

CANADA / JUDGMENT

Vesuna v. British Columbia (Transportation)

2011 BCSC 941

COURT

Supreme Court of British Columbia

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2011 BCSC 941 Vesuna v. British Columbia (Transportation)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Vesuna v. British Columbia (Transportation),

2011 BCSC 941

Date: 20110713

Docket: S1992

Registry: Powell River

Between:

Rumi Vesuna

Plaintiff

And

Kevin Falcon (Minister of Transportation of British Columbia),

Alec Drysdale, Her Majesty the Queen in Right of the Province of British Columbia, Sea-Mait
Investments Ltd., and M.L. & H. Holdings Ltd.

Defendants

Before: The Honourable Madam Justice S. Griffin

Reasons for Judgment

The Plaintiff, Rumi Vesuna:

Appearing on his own behalf

Counsel for the Defendants, the Province of British Columbia and Alec Drysdale:

Angela F. Davies

Karrie Wolfe

Counsel for the Defendants, Sea-Mait Investments and M.L. & H. Holdings Ltd.:

Ian Fleming

L. Berezan (A/S)

Place and Date of Trial:

Powell River, B.C.

February 22-25, & 28, 2011

March 1-4, 2011

Place and Date of Judgment:

Powell River, B.C.

July 13, 2011

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Introduction

- [1] The plaintiff, Mr. Rumi Vesuna, purchased property in rural British Columbia in February 2005, which he says is landlocked unless he succeeds in obtaining road access. That is the purpose of his lawsuit against the defendants.
- [2] The property is a rural parcel of approximately 50 acres, located outside of Powell River, British Columbia, described as District Lot 3504, Group 1, New Westminster District, Except Block A, PID # 005-949-955 ("Lot 3504").
- [3] Mr. Vesuna purchased the property for \$90,000.00. He did so after visiting the property twice on the same day, the first time with a realtor and the second time on his own. To get to the property the realtor and the plaintiff drove off Highway 101, through an open gate and across a road or driveway on the neighbouring property to the east, Lot 3836, and parked. They then walked into the property.
- [4] When viewing the property with the realtor, the realtor showed him a plan which indicated an area for a road running from the highway north-south, and bordering the east side of Lot 1, Block A, and then District Lot 3504. It was clear from Mr. Vesuna's visit to the property that the road shown on the plan was not built. For reasons which will become clear later, I will describe this area as the "road allowance".
- [5] To assist the mind's eye, the very general relationship between District Lot 3504 (pre-subdivision) and the relevant neighbouring properties is as follows (not precise or to scale):

North

West

District Lot 3504

Lot 3836

East

Lot 1521

- [6] In 1960 District Lot 3504 was subdivided into a north section, and a south section. The north section is the portion that was purchased by the plaintiff. The south section created by the subdivision was Block A. Later a smaller Lot 1 was subdivided out of Block A.
- [7] Highway 101 is to the south, running partially along the north border of Lot 1521 and the south borders of Lot 1 and Lot 3836.

- [8] The road allowance on the plan shown to Mr. Vesuna by the realtor was drawn along the east border of what was formerly all of District Lot 3504 (i.e. by then shown as running along the east border of Lot 1, Block A, and then District Lot 3504 to the north). The road allowance was shown as running north-south, and leading down to connect with Highway 101. Jefferd Creek was sketched as running roughly through the area where the road allowance intersects with Highway 101.
- [9] Prior to purchasing the property, Mr. Vesuna made no inquiries regarding his right to use the road or driveway that he and the realtor crossed on Lot 3836. He made no inquiries as to the process by which to build a road on the road allowance.
- [10] Mr. Vesuna has brought this claim against the neighbours to the east of his property, the corporate defendants Sea-Mait Investments Ltd. and M.L. & H. Holdings Ltd., owners of Lot 3836, and against the Provincial Crown and its employee, Mr. Drysdale. He also named the former Transportation Minister of the Provincial Crown as a defendant, Mr. Falcon, but that claim was struck out as a result of a pre-trial application.
- [11] Mr. Vesuna asserts a variety of allegations, from which emerge two key issues which I will first address:
1. Is the road or driveway that runs diagonally across the southwest corner of Lot 3836, from the south border of Lot 3836 to the west border of Lot 3836, intersecting with the road allowance, a public or a private road? For ease of reference, I will refer to this as the "Disputed Road";
 2. Was the Crown negligent in approving the subdivision that led to the creation of the plaintiff's parcel of property in 1960, because it is impossible to build a road on the road allowance?

Issue #1 - Is the Disputed Road a public or a private road?

- [12] The British Columbia Court of Appeal summarized the four ways in which a road can become a public road, in *Brady v. Zirnhelt* (1998), 57 B.C.L.R. (3d) 144 (C.A.) [Brady CA] at para. 7:

A highway can come into being in four ways:

1. exemption from a Crown grant (now Highway Act, R.S.B.C. 1996, c. 188, s. 2 and Land Act, R.S.B.C. 1996, c. 245, ss. 13 and 57);
2. expenditure of public money on a travelled road (now Highway Act, R.S.B.C. 1996, c. 188, s. 4) or entry on lands by the Minister of Highways and Public Works for the purpose of establishing a highway (now Highway Act, R.S.B.C. 1996, c. 188, s. 5(1));
3. common law dedication of a road by owner, whether a private owner or the Crown;

4. dedication by deposit of a subdivision plan showing a portion of the land as a highway (now Land Title Act, R.S.B.C. 1996, c. 250, s. 107).

[13] The plaintiff asserts that the first three means of creation of a public road occurred here, making the Disputed Road a public road.

Exemption From a Crown Grant

[14] The larger parcel of land that existed before Lot 3504 was created by subdivision in 1960, was described as District Lot 3504. In 1960 this lot was subdivided with the creation of the current Lot 3504 in a northern section of the larger lot.

[15] The original unsubdivided District Lot 3504 was first subject to a Crown grant in 1913. More specifically, on January 14, 1913, the Crown granted District Lot 3504 to Joseph Proulx for the sum of \$80.00. The Crown grant provided in the last paragraph:

PROVIDED, also, that all travelled streets, roads, trails, and other highways existing over or through said lands at the date hereof shall be excepted from the grant.

[16] The attached survey sketch of the Crown grant did not show any roads on it. Furthermore, other than the general language just mentioned, the Crown grant did not expressly exempt any named or described road from the Crown grant.

[17] The plaintiff's argument that the Disputed Road was exempted from the Crown grant is really an argument that prior to the Crown grant, a public road was created by common law dedication along the same location as the Disputed Road, over what is now Lot 3836.

[18] The focus of this argument then is really on the third way a public road can come into existence, by common law dedication.

Common Law Dedication

[19] In *Dunstan v. Hell's Gate Enterprises Ltd.* (1987), 20 B.C.L.R. (2d) 29 (C.A.) [Dunstan], the Court noted that there are two requirements to establish common law dedication of a road as a public road (at p. 40):

Firstly there must be an intention on the part of the owner of the land to dedicate it to the public for the purpose of a highway and, secondly, an acceptance by the public of the road as a highway.

[20] In *Dunstan*, the Court of Appeal noted that the standard of proof to establish common law dedication of a road is on a balance of probabilities, which requires, as the trial judge stated, "cogent and substantial evidence, that such a highway did, in fact, exist." This standard of proof is required whether or not it is a Crown dedication or a private dedication of a road.

[21] There are two periods of time to address the question of whether or not the Disputed Road became a public road over Lot 3836 by common law dedication: prior to the Crown grant of Lot 3836; and after the Crown grant of Lot 3836.

Was there common law dedication of the Disputed Road on Lot 3836, pre Crown grant?

- [22] Lot 3504 was Crown granted in 1913. The neighbouring property, Lot 3836, was not Crown granted until 1949.
- [23] The key piece of evidence the plaintiff relies on was found in copies of archival documents that set out an affidavit by Henry Rhodes, a qualified land surveyor for the Province of British Columbia, sworn January 6, 1912. His affidavit states that he conducted a survey of Lot 3504 on December 9-10, 1911. His affidavit attaches his survey notes and drawing.
- [24] The Henry Rhodes 1911 survey notes and drawing illustrate two short roughly parallel dotted line skid roads crossing from the southwest corner of what became Lot 3836 into Lot 3504 on the eastern boundary of Lot 3504, just east of Jefferd Creek, which runs through Lot 3504. The most southerly of these two skid road markings is noted as being 5.60 chains from the south boundary of the lot.
- [25] The plaintiff claims that the southerly skid road marking on Henry Rhodes' survey is in the same location as the Disputed Road.
- [26] I pause to note that at best the plaintiff's argument can only be that the skid road was located in part of the same location as the Disputed Road. The Disputed Road runs diagonally from the south border of Lot 3836 where it intersects with Highway 101, to the west border of District Lot 3836 (now Lot 1) part way up the road allowance (creating a triangle of the southwest corner of Lot 3836). This is how the plaintiff was able to exit the highway and drive up the Disputed Road to the west boundary of Lot 3836 and the road allowance. However, the skid road drawn on the 1911 survey only runs a short distance from the west boundary of Lot 3836 and does not extend as far as the south boundary of the lot. As drawn, it would not have provided access from what is now Highway 101 to District Lot 3504.
- [27] In any event, the plaintiff called as a witness Mr. Rick Rae, a qualified B.C. land surveyor. In 1960, a land surveyor who was then a member of Mr. Rae's firm prepared a survey of District Lot 3504 which showed the southeast corner of the lot where it meets Lot 3836. The surveyor who prepared that survey, Mr. Victor Cecchi, has since passed away.
- [28] Mr. Rae testified that Mr. Cecchi's survey drawing appeared to have been prepared in accordance with standard survey practice. Mr. Rae has surveyed Lot 3836 and found that the reference points used by Mr. Cecchi along the common boundary of the two lots 3504 and 3836 were correct. Mr. Rae has also done survey work on the northwest corner where Lot 3504 meets Lot 4423, and found that Mr. Cecchi's reference points were also correct.
- [29] Mr. Cecchi's survey identifies a "logging road" with a gate on it, which is the Disputed Road, running diagonally from Highway 101, at the southern boundary of Lot 3836, across Lot 3836 to the road allowance on the west boundary of Lot 3836, where it borders Lot 3504. Mr. Rae visited the site and checked and confirmed the measurements of the logging road. He concluded that point where the logging road intersected with the road allowance, north of the southeast corner of Lot 3504, was approximately the same distance and location where

the southern skid road shown in Henry Rhodes' survey intersected at the same boundary of Lot 3504 and Lot 3836. The location was not exact but was within a couple of metres of Mr. Rhodes' 5.60 chains.

- [30] The plaintiff argues that because of the commonality of location, between the skid road shown in 1911, and part of the Disputed Road, one must conclude that the skid road shown prior to the Crown grant of Lot 3504 was a public road, and has existed continuously as a public road.
- [31] A key problem with the plaintiff's argument is that he provided no evidence that would establish that what was shown as a "skid road" in 1911 was a public road at the time of the Crown grant of Lot 3504.
- [32] First of all, the fact that the intersection of the skid road with Lot 3504 in the 1911 survey is in the same place as where the Disputed Road meets Lot 3504 in the 1960 survey does not prove that the road was public at the time of the Crown grant. Subsequent use making it public is a different argument, which I will return to, but it does not establish pre-Crown grant public use.
- [33] The plaintiff argues that because the skid road was shown as partially on Lot 3504 and what became Lot 3836, before either was Crown granted, it must have been a public road, because you could not have a private road on public land. He argues that "all roads which are not within private lands are ipso facto public", to repeat an argument made at trial in *Brady v. Zirnhelt*, [1996] B.C.J. No. 969 (S.C.) [Brady SC] at para. 29.
- [34] In *Brady SC*, the trial judge rejected the argument that all roads which are not within private lands are ipso facto public and therefore excluded from a later Crown grant. The trial judge held at para. 29, in a passage cited by the Court of Appeal at para. 14 of its decision, as follows:

It is my opinion, as I have already stated, that the Two Mile Road was not used by the public. Plaintiffs' counsel contends that there can be no private road on public lands and that therefore all roads which are not within private lands are ipso facto public and therefore excluded from a later Crown grant. I do not accede to that proposition. It seems to me that a road, in order to be exempted, must fit within the definition contained within the Highway Act which defines highway as being a public street or road. Thus in order for the Crown grant to exempt a road, it must, in my opinion, be clear that the public used that road at the time when the grant was issued. I also fail to see what provision in the Land Act or elsewhere prevents a preemptor or lessee of Crown land from constructing a private road on such lands at his own expense and why such a road should become public upon the issuing of a Crown grant. Surely a road built on leased or preempted property does not automatically become a public road pursuant to the Highway Act, unless that road was dedicated by the Crown and accepted as such by the public. *Dunstan et al v. Hells Gate Enterprises et al*, [sic] *supra*, establishes that the standard of proof required to show dedication of private lands also applies to dedication of Crown lands.

[Emphasis added.]

[35] The Court of Appeal agreed with the trial judge that there could be a private road established on Crown land, holding, at para. 20:

I agree with the trial judge that a pre-emptor might build a road at his own expense that would be private as might the Crown.

[36] In Brady CA, the Court of Appeal at para. 15 noted that the trial judge did not mention s. 4 of the Highway Act (1936) which provided:

4. All roads, other than private roads, shall be deemed common and public highways.

[37] This is the same section of the Highway Act that applied when the lot that became Lot 3836 was Crown granted on November 8, 1949.

[38] However, in Brady CA, the Court found that the road at issue on this point had been built on public land with public monies by a crew that included not only the private pre-emptor of the lot, but many of the other settlers who benefitted from its construction: at para. 16. The Court continued on, at para. 20:

...I do not agree that a government road crew could build a private road in 1938 at public expense over pre-empted Crown land with the active participation of the pre-emptor. The road was built not only to benefit the Crown as owner and the pre-emptor, but all those who wished to use the road, including those who used the old west side road to gain access to properties beyond. In my view, the part of Two Mile Road located on Lot 8238 was never a private road within the meaning of s. 4 of the Highway Act (1936). Thus, under section 5 of the Act, it was deemed to be a public highway, of which the "soil and freehold" vested in the Crown, if such vesting was required to extinguish any claim by Mr. Kelly as the pre-emptor.

[Emphasis added.]

[39] In Brady SC, the trial Court had evidence about how the road was built and for what use and at whose expense. The Court of Appeal emphasized the evidence that the road was built to benefit other users. The Court of Appeal noted that in the absence of evidence of an authorization of public monies to build a private road or of the Crown's intention, the inference that the physical entry of the workmen was for the purpose of making a public road was more reasonable than an inference that the road was private : at para. 21.

[40] In contrast, in this case there is no evidence as to what was the basis for the two skid roads noted on Mr. Rhodes' 1911 survey. There was no evidence that the purpose of the skid roads was to provide access to owners of properties beyond.

- [41] There was also no evidence as to general practices with respect to skid roads on Crown lands in or around the same period as the Crown grant for Lot 3504. It is possible that skid roads were for the sole purpose of skidding logs harvested from Crown lands, and a private party paid for the use of that Crown land as part of a licence from the Crown. In other words, skid roads could have been for the purpose of facilitating timber harvesting, but that commercial purpose might not have amounted to dedication of the road as a public road.
- [42] There was some evidence called as to more recent practice regarding skid roads. Essentially, a skid road is an area which is only partially cleared and through which felled timber is dragged to take it out of the woods and ultimately to market. The limited evidence at trial suggested that such a road is more aptly described as a rough trail to permit skidding and logging equipment to pass through.
- [43] Mr. Arthur Lloyd was called as a witness at trial by the plaintiff. He has lived in the Powell River area since he was a child. He is in the logging industry.
- [44] At one time, Mr. Lloyd owned, through a company, Lot 3836. He also did selective logging of Lot 3504 on behalf of a previous owner of Lot 3504.
- [45] Mr. Lloyd explained that a predecessor owner of Lot 3504, before it was subdivided, was Martin Barchuk. He was hired by Mr. Barchuk to do selective logging on the pre-subdivision District Lot 3504. He said there were old skid trails on the property which were mostly overgrown with alder trees, the size of three inch to five inch diameter trunks. To log the wood, they would take a skidder machine and cut through these saplings to get into the woods where they could access the timber they desired. They made these trails wherever it was easiest to get to the timber they wanted to take. After they finished the trails, they would be left where brush would start to grow over them. From his experience, skid trails were not used as roads but were simply there to facilitate wood harvesting.
- [46] Another witness called by the plaintiff, Dennis McRae, was a long-time resident who grew up in the area of Powell River. His father was in the logging industry and he recalls going with him along some skid roads. When Mr. McRae was a boy, his father used a tractor to haul logs along skid trails. He said there were a number of skid roads throughout the area. He recalls going on a skid road south of the highway to help with skidding logs down to a body of water which is to the south, known as Thunder Bay.
- [47] The plaintiff argued that because the drawing by Henry Rhodes in 1911 showed a skid road intersecting the southwest corner of what became Lot 3836, where it was on the boundary with Lot 3504, and what became Lot 3836 was not yet Crown granted, that meant that at the time of the Crown grant of Lot 3836, there was a public road in that location. I have already addressed the problem with this argument, in that it wrongly asserts that there cannot be a private road on land before it is Crown granted. The mere fact that a skid road was shown does not mean it was a public road. But there is an additional problem with this argument. The problem is that the history of Lot 3836 does not support the inference that there was a historical road on that lot matching the skid roads shown on the 1911 historical survey of Lot

3504, let alone matching the Disputed Road.

- [48] As mentioned, Lot 3836 was Crown granted in 1949 to William Stoddart. Prior to that, Mr. Stoddart held a pre-emption over the same property, which he was granted in 1924.
- [49] The first record of a pre-emption for what became Lot 3836 was introduced by the plaintiff at trial as pre-emption record 2256, granted to Martin Stephen on February 13, 1911. It is significant that the sketch of the land attached to that application for a pre-emption record did not show any roads in the area of the now Disputed Road.
- [50] The historical records for Lot 3836 contain surveyors' notes of the pre-emption for that lot which are similar in form to the survey notes of Henry Rhodes with respect to Lot 3504.
- [51] The pre-emption record 2256 (Lot 3836) was surveyed in April 1914. The surveyor noted there had been some logging on the property. The surveyor did not note any skid roads on Lot 3836. In the southwest corner of Lot 3836, close to the boundary with Lot 3504, the surveyor sketched out an area as "sandy soil fenced clearing 5 acres". The location of this clearing area on the survey would be roughly in the same area as the skid roads shown on Henry Rhodes' drawing, but no such roads were shown on Lot 3836. In another aspect of the same surveyor's notes, this clearing area was stated to be fenced, containing a house, with five acres slashed, burned, and planted. There was no road shown in the area of the Disputed Road.
- [52] The notes of the 1914 surveyor, Wallace Earle, regarding Lot 3836 are inconsistent with the plaintiff's submissions that a skid road existed continuously since the time of Henry Rhodes' 1911 survey through to present, and that it was a public road.
- [53] Subsequent to the pre-emption grant, inspectors for the Department of Lands regularly inspected the property identified as pre-emption record 2256 (Lot 3836). These inspection reports contained form boxes where the inspector would note the nature and value of improvements and general comments such as occupation of the property. By and large, these inspection reports, of which there were many, noted a variety of improvements, including cleared land, but no roads were mentioned.
- [54] However, in a March 19, 1919 report for pre-emption record 2256, an inspector for the Forest Branch noted the following next to the words on a Forest Branch form "logging possibilities": "ground very tough and broken. Skid road (old) through corner property. Poor timber + limited quantity". The location of the skid road, and in which corner of the property, was not mentioned. It is possible that an attached sketch might have indicated a skid road in roughly the same general area as the Disputed Road. However, no expert in interpreting these documents was called to give evidence as to the meaning of the sketch.
- [55] I note that the plaintiff did not address the implications of the possibility that a skid road could be grown over, then re-cleared and re-used by someone else under a forest license, then grown over again, then re-cleared and re-used years later by another person pursuant to a forest license. I conceive it is possible that a skid road would be cleared more than once

over time, as presumably it would have first been chosen for its accessible topography, and presumably it would also be easier to clear the re-growth over a skid road then to carve out a new skid road through older and thicker growth. But if each time the skid road was used for a commercial purpose only, to access timber pursuant to some kind of license, this would not necessarily amount to dedication by the Crown of the road as a public highway.

- [56] Another inspection record for pre-emption record 2256 (Lot 3836), on June 30, 1920, noted under "general remarks": "Road into pre-emption." There was no indication of the location of the road, and whether it was private or public. It could have been a private road or on the north or east side of the property.
- [57] The plaintiff placed considerable emphasis on a Forest Branch record dated May 30, 1915. This record attached, at its fourth page, a sketch of land which included but was not limited to Lot 3504 and pre-emption record 2256 (Lot 3836). The plaintiff claims that the attached sketch shows, by way of dotted lines, a road leading from Thunder Bay through the same corner of what is now Lot 3836 in the same location as the Disputed Road, and through the entirety of Lot 3504. The plaintiff insists that this dotted line proves that the Disputed Road was a public road and that it was a main trunk road, with numerous branches off of it.
- [58] There are several problems with the plaintiff's interpretation of the May 30, 1915 Forest Branch document. First of all, no witness confirmed the plaintiff's interpretation, or was qualified to do so, although many were invited to speculate that it could indicate a road, a portion of which is in roughly the same area as the Disputed Road.
- [59] More importantly, a fair reading of the Forest Branch document of May 30, 1915 shows that it was prepared for an entirely different purpose and was not prepared for the purpose of identifying roads. The plan was prepared as part of a report by the office of a District Forester at Lund, B.C., directed to the Chief Forester at the Forest Branch in Victoria. The purpose of the report was to identify property outlined in yellow on the plan, and to discuss its timber quality and recommendations for settlement. The area which is the focus of the report is outside of the properties which are at issue in this case. The report makes the argument that the area outlined in yellow has poor timber quality and recommends it be surveyed and opened for settlement.
- [60] While there are dotted lines on the sketch that accompanies the Forest Branch report dated May 30, 1915, the scale of the map is such that it is impossible to say the dotted lines fall in the same place as either skid road shown on Henry Rhodes' survey. Furthermore, the sketch was not an official plan but a sketch for purposes of the application. It is unknown what the dotted lines meant. Even if they did mean to indicate some kind of road, it is unknown whether it was meant to indicate private skid roads for logging purposes only, for which someone had a permit.

- [61] The complete forestry history of Lot 3504 and Lot 3836 was not in evidence before me. However, by permit granted February 11, 1921, the Forest Branch granted a permit to Martin Stephen, the holder of pre-emption record 2256 over Lot 3836, to authorize him to cut timber on the land, "subject to the payment of royalty".
- [62] Mr. Stephens was unable to pay his taxes for pre-emption 2256, and so ultimately his record was cancelled on June 20, 1922. William Stoddart was the next pre-emptor who applied for and was granted pre-emption over Lot 3836, obtaining his pre-emption record in September 1924.
- [63] Inspections of the pre-emption over Lot 3836 continued after Mr. Stoddart became the pre-emption record holder. Although these reports mention various improvements he made to the property, such as "house, root house, chicken house, well, woodshed, picket fence, split rail cedar fence, fruit trees, and cleared acreage", none of them referred to a road.
- [64] The land was rugged and wild. In 1949, Mr. Stoddart became ill and moved to Shaughnessy Hospital, and subsequently a veteran's home. The Lands Branch inspector noted "because of lack of care the cleared area is very rapidly reverting" in a report to the Superintendent of Lands dated June 30, 1949. A related inspection report dated June 16, 1949 stated "this pre-emption is reverting very quickly to the wild state" as of June 16, 1949.
- [65] Because Mr. Stoddart had made improvements to Lot 3836 for 24 years, the Lands Branch issued him a certificate of improvement. This allowed him to apply for and obtain a Crown grant of Lot 3836, which he obtained on November 8, 1949.
- [66] On the 1949 Crown grant to Mr. Stoddart of Lot 3836, there were no express exceptions of any roads. The attached sketch of the property also did not show any roads. The Crown grant did provide, however, as follows:
- PROVIDED also that all highways, within the meaning of the "Highway Act", existing over or through said lands at the date hereof shall be exempted from this grant.
- [67] At the time of the Crown grant to Mr. Stoddart, the Highway Act, R.S. 1936, c. 116, s. 2, defined "highway" as follows:
- "Highway" includes all public streets, roads, ways, trails, lanes, bridges, trestles, ferry landings and approaches, and any other public way.
- Thus, it was essential that any road exempted from the Crown grant had to be a public road.
- [68] As I have mentioned above, the 1911 survey notes of Henry Rhodes do not show the skid road to run continuously from Lot 3504 across the corner of Lot 3836, down to the boundary of Lot 1521 (or present day Highway 101).

- [69] While it is likely that some roads in this province that started out as skid roads became cleared more extensively, used over time by the public, and became public roads, that does not mean that every skid road pre-Crown grant became a public road. Yet this is really the effect of the plaintiff's argument, without the evidence to support it.
- [70] The Court requires evidence before coming to the conclusion that a skid road shown on pre-Crown grant land is a public road. Given the extensive logging history of this province, concluding that a historical survey showing a skid road is proof that the road is a public road, without more evidence, could adversely affect many private property owners on whose lands were once skid roads.
- [71] I conclude that there is insufficient evidence for me to find that there was a public road existing across the southwest corner of Lot 3836 into Lot 3504, in the same area as the Disputed Road, at the time of the Crown grant of either lot.

Was there common law dedication of the Disputed Road on Lot 3836, post Crown grant?

- [72] The question remains whether there was a subsequent common law dedication of the Disputed Road by an owner, after the Crown grant.
- [73] Once Lot 3836 became privately owned in 1949, there is no evidence any owner of that property intended to provide public road access through the property.
- [74] The only witnesses who were called to give evidence about the use of the Disputed Road gave evidence that is more consistent with the succession of owners of Lot 3836 considering the Disputed Road to be their private driveway.
- [75] For example, Arthur Lloyd recalls Lot 3836 being owned by a Mr. Henninger whose house was south of Highway 101. Highway 101 intersected the property. Mr. Lloyd testified that the Disputed Road was the access road for Mr. Henninger. Whenever Mr. Lloyd sought to do some logging for the owner of Lot 3504, Mr. Barchuk, Mr. Lloyd sought permission of Mr. Henninger to use the Disputed Road.
- [76] Mr. Lloyd always considered the Disputed Road to be a private access road. When there was logging on either the Barchuk property or the Henninger property, there was a wire cable wrapped between two trees to block access over the Disputed Road. The evidence of Mr. Lloyd suggests that this wire barrier continued from the time Mr. Henninger owned the property and there was selective logging in or about 1975, through to present, although the wire was ultimately replaced with a steel gate by Mr. Lloyd when he became owner of Lot 3836. That steel gate continues to be in place and is the gate through which the plaintiff accessed Lot 3504 with the realtor, before purchasing Lot 3504.
- [77] The plaintiff argues that there was evidence that the Disputed Road was often used by the public over time. I disagree. The plaintiff's evidence was that an occasional salal picker or mushroom picker used or parked on the Disputed Road. The evidence that this happened was extremely weak, and fell short of establishing that if it did happen, that it was anything

more than extremely rare. The greater weight of the evidence was that if anyone sought to use the Disputed Road, they recognized it as a private road and sought and obtained the permission of the owner of Lot 3836 first.

[78] I find that the evidence does not establish that any owner of Lot 3836 dedicated the Disputed Road to public use.

Conclusion - Common Law Dedication

[79] I find that the plaintiff has failed to prove there was a common law dedication of the Disputed Road.

Expenditure of Public Money on a Travelled Road

[80] The plaintiff also argues that the Disputed Road became a public road through the expenditure of public money on it. This is based on a statutory provision deeming a travelled road on which public money is spent, to be a public road.

[81] The Transportation Act, S.B.C. 2004, c. 44 [Transportation Act], defines "highway" in s. 1 as follows:

"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;

[Emphasis added.]

[82] Section 42 of the Transportation Act provides:

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.

(2) 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.

- [83] The defendants did not advance any evidence or argument in support of an exemption from the application of s. 42 (1) by virtue of subsection (2), that is, a class of road or expenditure "prescribed by the regulations."
- [84] The plaintiff argues that in 2006 and following, the provincial Crown paid the corporate defendants monies in order to ensure Crown agents could access the Disputed Road, and paid public monies to maintain the Disputed Road.
- [85] In support of this argument, the plaintiff relies on an Industrial Roads Right of Way Agreement registered pursuant to the Land Title Act, R.S.B.C. 1996, c. 250 [LTA] on June 23, 2006 (the "Right of Way Agreement"). The Right of Way Agreement is between the corporate defendants and the provincial Crown, represented by the Minister of Forests and Range, care of the Ministry of Forests. By the terms of this agreement, the corporate defendants granted the Forest Service a right of way over the roads existing on Lot 3836, and to construct certain works on, over and under the lands subject to the agreement, all as necessary for "the operation and maintenance of an undertaking of the Forest Service". It appears therefore that the Disputed Road falls within the scope of this Right of Way Agreement.
- [86] The plaintiff also relies on a consulting and general service contract between the same provincial Crown entity and the corporate defendants. The project name on the contract is "Road Maintenance Agreement - Jefferd Creek" (the "Road Maintenance Agreement"). The contract confirms that the services purchased under the contract were being purchased with Crown funds. The contract was described as an addendum to the primary Right of Way Agreement.
- [87] The Road Maintenance Agreement provided, at Schedule A, that:
1. As an addendum to the primary Right of Way access agreement (copy attached), the supplier will provide certain road maintenance items as described below.
 2. The land owner will maintain in good order and in compliance with the Ministry of Transportation requirements, a junction permit at Highway 101.
 3. The gate installed near the junction will be properly signed, and keys required to access the area will be supplied to the Ministry of Forests.
 4. The landowner will ensure that all legal access requirements by the Ministry of Transportation (MoT) to enter onto the un-built, but gazetted, highway located immediately adjacent to the westerly boundary of District Lot 3836, have been met. The landowner will also ensure that if required to vacate the area in trespass by MoT, will promptly reconstruct a new access road entirely on their own property at their cost.
 5. The landowner will periodically inspect the standing timber adjacent to the road identified in the access agreement, and remove any hazardous or dangerous trees in compliance with Worksafe B.C. requirements.

6. The landowner will periodically inspect drainage structures along the roadway and maintain structures at their cost unless damaged by actions of the Ministry of Forests or its contractors or licensee's.
- [88] The contract price for the Road Maintenance Agreement was an all inclusive flat rate of \$3,500.00 per year. Invoices obtained by the plaintiff through the discovery process show that the contract was renewed for the same \$3,500.00 annual fee through 2009.
- [89] The reference in the Road Maintenance Agreement to the "un-built, but gazetted, highway" was a reference to the road allowance. It appears that the landowner was responsible to see that any use of the road allowance complied with any legal requirements of the Ministry of Transportation.
- [90] The defendants did not call any witnesses to testify. The plaintiff did not call witnesses to establish that the road maintenance referred to in the Road Maintenance Agreement was in part in reference to the Disputed Road. However, it is likely that it was: the reference to the gate at the junction with Highway 101 was likely the gate that was on the Disputed Road, as the only access to the road allowance from the Highway is via the Disputed Road.
- [91] It is therefore likely that public monies were expended on the Disputed Road. As noted, the plaintiff suggests that these public expenditures, contemporaneous with the Disputed Road's use, trigger the application of s. 42 (1) of the Transportation Act, thereby deeming the Disputed Road to be a public highway.
- [92] The corporate defendants argue that the use of the Disputed Road by the Crown and the Crown payment to use and maintain it, under the Right of Way Agreement and Road Maintenance Agreement, is not be sufficient to make their private road a public road.
- [93] In this regard they rely on a statutory exemption from the application of s. 42 of the Transportation Act, namely s. 24 of the Forest and Range Practices Act, S.B.C. 2002, c. 69 [Forest and Range Practices Act], which provides:
24. Despite section 42 of the Transportation Act, a road constructed or maintained under this Act, the Forest Act, the former Act as defined in section 1 of the Forest Act or the Forest Practices Code of British Columbia Act is not a public highway unless the Lieutenant Governor in Council declares it to be by an order in council that he or she may make under this Act.
- [94] Pursuant to s. 24 of the Forest and Range Practices Act, if the Disputed Road is constructed or maintained under that Act, or any of the other named Acts, then the Disputed Road is not a public highway, absent an order in council to the contrary. There is no evidence of any order in council declaring the Disputed Road to be a public highway.
- [95] The question then becomes: is the Disputed Road a road constructed or maintained under an Act listed in s. 24 of the Forest and Range Practices Act?

[96] The Right of Way Agreement makes clear its purpose at clause 1, namely, that it is:

... for the purpose of transporting logs from forest tenures and for all purposes necessarily ancillary to the harvesting of logs from forest tenures (but not for the purpose of parking vehicles or placing any vehicle or equipment so as to block any cross-road, driveway or entrance or exit ramp).

...[and] access to the quarry located in the northwest corner of the right of way area for the purpose of extracting gravel and rock for the use in building new roads.

[97] It is important to note that the Right of Way Agreement affirms that the roads at issue are private roads owned by the corporate defendants. Clause B in the preamble states:

WHEREAS:

...

B. The Grantor [the corporate defendants] owns private industrial roads constructed on a portion of the Lands [Lot 3836].

C. The Grantor has agreed to grant to the Forest Service on the terms and conditions set out in this Agreement a statutory right-of-way pursuant to Section 218 of the Land Title Act (the "right-of-way") over the roads which exist within the Lands at the date of this Agreement and to construct certain works on, over and under portions of the Lands.

D. The right-of-way is necessary for the operation and maintenance of an undertaking of the Forest Service.

[98] The Right of Way Agreement expressly provides at clause 2:

Should any of the existing roads within the said right-of-way become a Forest Service Road by acquisition under Section 121 of the Forest Act:

...

(c) the Forest Service will not use the foregoing expenditures for the purposes of claiming the existing road through the Lands as a public or Forest Service road.

[99] Section 121 of the Forest Act, R.S.B.C. 1996, c. 157 [Forest Act] gives the Crown the option of temporarily using private roads, or acquiring them, for certain purposes. It provides:

121 (1) The minister, for the purpose of providing access to timber or for any other purpose consistent with this Act, the Forest and Range Practices Act or the Wildfire Act may

- (a) construct and maintain roads and trails,
- (b) enter on and take possession of private land, and of roads and trails on private land,
- (c) enter on private land and take from it timber, stones, gravel, sand, clay or other materials for the purpose of constructing roads and trails,

- (d) construct, take possession of and use temporarily roads for the purposes of paragraph (c), and
 - (e) enter on private land and construct and maintain on it drains to carry water from a road.
 - (2) If private land is taken under subsection (1) (b) and, as a result of the taking, the total area in the original grant of the private land from the government or Her Majesty in right of Canada, that is taken by the government
 - (a) [Repealed 2004-44-105.]
 - (b) under this Act since the date of the original grant from the government or Her Majesty in right of Canada, exceeds 5% of the total area in the original grant, the government must pay compensation in respect of the area exceeding 5%.
 - (3) If, since the date of the government grant, private land taken under subsection (1) has been subdivided into 2 or more parcels by a registered conveyance or subdivision plan,
 - (a) the area of a parcel that may be taken without compensation must not exceed 5% of the area of the parcel, and
 - (b) the total area to be taken without compensation must be apportioned among all parcels, portions of which are taken at the same time, in proportion to the area taken from each.
 - (4) The government must pay compensation in respect of improvements on all private land taken under subsection (1).
 - (5) If land is expropriated under subsection (1), the Expropriation Act applies.
 - (6) [Repealed 2004-44-105.]
 - (7) The minister may designate employees of the ministry of the minister responsible for the administration of this Act who may prepare explanatory plans for the purposes of
 - (a) permitting persons to dedicate a forest service road to the government if
 - (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.
 - (8) If a person agrees to dedicate a forest service road to the government and has
 - (a) agreed to the consideration for the dedication, or
 - (b) entered into an agreement under section 3 (1) of the Expropriation Act,
- an explanatory plan prepared by a person designated under subsection (7) may be filed in the land title office, and section 107 (1) (c) and (d) and (3) of the Land Title Act applies.

...

[Emphasis added.]

- [100] The parties to the Right of Way Agreement clearly had s. 121 of the Forest Act in mind, expressly referring to it and expressly identifying that their intention was not to alter the private nature of the road which was the subject of that agreement and the Road Maintenance Agreement.
- [101] As was noted above, the Right of Way Agreement provides access to the grantee Ministry to enter the defendant's land in order to take from it timber, gravel, and the like. Section 121 of the Forest Act grants authority for the temporary use of roads for the purpose of entering private land to effect the taking of timber and gravel, and other materials.
- [102] The meaning of clause 2 of the Right of Way Agreement, set out above, seems clear. The parties agreed that if the Crown was to in the future "take" possession of any part of the lands, pursuant to s. 121(1)(b) of the Forest Act, that the Crown expenditures for temporary use of the roads would not constitute payments for the purpose of just compensation or for the purpose of claiming the road as public. In other words, if the Crown did in the future acquire the property, it would have to pay additional compensation for this in accordance with s. 121(2) or (4) and (5) of the Forest Act.
- [103] I find the purpose of the Right of Way Agreement and Road Maintenance Agreement to be consistent with s. 121 of the Forest Act. As such, any related expenditures by the Crown for construction or maintenance of the Disputed Road were pursuant to s. 121 of the Forest Act, and therefore, by virtue of s. 24 of the Forest and Range Practices Act, they are exempt from the operation of s. 42 of the Transportation Act. This means that s. 42 of the Transportation Act does not apply to these expenditures and the Disputed Road is therefore not deemed a public highway.
- [104] I also observe that s. 218 of the LTA provides that the registration of an instrument granting a right of way constitutes a charge on the land in favour of the grantee and confers on the grantee the right to use the land charge in accordance with the terms of the instrument. Nothing in the LTA suggests that such a right of way, if paid for by the Crown, creates a public road.
- [105] In addition, there are other arguments against the Disputed Road being deemed to be a public road by virtue of the expenditure of public monies on it.
- [106] Section 42 (1) of the Transportation Act also requires that the Disputed Road be a "travelled road" during the time expenditures were made. That s. 42 (1) has two components, both that it be "travelled" and that public money be expended on it, was recognized by the Court of Appeal in *Dunstan*, as well as in *Silvern Estates Ltd. v. British Columbia*, 2007 BCCA 284 [*Silvern Estates*], dealing with the predecessor to s. 42.

[107] There appears to be little authority on the meaning of "travelled road" in the context of s. 42 of the Transportation Act. However, the case law there is suggests that the meaning requires the route in question to have had some substantive public use, something more than occasional or rare use.

[108] In *Whistler Service Park Ltd. v. Normway Industries Ltd.* (1988), 48 D.L.R. (4th) 160 (B.C.S.C.) [Whistler], aff'd (1990), 69 D.L.R. (4th) 150 (C.A.), at issue was whether or not a logging road had become a public highway under s. 4 of the Highway Act. The evidence in Whistler demonstrated that the road was, at various times, consistently used by the public, including locals, fishermen, 4 x 4 tourists, and sightseers, with traffic increasing over the years, and then was used as a detour during separate but proximate highway construction. The road was therefore found to be "travelled" within the meaning of s. 4 of the Highway Act (a predecessor section to s. 42 of the Transportation Act). To this end, the words of Macdonald J. in Whistler, at 165, are apt:

...if an owner stands by and watches the public travel along a road on his lands, and permits public expenditure thereon in a significant amount, s. 4 will apply. The greater the benefit that results to the owner, the more likely it will be that s. 4 will be invoked.

[Emphasis added.]

[109] In *Silvern Estates* the Court of Appeal noted that there was "ample evidence" to show that the road was travelled, not only for commercial purposes for access for mining interests, but also by the general public and tourists. In part the Court of Appeal gave weight to affidavit evidence of elderly residents of the area, who deposed that they had driven the road often, including in the 1930's and 1940's, for picking raspberries and skiing, and that it was a well-gravelled and maintained road.

[110] In *Dunstan*, the Court of Appeal noted a distinction between a road and a trail. The Court overturned a finding of the trial judge that found the road to be a public highway. The Court of Appeal acknowledged the evidence that some public money had been expended on the road, and that it had been used by the public, but found that the route in question was a "trail" and not a "road".

[111] In contrast to the Whistler and Silvern Estates cases, here the only parties with a right to travel the road were the private owner, people granted permission by the private owner, and the Crown (and its employees or agents). There was no evidence from local residents of the area sufficient to establish that the Disputed Road was travelled, or used, by the general public.

- [112] It was clear by the terms of the Right of Way Agreement that the Crown considered that the road remained a private road, and not open to public use. The access to the Disputed Road was gated and locked. Also, the annual fees associated with the Right of Way Agreement were nominal and not of great benefit to the owner. In light of these circumstances, I find that the Crown's use of the Disputed Road did not result in the road being "travelled" within the intended meaning of s. 42 (1) of the Transportation Act.
- [113] Another argument militating against the Disputed Road being a public road are the very terms of the Right of Way Agreement.
- [114] The question raised by the terms of the Right of Way Agreement is whether the Crown may contract out of the operation of s. 42(1) of the Transportation Act, and do so on behalf of all members of the public if the Crown is the only party using the road, other than the private owner? Surely that must be the case, as otherwise it would do an injustice to the private owner, who thought they were entering into a limited agreement with the Crown but would end up losing a portion of their property to the public for all time.
- [115] Returning to *Whistler Service Park Ltd. v. Normway Industries Ltd.* (1990), 69 D.L.R. (4th) 150 (B.C.C.A.), the Court of Appeal upheld the trial judge's findings that a road was a "travelled road" and that public monies had been expended on it, thereby making it a public road pursuant to the then applicable s. 4 of the Highway Act. In obiter, the Court left open the possibility that a private owner might be able to expressly contract with the Crown to permit expenditures to be made on a private road without bringing the statutory deeming provision into effect. This was obiter because no such contract was found by the trial judge, but the Court of Appeal was sufficiently concerned to make note of it.
- [116] In the case at bar, there is a contract demonstrating an intention as between the Crown and corporate defendants to keep the road private. Failure to give effect to such intention would tread closely to sanctioning an expropriation without compensation. I find that the effect of the Right of Way Agreement is to acknowledge that the Crown use of the private road does not, in and of itself, make the road a "travelled road" for the purposes of s. 42(1) of the Transportation Act.

Conclusion - Crown Expenditures on Disputed Road

- [117] On the whole of the evidence, I find that any expenditures on the Disputed Road by the Crown were pursuant to s. 24 of the Forest and Range Practices Act, and that therefore s. 42(1) of the Transportation Act does not apply to deem the road a public highway.

[118] Further, in the circumstances of this case, where the Crown has expressly agreed with the private property owner that its expenditures and use do not transform an otherwise private road into a public highway, and where there is no evidence that the road has been generally used by the public, I find that the Disputed Road is not a "travelled road" pursuant to s. 42(1) of the Transportation Act, and so that section does not apply to deem the road a public highway.

Conclusion Issue #1 - Is the Disputed Road public or private?

[119] The burden of proof is on the plaintiff to prove that the Disputed Road crossing the southwest corner of Lot 3836 and intersecting with the road allowance bordering Lot 3504 is a public road. I conclude that he has not met this burden of proof.

Issue #2 - Was the Crown negligent in approving the subdivision of predecessor Lot 3504?

[120] The property purchased by the plaintiff in February 2005 is a north section of what was a larger lot prior to 1960. In 1960, the predecessor Lot 3504 was subdivided into two parcels. This subdivision was created by approval of the Approving Officer under the then Land Registry Act, S.B.C. 1948, c. 171 [Land Registry Act] on October 28, 1960, as identified in the subdivision plan no. 6468 deposited in the Land Title Office on December 2, 1960. It is not disputed that the Approving Officer was a representative of the defendant Province.

[121] The plaintiff claims that the Crown was negligent in approving the subdivision plan of Lot 3504. His theory is that the approved road allowance was impossible to build at its south end where it was shown as intersecting with Highway 101, and therefore the subdivision plan should not have been approved.

[122] The owner who applied for the subdivision was Martin Barchuk. He presumably agreed to dedicate on the subdivision plan a road allowance shown on the plan running from Highway 101 along the east boundary of the southern portion of Lot 3504 (which became Block A). This was the road access dedicated to provide access to the remainder of Lot 3504.

[123] As I have noted earlier, a further subdivision in 1961 carved a Lot 1 out of the southeast corner of Block A.

[124] The parties do not dispute that by virtue of its dedication on a subdivision plan, the road allowance shown on the plan is a public highway, title to which is vested in the Province: s. 112, Land Registry Act; s. 57, Transportation Act.

[125] No road has ever been fully constructed on the road allowance. A person must not cause anything to be constructed on a provincial public highway unless the person is authorized to do so: s. 62, Transportation Act.

[126] The subdivision plan 6468 was not seen by the plaintiff prior to his purchase of the property. The realtor, Mr. McLeod, did show him a survey prepared in 1996 "showing boundary staking and flagging for Bowen Contracting" which showed the same road allowance as in the subdivision plan. The Bowen Contracting survey did not indicate

whether or not the road was built on the road allowance. However, when he went to the property it would have been clear to the plaintiff that the road shown on the road allowance was not built.

- [127] The Bowen Contracting survey notes in the southeast corner of Block A, where the road allowance meets Highway 101, that the road allowance intersects with the centre line of a creek. The plaintiff did not investigate this prior to purchase.
- [128] The creek is a reference to Jefferd Creek, which runs through Block A.
- [129] Before and after Lot 3504 was subdivided by Martin Barchuk, Mr. Barchuk was able to access the west side of the lot by a driveway on the west of Jefferd Creek. Once the lot was subdivided, apparently that driveway did not provide access to the northern piece of the property which was purchased by the plaintiff.
- [130] After the plaintiff purchased the property in February 2005, he did not visit it until January 2006. When he showed up at the property in January 2006, he found the gate locked across the Disputed Road. He subsequently tried to obtain permission of the owners of Lot 3836, the corporate defendants, to use the Disputed Road, seeking that they grant him an easement, but they did not agree to do so.
- [131] By letter dated February 10, 2006, the plaintiff wrote to Mr. Robert White of the Ministry of Transportation in Powell River, stating that he would be constructing a gravel road on the road allowance. His letter did not seek permission but requested that if there was any objection to provide it to him in writing at an address in Calgary.
- [132] The Ministry of Transportation subsequently sent to the plaintiff an application form for an access permit, by cover letter dated February 23, 2006. The plaintiff filled out the permit application and returned it to the Ministry of Transportation, dating it March 7, 2006. Again, he showed his mailing address as in Calgary. The plaintiff did not provide any particulars, plan, or specifications with his application, although he says that he was told he did not need to do so.
- [133] By letter dated May 18, 2006, Mr. Tyler Lambert of the Ministry of Transportation wrote to the plaintiff and advised him that his application for an access permit had been refused. The letter stated:

... Your application is refused on the grounds that sufficient access cannot be constructed as proposed due to the presence of a fish-bearing stream in the right-of-way. Constructing this access would put you in direct contravention of Department of Fisheries and Oceans rules and regulations regarding placement of roads/driveways adjacent to fish-bearing watercourses.

Your best option for access to DL3504 is to negotiate an agreement with the owner of DL3836 to allow access through that property to your own. Should DL 3836 subdivide, additional right of way will be acquired to allow for access that will not be in conflict with the stream.

[134] The plaintiff considered the refusal of the application for an access permit to be an admission by the Province that it had originally erred in approving the subdivision plan. He began a campaign to have the Province take responsibility for this error and resolve it.

[135] By letter dated June 15, 2006, the plaintiff wrote to his MLA, Mr. Nicholas Simons, asserting:

... It is extremely unfair that the Ministry of Transportation has refused my application to construct the road in order that I may have road access to my property. Particularly since it was an error of the Ministry of Transportation in approving and designating a Gazetted Road that crossed Jefferd Creek.

[Emphasis in original.]

[136] As an aside, the road allowance was referred to by the plaintiff and in some of the documents as a gazetted road. However, at the time the road allowance was approved as part of the subdivision, it was not necessary to publish the dedication of the road in the gazette. Technically, it is not a gazetted road, but it is an approved dedicated road.

[137] The plaintiff's June 15, 2006 letter to his MLA asserted the basis for his conclusion that the Ministry of Transportation had erred in approving the road allowance:

Had the personnel from the Dept of Transportation visited the site of the Gazetted road, or studied the area drawings at the planing [sic] and approval stage, it would have been obvious that the Gazetted road should never have been permitted and approved in its present location.

[138] The plaintiff's letter was forwarded to the Minister of Transportation, who was at that time Mr. Kevin Falcon. Mr. Simons' forwarding letter dated July 19, 2006, identified that the plaintiff "claims that an error was made on the part of your Ministry...".

[139] The Minister of Transportation, Mr. Falcon, responded by letter dated September 6, 2006 to the plaintiff. He wrote:

I am advised that, while we are unsure as to how the road right-of-way came to occupy the same land as the creek, it would be extremely difficult to build a road such as you requested, even if Fisheries and Oceans Canada would permit it. We do intend to secure a right-of-way from district lot 3836 if and when it subdivides, with the intention of providing access to your property and others located in the area.

[140] The plaintiff asserts that Mr. Falcon's September 6, 2006 letter was an admission that the Ministry of Transportation erred in approving the subdivision plan. Furthermore, he asserts that Mr. Falcon's letter admits two errors by the Ministry of Transportation: first, in approving the road allowance over a creek; and second, in approving the road allowance in an area that is so steep that it would be impossible to use it to access the highway without creating a danger to the safety of the public travelling on the highway.

- [141] With respect, I do not read any admissions in the letter from the Minister of Transportation. The Minister of Transportation at best was attempting to acknowledge a problem and, without assigning responsibility or liability for the problem, wished to propose a potential solution.
- [142] The September 6, 2006 letter from Mr. Falcon went on to suggest that if the plaintiff was interested in negotiating a land swap with the neighbouring lot, Lot 3836, for an equal sized strip of Crown land, that the plaintiff begin by contacting the Integrated Land Management Bureau (ILMB). The letter suggested that the plaintiff also contact a Mr. Lambert to ensure that the swapped land would be appropriate for constructing a road.
- [143] The notion of a land swap was first mentioned in the plaintiff's letter to his MLA of June 15, 2006 which started this string of correspondence. He stated in his letter that the owners of Lot 3836 "refused categorically" to grant him an easement, but also asserted that they suggested that "they would be willing to swap the area of the access road for equivalent Crown Land."
- [144] I am not persuaded that the corporate defendants had made this suggestion in the strong terms stated in the plaintiff's letter, but regardless, the idea of a land swap in the plaintiff's communications with the government, initiated with him. Therefore, when the Minister of Transportation replied and suggested how he might proceed to negotiating a land swap, it was nothing more than an indication of where the process might begin. It was not an "agreement" by the Minister of Transportation that the Province would approve a land swap (something subsequently repeatedly asserted by the plaintiff).
- [145] Regardless of Mr. Falcon's suggestions in his September 6, 2006 letter, the plaintiff did try once more to persuade the Ministry of Transportation that it must solve the problem because, in the plaintiff's view, the Ministry had erred in the first place in approving and designating the road allowance. By letter dated October 10, 2006 to Mr. Brian Atkins of the Ministry of Transportation, the plaintiff once again asserted that the Ministry of Transportation had erred. He stated that there were two problems with approving the road allowance: first, that it was over salmon spawning Jefferd Creek; and second "on [e]xpert advice" he was informed that there would be very poor visibility of the intersection of the approved road with Highway 101, which would result in an extremely dangerous collision area. The plaintiff asserted that the Minister, Mr. Falcon, had alluded to this factor in his letter of September 6, 2006 (which, as I have indicated, is not borne out by the Minister's letter). The plaintiff did not present any of this "expert advice" at trial.
- [146] The plaintiff, in his letter to Mr. Atkins of October 10, 2006, stated that negotiating with the property owners of Lot 3836 was an option which he had "exhausted" after several meetings. He asserted that the Disputed Road was a common road historically since before 1912, providing access for many years to Lot 3504. He asked Mr. Atkins to provide a public access over the Disputed Road.

[147] The Ministry of Transportation replied by letter of October 16, 2006. Mr. Atkins on behalf of the Ministry offered the following comments:

- 1) Access to the remainder of District Lot 3504 was established on December 2, 1960 when Reference Plan 6468 was deposited in the Land Title Office. The only location that the original District Lot (prior to subdivision) fronted on Highway 101 is the South East corner of the lot. No other portion of DL 3504 could access the highway. It is likely for this reason that, the access was established at that location in accordance with the legislation at the time.
- 2) At the time of road dedication in 1960 the legislation of today concerning fish bearing streams is unlikely to have existed. To abide by the access to lands beyond requirements, the access to the remainder of DL3504 was at the only location possible.

[148] Mr. Atkins' letter suggested that the plaintiff consider an alternative option of approaching the adjacent landowners to obtain the access that he feels he needs. Mr. Atkins stated that the Ministry had no obligation to acquire land for the plaintiff's access. His letter concluded:

In as much as the Province tries to protect and ensure a property owner's access rights, it still remains the duty of the buyer to undertake due diligence in that and all regards.

[149] The letter from Mr. Atkins to the plaintiff dated October 16, 2006 proposed that the plaintiff inquire of the Ministry of Forests to see if it would allow him as an "invitee" to gain access across the Ministry's Right of Way agreement with the owner of Lot 3836. There is no evidence that this was pursued or whether it would have been successful if it was pursued.

[150] The plaintiff then began to deal with the ILMB in an attempt to pursue the land swap idea. In his many communications with the ILMB, the plaintiff continually asserted as a fact that the Ministry of Transportation had erred in approving and designating the road allowance. He also asserted that the Minister of Transportation had admitted this, and had approved the land swap -- which was a misinterpretation of the facts.

[151] Subsequent internal documents of ILMB indicate that employees of ILMB accepted that the problem with road access was created by the mistake of the Ministry of Transportation. Nothing appears in the documents that have been admitted at trial that would explain why that conclusion was reached.

[152] What appears from the internal ILMB documents is that it was the view of some ILMB employees that since the Ministry of Transportation was responsible for the problem, it should "take the lead in resolving the issue" and that it was not up to ILMB to resolve the issue. In an email from Mr. Drysdale to Heather MacKnight, both of ILMB, on January 27, 2007, he wrote "it is not acceptable for MOT to pass their mistakes (which they have acknowledged) onto us. We are more than prepared to support MOT - but they should take the lead".

- [153] The plaintiff argues that these emails prove that the Ministry of Transportation erred when approving the subdivision and the road allowance.
- [154] The documents of ILMB that the plaintiff relies on to assert that the Province has essentially admitted its error in approving the subdivision plan do not go so far as the plaintiff asserts. They do not provide sufficient evidence to support a finding that the Ministry of Transportation was negligent when the subdivision plan was approved.
- [155] The emails and internal documents of ILMB were introduced by the plaintiff as hearsay evidence. The plaintiff did not call any of the authors as witnesses. While it is true that the authors of these documents were employees of the defendant Province, I am unable to treat them as admissions against interest or to give them considerable weight, in the absence of evidence that the authors of these statements had the knowledge to support their conclusions that the Ministry of Transportation had erred. There is no evidence to indicate that these employees had any knowledge of what occurred when the subdivision plan was approved in 1960. There is also no evidence to suggest that these employees had the experience or expertise to be able to assess the facts of what occurred in 1960.
- [156] Furthermore, the comments in IMLB documents that suggest the Ministry of Transportation erred were in the context of responding to repeated assertions by the plaintiff that they had done so, and his repeated assertions that the Minister of Transportation had suggested that ILMB solve the problem. I read the ILMB internal documents as amounting to an employee in one department, faced with that department's own resource constraints, saying "if the other department says a mistake occurred, it was their mistake, and they should fix it, not us". It may appear to the plaintiff to be buck-passing and it was no doubt extremely frustrating for him, but to be fair, each government department has different spheres of authority and responsibility. It is not necessarily an admission of liability on the part of the Province for someone in one department to suggest a problem is another department's responsibility.
- [157] I therefore give the internal documents of ILMB very little weight in considering whether or not the Province was negligent in approving the subdivision plan.
- [158] The plaintiff called no evidence on the following:
- (a) the process for approval of the subdivision in 1960, including what was the nature of the application and what information was provided with the application;
 - (b) whether or not the process that was followed for approval of the subdivision plan in 1960 was in accordance with a statutory or regulatory regime; and,
 - (c) whether or not the process that was followed for approval of the subdivision plan in 1960 was in accordance with an accepted standard of practice.

- [159] I do not know, for example, what Mr. Barchuk submitted to the Province in order to obtain approval of the subdivision plan. Thus, I do not know whether an employee of the Province failed to ask important questions or to see gaping problems with the application, or whether an employee was misled by information provided by Mr. Barchuk. I do not suggest that either situation happened, but simply point out that there is no evidence of what occurred when the subdivision plan, with the road allowance, was approved.
- [160] The legislation governing road allowances and subdivision plans as of 1960 was the Land Registry Act, as amended.
- [161] Section 86 of the Land Registry Act provided that all subdivisions had to comply with several requirements, including:
- (a) necessary and reasonable access to all new parcels and through the land subdivided to lands lying beyond or around shall to the extent of the owner's control be provided by a sufficient public highway, and all existing highways provided for in subdivision plans of adjoining lands or otherwise legally established shall be continued without unnecessary jogs :...
- [162] According to s. 91 of the Land Registry Act, every subdivision plan had to be approved or rejected by the approving officer within thirty days from the date it was tendered for examination and approval, or from the furnishing of any profile or sketch when demanded under s. 92.
- [163] Section 95 of the Land Registry Act set out a number of criteria that the approving officer had to take into consideration in considering the sufficiency of the highway allowances shown upon the plan.
- [164] A further subdivision occurred when Lot 1 was carved out of Block A on Lot 3504, which was approved by the approving officer on August 24, 1961. Again, the road allowance which was already provided for would have provided the only potential access from Highway 101 to Lot 1 after the subdivision.
- [165] There is no evidence that the plaintiff's property contained a residence at the time of subdivision. The road was not constructed on the road allowance but there was no statutory requirement that this be done.
- [166] With respect to the allegations of negligent subdivision, the plaintiff appears to be advancing two main contentions: first, that the Province erred in approving a road on top of a salmon-bearing stream, namely, Jefferd Creek, and secondly, that there was a visibility problem at the location where the road adjoined to Highway 101 which prevented the road from being constructed, as it would make it dangerous for vehicles on Highway 101 and the road.

- [167] With respect to the first allegation, that the Province erred in approving a road on top of a salmon-bearing stream, the plaintiff has failed to prove that at the time of subdivision there would have been any barriers, either practical or legislative, to constructing a road on or near Jefferd Creek.
- [168] On the issue of legislative restrictions, in 1960 the federal Fisheries Act, R.S. 1952, c. 119 [Fisheries Act] did not contain any provisions that regulated the construction of roads or driveways in and around fish-bearing streams. At that time, the Fisheries Act did contain s. 33 (2) which prohibited the deposit of a deleterious substance into waters frequented by fish. However, the plaintiff has not produced any evidence to demonstrate that, even if Jefferd Creek did contain fish, that a road could not have been constructed without resulting in the deposit of any substances that would be considered deleterious at the time.
- [169] The Fisheries Act was substantially amended in 1976 to include what are commonly referred to as the "HADD" provisions. At that time what is now s. 35 (then s. 31) was added to the Fisheries Act. Section 35 (1) provides that no person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat. Section 35 (2) provides that no person contravenes subsection (1) by causing the alteration, disruption or destruction of fish habitat by any means or under any conditions authorized by the Minister or under regulations made by the Governor in Council under this Act.
- [170] The effect of these provisions added to the Fisheries Act in 1976 is that the construction of works or undertakings in areas of fish habitat became regulated and controlled. The plaintiff called no evidence from which I could conclude that an approving officer of a subdivision in 1960 ought to have foreseen this evolution in fisheries legislation.
- [171] Secondly, the plaintiff has adduced no evidence to establish that it would be impossible, from an engineering design perspective, to have constructed a road at the site of the road allowance in 1960. There has been no expert opinion provided on this point. In the absence of such evidence, I am unable to accept the plaintiff's argument that it would be practically impossible or highly dangerous to build a road at the junction of Highway 101 and the road allowance.
- [172] Returning to the sequence of events, after the plaintiff failed in his attempts to have the ILMB solve the problem of road access to his property, he again wrote to the Minister of Transportation by letters dated April 11, 2007 and May 9, 2007. The Minister of Transportation, Mr. Falcon, replied by letter dated July 17, 2007. In his letter he stated:

Regional staff have revisited your proposal of an access road from Highway 101 to your property, District Lot 3504, and can advise you that you are welcome to formally submit plans for approval. However, please keep in mind the plans must meet my ministry's requirements for safety and design, and drawings for all plans must be done by a certified engineer and contracted at your expense. You will also have to secure approval of the access design by appropriate regulatory agencies.

- [173] The plaintiff considers the suggestion of revisiting the subject of providing an access road to his property as meaningless and has not responded.
- [174] The situation the court must grapple with appears to be this: the plaintiff has not been successful in resolving the problem of road access to his property, either through his dealings with the Province or with the neighbouring landowners; the plaintiff asserts that the Province was negligent in 1960 in approving the subdivision plan, but has provided no evidence which would establish what steps the approving officer took in 1960, and whether those steps did or did not meet a standard of care; and the plaintiff has called no expert evidence to establish that no engineering solution is possible at the existing location of the road allowance.
- [175] The Court cannot assume there is negligence as a way of providing a judicial solution to a difficult problem. There must be evidence of sufficient facts on which the Court can find that a duty of care was owed; the standard of care was not met; and the breach of the standard of care caused the plaintiff damages.
- [176] I have not received sufficient evidence to determine that a standard of care was breached and therefore I will not proceed to consider the question of whether or not the approving officer owed the plaintiff a duty of care. But this question is by no means a small hurdle for the plaintiff to get over given the apparent lack of proximity between the approving officer in 1960 and the plaintiff as a subsequent purchaser 45 years later. I note that the Crown has asserted that no such duty of care exists because, amongst other things, the officer who approved the subdivision in 1960 was acting in a quasi-judicial capacity. In this regard, the Crown relies on *Cooper v. Hobart*, 2001 SCC 79; *Edwards v. Law Society of Upper Canada*, 2001 SCC 80; and *Bowen v. Edmonton (City)* (No. 2), [1977] 6 W.W.R. 344 (A.B.S.C.). Furthermore, the Crown correctly makes the point that the plaintiff did not rely on the subdivision plan in making the decision to purchase the property. He obtained the subdivision plan subsequent to purchasing the property.
- [177] Lastly, even if the approving officer did breach a duty of care in approving the subdivision plan, the plaintiff has not provided any evidence that he has suffered damages as a result. The plaintiff did not call any evidence to prove what the market value of the property would have been when he bought it, based on whether or not it had road access. The vendor of the property was not called as a witness. The listing price for the property was \$175,000.00. The plaintiff purchased this approximately 50 acres of property for \$90,000.00. He did so after visiting the property and doing no investigations regarding road access to it. The 2007 property assessment valued the land at \$153,000.00; the 2011 property assessment values the land at \$263,500.00.

Conclusion Issue #2 - Was the Crown negligent in approving the subdivision?

[178] I conclude that the plaintiff has failed to call evidence that would support a finding that the Crown's approving officer was negligent in approving the 1960 subdivision plan concerning Lot 3504.

Other Issues

[179] In addition to the two key issues I have addressed, the plaintiff raised a number of additional issues, for which the factual foundation to a large degree overlapped with the facts I have already reviewed, as follows:

1. If the Disputed Road is not public but instead is a private road, does the plaintiff have any enforceable agreement with the corporate defendants to allow him to use the Disputed Road, and if so, did the corporate defendants breach that agreement, causing the plaintiff damages?
2. Does the Plaintiff have any kind of easement which would allow him to use the Disputed Road?
3. Did the corporate defendants commit an actionable tort, such as nuisance, by locking their gate across the Disputed Road, preventing the plaintiff from accessing his property via that road in January 2006?
4. Did the Crown negligently misrepresent to the plaintiff that the road allowance provided access to Lot 3504?
5. Did an employee of the Crown, Mr. Drysdale, make and then breach an agreement with the plaintiff that the Crown would engage in a land swap to solve the problem of the use of the Disputed Road? and,
6. Did the Crown breach a fiduciary duty owed to the plaintiff, or did the conduct of its employee, Mr. Drysdale, in dealing with the plaintiff amount to bad faith or an abuse of public office?

[180] The evidence was clear that the plaintiff did not reach any agreement with the corporate defendants to allow him to use the Disputed Road. He admitted this in his correspondence with the Crown and in his evidence at trial.

[181] The plaintiff's argument that an easement exists over the Disputed Road appeared to be based on the same factual allegations he advanced with respect to common law road dedication, or, the existence of an enforceable agreement with the corporate defendants. These allegations were not proven.

[182] There was no evidence to support any duty on the part of the corporate defendants to have the gate access on their private property, across the Disputed Road, unlocked so as to allow the plaintiff to use it in January 2006.

[183] There were no negligent representations by the Crown relied upon by the plaintiff to his detriment.

[184] Mr. Drysdale did not make any agreement with the plaintiff. There is also no evidence to support any allegation that Mr. Drysdale dealt with the plaintiff any way that might found a cause of action. There is no basis in the evidence for any claim by the plaintiff that the Crown owed a fiduciary duty to him and then breached that duty.

Final Conclusions

[185] The plaintiff has failed to prove his claims. His claims are dismissed.

[186] Typically on the result in this case, ordinary costs would be payable by the plaintiff to the successful defendants and this is what I would order. However, if there are facts not within my knowledge and any party wishes to argue a different costs result, they may do so by taking steps, within 45 days of these reasons, to schedule a costs hearing before me at some point in the future.

"S. Griffin, J."

The Honourable Madam Justice S. Griffin

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