

Abandoned Use of Easement Leads to Loss of Backyard Parking Pad

Conveyancing Law and Property Act | Easement | Land Title Act | Litigation | Litigation & Dispute Resolution | Real Estate | Toronto

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In a densely populated city like Toronto, many older neighbourhoods contain tightly-packed homes separated by narrow easements which provide access to backyard parking areas. A recent decision of the Ontario Superior Court of Justice demonstrates that the prolonged failure to use such an easement may lead to its extinguishment as a legal right.

In January 2020, the Applicants in *Kansun v. Diamantakos*, 2020 ONSC 7193 (CanLII) bought a detached home in Toronto which contained two registered easements on the eastern and western sides of the property going from the front street between the houses to the backyard. The eastern easement was wide enough to accommodate a vehicle between the two houses, and it then traversed across the back yard to access the back yard of the home to the west, owned by the Respondents' family since the mid-1960s. The western easement was only wide enough for pedestrian use.

For some time, the Respondents' family used the eastern easement in order to access their back yard and park vehicles in their garage. However, by 1975 the garage was in disrepair and a fence had been erected between the two properties which blocked vehicular access to the Respondents' backyard from the easement. The eastern easement had become unusable by vehicles due to overgrowth and other obstacles, and neither easement was used by the Respondents to access the rear of their property after 1975. In 1990, a legal parking pad had been built at the front of the Respondents' property. The properties were converted into the *Land Titles Act* system in 2000.

Shortly before the Applicants purchased their property in 2020, the Respondents grew concerned over the potential loss of the registered easements. During the dead of night, the Respondents removed a portion of the fence; cut down trees at the boundary of the properties; removed garbage bins which were obstructing vehicular use of the easement; and parked a vehicle in their backyard (which could only be accessed through the eastern easement and across the Applicants' backyard). This attempt at a self-help resurrection of property rights proved to be unsuccessful.

After the Applicants completed their purchase of the property, they sought an Order discharging the easements pursuant to section 61(1) of the *Conveyancing Law and Property Act*, which provides as follows:

Where there is annexed to land a condition or covenant that the land or a specified part of it is not to be built on or is to be or not to be used in a particular manner, or any other condition or covenant running with or capable of being legally annexed to land, any such condition or covenant may be modified or discharged by order of the Superior Court of Justice.

In addition, the Applicants sought damages of \$500,000 for damages for trespass resulting from the Respondents' surreptitious night-time removal of the fence and obstructions from the easement.

At issue was whether the owners of the Respondents' property had abandoned their rights to use the easements. An easement may be extinguished by: (a) operation of a statute; (b) operation of law; or (c) express or implied release: *Pharand v. Jean-Louis*, 1952 CanLII 114 (ON CA); *Aragon (Wellesley) Development (Ontario) Corp. v. Piller Investments Ltd.*, 2018 ONSC 4607 (CanLII).

The easements at hand were not extinguished by operation of statute or release. However, the Applicants argued that the easements were extinguished by operation of law on the basis that they had been abandoned by the owners of the Respondents' property.

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Easements may be extinguished by “operation of law” where: (a) the same person comes to own the two properties which the easement involves (known as “merger”); (b) the period for which the easement was created comes to an end; (c) the purpose for which the easement was created has come to an end; or (d) the right to the easement is abused: *Remicorp Industries Inc. v. Metrolinx*, 2017 ONCA 443 (CanLII). A registered easement (or right-of-way) is not lost by mere non-use. Rather the non-use of the right-of-way must be coupled with the intention to abandon the right-of-way, which taken together imply release by abandonment. “Abandonment” itself must be ascertained from all the circumstances of the particular case, and requires the Court to engage in what it called “findings of fact perhaps more readily made by a psychologist.”

The application judge, the Honourable Mr. Justice Perell, determined that after 1975, the Respondents’ family did not use either of the easements as a means to gain access to their back yard. Further, the Respondents exhibited an intention to abandon the easements. Justice Perell found as a fact that the Respondents’ family knew they had a right to use the easements by the time that they built the parking pad, but they affirmatively decided to abandon the use of the easements and not to replace the garage. The Respondents’ family decided instead to build and to utilize the parking pad at the front of their property. The intention to abandon was further demonstrated by assessing the physical circumstances surrounding the [easement](#):

Given the awkwardness and inconvenience of traversing the middle of the backyard of one’s neighbour along a driveway of approximately 100 feet in length, which circumstances likely would be worse during Canadian winters, to reach a dilapidated garage, it was logical and clever of the [Respondents] to build a parking pad and replace the garage with a shed and to complete the fence, which along with the trees, would provide privacy to their own backyard.

As a result, the Court found that the two easements had long been abandoned by the Respondents’ family and granted an order discharging them from title to the Applicants’ property pursuant to 61(1) of the [Conveyancing Law and Property Act](#).

The Applicants’ claim for trespass damages from the Respondents was dismissed since they did not own the property at the time of the night-time self-help incursion. Further, the Court declined to order any costs of the proceeding. In Justice Perell’s view, the Respondents were entitled to defend their registered property interest (not to mention the claim for trespass damages): “Both sides should neither be encouraged or discouraged from putting their legal rights before the court for a decision.”

The case demonstrates that owners of an easement should take care to ensure that they do not lose the right to use it. This does not mean that an easement needs to be used on a daily basis or that temporary obstruction or interference with a right-of-way is proof of abandonment: e.g. *Yekrangian v. Brogren*, 2020 ONSC 2320 (CanLII); *Ma v. Abdullah*, 2019 ONSC 6781 (CanLII). However, while there is a high threshold to establish that a registered easement has been abandoned, the lack of use over a prolonged period, coupled by alternative ways to access a property which demonstrate an intention to abandon the former use of the easement, may lead to its extinguishment as a property right.

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