

Bundle Of Rights Theory Applied To Valuation Of Easements And Rights-Of-Way

By ROBERT CRAIG, AACI, FRICS

A long time ago it was an accepted fact that a man's home was his castle. That is to say, he could do whatever he desired with his property. He, and he alone, owned it and could control its use, misuse or non-use. He had the right to occupy it and deny occupation to others. He could build what he liked or destroy what had already been built. He could enter it at will or depart from it at will. He could allow others to occupy it, but only with his concurrence and agreement.

This was not only true of the surface, but also was considered to apply equally to the soil below the surface, right down to the very centre of the earth. Similarly, he completely owned all of the space above his property. In fact if his earthly property boundaries were, for example, in the form of a square, then the extent of his ownership was an almost limitless inverted pyramid, with the apex at the centre of the earth and the base of the pyramid somewhere out in infinite space . . . beyond imagination.

Ownership -- Bundle of Rights

To illustrate this concept of ownership let's consider a bundle of sticks. This bundle of sticks represents the complete package of man's original concept of ownership. Each stick represents one of the rights included in the overall package: The right to enter; the right to use for any purpose; the right to improve in any fashion; the right to deny entrance to others; the right to permit entrance by others; the right to rent or lease for fixed terms; the right to build whatever he

wants; the right to demolish a building; the right to grow trees or crops of any kind; the right to cut down trees; the right to sell or part with his ownership; and so on. In addition he has the right not to do any of these things.

The small known world of man expanded, many years ago, as new lands were "discovered." Such discoveries were usually made by individuals or groups of individuals on behalf of a King or a country. Huge areas of land were claimed in the name of the King. The bundle of sticks was taken over by the King. Later, perhaps in return for services rendered, the King granted to selected individuals, a tract of land here, or a tract of land there - sometimes small - sometimes large. And so it was with the continent of North America. The King gave away a bundle.

However, the *entire* bundle of rights was seldom, if ever, granted. Usually there was a holdback. Perhaps the grant of ownership stipulated that such grant would only continue subject to certain services being provided to the King upon demand, or subject to certain periodic payments of goods, or perhaps of rent.

The new owner didn't really have complete unconditional ownership and control of the land forever and ever. His package was something less than complete. One or more of the rights of absolute ownership had been conditionally removed. Let's subtract two sticks from the bundle.

In law however, and in the eyes of the people of the land, he was still the owner . . . i.e. the owner of something

less than absolute ownership. His "home" or his "castle" had lost just a little of its stature, and if he failed to meet his commitments, he could lose it.

Civilization Marches On

With the advance of civilization, owners of land started to make demands upon the King, through his governing bodies. They wanted protection from marauders - which meant the provision of soldiers or police. They demanded protection from the ravages of fire - which meant fire fighter or fire brigades. These and many other services cost money - money which, it was deemed, should come from those requiring the services. That was fine, as far as it went. But what if an owner refused to pay his share. The answer was obvious. Take back the "ownership" of the land. And so it came to pass that the owner would only be permitted to continue his ownership of the package, provided that he met these commitments, later to be called TAXES.

In more modern times it is recognized that there are a number of governmental limitations on the rights of ownership, and these are briefly as follows:

The Right of Taxation

As mentioned above, different levels of government - Federal, Provincial (Canada), State (USA), municipal (cities, towns, villages, etc.) - have passed laws which require the owner to make payment of taxes at various times and for various reasons. Failure to make payments when demanded, or within certain time limits,

can result in loss of ownership. Take another stick away from the bundle.

The Right to Police

As populations became more concentrated, it became necessary for the Government to pass laws to control the use of property for the good of others. Health, building and zoning laws were passed. Take another stick from the bundle.

The Right to Expropriate Or Condemn

With the advance of our modern society, it was found that sometimes certain public projects required the use of privately owned property. Initially, it was only necessary to haggle with the owner as to price and the property could be purchased. However, some owners didn't want to part with part or all of their property, and the proposed project was held up or even prevented from going forward, so the government passed laws to allow them to expropriate or condemn the property for public use. In other words, the government (at various levels) could take away the ownership of the property. Of course, they had to pay compensation to the former owner.

The same powers of expropriation (condemnation) were also given to quasi-governmental bodies and in many cases to large privately owned companies such as railroads, electricity companies, gas companies and so on. Take another stick from the bundle.

The Right of Escheat

It sometimes happened that a property owner died without leaving any heirs and without leaving a will. Rather than have all the neighbours scrambling to take over the ownership of the property, the Government decided that, in such a case, the ownership of the property would revert to the Government. This is referred to as escheat. Take yet another stick from the bundle.

Real Property Concept

I am trying to establish the concept that modern day ownership of property embraces a great many rights, but not absolute rights, to the

property. The package we know as "ownership" has many limitations thereon, of a hereditary or governmental character. This package is now represented by the bundle of sticks that remains; still a substantial bundle, but much reduced from the original "castle" that was owned by King Arthur, or given to one of his Knights. Even so, the package is still a substantial bundle, and still includes: The right to use (subject to governmental controls); the right to enter (more or less without restriction); the right to lease (subject to perhaps the need to register the lease); the right to improve (subject to governmental controls); the right to deny entrance to most others (but not certain governmental inspectors, etc.); the right to demolish a building (but not if it has been declared a historic site, etc.); the right to grow trees and crops (but not necessarily the right to cut down trees); the right to sell or part with ownership (subject perhaps to capital gains tax); and so on. In addition the right not to do any of these things except you could for example be forced to demolish a dangerous structure, or to remove a structure which constituted a health hazard.

Market Value

And so we come to the basis of almost all valuation, including most easement and right-of-way valuations, namely market value. For the purpose of this talk I do not propose to delve too deeply into the many facets of market value, or the many definitions of market value. There is however one definition to which I would like to refer and leave with you for your consideration:

"The highest price estimated in terms of money which a property will bring if exposed for sale in the open market allowing a reasonable time to find a purchaser who buys with knowledge of all the uses to which it is adapted and for which it is capable of being used."

This definition was, I believe, first set out in a legal decision in a condemnation case in California, and has been extensively used in the United States and also in Canada. It is a good definition, in that it qualifies to a

considerable degree the situation and circumstances, or terms of reference, under which the estimate of value is being made.

Right-Of-Way

For what purposes would someone require a right-of-way? The following, though not a complete list, embraces most of the uses with which we as members of the American Right of Way Association are familiar: Roadways; electricity transmission lines; gas pipelines; water mains; sewers; rights of access to another property; footpaths; and others. As I said, the list is not all embracing and there may be omissions, but this is not important for the purpose of this talk.

Fee Versus Easement

Some of the above uses could be for public or quasi-public purposes, but some could be for private purposes, acquired by negotiation or acquired by expropriation or by negotiation under the "cloud of expropriation."

Some of the above rights-of-way could entail the acquisition of the fee in the land, i.e. the whole residual bundle of rights in the possession of the former owner. Some, however, may be more in the nature of easements, to take only specified uses of the land, but still leave certain rights belonging to the former owner. In other words, the bundle is split -- part remains with the former owner, and part (of the bundle, that is) is conveyed to the person or party, government body or utility company, or whatever, that desires to make those specified uses of the land.

At this point this question arises. "Just how many sticks does the acquiring party require? Does he (the acquirer or purchaser) require only a few sticks, or does he require a lot of sticks?" Naturally the more he requires, the fewer will remain to the owner of the fee. Also, I submit, the more he takes, the more he will have to pay as the price of acquisition. If he takes the whole bundle (and it is an entire taking, not a partial taking) then he will presumably have to pay, as a minimum, the market value of the property at the date of taking. If the property was being used for business