

# NATURAL LEGACIES:

## Your Educational Guide to Conservation in BC



### Land Trust Liability towards Trespassers

This report outlines current trespass laws in British Columbia, including an overview of the common law tort of trespass and the provincial offence of trespass under the *Trespass Act*. A detailed analysis of the requirements for notice under the *Trespass Act* and *Trespass Regulation* is performed. The report then outlines occupier liability towards trespassers in British Columbia under the *Occupiers Liability Act* and provides some examples from recent case law in the province.

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## **1.0 Issue Overview**

Landowners and occupiers in British Columbia, particularly those in rural or remote areas of the province, may find that they have issues with trespassers. While the majority of people know that they are trespassing if they step onto someone's suburban lawn, many do not feel the same when they use unoccupied land for their own purposes and without permission. Snowmobilers, hikers, hunters and others may find themselves on private land without knowing it, or feel that they have a right to carry on such activities if the land is not otherwise in use.

This may become an issue for land trusts in particular, if they are trying to control access to lands or restrict certain activities on the land for conservation purposes or as accident prevention. Preventing accidents is related to the further issue of liability: a trespasser may be injured or die while on the land without the knowledge or permission of the landowner or occupier. It is important to know what steps should be taken to limit the degree to which the courts might find the landowner or occupier responsible for harm to trespassers.

Land trusts may be the registered owner of the land in fee simple or they may be the beneficiary of a conservation covenant on the land. The strength of the different interests in land will affect both the ability to bring an action in trespass, or to be compensated for damage to the land, and the degree to which the courts would find someone responsible for a trespasser's injuries.

This report first discusses trespass in British Columbia, and how to restrict access to private land. It then moves on to a discussion of how to limit liability towards trespassers. In both cases, it applies these situations to a land trust as owner of the land in fee simple and as the beneficiary of a conservation covenant on the land. It should be noted that the term "trespass" in a legal sense, can mean trespass to land, to chattels (objects) or to the person. In this report, only trespass to land is considered, and all references to "trespass" refer only to trespass to land.

This report does not discuss whether or not it is likely that the relevant provincial laws would be applicable to First Nations lands or to First Nations peoples exercising treaty rights on private or disputed land. To do so would require further research.

## **2.0 General Overview of Trespass Law in British Columbia**

### **2.1 What Constitutes Trespass in British Columbia**

Trespass to land, in its simplest form, is the act of being on another's property without that person's permission. There are two ways the law can deal with trespass: either under the traditional common law tort of trespass, or in British Columbia, as a provincial offence under a statute named the *Trespass Act*.<sup>1</sup> The two forms are different in substance, and also differ in the remedies that can be obtained, therefore in certain situations one may be more appropriate than the other. For example, one very concrete difference is that the tort is a civil action, meaning that a landowner or occupier can sue a trespasser directly in court. For the offence under the statute, charges must be brought by the Provincial Crown. The courts have

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<sup>1</sup> *Trespass Act*, RSBC 1996, c 462

explicitly stated that the *Trespass Act*, although newer, does not replace the tort of trespass in British Columbia; both remain available.<sup>2</sup>

### 2.1.1 Common Law Trespass

Trespass at common law is considered to be actionable *per se*, meaning that there is no requirement for any actual damage to have happened to the property.<sup>3</sup> Consent is a full defence to trespass, therefore anyone on the land with the occupier's permission is not a trespasser. However, someone who mistakenly believes they have permission is still considered to be trespassing.<sup>4</sup>

If a landowner were to bring an action for trespass and is successful in court, damages will be awarded to the landowner. Considerations such as whether the trespass was deliberate, or whether there was an intent to cause damage, are taken into consideration when the courts are awarding damages to the occupier.<sup>5</sup> Generally damages are awarded as compensation for what was lost. For example, in a case where someone cuts down a tree in a neighbour's yard, damages are awarded for the reasonable cost of replacing the tree, and for the loss of use and enjoyment from the tree to the extent it cannot be "replaced".<sup>6</sup> Punitive or exemplary damages may be awarded for high-handed or outrageous conduct.<sup>7</sup> If, however, there is no proven damage to the land at all, the courts tend to award only nominal damages, as low as one dollar.<sup>8</sup>

The courts may also award an injunction, which is an enforceable order that the person not trespass again. However, a court will only award an injunction if there is evidence that the person intends to trespass in the future.<sup>9</sup> For example, in a case where the defendant trespassed in the course of a completed log recovery operation, the courts found them unlikely to re-offend, and an injunction was refused.<sup>10</sup>

The party bringing the action in trespass must have a possessory interest in the property.<sup>11</sup> This may be as a private land owner or a municipality<sup>12</sup> or a leasehold tenant<sup>13</sup>, for example. Someone with a *profit à*

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<sup>2</sup> *Skopnik v BC Rail Ltd.*, 2008 BCCA 331 at para 72, <http://www.canlii.org/en/bc/bcca/doc/2008/2008bcca331/2008bcca331.html>; *Vancouver (City of) v O'Flynn-Magee*, 2011 BCSC 1647 at para 71, <http://www.canlii.org/en/bc/bcsc/doc/2011/2011bcsc1647/2011bcsc1647.html>

<sup>3</sup> *Banner v Jack Decoteau Excavating* (1997), 51 BCLR (3d) 62 (SC) at para 27, <http://www.canlii.org/en/bc/bcsc/doc/1997/1997canlii567/1997canlii567.html>

<sup>4</sup> *Banner v Jack Decoteau Excavating* (1997), 51 BCLR (3d) 62 (SC) at para 27, <http://www.canlii.org/en/bc/bcsc/doc/1997/1997canlii567/1997canlii567.html>

<sup>5</sup> *Anderson v Skender* (1993), 84 BCLR (2d) 135 (CA) at para 20, <http://www.canlii.org/en/bc/bcca/doc/1993/1993canlii2772/1993canlii2772.html>

<sup>6</sup> *Glashutter v Bell*, 2001 BCSC 1581 at paras 26-27, <http://www.canlii.org/en/bc/bcsc/doc/2001/2001bcsc1581/2001bcsc1581.html>

<sup>7</sup> *Kates v Hall* (1991), 53 BCLR (2d) 322 (CA) at para 12 and 46, <http://www.canlii.org/en/bc/bcca/doc/1991/1991canlii1127/1991canlii1127.html>

<sup>8</sup> *Bowen Contracting v B.C. Log Spill Recovery Co-operative Assn.*, 2008 BCSC 1676 at para 51-53, <http://www.canlii.org/en/bc/bcsc/doc/2008/2008bcsc1676/2008bcsc1676.html>, aff'd 2009 BCCA 457 at para 29, <http://www.canlii.org/en/bc/bcca/doc/2009/2009bcca457/2009bcca457.html>

<sup>9</sup> *Bowen Contracting v B.C. Log Spill Recovery Co-operative Assn.*, 2008 BCSC 1676 at para 51-53, <http://www.canlii.org/en/bc/bcsc/doc/2008/2008bcsc1676/2008bcsc1676.html>, aff'd 2009 BCCA 457 at para 1, <http://www.canlii.org/en/bc/bcca/doc/2009/2009bcca457/2009bcca457.html>

<sup>10</sup> *Bowen Contracting v B.C. Log Spill Recovery Co-operative Assn.*, 2008 BCSC 1676 at para 51-53, <http://www.canlii.org/en/bc/bcsc/doc/2008/2008bcsc1676/2008bcsc1676.html>, aff'd 2009 BCCA 457 at para 67, <http://www.canlii.org/en/bc/bcca/doc/2009/2009bcca457/2009bcca457.html>

<sup>11</sup> *Bailey v. McNeily* (1861), 20 UCQB 451 at para 2

<sup>12</sup> *Dykhuizen v Saanich (District of)*, 63 D.L.R. (4th) 211 (BC CA) at para 13

<sup>13</sup> *Excelsior Paper Stock Ltd. v Cartwright Lumber*, [1941] 1 W.W.R. 607 (BCSC) at para 17

*prendre*, such as a timber rights or a fishing permit, can sue for direct infringement with this right.<sup>14</sup> A licensee does not have a sufficient degree of exclusive possession to bring an action.<sup>15</sup> However, the court has commented that even a licensee may be able to bring an action if the trespasser specifically interfered with the licence granted.<sup>16</sup>

There was no case law found addressing whether the beneficiary of a covenant, such as a land trust, could successfully bring an action in trespass against a party trespassing on the burdened lands not owned by the land trust itself. The land trust is permitted on the land for certain purposes such as monitoring and conservation but has no general possessory right to the land. Perhaps similarly, in a recent British Columbia case, *Trans Mountain Pipeline ULC*, who had a statutory right to enter onto Burnaby Mountain Conservation Area lands for surveying and examination purposes, was found to have only a limited right to enforce their authorization, not a proprietary right.<sup>17</sup> However, *Trans Mountain's* right was only temporary in nature – it is possible that an enduring conservation covenant would lend a greater degree of possession. It is also possible that the courts might allow an action where the trespasser was specifically interfering with the land trust's rights and obligations under the conservation covenant, such as interference with volunteers who were monitoring the covenant.

While it is unlikely that a land trust would be able to successfully bring an action in trespass for lands they do not own, a land owner, either private or municipal, would have a clear right to bring an action in the common law.

### 2.1.2 Statutory Basis in British Columbia

The *Trespass Act* lays out the statutory form of trespass in British Columbia, and specifies what constitutes the provincial offence of trespass in the province. The accompanying *Trespass Regulation*<sup>18</sup> lays out specific details regarding what constitutes a lawful fence under the Act.

The *Trespass Act* defines an occupier as “a person entitled to maintain an action in trespass” for land premises.<sup>19</sup> This imports the common law definition into the Act, and a land trust that is only a beneficiary of a conservation covenant would likely face the same issues with regard to possession as discussed above. However, the definition is somewhat less strict, as it also includes a person with responsibility for and control over the condition of the premises. Depending on the degree of control a land trust exercises over the condition of the land, it may possibly fall under this definition.

Under the *Trespass Act*, there is a greater requirement to provide notice – a person cannot be found guilty of the offence of trespass without having had notice in any of a variety of forms: signs, fences, or oral or written direction.<sup>20</sup> This will be discussed in more detail below. Once a person has been provided with notice that they are present on lands without permission or engaged in a prohibited activity on those lands,

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<sup>14</sup> *Douglas Lake Cattle Co. v. British Columbia*, 23 ACWS (3d) 768 (BC CA) at para 17

<sup>15</sup> *Songhurst v Shawnigan Lake Recreation Assn.*, [1996] BCWLD 1694 (SC) at para 11, <http://www.canlii.org/en/bc/bcsc/doc/1996/1996canlii2104/1996canlii2104.html>, aff'd 78 ACWS (3d) 184 (BC CA), <http://www.canlii.org/en/bc/bcca/doc/1998/1998canlii6076/1998canlii6076.html>

<sup>16</sup> *Douglas Lake Cattle Co. v. British Columbia*, 23 ACWS (3d) 768 (BC CA) at para 18

<sup>17</sup> *Trans Mountain Pipeline ULC v Gold*, 2014 BCSC 2133 at para 124, <http://www.canlii.org/en/bc/bcsc/doc/2014/2014bcsc2133/2014bcsc2133.html>

<sup>18</sup> *Trespass Regulation*, BC Reg 85/1962, [http://www.bclaws.ca/civix/document/id/complete/statreg/85\\_62](http://www.bclaws.ca/civix/document/id/complete/statreg/85_62)

<sup>19</sup> *Trespass Act*, RSBC 1996, c 462, s.1, [http://www.bclaws.ca/civix/document/id/complete/statreg/96462\\_01](http://www.bclaws.ca/civix/document/id/complete/statreg/96462_01)

<sup>20</sup> *Trespass Act*, RSBC 1996, c 462, s.4 and s.1, [http://www.bclaws.ca/civix/document/id/complete/statreg/96462\\_01](http://www.bclaws.ca/civix/document/id/complete/statreg/96462_01)

they must either leave or stop as soon as practically possible, otherwise they can be charged with the provincial offence of trespassing.<sup>21</sup>

Although there is a heightened notice requirement, there are also greater powers of enforcement under the *Trespass Act*. An occupier or a person authorized by them may ask a trespasser for their name and address, and the trespasser must provide them, or they can be charged with a separate offence.<sup>22</sup> A peace officer, which includes a police officer, sheriff, and mayor<sup>23</sup> as well as a conservation officer<sup>24</sup> may arrest anyone on the premises without a warrant if they believe on reasonable and probable grounds that they are trespassing under the Act, or for a variety of related offences.<sup>25</sup>

An owner or occupier cannot charge someone with an offence of trespassing under the *Trespass Act*; this must be done by the Provincial Crown. However, an owner or occupier may make an application to the Provincial Court requesting compensation for any damage or loss suffered.<sup>26</sup> If they do so, however, they cannot bring a separate civil action for trespass under the common law.<sup>27</sup> The *Trespass Act* also applies to Crown property; the Crown can charge someone with the offence of trespassing on Crown lands if it meets all the requirements under the Act.<sup>28</sup>

#### 2.1.2.1 Notice Requirements and Enclosed Lands

The offence of trespassing requires that someone enter onto enclosed land without permission, despite having had notice. There are specific requirements for how notice may be given, and what constitutes enclosed land.

It is an offence under the *Trespass Act* to enter “enclosed land”, which is defined as land that is surrounded by a fence, or by a combination of fence and natural boundary, or that is posted with signs prohibited trespass.<sup>29</sup>

### **Fences**

What constitutes a lawful fence is set out in the *Trespass Regulation*.<sup>30</sup> There are specific requirements in the Act for fencing along railway property and for specific distances from hay or grain stacks, which are

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<sup>21</sup> *Trespass Act*, RSBC 1996, c 462, s.4, [http://www.bclaws.ca/civix/document/id/complete/statreg/96462\\_01](http://www.bclaws.ca/civix/document/id/complete/statreg/96462_01)

<sup>22</sup> *Trespass Act*, RSBC 1996, c 462, s.8, [http://www.bclaws.ca/civix/document/id/complete/statreg/96462\\_01](http://www.bclaws.ca/civix/document/id/complete/statreg/96462_01)

<sup>23</sup> Among others. *Interpretation Act*, RSBC 1996, c 238, s. 29, [http://www.bclaws.ca/civix/document/id/complete/statreg/96238\\_01](http://www.bclaws.ca/civix/document/id/complete/statreg/96238_01)

<sup>24</sup> As defined in the *BC Environmental Management Act*, SBC 2003, c 53, s. 1, [http://www.bclaws.ca/Recon/document/ID/freeside/03053\\_00](http://www.bclaws.ca/Recon/document/ID/freeside/03053_00)

<sup>25</sup> *Trespass Act*, RSBC 1996, c 462, s.10, [http://www.bclaws.ca/civix/document/id/complete/statreg/96462\\_01](http://www.bclaws.ca/civix/document/id/complete/statreg/96462_01)

<sup>26</sup> *Trespass Act*, RSBC 1996, c 462, s.11(1), [http://www.bclaws.ca/civix/document/id/complete/statreg/96462\\_01](http://www.bclaws.ca/civix/document/id/complete/statreg/96462_01)

<sup>27</sup> *Trespass Act*, RSBC 1996, c 462, s.11(2), [http://www.bclaws.ca/civix/document/id/complete/statreg/96462\\_01](http://www.bclaws.ca/civix/document/id/complete/statreg/96462_01)

<sup>28</sup> *R v Breeden*, 2007 BCSC 1765 at para 11, <http://www.canlii.org/en/bc/bcsc/doc/2007/2007bcsc1765/2007bcsc1765.html>

<sup>29</sup> *Trespass Act*, RSBC 1996, c 462, s.4 and s.1, [http://www.bclaws.ca/civix/document/id/complete/statreg/96462\\_01](http://www.bclaws.ca/civix/document/id/complete/statreg/96462_01)

<sup>30</sup> *Trespass Regulation*, BC Reg 85/1962, [http://www.bclaws.ca/civix/document/id/complete/statreg/85\\_62](http://www.bclaws.ca/civix/document/id/complete/statreg/85_62), enacted pursuant to *Trespass Act*, RSBC 1996, c 462, s.2, [http://www.bclaws.ca/civix/document/id/complete/statreg/96462\\_01](http://www.bclaws.ca/civix/document/id/complete/statreg/96462_01)

not discussed in this report. The following information comes from the residual fencing category that covers all other situations.<sup>31</sup>

A fence must be at least four feet six inches high, and made from a variety of materials, listed as:

- a) earth, stone, brick, concrete, or iron;
- b) horizontal logs, rails, boards or bars of wood;
- c) upright posts, boards, palings or pickets;
- d) woven standard gauge wire; or
- e) barbed wire.<sup>32</sup>

The table below indicates the specific requirements laid out in the *Trespass Regulation* for the various fencing materials above:

	<b>Post spacing (horizontal)</b>	<b>Post spacing (vertical)</b>	<b>Other requirements (all fences must be at least 4'6" high)</b>
<b>Earth, etc.</b>	--	--	--
<b>Horizontal Logs, etc.</b>	--	Maximum 9" apart to the height of 36". Maximum 11" apart above the height of 36". Lowest log must be 14" or less from the ground.	--
<b>Vertical Posts, etc.</b>	Maximum 4" apart.	--	--
<b>Gauge Wire</b>	Maximum 20' apart.	Lowest wire must be 14" or less from the ground.	Top and bottom wires must be at least No. 9 3/4 gauge. Intervening wires must be at least No. 12 1/2 gauge.
<b>Barbed Wire</b>	Maximum 24' apart. Cross wiring or wood droppers/poles every 6'.	Maximum 9" apart to a height of 32". Maximum 11" apart above the height of 32". Lowest wire must be 14" or less from the ground.	Must be at least No. 12 1/2 gauge.
<b>Barbed Wire</b>	In North and South Peace Electoral Districts, or in the area of the Province bordered by: 53° and 56° latitude, the Pacific Ocean and the summit of the Rocky Mountains there are special regulations. See <i>Trespass Regulations</i> , s.3(f)(i) and (ii).		

Table 1: *Trespass Regulation General Fencing Requirements*<sup>33</sup>

Despite these regulations, the *Trespass Act* specifically states that a trespass offence cannot be defeated simply because the fence was not of a uniform height, or the spacing between the bars was wider than stipulated.<sup>34</sup>

<sup>31</sup> *Trespass Regulation*, BC Reg 85/1962, s.3, [http://www.bclaws.ca/civix/document/id/complete/statreg/85\\_62](http://www.bclaws.ca/civix/document/id/complete/statreg/85_62)

<sup>32</sup> *Trespass Regulation*, BC Reg 85/1962, s.3, [http://www.bclaws.ca/civix/document/id/complete/statreg/85\\_62](http://www.bclaws.ca/civix/document/id/complete/statreg/85_62)

<sup>33</sup> *Trespass Regulation*, BC Reg 85/1962, s.3, [http://www.bclaws.ca/civix/document/id/complete/statreg/85\\_62](http://www.bclaws.ca/civix/document/id/complete/statreg/85_62)

<sup>34</sup> *Trespass Act*, RSBC 1996, c 462, s.6, [http://www.bclaws.ca/civix/document/id/complete/statreg/96462\\_01](http://www.bclaws.ca/civix/document/id/complete/statreg/96462_01)

Owners in rural areas must equally share the cost of putting up, maintaining and repairing fences and natural boundaries that border their respective premises. However, this does not apply on Crown or treaty lands.<sup>35</sup>

### **Natural Boundaries**

A hedge that is at least 4'6" high, a river bank or other boundary sufficient to keep out cattle, and an unfordable body of water will also constitute a lawful fence.<sup>36</sup>

### **Signs**

A sign may give notice that there is to be no trespassing on the land at all, and in this context is considered as a fence enclosing the land. The sign must be visible and legible during the day, under normal weather conditions. A sign must also be visible from the approach to each ordinary point of access.<sup>37</sup>

A sign may also prohibit a specific activity on the premises, such as hunting or snowmobiling. The sign must comply with requirements as set out above in terms of visibility and legibility. However, a picture of the activity or the name of that activity with an oblique line through (similar to a typical No Smoking sign) it is sufficient notice to prohibit that activity.<sup>38</sup>

Different activities may be prohibited on different parts of the premises;<sup>39</sup> this may be useful in limiting liability if there are certain areas that are particularly dangerous or unsuited to certain recreational activities.

### **Oral or Written Notice**

While a sign is a form of written notice, separate notice can also be given orally or in written form. Written form is defined broadly, as anything representing words in visible form.<sup>40</sup>

#### 2.1.2.2 Defences

Under the *Trespass Act*, there are three defences to a charge of trespass:

- a) consent;
- b) other lawful authority; or
- c) colour of right.<sup>41</sup>

Both consent and lawful authority require permission: by the occupier with respect to consent, and by an organization such as the provincial or federal Crown for lawful authority. Colour of right is less clear-cut, and is generally seen as an honest and good faith belief in a state of facts or law that would justify the party's actions.<sup>42</sup> However, it must be grounded in a property right – simply a right to protest, or a constitutional opposition to a bylaw, is insufficient. For example, the Occupy Vancouver movement was unsuccessful in a colour of right defence when charged with trespassing on City of Vancouver property.<sup>43</sup>

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<sup>35</sup> *Trespass Act*, RSBC 1996, c 462, s.3, [http://www.bclaws.ca/civix/document/id/complete/statreg/96462\\_01](http://www.bclaws.ca/civix/document/id/complete/statreg/96462_01)

<sup>36</sup> *Trespass Regulation*, BC Reg 85/1962, s.4, [http://www.bclaws.ca/civix/document/id/complete/statreg/85\\_62](http://www.bclaws.ca/civix/document/id/complete/statreg/85_62)

<sup>37</sup> *Trespass Act*, RSBC 1996, c 462, s.5(1), [http://www.bclaws.ca/civix/document/id/complete/statreg/96462\\_01](http://www.bclaws.ca/civix/document/id/complete/statreg/96462_01)

<sup>38</sup> *Trespass Act*, RSBC 1996, c 462, s.5(2) and (4),

[http://www.bclaws.ca/civix/document/id/complete/statreg/96462\\_01](http://www.bclaws.ca/civix/document/id/complete/statreg/96462_01)

<sup>39</sup> *Trespass Act*, RSBC 1996, c 462, s.5, [http://www.bclaws.ca/civix/document/id/complete/statreg/96462\\_01](http://www.bclaws.ca/civix/document/id/complete/statreg/96462_01)

<sup>40</sup> *Interpretation Act*, RSBC 1996, c 238, s.29, [http://www.bclaws.ca/civix/document/id/complete/statreg/96238\\_01](http://www.bclaws.ca/civix/document/id/complete/statreg/96238_01)

<sup>41</sup> *Trespass Act*, RSBC 1996, c 462, s.4.1, [http://www.bclaws.ca/civix/document/id/complete/statreg/96462\\_01](http://www.bclaws.ca/civix/document/id/complete/statreg/96462_01)

<sup>42</sup> *R v Drainville*, [1991] O.J. No. 340 (Ont. Prov. Div) at para 55

<sup>43</sup> *Vancouver (City of) v O'Flynn-Magee*, 2011 BCSC 1647 at paras 68-71,

<http://www.canlii.org/en/bc/bcsc/doc/2011/2011bcsc1647/2011bcsc1647.html>



### 2.1.2.3 Hunters

The *Wildlife Act* states that all wildlife in the province of British Columbia is owned by the government.<sup>44</sup> A landowner or occupier does not have any property in wildlife on their land. Hunting and trapping is prohibited on cultivated lands, Crown lands subject to a grazing lease while occupied by livestock, and any other area designated by regulation.<sup>45</sup>

The *Wildlife Act* also specifically preserves rights under the *Trespass Act* (that requires notice in the form of fencing or signing), but does not mention the common law of trespass (that requires only that a person be physically on another's lands).<sup>46</sup> Therefore, absent any notice against hunting specifically or trespass in general that complies with the provisions of the *Trespass Act*, hunters are not considered to be trespassers and hunting is permitted on private property during hunting season.<sup>47</sup>

## **3.0 Trespassers and Occupier Liability**

When someone is present on someone else's property, there is a relationship between the parties. The landowner or person otherwise in possession of the property (the occupier), owes the person on the property a duty of care to look out for that person's interests and ensure their safety while they are on the property. If someone is injured on another person's property, then the injured party may be able to sue the occupier, most commonly in negligence, for failing in their duty. Occupiers' liability is the legal term for that situation.

### **3.1 The Occupiers Liability Act Overview**

In British Columbia, occupiers' liability is controlled through the *Occupiers Liability Act*.<sup>48</sup> The *Occupiers Liability Act* regulates the duty owed by the occupier to all other people on their land, including both invited guests and trespassers. Liability toward invited guests or persons otherwise on the land with permission will be discussed in a separate report on Liability of Land Trusts for Personal Injury by Crystal Cook; this section deals only with occupier liability towards trespassers.

The *Occupiers Liability Act* defines the "occupier" in section 1:

"occupier" means a person who

- (a) is in physical possession of premises, or
- (b) has responsibility for, and control over, the condition of premises, the activities conducted on those premises and the persons allowed to enter those premises,

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<sup>44</sup> *Wildlife Act*, RSBC 1996, c 488, s.2, [http://www.bclaws.ca/Recon/document/ID/freeside/00\\_96488\\_01](http://www.bclaws.ca/Recon/document/ID/freeside/00_96488_01)

<sup>45</sup> *Wildlife Act*, RSBC 1996, c 488, s.39 and 40, [http://www.bclaws.ca/Recon/document/ID/freeside/00\\_96488\\_01](http://www.bclaws.ca/Recon/document/ID/freeside/00_96488_01)

<sup>46</sup> *Wildlife Act*, RSBC 1996, c 488, s.39, [http://www.bclaws.ca/Recon/document/ID/freeside/00\\_96488\\_01](http://www.bclaws.ca/Recon/document/ID/freeside/00_96488_01), cited in *R v Alphonse* (1993), 80 BCLR (2d) 17 (CA) at para 44,

<http://www.canlii.org/en/bc/bcca/doc/1993/1993canlii4517/1993canlii4517.html>

<sup>47</sup> *R v Bartleman* (1984), 55 BCLR 78 (CA) at para 8,

<http://www.canlii.org/en/bc/bcca/doc/1984/1984canlii547/1984canlii547.html>; *R v Alphonse* (1993), 80 BCLR (2d) 17 (CA) at para 44-45, <http://www.canlii.org/en/bc/bcca/doc/1993/1993canlii4517/1993canlii4517.html>

<sup>48</sup> *Occupiers Liability Act*, RSBC 1996, c 337, [http://www.bclaws.ca/civix/document/id/complete/statreg/96337\\_01](http://www.bclaws.ca/civix/document/id/complete/statreg/96337_01)

and, for this Act, there may be more than one occupier of the same premises;<sup>49</sup> (*emphasis added*)

If the land trust owns fee simple title to the property, then they would likely fall under part (a) of the definition, as they would be the physical owners of the property.

If the land trust was not the owner of the property, but the beneficiary of a conservation covenant, there is a remote possibility that it could be considered an occupier along with the owner of the premises, and any other party deemed to be an occupier under part (b). No case law was found in this area, but it is possible on a plain reading of the section that if the land trust exercised a great deal of responsibility for and control over the land through the terms of the covenant, it might be an occupier under this definition. However, the degree of control would have to extend to the condition, activities and persons entering the premises – this likely extends well beyond the scope of a typical conservation covenant.

The *Occupiers Liability Act* does not define what is intended by the word “trespasser”. However, it has been found by the courts to mean someone present on land without permission, even if they did not know they were trespassing (the common law definition as discussed above).<sup>50</sup> Therefore, someone on land that has not been signed or posted without permission will still fall under this definition of a trespasser.

Under the *Occupiers Liability Act*, there are two levels of duty of care owed by the occupier to a person on their land, or that person’s belongings while they are on their land:

1. The regular duty of care, which is a duty to take reasonable care to ensure that a person using the premises will do so safely.<sup>51</sup>
2. The limited duty of care, which is a duty not to create a danger with intent to harm, or act with reckless disregard for another person’s safety.<sup>52</sup>

The regular duty of care is the default that applies to the majority of situations. The limited duty of care applies in very specific circumstances, as discussed below.

### 3.1.1 The Limited Duty of Care

If the injured party is trespassing on certain types of property, they are deemed to have willingly assumed all risk associated with being there.<sup>53</sup> The limited duty is not to:

1. Create a danger with an intent to harm, or

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<sup>49</sup> *Occupiers Liability Act*, RSBC 1996, c 337, s.1,

[http://www.bclaws.ca/civix/document/id/complete/statreg/96337\\_01](http://www.bclaws.ca/civix/document/id/complete/statreg/96337_01)

<sup>50</sup> *Skopnik v BC Rail Ltd.*, 2008 BCCA 331 at para 72,

<http://www.canlii.org/en/bc/bcca/doc/2008/2008bccca331/2008bccca331.html>

<sup>51</sup> *Occupiers Liability Act*, RSBC 1996, c 337, s.3,

[http://www.bclaws.ca/civix/document/id/complete/statreg/96337\\_01](http://www.bclaws.ca/civix/document/id/complete/statreg/96337_01)

<sup>52</sup> *Occupiers Liability Act*, RSBC 1996, c 337, s.3(3),

[http://www.bclaws.ca/civix/document/id/complete/statreg/96337\\_01](http://www.bclaws.ca/civix/document/id/complete/statreg/96337_01)

<sup>53</sup> *Occupiers Liability Act*, RSBC 1996, c 337, ss.3(3.2) and 3(3.3),

[http://www.bclaws.ca/civix/document/id/complete/statreg/96337\\_01](http://www.bclaws.ca/civix/document/id/complete/statreg/96337_01)

2. Act with reckless disregard for the safety of another person on the premises.<sup>54</sup>

Acting with reckless disregard is generally accepted to mean doing something or omitting to do something that is likely to cause damage or injury to the trespasser, without caring that any harm might result.<sup>55</sup>

The lower standard of care for trespassers only applies in certain types of property. The *Occupiers Liability Act* was amended in 1998. At that time there was discussion in the British Columbia legislature regarding the purpose of the amendments: to encourage rural landowners to allow public use of their lands,<sup>56</sup> as well as a recognition that in rural areas, where parcels of land are often large and remote, it is often impractical for a landowner to control access and monitor their land.<sup>57</sup> The lower duty of care for trespassers therefore applies only to:

1. Premises used primarily for agricultural purposes;
2. Rural premises that are used for forestry or range, vacant/undeveloped, forested/wilderness, or private roads that are marked as such;
3. Recreational trails marked as such;
4. Utility rights of way and corridors.<sup>58</sup> (*emphasis added*)

Many land trust properties may fall under this definition, allowing them to take advantage of the lower duty of care owed to trespassers on their land, regardless of whether notice has been provided through the uses of signs or fences.

The word “rural” is not defined in the *Occupiers Liability Act*; the word “rural area” is defined in the *BC Interpretation Act* as “territory that is not in a municipality”.<sup>59</sup> However, the court, on at least one occasion, has stated that properties that fall within municipal boundaries are not excluded from consideration as “rural”, although a judge on the BC Supreme Court stated that “[l]ands in the middle of a large urban area, such as Victoria’s Beacon Hill Park or Vancouver’s Stanley Park are probably not “rural premises”.”<sup>60</sup> The courts have applied the term to the current use of the premises only, not to any possible future use.<sup>61</sup>

### 3.1.2 The Regular Duty of Care

If the person is trespassing, but they are not on rural premises as defined above, then the occupier has a regular duty towards trespassers, and must meet the regular standard of care.

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<sup>54</sup> *Occupiers Liability Act*, s.3(3)

<sup>55</sup> *Cormack v Mara (Township)* (1989), 68 OR (2d) 716 (ON CA) at para 29, <http://www.canlii.org/en/on/onca/doc/1989/1989canlii4279/1989canlii4279.html>, leave to appeal to SCC refused, [1989] 2 SCR vi (note), cited in *Skopnik v BC Rail Ltd.*, 2008 BCCA 331 at paras 77-78, <http://www.canlii.org/en/bc/bcca/doc/2008/2008bcca331/2008bcca331.html>

<sup>56</sup> British Columbia, Legislative Assembly, *Hansard* 36th Parl, 3rd Sess, Vol 8 No 9 (1 May 1998) at 7415 (Hon C. McGregor), <https://www.leg.bc.ca/hansard/36th3rd/h0501am.htm#7415>

<sup>57</sup> *Hindley v Waterfront Properties Corp* 2002 BCSC 885 at para 19, <http://www.canlii.org/en/bc/bcsc/doc/2002/2002bcsc885/2002bcsc885.html> cited in *Skopnik v BC Rail Ltd.*, 2008 BCCA 331 at para 14, <http://www.canlii.org/en/bc/bcca/doc/2008/2008bcca331/2008bcca331.html>

<sup>58</sup> *Occupiers Liability Act*, RSBC 1996, c 337, s.3(3.3), [http://www.bclaws.ca/civix/document/id/complete/statreg/96337\\_01](http://www.bclaws.ca/civix/document/id/complete/statreg/96337_01)

<sup>59</sup> *Interpretation Act*, RSBC 1996, c 238, s.29, [http://www.bclaws.ca/civix/document/id/complete/statreg/96238\\_01](http://www.bclaws.ca/civix/document/id/complete/statreg/96238_01)

<sup>60</sup> *Hindley v Waterfront Properties Corp* 2002 BCSC 885 at paras 20 and 22, <http://www.canlii.org/en/bc/bcsc/doc/2002/2002bcsc885/2002bcsc885.html>

<sup>61</sup> *Hindley v Waterfront Properties Corp* 2002 BCSC 885 at para 20, <http://www.canlii.org/en/bc/bcsc/doc/2002/2002bcsc885/2002bcsc885.html>

The regular duty of care is imposed by the *Occupiers Liability Act*, and is stated as:

An occupier of premises owes a duty to take care that in all the circumstances of the case is reasonable to see that a person, and the person's property, on the premises, and property on the premises of a person, whether or not that person personally enters on the premises, will be reasonably safe in using the premises.<sup>62</sup> (*emphasis added*)

The occupier is responsible for the condition of the premises, the activities on the premises, and the conduct of third parties on the premises.<sup>63</sup> The duty is the same as the duty that occurs when someone is on the property for a non-recreational purpose, and is discussed in greater detail in Crystal Cook's report on Liability of Land Trusts for Personal Injury.

Figure 1 below provides a summary of when the regular duty of care applies and when the lower duty of care applies under the *Occupiers Liability Act*:

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<sup>62</sup> *Occupiers Liability Act*, RSBC 1996, c 337, s.3(1), [http://www.bclaws.ca/civix/document/id/complete/statreg/96337\\_01](http://www.bclaws.ca/civix/document/id/complete/statreg/96337_01)

<sup>63</sup> *Occupiers Liability Act*, RSBC 1996, c 337, s.3(2), [http://www.bclaws.ca/civix/document/id/complete/statreg/96337\\_01](http://www.bclaws.ca/civix/document/id/complete/statreg/96337_01)

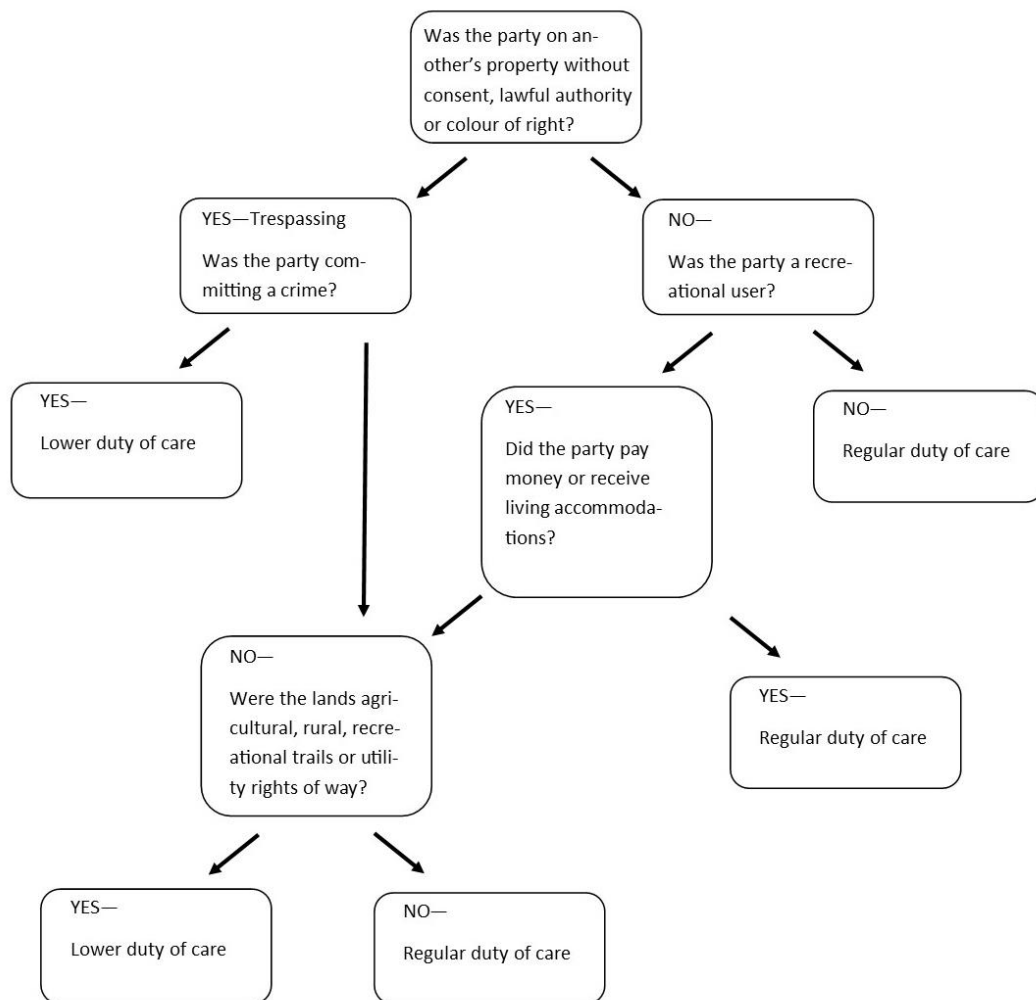


Figure 1: The duty of care under the Occupiers Liability Act

### 3.2 The Occupiers Liability Act Applied in Practice

The following are examples from recent case law interpreting the various sections of the *Occupiers Liability Act* with regard to trespassers:

#### Occupier

In the recent decision involving Trans Mountain Pipeline’s drilling on Burnaby Mountain, it was found that Trans Mountain, which did not own the land but was permitted to enter the land to survey or examine the land under National Energy Board legislation,<sup>64</sup> did not have a sufficient possessory interest to be considered an “occupier”, and therefore could not bring an action in trespass against protestors on the site.<sup>65</sup>

#### Rural property

<sup>64</sup> *National Energy Board Act*, RSC 1985, c. N-7, s.73, <http://laws-lois.justice.gc.ca/eng/acts/n-7/>

<sup>65</sup> *Trans Mountain Pipeline ULC v Gold*, 2014 BCSC 2133 at para 124, <http://www.canlii.org/en/bc/bcsc/doc/2014/2014bcsc2133/2014bcsc2133.html>

The land in question was a 45 acre parcel of land near Parksville, largely undeveloped and heavily treed. In the past, the land had been used for a gravel operation and there were remains of the pits on the property and gravel trails crossing it. The court found the land to be of rural character.<sup>66</sup>

Under similar legislation in Ontario, a 27,000 acre parcel of land crossed by service roads, partially treed but with a steel plant and housing to the south was considered to be rural.<sup>67</sup> A canal was found to be no different than an undeveloped waterway.<sup>68</sup>

### **Reckless disregard**

Under similar legislation in Ontario, failing to provide lighting or barriers along a rural road bordered by a canal was not found to constitute reckless disregard for the safety of recreational users or trespassers. The judge commented that although providing these improvements would likely decrease the risk of accident, not providing barriers or lighting did not on its own mean that the occupiers knew of the risk and did not care if harm resulted.<sup>69</sup>

In another case, failure to post signs or provide barriers was not found to be acting with reckless disregard to a trespasser along railway property, when the trespasser's ATV crested an excavation pit unexpectedly, and crashed, causing injury.<sup>70</sup>

### **3.3 The Duty of Care owed to Children**

Section 3.1(4) of the *Occupiers Liability Act* states that the lower duty of care owed to trespassers on certain types of properties does not relieve an occupier from any other higher standard of care owed to a particular class of persons under another enactment or rule of law.<sup>71</sup> Depending on the particular circumstances, this may require a heightened duty of care towards children.

### **4.0 Issue of Adverse Possession**

Traditionally in British Columbia, if a trespasser could show exclusive possession of another owner's property for a continuous period of 20 years, they could claim title to the property by adverse possession.<sup>72</sup> However, this was abolished by statute on July 1, 1975, unless it could be shown that the right to adverse possession, including the 20 year possession period, had been established before that date.<sup>73</sup>

## **5.0 Summary**

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<sup>66</sup> *Hindley v Waterfront Properties Corp* 2002 BCSC 885 at para 5,

<http://www.canlii.org/en/bc/bcsc/doc/2002/2002bcsc885/2002bcsc885.html>

<sup>67</sup> *Whaley v Hood*, [1998] OJ No 1785 (Ont Gen Div) at paras 1 and 13

<sup>68</sup> *Whaley v Hood*, [1998] OJ No. 1785 (Ont Gen Div) at para 13

<sup>69</sup> *Whaley v Hood*, [1998] OJ No. 1785 (Ont Gen Div) at para 15

<sup>70</sup> *Skopnik v BC Rail Ltd.*, 2008 BCCA 331 at para 76-80,

<http://www.canlii.org/en/bc/bcca/doc/2008/2008bccca331/2008bccca331.html>

<sup>71</sup> *Occupiers Liability Act*, RSBC 1996, c 337, s.3(4),

[http://www.bclaws.ca/civix/document/id/complete/statreg/96337\\_01](http://www.bclaws.ca/civix/document/id/complete/statreg/96337_01)

<sup>72</sup> *Statute of Limitations Act*, RS 1948, c 191, s.16; *Re Canadian Pacific Railway*, 2002 BCSC 1041 at para 47,

<http://www.canlii.org/en/bc/bcsc/doc/2002/2002bcsc1041/2002bcsc1041.html>

<sup>73</sup> *Limitation Act*, SBC 2012, c 13, s.28, [http://www.bclaws.ca/civix/document/id/complete/statreg/12013\\_01](http://www.bclaws.ca/civix/document/id/complete/statreg/12013_01)

A land trust that is the owner in fee simple of land could bring an action in trespass under the common law, could recover damages under the *Trespass Act*, and could also be liable for any injuries sustained by those on the land as an occupier under the *Occupiers Liability Act*.

The common law definition of trespassing differs from the offence of trespassing under the *Trespass Act*. Trespassing under the common law does not require that the person knew they were trespassing. The occupier can bring a civil action directly in trespass; however, if there was no actual physical damage to the property, the court will only award nominal damages. Under the *Trespass Act*, there are specific notice requirements requiring signage; fences and/or natural boundaries; or oral or written notice to the trespasser. However, once notice is given, peace officers can enforce the *Trespass Act* and the province can charge a trespasser with an offence. The occupier may also make a request to the court to recover expenses relating to any damage caused by the trespasser.

There are two different duties of care owed under the *Occupiers Liability Act* in British Columbia, which covers injuries sustained by someone on another person's property: the regular duty to take reasonable care that the person is safe while using the premises, and the limited duty not to intentionally create danger or act with reckless disregard for the person's safety. If the land is considered rural property as per the *Occupiers Liability Act*, the land trust as owner would only owe a limited duty towards trespassers. The definition of "rural" under the *Occupiers Liability Act* appears to apply to a large portion of land trust properties, although it is unclear at present whether forested or undeveloped properties within municipality boundaries would be considered rural. The lower duty of care towards trespassers on rural property applies to any who are on the land without permission; there is no requirement for notice through the use of signs or fences.

A land trust as a covenant beneficiary would likely not have the degree of possession of land required to maintain an action in trespass under the common law, or recover damages under the *Trespass Act*. Similarly, a land trust would likely not be considered an occupier under the *Occupiers Liability Act*, and would therefore not be liable for any injury suffered on lands for which they are the beneficiary.

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