



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 impact your work.

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The elements of the test for an easement to validly exist at law are well established. Accordingly, when all of the elements were found to be present and satisfied for a prescriptive easement claimed by a municipality for a watermain, the land owner's request to a court that the watermain be removed was dismissed. The owner appealed. At the appellate level, the owner raised a novel argument: a municipality has a statutory power of expropriation and therefore it can easily resort to exercising this power, rather than claim an easement by prescription. The owner argued that the municipality must demonstrate that the easement is necessary and cannot be acquired by any other means. The appeal was dismissed, but the implications for property owners as a result may well deserve further discussion and analysis.

Is the Test Different for Acquiring an Easement by Prescription by a Public Authority having an Expropriation Power?

Key Words: *easement, prescription, expropriation, necessity*

In *Paleshi Motors v. Woolwich (Township)*,¹ it was confirmed that the Township of Woolwich had installed a watermain on land which came to be owned by Paleshi Motors. The Applicant was using its land as an auto recycling yard. The circumstances were described by the Court:

Based on Township records, including minutes of the Public Works Committee Meetings on May 15, 1979 and March 4, 1980, a Construction Drawing dated May 31, 1979 and consultation with an engineer with the successor engineering firm responsible for preparation of the Construction Drawing, it would appear that the watermain was installed on the Paleshi property between July 1979 and March 1980.

¹ *Paleshi Motors v. Woolwich (Township)*, 2019 ONSC 4388 (CanLII), <http://canlii.ca/t/j1kbn>

From the Minutes of the Public Works Committee Meeting held on June 19, 1979, it is apparent that the Township was aware that the watermain, when constructed, would be on land which was not owned by the Township. The following is an excerpt from those Minutes:

The construction of the proposed watermain loop from High Street north, crossing the railway property in Elmira, was discussed with the Engineer. His report suggested that the extension of this watermain go west on High Street, from George Street, then north through lands which appear to be a portion of Bolender Park and across the railway right-of-way. Councillor Hill indicated that the lands in question between the westerly limit of High Street and the railway tracks were privately owned and not owned by the municipality. Under these circumstances, the Clerk was instructed to investigate the ownership of these lands and report back to the Committee.

The Township has no record of the outcome of the investigation that the Clerk was instructed to undertake. After an extensive search, no report to the Public Works Committee has been found. No evidence was presented from any of the individuals who owned Lot 21 prior to its conveyance to Paleshi Motors.²

The exact location of the watermain – or where it might appear on a survey plan - is perhaps not important for readers. The site can be viewed in Figure 1 below and a fire hydrant appears in the foreground of the image.



Figure 1: Paleshi Motors property in Woolwich Township³

² *Ibid.*, at paras. 7 to 8

³ From GoogleMaps® and Streetview® All rights reserved.

The Court continued:

Since it was installed, the watermain has been used and maintained by the Township without objection until the time the shares in Paleshi Motors were acquired by Rattasid.

In a Site Plan Agreement dated June 30, 1988, registered on July 8, 1988, between Paleshi Motors and the Township, reference is made to Proctor and Redfern drawing A1-86981-G1 dated November 1986. At the time, Proctor and Redfern were the consulting engineers for Paleshi Motors. The drawing references a 150 mm watermain appearing to extend onto Lot 21 and in particular on Part 1 of Plan 58R-2812.

The Paleshi property was converted to the *Land Titles* registry system on September 16, 2002.⁴

The effect of conversion to *Land Titles (Qualified)* is to grandfather whatever rights may have been acquired before, and matured on, the date of conversion - but no further rights arising through adverse possession of prescription can be acquired going forward. When Paleshi brought an Application before the Court to require the removal of the watermain by the Township, the Township cross-applied for an Order granting it an easement for the watermain on the basis of prescription. The Court explained the legal principles:

To establish a prescriptive easement, the party claiming the easement must establish the four essential characteristics of an easement which are:

- a) there must be a dominant and servient tenement;
- b) the easement must accommodate the dominant tenement;
- c) the dominant and servient owners must be different persons; and,
- d) 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 claimant must also establish that its use was “as of right” as opposed to by permission.⁵

In finding an easement to exist in favour of the Township, the Court also considered some of the underlying policy considerations:

There are a number of policy considerations with respect to prescriptive easements including:

- a) courts should tread cautiously before finding a prescriptive easement because to do so creates a burden on the servient owner’s land without compensation;

⁴ *Paleshi Motors v. Woolwich (Township)*, 2019 ONSC 4388 (CanLII) at paras. 11 to 13

⁵ *Ibid.*, at paras. 19 – 20 (citations omitted)

- b) courts should be cautious about finding a prescriptive easement because to readily grant such an easement risks discouraging acts of kindness and good neighbourliness and may punish the kind and thoughtful neighbour while rewarding the aggressor;
- c) courts ought reasonably to protect the dominant owners reliance interest where the usage has been only open and uninterrupted for many years and the evidence clearly shows the servient owner has acquiesced in that usage;
- d) courts should not propound rules that rewarded dominant owners surreptitious behaviour and that discourage neighbours from approaching one another about potentially litigious issues.⁶

These considerations were acknowledged, and the Court concluded:

I am mindful of the policy concerns expressed by the Court of Appeal in *1043 Bloor* about not finding a prescriptive easement too readily. I recognize that a finding of a prescriptive easement in favour of the Township creates a burden on the Paleshi property without compensation. However, I find that the burden on the Paleshi property is minimal. The watermain is located at the very back of Lot 21 which is zoned Open Space. In my view, the existence of the water main, at most, minimally impairs Paleshi Motor's use and enjoyment of the property. On the other hand, the watermain is a municipal service which has been in place for almost 40 years. It was not installed surreptitiously. It has been openly maintained by the Township. Paleshi Motors is not a thoughtful neighbour which was taken advantage of by the aggressor Township.⁷

Paleshi Motors appealed to the Court of Appeal for Ontario. The Court repeated many of the same facts outlined in the trial decision. In *Paleshi Motors Limited v. Woolwich (Township)*,⁸ the Court responded to the argument that the owners did not know of the watermain's existence:

A finding that the owners acquiesced in the use of the property by Woolwich goes to the openness of that use. It does not necessarily determine whether the use was "as of right", in the sense the owners had not permitted the use. The application judge found Paleshi Motors had failed to "prove" it had permitted Woolwich to use the property for the purposes of the watermain (para. 33). Paleshi Motors argues the application judge wrongly reversed the burden of proof. It submits Woolwich had to prove the absence of any permission by the owners of the Paleshi property. Woolwich counters with the submission the application judge did not reverse the burden of proof but, having found acquiescence by the Paleshi property owners, looked to the owners to point to evidence indicating that

⁶ *Ibid.*, at para. 24

⁷ *Ibid.*, at para. 34

⁸ *Paleshi Motors Limited v. Woolwich (Township)*, 2020 ONCA 625 (CanLII), <http://canlii.ca/t/j9x0t>

acquiescence was explained by permission having been given for the use of the property by Woolwich.⁹

A further point was made in the appeal:

Paleshi Motors also raises a novel legal argument. It submits the requirement the easement accommodate the dominant tenement must be given a special meaning when the dominant tenement is a public authority. Paleshi Motors argues that if a public authority, like Woolwich, is claiming the easement, Woolwich must demonstrate that the easement is necessary, in the sense there is no other way to acquire the interest in the land other than by way of an prescriptive easement. Given the land acquisition powers of most public authorities, this submission would bring an end to prescriptive easements in favour of entities like Woolwich. Paleshi Motors acknowledges as much in its supplementary factum, at para. 21:

Such an easement should never be necessary in the case of a public body with the power to compulsorily acquire the necessary easement while protecting private property rights.

Setting aside for the moment the argument based on Woolwich's status as a public body, Woolwich established the requirement that the easement accommodate the dominant tenement. The installation of the loop in the watermain improved water services for affected properties along the adjoining street. In doing so, it enhanced the enjoyment of that property by the owners and Woolwich: *Mihaylov v. 1165996 Ontario Inc.*, [2017 ONCA 116](#), at para. 81. There is an obvious and direct connection between the improved water services and the enhanced enjoyment of the properties benefitting from those improvements.

We must also reject the submission that, because Woolwich is a public authority and could have expropriated the property, it should not be able, as a matter of law, to claim a prescriptive easement. Nothing in the case law offers any support for this proposition. The lay of the statutory land is also against Paleshi Motors. As counsel for Woolwich observed, to the extent the *Municipal Act* speaks to the issue, it offers support for the power of a municipality to acquire prescriptive easements in the same way as other legal entities: see *Municipal Act*, 2001 S.O. 2001, ss. 6, 8, 9. Furthermore, the legislature can, and has, when it deems it appropriate, expressly foreclosed or limited the acquisition of property rights by prescription: see [Land Titles Act](#), R.S.O. 1990, c. L.5, s. 51(2). The legislature has not acted to prevent entities like Woolwich from acquiring property rights by way of prescriptive easements.¹⁰

⁹ *Ibid.*, at para. 17

¹⁰ *Ibid.*, at paras. 20 to 22

The decision in *Paleshi* is a helpful reminder of the limit courts will place on their own law-making activity. The policy objective described by the appellant was attainable through legislation – yet unenacted – and not through the courts. For real estate lawyers in Ontario, the decision is an affirmation of the basic principles of easements acquired by prescription prior to conversion. For land surveyors, the decision speaks to the importance of identifying infrastructure below ground that may give rise to a claim against an owner’s title. What surveyors will also face is the problem of how wide such an easement might be. Is it the width of the watermain itself? In these circumstances does it include the strip of land on both sides of the watermain that may be necessary for future maintenance or replacement? Neither decision from the courts offered any guidance in how to answer these questions.

Editor: Izaak de Rijcke

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

Chapter 5, *Boundaries of Easements* includes, at page 138 ff, a discussion on easements by prescription and, later, the difficulty that can exist in defining the spatial extent of an easement arising through prescription.



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