

CANADA / JUDGMENT

Laas v. Morrison

2023 BCSC 2130

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Supreme Court of British Columbia

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2023 BCSC 2130 Laas v. Morrison

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Laas v. Morrison,

2023 BCSC 2130

Date: 20231204

Docket: S57811

Registry: Vernon

Between:

Corey Edward Laas and Angela Christine Laas

Plaintiffs

And

Merle Thomas Morrison

Defendant

Before: The Honourable Justice Betton

Reasons for Judgment

Counsel for the Plaintiffs:

K. Burnham

Counsel for the Defendant:

M.S. Dugas

Place and Dates of Trial/Hearing:

Vernon, B.C.

November 2 and 7, 2023

Place and Date of Judgment:

Vernon, B.C.

December 4, 2023

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Introduction

- [1] In this summary trial the plaintiffs seek orders in relation to an easement over the defendant's property. Their stated objective is to address ongoing conflict associated to the location and their use of the easement that provides them with access to their residence.

Background

- [2] The parties own neighbouring properties on the shore of Shuswap Lake near Canoe, BC. They were created as Lots B and C by a subdivision in 1951. Lot C, now identified as Lot 1, lies to the north of Lot B. The lake is to the west of the lots. To the east of the lots is a railroad and then the TransCanada highway. The lots are accessed from the TransCanada Highway by way of a private rail crossing.
- [3] An easement is registered on the title of Lot B and runs across Lot B from the rail crossing to the lake shore and turns north to Lot 1 providing access to Lot 1. The easement document describes the easement as "all that portion of the Transferor's land which is 20 feet wide more or less as shown outlined in green on plan 5558". A reference plan is attached.
- [4] Lot B was acquired by the defendant in 1993.

- [5] Lot 1 was purchased by the plaintiffs in November 2021. They acquired the property from the Van Den Tillaarts (Currie) who had purchased it in 2005.
- [6] During the Van Den Tillaarts' ownership, issues arose with respect to the location of the boundaries of Lot 1 and Lot B. The genesis of those issues was a survey that was being done by surveyor Brian Sansom in connection with an easement over a separate property. Mr. Sansom produced a posting plan based on calculations from the original reference plan that had been deposited with the land registry office in connection with the subdivision in 1951. Mr. Sansom's plan suggested that the historical property line was inaccurate. It showed that Lot B actually extended 100 feet north and included the area where the Van Den Tillaarts' home and part of their garage were located.
- [7] Mr. Morrison sought to rely on the Sansom plan to assert ownership rights over a substantial portion of Lot 1. He commenced proceedings to advance those claims.
- [8] In that case (reported at 2012 BCSC 669), the Van Den Tillaarts brought a counterclaim seeking damages and an injunction against Mr. Morrison for blocking their easement over his property. Their access to the property was along a road that had been treated by previous owners as the easement access.
- [9] At trial, Justice Dley found that the Sansom plan was seriously flawed. This was based on a subsequent survey conducted on behalf of the Van Den Tillaarts that determined the property lines were in fact the historical property lines which previous owners had accepted. Justice Dley ordered that the registrar of the Kamloops and Nelson land title districts accept for registration the plan that had been prepared by the Van Den Tillaarts' surveyor. That plan showed the property lines but did not plot the location of the easement.
- [10] Justice Dley did state that easement "conformed to the road" that had always been used, and is the road that continues to be used. He concluded that there was a lawful easement and ordered Mr. Morrison to remove all obstacles and refrain from interfering with the access.
- [11] Mr. Morrison appealed the trial decision, challenging both the conclusion regarding the boundaries of the property and the finding that he had blocked the easement. His appeal was dismissed (2013 BCCA 48).
- [12] The Court of Appeal endorsed Justice Dley's conclusion that the Sansom plan was based on the original reference plan that was "riddled with error". A by-product of that was that Mr. Sansom's plan showed the easement being in a different location than the road that had been long used.
- [13] It had been on the strength of Mr. Sansom's plan that Mr. Morrison had, at least in part, attempted to justify blocking the road. He argued that in blocking the road he was not blocking the actual easement.
- [14] The Court of Appeal's conclusions with respect to the easement are set out as follows:

[26] The trial judge must be taken to have approached his conclusions on the basis that he could not rely on the Lewall Plan to locate the easement. It will be recalled that even Mr. Sansom did not defend his own plan. Quite apart from the problem with its measurements, the easement as shown on the Lewall Plan does not line up with the private crossing of the railway tracks.

...

[28] I accept the respondents' submission that the intention of the owners was to create an easement entering Lot B from the private crossing, running to the lakeshore and turning along the lakeshore towards Lot C. In the absence of any reliable evidence that the land area had shrunk by erosion, the best evidence of the location of the easement is the road which has always been used to reach Lot C. Within the hierarchy of evidence, the course travelled by the owners from the time of the subdivision is evidence of fences or possession reasonably related to the time of the original survey. Certainly, "measurements", in this case, are of little or no probative value.

[29] In my view, the trial judge was entitled to find that there was a lawful easement in place, to locate it as he did, and to conclude that Mr. Morrison had blocked it.

[15] Those statements from the Court of Appeal are the most specific descriptions as to the actual placement of the easement. The location shown on the plan currently registered as the reference plan associated to the easement, referenced above, is, therefore, incorrect. It is based on measurements which were found by the trial judge, and confirmed by court of appeal, to be incorrect.

[16] In 2018 Mr. Morrison wrote a letter to the registrar at the land registry office as follows:

Regarding Lot B and Lot C - Plan 5556.

I am the owner of Lot B Plan 5558. As you may know there is a new plan for Lot C Plan 5558.

This plan now KAP 87741 was deposited with Kamloops Land Title Office in Kamloops on October 17, 2008 to Registrar C. Johnston.

There is many problems relating to this plan. The most notable is it infringes on Lot B Plan 5558 by 102 feet. However, the error that I want to point out at this time is in fact that this plan shows an easement (Plan 5558) where there is no easement and never was. This easement is drawn with dashed lines on Plan KAP 87741. My concern is if Lot C (now Plan EPP66552) is sold, the new owner may be deceived into thinking he has land access to his property when in fact he does not.

By way of this email, you are now advised of this error.

...

[17] In 2021 the Van Den Tillaarts had indeed listed Lot 1 for sale. The plaintiffs in these proceedings viewed and ultimately purchased Lot 1 on November 26, 2021. During the period of their viewing and up to the time of their purchase Mr. Morrison was absent from his property. He had, however, posted signs next to the access road which read as follows:

BUYER BEWARE
OF FRAUDULENT
INFORMATION
ON ACCESS
AND PROPERTY
LINES OF LOT C
PLAN 5558
NO TRESPASSING
BE ADVISED THERE IS
NO EASEMENT TO ACCESS
LOT C PLAN 5558 FROM THIS
LOCATION. ANY USE OF THIS
ACCESS WILL BE TRESPASSING
ON LOT B, PLAN 5558
PRIVATE PROPERTY
SPEED LIMIT 10KM MAX
VIDEO
SURVEILLANCE IN USE

[18] Once the property was listed the defendant sent a letter to the listing agent which included the following:

To Whom it May Concern,

I met with Lisa Nobbs while she was driving through my property on her way from showing the neighboring property to a potential new buyer. I showed her a site plan plan of Lot B and C, Plan 5558, Section 4, Township 21, Range 9, West of the 6th Meridian, K.D.Y.D., prepared on January 31st, 2007, by Browne Johnson Land Surveyors, BC, and Canada Lands in Salmon Arm BC. File 742-06.

This plan clearly shows the house and half of the garage is on my property Lot B Plan 5558. This plan also shows the easement registered in 1951 when the property was subdivided into Lot B and C. She was also shown the main plan 5558 Lot B and C.

This easement is 77 feet to the east of my access and the railroad crossing. This easement was time extended only in 2005. The location of this easement was not altered in any way at this time. This agreement reads as outlined in green on Plan 5558.

Lisa Nobbs was shown and told there is no easement to access Lot C. I posted this access in 2018. The posted sign reads "No Trespassing, be advised there is no easement to access Lot C Plan 5558 from this location. Any use of this access will be trespassing on Lot B Plan 5558".

I note that Lisa Nobbs accessed and listed Lot C without my permission, therefore, trespassing on Lot B Plan 5558. I phoned Lisa Nobbs and left a message on August 13, 2021, and August 15, 2021, but did not get a reply.

I met with a potential buyer on September 20, 2021. He showed me a plan on his iPhone of Lot C, now KAP87741, registered October 17, 2008, showing [an] easement drawn in with a felt marker where there is no easement and never was. This plan was obtained through a realty firm via a Remax Listing and is fraudulent information. He emailed this plan as a courtesy.

This potential buyer was shown the same plans that I showed to Lisa Nobbs and told him there is no easement to access Lot C Plan 5558.

I was disappointed when you cancelled our scheduled appointment on Friday, September 24th, 2021. I can understand why Susan Currie would not want this fraudulent plan to be disclosed. Thank you for the text message with your new address. I will email you a copy to the above email as well as send a copy via Canada Post.

Sincerely,

Merle Morrison

CC.

Lisa Nobbs - Remax

lianobbs@shaw.ca

Sara Galusha - Century 21

sara.galusha@century21.ca

Cory Laas - Potential Buyer

Cory_lass@murphyoilcorp.com

- [19] After Mr. Morrison's return the plaintiffs initiated contact with him, beginning in late March 2022. During the course of those interactions the plaintiffs allege Mr. Morrison took the position that they were trespassing and had no right to use the easement, that the easement had been cancelled, that "he would block the road if [they] weren't respectful of it", suggested they should pay him for use of the road, that he would make their property boat access only, and that he would block the road if too many people used it.
- [20] In May 2022 they allege in dialogue with him that he took the position that the property line separating the properties was north of its actual location and that he owned their house.
- [21] On June 24 Mr. Morrison placed concrete blocks in the area of the road that had been used for access. There is some dispute as to the extent to which that may have blocked the roadway, however the police were called and Mr. Morrison relocated the blocks to a modest degree.
- [22] That incident resulted in the in this litigation being commenced on July 15, 2023. There was a delay in the filing of any response by Mr. Morrison. In exchange for extensions of time to file that response conditions were attached, to which Mr. Morrison agreed. They were confirmed in writing by Mr. Morrison as follows:
1. The extension of time is without prejudice to any remedies for either party and will not be used as a defence;
 2. The concrete blocks will remain off the travelled area of the current access to the property;
 3. I will immediately remove the "no trespassing" and warning signs;
 4. I will not photograph or interfere with your clients' guests, invitees or delivery people; and
 5. I provide this letter to you as my written commitment to the above, and I have arranged to have this letter emailed to you directly before 5 pm today (Thursday, August 11, 2022).
- [23] Thereafter each party retained and served and filed reports of surveyors as expert reports. The defence report was subject to terms of an order made by Mr. Justice Hori in March 21, 2023. The relevant terms of that order are as follows:
2. The survey commissioned on behalf of the Defendant, Merle Thomas Morrison, will be conducted in accordance with the findings made and confirmed by the Court of Appeal in the case of Morrison v. Van Den Tillaart, 2013 BCCA 48 and the surveyor is not to stray and create new boundaries that do not fit within the description of the easement set out in the Court of appeal decision.
 3. Between now and the time that the summary trial application is decided, the Defendant, Merle Thomas Morrison, shall not obstruct vehicular traffic accessing the Plaintiffs' property.

[24] In this summary trial application neither party challenged the admissibility of the other's report or sought to cross-examine their authors.

[25] Each surveyor provided a statement as to the nature of the task given to them.

[26] Mr. Minifie, the plaintiffs' expert, included this in his report:

INTRODUCTION

As requested in your letter of December 7, 2022, please accept this report as my expert opinion as to the location of the easement over the Property as described by the Court of appeal in the decision of *Morrison v. Van Den Tillaart et al.*, 2013 BCCA 48 ("Morrison").

In brief, I have been asked to prepare a sketch plan to reflect the judgement of the Court in *Morrison* regarding the location of the easement over the Property.

...

[27] Mr. Hol, on behalf of the defendant, states as follows on the first page of his report:

Thank you for your letter of March 25, 2023 in which you have requested this Expert Report. In that letter and through discussions your instructions to me are to provide my expert opinion on the location on Lot B Plan 5558 of Easement KX65845 which is described as "20' wide, more or less, as shown outlined in green on Plan 5558". You further have directed that I confine my report in accordance with the findings of the Court of Appeal decision you provided to me, paying particular attention to paragraphs 25 to 28. [Emphasis in original.]

...

Position of the Parties

[28] The notice of civil claim seeks a finding that the defendant is in contempt of the order of Justice Dley from February 10, 2012; that he remove all obstructions of the easement supported by a police enforcement clause; an order that he remove signage suggesting the easement does not exist; damages for nuisance, trespass and slander of title; punitive damages; an order that references plan of the easement in accordance with Mr. Minifie's opinion replace the existing reference plan of easement; and costs.

[29] In the notice of application and through the course of hearing, the plaintiffs abandoned their application for finding a of contempt and their claims in trespass and slander of title.

[30] The plaintiffs say the conduct of Mr. Morrison following the decision of the Court of Appeal both before and after their purchase of the property in 2021 shows that the Court of Appeal's decision in relation to the location of the easement needs to be formalized in a registered reference plan on the title of the defendant's property.

[31] In addition, they say that the historical conduct of the defendant together with his affidavit material support the other claims for relief.

- [32] In addition to the events relating to the placement of the concrete blocks on June 24, 2022, the plaintiffs say the placement of the signs and the interactions with the plaintiffs meet the tests of substantial and unreasonable interference.
- [33] The defendant questions the suitability of the matter for summary trial. The position contained in the response to the application for summary trial is set out in paras. 10 and 11 as follows:
10. The summary trial will not resolve all issues between the parties. There are disputes of facts between the parties relating to a number of the requests of the Plaintiffs.
 11. The overlapping nature of the claims results in a situation where it would be unjust to decide one issue.
- [34] I confess to some difficulty understanding the proposition stated there, although it is perhaps clarified by the additional paragraphs set out in Part 5 of the response as follows:
34. Mr. Minifie has provided an analysis.
 35. Mr. Lind has provided an analysis.
 36. Both analyses are plausible and require additional evidence on the issue of the cancellation of the easement.
- [35] It is the latter which, at the hearing, grounded the defence position; that there is a need to have the testimony and presumably cross-examination of the experts.
- [36] The defence argues that the conduct attributed to the defendant prior to the plaintiffs' purchase is irrelevant. In relation to the conduct attributed to the defendant by the plaintiffs, he stresses that all contact was initiated by the plaintiffs.
- [37] The defendant also asserts that he did not obstruct the plaintiffs' use of the easement. He stresses that when the concrete blocks were placed on June 24, 2022, they were moved on the same date following the attendance of the police. He also refers to his affidavit material which, again as I understand it, suggests that the blocks were not on the easement. This is based on the assertion that the easement is or should be located differently than as asserted by the plaintiffs.
- [38] The defendant says that any interference with the plaintiffs' use and enjoyment of the easement was not substantial or unreasonable.

Analysis

Suitability for Summary Trial

- [39] There is some conflict in the affidavits regarding the defendant's conduct. That, in and of itself, does not preclude the Court from proceeding.

- [40] As a result of the plaintiffs abandoning components of their claims some conflict is no longer relevant.
- [41] In relation to the remaining claims, in large part where there is conflict, I need not resolve the conflict to determine the issue. As will become evident from the analysis below, the nature and scope of the conflict in the evidence is not central to the determination of the issues. In some circumstances, I am prepared to accept the defendant's evidence.
- [42] In relation to the expert evidence the defendant did not challenge the admissibility of the plaintiffs' expert report nor seek to cross-examine the expert. Rather, he points to the absence of a specific explanation for why he placed the travelled road, which the Court of Appeal had determined was the best evidence of the location of the easement, in the centre of the 20-foot wide easement. He also references the differences between the plaintiff and the defence expert plans. This is something that may have been the basis for an application to cross-examine the plaintiffs' expert on the report at the summary trial, to file a rebuttal report or some other step. It is the basis for argument on the subject of the appropriate placement of the easement or the weight to be given to the opinion. It is not, however, a basis to conclude that this matter is not suitable for summary trial.
- [43] It is my conclusion that the matter is indeed suitable for disposition by way of summary trial.

Modification of the Easement

- [44] The fact that an easement exists is not challenged. All parties agree that the written description contained within the easement registered against the defendant's title is valid. That description is as follows:
1. The Transferor hereby grants to the Transferee an Easement in perpetuity for the benefit of the Transferee's Land and to be appurtenant to and for the use and benefit of the Transferee's Land upon all that portion of the Transferor's Land which is 20' wide, more or less, as shown outlined in green on Plan 5558 (hereinafter called the "Easement Area") and thereon by the Transferee and the owners and occupiers for the time being of the Transferee's Land and their respective agents, servants, workmen, contractors, licensees and all other person by his authority, both with and without vehicles, implements and equipment, to pass and re-pass along the Easement Area. . . .
- [45] The error identified by Justice Dley and confirmed by the Court of Appeal is in respect of a plan referred to within the above quote, "as shown outlined in green on Plan 5558". The plan directed to be registered by Dley J's decision does not remedy this.
- [46] Despite the Court of Appeal's conclusion, it is apparent from the defendant's conduct and his own affidavit material filed on this application, that he does not accept the conclusion of the Court of Appeal. Among the clearest evidence of this is his own letter referred to above.

[47] In his affidavit filed on this application, he expressly says this. The following paragraphs are demonstrative. From his first affidavit:

27. It is also my belief that the lane of travel proposed by the Plaintiffs is in trespass to my Property. It is my belief that when the Plaintiffs and their invitees travel on the inside (railroad side) of the pin that marks the easement to the Northeast Property, they are in trespass on my property, instead of on the outside (lakeside) of the pin, which is where the original easement was drawn as per plan 5558.

28. I made several attempts to notify those travelling to the Northeast Property about the fact that there was no registered easement to travel to the Northeast Property from the private crossing including that I posted notice of this fact.

...

31. Contrary to the affidavits of the Plaintiffs, I never demanded money from them for the use of the roadway to the Northeast Property. I advised the Plaintiffs that there was no easement at the private crossing, and they insisted they did have an easement.

[Emphasis added.]

[48] These are from his second affidavit:

3. The Plaintiffs have alleged that I have somehow blocked the easement when only one party was home. Again, this is not the case I did not block the easement. The established roadway is not the registered easement. It is a travelled path.

11. I have never bullied the Plaintiffs in any way. The only thing that I have done is to request that a plan be in place to govern the easement and that they assist with the plan. The pathway that has been used is not stated as the easement in the registered document and the fact that it has been used is not a basis for stating it is the easement. It is up to the expert surveyors and not laypersons to determine the easement. I hired and relied upon an expert to review the issue and provide a report. I cannot change his professional duty or obligation to assess the easement and property in order to establish his opinion.

[49] From a purely practical perspective, the circumstances that currently exist make it desirable to remove any question as to where the easement is located on the defendant's property. The defendant, in part, justifies his position on the inability of the plaintiffs to present a plan of the easement. In his affidavit at para. 32 he states:

32. Whenever the Plaintiffs and I would speak about the easement, I would ask them to show me the plan that showed the easement, or to come up with a plan, but no plan was produced to resolve the issues I raised.

- [50] It is apparent the defendant simply rejects the Court of Appeal's decision, and to the extent that the absence of an accurate plan included in the registered easement is used by the defendant as a basis to avoid the consequences of the Court of Appeal's decision, removing that uncertainty or that rational for avoidance is desirable.
- [51] Certainly the Court could rely on its inherent jurisdiction, but it is my conclusion that s. 35 of the Property Law Act is applicable. That section includes the following:

Court may modify or cancel charges

35 (1) A person interested in land may apply to the Supreme Court for an order to modify or cancel any of the following charges or interests against the land, whether registered before or after this section comes into force:

- (a) an easement;
 - .
 - (2) The court may make an order under subsection (1) on being satisfied that the application is not premature in the circumstances, and that
 - (a) because of changes in the character of the land, the neighbourhood or other circumstances the court considers material, the registered charge or interest is obsolete,
 - (b) the reasonable use of the land will be impeded, without practical benefit to others, if the registered charge or interest is not modified or cancelled,
 - (c) the persons who are or have been entitled to the benefit of the registered charge or interest have expressly or impliedly agreed to it being modified or cancelled,
 - (d) modification or cancellation will not injure the person entitled to the benefit of the registered charge or interest, or
 - (e) the registered instrument is invalid, unenforceable or has expired, and its registration should be cancelled.
 - (6) The registrar, on application and the production of an order made or a certified copy of it must amend the registrar's records accordingly.
- [52] By virtue of the Court of Appeal's decision, the registered easement in its present form, is obsolete. Cancellation is not necessary or appropriate. Modification is the manner to accurately describe the charge against the title and to place the parties in the position that logically results from the Court of Appeal's decision.
- [53] The authorities have concluded that the word "obsolete" in the section is to be given its ordinary meaning. The easement language is clear but the plan referenced to depict the described of the area of land is inaccurate.

- [54] In my view this renders the easement obsolete. It is an inaccurate depiction of the easement and has led to disputes and legal complications. A purchaser of either property cannot rely on the registered document for its intended purpose, that is certainty. Easements registered against a title and in the land registry office can be searched and should be able to be relied upon. A registered easement that cannot be relied upon must surely be seen as obsolete.
- [55] In my view, it is essential that the land description in this easement as with any easement be accurate to prevent its obsolescence and to ensure that it maintains its relevance and usefulness.
- [56] Having reached that conclusion, the question is how the easement area should be described based. It must be, on the statements of the Court of Appeal.
- [57] Both parties agree that the plaintiffs' expert, Mr. Minifie, accurately shows the location of the road which has always been used, as referenced by the Court of Appeal in para. 28 of its decision. Both parties also agree that road is the defining evidence for the location of the easement.
- [58] The experts explain there approaches in the body of their reports.
- [59] I begin with Mr. Hol. Despite the order of Hori J. and his acknowledgement of the requirement to "confine [his] report in accordance with the findings of the Court of Appeal", Mr. Hol seems to have approached the task by simply taking the Court of Appeal's decision as a consideration in the preparation of his opinion. A key example is contained at page 4 of his report and the fifth full paragraph where he quotes a portion of the Court of Appeal decision from para. 28 as follows:
- [28] . . ."Within the hierarchy of evidence, the course travelled by the owners from the time of the subdivision is evidence" which follows that the existing driveway must hold some weight as to the location of the Easement. [Emphasis added.]
- [60] Paragraph 28 is quoted in full at para. 14 above. The Court of Appeal's statement immediately prior to the partial sentence referenced was that "the best evidence of the location of the easement is the road which has always been used to reach Lot C." Mr. Hol's proposition that the "existing driveway must hold some weight as to the location of the Easement" is therefore not in keeping with the decision of the Court of Appeal or the order of Justice Hori.
- [61] The clearest statement of the erroneous approach of Mr. Hol is where he references the plaintiffs' expert report and states "they also plot the driveway where it may presently be being used as opposed to where it can and should be used to conform to the registered Easement from plan 5558 which would place the driveway much further from the existing buildings." Mr. Hol is asserting that easement should be located somewhere other than where the existing road is and, crucially, somewhere other than where the Court of appeal says that it is.

- [62] Mr. Hol proceeds to create a plan attached as Appendix "D" to his report which does not fully incorporate the existing road stating that the existing road "appears to partially trespass off the easement as it follows the lakeshore." He opines the easement area is based on the plan the Court of Appeal rejected and the high water mark. None of this adheres to Justice Hori's order.
- [63] It is my conclusion on the basis of this flawed approach his opinion is of no value.
- [64] Mr. Minifie's approach was to centre the location of the existing road within the 20-foot wide, more or less, area described in the easement document. He does not, as was stressed by the defence in argument, provide a specific rationale for this approach. It is, however, logical. Having the travelled portion centred provides users of the easement on the travelled roadway a buffer equidistant on either side in the event that larger vehicles, including any of those described in the easement language, maximum flexibility. This ensures that owners or occupiers of Lot B cannot place any structure, item or excavation that would otherwise impede the use of the easement area so closed to actual travelled road as to impact its use.
- [65] The defence provided no evidence that having the easement defined in these terms creates any practical or other issue. As noted, Mr. Hol's report is of no utility on the subject and the defendant presented no other contrary evidence.
- [66] It is my conclusion that Mr. Minifie's opinion as to the appropriate location for the 20-foot wide easement does accord with the Court of Appeal's decision, with common sense and logic, and there is no evidence that alternative locations are either justified or to be preferred.
- [67] In the circumstances, it is my conclusion that the easement should be modified and the reference plan drafted by Mr. Minifie should be registered in place of the reference plan currently forming part of the easement. The order sought as item 10 in the notice of application is granted.

Nuisance

- [68] The elements of the tort of nuisance have been described by the Supreme Court of Canada in *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13 at paras. 19, 21 and 22 in these terms:
- [19] The elements of a claim in private nuisance have often been expressed in terms of a two-part test of this nature: to support a claim in private nuisance the interference with the owner's use or enjoyment of land must be both substantial and unreasonable. A substantial interference with property is one that is non-trivial. Where this threshold is met, the inquiry proceeds to the reasonableness analysis, which is concerned with whether the non-trivial interference was also unreasonable in all of the circumstances.

...

- [21] On balance, however, my view is that we ought to retain the two-part approach with its threshold of a certain seriousness of the interference. The two-part approach is consistent with the authorities from this Court (as I noted above). It is also, in my view, analytically sound. Retaining a substantial interference threshold underlines the important point that not every interference, no matter how minor or transitory, is an actionable nuisance; some interferences must be accepted as part of the normal give and take of life. Finally, the threshold requirement of the two-part approach has a practical advantage: it provides a means of screening out weak claims before having to confront the more complex analysis of reasonableness.
- [22] What does this threshold require? In *St. Lawrence Cement*, the Court noted that the requirement of substantial harm "means that compensation will not be awarded for trivial annoyances": para. 77. In *St. Pierre*, while the Court was careful to say that the categories of nuisance are not closed, it also noted that only interferences that "substantially alte[r] the nature of the claimant's property itself" or interfere "to a significant extent with the actual use being made of the property" are sufficient to ground a claim in nuisance: p. 915 (emphasis added). One can ascertain from these authorities that a substantial injury to the complainant's property interest is one that amounts to more than a slight annoyance or trifling interference.
- [69] In assessing whether the evidence proves the elements of this tort reference to the defendant's demeanour during the interactions with the plaintiffs is relevant. They describe that at points as becoming agitated, aggressive or irate. In notes Ms. Laas made of the May 30, 2022 encounter she included the following:
14. On May 30, 2022, the train stopped on the tracks blocking access. Mr. Morrison had parked his car at the top of the access road leading into the property and I was forced to park on the side of the highway. After a few minutes he exited his vehicle and waited for me to get out of mine. I did this with the hopes that we could have a friendly conversation. I recorded those events on May 30 so that I would have a record. My records indicate:

Got in another fight with Merle. He was stopped at the top of the road waiting for a train. I pulled up behind and after a few minutes he got out of the car and waived me over. I asked him how long he had been waiting and he went on a tangent about all our coal being shipped to China and the government screwing everyone with the carbon tax. He asked where I worked and we had a casual conversation about both our work history. He then said I still hadn't brought him the easement paperwork. I suggested he review his e-mails as the lawyer had sent it over during the time of when we purchased the house. He said he doesn't check his e-mails. I asked for his mailing address so that the lawyers could send him the information. He wouldn't give me his address, stating, so that I could not send a certified letter. I confirmed what he asked last time that I said I would check if they had sent it, not that I would send it again. He went to his car and pulled out a printed CP map, the one that was discredited in Court. He proceeded to try to claim that the CP crossing doesn't line up with our easement and that our CP crossing was over 70 feet down which in itself is contradicting information. He got agitated and angry when I said that the

map wasn't accurate and had been discredited. He then pulled out a certified Land Title map from 2018 that shows the CP crossing and our easement lining up. When I pointed that out, he tried to claim that the CP crossing in real life had "moved over from this map that was drawn in 1950" and that our easement was that line and that it didn't line up. He continually contradicted himself and the map and he kept referencing that he owned all that land. He kept trying to say that the property line was 70 feet over and that he owned our house and land. When I called him out saying that he lost in Court twice and that the Land Titles, mortgage, lawyers, all did due diligence confirming that we own the property as the current map states, he called everyone stupid and that he knows best cause he has owned the property since 1970 and never signed that easement. I told him that I had paperwork confirming he did and all the Court records and he said that he would take me to the Supreme Court of Canada. He said he should have bulldozed down the house when he had the chance, and that he will take it back through the Courts, but then contradicted himself saying he doesn't want to get lawyers involved until he has to because he is going to blockage the road and put dips in it. I told him that he shouldn't threaten me. He continually got more agitated and aggressive in his threats to block the road, take me to Court, take the house back, and that if we could show where the easement is, he would cement it in with barricades so that only my car would fit through. No trucks. He kept saying that I print and show him the easement map of where our easement was and that we would go from there. I said his certified map shows the current easement but he is reading it wrong to make it backup his story so I asked if there was any point to printing what we had as he won't believe it anyways. He once again said that he was smarter than me and that I was wrong and that I should be smart enough to print a map if I was a secretary, at which time I told him he was being aggressive and unnecessarily argumentative. He called me stupid again and told me he wouldn't read anything I sent over because all the maps were wrong anyways. I told him I wouldn't stand there and be bullied, then retreated to my car.

[Italics in original.]

[70] Her description of the interaction on June 24 when the concrete blocks were placed includes the following:

25. Mr. Morrison was instantly irate, saying that I did not come back with a payment offer so he was blocking the road. I reminded him of what our previous deal was, which did not include a one week timeline. He became irate and screamed in my face to get off his property or there would be more hell to pay and my problems would be a lot more than a blocked road. I immediately retreated to my property and called the RCMP. The RCMP responded and required Mr. Morrison to move the blocks over so that we had sufficient room for safe passage to and from our house. The RCMP were on the premises for about an hour and warned Mr. Morrison that he would be arrested for mischief if he moved the blocks so as to block the road or disrupt our peaceful enjoyment of our property.

[71] The defendant denies the characterization of his demeanour.

- [72] Even if I were to accept the plaintiffs' version of these events I am unable to say that they meet the threshold for proving a private nuisance.
- [73] While no doubt frustrating, unsettling and even frightening, neighbour disputes do not equate to nuisance. The tort of nuisance is directly linked to interference with property and that interference must be substantial. Here the actual interference with property is limited to the placement of the concrete blocks. That was short lived even if requiring the intervention of police.
- [74] There is no evidence the posting of the signs actually resulted in anyone not attending the plaintiffs' property.
- [75] I do view the defendant's position and comments in relation to the easement to be unreasonable but the unreasonableness must be linked to the interference.
- [76] I would dismiss the claim in nuisance.

Conclusions

[77] I make the following orders:

1. Pursuant to s. 35 of the Property Law Act, easement KX 065845 be modified to reflect the actual location of the private level crossing and travelled road as it exists by reference to a new reference plan of easement based on the report of Mr. Minifie.
2. The claims in trespass, nuisance and slander of title are dismissed.
3. The application for a declaration the defendant is or has been in contempt of the order of Mr. Justice Dley is dismissed.

[78] As a result of the abandonment/dismissal of the various tort claims I will not address the claims for damages including punitive damages.

[79] The order of Dley J. is extended and confirmed. For clarification, this will be for the easement as modified by this order.

[80] If there are any corollary orders that I have not addressed, the parties are at liberty to request an appearance to address those. Such request to be made within 21 days of the release of these reasons.

[81] In light of these findings I will not address costs. If the parties are unable to agree either party is at liberty to request to appear before me to address costs. Such request to be made within 21 days of the release of these reasons.

"Betton J."

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