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# PUBLIC ACCESS THROUGH DEEDED LAND

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This is the third in a series of four articles about private land. The two previous articles have concerned the Trespass Act (B.C.) and the tort of trespass. This article is about roads and trails through private land. The fourth article will discuss establishing boundaries to deeded land.

Does the public have the right to use a road or trail on your deeded land? Finding the answer to that question is a highly complex and uncertain exercise. For that reason, please regard the procedure outlined below as a guideline only, and not as one which will provide a definite answer to your particular issue.

### Start With Your Title

Under section 23(1) of the Land Title Act (B.C.), anyone's title is subject to specific exceptions. Two exceptions that are important in establishing whether a road or trail is public or private, are:

s. 23(1)(a) the subsisting conditions, provisos, restrictions, exceptions and reservations, including royalties, contained in the original grant or contained in any other grant or disposition from the Crown; (these will be discussed below, under the Crown Grant section)

s. 23(1)(e) a highway or public right of way, watercourse, right of water or other public easement. (This reservation can include section 4 roads, discussed below).

Under the Land Title Act, a "highway" includes a public street, path, walkway, trail, lane, bridge, road, thoroughfare and any other public way.

Notice on Title. Occasionally there will be a notice or record on the title respecting a public road. Check your title to see if there are any notices under s. 23(1)(e) or s. 23(1)(k), which may indicate a gazetted road or Forest road. Get a copy of the notice and track back through the records of the Ministry that issued the notice to find out the exact location of the road.

"H" Plan Exception. Does the description of your land show an exception for an "H" plan, for example District Lot 1234, Kamloops Division Yale District, except Plan H12345. An "H" plan designates a road plan. If your title has such an exception, you can get a copy of the plan for your property, and can see where the road is located.

Even if there is no notice or record on the title about a public road, you are a long way from being able to say that there is no public right of access. You have to keep looking.

### Next Go To The Crown Grant

Each title can be tracked back through Land Title Office records, to the original grant from the provincial or federal government. These grants are supposed to be on file at the Land Title Office which has the records for your land. If the grant is not on file there, then the Land Title Office can order a copy of it for you.

What is the Specific Wording of Your Crown Grant? What does the grant say about roads and trails? The wording of the grants varied over time and you must see exactly what your grant says. Many grants make a couple of statements about roads, such as:

highways, streets, roads, trails and other ways existing at that date over or through the land [are excepted], (Land Act (B.C.) s. 23) and

where Crown land is disposed of by Crown grant and the map or plan annexed 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, 20.1168m in width; and
- (b) after January 2, 1977, 20m in width (Land Act s. 54 and s. 9).

What Shows On Any Map Attached? Check the map attached to (or referenced in) your Crown grant. If it shows a road or trail, unless the grant specifically says that the road or trail is not public (which would be very unusual), the road or trail shown on the map is not owned by the person who received the grant and the rest of the land. The road has the dimensions referred to above.

Look Further Even If The Map Shows Nothing. Even if the map shows no roads or trails, there may still have been some in existence at the time of the grant. The responsibility to prove that the road or trail was in existence at the time of the grant, belongs to the person claiming that it is public. This is often a difficult question of evidence. The sort of evidence that is often used is:

- historic documents showing the road or trail, such as maps or journals of explorers or local residents, of the same or prior date as the grant
- eye-witness accounts of the existence of the road or trail;
- air photos, as far back as they exist; and
- Ministry of Transportation records.

While it can be costly to do so, you can request that the Ministry of Transportation search its records with respect to public monies expended on the land in question, or any other indication that there are public roads on the land in question. The Ministry will often try to dissuade a land owner making a casual request for the information, but if one perseveres and is prepared to pay the Ministry to assemble the information, it will cooperate—although assembling the information is not a speedy process.

In addition, the Surveyor General (a provincial government office in Victoria) has surveyor's notes from the time that original surveys were conducted. These notes often mention the existence of roads or trails.

You can see that establishing a case that a road or trail was (or was not) in existence at the time of the grant can be a challenging task. The older the grant, likely the more difficult it is to find evidence about the road or trail. A trained researcher may be necessary to locate all relevant historic documents.

#### **"Section 4" Roads**

A further factor which must be considered is section 4 (formerly section 6) of the Highway Act (B.C.). It reads:

4)

1. Where public money has been expended on a travelled road that has not before then been established by notice in the Gazette or otherwise dedicated to public use by a plan deposited in the land title office for the district in which the road is situated, that travelled road is deemed and is declared to be a public highway.
2. This section does not apply where
  1. the expenditure of public money is confined to expenditure for snow-ploughing or ice control;
  2. a travelled road forms part of an existing railway right of way and was, at the time public money was expended on it, owned by the Crown, a Crown corporation, or agency, or formed part of a railways right of way; or
  3. money has been authorized to be loaned, guaranteed, invested, or expended under section 12 of the Ministry of Energy, Mines and Petroleum Resources Act (B.C.).

The section has been in existence, with varied wording, since 1905.

Under the Highway Act, "highway" includes all public streets, roads, ways, trails, lanes, bridges, trestles, ferry landings and approaches and any other public way.

Note that, for the section to apply, the road must be "travelled" before public moneys are expended on it, and snow-clearing alone is not sufficient to make the road public.

Evidence Required. There have been a number of lawsuits dealing with section 4. In all cases the claimants have clearly had to make a considerable effort to locate evidence to support their contention that the road in question is public. In several cases, the judge refers to

evidence from pioneer residents about their own recollection of early use of the road in question. One case refers to aerial photographs

Court Interpretation of the Section. The recent case of British Columbia v. Hilyn Holdings Ltd. is helpful to reconcile previous cases and state the general law for section 4 roads. The trial decision is [1989] B.C.J. No.2015 and the appeal decision is (1991) 78 D.L.R. (4th) 27.

In this case, Hilyn Holdings Ltd. owned land with a road across it. The road had been constructed by B.C. Hydro under contract with a previous owner of the land, to allow access to the Mica dam. The contract with B.C. Hydro stated clearly that the road continued to be owned by the land owner, and that Hydro had a private easement to use the road. The road soon became used by the public as a means of access to the dam, a garbage dump, and nearby recreational area. Hilyn Holdings put up a gate to stop public use of the road. At trial, Hilyn Holdings lost, partly on the basis that the road was a section 4 road. The appeal overturned this part of the trial decision.

In order to reach its conclusion, the Court of Appeal found that monies spent by B.C. Hydro were not "public monies". Although B.C. Hydro was not a party to the appeal, the Court recognized that it would have great difficulty in future negotiating for private easements if the Hydro money spent on them necessarily converted them to public roads. The Court said

"the expression "public money" as used in Section 4 of the Highway Act, refers to money 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 Hydro authority in carrying on their businesses as trading entities or public utilities."

The Court then went on to consider whether Hilyn Holdings or previous owners of the lands had, by their behavior, shown an intention to dedicate the land as public road. There was a sign that said "Private Road—Use at Your Own Risk". The Court held that

"an essential requirement of the law [of dedication] is that there be evidence from which an actual intention to dedicate on the part of the landowner can be inferred—that is to say intention not merely to permit public use of the road, out of what is described...as "neighborly spirit", but actually to relinquish all proprietary right to it. Where such an intention to donate an interest in land to the public without compensation exists, one would normally expect it to be evidenced by some sort of statement to that effect by the owner. It would, in any event, be difficult, in my view, to infer such an intention, in the absence of any such statement, from the mere fact of public use over a period, as here, of seven or eight years."

The Court decided further that the agreement with Hydro that the road would remain private, and the sign which clearly stated that although public use is permitted, the road remains private, was inconsistent with any intention to dedicate.

## Conclusion

This article is not an exhaustive discussion of all of the issues around the public or private nature of a road or trail. It does show that the determination of whether a road or trail is public or private is complex, and often involves evidence that is hard to track down.