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 impact your work.

The four-part test set out in *Re Ellenborough Park* serves as the core requirement for any easement to exist at common law in many jurisdictions of Canada. One of the four elements is that an easement must accommodate the dominant tenement. In a recent appellate court decision, this part of the test was considered and, since the court below had misapprehended the evidence on this element, the decision was set aside. Reviewing the two decisions in this matter allows readers to benefit from a deeper understanding of what it means that an easement must accommodate the dominant tenement.

What does it mean, "An Easement must accommodate the Dominant Tenement"?

Key Words: *easements, prescription, laneway*

Easements and rights of way[1] play an essential role in real estate law in Canada. These are means by which passing over another person's land to reach one's own parcel may occur, without it being deemed a trespass. In some Canadian jurisdictions, adverse possession and prescription claims are permitted, when seen as necessary for access, use and enjoyment of a (dominant) parcel of land to be enjoyed. Owners of such dominant tenements (as they are

[1] In this issue, the expressions "right of way" and "easement" are used interchangeably. Although an easement is, in essence, a right over another's land, any right claimed as an easement must satisfy the common law definition as found in *Re Ellenborough Park*, [1956] Ch 131. As a convenient reminder, in that English decision, the court laid out the essential characteristics of an easement as follows:

- There must be a dominant and a servient tenement;
- The easement must accommodate the dominant tenement, that is, be connected with its enjoyment and for its benefit;
- The dominant and servient owners must be different persons;
- The right claimed must be capable of forming the subject-matter of a grant.

Courts in Canada have broadly adopted these characteristics as necessary elements for an easement to legally exist.

known) must be careful to distinguish between a claim to land or an easement that would be "nice to have," as opposed to one that is necessary and essential to the use of the land.

In *Vivekanandan v. Terzian*,[2] the Court of Appeal for Ontario reversed and set aside an earlier decision in *Terzian v Vivekanandan*.[3]

The dispute involved neighbouring residential properties in Toronto, in particular a two foot strip that ran along the driveway and backyard and was shown on surveys and descriptions of the property as belonging to the applicant at trial who sought a declaration that her title was unencumbered by any possessory claim by the respondent.[4] The decision below had included a copy of a draft survey plan to illustrate the property in dispute. In Figure 1, the blue strip was the subject of an adverse possession claim and the ochre shaded portion was the subject of a prescriptive easement claim. The focus of this issue of the Boundary Point will be on the prescriptive easement claim to the strip of land running along the driveway.

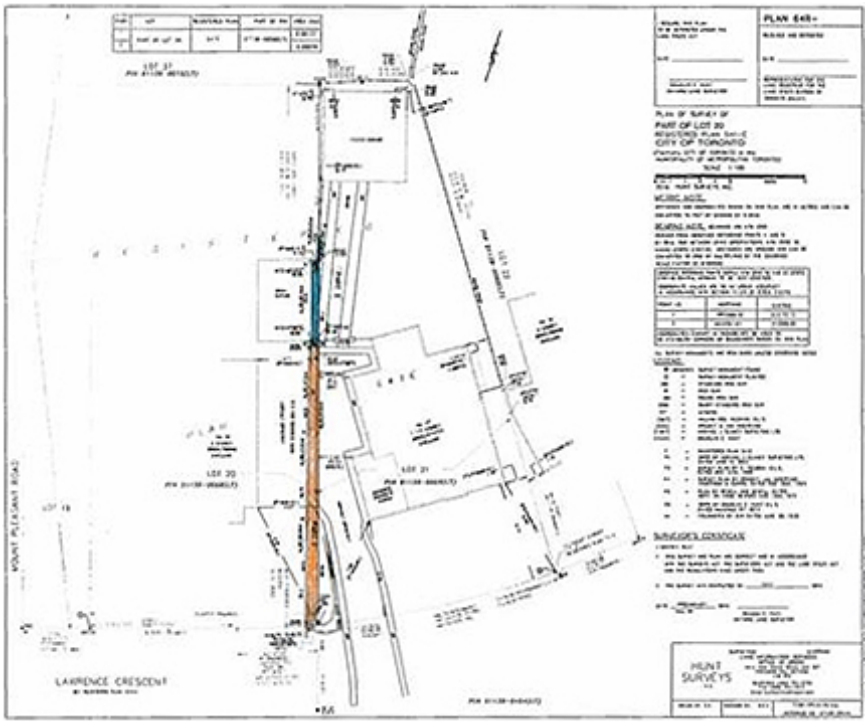

Figure 1: Draft survey plan to illustrate claims made by the Applicant, Terzian[5]

The disputed area was described by the application judge as follows:

[2] *Vivekanandan v. Terzian*, 2020 ONCA 110 (CanLII), http://canlii.ca/t/j56tm

[3] *Terzian v Vivekanandan*, 96 RPR (5th) 228, 2018 ONSC 4052 (CanLII), http://canlii.ca/t/hss5s

[4] There was also a claim by Vivekanandan to the disputed area.

[5] *Ibid.*, at Schedule "A"

> The disputed land runs north-south between the two properties (the "Disputed Area") and is divided into two parts: one part is alongside the driveway of 47 Lawrence (the "Driveway Area"), and the other part is in the backyard of 47 Lawrence (the "Backyard Area"). The entire Disputed Area is shown on surveys and descriptions of the properties as belonging to 45 Lawrence.
>
> Vivekanandan seeks a declaration that they have a right to use both parts of the Disputed Area, and that they have acquired such rights through their predecessors in title by adverse possession, easement, or estoppel. Terzian seeks a declaration that her title to 45 Lawrence is unencumbered by any possessory clam by Vivekanandan.
>
> The Reference Plan for 47 Lawrence shows the Disputed Area as clearly as any descriptive words. On this plan, the Driveway Area is shaded in orange and the Backyard Area is shaded in blue. The Reference Plan forms Schedule "A" to these reasons for judgment.
>
> For the purposes of this judgment, the Driveway Area under consideration is only the portion that lies north of the island in between the two properties. That island begins at the street on the south end and runs northward to a point, whereupon the western edge of the 47 Lawrence driveway veers further to the west. The island is roughly shaped like an elongated triangle, and is covered with grass and shrubbery. The boundary between 45 and 47 Lawrence runs somewhere down the middle of the island.[6]

The applications judge was presented with evidence of five predecessors in title going back several decades to cover the time period prior to the date of conversion to Land Titles and came to the conclusion that a prescriptive claim had been established:

> The only conclusion to be drawn from the evidence of the occupants of 47 Lawrence from 1980 to the Conversion Date is that they have demonstrated their use and enjoyment of the Driveway area as a form of right-of-way under a claim of right – i.e. not by permission of the owner of 45 Lawrence. This use was continuous, uninterrupted, open and peaceful. The criteria for a prescriptive easement over the Driveway Area from the northern end of the grassy island to the gate separating the 47 Lawrence driveway from the backyard have been made out[7]

An appeal followed. The Court of Appeal summarised the decision of the lower court as follows:

> The appellants appeal from the application judge's declaration that the respondents enjoy a prescriptive easement over the portion of the two-foot wide strip that abuts the respondents' driveway and ownership by way of adverse possession over the portion of the disputed strip that runs into the respondents' backyard and is enclosed by a gate.

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[6] *Terzian v Vivekanandan*, 96 RPR (5th) 228, 2018 ONSC 4052 (CanLII), http://canlii.ca/t/hss5s at paras 2-5

[7] *Ibid*. at para 34

> The application judge found that the respondents' predecessors in title to 47 Lawrence Crescent had acquired a prescriptive easement over the portion of the disputed strip that abuts their driveway through over 20 years of open and continuous use without the permission of the former owners of 45 Lawrence Crescent.
>
> With respect to the backyard portion of the strip, the application judge determined that the predecessors in title to 47 Lawrence Crescent had erected a gate which effectively excluded the former owners of 45 Lawrence Crescent from entering the backyard without permission.
>
> In particular, the application judge relied on what he said was the evidence of the former owner of 45 Lawrence Crescent that he entered the disputed backyard area only with the permission of the owners of 47 Lawrence Crescent.[8]

The appeal court noted that the applications judge had correctly set out the essential elements that those seeking a declaration over the disputed driveway area had to prove. These are well known as:

(i) there must be a dominant and a servient tenement;
(ii) an easement must accommodate the dominant tenement;
(iii) dominant and servient owners must be different persons; and
(iv) a right over land cannot amount to an easement unless it is capable of forming the subject matter of a grant.

This issue of *The Boundary Point* is confined to a consideration of the one element of four that are necessary for an easement to exist. The Court explained this:

> The appeal on this issue turns on the application judge's consideration of the second factor in determining whether a prescriptive easement arose, that is, whether the alleged easement accommodated the dominant tenement. In considering whether the alleged easement accommodated the dominant tenement, the application judge had to determine whether the easement over the disputed driveway area was "reasonably necessary" to the better enjoyment of 47 Lawrence Crescent, the dominant tenement. While the application judge made this determination in relation to the backyard area, he failed to determine whether the alleged easement over the disputed driveway area was "reasonably necessary" to the better enjoyment of the respondents' property. It therefore falls to this court to do so.[9]

In Figure 2, the driveway area beside the residence of Terzian is shown.

[8] *Vivekanandan v. Terzian*, 2020 ONCA 110 (CanLII), http://canlii.ca/t/j56tm at paras 2-5
[9] *Vivekanandan v. Terzian*, *supra*, at t paras. 10 to 12

Figure 2: Appear as Schedule "B" to the Ontario Superior Court reported decision[10]

In other words, the question, "What does 'reasonably necessary mean'?" was asked by the appellate Court as it explored the factors necessary to understanding how this element of the four-part test must be met.

> What does "reasonably necessary mean"? There is a distinction between what is meant by "necessity" and "reasonably necessary". A prescriptive claim need have no element of "necessity", namely, that use of the disputed portion is required for the owner of the dominant tenement to use his or her own land: *Caldwell v. Elia*, [2000] O.J. No. 661, at paras 13-14. However, there must be a connection between the easement and the dominant tenement, as opposed to a personal right. A personal benefit or an advantage to the owner of the dominant tenement does not rise to the level of an accommodation reasonably necessary for the better enjoyment of the dominant tenement. See: Depew, at para. 20; *Barbour*, at para. 58; *Caldwell*, at para. 19. What is "reasonably necessary" is fact specific and will depend on the nature of the property and the purpose of the easement. See *Depew*, at paras. 19, 24; *Barbour*, at para. 57[11]

The application judge had found that the backyard portion of the disputed strip "cannot be said to be reasonably necessary for the enjoyment of 47 Lawrence." However, does this does not automatically entail a similar finding for the driveway. The evidence concerning the historic use of the disputed driveway area showed that the use was mainly for the unloading of things from

[10] *Terzian v Vivekanandan*, at Schedule "B"
[11] *Vivekanandan v. Terzian*, *supra*, at para 14

cars and involved swinging doors out over the disputed area and stepping out of cars onto that area as one needs to do to unload small children, groceries or other items. This was viewed by the appellant court as falling short of continuous or permanent. The use was viewed as sporadic and time specific and was seen as very similar to the use in another case.

> This was virtually the same kind of use that this court in *Hodkin v. Bigley*, 20 R.P.R. (3d) 9 (C.A.), confirmed was not reasonably necessary for the better enjoyment of the dominant tenement. In that case, the disputed strip also ran between the parties' driveways. The prescriptive easement claimant complained that the erection of a fence on the disputed strip prevented her from using her driveway and accessing her garage. The trial judge's rejection of this position was upheld by this court for the following reasons, at paras. 11 and 12:
>
> > I see no error in the trial judge's finding that "[t]he four or four and a half feet that the defendant owns ... is not critical or even significant to the enjoyment of the house by the owners of Number 11." The appellant still had substantial use of her driveway even after the respondent's land was fenced off.
> >
> > The benefit that accrued to the appellant before the erection of the fence facilitated the appellant's parking but I agree with the trial judge that it cannot be said to accommodate the dominant tenement in such a way as to justify the creation of an easement. I see no merit in this ground of appeal. [emphasis added]
>
> In *Caldwell*, at para. 16, referring to *Hodkin*, this court described this kind of use as personal to the owner of the dominant tenement:
>
> > The use asserted in [*Hodkin v. Bigley*] involved the plaintiff swinging the door of her car out over the defendant's land and her stepping out of the car on to that same land. This use would be personal to the plaintiff rather than an accommodation to her property and thus not 'reasonably necessary' to the use of the property … [emphasis added][12]

It is this final distinction between accommodation to individuals compared to accommodation to the property that was critical to the appeal court's finding that the application judge erred in finding that criteria for a prescriptive easement had been met. As such, there was no need to look at the question of neighbourly accommodation. Easement rights are property rights, they run with the land and may be found where such rights are reasonably necessary accommodation for the property. This is distinct from something which is personally convenient.

[12] *Ibid.*, at paras 17-18

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

Survey depiction of easements is addressed in Chapter 5: *Boundaries of Easements* which also includes a broad discussion on the formation of easements.

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