

CIRCULAR LETTER NO. 490

October 3, 2024

TO ALL BRITISH COLUMBIA LAND SURVEYORS

Re: Interpretation of Section 56(2)(c) Land Act

The determination of ownership of waterbodies is a critical task for all land surveyors. Accurately evaluating ownership requires a thorough review of survey records, an understanding of the waterbody's history and physical characteristics, and careful interpretation of both common law and statute law.

Recently, I have reviewed the application of section 56(2)(c) of the *Land Act* with respect to subdivision plans deposited in a land title office before March 27, 1961. The purpose of this Circular Letter is to share my interpretation of section 56(2)(c) to promote consistency and transparency in its application. While this letter provides general guidance, it is essential to consider the unique circumstances of each case.

Sections 55 and 56 of the *Land Act* must be read together and are copied below (emphasis added).

Bodies of water

55 (1) If Crown land is or has, before March 27, 1961, been disposed of by the government by Crown grant, and the map or plan attached to the grant shows a lake, river, stream or other body of water coloured, outlined or designated in a colour other than red, no part of the bed or shore of the body of water below its natural boundary passes or is deemed to have passed to the person acquiring the grant unless

(a) there is express provision in the grant to the contrary, or

(b) the minister endorses a declaration on the plan under section 58.

(2) Nothing in any Act or rule of law to the contrary is to be construed to vest or to have vested in any person the land that comprises the bed or shore of the body of water below the natural boundary, and despite an indefeasible or absolute title to land, the title must be construed accordingly.

(3) When land, the title to which has been forfeited, reverted or otherwise returned to the government, is or has been granted by the government and the grant does not have a map or plan attached but describes the land granted by reference to its official plan, the description used is deemed not to include or to have included any land below the natural

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boundary of the body of water coloured, outlined or designated in a colour other than red on the map or plan attached to the last preceding Crown grant of that land, and the grant must be construed accordingly.

(4) Despite a rule of law to the contrary, if Crown land bordering on a lake, river, stream or a body of water is or has been granted by the government, in the absence of an express provision in the Crown grant to the contrary, no part of the bed or shore of the body of water below its natural boundary passes or is deemed to have passed to the person acquiring the land, and the Crown grant must be construed accordingly.

Application

56 (1) Section 55 (1), (2) and (3) applies regardless of the area shown on the Crown grant or on the official plan, and the area of land shown on the map or plan attached to the Crown grant must not be reduced by any lettering or numbering on the map or plan.

(2) **Section 55 does not affect the right of any of the following:**

(a) a grantee from the government or a person claiming under the government, if the right has been determined by a court before March 27, 1961;

(b) the registered owner of land to whom an indefeasible or absolute title has issued before March 27, 1961 that specifically includes the bed of a body of water coloured, outlined or designated in a colour other than red on the map or plan attached to a Crown grant;

(c) the owner of land in a subdivision, the plan of which was deposited in the appropriate land title office before March 27, 1961, if the plan includes the bed of a body of water coloured, outlined or otherwise designated in a colour other than red on the map or plan attached to a Crown grant.

These sections were enacted following the Supreme Court of Canada's judgement in *Canadian Exploration Limited v. Rotter*, 1960 CanLII 429 (SCC), [1961] SCR 15. This decision confirmed that the *ad medium filum aquae* presumption (ownership to middle thread) applied to non-navigable waterbodies in BC unless rebutted. The province enacted sections 55 and 56 to retroactively retain Crown ownership of waterbodies coloured, outlined or otherwise designated in a colour other than red on Crown grant tracings.

Section 56(2)(c) protects the right of a person that would reasonably have believed that they owned the bed of the waterbody, based on a survey plan, such that the retroactive provisions of s.55 should not apply to a plan deposited before the *Rotter* decision, in specific situations. If the conditions of s.56(2)(c) are met, then s.55 has no effect; meaning that even if the waterbody is shown on the grant tracing, the Crown does not retain the ownership of the bed of the waterbody.

Conditions for section 55 to apply:

- The waterbody must have been coloured, outlined or otherwise designated in a colour other than red on the map or plan (tracing) attached to the Crown grant.
 - Section 55 only applies to provincial Crown grants, not federal patents or other dispositions such as conveyances from the Esquimalt and Nanaimo Railway Company.
 - If there is an express provision in the grant that confirms that the waterbody shown on the tracing was intended to be included in the grant, then it is not retained by the Province.
 - The waterbody must be shown either coloured, outlined or otherwise designated in a colour other than red on the tracing, generally shown in blue. There is some uncertainty as to whether a waterbody shown in black was retained by the Province and we are unaware of any court cases that provide certainty.
 - If only a portion of the waterbody is shown on the Crown grant tracing, the whole extent of that waterbody was retained by the Province.
 - If a waterbody is not shown on the Crown grant tracing, common law principles of ownership related to navigability would apply, such as the *ad medium filum aquae* presumption for non-navigable waterbodies.
 - The waterbody was retained in whatever location it existed at the time of the grant, regardless of whether it was plotted correctly on the Crown grant tracing. An application under section 94 of the *Land Title Act* would be required before a new plan of the lands can be registered in the land title office if the waterbody was plotted incorrectly or if lawful accretion has occurred since the time of grant; the Surveyor General's approval under s.94 provides the Registrar with confirmation that the extent of lands are shown correctly on the new plan.
- The waterbody must have had a natural boundary at the time of grant.
 - A wetland or seasonal drainage without a natural boundary (at the time of grant) is not retained by s.55, even if it is shown on the Crown grant tracing.
 - If a waterbody did not have a defined natural boundary at the time of grant, but one was shown on the Crown grant tracing, a s.58 *Land Act* application to the Surveyor General may be submitted to request a declaration as to the ownership of the waterbody shown on the tracing.
 - If a waterbody existed at the time of the grant but either no longer exists or is in a different location due to sudden changes, a s.58 *Land Act* application to the Surveyor General may be submitted to request the transfer of Crown land to private ownership.

Conditions for section 56(2)(c) to apply:

- The subdivision plan must have been deposited in a land title office before March 27, 1961.
- The waterbody must be within the extent of the lands dealt with by the subdivision plan.
 - Section 56(2)(c) uses the words “if the plan includes the bed of the body of water...”. The waterbody must be located within the lands dealt with by the plan, whether the waterbody is shown on the subdivision plan or not.
 - In the modern era the lands dealt with by the plan are those included within the heavy outline. In the past there have been various methods to delineate the extent of the lands dealt with, including a coloured outline, often in red. It’s important to review a coloured scan of these older plans when assessing whether s.56(2)(c) applies so you can accurately determine if the waterbody is included in the lands dealt with by the plan.
- The waterbody must have been non-navigable at the time of the Crown grant.
 - Even prior to March 27, 1961 under common law the Crown owned the bed of navigable waterbodies unless the Crown grant expressly said otherwise.
 - Under common law there was no presumptive right of ownership *ad medium filum aquae* for navigable waterbodies in BC, so the adjacent landowner had no right of ownership to the bed of a navigable waterbody.
 - The assessment of navigability must include an analysis of the *Canadian Navigable Waters Act* and relevant case law.

Land surveyors are encouraged to consider the guidance in this letter when assessing the applicability of section 56(2)(c) to plans registered prior to 1961 and before submitting natural boundary applications to the Surveyor General.

Yours sincerely,

Cristin Schlossberger, BCLS
Surveyor General of British Columbia