CITATION: 165411 Ontario Limited v. The Rekai Centres, 2025 ONSC 4650
COURT FILE NO.: CV-25-00747693-0000
DATE: 20250826

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
1654199 ONTARIO LIMITED and 1888818 ONTARIO LIMITED	)	*Mitchell Wine*, for the Applicants
Applicants	)	
– and –	)	
THE REKAI CENTRES	)	*Christopher Stanek*, for the Respondents
Respondents	)	
	)	**HEARD:** August 8, 2025

REASONS FOR JUDGMENT

PAPAGEORGIOU J.

Overview

[1] The Applicants seek a permanent, or in the alternative, interlocutory, injunction enjoining the Respondent from taking any steps to interfere with the Applicants' easement rights over Part 4 on Plan 66R-21806 (the "Easement").

[2] The Applicants brought a motion for an urgent interlocutory injunction pending the hearing of the Application.

Decision

[3] For the reasons that follow the motion is dismissed.

Issues

- Issue 1: Have the Applicants demonstrated a substantial issue to be tried?

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- Issue 2: Have the Applicants demonstrated irreparable harm?
- Issue 3: Who does the balance of convenience favour?

Analysis

[4] Pursuant to *RJR MacDonald v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, at p. 334, the usual test for an interlocutory injunction is as follows:

> (a) Is there a serious issue to be tried?
>
> (b) Will the party requesting the injunction suffer irreparable harm if the injunction is not granted? and
>
> (c) Does the balance of convenience weigh in favour of granting an injunction or denying it?

Issue 1: Have the Applicants demonstrated a substantial issue to be tried?

[5] The test for determining whether conduct infringes a right-of-way is the “substantial interference test”. This requires consideration of whether practically and substantially, the right-of-way could be exercised as conveniently after than before the interference: *Weidelich v. de Koning* (2014), 325 O.A.C. 344 (CA), at para 10 [*Weidelich*].

[6] In applying this test, courts consider the reasonable use that the dominant owner benefitted from prior to the alleged obstruction, and if the right-of-way can be substantially and practically exercised as conveniently as before. It is a fact-driven inquiry and focusses on the instrument creating the easement in the context of the circumstances that existed when the easement was created: *Weidelich*, at paras 15, 33; *Wilson v. McQuade*, 2022 ONSC 0847, at paras 28, 36, 46; *Fallowfield v. Bourgault*, 2003 CanLII 4266 (ON CA).

[7] This does not mean that the owner of the easement cannot place structures on the easement. Caselaw is clear that the servient tenement “is not precluded from placing chattels or erecting a structure on an easement as long as what is done does not substantially interfere with the other party’s use of the easement that was granted.” *Fallowfield v. Bourgault*, [2003] O.J. No. 5206.

[8] Although there was argument on whether the Applicants meet this test, I am satisfied that they meet the low bar.

[9] The Applicants are related companies to HSC Holdings Inc. operating as AWIN ("AWIN"). AWIN owns 28 automobile dealerships in the Toronto Area including four dealerships that are operated on the property in question (the "Property"). It is in the business of sales and servicing new and used cars. The dealerships at the Property are Volvo, Honda, Acura, and Volkswagen.

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[10] The Applicants obtained ownership of the Property pursuant to a land exchange agreement with the Ontario Realty Corporation ("ORC") in 2005. Their agreement provided a Restrictive Covenant registered on the Property that restricts future development. The ORC believed that future development of the Property as a condominium would increase its value and if that occurred it wished to renegotiate the financial arrangements it had made with the Applicants.

[11] There was no bar to the Applicants building the dealerships in question which were completed in 2015.

[12] The Property has been subject to an Easement as of December 1, 2005 described as follows:

> FOR THE PURPOSES OF PEDESTRIAN AND VEHICULAR INGRESS AND EGRESS BETWEEN THE BENEFITTING LANDS AND EASTERN AVENUE AND FRONT STREET EAST AND TRAVEL BETWEEN EASTERN AVENUE AND FRONT STREET EAST.

[13] A Laneway was created over the Easement. The Laneway was not on the Property owned by the Applicants. Rather, the Applicants are the dominant tenement. The Laneway was owned by the ORC who was the servient tenement. It is between 335 to 341 feet long and is approximately 19 feet 8 inches wide.

[14] On December 19, 2019, the ORC subsequently sold the adjacent land, upon which the Easement and the Laneway are located, to the Respondent who is a non-profit charitable corporation. The Respondent is now thus, the servient tenement.

[15] The Respondent intends to build a long-term care home which will be a 13-story building with 348 long-term care beds at a cost in excess of $200 million.

[16] The Applicants may wish to build a condominium on this Property, and it is accepted that this is not permitted pursuant to the Restrictive Covenant.

[17] The Applicants and the Respondent were in negotiations related to both the Respondent's wish to build and make use of the Easement and the Laneway and restrictions to the Applicants' use as a result, as well as a sort of quid pro quo where in exchange, the Respondent would support the Applicants' attempts to have the Restrictive Covenant removed.

[18] These negotiations have stalled. I will return to this in the section on irreparable harm.

[19] The following is a drawing of the dealerships in question.

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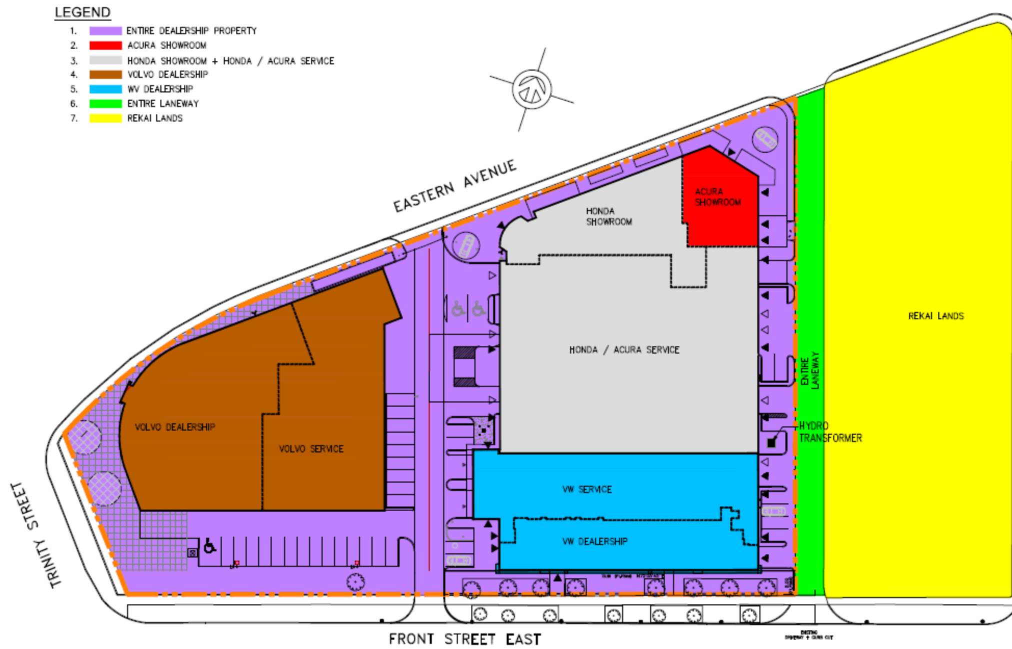

[20] As can be seen, the Property is a complex where the Respondent's land is on the right, and the Applicants' Property is on the left. The Laneway is between them and is shaded green. The Volvo dealership is to the far left and the Honda, Volkswagen, and Acura dealerships are to the left of the Laneway. There is parking between the two buildings where the dealerships are housed.

[21] As well, it is accepted that there is twenty feet owned by the Applicants which lies between the building housing the Acura, Honda, and Volkswagen dealerships.

[22] The Applicants say that they have used the Laneway in the following manner:

- The entrance to the Acura dealership, which they say can only be accessed from the Laneway. There is small parking in front of the Acura dealership that customers can park at after traversing the Laneway. I note that the image in the record shows that the Acura dealership and the parking in front of it is at one end of the Laneway such that customers could park at the designated parking that is not accessed by the Laneway and then simply walk around to the entrance.

- Service intake for the Acura dealership where cars are parked in front of the service area by customers before they enter into service. Again, a customer leaves their car in parking spaces in front of the service area for the attendant and this is on the Applicants' land which is adjacent to the Laneway.

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- A car wash the dealerships use for customer service and for new or used car customers. The only entrance is from the Laneway.

- Access to electrical transformers and electrical panels for the building that houses the Acura, Volkswagen, and Honda dealerships. These are on the wall of the building.

- An area where parts are delivered for the Honda, Acura, and Volkswagen dealerships. These are delivered by an 18-wheel tractor trailer which uses the Laneway.

- An area where they collect garbage and refuse.

- Honda, Acura, and Volkswagen Service Bays.

- The Volkswagen showroom entrance.

[23] Because the property owned by the Respondents was empty until they purchased it, and there was no activity, the Applicants' employees also used the Laneway for parking.

[24] The Applicants say that the Respondents have proposed and undertaken certain restrictions to the Laneway to accommodate their construction of the retirement home which the Applicants say substantially and practically interfere with their exercise of the Easement. In that regard, the Respondents have already erected a fence which decreases the width of the Laneway.

[25] The construction of the fence prompted this Application and this motion.

[26] Notably, there is direct access for customers to the Honda, Volkswagen, and Volvo dealerships who all have entrance areas not through the Laneway, and there is also a designated parking area that is not in the Laneway and that all customers could use. There are also sidewalks.

[27] By the time of the argument, the Respondent had decreased its intended restrictions such that they now propose as follows:

- From the later of the date when the Court decides the Injunction Motion and August 9, 2025 to October 5, 2025, the width of the Laneway will be 13 feet and 8 inches wide.

- From October 6, 2025 until the expiry of the Construction Period, the Laneway will be 10 feet and 8 inches wide.

- One end of the Laneway will be closed for three weeks for the construction of an underground storm sewer connection. The Respondent has undertaken to give the Applicants 30 days' notice of when this will be.

- The other end of the Laneway will be closed for 3 consecutive days between October 1, 2026 and April 30, 2026. The Respondent has undertaken to advise the Applicants no later than August 1, 2026 of the projected date when this will commence and it will then invite

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the Applicants to advise in writing, within ten days, of the three consecutive dates within the twenty-day period immediately following the projected dates for this closure for the Applicants to advise of the preferable dates and then it will use those dates.

[28] The Respondent has provided a written undertaking to the court in this regard.

[29] The Applicants say that this will still substantially interfere with the uses that they have previously made and to which they are entitled under the Easement. They say that they have made these uses openly and notoriously without anyone complaining.

[30] The Respondent argues that the only thing that the Easement permitted was pedestrian and vehicular ingress and egress, and that the uses set out above are not part of the Easement. In particular, the uses made by the large trucks who make deliveries and must park to do so is not a permitted use because the Easement does not permit parking.

[31] To this, the Applicants point to their evidence that at the time of the creation of the Easement, the ORC was aware that the Property would be used for dealerships and that the Easement, taking into account this surrounding circumstance, should be read to mean that it included all the things that they have been doing openly for many years.

[32] However, the ORC did not provide any evidence and the dealerships were not even built until 2015 (ten years after creation of the Easement) such that at the time of its creation, the uses that are currently being made were not actually being made. The large trucks parking to make deliveries certainly was not something that was happening.

[33] If the surrounding circumstance is ultimately proven to be as the Applicants assert, then it appears that the Easement was still only intended to be for pedestrian and vehicular ingress and egress and not parking or vehicle stoppage since the Applicants' Property would be used for any parking once that ingress or egress took place. Indeed, the Applicants left 20 feet to the left of the Easement which also supports this. Customers who traversed the Laneway are not parking on the Laneway but within the Applicants' 20 feet. Afterwards they use the Laneway to leave.

[34] While there were extensive arguments on whether all the uses being made are properly part of the Easement, because of the low bar, I am satisfied that the Applicants have met the initial aspect of the test overall.

Issue 2: Have the Applicants demonstrated irreparable harm?

[35] The Applicants say that the irreparable harm they will suffer relates to an inability to access the Acura dealership where the only access is through the Laneway, interference with vehicular traffic because it is no longer two-way road, and interference with the collection of garbage. With respect to their deliveries, they point out that with some of the existing restrictions, their truck driver could not open their door. I note here that the image of the truck shows it driving in one direction where the driver opened the door on the fence side and was restricted. If the truck entered

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the Laneway from the opposite side, the truck driver would have been able to open the driver's door into the 20 feet of the Applicants' own property.

[36] They also say there will be possible dangerous interference with electrical transformers. Finally, they also say that this would impact their business and then put in jeopardy the jobs of their 100 employees.

[37] They take the remarkable position that it would make the operation of the dealerships impossible if the Laneway was blocked "for any period of time at any time."

[38] Nevertheless, the Applicants, through their own conduct have shown that the restrictions which are set out in the undertaking to the court will not cause them irreparable harm because of agreements that they were prepared to make with the Respondents in exchange for a release of the Restrictive Covenant.

[39] On December 22, 2022, the parties entered into a Memorandum of Understanding (the "MOU"). Pursuant to the MOU, the Respondent agreed to consent to removal of the Restrictive Covenant.

[40] Section 4 provided as follows:

> **f. The Parties acknowledge and agree that the Dealership Owners require a minimum eleven (11) feet in width of continuous clearance on the Part 4 Access Easement from the easterly limit of the Dealership Lands at all times from the Effective Date until the completion of construction of the Rekai Development for vehicular access, delivery and maneuverability purposes to and from the Dealership Lands (collectively "Unobstructed Access").** Accordingly, Rekai covenants and agrees that it shall, at all times from the Effective Date until the completion of construction of the Rekai Development, provide the Dealership Owners with unobstructed access within the Unobstructed Access area. Rekai shall also be responsible for maintenance in the normal course in relation to the Part 4 Access Easement. This provision survives and shall not merge upon any termination of this MOU. [emphasis added]
>
> g. **The Parties acknowledge and agree that the portion of the Part 4 Access Easement (being approximately nine (9) feet that is to the east of the Unobstructed Access area), shall be used solely by Rekai** for a period of three (3) years from the date of discharge of the Restrictive Covenant on title to the Dealership Lands and the Rekai Lands (or such longer period as the Parties may agree, each acting reasonably) for staging, trailer parking and similar purposes as per the construction plan provided to the Dealership Owners by Rekai (the "Staging Period"). Upon the expiration of the Staging Period, Rekai shall, at its own cost and expense, restore the Part 4 Access Easement to the physical state as it existed as of the Effective Date and restore the same at such time for joint access use as per the terms of the Part 4 Access Easement. This provision survives and shall not merge upon any termination of this MOU. [emphasis added]

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> h. **The Dealership Owners acknowledge and agree that (i) they shall not park vehicles nor engage in any other Prohibited Use on the Part 4 Access Easement after December 31, 2022**; and (ii) failure of the Dealership Owners to comply with Section 4.h(i), may result in Rekai using any remedy available to it in law, equity or otherwise in respect of such non-compliance. This provision survives and shall not merge on any termination of this MOU. [emphasis added]

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[41] The term "Prohibited Use" was defined in the MOU in Clause 4.e:

> Each of the Dealership Owners do hereby covenant and agree to use the Access Easement Area solely for the purposes set out in the Part 4 Access Easement. For greater certainty, each of the Dealership Owners acknowledge and agree that such purposes do not include, without limitation, **storing (including storing of vehicles, machinery, equipment, bins or other containers), depositing of car parts or other materials, parking, constructing, digging or otherwise erecting or imposing anything on, below or above the Access Easement Area (collectively, the "Prohibited Uses") and each of the Dealership Owners covenants not to use the Access Easement Area for such Prohibited Uses.** [emphasis added]

[42] The MOU terminated as of October 31, 2023 but both parties confirm their position that paragraphs 4f, g, and h unconditionally survived the termination of the MOU.

[43] Thus, the Applicants agreed that their business interests could be satisfied with access to 11 feet of the Laneway. The maximum restriction in the width of the Laneway based upon the Respondents' undertaking is 10 feet 8 inches which is four inches less than what the Applicants agreed would be a sufficient width for its business interests.

[44] In his affidavit, Mr. John Srebot ("Mr. Srebot"), in house counsel with the Applicants, indicated that the Applicants agreed to the 11-foot restriction because, pursuant to the MOU, they were to receive ample notice of a reduction in the Laneway, such that they would have been able to organize their business to plan for the reduction in the width. That is, they could widen the Laneway by configuring part of the 20 feet of land that lies between the building housing the Acura, Volkswagen, and Honda dealerships and the Laneway. Mr. Srebot says that they could have taken 3.3 to 5 feet and added it to the western edge of the Laneway widening it to 14.3 to 16 feet which would have been sufficient.

[45] Mr. Srebot said that a curb would need to be removed and a new curb installed and that electrical equipment would have to be reinforced. These are the only changes that he says would have to be made. The photographs of the Laneway also support that this is all that would have to be done. Although Mr. Srebot says that this would have been a substantial cost, he does not say what that cost is in his affidavit.

[46] Mr. Angus Tai, the Applicants' Vice President of Operations, also said that any problems could be lessened if the Applicants had time to adjust their operations. He did not provide any specifics of what would be required while Mr. Srebot did.

[47] They were prepared to make these changes in exchange for the Respondent's consent to remove the Restrictive Covenant.

[48] It is unclear how the width reduction was acceptable and could be worked around if the Applicants secured the removal of the Restrictive Covenant, but then irreparable if the Applicants did not secure the removal of the Restrictive Covenant.

[49] The Respondent submitted in court that it is prepared to give sufficient time to the Applicants so that they can accommodate the changes that Mr. Srebot proposed. The Applicants provided no evidence of how much time it would take to do this or to reorganize.

[50] Based upon the photographs and Mr. Srebot's affidavit, it is unclear why there would be any extensive length of time to conduct necessary adjustments to accommodate the reduction in the width by using the Applicants' own land.

[51] While this would entail a cost to the Applicants, incurring of monetary losses that are quantifiable is not irreparable. If the Applicants ultimately succeed in this Application, then they will have a claim for damages in respect of any such costs incurred.

[52] The Applicants have also raised an issue of safety with respect to the electrical transformers which they say would be compromised if trucks got too close to them. However, the transformers are along the building which is 20 feet away from the edge of the Laneway. It is unclear on this record why, even with the width reduction, and any accommodations to widen the Laneway, the trucks would get anywhere close to these transformers, let alone actually interfere with them.

[53] With respect to the fact that the Laneway previously accommodated two-way traffic, there are many streets that are one way and the parties could change the Laneway to a one-way street. Additionally, it appears that the changes proposed by the Applicants would result in two-way traffic in any event.

[54] With respect to the closures at either end of the Laneway for a three-week period and then a 3-day period, this is a more significant concern because long delivery trucks would have to drive in and back out which would be inconvenient and potentially cumbersome, but it is not impossible.

[55] I also note here, that the MOU provided that there would be no parking of any vehicles which is implicitly required when these large trucks make deliveries. They must stop to unload and it is reasonable to infer that this takes some time. Therefore, the inability of the large trucks to park and unload was also implicitly acceptable to the Applicants pursuant to the MOU. I note that this is also consistent with the Easement which does not reference parking as a permitted use only ingress and egress. As such, there will be a significant issue at trial as to whether the problems the

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Applicants would face because of the inability of their large trucks to now park and make deliveries while on the Easement is a permitted use in any event.

[56] If all of these things were acceptable pursuant to the MOU where the Applicants received a quid pro quo, it is unclear why this would be irreparable or constitute significant damage to their business. I also note that Laneway closures at either end are a year or more in the future, and the Respondent has promised to give ample notice and, as such, these events should be able to be accommodated.

[57] These temporary closures will not significantly impact customer access or sales because there is a sidewalk and doors that pedestrians can use to enter the Acura dealership and any service bays whose only access is through the Laneway. Customers could park in the designated parking lot not accessed off the Laneway and then walk around. While less convenient, this would be for a short period of time.

[58] Any harm to the dealerships for a lack of access for the three weeks at one end and the three days at the other could also be compensated financially. That is, if they lost sales or could not receive deliveries or had to receive them later than expected because trucks did not want to back out the way they came, or there were delays in shipping cars during these periods, or there was a reduction of the use of the car wash and service calls during these periods, or a reduction in detailing, or if garbage pick-up had to be delayed or altered during these periods, this could be analyzed and any losses entailed by this could be quantified.

[59] Indeed, even if they did not make the business changes that they say could address the issues, the damages for the above types of damages would be quantifiable. While they baldly say that this would make it impossible for their businesses to continue, they provide insufficient evidence or analysis that supports this.

[60] In *Fountas v. Melo*, 2014 ONSC 2463, the court was able to award damages due to an interference with a right of way that were assessed as diminution in value, loss of revenue, and reduced parking availability.

[61] I add that even if the Applicants could not have accommodated the proposed reductions to the Laneway, through the changes they propose, I would not have found that they had established irreparable harm because any losses are quantifiable.

Issue 3: Who does the balance of convenience favour?

[62] The balance of convenience also favours the Respondent.

[63] The Applicants would tie up the development of a retirement home and the urgent need for long-term beds in Toronto on the basis of things that the Applicants have already implicitly agreed to in the MOU and which it showed it could accommodate through the MOU.

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[64] I dismiss the motion, but a term of this dismissal will be that the Applicants will have the a reasonable time to reconfigure their own Property, which is what they intended to do when the MOU was in place and which is something the Respondent represented to the court it was prepared to provide.

[65] The parties shall attempt to address this on consent and if they cannot, they may arrange a case conference with me to determine a process to address how much time is reasonably necessary. I expect the parties to conduct themselves reasonably as good neighbours for both of their benefit.

[66] The Applicants may make cost submissions within 7 days followed by the Respondent 7 days later.

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Papageorgiou J.

Released: August 26, 2025

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