

Lake access easements should be carefully scrutinized prior to purchase

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4 September 2020

In a dispute not uncommon to Canadian cottage country, the Ontario Court of Appeal recently addressed whether the owner of a non-lakefront property could drive a vehicle towing a boat over a right-of-way on their neighbour's property to access the lake: *Markowski v. Verhey*, 2020 ONCA 472 (CanLII).

The appellant, Markowski, bought a property by Lake Waseosa, north of Huntsville. The Markowski property was not directly on the waterfront but had a deeded right-of-way over the adjacent lakefront property owned by the Verheys, which included a beach. The right-of-way was described in the deed as being "for all the usual purposes, in, over, along and upon" the Verheys' waterfront property.

The Verheys had no issue with Markowski using the right-of-way to access Lake Waseosa for leisure activities such as swimming and canoeing, but they objected to Markowski's use of the right-of-way to bring boats to and from the shore using a motor vehicle. The Verheys took the position that the use of the right-of-way was limited to canoes and other small boats that could be portaged across the right-of-way.

Predictably, litigation ensued. Since the right-of-way (or "easement") was contained in the written deed for the properties, the Court of Appeal focused on the precise words used to create the easement. In the Court's words: "Where an easement is created by express grant, the nature and extent of the easement are to be determined by the wording of the instrument creating the easement, considered in the context of the circumstances that existed when the easement was created," citing earlier decisions in *Fallowfield v. Bourgault*, 2003 CanLII 4266 (ON CA), at para. 10; and *Smith v. Morris*, 1935 CanLII 56 (ON CA).

Unfortunately for Markowski, the wording of the easement for "usual purposes" did not specifically describe whether "usual purposes" included traversing the right-of-way with a car towing a boat. This wording can be contrasted with more specific language in other cases describing the purpose of a registered lake access easement, such as for "bathing and launching a motorboat" (see e.g. *Medeiros v. Baldassarra et al.*, 2019 CarswellOnt 19345, 2019 ONSC 2682). Accordingly, the Court had to examine evidence of the historical use of the right-of-way to determine what "usual purposes" actually meant.

The Court of Appeal noted that an express easement may also include unspecified "ancillary rights" which are reasonably necessary to use or enjoyment the right-of-way. In one earlier example, ancillary rights for an easement that was intended to provide access to an island were broad enough to permit the installation and maintenance of a dock and parking of vehicles: *MacKenzie v. Matthews*, 1999 CanLII 3801 (ON CA).

However, to imply a legal right ancillary to a right-of-way, "the right must be necessary for the use or enjoyment of the easement, not just convenient or even reasonable": *Fallowfield*, at para. 11.

In the matter at hand, the application judge reviewed the historical evidence proffered by the parties as to the historical use of the right-of-way and the ancillary rights which may have arisen as a result. The Court considered the fact that the adjacent lands had been previously owned by family members (so legal rights were not always strictly enforced), but it was clear that the owners of the Verhey lands had never allowed unrestricted vehicular access across the right-of-way to the lake. At the times when they had done so, it was with express and time-limited permission. Conversely, there was no such restriction preventing pedestrian traffic. Thus, while the former owners of the Markowski lands might have occasionally used the right-of-way to launch large boats, the evidence was that they had done so with the express permission of the Verhey lands and not as an ancillary right flowing from the grant of the right-of-way.

In the result, the Court of Appeal agreed with the application judge that the wording of the easement for the “usual purposes” was limited to allowing Markowski to engage in swimming and other related activities, and to transport boats by foot to and from the water. The right-of-way could not be used to tow a motor boat trailer to the lake, at least without the Verheys’ permission.

One expects that such permission would have been more easily obtained before Markowski launched a civil action against her neighbours.

It is unfortunate that the neighbouring cottage owners could not come to an agreement for use of the right-of-way without resorting to the courts to determine their respective rights. One wonders what Markowski was told at the time the non-lakefront property was purchased as to the potential uses and limits of the right-of-way. If one is going to be relying on a registered right-of-way over a neighbouring land, every possible inquiry should be made as to the uses and limits of the right-of-way before completing the transaction so that there are no surprises after closing.

For more information please contact: **James Cook** at **416.865.6628** or jcook@grllp.com

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Author



James R.G. Cook

Partner

416.865.6628

jcook@grllp.com



Bay Adelaide Centre — East Tower
22 Adelaide Street West, Suite 3600
Toronto, ON M5H 4E3

Phone: 416.865.6600
Fax: 416.865.6636
contactGR@grllp.com