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Real Estate

You can still claim prescriptive easement, if you can prove it

By **Ray Mikkola**

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(August 8, 2018, 8:58 AM EDT) -- The abolition of the creation of prescriptive easements created by the conversion of properties in Ontario into the *Land Titles* system has not resulted in the disappearance of such claims. Such claims may be made against the owner of any "Land Titles Conversion Qualified" property, by reason of the qualification in this regard as expressly set out on the parcel register, provided that the claim "crystallized" prior to the conversion. A recent Court of Appeal decision sheds light on the evidentiary requirements to make such a claim.

English v. Perras 2018 ONCA 649 involved a dispute between adjoining residential owners respecting a 14-foot wide strip of land between their houses. The strip consisted of two abutting driveways over which no mutual easement had been expressly created. The Perrases erected a fence down the centre of the strip of land just inside their property line. Due to a retaining wall at the front of the neighbouring house which narrowed their driveway, the neighbours were unable to use their driveway to access their garage at the rear of their property.

The Perrases appealed the application judge's finding that their neighbour had made out a case for a prescriptive easement over their driveway and had therefore ordered the fence to be removed. In allowing the appeal, the Court of Appeal made several important findings as follows:

- A surveyor's conclusion from 1980 indicating his opinion confirming the existence of a mutual right-of-way could not be relied upon due to the absence of clear evidence for the basis of his conclusions. The Court of Appeal found that the surveyor's opinion, accordingly, was "worthless".
- An agreement for a term of 21 years less a day with respect to the mutual use of the driveways (which referred to a "right of way") had been executed in 1980 by predecessors in title to both properties and had been registered on title to both properties. The Court of Appeal found that the agreement did not evidence an existing right-of-way but merely evidenced that the use was not as a matter of right and was therefore fatal to the applicant's case. It reasoned that if it had been signed to evidence a pre-existing right-of-way "it would make no sense to enter into an Agreement that limited its operation to 21 years". Whereas the application judge found that the agreement did not "wink out" the pre-existing right to a prescriptive easement, the Court of Appeal held that it was evidence that no such rights had ever been created.
- The application judge had found that the retaining wall was practically necessary and could not be removed based on the *absence* of evidence from either side regarding these issues. She therefore concluded that the prescriptive easement was necessary to the enjoyment of the neighbour's property. The Court of Appeal held that it is up to the party claiming the prescriptive easement to demonstrate that the prescriptive easement is reasonable necessary. The neighbour's failure to do so put them in the same position as if they had erected the retaining wall for aesthetic reasons after the erection of the fence by the Perasses, in which case the neighbours would be "hard-pressed to argue that the fence must come down."

The Court of Appeal found no evidence that either owner used the other portion of the driveway as a matter of right but merely on the basis of permissive use. It held that the character of the prescriptive use as "legal" is central in the analysis of a prescriptive use claim. The applicant needed to show that predecessors in title had used the other driveway "as a matter of right" [para 36]; that an affidavit demonstrating long use of the adjoining driveway nevertheless failed to shed any light on how a predecessor owner "regarded this situation from a legal point of view" [para 37]; and that the record "suggests that both owners were unsure of their respective rights" [para 40].

This case is authority for the proposition that it is not merely sufficient to provide evidence of use for the full period of 20 years prior to the conversion of a property into *Land Titles*. Such use must be made as a matter of right and not merely as a result of parties acting as "good neighbours" in permitting incursions by the other party.

The conclusions of a surveyor in this regard should be the subject of inquiry as to their factual and legal bases. Any agreement setting out or referencing a use must, if it is intended to memorialize existing rights, clearly indicate that new rights are not being created with its execution, and any agreement confirming existing rights is not subject to be invalidated by reason of exceeding the 21-year rule imposed by s. 50 of the *Planning Act*.

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