FROM CHALLENGES TO OPPORTUNITIES... NAVIGATING THE REAL PROPERTY PATHS

EASEMENTS: PART 2: BEYOND THE BASICS

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In the first session, I outlined the law on several basic aspects of easements: What is an easement? What are its characteristics? How is an easement created? The purpose of this second presentation is to provide background legal information on a number of slightly more complex issues relating to easements, including:

- easements created by prescription
- overriding interests
- scope of easements
- extinguishment of easements (with a particular focus on abandonment).

As with the first session, the information provided here is intended to work as a backdrop for the more practical discussions that will follow. Definitions of key terms are set out in bold print, for use of future reference, and a glossary encompassing those definitions is attached.

CREATION OF EASEMENTS BY PRESCRIPTION

<u>Pre *Land Registration Act*</u>

As I noted in the first session, the possibility of an easement arising because of long and uninterrupted use arose at common law, and then was incorporated into s. 32 of NS *Limitations Act*, which provides that use for 20 years that is open, without violence and without consent can lead to the creation of an easement.

The 20 years had to be uninterrupted, but more than one person could contribute to the 20 years. In other words, imagine that A started walking across her neighbour's land for 5 years, then sold her land to B, who immediately started using the path and did so for 10 years. B then sold his land to C and C kept on walking along the path over the neighbour's land. Assuming that the use of the path met the criteria for a prescriptive easement – i.e. open, without consent, etc, A and B's use would be "tacked" to that of C – and once the combined time reached 20 years, C would have an easement by prescription, across the neighbour's land.

The requirement for uninterrupted use does not mean that use must always be continuous; in order to acquire a right of way by prescription, there would have to be use of such a nature and

of such frequency that if the owner of the servient tenement were ordinarily diligent, he or she would be aware of the right of way.

Post *Land Registration Act*

The possibility of new easements being created by prescription has been eliminated under the *Land Registration Act.*

Where an easement was acquired by prescription before the servient land was first registered pursuant to the *Land Registration Act* – in other words, where the 20 years have already run before that first registration – then section 74 provides that the easement will have continued validity if and only if within 10 years of the servient land being first registered under the Act, the owner of the dominant land records or registers one of the four documents identified in s. 74. Thus, section 74 provides that for an already-exisiting prescriptive easement to continue in existence after land migrates to the new system, then within 10 years of that migration, one of the following must be registered or recorded:

- An order of the court confirming the easement;
- A certificate of lis pendens certifying that an action has been started to confirm the interest;
- An affidavit confirming that the land has been claimed pursuant to the *Crown Lands Act*;
- The agreement of the registered owner [of the servient land] confirming the easement.

If such a document is not registered or recorded within the 10 years, then the prescriptive easement is, in the words of 74(2) "absolutely void against the registered owner of the [servient] parcel".

Thus the impact of a parcel of land migrating to the new system is that an already existing prescriptive easement over that land may be preserved, but new prescriptive easements over that land cannot be created.

OVERRIDING INTERESTS

Section 73 of the Act recognizes the existence of certain overriding interests, which, although not recorded or registered, will "be enforced with priority over all other interests according to law".

Three categories of "overriding interest" are relevant to a consideration of easements:

s. 73 (c) "a utility interest"

(e) "an easement or right of way that is being used and enjoyed".

(f) any statutorily granted right to "enter, cross or do things on land for the purpose expressed in the enactment".

Paragraphs (c) and (f) seem relatively straightforward. Where an easement has been created by statute, it will show up in the register. Presumably too it will be possible to find a record of easements created by legislation.

The paragraph that may require slightly more attention is (e) - easements that are not recorded but are still granted priority so long as they are used and enjoyed. This category could include easements created by implied grant or implied reservation or prescriptive easements (so long as the prescriptive easement came into existence before the servient land came under the *Land Registration Act*). Of course, in order to be an overriding interest, it would have to be shown that the easement was not only created by implication or prescription, but that it is also currently being used and enjoyed. Presumably the intention behind permitting such easements to survive as overriding interests is that, given the current use and enjoyment, they will be obvious "on the ground" to any reasonably diligent person.

Although the possibility exists that a prescriptive easement created pre- *Land Registration Act* could meet the test for an overriding interest, presumably it is still the far more prudent approach to record the documentation required in section 74 to preserve such an easement, rather than simply hoping that in the future the easement will continue to be sufficiently used to meet the test for an overriding interest.

SCOPE OF EASEMENTS

The owner of the dominant lands, cannot, without the consent of the owner of the servient lands, increase or expand the easement beyond the terms of the grant or, where the easement is based on implied or prescriptive rights, beyond the accustomed use. Excessive use of an easement is a trespass on the servient tenement.

In the case of *Malden Farms v. Nicholson,*[1] a right of way was granted, allowing access across the neighbour's land to a sandy beach. At the time the easement was granted, the dominant land was privately used. Later, new owners of the dominant land opened a beach resort and, during the summer "hundreds traveled up and down the [right of] way". Finding that the scope of the easement had changed from "a private right of way...as originally contemplated" to "a use of the way for appellant's commercial purposes by great numbers of the public who travel over the respondent's lands much as though the same constituted a public highway or a busy toll road", the court held that the burden on the servient land had "markedly increased". Therefore, the

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[1] *Malden Farms ltd. Nicholson* [1956] O.R. 415 (C.A.)

owner of the dominant land was "restrained from continuing to use the right of way as he has been using it".

Two further examples may also help to illustrate this issue of the scope of the easement.

Road	House A	House B	Farmland

B lives on a fairly small plot of land, sandwiched between another house (owned by A) and some farm land. A grants B an easement over A's land, so that B has convenient access to the road. The right of way is used several times a day as B and his partner drive to and from work and, on occasion, to events in the evening. At some later date, B acquires the farmland which abuts his house. Is there now a right of way from the farmland across B's property, to the road? Not automatically. If B now wants to use the right of way to frequently bring farm machinery back and forth to his farm land, I think there would be a strong argument that this would significantly change the scope and extent of the use and so would markedly increase the burden on the servient land.

As a variation on this, consider the following example:

Road	A	B (house + farmland)

B owns a farm, and A has granted a right of way across A's land, so that B has access to the road. At a later date, B severs the back 20 acres off his farmland and further subdivides this, selling 40 individual plots. Do the 40 people who buy those plots now have a right of way across A's land, given that each of them now owns a portion of what was originally the dominant land? Again, I think there is a strong argument to say no, given the increased burden that this would place on A's land.

By the same token, just as the owner of the dominant land cannot markedly increase the burden of the easement, so too the owner of the servient tenement cannot unduly restrict the scope of the easement. Substantial interference with the rightful use of an easement would amount to nuisance.

EXTINGUISHMENT OF EASEMENT:

Extinguishment, in the context of an easement, means that the easement no longer exists.

There are a number of ways in which an easement can be extinguished. There are also two methods in which an easement could have been extinguished pre- *Land Registration Act*; one of these two is arguably no longer available and the second clearly is not. Methods of extinguishment available under the *Land Registration* Act are:

1. Express release:
The owner of the dominant land expressly releases the servient land from the easement, and this release is then recorded. To be effective in law, the release must be in writing

2. The use for which the easement was created comes to an end:
The idea here is fairly self–explanatory. If an easement was, at the time of creation, clearly created for particular purpose, and that purpose no longer exists, then so too will the easement cease to exist. For instance if I have a right of way across your land, so that I may take timber from my woodlot to the road, and it is clear that the right of way was created only for this specific purpose, then arguably if the woodlot no longer exists, the purpose for the right of way no longer exists and so it is extinguished.

3. The easement was created for a set term, and that term has ended:
Again, this is self-explanatory.

4. A court has ordered an easement to be cancelled.

5. Abandonment
According to *Anger and Honsburger*, **"Any action concerning the use of an easement indicating an intention by the owner to abandon the easement will extinguish it."[2].**

This form of extinguishment is, however, unlikely to be applied to easements created expressly; as *Anger and Honsberger* note, easements acquired by express grant or reservation "can rarely be extinguished in any manner other than by express release, or by circumstances so cogent as to preclude a quasi-releasor from denying the release."[3] A recent decision of the Supreme Court of Nova Scotia is directly on point here.

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2 *A.H. Oosterhpff and W.B. Rayner (eds) Anger and Honsberger Law of Real Property*, 2nd ed. Canada Law Book 1985, at 972.
3 *Ibid* at. 973

In *MacNeil v. Anban Holdings Ltd*[4], a right of way was created by express reservation in 1942. In 1960, a fence, with a gate or opening, was built between the two adjoining properties, and in 1982, a shed was built on the servient land, which partially obstructed the right of way. The owners of the servient land argued that the easement had been extinguished. The court in *MacNeil* cited the case of *King v. Brockins,*[5] in which the Nova Scotia Court of Appeal indicated that generally, an express release is required to extinguish an expressly created easement and stated, "The mere fact that an easement has not been used for periods of time does not indicate abandonment".[6] The court in *MacNeil* reiterated that non-use alone was not sufficient to extinguish the easement, and concluded that the applicants had failed to meet the onus of showing "that, in the absence of an express release of a right of way, there is very definite evidence of abandonment".[7]

The facts in *MacNeil* were complicated by the fact that reference to the right of way had been dropped temporarily, and then reinstituted, in conveyances f the dominant lands, and had also been dropped from recent conveyances of the servient land, including in the conveyance to the MacNeils.[8] On this point, the court commented

> I am also not persuaded that the removal of the reference to the right of way in the legal description for the Anban property in 1986 and the later removal of the reference for the MacNeil property in 2000 is proof of abandonment. On the contrary, it suggests to me that the owners from time to time of the servient tenement acknowledged the existence of the right of way through their property until relatively recently.[9]

With regard to easements created by implication or prescription, in order for an easement to be extinguished by abandonment, the owner of the dominant land must act in such a way as to indicate an intention to abandon the easement. This element of intention is key. Thus, according to Anger and Honsberger, the fact that an easement is not being used is not in and of itself abandonment but only evidence from which abandonment may be inferred. Other circumstances may indicate that there was no intention to abandon, and unless such intention exists, there is no abandonment. Whether there was an intention to abandon the use of an easement is always a question of fact.[10]

With regard to prescriptive easements, it should be noted that non-use which would not be sufficient to establish an abandonment of a right acquired may be enough to prevent the acquisition of the right by prescription in the first place.

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4 Reported in LAWNEWS Record, Jan. 14, 2005.
5 (1980), 35 N.S.R. (2d) 328
6 *Ibid*, at 334, as cited in *MacNeil*.
7 *MacNeil*, para 26
8 *Ibid*, para 11.
9 Para 24
10 *Supra* note 2 at 972

Pre - *Land Registration Act*, there were also two other methods by which an easement could be extinguished: prescription and unity of title.

- Extinguishment by prescription: As is stated in *Anger and Honsberger*: "An easement can be extinguished as well as created by prescription. The same rules applicable for the creation of an easement through prescription apply to extinguish an easement through prescription."[11] As an example as to how this would have worked, assume that we were neighbours and I had a right of way across your property. You built a house which blocked the right of way. If the term of my non-use reached 20 years, (and otherwise met the criteria set out in the *Limitations Act* for prescriptive easements) then my easement would be extinguished by prescription. This could occur with easements created by express grant or reservation as well as those acquired by implication or prescription. Post – *Land Registration Act*, however, given that prescriptive easements can no longer be acquired, it seems difficult to argue that extinguishment by prescription is still available.

- Unity of ownership (pre *Land Registration Act*)
  Until recent amendments to the *Land Registration Act*, unity of ownership (i.e. when the same person came to own both the dominant and servient tenement) would have extinguished an easement; however, because of the new s. 19A, this is no longer the case.

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11 *Ibid* at 973

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GLOSSARY

Overriding interests: Section 73 of the *Land Registration Act* recognizes the existence of certain overriding interests, which, although not recorded or registered, will "be enforced with priority over all other interests according to law".

The list of overriding interests includes "an easement or right of way that is being used and enjoyed". This could include easements created by implied grant or implied reservation or prescriptive easements (so long as the prescriptive easement came into existence before the servient land came under the *Land Registration Act*). In order for an easement to be an overriding interest, it would have to be shown that the easement was not only created by implication or prescription, but that it is also currently being used and enjoyed.

Extinguishment: An easement that has been extinguished no longer exists.

Abandonment: Abandonment is one form of extinguishment. According to *Anger and Honsburger*, "Any action concerning the use of an easement indicating an intention by the owner to abandon the easement will extinguish it." [1]. This form of extinguishment is, however, unlikely to be applied to easements created expressly; as *Anger and Honsberger* note, easements acquired by express grant or reservation "can rarely be extinguished in any manner other than by express release, or by circumstances so cogent as to preclude a quasi-releasor from denying the release."[2]

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1 *A.H. Oosterhpff and W.B. Rayner (eds) Anger and Honsberger Law of Real Property*, 2nd ed. Canada Law Book 1985, at 972.
2 *Ibid* at. 973