ACCESS - RED FLAG ISSUES UNDER LRA (Revised March 2, 2007)

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Access - Red Flag Issues Under LRA

1. INTRODUCTION

a. The purpose of this paper is to identify access issues under LRA for discussion and hopefully resolution. Of particular note are the following issues:

i. some background information on the LRA system;

ii. a suggested grouping of access categories;

iii. a suggested distinction between access that is "Private (By prescription)" and "Private (Openly used and enjoyed)" and the necessity of making that distinction;

iv. the risks of not adequately proving prescriptive interests;

v. the Register General's prohibition against recording "Private (By prescription)" access against previously migrated servient tenements under LRA, s.74(2);

vi. the question whether non-tidal waters are navigable waterways in Nova Scotia; and

vii. access across railway lands and former railway lands.

b. Changes to the earlier version of this paper are "redlined" as indicated by vertical lines in the right margin beside the new text.

c. **Yellow Flag -** This paper is current to March 2, 2007. There are pending changes to the Land Registration Administration Regulations so be sure to check the regulations for changes since then.

d. **Green Flag -** I thank all those who submitted "red flag issues" for discussion, those who reviewed and commented on the draft paper and those who have commented on the earlier presentations of this paper. Any errors are mine.

2. DEFINITIONS

a. "DNR" means the Nova Scotia Department of Natural Resources;

b. "DOT" and "TPW" mean the Nova Scotia Department of Transportation and Public Works;

c. "LAA" means the *Limitations of Actions Act*, as amended;

d. "LRA" means the *Land Registration Act*, as amended; and

e. "MTA" means the *Marketable Titles Act*, as amended.

3. *LAND REGISTRATION ACT* - PROVISIONS RESPECTING ACCESS

a. The *Land Registration Act*

> "37(4) An application shall be in the prescribed form and shall be accompanied by
>
> > (b) an opinion of title certified by a qualified solicitor setting out the ownership of the fee simple and of all other interests in the parcel and direct or indirect right of access to the parcel, if any, from a public street, highway or navigable waterway to the parcel appearing on the face of the record and that the solicitor's opinion is based on the abstract of title required by clause (c);"

b. The *Land Registration Act Administration Regulations*[1] provide as follows:

i. Paragraph 11:

> "11(1) Except as provided in subsection (2), a parcel register must contain
>
> > (c) a description of the direct or indirect right of access to the parcel, if any, from a public street, highway or navigable waterway;"
>
> Subsection 11(2) deals with parcels owned by Her Majesty in right of the Province that have never been conveyed or that have been acquired by Her Majesty as "owner unknown" land under the *Municipal Government Act*."

ii. Paragraph 8(2):

> "(2) Subject to subsections 2A and 2B, if a benefit to be added to a registered parcel has the effect of burdening a parcel not registered under the Act, the registered owner of the parcel to be benefitted must make an application to add the benefit, which must include
>
> ...
>
> (c) an Opinion of Title in Form 8 for the burdened parcel;"

c. The Opinion of Title, Form 8, Part 1, certifies that:

> "6. The signed Statement of Registered and Recorded Interests that accompanies this Opinion is a true and accurate summary of the registered interest, benefits, burdens, qualifications on title, recorded interests, and means of access that apply to this parcel." (emphasis added)

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[1] *Land Registration Administration Regulations* made under Section 94 of the *Land Registration Act* S.N.S. 2001, c. 6 N.S. Reg. 225/2004 (November 8, 2004, effective December 1, 2004) as amended to N.S. Reg. 83/2006 (April 12, 2006, effective April 10, 2006).

A lawyer should examine plans arising from the search and survey information affecting the parcel to ascertain whether the access granted and the actual traveled way correlate, and advise the client with regard to any material discrepancies.

A lawyer must explain to the client any limitation associated with a private right of way access and confirm the client's instructions prior to closing."

5. PRACTICAL TIPS

a. The basics:

i. The Province does not guarantee extent of title (boundaries) - LRA registration is "subject to survey"[5].

ii. The Province guarantees the four *registered* ownership interests in a parcel - fee simple, life estate, remainder and Crown interests - and only those interests[6].

iii. The Province does not guarantee the effect of recorded interests[7] or prescribed contracts[8] in the parcel register.

iv. There are currently two schools of thought on whether benefits and burdens are registered or recorded interests under LRA. Benefits and burdens are defined in the *Land Registration Administration Regulations* as follows[9]:

> "s.2(1)(d) "benefit" means an appurtenance to a registrable or registered interest in a parcel;
>
> s.2(1)(e) "burden" means a restriction or limitation on the use and enjoyment of a parcel that attaches to a registrable or registered interest in a parcel;"

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5 LRA, s.21.

6 LRA, s.17.

7 LRA, s.3(1)(g) "interest" means any estate or right in, over or under land recognized under law, a **prescribed contract** or a prescribed statutory designation, including a right or interest under the *Canada-Nova Scotia Offshore Petroleum Resources Accord (Nova Scotia) Implementation Act* , but excludes any interest under the *Gas Storage Exploration Act*, the *Mineral Resources Act*, the *Petroleum Resources Act* or the *Treasure Trove Act*;"

8 *Land Registration Administration Regulations* - Prescribed contracts:

12 (1) Contractual rights respecting a parcel registered under the Act, including but not limited to option agreements and rights of first refusal, are **prescribed contracts** for the purposes of the definition of "interest" in clause 3(1)(g) of the Act.

(2) A **prescribed contract** may be recorded in a parcel register and, if recorded, is subject to the Act's recording and cancellation of recording provisions.

9 N.S. Reg. 225/2004 (November 8, 2004, effective December 1, 2004) as amended up to N.S. Reg. 83/2006 (April 12, 2006, effective April 10, 2006).

d. Form 8, Part 2, now requires lawyers to certify title to the servient tenement, not the servitude. Regulation 8(2) will be amended to correct this.[2]

e. **Crimson Flag** - LRA, ss.90-92, give "aggrieved persons" a process to challenge registrations, recordings and the Registrar General's decisions to the courts. I understand DNR uses this process to challenge LRA titles migrated on the basis of adverse possession against the Crown when DNR believes the possessory title was not properly proved on the record.

f. **Red Flag.** - LRA, s.35, provides a process for a registered owner, a person prejudiced or aggrieved or the Registrar General to apply to the court for a declaration as to the rights of the parties where the revision of a registration was not authorized by law[3].

g. **Red Flag** - LRA, s.63, provides a process for registered owners of parcels to have invalid recorded interests cancelled. This includes servitudes[4].

4. PROFESSIONAL STANDARD 2.3 ACCESS

a. The Professional Standards For Real Property Transactions published by the Nova Scotia Barristers's Society guide lawyers in exercising their professional judgment. On November 24, 2006 Bar Council approved the following replacement Standard 2.3 Access:

> "A lawyer who prepares an opinion of title must confirm the nature of the access, if any, to the parcel and whether the access is public or private.
>
> If the lawyer determines the access to be private, the lawyer must determine whether the access has been granted.
>
> If the lawyer determines the access to be private and granted, the lawyer must ensure that there is marketable title for the grant of easement to the parcel. If access is referenced for the whole of the marketable title time frame, the grant may be presumed.
>
> If the lawyer determines the access to be private and not granted, the lawyer must be satisfied that there is authority for its continued use in conjunction with the parcel. Authority for continued use must be based on a factual foundation as documented on record.
>
> A lawyer should consider the implications of the legal description of a servient parcel that does not reference a private access to which it is subject.

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2 Registrar General email communication, October 20, 2006.

3 An application under this section was brought before the courts in February 2007 - see reference to *Sun N Sand Hotels Limited* v. *3094199 Nova Scotia Limited et al.*, in paragraph 5.a.iii, below.

4 LRA, s.3(1)(aa) "servitude" means an interest affecting the use or enjoyment of land created by covenant, condition, easement or implication at law, and includes a utility interest, but does not include a lien or a security interest;

"Appurtenance" is not defined in LRA or its regulations.

LRA, s.63(4), deals with recorded interests and specifically refers to "servitudes". LRA, s.47(4), deals with recording "overriding interests" which include "easements used and enjoyed" protected by s.73(1)(e).

In an email exchange between the Registrar General and Benjamin Fairbanks posted on the RELANS Listserv on November 27, 2006, the Registrar General wrote:

> "Benefits and burdens are recorded interests, not registered interests. The Province does not guarantee recorded interests.
>
> Benefits and burdens are integral to the fee simple, a registered interest. See definition of "appurtenance" to see what I am getting at.
>
> The PDCA requires benefits and burdens as they are by NS legal convention a part of the parcel's description. In jurisdictions that do not attach easements to metes and bounds descriptions the PDCA requirement probably wouldn't exist.
>
> See the wording of LRA Section 63, that talks about challenging recorded interests including "where the interest is a servitude...."
>
> AFRs and revisions that add benefits and burdens do certify the appropriateness of adding the benefit or burden to title.
>
> Therefore when you see a benefit or burden on title, it has been certified by a lawyer.
>
> I would argue that you don't have to search back 40 years but you do have to peruse the enabling instrument to ascertain its effect on the parcel. "

The categorization of benefits and burdens as recorded interests is not shared by some members of the Bar who hold that benefits and burdens are so inextricably bound to the fee simple that they are part of the fee simple thus are registered interests. The Nova Scotia Barristers Society and Service Nova Scotia and Municipal Relations are working together to resolve this question and to clarify the responsibilities of lawyers dealing with benefits and burdens. In the meantime Sun N Sand Hotels Limited has filed an application with the Supreme Court of Nova Scotia in Halifax[10] in which it seeks, *inter alia*, an order declaring "that an easement registered under a parcel register constitutes a registered (not recorded) interest for the purposes of the *Land Registration Act*, S.N.S. 2001, c.6, as amended (the "Act")"

Pending the outcome of the court application and the discussions between the Nova Scotia Barristers Society and Service Nova Scotia and Municipal Relations this author's approach is to accept easements as shown in a parcel register subject to a skeptical scrutiny. I pay particular attention when access is by cottage or

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10 *Sun N Sand Hotels Limited* v. *3094199 Nova Scotia Limited et al.* - SH 272285.

shore roads as I have found a significant number of parcels on these types of roads are shown as having "public" access when access is actually private.

NOTE: Few if any of the observations in this paper will be affected if benefits and burdens are determined to be registered interests instead of recorded interests.

v. **Red Flag -** The lawyer examining a parcel register is responsible for determining the legal effect, if any, of *recorded interests* and *prescribed contracts* in the parcel register. POL "Instrument Types" classification of recorded documents is helpful but is not determinative of their effect; the classification is simply an uncertified label. Do not rely on these labels; examine the documents carefully to confirm their legal effect yourself. For example, a lease may include an option or first refusal which is not flagged. At day's end it is the lawyer's interpretation of the recorded interests and prescribed contracts to his or her client that is critical - not the label on the document. Robert Burns said it best in his 1795 treatise on LRA[11]:

> "*The label is but the guinea's stamp,*
> *The Interest's the gowd for a' that*".

b. Administration

i. Print parcel graphics with "Topo" selected; this may alert you to visible but unrecorded rights of way affecting parcels. (I generally select all the display options and print the graphic using either "Print map" or in landscape mode so the summary of parcel details appears on the printed page.)

ii. It has been considered good practice to select the "Green Layer" when viewing and printing parcel graphics as a heads up for potential underlying Crown interests. We are advised that the Green Layer may be removed from POL soon to eliminate the uncertainty it has created in a number of transactions. Practitioners will still have to turn their minds to the possibilities of underlying Crown interests in parcels[12].

iii. Intake procedures are key to avoiding difficulties:

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11 With apologies to Robert Burns, *A Man's a Man for A' That*, 1795.

12 Garth C. Gordon, Q.C., *Comments About Underlying Crown Grants, Association of Nova Scotia Land Surveyors' Continuing Education Program, April 29, 2005*. The author has asked the Barristers' Library to post a copy of this paper in its Secondary Resources materials available through the Nova Scotia Barristers' Society website.

(1) Ask clients about access to, and the use of, parcels in your intake procedure so you can look for restrictions affecting access to, or use of, the parcels in your searches[13].

(2) Ensure your searcher:

(a) searches title to private access with particular regard to whether private access is based on a grant, on use and enjoyment (*i.e.*, implied grant or estoppel) or on prescription; and

(b) determines if all rights of way to the parcels you are concerned with

(i) are shown as burdens in the servient tenements' parcel descriptions and parcel registers; and

(ii) have priority over other recorded interests in the servient tenements.

6. PARCEL REGISTERS - ERRORS & OMISSIONS

a. **Red Flag -** Many migrated parcels with private access are incorrectly shown as having public access. If you are acting for a purchaser or mortgagor watch for this error and others - particularly with rural parcels. If you are migrating a parcel avoid this error. The Registrar General has stated[14]:

> "I think the transferee's lawyer has to be vigilant on purchase and object to incorrect access types. Where an error is made on the AFR the registering lawyer is required to fix it."

b. **Red Flag (Priority of Rights of Way) -** A right of way benefitting the parcel you are dealing with could be lost by judicial sale under a mortgage or judgment with priority over the right of way in the title of the servient tenement. Other prior interests may limit the use of the right of way. These prior interests should be shown as textual qualifications ("TQ") in the dominant tenement's parcel register; but they may not be. **Be safe. Confirm the priority of the right of way vis-a-vis other interests in the servient tenement. For granted rights of way be careful to determine the first recording date of the right of way - not just the date of the last instrument that may be shown as the enabling instrument for the right of way in the parcel register.** Be sure to consider the effect, if any, on ungranted rights of way which may exist by implication or operation of law. The Registrar General says[15]:

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13 Professional Standards 2.3 Access and 1.1 Legislative Review.

14 Email correspondence September 22, 2006.

15 Email correspondence, October 20, 2006.

"If an easement is impaired by a prior recorded interest, I think that the appropriate way to deal with that (whilst you arrange for a postponement agreement) is to add the qualification in a TQ and, once the agreement is obtained, remove the TQ with a F24.

Without a TQ, the register will have to be analyzed purely on a review of recording dates and this can lead to missed priorities problems by the searching party."

7. PROPERTY ON-LINE ACCESS CHOICES

a. POL provides thirteen access categories[16] which, excepting "Blank", I have grouped under four headings. These groupings are shown in the Access Chart on page 11.

b. The groupings are:

i. No Access - self explanatory.

ii. Public Access - access as a public right over lands or waters adjacent to the parcel:

(1) Public,
(2) Public (Other), and
(3) Navigable Waterway.

iii. Private Access - access as a private right appurtenant to the parcel:

(1) Private,
(2) Private (by grant),
(3) Private (by prescription),
(4) Private (openly used and enjoyed),
(5) Private (Other),
(6) Right of Way (Driveway), and
(7) Right of Way (Walkway).

iv. Other - access as a private right or privilege which is personal to the owner or is otherwise not appurtenant to the parcel.

Refer to the Access Chart on the next page.

The suggested grouping of the POL access categories in this paper attempts to match these with categories of access in law.

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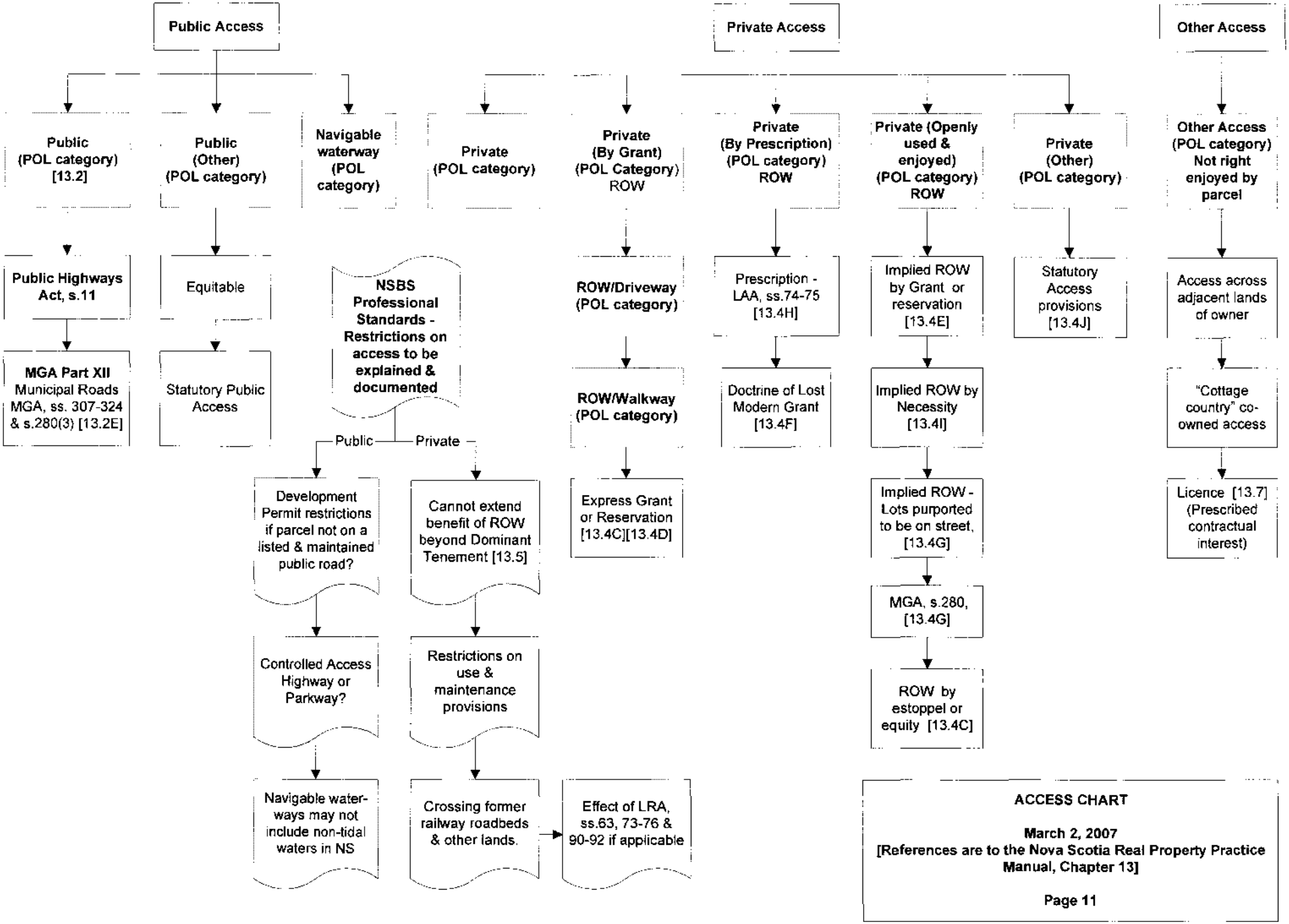
[16] These categories were expanded in 2004 at the request of the Procedures Advisory Committee .



ACCESS CHART

March 2, 2007

[References are to the Nova Scotia Real Property Practice Manual, Chapter 13]

8. PUBLIC ACCESS CATEGORIES

a. **PUBLIC**

i. Public streets and roads may be Municipal or Provincial.

ii. Municipal streets are governed by Part 12 of MGA.

(1) MGA, ss.307 and 308, define "street" and vest streets in municipalities.

(2) MGA, s.280(3), vests new streets and new extensions of streets in the municipality when the final approved plan is filed in the registry:

> 280(3) The new streets and new extensions of streets shown on a plan of subdivision, excluding roads that are shown on the plan as private roads, are vested absolutely in the municipality in which they are situate when the final approved plan is filed in the registry.

Section 280(3) came into effect on and after April 1, 1999[17] plans since then may be the only (deemed) conveyance of a street to a Municipality.

iii. Provincial Roads are governed by the *Public Highways Act*.

(1) The *Public Highways Act*, provides, *inter alia*:

> s.11(1) Except in so far as they have been closed according to law,
>
> (a) all allowances for highways made by surveyors for the Crown;
>
> (b) all highways laid out or established under the authority of any statute;
>
> (c) all roads on which public money has been expended for opening, or, on which statute labour has been performed prior to the twenty-first day of March, 1953;
>
> (d) all roads passing through Indian Lands;
>
> (e) all roads dedicated by the owners of the land to public use[18];
>
> (f) every road now open and used as a public road or highway; and
>
> (g) all alterations and deviations of, and all bridges on or along any road or highway
>
> shall be deemed to be common and public highway until the contrary is shown.

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17 Under MGA, s.584 (1) "This Act, except subsections 134(2) and (3) and Section 199, has effect on and after April 1, 1999..."

18 *Herman* v. *Whynot* (1976), 21 N.S.R. (2d) 201 (N.S.S.C.); *Seimac Ltd.* v. *Wood*, 1987 CarswellNS 316.

(2) Every common and public highway, together with the land within the highway's boundaries, is vested in Her Majesty in right of the Province.

...

Acceptance of road or allowance as public highway required

16(2) No road or allowance for a road laid out, made or set aside by any person other than the Minister or some person acting on his behalf **after the twenty-first day of March, 1953**, becomes a public highway for the purposes of this Act until the Minister indicates formally that he accepts the road or allowance as a public highway for the purposes of this Act. R.S., c. 371, s. 16.[19]"

(2) **Red Flags -**

(a) **Controlled Access Highways and Parkways**. Ian H. MacLean flagged no-access or limited access highways as an issue:

> "I think this issue needs to be identified and addressed when migrating. I don't believe it is accurate to indicate that there is public access, if in fact the only frontage is along a 100 series highway."

When the only access to a parcel is by a controlled access highway or parkway[20] note that in a textual qualification stating that access is restricted under the *Public Highways Act*.

(b) **Other restrictions**. Refer to **Schedule "A"** - Public Highway Access Considerations provided by TPW; it explains other restrictions on access to public highways.

(c) **Class "Z" roads.** These are private roads maintained by TPW which may appear to be public roads because of this classification or TPW maintenance. Ian H. MacLean provided the following comment on September 19, 2006:

> "... in recent months I encountered what was identified to me as a Z class road. I was acting for a Buyer of a rural property and the Seller's lawyer created a parcel register showing public access. I didn't think this was right, and I questioned her. She checked with her client and the client said there is a stop sign at the end of her road, and that the road is maintained by DOT. That sounds conclusive, but when I checked with DOT I learned that this is a privately owned piece of ground upon which DOT agreed to provide limited services on a purely voluntary basis. Apparently there are a half a dozen or so such roads in Pictou County (and I am told there are scattered throughout the Province), but the Area Manager says he cannot identify them for me, except if I ask whether or not a particular road is indeed Z class. Apparently DOT started providing service on such roads in the

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19 Refer to *Seimac Ltd.* v. *Wood*, 1987 CarswellNS 316 which found a highway was public (without acceptance) because it was dedicated to public use before March 21, 1953.

20 Refer to sections 21-23 of the *Public Highways Act*.

1970s or even into the early 1980s, and thus it doesn't come under the umbrella of the *Public Highways Act* (the March 21, 1953 reference)."

(3) How can you tell if a road is public?

(a) Ask TPW or the Municipal Development Office to confirm the road status from their current road lists. District TPW offices will refer questions beyond their information base to Halifax for determination. Checking with Local Development Officers can reveal development permit limitations arising from the access category as part of your due diligence under Professional Standard 1.1 Legislative Review.

(b) **Red Flag -** In one migration TPW said it owned a road only to a certain point stating it was not a public road beyond that point. As our client insisted the whole road was public, further inquiry determined the continuation of the road was public but under DNR administration.

(c) Locate the conveyance[21] transferring the road to TPW or the Municipality.

(d) Common knowledge of notoriously public roads in everyday use.

(e) Historical searches may be beyond most of our local resources; many would simply gather the best information available including an oral history of the road from clients then forward the information to TPW for a determination. The following are some of the historical sources checked by TPW researchers:

(i) The grant map for the parcel, if any; it may show the access and any road reserved to the Crown.

(ii) The early Provincial Highway Reports - they show maintenance expenditures on roads that were repaired during the reporting year - they are available for 1908 to 1912 and 1918 to 1941.

(iii) When necessary and where available, and if, an approximate date of layout is known one might find the record of a road's layout in the old Municipal Council Minutes or Minutes of the early Courts of the General Sessions of the Peace.

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[21] This will include deemed conveyances to municipalities under MGA, s.280(3).

(iv) Early Map sources:

1) Wm. McKay's 1834 Map of Nova Scotia,
2) The A. F. Church & Co. County Maps (1864),
3) The early series of the Canadian Geological Maps (dating from the late 1880's),
4) The 1919 Provincial Highway Board Map showing Provincial Highways,
5) The 1921 County road maps - where applicable,
6) The 1924 Map of the Province of Nova Scotia prepared by the Provincial Highway Board, and
7) Undated County road maps (c.1900) where available.

(4) Other Observations:

(a) Class K - abandoned roads. These are still owned by the Crown but are not maintained. **Red Flag -** These are public highways for migration purposes but, because they are not maintained, may not qualify a parcel served by them for some municipal development permit purposes.

(b) Ian H. MacLean provided the following on September 19, 2006:

> "In rural Nova Scotia we often encounter situations where a forestry company has rebuilt a listed but not maintained road. Quite often the Company will choose not to follow the exact path of the old road. Clearly the public has the right to use the rebuilt portions of the old road, but absent consent of the forestry company I don't believe there is any right to use the new portions. From a practical point of view the forestry companies generally allow such access and I suppose in many cases a prescriptive right can be documented, but this is not always the case."

Refer to **Schedule "A"** for TPW comments on private upgrading of public roads. Refer also to s.27 of the *Crown Lands Act* respecting forest roads over Crown lands.

b. **PUBLIC (OTHER).**

i. This might include

(1) Equitable rights of way granted by the Provincial Crown[22].

(2) Statutory public access.

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[22] *Hill* v. *NS(AG)*, 1997 CarswellNS 10 (Supreme Court of Canada).

c. NAVIGABLE WATERWAY

i. Public right of navigation - Tidal Waters.

(1) "Navigable Waterway" may be used for access over navigable tidal waters.

ii. Public right of navigation - non-tidal waters in Nova Scotia.

(1) **Red Flag -** Because the law may be different in Nova Scotia, treat cases dealing with the right of navigation over non-tidal waters in other provinces with caution before applying them to Nova Scotia matters.

(2) **Red Flag -** I recommend that you not use "Navigable Waterway" for parcels on non-tidal Nova Scotia waters except when

(a) the non-tidal navigable waterway access is authorized by statute[23];

(b) assuming out of caution that the "English rule" discussed below is the law in Nova Scotia, the Province of Nova Scotia, as owner of the bed of the non-tidal watercourse, has dedicated the particular watercourse[24] as a highway; or

(c) the courts determine there is a public right of navigation over non-tidal waters in Nova Scotia that are *de facto* navigable - as in other provinces.

(3) It is an open question whether this category may be used for access over **non-tidal Nova Scotia waters** that are *de facto* navigable. I discuss one 1991 Nova Scotia case dealing with non-tidal access by water, *Hirtle* v. *Ernst*[25], below. But I will first set the stage for that discussion with references to more recent text and case references. In *Anger & Honsberger*

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[23] See, for example, s.3(2) of the *Angling Act* which permits Nova Scotia residents with rod and line to go on watercourses for the purpose of lawfully fishing.

[24] Corkum v Nash (1990), 71 D.L.R. (4th) 390, 98 N.S.R. (2d) 364, 1990 CarswellNS 185, 263 A.P.R. 364, [1990] N.S.J. No. 423 (N.S. T.D., Jul 20, 1990), 1990 CarswellNS 185 held that a harbour was not a "watercourse":

> "42 The words river, stream, lake, creek, pond, spring, lagoon, swamp, march, wetland, ravine, gulch are interior bodies of water, for the most part non tidal and non brackish, which (except incidentally with respect to some rivers) are not directly connected to the sea. A harbour does not fall into the same genus or category and, in my opinion, does not fall within the definition of watercourse in the *Water Act*."

[25] (1991), 21 R.P.R. (2d) 95 (N.S. T.D.).

Law of Real Property, Third Edition[26], at pages 19-22 and 19-23, the author states:

> "In England the public has a natural right to navigate[1] in tidal waters but, though non-tidal streams may be *de facto* navigable, the public has no right to navigate on them except as authorized by statute or immemorial custom or unless the owner of the bed has dedicated the stream as a highway.[2] In most of Canada the rule is that if waters are *de facto* navigable, the public right of navigation exists there, whether the waters are tidal or non-tidal.[3] **In the Atlantic provinces, however, the courts have long assumed that the English rule applies[4], and the Supreme Court of Canada has left the point open.[5]** (Emphasis added)

The Supreme Court of Canada decision referred to in the above quotation is *Friends of the Oldman River Society* v. *Canada (Minister of Transport)*[27] in which La Forest, J., examined rights of navigation as follows:

> "74 ... I begin then by examining the circumstances that existed when the legislation was first enacted, bearing in mind that the general subject matter of the statute concerns navigation.
>
> 75 In so doing, it is useful to return to some of the fundamental principles of water law in this area, particularly those pertaining to navigable waters. It is important to recall that the law of navigation in Canada has two fundamental dimensions -- the ancient common law public right of navigation and the constitutional authority over the subject matter of navigation -- both of which are necessarily interrelated by virtue of s. 91(10) of the *Constitution Act*, 1867, which assigns exclusive legislative authority over navigation to Parliament.
>
> 76 The common law of England has long been that the public has a right to navigate in tidal waters, but though non-tidal waters may be navigable in fact the public has no right to navigate in them, subject to certain exceptions not material here. **Except in the Atlantic provinces, where different considerations may well apply, in Canada the distinction between tidal and non-tidal waters was abandoned long ago: see *Re Provincial Fisheries* (1896), 26 S.C.R. 444 , on appeal (sub nom. *Canada (Attorney General)* v. *Ontario (Attorney General)*) [1898] A.C. 700 (P.C.); for a summary of the cases, see my book on *Water Law In Canada: The Atlantic Provinces* (1973), at pp. 178-80.** Instead the rule is that if waters are navigable in fact, whether or not the waters are tidal or non-tidal, the public right of navigation exists. That is the case in Alberta where the Appellate Division of the Supreme Court, applying the *North West Territories Act*, R.S.C. 1886, c. 50, rightly held in *Flewelling* v. *Johnston*, [1921] 2 W.W.R. 374, 16 Alta. L.R. 409, 59 D.L.R. 419 (C.A.) , that the English rule was not suitable to the conditions of the province. There is no issue between the parties that the Oldman River is in fact navigable." (Emphasis added)

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26 Anne Warner La Forest, *Anger & Honsberger Law of Real Property, Third Edition*, (Aurora, Canada Law Book Company, 2005).

27 (1992), 84 Alta. L.R. (2d) 129, [1992] 1 S.C.R. 3, [1992] 2 W.W.R. 193, 7 C.E.L.R., (N.S.) 1, 132 N.R. 321, 88 D.L.R. (4th) 1, 3 Admin. L.R. (2d) 1, 48 F.T.R. 160, 1992 CarswellNat 1313.

iii. **What is the right of navigation?**

(1) The key principles respecting the right of navigation include:

(a) the waters must be navigable in fact;

(b) the right of navigation is not a property right, but simply a public right of way;

(c) this public right of way is not an absolute right, but must be exercised reasonably so as not to interfere with the equal rights of others; and

(2) the right of navigation is paramount to the rights of the owner of the bed, even when the owner is the Crown.

In *Friends of the Oldman River Society* v. *Canada (Minister of Transport), above*, La Forest, J., also stated:

> "77 The nature of the public right of navigation has been the subject of considerable judicial comment over time, but certain principles have held fast. First, the right of navigation is not a property right, but simply a public right of way: see *Orr Ewing* v. *Colquhoun* (1877), 2 App. Cas. 839 at 846 (H.L.). It is not an absolute right, but must be exercised reasonably so as not to interfere with the equal rights of others. Of particular significance for this case is that the right of navigation is paramount to the rights of the owner of the bed, even when the owner is the Crown. For example, in *Attorney General* v. *Johnson* (1819), 2 Wils. Ch. 87, 37 E.R. 240 (L.C.), a relator action to enjoin a public nuisance causing an obstruction in the River Thames and an adjoining thoroughfare along its bank, the Lord Chancellor said, at p. 246:
>
> > I consider it to be quite immaterial whether the title to the soil between high and low water-mark be in the Crown, or in the City of London, or whether the City of London has the right of conservancy, operating as a check on an improper use of the soil, the title being in the Crown, or whether either Lord Grosvenor or Mr. Johnson have any derivative title by grant from any one having the power to grant ... It is my present opinion, that the Crown has not the right either itself to use its title to the soil between high and low water-mark as a nuisance, or to place upon that soil what will be a nuisance to the Crown's subjects. If the Crown has not such a right, it could not give it to the City of London, nor could the City transfer it to any other person.
>
> 78 This court later came to the same conclusion in *Wood* v. *Esson* (1884), 9 S.C.R. 239 . There, the plaintiffs had extended their wharf so as to interfere with access to the defendant's wharf. The defendant pulled up the piles and removed the obstruction to allow passage to his wharf, and the plaintiffs then brought an action in trespass on the ground that they enjoyed title under a grant from the province of Nova Scotia to the soil of the harbour on which the wharf was constructed. The court held that the defendant was entitled to abate the nuisance created by the obstruction to navigation in the harbour. Strong J. remarked, at p. 243:
>
> > The title to the soil did not authorize the plaintiffs to, extend their wharf so as to be a public nuisance, which upon the evidence, such an obstruction of the harbour amounted to, for the Crown cannot grant the right so to obstruct navigable waters;

nothing short of legislative sanction can take from anything which hinders navigation the character of a nuisance ." (Emphasis added)

iv. What waters are "navigable?

(1) If there is a public right of navigation over non-tidal Nova Scotia waters the following statements of the Ontario High Court in *Canoe Ontario* v. *Reed*[28] may be relevant here:

> "28 I must now turn to the applicable law. The legal meaning of the phrase "navigable waterway" received considerable judicial attention in the late 19th century and in the early part of this century. Those authorities are carefully considered and analysed in the scholarly judgment of Henry J. in *Re Coleman and A.G. Ont.*[FN1] I have found his judgment most helpful as it deals with a waterway (the Bronte River) which is similar in many ways to the Credit River. I accept the following conclusions drawn by Henry J. from the earlier authorities:
>
> 29 (i) Navigability in law requires that the waterway be navigable in fact. It must be capable in its natural state of being traversed by large or small craft of some sort.
>
> 30 (ii) Navigable also means floatable in the sense that the river or stream is used or is capable of use for floating logs or log rafts or booms.
>
> 31 (iii) A river may be navigable over part of its course and not navigable over other parts.
>
> 32 (iv) To be navigable, a river need not in fact be used for navigation so long as it is realistically capable of being so used.
>
> 33 (v) A river is not navigable if it is used only for private purposes or if it is used for purposes which do not require transportation along the river (e.g. fishing).
>
> 34 (vi) Navigation need not be continuous but may fluctuate with the seasons.
>
> 35 (vii) Where a proprietary interest asserted depends on a Crown grant, navigability is initially to be determined as at the date of the Crown grants (in this case, 1821 and 1822).
>
> 36 If a waterway is held to be navigable then, absent valid legislative action to the contrary, the ownership of the riverbed does not rest in a private individual but in the Crown, and the public is entitled to travel the waterway.[FN2] The concept of navigability is premised on the notion that certain waterways are akin to public highways and are viewed as being within the public domain.[FN3] In a young country like Canada, where river routes are numerous and were of central importance to the exploration, settlement, and commercial development of the country, it is not surprising that claims of public access to these rivers have fallen on sympathetic judicial ears.[FN4] In essence, the test for navigability developed in Canada is one of public utility. If a waterway has real or potential practical value to the public as a means of travel or transport from one point of public access to another point of public access, the waterway is considered navigable.[FN5]

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[28] (1989), 6 R.P.R. (2d) 226, 69 O.R. (2d) 494, 1989 CarswellOnt 595 (Ont H.C.).

37 Many authorities, particularly those emanating from the province of Quebec,[FN6] and the United States,[FN7] limit the public utility test for navigability to situations where the transport is in the nature of commerce. It is not surprising that commercial usefulness has played a central role in determining the public utility of a waterway, since at one time water transport was almost entirely commercially motivated. I agree with Henry J. in *Re Coleman and A.G. Ont.*,[FN8] that commercial utility is not a *sine qua non* to navigability, although evidence of commercial use will be determinative of the question. If the purpose underlying the recognition of a public interest in certain waterways is analogous to that which recognizes the public interest in certain highways, then that purpose is not served by limiting navigability to cases involving commercial usage. A public highway may serve many public purposes other than a purely commercial one. For example, it may provide a valuable social and communication link between communities. Rivers on which people can readily travel can potentially provide the same link.

38 A distinction between public commercial use and public non-commercial use is also unrealistic. Many non-commercial uses can readily be turned into commercial endeavours. This case provides an example. If several individuals, for recreational purposes, canoe down the river, then their purpose is entirely non-commercial; however, if one individual, perhaps more experienced than the others, purports to operate a tour down the river and to charge individuals for canoeing the river with him, then the exact same trip becomes a commercial endeavor. Navigability should not depend on such personal considerations. Navigability should depend on public utility. If the waterway serves or is capable of serving a legitimate public interest in that it is or can be regularly and profitably used by the public for some socially beneficial activity, then, assuming the waterway runs from one point of public access to another point of public access, it must be regarded as navigable and as within the public domain.

39 I do not intend to hold that any body of water which, at some point for some brief instant, can be used by some segment of the public for some legitimate public purpose is thereby a navigable or public waterway. If, however, the use is regular and has practical value, then seasonal limitations or limits on the type or nature of the public utility do not remove that waterway from the public domain.[FN9]"

v. Jurisdiction over navigation

(1) The supremacy of the Federal legislative responsibility for navigation over provincial proprietary rights in watercourses was confirmed by the Supreme Court of Canada in In *Reference re Waters & Water-Powers*[29] as follows:

"41. ... A province is, moreover, bound, of course, in dealing with rivers in respect of which it has powers of control, to observe any regulation validly enacted by the Dominion in relation to navigation works or in exercise of its authority over navigable waters.

42 It would not be a sufficient recognition of the jurisdiction of the Dominion to affirm that, in the circumstances mentioned in the question, a province is entitled to regulate and control the waters of the river so long as navigation is not interfered with. The obligation of the province in such circumstances is much more definite and precise, as has just been stated. The exercise of jurisdiction by a province, in a manner permitted

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[29] [1929] S.C.R. 200. [1929] 2 D.L.R. 481,1929 CarswellNat 35.

by the terms of the question, might constitute a substantial encroachment upon the exclusive authority of the Dominion."

(2) The distinction between proprietary rights and legislative jurisdiction was noted by the Privy Council in *Reference Re Provincial Fisheries*[30]:

> "14 Before approaching the particular questions submitted, their Lordships think it well to advert to certain general considerations which must be steadily kept in view, and which appears to have been lost sight of in some of the arguments presented to their Lordships.
>
> 15 It is unnecessary to determine to what extent the rivers and lakes of Canada are vested in the Crown, or what public rights exist in respect of them. Whether a lake or river be vested in the Crown as represented by the Dominion or as represented by the province in which it is situate, it is equally Crown Property, and the rights of the public in respect of it, except in so far as they may be modified by legislation, are precisely the same. The answer, therefore, to such questions as those adverted to would not assist in determining whether in any particular case the property is vested in the Dominion or in the province. **It must also be borne in mind that there is a broad distinction between proprietary rights and legislative jurisdiction.** The fact that such jurisdiction in respect of a particular subject-matter is conferred on the Dominion Legislature, for example, affords no evidence that any proprietary rights with respect to it were transferred to the Dominion. There is no presumption that because legislative jurisdiction was vested in the Dominion Parliament proprietary rights were transferred to it. The Dominion of Canada was called into existence by the *British North America Act*, 1867. Whatever proprietary rights were at the time of the passing of that Act possessed by the provinces remain vested in them except such as are by any of its express enactments transferred to the Dominion of Canada." (Emphasis added)

(3) Paragraph 77 of the Supreme Court of Canada's decision in *Friends of the Oldman River Society*, above. states, *inter alia*:

> "... Of particular significance for this case is that the right of navigation is paramount to the rights of the owner of the bed, even when the owner is the Crown. ..."

vi. **Red Flag -** *Hirtle* v. *Ernst* and waterfront parcels in Nova Scotia

(1) In 1991 Nathanson, J., decided that a lakefront parcel did not have access *by right* over the waters of Big Mushamush lake in Nova Scotia[31]. This case was decided the year before the Supreme Court of Canada decision in *Friends of the Oldman River Society*. His Lordship's decision is based on two findings:

> "52 The plaintiff can have no right to use or pass over the waters of Big Mushamush Lake, because Big Mushamush Lake is vested in the Crown, and any right that any

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30 1898 CarswellNat 41.

31 *Hirtle* v. *Ernst* (1991), 21 R.P.R. (2d) 95 (N.S. T.D.).

> predecessor in title of the plaintiff may have had was discharged and released on May 16, 1919. The fact that, by virtue of s. 4(1) of the Act, the Minister may authorize the plaintiff to use the lake would not affect the reality that the plaintiff's access would not be as of right.
>
> 53 I also find no evidence that Big Mushamush Lake can be used for transportation of things needed for reasonable use of the plaintiff's land, that Big Mushamush Lake has transportation facilities for carrying on the ordinary and necessary activities of life to and from the land, and that Big Mushamush Lake has been used or is usable as a highway of commerce and travel."

(2) His Lordship does not expressly find that Big Lake Mushamush is not a navigable waterway. His finding that there was no evidence that Big Mushamush Lake can be used for transportation of things needed for reasonable use of the plaintiff's land seems to equate to such a finding. If so this finding renders his first finding about the effect of the *Water Act* moot.

(3) His Lordship's holding that the plaintiff can have no right to use or pass over the waters of Big Mushamush Lake, simply because Big Mushamush Lake is vested in the Crown is problematic. If the "English rule" of navigability does not apply in Nova Scotia there is a public right of navigation over *de facto* navigable non-tidal waters in Nova Scotia notwithstanding the province's proprietary rights in watercourses in Nova Scotia. If the "English rule" does apply in Nova Scotia the province's proprietary right is subject to the Dominion's legislative authority over navigation.

(4) **Red Flag** - Until the question whether there is a public right of navigation across *de facto* navigable non-tidal waters in Nova Scotia this decision casts doubt on any right of public access across *de facto* navigable watercourses in Nova Scotia.

vii. Navigable waterways and Zoning By-laws.

(1) **Red Flag** - In *Dominion Diving Ltd.* v. *Dartmouth (City)*[32] the court held that the navigable waters of Halifax Harbour were not a street as defined in the zoning by-law. The word "street" as defined in the bylaw is to be interpreted in accordance with: (a) the common everyday meaning of the word, (b) the *Planning Act*, (c) the *Public Highways Act* and (d) the meaning of the same word elsewhere in the by-law.

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[32] (1993), 125 N.S.R. (2d) 378, 349 A.P.R. 378, 1993 CarswellNS 363 (S.C.) (Nathanson, J,) .

9. PRIVATE

a. PRIVATE

i. I understand that SNS&MR intends to disable this category in the future[33]. Use one of the more specific categories of private access.

b. PRIVATE (BY GRANT)

i. I believe this category includes rights of way created by express reservation. Migrating lawyers must demonstrate marketable title to granted and reserved rights of way. No separate abstract for the right of way is required if the root and chain of title for the parcel includes the granted right of way[34]. You should still determine if the access is referenced in either or both of the parcel description and parcel register of the servient tenant[35].

ii. **Red Flag -** Do not confuse rights of way which are legal interests in lands with licences which are generally personal rights. The former are recorded as benefits and burdens under LRA. Licences are "prescribed contracts" which should be entered into parcel registers in the "recorded interests" section. Licences are discussed under "Other", below.

c. PRIVATE (BY PRESCRIPTION)

i. Prescriptive rights of way can be acquired under the *Limitations of Actions Act* or the doctrine of lost modern grant. In *Knock* v *Fouillard*[36] the court wrote:

> "39 In Nova Scotia, an easement by prescription can be acquired in two ways, namely, under s.32 of the *Limitations of Actions Act* or under the doctrine of lost modern grant. The latter was described by Charles MacIntosh, author of the *Nova Scotia Real Property Practice Manual* (at p. 7-21), as "a judge-created theory which presumes that if actual enjoyment has been shown for 20 years, an actual grant had been made when the enjoyment began, but the deed granting the easement has since been lost. However, the presumption may be rebutted."
>
> 40 Another helpful articulation of this doctrine is found in *Henderson* v. *Volk* (1982), 35 O.R. (2d) 379 (Ont. C.A.) where Cory, J.A. (as he then was) stated (at p.382) "that where there has been upwards of 20 years uninterrupted enjoyment of an easement and such enjoyment has all the necessary qualities to fulfill the requirements of prescription, ... the law will adopt the legal fiction that such a grant was made despite the absence of any direct evidence that it was in fact made".

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33 Email from Mark Coffin October 27, 2004.

34 Practice Standard 2.3 Access.

35 Practice Standard 2.3 Access.

36 2006 CarswellNS 199, 2006 NSSC 143, 43 R.P.R. (4th) 310 (N.S. S.C. May 16, 2006).

41 As affirmed by the Nova Scotia Court of Appeal in the recent case of *Mason* v. *Partridge*, [2005] N.S.J. No. 452 (N.S. C.A.), to acquire an easement under either of the foregoing ways, the claimant must demonstrate a use and enjoyment of the right-of-way under a claim of right which was continuous, uninterrupted, open and peaceful for a period of 20 years. However, under the doctrine of lost modern grant, it need not be the 20 year period immediately preceding the bringing of an action. It is because of that distinction that the plaintiff in the present case asserts an easement by prescription under the doctrine of lost modern grant, rather than under the limitations statute."

ii. LRA, ss.74 and 75, deal with prescriptive interests in parcels as follows:

74 (1) Except as provided by Section 75, no person may obtain an interest in any parcel registered pursuant to this Act by adverse possession or prescription unless the required period of adverse possession or prescription was completed before the parcel was first registered.

(2) Any interest in a parcel acquired by adverse possession or prescription before the date the parcel is first registered pursuant to this Act is absolutely void against the registered owner of the parcel in which the interest is claimed ten years after the parcel is first registered pursuant to this Act, unless

(a) an order of the court confirming the interest;

(b) a certificate of lis pendens certifying that an action has been commenced to confirm the interest;

(c) an affidavit confirming that the interest has been claimed pursuant to Section 37 of the Crown Lands Act; or

(d) the agreement of the registered owner confirming the interest, has been registered or recorded before that time.

(3) Nothing in this Section affects any interest in a parcel acquired by adverse possession or prescription, where the required period of adverse possession or prescription was completed before the paper title to the parcel was first registered, if

(a) there is a marketable title to the interest acquired by adverse possession or prescription pursuant to the Marketable Titles Act when the paper title to the parcel was first registered: or

(b) the interest is a fee simple estate and the holder of the interest registered the parcel pursuant to this Act prior to registration by the holder of the paper title.

75 (1) The owner of an adjacent parcel may acquire an interest in part of a parcel by adverse possession or prescription after the parcel is first registered pursuant to this Act, if that part does not exceed twenty per cent of the area of the parcel in which the interest is acquired.

(1A) An owner of an undivided interest in a parcel may acquire the whole interest in the parcel by adverse possession or prescription after the parcel is first registered pursuant to this Act.

(2) For the purpose of this Section, adverse possession and prescription include time both before and after the coming into force of this Act.

iii. Professional Standard 3.3 Prescriptive Rights states:

> "A lawyer may certify title to interests acquired by prescription in accordance with legislation, common law and equity.
>
> A lawyer must document facts evidencing prescriptive rights. This should be done with the best possible and reasonably attainable evidence, such as recorded affidavits or statutory declarations provided by persons such as surveyors and neighbouring property owners. In determining whether the standard for proof of prescriptive rights has been met, a lawyer must consider the extent and quality of the evidence as a whole and exercise professional judgment accordingly.
>
> When preparing an opinion of title to certify title to interests acquired by prescription, a lawyer must consider the effect of the *Land Registration Act* with respect to prescriptive rights and advise the client accordingly.
>
> When qualifying an opinion of title to a client with respect to an interest that may be lost by the operation of the *Land Registration Act*, a lawyer must explain the qualifications to the client and confirm the client's instruction prior to closing."

iv. **Red Flag -**

(1) On October 10, 2006 the Registrar General provided the following advice[37]:

> "On Friday, I rejected stat decs that were presented with F24s to add a burden to a registered parcel, in favour of a [registered] abutter. The rationale was that subsection 74(2) of the LRA stands for the proposition that a prescriptive interest cannot be obtained against a registered parcel without a court order.
>
> The "wandering boundary line" provisions would preserve the interest [either pre-existing or that have "ripened" after the servient title's registration], but I think Section 74 would require a court order to add the preserved prescriptive burden to the servient parcel's title."

(2) It is difficult to reconcile s.74(2) which voids prescriptive interests in prior registered parcels while s.75, simultaneously, permits adjacent parcel owners to acquire prescriptive rights of way in those registered parcels. This inconsistency is under review by the Registrar General[38].

(3) If you need to migrate an ungranted private right of way over a previously migrated servient tenement consider the following alternatives:

(a) If the right of way is "used and enjoyed" (see discussion below) thus protected as an overriding interest by LRA, s.73(1)(e), consider recording it under the authority of LRA, S-47(4). This recording

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37 Email correspondence October 10, 2006.

38 Email correspondence October 10, 2006.

process is not settled under POL at the moment but is under review by the Registrar General.

(b) If the right of way is by prescription and does not come under LRA, s.75, record one of the documents required under s.74(2) or show "No access" respecting the right of way.

(c) If the right of way is by prescription and comes under LRA, s.75, push to have it recorded after sufficiently proving it "on the record" and proving that it affects less than twenty percent of the servient tenement's area. If the Registrar General refuses to record this interest your client may have to challenge his refusal as an "aggrieved party" under LRA, s.90.

v. **Red Flag -** Expect others to aggressively challenge any migrated possessory interest in a parcel if they believe those possessory interests are not properly proved by recorded, statutory declarations or affidavits on the record. They may apply to the courts to have such migrated interests cancelled as an "aggrieved party" under LRA, ss.90-92. They may also use s.63 for invalid rights of way by prescription. Be especially vigilant for DNR attacks.

vi. **Red Flag** - The risk of challenges to possessory interests may be reduced considerably. Simply cover off all the required elements in the affidavits or statutory declarations you record to prove possessory interests. Apart from the owner's Statutory Declaration, record at least one Statutory Declaration from a knowledgeable, disinterested person. The paper *Affidavit Templates & Comments For Documenting Possessory Interests*[39] provides background information, commentary and templates for proving possessory interests including rights of way by prescription. **Schedule "B"** to this paper is a template adapted from that resource.

vii. **Red Flag - A registered servient tenement may be subject to a claim *including a lawsuit* for ten years after migration.** LRA, s.74(2), purports to make void certain prescriptive rights of way over a migrated servient tenement.

(1) There will be no claim if either

(a) you record the prescriptive right of way as a burden over the servient tenement during its migration; or

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[39] Garth C. Gordon, Q.C., 2006 Real Property Conference, Crown Interests and Due Diligence Under LRA: *The Sophomore Year*, February 2, 2006, A Joint Program Between The Nova Scotia Barristers' Society and The Real Estate Lawyers' Association of Nova Scotia.

(b) the prescriptive right of way was recorded during the prior migration of the dominant tenement.

(2) If you do not enter the prescriptive right of way as a burden in the servient tenement's parcel register on migration the dominant tenement owner may make a claim within ten years of the migration.

(3) Consider the following:

(a) If you are migrating the servient tenement advise the owner that the parcel will be subject to a claim for recording the prescriptive right of way for ten years after migration if it is not recognized in the migration. Your duty is found in Professional Standard 1.2 - Migration under the *Land Registration Act*. Before migrating the parcel without showing an apparent prescriptive right of way as a burden document your advice, your explanations and the client's instructions in writing under Professional Standards 1.2 and 1.5.

(b) If you migrate a client's parcel which has an apparent prescriptive right of way across it, consider noting this risk as a textual qualification in the servient tenement's parcel register.

(c) If you are acting for a client acquiring an interest in a parcel be alert to the possibility of this risk - whether or not the potential claim is noted in the parcel register. Some approaches to identify and deal with the this risk are:

(i) Encourage your purchaser and mortgagee clients to get current survey information that will disclose apparent interests before closing.

(ii) If you are asked to review an Agreement of Purchase and Sale for a purchaser before the agreement is signed, include a provision requiring the Vendor to disclose all interests in the parcel registered or recorded on the basis of a possessory interest in the last ten years.

(iii) If the parcel or a benefit associated with it was migrated within the past ten years

1) require the Vendor to convey the parcel and benefit by a warranty deed so your client may have recourse against the Vendor under the covenants of title; and

2) consider acquiring title insurance to cover the cost of defending title should a prior registered owner bring forward a claim under LRA, ss.74(2) or 90.

viii. There are other legislative limits on acquiring prescriptive rights including:

(1) *Federal Real Property and Federal Immovables Act*:

> s.14. No person acquires any federal real property or federal immovable by prescription.

This section became effective June 1, 1950 under the *Public Land Grants Act*, S.C. 1950, c.19. One must establish 60 years of use adverse to the federal Crown before June 1, 1950[40].

(2) *Environment Act* (Nova Scotia):

> 108 (1) Possession, occupation, use or obstruction of any watercourse, or any use of any water resource by any person for any time whatever on or after May 17, 1919, shall not be deemed to give an estate, right, title or interest therein or thereto or in respect thereof to any person.
>
> (2) Notwithstanding subsection (1), possession, occupation or use of a watercourse where the land is no longer covered by water, for a period of not less than forty years continuously, may give an interest therein in accordance with the principles of adverse possession or prescription. 1994-95, c. 1, s. 108; 2001, c. 6, s. 103.

This section must be read bearing in mind the Federal jurisdiction over navigation discussed in section 8.c above.

(3) *Public Highways Act*:

> s.17. Possession, occupation, user or obstruction of a highway or any part thereof by any person for any time whatever, whether before, on or after the twenty-first day of March, 1953, shall not be deemed to have given or to give to any person any estate, right, title or interest therein, or thereto, or in respect thereof, but the highway or part thereof shall, notwithstanding such possession, occupation, user or obstruction be and remain a common and public highway.[41]

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[40] *Nickerson* v. *Canada (Attorney General)* (2000), 185 N.S.R. (2d) 36; 575 A.P.R. 36 32 R.P.R. (3d) 141, 2000 Carswell NS 160.

[41] See *Ewing* v. *Publicover* (1976), 13 N.S.R. (2d) 346 (N.S.S.C.). A purchaser had an Agreement of Purchase and Sale put aside because part of the property to be purchased was within the statutory highway width and was not the vendor's to sell.

(4) *Municipal Government Act*:

> s.59(4) Possession, occupation, use or obstruction of property of a municipality does not give an estate, right or title to the property.
>
> s.308(4) Possession, occupation, use or obstruction of a street, or a part of a street, does not give and never has given any estate, right or title to the street.

(5) *Off-highway Vehicles Act*:

> s.14B. No person who operates or who is a passenger on an off-highway vehicle on land, with or without the permission of the owner or occupier of the land, thereby acquires any property rights with respect to the land. 2005, c. 56, s. 9.

d. PRIVATE (OPENLY USED AND ENJOYED)

i. Rights of way used and enjoyed are overriding interests protected by s.73(1)(e); as such they may be recorded in a parcel register pursuant to LRA, s.47(4):

> s.47(4) Anyone with an overriding interest[42] in a parcel may record that interest.

The clearest example of an easement used and enjoyed is one created by implication in the following circumstance[43]:

> "Upon the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent accommodations afforded by the part retained to the part granted which
>
> (1) are of such a nature that they might form the subject-matter of an easement,
>
> (2) are necessary to the reasonable enjoyment of the property granted, and
>
> (3) have been and are at the time of the grant used by the owner of the entirety for the benefit of the part granted.
>
> This rule is founded upon the principle that a man shall not derogate from his grant."

ii. LRA does not define the term "an easement or right of way that is being used and enjoyed" which is only found in s.73(1)(e). Under principles of statutory interpretation this term cannot be a synonym for prescriptive interests; "prescription" is only found in LRA, in ss.74 and 75. In any case one cannot reconcile s.73(1)(e) with s.75(2) unless these terms refer to separate interests. The term "an easement or right of way that is being used and enjoyed" appears to include rights of way created by implication on the severance of parcels - where that term seems to originate. Rights of way by prescription are founded under

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42 LRA, s.3(1)(k) "overriding interest" means an interest referred to in subsection 73(1).

43 *DuVernet* v. *Eisener*, [1951] 4 D.L.R. 406 (N.S.C.A.) as quoted in *English* v. *Wood*, cited below.

the *Limitations of Actions Act* or the doctrine of lost modern grant as noted above.

iii. It would be useful for clarity under LRA to define "an easement or right of way that is being used and enjoyed" to include easements and rights of way implied by law and those created by promissory estoppel. This would clearly recognize these as protected interests under LRA and differentiate them from prescriptive interests that may be made void by s.74(2). I have grouped these rights of way under this heading on that basis.

iv. In practice under LRA to date, I believe we have used the access categories "Private (Openly used and enjoyed)" and "Private (By prescription)" interchangeably. The risk in doing this is that rights of way "Private (Openly used and enjoyed)" incorrectly labeled "Private (By prescription)" may be rendered void - or at least considered to be void - if the servient tenement is migrated before the dominant tenement.

v. **Red Flags** -

(1) **First Red Flag -** It is not clear what, if any, enabling instrument must be recorded to evidence an rights of way used and enjoyed in a parcel register since they exist at law and are protected whether recorded or not. See **Schedule "E" - Supplementary Checklist & Templates Rights of Way Used And Enjoyed** for templates which may be helpful. For a (non-LR) Affidavit dealing with these issues see Document 86566081 recorded in the Kings County Registry Office on November 7, 2006.

(2) **Second Red Flag -** It is not clear how one will record rights of way used and enjoyed in the parcel register of a previously migrated servient tenement.

(3) **Green Flag** - The Registrar General is aware of these issues with easements and rights of way used and enjoyed. He will consider how to deal with them in consultation with the Procedures Advisory Sub-Committee[44].

[44] Email October 20, 2006.

vi. **Overview of Rights of Way by Implication**

(1) Rights of way by implication are described by A.G.H. Fordham, Q.C., as follows:[45]

> "(d) Implication
>
> A court will imply a grant of easement in the following circumstances:
>
> (i) where the owner of two parcels of land sells one of these parcels, a grant will be implied of those continuous and apparent easements which, during the unity of possession, were enjoyed under the title of ownership: *Ruetsch* v. *Spry* (1907), 14 O.L.R. 233 (High Ct.). It must be remembered that the use must be continuous and that it must be apparent, or perceptible to the senses, such as the use of an eave or downspout draining water from a roof;
>
> (ii) where a person owns a property which has access to a public highway, and conveys the back portion of the property that does not have access to the highway, the courts will, in such circumstances, imply an easement without express grant, in favour of the back part over the front part in order that the may have access to the highway: *Stephens* v. *Gordon* (1894) S.C.R. 61 at pp. 97ff. Where the Grantor does not designate a way which is reasonable, the grantee may designate a reasonable way. Such an implied way is called a right of way of necessity; or
>
> (iii) where the owner of a property subdivides his property into lots shown on a plan and shows streets on the plan, then each time he conveys a lot, he grants by implication without the necessity of an express grant, an easement over the street shown on the plan to and from the public highway and the lot conveyed: *Rossin* v. *Walker* (1858) Gr 619 (C.A.).

These are discussed further below.

vii. **Implied grant of rights of way on sale of a parcel**

(1) See *English* v. *Wood*[46] paragraphs 10 to 18 for a review of the relevant principles but note the caveat re mortgages at the time of original grant in paragraph 13[47]:

> 10 The defendants admit that there was no express grant of an easement or right-of-way over Lot 49 and they also admit that the period of user by the successors-in-title of Anne Penny, namely, the Moshers, and the defendants, has been shorter than the twenty-year period provided for by the *Statute of Limitations*, R.S.N.S. 1967, c.168,

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45 *Easements, Licences & Rights of Way*, CLE Real Property, April 11, 1987, at pp. 9 and 10.

46 (1981), 46 N.S.R. (2d) 441, 89 A.P.R. 441, 1981 CarswellNS 261 (Cowan, J.).

47 This caveat appears to rest on the parcel owner holding only the equity of redemption in the severed parcels at the time of severance. Consider whether LRA, s.51(1) which states that security interests do not transfer title to the security interest holder - only a security interest - might affect the application of this principle to post-migration severances.

s.31, dealing with claims made by prescription to easements. It is the position of the defendants, however, that such an easement was created by implication upon the severance of the unity of title and possession at the time of the deed of September 2, 1969, from Anne Penny to the Moshers.

...

12 In *DuVernet v. Eisener*, [1951] 4 D.L.R. 406 (N.S.C.A.), Parker, J., gave the reasons for judgment of the court. At pp.411-413 he said the following:-

> There was no serious contention made on behalf of the appellant that the conveyance to Teasdale contained an express grant of the right to use the driveway, or that the appellant was entitled to a right-of-way of necessity. From the evidence it is clear that no such contentions could successfully have been made. It was contended, however, that there was an implied grant of the right to use the driveway when the conveyance was made to Teasdale. Whether this be so, I think, depends upon the intention of the parties as expressed in the conveyance. To determine that intention the Court looks not only at the words used in the conveyance but also at the circumstances existing at the time the conveyance was made, including the manner in which the land was being used by the common owner at the time the conveyance was made. If there is evidence to show that the common owner in the occupancy of the land conveyed used this driveway as though it were appurtenant to it and that it was necessary for the reasonable and convenient use of the land conveyed and that such user was continuous and apparent, then a grant of a right-of-way will be implied and that which was a *quasi* easement appurtenant to the land conveyed before the severance becomes an easement on severance.
>
> The law relating to an implied grant of a right-of-way in a case of a grant by an owner of a tenement of part of that tenement is, I think, clearly stated by Thesiger L.J. in the case of *Wheeldon v. Burrows* (1879), 48 L.J. Ch. 853 at p. 856: "A number of cases have been cited to us, and on them, I think, two propositions arise which may be stated as the general rules governing cases of this kind. The first proposition is, that on the grant by the owner of a tenement of part of that tenement, as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements (by which of course I mean *quasi* easements), or, in other words, all those easements which are necessary to the reasonable enjoyment of the property granted, and which have been, and are at the time of the grant, used by the owners of the entirety for the benefit of the part granted." See also *Brown v. Alabaster* (1887), 37 Ch. D. 490; *Hart v. McMullin* (1899), 32 N.S.R. 340, confirmed on appeal to Supreme Court of Canada 30 S.C.R. 245; *Fullerton v. Randall* (1918), 44 D.L.R. 356, 52 N.S.R. 354.
>
> In 11 Hals., 2nd ed., p. 287, the law is stated as follows: "Upon the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent accommodations afforded by the part retained to the part granted which (1) are of such a nature that they might form the subject-matter of an easement, (2) are necessary to the reasonable enjoyment of the property granted, and (3) have been and are at the time of the grant used by the owner of the entirety for the benefit of the part granted. This rule is founded upon the principle that a man shall not derogate from his grant. There is no corresponding implied reservation in favour of the grantor.
>
> Gale on Easements, 12th ed., pp. 102-3 states the law as follows: "On the grant by the owner of a tenement of part of that tenement, a grant will be implied of (1) all those continuous and apparent easements which are necessary to the reasonable enjoyment of the part granted, and which have been, and are at the

time of the grant, used by the owner of the entirety for the benefit of that part; and (2) of all those easements without which the enjoyment of the part granted could not be had at all.

The law as stated by the foregoing authorities and in many other cases is applicable only to cases where the grantor at the time of the grant is also the owner of the land over which the alleged right-of-way extends: *Rangeley v. Midland R. Co* (1868), L.R. 3 Ch. 306; *Hunter v. Richards* (1912), 5 D.L.R. 116, 26 O.L.R. 458 [affd 12 D.L.R. 503].

13 **In that case, the court found that the land over which the right-of-way was claimed was, at the time of the grant, mortgaged and that all the grantor had was an equity of redemption and that, in those circumstances, the general principle did not apply.** (Emphasis added - see footnote 46, above)

14 In the case before me there is no evidence that Lot 49, the land over which the right-of-way is claimed, was, at the time of the grant ... mortgaged. In my opinion, therefore, in the absence of such evidence, the general principle stated by Parker, J., on behalf of the court, applies. Having regard to the evidence as to the circumstances existing at the time the conveyance in question was made, including the manner in which the land was being used by the common owner at the time the conveyance was made, I find that the common owner, ... in the occupancy of the land conveyed, Lot 48, used the driveway in question as though it were appurtenant to Lot 48, and that it was necessary, for the reasonable and convenient use of the land conveyed, and that such user was continuous and apparent.

15 It therefore follows that a grant of a right-of-way will be implied and that which was a *quasi*-easement, appurtenant to the land conveyed before the severance, becomes an easement on severance.

...

18 I therefore find that the defendants have an easement, consisting of a right-of-way over the driveway in its present location which, according to the evidence, I find has not changed from the time when Anne Penny used it as the owner of Lots 48 and 49, and that the driveway is located as shown as located on the plan dated September 6, 1971, produced as part of Exhibit 1, as amended by Mr. Keen in accordance with his report, dated April 7, 1981. The claims of the plaintiffs therefore fail."

(2) **Red Flag** - The form of words used to convey an easement created by implication on severance created before the present *Conveyancing Act* came into effect may be critical. The *Conveyancing Act*, s.13(d), may eliminate this issue in transfers after it was assented to on April 11, 1956. In *Aspotogan Ltd.* v. *Lawrence*[48] the Nova Scotia Court of Appeal observed:

"52 It must be borne in mind that the words used in the partition agreement are **"all the roads in *use* . . ."** and in clause 14 of the Will - **"the free use of roads and as are now *used* by them.**

53 I mention this because in *Smeltzer v. Barkhouse* (1888), 20 N.S.R. 409, the Court was considering a deed which included the words ". . . together with all the . . . ways . . .to the same belonging." Townshend, J. found that these words were not sufficient and

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48 *Aspotogan Ltd.* v. *Lawrence* (1972), 4 N.S.R. (2d) 313, 30 D.L.R. (3d) 339 1972 CarswellNS 67, at paragraphs 51-55.

he quoted *Barlow v. Rhodes*, 1 C. & M. 439, an 1833 case, where the words used were "with all ways thereto belonging, or in any wise appertaining,". At p. 414 he quoted Bayley, B.

> If you convey the close, with all ways thereto belonging and appertaining, the easement will not pass except in a case of a way of necessity, when such right of way passes without any words of grant of ways. . . . There are, however, apt words for the purpose of passing such an easement; and if you will only insert the words 'or herewith **used** and **enjoyed** the right would pass.'

At p. 415 he quoted *Bankshire v. Grubb*, 18 Ch. D. 616, where Fry, J. held:

> A grant by the owner of two tenements of one of them 'together with all ways now **used** or **enjoyed** therewith' will pass to the grantee a right of way over a clearly defined path, constructed over the other tenement, and, at the date of the grant, actually used for the purposes of the tenement which is granted, even though the path did not exist prior to the unity of possession.'

54 The same principle is expressed in *Gale*, Twelfth Edition, p. 87. Footnote (f) on p. 87 points out that by virtue of the *Law of Property Act*, 1925, s. 62, the words are to be read into every conveyance executed since 1881. Our own *Conveyancing Act*, c. 56, R.S.N.S. 1967, s. 5(d) says:

> (d) a conveyance of any property right in land includes the buildings, easements, tenements, hereditaments and appurtenances belonging or in anywise appertaining to that property right."

55 A review of the authorities and an examination of the evidence leads me to the conclusion that the two documents - the Will and the agreement by way of petition created not a mere license but an easement over this mill road. The evidence as to the user at the time of the grant makes it clear in my opinion that the dominant tenement was Lot 20 and there was only one road serving Lot 20 and in my view the owner of Lot 20 at the time of the execution of the partition instrument was the owner of the dominant tenement and the two documents, the Will and the instrument, were effective to convey an easement over that mill road."

(3) The following sentence uses the *Conveyancing Act*, s.13(d), language *plus* the *Bankshire* wording. Consider adapting this sentence with necessary adjustments in a dominant tenement parcel description to describe the Easement/Right of Way (Benefit) created by implication on severance:

> "Together with the buildings, easements, tenements, hereditaments and appurtenances belonging or in anywise appertaining thereto and all ways now used or enjoyed therewith including, but not limited to, the right of way created by implication of law **for the benefit of**[49] this parcel by the deed dated _____ that was registered in the LRO on _____ in Book _____, Page _____ as Document _____."

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[49] Modify the sentence for use as a "Subject to..." provision in the servient tenement parcel description.

viii. **Rights of way of necessity**

(1) In *B.O.J. Properties Ltd.* v. *Allen's Mobile Home Park Ltd.*[50], Mr. Justice Jones said at pp. 391-92 [N.S.R., A.P.R.]:

> "The following paragraph is from *Canadian Law of Real Property* by Anger and Honsberger at page 999:
>
> > A way of necessity may be acquired by an implied grant in favour of the grantee of lands over the lands of the grantor when landlocked lands are granted which are physically inaccessible unless the grantee is permitted to use the surrounding land of the grantor as an approach (*Fitchett* v. *Mellow* (1897) 29 O.R. 6), and similarly a way of necessity may by implication be reserved to the grantor over the lands of the grantee when landlocked lands are retained (*London* v. *Riggs* (1880), 13 Ch. D. 798). A way of necessity will only be implied where it is actually necessary for the use of the land retained or granted and not where it is for the more convenient enjoyment of the land granted or retained (*Aldredge* v. *Wright*, [1929] 2 K.B. 117; *Fitchett* v. *Mellow*, *supra*). A way of necessity will be implied where the landlocked parcel is acquired by a devise (*Dixon* v. *Cross* (1884), 4 O.R. 465). The right to a way of necessity will cease when the right is no longer required in order to render the grant or reservation effectual."

(2) *Hebb* v. *Wile*[51] contains an interesting statement about landlocked parcels:

> "28 A person whose property is truly landlocked is not without any recourse -- see the *Private Ways Act*, R.S.N.S. 1967, c. 237, particularly Part II that authorizes the grant of a general right of way by a municipal council."

This Act is little used and there is little if any reported case law related to it[52].

(3) In *Hirtle* v. *Ernst*[53] Nathanson, J., thoroughly considered how possible alternative water access to the parcel in question affected a claim for a right of way of necessity. See the discussion under the Navigable Waterway section above. When dealing with a possible right of way by necessity be sure to consider whether there is a right of access across any alternate water access such as its being a "navigable waterway".

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50 (1980), 36 N.S.R. (2d) 362 (C.A.)

51 (1988), 1 R.P.R. (2d) 1, 89 N.S.R. (2d) 1, 227 A.P.R. 1, 1988 CarswellNS 83 .

52 RELANS Listserv email exchanges October 13/14, 2006.

53 (1991), 21 R.P.R. (2d) 95 (N.S. T.D.).

ix. **Roads shown in plans of subdivision**

(1) MGA, s.280(2), now deems easements as follows:

> "s.280(2) The owners of lots shown on a plan of subdivision as abutting on a private right of way are deemed to have an easement over the private right of way for vehicular and pedestrian access to the lot and for the installation of electricity, telephone and other services to the lot."

This section is not considered retroactive so would be effective April 1, 1999 on enactment of MGA.

(2) If a road is shown in a plan of subdivision and access over that road was not conveyed with a parcel on the road, the parcel may have either or both a right of way of necessity[54] or an implied grant of right of way if the parcel and the road are in common ownership when the parcel is conveyed. In *Collins* v. *Speight*[55] the court stated:

> "17 The law relating to rights of way by estoppel has been long recognized. Ritchie, E.J., stated the principle of right of way by estoppel after a review of earlier case law in Pugh v. Peters et al (1876), 11 N.S.R. 139:
>
> > In these cases it is broadly laid down that where a grantor conveys land bounded on a street or way, he is estopped to deny the existence of such a street or way, and the grantee acquires by conveyance a perpetual easement or right of passage upon and over it, from the full enjoyment of which he can never afterwards be excluded.
>
> 18 The Appellate Division of the Ontario Supreme Court recognized the same principle in Nantais v. Panzer, [1926] 4 D.L.R. 605. It is summarized in the headnote as follows:
>
> > The sale of a lot according to a registered plan upon which such lot is shown as abutting a strip of land marked private lane, conveys to the purchaser an easement over such lane appurtenant to the lot.
>
> 19 In Phillips v. Ross, [1926] 1 D.L.R. 605 Harris, C.J.N.S. stated:
>
> As estoppel is the basis of the rule which prevents a grantor who bounds a lot on a street from saying thereafter that there is no street that estoppel must of necessity arise by the deed and is available only to the grantee or those claiming under or through him."

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54 See *B.O.J. Properties Ltd.* v. *Allen's Mobile Home Park Ltd.* discussed above under "Private (Openly Used and Enjoyed)".

55 (1992),116 N.S.R. (2d) 201, 320 A.P.R. 201; 1992 CarswellNS 578. See also *Harris* v. *Kyle*, [1951] O.W.N. 18; 1950 CarswellOnt 387 (Ont C.A.).

x. **Implied Reservation**[56]

(1) "An implied reservation of an easement may occur where land is severed and the quasi-dominant land is retained. Because of the rules that a grantor cannot derogate from their grant and that a grant is always strictly construed in favour of the grantee, courts are unwilling to recognize easements which have not been expressly reserved in the instrument conveying the quasi-servient land. There are only two exceptions to this:

(a) easements of necessity without which it would be impossible to enjoy the retained lands; and

(b) easements which are necessary to carry out the common intention of the parties.

Because courts are more stringent where the owner of the retained land, rather than the owner of the newly acquired land, is arguing that an easement should be implied on severance, it seems that continuous and apparent quasi-easements cannot be reserved by implication unless such an easement also meets the test of necessity."

xi. **Right of Way By Proprietary Estoppel**

(1) "An easement may also be created by proprietary estoppel which arises out of the conduct and relationship of the parties to the estoppel. For instance, where by an oral agreement, one party grants the other an easement in return for valuable consideration, this is sufficient to create an equitable easement which binds the parties as well as others with notice of the agreement. Furthermore, where a person without title who professes to grant an easement later acquires title to the land over which the easement would lie, the earlier grant creates an easement by estoppel."[57]

(2) See also *Maritime Telegraph & Telephone Co.* v. *Chateau Lafleur Development Corp.*[58]

c. **PRIVATE (OTHER)**

i. *Crown Lands Act*, s.27(3), agreements with the Minister permitting access over certain woods roads will be shown as recorded interests and classified as "Private (Other)"[59].

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56 *Anger & Honsberger Law of Real Property, Third Edition* at page 17-10.

57 *Anger & Honsberger Law of Real Property, Third Edition* at pages 17-16 and 17-18.

58 (2001), 2001 NSCA 167, 45 R.P.R. (3d) 209, 207 D.L.R. (4th) 443, 2001 CarswellNS 425

59 Email correspondence with the Registrar General December 17, 2004.

f. **RIGHT OF WAY/WALKWAY.**

i. This appears to be a sub-set of "Private (By Grant)" rights of way - refer to that section above.

g. **RIGHT OF WAY/DRIVEWAY**

i. This appears to be a sub-set of "Private (By Grant)" rights of way - refer to that section above.

10. **OTHER**

a. General Comment

i. This category may include means of access personal to the parcel's owner that may or may not pass to a future grantee under a conveyance of the parcel. The examples listed below are:

(1) access across adjacent lands in which the owner has an interest,

(2) "cottage country" co-owned cottage road parcels, and

(3) licenses.

b. **Access over adjacent lands in which the owner has an interest - other than a "Cottage Country" co-owned road**

i. If there is no access to a parcel this would normally be shown as "No Access". However, if the parcel owner has an interest in an adjacent parcel over which the owner has access to a public road or navigable waterway one might note this indirect access as "Other" combined with an explanatory textual qualification. The owner's interest in the adjacent parcel must entitle the owner to cross it - *e.g.* the fee simple, a tenant-in-common interest or a joint tenant interest. This does not require migration of the adjacent lands. Here is a sample textual qualification:

> "Access between ____ street, a public highway, and this parcel is across other lands owned [co-owned] by the registered owner of this parcel (PID _____)."

ii. Alternatively, if the owner holds the adjacent parcel in fee simple, the owner could simply create and record a right of way for the parcel over the owner's adjacent lands under LRA, s.19A.

c. **"Cottage Country" co-owned road parcels**

i. The Registrar General republished the following directive in his June 2006 Communique:

> "... Often a cottage parcel will be conveyed together with a fractional interest in a road system, green space, boat launch area, etc. These are not benefits that attach to the fee simple for the cottage parcel; they are conveyances of an interest in one, two or more other parcels, This has serious AFR implications.
>
> If your client's cottage is the first to be concerted in the subdivision, you will need to convert the road and common area PIDs too. Your client is registering 100 per cent ownership of the cottage parcel and a proportionate share of the other PIDs. The co-owners of the road system or green space are going to be added as Tenants in Common Not Registered Pursuant to the Land Registration Act (LR) on the AFR.
>
> When it comes time to revise the ownership of the cottage and share of the other Parcel Identification Numbers (PIDs), successive owners must remember to submit Form 24s to transfer ownership of the cottage and to elevate their Tenant in Common interest from unregistered to registered- see Land Registration Administration Regulations Section 15 for the required documentation."

ii. You may want to use the "Other" category coupled with a textual qualification referencing the associated access and common use parcels for a "Cottage Country" co-owned road parcel.

iii. An example of a "Cottage Country" co-owned road is Birch Lane at Aylesford Lake in Kings County - PID 55336630.

d. **Licences**

i. "A licence, which may be either express or implied, is a **personal right between the licensor and the licensee**, giving the Licensee the right or privilege to enter upon and use the licensor's land in a certain manner or for a specified purpose. Without the licence, such entry and use would amount to a trespass. **The licence does not create an estate or legal interest in the land.**

A number of different kinds of licences have come to be recognized:

(a) a mere licence;

(b) a licence coupled with a contract; and

(c) a licence coupled with a legal interest in land or chattels.

These classifications are relevant to disputes about whether a Licensor is entitled to revoke the licence or whether a licence is binding on a purchaser of the Licensor's land. Since a licence does not create a legal interest in land, generally, at common law, it is revokable and is not binding on purchasers of the Licensor's land. However in certain circumstances, equity will protect the Licencee...[60]

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[60] *Anger & Honsberger Law of Real Property, Third Edition* at page 16-18 *et seq.*

ii. Under LRA licences are usually "prescribed contracts". Prescribed contracts are not interests in land[61] (*i.e.* not benefits or burdens) so they are recorded in a parcel register. Recording a prescribed contract in a parcel register simply provides public notice of it: recording does not enhance its effect or turn it into an interest in land.

iii. Membership in a cottage-owners' association which owns the means of access to a parcel may effectively give parcel owners licences - recorded or not recorded - to use the access road(s) to their parcels. Here is a copy of an email exchange with the Registrar General on this subject:

> Garth: ... Your textual qualification is acceptable and appropriate in the circumstances. **I agree that a licence is properly shown as a recorded interest in a parcel, unless it has risen to the status of a benefit or burden, which I cannot see happening--it is either an appurtenance, a burden that runs with the land, or an agreement [recorded interest]** . C.A. Mark Coffin, Registrar General of Land Registration.
>
> "Garth Gordon" <gordon@tmclaw.com> 7/28/2004 1:27:58 PM >>>. Mark, ... Access to the parcel we are selling (Chateau Village) was by licence granted by the Developer to the original grantees of the parcel to use private roads in the development including access to public roads. The terms are set out in the original legal description which, *inter alia*, provides that the licence from the Developer ceases upon the developer conveying the roads and rights of way to a Property Owners Association. There is a positive covenant in the deed requiring the Owners to join the Property Owners' Association when formed. The deed for the parcel we are purchasing (A separate Chateau development) has the same access terms in its description.
>
> The Developer of Chateau Village (the development in which we are selling) subsequently conveyed and assigned the roads and rights of way to an incorporated (*Societies Act*) Owners' Association. My opinion is that the original licence expired and was replaced by an unregistered licence arising by the owners' membership in the Properties Owners' Association. I have laid this out in our AFR which is in for pre-approval - as a textual qualification. (PID 45215662) We await the results from the LRO. Whatever the correct legal categorization of the access, I am told it works extremely well and the Property Owners Assoc. does an excellent job. We have just received a deed from other counsel for the second parcel our client is purchasing in the related but separate development. The post-migration Parcel Register indicates the original developers' licence is an "Easement/Right of way". Clearly, as

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[61] LRA, s.3(1)(g) "interest" means any estate or right in, over or under land recognized under law, a **prescribed contract** or a prescribed statutory designation, including a right or interest under the *Canada-Nova Scotia Offshore Petroleum Resources Accord (Nova Scotia) Implementation Act* , but excludes any interest under the *Gas Storage Exploration Act*, the *Mineral Resources Act*, the *Petroleum Resources Act* or the *Treasure Trove Act*;"

Land Registration Administration Regulations - Prescribed contracts

12 (1) Contractual rights respecting a parcel registered under the Act, including but not limited to option agreements and rights of first refusal, are **prescribed contracts** for the purposes of the definition of "interest" in clause 3(1)(g) of the Act.
(2) A prescribed contract may be recorded in a parcel register and, if recorded, is subject to the Act's recording and cancellation of recording provisions.

a licence, if it still exists as such in this second development, it is a prescribed contractual interest, not an interest in land *i.e.* an easement or right of way. We intend to requisition a Form 17 requiring this correction. I would like to know where you as RG stand on the proper way to show a licence for access. If it is granted I would show it as an agreement under the recorded interest section (it being prescribed contractual interest). If this licence has expired by virtue of a conveyance to a Property Owners' Association in the second development without a subsequent recorded access agreement then I believe an appropriate Textual Qualification is in order. Any thoughts on the appropriate way in which these interests should be shown? Garth

iv. **Red Flag -** As a right personal to the current owner, licences will almost always be removed from the parcel register when the Licencee disposes of his, her or its interest in the parcel. Use great care in considering what access a parcel will have after the Licensee disposes of his, her or its interest in the parcel.

11. PRIVATE ACCESS CONSIDERATIONS

a. Rights of Way Issues

i. **Red Flag.** Before you enter a right of way (benefit or burden) in a parcel register ensure the interest is, in law, a right of way and that it has not been extinguished.

(1) The essential elements of a right of way are:

(a) there must be a dominant tenement and a servient tenement,

(b) the right must be actually capable of benefitting the dominant tenement,

(c) subject to LRA, s.19A, title to the dominant and servient tenements must be vested in different persons, and

(d) the right must be capable of being conveyed by a deed.

(2) Rights of way may be extinguished by

(a) operation of law:

(i) the purpose for which it was created comes to an end,

(ii) the period for which it was created terminates,

(iii) the right is abused, or

(iv) the same person comes to own the fee simple of both the dominant and servient tenements[62].

(b) Express Release.

(c) Abandonment (seldom grounds to release an express grant).

(d) As to prescriptive rights of way - those made void by LRA, S.74(2) that are not saved by LRA, s.75.

(e) Rights of way cancelled under LRA, s.63 or ss.90-92.

(f) Rights of way superceded by subsequent possessory interests.

ii. **Omitted rights of way.**

(1) **Gap in chain of title.** If a previously granted easement is left out of a deed in the chain of title consider if the *Conveyancing Act*, s.13(d), may bridge a gap since present s.13(d) came into effect on April 11, 1956 - refer to paragraph 9.d.vii.(2), above. Consider if the previous *Conveyancing Act* of 1912 (amended 1913) has the same effect for pre-1956 conveyances:

> "13. Except where a contrary intention appears by the conveyance,
> ...
> (d) a conveyance of any property right in land includes the buildings, easements, tenements, hereditaments and appurtenances belonging or in anywise appertaining to that property right. R.S., c. 97, s. 13."

(2) **Merged right of way.** If a right of way has merged in common ownership of the fee simple interests of the dominant and servient tenements, consider a Textual Qualification explaining why the right of way shown in previous instruments is not shown in the parcel register[63]. Here is a sample TQ:

> The rights of way benefitting Lots Nos. 1, 2, 3 and 4 of the lands conveyed to _____ (a predecessor in title) by deed recorded on _____ in Book ___, Page ____ as Document ____ are not carried forward in this parcel register because they merged in the common ownership of the fee simple of those parcels being all the parcels comprising the dominant and servient tenements of those rights of way.

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62 There is a thorough review of this issue in *Lonegren* v. *Rueben*, 1987 CarswellBC 446, 26 B.C.L.R. (2d) 327, 37 D.L.R. (4th) 491. Also refer to *From Challenges to Opportunities ... navigating the Real Property Paths, Easements*, Diana Ginn, Nova Scotia Barristers' Society 2005 Real Property Conference, February 11, 2005.

63 Refer to footnote 55, above.

iii. **Subdivision-related considerations - restating access after subdivision or consolidation.**

(1) The Registrar General's Communique, June 2006, states:

> "The biggest problem has been partially cured, and that is that on re-configuration of a parcel through subdivision or consolidation, the access type would often become incorrect (e.g. when back lands were subdivided off and former public access now becomes private) and lawyers were not clearing this up on conveyance. The system no longer posts an access type on reconfiguration. The issue will be solved completely when the regs changes being proposed for later in the fall come in--will require the subdivider to update the access type with a F45 before transfer/revision of the parcel's registered interest. Lawyers are reminded of the requirement to update a parcel's description after benefits or burdens have been added to or removed from a registered parcel's title.

(2) Responsibility for updating post subdivision and consolidation parcel registers has been a contentious issue at times. A cross-section of lawyers surveyed on this issue agreed it is the Developer's counsel's responsibility. Refer to **Schedule "C"** to this paper for their comments. Expect new regulations to settle this issue.

(3) Here is advice from Linda Wood on how to update parcel registers pending system changes[64]:

> "After a property has been touched by a subdivision or consolidation, it needs the "Parcel Access" updated with a Form 45. However until the Form 45 is updated to allow us to do this, we must use a Form 24. Put a note on the front of the Form 24 to code it as a Form 45, and there is no $74.50 needed. Then under number 2 (registered interests) show the Instrument type/code as "Removal of Interests Placed in the Parcel Register on S/D & CLE / 836". Make the appropriate change beside "Access type to be added". Then put an explanatory note beside the "Reference to related instrument in names-based roll/parcel register", such as "Changing access type because left blank on subdivision creating this parcel, but it should be "Public"". Garth, I think this is correct but if you want more details or to verify the information, your best bet is to contact [POL]..."

We have used the same technique, modified, to remove inherited enabling instruments (Form 24) and duplicate recorded interests (Form 26) that did not apply to the infant parcel.

b. **Prohibition on Extending the benefit of a right of way to other parcels**

i. **Red Flag -** If you are migrating title or reviewing title ensure the parcel register does not purport to extend the benefit of the right of way beyond the original dominant tenement. If you are migrating counsel this definitely is a potential

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64 Email correspondence September 21, 2006.

liability issue. If the error is obvious it may be a liability issue to reviewing counsel as well. Geoffrey Muttart contributed the following observation[65]:

> "...if one lot which benefits from an easement is consolidated with a second lot which doesn't benefit from that easement, the consolidated lot may appear in POL to benefit from the easement, when at law the dominant tenement doesn't expand. Therefore, it is imperative to describe the consolidated lot with an easement that only benefits the dominant tenement, i.e. the description of the easement will need to change to limit it to the original dominant tenement."

ii. The law clearly prohibits the extension of the benefits of rights of way. There is a thorough discussion of this issue in *Gordon* v. *Regan*[66]; the following are representative passages:

> "28 The authorities have consistently held that it is of the very essence of a right-of-way that it be appurtenant to some particular parcel of land. A right-of-way granted as an easement incidental to a specified property may not be used by the grantee for the same purpose in respect of another property. That is, it has been held that the owner of the dominant tenement cannot increase the burden on the servient tenement by using the right-of-way to go to property to which it is appurtenant and then passing over that property to reach adjoining property.
>
> ...
>
> 30 The Supreme Court of Canada decision of *Purdom* v. *Robinson* (1899), 30 S.C.R. 64, reads [in the headnote]:
>
> > A right of way granted as an easement incidental to specified property cannot be used by the grantee for the same purposes in respect to any other property.
>
> 31 In *Harris* v. *Flower* (1904), 74 L.J. Ch. 127, a decision of the English Court of Appeal, the defendant had a right-of-way by grant over the plaintiff's land (the servient tenement) to certain lands described by the Court of Appeal as the "pink lands" -- the dominant tenement. The defendant built a factory partially on the dominant tenement and partially on the adjoining lands described as the "white lands". Romer L.J. said at pp. 132-133:
>
> > The law really is not in dispute. If a right of way be granted for the enjoyment of Close A, the grantee, because he owns or acquires Close B, cannot use the way in substance for passing over Close A to Close B. This proposition of law is admitted. The question is whether what the defendant does or claims the right to do comes within the proposition I have stated. In my opinion it does. I think that it is impossible to say that this large building is to be regarded as if wholly erected on the land coloured pink, nor can it be said that every user of the way for the purposes of the land coloured white is one for the proper enjoyment of the land coloured pink. I will take one instance. The defendant has used, and claims a right to use, this right of way for the purpose of carrying building materials for the part of his buildings on the land coloured white. That, to my mind, is a user of the right of way for passage over the land coloured pink for the enjoyment of this land coloured white. It is impossible to say that by reason of one building being on both lands the defendant has made the right of way which was granted for the enjoyment of the one a right of way for the enjoyment of both, and that is what the defendant is really doing. That would substantially enlarge the grant of the right of way. The servient tenement is not obliged to submit to the carrying of building

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65 Email, September 18, 2006.

66 1985 CarswellOnt 669, 29 M.P.L.R. 42, 49 O.R. (2d) 521, 15 D.L.R. (4th) 641.

> materials for the purpose I have indicated; and other instances might easily be given which would result in using the right of way for purposes of the land coloured white, and not for the true and proper enjoyment of the land to which the way was appurtenant.
>
> ...
>
> 35 Counsel for the applicants in his very able argument submits that the governing principle is to be found in the opening words of Mulock C.J.Ex. in the *Miller* v. *Tipling* case, *supra*, and that is that the right-of-way granted to a particular property must not be used "colourably for the real purpose of reaching" a different adjoining land. It is submitted that the use here of the right-of-way to pass over the dominant tenement and to park automobiles on the adjoining lands, Parcels A-B, is a use that directly benefits the owners and occupants of the dominant tenement. It is submitted therefore that this use cannot be said to be a colourable use of the right-of-way or an unreasonable extension of the right-of-way within the terms of the original grant. Although I find this proposition attractive, it is not, in my view, supported by any of the authorities.
>
> ...
>
> 37 Although the proposed use here may place a minimal added burden on the servient tenement, regrettably I conclude that on the authorities, such an extension may not be authorized. As I interpret the authorities, the rights under the easement must be restricted to some purpose connected with the direct enjoyment and use of the dominant tenement. The right-of-way granted here cannot, under the authorities, be extended for the same purpose in respect of another property, even though that extended use may be of some benefit to the owners and occupants of the dominant tenement."

iii. The limitation of a right of way's benefit to part of a consolidated parcel may be noted as a textual qualification in the parcel register. Here is an example:

> The access to this consolidated parcel over the servient tenements being PID Nos. __ __, __ __, and __ __ benefits only that part of this consolidated parcel formerly being Lot No. 5 of the lands conveyed to ____ (a predecessor in title) by deed recorded on _____ in Book __, Page ___ as Document ____.

c. **Tax Sales - MGA saves easements**

i. Section 156(3), preserves easements stating they are not terminated or extinguished by a tax sale. An easement passes with the dominant tenement if that is the property sold and remains with the servient tenement if that is the property sold under tax sale.

ii. Section 135(12) preserves easements and rights of way in favour of the Province when either dominant or servient tenement of "owner unknown" land is vested in the Province by section 135.

d. ***Nova Scotia Power Privatization Act***[67]

i. If you are dealing with lands formerly owned by a power company this Act may be of assistance[68]:

> "25 (1) Any instrument within the meaning of the Registry Act heretofore executed purporting to convey to the Corporation, Nova Scotia Light and Power Company, Limited or Eastern Light & Power Company, Limited a fee simple estate is deemed to have vested in the Corporation, Nova Scotia Light and Power Company, Limited or Eastern Light & Power Company, Limited, as the case may be, and their successors and assigns, a full, absolute and indefeasible estate of inheritance in fee simple, subject only to any mortgages, judgments or easement registered on title against such estate."

This Act (section 3) binds the Crown therefore a deed protected by this statute should preclude a Crown claim based on an underlying Crown interest. Refer to MTA, s.7(1)(a) which states that MTA does not apply to "...any interest in land created or preserved by a statute"[69].

12. **Multiple means of access to a parcel**

a. Although POL permits one to enter many benefits, burdens and recorded interests in the parcel register it permits only one choice in the Access Field. When there are more than one means of access to a parcel the one entered is left to the lawyer's professional judgment. My first choice will always be "Public" if the parcel is serviced by a public road that is listed and maintained (other than a controlled access highway or parkway) - even if it is not the primary means of access. This is because there are fewer development permit restrictions for listed and maintained public roads. It would also be logical to enter the primary means of access as first choice. I expect it is not critical which is shown in the Access Field provided all means of access are set out in the parcel register. It would be helpful at times to have a comment section for access to avoid textual qualifications for access related comments. Here is a textual qualification used to show a public foot-path access to a parcel in Kentville; the foot-path is secondary to primary access by a listed and maintained public highway:

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67 S.N.S. 1992, c.8, s.25.

68 Noted by Geoffry Muttart, RELANS Listserv, on January 26, 2006.

69 See *Ontario Hydro* v. *Tkach* (1992), 95 D.L.R. (4th) 18 (Ont. C.A.). Hydro's interest in the land in question came through a deed from a private landholder to a predecessor power company. The land was subsequently conveyed by statute to Hydro in 1924 with notice of such transfer registered in 1926 - all these events occurred outside the 40-year search period. Hydro's interest was held to arise from the 1906 deed and was not "...a claim arising under any Act" which would have fallen within their corresponding exception under their *Registry Act*. Sections of the Ontario *Power Corporation Act* prohibiting adverse possession against Hydro was held to have no application to the case at bar.

This parcel also has public access by the public foot-path owned and operated by the Town of Kentville being part of the former Dominion Atlantic Railway lands deeded to the Town of Kentville by deed recorded on 1998-07-09 in Book 1152, Page 345, Document 4063.

13. CROSSING RAILWAY LANDS & FORMER RAILWAY LANDS

a. Ian H. MacLean identified railway crossings as a "red flag" access issue[70]:

> "I have noticed a number of Parcel Registers which show public or perhaps even private access when in fact the only way to get to the property is by crossing a railway (or former railway lands now owned by the Department of Natural Resources). It seems to me that this is problematic where no grant of right way exists."

b. **Red Flag** - Ian is properly concerned. I believe it is a safe starting position to assume that there will be no right of access across former railway "permanent ways". But ordinary principles of prescription and adverse possession generally apply to other railway and former railway lands. If there is a right to cross former "permanent ways" it will be up to you to prove it - do not assume that it exists because of long use. It is probable you will have to make a textual qualification to the effect that there is no right of access over the former railway "permanent way". In one recent migration we used the following textual qualification:

> Private access to this parcel crosses the former railway roadbed now owned by the Town of Kentville and is subject to the rights and obligations of the Town of Kentville with respect to such private crossings.

c. To the extent I have scratched the surface of this subject, the following seem to be general principles respecting railway crossings:

i. **Crossings as of right.**

(1) Whether there is a right to a private railway crossing to connect lands severed by the railway appears to depend on when the lands were severed:

(a) Lands split by railways before the *Railway Act* of 1888 are generally not entitled to a private crossing joining the severed parcels.

(b) Lands split by railways after the *Railway Act* of 1888 are generally entitled to a private crossing joining the severed parcels. In this case the National Transportation Agency and its predecessors have repeatedly held that the right to a private crossing pursuant to section 102 of the CTA (formerly section 215 of the *Railway Act* of 1985) arises when the railway traverses the lands of an owner in such a way as to leave a parcel of his land on each side of the railway. The

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[70] Email correspondence on September 19, 2006.

continuation of that right is dependent upon continued ownership of the parcel of land on each side of the railway. However, if there is a severance of the title into two parcels, the right to a private crossing is lost, unless the right to cross was expressly reserved in the conveyance of one of the parcels.

ii. **Prescriptive rights of way across "permanent ways".**

(1) Unless authorized in their enabling legislation, railways do not have the right to grant property interests in their "permanent ways" or their lands that are essential to the use and enjoyment of the railways as a public concern. The Courts have held that if an actual grant of the right by a railway would have been illegal and void, obtaining title through adverse possession or prescription against the railway would be impossible. The Courts consider the powers of the railway to dispose of land at the time the land in question was acquired by the company and subsequently during the period of time when the other party claimed to have used or possessed the land. The onus is on the party claiming through adverse possession or prescription to establish that the lands were not required by the railway for its purposes and that a disposition of the lands would be for the benefit of the railway. Therefore, the clock does not begin to run toward acquiring a prescriptive right of way or other possessory interest in "permanent ways" or lands essential to the use and enjoyment of a railways until the railway formally abandons its railway operations on those lands.

(2) If title to the former railway lands passed to a Municipality before the limitation period elapsed MGA, ss.59(4) and 308(4), stop the clock running for a prescriptive interest against the Municipality. For former railway lands deeded to the Crown it will depend on whether the former railway lands have become a public highway. If so the public will have access as a right; if not, the *Limitations of Actions Act*, requires 40 years of use adverse to the Crown to establish a possessory interest.

d. **More starting points:**

i. Refer to **Schedule "D"** for more background information about railway issues.

ii. Consideration of possessory interests in a parcel owned or formerly owned by a particular railway should start with a review of the legislation related to that railroad. The following website has a list of Nova Scotia railways and their related statutes: http://www.alts.net/ns1625/railways.html. I cannot vouch for its accuracy.

iii. Two cases may be of particular interest:

(1) *Canadian Pacific Ltd. et al v. Lowe*[71] which determined title to certain railway lands in Nova Scotia and the right of the railway to sell those lands.

(2) *Wotherspoon* v. *Canadian Pacific Ltd. et al*[72]. A classmate of mine with extensive experience in railway law advised me that this was *the* leading case concerning the power of railways to sell assets.

iv. Check the Canadian Transportation Agency Rail Transportation website, http://www.cta-otc.gc.ca/rail-ferro/index_e.html, particularly for agency rulings concerning railway crossings.

14. MORE PROFESSIONAL STANDARDS DUTIES

a. Professional Standard 1.1 Legislative Review

> "A lawyer should maintain familiarity with new and existing legislation affecting title or ownership rights and responsibilities. A lawyer should inquire as to the nature of a parcel and a client's proposed use of the parcel and then ensure the lawyer is familiar with any particular legislation affecting the use.
>
> When a client decides to acquire a parcel subject to legislative restrictions, a lawyer must explain the restrictions to the client and confirm the client's instructions prior to closing."

b. Professional Standard 1.5 - Documentation of Advice and Instruction

> "A lawyer should document in writing
>
> (a) advice to the client, including explanations and confirmation of the explanations, the lawyer's advice with respect to restrictions, if any, on the client's quiet use and enjoyment of the property and qualifications to the opinion on title[73]; and
>
> (b) instructions received from the client, including instructions limiting the lawyer's retainer and instructions arising out of the lawyer's advice described in clause (a).

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71 *Canadian Pacific Ltd.* v. *Lowe* (1999), 178 D.L.R. (4th) 764 (N.S.C.A.), refusing leave to appeal (1999), 177 N.S.R. (2d) 393, 542 A.P.R. 393 (N.S.C.A.), affirming (1998), 172 N.S.R. (2d) 89, 524 A.P.R. 89 (N.S.S.C., Carver, J.), leave to appeal was also refused by the Supreme Court of Canada (2000), 184 N.S.R. (2d) 200 (note), 573 A.P.R. 200 (note), 256 N.R. 193 (note) (S.C.C.). See Supreme Court of Canada Bulletin of Proceedings May 12, 2000, No. 27533, 850-896. This case confirmed that the railway retained the fee simple in these lands notwithstanding the abandonment of the lands for railway purposes.

72 1987 CarswellOnt 673; 45 R.P.R. 138, (sub nom. *Eaton Retirement Annuity Plan v. Canadian Pacific Ltd.*) 76 N.R. 241, 21 O.A.C. 79, [1987] 1 S.C.R. 952, 39 D.L.R. (4th) 169 (Supreme Court of Canada).

73 *Ravina and A & R Properties Ltd.* v. *Stern* (1987), 1987 Carswell NS 348, 77 N.S.R. (2d) 406 (sub nom. *Ravina* v. *Stern*) 191 A.P.R. 406 (C.A.).

...
When a lawyer explains to the client the effect of a document signed by the client, the lawyer may consider the client's signature evidence of the client's instructions. The lawyer should meet personally and explain the effect of the document to the client.[74]"

c. A lawyer's advice and explanations about access may include the following matters:

i. About private access:

(1) restrictions on use,

(2) maintenance provisions, and

(3) consideration of the net effect of LRA ss.73(1)(e), 74(2) & 75(1) on rights of way used and enjoyed and prescriptive rights of way.

ii. About public access:

(1) Possible development permit limitations - Municipal land use by-laws may restrict development of parcels that are not on public streets that are listed and maintained.

(2) Limits respecting access to public highways particularly controlled access public highways and parkways - see **Schedule "A"**.

15. **RESOURCES** (Find CLE papers at the NSBS website)

a. Charles W. MacIntosh, Q.C., *Nova Scotia Real Property Practice Manual,* (Butterworths, Markham, Ontario).

b. John R. Cameron, *Due Diligence: Easements, Access and Possessory Titles*, (February 2006), in 2006 Real Property Conference: Crown Interests and Due Diligence under LRA: "The Sophomore Year".

c. C.A. Coffin, *Textual Qualifications in the Title Registration System,* (February 2005), in 2005 Real Property Conference for lawyers and legal assistants: from Challenges to Opportunities ... Navigating the Real Property Paths.

d. Erin O'Brien Edmonds, Nancy Saunders and Dianne E. Paquet, *Easements: Case Scenarios to Challenge Your Skills*, (February 2005), in 2005 Real Property Conference for lawyers and legal assistants: from Challenges to Opportunities ... Navigating the Real Property Paths.

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[74] Supervision of employees: Legal Ethics and Professional Conduct Handbook Commentaries 19.4, 19.6 and 19.7.

e. A.G.H. Fordham, Q.C., *Easements, Licences & Rights of Way*, CLE Real Property, April 11, 1987.

f. Diana Ginn, *Easements: Part I: Back to Basics* and *Easements: Part II: Beyond The Basics*, From Challenges to Opportunities…Navigating the Real Property Paths, Easements, Nova Scotia Barristers' Society 2005 Real Property Conference, February 11, 2005.

g. Ian H. MacLean, *LRA Easements, Subdivisions and Related Issues: Getting it Right the First Time, or Perhaps the Second....*, (February 2005), in 2005 Real Property Conference for lawyers and legal assistants: from Challenges to Opportunities ... Navigating the Real Property Paths.

h. Kenneth O. Thomas, *Abandonment of rights-of-way*, (February 2001), in Property Law: Profession and Business - Staying in the Game.

Schedule "A" - Public Highway Access Considerations

Access Management

Access Management is the control of the location and spacing of driveways and signalized and un-signalized street intersections to reduce traffic congestion, extend the life of existing roads and increase public safety. In implementing access management principles, the Department has the authority to identify access locations and limit the number of accesses to a private property. For example, if the property has multiple access points, the Department may require these to be consolidated. If a property abuts two roads and the driveway access is currently on the major road, it may be required to be relocated to the minor road. Decisions regarding allowable access are made at various stages of approval for development and redevelopment of a property.

Controlled Access Highways

Certain sections of some highways are designated as controlled access highways. Driveways and roads cannot be constructed to intersect with these highways without the consent of the Minister (This is the case for all public highways). Most sections of 100 series highways are controlled access and, in general, driveway entrances will not be permitted to intersect them. Additional intersections and driveways may be allowed on non 100 series controlled access roads provided their location and design are in keeping with the access management plan for that road. The Department Access Management Engineer can provide information on which roads are controlled access.

Driveway Permits - Non Controlled Access Highways

A driveway entrance is a means of providing access to a listed public highway from a private property. Two permits are required from the Department. The first is for consent to access the highway. If permission for access is granted, a second permit is required for the construction of the driveway. The Department Area Manager issues both permits. The length of stopping sight distance at the proposed driveway location is an important safety consideration in determining whether to grant access. The minimum stopping sight distance varies with driveway use and approach speed on the public road. Stopping sight distance requirements are to be met before an access permit is given. It is possible that a property will not have a suitable access point and an access permit will not be granted. In addition, the access permit is issued for the current use of the property. If the property use changes, a new access permit may be required and the stopping sight distance requirement may change. Minimum stopping sight distances are greater for commercial entrances than they are for residential accesses.

J, K and Z Class Roads

J Class roads are typically subdivision streets. Driveway entrances would be assessed as noted above under Driveway Permits.

K Class roads are roads that are listed but not maintained by the Department. These are generally old local roads that have fallen out of use and deteriorated to the state that regular maintenance is not possible without upgrading. Private parties who wish to upgrade these roads, or sections of them, for access to their properties can apply to the Area Manager to do so. When a private party initiates the upgrading of the road, it is reconstructed at their expense to a maintainable standard, typically I Class as a minimum. As a general rule, the road should be upgraded at least to the standard of the adjoining maintained section. There is no obligation by the Department to reclassify the upgraded road or to provide maintenance service to the road. However, resumption of regular maintenance may be considered if the road is upgraded.

Z Class roads are privately owned roads that are unlisted. They may be roads that appear in historical mapping but were never listed or owned by the Department. They are roads that the Department provides some limited maintenance due to a historical commitment of the government. The Department does not issue access permits to Z Class roads. A property owner with access to a Z Class road should not expect the road to be upgraded or for the level of maintenance to increase.

Prepared by:
Janice Harland, P.Eng.
Special Projects Engineer, TPW
October 16, 2006

N:\HotDocs9\Access Red Flag Issues 2007.WPT

Schedule "B" - Prescriptive Right of Way Affidavit Template

CANADA
PROVINCE OF NOVA SCOTIA
COUNTY OF _____

IN THE MATTER OF A PRESCRIPTIVE RIGHT OF WAY BENEFITTING THE PARCEL OF LAND AT _____, _____ COUNTY, NOVA SCOTIA, ASSIGNED PID NUMBER _____ and AAN NUMBER _____, THE "DOMINANT TENEMENT".

AND IN THE MATTER OF A PRESCRIPTIVE RIGHT OF WAY BURDENING THE PARCEL OF LAND AT _____, _____ COUNTY, NOVA SCOTIA, ASSIGNED PID NUMBER _____ and AAN NUMBER _____, REGISTERED IN THE NAME(S) OF _____, THE "SERVIENT TENEMENT".

Affidavit Template - Prescriptive Right of Way

[Red Flag. Before using this template carefully consider the evidence supporting the particular right of way you intend to prove. Note that parties affected by your recording of the right of way will have recourse under LRA, s.63 and ss.90-92, to challenge the recording.]

[Refer to Civil Procedure Rule 38 respecting affidavits. State facts not conclusions. Adapt for supporting affidavits from others. Key elements have bolded headings.]

[Red Flag - If claiming a prescriptive right of way over a previously migrated servient tenement consider the effect of LRA, s.74(2) and s.75. If claiming under LRA, ss.75(1) & 75(2), be sure to establish that your dominant tenement is adjacent to the servient tenement and that the part of the servient tenement does nor exceed twenty percent of the servient tenement's area.]

I, [Full Name] of [Place of Residence], _____ County, Nova Scotia, [Occupation], make oath and swear that:

Purpose

1. This affidavit is sworn to evidence the prescriptive right of way benefitting the Dominant Tenement and burdening the Servient Tenement.

2. I have personal knowledge of the matters to which I have sworn in this affidavit except where otherwise stated.

Identification of the prescriptive right of way

3. All registration and recording references in this affidavit refer to registrations and recordings in the _____ County, Nova Scotia, Land Registration Office, the "Registry Office", unless otherwise stated.

4. The Dominant Tenement benefitting from the prescriptive right of way is described in Exhibit "A" to this affidavit.

5. The Servient Tenement burdened by the prescriptive right of way is described in Exhibit "B" to this affidavit.

6. The prescriptive right of way is described in Exhibit "C".

Registered ownership interest(s)

7. I have been advised by my solicitor [Name of Solicitor_____], and I truly believe that his/her inquiry concerning the Servient Tenement in the Property On-line Database and in the Registry Office shows that [Names of registered owners] appear to be the registered owners of the Servient Tenement. I refer to [them] as the "Registered Owner(s)" in this affidavit.

8. To the best of my knowledge and belief [based on the advice of _____ which I truly believe,] no other parties appear to hold an interest in the Servient Tenement material to the prescriptive right of way or this affidavit.

9. To the best of my knowledge and belief none of the Registered Owner(s) is either or both under the age of nineteen or incompetent. **[Use only if correct and you are documenting less than twenty-five years use of the prescriptive right of way.]**

Extent of the Prescriptive Right of Way

> **[Adapt such of the following as apply to the prescriptive right of way. Describe its course and its width. It may be advisable to have the prescriptive right of way surveyed by a licensed Nova Scotia Land Surveyor for certainty of its extent.]**

10. The prescriptive right of way is [approximately] _____ feet in width.

11. The course of the prescriptive right of way is shown in the plan of survey prepared by _____, N.S.L.S., dated _____ bearing his file number _____, "Plan 1". Plan 1 was recorded in the Registry Office on _____ as plan _____. A partial copy of Plan 1 is annexed to this affidavit as Exhibit "_____".

12. The course of the prescriptive right of way is shown, approximately, in the sketch annexed to this affidavit as Exhibit "___".

13. Parts of the prescriptive right of way are shown, incidently, in the plan of Survey prepared by _____, N.S.L.S., dated _____ bearing his file number _____; this plan was recorded in the Registry Office on _____ as plan _____, "Plan 2". A partial copy of Plan 2 is annexed to this affidavit as Exhibit "_____".

14. National Air Photo Library aerial photograph Roll Number _____ Photo Number _____ dated _____ shows a travelled way over the course of the prescriptive right of way so the way was used on or before that date. [It also shows .....] A partial copy of the photograph is annexed to this affidavit as Exhibit "_____".

15. **Red Flag** - If claiming a prescriptive right of way over a previously migrated servient tenement consider the effect of LRA, s.74(2) and ss.75(1), (2). If claiming under s.75(1), (2) be sure to establish that your dominant tenement is adjacent to the servient tenement and that the part of the servient tenement does nor exceed twenty percent of the servient tenement's area.

Actual of use of the prescriptive right of way

16. I rely on the following acts of actual use of the prescriptive right of way in support of my right to use the prescriptive right of way: **[Use the following items as a starting point.]**

    a. Building the way, grading, installing drainage or culverts, applying gravel, laying pavement?

    b. Maintaining the way - re-paving, repairs, re-surfacing, marking the course of the way in winter, snow-plowing?

    c. Use of the way - use by deponent, deliveries, mail carriers, newspaper & flyer delivery, fuel delivery, use of way for access by friends, visitors & canvassers? Hauling crops, wood, fish or other commodities across the way? Define the purposes for which the prescriptive right of way has been used.

    d. Other acts of use?.

External evidence of use

[This information may be outside CPR 38 but it is desirable for registration in the LRO for a full documentation of the possessory interest]

17. I also rely on the following external evidence in support of my title to the prescriptive right of way: **[Use the following items as a starting point.]**

a. The prescriptive right of way is acknowledged in the legal description of the Servient Tenement annexed to this affidavit as Exhibit "B".

b. Note other references, if any, disclosed in the descriptions of adjoining parcels.

c. Do aerial photographs show evidence of use?

d. Do any old family or other photographs show evidence of use of the prescriptive right of way?

e. Do old Underwriters' Survey Bureau Limited's town maps show the access?

f. Note recorded affidavits, statutory declarations or recitals about use of the prescriptive right of way.

g. Note corroborating affidavits of disinterested, knowledgeable, surveyors, neighbours, former neighbours or others who have particular knowledge of the way to corroborate the claim.

h. Do any of the "A. E. Church Maps", historical tracts or statements in registered instruments for adjoining properties provide material evidence of the prescriptive right of way?

Use was continuous and unobstructed

[Establish that the claimant's use was for the duration of the statutory period. You should evidence more than 25 years of continuous use (to include the potential disability period) - tacking is recognized. If applicable, describe the continuity of all successive uses of the prescriptive right of way relied upon.]

18. [I]/[Name of Predecessor] commenced use of the prescriptive right of way on or before _____, 19___ by .....[describe how use began].

19. My use of the prescriptive right of way against the Registered Owner(s) was continuous and unobstructed without gaps for _____ years from _____ to [_____]/ [the date of this affidavit]. My use of the prescriptive right of way continues to the date of this affidavit. **[Refer to ss.32 *et seq.* of the *Limitations of Actions Act* and consider the doctrine of "lost modern grant". Adapt this paragraph according to your circumstances.]**

Use was open and visible

[The use must take place in an open and visible manner so that others, in particular the Registered Owner(s), might readily know of it or could regularly observe it. The use will generally be widely known by others in the area. The degree of notoriety will be consistent with the nature of the area in which the land is located.]

EITHER

20. The Registered Owner(s) became aware of my use of the prescriptive right of way on or about _____ by virtue of the acts of use set out above and .....[state specific evidence of Registered Owner(s)'s awareness *e.g.* ...my refusal to stop using the prescriptive right of way when the Registered Owner(s) demanded that I do so on or before ___[date]____ and the Registered Owner(s) has made no attempt to stop me from using the prescriptive right of way since].

OR

21. The Registered Owner(s) were aware, or ought to have been aware, of my use of the prescriptive right of way because [State specific facts evidencing wide public knowledge of the use, and absence of concealment - deliberate or by circumstances] *e.g.* [My use of the prescriptive right of way in _____ was visible to the neighbours and to everyone passing the Servient Tenement on {Main Street} because.....]

No acknowledgment or consent

22. I have not at any time during my use of the prescriptive right of way acknowledged, in writing or otherwise, to any party that I do not have the right to exercise the prescriptive right of way across the Servient Tenement.

23. I have not at any time before or during my use of the prescriptive right of way sought or received the consent, express or tacit, of the Registered Owner(s) or of any other party for my use of the prescriptive right of way.

24. I have not at any time during my use of the prescriptive right of way used force, secrecy or evasion in my use of the prescriptive right of way.

25. I am not aware of any claim advanced against either my right to use the prescriptive right of way or against the right of my predecessors in title to the Dominant Tenement to use the prescriptive right of way for access to and from the Dominant Tenement across the Servient Tenement. **[If there have been claims describe how they were dealt with.]**

Estoppel and laches

State facts, if any, that reasonably support arguments for either or both estoppel[75] or laches[76] against the Registered Owner(s) of the Servient Tenement.

Sworn before me at ...*etc.*

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[75] *Ford* v. *Kennie*. 2002 CarswellNS 461, 2002 NSCA 140, 4 R.P.R. (4th) 252, 210 N.S.R. (2d) 50, 659 A.P.R. 50.

[76] *MacDonell* v. *M & M Developments Ltd. et al.* (1997), 164 N.S.R.(2d), 81 (S.C.) *MacDonell* v. *M & M Developments Ltd. et al.* (1998), 165 N.S.R.(2d) 115 (C.A.).

Schedule "C" - Developers' Responsibility For Correcting Parcel Registers

Developers' Responsibility Re Cleaning-up Titles of Infant Parcels - Summary of Emails

From: Dianne Paquet
To: Tony Robinson ; Brenda Rice-Thomson ; Erin O'Brien-Edmonds ; Ian MacLean ; Catherine Walker ; David Curtis ; Garth Gordon ; John Cameron ; R.A. Balmanoukian ; Ron Creighton
Sent: Friday, September 23, 2005 3:15 PM
Subject: FW: Subdivision Land Registration Question

Hi everyone: Below is a question posed by [Inquirer] on process. [Inquirer] and I would really appreciate if any of you have the time to pose a response.

Thanks, Dianne

From: [Inquirer]
Sent: Friday, September 23, 2005 1:30 PM
To: Dianne Paquet
Subject: Subdivision Land Registration Question

Hi Diane:

Just wondering if maybe you could help me understand something or point me to someone who can. I don't actually work in the system but work for [Developer] and must have an understanding of how things work in order to make sure that our timing with scheduling closings and such are in line with the system requirements.

We converted all of our bulk parcels of land and are now into our second batch of lots that have been subdivided off. It is my understanding that any easements or other burdens that were associated with the parent parcel are automatically put on the individual lots. The parent parcel in question had a burden (as copied from Property Online):

Burdens on the Registered Interests

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF NOVA SCOTIA BY VIRTUE OF THE ENVIRONMENT ACT EASEMENT / RIGHT OF WAY HOLDER (BURDEN)

Therefore all individual lots have this burden on them although this burden does not necessarily affect all of the lots. I know that a form 45 would have to be used to remove this burden but the problem is that our solicitor says that it isn't his responsibility to do it and I know that in the past on lots that we have sold the purchaser's solicitor did not do it either.

What I am wondering is, who is responsible for confirming that what is reflected in the parcel register after subdivision is correct and who is responsible to submit form 45 in order to correct it? Any information you could provide would be greatly appreciated. This issue is causing some delays in some closings we have for the end of the month.

If I am totally wrong in my thinking please advise what the correct procedures are.

Thank you for your time.

From: R.A. Balmanoukian
Sent: September 23, 2005 3:43 PM

My gut reaction is the vendor should do it. My reasoning is that the standard for requisitions on title hasn't really changed from the old world: the vendor provides the purchaser with the parcel register or SRRI, after which the buyer has X days in which to raise objections to title. It would seem to me that the easement would be a valid objection which the vendor

would then have to remove (by way of Form 45) or say that they cannot (if it in fact is a burden on the infant parcel); if they cannot, the buyer would then be put to the same election as always: waive the objection or terminate the contract.

In addition, the vendor may or may not have particular knowledge of whether the burden is or is not appropriate to remove (I am thinking, for instance, of some older plans which simply show centre lines of power easements, etc.)

That's my 0.02 (Canadian funds). Gang?

From: Tony Robinson
Sent: Friday, September 23, 2005 4:29 PM

I agree but I think to withdraw from a standard form contract you would have to show that the easement materially affects the enjoyment of the property. Clause 7 of APS - form 100.

Creighton, Ron wrote:

I agree with Raffi's position on this. The Developer has a responsibility to clean up these burdens that are no longer affecting a subdivided lot that the developer created and is selling. Even if the Vendor did not create the subdivision I still feel the Vendor should be responsible to release any burden that no longer affects the parcel being sold.. If it is not a legal obligation (which I would argue it is based on practice standards) it is at least an "ethical obligation".

From: Garth Gordon
Sent: Fri 09/23/2005 4:29 PM

This situation is caused by a gap in the legislative system. The developer's lawyer may not have had a hand in the subdivision approval process and many developers' counsel seem reluctant to clean up the infant parcels and add the parcel description MGA compliance statement which is not added in the approval process. The purchaser's lawyer has no knowledge of the parcel or of the approval process; he or she normally would have no information about back title and should be able to rely on what is shown in the parcel register. We have had some less than pleasant experiences in these circumstances.

Although there is a gap in legislated responsibility I believe it falls to the developers to ensure the parcel registers of their infant parcels are corrected before sale. If they do this as the parcels are approved there should be no delays (for this cause) at the time of sale.

From: JR Cameron
Date: Fri, 23 Sep 2005 17:00:21

The original teaching, which I believe to be unchanged, was that the subdivider had an obligation to ensure that the parcel descriptions, burdens etc. were correct after the automatic addition of them to all parcels in the new area. That is why Form 45 was a freeby.

The subdivider is responsible for the state of the parcel registers, and for ensuring that they are correct.

That means Raffi is right. Since the parcel register may show an easement that is unreal, requiring its removal goes beyond dealing with an easement that may or may not interfere with the enjoyment of a parcel to one where the parcel is in fact falsely described. I think this is Ron's position. Tony's point is valid but, I submit, does not address what the true problem is.

Garth's legislative gap, of course, comes from the system designed after the fact, and the alternative is to require a separate AFR or Form 24 for each lot being created - which would create bigger problems for developers' lawyers than simply being required to ensure their parcel registers are correct, as at present.

I would agree with Raffi that it is a matter of title that the property and its benefits and burdens are correctly depicted in the parcel register, which is all we have for title now. Leaving a burden on a lot to which it does not belong is, I suggest, a serious error that impinges on the integrity of the system.

Erin O'Brien Edmonds
Fri 09/23/2005 6:00 PM

I agree with all the statements on this issue so far. The developers have the knowledge from the title search to do the "clean up" work. The buyers lawyers do not have the search and are less comfortable doing the clean up. The developers lawyers also have a responsibility to their client (the developer) to ensure the easements and covenants are put on properly. If the developers lawyer thinks that the buyers lawyer should add the covenants and this is not done, then the whole building scheme could fall.

I am sure that sooner or later someone will volunteer to do a paper on this to help develop the protocol.

C Walker
Fri 09/23/2005 7:34 PM

I agree with John's summary...

Raffi Balmanoukian
Fri 09/23/2005 7:21 PM

Lawyers in consensus. Whodathunkit?

Schedule "D" - Railway Lands Notes

a. **Possessory Interests in Railway lands**. In *Arnprior (Town)* v. *Coady*, 2001 Carswell Ont 1010; 42 R.P.R. (3d) 188 (Ontario Superior Court of Justice), the Court made the following statements:

"Railway Lands:

52 Relevant sections of the *Railway Act*, R.S.C. 1985, c. R-3 are as follows:

> 106(1) The company may, for the purposes of the undertaking, subject to the provisions of this Act, the *Railway Safety Act* and the Special Act,...
>
> (c) purchase, take and hold of and from any person any lands or other property necessary for the construction, maintenance and operation of the railway, and also alienate, sell or dispose of any lands or property of the company that for any reason have become unnecessary for the purposes of the railway;... R.S., c. R-3, s. 106
>
> . . . . .
>
> 110. The company may abandon the operation of any line of railway with the approval of the Commission, and no company shall abandon the operation of any line of railway without that approval. R.S., c. R-2, s. 106.
>
> . . . . .
>
> 263. No approval for the abandonment of the operations of any line of railway shall be given under section 110 except in accordance with such regulations as the Governor in Council may make in that regard. R.S., c. R-2, s. 259.

53 *The Railway Abandonment Regulations*, C.R.C. 1978, c. 1382 required an application to the Canadian Transport Commission for approval to abandon "a line of railway" under the Railway Act.

54 In *Erie & Niagara Railway* v. *Rousseau* (1890), 17 O.A.R. 483 (Ont. C.A.), Osler J.A. decided that lands that were equitably owned by a railway company, but which were not part of the railway's "permanent way" or essential to the use and enjoyment of the railway as a public concern, could be the subject of a claim by way of adverse possession. Osler J.A. concluded that since the lands could have been sold or leased by the railway company, the railway company was liable to lose ownership of them by the operation of the Statute of Limitations if they permitted or overlooked someone's occupation for the necessary period.

55 In *Grand Trunk Railway* v. *Vallicar* (1904), 7 O.L.R. 364 (Ont. C.A.), the Ontario Court of Appeal (Osler J.A. dissenting) had to consider land that formed part of a railway station yards. The Court started with the assumption that in order to establish a prescriptive right, it must be claimed under and through some one who had a right to grant or create the right claimed. If an actual grant of the right would have been illegal and void, obtaining title through adverse possession would be impossible. The Court considered the powers of the railway company to dispose of land at the time the land in question was acquired by the company and subsequently during the period of time when the other party claimed to have used or possessed the land. In that case, the railway company had no power to make a sale or grant of any of its property, otherwise than for the benefit and account of the railway. The Court concluded that in the absence of any corporate or other unequivocal act from which it could be inferred that the railway company had deemed any part of the disputed lands not necessary for the purposes of the railway, it ought to be presumed that there was no intention of treating any part of such lands superfluous to the railway company. **The onus was on the party claiming through adverse possession to establish that the lands were not required by the railway for its purposes and that a disposition of the lands would be for the benefit of the railway. The other party in that case was unable to meet that onus.**

56 Osler J.A., although in dissent, still agreed that the starting point in the analysis was whether a grant of the lands in dispute by the railway could have been made during the period which was relied on by the other party as establishing a right through use.

57 *Grand Trunk Railway* v. *Valliear*, *supra*, was followed in *McMahon* v. *Grand Trunk Railway* (1908), 12 O.W.R. 324 (Ont. C.P.) (per Falconbridge, C.J.).

Analysis regarding Adverse Possession:

58 The onus is on the Defendants to establish one or more of them has gained ownership rights in the disputed parcels by virtue of adverse possession. The Defendants have not met that onus. Adverse possession is not established in regard to the disputed portion of lot 36 for three reasons: (1) the existence of leases during the ten-year period preceding the commencement of the action; (2) the fact that the land in question was part of a railway line during the ten-year period; and (3) the absence of proof of the necessary facts regarding possession. Adverse possession is not established in regard to the disputed portion of lot 37 due to the absence of proof of facts that would support such a finding.

59 I note that during the course of the trial, Ms. Coady did not make it clear at any time which of the Defendants is claiming ownership by virtue of adverse possession over the disputed land. Furthermore, Ms. Coady adduced no evidence in regard to the relationship between the various Defendants, nor any evidence in regard to which, if any, of the Defendants occupied the disputed parcels between March 31, 1989 and the commencement of this action on March 27, 1997.

...

63 CN applied to the Canadian Transport Commission (subsequently the National Transportation Agency) on March 27, 1987 for permission to abandon the operation of the Renfrew Subdivision from Nepean (mile 0) to Renfrew (mile 43.78). I find that included in this line was lot 36 which is located at 26.3 miles. Authority to abandon the line was given by Order No. 1988-R-1216 dated December 30, 1988 which was to become effective December 30, 1989. However, by Order No. 1989-R-346 dated November 7, 1989, Order No. 1988-R-1216 was varied by changing the effective date of abandonment of the operation of the portion of the branch line between Nepean and mile 27.2 at Arnprior to December 31, 1990.

64 **I find that December 31, 1990 was the first date on which CN had the authority to sell or dispose of lot 36. Based on the authority of *Grand Trunk Railway* v. *Valliear*, *supra*, and *McMahon* v. *Grand Trunk Railway*, *supra*, I conclude that the clock could not start running on the ten-year period of adverse possession until December 31, 1990. This action was commenced on March 27, 1997 before ten years had elapsed.**

65 This is the second reason why the Defendants' claim for adverse possession of the disputed part of lot 36 must fail."

b. **The *Railway Act* of 1888**

The Canada Transport Agency Decision No. 417-R-2003, July 16, 2003, summarizes the effect of the *Railway Act* of 1888 on rights to "farm crossings" for lands severed before 1888:

> "The Agency and its predecessors have repeatedly held that the right to a private crossing pursuant to section 102 of the CTA (formerly section 215 of the Railway Act of 1985) arises when the railway traverses the lands of an owner in such a way as to leave a parcel of his land on each side of the railway. The continuation of that right is dependent upon continued ownership of the parcel of land on each side of the railway. However, if there is a severance of the title into two parcels, the right to a private crossing is lost, unless the right to cross was expressly reserved in the conveyance of one of the parcels.

In this case, the Agency notes that the parties agree that the subject land was divided as a result of the construction of the railway and that ClubLink is presently the registered owner of the land on both sides of the railway right of way.

CN argued that prior to the Railway Act of 1888, there was no statutory right to cross a railway right of way that divided a landowner's property. In the Railway Act of 1888, section 191 specifically provided, for the first time, for a farm crossing "as of right" in cases where a railway line was carried across private property. The Agency notes that it has generally been held that such a landowner was not so entitled prior to 1888, as the law of that time intended that he would be otherwise compensated in damages for the loss of land value arising from a severance.

This issue has been considered by various courts. In Ontario Lands and Oil Co. v. Canada Southern R.. W. Co. (1901) O.J. No. 46, Justice Meredith of the Ontario High Court of Justice held that:

> before the Dominion Railway Act of 1888 there was no statuable obligation upon a railway company to provide and maintain a farm crossing where the railway severed a farm, and sec. 191 of that Act, providing that every company shall make crossings for persons across whose lands the railway is carried, is not retrospective.

Also, in Grand Trunk Railway Co. of Canada v. Perrault, (1905), 36 S.C.R. 671, wherein Justice Davies of the Supreme Court of Canada held that the court considered at great length the meaning of sections identically worded and determined:

> that these statutes (Railway's incorporating statutes - that is, the Consolidated Railway Act prior to 1888) did not give a right of crossing over the railway apart from contract. This same conclusion was re-affirmed in the case of Grand Trunk Railway Co. of Canada v. Therrien, (1900), 30 S.C.R. 485. By these decisions we are bound, and as far as I am concerned, I may say I fully concur in them.

In addition, in Lazure v. C.N.R. 46, C.R.C. 150, the Board of Railway Commissioners held on November 20, 1936 that:

> the right of way in this case was acquired by the railway company prior to the passage of the Railway Act of 1888. The Act of 1888 was the first Act which gave to owners of land which had been severed by a railway the right to have crossings constructed and maintained at the expenses of the railway. Prior to the Railway Act of 1888 there was no statutory obligation upon a railway company to provide such crossings. It has been held in many cases that the Railway Act of 1888 was not retroactive.

More recently, the National Transportation Agency in Order No. 1991-R-466 dated August 29, 1991, held that:

> the applicant is not entitled to a farm crossing by right under section 215 of the Railway Act, 1985 because the railway bisected the subject lands prior to 1888 and no landowner may benefit from the rights granted pursuant to section 215 of the Railway Act where lands were crossed by railway prior to 1888.

The Agency is thus of the opinion that a railway company has no statutory obligation to provide a crossing for any land it bisected prior to 1888, pursuant to section 191 of the Railway Act of 1888 or any of its subsequent replacements up to and including section 215 of the Railway Act of 1985. Furthermore, the Agency has, since 1996, consistently applied section 102 of the CTA as a continuation of section 215 of the Railway Act of 1985.

However, ClubLink has argued that with the repeal of the Railway Act of 1985 in July 1996, section 102 of the CTA should no longer be considered to be a continuation of section 191 of the original Railway Act of 1888. According to ClubLink, there is thus no basis in the current legislation for

distinguishing between cases where land was divided by a railway line before 1888 to that divided after 1888, and that its application can be considered by the Agency pursuant to section 102 of the CTA.

The CTA is an act to continue the National Transportation Agency as the Canadian Transportation Agency, to consolidate and revise the National Transportation Act, 1987 and the Railway Act and to amend or repeal other acts as a consequence. Among other things, those portions of the Railway Act that were deemed necessary were continued in the CTA. In reviewing the legislation and its accompanying analysis, the legislative intent of Parliament, in enacting the CTA, was that section 102 of the CTA replace section 215 of the Railway Act. Therefore, in determining whether a statutory right to a crossing exists pursuant to section 102 of the CTA, the Agency only considers cases where the land was divided by the construction of a railway after 1888, the date on which the right first came into being.

Therefore, the Agency is of the opinion that as the Hamilton and North Western Railway Company acquired the original right of way from Alexander Stewart in 1877, prior to the enactment of the Railway Act of 1888 and section 191 therein, neither ClubLink nor the previous owners of the lands are entitled to a crossing 'as of right'. As such, ClubLink cannot, in this case, rely on section 102 of the CTA as there is no right that the Agency could recognize.

A crossing, pursuant to section 102 of the CTA and its predecessor sections of the Railway Act, is a statutory right that arises when land is divided by the construction of a railway line. Such a right is lost upon complete severance of the title to the two parcels unless the right to cross was expressly reserved in the conveyance of one of the parcels. Having determined that such a right could not exist in this case, the Agency need not address whether the two parcels of land have been maintained under single ownership. Furthermore, it need not address whether the existing farm crossing referred to in Deed No. 179521 dated March 17, 1964 is a reservation of a statutory right to cross. The Agency is of the opinion that the farm crossing referred to in Deed No. 179521 is neither a crossing by right pursuant to section 102 of the CTA nor a crossing pursuant to section 103 of the CTA and its predecessor sections of the Railway Act (as there is no Agency order authorizing such crossing); it is a private contractual arrangement between the parties over which the Agency has no jurisdiction.

CONCLUSION

In light of the foregoing, the Agency determines that ClubLink has no right to a private crossing pursuant to section 102 of the CTA, and therefore denies the application. "

c. **"Farm Crossings"**. See *Toronto, Hamilton, and Buffalo R. W. Co.* v. *Simpson Brick Co.*, 1909 CarswellOnt 11, for the following discussion of easements over railway crossings:

"9 It is notable that, while "farm crossing" is found in the operative clause, "crossing" alone is used in the recital. The terms "crossing" and "farm crossing" appear to be used indifferently and as interchangeable terms. Having regard to the facts that for 25 years before the railway was built the property to the north had been used almost constantly as a brickyard, and was unsuited for other purposes, and that the crossing was designed to furnish a means of egress from this land to Aberdeen avenue, it would seem that it was intended by this agreement to provide for a crossing for such purposes as the owners of this property might require, and not merely for a crossing restricted in its use to "farm purposes," in the ordinary sense of that phrase. Indeed, I think that the word "farm" may well be disregarded in construing the agreement, and that it may be read as conferring a right of crossing for all purposes for which the land cut off by the railway may profitably and conveniently be used. It would, in my opinion, defeat the intent of the parties to the agreement to hold that the use of the crossing must be confined strictly to farm purposes.

10 But if the word "farm" may not be rejected or ignored, then I would find that the term "farm crossing" was used by the parties as a convenient description of the right of crossing created by sec. 191 of the Railway Act of 1888.

11 In the *Railway Act* of 1888 two kinds of crossings and only two are provided for, viz., "highway crossings" and what are in the heading and side-note to sec. 191, though not in the section itself, termed "farm crossings." "Farm crossings" appears to be a term used in the statute in contradistinction to "highway crossings," and intended to cover all private rights of crossing to be enjoyed by "persons across whose lands the railway is carried," whatever may be the character of such lands or the use to which they are put. Having regard to all the circumstances in which the agreement here in question was made, as shewn by the evidence, it was intended, in my opinion, to confer upon the grantors to the railway company a right of crossing, in its nature and extent at least as great as that described under the caption "farm crossings" in sec. 191 of the *Railway Act*, the width of the crossing itself, and of the gates and its precise location, being defined by the agreement. The phrase "a farm crossing," if not used as the equivalent of "a private crossing," as I think it was, was employed as a convenient and well-understood phrase to describe the rights created by sec. 191 of the *Railway Act*, and these rights, at least, the agreement, upon its proper construction, in my opinion conferred on Noah and Charles Briggs.

12 For the plaintiffs it is contended that the right of crossing conferred by sec. 191 is restricted to such uses as are incident to the usual and ordinary requirements of a farmer. This question was mooted but not determined in *Plester* v. *Grand Trunk R. W. Co.*, 32 O. R. 55, where it was held by a Divisional Court that the hauling of gravel from a farm to a highway was "a farm purpose," and the Court suggested that the hauling of timber cut from the land might be within "farm purposes." Possibly conveying from the land brick made from clay found in it might also, upon a construction, liberal but not unreasonably so, of "farm purposes," be deemed to be covered by that phrase.

13 As already pointed out, sec. 191 made the only provision under the Act of 1888 for crossings over railways other than highway crossings. Railways are necessarily carried across many properties which are not farms in any sense of the word. The language of sec. 191 is that "every company shall make crossings for persons across whose lands the railway is carried, convenient and proper for the crossing of the railways by farmers' implements, carts and other vehicles." Unless these latter words are to be read as restricting the preceding general language of the section, and confining the use of every crossing provided under this section to farmers' implements, farmers' carts and farmers' other vehicles, there is in the section itself nothing to warrant the view that it was intended to provide only for crossings for "farm purposes." On the contrary, the section extends to all lands across which the railway is carried. The word "farmers'" applies necessarily only to the word "implements." It does not necessarily qualify the words "carts and other vehicles." But, if it does, the phrase "convenient and proper for the crossing of the railway by farmers' implements, carts and other vehicles," describes, not the uses to which the crossing may be put, but the kind of construction which the railway company were required to provide, that is, a crossing so built and arranged that it should afford a suitable passage for farmers' implements, for carts and for other vehicles. Whatever the purpose for which the lands crossed by the railway are used, the owner shall not be entitled to require the company to provide or maintain any higher grade or better class of crossing than that so described. But it by no means follows that the use of the crossing is to be restricted to farm purposes.

14 Should the generality of the section as to the lands to which it applies be restricted by the caption and side-note "farm-crossings?" In my opinion, it should not. The fact that, if such a construction were to prevail, many properties not farms would be left unprovided for and much valuable land cut off from access to street or highway, affords a cogent argument against it. That marginal notes are no part of the statute is well established. The function of the caption or heading appears to be similar to that of a preamble, viz., to aid in explaining obscure, doubtful, or ambiguous language in the section or sections found under it: *Donly* v. *Holmwood*, 4 A. R. 555, 560; but not to extend or restrict the scope of terms plain and unequivocal. The heading must often be regarded as "inserted for the purpose of convenience of reference and not intended to control the interpretation of the clauses

which follow:" *Union Steamship Co. of New Zealand* v. *Melbourne Harbour Trust Commissioners*, 9 App. Cas. 365, 369.

15 "In this Act . . . unless the context otherwise requires . . . the expression 'lands' . . . includes real property, messuages, lands, tenements, and hereditaments of any tenure" The onus is certainly upon those who contend that "lands" in sec. 191 means "farm lands" only, to shew that it is inconsistent with the context to give to the word "lands" the wider meaning given it in the interpretation section: ib.

16 The distinction between cases such as *Eastern Counties and London and Blackwell R. W. Co.* v. *Marriage*, 9 H. L. C. 32, in which the heading dealt with read, "And with respect to small portions of intersected land be it enacted as follows," and *Hammersmith, &c., R. W. Co.* v. *Brand*, L. R. 4 H. L. 171, where the heading was, "And with respect to the construction of the railways and the works connected therewith, be it enacted as follows" (pp. 203 and 208), on the one hand, and, on the other, cases like that now under consideration, where the headings are not "so drawn as to be applicable grammatically to the sections which follow them," is pointed out in *Union Steamship Co. of New Zealand* v. *Melbourne Harbour Commissioners*, *supra*. In the former class of cases the heading is certainly intended to control the application of the sections under it, while in the latter class the heading rather appears to be inserted for convenience of reference, and its further office to be that it "may properly be . . . used for the purpose of construing any doubtful matter in the sections under that very heading:" per Brett, L.J., in *The Queen* v. *Local Government Board*, 10 Q. B. D. 319, 321.

17 But the heading "farm crossings" is given full effect if it is taken to be descriptive of the grade or class of crossing which the railway shall be obliged to provide. If there is anything obscure or ambiguous in sec. 191, it is found in the concluding words, "farmers' implements, carts and other vehicles." If the heading is looked at for the purpose of clearing up any doubt as to whether the qualifying word "farmers'" applies to "carts and other vehicles," as well as to "implements," it then fulfils its legitimate office. This may lead to the application of the qualifying word "farmers'" to all three subjects. But the whole phrase in which these words occur -- "convenient and proper for the crossing of the railway by farmers' implements, carts and other vehicles -- " is, as already pointed out, restrictive neither of the kinds of properties for which crossings must be provided nor of the uses to which such properties or crossings may be put, but descriptive of the sort and quality of crossing which the railway must make. The heading "farm crossings" is given all the effect and influence to which it is entitled in the construction of the section, if it, too, is taken as descriptive of the character of the construction of the crossing, and not restrictive of the purposes for which it may be used, or of the uses to which the lands crossed by the railway may be put. I see nothing to require construction of the words "for persons across whose lands the railway is carried," in a sense different from their plain and ordinary meaning.

18 No doubt, the vast majority of crossings which it was expected that railways would be required to make under this provision were crossings which may properly and with strict accuracy be called "farm crossings." This fact may account for the use of this term in the statute to designate the private crossings, of whatever nature, for which it was intended to provide by sec. 191, in contradistinction to the public crossings designated "highway crossings," and provided for by secs. 183 to 190 inclusive. But I incline rather to the view that this heading was inserted as descriptive of the class and grade of crossings which the railway companies should be obliged to construct.

19 The corresponding section of the English Act, the *Railway Clauses Consolidation Act (1845)*, numbered 68, is so different in its terms that cases decided under it afford little assistance in construing sec. 191. It requires the company to make and maintain "for the accommodation of the owners and occupants of lands adjoining the railway, such and so many convenient gates, bridges, arches, culverts, and passages as shall be necessary for the purpose of making good any interruptions caused by the railway to the use of the lands through which the railway shall be made." If the plaintiffs' railway were constructed under such a statutory provision as this, I should entertain no doubt that, subject to the question whether the extent and mode of his user prevents or obstructs the working of the railway -- *Great Northern R. W. Co.* v. *McAllister*, [1897] 1 I. R. 587 -- the defendants

would, apart from agreement, be entitled to the right of crossing which they claim. Upon the construction of sec. 191 of our own *Railway Act* of 1888, I have been referred to no authority except the case of *Plester* v. *Grand Trunk R. W. Co.*, *supra*, and I have myself found no such authority. I have no hesitation in concluding that sec. 191 is not restricted in its application to crossings for farm purposes merely."

Schedule "E" - Supplementary Checklist & Templates
Rights of Way Used And Enjoyed (Section 9.d.)

1. Introduction

a. If the parcel you are searching has an *ungranted* right of way with any of the following sets of characteristics, the right of way *may* be a "... right of way that is being used and enjoyed" protected as an overriding interest under LRA, s.73(1)(e). It is not a prescriptive right of way.

b. "DTP" means dominant tenement parcel and "STP" means servient tenement parcel.

c. For an Affidavit dealing with these issues see Document 86566081 recorded in the Kings County LRO/Registry Office on November 7, 2006.

2. Rights of way of necessity[77] - s.9.d.viii - Template 1

a. A way of necessity may be acquired by an implied grant in favour of the grantee of lands over the lands of the grantor when landlocked lands are granted which are physically inaccessible unless the grantee is permitted to use the surrounding land of the grantor as an approach.

b. Similarly a way of necessity may by implication be reserved to the grantor over the lands of the grantee when landlocked lands are retained.

c. A way of necessity will only be implied where it is actually necessary for the use of the land retained or granted and not where it is for the more convenient enjoyment of the land granted or retained.

d. A way of necessity will be implied where the landlocked parcel is acquired by a devise.

e. The right to a way of necessity will cease when the right is no longer required in order to render the grant or reservation effectual.

f. Carefully consider potential alternate water access particularly over non-tidal waters - **s.8.c.**

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[77] *B.O.J. Properties Ltd. v. Allen's Mobile Home Park Ltd.* (1980), 36 N.S.R. (2d) 362 (C.A.).

3. **Parcels abutting roads shown in recorded plans - s.9.d.ix(2) - Template 1**

   a. The sale of a parcel according to a registered plan in which the parcel is shown as abutting a private lane, may convey an implied easement over the lane to the purchaser. The parcel and the lane must be in common ownership when the parcel is conveyed.

4. **Parcels said to be bounded by streets or ways - s.9.d.ix(2) - Modify Template 1**

   a. Where a grantor conveys land described as bounded by a street or way, the grantor cannot deny the existence of the street or way. The grantee acquires a perpetual easement or right of passage upon and over the street or way by the conveyance. The parcel and the street or way must be in common ownership when the parcel is conveyed.

5. **MGA, s.280(2) - s.9.d.ix(1) - See Template 1 (Comment after paragraph 16)**

   a. MGA, s.280(2) states "The owners of lots shown on a plan of subdivision as abutting on a private right of way are deemed to have an easement over the private right of way for vehicular and pedestrian access to the lot and for the installation of electricity, telephone and other services to the lot." This section is not considered retroactive; it became effective April 1, 1999 on enactment of MGA.

6. **Easement by implied grant on severance by a common owner - s.9.d.vii - Template 2**

   a. When the DTP was conveyed a *quasi* easement benefitting the DTP and STP became an easement benefitting the DTP because the following conditions were met:

      i. the DTP & STP had the same owner;

      ii. the *quasi* easement was such that it might become an easement;

      iii. the *quasi* easement was necessary to the reasonable enjoyment of the DTP;

      iv. the *quasi* easement was, and had been, used by the owner of the DTP and STP for the benefit of the entirety of the DTP and STP (*i.e.* it was a continuous and apparent *quasi* easement); and

      v. the DTP and STP were not subject to a mortgage.

   b. The form of words used to transfer this type of implied right of way in the chain of title may be critical. The words *'together with all ways now **used or enjoyed** therewith'* will pass this type of implied right of way; the words ". . . together with all the . . . ways . .

.to the same belonging." will not. The *Conveyancing Act*, s.13(d) may eliminate this issue in transfers after it came into effect on April 11, 1956[78].

7. **Proprietary Estoppel - s.9.d.xi**[79].

   a. When A to the knowledge of B acts to his detriment in relation to his own land in the expectation, encouraged by B, of acquiring a right over B's land, such expectation arising from what B has said or done, the court will order B to grant A that right on such terms as may be just. A right of way on this grounds is rare and probably should be based on a recorded court order not on affidavit or statutory declarations alone.

78 *Aspotogan Ltd.* v. *Lawrence* (1972), 4 N.S.R. (2d) 313, 30 D.L.R. (3d) 339 1972 CarswellNS 67, paragraphs 51-55.

79 *Maritime Telegraph & Telephone Co.* v. *Chateau Lafleur Development Corp.* (2001), 2001 NSCA 167, 45 R.P.R. (3d) 209, 207 D.L.R. (4th) 443, 2001 CarswellNS 425

CANADA
PROVINCE OF NOVA SCOTIA
COUNTY OF _____

TEMPLATE 1

IN THE MATTER OF **THE RIGHT OF WAY CREATED BY NECESSITY OR BY IMPLIED GRANT (ACCESS SHOWN IN PLAN)** BENEFITTING THE PARCEL OF LAND AT _____, _____ COUNTY, NOVA SCOTIA, ASSIGNED PID NUMBER _____, THE "DOMINANT TENEMENT", REGISTERED TO [NAMES]; AND

IN THE MATTER OF THE RIGHT OF WAY BURDENING THE PARCEL OF LAND AT _____, _____ COUNTY, NOVA SCOTIA, ASSIGNED PID NUMBER _____, BELIEVED TO BE REGISTERED TO [NAMES], BY THE DEED REGISTERED ON _____ IN BOOK _____, PAGE _____, DOCUMENT _____, THE "SERVIENT TENEMENT"

CAUTION. Before using this template carefully consider the evidence supporting the particular right of way you intend to prove. Consider the effects, if any, on the right of way by LRA s.73(1)(e), s.74(2) and s.75 dealing with easements "used and enjoyed" and "prescription". Note that parties affected by your recording of the right of way will have recourse under LRA, s.63 and ss.90-92, to challenge the recording. Note also that the owner of the Servient Tenement may have ten years to challenge the right of way if the owner takes the position that the right of way is by "prescription", not one "used and enjoyed".

Affidavit

I, [Full Name] of [Place of Residence], _ _____ County, Nova Scotia, Barrister, make oath and swear that:

Purpose

1. This affidavit is sworn to evidence the Right of Way by necessity or by implied grant benefitting the Dominant Tenement and burdening the Servient Tenement, the "Right of Way".

2. I have personal knowledge of the matters to which I have sworn in this affidavit except where otherwise stated.

Identification of the Right of Way

3. The Dominant Tenement is described in Exhibit "A" to this affidavit.

4. The Servient Tenement is described in Exhibit "B" to this affidavit.

5. The Right of Way is described in Exhibit "C" to this affidavit.

Inquiries

6. All registration and recording references in this affidavit refer to registrations and recordings under either or both the *Registry Act* and the *Land Registration Act* as the case may be in the _____ County, Nova Scotia, Registry Office/Land Registration Office, the "LRO", unless otherwise stated.

7. I have conducted or caused to be conducted an inquiry concerning title to the Right of Way in the LRO. I have also made limited inquiries to determine the names of the apparent current owner(s) of the Servient Tenement.

Servient Tenement ownership

8. I believe, but I do not certify, that [Names] appear to be the currently registered owners of the Servient Tenement by the deed dated _____ that is registered in the LRO on [Date] _____ in Book _____, Page _____ as Document _____ .

Extent of the Right of Way

[Adapt such of the following as apply to the Right of Way. Advise your client about the advantage of having the right of way surveyed by a licensed Nova Scotia Land Surveyor for certainty of its extent.]

9. The Right of Way is shown as "_____" in the plan of survey prepared by _____, N.S.L.S., dated _____ bearing his file number _____, the "Plan". The Plan was recorded in the LRO on _____ as plan _____. A partial copy of the plan is annexed to this affidavit as Exhibit "D".

10. The course of the Right of Way is shown, approximately, in the sketch annexed to this affidavit as Exhibit " ". The Right of Way is [approximately] _____ feet in width.

11. Parts of the Right of Way are shown, incidently, in the plan of Survey prepared by _____, N.S.L.S., dated _____ bearing his file number _____; this plan was recorded in the LRO on _____ as plan _____. A partial copy of this plan is annexed to this affidavit as Exhibit "_____".

12. National Air Photo Library aerial photograph Roll Number _____ Photo Number _____ dated _____ ___ shows a traveled way over the course of the Right of Way on or before that date. [It also shows .....] A partial copy of the photograph is annexed to this affidavit as Exhibit "_____".

Creation of the Right of Way

Right of Way By Implied Grant - Access Shown in Plan

13. On [Date of Originating Deed, below] [Name(s)], the "Originating Owners", owned both the Dominant Tenement and Servient Tenement as [all/part of] the lands described in the deed dated _____ that was registered in the LRO on _____ in Book _____, Page _____ as Document _____.

14. The Originating Owners caused the Plan to be recorded in the LRO on [Date]. The Plan shows the Servient Tenement as ["Proposed Road"] abutting the Dominant Tenement which is shown as [Lot "__"]. The Plan shows the Dominant Tenement having apparent access across the Servient Tenement. The Plan shows no other access to the Dominant Tenement except across the Servient Tenement.

15. While owning both the Dominant Tenement and the Servient Tenement, the Originating Owners conveyed the Dominant Tenement to [Grantee Name], the "Grantee", by deed dated _____, the "Originating Deed". The Originating Deed was registered in the LRO on [Date] _____ in Book _____, Page _____ as Document _____. The Grantee is a predecessor in title to the currently registered owner of the Dominant Tenement.

16. The Originating Owners did not expressly grant a right of way over the Servient Tenement for the benefit of the Dominant Tenement in the Originating Deed.

17. Under the circumstances of the Originating Deed the law implies a grant of easement over the Servient Tenement for the benefit of the Dominant Tenement by the Originating Deed[80].

[**Comment:** Consider the possible application of MGA, s.280(2), which states:

"s.280(2) The owners of lots shown on a plan of subdivision as abutting on a private right of way are deemed to have an easement over the private right of way for vehicular and pedestrian access to the lot and for the installation of electricity, telephone and other services to the lot."

This section is not considered retroactive so would be effective April 1, 1999 on enactment of MGA.]

Right of Way By Necessity

18. The Plan shows no access to the Dominant Tenement except across the Servient Tenement. Our inquiries show that there is no alternate access to the Dominant Tenement of record.

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[80] *Collins* v. *Speight* (1992),116 N.S.R. (2d) 201, 320 A.P.R. 201; 1992 CarswellNS 578. See also *Harris* v. *Kyle*, [1951] O.W.N. 18; 1950 CarswellOnt 387 (Ont C.A.).

[**Comment.** When dealing with a right of way by necessity be sure to consider whether there is an alternate public right of access across any adjacent waters that would preclude the "necessity". There seems to be no doubt that there is a public right of access across navigable **tidal** waters in Nova Scotia. In Hirtle v. Ernst[81] Nathanson, J., thoroughly considered how possible alternative water access to a parcel across **non-tidal** waters affected a claim for a right of way of necessity. There may be an issue with this decision concerning the stated effect of the former *Water Act* provisions now found in the *Environment Act* - refer to this author's comments about the *Hirtle* decision in *Access - Red Flag Issues Under LRA*[82]. Until the question whether there is a public right of navigation across *de facto* navigable **non-tidal** waters in Nova Scotia is clearly settled, this decision casts doubt on any such right. The following is an example paragraph for consideration if you are dealing with an otherwise "landlocked" parcel on a non-tidal watercourse.]

[Alternate Water Access Considered

19. The Dominant Tenement abuts [_____], a *non-tidal* watercourse, the "Watercourse". We have considered whether there is alternate access to and from the Dominant Tenement over the Watercourse by public right of navigation. We cannot opine that the Watercourse is a navigable waterway providing access to the Dominant Tenement by public right for two reasons:

    a. first we have no evidence that the watercourse is *de facto* navigable at law; and

    b. second, even if the watercourse is *de facto* navigable, it is an open question at law whether there is a *public right of access* over **non-tidal** watercourses in Nova Scotia that are *de facto* navigable[83].]

20. Under the circumstances of the Originating Deed, and in the absence of alternative access to a public road or navigable waterway, the law implies a grant of easement by necessity over the Servient Tenement for the benefit of the Dominant Tenement under the Originating Deed[84].

21. Our inquiries did not find any recorded release of the Right of Way from any of the registered owners of the Dominant Tenement from the date of the Originating Deed to the date of this affidavit. We are not aware of any unrecorded releases of the Right of Way.

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81 (1991), 21 R.P.R. (2d) 95 (N.S. T.D.).

82 Garth C. Gordon, Q.C., Presentation to Lawyers, Canadian Bar Association Nova Scotia, November 7, 2006, and Real Estate Practice For Legal Support Staff, Canadian Bar Association Nova Scotia, November 24, 2006.

83 *Friends of the Oldman River Society* v. *Canada (Minister of Transport)*(1992), 84 Alta. L.R. (2d) 129, [1992] 1 S.C.R. 3, [1992] 2 W.W.R. 193, 7 C.E.L.R., (N.S.) 1, 132 N.R. 321, 88 D.L.R. (4th) 1, 3 Admin. L.R. (2d) 1, 48 F.T.R. 160, 1992 CarswellNat 1313. Anne Warner La Forest, *Anger & Honsberger Law of Real Property, Third Edition*, (Aurora, Canada Law Book Company, 2005), at pages 19-22 and 19-23. *Hirtle* v. *Ernst* (1991), 21 R.P.R. (2d) 95 (N.S. T.D.).

84 *B.O.J. Properties Ltd.* v. *Allen's Mobile Home Park Ltd. (1980), 36 N.S.R. (2d) 362 (C.A.)*, 1979 CarswellNS 82.

22. For the reasons set forth above it is our opinion that the Dominant Tenement enjoys both a right of way of necessity and an implied grant of right of way over the Servient Tenement across the lands described in Exhibit "C".

23. [It is our further opinion that this right of way is an overriding interest in the Servient Tenement as contemplated under section 73(1)(e) of the *Land Registration*[85].]

[CAUTION. Do not forget to address the priority of the Dominant Tenement's interest in the Servient Tenement and, if there are interests with priority over the Right of Way in its title, note them as a textual qualification in the Dominent Tenement's parcel register.]

Sworn before me at ...*etc.*

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[85] Consider using this additional language if you are comfortable that the right of way is protected by LRA, s.73(1)(e) and the Servient Tenement Parcel, "STP", is already registered under LRA. If the STP is not already registered under LRA the additional language is not required and may raise unnecessary questions. If the STP is already LRA registered the additional language may help avoid or deal with any suggestion that LRA, s.74(2) may be a barrier to recording the right of way. Note that s.74(2) only applies to *prescriptive easements*. S.74(2) appears to be subject to LRA, s.75, as well.

CANADA
PROVINCE OF NOVA SCOTIA
COUNTY OF _____

TEMPLATE 2

IN THE MATTER OF THE **RIGHT OF WAY CREATED BY IMPLIED GRANT ON SEVERANCE** BENEFITTING THE PARCEL OF LAND AT _____, _____ COUNTY, NOVA SCOTIA, ASSIGNED PID NUMBER _____, THE "DOMINANT TENEMENT", REGISTERED TO [NAME(S)]

AND IN THE MATTER OF THE RIGHT OF WAY BURDENING THE PARCEL OF LAND AT _____, _____ COUNTY, NOVA SCOTIA, ASSIGNED PID NUMBER _____ BELIEVED TO BE REGISTERED IN THE NAME(S) OF _____, THE "SERVIENT TENEMENT".

CAUTION. Before using this template carefully consider the evidence supporting the particular right of way you intend to prove. Consider the effects, if any, on the right of way by LRA s.73(1)(e), s.74(2) and s.75 dealing with easements "used and enjoyed" and "prescription". Note that parties affected by your recording of the right of way will have recourse under LRA, s.63 and ss.90-92, to challenge the recording. Note also that the owner of the Servient Tenement may have ten years to challenge the right of way if the owner takes the position that the right of way is by "prescription", not one "used and enjoyed".

Affidavit

I, [Full Name] of [Place of Residence], _____ County, Nova Scotia, [Occupation], make oath and swear that:

Purpose

1. This affidavit is sworn to evidence the Right of Way created by implied grant on severance benefitting the Dominant Tenement and burdening the Servient Tenement, the "Right of Way".

2. I have personal knowledge of the matters to which I have sworn in this affidavit except where otherwise stated.

Identification of the Right of Way

3. The Dominant Tenement is described in Exhibit "A" to this affidavit.

4. The Servient Tenement is described in Exhibit "B" to this affidavit.

5. The Right of Way is described in Exhibit "C" to this affidavit.

Inquiries

6. All registration and recording references in this affidavit refer to registrations and recordings under either or both the *Registry Act* and the *Land Registration Act* as the case may be in the _____ County, Nova Scotia, Registry Office/Land Registration Office, the "LRO", unless otherwise stated.

7. I have conducted or caused to be conducted an inquiry concerning title to the Right of Way in the LRO. I have also made limited inquiries to determine the names of the apparent current owner(s) of the Servient Tenement.

Servient Tenement ownership

8. I believe, but I do not certify, that [Names] appear to be the currently registered owners of the Servient Tenement by the deed dated _____ that is registered in the LRO on [Date] _____ in Book _____, Page _____ as Document _____ .

Extent of the Right of Way

[Adapt such of the following as apply to the Right of Way. Advise your client about the advantage of having the right of way surveyed by a licensed Nova Scotia Land Surveyor for certainty.]

9. The Right of Way is shown in the plan of survey prepared by _____, N.S.L.S., dated _____ bearing his file number _____, the "Plan". The Plan was recorded in the LRO on _____ as plan _____. A partial copy of the plan is annexed to this affidavit as Exhibit "_____".

10. The course of the Right of Way is shown, approximately, in the sketch annexed to this affidavit as Exhibit "___". The Right of Way is [approximately] _____ feet in width.

11. Parts of the Right of Way are shown, incidently, in the plan of Survey prepared by _____, N.S.L.S., dated _____ bearing his file number _____; this plan was recorded in the LRO on _____ as plan _____. A partial copy of this plan is annexed to this affidavit as Exhibit "_____".

12. National Air Photo Library aerial photograph Roll Number _____ Photo Number _____ dated _____ shows a traveled way over the course of the Right of Way on or before that date. [It also shows .....] A partial copy of the photograph is annexed to this affidavit as Exhibit "_____".

Creation of the Right of Way on Severance

13. On [Date of Originating Deed, below] [Name(s)], the "Originating Owners", owned both the Dominant Tenement and Servient Tenement as [all/part of] the lands described in the deed dated _____ that was registered in the LRO on _____ in Book _____, Page _____ as Document _____.

14. While owning both the Dominant Tenement and the Servient Tenement, the Originating Owners conveyed the Dominant Tenement to [Grantee Name], the "Grantee", by deed dated _____, the "Originating Deed". The Originating Deed was registered in the LRO on [Date] _____ in Book _____, Page _____ as Document _____. The Grantee is a predecessor in title to the currently registered owner(s) of the Dominant Tenement.

15. The Originating Owners did not expressly grant a right of way over the Servient Tenement for the benefit of the Dominant Tenement in the Originating Deed.

16. [Name] has sworn an affidavit dated _____ setting out the material facts proving the presence and nature of the Right of Way as it was used and enjoyed as a *quasi*-easement benefitting the lands which became the Dominant Tenement and the Servient Tenement on and immediately before the date of the Originating Deed. The affidavit was registered in the LRO on _____ in Book _____, Page _____ as Document _____, the "Affidavit".

17. I have read the Affidavit. I truly believe it to be an accurate and complete description of the *quasi*-easement referred to therein that existed on and immediately before the date of the Originating Deed.

18. Based on the Affidavit and our inquiries in the LRO, I believe the following conditions existed when the Originating Owners conveyed the Dominant Tenement to the Grantee under the Originating Deed:

    a. the Originating Owners held title to the lands now comprising the Dominant Tenement and the Servient Tenement in fee simple;

    b. the quasi easement was of such a nature that it might form the subject-matter of an easement;

    c. the quasi easement was necessary to the reasonable enjoyment of the Dominant Tenement;

d. the *quasi*-easement had been and was, at the time of the Originating Deed, used by the Originating Owners, as owners of the entirety, for the benefit of the Dominant Tenement; and

e. the lands comprising the Dominant Tenement and the Servient Tenement were not subject to any mortgage.

19. Under the foregoing circumstances, the law implies a grant of easement over the Servient Tenement for the benefit of the Dominant Tenement[86] under the Originating Deed.

20. Our search did not find any recorded release of the Right of Way by any registered owners of the Dominant Tenement from the date of the Originating Deed to the date of this affidavit. We are not aware of any unrecorded releases of the Right of Way.

21. For the reasons set forth above it is our opinion that the Dominant Tenement enjoys an implied grant of easement over the Servient Tenement across the right of way described in Exhibit "C".

22. [It is our further opinion that this right of way arising by implication from its "use and enjoyment" is an overriding interest in the Servient Tenement as contemplated under section 73(1)(e) of the *Land Registration Act*[87].]

[Red Flag. Do not forget to address the priority of the Dominant Tenement's interest in the Servient Tenement and, if there are interests with priority over the Right of Way in its title, note them as a textual qualification in the Dominant Tenement's parcel register.]

Sworn before me at ...*etc.*

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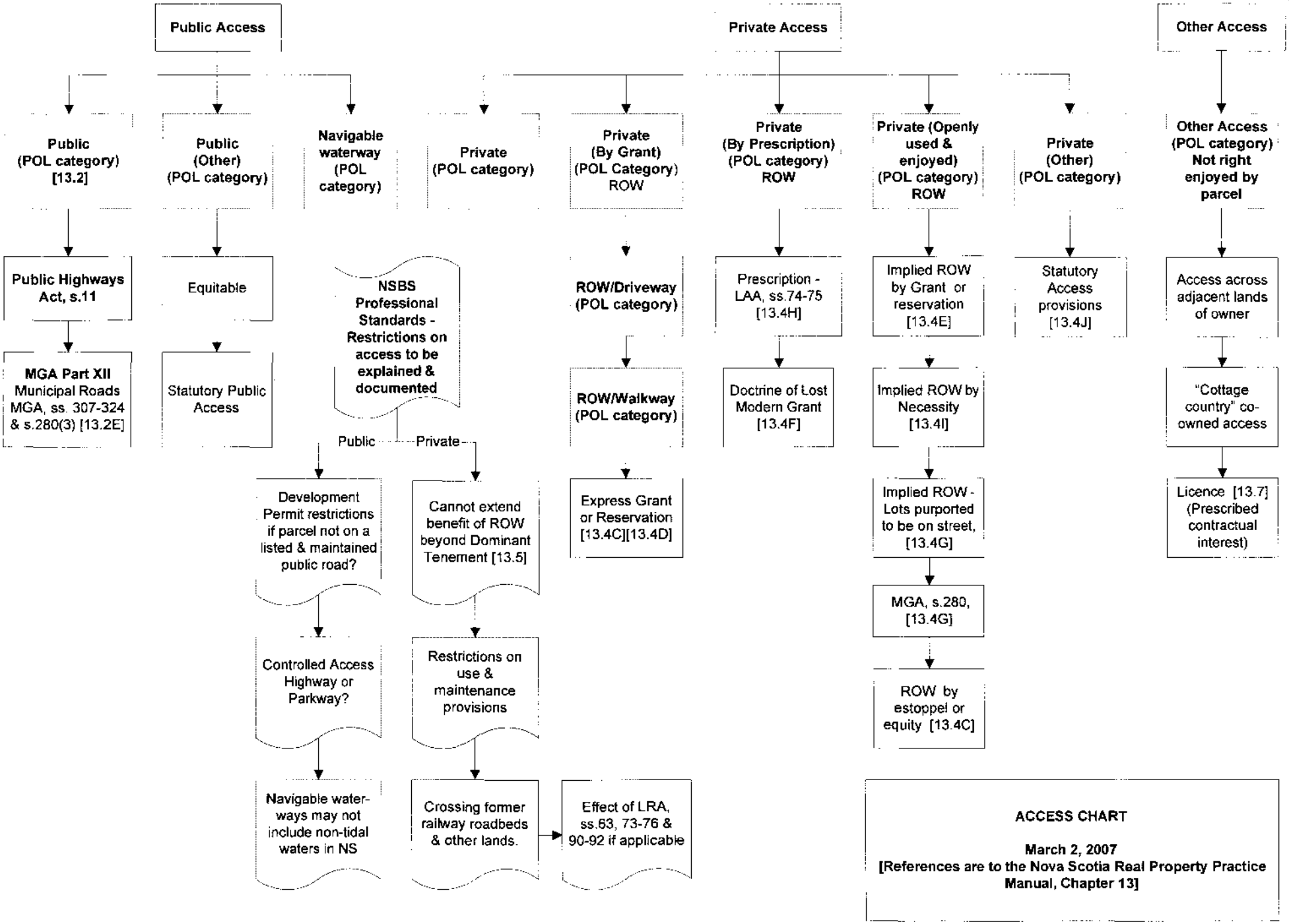
86 *English* v. *Wood* (1981), 46 N.S.R. (2d) 441, 89 A.P.R. 441, 1981 CarswellNS 261 (Cowan, J.).

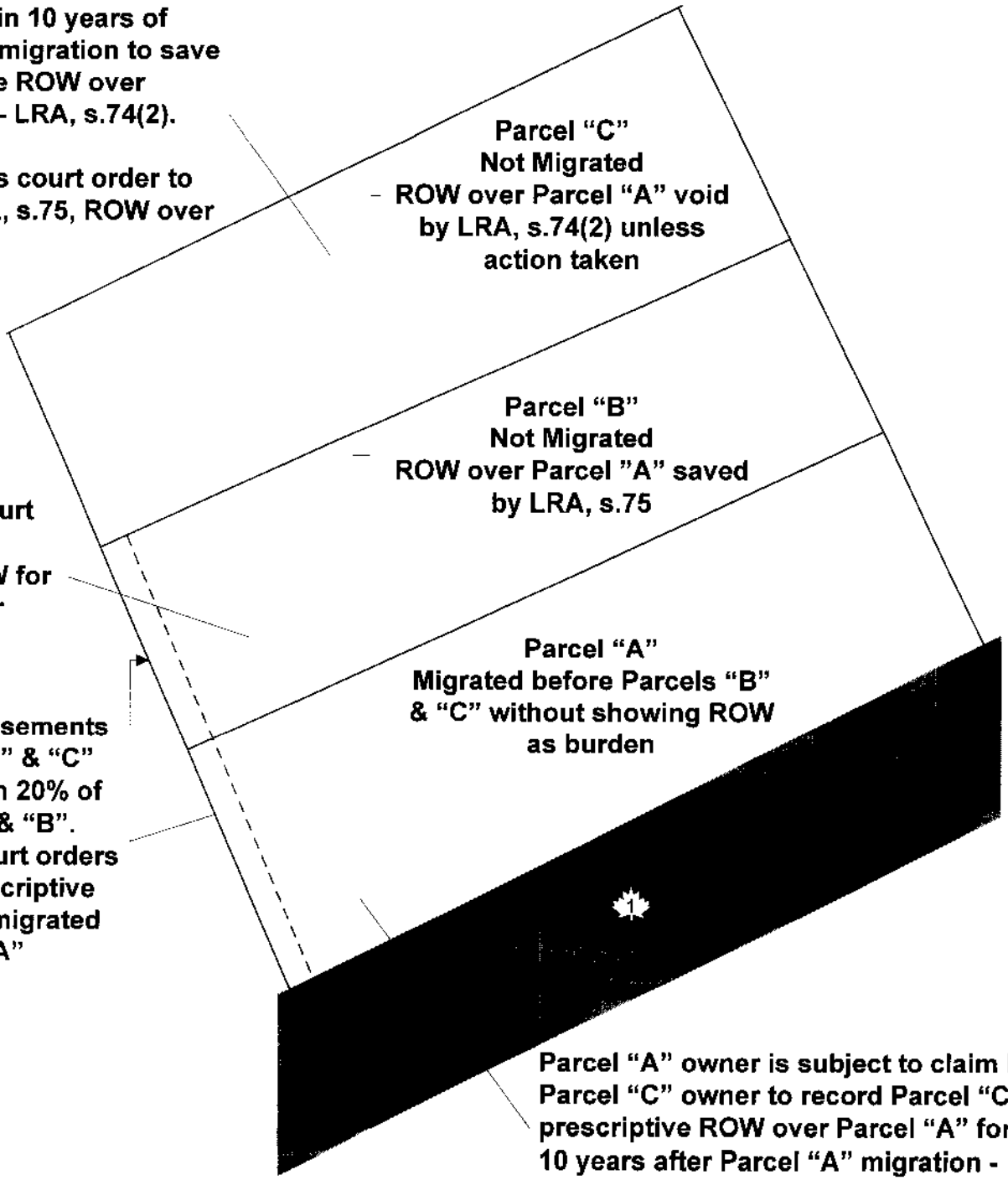
87 Consider using this last paragraph if you are comfortable that the right of way is protected by LRA, s.73(1)(e), and the Servient Tenement Parcel (STP) is already registered under LRA. If the STP is not already registered under LRA the additional language is not required and may raise unnecessary questions. If the STP is already registered under LRA the additional language may help avoid or deal with a claim that LRA, s.74(2) may be a barrier to recording the right of way. Note that s.74(2) only applies to *prescriptive easements*; if the STP owner claims that S.74(2) applies consider if your right of way comes within LRA, s.75 as an alternate position.


Public Access
Private Access
Other Access
Public (POL category) [13.2]
Public (Other) (POL category)
Navigable waterway (POL category)
Private (POL category)
Private (By Grant) (POL Category) ROW
Private (By Prescription) (POL category) ROW
Private (Openly used & enjoyed) (POL category) ROW
Private (Other) (POL category)
Other Access (POL category) Not right enjoyed by parcel
Public Highways Act, s.11
Equitable
NSBS Professional Standards - Restrictions on access to be explained & documented
ROW/Driveway (POL category)
Prescription - LAA, ss.74-75 [13.4H]
Implied ROW by Grant or reservation [13.4E]
Statutory Access provisions [13.4J]
Access across adjacent lands of owner
MGA Part XII Municipal Roads MGA, ss. 307-324 & s.280(3) [13.2E]
Statutory Public Access
Public
Private
ROW/Walkway (POL category)
Doctrine of Lost Modern Grant [13.4F]
Implied ROW by Necessity [13.4I]
"Cottage country" co-owned access
Development Permit restrictions if parcel not on a listed & maintained public road?
Cannot extend benefit of ROW beyond Dominant Tenement [13.5]
Express Grant or Reservation [13.4C][13.4D]
Implied ROW - Lots purported to be on street, [13.4G]
Licence [13.7] (Prescribed contractual interest)
Controlled Access Highway or Parkway?
Restrictions on use & maintenance provisions
MGA, s.280, [13.4G]
Navigable water-ways may not include non-tidal waters in NS
Crossing former railway roadbeds & other lands.
Effect of LRA, ss.63, 73-76 & 90-92 if applicable
ROW by estoppel or equity [13.4C]
ACCESS CHART
March 2, 2007
[References are to the Nova Scotia Real Property Practice Manual, Chapter 13]

Prescriptive Easement from Highway 1 to Parcels B & C across Parcels A & B

Parcel "C" Owner must take action within 10 years of Parcel "A" migration to save prescriptive ROW over Parcel "A" - LRA, s.74(2).

RG requires court order to record LRA, s.75, ROW over Parcel "B".



RG requires court order to record LRA, s.75, ROW for Parcel "B" over Parcel "A".

Prescriptive Easements for Parcels "B" & "C" affect less than 20% of Parcels "A" & "B". RG requires Court orders to record prescriptive ROW against migrated Parcel "A"

Parcel "A" owner is subject to claim by Parcel "C" owner to record Parcel "C" prescriptive ROW over Parcel "A" for 10 years after Parcel "A" migration - LRA, s.74(2)

IMPLIED GRANT OF ROW ON SEVERANCE

DIAGRAM 1 "BEFORE"

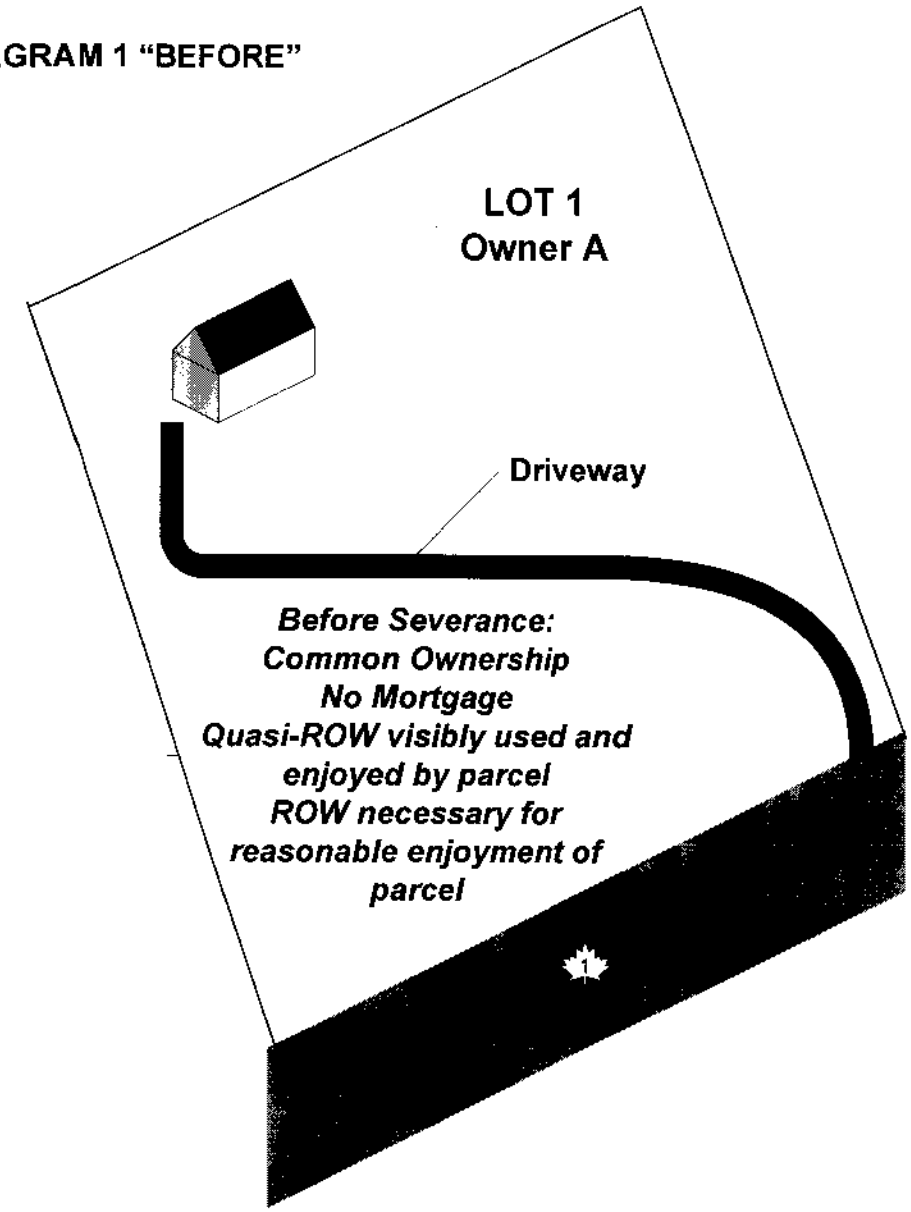
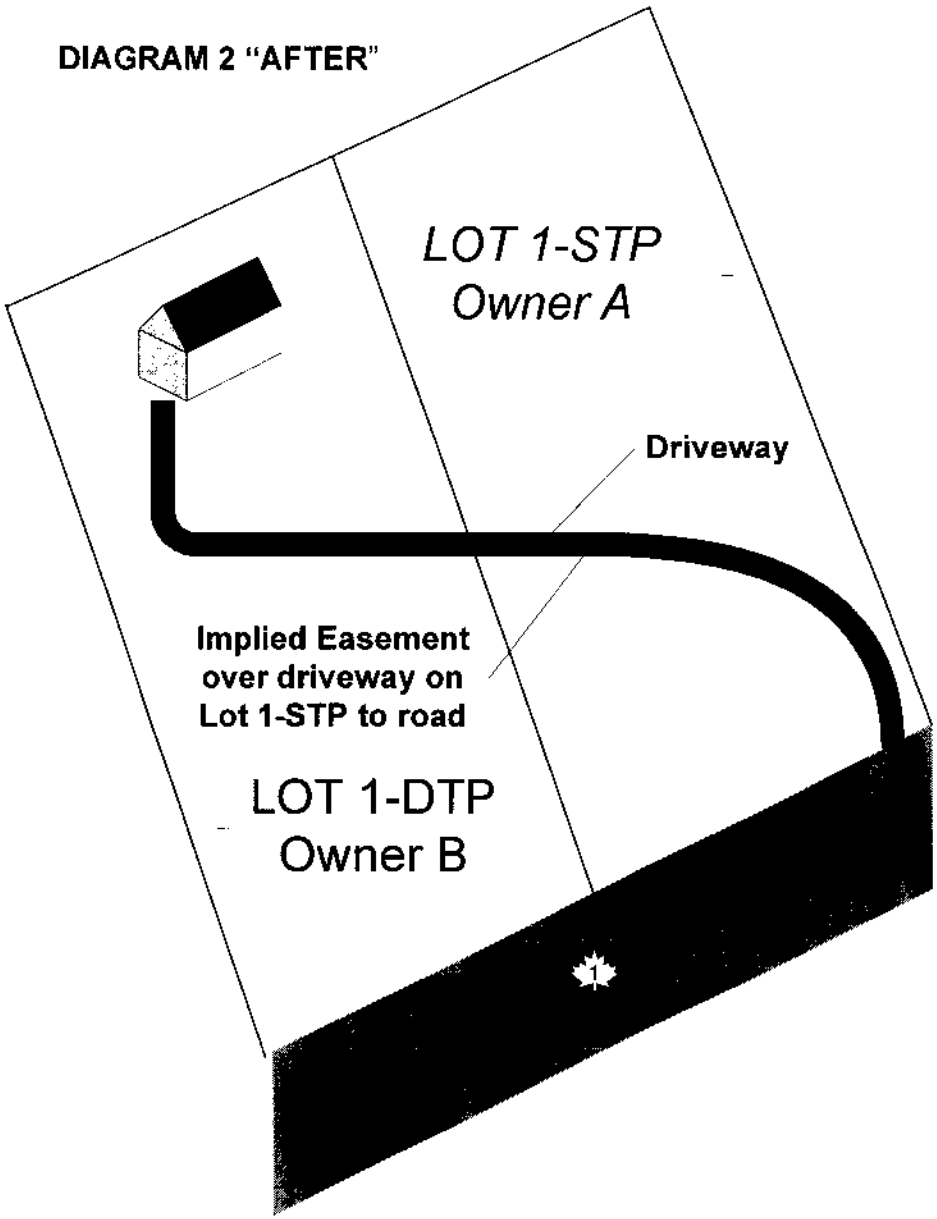
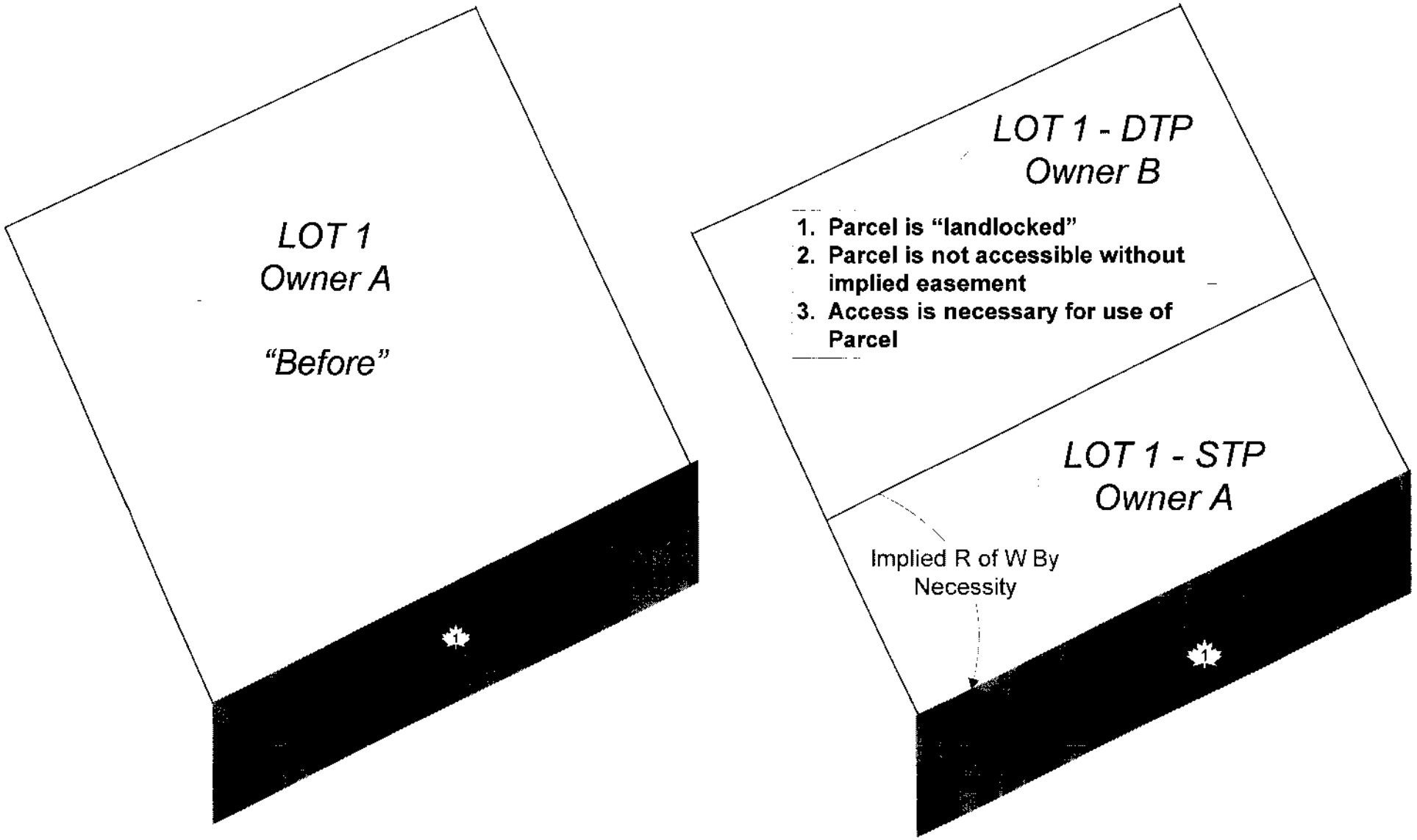


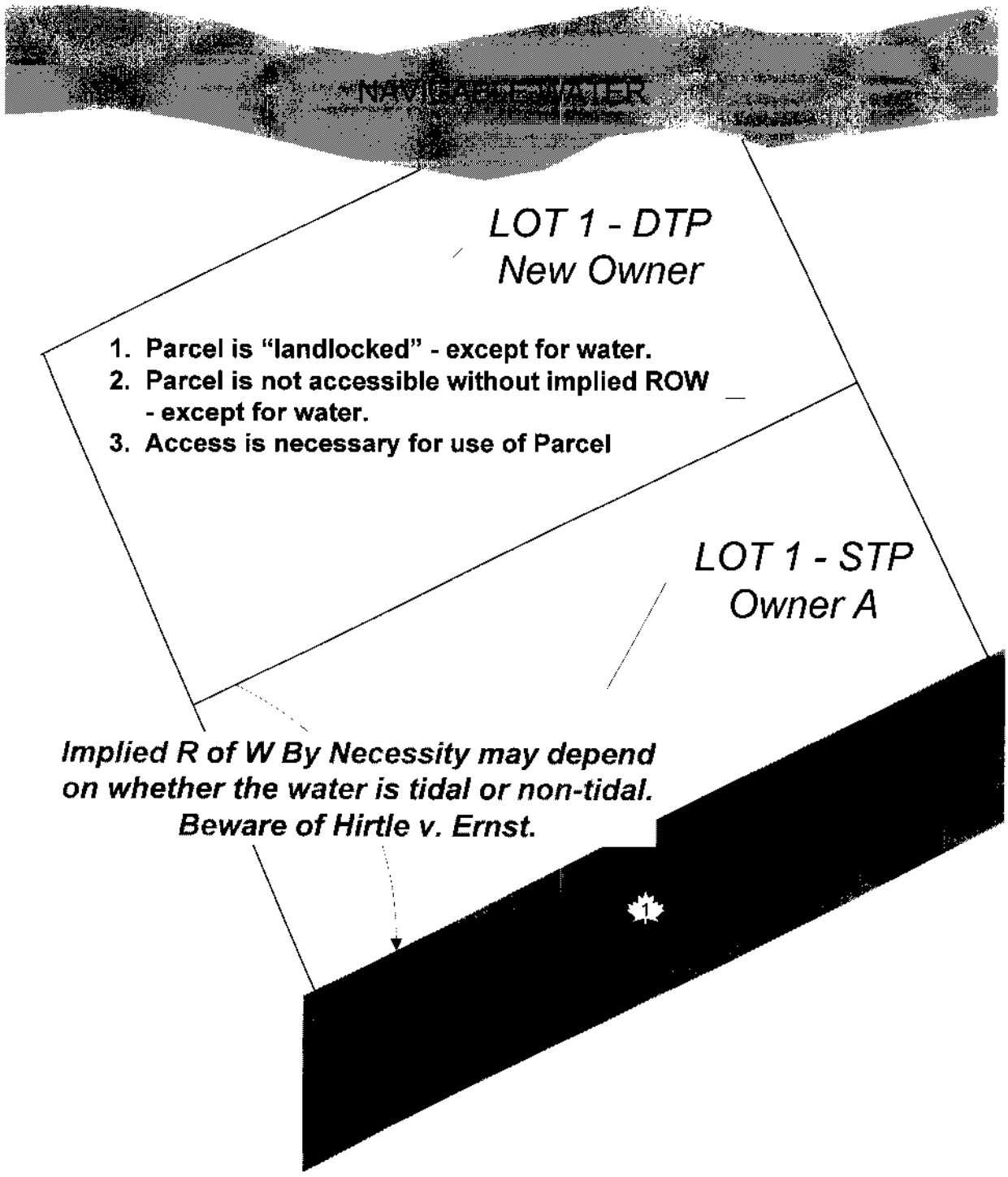
DIAGRAM 2 "AFTER"



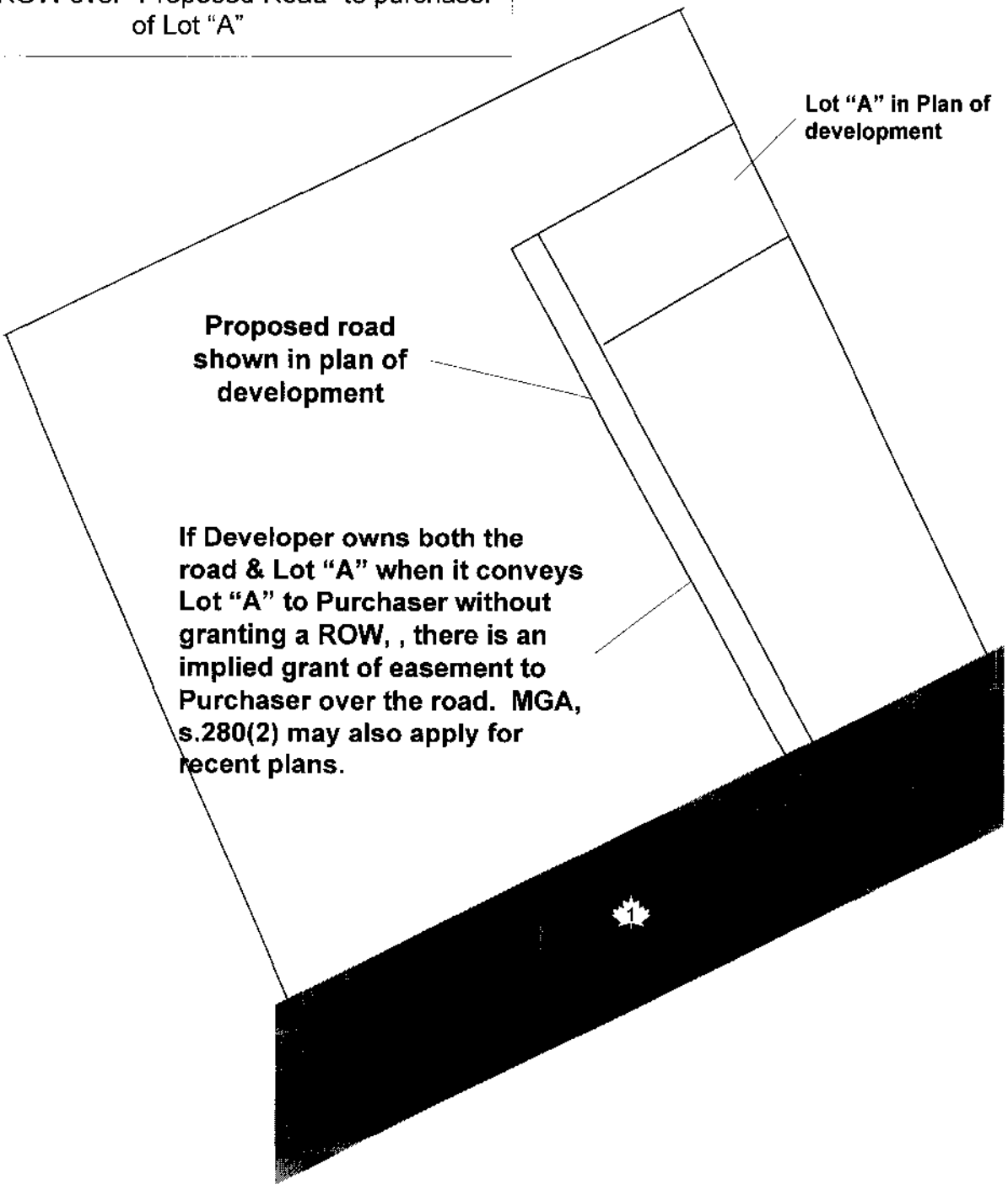
IMPLIED GRANT
RIGHT OF WAY BY NECESSITY



IMPLIED GRANT
RIGHT OF WAY BY NECESSITY
(Potential Access By Water)



IMPLIED GRANT
Lot & Road Shown in Plan of Development
*
Developer owns Lot "A" & "Proposed Road" but does not grant ROW over "Proposed Road" to purchaser of Lot "A"



ACCESS - RED FLAG ISSUES UNDER LRA (Revised March 2, 2007)

Garth C. Gordon, Q.C.
TMC LAW
Kentville, Nova Scotia

ADDENDUM:

Please revise section 8.b as follows (insert new "8.b.iii" and footnote 22A):

8.b. **PUBLIC (OTHER)**.

i. This might include

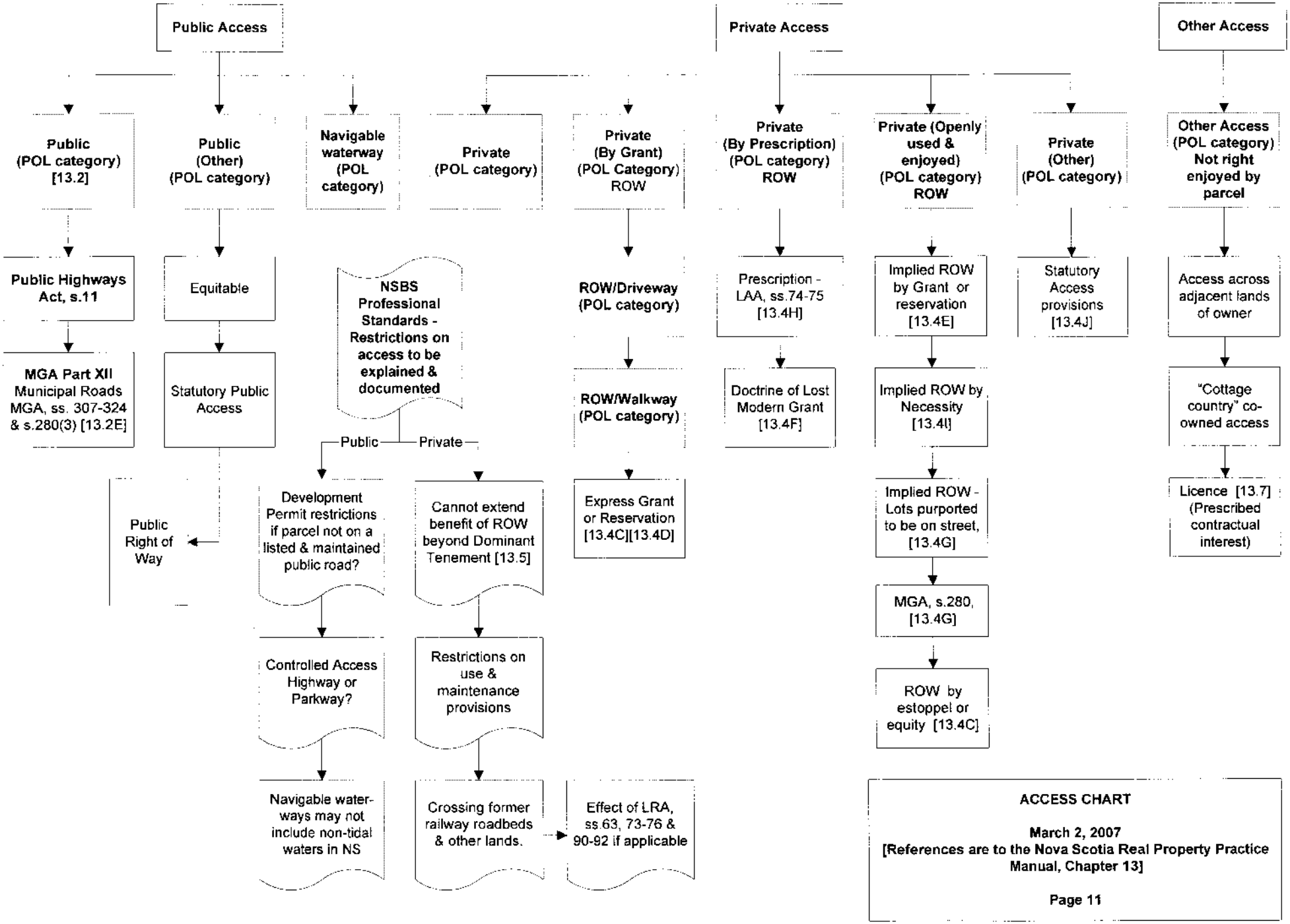
(1) Equitable rights of way granted by the Provincial Crown,[22]

(2) Statutory public access, or

(3) A public right of way,[22A]

Amended page 11 and the second transparency are identical - as attached.

Fn 22A *Newell* v. *Smith* (1971), 5 N.S.R. (2d) 533, 1971 CarswellNS 128 (N.S.S.C.T.D.)


Public Access
Public (POL category) [13.2]
Public Highways Act, s.11
MGA Part XII Municipal Roads MGA, ss. 307-324 & s.280(3) [13.2E]
Public (Other) (POL category)
Equitable
Statutory Public Access
Public Right of Way
Navigable waterway (POL category)
NSBS Professional Standards - Restrictions on access to be explained & documented
Public
Private
Development Permit restrictions if parcel not on a listed & maintained public road?
Controlled Access Highway or Parkway?
Navigable water-ways may not include non-tidal waters in NS
Cannot extend benefit of ROW beyond Dominant Tenement [13.5]
Restrictions on use & maintenance provisions
Crossing former railway roadbeds & other lands.
Effect of LRA, ss.63, 73-76 & 90-92 if applicable
Private (POL category)
Private (By Grant) (POL Category) ROW
ROW/Driveway (POL category)
ROW/Walkway (POL category)
Express Grant or Reservation [13.4C][13.4D]
Private Access
Private (By Prescription) (POL category) ROW
Prescription - LAA, ss.74-75 [13.4H]
Doctrine of Lost Modern Grant [13.4F]
Private (Openly used & enjoyed) (POL category) ROW
Implied ROW by Grant or reservation [13.4E]
Implied ROW by Necessity [13.4I]
Implied ROW - Lots purported to be on street, [13.4G]
MGA, s.280, [13.4G]
ROW by estoppel or equity [13.4C]
Private (Other) (POL category)
Statutory Access provisions [13.4J]
Other Access
Other Access (POL category) Not right enjoyed by parcel
Access across adjacent lands of owner
"Cottage country" co-owned access
Licence [13.7] (Prescribed contractual interest)
ACCESS CHART
March 2, 2007
[References are to the Nova Scotia Real Property Practice Manual, Chapter 13]
Page 11