Home on the Range: A Review of Recent Law Regarding Fencing, Trespass and Liability Issues

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This paper will deal with recent amendments to the Line Fence Act, the Petty Trespass Act, and the Public Lands Act, the Occupier's Liability Act, and proposed amendments to the Occupiers' Liability Act.

I will discuss how this legislation, this proposed legislation, and current law may affect horse owners' and land owners' rights and responsibilities, in terms of fencing, livestock containment, trespass, and access to private and Crown land.

The Line Fence Act

Everyone who owns horses and/or keeps horses on their property should know the law in Alberta regarding fencing. In my experience, people who own horses as part of an ongoing, long-term farming operation usually know about the Line Fence Act, but it seems that many small land owners buy these properties with the intention of keeping horses, without any idea of their rights - and obligations - in choosing to fence, or not.

The Line Fence Act basically changed old English law by creating a presumption that every landowner who benefited from a fence, regardless of who actually built it, was obligated to pay a portion of the fencing costs, both in terms of construction and maintenance. Prior to the Line Fence Act, there was no legislation regarding fencing, and no presumed obligation between neighbours to share the cost of a fence, even if one neighbour paid for 100% of the fence and the other benefited in that his/her livestock was contained.

Until 2003, the Line Fence Act read as follow:

1. A person erecting a wire fence across a trail that has been in constant use by the public for a period of three months immediately before the erection of the fence shall place on the fence where it crosses the trail, and for a distance of 2 rods on each side from the centre of the trail either

(a) a top rail, or
(b) pieces of wood, commonly known as droppers, placed perpendicularly not less in length than the height of the fence nor less than 2 inches in width and at intervals not exceeding 6 feet.

2(1) When 2 owners or occupiers of adjoining parcels of land desire to erect a line or boundary fence between the adjoining parcels for the common advantage of both of them they shall bear the expense of the erection, maintenance and repair of the fence in equal shares.

2(2) If the owner or occupier of a parcel of land erects a line or boundary fence between the land and an adjoining parcel of land the owner or occupier of the adjoining parcel of land shall, as soon as he receives any benefit or advantage from the line or boundary fence by the enclosure of his land or any portion of it or otherwise, pay to the first mentioned owner or occupier a just proportion of the then value of the line or boundary fence and thereafter the expense of maintaining and repairing the fence shall be borne by the adjoining owners or occupiers in equal shares.

3(1) If adjoining owners or occupiers of land disagree as to:

(a) the quality of the fence that has been or that is to be erected,
(b) the proportion of the value of the fence to be borne by the parties to the dispute,
(c) the amount of the expense incurred in erecting, maintaining or repairing the fence,
(d) the proper location of a proposed or existing line or boundary fence;
(e) the just proportion of a line fence that each owner or occupier should make or put in repair, or
(f) the amount that an owner or occupier should pay as compensation to the other for making or keeping in repair any fence,

they shall each appoint an arbitrator to determine the matter in dispute.

3(2) The arbitrators shall, after first giving the parties reasonable notice of the time and place where they intent to meet for the purpose of hearing and determining the matter in dispute, attend at the time and place and hear the parties and their witnesses and make their award in respect of the matters in dispute.

3(3) If either of the parties refuses or omits to appoint an arbitrator within 48 hours after a demand is made in writing on him to do so by the other party, that other party may apply to a justice of the peace who, on being satisfied by the oath of a credible witness that the demand has been made and not complied with, may appoint an arbitrator for the person refusing or omitting to appoint, and the arbitrator appointed shall proceed and act and all steps shall be taken as provided in this section as if the arbitrator had been appointed by the person refusing or omitting to appoint.

3(4) When the arbitrators are unable to agree they shall appoint an umpire who shall make an award as to the matter in dispute.

3(5) The appointment of arbitrators under this section is deemed to be a submission under the Arbitration Act and the provisions of that Act shall apply thereto.

3(6) The decision of the arbitrators or umpire as to the proper location of a proposed or existing line or boundary fence does not affect the title to the land on either side of it and is binding only during the actual existence as a lawful fence of the fence in question.

Section 1 is clear that if you own a parcel of unfenced land that people have been using informally, (for trail rides, for example), Section 1 provides that you are entitled to fence it to contain your horses, but that you have to make the fence clearly visible. There has been no litigation about this issue.

Four problems arose with the Line Fence Act:

The first problem was that the Line Fence Act was legislated with a view to encourage adjacent rural landowners to share the cost of fencing to keeping their livestock off one another's property. As far as I am aware, there are no reported Alberta cases about rural landowners in dispute about the Line Fence Act. The reported cases are all about city dwellers trying to use the Act to force their neighbours to build fences. These cases have nothing to do with livestock containment. They all involve fights between neighbours that got completely out of hand and ended up in Court - and in one case, in Criminal Court for a fight that escalated into criminal threats and harassment.

The second problem with the Line Fence Act arose from the first problem. The Act specifically sets out that neighbours had to go to arbitration if they could not agree. The Legislature intended that parties go first to arbitration, specifically to avoid bitter court battles. Unfortunately, city people kept trying to short-cut this procedure, and went straight to the Courts.

The third problem concerned trying to define a "benefit" and "advantage" as referenced in Section 2(2).

The fourth problem involved trying to decide how far arbitrators could go in resolving fencing disputes.

In Terrigno v. Wood, [1995] A.J. 774, a 1995 Calgary case, Terrigno unilaterally tore down an old fence along the property line with his neighbour, Wood. The Woods watched the fence come down, and didn't complain, but refused to pay Terrigno when he came calling to ask for ½ the cost of the new fence. The Woods argued that they had never asked that the old fence be torn down. The Judge ruled, with reference to Section 2(2), that even if the Woods didn't ask for the new fence, they benefited from it and should pay for ½ the cost. The Judge also ruled that as the Act didn't specifically say that the parties had to go to arbitration, before going to Court, that he could hear and decide upon the matter without forcing the parties to go to arbitration.

In Boyd v. Moss, [2003] A.J. No. 156, a 2003 Calgary case, the Boyds bought a house next to a house owned by the Moss family. The Moss family rented their house to another family. The tenants owned a Rottweiller. The Boyds built a fence and claimed for ½ the cost of the fence from the Mosses. The Boyds argued the containment of the tenant's Rottweiller was a "benefit" to the Mosses, pursuant to Section 2(2) of the Act. The Boyds also argued that the fence "benefited" the Mosses because it increased their property value. The Boyds sued the Mosses, without trying arbitration first. The Judge noted that since Wood was decided in 1995, all the other Judges who had dealt with Line Fence Act cases had ruled that the Act was clear and that parties must go to arbitration first. The Judge also ruled that the fence was not a benefit to the Mosses. The containment of the Rottweiller was a dubious benefit to the tenant, only.

In Luethi v. Alberta (Board of Arbitration) [1995] A.J. No. 32, the Court of Appeal was asked, if landowners were forced to go to arbitration, exactly how much power arbitrators should have. Luethi and his neighbour had obviously been involved in a number of long-term disputes, many of which ended in litigation. The arbitrators told Luethi and his neighbour to each build a fence, 25 feet from their joint property line, creating a 50-foot "no man's land" between them. The Court of Appeal held that this exceeded the arbitrator's jurisdiction because by creating the 50-foot "no man's land" the arbitrators were also telling the property owners how they could use their land. The Court wrote:

"We understand and sympathize with what the arbitrators did. We think they had nothing but the best of intentions in trying to do these two men a favour. The result is they are both in the Court of Appeal. That gives you some indication what it is like trying to help them resolve their disputes. We are not sure whether the Line Fence Act has sufficient power within it to permit anybody, even Solomon himself, to stop these two gentlemen from their squabbling. ... We hope that [with this Judgment] the parties will be able to resolve their disputes, just like Albertans have been able to resolve problems like this for a century. I confess that I am not particularly optimistic about that."

The Line Fence Act was amended in May of 2003, to try to bring the Act back to its original intention: To help resolve fencing issues between rural landowners with livestock. The Amendment consists of the addition of Section 1.1, which reads as follows:

1.1(1) In this section and sections 2 and 3, "livestock" means cattle, horses, bison, sheep, swine including wild board, goats and animals to which the Livestock Industry Diversification Act applies;

1.1(2) Sections 2 and 3 apply only to the extent that a fence is designed to keep livestock of an owner or occupier out of the adjoining land of another owner or occupier.

1.1(3) For the purposes of sections 2 and 3,

1. there is only a benefit or advantage to a parcel of land if it has livestock on it, and

2. where there are livestock on both parcels of land, in determining the benefit or advantage accruing to each parcel, there shall be taken into account the height, strength and structure of fence needed by each parcel, including any special needs on the part of a parcel arising from the species of livestock on it.

There are as yet no reported cases dealing with the amended Line Fence Act, but in my view the Legislature clearly intended the Act to apply to livestock owners, not quarrelling city dwellers. Parties in dispute must go to arbitration before Court. Once livestock are fenced, a "benefit" for the neighbour, whether or not he/she keeps livestock on his/her side of the fence. If a party wants to keep horses (or other livestock), that person is entitled to fence and to look to his/her neighbour to contribute to the cost of fencing. If there is an existing fence, but which is unsuitable for horses (or other livestock), the horse owner would be entitled to upgrade the fencing, as necessary, and look to his/her neighbour to share the cost.

Consider the following practical issues:

Make a point of discussing any fencing plans with your neighbour. If you suspect that there may be a fight about the type of fencing and the cost to build and maintain it, make sure that you give your neighbour the opportunity to participate from the outset.

Don't try to use the Act to force your neighbour to pay ½ the cost of upgrading your fencing, if existing fencing is appropriate. For example, an arbitrator might not be very interested in ordering your neighbour to pay for the cost of tearing up acres of existing wire fencing and replacing it with 3-rail pipe fencing painted to coordinate with your flower garden.

Most of us would prefer not to keep our horses behind barbed wire, but your ability to force your neighbour to help pay for new, speciality fencing will depend on the type of livestock to be contained. An arbitrator will decide what is a reasonable fencing request in the circumstances. Consider, for example, neighbours who keep, respectively, free range chinchilla rabbits and thoroughbreds. What kind of fencing requirements might each neighbour have? I believe that arbitrators will decide what is appropriate fencing, and who should pay what share for it, based on who was on the land first, who wants to build the fence, whether it is a specialty fence and the cost of the specialty fence.

Livestock Containment Issues

Assume that you have appropriate fencing (which you and your neighbour have agreed to jointly pay for) but one day your horses get out on the road, run into an oncoming car, and the driver is injured and your horse dies. Are you at fault? Can you sue the driver for the cost of your horse?

Alberta law has been well settled since the 1940s that if a horse escapes its pasture and runs onto the road and causes an accident, the Court will presume that the horse owner is liable for any injuries or property damage the horse causes. To avoid this liability, the horse owner must prove that the horse owner made his/her best efforts to keep the horse contained, and to prevent the accident. This includes keeping your horses behind appropriate and well-maintained fences and checking your horses on a regular basis.

Drivers are expected to keep a proper and reasonable lookout for livestock on the highway, and are expected to make reasonable efforts to avoid obstacles on the road, including horses. Drivers are not expected to be able to avoid accidents in every case, particularly where the horse bolts suddenly onto the road, or when the light and road conditions are poor.

In Bryant v. Pederson [1975] A.J. No. 54, Bryant's colt got out of a field fenced with four strand barbed wire. The fence was down where the colt was ordinarily fed and watered. The Judge held that there was no way of knowing why the fence was down. The colt ran to the side of the highway, before bolting in front of Pederson's car. Pederson sued for injuries and damages. Bryant sued for the death of the colt. The Judge held that neither Pederson or Bryant were liable. Four-strand barbed wire was acceptable fencing. Pederson checked it every day when he fed the colt. There was no way of knowing how why the fence was down. As soon as he saw the colt was out, he tried to catch the colt but couldn't. He then tried to lure it back into the pasture by having it follow an older horse. The colt was spooked by a dog and ran in front of Pederson's car. Pederson was not liable for the colt's injuries. She was driving at a reasonable rate of speed, and had no chance to see and avoid the colt as it bolted in front of her.

In Gooch v. Mikkelsen [1977] A.J. No. 649 the Mikkelsens' horse got out of its pasture and onto the highway between Black Diamond and Calgary. There had been a very heavy snow fall and the horse walked over the fence across a snow bank. Ms. Gooch struck the horse and sustained injuries. She sued the Mikkelsens's alleging that they negligently let their horse out. The Mikkelsens' sued Ms. Gooch for the loss of their horse. The Judge dismissed both claims. The Mikkelsens could not reasonably have foreseen that their horse would escape in this way. As the horse's escape truly was an accident, Ms. Gooch could not be expected to avoid a horse in the middle of the highway on a winter night.

In my view, if a horse owner can prove that the horse's escape was truly an accident, then the chances of claiming for the horse's value are slim. If the escape was an "accident" for the purposes of the driver's claim, it must also be an "accident" for the purposes of the horse owner's claim.

The Petty Trespass Act

You are entitled to presume, unless you are warned, that you may ride on private land. The law does not presume trespass. Most horse owners and riders, as a matter of basic courtesy, know that it is rude to ride over other people's property without permission, and never over crops. It is the law in Alberta that if you are warned, verbally or in writing, directly or indirectly, not to ride on or across a piece of property, you are a trespasser. The governing legislation is the Petty Trespass Act, which reads:

1(1) No person shall trespass on

(a) privately owned land,
(b) Crown land subject to any disposition granted under the Public Lands Act,
(c) a garden or law,

with respect to which the person has had notice by word of mouth, or in writing, or by posters or signboards, not to trespass.

1(2) For the purpose of subsection (1), a person is deemed to have had notice not to trespass when posters or signboards are visibly displayed

(a) at all places where normal access is obtained to the land, and
(b) at all fence corners or if there is no fence, at each corner of the land.

1.1 This Act does not apply in respect of a person who, for recreational purposes within the meaning of the regulations under section 62.1 of the Public Lands Act, enters Crown land that is the subject of a grazing lease, grazing permit, farm development lease, cultivation permit, gazing license, authorization to harvest hay or head tax grazing permit issued under that Act, whether or not the entry is in accordance with that Act and the regulations.

Section 2 of the Petty Trespass Act provides for a $100 fine. Section 3 provides automatic liability if someone enters on a motor vehicle.

4. Any person found committing a trespass to which this Act applies may be apprehended without warrant by any peace officer, or by the owner or occupier of the land on which the trespass is committed, or the servant of, or any person authorized by the owner or occupier of the land, and may be forthwith taken before the nearest provincial judge or justice of the peace to be dealt with according to the law.

Section 5 provides that the only people who can lay trespass charges are the owner or the occupier, or owner's or occupier's servant.

Section 6 provides that a Judge can't hear a trespass action where the ownership of the land is in issue.

7. Nothing in this Act extends to a case where the person trespassing acted under a fair and reasonable supposition that the person had the right to do the act complained of.

The Public Lands Act

There is a lot of wonderful Crown land suitable for riding. For decades, Crown land which was subject to grazing or other types of leases, was essentially off-limits to the public if the lease owner said so. In other words, the land came to be viewed as "private property". Notwithstanding that there is no presumption of trespass on private property, there developed a de facto presumption of trespass on leased Crown land. In this regard, consider O.H. Ranch Ltd. v. Patton [1996] A.J. No. 795.

In O.H. Ranch, the ranch owners had a grazing lease over Crown land. Patton wanted to hunt on the land. Patton argued that the O.H. Ranch had the use of, but not the ownership of the land, and had no authority to refuse him permission to hunt. The O.H. Ranch argued that as the lease was silent about what kind of control the O.H. Ranch had over the land, that the O.H. Ranch was presumed to have full control, as an owner, over the land. The Court held that Patton was not entitled to hunt on the land because hunting was incompatible with the O.H. Ranch's use of the land for gazing.

Recent amendments to the Public Lands Act have set out what recreational uses the public may make of Crown land that is subject to leases. The Public Lands Act now presumes that the public has access to these Crown lands. In light of these amendments, O.H. Ranch may no longer represent current law. Horse owners will be pleased to know that access is presumed. Grazing lease holders must be aware that access cannot be unreasonably refused.

Consider section 62.1(1) of the Public Lands Act:

6.2(1) The holder of an agricultural disposition shall, in accordance with the regulations, allow reasonable access to the land that is the subject of the disposition to persons who wish to use the land for recreational purposes.

62.1(3) provides that if a person wanting access to the Crown land does not comply with the regulations, that person can be asked to leave, and if that person refuses to leave, that person can be arrested.

The Recreational Access Regulation (to the Public Lands Act) was passed in the summer of 2003. The regulation defines "recreational purposes" as including hunting, camping, fishing, boating, swimming, berry picking, picnicking, hiking, nature study, snow shoeing and "other winter sports", hang-gliding, hot air ballooning, bicycling, "the use of animals for transportation" and "the use of motor vehicles."

Note that the regulation does not create a priority between users. In other words, hunters don't trump hang-gliders, and A.T.V.s don't trump horses. Everyone has to get along.

The regulation provides that the lease holder has to notify the public of the name and number of the contact person for each parcel of leased Crown land. If no contact person is listed, a local settlement officer has the authority to grant access. Note, however, that the regulation also provides that people who want access to Crown land must request access, and, per section 5, give names and license plate numbers, the name of a contact person, the purpose, the time, date and duration of the access. In the event of a dispute, the onus is on the person wanting access to prove that the regulation has been complied with.

The regulation creates a duty on the lease holder to allow access, unless it conflicts with an existing agricultural use (e.g. crops or livestock). In that case, the lease holder may allow restricted access.
Section 9 of the regulation sets out rules and regulations for access. Any disputes must be set out in writing, to a local settlement officer, within 7 days of the dispute. Decisions regarding disputes are public documents. The Crown may assess a fee for dispute resolution.

As the amendments to the Public Lands Act and the Recreational Access Regulation are very recent, there are no reported cases about either, as yet. What is clear is that the public, including riders, is now presumed to have a reasonable right of entry and recreational use of leased Crown land.

Who is Responsible if There is An Accident on Private or Crown Land?

Suppose that you are riding across a meadow and you come upon the remains of a bush party. Your horse steps on a broken beer bottle, falls, and throws you. You are very badly injured and want to sue the land owner (if it is private land) or the Crown and the lease holder (if it is Crown land subject to a grazing lease) because you believe that it was unreasonable for the landowner to allow someone to leave broken beer bottles where he/she knew riders might go.

Alternatively, imagine that you are riding through a herd of grazing cattle. Your horse spooks, and you set off a stampede. A number of the cattle are very badly hurt and have to be put down. The land owner (if it is private land) or the lease holder (if it is Crown land subject to a grazing lease) sues you for the loss of his/her cattle.

The Occupier's Liability Act sets out an owner's or occupier's (i.e. lease holder's) responsibilities to people who use their land.

Section 5 of the Act states that:

"An occupier of premises owes a duty to every visitor on the occupier's premises to take such care as in all the circumstances of the case is reasonable to see that the visitor

will be reasonably safe in using the premises for the purposes for which the visitor is invited or permitted by the occupier to be there or is permitted by law to be there."

Section 14 of the Act provides that the landowner has a greater responsibility towards children.

Section 6 provides that what is "safe" will depend on the condition of the premises (e.g. developed or undeveloped land), the activities, and the behaviour of other people who are also on the land. For example, the landowner might not be liable if, in the first of the scenarios above, rather than riding on a broken beer bottle, a drunk threw a beer bottle at you, startling your horse.

Section 7 provides that the land owner is not liable if the person using the land has been warned of any specific risks or dangers on the land, that the landowner may be aware of, and acknowledges this warning. Section 9 provides, however, that if the landowner knows of unusual risks, and takes no steps to reduce these risks, merely warning of the risks is not sufficient. For example, a landowner could not knowingly leave coils of old barbed wire lying around, simply tell people to look out for them, but not remove them.

The Occupier's Liability Act was amended in 2003 to address grazing leaseholders. The new Section 11 states:

11.1 The liability of a holder of an agricultural disposition issued under the Public Lands Act in respect of a person who, under section 62.1 of the Public Lands Act and the applicable regulations, enters and uses the land that is subject to the agricultural disposition shall be determined as if the person entering the land were a trespasser.

Section 11 essentially says that people who use Crown land, subject to leases, for recreational purposes, do so entirely at their own risk. They cannot sue either the Crown or the lease holder for injuries sustained on the Crown land.

To return to the first of the two scenarios, and applying the amendments to the Occupier's Liability Act, I speculate that it would be very difficult for the rider to sue the lease holder or the Crown for injuries sustained while riding on leased Crown land. The only exception to this might be what used to known as "gross liability", or in other words, behaviour that is so obviously negligent that the public would be offended if the person were allowed to get away with it. It would be somewhat easier to sue the private landowner, because the private landowner does not have the same protection given to a person with a lease on Crown land. Having said that, the private land owner always has the option of refusing a right of entry, even if the refusal is "unreasonable". The lease holder no longer has that option and thus, has no way of controlling who goes on the leased Crown land.

The amendments to the Occupier's Liability Act do not, in my view, affect the responsibilities of the person using the land toward the landowner, or lease holder, so to

refer to the second scenario involving the injured cattle, the recreational rider might very well be liable for their replacement cost.
Lastly, the Occupier's Liability (Recreational Users) Amendment Act (Bill 208) is a private member's bill which, at the time this paper is written, had reached second reading. The bill was apparently tabled in response to proposed multi-use trails. The bill would further amend the Occupier's Liability Act to create a presumption of trespass not only on Crown land subject to grazing leases, but on all rural land used for agricultural purposes, vacant land, forests or wilderness areas, golf courses (when not open for playing), utility rights-of-ways and recreational trails.

Conclusion

In summary, the law regarding fencing has changed to clarify the rights and responsibilities of land owners seeking to erect fences.

The law in Alberta has also been changed to reflect greater recreational access to leased Crown land, but with greater access apparently comes greater responsibility on the part of riders and other recreational users, to take care for their own safety.

This paper is written for general interest only. Any specific legal questions should be addressed to the reader's own lawyer.