

# “You Can’t Get There From Here” Access Issues Under the LRA

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Raffi Balmanoukian  
Barrister & Solicitor  
New Glasgow, NS



# Overview

- - Currently a dozen POL access categories
- - Mistakes and overlaps abound
- - Some difference in opinions (square pegs / round holes)
- - Some differences in practice (subdivision, s. 280(2), used and enjoyed)
- - “Old rules done right”
- - New information (e.g. new survey fabric)
- - Information that becomes incorrect (e.g. PIDs on subdivision)

## Whatchutalkingboutwillis?

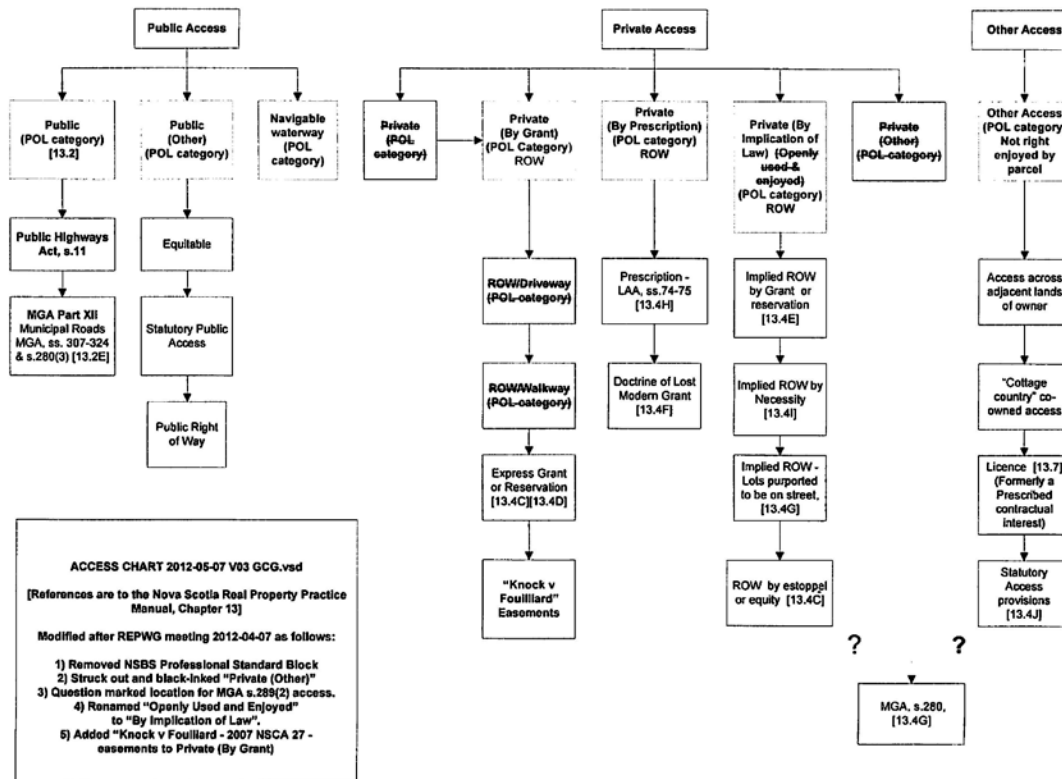
- Conceptual basis of access (the Four Musketeers)
- Analytical Framework (as stolen from Garth and Brenda)
- Some issues and answers
- Some best practices
- When the street hits the fan



# Access – conceptual basis

- Public (including frontage not used)
- Private – by grant or operation of law
- Navigable waterway
- None (whether “used” or not)

# The World According to Garth



# Public access

- Usually but not always can be determined from mapping graphics/survey
- “Red Line” not to be relied upon but may lead to further inquiries
- Controlled access highways
- Class K roads
- Dedication and acceptance
  - “that’s the way it’s always been”
- Ghost Roads
- Parcels fronting on public road but that’s not what is used – best practices

# Case study – Cottage Country

Property Online - Map - Google Chrome

https://linns.gov.ns.ca/property-online/secure/map/generate.do

PROPERTY Online NOVA SCOTIA

Search Provincial Map Bulletin Board Help

Back to Search Results

Map Actions

- Point Select
- Pan
- Zoom In
- Zoom Out
- Zoom Box
- Monument Select
- Clear Selection
- Center Selection

Map Layers

- ☒ Properties
- ☒ LR Parcel Shading
- ☒ Topo
- ☒ Monuments
- ☒ Place Names

Refresh Map

Map Controls

Location:  Search

1 Property found

PID: 00808303 Details

AAN: 04101251

Value: \$346,300 (2015 RESIDENTIAL TAXABLE)

Address: 12 HILLTOP LANE  
CARIBOU ISLAND

County: PICTOU COUNTY

Owner: AVEDIS BALMANOUKIAN  
BARBARA BALMANOUKIAN

LR: LAND REGISTRATION

Powered By CARIS Spatial Fusion

Lat: 45-45-48N Long: 62-42-27W Scale: 2691 Zoom: 2

The Provincial mapping is a graphical representation of property boundaries which approximate the size, configuration and location of parcels. Care has been taken to ensure the best possible quality, however, this map is not a land survey and is not intended to be used for legal descriptions or to calculate exact dimensions or area. The Provincial mapping is not conclusive as to the location, boundaries or extent of a parcel [Land Registration Act subsection 21(2)]. THIS

arnold-different-strokes.jpg Visio-Access Chart - ....pdf IMG\_2092.JPG

Show all downloads...

# Private Access

- Most fertile ground for disputes
- Most fertile ground for mismatches
- Most fertile ground for overlap
- Most fertile ground for “the call nobody wants to make” ie LIANS
- Most fertile ground for outdated parcels





# Granted access

- Is there a grant?
- Does it take priority over any encumbrances on the flip side?
- What if any information do you have as to its location?
  - Survey
  - Flip sides
  - Client conversation
  - “red line”
  - Aerial photography



# Granted access (continued)

- Scope of access (horses, vehicles, utilities; subdivision)
  - NSBS Bar Review materials, pp 19-20
  - Subdivision: Jerome v. Akers 2013 NSSC 154
  - Cottage country disputes: Pink v. Lohnes-Davis 2014 NSSC 304 (under appeal)
  - “substantial” interference: Cobalt Investments v. Panko 2012 NSSC 34; Warnock v. Wiechert 2010 NSSC 79
  - Alteration of scope: Croft v. Cook 2014 NSSC 230

# Granted access – other issues

- Obligation to maintain (positive covenant?)
- No obligation to maintain – developer who “goes down the road”
- Homeowners’ Association
- Potential to become a public road (QCDs from ROW holders?)
- Non-use vs. abandonment (See: Kenneth O. Thomas, “Abandonment of Rights-of-Way,” CLE February 16, 2001)





# Private

## (ungranted and “kind of granted”)

- License v. easement (and licenses that mature into easements: MacLean v. Williams 2008 NSSC 293)
- Prescription: Danger zone!
  - Is it prescription or adverse possession?
  - Documentary evidence: professional standards “knowledgeable and disinterested”
  - What’s good enough evidence for you may not be good enough for “them”
  - Better to ask for forgiveness than permission?



# Private - continued (ungranted and “kind of granted”)

- Overlap – ROW driveway / ROW Walkway / other
- Reservation: Knock v. Fouillard 2007 NSCA 27
- 280(2) MGA – retrospective?
- ROW of necessity
- Private Ways Act – Alive and well!
- Estoppel / Equity (MacLean v. Williams, supra)
- Lost Modern Grant (any 20 years versus the last 20 years)



# Navigable Waterways



Vs.





# Navigable Waterways

- Waterfront on a road (e.g. Lot on Pictou Island)
- Waterfront with private access (e.g. cottage country case study above)
- Is it navigable?
- Water lots
- Federal/provincial issues
- Islands in lakes





# No Access

- Landlocked parcel (access via commonly owned lot? TQ or grant from self to self s. 61 LRA)
- Unripened access (e.g. 17 years' use)
  - “Openly used and enjoyed”
- Railroad crossing (with or without license)
- The “woods road”
- The “Old King’s Highway”





# Some Scenarios

## (“expropriated” from Brenda)

- Frontage on a street but accessed via a granted or ungranted ROW
- Frontage on a controlled access highway
- Granted ROW and traveled way differ
- Road crossing a railway
- Landlocked parcel with access via commonly owned lot
- Consolidated lot – Parcel A has deeded ROW but Parcel B does not

# Some more scenarios

- Subdivision (Form 45)
- New survey fabric
- “Various PIDs” – LRAR 10(14)
- Mismatches resulting from subdivision
- Grant of ROW when dominant parcel is encumbered
- Class K roads (“listed but not maintained”)
- Adding benefits/burdens (Reg. 14)
- And a message from that great conveyancer:

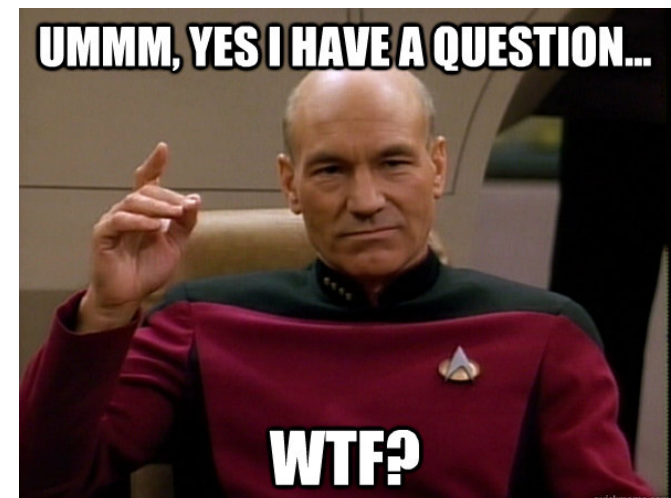


You can observe a lot by just watching.

(Yogi Berra)

# News Flash: Lawyers can disagree!

- Reg. 22 “obligation” to fix
  - When you messed up
  - When the other side messed up
  - When someone else messed up
  - When nobody messed up
  - When nobody thinks they messed up
- Client consent
- RG dispensation
- “various PIDs” redux



# Resources

- Resources:
- Generally:
- LIANS resource page <http://www.lians.ca>
- Articles: <http://www.lians.ca/resources/real-estate/articles>
- LRA training materials: <http://www.lians.ca/resources/real-estate/lra-training-material>
- Easements: <http://www.lians.ca/resources/real-estate/articles/easements>
- Rights of way: <http://www.lians.ca/resources/real-estate/articles/right-way>
- NSBS Real Estate Bar review materials: <http://nsbs.org/sites/default/files/ftp/BarReviewMaterials/RealEstate2015.pdf>
- Gordon, Garth, QC: Access - Red Flag Issues Under LRA (Revised March 2, 2007): <http://www.lians.ca/sites/default/files/documents/00009791.pdf>
- RG Directive on 10(14) “necessary changes” and s. 17 dispensations:
- <http://novascotia.ca/sns/pdf/ans-property-directive-necessary-changes.pdf>
- Rice-Thomson, Brenda L.: Parcel Access - Best Practices (April 29, 2014 revision) - unpublished
- MacIntosh, Charles W., QC: Nova Scotia Real Property Practice Manual: LexisNexis Canada Inc. (Looseleaf)