FROM CHALLENGES TO OPPORTUNITIES… NAVIGATING THE REAL PROPERTY PATHS

EASEMENTS: PART 1: BACK TO THE BASICS

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The purpose of this presentation is to provide an overview of the law regarding:

- What is an easement?
- What does it mean to say that "easements run with the land"?
- What are the characteristics of easements?
- How are easements created?

This session is intended as a very basic review on the law, to form a backdrop for the practical discussions that will follow. **Key definitions are set out in bold print**.

WHAT IS AN EASEMENT?

An easement is a right that one landowner can exercise over or in relation to another's land. The right is seen as being annexed to the land itself. This definition distinguishes easements from two other concepts found in the law: ownership and licences.

> Easement v. Ownership: an easement permits one person (A) to exercise rights over the land of another (B), but it is B who retains ownership of the land. If A's rights ever became so extensive as to oust B's ownership, then A would hold actual title to the land, not just have the right to exercise an easement over it.
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> Easement v. Licence: Just as an easement is something less than ownership, it is, in property law terms, something more than a mere licence. In most basic terms, a licence allows one to do something that would, without the licence, be trespass. To use two very common examples:
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> - If I barge into your house without your consent, that is trepass. If you invite me in for tea, you have in fact extended a licence to me, allowing me to enter your home in order to have tea with you.
> - If I were to attempt to get into a movie theatre to watch a movie, without purchasing a ticket, that would be trespass. When I buy a ticket, I have entered into a contract for a licence, which allows me to enter a particular theatre and watch a particular movie.
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> However, in neither of these cases do I actually acquire rights to the land itself – to your home or to the movie theatre. All I have is a right to be there at a particular time, for a particular purpose: having tea or watching a movie. Furthermore, a licence is seen as

personal – attached to me as individual. This is unlike an easement, where A (who has the right to exercise the easement) holds that right not because of who they are as an individual, but because they own the lands to which the easement is attached.

This leads to the concept of dominant and servient lands. An easement is seen as a right that benefits one piece of land (the dominant land) and which burdens (or is exercised over) the servient land. Assume that A and B are neighbours. A"s land lies north of B's and has no access to the road except by way of a right of way across B's land, out to the road. In this situation, A's land is dominant and B's land in servient. In everyday language, A might say "I have a right of way". In legal terms though, it is the owner of the piece of land to the north that has the easement, whoever that happens to be at any particular moment. Thus, if I have an easement, it is not because I am me, but because I happen to own the dominant land.

(It should be noted that the law requires some proximity between the dominant and servient land, but does not require that they necessarily be side by side.)

So, clearly, it is key to be able to remember which lands are to be described as dominant and which as servient:

- **dominant: land which benefits from the exercise of the easement**
- **servient: land over which the right is exercised.**

There are a variety of mental tricks that can be used to help distinguish between the terms, including: the servient lands are subject to the easement. Both "servient" and "subject to" start with "S"

So, an easement is a right that one landowner can exercise over or in relation to another's land and that right is seen as being annexed to the land itself. What kinds of rights might be encompassed by this definition?

Many easements are what the law calls positive easements: such an easement allows the dominant landowner to do something on/in relation to the servient lands. For instance

- The owner of the dominant land might have a right of way over the servient land;
- The owner of the dominant land might have the right to post a large sign on a building situated on the servient lands.

The class of positive easements is fairly open ended, so long as the right claimed has characteristics listed below.

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It is also possible to have a negative easement: such an easement allows the owner of the dominant lands to prevent the servient landowner from doing something on his/ her lands. For instance if our houses are attached and constructed in such a way that your house depends on mine for support, if an easement of support existed, that would prevent me from tearing down my house and leaving your house in danger of collapse. The law is far less willing to recognize new categories of negative easements, so most of the case law on easements deals with positive easements.

WHAT DOES IT MEAN TO SAY THAT AN EASEMENT "RUNS WITH THE LAND"?

This relates to the earlier point that if A has the right to exercise an easement over B's land, this is because A is the owner of the dominant land and B is the owner of the servient land. The benefit of the easement is seen as being attached to the land which A currently owns and the burden of the easement is attached to the land that B currently owns. If A sells his land to C, C will now have the right to exercise the easement. If B sells her land to D, it is now D who cannot stand in the way of the easement being exercised.

This concept that the easement is attached to the land itself, and that this continues when ownership to the land (whether dominant or servient) is transferred is described in the phrase that easements "run with the land". Unless the easement is extinguished at some point, the benefit of the easement will always run with the dominant land and the burden of the easement will always run with the servient land. This is what it means to say that an easement is annexed to or runs with the land.

The rule that easements automatically run with the land is found in section 13(d) of Nova Socita *Conveyancing Act*.

WHAT ARE THE CHARACTERISTICS OF EASEMENT?

The characteristics of an easement developed over time at common law; in other words, these characteristics were first developed through decisions made by judges, rather than in a piece of legislation. The common law can be altered by legislation, and where this has happened, regarding the characteristics of easements, I will note the change.

1. Existence of dominant and servient lands

At common law, in order for an easement to exist, there must be both dominant and servient land; it must be possible to identify both the land that is benefited by the easement and the land over which the easement is exercised. Thus, if I have a right to come on your land and this right is unconnected to any property that I might own (in other words if that right is held by Diana Ginn as Diana Ginn, rather than Diana Ginn as the current owner of the dominant lands) then, at common law, this right does not amount to an easement.

A frequently quoted statement on this point holds:

> ...a right of way enjoyed by one over the land of another does not possess the status of an easement unless it accommodates and serves the dominant tenement, and is reasonably necessary for the better enjoyment of that tenement, for if it has no necessary

> connexion therewith, although it confers an advantage upon the owner and renders his ownership of the land more valuable, it is
>
> not an easement at all, but a mere contractual right personal to and only enforceable between the two contracting parties.[7]

In specific situations, this requirement that there be dominant lands has been altered by legislation. For instance, there are statutes that provide for utility easements, conservation easements etc.; however, unless there is such legislation, the common law rule still applies in Nova Scotia, such that an easement can exist only if there are dominant lands benefited by the easement as well as servient lands burdened by it.

2. Ownership of dominant and servient lands by different people

Until very recently, Nova Scotia followed the common law requirement that the dominant and servient lands must be owned by different people. Remember the example used earlier of two pieces of land, the piece to the north having access to the road only by way of a right of way over the land to the south. Assume now that I come to own both pieces of land. At common law, the right of way would cease to exist: I would be seen as having access to the road not because of a right of way, but because I own the whole piece, right up to the road, and of course have the right to cross land that I own.

But, recent amendments to the *Land Registration Act* [s. 19A] explicitly alter this aspect of the law on easements. An easement that was created when the two parcels of land were separate can now continue to exist, even where the same person comes to own both the dominant and servient lands. (In fact, section 19A also allows a person who owns two parcels of land to create an easement over one, for the benefit of the other parcel.)

3. The easement must accommodate (enhance) the dominant lands

If we say that an easement attaches to the land – that there is a particular piece of land benefited by that land and a particular piece of land burdened by that easement – then it makes sense to say that the easement must actually benefit the land labeled as dominant. This appears, however, to be a very flexible criterion; in fact, it is very hard to find cases where a potential easement fails on this ground.

4. The right is capable of being granted

The way in which this last characteristic is described is not particularly illuminating: what it really comes down to is that the right claimed as an easement must be sufficiently definite, so that it can be determined what the owner of the dominant land is allowed to do and what the owner of the servient land must allow.

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[7] *Re Ellenborough Park, supra* footnote 1 at p. 170*; Re Davies*, *supra* footnote 1; *518002 Alberta Ltd. v. Edmonton (City)* (1996), 2 R.P.R. (2d) 245 (Q.B.).

Besides these characteristics, there are a number of common sense rules that also apply, including that

- the person originally granting the easement must be capable legally of doing so (i.e. a child could not grant an easement); and
- a person cannot grant an easement over the land of another (in other words, you can't grant a right of way to X, allowing X to walk across your neighbour's land. Only your neighbour can do that.)

HOW ARE EASEMENTS CREATED?

There are a number of ways in which an easement can be created, although one of these (prescription) has been significantly affected by the *Land Registration Act*.

1. Statute

An easement can be created in a particular piece of legislation; for example, hydro, telephone and conservation easements.

2. Express grant

An easement is created where the owner of sevient land expressly grants an easement over his/her land.

Example:
A owns all of

A then divides and sells half to B.

A	B

If in the conveyance, A grants B a right of way over A's land, this is an express grant of an easement.

A (grants easement) servient land (land over which right of way is exercised)	B Dominant land

3. Express reservation

An easement is created by reservation where the owner of a parcel expressly reserves the right to exercise an easement over another parcel of land.

Assume again that A is selling part of her land to B, as in the example above. This time, however, in the conveyance A retains a right of way over B's land. This would be an express reservation.

A (reserves easement) Dominant land	B Servient land (land over which right of way is exercised)

4. Implied grant of easement.

Assume that A has sold land to B, as above, but there is no express grant of an easement to B. The law may imply the grant of an easement from A to B, even if there are no express words in the conveyance. In other words, **in some situations, an easement will be implied by the law, even without express words granting the easement.**

The circumstances in which the law may imply the grant of an easement are as follows:

- carrying out the common intentions of the parties;
- easements of necessity;
- quasi easements: here, the right that is now being claimed by B as an easement
    - must have been used by A before A severed and sold part of the land to B;
    - must be continuous and apparent; and
    - must be necessary to reasonable enjoyment B's land.

  Example: pipes running from what is now B's land across the land that A has retained.

5. Implied reservation of easement.

A has sold land to B, as above, but there is no express reservation of an easement to A. The law may imply the reservation of an easement (making A's lands the dominant land, and B's lands the servient land), even if no express words of reservation are found in the conveyance; however, this will be done rarely. Only an easement of necessity can be reserved by implication. In other words, **an easement of necessity may be implied by the law, even without express words reserving the easement.**

6. Easements created by prescription

I will touch on this only briefly in this session, and talk about it in a little more depth in the second session. **A prescriptive easement is an easement acquired by possession (where that possession meets the criteria set by law) rather than by an express or implied grant or reservation.**

The possibility of an easement arising because of long and uninterrupted use was recognized at common law, and then was incorporated into s. 32 of NS *Limitations Act*. This section provides that a prescriptive easement can come into existence when there is use for 20 years that is open, without violence and without consent.

The law on prescriptive easements is, however, significantly altered by the *Land Registration Act*. While there are provisions that allow for the survival of prescriptive easements that arose before the coming into effect of the new Act, the premise underlying the *Land Registration Act* is that once a parcel of land migrates to the new system, it will no longer be possible to acquire new easements by prescription over that land.

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GLOSSARY

Easement: An easement is a right that one landowner exercises over or in relation to another's land. The right is seen as being annexed to the land itself. An easement is a lesser right than full ownership and a greater right than a licence.

Dominant land: the land that benefits from the exercise of the easement.

Servient land: The land over which an easement is exercised**.**

Express grant: An easement is created by express grant where the owner of sevient land explicitly grants an easement over his/her land.

Express Reservation: An easement is created by way of express reservation where the owner of a parcel severs a portion of that parcel and explicitly reserves the right to exercise an easement over the severed parcel. The portion retained by the owner will be the dominant land and the portion severed will be the servient land.

Implied Grant: In some situations, an easement will be implied by the law, even without express words granting the easement.

Implied Reservation: An easement of necessity may be implied by the law, even without express words reserving the easement.

Prescriptive Easement: An easement may be acquired by possession (where that possession meets the criteria set by law) rather than by an express or implied grant or reservation.