



Easements:

Encroaching onto Easements: Can it be Done?

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In *Chapman v. C.A. Realty*, a case argued before the Supreme Court of Nova Scotia and then at the Nova Scotia Court of Appeal, a landowner argued that she had two exclusive rights of way: one for a driveway and the other in the rear of the other adjoining landowner's property where electrical utility infrastructure – a transformer and electrical utility poles erected there by the adjoining owner – was located.

For those unfamiliar with the term, a right of way is a type of easement, which can be defined as a right or interest of use or passage of persons, vehicles and animals over another person's owned property, created through an express registered grant of easement.

An easement has four characteristics:

- There must be both a dominant and a servient tenement, except for easements in gross expressly authorized by statute
- The dominant tenement must benefit from the easement
- The dominant and servient tenements must be held by different persons, and
- A right over land cannot amount to an easement unless it is capable of forming the subject of a grant, i.e. it must be capable of definition and not vague and uncertain.

Ms. Chapman, the landowner, claimed that the adjoining landowner had encumbered and interfered with the use and enjoyment of her two rights of way. In particular, she noted that she would have more parking spaces if the electrical equipment on her driveway, consisting of electrical utility poles, guy wires and overhead wires, was removed. She also demanded the previously mentioned electrical utility infrastructure be removed. The adjoining



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landowner denied that it had interfered with her use and enjoyment of the right of way and refused to remove any of the said infrastructure. Both levels of court found that Ms. Chapman did have a right of way for a driveway over the adjoining owner's land. She had purchased the property subject to an easement clearly described in the deed as granting her an "exclusive right of way for persons and vehicles over the driveway." After the creation of this right of way, the electrical equipment consisting of utility poles and wires was installed on her right of way by the adjoining landowner.

Both the Supreme Court of Nova Scotia and the Nova Scotia Court of Appeal examined established case law, such as *MCC No. 229 v. 1510231 Ontario Inc.*, 2016, ONSC, where it was stated that, "it is trite law that interference by the owner of the servient tenement with the enjoyment of the owner of the dominant tenement of the right of way must be substantial to be actionable," and *Weidelich v. Koning*, 2014 ONCA, where it was stated that, "there is no actionable interference with a right of way if it can be substantially and practically exercised as conveniently after as before the occurrence of the alleged obstruction."

Following the established case law, both levels of court found that relocating this electrical equipment was not warranted as its interference did not substantially interfere with the right of way for its "intended purpose of providing access to the street" and that the right of way had not been "created to allow for increased parking." As a result, Ms. Chapman was unsuccessful in her attempt to obtain an order for the removal of the poles and wires from her driveway.

In regard to the second right of way claimed by Ms. Chapman, that being the right of way in the rear of the other adjoining landowner's property where electrical utility infrastructure was located, the Court found, based on the evidence of surveyors, that the fence built around the driveway established its boundaries and that there was no easement that would give Ms. Chapman a right of way over the rear part of the adjoining owner's land where the electrical infrastructure was located.

In essence, for those clients wishing to undertake a development project of any size, careful attention should be exercised to determine if there are any easements or rights of way affecting the property. A review of these easements or rights of way is essential to ensure that your project is not impeded in any way as you will be able to make adjustments to your project prior to running into trouble.

