OMBUDSMAN OF BRITISH COLUMBIA

Special Report No. 5

to

The Legislative Assembly of British Columbia

THE REID CASE

Legislative Assembly
Province of British Columbia

OMBUDSMAN

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July 6, 1982

The Honourable Harvey W. Schroeder
Speaker of the Legislative Assembly
Province of British Columbia
Parliament Buildings
Victoria, B.C.

Mr. Speaker:

I have the honour to submit herewith a special report to the Legislative Assembly, pursuant to section 30(2) of the Ombudsman Act, R.S.B.C. 1979, chapter 306.

The report concerns a complaint I received from Mrs. Vera Reid of Pemberton, B.C., the investigation of this complaint by my office, and the recommendations I made to the Ministry of Transportation and Highways following this investigation. I have attached in the appendices to this report copies of my correspondence with the Ministry of Transportation and Highways.

Respectfully yours,

Karl A. Friedmann
Ombudsman

OMBUDSMAN OF BRITISH COLUMBIA

SPECIAL REPORT #5

TO

THE LEGISLATIVE ASSEMBLY OF BRITISH COLUMBIA

AN INVESTIGATION BY THE OMBUDSMAN

INTO A COMPLAINT

RECEIVED FROM MRS. VERA REID

OF PEMBERTON, BRITISH COLUMBIA

July 6, 1982

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INTRODUCTION

The Legislative Assembly has entrusted to the Ministry of Transportation and Highways broad powers of expropriation under the Highway Act. There are few protections for those whose property the Ministry requisitions for public purposes. In the absence of such procedural protections, it is all the more important for that Ministry to exercise its vast powers with restraint and fair consideration for the rights and interests of affected property owners.

I must bring one case to the attention of the Legislative Assembly in which the Ministry failed to exercise appropriate restraint. Far from being fair and considerate of the interests of the property owner, the Ministry engaged in actions which frustrated my recommendations and frustrated my complainant's potential redress in the Courts of British Columbia.

People who want to subdivide their property face many difficulties. They quickly discover that the law permits government officials to demand many concessions before granting approval for a subdivision. Subdividers may be required to give land to the Crown, without compensation, for future road purposes; to enter into a restrictive covenant so that if their property is ever flooded compensation may not be claimed from the

government; and to give up land along creeks and rivers to act as a buffer zone to protect the natural environment. One concession demanded from all subdividers is that "necessary and reasonable access" to all parcels be provided by way of the establishment of a public road to each parcel.

This latter requirement is a matter of legislative policy and is found in section 75(1)(a) of the Land Title Act. It is obviously a good policy, for if subdividers were not required to ensure that a legal access road was provided to each subdivided parcel of land, subsequent purchasers of the property would be left without access to their property. It is an invariable requirement of the law that a public access road be dedicated to the Crown before land may be subdivided.

In 1974, a private company (which for the purposes of this report I have called "the Developer") purchased a large tract of land northeast of Pemberton, described as District Lots 2679 and 4100. Between 1974 and 1981 the Developer made a series of applications to the Approving Officer of the Ministry of Transportation and Highways for permission to subdivide the property. The Land Title Act requires that every subdivision be approved by an Approving Officer. In municipalities, the Approving Officer is an employee of the municipal council, while the Ministry of Transportation and Highways exercises the powers of the Approving Officer in rural areas.

Mrs. Vera Reid complained to me in September of 1981 that the Ministry's Approving Officer had granted preliminary layout approval for the Developer's subdivision. She alleged that this preliminary approval was based on the mistaken assumption that there was a public right-of-way through her property which would provide public road access to the Developer's subdivision. The complaint raised what appeared to be a straight-forward question: is there or is there not a public right-of-way through Mrs. Reid's property? It was clear that many decades ago an old trail had existed through the land owned by Mrs. Reid. The question I faced was whether or not the trail was a public road and was contained within a public right-of-way. Alternatively, was Mrs. Reid correct in asserting that she owned the trail and there was no public right-of-way?

Mrs. Reid has owned her land for many years. Some time ago, the Ministry of Transportation and Highways acquired some of her property for road purposes. The Federal Government also took a ten foot strip through her land for a power line right-of-way. These works she accepted. But she was not happy about the idea of having her property further divided by yet another road. Mrs. Reid was not concerned that she might not receive compensation for the road. Instead she complained that the Ministry had improperly asserted that there was public right-of-way on her property which could be used to provide access to the Developer's subdivision.

My investigation was substantially completed within one month. The complaint, however, remains unresolved. The Ministry's numerous and eventually successful attempts to stonewall any questioning of its claim to the right-of-way were almost unbelievable, and raise important questions concerning the proper conduct of a government authority and how it treats citizens in a free and democratic society.

I do not ordinarily use the actual names of complainants in my Special Reports as there is usually no need to do so. Mrs. Reid consented to the use of her name in this report; her complaint has received a good deal of local publicity and there now seems little point in trying to preserve her anonymity.

A BRIEF HISTORY OF THE PROBLEM

Mrs. Reid has been the owner since 1960 of District Lot 1543, which lies a few miles northwest of Pemberton. Mr. George Walker owned the property between 1947 and 1960. The property had been acquired by Mr. Walker from the Spetch family, to whom it had been granted by the Crown in 1910. Mrs. Reid's land lies directly east of the Developer's property; I have attached a map of the area which illustrates the location of the properties (Appendix A).

In the decade prior to the Crown grant of this property to Mr. Spetch, a narrow cattle trail was constructed from Anderson Lake (south of Lillooet) to Pemberton, which became known as the Pemberton Meadows Trail. This trail crosses Mrs. Reid's property, and goes westward into District Lots 2679 and 4100, which are now owned by the Developer. Mr. Bill Spetch, the son of the original homesteader, recalls that in about 1917 an engineer for the Department of Highways, by the name of Todd, did some work on that part of the trail. Mr. Spetch remembered driving a truck from D. L. 1543 to D. L. 4100 in about 1929. It appears however that this part of the Pemberton Meadows Trail fell into disuse shortly after that time.

The Ministry of Transportation and Highways adopted a variety of positions over the years with respect to the status of the trail. In 1962, the

District Highways Superintendent, in reply to a query from Mr. Walker, advised that the trail was a public road because public monies had been spent on it (section 4 of the Highway Act provides that where public monies are spent upon a travelled private road, that road automatically becomes a public road). He also stated that because of a Notice published in the B. C. Gazette in 1911, the trail was contained within a public right-of-way having a width of sixty-six feet.

A road, of course, is just that - a road. Most public roads, however, lie within a larger area of public property called a right-of-way. A right-of-way is acquired by the Ministry to permit soil to be taken from the sides of the right-of-way for construction of the road; for ditches to be created so that snowmelt and rainfall flowing off the road will be carried away; and to permit proper maintenance of the road to be carried out.

In 1973, the District Highways Manager in reply to a letter from Mrs. Reid stated that the trail was a public road "although no right-of-way exists for the road". Mrs. Reid's solicitor wrote to the Ministry, upon receipt of that letter, and asked for proof of the expenditure of public monies on the trail. The District Highways Manager replied that there were no records of money being spent on the road, and referred back to the 1962 letter.

Since 1974, the Developer made a number of applications to develop a large subdivision to the west of Mrs. Reid's property. As a condition of subdivision approval, the Developer was required to establish access to the property and for this purpose asserted that the Pemberton Meadows Trail through Mrs. Reid's property was a public road. If the trail is a public road, it would provide very desirable access to the subdivision as it intersects with the Pemberton - Portage Highway at a point within Mrs. Reid's property.

It appears that Ministry officials first agreed with Mrs. Reid that the trail through her property was very narrow and, therefore, would not provide adequate road access to the subdivision. One Ministry employee commented as follows:

> This access road claimed as a Section 6 [now section 4] road is more of a trail fit for a 4 wheel drive.

Thereafter, the Developer was periodically informed that the access problem would have to be resolved before approval could be given for the subdivision. As late as March 4, 1981, the Approving Officer wrote to the Developer stating:

> A minimum 20 metre wide right-of-way between the East boundary of D. L. 2679 [the subdivision] and the existing Pemberton Portage Road is to be acquired, dedicated and constructed by the applicant. . . . Applicant is to be entirely responsible for

settlement of this aspect with existing property owner, D. L. 1543 [Mrs. Reid] prior to final approval of subdivision plans. (This should be one of the first items addressed by applicant.)

However, in the summer of 1981 the Developer discovered the existence of the Gazette Notice of 1911 and brought it to the attention of the Approving Officer. In a letter to Mrs. Reid dated August 5, 1981, the Approving Officer of the Ministry concluded that the Gazette Notice of 1911 had the effect of creating a sixty-six foot wide public right-of-way through Mrs. Reid's property, and on that basis granted preliminary layout approval for the Developer's subdivision.

On September 17, 1981, Mrs. Reid complained to my office.

MY INVESTIGATION AND CONCLUSIONS

The Gazette Notice of 1911 reads as follows:

> "Notice is hereby given that all public highways in unorganized districts, and all main trunk roads in organized districts are 66 feet wide, and have a width of 33 feet on each side of the mean straight center line of the travelled road.
>
> Thomas Taylor,
> Minister of Public Works
>
> Department of Public Works,
> Victoria, B.C., July 7th, 1911."

Possible statutory authority for the Gazette Notice is found in section 6C of the Highways Establishment Act, 1911. That section provides that

> It shall be lawful for the Minister of Public Works in his discretion, to make public highways, and to declare the same by notice in the British Columbia Gazette, setting forth the direction and extent of such highway . . . . (my emphasis)

In the early part of October, 1981, my staff found a decision of the Supreme Court of British Columbia in 1920, in which Mr. Justice Gregory considered the validity of the Gazette Notice of 1911. The Court concluded as follows:

> The Notice [of 1911] neither purports to make or declare, nor to set forth the nature and extent of the same, and is, I think, ineffective and unauthorized by the Act. (my emphasis)

This Supreme Court decision was not appealed, and it appears that the Gazette Notice of 1911 has not been considered in any subsequent court cases. I found it particularly alarming that the Ministry had apparently ignored the decision of the Supreme Court and had gone on using it since 1920 to lay claim to numerous properties. The Director of Property Services for the Ministry informed my investigator that the Gazette Notice is used to assert ownership of a right-of-way in some three or four instances each year.

Even if the Ministry were to argue that the decision of the Supreme Court in 1920 could be ignored, it nevertheless appeared to me that the Gazette Notice, not having been filed with the Registrar of Regulations as required by section 2(1) of the Regulation Act, was now without effect. Section 2(4) of that Act provides that a regulation that has not been filed as required by the Act "ceases to have effect". The Registrar of Regulations informed my investigator that the Gazette Notice of 1911 had not been filed with her office.

I wrote to the Ministry on October 13, 1981 (Appendix B), and pointed out that the Gazette Notice of 1911 may be invalid. I proposed a practical resolution to the problem of public access to the subdivision. However, this resolution was contingent upon the agreement of all parties and Mrs. Reid was not happy with it. She was unwilling to agree to the establishment of a public road through her land. This of course is her perfect right as she is the owner of the property.

I then reported my preliminary findings to the Ministry on October 28 (Appendix C), and invited Ministry representations. I stated that it appeared to me that the Ministry had made a mistake of law in asserting that there was a public right-of-way through Mrs. Reid's property. In reply (Appendix D), the Ministry stated that it considered the decision of the Supreme Court in 1920 to be obiter dicta (not of a binding nature) and maintained its original position that a public right-of-way existed. The Ministry further asserted that the Gazette Notice of 1911 was not a regulation and therefore was not required to be filed with the Registrar of Regulations.

In a further effort to resolve this matter expeditiously, my investigator entered into a verbal agreement on November 23 with the Executive Director, Highways Engineering Division (who apparently had obtained the approval of his superiors) to have our solicitors meet in an attempt to reach agreement on the legal issues involved. The Ministry subsequently reneged on this agreement. On December 3, by way of a notice in the B. C. Gazette, the Ministry expropriated a right-of-way through Mrs. Reid's property.

The expropriation itself was bungled. The Ministry apparently intended to expropriate the right-of-way over which it had previously already asserted ownership on the basis of the Gazette Notice of 1911. However, after the expropriation, the Ministry discovered that the Pemberton Meadows Trail actually lay about sixty feet south and roughly parallel to

the newly expropriated right-of-way. The wording of the expropriation notice itself, which was published in the December 10, 1981 Gazette, reveals this mistaken belief. The notice was entitled "Establishing Existing Right of Way Within DL 1543, Lillooet District", and stated that the right-of-way "is hereby established and confirmed as public highway." (my emphasis) But why would the Ministry wish to expropriate a right-of-way which it claimed was already owned by the Crown?

It appeared to me that what the Ministry was trying to do was to frustrate my complainant's possible recourse to the Courts to have the Gazette Notice of 1911 declared invalid. The attempt to expropriate the right-of-way was, in my opinion, an admission by the Ministry that the Gazette Notice was invalid. Obviously, if the Gazette Notice was valid, there was no need to expropriate the right-of-way -- the Ministry already owned it. I think that if the Ministry honestly thought that the Gazette Notice was valid, and that the Gazette Notice had created a right-of-way through Mrs. Reid's property, it ought to have been prepared to face a Court challenge.

On December 11, I wrote a lengthy letter to the Ministry (Appendix E), setting out the following grounds upon which I subsequently made recommendations:

> It is my belief that your Ministry's assertion that the public right-of-way in question is 66 feet wide was based upon a mistake of law.

> It is my belief that the use of the Gazette Notice of 1911 by your Ministry in order to claim public ownership over untold properties for six decades, and apparently without paying compensation for such expropriations, was unjust and oppressive.
>
> It is my belief that the expropriation of Mrs. Reid's property by gazette notice dated December 3, 1981, was done for an improper purpose, and was unjust and oppressive.

On December 3, the Assistant Deputy Minister informed my investigator that the right-of-way was being expropriated in order to permit the subdivision to go ahead. He argued that the subdivision was supported by the community and would create employment in the nearby area. I have reason to believe that the Ministry had been under substantial pressure from the Developer to provide an access road; the Ministry had told them that there was a public right-of-way to the property and they had already invested money in preparing the subdivision. It was possible that the Ministry could be sued for negligent misrepresentation.

I believe that the power of expropriation should only be used where it is necessary to serve the public interest. I do not think that the creation of access to benefit private developers is one of the purposes found in the Highway Act for which the Minister may expropriate private property. For that reason I concluded that the expropriation was done for an improper purpose.

The Ministry's reply of December 23 (Appendix F), to my letter of December 11, merely restated the Ministry's original position.

Mrs. Reid's complaint became a matter of local interest and letters and articles appeared in the local press. One of Mrs. Reid's neighbours wrote to the Minister of Highways and stated:

> How can a 3' cattle trail built in the eighteen hundreds be declared a 66 foot access road to benefit a developer in the 1980's? Pemberton in the early days, as you probably are aware of, was a network of trails. Were these trails all gazetted as 66 foot roads in 1911? If this is the case please send me a map of the original trails as I believe my property had a trail through it leading to the reserve of Mt. Currie.
>
> Do you expect us to pay taxes, improve our property as Mrs. Reid has done, when you are willing to sell us out to a developer that obviously knows which doors to knock on in Victoria? Mrs. Reid has taken her problem to the Ombudsman who is looking into the matter. Why is the Ombudsman appointed and paid at taxpayers' expense if you are not willing to wait for his decision?
>
> Myself and the residents of Pemberton Valley are aware of Mrs. Reid's problem, are sympathetic to her plight, and are asking that her dispute be dealt with fairly.

MY RECOMMENDATIONS AND THE MINISTRY'S RESPONSE

I considered the Ministry's response. On January 8, 1982, I finally concluded that

> (1) the Ministry's assertion of a public right-of-way through Mrs. Reid's property was based on a mistake of law;
>
> (2) the Ministry's use of the 1911 Gazette Notice was unjust and oppressive; and
>
> (3) the December 1981 expropriation of property from Mrs. Reid was done for an improper purpose and was unjust and oppressive.

I made four recommendations to the Ministry (Appendix G). (At that time I was also under the misapprehension that the notice of expropriation of December 3, 1981 referred to the same right-of-way over which the Ministry asserted ownership on the basis of the Gazette Notice of 1911, and my Recommendation #1 as set out in that letter reflects this incorrect belief.) My recommendations were as follows:

RECOMMENDATION #1:

> That the Minister of Transportation and Highways immediately publish a notice in the Gazette varying the road established by gazette notice of December 3, 1981 pertaining to D. L. 1543, Lillooet District, to one which follows the boundaries of the existing travelled trail through Mrs. Reid's property.

RECOMMENDATION #2:

> That the Ministry of Transportation and Highways seek a declaration from the Supreme Court of British Columbia for the purpose of determining whether or not there is a public right-of-way having a width of sixty-six feet through Mrs. Reid's property pursuant to the Gazette Notice of 1911, and for the purpose of determining whether or not the Gazette Notice of 1911 is valid today.

RECOMMENDATION #3:

> (a) That the Ministry of Transportation and Highways seek to identify all rights-of-way over which public ownership has been asserted on the basis of the Gazette Notice of 1911 and where compensation has not been paid but is authorized to be paid under the relevant legislation, the Ministry of Transportation and Highways seek to locate the owner of the property at the time public ownership was asserted and pay compensation to that person.
>
> (b) That the Ministry of Transportation and Highways provide me with a list of properties identified pursuant to Recommendation #3(a), the owners of the properties at the time public ownership was asserted, and the amount of compensation paid, if any, to the owners.

RECOMMENDATION #4:

> That, if the Court determines that the Gazette Notice of 1911 was and is ineffective and unauthorized by statute, that the Ministry of Transportation and Highways cease its practice of asserting ownership of properties on that basis.

The Ministry refused to implement any of my recommendations (Appendix H), and suggested that Mrs. Reid was welcome to challenge the validity of the Gazette Notice of 1911. This invitation was equivalent to rubbing salt into wounds. The Ministry had made it pointless for Mrs. Reid to seek legal redress by expropriating a right-of-way on December 3. Even if the Court determined that the Gazette Notice of 1911 had no legal validity, the expropriation of December 3, 1981 created a fait accompli which the Court could not set aside.

Because of the confusion over exactly which right-of-way was expropriated, I again wrote to the Ministry on February 9 (Appendix I), modified my first recommendation and added a fifth. These are as follows:

RECOMMENDATION #1

> That the Ministry of Transportation and Highways immediately close, under the authority of s. 9 of the Highway Act, the public right-of-way created by the notice in the British Columbia Gazette dated December 3, 1981, and that the property be transferred back to Mrs. Reid.

RECOMMENDATION #5:

> That the Ministry of Transportation and Highways undertake to ensure that no further construction or associated work take place on either the right-of-way expropriated by the Gazette notice dated December 3, 1981, or the right-of-way through Mrs. Reid's property allegedly expropriated by the Gazette Notice of 1911.

The Ministry replied on February 15 (Appendix J), stating it did not intend to implement either my modified Recommendation #1 or Recommendation #5. For the first time, however, the Assistant Deputy Minister stated that he was willing to meet with myself or my investigator to "discuss a solution."

On February 21, such a meeting was held between my investigator, my solicitor, the Assistant Deputy Minister and the Ministry solicitor. The meeting proved fruitless. Neither the Assistant Deputy Minister or his solicitor were willing to discuss any resolution other than to indicate that they were willing to agree not to construct a road upon the first right-of-way, if Mrs. Reid would agree to accept compensation for the

right-of-way expropriated from her on December 3, 1981. Although the Ministry's solicitor was unprepared and generally unwilling to discuss and attempt to resolve the legal issues in the matter, he stated candidly that even if the Gazette Notice of 1911 was invalid, it was his advice that the Ministry should not admit this as it would open up an unacceptably large can of worms.

As the Ministry's response was inadequate and did not remedy the injustice which the complainant had suffered in my view, I decided to make a report to the Lieutenant Governor in Council. Before taking this step I asked to meet with the Honourable Alex Fraser, Minister of Transportation and Highways, in order to make one last attempt at finding a resolution. The Minister at first refused to see me. I then wrote a letter to the Minister expressing my willingness to meet with him prior to making a report to the Lieutenant Governor in Council. The Minister replied that he was prepared to meet with me; but the Minister's office informed my secretary immediately thereafter that Mr. Fraser would be unavailable for the next ten days. As the Ministry had refused to accept my recommendation that construction of the road be halted, I was concerned that irreparable harm would be caused to Mrs. Reid's property by further delays. I therefore made my report to the Lieutenant Governor in Council.

MY REPORT TO THE LIEUTENANT GOVERNOR IN COUNCIL

On March 10, 1982, I made a report to the Lieutenant Governor in Council in accordance with section 24 of the Ombudsman Act. The Honourable Alex Fraser, Minister of Transportation and Highways replied, on behalf of the Lieutenant Governor in Council, by letter dated April 22, 1982 (Appendix K). Two of Mr. Fraser's statements were most surprising.

First, the Minister asserted that

> The only entitlement claimed by the Ministry comes within the statutory authority granted to me under Section 6 of the Highway Act. No entitlement is advanced under either the provisions of Section 4 of the Act or the 1911 Gazette Notice. (emphasis added)

Section 6 of the Highway Act gives the Minister the power to expropriate. I found the Minister's statement most interesting. In response to my recommendations, the Assistant Deputy Minister had earlier informed me as follows:

> I confirm our position that at this point in time, two established rights-of-way over District Lot 1543, Lillooet District, exist. (February 15, Appendix I)

It appeared that the Ministry had backed off from its claim to the original right-of-way on the basis of the Gazette Notice of 1911, and now

claimed entitlement to only the right-of-way expropriated by the Ministry in December, 1981. Did this mean that the Ministry now recognized that the Gazette Notice of 1911 was invalid?

Second, the Minister also stated:

> With reference to the Section 6 [expropriation] proceeding, your suggestion that my actions were taken for an improper purpose is categorically denied. The content and spirit of that statutory provision have been totally adhered to. While I see no reference whatever within the statute to your suggested test of public interest, I can assure you that such a consideration, along with all other relevant factors, received my full attention as I met the responsibility resting with me under the indicated section of the statute. (emphasis added)

It concerns me that the Minister appears to be of the view that because the statute does not expressly state that property may only be expropriated in the public interest, the public interest is therefore not the "test of expropriation" as I have always believed.

I wrote to the Minister on May 11, 1982 (Appendix L) and asked for clarification. Mr. Fraser replied on May 31 (Appendix M). Concerning the question of whether the Ministry was now in agreement that the Gazette Notice of 1911 was invalid, the Minister stated:

> Although this Ministry has altered its position concerning the right-of-way across the property of Mrs. Reid, which change in position is a result of the Ministry's inability to accurately locate the pre-1911 trail on the ground, the Ministry has not altered its position concerning the applicability and use generally of the Gazette Notice of 1911.

The Minister also informed me now that yet a further notice of expropriation had been published in the B. C. Gazette which amended the expropriation of December 3, 1981. I am told that this further Gazette Notice was for the purpose of slightly altering the location of the right-of-way. The Developer had cleared and partly constructed a road on the expropriated right-of-way but the road's actual location did not coincide with the legal boundaries of the right-of-way; instead of insisting that the road be moved, it was easier for the Ministry to re-expropriate the right-of-way.

The Minister went on to state that

> This Ministry therefore declines to implement any of the recommendations contained in your letter to [the Assistant Deputy Minister], dated January 8th, 1982. The Ministry further declines to implement the recommendations contained in your letter to [the Assistant Deputy Minister] dated February 9, 1982, and hereby advises you that construction of the road is being commenced at this time.

CONCLUSION

In my report to the Lieutenant Governor in Council I posed three questions, and suggested that the answer to each should be "No". Here I would like to pose these questions again and to provide the reasons for my answers.

Question #1

> Did the Ministry of Transportation and Highways act properly in asserting ownership of the Pemberton Meadows Trail right-of-way, even though the Gazette Notice of 1911 had been found to be without statutory authority by the Supreme Court in 1920 and was not filed with the Registrar of Regulations as required by the Regulation Act?

I think not. As explained earlier, it is my opinion that the Ministry's claim to the right-of-way was based on a mistake of law. Although it was probably an honest mistake on the part of the officials who made that decision, it appalls me that the Ministry has used the Gazette Notice of 1911 for the past sixty years to claim ownership of untold properties and apparently without paying compensation. I do not think it was the

intention of the Legislature to authorize the Minister of Public Works in 1911 to expropriate numerous and unspecified properties throughout the province by way of a blanket notice in the British Columbia Gazette. A plain reading of the Highways Establishment Act, 1911 shows that the Minister was authorized to make a public road by posting a notice in the Gazette setting out the "direction and extent" of the road. The Gazette Notice of 1911 does not set out the direction or extent of any road. Because the Gazette Notice does not comply with this provision, it is without statutory authority and is therefore invalid. This is what the Supreme Court concluded in 1920.

It is not my role to seek a declaration from the Courts as to the validity of the Gazette Notice of 1911. In Mrs. Reid's case, the Ministry made it pointless for her to challenge its validity by expropriating a right-of-way on December 3, 1981. I believe, and have recommended, that the Ministry should seek such a declaration if it asserts that the 1911 Gazette Notice is valid.

As described earlier, it is also my view that the Gazette Notice is invalid because it was not filed with the Registrar of Regulations as required by the Regulation Act. There is a important purpose behind the requirement that regulations be filed in the manner prescribed by statute. We need to know the law so that we can govern our affairs accordingly. The Regulation Act is designed to ensure that all regulations are kept on file with the Registrar and are properly recorded

with the Registrar and appropriately published. Most people and, I expect, most lawyers have never heard of the Gazette Notice of 1911 and unless they spent the days necessary to read all of the thousands of Gazette notices published in this century, they would never be able to find it. If, however, the Gazette Notice had been filed with the Registrar, anyone could find it by a simple search in the "Index of Regulations".

This issue involves a fundamental principle of our society. This is that Ministries of the Government are bound by the rule of law. Only the Legislature can make law. While the law gives Ministers and government officials large areas of discretion and great powers, it also requires that such persons comply with both the letter and the spirit of the law. It is the rule of law which preserves our nation as a free and democratic society.

Question #2

> Did the Ministry of Transportation and Highways act properly in attempting to expropriate the original right-of-way when serious doubts were raised about the legality of the Gazette Notice of 1911?

As has been seen the Ministry has adopted a most difficult position throughout this matter. On the one hand the Ministry adamantly maintained

that the Gazette Notice of 1911 was valid, but on the other hand it refused to permit our solicitors to attempt to resolve the legal issue, refused to provide me with a copy of the legal opinion they received from their solicitor, and has refused to seek a declaration from the Courts as to the validity of the Gazette Notice of 1911. Yet the Ministry was sufficiently unsure of its position that it attempted to expropriate the right-of-way which allegedly had been created by the 1911 Gazette Notice. The redundant wording of the December 3 notice of expropriation illustrates this conflict: "Establishing Existing Right-of-Way . . . ." (emphasis added)

Whether a road is publicly or privately owned is purely a question of law. While government has the right and indeed the obligation to form opinions on matters of law, I think that when serious doubts are raised, government should attempt to resolve such questions or alternatively seek direction from the Courts. In my view, ministries of the government are in a unique position in our society. They are on the one hand bound by the laws of the Province and charged with various responsibilities thereunder, while on the other hand they have a considerable influence in developing those same laws. Like private individuals and organizations, they must play by the rules of the game, but unlike private parties, they have a hand in making the rules. For these reasons, I think that government agencies, such as the Ministry of Transportation and Highways, are in a position of trust; they must apply the laws of the Province fairly and honestly, and where disputes arise as to their interpretation,

government officials should resolve such disputes fairly and honestly or seek a determination from the Courts of British Columbia.

In this case, when doubts were raised about the validity of the Ministry's claim to the right-of-way on the basis of the Gazette Notice of 1911, instead of seeking a clarification from the Courts, the Ministry summarily expropriated a right-of-way. I think this was heavy-handed and oppressive.

Question #3

> Did the Ministry of Transportation and Highways act properly in expropriating a right-of-way through Mrs. Reid's property, even though the right-of-way will only benefit the developer and serves no public interest?

The Ministry showed a ready willingness to accede to the request of the Developer that an access road be provided through Mrs. Reid's property. It would have been more appropriate to advise the Developer to purchase an access road through neighbouring private properties. Providing access is commonly accepted as the obligation of the person wishing to subdivide property. In this case, at least two alternative access routes to the Developer's subdivision were possible.

After I had brought the 1920 Supreme Court decision to the attention of the Ministry and the Developer, the Developer continued to insist that the Gazette Notice of 1911 was valid. I think that the Ministry ought to have recommended that the Developer seek a declaration from the Court to that effect. For the Ministry to use its powers of expropriation on behalf of the developer, in an attempt to quell Mrs. Reid's opposition to the road, was in my view unjust and oppressive. A government authority acts oppressively when it uses its position to place a citizen at an unreasonable disadvantage.

Why did the Ministry go to such lengths to provide the Developer with a right-of-way? The Ministry may have been concerned about the possibility of a lawsuit. The Ministry had mistakenly informed the Developer that there was a right-of-way through Mrs. Reid's property, and the Developer had spent money in reliance on this statement. I do not believe, however, that this mistake on the part of the Ministry in any way justifies forcing Mrs. Reid (by way of the expropriation) to provide a public access road to the Developer's property. To use an old cliche, two wrongs do not make a right.

This case demonstrates again the desperate need for more acceptable expropriation procedures in British Columbia. Expropriation is the taking, by force of law, of a person's private property for the use of the public. Such power ought only to be used where absolutely necessary and where the public good clearly requires that the interest of the individual

be subordinated. It may be that in some countries the right of an individual to hold and enjoy private property is given little protection. This, however, is not the case in Canada where we have long held that the right to own private property is protected by law, and may only be abridged by due process of law.

In 1971, the Law Reform Commission of British Columbia stated in its Report on Expropriation as follows:

> Certainly, the public has a vital interest in the reform of the law of expropriation. On the one hand, it is fundamental justice that there should be adequate procedural safeguards to protect the individual citizen from the abusive exercise of expropriation powers. In addition, he should be entitled to receive compensation that will provide him with full indemnification for losses resulting from expropriation.
>
> At the same time it must be remembered that expropriation powers exist for a reason. There is a point at which the interests of the community must override that of the individual. That is the essence of expropriation. There are instances where the community, to achieve a public benefit, must be able to acquire private property where the owner of the property is unwilling to sell -- either at all or for what would generally be regarded as reasonable compensation. (Report, p. 9; emphasis added)

I am of the view that the expropriation in this case was done for an improper purpose. The road was expropriated through Mrs. Reid's property to provide access to the private subdivision of the Developer. There is clearly no pressing public interest involved. In fact, the only person who will directly benefit from the creation of the road is the Developer. I do not criticize the Developer; private corporations are in business to make a profit. We do not expect, however, that the government's powers of expropriation will be used to override the objections of other private individuals unless there is an important public interest to be served. I should note in passing that the recommendations of the Law Reform Commission on expropriation have never been implemented.

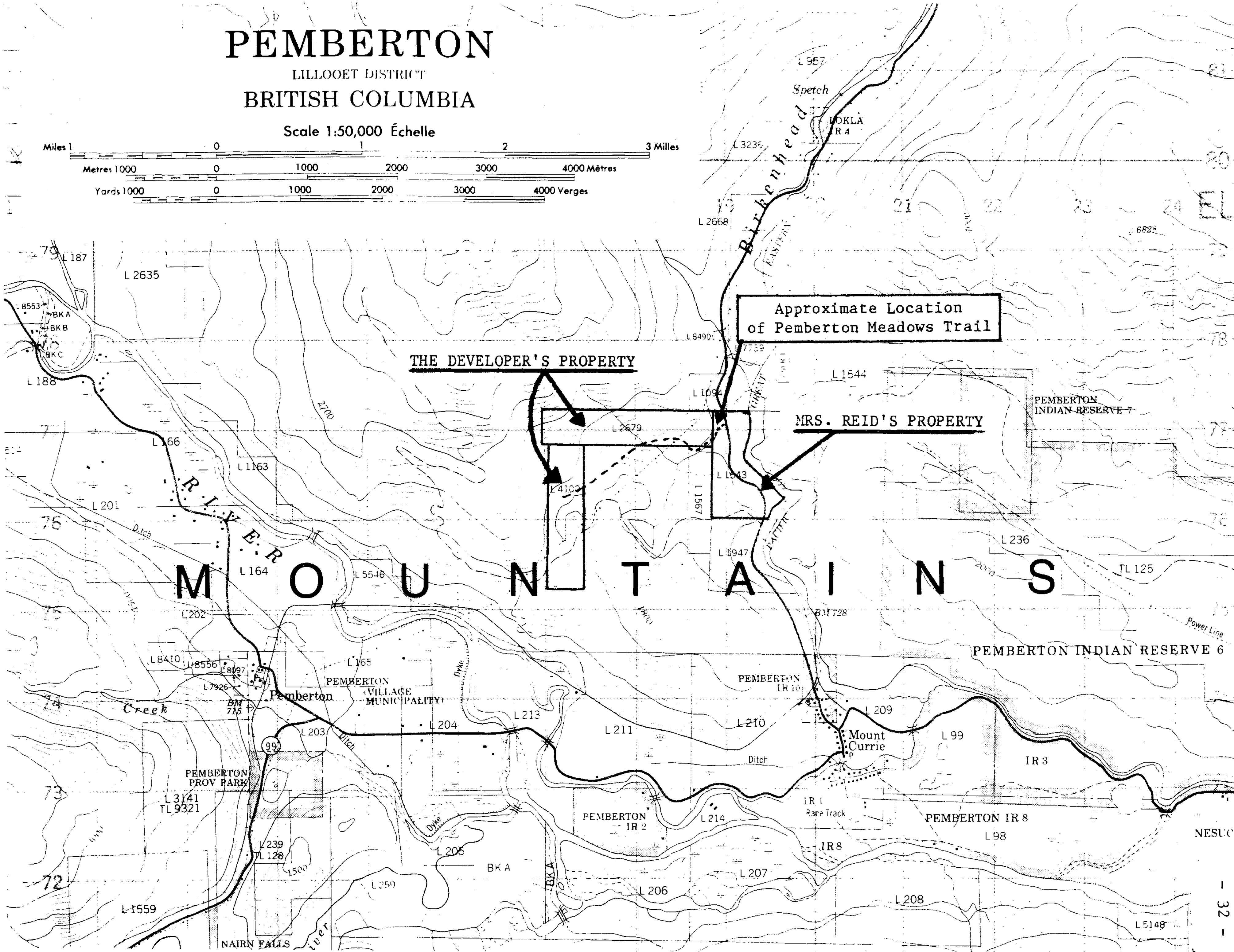
My complainant in this case is a reasonable person. I am sure that, if the public interest requires that there must be a public road through her property, Mrs. Reid will amicably accept the compensation which the Ministry must pay to her under the Highway Act; she has already cooperated with the Ministry in determining the most desirable location for the road. In fact, at the time of making her complaint to me, Mrs. Reid made an agreement with the Ministry's Approving Officer that she would accept the decision of the Ombudsman, whatever it might be.

But Mrs. Reid believes that there is a principle involved here. Roughly stated the principle is that government ought not be able to ride roughshod over the rights of individuals. I agree with her. We, as citizens, give our governments great powers over us, but in return we expect those powers to be used fairly, and according to law, and in our common best interests.

As indicated above, it is my belief that the Ministry's actions in this matter have been based upon a mistake of law, have been oppressive and unjust, and have been done in part for an improper purpose. I have no power to rectify the inequities which have resulted from the Ministry's conduct. I therefore respectfully submit this report for the consideration of the Legislative Assembly and ask that my recommendations be implemented or that other corrective measures be taken.

TABLE OF APPENDICES*

*For ease of reference, the remaining pages are consecutively numbered on the top, outside corner of each page.



PEMBERTON
LILLOOET DISTRICT
BRITISH COLUMBIA
Scale 1:50,000 Échelle
Miles 1 0 1 2 3 Milles
Metres 1000 0 1000 2000 3000 4000 Mètres
Yards 1000 0 1000 2000 3000 4000 Verges
Approximate Location of Pemberton Meadows Trail
THE DEVELOPER'S PROPERTY
MRS. REID'S PROPERTY
MOUNTAINS
PEMBERTON INDIAN RESERVE 7
PEMBERTON INDIAN RESERVE 6
PEMBERTON VILLAGE MUNICIPALITY
Pemberton
Mount Currie
PEMBERTON PROV PARK
PEMBERTON IR 8
PEMBERTON IR 2
Birkenhead
Spetch
Creek
Power Line
NAIRN FALLS
L 2679
L 4100
L 1543
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Legislative Assembly
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File No: 81 1448

Oct. 13, 1981

Mr. A. E. Rhodes
Assistant Deputy Minister
Administration
Ministry of Transportation & Highways
5th Floor - 940 Blanshard Street
Victoria, B.C.
V8V 1X4

Dear Mr. Rhodes:

Re: Mrs. Vera Reid
P.O. Box 280
Pemberton, B.C.
VON 2LO

I have received a complaint from Mrs. Reid concerning the status of a trail which traverses her property, described as D.L. 1543, Lillooet District.

I understand that the owner of District Lots 4100 and 2679, Templar Holdings Limited, applied to your Ministry some months ago for approval to subdivide their property. Road access was a condition precedent to the approval of the subdivision, and the Ministry considered whether or not an old trail traversing Mrs. Reid's property and leading into Templar Holdings' property was a public road. In a letter dated August 5, 1981, Mr. Lloyd Paulson, Regional Approving Officer in Burnaby, wrote to Mrs. Reid and advised her that it was his opinion that the trail was a public road, and was contained within a 66 foot wide public right-of-way, pursuant to a notice published on page 10910 of the British Columbia Gazette dated August 3, 1911 (hereinafter referred to as "the Gazette notice"). Mrs. Reid has complained that the Ministry has erred in reaching these conclusions.

The two issues which I propose to address below are first, whether the trail lays within a public right-of-way which is 66 feet wide and second, whether the existing trail is a public road.

...2

ISSUE #1

The Gazette notice of 1911, referred to above, stated as follows:

> "Notice is hereby given that all public highways in unorganized districts, and all main trunk roads in organized districts are 66 feet wide, and have a width of 33 feet on each side of the mean straight center line of the travelled road.
>
> Thomas Taylor,
> Minister of Public Works
>
> Department of Public Works,
> Victoria, B.C., July 7, 1911."

The Gazette notice was considered in a case styled Clarke v. Milligan et al., [1920] 1 W.W.R. 1044. In that case the defendant asserted that the road in question was a public road having a right-of-way of 66 feet in width. In considering this assertion, the Court stated as follows (at p.1046):

> "Under sec.6 [similar to section 4, Highways Act, R.S.B.C. 1979, c.167] it may be and probably is a public highway, so far as the actual travelled road is concerned, but that is only 12 feet wide, and the buildings are not erected upon the travelled road, but they are within a distance of 33 feet on either side of the center lines of that road, but it is contended that the public highway is 66 feet wide by virtue of said sec. 8, and the notice which appeared in The British Columbia Gazette of August 3, 1911, No. 10910. The Revised Statutes were not, I think, in force at this time, but sec. 88 of ch. 30, B.C. Statutes, 1908, (Land Act) is quite similar and enabled the Chief Commissioner
>
> > to make public highways, and to declare the same by notice in the British Columbia Gazette, setting forth the direction and extent of such highway.
>
> THE NOTICE NEITHER PURPORTS TO MAKE OR DECLARE, NOR TO SET FORTH THE NATURE AND EXTENT OF THE SAME, AND IS, I THINK, INEFFECTIVE AND UNAUTHORIZED BY THE ACT. It refers to 'all public highways in unorganized districts,' and 'all main trunk roads in organized districts.'" (capitals added)

It appears that this case was never appealed, and I have been unable to find any further reference to the Gazette notice in any other reported case.

...3

I note also that the Gazette notice appears to be of a legislative nature, in that it purports to apply to numerous and unspecified roads throughout the province. However, the Registrar of Regulations advises that the Gazette notice has not been filed with the Registrar and published since 1958. It would therefore appear that even if the Gazette notice was originally valid and effective, it is now without effect because of the provisions of section 2 (4) of the Regulation Act, R.S.B.C. 1979, c. 361.

It therefore appears to me that the Ministry may have erred in asserting that the trail traversing Mrs. Reid's property lies within a 66 foot wide public right-of-way.

ISSUE #2

The issue of whether or not the existing trail through Mrs. Reid's property is a public road is more difficult to resolve. The Crown Grant pertaining to Mrs. Reid's property, issued in 1913, included a proviso which stated that

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

Whether or not the trail in question was a "travelled trail", and whether or not it was in existence at the time of the Crown grant, are questions of fact not so easily determined. From the evidence provided by Mr. Paulson, it would appear that the trail may have been property described as a "travelled trail" at the time of the Crown grant, and was therefore exempted from the Crown grant. Even if it was not, the trail may possibly be a public road today pursuant to section 4 of the Highway Act. On the facts before me at this time, therefore, it appears probable that the travelled portion of the trail is a public road.

The opinions which I have expressed above to the effect that (1) the right-of-way appears not to be 66 feet wide, but rather is only the width of the trail which existed in 1913, and (2) the travelled portion of the trail appears to be a public road, are at best only tentative and further research will be required in order to conclusively determine both issues.

I have formed these tentative opinions at this early stage in my investigation for the simple reason that Dr. Raymond Rogers, planning consultant for Templar Holdings in regard to this subdivison, has advised my office that, in reliance upon Mr. Paulson's assertions that the public right-of-way is 66 feet wide, he has made various financial commitments. Dr. Rogers asserted that any delay in resolving the status of the right-of-way would result in considerable additional costs for his client.

...4

In order to facilitate an immediate resolution to this problem, I would therefore propose the following resolution; such resolution to be implemented only upon the agreement of all parties concerned. This resolution is as follows:

1. The Ministry of Transportation and Highways will immediately gazette a 66 foot right-of-way having an alignment centered on the existing trail through Mrs. Reid's property, or such other alignment as agreed upon between Mrs. Reid and the Ministry;

2. Subject to the agreement of the Ministry of Transportation and Highways and Templar Holdings Limited that the Gazette notice of 1911 is ineffective with respect to the right-of-way in question, Templar Holdings would pay compensation to the Ministry of Transportation and Highways equal to an amount which the Ministry of Transportation and Highways would be required to pay to Mrs. Reid; and

3. If either or both of the Ministry of Transportation and Highways and Templar Holdings Limited are of the view that the Gazette notice of 1911 does apply to the trail in question, then that party or both shall seek a declaration from the Supreme Court in order to determine that issue. If the Supreme Court determines that the Gazette notice is ineffective in its application to the trail in question, then compensation shall be paid according to paragraph 2 above. If the Supreme Court concludes that the Gazette notice is valid and effective in its application to the trail in question, then no compensation shall be paid to Mrs. Reid, subject to a possible recommendation from the Ombudsman to the contrary.

If any of the parties affected do not agree to negotiating an immediate resolution to this problem, then I will proceed with my investigation under the procedures outlined in the Ombudsman Act. If all of the parties agree that an immediate resolution is desirable, though not necessarily the one which I have proposed, then I would suggest that a meeting be held between the Ministry of Transportation and Highways, Templar Holdings Limited, Mrs. Reid, and representatives from my office. I would suggest that such a meeting be held in Vancouver within the next two weeks.

...5

I would therefore ask that your Ministry contact my investigator, Rick Cooper, on or before Friday, October 23, 1981, and advise whether your Ministry would be interested in participating in such a meeting in order to negotiate an immediate resolution to this problem. By copy of this letter I would also make the same request of both Mrs. Reid and Templar Holdings Limited.

Thank you for your cooperation and assistance.

Yours sincerely,

Karl A. Friedmann
Ombudsman

cc. Mrs. V. Reid

Dr. Raymond Rogers
Rogers and Associates Ltd.

Mr. Al Brown
Director of Property Services
Ministry of Tranportation and Highways

Mr. M. J. O'Connor
Regional Highway Engineer, Burnaby

Mr. Lloyd Paulson
Regional Approving Officer, Burnaby

Legislative Assembly
Province of British Columbia

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File No: 81 1448

October 28, 1981

Mr. A. E. Rhodes
Assistant Deputy Minister
Administration
Ministry of Transportation & Highways
5th Floor - 940 Blanshard Street
Victoria, B.C.
V8V 1X4

Dear Mr. Rhodes:

Re: Mrs. Vera Reid
P.O. Box 280
Pemberton, B.C. VON 2LO

I have recently been informed by Mrs. Reid that she is unwilling to agree with the resolution of her complaint as proposed in my letter to you of October 13th, 1981; Mrs. Reid quite simply does not wish to have such a road traversing her property. Because it appears that an immediate resolution of this matter may not be found in the near future, I am writing pursuant to section 16 of the Ombudsman Act to inform you of the ground upon which I may make recommendations.

For the reasons set out to you in my letter to you of October 13th, 1981, it appears to me that your Ministry may have acted contrary to law in asserting that the road traversing Mrs. Reid's property was contained within a public right-of-way having a width of 66 feet. I may therefore recommend that your Ministry immediately advise Mrs. Reid and Templar Holdings Ltd. that your Ministry no longer considers the road in question to be contained within a public right-of-way having a width of 66 feet. I am also contemplating other recommendations which I have not as yet formulated.

With respect to the issue of whether or not the existing road is a public road, I do not intend to reach a decision on this matter, given that implementation of the aforementioned proposed recommendation will resolve Mrs. Reid's complaint. Even if the existing trail is a public road, it clearly cannot in its existing condition provide "necessary and reasonable access" as required by section 75(1) of the Land Title Act.

...2

Before I reach a decision on the merits of Mrs. Reid's complaint, I would invite your representations on the ground, upon which I may make recommendations, as described above. If you do wish to respond, may I receive your reply in writing within two weeks of the date of this letter. Because it appears that Templar Holdings Ltd. may be adversely affected by my report and recommendations, by copy of this letter I would also invite Templar Holdings Ltd. to comment on this ground , provided such representations are received within the same two week period.

Yours sincerely,

Karl A. Friedmann
Ombudsman

cc: Mrs. V. Reid

Dr. Raymond Rodgers
Rodgers & Associates Ltd.

Mr. M. Elston
Executive Director
Highways Engineering Division

Mr. Al Brown
Director of Property Services

Mr. M. J. O'Connor
Regional Highway Engineer, Burnaby

Mr. Lloyd Paulson
Regional Approving Officer, Burnaby

Province of British Columbia

OFFICE OF THE DEPUTY MINISTER

Ministry of Transportation and Highways

940 Blanshard Street
Victoria
British Columbia
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Phone: 387-3280

YOUR FILE: 81 1448

OUR FILE 11-01-32

November 17th, 1981.

Mr. Rick Cooper,
Office of the Ombudsman,
8 Bastion Square,
Victoria, B. C.
V8W 1H9

Dear Mr. Cooper:

Re: Mrs. V. Reid,
Pemberton, B.C.

Please refer to your letters of October 13th, 1981 and October 28th, 1981.

The Ministry has carefully reviewed the matter but does not at all share your views on the status of the road through D.L. 1543. The Ministry does not accept that Clarke vs Milligan knocks down the 1911 gazette. It is our view that the words in the reasons for judgment are obiter. Further, with respect to your position that the 1911 gazette notice is a regulation, the Ministry holds the view that it is not.

The Ministry's position then is that the road is public and its right-of-way is 66 feet wide.

Yours very truly,

A. E. Rhodes,
Asst. Deputy Minister.

AER/CW

Legislative Assembly
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File No: 81 1448

December 11, 1981

Mr. A. E. Rhodes
Assistant Deputy Minister
Administration
Ministry of Transportation & Highways
5th Floor - 940 Blanshard Street
Victoria, B.C.
V8V 1X4

Dear Mr. Rhodes:

Re: Mrs. Vera Reid
P.O. Box 280
Pemberton, B.C.
VON 2LO

Thank you for your letter of November 17, 1981, to my investigator, Rick Cooper. After reviewing your comments and those received from the other parties affected, I have decided that Mrs. Reid's complaint, that your Ministry erred in asserting that the trail traversing her property near Pemberton is contained within a public right-of-way having a width of 66 feet, is substantiated. I am writing to inform you of my opinion and the reasons for it, pursuant to section 22 of the Ombudsman Act,. It appears to me that there may also be other grounds in this case upon which I may make recommendations, and I am also writing to inform you of these, pursuant to section 16 of the Ombudsman Act.

It is my belief that your Ministry's assertion that the public right-of-way in question is 66 feet wide is based upon a mistake of law. I set out the reasons for this conclusion in my letter to you of October 13, 1981, and I have attached a copy of that letter for your convenience. I have now received your submissions and those of Mr. Rose, solicitor for Templar Holdings Ltd., as contained in his letter to you of October 23, 1981, a copy of which was sent to this office. I discuss below why I do not agree with your and Mr. Rose's submissions that the notice published on page 10910 of the British Columbia Gazette dated August 3, 1911 (hereinafter referred to as "the Gazette Notice") remains in effect and does apply to the right-of-way on Mrs. Reid's property.

My first reason for concluding that the Gazette Notice is no longer valid is that it appears to me that the Supreme Court of British Columbia, in a case styled Clarke v. Milligan, heard in 1920, concluded that the Gazette Notice was made without statutory authority and was therefore ineffective. Both you and Mr. Rose have argued that the comments of the learned judge are obiter dicta; Mr. Rose argued that His Lordship's comments appear to be merely a "passing 'thought'" and that the real basis of the Court's decision was the failure of the defendant to introduce evidence that the road in question was a public highway in an "unorganized district" or was a "main trunk road in an organized district."

I cannot agree. First, I do not think that His Lordship's statement, that "The notice . . . is, I think, ineffective and unauthorized by the Act," is properly described as a mere passing thought. I should think that members of the judiciary would be quite surprised to learn that statements prefaced with the words 'I think' do not qualify as findings of fact or law of a binding nature. In fact, it is not uncommon for appellate court judges to conclude with the words: "I think the appeal must fail"; such a statement is intended to be binding.

Second, Mr. Rose's argument that the real basis for His Lordship's decision was the failure of the defendant to introduce evidence establishing that the road in question was of a type which fell within the parameters of the Gazette Notice is, in my view, a misreading of the reasons for judgement. In reviewing the reasons for judgement, it seems to me that His Lordship first considers the Gazette Notice and concludes that it is unauthorized by the Act. Why? Because it does not set forth the nature and extent of the highways intended to fall within its purvue, but rather refers to "all public highways in unorganized districts" and "all main trunk roads in organized districts." His Lordship then prefaces the next sentence with the words "As a matter of fact", and then goes on to note the lack of evidence to establish whether or not the road in question was of a type described in the Gazette Notice. It is my view, that the learned judge made this point to further support his conclusion; it was, however, not necessary to his decision; he had already concluded that the Gazette Notice was invalid.

Section 2 of the Highways Establishment Act, 1911, S.B.C. 1911, c. 22, which purportedly provided the statutory authority for the Gazette Notice stated as follows:

> It shall be lawful for the Minister of Public Works, in his discretion, to make public highways, and to declare the same by notice in the British Columbia Gazette, setting forth the direction and extent of such highway . . . .

In enacting this section, the Legislative Assembly empowered the Minister of Highways to create public roads by posting a notice in the Gazette which sets out the direction and extent of "such highway". It appears to me that this latter requirement was so that persons affected would know precisely which area had been declared to be a public road. (I use the singular intentionally; the statute refers to "such highway", and does not, I think, contemplate multiple expropriations by a single notice.) In reading the Highways Establishment Act, 1911 in its entirety, this view is reinforced by the subsequent provisions respecting entry of a gazetted road by Highways employees; compensation for improvements on such property and for land taken in excess of one-twentieth of the total parcel; and arbitration where the amount of compensation could not be agreed upon.

With respect, I agree with the decision of the learned judge in the Clarke case. The Gazette Notice does not set out the direction and extent of any road as required by the above-quoted section of the Highways Establishment Act, 1911. It seems to me that it is impossible to ascertain precisely which roads were intended to be included within the terms of the Gazette Notice, nor is it possible to know precisely what area of land is affected in each case. If it is impossible to determine precisely which roads are affected by the Gazette Notice, and in what direction and to what extent, then it is even more impossible to determine the compensation payable to the property owners as also provided by the Highways Establishment Act, 1911. In simple terms, I do not think it was the intention of the Legislature to authorize the Minister of Public Works to expropriate numerous and unspecified properties throughout the province by way of a blanket notice in the British Columbia Gazette.

It is my opinion that the Supreme Court did reach a determination, of a binding nature, that the Gazette Notice was ineffective and unauthorized by statute. Because the decision was not appealed, and because the Gazette Notice was not subsequently amended, it remains ineffective to this day.

My second reason for concluding that the Gazette Notice is ineffective is because I believe that it is a "regulation" as defined in the Regulation Act, R.S.B.C. 1979, c. 361. If the notice is a regulation, then it is invalid because it has not been filed with the Registrar as required by section 2 of the Act; subsection 2 (4) provides that

> A regulation made before September 1, 1973 ceases to have effect after December 1, 1973 unless it is filed under this Act or was filed under the Act repealed by this Act.

The Registrar of Regulations has recently advised my office that she

> can find no record of the notice under the Highway Act regarding road widths which was published in the August 3, 1911 issue of the Gazette on page 10910. It appears that it was never filed under the Regulation Act.

I therefore do not accept Mr. Rose's submission that the notice was filed in 1958 under the preceding Regulation Act.

It was your Ministry's submission that the Gazette Notice is not a regulation. Clearly, if the Gazette Notice is not a "regulation" as defined in the Regulation Act, then s. 2 (4) of that Act would not render it ineffective. "Regulation" is defined in s. 1 of the Regulation Act as

> every regulation, rule, order, proclamation and bylaw of a legislative nature made under or by the authority of any Act . . . .

Is the Gazette Notice a regulation or order "of a legislative nature?" I have been unable to discover any reported cases in which this phrase in the British Columbia Regulation Act has been interpreted. It appears however that section 1 (e) of the Ontario Regulations Act, R.S.O. 1950, c. 337, employed identical wording and the Ontario Court of Appeal interpreted these words in a case styled Rose v. The Queen, [1960] O.R. 147. In that case, the Highway Improvement Act authorized the Lieutenant Governor in Council, upon the recommendation of the Minister, to close a highway and direct that it revert to the municipality in which it was situated. Subsequently an order-in-council, closing and transferring a three mile stretch of a particular highway to a municipality, was passed, but was not published in the Gazette. The Regulations Act required that regulations be published, so the issue arose as to whether or not the order-in-council in question was "of a legislative nature" and therefore fell within the definition of a regulation.

The Court concluded that the order-in-council was of a legislative nature. Aylesworth, J. A. commented as follows:

> The action of the Lieutenant Governor in Council, as set out in the order-in-council referred to, in our opinion, clearly is of a legislative nature as I have said. We think that to an extent generally applicable to the public or large segments thereof it alters rights and responsibilities and even the nature and extent of those responsibilities. . . . In coming to a conclusion as to the nature of the act performed, not only must one look at the substance rather than the form but indeed in the inquiry upon which one must embark, all the surrounding circumstances must be looked at and by that I include the nature of the body enacting the order in question, the subject of the order, the rights and responsibilities, if any, altered or changed by that order.

As previously noted, the Gazette Notice of 1911 was signed by the Minister of Public Works and purported to expropriate numerous and undefined lands throughout British Columbia. It is my belief that the Gazette Notice is of a legislative nature. Thus, even if it was lawfully enacted, it is my view that it is now without effect because it was not filed with the Registrar of Regulations as required by the Regulation Act.

For the above reasons, it is my belief that your Ministry's assertion that the right-of-way traversing Mrs. Reid's property is 66 feet wide was based upon a mistake of law.

There appear to be other grounds upon which I may make recommendations which exist in this case, and I discuss my reasons for these grounds below.

The central issue in this case is quite simply a question of law; is the road traversing Mrs. Reid's property contained within a public right-of-way having a width of 66 feet or is it not? Your Ministry's position throughout has been that it is a public right-of-way, while my opinion as communicated to you by letter dated October 13, 1981, is that it is not. In order to resolve this issue without further delay, Mr. M. Elston, for your Ministry, and my investigator, Rick Cooper, entered into an verbal agreement on November 23, 1981, that no further action would be taken until our solicitors were able to meet and attempt to resolve the legal issue. Apparently Mr. Elston indicated that your solicitor would be unavailable for two weeks and arrangements for such a meeting were therefore to be delayed until that time.

On December 3, 1981, my solicitor received a telephone call from yours. Mr. Parfitt was at that time in my Vancouver office and, not having his file with him, would not agree to hold the intended meeting at that instant on the telephone. Your solicitor advised that your Ministry intended to publish a notice in the Gazette and thus expropriate the right-of-way in the immediate future. Mr. Cooper tells me that he spoke with you in the few hours following, but that while you agreed to discuss the matter further with your Minister, you would not consent to seek to forestall the gazetting of the right-of-way so that our solicitors could meet in an attempt to resolve the legal issue. You have now informed my office that the right-of-way was gazetted that same day.

You will no doubt agree that your Ministry is not a private corporation conceived for the sole purpose of achieving its own objects, but rather a government department designed to serve the public. Ministries of the government have a unique position in our society. They are on the one hand bound by the laws of the province and charged with various responsibilities thereunder, while on the other hand they have a large influence in developing those same laws. Like private individuals and

organizations, they must play by the rules of the game, but unlike private persons, they have a hand in making the rules. For these reasons, it is my opinion that government departments, such as the Ministry of Transportation and Highways, are in a position of trust; they must apply the laws of the Province fairly and honestly, and where disputes arise as to their interpretation, to seek to resolve such disputes fairly and honestly or to seek a determination from the Courts of British Columbia.

In making these comments, I refer not so much to your refusal to permit our solicitors to meet and attempt to reach agreement on the legal issue in question, nor to your refusal to provide my solicitor with a copy of the legal opinion given to you by your solicitor, but rather to your Ministry's continued use (or perhaps more properly put - abuse) of the Gazette Notice of 1911. I understand that Mr. A. Brown, Director of Property Services for your Ministry, recently informed my investigator, Rick Cooper, that your Ministry employs the Gazette Notice to assert ownership of a 66 foot right-of-way in roughly three or four cases annually. I must assume that no compensation is paid to the property owners in those cases so affected as you advised Mr. Cooper that no compensation would be payable to Mrs. Reid. I am appalled that your Ministry has for the past sixty years apparently ignored the opinion of the Supreme Court that the Gazette Notice is ineffective, as stated by Mr. Justice Gregory in 1920. Even if, as you have asserted, the Court's comments on the Gazette Notice were obiter dicta, and therefore not of a binding nature, the mere fact that doubts were raised by the Court about the validity of the mass expropriation purportedly effected by the Gazette Notice, should have been sufficient for your Ministry to seek further clarification from the Court. It appears to me that the use of the Gazette Notice by your Ministry in order to claim public ownership over untold properties for six decades, and apparently without paying compensation for such expropriations, was unjust and oppressive.

Similarly, in this case, in the face of Mrs. Reid's continued position that the right-of-way is private, instead of seeking to resolve the legal issue in question, your Ministry chose simply to expropriate the right-of-way, and apparently without compensation, by publishing a notice in the Gazette pursuant to section 6 of the Highway Act. Why did your Ministry take this drastic action? Probably because your Ministry had since 1962, and based upon the belief that the Gazette Notice of 1911 was valid, asserted that the right-of-way was public. Subsequently Templar Holdings now claims that it has invested large fractions of a million dollars in reliance (although whether such reliance was reasonable is another question) upon these statements.

I appreciate the difficult position in which the Ministry found itself. If the right-of-way is not public, and the statements of Ministry employees to the contrary are in error, then the Ministry may face the threat of legal action by Templar Holdings for negligent

misrepresentation. Is the solution for this predicament found by expropriating Mrs. Reid's right-of-way? I think not. In my view, the power to seize private property by force of law may only be exercised where it is necessary to serve the public interest.

In this case, it would appear that the public has little interest in the creation of a right-of-way across Mrs. Reid's property. In fact, the narrow public trail contained within this right-of-way had been of so little use in recent years that your Ministry had declined to maintain it. Thus the expropriation action was apparently taken to ensure that the subdivision could proceed. I do not accept your arguments, made during your telephone conversation with Mr. Cooper, to the effect that the expropriation of the right-of-way is in the public interest because members of the community were in favour of the subdivision, and because many local jobs have been created by the development.

It appears to me that the right-of-way was not expropriated to serve the public interest, but rather to avoid the possibility of the Ministry being sued by Templar Holdings. Does this reason justify the expropriation of Mrs. Reid's property? In the circumstances, I think not. If the Ministry was honestly convinced that the right-of-way is a public road and that the Gazette Notice is valid, as you have asserted, why didn't the Ministry merely advise Templar Holdings to proceed with the construction of a highway through the right-of-way and allow Mrs. Reid to sue for trespass if she believed that it was her property? This would have resulted in a determination by the Court of the status of the right-of-way. Alternatively, if the Ministry was anxious that private individuals not bear the cost of such litigation, why did not the Ministry itself seek such a declaration from the Court?

I do not think that the avoidance of legal action against the Ministry, or for that matter the provision of access to private subdivisions, are among the purposes for which the Minister may expropriate private property as contemplated by the Highway Act. It seems to me that by not seeking to have the Court determine the issue and by not permitting our solicitors to attempt to reach agreement on the legal issue, the Ministry was acknowledging that there was a very good possibility that it had made a mistake of law. Rather than permitting the legal issue to be decided, and bearing the consequences of that decision, the Ministry expropriated the road. Clearly, if the right-of-way was a public road, the Ministry did not need to expropriate it -- the Crown already owned it. Given that the Ministry chose to employ its powers of expropriation to extinguish Mrs. Reid's ownership of the right-of-way, in order to extricate itself from a difficult situation, it appears to me that the expropriation of Mrs. Reid's property was done for an improper purpose, and was unjust and oppressive.

I have summarized below these additional grounds upon which I may make recommendations:

> It appears to me that the use of the Gazette Notice by your Ministry in order to claim public ownership over untold properties for six decades, and apparently without paying compensation for such expropriations, was unjust and oppressive.
>
> It appears to me that the expropriation of Mrs. Reid's property was done for an improper purpose, and was unjust and oppressive.

Before I reach a decision as to whether or not these grounds exist in this case, I would invite your representations, pursuant to section 16 of the Ombudsman Act. As discussed earlier in this letter, it is my belief that your Ministry's assertion that the right-of-way traversing Mrs. Reid's property is 66 feet wide was based upon a mistake of law. I do not intend to make recommendations based upon this ground until I have received your submissions on the grounds set out above. Because of the urgency of this matter and because I understand that your Ministry has already extensively reviewed this matter, I would request that any representations you may wish to make be received in this office within one week of the date of this letter. If I have received no response within that time, I will proceed to make recommendations based on the grounds set out above.

Yours sincerely,

Karl A. Friedmann
Ombudsman

Enclosure

Province of British Columbia

OFFICE OF THE DEPUTY MINISTER

Ministry of Transportation and Highways

940 Blanshard Street
Victoria
British Columbia
V8W 3E6
Phone: 387-3280

YOUR FILE: 81 1448

OUR FILE 11-01-32

December 23, 1981

Dr. Karl A. Friedmann
Ombudsman
8 Bastion Square
Victoria, British Columbia
V8W 1H9

Dear Dr. Friedmann:

RE: Mrs. Vera Reid,
Pemberton, B.C.

Further to my letter to you of 15 December 1981, I am now able to respond to your letter of 11 December 1981 concerning the position of the Ministry of Transportation and Highways.

This Ministry remains firm on the position that the Gazette Notice of 1911 is valid, and that a public highway of a width of sixty six feet has existed on Mrs. Reid's property since the date of that Notice.

Yours very truly,

A. E. Rhodes
Assistant Deputy Minister

AER/wlc

Legislative Assembly
Province of British Columbia

OMBUDSMAN

8 Bastion Square
Victoria
British Columbia
V8W 1H9
Telephone: (604) 387-5855
Zenith 2221

DELIVERED BY COURIER

File No: 81 1448

January 8, 1982

Mr. A. E. Rhodes
Assistant Deputy Minister
Administration
Ministry of Transportation & Highways
5th Floor - 940 Blanshard Street
Victoria, B.C.
V8V 1X4

Dear Mr. Rhodes:

Re: Mrs. Vera Reid
P.O. Box 280
Pemberton, B.C.
VON 2LO

Thank you for your letters of December 15 and December 23, 1981, in reply to mine of December 11, 1981. I do regret that you chose not to provide me with your comments on the additional grounds stated therein.

For the reasons set out in my letter of December 11, 1981, I have now concluded that those additional grounds upon which to make recommendations do exist in this case. I have set all of the grounds upon which I intend to make recommendations again below:

> It is my belief that your Ministry's assertion that the public right-of-way in question is 66 feet wide was based upon a mistake of law.
>
> It is my belief that the use of the Gazette Notice of 1911 by your Ministry in order to claim public ownership over untold properties for six decades, and apparently without paying compensation for such expropriations, was unjust and oppressive.
>
> It is my belief that the expropriation of Mrs. Reid's property by gazette notice dated December 3, 1981, was done for an improper purpose, and was unjust and oppressive.

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I therefore make the following recommendations:

RECOMMENDATION #1:

That the Minister of Transportation and Highways immediately publish a notice in the Gazette varying the road established by gazette notice of December 3, 1981 pertaining to D. L. 1543, Lilloet District, to one which follows the boundaries of the existing travelled trail through Mrs. Reid's property.

RECOMMENDATION #2:

That the Ministry of Transportation and Highways seek a declaration from the Supreme Court of British Columbia for the purpose of determining whether or not there is a public right-of-way having a width of sixty-six feet through Mrs. Reid's property pursuant to the Gazette Notice of 1911, and for the purpose of determining whether or not the Gazette Notice of 1911 is valid today.

RECOMMENDATION #3:

(a) That the Ministry of Transportation and Highways seek to identify all right-of-ways over which public ownership has been asserted on the basis of the Gazette Notice of 1911 and where compensation has not been paid but is authorized to be paid under the relevant legislation, the Ministry of Transportation and Highways seek to locate the owner of the property at the time public ownership was asserted and pay compensation to that person.

(b) That the Ministry of Transportation and Highways provide me with a list of properties identified pursuant to Recommendation #3(a), the owners of the properties at the time public ownership was asserted, and the amount of compensation paid, if any, to the owners.

RECOMMENDATION #4:

That, if the Court determines that the Gazette Notice of 1911 was and is ineffective and unauthorized by statute, that the Ministry of Transportation and Highways cease its practice of asserting ownership of properties on that basis.

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Pursuant to section 23 of the Ombudsman Act, I would request that you inform me within three weeks of the date of this letter of the steps which have been taken or are proposed to be taken to give effect to each of these recommendations. If no steps have been taken or are proposed to be taken, I would request to be informed of the reasons for not following each of the recommendations within the same time period.

Thank you for your cooperation and assistance.

Yours sincerely,

Karl A. Friedmann

Karl A. Friedmann
Ombudsman

Province of British Columbia

OFFICE OF THE DEPUTY MINISTER

Ministry of Transportation and Highways

940 Blanshard Street
Victoria
British Columbia
V8W 3E6
Phone: 387-3280

YOUR FILE: .....

OUR FILE 11-01-32

January 29, 1982

Dr. Karl A. Friedmann
Ombudsman
8 Bastion Square
Victoria, British Columbia
V8W 1H9

Dear Dr. Friedmann:

Re: Mrs. Vera Reid, Pemberton

Further to my letter of the 8th instant our solicitors have reviewed your recommendations, and considerable discussion has taken place between the solicitors and members of your staff. As a result of these deliberations, I am now in a position to reply to your recommendations as follows:-

Recommendation #1

- Until such time as a court rules upon the validity of the 1911 Gazette notice, no point is served in varying the Gazette notice published in relation to Mrs. Reid's property.

Recommendation #2

- It is recommended that Mrs. Reid and not the Ministry of Transportation and Highways seek a declaration as to validity of the 66 foot right-of-way. In the event that the court determines the 1911 Gazette notice to be invalid, then it would be agreed that your recommendation #4 is appropriate and we would no longer rely upon the 1911 Gazette notice in acquiring further right-of-way.

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Dr. Karl A. Friedmann
Ombudsman

January 29, 1982

Recommendation #3

- Even the event of Mrs. Reid obtaining a declaration from the court, there does not appear to be any obligation in law for this ministry to undertake the identification of rights-of-way as recommended. Such an undertaking would be prohibitive in terms of manpower resources available to this ministry.

I trust that the above confirms our position with respect to this matter and will satisfy the requirements of Section 23 of the Ombudsman Act.

Yours very truly,

A. E. Rhodes
Assistant Deputy Minister

AER/wlc

Legislative Assembly
Province of British Columbia

OMBUDSMAN

8 Bastion Square
Victoria
British Columbia
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Telephone: (604) 387-5855
Zenith 2221

Your File: 11-01-32
Our File: 81 1448

February 9, 1982

Mr. A. E. Rhodes
Assistant Deputy Minister
Administration
Ministry of Transportation & Highways
5th Floor - 940 Blanshard Street
Victoria, B.C.
V8V 1X4

Dear Mr. Rhodes:

Re: Mrs. Vera Reid
Pemberton, B. C.

Thank you for your letter of January 29, 1982 in which you declined to implement any of the four recommendations I had made respecting Mrs. Reid's complaint in my letter to you of January 8, 1982.

You will appreciate that at the time of formulating these recommendations I was under the misapprehension that the right-of-way expropriated by your Ministry on December 3, 1981, is a completely seperate right-of-way than that which the Ministry had asserted ownership of pursuant to the Gazette Notice of 1911. I understand that you appeared also to be under the same misapprehension at some time, as Mr. Cooper tells me that when he spoke with you on the day of the expropriation, you expressed the view that the Ministry was not really expropriating any property from Mrs. Reid but rather confirming its ownership of the public right-of-way alleged to have been expropriated by the Gazette Notice of 1911.

Given that your Ministry appears to have acted on mistaken facts in expropriating an entirely different right-of-way through Mrs. Reid's property, and given that I remain of the belief that this expropriation was done for improper purposes, I now wish to modify my Recommendation #1 to state as follows:

RECOMMENDATION #1

> That the Ministry of Transportation and Highways immediately close, under the authority of s. 9 of the Highway Act, the public right-of-way created by the notice in the British Columbia Gazette dated December 3, 1982, and that the property be transferred back to Mrs. Reid.

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I have not modified my Recommendations #2, #3, or #4.

In light of the fact that it is now my intention to make a report on this matter to the Lieutenant Governor in Council, unless your Ministry sees fit to accept my recommendations on this matter, I would also recommend the following, which I have labelled for purposes of clarity as my fifth recommendation:

RECOMMENDATION #5:

> That the Ministry of Transportation and Highways undertake to ensure that no further construction or associated work take place on either the right-of-way expropriated on by the Gazette notice dated December 3, 1981, or on the right-of-way through Mrs. Reid's property allegedly expropriated by the Gazette Notice of 1911.

You will appreciate that because it is my belief that your Ministry has acted on a mistake of law, and has acted for improper purposes, I am concerned that irreparable damage is not caused on either of these rights-of-way until such time as I have exhausted my options under the Ombudsman Act.

Pursuant to section 23 of the Ombudsman Act, I would request that you inform me within ten days of the date of this letter of the steps which have been taken or are proposed to be taken to give effect to each of these recommendations. If no steps have been taken or are proposed to be taken, I would request to be informed of the reasons for not following each of the recommendations within the same time period.

Thank you for your cooperation and assistance.

Yours sincerely,

Karl A. Friedmann
Ombudsman

Legislative Assembly
Province of British Columbia

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V8W 1H9
Telephone: (604) 387-5855
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February 15, 1981

Mr. A. E. Rhodes
Assistant Deputy Minister
Administration
Ministry of Transportation & Highways
5th Floor - 940 Blanshard Street
Victoria, B.C.
V8V 1X4

Dear Mr. Rhodes:

Re: Mrs. Vera Reid
Pemberton, B. C.

You may recall that in my letter to you of February 9, 1982, I stated in the second paragraph of that letter as follows:

> You will appreciate that at the time of formulating these recommendations I was under the misapprehension that the right-of-way expropriated by your Ministry on December 3, 1981, is a completely seperate right-of-way than that which the Ministry had asserted ownership of pursuant to the Gazette Notice of 1911.

That sentence was in error, as I am sure you appreciated. For the record, however, I would like to correct it. That part of the letter should read as follows (I have underlined the amended part):

> You will appreciate that at the time of formulating these recommendations I was under the misapprehension that the right-of-way expropriated by your Ministry on December 3, 1981, is the same right-of-way as that which the Ministry had asserted ownership of pursuant to the Gazette Notice of 1911.

I apologize for any inconvenience this error may have caused you, and I look forward to receiving your reply to that letter in the near future.

Yours sincerely,

Karl A. Friedmann

Karl A. Friedmann
Ombudsman

Province of British Columbia

OFFICE OF THE DEPUTY MINISTER

Ministry of Transportation and Highways

940 Blanshard Street
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V8W 3E6
Phone: 387-3280

YOUR FILE: 81-1448

OUR FILE 11-01-32

February 15th, 1982.

Dr. Karl A. Friedmann,
Ombudsman,
8 Bastion Square,
Victoria, B. C.
V8W 1H9

Dear Dr. Friedmann:

Re: Mrs. Vera Reid, Pemberton

Thank you for your letter of February 9th, 1982, respecting Mrs. Reid's complaint. I have again reviewed this Ministry's position with our solicitors.

I confirm our position that at this point in time, two established rights-of-way over District Lot 1543, Lillooet District, exist. Consequently, your modified Recommendation #1 is unacceptable as we plan to continue with the upgrading of one of the rights-of-way to allow access to the subdivision and lands beyond. We are advised by Mrs. Reid that the right-of-way established by Gazette on December 3rd, 1981, is preferable to that previously established in 1911.

In view of the foregoing, your new Recommendation #5 is also unacceptable. Additionally, any delay in construction or associated work will result in increased costs.

In light of the fact that Mrs. Reid has indicated that she does not wish construction to take place on the right-of-way established in 1911, we are prepared to offer fair and reasonable compensation to Mrs. Reid for the property covered by the Gazette Notice of December 3rd, 1981. In this regard, we are anxious to re-establish contact with Mrs. Reid. However, Mrs. Reid has informed us that she will not negotiate any form of settlement as she is taking direction from Mr. Cooper of your office.

We would be pleased to meet with you and/or Mr. Cooper to discuss a solution otherwise, we may be compelled to proceed with the

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Dr. Karl A. Friedmann February 15th, 1982.

improvement of the right-of-way established in 1911, which we understand is not the wish of Mrs. Reid.

We look forward to a satisfactory resolution of this matter.

Yours very truly,

A. E. Rhodes,
Asst. Deputy Minister.

AER/CW

Province of British Columbia

OFFICE OF THE MINISTER

Ministry of Transportation and Highways

Parliament Buildings
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Minister's phone:
387-3180 or 387-3181
Executive Assistants:
387-6046 or 387-6709

File No. 11-01-32

April 22nd, 1982.

Dr. Karl A. Friedmann,
Ombudsman,
8 Bastion Square,
Victoria, B. C.
V8W 1H9

Dear Dr. Friedmann:

Re: Mrs. Vera Reid, Pemberton
Your File No. 81-1448

I have been asked to reply to your report on the above matter as submitted to the Lieutenant Governor in Council with your covering letter of March 10th, 1982, addressed to the Premier of the Province.

Contrary to the conclusion drawn by you, this Ministry does not take the position that there has been provided "two parallel public rights-of-way through Mrs. Reid's property". The only entitlement claimed by the Ministry comes within the statutory authority granted to me under Section 6 of the Highway Act. No entitlement is advanced under either the provisions of Section 4 of the Act or the 1911 Gazette Notice referred to by you.

With reference to the Section 6 proceeding, your suggestion that my actions were taken for an improper purpose is categorically denied. The content and spirit of that statutory provision have been totally adhered to. While I see no reference whatever within the statute to your suggested test of public interest, I can assure you that such a consideration, along with all other relevent factors, received my full attention as I met the responsibility resting with me under the indicated section of the statute.

I offer two further comments that you may find helpful. Firstly, I am hopeful that all unresolved matters between this Ministry and Mrs. Reid, including that of compensation, can soon be resolved. To that end, my officials wrote to Mrs. Reid on April 7th. Secondly, should you wish any further explanation or expansion on the legal points raised by you and which I have endeavoured to answer in this communication, my officials are available to meet with you at a time convenient to all.

Yours very truly,

Alex V. Fraser,
Minister.

Legislative Assembly
Province of British Columbia

OMBUDSMAN

8 Bastion Square
Victoria
British Columbia
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Telephone: (604) 387-5855
Zenith 2221

File No. 81 1448

May 11, 1982

The Honourable Alex V. Fraser
Minister of Transportation and Highways
Province of British Columbia
Parliament Buildings
Victoria, B. C.

Dear Mr. Fraser:

Re: Mrs. Vera Reid, Pemberton
Your File No. 11-01-32

Thank you for your letter of April 22, 1982, in response to my report to the Lieutenant Governor in Council concerning Mrs. Reid's complaint.

I would appreciate your clarification with respect to the statements made in the second paragraph of your letter. On February 15, 1982, your Assistant Deputy Minister, Mr. A. E. Rhodes, informed me as follows:

> I confirm our position that at this point in time, two established rights-of-way over District Lot 1543, Lillooet District [Mrs. Reid's property], exist.

However you state that I am in error in concluding that there are two parallel public rights-of-way through Mrs. Reid's property. You go on to say that

> The only entitlement claimed by the Ministry comes within the statutory authority granted to me under Section 6 of the Highway Act. No entitlement is advanced under either the provisions of Section 4 of the Act of the 1911 Gazette Notice referred to by you.

. . . 2

I must say that these comments come as a surprise. You will recall that throughout the Fall of 1981, your Ministry asserted that there was a public right-of-way through Mrs. Reid's property which had been created under the authority of section 4 of the Highway Act and the 1911 Gazette Notice. On December 3, 1981, a second right-of-way was expropriated under the authority of section 6 of the Highway Act, and this is of course what led Mr. Rhodes, and myself, to believe that your Ministry's position was that there were two public rights-of-way through Mrs. Reid's property.

As you know, I had questioned the validity of the Gazette Notice of 1911 and had concluded that your Ministry's claim to the first right-of-way on the basis of the Gazette Notice of 1911 was based upon a mistake of law. Does your comment that "no entitlement is claimed under . . . the 1911 Gazette Notice" mean that your Ministry is now in agreement that the Gazette Notice is invalid and therefore did not result in the creation of a right-of-way through Mrs. Reid's property? You will appreciate that the question of whether or not your Ministry was correct in asserting that such a right-of-way exists, on the basis of the 1911 Gazette Notice, is a question of law and not a matter of ministerial discretion.

If your Ministry has adopted the view that the 1911 Gazette Notice is invalid, as being without statutory authority, will my Recommendations #2 and #3, pertaining to your Ministry's use of the Gazette Notice, be implemented?

I am pleased to hear of your hope that "all unresolved matters between this Ministry and Mrs. Reid, including that of compensation, can soon be resolved." I sincerely trust that such a resolution will be found. I should point out, however, that Mrs. Reid has consistently expressed to me that she does not want any public right-of-way through her property. My investigation, therefore, has been to determine whether your Ministry was correct in asserting that there already existed a public right-of-way through her property, on the basis of the 1911 Gazette Notice, and whether your Ministry acted properly in expropriating a right-of-way through her property on December 3, 1981. As you know I concluded that your Ministry had erred on both counts. It is my belief that your Ministry improperly employed its powers of expropriation in expropriating a right-of-way from Mrs. Reid which will benefit only the developer and serve no public interest.

As set out in my recommendations, I believe that this injustice can only be rectified by your Ministrty giving the right-of-way back to Mrs. Reid and requiring the private parties to settle the matter between themselves. I appreciate that this may result in a claim for compensation

. . . 3

from Templar Holdings for losses resulting from their reliance on your Ministry's assertion that there was a public right-of-way through Mrs. Reid's property. I do not believe, however, that the consequences of this error can be avoided by forcing Mrs. Reid (by way of expropriation) to provide a public access road to the subdivision through her property. To use an old cliche, two wrongs do not make a right.

In view of the fact that I have no power to cause you to change your decision and the fact that construction has already taken place on the right-of-way, Mrs. Reid may decide to cut her losses and accept compensation for the expropriated right-of-way. I cannot conclude that this will result in a just resolution of her complaint. It is my view, as expressed in my recommendations, that Mrs. Reid will only receive fair treatment if your Ministry closes the right-of-way expropriated from her on December 3, 1981, and either drops its claim to the first right-of-way on the basis of the 1911 Gazette Notice or seeks a declaration from the Supreme Court to determine the validity of that claim.

In the hope that your Ministry may yet accept my recommendations and rectify this complaint, I will hold off submitting a Report on this matter to the Legislative Assembly for the time being in the hope that a just resolution may be found. In the meantime, I would appreciate your early clarification of the questions I have raised earlier in this letter. I would be happy to meet with you to discuss this matter further; I am available to attend such a meeting at your convenience.

I am sending a copy of this letter to Mrs. Reid so that she will know my current position on this matter as well as my future intentions as outlined above.

Yours sincerely,

Karl A. Friedmann
Ombudsman

cc. Mrs. Vera Reid

Province of British Columbia

OFFICE OF THE MINISTER

Ministry of Transportation and Highways

Parliament Buildings
Victoria
British Columbia
V8V 1X4

Minister's phone:
387-3180 or 387-3181
Executive Assistants:
387-6046 or 387-6709

File No. 11-01-32

May 31st, 1982.

Dr. Karl A. Friedmann,
Ombudsman,
8 Bastion Square,
Victoria, B. C.
V8W 1H9

Dear Dr. Friedmann:

Re: Mrs. Vera Reid, Pemberton.
Your File No. 81-1448

I acknowledge receipt of your letter dated May 11th, 1982 concerning the complaint of Mrs. Vera Reid. Please be advised that a Gazette Notice dated May 13th, 1982 has recently been filed and published, which Gazette Notice amends the Notice dated December 3rd, 1981, concerning the right-of-way across the property of Mrs. Reid. A copy of the amending Gazette Notice is attached for your reference.

The amending Gazette Notice, dated May 13th, 1982, establishes a highway across the property of Mrs. Reid pursuant to the Highway Act, section 6. Compensation will be paid for the land taken in accordance with section 14 of the Act. Personnel of this Ministry, together with our solicitor, met with Mrs. Reid and her solicitors prior to the amended Gazette Notice being executed, in order to discuss with her the precise location of the road most favourable to her, together with the amount of compensation to be paid. In the event that Mrs. Reid does not agree with the amount of compensation offered, the amount of compensation may be appraised and awarded by arbitration in accordance with 14(2) of the Act.

Although this Ministry has altered its position concerning the right-of-way across the property of Mrs. Reid, which change in position is as a result of the Ministry's inability to accurately locate the pre-1911 trail on the ground, the Ministry has not altered its position concerning the applicability and use generally of the Gazette Notice of 1911. This Ministry therefore declines to implement any of the recommendations contained in your letter to Mr. A. E. Rhodes, dated January 8th, 1982. The Ministry further declines to implement the recommendations contained in your letter to Mr. A. E. Rhodes of February 9th, 1982, and hereby advises you that construction of the road is being commenced at this time.

Yours very truly,

Alex V. Fraser,
Minister.

Encl.

82-06-09