

EASEMENTS (INCLUDING PARTY-WALLS AND RIGHTS-OF-WAY)

REGISTRATION AND RELATIVE ADVANTAGES

An easement (party wall or right-of way) can be registered at Land Titles in one of two ways. The easement can either be registered pursuant to section 76 of *The Real Property Act*, or it can be registered by way of a caveat. Each method of registration has its own advantages and challenges.

Where an easement is registered pursuant to section 76 of *The Real Property Act*, the easement must conform to the following rules:

1. The lands affected must be clearly defined, affecting either all of the lands in the servient land owner's title or a defined portion thereof. Where only a portion of the lands are affected this portion must be identified in one of two ways. The easiest way to identify the lands is to use a "metes and bounds" description of the affected lands. Land Titles will only accept "metes and bounds" descriptions where they are clear and meet the strict guidelines set forth by our surveys department.

Where the affected lands are not the entire title and an easy "metes and bounds" description cannot be prepared then the easement agreement must refer to lands set forth in a registered plan of survey. Land Titles does not accept sketches in section 76 agreements.

2. The easement document must be executed by all of the registered owners of all of the lands (dominant and servient). This execution must conform to Land Titles rules governing execution generally, including proper parties, proper officers, and a seal or where a seal is not appropriate or available, a proper witnesses and an affidavit of execution where the witness is not an officer as set forth in *The Real Property Act*.
3. The consents of all persons who have a registered interest in the lands must be attached (other than easements for the supply of utility services, or caveats for same). These consents must also be executed in accordance with Land Titles rules governing execution.
4. The lands affected must be contiguous (adjoining).

Where an easement is registered by way of caveat Land Title's requirements are significantly lower. In these cases Land Titles does not examine the agreement (if it is even attached to the caveat) for consents or for execution. Nor do we examine the description of the affected lands in the agreement where the caveat affects all of the land in the servient land owner's certificate of title. Finally we don't check to see if the dominant and servient lands are contiguous.

We do require the following:

- The caveat must contain a clear statement as to the interest claimed (easement, right-of-way or party-wall)
- The caveat must set forth the dominant and the servient lands.

EASEMENTS (INCLUDING PARTY-WALLS AND RIGHTS-OF-WAY) (continued)

The greatest advantage of the easement caveat is obvious, it is the simplicity of registration. The advantage the section 76 registration has over the caveat is the protection given section 76 registrations. An easement registered by way of caveat will be disposed of in the event the property is sold for taxes and will also be disposed of in the event of a mortgage sale or a foreclosure under a mortgage registered in priority to the caveat. Section 76 registrations survive both tax sale and mortgage foreclosure!

An added advantage the section 76 registrations have is the fact that that are very difficult to remove from title. In order to discharge a section 76 registration all owners and all encumbrancers of all affected lands must consent.

Note that where the dominant and servient lands are owned by the same party all easements (easement declarations and party-wall declarations) must be registered pursuant to section 76 and cannot be registered by way of caveat.

DISCHARGE

As noted above a section 76 registration can only be discharged with the consent of all owners and all encumbrancers of all affected lands must consent. A caveat protecting an easement can be discharged by the current owner of the dominant lands.

Note that Land Titles will not accept a discharge from the party who originally registered an easement caveat where they are no longer the owner of the dominant lands. Given that the only party who can sign a discharge of these caveats is the current owner of the dominant land, Land Titles will only allow an agent to sign a discharge of these caveats (where the agent also signed the original caveat) where the ownership of the dominant lands has not changed.

ASSIGNMENT

Because easements run with the land, because they benefit the dominant lands regardless of who the owner of the dominant lands is, these agreements do not need to be assigned on the sale of the dominant lands. Further, given that these agreements benefit the owner of the dominant lands and can not benefit any other party, these easement cannot be assigned to a party who is not the owner of the dominant lands.

Given that easements do not need to be assigned to a purchaser upon the sale of the dominant lands (nor do they need to be assumed by a purchaser upon the sale of the servient lands) and given that they cannot be assigned to a party who is not the owner of the dominant lands, land titles will not accept for registration an assignment of an easement (agreement or caveat).

Easements cannot be assigned because they are un-assignable. An interest similar to an easement which is assignable is a license. Unlike an easement though, a license is not an interest in land.