COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Fox v. British Columbia (Ministry of Forests, Lands, Natural Resource Operations and Rural Development),* 2023 BCCA 170

Date: 20230421
Docket: CA48268

Between:

Timothy Jon Fox and Faye Kathleen Fox

Appellants
(Plaintiffs)

And

His Majesty the King in Right of the Province of British Columbia Ministry of Forests, Lands, Natural Resource Operations and Rural Development

Respondent
(Defendant)

Before: The Honourable Madam Justice Newbury
The Honourable Madam Justice Fenlon
The Honourable Madam Justice Fisher

On appeal from: An order of the Supreme Court of British Columbia, dated April 5, 2022 (*Fox v. British Columbia (Ministry of Forests, Lands, Natural Resource Operations and Rural Development)*, 2022 BCSC 541, Kamloops Docket S60178).

Counsel for the Appellants: D.W. Draht

Counsel for the Respondent: G.N. Rudyk

Place and Date of Hearing: Vancouver, British Columbia
March 16, 2023

Place and Date of Judgment: Vancouver, British Columbia
April 21, 2023

Written Reasons by:
The Honourable Madam Justice Newbury

Concurred in by:
The Honourable Madam Justice Fenlon
The Honourable Madam Justice Fisher

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Summary:

Plaintiffs purchased a farm property near Summit Lake in 2003 through which a long-defunct railway had run in the early 20th century. A survey commissioned by the plaintiffs at the time of purchase showed a line representing the railway, but since the railway corridor seemed to have been abandoned and no reference appeared on title to a railway easement or right-of-way, plaintiffs assumed the corridor was included in the main property. In fact the corridor was the subject of a separate legal lot which is held by the Crown. Plaintiffs have carried on farm operation since 2003 and have constructed farm buildings etc. that encroach on the corridor. Province hopes to "formalize" a trail along the corridor suitable for walking and motorized traffic and issued a trespass notice to the plaintiffs in 2014. The notice demanded removal of all encroachments and full accessibility to persons using the trail. This formalized use would clearly conflict with plaintiffs' farming activities.

Plaintiffs applied under s. 36 of the Property Law Act (PLA) for a "land swap" under which the Province would trade the railway corridor for a new corridor running through the forested area of the property, or grant to the plaintiffs an easement or right-of-way in respect of the existing corridor.

Chambers judge below found that s. 36 of the PLA did not apply to the Crown, relying on s. 14(2) of the Interpretation Act. He also found that in terms of the equities between the parties, the deciding consideration was the need to protect the public interest which is reflected in the requirements of the Land Act dealing with Crown grants. He dismissed the application.

Held: Appeal dismissed. CA agreed that s. 36 of the PLA was not binding on the Province by virtue of s. 14 of the Interpretation Act. District of West Vancouver (Corporation of) v. Liu (2016 BCCA 96) distinguished. CA also agreed that the equities were in favour of protecting the public interest in connection with grants of Crown land. However, CA also noted that it was open to the plaintiffs to apply under the Land Act for the grant of an easement or right-of-way or a Crown grant of fee simple in respect of the corridor — which application the Province had said it would consider. Court noted the comments of the Agricultural Land Commission concerning the negative impact of the use of the corridor as a formal trail on the plaintiffs' farm operation.

Reasons for Judgment of the Honourable Madam Justice Newbury:

[1] This appeal concerns a strip of land in the Slocan River Valley that, for about a century ending in 1989, formed the bed of a now-forgotten railway, the Nakusp and Slocan Railway. The part of the strip that is relevant to this proceeding was surveyed in 1899 as District Lot 5391. Although the plaintiffs were unaware of this fact until recently, I believe it is now common ground that plans representing the

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survey of DL 5391 were filed in the Crown Land Registry and in the Land Title Office in Nelson in or about 1899. Title to DL 5391 was granted by the Crown in right of the Province to the railway company in 1901. (I will refer hereafter to District Lot 5391 as the "Railway Corridor" or the "Corridor").

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[2] In 1927, a property identified as Lot 11338 was surveyed consisting of two pieces separated by the Railway Corridor. The two pieces comprised 36.7 acres and were shown on the survey, with the Corridor running between them at an angle (the north end being farther west than the south end). It appears the Crown granted title to DL 11338 in 1945 to one Mary Markin.

[3] In 2003, the plaintiffs Mr. and Mrs. Fox purchased DL 11338 in a foreclosure sale. Mr. Fox deposes:

> Upon viewing Lot 11338 prior to purchase, there was no markings of any kind to indicate property lines between Lot 11338 and the Railway Strip [i.e., the Railway Corridor]. I found broken down fencing on various parts of the Railway Strip indicating that the previous owners of Lot 11338 had used and occupied the Railway Strip. There was also a "No Trespassing/Private Property" sign at the north end of the Railway Strip and evidence of dirt, log and rock barricades placed to block access from both sides of the Railway Strip.
>
> Prior to purchasing Lot 11338, I paid for a land survey of Lot 11338 which was conducted on or about April 23, 2003 (the "Survey"). I attach a true copy of the Survey marked as Exhibit "A".
>
> While the general location of the Railway Strip was indicated as a landmark on the survey, there are no pins, lot name or measurements included for the Railway Strip and there are no hooks through the Railway Strip to indicate that Lot 11338 is a bisected by another piece of property, as would be required to identify a bisected lot. I attach a sample survey from the Association of British Columbia Land Surveyor as Exhibit "B".
>
> Prior to purchasing Lot 11338, I paid for a title search of the property (the "Title Search"). The Title Search made no mention of a right of way or any other interests on the property aside from Lot 11919 and Lot 13811, nor does the legal land description exclude the "railway strip".
>
> As the railway strip was close to the house and in the middle of the lot I wanted to be absolutely sure of what we were purchasing. Upon viewing the Title Search and Survey, I made an inquiry with the Land Titles Office as to the status of the lot where I was told that if no exclusions or interests were showing on the title then none exist.

> I attach a true copy of a current title search for Lot 1133 8 as Exhibit “C” which is substantially the same as the Title Search, save for the registered mortgage.
>
> Based on what I had seen on the ground, the Title Search and the Survey, the information provided by the land titles office, and statements made by the Crown <u>I formed the belief that the Railway Strip was included in Lot 11338</u>. [At paras. 5–11; emphasis added.]

(I attach Mr. Fox’s Exhibit “A” as Schedule A to these reasons.)

[4] Unbeknownst to the plaintiffs, however, their lot did *not* “include” the Railway Corridor. Rather the Corridor was a separate registered lot (i.e., DL 5391) that, because it had existed before DL 11338, was not required to be “excluded” from it. The Corridor never did and does not now form part of District Lot 11338. (I have attached as Schedule B to these reasons a copy of the survey plan of DL 11338 bearing the signature of the surveyor, Mr. Wilkie, in 1927.) As pointed out in a letter in August 2018 from a government land agency to the plaintiffs, a “hook” was shown on the official plan of District Lot 11338 to connect the two parts and the (red) outline of DL 11338 excluded the Railway Corridor, confirming that it bisects DL 11338.

[5] At some point after 1945, the Nakusp and Slocan Railway discontinued operations. In 1957, its assets (including the Railway Corridor, or DL 5391) were acquired by the CPR, which eventually removed the tracks from the railway bed. Then, in 1995, the CPR transferred the Railway Corridor and two other railway parcels to the Province. Since then, the Corridor has been “administered” by three government ministries, although it appears that the land has essentially been neglected. Indeed, as mentioned by Mr. Fox in one of his affidavits, there is broken-down fencing on much of the Corridor and there are (or were) barricades at each end. However, the Province evidently has a long-term plan to create or improve recreational trails along former railway corridors in the Province. Mr. Trent, the provincial Manager of Trails, deposes:

> The Nakusp & Slocan Rail Trail (the “NSRT”), is of both local and regional recreational interest. A 5-year planning process led by the Province appears to be near conclusion and will allow development of much of the NSRT near the plaintiffs’ property for recreational use. The stakeholders involved in the

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> planning process for the NSRT have involved community groups from New Denver, Rosebery, Nakusp, and other areas. [At para. 18.]

[6] In order to begin to develop the Rail Trail as a recreational resource, the Province found it had to seek the approval of the Agricultural Land Commission to authorize the use of 12 kilometres of the Nakusp and Slocan rail corridor that were in the Agricultural Land Reserve for "mixed motorized and non-motorized recreational trail" use. In its decision issued in June 2020, the Commission noted:

> The Corridor is currently unmanaged, titled Crown land. The tracks have been removed and the remaining ~3 m wide rail bed has been used by the public as an informal trail for approximately twenty years. As of January 29, 2020, [Recreation Sites and Trails B.C.] has issued basic maintenance authorizations under s. 57 of FRPA [*the Forest Range Practices Act*] along the length of the Corridor from Nakusp to Roseberry to accommodate safe public use. Establishing the proposed Trail as a Provincial Recreation Trail under s. 56 of FRPA will allow RSTBC to enter into a partnership agreement with multiple non-profit societies, including the Nakusp and Area Community Trails Society and the Roseberry Parkland and Trails Commission, to enable ongoing maintenance and formal management of the Trail. [At para. 10.]

[7] The Commission noted at para. 17 of its reasons an ongoing dispute between an unnamed "land owner north of Summit Lake" (i.e., the plaintiffs) whose property was bisected by the Railway Corridor and whose farm operations had been negatively affected by the current use of the Corridor as an informal trail. Although acknowledging the existence of this dispute, the Commission made it clear it had "no involvement" in it and that:

> ... it does not factor in to the Panel's consideration. Regardless of where the legal boundaries fall, the Panel acknowledges that the landowner has valid concerns about the Proposal's impact on the farm operation. To the Panel's knowledge, the Summit Lake Property is the only actively farmed parcel that is bisected by the Corridor; as such, the potential for conflict in this area is high, particularly due to the motorized designation in this section of the proposed Trail.

Ultimately, the Commission declined to grant the Province's application.

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[8] In July 2014, the plaintiffs received a Trespass Notice from the provincial government, issued under s. 59 of the *Land Act*, R.S.B.C. 1996, c. 245, charging that the plaintiffs had contravened s. 60 of the Act by:

> (a) occupying or possessing Crown land without lawful authority,
>
> (b) using Crown land without lawful authority,
>
> (c) constructing on Crown land structures without lawful authority,
>
> The details of the contravention(s) are the following: You have erected gates that block public access to crown land. You have posted signs and notices on crown land. You have constructed fences and buildings on crown land. You have parked vehicles on Crown land. You have allowed livestock grazing on Crown land.

Section 60 provides:

> A person commits an offence if the person does any of the following:
>
> (a) occupies or possesses Crown land without lawful authority;
>
> (b) uses Crown land without lawful authority;
>
> (c) being the holder of a lease, right of way, easement, licence of occupation, permit or other disposition issued under this Act, uses Crown land for a purpose not provided for in the disposition;
>
> (d) is guilty of an act or default by which a lease, right of way, easement, licence of occupation, permit or other disposition issued under this Act may be terminated;
>
> (e) constructs on Crown land a building, structure, enclosure or other works, or does or performs any dredging, excavation or filling, without the authorization of the minister;
>
> (f) abandons on Crown land any vehicle or vessel without the authorization of the minister;
>
> (g) unlawfully interferes with or removes a sign erected by or on behalf of the minister.

[9] The notice required the plaintiffs to cease their “unauthorized occupation” and use of Crown land (i.e., the Railway Corridor), to open the gates blocking access, to remove a ‘no trespassing’ sign and to remove all other improvements, fences, gates, buildings, livestock and vehicles by November 30, 2014. The notice also warned that a person who failed to comply with a trespass notice could be liable for a penalty of up to $1,000 and that the Minister could remove the offending improvements and require the plaintiffs to pay the costs of removal.

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[10] It appears that Mr. Fox was in contact around July 19, 2014 with a government official and agreed to open the “gates” to the Railway Corridor and remove “intimidating” signs. Although he would close the north gate at times to contain animal grazing, the gate would not be locked. The official apparently told Mr. Fox that as a temporary measure the plaintiffs could erect “Private Property -- Proceed with Care” signs on the Corridor.

[11] On or about July 25, 2014, Mr. Fox responded formally to the trespass notice, stating that the “fixtures” (i.e., improvements) referred to in the notice were the plaintiffs’ private property, and that the “land in question” had been “marked as private property in excess of 20 years and we have been paying tax on the land in question since purchased in 2003.” The plaintiffs did not receive any communication from the Province until 2016. Mr. Fox deposes that in the meantime, the plaintiffs believed their dispute notice had been “accepted”, and proceeded to build a horse barn, part of which was located on the Corridor. A pig barn had already been erected entirely on the Corridor, but the plaintiffs ultimately shut down the pig operation due to fears that the Province might remove it without notice, leaving the plaintiffs with nowhere to house the pigs.

[12] In June 2016, the plaintiffs received a second Trespass Notice in terms similar to the first. They were told they must pay a penalty of $3,137.50 to the Minister of Finance for failing to comply with the earlier notice, and remove “all fences, buildings and chattels from Crown land” no later than October 31, 2016. If they wished to dispute the notice, they were told to provide written reasons to the Ministry of Forests in Revelstoke no later than 30 days from the date of the notice. On June 20, Mr. Fox wrote to Mr. Hills, the Ministry’s Regional Manager of Compliance and Enforcement, reiterating his view that the plaintiffs woned the Corridor and noting that the government’s published “Trail Strategy for British Columbia” had emphasized “collaborative trail planning” to be developed “in the spirit of partnership”. The Province made no response to the latter comment, but by letter dated July 11, 2016, Mr. Hills confirmed that the Railway Corridor was Crown land. He encouraged the plaintiffs to carry out a full registry search or engage a land

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surveyor to provide an independent assessment of the status of the property. All improvements encroaching onto the Corridor were still to be removed no later than October 31, 2016.

[13] Mr. Fox asserts that with the encouragement of one or more government officials, the local community began filing complaints about the plaintiffs' use of the Railway Corridor, especially its apparent closure to "motorized use". He deposes that he and his wife have "faced verbal and written abuse, threats, vandalism, public shaming, people deliberately setting our livestock free, dead and injured livestock, thefts, personal and emotional and physical injury, etc."

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[14] In November 2017, a Notice of Seizure from the Ministry of Forests followed, and the predictable features of the dispute between the plaintiffs and the Province continued to fester, with other residents of the area joining in. The Province evidently carried out a new survey of the Railway Corridor in late 2018; the plaintiffs retained counsel; and further correspondence ensued between the parties. At some point, the plaintiffs realized that their belief that they were the owners of the Railway Corridor had been mistaken — although they continued to assert that they had relied on misleading land registry plans and had acted *bona fide* at all times. As stated by Mr. Fox in a later affidavit:

> I vehemently believe that I rightfully and in good faith purchased the Railway Strip along with Lot 11338 back in 2003 and that I still own the Railway Strip. This belief is founded in the public advertising and statements the Crown makes, the principles of the Torrens system, and the information contained in the Land Act, Land Survey Act and the Land Titles Act.
>
> I believe Crown's assertions that, an indefeasible title for a subdivided lot need not conform to the Philosophy of the Torrens system, namely, the mirror principle, the curtain principle and the insurance principle, is abhorrent and completely opposite of every advertising and public statement they make.
>
> If I do not actually own the Railway Strip, I believe that the Crown made assurances or representations to me that I was authorized to use and occupy the Railway Strip at the time of my purchase in 2003. I believe that the Crown continued to represent these authorizations until on or about July 24, 2014 when I was first issued a trespass notice. For the Crown to go back on their representation after I have relied on it would be unreasonable and unfair. [At paras. 47–49.]

[15] Finally, on September 16, 2019, the plaintiffs filed a Notice of Civil Claim ("NOCC") in the Supreme Court alleging that they had suffered loss and damage as a result of the Province's committing "the torts of trespass, nuisance and intimidation" and damage relating to the cost of paying the trespass fee, the seizure of their chattels, and accompanying stress and anxiety. The NOCC sought the following relief:

> 1. An order that the plaintiffs not be required to comply with the First Notice or the Second Notice.
> 2. An order that the Ministry either return the seized property to the plaintiffs or provide compensation to the plaintiffs for the seized property.
> 3. An order that the plaintiffs were bona fide purchasers for value of the Portion and that <u>title of the Portion be vested in the plaintiffs</u>.
> 4. <u>If the plaintiffs were not bona fide purchasers for value of the Portion, then an order that the plaintiffs be granted a life lease over the Portion.</u>
> 5. In the alternative to a life lease, <u>an order that an easement be granted over the Portion in favour of Lot 11338</u>.
> 6. General damages.
> 7. Special damages. [Emphasis added.]

(We are told that by "life lease", the plaintiffs meant a lease for as long as the encroachment remains in existence.)

[16] Under the heading "Legal Basis", the plaintiffs invoked s. 36 of the *Property Law Act*, R.S.B.C. 1996, c. 377 ("PLA"), s. 23 of the *Land Title Act*, and "the elements of proprietary estoppel". The Province joined issue on all bases, citing various provisions of the *Land Act*, including provisions to the effect that an interest in Crown land may not be acquired by prescription, occupation or colour of right. (See ss. 8(1), 23 and 25.)

[17] On May 4, 2021, the plaintiffs applied for the summary determination of their prayer under s. 36 of the PLA for the following orders:

> 1. An order vesting title of the land encroached by the Plaintiffs to the Plaintiffs upon payment of an alternative route through the Plaintiff's land or upon payment of a sum of money;
> 2. In the alternative, a declaration that the Plaintiffs have a permanent easement over the encroached land;

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> 3. In the further alternative still, an order that HMQ pay the Plaintiffs compensation for loss and damage to their land;….

[18] On May 4, Mr. Fox also filed another affidavit setting out details about the condition of the Railway Corridor, and attaching various photos describing his farm operations as they relate to the Corridor. He suggested a "bypass" that could be granted by the plaintiffs as an easement in favour of the Crown, or as a grant in its favour, in exchange for the Railway Corridor. No survey of the proposed bypass was provided — it appears simply as a wavy line drawn onto a map — but it would be farther to the east, in the forested area of DL 11338. The transfer of the Railway Corridor to the plaintiffs would of course permit their encroachments to remain in place. Mr. Fox deposed:

> It is only in the past few weeks that I have come to understand that I may have been in error in forming my beliefs about what is and is not included in the Farm. My primary skill sets are in mechanics and farming, though I have invested a considerable amount of my time in working to gain a stronger understanding of the law surrounding land use and property titles. In my own defense, I would like to point to the challenges HMQ with all its experts had in determining the correct nature of the Railway Corridor in response to my disputes letters. Through a Freedom of Information request, I received the correspondence attached and marked Exhibit "C" which shows discussion over the Railway Corridor across the Farm and is described by Robyn Begley as "quite complex" and that they had "pulled plans, data, Crown Grant titles and all documents we could find regarding" the farm.
>
> Recognizing that I have been in error all these years, I would like now to apologize for the inconvenience I have caused and come to the table in the hopes of arriving at <u>a workable arrangement with HMQ such that the rail trail proposed can go forward without making continued raising of livestock on the Farm untenable.</u> [At paras. 24–5; emphasis added.]

[19] He also described his fears concerning the plaintiffs' future farm operations if the Railway Corridor were converted to a trail for recreational use:

> Since our residence is on the west side of the Railway Corridor, the pastureland within the Railway Corridor and on the east side of the Railway Corridor will become difficult to use for livestock rearing if not altogether impossible. HMQ has informed me that I will require an easement if I were to even attempt to cross the Railway Corridor, though I am not sure I would want to bring my livestock across a recreational trail. <u>Much of the pastureland on the east side of the Railway Corridor is enclosed by fencing and used for grazing by cows, bulls and horses, each in separate pastures</u>. Before 2014 we used the grazing land on the Railway Corridor, and even on the rail bed of

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> the Railway Corridor without any issues. Nearly the entire 3.3 acres of the Railway Corridor that cuts across the Farm is useful for grazing, though we do use some of it as a roadway.
>
> Unfortunately, if the Railway Corridor is converted to a recreational trail, I do not think that my wife and I will be able to utilize the Farm for raising livestock, or, if we continue with that work, it will be reduced to well under half of what it was before this issue arose. [At paras. 56–7; emphasis added.]

Section 36 of the PLA

[20] Section 36 of the PLA provides:

> 36 (1) For the purposes of this section, "owner" includes a person with an interest in, or right to possession of land.
>
> (2) If, on the survey of land, it is found that a building on it encroaches on adjoining land, or a fence has been improperly located so as to enclose adjoining land, the Supreme Court may on application
>
> (a) declare that the owner of the land has for the period the court determines and on making the compensation to the owner of the adjoining land that the court determines, an easement on the land encroached on or enclosed,
>
> (b) vest title to the land encroached on or enclosed in the owner of the land encroaching or enclosing, on making the compensation that the court determines, or
>
> (c) order the owner to remove the encroachment or the fence so that it no longer encroaches on or encloses any part of the adjoining land.

[21] The genesis of s. 36 and the correct approach to be taken in applying it were considered at some length by this court in *Taylor v. Hoskin* 2006 BCCA 39. As noted by Madam Justice Levine for the Court, the provision first appeared as s. 12 of the *Laws Declaratory Act*, R.S.B.C. 1960, c. 213 as a consequential amendment when a new *Limitation Act* was enacted. One of its effects was to jettison the principle of adverse possession, which was inconsistent with the Torrens system of land registration. In its *Report on Limitations: Part II — General*, the Law Reform Commission had expressed the view that adverse possession could still be useful in "boundary" disputes, and recommended legislation similar to what was then s. 28 of the *Law of Property Act* of Manitoba, R.S.M. 1970, c. L90 (see *Taylor* at para. 41). In due course, a slightly expanded version of that provision was adopted in 1975 in British Columbia. When the *Laws Declaratory Act* was repealed in 1978, the

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provision became s. 32 of the *Conveyancing and Law of Property Act*, S.B.C. 1978, c. 16, and ultimately became s. 36 of the present PLA.

[22] One of the issues before the Court in *Taylor* was whether s. 36 was intended to be interpreted narrowly or more liberally. The Court found that a "broader equitable approach" was "amply supported by a consideration of the history and purpose of s. 36." The phrase "equitable approach" was, I infer, not intended to suggest that a remedy like s. 36 had been available in Equity, but that the remedy was a discretionary one to which equitable principles such as fairness apply. As noted by Chief Justice Williams in *Hrynyk v. Kaprowy* [1960] 30 W.W.R. 433 (Man. Q.B.) at 443:

> I should point out that any relief given by the court under sec. 29 [the equivalent of s. 36 of the PLA] is entirely discretionary .... In exercising its discretion the court, as has been seen, proceeds upon equitable principles. [At 443.]

In *Taylor* itself, the Court affirmed a trial judge's order for a "land swap" under s. 36, following an earlier land swap case, *Tai Wo Enterprises Ltd. v. 338822 B.C. Ltd.* [1996] B.C.J. No. 70 (S.C.).

Trial Judge's Reasons

[23] The plaintiffs' application for summary determination came on before Mr. Justice Hori on February 20, 2022, and he issued his reasons, indexed as 2022 BCSC 541, on April 5, 2022. He began by providing a brief summary of the facts, including the following:

> Mr. Fox also paid a surveyor to prepare a land survey of DL 11338 before the plaintiffs purchased the property. The survey prepared for Mr. Fox clearly showed the Railway Corridor bisecting DL 11338. However, Mr. Fox explains that because the Railway Corridor on the survey did not show pins, a property description, measurements or hooks, he concluded that the Railway Corridor on the survey plan was merely a landmark from a previous time. However, Mr. Fox did not discuss the existence of the Railway Corridor on the survey plan with the surveyor, nor did he ask the surveyor why the Railway Corridor was shown on the survey.
>
> Mr. Fox also conducted a title search which made no mention of a right-of-way or any other exclusions from DL 11338 other than Lot 11919 and Lot 13811.

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> Based on the results of Mr. Fox's inquiries, the plaintiffs believed that title to DL 11338 included the Railway Corridor. [At paras. 20–22.]

[24] The judge found that the plaintiffs had "constructed structures within the boundaries of the Railway Corridor", including a fence that runs along both sides of the Corridor in some locations, the pig barn entirely within the Railway Corridor, and part of the horse barn. The plaintiffs estimated that the cost of removing the two barns would be about $110,000.

Applicability of s. 36 to Crown Land

[25] The Province took the position that s. 36 of the PLA could have no application in this case. First, it said, the dispute between the parties was a "dispute about title" and not a "boundary dispute". The summary trial judge rejected this argument, given that the plaintiffs had conceded that title to the Railway Corridor was vested in the Province and given that the plaintiffs were proposing a land swap — i.e., an arrangement under which the Crown would transfer the Railway Corridor to the plaintiffs in exchange for a similar strip of land much closer to the eastern boundary of DL 11338. In any event, the judge said, most boundary encroachment disputes are "title" disputes in that the encroaching parties believe, or at least initially believed, that they owned the land onto which they had encroached (at para. 39).

[26] The Crown's second major defence was that s. 36 does not apply to Crown land, but only to disputes between *private* landowners. In response, the plaintiffs submitted that s. 36 itself contains no "limiting language" and that in *District of West Vancouver (Corporation of) v. Liu* 2016 BCCA 96, this court had proceeded on the basis that s. 36 could apply in a dispute between an individual property owner and the District of West Vancouver. Mr. Justice Fitch for the Court had added, however, that:

> In my view, <u>the Court must be very cautious about making an order that eliminates both a public consultation process and discretionary decisions made by elected municipal representatives about the future of public land</u>.
>
> Were it not for this concern, I would have no hesitation in coming to a conclusion now that the balance of convenience favours making an order under s. 36(2)(b) of the *PLA* vesting title to the encroached land in Ms. Liu on

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> her making compensation to the District in an amount representing the fair market value of that land.
>
> As this Court is not in a position to determine the fair market value of the land encroached on the material before us, that issue must, of necessity, be remitted for determination in the Supreme Court of British Columbia.
>
> In my view, any order this Court makes should respect the public consultation process and decision-making authority of the District's municipal council. [At paras. 83–86; emphasis added.]

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[27] The summary trial judge distinguished *Liu* on the basis that it had not dealt with land owned by *the Province*. The significance of this distinction lay in the fact that s. 14 of the *Interpretation Act*, R.S.B.C. 1996, c. 238, provides as follows:

> 14 (1) Unless it specifically provides otherwise, an enactment is binding on the government.
>
> (2) Despite subsection (1), an enactment that would bind or affect the government in the use or development of land, or in the planning, construction, alteration, servicing, maintenance or use of improvements, as defined in the Assessment Act, does not bind or affect the government. [Emphasis added.]

[28] In the judge's analysis, Crown land was excluded from the operation of s. 36, and it was "understandable" why this was so, given the context of the obligations placed on the Province by the [*Land Act*] when disposing of an interest in Crown Land." He continued:

> The Province has discretionary decision-making authority over the land it holds on behalf of the people of British Columbia and it must consider the public interest in the exercise of its discretion. The [*Land Act*] imposes limitations and conditions on the Province's discretion to dispose of Crown land. Those limitations and conditions include the following:
>
> a) Section 8(1) provides that a person may not acquire by prescription, occupation not lawfully authorized or a colour of right, an interest in Crown land, or in any land as against the government's interest in it;
>
> b) Section 8(3) provides that a disposition of Crown land is not binding on the government until the appropriate documents are executed by the government under the [*Land Act*];
>
> c) Section 9 provides that a person who is not a Canadian citizen or permanent resident of Canada is not entitled to a Crown grant unless the person's application for disposition was allowed before May 1, 1970;

> d) Section 10.1(1) provides that the Minister may order that no application for Crown land may be made in respect of an area of the province, an activity, a use, a period of time, or a class of applicant;
>
> e) Subject to compliance with the [*Land Act*], s. 11 authorizes the Minister to dispose of Crown land as the Minister considers advisable in the public interest and to impose terms on the disposition;
>
> f) Section 32(2) provides that the Minister must publish an application for disposition of Crown land on a publicly accessible website maintained by or on behalf of the Minister;
>
> g) Section 33 provides that if the Minister considers it advisable in the public interest, the Minister may require the applicant to publish a notice of his or her application in the Gazette or a newspaper;
>
> h) Section 33.1 provides that the public is entitled to provide comments to the Minister on an application for disposition before the disposition of Crown land is made; and
>
> i) Section 35 provides that the Minister may require an applicant for a Crown grant to produce feasibility studies, environmental assessments, timber cruises, land valuation appraisals, or other information about the application. [At para. 50.]

[29] This conclusion was, the judge noted, supported by the recent decision of *Wan v. British Columbia* 2022 BCSC 106, where the Court had ruled that Crown *foreshore* was excluded from the operation of s. 36 of the PLA. In particular, MacNaughton J. had stated in that instance:

> There is a clear legislative intent not to permit the *PLA*'s vesting and entry orders to provide applicants a back door to circumvent the formal Crown grant process. The *Land Act*:
>
> 1. prohibits the acquisition of Crown land through unauthorized occupation, or colour of right, both of which are at the foundation of *PLA* vesting orders; and
> 2. sets up an exclusive statutory regime governing how individuals can gain an interest in the foreshore, to the exclusion of the *PLA*. [At para. 120; emphasis added.]

The summary trial judge interpreted *Wan* as applying to *all* Crown land, not only foreshore. In the result, he ruled that the plaintiffs could not pursue a claim against the Province under s. 36 of the PLA.

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The Equities

[30] Although this was sufficient to dispose of the application under s. 36, the judge went on to assess the equities between the parties. In *Vineberg v. Rerick* 1995 CanLII 3363 (B.C.S.C.), a three-part test had been suggested for consideration by a court in weighing the balance of convenience under s. 36, namely:

> a) Did the party seeking relief have an honest belief as to the location of the property line?
>
> b) Is the encroachment a lasting improvement? and
>
> c) How does the encroachment affect the properties in terms of present and future value and use? [Reasons at para. 60.]

[31] On the other hand, this court in *Taylor* had emphasized that the three "*Vineberg* considerations" are not exhaustive and that the granting of a remedy under what is now s. 36 of the PLA is discretionary. In the words of the Court in *Taylor*:

> In applying the controlling principles of equity, the promotion of fairness and the prevention of injustice, in cases, such as this one, which present unusual factual circumstances, the court can only apply "tests" formulated in prior decisions to the extent that the tests may be relevant to the factual issues before it in determining whether to grant or refuse relief. [Quoted at para. 51 of *Taylor* from *Manita Investments Ltd. v. T.T.D. Management Services Ltd. (Realty World Capital)* (1997), 15 R.P.R. (3d) 88, *aff'd* 2001 BCCA 334, at paras. 42–43.]

[32] As far as the *Vineberg* considerations were concerned, the summary trial judge noted the plaintiffs' claim that they had honestly believed that DL 11338 had included the Railway Corridor "even though their survey of DL 11338 showed the Railway Corridor running through the property." (At para. 65.) Although they "may have" relied upon legal advice and documents from the Land Title Office to conclude that the Railway Corridor shown on their survey was "merely a landmark from a previous time", they had not sought an explanation from their surveyor about the presence of the Corridor on his survey. After receiving the first Trespass Notice, they had proceeded to construct the horse barn because, the plaintiffs said, they had received no response from the Province to their letter disputing the trespass claim. The summary trial judge found that there had been an "element of recklessness and

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wilful blindness" on the plaintiffs' part. Although they may have had an honest belief that they owned the Railway Corridor, they had formed that belief "by failing to make inquiries that they ought to have made."

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[33] In connection with the second *Vineberg* consideration — whether the encroachment is a lasting improvement — there was little doubt that the fence, horse barn and pig barn were "lasting improvements" that could not be moved without "significant cost".

[34] On the third consideration — how the encroachments affect the properties — the judge was left with no doubt that the Province's use of the Railway Corridor as a public trail would disrupt the plaintiffs' livestock operation and perhaps pose a danger to users of the trail and to livestock nearby. An unfortunate incident had already occurred in which one of the plaintiffs' young bulls had been trampled to death. The plaintiffs contended that the use of the Corridor as a public trail was no longer appropriate given the ALC's ruling against the mixed motorized and non-motorized recreational use of those portions of the Railway that lay within the Land Reserve. However, the summary trial judge did not regard the Commission's decision as preventing the Province from allowing members of the public to use the Railway Corridor "in accordance with [the Province's] existing policies"; nor did it prevent the Province from using the Corridor for purposes other than those prohibited by the ALR Regulations.

[35] In the end, the *Vineberg* considerations did not provide the judge with a "clear indication" of where the equities lay between the parties. On the one hand, the permanent nature of the encroachments on the Railway Corridor and the significant costs of removing them tended to favour the plaintiffs, while on the other hand, the plaintiffs' failure to investigate the status of the land "fully and completely" before they purchased it tended to favour the Province. The judge continued:

> With respect to the effect on the present and future value and use of the property, both the plaintiffs and the Province have legitimate and serious interests that will be compromised.

> While the balance of convenience on the *Vineberg* Considerations does not favour one party over the other, the deciding consideration in this case is the need to consider and protect the public interest through the requirements of the [*Land Act*].
>
> As suggested in *Liu*, I must be extremely cautious about making orders that eliminate the consideration of the public interest by elected representatives.
>
> Therefore, I conclude that the equities in this case favour the Province. Accordingly, even if s. 36 of the *PLA* applied to the Province, I would find that the plaintiffs are not entitled to the remedy they seek. [At paras. 82–85; emphasis added.]

[36] Last, the judge ruled that the remedy of proprietary estoppel was not available given the absence of any representation or assurance given by the Province to the plaintiffs at any time that they could enjoy the benefits of the Railway Corridor. He dismissed the plaintiffs' claim for relief under s. 36 of the PLA and their claim for relief on the basis of proprietary estoppel.

On Appeal

[37] On appeal to this court, the plaintiffs submit that the summary trial judge erred in law, principle and fact as follows:

a) in concluding that section 36 of the *Property Law Act* does not apply to land owned or controlled by the Province; and

b) in concluding that the equities of the case favour the Province.

No appeal is taken on the issue of proprietary estoppel.

Applicability of s. 36

[38] The plaintiff's first argument is that the summary trial judge's ruling on this point is contrary to binding authority. Counsel referred in particular to this court's decision in *Ferguson v. Lepine* [1982] 41 B.C.L.R. 263 (C.A.), which concerned a dispute between two individual neighbours. The claimant Mr. Ferguson had acquired property that encroached onto an 8-foot strip that had been acquired by his neighbour Mr. Lepine under the *Escheat Act*. Mr. Ferguson applied under (then) s. 32 for a vesting order in respect of the strip. The Court found that Mr. Lepine had acquired title to the strip by fraud: his solicitor had sworn an affidavit stating incorrectly that Mr. Lepine had been in continuous possession of the strip when in

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fact he had known that part of the strip had been enclosed by a fence and had been in his neighbour's sole possession. Obviously, the equities did not favour him.

[39] In the course of his reasons granting title of the strip to Mr. Ferguson, Mr. Justice Macfarlane for the Court reasoned:

> It is clear, in my view, that s. 32 was enacted to provide a basis, on equitable grounds, for resolving disputes over encroachments. If this case had involved an encroachment on Crown land, which was the circumstance when Ferguson purchased the property without knowledge of the encroachment, then relief would, in my opinion, have been granted to Ferguson. At that time Lepine did not have any equitable position to assert. He had not been in possession of the land and there was no basis for him to contend successfully that a grant to Ferguson would be detrimental to him. The balance of convenience in October 1979 was in favour of Ferguson. [At para. 8; emphasis added.]

[40] Notwithstanding Mr. Draht's argument to the contrary, I cannot agree that these comments represent a binding ruling of this Court to the effect that Crown land is subject to what is now s. 36 of the PLA. That question was not at issue; the Province was not a party; and it appears the Court was not referred to s. 14(2) of the *Interpretation Act*, which was then in force.

[41] Counsel for the plaintiffs also relied heavily on this court's decision in *Squamish (District) v. Great Pacific Pumice Inc.* 2000 BCCA 328, a case not mentioned by the summary trial judge below. The question before the Court was whether s. 14(2) applied so as to "extend Crown immunity to private third parties" such as the lessee who was renting the subject property from the Crown. With respect to the phrase "bind or affect the government in the use or development of land" in s. 14(2), we stated:

> As far as the wording of s. 14(2) is concerned, the phrase "bind or affect the government in the use or development of land" must in my view be contrasted with wording referring to Crown land regardless who is the user or developer thereof. The section does not refer, for example, to an enactment that would "affect the use or development of Crown land" — wording that would support Mr. Baker's argument that the immunity is intended to be in rem. Instead, the section refers to an enactment that would "bind or affect the government in the use or development" of (any) land — wording that in my view suggests the section is restricted to the government as user or developer, presumably of any land regardless of ownership. This

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> interpretation is consistent with the notion that s. 14(2) was intended to ‘reverse the reversal’ of Crown immunity, there being no evidence that prior to 1974, a private party leasing land from the Crown was also entitled to claim immunity from land use laws in the province.
>
> Nor am I convinced that the leasing of land — obviously a form of tenure — constitutes a “use” thereof within the meaning of the section. No authority was cited for this proposition and if one were to consider how the word “use” is used in its ordinary or everyday meaning, it would in my view exclude leasing out land to others. If a landlord were asked, for example, what use he was making of his property, one would normally expect him to answer “I am not using the property — I have rented it out to a tenant.” (See also *Pickering v. Godfrey*, [1958] O.R. 429 (Ont. C.A.), citing a passage from *Brake v. I.R.C.* [1915] 1 K.B. 731.) [At paras. 21–22.]

In the end, the Court ruled that Crown land leased to a private commercial party did not come within the exemption created by s. 14(2). It followed that local zoning laws applied to the industrial operation being carried out on the land.

[42] From this, Mr. Draht contends that if leasing land does not constitute a “use” for purposes of s. 14(2)), then a “disposition” of Crown land (which would have to occur for a ‘land swap’ or the granting of an easement) could not be a “use” within the meaning of the provision. With respect, this misapprehends the *ratio* of *Squamish*, which decided that land being leased out by the Crown was not being “used” by it for purposes of s. 14(2). Similarly, land disposed of by the Crown would obviously not be “used” by it after the disposition. But the issue in the case at bar is not whether a *disposition* of land or an interest therein (e.g., by the granting of an easement or right-of-way) would constitute a “use” of land. Rather it is whether a land swap or other order granted by means of the statutory remedy in s. 36 would “*affect the government in the use* or development of land”. (My emphasis.) Obviously it would. Indeed, the whole purpose of any remedy granted under s. 36 would be to *change the use* of the Railway Corridor from a public trail to agricultural use. Conversely, any land or easement granted by the plaintiffs to the Province elsewhere through DL 11338 would cease to be used for agricultural purposes and would become a public trail. In any event, if the disposition of Crown land were a “use” — a proposition I do not accept — then as the Province contends in its factum,

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s. 14(2) of the *Interpretation Act* would apply such that that "use" would not be subject to the statutory remedy in s. 36 of the PLA.

[43] Counsel for the plaintiffs referred as well to *Liu*, which I have already mentioned. The Court in that case defined the first issue before it as "whether s. 36 of the PLA applies to public lands". It proceeded on the basis that land held by a municipality was "public land", but it did not address the more specific question of whether land held *directly by the Crown* was also subject to s. 36. In my view, this question is answered by reference to the definition of "government" in the *Interpretation Act*, where it is defined to mean "His Majesty in Right of British Columbia". It does not include land held by a municipal government.

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[44] In the alternative, the plaintiffs also submitted that the summary trial judge's interpretation of s. 14(2) is "self-defeating". In particular, they note his statement at para. 49 that:

> The exclusion of Crown land from the operation of s. 36 of the *PLA* is understandable when viewed in the context of the obligations placed on the Province by the [*Land Act*] when disposing of an interest in Crown land.

As I understand it, the argument is that since s. 93.02 of the *Land Act*, which states that notwithstanding s. 14(2) of the *Interpretation Act*, Part 7.1 of the *Land Act* and regulations and orders made thereunder are binding on the government, means that the various other sections of the *Land Act* (such as ss. 8 and 10) relied on by the trial judge are not binding on the government. The plaintiffs state at para. 37 of their factum:

> In light of Hori J.'s treatment of the [*Land Act*], the intended outcome of the decision in Fox could not have been to render the [*Land Act*] inapplicable to land owned or controlled by the Province, yet this is the necessary outcome of his decision. Accordingly, Hori J.'s finding that section 36 of the *PLA* does not apply to land owned or controlled by the Province must be set aside.

[45] Again, with respect, I do not agree. The many provisions of the *Land Act* providing procedures to be followed in connection with Crown grants obviously apply to the Crown. In this case, however, the question is whether s. 14(2) of the *Interpretation Act* applies to the statutory remedy provided by s. 36 of the *PLA* — *not*

the Land Act. As Mr. Rudyk emphasized, the PLA does not contain a provision similar to s. 93.02 of the *Land Act*.

[46] In my view, then, no error in law or principle has been shown in the summary trial judge's conclusion that s. 36 of the PLA does not apply so as to give the Court the ability to order a disposition of Crown land in order to resolve an encroachment dispute. Any such remedy would clearly "affect" the Crown's use of land — in this case, the Railway Corridor; indeed, as already noted, that effect would be the sole objective of any land swap or grant of easement. It would also have the effect of circumventing the myriad provisions of the *Land Act* designed to ensure that the public interest governs any disposition of Crown land. As we have seen, the authorities suggest that courts should be cautious in making orders that would circumvent or attenuate the provisions designed to protect the public interest where Crown land or an interest therein is being disposed of.

The Equities

[47] It will be recalled that the summary trial judge considered that even if s. 36 did apply to the Province, there were "legitimate and serious interests" on both sides relating to the status and use of the Corridor. (See para. 82.) In the Court's analysis, the deciding factor was the need to "consider and protect the public interest through the requirements of the [*Land Act*]." Applying the standard of review applicable to discretionary decisions formulated in *Friends of the Old Man River Society v. Canada (Minister of Transport)* [1992] 1 S.C.R. 3, I see no reviewable error in this part of the judge's analysis. I agree with him that caution is required in making orders that at least on their face "eliminate the consideration of the public interest by elected representatives". At the least, a much more precise understanding of the remedy sought under s. 36 would be required, necessitating a full survey of the 'bypass' area and, one assumes, evidence as to the economic value of what each side would be 'trading'. Such evidence was clearly not before the summary trial judge.

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[48] For both of the judge's major reasons for his dismissal of the application under s. 36, then, I would dismiss the appeal. Although the result is in my view unfortunate, some hope for the plaintiffs was offered by Mr. Rudyk in his submissions. He pointed out that regardless of the result of this appeal, it would be open to the plaintiffs to apply under the *Land Act* for a grant of Crown land — here the Railway Corridor or an interest therein — on terms the Minister considers advisable. Various conditions would apply to any such disposition and anyone seeking an easement such as the proposed bypass would have to provide considerable information concerning *inter alia* the topography and utility of the bypass area for use as a "formalized" public trail. Mr. Rudyk assured the Court that if a proper application was made under the *Land Act*, the Province would consider it. He added that in the event the plaintiffs were not successful, it would be open to them to seek judicial review of the minister's decision.

[49] If the plaintiffs consider making such an application, I would urge the relevant Provincial authorities to consider the equities that were considered by the trial judge as lying on the plaintiffs' side, as well as the fact that they appear to have relied on the survey attached to these reasons as Schedule A when they were thinking of acquiring DL 11338. There was no reference to DL 5391 on that plan or on the title at the time. The reason for this has been explained, but that is little consolation to the plaintiffs at this point. Further, the comments of the Agricultural Land Commission concerning the negative effects of recreational trails on agricultural land should be of interest to the Province:

> The Panel acknowledges that the Proposal would utilize land that has been previously impacted by railway use; however, the Panel finds that the past use of the Corridor does not justify its suitability for recreational trail use. It is the Panel's experience that recreational trails through agricultural areas can negatively impact adjacent farm and/or ranch operations, by creating issues including, but not limited to: spread of invasive species, trespass and vandalism, harassment of livestock, access limitations, crop contamination, and liability. While recognizing that the Corridor is already informally used for recreation by the public, the Panel finds that converting the Corridor to recreational trail use and establishing it as a Provincial Recreation Trail will lead to increased usage and greater potential for conflict with adjacent agricultural land.
>
> ...

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> The Panel received correspondence regarding the Proposal from ten members of the public. The majority of submissions expressed concern with impacts to species-at-risk (which is beyond the scope of the Commission's mandate) and loss of farmland. Additionally, the Panel received correspondence from a landowner north of Summit Lake whose Property is bisected by the corridor (the "Summit Lake Property"). The landowner advised the Commission that the Corridor's current use as an informal trail, by motorized users in particular, has negatively impacted their farm operation, as they have experienced instances of trespass, vandalism and livestock harassment. The Panel understands that the landowner is involved in an ongoing dispute with the Crown regarding the legal boundaries of the Corridor; the Panel wishes clarify that the ALC has no involvement in this dispute and it does not factor into the Panel's consideration. Regardless of where the legal boundaries fall, the Panel acknowledges that the landowner has valid concerns about the Proposal's impact on the farm operation. To the Panel's knowledge, the Summit Lake Property is the only actively farmed parcel that is bisected by the Corridor; as such, the potential for conflict in this area is high, particularly due to the motorized designation in this section of the proposed Trail. [At paras. 13, 17; emphasis added.]

[50] I express the hope that the plaintiffs and the Province may find some solution in the *Land Act* to the unfortunate situation in which the plaintiffs find themselves. Since no stay or injunctive relief was sought by the plaintiffs, I also express the hope that until a reasonable time has passed in which the plaintiffs could be expected to file an appropriate application should they decide to do so, the Province will not proceed with further enforcement of its trespass notices and other enforcement measures.

[51] For the foregoing reasons, I would dismiss the appeal.

"The Honourable Madam Justice Newbury"

I agree:

"The Honourable Madam Justice Fenlon"

I agree:

"The Honourable Madam Justice Fisher"

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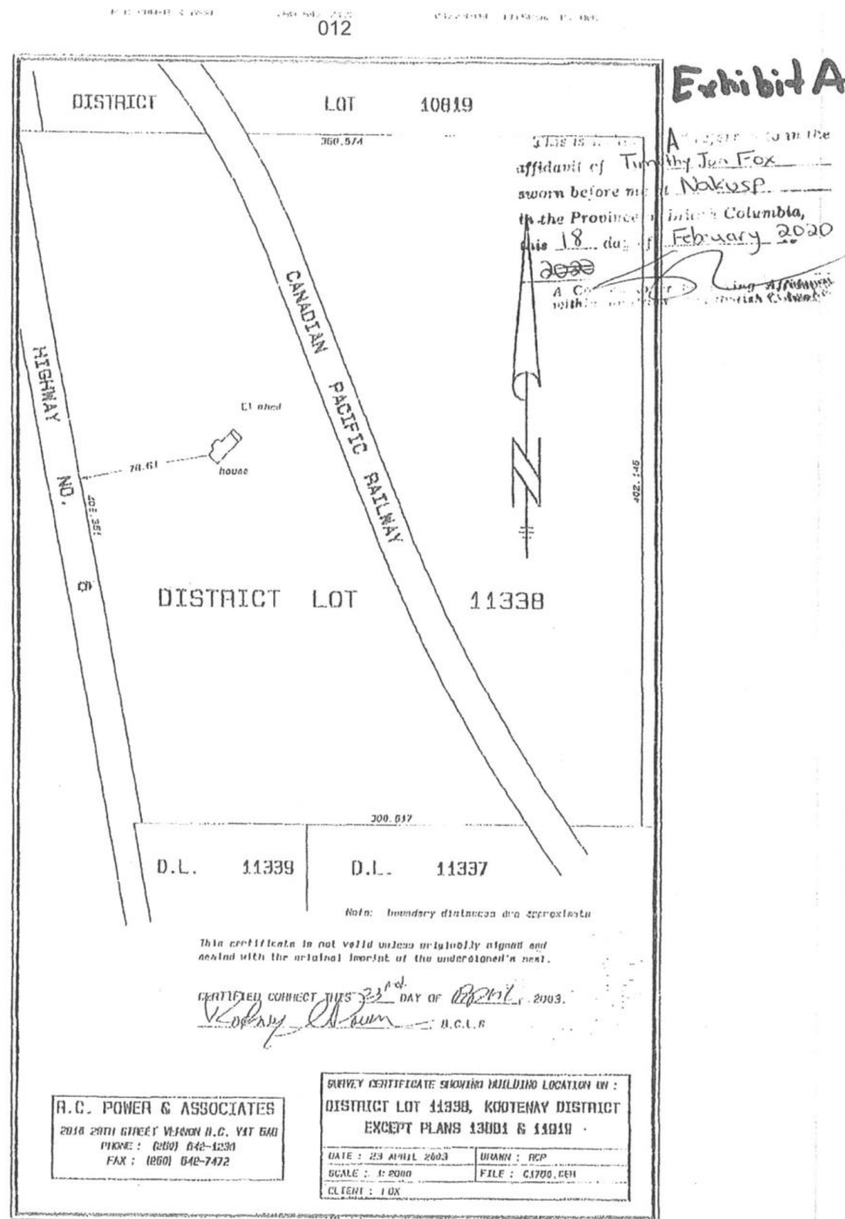
Schedule A



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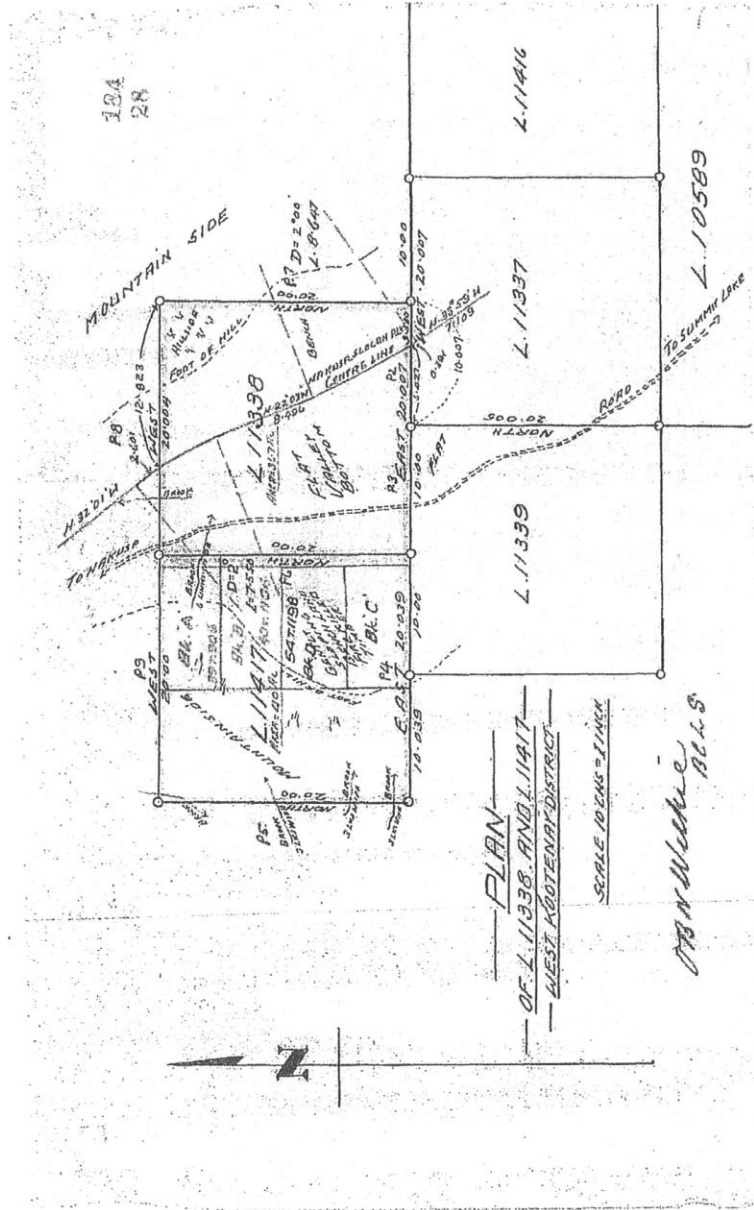
Schedule B



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