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COMMERCIAL REAL ESTATE

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Real Estate Law Update

Encroachments on Rights of Way

They do not entitle the dominant owner to require removal

We often have clients who complain to us that somebody has encroached on an easement or right of way by constructing an addition, garage, fence or hedge on the right of way or easement. They claim that their "legal rights" have been impinged upon and their right to use the right of way is limited or diminished by virtue of the encroachment.

Sometimes, these clients ask us to send letters to their encroaching neighbour insisting that the encroachment be removed and that the right of way be kept absolutely free and clear in accordance with its proper and full boundaries as contained in the grant of the easement.

In the case of *Weidelich. v. de Koning*,(2014) 122 O.R. (3d) 545, the Court of Appeal had to consider the effect of a building addition that encroached onto a private right of way, which was granted for the purpose of vehicular access to houses of the owner's neighbours. The driveway ran from the street alongside the owner's house and then along the backs of the owner's and his neighbours' houses so that the neighbours had access to the parking areas behind each of their houses. Every owner owned the land on which the right of way was located as part of his or her property but it was subject to rights of way in favour of the other owners. The owner built an addition on a part of his land that encroached on that part of his land that was subject to the right of way. Four of the neighbours who had the benefit of the right of way over the owner's property objected and brought an application.

The trial judge found and it was admitted that the neighbours' access was not substantially interfered with despite the encroachment. The court held that ultimately, that was the test in order to require the owner to remove the encroachment. The court held that it did not matter if the owner inherited his property with the encroachment or deliberately built into the right of

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way as long as the encroachment did not substantially interfere with the neighbours' access. Even permanent structures may not substantially interfere and therefore do not give rise to a right to removal. The case includes a sketch showing the location of the right of way and the encroachment.

The Court of Appeal did not find that the building addition did not encroach. It clearly encroached on the right of way. It held, however, that in order for the encroachment to give rise to a cause of action (the Court of Appeal refers to the encroachment being actionable), there must be substantial interference with rights granted to the neighbours. The Court found that the laneway remained accessible and passable both before and after construction of the encroaching building and dismissed the application.

The neighbours appear to have also sought an order that the right of access and ingress contained in the grant of right of way included the ancillary right to snow removal. The court confirmed the law that ancillary rights are those that are reasonably necessary to the enjoyment of the right of way granted and that the determination of the existence and scope of any claimed ancillary right is a factual one. However, the record did not contain sufficient facts to make a determination. In conclusion, the court said that if disagreements arise in the future over ancillary rights, they can deal with the matter based on appropriate evidence but, hopefully, common sense and neighbourly goodwill will find a solution.

This case may be of assistance in answering your clients' questions about neighbourhood disagreements. Perhaps, it will be of assistance in encouraging your clients to find something else to complain about.