LRA Easements, Subdivisions and Related Issues

- Getting it Right the First Time, or Perhaps the Second . . .

1. Conversion, and subsequent revisions (including purchases/sales) and recordings (including Mortgages) are time consuming and sometimes frustrating exercises. The anxiety level increases when errors are made. This paper identifies some common fact situations which can cause grief.

Checking "Old World" Descriptions subsequent to Conversion

2. Should you, when acting for a Buyer or for a Mortgagor after conversion, be concerned about the Schedule "A" legal description which was used prior to approval of the parcel description? Should you compare the two to each other, and to any available plan? Some lawyers take the position that once the curtain is drawn they don't need to know and they don't want to know how the parcel was described in the past. I don't think that a surveyor will feel similarly constrained, and it is a fact that various persons will at various times refer to the old description. Thus, some lawyers make a point of reviewing the old world description to check for possible errors in the approved parcel description. I am a firm believer in the necessity of doing this. We have to remember that the PDCA submitter is responsible for ensuring that the parcel description is compliant with the Land Registration Administration Regulations as well as Professional Standard 2.1. The system is simply confirming the match between the description and the PID; i.e. the location of the parcel, with reasonable accuracy, in relation to its neighbours. The system does not guarantee the extent or location of the boundaries, nor does it guarantee the accuracy of the description. Mistakes frequently occur; some are significant and some are of a minor nature.

3. When submitting (or reviewing a previously submitted and approved parcel description), you should consider the following:

Professional Standard 2.1

When a lawyer examines a legal description, the lawyer must be satisfied that the legal description

(a) is a proper and complete description of the parcel;

(b) identifies the parcel; and

(c) when based on a plan of survey, reflects the parcel as shown on the plan.

If a lawyer determines that the abstract of title shows that the legal description has been amended from time to time, the lawyer must assess each amendment to determine whether the amendment complies with legislative requirements for transfer of title to land.

A lawyer must ensure that a certificate of title prepared by the lawyer clearly identifies the parcel by a metes and bounds description or in another form as authorized by legislation.

4. As well, you should bear in mind Section 5(7) of the Land Registration Administration Regulations, which provides as follows:

Every legal description submitted to a registrar must be accurate and complete and must contain

(a) a description of the location, boundaries and extent of the parcel;

(b) a description of all parcels excepted out of the legal description;

(c) a description of all benefits;

(d) a description of all burdens;

(e) all information pertinent to the use of easements; and

(f) information that evidences compliance with the subdivision provisions of Part IX of the Municipal Government Act in the form of a statement that confirms that

(i) the subdivision is validated by Section 291 of the Municipal Government Act,

(ii) an approved plan of subdivision has been filed under the Registry Act or registered or recorded under the Act, or

(iii) the subdivision is exempt from the subdivision provisions in the Municipal Government Act.

5. Section 5(9) of the Land Registration Administration Regulations must be considered:

A restrictive covenant, utility interest or development agreement that runs with the land must be described

(a) in full text; or

(b) by reference to the registration or recording particulars or a document, if the document contains a full text description of the covenant, utility interest or development agreement.

6. For those of us who were practicing in the system before December 1, 2004, it should be remembered that there have been significant changes to the Act and to the Administration Regulations, and that these impact upon PDCAs.

7. Finally, it is helpful to consult the latest version of the PDCA Checklist. This Checklist was most recently revised and sent to us on January 28, 2005. It is also posted on the Registry 2000 website (look under "Email Notices Sent to Eligible Lawyers").

Inherited Benefits or Burdens

8. Mappers may wish to be helpful, but they should not try to assist you in determining which inherited benefits or burdens should be removed from the infant parcel. This is not their job and the

end result can be an unhappy one for you and your client. You should always check the SRI (and of course the parcel description) to determine that you are left with the correct benefits and burdens. The potential for making a serious error by removing a needed benefit from the parcel register should not be underestimated.

9. If acting for the Buyer, you have to be certain that the parcel register has been revised so as to reflect the appropriate benefits and burdens. While you may not always be able to identify the applicable burdens, you should be in a position to determine, in consultation with your client and by having reference to the plan and to the Schedule "A" produced by the surveyor, the benefits which are incidental to the use and enjoyment of the parcel, and those which are burdens upon it.

10. Remember that the parcel description must be amended so as to include any applicable benefits and burdens to correspond with the parcel register.

Short Form Descriptions vis-a-vis Metes and Bounds Descriptions

11. Rather than describing the parcel in full text, it can be described by reference to an approved plan of subdivision or a plan of survey filed in the Registry. In that case, it must be referred to by lot number, the Registry plan reference number, and the registration district. In fact, the Mapper will create a short form description of a parcel, as part of the subdivision process. You then have the opportunity to amend that description by using the metes and bounds description generated by the surveyor. While it is not necessary for LRA purposes to substitute a metes and bounds description,

it may be desirable to do so. The agreement of purchase and sale may call for the provision of a metes and bounds description; such a description may be difficult to locate in years to come, unless it is part of the parcel register. Some lawyers (and some clients for that matter) may take comfort in the fact that the deed contains a metes and bounds description of the parcel, rather than a mere reference to particulars of a plan. Others would argue that the metes and bounds description is redundant as the plan will be available as a scanned image, and that the plan represents the best possible evidence of the area and boundaries of the parcel.

Confirming Compliance with Part IX of Municipal Government Act

12. Appropriate completion of this section appeared to be particularly problematic prior to the December 1, 2004 changes to Form 8. Now, the choices are quite straight-forward and we are presented with the following:

First Option:

If the approved plan of subdivision has been registered, you insert the plan registration number. In those cases where the plan of subdivision has been approved but has not been registered (this did happen from time to time in the past), it would be logical that the plan should be registered before the property is converted. See Land Registration Administration Regulations, Section 5(11) requiring that the referenced plan be recorded. There is no fee for recording the plan.

Second Option:

If you are claiming that Part IX of the MGA does not apply, you are then presented with two options:

a) Subdivision approval is not required. This would include:

- Defacto consolidation (Section 268A(i));
- Subdivision where each resulting parcel has an area in excess of ten hectares (Section 268(2)(a));
- Subdivision as a consequence of expropriation (Section 268(2)(c));
- Subdivision resulting from an acquisition or disposition of land by the Crown (Section 268(2)(c));
- Subdivision resulting from an acquisition of land by a municipality for municipal purposes (Section 268(2)(e);
- Subdivision resulting from the disposal, by a municipality, of a street or part of a street (Section 268(2)(f));
- Subdivision of an abandoned railway right of way (Section 268(2)(g));
- Subdivision resulting from a division of land by Will executed on or before January 1, 2000, assuming there is no Codicil made after that date (Section 268(2)(j)). It should be noted that there appear to be conflicting opinions about the effect of purported subdivision by Will if there is a Codicil dated on or after January 01, 2000.
- The other exemptions listed specifically in Section 268.

Each of the instruments by which the exempt subdivision is effected must be accompanied by an affidavit specifying the exemption.

Third Option:

Subdivision was validated by Section 291 of the *Municipal Government Act*. Section 291(1) provides that:

> *"A failure to comply with:*
>
> *a) this Act; or*
>
> *b) the former Planning Act,*
>
> *or a regulation or by-law made thereunder does not affect creation of a title or interest in real property conveyed, or purported to have been conveyed by deed, lease, mortgage or other instrument before April 16, 1987."*

Utility Interests

13. As we know, utility interests which run with the land must be described in full text or by reference to the registration or recording particulars of the document, if that document contains a full text description of the interest (see Land Registration Administration Regulation 5(9) set out in an earlier paragraph in this paper).

14. If the utility interest is not evidenced by a grant, and if it is not in your client's deed, I would make reference to it as a textual qualification. I would not include it as a burden, but I would put it in the parcel description.

15. Remember that the utility interest is an "overriding" interest pursuant to Section 73(1) of the Act if it was in existence as of March 24, 2003 (see Section 3(1)(ae) of the Act).

Easement Security Interests

16. Maritimes and Northeast Pipeline Limited Partnership (and perhaps other easement benefit holders?) has registered a debenture against its pipeline. Because it has created this charge, the recorded interest must be reflected in the AFR and in Form 8. The Interest Type to be used is "security interest - easement" and the Instrument Type is "debenture".

Section 19A Land Registration Act

17. The Act, was recently amended so as to provide that the Owner of a registered interest in a parcel may grant an easement in the parcel for the benefit of a commonly owned parcel. This is a significant change in the law, as merger no longer occurs unless there is an express release of the easement. An easement benefit and/or burden may be created prior to sale of a parcel. The parcel can be conveyed subject to or together with the easement in question thus avoiding the necessity of adding the benefit or burden by using the appropriate paragraphs in Form 24.

18. Note that the wording of Section 19A requires that a grant be made, in order to create the easement. Thus, the Owner must execute and record a document evidencing such grant. The document is accompanied by a Form 24. Remember that the effect of Section 19A is limited to registered parcels.

19. Prior to December 1st, it was not uncommon to include reference to a "*quasi-easement*" in the parcel description, to identify an intended benefit for a commonly owned parcel. References to these *quasi-easements* should be removed when amending the parcel description.

Existence of Roadway or Lane Unaccompanied by a Grant

20. Sometimes you will see a survey plan which shows the existence of a wood road or traces of an old road or things of that nature that appear to be a burden on your client's parcel, but which is otherwise undocumented. Your client may advise you of the existence of such a road, even in the absence of documentation or a survey plan. Depending upon the circumstances, your client may wish to make a grant to the owner of the parcel using the road, particularly if it is and has been used by the owner of a neighbouring parcel, or if it is the only apparent access to a public highway. It may be that this is the appropriate time to properly document the right of usage, and to obtain the grantee's signed consent to any limitations (i.e. as to width, etc.) which may be desirable from your client's perspective. But what if your client doesn't want to proceed by way of grant? Perhaps the road has not been used for many years, or perhaps it was used by way of a verbal license agreement. Ideally you would have the owner of the "dominant" tenement sign a document confirming that he/she claims no right of usage. Alternatively it may be possible to obtain and record statutory declarations which allow you to "ignore" the existence of the road. However, you must be careful to ascertain that you are not dealing with an abandoned public road ("once a highway, always a highway"), a right of way of necessity, or an overriding interest pursuant to Section 73(1) of the *Land Registration Act* (an easement or right of way that is being used and enjoyed).

21. If your client doesn't want to make a grant of easement, and if it isn't possible to extinguish or release the possible right of usage, then the existence of the road should not be ignored. You may want to make reference to it in the parcel description, but you would not want to include it as a burden. Instead, it would be referenced as a textual qualification, and the plan (if there is one) showing the existence of the road would be referenced in the textual qualifications.

Undocumented "Benefit"

22. As noted above, Section 73(1)(e) of the *Land Registration Act* provides that "an easement or right of way that is being used and enjoyed" is an overriding interest. Let us suppose that you are dealing with a parcel which has no deeded or granted right of access but there is an existing road which is being used and enjoyed. In that case, you would be well advised to obtain a grant from the owner of the "servient" tenement, and alternatively you could try to obtain statutory declarations from knowledgeable and disinterested persons, establishing the prescriptive right of usage. However, some lawyers choose to rely upon the overriding interest provision, without supporting Affidavit evidence. In that case, the parcel access is stated to be "private" and the parcel description does not contain reference to access, nor does the access appear as a benefit attaching to the registered interest. Thus, there is no benefit included in Forms 8 and 29. It would seem prudent to obtain the informed consent of your client if proceeding in reliance upon an overriding interest, the integrity of which may well be subject to interpretation and attack. If you are going to hang your hat on s.73(1)(e) you must be able to establish prescription, whether or not you document that prescription. If the right is prescriptive, I think it becomes difficult to imagine why you wouldn't document it accordingly.

No-Access and Limited Access Highways

23. The graphic and the parcel description may show that the parcel abuts on a public highway. However, it may come to your attention (as a result of information given to you by your client, a note contained on a survey plan, an Order in Council discovered when doing your search, or as a consequence of your personal knowledge) that the access is prohibited or restricted. Careful consideration should be given when designating the nature of the access and it is advisable to include a textual qualification noting the prohibition or restriction. Otherwise, your client or others may be misled by your designation of access by public road.

Naming of Individuals in the Benefits Section of the Parcel Register

24. In the Northern and Valley Regions it was the practice, for a period of time, to name the Owners of the registered interest as the holders of the benefits, in the Benefit section. The procedure has changed, and now we place the benefit by indicating "together with a right of way/easement" in the Interest Holder field of the Enterprise sub-screen. From time to time you will see parcel registers which reflect the former procedure. When doing a revision it is essential that you change the parcel register by removing the individual owners' names and adding the Enterprise "together with an easement/right of way"; otherwise, you may be depriving your client of the easement benefit. Once the benefit is thus placed, no further revision of the Benefit section is required upon subsequent transfers of ownership or revisions.

Practice Points to Consider:

① If the easement benefit/burden is in the parcel description, it must also appear in Forms 8 (the Opinion) and 29 (the SRI) and vice versa.

② If the parcel has been converted, and the Land Registration View indicates that access is private, then a benefit must be described in the parcel description and in Forms 8 and 29. If this is not the case, rectification will be required. The means of access shown at the top of the Land Registration View must be consistent with the parcel description and with the benefits/burdens listed in the Land Registration View.

I would suggest adding a textual qualification where no grant is found, but the benefit appears in the plan and the benefit applies to the parcel by reason of s.280(2) of the *Municipal Government Act*.

③ Remember that correction of any errors (or omissions) appearing in the AFR is done by way of a Form 17. Among other things, this would include:

- Failing to include a benefit/burden in Forms 8 and/or 29.
- Showing a benefit or burden in Forms 8 and 29, where creation of the same has not occurred by way of a grant or documentation establishing a possessory right.
- Erroneous designation of the means of access, in Form 8.

Again, it is important to remember that the parcel description will have to be amended as well, if the benefit or burden does not appear there, or if it appears incorrectly.

It is logical that the lawyer who makes the error do the necessary corrections, as he/she probably has the best access to the information required in order to do the fix.

④ Parcel descriptions, which are usually generated in "block" form without indentation, are monotonous to read and thus often incapable of comprehension by mere mortals. Although it is not necessary to do so, it may be helpful to distinguish between various exceptions/burdens/benefits by using the introductory words: "first exception", "second benefit", and so on. This will increase the likelihood that you, the Mapper, and others will distinguish the various exceptions/benefits/burdens. This may be a particularly useful safety net when removing a burden or a benefit. Remember that even if the parcel description has two or more separate and distinct benefits, they will be shown as one in the parcel register, if they have the same enabling instrument. Thus, there is a real risk of entirely removing the benefit from the parcel register even though the intention is to extinguish only one of the two benefits which are included in the single reference.

⑤ Consolidations require special consideration. Bear in mind the fact that an easement can apply to all of its subdivided parts consider the consolidation of a one acre parcel which has the benefit of an easement, with a 100 acre parcel which does not have the benefit of that easement. If the consolidated 101 acre parcel is shown in the parcel register as having the

easement benefit, others who review the parcel register will be justified in assuming that it is indeed the entire consolidated parcel which has the easement benefit. The end result will predictably be an unhappy one. This can be avoided by making a textual qualification.

⑥ The importance of spending time with your client (whether the client be the converting Owner or a subsequent Mortgagor or Buyer) to review the legal description, survey plan, Property Online Property Details or Land Registration View, and your client's knowledge of the property cannot be overemphasized. To a considerable extent the quality of the end product depends upon this input, which should take place early in the transaction. Accuracy will increase, stress will be reduced and there is a much better chance that the transaction will proceed in accordance with the client's expectations if you get things right the first time. Rejected PDCAs and rejected draft AFRs are costly in terms in time and other resources. These difficulties can almost always be avoided by spending extra time up front, dealing with the client and reviewing documents.

⑦ When converting, you should check your draft AFR to make sure that the information is consistent with that contained in the abstract. As soon as you have converted, you should compare the information contained in the Form 29 with that contained in your Form 8 and in your abstract. If you discover a mistake at that time, you will have the pleasure of preparing a Form 17 and paying the $74.50 cost of filing it, except in those cases where the LRO has made the error. It goes without saying that it is better that you identify the error than have it identified for you by some third party.

Conclusion

25. The best advice I can offer, based upon many painful personal experiences, is to be cautious. Do not assume that the parcel description is correct, and do not assume that all of the information contained in the parcel register is correct. I am not suggesting that you conduct another title search. After all, we are entitled to rely upon the parcel register's identification of registered and recorded interests. You do need to compare the approved parcel description to the old world description and to the survey plan and I am suggesting that you have your client do the same. The client generally knows much more about the property than we do, and we can benefit from the client's input.

26. I use a closing checklist to review, for the last time, the documents given to me by the Seller's lawyer. It is not uncommon to find errors[1]. I practice in a small town, and thus on occasion I represent both the Buyer and the Seller. In those instances, I use the same checklist to triple-check my own work. It is truly humbling to identify, at that time, my previously undetected errors. The potential for making errors has greatly increased, but appropriate systems and the use of a good checklist will identify these problems before they spiral out of control.

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[1] The following is a list of some errors which I recently discovered in parcel registers:

- Easement present in parcel description but not entered as a benefit/burden.
- Easement entered as a benefit/burden but absent from parcel description.

- Restrictive covenant entered as a burden but absent from the parcel register (post-November 30, 2004 conversion).

- Parcel register indicates public access, but parcel description reveals private access or no access.

- The property is separated into two parcels by a public highway, but a single parcel is described (during timeframes when this was not permitted).

- Error in parcel description (i.e., north instead of south, 1,500 square feet instead of 15,000 square feet, etc.)

- Name of owner is inconsistent with that provided by Seller's lawyer.

- Absence of a recorded interest for which I have been given an undertaking (i.e. Seller's lawyer has advised me of the existence of a mortgage, but that mortgage is not shown as a recorded interest).

- Title converted after death of the owner, but the parcel register still shows that person as being the owner (rather than the personal representative or the estate of the deceased owner).