Real Estate Lawyers Association – Nova Scotia

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Railway Crossings: Issues and Some Solutions

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Background

Nova Scotia's landscape is bisected by quite a number of railways or former rail beds. This is a reflection of our industrial past, as well as the almost universally held desire for a rail link. Some (notably the CN line from Halifax to the New Brunswick border; and Cape Breton and Central Nova Scotia Railway, operating a short line from Truro to Point Tupper; and the Sydney Coal Railway (a short line from Sydney International Coaling Piers to the Lingan Generating Station) remain in active use. That portion of the Cape Breton and Central Nova Scotia railway connecting Point Tupper and Sydney is currently not in use and its future is uncertain, as is the rail corridor connecting Windsor Junction and Hantsport. Service to many parts of the Province was discontinued within the past forty years, with the rails, ties, stations, and other buildings having disappeared from the landscape. In almost every case the rail beds including bridges and culverts were left intact and have thus, either officially or unofficially, become multi-use trails/ corridors. The Province has acquired title to many but not all of these former rail beds.

Not all of these railways operated as common carriers; some (such as is the case with the Sydney Coal Railway) were dedicated to transportation of a single product. Thus there is a legacy in the Cape Breton and Pictou County coal fields of somewhat parallel lines running from the mines to the ports from which the coal was shipped to market. Some railways were dedicated to shipment of logs from the forests to the shore or to local markets.

I believe most rail beds were owned by the operators, although there are at least some examples of rail beds which were leased from the owners of the lands through which they passed. Still others, including the Chignecto Ship Railway and the Old Guysborough Railroad, were built but never saw rail traffic.

The Issue

No consideration of railway crossings is complete without a review of Garth Gordon's paper "Access – Red Flag Issues Under LRA" (revised March 2, 2007). Garth begins his discussion with the observation that "*I believe it is a safe starting position to assume there will be no right of access across former railway "permanent ways"… If there is a right to cross former "permanent ways" it will be up to you to prove it – do not assume that it exists because of long use".*

Unfortunately it is very common to encounter parcel registers where the migrating lawyer has identified the access as "public" or "private" when in fact access is interrupted by a railway or former railway over which there is no legal right of passage. In those situations the proper identification is "no access". This has implications for marketability. The migrating lawyer should never identify legal access if none exists. Similarly if I am acting for a Buyer, it is incumbent upon me to identify access issues such as this. Remember that the Government guarantee does not go so far as to underwrite identification of access. It is not a matter of looking behind the curtain to see whether or not access has been correctly identified; it is a matter of examining the parcel register for evidence of a document properly enabling access.

Turning again to Garth's "Access – Red Flag Issues Under LRA", he outlined the following principles respecting railway crossings:

"(i) ***Crossings as of right.***

(1) Whether there is a right to a private railway crossing to connect lands severed by the railway appears to depend on when the lands were severed:

(a) Lands split by railways before the Railway Act of 1888 are generally not entitled to a private crossing joining the severed parcels.

(b) Lands split by railways after the Railway Act of 1888 are generally entitled to a private crossing joining the severed parcels. In this case the National Transportation Agency and its predecessors have repeatedly held that the right to a private crossing pursuant to section 102 of the CTA (formerly section 215 of the Railway Act of 1985) arises when the railway traverses the lands of an owner in such a way as to leave a parcel of his land on each side of the railway. The continuation of that right is dependent upon continued ownership of the parcel of land on each side of the railway. However, if there is a severance of the title into two parcels, the right to a private crossing is lost, unless the right to cross was expressly reserved in the conveyance of one of the parcels.

(ii) ***Prescriptive rights of way across "permanent ways".***

> *(1) Unless authorized in their enabling legislation, railways do not have the right to grant property interests in their "permanent ways" or their lands that are essential to the use and enjoyment of the railways as a public concern. The Courts have held that if an actual grant of the right by a railway would have been illegal and void, obtaining title through adverse possession or prescription against the railway would be impossible…"*

Here are some points to consider:

1. It is never safe to assume that a crossing exists, as of right, simply because the land was severed at the time the railway was built. The date of construction (pre or post 1888) is a consideration, as is any legislation respecting the particular railway. As noted above, the right to a private crossing ends with severance of common ownership on both sides of the rail bed. The intended use of the private crossing may well come into play, depending upon judicial interpretation of the term "farm crossing", bearing in the mind the fact that severance of farm properties was a primary concern in the early days of railway construction and legislation.

2. Is the land which is the subject of the crossing or proposed crossing "essential to the use and enjoyment of the railway as a public concern"? There are rare situations where the crossing is not of the rail bed or other infrastructure which is essential for railway purposes and therefore a grant of easement, a prescriptive right, or even adverse possession might be possible.

3. If the rail bed is no longer in use, has it been abandoned and if so, when did abandonment occur? Pursuant to Section 2 (i) of the Railway Discontinuance of Services and Abandonment Regulations made under section 48 of the Railways Act, S.N.S. 1993, c. 11 "date of abandonment" of a railway line means the date determined by the Minister under Section 18 on "approval of an application for approval to abandon the railway line". Thus the date the last train used the tracks is not pertinent to a determination of the starting point for any claim of establishment of a prescriptive right. To determine the date of abandonment, go to the Canadian Transportation Agency's website and look for Nova Scotia decisions.

4. Even if abandonment has occurred and the crossing has been used as a right for a period of at least twenty years, a prescriptive right cannot be established if ownership of the former rail line has vested in a municipality. Bear in mind that pursuant to Section 50 (4) of the Municipal Government Act "possession, occupation, use or obstruction of property of a municipality does not give any estate, right or title to the property". I would surmise that this provision is not retrospective and thus perhaps prescription is possible if the right ripened or matured prior to the April 1, 1999 proclamation of the Municipal Government Act. This is to be contrasted with the 1963 Halifax City Charter which, by virtue of Section 592, precluded the possibility of obtaining "any estate of interest [in land of the City] by reasons of … adverse possession, occupation, enjoyment for use there of". In fact a similar provision appeared in Section 613 of the 1931 Halifax City Charter. I don't know if the charters pertaining to Dartmouth and Sydney contained similar provisions. In any event it is quite common to find that that portion of a former rail line running through the core of an urban area, including towns and villages, has been conveyed to the municipal unit, thus precluding the possibility of establishing a prescriptive right or possessory title.

Of course many of the former rail beds are now owned by the Province. The required period of possessory or prescriptive use with respect to lands owned by the Province is forty years, pursuant to Section 21 of the Real Property Limitations Act.

If the crossing is over an area which has now become a public street, whether provincially or municipally owned, of course there will be a right of passage. The key lies in determining whether or not the crossing is over a public street. Public ownership does not necessarily equate with the establishment of a public street or way.

5. If obtaining a grant of easement, remember that a search of the title to the dominant parcel is required. The consent of a secured lender or other recorded interest holder will be required, if applicable.

6. If a documented right of crossing has been established on the public record, it should be checked to determine if there is any limitation upon the scope of the easement.

7. Occasionally I have encountered a recorded license. If indeed it is only a license, this does not equate to a grant of easement and accordingly the client must be informed of the lack of permanency. In other words, the license may not be transferrable and for that matter it may be subject to termination at any time. I understand Cape Breton and Central Nova Scotia Railway Limited is reasonably receptive to requests for transfers of licenses.

Solutions

A starting point, whether seeking a grant of easement, a license, or establishing a prescriptive right, is determination of ownership. Ownership includes the following categories:

a) Canadian National Railway (CN). CN owns and operates the rail corridor running from Halifax to the New Brunswick border, along with various "subdivisions" such as Dartmouth. It also owns the rail bed running from Windsor Junction to just outside Windsor and is said to be in the process of selling that infrastructure to The Windsor and Hantsport Railway Company. If seeking a crossing, contact should be made with its Real Estate Department in Montreal. I am told that CN is not anxious to increase its risk by the granting of new rights.

b) Cape Breton & Central Nova Scotia Railway Limited. This Company is owned by Genesee & Wyoming Railroad Services, Inc. At the present time the contact person if seeking a right of crossing is Mary Cole whose contact information is: Telephone 904-900-6302, Email mary.cole@gwrr.com Mailing address 13901 Sutton Park Drive South, Suite 160, Jacksonville, Florida, USA 32224

c) The Windsor & Hantsport Railway Company. I am told that the head office is located at 44 Canal Centre Plaza, Suite 303, Alexandria, Virginia, USA 22314 and that the telephone number is 703-299-9944. The email address of the President & CEO, Robert T. Schmidt is bobirr@aol.com I am also told that they maintain a telephone number in Windsor where a message can be left for Jim Taylor (902-798-0798).

d) Sydney Coal Railway. The rail bed is owned by Nova Scotia Power Incorporated and has been operated on its behalf by Logistec Corp. out of Montreal. However, recent media reports have indicated that operations will be assumed by Savage Canac Corp, a logistics firm from Utah. Nova Scotia Power will retain ownership of the rail bed and I have been advised that it will consider requests for crossings on an individual basis.

e) Department of Lands & Forestry (formerly the Department of Natural Resources). Most crossings requests which I make are to this Department, as a consequence of the fact that it owns most of the abandoned rail corridors in Nova Scotia. Most recently the contact person has been Ann Tupper, a Paralegal, who can be reached at 902-424-3160 or at ann.tupper@novascotia.ca . I have found the Department to be very receptive to requests for grants of easements, based upon the following ground rules:

1) There is a minimum easement fee of $1495.13 plus HST. If the affected area exceeds one hectare, an additional change applies, on a per hectare (or portion thereof) basis.
2) A survey, conducted by a Nova Scotia Land Surveyor, is required.
3) The maximum width which will be considered is twenty (20) meters.
4) I ask for a right of passage for all purposes, and for the right to install, maintain, inspect, repair and replace utilities infrastructure, both above and below ground. However, bear in mind the fact that Nova Scotia Power and Bell Canada require specific grants of easement to them.

f) Former rail corridors now owned by a Municipal Unit. Of course an approach must be made on a case-by-case basis.

g) Other privately owned former rail corridors. There are a number of these in the Province, and of course, an approach must be made on a case-by-case basis.

h) Privately owned former corridors for which ownership cannot be determined. There are a number of these, particularly in the former coal field districts, and perhaps the best solution is properly documented claims of adverse possession or a prescriptive right.

Conclusion

The best that can be said of railway crossings is that they are dangerous in more ways than one. Whether migrating, acting for a lender, or acting for a prospective buyer, we must be wary of any crossings of a railway or former rail corridor. The fact that a parcel register might identify access as "public" or "private" or perhaps even as "private (openly used and enjoyed)" does not necessarily make is so. It is incumbent upon us to check the property mapping and any available survey fabric, to consult with our clients, and then determine if a right of crossing exists on the public record. Failure to do so may well result in adverse consequences.