ON THE ROAD AGAIN:

Fixing a longstanding injustice in section 42 of the *Transportation Act*

OMBUDSPERSON
BRITISH COLUMBIA

Special Report No. 55

March 2024

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Our office is located on the traditional lands of the Lək̓ʷəŋən (Lekwungen) people and ancestors and our work extends across the homelands of the First Nations peoples within what we now call British Columbia. We honour the many territorial keepers of the lands and waters where we work.

OMBUDSPERSON
BRITISH COLUMBIA

March 2024

The Honourable Raj Chouhan
Speaker of the Legislative Assembly
Parliament Buildings
Victoria BC V8V 1X4

Dear Mr. Speaker,

It is my pleasure to present the Ombudsperson's Special Report No. 55, *On the Road Again: Fixing a longstanding injustice in section 42 of the* Transportation Act.

The report is presented pursuant to section 31(3) of the *Ombudsperson Act.*

Yours sincerely,

Jay Chalke
Ombudsperson
Province of British Columbia

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MESSAGE FROM THE OMBUDSPERSON

The question of who owns a road is of critical importance, particularly for people living in rural or remote areas. This report highlights the experiences of two British Columbians who complained to our office about the issue of road ownership. The misunderstandings and challenges detailed in these two examples show the real-life consequences for people.

Both of these complaints arose from the peculiar operation of section 42 of the *Transportation Act*, which can result in some roads crossing private property automatically being deemed to be public, without the property owner's knowledge or consent. The status of a road as public or private determines whether access to it can be controlled or limited by a property owner. However, property owners or purchasers have no easy way to learn the status of certain roads. We make seven recommendations to address the issues raised in this investigation. My recommendations seek to ensure the legislation is applied consistently, that uncertainty around road ownership is minimized, that private land is no longer expropriated unfairly, and that there is an accessible dispute resolution process for issues that do arise.

I also recommend government develop clear policy to apply the legislation consistently and create a publicly accessible registry of roads it believes are public under s.42.

The Ministry of Transportation and Infrastructure has fully accepted five of my seven recommendations. With respect to the other two recommendations, to register s.42 roads in the land titles system and to provide a mechanism for dispute resolution regarding inclusion in the s.42 road registry, I would have preferred a more definitive committment from the ministry, but I am satisfied that its committment is sufficient to consider the recommendations accepted.

I recognize these recommendations represent a lot of work to digitize records – a process that technology has made more achievable since an earlier report by our office on this issue released in 1985.

Thank you to the people who came to my office with trust that we would investigate their important concerns. Their voices will result in significant improvements to public administration for property owners especially those in rural parts of BC. We will monitor the implementation of our recommendations and report on the ministry's progress.

Sincerely,

Jay Chalke
Ombudsperson
Province of British Columbia

INTRODUCTION

Many property owners – especially in rural British Columbia – have roads running through their property, or use roads that cross other private properties to access their land. They need to know whether such roads are public or private, as the status of the road can impact their ability to use and access their property. Unfortunately, in British Columbia, it is not always easy to determine the ownership of roads. This report is about two complaints we investigated that illustrate how uncertainty around the ownership of roads can negatively impact property owners.

One property owner, Ms. P, had a road through her property that she believed was private. She was of course surprised when she learned that the road was public, and would be used by logging trucks. Although that plan was later changed because of opposition from property owners in the area, the Ministry of Transportation and Infrastructure continued to maintain the road on the basis that it was public.

The other property owner, Mr. S, had previously used a road that passed through several other private properties to access his own property. When intervening property owners blocked the road, Mr. S sought to have the ministry recognize the road as a public road and remove the blockage. However, the ministry was unwilling to do so, on the basis that it was not a public road.

Both of these complaints relate to section 42 of the *Transportation Act*, which says that if public money is spent on a travelled private road, it is automatically deemed to be public. As a result, the Ministry of Transportation and Infrastructure becomes responsible for maintaining it and can make decisions about the road's use and access. In practice, this means private land can become public without an owner's knowledge or consent and without compensation for the lost land being provided. The legislation also creates uncertainty with respect to ownership of roads because the "deeming" of making the road public occurs automatically, by force of legislation. This means there is no decision maker or record of a decision to declare a road is public – it just occurs by virtue of public money being spent on a travelled private road.

This report describes our investigations that resulted in seven recommendations to the Ministry of Transportation and Infrastructure that will result in systemic change and address these long-standing concerns.

[1] Ombudsman of British Columbia, *Section 4 of the Highway Act*, Legislative Assembly: Special Report No. 10, June 1985, https://bcombudsperson.ca/assets/media/Special-Report-No-10-Section-4-of-the-Highway-Act.pdf.

BACKGROUND

This report focuses on the way in which the *Transportation Act* creates uncertainty for private landowners across the province. We acknowledge that land in the province we now know as British Columbia has been home to First Nations since time immemorial, and that BC's laws have not historically recognized First Nations title to land. With the passage of the *Declaration on the Rights of Indigenous Peoples Act* in 2019, the government committed to bringing provincial laws into alignment with the *UN Declaration on the Rights of Indigenous Peoples*. We acknowledge and uphold this ongoing work, and recognize that it is an important part of the broader context within which we investigated complaints about section 42 of the *Transportation Act*.

The significance of road ownership

Property owners need to know the status of roads that cross, or lead to, their property.

If a road is private, the property owner owns the land under the road, which contributes to the overall size of their property. Importantly, the property owner can also block others from using the road, or they can deactivate the road entirely, subject to any existing rights of other property owners as set out in rights of way, easements or other legal instruments.

Conversely, if the same road is public, the government owns the land under the road. This reduces the size of the property owner's land, and it may split what would otherwise be one parcel of land into two. Additionally, and not surprisingly, anyone is entitled to travel along public roads. Therefore, a property owner cannot block or otherwise interfere with people travelling along a public road. The government maintains public roads and may give approval to use them for industrial purposes.

Some property owners access their property using a road that crosses neighbouring private property. If there are legal rights of access such as an easement or a right of way those property owners have a right to use that road crossing private property. However, if no such legal rights exist, and the access road is private, the owner of the road can legally block it, even if doing so prevents other property owners from accessing their respective properties. Therefore, if a property owner's access is dependent on a private road that is owned by someone else, their access is subject to the agreement of the road's current and future owners.

If the road is public, on the other hand, the public is entitled to travel along it. Property owners who access their properties via public roads are therefore assured continued access.

Methods for establishing public roads

Dedication by survey plan

The Ministry of Transportation and Infrastructure, whose mandate includes planning, improving and maintaining the provincial highway network, can acquire private land and dedicate the land as provincial public highway.[2] For our purposes, the term "highway" in this context refers to a public road.

In accordance with this process, the ministry surveys a planned or existing road and the resulting plan is deposited with the Land Title and Survey Authority of BC (LTSA).[3] Dedications by survey plan are certain and clear. Interested parties – including potential purchasers of land – can acquire a copy of the relevant survey plan from the LTSA to see the road dedication and its exact location.

If the land intended to become a public road cannot be acquired through agreement, and the road is required in the public interest, the minister also has the ability to expropriate private land. If the minister exercises their expropriation powers, they must pay compensation to the owner.[4] The ministry must also create a survey plan, and the resulting plan detailing the newly established public road is deposited with the LTSA. The title for any affected private land is also updated to reflect the new public road.

Roads created by operation of section 42 of the *Transportation Act*

Another way in which private roads can become public is by operation of section 42 of the *Transportation Act*. These so-called "section 42 roads" are the focus of this report.[5] Section 42 states:

> ***42*** *(1) Subject to subsection (2), if public money is spent on a travelled road that is not a highway, the travelled road is deemed and declared to be a highway.*
>
> *(2) Subsection (1) does not apply to any road or class of roads, or to any expenditure or class of expenditures, that is prescribed by the regulations.*

Under section 42, "if public money is spent" on a privately owned "travelled road," the road is automatically and immediately deemed and declared to be a public road.[6] This is known as a "deeming provision" because it operates automatically when a specific set of requirements is met. The

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2 Pursuant to section 43 or 44.1 of the *Transportation Act*, S.B.C. 2004, c. 44.

3 *Transportation Act*, S.B.C. 2004, c. 44, s. 44.1

4 *Transportation Act*, S.B.C. 2004, c. 44, s. 10-11.

5 In addition to dedication by survey plan and section 42 of Transportation Act, there are other ways in which private roads can become public that are outside the scope of this report. Further, it is worth noting the Ministry is only responsible for highways, including section 42 highways, outside of incorporated areas such as municipalities. A more comprehensive overview of the ways in which a public roads are created can be found at Chapter 15 of the Association of BC Land Surveyors Professional Reference Manual: https://abcls.ca/page/practice-guidelines.

6 Subject to narrow exceptions that are prescribed in the *Transportation Act Regulation,* including the expenditure of public money if the expenditure is only related to snowploughing or ice control: *Transportation Act*, S.B.C. 2004, c. 44, s. 42(2) and *Transportation Act Regulation*, B.C. Reg. 546/2004, s. 4.

ministry does not have authority under section 42 to declare whether a road is public in accordance with this section.[7]

Because section 42 declarations occur immediately and automatically by operation of the statute, they can result in expropriation of otherwise private property without the knowledge or consent of property owners, and without payment.

While the ministry does not have authority to make a binding declaration under section 42, it still takes positions on whether roads are public by operation of section 42. The ministry generally forms these positions by reviewing its records and other available evidence related to public expenditure and travel on a road. If it believes the evidence is sufficient to have triggered the section 42 deeming provision, the ministry will act on that basis. For example, the ministry may actively maintain and enforce public travel along roads it considers public by operation of section 42.

Property owners will sometimes disagree with the ministry's position on whether a road is public. Unfortunately, going to court is the only way to definitively resolve these types of disputes. The court is able to determine, as a question of fact, whether the section 42 requirements regarding expenditure of public money and travel have been met in a particular case. The court does so by issuing a declaratory judgment. With that said, it is important to reiterate that section 42 declarations occur immediately and automatically after the requisite public expenditure and travel have occurred. As such, a declaratory judgment by the court is not a prerequisite to section 42 taking effect.

The following complaints that we investigated illustrate issues caused by section 42.

[7] *Hollis v Her Majesty the Queen*, March 12, 1998, BC Supreme Court, Docket 6733.

THE COMPLAINTS

The complaint of Ms. P

Ms. P owned a property located in the central interior of BC, on the traditional territory of Tk̓emlúps te Secwépemc. A road that we will refer to as "Road A" crosses her property.

Figure 1: Map showing approximate location of Road A

Ms. P purchased the property in 2012. At the time, she understood that Road A was a private road and formed part of her property. There were no records indicating that the road had been surveyed or deposited with the LTSA.

In February 2014, Ms. P learned that logging trucks planned to use Road A, so she contacted the Ministry of Transportation and Infrastructure. In an email to Ms. P, the ministry told her that the portion of Road A crossing her property formed part of a public road by operation of section 42.

As a result of opposition from property owners in the area, the logging trucks ended up using an alternative route. Because of this, Ms. P did not pursue the matter further until the spring of 2017, when she saw one of the ministry's maintenance contractors grading Road A and cutting trees.

In the summer of 2017, Ms. P asked the ministry to stop maintaining the part of Road A that she understood she owned. In a December 2017 email, the ministry informed Ms. P that it had instructed its contractor to continue maintaining the road because the ministry had done so historically.

Ms. P complained to our office and we began an investigation.

In response to our investigation, the ministry confirmed that for many years it had taken the position that Road A met the requirements for a public road under section 42, despite portions having never been surveyed or deposited with LTSA. The ministry's position was based on a review of its records and other available evidence related to the public expenditure of funds and travel on the road.

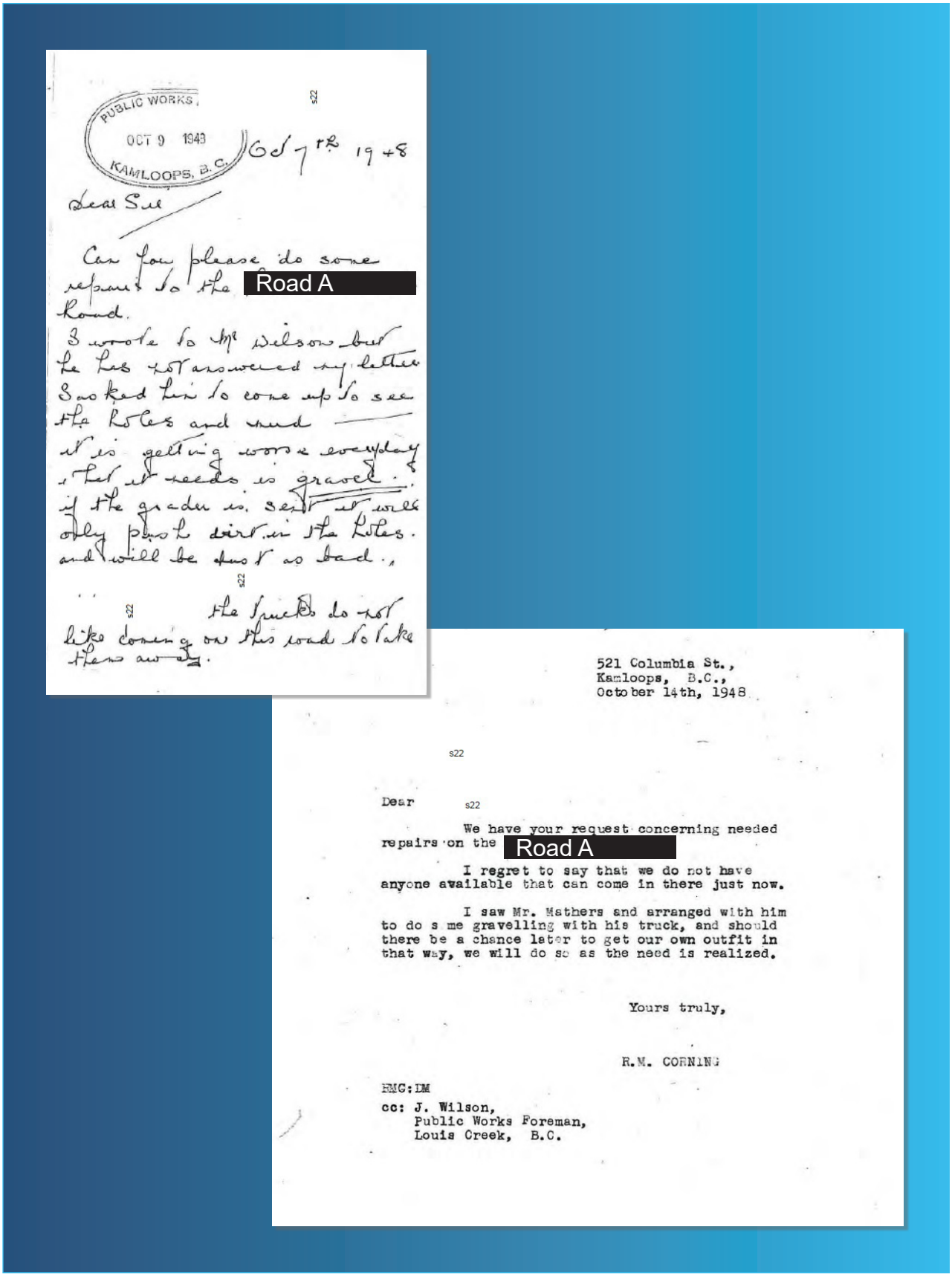
In this case, the ministry's records included an entry in its Road Register for Road A.[8] The Road Register entry for Road A showed that the ministry considered Road A to be public up to the 10.645 km point, which included the section crossing Ms. P's property. The Road Register also listed the legal status of each portion of the road (although it was difficult to discern precisely which part applied to the section of the road at issue).

In addition, the ministry's maintenance classification for Road A means it receives regular maintenance, such as grading. Further, the ministry produced records that showed it had it had maintained Road A as a public road for over 100 years. The records included statements of expenditure dating back to 1918 and correspondence regarding maintenance dating back to 1948 (see Figures 2 and 3).[9]

[8] The Road Register details a road's location, legal status and maintenance classification. Information in the ministry's Road Register is not publicly available, although the ministry will provide information from it in relation to a particular entry upon request.

[9] "s22" throughout Figures 2 and 3 refers to information that the ministry redacted when it provided the documents to Ms. P to prevent disclosure harmful to personal privacy under the *Freedom of Information and Protection of Privacy Act*.

Figure 2: Maintenance requests regarding Road A , 1948



PUBLIC WORKS
OCT 9 1948
KAMLOOPS, B.C.

s22

Oct 7th 1948

Dear Sir

Can you please do some repairs to the Road A
Road.
I wrote to Mr Wilson but he has not answered my letter I asked him to come up to see the holes and mud it is getting worse everyday, but it needs is gravel. if the grader is sent it will only push dirt in the holes. and will be worse as bad.,

s22

the trucks do not like coming on this road to take them away.

521 Columbia St.,
Kamloops, B.C.,
October 14th, 1948

s22

Dear s22

We have your request concerning needed repairs on the Road A

I regret to say that we do not have anyone available that can come in there just now.

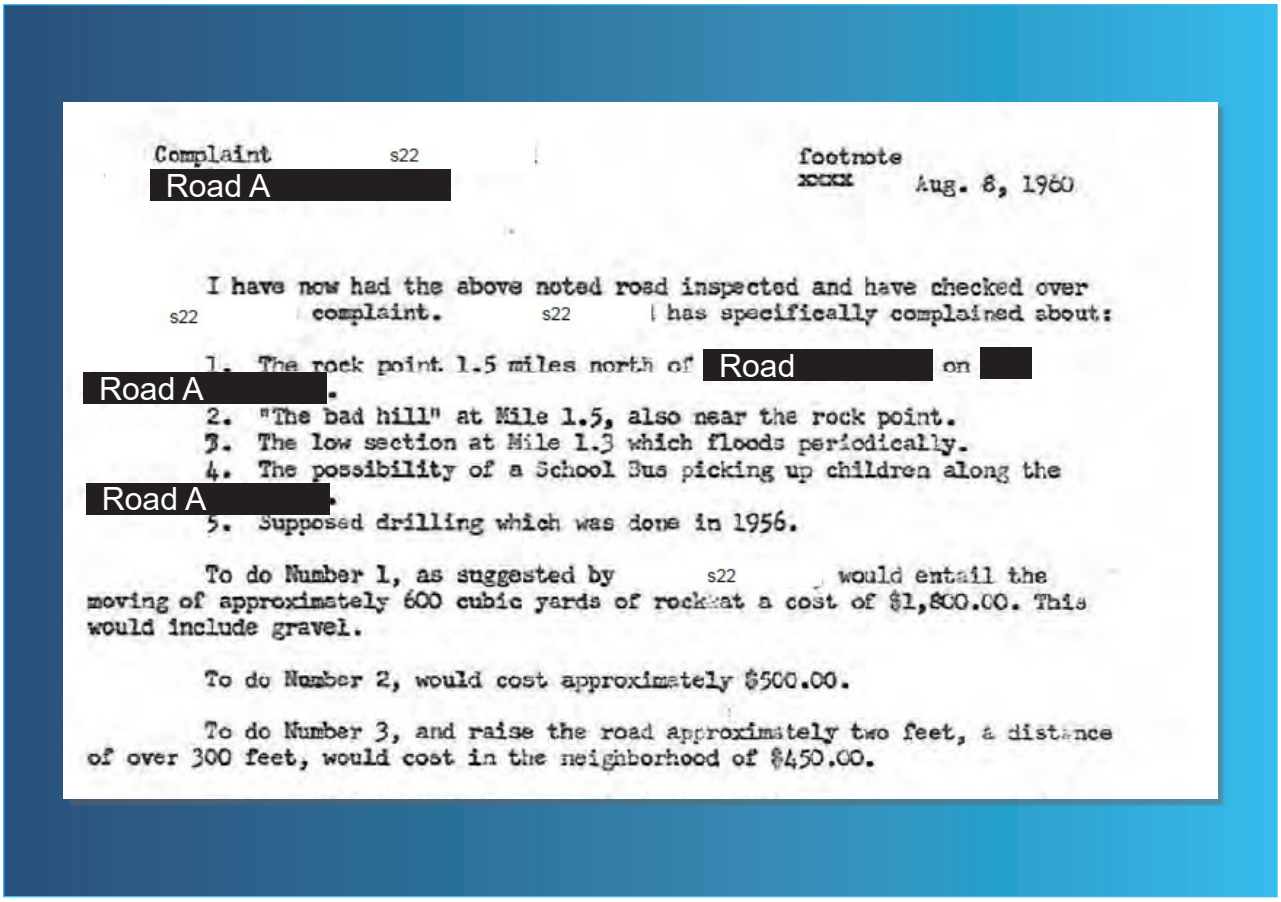
I saw Mr. Mathers and arranged with him to do s me gravelling with his truck, and should there be a chance later to get our own outfit in that way, we will do so as the need is realized.

Yours truly,

R.M. CORNING

RMC:LM
cc: J. Wilson,
Public Works Foreman,
Louis Creek, B.C.

Figure 3: Maintenance estimates for Road A, 1960



Complaint s22 Road A [redacted]

footnote xxxx Aug. 8, 1960

I have now had the above noted road inspected and have checked over s22 complaint. s22 has specifically complained about:

1. The rock point 1.5 miles north of Road [redacted] on Road A [redacted].
2. "The bad hill" at Mile 1.5, also near the rock point.
3. The low section at Mile 1.3 which floods periodically.
4. The possibility of a School Bus picking up children along the Road A [redacted].
5. Supposed drilling which was done in 1956.

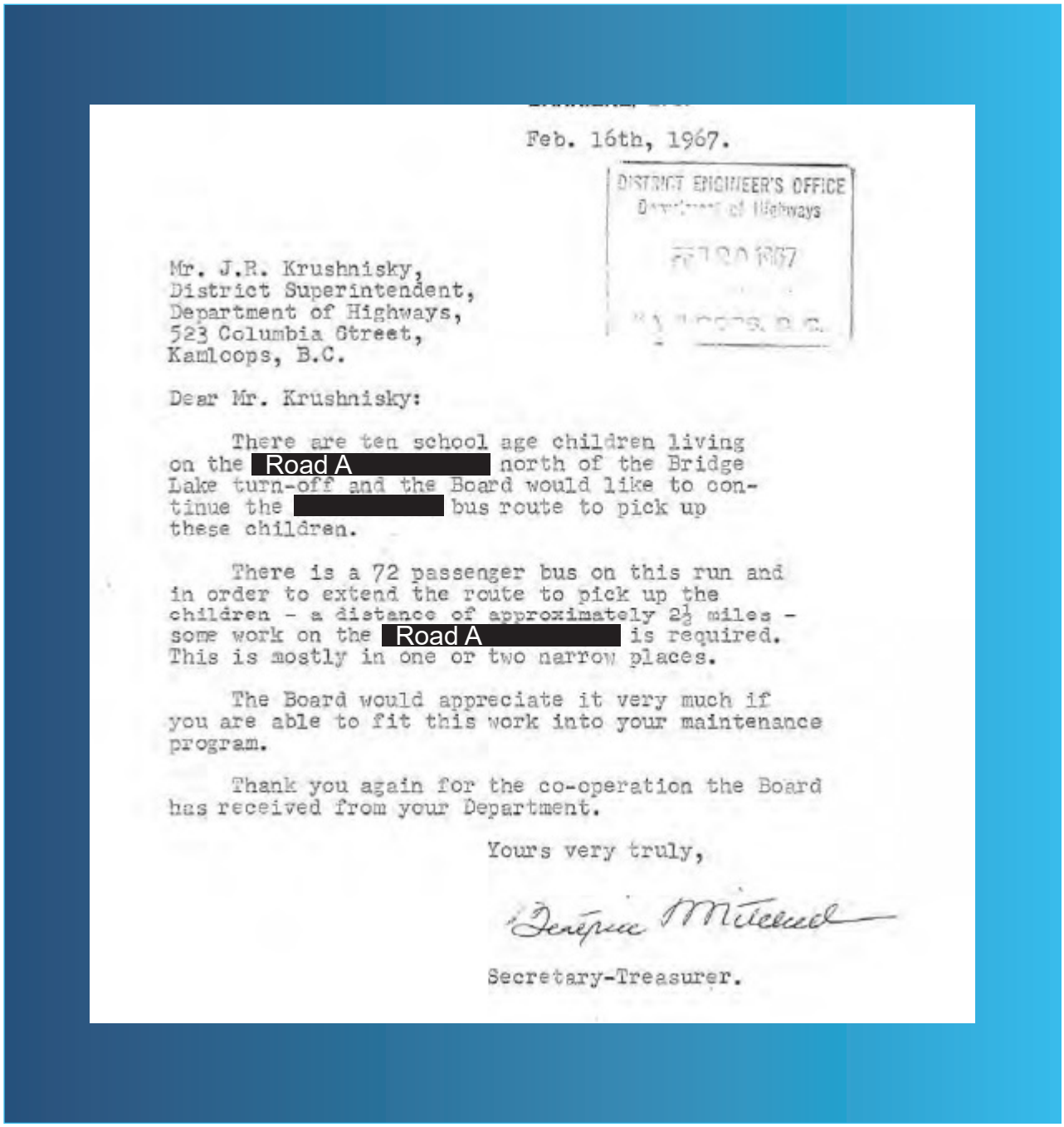
To do Number 1, as suggested by s22 would entail the moving of approximately 600 cubic yards of rock at a cost of $1,800.00. This would include gravel.

To do Number 2, would cost approximately $500.00.

To do Number 3, and raise the road approximately two feet, a distance of over 300 feet, would cost in the neighborhood of $450.00.

Road A provides public access to about 20 privately owned properties, including six properties beyond Ms. P's property. The ministry also provided records from the 1960s showing that a school bus ran along the road (see Figure 4).

Figure 4: Correspondence relating to school bus route on Road A



Feb. 16th, 1967.

DISTRICT ENGINEER'S OFFICE
Department of Highways
FEB 20 1967
KAMLOOPS, B.C.

Mr. J.R. Krushnisky,
District Superintendent,
Department of Highways,
523 Columbia Street,
Kamloops, B.C.

Dear Mr. Krushnisky:

There are ten school age children living on the Road A north of the Bridge Lake turn-off and the Board would like to continue the [redacted] bus route to pick up these children.

There is a 72 passenger bus on this run and in order to extend the route to pick up the children - a distance of approximately 2½ miles - some work on the Road A is required. This is mostly in one or two narrow places.

The Board would appreciate it very much if you are able to fit this work into your maintenance program.

Thank you again for the co-operation the Board has received from your Department.

Yours very truly,

Secretary-Treasurer.

The final piece of evidence the ministry produced to support its conclusion that the road was public under section 42 was a subdivision plan extending beyond Ms. P's portion of Road A. The plan was approved in 1980, and Road A appeared to have been considered to meet the highway access requirements required for the subdivision.[10]

When viewed as a whole, there was a substantial body of evidence to support the ministry's position that the portion of Road A crossing Ms. P's property was a public road in accordance with section 42. It was clear from the ministry's records that public monies had been spent to maintain Road A for many years, and Road A had been regularly travelled by neighbours beyond Ms. P's property.

However, while the ministry's position was reasonable, Ms. P's complaint demonstrated how section 42 creates uncertainty with respect to ownership of roads. Ms. P received no notice that the road was public. Moreover, when she purchased the property, there was no clear, public-facing way for Ms. P to determine whether the road on her property had been deemed public by operation of section 42. Nothing was registered with the LTSA. In the absence of this or any other accessible public-notice system, Ms. P had little way of knowing that she did not in fact become the owner of that portion of the road when she purchased the property in 2012.

There was also no low-cost, easily accessible administrative mechanism available for Ms. P to challenge the position taken by the ministry. Ms. P's only option was to challenge the ministry's decision in court, which would be costly and time-consuming.

[10] The *Land Title Act* requires that when a parcel is subdivided, there must be a highway that provides access "through the land subdivided to land lying beyond or around the subdivided land": *Land Title Act*, R.S.B.C. 1996, c. 250, s. 75(1)(a)(ii).

The complaint of Mr. S

Mr. S owns a rural woodlot property in the Okanagan, on Syilx traditional territory. Mr. S traditionally accessed his property via a road that started at the closest dedicated highway and then crossed several private properties before reaching his. In 2016, one of the property owners blocked Mr. S's access to the road.

Mr. S asserted that the blocked road, which we refer to as "the Old Road" was a public road by operation of section 42. Mr. S stated that the road had a history of public expenditure and travel, and he stated that the Ministry of Transportation and Infrastructure's Road Features Inventory corroborated his assertion.[11] In this case, the Road Features Inventory showed a road leading to Mr. S's property, although the lower part of the depicted road had migrated because of subdivisions.

Mr. S complained that the ministry had failed to take steps to ensure that public access along the road was maintained. We investigated his complaint.

In response to our investigation, the ministry told us that, based on its review of the Road Register for the Old Road and the additional research it had conducted, it had insufficient evidence to conclude that the road was public.

The Road Register for Old Road supported the conclusion that Old Road had historically been a highway in accordance with section 4 of the *Highway Act*.[12] The Road Register indicated that Old Road was established prior to 1939 and listed its legal status as "section 4 by use."

However, the Road Register did not show Old Road as leading to Mr. S's property. Instead, the Road Register depicted Old Road as leading to the property immediately to the west of Mr. S's property (the green road on Figure 5).

The ministry pointed out that the Road Features Inventory, unlike the Road Register, did not provide details of the depicted road (e.g., the road's legal status). Therefore, the ministry took the position that the Road Features Inventory (the pink road on Figure 5) provided insufficient evidence to find that there was a public road leading to Mr. S's property. Additionally, the ministry could not locate any documentary evidence of public money being expended or a history of public travel on the road leading to Mr. S's property.

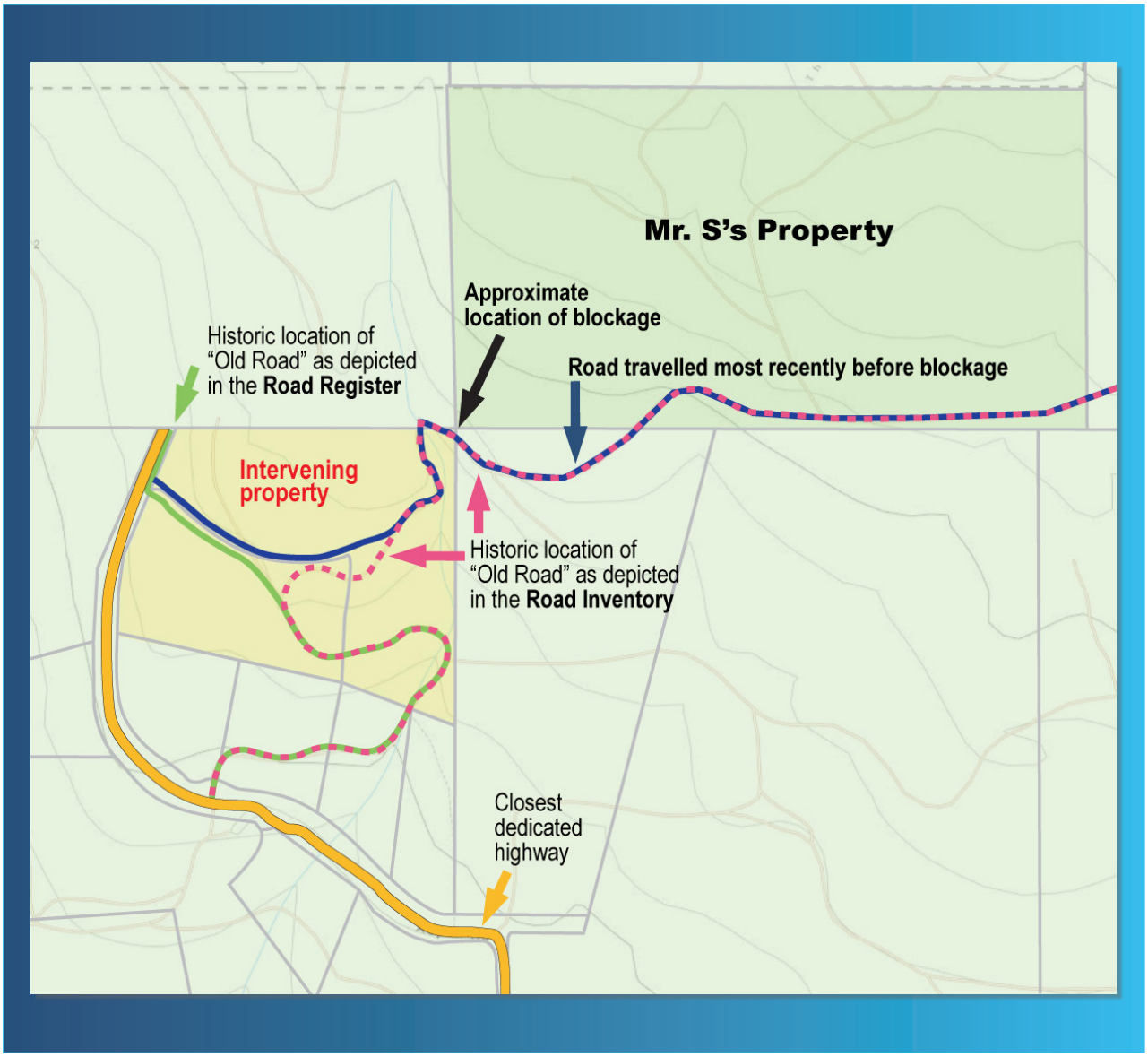
We concluded that the ministry's position on the status of the road was reasonable in the circumstances. The Road Register suggested that Old Road did not lead to Mr. S's property, the Road Features Inventory did not provide details of the road it depicted, and there was an absence of documentary evidence concerning public money being expended or travel on the blocked road.

However, while the ministry's position was reasonable, Mr. S's complaint illustrated again how section 42 creates uncertainty around the ownership of roads, without a low-cost or accessible mechanism for addressing disputes that arise. Prior to the access road

[11] The Road Features Inventory is a publicly accessible spatial database that is meant to show highways under the administration and control of the ministry.

[12] Section 4 of the *Highway Act* is a predecessor to section 42 of the *Transportation Act.* Little has changed between section 4 and what is now section 42. For example, the deeming provision in section 4 stated "[w]here public money has been expended on a travelled road […] that travelled road is deemed and declared to be a public highway."

Figure 5: Map showing approximate location of Old Road



being blocked, Mr. S had no definitive way of knowing that the road he had been using was not a public road and that his travel was instead subject to the agreement of the intervening property owners. Because Mr. S didn't know the status of the road, he may have missed opportunities to secure formal access agreements or rights of travel, such as easements, with previous owners of the intervening properties who did not object to his travel along the now disputed road.

Mr. S could have sought a declaration by the court that the road was public under section 42. However, this would have been a costly and time-consuming option.

Finally, even if the court were to make a declaratory judgment, the road would still not be surveyed or deposited with the LTSA. Therefore, if Mr. S were to later sell his property, there would still be no clear public-facing notice system to inform prospective buyers about the ownership status of the access road.

OUR 1985 REPORT

These complaints raise issues very similar to those in a report issued by the first Ombudsman in 1985.

Our 1985 report, *Special Report #10*[13], focused on a predecessor to section 42: section 4 of the *Highway Act.* Little has changed between section 4 and what is now section 42. Therefore, our 1985 report remains relevant today.

Our office reported that we had received many complaints about section 4, and we detailed two such complaints that our office had investigated. The first complaint was from a property owner with a road crossing their property. The property owner attempted to block the road, but the Ministry of Transportation and Highways (as it was then known) took the position that it was public on the basis that it had once expended public money to grade the road. The ministry enforced public travel along the road, and it later purchased a wider right-of-way along the road from the property owner. However, the purchase price did not include compensation for the land under the road, or for splitting the property owner's land into two parcels.

The second complaint was from a property owner who sought to have the ministry recognize a road leading to their property as public in order to facilitate a subdivision application. To support their position, the property owner asserted that the ministry had spent public money to install culverts along the road in question. The ministry took the position that the road was not public.

In both cases, our office had concerns about the position taken by the ministry. More importantly, however, the Ombudsman found that section 4 was unjust under the *Ombudsman Act* (as it was then known). The Ombudsman set out three reasons for this finding:

1. Section 4 declarations could result in expropriation without the knowledge or consent of property owners, and without payment.
2. Key terms in section 4 were so broadly phrased that considerable opportunity existed for them to be applied inconsistently.
3. Section 4 created uncertainty with respect to ownership of roads in the province, which led to conflict among neighbours and with the ministry, resulting in disputes that could only be resolved through costly court actions.

In our 1985 report, we recommended that the ministry phase out section 4 over five years. We also recommended that the ministry survey existing section 4 roads and register them with the LTSA during that same period. The ministry declined to implement the recommendations, citing what it said would be prohibitive costs of implementation.

[13] Ombudsman of British Columbia, Section 4 of the Highway Act, Legislative Assembly: Special Report No. 10, June 1985, https://bcombudsperson.ca/assets/media/Special-Report-No-10-Section-4-of-the-Highway-Act.pdf.

ANALYSIS

Following our investigations of Ms. P's and Mr. S's complaints, we revisited each of the three issues highlighted in our 1985 report. In doing so, we reviewed a number of court decisions issued since then that interpret section 42 of the *Transportation Act* and, in some cases, its predecessor sections.[14] We also consulted with the Ministry of Transportation and Infrastructure to assess whether and how its practice may have evolved in the years since our 1985 report, as well as the impact of technology in facilitating a solution.

Expropriation without the knowledge or consent of property owners, and without payment

In 1985 we found that section 4 of the *Highway Act* created a substantive injustice because it resulted in land being expropriated, without compensation and without the knowledge of the property owner:

> Section 4 of the *Highway Act* is, of course, a form of expropriation in that by virtue of the expenditure of public money on a travelled private road, the ownership of that road is immediately transferred to the Crown. The Law Reform Commission of British Columbia, in its 1971 Report on Expropriation, considered the effect of section 6 (now section 4) of the *Highway Act* and found that the use of section 6 by the then Department of Highways violated the Commission's proposed procedural safeguards for fair and reasonable expropriations. These procedural steps included: notice of intention to expropriate; approval for the proposed expropriation by a politically-responsible person or body; registration of notice of the expropriation on the title to the land

[14] Decisions reviewed: *Silverton v Hobbs and Jupp* (1985), 60 BCLR 208 (Supreme Court); *Whistler Service Park Ltd. v Normway Industries Ltd.* (1990), 69 DLR (4th) 150 (BC Court of Appeal); *Emmett v Arbutus Bay Estates Ltd.* (1994), 88 BCLR (2d) 72 (Court of Appeal); *Okanagan Similkameen Cooperative Growers Assn. v Osoyoos (*Town), [1994] BCJ No 1957 (BC Supreme Court); *Winskowski v Coldstream (District)*, [1996] BCJ No 1088 (BC Supreme Court); *British Columbia (Ministry of Transportation and Highways) v Perepelkin,* [1996] BCJ No 1216 (Supreme Court); *Brady v Zirnhelt* (1998), 57 BCLR (3d) 144 (Court of Appeal); *Dunromin Investments Ltd. v Spallumcheen (Township),* 2000 BCSC 383; *Kirkpatrick v Parkinson Estate (Public Trustee of),* 2001 BCSC 902; *Arbutus Bay Estates Ltd. v Davis & Co.*, 2002 BCCA 660 (application for leave to appeal to SCC denied); *British Columbia (Attorney General) v Perry Ridge Water Users Assn.*, 2003 BCCA 275; *Silvern Estates Ltd. v British Columbia*, 2007 BCCA 284; *Vesuna v British Columbia (Minister of Transportation),* 2011 BCSC 941; *Skutnik v British Columbia (Attorney General)*, 2013 BCSC 195; *452195 B.C. Ltd. v Abbotsford (City)*, 2013 BCSC 2055; *Northern Rockies (Regional Municipality) v Loewen Resort Management Ltd.,* 2014 BCSC 342; *Chemainus Park Holdings Ltd. v Island Timberlands GP Ltd.*, 2015 BCCA 325; *Douglas Lake Cattle Company v Nicola Valley Fish and Game Club*, 2018 BCSC 2167; *Douglas Lake Cattle Company v Nicola Valley Fish and Game Club*, 2021 BCCA 99.

> affected; compensation based on 100 percent of the market value of the land, with full disclosure of the basis of the offer; a bilateral right to invoke arbitration proceedings; and notice of possession by the expropriating authority. […]
>
> In the case of section 4, none of these procedural safeguards exist. Because a road has been graded or a culvert installed, the title to the land covered by the road may immediately transfer to the Crown. This arbitrary procedure has the potential of being used for improper purposes and can also result in quite unexpected consequences.
>
> Not only may a person be deprived of his property without fair process, but sometimes no process is entered into at all: the mere event of a Ministry employee grading a private road can result in the instantaneous and compulsory transfer of the ownership of the road to the Crown.

In analyzing this issue, in 1985 we also considered whether section 4 resulted in expropriation without the consent of property owners. We noted that guidance from the court was unclear on whether an intention to dedicate by the property owner was required for section 4 to take effect. At the time, the court had indicated that section 4 could take effect if the property owner consented to the performance of work on the road, even if they were unaware that work being performed would result in a transfer of ownership to the government.

More recent court decisions have made it clear that an intention to dedicate is not required, although courts may examine whether an owner had knowledge of or acquiesced to the expenditures and travel on the road.

In some respects, this conclusion results in an even stricter application of the section 42 deeming provision, because owners will no longer be able to argue that – despite evidence of public expenditures and travel – they did not intend for the road to become public. And, as noted in our 1985 report, even if an owner agreed to the expenditure of public monies on their road (e.g. to grade it), the owner may not know that the consequence of such agreement would be to transfer ownership of the road to the government.

Therefore, as the deeming provision remains largely unchanged under section 42, the opportunity for expropriation without knowledge, consent or compensation to property owners remains a live issue today.[15]

However, the ministry has informed us that it no longer relies on section 42 to establish new highways, and its reliance on section 42 is limited to historical section 42 roads. “Historical” section 42 roads are roads that

[15] The word “expropriation” throughout this section of the report refers to the generally understood definition of the term as referring to action, especially by the state, to take property away from its owner (see, for example, Oxford Encyclopedic English Dictionary, New York: Oxford University Press, 1991, 501). This section of the report is not referring to the definition and process of expropriation set out in the *Expropriation Act*, which requires notice, vesting and advance payment of compensation to impacted landowners.

became public by operation of section 42 at some point in the past. Some of these are still maintained by the ministry, such as Road A in Ms. P's case. Others are no longer maintained, but received public expenditure in the past (sometimes the very distant past). Often, the ministry itself is unaware of the latter until they are brought to its attention by the public.

The ministry no longer relying on section 42 to establish new highways goes some way toward mitigating concerns around expropriation without knowledge, consent or payment. However, because the deeming provision is automatic and immediate, section 42 does not require the ministry's intention to create a public road. Further, there are thousands of kilometres of "historical" s.42 roads in the province.

Therefore, while the ministry may not intentionally act in a way that creates new section 42 roads, there is a risk that government will still inadvertently trigger the deeming provision and expropriate land without the knowledge or consent of property owners, and without payment to them. For example, property owners in the area of a private travelled road could successfully advocate for a public body to grade the road; the expenditure of public monies may then trigger the deeming provision in section 42 without either the property owners or the ministry fully considering the implications.

Inconsistent application of the legislation

In our 1985 report, we reported that the broad phrasing of key terms in section 4 led to inconsistency:

> [S]ection 4 is so broadly phrased that considerable opportunity exists for it to be applied inconsistently. It is evident from my investigations of a number of complaints involving the application of section 4 that the Ministry of Transportation and Highways has not always taken consistent positions on whether a road is public under section 4. Similar cases have not always been treated in a similar way and section 4 has resulted in the transfer of ownership in land in some cases where neither the Ministry nor the property owner intended such an effect; this is arbitrariness at its worst.

Nearly four decades later, important terms in section 42, particularly "public money is spent" and "travelled road," are still not defined in the *Transportation Act* or the *Transportation Act Regulation.*

However, the courts have provided some guidance to interpret these key terms. For example, with respect to the question of whether "public money is spent" on a road, the courts require that any expenditure of money on a travelled road be more than insignificant or trivial.[16] Similarly, the requirement that the road must be "travelled" will not be satisfied by trivial or casual use.[17]

[16] *Whistler Service Park Ltd. v Normway Industries Ltd.* (1990), 69 DLR (4th) 150 (BC Court of Appeal) at page 7 (QL).

[17] Skutnik v British Columbia (Attorney General), 2013 BCSC 195 at para 68.

While helpful to a degree, guidance from the court is itself broadly phrased and often case specific. As a result, the factual circumstances sufficient to trigger section 42 remain vague and therefore section 42 may still be applied inconsistently.

Uncertainty with respect to ownership of roads

In 1985, we highlighted how the *Highway Act* created uncertainty with respect to ownership of roads in the province:

> There are other equally serious consequences of section 4 and its use and application by the Ministry. The Law Reform Commission Report on Expropriation has identified the problem for a person or his lawyer in determining whether or not a particular road traversing the client's property is a section 4 road. Section 4 roads are not registered in the Land Title Office as are other public highways. In fact, no one really knows until it is determined by a court whether or not a particular road is or is not a public road under section 4. The Ministry of Transportation and Highways in the past regarding the section 4 status of particular roads has often confused the issue further and caused trouble and expense both for the complainants and, in some cases, for the Ministry itself.
>
> […]
>
> [S]ection 4 has the effect of making the status of the road uncertain, which results in disputes and friction between neighbours, and the Ministry finds itself drawn into these disputes.

As we saw with Ms. P and Mr. S, the same is true today of roads that come under section 42 of the *Transportation Act.* There is no requirement to survey section 42 roads, or to deposit those survey plans with the LTSA. The records that might help someone interpret and apply the terms used in section 42 are not publicly available; instead, they are held by the ministry. And the fact that the ministry possesses no declaratory authority, with the courts the only forum for disputes, means that for many roads, the question of ownership may remain unsettled. At the same time, as we saw in both of the complaints we investigated, the ministry will continue to make decisions based on its understanding of the road's legal status.

It is clear that section 42 continues to create uncertainty that results in disputes both between neighbours and between property owners and the ministry.

THE ROAD AHEAD: CONCLUSION AND RECOMMENDATIONS

The unfairness we identified in 1985 with respect to section 4 of the *Highway Act* continues in section 42 of the *Transportation Act*. Therefore, I find that our office's previous conclusions apply with equal force today. I have made seven recommendations for systemic change to the Ministry of Transportation and Infrastructure that are intended to address, finally, these long-standing concerns.

Finding 1:

Consistent with our office's Special Report #10 issued in 1985, section 42 of the *Transportation Act* is unjust for the following reasons:

(a) Section 42 can result in expropriation without the knowledge or consent of property owners, and without payment.

(b) Key terms in section 42 are so broadly phrased that considerable opportunity existed for them to be applied inconsistently.

(c) Section 42 creates uncertainty with respect to ownership of roads in the province. This uncertainty leads to conflict among neighbours and with the Ministry of Transportation and Infrastructure, resulting in disputes that can only be resolved through costly court actions.

I acknowledge the costs associated with implementing these recommendations will likely be significant. This was also a concern raised by the ministry when we made our recommendations almost four decades ago. However, whatever government's objections were in the past, technology exists today that would likely enable the ministry to do the required work in a more timely and cost-effective way.

More importantly, failing to address an ongoing injustice can have serious consequences; we these consequences in our 1985 report when we said, "Failing to rectify an ongoing injustice undermines society's belief in democracy and the rule of law." In this case, the injustices perpetuated by section 42 remain ongoing nearly 40 years after our 1985 report was published. It is time they were addressed.

Preventing expropriation through section 42

To address the potential for expropriation without the knowledge or consent of property owners, and without payment, I recommend section 42 be amended to prevent the creation of new section 42 roads as of the date legislative amendments come into force.

During our investigation, the ministry acknowledged that section 42 can be ambiguous and challenging to interpret and apply consistently. The ministry also agreed that the interpretation and application of

section 42 has become progressively more challenging throughout the decades, creating uncertainty that is not ideal for either the ministry or private property owners.

The ministry stated that it has in the past taken steps to address challenges around section 42, including forming internal committees to provide guidance and clarification to staff. More recently, the ministry created a provincial Section 42 Working Group to address concerns regarding section 42.

The ministry informed us that its Section 42 Working Group has several key deliverables it hopes will improve the ministry's approach to section 42. The ministry advised that this recommendation is aligned with the findings and ongoing work of its Section 42 Working Group.

Recommendation 1:

By December 31, 2024, the Minister of Transportation and Infrastructure reconsider the *Transportation Act* by introducing amendments to prevent the creation of new section 42 highways as of the date legislative amendments come into force.

Developing a public-facing notice system

To address the lack of a public-facing notice system for prospective property buyers, I also recommend legislative amendment to require that section 42 roads be registered with the Land Title and Survey Authority (LTSA). Such registration would help to ensure that notification occurs as a routine part of the conveyancing process.

The ministry raised concerns that this recommendation would require it to undertake work parcel by parcel, instead of just by road. This would be much more resource-intensive, as one road can impact many parcels. The ministry told us it was also unsure if the LTSA would allow a legal notation without a legal survey to support it, and it indicated that amendments to the *Land Title Act* may be required.

I acknowledge the challenges highlighted by the ministry. However, I believe a public-facing notice system is of critical importance, and it does not appear that there are any viable alternatives to registering section 42 roads with the LTSA that would provide clear notice to prospective property owners. I fully expect that the Minister of Transportation and Infrastructure will work with other ministers as needed to ensure that any consequential amendments required to give effect to this recommendation are brought forward.

Recommendation 2:

By December 31, 2024, the Minister of Transportation and Infrastructure work with the minister responsible for the Land Title and Survey Authority to reconsider the *Transportation Act* by introducing amendments to require that existing section 42 highways be registered with the Land Title and Survey Authority.

Ensuring consistent application of the legislation

My investigation highlighted that the terminology in section 42 of the *Transportation Act* that is used to assess the status of a road is not always clear and can be applied inconsistently. To address inconsistency, I recommend the ministry establish clear and consistent guidance

for its staff in assessing key terms such as "public money is spent" and "travelled road." Creating policy to clarify terminology and processes would likely benefit both ministry staff and the public by helping to improve transparency, consistency and fairness when dealing with potential section 42 roads.

The ministry told us that this recommendation also aligned with the findings and ongoing work of the Section 42 Working Group.

Recommendation 3:

By December 31, 2024, the Ministry of Transportation and Infrastructure develop policy that establishes clear and consistent guidance for its staff in assessing key terms in section 42 of the *Transportation Act* such as "public money is spent" and "travelled road".

Creating certainty with respect to ownership of roads

To address uncertainty with respect to ownership of roads, I recommend the ministry consolidate and digitize records in its possession that are relevant to section 42 highway assessments and conduct a review of possible section 42 highways in the province and establish a publicly accessible registry of roads it believes to be highways by operation of section 42.

I also recommend the ministry incorporate spatial data in the registry, as this will greatly increase its utility for the public. My expectation is not that the ministry undertake expensive and time-consuming legal surveys, but instead that it provide data in the form of simple Global Positioning System (GPS) tracks with the disclaimer that the precise location of a road would need to be determined by survey, if necessary.[17] This would allow the public to quickly and easily ascertain whether a given road is considered to be public in accordance with section 42, as well as the road's approximate location in relation to nearby private parcels.

The ministry advised these recommendations are in line with the findings and ongoing work of its Section 42 Working Group, and it is committed to pursuing this work, subject to budgetary and operational considerations.

Recommendation 4:

By December 31, 2024, the Ministry of Transportation and Infrastructure consolidate and digitize records in its possession that are relevant to section 42 highway assessments.

Recommendation 5:

By December 31, 2029, the Ministry of Transportation and Infrastructure conduct a review of possible section 42 highways in the province and establish a publicly accessible registry of roads it believes to be highways by operation of section 42.

[17] With today's technology, spatial data detailing the approximate location of a road can be gathered by travelling along the road with a low-cost, handheld GPS device using a "track" function. The accuracy of the resulting GPS track is not equivalent to that produced by a legal survey; for example, the GPS track would not identify the road's centreline or width. However, such GPS tracks would allow the public to quickly and easily ascertain a road's approximate location in relation to nearby private parcels.

Recommendation 6:

By December 31, 2029, the Ministry of Transportation and Infrastructure develop and incorporate spatial data for the information in its publicly accessible registry of roads it believes to be highways by operation of section 42.

Developing an alternate dispute resolution process

To provide a more accessible alternative to court actions for people seeking to clarify or dispute the status of a potential section 42 road, I recommend the ministry develop administrative processes in relation to its publicly accessible registry of roads it believes to be highways by operation of section 42.

Specifically, to address situations where the ministry is unaware of a potential section 42 road until brought to its attention, or other instances in which a road is not already included in the ministry's publicly accessible registry, I recommend the ministry establish a process that allows the public to request the ministry assess whether the road should be included in the registry.

Similarly, if a road is included in the ministry's publicly accessible registry, I recommend the ministry establish a process that allows the public the opportunity to dispute the road's inclusion in the registry.

The ministry agreed to investigate this recommendation further and consider it while working to create a publicly accessible registry.

Recommendation 7:

By December 31, 2029, the Ministry of Transportation and Infrastructure develop the following administrative processes in relation to its publicly accessible registry of roads it believes to be highways by operation of section 42:

(a) if a particular road is not included in the registry, a process that allows the public to request the Ministry of Transportation and Infrastructure assess whether the road should be included in the registry; and

(b) if a particular road is included in the registry, a process that allows the public the opportunity to dispute the road's inclusion in the registry.

APPENDIX

Response from Ministry of Transportation and Infrastructure

May 9, 2023

Jay Chalke, Ombudsperson
Office of the Ombudsperson
PO Box 9039 Stn Prov Govt
Victoria BC V8W 9A5

Reference: [redacted]
Your Files: [redacted]

Dear Jay Chalke:

Re: Section 42 of the *Transportation Act*

Thank you for your letter of April 24, 2023, regarding Section 42 (S.42) of the *Transportation Act,* which provided the final revised recommendations of the upcoming public report. I appreciate your investigation of this topic and that you have shared your findings and recommendations with the Ministry of Transportation and Infrastructure (the ministry). I also appreciate the opportunity to comment on the final report and thank you for incorporating the information the ministry provided in your findings and recommendations.

During our discussions, we have advised that the ministry does not rely on S.42 to create new highway and considers it only in a historical context when trying to determine the status of a particular road. Additionally, case law sets out that only the courts can decide if a road is public by operation of S.42. In practice, when the ministry discovers a road that may be highway under S.42, we conduct detailed research, and if we find the road is required in the public interest, we take steps to acquire the necessary highway tenure through negotiations with the owner and legal survey. In cases where the owners are unwilling to dedicate the road as public highway, then the matter may be referred to the courts.

The ministry's responses to the recommendations follow. Please note that S.42 also applies to roads located within municipal boundaries and under municipal authority, outside the jurisdiction of the ministry. For clarity, this response is only regarding roads that may be considered provincial public highway by operation of S.42 and not municipal roads.

Recommendation 1
The ministry agrees that the *Transportation Act* could be amended to prevent the creation of any new highway by operation of S.42. This recommendation aligns with the findings and ongoing work of the Section 42 Working Group. While the ministry is unable to commit to meeting the timelines noted, the ministry can commit to putting this change forward for the consideration of government in due course.

…/2

Ministry of Transportation and Infrastructure
Office of the Deputy Minister
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Recommendation 2
The ministry is committed to investigating the legal implications and requirements of this recommendation further and opening discussions with the Minister responsible for the *Land Title Act*. It should be noted that in cases where a potential S.42 road is determined to be required in the public interest, the ministry's preference, subject to budget availability, is to come to a mutual agreement with the property owner to legally survey and register a road plan with the Land Title and Survey Authority.

Recommendation 3
The ministry agrees that there may be benefit to developing policy to establish clear and consistent guidelines as recommended. This recommendation is aligned with the findings and ongoing work of the Section 42 Working Group. Creating policy to clarify terminology and processes would likely benefit both ministry staff and the public by helping to improve transparency, consistency and fairness when dealing with potential S.42 roads. However, having this work completed by December 2023 may not be achievable as the policy development process is complex and requires work from several departments within the organization and is subject to ministerial approval.

Recommendation 4
The ministry agrees that its historical records should be digitized and consolidated as recommended. Some of this work is already underway. The pace of this work will be dependent on the reallocation or addition of operating funding and staff within the ministry.

Recommendation 5
The ministry acknowledges that a thorough review of the 47,000 km of maintained highway in the province for adequate highway tenure would be beneficial. As discussed, given the magnitude of the task and the operational and financial resources needed, new funding would be required to accomplish this project, and the ministry is unclear on how long it may take to complete the review. At a minimum, this work will take multiple years, and a complete record may take a decade.

As you know, there are many ways that highway tenure in B.C. could have been established, so researching roads to determine the existence or adequacy of legal highway tenure is complex and time consuming, requiring a parcel-by-parcel review of each parcel of land a particular road crosses to determine if there is highway, how it was created, and if there are gaps in the legal tenure.

At this time, it is not clear how a publicly accessible registry as suggested in the recommendation could be established, and the ministry will need to explore this recommendation further. The ministry's historical road records are and continue to be available to the public by request. Additionally, given that case law sets out that only the courts can decide if a road is or is not public by operation of S.42, the ministry must understand any legal implications of creating a publicly accessible registry, as we must be mindful of not being perceived to be making declarations of S.42 roads.

…/3

Recommendation 6
The ministry agrees that spatial data should be developed and incorporated into the review recommended in Recommendation 5, subject to funding being made available. As previously discussed, a complete spatial record could take a decade if funding and staff were made available.

Recommendations 4, 5 and 6 are in line with the findings and ongoing work of the Section 42 Working Group. The ministry will review Treasury Board Staff's 2024 budget instructions to determine if opportunities are available to seek incremental funding and staffing to accelerate the digitization of the property records. The ministry will also undertake further analysis to review and justify the larger expenditures on the highway tenure review and associated spatial data, in support of future Treasury Board requests to fund these activities.

Recommendation 7 (a) and (b)
The ministry will investigate this recommendation further and will consider it as part of the work outlined above in our responses to Recommendations 4 and 5. As cautioned in our response to Recommendation 5, the ministry must be mindful to not make declarations of public highway by operation of S.42, so we need to fully understand how to meet the intent of this recommendation without being in contravention of established case law.

The ministry agrees that preventing the creation of new S.42 roads through legislative amendment, undertaking a review of highway tenure in the province, and exploring policy options to promote fair, consistent and transparent application of S.42 would benefit the public, the ministry and its partner agencies. The ministry is committed to pursuing this work as budgets and operational requirements allow. We thank you for providing the results of your investigation and your recommendations, and we are confident that the ministry's ongoing work will result in improvements to the application of S.42.

If you have any questions or would like more information about the ministry's work related to S.42, please do not hesitate to contact me.

Thank you again for taking the time to write.

Sincerely,

Kaye Krishna
Deputy Minister

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