



Canadian Bar Association – New Brunswick Branch – Fall Webcast

EASEMENTS AND RIGHTS OF WAY IN THE LAND REGISTRY

October 26, 2023 – Online
presentation



Law Society Standard

Standard 2.1.1(e)

The owners of parcels adjoining a private right-of-way, street, alley or land shown on a filed plan, acquire an interest in and right to use such right-of-way, street, alley or land **in appropriate circumstances**, and in such cases it can be identified in the PID Databank Application as the means of private access to a parcel by reference to such filed plans. See *Merrill v. Grexton* [1999] NBJ No. 424.

Merrill v. Grexton

You will note that *Merrill v. Grexton* was decided in 1999, before the whole Province was subject to the *Land Titles Act*. The ruling had to be adapted to land titles realities in terms of access to the parcel.

Merrill v. Grexton

- This case establishes that where the reference to a right of way by plan does not interfere with a documented access (i.e. an easement document), reflecting access by plan is acceptable in appropriate circumstances.

2.1.1(e) – Appropriate Circumstances

- If the servient tenement is under Land Titles, the benefitting Registry PID must be an encumbrancer on the CRO for that parcel before the benefit statement for the benefitting parcel is in reference to a filed plan.

Appropriate circumstances

- Where the benefitting PID is not an encumbrancer on the CRO for the encumbered parcel, then the consent of the **all** the Land Titles owners of that encumbered parcel must be obtained via Form 49, to add the benefitting PID as a further encumbrance on that CRO.
- Upon receipt of Form 49, the RG will rectify and attach the consent of the LT owner to Form 52, and the benefitting PID will be added on to that CRO as a further encumbrancer.

Where the LT owners do not consent

Where the consent of the owners of the encumbered parcel cannot be obtained, the person benefitting from a right of access that is not reflected on the CRO as an encumbrance, can apply to the Court for relief, per subsection 17(2) of the *Land Titles Act*.

PID will not be reflected as encumbrance with no consent

- The office of the RG will not unilaterally reflect a PID as an encumbrance without the consent of the Land Titles owners
- The RG will not interfere with the conversion of parcels in terms of reflected PIDs as encumbrancers, given the language of clauses 5 and 6 of Form 2.
- Perhaps the title search of the converting lawyer revealed that the right of way in question was released or discharged by the parties beneficially entitled thereto.
- The RG will not search to see if a release has been registered, or whether a registered easement exists.

Registered plans

- The land registry mapping staff will not insert a benefit statement in the existing PID Databank description, by plan, for a benefitting lot when a S/D plan is registered where access is shown on that Plan.
- The subscriber must apply to the RG's office for an exemption to amend the description to reflect the right of way by plan, if the other requirements of standard 2.1.1(e) are satisfied.

Access must reach a public road

- Another requirement of standard 2.1.1 is that the access on the plan must flow from the benefitting parcel to a public road, on the plan that is referred to.
- If not, an exemption will not be granted, as the private access is not a full access to the parcel on the plan referred to.
- This can be the reference to one plan, or various plans together that depict the right of way in question.
- If it is by various plans, there will be more than one benefit statement in the PID Databank description.

Prescriptive rights

- We will not grant exemptions to reflect easements by prescription as a benefit statement in the PID Databank description.
- If the access is private but not documented or reflected on a plan where it complies with the requirements with Standard 2.1.1(e), the parcel access value can be ‘undetermined’ until it is resolved by the creation of an easement.
- Only the Court of King’s Bench can grant an easement by prescription based on facts on the ground.
- It is not up to lawyers, surveyors or the Registrar General to determine whether a prescriptive right exists.

No prescription under LT

- As soon as a parcel is converted to Land Titles, the prescriptive period for an easement ceases to run with the land, if it has not matured to 15 years.
- This is pursuant to paragraph 17(1)(b) of the LTA.
- If the prescriptive right has matured to 15 years prior to conversion, then the encumbrance holder should probably have to be reflected as an encumbrancer, enabled by the AFR, to satisfy the requirements of clauses 5 and 6 of Form 2.
- Or register an easement prior to conversion.

Owner of dominant and servient tenements the same

If the owner of the benefitting parcel and the encumbered parcel are the same, then the expectation is that access will be created when the Transfer is registered, and an exemption will not be granted to reflect the access by plan.

Advantage of creating access by Transfer

- The advantage in question is that when the easement is created by Transfer (Interest to benefit the parcel on Form 13), the Transferor qualifies and controls the use of the access in question
- i.e. – who can use it and who is responsible for the maintenance and care of the right of way, and perhaps the manner in which it can be released when it is no longer required.
- That advantage does not exist if the right of way is only by reference to the depiction on a filed plan.

Merger

- If the owner of a servient tenement acquires the ownership of the dominant parcel, then there is a merger of interests and the right of way ceases to exist in law
- Provided that there is no mortgage on the benefitting parcel, in which case the law does not apply, as the mortgagee will wish to retain the right of way in the case of mortgage sale for the benefitting parcel caused by foreclosure.

Administrative Consolidation

- To administratively consolidate more than one PID into one PID, the encumbrances have to be the same on every PID.
- This does not apply to easements, as they are not financial encumbrances and are specific on the ground.
- Accordingly, an easement does not need to be amended to be included no another PID to administratively consolidate.

Form 14 – Easement

- Does not have to state that it runs with the land (binding on the heirs, successors and assigns), as it is called EASEMENT.
- If not, use a licence agreement if the created interest is not intended to run with the land.

Form 14 - Easement

- If creating a public utility easement by Form 14 (in favour of Bell Canada or NB Power), you do not necessarily have to identify a benefitting PID on Form 14, which is why it is in brackets on the regulated form.
- The fact that the utility will benefit signifies that this is for the benefit of all.

Form 14 - Easement

- When the encumbered parcel is under LT, Form 14 has to be used.
- While Form 14 can be used when the encumbered parcel is not under LT (as there is no statutory form for easements under the *Registry Act*), another form of easement agreement can be used to create the easement under the *Registry Act*, and upon registration, the right of way created will be added as a benefit to the description associated to the benefitting parcel under LT.

Form 14 - Easement

- The description of the easement, or the purposes of the easement can be identified on the first page of Form 14, or can be identified by reference to a Schedule (other than 'A' or 'B') attached to Form 14.
- Schedule 'B' is reserved for the diagram of the easement, where an easement has to be uniquely and clearly identified on the ground for a Land Titles parcel. If you do not wish to identify by diagram but rather by the depiction on a plan that was previously registered, then you can attach a Schedule 'C' to describe the easement, or identify it on the first page following 'Description of Easement'.
- Schedule 'A' should be kept for only describing a servient or dominant tenement that are not under LT.

Transfer as easement on the other parcel

- When an easement is created as an interest to benefit a parcel or as an interest to burden a parcel, the Transfer will be reflected as an easement document in the PLANET listing for the benefitting or burdened parcel, whether this parcel is under LT or not.

Legal advice

- The office of the Registrar General or any of our Land Registry Staff will not assist you in the preparation of your easement document, and/or will not pre-approve your document prior to registration.
- Feel free to consult your peers for best practices.

Overriding incidents – 17(4) of LTA

- Registered land is, by implication and **without any special mention** in the title register, subject to overriding incidents.

Overriding incidents

- Any easement or right of way, held by the Crown, **however created**, used to construct, alter, maintain, inspect or repair water mains or pipelines, drains, storm sewers, sanitary sewers, gas pipelines, **electrical transmission lines**, **telecommunication transmission lines** or any other similar works or works related to or appurtenant to those works, including if necessary permanent towers, poles or relay or switching stations.

Overriding incidents

- Accordingly, public utility easements do not necessarily need to be reflected on title as encumbrancers to bind title.
- This can cover easements in fact but that are not documented
- As a result, the consent of LT owners to add a public utility easement as a further encumbrance on a CRO is not required before the rectification to do so is registered.