Rights Of Passage

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Two roads diverged in a wood, and I-
I took the one less travelled by,
And that has made all the difference.

-Robert Frost

I INTRODUCTION

How do you get from "here" to "there"? In my last article ("Follow the Yellow Brick Road", *The Ontario Land Surveyor*, Spring 1993), I explored the concept of rights of passage held by the public over highways - interconnecting strips of land under municipal, provincial or federal jurisdiction. Although not directly owned by the public, nevertheless the public's right to use these highways is well entrenched in common and statute law.

What about rights of passage held by individuals over privately owned land? Do they differ in any way with rights over highways held by the public at large? We are now entering the realm of easements, a more restricted right of passage than a public highway.

II IN THE BEGINNING

When nomadic tribes stopped their wandering and began to farm the land, the world witnessed the birth of civilization - and with it the rise of thorny issues related to property ownership. The movement of people and goods took on a new complexity when land owners began asserting their rights.[1]

Of course we should remember that we do not own land, such as we might own a car or a stereo. What we own is an *estate* in land, the highest (and most valuable) being an estate in fee simple. Examples of lesser estates are life estates and leasehold estates. We can trace this concept back to William the Conqueror who, in 1066, imposed his version of feudalism on what is now England. William, who owned all there was to own in the way of real estate in his kingdom, granted large tracts of land to the 1500 barons who supported him. The Conqueror still owned the land; the baron held it as a tenant. The barons, in turn, granted lesser estates to those living on and working the land.

And so it continues today - the Crown in the right of the Province of Ontario, in effect, owns all land in Ontario. When we say we "own" land, in fact we are merely tenants. If an individual holds an estate in fee simple, he can pass this on to his heirs. If he dies intestate, statute law determines the division among heirs. If he dies intestate with no heirs, his land will escheat to the Crown, the owner.

The fee simple estate (the most common estate), being inheritable, can potentially last forever. This is an interest in land that is as large as it is possible to have. Such an estate is composed of a number of rights and the owner of those rights can divide them up as he pleases into certain prescribed and fairly definite individual packages[2]. One of these packages is an easement - not an *estate* in land but a right in land of a non-possessory nature.

Although many types of rights may be easements, the most common, in a surveyor's experience, is a right of passage (right-of-way) over a parcel of land to provide access to another parcel of land. The following comments have this perspective in mind.

Definition of an Easement

An easement has been defined variously as:

1. "An interest which one has in the land of another."[3]
2. "A right annexed to land which permits the owner of the dominant tenement to require the owner of the servient tenement to suffer or not to do something on such land."[4]
3. "A right in property belonging to someone else which benefits land owned by the person who has the easement."[5]

Remember that we are not discussing ownership of land but the acquisition of a right to use land in a particular manner. Different people can hold different rights in the same parcel of land at the same time.

First of all, two fundamental terms should be clearly understood in any discussion regarding easements:

1. **Dominant Tenement** - the land which benefits from the easement or the land to which the benefit of the easement attaches;
2. **Servient Tenement** - the land over which the easement runs or which is subject to the easement.

Characteristics of an Easement

There are four characteristics common to any easement:

1. There must be a dominant and servient tenement.

An easement cannot exist independently of the ownership of land. It is a property right and not a right of an owner personally. A personal right between parties is a license only and not binding on successors in title. In other words we can only have an easement when it is possible to say that the right so created is a right in and for land, not for people.[6] There are situations, however, where an easement can exist without a dominant tenement. More on this shortly.

2. An easement must accommodate the dominant tenement.

It must be solely for the use and benefit of the dominant tenement. The purpose of the easement must be set out (e.g. for pedestrian or vehicular traffic, for installation and maintenance of a water line, for support of a party wall, etc.). An easement "runs with the land". In other words, when the dominant tenement (or any part of it) is transferred, all appurtenant easements are also conveyed[7] unless specifically excluded.[8] The tenements do not have to physically adjoin[9] but there must be some natural connection between the tenements, and the easement must be connected with the enjoyment of the dominant tenement.

3. The dominant and servient tenements must be owned by different persons.

If both tenements are bought by the same person, the easement is said to merge. The lesser right of the easement cannot co-exist with the higher estate of fee simple for, obviously, a person can do as they wish on their own land having no need for an easement. Condominium properties are an exception to this rule - see "Changing The Rules" below.

It should be noted that ownership of both tenements must be identical for the easement to merge. If "A" owns land subject to a right-of-way appurtenant to land owned by "A" and "B", there is no merger.

4. An easement must be capable of forming the subject matter of a grant.

The right must be clear and specifically identified, so that the parties are certain of the use and location. With regard to a right-of-way, there must be a precise route and not just a right to wander at large over the servient tenement. The courts have held that a grant of right-of-way over an entire lot was restricted to a track actually in use and the width was limited to the width of a gate at point of entry.[10]

Establishment of an Easement

There are three common ways in which easements can be created:

1. *By express grant or reservation.*

An easement can be created in a grant (transfer), either together with a dominant tenement or by itself and declared to be appurtenant to land already owned by the transferee.

An easement established by express reservation is created in a transfer of a parcel of land where the transferor reserves an easement over the property transferred. The easement so created must be appurtenant to property owned by the transferor. An easement cannot be reserved in favour of a third party.

Once an easement has been established, it runs with the land until released, abandoned or quit claimed or until a fixed expiry date is reached.

2. *By implied grant or reservation.*

A situation can arise where a parcel of land is severed and conveyed without transferring an easement over the transferor's retained land. Courts have held that the transferor must have intended to convey, along with the

severed parcel, an easement over any apparent and well-defined path over the transferor's retained property.[11]

Similarly, a right-of-way of necessity can arise where a property has no other means of access whatsoever (i.e. it is "landlocked").[12]

An easement created by implied reservation is rare, as the courts generally will not allow a transferor to derogate from his conveyance of land. In other words, the transferor cannot transfer all his rights in a parcel of land and later claim to have retained one of those rights, i.e. an easement. However, the courts have ruled that a right-of-way of necessity can be created by implied reservation.[13]

3. *By prescription.*
The *Limitations Act*[14] provides that an easement claimed over the land of another that has been in use for twenty years without interruption, or consent of the owner, may preclude the registered owner from defeating the claim. After a period of forty years, the right to the easement is absolute and indefeasible. The use does not have to be exclusive. It can be in conjunction with other parties, including the registered owner of the land over which the easement runs.

Three conditions must be met before an easement by prescription can be claimed:

i) the registered owner knew that another party was using an easement over his property;
ii) the registered owner had the right and opportunity to stop the adverse use;
iii) the registered owner took no action to stop or interrupt the use.

Obviously, if a right-of-way is used with the owner's permission, he can withdraw that permission at any time. By asking for permission, it is acknowledged that the owner has the right to discontinue the permitted use of his land.

The majority of easements are created by express grant or reservation. Easements created by implied grant or reservation, or by prescription are normally dealt with by the courts and are often the subject of a vesting order.

III VARIATIONS ON A THEME

As previously noted, easements must attach to and benefit a dominant tenement, however, a class of easement exists without this requirement. "Easements in gross" can be aquired by a utility company or a municipal corporation for purposes such as a hydro line, telephone line, water line, pipeline, etc. While not true easements, it is convenient to consider them as such by their creators and land registration systems. As they serve a public interest, it would be difficult to argue that they cannot exist. Often, in an attempt to bring them into line with a true easement, a clause was inserted in the document specifying the head office of the utility company or municipality as the dominant tenement. This uncertainty, with regard to municipalities, was eliminated by the *Easement Statute Law Amendment Act* in 1990 (see "Changing the Rules" below).

Other types of easements are: 1) a right of support for buildings, 2) a right to air and light, 3) a right for drainage and to draw water. These are all rights enjoyed by the dominant tenement affecting adjacent land and are often a source of litigation.

Licenses are sometimes confused with easements, but it is easy to distinguish the two - a license does not attach to land but only benefits an individual and cannot be passed on to his heirs. It is not an estate in land and rarely can it be considered an interest in land. While not holding an interest, a licensee nevertheless, has a right related to land. A license to enter upon, cut wood, and remove it from a bush lot, would be an example. A license, unless permitted by legislation, is not a registerable interest in land.

Restrictive covenants are a cousin to the easement. They run with the land, are a registerable interest, and can be enforced in the courts. While a complex topic in itself, briefly explained, an owner can transfer a fee simple estate but include conditions in the document controlling the use of the land.

Mention should be made at this point of the *Road Access Act*[15]. This act does not create easements or any other right of ownership in land.[16] It provides procedures for blocking private roads which provide access to one or more parcels of land and no easement exists. The owner of the land over which the road runs must apply to a judge to block the road. Those using the road may, in fact, have a prescriptive right, but the act does not deal with this issue.

IV CHANGING THE RULES

In the past, common law principles regarding the establishment of easements have sometimes proven inconvenient. As is often the case, statute law is then enacted which modifies the common law. An example is the rule requiring the dominant and servient tenements to be owned by different parties in order for an easement to exist. This rule was causing problems with condominiums, particularly with staged developments, and in 1980 both the *Registry Act*[17] and the *Land Titles Act*[18] were amended to provide that certain easements created in a condominium declaration or in a deed by the declarant, did **not** merge even though the dominant and servient tenements were owned by the same party.

Another example is the *Easement Statute Law Amendment Act*.[19] This act cleaned up a number of troublesome areas. A section was added to the *Municipal Act*[20] specifying that a municipal public utility easement is no longer required to be attached to any particular parcel of land to be valid (a dominant tenement is no longer required). The new Act also extended the requirement for registering a notice of claim related to such easements under the *Registry Act* until December 31, 1999.[21] Normally, a notice of claim is required to preserve registered easements, which might otherwise expire, beyond the forty year notice period as defined in the *Registry Act*. The law gets confusing at this point and some explanation is needed.

Let's back up a bit: - you will recall that earlier in this article it was stated that once established by grant or reservation, an easement runs with the land until released, abandoned, or quit claimed, or until a fixed expiry date is reached. Not so, for the hapless owner with an easement registered under the *Registry Act*! Section 113(1) of the *Registry Act* has the effect of extinguishing claims (e.g. an easement) forty years after they have been created in a registered document unless a notice of claim in the prescribed form has been registered.[22] The mere fact of referring to an easement in a transfer or charge is not sufficient to preserve it.[23] The new Act gives municipalities other rights and a full reading of it is recommended. Particular attention should be paid to the legislation when performing surveys for the purposes of first applications under the *Land Titles Act*.

V END OF THE ROAD

Whether served by a public highway or a private right-of-way, hardly a property exists in Ontario without access rights. The concept of a right of passage should be well understood by the practising land surveyor. There are many methods of creating these rights and careful consideration should be given to their current validity and whether the right, in fact, exists.

They shut the road through the woods
Seventy years ago.
Weather and rain have undone it again
And now you would never know
There was once a road through the
woods.

-Rudyard Kipling

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VI STATUTE AND CASE REFERENCES

1. Jordan, R.W., *WAYS AND MEANINGS; Some Aspects of the Right of Passage in Ontario*, a paper submitted to D.W. Lambden, Prof. - March 8, 1993 (used with the kind permission of the author).
2. *Introduction to Real Property Law*, 3rd Edition, A.M. Sinclair, Butterworths, Toronto, 1987, Chapter 2.
3. *Introduction to Real Property Law*, 3rd Edition, Chapter 2.
4. *Anger and Honsburger Real Property*, 2nd Edition, Oosterhoff and Rayner, Canada Law Book Inc., Aurora, 1985, Chapter 18.
5. *Real Estate Practice in Ontario*, 4th Edition, D.J. Donahue and P.D. Quinn, Butterworths, Toronto, 1990, Chapter 7.
6. *Introduction to Real Property Law*, 3rd Edition, Page 31.
7. *Conveyancing and Law of Property Act*, R.S.O. 1990, chap.C.34, Section 15. This is not the last word, however, on this rule of law. Section 113 of the *Registry Act*, R.S.O. 1990, chap.R.20, provides that claims (e.g. an easement) expire forty years after they were created by a registered instrument unless a notice of claim is registered within the forty year notice period. See endnote 22 for a more detailed look at this.
8. If a parcel of land is divided and conveyed, each portion is benefitted by the ease-

ments appurtenant to the original parcel. See *Locke & Locke v. Scharfe* (1958) 17 D.L.R. 2d 51 at 57:

Once a right of way becomes appurtenant to land, even if the land is subsequently divided, the right of way and easement remains appurtenant to all land to which it may be said to have been surrendered, or a claim to it abandoned by those owning it. And the fact that part of the land may be later physically separated from the right-of-way, unless there is an abandonment, does not necessarily preclude such a person owning such separated land from using it if he can gain rights of access to it.

The failure to specifically deal with an appurtenant easement in a conveyance of a portion of the dominant tenement would not be grounds for declaring the easement has been abandoned and therefore extinguished. A properly constructed transfer should include the appurtenant easements or exclude them with a specific statement.

9. re Gordon and Regan (1985), 49 O.R. (2d) 521 (Ont. H.C.)
10. Laurie v. Winch (1953), 1 S.C.R. 49 (S.C.C.)
11. Hardy v. Herr (1965), 1 O.R. 102 (Ont. H.C.), affirmed (1965) 2 O.R. 801 (Ont. C.A.)
12. Fullerton v. Randall (1918), 44 D.L.R. 356 (N.S.C.A.)
13. St. Mary's Milling Co. v. St. Mary's (1916), 37 O.L.R. 546 (Ont. C.A.)
14. *Limitations Act* R.S.O. 1990, chap. L.15, Section 31.
15. R.S.O. 1990, chap. R.34
16. Whitmell v. Ritchie (1992), 8 O.R. (3d) 20 (Ont. C.A.)
17. R.S.O. 1990, chap. R.20, section 27
18. R.S.O. 1990, chap. L.5, section 40
19. R.S.O. 1990, chap.4
20. R.S.O. 1990, chap.M.45
21. This extended period only applies to easements owned by municipalities and the Management Board Secretariat (formerly the Ministry of Government Services. It is expected this will be sufficient time for municipalities and MBS to locate and register their easements which otherwise would expire. This new amendment to the *Registry Act* also retroactively recreates and preserves these easements that have expired since 1981. The question is immediately raised, of course, as to the effect of this "re-creation" on an easement over land that, since 1981, has been registered under the *Land Titles Act* and not subject to the easement. Further legislation would appear to be necessary.
22. Section 113 is contained in Part III of the *Registry Act* which deals with length of search provisions and extinguishing of claims provisions. Essentially, there are 2 forty-year periods defined:

    - The first one (the "title search period") limits the required length of search to a period of forty years immediately preceding the day of dealing with a parcel of land (unless no transfer has been registered within this period - you then search backwards to the next transfer);
    - The second one (the "notice period") extinguishes a claim on the day forty years after the day of registration of an instrument.

    Some examples might help:

    - On December 1, 1993 you search the title to Lot 1 and find a transfer to the current owner registered in 1985. Searching back to November 30, 1953, you can find no other transfer registered. The chain of title, therefore, commences on November 30, 1953, and instruments registered before this date need not be considered. (There are exceptions and qualifications in the legislation and Sections 112 to 114 of the *Registry Act* should be read in their entirety).

    If the previous owner had transferred an easement over Lot 1 to his neighbour in 1952, it is outside the "title search period" and is of no effect. It had expired anyhow in 1992 due to the "notice period" provision. To preserve his easement, the neighbour should have registered a notice of claim prior to 1992.

    - On December 1, 1993 you search the title to Lot 2 and find that the current owner's transfer was registered in 1948. You also find that in 1949 he transferred an easement over Lot 2 to his neighbour. The "title search period" commences with the date of registration of the transfer in 1948. The easement had expired in 1989 and Lot 2 is now free of this interest. Again, the neighbour should have registered a notice of claim prior to 1989 in order to preserve his easement.

    For a thorough discussion on the effects of Section 112 and 113 of the *Registry Act*, see *The Length of a Title Search* in Ontario by T. G. Youdan in *The Canadian Bar Review*, Vol. 64, 1986.
23. Prior to 1981 it was possible to preserve easements (and other claims) by including a reference to them in a registered document. Effective August 1, 1981, the *Registry Amendment Act*, 1981 (S.O. 1981, Chap.17, S.4) eliminated this option in order to facilitate the automation of land records (POLARIS). The new provision had a retroactive effect and applied to claims and notices of claim registered prior to this date.

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