the province and records of government road

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<sup>22</sup> BC Archives Collection Search, “Series GR-3671 - Dept. of Highways selected general files,” online: <<https://search-bcarchives.royalbcmuseum.bc.ca/dept-of-highways-selected-general-files>> [<https://perma.cc/4BEZ-L7NX>].

<sup>23</sup> BC Archives Collection Search, “Series GR-1585 - Department of Highways general administrative files,” online: <<https://search-bcarchives.royalbcmuseum.bc.ca/departement-of-highways-3>> [<https://perma.cc/3NUM-G2C7>].

<sup>24</sup> See GR-3671 Dept Highways selected general files 1909-1963 (use finding aid to locate container and folder for subject area; some records are held by BC Archives, some by MoTI, available by FOI request): <<https://search-bcarchives.royalbcmuseum.bc.ca/dept-of-highways-selected-general-files>> [<https://perma.cc/4BEZ-L7NX>] and see GR-1585 - Department of Highways general administrative files 1910-1970 (331 reels of microfilm) <<https://search-bcarchives.royalbcmuseum.bc.ca/departement-of-highways-3>> [<https://perma.cc/3NUM-G2C7>]. “The Ministry of Transportation and Highways transferred the original 331 microfilm reels to the BC Archives in 1986 (accession G86-057). The reels were returned to the Ministry of Transportation and Highways in 1993 at their request. The series consists of administrative files selected for microfilming by the Dept. of Highways from file range 2 to 1396 with gaps. Most of the original files were destroyed after filming.”

expenditures. Proof of such expenditures can be critically important. (See “Expenditure of Public Funds on a Travelled Road” below.)

### **BC Legislative Journals**

([http://archives.leg.bc.ca/civix/content/leg\\_archives/legarchives/?xsl=/templates/browse.xsl](http://archives.leg.bc.ca/civix/content/leg_archives/legarchives/?xsl=/templates/browse.xsl) [<https://perma.cc/T5QC-LUXG>]): Provide a record of legislative debates and reports that may mention roads and trails in an area. The Journals are also keyword searchable.

**Orders in Council** (<http://www.bclaws.ca/civix/content/oic/?xsl=/templates/browse.xsl> [<https://perma.cc/7R3T-A2AN>]): Orders in Council are another location for information related to the establishment of a highway through public expenditure. These orders are directives of the Lieutenant Governor authorizing certain actions – and some of these actions include expenditure of public funds. All Orders in Council are published on the BC Laws website. Indexes of Orders in Council are created for each couple of months, and with the exception of very old handwritten Orders in Council, the database is keyword searchable.

**You Can Make Direct Requests to Ministries:** You may be able to obtain key information by contacting the relevant ministry directly, or by submitting a request under freedom of information legislation. Requesting information this way is not an onerous step – and is sometimes an expeditious way to obtain information. Two of the most common ministries to contact are:

#### ***Ministry of Transportation and Infrastructure:***

Contact: 250 387-3198; [TRAN.WEBMASTER@gov.bc.ca](mailto:TRAN.WEBMASTER@gov.bc.ca)

Information that may be useful from the Ministry of Transportation and Infrastructure may include historical road inventories, current and past classifications of roads and other routes, road contracts, quantified work records, and historical correspondence about roads.<sup>25</sup> Every regional office of this Ministry should have a copy of the Road Register for that region available. It may not contain all public highways – but if a road is in the Register, that is likely conclusive that it is public.

#### ***Ministry of Forests, Lands, Natural Resource Operations and Rural Development [Recently re-named Ministry of Forests] or your local Natural Resources District Office.***

Contact: 1-800-663-7867, [EnquiryBC@gov.bc.ca](mailto:EnquiryBC@gov.bc.ca)

It is important to note that the district engineer will have specific information about roads within their district. Information that could be useful from the Ministry may include aerial photographs and maps of the area, as well as potential information related to road permitting and construction (if the road was constructed under legislation administered by this Ministry or its predecessors). Also, this Ministry may have information if access to an

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<sup>25</sup> Some of the road correspondence may be held in Provincial Archives and some by the Ministry.

area has been restricted through other legislation, such as the *Wildlife Act*. Note that the District will likely point you to DataBC for more information.

**Freedom of Information Requests** (<https://www2.gov.bc.ca/gov/content/governments/about-the-bc-government/open-government/open-information/freedom-of-information/submit-a-general-freedom-of-information-request> [<https://perma.cc/JPE3-A7BP>]): You can follow up on direct requests for information by filing a freedom of information request for government records. Freedom of information requests can be submitted online, and information on how to make a request can be found on the government website.

For more information and assistance in submitting a freedom of information request, review the University of Victoria Environmental Law Centre's, *A Citizen's Guide to FOI*<sup>26</sup> and contact the Centre for updated information on the current process.

Your request should normally be as specific as possible regarding dates, locations and other particulars. If possible, use evidence gathered from other sources to narrow your request for information to the government. This can make it more likely that you receive the specific government records that you seek.

**Open Information** (<https://www2.gov.bc.ca/gov/content/governments/about-the-bc-government/open-government/open-information/search-open-information-resources> [<https://perma.cc/V27C-NXY3>]): The BC government proactively discloses information and publishes the results of previous freedom of information requests. Even if this does not provide you directly with information that you need, it may narrow your search and provide you with a sense of the scope and cost of freedom of information requests.

**Federal Government:** If your research shows that the federal government has at some point been involved in the area where you are seeking to establish a right of public access, then the following resources may be helpful:

**Library and Archives Canada** (<https://www.bac-lac.gc.ca/eng/collectionsearch/Pages/collectionsearch.aspx> [<https://perma.cc/A7Z5-TYDW>]):

Library and Archives Canada may have useful information related to federal topics (e.g., wharves, railroads, hydrographic surveys, post office records, etc.). Some of the material from Library and Archives Canada is also digitized and available at <https://heritage.canadiana.ca/> [<https://perma.cc/F94G-SHN3>]. You may request that Canadian Heritage digitize the specific material from Library and Archives Canada that interests you.

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<sup>26</sup> University of Victoria Environmental Law Centre's, *A Citizen's Guide to FOI*, <<http://www.elc.uvic.ca/a-citizens-guide-to-foi/>> [<https://perma.cc/4P8K-LPH2>].

***Digitized Dominion of Canada sessional papers*** (<https://archive.org>):

May be useful if federal infrastructure is involved, e.g. wharves.

***Federal government publications*** (<http://publications.gc.ca/site/eng/home.html>):

Repository of many publications released by the federal government, including the Geological Survey of Canada.

***Internet Archive*** (<https://archive.org>):

This general open-access archive includes digitized Dominion of Canada sessional papers.



Photo Credit: Zoya Lynch (Starry sky Carlyle camp)

## Part II

In this part of the *Guide*, we outline different legal means by which a right of public access can be established. We begin by discussing ways that public “highways” (including trails) may have been legally created, including:

- Exemption of the public “highway” from the original grant of Crown land;
- Filed subdivision plans and other documents at the Land Title Office that indicated the highway;
- Publication of a Ministerial notice declaring the “highway” in the *BC Gazette*;
- A history of public expenditures on traveled roads;
- Historic actions of a property owner that showed intent to dedicate the route to the public – followed by public use;
- Historic government action to enter and possess the land for highway purposes; and
- A number of other circumstances.



Then we examine the important right of public access provided by forestry legislation. We go on to discuss the general right to travel along the Crown foreshore, the general permission for the public to traverse Crown lands, and some of the restrictions that apply on Crown lands. We briefly touch on other provincial statutes relevant to resource roads – and on natural resource and other statutes that provide for public use. We conclude with a discussion of an overarching legal/public policy argument in support of a broad interpretation of public rights of access.

## THE MANY WAYS A ROUTE MAY BECOME A PUBLIC “HIGHWAY”

The major means by which a road, trail, or other public way can become a legal “highway” are set out in section 1 of the BC *Transportation Act*. Section 1 states that a “highway” means:

...a public street, road, trail, lane, bridge, trestle, tunnel, ferry landing, ferry approach, any other public way or any other land or improvement that becomes or has become a highway by any of the following:

- (a) deposit of a subdivision, reference or explanatory plan in a land title office under section 107 of the Land Title Act;
- (b) a public expenditure to which section 42 applies;
- (c) a common law dedication made by the government or any other person;
- (d) declaration, by notice in the *Gazette*, made before December 24, 1987;
- (e) in the case of a road, colouring, outlining or designating the road on a record in such a way that section 13 or 57 of the *Land Act* applies to that road;
- (f) an order under section 56 (2) of this Act;
- (g) any other prescribed means;<sup>27</sup>

The BC Court of Appeal has stated that the above provisions of the *Transportation Act* currently is a “complete code” expressing the “only means by which a highway can come into existence in British Columbia.”<sup>28</sup> While that may be true today, note that there may be additional highways today that were created historically by different legal rules. And those historical highways may continue as highways due to the general presumption that “once a highway, always a highway.”<sup>29</sup>

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<sup>27</sup> *Transportation Act*, SBC 2004, c 44, s 1. Note that under previous legislation, there were ways other than those listed in section 1 of the *Transportation Act* by which highways could come into existence. Notable among these was the Minister’s ability to create a highway by simply entering and taking possession of land.

<sup>28</sup> *Adam v Insurance Corporation of British Columbia*, 2018 BCCA 482, at para 55.

<sup>29</sup> For example, it might be argued that if a road became a highway through an additional means historically – such as the Minister or agent “entering and taking possession” of highway lands – the way may still be a public “highway” despite changes in the law since. See “Entering and Taking Possession,” discussed below. For the principle of “once a highway, always a highway,” See *Emmett v. Arbutus Bay Estates Ltd.* 1994 CanLII 8700, 39 BCAC 194 at paragraph 39 found at: <<https://canlii.ca/t/231qx>> [<https://perma.cc/UJ7H-QQFQ>]. Also see discussion of the legal maxim “Once a Highway, Always a Highway” in *Dunstan v. Hell’s Gate Enterprises Ltd.* (1987), 45 D.L.R. (4th) 677 (B.C.C.A.). Commentators have written about *Dunstan*: “...interested parties sought to benefit from what can, for the most part, be described by the rule: ‘once a highway, always a highway.’ If the trail had been dedicated as highway in the 1870s then,

The above means of a highway coming into existence are discussed below. Some means are relatively straightforward and can be proven with minimal clear documentation. Others will be more complex and require extensive evidence to prove.

## CREATING A HIGHWAY

### a) Deposit of Subdivision or Other Plans at the Land Title Office

When you are looking for public trails and other “highways,” be sure to carefully examine subdivision plans, reference plans, explanatory plans and other documents filed at the Land Title Office.<sup>30</sup> Generally, when a Land Title Office plan<sup>31</sup> marks your route as “highway” or “road,” that is enough to prove public access.<sup>32</sup>

On subdivision plans, look for the public areas that are *between* private lots. Remember that “highway” accesses are not necessarily roads at all – they often exist as undeveloped land which the public has a right to access and use. As the definition of “highway” in section 1 of the *Transportation Act* states, a highway can include a “street, road, trail, lane, bridge, trestle, tunnel, ferry landing, ferry approach, any other public way.”

Section 107 of the *Land Title Act* provides:

107 (1) The deposit of a subdivision, reference or explanatory plan showing a portion of the land

- (a) as a highway, park or public square, that is not designated on the plan to be of a private nature, or
- (b) as covered by water and as lying immediately adjacent to a lake, river, stream or other body of water not within the land covered by the plan, and designated on the plan to be returned to the government, operates

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subject to any formal road closing proceedings, it would still be highway today.” See Michael Moll, Joanna Track, *When is a Highway Really a Highway?* Young Anderson, Barrister and Solicitors, November 25, 2016, at p. 11-12. See: <[https://www.younganderson.ca/assets/seminar\\_papers/2016/When-is-a-Highway-Really-a-Highway.pdf](https://www.younganderson.ca/assets/seminar_papers/2016/When-is-a-Highway-Really-a-Highway.pdf)> [<https://perma.cc/N2WJ-CCC2>]. Note that you should check to see if formal steps have been taken to close such highways since their creation (See “Closing Highways” below).

<sup>30</sup> See s. 1 *Transportation Act*, definition of “Highway” (a), as reproduced in the text above. Note that the Land Title Office register is operated and administered by the Land Title and Survey Authority of BC (“LTSA”). The LTSA’s electronic search service allows registered users (for a fee) to perform title searches and obtain copies of registered documents and plans.

<sup>31</sup> *I.e.*, subdivision plan, reference plan or explanatory plan.

<sup>32</sup> See s. 107 of the *Land Title Act*, R.S.B.C. 1996, c. 250 and see Michael Moll, Joanna Track, *When is a Highway Really a Highway?* Young Anderson, Barrister and Solicitors, November 25, 2016 at p. 2. See:

<[https://www.younganderson.ca/assets/seminar\\_papers/2016/When-is-a-Highway-Really-a-Highway.pdf](https://www.younganderson.ca/assets/seminar_papers/2016/When-is-a-Highway-Really-a-Highway.pdf)> [<https://perma.cc/N2WJ-CCC2>].

(c) as an immediate and conclusive dedication by the owner to the public of that portion of land shown as a highway, park or public square, or to be returned to the government, for the purpose indicated on or to be inferred from the words or markings on the plan,

[emphasis added]

When examining “plans” be sure to examine *all* documents, in case ancillary documents indicate your access is part of the “plan.” Note that Land Title Office plans will not only reflect original subdivision plan “highways,” but also subsequent public access “highways” that landowners have sold to government or had expropriated.<sup>33</sup>

### ***Previously subdivided lands: The source of numerous public accesses to waterfront***

In particular, note that waterfront lands with a history of subdivision are likely to have had public accesses created during subdivision. British Columbia has relatively strong laws that mandate generous public access to waterfront when land is subdivided.

Often, the public is unaware of these public accesses to waterfront that have been established. Indeed, it is extremely common for adjacent land owners to appropriate these public waterfront accesses – even putting fences, hedges, driveways, carports, patios, gardens and other things on them, making it appear that there is no public access. The Environmental Law Centre (ELC) succeeded in restoring public access to such areas in Greater Victoria by simply using Capital Regional District maps and demonstrating that established public accesses had been appropriated.<sup>34</sup>

If you are dealing with waterfront lands that have been previously subdivided, look for waterfront accesses established during the subdivision process. Under the section 75 of the *Land Title Act*, subdivisions that border bodies of water generally must include a 20-metre-wide highway providing water access every 200 metres; or in rural areas with larger lots, every 400 metres.<sup>35</sup>

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<sup>33</sup> *Transportation Act*, SBC 2004, c 44, s 43. Note that under Section 43 of the *Transportation Act*, if a landowner agrees to dedicate land to become a highway s. 107 *Land Title Act* applies: “43 If a person agrees under section 3 (1) of the *Expropriation Act* or otherwise to dedicate land to the government to become a highway, the minister may, for the purposes of section 107 of the *Land Title Act*, prepare and deposit with the registrar of the applicable land title office an explanatory plan showing that land as highway, and, in that event, (a) section 107 (1) (c) and (d) and (3) of the *Land Title Act* applies, and (b) the dedicated land becomes a provincial public highway.”

<sup>34</sup> See Neal Parker, *Protecting Public Greenspace* (Victoria: Environmental Law Centre, 2017), p. 2 at: <<https://elc.uvic.ca/publications/protecting-public-green-space/>> [<https://perma.cc/XYD2-ZE2Q>]. And see: Jeff Bell, “Encroaching on public land near Gorge ‘not acceptable,’ Esquimalt warns property owners,” May 3, 2018 Victoria Times Colonist at: <<https://www.timescolonist.com/local-news/encroaching-on-public-land-near-gorge-not-acceptable-esquimalt-warns-property-owners-4661726>> [<https://perma.cc/DU7U-QNPK>].

<sup>35</sup> This requirement applies to subdivisions that border:

- a body of water, the bed of which is owned by the Crown;
- the boundary of a strip of land established as the boundary of a water reservoir, where the strip of land and reservoir are owned by the Crown;
- a strip of Crown land 20 metres or less in width contiguous to a natural boundary [visible high water mark]

If you hope to establish waterfront access to urban or rural lands that may have been subdivided in the past, review how the ELC successfully documented numerous historical waterfront accesses along Greater Victoria's Gorge Waterway. Basically, the ELC presented local governments with Capital Regional District maps that clearly showed the public accesses. Those maps were contrasted with current photographs of where private landowners had appropriated the public access lands for private uses. Presentation of this documentation led local governments to re-open a number of waterfront public access lands.<sup>36</sup> Contact the ELC for further information.

## b) Expenditure of Public Funds on a Travelled Road

If public money has ever been spent on a road, the road may be a public "highway" today – even if the road is not recorded as a highway on government records.<sup>37</sup> Under section 42 of the *Transportation Act* and the previous versions of this statute, a road is deemed a public highway if it was a travelled road that public funds were spent on.

**Section 42** states:

(1) Subject to subsection (2), if public money is spent on a travelled road that is not a highway, the travelled road is deemed and declared to be a highway.<sup>38</sup>

In order for a road to be considered "travelled," it "requires the route in question to have had some substantive public use, something more than occasional or rare use."<sup>39</sup> For money to be considered "public" it must be:

*... expended by departments of the provincial, municipal and other governments for highway purposes, and does not include money spent by autonomous, or "quasi-autonomous" Crown corporations such as the*

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- a lake or pond, the bed of which is owned by a person other than the Crown, if, at mean annual highwater, its surface measures at least 1.5 hectares and its depth at least 0.6 meters; and,
  - a river, creek, or watercourse, the bed of which is owned by someone other than the Crown, if, at mean annual highwater, its average width measures at least 6 metres and its depth at least 0.6 metres. *Land Title Act*, RSBC 1996, c 250, s 75.

<sup>36</sup> See Neal Parker, *Protecting Public Greenspace* (Victoria: Environmental Law Centre, 2017), <<https://elc.uvic.ca/publications/protecting-public-green-space/>> [<https://perma.cc/XYD2-ZE2Q>]. A community group had asked the Environmental Law Centre to investigate the problem of encroachment by private landowners on public property along the waterfront. Many private landowners had appropriated end-of-road public access points to the ocean – using the accesses for driveways, parking, carport, private garden, composting pile, and putting up fences and no trespassing signs on public land. To address this, the ELC prepared a striking visual/written submission to local municipalities, documenting the extent of the private encroachment on public lands, and requesting the restoration of public accesses.

<sup>37</sup> Even if it's not shown as a highway on any Crown grant, *Gazette* records, or Land Title Office records.

<sup>38</sup> *Transportation Act*, SBC 2004, c 44, s 42 Note that s. 42 (2) goes on to state: "Subsection (1) does not apply to any road or class of roads, or to any expenditure or class of expenditures, that is prescribed by the regulations."

<sup>39</sup> *Vesuna v British Columbia (Minister of Transportation)*, 2011 BCSC 941, at para 107.

*Hydro Authority [now, BC Hydro] in carrying on their businesses as trading entities, or public utilities.*<sup>40</sup>

Additionally, the expenditure of public funds must be “significant.”<sup>41</sup> There is not a formula for determining how much is “significant,” but one court has stated, “Mere incidental expenditures or ones made by inadvertence are insufficient to trigger the operation of the section.”<sup>42</sup> However, a single expenditure can be sufficient to make a travelled road a public highway.<sup>43</sup>

Section 4 of the *Transportation Act Regulation* provides key exceptions to the above section 42 public expenditure rule.<sup>44</sup> Section 4 states that section 42 does not apply to certain specific roads or ferry terminal properties, and that:

- 4 (1) Section 42 (1) of the Act does not apply
- (a) to an expenditure of public money if the expenditure is confined to an expenditure for snowploughing or ice control,
  - (b) to a travelled road if the travelled road forms part of an existing railway right of way and, at the time public money was spent on it,
    - (i) was owned by the government or a Crown corporation or Crown agency, or
    - (ii) formed part of a railway right of way,
  - (c) to a highway if money has been authorized to be lent, guaranteed, invested, granted or spent in relation to the highway under section 13 of the Ministry of Energy and Mines Act
- [emphasis added]

In addition, note that forestry roads may **not** have become highways simply by virtue of being travelled roads subject to public expenditure. Section 24 of the *Forest and Range Practices Act* specifies that despite travel and public expenditure, forestry roads are not considered highways unless an order in council declares them to be.

[See “Have Some Forestry Roads Become Highways?” below.]

### ***History of the Public Expenditure Rule: When and Where was Money Spent on Your Road?***

Travelled roads on which public funds had been spent were originally deemed to be public highways by section 2 of the *Highways Establishment and Protection Act, 1905*, which came into

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<sup>40</sup> *British Columbia v Hilyn Holdings Ltd*, 1991 CarswellBC 1143, [1991] BCWLD 901 (BCCA), at 5.

<sup>41</sup> Michael Moll, Joanna Track, *When is a Highway Really a Highway?* Young Anderson, Barrister and Solicitors, November 25, 2016 at p. 15. See: <[https://www.younganderson.ca/assets/seminar\\_papers/2016/When-is-a-Highway-Really-a-Highway.pdf](https://www.younganderson.ca/assets/seminar_papers/2016/When-is-a-Highway-Really-a-Highway.pdf)> [<https://perma.cc/N2WJ-CCC2>].

<sup>42</sup> *Whistler Service Park Ltd v Norway Industries Ltd*, 1988 CarswellBC 918, [1988] BCWLD 1279, at para 17, aff’d: *Whistler Service Park Ltd v Norway Industries Ltd*, 1990 CarswellBC 97, [1990] 5 WWR 153 (BCCA).

<sup>43</sup> *Dunstan v Hell's Gate Enterprises Ltd*, 1987 CarswellBC 375, [1988] BCWLD 170 (BCCA), at para 34.

<sup>44</sup> Section 42 *Transportation Act*, as discussed above.

effect on April 8, 1905.<sup>45</sup> However, even prior to 1905, it is arguable that any roads that were travelled and on which public funds had been spent became public highways through common law dedication (discussed in the next section of this report), because travel and expenditure of public money are key indicia of dedication. As the BC Court of Appeal has noted:

*As the statute was apparently not intended to codify the common law but to provide another method of creating a highway, the legislators have taken two of the most obvious indicia of intention to dedicate and acceptance — travel and expenditure of public money — and stated that proof of these alone would establish a highway.<sup>46</sup>*

Note that the expenditure of public money need not have been spent on the entire length of the road. Indeed, up until March 28, 1945, the statutory test for whether a road became a public highway was whether the public funds had been spent “on *any portion*” of a travelled road.<sup>47</sup> For road maintenance done before 1945, the Court of Appeal has declared:

*It was sufficient for the statute to operate that public monies had been expended on any portion of the travelled road<sup>48</sup> [emphasis added]*

In other words, where public money was spent before 1945, it clearly need not have been expended on the particular section of the road in question. Maintenance done elsewhere along the road could make the rest of the road public.<sup>49</sup> Note that after 1945, the statutory test was changed to delete the phrase “any portion of” – and the test became whether public funds were spent “on a travelled road.”<sup>50</sup>

In relation to section 4(1)(a) of the Transportation Act Regulation excerpted above, it was not until 1968 that the expenditure of public funds for ice control and snow plowing was *excluded* from the general rule on public expenditure.<sup>51</sup> Thus, such winter expenditures prior to 1968 might have been enough to have created a public highway.

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<sup>45</sup> *Highways Establishment and Protection Act, 1905*, SBC 1905, c 26, s 2, available online:

<<https://www.bclaws.gov.bc.ca/civix/document/id/hstats/hstats/908836941>> [<https://perma.cc/Y6XP-QLYZ>].

<sup>46</sup> *Whistler Service Park Ltd v Norway Industries Ltd*, 1990 CarswellBC 97, [1990] 5 WWR 153 (BCCA) at para 38.

<sup>47</sup> See *Highways Establishment and Protection Act, 1905*, SBC 1905, c 26, s 2 and subsequent versions of that Act up until 1945.

<sup>48</sup> *Emmett v Arbutus Bay Estates Ltd*, 1994 CanLII 8700, 39 BCAC 194, at para 40 and following.

<sup>49</sup> *Emmett v Arbutus Bay Estates Ltd*, 1994 CanLII 8700, 39 BCAC 194, at para 40 and following. Also see: *Saanich District v. McFadden*, [1923] 1 D.L.R. 1170, affd. [1923] 3 D.L.R. 171; [1923] 2 W.W.R. 429; 32 B.C.R. 221 (C.A.).

<sup>50</sup> *The Highway Act Amendment Act, 1945*, SBC 1945, c 36, s 2, available online:

<<https://www.bclaws.gov.bc.ca/civix/document/id/hstats/hstats/1842788764>> [<https://perma.cc/N4T9-CTAF>].

<sup>51</sup> *Statute Law Amendment Act, 1968*, SBC 1968, c 53, s 8.

Similarly, in relation to section 4(1)(b), it was not until 1972 that travelled roads were *excluded* from becoming public highways through expenditure *if they formed part of a railway right of way*.<sup>52</sup> Thus, pre-1972 expenditures may have created a “highway” on such railway rights of way.

Similarly, in relation to section 4(1)(c), the *Mines Development Act*, dating back to 1916, gave the Minister the power to authorize the expenditure of public funds on roads and trails for the exploration of petroleum and mineral resources.<sup>53</sup> But it was not until 1986 that *Highway Act*<sup>54</sup> amendments stipulated that expenditure of public funds under the *Ministry of Energy, Mines and Petroleum Resources Act*<sup>55</sup> **did not make a road a public highway**.<sup>56</sup> The result is that mining and petroleum resource roads subject to pre-1986 public spending could be subject to the rule about public expenditure creating a public highway.

### ***Trails and Public Expenditures***

Note that courts have distinguished between *roads* and *trails*, when determining whether public expenditure could make a travelled route into a highway. Section 42 of the *Transportation Act* and its predecessors specifically refer to “travelled roads” that have received public funding. The courts have found that expenditure of public funds could not make a *trail* into a public highway under this provision because a trail could not be a “travelled road.”<sup>57</sup>

However, your “trail” might still qualify as a “travelled road.” When a Court considers whether a route was a “trail” or a “travelled road,” this is a question of fact. In a notable decision, the Court of Appeal found that the “Quarry Trail” was in fact a “road” – and became a public “highway” by operation of section 4(1).<sup>58</sup> What was once a trail can become a road. In determining whether or not a trail has become a road, the court has looked at its width, culvert installation, history and reference to the route in Ministry<sup>59</sup> documents. The key thing to remember is this – the mere fact that a route is named a “trail” is not conclusive evidence that it is not a “travelled road” for this

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<sup>52</sup> “...and were, at the time public money was spent, owned by the Crown, a Crown corporation or agency, or were part of a railway right of way.” See s. 4 (1)(b) of the *Transportation Act Regulation* quoted in the main text above. For the 1972 change, see *An Act to Amend the Highway Act*, SBC 1972, c 26, s 1.

<sup>53</sup> *Mines Development Act*, SBC 1916, c 43, ss 2-3. This was carried through until it was continued in the *Department of Mines and Petroleum Resources Act*, SBC 1973, c 111, s 13. See RSBC 1960, c 107, s 15; RSBC 1948, c 211, s 15; SBC 1937, c 47, s 15; RSBC 1936, c 178 s 233; SBC 1930, c 44, ss 2-3; RSBC 1924, c 164, ss 203; SBC 1916, c 43, ss 2-3.

<sup>54</sup> Predecessor to the *Transportation Act*.

<sup>55</sup> And prior to that, the *Mines Development Act*.

<sup>56</sup> *Miscellaneous Statutes Amendment Act (No 4)*, 1985, c 75, ss 10, 28, available online: <<https://www.bclaws.gov.bc.ca/civix/document/id/hstats/hstats/1955986729>> [<https://perma.cc/ZV22-DW6U>]; BC Reg 39/86.

<sup>57</sup> See *Dunstan v. Hell's Gate Enterprises Ltd.* (1988), 45 D.L.R. (4th) 678 at pp. 690 to 691 and *Campbell v Thomson*, 1990 CarswellBC 1435, [1990] BCWLD 2438, (BCCA).

<sup>58</sup> *Campbell v Thomson*, 1990 CarswellBC 1435, [1990] BCWLD 2438, (BCCA).

<sup>59</sup> Ministry of Highways and Public Works.

purpose.<sup>60</sup> In the right circumstances, public expenditure on a so-called “trail” could potentially make it into a “highway” – if the court concludes that the trail is essentially a “road.”

Also, keep in mind that spending of public money on a true “trail” could conceivably make the trail a public “highway,” under two additional legal theories we will discuss below.<sup>61</sup>

### c) Common Law Dedication

You should consider whether you can invoke the doctrine of “common law dedication” to prove that your road or trail is public.<sup>62</sup> If you can prove the elements of Common Law Dedication below, you may be able to prove the way is a public highway – even if no government records have recorded it as a highway.<sup>63</sup>

To prove that a road or trail has historically become public through common law dedication, you must prove two things:

- (1) **intention** on the part of the owner to dedicate the route to the public for the purpose of a highway; and
- (2) **acceptance** by the public of the route as a highway.<sup>64</sup>

Note that creating a “highway” by common law dedication is not limited to roads. Under section 1 of the *Transportation Act*, trails, lanes, bridges and other public ways can also become a “highway” if the elements of intention and acceptance are made out.<sup>65</sup>

The party seeking to prove a common law dedication must prove both elements, on the balance of probabilities.<sup>66</sup> Considerable evidence may be needed to support inferences of both landowner “intention” and public “acceptance” – the two essential elements of common law dedication. You may need convincing evidence about historical use of the route, actions of the landowner, actions

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<sup>60</sup> *Campbell v Thomson*, 1990 CarswellBC 1435, [1990] BCWLD 2438, (BCCA), at para 23.

<sup>61</sup> A traveled trail upon which public funds were spent could still become a public highway through the doctrine of common law dedication. Alternatively, the expenditure could arguably be evidence of an overt possessive act by the Ministry, leading to “highway” status. See “Common Law Dedication” and “Entering and Taking Possession,” below.

<sup>62</sup> See s. 1 *Transportation Act*, definition of “Highway” (c), reproduced in the text above, which includes highways created by “common law dedication” as highways.

<sup>63</sup> Even if it is not shown as a highway on any Crown grant, *Gazette* records, or Land Title Office records.

<sup>64</sup> *Adam v Insurance Corporation of British Columbia*, 2018 BCCA 482, at para 60, citing *Brady v Zirnhelt* 1998 CarswellBC 1951, [1998] B.C.J. No. 2083, at para 37. See also: *Dunstan v. Hell’s Gate Enterprises* (1987) 45 D.L.R. (4<sup>th</sup>) 677. Also see Michael Moll, Joanna Track, *When is a Highway Really a Highway?* Young Anderson, Barrister and Solicitors, November 25, 2016, p. 11, at: <[https://www.younganderson.ca/assets/seminar\\_papers/2016/When-is-a-Highway-Really-a-Highway.pdf](https://www.younganderson.ca/assets/seminar_papers/2016/When-is-a-Highway-Really-a-Highway.pdf)> [<https://perma.cc/N2WJ-CCC2>].

<sup>65</sup> Section 1 of the BC *Transportation Act* states that a “highway” means: “...a public street, road, trail, lane, bridge, trestle, tunnel, ferry landing, ferry approach, any other public way or any other land or improvement that becomes or has become a highway by any of the following: ...(c) a common law dedication made by the government or any other person...”

<sup>66</sup> *Adam v Insurance Corporation of British Columbia*, 2018 BCCA 482, at 60.



of the public, statements and other records regarding the intention and acceptance of the parties, documents related to the historical evolution of use, etc.

There are many factors that courts have looked to in determining whether there was an “intention” on the part of the owner to dedicate a highway. The owner’s intention can be shown explicitly (*e.g.*, by the owner approving a plan that showed roads) – or implicitly (by owner action or inaction, such as failure to communicate to the public that the area was private).

In *Highways, Parks and the Public Trust Doctrine*, Andrew Gage cites duration of public use and the following factors as relevant in determining if a dedication should be implied:

*...the expenditure of public funds on the road; occasional gating or otherwise closing of the road, thereby restricting public access; the use of the road not by the public at large, but only by some subset of the public; the use of signage or other means to convey the owner's intent; any private benefit received by the property owner arising from the public use of the road; and any actions by the owner encouraging public use of the road. Somewhat surprisingly, the fact that the level of public use was low, provided there was some public use, does not appear to a factor against implying a dedication, although use must be by the public at large, and not merely local residents.*<sup>67</sup>

In Canada, the shortest period of use which has established a dedication has been 19 years,<sup>68</sup> although it is typically the case that longer periods of 30-50 years are required.<sup>69</sup>

Where the public used the right of way very rarely, or sought permission from a landowner to use the right of way, then this does not amount to a common law dedication.<sup>70</sup> To establish dedication, there must have been a clear public understanding that the right of way could be used without liability in trespass.<sup>71</sup> Intention on the part of the owner must be an actual intention to dedicate a public highway; it is not sufficient that a landowner allow their neighbours to cross the land in a neighbourly spirit, and this is especially the case when an area is at an early stage of development.<sup>72</sup>

Note that “common law dedication” is not limited to the creation of a public highway. The principle of dedication and public acceptance can apply to other lands, including commons, parks,

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<sup>67</sup> Andrew Gage, *Highways, Parks and the Public Trust Doctrine*, 18 J Env L & Prac. 1 2007, at 5, online: <<https://backcountrybc.ca/images/documents/SingingPass/HighwaysParksAndThePublicTrustDoctrine.pdf>> [<https://perma.cc/2GNK-PCPR>].

<sup>68</sup> *R v Gordon*, 1856 CarswellOnt 171, 6 UCCP 213.

<sup>69</sup> Andrew Gage, *Highways, Parks and the Public Trust Doctrine*, 18 J Env L & Prac. 1 2007, at 4, online: <<https://backcountrybc.ca/images/documents/SingingPass/HighwaysParksAndThePublicTrustDoctrine.pdf>> [<https://perma.cc/2GNK-PCPR>].

<sup>70</sup> *Vesuna v British Columbia (Minister of Transportation)*, 2011 BCSC 941.

<sup>71</sup> *Shaman v Meek*, 2019 BCSC 9, at para 52.

<sup>72</sup> *Brady v Zirnhelt*, 1998 CarswellBC 1951, [1998] BCJ No 2083 (BCCA), at para 14.

greenbelts, walks, public squares, and wharves.<sup>73</sup> Therefore, even in situations where a public highway has not been created through dedication, a right to enter upon the land may exist.

*Caveat:* When investigating the history of possible highway dedication, keep in mind that only the owner of the property – not a tenant or other user – has the authority to dedicate a highway.<sup>74</sup>

## d) Gazetted Roads

You may be able to discover whether a road or trail is a public “highway” by searching the *BC Gazette*. For example, before December 24, 1987, a “highway” could be created if, it was declared a highway by notice in the *Gazette*. This was pursuant to section 6(1)(d) of the 1979 version of the *Highway Act*, which stated:

6 (1) The minister in his absolute discretion may...

(d) declare the highway by notice in the *Gazette* setting forth its direction and extent.<sup>75</sup>

In 1987 the legislature changed this particular mode of creating highways.<sup>76</sup> BC Supreme Court Justice Cooper has described the 1987 change of procedure:

*Until the amendment of the Highway Act in 1987, highways could be established by publication of notice in the Gazette. Since those*

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<sup>73</sup> Andrew Gage, *Highways, Parks and the Public Trust Doctrine*, 18 J Env L & Prac. 1 2007, online: <<https://backcountrybc.ca/images/documents/SingingPass/HighwaysParksAndThePublicTrustDoctrine.pdf>> [<https://perma.cc/2GNK-PCPR>]. Note that in *Wright v Long Branch (Village)*, the Supreme Court of Canada ruled that a public war memorial historically built in the centre of a private lot had been dedicated by common law to that public purpose, *Wright v Long Branch (Village)*, 1959 CarswellOnt 75, [1959] SCR 418, at para 8.

<sup>74</sup> Andrew Gage, *Highways, Parks and the Public Trust Doctrine*, 18 J Env L & Prac. 1 2007, at 12, online: <<https://backcountrybc.ca/images/documents/SingingPass/HighwaysParksAndThePublicTrustDoctrine.pdf>> [<https://perma.cc/2GNK-PCPR>].

<sup>75</sup> *Highway Act*, RSBC 1979, c 167, s 6(1)(d); Note: other statutes such as the *Municipal Act, 1892*, SBC 1892, c 33 also gave authority for highways to be created through Gazetting. See: *Dunromin Investments Ltd v Spallumcheen (Township)*, 2000 BCSC 383, at para 63.

<sup>76</sup> This was changed by section 79 of the 1987 version of the *Expropriation Act*, SBC 1987 c 23, which stated: “Section 6 (1) (d) and (2) are repealed and the following substituted:

(2) The minister may designate employees of the Ministry of Transportation and Highways who may prepare explanatory plans for the purposes of

(a) permitting persons to dedicate a highway to Her Majesty where

(i) consideration for the dedication has been agreed on, or

(ii) an agreement under section 3 (1) of the *Expropriation Act* has been made, or

(b) sections 5 (5) and 6 (4) (b) of the *Expropriation Act*.

(2.1) Where a person agrees to dedicate a highway to Her Majesty and has

(a) agreed to the consideration for the dedication, or

*amendments, the Ministry of Transportation and Highways follows a process of surveying Crown land for which there is no title in the Land Title office and obtaining confirmation as an official plan under the Land Act.*<sup>77</sup>

Thus, when you're looking for evidence that your trail or road has ever become a public "highway," search all the *Gazettes*. But remember that after 1987 the process of creating highways with *Gazette* notices changed – and the documents you need may be plans/records in the Land Titles Office.<sup>78</sup>

## **e) Exemption from a Crown Grant (Sections 13 and 57 of the Land Act)**

It is important to examine the original "Crown grant" of title to the land in question – *i.e.*, the grant made to the first private property owner. Carefully scrutinize the maps and plans attached to the grant – and review the original surveyor's notebooks.<sup>79</sup> Look to see if your access route was *exempted* from the Crown grant of private property – and should therefore be treated as a public highway.<sup>80</sup>

Indeed, a public "highway" may still exist if the highway is:

- referenced in a grant of Crown land or the plans attached to the grant, or
- was in existence prior to the grant taking effect.

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(b) entered into an agreement under section 3 (1) of the *Expropriation Act*, an explanatory plan prepared by a person designated under subsection (2) may be filed in the land title office, and section 107 (1) (c) and (d) and (3) of the *Land Title Act* applies."

<sup>77</sup> *British Columbia (Minister of Transportation & Highways) v Perepelkin*, 1996 CarswellBC 1192, [1996] BCWLD 1735 (BCSC), at 12.

<sup>78</sup> See *Deposit of a Subdivision Plan* above.

<sup>79</sup> Surveyors' notebooks are a useful source of information that can be used to cure ambiguities in plans and maps annexed to the crown grant. If such notebooks exist, you may be able to obtain them by inquiring with GATOR or the Land Title and Survey Authority. The easiest way to seek them may be to hire a BC land surveyor to go directly to the LTSA files and examine all documents on file – which may not only include the original surveyor's notes but also other potentially useful notes and documents. (At the same time, your land surveyor can do a "chain of title" search to document all historical owners of the property back to the original crown grant – which may be useful if you are using "common law dedication" arguments.) If you cannot obtain surveyors' notebooks from GATOR or the LTSA, you might find them in Archives.

<sup>80</sup> Pursuant to the definition of "highway," subparagraph (e) in s. 1 of the *Transportation Act* quoted above, and the legal principles discussed below.

Exempting a highway from the original Crown Grant to a private person may have occurred in a number of ways. As BC Supreme Court Justice Funt has described it:

*First, a highway may be specifically described in the language of the Crown grant. Second, the highway may be shown in an annexed plan to the Crown grant. Third, the highway may be excepted by general language, for example, by reference to "all highways, within the meaning of the Highway Act, existing or through said land at the date hereof." Finally, pursuant to s. 23(2)(e) of the Land Title Act, a highway may also be excepted without any specific reference in the Crown grant or annexed plan (see also Land Act, RSBC 1996, c 245, s 50(5)).<sup>81</sup>*

For example, if the map or plan attached to the Crown grant shows a road in a colour other than red, the road is likely a "highway." Section 57 of the *Land Act* states:

57 If Crown land is disposed of by Crown grant and the map or plan attached to the grant shows a road coloured, outlined or designated in a colour other than red, no part of the road passes to the grantee, and, unless there is express provision in the grant to the contrary, the road is deemed to be, for a grant issued

- (a) before January 3, 1977, 20.1168 m in width, and
- (b) after January 2, 1977, 20 m in width.<sup>82</sup>

Similarly, section 13 of the *Land Act* provides that in disposition of Crown land where a road is designated in the instrument or attached maps or plans, then by default the road normally remains publicly owned. Roads designated in the original Crown grant didn't pass to the original property owner, without express provision.<sup>83</sup> Note that the definition of "highway" in the *Transportation Act* specifically includes roads to which these sections 13 and 57 apply.<sup>84</sup>

In addition, Crown grants of land, *per se*, did not generally have the effect of privatizing existing highways. Thus, a Crown grant would not normally operate to privatize highways already created by common law dedication or other means. Section 50 of the *Land Act* emphasizes that highways are generally exempted from dispositions of Crown land, stating:

50 (1) A disposition of Crown land under this or another Act...

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<sup>81</sup> *Shaman v Meek*, 2019 BCSC 9, at para 47

<sup>82</sup> *Land Act*, RSBC 1996, c 245, s 57

<sup>83</sup> Section 13 of the *Land Act* states: "13 (1) In a disposition of Crown land under this or a former Act in which a portion of the land is designated as a road in the instrument evidencing the disposition or in a map or plan attached to it, unless there is express provision in the instrument to the contrary, the road is deemed to be,

(a) in the case of a disposition made before January 3, 1977, 20.1168 m in width, being 10.0584 m on each side of the centre line of the travelled portion of the road, and

(b) in the case of a disposition made after January 2, 1977, 20 m in width, being 10 m on each side of the centre line of the travelled portion of the road.

(2) No part of the road referred to in subsection (1) passes to any person under the instrument."

<sup>84</sup> See the definition of "highway," subparagraph (e) in s. 1 of the *Transportation Act*.

(c) conveys no right, interest or estate to highways, within the meaning of the *Transportation Act*, existing over or through the land at the date of the disposition...<sup>85</sup>

Section 23 (2)(e) of the *Land Title Act* is of similar effect:

23... (2) An indefeasible title, as long as it remains in force and uncanceled, is conclusive evidence at law and in equity, as against the Crown and all other persons, that the person named in the title as registered owner is indefeasibly entitled to an estate in fee simple to the land described in the indefeasible title, subject to the following...

(e) a highway or public right of way, watercourse, right of water or other public easement<sup>86</sup>

The effect of these sections is that, even where an instrument disposing of Crown land does not actually contain words, maps or markings which would exempt a highway, the instrument is deemed to exempt highways already in existence on the land at the date of dispossession.

Here's the takeaway: If you can prove that a highway came into existence before a Crown grant, you can argue that the highway is exempted from the grant to the property owner – even if the right of way does not appear on the instrument.

## f) Section 56 Dedication of a Forest Service Road as a Highway<sup>87</sup>

Under section 56 of the *Transportation Act*, Provincial Cabinet can transform a forest service road into a public “highway” – and vice versa. If you are dealing with a road that has ever been a forest service road, you may want to investigate whether it has ever been designated a public “highway.” Section 56 provides that Cabinet may order that a forest service road become a highway, and also do the reverse. See the footnote below for the text of section 56.<sup>88</sup>

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<sup>85</sup>Section 50(5) of the Act goes on to state: “5) For all purposes, including section 23 of the [Land Title Act](#), every disposition of Crown land is conclusively deemed to contain express words making the exceptions and reservations referred to in subsection (1) of this section, except to the extent that the disposition is made on different terms under subsection (3), (3.1) or (3.2)” See *Land Act*, RSBC 1996 c 245, s 50. Note that subsections 50(3), (3.1) and (3.2) have a narrow range of exceptions. involving explicit reference to another Act that allows for dispossession, the transfer of fossils, and final agreements with First Nations

<sup>86</sup> *Land Title Act*, RSBC 1996, c 250, s 23(2)(e)

<sup>87</sup> See s. 1 *Transportation Act*, definition of “Highway” (f), reproduced in the text above – which includes highways created by “an order under section 56(22) of this Act” as highways.

<sup>88</sup> “56 (1) In this section, “forest service road” has the same meaning as in section 1 of the *Forest Act*.

(2) Without limiting any right or power the minister responsible for the administration of the *Ministry of Forests and Range Act* may have in relation to forest service roads, the Lieutenant Governor in Council may, with the consent of the minister and the minister responsible for the administration of the *Ministry of Forests and Range Act*, order that a forest service road cease to be a forest service road for the purposes of the *Forest Act* and become, for the purposes of this Act,

(a) if and to the extent it is located in a municipality, an arterial highway, or

## g) Other Prescribed Means

Finally, the section 1 *Transportation Act*, definition of “Highway” (g) includes highways created by “any other prescribed means.” As the Court of Appeal has noted, other prescribed means “is a catch-all category apparently designed to specify other means that may be established by government from time to time.”<sup>89</sup> “Prescribed” means prescribed by regulation,<sup>90</sup> and so this gives a means by which other highways may come into existence through government regulations.

## h) Entering and Taking Possession

In addition to the means of creating a public highway currently listed in subsections 1(a) – (g) of the *Transportation Act* definition of “highway” described above, there may be other means by which public highways have been created historically.<sup>91</sup> One of the most notable additional means was the Minister’s historical ability to create a highway by simply entering and taking possession of land (e.g., a trail or road) for that purpose.

Under this principle, a highway may have been established if the Minister<sup>92</sup> carried out an “overt performance of a possessive act in relation to the land”<sup>93</sup> before 1987 (or possibly 2004).<sup>94</sup> However, note that the BC Supreme Court has stated:

*[i]t seems probable that those who drafted Section 6(1) [of the Highway Act] expected construction of a highway would take place prior to*

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(b) in any other case, a rural highway.

(3) Without limiting any right or power the minister may have to close a provincial public highway, the Lieutenant Governor in Council may, with the consent of the minister and the minister responsible for the administration of the *Ministry of Forests and Range Act*, order that a provincial public highway cease to be a provincial public highway and become a forest service road for the purposes of the *Forest Act*, and, in that event, the provincial public highway is deemed to be closed and discontinued at the time it becomes a forest service road.

(4) Before an order is made under subsection (2) (a) in relation to a forest service road, the minister must consult with the municipal council of the municipality in which the forest service road or a part of it is located.” *Transportation Act*, SBC 2004, c 44, s. 56.

<sup>89</sup> *Adam v Insurance Corporation of British Columbia*, 2018 BCCA 482, at para 45.

<sup>90</sup> *Interpretation Act*, RSBC 1996, c 238, s 29.

<sup>91</sup> Although the BC Court of Appeal has stated that the above provisions of the *Transportation Act* currently is a “complete code” expressing the “only means by which a highway can come into existence in British Columbia” (*Adam v Insurance Corporation of British Columbia*, 2018 BCCA 482, at para 55), it is arguable that highways previously established by common law remain highways, regardless. Note that lawyers Michael Moll and Joanna Track have stated that the section 1 list leaves the potential for additional legal bases upon which ways can become highways. See Michael Moll, Joanna Track, *When is a Highway Really a Highway?* Young Anderson, Barrister and Solicitors, November 25, 2016, at p. 1. See: <[https://www.younganderson.ca/assets/seminar\\_papers/2016/When-is-a-Highway-Really-a-Highway.pdf](https://www.younganderson.ca/assets/seminar_papers/2016/When-is-a-Highway-Really-a-Highway.pdf)> [<https://perma.cc/N2WJ-CCC2>].

<sup>92</sup> (or agent).

<sup>93</sup> In accordance with the *Highway Act*, RSBC 1979, c 167 and *Ministry of Transportation and Highways Act*, RSBC 1979, c 280 See *Hougen v British Columbia (Minister of Highways)*, 1984 CarswellBC 886, [1984] BCWLD 2321, at para 12.

<sup>94</sup> Before December 24, 1987, or potentially December 31, 2004, as described below.

*publication of notice in the Gazette declaring its existence and location.*<sup>95</sup>

Thus, most highways that could be considered to be created by an overt possessive act, were also likely “created” through gazetting.

Nevertheless, the principle of “entry and possession” could be important where you can’t prove a highway through gazetting, public expenditure on a travelled road, etc. Indeed, some highways may have been created by overt possessive acts – but failed to be recorded in the *Gazette*. In addition, it may be helpful to invoke the “entry and possession” argument where the Minister built a *trail* in the past.<sup>96</sup> Although a *trail* would not become a highway under the “public expenditure on a *road*” rule above, you might argue that the trail became a permanent highway pursuant to historical “entry and possession.”<sup>97</sup>

There are not many cases that consider what constitutes an “overt possessive act” that would create a highway in British Columbia. However, the courts have stated that the purpose of the “overt possessive act” is to “give unequivocal notice of the expropriation.”<sup>98</sup> Wherever it can be said that the actions of the government would have given unequivocal notice of expropriation, then it is likely that the land in question has become a highway. Note that courts have ruled that a land survey done to generally map the boundaries of the right-of-way *did not* constitute an overt possessive act<sup>99</sup> -- but the Minister entering the property in question and staking the right-of-way by slashing and blazing *did* constitute an overt possessive act under analogous legislation.<sup>100</sup> Also, where a Ministry work crew built a road, this constituted an overt act of possession.<sup>101</sup>

## **Background**

A brief review of amendments to the relevant legislation over the past 150 years may be required in order to understand the power of the Minister to create a highway by entering and taking possession of land. The 1874 *Act to Amend and Consolidate the Laws Affecting Crown Lands in British Columbia* was the first legislation in BC that explicitly gave the power to create highways by “entering and taking possession:”

... it shall be lawful for the Chief Commissioner of Lands and Works, in his discretion, to make public highways, and to declare the same by notice in the British Columbia

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<sup>95</sup> *Hougen v British Columbia (Minister of Highways)*, 1984 CarswellBC 886, [1984] BCWLD 2321, at para 30.

<sup>96</sup> During the time period when the relevant provisions of the *Highway Act* and *Ministry of Transportation and Highways Act* were in force (from April 9, 1875, to December 24, 1987, or possibly to December 31, 2004).

<sup>97</sup> *British Columbia (Attorney General) v. Perry Ridge Water Users Assn*, 2003 BCCA 275.

<sup>98</sup> *Hougen v British Columbia (Minister of Highways)*, 1984 CarswellBC 886, [1984] BCWLD 2321, at para 45

<sup>99</sup> *Hougen v British Columbia (Minister of Highways)*, 1984 CarswellBC 886, [1984] BCWLD 2321.

<sup>100</sup> *I.e.*, the *Forest Act*. *British Columbia (Attorney General) v. Perry Ridge Water Users Assn*, 2003 BCCA 275, at para 66 and following.

<sup>101</sup> *Brady v Zirnhelt*, 1998 CarswellBC 1951, [1998] BCJ No 2083 (BCCA), at para 21. Note that in this instance, such action would often have also created a highway due to the expenditure of public funds.

Gazette, setting forth the direction and extent of such highway, and by himself or his agents to enter and take possession of any private roads and any lands in the Province, and the timber thereon, for the purpose of laying out public roads of any width not exceeding 66 feet, and to vary and alter any existing roads; also to enter and take any gravel, timber, stone, and other materials required for the construction of any bridge or road, and also to enter upon any land for the purpose of cutting any drains that the Chief Commissioner of Lands and Works may think necessary.<sup>102</sup>

[emphasis added]

- Section 8 of the 1911 version of the *Highway Act* slightly changed this wording so the Minister could enter and take land “to make public highways” rather than “for the purpose of laying out public roads.”<sup>103</sup> This had the possible effect of expanding the Minister’s power to create highways by entering and taking possession. Prior to this, this provision had only applied to “roads.” The amendment to “highways” in 1911 suggests that the power could be applied to other public ways such as trails and paths.
- Section 9 of the 1911 version of the *Highway Act* consolidated previously enacted provisions<sup>104</sup> that added a limitation on the *portion* of the lot that could be taken by the Minister:

The entry by the Minister, his agents, servants, or workmen, as in the last preceding section mentioned, shall be limited to an area not exceeding one-twentieth of any lot or section held or occupied by any person, and shall operate as a complete extinguishment of every title and claim thereto.<sup>105</sup>

[emphasis added]

- In 1913 the legislative scheme was amended to allow a greater width of land be taken “where necessary to secure the efficient construction, maintenance, or use of the highway.”<sup>106</sup>
- In 1917 the one-twentieth limitation on the total area that could be taken to create a highway through entry by the Minister was removed.<sup>107</sup> It was already the case that if

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<sup>102</sup> *Act to Amend and Consolidate the Laws Affecting Crown Lands in British Columbia*, SBC 1874, c 3, s 73; the Act came into force on April 9, 1875 (per s 86, the Act did not come into force until proclaimed by notice in the *BC Gazette*; this happened on April 9, 1875: *BC Gazette* vol XV, no 15, p 89 (e-page 111):

<<https://open.library.ubc.ca/collections/bcbooks/items/1.0357959#p0z-3r0f:crown%20land>> [<https://perma.cc/F5ZE-EAE4>].

<sup>103</sup> *Highway Act*, RSBC 1911, c 99, s 8.

<sup>104</sup> *Highway Reclamation Act*, 1911, SBC 1911, c 23, s 3, available online:

<<https://www.bclaws.gov.bc.ca/civix/document/id/hstats/hstats/1714728573>> [<https://perma.cc/SF4R-YVD7>]; see also *Land Act, 1908*, SBC 1908 c 30, s 88, available online:

<<https://www.bclaws.gov.bc.ca/civix/document/id/hstats/hstats/1238773615>> [<https://perma.cc/42GS-T5BY>]. Note this provision can be traced back further to the *Land Act, 1874*, SBC 1874, No 2, ss 72-73.

<sup>105</sup> *Highway Act*, RSBC 1911, c 99, s 9.

<sup>106</sup> *Highway Act Amendment Act, 1913*, SBC 1913, c 29, s 2.

<sup>107</sup> *Highway Act Amendment Act, 1917*, SBC 1917, c 28, s 2.



more than one-twentieth of any piece of land was taken to build a highway than this would trigger a right to compensation.<sup>108</sup>

- In 1931 the width of land that would be taken to create a highway was changed from 66 feet to 100 feet,<sup>109</sup> and in 1945 the maximum limit on the width of land that could be taken to build a highway was removed altogether.<sup>110</sup>
- Subsequent amendments reworded and reorganized these clauses. However, the next substantive amendment did not occur until 1987 with the passing of the *Expropriation Act*, SBC 1987 c 23, sections 79-80. In addition to removing gazetting as a means of creating new highways, the 1987 version of the *Expropriation Act* repealed section 7 of the *Highway Act* which had specified:

The entry by the minister, his agents, servants or workers... for taking possession of a road or land operates as a complete extinguishment of every title and claim to the road or land entered and taken possession of.<sup>111</sup>

It is arguable that with the passing of the 1987 version of the *Expropriation Act*, the mere entry and possession by the Minister or their agents was no longer sufficient to create a highway—private rights were no longer explicitly extinguished upon an overt possessive act. However, until the *Transportation Act* came into force in 2004,<sup>112</sup> the *Highway Act* continued to give the Minister the power to “enter on, set out, ascertain and take possession of a private road [and] any land in the Province” for the purposes of making highways.<sup>113</sup> It is unclear what the effect of entry and possession for the purposes of creating a highway would be if not the extinguishment of certain private rights. Thus, it may be arguable that highways could continue to be established through entry and possession until 2004.

## HAVE SOME FORESTRY ROADS BECOME “HIGHWAYS”?

### The Forestry Road Exception to the Public Expenditure Rule

The *Forest and Range Practices Act* makes clear that most forestry roads do not become “highways” by virtue of simply being “travelled roads” that government has spent money on. Such

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<sup>108</sup> *Highway Act*, RSBC 1911, c 99, s 14.

<sup>109</sup> *Highway Act Amendment Act, 1931*, SBC 1931, c 29, s 2.

<sup>110</sup> *Highway Act Amendment Act, 1945*, SBC 1945, c 36, s 3. Note: these widths apply to highways created through gazetting as well.

<sup>111</sup> *Highway Act*, RSBC 1979, c 167, s 7; repealed by *Expropriation Act*, SBC 1987 c 23, ss 79-80, which came into force on May 17, 1980 by B.C. Reg. 153/80.

<sup>112</sup> *Transportation Act*, S.B.C. 2004, c. 44, came into force by order through B.C. Reg. 547/2004.

<sup>113</sup> *Highway Act*, RSBC 1979, c 167, s 6.

forestry roads form an important exception to the rule in section 42 of the *Transportation Act* which states:

42 (1) Subject to subsection (2), if public money is spent on a travelled road that is not a highway, the travelled road is deemed and declared to be a highway.<sup>114</sup>

Section 24 of the *Forest and Range Practices Act* lays out the exception:

24 (1) Section 42 (1) of the *Transportation Act* does not apply to public money spent on the following:

- (a) a forest service road;
- (b) a road authorized under an agreement under the *Forest Act* or under a cutting permit;
- (c) a road authorized under a special use permit;
- (d) a road constructed or maintained under section 121 of the *Forest Act* by the minister responsible for that Act;
- (e) any other road constructed or maintained under
  - (i) this Act,
  - (ii) the *Forest Act*,
  - (iii) the former Act as defined in section 1 of the *Forest Act*, or
  - (iv) the *Forest Practices Code of British Columbia Act*.

(2) A road referred to in subsection (1) does not become a public highway under the common law as result of public money being spent on the road.”<sup>115</sup>

Similarly, in 1996, section 66 of the *Forest Practices Code of British Columbia Act*, RSBC 1996 c 159 (the predecessor of the *Forest and Range Practices Act*) laid out the same rule:

Despite section 4 of the *Highway Act*, a road constructed, modified or maintained **under** this Act, the *Forest Act* or the former Act is not a public highway unless the Lieutenant Governor in Council declares it to be.<sup>116</sup>

[emphasis added]

The above two provisions reflect a rule first legislated in **section 100 of the 1978 version of the *Forest Act***:

Notwithstanding the *Highway Act*, a road built or maintained **under** this or the former Act is not a public highway unless the Lieutenant Governor in Council orders it to be a public highway.<sup>117</sup>

[emphasis added]

The section 100 provision that declared forestry roads are not highways despite otherwise meeting the definition only came into force on July 27, 1978.<sup>118</sup> However, the reference to roads

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<sup>114</sup> *Transportation Act*, SBC 2004, c 44, s 42 Note that s. 42 (2) goes on to state: “Subsection (1) does not apply to any road or class of roads, or to any expenditure or class of expenditures, that is prescribed by the regulations.”

<sup>115</sup> *Forest and Range Practices Act*, SBC 2002, c 69, s 24.

<sup>116</sup> *Forest Practices Code of British Columbia Act*, RSBC 1996, c 159, s 66.

<sup>117</sup> *Forest Act*, SBC 1978, c 23, s 100.

<sup>118</sup> See BC Reg 530/78.

built under “the former act” means that this exclusion of forestry “highways” likely applied to forestry roads built prior to July 27, 1978, too.<sup>119</sup>

## Background

The legislative history of the creation of rights-of-way to construct roads for logging purposes dates back to 1906 amendments to the *Land Act*. Potentially useful history on the evolution of laws on forestry roads is found in the footnote below.<sup>120</sup>

Section 32 of the 1912 *Forest Act*<sup>121</sup> gave the Minister the power to create roads for logging purposes with the Minister’s consent. Roads created pursuant to section 32 of the 1912 version of the *Forest Act* and its successors fall within the definition of a “road built or maintained ...under the former act” within the meaning of section 100 of the 1978 *Forest Act*<sup>122</sup> – and therefore may not be deemed “highways,” even if public funds were spent on such travelled roads.

However, in some cases you might be able to get around this exclusion of “highway” status for forestry roads. Note that not all forestry roads are necessarily created or maintained “**under**” the above pieces of legislation. Indeed, courts have found that logging roads constructed on both

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<sup>119</sup> It is arguable that the effect of this application is retrospective – declaring the status of certain roads as of the date it was enacted. This is as opposed to retroactive effect, which would change the legal status of roads from the date they were constructed – so prior to July 27, 1978. Though some of these roads, by being travelled and having public funds spent on them, may have been highways before section 100 came into force, the likely effect of the section is that the roads are deemed no longer to be highways (as opposed to them *never having been* highways—which would be a retroactive effect).

<sup>120</sup> The 1906 amendments to the *Land Act*, RS 1897, c 113 stated:

19. Any holder of a timber leasehold or of a special timber licence who may desire to secure a right of way across any Crown-granted lands for the purpose of constructing chutes, flumes, a road or roads or other works for use in getting out timber from the limit covered by his lease or licence, shall give

(1). Thirty days' notice of his intention to apply for authority to construct and use such chutes, flumes, road or roads or other works, by an advertisement published one month in the *British Columbia Gazette* and in a newspaper published or circulated in the district: ...

(4.) The applicant shall only have a right of way forty feet wide, and all works shall be confined on this area, and the title obtained by the applicant shall only be an easement.

[*Land Act Amendment Act, 1906*, SBC 1906, c 24, s 19, available online:

<<https://www.bclaws.gov.bc.ca/civix/document/id/hstats/hstats/283774150>> [<https://perma.cc/Q555-CCTA>], incorporated into the *Land Act*, RSBC 1911, c 129, s 103.]

This was amended in 1907 to apply to all lands, not only Crown-granted lands, and to apply to holders of Crown-granted timber lands. It also required compensation be provided to the landowner and removed the previous requirement for security. [*Land Act Amendment Act, 1907*, SBC 1907, c 25, s 20, available online:

<<https://www.bclaws.gov.bc.ca/civix/document/id/hstats/hstats/1552128833>> [<https://perma.cc/3GHT-MVQM>].] This

was incorporated into the 1908 version of the *Land Act*: *Land Act*, SBC 1908, c 30, s 58, available online:

<<https://www.bclaws.gov.bc.ca/civix/document/id/hstats/hstats/1238773615>> [<https://perma.cc/Z8BQ-SGR7>].

In 1910, “[holders of] Crown-granted timber lands” was clarified to read “[holders of] timber land in fee-simple.” [*Land Act Amendment Act, 1910*, SBC 1910, c 28, s 7, available online:

<<https://www.bclaws.gov.bc.ca/civix/document/id/hstats/hstats/2033394236>> [<https://perma.cc/8ZHK-AJGR>].

<sup>121</sup> *Forest Act*, SBC 1912, c 17.

<sup>122</sup> *Forest Act*, SBC 1978, c 23, s 100.

private<sup>123</sup> and Crown<sup>124</sup> land have become highways through travel and public expenditure. You might be able to argue that your particular forestry road wasn't established "under" the above Acts – and that expenditures could therefore make it a highway.

Alternatively, your lawyer could potentially argue that forestry roads which had become established as highways before the 1978 *Forest Act* remained highways – because of the "once a highway always a highway" principle, and the requirement for strict adherence to proper procedure when closing a public highway. Although there are strong arguments that section 100 of the 1978 *Forest Act*, s. 24 of *Forest and Range Practices Act (FRPA)* and section 66 of the *Forest Practices Code* extinguished the "highway" status of forest roads referred to, it might be possible to challenge this retroactive extinguishment in some cases. You might be able to argue that some of these forestry roads are still highways.

Such an argument in favour of some forestry roads still being highways might rely upon the maxim "once a highway, always a highway"<sup>125</sup> – and the principle that closure of existing highways requires clear and express legislative intent and strict compliance with procedural requirements. A potential argument is briefly sketched out for your lawyer in the footnote below.<sup>126</sup> Nevertheless,

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<sup>123</sup> *Whistler Service Park Ltd v Normway Industries Ltd*, 1990 CarswellBC 97, [1990] 5 WWR 153 (BCCA), at para 24.

<sup>124</sup> *British Columbia (Minister of Transportation & Highways) v Perepelkin*, 1996 CarswellBC 1192, [1996] BCWLD 1735 (BCSC), at para 30.

<sup>125</sup> *Emmett v. Arbutus Bay Estates Ltd.* 1994 CanLII 8700, 39 BCAC 194 at paragraph 39 found at: <<https://canlii.ca/t/231qx>> <<https://perma.cc/UJ7H-QQFQ>>. Also see discussion of the legal maxim "Once a Highway, Always a Highway" in *Dunstan v. Hell's Gate Enterprises Ltd.* (1987), 45 D.L.R. (4th) 677 (B.C.C.A.). Commentators have written about *Dunstan*: "...interested parties sought to benefit from what can, for the most part, be described by the rule: 'once a highway, always a highway'. If the trail had been dedicated as highway in the 1870s then, subject to any formal road closing proceedings, it would still be highway today." see Michael Moll, Joanna Track, *When is a Highway Really a Highway?* Young Anderson, Barrister and Solicitors, November 25, 2016, at p. 11-12. See: <[https://www.younganderson.ca/assets/seminar\\_papers/2016/When-is-a-Highway-Really-a-Highway.pdf](https://www.younganderson.ca/assets/seminar_papers/2016/When-is-a-Highway-Really-a-Highway.pdf)> <<https://perma.cc/N2WJ-CCC2>>.

<sup>126</sup> From the moment that they were travelled and had public funds spent on them, some forestry roads built prior to 1978 were highways. And it might be possible to argue that the 1978 *Forest Act* provision *did not meet the requirements for interfering with their highway status*. Though the 1960 version of the *Highway Act* [*Highway Act*, RSBC 1960, c 172] which was in force at the time, did not specify in detail what the effect of a highway becoming a forest service road would be, the current *Transportation Act* [*Transportation Act*, SBC 2004, c 34, s 56(3)] states that when a highway becomes a forest service road it is "**deemed to be** closed and discontinued at the time it becomes a forest service road." And the key thing is that section 11 of the 1960 version of the *Highway Act* had strict requirements for **closing** public highways:

"(1) The Minister may at any time, by notice published in the Gazette, in such form and containing such particulars as he may determine, discontinue and close in whole or in part any highway the maintenance of which is not considered necessary in the public interest...

(4) Where the highway or the part thereof intended to be discontinued and closed under subsection (1) is in actual use by any person as a highway, the Minister shall, prior to the publication of the notice in the Gazette, give public notice of his intention so to discontinue and close the same..."

Yet the change in the highway status of roads that resulted from the *Forest Act* may have failed to meet these procedural requirements, and so it might be argued that certain forestry roads built prior to July 27, 1978 are still highways – despite s. 100 of the 1978 *Forest Act*. Potentially bolstering this interpretation is the presumption against interference with public rights discussed in "A General Argument for Expansive Interpretation of Public Rights to Access"

strong arguments could likely be made to the contrary. See this second footnote for those counter-arguments.<sup>127</sup>

In summary, it may be difficult – but not necessarily impossible – to argue that historical forestry roads are now public “highways” merely because of past public use and public expenditure.<sup>128</sup>

## **A Key Right of Public Access: Road Access Rights under the *Forest and Range Practices Act***

Fortunately, the *Forest and Range Practices Act (FRPA)* provides an important statutory right of public access to forest service roads and roads authorized under a road permit or woodlot licence.<sup>129</sup>

Section 22.2 of *FRPA* reads as follows<sup>130</sup>:

- (1) Subject to subsection (4), a road that is
  - (a) a forest service road, or
  - (b) authorized under a road permit or a woodlot licencemay be used by any person without charge for a purpose other than a timber harvesting purpose, silviculture purpose or natural resource development purpose.

[emphasis added]

Pursuant to this provision, members of the public can use these roads free of charge for non-industrial purposes. Therefore, you will want to find out early in your research whether your

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below. Though forestry roads (especially forest service roads) sometimes serve a similar function to that of a public highway, the public does not enjoy the same rights of access and use on these roads. Transforming existing “highways” into forestry roads would impose limitation on public rights – and limiting public rights requires there to be a clear and express intention of the legislature to do so, and strict adherence to all procedural requirements. These requirements may not have been met.

<sup>127</sup> For example, one could argue that the *Forest Act* successfully extinguished the forest roads’ highway status, and that the language of section 100 sufficiently and specifically expressed the intention to remove the highway status of these roads. In addition, it could be argued that the strict s. 11 *Highway Act* gazettement requirements for closing a highway may not have applied at all – because these highways were really not “closed or discontinued,” but continued as forest service roads which the public had some rights to access and use. Furthermore, a public policy argument for accepting that s. 100 removed the highway status of forestry roads could be mounted that the negative impact on the public’s right is relatively minimal – the public will still have some right to access and use these roads. See: “A Key Right of Public Access – Road Access Rights under the *Forest and Ranger Practices Act*,” below.

<sup>128</sup> Note that such an argument may have a better chance of success in instances where a court had previously declared the road in question to be a highway. *Hornby Island Trust Ctee. v. Stormwell*, 1988 CanLII 3143 (BC CA) The Court pointed out: “A statute should not be given a retroactive construction that has adverse effects, or a retrospective construction that interferes with “vested” rights, unless it is clear that the legislature intended that the legislation should have such a construction. The reason is that the legislature should not be presumed to have enacted a statute that treats those it affects, or some of them, not just adversely, but unfairly” (paragraph 27).

<sup>129</sup> *Forest and Range Practices Act*, SBC 2002, c 69, s 22.2

<sup>130</sup> See Bill 23 at: <[https://www.leg.bc.ca/content/data%20-%20ldp/Pages/42nd2nd/3rd\\_read/PDF/gov23-3.pdf](https://www.leg.bc.ca/content/data%20-%20ldp/Pages/42nd2nd/3rd_read/PDF/gov23-3.pdf)> [<https://perma.cc/3MJH-BA73>]. Note that this legislation has received Royal assent, but will only come into force by new regulation. Check BC Laws to see if the similar old version of s. 22.2 is still in effect.

desired access road is defined by the Ministry as being a “forest service road” or if it has been authorized under a “road permit” or a woodlot licence. See Part I for information about how to determine if the road in question is classified as a forest service road, or as a road “authorized under a road permit or woodlot licence.”

Note that the public use authorized by section 22.2 can be limited for safety purposes during the hours that industrial vehicles are transporting materials on the road. Regulations under the *Industrial Roads Act* provide the following qualification:

Unless otherwise provided for, vehicles owned and operated by the public and licensed to operate on public highways shall not be permitted to run on industrial roads during the hours industrial vehicles are transporting materials on such industrial roads except with permission of the industrial road administrator, and signs shall be posted accordingly by the industrial road administrator at all entrances of industrial roads from public roads.<sup>131</sup>

[emphasis added]

Note also that in some circumstances government can act to restrict or close public use of such roads – so you will want to investigate whether the road has been formally closed or restricted.<sup>132</sup>

## A Note on Maintenance and Deactivation of Forestry Roads

The maintenance of *forest service roads* is generally the responsibility of the Crown. On the other hand, maintenance of roads authorized by a *road permit* lies with the permit holder. This can create pressure from permit holders to deactivate roads – so that the obligation to maintain the road can be avoided.

However, it is not always necessary for a road to be deactivated to relieve the obligation to maintain it. Section 79 (2) of the *Forest Practices and Planning Regulation*, BC Reg 14/2004 (“FPPR”) states:

- (2) A person who is authorized in respect of a road must maintain the road, including bridges, culverts, fords and other structures associated with the road, until
- (a) the road is deactivated,

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<sup>131</sup> *Vehicular Traffic on Industrial Roads Regulation*, BC Reg 450/59, s 67.

<sup>132</sup> Note that it may now be easier for government to close such roads than it has been in the past. Recent amendments to the *Forest and Range Practices Act* repealed sections of the *Act* that empowered the District Manager to authorize road use restrictions or closures – but only if continued use of the road would likely cause road damage, significant sediment or endanger property, public health or public safety. The statutory requirement that there first be likely damage, sediment or endangerment of property, public health or safety before imposing road restrictions or closures has been deleted<sup>132</sup> [*Forest Statutes Amendment Act*, s.89. Note that this provision has received Royal Assent and will likely come into force by new regulation. Check BC Laws to see if the old version of s. 22.2(2) of FRPA (that required likely damage, sediment delivery or endangerment) might still be in effect. <[https://www.leg.bc.ca/content/data%20-%20ldp/Pages/42nd2nd/3rd\\_read/PDF/gov23-3.pdf](https://www.leg.bc.ca/content/data%20-%20ldp/Pages/42nd2nd/3rd_read/PDF/gov23-3.pdf)> [<https://perma.cc/9AR4-FWMG>] This poses a potential concern for future public access to forest service roads or roads authorized under a road permit or a woodlot licence.

- (b) the district manager notifies the person that the road should not be deactivated due to use or potential use of the road by others,
- (c) a road permit or special use permit for the road is issued to another person, or
- (d) the road is declared a forest service road under the *Forest Act*.<sup>133</sup>

[emphasis added]

In other words, section 79(2)(b) suggests that the district manager can exempt a company from maintenance and deactivation requirements *if the road is still being used by the public*.

Note that section 81 of *FPPR* provides for “Wilderness Roads,” which – if they are not used industrially – also have lower maintenance obligations. Maintenance obligation for these roads is to “ensure there is no material adverse effect on a forest resource.”<sup>134</sup> The effect of these provisions is to ensure the road is maintained so that the road doesn’t do damage while not being used by industry. Though many of these wilderness roads are “not maintained for vehicular access,”<sup>135</sup> the public is generally allowed to use these roads. Check with your district office first for possible restrictions.

Note that even where a road is “deactivated,” it may still be available for use by all-terrain vehicles, hikers, mountain bikers, etc. Again, check with your district office for possible restrictions.

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<sup>133</sup> *Forest Practices and Planning Regulation*, BC Reg 14/2004, s 79(2).

<sup>134</sup> *Forest Practices and Planning Regulation*, BC Reg 14/2004, s 81.

<sup>135</sup> Government of British Columbia, “Resource roads” (accessed 13 March 2021), online: <<https://www2.gov.bc.ca/gov/content/industry/natural-resource-use/resource-roads>> [<https://perma.cc/2L7S-YL4U>], under the tab marked “other.”



Photo Credit:Brad Ross (Paddling photo, Clayoquot Sound)

## SELECTED ISSUES RELATED TO CROWN LANDS

### The General Right to Walk Along the Foreshore (e.g. beaches)

Keep in mind that, with some exceptions, most BC *foreshore* – the land between high and low watermarks of streams, rivers, lakes and the ocean – is generally publicly owned. Land adjacent to foreshore may be privately owned and the owner may stop you from crossing that private land. But if you can get to the foreshore without crossing private land, you usually have the right to walk along the foreshore.<sup>136</sup> Check with your lawyer about specific foreshore that you are interested in using.

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<sup>136</sup> There are exceptions. Have your lawyer check on the particular circumstances of the area you are interested in. See discussion of the public's "bare licence" right to walk the foreshore at: Government of British Columbia "Foreshore and aquatic Crown land ownership in British Columbia" at: <<https://www2.gov.bc.ca/gov/content/industry/crown-land-water/crown-land/crown-land-uses/residential-uses/private-moorage>> [<https://perma.cc/WJT8-TMKB>]. Also see: *Land Act*, RSBC 1996, c245, ss 18, 55. Keep in mind that "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." *Land Act*, RSBC 1996, c245, s 1.



## GENERAL PERMISSION TO TRAVERSE CROWN LANDS

Although the *Land Act* makes it an offence to use Crown land without lawful authority,<sup>137</sup> government has issued a Policy that gives “lawful authority” to citizens to use Crown lands. The *Land Use Policy: Permission* gives citizens a “bare licence” to use Crown lands.<sup>138</sup> This Permission Policy grants permission to the public to use Crown land for a wide variety of recreational purposes, subject to certain rules.

The Policy specifically allows people to use Crown land for transitory activities such as hiking, rock climbing, boating, water skiing, swimming, snow skiing, non-commercial filming/photography (location scouting is acceptable), bird watching, horseback riding, caving, and snowmobiling, as well as dirt biking, biking, use of all-terrain vehicles, landing of aircraft and other similar activities. This Permission also authorizes use of Crown land for hunting, fishing and recreational or amateur fossil collecting, and camping subject to regulations.

Under the Permission Policy, citizens using the Crown land must abide by conditions such as:

- “Activities must abide by and comply with all applicable laws, regulations and by-laws;<sup>139</sup>
- Activities are undertaken in a safe and healthy manner;
- No permanent structures or buildings are allowed on the land;
- Campfires are undertaken in a safe manner;
- Activities must be undertaken in manner which does not negatively impact the environment and wildlife, including the removal of all garbage and materials brought onto the land as part of those activities; and
- The enjoyment of other Crown land users is respected.”

Note that specified types of Crown land are not covered by the general Permission Policy, others may be closed to the public, and still others require citizens to make a special application for use. See footnote below.<sup>140</sup>

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<sup>137</sup> See section 60.

<sup>138</sup> Government of British Columbia, “Land Use Policy: Permission Policy” (16 May 2014), online: <<https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/land-water-use/crown-land/permissions.pdf>> [<https://perma.cc/W9GQ-HC5W>].

<sup>139</sup> Including the *Wildlife Act*, *Forest Act*, *Forest and Range Practices Act*, *Off-Road Vehicle Act*, *Water Sustainability Act*, *Heritage Conservation Act*, *Environmental Management Act*, *Transportation Act*, *Park Act*, *Wildfire Act*, and other legislation or regulations, as applicable.

<sup>140</sup> The general permission does not extend to the following areas: “The Crown land must not be within a: Protected Area which includes Ecological Reserves, Parks and Conservancies; Wildlife Management Area or other Administered Conservation Lands; Municipality; Lease; Previously existing Authorization where the activity will interfere with rights already granted, without the consent of the holder of the Authorization; Land under the administration of the Government of Canada; Reserve or withdrawal established under s.15, 16 or 17 of the *Land Act* for the conservation of natural, cultural or heritage resources; Crown land area, including private roads, which are posted or otherwise signed

You can identify whether the general *Land Use Policy: Permission* applies to your area by consulting the ILRR (<https://a100.gov.bc.ca/apps/ilrr/html/ILRRWelcome.html> [<https://perma.cc/B3AD-WWHS>]), the Natural Resource Online Services Explore Tool (<https://portal.nrs.gov.bc.ca/web/client/explore> [<https://perma.cc/EQ8B-UZF9>]) or contact FCBC toll free at 1-877-855-3222 or visit [www.frontcounterbc.gov.bc.ca](http://www.frontcounterbc.gov.bc.ca) to find the local office.

## Accessing Grazing Licences and Tree Farm Licences

Where someone holds a *lease* on Crown land, they have the power to restrict public access to that land.<sup>141</sup> However, holders of a tree farm *licence*, grazing *license* or other licence on Crown land may not have a right to prevent the public from entering the Crown lands, so long as the public does not interfere with the permitted logging, grazing or other operations. (However, note that these licence holders can probably bring a trespass action against any stranger who interferes with their rights under their license – e.g., grazing rights.<sup>142</sup> In one important old injunction case, it was held that an environmental group building a trail had not interfered with the rights of the tree farm licence holder.<sup>143</sup>)

## Miscellaneous Specific Legal Restrictions on Accessing Crown Lands

Note that there are numerous ways under various provincial laws that public access to Crown lands may be restricted. For example:

- The **Land Act** (section 66) and the **Off-Road Vehicle Act** (section 32) can be used to create prohibition regulations that can restrict the use of all motor vehicles.
- The **Wildlife Act** (sections 108 and 109) can be used to prohibit or restrict access to specific areas or to roads for the purposes of protecting wildlife or wildlife management. These restrictions are regulated (and the areas defined) under:
  - the **Closed Areas Regulation**, which restricts hunting and trapping in specific areas;
  - the **Public Access Prohibition Regulation**,<sup>144</sup> which restrict all access to an area; and
  - the **Motor Vehicle Prohibition Regulation**,<sup>145</sup> which provides for closure of motor vehicle use in particular areas; at particular times; and using particular types of vehicles.

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to prohibit all or some activities; “Closed Areas” (refer to Section 7.1.1); and Designated “Application-only Areas” which require an application for the intended use, as per Section 7.1.2.”

<sup>141</sup> *Land Act*, RSBC 1996, c 245, s 65; *Trespass Act*, RSBC 2018, c 3, s 2.

<sup>142</sup> *Douglas Lake Cattle Co v British Columbia*, 1990 CarswellBC 1485, [1990] BCWLD 2508, at paras 18, 19.

<sup>143</sup> *Macmillan Bloedel Ltd v Western Canada Wilderness Committee*, 1988 CarswellBC 565, [1989] BCWLD 509.

<sup>144</sup> BC Reg. 187/2003.

<sup>145</sup> BC Reg. 196/99.

Maps of these areas are available for inspection during office hours at the Victoria offices of the Ministry of Forests Lands Natural Resource Operations and Rural Development.<sup>146</sup>

- **Forest and Range Practices Act** (section 58) can be used to restrict public access to Crown land for the purposes of protecting a recreation or range resource. These restrictions are enabled through a public recreation order under the **Forest Recreation Regulation**.<sup>147</sup>
- The **Parks Act** establishes rules for use of Parks and park roads and trails.

## Other Statutes Related to Roads

Numerous BC statutes and regulations relate to roads. It is beyond the scope of this handbook to fully consider all the legislated road regimes. However, below are some road laws that you may wish to consider, depending upon the particular type of road you are examining:

### **Oil and Gas Development Roads**

- “Development Roads” were constructed under the *Petroleum and Natural Gas Act*, RSBC 1996, where the Minister authorized public expenditure on roads for purposes related to petroleum and natural gas. However, the regulation which governed the use of roads created under this Act was repealed in 2013.<sup>148</sup> Under the previous regulation, a broad right of public access was protected for roads created under this Act.<sup>149</sup> Now, the legislative framework governing roads used for oil and gas or related purposes has been shifted to the *Oil and Gas Activities Act*. This seems to have filled the legislative gaps left when the *Petroleum Development Road Regulation* was repealed.<sup>150</sup> The *Oil and Gas Activities Act* includes its own framework for public access, as described below:
- Roads to support oil and gas activities can be created under the *Oil and Gas Activities Act*<sup>151</sup> and the *Oil and Gas Road Regulation*<sup>152</sup> governs the use of these roads. The

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<sup>146</sup> A Ministry recently divided and re-organized into the Ministry of Forests and the Ministry of Land, Water and Resource Stewardship.

<sup>147</sup> Forest Practices Board, *Access Management and Resource Roads: 2015 Update*, at 16, online: <<http://www.llbc.leg.bc.ca/public/pubdocs/bcdocs2015/585716/sr49-access-management.pdf>> [<https://perma.cc/LJ7X-PJ8B>].

<sup>148</sup> *Petroleum Development Road Regulation*, BC Reg 356/98 was repealed by BC Reg 136/2013.

<sup>149</sup> *Petroleum Development Road Regulation*, BC Reg 356/98, s 13(1): “Except when authorized by this regulation, no operator may deny access over or use of a petroleum development road to any member of the public or to any industrial user.”

<sup>150</sup> The *Petroleum Development Road Regulation* was repealed in July 2013, just after the *Oil and Gas Road Regulation* (OGRR) was implemented in June 2013. Petroleum Development Roads are now subject to the legal framework that was implemented in the *Oil and Gas Activities Act* under the definition of “oil and gas road” within the OGRR. Under the *Oil and Gas Road Regulation*, “oil and gas road” includes:

“(b) a road or portion of a road that was constructed before June 3, 2013, under the *Land Act*, the *Petroleum and Natural Gas Act* or the *Pipeline Act* and has been used to facilitate the carrying out of a primary activity,”

<[http://caplacanada.org/wp-content/uploads/2015/09/2015\\_September\\_NEXUS.pdf](http://caplacanada.org/wp-content/uploads/2015/09/2015_September_NEXUS.pdf)> [<https://perma.cc/GL7G-EKAE>].

<sup>151</sup> *Oil and Gas Activities Act*, SBC 2008, c 36.

<sup>152</sup> *Oil and Gas Road Regulation*, BC Reg 56/2013.

regulation provides that the public has a right to use these roads;<sup>153</sup> that temporary closure or restriction of road access is only allowed where there is a threat to the road, the environment, human life, or property, or if it is determined to be necessary in the public interest;<sup>154</sup> and, that notice of a deactivation of a road that supports oil and gas activities must be given to the Oil and Gas Commission, affected landowners, local Indigenous nations, any road users known to the permit holder, and the district office for the forest district in which the road is located.<sup>155</sup>

### **Energy and Mines Roads**

- Roads can be created under the *Ministry of Energy and Mines Act*, RSBC 1996, c 298; however there do not appear to be current regulations under this Act governing the use of these roads. Further, the *Transportation Act Regulation* specifies that the public expenditure of funds under the *Ministry of Energy and Mines Act* does not make a road a public highway.<sup>156</sup>
- “Access Roads” can be built under the *Mining Right of Way Act*, RSBC 1996. The Act also specifies that despite the *Transportation Act*, roads built under the *Mining Right of Way Act* are not normally “highways.”<sup>157</sup> Use of these roads is generally restricted to those who have “a specific legal interest in the land or resources in the region tributary to the access road” or require the road for a commercial purpose and have obtained written consent from the minister.<sup>158</sup>
- The *Coal Act Regulation*, B.C. Reg. 251/2004 regulates the exploration and development of coal, which includes construction of roads that are within or that connect with a licence or lease or any freehold land.<sup>159</sup>

Note that roads can also be transferred and jurisdiction over roads provided for in self-government agreements with First Nations.<sup>160</sup> First Nations may regulate and restrict the use of roads on their lands.

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<sup>153</sup> *Oil and Gas Road Regulation*, BC Reg 56/2013, s 16.

<sup>154</sup> *Oil and Gas Road Regulation*, BC Reg 56/2013, s 20.

<sup>155</sup> *Oil and Gas Road Regulation*, BC Reg 56/2013, s 23.

<sup>156</sup> *Transportation Act Regulation*, BC Reg 546/2004, s 4(1)(c).

<sup>157</sup> *Mining Right of Way Act*, RSBC 1996, c 294, s 11.

<sup>158</sup> *Mining Right of Way Act*, RSBC 1996, c 294, ss 7(1)-(2). Note that the owner of the road may close or restrict access to it in situations where use “would likely cause significant damage to it or endanger life or property” and the minister consents. See *Mining Right of Way Act*, RSBC 1996, c 294, s 7(3).

<sup>159</sup> *Coal Act Regulation*, BC Reg 251/2004, s 1.

<sup>160</sup> For example: Tla’amin Final Agreement, 2014, available online: <[https://www.tlaaminnation.com/wp-content/uploads/2016/08/TLA\\_AMIN\\_FINAL\\_AGREEMENT\\_-\\_ENGLISH\\_signed\\_2014.pdf](https://www.tlaaminnation.com/wp-content/uploads/2016/08/TLA_AMIN_FINAL_AGREEMENT_-_ENGLISH_signed_2014.pdf)> [<https://perma.cc/XA96-YZTW>].

## HAS YOUR HIGHWAY OR ROAD BEEN MOVED OR CLOSED?

**A small caution:** No matter the historic means by which a highway came into existence, to prove that a highway *still* exists it also must be proven that the right-of-way is in the same location as one which met the historic test for becoming a public highway and this requires “cogent and substantial evidence.”<sup>161</sup>

In addition, if your research demonstrates that your route has become a public route (*e.g.*, “highway,” forest service road, etc.), you should check to make sure that it has not been formally closed by government action. Check on *current status* of the route when you review the websites and talk to the government officials described in [Part I](#). The following information is offered to help your lawyer investigate whether the route has been closed at some point in the past.

Once a highway is public, it cannot generally return to private ownership by default. Mere lack of public use cannot make a public road private.<sup>162</sup> Unless government takes formal authorized action to close a highway, it normally remains a highway.<sup>163</sup>

However, under the *Transportation Act*, the Province can formally close highways. In British Columbia, the power to close highways was first explicitly granted in the 1917 *Act to Amend the “Highway Act”* (1917).<sup>164</sup> Note that it is arguable that before the enactment of this statute, the British Columbia government did not have the power to close highways – as a power to extinguish public rights must be explicitly granted by statute.<sup>165</sup>

From the enactment of the 1917 statute until the current version of the legislation,<sup>166</sup> closing a highway has legally required publication of the notice of closure in the *BC Gazette* and in local

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<sup>161</sup> *Winskowski v Coldstream (District)*, 1997 CarswellBC 2599, [1997] BCJ No 2767 (BCCA), at para 5.

<sup>162</sup> *Brady v Zirnhelt*, 1998 CarswellBC 1951, [1998] BCJ No 2083 (BCCA), at 6 (paragraph 22). This principle also generally applies to public rights.

<sup>163</sup> *Emmett v. Arbutus Bay Estates Ltd.* 1994 CanLII 8700, 39 BCAC 194 at paragraph 39 found at: <https://canlii.ca/t/231qx> [<https://perma.cc/UJ7H-QQFQ>]. Also see discussion of the legal maxim “Once a Highway, Always a Highway” in *Dunstan v. Hell’s Gate Enterprises Ltd.* (1987), 45 D.L.R. (4th) 677 (B.C.C.A.). Commentators have written about *Dunstan*: “...interested parties sought to benefit from what can, for the most part, be described by the rule: ‘once a highway, always a highway’. If the trail had been dedicated as highway in the 1870s then, subject to any formal road closing proceedings, it would still be highway today.” see Michael Moll, Joanna Track, *When is a Highway Really a Highway?* Young Anderson, Barrister and Solicitors, November 25, 2016, at p. 11-12. See: [https://www.younganderson.ca/assets/seminar\\_papers/2016/When-is-a-Highway-Really-a-Highway.pdf](https://www.younganderson.ca/assets/seminar_papers/2016/When-is-a-Highway-Really-a-Highway.pdf) [<https://perma.cc/N2WJ-CCC2>]. The same authors also write: “The BC Court of Appeal cited *Township of Gloucester v. Canadian Atlantic Railway Co.* (1902), 3 O.L.R. 85 (H.C.J.) for the proposition that the public’s rights of passage adhere to a highway regardless of whether it is improved or left as wilderness. The only way in which the public’s right to pass over a highway can be entirely extinguished is if the municipal council formally closes the highway by bylaw.”

<sup>164</sup> *Highway Act Amendment Act, 1917*, SBC 1917, c 28, s 3.

<sup>165</sup> See Andrew Gage, “Public Rights and the Lost Principle of Statutory Interpretation” (2006) West Coast Environmental Law, at 6, online: <https://www.wcel.org/sites/default/files/publications/Public%20Rights%20and%20the%20Lost%20Principle%20of%20Statutory%20Interpretation.pdf> [<https://perma.cc/3F5X-93BF>].

<sup>166</sup> *Transportation Act*, SBC 2004 c 44, s 60(2); *Transportation Act Regulation*, BC Reg 546/2004, s 5.

newspapers. The specific requirements for newspaper publishing have changed slightly over the years, and so the *BC Gazette* may be the best place to go to check if a highway has been closed.<sup>167</sup> If a purported closure was not published in the *Gazette*, you might be able to challenge that closure.<sup>168</sup>

In thinking about challenges to closures, note:

- A legal prerequisite for legal closure under the legislation has been that closure was “in the public interest.”
- The Ministry has long had policies of inviting public comment on proposals to close highways.<sup>169</sup>
- Ministry of Transportation Policy has been that public accesses to water should not be closed – “existing rights of way that provide public access to water are to be retained for public use.”<sup>170</sup>

If a highway came into existence at some point and has not been closed using the proper process, then the highway may still exist, and you may have a right to use it. The argument for expansive interpretation of public access rights outlined in the following section may be helpful.

## Access Restriction and Closure under the *Forest and Range Practices Act*

There are procedural requirements that must be followed when a road governed by section 22.2 of the *Forest and Range Practices Act* (“*FRPA*”) is closed or access is restricted. If these requirements were not met, then there is a potential that your access has been restricted unlawfully.

A right of public access pursuant to section 22.2 of the *FRPA* can be restricted by officials in certain circumstances.<sup>171</sup> Information about closures and restrictions is available at the Natural Resource District Office for the particular region. You can find information about permanent closure of many forest service roads by searching the *BC Gazette*.

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<sup>167</sup> The amendments to the *Highway Act* over the years have varied slightly the extent of the requirement to publish notice in local newspapers, and so searching for evidence of closure in the *Gazette* is more straightforward.

<sup>168</sup> As one example, note that current legislation (s. 60 of the *Transportation Act* and s. 5 of the *Transportation Act Regulation*) requires publication of highway closure notices in the *Gazette*.

<sup>169</sup> BC Ministry of Transportation and Infrastructure, “Highway Permits and Approvals Manual,” (last updated February 2021), online: <[https://www2.gov.bc.ca/assets/gov/driving-and-transportation/funding-engagement-permits/highway-permits/highway\\_permits\\_approval\\_manual.pdf](https://www2.gov.bc.ca/assets/gov/driving-and-transportation/funding-engagement-permits/highway-permits/highway_permits_approval_manual.pdf)> [<https://perma.cc/2HQ3-7N4D>].

<sup>170</sup> Ministry of Transportation, “Policy on Closure of Rights of Way that Provide Access to Water,” T-Circular T-07/03 <<https://www2.gov.bc.ca/assets/gov/driving-and-transportation/transportation-infrastructure/engineering-standards-and-guidelines/technical-circulars/2003/t07-03.pdf>> [<https://perma.cc/EJ7Q-ZFM8>].

<sup>171</sup> The recently legislated s. 155(1) (i) of the *Forest and Range Practices Act* will give Cabinet power to write regulations authorizing officials to close or restrict the use of forest service roads and forest resource roads. This statutory provision has received Royal Assent and will likely come into force by new regulation.



*Photo Credit: Rose Schroeder (Hauling in tools to clear the trails)*

## **A GENERAL ARGUMENT FOR EXPANSIVE INTERPRETATION OF PUBLIC RIGHTS TO ACCESS**

As you build your case for public access, you will likely rely on one or more of the specific legal rules discussed above. In addition, your lawyer should invoke the overarching legal principle that asserts the unique importance of public rights and public access. From ancient times, common law courts have held that public access rights should be given the highest respect when government makes decisions – and when laws are being interpreted.

This principle has developed over centuries of common law. When Europeans first arrived in North America, they brought a legal tradition that had long recognized public access rights. Public highways and other public rights were recognized in “The Twelve Tables” which, in 450 BCE, codified Roman law.<sup>172</sup> These laws spread with the Roman Empire and some ancient public rights

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<sup>172</sup> "Twelve Tables of Roman Law" *Milestone Documents in World History: Exploring the Primary Sources That Shaped the World*, ed Brian Bonhomme & Cathleen Boivin, vol. 1: 2350 BCE - 1058 CE, (Schlager Group, 2010), at 135-136.

of way in the British Isles were likely created pursuant to the Tables. As early as 1217, King Henry III sealed the *Charter of the Forests* as a supplement to the *Magna Carta* and guaranteed the right to access royal forests to gather wood and honey.<sup>173</sup> When Europeans settled in North America, they tended to recognize a public right to access all unenclosed land. For instance, a South Carolina judgment from 1818 recognized that the right to hunt on unenclosed private land was universally exercised from the first settlement of the country, and the court commented that “a civil war would have been the consequence of an attempt, even by the legislature, to enforce a restraint on this privilege.”<sup>174</sup> Clearly, the right of public access has historically been broadly recognized and fiercely defended.

The special place of public rights such as public access is now well-established in the law. An Ontario Court of Appeal decision stated it well:

*... I mention [the public rights to use the highway] in order to bring into bolder relief the fact that the right of the public in the King’s highway has always been jealously guarded by the Courts and is not lightly to be interfered with. There is no question but that the Legislature of Ontario can by statute modify or abolish that right; but, if it is to be modified and the rights of the public curtailed or affected, the will of the Legislature must be unequivocally expressed.*<sup>175</sup>

Similarly, the Supreme Court of Canada has stated:

*...it remains the right of all such subjects to pass over the highway without obstruction and that this right is paramount and cannot be infringed, even by the municipal authority itself except under express statutory powers.*<sup>176</sup>

Lawyer Andrew Gage has documented the Principle of Statutory Interpretation that favours public rights:

*...the case law is clear that statutes should be interpreted as affirming and protecting public rights unless they contain clear language to the contrary...*

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<sup>173</sup> Graham Litman, Matt Hulse & Calvin Sandborn, *Enhancing Public Access to Privately Owned Wild Lands*, (Victoria: Environmental Law Centre, 2016), at 2, online: <<http://www.elc.uvic.ca/wordpress/wp-content/uploads/2016/06/EnhancingPublicAccess-2016-01-03.pdf>> [<https://perma.cc/888U-6X9H>].

<sup>174</sup> Brian Sawers, "The Right to Exclude from Unimproved Land" (2011) 83:3 Temp L Rev 665 at 678, quoting from *M'Conico v Singleton*, 9 SCL (2 Mill.) 244, 244 (1818).

<sup>175</sup> *Hydro-Electric Power Commission of Ontario v. County of Grey*, 55 O.L.R. 339 per Masten J.A. at 344-346.

<sup>176</sup> *Brown Co. Ltd. v. Toronto* (1916), 55 S.C.R. 153.



*...legal documents should be interpreted as not derogating from, and where appropriate affirming, public rights.*<sup>177</sup>

*Interference with public rights will require legislative sanction and grants made by the Crown should be presumed as not intending interference.*<sup>178</sup>

Gage argues that the same presumption against interference with public rights should apply to government decisions, regulations and grants made under a statute.<sup>179</sup> He also argues:

*Where there are procedural requirements in a statute authorizing interference with public rights, the courts will require strict compliance with such requirements.*

*...the common law can require, and has required, governments to abide by basic procedural protections before making decisions likely to negatively impact on public rights.*<sup>180</sup>

Where the interference with a right of public access occurs through an exercise of bureaucratic decision making, rather than legislation, the responsible bureaucrat's discretion should be exercised clearly and conform to basic procedural protections.

Many of the statutes discussed in this guidebook restrict the circumstances in which a decision-maker will have the discretion to bar access. For example, officials' discretion to close roads that support oil and gas activities is limited to circumstances when there is an "existing or imminent threat" that may "cause damage to the oil and gas road or the environment" or "endanger human life or property."<sup>181</sup> Also, many of the statutes require that decision makers meet certain procedural requirements in order to close a road, such as providing notice. If interfering with

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<sup>177</sup> Andrew Gage, "Public Rights and the Lost Principle of Statutory Interpretation" (2006) West Coast Environmental Law, at 1, online:

<<https://www.wcel.org/sites/default/files/publications/Public%20Rights%20and%20the%20Lost%20Principle%20of%20Statutory%20Interpretation.pdf>> [<https://perma.cc/3F5X-93BF>].

<sup>178</sup> Andrew Gage, "Public Rights and the Lost Principle of Statutory Interpretation" (2006) West Coast Environmental Law, at 4, online:

<<https://www.wcel.org/sites/default/files/publications/Public%20Rights%20and%20the%20Lost%20Principle%20of%20Statutory%20Interpretation.pdf>> [<https://perma.cc/3F5X-93BF>].

<sup>179</sup> Andrew Gage, "Public Rights and the Lost Principle of Statutory Interpretation" (2006) West Coast Environmental Law, at 6,

online:<<https://www.wcel.org/sites/default/files/publications/Public%20Rights%20and%20the%20Lost%20Principle%20of%20Statutory%20Interpretation.pdf>> [<https://perma.cc/3F5X-93BF>].

<sup>180</sup> Andrew Gage, "Public Rights and the Lost Principle of Statutory Interpretation" (2006) West Coast Environmental Law, at 9, online:

<<https://www.wcel.org/sites/default/files/publications/Public%20Rights%20and%20the%20Lost%20Principle%20of%20Statutory%20Interpretation.pdf>> [<https://perma.cc/3F5X-93BF>].

<sup>181</sup> *Oil and Gas Road Regulation*, BC Reg 56/2013, s 20.

public access rights, there is a strict requirement that these statutory conditions be met. As stated by the Judicial Committee of the Privy Council, “there is excellent authority for requiring statutory conditions to be strictly fulfilled if interference with public rights is to be justified.”<sup>182</sup>

Additionally, Andrew Gage argues that even where a statute does not explicitly restrict a decision-maker’s discretion, if that discretion interferes with a public right, then it is likely subject to some restraints:

*The fact that a statute does authorize interference with public rights does not mean that regulations, grants or other decisions made under that statute should be presumed to impact public rights. In most cases the legislation will merely give the decision-maker the discretion to interfere with public rights – a discretion which should be exercised in a clear manner.*<sup>183</sup>

**Caution:** Note that the argument in favour of public rights will not always prevail. In many cases private landowners will challenge the right of the public to pass over or by their property – and will invoke property rights and the presumption that law will not lightly detract from private property rights. For example, see *Douglas Lake Cattle Company v. Nicola Valley Fish and Game Club*, a dispute about the right to access publicly owned lakes surrounded by private land, where the court held that public access existed to the water over a section 42 road and an aboriginal trail – but that any boating on the water was a trespass since the lake-bottom there was privately owned.<sup>184</sup>

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<sup>182</sup> *Burrard Inlet Tunnel & Bridge Co v “Eurana” (The)*, [1931] 1 DLR 785 (JCPC), at para 7.

<sup>183</sup> Andrew Gage, “Public Rights and the Lost Principle of Statutory Interpretation” (2006) West Coast Environmental Law, at 6, online:

<<https://www.wcel.org/sites/default/files/publications/Public%20Rights%20and%20the%20Lost%20Principle%20of%20Statutory%20Interpretation.pdf>> [<https://perma.cc/3F5X-93BF>].

<sup>184</sup> See Ian Burns, “Fight over lakes prime example of need for public access legislation in B.C.: legal expert” (2021) *Lawyers Daily*, online: <<https://www.thelawyersdaily.ca/articles/25345/fight-over-lakes-prime-example-of-need-for-public-access-legislation-in-b-c-legal-expert>> [<https://perma.cc/9WSD-GACX>]; See also *Douglas Lake Cattle Company v. Nicola Valley Fish and Game Club*, 2021 BCCA.