

KEEPING CURRENT

April 1, 2021

A short walk to the beach – What is reasonably necessary for a prescriptive easement?

By James R.G. Cook

Founded in the 1920s, Gardiner Roberts LLP has grown to become a strategically placed mid-sized business law firm with a diverse client base which includes several of Canada's largest banks, public companies including mining, high tech and software companies, real estate enterprises, lenders and investors.

James R.G. Cook
Partner
416.865.6628
jcook@grllp.com

One of the requirements to establish a prescriptive easement is that it is “reasonably necessary” for the better enjoyment of the owner of the land who claims the prescriptive right. In some cases this may be obvious, but in other situations, particularly involving recreational and seasonal properties, whether the easement is reasonably necessary may be a matter of considerable debate.

In *Mighton v. Palmer*, [2021 ONSC 2275 \(CanLII\)](#), the applicant owner of a summer cottage sought a prescriptive easement over a narrow sandy footpath on an adjacent property through trees and underbrush leading to the eastern shore of Lake Huron. There was an alternate route available for the applicant to get to the lake, but this entailed a substantially longer walk. After the applicant purchased his cottage in 1980, he did occasional maintenance on the path to the lake, in the form of replenishing sand in places where it was needed, to make walking easier and safer.

The parties were in agreement that to make out a prescriptive easement the applicant met the first three of the four essential [characteristics](#) as set out in the case of *Bailey v. Barbour*, [2016](#)

[ONCA 98 \(C.A.\)](#) at para. [56](#). In that regard, (i) there was “a dominant and servient tenement” (the former being the applicant’s property and the latter being the property over which the path ran); (ii) the dominant and servient lands were owned by different persons; and (iii) the easement was capable of forming the subject matter of a grant. At issue was the fourth characteristic: “The easement must accommodate – that is, be reasonably necessary to the better enjoyment of – the dominant tenement.”

The property at issue was converted to Land Titles in 2007 which “stops the clock” for prescriptive easement claims, which require 20 years’ of use prior to the lands being registered in Land Titles. Accordingly, the applicant had to demonstrate that the prescriptive easement had been created through 20 years’ use prior to 2007. In that regard, the applicant established that the use he and his predecessors in title made of the property has been going on since at least 1948, and was therefore well in excess of 20 years. In addition, such use was open, in that the path was used during the daytime to walk to the beach and such use was made of the property without permission, which was admitted by all parties.



The court found that it was apparent that the applicant used his property as a summer cottage, and that reasonable access to the beach and the waters of Lake Huron would significantly contribute to the normal enjoyment of the cottage. The path over which the easement was claimed was approximately 25 feet while the alternate route was between 650 and 1,300 feet. The court reasoned that the shorter the walk to the beach, the more enjoyable it would be to use a cottage, particularly when considering the following factors:

- The time it would take to walk from the cottage to the beach and return;
- The time and difficulty it would take to transport objects, like beach chairs, floating apparatus, lunch baskets, coolers, books, electronic devices and beach umbrellas, to the beach and back;
- Access to washroom facilities;
- Young children or older people using the path, which would heighten all of the above reasons.

After considering these factors, the court found that the applicant's claim for easement rights was not merely for recreation and amusement but that it was for the "utility and benefit to the dominant tenement" (following *Barbour*), notwithstanding that there was an alternate means of getting to and from the beach. The easement was therefore "reasonably necessary" for the better enjoyment of the applicant's cottage property.

Finally, the court had no difficulty concluding that the former owners of the lands on which the easement was located knew that the applicant (as well as other property owners in the area) were going to and from their properties to the beach using the shorter path during the requisite time for the prescriptive easement

to be established. The applicant was therefore successful in obtaining an order confirming the prescriptive easement over the path.

Prescriptive easements are often a sensitive issue between adjacent landowners, as the owner of the servient lands on which the easement is located is required by law to allow the adjacent property owner the right to traverse their property using the easement for the purposes for which it was created. As noted in the [decision](#), the right to use someone else's land without compensation is extremely intrusive, and the courts are hesitant to recognize prescriptive easements, because doing so "would permit a landowner's neighbourly accommodation of sufferance to ripen into a legal burden on his or her lands without compensation."

Once established, a prescriptive easement will continue to run unless [extinguished](#) by operation of law or release. A prescriptive easement is a valuable right – one can easily understand how a cottage with a short path to the beach may well be more valuable than a cottage with a considerably longer or more inconvenient route. Accordingly, if one is purchasing a property that potentially involves a prescriptive easement (either on the land or running over the adjacent property), the requisite characteristics of a prescriptive easement should be carefully assessed for each of the adjacent properties in order to determine whether or not the prescriptive easement rights have been established.

Contact us

If you have a litigation matter and are in need of legal advice, please contact [James Cook](#), at 416.865.6628 or jcook@grllp.com.

(This newsletter is provided for educational purposes only, and does not necessarily reflect the views of Gardiner Roberts LLP.)