

SUBTLETIES OF STATUTORY RIGHTS OF WAY/EASEMENTS AND DETERMINATION OF COMPENSATION

For the purposes of this presentation statutory rights of way and easements will be considered to be the same. The clearest difference between these two instruments is that a statutory right of way requires no dominant tenement. For our purposes, the debate need not go any further.

It is apparent that by its nature a right of way/easement does not intend to extinguish all the rights of the fee simple owner in the land over which it is impressed. Typically, a right of way is considered as removing only a portion of those rights and leaving the owner with the balance.

In the context of determining the impact of the right of way/easement it should be apparent at the outset that it would be possible to create a right of way document which by its words or by its effect entirely dispossess the owners of the possession, occupation and enjoyment of their land. The courts of this Province in considering what rights are left to an owner could certainly be persuaded that their fee simple title has been "turned into a worthless piece of paper". In those circumstances a right of way/easement which effectively extinguishes the registered owner's rights in the land might well be considered a fee simple grant or taking. The valuation of the lands with the right of way/easement in place must start from the perspective of a legal determination of whether the right of way/easement is entirely inconsistent with the principles of proprietorship or possession.

In assessing what rights have been acquired and what remain the right of way/easement itself must be carefully considered. This is clearly a legal and an appraisal function.

Obviously, the preliminary conclusions of the nature of the rights acquired must be followed by conclusions of highest and best use, contributing utility and in the case of an expropriation consideration of damages and injurious affection to the remainder lands. Under the present *Expropriation Act* one must also assess general and specific benefit which can be offset against compensation.

The consideration of the right of way/easement commences with a review of its "operative clauses". In extracting them from the document and reviewing and reflecting on them, the following questions might be asked of the language of the agreement:

- (a) What is the nature of the rights being acquired?
- (b) Are they in perpetuity?
- (c) Are the rights limited to a narrow group of people, i.e. the holder of the right of way/easement, or are they broadly construed for use by the public?
- (d) Is there exclusivity of use in the right of way/easement area?
- (e) Is something being brought on or over or under the land, are there rights to construction and obligations of maintenance?
- (f) Are there financial consequences to the registered owner, i.e. liability for maintenance costs, taxes?
- (g) Is there the potential for a future disturbance or expansion of the use presently contemplated?
- (h) What rights of the owner are specifically protected?

It may well be the case that disputes as to the assessment of the operative clauses of the agreement and their interpretation occur. Typically, a right of way/easement will not be invalidated for vagueness or uncertainty and will only fail if it is impossible to ascribe a meaning to the language after legal reasoning and legal analysis has been applied to the document and failed to produce a result. In considering the document the conduct of the parties may well be of little help in assessing the interpretation. They may have misinterpreted the document themselves or failed to comprehend their obligations and rights and, consequently, a lack of user may be the result of failing to comprehend just as an excessive user may be simply the result of a failure to object.

Although the conduct of the parties may not be useful, the "factual matrix", i.e. the background that went into the placement of the right of way/easement, may well be considered by the court where interpretation proves difficult. Typically, the court, in considering whether the factual matrix is of assistance, will hear the evidence tendered as potentially relevant or useful in that regard and then reflect upon the document and determine whether in fact resort can usefully be had or should usefully be had to the implications of those facts. In considering the relevance of the information that can be derived from the factual matrix particular view should be focused on what was the genesis or aim of the right of way/easement which was ultimately put in words and registered against the property. This thinking may provide some useful assistance in determining the extent and scope of the language of the document.

It is typical of a right of way/easement that various areas within the right of way/easement are themselves impacted differently by the use being imposed on it. Some areas in the right of way/easement may well be substantially, if not totally, sterilized in utility to the owner whereas immediately adjacent areas may well have a

substantial reservation of rights to the owner. The assessment of the right of way/easement impact overall must take into account these varying levels of impact in determining comprehensively what rights of ownership, possession, occupation and enjoyment have been left to the owner and more particularly how the extent of the diminishment of those rights can be considered in a reflection of the determination of the market value of the interests.

Cases providing some direction with respect to these matters are:

British Columbia (Ministry of Environment, Lands and Parks) v. Thomas (Unreported June 30, 1998) (B.C.C.A.) and Hillside Farms Ltd. v. BC Hydro et al [1977] 3 W.W.R. 749 (B.C.C.A.)

- *process of interpretation, factual matrix, burden on land to be assessed*

Keewatin Power Company Limited v. Lake of The Woods Milling Company, Limited [1930] 3 W.W.R. 260 (P.C.)

- *interpretation, abandonment, lack of user, historical consideration*

Collison v. LaPlante (1992) 73 B.C.L.R. (2d) 257 (B.C.C.A.)

- *interpretation, questions of obsolescence, implied release, user*

Shelf Holdings Ltd. v. Husky Oil Operations Ltd. et al (1989) 56 D.L.R. (4th) (Alta. C.A.); leave to S.C.C. refused [1989] 4 W.W.R. lxi

- *easement equals right of way versus absolute grant of fee simple, inconsistent right and degree of occupation*

Grant v. MacDonald (1992) 62 B.C.L.R. (2d) 332 (B.C.C.A.)

- *extent of grant, fee simple versus easement, interpretation and residual rights*

Duncan v. West Kootenay Power and Light Co. (1991) 17 R.P.R. (2d) 1 (B.C.C.A.)

- *construction of agreement, extent of user, redevelopment of hydro lines within easement area*

Vantreight v. Gray [1994] B.C.J. No. 2749 (B.C.C.A.); (1994) 43 R.P.R. (2d) 179 (B.C.C.A.)

- *interpretation of easement, fee simple versus extent of rights, dispossession of owner, factual matrix*

Torwest Investments v. Saskatchewan Power Corporation (District Court of Saskatchewan) (1977)

- *power line easement, extent of impact and effect on value 30%*

286684 B.C. Ltd. v. City of Colwood (B.C.E.C.B.) E.C.B. No. 12/97/167

- *SWR 75% of value for sewer easement, extent of disturbance considered*

Seaside Acres Ltd. v. Centra Gas British Columbia Inc. (B.C.E.C.B.) E.C.B. No. 54/91/162

- *extent of loss of use considered, 50% of value accepted*

Cokato Dairy & Stock Farms Limited v. The City of Fernie (B.C.E.C.B.) E.C.B. No. 46/91/78

- *statutory right of way for sewer line under farm land, 50% accepted as reduction in value*

Creative Stretch Fabrics Ltd. v. District of Pitt Meadows (B.C.E.C.B.) E.C.B. No. 6/91/046

- *power lines and underground natural gas 30%*