ABANDONMENT OF RIGHTS-OF-WAY

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As a rural lawyer with a real property practice, you have seen them. Although innocuous at first glance, eventually they will require your considerable attention and ultimately your client will require advice. They come in different guises, but are often shown as "hauling road", "traces of old road", "abandoned road" or another such name. They appear on Plans of Survey showing the property your client has contracted to buy and most times appear to arise from nowhere and to go nowhere, except to cross the boundary line of the property your client intends to purchase. Do not ignore them.

At the earliest possible opportunity, inform your client of their existence and the potential for later difficulties.

EASEMENT OR LICENSE

One must first determine whether or not the roadway represents a true easement, or a license.

An easement, of course, is the right of the owner of the dominant tenement to make use of another's lands (servient tenement) for the benefit of the dominant tenement. This right "runs with the land" and is appurtenant to the dominant tenement. In general, a license, however, is a right personal to the person to whom the license is granted to make use, in some way, of another's lands. Generally, a license does not run with the land, and is usually revocable (absent any evidence or agreement to the contrary) by the grantor of the license. Rural woodlots

are often crisscrossed with roads that transgress boundary lines, and frequently were merely used to conveniently remove logs or to bring in equipment. They did not constitute easements, and were constructed for convenience and ease of commerce by the landowners involved.

One should examine, if possible, the title records to see whether or not, along the chain of title, a right-of-way has been reserved over the property in question. If no such reservations can be found (which is often the case), the abutter's (owner of the potential dominant tenement) deed and those of its predecessors should be scrutinized for the inclusion of an express grant. If both searches reveal nothing, and the usage of the roadway has long since ceased, a Statutory Declaration by an uninterested third party (if such a creature can be found), as to the nature and duration of the usage of the road, may suffice to establish a license and give some comfort to you and your client.

In my experience, a great many of the roadways that are shown crossing boundary lines were, in fact, roads of convenience, never intended to be permanent easements, and which were constructed for the purpose of removing wood products, sea manure or other such commodity. Beware, however, of old roads shown as providing what appears to be the only public-road access available to a land-locked parcel. The case for an easement is easier to make if the road appears to be the sole manner of getting from a woodlot to the Post Road.

There is a notation on the survey plan showing, in the surveyor's words "old woods road" leading from the neighboring lands, crossing your client's land, and heading in the general direction of the Public Road. You have discovered in a 1906 deed to your client's predecessor, a reservation of a right-of-way included in the description, for the benefit of the neighbor's property to permit access to the public road.

In the intervening years, the neighbor has acquired another more convenient way to access his property, and the surveyor tells you that there are black spruce trees growing in the old roadway that are at least eighty years old. Can you safely assume that the right-of-way is abandoned and the neighbor has lost the right to assert his use of the right-of-way?

This would be a most dangerous assumption. Assuming that the neighbor will not release or quit claim the right-of-way back to your client (he wants to keep all his options open) you must then attempt to determine whether or not the neighbor and his predecessors have retained the easement. For the most part, it is a matter of evidence which requires time to gather, something we often do not have, with a closing date looming.

IS THE ROAD AN EASEMENT OF RIGHT-OF-WAY?

Firstly, you must be satisfied that the roadway is, in fact, an

easement, appurtenant to the dominant tenement and a right which passes with the land. Without digressing into a discussion of how easements arise, it is probably sufficient for our purposes to recognize easements which arise from express grant, presumed grant, or by prescription.

An examination of the Registry of Deeds documents should reveal an express grant. Of course, you may have to search back for some time to find an actual grant, keeping in mind both the failure of some conveyances to include rights-of-way in their descriptions, and S. 13(d) of the Conveyancing Act, R.S.N.S., 1989, c. 97.

If no such express grant arises, a prescriptive easement is also possible, having been established by continuous usage sufficient to satisfy the Doctrine of Lost Modern Grant. S. 32 of the Statute of Limitation, R.S.N.S., 1989, c. 258, is probably not relevant to our discussions as usage required there must be continuous to the time when legal action is commenced. See Publicover v. Publicover (1991), 101 N.S.R. (2d) 75 (N.S.C.C. T.D.) The likelihood of an adjoining landowner's claim to a prescriptive right-of-way increases if his/her property does not adjoin a public road and it appears as if the roadway in question is the only access the landowner has to a public road.

Caution must be exercised to ensure that the roadway with which you are concerned is not the exception to what may appear to be

permissive hauling roads. Licenses may also be problematic, in that they may not be revocable at will by the Grantor of the license, and may endure for some time, especially where consideration has passed, or expense incurred in the construction of the road. I commend C.W. MacIntosh, Q.C.'s Nova Scotia Real Property Practice Manual, Butterworths Canada Limited, 1988, to your reading, especially his discussion of Licenses in Chapter 13. Statutory Declarations may be obtained from disinterested third parties to establish the legal nature of the roadway. Of course, the declarations must be sufficient and comprehensive enough to satisfy you or another lawyer acting as the Purchaser's solicitor.

ABANDONMENT

Assuming you are satisfied that the roadway in question represents an easement of right-of-way, and that it has not been used for a considerable length of time, the question of abandonment then arises.

Public highways cannot be extinguished by adverse possession (S. 17, Public Highways Act, R.S.N.S., 1989, c. 371. S. 11(1) of the Act defines a "deemed common and public highway" and the definition is broad. An old unused public highway is not a right-of-way in the true sense, as title to the fee is vested in the Crown (S. 11(2)).

In the case of a private right-of-way, abandonment may result in the loss of the easement to the dominant tenement. How does

one establish abandonment?

In order to assert and maintain abandonment, the user's intention to abandon must be shown. It is a question of fact as to whether there was an intention to abandon. It is worthwhile, at this point, to examine rights-of-way created by prescription and the application of S. 32 of the Statute of Limitations, R.S.N.S, c. 258:

> *32 No claim which may be lawfully made at the common law by custom, prescription, or grant, to any way or other easement, or to any watercourse, or the use of any water to enjoyed or derived upon, over or from any land or water of our Lady the Queen, her heirs or successors, or being the property of any ecclesiastical or lay person, or body corporate, when such way or other matter as herein last before mentioned has been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by showing that such way or other matter was first enjoyed at any time prior to such period of twenty years but, nevertheless, such claim may be defeated in any other way by which the same is now liable to be defeated and where such way or other matter as herein last before mentioned has been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it appears that the same was enjoyed by some consent or agreement expressly given, or made for that purpose by deed or writing."*

A good discussion on this section and its relevance to abandonment is contained in Publicover v. Publicover (1991) 101 N.S.R. (2d) 79 (S.C.). Roscoe, J. at page 79, in referring to the use of a right-of-

way for more than forty years as contemplated by S. 32, "... the right is absolute and indefeasible unless it can be shown that its use was by consent or agreement expressly given in writing. Therefore, use for more than forty years cannot be defeated by abandonment, non user or interruption as in the case of twenty-year claims" (my emphasis).

As our discussion concerns roads that are not presently in use, and a "statutory" prescriptive easement requires counting backwards for the requisite number of years from the time action is commenced, it is unlikely that a prescriptive right acquired via the Statute of Limitations is relevant here, and the owner of the dominant tenement would rely on the Doctrine of Lost Grant. See Gilfoy v. Westhaver et al (1989), 92 N.S.R. (2d) 425 (N.S.S.C. T.D.) at page 430, where Tidman, J. stated:

> *"[30] The major difference in prescription based upon lost modern grant as opposed to the* ***Limitation of Actions Act*** *is that the time of usage in order to establish the former must be counted from the outset of use, while in order to establish prescription under the* ***Limitation of Actions Act*** *the time usage is counted backwards from the time action is commenced under the* ***Act*** *and it provides for persons who do not oppose the right because of a disability. [31] Usage of the roadway, in either case, must be open continuous, unobstructed, and without permission of the landowner. The plaintiffs' usage of the route of the roadway was open, unobstructed, and without permission of the landowner from the time construction of the road commenced in 1955 until the commencement of this action in 1987."*

In Nantais v. Panzer [1926] 4 D.L.R. 258 (Ont. C.A.) the Plaintiff had purchased a lot of land by reference to a Plan of Survey which showed a laneway on the rear of her lot which provided access to a public street. The Defendant constructed a garage partially on the laneway which obstructed its use by the Plaintiff. While finding that the Plaintiff had acquired "... as part of her grant the easement or right of way over the lane ..." Smith J.A. found that even though the laneway had not been used by the Plaintiff or her predecessors for approximately twenty years, "non-use by the plaintiff is not of itself evidence of abandonment".

Although at trial, the Ontario Supreme Court considered the question of abandonment of a right-of-way created by express grant, Kelly, J. at page 357 of Baker v. Harris [1930] 1 D.L.R. 354 distinguished between abandonment of a prescriptive right-of-way and one created by express grant where he stated:

> *"In respect of the extinguishment of an easement there is a marked distinction between easements the title to which has been perfected by the existence of an actual grant, and easements the title to which remains imperfect, but a right to which is capable of establishment under the doctrine of prescription. Extinguishment by release may be effected either by express release or by circumstances occurring from which a release must be presumed. Where the title to an easement has been perfected, an extinguishment by release can rarely be effected in any other manner than by express release, or by*

circumstances so cogent as to preclude a quasi-releasor from denying the release. The extinguishment of an easement by implied release must be based upon the presumed intention of the dominant owner. It is a question of fact whether an act amounts to abandonment or was intended as such. The intention to release an easement will be less readily presumed where the title to the easement has been perfected than where the title still remains inchoate, and it will be less readily presumed from non-user in the case of negative easements, where they are acquired by mere occupancy, than in the case of positive easements acquired by actual physical user. In no case, whether the title to an easement has been perfected or not, or whether the easement is negative or positive, will mere non-user of a right alone cause extinguishment; for the suspension of the exercise of a right is not sufficient to prove an intention to abandon it. There must be other circumstances in the case to raise a presumption of intention to abandon. There is no hard and fast rule that 20 years' non-user raises even a primâ facie presumption of a release."

In King v. Brockins (1980) 35 N.S.R. (2d) 328, Glube, J. reinforces the premise that non use, by itself, is not sufficient evidence of abandonment. At page 334 she found "The mere fact that an easement has not been used for periods of time does not indicate abandonment."

However, non-use by the owner of the dominant tenement may infer an intention to abandon. Anger and Honsberger's Law of Real Property, second edition, Canada Law Book Inc., Aurora, Ontario, 1985, at page 972 suggests that actions by the servient tenement's owners which prevents the use of the right-of-way, coupled with non-use, may

infer abandonment:

> *"A release of an easement which depends on user and has not been perfected will be implied if the owner of the dominant tenement permits the owner of the servient tenement to do an act of a permanent nature on the servient tenement which necessarily prevents the future enjoyment of the easement, of if the use of the easement has been abandoned. The cessation of user of an easement is not in itself abandonment but only evidence from which it may be inferred."*

In other words, the owner of the right-of-way may be estopped from making use of it if the owner of the servient tenement has done acts which physically prevent its use, and the user has made no objection and has refrained from use for an extended period of time. Cooper, J.A. in Finley v. Sutherland, [1969] 4 D.L.R. (3d) 586 (N.S.S.C. App.Div.), at page 597 quotes Warrington, L.J. in Swan v. Sinclair [1925] A.C. 227,

> *"In the Court of Appeal the case was argued solely on the question as to whether or not there has been an abandonment of the right of way. Warrington, L.J., at p. 268 said:*
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> > *The law is, I believe, correctly stated by Alderson B in Ward v. Ward, 7 Ex. 838, 839. He says: 'The presumption of abandonment cannot be made from the mere fact of non-user. There must be other circumstances in the case to raise that presumption. The right is acquired by adverse enjoyment. The non-user, therefore, must be the consequence of something which is adverse to the user.'*
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> *Warrington, L.J., went on to say at p. 269:*
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> > *In the present case the user of the road has been rendered impossible by not only the continuance of obstructions existing at the date of the grant, but also by the creation of a fresh one by the raising, in 1883, of*

> *the level of the land over which the way would pass. It seems to me that these circumstances, adverse to user, and sufficient in themselves to explain the non-user, combined with the great length of time during which no objection has been made to their continuance, nor effort made to remove them, are sufficient to raise the presumption that the right has been abandoned, and has now ceased to exist."*

In finding that the right-of-way was abandoned, Cooper, J.A. in Finley v. Sutherland distinguished Baker v. Harris by noting that in Baker, a portion of the right-of-way had been used over the years, while in Finley, the owner of the easement had made no use whatsoever of the right-of-way.

The case law appears to indicate that the only method by which a right-of-way created by express grant can be abandoned is by evidencing the intention to abandon by way of an express release executed by the holder of title to the dominant tenement. Simple non use is insufficient, even if for long periods of time, to indicate an intention to abandon such a right-of-way. See C.M. MacIntosh's Nova Scotia Real Property Practice Manual, p. 13-141. This may be partially explained by the inclusion of an express grant in each of the succeeding deeds in a chain of title. Obviously, the Grantors intend to include the right-of-way as part of the grant and the Grantees intend to rely on this grant, thus negating any suggestion of an intention to abandon.

All is not lost, however. The Court may find an intention to abandon a right-of-way created by express grant if the user has

acquiesced to the servient tenement owner's use of the lands that would prevent the easement from being exercised. Although the case turned upon the issue of whether or not an easement had been created by the words of the express grant, Cooper, J.A. in Finley v. Sutherland, supra. at page 600 set out his views on what was required to establish the intention to abandon. He states in part:

> *"However, I think that I should set out my views as to whether, upon the assumption that what was granted by the 1891 Deed was a right of way and not merely a right to construct and build a right of way, there was abandonment. I do so particularly because this question was raised and argued at some length.*
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> *In the first place there was here much more than mere non-user. The green strip area was obstructed by two stone walls which have been in place for at least 40 years. In addition there are other obstructions, namely, the shed and garage of the plaintiff, to the extent I have mentioned, and these have existed over many years. In addition predecessors in title of the defendant sought and obtained permission from predecessors in title of the plaintiff to obtain access to the property now owned by the defendant over the plaintiff's property by another route. All these matters indicate to me an intention to abandon any right of way over the green strip area. I therefore conclude that if there was an outright grant of a right of way by the 1891 Deed, the right of way has been abandoned."*

An example of non-use coupled with the inability to make use of the right-of-way can be found in Re: Bungay (1983), 58 N.S.R. (2d) 327 (N.S.S.C.) where the Court determined that non-use for nearly

one hundred years together with the construction of a power corridor along a reserved street to which the right-of-way led "frustrated" the purpose for which the right-of-way was granted, and constituted abandonment.

As well, the intention to abandon may be inferred by the actions of the owner of the dominant tenement if he or she alters the dominant tenement in such a way as to render usage of the right of way impossible or unnecessary.

Although the case did not involve an assertion of abandonment, King v. Brookins, (1980) 40 N.S.R. (2d) 278 (N.S.S.C. App. Div.) is interesting for the Appeal Division's creative approach in reducing the width of a right-of-way created by express grant from 15 feet to 11 feet, while finding no evidence of abandonment of any portion of the right-of-way. The Appeal Division appeared to have interpreted the words of the grant; although declared to be 15 feet in width, to 11 feet because the full fifteen feet did not appear necessary to carry out the purposes for which the right-of-way was granted.

In Aspotogan Ltd. v. Laurence (1972), 4 N.S.R. (2d) 313 (N.S.S.C. App. Div.), the Appeal Division adopted the reasoning of the trial judge as to the alleged abandonment of a right-of-way created by express grant, which by the evidence had apparently been unused for approximately 34 years. At trial, Hart, J. at page 349 rejects the notion

that non-use, absent other evidence showing an intention to abandon, equates abandonment:

> *"The plaintiff contends that even if a right to cross such property was at any time vested in the owner of Lot 20 that such right has been abandoned by non-user. In support of this proposition he argues that from 1928, when the plaintiff purchased the property, until 1962 virtually no use was made of the old mill road. To extinguish an existing right-of-way by non-user the circumstances of the failure to exercise the right must be indicative of an intention on the part of the person entitled thereto to abandon that right. No precise rule can be followed as may be seen from the discussion of the subject in* ***Gale on Easements****, 10th ed. at p. 485, which is as follows:*
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> > *The precise period requisite to extinguish a right of way, by mere non-user, does not appear to have been determined by any express decision of the English Courts. In* ***Bower v. Hill*** *(1835), 1 Bing. N.C. 555, Tindal, C.J., indeed said that an obstruction to a way of a permanent character, if acquiesced in for twenty years, would be evidence of a renunciation and abandonment of the right. But the weight of authority is against this dictum. In the earlier case of* ***Seaman v. Vawdrey*** *(1810), 16 Ves. 390, where a right of access to mines had been reserved by a conveyance of 1704, but had never been exercised, it had been held that the right had not been released by this non-user. 'The non-user of this right proves nothing,' said Grant, M.R. In* ***Doherty v. Beasley*** *(1835), 1 Jones Exch. Rep. (Ir.) 123, where plaintiff brought an action against defendant for obstructing plaintiff's right of way over defendant's close, and defendant pleaded in effect that plaintiff*

> *had not used the way for twenty years, Joy, C.B., said that the question really came to this: Was the plaintiff obliged to use the way, and if he did not make use of it for twenty years was he to be excluded by a plea such as the defendant's? 'We think not. The question is not whether the non-user may not be evidence . . . but whether it is per se an absolute bar. We think that we must allow the demurrer,' said the Chief Baron. Inn* **Cook v. Bath** *(1868), 6 Eq. 177, Malins, V.-C., held that thirty years' non-user without more was insufficient to extinguish a right of way.*

and also at p. 487:

> *In* **Ward v. Ward** *(1852), 7 Ex. 838, a right of way was held not to have been lost by mere non-user for a period much longer than twenty years, it being shown that the way was not used, because the owner had a more convenient mode of access through his own land. Alderson, B., said: 'The presumption of abandonment cannot be made from the mere non-user. There must be other circumstances in the case to raise that presumption. The right is acquired by adverse enjoyment; the non-user, therefore, must be the consequence of something adverse to the user.*

The fact that the old mill road was not used to any extent from the time that the plaintiff purchased Lots 18 and 19 in 1929 until Lot 20 was purchased by Mr. Masland in 1962 was really simply a consequence of the cessation of operations upon Lot 20. The grist mill had ceased to operate some years before, and after 1926 when the concrete plant and the shingle mill folded no other commercial activity was carried

> *on at the site. The property was apparently up for sale over this period of years and was not occupied by its owner. There is nothing in these circumstances to indicate an intention on the part of the owner to abandon the right of access to Lot 20 from the main highway and I do not find therefore that the non-user of the right-of-way over this long period of time had extinguished the right."*

The notion of estoppel, i.e. estoppel of the owner of the dominant tenement from insisting on making use of the easement because of his or her acquiescence to the servient tenement owner's usage (presumably at some expense to the servient tenement owner) of the lands subject to the easement appears to be available to a defendant owner of the servient tenement. The acts of the servient owner would, I would think, fall somewhat short of any prescriptive rights acquired by him or her over the lands subject to the easement.

Although not strictly speaking "abandonment" in the legal sense, a right-of-way may be extinguished if the servient tenement owner has acquired a prescriptive right to the land affected by the easement. The distinction appears to be the length of time involved and the nature and extent of the acts done by the servient tenement owner.

As can be seen, the cases are extremely fact dependant: length of non-use, partial usage, documentary evidence of an intention to abandon, nature of use of land subject to easement by servient tenement owner and the length of time of such usage, and alteration of dominant

tenement by owner(s) adversely affecting the ability or necessity of using the right-of-way, are all factors that must be examined.

Crossley & Sons v. Lightower (1867), 2 Ch. App. 478 at page 482, as quoted by Cooper, J.A. in Finley v. Sutherland, supra. at page 601 stated that:

> *"The question of abandonment of a right is one of intention, to be decided on the facts of each particular case. Previous decisions are only so far useful as they furnish principles applicable to all cases of the kind."*

How then, should the humble solicitor proceed when confronted with the survey plan showing the old hauling road traversing the boundary of the lands his client intends to purchase? The simple answer is WITH EXTREME CAUTION. If the roadway appears to be an easement, and you cannot obtain a release, your client will have to choose to accept the property subject to the right-of-way or decline to purchase. As the case law indicates, a perfected easement, no matter how long it has remained dormant, is difficult to remove.