

That's my right (-of-way)!

By Lorren Wilson

Quite frequently, clients request clarification about a (supposed) right-of-way that their neighbour is using to cross their property. Typically, the telephone calls have been prompted by a long running dispute between the neighbours concerning whether or not a right-of-way exists, and if it does exist the extent of its use and who is responsible for maintaining it.

As with most disputes, the common sense approach is for the people involved to try to resolve the matter without the use of lawyers or the Courts. Decisions, however, should be based on a working knowledge of the legal principles involved. Below is a brief outline of what a right-of-way is and how it may effect you.

Simply put, a right-of-way is a "right" which permits a person or persons to pass over another person's land. The land which has the benefit of the right-of-way is called the "dominant tenement", and the land over which the right-of-way lies is called the "servient tenement". The practical effect of this right is that the "dominant tenement" owner (along with his guest, tenants, visitors and all other lawfully authorized persons) has a legal right to travel over the "servient tenement" owner's land from one point to another.

The operative word is "travel". The person(s) using the right of way must keep moving. They do not have the right to stop or park on the right of way or to use it in a manner not contemplated when the right was granted. Similarly, the owner of the "servient tenement" can not obstruct the right-of-way in an attempt to prevent its use. If they do, the owner of the "dominant tenement" will be able to proceed through the Courts to have the obstruction removed. The owner of the "servient tenement" will be pleased to know that they are not obliged to contribute to the maintenance of the right-of-way. So if the right-of-way is in need of repair, the person who has the benefit has to "foot the bill".

The matters discussed above do not cover all of the features or issues that arise concerning a right-of-way. Therefore,

they should not be used as the basis of entering into a heated exchange with your neighbour about your "rights". To get a complete understanding of the right-of-way that may exist over your property, make an appointment to see a lawyer or a legal executive who is versed in property law and bring the title deeds to your property with you. If there is a mortgage on your property call your lending institution and ask for copies of the title deeds.

Before attending your meeting, see if you can find the words "full free and unrestricted right and liberty of way and passage" in the part of the deed that describes your property. If your deeds contain those hallowed words, it is a sure indication that a right-of-way exists.

In your meeting, an examination of the deeds will reveal whether a right-of-way exists over your property, or whether your property (the word "property" is used because a right-of-way attaches to land, not to people) has a right-of-way over a neighbour's property. It will also reveal other information such as covenants (another term for a promise made in a deed) that may affect the use of your land. Ask for everything discovered and any obligations which may flow from them to be explained to you.

The matters discussed above are intended to give you a brief insight to some of the features and issues involved in a right-of-way. Hopefully, that potential heated exchange with your neighbour about the right-of-way has now been averted.

This article contains information of a general nature and should not be relied upon as a substitute for professional legal advice given with respect to a particular factual situation.

Lorren Wilson is the Managing Partner of Cox Hallett Wilkinson and is a member of the Private Client Department. You may contact him with any question you may have at lwilson@chw.com.

Cox Hallett Wilkinson
Milner House
18 Parliament Street
P.O. Box HM 1561
Hamilton HM FX
Bermuda

Tel: 441-295-4630
Fax: 441-292-7880
email: chw@chw.com
web: www.chw.com

