



Interpreting easement agreements – appraisal uncertainty

BY **JOHN SHEVCHUK**

LITIGATION COUNSEL, C.ARB, AACI(HON), RI

How comfortable can appraisers be that they understand the scope of any particular easement over real property? The challenge in the interpretation of easement rights is illustrated in the Ontario Court of Appeal decision in *Reddick v. Robinson*, 2024 ONCA 116 [*Reddick*] where the following easement language was litigated:

[F]or the purposes of pedestrian access only in order to use and enjoy the shores of Lake Ontario, such use and enjoyment shall not include camping or the use or operation of motorized vehicles.

There were two competing interpretations. The Appellants argued for a restricted view that would only allow the Respondents to pass over the easement to go to and from the lake. The Respondents said that, properly interpreted, the easement allowed them to make park-like uses of the easement area. Foreshadowing the discussion that follows, the litigants presented their arguments to one judge in the Ontario Superior Court of Justice and to three judges in the Ontario Court of Appeal. The result was a 2:2 split among the judiciary, with the majority of the Court of Appeal adopting the Appellants' more restricted interpretation. *Reddick* is a cautionary tale for appraisers having to value easements.

Background – property description

A six-acre parcel had been subdivided into three two-acre parcels ['Subdivided Parcels']. Each parcel was then purchased by the different parties in the *Reddick* lawsuit. The Subdivided Parcels are separated from Lake Ontario by two parcels of land ['Intervening Parcels']. A private road separates the Intervening Parcels from the Subdivided Parcels.

When the Subdivided Parcels were created, the owners of the Intervening Parcels arranged for the creation of a 20' x 300' strip of land ('Part 11') between the Intervening Parcels. Part 11

connects the Subdivided Parcel owned by the Appellants to the shores of Lake Ontario. The Appellants own Part 11 subject to the aforementioned easement in favour of the Subdivided Parcels owned by the Respondents.

Part 11 was described in the evidence as having a grassy area that drops off to limestone sloping down to the water. Access to the limestone area depends on the lake levels throughout the year. The evidence established that the grassy area provides a park-like setting. The Appellants constructed two 8' x 8' wooden decks on the grassy area and placed chairs on the decks. A picnic table was placed nearby. Apparently, the Respondents were either attempting to use or had used the grassy area for more than mere ingress and egress to the lake. The Appellants objected saying this was contrary to the easement arrangement.

The Ontario Superior Court of Justice application

The Appellants applied to the Ontario Superior Court of Justice for an order restricting the Respondents to pedestrian access over the easement area limited to ingress and egress to the shores of Lake Ontario. The Respondents countered by arguing that the easement allowed for their use of the easement area consistent with typical park use, e.g., picnicking and sitting in lawn chairs enjoying the view. The application judge adopted the Respondents' broader view of the easement language and dismissed the Appellants' application.

One of the bases upon which the application judge held for the Respondents was the general rule that contractual interpretation that would render express words meaningless or redundant is to be avoided. The application judge was persuaded that the limestone area below the grassy area could not practically be used for camping or by motorized vehicles. Consequently, the easement prohibition against camping and vehicle use could not be referring to the limestone area, but must be referring to and prohibiting uses

on the grassy area. Logically then, there was implicit recognition of uses of the grassy area for other than mere access, but not camping or motorized vehicle use.

The application judge also referenced the underlying local government land use documents put in place when Part 11 was created. The language suggested to the application judge permitted uses beyond access and he took this evidence as some indication of intent of the easement arrangement.

Finally, he relied on evidence from the owners of the Intervening Parcels who had arranged for the creation of Part 11 regarding the intent in creating the easement area. This evidence was in the form of testimony from one of the Intervening Parcel owners ('Moore') and a letter from the now-deceased owner of the other Intervening Parcel.

The Ontario Court of Appeal decision

The Appellants appealed to the Ontario Court of Appeal. In a 2:1 split, two of the three-member Court of Appeal panel adopted the restricted interpretation advanced by the Appellants, but there was a strong dissent from the third judge. The Court of Appeal judges agreed that an easement is to be interpreted on the basis of its express wording having regard to the surrounding circumstances at the time the easement was created. Despite this agreement on the applicable legal principles, the majority and the dissenting judge drew different conclusions of fact from the evidence.

An important qualification on the use of surrounding circumstances to interpret agreements is that only surrounding circumstances addressing 'objective intentions' of the parties is admissible evidence, but evidence of 'subjective intentions' is not. For example, what one person might have had in mind about the meaning of a document is not admissible evidence. On the other hand, a document created independent of the disputing parties contemporaneously with entering an agreement may be an example of evidence that objectively sheds light on the intention of the parties. This distinction between objective and subjective intention became important in the Court of Appeal proceedings.

The majority decision

The majority of the Court of Appeal concluded that the application judge 1) erred in principle in his interpretation of the easement, 2) misapprehended evidence, and 3) erred by taking into account evidence of Moore that the majority regarded as evidence of subjective intent related to the easement creation.

At this point, it will be helpful to refer to the language creating the easement set out above in the first paragraph.

The majority found that 'shores' in the easement document in the context of surrounding circumstances meant the area between the low and high-water mark. They concluded that the words creating the easement drew a distinction between 'shores' and the strip of land providing access to the shores. In their view, the easement language addressed two separate things: 1) access to the shores

through the easement area, and 2) use and enjoyment of the shores. In their view, the easement gave the Respondents the right to use and enjoy the shores, but not a right to use the pedestrian access for anything other than pedestrian access.

Further, on the majority's review of the photographic evidence, they concluded that, when the water was at its lowest level, it would be possible to erect a tent and to operate a "smaller motorized vehicle" on the shores. Therefore, according to the majority, in order to prohibit these activities, the easement needed to expressly do so. In the result, the majority disagreed with the application judge that the prohibition on camping and motorized vehicles was redundant.

On the question of objective versus subjective intent gleaned from surrounding circumstances, the majority found that the application judge erred by relying on the evidence of Moore, one of the Intervening Parcel owners, because, in their opinion, Moore's evidence relating to the creation of Part 11 addressed subjective intent. The majority held that the most relevant objective evidence was a copy of the local government's notice of decision approving the rezoning application for Part 11. The notice stated in part "The effect of the above applications was to create three residential building lots each with either direct or legal access to Lake Ontario ...". The majority held that the notice of decision was instructive because 1) it told that the rezoning application was aimed specifically at providing access to Lake Ontario, and 2) it prohibited construction of any buildings or structures on the narrow, shared water access on the easement area. The majority concluded that the easement area was to provide unobstructed access to Lake Ontario rather than be jointly used as a park. The zoning documents, while not determinative, provided objective evidence of intent – unobstructed access to Lake Ontario.

The majority held that absent what they regarded as Moore's evidence of inadmissible subjective intent, the objective evidence established that the easement restricts the Respondents to "pedestrian access only" for the purpose of ingress and egress from the "shores of Lake Ontario."

The dissenting opinion

The dissenting judge rejected the Appellants' interpretation of the easement granting language and would have dismissed the appeal. She concluded that camping and motorized vehicle use were not practically possible with the result that the prohibition against those activities expressed in the easement language had to refer to the strip of land leading to the shore and, therefore, contemplated greater use than merely access to the lake.

The dissenting judge disagreed with the majority that the evidence of Moore was all evidence of subjective intention and that at least parts were evidence of objective intention that could be considered by the court. In any event, she found that the application judge had not relied upon evidence of subjective intent, but instead had relied upon uncontradicted evidence of surrounding

circumstances from Moore related to the subdivision of the six-acre parcel and the creation of Part 11. She concluded that this was objective evidence of the intent to provide equal opportunity for the owners of all three lots and their successors to enjoy the shores of Lake Ontario, which she found to be consistent with how the lots were marketed and sold and how the easements were created and Part 11 was zoned. She stated that to ignore this evidence would result in an interpretation of the easement without the necessary context.

As noted above, the majority ruling prevailed and the Appellants' appeal from the order of the application judge was allowed. The Respondents' application for leave to appeal to the Supreme Court of Canada was denied.

The takeaway from *Reddick*

In *Reddick*, there was no disagreement among the Court of Appeal judges on the applicable legal principles governing the outcome of the case, but there was a profound disagreement on interpretation of the express words of the easement agreement and what evidence could be referred to in having regard to surrounding circumstances.

To a large extent, this case fell to be decided on the basis of the evidence related to use of the limestone area (shores of the lake). The application judge and the dissenting judge in the Court of Appeal were of the view that the limestone area could not practically be used for camping or by motorized vehicles. The majority of the Court of Appeal concluded that, at least at lower water levels, the two uses were possible. The differing conclusions directly impacted the different interpretations of the easement language. Additionally, the opinions of what was admissible surrounding circumstances greatly informed the competing interpretations of the easement agreement in *Reddick*. All of this indicates the difficulty appraisers and their legal advisors will have in determining the effect of not only easements, but, more generally, any interest or right in real property.

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