



**ENHANCING PUBLIC ACCESS TO  
PRIVATELY OWNED WILD LANDS**

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*I am glad I will not be young in a future without wilderness.*

— Aldo Leopold

## **1. Introduction**

The Outdoor Recreation Council (ORC) works on behalf of about 40 provincial member groups - representing more than 100,000 individuals --and the general public to protect the outdoor recreation way of life in BC.

The goal of this memo is to address one of the most significant issues affecting the ORC's members - the problems faced by citizens who want to enjoy or pass through privately-owned forests and wild areas. Increasingly, British Columbians are being fenced out of privately-owned wild lands that have been enjoyed by the public for generations. And British Columbians are increasingly unable to enjoy many public lakes and lands -- because private landowners block access to those Crown jewels.

### **1.1 This memo is structured into three parts**

- The first part will document the problems with the current situation in BC.
- The second will assess the merits of solutions to similar problems in other jurisdictions.
- The final part will recommend ways BC could address this issue in a way that creates a more equitable balance between the interests of landowners and the rights of the public to enjoy wild places.

### **1.2 What is at stake:**

Often the only way to access wild Crown lands is to cross privately owned forests or wild areas. However, ORC members report a growing trend of private landowners imposing increasingly stringent conditions in areas where access has not been a problem in the past. Many landowners are flatly refusing access -- or else imposing conditions such as high access fees, unreasonable scheduling demands or unattainable insurance requirements.

Such refusal of access is a loss for the individuals who are fenced out of wild places. However, it may also be a major loss to society as a whole. Loss of public access to the wild may have important long-term consequences for environmental protection -- because people who know nature will defend it, and those who do not know nature may not care. In this sense, free public access to wild areas supports social engagement with the environment. People who spend time in wild areas develop a personal connection to them, and are more likely to support measures to protect threatened wild areas. On the other hand, people routinely deprived of the wilderness experience may not learn to love -- and want to protect -- nature.

In another sense, this project is about a basic human right -- the right to access and experience nature. It is an age-old issue. For example, as early as 1217 King Henry III sealed the *Charter of the Forests* as a supplement to the *Magna Carta*. Responding to demands of his subjects, the

King guaranteed commoners the right to access (royal) private forests to gather wood and honey.<sup>1</sup>

### **1.3 What this memo seeks to accomplish**

Ultimately this memo aims to prompt tangible action to improve public access to private forests and other rural lands within BC. By describing options used elsewhere to accommodate public access, this memo seeks to inform a public discussion that will lead to positive legal, policy and other reforms.

## **2. Documenting the Problem**

### **2.1 Examples of Access Issues in BC**

#### **2.1.1 The Vancouver Island Spine Trail -- An Epic Initiative at Risk**

The Vancouver Island Spine Trail Association (VISTA)<sup>2</sup> is a non-profit society that seeks to build a 700 km public non-motorized trail system of the entire length of Vancouver Island. The Spine trail is modeled on existing island trails: Juan de Fuca Trail, West Coast Trail, Cape Scott, and the North Coast Trail. It will follow existing trails along the site of the 1912 Canadian Pacific Railway, and promises to open up new trails on the north Island. Like the highly successful Appalachian Trail in the eastern US, the Vancouver Island trail promises to eventually attract both locals and tourists from afar.

*“People go on pilgrimages all over the world, from Mecca to the Camino de Santiago. The West Coast Trail has proven there is a demand for pilgrimages into the wilderness. The time is now to create the world's next great pilgrimage joining up the last of the ancient forests and rugged coastlines of the entire length of Vancouver Island.”* - Briony Penn, VISTA Member

VISTA has completed a substantial trail network; however there are three major gaps where private forest land owners have not permitted access. These private landowners are large timber companies, who have thus far not been amenable to trail building. Yet, the Spine Trail is designed for non-motorized uses only, which should create minimal disruption for landowners. Liability should not be a substantial issue as 1998 amendments to section 3.2 of the BC *Occupier's Liability Act*<sup>3</sup> created an exception to the ordinary standard of care for recreationalists on private lands.

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<sup>1</sup> Jones, G. *The Charter of the Forest of King Henry III*, St John's College (University of Oxford) (accessed 15 December , 2015), <<http://info.sjc.ox.ac.uk/forests/Carta.htm>>

<sup>2</sup> The Vancouver Island Spine Trail Association (accessed 20 November 2015), <http://www.vispine.ca/>

<sup>3</sup> *Occupier's Liability Act* RSBC 1996, c 337

The construction of the Spine Trail is an attractive project in this period of low demand for the Province's timber, and the ready availability of skilled outdoor workers. The promotion of the Spine Trail will bring tourism and local recreation dollars to communities that are currently searching for ways to diversify their economies. The Spine Trail concept complies with the Trails Strategy of BC, developed by the BC Government.

However, the Trail cannot be completed until the gaps across private forest land are somehow bridged – until a mechanism is created to allow recreationalists to cross the private timber holdings to Crown land on the other side.

### **2.1.2 BC Federation of Fly Fishers – Access to Lakes and Rivers**

The British Columbia Federation of Fly Fishers (BCFFF) is a registered non-profit whose main objective is to promote the conservation of the fishing environment in BC. The Federation believes that “concern for the future of our province's environment is not just the exclusive domain of fly fishers, but should be the concern of all citizens”.<sup>4</sup>

However, Ken Sawayma, the President of the BCFFF, reports that public access is a major issue for anglers, particularly on Vancouver Island. He states that group members have been unsuccessful in gaining access to publicly owned lakes and rivers which are only reachable through private land. In some cases these lakes were stocked using public funds, thus the fish belong to the BC public. Prior to the 1990s private landowners provided much freer access to these areas. Even when BCFFF members are allowed access, they only get a maximum of six hours during the middle of the day. However, as fish are most active in the morning and evening, the best times to fish are outside the hours provided.

### **2.1.3 Frank Gibbins, BCFFF Member**

Frank Gibbins was unable to access public fishing areas because timber companies denied all access permits to forests on Vancouver Island due to forest fire season in early Spring. These permit denials occur despite the fact that the BC Wildfire Service considers these areas low to very low fire risk at this time of year.<sup>5</sup> He was also required to purchase \$1M of forest fire insurance for a single day as a condition for access. The problem is that no company even sells such a policy in Canada. As Frank Gibbins has summed up the situation:

*I'm fairly resigned that my kids will never enjoy the activities that I did as a youth: camping on Echo Lake, fishing Tadjiss Lake, Wild Deer, and Pete's Pond.*

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<sup>4</sup> British Columbia Federation of Fly Fishers (accessed 20 November 2015) <<http://www.bcfff.bc.ca/index.php/about>>

<sup>5</sup> BC Wildfire Service, Danger Class Values (accessed 22 November 2015) <<http://bcwildfire.ca/hprScripts/DgrCls/index.asp?Region=2>>

### **2.1.4 Nicola Valley Fish and Game Club – A Vivid Example**

The Nicola Valley Fish and Game Club (Nicola Club)<sup>6</sup> is a non-profit association dedicated to the preservation and management of Nicola Valley habitat and wildlife. It promotes activities for outdoor enthusiasts with a focus on fish and game.

For several years the Nicola Club has been involved in a legal dispute with the Douglas Lake Ranch, a high end golfing and fly-fishing resort located North of Merrit BC.<sup>7</sup> This dispute arose over the right of Nicola Club members to cross lands to fish in Minnie and Stoney Lakes, which are popular publicly-owned lakes within the property of the ranch. Historically, the local public has fished the lakes, but they are now being excluded by the Ranch, which is owned by an American billionaire.

The position of the Nicola Club is that it seeks to maintain public rights to fish on public lands and waters. However, the Ranch continues to refuse public access, and is currently suing the club for trespass because club members have tried to exercise their historical fishing rights. Until the court case is resolved, the public has lost its access to Minnie and Stoney Lakes.

### **2.1.5 Freshwater Fisheries Society of BC – Many Lakes No Longer Stocked or Freely Fished**

The Freshwater Fisheries Society of BC is a privatized former government agency which stocks lakes with fish for recreational use.<sup>8</sup> However, they no longer stock about 30 lakes, mostly in central Vancouver Island. This is due to the fact that these lakes are on private forest lands where public access has now been restricted.

Some examples include: Jarvis and Weeks Lakes in the Sooke watershed, which were stocked annually with Rainbow Trout; and Timberland, Crystal and McKay Lakes in the Cassidy area.

### **2.1.6 BC Wildlife Federation**

The BC Wildlife Federation (BCWF) is a province-wide voluntary conservation, angling and hunting organization which traces its origins to the 1890s.<sup>9</sup> It represents all British Columbians whose aims are to protect, enhance and promote the wise use of the environment for the benefit of present and future generations. The BCWF's membership is made up of over 100 separate and distinct clubs from throughout British Columbia, ten Regional Associations, and direct members, for a collective membership of about 40,000.

BCWF members describe numerous incidents they have experienced with private landowners restricting access to lands. Often these conflicts arise in relation to public hunting and angling lands which are only accessible by passing through private lands. In several cases, for example in

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<sup>6</sup> Nicola Valley Fish and Game Club (accessed 20 November 2015) <http://www.nvfishandgameclub.ca/>

<sup>7</sup> Douglas Lake Ranch (accessed 20 November 2015), <<http://www.douglaslake.com/>>

<sup>8</sup> Freshwater Fisheries Society of BC (accessed 7<sup>th</sup> January 2016), <<http://www.gofishbc.com/>>

<sup>9</sup> BC Wildlife Federation (accessed 20 November 2015), <<http://www.bcdf.bc.ca/>>

Christian Valley, Vanderhoof, and Peace Valley, landowners have placed physical barriers across public, or publicly-funded access roads that run through private lands<sup>10</sup>.

### **2.1.7 Comox Bike Park**

The municipality of Comox and the United Riders of Cumberland (UROC),<sup>11</sup> a local mountain bike club, have been attempting to develop an organized mountain bike trail network since 2013. They believe this network will serve as a key economic driver to the local economy.<sup>12</sup> TimberWest and Comox Timber own a significant private forested area within and immediately adjacent to the municipal boundaries.

Both landowners are amenable to formal agreements. However, risk management is a primary concern for them. While public access has never been outright denied (outside periods of extreme wildfire risk), it has never been approved. This has reportedly created a challenging situation for the village, its partners, and its residents.

### **2.1.8 Access to Mount Arrowsmith**

Peter Rothermel guides hikes to the Mt. Arrowsmith area for the Regional District of Nanaimo. However, the only access to the Mt. Arrowsmith park is through lands owned by Island Timberlands. These hikes are extremely popular -- even when he takes 16 people he always has a wait list. Peter never had a problem with access until 2010, when Island Timberlands quintupled the entrance fee. This has limited the ability of some members of the public to participate in the regional district's public hiking program.

### **2.1.9 Further Reports**

The above reports are only the tip of the iceberg. For every report included in this memo, we had several more that we left out for the practical reasons of space. An email request to ORC members for their submissions about this problem of access across private lands generated over a hundred responses. Generally, ORC members reported similar patterns of increasingly stringent conditions -- to the extent that access is often effectively denied to the general public.

## **2.2 Current BC Law**

Under the *Trespass Act* and the common law, owners of forests and wild lands in BC have a relatively unconstrained right to exclude recreationalists from crossing their lands. The laws governing recreational access in BC are fragmented and confusing, and there is little to no planning or coordination for recreational access.<sup>13</sup> Certainly, compared to many jurisdictions, BC lags behind in encouraging and enhancing public access across privately-owned wild lands.

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<sup>10</sup> Personal communication with Jesse Zeman, BC Wildlife Federation

<sup>11</sup> United Riders of Cumberland (accessed 20 November 2015), <<http://www.unitedridersofcumberland.com/>>

<sup>12</sup> Personal communication with Kevin McPhedran, Parks and Outdoor Recreation Coordinator, Village of Cumberland

<sup>13</sup> Recreational Access, John Rich, *Law Reform for Sustainable Development in BC* (1990), page 178

### 2.2.1 Public Access in BC

Currently, BC law does not have any public access legislation comparable to England and Wales' *Countryside and Rights of Way Act*,<sup>14</sup> ("CROW") or Scotland's access legislation under its *Land Reform Act*<sup>15</sup>. These Acts, addressed in section 3.1 in more detail, provide members of the public with the right to access rural land, so long as they abide by a series of provisions which prevent excessive burden to the landowner. In contrast, BC landowners have more or less complete control over whether the public can enter their land.

It is worth noting that in 1962, a BC Special Committee on Public Access to Private Roads considered this issue, and recommended consideration of a *Public Access Act*. The envisioned Act would have been administered by the Department of Commercial Transport and allowed for the making of regulations governing the use of private easements, right of ways etc. The Legislative Committee also recommended the creation of criteria for the expropriation of private roads in the general public interest -- and that Government consider reserving the right to designate a right-of-way over land in all future Crown grants.<sup>16</sup> However, the Committee's work was shelved when forest companies freely granted recreational access to their Crown and privately-held properties.

Unfortunately, over the intervening decades a number of companies have withdrawn access. Among other things, hundreds of kilometres of roads to access lakes stocked at public expense have now been gated off.<sup>17</sup> A modern solution to the old problem clearly needs to be fashioned.

### 2.2.2 General Trespass Issues

Section 4 of the *Trespass Act* RSBC 1996 c 462 ("*Trespass Act*") provides that it is an offence for a person who:

- (a) enters premises that are enclosed land,
- (b) enters premises after having notice from an occupier of the premises or an authorized person that entry is prohibited, or
- (c) engages in an activity on or in the premises after receiving notice from an occupier of the premises or an authorized person that the activity is prohibited.<sup>18</sup>

The *Trespass Act* defines "enclosed land" as being surrounded by a lawful fence and/or a natural boundary or that is posted by signs prohibited trespass.<sup>19</sup> The defences to trespass are stated as "(a) the consent of an occupier or an authorized person, (b) other lawful authority, or (c) colour of right."<sup>20</sup> Note that the *Trespass Act* does not generally prohibit entry to premises that are not fenced, posted or subject to prior notice.

<sup>14</sup> *Countryside and Rights of Way Act* 2000 C. 37 (UK) ("CROW")

<sup>15</sup> *Land Reform (Scotland) Act* 2003 asp 2 (Scotland)

<sup>16</sup> *Special Committee on Public Access to Private Roads*, (1962) See Appendix 6.1

<sup>17</sup> Personal communication with Stew Lang, former reporter for *Victoria Times Colonist*.

<sup>18</sup> *Trespass Act* RSBC c 462 ("*Trespass Act*"), s.4(1)

<sup>19</sup> *Trespass Act* s.1

<sup>20</sup> *Trespass Act* s.4.1

However, the common law tort of trespass applies when a person unlawfully enters land owned or occupied by another person. The tort of trespass is made out regardless of any damage to the land, or any knowledge that they were trespassing.<sup>21</sup> Thus, a person who entered unfenced and unposted private land without the permission of the owner/occupier would still be considered a trespasser under the common law. Note that consent can also be a defence to the common law tort of trespass.

### 2.3 Landowner Concerns:

A central problem is that rights of access to land for outdoor recreation require a balance to be struck between collective rights to the land and individual rights of exclusion.<sup>22</sup> The desire of landowners to control who enters their property and what people do on it is understandable. Indeed, some private landowners have raised legitimate concerns about allowing public access, such as liability, forest fires, and vandalism.<sup>23</sup>

#### 2.3.1 Liability – Landowner Concerns Have Been Addressed

Landowners are concerned about potential liability, including liability that may arise if users of the land are injured. However, this once-significant concern has been substantially reduced, if not almost eliminated. In 1998, the BC legislature amended the *Occupiers Liability Act* (“OLA”) to create an exception to the general rule of occupier’s liability. The general rule [set out in s. 3(1) and (2) of OLA] requires an occupier of premises to exercise reasonable care to ensure that persons and property on the premises are reasonably safe in using the premises in relation to the condition of the premises, activities on the premises, or the conduct of third parties on the premises.<sup>24</sup>

In situations involving recreationalists, the 1998 amendments dramatically reduce this general landowner obligation to avoid negligence. Under the amendments, s.3 of the OLA now establishes that persons who trespass or enter for the purpose of a recreational activity onto certain types of lands are generally deemed to have willingly assumed all risks.<sup>25</sup> The duty of care of the occupier/landowner to the safety of such persons is drastically limited to a simple duty to not:

- (a) create a danger with intent to do harm to the person or damage to the person's property,  
or
- (b) act with reckless disregard to the safety of the person or the integrity of the person's property<sup>26</sup>

Landowners are protected by this reduction in landowner legal duties on lands used for agriculture, rural forestry and range purposes, recreational trails reasonably marked as

<sup>21</sup> *Skopnik v BC Rail Ltd* 2008 BCCA 331 at 65.

<sup>22</sup> N. Curry, *Rights of access to land for outdoor recreation in New Zealand: dilemmas concerning justice and equity* Journal of Rural Studies (2001) 17:4 409-419, (“*Access Rights and Dilemmas in New Zealand*”) at page 409

<sup>23</sup> Personal communications with Private Forest Landowners Association (“PFLA”), <<http://www.pfla.bc.ca/>>

<sup>24</sup> *Occupiers Liability Act*, [RSBC 1996] c. 337, (“*Occupiers Liability Act*”) s.3(1)&(2)

<sup>25</sup> *Occupiers Liability Act* s.3 (3.2).

<sup>26</sup> *Occupiers Liability Act* s.3(3)

recreational trails, wilderness areas, rural private roads marked as private roads, and utility rights of way.<sup>27</sup>

In other words, in such areas, if an owner/occupier has fulfilled their basic duty to not create a danger with intent to harm and to not act with reckless disregard to safety and property, they generally have a defence against liability.<sup>28</sup> They will not be subject to suit for violating the normal rules that apply to negligence. The cases we have found dealing with recreationalists on private lands indicate that landowners are being protected from lawsuits, as intended by the amendments.

The following cases are three examples of where the courts have interpreted the amendments to the *Occupiers Liability Act* relevant to recreational users of land:

- In *Skopnik v BC Rail Ltd*, [“Skopnik”]<sup>29</sup>, the plaintiff was injured while riding an ATV along a railway right of way. The BC Court of Appeal held that a railway right of way was a utility right of way under the OLA, and so fell under s.3.3(b) of the Act. As a result, the lower standard of care applied and the property occupier was found not liable.
- In *Hindley v Waterfront Properties Corp* [“Hindley”],<sup>30</sup> the plaintiff was severely injured while cycling on a trail that traverses the defendant’s property when he was thrown from his bike after hitting an obscured ditch. The defendants had consented to allow the public to use the trail. The defendants argued that under the 1998 amendments to the OLA, they owed only a limited duty of care to recreational users of the land, and they have met that duty of care. The BC Supreme Court stated that the purpose of the amendment is to encourage landowners in rural areas to allow the public to use their land for recreational purposes, and that the diminished duty of care applied to the situation in question. In order to succeed in this case, therefore, the plaintiffs needed demonstrate that the defendants acted with reckless disregard. The court held that there was insufficient evidence to support an inference of recklessness.
- *Gill v A & P Fruit Growers Ltd* [“Gill”]<sup>31</sup> was not a true recreationalist case and was decided differently. In that case, the plaintiff fell while exiting a mobile home during a visit to his friend. The mobile home rented by the plaintiff’s friend just happened to be located on the defendant’s blueberry farm. The defendant tried to argue that s.3.3 of the OLA should apply because the plaintiff was a recreational user of agricultural property. The BC Court of Appeal held that socializing at a home was not the sort of recreational activity meant by OLA, and the owner was subject to the ordinary standard of care. The

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<sup>27</sup> *Occupiers Liability Act*, s. 3(3.3).

<sup>28</sup> Race & Company LLP, *Developments in the Law of Occupiers' Liability and Its Effects on Recreational Users of Certain Classes of Land*, (accessed November 20<sup>th</sup> 2015),

<[http://www.raceandcompany.com/resources/occupiers\\_liability.htm](http://www.raceandcompany.com/resources/occupiers_liability.htm)>

<sup>29</sup> *Skopnik v BC Rail Ltd.*, [2008] BCCA 331

<sup>30</sup> *Hindley v. Waterfront Properties Corp.*, [2002] BCSC 885

<sup>31</sup> *Gill v A & P Fruit Growers Ltd.*, [2010] BCCA 107

end result was that the defendant failed to exercise the standard of care required by the OLA and that the plaintiff was 30% contributorily negligent for stepping out into the darkness without any hesitation.

These cases demonstrate how the amended OLA has been interpreted to protect landowners from liability for injuries to users of their lands. The cases interpreted the OLA with respect to the occupier's limited duty of care (*Hindley*), on what lands this limited duty applies (*Skopnik*), and what constitutes a "recreational activity" (*Gill*). See Appendix 6.2 for related information in the Alberta context.<sup>32</sup>

### 2.3.2 Fire Suppression

Forest fires can be triggered by recreational activities such as camp fires, motorized vehicles and hunting – and valid concerns about potential fires must be addressed. However, as will be shown later, there are ways of dealing with this concern, short of cutting off all public access.

It is worth noting that access restrictions appear to be the strictest in wet, low fire hazard areas -- and do not reflect seasonal changes in fire risk. Based on ORC reports, roughly 3/4 of reports of recreationalists being denied access occurred on Vancouver Island or the lower mainland.

However the corresponding BC Wildfire Service fire protection zone (Coastal Fire Zone) is considered low danger, accounting for only 11% of fire starts and 8% of acreage burned in the past fire season. In terms of seasonal variability, every fire larger than 10 hectares ("Ha") in BC occurred between May 3<sup>rd</sup> and October 9<sup>th</sup> during the 2015 fire season.<sup>33</sup> Yet many instances of public exclusion occur outside of these windows.<sup>34</sup>

These statistics indicate that actual fire risk from public users of private land may be less than perceived. In any case, there are ways of managing fire risk to reduce landowner concerns, as discussed below.

### 2.3.3 Vandalism

Of course, vandalism is a valid landowner concern that should be addressed. As we will see, effective measures can be taken to deter potential vandalism. It should also be noted that we have not seen evidence that vandalism is more likely than in the past when landowners allowed much freer access. Indeed, although specific statistics on vandalism to private rural land are not available, Statistics Canada reports that property crime rates Canada wide have declined 34% from 2003 to 2013. Although this does not prove that vandalism to private land has been decreasing, it does suggest that access restrictions may not be warranted by reason of increasing vandalism.<sup>35</sup> Additional research on this issue, and on practical

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<sup>32</sup> For further discussion of liability in the Alberta context, see appendix 6.2, which discusses the issue in relationship to public land in Alberta.

<sup>33</sup> Coastal Zone Fire Starts = 200, Total BC Fire Starts = 1,826, 200/1,826 = 10.95%. Coastal Zone = 200, Total BC Area Burned = 25,060 Ha, Total BC Area Burned = 304,464 Ha, 25,060/304,464 = 8.23%. Data Source: <http://bcwildfire.ca/hprScripts/WildfireNews/Statistics.asp>

<sup>34</sup> Personal communication with Frank Gibbins, BC Fly Fishers.

<sup>35</sup> Boyce J, Cotter, C. & Perreault, S. *Police-reported crime statistics in Canada, 2013* Canadian Centre for Justice Statistics (2014), page 28, (accessed 26 February 2016) <http://www.statcan.gc.ca/pub/85-002-x/2014001/article/14040-eng.pdf>

measures taken elsewhere to deal with it, should be undertaken. Such research could help guide reform measures, to ensure that issues such as fire and vandalism are squarely addressed.

#### **2.3.4 Additional landowner concerns:**

- Garbage dumping
- Damage to environmentally sensitive areas
- Damage to wildlife trees and nesting sites
- Public safety
- Worker safety
- Theft of timber, foliage and Christmas trees
- Damage to structures
- Damage to reforested areas
- Vandalism and theft of equipment
- User expectations related to trails<sup>36</sup>

Such concerns must be addressed, but hopefully not at the cost of forcing responsible members of society out of wild areas. These concerns can be assessed and managed, as you will see below. Similar concerns have not stopped other jurisdictions from ensuring public access to wild private lands.

### **3. Access Regimes in Other Jurisdictions**

#### **3.1 Outside North America**

##### **3.1.1 England and Wales**

In 2000, the Parliament of Great Britain enacted the “right to roam” in a new *Countryside and Right of Way Act* [“CROW”]. This Act opened all private land classified as “mountain, moor, heath or down” (approximately 4 million acres) in England and Wales to the public for hiking and picnicking.<sup>37</sup> This was a dramatic change from both the statutory and cultural status quo in England and Wales.<sup>38</sup>

Leading up to the passage of the CROW there was a concern about the liability for private landowners when members of the public are injured while walking across their lands.<sup>39</sup> In response, the CROW included a similar provision to BC’s OLA amendments discussed above. Under s.12 of the CROW, the new access rights do not increase the liability of land occupiers for land designated as “access land”. Landowners are not responsible for injuries to recreationalists as they might be with respect to private lands not designated as “access land”.<sup>40</sup>

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<sup>36</sup> Personal communications with Private Forest Landowners Association [“PFLA”], <http://www.pfla.bc.ca/>

<sup>37</sup> *Countryside and Rights of Way Act*, (2000) C. 37 S. 2

<sup>38</sup> Robertson, H. (2011) *Public Access to Private Land For Walking: Environmental and Individual Responsibility as Rationale for Limiting the Right to Exclude*, Georgetown International Environmental Law Review, 23(2): 211-262 (“*Public Access, Responsibility & Right to Exclude*”) page 240

<sup>39</sup> *Public Access, Responsibility & Right to Exclude*, page 241

<sup>40</sup> *Public Access, Responsibility & Right to Exclude*, page 241

The CROW is grounded in an expansion of environmental and individual responsibility.<sup>41</sup> It balances the needs of recreationalists with those of landowners by limiting particularly disruptive public recreational activities. Restricted activities include: driving, lighting fires, bathing, hunting, trapping, fishing, activities that damage property, or activities for any commercial purpose. The CROW requires local authorities to issue a code of conduct for persons exercising their access rights. The CROW also balances environmental interests. For example, s.12 of the Act allows relevant authorities to exclude public access for the purpose of conservation.

Interestingly, the CROW includes a provision for fining any person who places a notice containing “false information likely to deter the public” from exercising their access rights.<sup>42</sup> In BC, recreationalists have repeatedly reported similar false notices to deter them from entering *public* lands. Enacting a similar provision in BC could provide a solution to this problem, for example, prescribing fines for anyone who places a notice intended or likely to limit public access.

The CROW may be seen as partially restoring the historic commoner rights lost during the ancient enclosure period when the commons system ended. Many of these rights can be traced to the, *Charter of the Forest* (1217). *The Charter* followed the reissue in 1216 and 1217 of the *Magna Carta*, and the two statutes need to be seen as complementary.<sup>43</sup> *The Charter of the Forests* established rights of access to the royal forest for free men for activities such as gathering wood under s.1, keeping dogs and pigs under s.6 and s.9, and gathering honey under s.13.

The CROW provides a modern illustration of how the right to exclude may be modified to accommodate public needs while protecting the interests of the private landowner.<sup>44</sup> The CROW also reflects the view that outdoor recreation is an important element in people’s lives - a social commodity or public good - and therefore its provision should fall into the public domain.<sup>45</sup>

### 3.1.2 Scotland

Similarly, the *Land Reform (Scotland) Act 2003* [“LRSA”] codifies public access rights in Scotland<sup>46</sup> This Act gives everyone the right to cross land (and inland water and foreshore) for purposes of recreation, education and commercial activities where the activities are the same as those done by the general public. Access rights also extend to activities carried out commercially or for profit, if these activities could also be carried on other than commercially or for profit (i.e. by the general public for recreational purposes or for educational activities or for crossing land). For example, a canoe instructor from a commercial outdoor pursuits centre travelling along a

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<sup>41</sup> *Public Access, Responsibility & Right to Exclude*, page 211.

<sup>42</sup> *Countryside and Rights of Way Act 2000* s.14

<sup>43</sup> Graham Jones, St John's College (University of Oxford), *The Charter of the Forest of King Henry III*, (accessed 15 December 2015), <<http://info.sjc.ox.ac.uk/forests/Carta.htm>>

<sup>44</sup> Anderson, J. (2007) *Britain's Right to Roam: Redefining the Landowner's Bundle of Sticks* Georgetown International Environmental Law Review 19(3): 375-435, (“*Britain's Right to Roam*”) page 377

<sup>45</sup> N. Curry, *Countryside, Recreational Access, and Land Use Planning*, London ; Spon, 1994

<sup>46</sup> *Land Reform (Scotland) Act 2003*, 2003 asp 2 (“*Land Reform (Scotland) Act*”). See *Know the Code Before You Go* at <<http://www.outdooraccess-scotland.com/>> for more information about the Act.

canal with a party of canoeists is carrying on a commercial activity -- but this falls within the protected access rights because the activity involved could be done by anyone else exercising access rights. Other examples include a commercial writer or photographer writing about or taking photographs of the natural or cultural heritage.

The Act states that a person has access rights only if they are exercised responsibly. It also introduces a reciprocal obligation of landowners to use and manage their land and otherwise conduct the ownership of it in a way which is responsible, in respect to access rights.<sup>47</sup> Section 5 of the LRSA states that the extent of duty of care owed by land occupier is not changed. Local authorities must produce, within three years of the legislation coming into force, core path plans setting out their proposals for a system of paths – called “core paths” – sufficient for the purpose of giving the public reasonable access throughout their areas.

Section 6 of the LRSA includes several limits on public rights, which appear to be aimed at alleviating landowner concerns and avoiding conflict. These access rights are not exercisable over areas around a house sufficient to ensure privacy, cropland, schools, or land excluded by virtue of past entry by payment.<sup>48</sup> Additionally, hunting, shooting, fishing, taking things for profit, motorized vehicles and uncontrolled dogs are excluded.<sup>49</sup>

Scotland’s approach is largely underpinned by a philosophy of enabling rather than enforcement of access rights.<sup>50</sup> The LRSA specifies on maps where rights exist. The new legislation provides for access to land throughout Scotland, including bridges and other structures built on or over land, inland waters, canals, and the foreshore (between high and low water marks),<sup>51</sup> subject only to the exemptions specified in s.6 of the Act<sup>52</sup> and to an obligation for those exercising their new rights to act responsibly.

### 3.1.3 Sweden

The idea of public access to identified privately owned lands has never caused much negative reaction in Sweden, where "*Allemansrätt*" translated as "all man's right" of access to private land is an accepted foundation of Swedish culture. This allows members of the public to use land owned by others in a responsible and limited manner: to walk and camp on the land, and otherwise to use the land in ways that do not damage the land or interfere with the landowner's use of it. Strong ethics of individual responsibility, respect for people and their privacy, environmental responsibility, and respect for the land itself support the concept of *Allemansrätt*, and in fact, make it possible and, to date, sustainable.<sup>53</sup>

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<sup>47</sup> Macleod, C. et al. (2010) *Post Legislative Scrutiny of the Land Reform (Scotland) Act 2003*, (accessed 26 February 2016), <<http://archive.scottish.parliament.uk/s3/committees/rae/documents/Inquiryplanningsheet.pdf>> (“*Post Legislative Scrutiny of LRSA*”), page 24

<sup>48</sup> *Land Reform (Scotland) Act* s.6

<sup>49</sup> *Land Reform (Scotland) Act* s.9

<sup>50</sup> *Post Legislative Scrutiny of LRSA*, page 24

<sup>51</sup> *Land Reform (Scotland) Act* s.31

<sup>52</sup> *Land Reform (Scotland) Act* s.1(7): “*The land in respect of which access rights are exercisable is all land except that specified in or under section 6 below.*”

<sup>53</sup> *Public Access, Responsibility & Right to Exclude*, page 231

This right of access is deeply embedded in Swedish law. Indeed, it is a constitutional right. Chapter 2, Article 18 of the Constitution of the Kingdom of Sweden states:

*“The property of every citizen shall be so guaranteed that none may be compelled by expropriation or other such disposition to surrender property to the public institutions or to a private subject, or tolerate restriction by the public institutions of the use of land or buildings, other than where necessary to satisfy pressing public interests....There shall be access for all to the natural environment in accordance with the right of public access, notwithstanding the above provisions.”*<sup>54</sup> [Emphasis added]

However, *Allemansrätt* is not absolute and the Swedish Penal Code sets out some limits.<sup>55</sup> Chapter 12, Section 2 includes a list of plants that a passerby may not pick or collect. Chapter Section 4 sets forth punishments for persons who violate certain spaces within privately owned land – such as cultivated land or the area surrounding a home. This area is called a “tomt”. However, the landowner may not put up a fence to exclude people from an area larger than the “tomt”. If they do, the Swedish Environmental Code gives local administrators the authority to order the landowner to install a gate or stile so the public can have access to the land within the fenced area.<sup>56</sup>

*Allemansrätt* is mentioned but not defined either in the Environmental Code or anywhere else in Swedish law.<sup>57</sup> However, the Swedish Ministry of the Environment provides the following interpretation of the rights established under *Allemansrätt* in practice:

- The right to walk, cycle, ride, ski and be in the countryside provided that there is no risk of damage to crops, forest plantings or other sensitive land. This does not include the right to enter or cross the area near a house;
- The right to pick wild berries, flowers, fungi, fallen branches and dry brushwood lying on the ground;
- The right to put up a tent for a day or two on land that is not used for agriculture and is far from housing of any kind;
- The right to light a fire, if great care is taken and rocks are not damaged;
- The right to use a boat in lakes and streams; and
- The right to go ashore, temporarily moor a boat, and bathe, except near the grounds of a house or where access is prohibited to a bird or seal sanctuary.<sup>58</sup>

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<sup>54</sup> *The Constitution of the Kingdom of Sweden: The Instrument of Government* (SFS nr: 1974:152): Chapter 2, Article 18 (accessed 26 February 2016), <<http://www.parliament.am/library/sahmanadrutyunner/Sweden.pdf>>

<sup>55</sup> *Swedish Penal Code*, SFS 1962:700 Brottsbalken, (accessed 22 November 2015), <<http://www.government.se/government-policy/judicial-system/the-swedish-penal-code/>>

<sup>56</sup> *Swedish Environmental Code* (1998:808), Chapter 26: Section 11 (accessed 22 November 2015), <<http://www.government.se/contentassets/be5e4d4ebdb4499f8d6365720ae68724/the-swedish-environmental-code-ds-200061>>

<sup>57</sup> *Public Access, Responsibility & Right to Exclude*, page 218

<sup>58</sup> *Public Access, Responsibility & Right to Exclude*, page 219

### 3.1.4 Norway

In the 1950s, Norway had a right of public access essentially the same as that in Sweden. In 1957, in order to protect both the land and the right to public access, the Norwegian Parliament passed the *Friluftsloven*, or *Outdoor Recreation Act* ["ORA"] in English.<sup>59</sup>

The ORA differentiates between cultivated and uncultivated land, and sets forth how one can pass through each. It forbids the public from using sites on cultivated land for picnicking, sunbathing, staying overnight or the like without the permission of the landowner or user. In uncultivated areas, camping or another form of stay is not permitted for more than two days at a time without the permission of the owner or user.<sup>60</sup>

The ORA requires any person who passes through or on another person's property to behave considerately and with due care in order not to cause damage or inconvenience or damage to the environment.<sup>61</sup> The landowner or user of the land has the right to expel persons who act inconsiderately or who, by improper conduct, cause damage or inconvenience to the property or rightful interests.

If a property is heavily used by the public and this use is causing damage or inconvenience, the local municipality may, with the consent of the landowner or user, close the property.<sup>62</sup> Such closure cannot exceed five years.

As in Sweden, Norwegians depend on certain rules of environmental responsibility and individual responsibility-respect for the land and the landowner. Unlike in Sweden, however, those rules are codified.<sup>63</sup>

### 3.1.5 Other Scandinavian Countries

Finland also has a system of rights of access very similar to that of Sweden. The doctrine, called "*Jokamiehenoikeus*", is the functional equivalent of *Allemansrätt* in Sweden, and means the same thing: "everyman's right".<sup>64</sup> Everyone in Finland is entitled to walk, ski, cycle or ride freely in the countryside, as long as this causes no harm to property or nature. Similar to Sweden, the concept of *Jokamiehenoikeus*, though indicated in the Constitution, is defined more by what is not criminalized than by what is specifically allowed. Finish law includes several common sense restrictions:

- This right is limited in cultivated fields and plantations, and around people's homes.
- Camp fires must not be lit in or near forests when conditions are such that there is a danger of forest fire.<sup>65</sup>

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<sup>59</sup> *Friluftsloven*, ("Outdoor Recreation Act" - Norway), *Act of 28 June 1957 No. 16* (accessed 25 November 2015), <<https://www.regjeringen.no/en/dokumenter/outdoor-recreation-act/id172932/>> ("*Friluftsloven*")

<sup>60</sup> *Friluftsloven*, § 9

<sup>61</sup> *Friluftsloven*, § 11

<sup>62</sup> *Friluftsloven*, § 16

<sup>63</sup> *Public Access, Responsibility & Right to Exclude*, page 235

<sup>64</sup> *Public Access, Responsibility & Right to Exclude*, page 235

<sup>65</sup> *The Fire and Rescue Services Act 559/1975* (Finland), s.25 (accessed 25 November 2015), <http://www.finlex.fi/en/laki/kaannokset/2011/en20110379.pdf>

- Driving motor vehicles off road is not permitted on private land without owner's permission.<sup>66</sup>
- Fishing with a reel and lure on private land is not permitted without payment of a statutory fishing fee or owner's permission.<sup>67</sup>

Icelandic law includes public access both to privately owned and state owned land. Notably, the law specifically obliges visitors to exercise this right while treating the land with "respect" and with "utmost care to avoid damaging it". The law requires visitors to follow marked paths where possible.<sup>68</sup> Icelandic law is balanced more in favour of the landowner than other Scandinavian countries. On privately owned uncultivated land in settled areas an owner may limit or prohibit public access through signs and gates.<sup>69</sup> However Icelandic law is still fairly access oriented. For example, landowners must not put up fences that would block a traditional route; but, if a fence is necessary, it must include a gate to provide access.<sup>70</sup>

### 3.1.6 New Zealand

Area-based collective rights of public access to rural land in New Zealand have been the dominant means of access rights apportionment for more than 150 years. More recently, however, there has been a significant shift in such apportionment towards more exclusionary mechanisms.<sup>71</sup>

Some of the reasons for this shift in New Zealand are unique to that country. The first unique reason is Maori land negotiations. The land reform process of the Treaty of Waitangi has acknowledged historical Maori claims to land to a greater degree than in any of the other New World countries, which has reduced public access rights in New Zealand.<sup>72</sup> The second reason is the influence of intentional tourism. With a resident population of 4.6 million and actual international tourist throughput of 3 million a year, it is possible that the dominant users of New Zealand public access rights may well be from overseas.<sup>73</sup> There is a sense in New Zealand public policy that provision for the international tourist is probably better served through exclusionary rights which tend to deny public access, rather than open access.<sup>74</sup>

<sup>66</sup>Environmental Administration - Finland, *Everyman's right in Finland*, (accessed 25 November 2015), <http://www.ymparisto.fi/en-US>, ("Everyman's right in Finland") page 12

<sup>67</sup> *Everyman's right in Finland*, page 17

<sup>68</sup> *The Nature Conservation Act No. 44, 22 March 1999* (Iceland), Chapter 3, Article 13 - Passage through the country and treatment of the environment (accessed 25 November 2015), [https://www.ust.is/library/Skrar/Atvinnulif/Log/Enska/The\\_Nature\\_Conservation\\_Act.pdf](https://www.ust.is/library/Skrar/Atvinnulif/Log/Enska/The_Nature_Conservation_Act.pdf), ("The Nature Conservation Act (Iceland)")

<sup>69</sup> *The Nature Conservation Act* (Iceland), Chapter 3, Article 14 - Pedestrian traffic

<sup>70</sup> *The Nature Conservation Act* (Iceland), Chapter 3, Article 23 - Fences

<sup>71</sup> Curry, N. (2002) *Access rights for outdoor recreation in New Zealand: some lessons for open country in England and Wales*, *Journal of Environmental Management* 64:423-435 ("Access Rights – Lessons from New Zealand"), page 433.

<sup>72</sup> Devlin, P. J. (1993) *Outdoor recreation and environment: towards an understanding of the use of the outdoors in New Zealand*. Leisure, Recreation and Tourism, page. 37–49.

<sup>73</sup> Statistics New Zealand (2015), (accessed 20 November 2015),

[http://www.stats.govt.nz/tools\\_and\\_services/population\\_clock.aspx](http://www.stats.govt.nz/tools_and_services/population_clock.aspx) and

[http://www.stats.govt.nz/browse\\_for\\_stats/population/Migration/international-visitor-arrivals-sep-15.aspx](http://www.stats.govt.nz/browse_for_stats/population/Migration/international-visitor-arrivals-sep-15.aspx)

<sup>74</sup> *Access Rights - Lessons from New Zealand*, page 10

New Zealand offers an interesting example from the perspective of a Canadian observer. As with New Zealand, Canada has strong cultural links to England as a colony and member of the commonwealth. Both countries are currently dealing with large scale issues of the reassertion of aboriginal land rights, in New Zealand under the treaty of Waitangi, in Canada through treaty negotiations and major land title cases such as *Tsilhqot'in Nation v British Columbia*.<sup>75</sup> For BC in particular, tourists are likely to be major users of public access rights.<sup>76</sup> Legally, we share a common law tradition, which draws on similar understandings of the balance between public and private rights. For the Canadian observer, it is therefore useful to note that in New Zealand, the prevailing view is that it is not actually necessary to own the land to secure satisfactory access rights to it.<sup>77</sup>

## 3.2 Within North America

### 3.2.1 Nova Scotia

The law in Nova Scotia provides precisely the type of public access sought by the fishermen and women of the Nicola Valley Fish and Game Club. Section 3 of the *Angling Act* provides for a right to go upon land, river stream or lake for the purposes of fishing, stating that

*“(1) Any resident of the Province shall have the right to go on foot along the banks of any river, stream or lake, upon and across any uncultivated lands and Crown lands for the purpose of lawfully fishing with rod and line in such rivers, streams or lakes.*

*(2) Any resident of the Province shall have the right to go on, upon or across any river, stream or lake in boat or canoe or otherwise, for the purpose of lawfully fishing with rod and line in such rivers, streams or lakes.*

*(3) The rights conferred by this Section shall not in any way limit or restrict the right of any owner or occupant to compensation for actual damages caused by any person going upon or across such lands for the purpose aforesaid, and shall not be construed to give the right to build any fires upon such lands.”<sup>78</sup>*

This Nova Scotia law provides a remarkable potential model that would greatly help BC fishers to access fishing spots.

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<sup>75</sup> *Tsilhqot'in Nation v British Columbia*, [2014] SCC 44.

<sup>76</sup> As of Sept 2015, international visitor visits to BC were 4,092,233 year to date, according to Destination BC (accessed 20 November 2015) <http://www.destinationbc.ca/Research/Industry-Performance/Tourism-Indicators.aspx>, relative to a provincial population of 4,631,302 as of July 1, 2014 (accessed 20 November 2015) <http://www.bcstats.gov.bc.ca/StatisticsBySubject/Demography/PopulationEstimates.aspx>.

<sup>77</sup> *Access Rights and Dilemmas in New Zealand* page 410

<sup>78</sup> *Angling Act* RSNS 1989 c 14 (“*Angling Act*”), s.3

### 3.2.2 Maine

Like British Columbia, the state of Maine is heavily forested. Unlike British Columbia, about 90% of the land is privately owned, held by small landowners in the southern third of the state and by a few timber companies and investment corporations in the north.<sup>79</sup> Nevertheless, the people of Maine have long used private land for their recreation. The state has a historic open land tradition that is supported by law, policies and the courts. Many Mainers feel that using land of others for recreation is one of their traditional rights, referred to as the “open land tradition” or “Maine’s hunting heritage”.<sup>80</sup> This tradition is unique in the US and has huge economic implications, especially for the state’s tourism industry.

The “Great Ponds law” of 1641 is a key foundation of this tradition. It has been interpreted by the courts that ponds over 10 acres are public ponds, held in trust by the state for use by the public.<sup>81</sup> The public has a right to access these ponds through privately owned unimproved lands and Maine law sets penalties for landowners who deny access or egress over unimproved land to a great pond. However, the state’s strong landowner liability laws protect landowners from suits by recreationalists who get hurt on their land, removing a motive for landowners to forbid public use of their land.<sup>82</sup>

The law also establishes that if land is not posted (e.g. with “No Trespassing” signs) it is assumed that the public has a right to use the land under the doctrine of “implied access”.<sup>83</sup> However, it appears that the right of “implied access” only applies to access to the Great Ponds via private lands and does not extend generally to access to private land in Maine.<sup>84</sup> Private property owners do have the right to keep uninvited people off their land, and a criminal statute in Maine prohibits trespassing on posted land.<sup>85</sup> It should be noted that the Great Ponds law and the law of trespass may be in conflict -- the rights of the public to access private land have not been fully tested in court.<sup>86</sup>

Beyond legislation and case law, it is the policy of the state to encourage landowners to continue to allow the public to have access to their land. Initiatives, such as a landowner relations program, have been set up to achieve this end.

In order to ensure that recreationalists do not abuse these access rights, the Maine Department of Inland Fisheries and Wildlife has published a code of conduct for land users accessing private

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<sup>79</sup> Acheson, J. (2006) *Public Access to Privately Owned Land in Maine*, Maine Policy Review 15.1:18-30 (accessed 17 February 2016) <<http://digitalcommons.library.umaine.edu/mpr/vol15/iss1/5/>> (“*Public Access in Maine*”), page 19.

<sup>80</sup> *Public Access in Maine*, page 19.

<sup>81</sup> *Public Access in Maine*, page 21-22

<sup>82</sup> *Public Access in Maine*, page 22

<sup>83</sup> *Public Access in Maine*, page 19.

<sup>84</sup> Personal communication with Dr. James Acheson, Research Professor of Anthropology, University of Maine and author of *Public Access to Privately Owned Land in Maine*, 7 March 2016

<sup>85</sup> *Public Access in Maine*, page 22

<sup>86</sup> *Public Access in Maine*, page 23

land through the Maine Landowners Relations Program.<sup>87</sup> The publication provides a summary of the laws related to landowner property and suggests that recreationalists should:

- Ask for permission first
- Respect any and all special requests made by the landowner.
- Understand clearly where you can and cannot drive or park.
- If requested, provide the landowner, your name, address, phone number and vehicle description.
- Consider using pre-printed Landowner/Land user Courtesy Cards [that facilitate permission between and landowner and land use to use the land].
- Know the property boundaries of the land you have permission to use and stay within those boundaries.
- Railroad and utility corridors are not public rights of way and require permission for access.
- Always obey the law.

In recent years, there has been a substantial increase in owners posting their land against trespassing, in response to abuses by the public. Although a number of different kinds of mechanisms have developed to allow public access, more needs to be done if Maine's open land tradition is to be maintained.<sup>88</sup>

### 3.2.3 Washington State

Financial incentives can be created to encourage landowners to provide public access. For example, in Washington State, the *Open Space Taxation Act*, enacted in 1970, provides for a reduction in property tax assessments if the owner agrees to keep the land in open space for ten years.<sup>89</sup> The legislation enables county legislative authorities to establish a public benefit rating system that sets the criteria for both eligibility and the amount of the tax benefit. The local rating system awards "points" for land that provides benefit to the public.<sup>90</sup> Two counties which have used these rating systems to promote open access are King County and Whatcom County.

What is particularly interesting about these examples from a BC perspective, is that King County includes large urban centers such as Seattle, Redmond, and SeaTac. Whatcom County, which encompasses the city of Bellingham, is adjacent to the Canada-US border, directly south of Surrey and Abbotsford. This would indicate that these counties have geographically and culturally similar conditions to southern BC.

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<sup>87</sup> Maine Department of Inland Fisheries and Wildlife (2008) *Access to Private Land is a Privilege not a Right* (accessed 17 February 2016) <[http://www.maine.gov/ifw/aboutus/commissioners\\_office/OutdoorPartnersPqrm/pdfs/AccessingPrivateLand\\_2008.pdf](http://www.maine.gov/ifw/aboutus/commissioners_office/OutdoorPartnersPqrm/pdfs/AccessingPrivateLand_2008.pdf)>

<sup>88</sup> *Public Access in Maine*, page 19

<sup>89</sup> Washington State Legislature, 458-30 *WAC Open Space Taxation Act Rules* (accessed 22 November 2015) <<http://apps.leg.wa.gov/wac/default.aspx?cite=458-30>>

<sup>90</sup> Washington State Department Of Revenue (2014), *Open Space Taxation Act – Fact Sheet*, (accessed 26 February 2016) < [http://dor.wa.gov/docs/pubs/prop\\_tax/openspace.pdf](http://dor.wa.gov/docs/pubs/prop_tax/openspace.pdf)>, page 1

### 3.2.3.1 King County, Washington State

Under the King County public benefit rating system, points are awarded if the land provides recreation, habitat, scenic or historic value, shoreline, trail linkage, water quality buffer, or buffer to public park lands.<sup>91</sup> Bonus points are earned for public access provisions, or if permanent conservation covenants are placed on the land. Depending on points earned, tax reductions vary from 50 percent to 90 percent for property approved as open space land.

For example, landowners receive 5 points (and an automatic tax base reduction to 50% of market) for allowing year-round access to their land for public recreation. The landowner may impose reasonable restrictions on access, such as limiting use to daylight hours, which are mutually agreed to by the landowner and the local planning department. Access must be allowed on only the portion of the property that is designated for public access.<sup>92</sup> Landowners can reduce their property taxes by up to 90% by placing a conservation covenant on their land and simultaneously allowing public access.<sup>93</sup>

### 3.2.3.2 Whatcom County, Washington State

In Whatcom County, landowners who provide public access can qualify for an open space tax reduction. This is a financial incentive to property owners to voluntarily conserve and preserve these lands for public access.<sup>94</sup> Public access is defined as the right of any individual to request permission to enter and visit the premises on foot for legitimate recreational purposes such as bird watching, strolling and general relaxation on the premises.<sup>95</sup> Public access is required for all applications to be classified as Open Space Land or Farm and Agricultural Conservation Land -- but this requirement may be waived by the County Council when the purpose of classification is to protect wetlands or endangered species, or archaeological sites.<sup>96</sup>

Whatcom County administers this incentive program through a “public benefit rating system”. A land parcel is assigned a “basic value” based on how many points it receives for meeting certain criteria, including whether the land provides opportunities for recreational activities such as hiking, horseback riding, hunting, fishing, bird watching, and nature observation.<sup>97</sup> The “public benefit rating” is then calculated by assessing the land’s “basic value” against the benefit to the general welfare in preserving the current use of the parcel. Benefit to general welfare is based on conformance of the land with a number of factors including public access, parcel size, and linkage with other open spaces. A public benefit rating of at least 45 points must be attained

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<sup>91</sup> Sandborn, C. (1996), *Green Space and Growth: Conserving Natural Areas in BC Communities*, (accessed 26 February 2016) <[http://www.elc.uvic.ca/documents/Sandborn\\_Greenspaces\\_Report\\_1996.pdf](http://www.elc.uvic.ca/documents/Sandborn_Greenspaces_Report_1996.pdf)>page 167

<sup>92</sup> King County Council, *King County Code, Title 20 - Planning*, Updated: September 23, 2015, 20.36.100 Public benefit rating system for open space land-definitions and eligibility (“*King County Code, Title 20*”), page 58, 59.

<sup>93</sup> *King County Code, Title 20* at page 65

<sup>94</sup> Whatcom County Council (1995) *Whatcom County Open Space Policy and Criteria and Public Benefit Rating System* (accessed 22 November 2015) <<http://wa-whatcomcounty.civicplus.com/DocumentCenter/View/8864>> (“*Whatcom County Open Space Policy*”), page 2

<sup>95</sup> *Whatcom County Open Space Policy* page 12.

<sup>96</sup> *Whatcom County Property Tax Reduction Programs Presentation Handout - V03-March 3, 2015*. page 1 -2. (accessed 25 February 2016) <http://wa-whatcomcounty.civicplus.com/DocumentCenter/View/7038>

<sup>97</sup> *Whatcom County Open Space Policy*, page 6

to attain approval for a tax reduction though the greater the public benefit rating, the greater the tax reduction.<sup>98</sup> As a condition for approval, owners of open space parcels must agree to provide a certain degree of public access and post a sign visible to passing motorists, indicating the parcel's availability of public access. The owner of a parcel of land must also sign an agreement, freeing Whatcom County of any liability that may arise as a result of open space approval.

All applicants for open space and open space farm and agriculture conservation shall be accompanied by the owner's proposed rules of conduct and describe how public access is to be managed.<sup>99</sup> The right is subject to the acceptance by the visitor of an agreement to abide by rules of personal conduct required by the owners, and a general release of the owner from liability for any injury suffered by the visitor while on the premises. This release does not apply to a disorderly or apparently intoxicated person.

Note that in BC the Islands Trust Natural Areas Protection Tax Exemption Program already provides tax reductions for conservation covenants to protect natural values --, but is not commonly used to incentivize recreational access<sup>100</sup> There may be an opportunity for BC to build on the current Islands Trust approach to promote public access, by borrowing from the Washington State schemes described above.

### **3.2.4 Voluntary Public Access and Habitat Incentive Program**

The Natural Resource Conservation Service, a branch of the US Department of Agriculture, administers a competitive grants program known as the Voluntary Public Access and Habitat Incentive Program (VPA-HIP).<sup>101</sup> This program helps state and tribal governments increase public access to private lands for wildlife-dependent recreation such as hunting, fishing and hiking. These governments obtain grants from the NRSC in order to fund participating private landowners to initiate or expand existing public access programs in their jurisdiction. Funding priority is given to public access programs that address the following objectives:

- Maximize private lands acreage available to the public
- Ensure that land enrolled in the program has appropriate wildlife habitat
- Provide incentives to strengthen wildlife habitat improvement efforts
- Supplement funding and services from other federal or state agencies, tribal governments or private resources provided in the form of cash or in-kind services
- Provide information to the public about the location of public access land
- Make special efforts to reach historically underserved or socially disadvantaged landowners and operators

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<sup>98</sup> *Whatcom County Open Space Policy*, page 2

<sup>99</sup> *Whatcom County Open Space Policy*, page 12

<sup>100</sup> Personal communication with Kate Emmings, Islands Trust Fund, 17 February 2016. For information on the Gulf Islands program, see: <http://www.islandstrustfund.bc.ca/initiatives/privateconservation/napter.aspx>

<sup>101</sup> USDA – Natural Resources Conservation Service, 2014 Farm Bill – Voluntary Public Access and Habitat Incentive Program- NRCS (accessed 26 February 2016) <http://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/programs/farmbill/?cid=stelprdb1242739>

- Follow NRCS conservation practice standards for VPA-HIP habitat improvement activities

In 2015 the NRSC invested \$20 million in 15 states to advance recreational opportunities on private lands.<sup>102</sup> Examples of grantees and the recreational opportunities they provide include:

- Colorado Department of Natural Resources – Acquire access to privately owned land that will be open to public access. Develop habitat on privately owned land.
- Connecticut Department of Energy and the Environment – Maintain and expand existing program by offering landowner financial incentives to be part of the public access system.
- Illinois Department of Nature Resources: Continue and expand program to bring additional opportunities to youth throughout the state, targeting areas close to metropolitan centers.

#### 4. Options for Change

As demonstrated by the above examples, BC’s current legal regime for public access is not the only option. There are other ways to balance the property rights of landowners with the right of the general public to enjoy nature through recreational activity. The following section outlines some possible solutions, starting with those that require the most substantial change to the current system, and working to the least.

##### 4.1 Option One: Legislated Right of Access

**Recommendation 1: Government should consider enacting a statute to establish a broad right to public access to designated types of private rural land for recreational purposes.**

One option would be to pass a statute at the provincial level enacting a right to public access to designated types of rural land for recreational purposes. England and Wales’s *Countryside and Right of Way Act*, and Norway’s *Outdoor Recreation Act* provide excellent examples of how this could be done in a fair and minimally disruptive way. These regimes recognize that outdoor recreation is an important element in citizens’ lives - a social commodity and a public good - and therefore its provision should fall into the public domain.

Sweden’s Constitutional right of *Allemansrätt* clearly demonstrates the fundamental importance of public access and provides useful lessons about how different interests can be effectively balanced.

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<sup>102</sup> USDA – Natural Resources Conservation Service, 2015 VPA-HIP Grantees (accessed 25 February 2016) <<http://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/programs/farmbill/?cid=nrcseprd388655>>

What the above-mentioned examples do well, and what BC could emulate, is that they strictly limit the types of activities and where they can occur, within private land. In other words, the right to public access is directly tied to corresponding responsibilities.<sup>103</sup>

A public access statute should include provisions:

- Limiting the right of access to uncultivated and wild areas, and setting a specified distance away from homes, schools and businesses. Including a specific distance requirement would avoid confusion about what constitutes an interference with the landowner's rights. It could also direct public access away from the property of small landowners, reducing the possibility of recreationalists disturbing landowners and residents.
- Limiting the types of activities that recreationalists can engage in without landowner permission. For example, provisions could restrict motorized activities to roads only, require dogs to be leashed, and limit commercial activities. This could be bolstered by a general prohibition against activities (fires, etc.) that could potentially damage the land.
- Providing for strict penalties for recreationalists who abuse their rights. In order to achieve a fair balance, it is important that the law is fair to both landowner and recreationalist. For example, the statute could provide for large fines for those who come too close to landowner residences or otherwise violate a stipulated mandatory code of responsible conduct. Government should enforce these rules, and save landowners the cost and time required to bring claims in civil court.

One challenge with this option is that it might be viewed as too large a change to BC's traditional property law system. A move from our current system of more or less complete landowner control to a broad right of public access could be a major undertaking.

Alternative approaches exist. For instance, BC could begin by legislating specific rights – for example, it could legislate a comprehensive right of access for fishers to access water bodies across the Province, as Nova Scotia has. Or it could follow the Maine example of legislating access to water bodies.

If there is resistance to such legislation, alternative approaches could be considered. A commonly used metaphor for property rights in the common law system is as a “bundle of sticks”.<sup>104</sup> Perhaps a more palatable solution would be to begin creating a more equitable balance one stick at a time, with one of the less comprehensive options described below. Then, if the transition is not especially painful, landowners may be more open to moving in this direction down the road.

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<sup>103</sup> *Public Access, Responsibility & Right to Exclude*, page 211.

<sup>104</sup> *Access Rights - Lessons from New Zealand*, page 423

## 4.2 Option Two: Facilitate Access

### **Recommendation 2: Government should consider facilitating access with a broad range of legislation, policy, mapping, strategic planning and other initiatives.**

Another option would be to develop laws which facilitate -- rather than globally enforce -- rights of access. Some examples of facilitation from other jurisdictions that could provide useful lessons include:

- Scotland's *Land Reform (Scotland) Act 2003* (LRSA) facilitates broad public access by:
  - mandating local governments to create a system of “core path plans” to give the public reasonable access throughout their jurisdiction;
  - requiring public mapping of locations where access exists; and
  - providing recreational access across the Scottish landscape, subject only to limited exceptions.<sup>105</sup> The Scottish program has been found to reduce disputes between the public and land managers.<sup>106</sup>
- England and Wales facilitate access with public mapping programs. Countryside Agency Access Land Maps under the CROW indicate land categorized as open country or registered common land -- and include lands dedicated for open access. These maps are made available to the public through local authorities,<sup>107</sup> and a search database can be found through Natural England, the UK government's advisor for the natural environment in England.<sup>108</sup>
- Maine State law and policy encourage landowners to allow access to recreationalists, through its doctrine of “implied access” for all unposted land. State departments of Conservation and Inland Fisheries and Wildlife seek to minimize conflict between recreationalists and landowners by outlining a code of ethics and other information related to accessing private land.<sup>109</sup>
- Alberta's *Public Lands Act*, though it relates to grazing leases and not private land, also has some interesting ideas which apply directly to the Canadian cultural and legal landscape.<sup>110</sup>

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<sup>105</sup> *Land Reform (Scotland) Act*, s.6

<sup>106</sup> *Post Legislative Scrutiny of LRSA*, page 33.

<sup>107</sup> *Public Access, Responsibility & Right to Exclude*, page 241.

<sup>108</sup> Natural England (2016) *Open access land: management, rights and responsibilities* (accessed 24 February 2016) <https://www.gov.uk/guidance/open-access-land-management-rights-and-responsibilities> Direct link to the CROW Act maps search engine at

<[http://www.openaccess.naturalengland.org.uk/wps/portal/oasys/maps/MapSearch!/ut/p/c5/04\\_SB8K8xLLM9MSSzPy8xBz9CP0os3gfdwMzDyNnA0v\\_kCBXA08DT38XH9PQ38DE6B8pFm8AQ7gaEBAdzjIPrN4M3cfC0MnfwNLg0A\\_CwNPC3MTI0cPbwMDY1OIPB7z\\_Tzyc1P1C3IjDLJMHUBUBQs8ezw!!/dl3/d3/L2dBISEvZ0FBIS9nQSEh/](http://www.openaccess.naturalengland.org.uk/wps/portal/oasys/maps/MapSearch!/ut/p/c5/04_SB8K8xLLM9MSSzPy8xBz9CP0os3gfdwMzDyNnA0v_kCBXA08DT38XH9PQ38DE6B8pFm8AQ7gaEBAdzjIPrN4M3cfC0MnfwNLg0A_CwNPC3MTI0cPbwMDY1OIPB7z_Tzyc1P1C3IjDLJMHUBUBQs8ezw!!/dl3/d3/L2dBISEvZ0FBIS9nQSEh/)>

<sup>109</sup> Maine Department of Inland Fisheries and Wildlife, *Accessing Private Land*, (accessed 20 November 2015),

<[http://www.maine.gov/ifw/aboutus/commissioners\\_office/OutdoorPartnersPgrm/accessing\\_private\\_land.htm](http://www.maine.gov/ifw/aboutus/commissioners_office/OutdoorPartnersPgrm/accessing_private_land.htm)>

<sup>110</sup> Alberta's *Recreational Access Regulation*, Alta Reg 228/2003 establishes a comprehensive framework for managing public access to land held under a grazing lease or farm development lease. Persons seeking access to

Technology offers great opportunities to facilitate access. For example, the BC Government could aid the development of smartphone applications which allow the public to immediately access maps which include information on the right of the public to access an area of land, and to contract with landowners immediately about their conduct on the land.<sup>111</sup>

The benefit of such facilitative options is that they can provide a benefit in terms of reduced conflicts. They also stand to greatly improve public access, in that they can serve to inform recreationalists of lands that are currently open to the public. However, they may fail to provide the universal access found in some jurisdictions.

### 4.3 Option Three: Provide Incentives to landowners to allow public access

#### **Recommendation 3: Government should consider providing financial incentives to landowners who provide public access.**

Another option would be to pass legislation that would provide an incentive for landowners to allow the public on their land. Rather than using a legal “stick” to force landowners to allow the public on their lands, this option would involve creating a financial “carrot” to make them want the public on their lands.

One way to go about this would be follow the Washington State model in its *Open Space Taxation Act* (1970) of providing a reduction in property tax assessments if the owner agrees to allow public access.<sup>112</sup> This could be a very flexible system as it could vary the amount of the tax reduction by the extent of access. For example, a landowner might obtain a tax reduction for allowing the public to simply walk through their land to fish a publicly stocked lake such as Douglas Lake, but would obtain a greater tax reduction if they allowed free access to people picking mushrooms elsewhere on their land. Allowing the construction of a permanent trail through their land might increase the tax incentive further.

One challenge with this plan is finding funding for a tax reduction. The more landowners that allow recreationalists on their land, the more it could cost. This might be beneficial in terms of providing more access, but it may be difficult to justify a large expenditure for a program that is

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the land must first contact the leaseholder and provide specified information: name and contact information, number of persons seeking access, and the recreational purpose, proposed date, time and duration of the proposed access (s.5(1)). . They are prohibited from accessing the land until the leaseholder’s designated contact person has responded, but a designated government official can allow access to the land if a person has been unable to make contact with the leaseholder after reasonable attempts have been made. (s.5(4)) If proper contact before access has been made, leaseholders have a duty to allow access to the land except in specified circumstances involve , . (s.6) The regulations impose duties on the recreational user. (s.9) The regulations also establish a process for resolving access-related disputes. (s.13-22) This involves written statement to local settlement officer, who has broad authority to allow or prohibit access, or adopt “recreational management plans”.

<sup>111</sup> The Nicola Club (an ORC member organization) reports that they have been in discussion with John Corbett, a cartographer for UBC Okanagan regarding the development of such an application. However, government funding and access to government data would be extremely helpful. Another useful feature of the proposed application is that it could allow members of the public to upload photos of obstructions in access to land to determine whether the obstructions are legitimately erected. ORC reports suggest that people sometimes block access to public logging roads to keep the public out in cases where they do not have the legal right to do so.

<sup>112</sup> Washington State Legislature, *458-30 WAC Open Space Taxation Act Rules* (accessed 22 November 2015), <<http://apps.leg.wa.gov/wac/default.aspx?cite=458-30>>

only used by recreationalists. However, cost could be reduced by only providing the tax break for lands necessary for strategically-defined public access. For example, if one property provides a “bridge” between two Parks, there may not be a need to provide a tax break for other private lands that bridge the same gap.

Note that it may be possible to help fund the tax reductions (as well as outright purchase of key lands) through a levy on outdoor recreation goods purchased by recreationalists. See *Finding the Money to Buy and Protect Natural Lands* at: <http://www.elc.uvic.ca/funding-natures-future/> at pp. 15-16 for more information on this potential source of funds, as well as others.

A possible way to implement this option to maximise local flexibility might be to adopt a property tax exemption scheme similar to that found in King and Whatcom counties in Washington State, or broaden the application of the Islands Trust Natural Areas Protection Tax Exemption Program to other local BC jurisdictions. The Province of BC might pass or adapt the necessary legislation to allow for public access tax exemptions but allow local governments to set the criteria and eligibility for such a tax benefit. This type of public access regime would allow for a high degree of local flexibility in defining where public access is permitted, while allowing the province to set land access targets and coordinate the development of connectivity throughout and between regions, as might be necessary for a trail network. Provision for local flexibility would help encourage public engagement with (and hopefully acceptance of) a land access regime, rather than being something landowners feel is imposed on them by a distant legislature uninterested in their concerns.

## 5. Conclusion

The desire of landowners to control who enters their property and what people do on it is understandable. Private landowners raise legitimate concerns arising from allowing public access, such as liability, forest fires, and vandalism. However, the recent trend of increased access restrictions seems unwarranted. Amendments to the *Occupiers Liability Act* were made in 1998 to protect landowners from lawsuits by recreationists on their lands. Fire and vandalism concerns can be addressed through provisions such as those provided in England, Sweden, Norway and elsewhere.

Fortunately, there are good examples of how to enhance public access in a way that is fair to landowners. A number of jurisdictions within North America and around the world have found ways to fairly balance the property rights of landowners with the right of the public to access and enjoy nature. In Sweden, every member of the public has the constitutional right to cross certain types of private property so long as they do so in a way that does not disturb the land or its occupants. This right is balanced by strict responsibilities -- the Swedish penal code makes it a crime to abuse this privilege. Norway, Finland and Iceland have codified similar access rights.

England, Wales and Scotland provide the public with broad access rights, and England and Wales require local authorities to create publicly available maps of areas the public has access to.

This mapping initiative prevents conflicts between landowners and the public, by removing confusion about what land is really free to access. Scotland requires the establishment of “core paths” to ensure adequate access across the landscape.

Although dramatically open public access regimes are quite popular in some European nations, it may be difficult to reproduce the extremely broad access rights found in Europe. In that case, we should consider North American examples. We should seriously consider Nova Scotia and Maine, where legislative and common law rights enable public access through private lands to waterways.

Finally, we should consider jurisdictions which have instituted economic incentive systems to encourage landowners to open access to their lands. For example, King and Whatcom counties in Washington State give landowners a reduction in their property taxes if they allow public access. These incentive systems can make good economic sense if applied correctly in a fair and flexible way that is responsive to local needs.

Ultimately, this is a complex issue. Private property is an important value to many Canadians. At the same time, action is needed to allow for a more equitable sharing of the right to access nature. We must act, if we want future generations to enjoy BC’s natural wonders – and to learn how to love and protect them.

## 6. Appendix

### 6.1 Special Committee on Public Access to Private Roads

Compliments of  
GOVERNMENT OF BRITISH COLUMBIA  
Department of Recreation and Conservation,  
Hon. Earle C. Westwood, Minister,  
Victoria, B. C.

The Special Committee on Public Access to Private Roads, convened under the Chairmanship of Mr. W. C. Speare, has submitted its report and recommendations to the Legislature. Herewith is the report as submitted.

March 22, 1962.

MR. SPEAKER:

Your Special Committee on Public Access to Private Roads begs leave to report as follows:-

That the Committee has convened on a number of occasions and has had presented to it a total of fourteen submissions on behalf of various organizations interested in the general problem. Additionally, a number of letters were received from individual members of the public with specific or general interest.

The submissions in general represented two broad segments of the community, namely, the recreationists, including fishermen and hunters, and the individual or company owner of private land and (or) roads.

From the submissions received, it is clearly evident there is a distinct cleavage in the line of thought as between the two groups.

The first-mentioned press strongly for an almost unrestricted right of access over private lands or road facilities to attain their recreational pursuits. The road-owner group, largely industrial operators, appear to recognize that they should adopt certain measures to facilitate the recreationists' needs and are generally co-operative toward that end, but are likewise firm that failing take-over of the road as a public highway, control of the use by recreationists must remain in the road-owner's hands, and, when public use is allowed, the road-owner must be relieved of various responsibilities now imposed upon him under statutes as, for example, the Forest Act and the Motor-vehicle Act.

Your Committee has duly deliberated on the various submissions made and has likewise studied the recommendations of the Cabinet Committee, which relate to the report of the Deputies Committee which studied these matters.

Your Committee hereby endorses the recommendations of the Cabinet Committee, which are as follows:-

- "(a) That an Inter-departmental Committee on Public Access be established to temporarily serve as a processing group for immediate and pressing access problems which may be referred to the Committee for study and return advice by deputy ministers of separate departments of Government. It is suggested that the Committee be composed of a senior representative of all departments of Government concerned and the Chairman for the Committee be named from the Department of the Attorney-General.

- "(b) That a public forum be established by Government to hear submissions from industrial or other interested groups in respect to the access problem as it applies to private roads. It is recommended that a select standing committee of the Legislature constitute the forum.
- "(c) That consideration be given to the drafting of a Public Access Act and the various regulations which might be promulgated thereunder. It is envisioned that such an Act would be administered by the Department of Commercial Transport, might replace the present Industrial Transportation Act and would be additionally a vehicle for the making of regulations governing use of private easements, rights-of-way, etc. It would not cover the granting of tenures. Actual work on the drafting of such an Act should be delayed pending the suggested hearing of public submissions and subsequent completion of the whole study by the Deputies and Cabinet Committees. The Inter-departmental Committee on Public Access might then be the logical group to evolve the context of the new Act and report its findings through the Deputies Committee for final processing.
- "(d) The actual granting of land tenures in respect to easements and rights-of-way be continued to be vested in the Department of Lands and Forests under the Land Act and Forest Act. Following approval of a new Public Access Act all easements or rights-of-way granted would be made subject to provisions of that Act.
- "(e) That the Departments of the Attorney-General, Highways, Recreation and Conservation, and Municipal Affairs collaborate in a study designed to evolve some criteria or yardsticks for determination as to when a private road should be expropriated in the general public interest.
- "(f) That immediate effect be given to a policy requiring that the Department of Highways be consulted for advice and recommendations in respect to any roads built by industrial operators under arrangement with any department of Government when such arrangement anticipates eventual use of the road as part of the public highway system.
- "(g) That consideration be given to amendment of the Land Registry Act so that it will provide access in a form more suited to present day concepts. The Department of Highways in consultation with the land use departments concerned should be charged with working out details prior to referral of the drafted amendment to the Department of the Attorney-General.
- "(h) That the present Government policy of creating block reserves for the use and enjoyment of the public at all suitable sites and particularly water frontage be continued.
- "(i) That consideration be given by the Lands Service of the Department of Lands and Forests to inclusion in all future Crown grants of a suitable proviso reserving a right unto the Crown to designate a right-of-way

"(i) cont.  
over the land granted as may at any time be required in public interest."

Firstly, in respect to the foregoing it is pointed out that recommendation (b) of the Cabinet Committee has been performed by submission of this report.

Your Committee now strongly urges that recommendation (a) be implemented forthwith, namely:-

"(a) That an Inter-departmental Committee on Public Access be established to temporarily serve as a processing group for immediate and pressing access problems which may be referred to the Committee for study and return advice by deputy ministers of separate departments of Government. It is suggested that the Committee be composed of a senior representative of all departments of Government concerned and the Chairman for the Committee be named from the Department of the Attorney-General.

It is further urged that such Inter-departmental Committee proceed without loss of time to the drafting of a Public Access Act to be duly processed through the Deputies and Cabinet Committees before 1963, in accordance with recommendation (c) of the Cabinet Committee, and the various submissions just made to your Special Committee be made available to the Inter-departmental Committee as background in this work.

It would also seem that recommendation (i) of the Cabinet Committee, dealing with insertion in all future Crown grants of a suitable proviso reserving a right unto the Crown to designate a right-of-way over the land granted as may at any time be required in the public interest, be investigated immediately with a view to implementation as soon as legally possible.

As further general guidance in the drafting of a Public Access Act it does seem to your Committee that failing formal take-over as a public road, in respect to any private road to which the public is given access control should remain with the owner of the road subject to relevant provisions of the said Act. Your Committee is also of the opinion that the road-owner in such cases should receive some relief from responsibilities at present placed upon him under certain statutes, notably in the matters of taxation, public liability, and responsibilities for forest-fire protection.

Your Committee is further of the opinion that where public access is granted and arranged, as between the road-owner and the public, such access should be open to all members of the public and not restricted to any one group or organization.

It is also suggested that, in defining and classifying roads and (or) trails for public access, the views of interested local groups be enlisted and given every consideration.

The problem of use of a private road by another industrial user in the opinion of your Committee does not seem too acute at this time and presumably is being adequately resolved by private arrangement between parties concerned.

Finally, when the foregoing recommendations are acted upon, your Committee suggests that a draft of any proposed relevant legislation be reviewed by a similar Special Committee of the Legislature prior to being placed before the Assembly.

All of which is respectfully submitted.

W. C. Speare, Chairman.

## 6.2 Managing recreation on public land: How does Alberta compare?<sup>113</sup>

### 1. EXECUTIVE SUMMARY

Recreational use of public land in Alberta is creating significant management challenges as the demands for recreational opportunities and the impacts of recreational activity are increasing together. These challenges are shared by many western jurisdictions and have intensified in recent decades due to increases in motorized recreation.

This review by the Environmental Law Centre (ELC) compares the legal framework for recreation management in Alberta to other Canadian provinces and US jurisdictions. These comparisons include the provinces of Ontario, British Columbia and Nova Scotia, the US Bureau of Land Management, the US Forest Service, and the States of Colorado, Utah and Oregon.

The comparisons focus on three legal barriers to on-the-ground management actions in Alberta that were identified in advance of the research. These are:

- mandates to manage recreation on public lands;
- funding for recreation management programs; and,
- liability for injuries on recreation trails.

The review also explores two questions relevant to recreation policy development in Alberta:

- how motorized recreation is typically managed as compared to non-motorized recreation; and,
- how options for improving recreation management under existing legislation compare to the option of legislative reform.

The findings reveal that the legal framework for managing recreation in Alberta diverges significantly from those in jurisdictions that are ahead in responding to the challenges. Moreover, it most resembles those in other jurisdictions that are struggling to so respond.

#### Topic 1: Mandates to manage recreation on public lands

In Alberta the various powers, duties and functions related to recreation management are fairly fragmented. Parks recreation and conservation, access to public lands, roads, motor vehicles, and liability for injuries related to recreational use of public land are treated as fairly separate matters under separate pieces of legislation that are often administered by separate agencies. These pieces of legislation often do not provide strong direction or authority to these agencies, such that many recreation management decisions require the involvement of Ministers or Cabinet. This fragmentation is a contributing factor in unclear rules, lack of developed recreational amenities and difficulty in mitigating the negative impacts of recreation. It also engenders the politicization of many recreation management decisions.

The mandate model in Alberta diverges from most jurisdictions reviewed in several ways. For example, in several US jurisdictions and some Canadian provinces, several mandated powers, duties and functions

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<sup>113</sup> Alberta Environmental Law Centre, *ref. (2015), December-2015-Managing recreation on public land: How does Alberta compare?* (accessed 31 December 2015). Full report can be found at <http://www.elc.ab.ca/media/105057/Managing-recreation-on-public-land-Final-December-10-2015.pdf>

related to recreation management are consolidated under the same legislation and in the same agencies. These mandates included stronger legislated direction to prioritize recreation among multiple land uses, to actively develop recreational amenities and to directly tackle the negative impacts of recreation. Several jurisdictions had specific legislation to enable motorized recreation management programs on top of general or non-motorized recreation programs.

In all jurisdictions reviewed the majority of recreation management functions were assigned to government land agencies. The two most common models were:

- multiple agencies such as parks, public lands and forests would have similar recreation management functions on separate land bases; or alternatively,
- a parks agency housed within a larger public lands and resource agency lead on recreation programs outside of the parks land base.

All jurisdictions reviewed provided roles in program delivery to recreational user representatives and local authorities. However, none of the jurisdictions reviewed used delegated administrative organizations to manage recreation trails and services.

The comparisons also provide warnings that there is no utopic model or silver bullet solution to establishing recreation management mandates. Multiple jurisdictions have had the same debates as in Alberta. Moreover, there is further evidence that clear managerial mandates will not be met without practical capacity.

## Topic 2: Funding for recreation management programs

In Alberta there is relatively little public funding for recreation management programs. Furthermore, the source of funds is general revenues and departmental budgets. This means that recreation management must compete for funds with many other governmental priorities.

In striking contrast, every other jurisdiction reviewed generated revenue from the recreating public and directed it towards recreation management programs. Examples included:

- user fees and permits;
- regulatory charges such as vehicle registrations, operator licensing, or user education;
- fines, restitution payments and community service for offenders;
- the percentage of fuel tax that can be attributed to recreational vehicle fueling; and,
- legislative allocations of gaming revenues and oil royalties.

Most jurisdictions used multiple tools from this spectrum to fund an array of recreation management programs. They had programs for general or non-motorized recreation, and separate programs for motorized recreation. Some motorized programs were further subdivided by machine type.

Motorized programs are usually called “off-highway vehicle (OHV)”, “off-road vehicle (ORV)” or “all-terrain vehicle (ATV)” programs. However, several programs cover a broader range of vehicles including snowmobiles, 4x4 trucks and street-legal vehicles used on public land. The diverse scope of OHV programs reveals at least three points of debate:

- what types of machines or operators should revenue be collected from;
- who should receive funding as between government agencies, recreational user groups, municipalities, other public service organizations or private sector service providers; and,
- what should funds be used for as between recreational opportunity development and impact mitigation activities?

Multiple Canadian provinces and US jurisdictions showed evidence of public debate over recreational user payments. However, the practical need for additional funding is real and the trend is definitely towards such user payment programs.

### Topic 3: Liability for injuries on recreation trails

In Alberta the legal protection from lawsuits concerning trail-related injuries is stronger than it used to be because the provincial *Occupiers Liability Act* now reduces the duty of care owed to recreational users in some situations. However, this legislation is complicated and does not provide certainty.

There are not many court cases on liability for injuries on trails and extremely few in which public land managers or land users have been held liable. Nonetheless, government agencies, trail groups, industrial operators and other “occupiers” all perceive exposure to liability. Risk management practices vary between stakeholders and the insurance regime is not clearly adequate. While the current liability model is fairly enabling of recreational access, it is a deterrent to “proactive” management actions such as developing trail infrastructure or charging user payments.

The liability regime in Alberta is fairly similar to that in British Columbia and Ontario. In contrast, all American jurisdictions and the Province of Nova Scotia provided stronger liability protections in legislation. This usually involves broader reductions in the duty of care owed to users plus further provisions on voluntary assumption of risk for motorized use. Nonetheless, some uncertainty exists in all jurisdictions and trail proponents are calling for reforms. Given the trend towards increased protections, it is important to recall that recreational users of public land can be injured through the fault of others, and it is not good policy to remove all recourse in all situations.

### Reform options and considerations

Several improvements in Alberta can be made without major reforms. Options to pursue include:

- creating a specialized public lands enforcement force with authority to levy fines;
- making more use of public lands regulations and providing guidance for use of regulations; and,
- making regional plans that set clear objectives and direction for decision makers.

However, the prospects of filling the key gaps concerning management mandates, funding and liability protections are all limited under existing legislation.

**Mandates to manage recreation outside the parks system** create the largest reform issues because all administrative powers and duties must come from legislation. Current provincial initiatives including regional planning, public land regulations and trails partnerships can help the existing reliance on shared responsibility work better. However, they cannot create legislated mandates that do not otherwise exist.

**Funding for recreation management** has some potential without legislative reforms:

- user fees can be implemented, but they require Ministerial involvement which invites politicized debate;
- permits and disposition fees can be charged by agencies but currently the revenue need not be directed to specific programs;
- obtaining revenue from vehicle registrations, operator licensing or mandatory user education would require legislative reforms; and,
- revenue from fuel tax attributable to recreational vehicles is collected but it is not parsed out and directed to recreation management; thus, without reforms it is likely that competing priorities for tax revenues will continue to prevail.

**Liability protection** presents a difficult reform issue because protections from lawsuits brought by recreational users are already stronger than in times past. Moreover, there are few examples of these protections actually failing in a court of law. Nonetheless, uncertain liability is deterring management action. The ideal would be reforms to clarify liability and provide stronger protections, but not to the extent of eliminating all recourse in all situations.

Overall, legislative reforms would be the best way to create clear mandates, adequate funding sources, and stronger protections from liability.

**Motorized recreation:** Managing motorized recreation is a universal challenge. However, our review indicates that Alberta is lagging behind other jurisdictions on this front. The question is how to proceed so as to align with other jurisdictions that are ahead on responding to this challenge.

Recent provincial initiatives including regional planning and the provincial trails partnership pilot imply a focus on OHVs at the outset of formalizing a management system. While the impacts of OHVs are certainly a leading concern, this latent focus on OHVs in Alberta is opposite from the jurisdictions reviewed in two regards:

- the legislation and management programs in other jurisdictions was often overtly clear regarding the specific types of uses or vehicles that the programs concerned; and,

- in many other jurisdictions the general recreation management systems were well established before motorized recreation became widespread, so it was more a matter of adding motorized-specific legislation and programs as this new challenge emerged.

Aligning Alberta with other more progressive jurisdictions will require developing a general recreation management system and clear program streams for multiple motorized and non-motorized uses simultaneously.

#### Recommendations for legislative reforms

As there are shortcomings on every major point of comparison, the best way to improve recreation management in Alberta is through legislative reform. There are multiple options for affecting such reforms. Examples include:

- targeted amendments to multiple pieces of existing legislation;
- overhauling the major public lands legislation in response to broader issues with "multiple use" of public lands; or,
- creating a new piece of legislation focused on recreation management.

While the need to improve the legal framework for recreation management in Alberta is significant, there are ample models to follow. The details in this review can help identify the most optimal features from other jurisdictions while avoiding the least optimal ones.