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Land survey most important document in real estate transaction

The sad tale of the Glenlake Ave. driveway featured in the *Star* late last month has focussed public attention on the difference between the Land Registry and the Land Titles systems of property ownership. It has underscored yet again the fact that the single most important document in any real estate transaction is the land survey formally known as surveyor s real property report.

As reported in the *Star*, the Perkovic family owns 104 Glenlake Ave. in Toronto s west end, and the Roslins recently purchased the house next door at 106. In between the two properties is a wide driveway, leading to the back of both properties and to the Perkovics double garage on the west and the Roslins parking area to the east.

For 33 years, the Perkovics had been using it to access their garage. Unfortunately for them, they only own a small strip beside their house not wide enough for a car to navigate. Recently, the Roslins blocked access by the Perkovics to their driveway.

Had the properties been registered in the old Land Registry system, the Perkovics would probably have acquired a right to the continued use of the driveway. In law, this is known as an easement by prescription, or a right of way resulting from continuous use for more than 20 years.

But since both houses were originally registered under the newer Land Titles system, the squatter s rights rules do not apply and the Perkovics have no right of vehicular access to their double garage.

The Glenlake Ave. dispute can be compared to the case of Amar and Brown v. Fricker, which was heard in the Nova Scotia Supreme Court last October. The parties to the litigation own adjacent properties on Robie St. in Halifax. Title is registered under the Registry system.

The houses are separated by approximately 11 feet (Nova Scotia judges still use Imperial measurements). Eight feet of the driveway are owned by Mitchell Amar and Diana Brown, and three feet by their neighbours, Aubrey and Joan Fricker.

For many years Amar and Brown and the prior owners of their house enjoyed what one witness at the trial called friendly mutual access to the space between the houses.

The Frickers were not using their three-foot strip as a driveway. Recently, they built a fence along the property line, ending the ability of Amar and Brown to use the driveway. Although the remaining eight feet of the driveway which they owned was wide enough to allow a car to pass through, it was not wide enough to allow the car doors to be opened.

One person who tried to get his van up the narrow passage had to exit through the rear door because there was not enough room to open the passenger doors.

Eventually, the neighbours wound up in court. Amar and Brown claimed a right of way (also known as an easement by prescription) over the three-foot strip and an order requiring removal of the fence.

The Frickers, who built the fence, claimed damages for trespass over their three-foot strip before the fence was built.

After a two-day trial, Justice Suzanne Hood found that the usage of the driveway strip by Amar and Brown and the previous owners of their property was open, continuous since the 1980s, unobstructed and without the permission of the owners of the three-foot strip.

The judge ruled that Amar and Brown had an easement over the Fricker portion of the driveway, and ordered the Frickers to remove the fence.

Amar and Brown were awarded damages of $1,000 for interference with the driveway and $3,000 for costs.

The lesson from the Nova Scotia case and the Glenlake Ave. dispute in Toronto is for buyers to review the land survey and deed description with their lawyers very carefully before closing a home purchase. Knowing where the property begins and ends and what rights of passage are included or excluded is of critical importance.

Amar v. Fricker, 2009 NSSC 359 (CanLII)

Date: 2009-10-27
Docket: 309983
URL: http://www.canlii.org/en/ns/nssc/doc/2009/2009nssc359/2009nssc359.html

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

Decisions cited

- Ford v. Kennie, 2002 NSCA 140 (CanLII) 210 N.S.R. (2d) 50
- Gilfoy v. Westhaver et al., reflex 92 N.S.R. (2d) 425
- MacIntyre v. Whalen and Kehoe, reflex 97 N.S.R. (2d) 317

SUPREME COURT OF NOVA SCOTIA

Citation: Amar v. Fricker, 2009 NSSC 359

Date: 20091027

Docket: Hfx. No. 309983

Registry: Halifax

Between:

Mitchell M. Amar and Diana E. Brown

Applicants

v.

Aubrey Fricker and Joan Fricker

Respondents

LIBRARY HEADING

Judge: The Honourable Justice Suzanne M. Hood

Heard: October 26 & 27, 2009 in Halifax, Nova Scotia

Written Decision: November 27, 2009 *(Oral decision given on Oct. 27. 2009)*

Subject: Easement: by prescription or lost modern grant, application (not action) pursuant to *CPR 5*.

Summary: The parties to this application owned adjacent properties on Robie Street in Halifax. There is approximately eleven feet between the two properties, eight feet of which is owned by one party and approximately three feet by the other. The space is used as a driveway and the owner of the three foot strip has recently erected a fence along most of the driveway portion of the three foot strip.

Issues: 1. Is there a prescriptive right over the three foot strip?

2. If so, must the fence be removed?

3. If not, have there been acts of trespass?

Result: Prescriptive easement exists over three foot strip to allow access to and egress from vehicles. Damages of $1,000.00 for interference with easement for one year.

THIS INFORMATION SHEET DOES NOT FORM PART OF THE COURT'S DECISION. QUOTES MUST BE FROM THE DECISION, NOT THIS LIBRARY SHEET.

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Written Decision: November 27, 2009 *(Oral decision given on Oct. 27. 2009)*

Counsel: Allen C. Fownes for the Applicants

Aubrey and Joan Fricker, self-represented

By the Court:

[1] The parties to this application owned adjacent properties on Robie Street in Halifax. There is approximately eleven feet between the two properties, eight feet of which is owned by one party and approximately three feet by the other. The space is used as a driveway and the owner of the three foot strip has recently erected a fence along most of the driveway portion of the three foot strip and what I will call a low wood enclosure around the rest.

[2] There are two applications. One is a claim for a prescriptive right to use of the three foot strip for access and egress from vehicles and the other application is for trespass over the three foot strip.

ISSUES

1. Is there a prescriptive right over the three foot strip?

2. If so, must the fence be removed?

3. If not, have there been acts of trespass?

FACTS

[3] Mitchell Amar and his wife, Diana Brown, bought the property at 1682 Robie Street in August 2007. Aubrey and Joan Fricker bought their property at 1678 Robie Street in 1978. The Frickers have a shared driveway on the other side of their house with their neighbour. The land between what I will call the Amar property and the Fricker property is the only driveway for the Amar property.

[4] The previous owners of the Amar property parked their car on that land. Those previous owners are both deceased but their nephew, Robert Salah, and the co-executor of Sally Grafton s will, filed an affidavit and gave evidence. He said that his aunt and uncle parked in the driveway. In his affidavit (Exhibit 3), he said he is 56 years old (therefore born in 1952 or 1953). He said from his earliest recollections around 1960 his uncle, Stewart Grafton, always had a large car. He recalled a large 1960 or 1961 Buick with fins and other vehicles parked in the driveway. He also said he recalled the driveway was paved in the 1960's. He said it was paved from the foundation of the Grafton property to the foundation of the property next door, now owned by the Frickers.

[5] He recalled no use ever being made of the land covered by asphalt by the owners of what is now the Fricker property. He also said from 1960 on until 2007, when the property was sold, he was not aware of any interference with his aunt and uncle s use of the driveway. He said, in his personal opinion, and he agreed it was only that, that vehicles in the 1960's were very large cars and that it would not have been possible to enter or exit one if there had been a fence. He said the cars were wide and their doors were large.

[6] He recalled his father s Chrysler Imperial which was a very large car. He said it was wider than any car he drives now. He said he drove that car to his aunt and uncle s home and parked it in their driveway (and, of course, got in and out of it). He said he parked there when he visited. He said his recollection was that his aunt did not let her tenants park there, except her niece who was a tenant for one year. On cross-examination, he said he did not recall other tenants who parked in the driveway.

[7] On cross-examination, he did recall scaffolding being erected in the driveway for work being done on the Fricker property on two occasions. On the later of those occasions, which was after his aunt s death, he, as executor, had a discussion with Mr. Fricker. But he said they did not discuss legal rights to use the driveway but only that, because of a fire, the scaffolding needed to be erected.

[8] Aubrey Fricker testified about the previous owner s use of the driveway and was cross-examined by Mr. Fownes with respect to it. He said that Sally Grafton parked her car there from the time they bought the house in 1978 until some time in the 1990's when she had broken her arm and did not drive any more.

[9] He said on occasion they parked in the driveway. He called it a neighbourly accommodation and, in his written submissions, referred to it as a mutual license.

[10] In his Affidavit of May 20, 2009 (Exhibit 8), Mr. Fricker refers in paragraph 9 to

a peaceful relationship with the owners of 1682 Robie Street and friendly mutual access to the land between our houses.

He also said in para. 28: We had mutually used the space between the houses, again referring to the friendly relationship with Sally Grafton.

[11] When the Frickers son visited for Christmas, he parked in the driveway with the consent of Sally Grafton. Mr. Fricker also testified about erecting scaffolding in the driveway on two occasions, once in 1979 when renovations were being done to their house and again in 1994 for painting. He said on each occasion he asked for Sally Grafton s consent since she would have to park elsewhere.

[12] Mr. Fricker testified that there had been asphalt on the driveway but that it was quite broken up and that Sally Grafton eventually had the driveway repaved. It was done at her sole cost and the area was paved from her foundation right up to the foundation of the Fricker house. Mr. Fricker said she asked him if it was okay.

[13] Sally Grafton also arranged for snow clearing. Mr. Fricker testified that his recollection was that the man who did the clearing did it with a truck with a plow and cleared it almost from foundation to foundation. He agreed that Sally Grafton paid for the snow clearing.

[14] The driveway in winter is shown in photograph 25 in Exhibit 7. That photograph is of Paul Fricker s car and shows it parked

just about in the centre of the approximately eleven foot space. Photographs 8 and 9 show the rather large Grafton car parked between the houses around 1978. In contrast to present day photographs, there were no fences between the properties or at the rear of the driveways at that time. Photograph 19 discloses that there were now fences, around 1990. Photograph 17 shows Sally Grafton s car in the driveway in 1987.

[15] Mr. Fricker took a number of photographs showing vehicles in the driveway at 1682 Robie Street. He said the pickup shown in photograph 7 was six feet wide. That truck is also shown in photograph number 28, parked between the fence erected by Mr. Fricker and the house at 1682 Robie Street. Photograph 29 shows a car parked in the driveway as does photograph 40.

[16] In his affidavit of August 14 which is Exhibit 11, Mr. Fricker refers to the right of way agreement between his predecessor and the owner of 1674 Robie Street, which is the property on the other side of the Fricker property. It dealt with a shared driveway between those two houses. Mr. Fricker says in paragraphs 16 and 17 of his affidavit that it was his understanding that, when the owner of 1674 Robie Street began to talk about putting up a fence, the man who then owned 1678 Robie Street (Mr. Roberts) agreed to a right-of-way agreement (Exhibit 6).

[17] Mr. Fricker then says in paragraph 18 of that Affidavit:

> 18. That this information created in our minds the precedent for the legal and appropriate means in the neighbourhood context for settling such a dispute over sharing such a space which is in part the property of each owner.

[18] He alleges that he had discussions with Sally Grafton with respect to a similar document and says they both agreed they would not sign such an agreement. This is hearsay to which Mr. Fownes quite rightly objected, since Sally Grafton is deceased and cannot be questioned about her understanding of such a conversation. Mr. Fricker also says that Sally Grafton asked their consent to repave the driveway.

[19] He says that after her death and the purchase of the property by Amar and Brown they continued to use the driveway as before. He says he had a conversation with Jacob Amar in which he says Jacob agreed to continue the historic sharing protocol (quoting from para. 30 of his Affidavit).

[20] Attached to the Affidavit are a number of photographs taken by Mr. Fricker. Number 44 is a photograph which he says illustrates the ease of parking for a modest domestic vehicle in the eight foot space. He also attaches, as number 46, two photographs of a Chrysler Sebring which he says he measured to be five feet, eleven inches wide plus two 4 inch wide mirrors. He says that shows how possible it is still to use the eight foot space.

[21] Jacob Amar, son of the owners, lives at 1682 Robie Street. He is a student at Dalhousie University. He too took photographs of the driveway with vehicles parked there. He does not own a vehicle himself but some of the other tenants do. He testified about the difficulties encountered since the fence was erected. He said that on one occasion the oil delivery man could not get into the driveway and access the oil filler pipe on the house because the vehicles were parked too close to the house. He said as a result they ran out of oil to heat the house and heat hot water. When the oil delivery man returned, they had to move the vehicles out of the driveway so he could access the oil filler pipe.

[22] Jacob Amar also said one of the tenants lost the mirror on his vehicle when parking it because it hit the electric meter on the side of the house. He said the owner of the van must fold the mirrors in order to park. He said that tenant must exit through the rear of the van because there is not room enough to open the door to get out.

[23] His photographs show the pickup truck and the van parked in the driveway adjacent to the fence. His overhead view of the vehicles shows how close they are to the fence and to the house and, in particular, to the electric meters. His third last photograph shows the width the door of the van will open beside the fence, which is the width of his hand. The second last photograph shows how close the pickup truck is to the house - the width of his boot. That photograph also shows the oil filler pipe.

[24] Mitchell Amar filed an affidavit and gave evidence on cross-examination. Attached to his affidavit is the deed to his property and the location certificate. Also in evidence is a more recent location certificate, Exhibit 5. Exhibit 1 is a copy of the deed into the Graftons in 1956. Neither the deed into Amar nor the deed into the Graftons refers to any easement with respect to the property. The 2000 location certificate is not a certificate of boundary lines but shows the asphalt paying for the driveway extending beyond the boundary line of the Fricker property. The later certificate shows the location of the fence although, again, it is not a Boundary Certificate. Each location certificate says it is not to be used for boundary definition.

The Law

[25] Amar and Brown rely on the *Limitation of Actions Act* (R.S. 1989, c. 258) provision which in summary disentitles someone from defeating a claim for, among other things, an easement. As Mr. Fownes says, it operates in a negative fashion. They also rely on the doctrine of lost modern grant which is a presumption in law that a grant must have existed because one party has long enjoyed use in a certain fashion of another s property.

[26] The authorities which I am must follow are Supreme Court of Canada decisions and decisions of the Nova Scotia Court of

Appeal. These are binding on me. Other decisions are called persuasive, that is, I may consider them. Many of the cases cited fall within the latter category. In the only Nova Scotia Court of Appeal decision cited to me, *Ford v. Kennie,* 2002 NSCA 140 (CanLII), 2002 NSCA 140, the Nova Scotia Court of Appeal overturned the decision of the trial judge and concluded in para. 72:

72 In my opinion, the uncontradicted evidence, *viva voce* and documentary, strongly supports the conclusion that there was, prior to 1982, continuous adverse possession of the triangle by and on behalf of the owners of 70 Prospect Avenue for a period substantially in excess of 20 years. The evidence also establishes that the Ward driveway was used during such period as a right-of-way to the home via the triangle. The fact of this right-of-way is admitted in the defence. The evidence establishes that the foregoing user and possession was with the knowledge and acquiescence of Wilbert Ward and his predecessors in title.

[27] In *MacIntyre v. Whalen*, reflex, (1990), 97 N.S.R. (2d) 317 (N.S.S.C.T.D.), Roscoe, J. (as she then was) dealt with the creation of easements by prescription. In para. 7, she summarizes part of the plaintiff s evidence as follows:

7. Mr. MacIntyre testified that his use of the driveway began in 1954 and continued without interruption of any nature until 1986, when this action commenced. During the 32 years he kept the driveway in good repair by periodically placing loads of gravel on it. He testified that until the Whalens purchased the property in 1979, there was never any discussion or complaint with respect to his use of the driveway.

[28] In that case, the issue was also a claim based on both the doctrine of lost modern grant and the provisions of the *Limitation of Actions Act*. Roscoe, J. cited Gale on Easements (14th edition) at p. 41 where the author said:

In *Tehidy Minerals Ltd. v. Norman*, Buckley, L.J. ... stated the effect of Angus v. Dalton as follows:

> ... the law will adopt a legal fiction that such a grant was made ... .

[29] She also referred to *Gilfoy v. Westhaver et al* reflex, (1989), 92 N.S.R. (2d) 425 where Justice Tidman said at p. 430:

The major difference in prescription based upon lost modern grant as opposed to the *Limitation of Actions Act* is that the time of usage in order to establish the former must be counted from the outset of use, while in order to establish prescription under the *Limitation of Actions Act* the time usage is counted backwards from the time action is commenced under the A*ct* and it provides for persons who do not oppose the right because of a disability.

Usage of the roadway, in either case, must be open continuous, unobstructed, and without permission of the landowner. ...

[30] Justice Roscoe, in the *MacIntrye* decision, concluded in paras. 24 and 25:

24 I am satisfied on the evidence presented in this case that Mr. MacIntyre has used a 10 foot driveway from Philpott Street to his sideline which crosses over the properties now owned by the defendants since 1954 in an open, continuous, unobstructed manner without permission of either of the land owners from time to time. I am further satisfied that even if, in 1979, Mr. Whalen told Mr. MacIntyre not to use the driveway, that mere statement did not amount to an interruption in the use of the easement and, in any event, the easement had been in existence for 25 years at that point.

25 I therefore find that the plaintiff has established that he is entitled to a permanent right-of-way by prescription based on the doctrine of lost modern grant and that since there is no evidence that the defendants or their predecessors-in-title were suffering from any disability preventing them from bringing an action under the *Limitation of Actions Act* that statute prevents any action to defeat or destroy the existence of the right-of-way.

[31] The case which was brought to my attention by the Frickers is a decision of the Ontario Court of Appeal, *Hodkin v. Bigley,* 1998 Can LII 6259. In that case, a fence was erected by the owner of a four foot strip and the owner of an adjacent eight foot strip alleged that she had either acquired title to the four foot strip by adverse possession or had a prescriptive easement over it. The trial judge concluded that the requirements for both had not been met and the Court of Appeal did not disagree. However, the issue in that case was not the same as in this one. In *Hodkin*, the plaintiff used the driveway mainly for access to her garage. The court said in para. 4:

[4] At trial, the appellant claimed the previous owner s use entitled her to title by adverse possession or, alternatively, a right-of-way by prescriptive easement over the 12 feet in issue. The relief sought by the appellant was necessary since the fence makes it difficult for her to park her car on the driveway, access her garage and alight from her car when it is parked between the houses.

[32] The court said in para. 13:

[13] The real difficulty in this case, as identified by the trial judge, is the erection of the fence. While the eight feet owned by the appellant is sufficient for a driveway, she would undoubtedly enjoy the greater convenience in parking and using her garage without the fence.

[33] In para. 14, the Court of Appeal quoted from part of the trial judge s decision:

[14] ...

> If I were satisfied that the fence seriously impeded the plaintiff s access to a garage ... I would be inclined to require the defendant to remove the fence.

[34] The Court of Appeal then concluded in para. 15:

[15] The trial judge therefore found that the fence did not seriously impede the appellant s access to the garage, and I am not satisfied that the trial judge made any palpable or unreasonable error in coming to this conclusion.

[35] In this case, the issue is the use of the driveway, not for access to a garage only, but for parking and therefore entering and exiting vehicles.

[36] There is no question here that the usage was open. It was usage of the driveway between the two houses owned by the parties to this application or their predecessors in title. The Frickers have lived in the house since 1978 and, before then, Mr. Roberts ran his business from there.

[37] With respect to its continuity, we have the evidence of Robert Salah about his aunt and uncle parking their car there as far back as he can recall to approximately 1960 when he was 6 or 7 years old. This usage continued until at least some time in the 1990's when his aunt stopped driving and stopped parking her car there. She and her husband had lived there for over thirty-five

years at that time. There is no evidence of anyone obstructing the Graftons right to park there and to enter and exit their vehicles.

[38] The issues therefore are consent and the extent of the usage. Mr. Fricker says he and Sally Grafton discussed entering into an agreement and she said she did not want to nor did Mr. Fricker. However, in my view, even if she did say this, it does not necessarily mean she was seeking the Frickers consent to use three feet of their property. It must be remembered in this context that the situation was quite different between these two properties and the two properties at 1678 and 1674 Robie Street. The latter shared a driveway. But as between 1678 and 1682 Robie Street, the Frickers had a driveway on the other side of their house and had no regular need for the use of the space between the two houses at 1678 and 1682 Robie Street. It may well be that it was because of that that Sally Grafton had the view that there was no need for an agreement. In fact, her actions are to the contrary.

[39] The driveway had been paved before the Frickers bought 1678 Robie Street. It is difficult now to ascertain the extent of that paving from old photographs. Robert Salah s recollection as a young boy who did not live there but only visited is, in my view, not determinative. However, Sally Grafton did repave the entire space between the two houses around 1990. She asked the permission of the Frickers. This does not, in my view, mean she was not asserting a right to an easement. A person claiming an easement has no right to treat the land over which they have an easement as their own, for example, by paving it. Hence, the need for permission to pave or do other acts that only an owner would have authority to do.

[40] Once permitted to pave the Frickers land, she paid for all the paving and also for snow clearing. According to Mr. Fricker, she paid for snow clearing of the entire width of the paved driveway.

[41] I therefore conclude that the Graftons seeking permission to pave does not mean that the use of the driveway was with the Frickers consent. There is no evidence that Sally Grafton asked permission and was granted permission to open her car doors over the Fricker property (formerly the Roberts property) or to pass over that property to gain access to or make egress from her vehicle.

[42] It is quite likely that vehicles could park entirely within the 8 feet of the property at 1682 Robie Street; but if a vehicle parked in the middle of the space, as one might expect, it is quite clear from the photographs in evidence that some of the car doors would open over the property at 1678 Robie Street and that people getting in and out of such vehicles would pass over that property.

[43] A six foot wide vehicle cannot possibly have the doors on both sides of the vehicle open to permit access and egress within eight feet. The way in which the Graftons used the lands excluded the Frickers and their predecessors in title from full usage of the lands. Their use of the lands was limited by the ability of the Graftons to use the lands only for access and egress from their vehicles.

[44] Mr. Grafton had a large car and Mr. Salah s father s car was large. The Ford Ranger shown in the recent photographs and the Chrysler Sebring are not large vehicles. There is no evidence, other than visual evidence in the photographs, about the size of Ian s Ford Explorer. It is described by Mr. Fricker as a commercial vehicle and it may well be used for commercial purposes, although there is no evidence of that. I am not satisfied that it is any wider than vehicles previously parked in the driveway by the Graftons. In any event, the question of law is not whether the owners of the Amar property should drive smaller vehicles or have their tenants only park smaller vehicles. Nor is the question whether they could park in the rear as the evidence is the Frickers and others do.

[45] The issue for me is whether historically a right has been established that allows the owners of 1682 Robie Street to park vehicles within the space between the two houses and open the vehicle doors and exit or get into the vehicles, crossing lands owned by the Frickers.

[46] The Affidavit of Mr. Fricker focuses on what he refers to as the relative ease of parking a domestic vehicle. However, the issue is not the parking as much as it is the difficulty or even impossibility of entering and exiting a vehicle. The fact that other properties nearby may have driveways of only 8 feet in width and the fact that others, including the Frickers, do not park in the driveway but in the yard beyond the end of the house, does not mean that the owners of 1682 Robie Street must do so. The ability to do something else is not a defence to the claim that the owners of 1682 Robie Street have acquired the right to park in the driveway and have room to open vehicle doors and get in and out of a vehicle, passing over the Fricker lands.

[47] The discussions between the Graftons and the Frickers up to the time the prescriptive right was acquired are not known. If there were discussions, they were in the nature of the Frickers seeking permission from the Graftons, who owned the bulk of the land between the two houses, either for the Frickers to park there briefly or to briefly erect scaffolding. They are not evidence that the Graftons sought, and the Frickers or their predecessors in title gave, permission for the Graftons to use the driveway to its full extent between the two houses.

[48] I cannot conclude that the Frickers gave the Graftons only a license. In any event, I have concluded that the easement existed at least by the early 1980's or even earlier, since the Graftons bought the property in 1956. If that were so, the easement existed before the Frickers bought their home in 1978. Any license that may have existed was a license by Sally Grafton to allow the Frickers to use her portion of the lands between the houses on occasion.

[49] I am satisfied that, by the 1980's, such a right had been acquired by the predecessors in title of Amar and Brown and that the Frickers cannot now defeat that previously acquired right. It is not a right of ownership of the Frickers land, it is a limited right, an easement to use the Fricker lands for access to vehicles, which includes the right to open vehicle doors and pass across the Fricker land when entering and exiting the vehicles. It limits the uses to which the Frickers can put the approximately three foot strip, but it must be noted that little use was ever made of it, especially since it was paved with their consent around 1990. The acts of occasional parking and, on two occasions, the erection of scaffolding are not sufficient in law to defeat the claim of a prescriptive right.

CONCLUSION

[50] Accordingly, the fence must be removed to allow the owners of 1682 Robie Street and their invitees and others to use the easement acquired by prescription. That being said, it is the responsibility of the owners of 1682 Robie Street to ensure that anyone using the driveway does not damage the house at 1678 Robie Street or the oil filler pipe on the side of the house and that there is access to that pipe.

[51] There is some indication in the submissions from Amar and Brown, and the Frickers in fact believe that they are saying, that the asphalt should be replaced. Although the Frickers permitted Sally Grafton to place asphalt, that was a license between the two parties and not a right Sally Grafton had because of the easement. In my view, if the Fricker lands (that three feet) are paved, I agree with Mr. Fricker that it takes away all of the Frickers rights to that strip of land. It need not be repaved and I will not so order. The owners of 1682 Robie Street cannot require it to be paved. Their rights are limited to requiring it to be free from obstructions so that the owners of 1682 Robie Street can open vehicle doors and get in and out of vehicles and pass over the land to do so.

[52] Amar and Brown also seek general damages for interference with a prescriptive easement. In his closing submissions, Mr. Fownes referred to these damages as notional. He did not submit a particular amount that he thought should be awarded. I therefore award $1,000.00 for the interference which has existed to the easement for just over one year.

[53] In his brief, Mr. Fownes also says he is seeking solicitor/client costs. Although, as a successful party he is entitled to costs, I do not see any of the exceptional circumstances that would make this one of those rare cases where solicitor/client costs should be awarded. I therefore award party/party costs.

[54] According to the new *Rules*, costs on applications such as this are to be awarded in the same fashion as costs for a trial. There is no amount involved. This was a short matter, affidavits were filed and there were appearances for two motions for directions. Tariff A of the costs rule applies. Unless Mr. Fownes has some particular amount of costs in mind, I am prepared to make an award of costs myself. Tariff A is for an amount under $25,000.00 and really there was no amount involved in this case. The *Rules* say that, where there is no amount involved, I am to look at the complexity of the proceeding and the importance of the issues. It seems to me that, according to the top most item in Tariff A, column 1, costs of $3,000.00 should be awarded.

[55] In summary, the fence must be removed, the asphalt does not need to be replaced and I do not so order. General damages for interference with the property are awarded in the amount of $1,000.00 and costs of $3,000.00.

Hood, J.