

BC Expropriation Association

2014 Fall Conference

***Positive Covenants: Enforceability
and Registration***



Jeff Frame
Forward Law LLP



Salim Hirji
Hirji Law Corporation

Positive Covenants: Enforceability and Registration

1. On March 27, 2014, Madam Justice Donegan set aside the Expropriation Notice filed by the Regional District of Kootenay Boundary (“RDKB”) against lands owned by the petitioner, Atco Lumber Ltd. The basis of her decision (for this, we can start at p. 21 of the decision) was that the Statutory Right of Ways (SRWs) that the RDKB had attempted to acquire through expropriation contained a number of positive covenants which were incapable of forming an interest in land. As a result, it was beyond the RDKB’s powers of expropriation.

[Atco Lumber Ltd. v. Kootenay Boundary \(Regional District\), 2014 BCSC 524](#)

2. This story begins as a spat between a landowner and employees of the unincorporated community of Fruitvale. The owner was upset that the workers were crossing his property to get to Fruitvale’s water treatment plant and, in the process, would leave his gate open thus allowing others onto his property. The owner wanted the workers to go through the gate, stop, get out, close and lock the gate, and then (and only then) carry on to the water treatment plant. The workers complained that the gate was heavy and difficult to operate and that it would be unsafe for them to work behind a locked gate in the event of an accident.
3. After many to’s and fro’s, the RDKB sought to end the debate by expropriating a statutory right of way across Atco’s property which expressly provided that Atco:

[S]hall not ... maintain any ... gate ... or permit the existence of any obstruction on the Right of Way Areas;

4. At the hearing of the petition, Atco argued that the proposed SRWs contained this and other positive covenants. The others being:
 - a. clause 4(c) purported to extract a promise by Atco to indemnify and save the RDKB harmless;
 - b. the combined effect of the RDKB’s right to use Atco’s road and the lack of any obligation on the RDKB to maintain or repair the road placed a positive obligation

on Atco to repair wear and tear to the road done by the RDKB in order to exercise its own right to use the road;

- c. clause 6(b) allowed the RDKB to perform acts and then demand repayment of its costs from Atco and, if not paid, add that amount to the taxes payable by Atco;
 - d. clause 6(c) has Atco acknowledging the RDKB's entitlement to certain remedies in order to enforce its rights under the right of way;
 - e. clause 6(f) purported to bind Atco to personal covenants as long as it held an interest in the Land; and
 - f. clause 6(h) required Atco to accept a different version of the right of ways in the event that some portion of the instrument is found to be unenforceable.
5. The question for the court's consideration was whether the *Local Government Act* empowered the RDKB to expropriate the SRWs in the format used. Section 309 of the *Local Government Act* provides that

For the purposes of exercising or performing its powers, duties and functions, a regional district may expropriate real property or works or an interest in them....

6. Atco argued that it was trite law that a right of way must concern rights which are capable of forming the substance of a grant of an interest in land. Positive covenants, such as the obligation to spend money, do not and cannot run with the land and do not create an interest in land. Although it was not relied upon in *Atco*, we offer this quote from a 2002 decision by the Ontario Court of Appeal:

The rule that positive covenants do not run with the land has been a settled principle of the English common law for well over a century and it is indisputable that it has clearly been adopted in Canada: *Parkinson v. Reid*, [1966] S.C.R. 162, 56 D.L.R. (2d) 315.

[*Durham Condominium Corporation No. 123 v. Amberwood Investments Limited*, \[2002\] OJ No. 1023 at para 17](#)

7. *Durham* also contains an historic explanation for the rule that negative covenants run with the land but positive covenants do not, including this passage from the English House of Lords decision in [*Rhone v. Stephens*, \[1994\] 2 All ER 65](#) .

My Lords, equity supplements but does not contradict the common law. When freehold land is conveyed without restriction, the conveyance confers on the purchaser the right to do with the land as he pleases provided that he does not interfere with the rights of others or infringe

statutory restrictions. The conveyance may however impose restrictions which, in favour of the covenantee, deprive the purchaser of some of the rights inherent in the ownership of unrestricted land. In *Tulk v. Moxhay* (1848), 2 Ph 774, [1843-60] All ER Rep 9 a purchaser of land covenanted that no buildings would be erected on Leicester Square. A subsequent purchaser of Leicester Square was restrained from building. The conveyance to the original purchaser deprived him and every subsequent purchaser taking with notice of the covenant of the right, otherwise part and parcel of the freehold, to develop the square by the construction of buildings. Equity does not contradict the common law by enforcing a restrictive covenant against a successor in title of the covenantor but prevents the successor from exercising a right which he never acquired. Equity did not allow the owner of Leicester Square to build because the owner never acquired the right to build without the consent of the persons (if any) from time to time entitled to the benefit of the covenant against building. In *Tulk v. Moxhay*, 2 Ph 774 at 777-778, [1843-60] All ER Rep 9 at 11 the judgment of Lord Cottenham LC contained the following passage:

It is said, that the covenant being one which does not run with the land, this Court cannot enforce it; but the question is, not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased.

Equity can thus prevent or punish the breach of a negative covenant which restricts the user of land or the exercise of other rights in connection with land. Restrictive covenants deprive an owner of a right which he could otherwise exercise. Equity cannot compel an owner to comply with a positive covenant entered into by his predecessors in title without flatly contradicting the common law rule that a person cannot be made liable upon a contract unless he was a party to it. Enforcement of a positive covenant lies in contract; a positive covenant compels an owner to exercise his rights. Enforcement of a negative covenant lies in property; a negative covenant deprives the owner of a right over property.

8. On a closer reading, the decision in [*Tulk v. Moxhay*](#) can be interpreted to allow for positive covenants to run with the land as well. However, the door on that interpretation was firmly closed by the English Court of Appeal in *Haywood v. Brunswick Building Society*, (1881), 8 Q.B.D. 403. There, the Court of Appeal held that in the absence of privity of contract, a covenant compelling a person to spend money or do some positive act would not be enforceable, i.e., it did not run with the land.

9. When thinking about negative covenants, the basic notion is this: if I have a piece of property that is encumbered with a negative covenant, then I am *restricted* from doing

something that I would otherwise be able to do. However, I can always satisfy the covenant by doing *nothing*. For example, if the restrictive covenant says that I cannot build higher than 100 feet, I can always satisfy that covenant by not building anything at all.

10. You will sometimes hear a negative covenant being referred to as a positive covenant. This happens where the covenant is not targeted at preventing the servient tenement from doing something, but instead at allowing the dominant tenement to do something that would otherwise constitute a nuisance. A good example of this is the covenants that the smelter in Trail, BC placed on properties near the smelter before selling the land. The covenant requires the owner to put up with the smells and dust associated with a smelter and thus allow the smelter to cause what would otherwise constitute a nuisance. Such a covenant is a truly negative covenant and runs with the land.
11. In its argument, Atco relied on [Cloutier v. Ball, \[1995\] BCJ No. 1301](#) in which the plaintiffs attempted to enforce a covenant that required trees to be kept to a maximum height of 20 feet. The plaintiffs wanted the defendants to trim four trees that were between 60 – 70 feet tall. The plaintiffs' motive was their view. The court found that compliance with the covenant would require the defendants to spend money (although the plaintiffs had offered to pick up the bill). The court found that because the covenant required the expenditure of money, it was a positive covenant which could not run with the land so as to bind subsequent owners such as the defendants.
12. Atco also relied on the Court of Appeal's decision in [Aquadel Golf Course Limited v. Lindell Beach Holiday Resort Ltd. et al., 2009 BCCA 5](#). There, Aquadel sought to cancel a charge against its property that provided that a third of it had to be used as a golf course. Aquadel was losing money on the golf course and wanted to redevelop the property or sell to someone who would. There were three covenants at issue:
 - a. not to use the land for any purpose but a golf course;
 - b. to maintain the golf course to a certain standard; and
 - c. to offer certain persons preferential rates at the golf course.
13. The BC Supreme Court held that the first of these covenants was a valid prohibition against using the land for anything but a golf course. The Supreme Court decision was

overturned on appeal. The Court of Appeal found that, although the words used in the covenant were negative, the covenant was positive in substance in light of the other provisions. The Court concluded that, as the covenant was not negative in substance, it could not be enforced against successors in title and ordered the cancellation of the agreement as a charge on the land.

14. The fact that the Courts will look to the *substance* of the covenant is important, because there is always a certain temptation to use negative language to describe a positive obligation, so that the covenant appears to be negative. This is a risky practice at the best of times, but especially so when used in an expropriation context - as we can see from the decision in *Atco*.
15. In *Atco*, Madam Justice Donegan preferred to rest her decision on [Nordin v. Faridi, \[1996\] BCJ No. 61 \(BCCA\)](#) from which she quoted extensively at paragraph 105 of her reasons. In the end, *Nordin v. Faridi* stands for the same principle of law: the nature of an easement “is always negative, the obligation on him being either to suffer or not to do something.”
16. Madam Justice Donegan also supported her decision by highlighting the difference between a s. 218 covenant (which is the section that was being used by the RDKB), and the language of s. 219, which specifically allows for the creation of a positive covenant without a dominant tenement and permits such positive covenants to run with the land. Since s. 219 deals specifically with positive covenants, general principles of statutory interpretation say that s. 218 should not be read to allow positive covenants as well, as that would make s. 219 unnecessary.
17. In ruling in *Atco*’s favour, Justice Donegan found that clauses 4(a), 4(c), 4(d) (*Atco* did not argue that 4(d) was a positive covenant), 6(a), 6(b), and 6(f) on their own or in combination with other clauses were positive and personal in nature. The imposition of positive and personal covenants by way of expropriation was impermissible.
18. This result should not surprise or worry anyone.
19. First, the result only applies in the context of an expropriation. Where the acquisition is by means other than an expropriation, there is no concern that the entire SRW will be set

aside, because there would be a voluntary contract between the parties that could contain both positive and negative covenants.

20. Second, in those cases where there has been an acquisition by way of expropriation, the time limit for challenging the expropriation is brutally short (from the owner's perspective). Pursuant to s. 51 of the *Act*, once the land "vests" under s. 23 of the *Act*, no court challenge can be mounted. In *Atco*, the owner had to make a very novel and complex argument to avoid the application of that section and only succeeded due to a very unique set of circumstances.
21. Third, the time limit imposed by s. 51 of the *Act* might not protect a SRW if it were truly void, rather than just voidable. In an effort to avoid s. 51, *Atco* argued that the expropriation was void, but on that point, *Atco* lost. Apparently, only s. 4 of the *Act* creates a condition precedent to a valid expropriation. Any other deficiency merely makes the expropriation voidable and is therefore protected by s. 51 of the *Act*.
22. Fourth, if and to the extent a right of way instrument contains positive covenants, that simply means that once the original owner no longer owns the property, those covenants are no longer enforceable. This should not come as any shock or surprise to governments or public utility companies.
23. Fifth, the standard form of an SRW used by utility companies for decades does not contain any positive covenants as was the case in *Atco*. To illustrate this by example, a 47 year old BC Hydro SRW and an 18 year old BC Tel SRW are appended to this paper.
24. However, in light of the decision in *Atco*, expropriating authorities looking to expropriate an SRW should take a good look at their SRW Agreement templates before proceeding with the expropriation. For example, the "further assurances" clause found at paragraph 4(d) is found in many "standard" SRW Agreements. Not being able to rely on that clause puts additional pressure on the expropriating authority to make sure they "get it right" the first time, because they won't be able to compel the landowner to sign any correcting or modifying documents later on. Instead, the authority will have to turn to the court for permission to make the necessary changes and to order the registration of the corrected instrument.

25. As an aside, we think an SRW acquired under s. 3 of the *Expropriation Act* would be safe (i.e. it could contain positive covenants that would bind the existing landowners), but using a s. 3 agreement presents an interesting problem from a compensation perspective. The grantor's right to compensation is defined and limited by the *Expropriation Act* – so while the SRW agreement could contain positive and personal covenants, the grantor may not be able to obtain compensation for those covenants under one of the established heads of damages set out in the *Expropriation Act*. How would you claim compensation for agreeing to a positive obligation? Does it decrease the market value of what is being taken? Is it injurious affection because of its effect on the landowner? What about under the rubric of disturbance damages? It might not affect the value of the land because a positive covenant would not bind any purchaser; however, a seller may be willing to sell for a lower price to get out from under the positive obligations, which may be a factor in determining market value.
26. The result in *Atco* serves as an important reminder to everyone involved in the expropriation process that expropriation powers are not unlimited – they can be used to take away property rights, but they cannot be used to impose positive obligations on affected landowners without their consent (except perhaps in the case of an instrument authorized under s. 219 of the *Land Title Act*).
27. *Atco* highlights another practical issue that expropriating authorities should try to avoid – though what I am about to say is much easier said than done. In *Atco*, the RDKB believed that its goals could be achieved by expropriating a right of way, rather than a fee-simple taking or a combination of the two. Expropriating a right of way secures the necessary access rights, but when you look at the result, you have to wonder whether the RDKB would have been better off conducting a full taking. Or perhaps the RDKB should have considered agreeing to a locked gate as long as keys were provided. If all else failed, RDKB could have found or built a different route.
28. Alternatively, the RDKB could have taken the rather bold step of entering the property under s. 310 of the *Local Government Act* to “break up” or “alter” the locked gate. The same power is afforded to a municipality under s. 32 of the *Community Charter*. This power is limited to situations where the authority is providing a “service”, but the term “service” has a broad meaning in both the *Community Charter* and the *Local Government Act*.

29. As of today, RDKB has been engaged in this process for 2 years, and as a result of the Court's decision, they really don't have very much to show for it. Though we are getting there....
30. Hindsight is always 20/20, but we would suggest that there might have been an opportunity at some point in the process for someone within RDKB – someone with a good knowledge of the property itself – to look at the situation, recognize that there was a pre-existing locked gate, look at the covenants in the SRW Agreement, and start asking questions about whether the RDKB could really achieve their desired result (removal of the locked gate) by simply expropriating a right of way.
31. As long as we are speaking in terms of a right of way (as opposed to a public road), one should not lose sight of the fact that the right to exclude others (i.e., the public) is a fundamental component of the bundle of rights that make up a fee simple interest in land. A right of way, to some extent, impairs an owner's right to exclude others; but an owner retains the right to exclude those who are not entitled to the benefit of the easement. A demand that an easement be clear of any gate imposes a potentially unenforceable burden on an owner to allow anyone and everyone to use the easement. That type of excessive use was/is the focus of a legal battle between UBC (Kelowna Campus) and its neighbours. Last summer, the Supreme Court cautioned UBC that if it could not restrict the use of the easement to those who were entitled to use it, UBC risked having the easement cancelled. After setting out a solution to the excessive use of the easement, the Court wrote:

It seems to me that if the use of the easement is limited in the fashion set out above, the number of pedestrians and cyclists using it should decline and decline markedly. If the number of users does not decline, it may be that the solution I have fashioned is impractical. Should that be the result, it may be that the easement must be terminated.

[*Lafontaine v. The University of British Columbia, 2013 BCSC 1517*](#)

32. We wish to end this presentation by stating that positive covenants do indeed run with the land and do so in this province on a regular basis. Not only is this permissible, it is necessary. No, we are not now reversing everything that we just proposed. The difference is whether the positive obligation falls on the servient or on the dominant tenement. We

realize that there is no dominant tenement in an SRW but the point stands just the same. It is common and acceptable that positive obligations are placed on the benefiting party. Such obligations may concern:

- a. duties to repair;
- b. duties to take steps to prevent unauthorized access;
- c. duties to insure;
- d. duties to indemnify; and
- e. duties to compensate.

33. The reason that these positive obligations are not offensive is two-fold. First, it is a principle of law that a party accepting the benefit of deed must also accept the burdens that come with it. By definition, there is no benefit to the servient tenement. Second, the dominant tenement is free to abandon its rights over the servient tenement and thus end its positive obligations that come with it. Conversely, a servient tenement has no authority to disavow its obligations under the easement (short of court intervention).

We thank you for your time and thank the BCEA for the invitation to present at this year's conference.

Jeff Frame
Forward Law LLP

Salim Hirji
Hirji Law Corporation

B 4373

No. 15,16 H-Br

RECEIVED
LAND REGISTRY OFFICE
KAMLOOPS B.C.

67 MAR 8 11 59 1967



LAND REGISTRY ACT
FORM C
(Section 128)

Application for Registration of Charge

Date 6th March 1967

I, Bonnie Laurel Schacht, solemnly declare

that I am ~~the~~ ~~sole~~ ~~authorized~~ ~~Agent~~ of ~~British Columbia Hydro and Power Authority~~ and that ~~he~~ ~~is~~ entitled to a

charge by way of right of way over the land hereunder described, and hereby make application under the provisions of the "Land Registry Act" and claim registration of a charge accordingly.

The full name, address, and occupation of the person so entitled to be registered as owner of the charge is British Columbia Hydro and Power Authority,
970 Burrard Street, Vancouver 1, B.C.

1 Not applicable where the applicant is a corporation. Strike out words not applicable.

~~Kamloops British subject (X)(Or)~~
~~Kamloops British subject (X)(Or)~~
~~Kamloops British subject (X)(Or)~~

(Adapt to suit circumstances.)

1 For use where the application is made by a solicitor or agent.

~~you do hereby declare that the person so entitled to be registered as owner of this charge is a British subject (or is a British subject)~~

The fee-simple is registered in Vol. , Fol. , of the Register.

DESCRIPTION OF LAND

MUNICIPALITY OR ASSESSMENT DISTRICT	LOT OR SECTION	ADMEASUREMENT OR ACREAGE
Kamloops Assessment District	The 3.38 ac. portion of D.L. 3994 KDYD; and Those two portions comprising collectively 1.19 acs. of D.L. 4297, KDYD; which portions are shown outlined in red on Plan A-3064.	

LIST OF INSTRUMENTS

DATE	PARTIES	CHARACTER OF DEFID
1st March, 1967	Aubrey Lisle King ✓ - and - British Columbia Hydro and Power Authority ✓	Right of Way Agreement

Do not write outside the side-line. Space reserved for binding.

And I solemnly declare that I have investigated and ascertained the value of the interest covered by the charge, registration of which is hereby applied for, and that the true value thereof at the date of this application is \$115.00 dollars: (In the case of a Solicitor or Agent, add) and I am duly authorized by the owner to make this application (In the case of an Agent, add) and I reside in the Province of British Columbia, and am of the full age of twenty-one years.

And I make this solemn declaration conscientiously believing it to be true, and knowing that it is of the same force and effect as if made under oath and by virtue of the "Canada Evidence Act."

DECLARED before me this 6th day of March 1967 at Vancouver, British Columbia. (Signature) Bonnie L. Schacht 970 Burrard Street, Vancouver 1, B.C. (Full post-office address) For mailing notices and documents.

* Note.—Insert here the estate less than the fee-simple, or encumbrance or equitable interest claimed in, over, or upon the land: e.g. mortgage in fee-simple for \$500, estate for life, life pendants (according to circumstances, upon, in, over).

15 & 16 H-Br

B 4373

THIS AGREEMENT made as of the 1st day of March,
1967 .

WITNESSETH THAT:

1. AUBREY LISLE KING, of 894 - 14th Avenue,
New Westminster, in the Province of
British Columbia,

(hereinafter called "the Owner"),

for and in consideration of the sum of one hundred & fifteen Dollars
(\$ 115⁰⁰/₁₀₀), the receipt of which he hereby acknowledges,
hereby grants in perpetuity to British Columbia Hydro and Power
Authority, of 970 Burrard Street, in the City of Vancouver,
Province of British Columbia (hereinafter called "B. C. Hydro")
the right, liberty and right of way for B. C. Hydro, its
servants, agents and all others the licensees of B. C. Hydro:

- (a) (i) To construct, erect, string, operate,
maintain, remove and replace towers and
poles with anchors, guy wires, brackets,
crossarms, insulators, transformers and
their several attachments and one or more
lines of wire; and
- (ii) To excavate for, install, operate,
maintain, remove and replace (with
conduits, cables or pipe of the initial
or any other size) one or more under-
ground conduits whether or not encased
by concrete or other protective material,
and cables with all necessary attachments
and fittings, and one or more underground
pipe lines of whatsoever kinds or dimen-
sions with necessary and proper above-
ground or underground valves, meters and
other appliances and fittings and devices
for controlling corrosion, all for use
in connection with such pipe line or
lines;

for the transmission and distribution of electric energy and
gas and for communication purposes (all of which are herein-
after collectively called "the works") upon and within the

Registered the 9 Day of March
1967 on Application Received
at the Time Written or Stamped
on the Application.

B 4373

- 2 -

portion described in Schedule II hereto (hereinafter called "the right of way") of the land described in Schedule I hereto (hereinafter called "the land");

- (b) To clear the right of way and keep it cleared of all or any part of any trees, growth, buildings or obstructions now or hereafter on the right of way which might, in the opinion of B. C. Hydro, interfere with or endanger the construction, erection, stringing, excavation for, installation, operation, maintenance, removal or replacement of the works or any part thereof;
- (c) To install, maintain and use gates in all fences which now or hereafter shall cross the right of way; and
- (d) Generally to do all acts necessary or incidental to the business of B. C. Hydro in connection with the foregoing.

2. The Owner hereby covenants with B. C. Hydro:

- (a) Not to make, place, erect or maintain any building, structure, foundation, pavement, excavation, well, pile of material, obstruction or inflammable substance or to plant any growth upon the right of way which, in the opinion of B. C. Hydro, might interfere with or endanger the construction, erection, stringing, excavation for, installation, operation, maintenance, removal or replacement of the works or any part thereof or which might obstruct access by B. C. Hydro's servants, agents or licensees to the works or any part thereof;
- (b) Not to carry out blasting or aerial logging operations on or adjacent to the right of way unless permission in writing from B. C. Hydro has first been received, which permission shall not be unreasonably withheld;
- (c) Not to diminish or substantially add to the ground cover over such of the works as may be from time to time installed, operated or maintained below the surface of the right of way and, in particular, without in any way limiting the generality of the foregoing, not to construct open drains or ditches along or across any underground conduit, cable or pipeline which may at any time be installed on the right of way; and
- (d) Not to do or knowingly permit to be done any act or thing which might, in the opinion of B. C. Hydro, in any way whatsoever interfere with or injure the works or any part thereof or impair the operating efficiency thereof.

B 4373

- 3 -

3. B. C. Hydro hereby covenants with the Owner:
- (a) To pay compensation to the Owner for any damage to any buildings outside the right of way, and to crops (other than timber), livestock, drains, ditches, culverts, fences, bridges, roads and fruit, nut or ornamental trees anywhere on the land caused by B. C. Hydro in the exercise of any of its rights hereunder and without negligence on the part of the Owner;
 - (b) To pay all royalties, scaling fees and other charges which may be levied by the Crown against any timber that B. C. Hydro cuts on the land;
 - (c) To pay compensation to the Owner for all merchantable timber cut or damaged on the land by B. C. Hydro in the exercise of any of its rights hereunder; and
 - (d) That it will, as soon as weather and soil conditions permit and insofar as it is practicable to do so, bury and maintain all conduits, cables and pipelines installed hereunder so as not to interfere with the drainage or ordinary cultivation and use of the land.
4. It is mutually agreed between the Owner and B. C. Hydro that:
- (a) The amount of any compensation payable under paragraph 3 hereof shall be such as may be mutually agreed upon between the Owner and B. C. Hydro and in the event of disagreement as may be settled by arbitration pursuant to the Arbitration Act of British Columbia;
 - (b) The title to all timber cut on the land by B. C. Hydro in the exercise of its rights hereunder shall vest in B. C. Hydro;
 - (c) This Agreement shall be construed as running with the land, that no part of the fee of the soil shall pass to or be vested in B. C. Hydro under or by these presents and that the Owner may fully use and enjoy the land subject only to the rights and restrictions herein provided;
 - (d) The expressions "Owner" and "B. C. Hydro" herein contained shall be deemed to include the executors, administrators, successors and assigns of such parties wherever the context so admits;
 - (e) Where the expression "Owner" includes more than one person, all covenants herein on the part of the Owner shall be construed as being several as well as joint; and

B 4373

- 4 -

(f) Wherever the singular and masculine are used in this Agreement they shall be construed as meaning the plural or the feminine or body corporate where the context or the parties hereto so require.

IN WITNESS WHEREOF the Owner has caused these presents to be executed as of the day and year first above written.

SIGNED, SEALED AND DELIVERED
by the Owner in the presence
of:

<u>Robert James Sloan</u>	Name
<u>2276 West 47th Ave</u>	
<u>Vancouver 13 B.C.</u>	Address
<u>Land Rep.</u>	
<u>B.C. Hydro.</u>	Occupation

Aubrey Lisle King
Aubrey/Lisle King



B 4373

- 5 -

SCHEDULE I

ALL AND SINGULAR those certain parcels or tracts of land and premises, situate, lying and being in the Kamloops Assessment District, in the Province of British Columbia and more particularly known and described as:

- (a) District Lot Three Thousand Nine Hundred Ninety-four (3994), Kamloops Division, Yale District; and
- (b) District Lot Four Thousand Two Hundred Ninety-seven (4297), Kamloops Division, Yale District.

SCHEDULE II

- (a) The 3.38 acre portion of the land and premises described in paragraph (a) of Schedule I hereto, which portion is shown outlined in red on a plan deposited in the Kamloops Land Registry Office under Charge Number A-3064; and
- (b) Those two portions comprising collectively 1.19 acres of the land and premises described in paragraph (b) of Schedule I hereto, which portions are shown outlined in red on a plan deposited in the Kamloops Land Registry Office under Charge Number A-3064.

8387 B

B 1373

ACKNOWLEDGMENT OF OFFICER OF A CORPORATION

I HEREBY CERTIFY that, on the ... day of ... 19 ... at ... in the Province of British Columbia, (whose identity has been proved by the evidence on oath of ...); who is personally known to me, appeared before me and acknowledged to me that he is the ... of ... and that he is the person who subscribed his name to the annexed instrument as ... of the said ... and affixed the seal of the ... to the said instrument, that he was first duly authorized to subscribe his name as aforesaid, and affix the said seal to the said instrument, and that such corporation is legally entitled to hold and dispose of land in the Province of British Columbia.

IN TESTIMONY whereof I have hereunto set my Hand and Seal of Office, at ... in the Province of British Columbia, this ... day of ... in the year of our Lord One thousand nine hundred and sixty-

A Notary Public in and for the Province of British Columbia. A Commissioner for taking affidavits for British Columbia.

ACKNOWLEDGMENT OF OFFICER OF CORPORATION (D.V.A.)

I HEREBY CERTIFY that, on the ... day of ... 19 ... at Ottawa, in the County of Carleton, in the Province of Ontario, personally known to me, appeared before me and acknowledged to me that he is the person who executed the annexed instrument as The Director, The Veterans' Land Act, and affixed the seal of the said Director to the said instrument, that he was first duly authorized to subscribe the Director's name as aforesaid, and affix the said seal to the said instrument, and that THE DIRECTOR, THE VETERANS' LAND ACT, is a Corporation Sole and as such is legally entitled to hold and dispose of land in the Province of British Columbia.

IN TESTIMONY whereof I have hereunto set my Hand and Seal of Office at OTTAWA, this ... day of ... in the year of our Lord One Thousand Nine Hundred and Sixty-

A Notary Public in and for the Province of Ontario. A Commissioner for taking affidavits for the Province of Ontario.

STATUTORY DECLARATION OF ATTORNEY

I, ... of the ... in the Province of British Columbia, DO SOLEMNLY DECLARE:-

- 1. That I am the attorney for ...
2. That I am the person who subscribed the name of ... in the annexed instrument as the Maker thereof.
3. That at the time of the execution of the said instrument the power of attorney had not been revoked by or on behalf of ... and I have not received any notice or information of the death, disability, or bankruptcy of ... (or if the donor of the power is a corporation, substitute for 3 (ante) ---
3. That at the time of the execution of the said instrument the power of attorney had not been revoked by or on behalf of ... and I had not received any notice or information of the bankruptcy or dissolution of ...
4. That I know the contents of the said instrument and subscribed the name of the said thereto voluntarily as the free act and deed of the said

AND I make this solemn declaration conscientiously believing it to be true, and knowing that it is of the same force and effect as if made under oath and by virtue of the "Canada Evidence Act".

Declared before me at ... In the Province of ... This ... day of ...

A Notary Public in and for the Province of British Columbia. A Commissioner for taking affidavits for British Columbia.

FOR MAKER

B 4373

I HEREBY CERTIFY that, on the _____ day of _____, 19____, at _____ in the Province of British Columbia personally known to me, appeared before me and acknowledged to me that person _____ mentioned in the annexed instrument as the maker thereof, and whose name subscribed thereto as part _____ that _____ know the contents thereof, and that _____ executed the same voluntarily, and _____ of the full age of twenty-one years.

IN TESTIMONY whereof I have hereunto set my Hand and Seal of Office, at _____ in the Province of British Columbia, this _____ day of _____ in the year of our Lord, one thousand nine hundred and sixty-

 A Commissioner for taking affidavits for British Columbia.
 A Notary Public in and for the Province of British Columbia.

Land Division
 British Columbia Hydro and
 Power Authority
 970 Burrard Street
 Vancouver 1, B. C.

R I G H T O F W A Y

BRITISH COLUMBIA HYDRO AND
 POWER AUTHORITY

AUBREY LISLE KING

dated 19 67.

AFFIDAVIT OF WITNESS

PROVINCE OF BRITISH COLUMBIA)
 TO WIT

I, ROBERT JAMES SHEARER, of the City of Vancouver B.C.

make oath and say:

1. I was personally present and did see the within instrument duly signed and executed by Aubrey Lisle King, the party thereto, for the purposes named therein.
2. The said instrument was executed at BURNABY B.C.
3. I know the said party _____, and that she is of the full age of twenty-one years.
4. I am the subscribing witness to the said instrument and am of the full age of sixteen years.

Sworn before me at VANCOUVER)
 in the Province of British Columbia)
 this 1st day of MARCH 1967.)

[Signature]
 A Commissioner for taking Affidavits
 for British Columbia.
 A Notary Public in and for the Province
 of British Columbia.

Robert James Shearer

96 APR 15 10 09

YK029548

LAND TITLE OFFICE
KAMLOOPS

STC Y2)

C. 50

LAND TITLE ACT
FORM C

(Section 219.81)

Province of

British Columbia

GENERAL INSTRUMENT - PART 1 (This area for Land Title Office use)

Page 1 of 3 Pages

ABSTRACT REGISTRY SERVICES LTD.
372-0746

1. APPLICATION: (Name, address, phone number and signature of applicant, applicant's solicitor or agent)
Howard Coulter, BC TEL, 15th Floor, 3777 Kingsway, Burnaby, B.C. V5H 3Z7
Telephone: 432-3797 CLIENT NO. 10869
File: 16100-02(A)


Howard Coulter, Agent

2. PARCEL IDENTIFIER(S) AND LEGAL DESCRIPTION(S) OF LAND*
(PID) (LEGAL DESCRIPTION)

✓ 012-994-651 DL 749, KDYD
✓ 013-021-281 DL 750, KDYD except Plans 15307, 17686 and KAP55133
CF. KC 6767
CF. K559189

3. NATURE OF INTEREST*

DESCRIPTION	DOCUMENT REFERENCE (PAGE AND PARAGRAPH)	PERSON ENTITLED TO INTEREST
Statutory Right of Way as to part on Plan A2578	Page 3	Transferee 04/16/96 A0259M CHARGE 50.00

4. TERMS: Part 2 of this instrument consists of (select one only)

- (a) Filed Standard Charge Terms D.F. No.
- (b) Express Charge Terms Annexed as Part 2
- (c) Release There is no part 2 of this instrument

A selection of (a) includes any additional or modified terms referred to in Item 7 or in a schedule annexed to this instrument. If (c) is selected, the charge described in item 3 is released or discharged as a charge on the land described in item 2.

5. TRANSFEROR(S) *

✓ GORDON GARTHWAITE
LARRY GARTHWAITE
Mamit Lake Road, PO Box 489, Merritt BC V0K 2B0

6. TRANSFEREE(S) : *name(s), occupation(s), postal address(es), postal code(s)

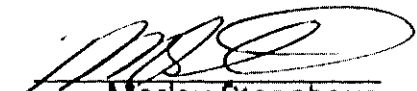
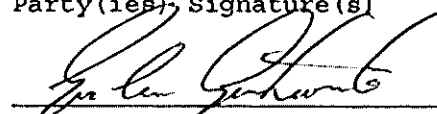
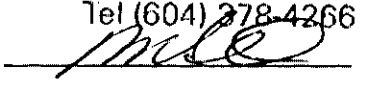

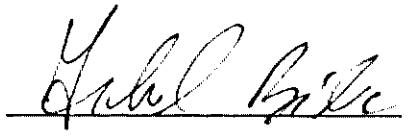
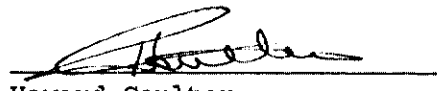
BC TEL, a company incorporated pursuant to the laws of Canada and having its head office at 3777 Kingsway, Burnaby, B.C. V5H 3Z7
(Extra-provincial No. 1801A)

* If space insufficient, enter "SEE SCHEDULE" and attach schedule in Form E
** If space insufficient, continue execution on additional page(s) in Form D

GENERAL INSTRUMENT - PART 1

7. ADDITIONAL OR MODIFIED TERMS:*
N/A

8. EXECUTION(S)** This instrument creates, assigns, modifies, enlarges, discharges or governs the priority of the interest(s) described in item 3 and the Transferor(s) and every other signatory agree to be bound by this instrument, and acknowledge(s) receipt of a true copy of the filed standard charge terms, if any.

Officer Signature(s)	Execution Date	Party(ies), Signature(s)												
	<table border="1"> <thead> <tr> <th>Y</th> <th>M</th> <th>D</th> </tr> </thead> <tbody> <tr> <td>96</td> <td>4</td> <td>7</td> </tr> <tr> <td>96</td> <td>4</td> <td>6</td> </tr> <tr> <td>96</td> <td>4</td> <td>12</td> </tr> </tbody> </table>	Y	M	D	96	4	7	96	4	6	96	4	12	
Y	M	D												
96	4	7												
96	4	6												
96	4	12												
 Morley Stonehouse NOTARY PUBLIC P.O. Box 3127 Merritt, B.C. V0K 2B0 Tel (604) 378-4266		 GORDON GARTHWAITE ✓												
 Morley Stonehouse NOTARY PUBLIC P.O. Box 3127 Merritt, B.C. V0K 2B0 Tel (604) 378-4266		 LARRY GARTHWAITE ✓												
 MICHEL E. BELEC BARRISTER & SOLICITOR 21st FLR. - 3777 KINGSWAY BURNABY, B.C. V5H 3Z7 TEL: (604) 432-4989		BC TEL by its authorized signatory  Howard Coulter Manager Real Estate - Property Management ✓												

OFFICER CERTIFICATION:

Your signature constitutes a representation that you are a solicitor, notary public or other person authorized by the Evidence Act, R.S.B.C. 1979, c.116 to take affidavits for use in British Columbia and certifies the matters set out in Part 5 of the Land Title Act as they pertain to the execution of this instrument.

* If space insufficient, enter 'SEE SCHEDULE' and attach schedule in Form E
**If space insufficient, continue execution on additional page(s) in Form D

TERMS OF INSTRUMENT - PART 2

WHEREAS the Owner (as identified in Form C Part 1 Item 5) is the registered owner of the Lands (as identified in Form C Part 1 Item 2) and has agreed to grant BC TEL (as identified in Form C Part 1 Item 6) a statutory right of way which is necessary for the operation and maintenance of BC TEL's undertaking. ✓

NOW THEREFORE in consideration of the terms and conditions set out below the Owner and BC TEL agree as follows:

1. **Statutory Right of Way** The Owner grants to BC TEL, in perpetuity, from the date this Agreement is executed by both parties a statutory right of way to construct, maintain and remove upon the Lands one or more poles, pole mounted devices, anchoring mechanisms, cables, underground ducts and termination or splicing chambers and related works (the "Works") and to enter upon the Lands for the purpose of access and egress from the Works and the Lands, all as necessary or convenient for BC TEL's undertaking.
2. **Area Restriction** BC TEL shall restrict its construction of the Works within that portion of the Lands shown in bold outline on plan number A2578 deposited in the Land Title Office at Kamloops, unless the Owner permits otherwise.
3. **Fee** BC TEL shall on the date this Agreement is executed by both parties pay the Owner a lump sum fee in the amount of \$2100.00 dollars.
4. **Construction** BC TEL shall at its sole expense construct, maintain and remove the Works in compliance with all applicable laws. The Works shall at all times remain the property of BC TEL and shall not be considered a fixture notwithstanding any rule of law or equity to the contrary.
5. **Non-Interference** The Owner shall not do or permit to be done any act or thing which may, as reasonably determined by BC TEL, interfere with any rights granted to BC TEL by this Agreement.
6. **Indemnity** BC TEL shall indemnify and save harmless the Owner against all actions, damages and liabilities resulting from anything done or omitted to be done by BC TEL in the exercise of its rights under this Agreement provided such actions, damages and liabilities are not due to the Owner's negligence or breach of this Agreement.
7. **Abandonment** BC TEL may at any time abandon all or part of the Works without affecting the rights granted to BC TEL by this Agreement.
8. **Notice** Any notice required to be given hereunder shall be valid if in writing and delivered or telecopied at the address set out above or at such other address as may be designated in writing by either party and any such notice shall be deemed given when received.
9. **Binding Effect** This Agreement will be registered at the Land Title Office and shall be binding upon and enure to the benefit of the Owner and BC TEL and their respective heirs, executors, administrators, successors and assigns. By executing the Form C Part 1 Item 8, the Owner and BC TEL agree to be bound by this Agreement.

END OF DOCUMENT ✓

R21381

IN THE MATTER OF HYDRO AND POWER
AUTHORITY ACT R.S.B.C. 1979,
CHAPTER 188

'82 OCT 13 PM 2 49

and

IN THE MATTER OF THE EXPROPRIATION OF
AN INTEREST OR LIMITED INTEREST IN
LAND IN THE PROVINCE OF
BRITISH COLUMBIA

Description of the interest or limited interest
in land taken by expropriation by British Columbia Hydro and
Power Authority pursuant to Hydro and Power Authority Act, and
by authority of the Lieutenant-Governor in Council, by
Order-in-Council No. 1441 approved on the 28th day of
July 19 82.

The rights on, over and under:

Those 0.3633, 0.1575 and 1.507 hectare portions
of Lot Eight Thousand Six Hundred and Twenty
(8620), Kootenay District, save and except
Parcel "A" (D.D. 14346) thereof, which portions
(hereafter called "the land") are shown outlined
in red on a plan deposited in the Nelson Land
Title Office and numbered 12102

14907

being the right, liberty and right of way for British Columbia
Hydro and Power Authority (hereinafter called "B.C. Hydro"),
its servants, agents and all others the licensees of
B.C. Hydro:

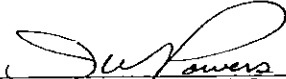
To pass and repass, either with or without
vehicles of all kinds, machinery and other
things, upon and along and from time to time
enter upon and use the land for the purpose
of ingress and egress to and from B.C. Hydro's
Blizzard Mountain microwave station situate
in unsurveyed Crown land, north of Fruitvale,
British Columbia;

To build, upgrade and maintain on the land
an access road including installation and
maintenance of all necessary ditches, culverts
and other appurtenances reasonably consistent
with accepted standards of road construction
and maintenance;

FREE

Generally to do all acts necessary or incidental to the business of B.C. Hydro in connection with the foregoing.

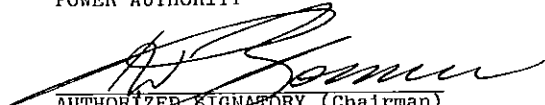
DESCRIPTION CERTIFIED CORRECT

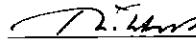

British Columbia Land Surveyor

11th. day of AUGUST, 1982.

DATED this 13th day of August 1982.

BRITISH COLUMBIA HYDRO AND
POWER AUTHORITY


AUTHORIZED SIGNATORY (Chairman)


AUTHORIZED SIGNATORY (Associate Secretary)

REGISTRATION OFFICE

BRITISH



COLUMBIA

R21381

82 OCT 13 PM 2 50

1441

I hereby certify that the following is a true copy of a Minute of the Honourable the Executive Council of the Province of British Columbia approved by His Honour the Lieutenant-Governor.

APPROVED AND ORDERED JUL 28.1982

Bund R

Deputy Order-in-Council Custodian

J.P. Sullivan

Lieutenant-Governor

EXECUTIVE COUNCIL CHAMBERS, VICTORIA JUL 28.1982

On the recommendation of the undersigned, the Lieutenant-Governor, by and with the advice and consent of the Executive Council, orders that on the recommendation of British Columbia Hydro and Power Authority, and for a purpose related to the exercise of the powers of the Authority, namely, to construct, operate and maintain on, over and under the land referred to as "the land" in the Schedule attached hereto, and other land, an access road from the British Columbia Hydro and Power Authority Nicola Substation near Fruitvale to the British Columbia Hydro and Power Authority Blizzard Microwave Station near Trail, both in the Province of British Columbia, in connection with the distribution and supply of electricity, British Columbia Hydro and Power Authority is hereby authorized, without the consent of the owner or of any other person, to take by expropriation in accordance with the provisions of the Hydro and Power Authority Act, R.S.B.C. 1979, the real property being the interest or limited interest in land described in the Schedule hereto.

1326

C/T #53578-J

5609 TRN 10 REG 1 CLK .00 FREE
PAID - "BCG" NELSON "LTO" 13/10/82

FORM 17 — CHARGE
 NATURE: Right of Way expropriated pursuant to Sec. 21(1)(b) of the Hydro and Power Authority Act R.S.B.C. 1979
 TRUE VALUE: \$3,000.00 SEP 13 1982
 HEREWITH FEES OF \$ Nil RETURN COMES TO 26704
 EXPRESS REGISTRY SERVICES LTD.
 APPLICANT
 WILLOUGHBY TREVELYAN ROBERTS
 SOLICITOR FOR B.C. HYDRO, 900-1045 HOWE ST.,
 VANCOUVER, B.C. V6Z 2B1 662-2438

R. Campbell
MINISTER OF ENERGY, MINES AND PETROLEUM RESOURCES

W. R. Bennett
PRESIDING MEMBER OF THE EXECUTIVE COUNCIL

(This part is for administrative purposes and is not part of the Order.)

Authority under which Order is made:

Act and section: Hydro and Power Authority Act R.S.B.C. 1979, Chapter 188,

Other (specify): Section 16

Statutory authority checked by:

J.C. Buchanan

(Signature and typed or printed name of Legal Officer) 15/10/82

SCHEDULE

The rights on, over and under:

Those 0.3633, 0.1575 and 1.507 hectare portions of Lot Eight Thousand Six Hundred and Twenty (8620), Kootenay District, save and except Parcel "A" (D.D.14346) thereof, which portions (hereafter called "the land") are shown outlined in red on a plan deposited in the Nelson Land Title Office and numbered 12102

14907 - [REDACTED]

being the right, liberty and right of way for British Columbia Hydro and Power Authority (hereinafter called "B.C. Hydro"), its servants, agents and all others the licensees of B.C. Hydro:

To pass and repass, either with or without vehicles of all kinds, machinery and other things, upon and along and from time to time enter upon and use the land for the purpose of ingress and egress to and from B.C. Hydro's Blizzard Mountain microwave station situate in unsurveyed Crown land, north of Fruitvale, British Columbia;

To build, upgrade and maintain on the land an access road including installation and maintenance of all necessary ditches, culverts and other appurtenances reasonably consistent with accepted standards of road construction and maintenance;

Generally to do all acts necessary or incidental to the business of B.C. Hydro in connection with the foregoing.

R21381