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'Tortuous' property law section needs legislative adjustment

Appeal court judges find wording of law 'virtually incomprehensible'

A three-judge panel of the Ontario Court of Appeal has called the wording of a section of the Ontario Real Property Limitations Act "virtually incomprehensible" and "tortuous at best."

In a decision released in late April, Justice Robert Blair noted that the wording of section 31 of the Real Property Limitations Act is essentially the same as that of the 1832 Prescription Act of the United Kingdom.

The appeal court noted that the British law "has long been disparaged."

Both the Ontario and British laws deal with the process of acquiring property rights such as squatter's rights by uninterrupted use over a long period of time.

Justice Blair referred to the 1966 U.K. Law Reform Commission, which concluded that the "Prescription Act 1832 has no friends. It has long been criticized as one of the worst drafted Acts on the Statute Book."

Despite this, the 177-year-old wording of section 31 remains in force in Ontario. It contains only one sentence, but is an incredible 186 words long.

The unusual judicial swipe at a piece of Ontario legislation appears in an appeal decision involving a dispute over a shared driveway.

Larry and Joan Storm and John Kaminskas owned adjacent homes on Kitchener St. in Niagara Falls. The two houses were separated by a narrow, paved driveway on the Kaminskas property, but the driveway encroached three feet into the Storm property.

Kaminskas parked his car on the front portion of the single-car driveway between the entrance steps to the two houses and the front sidewalk. He claimed he was following a pattern that had been accepted by the owners of the two houses for the previous 56 years, and that he had received written consent to the use of the driveway from a prior owner of the Storm property in 1991.

After the Storms bought their property in 2006, they sought to build a fence down the middle of the driveway between the buildings, along with a concrete curb on the dividing line of the open paved area. This would have prevented Kaminskas from parking in front of the houses.

In early 2007, Kaminskas applied to the Ontario Superior Court for an injunction restraining the Storms from building a fence along the property line. Kaminskas also asked the court to declare that he had a right to park in the driveway as a result of continuous use of that right by the owners of the house for 56 years.

In law, this right is known as a prescriptive easement, which comes into force by uninterrupted use over a period of time. Calculating that period of time involved interpreting section 31 of the Real Property Limitations Act.

At the initial hearing, the judge ruled that Kaminskas was entitled to an easement over the disputed strip and she issued an injunction restraining the Storms from building a fence.

The Storms appealed and won at the Court of Appeal.

One of the main issues on appeal was when and how to calculate according to section 31 the period of time necessary to obtain an easement over another person's land.

In order for Kaminskas to win his case, he had to prove that his use of the claimed right had to have been both continuous for a 20- or 40-year time period, and "as of right."

"As of right" means that the use must be uninterrupted, open, peaceful and without permission for the entire time period.

The Court of Appeal decided that the judge at the initial hearing misinterpreted the very confusing provisions of section 31 and that Kaminskas' claim under the legislation was defeated by the written consent from a previous owner of the Storm property.

For me, the message of the case is that when three judges of the highest court in the province say that a piece of Ontario legislation is "tortuous at best" and "virtually incomprehensible," it's time for the legislature to fix it.

Bob Aaron** is a Toronto real estate lawyer and a director of the Tarion Warranty Corporation. He can be reached by email at bob@aaron.ca, phone 416-364-9366 or fax 416-364-3818.* ***Visit the column archives at http://aaron.ca/columns/toronto-star-index.htm for articles on this and other topics.

TRIAL DECISION: (APPEAL DECISION FOLLOWS BELOW)

- Fran ais
- English

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Kaminskas v. Storm, 2007 CanLII 4872 (ON S.C.)

Print: PDF Format
Date: 2007-02-23
Docket: 5369/06
URL: http://www.canlii.org/en/on/onsc/doc/2007/2007canlii4872/2007canlii4872.html
Noteup: Search for decisions citing this decision

Reflex Record (related decisions, legislation cited and decisions cited)

Related decisions

- **Court of Appeal for Ontario**

  Kaminskas v. Storm, 2009 ONCA 318 (CanLII) - 2009-04-20

COURT FILE NO.: 5369/06

DATE: 2007/02/23

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
JOHN MICHAEL KAMINSKAS	)	Brian Wilcox, for the Applicant
	)	
	)	
	)	
Applicant	)	
	)	
- and -	)	
	)	
	)	
LARRY STORM and JOAN STORM	)	Peter Soltysiak, for the Respondents
	)	
	)	
	)	
Respondents	)	
	)	
	)	
	)	**HEARD:** February 13, 2007

THE HONOURABLE MADAM JUSTICE C.A. TUCKER

DECISION ON APPLICATION

THE ISSUES

[1] Does the applicant have a prescriptive easement over part of the lands of the respondents?

[2] Is the applicant entitled to a permanent injunction preventing the respondents from erecting a fence along the lands in dispute that are within their legally titled lands?

THE BACKGROUND

[3] The applicant purchased the lands described as 5087 Kitchener Street, in the City of Niagara Falls, on October 1, 1991, from Vito Parisi. Mr. Parisi had purchased the same lands from his grandfather on or about 1980. Mr. Parisi Sr. had purchased the lands approximately 10 years earlier, on or about 1970. No title search was provided on the application to provide exact dates. Ross and Harriet Angiers purchased 5091 Kitchener Street, in September 1950, and sold this property to the respondents in March 2006.

[4] The driveway to the applicant s home encroaches on the respondents titled property. The respondents son-in-law, Mark Balice, and daughter reside in this home. Unhappy differences have arisen between the neighbours as to the use of the encroached land, which I describe as the disputed property. No legal description was provided during the application for the lands in issue, nor was its exact dimensions quantified.

[5] The difficulties culminated in this lawsuit where the parties seek a determination of the legal characterization of the disputed lands. The applicant claims a

prescriptive easement or right of way claiming use of the disputed lands by himself and his predecessors in title for over 56 years.

[6] The respondents deny this claim. Firstly, they deny being aware of an agreement about the use of the lands on the purchase of their property and, further, they deny that any such use gave rise to the rights claimed by the applicant. They assert that the use was merely consensual use granted by their predecessor in title in favour of the applicant s predecessors in title, which did not give rise to a prescriptive right.

THE EVIDENCE

[7] The application was argued on the basis of affidavit evidence, some of which was conflicting. However, for the most part, the arguments of the parties centered in interpretation of the existing evidence and the relevant law that applied to such evidence.

[8] The applicant swears that he had exclusive use of the driveway, which encroaches approximately three feet onto the respondents land for the past 16 years. I would note firstly from the photographs filed as an exhibit that the disputed area is paved, as is that part of the driveway which does not encroach on Mr. and Mrs. Storms lands. The visual appearance of the driveway is that it extends to the sidewalk leading to the respondents home. The driveway in issue is a single car driveway. The respondents property has its own driveway on the westerly side of their lands. The encroachment is also clearly shown on a survey obtained by Mr. Kaminskas dated December 9, 1987.

[9] Prior to purchasing the property, Mr. Kaminskas requested a letter from Mr. and Mrs. Angiers concerning the use of the disputed lands. On August 26, 1991, Mr. Angiers provided the applicant with a letter. I will quote from this letter in its entirety, as the interpretation of this letter is relevant to the position of the respondents:

> Janice Parker & John Kaminskas:
>
> We Ross and Harriet Angiers give our consent to Janice and John for the full use of the mutual driveway at 5087 and 5091 Kitchener Street.

[10] The letter is signed only by Mr. Angiers. Janice Parker was the former spouse of the applicant, who conveyed her interest in the said property to the applicant in 1997.

[11] Mr. Angiers provided a sworn affidavit in support of the position of the applicant. He purchased the property presently owned by the respondents in September 1950. He states that the prior owners of the applicant s property continuously used the single car driveway that encroached on his land since his purchase. In fact, Mr. Angiers attests that to the best of his knowledge and recollection the driveway utilizing the disputed property was in existence in 1950, when he purchased his home.

[12] Mr. Angiers also attests that he and the adjoining property owner, Vito Parisi Sr., paved the driveway together, including the portion that contains the disputed property, many years prior to the purchase of the lands by Mr. Parisi s grandson, Vito Parisi Jr.

[13] Finally, he swears that he told the person he believed to be the purchaser of the respondents property (who in fact is the son-in-law of the purchaser) about the encroachment and had him acknowledge it and shake hands on it.

[14] It is strange to the court that apparently no declarations of possession were tendered on either of the purchases, either in 1991 by the applicant, or in 2006 by the respondents, given the fact that the respondents predecessor in title had owned the property for in excess of 50 years. In addition to that, I find this even more remarkable given the blatant visual encroachment and the surveying evidence available disclosing the existence of the encroachment.

[15] No information was provided by Mr. Angiers as to his use, if any, of the area in question. He makes it clear, however, in his affidavit, that the area between the verandahs of the two houses located on the lands owned by the applicant and respondents was definitely utilized by the applicant s predecessors. He refers in his affidavit to the applicant s exclusive use of the driveway. I would note that he did use the term mutual driveway in his August 26, 1991 letter to the applicant.

[16] Mr. Angier s position is supported by the affidavit of Mr. Vito Parisi, who purchased the property now owned by the applicant on or about 1980. He states that at all times during his occupation of the property at 5087 Kitchener Street, Niagara Falls, he enjoyed quiet and peaceful possession and use of the driveway that encroaches upon the lands at 5091 Kitchener Street. He did not request or receive, he attested, any agreement from Mr. and Mrs. Angiers who were aware of and permitted his continued use. His grandfather also used the driveway to his knowledge and belief, even though his grandfather himself did not drive.

[17] The affidavit of Mark Balice, one of the occupants of 5091 Kitchener Street stated that upon issues arising between the neighbours, the applicant began to park on the disputed portion of the driveway, rather than on his own side. Mrs. Kaminskas denies that claim in her affidavit and states the applicant has always parked the car in the same place on the driveway since 1991 and this is reflected by divots shown on the driveway surface itself caused by the tires. Mr. Balice estimates the area on Mr. Kaminskas side of the driveway to be approximately six feet wide. Mr. Balice also attests that if the applicant parked on his side, he would allow the applicant to alight from his vehicle using the disputed portion. He also states that he uses the disputed portion to put out his garbage and to access his backyard. Mrs. Kaminskas to the contrary attests that since she has resided in the property on or about 1991, the easterly door of the house at 5091 Kitchener Street has never been used for ingress or egress, and in fact, did not even have door handles.

[18] Further, Mr. Balice also disputes that Mr. Angiers advised him of the August 26, 1991 letter provided to Mr. Kaminskas by Mr. Angiers. Interestingly enough, neither he nor Mr. Storm in his affidavit specifically denied that Mr. Angiers had a conversation with Mr. Balice about the use of the driveway or shaking hands on it. Further, neither of them specifically deny that they did not know about the easement either from surveys or from the visual appearance of the property. Mr. Storm swore only that he was never aware of any agreement between the applicant and Ross Angiers and that no such document was registered on title.

[19] Evidence was also led that parking is not permitted on the street in the area where the applicant s property is located.

[20] No other evidence was tendered that is relevant to the court s decision. The details of the many conflicts between the parties commencing with the backyard fence dispute are, I would suggest, the reason for the present litigation, but not relevant to its decision and accordingly, I will not review those conflicts here.

THE LAW

[21] The relevant law in the area centres in the *Real Property Limitations Act*, specifically section 31 which reads as follows:

> No claim that may be made lawfully at the common law, by custom, prescription or grant, to any way or other easement, or to any water course, or the use of any water to be enjoyed, or derived upon, over or from any land or water of the Crown or being the property of any person, when the way or other matter as herein last before-mentioned has been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years shall be defeated or destroyed by showing only that the way or other matter was first enjoyed at any time prior to the period of twenty years, but, nevertheless the claim may be defeated in any other way by which it is now liable to be defeated, and where the way or other matter as herein last before-mentioned has been so enjoyed for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it appears that it was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing.

[22] Section 32 of the *Real Property Limitations Act* reads as follows:

> Each of the respective periods of years mentioned in sections 30 and 31 shall be deemed and taken to be the period next before some action wherein the claim or matter to which such period relates was or is brought into question, and no act or other matter shall be deemed an interruption within the meaning of those sections, unless the same has been submitted to or acquiesced in for one year after the person interrupted has had notice thereof, and of the person making or authorizing the same to be made.

[23] The applicant relies upon the statement made in ***Henderson v. Volk*** (1982), 35 O.R. (2d) 379 (O.C.A.) at paragraph 12:

> In order to establish the easement the claimant must demonstrate a use and enjoyment of the right-of-way under a claim of right which is continuous, uninterrupted, open and peaceful for a period of twenty years immediately prior to the commencement of the action making claim to it.

[24] It appears by the affidavit material filed, specifically that of Mr. Angiers, that there has been a right in favour of the owners of the property at 5087 Kitchener Street to use the property of 5091 Kitchener Street as part of their driveway. The use is uncontradicted by the evidence. The only real issue between the parties is the

respondents position that:

(a) They were not aware of the easement as there is no registered notice on title or knowledge of an agreement for such given to them by Mr. Angiers;

(b) That the permission granted by Mr. Angiers interrupted the period of adverse possession as it granted permission or consent to that use.

[25] I do not agree with the position taken by the respondents. Firstly, it is obvious that the respondents would have been aware of the driveway as it is visually obvious as an encroachment on their property and in addition, there was surveying evidence available disclosing the encroachment. I concur that they may not have been told about any agreement between Mr. Angiers and the applicant, however, they would have been put on notice given the facts mentioned above. In addition, I do not agree that consent or permission somehow operated to remove what I find to be an easement since at least 1950 and, accordingly, is now a prescriptive easement. The only evidence we have of the use of the property in 1950 is that of Mr. Angiers who was there at the time. Mr. Angiers indicates that he believes the driveway pre-dated his use of the property and in those circumstances, he was not in a position to grant permission to anyone, as he would have taken his title subject to the use of the lands in 1950. In any event, from 1950 until 2006, Mr. Angiers makes it clear that the neighbours have used as a right the driveway that encroaches on his lands. I agree that the words used in 1991 were permission and mutual driveway , however, as indicated, Mr. Angiers would not be in a position in 1991 to grant permission to anyone having acknowledged and accepted the use of the property by the predecessors in title and the fact that the use pre-dated his occupation of his property. In this regard, I quote from the case of ***Rose v. Krieser, In Trust***, (Ont. C.A.), 58 O.R. (3d) in which the Court of Appeal considers s. 31:

> Examined in context, it is apparent that the closing words of s. 31 relating to the 40 year time period are to be read in contrast with the preceding part of the section dealing with the 20 year time period. The words consent or agreement expressly given or made for that purpose by deed or writing in relation to the 40 year time period relate to the common law defence of *permission* given by deed or writing, and clarify that the defence of *permission* does not apply in full measure to the 40 year period. Rather, the defence is limited to written *permission* with respect to the 40 year period.
>
> Moreover, it is clear, in my view, that the words consent or agreement expressly given or made for that purpose by deed or writing cannot apply to *a use as of right* given by deed or writing. The very foundation of the law of prescription is the presumption that the use originated with a grant of *the right* claimed. Proof of a written agreement granting the right simply displaces prescription; it does not constitute a defence of the claim. On the other hand, *permission* negatives a claimant s assertion that his use was as of right and constitutes a real defence to the claim.

Here, I find that the use was a right. The rights accrued 40 years prior to the 1991 letter without permission. I find it was not a mere acquiescence; it was acceptance and the use of the term permission does not erase that right.

[26] The only issue that I find is not clear is the issue of whether or not the disputed property has been used by anyone else. Mr. Angiers does not explain in his affidavit as to any use he made of the disputed portion of the property, although he speaks to the exclusive use by the applicants and their predecessors. Accordingly, I would find that there is a prescriptive easement over the disputed portion of the lands in favour of the owners of 5087 Kitchener Street, Niagara Falls, for the purpose of ingress and egress by persons and vehicles and for persons to enter and exit from such vehicles and for the parking of vehicles and that the applicant has the exclusive use of the lands as a driveway. I cannot say that the respondents are not entitled to use the disputed portion for access to their side door on the evidence before me, however, the respondents cannot in any way interfere with the full use of the disputed lands for the purposes set out before by the applicant. I also find that the applicant, in the circumstances, would be entitled to the injunction order requested to ensure the full and continued use of the prescriptive easement as described above by the applicant, without interference by the respondents.

[27] If the parties are unable to agree upon the description of the disputed lands, I may be spoken to.

[28] If the parties are unable to agree upon costs, I may be spoken to.

Justice C.A. Tucker

Released: February 23, 2007

- Fran ais
- English

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Kaminskas v. Storm, 2009 ONCA 318 (CanLII)

Print: PDF Format

Date: 2009-04-20

Docket: C46886

URL: http://www.canlii.org/en/on/onca/doc/2009/2009onca318/2009onca318.html

Noteup: Search for decisions citing this decision

Reflex Record (related decisions, legislation cited and decisions cited)

Related decisions

- **Superior Court of Justice**

  Kaminskas v. Storm, 2007 CanLII 4872 (ON S.C.) - 2007-02-23

Legislation cited (available on CanLII)

- Real Property Limitations Act, R.S.O., 1990, c. L.15 31 32

Decisions cited

- Rose v. Krieser, 2002 CanLII 44894 (ON C.A.) (2002), 58 Ont. R. (3d) 641 (2002), 212 D.L.R. (4th) 123 (2002), 157 O.A.C. 252

CITATION: Kaminskas v. Storm, 2009 ONCA 318

Date: 20090420

Docket: C46886

COURT OF APPEAL FOR ONTARIO

Rosenberg, Feldman and Blair JJ.A.

BETWEEN

John Michael Kaminskas

Applicant (Respondent)

and

Larry Storm and Joan Storm

Respondents (Appellants)

Arthur Robert Camporese and Karen Power, for the appellants

Nicholas F. Ferguson, for the respondent

Heard: November 18, 2008

On appeal from the judgment of Justice C. Anne Tucker of the Superior Court of Justice, dated February 23, 2007 and reported at (2007), 54 R.P.R. (4th) 239.

R.A. Blair J.A.:

I. BACKGROUND

[1] The Storms and Mr. Kaminskas are the owners of modest homes adjacent to each other in the City of Niagara Falls. Their homes are separated by a single paved driveway, which encroaches 3 feet onto the Storms property. There is no room for a car to drive into the space between the houses. Mr. Kaminskas uses the portion of the single-car driveway between the entrance steps to the houses and the front sidewalk to park his car. In doing so, he says he is following a pattern that has been accepted by previous owners of these two homes for over 56 years. The Storms who purchased their property in 2006, and whose daughter and son-in-law actually reside in the home object.

[2] The seeds for a potential dispute are readily apparent from a glance at the photo which is attached as Schedule A to these reasons. There is no dispute that the driveway to Mr. Kaminskas home encroaches on the Storms titled property.

[3] To resolve the dispute, the Storms sought to build a fence down the middle of the driveway between the buildings and a three to four inch concrete curb on the dividing line of the open paved area. This did not find favour with Mr. Kaminskas, who applied to the court for a declaration that he is entitled to a right-of-way over the driveway and for injunctive relief. He succeeded. Tucker J. found that he was entitled to a prescriptive easement over the disputed portion of the land and that he would be entitled to an injunction preventing the Storms from interfering with his use of the property. The Storms appeal.

[4] Consent or permission operates to defeat a claim to a prescriptive right. While Mr. Kaminskas and his predecessors in title had exclusive and continuing use of the driveway for parking purposes for over half a century, the evidence is clear that they used the driveway in that fashion with the permission (oral or written) of the prior owners of the Storm property. Respectfully, the application judge erred in failing to calculate the period of unpermitted user as the period next before the commencement of the application. Moreover, her attempts to characterize the permission granted as ineffective, or to differentiate it as something else, are not supportable on the evidence.

[5] I would allow the appeal.

II. FACTS

[6] Mr. Kaminskas purchased the property at 5087 Kitchener St. in October, 1991, from a Mr. Parisi. Mr. Parisi, in turn, had purchased the property in 1980 from his grandfather, who had owned it since 1970.

[7] The Storms acquired the adjacent property at 5091 Kitchener St. in March 2006 from Ross and Harriet Angiers, who had owned it since 1950.

[8] Mr. Kaminskas claims, himself, to have had exclusive and continuous use of the disputed driveway which encroaches approximately 3 feet onto the Storm s side for 16 years prior to the application. His predecessors in title enjoyed a similar use as far back as 1950. The existence of the right to the use is important to him because the City by-law prohibits parking on the street at that point and there is no other parking available on his property. The Storm property, on the other hand, has its own driveway on the opposite side of the building.

[9] The evidence is that Mr. Parisi used the driveway in the same fashion during his tenure. Mr. Parisi stated in his affidavit that his grandfather also used the driveway, to his knowledge and belief, although his grandfather, himself, did not drive.

[10] Mr. Angiers swore he and his wife were always aware of the previous and current owners of 5087 Kitchener Street, using the single car driveway that encroached onto [their lands]. In fact, he said that to the best of his knowledge and recollection the driveway was already on the property when he and Mrs. Angiers bought it in 1950, and had been in use of the then owners at that time. He and Mr. Parisi Sr. (the grandfather) paved the driveway together. Mr. Angiers swore that he made the person he thought was the buyer of their property Mr. Balice, the son-in-law who now occupies it with the Storm s daughter aware of the encroachment and that they shook hands agreeing to this encroachment and condition. He said that Mr. Kaminskas has had the exclusive use of the driveway and that he and Mrs. Angiers had always given permission to the previous and present owners of 5087 Kitchener Street to the use of this single car driveway and the said encroachment.

[11] Although the encroachment is visually obvious, no declarations of possession were ever tendered on either the Kaminskas purchase in 1991 or the Storm purchase in 2006.

[12] In 1991, when Mr. Kaminskas acquired 5087 Kitchener St. from Mr. Parisi, the Angiers provided Mr. Kaminskas with a letter consenting to his use of the disputed driveway. This letter said:

To: Janice Parker[1] & John Kaminskas:

We, Ross & Harriet Angiers give our consent to Janice and John for full use of the mutual driveway at 5087 and 5091 Kitchener Street.

Sincerely,

[Signed] Ross S. Angiers

[13] The Storms side of the story was put forward partly through the affidavit of Mr. Balice. He says the problems began when Mr. Kaminskas started to park on the encroachment part of the driveway, rather than on his own side.[2] From the perspective of Mr. Balice and the Storms daughter, if Mr. Kaminskas were to park on his side, they would allow him to use the disputed portion of the driveway to get in and out of his car on the driver s side. They wish to use the driveway to put out their garbage and to have access to their back yard. When Mr. Kaminskas parks in the centre of the driveway, they are unable to do so.

[14] Mr. Balice says that he did not know of the letter from Mr. Angiers to Mr. Kaminskas, cited above. As the application judge noted, however, neither he nor Mr. Storm specifically deny the conversation with Mr. Angiers concerning the use of the driveway and shaking hands on it. Nor do they specifically deny knowing about the claimed easement, either from the surveys or from the visual appearance and use of the property.

[15] The application was heard and determined on the basis of the affidavit evidence filed. No one was cross-examined.

III. THE GROUNDS OF APPEAL

[16] The appellants make two principal submissions.

[17] They argue, first, that the application judge erred in the manner in which she calculated the time required for a prescriptive easement claim pursuant to the *Real Property Limitations Act*, R.S.O. 1990, c. L.15, ss. 31 and 32. The application judge determined that Mr. Kaminskas had established an absolute 40-year right that crystallized before the 1991 letter was provided and, therefore, that the letter of permission could not defeat what was already an absolute prescriptive easement. The appellants submit, however, that the relevant time period for a prescriptive easement under the Act is the period next before some action wherein the claim was or is brought into question , i.e. from the date of the commencement of the application in these proceedings. The 1991 letter of permission therefore operates to defeat the prescriptive right, they say.

[18] Secondly, the appellants submit there were insufficient facts before the court to enable the application judge to find a prescriptive easement and Mr. Kaminskas failed to meet his burden of proof in that respect.

[19] I agree with the appellants submission that Mr. Kaminskas claim under statute is defeated by the written consent provided to him by the Angiers in 1991. Further, the evidence failed to establish that the user was as of right .

IV. LAW & ANALYSIS

The Applicable Principles

Methods of Acquisition of Easements by Prescription

[20] In law, there are three ways in which an easement may be acquired by prescription:

a) prescription at common law;

b) prescription by the doctrine of lost modern grant; and

c) prescription by statute (*Real Property Limitations Act*).

[21] Prescription at common law is no longer relevant. It requires use of the disputed right since time immemorial. Time immemorial, for purposes of the period of legal memory is defined as the year 1189, the beginning of the reign of King Richard I. Obviously, a prescriptive right at common law is somewhat difficult to prove in modern times, particularly in Canada. It has been said that prescription by common law cannot exist here because there is no legal memory on which to found it: see A.H. Oosterhoff & W.B. Rayner, 2d ed. *Anger and Honsberger: Law of Real Property*, vol. 2 (Aurora, Ont.: Canada Law Book Inc., 1985), at p. 936, citing *Abell v. Village of Woodbridge and County of York* (1917), 39 O.L.R. 382 (H.C.), rev d on other grounds 45 O.L.R. 79 (S.C. App. Div.).

[22] The doctrine of lost modern grant, on the other hand, is alive and as Cory J.A. noted, drily, in *Henderson v. Volk* (1982), 35 O.R. (2d) 379 (C.A.), at p. 382 if not well is at least surviving in the province of Ontario. This doctrine was developed in common law jurisprudence to overcome the inconvenience of the common law rule (where the right could be defeated if it could be proven that the right claimed did not exist at any point in time within legal memory). Under the doctrine of lost modern grant, the courts will presume that there must have been a grant made sometime, but that the grant had been lost. Uninterrupted user as of right at any point in time will create the prescriptive right under this doctrine, provided it was for at least 20 years.

[23] Cory J.A. described the doctrine of lost modern grant in *Henderson v. Volk*, at pp. 382-383:

The doctrine indicates that where there has been upwards of 20 years uninterrupted enjoyment of an easement and such enjoyment has all the necessary qualities to fulfil the requirements of prescription, then apart from some aspects such as incapacity that might vitiate its operation but which do not concern us here, the law will adopt the legal fiction that such a grant was made despite the absence of any direct evidence that it was in fact made.

It should be emphasized that the nature of the enjoyment necessary to establish an easement under the doctrine of lost modern grant is exactly the same as that required to establish an easement by prescription under the *Limitations Act*. Thus, the claimant must demonstrate a use and enjoyment of the right-of-way under a claim of right which was continuous, uninterrupted, open and peaceful for a period of 20 years. However, in the case of the doctrine of lost modern grant, it does not have to be the 20-year period immediately preceding the bringing of an action.

As well, the enjoyment must not be permissive. That is to say, it cannot be a user of the right-of-way enjoyed from time to time at the will and pleasure of the owner of the property over which the easement is sought to be established. [Citations omitted.]

See also *Rose v. Krieser (In Trust)* 2002 CanLII 44894 (ON C.A.), (2002), 58 O.R. (3d) 641 (C.A.).

[24] As the years passed, the doctrine of lost modern grant was found to be more and more unsatisfactory, because it called upon juries to presume the existence of a lost grant as a fact, even where they did not believe it existed. The English *Prescription Act 1832*, 2 & 3 Will. 4, c. 71, may have been enacted, at least in part, to overcome this problem.[3] Its preamble states that it was enacted to prevent common law claims from being defeated by evidence of the commencement of user after 1189 (the very rationale for the development of the doctrine of lost modern grant). Sections 31 and 32 of the Ontario *Real Property Limitations Act* echo the language of the 1832 legislation.

[25] The wording of these sections is tortuous at best.[4] Stripped to their essentials, for purposes of this appeal, they read as follows:

Right of way, easement, etc.

31. No claim that may be made lawfully at the common law, by prescription or grant, to any way or other easement when the way has been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years shall be defeated or destroyed by showing only that the way was first enjoyed at any time prior to the period of twenty years, but, nevertheless the claim may be defeated in any other way by which it is now liable to be defeated, and where the way has been so enjoyed for the full period of

forty years, the right thereto shall be deemed absolute and indefeasible, unless it appears that it was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing.

How period to be calculated, and what acts deemed an interruption

32. Each of the respective periods of years mentioned in [section] 31 shall be deemed and taken to be the period next before some action wherein the claim to which such period relates was or is brought into question, and no act or other matter shall be deemed an interruption within the meaning of those sections, unless the same has been submitted to or acquiesced in for one year after the person interrupted has had notice thereof, and of the person making or authorizing the same to be made.

[26] Sections 31 and 32 do not displace the right to establish a prescriptive easement based on the doctrine of lost modern grant, which continues to exist in this province: *Henderson v. Volk*, at p. 382; *MacRae v. Levy* (2005), 28 R.P.R. (4th) 291 (Ont. S.C.), at para. 59; Graeme Mew, *The Law of Limitations*, 2d ed. (Markham, Ont.: LexisNexis Canada Inc., 2004), at p. 237. Moreover, the nature of the enjoyment necessary to establish a prescriptive easement under the doctrine of lost modern grant is precisely the same as that required for a prescriptive easement under the statute: *Henderson v. Volk*.

Characteristics of Prescriptive Easements

[27] To establish a prescriptive easement of either kind, the user must first meet the four essential characteristics of an easement at common law, namely:

a) there must be a dominant and servient tenement;

b) an easement must accommodate the dominant tenement;

c) the dominant and servient owners must be different persons; and

d) a right must be capable of forming the subject matter of a grant.

[28] In addition, for an easement to be created by prescription, the user of the alleged right (for the applicable time period) must be shown to have been (i) continuous, and (ii) as of right .

[29] Here, there is no real issue that the proclaimed easement meets the four essential criteria of an easement at common law, or that the use of the driveway by Mr. Kaminskas and his predecessors was continuous. The appeal hinges on whether the user was as of right .

[30] User as of right means that the use has been uninterrupted, open, peaceful and without permission for the relevant period of time. It is often described using the Latin maxim *nec vi, nec clam, nec precario* (i.e., without force, without secrecy, and without precario). Precario in this sense is taken to mean [t]hat which depends not on right, but on the will of another person : *Burrows v. Lang*, [1901] 2 Ch. 502, at p. 510, cited in Jonathan Gaunt Q.C. & Paul Morgan Q.C., *Gale on Easements*, 17th ed. (London: Sweet & Maxwell Ltd., 2002), at para. 4-82. *Nec precario*, therefore, means without permission.

Differences between Prescriptive Easements under Statute and Lost Modern Grant

[31] There are three important differences between a prescriptive easement arising by statute and a prescriptive easement arising by lost modern grant, however. First, in order to establish a prescriptive right by statute, it is necessary for the user to have been continuous, uninterrupted, open, peaceful and without permission for a period of 20 or 40 years immediately preceding the commencement of the action or assertion of the claim in the language of s. 32, during the 20 or 40-year period *next before* some action wherein the claim to which such period relates was or is brought into question (emphasis added). For the right to accrue under the doctrine of lost modern grant, however, the requisite user need not be for the period next before the action, but may exist during any uninterrupted 20-year period or longer.

[32] While the next before requirement may give rise to unfairness in some circumstances, there are policy reasons founded in the need to promote certainty and stability in conveyancing law that support its existence. As the authors of a leading text, Robert Megarry & William Wade, *The Law of Real Property*, 6th ed. by Charles Harpum (London: Sweet & Maxwell Ltd., 2000), observe, at p. 1138, footnote 76:

> It should be noted that, for all its shortcomings, prescription under the *Prescription Act 1832* is, from a conveyancing point of view, preferable to prescription by lost modern grant. Because it has to be exercised without interruption next before some suit or action , it may be easier for any purchaser of the servient tenement to discover. If an easement has been acquired by lost modern grant [a] purchaser may be bound by it even though he could not have discovered its existence.

[33] In addition, the next before requirement under the legislation confines the courts review to a relatively recent period of time, when the evidence will be easier to obtain and evaluate, and therefore may be preferable to the lost modern grant regime for that reason: see U.K., Easements, Covenants and Profits Prendre , The Law Commission Consultation Paper No. 186, (2008), at p. 80, para. 4.213.

[34] Secondly, a statutory claim to a prescriptive easement based on 40-years user can be defeated by permission only where that permission was given in writing. This is established by the closing words of s. 31, which, for convenience, I repeat:

> [W]here the way has been so enjoyed for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it appears that it was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing.

[35] Under the statute, a 40-year right will not be considered permissive (*precario*) unless it is enjoyed by written permission. However, claims to a prescriptive right based on the doctrine of lost modern grant (or with respect to the statutory right based on 20 years user) can be defeated by consent or permission, whether written or oral.

[36] Finally, it is noteworthy that the 40-year concept is a creature of the statutory prescriptive right. It has no application to the doctrine of lost modern grant, which requires only an appropriate user of 20 years or more without permission.

Application of the Principles to this Case

[37] In light of the foregoing review of the principles underlying prescriptive easements, it is apparent where the dilemma for Mr. Kaminskas arises. His claim under statute is defeated by the written consent provided to him by the Angiers in 1991, less than twenty years next before the commencement of his application. It is also defeated by the permission by inference, an oral permission that Mr. Angiers says he and his wife had always given to the owners of the Kaminskas property, whether the claim is based on statute or on the doctrine of lost modern grant.

The Application Judge s Reasons

[38] The application judge rejected the argument that consent or permission somehow operated to remove what [she found] to be an easement since at least 1950 and, accordingly, [was] now a prescriptive easement. She went on to say (at para. 25):

In any event, from 1950 until 2006, Mr. Angiers makes it clear that the neighbours have used as a right the driveway that encroaches on his lands. I agree that the words used in 1991 were permission and mutual driveway , however, as indicated, Mr. Angiers would not be in a position in 1991 to grant permission to anyone having acknowledged and accepted the use of the property by the predecessors in title and the fact that the use pre-dated his occupation of his property. In this regard, I quote from the case of *Rose v. Krieser* 2002 CanLII 44894 (ON C.A.), (2002), 58 O.R. (3d) 641 (Ont. C.A.) in which the Court of Appeal considers s. 31:

> Examined in context, it is apparent that the closing words of s. 31 relating to the 40 year time period are to be read in contrast with the preceding part of the section dealing with the 20 year time period. The words consent or agreement expressly given or made for that purpose by deed or writing in relation to the 40 year time period relate to the common law defence of *permission* given by deed or writing, and clarify that the defence of *permission* does not apply in full measure to the 40 year period. Rather, the defence is limited to *written permission* with respect to the 40 year period.
>
> Moreover, it is clear, in my view, that the words consent or agreement expressly given or made for that purpose by deed or writing cannot apply to *a use*

> *as of right* given by deed or writing. The very foundation of the law of prescription is the presumption that the use originated with a grant of *the right* claimed. Proof of a written agreement granting the right simply displaces prescription; it does not constitute a defence of the claim. On the other hand, *permission* negatives a claimant s assertion that his use was as of right and constitutes a real defence to the claim.

Here, I find that the use was a right. The rights accrued 40 years prior to the 1991 letter without permission. I find it was not a mere acquiescence; it was acceptance and the use of the term permission does not erase that right. [Emphasis in original.]

[39] These findings appear to have been based on a prescriptive easement by statute the application judge earlier cites the relevant law as being centred in ss. 31 and 32 of the *Real Property Limitations Act*, and makes no reference to the doctrine of lost modern grant and to have been founded on the notion that prescriptive title had been acquired *before* the letter of 1991 was provided.

[40] This may be a fair result, if the application judge were exercising a discretionary or equitable jurisdiction in making her decision. Respectfully, the foregoing passage from her reasons discloses a number of misconceptions of the evidence and of the law. I do not see how her conclusion can be born out on the record, given the law described above and the uncontested evidence of Mr. Angiers.

Error in how Time was Calculated under the Act

[41] Insofar as the application judge purported to find a prescriptive easement by statute, she failed to apply the next before time parameters of s. 32. I agree with the appellants submissions in this regard. Even if Mr. Angier s evidence is explained away as acceptance, rather than permission, throughout the period between 1950 and 1991, the 1991 letter granting Mr. Kaminskas *consent* to use the driveway for parking broke any prior period of open and uninterrupted use without permission. And it did so within the 20 year period immediately preceding the commencement of the application, which is sufficient to prevent the right from crystallizing under the Act.

The User was Not As of Right

[42] Mr. Angiers evidence does not make it clear, however, or, indeed, even suggest that his neighbours had used the driveway as a right . His evidence is that they used it at all times with his and his wife s permission. Mr. Angiers who would know was not cross-examined on his affidavit. He did not say he and his wife acquiesced in their neighbours use of the driveway (a state of affairs that would justify the finding of a prescriptive easement, other factors being equal). His evidence was unequivocal: My wife, Harriet Angiers and I had always given *permission* to the previous and present owners of 5087 Kitchener Street to the use of this single car driveway and the said encroachment (emphasis added).

[43] Further, the application judge s comment that Mr. Angiers would not be in a position in 1991 to grant permission to anyone having acknowledged and accepted the use of the property by the predecessors in title and the fact that the use pre-dated his occupation of his property is based on the same misconception of the evidence. Mr. Angiers did not say he acknowledged and accepted the use of the property . He said they gave permission for the use.

[44] The legal premise that the prescriptive right had already crystallized before the 1991 letter of consent was provided is also mistaken. The application judge focused on the point that permission can only defeat the 40 year period if it is evidenced in writing. This is apparent from her quotation from *Rose v. Krieser* and from her own statement that [t]he rights accrued 40 years prior to the 1991 letter without permission .

[45] Her reasoning appears to have pursued the following logic. Mr. Kaminskas and his predecessors in title had used the driveway since at least 1950, and perhaps before that time. There was at least 40 years user before 1991 and the rights had accrued by that time. Mr. Angiers was therefore not in a position to give permission by the date of the letter and the letter was, in effect, meaningless. Oral consent is not capable of defeating a 40 year prescriptive right. The use before 1991 was therefore without permission.

[46] This logic does not get Mr. Kaminskas to where he needs to be, however. The 40 years user was founded upon the Angiers permission.

Doctrine of Lost Modern Grant

[47] Finally, the doctrine of lost modern grant not alluded to by the application judge, but raised on appeal does not assist Mr. Kaminskas either. Although permission can defeat a 40 year period of user for purposes of a prescriptive easement by statute only if evidenced in writing, oral permission is sufficient to defeat a prescriptive easement by lost modern grant. Here, the evidence is that the Angiers at all times gave permission to the use of the driveway for parking. It is not said whether that permission was oral or written, but since the 1991 letter is the only reference on the record to consent in writing, it is a reasonable inference that, prior to the letter, the ongoing permission was oral. In any event, a prescriptive right by lost modern grant cannot be established if the user was by permission, whether written or oral it can only arise where the user is as of right .

[48] This result may seem unfair to Mr. Kaminskas. It is apparent that he and his predecessors in title have had the continuous, open, uninterrupted, peaceful and exclusive use of the driveway for purposes of parking over a period of at least 56 years before the commencement of these proceedings. Everyone was in agreement, except for the current occupants and owners of the Storm property. But it is also apparent that this user was with the permission of the predecessors in title to the Storms. And permission defeats a prescriptive easement.

V. DISPOSITION

[49] For the foregoing reasons, I would allow the appeal, set aside the judgment below, and dismiss the application.

[50] The appellants are entitled to their costs here and below. Costs of the appeal are fixed in the amount of $5,000, as agreed by counsel.

R.A. Blair J.A.

I agree M. Rosenberg J.A.

I agree K. Feldman J.A.

RELEASED: April 20, 2009

SCHEDULE A

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[1] Ms. Parker was the spouse of Mr. Kaminskas at the time. They subsequently separated. She conveyed her interest in the property to him in 1997.

[2] From the picture attached as Schedule A it can be seen that there remains a paved area of two or three feet to the right of the vehicle, on the passenger s side, when the car is parked in the middle of the paved area.

[3] Jonathan Gaunt Q.C. & Paul Morgan Q.C., *Gale on Easements*, 17th ed. (London: Sweet & Maxwell Ltd., 2002), at p. 179 suggests that the intention behind the legislation is a matter of speculation, however.

[4] Section 31 in its entirety is virtually incomprehensible and has long been disparaged on that basis. For example, in 1966, the U.K. Law Reform Commission stated that the Prescription Act 1832 has no friends. It has long been criticised as one of the worst drafted Acts on the Statute Book : (Acquisition of Easements and Profits by Prescription , Law Reform Committee, 14th Report, Cmnd 3100 (1966), at para. 40). Simmons J.A. echoed this comment in *Rose v. Krieser*, at para. 22. In spite of these criticisms, however, the language of the U.K. legislation has been adopted, essentially unaltered, in many provinces in Canada.

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