

Prescriptive hydro road easement affirmed by Court of Appeal

Easement | Litigation | Litigation & Dispute Resolution | Ontario Court of Appeal

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Easements that are intended to provide utility companies with access to maintain and service the utilities they provide are common features of many properties in Ontario. If the easement is not registered on title, however, the use of the easement lands must be established under the same legal requirements for an easement, and rights may be gained or lost in the same manner.

There is a high threshold for establishing a prescriptive easement because courts are generally hesitant to “permit a landowner’s neighbourly accommodation of sufferance to ripen into a legal burden on his or her lands without compensations”: *Carpenter v. Doull-MacDonald*, 2017 ONSC 7560, at para. 51.

In *Hydro One Networks Inc. v. Amos Allen Shiner*, 2023 ONCA 346 (CanLII), Hydro One Networks sought a declaration that it held a permanent easement over the portion of a road on the respondent’s property in Cloyne, Ontario. Hydro One sought the right to use the road without permission to access an easement in favour of the Hydro-Electric Power Commission of Ontario, as well as ancillary orders that would permit access and prevent the respondent from preventing access to the road.

In the 1930s, Hydro One’s predecessor company built a transmission line and towers that passed through the property now owned by the respondent. In 1948, an easement was granted to Hydro One’s predecessor company on the land upon which the transmission towers were built. Hydro One employees must access the hydro easement to service and maintain the transmission towers and trim the vegetation around them.

To reach the hydro easement, Hydro One employees traditionally travelled over the portion of a road on land now owned by the respondent. There was no question that the road was private and that different portions were owned by different property owners, including the respondent.

The respondent bought his property in December 2017. In the ensuing years, a dispute arose between Hydro One and the respondent over the use of the easement, culminating in the respondent installing a gate at one end of the road and a chain blocking access at the other end.

Hydro One then brought an application for the right to an easement over the road on the respondent’s property. Hydro One’s position was that they were required by the applicable regulations issued by the Ontario Energy Board to inspect, maintain, repair and construct transmission assets. Therefore, they required reliable access to the transmission line easement.

In the application, Hydro One argued that it had acquired a prescriptive easement under either [section 31](#) of the *Real Property Limitations Act*, which required Hydro One to establish that they used the road for more than 20 years prior to 2008 when the respondent’s property was registered under the *Land Titles Act*.

Alternatively, Hydro One relied upon the doctrine of “lost modern grant,” under which an easement by prescription can be established by the owners of the dominant tenement (the adjacent land using the easement) over the affected portion of the servient tenement (the land on which the easement is located) based on 20 years of continuous, uninterrupted, open and peaceful use of the land “as of right”, meaning without permission of the owner of the servient tenement: *Carpenter v. Doull-MacDonald*, 2017 ONSC 7560, at paras. 42-47, aff’d 2018 ONCA 521.

In *Balogh v. R.C. Yantha Electric Ltd.*, 2021 ONCA 266, at para. 6, the Court of Appeal explained that permission could have been sought either orally or in writing during the 20-year period under the *Real Property Limitations Act* or pursuant to the doctrine of lost modern grant. However, under the *Real Property Limitations Act*, after 40 years, the right is absolute unless permission to use the land was given in writing during the 40 years.

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The application judge found that because Hydro One used the road infrequently, “at most once a year and probably considerably less frequently than that”, its use was not continuous within the meaning of that term as discussed in the case law. The application judge found that Hydro One’s use was “occasional at best” and dismissed the application: 2022 ONSC 1893 (CanLII).

On appeal, Hydro One argued that the application judge had erred in the interpretation of the continuous use requirement of the test for a prescriptive easement.

In the Court of Appeal’s view, it was incumbent on the application judge to view the evidence regarding the nature, frequency and pattern of use by Hydro One of the Hydro Road over the period of 40 years to determine whether it met the criteria to establish a prescriptive easement. The “weight of the evidence” was of a pattern of use of the Hydro Road by Hydro One which was open, peaceful and uninterrupted from 1966 to 2018. Hydro One accessed its registered easement with vehicles, as needed, to maintain its transmission lines and towers. The frequency and nature of the access was sufficient to satisfy the threshold of “continuous” use.

The Court of Appeal found that the evidence also showed that the Hydro One employees were consistent in that they were seeking to accommodate and appease the respondent’s concerns regarding the use of his road by Hydro One but that did not mean that they were not seeking his permission.

In any event, the issue before the application judge was whether a prescriptive easement had been established by Hydro One over the easement lands over a 20-year period without consent or over a 40-year period without written consent before 2008. Since there was no evidence of written or oral consent by the prior owners of the respondent’s lands at any time during their ownership from 1925 to 2017, the application judge erred in law by failing to find that Hydro One’s use of the Hydro Road over the prescriptive period was as of right. As a result, the prescriptive easement was established on the record before the court.

The appeal was therefore allowed, and Hydro One was granted a declaration that established a permanent prescriptive easement prior to 2008 over the portion of the Hydro Road located on the respondent’s property for the purpose of reaching the Hydro Easement to carry out Hydro One’s needs and obligations to inspect, repair, maintain and rebuild its assets on the Hydro Easement and to manage the vegetation and land thereon. The respondent was ordered to remove all obstacles restricting Hydro One’s ability to access the Hydro Easement for these purposes.

The decision demonstrates the evidentiary issues that may arise when seeking to establish—or refute—the existence of a prescriptive easement. Evidence of permission will be difficult to establish without a written record showing an agreement or other express consent being given for use of an access road or similar easement during the required number of years, even if such use has not been regular or frequent. A PDF version is available to download [here](#).

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