Due Diligence: Easements, Access and Possessory Titles

An easement is a right to use someone else's property in some defined way for the benefit of your property. The most common example is access, so common that a right of way is often considered something different from an easement. While this distinction is not correct it is often convenient. Other common easements include water easements (transportation and source), sewer easements, septic tank and disposal system easements, easements for telephone and electricity or other services (a grant of right of way does not imply that you can also put pipes or wires in it unless expressed), and parking.

An easement benefit is a property interest to which you are certifying title when converting a property to LRA. An easement burden derogates from the title which you are certifying and operates as an exception to what you certify. Missing a benefit "costs" your client. Missing a burden means an incorrect certification.

In these notes "easements" include rights of way.

Easement benefits
- must be specified in description
- must show on parcel register
- must have a good root of title or be otherwise proved.

> Standard 3.3 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.

If, as is often the case, the root of title is the same as the root for the easement, include a note on the abstract to explain why there is no separate abstract for the easement. If it originates after the root, include an abstract of the parcel over which it runs to the point that it is conveyed for the benefit of your parcel. Ensure that if the servient tenement was mortgaged when the easement was granted that there has been a release.

If an easement is being left out because the same owners own both the dominant and servient tenements (merger) and there is no point in retaining it, ensure that in fact the same owners own **both.** Examples of cases where the client will assume common ownership which is not correct legally include where one spouse (only) owns one lot and the other is in joint tenancy, and where the ownership is corporate (either the other piece is owned personally or it may be owned by a different corporate personality). In these cases dropping the easement will require some form of release or perhaps a deed to make the ownership common.

These concerns also apply to adding an easement benefit after a parcel has been migrated. The question to be answered is always: where is the proof that this is a valid property interest?

The same issues apply to easement burdens except that there is no requirement to provide an abstract or proof. Apart from utility easements there should be some evidence of the dominant (benefitting) tenement.

The text of utility easements (NSPI, Aliant, municipalities etc.) is frequently not included in the property description. As a matter of courtesy to future buyers it is preferable to include the full text even if not required. Otherwise the purchaser's lawyer has to get it from the Registry. In the case of common easements it is a fairly simple task once the first one has been done. A utility easement is an overriding interest, so complete omission from the parcel register does not eliminate it. If, however, it shows up in the search or the original description or the survey, it is appropriate to include it in the parcel register simply to provide full information to the buyer and subsequent owners.

Access - must be specified

- POL choices:
  - navigable waterway
  - no access
  - other
  - private
  - private (by grant)
  - private (by prescription)
  - private (openly used and enjoyed)
  - private (other)
  - public
  - public (other)
  - right of way/driveway
  - right of way/walkway

A later session will attempt to guide you through what each of these is intended to mean.

Checklist:

navigable: does your abstract have a note as to how you know if it is not obvious?

Other: did you define this? Did you establish the basis for it?

Private: do you have an abstract for the right of way if it does not go back to the root of title? If it does, does your abstract make this clear?

If by prescription, do you have proof? Is it in the abstract?

(*Note: a common failing is not to include the work <u>you</u> did in the abstract.*)

"Openly used and enjoyed": the *Marketable Titles Act* prescribes as an overriding interest "an easement or right of way that is being used and enjoyed". See LRA s. 73 (1) (e). Unless you can demonstrate by grant or prescription that there is in fact an easement or right of way, this provision does not apply. See also standard 2.3: 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. This is a concern for both the vendor (how can you certify that something exists if you have no proof?) and the purchaser (is the access real?)

Proof is a matter for a later session.

Common law or Possessory Titles

A common law title is somewhat different from a possessory title, which is based on the provisions of the *Limitation of Actions Act*.

If you cannot find a *Marketable Titles Act* root for your property, this is where you end up.

One common law root of title can, in some circumstances, be a will - if the property is sufficiently identified in the will or in subsequent conveyances.
If there is sufficient possession, then a possessory title can be certified under the *Limitation of Actions Act*. In some cases this may be shorter than the standard forty year plus search since only 25 years are needed except against the Crown. You might even cut this to 20 years if you can be sure there is no period of incompetence, as in corporate ownership of the paper title.

You cannot legitimately convert a property to which there is no title.

You cannot certify that the property is owned by X if there is no proof, even if you include a textual qualification to the effect that X does not really own the property. At this point what, if anything, has been certified?

Reliance on a common law title must include the basis for the claim in the abstract.

Reliance on a possessory title must include the basis for the claim in the abstract.

Garth Gordon's session later today will go into this more deeply.

Do not forget to include the results of any work you did yourself to clean up the title. If you are including recitals or other proofs such as a death certificate in the deed of conveyance, include the same material in your abstract.

The abstract under the LRA is the basis for the lawyer's opinion of title: s. 37 (4) (c). Therefore, everything needed to support the opinion (including if necessary a note on your reasoning) must be in the abstract or attached to it or referred to in it. If you rely on a statement of law from a case, be sure your facts are the same.

Due diligence in relation to easements, rights of way and possessory titles essentially means following the standards and keeping them in mind throughout the conversion. As a purchaser's lawyer, due diligence means ensuring you know what has been added to or subtracted from the bundle of rights attached to the land your client is buying, that you can explain them to the client, that they are sufficiently described that it is certain what they mean and that your client both knows about them and agrees to them.

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