Easements in the LRA
Further Issues

An easement is a part of the attributes of a property, whether benefit or burden. It is a legal interest. That is why it is incorporated in the description for PDCA purposes. That is why it is necessary to search out the back title and incorporate it in your abstract. Obviously, if you get a right of way from Great Aunt Tessie, and she has a mortgage she forgets to pay so that it is eventually foreclosed, your right of way disappears.

It is important to know that the creation of an easement by itself does not trigger the need to migrate a parcel. It is not considered as a separate legal interest by the system.

Subdivisions

Given that an easement is an interest in a property, once a property has been subdivided all of the benefits and burdens are attached to each parcel. This may be correct in smaller subdivisions, but is likely to be incorrect in large ones.

If we consider that the system, including staff, are not making decisions about legal issues when these changes are made, we will be better able to deal with correcting the consequences. It is similar to a simple cut and paste: copy the easement information from the parent and paste it into each of the infant parcels. It is not the system's job to decide which of the infants has an easement and which does not. Check carefully to ensure that if someone in the system has tried to be helpful, they got it right. These are manual transfers, not automatic ones.

It is the lawyer's job now to review each of the created parcels to decide whether that infant parcel is subject to the easement that ran over the parent parcel or not. That information should be available on the plan that created the subdivision. There is an example in the learning materials for the LRA. When you determine that an easement does not apply to a particular parcel the description has to be amended to delete the reference. The parcel register also needs to be amended.

Remember that the parcel description and the parcel register must match.

The process is straightforward. First, amend the parcel description. Include in the comments the reason and that a Form 45 will be submitted. Once there is an approval, submit the Form 45 to delete the extra interest that does not apply to the lot. You are just cleaning up after the indiscriminate application of easement burdens mandated by subsection 23 (2) of the *Land Registration Act*. Form 45 is one of the free forms, but has to come from a lawyer.

What you are doing here is cleaning up your client's property to make it saleable. It is inappropriate to impose this burden on the purchaser's lawyer, and it is a little surprising to hear that the question even arises. The purchaser's lawyer will want to double check against the plan to ensure that the client is getting what they expected, and not getting something unexpected.

How to deal with adding burdens, such as restrictive covenants or easements, to parcels being conveyed after subdivision, is a more complicated matter. Technically, the buyer will have to

add the burdens on the Form 24 that accompanies the deed. On the principle that if a mistake is going to be made you might as well be the one to make it, it is more sensible for the developer's lawyer to put the easements, covenants and so on in place for all of the lots to be sold in advance of any sales. The alternative is to depend on many purchasers' lawyers of varying abilities all doing the right thing and the same thing. If you think that will work I can get you a job herding cats. The LRA has been specifically amended to cover this issue.

Now, for fun, consider what happens when it is a "together with" benefit. To start with, are you certain it will apply to all of the lots being created? Most easements and rights of way are not that indiscriminately applicable. It depends on the wording, and the wording tends to be limited.

If you are creating an easement, such as a sewer easement for the municipality, it may have already been created as a condition of subdivision. If you are creating an access right-of-way from a private road, allocated to each lot after the subdivision, perhaps you need to do nothing. Recall subsection 280 (2) of the *Municipal Government Act*:

> 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 was not a retroactive provision.

For myself, I prefer to see a specific right of access when I am acting for a buyer, and certainly if one exists it ought to be in the description and the parcel register.

Other easements can be added through Form 24, and will usually be created on the sale of the lot, similar to the creation of restrictive covenants.

If the street is shown as public on the subdivision plan it is vested in the municipality when the approved plan is filed: s. 280 (3).

Consolidation is a more difficult concept to cope with. Mortgages, for example, will travel into the system with the parcel being added, but you can take them out again with the appropriate partial (or full) release. Make sure you get the right PID for the release, because it is an expensive error to correct as there are at least two Form 49s: one to take the mortgage off the right parcel and one to put it back on the parcel it should not have come off. If both pieces being consolidated are subject to a mortgage you have to sort out which will continue and which has to be released, and then make sure you have the consent of the continuing mortgagee for the consolidation. Usually this is not a problem since the change will make the new parcel more saleable, one hopes, but not if you have just appended a former service station to your multi-million dollar home.

A deemed consolidation under Section 268A of the *Municipal Government Act* is a consolidation that does not require approval. The point is to establish facts that demonstrate that for all

practical purposes the parcels were consolidated by use prior to the last validating date. However, the Act clearly states that the lands are deemed to be consolidated as of the date of registration or recording.

Perhaps it is a good idea that subdivisions of lots that are only for consolidation are exempt. The administration regulations define "parcel" in subsection 37 (2) of the Act (which is the provision requiring conversion to LRA of all transfers for valuable consideration) as not including "any unregistered piece of land that is being created as a parcel under the subdivision provisions of Part IX of the *Municipal Government Act* solely for purposes of consolidation with an abutting unregistered parcel". A deemed consolidation comes under this exception.

However, if either lot is registered, but not both, the unregistered lot must be converted. Otherwise you are attaching a piece of land with uncertified title to one that has a certified title, resulting in who knows what mess. If both are registered there is no problem. If one or the other of the original pieces were subject to an easement, then the consolidated lot will be subject to that easement.

If one or the other of the pieces being consolidated had the benefit of an easement, the consolidated lot may or may not have the benefit. Most likely the benefit will attach solely to the part of the land that already had the benefit. If this is so, it must be included as a textual qualification. Otherwise, you will have extended the full benefit of the easement to the entire consolidated parcel, which may be quite erroneous.

After the approval, check to make sure that what you thought would happen did happen. And see whether you are going to replace the short form description with a full word description. You might be doing that for any newly created parcel, of course. And the new description likely does not contain the full text of the easement as it is required to do.

Prescriptive Interests

All kinds of easements are prescriptive (unwritten), assuming of course that they are real. There are all kinds of "easements" that are not real, whether because they have not matured or are in the nature of licences or have no dominant tenement or for other reasons.

Consider first the easements that are overriding interests. Section 73 lists them. For our purposes they are: interests reserved to Her Majesty in a grant (almost always highways); a utility interest (defined as an easement or other right to use land in existence prior to the LRA for the benefit of a public utility or a municipality - public utility is not further defined); an easement or right of way that is being used and enjoyed (I suppose you need a statutory declaration of satisfaction to prove enjoyment); any right created by or pursuant to an enactment, such as the MGA conferred right of way referred to above.

This list may seem very familiar. It is a close relative of the overriding interests in the *Marketable Titles Act.*

Because the parcel description is intended to be a complete catalogue of the benefits and burdens

that attach to a parcel it is appropriate to incorporate any known easements, even overriding ones, in the parcel description. If so incorporated they must also be reflected in the parcel register. To incorporate them in the parcel register there must be a document of some kind. The goal is to provide the client with a complete view (and perhaps discourage him/her from suing over something that we did not mention along the way).

The last clause (any right created by or pursuant to an enactment) is thought by some to refer to adverse possession or prescription; if so, the statutory period must have been completed before the parcel was first registered (s. 74 (1)). If the parcel over which they run has been registered, the right can be lost even if it was real at the time of registration unless enforced: 74 (2), but see s. 75.

Easements may in most cases fall within what we have referred to from time to time as the wandering boundary exemption for up to 20% of a lot, Section 75.

If a prescriptive right is claimed, and added to a parcel register, there must be a foundation document of some kind. Normally this is one of the statutory declarations that have been recorded to assert the easement. These declarations must meet the Professional Standards, and your own evaluation of probable truthfulness. Self-serving declarations ought to be avoided. Remember, you are the one relying on these declarations, so you have to be satisfied that they are truthful and that they cover all of the bases necessary to establish a prescriptive right.

There must be a search to ensure the validity of the easement as if it had been granted. What happens to your twenty-five years if the servient tenement had been expropriated or sold to the Crown? Perhaps now you have a forty-year limitation period to cover.

Open questions include access over former railways that are now vested in the provincial Crown (finally) but not subject to the implied access rights from public highways. Will all of these properties have to go to the expense of getting deeded rights of way? Few if any ever had any written form of access. Some can be proven, as prescriptive, and a good many cannot. In some cases it is difficult to acquire the evidence, and in a good many others the property simply has not been used for long enough. One of the decisions you have to make is whether an easily acquired provincial licence for the crossing, which will likely end any hope of establishing a prescriptive right as the mere request for the licence is an acknowledgement of the Province's title, is the best approach or whether you can prove an easement by prescription that would override the Crown interest. As a purchaser, would you take property that only has a licence for access? In this kind of case I suspect the answer is why not, but you want to be sure the client is fully informed and agrees - both purchaser and mortgagee.

Prescriptive rights are similar to other forms of possessory interests. One of the questions to ask before you certify a prescriptive (or possessory) right to the system is whether you would ask a client to venture the cost of a *Quieting Titles* application on the evidence you have put on record. Not whether the client would - we all know that land issues and rationality are frequently disconnected - but whether in the proper use of your professional judgment you could seriously

advise a client that if the information you have is accurate the chances of getting a certificate of title are very high. Now, a quieting is not what clients want to go through to prove a prescriptive easement, but the test is still relevant.

We should not forget that in many cases it may be simpler to get consent, and a grant of easement, from the current owner of the servient tenement than it is to prove prescription.

How do you decide when a written (or other) right of way is not valid? Abandonment is not straightforward. Where there is an express grant of easement there must be strong evidence of abandonment and generally an express release recorded: see *King* v. *Brockins* (1980), 35 N.S.R. 328 at 334. Non use is not recognized as adequate evidence of abandonment. There must be some evidence of intent to abandon. This is where the question of barriers arises. On the other hand, it is hard to accept evidence of a prescriptive easement for vehicles if there are forty year old trees ten inches apart scattered all over it.

Also refer to clause 13 (d) of the *Conveyancing Act*, which provides that "a conveyance of any property right in land includes the buildings, easements, tenements, hereditaments and appurtenances" attached, in the absence of evidence to the contrary, which is why so many easements were not repeated in short or long form in a description prior to the LRA.

The *Land Registration Act* has not made the uneasy law of easements any simpler or less difficult than it ever was. However, once the easement is into the system, you can rely on it. That is the

purpose of the system: reliable titles to all aspects of a property, all of its "buildings, easements, tenements, hereditaments and appurtenances".

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