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# Home Owners Ordered to Remove Pool built over Municipal Easement

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Home buyers would do well to ensure that their local municipal by-laws and easements do not prohibit their development plans before they embark on any major construction or renovation projects. In a recent case, the Ontario Court of Appeal affirmed that home owners were required to remove a pool and associated amenities which they had built on top of a municipal easement.

In *Oakville (Town) v. Sullivan*, 2021 ONCA 1 (CanLII), the Appellants bought a property in Oakville, Ontario, and subsequently built a swimming pool and surrounding deck, platform, and other amenities behind their house. The pool and amenities extended over a ten-foot strip of land which was subject to a registered easement held by the Respondents, the Town of Oakville and Oakville Hydro Electricity Distribution Inc. ("Hydro").

The subject easement had been registered in 1972, and stated that the owners of the Appellants' property maintained "the right to use the surface of the said land for any purpose which does not conflict with the Town's rights hereunder and specifically excluding the planting of any tree and the erection of any building or structure."

While the Appellants knew about the easement prior to closing their purchase, they apparently believed that the easement had been abandoned or never used. The only current use of the easement was as an underground conduit housing a hydro cable providing power to a neighbouring property. Over the years, several other structures had been erected within the easement with the Town's approval, including a carport and part of the house. Two large trees are also within the easement. The Town's approval was not sought, however, before the pool and amenities were built in 2014.

In 2018, the Town and Hydro brought an application for a declaration that the Appellants' pool and amenities encroached upon the easement and for an order requiring their removal. The application judge ruled that the pool and amenities actionably encroached upon the easement because they contravened the express prohibition against erecting a building or structure. He also ruled that

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the equitable doctrine of proprietary estoppel did not prevent the Town and Hydro from enforcing their rights under the easement. As a result the Appellants were ordered to remove the pool and amenities, to remediate damage to the easement, and pay costs to the Town and Hydro for the legal proceedings in the amount of $50,000.

On appeal, the Appellants argued that the application judge incorrectly ruled that there was on outright prohibition on erecting *any* building or structure within the easement, regardless of whether that building or structure conflicted or substantially interfered with the rights of the easement holders. The Appellants argued that the pool and amenities did not constitute an "actionable encroachment" on the easement.

In evaluating whether there is an "actionable encroachment" on an easement created by express grant, Ontario courts first determine the nature and extent of the easement by interpreting the wording of the instrument creating the easement, within the context of the circumstances that existed when the easement was initially created: *Fallowfield v. Bourgault* (2003), 2003 CanLII 4266 (ON CA), at para. 10; *Raimondi v. Ontario Heritage Trust*, 2018 ONCA 750, 96 R.P.R. (5th) 175, at para. 11. Once the nature and extent of the easement have been determined, the court then assesses whether there is a "substantial interference" with the use and enjoyment of the easement for the purpose identified in the grant: *Weidelich v. de Koning*, 2014 ONCA 736 (CanLII), at paras. 9-11; *Fallowfield*, at paras. 40-41; *Hunsinger v. Carter*, 2018 ONCA 656 (CanLII), at para. 11. An "actionable encroachment" which requires some remedial action to be taken by the land owner generally depends on a finding of "substantial interference" on the use of the easement.

The Appellants claimed that the easement did not limit their right to build the pool and amenities because the easement was only ever intended to be used, and has only ever been used, for a hydro line, which could be serviced notwithstanding the pool and amenities. Essentially, the Appellants argued that the pool and amenities did not "substantially interfere" with the rights of the Town and Hydro to use the easement and therefore they had not established the legal basis for an "actionable encroachment" requiring the offending structures to be removed.

The Court of Appeal soundly rejected this argument, concluding that the application judge had properly focused on the precise wording of the easement. In that regard, the property owners maintained the right to use the surface of the lands within the easement but were "specifically exclude[ed from] the planting of any tree and the erection of any building or structure." The pool and amenities obviously contravened this wording. The application judge was also entitled to conclude that interpreting the easement as an outright prohibition reflected its broad purpose of allowing the Town unfettered access within the easement to provide municipal services.

Further, the Court of Appeal found that the application judge had implicitly applied the correct substantial interference test. By agreeing to an outright prohibition, without qualification, at the time the easement was granted, the parties effectively defined for themselves what would constitute a substantial interference with the easement. When an outright prohibition is contained in a registered easement, substantial interference with such prohibition is established simply by erecting any building or structure within the easement lands.



As a final pitch, the Appellants raised the legal doctrine of proprietary estoppel. They argued that as a result of the Town expressly permitting the construction of a portion of the appellants' house and carport within the easement, and the Town had induced, encouraged, or allowed them to believe that the easement was abandoned or no longer in use. The Appellants claimed that they relied on such belief when building the pool amenities.

The Court of Appeal upheld the application judge's findings that there was no evidence to suggest that Hydro had any knowledge of the other structures located within the easement, and that the Appellants made no enquiries with the Town and/or Hydro about the scope of the easement or a building permit before installing the pool and amenities. Accordingly, there was no evidence to suggest that the Appellants acted to their detriment when building the pool or amenities to the knowledge of either the Town or Hydro.

As a result the appeal was dismissed and the Appellants were ordered to pay further costs of $40,000 to the Town and Hydro for the appeal, in addition to having to remove the pool and amenities by June 30, 2021.

The decision demonstrates that home owners should never assume that easements on their lands are abandoned or will no longer be enforced according to their terms by the easement holders. In the case of registered easements, the specific wording should be examined in addition to the factual matrix existing at the time the easement was granted. Ultimately, the inclusion of prohibitions within an easement indenture may lead to proof of "substantial interference" from any encroachments or structures built upon the easement lands. As well, home owners should always be prudent to review the requirements of obtaining building permits before embarking on any significant renovations or construction on a property, particularly a pool. The cost of removing any offending structures and repairing the damage to the easement lands could easily dwarf the cost of the original construction.

## Contact us

If you have a litigation matter and are in need of legal advice, please do not hesitate to contact **James Cook**, at 416.865.6628 or via email at jcook@grllp.com.

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