
CANADA / JUDGMENT

Birch v. Brenner

2017 BCCA 22

COURT

British Columbia Court of Appeal

DECIDED

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2017 BCCA 22 Birch v. Brenner

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Birch v. Brenner,

2017 BCCA 22

Date: 20170116

Docket: CA42737; CA42738

Docket: CA42737

Between:

Suzanne Birch

Respondent

(Plaintiff)

And

Robin Elizabeth Brenner

Appellant

(Defendant)

And

Suzanne Birch and (Others Residing at Property)

Respondents

(Defendants By Way Of Counterclaim)

- and -

Docket: CA42738

Between:

Robin Elizabeth Brenner

Appellant

(Plaintiff)

And

Frances Ann Bakewell

Respondent

(Defendant)

And

Robin Elizabeth Brenner

Appellant

(Defendant By Way Of Counterclaim)

Before:

The Honourable Mr. Justice Groberman

The Honourable Mr. Justice Goepel

The Honourable Madam Justice Fenlon

On appeal from: An order of the Supreme Court of British Columbia,

dated March 26, 2015 (Birch v. Brenner, 2015 BCSC 466,

Vancouver Docket Nos. S128262 and S138927)

Counsel for the Appellant:

S.A. Dawson

C. George

Counsel for the Respondents:

S.A. Griffin

P.D.H. Williams

Place and Date of Hearing:

Vancouver, British Columbia

April 26, 2016

Place and Date of Judgment:

Vancouver, British Columbia

January 16, 2017

Written Reasons by:

The Honourable Mr. Justice Groberman

Concurred in by:

The Honourable Mr. Justice Goepel

The Honourable Madam Justice Fenlon

Summary:

The parties are the owners of lots in Roberts Creek. The Birch and Bakewell lots enjoy an easement over the Brenner lot. At trial, the judge found that the easements provided rights of way not only to the nearest public road, but also to the Gulf of Georgia. He granted an expansive order setting out the rights of the parties. Ms. Brenner appeals, arguing that the easements do not extend to the water, and also that the judge's order did not properly reflect his interpretation of the easements. Held: appeal largely dismissed. The judge interpreted the easements correctly. His order, while understandably designed to prevent future disputes between the parties, had the effect of expanding the respondents' rights beyond those associated with a right of way. Accordingly, some modification to the order is required.

Reasons for Judgment of the Honourable Mr. Justice Groberman:

- [1] Ms. Brenner, Ms. Birch and Ms. Bakewell each own one of three contiguous lots in Roberts Creek. There are easements over Ms. Brenner's lot in favour of the lots owned by Ms. Birch and Ms. Bakewell. The trial judge found that the easements extend from a public road - Lower Road - to the foreshore on the Gulf of Georgia. Ms. Brenner takes issue with that finding, arguing that the easements only provide access from Lower Road to the Birch and Bakewell properties.
- [2] A secondary issue on this appeal is whether the formal order entered in the court below was in conformity with the judge's findings.

The Lands and the Easements

- [3] The lots owned by the parties comprised a single parcel of land until 1927, when the southeast corner of the parcel was subdivided off to form Lot A. Lot A is a waterfront parcel with no public road access. An easement along the eastern boundary of the remainder lot connected it to "Lower Road". That easement is not in issue in this litigation.
- [4] In 1940, the remainder was further subdivided into four lots. Most of the waterfront portion of the remainder lot became Lot C. Two upland lots fronting on Lower Road were also created: one north of Lot C, designated Lot B; and one north of Lot A, designated Lot D. The fourth lot created was a 12 foot strip of land running south from Lower Road to the foreshore. Its eastern boundary coincided with the western boundaries of Lots A and D, and its western boundary coincided with the eastern boundaries of Lots B and C. It is designated "Private Road" on the subdivision plan. The following diagram, based on the 1940 subdivision plan, shows the general configuration of the lots:
- [5] In 1949, the owners of the "Private Road" lot (who also owned Lot C) granted an easement over the "Private Road" lot in favour of the owners of Lots A and C. The easement is described as "a right of way over the private road for persons, animals, and vehicles."
- [6] In 1973, the owner of Lots A and D proposed to consolidate the two lots, and, in the belief that it was necessary in order to effect a consolidation, acquired an easement in favour of Lot D over the Private Road lot. The easement is in identical terms to the 1949 easement. Although the easement was registered, the lots were not consolidated.
- [7] Today, Lot A is held by Ms. Birch, and Lot D is held by Ms. Bakewell. Ms. Brenner, who owned Lot C and the Private Road lot, has consolidated them into a single parcel, known as Lot 1. The easements that are appurtenant to Lots A and D continue to exist over that portion of Lot 1 that was formerly the "Private Road" lot. In accordance with the terminology generally used in the law of easements, I will use the term "dominant tenement" to describe the land that benefits from the easement (here, Lots A and D) and "servient tenement" to describe the lands over which the easement passes (here, that part of Lot 1 that was formerly the "Private Road" lot).

The Litigation

- [8] In approximately 2004, Ms. Brenner and her husband (now deceased) constructed a home on their lot. The following year, they undertook extensive landscaping of their property. They installed hedges and other plants on parts of the easement, and also erected wire fencing on it. They placed a large boulder on the easement, blocking some vehicular use, and also installed a wooden fence and locking gate. The southern 120 feet of the easement ceased to be available for use by the respondents, preventing them from accessing the foreshore using the easement.

- [9] Eventually, the blocking of the southern portion of the easement resulted in litigation. At trial, among other claims, Ms. Birch and Ms. Bakewell sought declarations that they were entitled to use the easements, and injunctions restraining interference with them and requiring the removal of existing impediments. Ms. Brenner, among other claims, sought declarations that the easements were void or expired, and the cancellation of the easements.

Supreme Court Decision

- [10] A number of issues were addressed at trial. The judge found the easements to be valid and enforceable, and concluded that they should not be modified or cancelled. He granted injunctive and declaratory relief. Most importantly, the judge rejected the proposition that the easements extended only from Lower Road to the respondents' lots, finding that the easements continued to the foreshore:
- [45] I am unable to accept that the Easements in this case are so limited. They both refer to a right-of-way over "the said private road", and not merely that portion of it that permits access to Lots A and D. It is my view that the Easements in this case were intended by the grantors and grantees to afford the grantees a right of access from the Private Road not only to their properties, but to the beach and waterfront at the southern end of the Private Road as well. Any other interpretation of the wording of the Easements, and their depiction on Plan 6851 would fail to derive a sensible meaning from those words and depiction, as required by authorities such as *Anglo-Saxon Petroleum Co. Ltd. v. Adamastos Shipping Co. Ltd.*, [1957] 2 Q.B. 233.
- [11] After the reasons for judgment were pronounced, the parties disagreed on the appropriate terms for the formal order. The judge conducted a hearing to deal with several issues including the settlement of the orders. He gave reasons following that hearing (indexed as 2015 BCSC 974), including a discussion of the appropriate terms for the order.
- [12] The order in the proceeding brought by Ms. Birch against Ms. Brenner was settled in terms that include the following provisions:
2. The Plaintiff Suzanne Birch and her agents, servants, workmen, and invitees are entitled to free, full, and uninterrupted access to the whole of the Easement Area for persons, animals, and vehicles save and except that the Easement conveys no right to park vehicles on the Easement Area or construct within the Easement Area a bridge to permit vehicle traffic to cross Stephens Creek.
 3. The Defendant Robin Brenner is enjoined from restricting the free, full, and uninterrupted use by the Plaintiff Suzanne Birch and her agents, servants, workmen, and invitees of the whole of the Easement Area for persons, animals and vehicles.
- [13] The order in the proceeding brought by Ms. Brenner against Ms. Bakewell included identical provisions, except that they referred to the "Defendant Ann Bakewell" and the "Plaintiff Robin Brenner" rather than the "Plaintiff Suzanne Birch" and the "Defendant Robin

Brenner".

- [14] On appeal, the major issue is whether the judge interpreted the easements correctly in finding that they afforded the holders of the dominant tenements a right of way to the foreshore, rather than only between Lower Road and their properties. A second issue is whether, in settling the orders, the judge afforded the respondents rights beyond those granted in the easements.

The Nature of a Right of Way

- [15] Ms. Brenner argues that the judge failed to appreciate the nature of a right of way granted by easement. She says that, as a matter of law, a right of way in an easement carries with it only a right of access to or egress from the dominant tenement over the servient tenement. She says access or egress from the dominant tenements in this case is by way of Lower Road, and that any interpretation of the easements that allows access from the dominant tenements to the foreshore exceeds the proper scope of a right of way.
- [16] In support of her argument, Ms. Brenner cites the following passage from Colin Sara, *Boundaries and Easements*, 5th ed. (London: Sweet & Maxwell, 2011) at 375:

A private right of way is an easement permitting people to pass to and fro over another person's land from one point to another for the benefit of land belonging to the person entitled to the right of way.

- [17] A number of cases support the proposition that a person making use of a right of way granted in an easement is only entitled to use the right of way for access to or egress from the dominant tenement, and not for access to or egress from other properties. Ms. Brenner particularly relies on *Purdom v. Robinson*, [1899] 30 S.C.R. 64; *Harris v. Flower* (1904), 74 L.J. Ch. 127 (C.A.); *Grant v. Lerner* (1914), 7 O.W.N. 564 (Ont. H.C.); *Weisner v. Blades*, [1985] B.C.J. 182, 1985 CarswellBC 2764 (S.C.) and *Das v. Linden Mews Ltd.*, 2002 E.W.C.A. Civ. 590. I will discuss *Purdom*, *Harris*, and *Das*, which appear to me to be the most important authorities. It does not appear to me that the principles applied in *Grant* or *Weisner* differ in any respect from those applied in the three authorities I will discuss.
- [18] In each of these cases, a person who held property to which a right of way attached used that right of way for the purpose of accessing other properties that they owned.
- [19] In *Purdom*, the defendant travelled along a beach to get from his lot to a village. He had no right to do so. After the plaintiff sought to enjoin such use, the defendant acquired a second lot that purportedly benefitted from an easement over the beach. The Supreme Court of Canada rejected the proposition that the easement in respect of the second property constituted a defence to the trespass claim brought against the defendant. Citing *Ackroyd v. Smith* (1850), 10 C.B. 164 and *Skull v. Glenister* (1864), 16 C.B. N.S. 81 the Court said, at 71:

[A] right of way granted as an easement incidental to a specified property cannot be used by the grantee for the same purposes in respect of any other property...

- [20] In *Harris*, a factory was constructed on two lots, one of which had a right to access over an easement on an adjacent lot, and the other of which did not. The English Court of Appeal held that the owner of the factory was not entitled to use the easement for the purpose of accessing that part of the factory that lay on the lot that did not benefit from the easement. To do so would be to allow the burden of the easement to be expanded beyond the scope of the grant.
- [21] In *Das*, the owner of a residence had a right to use the carriageway in front of the residence for limited purposes. At para. 5, the court described the easement as allowing "a right to pass and repass over the [carriageway] to and from the highway to their respective properties by foot and with vehicles and a right to halt a single vehicle immediately adjacent to their respective properties for the purposes of loading and unloading the said vehicles." The owner acquired a separate property that was separated from the carriageway by a wall. He modified the wall to allow passage into an area of the second property, which he used for parking his car. The court held that the use of the carriageway to access the second property was beyond the scope of the easement:
- [23] What the owner wishes to do is to drive a car up the carriageway, past number 4, on to the garden ground, and then leave the car parked there while he enters number 4: by going either through the garden ground or through the front door that abuts on to the carriageway. All that is said to accommodate the dominant tenement, in that it is an adjunct to, ancillary to, the owner's enjoyment of life in number 4. But even if the latter were, in law, an available analysis in general terms, on the facts of this case it presents an insuperable problem. The great benefit of access to the garden ground is not simply to be able to access number 4, because that can already be done by using the easement according to the grant. What the garden ground adds is somewhere where the car can be left: a parking space.
- [24] [T]hat is a separate use from mere access. It is a use that takes place other than on the dominant tenement, and by using the carriageway to access that parking space the owner extends the dominant tenement.
- [22] Ms. Brenner argues that this case is analogous to *Purdom*, *Harris*, and *Das*. She says that the easements only grant a right of way for access to or egress from the Birch and Bakewell lots, and do not give a right of access to the foreshore.
- [23] Ms. Brenner's position is premised on the assumption that an easement must start at a public highway and end at the dominant tenement. Such an assumption is not correct as a matter of law. While an easement will, most often, start from a public highway and end at the dominant tenement, there are other possibilities. Sara discusses the issue at p. 377 of his book:

It is sometimes said that a right of way must have a terminus a quo and a terminus ad quem, i.e. that it must lead from one fixed point to another. Usually one of these fixed points will be a public highway and the other will be the dominant tenement. There is no requirement, however, that the way must lead directly to the dominant land. There is nothing to stop a person obtaining a right of way over one parcel of land for the purpose of gaining access to his own land over intervening land.

[citations omitted]

- [24] Equally, there is nothing to stop a person obtaining a right of way that extends from the dominant tenement to other land that the owner of the dominant tenement wishes to access from their land. A landowner can acquire an easement providing a right of way extending from the dominant tenement to the foreshore.
- [25] In the case before us, the judge interpreted the easements as allowing access not only between the dominant tenements and Lower Road, but also between the dominant tenements and the foreshore. There is no legal impediment to the existence of such rights of way.
- [26] This case is not like *Purdon* or *Harris*, in which the owners of lands that enjoyed the benefits of an easement purported to be entitled to use the easements for access to other lands. Ms. Birch and Ms. Bakewell do not claim a right to use their rights of way for properties to which they are not appurtenant. They wish to use them only in connection with the dominant tenements.
- [27] This case does resemble *Das* in some respects. *Das* could be characterized as a case in which the property owner was asserting a right to pass back and forth from the highway to his home and back and forth from his home to a parking spot. It is important to recognize, however, that the easement in *Das* was not a general right of access to the property over the carriageway, but rather a specific right to proceed from the highway to the property, drop off passengers, and return to the highway. By continuing along the carriageway to a different property on which the parking spot was located, the owner was exercising rights beyond those given by the easement.
- [28] In contrast, the case before us is one in which the easements simply provide for a right of way through the easement area. I see no difficulty in the judge's characterization of them as extending both to Lower Road and to the foreshore.

The Interpretation of the Easement

- [29] Ms. Brenner's contention that, as a matter of law, an easement cannot allow access to the foreshore, then, is without merit. She contends, however, that, as a matter of interpretation, the easements in issue in this case do not afford access to the foreshore. She points out that Lot A was, at all times, a waterfront lot, with no need to have foreshore access by way of the easement. While Lot D does not have any other access to the foreshore, it is clear that the

easement was acquired for Lot D solely in order to facilitate its consolidation with Lot A, and not for the purpose of providing independent access to the foreshore.

- [30] The trial judge heard extensive evidence on the history of the easements, and gave cogent reasons for his conclusions. The interpretation of the easements is a mixed question of fact and law, and the judge is entitled to deference in respect of it. I am not persuaded that the judge made any error in construing the easements.
- [31] Indeed, I am of the view that the interpretation reached by the judge was completely consonant with the language of the easement. It also conformed with the history of the easement. When it was granted, it was over a narrow lot designated as "Private Road". On the face of it, the only practical use for that lot was as a transportation corridor for the adjoining landowners to access Lower Road and the foreshore.
- [32] In my view, the judge's reasons represent a thorough canvassing of the history and nature of the easements, and his conclusions are well-supported.

The Scope of the Order

- [33] An easement involves use of land by both the owners of the dominant and servient tenements. In order to accommodate such joint use, the rights of each are subject to limitations. The easement itself will contain limitations as to its extent and purpose. Beyond those limitations, the easement will be interpreted as not allowing the owner of the dominant tenement to make use of the easement beyond what is reasonable. Equally, the owner of the servient tenement must not unreasonably interfere with the use of the easement by the dominant tenement.
- [34] The judge in this case was called upon both to construe the terms of the easement and to decide whether certain uses of the dominant and servient tenements were reasonable. In his original judgment, the judge construed the easement as providing rights of way from Lower Road to the dominant tenements and from the dominant tenements to the foreshore. He also made certain determinations with respect to the use of the easement, particularly at paras. 50-56:
- [50] Ms. Brenner relies on the decision of the Court of Appeal in *Duncan v. Sherman*, 2006 BCCA 14 [Duncan] to support her contention that the Easements only afford the owners of the dominant tenements access to their properties at their respective driveways. In that case, the easement for the benefit of the dominant tenancy provided that:

The Lot A Owner, as the registered owner of Lot A, grants to the Lot B Owner, as the registered owner of Lot B, for the benefit of and to be appurtenant to Lot B, for the use and enjoyment of the Lot B Owner at any time and from time to time, the non-exclusive right, liberty and easement to enter on, go across, pass and repass over and through, with or without motor vehicles, the Lot A Easement Area for the purposes of obtaining access to and egress from Lot B.

- [51] In *Duncan* the purchaser of Lot B agreed, by an addendum to his contract of sale and purchase, to restrict his access to the easement from only two locations along its length. In the result, at para. 17, Madam Justice Levine held:
- [17] [A]s a matter of law, as noted by the chambers judge, *Lewis v. Wakeling* (in which the Ontario Court of Appeal relied on the principles articulated by the English Court of Appeal in *Petty v. Parsons*, [1914] 2 Ch. 653), is authority for the principle that a grantee of an easement is entitled to reasonable access to his property, not access "along the whole unfenced line". The Addendum provided for reasonable access, and there is no reason not to enforce the agreement. The respondent is not entitled to access to the easement at gate 2.
- [52] As no such agreement exists between Ms. Brenner and the owners of the dominant tenements, the case is of no assistance to Ms. Brenner. The intention of the parties who agreed to the Easements was to afford the owners of the dominant tenancies access from the Private Road not only to their properties, but to the beach and waterfront as well.
- [53] That does not mean, of course, that the owners of the dominant tenements can expect to access their properties at all points along the Private Road, or that Ms. Brenner cannot fence or plant hedges along the eastern boundary of her property, so long as she affords that reasonable access from the Private Road to the dominant tenements and to the beach and waterfront that were previously enjoyed, or subsequently agreed to: see, for example, *Fisher v. Bosse*, 2006 BCSC 674.
- [54] However, it does mean that Ms. Brenner cannot maintain uninterrupted hedges or fencing along the entirety of the eastern boundary of her property or the wooden fence and locked gate to the south of the driveway into Lot A, the large boulder, or significant landscaping and planting on the Private Road that would prevent the passage of vehicular traffic along the Private Road as far as the northern side of Stephens Creek.
- [55] I am not, however, persuaded that the owners of the dominant tenements are entitled to park vehicles on the Private Road or construct a bridge to permit vehicular traffic to cross Stephens Creek. Such use to the south of Stephens Creek is contrary to the topography and the vegetation in that area, which is necessary to reduce the likelihood of further erosion of Ms. Brenner's property above the tide line.
- [35] These paragraphs appear to have led the parties to differing views as to the proper form of order. Ms. Brenner, in particular, wished to have the orders spell out specific points of access from the right of way to the dominant tenements, and specific details with respect to the use of the easement. The judge did not agree with her view. In his reasons settling the order, he said:

- [19] In my view, the forms of orders proposed by Ms. Brenner are a recipe for further unpleasantness between the litigants, and are unnecessarily detailed. While I agree that the areas covered by the easements should be set out in the orders, with some minor exceptions, it is unnecessary to reiterate in the orders the rights afforded and duties required by the easements.
- [36] The approach taken by the judge cannot be faulted. The case before him was a broad-ranging one, touching on many nuances of the easements. He was required to decide certain fundamental issues - whether the easement allowed the respondents access to the foreshore, and whether the obstructions placed by the appellant on the easement violated the respondents' rights. The judge's order specifically addressed these issues.
- [37] The judge was entitled, as well, to determine whether particular actions by the parties, and particular uses proposed by them, were reasonable in light of the existence of the easement. He enjoyed considerable leeway in deciding how far to go in this regard. The action before him did not touch on every possible future scenario. He wisely refrained from making his order too detailed, reasoning that doing so would increase the likelihood of future disputes between the parties.
- [38] I am of the view, however, that the terms in which the order was settled were not wholly appropriate. The easements are rights of way, and as such, they only allow the respondents to use the servient tenement for the purpose of passing from Lower Road to their lands, and from their lands to the foreshore. The order, in stating that the respondents have "free, full and uninterrupted use" of the servient tenement fails to recognize this limitation. Further, the provision enjoining Ms. Brenner from "restricting the free, full, and uninterrupted use" by the respondents of "the whole of the Easement Area for persons, animals and vehicles" is inconsistent with the judge's recognition that Ms. Brenner is not prohibited from placing some fencing or hedging along the eastern boundary of her property, provided that doing so does not unreasonably restrict the respondents' use of the right of way.
- [39] Given the unfortunate history of this matter, I am persuaded that it is necessary to modify the formal order granted in the court below to ensure that it does not have the effect of enlarging the respondents' rights beyond what they are entitled to as holders of a right of way granted by easement.
- [40] In the result, I would replace paragraphs 2 and 3 of the order in the Birch proceeding with the following:
2. The Plaintiff Suzanne Birch is entitled, with or without other persons, vehicles or animals, to use the Easement Area to pass:
 - a) from Lower Road to Lot A
 - b) from Lot A to Lower Road
 - c) from Lot A to the foreshore

d) from the foreshore to Lot A

and is entitled to authorize agents, servants, workers and invitees to pass from and to the same points, with or without other persons, vehicles, or animals.

3. The Plaintiff Suzanne Birch does not have the right to park vehicles on the Easement Area or to construct within the Easement Area a bridge to permit vehicular traffic to cross Stephens Creek.

4. Nothing in this order grants the Plaintiff Suzanne Birch authority to use her right of way over the Easement area in an unreasonable manner.

5. The Defendant Robin Brenner is enjoined from doing anything that restricts the ability of Plaintiff Suzanne Birch or her agents, servants, workers and invitees to pass through the Easement Area as set out in this Order.

[41] The other paragraphs of the original order will have to be renumbered to accommodate these changes.

[42] I would replace paragraphs 2 and 3 of the order in the Bakewell proceeding with the following:

2. The Defendant Ann Bakewell is entitled, with or without other persons, vehicles or animals, to use the Easement Area to pass:

a) from Lower Road to Lot D

b) from Lot D to Lower Road

c) from Lot D to the foreshore

d) from the foreshore to Lot D

and is entitled to authorize agents, servants, workers and invitees to pass from and to the same points, with or without other persons, vehicles, or animals.

3. The Defendant Ann Bakewell does not have the right to park vehicles on the Easement Area or to construct within the Easement Area a bridge to permit vehicular traffic to cross Stephens Creek.

4. Nothing in this order grants the Defendant Ann Bakewell authority to use her right of way over the Easement area in an unreasonable manner.

5. The Plaintiff Robin Brenner is enjoined from doing anything that restricts the ability of the Defendant Ann Bakewell or her agents, servants, workers and invitees to pass through the Easement Area as set out in this Order.

[43] Again, the succeeding paragraphs of the original order will have to be renumbered.

- [44] I acknowledge that there remains potential for future disputes between the parties surrounding what use of the right of way is "reasonable". They also may disagree on the extent of fencing and hedging Ms. Brenner may erect on the eastern boundary of Lot 1 without restricting the ability of the respondents to make use of their right of way. It is inappropriate, however, for the order to resolve these matters, as they have not specifically been the subject of the litigation. I am hopeful that the parties will be willing and able to agree on such matters as necessary.
- [45] I am aware that there may also remain some uncertainty as to whether the easement authorizes the use of vehicles on the portion of the easement lying south of the north side of Stephens Creek. The judge was clearly aware of the topography, and specifically found that the easement did not allow for the construction of a bridge over the creek. He did not specifically deal with the ability of the respondents to operate vehicles south of the creek (or, indeed, assuming it is private property covered by the easement, through the creek). It seems obvious from the evidence that conventional automobiles are wholly unsuited to the topography, and that it would be difficult for any vehicle to traverse the creek itself. The judge did not specifically address the question of whether any vehicular traffic could use the area south of the creek to access the foreshore. It seems to me that if such a question arises in future (something I would think unlikely), a court would have to determine whether such access was a reasonable use of the easement.

Costs

- [46] It does not appear that any order for costs has yet been made in the Court below. I would not interfere with the discretion of the trial judge to address the issue of costs if that remains outstanding.
- [47] With respect to costs in this Court, I am of the view that there has been divided success on distinct issues. In such circumstances, it is open for the court to award the more successful party a portion of their costs: *Cowper-Smith v. Morgan*, 2016 BCCA 509. I am of the view that a fair order would be for the appellant to pay 75% of the respondents' costs.

Conclusion

- [48] In the result, the appeal is allowed only to the extent of modifying the formal order entered in the court below as indicated in paras. 40-43 of these reasons. The appeal is otherwise dismissed. The respondents are entitled to 75% of their costs of the appeal on scale 1.

"The Honourable Mr. Justice Groberman"

I AGREE:

"The Honourable Mr. Justice Goepel"

I AGREE:

"The Honourable Madam Justice Fenlon"

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