“EVERYTHING OLD IS (ALMOST) NEW AGAIN”
THE (DRAFT) NEW ACCESS RULES
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Raffi Balmanoukian
Barrister & Solicitor
New Glasgow, NS
Whatchutalkingboutwillis?

- How did we get there from here? (the Four Musketeers)
- Analytical Framework (as stolen from Garth and Brenda)
- The new(ish) regime
- Some best practices
Overview

- Currently a dozen POL access categories
- Mistakes and overlaps abound
- Some difference in opinions (square pegs / round holes)

• Seven categories:
  – Public
  – Private
  – Right of way (driveway)
  – Right of way (walkway)
  – Navigable waterway
  – No Access
  – “Other”
The Current World

- Public
- Public (other)
- Private
- Private (by grant)
- Private (by prescription)
- Private (openly used and enjoyed)
- Private (other)
- Right of way (driveway)
- Right of way (walkway)
- Navigable Waterway
- No access
- Other
So now we have.....
Access – the “new” conceptual basis

- Public (including frontage not used)
- Private – however it has come to be
  - - grant
  - - prescription
  - - operation of law
    - - 280(2) MGA (retrospective? Probably not)
    - Reservation (Knock v. Fouillard)
    - Estoppel (Collins v. Speight)
    - License matured into a right (MacLean v. Williams)
    - Lost modern grant
    - Necessity, Private Ways Act, statute
- Navigable waterway
- No documented right of access
  - Various ways of saying this at present: Other, openly used and enjoyed (perhaps?), no access, and sometimes “just wrong.”
Public access

• Usually but not always can be determined from mapping graphics/survey
• “Red Line” not to be relied upon but may lead to further inquiries
• Controlled access highways
• Class K roads
• Dedication and acceptance
  – “that’s the way it’s always been”
• Ghost Roads
• Parcels fronting on public road but that’s not what is used – best practices
Private Access

• Currently various types
• New draft categories anticipate that particulars of the type of access will still appear within the parcel register (enabling instrument, parcel description)
• Old types of access will remain on migrated parcels – encouraged but not required to update
Private
(grafted, ungrafted and “kind of granted”)
• Encompasses all types of access for which you can certify, other than public or navigable waterway
  – No change in current law on what you can and cannot certify (e.g. quality of stat decs, substantive law on what is or is not a RIGHT of access)
Navigable Waterways

Vs.

Washington crossing the street
Navigable Waterway
(it’s all about “current”)

• No change in current definition
• No change in current subdivision rules
• Current rules on water lots, federal/provincial harbours, infill, accretion, etc. remain
• Lots bounded on a roadway AND by navigable waterway: what do you really use?
No documented **RIGHT** of Access

- Landlocked parcel (access via commonly owned lot? TQ or grant from self to self s. 61 LRA, changing “no documented right of access” to private)
- Unripened access (e.g. 17 years’ use)
  - “Openly used and enjoyed (?)”
- Railroad crossing (with or without license)
- Other interrupted access
  - E.g. ROW that doesn’t go all the way in
- The “woods road”
Some “New categories” scenarios

TQS!

TQS EVERYWHERE!
Some Scenarios
(“expropriated” from Brenda)

• Frontage on a street but accessed via a granted or ungranted ROW – Access is PUBLIC (TQ usually appropriate – “there is road frontage but here is what we use”)

• Frontage on a controlled access highway – Access is PUBLIC
  – Rationales for above: only place to indicate public frontage is in the access field; all other rights of access appear as benefits with links to the enabling instrument(s) – again, TQ is usually appropriate

• Granted ROW and traveled way differ – Access is PRIVATE
  – Explain difference between granted way and used way (document latter if arising from separate legal principles e.g. prescription)

• Road crossing a railway – “No documented right of access”
  – Rationale: access is interrupted; permission to cross railway is generally by license (in personam and revocable), or just non-existent (no prescription against lands used for railway purposes)
Some scenarios (continued)

• Landlocked parcel with access via commonly owned lot – No documented right of access; TQ can be appropriate (and a flag to alert a single-lot purchaser)

• Consolidated lot – Parcel A has deeded ROW but Parcel B does not – Access is private (but add TQ re scope)

• Reservation of a right of way from lots formerly under common ownership – Access is private (Knock v. Fouillard)

• Lot abuts a private ROW shown on a plan (at least after 4.1.99) – Access is private (280(2) MGA)
Not going to happen
What will not be changed

• Disagreements among counsel
• Access on parcels already migrated (although you should update if the ‘new’ descriptor would be different from the old one)
• Form 45 on subdivision (including consolidation)
• Need to examine enabling instruments
• Standard to “raise” non-public access (grant, title to STP, adequacy of stat decs, etc.)
• Obligation to fix (LRAR 22)
• PROFESSIONAL JUDGMENT
Resources

Generally:

- LIANS resource page [http://www.lians.ca](http://www.lians.ca)
- Articles: [http://www.lians.ca/resources/real-estate/articles](http://www.lians.ca/resources/real-estate/articles)
- LRA training materials: [http://www.lians.ca/resources/real-estate/lra-training-material](http://www.lians.ca/resources/real-estate/lra-training-material)
- Easements: [http://www.lians.ca/resources/real-estate/articles/easements](http://www.lians.ca/resources/real-estate/articles/easements)
- Rights of way: [http://www.lians.ca/resources/real-estate/articles/right-way](http://www.lians.ca/resources/real-estate/articles/right-way)
- Rice-Thomson, Brenda L.: Parcel Access - Best Practices (May 2, 2014 revision) - unpublished - to be uploaded in draft