



PROPERTY RIGHTS:

where do they come from
and what do they mean?

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Since real estate valuation is pertinent to the future benefits of property rights, it is important for appraisers to understand the source of those rights and their implications for the appraisal process.

Our examination begins with the *Magna Carta*, signed in England in 1215. Before William the Conqueror invaded in 1066, England had *Common Law* in place that respected the private property rights of landowners. However, after William took control of England, he asked for a complete list of all the private property owners in the land. This was completed in 1085.¹ With this information, William forced these landowners to sign over the deeds to their property.

King John succeeded William the Conqueror in 1199. In 1215, the landowners revolted and forced him to sign the *Magna Carta*, in which King John agreed to return individual property rights to the landowners.

How did these private property rights of the English people get to Canada? We can start with the *Letters Patent* issued by King Charles II in 1670 to the Hudson Bay Company, the *Constitution of 1792* which created Upper and Lower Canada, and the *British North America Act of 1867 (BNA Act)* that formed the Dominion of Canada. All of these documents protected the property rights of individuals.²

In Canada, the government protects your private property rights from the Crown via the Constitution. Letters Patent from the Governor General or the Lieutenant Governor protect you legally from the Crown if it tries to take your private property rights away.

Recently, while appraising a campground, the owner showed me his Letters Patent. It was a parchment-like document that simply stated “any gold and silver found on the land had to be given to the government” and that was it. The owner pointed this out to the local Conservation Authority who thought that they had an exclusive right to enter his property looking for evidence of the Red-Breasted Thrush. They were told to “leave,” since the owner’s obligation was to provide only “gold” and “silver” to the government, not birds. They have never been back.

Private property ownership comes with a set of rules that govern the use of privately owned land:

- A boundary system that clearly defines “your property” and “your neighbour’s property.”
- Limits to the things you can do to your property to prevent harming a neighbouring property.
- Regulation of house building on private property dating back to the days of the Anglo-Saxons and their Common Law.
- Under the BNA Act you have to pay your property taxes and make sure that your property is not a fire hazard.

- A system for the transfer of property rights from one person to another via a Land Transfer Office. The definition of exchange was very simple: *consideration paid for the privilege of ownership or transfer of given property rights onto a deed.*

The extension of private property rights is the Fee Simple Interest. The Fee Simple Interest is one of absolute control and duration regarding ownership. It does not end because the Fee cannot be granted to another person into infinity. That was not always the case. Prior to the 1300s, the Fee Simple Interest died with the property owner, if there were no heirs to inherit the property.

Under the Fee Simple Interest, any owner has the right to do whatever they decide with the property (subject to the rules above). They could sell it; mortgage it, which means allow a party to place a lien against the property until such time as an amount of money has been paid in the form of a loan; give it away; sell part of the property as in a right of way; do nothing with the property in terms of ownership; build upon it; rent the improvements on the property; or rent the vacant property.

The Fee Simple Interest is often the starting point for describing the property rights in an appraisal assignment. A property held in Fee Simple that is **encumbered** needs to be identified accurately in the appraisal report. Some examples are:

1. the subject property has been valued in Fee Simple;
2. the subject property has been valued in Fee Simple together with a right of way or together with or subject to;
3. the subject property has been valued in Fee Simple together with a right of way together with or subject to and the riparian rights of the creek that flow through the property;
4. the subject property has been valued in Fee Simple together with a Life Lease granted to; and
5. the subject property has been valued in Fee Simple together with the tenants occupying the apartment building, campground or the adjacent

farmer that has a yearly lease to cultivate the land.

In other words, any part of the Fee Simple Interest that has been granted to another person or body in which he, she or they have some right to access the property for whatever purpose must be disclosed in the appraisal.

The question to be answered is: does the right of way, tenancy or life lease cause an effect on the current valuation of the property? How would anybody be able to answer the question without knowing exactly what property rights run with the property being valued?

By identifying all the interests in the property, the appraiser can begin the process of isolating how these other interests may affect Market Value. Not identifying any other interests shared under the Fee Simple Interest can call into question the validity of the final estimate of value. In many cases, these other rights granted from the Fee Simple Interest are beneficial, for example, the rent paid by tenants in an apartment building or retail plaza. At other times, they may be detrimental, particularly if it is a life lease situation or perhaps the lease rate is BELOW market rent.

Because of its ability to be segregated into a whole host of other rights given and granted, the Fee Simple Interest can cause issues regarding environmental and expropriation valuations. This right to add to the Fee Simple Interest can trigger valuation concerns.

A property cannot be divided in accordance with the types of property rights held for the property, for example:

75%	Fee Simple
10%	Right of Way regarding a utility easement
15%	Rights of the tenants occupying the building located on the property
100%	

Land rights cannot be divided. The Fee Simple Interest is always 100% of the property. Granting an easement to a neighbour does not



negate the underlying Fee Simple Interest to that easement. The owner granting the easement does not lose the Fee Simple Interest because it was not sold. It is simply being used for a period of time until it is abandoned or the right of way user does not need the right of access or use anymore.

Therefore, the valuation of this Right of Way or Easement is directly related to its impact on the underlying Fee Simple Interest. For example, a municipality wants to put a large sewer main under a vacant residential lot on a diagonal basis. This will prevent the construction of a house which disrupts the underlying Fee Simple Interest to build a house on the property. Thus, the value of this Right of Way becomes the value of the entire Fee Simple Interest. If the sewer easement is off to one side of the lot and the owner can still build a house on the property, the value of the easement is less severe to the Fee Simple Interest and would represent a specific percentage value of the Fee Simple Interest. But, once again, the underlying land right of this property remains the Fee Simple Interest.

Why does environmental contamination on a property cause loss? The 'loss' is the disruption of the individual property rights as a result of the underlying land contaminated. It is this 'loss' of the ability to sell the property at a market value without the contamination, the right to obtain a mortgage, to obtain insurance on the house or building, the right to lease it, the right to encumber the property in a manner that the owner sees fit.

When property rights are changed in Canada, compensation is due and payable to the people in which the land rights are changed. The *Letters Patent* have removed the Crown from the property rights of individuals. The difficulty lies with municipalities and provincial governments creating Conservation Authorities or Commissions to protect some aspect of lands. The *Letters Patent* left an empty space in terms of private property rights. This means that property rights are protected by the federal government, not local municipalities or a provincial government.

We see many examples of Conservation Authorities wanting control of privately held lands including:

a) **Flood Plains**

Many issues are arising over the issue of building on so called designated Flood Plain Land, when the Flood Plain line is nothing more than a computer generated line that has not been based on concrete evidence of flooding.

b) **Erosion**

The right to stop cliff erosion is a highly contested issue between the Lake Erie North Shore Landowners Association and three Conservations Authorities as described in a London Free Press article dated September 2016. Here, \$34 million dollars' worth of real estate are at risk because the Conservation Authorities can decline to take action to prevent erosion. In this situation, what are the land rights that could be affected?

Certainly, a loss of the physical land, but

more importantly, the loss of enjoyment, the potential loss of mortgage financing and the potential loss of physical improvements such as a house or barns.

c) **Pipeline Easements**

Property rights often affect farmland. Farmers farming near the easement for high pressure oil and gas lines could face large fines. Often, the easement is not even on their property. The easement may not be registered on title in any Land Registry Office. This was certainly the case with Lambton County landowners and Union Gas. Hydro lines crossing a farmer's property are also not necessarily registered on title.

d) **Contamination**

The imposition of fines on a property owner by an Environmental Agency for a company with a right of way on private property that allows contaminates to leech out into the water is another example of responsibilities that come with the Fee Simple Interest. The Environmental Agency does fine the parties that caused the spill, it holds the property owner responsible (*Sickenger case*).

Bylaws prohibit private property owners from using weed control sprays on their property, while golf courses are allowed to use harsh weed spray chemicals on the course.

Property rights are always going to be challenged at all levels of Courts. For the appraiser, the process of identifying the Land Rights that form the basis of valuation should be carefully considered. Read the actual Right of Way agreement or any other documentation that runs with the Fee Simple Interest thoroughly. The present worth of the future benefit of the real estate demands it.

END NOTES

¹ <https://www.britannica.com/biography/William-I-king-of-England>

² Marshall, Elizabeth. *Property Rights 101: An Introduction*. CreateSpace Independent Publishing Platform; 2nd edition (May 11, 2015). 