WHAT IS IN AN EASEMENT?

Juliet famously asks: *What is in a name?* After the recent decision in *Primont (Castelmont) Inc v Friuli Benevolent Corporation*[1] ("***Primont***"), the question becomes: *What is in an easement?*

This paper outlines how the court's decision in *Primont* diverges from the traditional analysis that courts have applied to ancillary rights.

The first part of the paper provides an overview of the jurisprudence on easements and ancillary rights.[2] In this section, we discuss the ancillary rights analysis, which requires courts to consider the circumstances in which the grant was made, not limiting the analysis to the wording of the easement grant. The second section of the paper focuses on the *Primont* decision, in which the Ontario Court of Appeal (ONCA) adopts a contrasting approach to determine whether parking rights are included in an easement. Finally, we conclude with practice points for legal professionals in light of the court's direction in *Primont*.

1. Jurisprudence on Easements and Ancillary Rights

A. Courts interpret easements using principles of contractual interpretation, which includes a consideration of the wording of the grant and surrounding circumstances.

For easements created by express grants, the words of the grant are the primary determinant of the parties' intention. To determine the nature and extent of an easement created by an express grant, courts will examine the "wording of the instrument creating the easement, considered in the circumstances that existed when the easement was created."[3] In other words, the wording of the grant governs the easement's use.[4] In *Fallowfield v Bourgault* ("***Fallowfield***") the ONCA outlined the approach to interpreting easements[5]:

> The nature and extent of an easement created by express grant primarily depend upon the wording of the instrument. **In construing a grant of an easement regard must be had to the circumstances existing at the time of its execution**; for the extent of the easement is ascertainable by the circumstances existing at the time of the grant and known to the parties or within the reasonable contemplation of the parties at the time of the grant, and is limited to those circumstances. [Emphasis added.]

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[1] 2023 ONCA 477 [*Primont*]

[2] The scope of this paper is limited to easements created by express grants.

[3] *Fallowfield v Bourgault*, [2003] OJ No 5206, 2003 CanLII 4266 (ONCA) at para 10 [*Fallowfield*]; Halsbury's Laws of Canada (online), *Real Property*, "Easements: Establishment and Acquisition of Easements: Legal Easements" (IV.2.(1) at HRP-303 "Nature and Extent" (2021 Reissue) [Halsbury's].

[4] Craig R Carter & David R Carter, *Real Estate Transactions: Cases, Text and Materials*, 2nd ed (Toronto: Emond, 2017) at 788 [Carter & Carter].

[5] *Fallowfield*, *supra* note 3 at para 10, citing Halsbury's Laws of England, vol 14, 4th ed (London: Butterworths, 1980) at pg 26, para 54.

This interpretation of an express grant in light of the circumstances existing at the time of its execution bears some resemblance to principles of contractual interpretation, which requires consideration of the words selected by the parties and the context in which those words have been used.[6] In fact, Canadian courts have likened the interpretation of easements to contractual interpretation. In *Robb v Walker*[7], citing *Sattva*, the seminal Supreme Court of Canada decision on contractual interpretation, the British Columbia Court of Appeal (BCCA) explained the general principles of interpreting an easement:

> When interpreting an easement, the court must have regard to the plain and ordinary meaning of the words in the grant to determine what the intention of the parties was at the time the agreement was entered into. Surrounding circumstances, that is, objective evidence of the background facts at the time of the execution of the contract, are to be considered in interpreting the terms of a contract: *Sattva* at para. 58.
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> The wording of the instrument creating the right of way should govern interpretation unless (1) there is an ambiguity in the wording, or (2) the surrounding circumstances demonstrate that both parties could not have intended a particular use of the easement that is authorized by the wording of the document: *Granfield v. Cowichan Valley (Regional District)* (1996), 1996 CanLII 356 (BC CA), 16 B.C.L.R. (3d) 382 (C.A.).

In *Husky Oil Operations Ltd v Self Holdings Ltd*[8], the Alberta Court of Appeal stated:

> The Grant of Easement must be recognized as a contract reflecting the terms of the agreement made by the contracting parties. It is elementary that any contract is the primary source of reference to determine a dispute involving the rights and obligations of those parties.

In *Sherbinin v Jackson*[9], the British Columbia Supreme Court (BCSC) summarized the law regarding the proper interpretation of an easement:

> Interpretation of an easement is subject to the same principles of judicial interpretation as govern other documents. When interpreting an easement, the Court

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[6] Geoff R Hall, *Canadian Contractual Interpretation Law*, 4th ed (Toronto: LexisNexis, 2020) citing *Golden Capital Securities Ltd v Investment Industry Regulatory Organization of Canada*, 2010 BCCA 359 at 44. In *Creston Molly Corp v Sattva*, 2014 SCC 53 at para 50, the Supreme Court of Canada confirmed: "Contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix."

[7] 2015 BCCA 117 at paras 31–32. This case was followed in *Owners, Strata Plan LMS 3905 v Crystal Square Parking* Corp, 2020 SCC 29 at para 101, *Herold Estate v Canada (Attorney General)*, 2021 ONCA 579 at para 45, and *Reddick v Robinson*, 2022 ONSC 6124 at para 12.

[8] 1989 ABCA 30 at para 12.

[9] 2011 BCSC 74 at paras 30–31, followed by *Englehart v Holt*, 2014 BCSC 1696 at para 113, *Lafontaine v University of British Columbia*, 2012 BCSC 805 at para 57, and *White Russian Enterprises Inc v Big Bend Operating Co. Ltd*, 2012 BCSC 137 at para 15. More recently, in *The Owners, Strata Plan KAS2084 v The Owners, Strata Plan KAS1980*, 2023 BCSC 1011 at para 27, the BCSC stated: "Although *Sattva* is not expressly cited…the principles of interpretation of an easement are helpfully summarized and are consistent, I find, with the *Sattva* principles."

> must have regard primarily to the words of the easement in determining the intention of the parties. However, if there is ambiguity, the Court may also have regard to the surrounding circumstances when the document was made…Surrounding circumstances may not include evidence of the subjective intent of the parties. Moreover, evidence of surrounding circumstances must not be allowed to overwhelm the plain language of the document: *Avanti*, at paras. 43, 61.

Courts will give primacy to the words of the grant absent ambiguity and indicators from the surrounding circumstances at the time of the grant demonstrating that a particular use could not have been intended.[10] Where no ambiguity in the language of the grant exists, extrinsic evidence is not admissible, if the purpose is to add a term instead of explaining the terms or identifying the subject matter.[11] For example, in *Oakville (Town) v Sullivan*[12], the ONCA rejected the appellants' argument that the application judge erred by focusing principally on the wording of the instrument and ignoring the contemporaneous extrinsic evidence.[13] The court reasoned that the appellants' argument was "in effect, an invitation for the court to read down the clear words of the easement indenture based on the surrounding circumstances and the use made of the easement to date."[14]

However, the emphasis on the wording of the easement grant does not suggest that the court is precluded from looking at the circumstances in which the grant was made. In fact, in *Oostdale Farm and John Oostovogels v Joseph Lawrence Oostvogels*[15], the Nova Scotia Supreme Court stated that "it will be a rare case when resort to the surrounding circumstances will not be necessary in construing the bounds of an easement."[16] Where there is ambiguity, uncertainty, or a lack of specific wording in the express grant, the parol evidence rule allows courts to refer to extrinsic evidence to ascertain the terms of the agreement, such as the circumstances at the time of execution.[17] A court may refer to various factors in the surrounding circumstances, such as: the past use of the right of way and its use at the time of the grant, why the right of way was created, physical characteristics of the right of way surrounding servient land, characteristics of the dominant tenement, relationship of the parties, and passage of time.[18]

For instance, in *Fallowfield*, the ONCA examined the wording of the clause granting the easement and the circumstances at the time of the grant, despite finding that the wording of the grant was clear. In this case, two adjoining property owners had houses separated by a four-foot strip of land,

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[10] Carter & Carter, *supra* note 4 at 788.

[11] *Canadian Construction Co v Beaver (Alberta) Lumber Ltd*, [1955] SCR 682. Before this decision, the SCC stated in *Laurie v Bowen* (1952), [1953] 1 SCR 49 that the court may look at the circumstances at the time of the grant of the right of way for the "purpose of construing the conveyance as to the nature and extent of the rights conveyed".

[12] 2021 ONCA 1 [*Oakville*].

[13] *Ibid* at para 21.

[14] *Ibid* at para 22.

[15] 2016 NSSC 146 [*Oostovogels*].

[16] *Ibid* at para 31.

[17] Halsbury's, *supra* note 3, citing *Gallen v Allstate Grain Co*, [1984] BCJ No 1621, 1984 CanLII 752 (BCCA); CED (online), *Easements*, "Extent and Nature of Easement" (II.C) at § 26.

[18] *York Region Condominium Corporation No 890 v Market Village Markham Inc*, 2020 ONSC 3993 at para 21, citing *Oostovogels* at para 32.

with each owner owning a two-foot strip adjacent to their respective houses. The easement gave each owner access to the four-foot strip to repair their homes and lots. The appellant built a fence, restricting the respondent's access to the easement area from the front of the houses. The respondent had already built a patio and deck, preventing backyard access to certain equipment. The application judge granted the respondent's application for a declaration that the fence interfered with access to the easement, and an order for the appellant to remove part of the fence, which was overturned on appeal. In its ancillary rights analysis, the ONCA first looked at the wording of the grant. The court found that the clause was "clear in delineating the physical boundaries of the grant" and the purpose of the easement was "unambiguous".[19] The court then examined the circumstances at the time the grant was made and found that "the intention and circumstances at [the time of the grant]" governed, and noted that the deck and patio built at the back of the respondent's house after the creation of the easement grant was irrelevant in construing the nature and extent of the easement.[20]

In summary, when interpreting an express grant, courts typically apply the following rules[21]:

1. The grant must be construed in light of the situation of the property and the surrounding circumstances, in order to ascertain and give effect to the intention of the parties.

2. If the language of a grant is clear and free from doubt, such language is not the subject of interpretation, and no resort to extrinsic facts and circumstances may be made to modify the clear terms of the grant.

3. The past behaviour of the parties in connection with the use of the right of way may be regarded as a practical construction of use of the way.

4. When in doubt, construction should be made in favour of the grantee.

B. Courts will read "ancillary rights" into a grant of easement.

The grant of an easement *prima facie* includes the grant of ancillary rights.[22] Once an easement is established, courts will read into the easement such ancillary rights as are "reasonably necessary" to enjoy the easement.[23] Ancillary rights are an equitable concept providing reasonable additional rights to the dominant owner that the parties would have likely agreed to if they had turned their minds to it at the time the easement was agreed to. In effect, the courts step in to fix the bad drafting of the parties.[24]

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[19] *Fallowfield*, *supra* note 3 at paras 16–17.

[20] *Ibid* at para 18.

[21] Anne Warner La Forest & Diana Ginn, *Anger & Honsberger Law of Real Property*, 3rd ed (Toronto: Thomson Reuters, 2023); *Jordan v Beauchamp-Kiss*, 2018 ONSC 2677 at para 45.

[22] CED (online), *Easements*, "Ancillary Rights Included" (II.C) at § 25.

[23] *Kasch v Goyan* (1992) 87 DLR (4th) 123, 1992 CanLII 8523 (BCSC), citing *Jones v Pritchard*, [1908] 1 Ch 630, aff'd 103 DLR (4th) 51, 1993 CanLII 2291 (BCCA) [*Kasch*]; *Voye vs Hartley*, 2002 NBCA 14 at para 21; *Boone v Brindley*, [2001] OJ No 5936, 2001 CanLII 2578 (ONSC) aff'd (2003) 179 OAC 50, 2003 CanLII 20920 (ONCA); Carter & Carter, *supra* note 4 at 815.

[24] Carter & Carter, *supra* note 4 at 815.

In *Kasch v Goyan*[25] ("***Kasch***"), the BCSC recognized **the need to examine the circumstances** in determining ancillary rights:

> …The question truly becomes: what are the precise "ancillary" rights which are "reasonably necessary" to the exercise or enjoyment of the easement. In my opinion, the question of what rights are reasonably necessary incorporates into it the usual factors that accompany any question of reasonableness, namely, a consideration of all of the circumstances which are in any way relevant. That consideration should be followed by a decision whether in all of those circumstances what is done or what is proposed is "reasonably necessary" to the exercise or enjoyment of the easement.

In *Muir v Drozdoski*[26], the ONCA explained that what is "reasonably necessary" depends on "a proper construction of the instrument creating the easement, but also the factual circumstances including the purpose of the easement, the circumstances of its creation, the history of its development and the circumstances of its use".[27] In other words, there is "no mechanical way to determine what constitutes an unreasonable demand upon an easement".[28] The court added that the application judge may have erred by applying the "precise language of grant" test to determine the scope of the easement.[29]

For instance, *Adili v Donn*[30], the court granted an ancillary right to use a small part of the servient lands because otherwise, the dominant owner would not be able to access his lands. While the wording of the grant was "clear and ambiguous", the court looked at the circumstances at the time of the creation of the right of way, including the configuration of the laneway, the Tree Management Report, and the Tree Management Plan, which were documents given to the dominant owner when purchasing the lots.

Another example is *MacRae v Levy*[31], in which the Ontario Superior Court of Justice (ONSC), after looking at the circumstances at the time of the grant, concluded that that the right to park was not an ancillary right. The court reasoned that the grant of the right of access was made in 1940, while the cottage was built 13 years later in 1953. At the time of the grant, parking on the right of way to gain access to the property was not necessary. When the cottage was built in 1953, the right to park on the right of way became necessary as there was no place remaining to park vehicles except on the right of way.

Finally, in *West High Development Ltd v Veeraraghaven*[32], the ONSC held that the respondents had ancillary rights to alter the right of way to make use of it, which included excavation and

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[25] *Kasch*, *supra* note 23 citing *Jones v Pritchard*, [1908] 1 Ch 630.

[26] [2003] OJ No 5153, 2003 CanLII 48154 (ONCA).

[27] *Ibid* at para 7.

[28] *Ibid*.

[29] *Ibid*.

[30] 2012 ONSC 4086 at para 65.

[31] (2005) 28 RPR (4th) 291, 2005 CanLII 2316 (ONSC).

[32] 2011 ONSC 1177

paving.[33] The court addressed the applicant's argument regarding the increased volume of traffic by looking at past use and the historical nature of the properties and concluded that vehicular traffic would not be problematic.[34]

Ancillary rights are also determined by the actual use or purpose of the easement.[35] For instance, in *Clarke v Kokic*[36], the ONCA held that the easement holder had the ancillary right to renovate the property to use the relevant portion to build an emergency exit, to comply with building and fire regulations.[37] The title deed provided for a "right-of-way for all persons entitled thereto…a like right, over, and through and along the existing hallways and stairways…"[38] The appellate court agreed with the application judge that the grant was sufficiently broad to include using the easement as an emergency exit in case of fire. The court also noted that the easement holder already "had the right to use the easement for ingress and egress, including as an emergency exit".[39]

In *Kasch*, the court outlined two factors that may be considered when determining whether an ancillary right is reasonably necessary: (a) the extent of the utilization of each of the parties of the right of way incorporated into the easement, and (b) the extent of the inconvenience in not having a structure built within the right of way.[40] The broader the easement, the more ancillary rights are possible.[41] However, courts are reluctant to recognize an ancillary right that would enlarge the dimensions of a granted easement.[42]

Courts should analyze whether the ancillary rights doctrine is applicable after interpreting the grant. In *Fallowfield*, the ONCA noted that: "[o]nce the wording of the grant has been interpreted in the context of the circumstances…the next question is whether there are any ancillary rights, not included in the wording of the granted easement, that are reasonably necessary…to be able to exercise their use of the easement."[43] In *Wilson v McQuade*[44], the ONSC first considered the scope of the easement granted to the applicants, then considered whether the applicants had an

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[33] *Ibid* at paras 113–115.

[34] *Ibid* at paras 121–123.

[35] Carter & Carter, *supra* note 4 at 815.

[36] 2018 ONCA 705, leave to appeal refused 2019 CanLII 29771, 2019 CarswellOnt 5579 (SCC).

[37] *Ibid* at para 11.

[38] *Ibid* at para 6.

[39] *Ibid* at para 11.

[40] *Kasch*, *supra* note 23 at para 14.

[41] For instance, in *Kendrick v Martin*, 2012 ONCA 711, the court found that the trial judge erred in finding that the wording of the easement grant provided for a particular use. The court stated: "The grant is a right of way that is unlimited by words confining the use that persons entitled to use it and may make of it. The general use thus provided is made available to persons and animals and vehicles." Another example is *Kokoruds Estate v Britton*, 2010 ONCA 663, where the court upheld the trial judge's conclusion that the respondent had an ancillary right to allow for vehicular turning at the "daylight corners" of the right of way. The ONCA stated that no words of limitation or qualification on the scope of the right of vehicular use were included in the original right of way, and in the absence of such a restriction, it was open to the trial judge to find that an ancillary right existed.

[42] *Arbutus Bay Estates Ltd v Canada (Attorney General)*, 2017 BCCA 374 at para 78, reversed in part on other grounds 2018 BCCA 259.

[43] *Fallowfield*, *supra* note 3 at para 19.

[44] 2022 ONSC 847.

ancillary right to park on the right of way. Similarly, in *Kasch*, the BCSC first examined the instrument that created the easement, then determined whether the respondent was entitled to construct the walkway, staircase, and railing as an ancillary right reasonably necessary to the enjoyment of the easement.

In determining ancillary rights, a court need not limit its analysis to the wording of the easement grant. In *MacKenzie v Matthews*[45], the ONCA considered the purpose and language of the easement and extrinsic evidence to confirm that the right of way to access island properties included the ancillary right to install a dock, have a vehicle turn-around area, and park temporarily. First, the court reasoned that the easement's purpose was to provide island owners access to their properties by boat, and the installation of a dock was implicit in such an easement since the owners must arrive by vehicle. The court also noted that the evidence demonstrated that a dock existed at the end of the right of way when the easement was created. Second, the court found that the language of the conveyance creating the easement, its purpose, the circumstances of its creation, the history of its development in conjunction with the vehicle turnaround, and the circumstances of its use led to the conclusion that access to and from the vehicle turnaround was a reasonable ancillary use.[46]

C. Whether parking is an ancillary right depends on the circumstances of the case.

i. Decisions in which parking was found to be an ancillary right

In *Boone v Brindley*[47], the Court of Appeal upheld a trial judge's determination that parking was an ancillary right within the right for free passage granted by an easement. Here, a right of way held by cottagers over a farmer's property was required to access their lakeside properties, but the grant did not speak to any express right to park. The ONCA held that the trial judge properly considered "the language of the conveyance creating the easement, the purpose and circumstances surrounding the creation of the right of way, the history of its development, and the circumstances of its use."[48] The trial judge had concluded that parking was an ancillary right after finding that the deeded right of way was the only topographically feasible location at which to park.[49]

In *Square-Boy Limited v City of Toronto*[50], the ONSC held that the right of way included, as an included or ancillary right, the right to permit parking. The City of Toronto sought to expropriate strips of land for an anticipated new ramp. The right of way covered a former parking lot that Square-Boy had sold to the City of Toronto that had previously been used to access Square Boy's properties. The court was asked to interpret the meaning of the words "right-of-way in, over, along and upon the lands herein described…for all purposes". The court held that "for all purposes"

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[45] [1999] OJ No 4602, 1999 CanLII 19931 (ONCA) at para 8. Note: The court did not analyze the wording of the grant. The language of the grant provided for a "private right of way providing access to the registered [island] owners" and that no right of way would be granted to "the public at large…other than the owners, guests and tradesmen" of the islands.

[46] *Ibid* at para 12.

[47] 179 OAC 50, 2003 CanLII 20920 (ONCA).

[48] *Boone v Brindley*, 179 OAC 50, 2003 CanLII 20920 (ONCA) at para 2.

[49] *Lafferty v Brindley*, [2001] OJ No 5936, 2001 CanLII 2578 (ONSC).

[50] 2017 ONSC 7178.

meant that the right of way was to be interpreted in a manner "that includes all of the purposes for which it was agreed upon, created and granted to encompass which, in the context of this case, includes the right to permit parking to access to commercial premises of the Property."

ii. Decisions in which parking was not found to be an ancillary right

In *Kirby v Otulakowski*[51], the ONSC concluded that while both parties had the ability to drive a vehicle over the easement between their houses, they had no ancillary right to park their cars. The court reasoned that the purported ancillary right to park the vehicle on a mutual driveway would substantially interfere with and undermine the right of way.[52] The instruments providing for the right of way were described as being "over along and upon" the strip of land between the applicant and respondents' properties.[53]

In *Soares v Café Regional Bar and Grill Inc*[54]*,* the court addressed competing interests of residential and commercial landowners who were entitled to pass and repass over a right of way to access their properties. The residential homeowner sought injunctive relief to stop the commercial landowners and their customers from parking on the right of way, on the basis that the parking was obstructing the homeowner's ability to access her garage. The ONSC determined that the right of way constituted a right to pass and that any parking of less than 15 minutes was permissible, but that parking over 15 minutes would constitute parking and interfered with the use of the right of way by the other right holders.

In *Miller v MacLean*[55], the court held that a right of way would include the right to temporarily park vehicles, but not semi-permanent or permanent obstruction of the right of way. The court held that the parking of old vehicles in the right of way "are not activities which would be permitted within a proper construction of the reasonable use of the easement", and that it would "amount to substantial interference with the plaintiffs' lawful right to use" the road.[56]

Several decisions from BC courts have also held that an easement did not permit parking:

1. In *444038 BC Ltd v Suraj Imports Ltd*[57], the court held that the easement, reasonably interpreted, may have allowed for "brief times to unload or park on each other's lot without unduly impeding the passageway". However, unlimited parking would not be included because "if parking was intended in addition to a passageway, the instrument would probably have said so."[58]

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[51] 2021 ONSC 3298 at para 30.

[52] *Ibid* at para 28.

[53] *Ibid* at para 11.

[54] 2013 ONSC 7939.

[55] 7 NSR (2d) 371, 1972 CanLII 2240 (NSSC) at para 54.

[56] *Ibid* at para 55.

[57] 2004 BCSC 307.

[58] *Ibid* at para 41. Note: In this case, the easement provided for the right to "pass and repass".

2. In *Banville v White*[59], the court held that while stopping temporarily on the easement did not amount to parking, the jurisprudence demonstrated that parking is not permitted on the easement.

3. In *Brundrett v Muckle*[60], the BCCA dealt with whether a right to cross over an easement area carried with it the right to build a concrete and blacktop area and use it for parking. The court stated that the "grant…does not carry with it a right of parking. A right to cross over may carry with it the right to tarry for a brief moment or two, but no more."[61]

4. In *Wong v Rashidi*[62], the BCSC held that while the easement agreement providing for "pass and repass" included the right to stop on the easement for no more than five minutes, there was no ancillary right to park on the easement.

D. Evolution of the Treatment of Easements

The court's treatment of easements has evolved over many years. There are several important instances in that evolution where the court has shifted the way it interprets and views express easements. The authors of this paper believe that *Primont* is one of those instances. Another is the case of *Weidelich v de Koning*[63] ("***Weidelich***"), which is generally viewed as the leading case on the "substantial interference" threshold. In that case, the ONCA held that an encroachment on a private right of way was not actionable unless there is a substantial interference with the easement holder's rights.

In *Weidelich,* the appellants and respondents were neighbours in a block, whose properties backed into a private laneway. Each of the landowners in the block owned a part of the laneway, and the respondents owned "Part 19" of the laneway. The respondents were subject to a right of way "in favour of the owners and occupants from time to time [of the five properties]…over, along and upon…Part 19…for the purpose of vehicular ingress and egress." The respondents began a home renovation, intending to add a three-story structure, an outdoor balcony floor on the second floor, and a ground-floor patio and outdoor planter. The structure encroached upon Part 19 but did not affect the width of the right of way.

The appellants applied for a declaration that the respondents not obstruct the right-of-way and sought an order requiring the removal of structures built on the right of way. The application judge found that the encroachments did not create a "real or substantial interference with the use of the laneway for vehicular access".[64]

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[59] 2002 BCCA 239. Note: The language of the easement allowed for "access over the said lands…to pass and repass over and across the said property either with or without motor-vehicles, implements and other things which the Grantee may reasonably require to move across the lands of the Grantor".

[60] [1997] BCJ No 1585, 1997 CanLII 4439.

[61] *Ibid* at para 12.

[62] 2010 BCSC 1451.

[63] 2014 ONCA 736 [*Weidelich*].

[64] *Weidelich v De Koning*, 2013 ONSC 7486 at para 11.

The Court of Appeal agreed with the application judge that an "encroachment on a private right-of-way is actionable only where the encroachment substantially interferes with the dominant owner's ability to use the right-of-way for a purpose identified in the grant."[65] The court considered the express purpose of the grant of the easement, which was specifically limited to "the purpose of vehicular ingress and egress". Accordingly, the court found that the building of a structure on the easement was not a substantial interference, notwithstanding that it was placed within the area expressly granted for use by the dominant tenement. At the time, many practitioners found this surprising, since the decision seems to permit a derogation from the express grant. However, this is arguably resolved through the court's analysis of the difference between fee simple ownership and an interest in an easement. The court explained that the substantial interference requirement reflects the nature of the dominant owner's right, who did not own the right of way but enjoyed the reasonable use of that property for its granted purpose. This stems from the nature of an easement and is more than a simple reading of the grant. Were the facts in *Weidelich* different, such that the instrument being interpreted was a lease, licence or other contract, these authors believe the decision may have gone the other way. In this respect, *Weidelich* affirmed that easements are something different from mere contracts.

2. Analysis of Primont

A. Facts

Primont was an appeal from an application judge's decision granting an application for a declaration that a mutual easement among the parties does not include the right to park.

The applicant, Primont, agreed to purchase real property owned by Famee (the "**Property**") and sought a declaration that the easements registered against the Property do not include the right to park. The adjacent landowners holding the easements were Friuli Benevolent Corporation ("**Benevolent**"), the owner of an apartment building, and Friuli Long Term Care ("**LTC**"), the owner of a long-term care facility. Only the easement granted to LTC was at issue.

The wording of the easement at issue, granted by Famee to LTC, was as follows:

> A non-exclusive easement for the purposes of vehicular and pedestrian access and egress over and along [Property legal description omitted], as may be unencumbered by buildings or structures from time to time and as may be improved from time to time by the owner thereof to accommodate vehicular and pedestrian access and egress, being the servient tenement.

Famee and Benevolent were adjacent landowners. In 2001, Famee, who owned a banquet hall and social club on a part of its land, decided to build a long-term care facility between the social club and Benevolent's apartment building. A new lot was then severed for the long-term care facility and transferred to LTC. This lot was landlocked and had inadequate parking. Famee's banquet hall and social club were busy at night, and many of its parking spaces were available for LTC visitors' and staffs' use during the day. Famee, LTC, and Benevolent agreed that the three lots would

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[65] *Weidelich*, *supra* note 63 at para 10.

function as a single campus, with mutual access to adjacent roadways and shared parking between Famee and LTC.

In December 2002, a planning report to the City of Vaughan (the "**City**") noted that existing zoning standards required 435 parking spaces for the three proposed uses: 238 spaces for the social club, 113 spaces for the seniors apartment, and 84 spaces for the long-term care facility. However, the proposal included only 325 parking spaces. The report noted that "[g]iven the different peak times for the different on site uses, some shortfall is acceptable". In March 2003, the City passed a zoning bylaw to:

- "permit development of the long-term care facility "as a complimentary use to the existing seniors apartment building and banquet hall facility"
- direct that the three properties be "deemed to be one lot", and
- confirm the minimum number of parking spaces to be 311.

In June 2003, the City, Famee, and two builder corporations entered into a Site Plan Agreement, which was registered against all of the Famee, LTC, and Benevolent lands. Section 2 of the Site Plan Agreement required that the lands be developed in accordance with the attached schedules, and not be used "for any purpose other than the use designated on the said Schedules". Section 5 required parking to be completed as shown on the Schedules, and Schedule A1 reflected a total of 319 parking spaces associated with the "total site" on which the long-term care facility was to be constructed.

In September 2003, Famee, LTC, and Benevolent entered into a Tripartite Agreement to establish "the manner in which [their respective lands] are to be utilized and the manner in which related costs are to be shared." In paragraph 4(a), LTC agreed to construct "reconfigured parking areas and internal roadway systems". Paragraph 4(b) provided that "notwithstanding that [the parties] enjoy an easement for vehicular and pedestrian access and egress over the lands of the other parties … such right shall not permit the owner of the dominant tenement…to change, alter or modify the lands of any servient tenement or expand those parts of the servient tenement actually being used for the purposes of the easements…without the prior written consent of the owner of the servient tenement, which may not be arbitrarily withheld but which may be subject to reasonable terms including that the proponent of the change…agreeing to pay for all costs relating to same".

Later that month, the parties registered the easements referred to in the Tripartite Agreement against the Property, LTC, and Benevolent lands. The reciprocal easements created a property interest in favour of each of LTC, Famee and Benevolent in all of the Lands and gave each the right to use the other parties' lands "for the purposes of vehicular and pedestrian access and egress". However, each party's use of the other parties' lands was restricted to the portion of the other parties' land "as may be unencumbered by buildings or structures from time to time and as may be improved from time to time by the owner thereof".

B. The Application Judge's Decision

The application judge concluded that parking rights between the parties are contractual, and granted a declaration that the mutual easements did not include the right to park. His Honour began by noting that the issue before the court was narrow: whether parking rights are property rights

that are included in the easements, or contractual rights under various agreements alone.[66] The court noted that the easement dealt with "access and egress only", and that the fact that LTC agrees it has no right to use the parking spots of the Benevolent apartment building was telling because it was inconsistent with the argument that a parking right is included in the easements.

The court then stated that the "easements are to be interpreted in accordance with the words used first and foremost. Reference can be had to objective surrounding circumstances but not to overwhelm the words used." The court held that nothing in the City development documents, planning reports, zoning bylaws or the parties' agreements required or allowed the words "vehicular and pedestrian access and egress over and along" to be construed as "parking".

The court then noted that parking was an issue for the City and the parties, and it was dealt with as they wished and to the satisfaction of all at the time.

The application judge disagreed with LTC's argument that the granting of easement does not make sense if it does not include parking, holding that the parties anticipated future redevelopment, and that roadways could move without the easements needing to be changed. The application judge then stated that nothing in the bylaws or other planning documents required parking to be dealt with as a property right rather than a contractual right. His Honour emphasized that the easements are to be interpreted in accordance with their words, unless they were ambiguous, which was not the case. The application judge held that there was no easement by necessity, because only access and egress, which was dealt with by the easements, were necessary. Parking was the subject of agreements between the parties and the City for use contemplated by the landowners.[67]

The court also deferred to the Land Planning Appeal Board, adding that LTC is bringing an issue for use and zoning that may be for the Land Planning and Appeal Board, which would be dealing with any proposal of a redevelopment process that can address LTC's need for day parking.

C. ONCA's Holding and Analysis

On appeal, LTC argued that the application judge erred by failing to hold its right under the Easement included parking rights.[68] Specifically, LTC argued that the application judge erred by failing to consider the ancillary rights doctrine, since the adjoining landowners always agreed that parking rights were necessary for the long-term care facility operations. LTC stated that without parking rights, the easement would be rendered useless.

The Court of Appeal rejected LTC's argument and upheld the application judge's decision. The court cited *Fallowfield*, noting that the "nature and extent of the easement are to be determined by

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[66] *Primont (Castelmont) Inc v Friuli Benevolent Corporation*, 2022 ONSC 2066 [*Primont* application decision].

[67] The court also held that promissory estoppel would not apply, given that the parties agreed upon contractual rights, and neither party promised to "never propose a revision to a parking plan" or that it would "not rely on its right to redevelop".

[68] Note: LTC also argued that Primont's application was speculative and hypothetical, a discussion that is irrelevant to this paper. Specifically, LTC submitted that the application was hypothetical because it had no practical effect of resolving the dispute between the parties about parking rights, and because Primont did not put forward any development plan indicating what it intended to do with the existing parking spaces or where it intended to locate new buildings or parking spaces.

the wording of the instrument creating the easement, considered in the context of the circumstances that existed when the easement was created" and that ancillary rights are "reasonably necessary to use and enjoy the easement".[69] The court then held that the application judge excluded the possibility that parking rights were an ancillary right. The court's reasoning was three-fold. First, the application judge correctly noted the purpose of the easement, which was for "vehicular pedestrian access and egress". Because LTC's lot was landlocked, the easement was a necessary remedy. Second, the application judge correctly noted that the City and the parties dealt with parking rights "as they wished to and to the satisfaction of all at the time", which signified that parking rights could not be construed as reasonably necessary. Lastly, the court stated that while the long-term care facility did not lack parking altogether, despite having a limited number of parking spaces. Accordingly, the long-term care facility was not rendered useless in the absence of ancillary rights to park.

The ONCA also rejected LTC's argument that the application judge erred in failing to find an easement of necessity for parking. The court reasoned that parking was dealt with by the agreements between the City and the parties, and the easement resolved the problem of the LTC lot being landlocked.

3. Practice Point

The ONCA's approach in *Primont* demonstrates a narrowing of the ancillary rights doctrine.

The court's analysis in *Primont* represents a change from the traditional approach, where surrounding circumstances played a greater role in the interpretation of the easement. Compared to the approach previously taken by courts to assess ancillary rights, the court in *Primont* appears to give more weight to the wording of the instrument creating the easement, which was for "access and egress". Here, the court emphasized that the purpose of the easement was to remedy the problem of the landlocked LTC lands and interpreted this purpose as precluding parking as an ancillary right. The court's decision to downplay the surrounding circumstances is noteworthy, as the parties in *Primont* clearly used the easement not only for "access and egress", but also for parking, as evidenced by the process leading up to the registration of the easement grant.

In previous decisions, Canadian courts have considered ancillary rights in light of the surrounding circumstances. For instance, in *Fallowfield*[70], the court provided several reasons for concluding that the easement did not include the ancillary right to enter the easement by crossing over the appellants' property. In addition to the wording of the easement, these reasons included the surrounding circumstances: the description of the easement considered in the context of houses that were built four feet apart, the ample space existing at the time of grant to bring backyard equipment, and the sufficient width in the current circumstances to effect repairs. Where courts have refused to give weight to the surrounding circumstances, such as *Oakville (Town) v Sullivan*[71], the court was rejecting an invitation to modify the words of the easement grant that were already clear and unambiguous.

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[69] *Primont*, *supra* note 1 at para 56.

[70] *Fallowfield*, *supra* note 3.

[71] *Oakville*, *supra* note 12.

In *Primont*, the court did not limit its analysis exclusively to the language of the easement grant. The ONCA briefly examined the circumstances at the time the easement was created, which included agreements signed between the parties and the City and the limited number of parking spaces held by the long-term care facility. However, the application judge and the ONCA emphasized the fact that parking rights were subject to an agreement between the parties.[72] The court did not look to other factors, such as past use of the easement, physical characteristics surrounding the servient land, characteristics of the dominant tenement, relationship of the parties, and the passage of time. Moreover, the ONCA and the application judge did not discuss the actual use or purpose of the easement, which is a factor typically considered by courts in the ancillary rights analysis.

If courts continue to follow the direction of *Primont* to restrict the ancillary rights analysis through greater emphasis on the words of the grant, lawyers should ensure that the description of the easement in the grant is well-drafted, including a precise definition of its scope. Parties should be completely satisfied with the easement grant when it is drawn up and expect that courts will limit the extent and scope of the easement, including ancillary rights, to what is written. Specifically, when negotiating an easement grant, lawyers should ensure that the wording accurately reflects its intended use, including present and future use, insofar as it is possible to anticipate.

Parties should also be cautious of addressing ancillary rights in a separate agreement outside of the grant, as courts may consider the issue to be resolved "to the satisfaction of all" at the time of the agreement. In other words, addressing rights related to an easement, such as the right to park, fence, and repair, in a separate contract may lead a court to restrict its interpretation of rights granted by the easement.

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[72] *Primont* application decision, *supra* note 65 at para 34; *Primont*, *supra* note 1 at para 59.