

THE GR COURT DOCKET

May 1, 2019

Reduction of Right-of-Way Denied

By Stephen Thiele

Founded in the 1920s, Gardiner Roberts LLP has grown to become a strategically placed mid-sized business law firm with a diverse client base which includes two of Canada's largest banks, several medium to large-sized municipalities, agencies, boards and commissions and other government entities, high tech and software companies, real estate developers, lenders and investors.

A number of our lawyers have enjoyed in-house corporate positions and been appointed as board members of tribunals or as judges.

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Rights to the use of land can come in various forms.

For example, a person can either be an owner in fee simple and have absolute rights of use to an entire parcel of land, or a person can have a qualified right of use to or over all or part of a parcel of land as a lessee, licensee or grantee of an easement or right-of-way.

In connection with an easement or a right-of-way, such rights are not easily disturbed by a court where the easement is registered on title and there is evidence that the easement is being used.

In the recent case of *Medeiros v. Baldasarra*,¹ the court once again demonstrated that rights granted to a dominant landowner under a registered easement cannot be easily displaced or restricted.

Relevant Facts and Arguments

The applicants in the case are the owners of a piece of land in Georgina, Ontario.

The land fronts onto Lake Simcoe and is subject to registered easements in favour

of 12 dominant lands over the entire property that were granted between 1969 and 1972.

The owners of the dominant lands have used the right-of-way since that time and have contributed to its maintenance.

A shed, sitting on a concrete pad, encroaches on the right-of-way. However, none of the dominant owners have complained about its existence. In essence, the shed does not prevent the dominant owners from using the easement to access the beach for launching boats or for bathing, as expressly granted.

But the applicants wanted to further restrict the easement by reducing it to a 10-foot wide corridor that runs along the western boundary of the property and to part of the northern boundary, along the shoreline, for boat access.

The applicants submitted that their proposal would still enable the dominant owners to use the right-of-way, as granted, without substantially impacting its use.

The dominant owners who responded to the application contended, among other grounds, that the applicants did not propose a specific plan or need for the use of their land to justify the restriction of the easement rights.

They also argued that the 10-foot wide corridor and proposed use of part of the northern boundary along the shoreline failed to properly allow vehicles and pedestrians to safely use the right-of-way or to provide sufficient space for the turning of a vehicle to properly launch a boat (a use that was expressly granted in the registered easement). Accordingly, the applicants' proposal did substantially impact on the use of the easement.

The Court's Decision

The court ruled in favour of the dominant landowners.

Based on *Wiedrich v. de Koning*,² a court, when deciding whether an encroachment results in a substantial interference with the use of a right-of-way, must take into account the terms of the grant and the nature of the encroachment.

While the circumstances of each case will govern, a dominant owner is entitled to every reasonable use of a right-of-way for its granted purpose. Accordingly, the significance of an encroachment will depend on its impact on that reasonable use.

The test is one of convenience.

In this case, the applicants had failed to explain why a reduction, discharge or vacating of the expressly granted right-of-way was being sought or was needed.

The court found that the application was unnecessary because the applicants showed no

proposed use for the right-of-way which would encroach on the dominant owners' use and dismissed it.

In *obiter*, the court further held that even if an order in favour of the applicants could be made in the circumstances, the application should be dismissed because there was insufficient evidence to permit the court to determine if the proposed restriction would not substantially impact the rights of the dominant owners.

Representation by GR

James Cook, a partner and dispute resolution lawyer at Gardiner Roberts LLP, represented two of the dominant landowners who opposed the application.

James was assisted with the legal analysis of easement rights by Stephen Thiele, a partner and the Director of Legal Research at Gardiner Roberts LLP, and Madelena Viksne, a junior associate in the dispute resolution group at Gardiner Roberts LLP.

1 2019 ONSC 2682

2 2014 ONCA 736

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