

COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

JEFFERY JOHN SCHENKER,)	<u>Mathieu R. Lafreniere</u>
)	for the applicant
applicant,)	
)	
- and -)	<u>Samantha Wong</u>
)	for the respondent
NEIL MCEWEN MARTIN,)	
)	
respondent.)	<u>Judgment Delivered:</u>
)	May 26, 2026

BOCK J.

[1] This application concerns a claim for a prescriptive easement.

[2] The applicant, Jeffrey Schenker, and the respondent, Neil Martin, live in houses next door to one another in Stony Mountain, Manitoba. Each has a gravel driveway which, for about the first 50 feet, are adjacent to one another. Mr. Schenker claims that over time he has acquired a prescriptive easement over a narrow, triangle-shaped portion of Mr. Martin's driveway. Mr. Martin disputes Mr. Schenker's claim.

[3] For the reasons that follow, Mr. Schenker's application is dismissed.

BACKGROUND

[4] Mr. Schenker bought his home at 1 Sellars Hill Road in 2002 (the "Schenker property"). Mr. Martin bought the house next door, at 134 Dufferin Drive, in 2018 (the "Martin property"). A professional survey of the Martin property, sketches, and aerial and street-view photographs were filed in evidence. The following description of the properties, which is not disputed, is taken from that evidence.

[5] The Schenker property lies to the north of the Martin property. Each lot is about 300 feet long and 50 feet wide. If one were to stand on the street at the end of the adjacent driveways, facing east, one would see the Schenker house on the left and the Martin house on the right. Each driveway leads from the street to a detached garage. The boundary between the two driveways is not marked.

[6] If one were to walk about 50 feet up the driveways toward the garages, one would come to a point where the driveways are separated by a patch of grass and then, further on, by a line of trees which extends between the garages to the eastern end of the properties – that is, to the edge of their back yards. Although this line of trees was originally thought to mark the boundary between the Schenker and Martin properties, it turns out this was not quite correct.

[7] The parties' dispute concerns a narrow, triangle-shaped part of the Schenker driveway which encroaches on the Martin driveway. In these reasons I refer to it as "the encroachment."

[8] The encroachment is clearly identified on a survey made on March 25, 2022, by Norman Nachtigall, a professional land surveyor retained by Mr. Martin. The survey

sketch is marked as Exhibit "D" to Mr. Martin's affidavit affirmed March 20, 2025 (the "Martin Affidavit").

[9] The encroachment has the shape of a right-angle triangle. The base of that triangle, measuring 7 feet, is at the western edge of the driveways, nearest the street. The side perpendicular to the base, measuring 51 feet, runs eastward along what is now understood to be the legal boundary of the two properties, toward the garages. The third side (the hypotenuse) is on the Martin property. While its length is not indicated on the survey sketch, according to the Pythagorean theorem (of which I am quite prepared to take judicial notice), it measures slightly more than 51 feet.

[10] When Mr. Schenker bought his house at 1 Sellars Hill Road in 2002, he mistakenly believed that the encroachment was part of his property. As a result, he used it as such, by driving and parking his car on it. Dennis Sveinson, who owned the Schenker property from 1997 until 2002, deposed that during his ownership he also held this same mistaken belief and used the encroachment in the same way.

[11] When Mr. Martin bought 134 Dufferin Drive in March 2018, he did so without obtaining a survey certificate and was therefore unaware of the exact location of the boundary between his and Mr. Schenker's property.

[12] According to Mr. Martin, the first disagreement between him and Mr. Schenker concerning the encroachment occurred in December 2021. Mr. Martin deposes that his common-law partner, Cari Church, became involved in a dispute with Mr. Schenker about whether snow piled on the encroachment was on the Martin side or the Schenker side of the property. Later that same evening, Mr. Martin deposes, he went to speak to

Mr. Schenker, who asserted that the encroachment fell on his side of the property line, based on his understanding that the property line aligned with the line of trees between the two properties.

[13] Mr. Schenker, on the other hand, denies this incident ever occurred.

[14] Mr. Martin claims it was this disagreement with Mr. Schenker in December 2021 that caused him to obtain a professional survey of his property, in order to settle the issue of ownership. On March 25, 2022, Mr. Nachtigall, the surveyor, attended to the Martin property. Before leaving, Mr. Nachtigall identified the location of the property boundary on the Martin and Schenker driveways with purple spray paint. About two weeks later, on April 6, 2022, Mr. Nachtigall issued the survey sketch attached to the Martin Affidavit as Exhibit "D".

[15] Mr. Schenker's recollection of events surrounding the survey differs from Mr. Martin's. As Mr. Schenker recalls it, Mr. Martin told him in March 2022 that he had his property surveyed for the purpose of installing a fence around his yard. Based on what Mr. Martin told him, Mr. Schenker understood the fence would not affect him because it would be located between Mr. Martin's driveway and yard.

[16] Where Mr. Schenker and Mr. Martin do agree is that in March 2022, shortly after Mr. Nachtigall's survey of the properties, Mr. Martin presented Mr. Schenker with the results of the survey, which confirmed Mr. Martin's ownership of the encroachment. In Mr. Schenker's words (Affidavit of Jeffrey John Schenker, affirmed December 6, 2024, para 6 - the "First Schenker Affidavit"):

Sometime in early 2023 [this date is in error; Mr. Schenker corrected himself and identified the correct date as March 2022, shortly after the survey was done: cross-examination of Jeffrey John Schenker, August 20, 2025, p.7, lines 10-22] I was informed by the Respondent [Mr. Martin] that the property line dividing the two properties was not as we assumed and that the driveway which I used to access My Property, in fact, encroached on the Respondent's Property. The scope of the encroachment was captured in an image from the street. The purple paint demonstrates the actual boundaries.

A copy of the photograph to which Mr. Schenker makes reference – the “image from the street”- is marked Exhibit “D” to his affidavit.

[17] According to Mr. Schenker, since March 2022 Mr. Martin has “hinted at preventing me access across the encroachment...” (First Schenker Affidavit, para. 7). Mr. Martin's evidence is that he has done far more than “hint”. He submits his communications with Mr. Schenker about the encroachment have been straightforward and contentious. For example, he deposes that in March 2022 he told Mr. Schenker he did not want him “to trespass” on his land, and that since April 2022, “I have had multiple arguments with the Applicant, as the Applicant continues to use the Disputed Land [the encroachment], despite my requests for him to stop.” (Martin Affidavit, paras. 12(b) and 14(a)).

[18] Whether one accepts Mr. Schenker's version of events or Mr. Martin's, what is not in dispute is that since March 2022, Mr. Martin has been parking his car on the eastern end of the encroachment where Mr. Schenker had previously parked, while Mr. Schenker has continued to drive across the western end of the encroachment to access his driveway.

[19] In 2024 Mr. Schenker, through counsel, asked Mr. Martin to enter into an easement agreement with respect to the encroachment. Mr. Martin refused. On

December 20, 2024, Mr. Schenker commenced this application for declaratory relief. According to Mr. Schenker, his decision to do so was the result of Mr. Martin “repeatedly avoid[ing] the idea of registering a shared driveway agreement.” (Affidavit of Jeffrey John Schenker, affirmed May 16, 2025, para. 7 – the “Second Schenker Affidavit”).

THE PARTIES’ POSITIONS

[20] Broadly speaking, the parties agree on the legal principles which apply to this dispute but differ on the result of their application.

[21] In short, Mr. Schenker asserts he has met all the criteria necessary to establish his claim for a prescriptive easement, while Mr. Martin argues he has not.

THE LAW OF PERSPECTIVE EASEMENTS

[22] In recent years, the law of prescriptive easements has been the subject of three decisions of the Manitoba Court of Appeal: *Klimack et al v. Kroeker et al*, 2020 MBCA 98, *Niata Enterprises Ltd et al v. Snowcat Property Holdings Limited*, 2023 MBCA 48, and *Wilson et al v. Kornelsen*, 2023 MBCA 99. In addition, Dewar J.’s decision in *RPM Farms Ltd. et al v. Laurence Jay Rosenberg et al*, 2019 MBQB 140 contains an excellent summary of the law of prescriptive easements at paras. 25 – 31. As a result, a lengthy review and discussion of the law is unnecessary.

[23] For the purposes of these reasons it is enough to say that Mr. Schenker’s onus is twofold. First, he must demonstrate the four criteria for an easement:

- (a) the presence of a dominant and servient tenement;

- (b) the easement must accommodate the dominant tenement;
 - (c) the owners of the dominant and servient tenements must be different persons; and
 - (d) the easement must be capable of forming the subject matter of a grant.
- (See *Klimack*, para. 16; *Niata*, para. 17; *Wilson*, para. 31).

[24] Next, Mr. Schenker must demonstrate the statutory requirements contained in *The Prescription Act 1832 (UK)*, 2 & 3 Will IV, c. 71, (the "*Act*"). (The *Act* is a rare example of the continued operation in Manitoba of a law of England as it existed on Manitoba's entry into Confederation on July 15, 1870: *Klimack*, paras. 9 - 15.) The requirements relevant to Mr. Schenker's claim may be summarized:

- (a) the usage of the easement must be enjoyed "as of right", which is to say continuously, openly, peacefully, and without oral or written permission; and
- (b) such usage must be carried on, without interruption, for a period of at least 20 years immediately prior to the commencement of the action in which the claim to a right of easement is brought. The *Act* also includes provisions for 40-year prescriptive easements, but they do not apply in this instance. (See *Klimack*, paras. 18 - 21; *Niata*, paras. 19 - 20; *Wilson*, paras. 32 - 33; on the requirement that the 20 years be tolled retrospectively from the date of the commencement of the action, see *Stokes v. Composite Holdings*, 2008 MBQB 124, para. 13 and *St.*

Boniface Warehousing Ltd. v. BBD Holdings Ltd., 2019 MBQB 181, para. 13).

[25] I will briefly elaborate on each of these statutory requirements, first that the use be “as of right”, and then that it be “without interruption”.

[26] In order to determine whether a prescriptive easement has been enjoyed “as of right”, courts look for evidence of acquiescence by the servient owner. Any sign of either permission or protest by the servient owner is antithetical to the use being “as of right” (***Klimack***, paras. 19 - 21).

[27] Acquiescence denotes passive acceptance. For that reason, it is perhaps easier to identify conduct which is inconsistent with acquiescence than it is to positively identify the presence of acquiescence. For instance, a servient owner’s permission, good neighborly accommodation or friendly courtesy are inconsistent with acquiescence and therefore militate against a finding of a prescriptive easement (***Blankstein v. Walsh***, 1988 CanLII 7198 (MB QB), at p. 283, affirmed in ***Blankstein and Fages v. Walsh***, 1989 CanLII 7253 (MB CA)). A servient owner’s complaints, protests or objections are also inconsistent with acquiescence (see Bruce Ziff *Principles of Property Law*, 7th ed (Toronto: Thomson Reuters, 2018, at p. 435, quoted with approval in ***Klimack***, at para. 21, and in ***Niata***, at para. 21).

[28] The requirement that the usage be carried on without interruption is found in s. 2 of the ***Act***, which provides in relevant part that the easement “shall have been actually enjoyed by any Person claiming right thereto without Interruption for the full Period of Twenty Years...” [emphasis added]. Section 4 qualifies that requirement by

stipulating that “no Act or other Matter shall be deemed to be an Interruption” unless the dominant owner has “submitted to or acquiesced in [the interruption] for One Year.”

[29] In summary, a dominant owner who claims the right to a prescriptive easement under the **Act** must demonstrate that they have enjoyed the use of the easement as of right for at least 20 years immediately prior to the commencement of their action, and that during those 20 years they neither submitted to nor acquiesced in an interruption of that use for a period of more than one year.

DISCUSSION AND DISPOSITION

[30] In my opinion, Mr. Schenker has established all but one of the necessary elements of a prescriptive easement.

[31] I am satisfied that he has demonstrated the four elements of an easement:

- a) there is a dominant tenement – the Schenker property – and a servient tenement – the Martin property;
- b) the easement in question – the encroachment on the Martin driveway – accommodates the Schenker property by facilitating access to it. In this regard, while the encroachment accommodates the Schenker property, it is not necessary to the use of the Schenker driveway. Mr. Schenker can still access his driveway if he no longer has access to the encroachment;
- c) the dominant and servient owners are, and for at least the last 20 years have been, different persons; and

- d) the right of easement asserted by Mr. Schenker is capable of forming the subject matter of a grant.

[32] As regards the statutory requirements for a prescriptive easement, I find Mr. Schenker has established that for most of the 20 years before December 20, 2024, the day he sued Mr. Martin, his usage of the encroachment has been continuous, open, peaceful, and without Mr. Martin's oral or written permission.

[33] Where Mr. Schenker falls short, however, is with respect to the requirement in s. 2 of the **Act** that his usage of the easement be "without interruption". Based on Mr. Schenker's evidence, I find his usage of the easement was interrupted for a period in excess of one year, from about March 25, 2022, when he was informed of the true location of the boundary between his property and Mr. Martin's, until December 20, 2024, when he commenced this application, and that he acquiesced in that interruption.

[34] I pause here to emphasize that my conclusion is based on Mr. Schenker's evidence. As noted above, Mr. Schenker and Mr. Martin's evidence conflicts on some significant points. Resolving such conflicts on the basis of affidavit evidence and transcripts of cross-examinations can be difficult, if not impossible. In this case, however, I find it unnecessary to do so.

[35] In my view Mr. Schenker's evidence, standing alone, establishes that after his discussion with Mr. Martin about the survey in March 2022, he understood Mr. Martin to be asserting a right of ownership and control over the encroachment which stood in opposition to his own use of it. As I will explain, I find Mr. Martin's assertions of

ownership and control constitute an “interruption” to which Mr. Schenker “submitted” or “acquiesced” within the meaning of the **Act**.

[36] I begin with Mr. Schenker’s description of the parties’ discussion about the survey in March 2022 during which the question of Mr. Martin’s legal ownership of the encroachment was clearly and unequivocally settled in Mr. Martin’s favour.

[37] Second, Mr. Schenker himself deposed that since March 2022 Mr. Martin has “hinted at preventing” him from accessing the encroachment (First Schenker Affidavit, para 6). The inference I draw from this is that Mr. Martin, to Mr. Schenker’s knowledge, has been asserting a right to control Mr. Schenker’s use of the encroachment.

[38] Third, on cross-examination Mr. Schenker admitted that after March 2022 Mr. Martin began to park his car on the encroachment. He acknowledged this “seemed reasonable” to him, given that it was Mr. Martin’s property, despite the fact that “we parked there previously” [Cross-examination of Jeffrey John Schenker, August 20, 2025, p. 12, lines 13 – 15]. By his own admission, Mr. Schenker has ceded to Mr. Martin one portion of the encroachment which he had been using.

[39] Fourth, under cross-examination Mr. Schenker also admitted that even after the question of ownership of the encroachment had been settled, its use still gave rise to disagreement and uncertainty:

It remained like that without any disagreement other than just comments by his wife [i.e., Ms. Church] every once in a while. Probably about once or twice a year she would make comments about a fence being built, and that’s why I sought [*sic*] legal advice of, ‘I don’t want to come home with a fence down the driveway.

[Cross-examination of Jeffrey John Schenker, August 20, 2025, p. 12, lines 20 – 25]

[40] Finally, in 2024 Mr. Schenker asked Mr. Martin, through counsel, to enter into an easement agreement, which Mr. Martin refused. I find Mr. Schenker's recognition for the need of a formal, legal agreement to be a telling indication that he understood the precarity of any right he might have to use the encroachment.

[41] Taken as a whole, this evidence leads me to conclude that after March 25, 2022, Mr. Martin did not acquiesce to Mr. Schenker's use of the encroachment. In my view, Mr. Martin and Ms. Church's words and conduct since then, as described by Mr. Schenker himself, are incompatible with a finding that Mr. Schenker used the encroachment "as of right". At best, I find Mr. Schenker's continued use of the encroachment after March 2022 was not with Mr. Martin's acquiescence, but at his sufferance.

[42] Accordingly, I find from about March 25, 2022 to December 20, 2024, a period of well over one year, there was an "interruption" of Mr. Schenker's enjoyment of the easement as contemplated by ss. 2 and 4 of the **Act**.

[43] I also find that Mr. Schenker "submitted to or acquiesced in" that interruption for more than one year, as contemplated by s. 4 of the **Act**. As I wrote earlier in these reasons, acquiescence denotes passivity, and Mr. Schenker's response to the position taken by Mr. Martin with respect to the encroachment was passive. He did not challenge or protest Mr. Martin's assertions of ownership and control, nor similar assertions made by Ms. Church, and he yielded to Mr. Martin's use of one portion of the encroachment to park his car. Mr. Schenker's only real effort to resolve matters was to

retain counsel and seek formal agreement, which I interpret as recognition by him of his need to secure Mr. Martin's permission.

[44] As a result, Mr. Schenker has failed to meet one of the essential elements of a prescriptive easement namely, uninterrupted use. In order for a prescriptive easement to be recognized all of the common law and statutory elements must be met. The failure to meet even one will result in the dismissal of the claim (*Niata*, at para. 23; *Wilson*, at para. 34).

CONCLUSION

[45] In conclusion, Mr. Schenker's application for a declaration that Mr. Martin's property is subject to a prescriptive easement is dismissed. If the parties are unable to agree on the issue of costs, they may arrange for further submissions on that point, either in writing or in person, as they prefer.

J.