

Neighbours in right-of-way dispute are authors of their own misfortune (Bennett v. Chadwick)

Litigation | Litigation & Dispute Resolution | Ontario | Real Estate | Right-of-way Access

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The location of a right-of-way over a neighbour's land can be the subject of significant disagreement if it not clearly outlined in a written agreement or registered document. Disputes may arise over time due to changes in ownership of the properties or the purpose for which a right-of-way is used. While courts will consider factors such as convenience and the nature of the properties at issue, the primary focus will generally be the documentation that led to the creation of the right-of-way.

Bennett v. Chadwick, 2025 ONSC 3603, involved a dispute between shareholders of a non-profit corporation that owned adjoining lots on a creek in the area of Cressview Lakes, Ontario. The corporation had issued share certificates which granted holders with membership in the corporation and exclusive possession of one or more lots.

The applicants owned share certificates for possession of lots 45, 51 and 52, by way of membership in the corporation acquired in 2013. The respondents had possession of lot 46 after acquiring membership in 2021.

At issue was the fact that lot 52 was a creekside lot without land access from the local roadway, save by traversing a right-of-way over lots 45 and 46.

In 1961, at the first annual meeting of shareholders of the corporation, a unanimous resolution was passed to provide the owner of lot 52 with access by using "the present roadway" over lot 45 and 46.

In 1974, the right-of-way was described in a handwritten agreement between the members of lot 46 and 52, stating "Right-of-way shall be granted across lot 46 as access to lot 52 as long as these lots exist".

For a period of time, the owners of lot 52 used a driveway across lot 46.

By 2025, however, a dispute arose between the neighbours. The owner of lot 46 erected a fence that blocked the use of the driveway to access to lot 52, requiring the owner of lot 52 to access their lot by traversing lot 45 from another access point. The owner of lot 46 argued that this was the original location of the right-of-way contemplated by the 1961 resolution and 1974 agreement and that it provided access to lot 52 unimpeded by the fence.

The court had to determine where the original point of access to the right-of-way was located and whether there was any agreement between the parties that would have changed that access point.

The application judge noted that the 1974 agreement did not show where the right-of-way was located. Further, the minutes of the corporation dating back to 1961 left no doubt that the point of access to the right-of-way over lot 46 had to be on lot 45 because the minutes specifically referred to lot 45 as where the point of access was located.

The court therefore considered whether or not the point of access was ever changed to lot 46.

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The applicants argued that they had enjoyed regular unimpeded access across lot 46 on the driveway from the local roadway. They argued that with the erection of the fence, their ability to access lot 52 was impacted to the point where they could not access their property other than by foot.

Underlying the dispute, however, was the alleged use of the right-of-way on lot 46 by the applicants to store property. While the owner of lot 46 conceded that she originally did grant permission to use her driveway to access lot 52, she revoked her permission to use the driveway because the applicants refused to comply with her requests to remove their property from lot 46.

While the applicants denied that they had stored property on lot 46, there was evidence in minutes from 2021 that confirmed they had improperly stored property on lot 46, which was a source of consternation for the former owner of lot 46. The application judge commented that the apparent refusal of the applicants to be a “good neighbour” and remove their property from lot 46 resulted in the fence being built.

The applicants attempted to rely on an unsworn statement from the former owner of the share for lot 46 that there had been access across lot 46 since at least 2000. As the statement could not be cross-examined upon, however, the court placed no weight on it.

The application judge therefore concluded that there was no admissible evidence that the applicants had enjoyed a continuous and uninterrupted right-of-way or licence across lot 46. Rather, the evidence supported the opposite conclusion—namely that the owners of the share for lot 46 had given permission to the applicants to use the driveway on lot 46 and that permission had been revoked.

Essentially, the applicants were seeking the convenience of using the driveway across lot 46 to gain access to lot 52, as the other route for the right-of-way was grown over with vegetation after not having been used in years. The application judge was satisfied, however, that a large pick-up truck had in fact traversed the creekside right-of-way from lot 45 without issue and that it could safely accommodate vehicles.

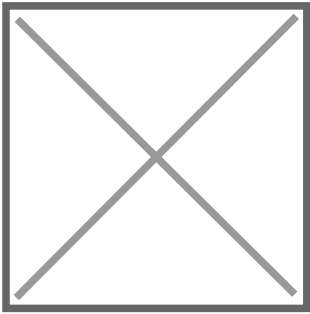
While the longer route of access to lot 52 via lot 45 may create some inconvenience, there was no evidence that the right-of-way could not be restored to its original state.

In the [result](#), the court determined that the right-of-way to lot 52 was via access on lot 45 and not the driveway on lot 46. The owner of lot 46 was permitted to keep the fence where it had been erected since it did not impede access to lot 52.

The case illustrates that the location of a right-of-way may not depend on where it is most conveniently used. Ultimately, the applicants were, in the application judge’s words, the authors of their own misfortune. Had they been good neighbours and removed their property from the driveway on lot 46, litigation and the erection of the fence would not have been necessary. Instead, the owner of lot 46 revoked permission to use the driveway. The applicants were given every opportunity to remedy the issues before they came to court and failed to do so. A PDF version is available for [download here](#).

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

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