

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: *Warnock v. Wiechert*, 2010 NSSC 79

Date: 20100305

Docket: Hfx No. 266098

Registry: Halifax

Between:

Stephen Warnock and Else-Maj Warnock

Plaintiffs

v.

Norman Wiechert and New Star Properties Inc.

Defendants

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Judge: The Honourable Justice Allan P. Boudreau

Heard: February 16, 17, 18 & 23, 2010, in Halifax, Nova Scotia

Written Decision: March 5, 2010

Subject: Real Property - Easements - Prescriptive Rights

Summary: The plaintiffs and the defendants are in disagreement over the use of an 8' wide strip of land between their respective residential dwellings. The plaintiffs, Stephen and Else-Maj Warnock, are the owners of this strip of land, and the defendants, Norman Wiechert and New Star Properties Inc., have an easement for a free and uninterrupted use of a passageway 8 feet in width and 39 feet long over this same strip of land.

The Warnocks claim that Mr. Wiechert and his company have trespassed on their land by erecting permanent fixtures during the renovations to the Wiechert property which encroach on their lands, and by changing the drainage on this strip of land. The Warnocks request that the encroachments be removed and that the land be restored to its original condition.

Mr. Wiechert denies any encroachments and he claims prescriptive rights on this easement. Mr. Wiechert also counterclaims that the Warnocks have interfered with his easement by placing a heat pump and a cement brick encased flower bed on this strip of land and he requests that these be removed.

Issue:

The issues in this case are fairly numerous and I will enumerate them as follows:

1. Does the language of the grant permit the owner of the Wiechert property to make permanent encroachments into the passage way easement?
2. Have the Warnocks proven that the repairs to the foundation of the Wiechert building encroach on the passage way which is part of their land?
3. Have the Warnocks proven that the electric meters and conduit pole located on the passage way side of the Wiechert building encroach on the said passage way?
4. Have the Warnocks proven that the replacement posts to the railing surrounding the cement deck attached to the Wiechert property are an incremental or additional encroachment to the prior railing which was protected by prescriptive rights?
5. Have the Warnocks proven that the oil tank placed in the passage way adjacent to the Wiechert building is an encroachment on their property?
6. If the answer to questions 2, 3, 4 or 5 is yes, then are any of those encroachments protected by prescriptive rights?
7. Has Mr. Wiechert proven that the heat pump is an unreasonable infringement on his easement rights to the passage way?
8. Has Mr. Wiechert proven that the cement brick encased flower bed is an unreasonable infringement on his easement rights to the passage way?
9. Has Mr. Wiechert proven that he has a prescriptive right to keep several garbage, recyclable, compost or other such bins on the passage way?
10. Has any party given its consent to any encroachment which may exist and which are not protected by prescriptive rights?

Result:

Success on the many issues was divided. Fact specific. Costs not awarded; except sharing of the expert's fees.

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Written Decision: March 5, 2010

Counsel: Matthew Moir, for the Plaintiffs
Norman Wiechert, for both Defendants
- Self-Represented

By the Court:

Introduction

[1] The plaintiffs and the defendants are in disagreement over the use of an 8' wide strip of land between their respective residential dwellings. The plaintiffs, Stephen and Else-Maj Warnock, are the owners of this strip of land, and the defendants, Norman Wiechert and New Star Properties Inc., have an easement for a free and uninterrupted use of a passageway 8 feet in width and 39 feet long over this same strip of land.

[2] The Warnocks claim that Mr. Wiechert and his company have trespassed on their land by erecting permanent fixtures during the renovations to the Wiechert property which encroach on their lands, and by changing the drainage on this strip of land. The Warnocks request that the encroachments be removed and that the land be restored to its original condition.

[3] Mr. Wiechert denies any encroachments and he claims prescriptive rights on this easement. Mr. Wiechert also counterclaims that the Warnocks have interfered

with his easement by placing a heat pump and a cement brick encased flower bed on this strip of land and he requests that these be removed.

Background

[4] The Warnocks purchased and moved into a single family dwelling, which is a registered “Heritage Property” located at 32 Dundas Street, Dartmouth, Nova Scotia, on August 21, 1997. At the time of this purchase, the adjoining property, 34 Dundas Street, was owned by a Dr. Kazi. That property was a 2 to 3 storey building fronting on both Dundas and Queen Streets. It contained several apartments and it was in somewhat of a state of disrepair. Most of the witnesses who testified stated that the 34 Dundas Street building attracted what they described as undesirable tenants and neighbours and the location had become known as a drug dealers and drug users haven. The neighbours testified they were uneasy with this situation and the police had been called on a number of occasions.

[5] Mr. Wiechert purchased the 34 Dundas Street property on April 5, 2001. His intention was to clean up, repair and renovate the property and attract a better quality of tenants. He began his repair and renovation project soon after his

purchase. Mr. Wiechert testified that the project took about one year to complete at a cost of approximately \$200,000.00. Needless to say, the neighbours were pleased that the property had been sold to someone who was significantly improving the building and, as a result, the neighbourhood.

[6] There is an 8 feet by 39 feet easement between the Warnock and Wiechert properties, which is just about all the land between these two properties. The Warnocks own the land with the easement in favour of the Wiechert property. The easement has been described as follows in their respective deeds and it has been described as such since its creation, over 100 years ago. There is a slight variation between the deeds when one looks at the grant and the reservation, but I do not consider this material.

[7] The Warnocks' deed states:

EXCEPTING AND RESERVING . . . the uninterrupted and free use of the passage way on the north side of the above lot, being of the width of eight feet (8') from said Gentles dwelling . . . (Now part of the Wiechert dwelling)

[8] The Wiechert deed states:

TOGETHER WITH the free and uninterrupted use of a passage way on the south side of the said lot herein conveyed, eight feet (8') in width and thirty-nine feet (39') long, half the expense of repairing, maintaining and upholding the gateway leading to said passage way to be borne by the purchaser . . .

[9] At issue are the meaning of the phrase in the deeds “free and uninterrupted use of a passage way . . . eight feet wide and thirty-nine feet long . . .” and the question of prescriptive rights.

[10] It is interesting to note that the original conveyance of this easement did not stipulate the starting point of the 8' easement, but only its width and length. It appears that it has been assumed, especially in more recent times, that the easement must of necessity begin at the Dundas Street line because, if it were otherwise, it would not provide access from that street; and it is presently the only land left undeveloped between the two properties. However, access to the back yard of 34 Dundas Street was not an issue when the easement was granted. At that time 34 Dundas Street had plenty of access to its back yard from Queen Street because the addition to the building along Queen Street did not exist. I say this only to show that the precise location and anticipated use of this easement was not established in the original grant and reservation.

[11] During the extensive renovations to the Wiechert property, some old siding was removed and it was replaced with exterior insulation and new siding, new windows, etc. Some old wooden cladding and other cladding materials were removed from the crumbling foundation and a concrete veneer and reinforcement wall the thickness of the width of a finished 2 x 4 was added to the outside of the foundation. In its finished form, the width of a 2 x 4 would be approximately 3 ½ inches. Most of the foundation work is below ground, with its cap protruding above ground as shown in the photographs attached to the expert's report found at Tab 6 of Exhibit # 1.

[12] The renovation work also consisted of Mr. Wiechert replacing and securing an outside oil tank adjacent to his dwelling and located in the passage way. Some witnesses testified that there was in all probability an oil tank in that approximate location dating back to at least 1997, but I will say more about this later.

[13] It was also necessary to install a bank of 5 or 6 electric meters and a new electric conduit pole, on the passage way side of Mr. Wiechert's building, in the approximate location where there had previously been an old electric meter and electric conduit pole. Nova Scotia Power regulations require the meters to be

installed on the outside of such a building. I will also have more to say about the meters later.

[14] Toward the end of the project Mr. Wiechert also laid some gravel and changed the slope and drainage characteristics of the passage way, such that it no longer drains away from Dundas Street towards the north and away from the foundation of the Warnock dwelling. The Warnocks want this corrected and I will say more about this later as well.

[15] Continuing with the construction, Mr. Wiechert replaced the railing on a cement deck which is connected to a set of cement stairs which protrude in the passage way and which would be a clear encroachment onto the easement, which is the property of the Warnocks; however, it appears that this structure has been there for many years, (more than 20 years before the present litigation) and it has not been made an issue in these proceedings. Nevertheless, the posts for the new railing are placed on the outside edge of this cement deck and the Warnocks claim that this is a new or enlarged encroachment on their property and that it must be removed. At present, this deck and stairs cannot be used by order of the building inspector because they do not conform to the building code requirements.

Consequently, there is no pedestrian traffic in the passage way for access to that entrance to 34 Dundas Street.

[16] Finally, since the renovations have been completed, Mr. Wiechert has taken to storing several large garbage and recycling bins on the passage way. Mr. Wiechert claims that since his building has been constructed in such a manner that it occupies almost every square foot of his land, that it is necessary for him to be able to store his tenants' garbage and recycling bins on this passage way. It is not Mr. Wiechert who constructed the building in this manner; however, it was occupying his entire land when he purchased it in 2001. He says that requiring him to find an alternate location for his tenants' garbage and recycling bins would be difficult and pose a hardship for him.

[17] Since Mr. Wiechert has completed his renovations, the Warnocks have installed a heat pump and located it in the passage way and adjacent to their house. They claim that it does not unreasonably interfere with Mr. Wiechert's right and use of the passage way. They also contend that, since their's is a registered heritage property, and because it would have been impractical structurally and

financially to install the heat pump in a different location, that they should be permitted to leave the heat pump in its present location.

[18] The Warnocks have also placed a cement brick encased flower bed at the Dundas Street entrance to the passage way. Mr. Wiechert claims this flower bed impedes pedestrian use of the passage way and that it poses a safety hazard. He requests that it be removed, or, at least, reconfigured so that it does not impede passage or constitute a safety hazard.

Expert's Report

[19] The Warnocks retained Thomas Giovannetti, a Nova Scotia land surveyor and professional engineer to attempt to determine if there were any encroachments to their property and, if so, their extent. Mr. Giovannetti was qualified and gave expert evidence to the court in the area of land surveying, engineering and his opinion of the location of land boundaries in relation to objects and fixtures on lands and on the location and types of residential foundations.

[20] Mr. Giovannetti testified that he did not perform a boundary survey of the Warnocks' land. He stated that his main focus was to ascertain the location of the Wiechert boundary line bordering the passage way easement and the extent, if any, of the alleged encroachments onto the easement. He testified his primary source for determining the location of the boundary line of the Wiechert property bordering the passage way was the May 16, 1978 deed which created the easement. This deed describes the boundary line in question as originating on a porch attached to the 34 Dundas Street dwelling a distance of 8' from the Warnocks' property line. This is the crucial quotation from that description:

. . . thence westwardly by said porch and dwelling house thirty-nine feet to Dundas Street . . .

[21] Mr. Giovannetti testified that, in his opinion, this would establish the boundary line as the side of the porch and dwelling on the Wiechert property. He described the side of the porch and dwelling as a "monument" for survey purposes, which "monument" would create and establish the boundary line of the Wiechert property bordering on the easement in question. It is important to note that Mr. Giovannetti was of the opinion that it would be the intention of such a conveyance and granting of an easement to avoid and not create any encroachments at the time

of the conveyance and the grant. For that reason, he stated it would not be appropriate to use the foundation of the Wiechert dwelling because the siding or outside structure of the walls would ordinarily extend beyond the foundation; but he did not state how much beyond the foundation this would have extended, except to say it would probably be the original siding of the Wiechert building. He did not comment on such things as window casings, utility services or the like, which could normally extend beyond the original siding of the house. When questioned by the court as to the eaves of the roof of the house which, by all indications, have historically extended between 10 and 12 inches beyond the siding, Mr. Giovannetti stated he does not believe that the description of the boundary line, as cited previously, would mean any part of the house which extended beyond the original siding to items such as the eaves. The Warnocks contend that the extensions beyond the siding, such as eaves or window casings, etc., would not define the boundary line of the easement on the ground, but simply create additional easements which would encroach on the easement and which would be permitted or “grand-fathered” under the original grant.

[22] In the end, Mr. Giovannetti concluded that the repairs to the foundation of the Wiechert property encroached on the boundary line established by the 1878

deed by 4 ½ inches tapering to 2 inches beyond the new siding of the Wiechert building over a length of approximately 26 feet. Mr. Wiechert testified that he did not extend the repairs to the foundation and siding beyond the old cladding, which he removed and replaced with new materials, i.e., insulation, new siding and concrete reinforcement. Mr. Giovannetti did not say whether the repairs effected by Mr. Wiechert necessarily extended beyond the old cladding which was removed from the foundation because he had apparently not inspected or viewed the property before the Wiechert renovations were well under way and he only had photographs after the work was undertaken and after much of the old cladding had already been removed.

[23] Robert Wigle, who was the previous owner of the Warnocks' house at 32 Dundas Street, testified that he lived on that property from 1987 to 1997; however, he must have meant 1988 and not 1987 because he only acquired the property in February of 1988. That is the date on their deed in any event. Mr. Wigle stated that if there was an oil tank in the passage way from 1987 to 1997, he believed he remembered that it would have been closer to the north end of the passage way, close to the cement steps. Mr. Wigle also testified that there existed an outside electric hook-up on the side of the Wiechert property and that the roof

configuration as shown at Tab 11 of Exhibit # 2 was the same during his occupation of 32 Dundas Street. Mr. Wigle stated that garbage was not to be stored in the passage way during his occupation of 32 Dundas Street. He said that if there was such a problem he would call the previous owner of 34 Dundas Street, Dr. Kazi, and have the problem rectified.

[24] Joan Versnel testified that she also lived at 32 Dundas Street from 1988 to 1997. She stated that permanent storage of garbage was not permitted in the passage way and if that occurred they would call Dr. Kazi to rectify the situation. She could not recall whether or not there was an oil tank to service the Wiechert building located in the passage way.

[25] The Warnocks both testified and gave basically similar testimony on the pertinent issues. They both acknowledged the presence of the oil tank in the passage way, but they denied the storage of garbage in that location except for a period from around 2000 to 2001 when Dr. Kazi had the property up for sale. Prior to that, Mr. Warnock had been making sure the passage way was kept clean, but he relented on those efforts when Dr. Kazi put the property up for sale because he became wary of the tenants. He and Mrs. Warnock stayed clear of the passage

way due to what they considered drug related activity and waited and hoped for a new owner of 34 Dundas Street, who would improve the situation.

[26] The Warnocks testified that they observed the renovations to the Wiechert property, but they assumed they were not encroaching on the passage way easement portion of their property.

[27] The Warnocks testified as to their reasons for placing the heat pump for their house in the passage way, as I outlined previously, and they stated it was reasonable because it did not obstruct persons from using the passage way. They basically testified the same about the cement brick encased flower garden, but they ceased with that project once this became an issue in these proceedings.

[28] Two non-party witnesses testified for the defence: Lisa Scott, who moved to 64 Queen Street, which is located at the corner of Queen and Dundas Streets, in March of 2000; and Patricia Dumaresk, who moved to 36 Dundas Street, across from 34 Dundas Street, in November of 1989. Both these witnesses testified as to the unsightliness of the passage way before Mr. Wiechert completed the renovations to his building and the fact that it was now neat and orderly. Needless

to say, both of these witnesses stated how pleased they were that the improvements to the Wiechert building had not only improved the condition of the passage way between 34 and 32 Dundas, but that it had been the beginning of the improvements of the neighbourhood. They also both testified to having seen garbage in the passage way before Mr. Wiechert purchased the property, but their knowledge was limited from 2000 and 1989 respectively, at the most, 17 years before this litigation was commenced.

[29] Mr. Wiechert testified, but his personal knowledge was necessarily limited to December 2000 forward, being the time when he became interested in purchasing 34 Dundas Street. With regard to other possible defence witnesses; on February 9, 2010, seven days before the commencement of this trial, Mr. Wiechert issued a subpoena for the previous owner, Dr. Kazi, who had owned the property from 1984 to 2001. Dr. Kazi was unable to be located and served during that short period of time. Mr. Wiechert declined to make a motion for an adjournment, electing instead to proceed and complete the trial without making any further attempts to locate and serve Dr. Kazi because he considered this would be futile.

[30] Mr. Wiechert testified that there was an oil tank and garbage stored in the passage way easement when he became interested in purchasing 34 Dundas Street in December 2000, and when he completed the purchase of the property in April of 2001. Mr. Wiechert has no personal knowledge of the property before that time. He could only confirm the existence of the oil tank and some garbage in the passage way from the time when he began his efforts to acquire the property. He could testify primarily to the renovations which he completed in 2001 to 2002. He did, however, present into evidence Tab 26 of Exhibit # 2, a business record he obtained from Thermoshell, of Burnside, Dartmouth, Nova Scotia, which he says indicates that fuel oil delivery to 34 Dundas Street commenced in the name of Dr. Kazi on December 17, 1984. This would be the year that Dr. Kazi purchased the 34 Dundas Street property.

[31] As I stated, Mr. Wiechert's testimony dealt primarily with the renovations which he completed between 2001 and 2002. He testified that his renovations to the siding and the repairs to the foundation on the passage way side of his building did not extend beyond the cladding and covering which he removed from the side of the building and from the foundation. He also testified that the new electric meters and new electric power conduit pole which he installed on the passage way

side of the building do not extend beyond the old electric equipment which he contends had to have been there well before 1984 when Dr. Kazi became the owner of the property. He contends the same with regard to the oil tank. He said that during his extensive renovations to the inside, as well as the outside of the building, he could find no evidence that this equipment could have been located any where other than its approximate location on the passage way side of his building. It is noted that the expert's survey certificate, found at Tab 6 of Exhibit # 1, shows the electric meter for 32 Dundas is also located on the passage way side of that dwelling. It is reasonable to infer that the electric services for both 34 and 32 Dundas Street enter those buildings in the area of the passage way easement.

[32] Mr. Wiechert admits that he placed some gravel on the passage way, which he says was only intended to improve its appearance and grading. He agrees the slope and drainage should be modified and he is agreeable to restoring the areas drainage characteristics as they were prior to the changes which he effected.

Issues

[33] The issues in this case are fairly numerous and I will enumerate them as follows:

1. Does the language of the grant permit the owner of the Wiechert property to make permanent encroachments into the passage way easement?
2. Have the Warnocks proven that the repairs to the foundation of the Wiechert building encroach on the passage way which is part of their land?
3. Have the Warnocks proven that the electric meters and conduit pole located on the passage way side of the Wiechert building encroach on the said passage way?
4. Have the Warnocks proven that the replacement posts to the railing surrounding the cement deck attached to the Wiechert property are an incremental or additional encroachment to the prior railing which was protected by prescriptive rights?

5. Have the Warnocks proven that the oil tank placed in the passage way adjacent to the Wiechert building is an encroachment on their property?

6. If the answer to questions 2, 3, 4 or 5 is yes, then are any of those encroachments protected by prescriptive rights?

7. Has Mr. Wiechert proven that the heat pump is an unreasonable infringement on his easement rights to the passage way?

8. Has Mr. Wiechert proven that the cement brick encased flower bed is an unreasonable infringement on his easement rights to the passage way?

9. Has Mr. Wiechert proven that he has a prescriptive right to keep several garbage, recyclable, compost or other such bins on the passage way?

10. Has any party given its consent to any encroachment which may exist and which are not protected by prescriptive rights?

The Law

[34] I will first deal with the burden of proof. It is trite to say that in a civil case the party asserting a cause of action or claim must prove his or her case on a balance of probabilities. In the present case, the Warnocks allege that the repairs to the foundation of Mr. Wiechert's building, the new electric meters and the new deck railing posts encroach on the passage way easement which is part of their land. Therefore, they must prove this on a balance of probabilities. On the other hand, Mr. Wiechert alleges that the heat pump and the cement brick encased flower garden are unreasonable interferences with his rights pursuant to the passage way easement granted to him and reserved from the Warnocks' title and, consequently, he must prove this on a balance of probabilities as well.

[35] Mr. Wiechert also alleges prescriptive rights in relation to the foundation, the electric meters and the oil tank and he denies that the posts supporting the new railing on the cement deck is an incremental encroachment of that structure. There is no dispute between the parties on prescriptive rights and the law of adverse possession which requires adverse, continuous and notorious possession or use in regard to a title holder's property over a period of twenty years. It is the

continuous use or possession of certain parts of the passage way easement by Mr. Wiechert and his predecessors in title for twenty years or more which is contested by the Warnocks. Obviously, Mr. Wiechert must prove his allegations in this regard on a balance of probabilities.

[36] The authorities as to what uses a title holder is permitted to make regarding an easement granted to another land owner are not so clear. What constitutes a reasonable use or a minor or reasonable infringement on the easement rights of another appears to be a question of fact to be decided on the particular circumstances of each case.

Analysis

[37] In my analysis, I will deal with the questions to be answered in the same numerical sequence as they are listed in the issues part of this decision.

[38] 1. The language of the grant of easement in this case has been referred to and quoted earlier in this decision. It is “the free and uninterrupted use of a passage way” located as described in the grant. The key words here are “passage

way.” This cannot mean that the owner of the Wiechert property can erect any permanent structures or expand any existing structures into the passage way. The most that this phrase can be interpreted to mean in addition to passage over this easement would be the right to use the passage way to effect repairs and maintenance to the Wiechert property. Otherwise there would be no way to repair or paint the side of the Wiechert property bordering on the passage way. Consequently, any other uses such as permanent oil tanks or other encroachments would have to have been established by prescriptive rights, as in the case of the cement deck and stairs now protruding in the passage way.

[39] 2. The question of the repairs to the foundation of the Wiechert building is a difficult one. The surveyor, Mr. Giovannetti, testified that in his opinion, referring to the Wiechert property, “. . . the dwelling location has been altered as part of the renovation project. The constructed concrete wall visibly encroaches from 4 ½ inches to 2 inches for a distance of 26 ± feet along the side of civic 34.” It is important to note that Mr. Giovannetti testified that he did not conduct a boundary survey of the lots in question , but took it from the May 16, 1878 deed that the side or siding of the now Wiechert building was the boundary line between it and the passage way easement. It should also be noted that Mr. Giovannetti did

not inspect or observe the foundation of the Wiechert dwelling before renovations were undertaken.

[40] Mr. Wiechert testified he had removed some cladding which covered what appears to have been part of the original foundation. I find that it is also improbable, as opined by Mr. Giovannetti, that the grantors of the passage way easement would have consciously made parts of the house such as window casings, electric meters or eaves as already existing encroachments which themselves would have required an easement over an easement. In addition, Mr. Wiechert testified that he did not enlarge the foundation beyond the cladding that had existed over this foundation for many years.

[41] In those circumstances I find that the Warnocks have failed to prove, on a balance of probabilities that the repairs to the foundation of the Wiechert building extend beyond what the grantors had intended in the original grant. In the alternative, the most probable inference to be drawn from the totality of the evidence is that the original foundation, together with the cladding removed by Mr. Wiechert, were in place for many years, at least prior to Dr. Kazi's ownership since the evidence indicates that he just let the building go into disrepair.

[42] In the circumstances, I would also find in the alternative that the foundation in its present location is protected by prescriptive right.

[43] 3. With regard to the electric meters and the conduit pole, these would appear to be minor encroachments which are above ground level and which clearly do not protrude on the side of the Wiechert building beyond the eaves of the house. As Mr. Giovannetti stated, it would not be intended in the original grant that items such as eaves, and I infer, window casings or decorations and electric meters which are all above ground, would be infringements on the grant. The most probable inference to be drawn from the photographic evidence and the survey certificates found at Tabs 8 and 9 of Exhibit # 1, which do not show the electric meters as encroachments, is that the location of the electric meters were not considered by the surveyors who completed those certificates to be encroachments.

[44] In any event, the most probable inference is that electric meters and conduit poles have been on the passage way side of the Wiechert building well before Dr. Kazi's ownership in 1984 and would thus be protected by prescriptive right, and I so find.

[45] 4. With regard to the replacement posts for the railing on the cement deck, there is no clear evidence as to the construction of this structure prior to the repairs effected by Mr. Wiechert. In the circumstances, I am not satisfied that the replacement posts supporting the new railing are an additional or incremental encroachment onto the passage way easement. As I stated previously, it is agreed by the parties that the cement deck and stairs are already protected by a prescriptive easement, but cannot be enlarged. The evidence does not satisfy me on a balance of probabilities that they have been enlarged or are additional encroachments.

[46] 5. With regard to the oil tank, there can be no doubt that this item is a fixture which encroaches on the passage way easement and it can only remain there if it is protected by prescriptive right. Mr. Wigle, the previous owner to the Warnocks property who lived there from February 1988 to 1997, stated that if there was an oil tank in the passage way, he believes it was tucked in closer to the cement steps. The most probable inference is that there was such an oil tank in that passage way to supply oil to the Wiechert property from 1988 to 1997. Mr. Wiechert produced a business record from Thermoshell, Tab 26 of Exhibit # 2,

from which it can be inferred that oil was being delivered for Dr. Kazi's account for 34 Dundas Street, commencing in 2004. That evidence, together with the previous evidence that I cited from Mr. Wiechert which indicated that no other possible locations for such equipment were found during his renovations, leads me to conclude, on a balance of probabilities, that there was an oil tank serving the Wiechert property at least as early as 2004 in the approximate location of the present oil tank and therefore the location of the present oil tank is protected by prescriptive right.

[47] 6. The questions posed in Issue No. 6 have been answered during my analysis of questions 2 to 5 which are the issues of prescriptive rights.

[48] 7. With regard to the heat pump installed on the Warnock land close to their dwelling, but on part of the passage way, in my opinion this does not pose an unreasonable infringement or unreasonable interference with Mr. Wiechert's use of the passage way. It must be noted that it was the previous owners of the Wiechert property who built an addition and extension to their building right to the boundary line of the Warnock property such that it blocks any through passage over the easement. Moreover, the cement deck and steps are no longer used as an entry

point to the Wiechert property addition through this passage way. The only uses which can be made of the passage way in the present circumstances are for the oil delivery person, the electric meter reading person and for access to repair the parties' respective dwellings and equipment. I find that these uses are not unreasonably impeded by the heat pump.

[49] 8. With regard to the cement brick encased flower garden, I find that this is an unreasonable infringement and interference with Mr. Wiechert's and his invitees' authorized use of the passage way. The structure protrudes well beyond the mid-point of the passage way at its entrance, and I accept that it is a safety hazard and impediment in certain conditions or for certain activity, such as delivering oil. Such a structure must not protrude more than 30 inches into the described passage way.

[50] 9. With regard to Mr. Wiechert storing or keeping several garbage, recyclable, compost or other such bins on the passage way, I find that Mr. Wiechert has clearly failed to prove such continuous use over 20 years and consequently he has failed to prove such a prescriptive right.

[51] Except for the prescriptive rights which I have accepted have been proven on a balance of probabilities, no other prescriptive rights have been proven. Any other uses, except for pedestrian traffic and repairs or maintenance on the part of Mr. Wiechert or his lawful invitees would have to be by agreement of the parties. The fact that this makes it more difficult for Mr. Wiechert to control his tenants garbage may be unfortunate, but it does not override the Warnocks' rights to control their property. It must be remembered that it was Mr. Wiechert's predecessors in title who chose to build on every square foot of their land and Mr. Wiechert was aware of this when he purchased the property.

[52] 10. I can say unequivocally that neither party has given any permission to the other to trespass on their property or to infringe their rights.

[53] As agreed by Mr. Wiechert at trial, the passage way shall be regraded and drainage incorporated in that area such that the surface water drains away from the foundation of both dwellings and that it drains in the direction it drained before the resurfacing, that is away from Dundas Street and toward the back of the Warnock property. This shall be done at Mr. Wiechert's expense and in consultation with the Warnocks.

[54] The doctrine of laches was raised at trial, but in view of my decision and rulings, it is not necessary for me to decide the issue.

Damages

[55] I find that general or other damages are not appropriate in this case.

Costs

[56] I am not inclined to award any costs because success has been divided; however, in my view, I disagree that the expert was not helpful. The expert was helpful to me to understand the issues and I believe the expert provided valuable assistance to the court. Whether or not his opinion prevailed in the end, the assistance which he provided was helpful to the court. The cost of \$2,500.00 for the report and \$1,000.00 for his attendance is \$3,500.00. I am going to award half of those costs to the Warnocks, which is \$1,750.00 payable forthwith. Those are all the costs I am going to award in this case.

[57] I will grant an Order accordingly, drafted by counsel for the plaintiffs and consented as to form by all parties.

Boudreau, J.