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WHEN IS A HIGHWAY REALLY A HIGHWAY?

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I. INTRODUCTION

This paper is not about the typical highway, the road recorded in the Land Title Office, named and paved by the local government and travelled along every day by anyone and everyone. This paper focuses on the legal issues that arise from a subset of more unorthodox highways; in particular, those formally recorded highways that are not improved and those unrecorded highways that are, or at least were once, improved and regularly used by the public.

The fact that there are many different types of public ways that are highways at law should not surprise anyone who has reviewed the definition of "highway" in section 1 of the *Transportation Act*, S.B.C. 2004, c. 44. This definition alone contains a non-exhaustive list of nine types of public ways that are highways and lists six, with the potential for more, legal bases upon which such ways can become highways:

> "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 …

This particular definition does not recognize the varying degrees to which a highway can be improved, the variation in the type and frequency of public user, and the different government authorities who might claim a right of ownership or possession of such highway. Improvement, use, and ownership are nevertheless important factors in dealing with each of the highways discussed below.

II. HIGHWAYS ON PAPER

While there are a number of ways in which highways are legally established in British Columbia, the most common method is for a survey plan to be filed in the Land Title Office under section 107 of the *Land Title Act*, R.S.B.C. 1996, c. 250. Section 107 provides that when a subdivision plan, reference plan or explanatory plan showing a portion of land marked as "highway" or "road" is deposited in the Land Title Office, that plan acts as an immediate and conclusive dedication by the landowner to the public of that portion of land as a highway, and extinguishes the landowner's common law property in that land.

Less commonly, highways can be formally established by way of an exemption from a Crown Grant. If the map or plan attached to a Crown Grant shows a road coloured, outlined, or designated in a colour other than red, then no part of that road passes to the grantee. In the past, highways have also been created by declaration, by public notice published in the British Columbia Gazette.

These are all highways that are recorded on paper and generally determinable by searching the records of the Land Title Office. If a plan showing a portion of land marked as "highway" or "road" has been deposited, then that highway has been formally dedicated and its location and dimensions are easily known by obtaining and reviewing a copy of the plan. Whether there is, in fact, a road located in that legally dedicated location is another matter, and one that will be discussed further below.

A. Ownership of Highways

Section 107 of the *Land Title Act* says that the deposit of a plan showing a portion of land marked as "highway" or "road" in the Land Title Office operates to vest title to that land in the Province. However, this is subject to section 35(1)(a) of the *Community Charter*, S.B.C. 2003, c. 26, which says that all highways physically located in a municipality are vested in that municipality except for those highways listed as exceptions in section 35(2), being Provincial arterial highways and other forms of highway owned by the Province, federal highways, and highways located on Indian reserves. The definition of "highways" under the *Community Charter* is notably broad and "includes a street, road, lane, bridge, viaduct and any other way open to public use, other than a private right of way on private property."

The fact that highways are "vested" in the municipality in which they are located means that the municipality has ownership and possession of those highways, but that vesting is subject to the provincial right to resume the highway in subsection 35(8). This means that, by regulation or by Order-in-Council, the Province can cancel the vesting of a particular highway in a municipality and resume ownership and control of that highway. This comes into play when a municipality decides to sell a portion of its highway, as a buyer may not wish to purchase land that could be resumed by the Province at any time. The Province's right of resumption can only be removed by the municipality if the highway is being exchanged for other highway, or if the highway is being transferred to an adjacent landowner for the purpose of consolidating it with

that landowner's existing adjacent parcel of land. Absent those facts, the municipality must apply to the Province for an Order-in-Council cancelling the Province's right of resumption.

Under the *Transportation Act*, the Provincial Cabinet can designate and declare certain highways and road improvements to be "arterial highways". Once a highway is declared to be an arterial highway, ownership of that highway vests in the Province and the Province assumes all of the "rights, powers and advantages that the affected municipality had, before the arterial highway was designated as such, to plan, design, acquire, hold, construct, use, operate, upgrade, alter, expand, extend, maintain, repair, rehabilitate, protect, remove, discontinue, close and dispose of the highway" (s. 47). Before Cabinet can declare a new designation of an arterial highway, it must consult with the affected municipality.

B. Use of Highways

Despite the clear wording in section 35(1)(a) of the *Community Charter*, which says that the soil and freehold of every highway located in a municipality is vested in the municipality, it is important to accept that such fee simple ownership is subject to the public rights of passage that are an essential element of the legal nature of a highway. In 1932, the Supreme Court of Canada considered a case involving the City of Vancouver, which has under the *Vancouver Charter* always "owned" its roads. The Court confirmed that ownership of roads carries with it public obligations:

> We are unable to accede to the proposition which would, in that respect, assimilate the municipality to an ordinary land-owner … Under statutes where the fee simple is vested in them, the municipalities are in a sense owners of the streets. They are not, however, owners in the full sense of the word, and certainly not to the extent that a proprietor owns his land. The landowner enjoys the absolute right to exclude anyone and to do as he pleases upon his own property. It is idle to say that the municipality has no such rights upon its streets. It holds them as a trustee for the public. The streets remain subject to the right of the public to pass and repass and that character, of course, is of the very essence of a street. So that the municipality, in respect of its streets, does not stand in the same position as a landowner with regard to his property.
>
> [*Vancouver v. Burchill*, [1932] S.C.R. 620 and 625]

The Supreme Court of Canada expressed the same position in affirming the following comments of Masten J of the Ontario Court of Appeal:

> … neither here nor in England during all the years that local authorities have owned the surface, has it even been held that such municipal ownership in the highway is absolute beneficial ownership identical with the right of private ownership. On the contrary, it was said … they … hold the freehold but … it is only as trustees for the public.

> A consideration of the section of the *Municipal Act* relating to the highways confirms the view that the municipal corporations are trustees for all of the King's subjects of the highway so vested in them and that it remains the right of all such subjects to pass over the highway without obstruction and that this right is paramount and cannot be infringed, even by the municipal authority itself except under express statutory powers. [underlining added]
>
> [Brown Co. Ltd. v. Toronto (1916), 55 S.C.R. 153]

Noting the underlined passage above, such public rights of passage can in British Columbia be restricted in a number of ways by statute. Section 36(1) of the *Community Charter* begins by granting municipalities the broad and express authority to, by bylaw, regulate and prohibit in relation to all uses of or involving a highway or part of a highway, subject to specific limitations set out in 36(2). For example, traffic and parking on highways may only be regulated or prohibited in accordance with the *Motor Vehicle Act* and municipal authority in relation to electrical transmission and distribution facilities and works that are on, over, under, along or across a highway is subject to the *Utilities Commission Act*.

There is another head of power found in section 36(3), which provides:

> Authority in relation to highways that is provided to a municipality under this or another Act includes the power to restrict the common law right of passage by the public over a highway that is vested in the municipality, if this restriction is necessary to the exercise of the authority. [underlining added]

Section 36(3) contains two notable restrictions. First, it is a power to "restrict" and not a power to prohibit, in contrast to the words "regulate and prohibit" appearing in each of subsections 36(1) and 36(2). Second, the words underlined above clearly rule out any restriction (even if it were not to amount to a prohibition) that is not highway-related per se (i.e. that is related to the use of the highway as a highway), and not say arising from worthy but unrelated public objectives, such as the achievement of community planning objectives.

Highways, whether improved or not, can be temporarily or permanently closed and can be wholly abandoned. While temporary closure is just that – short term closure for specific highway purposes (e.g. to facilitate repairs in order to improve the use of the highway as a travelled road) – permanent closure and abandonment are more serious matters and engage the requirement for a bylaw and a public process. Section 40 of the *Community Charter* gives municipalities the authority to, by bylaw, close a highway vested in the municipality to all or certain types of traffic, and to reopen any such highway that has been closed by bylaw. Section 40 also enables a council to remove the dedication of a highway that has been closed, or that is being closed in the same bylaw. Before adopting a bylaw to close or reopen a highway to traffic, or to remove a highway dedication, Council must give public notice of its intention in accordance with the public notice provisions of the *Community Charter*. Council must also give any citizens who consider they are affected by the bylaw an opportunity to make

representations to council, and must give notice to any utility operators whose works Council considers will be affected by the bylaw.

In order to either sell a highway or use it for another purpose, a municipality needs to have closed the highway to all types of traffic and removed that highway's dedication as highway. The bylaw(s) dealing with both steps must be filed in the Land Title Office in accordance with section 120 of the *Land Title Act* and, on filing, the property subject to the bylaw ceases to be a highway, its dedication as a highway is cancelled, and title to the property is registered in the name of the municipality.

Under the *Community Charter*, a municipal council also has the authority to allow some non-highway uses of a highway, without formally closing the highway and removing its dedication. Specifically, pursuant to section 35(12), Council has the express ability to grant a license of occupation or an easement to a third party over a highway vested in the municipality. This section confirms a municipality's ability to enter into written agreements with neighbouring landowners to allow building overhangs, encroaching signs and fences, patios on sidewalks, and so on, as well as allowing construction and use of specific improvements such as pedestrian walkways above or below busy roads, as well as underground parkades. Although highways do not have title in the Land Title Office, it is possible to create a provisional title to a portion of a highway for the purposes of registering an easement.

C. Unimproved Highways

Unimproved road allowances are strips of land dedicated as highway but not yet formally improved. While these are often referred to as "unopened" road allowances, the only highway that can be said to be unopened is one that has been "closed" pursuant to the formal statutory procedures for closing highways described above. A highway by its legal nature, once dedicated, confers a common law right on the public to pass and re-pass along the highway. Anyone is free to pass along them on foot, by horse, or by vehicle so long as it is physically possible to do so, subject to municipal regulation. In *Einhorn v. Maple Ridge (District),* (1993) 85 B.C.L.R. (2d) 115 (C.A.) the BC Court of Appeal applied well-settled law:

> First, with respect to the unimproved highway lands, it is conceded that once the 1883 plan was filed, these lands could have been improved as highways without any further action or authority by the Municipality. Furthermore, as a matter of common law, any person could have travelled upon such lands without fear of injunction or any action for trespass. It is true that adjoining landowners understandably used this apparently vacant land for reasonable purposes, but that does not change the nature of the lands [as highway]. (at para. 17)

The BC Court of Appeal cited *Township of Gloucester v. Canadian Atlantic Railway Co.* (1902), 3 O.L.R. 85 (H.C.J.) for the proposition that the public's rights of passage adhere to a highway regardless of whether it is improved or left as wilderness. The only way in which the public's right to pass over a highway can be entirely extinguished is if the municipal council formally closes the highway by bylaw.

1. Regulating the Use of Unimproved Highways

As discussed earlier, section 36 of the *Community Charter* confers on municipalities an authority to regulate the use of highways within their jurisdiction. This authority is equally applicable to unimproved highways, although in practice there is likely no motor vehicle traffic or parking to regulate. Other exercises of regulatory power could remain useful, such as the power under bylaw to seize things unlawfully occupying a portion of a highway (*Community Charter*, s. 46(2)).

Section 46(1) of the *Community Charter* also imposes a general prohibition against the obstruction of a highway:

> 46(1) Except as permitted by bylaw or another enactment, a person must not excavate in, cause a nuisance on, obstruct, foul or damage any part of a highway or other public place.

This prohibition applies to improved and unimproved highways alike, though the fact that a portion of a highway is unimproved and rarely travelled may make it easier for members of the public to overlook an obstruction. A neighbouring landowner is free to cross over an open and unimproved highway, as is any member of the public, but that landowner is not permitted to erect fences or other structures, or otherwise obstruct the highway, unless expressly permitted to do so.

An extreme example of unauthorized obstruction was considered in *West Vancouver (District) v. Liu*, 2016 BCCA 96 in which a dedicated but unimproved highway contained a 431 square foot carport, a 621 square foot living room, a stone patio, and a 150 square foot koi pond, all of which were constructed and used for the exclusive benefit of the adjacent residential property. Problematically, the District had very poor records regarding the development of the adjacent property, and it appeared that the District had tolerated the substantial encroachment for decades. Although the Court of Appeal affirmed the District's right to seek removal of the unauthorized obstructions, the proceeding was far from straightforward.

If a municipality wishes to permit private obstructions of an unimproved highway, it can do so through a license agreement, an easement, or by bylaw. However, there is an open question as to whether a municipality can grant a license of occupation or an easement that effectively grants a third party exclusive use of an entire width of highway such that it can no longer be reasonably used by the public. In *Covucci v. Trail (City)* (1996), 36 M.P.L.R. (2d) 105 (B.C.S.C.), a case that was decided before BC municipalities owned their highways, the Court concluded that

a municipality could not grant a license giving an adjacent landowner exclusive use of a lane allowance. The City had closed the lane and granted the adjacent owner a license to use the lane as a garden area. This effectively precluded other adjoining landowners and the remainder of the general public from having access to it. The Court found that the City had only a right of possession of the lane allowance, and the license given by the City to the adjacent landowner was not one directed to the use of the property for a highway purpose. Since the City had no authority to use the lane itself other than for highway purposes, it therefore could not grant a license allowing someone else to use it for other purposes. The license was found to be invalid.

That said, now that municipalities are vested with title to their highways, and municipalities have an express ability to grant licenses of occupation and easements in respect of their highways, there is more flexibility as to how municipalities may use and allow others to use those highways. However, if a municipality wishes to grant a license of occupation or an easement that would effectively close an entire portion of highway to the public, such that the public can no longer pass, it would be prudent to adopt a bylaw formally closing that section of the road. It should not be forgotten that a road may only be closed by bylaw, and municipalities should not enter into agreements that have the practical effect of closing off a portion of highway to the public without going through the statutory process.

2. Is There a Duty to Maintain an Unimproved Highway?

The fact that land is dedicated as highway but unimproved can have some notable effects on municipal duties. The first is that the municipality benefits from the general exemption of highways from the *Occupiers Liability Act*, R.S.B.C. 1996, c. 337, which imposes a duty of care on owners and possessors of land to keep that land reasonably safe (see *Plakholm v. Victoria (City)*, 2009 BCCA 466). Although the *Occupiers Liability Act* imposes a statutory duty on municipalities regarding the upkeep of their dedicated park lands, it would not apply to unimproved highways that are used in a park-like manner.

Municipalities do have a common law duty to reasonably maintain their roads (*Plakholm v. Victoria (City)*). This duty is often described as requiring a road or sidewalk to be "in such reasonable state of repair that those requiring to use the road may, using ordinary care, pass to and from or upon it in safety" (*Raymond v. Bosanquet*, (1919), 59 S.C.R. 452). What standard of care constitutes reasonable maintenance is something that can be varied through municipal policies. Of course, if the unimproved highway has no pathways or paving, there is no work to keep in a reasonable state of repair. The public is nevertheless entitled to pass through such unimproved highways, and rough paths and trails may be built or cut by members of the public. This could create a problem for a municipality if someone is injured and claims that a 'rogue' path was not properly maintained.

3. Is There an Obligation to Improve an Unimproved Highway?

A common scenario that arises with unimproved highways is that a landowner wishes to build a residential dwelling on an adjacent parcel and requires vehicle use of the highway for fire access. In those cases, the landowner might request that the municipality improve the highway for vehicle access, at the municipality's cost, or allow the landowner to improve the highway at its own cost.

A municipality is not under any duty to open to vehicular traffic at the behest of a private individual a road allowance that has never been opened except to pedestrian traffic. As stated in Rogers' The Law of Canadian Municipal Corporations, (2d ed.) at page 1198, paragraph 229.3:

> It is discretionary and not obligatory upon a municipal council to open a road even though a bylaw for that purpose has been passed; a court, therefore, has no jurisdiction, at the suit of a private individual, to compel a municipality to open and make fit for travel either an original road allowance … or a road dedicated to the public and assumed for public use … or one established by bylaw … where the council is acting in what it perceives to be the interest of the ratepayers and inhabitants, it is acting in the public interest and its decision not to open a road allowance is not subject to review by a court.

The general authority to construct roads is contained in the general service power in section 8(2) of the *Community Charter*, which states that Council may by bylaw establish and operate any service that the Council considers necessary or desirable. The words "may" and "necessary or desirable" make it clear that a municipal council has complete discretion whether or not to establish and operate any particular service, including whether or not to build any particular highway.

4. Must a Municipality Allow a Developer to Improve an Unimproved Highway?

The somewhat more difficult question is: where a landowner approaches the municipality with an offer to improve a highway at its own expense, to all road standards required by the municipality's bylaws, could the municipality refuse permission, particularly if the effect of denial would be to sterilize the development potential conferred by the existing zoning?

In *Goudreau v. Chandos (Township)*, [1993] 16 M.P.L.R. 2d 224, the Ontario Court upheld a municipality's refusal to allow an unimproved highway to be partially improved. The applicant's property was 1.6 kilometres from the main road. Part of the 1.6 kilometre road allowance could be safely travelled by vehicle, but in order to safely drive the remaining part it would be necessary to cut down trees, reduce the grade in places, and fill low areas. The property owners argued that the municipality's failure to improve the road allowance meant that the public was entitled to do what was necessary to make the road allowance passable. The Court disagreed and noted the well-founded position that the public may only use a road allowance as it finds it.

The Court also found that the municipality had a sound policy basis for refusing the request. The municipality was only willing to permit improvement of the highway to its full width at the standards set out by the Ministry of Transportation. The Court found that the owner just wanted to do as little work as was required for minimal access:

> There is a sound policy basis for coming to the conclusion that municipal consent is required to improve an unopened road allowance. The province has a great number of unopened road allowances. To rule that consent is not required would make available all of the road allowances for unregulated development. The chaos and destruction that could ensue is frightening to contemplate. There would be no standards.

In upholding the municipality's refusal to consent, it is clear that the Court relied on the assertion that the municipality's refusal was a conditional one, premised on its reasonable requirement that consent would be forthcoming provided the applicant met Ministry standards for construction of roads.

While adherence to "standards" are a given, bona fide planning objectives may be an equally valid basis on which consent may be withheld, provided that the municipality can show good faith in its concrete efforts to realize the advancement of its planning goals and objectives for the subject area. Without such efforts, a court may be concerned that this type of withholding of consent cannot continue indefinitely in the face of inaction on the part of the municipality. A court is likely to balance the current legal rights of the owners to be able to use and develop their property as clearly enabled by the zoning, and the municipality's public interest goals.

In an earlier case, *W.A.W. Holdings Ltd. v. Sundance Beach (Summer Village)* (1980), 27 A.R. 451 (C.A.), the Alberta Court of Appeal found that the municipal discretion to improve or not improve a dedicated highway ought to be considered on a reasonableness standard. In that case, all of the existing parcels had adequate legal access, but certain owners wanted to improve, at their expense, trails along unimproved highway allowances so that they could more conveniently walk directly to the waterfront. The Court made several important findings – even on the basis that the initial construction would be borne by the individual owners:

- The future cost of maintenance of the walkways and the question of liability to the uses of the road allowances which the clearing of a walkway could create were matters of legitimate concern with the Council; and

- Where Council is acting in what they perceive to be the best interests of ratepayers and inhabitants, they are acting in the public interest, which can be balanced against the public interest in providing access to the beach of property owners who, while they have adequate road access, also desire more direct access to the water.

Applying the reasonableness standard to the above points, the Court held that reasonable deference to the Council's decision was required by law. In such case, the Court stated "a decision to improve a highway is discretionary as there is no obligation on council to [improve] a road ... and [no person] can compel a municipality to make fit for travel … a road dedicated to the public…" The Court noted that the owners in question already had improved road access to their lots; what they really wanted was more convenient access to the beach. The municipality's concerns with increased liability and maintenance costs were valid and Council's decision to refuse the owners' application to improve the walkway was reasonable.

5. Special Considerations for Unimproved Highways

The *Sundance Beach* case, in particular, strongly suggests that a municipality should develop a rational public interest policy and be seen to be pursuing it in good faith to achieve its planning and land use goals. For example, if a municipality wishes to discourage the construction of new roads in an agricultural area, notwithstanding that the zoning allows for a single family dwelling on each parcel, the municipality should be seen to be pursuing those agricultural goals. A position of positive action (rather than simple denial) on the municipality's part will add weight to its argument that its policies are rational and its decision to refuse an application to improve an unimproved highway is reasonable in the context of its valued public interest objective of returning the lands to agricultural use.

In summary, a municipality should be mindful of the legal status of unimproved highways and should consider adopting policies to address common issues, for example:

- Investigate and respond to obstructions of unimproved highways by adjoining landowners, either by seeking to legitimize the obstruction through a license or easement or by seeking removal;
- Adopt a policy of (non-)maintenance and inspection for unimproved highways;
- Consider adopting policy objectives for unimproved roads;
- Consider formally closing the highway, if the council's view is that the highway will never be improved.

These are just a few possible responses to the questions that may arise as to how an unimproved highway may be used.

III. HIGHWAYS AT LAW, IF NOT ON PAPER

The preceding section of this paper discussed highways that were recorded "on paper", including those that were not in fact used or improved as roadways. This section discusses the inverse: highways that are used by the travelling public, but that are not marked as highways on a Crown Grant, published in the Gazette, or shown on any plans registered with the Land Title Office. This part of the paper focuses on highways that are created by common law dedication

("Common Law Highways") or by a public expenditure to which section 42 of the *Transportation Act* applies ("Section 42 Highways").

The fact that Common Law Highways and Section 42 Highways are not recorded on any registered survey or subdivision plan does not make them any less "highways" than those discussed earlier in the paper. This equivalence, however, presumes that everyone recognizes the same road and trail as being either a Common Law Highway or a Section 42 Highway. Uncertainty over either the existence or the metes and bounds of such highways is the focal point of most legal disputes. Recognizing the existence of Common Law Highways and Section 42 Highways is important for landowners, local governments, and the public at large for three key reasons:

- An owner's indefeasible title to land is "subject to" a highway (*Land Title Act*, 23(2)(e)) — in other words, the owner does not own land within a highway, even if that land is nevertheless included within the legal description;
- A government, in most cases the Provincial Government or a municipality, will own and have possession of the highway, and therefore be burdened with the responsibilities associated with highway ownership; and
- The travelling public will have a right to pass freely over the highway even if they cannot point to any particular document that dedicates that portion of highway.

In discussing Common Law Highways and Section 42 Highways, this part of the paper will refer to many cases, although for brevity it will not provide too many factual details simply because the facts can be complex and very case-specific. The cases typically involve one party seeking to enforce a claimed right of ownership or a right to pass over certain lands that conflicts with another party's claim, with the decisive question being whether the lands are actually highway.

A. Common Law Highways

Section 1 of the *Transportation Act* includes within its definition of "highway" those roads, streets, paths and other public ways "that becomes or have become highway by … (c) a common law dedication made by the government or any other person."

The British Columbia Court of Appeal in *Dunstan v. Hell's Gate Enterprises Ltd.* (1987), 45 D.L.R. (4th) 677 (B.C.C.A.) concisely described the requirements for a common law dedication of highway: "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." In a dispute, the onus is on the party claiming the existence of a Common Law Highway to prove on the balance of probabilities that the road has been dedicated as a public highway.

The *Dunstan* case related to a dispute over whether a trail between Lytton and Lillooet that had been used by the public in the 1870s was (still) a highway. The bridge that was alleged to have

been connected to the trail was removed long ago. However, the now wider trail was being used for river access by white water rafting companies. Interested parties sought to benefit from what can, for the most part, be described by the rule: "once a highway, always a highway". If the trail had been dedicated as highway in the 1870s then, subject to any formal road closing proceedings, it would still be highway today.

1. The Owner's Intention to Dedicate

At present, newly dedicated highways are regularly recorded because landowners are usually reluctant to give up land for highway purposes without receiving compensation (such as money or subdivision approval) and the party providing compensation usually demands (and should demand) a clear record of the dedication. However, the common law recognizes the historic practice of owners offering up land for highway through conduct that does not actually result in a recorded dedication.

A landowner could build a road and allow the public to use it, because the owner sees the benefit of the access and increased traffic. A landowner similarly could allow its neighbours to build a road across that landowner's property. In both cases the intention of the landowner is to surrender a portion of his or her property to the public, and to surrender this land for all time. The landowner's conduct must express a clear intention to dedicate for this element of Common Law Highway dedication to be present. In *Dunstan*, the Court of Appeal adopted the cautionary comments of the Ontario Court of Appeal in *Reed v. Lincoln (Town)* (1975), 6 O.R. (2d) 391 (C.A.):

> Such an intention ought not be too readily inferred from the use by members of the public of a road traversing private property in a rural community, especially in a locality where the normal system of roads did not develop. In these circumstances the owner of the property may well, in a neighbourly spirit, permit local residents to use a way across it for their convenience without having any intention of dedicating the road as a public highway. The inference of neighbourly tolerance is the more likely when dedication is sought to be established at a period when the area is in a relatively early stage of its development.

This passage, and the common law rule, reflects historical circumstances in which landowners wished to dedicate a road to the public without waiting for such a dedication to be formally recorded by the local highway authority.

Landowners may, however, seek to have a road pass through their property while avoiding a highway dedication. This occurs, for example, when a landowner grants a right-of-way. Since such a grant is for rights less than full ownership and possession, the owner retains some residual property rights. A landowner may also intend to operate a private road. The statutory definitions of highway in the *Transportation Act* and the *Land Title Act* are both limited to "public" roads and other "public" ways. A road will not be captured if it is built with private

funds and the owner does not intend to open up its use to the public at large as a highway. A prudent owner might place a sign marking a road as private if it might otherwise be mistaken for a public thoroughfare. Private roads may even be built on public lands. For example, a tenant or licensee on Crown Land may wish to build a road for a private purpose.

2. The Public's Acceptance of Dedication

The conduct that confirms public acceptance of a dedication is the actual use of the road by any and all who wished to use it. In *Brady v. Zirnhilt* (1998), 57 B.C.L.R. (3d) 144 (C.A.), the Court of Appeal observed that the public's acceptance could occur despite a municipality or Provincial highway authority's lack of acceptance.

In many cases an acceptance by the public of the dedication can be confirmed by someone, other than the landowner, performing work to improve the road for the benefit of the travelling public. As will be discussed later in this paper, when it is a public authority performing the work, the elements of a Section 42 Highway may also be present. However, neighbours could collectively build a road so that they, and anyone else, may use it is a highway.

3. When is a Common Law Highway 'Officially' a Highway?

It is simple enough to say that a Common Law Highway comes into being when the dedication is both offered and accepted. These necessary elements are, however, defined by the intention and conduct of the landowner and the public. It is not necessary that the dedication be concurrent with the actual construction of an improved road; a landowner may dedicate a private road years after it was constructed. The public may accept the dedication of unimproved land as highway and, on the strength of that dedication, begin to construct. In this second case, the highway theoretically exists at law immediately before construction occurs, however if there was a dispute of the acceptance of the dedication, actual construction and use would very likely be required evidence before the Court.

B. Section 42 Highways

Section 42 Highways are recognized by statute, specifically section 42(1) of the *Transportation Act*. This section resembles earlier provisions in the now-repealed *Highway Act*. Section 42 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.

Section 42(1) suggests just two simple-sounding elements to create a Section 42 Highway: public money must be spent and the spending must be on a travelled road. However, the prospect of controversial interpretations is revealed by the over 50 reported court cases in

British Columbia regarding the proper application of this section and its equivalent provision in the earlier *Highway Act*. As with Common Law Highways, the onus is on the party claiming that a particular road is a highway to show on a balance of probabilities that section 42(1) of the *Transportation Act* applies.

Despite the bounty of jurisprudence, the Court of Appeal recently acknowledged in *Chemainus Park Holdings Ltd. v. Island Timberlands GP Ltd.*, 2015 BCCA 325 that many questions remain:

> The simple wording of s. 42 leaves open many issues that have not been firmly decided. Must the owner of the road in question demonstrate an intention to "dedicate" the land to public use, as suggested by some judges? Can the section operate against the owner's will? Is any expenditure beyond de minimis sufficient to trigger s. 42? What exactly happens to the interest of the owner in the land that becomes highway? Is the road effectively expropriated and if so, is the owner entitled at common law to compensation? Some of these questions arise, at least in the background, in this case. (at para. 2)

These lingering questions mean that in some cases, where a dispute arises, it may be very difficult to predict whether the court will recognize a Section 42 Highway. However there are no doubt many other instances in which the necessary elements are obvious.

1. What Creates a Section 42 Highway?

The *Chemainus* case is illustrative of the potential for disagreement over the two, or arguably three, elements of a Section 42 Highway. In that case, a road known as “Haul Road”, located on private land, was improved by workers under contract with the Province in exchange for gravel located on the private land. That same road was also regularly used by a neighbouring landowner who, for a time, paid a fee for such use. The neighbouring landowner then claimed that the road was a Section 42 Highway. The road had been improved by workers employed by the government (public money?) and was used as a through road by the neighbouring landowner as well as by some members of the public (a travelled road?).

(a) Public Money

The question of what constitutes “public money spent” for the purpose of section 42 of the *Transportation Act* is one that has been addressed by both court decisions and Provincial regulation. Public money unquestionably includes money held by the Provincial Government or a local government with the authority to construct roads. The effect of school boards, public universities, and other institutions paying for road improvements raises some interesting questions.

A significant finding in the *Chemainus* decision was that the public money must be spent directly <u>on</u> the travelled road. In that case the paving of Haul Road by government contractors meant that there was a link to government money, however the Court of Appeal found that this was not money spent for highway construction and maintenance purposes but rather spent for

the purpose of purchasing gravel. Haul Road had not been improved because it was a road that the Province sought to improve for the benefit of the public.

The *Transportation Act Regulation* specifically excludes "an expenditure of public money if the expenditure is confined to an expenditure for snowploughing or ice control." This regulation appears to protect the interests of owners of private roads and driveways who might benefit from municipal snow clearing. The Court has also declined to include the small amounts spent on the grading of a gravel road and the application of dust suppressant for the purpose of protecting occupiers of nearby properties from dust (*Okanagan Similkameen Cooperative Growers Assn. v. Osoyoos (Town)*, [1994] B.C.J. No. 1957 (S.C.)(QL)).

The case law suggests that the amount of public money spent must be "significant" (*Chemainus*), but does not provide a formula for calculating significance. If the amount of money is in the tens or hundreds of thousands of dollars, there will be little room for dispute. In *452195 B.C. Ltd. v. Abbotsford (City)*, 2013 BCSC 2055 the Court observed that over the past 100-plus years, public road authorities had spent over $2,000,000 on Clearbrook Road, a road that had been well-travelled for a century. This was more than sufficient to nullify the landowner's claim that the portion of Clearbrook Road fronting its property was private property, even though the surveyed boundary of the landowner's parcel ran through the centre of the road. How much of that significant expenditure was specifically spent on the disputed portion of road did not matter. The Court has held that public money need only be spent on part of the travelled road, not every part of the travelled road (*Emmett v. Arbutus Bay Estates Ltd.* (1994), 88 B.C.L.R. (2d) 72 (C.A.)).

(b) A Travelled Road

The case law provides some refinement to what constitutes a "travelled road" under section 42 of the *Transportation Act.* To be "travelled", the land at issue must be used by the public. How frequent and heavy this travel must be can be a matter of dispute. In *Skutnik v. British Columbia (Attorney General)*, 2013 BCSC 195, Russell J provided a general summary of what constituted sufficient travel:

> Taken together, these cases suggest that evidence of casual travel is insufficient. The travel on the road must be significant. This finding can be based on a number of factors. In some instances, the degree of travel might not be so great but recognition of the road as a necessary route of access will prompt a finding the road is travelled. It may also be measured by way of historical use, the number of users in relation to the population of the community and the diversity of users (i.e. not simply the locals).

In many cases, the significant public use of a road will be obvious and continuous. However, it may be that the public's use of the road has stopped over time. So long as it was, at some point, a road regularly travelled by the public, section 42 of the *Transportation Act* will continue to apply. A lack of use cannot make a public road private (*Brady v. Zirnhelt*). In contrast, in *Vesuna*

v. British Columbia (Minister Of Transportation), 2011 BCSC 941, the Court found that a road was never a "travelled road", because the only people who could access it were the owner of the road and the owner's invitees, including the Crown, which had been granted access rights under an agreement.

"Road" is not defined in the *Transportation Act*, which leads to some uncertainty as to what minimal characteristics distinguish a road from another type of path. In *Dunstan*, the case discussed earlier with regard to Common Law Highways, the Court of Appeal found that the public money spent on the pack trail in the 1870s did not make it a highway under statute, because at the time, a narrow pack trail was considered distinct from the wider wagon road. That may no longer be the case.

The former *Highway Act*, R.S.B.C. 1996, c. 188 also contained a provision at section 4(4) that expressly excluded recreational trails from being considered a travelled road. This section is not contained in the *Transportation Act*, however the Court has subsequently applied this interpretation as a matter of common law (*Silvern Estates Ltd. v. British Columbia*, 2005 BCSC 1071, reversed on other grounds, 2007 BCCA 284). Although land does not need to be passable by automobiles in order to be a highway, it is likely that the land has to meet (or have met at the critical time) that standard in order to be a Section 42 Highway.

(c) Something More?

It is notable that section 42 of the *Transportation Act* does not make reference to the interests of the affected landowner. A lingering question recognized by the Court of Appeal in the *Chemainus* decision is whether the application of section 42 of the *Transportation Act* can operate against the owner's will without any intention to dedicate. The Court of Appeal noted that some judges considered some evidence of intention to be required. Although this does not provide a complete answer it is worth noting that, if a Section 42 Highway could only be created if the landowner expressed an open and unequivocal intention to dedicate, then there would be little if anything to distinguish a Section 42 Highway from a Common Law Highway. In practice, reliance on section 42 of the *Transportation Act* is used in cases in which the landowner's original intention or ultimate acquiescence is not known or clear. How section 42 would apply to a highway that was mistakenly constructed on private land in the face of immediate and clear expression of objection by the owner has not been resolved by the court.

(d) Which Roads are Exempted?

Subsection 42(2) of the *Transportation Act* allows for Provincial Regulations to exempt specific roads or classes of roads from becoming highway under the Act. The *Road Exemption Regulation No. 1*, B.C. Reg. 86/2006 and the *Transportation Act Regulation* presently exempt just five specific roads. The *Transportation Act Regulation* also exempts a number of classes of roads, including:

- A travelled road if the travelled road forms part of an existing railway right of way and, at the time public money was spent on it, was owned by the

government or a Crown corporation or Crown agency, or formed part of a railway right of way (s. 4(1)(b)),

- A highway if money has been authorized to be lent, guaranteed, invested, granted or spent in relation to the highway under section 13 of the *Ministry of Energy and Mines Act* (s. 4(c)), and

- Travelled roads that are on ferry terminal properties, within the meaning of the *Coastal Ferry Act*, and are not designated under that Act, as highway properties (s. 4(d)).

Although likely not travelled roads to which section 42(1) of the *Transportation Act* could apply, the *Transportation Act Regulation* also provides that:

> (2) Section 42 (1) of the Act does not apply to any of the following trails, whether or not public money is spent on the trail before or after the coming into force of this subsection:
>
> (a) the Trans Canada Trail;
>
> (b) a snowmobile trail established and maintained by a recreational organization.
>
> (3) Nothing in subsection (1) or (2) is to be read as including recreational trails within the meaning of roads or travelled roads.

A local government should always review all regulations adopted under the *Transportation Act* if a question arises regarding whether a particular road is a Section 42 Highway.

2. When is a Section 42 Highway 'Officially' a Highway?

Section 42 of the *Transportation Act* provides that if the requisite conditions are met, the travelled road is "deemed and declared to be a highway". It does not appear to matter if the conditions are met because a travelled (privately built) road had significant public money later spent on it or because significant public money was spent building a road that was subsequently used by the travelling public. In both cases that travelled road, by operation of statute, becomes a highway. For the landowner worried about section 42 of the *Transportation Act* operating against their will, it seems imperative that the owner either seek to stop the expenditure of public money on roadworks on their land or seek to ensure that the road is never used by the public.

It is worth emphasizing that a Section 42 Highway comes into existence without any involvement by the courts, the Land Title Office, or a surveyor. The court will only become involved to resolve disputes, which typically centre on the question of whether one party is

refusing to recognize what is at law a Section 42 Highway or alternatively, the other party is mistaking private land for a Section 42 Highway.

3. Does Section 42 Constitute Expropriation and Is Compensation Payable?

Hopefully no reader has formed the opinion that section 42 of the *Transportation Act* provides a convenient alternative to expropriation and negotiation for the municipal acquisition of roads. This statutory provision is one that operates to recognize the creation of past highways, not authorize the construction of new ones. It is notable that the Court of Appeal in *Chemainus* commented that questions of whether an expropriation occurred and whether compensation is payable are uncertain. This paper will not seek to prescribe the law. However, it is worth noting that these issues may not be material where the Section 42 Highway was created decades previous. First, the passage of time may lead to the inference that the affected owner did not seek compensation when the Section 42 Highway was created. As is deemed to be the case with Common Law Highways, the benefit of being served by the highway may offset the loss of land. Second, any right to claim compensation may be lost through expiration of the limitation period.

C. Some Potential Complications Arising With Unrecorded Highways

This part of the paper has so far focused its discussion on the determinants of Common Law Highways and Section 42 Highways. The fact that such highways exist, despite not being described on any registered plan, Crown grant, or Gazette, can lead to uncertainty or a lack of awareness as to the presence of such highways or their precise metes and bounds. This in turn can create complications for the administrative function of local governments, in particular municipalities. For example:

- A municipality may have difficulty describing a Common Law Highway or Section 42 Highway, or having it recognized by the Land Title Office, for the purpose of closing it and removing the highway's dedication and potentially selling it;
- A local government may overlook the impact that a Common Law Highway or Section 42 Highway has on the determination of minimum parcel size, setbacks, or developable area of a parcel under a land use bylaw;
- A local government may neglect its duty of care with regard to highway maintenance because it did not acknowledge a Common Law Highway or Section 42 Highway; and
- Utility providers may have installed utilities within what they believe is a Common Law Highway or Section 42 Highway and may look to the local government to assert its position of ownership in the event of a dispute.

One potential solution to the problem of unrecorded highways is to obtain a road dedication plan under section 107 of the *Land Title Act* from the person who would be the owner of the land had it not become highway at common law or pursuant to section 42 of the *Transportation Act*. This may not be a practical option if the owner refuses to acknowledge the existence of the highway or seeks unreasonable compensation for his or her efforts. Proponents of basic principles of property law may object to the suggestion that an owner is being asked to transfer land they do not own (because it is already deemed and declared to be highway), however it may be more helpful to focus on the clarity that a section 107 plan brings with regard to the location of the highway.

That said, local governments who discover a highway that appears to be trespassing on private property, according to the records in the Land Title Office, are well-advised to consider their potential position under section 42 before rushing to purchase or even expropriate the land on which that highway sits.

D. When Does the Court Become Involved?

In a perfect world, litigation should never arise regarding the presence and exact location of Common Law Highways and Section 42 Highways. In both cases, everyone should be in agreement – either the owner has dedicated and the public has accepted the highway, or everyone accepts that the *Transportation Act* operates to deem and declare certain land to be a Section 42 Highway. Alas, it is unreasonable to expect such universal consensus and litigation may be necessary when a person takes an action or makes a decision that another person thinks is inconsistent with a piece of land's status as highway. Some potential legal disputes could involve:

- An action in trespass seeking to keep a municipality and the public off of land that the claimant says is not highway but rather land owned by the claimant;
- An action by a municipality or a member of the public seeking to stop the obstruction of a highway by someone claiming to be the owner of the obstructed land;
- A bylaw enforcement proceeding in which the status of a portion of land as highway affects whether or how the bylaw applies to the person subject to enforcement;
- Judicial review of a decision by a local government authority (building permit issuance, development permit issuance, subdivision approval) involving a decision predicated on whether certain land is or is not highway;
- A proceeding seeking relief necessary to have a highway recorded in the Land Title Office; and

- A proceeding seeking the revision of an assessment for property tax purposes on the basis that the Assessor has failed to exclude a highway in the assessment.

The above list is by no means exhaustive, but hopefully illustrates the diversity of instances in which the question of whether a purported highway is actually a highway could be engaged in litigation.

IV. CONCLUSION

While most highways are easily determinable by simply pulling a copy of the plan by which they were created from the Land Title Office, where a highway has been dedicated but not improved, or improved but not formally dedicated, a number of interesting challenges may arise. Likely every municipality has some of these more unorthodox highways located within its boundaries, so it is important for local governments to understand when a highway is really a highway in order to enable them to better address highway-related disputes and assert appropriate rights of ownership from time to time.

NOTES