

Developer restrained from interfering with use of right-of-way during condominium construction (*Figaro Dominion v. The Incumbent*)

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Neighbouring property owners who have a shared laneway or other land that is subject to a right-of-way are generally not permitted to interfere with each other's established use of the right-of-way at issue. Where disputes arise, the courts will carefully examine the historical rights that created the right-of-way and whether there has been substantial inference with the rights asserted by the party raising the complaint.

In *Figaro Dominion v. The Incumbent*, 2025 ONSC 891 (CanLII), the applicants sought an injunction restraining the respondent developer from allowing its delivery trucks and workers to obstruct a laneway and restraining construction workers hired by the developer from parking in the spots directly behind the applicants' units.

The applicants owned 5 commercial units with a shared laneway subject to a right-of-way over land owned by a neighbouring Church. The respondent developer owned two adjacent units that benefited from the same right-of-way over the laneway.

In September 2021, the Church entered into an agreement with the developer which licensed it to use the laneway as a "construction staging area" to store materials, supplies, and equipment; to install a site trailer; erect site fencing; and to park. The developer was in the process of building a 12-storey condominium tower and paid the Church \$67,000 for the agreement to use the laneway.

By the fall of 2024, a dispute arose between the applicants and the developer over the developer's use of the laneway, which the applicants claimed infringed their rights as users of the right-of-way.

Among other issues, the applicants complained that the developer's use of the laneway as a fenced-off construction staging area with a site office and a large crane had substantially reduced the usable parts of the right-of-way. Further, the developer had permitted construction workers to park their cars along the laneway which prevented the applicants' tenants from parking their own vehicles behind their units. The developer's workers claimed to the applicants' tenants that they could park wherever they wanted on the right-of-way.

There were specific examples where the right-of-way had been completely blocked sometimes for several hours by the developer's activities. One of the applicants' tenants was a daycare who provided evidence that the developer's use of the right-of-way interfered with the drop-off and pick up of children.

The applicants therefore sought an injunction to restrain the developer's use of the right-of-way.

The application judge followed the established test in Ontario for determining whether conduct infringes a right-of-way, which considers “whether practically and substantially the right of way could be exercised as conveniently as before” the interference: *Weidlich v. de Koning*, 2014 ONCA 736, at paragraph 10. This involves a fact-driven inquiry based upon the interpretation of the instrument creating the easement according to the intention of the parties based on the words they used in the context of the circumstances that existed when the easement was created: *Weidlich*, at paragraphs 15, 33; *Markowsky v. Verhey*, 2020 ONCA 471, at paragraphs 26-28.

The application judge noted that a right-of-way is an easement that does not exist in the abstract but is granted for a purpose: *Khazai v. Disante*, 2020 ONSC 2152 at paragraph 21. In the case at hand, the right-of-way was created in 1949 and the wording was intended to provide the applicants and the owners of the adjacent units with the right to use it for the purpose of “parking motor vehicles” by anyone “doing business” with them.

When the right-of-way was registered in the Land Titles system, the wording was misdescribed to include “workmen” of the unit owners. There was no dispute that such wording was not contained in the original wording of the right-of-way. The application judge noted that there was no evidence that the right-of-way was ever historically used to service the construction of a 12-storey building, with all that it entails, or the kind of usage being made by the developer.

While a party is not necessarily precluded from placing chattels or erecting a fence or gate on an easement, this cannot “substantially interfere” with the other party’s use of the easement that was granted”: *Fallowfield v. Bourgault*, 2003 CanLII 4266 (ON CA), at paragraph 33.

The application judge noted that a party may even be permitted to build permanent structures on an easement as long as this does not substantially interfere with the use of the easement: *Weidlich* at paragraphs 20-26. However, such a right would belong to the owner of the underlying land subject to the right-of-way (in this case, the Church), rather than the party who benefits from the easement but does not otherwise own the land.

A brief obstruction that is remedied promptly upon request will not likely result in damages. However, parties enjoying a right-of-way over a laneway should not obstruct it without the permission of the other, except for the brief obstruction that is inevitable when a party is using the laneway to access their property.

Significantly, the Church provided its own evidence outlining issues caused by the developer and its efforts to have the developer refrain from obstructing the applicants’ use of the right-of-way. The agreement with the developer specifically stated that the use of the right-of-way would be limited to only a portion of the laneway and shall not prohibit or prevent ingress and egress into the properties.

While the laneway was still wide enough for a car to pass by the developer’s staging area, the applicants argued that the combination of the narrowing of the laneway and construction activities, movement of trucks, positioning of trucks and the lining up of cement trucks to deliver materials, resulted in a substantial (and practical) interference with the ability of cars to pass and park.

The application judge was satisfied that there was sufficient evidence that at various points of time, the developer’s use had completely blocked the right-of-way. The unpredictable and complete blockage of the right-of-way at times affected the business of the applicants’ tenants and constituted substantial inference with the right-of-way.

As to the appropriate remedy, the developer argued that the intended completion date for the project was June 2025 and that the staging and fenced-in areas had been in place since the outset of construction in 2021. Since that time, the developer received deliveries in the staging area and installed a hoist supported by an external elevator to transport construction materials up the condominium. The developer argued that it would be manifestly unfair for the applicants to now obtain a permanent injunction that would effectively stop or significantly delay the construction since these items have been there from the outset and the applicants did not raise any issues until the fall of 2024.

In response, the applicant argued that the issues experienced by its tenants escalated in 2024 but the proprietor of the daycare had been complaining since 2022.

The application judge agreed that after waiting almost three years to bring the application, it would be manifestly unfair for the construction of the condominium to be impeded in this way when it is so close to completion. Furthermore, there would still be sufficient space for the applicants, their tenants and customers to pass through, but for some of the other activities of the developer.

In the result, the court granted a permanent injunction restraining the developer from allowing its delivery trucks or other vehicles to obstruct the laneway during business hours and restraining the developer’s workers from parking directly behind the applicants’ units. The injunctions granted were subject to various terms to allow for the ongoing construction and the right of the applicants to seek further relief on an urgent basis if necessary.



Whether the relief granted to the applicants will be sufficient to allow for the orderly operation of the tenants' businesses pending completion of the construction remains to be seen. A PDF version is available for download [here](#).

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