Introduction: Nature of Licences, Easements and Rights of Way

Easements, licences and rights of way are limited rights with respect to real property: they create rights to carry out activities on real property which would otherwise amount to trespass.

A right of way may be either private or public. A right of way is a particular type of easement or licence, since it is a right to carry on a particular type of activity, namely the right to pass or repass over a property. Accordingly, any future reference in this paper to an easement or licence should be taken to include a private right of way and, therefore, private rights of way will not be discussed separately.

Since public rights of way have certain unique features, I will deal briefly with them at the end of this paper.

The Difference Between Licences and Easements

The difference between a licence and easement is this: a license is a right in contract only, while an easement is not only a right in contract but also an interest in real property. The case of *Errington v. Errington* [1952] 1 K.B. 290, in which the English Court of Appeal held that a licence amounts to an interest in real .property, could signal a change in the law. **However**, in my view, it is still too early to tell. Indeed, the learned authors of Megarry and Wade - The *Law of Real Property* (Fourth Edition) have this to say about *Errington v. Errington* (at page 783):

"It seems likely that, if directly challenged, the doctrine of *Errington v. Errington* would be overruled as being inconsistent with long-settled principles of property law."

Accordingly, if A by licence, that is, by contract, permits B to pass and repass over A's land, and A subsequently sells the land to C, because C was not a party to the contract, C may maintain an action in trespass against B and get an injunction stopping B from passing over the land. The only remedy B has, in this situation, is an action in damages against A for breach of contact.

However, if the grant by A is an easement, then *B's* right to pass and repass over the property in question burdens the title to the property and, as a result, the new owner, C, takes a title which is subject to, or encumbered by, *B's* right to pass and repass over the property and, therefore, C cannot stop *B* from doing so.

It is immediately apparent that a right created by an easement is much more secure, and therefore much more valuable, than a right created by a licence.

Since a licence is a contractual right not governed by the principles of property law, the remainder of this paper will deal only with easements.

I will now discuss

(a) essential elements needed to create easements;
(b) certain considerations of a practical nature which must be taken into account when creating easements;
(c) how easements are created;
(d) easements arising from property ownership;
(e) the mutual rights and obligations of persons entitled to easements and the owners or occupiers of the properties over which the easements run;
(f) remedies for interference with easements;
(g) termination of easements; and

(h) transfer of rights under easements.

Essential Characteristics of an Easement

There are four tests a right must pass before it qualifies as an easement or an interest in real property. These tests are set out in *Re: Ellenbrough Park; Re: Davies* [19561 Ch.

Firstly, there must be a dominant and servient tenement, that is, the right created must be framed so as to benefit one parcel of land (the dominant tenement) and burden the other (the servient tenement).

Secondly, the right created must be actually capable of benefitting the dominant tenement: although it is not essential that the dominant and servient tenements be adjacent to one another, the right must be of practical use to the owner or owners from time to time of the dominant tenement. For example, if the owner of parcel A, located in the extreme south end of Halifax grants, for the benefit of parcel B, located in the extreme north end of Halifax, the right to pass and repass over parcel A, the right is not an easement because it is inconceivable that such a right over lands so far away can be of any practical benefit to parcel B.

In meeting this test, it must also be shown that the right is an actual benefit to the *enjoyment* of the dominant tenement and is not merely an advantage to the owner of the dominant tenement rendering his ownership of the land more valuable. For example, an agreement to pay the owner of a parcel of land $500.00 per month as long as he is the owner is not an easement at all because while it may personally benefit the owner it has nothing to do with the enjoyment of the land: *Re: Ellenbrough Park; Re: Davies supra, p.170.*

Thirdly, title to the dominant and servient tenements must be vested in different persons: it is impossible for a person to grant to himself limited rights over land which he already owns and over which he already has full rights.

Fourthly, the right must be a right which is capable of being conveyed by deed: the grantor and the grantee must have legal capacity to convey a property right and the right must be clearly defined. For example, there can be an easement permitting the passage of air through a defined channel, but there cannot be an easement permitting the general flow of air over land: Megarry and Wade - The *Law of Real* Property, (Fourth Edition), p. 812.

Practical Considerations

Having discussed the law, let us put ourselves in the position of the solicitor for an oil company: the oil company has just negotiated a deal with a property owner which provides that the property owner will, for a substantial price, permit the company to install and maintain on his property a very expensive oil pipeline to be used for the transportation of crude oil from oil tankers to the oil company's refinery. Your client asks you to ensure that it has maximum legal protection.

To begin with, it is obvious that what the client requires is an easement, if at all possible, and not merely a licence. If only a licence is obtained, your client has no rights against a subsequent owner of the property.

The first thing for you to determine, therefore, is whether or not the circumstances exist which permit the creation of an easement, that is, a right which is not only contractual but which also amounts to an interest for your client and the owner or owners from time to time of your client's refinery, in the land under which the pipe will pass.

I have already outlined the circumstances which must exist before an easement can be created. If all of these circumstances do not exist, then no easement or right which runs with the land can be created, no matter how cleverly the grant is drafted or how it is labelled.

If all the required circumstances do not exist then all you can do is advise your client that the best it can get is a licence agreement and you must make it clear to the company the risk it takes in making a large capital investment relying on a mere. contractual right to maintain the pipe, which is so susceptible to defeat against a subsequent purchaser of the property.

If, however, the proper circumstances for an easement do exist then the

documentation, if properly framed, will create an interest in the property under which the pipe is located.

Before preparing documentation, certain preliminary steps should be taken.

First of all, it must be borne in mind that since your client is obtaining an interest in the property under which the pipe will run (the servient tenement), it is essential to determine that the person granting the easement is, **in fact**, **the owner** of the servient tenement. In this respect your responsibility as a solicitor is no different than the responsibility of the solicitor for a purchaser of the servient tenement.

Accordingly, a search of the title to the servient tenement should be done in order to determine

(a) whether the person with whom your client has negotiated the deal is, in fact, the owner of the servient tenement and therefore capable of granting the right; and

(b) whether or not the servient tenement is subject to any encumbrances, such as mortgages, judgments, liens or other easements.

It must be remembered that if the property is subject to such an encumbrance, the encumbrance should be either

(a) released; or

(b) postponed in priority to your client's rights under the easement.

It. must be remembered that if the servient tenement is, at the time the easement is created, subject to a mortgage or a judgment (Section 18 of the *Registry* Act, provides that a judgment has the same effect as a mortgage) and if the mortgage is foreclosed or the judgment is executed and the property is, as a result, sold at a foreclosure sale or an execution sale, the purchaser at the sale takes the property free of the easement, since the purchaser at the sale gets whatever title the owner of the servient tenement had at the time the mortgage or judgment came into existence. In this case, the property was not subject to your client's easement at'the time the mortgage or judgment came into existence. Accordingly, the foreclosure or execution sale would extinquish your client's easement.

Real property taxes constitute a first lien on property and, consequently, for some years, the consequences of tax arrears and resulting tax sales were a concern to persons entitled to easements. However, the Assessment Act now provides, by subsection 38(3), that where a servient tenement is sold for arrears of taxes, the sale does not terminate or affect an easement or right of way to which it is subject.

Having done a title search, the next step is the preparation of the grant of easement itself. I do not intend to suggest what form the complete document should take, as the covenants may vary according to the type of easement which is being granted. However, assuming that the proper circumstances exist, I suggest that the grant clause could take the following form:

> To the intent that the easement hereby granted runs to the benefit of the lands described in Schedule A" and to each owner or occupier for the time being of those lands, and is a burden and encumbrance which runs with the lands described in Schedule "B", the Grantor grants to the Grantee and the owners and occupiers from time to time of the lands described in Schedule"A" the right at all times and from time to time to (describe right being granted).

Once the grant of easement has been executed, it is important that your client's interests thereunder are protected against subsequent purchasers or mortgagees of the servient tenement.

Remember that your client is acquiring an interest in real **property and it is**

therefore important that his interests be protected pursuant to the Registry Act. Section 1? of the *Registry Act* provides, in effect, that every "instrument" is ineffective against any person claiming for valuable consideration and without notice under any subsequent instrument unless the instrument is registered pursuant to the *Registry Act.* "Instrument" is defined in the Registry Act as "every conveyance or other document by which *the title to land is changed or in any wise affected."*

As a result, if your client's grant of easement is not registered in the registry of deeds for the registration district in which the servient tenement is situate, then it is ineffective against a *bona fide* purchaser or mortgagee for value and without notice of the easement.

Creation of Easements

An easement may be created by
(a) express grant;
(b) reservation;
(c) statute;
(d) implication; or
(e) prescription

(a) *Express grant*

I have given, in the above example, one method by which an easement can be created by the voluntary act of the parties, that is by express grant or deed.

(b) *Reservation*

However, an easement may also be voluntarily created by reservation: a person may sell a **portion of his property and** reserve to himself an easement over the part sold which benefits the part retained.

In the case of a reservation of easement the sample grant clause which I gave above could be adapted to read as follows:

> To the intent that the easement hereby reserved runs to the benefit of the lands described in Schedule "B", and is a burden and encumbrance which runs with the lands described in Schedule "A" the Grantor reserves to himself (or herself) and the owners and occupiers from time to time of the lands described in Schedule "'B" the right at all times and from time to time to (here describe the easement being reserved).

A court of equity will construe an agreement under seal to create an easement as a grant of easement: Ross *v. Hunter (1882), 7 S.C.R. 289.*

(c) Statute

As long as a statute clearly provides that the right created runs with the title to the servient tenement, then the circumstances outlined in *Re Ellenbrough* (supra) need not exist. Creation of an easement by statute is not a common occurrence, but, where the circumstances necessary for the creation of an easement do not exist but the government or legislature feels that the creation of the easement is in the public interest, legislation could be enacted for this purpose. For example, the British Columbia Legislature removed the common law rule requiring a dominant tenement in the cases of easements created in favour of the Crown, a crown corporation or agency, a municipality, a regional district, an improvement district, a water users community, a public utility, a pulp or lumber, mining, railway or smelting corporation, a corporation authorized to transport oil or gas or any person designated by the Minister of Lands, Parks and Housing: *Land Title Act* R.S.B.C., *1979, c. 219, s. 214.*

(d) Implication

A court will imply a grant of easement in the following circumstances:

(i) where the owner of two parcels of land sells one of the parcels, a grant will be

implied of those continuous and apparent easements which, during the unity of possession, were enjoyed under the title of ownership: *Ruetsch v. Spry (1907), 14* O.L.R. 233 (High Ct.) It must be remembered. that the use must be continuous and that it must be apparent, or perceptable to the senses, such as the use of an eave or downspout draining water from a roof;

(ii) where a person owns a property which has access to a public highway, and conveys the back portion of the property which does not have access to the highway, but retains the front part which does have access to the highway, the courts will, in such circumstances, imply an easement, without express grant, in favour of the back part over the front part in order that the back part may have access to the highway: *Stephens v. Gordon (1894)* S.C.R. 61 at *pp. 97ff.* Where the grantor does not designate a way which is reasonable, the grantee may designate a reasonable way. Such an implied easement is called an easement of necessity; or

(iii) where the owner of a property subdivides his property into lots shown on a plan and shows streets on the plan then, each time he conveys a lot, he grants, by implication, without the necessity of an express grant, an easement over the street shown on the plan to and from the public highway and the lot conveyed: *Rossin v. Walker (1858)* Gr 619 (C.A.).

(e) *Prescription*

An easement can also be created by prescription, that is, by continuous use over a long period of time. Although the practical result of this doctrine is the same as the doctrine of adverse possession, whereby title to land is, in effect, acquired by long use, the theory underlying acquisition of easements by prescription is very different than the theory underlying acquisition of title by adverse possession.

When one claims title by adverse possession, one relys totally on the *Limitation of Actions Act* which terminates the right of the true owner to recover property after having been dispossessed for those periods of time mentioned in the *Limitation* of *Actions Act.* The doctrine of adverse possession is, consequently, a negative doctrine, because under that doctrine, the true owner's rights are extinquished pursuant to statute.

The doctrine of acquisition of easements by prescription is, however, positive although it was born and developed out of a fiction created by the courts.

First let us consider prescription at common law. In England, the courts held that if an easement has been enjoyed since the beginning of legal memory, that is since the year 1189 (which year was set by statute), then it is presumed that the person enjoying the easement acquired the easement by grant prior to 1189 even though he cannot produce the grant and, in all likelihood, there never was one.

Because of the extreme difficulty of showing continuous use since 1189, the courts then developed a more relaxed doctrine called the "presumption of modern grant": if the use continues over a long period of time (normally 20 years) then the court presumes that a grant of easement had been made since 1189 but before the use commenced.

The problem with this doctrine is that if it can be shown that the person enjoying the easement **had not always enjoyed it**, **then the presumption of grant** is rebutted. For example, an interruption of use would rebut this presumption.

As a result of the inadequacy of these judicial fictions, the British Parliament enacted the *Prescription Act* which provides that if a person can show that he actually enjoyed an easement without interruption for the full period of twenty years, that right may not be defeated or destroyed by showing only that the way or other matter was first enjoyed at any time prior to the period of twenty years. This Act also goes on to provide that if the enjoyment continues for the full period of forty years, the right is deemed absolute and indefeasible unless it appears that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing. This provision is now the law of Nova Scotia appearing, as it does, in the Nova Scotia *Statute of Limitations* as Section

It is apparent, therefore, that although the theory and development of the doctrines of adverse possession and prescription are different, the burden on the claimant is, for all practical purposes, the same in each case.

In discussing acquisition of easements by prescription, I should point out that subsection 32(2) of the *Limitation o` Actions Act* takes away the right to acquire by prescription the right to light or air to or for any building situate in any city or in any incorporated town in Nova Scotia. However, this subsection does not apply to any right which has been acquired b

y prescription before April *15,1931.*

What type of use, therefore, is necessary in order to acquire an easement by prescription? If at the end of the day, the court concludes that the owner of property has acquiesced in the use, then the court will declare that an easement has been created by prescription. In *Dalton v. Henry Angus & Co.; Com'rs of Her Majesty's Works and Public Buildings v. Henry Angus & Co., (1881), 6 App.* Cas *740,* H.L., Fry, J. said (at *pp. 773-774):*

". . in my opinion, the whole law of prescription and the whole law which governs the presumption or inference of a grant or covenant rest upon acquiescence. The Courts and the Judges have had recourse to various expedients for quieting the possession of persons in the exercise of rights which have not been resisted by the persons against whom they are exercised, but in all cases it appears to me that acquiescence and nothing else is the principle upon which these expedients rest. It becomes then of the highest importance to consider of what ingredients acquiescence consists... I cannot imagine any case of acquiescence in which there is not shewn to be in the servient owner: 1, a knowledge of the acts done; 2, a power in him to stop the acts or to sue in respect of them; and 3, an abstinence on his part from the exercise of such power."

Accordingly, physical evidence of an easement which shows up on a survey should be of concern to the solicitor for a purchaser, notwithstanding the absence of an express grant of easement.

For a detailed discussion of the development of the doctrine of prescription as it relates to easements see Megarry & Wade - The *Law* of *Real Property* (Fourth Edition), pp. 846 ff, and Anger and Honsberger - Real *Property* (Second Edition), pp. 930 ff.

Easements Arising From Property Ownership

Every owner of property is entitled, as an incident of ownership and without any grant, to have his land to be laterally supported by adjacent land. This is known as an easement of support. This easement is described in Anger and Honsberger *Real Property* (Second Edition) at p. 954 as follows:

Each land owner must so use his own land that he shall not interfere with or prevent his neighbors enjoying the land in its natural condition. It is the right of every property owner to have his land left in its natural plight and condition without interference by the direct or indirect action of nature facilitated by the direct action of the owner of the adjacent land. This right is a natural feature of the title to land.

The natural right to support does not provide for the support for buildings or of the additional weight caused by the buildings: Joss v. *Ukryniwk* (1957), 10 D.L.R. (2d), 630 (Man. Q.B.)

Accordingly, the owner of parcel A cannot, by reason of operating a gravel pit thereon, cause the surface of parcel B, a vacant lot, to subside.

Mutual Rights and Obligations of Parties

Once an easement has been properly created, what are the mutual rights and obligations of

the owners of the dominant and servient tenements?

Firstly, the servient owner must not do anything to interfere with the enjoyment by the owner of the dominant tenement of his rights pursuant to the grant of easement.

Secondly, the owner of the dominant tenement has a correlative obligation not to commit a trespass on the servient tenement unless the Act is permitted by the grant of easement. For example, an easement which gives the right to pass and repass with or without vehicles, including trailers, does not include the right to maintain the trailer as a home on the servient tenement unless the grant of easement expressly authorizes this extended use.

Thirdly, the owner of the dominant tenement must carry out any repairs or maintenance do any work which is necessary to facilitate the enjoyment of the easement. In the result, the grantor of a right of way is under no obligation to construct the way or to maintain and repair it: Anger and Honsberger - Real Property (Second Edition) p. 952.

Therefore, the owner of a property on which a shared driveway is located has no obligation to the person with whom he shares the driveway to maintain or repair the driveway. As a result, when acting for a client in such a situation, and where the client expects cost-sharing you should ensure that the grant of easement imposes an obligation on both parties to share the cost of constructing or maintaining the right of way, including keeping it clear of snow and ice.

Remedies

When a person's rights under an easement are interfered with, what remedies are available to that person? For example, if A has granted B an easement to pass and repass over his property and A obstructs the right of way, what remedies are available to B?

First there is the self-help remedy of abating the interference. This remedy is, of course, risky because B is liable for any damages A suffers as a result of B doing more than is absolutely necessary to abate the obstruction.

All other remedies are juridical in nature: they are awarded by the courts in the form of damages, injunctions or declarations or a combination of these: Megarry and Wade, *The Law* of *Real Property* (Fourth Edition) Page $65.

Termination of Easements

An easement may be terminated or extinquished by
(a) express release;
(b) statute;
(c) implication; or
(d) merger

(a) *Express Release*

An express release must be executed by the person who is presently the owner of the dominant tenement and it must release the interest which that person has in the servient tenement by virtue of the easement.

A solicitor for a purchaser of a property who finds that the property is subject to an easement and requisitions a release of the easement must be concerned that the easement is properly extinguished: that solicitor should search the title to the dominant tenement to ensure that the easement is released not only by the person who is, in fact, the owner of the dominant tenement, but also by any encumbrancer, such as a mortgagee or judgment creditor. If it is not released by the mortgagee or judgment creditor, and the mortgagee forecloses the property, or the judgment creditor causes the property to be sold, then a purchaser of the dominant tenement at the Sheriffs Sale could ignore the release: the sale would carry with it the benefit of the easement because the easement existed when the mortgage or judgment attached.

A release of easement should take the following form:

In consideration of one dollar and other valuable consideration, (name of owner of dominant tenement and names of mortgagee or judgment creditors, if any) release to (here insert name of owner of servient tenement) any right, title or interest which they have in the lands described in, Schedule "A" (Schedule "A" should be a description of the servient tenement) by virtue of a grant of easement dated the

day of 19 and registered in the registry
o ee at Halifax in k - at page

(b) Statute

This requires no explanation. If legislation terminates an easement, then the easement is terminated.

(c) Implication

An easement is released by implication where a court can infer from all the evidence that a party, by his conduct, intended to abandon an easement. In such a case, the court may declare that the easement is extinquished. It must be remembered that this doctrine is not based on the *Limitation of Actions Act* and therefore non-use of an easement for twenty or forty years is not necessarily conclusive. Non-use is only one item of evidence from which a court may infer that the owner of the easement *intended* to abandon it. Therefore, a court will consider not only evidence of non-use, but also any other relevant circumstances before concluding, at the end of the day, whether or not the owner of the easement intended to abandon it. For example, it has been held that, under certain circumstances, bricking up a door for thirty years did not, in itself, establish an intention to abandon an easement: *Cook v. Bath (1868),* L.R. 6 Eq 177 at 179. However in *Liggins v. Ingle* (1831) 7 Bing. 682 the court held that an easement to take water to a mill was extinquished because the mill was demolished.

(d) *Merger of Titles*

An easement will be extinquished where the titles to the dominant and servient tenements become vested in the same person since the owner of the dominant tenement, once he becomes the absolute owner of a the servient tenement cannot be said, any longer, to have only limited rights over it.

Transfers of Easements

A right of easement, being a right in real property, can be conveyed, but if it is transferred to a person other than the owner of the dominant tenement, it ceases to operate, since one of the necessary elements of an easement, namely, the dominant tenement, is missing.

The normal way in which an easement is transferred is by the conveyance of the dominant tenement. It is not necessary to expressly refer to the easement in the conveyance because clause (d) of Section 5 of the *Conveyancing Act* provides that a conveyance of any property right in land includes all hereditaments and appurtenances (which includes easements) belonging or in anywise appertaining to that property right. If, however, it is not intended to convey the easement, then the easement should be expressly reserved.

Public Rights of Way

A public right of way differs from a private right of way in that

(a) it gives all members of the general public the right to pass over the land affected by the right of way; and

(b) the essential element of a dominant tenement is not a necessary element of a public right of way.

A public highway may be created by the government expropriating land and establishing the land as a highway.

However, a public right of way or public highway may also be created by implication.

For a public highway to be created by implication the owner must dedicate the land either expressly, or by implication, for public use and the land must be accepted by the public as a public highway: *Bailey v. City of Victoria (1920), 60 S.C.R. 38.*

An intention to dedicate and public acceptance are questions of fact. For example, an intention to dedicate may be inferred from the preparation of a plan by the owner showing a strip of his land as a public highway and acceptance of the way by the public can be inferred from use of the way by the public.