



9TH ANNUAL Real Estate Law Summit

Cottage Issues with a Twist – The Pitfalls of a Cottage Purchase from a Cottage Country Lawyer's Point of View

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Fred Hacker, Q.C.
HGR Graham Partners LLP

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Introduction

Twist? pitfall? how hard can it be? After all, it’s just a real estate transaction and all the same principles apply. Don’t they?

There is a challenge and a risk for lawyers to launch into a new practice area. That challenge and that risk are often not so well appreciated when we move within a practice area to a new type of transaction or matter.

Recreational real estate is different. Many of those differences stem from the physical characteristics of the properties, the location of the properties and their proximity to services.

And there is one other difference in a cottage real estate transaction that cannot be underestimated. That relates to the emotional fervor that surrounds the transaction. Buyers aren’t buying a piece of real estate; they’re buying their sanctuary, their retreat, the focus of their family life, a lifestyle and the stuff of dreams. And Sellers aren’t just disposing of real estate; they’re parting with memories, sentimental attachments, their history and, in

many cases, the best years of their lives. So every aspect of the transaction is emotion-laden. Decisions are not based on simple logic or financial analysis. That would be too simple.

So, let's look at some of the "twists" and "pitfalls" that distinguish cottage real estate. And let's keep the emotional context in mind as we deal with each.

Pitfall #1: How Do We Get There? [Road Access]

This isn't just an issue of directions – although that can be a challenge too. This deals with the issue of lawful access. Understand that many cottages are not on municipally owned, improved and serviced public highways. In fact, road access can involve a number of different of “roads” including:

- **Seasonal roads** (municipal roads that are maintained by the local municipality for only certain seasons of the year);
- **Deeded private rights-of-way** (access over a property owned by another party but over which the Seller has a registered right-of-way);
- **Private roads without any registered easement** where prescriptive rights have been acquired;
- **Private roads without prescriptive rights** (while the *Road Access Act* may offer limited comfort, see *Blais and Karchie v. Belanger* in which the Ontario Court of Appeal reiterates that the Act is a shield, not a sword); and
- **Roads across Crown Land** (which may or may not have Crown approval).

In dealing with issues relating to road access, it is important to be aware of:

- **Actual road location:** While there may be a reference plan purporting to illustrate an easement parcel, the actual travelled road may not follow the easement, a much more common problem than at first imagined;
- **Planning Act compliance:** Grants of easement must comply with the *Planning Act*;

- **Parcel Register:** Appropriate easements may have been obtained and registered originally but may not appear on the Parcel Register because they have not been “brought forward” at the time of conversion by Teraview;
- **Land Titles limitations:** Much of cottage country has been in Land Titles for decades so possessory and prescriptive rights may not be available;
- **The whole route:** While part of the access may be over public or private deeded rights-of-way, you have to ensure that the whole route to the cottage can be lawfully traversed;
- **Maintenance:** Even if appropriate lawful access is available, there may be issues regarding road maintenance and snow removal that should be considered before closing.
- **Road Associations:** There may be formal or informal road associations which oversee the maintenance and snow removal of access roads. In some cases, the road association is incorporated and owns the access road.

Pitfall #2: Why Can't We Just Go By Boat? [Water Access]

Much of cottage country is accessible only by boat. And that includes much mainland real estate as well as island properties. Purchasers assume that if the property is accessible by water, they don't need to worry about access issues. But there are issues:

- **Marina availability:** If the Buyer plans on leaving a boat at a marina and just driving to the marina and travelling to the cottage by boat, they have to ensure that there is dockage and vehicle parking space available at a local marina. That's not always the case. And even if dockage and parking is available, it may not be on terms acceptable to the Buyer. So, it's important that the issue be addressed in the Agreement of Purchase and Sale. And satisfied by closing.
- **Launch ramp accessibility:** Buyers may decide that they'll trailer a boat and avoid marina costs. In that case they have to be assured that there is a public (or accessible private) boat launch ramp and vehicle parking available.
- **Water depth:** Even when the Buyer has made adequate arrangements for marina or boat launch facilities, the Buyer still has to be satisfied that there is water access to the cottage and adequate dockage available at the cottage. With dropping water levels, access to some properties is becoming an issue. And docks that are 200 or 300 feet long are not uncommon (with attendant costs).
- **Travel conditions:** Buyers may not have considered the challenges of boat transportation over rough waters, the problems that advancing age can cause for water travel and the impact of ice conditions on cottage access in fall and spring.

Pitfall #3: Do We Have the Right Property? [Legal Descriptions]

The descriptions used for cottage country properties are easier to deal with in the Teraview system than what were previously encountered. But there are still issues:

- **Identification:** Cottage properties don't have traditional street addresses and their location, dimensions and boundaries are often irregular. So, it's critical to ensure that the property described in an Agreement of Purchase and Sale and ultimately in a Transfer is actually the property viewed by the Buyer.
- **Completeness:** Does the description cover the entire parcel? Often cottage parcels are acquired in bits and pieces. It is essential to ensure that the description includes any parcel acquired by acquisition, land exchange or boundary adjustment. Omitting a part of the subject lands may not just reduce what is being acquired. It may also offend the part lot control provisions of the *Planning Act*.
- **Road Allowance:** When a shore road allowance or other road allowance is acquired and added to a parcel, it may be separately described. It's important to ascertain the status of any neighbouring shore road allowances and ensure they are included in the description if intended to be acquired by the purchaser.
- **Rights-of-Way and Other Easements:** It is not uncommon in cottage country for there to be numerous easements and rights-of-way, some benefitting the subject property and some burdening it. It's important to ensure that the title is carefully reviewed and that easements and rights-of-way are reflected in the property description and acknowledged on the title to the parcels over which there are to be easement rights.

Pitfall #4: Do We Need a Survey? [Real Property Surveys]

With the advent and widespread popularity of title insurance, the need for a survey has been overlooked. A survey can disclose:

- **Road Access:** Whether the road is actually on the road allowance or lands designated by reference plan;
- **Ownership Limits:** The limits of ownership, particularly with respect to waterfront issues and the location of property boundaries. A survey can disclose the existence and location of an original shore road allowance, whether part of the “land” is in fact filled land to which there may not be title, the loss of land due to shoreline erosion, and building, dock, pier, boathouse and other encroachments;
- **Septic Bed:** The location of the tile field serving the sanitary sewage disposal system;
- **Well:** The location of the well servicing the property; and
- **Set Backs:** Whether the buildings are set back appropriately from property boundaries in compliance with local zoning by-law requirements.

Pitfall #5: Do We Need To Worry About the Crown Patent? [Crown Reservations]

The Crown Patent is important in a cottage transaction. There can be reservations that will adversely affect the intended use of the property such as:

- Mines and mineral reservations;
- Access reservations;
- Reservations relating to navigability;
- Reservations of colonization roads, original shore road allowances or other roads or limitation on road construction; and
- Reservations of the beds of navigable waters.

While you may encounter a reservation of trees and timbers, those reservations have been held to be void.

Water lots are subject to numerous reservations including the public's right to navigation, the public right to float logs, riparian rights, reservations regarding fish and game and the right to the water itself.

Pitfall #6: Is Every Interest Reflected by the Title? [Unregistered Interests]

While the Parcel Register is the foundation for determining property rights and interests, there can be unregistered interests that will limit the rights of Buyers of cottage real estate such as:

- **Unregistered hydro easements:** Lands that were subject to unregistered easements for hydro transmission and service lines before 1998 continue to be subject to the unregistered rights;
- **Prescriptive Rights:** Rights of passage, access and even ownership may have been created by possession or prescription. It's important to be made aware of what a physical inspection would reveal; and
- **Road Access Issues:** As addressed above, a property may be subject to access rights that cannot be easily terminated.

Pitfall # 7: Are There Any Historic Interests That Affect Us? [Aboriginal Claims]

The Indian Claims Commission was established in the 1960s to deal with claims by Indians based on:

- Claims relating to land where the Crown and First Nations did not come to an agreement to extinguish the First Nations' interest in the lands;
- Claims based on non-fulfillment of the terms of a treaty;
- Claims based on an alleged violation of trust or treaty or land surrender; and
- Claims based on honourable dealings, fairness and good conscience

There is the potential for a claim relating to cottage lands. In fact, there is the possibility that all occupied or Crown lands in Canada have the potential to be the subject of a claim at any time. Claims can be anticipated by:

- Referring to the website list of filed, open and concluded land claims; and
- Having local knowledge of the claims under discussion

Pitfall #8: Do We Own to the Water's Edge? [Water Boundary Issues]

Make no assumptions! This is a challenging issue fraught with complexities. Beware of these scenarios:

- The property may have a fixed boundary and someone else may own the land between the property boundary and the water's edge.
- The Crown may have reserved ownership of property to the water's edge in the original Crown Patent.
- There may be reservations of certain rights in the Crown Patent.
- The original subdivider may have retained land along the waterfront as a "Block" or "Beach" or "Park" for use by the public at large or for use by other lot owners in a subdivision.
- A designated "Block", "Beach" or "Park" area may have been conveyed in fractional parts to all the owners of lots in a subdivision.
- There may be an Original Shore Road Allowance between the privately deeded property and the water's edge (usually 66 feet in width).
- There may be a roadway along the water's edge (which could be a municipal highway, a deeded right-of-way, a prescriptive easement or a trespass road).
- Previous owners may have "shored up" their water boundary to prevent erosion or to enlarge their parcel. The resulting "filled lands" may not be owned by the Seller.

Pitfall #9: What Rights Do We Have in Our Docks, Decks, Piers, Ramp, Boathouses and Similar Improvements? [Waterfront Improvements]

Waterfront amenities are often the highlight of the cottage property. It goes without saying that the cottage purchaser expects to have title and full rights to use all the waterfront improvements. So, what are the problems?

- **Who owns the improvement?** Pursuant to the *Public Lands Act*, you can assume that the Seller does not own the waterfront improvements that extend out over the water. There are some exceptions such as, for example, where there is a deeded water lot.
- **Have all necessary permits and approvals been obtained?** Approvals can be required from at least three levels of government. Municipal approvals can include building permits, zoning approvals and site plans. District approvals can be required in some regions. Depending on the property location, approvals may be required from the Federal Ministry of Transport (the Canadian Coast Guard regarding interference with navigation), the Federal Ministry of Fisheries and Oceans, Environment Canada, the Provincial Ministry of Natural Resources, Parks Canada (the Trent-Severn Waterway Authority), Conservation Authorities and other agencies. The nature and extent of approval requirements will depend on where the improvement is situated, the nature of the structure (for example, whether a dock is fixed or floating) and the size of the structure.
- **Is a lease agreement or license of occupation required?** Boathouse leases will be required from the Ministry of Natural Resources in certain circumstances in certain locations including where there is a second story, where the boathouse contains living accommodation and where the boathouse is remote from the owner's upland property.

Pitfall #10: What Happens When the Water Levels Go Down? [The Disappearing Water Frontage]

This is not a hypothetical issue. Low water levels on the Great Lakes are at a crisis point. Water levels have declined steadily for more than two decades. This is impacting the economy, the environment and the quality of life. It has had an adverse effect on many cottages. Cottage properties that once had an attractive waterfront are now fronting on marshes and swamps. Properties that once had their dock at their door now have hundreds of feet of ramps and docks. Cottages that once sat right at or near the water's edge are now a good hike from water as levels recede. And it's also caused a legal issue. On an inlet bay where there were once dozens of cottages with water frontage, as the water recedes and leaves the bay, who owns what part of the water frontage. If you extend the side boundaries out towards the water, those boundaries often converge before reaching the water. Does that mean those cottages have lost their frontage? Even if the available frontage is prorated, there is often so little frontage left that docks are an impossibility. And property values plummet.

Pitfall #11: Are There Limits on How We Can Enjoy Our Cottage? [Zoning and Site Plans]

We've already pointed out numerous ways in which the cottage owners' right to enjoy their property may be limited. In addition:

- **Environmental Zoning:** Municipal zoning by-laws may be enacted under the *Planning Act* to prohibit any use of land or the erection of any building on land where the land is a significant wildlife habitat, wetland, woodland, ravine, valley or area of natural or scientific significance, or where there exists a significant corridor or shoreline of a water body or a significant natural corridor. This could affect site alteration or reconstruction.
- **Endangered Species:** The *Endangered Species Act* is intended to prohibit damage to the habitat of endangered or threatened species. Protected areas can be prescribed by regulation. This may impact redevelopment of existing facilities.
- **Site Plans:** Site plan agreements may impose limits on how land can be developed or used. Provisions should be carefully reviewed and compliance to date ensured.

Pitfall #12: Do We Need to Worry About Contamination Issues? [Environmental]

There is the risk that a cottage purchaser will consider that all that looks pristine is pristine. But, cottage properties are very susceptible to contamination. The terrain (surface rock and little soil in many areas), the proximity to water, the use of wells and septic systems and the intermittent use of properties can all create an environment for contamination. It is essential to ensure that wells, water distribution systems, sewage disposal systems and fuel tanks are carefully inspected.

Pitfall #13: Will Title Insurance Fix Everything? [Title Insurance]

While title insurance is helpful in addressing many issues relating to title and legality of use, there are pitfalls here too:

- **Legal Description:** Only the property described in the legal description in the policy is insured. If part of the lands to be acquired (for example, parcels subsequently acquired or shore road allowances) are overlooked or omitted from the legal description in the policy, title insurance will not be available for those omitted parcels.
- **Easements:** To have the benefit of coverage, easements (for example, for access to the nearest public road, for access to the water's edge or for wells) must be accurately and fully described in the policy. The title insurance company may require affidavit evidence of the historical use of the access before coverage is provided.
- **Water Lots:** To be insured, water lots must be fully and accurately described.
- **Docks, Decks, Piers, Boathouses and Other Improvements:** Title insurance will only extend to items constructed on land owned by the insured and the legal description in the policy must include the land on which such improvements are built. Coverage may be available from a title insurer if pertinent approvals and permits for the improvement have previously been issued to the Seller and if a new permit is issued to the Buyer.
- **Encroachments onto Shore Road Allowances:** Coverage is seldom available.
- **Septic Systems:** Title insurers are reluctant to insure over sanitary sewage disposal systems installed before the implementation of the *Environmental Protection Act* (1974). For systems installed after that, coverage may be available for losses arising due to inability to use the system if no permit has been issued or for outstanding work orders.

Pitfall #14: Is the Building Legal? [Structural Issues]

There are some issues that arise with respect to the construction of cottages that are less common in urban residential settings:

- **No building permit:** Because some cottage locations are remote, construction or renovation is often undertaken without appropriate building permits. So, seemingly sound buildings may be illegal (and unsound). There is also an issue as to the structural integrity of buildings constructed without permits or inspections.
- **Location:** Because the property boundaries are often difficult to locate, the terrain is often uneven and rugged and there are often physical obstacles to construction (such as rocks, escarpments, water courses and irregular shorelines), cottages are often not constructed in compliance with setback requirements (particularly setbacks from water courses). Cottages are occasionally even built encroaching on or even entirely on a neighboring parcel of land.
- **Woodstoves:** Woodstoves are potentially dangerous and for that reason certification is required by a WETT Certified Technician.
- **Illegal Uses:** Cooking facilities are seldom permitted in "bunkies" (sleeping cabins) and boathouses. That doesn't prevent widespread illegal installations.
- **Overbuilding:** While zoning by-laws may permit a main cottage, a sleeping cabin, and a garage, the proliferation of out buildings found at many cottage locations may exceed the permitted uses.

Pitfall #15: Do We Get the Benefit of a New Home Warranty? [Tarion]

New home warranty coverage varies depending on the type of new housing that is purchased. For example, homes built on existing footings or foundations are not covered under warranty. So, a first or subsequent purchaser of such a home will not receive the warranty benefit.

Pitfall #16: Can We Drink the Water? [Water Service]

Most Ontario cottages lack municipally supplied water service. Water supply may be:

- From a drilled well;
- From a dug or bored well;
- From a sandpoint well;
- From a shore well;
- From a shared well;
- From a communal water system;
- Pumped from the lake, bay or river and treated on site; or
- Pumped from the lake, bay or river and untreated.

In each case, there are issues that must be addressed:

- **Approvals;**
- **Water quality** (common problems include contamination by e-coli, coliform, pesticides, and fuels. In addition, there may be issues of colour, smell, sedimentation, hardness, and chemicals);
- **Water flow** (quantity);
- **Availability of water** (quantity);
- **Pressure and distribution system capacity;**
- **Location** (is the well on the subject land or is there a registered well agreement to provide access to and use of a shared or communal well?); and
- **Set backs** (is the well sufficiently distance from potential sources of contamination such as a septic system or shoreline?).

Pitfall #17: What Happens to our Sewage? [Sanitary Sewage Service]

As with water, most Ontario cottages do not have connections to municipal sanitary sewage treatment facilities (although some Buyers express shock when they learn that their new island cottage is not connected to a municipal system). So, what happens when you flush if there's no municipal system? The Ontario Building Code contemplates five alternate classes of sewage disposal systems:

- Septic tank systems (Class 4);
- Holding tanks (Class 5);
- Chemical toilets (Class 1);
- Cesspools (Class 3); and
- Grey water systems (Class 2).

And again, there are issues that must be addressed:

- **Approvals** (now governed by the Ontario Building Code, as to design, construction, maintenance and operation, and administered by the local municipality, although some municipalities continue to delegate to the local Health Unit).
- **Capacity** (the system must be adequate for the area of the dwelling, the number of bedrooms and the number of plumbing fixtures in the dwelling).
- **Location** (the system must be set back from structures, wells, property boundaries, and water courses).
- **Functionality** (if the system is not operating properly it must be brought into compliance or replaced).

Pitfall #18: Don't We Have All the Same Services As At Home? [Other Services]

In a word, "No"! Many Buyers have an assumption that cellular telephone service, internet service, land line telephone service, garbage pick up, snow removal, natural gas and other urban subdivision staples will naturally be available at the cottage. Not necessarily so. In fact, not even hydro service is a given.

Pitfall #19: What Stuff is Included? [Chattels]

This can become a major stumbling block in recreational real estate transactions for several reasons:

- If not enough attention is paid at the time of the drafting of the Agreement, the parties may not have a “meeting of the minds”. If the agreement says “all contents as viewed” are included in the purchase price, the parties may have a very different understanding of what that entails. If the agreement says “personal effects are excluded”, the Seller may have a very generous interpretation of what is “personal”. If the agreement provides for a list to be provided later, the Buyer has no certainty as to what they are buying.
- Because access to a cottage property (particularly boat access) may limit the ease with which furnishings and appliances can be brought to and from a cottage, there is an incentive for Buyers to want to include as much “good stuff” as possible and to require the Seller to dispose of as much “bad stuff” as possible.
- The Sellers have a different set of priorities. The Sellers want to take as many memories with them as possible and avoid the inconvenience and cost of removing the junk.
- Inappropriate assumptions are made that floating docks, rafts, boats, swing sets and other chattels are included in the transaction.

This issue causes many confrontations in cottage transactions. The parties will sign anything to “get the deal” but become very creative in their interpretation of what they have signed.

Note also that, if substantial assets are included such as boats and expensive equipment, additional searches may be required to ensure that there are no outstanding security interests registered against those chattels

Pitfall #20: Do We Need to Worry about Tax Considerations? [Tax Planning]

There are a number of tax issues that may go beyond the considerations in a normal urban residential transaction:

- **Land Transfer Tax:** Buyers must be made aware that land transfer tax applies to extras, upgrades, installations (such as meters) and assumed liabilities (levies and development charges).
- **HST:** While the exemptions are available for circumstances commonly referred to as “used residential property” and “personal use property”, HST will apply to newly constructed cottages (subject to rebates if the property is the primary residence of the Buyers) and may apply if the property was used for commercial purposes.
- **Capital Gains Tax:** Buyers must be aware that, if they already own a principal residence, the capital gains tax principal residence exemption will not be simultaneously available for both properties. Tax planning may be appropriate before taking title to ensure that property is held in the name of the appropriate person for tax planning purposes and that the appropriate residence qualifies as “principal”.
- **Non-Resident Vendor and Capital Gains Tax:** The number of non-residents who own recreational property is much greater than for other residential properties. The Buyer must ensure compliance with Section 116 of the *Income Tax Act* and hold back 25% of the purchase price until a clearance certificate is delivered by the Seller.
- **Probate Fees:** On the death of an owner of property, an application for appointment of an estate trustee may be required (with attendant estate administration taxes). Tax planning

may reduce exposure to such taxes (by placing title in joint names, in a trust or in the name of a younger owner). Each option requires special consideration.

Conclusion

The types of issues that are confronted in cottage country can vary from region to region. The questions that need to be asked, the searches that need to be performed, the off-title enquiries that need to be made will depend on the area in which the cottage is situated. In fact, the diversities from region to region may be more extensive than between urban settings. But the fundamentals in any real estate transaction apply:

- read the Agreement of Purchase and Sale carefully;
- understand the expectations of your clients;
- learn as much as you can about the property;
- understand what's available in terms of searches, off-title enquiries and resources
- ask lots of questions; and
- have the purchaser clients sign a thorough and detailed form in which they acknowledge their understanding and acceptance of the inevitable unique idiosyncrasies of the special cottage property they're purchasing.