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Certainty of title is a fundamental principle of all land title systems. As a basis for confidence in transactions in real property, prospective buyers must be able to have a certain level of trust that they are obtaining title (along with any limitations or additional rights) as described in the parcel register. In this month's issue we explore a decision regarding the status of a right of way that had initially been established to create a means of accessing cottage properties - and registered on both dominant and servient properties indicating such. Over time, the small community of cottages in the Ontario Superior Court decision in *Davidson v. Lollar*<sup>1</sup> developed an alternative means of access when a municipal roadway was established. What impact did this public road have on the original (private) right of way? Was it abandoned in favour of the more convenient route for vehicular access? The decision, which resulted in a declaration that the Applicants' easement remained in full force and effect, hinged on the language of the easement itself. A broadly worded easement with no expiry date that was clearly registered on title for all properties impacted by same remained in place. Only with very clear evidence of abandonment or otherwise would the court be willing to entertain the cancellation of a property right that is otherwise clearly established. The decision is also reflective of the importance of the use of clear language in creating a right of way.

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## The Limited Role of Courts in Extinguishing Certain Rights of Way

**Key Words:** *easement; right of way; abandonment; implied release; extinguishment; language of grant*

Rights of way and easements created by, and at the time of, original grants reflect the circumstances on the ground and in the neighbourhood at the time. Properties may have

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<sup>1</sup> *Davidson v. Lollar*, 2023 ONSC 3473 (CanLII), <https://canlii.ca/t/jxlll>

easements required for access for certain purposes (such as movement of agricultural equipment or livestock, accessing property by foot or vehicles, etc.). However, surrounding circumstances may change, the lands may no longer be used for agricultural activity, or alternative routes of access may have become established. What then happens to the originally granted easements?

When it comes to rights of way that were granted prior to significant changes and development in the surrounding neighbourhood, a court may find that a right of way is abandoned, and can be extinguished, but this is not something that a court is inclined to readily conclude. There is a hesitancy to formally extinguish such rights, particularly where the language describing the purpose of the easement itself is sufficiently broad and there is no time limit or other clear event or circumstance that would signal the end of an easement. In *Davidson v. Lollar*, an application was brought by one of 50 land owners who enjoyed a right of way over properties owned by the three Respondents.

The area was a neighbourhood of seasonal cottages and four-season residences and was developed in various phases between 1970 and 1990. The history of the right of way at issue was described by the court as follows:

On July 22, 1974, a right of way was granted to the original developer of the lands in instrument number FR254133. The right of way allowed the deeded owners from Plan 544 to cross over the properties on Plan 1752, which is where the Respondents' properties are located.

The location of the right of way, as confirmed in Plan 544, [...] runs the length of the [respondents' properties], as well as across other properties on Plan 752 between Cedar Ridges Lane and Holmes Road.

In around 1998 Silverwood Drive was constructed, which is a public paved road that runs parallel to the right of way. Silverwood Drive was built by the Township, and it creates another route for the owners on Cedar Ridges Lane to access their property.

The right of way in favour of the Applicant and the other dominant tenements is described in instrument number F498884 as "together with a right of way over the private road shown on the said plan, and across the said Lot 11, in the First Concession as now travelled to the public highway as in instrument number 386867."

The right of way over the servient tenements including the Respondents as described in instrument number 254113 is "subject to a right of way in favour of those entitled thereto over the private road shown on the said Plan 544."<sup>2</sup>

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<sup>2</sup> *Ibid.* at paras 9-13

It was agreed that the right of way was included in all of the deeds for the affected properties owned by the Applicant and other dominant tenement owners and that all of the Respondents were aware of the right of way registered on the title to their properties and that they accepted the right of way when they purchased their properties (purchases by the Respondents occurred between 1995 and 2002). Figure 1 below shows the location of the right of way at the rear of the Respondents' properties as well as later constructed municipal roadways that provide alternative access to the applicant's property and others.



**Figure 1.** Image with right of way appearing as an unmarked road parallel to Silverwood Drive.<sup>3</sup>

The Respondents argued that the court was authorized under statute to modify or discharge the easement. In particular under the *Conveyancing and Law of Property Act* and the *Land Titles Act*. The court noted that section 119(5) of the *Land Titles Act* does allow for modification of a parcel register by a court, but under certain conditions:

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<sup>3</sup> Image from Google® Maps. All rights reserved.

119 (5) The first owner and every transferee, and every other person deriving title from the first owner, shall be deemed to be affected with notice of such condition or covenant, but any such condition or covenant may be modified or discharged by order of the court on proof to the satisfaction of the court that the modification will be beneficial to the persons principally interested in the enforcement of the condition or covenant.<sup>4</sup>

In support of their position, the Respondents argued that there had been an abandonment of the right of way, that there had been thefts at the Respondents' properties and other nuisances as a result of the right of way remaining open. The court found little evidence to tie these issues to the Applicants and other owners of dominant tenements - as opposed to third parties. The balance of convenience required by s. 119 was found to favour the Applicants (*i.e.*, keep the right of way open) as opposed to the Respondents.

A key question before the court was whether the right of way was extinguished when Silverwood Drive, which provided access to the dominant properties, was constructed. The Applicants argued that the wording of the original grant of the right of way referred to access and was not limited to vehicular access. Moreover, the dominant owners continued to use the right of way as footpath for recreational access and to access mailboxes. The Respondents took a narrow view of the right of way, arguing that it was created to provide seasonal vehicle access and, since Silverwood Drive was constructed, its purpose no longer existed. It was argued that the right of way was only temporary and should have been closed upon the construction of Silverwood Drive, although this did not occur due to an oversight by the Township.<sup>5</sup>

Evidence presented on the intention of the Township to close the right of way was limited and further addressed by the court:

The court finds that at some point in time there may have been an intention by someone in authority to close the right of way, but that intention was never followed through with any form of action. No process was set in motion to close the right of way and the right of way was never closed. There is no paper trail evidence of action to close the right of way before the court.<sup>6</sup>

It was argued that, given the significant change in circumstances following the grant, (*ie*: the construction of an alternative access road) this substitution made the right of way unnecessary.

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<sup>4</sup> *Land Titles Act*, RSO 1990, c L.5, at s119(5), <https://canlii.ca/t/55qn4>

<sup>5</sup> *Supra*, note 1, at paras 41-49

<sup>6</sup> *Supra*, note 1, at para 59

The court noted the broad language of the right of way – that it was not restricted to vehicular access, and that the evidence supported the conclusion that there had been continuous use and no abandonment.

The purpose of the easement when it was created was to allow access to and from the Cedar Ridges Lane properties. That access was not restricted to vehicle access. The wording of the right of way is clear and unambiguous. It contains no restriction as to use. Furthermore, there is no affidavit evidence from anyone who was involved in the creation of the right of way as to its purpose, its length or any restriction thereto.<sup>7</sup>

The Respondents' argument that the change in circumstances had extinguished the easement was rejected.

The case of *Fyfe v. James* (2006), 2006 CanLII 2186 (ON SC), 42 R.P.R. (4th) 221 (Ont. S.C.), dealt with a similar issue. In *Fyfe*, the court held that an access easement was not extinguished after a new alternate access road was built. The court distinguished the facts in *Bost Properties* and rejected the Respondents' argument that, because the new road provided full ingress and egress to the relevant properties, the right of way was no longer necessary, and therefore extinguished. The grant did not provide for the easement to be extinguished by alternative access, nor did it stipulate a time limit.

The court notes that in *Bost Properties* the use of the property had undergone a radical change since the easement was granted: from farmland to highly developed residential property.

Furthermore, in *Bost Properties* the facts were substantially different from this case. In *Bost Properties*, only one person was entitled to use the right of way compared to 50+ families in the present case. Furthermore, in *Bost Properties*, the right of way created access to farm fields for agricultural purposes which no longer existed. In addition, the house to which access was to be granted no longer existed.

The court finds that in the present case there is no radical change in the use of the properties in the area since the easement was granted. Some changes have occurred which include that some of the cottages have now been converted into all season homes and the fact that Silverwood Drive creates an alternate access route to the property.

In *Bellhouse v. Kaas*, 2020 ONSC 7452, the court found that construction of an alternate access route did not extinguish an easement. The court stated that the deeded owners of the concrete steps still use the stairway and the fact that the owners no longer needed them did not eliminate a benefit to them.

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<sup>7</sup> *Supra*, note 1, at para 62

In the present case, the court finds that there is no mention in the easement about any time limitations or an expiry of the easement.<sup>8</sup>

The Respondents also argued that the right of way had been extinguished by abuse of the right and that the Applicant was not permitted to expand upon the use contemplated by the original grant. To this end it was noted that the right of way was being used by persons not entitled to same, and it was being used by individuals from other subdivisions.

While the court did not find any extinguishment by abuse of right, it was noted that “[t]he right of way must only be used by those entitled thereto in their deeds as well as their direct family members and guests who are with them.”<sup>9</sup>

On the question of whether the right of way had been abandoned by implied release the court noted that:

Furthermore, there is little or no evidence of a lack of use or acquiescence by the dominant tenements with respect to the use of the right of way. The fact that they have not maintained it for vehicle use is not evidence of abandonment. It may be evidenced that they stop using it for vehicle passage but not for other forms of passage.<sup>10</sup>

In the end, the court concluded that the right of way in favour of the Applicant and other deeded owners remained in full force and effect and could be used by them without interference. Given concerns and evidence of use of the right of way by parties not entitled to same, the court found it appropriate for the Respondents or other servient tenements to place signs and unlocked gates to restrict unauthorized use - provided these are in compliance with municipal or other regulations.<sup>11</sup>

Clear, consistent language regarding the deeded right of way put both dominant and servient tenements on notice that this right/burden attached to title at the time of purchase. While subsequent to the original grant, the circumstances on the ground changed, the continued actions by the dominant owners and the broad wording of the original grant itself, combined with inaction from the Township to close the right of way (there was a finding that the Township viewed it as a civil matter) meant that the powers available to the court through the *Land Titles Act* were not used in these particular circumstances. Should developers seek to create temporary means of access in anticipation of further building of roadways and so forth, the wording of such easements to create a limitation on rights needs to be explicit and clear.

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<sup>8</sup> *Supra*, note 1, at paras 73-78

<sup>9</sup> *Supra*, note 1, at para 93

<sup>10</sup> *Supra*, note 1, at para 104

<sup>11</sup> *Supra*, note 1, at para 118

## Cross-references to *Principles of Boundary Law in Canada*

Easements and rights of way are discussed in *Chapter 5: Boundaries of Easements*, and easements by express grant in particular are discussed at section 5.5: *How Easements are Formed*.

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#### **Course: *Survey Law 1***

***Survey Law 1*** provides a foundation for professional surveyors to integrate legal principles, legislation and regulations within the overall framework of property boundary surveys. This course will be taught online Wednesday evenings by Izaak de Rijcke, starting September 6<sup>th</sup>. For more information, consult the [syllabus](#). Please note that registration is through [AOLS](#).

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