

Township's Prescriptive Easement Upheld by Court of Appeal

Land Registry | Land Title Act | Litigation | Litigation & Dispute Resolution | Municipal & Land Use Planning | Municipal Law | Ontario Court of Appeal

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In *Paleshi Motors Limited v. Woolwich (Township)*, 2020 ONCA 625 (CanLII), the Ontario Court of Appeal affirmed that a Township had established a prescriptive easement over private lands for the purposes of maintaining a watermain.

The lands in issue were being used as an auto salvage yard. The Township had installed a watermain on the lands in 1979, and had entered onto the lands over the years for the purposes of operating, maintaining, repairing and replacing the watermain without seeking permission from the former owners. There was no evidence of a formal agreement having been granted to the Township by former land owners to do so.

In 2015, the shares of the company which owned the salvage yard were acquired by a new owner, who asked that the watermain be removed, which the Township refused. Litigation ensued, with the new owner seeking to have the watermain removed and the Township seeking an order that it had established a prescriptive easement.

In Ontario, a party claiming a prescriptive easement must establish four essential characteristics:

- i) there must be a dominant tenement (which benefits from the easement) and a servient tenement (the land burdened by the easement);
- ii) the easement must accommodate the dominant tenement;
- iii) the dominant and servient land owners must be different persons; and,
- iv) the easement must be capable of forming the subject matter of a grant.

In addition, the party claiming the easement must show that its use and enjoyment of the easement was continuous, uninterrupted, open and peaceful for a period of 20 years. The easement claimant must also establish that its use was “as of right” as opposed to by permission: *Barbour v. Bailey*, 2016 ONCA 98 (CanLII) and *Kaminskas v. Storm*, 2009 ONCA 318 (CanLII).

In Ontario, once lands are converted into the Land Titles registry system, title can no longer be gained or lost through unregistered rights. As the salvage yard lands were converted into the Land Titles registry system on September 16, 2002, the Township had to demonstrate a continuous, uninterrupted, open and peaceful use of the easement lands for a period of 20 years prior to that date: *Henderson v. Volk*, 1982 CanLII 1744 (ON CA).

The application involved evidence from the Township regarding the construction of the watermain in 1970-80, and maintenance over the years thereafter. However, there was no evidence from anyone who owned the salvage yard property during the 20-year period, or from anyone associated with any owner, as to the owner's knowledge of the existence of the watermain, or any arrangement that existed between the owners and the Township with respect to the watermain.

The application judge ultimately concluded that the owners of the salvage yard during the relevant 20 years prior to 2002 had acquiesced in the use of the property for the watermain. A finding of “acquiescence” did not require evidence that the former owners had actual knowledge of the existence of the watermain. Knowledge of the existence of the watermain could be “imputed” to the former owners if “an ordinary landowner, diligent in the protection of her interests, would have had a reasonable opportunity of becoming aware of the watermain”: *Garfinkel v. Kleinberg and Kleinberg*, 1955 CanLII 112 (ON CA).

On appeal, the salvage yard owners argued that the application judge had wrongly reversed the burden of proof by requiring them to “prove” the Township was permitted to use the property for the purposes of the watermain. The Court of Appeal disagreed. Unlike many prescriptive easement cases, the case did not turn on the distinction between “acquiescence” and “permission.” There was no evidence from either the landowners or the Township that the former owners of the salvage yard had ever given the Township permission to install or maintain the watermain. Rather, the Township had acted unilaterally when it installed the watermain and the current owners of the salvage yard adamantly denied any permission had ever been given.

The salvage yard owners also raised a novel legal argument by submitting that a prescriptive easement must be given a “special meaning” when it accommodates a public authority like the Township as the dominant tenement. The salvage yard owners argued that a public authority must demonstrate that the prescriptive easement was in fact “necessary” because there is no other way to acquire the interest in the land. Effectively, this argument would end the need for public entities to acquire rights through prescriptive easements since they had other options available, like expropriation. The Court of Appeal rejected this novel argument as there was no case law offering any support for the salvage yard’s position.

At the end of the day, the fundamental policy underlying the common law’s recognition of prescriptive easements applies to all property owners whether private or public. In the Court of Appeal’s words:

Prescriptive easements rest on a policy which holds, after the passage of a significant period of time, during which one owner has acquiesced in the use of its property by another owner, that other owner becomes entitled to rely on that acquiescence and conduct itself accordingly. Whether that policy should apply to all, some, or no public authorities, is a question for the legislature.

As a result, the common law principles for acquiring a prescriptive easement applied to the Township’s claim, and the Township obtained an order for the right to access the lands to maintain the watermain. One wonders whether the current owners of the salvage yard were advised of the watermain at the time they acquired ownership of the lands. They will certainly have to accommodate the Township’s access to the property going forward and disclose the existence of the easement to any subsequent purchasers.

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