# Easements in lieu of Subdivision

By
Edward L. Wilson

*September 30, 2006*
*This paper was prepared for a Lorman Education Services Conference in May, 2006*

*This is a general overview of the subject matter and should not be relied upon as legal advice or opinion.*
*For specific legal advice on the information provided and related topics,*
*please contact the author or any member of the Real Estate Group.*

## TABLE OF CONTENTS

# EASEMENTS IN LIEU OF SUBDIVISION

## A. The Statutory Framework for Subdivisions

For many years, parties have created various legal tools to grant others the right to use a portion of their lands. Prior to the imposition of statutory controls on the subdivision and leasing of land, this could simply be accomplished by the property owner granting exclusive possession over a portion of their land to a tenant by way of a lease and everyone was happy. Everyone that is but the local and provincial governments.

For a wide range of public policies reasons, provincial and local governments have determined that the land uses and subdivisions must be regulated. Over the years, the provincial government has granted powers to local governments to control the subdivision of land. Zoning bylaws first appeared in BC in the *Municipal Clauses Act* of 1899. The *Town Planning Act* of 1925 was the first comprehensive granting of land use regulatory powers by the provincial government to local governments. In 1957, the planning and zoning powers of local governments and the power to regulate subdivisions appeared in the new *Municipal Act*. Through the 80's and 90's the planning, zoning and subdivision powers of local governments were constantly rewritten and expanded.

Most of the local government powers over zoning and land uses are now set out in Part 26 of the *Local Government Act*. Local governments get additional powers to regulate the subdivision of land in Part 7 of the *Land Title Act* which establishes the statutory office of the "approving officer".

Section 73 of the *Land Title Act* provides that when subdividing land, a person must comply with Part 7 of the *Land Title Act*.

Section 73 of the *Land Title Act* provides as follows:

> 73 (1) Except on compliance with this Part, a person must not subdivide land into smaller parcels than those of which the person is the owner for the purpose of
>
> (a) transferring it, or
>
> (b) leasing it, or agreeing to lease it for a life, or for a term exceeding 3 years.
>
> (2) Except on compliance with this Part, a person must not subdivide land for the purpose of a mortgage or other dealing that may be registered under this Act as a charge if the estate, right or interest conferred on the transferee, mortgagee or other party would entitle the person in law or equity under any circumstances to demand or exercise the right to acquire or transfer the fee simple.
>
> (3) Subsection (1) does not apply to a subdivision for the purpose of leasing a building or part of a building.
>
> (6) An instrument executed by a person in contravention of this section does not confer on the party claiming under it a right to registration of the instrument or a part of it.

Section 86 of the *Land Title Act* sets out what matters an approving officer may consider when considering a subdivision application. Section 86 provides as follows:

86 (1) Without limiting section 85(3), in considering an application for subdivision approval, the approving officer may

(a) at the cost of the subdivider, personally examine or have an examination and report made on the subdivision,

(b) hear from all persons who, in the approving officer's opinion, are affected by the subdivision, and

(c) refuse to approve the subdivision plan, if the approving officer considers that

(i) the anticipated development of the subdivision would injuriously affect the established amenities of adjoining or reasonably adjacent properties,

(ii) the plan does not comply with the provisions of this Act relating to access and the sufficiency of highway allowances shown in the plan, and with all regulations of the Lieutenant Governor in Council relating to subdivision plans,

(iii) the highways shown in the plan are not cleared, drained, constructed and surfaced to the approving officer's satisfaction, or unless, in circumstances the approving officer considers proper, security is provided in an amount and in a form acceptable to the approving officer,

(iv) the land has inadequate drainage installations,

(v) the land is subject, or could reasonably be expected to be subject, to flooding, erosion, land slip or avalanche,

(vi) after due consideration of all available environmental impact and planning studies, the anticipated development of the subdivision would adversely affect the

natural environment or the conservation of heritage property to an unacceptable level,

(vii) the cost to the government of providing public utilities or other works or services would be excessive,

(viii) the cost to the municipality or regional district of providing public utilities or other works or services would be excessive,

(ix) the subdivision is unsuited to the configuration of the land being subdivided or to the use intended, or makes impracticable future subdivision of the land within the proposed subdivision or of land adjacent to it,

(x) the anticipated development of the subdivision would unreasonably interfere with farming operations on adjoining or reasonably adjacent properties, due to inadequate buffering or separation of the development from the farm, or

(xi) despite subparagraph (ix), the extent or location of highways and highway allowances shown on the plan is such that it would unreasonably or unnecessarily increase access to land in an agricultural land reserve.

Section 87 links compliance with the *Land Title Act* with compliance with the regulations under the *Local Government* Act and the municipality's subdivision and zoning bylaws.

87 Without limiting section 85(3), the approving officer may refuse to approve a subdivision plan if the approving officer considers that the subdivision does not conform to the following:

(a) all applicable provisions of the Local Government Act;

(b) all applicable municipal, regional district and improvement district by-laws regulating the subdivision of land and zoning;

> (c) if the land affected is within the trust area under the Islands Trust Act, all applicable local trust committee by-laws regulating the subdivision of land and zoning.

Thus under the *Land Title Act* and the *Local Government Act*, an approving officer may refuse to approve a subdivision application unless all of the local bylaws are complied with. As a condition of approving most subdivisions, the approving officer will impose the many subdivision servicing requirements that the local bylaws establish such as the construction of roads, installation and undergrounding of utilities, payment of development cost charge levies, construction of sidewalks and so forth.

All of these statutory controls means any party seeking subdivision approval will generally have to comply with extensive and often expensive requirements of the local government. Often these requirements cannot technically be met with regard to the specific proposal for the property. Other parties simply may wish to avoid this lengthy approval process and its accompanied cost.

## B. The Law Prior to International Paper Industries v. Top Line

Notwithstanding the restriction on leasing a portion of parcel of land set out in Section 73, for many years sophisticated parties using experienced real estate lawyers have proceeded and entered into leases of a portion of a parcel of land without the approval of the approving officer.

Prior to the decision in the *International Paper* case, it was generally felt that though such a lease contravened section 73 and was not registerable in the Land Title Office, it nonetheless created enforceable rights and obligations as between the landlord and tenant. With that

belief, many parties entered into such leases rather than apply for fee simple or leasehold subdivision approval.

### C. International Paper Industries v. Top Line

In 1996, the B.C. Court of Appeal handed down the decision in *International Paper Industries Ltd.* v. *Top Line Industries Inc.*[1]

In the *International Paper* case, the landlord Top Line Industries Inc. leased an unsubdivided portion of land to International Paper Industries Ltd. At the time neither party was aware of the prohibition in section 73 of the *Land Title Act*. Prior to the expiration of the term of the lease and pursuant to the renewal clause in the lease, the tenant sought to renew the lease. The landlord refused and the tenant brought an action seeking a declaration that the lease was valid and the tenant was entitled to the renewal of the lease. The landlord claimed that the lease and any renewal was unenforceable by virtue of the provisions in section 73.

The court considered the existing cases that dealt with rights created by such a lease. In *Nesrallahh* v. *Pagonis*,[2] the court considered whether a leasehold interest contravening the predecessor to section 73, created legally enforceable interests or was void *ab initio*. In that case the court found that there was no interest in land and did not decide the issue of whether or not the lease created personal rights as between the parties.

---

[1] *International Paper Industries Ltd.* v. *Top Line Industries Inc.* (1996) 135 D.C.R. (4th) 423, [1996] 7 W.W.R. 179, 20 B.C.L.R. (3d) 41. (C.A.), Newberry J.A. See also 2000 B.C.C.A. 23 (on the issue of occupation rent).

[2] *Nesrallahh* v. *Pagonis*, (1982) 136 D.L.R. (3d) 762, [1982] 5 W.W.R. 175, 38 B.C.L.R. 112 (S.C.).

In *Yorkshire Trust Company* v. *Gunther Farms Ltd.*[3] the court considered the situation where an unregistered lease did not contravene section 73. The court found that on the basis of the Nasrallabhb decision, the unregistered lease did not create any property rights, but did create personal rights as between the parties.

In *Anglican Synod British Columbia Diocese* v. *Tapanainen*[4] the court found that where a lease contravened section 73, the tenant did not acquire an interest in land but the lease did create personal rights and obligations between the landlord and the tenant. The trial judge in the *International Paper* case followed the decision in *Tapanainen* and concluded that the lease in the *International Paper* case created personal rights as between the parties.

In *International Paper*, the Court of Appeal heard the appeal from the BC Supreme Court. Since section 73 did not spell out the consequences of a breach of the section beyond providing that such a lease could not be registered in the Land Title Office, and since the Court of Appeal found there was no binding past authority, the Court of Appeal found it necessary to examine the policies underlying section 73. Ultimately the Court found that a lease that violated section 73, created no personal or property rights as between the parties. The Court of Appeal distinguished the prior line of cases and rejected the interpretation that found that those cases were authority for the proposition that a lease in contravention of section 73 created *in personem* rights and obligations. The court found that public policy would be offended if it found that non-compliance with section 73 still created a valid lease.

---

[3] *Yorkshire Trust Company* v. *Gunther Farms Ltd.* (1987) 47 R.P.R. 216 (B.C.S.C.) Hutchinson L.J.S.C. aff'd, (1989) 40 B.C.L.R. (2d) 161 (C.A.).

[4] *Anglican Synod of the Diocese of British Columbia* v. *Tapanainen,* [1990] B.C.J. No. 1164 (S.C.) MacKinnon J.

The court found that municipal control over subdivision was necessary to regulate zoning and land development and other public policy concerns. The court refused to imply a condition precedent into the lease, that one party was to bring the lease into statutory compliance with the *Land Title Act*, and therefore refused to allow the lease to stand on that basis. Finally, the court refused to find that the tenant had a licence or other personal right that would effectively put the tenant in a position of a holder of an unregistered lease. They found that to do so, the public policy concerns behind section 73 would still be offended.

Even though section 73 does not expressly say that a lease in contraction of section 73 is void, rather than such an instrument may not be registered, the court concluded that the public policy aspects of section 73 were paramount and would be offended if the contravening lease would be upheld by the court to assure a tenant any right of occupation. The court ruled the lease was void *ab initio*, or void from its creation and never had any legal validity and was therefore completely unenforceable.

The Court of Appeal received significant criticism for it decision, in part due to the fact that it was felt by most lawyers that the *Land Title Act* did not take away any common law property rights. The theory was and is, that the *Land Title Act* and its predecessor's legislation simply imposed a system of recording titles upon the existing common law. The *Land Title Act* does not state that leases that violate section 73 are void, just that such leases were not registrable. Lawyers have argued that leases that violate section 73 are still valid as between the parties based on section 20 of the *Land Title Act* which provides that while an unregistered instrument does not pass any state or interest in land, that such an instrument is still effective as between the parties to the instrument.

The *International Paper* decision meant a landlord cannot bring a court action to enforce payment of rent under such a lease, nor can a tenant bring an action to enforce the covenant of quiet enjoyment or exclusive occupancy of the premises.

Since the decision was handed down on the *International Paper* case there have been a series of cases that have considered the decision. Some of those cases have moderated the effect of the *International Paper* case in certain factual situations, but the case still stands for the proposition that a lease that violates section 73 is void *ab initio*. [5]

## D. Options

In light of the *International Paper* decision, parties wishing to lease a portion of a parcel of land were left with six choices:

1. Continue as before, ignoring the decision and hope that the parties to the lease honour their obligations notwithstanding the fact that such a lease was void *ab initio* and unenforceable;

---

[5] *BC Rail Ltd.* v. *Domtar Inc.* (1999), 71 B.C.L.R. (3d) 242 (S.C.) and [2001] B.C.J. No. 293, (2001) C.A. 117, (2001) 189 B.C.L.R. (3d) 48 (C.A.); *456559 B.C. Ltd.* v. *Cactus Café Maple Ridge Ltd. and Cactus Restaurants Ltd.* 2000 B.C.S.C. 1652 (BCSC) 2001, C.A. 622 (2001), 93 B.C.L.R. (3d) 224; 44 R.P.R. (3d) 217, 2001 B.C.C.A. 622; *Layton Bryson Outfitting & Trailriding Ltd.* v. *R. & R. Ginseng Enterprises Ltd.*, [1998] Civ. L.D. 502 (B.C.S.C.); *Russell* v. *Pfeiffer*, 1999 Carswell B.C. 2276 (Prov.Ct.); *Russell* v. *Pfeiffer*, 1998 Carswell B.C. 9096 (S.C.); *Jack* v. *Jack*, 2001 B.C.S.C. 1497; *Coe* v. *Houle*, [2000] 2 W.W.R. 159 (B.C.S.C); *Bowen Island Properties Ltd.* v. *Rogers* [2003] B.C.J. No. 2423, (2003) 14 R.P.R. (4th) 259; *Todd* v. *Freeman* [2003] B.C.J. No. 1788; *Jamieson's Saddlery & Feed Supplies Ltd.* v. *Quality Industrial Mineral & Supply Inc.* [2000] B.C.J. No. 2092; *Abbott Street Holdings Ltd.* v. *McFarlane* [2000] B.C.J. No. 1420, (2000) 34 R.P.R. (3d) 33; *Master Contract Services Ltd.* v. *Altamar Developments Corp.* [2000] B.C.J. No. 781; *S.G.W. v. D.W.W.* [1998] B.C.J. No. 840; *Pierce* v. *Pierce* [1997] B.C.J. No. 434, (1997) 29 B.C.L.R. (3d) 111; *Brian Higgins Holdings Ltd.* v. *Bentall Properties Ltd.* [1996] B.C.J. No. 2426

2. Apply for approving officer's approval of a traditional fee simple subdivision. This costly and time-consuming process may however, not reflect the landlord's long term intentions for their land;

3. Apply for approving officer's approval for a leasehold subdivision. This is an alternative form of subdivision approval, where the approving officer approves a lease of a portion of a parcel of land for the term of the lease. The approval is valid only for the term of the lease and expires when the lease expires;

4. Where the tenant owns adjoining or nearby property, the property owner (the landlord) may instead of granting the tenant a lease of a portion of their property, may grant them an easement appurtenant to the tenant's other property;

5. Use an alternative legal structure, such as a lease with an appurtenant easement to achieve many, if not most, of the desired objectives; or

6. Have the grantor grant a licence to the other party, rather than a lease.

## E. Fee Simple Subdivision

Fee simple subdivisions are reviewed by other panelists for this course and thus will not be addressed in this paper.

## F. Leasehold Subdivision

If parties do want to lease a portion of a parcel of land for a term of over 3 years, they can seek the approval of such a lease by the approving officer. Section 73 does not prohibit the

leasing of a portion of a parcel of land, it only requires that if parties wish to do so, the subdivision must be carried out in accordance with Part 7 of the *Land Title Act*. Normally this would be done by a traditional fee simple subdivision. However, a leasehold subdivision is a possible alternative.

Leasehold subdivisions require that a surveyor prepare an explanatory plan or reference plan of the property, and the portion of the property being leased by the owner to the tenant. The plans are generally prepared pursuant to section 99(1)(k) of the *Land Title Act*. The owner then makes application to the approving officer for approval of the leasehold subdivision.

Leases of a portion of land are usually approved by the approving officer signing the explanatory plan or reference plan prepared by the surveyor. The approving officer's approval extends only to the term of the particular lease and the leasehold subdivision would expire on the expiry or earlier determination of the lease. The parcel of land identified by the approving officer's approval cannot be transferred separately from the remainder of the parcel.

Most municipalities submit the application for approval for leasehold subdivision approval through the same approval process that they do for regular fee simple subdivisions. However, they often do not impose the same conditions that they would for a fee simple subdivision. If the lease is of a relatively short term, 5 to 10 years, approving officers will, if their subdivision bylaws allow, often exercise their discretion and not require full compliance with the normal subdivision requirements (construct roads, underground utilities, etc.). This

makes a leasehold subdivision much less costly than a traditional fee simple subdivision. If the lease is to be in force for a long term, say 20 to 30 years, it is more likely the approving officer will require full compliance with all of the subdivision and zoning requirements.

## G. Easements Appurtenant to Another Parcel of Land

In many situations, rather than a fee simple or leasehold subdivision, the goals of the parties can be achieved by the granting of an easement in favour of one party by the other. For example, if the owner of Lot A needs access over Lot B to access Lot A, they could subdivide off a portion of Lot B and consolidate that portion with Lot A. Alternatively the Lot B owner could grant the Lot A owner an easement over that same portion of Lot B. Such an easement would not require the approval of the approving officer.

Obviously, such easements will only work where the grantee owns an adjacent or nearby parcel of land that the easement can be made appurtenant to. The easement must be for the use and benefit of the grantee's lands (the dominant tenement) and be reasonably necessary for the better enjoyment of the grantee's lands (the servient tenement). While the parcels need not be contiguous, there must be some relationship between the two parcels.

Examples where easements could be used instead of carrying out a fee simple or leasehold subdivision include:

(a) an easement to allow a building that encroaches on to the adjoining property to remain;

(b) an easement allowing services such as water or sewer lines to cross over an adjoining property;

(c) an easement allowing a neighbouring owner to expand their parking lot onto an adjacent property;

(d) an easement to allow portions of a building (such as overhangs) to extend into the airspace of an adjoining property;

(e) an easement to allow a neighbour to put a sign on a neighbour's property.

Rather than going to the cost and expense of subdividing off a portion of a lot and its consolidation with the adjoining lot, an easement can achieve many of the goals that give rise to a desire for the subdivision. A simple form of access easement is included with this paper as Appendix A.

In order to achieve the objectives for a particular situation, the easement agreement must be tailored for the facts of the particular transaction. Issues that should be addressed in the easement agreement include:

(a) Term: Is the easement to be permanent or only for a specified term? If the easement is to permit an existing building that encroaches on the adjoining property to remain, will it end when and if the building is destroyed or removed?

(b) Consideration: What is the consideration for the granting of the easement? Is there an exchange of money when the easement is granted or is there an annual fee?

(c) Parties: Will the easement only exist as long as the properties are owned by the current owners, or will it extend to all successors? Will a priority agreement be required from any mortgagees?

(d) Easement Area: The area of the easement must be defined. Is it to be a blanket easement covering the entire parcel or just a portion of it? In most cases, if it is to cover just a portion of the parcel, an explanatory or reference plan prepared by a land surveyor will be required. In some situations, you may be able to avoid the cost of a survey by granting a blanket easement, but then provide that as between the parties, they agree that they will only use a specified portion of the lands;

(e) Risk, Liability, Indemnities and Insurance: The easement agreement should address whose risk it is if any of the improvements on the easement area are destroyed. The easement agreement should provide that the grantee will indemnify the grantor for any damages suffered by the grantor caused by the grantee's use of the easement area. Often there will also be a requirement that the grantee maintain insurance naming the grantor as an insured party;

(f) Maintenance: The easement agreement should address who is to maintain the easement area and who is to bear the cost of such maintenance. If the

easement area is to be used jointly by the parties, it is useful to address how the costs will be allocated;

(g) Property Taxes: The easement agreement should address whether or not the grantee will be responsible for any or all of the property taxes that are attributable to the easement area and how the taxes for the property are allocated;

(h) Restrictions on Use: The easement agreement should specify the uses to which the easement area may be placed. The grantor will generally want those permitted uses to be as narrow as possible. The easement agreement may provide that the grantor's permission is required to any expansion of the uses;

(i) Grantor's Obligations: The easement agreement should address what, if any, obligations the grantor continues to have with respect to the easement area;

(j) Registration: The easement agreement should address whether or not the easement agreement is to be registered in the Land Title Office. In order for the easement to be binding upon successors in title, the easement agreement should be registered in the Land Title Office. Upon its registration at the Land Title Office, it will show up as a legal notation to the grantee's property and as an easement against the title to the grantor's property. The easement agreement should provide who is responsible for the cost of registering it including the cost of any explanatory plan required;

(k) Initial Construction: The easement agreement should address who is responsible for the initial construction of the works that are to be permitted under the easement;

(l) Utilities: The easement agreement should address who is responsible for paying for any utilities consumed on the easement area;

(m) Fencing: The easement agreement should address whether or not the grantee may install fencing or other works that outwardly would appear to incorporate the easement area as part of their property;

(n) Release: The easement agreement should provide that it is only binding upon the parties who originally signed the easement agreement, during the period in which they own their respective properties. They should be released from any obligation under the easement agreement upon their sale of their respective properties;

(o) Restrictions on Users: Many easement agreements allow the grantee and any parties authorized by the grantee to make use of the easement area. If the class of persons who are to use the easement area is to be restricted, that should be provided for in the easement agreement;

(p) Commencement Date: The date that the easement is to commence should be specified. Often the easement will commence upon execution of the

easement agreement but there may be situations where the grantee may use the easement area only once certain works are completed;

(q) Arbitration Clause: If there are issues that are left for determination between the parties, such as the cost-sharing arrangement, an arbitration clause should be inserted in the easement agreement;

(r) Exclusivity: The easement agreement should address the degree of exclusivity to the easement area that the grantor will provide to the grantee;

(s) Underground: Many easement agreements, particularly those with utilities, will provide that all the works must be installed underground and that the surface of the land must be restored by the grantee. In such circumstances, the easement should specify what works the grantor may install on the surface of the lands (i.e., can the grantor pave over the easement area). Often, when works are installed underground, the grantor requires that the grantee provide "as built" plans showing the actual location of the underground works;

(t) Restrictions on Grantor: The easement agreement should provide for any restrictions on the grantor's use of the easement area or the balance of their land, that may impact on the grantee's use of the easement area or the works installed in the easement area.

## H. Easements Appurtenant to Lease

One of the ways lawyers have traditionally overcome the constraints imposed by section 73 of the *Land Title Act*, is to exploit two of the exceptions in section 73.

Section 73(1)(b) says that the restriction on leasing a portion of a parcel does not apply for leases having a term of 3 years or less.[6] A term of 3 years is often not sufficient to satisfy the needs of the parties. They require for valid reasons a longer term to justify their investments and thus exploiting this exemption will not be enough. However, a 3 year term may be acceptable if the grantee is not planning to expend significant monies on the easement area.

One way to get around the 3 year term limit, is to have the landlord grant a lease of 3 years to Party A. Then have the landlord grant an Option to Lease (with the lease having a term of 3 years) to Party B who is related to but not the same party as Party A, with the Option to be exercisable at the end of the 3 year term of the first lease.

The other exception to the general prohibition is that set out in section 73(3) that says the general prohibition against leasing a portion of a parcel of land does not apply to leases of a building or part of a building. A landlord can therefore lease to a tenant all or a portion of a building located on the land, and then grant them an easement appurtenant to the lease over the larger portion of the land that the party really wants to lease. The easement is made appurtenant to the lease and it will terminate when the lease is terminated. Neither the lease nor the easement require the approval of the approving officer. Attached to this paper as

[6] The 3 year term restriction has been interpreted as including any renewals so you cannot have a lease with a 3 year term and ten 3 year renewal terms.

Appendix B is a sample of such a lease with an appurtenant easement. The unique provisions of the lease that relate to the easement are shown in bold.

Parties are often very creative in deciding what constitutes a building that can be leased. The Land Title Office, when examining explanatory plans in such circumstances, will not allow the parties to simply use their own definition of what is or is not a building. They will require that the plan clearly identify the building and they have been known to challenge the parties as to what constitutes a building. There have been a few court cases that have considered what is a building. A community mailbox was deemed not to be a building in one particularly creative situation.[7] Small utility buildings and huts have however, been found by the Land Title Office to be buildings. Similarly, canopies located over gasoline pumps have been accepted by the Land Title Office as constituting buildings.

## I. Easements at Common Law

When drafting an easement, you must be conscious of certain provisions of the common law relating to easements. The granting of an easement does not transfer possession and does not transfer an estate in land. It is a right given to a parcel of land rather than to an individual. It is a privilege acquired by a landowner (the dominant tenant) for the benefit of his land over the land of another (the servient tenant).

---

[7] *Swan Lake Recreation Resort Ltd.* v. *British Columbia (Kamloops Land Title Office, Registrar)* (1999), 174 D.L.R. (4th) 549 (B.C.S.C.).

The 4 requirements at common law required to create a valid easement are:[8]

1. There must be a dominant and servient tenement. The land enjoying the benefit of the easement being the dominant and the land subject to the easement being the servient. On any transfer of the dominant tenement the benefit of the easement will be transferred with it. The easement may be appurtenant to a lease as a lease is an interest in land at common law.

2. The easement must accommodate the dominant tenement. It must be for the use and benefit of the dominant tenement. If the easement does not serve the dominant tenement or is not reasonably necessary for the better enjoyment of that tenement, it is not an easement (but perhaps a licence). It must be appurtenant to a particular parcel of land and that land must get some practical advantage from the easement. The parcels need not be contiguous however.

3. At common law the dominant and servient owners had to be different people. As a property owner already had the right to cross over his land, he could not give himself further right to do that. section 18(5) of the *Property Law Act* however now expressly allows a party to grant themselves an easement.

4. The easement must be capable of forming the subject matter of a grant. In other words it cannot be too wide or uncertain so as to render it meaningless.

---

[8] *Ellenborough Park* [1955] 3 All ER 667 at 673 [1956] Ch. 131 at 163.

Any easement appurtenant to another parcel of land or a lease must still comply with these common law rules relating to easements.

## J. Exclusive Possession

The grant of the exclusive use of land, grants an interest in land (i.e. a lease) and is not an easement. One of the essential characteristics of a lease is that it provides exclusive possession being the right to exclude all others from the premises.[9] Without exclusive possession there cannot be a lease notwithstanding any label the parties attach to the document. Conversely, an easement cannot give exclusive possession or unrestricted use of a parcel of land.[10] It can on occasion however, be difficult to determine what degree of possession an easement can provide, without running afoul of the rule against exclusively.

Easements that allow a part of a building to be put and remain on another persons parcel of land have been found to be valid.[11] An easement that gave a party to all intents and purposes, an exclusive right to use a cellar was found to be valid.[12] However, another case where a tenant was given an exclusive easement over a portion of a building subject to the

---

[9] *Street* v. *Mountford* [1985] A.C. 809.

[10] *Reilly* v. *Booth* (1890) 44 Ch. D 12 at 26.

[11] *Copeland* v. *Greenhalf* [1952] CL488.

[12] *Gregsby* v. *Melville* [1972] 1 W.L.R. 1355.

landlord's right to enter to repair was found not to be a valid easement.[13] The right to park in a defined area of another person's land has been found to be a valid easement.[14]

In *Mercantile General Life Reassurance Co.* v. *Permanent Trustee Australia Ltd.*[15] it was held that it was possible to grant an easement that gave the dominant tenement:

(a) a right to use a portion of the servient tenement to the dominant tenement, to the exclusion of the servient owner;

(b) the use of the whole of the servient tenement in common with the servient owner;

(c) the dominant tenement the right to use the lands in common with another person deriving their interest from the servient owner; or

(d) a right to use the servient tenement in common with the servient owner and another person deriving their interest from the servient owner.

Other cases have upheld grants that amount to exclusive possession, where the easement expressly provides that the dominant owner may not use the land in question, one day per

---

[13] *Honina* v. *Murland* (2000) 97 (47) L.S. Gaz. 41, C.A.

[14] *Newman* v. *June*, (see *Handel* v. *St. Stephens Close Ltd.* [1994] E.G.L.R. e 70).

[15] *Mercantile General Life Reassurance Co.* v. *Permanent Trustee Australia Ltd.* (1988) 4 B.P.R. 97279.

year.[16] The principle being that as they could not use the land on that day, the easement did not grant them exclusive possession.

The cases distinguish "exclusive possession" from "exclusive occupation". Where the grantor retains control of the premises they have not granted exclusive possession rather they have given exclusive occupation.

The Land Title Office takes the position that an easement that purports to grant exclusive possession converts an easement to a lease and will refuse to register an easement if it purports to give exclusive possession to the grantee.

Thus when drafting the easement agreement, you must be careful not to grant exclusive possession to the tenant. You can insert provisions into the easement agreement such as the following to give the tenant what practically amounts to exclusive possession, but what is not exclusive possession at law:

(e) Provide that the landlord agrees not to let any other parties, other than the landlord, to have access to the easement area;

(f) Provide that the tenant may install a fence or gates around the easement area; and

(g) Restrict the landlord's access to certain time periods and provide that such access shall be conducted in the presence of the tenant.

---

[16] *Evanel Pty. Limited* v. *Nelson.*

## K. Licence

Instead of granting a party a lease, the parties will often just enter into a licence instead. The difference between a lease and a licence is that a lease is in an interest in land, where a licence is not. The licence is a personal contractual relationship that is not intended to bind successors in title to the land. When the agreement is to have a short term or where security of tenure is not as important, a licence may prove acceptable to the parties.

The courts have found that the distinction between a licence and a lease depends on the truth of the relationship and not the label which the parties have put on it. It is a matter of substance over form. Just because you call it a licence does not make it one. If exclusive possession is to be given under the licence however, this may result in the courts finding that the parties have really created a lease and not a licence. If you are trying to avoid the impact of section 73, by using a licence you may find a court eventually determining what you have is really a lease.

Any licence is revocable in accordance with the terms of the agreement. If the licence is silent as to the right to revoke it, but has a fixed term, it is not revocable before the expiry of the term failing a breach of the licence. If the term is not stated in the licence, it generally may be revoked on reasonable notice.

If a licence is revoked, and the licencee thereafter enters the land, the licencee is a trespasser, even if the revocation of the licence was not lawful. The licencee should have instead sued for damages for breach of contract.

## L. British Columbia Law Institute

The British Columbia Law Institute has published a paper entitled "Leases of Unsubdivided Land and The Top Law Case". A copy may be obtained at www.bcli.org.

The paper proposes 3 options in dealing with the decision:

(a) Amend section 73 of the *Land Title Act* to provide that any purported lease that violates section 73 shall be capable of taking effect as a licence for the purpose of creating personal rights and obligations among the parties to it.

(b) Leave the matter to the courts to develop remedies that blunt the harsh conclusions of Top Line.

(c) Consider Top Line in the context of a legislative response to illegal contracts generally such as the Uniform Illegal Contracts Act which was recently adopted by the Uniform Law Conference of Canada.

In July of 2005 they issued a final Report on the topic entitled: "Report on Leases of Unsubdivided Land and The Top Law Case". The Report recommended that the option set out in (a) above be adopted and that the *Land Title Act* be amended to provide that any purported lease that violates section 73 shall be capable of taking effect as a licence for the purpose of creating personal rights and obligations among the parties to it.

**Vancouver**
1600 Cathedral Place
925 West Georgia Street
Vancouver, British Columbia
Canada V6C 3L2
Telephone 604.685.3456
Facsimile 604.669.1620

**Calgary**
3700, 205-5th Avenue SW
Bow Valley Square 2
Calgary, Alberta
Canada T2P 2V7
Telephone 403.269.6900
Facsimile 403.269.9494

**Yellowknife**
P.O. Box 818
200, 4915 – 48 Street
YK Centre East
Yellowknife, Northwest Territories
Canada X1A 2N6
Telephone 867.669.5500
Toll Free 1.888.465.7608
Facsimile 867.920.2206

genmail@lawsonlundell.com
www.lawsonlundell.com