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Locating Road Boundaries under the Doctrine of Dedication

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Cases Considered:

Nelson v. 1153696 Alberta Ltd., 2010 ABQB 164

What is the proper basis for fixing the physical boundaries of a road dedicated to public use under the common law doctrine of dedication? In an earlier decision, Justice Andrea Moen had determined that the road known as the Rabbit Hill Road, which passes through private land owned by the respondents, the Nelsons, and the appellant, 1153696 Alberta Ltd., had been "dedicated" as a public road by a previous owner of the land: see *Nelson v.1153696 Alberta Ltd.*, 2009 ABQB 732. As a result of that 2009 judgment, the Nelsons hired a land surveyor so the precise geographic location and physical dimensions of Rabbit Hill Road could be determined. The surveyor provided for a 66 foot wide road. The appellant took issue with that width and the amount of private property that it thereby lost to the public road. The width of the driving surface of Rabbit Hill Road was usually only 45 feet, which meant that the 66 foot width included more than the road itself. Is a public road dedication confined to the actual driving surface of the road or does it include roadside ditches and slopes? It seems that this issue about the scope of a dedication has never been specifically addressed by a Canadian court. English courts have addressed the issue, but Justice Moen refused to follow those precedents.

Rabbit Hill Road is just south-west of the City of Edmonton and mainly located on the NW ¼ - 6 – 51 – 25 – W4th, lands now owned by the appellant and formerly owned by Dale Stelter. Physically, Rabbit Hill Road is a two-lane paved road with roadside ditches but without shoulders or painted markings. It has been used by thousands of members of the public to travel to and from the Rabbit Hill Ski Hill and Shalom Park. Shalom Park, which is adjacent to the west of the base of the ski hill, is the Nelson's water skiing facility on the North Saskatchewan River. The Rabbit Hill Ski Hill has been in operation since 1969 and Shalom Park since 1985. In 1972, the Rabbit Hill Ski Hill leased access through the NW ¼ to its ski facilities from Stelter. The Ski Hill paid Stelter an annual rent and was solely responsible for the construction and maintenance of Rabbit Hill Road.

In 2005 Stelter sold the NW ¼ to the appellant. There was nothing on Stelter's title, or on the appellant's title after it bought the quarter section from Stelter, to indicate the existence of Rabbit Hill Road. That road, it turned out, was not a public road, i.e., not a road owned and operated by the county. The appellant denied the Nelsons' access to Rabbit Hill Road where it crossed the

NW ¼, effectively denying them access to their home and shutting down their water skiing business. A combination of temporary court injunctions and temporary county by-laws kept the road open until Justice Moen's December 2009 decision. In that decision, Justice Moen decided that Stelter had dedicated the Rabbit Hill Road as a public road. The question before her in this supplementary decision was the extent or scope of the public road. Just how much land did the appellant lose from the NW ¼?

Before getting to the issue of the extent of the dedication, Justice Moen returned to the test in Alberta for a public dedication which she had dealt with in her December 2009 decision. According to the leading decision of the Alberta Court of Appeal in *Foothills (District) No. 31 v. Stockwell* (1985), 64 A.R. 335, at para 4, that test requires:

> (1) There must be, on the part of the owner, the actual intention to dedicate, and
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> (2) It must appear that the intention was carried out by the way being thrown open to the public and that way being accepted by the public.

One important thing to note is that public road dedications are not unilateral acts. The owner — Stelter in this case — must dedicate his private land and intend to do so, and the public must accept. The owner of the private land must, by words or conduct, lead members of the public to infer that he or she is willing to allow the public to use a road on their land. On the facts of this case, access must have been available to the general public and not just to the invitees of the lessee, the Rabbit Hill Ski Hill. The public must have no reason to believe that they were not entitled to use the road and the public must then use the road. In Alberta, unlike in England, British Columbia and Ontario, a history of acquiescence by the owner is enough to constitute the necessary "actual intention to dedicate" (*Foothills* at paras. 6 and 10; *Nelson* 2009 at para. 71). Once the test for dedication is met, the formerly private land on which the road is located becomes public property.

There is more than a hint in the arguments of the appellant that delimiting a 66 foot wide road, instead of only the 45 foot width of the actual paved surface, amounted to a "taking" or expropriation of private property by the state, which normally requires compensation. Justice Moen explicitly addresses this issue (at para. 17). Rabbit Hill Road was dedicated by the previous owner of the land to the public and therefore the appellant, a subsequent purchaser, never received any title to the road. This is so even if the road is not mentioned on the numbered company's title to the land, due to the *Land Titles Act*, R.S.A. 2000, c. L-4, section 61(1)(c), which provides:

> The land mentioned in any certificate of title granted under this Act is, by implication and without any special mention in the certificate of title, subject to
>
> . . .

> (c) any public highway or right of way or other public easement, howsoever created, on, over or in respect of the land, … (emphasis added)

The certificate of title to land in Alberta shows all encumbrances against the land except the six listed in section 61(1). Dedicated public roads are one of the six encumbrances that exist despite any lack of mention on title.

Just two months after Justice Moen's decision that Rabbit Hill Road had been dedicated to public use by Stelter before the appellants bought the NW ¼, the parties were back in front of Justice Moen to argue about the dimensions of the public road. As already indicated, the Nelsons had hired a surveyor to determine the precise geographic location and physical dimensions of Rabbit Hill Road. The surveyor drew a 66 foot wide road even though the width of the driving surface of the road usually amounted to only 45 feet. The appellant took issue with that width and therefore asked Justice Moen to determine whether land dedicated to a public road is confined to the actual driving surface or includes roadside ditches and slopes.

The test that Justice Moen uses for determining the scope or extent of the public road dedication is not clear, mainly because she offers so many different versions of a test, with the owner's intent explicitly relevant in only some of those versions. Nevertheless, reading her judgment as a whole, it appears that her test states that both the owner's intent, indicated by words or conduct, and the public's actual use are relevant to determining the physical dimensions of the newly dedicated road. In the end, however, it appears that expert (surveying) evidence and what Justice Moen calls "public guidelines" (i.e., statutory provisions about road widths) are conclusive, and not owners' intentions or the public's use. In this way, public road widths are standardized and they are standardized at the one chain length developed in 1620 by the English clergyman, Edmund Gunter.

Turning to the test and her first formulation of it, Justice Moen uses the *Foothills* test for recognition of a dedication of a public road to help define the extent of the public road, adapting it to that purpose as follows (at para. 20):

> (1) What did the owner intend to dedicate, and
>
> (2) What use of the dedication did the public accept?

These questions are fact-based ones, determined not by any rules of law but by the course of conduct of numerous individuals. However, Justice Moen goes on to refine the test she initially formulates for determining the scope of the dedication by adding a more objective and abstract element. She first determines that the owner's intent and the public's use are relevant over time, a recognition that dedication is not a once and for all event but a process. One reason dedication is a process is that the owner's intent may be demonstrated by acquiescence to the public's assertion of a right of passage (at para. 26). Once years of use are made relevant, the next move is to acknowledge that the use may change over time; public roads evolve with technology, as does their use. The second part of the test, use by the public, is therefore tied to function, and not just

to the use the public has made of the gift, according to Justice Moen (at paras. 22-23). She thus reformulates her test for the scope of the use with more objective and abstract elements, as follows (at para. 23):

> [T]he relevant question is what dedication meets both the intention of the private land owner and the functional requirements of the right presumptively exercised by the public.

Up to this point in her judgment, the owner's intent to gift plays as great a role as the public's use of that gift. However, after this point, Justice Moen begins to focus on a hypothetical public's functional use. In the same paragraph where she reformulated her test for scope, she states that the key criterion is the "minimum physical dedication that allows for the functional use of the dedicated public property, taking into account the use of the dedicated property by the public" (at para. 23). Later (at para. 31) she states that the principle should be one of "identify[ing] the physical extent and character of public use, and from that extrapolat[ing] the minimum dedication that would functionally permit continued public activity on that land." These ways of stating the test not only import a more objective and abstract element into determining the scope, but also drop the intention of the owner factor.

In addition to deciding that the scope of a dedication may change over time, Justice Moen determines that the most extensive historical use of the land defines the scope of the dedication. She decides this because dedication is a permanent change from private to public land. She offers (at para. 28) the example of a public road that had in the past functioned as a highway for motor vehicles but now was only used by foot traffic; the most expansive motor vehicle use would determine the physical boundaries. This part of her judgment is *obiter*, as Rabbit Hill Road had, at its most expansive, been used for motor vehicle traffic and that most expansive use continued up to the present. With respect, it does not seem in keeping with a test for determining the scope of the dedication that includes owners' intentions or with an approach to dedication as a process or with an emphasis on functionality. It assumes irrevocability without more than public use, converting the idea of the creation of a road at common law as a gift to the idea of its creation by adverse possession. It would seem more prudent to await a case with facts that indicated a contraction in the extent of the public's use before determining that the most expansive use prevails, regardless of why the use became more restricted.

As part of her approach to setting out a test for determining the scope of Rabbit Hill Road, Justice Moen rejects the approach in the English precedents referred to her by the appellant: *Chorley Corp. v. Nightingale*, [1906] 2 K.B. 612 (Div. Ct.) and *Hanscombe v. Bedfordshire CC* , [1938] Ch. 944 (Chancery Div.). As she notes (at para. 8), neither of these cases has been relied upon by a Canadian court. (Neither appears to have been relied upon by English courts either, at least according to a search in the British and Irish Legal Information Institute, which managed to only turn up one use of the latter case by a Scottish court and then only to say it was not on point.) In *Hanscombe*, a highway authority had laid pipes in a ditch on land adjoining a highway and had filled in the ditch. One issue was whether the ditch was part of the highway and therefore belonged to the local authority. Justice Moen states (at para. 11) that the decision

appears to apply a rule that a public highway is whatever space can be used for passage and which is enclosed by a barrier. In *Chorley*, the issue was also one of whether a ditch beside a public highway was part of that highway. The trial judge in that case held that it was based on the integrated operation of the road and ditch — the ditch drained the road and was necessary to the existence of the road. The appeal court, however, relied upon a legal rule that the boundaries of a dedication flowed from the barriers around the dedicated pathway, i.e., the fences and hedges. In the English cases, therefore, the status of the features alongside the road was determined by their function and relationship to the road. Justice Moen rejects (at para. 31) the English rule that surrounding barriers are the critical factor in determining the physical extent of a public road. She distinguishes between the built-up nature of the English countryside and the frequent presence of barriers such as fences and hedges, contrasting this with the more wide open nature of the Canadian prairies.

The "functional" element of Justice Moen's test is the more objective and abstract element. It is not just the use of the private land by the public, acquiesced in by the owner, which counts. It is also determined by what features are necessary to make the road usable. Thus, Justice Moen notes (at para. 32) that "[i]n a climate such as that of Alberta, a publically used road will typically require roadside ditches for drainage and plowed snow." According to this approach, the court needs to be sensitive to what real property rights are necessary for the "proper operation" of the dedication. "Proper" use could easily include more property rights and more physical property than the public's actual use. Justice Moen seems to assume, for example, that roads must be useable year-round to be functional as roads (at para. 32), but this perhaps merely because ice roads allowing access only in winter were not on her mind.

Justice Moen next addresses (at para. 34-36) the kind of evidence that would be useful to a court in determining this more objective element of functionality. She notes that expert evidence will often be useful, especially when the dedicated land might require complicated infrastructure. In the alternative, public guidelines and standards might also be relevant to the extent of the dedication.

When applying a test for determining the physical boundaries of the public road dedication to the facts of the case, Justice Moen does take into account (at paras. 39-40) the private landowner's intent. Although more relevant to the fact of dedication than to the scope, she notes that the former private landowner, Dale Stelter, took no steps to restrict motor vehicle access by the public on Rabbit Hill Road and indeed entered into a lease with the Rabbit Hill Ski Hill to allow the construction and maintenance of the road year-round in its current form. These facts going to the finding of a dedication of the private land to public use are used by Justice Moen to conclude that the physical boundaries of the dedication must be adequate to allow for year-round use for two-way motor vehicle traffic.

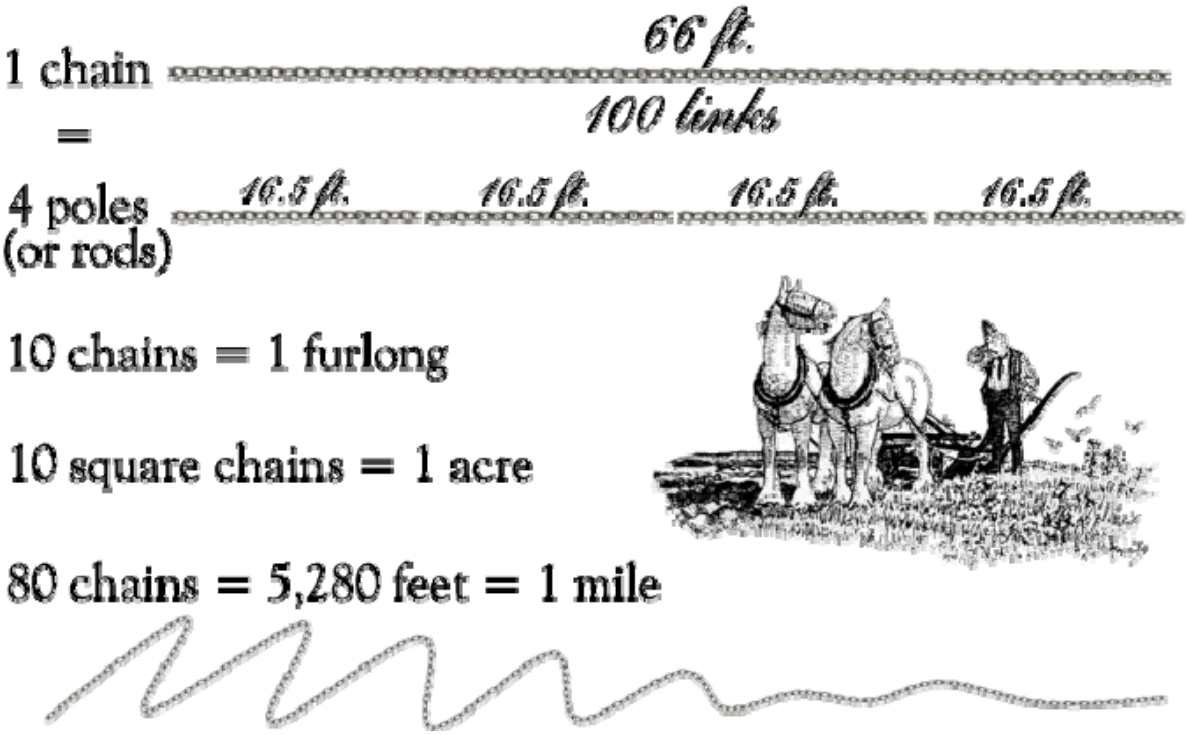
Having determined that the public road was one whose extent had to be "proper" for year-round two-way motor vehicle traffic, Justice Moen turned to the expert evidence from the surveyor hired by the Nelsons to delineate the physical boundaries of the public road dedication. The expert evidence, apparently in the form of a letter from that surveyor, revealed that in Alberta

standard public roads are located in corridors of either 66 or 99 feet widths. In this case, a 66 foot width would take in the roadside ditches. The Nelsons also put forward various public guidelines as found in a variety of Alberta statutes. The *Public Highways Development Act*, R.S.A. 2000, c. P-38, section 1(i) defines “highway” or “road” as "land used or surveyed for use as a public highway or road", which includes "any structure incidental to the public highway or road or bridge." The *Traffic Safety Act*, R.S.A. 2000, c. T-6, s. 1(p) defines "highway" to include a ditch if a ditch lies adjacent to and parallel with the roadway.

The appellant did not offer any expert evidence or alternate public guidelines. Neither did they offer any evidence that a dedication of less than 66 feet would be functional.

As a result, Justice Moen concluded that a 66 foot width was the appropriate width for the Rabbit Hill Road. It is the standard road width in Alberta (and indeed in North America). She declared that the boundaries of the road were to be determined by measuring out 33 feet from the centre line of the actual road in each direction, exactly as the land surveyor had done.

Before concluding, I want to note that this case contains traces of two important historical forces that shaped the province of Alberta into what it is today, namely, the Dominion Land Survey and the reception of English law. First, in these days of metric measurements, it is easy for urban residents to forget that Alberta was (re)settled on the basis of the Imperial system of measurement, which included such measurements as the chain. The Dominion Land Survey was the method used to divide most of the Prairie Provinces into square mile sections for agricultural purposes. The survey was begun in 1869, shortly after Rupert’s Land was acquired from the Hudson’s Bay Company by the Dominion of Canada. For an interesting contemporaneous account, see John Stoughton Dennis, *A short history of the surveys performed under the Dominion lands system, 1869 to 1889* (Ottawa, 1892). The survey system and its terminology of sections, miles, acres, etc. — all based on the chain as this illustration makes clear — are ingrained in the rural landscape and culture. There appear to be many cases about the physical boundaries of dedicated public roads in British Columbia and Ontario, and relatively few in Alberta and the other Prairie Provinces. I would hazard a guess that the Dominion Land Survey has kept the number of contests to a minimum here.



Second, as recently as 1969, the Alberta Law Reform Institute had cast doubt on whether the common law doctrine of dedication was even applicable to Alberta. In their 1969 Report No. 3 on Occupier's Liability, the Institute stated (at page 16):

> In Alberta, highways are created under statutory authority. There may even be a question as to whether the common law of dedication is applicable in Alberta though *Heiminck v. Edmonton* (1897), 28 S.C.R. 501 assumed that it was. In any case, we know of no highway so created . . . .

The Court of Appeal, in its 1985 decision in *Foothills (District) No. 31 v. Stockwell, supra*, seems to have made the same assumption as there is no discussion about whether the English common law doctrine was received into law in Alberta. When Justice Moen rejected the English rule that surrounding barriers are the critical factor in determining the physical extent of a public road, she distinguished between the built-up nature of the English countryside and the frequent presence of barriers such as fences and hedges, contrasting this with the more wide open nature of the Canadian prairies. In justifying her rejection on this basis, she is adapting the standard reason for justifying the rejection or adoption of English law: the received law must be applicable to conditions in the receiving jurisdiction ((Bruce Ziff, *Principles of Property Law*, 3rd edition, at 57-61). However, there was no consideration by the Supreme Court of Canada in *Heiminck* or the Alberta Court of Appeal in *Foothills* of whether the common law doctrine of dedication of private property for public use should be rejected or adopted in Alberta. A little piece of ancient English common law appears to have effectively slipped into modern Alberta law, illustrating the fiction that Her Majesty's subjects carried their law with them in their pockets when they first came to the land that became Alberta.