

Subject: **EASEMENT / ENCROACHMENT / PARTY WALL
AGREEMENT**

BACKGROUND

An easement confers on the owner of a parcel of land "the right to use the land of another in some way, or to prevent it from being used for certain purposes." (1) It is: "A right in the owner of one parcel of land, by reason of such ownership, to use the land of another for a special purpose not inconsistent with a general property in the owner." (2)

The common law requires the following conditions to be satisfied in order to create an easement which is enforceable by and against successors in title to land. (3)

1. There must be a parcel of land which benefits from the easement, known as the dominant tenement.

And a parcel of land which is burdened by the easement, known as a servient tenement

An easement must clearly identify a dominant and servient tenement and may not be granted where only one parcel of land purports to be both the dominant and servient tenement.

- a) dominant tenement, a parcel of land
"for the benefit or advantage of which an easement exists or is enjoyed."
- b) servient tenement, a parcel of land
"which is subject to the burden of an easement existing for or enjoyed by another tenement."

An easement cannot exist in gross (i.e., without a dominant tenement). (4)

2. The easement must accommodate the dominant tenement in the sense of making the dominant tenement a better and more convenient property.

3. At common law the dominant and servient tenements could not be both owned and occupied by the same person. However, section 68 of the Land Titles Act has changed this condition in Alberta law. It provides that an owner may grant an easement to himself for the benefit of land which he owns and against land which he owns. Consequently, when dominant and servient tenements become registered in the name of the same person, an easement does not necessarily merge by reason of common ownership.

4. The easement must be capable of forming the subject matter of a grant. In general terms, this condition means that the right granted in the easement must be within the general nature of rights which the law has recognized as easements.

In most jurisdictions, an easement can be created by express grant, by statute, by implication of law or by prescription. (5) Statutory easements are created by different Alberta Acts (e.g., the Irrigation Districts Act) and are registered as orders or certificates but have the same effect as an easement. Section 69 of the Land Titles Act authorizes the registration of certain utility rights of way which do not require a dominant tenement. Where an owner conveys part of a parcel of land, the common law will imply such easements as are necessary to the reasonable enjoyment of the property conveyed, such as a way of necessity to give access to a land-locked parcel. Prescription (the acquisition of rights through long-continued enjoyment of the rights) is not applicable in Alberta by virtue of section 69(3) of the Law of Property Act, R.S.A. 2000, c. L-7 which states that no easement may be acquired by prescription.

The land mentioned in any certificate of title granted under the Land Titles Act is by implication and without any special mention therein subject to

- a) any public highway or right of way or other public easement, howsoever created, on, over or in respect to the land, and
- b) any right of way or other easement granted or acquired under any Act or law in force in Alberta. (6)

REGISTRATION PROCEDURE

1. The dominant and servient tenement is to be clearly specified in the document presented for registration. The dominant and servient tenement need not be contiguous. (7) An owner cannot grant himself an easement where one parcel of property purports to be both the dominant and servient tenements.

2. There must be a certificate of title issued for all affected parcels of land. If the servient tenement is a leasehold interest, a certificate of title must be issued for the leasehold interest. If the dominant tenement is a leasehold estate, a certificate of title must be issued for either the fee simple estate or the leasehold estate. (8) If titles do not exist for all affected land, the easement may be registered by way of caveat. (9)

3. The registered owners must be the same as the grantor (party granting the easement) and grantee (party benefiting from the easement) of the easement and they can be the same person. (10)

4. Legal Description Requirements

a) The legal descriptions of all lands affected by the agreement must be consistent with the existing certificates of title.

b) An easement affecting the whole servient tenement (i.e., a blanket easement) may be registered.

b.1) An easement affecting existing improvements like utilities, access road etc. may be registered as a blanket easement provided it does not refer to any sketch or the location.

c) Where the portion of the servient tenement affected by the easement is described by reference to a registered plan, the plan must be checked to ensure that it affects the land in the title.

d) Where a metes and bounds description is used to describe the portion affected by the easement, the document must be referred to the Surveys section for description approval. A sketch illustrating the metes and bounds description may be attached but a sketch cannot be accepted on its own to describe the portion of the parcel affected.

5. **Acceptable Easements**

The following is a list of some recognized easements. As this list is not exhaustive, any doubtful easement documents should be referred to a supervisor.

- a) right of way for passage by pedestrians or vehicles
- b) right of access
- c) right to park vehicles
- d) right of drainage
- e) right to project eaves and gutterings over a property boundary
- f) right of light
- g) right to support
- h) right to maintain and service utilities (usually between owners of duplexes)
- i) right to commit a nuisance (11)

6. The easement must be signed by the owner of the servient tenement. Some mutual easements, such as joint driveway agreements, confer rights and obligations on both parties so that each tenement is both servient and dominant and the document must therefore be signed by both parties.

7. Attestation requirements must be complied with (see procedures under [AFF-1](#), [AFF-2](#) and [COR-1](#)).

8. Dower is required for the person granting the interest (owner of the servient tenement) (see procedure under [DOW-1](#)).

9. a) **Easement** – is endorsed against title as follows:

**EASEMENT
OVER AND FOR BENEFIT OF: SEE INSTRUMENT**

The original agreement is checked to determine the dominant and servient tenements in the agreement and the estate affected.

The SPIN2 document type to be used when creating a Document Registration Request (DRR) form is: Easement

The code used for registration at Land Titles is: EASE

b) **Easement and Restrictive Covenant Agreement** – is endorsed against title as follows:

EASEMENT AND RESTRICTIVE COVENANT
OVER AND FOR BENEFIT OF: SEE INSTRUMENT

The SPIN2 document type to be used when creating a Document Registration Request (DRR) form is: Agreement – (in document comments type in “Easement and Restrictive Covenant Agreement”).

The code used for registration at Land Titles is: AGRE

10. **Party Wall Agreements** - The registered owners of adjoining parcels of land may enter into a party wall agreement:

- a) declaring certain existing walls or walls that are to be constructed on those parcels to be party walls, and
- b) setting forth the rights, privileges, easements and covenants that exist in respect of the party walls.

The rights, privileges, easements and covenants under the party wall agreement are deemed to run with the land. (12) The endorsement on the titles is as follows:

"BETWEEN LOTS: SEE INSTRUMENT"

Attestation and dower requirements are to be complied with for all parties to the agreement as both are benefitting and burdened by the agreement.

The SPIN2 document type to be used when creating a Document Registration Request (DRR) form is: Party Wall Agreement

The code used for registration at Land Titles is: PAWA

11. **Encroachment Agreements** – The Land Titles Act permits the registration of an encroachment agreement executed by the owner of a parcel of land (the servient tenement) to permit the encroachment of an improvement made on an adjoining parcel of land (the dominant tenement).

Certificates of Title must exist for all parcels of land affected by the agreement. (14)

The encroachment agreement is to be accompanied by a real property report prepared by an Alberta Land Surveyor showing the encroachment.

Attestation and dower requirements must be complied with **for the current registered owner granting the Encroachment (Servient tenement).**

Once the agreement is registered, it runs with the land to the same extent as if it was an easement. (15). The encroachment agreement is registered against both parcels in the same manner as an easement.

For example:

**"ENCROACHMENT AGREEMENT
OVER AND FOR BENEFIT OF: SEE INSTRUMENT"**

The SPIN2 document type to be used when creating a Document Registration Request (DRR) form is: Encroachment Agreement

The code used for registration at Land Titles is: ENCA

A caveat submitted by the owner of the dominant tenement may also be accepted for registration. No party information is shown.

REGISTRATION OF AN ENCROACHMENT AGREEMENT AFFECTING A ROAD - An encroachment over a road, lane or street may be registered by way of caveat by the municipality pursuant to section 651.2 of the Municipal Government Act. (see procedure under [CAV-5](#)).

ENCROACHMENT OVER A UTILITY RIGHT OF WAY OR EASEMENT - Where the encroachment is over a utility right of way or easement, the existing legislated provisions of the Land Titles Act provides for the registration of an amending agreement (or a caveat re: amending agreement) amending the terms of the utility right of way to allow for the encroachment.

Attestation requirements must be complied with for all parties to the agreement.

12. Discharge of Easements, Party Wall Agreements or Encroachment Agreements - A discharge in the prescribed form ([FORM 10.1](#)), executed by the current registered owner of the lands benefitted by the agreement (dominant tenement), is required. (16) Where all lands affected by the agreement are both dominant, ie mutual easements for joint driveways and party wall agreements, the discharge is to be executed by the current registered owners of all affected parcels.

In all cases, the original instrument is checked to verify the dominant tenement(s). Attestation requirements must be complied with.

The SPIN2 document type to be used when creating a Document Registration Request (DRR) form is: Discharge

The code used for registration at Land Titles is: DISC

13. Expiry of Easements, Party Wall Agreements or Encroachment Agreements
- Easements, Party Wall Agreements or Encroachment Agreements may contain an express provision that the instrument expires on a specific date or following a specific period of time after the date of execution of the instrument. (17)

An owner of land affected by the easement, a party wall agreement or an encroachment agreement may request in writing that the Registrar cancel the registration of the instrument where the interest created by the instrument has expired. Normal attestation requirements do not apply.

Upon review of the original agreement and being satisfied that the interest has expired, the Registrar will remove the instrument from title

The SPIN2 document type to be used when creating a Document Registration Request (DRR) form is: Discharge or Expiry

The code used for registration at Land Titles is: DISO

14. Fees - [Tariff items 11\(6\) and 11\(5\)](#) are charged for all registrations and discharges, including expiries, respectively and extra endorsement fees are charged under [Tariff item 13](#). If a description approval is required, [Tariff item 9](#) is also charged.

STATUTE AND CASE REFERENCES

Statute references are to the Land Titles Act, R.S.A. 2000, c. L-4, unless otherwise indicated.

1. R.E. Megarry and H.W.R. Wade, *The Law of Real Property*, (3rd ed. 1966) p. 145
2. Henry Campbell Black, *Black's Law Dictionary*, (4th rev. ed. 1968) p. 599
3. *Re Ellenborough Park; Re Davis; Powell Maddison* [1956] Ch 131 (Court of Appeal of England) and *Principles of Property Law* (2d) Ziff (1996) pages 328-332
4. In G.C. Cheshire, *Cheshire's Modern Law of Property*, 9th ed. at p. 448, "in gross" is explained as follows: "an easement that is independent of the ownership of land by the person who claims the right. Of course a person who does not own a yard of property may be granted a privilege to pass over Whiteacre, but though this may give him a contractual right it certainly does not entitle him to an easement. It amounts to a licence confined in its effect to the actual parties."
5. V. DiCastri, *Thom's Canadian Torrens System*, 2nd ed., at p. 47
6. s. 61(1)(c) and (f) and *Husky Oil Operations Ltd. and Alberta Inspector of Land Titles v. Shelf Holdings Ltd.* (1989) 65 Alta. L.R. (2d) 300 (Alta. C.A.) and *Petro-Canada Inc. v. Shaganappi Village Shopping Centre Ltd.* (1990) 76 Alta. L.R. 162 (Alta. C.A.)

7. *Gale on Easements*, 14th ed. by Spencer G. Maurice at p. 20 states: "If land to which a right purports to be annexed is in fact accommodated by the use of the right, the right qualifies as an easement whether the dominant and servient tenements are contiguous or not. A right of way, not ending anywhere on the land to which it is annexed, will be a valid easement if the owner of the land owns, or otherwise has the right to pass over, the intervening land."
8. s. 67
9. *Rystephaniuk v. Prosken* (1951), 3 W.W.R. (NS) 76 (Man. K.B.)
10. *supra*, footnote 4 and s. 68
11. *British Columbia Forest Products Ltd. v. Nordal and Nordal* (1954), 11 W.W.R. (N.S.) 403 (B.C.S.C.)
12. s. 71
13. *Husky Oil Operations Ltd. and Alberta Inspector of Land Titles v. Shelf Holdings Ltd.*, *supra*, footnote 6
14. s. 72(b)
15. s. 72(a)
16. s. 73
17. s. 73(2)