The Boundary Point
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Case Commentaries on Property Title and Boundary Law

The Boundary Point is published by Four Point Learning as a free monthly e-newsletter, providing case comments of decisions involving some issue or aspect of property title and boundary law of interest to land surveyors and lawyers. The goal is to keep you aware of decisions recently released by the courts in Canada that may affect your work.

Disputed rights of way and claims to easements in order to enjoy access or some means of reaching a portion of one's property continues to appear in the courts across Canada. In *Dickinson v. Hirsch Garcia*,[1] an Ontario court denied a claim to a right of way over a disputed strip in order to gain vehicular access to the rear of a property from the street. In reaching the decision to reject the claim, the court described the evidence available and also the legal principles which applied to the circumstances in reaching its decision. Ultimately, while the claimed easement may have made use of the property more **convenient**, it was not **essential**

Convenient, but not Essential: A Claim to an Easement by Prescription Fails

Key Words*: easement, necessity, convenience, vehicle parking, nature of use, prescription*

A prescriptive claim to an easement has both similarities to, and differences from, adverse possession. In this dispute, the court explained the basic issue in the dispute before it as follows:

> The parties in this case are both home owners of multi-residential, older homes in the Glebe, one of Ottawa's historic neighbourhoods. A dispute has arisen over the narrow strip of land running between the properties, 156 and 152 First Avenue. The Respondents, who own 152, erected a fence making it difficult for the Applicants to access the rear of their property. The Applicants, who own 156, seeks a declaration of prescriptive easement, and an order that the fence be removed.
>
> In this proceeding, this strip of land has been referred to as the "Disputed Lands". However, the land consists of a laneway which the Applicants, Jill and Dave Dickinson, wish to use to access the rear of their property and for parking. The Respondent, Trudi Hirsch Garcia and the Estate of Lawrence Hirsch, erected the fence shortly before the Dickinsons bought 156 in

[1] *Dickinson v. Hirsch Garcia*, 2025 ONSC 1489, https://canlii.ca/t/kb2p9

> September of 2023. The Respondent's access to parking is on the other side of 152 and is not impeded by the fence.
>
> As a result of the fence, the Applicants claim they can no longer reach the back of 156 to park their vehicles, nor can contractors access the backyard with their vehicles to renovate and repair the building.[2]

An image from Google Streetview® appears below and is dated April, 2019. House number 156 is on the left and 152 First Avenue is on the right. The freshly paved are between the buildings and the further strip to the left and up to the building is the "Disputed Lands" referred to in the court's ruling.

A red line has been drawn to illustrate the approximate location of the property line. It is at about this location where the respondents erected a fence.

What other facts can be gathered from the reasons given in the court's ruling? The applicant owners of the property on the left sought an order from the court that would recognize their right to use the neighbour respondents' side of the "shared laneway" based on a prescriptive easement. They also sought an order that the fence be removed, so that a surveyor could conduct a survey and thereby permit the easement to be registered. The respondents argued

[2] *Ibid.* at paras 1-3

that the requirements for a prescriptive easement have not been met. They also argued that the easement was not required for the reasonable enjoyment of the property.[3]

The proceeding was brought as an application, meaning that the evidence was largely paper based. The *Rules* do permit a "mini trial" on some of the affidavit evidence if it is necessary, but this was not done in this application. The Ruling explained further,

> The Applicants were advised by Halina Tubin [the former owner of #156], who was selling the house on behalf of her mother, that a fence had just been recently erected by the Respondents. The Applicant understood that predecessors in title and their tenants drove along the laneway abutting 152 in order to access the rear of the Applicants' Property and the parking lot that was at the rear of the building.
>
> Ms. Dickinson deposed that she and her husband Dave also understood that to access the rear of their building, they might have to periodically, but regularly, drive on 152. They were told that historically this was not an issue and that the predecessors in title had always done this.
>
> Ms. Dickinson noted that the asphalt associated with the Applicants' property went past the fence toward 152. She found this to be consistent with the area being used for parking. Ms. Dickinson noted that the curb and sidewalk on First Avenue dipped down in front of both properties consistent with a previous use of the laneway by the vendors, their family and tenants. The curb and sidewalk dips down consistently in front of both properties. This dip in the curb was some evidence of historical use, however the inferences I can draw from the dip are limited and ultimately I did not find it persuasive with regard to the issue of continuous use, nor to the issue of reasonable enjoyment.
>
> The Applicants maintain that the newly erected fence prevents their vehicles and vehicles owned by their contractors from accessing the rear of their property. Although a small car could be driven to the back of the property, the Applicant's Mercedes SUV does not fit, nor does her contractor's vehicle. The fence is causing a significant amount of trouble for the contractor and the Applicants. If a vehicle is parked in the laneway, the rear of the property cannot be accessed even on foot.
>
> When there are winter parking bans they are unable to park on the street and there is not enough room at the front of the house to park without obstructing the sidewalk, given the distance between the fence and the laneway.
>
> The distance between the side of the building and the fence is 2.13 meters and Ms. Dickinson's vehicle is 2.15 meters wide. There was no evidence as to whether this measurement includes the side mirrors fully extended, or whether they were retracted at the time of measurement.[4]

The curb cut and "dip" in the sidewalk can be seen in the image above. Ms. Turbin, the former owner of #156 provided an affidavit in which she described her family's use of the property and

[3] *Ibid.* at para 4
[4] *Ibid.* at paras 9-14

the vehicular travel over the Disputed lands by her family and tenants to park in the backyard of the property. She explained that their property was surveyed in 2007 and they discovered that the asphalted area was part of #152 and that it belonged to their neighbours. She also had attached aerial photography from the 1960s showing cars parked at the back of #156.

The respondent owner of #152 also filed an affidavit, mostly disagreeing with the evidence from the Applicants. The court explained,

> The Respondent submitted aerial photos from the City of Ottawa geoOttawa interactive online map. Most of the photos were of poor quality and of little assistance in determining whether a car was parked in the rear or not. Some depicted no cars parked in the rear of the property. A photo from 1965 submitted by the Tubins showed two cars parked in the rear of the property. An aerial photo from 1991 depicts a car parked in the laneway between the two properties.
>
> The laneway is covered with asphalt and gravel from the edge of one building to the edge of the other. The Respondent attested that she and her tenants were always careful not to encroach on the Tubin side of the laneway. The Respondent maintained that the Tubins never claimed a right to her portion of the laneway and would have been physically blocked from doing so by the tree and the porches. I reject the Respondent's evidence that the porches—which were removed in 2007– or the tree at the front of the property—since removed—prevented cars on the 156 side from parking at the rear of 156. The 1965 geoOttawa photo shows two cars parked in the back of the building at a time that the tree and porches were purportedly blocking vehicle access to the back of the yard. I reject the Respondent's evidence on this issue, preferring the photographic evidence submitted in this case and the evidence of Ms. Tubin on this issue.
>
> In the summer of 2023, the Respondent decided to construct a fence along the boundary between 152 and 156 and cut down the tree at the front of 152. No reason was provided for the construction of the fence.
>
> The Respondent attests that the fence does not block the laneway, it remains passable. The Respondent points out that the sales listing for 156 shows the total number of parking spaces as zero. The listing also states that the tenants have street parking permits and do not park on property. The listing also indicates there is potential to develop a 4th apartment in the basement with direct access from the south facing yard.
>
> The Respondent attests that her own research establishes that the Applicants are developers who own a lot of other properties. She attests that the fence was a good idea as the Applicants are intent on radically changing the character and use of the laneway and to interfere with her use of the laneway. She submits photographs of items leaned against her fence, and a photograph of her grass which is flattened and squashed, along with bent small metal partitions which she had installed to protect the grass.[5]

[5] *Ibid.* at paras 38-42

Many affidavits from former tenants of the properties were filed as well - and considered by the court. The test to be satisfied by the Applicants (who bore the burden of proof) was expressed as,

> The Applicants bear the burden of proving that they have used the Disputed Lands in the manner described for 20 years with the acquiescence of 152. The nature of the evidence required to establish such a claim is unequivocal, as there are strong policy rationales not to grant such claims.[6]

That said, the court explained the applicable law as follows:

> The Applicants claim that they have prescriptive easement over the Disputed Lands belonging to the Respondent's property. An easement is a right to cross or otherwise use land that does not belong to you for a specified purpose. The essential features of an easement are set out in *Barbour v. Bailey,* 2016 ONCA 98, 345 O.A.C. 311 in which Roberts J.A. wrote at para 56:
>
> > To make out an easement, a claimant must satisfy the following four essential characteristics of an easement or right-of-way:
> >
> > i) There must be a dominant and serving tenement;
> > ii) The dominant and servient owners must be different persons;
> > iii) The easement must be capable of forming the subject matter of a grant; and
> > iv) The easement must accommodate – that is be reasonably necessary to the better enjoyment of – the dominant tenement.
>
> See also, *Depew v. Wilkes* (2002) CanLII 41823 (ON CA), 60 O.R. (3d) 499 (C.A.), at paras 18-23; *Kaminskas v. Storm,* 2009 ONCA 318, 95 O.R. (3d) 387, at paras 26-28.
>
> The doctrine of lost modern grant is recognized as a method for acquiring a prescriptive easement. It involves requirements in addition to the constituent elements of an easement. *English v. Perras,* 2018 ONCA 649, para 28. In *1043 Bloor Inc., v. 171404 Ontario Inc.,* 2013 ONCA 91, 114 O.R. (3d) 241, Laskin J.A. described the doctrine as follows at para 91:
>
> > The acquisition of a prescriptive easement by lost modern grant rests on a judicial fiction. The law pretends that an easement was granted at some point in time in the past, but that the grant of the easement has gone missing. A prescriptive right emerges from long, uninterrupted, unchallenged use for a specified period of time – in Ontario, 20 years….
>
> In Ontario, prescriptive easements have been abolished with respect to properties registered in the Land Titles system: *Land Titles Act,* R.S.O. 1990, c.L.5, s.51. As a result, the 20-year period must precede the transfer of property into the Land Titles system. In this case the property was transferred to the Land Titles system on August 26, 1996. In order to acquire prescriptive rights, the Applicants must establish that they and their predecessors on title used the strip of disputed land on the laneway continuously, uninterruptedly, openly and

[6] *Ibid.* at para 46

peacefully for at least 20 years prior to August 1996: *Vivekanandan v. Terzian,* 2020 ONCA 110 at para 9, *Pagliaro v. 1823360 Ontario Inc.,* 2023 ONSC 3253 at para 4.

As noted in *English v. Perras, supra,* at para 30, the courts have insisted on clear and unequivocal evidence to establish a prescriptive easement by lost modern grant. There are compelling policy reasons mandating a cautious judicial approach. The recognition of such a claim burdens the servient owner's property, without any compensation: *1043 Bloor Inc.,* per Laskin J.A. at paras 102-104; See also *Ebare v. Winter* (2005) CanLII 247 (ON CA), 193 O.A.C. 174 (C.A.) at paras 27-28. The ready invocation of a prescriptive easement has also been noted as potentially discouraging acts of kindness and good neighborliness; it may punish the kind and thoughtful and reward the aggressor, *Henderson v. Volk* (1982), 35 O.R. (3d) 379 (C.A.) para 21, See also, *Carpenter v. Doull-MacDonald,* 2018 ONCA 521 at para 6.

On the other hand, courts ought also to reasonably protect the dominant owner's reliance interest where the usage has been open and uninterrupted for many years and where the evidence clearly shows that the servient owner has acquiesced in that usage. *1043 Bloor Inc., supra,* at para 105.

As in *English v. Perras, supra,* the outcome of this case should not be viewed as an endorsement of the Respondent's conduct in erecting a fence along the laneway. Since the owners of 152 do not park on that side of their property, the fence does not interfere with parking at 152, just 156. As Justice Trotter noted, this type of behaviour is "not worthy of reward. Quite the contrary." However, in that case, as in this one, it is the use of the property and the conduct of the parties in title during the putative prescriptive period that matters, not that of the present-day owners. *English v. Perras, supra,* para 32.

The doctrine of the lost modern grant provides a property owner with a method of establishing that they have a prescriptive easement over another property The underlying rationale is that owners of the servient property granted a right-of-way, or use, to the owners of the dominant property sometime in the past, but it was not recorded formally on title.

The Respondents argue that the Applicants have not established, on a balance of probabilities, 20 years of peaceful, uninterrupted and continuous use of the laneway. They argue that the right-of-way over their property is not reasonably necessary for the enjoyment of 156 and the scope of the alleged easement is not certain.[7]

As expected, the court then applied the law to the facts and concluded,

There is a dominant and serving tenement in this case.

The properties are not owned by the same parties.

However, I was unable to conclude that the prescriptive easement sought in this case was reasonably necessary for the enjoyment of 156.

[7] *Ibid.* at paras 58-65

In my view, the use of the Disputed Lands is personal to the Applicants rather than an accommodation to their property and thus not reasonably necessary to the use of the property. See: *Pagliaro v. 1823360 Ontario Inc.,* 2023 ONSC 3253 at para 15, *Hodkin v. Bigley,* 1998 CanLII 6259 (ON CA) para 11 and 12. The fence is entirely on the Respondent's property line and does not encroach upon the Applicants' property.

The Applicants can park at the front of 156. Smaller vehicles can drive to the back and park. The ability to drive larger vehicles to the rear of the property is not an inherent requirement for the reasonable enjoyment of the property, but to the personal use of the Applicants.

While it is somewhat inconvenient to not be able to access the rear of the property with larger vehicles, it is not reasonably necessary to the use of the property. A larger vehicle can park at the front of 156. The materials required for reparation of the building can be carried to the rear of the building. While this is not ideal, and may incur greater costs to the Applicants, it is not an inherent requirement to the reasonable enjoyment of the property that these vehicles be able to park at the rear of 156. Ms. Dickinson also attested that her Mercedes SUV is 2.15 meters wide. The evidence is that the distance from the laneway to the fence is 2.13 meters wide. I have no evidence as to whether this measurement included the mirrors of the SUV being extended, or whether they are retractable. I take judicial notice of the fact that retractable mirrors can make a car narrower. Given the lack of evidence on this subject, I cannot speculate as to how much narrower retraction of the mirrors makes a Mercedes SUV, or whether Ms. Dickinson has retractable mirrors, or whether her mirrors were retracted at the time of measurement of the vehicle. I suspect retractable mirrors are standard fare in a Mercedes SUV. However, as in *English* v. *Perras*, *supra,* I note that the burden is on the Applicant to establish facts which would favour the granting of an easement. In that case the issue was whether the Applicant's retaining wall was necessary, as it restricted the width of the laneway. The Applicants failed to establish that the wall was necessary.

Given that whether the mirrors are retractable or not has not been established, I am not satisfied that it would be impossible for Ms. Dickinson to drive her SUV to the rear of the building. In evidence is a photograph of a smaller vehicle parked at the rear of the building, so it is apparent that a smaller car can traverse the laneway.

As I write this decision, it is winter in Ottawa and the city has experienced a massive snowfall. The lack of street parking during snow clearing periods is a reality in heavily populated neighbourhoods like the Glebe. However, the lack of street parking does not prevent the Applicants from parking smaller vehicles at the rear of the property, or from parking a larger vehicle in the front.

I turn now to the issue of whether the Applicants have established that they have traversed over the Disputed Lands for 20 years in an open and uninterrupted fashion prior to August 26, 1996 and whether the evidence clearly shows that the owners of 152 or their predecessors in title acquiesced in that usage. *1043 Bloor Inc., supra,* at para 105.

After assessing all of the evidence in this case, I am not satisfied that the use of the laneway to access the rear of the property for tenant parking was open and uninterrupted during the

> prescriptive period. The evidence establishes that the backyard was at one time used for tenant parking. However, when the property was sold it was advertised as having no parking available and the listing indicated that tenants parked on the street. I take judicial notice of the fact that tenant parking for this home in the Glebe would add significant value to the property. If the property had been historically and regularly used for parking, I would expect that this would have been featured in the sales listing. Ms. Tubin does not indicate why the property was listed as having zero parking, with street parking available for tenants. This is not conclusive evidence, as the home was sold outside of the prescriptive period, but it is some evidence which is relevant to the historical use of the rear portion of the property. Likewise, the existence of the clothes line and the garden box in the rear of the property, while not conclusive, do tend to suggest that the rear area of the property was historically not used for parking but for gardening and doing laundry. And while I do not accept all of the evidence of every tenant and Ms. Montgomery, the neighbour, I do accept some of their evidence, and it persuades me on a balance of probabilities, when I consider the evidence as a whole, that the rear area of 156 was not used for parking on an open and uninterrupted basis during the 20-year prescriptive period.
>
> Further, while I accept that there would be service vehicles which had to periodically access the backyard, this was on an occasional basis, and not, on the evidence, on an uninterrupted basis for 20 years during the prescriptive period.
>
> On the other hand, I am satisfied, based on all of the evidence, that Leon Tubin and others, continually parked their vehicles in the front spot next to 156 on an open and uninterrupted basis for over 20 years during the prescriptive period. Further, I am satisfied on a preponderance of the evidence that in parking there, the residents of 156 likely encroached on the Disputed Lands in entering and exiting their car.
>
> If a prescriptive easement were to be found at all in this case, it would be only on this narrow strip of the Disputed Lands at the front of 156.[8]

What emerges from this Ruling is the sharp distinction between convenience and necessity. Claiming a prescriptive easement based on convenience to the dominant tenement (it would be “nice” to have) is a non-starter. Instead, a prescriptive easement, based on it as being essential to the enjoyment of the dominant tenement is the litmus test. The court summed it all up when, near the end of the Ruling, we read,

> The requirement that an easement be necessary, not merely convenient, for the reasonable enjoyment of the property is strictly construed by the courts in the balancing of interests between the dominant and servient tenement. *English v. Perras, supra*. The Applicants have not provided evidence which sufficiently satisfies me that this test has been met, nor that the use of the rear area of 156 was used for parking in the manner required for 20 years such that it would require driving over the Disputed Lands. The Application is therefore dismissed.[9]

[8] *Ibid.* at paras 66-78
[9] *Ibid.* at para 81

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

A discussion of prescriptive easements can be found in Chapter 5 of *Principles of Boundary Law in Canada*, and beginning at page 138.

FYI

There are many resources available on the Four Point Learning site. These include self-study courses, webinars and reading resources – all of which qualify for *formal activity* AOLS CPD hours.[10] These resources are configured to be flexible with your schedule, range from only a few hours of CPD to a whole year's quota.

Course: *Survey Law 2*

Survey Law 2 builds on *Survey Law 1* with a special emphasis on evaluation of evidence and special circumstances encountered in problematic and natural boundaries. This course will be taught online Wednesday evenings by Izaak de Rijcke, starting January 7, 2026. For more information, consult the syllabus. Please go to Four Point Learning to register.

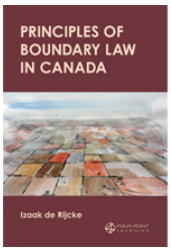
Course: A Practical Guide for Surveyors in Making *Boundaries Act* Applications

The original presentation delivered by Izaak de Rijcke and Ken Wilkinson at the South-Central Regional Group of AOLS meeting on October 23, 2025 has been reconfigured as a 3-part course.[11] Cadastral surveyors will learn about the legal framework, procedural steps, practical requirements, and best practices for preparing and submitting applications under *Boundaries Act* as professionally and cost-effectively as possible.

[10] Please note that the designation of CPD hours is based on the estimated length of time for the completion of the event. The criteria used are those set out in GeoEd's *Registered Provider Guide* for Professional Surveyors in Canada. Other professions may qualify under different criteria. References to AOLS are to its Continuing Education Committee. Elsewhere in Canada, please confirm your eligibility for claiming CPD hours.

[11] This course qualifies for 5 *Formal Activity* AOLS CPD hours.

Principles of Boundary Law in Canada



This comprehensive treatment of the principles of boundary law lies at the intersection of law and land surveying. Although the textbook has its foundation in the law of real property in Canadian common law jurisdictions, it is intended as a resource which bridges two professions. For real estate lawyers, it connects legal principles to the science of surveying and demonstrates how surveyors' understanding of the parcel on the ground has helped shape efficient systems for property demarcation, conveyancing and land registration.

For land surveyors, it provides a structure and outlines best practices to follow in the analysis of boundary retracement problems through the application of legal principles. This textbook is not meant to be used as a "how to" guide for the answering of specific questions about boundary problems. Rather, it is intended to serve as a reference tool to support the formation of professional opinions by clarifying the framework for evaluating boundary and survey evidence.

See *Principles of Boundary Law in Canada* for a list of chapter headings, preface and endorsements. You can mail payment to: ***Four Point Learning*** (address in the footer of the first page of this issue of *The Boundary Point*) with your shipping address **or** purchase online. (*NB: A PayPal account is not needed.*)

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