

Citation: Dunromin v. Spallumcheen
2000 BCSC 0383

Date: 20000301
Docket: 20158
Registry: Vernon

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

DUNROMIN INVESTMENTS LTD.

PLAINTIFF

AND:

**THE CORPORATION OF THE TOWNSHIP OF SPALLUMCHEEN
and CANADIAN NATIONAL RAILWAY COMPANY**

DEFENDANTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MADAM JUSTICE BEAMES

Counsel for the Plaintiff:

Jeffrey G. Frame

Counsel for the Defendant,
The Corporation of the
Township of Spallumcheen:

David T. McKnight

Dates and Places of Hearing:

November 2, 1999
Vernon, B.C.
February 3 and 4, 2000
Kelowna, B.C.

INTRODUCTION

[1] On February 6, 1996, the Canadian National Railway Company (the "CNR") sold to Kimsquit Enterprises Ltd. two pieces of property described as:

That part of District Lot 35 shown on Plan A524, ODYD, except Plan 36407

(P.I.D. 003-415-147); and

Those parts of the northeast $\frac{1}{4}$, SEC. 10, shown on Plan A524, TP. 7, ODYD, except Plan 36407

(P.I.D. 003-414-841);

for a total purchase price of \$6,400.00. I will generally refer to both pieces as the plaintiff's property.

[2] The purchase of the plaintiff's property was originally negotiated by Richard Loohuizen, a nominee and president of Kimsquit Enterprises Ltd. ("Kimsquit"), and also a principal of the plaintiff, to which Kimsquit transferred the property and assigned any cause of action with respect to the lands on February 1, 1997. According to the affidavit of Mr. Loohuizen, at the time of the purchase of the plaintiff's property by Kimsquit from the CNR, he did not know that a paved roadway, known as Larkin Cross Road, traversed the property. Upon discovering the existence of the road, Mr. Loohuizen advised the defendant, the Corporation of the

Township of Spallumcheen (the "Township"), that he did not consent to the presence of the roadway. The Township took the position that the road in question was a public highway.

[3] On December 24, 1997, the writ commencing the within action was filed, claiming against the Township for damages for trespass and against the CNR for damages for breach of contract and misrepresentation. The statement of claim was filed January 12, 1998, and defences were filed by both defendants. On May 20, 1999, a consent dismissal order was filed with respect to the plaintiff's claim against the CNR.

THE APPLICATIONS

[4] On October 27, 1999, the plaintiff filed a notice of motion, pursuant to Rule 18A, seeking declarations as follows:

- (1) The paved roadway known as Larkin Road or Larkin Cross Road crossing the plaintiff's property is not a public highway pursuant to s. 1, 2 or 4 of the **Highway Act**, R.S.B.C. 1996, c. 118 as amended;
- (2) The paved roadway known as Larkin Road or Larkin Cross Road crossing the plaintiff's property has not been dedicated a public highway pursuant to the **Land Title Act**, R.S.B.C. 1996, c. 250 by deposit of subdivision plan showing a portion of the land as highway; and

- (3) The paved roadway known as Larkin Road or Larkin Cross Road has not been dedicated a public highway pursuant to the common law doctrine of dedication.

[5] On October 18, 1999, the defendant Township filed a notice of motion pursuant to Rule 18A, seeking declarations and orders as follows:

- (1) The paved roadway known as Larkin Road or Larkin Cross Road has been dedicated as a public highway by notice published in the British Columbia Gazette dated July 18, 1895;
- (2) The paved roadway known as Larkin Road or Larkin Cross Road is a public highway pursuant to sections 1, 2, and 4 of the **Highway Act**;
- (3) The paved roadway known as Larkin Road or Larkin Cross Road has been dedicated as a public highway pursuant to the **Land Title Act**, by deposit of a subdivision plan showing a portion of the land as a highway;
- (4) The paved roadway known as Larkin Road or Larkin Cross Road has been dedicated a public highway pursuant to the common law doctrine of dedication;
and

(5) The plaintiff's claim against the Township be dismissed, and costs of the action be awarded to the Township.

BACKGROUND

[6] The history of the property in question, and the evidence with respect to the road in issue, must be reviewed in detail in order to put the parties' respective positions in perspective. The plaintiff's property was part of an original Crown grant of property in 1884. The land covered by the Crown grant was said to be 306 acres, described as Lot 35, Group 1 and the North East $\frac{1}{4}$ of Section 10, Township 7, Osoyoos Division of Yale District. The Crown grant was made to a Thomas Greenhow.

[7] In April and May of 1895, the council of the Township had before it issues with respect to a road then referred to as the Larkin Clarks Flat Road. Under the heading of "Unfinished Business" in the minutes of meeting of April 27, 1895, the following notation appears:

Reeve Hamill called on the taxpayers present to give their views on the petition for a road from Larkin Station to Clarks Flat: and on the counter petition presented by Mrs. Greenhow and others opposing said road, in favour, of another. Mr. J. Dunne stated that he was still of opinion that the Larkin Clarks Flat Road was the best for all parties and as he had

spoken fully on the subject at last meeting he had nothing more to say.

Mrs. Greenhow spoke opposing Larkin Clarks Road as it would cut into her property and supported the argument mentioned in counter petition.

Mr. Thos. LeDuc said he did not oppose either of the petitions as he thought an outlet was necessary somewhere but as he had signed a petition for Larkin Clarks Flat Road he recommended same in preference to the counter petition - all he wanted was that the best road be gazetted. ...

The Board of Works were then called upon for their report on above roads. Coun. Mathison reported that a cross road was necessary, that he and the other members of the Committee went over Larkin Clarks Flat Road and considered it a good one - that he did not see the counter road until after they had gone over that petitioned for by Dunne and others but on going over it subsequently was of the opinion that the grade would be very heavy and the construction expensive, and also that the crossing of the meadow was very wide and that he had come to the conclusion, that a saving of 100% would be gained by adopting the Larkin Clarks Flat Road.

Coun. Schubert reported that in his judgment Larkin Clarks Flat Road was the easiest to be built and to maintain, that there was less timber on it and the grade much easier and in every way the proper road ...

...

Moved by Coun. Cummins, seconded by Coun. Schubert "that the Larkin Clarks Flat Road as reported and recommended by Coun. Mathison be adopted". Carried unanimously.

[8] At the council meeting of May 25, 1895, it was moved, seconded, and carried that:

Coun. Cummins be authorized to employ a licensed surveyor to survey Larkin Clarks Flat Road and get what assistance may be necessary.

[9] At a special meeting of the council on June 12, 1895, several bills were presented by the finance committee and council ordered to be paid the following:

R.S. Pelly, P.L.S. for surveying Larkin Clarks Flat Road and expenses - \$16.00

R.S. Pelly - Writing desk for clerk - \$12.00

Joe Dunne - Road work and assistance on survey - \$11.00

[10] In addition, By-Law 13, which became the by-law with respect to Larkin Clarks Flat Road, passed its first and second readings at that meeting.

[11] At the July 6, 1895 meeting of the council, it was determined that tenders would be called for Larkin Clarks Flat Road and that no payments were to be made until after October. The value set for the tender was \$250.00. At that same meeting, By-Law 13 came forward for third reading. The minutes reflect the following:

Moved, seconded and resolved that by-law no. 13 (highway by-law) pass its third reading - Moved, seconded and resolved that this council hold a special meeting on Monday the 8th inst. to reconsider and finally adopt by-law no. 13.

[12] Minutes of a special meeting of the council held on July 8, 1895 reveal that the council met to reconsider and finally adopt By-Law 13. The minutes reflect that By-Law 13 was reconsidered and finally adopted, "and ordered to be published in B.C. Gazette and Vernon News".

[13] On July 18, 1895, notice of "Spallumcheen By-Law No. 13" was published in the British Columbia Gazette, as follows:

The Reeve and Council of Spallumcheen Municipality enact the following:-

Roads Gazetted as public highways:-

No. 1 - Starting from centre of Section 12, Township 7; thence west 147 chains; thence north-westerly on line of Pelly's survey, as entered on the minutes of Spallumcheen Municipal Council, June 12, 1895.

...

All said roads to be 40 feet wide, and where following boundary line of Lots 20 feet to be on each side of line.

Passed the Municipal Council the 6th day of July, 1895.

Reconsidered and finally passed on the 8th day of July, 1895.

[L.S.]

John Hamill, Reeve

R.S. Pelly, C.M.C.

[14] The Gazette publication concluded with the following:

Notice

The above is a true copy of a by-law passed by the Municipal Council of the Corporation of Spallumcheen on the 8th day of July, A.D. 1895, and all persons are hereby required to take notice that anyone desirous of applying to have such by-law, or any part thereof, quashed, must make his application for that purpose to the Supreme Court within one month next after the publication of this by-law in the British Columbia Gazette, or he will be too late to be heard in that behalf.

R.S. Pelly, C.M.C.

jy18

[15] The same highway description and notice was advertised in the Vernon News on July 18, 1895, and a certified true copy of the same was marked as an exhibit in the hearing before me.

[16] At the council meeting of March 28, 1896, it was reported to the council that communication had been received from Mrs. Greenhow reporting that Larkin Clarks Flat Road was free of gates and open to the public. At the same meeting, it was resolved that Councillor Cummins be empowered to receive tenders for a viaduct on the Larkin Clarks Flat Road near Clinton and it was resolved that tenders be called for gravelling and repair to the Larkin Clarks Flat Road near the bridge over the creek. At the meeting of April 25, 1896, the tender of Charles Seymour for \$70.00 was accepted for the gravelling of the Larkin Clarks Flat Road.

[17] At the June 27, 1896 meeting, it was resolved that the Municipality would pay a bulk sum of \$25.00 towards the bridge to be made over the Otter Lake drain on Larkin Clarks Flat Road. The July 25, 1896 meeting resulted in a resolution that one of the councillors be empowered to call for tenders for a bridge on Larkin Clarks Flat Road over the Otter Lake drain and that the same councillor and the reeve be empowered to open the same and to award a contract on August 15th. At the meeting of August 29, 1896, it was reported to council that a tender of \$55.00 to build the bridge had been accepted.

[18] Various reports to the council followed with respect to the construction of the bridge on Larkin Clarks Flat Road, including references to a dispute that arose between the Municipality and the contractor, Joe Dunne. The work was finally reported to council as being complete on November 25, 1896. Council authorized the payment of \$90.00 to Joe Dunne at that meeting for bridge construction.

[19] Counsel have been unable to produce the transfer or transfers between the original Crown grantee, Thomas Greenhow, and any subsequent owners. Land Registry records do make it clear, however, that by 1912, the Land and Agricultural Company of Canada (the "LACC") was the owner of a large parcel of land which included what has become the plaintiff's

property. On December 13, 1912, the LACC conveyed a portion of its land to the Canadian Northern Pacific Railway (the "CNPR") for a right-of-way. The certificate of title for the right-of-way which passed through Sections 34 and 35 of Township 8 was given the number 861D. The indenture and plan, also numbered 861D, were filed in the Land Registry Office. Plan 861D shows the right-of-way which was granted to the CNPR, and shows that the right-of-way was intersected by a road called the Larkin Road.

[20] The Township has located a map published on November 30, 1921, by the Department of Lands, British Columbia, entitled "Vernon Sheet, Map No. 4J". On that sheet, there is clearly a road depicted which I am satisfied is what had been referred to by the council for the Township until that time as the Larkin Clarks Flat Road. That road is shown on the map as being intersected by a series of crosses, which according to the map's legend indicate a projected railway. I am satisfied that the crosses depict the right-of-way granted to the CNPR by the LACC.

[21] On January 2, 1927, a further indenture was entered into between the CNPR and the LACC, and a third party, John Cousins. The recitals indicate that the indenture was being entered into as a result of errors, defects or omissions which

had been found in the plan of right-of-way attached to the deed deposited as Plan 861D in the Land Registry Office. The recitals also indicate that in order that such errors, defects, and omissions might be corrected and the boundary between the right-of-way and the adjoining lands might be more certainly defined, the CNPR, at the request of the LACC, had a fresh survey and a plan prepared of the right-of-way. That plan, according to the recitals, had been deposited in the Land Registry Office at Kamloops as Plan A524. That plan does not show the Larkin Road, nor, indeed, any of the other roads shown on Plan 861D.

[22] Although Plan A524 was completed on August 8, 1921, it was not deposited at the Land Registry Office until February 18, 1924. In the interim, the LACC subdivided the land surrounding the right-of-way. The plan with respect to the subdivision was filed on May 16, 1922, as Plan 1817. That plan clearly illustrated the road to Larkin intersecting the CNPR right-of-way. The plan was signed by the owners, the LACC, approved by the Municipality of Spallumcheen, and certified by a surveyor.

[23] A further subdivision of the LACC's property in this area was deposited October 1, 1924, as Plan 1959. It again showed the right-of-way, and clearly showed the road intersecting the

right-of-way. The road, on Plan 1959, is labelled "Public Road". It was signed by the owners of the land, the approving officer of the Municipality of Spallumcheen, and certified by a surveyor.

[24] It is of note that both of the subdivisions and resulting plans were expressly dealt with in the January 2, 1927 indenture between the CNPR and the LACC, and Mr. Cousins, who owned property adjoining the right-of-way. The 1927 indenture included the following recital:

AND WHEREAS those parts of Lots thirty-five (35) and thirty-three (33) Group one (1) which adjoin the said right of way have been subdivided by the Party of the second part as shown on subdivision plans 1817 and 1959, and the said subdivision plans conform as to the said right of way with the said plan A524 and none of the lots which are shown on the said subdivision plans as adjoining the said right of way are now owned by the party of the second part, but all of the said lots are owned under Certificates of indefeasible title by various persons.

[25] In 1973, Plan 24374 was filed at the Land Registry Office. It created a further subdivision of lots originally created by Plan 1959, and also provided for additional road dedication and widening of the Larkin Cross Road. Again, this plan clearly illustrates the road intersecting with the right-of-way.

[26] On February 27, 1986, Plan 36407 was filed in the Land Title Office, creating a subdivision of Lots 4 and 5 from Plan 1959 and a part of Plan A524, the plan which had amended Plan 861D concerning the right-of-way. By Plan 36407, the CNPR's right-of-way was subdivided. Plan 36407 again clearly showed the Larkin Cross Road, and its intersection with the right-of-way illustrated on Plan A524.

[27] There is documentary evidence of some work having been done on the Larkin Cross Road in 1971, as a result of permission granted by the Township to the Larkin Waterworks District to lay a water line crossing. It was a condition of the permission being granted that the surface would be restored to its original condition. Other issues with respect to the Larkin Cross Road were dealt with by the council of the Township in the early 1980s, as reflected in minutes attached to the affidavit of Bevin Keith, the administrator for the Township. There is other evidence before me with respect to expenditures of funds by the Township on the road in more recent years. Although counsel for the plaintiff objects to the admissibility of some of the documents with respect to town budgets, I am prepared to admit those documents into evidence, and I accept that there were public funds expended

on the road in more recent years, both before and after the plaintiff's acquisition of the plaintiff's property.

[28] The Township has also obtained aerial photographs taken of the area in 1950, 1972, 1978, 1981, 1984, and 1990. Those aerial photographs clearly show the existence of the Larkin Cross Road in the years those photographs were taken.

[29] The Township has located numerous long term residents of the area in question, and has filed affidavits signed by them with respect to their knowledge of the road in question. In particular, Matt Hassen, has sworn an affidavit attesting to the fact that he was born on May 8, 1915, in Armstrong, B.C., and for his entire life, with the exception of the period from 1939 to 1946, he has lived in the Armstrong area. To Mr. Hassen's knowledge, Larkin Cross Road, as it is now most commonly known, was constructed prior to his birthdate, and throughout the course of his life he has travelled on the Larkin Cross Road on many occasions. He has, over the years, observed horse drawn sleighs, cars, trucks, buses, and commercial vehicles using the road. Mr. Hassen recalls speaking to Maria MacDonald many years ago with respect to the Larkin Cross Road. She advised Mr. Hassen that the Larkin Cross Road had existed "since at least 1880". Ms. MacDonald passed away approximately 30 years ago at the age of 93.

[30] A second long-time resident, Tom LeDuc, was born on September 25, 1914, in Armstrong. With the exception of the period of 1946 to 1949, he has lived in the Armstrong area for his entire life. He is a grandson of Joseph Dunne, who lived in Spallumcheen during the 1880s. In or around 1884, Mr. LeDuc's grandfather purchased property on Larkin Cross Road. Mr. LeDuc was advised, many years ago, by his mother, Catherine Dunne, that his grandfather was involved in the initial construction of the Larkin Cross Road, which information is corroborated by the Township's Council Meeting minutes, to which I have earlier referred. He deposes that he has travelled on the Larkin Cross Road by car and by foot on many occasions, and that he has observed many vehicles using the road including cars, trucks, farm vehicles, and commercial vehicles. As far as he is aware, the Larkin Cross Road has always been open for use by the public.

[31] I pause here to note that with respect to the hearsay evidence contained in the affidavits of Mr. Hassen and Mr. LeDuc with respect to things they were told concerning the origin and construction of the Larkin Cross Road, I am satisfied that such evidence is admissible on the application before me, for the reasons articulated by Toy, J. in *Silverton v. Hobbs and Jupp* (1985), 60 B.C.L.R. 288 at 291.

[32] Several other residents of the area, born somewhat more recently than Mr. Hassen and Mr. LeDuc, have also sworn affidavits. Les Melish lived in Larkin between 1930 and 1940, and he recalls catching the school bus in Larkin and riding it, along the Larkin Cross Road, to the school in Armstrong. He recalls the Larkin Cross Road being used by horse drawn wagons. Other residents, born in the 1930s, similarly provide evidence with respect to the continuous public use of the Larkin Cross Road for as long as they can recall.

[33] Those affiants also provide evidence with respect to work performed on the Larkin Cross Road, including such matters as paving. One of the former employees of the Township who has sworn an affidavit, Keith McCord, was involved in paving a large portion of the Larkin Cross Road in the 1960s on behalf of the Township; he was involved in building culverts across ditches along Larkin Cross Road; and during the course of his employment with the Township, he assisted in snowplowing and sanding during the winter months to allow school bus access and public use. Occasionally, he cut brush along the sides of the Larkin Cross Road in the summer months. He retired from his employment with the Township in August of 1995.

[34] With that recitation of the history of the property in the area and the road, I turn now to the acquisition of the

property in issue by Mr. Loohuizen and his companies. The first written contact, on the evidence, between Mr. Loohuizen and the CNR, the successor to the CNPR, was a letter dated November 20, 1995, from Mr. Loohuizen, at the address of 4580 Larkin Cross Road, to the CNR. The letter followed a telephone conversation between Mr. Loohuizen and someone on behalf of the CNR of November 17, 1995. Attached to the November 20, 1995 letter was a map on which Mr. Loohuizen highlighted property he owned at the time and the portions of the CNR's right-of-way he was interested in purchasing. The map is an overview of the area in question, and clearly shows the Larkin Cross Road crossing the right-of-way, although not in the precise area of the portion of the right-of-way Mr. Loohuizen was then expressing an interest in purchasing.

[35] In that initial correspondence, Mr. Loohuizen offered to purchase two specific pieces of property, one of which was shown on Plan A330, which the CNR no longer owned. With respect to the other piece of property, shown on Plan A524, the CNR accepted Mr. Loohuizen's offer, and prepared a form of offer to purchase and agreement of purchase and sale. By December 1, 1995, Mr. Loohuizen had retained counsel for the purpose of completion of the transaction, and the sale with respect to that piece of property completed in January.

[36] On January 3, 1996, the land sales manager for the CNR's property company wrote to Mr. Loohuizen's counsel, attaching a plan showing additional land owned by the CNR in which Mr. Loohuizen had apparently expressed interest. The property shown on the plan sent January 3, 1996 is the property now in issue. On that same date, another employee of that company, Lucille Krol, sent Mr. Loohuizen a further form of offer to purchase and agreement of purchase and sale with respect to the property now in issue. Attached to that letter were two maps, one showing a close-up of the portion of right-of-way which was being sold and the second being a map, with a rough rectangle drawn on it showing the approximate area of the property in question. The rectangular box on the map, representing the right-of-way property, is clearly shown as intersected by the Larkin Cross Road.

[37] I pause here to note that counsel for the plaintiff objects to the admissibility of the map, and other documents, on the basis that Ms. Krol admitted on cross-examination on her affidavit that she did not, in January of 2000, have a direct recollection of mailing the letter and attachments to Mr. Loohuizen. She based her sworn statement in her affidavit on her review of the CNR files. Mr. Loohuizen has not denied that he received the letter and attachments. I am satisfied

that Ms. Krol was entitled to review the CNR files to refresh her memory with respect to the mailing of a letter and attachments four years ago. I am satisfied that the letter and attachments are admissible. I will say, however, that my ultimate decision in this case does not depend upon the letter and attachments being before me on the applications.

[38] On January 11, 1996, Mr. Loohuizen's counsel returned the signed offer to purchase and agreement of purchase and sale with respect to the two pieces of property I have been referring to as the plaintiff's property. On January 24, 1996, the conveyance co-ordinator for the CNR delivered to Mr. Loohuizen's counsel the vendor's statement of adjustments and the executed Form A freehold transfers with respect to the property for registration. It is significant to note that both the vendor's statement of adjustments and the Form A freehold transfers include the legal descriptions in full, including the notations "except Plan 36407" with respect to both properties. Plan 36407 is one of the plans, referred to earlier, which showed the Larkin Cross Road intersecting the right-of-way shown on Plan A524.

[39] It was a term of the agreements between the CNR and Mr. Loohuizen that the purchaser had inspected the property and accepted the property as is. I will also add here that each

of the documents with respect to the purchase of all of the lots by Mr. Loohuizen or his companies from the CNR gave a Larkin Cross Road address for Mr. Loohuizen and as the registered office for Kimsquit.

[40] Before I complete my review of the relevant evidence, I will finally deal with the evidence before me from the surveyors retained by the plaintiff and the Township. Richard Bartell is the surveyor retained by the plaintiff with respect to this matter. He has plotted the survey by R.S. Pelly entered in the Township council meeting minutes of June 12, 1895, and has compared that to a survey of the actual road as identified on Plan 1817, Plan 1959 and Plan 24374, all of which I have referred to earlier. There are points where the Pelly survey and the road do not agree precisely. Mr. Bartell concludes that in his professional opinion, "that portion of the road located in 1895 from the west end of Larkin Cross Road to the terminus of the "tie line" is not the same road which is shown on" Plans 1817, 1959 or 24374.

[41] Robert Flynn is the surveyor retained by the Township to assist with "determining whether the road known as the Larkin Cross Road within the Township was previously surveyed and dedicated as a public highway by notice published in the British Columbia Gazette". He has made an attempt to obtain

the original survey notes of Mr. Pelly from 1895, but the Corporation of Land Surveyors has no record of the notes. The Office of the Surveyor General Crown Land Registry Services in Vancouver has been able to provide Mr. Flynn with survey notes for the area in question dated in or around May, 1877, and a section plan for the Osoyoos District Township 7. Using those documents and analyzing Mr. Pelly's survey, as recorded in the Gazette notice and the Township council meeting minutes, Mr. Flynn has concluded that the first leg of the road surveyed by Mr. Pelly corresponds with the same road shown as intersecting the southeast corner of the N.E. $\frac{1}{4}$ of Section 10 on Plan 1817.

[42] He has then further analyzed Mr. Pelly's survey and made some adjustments for the Compass Adjustment Rule, which attempts to take into account any inaccuracies inherent in the use of compass bearings in surveying. Based on that analysis, he has found that the adjusted measurements illustrate a close alignment between the beginning and end sections of the Pelly road survey and the Larkin Cross Road. He has also performed a comparison of the roads illustrated on Plans 1819, 1959, 24374 and 36407, and has concluded that the Larkin Cross Road has existed in the same location since at least 1921, the date of Plan 1817. Based upon all of his investigations and analyses, Mr. Flynn provides the professional opinion that:

Despite the discrepancies ... the road known as the Larkin Cross Road is probably the same road which was surveyed by ... Pelly in or around June 1895 and which was dedicated as a public highway by the Township in a Gazette Notice which was published in the British Columbia Gazette on or about July 18, 1895.

DISCUSSION

[43] The Township takes the position that the road which is today known as the Larkin Cross Road, which road traverses the plaintiff's property, is a public highway. The Township's position is that the Larkin Cross Road became a public highway in any one of four alternate ways, none of which are mutually exclusive from the others. The four methods relied upon by the Township are as follows:

- (a) Expenditure of public monies on a travelled road, pursuant to s. 4 of the **Highway Act**, R.S.B.C. 1996, c. 188, and its predecessors;
- (b) A common law dedication of the road by an owner;
- (c) Dedication by deposit of a subdivision plan showing a portion of the land as a highway, **Land Title Act**, R.S.B.C. 1996, c. 250, s. 107, and its predecessors;
and
- (d) Dedication by way of a public notice published in the British Columbia Gazette.

I will deal with each method in turn.

(a) **Expenditure of Public Monies on a Travelled Road,
Pursuant to s. 4 of the *Highway Act*, R.S.B.C. 1996, c.
188, and Its Predecessors**

[44] Prior to 1905, "highway" was statutorily defined to mean all public wagon roads and bridges (*Highways Nuisances Removal Act*, S.B.C. 1888, c. 56) and later, all wagon roads, streets, lanes, and bridges (*Highways Traffic Regulation Act*, R.S.B.C. 1897, c. 92). In 1905, the *Highways Establishment and Protection Act*, S.B.C. 1905, c. 226, s. 2 provided as follows:

All existing travelled roads not established prior to the passing of this Act by notice in the British Columbia Gazette, or otherwise dedicated to public use by a plan deposited in the Land Registry Office for the district in which the roads are situated respectively, on any portion of which public money has been expended, shall be deemed and are hereby declared to be public highways.

[45] In the *Highway Act*, R.S.B.C. 1924, c. 103, the same wording was re-enacted as section 6, with the exception that the section was extended to cover all travelled roads existing on the 16th day of December, 1922. In the *Highway Act*, S.B.C. 1930, c. 24, the section was amended to apply to all travelled roads existing on the 1st day of April, 1930. In 1945, there was a substantive change made to the legislation, by the elimination of the words "on any portion of which". In 1972,

there was a further substantive change to section 6, by an addition of the following:

- (2) This section does not apply where
 - (a) the expenditure of public money is confined to expenditure in respect of snow plowing or ice control; or
 - (b) the travelled road forms part of an existing railway right-of-way and was, at the time public money was expended on it, owned by the Crown, a Crown corporation of agency, or formed part of a railway right-of-way.

[46] As stated by Legg, J.A., for the court, in *Emmett v. Arbutus Bay Estates Ltd.* (1994), 88 B.C.L.R. (2d) 72 at 81:

Under the provisions of the Act, as amended up to 1945, public expenditures need not relate to every portion or section of a travelled road before it could be deemed to be a public highway. It was sufficient for the statute to operate that public monies had been expended on any portion of the travelled road.

[47] Further, it is clear that once a road becomes public it remains public: *Brady v. Zirnhelt* (1998), 57 B.C.L.R. (3d) 144 at 152 (B.C.C.A.). As quoted in *Emmett v. Arbutus Bay Estates Ltd.*, *supra*, from I.M. Rogers, The Law of Municipal Corporations, vol. 2 (Toronto: The Carswell Co. Ltd., 1971), at p. 1203 (s. 230.1), "once a highway, always a highway".

[48] In this case, the first question before me is whether the Township can prove that prior to 1945, Larkin Cross Road was a road which was travelled by the public and on any portion of which public funds were expended. The burden of proof upon the Township is a preponderance of probabilities, which requires cogent and substantial evidence: ***Dunstan v. Hells Gate Enterprises Ltd.*** (1987), 20 B.C.L.R. (2d) 29 at 41 (C.A.).

[49] On the evidence, I am satisfied that by no later than March of 1896, a road then described as Larkin Clarks Flat Road existed as a public road, travelled freely by the public, without restriction of access. It is clear that the area surrounding the Larkin Clarks Flat Road was being developed, as evidenced by the subdivisions to which I referred earlier. Based on the affidavits of the long term residents in the area, the Township has established that the road was travelled by various and miscellaneous vehicles, from horse drawn buggies to school buses.

[50] Other than a variation between portions of the road which was surveyed in the 1890s and the road which exists today, which variation I referred to earlier and will deal with shortly, there is not a hint of a suggestion that the road which was built by the Township in the 1890s and opened to the

public by no later than 1896, is not the same road which exists today and is called the Larkin Cross Road. Indeed, Mr. Flynn, the surveyor for the Township, has deposed that the road as surveyed and shown in plans filed as early as 1921 has not changed in dimension or location, other than by widening, since 1921.

[51] With respect to the expenditure of public funds on the road, there are meeting minutes which establish the expenditure of public funds on at least a part of the road in the late 1890s, after the surveying of the road and the construction of the road initially. Although the sums expressly referred to in the minutes are not large by today's standards, I do not consider them to be trivial, casual or insignificant for the time, taking into account other expenditures and budget items disclosed in the same minutes. Despite the inability to find meeting minutes proving expenditures after the late 1890s and before the early 1970s, I am prepared to infer, on the evidence, that the road has been regularly maintained and upgraded at public expense since the late 1890s.

[52] I am further satisfied that the Larkin Cross Road was a public highway prior to 1912, when the then owner of the land, the LACC, conveyed a portion of its land to the CNPR for a

right-of-way. That conclusion is supported by Plan 861D, which accompanied the indenture and which clearly shows the Larkin Road. Consequently, I am not persuaded by the plaintiff's arguments with respect to the railway right-of-way and particularly, the amendment in 1972 to the **Highway Act**, which the plaintiff argues was the codification and confirmation of the law then existing, with respect to section 4 of the **Highway Act** having no application to railway right-of-ways.

[53] It follows that I am fully satisfied that the Larkin Cross Road was, well before 1945, an existing road, travelled by the public, and upon which public funds were expended. I find that the Larkin Cross Road was and is a public highway by virtue of what is now section 4 of the **Highway Act**, and the defendants are entitled to a declaration to that effect.

(b) A Common Law Dedication of the Road by an Owner

[54] It is clear that a road can be dedicated, by a land owner, as a public highway. The elements required to support a common law dedication are: (1) the owner of the land had an actual intention to dedicate the land; and (2) the intention was carried out by way of the road being opened to the public and accepted by the public: **Bailey v. Victoria** (1920), 54 D.L.R. 50 (S.C.C.); and **Brady v. Zirnhelt**, *supra*, at p. 155.

As clearly stated in *Brady v. Zirnhelt*, *supra*, at p. 156, evidence concerning the use of a road can found inferences with respect to both elements.

[55] As I have already indicated, a continuous public use of the Larkin Cross Road has been proven on the evidence before me, since at least the turn of the 19th century. As in the case before the Alberta Court of Appeal in *Foothills (Municipal District No. 31) v. Stockwell*, [1986] 1 W.W.R. 668, the road in question connects two other public highways. No effort has been made, in over a century, to prevent the public from using the road, by any of the plaintiff's predecessors in title including Mrs. Greenhow, the LACC, the CNPR, and the CNR.

[56] I also find that Plan 861D is evidence of at least an acquiescence or concurrence by the LACC, and subsequently by the CPNR, to the public nature of the Larkin Cross Road, and the expenditure of public funds for maintenance on the same. Further, Plan 36407, which was deposited in the Land Title Office in February of 1986, is a subdivision of the CNR's right-of-way, as originally shown on Plan A524. Plan 36407, illustrating, as it clearly does, the bisection of Plan A524 by the Larkin Cross Road, is further evidence of notice to the

CNR of the existence of the road, and acquiescence, at least, by the CNR to the public nature of the Larkin Cross Road.

[57] I am satisfied that an intention to dedicate and a corresponding acceptance by the public can properly be taken from the evidence before me. It follows that I am satisfied that the Township has proven common law dedication, in addition to dedication by operation of section 4 of the *Highways Act*.

(c) **Dedication by Deposit of a Subdivision Plan Showing a Portion of the Land as a Highway, *Land Title Act*, R.S.B.C. 1996, c. 250, s. 107, and Its Predecessors**

[58] The Township also relies upon the provisions of the *Land Title Act*, and particularly, s. 107. Section 107 of the *Land Title Act* provides as follows:

- 107 (1) The deposit of a subdivision, reference or explanatory plan showing a portion of land
 - (a) as a highway, park or public square, that is not designated on the plan to be of a private nature, or
 - (b) is covered by water and is laying immediately adjacent to a lake, river, stream or other body of water not within the land covered by the plan, and designated on the plan to be returned to the government
 - (c) operates as an immediate and conclusive dedication by the owner to the public of that portion of land shown as a highway, park or public

square, or to be returned to the government, for the purpose indicated on or to be inferred from the words or markings on the plan.

[59] As I have indicated, the LACC became the owner of the land in dispute sometime prior to 1912. The indenture of December 3, 1912 resulted in a transfer of some of the LACC's land to the CNPR for a right-of-way. Plan 861D, deposited with the indenture, is clearly a "subdivision, reference or explanatory plan". It illustrates Larkin Road, as well as the Vernon Kamloops Road and a third road, not named. None of those three roads were designated to be private in nature.

[60] The plaintiff argues that the way in which the Larkin Road is drawn on the plan, together with the wording in the indenture between the LACC and the CNPR, supports an inference that the parties considered the Larkin Road to be a private road. I cannot draw any inferences, as the plaintiff suggests I should, with respect to the way in which the Larkin Road is drawn. I cannot find the method of illustration of the Larkin Road to be any different than the illustration of the other roads on the plan. Similarly, I cannot take anything from the section of the indenture which provides that the owner (the LACC) has done nothing to encumber the lands. Indeed, such a representation in the indenture is consistent with my earlier

finding, namely that the Larkin Cross Road was, prior to 1912, already a public highway, and the LACC knew of the existence of the public highway when it became the owner of the land in that area.

[61] If Plan 861D, signed by the LACC and registered by the CNPR, were not enough, then Plans 1817, 1959, 24374, and 36407 are all subdivision plans, clearly illustrating the Larkin Cross Road.

[62] I am satisfied, as an alternative to the Township's other grounds, that if the Larkin Cross Road was not a public highway by virtue of any other means, it certainly became one as a result of the operation of section 107(1) of the **Land Title Act** and the depositing of any one of the plans to which I have just referred.

(d) Dedication by way of a Public Notice Published in the British Columbia Gazette

[63] The **Municipal Act, 1892**, S.B.C., c. 33, as amended by the **Municipal (Amendment) Act**, S.B.C. 1895, c. 41, included the following provisions:

Section 104

In every municipality the Council may, from time to time make, alter and repeal by-laws for any of the following purposes, or in relation to matters coming within the classes of subjects next hereinafter mentioned, that is to say: -

Section 104 (107)

For establishing, opening, making, preserving, improving, repairing, widening, altering, diverting, or stopping up roads, streets, squares, alleys, lanes, bridges, or other public communications within the boundaries of the Municipality or the jurisdiction of the Council, and for entering upon, expropriating, breaking up, taking, or using any real property in any way necessary or convenient for the said purposes without the consent of the owners of the real property, subject to the restrictions contained in sections 269, 270, 271, and 272 of this Act:

Section 122

Every by-law passed by the Council shall be reconsidered not less than one day after the original passage, and if adopted by the Council and signed by the Mayor or Reeve, or confirmed by the municipal electors, as herein provided, shall come into effect, and be binding on all persons, after the publication of the same in the British Columbia Gazette and in some one or more of the newspapers selected by the Council and circulating in the municipality, unless the date of its coming into effect is otherwise postponed by such by-law.

Section 123

Every by-law shall be under the seal of the corporation, and shall be signed by the Mayor or Reeve, as the case may be, or by the person legally presiding at the meeting at which the by-law has been passed, and by the Clerk of the Council.

Section 124

Every promulgation of a by-law shall consist in the publication in the British Columbia Gazette of a true copy of the by-law, and of the signature or signatures attesting its authenticity, with a notice appended thereto of the time limited by law for application to the Courts to quash the same, or any part thereof.

Section 125

The notice to be appended to every copy of the by-law for the purpose aforesaid shall be to the effect following: -

"Notice"

"The above is a true copy of a by-law passed by the Municipal Council of the _____ of _____ on the _____ day of _____ A.D. 18____, and all persons are hereby required to take notice that anyone desirous of applying to have such by-law or any part thereof quashed may make his application for that purpose to the Supreme Court within one month next after the publication of this by-law in the British Columbia Gazette, or he will be too late to be heard in that behalf."

Section 126

Evidence of any by-law made before or after the passing of this Act may be given in all Courts of the Province in any of the modes hereinafter mentioned, that is to say -

- (1) by the production of a copy of the British Columbia Gazette purporting to contain a copy of such by-law or by-laws;

...

- (3) in case no application to quash a by-law is made within one month next after the publication thereof in the British Columbia Gazette, and notices provided in section 125 of this Act, the by-law, or so much thereof as is not the subject of any such application, or not quashed upon such application, so far as the same ordains, prescribes, or directs anything within the proper competence of the Council to ordain, prescribe, or direct, shall, notwithstanding any want of substance or form, either in the by-law itself or in the time or manner of passing the same, be a valid by-law.

[64] I have before me evidence with respect to the passing of the by-law, and the publishing of notice of the by-law in the local newspaper and in the British Columbia Gazette. I am satisfied that the by-law was validly passed.

[65] The plaintiff argues that there is no evidence that the Township complied with sections 269 to 272 of the **Municipal Act, 1892**, dealing with compensation for real property taken. I am not able to find, 105 years after the event, that the by-law was invalid on the basis of a purported failure to comply with sections 269 through 272. Any such argument, if supported by the evidence, may well have been open to the owner of the property at the time the by-law was enacted. I cannot, however, find that it is open to the plaintiff in this action to challenge the by-law now. I also can give no credence to the plaintiff's arguments with respect to the suggestion that there is no evidence that the by-law was signed, particularly in view of section 126 of the **Municipal Act, 1892**, quoted above.

[66] The plaintiff also relies on the discrepancy between what was surveyed by Mr. Pelly and what was built as a basis for arguing that the Larkin Cross Road is not a public highway by virtue of public notice in the Gazette. I have carefully considered the opinions of Mr. Bartell and Mr. Flynn. While

there is a discrepancy between the road as surveyed and the road as built in the 1890s, there is, given the technology available to surveyors then, namely compasses, rods and chains, a striking similarity in my view. Indeed, parts of the survey match precisely the road as it now exists. In the immediate area of the plaintiff's property, there is less similarity than at either end of the road. However, both the surveyed centre-line and the actual road intersect the plaintiff's property. I am not prepared to find that the discrepancies, which I find to be relatively minor in nature, necessarily lead to a conclusion that the road which was Gazetted was not the road built. I prefer the opinion evidence of Mr. Flynn on this point.

[67] In summary, with respect to this issue, I am satisfied that the Larkin Cross Road is a public highway by virtue of the Gazette notice and advertisement in the Vernon News of July 18, 1895.

CONCLUSION

[68] On all of the evidence before me, and for the reasons I have given, I find that the Larkin Cross Road is a public highway. Having made that determination, it necessarily

follows that I allow the Township's application, grant the declarations sought, and dismiss the plaintiff's claim.

[69] Unless there are matters which have not been put before me which bear on the issue of costs, the plaintiff shall pay taxable costs to the Township.

"Beames, J."
Beames, J.