

Deadline 1999: preserving public utilities easements

A Municipal Perspective

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December 31, 1999 is the deadline to remember for preserving public utilities easements in the registry system of the Land Registry Office. After that date, existing easements will no longer receive special statutory treatment and could begin to expire unless they are renewed.

SOME LEGISLATIVE BACKGROUND

Sections 112 and 113 of the Registry Act¹ provide that a person dealing with land need not show lawful entitlement to the land as owner through a good and sufficient chain of title for a period greater than the preceding 40 years. Very few interests will affect land, unless they are registered or renewed in the appropriate Registry Office within this 40-year "window". Before 1981, registrations of interests (such as a transfer of ownership), which contained specific reference to or acknowledgment of an existing claim (such as a claim for easement), constituted sufficient notice to preserve the claim. That situation changed with the 1981 amendments to the Registry Act. As a result, registered easements began to expire if a Notice of Claim had not been registered within the 40-year title search period preceding any dealings with the land.

BILL 106, THE "SOLUTION" FOR PUBLIC UTILITIES

A "solution" for public utilities easements was devised with the enactment of the Easement Statute Law Amendment Act² (Bill 106) on June 21, 1990. Bill 106 amended the Registry Act, the Municipal Act³, and the Ministry of Government Services Act⁴. In all three statutes, reference to a "public utility" includes water works or water supply systems, sewage works, steam or hot water distribution systems, electrical power or energy generating, transmission, or distribution systems, street lighting systems, natural or artificial gas works or supply systems, or transportation systems.

Bill 106 benefitted municipalities in two ways. First, pursuant to what is now section 114 of the Registry Act, public utility easements that were in existence on July 13, 1981 were continued until December 31, 1999. This provided municipalities with an opportunity, prior to December 31, 1999, to renew their easements by registering Notices of Claim against the lands affected. Section 114 provides compensation for a limited class of owners affected by the continuation of public utilities easements. Alternatively, the beneficiary of the easement may remove its utilities, restore the land and abandon the easement.

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The second benefit of Bill 106 resulted from amendments made to the Municipal Act. Pursuant to what is now section 194 of that statute, it became an offence for any person to interfere with a part of a municipal public utility for which there is no easement unless the municipality consents or the interference is authorized by a court order. To balance this new municipal right, section 194 empowers a person with an interest in the land, whose use is substantially affected by the municipal public utility, to apply to a district court to authorize interference with the public utility. The district court may make such other orders as are necessary, including an order that the applicant provide an easement for an alternative location for the service, upon payment by the municipality of such compensation as is appropriate.

The amended section 194 of the Municipal Act also provides that a municipality's forces may enter onto any

land, subject to the court order referred to above, to repair and maintain its public utilities. In addition, section 194 created a deemed easement if, prior to June 21, 1990, the municipality installed part of a public utility on private land, without the owner's authority, in the mistaken belief that the utility was being located on the road allowance. The owner is entitled to compensation determined in accordance with the Expropriations Act⁵. There does not seem to be a positive obligation on the municipality to register these deemed easements.

PRESERVING EASEMENTS

- SOME PRACTICAL RESPONSES

After December 31, 1999, municipal easements of a certain age will begin to expire. In response, a municipality may simply let the easements expire and rely on the deemed easements created adjacent to roads or rely on the right of entry, repair and maintenance. Against this, it might be argued that the "deemed" easement has uncertain status (until a court confirms there was municipal error during installation), or that the rights of repair and maintenance do not include rights to replace or expand the utilities. In addition, both of these rights could require the landowner to be compensated. Nonetheless, the process of preserving easements discussed below may simply not be worth the trouble for many of the minor public utility lines a municipality operates.

The process of renewing existing easements begins with the creation by the municipality of an inventory of utilities located on privately owned land. It is not necessary to inventory utilities on land within the land titles system, since those easements do not expire. Land titles is a system by which the province provides a guaranteed statement of title (as opposed to the registry system, which merely offers an inventory of instruments that might affect title). In connection with preparing the inventory of utilities located in the registry system, it will save title search costs to review the municipality's

in-house records of its easements in order to determine which lot and plan or which concession lot the utility is located on and to identify instrument numbers and legal descriptions of potentially valid easements.

The next step requires a search in the registry system. This involves engaging someone who is experienced in title searching. That person must review the abstract index for each concession lot or plan containing public utilities, searching back through the registrations for references to municipal easements. There is no shortcut in the registry system to facilitate this time-consuming process. Moreover, it is unlikely that the form of title information to be recorded in coming years through the new POLARIS system will incorporate easements continued by Bill 106, since no Notice of Easement will have been registered for such easements.

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In selecting a time frame for the title searcher, recall that subsection 114(2) of the Registry Act, as amended by Bill 106, continued easements that existed on July 31, 1981. Thus, if any specific reference to or acknowledgment of an easement can be found among the registered instruments after July 31, 1941, the easement existed in 1981 and was continued by Bill 106.

If you want to maximize the impact of the time frame searched, recall that clause 113(2)(b) of the Registry Act provides that a Notice of Claim can still be registered after the expiry of the 40-year search period and before the registration of any conflicting claim. Accordingly, you may wish to instruct the title searcher to search prior to the July 31, 1941 date. For example, an easement registered in 1930 should have expired in 1970. But if there was no conflicting

claim dealing with the land from 1970 to July 31, 1981, you may take the position that the easement has not expired. It was continued by Bill 106 and there may be no obstacle to registering the Notice of Claim today.

REGISTERING THE NOTICE OF CLAIM

The Notice of Claim is registered by means of a Document General. The language of the claim can be found in Form 32 to Regulation 995, R.R.O. 1990 under the Registry Act. This language can be entered on the face of the Document General or as a schedule thereto. Form 33, the Affidavit in Support of Notice of Claim, must be attached as a schedule to the claim. This will include a recitation of the particulars of the previously registered instrument. In completing these materials, bear in mind that an action may lie against the municipality for unlawful interference with an owner's title. Once you are satisfied that the municipality has a right to renew its easement, the Notice of Claim may be registered. Hopefully, the local Registry Office will accept the original legal description where it is a metes and bounds description. If not, a reference plan may have to be deposited to describe the easement.

If notices are registered for all easements in existence up to July 31, 1981, the provisions of Bill 106 continue those easements until December 31, 1999. Under the present law, these easements would continue for 40 years and begin expiring on December 31, 2039.

COMPENSATION FOR RENEWED EASEMENTS

If no compensation is required, it appears that a municipality may register a Notice of Claim for easement without the landowner's signature and without notifying the owner. You may wish to consider the public relations side of this question. What impact will your registration have, for example, on an unsuspecting owner who tries to refinance or sell and discovers this recent municipal registration on title? To avoid such problems, you may wish to send a follow-up letter, including a copy of the registered Notice of Claim, to the owner.

Where a right of compensation exists, subsection 114(5) of the Registry Act contemplates the owner receiving compensation valued at the earlier of the date the owner gives notice of a claim or receives notice of the easement. Technically, registration of the municipal Notice of Claim provides the owner with constructive notice and it may not be necessary for the municipality to initiate the compensation process by providing actual notice to the owner. Once again, the public relations side of this question should be considered.

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Entitlement to compensation arises in the following circumstances:

- where an easement was continued by Bill 106;
- where the person's interest in land was acquired after August 1, 1981 and before June 21, 1990 (in other words, compensation is limited to those persons who acquired land during the period after Bill 106 continued easements, but before Bill 106 was proclaimed in force); and
- where the instrument by which the person acquired an interest, or some other instrument executed before June 21, 1990 did not specifically refer to the easement.

Subsection 194(3) of the Municipal Act provides that Part III of the Registry Act does not apply where the utility was constructed on private land with the consent or acquiescence of the owner of the land. Hence, any available correspondence with the owner relating to installation of the utilities should be reviewed as part of the municipal inventory of easement related materials discussed above.

CONCLUSIONS

Bill 106 introduced both opportunities and challenges for managers of municipal real property rights. The opportunities include creation of deemed ease-

ments adjacent to highways in certain circumstances and the comfort that public utilities without easements can be maintained and will not be interfered with, unless the interference is supported by a court order. For many municipalities, the operation of the December 31, 1999 deadline will assist them to focus on creation of an inventory of public utilities on private lands. However, the challenges will include allocating the municipal resources necessary to ensure that municipal public utilities are inventoried and that existing easements are discovered and renewed as the deadline approaches.

ENDNOTES

1. *Registry Act*, R.S.O. 1990, c. R.20 (as amended).
2. *Easement Statute Law Amendment Act*, 1990, c. 4.
3. *Municipal Act*, R.S.O. 1990, c. M.45 (as amended).
4. *Ministry of Government Services Act*, R.S.O. 1990, c. M.25 (as amended).
5. *Expropriations Act*, R.S.O. 1990, c. E.26 (as amended).



Sites to See

The following is a list of web sites that you may find useful and interesting. Remember - Check the Association's website link page. Every effort has been made to ensure that the addresses are up-to-date and correct. If your firm's web site is not listed here and you would like to it be, please contact the Association office.

SurveyWorld

<http://www.users.dircon.co.uk/~mallace/surveywld.htm>

Surveyors Supply Company

<http://www.surveyors-supply.com/>

Cansel

<http://www.cansel.ca/>

Land Surveyors Reference Page

<http://www.lsrp.com/>

Home page of Roland Olsen!

<http://userzweb.light speed.net/~rolsen/index.html>

Dave Baker's Land Surveying Resources

<http://members.iex.net/~dvdbaker/survey.html>

Bring Back the Don

<http://www.hookup.net/~markj/rivers.html>