

CANADA / JUDGMENT

Brown v. Volcz

2025 BCSC 295

COURT

Supreme Court of British Columbia

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2025 BCSC 295 Brown v. Volcz

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Brown v. Volcz,

2025 BCSC 295

Date: 20250225

Docket: S252986

Registry: New Westminster

Between:

Darrell Brown and Brenda Brown

Petitioners

And

Peter Volcz and Karen Volcz

Respondents

Before: The Honourable Justice Hamilton

Reasons for Judgment

Counsel for the Petitioners:

M. Pokrajac

Counsel for the Respondents:

C.A. Bush

Place and Date of Hearing:

New Westminster, B.C.

November 8 and December 11, 2024

Place and Date of Judgment:

New Westminster, B.C.

February 25, 2025

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Introduction

[1] This petition concerns a dispute between neighbours regarding the use of a driveway.

[2] The petitioners Darrel and Brenda Brown (the "Browns") seek orders regarding the use of a three-metre-wide strip located on and along the western side of their neighbours' driveway located at 20333 Menzies Road, Pitt Meadows, BC (the "Respondents' Property"). Specifically, the petitioners seek an equitable easement over the existing three-metre laneway along the respondents' driveway to access their own property off Menzies Road (the "Laneway"). The Laneway does not match the easement registered on title (the "Registered Easement"). The registered easement runs beside (not on) the respondents' driveway (where there is currently no vehicular path) as opposed to the existing Laneway. In the alternative, if I do not declare an equitable easement, the petitioners seek rectification of the registered easement so that the easement aligns with the existing Laneway.

History of Proceedings

- [3] The petition was filed in March 2024 and delivered (not personally served) to the respondents in April 2024 along with affidavit materials. The petition sought rectification of the registered easement at that time, not an equitable easement.
- [4] The petitioners set a hearing for June 2024. The respondents provided a response to the petitioner's application and the respondent's affidavit materials in June 2024. The respondents included an affidavit of the previous owner of the Respondents' Property Christopher Tipper. The June hearing was adjourned by consent. The petitioners also sought an interim injunction in June 2024 which was not granted.
- [5] In July 2024, the petitioners amended the Petition to seek an equitable easement.
- [6] In August 2024, the respondents provided their response and affidavits. At the same time, the petitioners provided new affidavits, namely the 3rd affidavit of Mr. Brown and the 1st affidavit of Ms. Eva Stanbury, the latter of which simply attached the easement which was on title of the Respondents' Property in 1988.
- [7] The hearing was scheduled to be heard in the fall of 2024 but it was adjourned due to lack of court time. The petitioners produced affidavit #4 of Mr. Brown after the hearing was adjourned. Affidavit #4 of Mr. Brown addresses flooding conditions that occurred in October 2024.
- [8] The hearing proceeded on November 8 and December 11, 2024.
- [9] The respondents oppose the relief sought by the petitioners. The respondents also seek to exclude affidavits #3 and #4 of Mr. Brown pursuant to Rule 16-1(7) which provides that unless the court otherwise orders, a party must not serve any affidavits in addition to those served under subrules (3), (4) and (6). In the alternative, if I find the affidavits to be admissible, the respondents ask that I give little weight to that evidence.
- [10] I have considered the parties' submissions regarding the improperly filed affidavits and considered the object of the Supreme Court Civil Rules, B.C. Reg. 168/2009 [Rules] set out in Rule 1-3 and I conclude that it is necessary to admit the additional affidavits in order to ensure a just hearing on the merits. There is no significant prejudice to the respondents. They have been able to respond to the affidavits as necessary and properly prepare for the hearing. I am also mindful of the respondents' arguments as to weight which I address below.

Background Facts

- [11] The Browns own and reside at 20289 Menzies Road, Pitt Meadows, British Columbia (the "Petitioners' Property") which they purchased in March 2015. They also rent the Petitioners' Property to film crews.

[12] The respondents Peter and Karen Volcz (the "Volczs") own and reside at the Respondents' Property which they purchased in November 2019 and which is adjacent to the Petitioners' Property on Menzies Road.

[13] The petitioners have legal access rights to a portion of the Respondents' Property pursuant to an easement registered in the New Westminster Land Title Office under registration No. BH316426 in 1994 (the "Registered Easement"). The Registered Easement existed before the parties to this proceeding owned their properties. There was a prior registered easement filed in 1988 which was replaced by the Registered Easement in 1994.

[14] The Registered Easement provides that:

[1] The Grantor, for himself and its successors and assigns does hereby give and grant unto the Grantees, and their successors and assigns:

- a) an easement and the right to enter in, over and upon that parcel or tract of land and premises situate in the District of Pitt Meadows in the Province of British Columbia and more particularly described as

All that portion of: Lot 1 except part subdivided by Plan 85220 Section 2 Township 40 NWD 79943 shown boldly outlined on Explanatory Plan 79944 (hereinafter called the "Access Easement")

for the purpose of constructing, reconstructing, improving, extending, altering, repairing, maintaining, inspecting and operating a driveway and for the purpose of providing vehicular and pedestrian access to and egress from the Dominant Tenement; and

- b) Free and uninterrupted access to and through the Access Easement, with or without workmen, vehicles, and equipment for the purpose aforesaid.

[15] In 2015, when the Browns purchased the Petitioners' Property, the only way to access their residence by vehicle was via the Laneway. At that time, the Respondents' Property was owned by Christopher Tipper who owned the Respondents' Property from 2003 until he sold it to the respondents in November 2019.

[16] In 2017, the Browns constructed their own separate driveway to their residence off of McNeill Road (the "Alternative Access") which is located entirely on the Respondents' Property.

[17] Mr. Brown's evidence is that they constructed the Alternative Access as an alternative route which could be used by film crews to alleviate some of the traffic from the Laneway and maintain good neighbourly relations. Mr. Brown's evidence is that he and his wife never intended to use the Alternative Access as their main or only access.

[18] There are portions of the Alternative Access that are relatively steep and the Alternative Access route appears more prone to flooding during heavy rain conditions than the Laneway. However, I do not accept Mr. Brown's suggestion that the Alternative Access is dangerous, unsafe or not useable, other than occasionally during very heavy rain or

atmospheric river conditions. The Alternative Access was professionally constructed in accordance with permits which were only granted after thorough studies regarding the grade, soil and other aspects.

- [19] Mr. Volcz deposed that when he and his wife purchased the Respondents' Property from Mr. Tipper in November 2019, they obtained a Fortis Gas survey for the purpose of installing new gas lines. Mr. Volcz' evidence is that the Fortis report was completed in November 2019 and it demonstrated that the Laneway did not align with the Registered Easement.
- [20] Mr. Volcz deposed that when he received the Fortis survey report in November 2019, he informed the Browns that the Laneway did not align with the Registered Easement. He deposed that Mr. Brown then asked him if they could continue to use the Laneway. Mr. Volcz deposed that he and his wife wanted to be good neighbours so they told Mr. Brown that they would let the Browns use the Laneway from time to time on the basis that they could revoke the Browns' use at any time.
- [21] Mr. Brown denies having this conversation in 2019. He also denies being informed of the Fortis survey prior to 2022. Mr. Brown denies having any discussion with the Volczs in 2019 regarding the use of the Laneway. Mr. Brown's evidence is that he and his wife simply continued to use the Laneway before and after the Volcz' purchased the Respondents' Property.
- [22] Over time, the relationship between the Volczs and the Browns deteriorated due to certain unneighbourly behaviour, including Mr. Brown trespassing on other portions of the Respondents' Property, Mr. Brown taking sap from the Volcz' trees, Mr. Brown damaging their tractor, garbage and recycling bins, interfering with drainage and focussing a large flood light on the Volcz' residence day and night for six weeks. They include photographs in support of their allegations. Mr. Brown's evidence is that the incidents are exaggerated or blown out of proportion. His counsel submits that the behaviour is irrelevant. I have not relied on the incidents in my analysis of the legal issues.
- [23] In any event, the Volcz' evidence is that they ultimately revoked the Browns' license to use the Laneway and on June 4, 2023 installed a gate on the Respondents' Property which blocked the Brown's use of the Laneway. Since June 4, 2023, the Browns' only access to their property has been via the Alternative Access. The Browns submit that the Alternate Access is more prone to flooding which makes it difficult/unsafe to use during extreme weather conditions such as the atmospheric river conditions experienced in January and December 2024. Mr. Brown also deposes that the utility lines underneath the Alternate Access have suffered damage as a result of them and their film crews over-using the Alternative Access.
- [24] The Browns obtained their own survey in the summer of 2023 which confirmed that the Laneway does not align with the Registered Easement.

- [25] It is common ground that the neighbours do not get along and that the registered easement does not align with the Laneway. The parties differ regarding the timing of the Volczs informing the Browns of the Fortis survey (November 2019 versus January 2022) and the communications with regard to the use of the Laneway (no communications versus the Volczs providing a revocable license).
- [26] The Browns seek a declaration that they have an equitable easement over the Laneway. In the alternative, the Browns seek rectification of the Registered Easement agreement to reflect what they claim was the actual agreement between the grantee and grantor of the Registered Easement in 1994.
- [27] The Volczs oppose the relief sought by the Browns. They submit that if the Browns wish to access the Respondents' Property off of Menzies Road rather than relying on the Alternative Access, the Browns are entitled under the Registered Easement to properly construct a driveway that actually aligns with the Registered Easement. They seek a dismissal of the Petition and costs. In relation to costs, the respondents rely on the easement agreement which they submit provides them full indemnity for any costs incurred in relation to the Registered Easement.
- [28] Therefore, the issues to be decided are:
- 1) Have the Browns established entitlement to an equitable easement over the Laneway?
 - 2) If not, in the alternative, have the Browns established that they are entitled to a rectification of the easement agreement?
 - 3) Is the easement agreement determinative of costs?

Are the Browns Entitled to an Equitable Easement?

Legal Principles

- [29] The petitioners' claim for an equitable easement is based on the equitable principal of proprietary estoppel. Proprietary estoppel is a flexible doctrine.
- [30] To establish an equitable easement, the Browns must establish the following:
- 1) An assurance or representation was made to them that lead them to expect that they have an interest in the property at issue;
 - 2) They reasonably relied on this expectation by doing or refraining from doing something; and
 - 3) They suffered a detriment as a result of this reasonable reliance, such that it would be unjust or unfair for the Respondents to go back on their representation.

Cowper-Smith v. Morgan, 2017 SCC 61 at para. 15; Idle-O Apartments v. Charlyn Investments Ltd., 2014 BCCA 451 at para. 49.

Representations or Assurances by the Volczs

- [31] I will address the first part of the test regarding whether there were representations or assurances made to the Browns that lead them to expect a proprietary interest in regards to the Laneway.
- [32] In his 1st affidavit, Mr. Brown states at para. 10 that he and his wife have "relied on the Driveway to access [the Petitioners' Property] until September 2023". There is no reference in Mr. Brown's 1st affidavit to the Volcz' making any oral representations or assurances that the Browns were entitled to any rights to use the Laneway. Neither does Mr. Brown mention any representations or assurances being made by Mr. Tipper in his 1st affidavit.
- [33] At the time Mr. Brown's 1st affidavit was sworn, the petitioners had not yet amended their petition to claim an equitable easement. However, Mr. Brown deposed that he had been advised by the previous owners of the Petitioners' Property (as opposed to the Respondents' Property) that he was entitled to use the Laneway and that he relied on those representations. Representations made by the previous owners of the Petitioners' Property cannot give rise to equitable rights in relation to the Respondents' Property as they never had any proprietary interest to the Laneway.
- [34] The Volcz' evidence in response is that they obtained the Fortis survey at the time they purchased the Respondents' Property and they specifically informed the Browns in November 2019 of the survey and the fact that the Laneway did not match the Registered Easement. Mr. Volcz deposes at paras. 18 and 19 of his 1st affidavit:

Notwithstanding that, at all material times, Mr. Brown did not, and does not, have legal access over the Driveway, I previously allowed Mr. Brown periodic use of the Driveway with my express consent. Shortly after the Fortis Survey, Mr. Brown asked me if he could have permission to use the Driveway from time to time. Having recently moved to [the Respondents' Property], I wanted to be a good neighbour and maintain a good relationship with Mr. and Mrs. Brown. Accordingly, I gave Mr. Brown my express consent that he could use the Driveway from time to time.

I have never advised Mr. Brown that he had a legal right to use my Driveway and I never indicated to Mr. Brown that he would always have access to the Driveway. I always intended for Mr. Brown's use of the Driveway to be sporadic and temporary, and subject to my express consent.

- [35] Notably, Mr. Volcz' affidavit was sworn before the petitioners even filed their amended Petition to claim an equitable easement. The affidavit cannot be said to have been crafted to defend against the claim for equitable easement.

- [36] In response to the respondents' affidavits, in Mr. Brown's 3rd affidavit, he denies having a conversation with the Volczs, stating at para. 10 that he "did not ask for, nor was there any permission given to [him] by the Volcz' to periodically use the [Laneway]." While Mr. Brown's evidence conflicts with Mr. Volcz' evidence regarding a conversation taking place in 2019, Mr. Brown does not allege that the Volczs made any oral representations or assurances regarding use of the Laneway.
- [37] I find that the Volczs did not make any oral representations or assurances to the Browns that would give rise to a mistaken assumption that the Browns could rely on as to the use of the Laneway. I will now turn to address whether the previous owner of the Respondents' Property made any such representations or assurances and whether the Volczs made representations by way of their conduct.

Representations or Assurances by Mr. Tipper

- [38] The Browns allege that Mr. Tipper, the previous owner of the Respondents' Property made representations regarding the use of the Laneway between 2003 and November 2019 which they relied on. The Browns further allege that the Volczs' conduct in permitting the Browns, or acquiescing to them using the Laneway from November 2019 through June 4, 2023, was itself a representation which they reasonably relied on.
- [39] The respondents deny any such representations were made by either Mr. Tipper or themselves. There is no evidence from Mr. Tipper directly regarding whether or not he made any oral representations to the Browns that they could use the Laneway. The affidavit of Mr. Tipper was filed in June 2024 before the Browns amended their petition to claim an equitable easement and before Mr. Brown provided his 3rd affidavit in which he alleges that Mr. Tipper made such representations. Mr. Tipper's affidavit alleges Mr. Brown's conduct was not neighbourly and states that Mr. Brown "never respected [Mr. Tipper's] property rights".
- [40] In the alternative, the respondents submit that if Mr. Tipper did make representations to the Browns that they could use the Laneway, that cannot assist the Browns in meeting the first prong of the test. The respondents submit that in order to give rise to equitable rights, the representations must be made by current owners, not previous owners of the property. They submit that it would be contrary to the certainty brought by the Torrens land title system in British Columbia for new owners to be bound by unregistered representations made by prior owners. The Volczs did their own due diligence in buying the Respondents' Property. They submit that had the Browns done their own due diligence, they would have discovered that the registered easement did not match the Laneway. As such, the Volcz' maintain that if Mr. Tipper made any representations to the Browns, it is unfair for them to be bound by such representations.

[41] In support of their submission that the current owner must be the person to make the representation or assurance, the respondents rely on *Wolff v. Canada (Attorney General)*, 2017 BCCA 30, in which Justice Tysoe states at paras. 20-21:

In such a case, I think it is now well settled that the court, having analysed and assessed the conduct and relationship of the parties, has to answer three questions.

[]

1. Is an equity established? An equity will be established where:
 - a) There was an assurance or representation, attributable to the owner that the claimant has or will have some right to the property, and
 - b) The claimant relied on this assurance to his detriment or her detriment so that it would be unconscionable for the owner to go back on that assurance.

[Emphasis added.]

[42] I disagree with the respondents' position that representations or assurances of a previous owner cannot give rise to an equitable easement. *Wolff v. Canada (Attorney General)*, 2017 BCCA 30, *Stratton v. Richter*, 2022 BCCA 337, and *Young v. Beck*, 2017 BCCA 248 establish that the assurances, express or implied, of a previous owner can be used to establish the reliance portion of the test. The other aspects of establishing an equity, namely that the claimant reasonably relied on the assurance to their detriment, would still need to be shown.

[43] In *Stratton v. Richter*, 2022 BCCA 337, the Court of Appeal overturned a trial judge's finding of proprietary estoppel. One of the bases on which the Court determined that proprietary estoppel was not established was the fact that the remedy was sought against strangers to the representation. It was the previous owner of the strata lot that had provided the claimant with the representation, which the claimant relied on when they purchased the property. In *Stratton*, the representation was that the owner of strata lot #3 was permitted to use the deck and stairway on strata lot #1. A new owner took title and objected to this. The Court of Appeal discusses a previous decision of its court, *Young v. Beck*, 2017 BCCA 248 at paras. 127 through 130 as follows:

127 Ms. Richter places a great deal of reliance on the decision of this Court in *Young v. Beck*, 2017 BCCA 248. In that case, the Court upheld the granting of an easement as a remedy for proprietary estoppel, even though the parties originally responsible for the representation no longer owned the property. However, there were unique features in that case. In his reasons for judgment (*Young v. Beck*, 2016 BCSC 562), the trial judge said:

[25] I have no difficulty finding that despite her recent suggestion that she knew nothing about an easement, the respondent purchased her property in the belief that it was impressed with an obligation to afford access to the petitioners' lot and that she continued in that belief and behaved accordingly until irritants arose in the relationship.

128 All owners of the properties in question had understood there to be an easement in favour of the plaintiffs and had arranged their affairs accordingly. In applying the test for proprietary estoppel, the judge said:

[30] The difficulty with applying such a test to the present situation is that there is some artificiality to the focus on the immediate parties. The petitioners' right to access is not precisely or solely "created or encouraged by the words or the actions of the respondent". Each of the parties is a successor in title to property subject to a longstanding assumption that the owners of lot 3 had a right to cross lot 2 to access their property. The location of the house and garage on lot 3, are premised on the location of the access road.

129 This Court was also cognizant of the unusual background to the case in finding that the representation remained alive despite the fact that it was not expressly made by the current title holder. It said, at para. 25:

[25] I would not bar the door to proprietary estoppel on the basis that the understanding of access precedes the parties' purchases of Lots 2 and 3. That is a matter, however, for consideration in reviewing reliance, detriment, and unconscionability.

130 In my view, *Young v. Beck* can best be characterized as a case in which the representation, while originally made by the defendant's predecessor in title, was of a continuing nature. The representation continued to be effective because the parties understood it to apply when they took title to their properties and governed their affairs in accordance with it.

[Emphasis added.]

[44] The Court of Appeal in *Stratton* does not depart from *Young*, however, it distinguishes it. The representation made by the new owner of strata lot #1 in *Stratton* was not of a continuing nature. The new owner in *Stratton*, unlike in *Young*, did not adopt or continue the right of access granted by the previous owner.

[45] Thus, to summarize, the representations of a previous owner can ground a claim for proprietary estoppel but only if the representation is of a continuing nature. The reliance must still be reasonable on the part of the Petitioner and there must be a detriment suffered relating to the reliance. That is, if the nature of the promise changed, from a general access to the property to a revocable license, the reliance on the previous owners' representations is either no longer relevant since it was not continued, or was no longer reasonable to rely upon.

[46] So, I must address the petitioners' evidence regarding Mr. Tipper, the previous owner of the Respondents' Property, having made representations to the Browns regarding the use of the Laneway and if I find that Mr. Tipper made such representations, I must then consider whether such representations were of a continuing nature as submitted by the Browns or whether such representations did not continue but, for example, changed to a revocable license scenario as submitted by the Volczs.

[47] In his 3rd affidavit, Mr. Brown states at para. 11: "When we decided to build the Alternative Access we did so in reliance on the representations made to us by the then owners of [the Respondents' Property] that we have access rights across the Driveway."

[48] At para. 18 of his 3rd affidavit, Mr. Brown states: "..I confirm that I did alter the land on my property by making several improvements from 2015 to 2019. These improvements were made in reliance on the representation made to me by Christopher Tipper of my right of way across the Driveway."

[49] At para. 20 of Mr. Brown's 3rd affidavit, he deposes the following:

"when I decided to purchase [the Petitioners' Property], I understood that Mr. Tipper had never raised any issues with the use of a laneway over the Driveway. I believed I had a right of way across the Driveway because it was the only way for me to access [the Petitioners' Property] when I purchased the property. At all material times during which Mr. Tipper was my neighbour, he consistently represented to me that I had the right to use the Driveway to access [the Petitioners' Property]."

[50] Furthermore, the petitioners claim that Mr. Tipper's acquiescence in letting the Browns use the Laneway from 2015 until November 2019 is an implicit representation that they were able to use the Laneway. They further claim that the explicit and/or implicit assurances of Mr. Tipper were of a continuing nature due to the Volcz' conduct/acquiescence in letting them use the Laneway from November 2019 until June of 2023 which the Browns maintain is also an implicit representation. The Browns submit that they reasonably relied on Mr. Tipper's oral assurances and implied representations as well as the Volcz' implied representations that they had legal rights to use the Laneway to access the Petitioners' Property.

[51] In response to these arguments, the Volczs submit that these alleged representations ought not to be accepted for the following reasons:

- a) The 3rd and 4th affidavits were provided by the Browns after they amended their initial Petition to claim an equitable easement;
- b) They are all hearsay statements and there is no objective supporting evidence that such representations were made to Mr. Brown;
- c) The hearsay statements are vague in that they lack particulars;

[52] I now proceed to my analysis.

[53] A representation or assurance may be express or implied: Wolff at para. 21.

[54] It is difficult on the affidavit evidence to determine exactly what occurred in November 2019. On the one hand, I am somewhat troubled by the fact that the respondents did not produce the Fortis survey which would have confirmed the date the report was completed. They could have attached the report to their materials and confirmed that the date was indeed

November 2019. However, it makes sense in terms of timing that the Volcz' would have had the survey done when they purchased the Respondents' Property to determine whether they should or could relocate the gas lines. It makes sense that they had the survey done at the time of purchase as part of their due diligence. It also makes overall sense that the Volczs would have initiated a conversation with the Browns as soon as they found that, based on the Fortis survey, the Laneway did not match the Registered Easement. The fact that the Laneway did not match the Registered Easement affected the parties' legal rights and it does not make sense that the Volcz', having obtained the survey, would not have raised the issue until 2022.

- [55] I find that it is more likely than not that the Volczs initiated a conversation with the Browns in or about November 2019, shortly after receiving the Fortis survey and informed the Browns that the Laneway was not part of the Registered Easement. I accept Mr. Volcz' evidence that he obtained the survey in November 2019 and then had a conversation with the Browns to discuss the Registered Easement not matching. I prefer Mr. Volcz' evidence over Mr. Brown's evidence in this regard as it is more specific and his evidence does not alter from one affidavit to the next.
- [56] By comparison, Mr. Brown's evidence regarding representations is vague and relies on hearsay. Mr. Brown's evidence regarding representations also shifts from his 1st to his subsequent affidavits. While it may be understandable for him not to address the representations which he relied on in his first affidavit, before the petition was amended to include a claim for equitable easement, he specifically mentioned in his 1st affidavit that the previous owners of the Petitioners' Property represented to the Browns that they would have access rights over the Laneway. It is odd that if Mr. Tipper, for example, made representations to Mr. Brown when he purchased the Petitioners' Property, that Mr. Brown did not mention those as well in his 1st affidavit. I find overall that Mr. Brown's 3rd and 4th affidavits contain vague, unparticularized statements regarding the representations based on hearsay without objective supporting evidence, having a self-serving air about them as if Mr. Brown has recrafted his recollection to attempt to meet the legal test.
- [57] As such, I find that the Petitioners have not satisfied the first prong of the test, to demonstrate that the previous owner or the respondents made representations or gave assurances to the Browns that they had legal access to use the Laneway on which the Browns could reasonably rely. I do not find the evidence regarding Mr. Tipper's alleged explicit representations compelling because they are vague, based on hearsay, and internally inconsistent. In the event that Mr. Tipper's conduct gave rise to an implicit assurance or representation, unlike in *Young*, I do not find that the representation was of a continuing nature. Rather, as mentioned above, I find that it is more likely than not that the Volczs had a discussion with Mr. Brown in 2019 about the use of the Laneway and confirmed the Laneway did not match the Registered Easement and proceeded on the basis of the Browns being able to use the Laneway from time to time, but that this access could be revoked by the Volczs at any time.

Detriment

- [58] If I am wrong and there was either an express or implicit representation or assurance made by the Volczs to the Browns that continued a previous representation or assurance of their rights to use the Laneway, I find that the Browns have failed to demonstrate any significant detriment to themselves. Mr. Brown claims in his 3rd affidavit that he made "regular repairs and improvements" to the Laneway from 2015 to June 2023." However, he does not provide particulars regarding what he did to maintain or improve the Laneway or how much time or money he may have spent doing so. He attaches photographs of equipment that may be used to move or spread gravel on a driveway but he offers no details regarding the picture in terms of what specific work was done, when it was done or even confirm that the photographs depict work being done on the Respondents' Property as opposed to the Petitioners' Property.
- [59] Mr. Brown also deposed that he "altered the land on [his own property] by making several improvements from 2015 to 2019" in reliance on Mr. Tipper's representation that they had a right of way across his driveway. There are no particulars provided in regard to these improvements with one exception - the Browns claim they built the Alternative Access in their reliance on their access to the Laneway. However, the Browns have not demonstrated that they suffered any detriment in building the Alternative Access. Mr. Brown deposes that he built the Alternative Access to alleviate some of the traffic on the Laneway including for the film crews to access the Petitioners' Property.
- [60] In the Browns' applications for soil removal and fill deposit permits to build the Alternative Access, the stated purpose of constructing the Alternative Access was "to provide street access via the [petitioners'] property. This proposed access benefits both property owners by providing each with their own respective direct access to municipal right of way." Indeed, I find that the Browns benefitted by building a second route. They certainly have not demonstrated that they suffered a detriment in building the Alternative Access.
- [61] Overall, even if the first and second parts of the test were met, the Browns do not satisfy the third prong of the test of demonstrating detriment.

Unconscionability

- [62] Finally, while the three elements under the Cowper-Smith test are: (1) representation; (2) reasonable reliance; and (3) detriment, unconscionability is essentially the overarching question: whether it would be unconscionable, in light of the three factors, to deny the claimant an equitable remedy. As Chief Justice McLachlin, as she then was, noted in Cowper-Smith at para. 67:

Specifically, those three conditions have been described as part of a broader inquiry into whether it would be "unconscionable" to permit the promisor to renege on the promise made to the claimant (Crabb, at p. 195; Sabey, at para. 27; Idle-O Apartments Inc, at para. 61). The concept of unconscionability is not a separate element of the test for establishing the equity sufficient to

ground proprietary estoppel, but rather serves as a mechanism for "unifying and confirming" the three conditions (*Cobbe v. Yeoman's Row Management Ltd.*, [2008] UKHL 55, [2008] 4 All E.R. 713 (U.K. H.L.), at para. 92). In this sense, the three conditions are designed to answer the question of "whether upon the facts of the particular case the situation has become such that it would be dishonest or unconscionable for the plaintiff, or the person having the right sought to be enforced, to continue to seek to enforce it" (*Taylor's Fashions Ltd. v. Liverpool Victoria Trustees Co.* (1979), [1982] 1 Q.B. 133 (Eng. Ch. Div.), at p. 154 (emphasis added); see also *Crabb*, at p. 195). Alternatively put, "[t]he equity of estoppel arises in an 'inchoate' form as soon as ... the landowner unconscionably sets up his rights adversely to the legitimate demands of the estoppel claimant" (K. Gray and S. F. Gray, *Land Law* (5th ed. 2007), at §10.22 (emphasis added)).

[63] Even if I am wrong in my analysis of the three prongs of the test above, I do not find that it would be unconscionable in this case to permit the Volczs to rely on the Registered Easement. In this regard, not only do the Browns have the Alternative Access to access their property directly from McNeill Road, but they continue to have the ability under the Registered Easement to construct a new laneway off of Menzies Road, which from the diagram that appears in the materials would be approximately three metres to the immediate West of the Laneway. The Registered Easement permits them to construct and maintain such a path so long as it complies with Plan 79943. Presumably, this would be an easier task to accomplish now than in 2015 as the petitioners now have the Alternative Access to use if and while they construct a new laneway.

Rectification of Easement

[64] If there is no equitable easement, the petitioners seek an order to rectify the Registered Easement.

[65] An order for rectification is intended to restore the parties to their original bargain: *Canada (Attorney General) v. Fairmont Hotels Inc.*, 2016 SCC 56 at para. 13.

[66] The petitioners need to demonstrate on a balance of probabilities that the parties reached a prior agreement which has terms that are definite and ascertainable; that the agreement was still effective when the instrument was executed; that the instrument fails to accurately record that prior agreement; and if rectified as proposed, the instrument would carry out the parties' original agreement: *Fairmont Hotels* at para. 14.

[67] The respondents submit that the Registered Easement cannot be rectified because there is no proof that there was a mutual mistake between the parties to the Registered Easement who agreed to the Registered Easement and its terms.

[68] The parties to this proceeding were not owners of their properties until long after 1994 when the easement agreement was signed and the Registered Easement registered. Further, none of the parties to the 1994 easement agreement provided evidence in these proceedings. Even Mr. Tipper was not a party to the easement agreement as he did not own the servient lands until 2003.

- [69] While there is no direct evidence from the parties to the easement agreement, the petitioners rely on the circumstances surrounding the agreement and their interpretation of the agreement and Registered Easement.
- [70] Plan 79944 was created concurrently with the 1988 easement and is referred to in both the 1988 and 1994 easements.
- [71] Both the 1988 registered easement and the 1994 Registered Easement provide that the owners of the dominant lands have the right to construct and operate a three-metre-wide laneway as boldly outlined on Plan 799444.
- [72] The petitioners highlight that the only way to access the dominant lands from 1988 through 1994 was to pass across the servient lands. They say that the only way that the owners of the Dominant lands (Lot 2 of that easement) could access their land was to construct and maintain a laneway over the servient lands prior to 1994.
- [73] The petitioners claim that the intention of the parties to the 1994 Registered Easement was to create a right of way over what was and remains a three-metre-wide laneway across the western boundary of the Driveway, which is essentially what the Laneway provides.
- [74] Therefore, they say that the driveway and Laneway existed prior to 1994 and that the parties to the 1994 Registered Easement, who were the then owners of the Petitioners' Property (newly subdivided Lot A) and the then owners of the Respondents' Property, more likely than not made a common mistake in believing that the right of way shown in Plan 79944 had already been constructed and that the existing Laneway was aligned with the right of way shown on Plan 79944.
- [75] Upon reviewing all the evidence before me, I find that the petitioners have not discharged the onus of demonstrating that the Registered Easement and its reference to Plan 799444 did not accurately reflect the agreement between the parties to the easement agreement/Registered Easement in 1994.
- [76] If the parties intended for the existing Laneway to be used as opposed to a new laneway being constructed in accordance with the bold outline in Plan 799444, there is no explanation for why the Registered Easement in 1994 continues to state that the owners of the Petitioners' Property (Lot A) have a right to enter onto the servient land for the purpose of constructing, reconstructing, improving, extending, altering and inspecting a driveway in addition to the right to then operate and maintain a driveway. If the location of the Laneway was intended to be the location of the three-metre access path for the dominant land owners, there would have been no need to include that the purpose included the construction of a driveway as the Laneway presumably already existed in 1994.

- [77] In addition, the Registered Easement states that the free and uninterrupted access to and through the access easement is "with or without workmen, vehicles and equipment for the purpose aforesaid" which seems again to contemplate construction. It may be that Mr. Tipper was mistaken as to the terms of the Registered Easement. However, as mentioned, he was not a party to the agreement so his mistake would not be a basis for rectification.
- [78] Overall, I am not able to conclude that the parties to the easement agreement and Registered Easement made a mistake in 1994. As such, the petitioners' claim for rectification fails.
- [79] The petitioners seek in the further alternative an order that allows them the right to develop that portion of the servient lands outlined in bold in Plan 799444 for the purposes of constructing and maintaining a laneway. The respondent's counsel submits that the petitioners already have that right under the existing Registered Easement. I agree. I expect that the respondents would do all things reasonable or necessary to facilitate the petitioners' construction of a new laneway that complies with Plan 799444 without requiring court orders. However, in the event it is necessary for the construction of the new laneway, the petitioners may apply to court for orders or directions in this regard. I am willing to hear any such applications if it assists; however, I do not consider myself seized of such applications.
- [80] All other relief claimed by the petitioners is dismissed. I will now address the issue of costs.

Costs

- [81] The respondents have been successful and are entitled to costs.
- [82] The respondents submitted that they were entitled to costs regardless of the outcome based on the indemnity clause contained in the easement agreement. The easement agreement provides that the Browns (successors to the grantees), are required to indemnify the Volczs (successors to the grantors) from or against "all claims, debts, actions, demands, suits, proceedings, costs, expenses, losses and other harm, whether suffered by the Grantor or any other person, arising out of or that would not have occurred but for the granting, existence or use of the assessments and permissions granted."
- [83] The indemnity clause is broad and appears to me to cover the legal fees incurred by the Volczs as a result of this proceeding as the expense would not have been incurred but for the act of the petitioners in bringing the action regarding the easement and requiring the Volczs to defend such action. But for the granting of the easement, there would have been no proceeding regarding the easement.
- [84] In the event that the parties require further orders or directions regarding costs, they may request a brief hearing before me, such request to be made within 30 days.

Hamilton J.

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