No Public Right to Cross Private Land to Access Recreational Assets

In the recent decision, *Douglas Lake Cattle Company v Nicola Valley Fish and Game Club* (2021 BCCA 99), the BC Court of Appeal determined that the Douglas Lake Ranch could block the public from crossing its property to fish in the Crown owned Minnie and Stoney Lakes. The outcome is very disappointing not only for the Nicola Valley Fish and Game Club, but for all who had hoped this case would provide a stepping stone to gain public access across private land to enjoy Crown owned recreational assets, such as lakes, trails, mountains and parks.

The Nicola Valley Fish and Game Club started the lawsuit in 2013 to be able to cross the land owned Douglas Lake Ranch to fish in the Crown owned lakes. In the appeal, the Club sought to uphold the judgment of the BC Supreme Court (2018 BCSC 2167), which had granted public access to Minnie Lake, via a trail and road, and to Stoney Lake, via a road. The trial judge had concluded that the road had been exempted from the Crown grant establishing title to the properties, now owned by Douglas Lake Ranch, and that the remainder of the road was a public highway because it had been maintained by public funds. Regarding the trail connecting Minnie lake to the road, the trial judge concluded that the trail had also been exempted from the Crown grant; or, alternatively, it had been dedicated at common law.

The BC Court of Appeal confirmed that the Crown owned both lakes and that the Douglas Lake Ranch did not own the fish in the lakes. However, the Court of Appeal concluded that there was no evidence of public access to either lake. The Court determined that the trail had not been exempted from the Crown grant because the legislation did not provide for exemption of trails; and, the trail had not been dedicated at common law. Although the findings relating to the public road were undisturbed, the Court of Appeal determined there was no public access from the road over the private land to the lakes.

The Club is currently considering whether to appeal the decision to the Supreme Court of Canada. Since an appeal is not automatic, the Club will have to apply for leave to appeal. The odds don't favour leave being granted because of the fact-driven nature of this case.

The portion of the BC Court of Appeal judgment that is of greatest interest to the Federation of Mountains Clubs is the court's findings that there is no public right to cross private land to access a public lake. Although the case relates to a public lake, the outcome would be the same for any Crown owned recreational asset that requires the public to travel across private land to gain access to the recreational asset. The relevant paragraphs from the judgment are reproduced below:

> ***The Right to Cross Private Land to Access a Public Lake***
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> [134] the Club invites us to recognize a right to cross private land where it is necessary to do so to access a lake on land reserved to the Crown for the benefit

> of the public. In my view, while this argument may attract considerable public support, it has no support in our law. It may be dealt with briefly.
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> [135] Unlike other jurisdictions, British Columbia does not have public access legislation. The absence of such legislation reflects a policy decision by the legislature that is the focus of some debate. The debate, however, is with respect to the wisdom of the policy decision that has been made, not with respect to the state of the law. The texts to which we have been referred by the parties include: Graham Litman & Matt Hulse, *Enhancing Public Access to Privately Owned Wild Land* (University of Victoria Environmental Law Clinic, 2016); Heidi Gorovitz Robertson, "Public Access to Private Land for Walking: Environmental and Individual Responsibility as Rationale for Limiting the Right to Exclude" (2011) 23 Geo Int'l Envtl L. Rev 211, Jerry L. Anderson, "Britain's Right to Roam: Redefining the Landowner's Bundle of Sticks" (2007) 19 Geo Int'l Envtl L. Rev 375; and John Rich, "Recreational Access" in Calvin Sandborn ed, *Law Reform for Sustainable Development in British Columbia* (Vancouver: Canadian Bar Association, British Columbia Branch, 1990) 178.
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> [136] The author of the last study, Mr. Rich, canvassed many statutes before summarizing succinctly, at 181: "There is no right to cross private land in B.C. without permission of the owner or occupier, except on a highway, pursuant to the *Highway Act*, or on an easement or right of way, registered in the Land Title Office."
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> [137] Litman and Hulse, the students who addressed this issue admirably, advance a strong argument for the adoption of public access legislation in British Columbia similar to the UK rights of way legislation (*Countryside and Rights of Way Act 2000* (UK), c. 37 and *Land Reform (Scotland) Act 2003*, 2003 ASP 2). They correctly observe at 7: "BC landowners have more or less complete control over whether the public can enter their land." The political aspect of reforming that regime is reflected in the history of attempts to secure legislated access documented in their paper.
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> [138] The trial judge, in his epilogue, added his voice to the chorus of those seeking to limit the rights of private property owners. In doing so, he was not describing the law but advocating for a right of public access to lakes on private land.
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> [139] In conclusion, it is my opinion that DLCC is entitled to restrict access to Minnie Lake and Stoney Lake and the Club has no statutory or common law right to cross DLCC property, whether it is flooded or not to access the lakes.

In short, the Court of Appeal concluded that there is no public right in BC to cross private land without permission of the owner or occupier. With BC landowners having more or less complete control over whether the public can enter their land, the only way this will change is through legislation that secures public access or through some form of agreement or arrangement with the landowner that provides public access.

The Litman and Hulse paper, *Enhancing Public Access to Privately Owned Wild Land*, referenced in paragraph 137 of the judgment above, outlines potential options to gain public access and is worth a read. The three options outlined by the authors are:

> (1) *Legislated right of access*: enactment of a statute to establish a broad right to public access to designated types of private rural land for recreational purposes
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> (2) *Facilitated access*: facilitation of public access through a broad range of legislation, policy, mapping, strategic planning and other initiatives
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> (3) *Incentives to landowners to allow public access*: provision of financial incentives by government to landowners who provide public access

Working groups, such as the one described in a recent media release from Mosaic Forest Management and Alberni-Clayoquot Regional District, may provide another collaborative approach for the public to gain access to recreation sites and opportunities within or adjacent to private lands.

The Federation will continue to work collaboratively with other groups, organizations and government to find long and short-term solutions that will allow the public to access designated types of rural land for recreational purposes.

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