

PART 1 - REAL ESTATE BASICS

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REAL ESTATE BASICS

1.1 Ownership Concepts and Interests in Land

Ownership of land may include the right to possess, occupy, use or enjoy the land. Ownership will normally also include the right to remove the resources, the right to exclude others and the right to transfer the interest(s) in the land by sale, lease or gift. These rights and interests in land may be divided between different owners. For example, the “landowner” may rent agricultural land to a neighbouring farmer, sell exclusive timber harvesting rights to a logger, or grant a right-of-way across the land in favour of an adjacent landowner. As will be discussed in subsequent sections, the landowner may also create restrictions on the use of the land, such as conservation easements, which when properly registered will bind subsequent owners of the land.

1.1.1 Fee Simple

When people speak of “owning land,” they are normally referring to the legal “fee simple” interest in land. The law recognizes “fee simple” as the most comprehensive interest in land for private individuals and corporations, and is as close as possible to absolute ownership. It is subject to the right of the government to levy taxes, regulate uses, and to expropriate where justified. Other interests in land such as leases, covenants and easements are lesser or partial interests in land that are taken out of, or away from, the fee simple interest.

The owner of the fee simple is entitled to dispose of the land or any interest in the land as they see fit, subject in Ontario to the restrictions of the *Planning Act*. At death the land can be conveyed pursuant to a will or without a will (by intestate succession). The fee simple can continue indefinitely through successive ownership transfers and through the generations. However, if the owner dies without heirs, the title may revert (or “escheat” in legal terms) to the Crown.

The owner of the fee simple title generally has the right to use the land anyway they choose. However, land use may be restricted by various government regulations such as Conservation Authority flood plain regulations, by zoning under the *Planning Act*, by environmental protection legislation, and by common-law limitations on harm caused to abutting lands.

1.1.2 Life Estate

As indicated above, the fee simple can continue indefinitely through the generations and through ownership transfers. A “life estate,” on the other hand, is a time-limited estate in land. The limit is usually the lifespan of the person possessing the property. In land conservation practice, a landowner or donor could transfer title to a land trust while reserving to themselves a life estate, allowing them to continue to live on the property, or to use and enjoy it until their death. The land trust would only be entitled to exclusive

possession of the property upon the death of the grantor. The duration of the life estate could also be measured by the life of another person, such as a child or relative.

The landowner or donor can achieve a result similar to the life estate by having the land trust accept title to the property while providing a lease back to the donor or grantor. These protection alternatives are discussed in more detail in Parts 2 and 3 of this manual. They are outlined here only to illustrate the meaning and possible use of the life estate.

During the term of the life estate, the previous owner may have the right to collect rents or crops or other products from the land, in addition to the right to enjoy the property. They will normally be obliged to maintain the property, insure it and pay the taxes. They should also be obliged not to injure, despoil or waste the resources on the land to the detriment of the future owner or conservation organization.

1.1.3 Leasehold Interest

A lease or a rental agreement governs the relationship between landlord and tenant and creates an interest in land, but only for a fixed period of time. During the term of the lease, the tenant usually has the right to the exclusive possession of the land. A lease will normally expire at the end of its term, although it may expire by notice from the landlord or as specified in the lease agreement.

The tenant is normally entitled to “quiet enjoyment” of the leased property, meaning that they will not be substantially interfered with. The tenant, on the other hand, is obliged to pay rent. The tenant is not allowed to “commit waste,” meaning the tenant should not alter the land in an abusive or destructive manner.

Leases offer a great deal of flexibility because the terms of the lease and the covenants or promises made between landlord and tenant can be tailored to the specific situation.

1.1.4 Common Law Easements

An easement is a right allowing the owner of one piece of land to use or to restrict the use on another, separately owned piece of land. Rights-of-way are a common form of easement familiar to many people. The right-of-way entitles the owner of one parcel of land to use part of a neighbour's land for access. Language in the property deed will state that the first Parcel ‘A’ is conveyed “together with a right or easement to cross (part of) the other Parcel ‘B’”. Similarly, the deed for Parcel ‘B’ will state that it is “subject to a right or easement in favour of Parcel ‘A’ for access.” The deeds notify anyone purchasing these properties of the existence of the right-of-way and the purchasers are bound to respect it. Legally, the right-of-way is said to “run with the land.” This means it binds future landowners, but that it is not personal. When the owner of Parcel ‘A’ sells and moves away they do not personally retain the right to use Parcel ‘B’ for access.

In law, Parcel 'A' enjoys the benefit of the right-of-way or easement and is referred to as the dominant tenement. Parcel 'B' bears the burden or obligation (e.g. to permit access) and is referred to as the servient tenement. Two separately owned pieces of property are required: the dominant tenement which benefits from the easement, and the servient tenement which is burdened by it. These legal rules evolved historically, mainly through the British courts. This law arising from the decisions of judges is referred to as "common law," and can be contrasted with laws or statutes enacted by parliament.

A fundamental problem lies behind many of the issues reviewed in the land-law sections of this manual. Any two people or landowners can make an agreement between themselves. They may agree, for example, that one landowner will pay the other for use of an access driveway, a water well or a pasture field. That agreement may be a binding contract on the respective landowners. Sections 2 and 3 of this manual discuss management agreements, licences and other types of agreements that may bind parties entering into them. However, these agreements may not be binding if there is a change in ownership. Typically, such contracts will not restrict sales or transfers of the two parcels of land. The issue, then, is how to make agreements binding on subsequent owners of the two parcels of land. Historically, common law recognized that where the benefit and burden of an easement agreement was integral to the use and enjoyment of the land itself, there could be agreements that "ran with the land" and bound future owners. The requirement for two separate parcels of land, the dominant and servient tenements, was one of the most important requirements that evolved out of common law. Additional complex rules must be satisfied if the common-law easements are to be enforceable against future landowners.

More recently, it has been recognized that it would be expedient to have agreements (for conservation purposes) that could "run with the land" even if the historic criteria and requirements were not satisfied. Specific legislation was required to replace and overcome those common-law requirements and to allow the creation and enforcement of "conservation easements" even where the conservation body holding the easement does not own nearby benefiting land. That legislation, the *Conservation Land Act*, is described below in Section 1.1.6.

1.1.5 Restrictive Covenants

A covenant is simply a promise or a term of agreement, usually in a deed or other document affecting land. It may be an agreement that something is either done, shall be done or shall not be done. As with common-law easements, restrictive covenants may bind not only the original parties to the agreement but also future landowners if certain historic legal requirements are satisfied. Again, as with easements, there must be two pieces of property, the dominant tenement to receive the benefit of the restrictive covenant and the servient tenement to which the restriction is applied. There must be some relationship between the two pieces of property so that the restrictive covenant will clearly benefit the dominant tenement. Only negative or restrictive covenants are enforceable against future landowners.

Although easements and restrictive covenants appear to be quite similar, they arose from different historic origins. When common law was too strict and inflexible, citizens could appeal to the monarch and the courts of equity for assistance. Restrictive covenants evolved from the law of equity, legally independent of common law.

The complexity of legal rules governing easements and restrictive covenants prompted the Ontario government to enact special legislation to permit conservation easements. The new statute law under the 1994 amendments to the *Conservation Land Act* incorporates elements of both the old common-law easements (for example, for access to the lands) and restrictive covenants (for example, to prevent building development). The complex historic requirements, including the need to own benefiting land, are removed and replaced by the 1994 legislation.

In this and preceding parts the difficulty of using restrictive covenants and common law easements for conservation purposes has been briefly described. Section 1.1.6 will introduce the statutory rules that allow conservation organizations to use conservation easements (and covenants) without concern for the old common-law rules. However, despite the enactment of the *Conservation Land Act* amendments, traditional restrictive covenants and common-law easements may still be useful. For example, where a conservation organization or even a private landowner (a) does not qualify as a “conservation organization” as defined under the *Conservation Land Act*, and (b) owns lands that could benefit from the easement agreement, that landowner could secure an easement for access and a restrictive covenant. An individual or a private hunting club could, for example, enter into a combined restrictive covenant and common-law access easement over adjacent land to protect natural habitat values and to enhance the protection and use of their own property.

1.1.6 Statutory Easements

In 1994 the Province of Ontario enacted an amendment to the *Conservation Land Act* specifically to address the complex rules governing the old common-law easements and covenants and to permit conservation bodies, including non-government conservation organizations such as land trusts, to accept and acquire “conservation easements.” Legally, that legislation is now described as section 3 of the *Conservation Land Act*, R.S.O. 1990, c. C.28, as amended (or more specifically as amended by S.O. 1994, c.27, s 128. (1) and (2)).

Other statutes also authorize the creation of conservation easements by government agencies or other specific bodies. For instance, the Ontario Heritage Foundation, municipalities, and provincial government ministries and agencies rely on the *Ontario Heritage Act* and the *Ministry of Government Services Act* to obtain conservation easements. The *Agricultural Research Institute of Ontario Act* specifically provides for the creation of easements to protect agricultural lands, but has not to our knowledge been used to date.

All of these statutes have in common the elimination of the requirement for the ownership of adjacent land or a dominant tenement. They also eliminate the complex rules governing the enforceability of common-law easements and covenants against subsequent landowners.

These statutes differ in the scope of the purposes for which the easements can be acquired and in identifying the organizations that are capable of holding and enforcing the conservation easements against landowners. Only the *Conservation Land Act* authorizes non-government conservation organizations to acquire conservation easements directly.

The *Ontario Heritage Act* allows the acquisition of conservation easements by the Ontario Heritage Foundation and municipalities for a wide variety of purposes, including historic preservation. It also provides for the assignment of conservation easements from the Ontario Heritage Foundation to other bodies, including non-government land trusts. These provisions have been used, for example, on the Niagara Escarpment to transfer easements from the Ontario Heritage Foundation to the Bruce Trail Association.

Other statutes enabling government bodies to hold easements are listed in Section 2.4.2.

1.2 Title Records and Registration

Provincial government land registry offices provide a central and reliable system for recording the documents transferring ownership and interests in land. Two registration systems operate in Ontario. The registry system is older and operates in the first-settled southern parts of the province. The land titles system prevails in northern Ontario. The registry offices are gradually converting lands in southern Ontario from registry to the land titles system. Lands are also generally converted to the land titles system as they are developed by subdivision plan or condominium.

1.2.1 The Land Registry System

The registry system was originally based upon township surveys of lots and concessions. The land registry office simply compiles in a separate abstract book all the legal instruments or documents affecting the land title of each concession lot. When purchasing property under land registry, the purchaser must complete a review of the title abstract book and all of the relevant instruments and documents to establish that there is a good chain of title, that the vendor has the right to convey the property, and that the purchaser will be obtaining clear title. It is up to the title searcher to determine ownership and to identify encumbrances affecting title. The title search must go back forty years from the date of the search. If there are no conveyances of the land within the last forty years, the search must go back to the last registered conveyance. All relevant documents or instruments must be carefully examined to ensure there are no interests competing or conflicting with the rights of the registered owner.

1.2.2 The Land Titles System

In contrast to land registry, the land titles system provides an up-to-date statement respecting the land title and a comprehensive, up-to-date list of encumbrances still in effect. The government warrants that the title information is accurate and reliable and may compensate any party suffering a loss due to an error on the land titles records.

1.2.3 POLARIS

The Province of Ontario Land Registry Information System, or POLARIS, was initiated in the mid-1970s to simplify the registration and searching of title documents. The objectives include:

- development of an automated title record system, through the title index database;
- development of a property mapping system through the property mapping database;
- to make the registry and land titles systems more compatible.

Under POLARIS every property has an identifier number used to search the database. In 1999 more than half the land registry offices and approximately seventy percent of properties in Ontario had been converted or updated onto the POLARIS system.

1.3 **Crown Reservations**

In some cases (as suggested below) a review of the original Crown grant may be required to settle title issues. For example, the rights to the minerals beneath the surface may have been reserved to the Crown in the original Crown grant, and may not automatically be conveyed with the ownership of surface lands. Some reservations in the original Crown Patents, such as the reservation of all pine trees, have been released by subsequent legislation. A review of the Crown grant may also be helpful in cases where ownership of the land below the surface of a lake or river is an issue. Normally, the Crown owns the beds of navigable waters, but there are exceptions where the original grant may have specifically included the water bed.

1.4 **Title Insurance**

When buying land, the purchaser has to be careful the vendor really is in a position to provide clean, clear title. Mortgages, construction liens, easements or encroachments from adjacent buildings affecting the land may become the responsibility and problem of the new owner if title has not been properly checked before closing the purchase. Traditionally, purchasers have relied upon the advice and opinion of their solicitor to identify these problems and to provide an opinion on title. The risks inherent in

purchasing land are addressed first by the diligence and competence of the solicitor, and second by the right to sue the solicitor in the event of incompetence or negligence.

Title insurance is an alternative form of protection from the risks of defective title. If a purchaser of land or a mortgagee does not wish to rely solely on a solicitor's opinion of the title, they may purchase title insurance. In that case, the lawyer acting for the purchaser or mortgagee will give an opinion on title to the insurance company (usually based on fewer searches) and the insurance company issues a policy to the new owner or mortgagee or both. A landowner with a title insurance policy can make a claim against the insurance company if a title risk, specified in the policy, causes a loss, regardless of the source of the loss. The value of the insurance is completely dependent on the contractual terms of the policy, and especially the scope of the coverage and the exceptions from coverage. An owner's policy normally covers the title to the interest in land, any defect or encumbrance on title, and access to the land. Restricted coverage may be included for survey-related issues such as encroachments and boundary disputes.

Despite the availability of title insurance, it's normally prudent to have a lawyer review the title and to identify and advise on the significance of any boundary issues, encumbrances or restrictions on use affecting rural lands purchased for conservation purposes.

References

In preparing this summary of basic real estate concepts, we relied heavily upon existing texts and materials, including in particular those listed below:

Real Estate Practice in Ontario, 5th Edition, Donahue, D.J. and Quinn P.D. of Butterworths, 1995

Real Estate Reference Materials, Donald Thomson and Sidney Troister for the Law Society of Upper Canada, 39th Bar Admission Course Materials, 1997.

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