

CITATION: Polat v. Richardson et al, 2026 ONSC 3940
DIVISIONAL COURT FILE NO.: DC-25-00000001-0000
DATE: 2026/07/06

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

BETWEEN:	)	
	)	
FRANK POLAT	)	Adin Wagner, for the Appellant
	)	
Appellant	)	
	)	
– and –	)	
	)	
DALE RICHARDSON and KRISTA	)	
RICHARDSON	)	Sheri Thompson, for the Respondents
Respondents	)	
	)	
	)	
	)	HEARD at Belleville by Zoom: May 11,
	)	2026

Labrosse J.

ENDORSEMENT

Introduction

[1] This is an appeal of the Small Claims Court decision of Deputy Judge E. Kafka dated November 25, 2024.

[2] The Appellant claimed damages of \$35,000 from the Respondents from the wrongful use of a right-of-way (“ROW”) and the construction costs for a chain-link fence, gate and gate pillars. The Appellant also claimed damages for trespass, nuisance and lack of reasonable enjoyment of the property.

[3] Deputy Judge Kafka (the Trial Judge) dismissed the claim and awarded double and punitive costs against the Appellant in the amount of \$14,077.00.

[4] At the appeal, the Appellant pursued the following grounds of appeal:

- i. The Trial Judge erred by treating the agreement to release the ROW as a global release;
- ii. The Trial Judge erred by applying the wrong legal framework to interpret the ROW;
- iii. The Trial Judge erred in imposing double costs and penalty costs.

[5] For the reasons below, I find that the appeal fails on the first two grounds of appeal along with the appeal against double costs. However, I grant the appeal in respect of the penalty costs.

Background

[6] The Appellant and the Respondents are next-door neighbours on Highway 33 in the Town of Frankford, Ontario. Each property fronts on Hwy 33 and backs onto the Trent River. Until mid-2022 the properties had a shared driveway. The driveway was located on the Appellant's land, and the Respondents had a deeded ROW to use the driveway.

[7] The ROW crossed a wooded approach toward the rear of the properties and near the edge of the waterfront. Photographs and aerial overlays were filed by the Appellant to show the path, typical turning points, and where the Appellant understood the ROW ended.

[8] The deeded ROW was registered on title as Instrument QR273607. The Appellant's lands were "Subject to QR273607" and the Respondents' lands were "Together with QR273607". The ROW is described in Instrument QR273607 as being Part 1 and 2 on Registered Plan of Survey 21R4460. Both Instrument QR273607 and Plan 21R4460 were entered as exhibits at the trial along with a later R-plan described as Plan 21R-17756.

[9] After various disputes between the parties about the use of the ROW and with the assistance of counsel, the parties entered into a document titled "An Agreement to Release and Abandon an

Easement” on April 22, 2022 (the “2022 Agreement”). By way of the 2022 Agreement, the Respondents released their interest in the ROW in exchange for the sum of \$16,000 which was to be used to construct a driveway on their own property. Issues regarding prior conduct were not addressed in the 2022 Agreement.

[10] The Appellant has admitted that the pre-2022 Agreement period was characterized by an increased use of the ROW by people and vehicles not associated with the Respondents. According to the Appellant, on weekends and evenings, groups of people would use the ROW and gather at the shoreline. Vehicles were routinely parked near the water. In one circumstance, the Appellant complained of a water truck that came to draw water at the river’s edge using the ROW. The Appellant claims to have spoken to the Respondents about this and that the Respondents acknowledged having given that permission to the water truck.

[11] Shortly after the 2022 Agreement was signed and implemented, the Appellant installed a perimeter fence, new gate, and pillars between the properties. Thereafter, no further incidents took place in respect of the ROW.

[12] During the period between the execution of the 2022 Agreement and the erection of the fence, it is unclear as to what activity the Appellant claims may have taken place, which offends the use of the ROW, if any. However, after the installation of the fence, the Appellant was clear that no further offending activity was alleged as against the Respondents.

[13] Even before the 2022 Agreement, it is unclear as to what activity that offended the use of the ROW, was attributed to the Respondents, their family or guests. Claims were made about garbage being left that had the Respondents’ name on it and that some people parked on the ROW and then moved the cars when asked by the Appellant. In large part, the offending conduct was attributed to unknown people and some who may have said that they had permission from the Respondents. Much of the Appellant’s focus was on the Respondents using the ROW all the way to the shoreline. The Appellant claimed that the ROW ended before the shoreline and as such, any access to the waterfront was a trespass. Further, there was a parking area on the Respondents’ land that was located beyond what the Appellant claimed was the end of the ROW. It was the

Appellant's evidence that any cars parked in that area would have travelled on the Appellant's land, outside the ROW to get to the parking area.

[14] To establish the limits of the ROW, the Appellant relied on Plan 21R-17756 and a dotted line that shows two points within Part 2 of that plan with the words "Travelled Right-of-Way as set out in Inst No. 273607". He suggested that the dotted line demonstrated that the ROW did not extend to the waterfront. This was a fundamental misinterpretation of Plan 21R-17756 as that notation is clearly not meant to delineate the limits of the ROW. Part 2 on Plan 21R-17756 is clearly the same as Part 1 on Plan 21R-4460 which is identified as the portion of the ROW extending down to the waterfront.

[15] The Appellant also tried to rely on an invoice from Watson Land Surveyors Ltd. which suggests that the Appellant had the west limit of the ROW marked. However, the Appellant did not call the surveyors as witnesses and the evidence of the west limit of the ROW was never properly established into evidence. The Appellant was never able to contradict that which is shown on Part 1 on Plan 21R-4460 which is that the ROW extends to the waterfront.

[16] The Appellant's inability to establish that the ROW ended before the waterfront was essential to much of his claim for trespass and nuisance. He relied on photographs that showed vehicles parked in a parking area which formed part of the Respondents' land. He claimed that in order to reach the parking area, that vehicles would have to trespass beyond the end of the ROW to access that area. However, as the ROW was shown to extend to the waterfront, there would be no trespass to access that parking area.

[17] In the end, the Appellant did not present any evidence as to the exact location of the ROW, otherwise than as described on registered instruments.

Standard of Review

[18] The Divisional Court has jurisdiction to hear an appeal from a final order of the Small Claims Court pursuant to s.31 of the *Courts of Justice Act*, R.S.O. 1990, Chap.C.43.

[19] The Supreme Court of Canada in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, established that the appropriate standard of review for questions of law is a correctness standard; and questions of fact are reviewed on a palpable and overriding error standard. Questions of mixed fact and law fall on a spectrum: if the issues of fact and law cannot be separated, the palpable and overriding error standard applies. However, correctness applies if the question of law is extricable from the factual matrix.

[20] Several cases have expounded the meaning of the palpable and overriding error standard. In *Huisman v. MacDonald*, 2007 ONCA 391, 280 D.L.R. (4th) 1, a palpable error was characterized as one which is so overriding as to discredit the result.

[21] As noted above, *Housen* establishes that the correctness standard is only applied on questions of mixed fact and law when the law is easily separable from the facts.

Analysis

Issue 1: The Trial Judge erred by treating the 2002 Agreement as a global release

[22] My review of the trial judge's reasons allows me to conclude that he did not treat the 2022 Agreement as a release. Had he done so, most of his analysis of the evidence would have been moot.

[23] The Trial Judge did question how the 2022 Agreement did not resolve the dispute, and he had doubts as to why the Appellant chose to pursue damages for the pre-2022 period. I have the same questions, given the evidentiary record presented by the Appellant and the absence of direct evidence relating to the pre-2022 Agreement period. The Trial Judge goes on to state that it appeared "unseemly" for the Appellant to have intentionally omitted to discuss his claims in nuisance as part of the 2022 Agreement, but he does not go so far as stating that the 2022 Agreement released any rights to claim nuisance.

[24] When the Trial Judge analyzes the evidence in relation to nuisance, he does so with a focus on the period that was prior to the 2022 Agreement and the Appellant's claim that the ROW did not extend to the waterfront. He highlights that the Appellant did not establish where the ROW

begins and where it ends. The focus is on the pre-2022 period because he makes a finding of fact that the Appellant did not present any evidence of nuisance after the 2022 Agreement.

[25] When considering the pre-2022 Agreement period, the evidence at trial focused on the Appellant's view that the ROW did not extend to the waterfront. However, that was never proven in evidence and to the contrary, the depiction of Part 1 on R-plan 21R-4460 and Part 2 on R-plan 21-R-17756 suggests that it extended from the highway to the waterfront. The Trial Judge makes specific references to the Respondents' use of the ROW by themselves and their family and friends. However, when considering the Appellant's evidence that could lead to a finding of nuisance such as being used as an area to drink, smoke and leave trash, that evidence does not appear to specifically refer to the Respondents or their known friends and family. The possible evidence of nuisance mostly refers to unspecified individuals.

[26] As to the specific use, the Appellant's evidence focused on the Respondents parking on the ROW near the waterfront and launching boats. He stated that he spoke to some people but not most of them. When specifically asked if he knew who the people were who parked on the ROW, he said he did not. During the trial, the Trial Judge specifically questioned the parties on the relevance of the evidence of people using the ROW who were not identified as being related to the Respondents. At one point, the Appellant acknowledged that he had to ask people who they were because he did not know them to be associated with the Respondents.

[27] The Appellant's evidence was replete with references to "the people" or "they" without making any specific link to the Respondents. Even when specifically asked about anything particular done by the Richardsons, the Appellant did not provide specifics and only spoke in generalities. At one point, he testified that a relative of the Richardsons went down the ROW a few times to go fishing. When specifically addressing the trash, the Appellant referred to "the people" without specific reference to the Richardsons, their family or guests. At one point, he spoke vaguely about seeing the Richardson name on some of the trash he picked up but provided no detail.

[28] The Appellant did reference an occasion when friends of the Respondents' son were parked on the ROW, he messaged the Respondents, and the cars were moved. At one point in cross-

examination, the Appellant referred to his frustrations about the use of the ROW and stated that it was not only due to the Richardsons but also many other people. Later, when asked about the Respondents' improper use of the ROW, he referenced the truck going down to the waterfront to take water from the river on one occasion and parking on the ROW. With respect to parking, the Appellant was taken to certain photos filed as exhibits and he acknowledged that in some photos, the cars or ATVs were not parked on the ROW but on the Respondents' land. Further, the Appellant acknowledged that he never saw the Respondents dump anything on his property.

[29] Even if the actions alleged by the Appellant were accepted, I question if this would amount to nuisance that could lead to an award of damages. When asked during his examination in chief as to why he was claiming ten thousand dollars in damages, he indicated that it was because he was not able to the area for three to four years until the easement was removed. There is no possible way for the evidence of use by the Respondents to be viewed as preventing the Appellant from doing anything with the ROW. At best, the use claimed by the Appellant that offended the ROW was sporadic and would happen from time to time. The evidence does not suggest that the Appellant was ever prevented from using the ROW in any way.

[30] The Trial Judge's findings as to the historical use of the ROW are not limited to the post-2022 Agreement period. To the contrary, much of the focus is on the evidence prior to the 2022 Agreement. In doing so, the Trial Judge preferred the evidence of the Respondent, Dale Richardson, as to the use he has made of the ROW. The evidence included Mr. Richardson's acknowledgement of the limits of his rights over the area and how they did not have an ownership interest over the ROW.

[31] The Trial Judge accepted the Respondents' evidence that there were no disputes after signing the 2022 Agreement and certainly no agreement to share in the costs of the fence, gate and pillars. That claim was not pursued on appeal.

[32] The Trial Judge concludes by stating that there has been no evidence "throughout" that would indicate that the Respondents, their heirs, their assignees, invitees or guests violated the ROW and caused any damage to the appellant's property. That finding was available to the Trial

Judge based on the evidence presented at trial and he committed no error in his interpretation of the scope of the 2022 Agreement. There is no overriding error that would discredit the result.

Issue 2: The Trial Judge erred by applying the wrong legal framework to interpret the ROW.

[33] When considering the proper framework to interpret the ROW, the Appellant refers to not only the location of the ROW down to the waterfront. He also relies on the actual use of the ROW by the Respondents and if that use fit within the description of what was permitted by Instrument QR273607. The Appellant alleges that the Respondents caused damage both from their presence on the ROW and the use which was beyond that which is permitted by Instrument QR273607.

[34] The Appellant claims that the interpretation of the ROW is a question of mixed fact and law and that the Trial Judge erred in his assessment of the pre-2022 Agreement evidence. The Appellant argues that the pre-2022 Agreement use at the shoreline would be outside the grant of the ROW.

[35] Starting with the location of the ROW, it is evident that the Appellant was never able to establish that the ROW did not extend down to the shoreline. The photographs entered into evidence do not demonstrate use of the ROW that offends its terms by individuals associated with the Respondents. Vehicles are parked in the parking area that formed part of the Respondents' land. Even the broken trailer shown on photos that are part of Exhibit 5 seems to be located on the Respondents' land.

[36] Any claims relating to the use of the ROW down to the waterfront as a basis for trespass were never made out by the Appellant.

[37] When looking at the exact wording of the ROW, it allows for the "free and uninterrupted right-of-way, in common with the Grantor, for persons and vehicles through, along and over that certain parcel of land described as follows..." The description then refers to Part 1 and Part 2 on Plan 21R4460. That plan shows Part 1 running from the boundary of Highway 33 to the Trent River with no apparent gap between the ROW and the Trent River.

[38] In his conclusions, the Trial Judge stated that he preferred the evidence of the Respondent as to the use of the ROW. He referred to the Appellant's evidence and concluded that the Appellant

did not state who was using the ROW as a dumping area and who or when the kayaking took place or who was ice-skating or ice fishing. He also did not associate the offending conduct to the Respondents after the 2022 Agreement.

[39] The Trial Judge highlighted the weaknesses in the Appellant's evidence as to the role of Respondents in creating a nuisance prior to the 2022 Agreement. He concludes that throughout the period in question, the Appellant failed to establish evidence of the Respondents' nuisance.

[40] When considering the evidence of the Respondent, Mr. Richardson, it was straightforward and clear. He admitted to the use of the ramp leading into the water at the shoreline. He admitted to various people coming down the ROW, accessing the water and then parking on the Respondents' land. He agreed that some people may have parked within the ROW from time to time but not intentionally. When he realized that someone was parked where they should not be parked, the vehicle would be moved.

[41] Much of the appellant's objection to the use of the ROW related to accessing the water. There is a ramp at the bottom of the ROW and there was no evidence to clarify if the ramp is in the ROW or within the river. Given that the ROW was available to the Respondents to have *free and uninterrupted right-of-way, ...for persons and vehicles through, along and over that area*, it was certainly available for the Trial Judge to conclude that there had been no violation of the ROW. I conclude that the Appellant failed to establish that the use made by the Respondents violated the terms of the ROW. If there were times when someone parked in the wrong area or where a truck may have accessed the ramp to draw water on limited occasions, these actions would certainly not qualify as a nuisance.

[42] In contrast, the Appellant's evidence was general in nature and often did not identify the Respondents or their guests as being the ones who offended the terms of the ROW. His objections were focused on the access made by people using the ramp and accessing the water, something that he failed to establish they could not do. The end of the ROW and start of the river was never clearly delineated. In the end, the Trial Judge preferred the evidence of the Respondent that the use made of the ROW did not offend the terms of the ROW.

[43] This was a conclusion available to the Trial Judge and certainly grounded in the evidence preferred by the Trial Judge. Once again, there is no error that would discredit the result. In coming to this conclusion, I do say that the Respondents never did anything that was not entirely in keeping with the terms of the ROW. However, the limited instances identified by the Appellant that would implicate the Respondents do not offend the overall conclusions of the Trial Judge that there was no established nuisance.

[44] I conclude that the Trial Judge did not err in his interpretation of the use made of the ROW by the Respondents either before or after the 2022 Agreement.

Issue 3: The Trial Judge erred in imposing double costs and penalty costs.

[45] Section 29 of the *Courts of Justice Act* limits costs in the Small Claims Court to 15% of the amount claimed or recovered, exclusive of disbursements and taxes, subject to exceptions that must be justified.

[46] Rule 14.07 of the *Rules of the Small Claims Court* permits the doubling of costs from the date of an offer that is not beaten. That said, the rule is required to be applied consistently with s. 29 of the *Courts of Justice Act* and the 15% cap.

[47] Rule 19.06 of the *Rules of the Small Claims Court* authorizes a penalty where a party or representative has unduly complicated or prolonged the proceeding or otherwise acted unreasonably in the proceeding.

[48] The Trial Judge fixed representation costs at the s. 29 cap being \$5,250 (\$35,000 x 15%), and then proceeded to double the amount pursuant to Rule 14.07 on the basis of the Respondents having beaten their offer dated October 3, 2023. That offer was rejected by the Appellant. In addition, the trial judge imposed a penalty of \$3,500 pursuant to Rule 19.06.

[49] The issue of costs in this case was dealt with following the oral reasons of the Trial Judge. The Trial Judge recognized that Rule 14.07 applied as a result of the Respondents' offer to settle dated October 3, 2023 and that Rule 14.07 was engaged. He then found that the rule permitted him to "run double the costs that are outlined as the maximum cost under s. 29 of the Courts of Justice Act." He also acknowledged that Rule 14.07 allowed him "to award costs up to double."

[50] The Trial Judge then applied his jurisdiction, recognized the lengthy trial and resulting costs and concluded that it was appropriate for costs to be doubled to \$10,500. I reject any argument that the Trial Judge did not properly exercise his discretion under Rule 14.07.

[51] However, when turning to the application of Rule 19.06 and the penalty costs, this is where the Trial Judge erred. He stated that Rule 19.06 required that he find that the Appellant's conduct be abusive, without merit or caused this matter to be prolonged unnecessarily. The wording of Rule 19.06 is different and states where a party or their representative has unduly complicated or prolonged an action or has otherwise acted unreasonably. The wording differs but the approach is the same.

[52] The Trial Judge properly did not place importance on the argument that the Appellant may have failed to follow the advice of other lawyers that he consulted. But then he focused on the fact that the Respondents had expended funds in their defence, and that the Appellant should have known that he did not have the evidence to establish the ROW on a balance of probabilities. In this regard, the Trial Judge faults the Appellant for not having retained a surveyor to testify at trial. He concluded that the penalty costs are in order to send a message to all litigants who are bringing frivolous claims.

[53] I am of the view that the Trial Judge's reasons on the penalty costs fall short of establishing that the Appellant acted in a manner that has unduly complicated or prolonged an action or has otherwise acted unreasonably. Here, the Appellant was not successful, was liable for costs and then double costs based on the offer to settle. This is proper and reflective of the manner in which this litigation proceeded. However, the evidentiary record demonstrates that there was activity within the ROW which at different times could be questioned against the permitted use of the ROW. This was not a meritless claim. However, the Appellant was unable to attribute that offensive behaviour to the Respondents and he failed to properly establish when that offensive use of the ROW took place. Even the evidence of the Respondent provides examples of situations where the ROW may have been briefly used in a manner inconsistent with the terms of the ROW by error or inadvertence. While these circumstances may not amount to nuisance and an award of damages, it is not a claim that was totally without merit. This does not warrant penalty costs and the Respondents did not really argue otherwise.

[54] I conclude that the Trial Judge made a palpable and overriding error in his findings of fact surrounding the penalty costs and that accordingly, that finding is overturned. The proper award of costs is fixed at \$10,500 plus \$77.00 for disbursements.

Conclusion

[55] For the reasons set out herein, the appeal is granted in part. The Trial Judge's finding on penalty costs is overturned. Otherwise, the appeal is dismissed.

Costs

[56] The parties are encouraged to resolve the issue of costs failing which they may make written cost submissions. Each party will have 15 days to file written costs submissions, and each will have a right to reply 15 days thereafter. All costs submissions will be a maximum of 3 pages, plus attachments.

Justice M. Labrosse

Released: July 6, 2026

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ONTARIO
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BETWEEN:

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Appellant

– and –

DALE RICHARDSON and KRISTA
RICHARDSON

Respondent

REASONS FOR JUDGMENT

Justice M. Labrosse

Released: July 6, 2026