Citation: 634 Broadway Ave Ltd v Par-Ket/Vending Inc, 2024 MBCA 24
Date: 20240311
Docket: AI23-30-09917

IN THE COURT OF APPEAL OF MANITOBA

Coram: Chief Justice Marianne Rivoalen
Mr. Justice James G. Edmond
Madam Justice Anne M. E. Turner

B E T W E E N :

	)	***D. A. Thiessen***
634 BROADWAY AVE LTD.	)	*for the Appellant*
	)	
(Applicant) Respondent	)	***B. Cornick***
	)	*for the Respondent*
- and -	)	
	)	*Appeal heard:*
PAR-KET/VENDING INC.	)	***December 12, 2023***
	)	
(Respondent) Appellant	)	*Judgment delivered:*
	)	***March 11, 2024***

EDMOND JA

[1] The respondent, Par-Ket/Vending Inc. (Par-Ket), appeals the decision of the application judge granting an easement to the applicant, 634 Broadway Ave Ltd. (634), pursuant to s 28 of *The Law of Property Act*, CCSM c L90 [the *Act*].

Background

[2] This appeal deals with an encroachment of portions of a structure constructed by 634 from 2014 to 2015, extending onto Par-Ket's property. The undisputed evidence is a survey, completed in February 2015, which showed that 634's construction (the renovation work) encroached onto

Par-Ket's property. This encroachment consisted of an above ground portion of a retaining wall at the base of each fire escape staircase, which encroached up to four inches, and the underground footings of the retaining wall, which encroached approximately six inches onto Par-Ket's property. The above ground encroachment consisted of approximately 10 square feet and the underground encroachment consisted of approximately 13.75 square feet (collectively, the encroachments).

[3] Par-Ket relies on evidence that it repeatedly raised concerns with 634 that the renovation work being completed by 634's contractors would encroach on its property. Par-Ket would not consent to the encroachment and was assured there would be no encroachment.

[4] Par-Ket submits that the test to grant an easement requires 634 to prove, as a threshold issue, that it had an "honest belief", at the time of the renovation work that it was building on its own land. Instead, Par-Ket submits 634 was negligent in forming its belief that led to the encroachment. Accordingly, Par-Ket asks this Court to allow the appeal and order that 634 be required to remove the encroachments from its property or alternatively, 634 be required to pay a higher compensation.

[5] 634 submits that it held an honest belief that the renovation work would not encroach on Par-Ket's property based on construction plans. In addition, it had entered into a lease agreement with Par-Ket to permit some of the construction equipment and workers to access the work area using Par-Ket's property.

[6] While the application judge's reasons for decision are very brief, they are sufficient and allow for appellate review. It appears that the

application judge was satisfied that 634 was not negligent, although was "perhaps somewhat careless in . . . carrying out the . . . work that was done on the [building]." Nevertheless, the application judge was satisfied that the carelessness did not disentitle 634 to the easement.

[7] The application judge granted the application, allowed the easement for the life of the building and ordered that 634 pay Par-Ket the yearly sum of $1,000, due and payable on January 15 of each year, indexed at 1.5% until such time as the encroachments are removed. The application judge also granted Par-Ket compensation of $7,000 payable in respect of the encroachment that existed since 2015. 634 was also ordered to pay costs to Par-Ket in the amount of $2,000.

Issues

[8] Par-Ket advances three grounds of appeal:

1. The application judge erred in law by failing to identify and apply the correct legal test;

2. The application judge misapprehended the evidence that demonstrated 634 was negligent regarding the property lines between the two properties; and

3. The application judge erred in determining the yearly sum of $1,000 as reasonable compensation for the encroachments.

Analysis

Issue One: Did the Application Judge Apply the Correct Legal Test?

[9] Par-Ket submits that the application judge failed to apply the test articulated in *Howarth v Farguson*, 2014 MBQB 103 [*Howarth* QB], aff'd in part, 2015 MBCA 21 [*Howarth* CA]. Specifically, Par-Ket submits that, to grant an easement, the Court must find, as a threshold issue, that 634 had an "honest belief" that it was constructing the renovation work on its own property and was not negligent in forming such belief.

[10] Section 28 of the *Act* provides a judge of the Court of King's Bench with discretion to grant a remedy when a building encroaches onto a neighbouring property. Section 28 states:

> **Encroachments on adjoining land**
> **28** Where, upon the survey of a parcel of land being made, it is found that a building thereon encroaches upon adjoining land, the Court of King's Bench may, in its discretion,
>
> (a) declare that the owner of the building has an easement upon the land so encroached upon during the life of the building upon making such compensation therefor as the court may determine; or
>
> (b) vest title to the land so encroached upon in the owner of the building upon
>
> ***Empiètements sur les biens-fonds contigus***
> **28** La Cour du Banc du Roi a l'entière discrétion, si l'arpentage d'une parcelle de bien-fonds révèle qu'un bâtiment situé sur celle-ci empiète sur un bien-fonds contigu, de poser l'un ou l'autre des actes suivants :
>
> a) déclarer que le tenant du bâtiment a, pour la durée du bâtiment, une servitude sur le bien-fonds faisant l'objet de l'empiètement, s'il verse l'indemnité que la Cour du Banc du Roi fixe à cet égard;

payment of the value thereof as determined by the court; or	b) investir le tenant du bâtiment du titre de propriété du bien-fonds faisant l'objet de l'empiètement, s'il en paie la valeur fixée par la Cour du Banc du Roi;
(c) order the owner of the building to remove the encroachment.	c) ordonner au tenant du bâtiment de mettre fin à l'empiètement.

[11] Par-Ket relies on *Howarth* QB as authority for the proposition that, in order to obtain relief under s 28 of the *Act*, the party seeking the easement "must have held an honest belief that when they built the addition, they were doing so on their own property" (at para 13). In *Howarth* QB, Menzies J pointed out that the purpose of s 28 of the *Act* is to grant the court the ability to adjudicate an equitable resolution to boundary disputes where an encroachment is found to exist. At para 10, he quotes *Welz v Bady*, 1948 CanLII 240 at 379 (MBCA):

> . . .
> The principle of the Act is one of equity and justice. The owner shall not be able to take advantage of another's mistake, enuring to the owner's benefit, without compensation by the owner to the mistaken party to extent of the benefit which the owner receives in the enhanced value of his property. Or in the alternative, if the other party takes over the property, the owner shall be put in as favourable a position, as nearly as possible, as if the mistake had not occurred; that is, he should receive the value before the improvements and generally he should receive payment for use in the meantime by the mistaken party.
> . . .

[12] Justice Menzies also referenced the Supreme Court of British Columbia decision of *Vineberg v Rerick*, 1995 CanLII 3363 at 20 (BCSC) [*Vineberg*], in which the Court outlined its task in adjudicating the balance of convenience and the factors to take into account. Justice Menzies set out the three factors (the *Vineberg* factors) as follows (*Howarth* QB at para 12, citing *Vineberg* at 20):

> . . .
>
> 1) The comprehension of the property lines: Were the parties [cognizant] of the correct property line before the encroachment became an issue? There are three degrees of knowledge: honest belief, negligence or fraud. The party seeking the easement should have an honest belief to be awarded this remedy.
>
> 2) The nature of the encroachment: Was the encroachment a lasting improvement? What is the effort and cost involved in moving the improvement? What is the effect on the properties in question? The more fixed the improvement, and the more costly and cumbersome it would be to move it, the more these considerations will be weighed in favour of the petitioner.
>
> 3) The size of the encroachment: How does the encroachment affect the properties, in terms of both their present and future value and use? These questions serve to balance the potential losses and gains of the creation of an easement.

[13] Justice Menzies concluded (*Howarth* QB at para 13):

> In order to obtain relief by way of an encroachment, the respondents must have held an honest belief that when they built the addition, they were doing so on their own property. See: ***Chandler v. Gibson*** (1901) 2 O. L. R. 442 (C. A.); ***Parent v. Latimer*** (1910) 17 O. W. N. 210 (D. C.), affirmed (1910) 2 O. W. N. 1159, 19 O. W. R. 461 (C. A.); ***Hrynyk v. Kaprowy***, (1960) W. W. R. 433 (Man. Q. B.); ***Robertson v. Saunders*** (1977), 75 D. L. R. (3d) 507 Man. Q. B.).

[14] Before reviewing the other decisions referenced by Menzies J in *Howarth* QB, it is important to review the differences between the legislative provisions in different provinces. In Manitoba, the encroachment provision is detailed in s 28 of the *Act*, which is the central issue of this case. Section 27 of the *Act* deals with lasting improvements mistakenly made on another's land. It provides:

> **Relief of persons making improvements under mistake of title**
> **27** Where a person makes lasting improvements on land under the belief that the land is his own, he is or his assigns are entitled to a lien upon the land to the extent of the amount by which the value of the land is enhanced by the improvements, or is or are entitled, or may be required, to retain the land if the Court of King's Bench is of opinion or requires that that should be done, according as may, under all the circumstances of the case, be most just, making compensation for the land if retained, as the court may direct.
>
> **Améliorations faites par erreur**
> **27** La personne qui fait des améliorations durables sur un bien-fonds, en étant persuadée que le bien-fonds est le sien, et ses ayants droit ont droit à un privilège sur le bien-fonds jusqu'à concurrence du montant de la plus-value du bien-fonds attribuable aux améliorations. Cette personne ou ses ayants droit ont droit ou peuvent être tenus de conserver le bien-fonds si la Cour du Banc du Roi est d'avis que cela doit être fait ou si elle l'exige, selon ce qui peut être le plus juste compte tenu de toutes les circonstances en l'espèce, et de verser l'indemnité pour le bien-fonds que la Cour fixe, s'il est conservé.

[15] Ontario, Alberta, Saskatchewan and Nova Scotia all have provisions almost identical to the wording of s 27 of the *Act* (see *Conveyancing and Law of Property Act*, RSO 1990, c C 34, s 37(1); *Law of Property Act*, RSA 2000, c L-7, s 69(2) [*Law of Property Act*]; *The Improvements under Mistake of Title*

Act, RSS 1978, c I-1, s 2; *Land Registration Act*, SNS 2001, c 6, s 76(2) [*Land Registration Act*]).

[16] Alberta and Nova Scotia also have provisions equivalent to s 28 of the *Act* (see *Law of Property Act*, s 69(3); *Land Registration Act*, s 76(3)), whereas Ontario and Saskatchewan lack such provisions.

[17] In British Columbia, s 36(2) of the *Property Law Act*, RSBC 1996, c 377 [the *BC Act*], is almost identical to s 28 of the *Act*. British Columbia does not, however, have a provision similar to s 27 of the *Act*.

[18] The older decisions from Ontario referenced in *Howarth* QB—*Chandler v Gibson*, [1901] OJ No 218 (QL), 2 OLR 442 (ONCA) [*Chandler*] and *Parent v Latimer*, 1910 CarswellOnt 513, 17 OWR 368 (Div Ct) [*Parent*]—were interpreting "belief" in the Ontario equivalent to s 27 of the *Act*. In interpreting that section, the courts required that the person who made the lasting improvements on land had a *bona fide* and honest belief that the land was their own.

[19] Both *Hrynyk v Kaprowy*, 1960 CanLII 544 (MBQB) [*Hrynyk*] and *Re Robertson and Saunders*, 1977 CanLII 1767 (MBQB) [*Robertson*], referred to in *Howarth* QB, are older Manitoba decisions that considered encroachments and the application of both ss 27-28 of the *Act*.

[20] *Hrynyk* dealt with two encroachments that the plaintiffs alleged were caused by the defendants wrongfully, carelessly and negligently constructing a building on the plaintiffs' lands. The plaintiffs requested an order that the defendants remove those portions of the buildings and a stairway that encroached on the plaintiffs' land and claimed damages. The defendants

submitted that the encroachments were made inadvertently and under the belief that the impugned buildings were being erected on lands owned wholly by them. The Court had to consider whether relief could be granted pursuant to ss 28-29 of the *Act* (now ss 27-28, respectively).

[21] After reviewing the cases regarding the relevant sections of the *Act*, Williams CJQB stated: "The cases on these sections emphasize that there must be an honest belief in the person making the mistake: See [*Chandler*]; [Parent], affirmed (1910) 2 OWN 1159, 19 OWR 461 (C.A.)" (*Hrynyk* at p 441).

[22] Regarding the applicability of s 28 (now s 27), the Court stated (*Hrynyk* at p 442):

> . . .
> In my opinion sec. 28 [now s 27 of the *Act*] of *The Law of Property Act* [RSM 1954, c 138] does not apply for the following reasons: (1) What the defendants did was not to make a lasting improvement on the plaintiffs' land; it was not an improvement in any sense of the word; it was a detriment; (2) It was not done under a belief that the land was their own; they knew it was not; there was no mistake of title; (3) The value of the plaintiffs' land was not enhanced by the work.

[23] The Court went on to consider the application of s 29 (now s 28 of the *Act*) and stated (*Hrynyk* at p 443):

> . . .
> I should point out that any relief given by the court under sec. 29 [now s 28 of the *Act*] is entirely discretionary and the defendants have no "undoubted right," either to an "easement" or a "conveyance." In exercising its discretion the court, as has been seen, proceeds upon equitable principles.
> . . .

[24] The Court in *Hrynyk* specifically found that the defendants did not hold an honest belief that the improvement that caused the encroachments was being constructed on their property. Notwithstanding that finding, the Court exercised its discretion pursuant to s 29 (now s 28) and concluded that the best solution was to give the defendants an easement for the plaintiffs' land encroached upon for the joint life of the two existing buildings and no longer (see *ibid* at p 444). A similar finding was made respecting the second encroachment. Both encroachments required the defendants to pay compensation to the plaintiffs fixed by the Court.

[25] Therefore, *Hrynyk* is not authority for the proposition that, in order to obtain relief under s 28, the party seeking relief must have held an honest belief that the encroachment was built on their own property. In *Hrynyk*, the Court granted relief by exercising its discretion pursuant to s 29 (now s 28 of the *Act*) even though the Court found that the defendants knew they were not constructing the improvements on their land.

[26] *Robertson* also involved a dispute between neighbors regarding buildings that were not constructed on land that they owned. In 1971, the Robertsons wished to erect a permanent fence on the boundary line of their property to keep out stray cattle and sought the assistance of government surveyors to locate the boundary line. During the course of the survey, it was discovered that the land occupied and developed by the Robertsons was not their property, but was on property registered in the name of the respondent Saunders. Mr. Saunders was also unaware of the location of the boundaries on the property that he had purchased. He moved into a house on the property he thought he owned and continued to occupy and improve it. The property he occupied was actually owned by the respondent Ross. The Court

considered its jurisdiction under ss 27-28 of the *Act* based on the particular facts of the case. The Court concluded as follows (*Robertson* at 510-11):

> . . .
> In my opinion, s. 28 does not apply in a situation of this kind. This section applies to a building on one portion of land that encroaches upon another portion of land: "Where . . . a building *thereon* encroaches upon *adjoining land* . . ." (emphasis added). This section, in my opinion, is intended to permit the Court to adjust encroachments that might be called boundary disputes where a building is partly on one piece of land and partly on another. It does not apply to improvements made entirely within a parcel of land.
> . . .
> [emphasis in original]

[27] Since s 28 of the *Act* did not apply, the Court in *Robertson* went on to consider whether s 27 permitted the Court to provide relief. The Court reviewed a number of authorities and concluded that it had jurisdiction to grant relief. The Court stated (*Robertson* at 515):

> . . .
> These authorities lead me to conclude that the Court has jurisdiction to confirm a lien or order land to be conveyed to an occupant. To succeed an applicant, (1) must have made lasting improvements, and (2) have had the *bona fide* and reasonable belief that the land was his own. If he made the improvements in those circumstances, he would have done so (to use the heading preceding s. 27) "under mistake of title". Be that as it may, the section does not, in my opinion, distinguish between mistakes of title or identity, and no categorization is necessary. If the conditions of the section are met, the Court may grant relief.
> . . .

[28] The Court in *Robertson* applied s 27 of the *Act* and concluded that the circumstances of the case dictated that the most just solution was to require

the Robertsons to retain the land upon which they had made the improvements. There was also an order directing compensation for the land required to be retained and the easement to permit access to the public road.

[29] Again, *Robertson* does not stand for the proposition that, in order to obtain relief pursuant to s 28, the party seeking the easement must have held an honest belief that they were building on their own property.

[30] All of this to say that, in my opinion, the correct interpretation of s 28 of the *Act* and the law of Manitoba does not require, as a threshold issue, that 634 must prove that it held an honest belief that the renovation work being completed was being done on its property. In my view, s 28 is a permissive section that provides the discretion to a Court of King's Bench judge to fashion an appropriate remedy based on the circumstances of each case.

[31] Such an interpretation is consistent with *Howarth* CA when this Court reviewed a discretionary order made pursuant to s 28 of the *Act* and dealt with the standard of review as follows (at para 4):

> The language of s. 28 of the *Act* confers on a judge a broad discretion to remedy boundary disputes based on the facts and equities of the individual case (*Taylor v. Hoskin*, 2006 BCCA 39 at paras. 50-53, 222 B.C.A.C. 86; and *Gainer v. Widsten*, 2006 BCCA 580 at paras. 7-9, 233 B.C.A.C. 313). Such a discretionary decision is entitled to significant deference and should not be varied on appeal absent a misdirection of law, a palpable and overriding error of fact or a clearly wrong decision occasioning "a truly unjust result" (see *Towers Ltd. v. Quinton's Cleaners Ltd. et al.*, 2009 MBCA 81 at paras. 25-28, 245 Man.R. (2d) 70).

[32] In *Howarth* CA, this Court reviewed some of the factors to be considered in granting such an application and stated (at para 5):

> . . . In comprehensive reasons, the judge identified and weighed relevant factors in determining that the balance of convenience favoured a statutory easement such as: the honest error that caused the encroachment in 1996, its permanent nature, its small size and the minimal impact it has on the appellants' property.

[33] What has often been referred to in authorities as the *Vineberg* factors, enunciated above, are factors used in the balance of convenience analysis. No one factor is a threshold factor.

[34] In *Howarth* CA, this Court cited with approval *Taylor v Hoskin*, 2006 BCCA 39 at paras 50-53 [*Taylor*]. Regarding the *Vineberg* factors, the Court in *Taylor* concluded (at para 51):

> To point out that the ***Vineberg*** principles evolved from the interpretation and application of other provinces' lasting improvements legislation is not to say that they are not relevant to interpreting and applying s. 36. But they should be applied in the context of the words and intent of s. 36: to equitably resolve boundary disputes. It is the facts and the equities of each individual case that determine the court's exercise of its discretion, rather than the application of a one-size-fits-all "test". I would adopt the reasoning of Quijano J. in ***Manita Investments Ltd. v. T.T.D. Management Services Ltd. (Realty World Capital)*** (1997), 15 R.P.R. (3d) 88, aff'd (2001), 39 R.P.R. (3d) 178, 2001 BCCA 334, at paras. 42-43:
>
> > The considerations articulated by Mr. Justice Leggatt in ***Vineberg*** are set forth as a guide to assist in determining the equities and balance of convenience. They are not intended to be tests that must be applied rigorously in every case but depend for their application on the circumstances of each case.

> The grant of a remedy pursuant to s. 32 [now s. 36] of the ***Property Law Act*** [RSBC 1979, C 340] is discretionary. In applying the controlling principles of equity, the promotion of fairness and the prevention of injustice, in cases, such as this one, which present unusual factual circumstances, the court can only apply "tests" formulated in prior decisions to the extent that the tests may be relevant to the factual issues before it in determining whether to grant or refuse relief.

[35] Similarly, in the earlier decision of *Gainer v Widsten*, 2006 BCCA 580 [*Gainer*], the Court of Appeal for British Columbia considered an encroachment and the proper interpretation of s 36(2) of *BC Act*. The Court was tasked with determining whether relief under the *BC Act* was available in circumstances where a party's negligence led to the encroachment.

[36] After reviewing other British Columbia decisions, the Court stated (*Gainer* at para 9):

> I do not consider that, where there is an erroneous assumption about the position of a lot line that is attributable to neglect on the part of one who seeks relief under the Act, the relief sought cannot be granted. Neglect is not necessarily inconsistent with an honest belief. Conduct which might be said to have been negligent is one of the circumstances to be considered in assessing the equities. The decisions of the trial court in ***Henderson*** [*Henderson v Porter*, 2001 BCSC 1601] and ***Wheeler*** [*Wheeler v Piggford*, 1998 CanLII 6794 (BCSC)] were cases where the negligent conduct could, in the circumstances, be said to be less deserving of relief than the Gainers' conduct, and the Gainers are able to point to what are also trial decisions where relief has been granted when there has been a finding of negligence or a careless assumption about lot lines: ***Wells v. Little***, [1987] B.C.J. No. 531 (QL) (S.C.), and ***Barrow v. Landry***, [1998] B.C.J. No. 1601 (QL) (S.C.), aff'd 1999 BCCA 143.

[37] The Court of Appeal for British Columbia continues to cite *Taylor* as guidance regarding the appropriate, "broad[er] equitable approach" (*Gainer* at para 18) to interpreting s 36 of the *BC Act* (see also *Fox v British Columbia (Ministry of Forests, Lands, Natural Resource Operations and Rural Development)*, 2023 BCCA 170 at para 22).

[38] As this Court pointed out in *Howarth* CA, the language of s 28 of the *Act* confers on a judge broad discretion to remedy boundary disputes based on the facts and equities of the individual case. In my view, this Court has endorsed the Court of Appeal for British Columbia's approach and interpretation of the similar section in the *BC Act*. This is clear from the reading of paras 4-5 of Mainella JA's decision in *Howarth* CA.

[39] More broadly, in my view, the law in Manitoba and other provinces, including British Columbia, supports a broad, equitable approach to the application of s 28 of the *Act*. The *Vineberg* factors are applicable as guidance in assessing the equities, which involves a consideration of the degree of knowledge and comprehension of the property lines, the nature of the encroachment, the size of the encroachment and its impact on the neighbouring property owner's land. Where there is evidence of an honest belief in the comprehension of the property lines, that factor may generally favour granting the relief sought. On the other hand, where there is evidence the property owner exercised fraud, knew full-well where the property line was located and built across the property line onto neighbouring property, such evidence would weigh in favour of not granting relief under s 28. In cases where there is evidence of negligence, the court must weigh the facts and equities in the individual case to determine whether it should exercise its discretion. As pointed out in the British Columbia authorities, this is not an

application of a one-size-fits-all "test" (*Taylor* at para 51). The factors are not independent hurdles that must be met.

[40] An application made pursuant to s 28 of the *Act* requires the Court of King's Bench judge to review the *Vineberg* factors to guide their assessment of the facts and the equities of each individual case, so that they can determine how to exercise the discretion conferred to them.

[41] In this case, the application judge's brief reasons must be considered in light of the submissions and the live issues at the hearing. A review of the entire transcript of the proceedings demonstrates that counsel advanced submissions regarding the interpretation of s 28 of the *Act* and made significant reference to the factors reviewed in *Howarth* CA. I am not persuaded that the application judge failed to weigh the relevant factors identified, including whether there was an honest error that caused the encroachment, the permanent nature of the encroachment, the size of the encroachment and the minimal impact the encroachment had on Par-Ket's property. The application judge specifically found that the encroachment was not done deliberately. He found that there may have been some carelessness that should have been addressed, but he concluded that it did not amount to negligence and did not disentitle 634 to the easement.

[42] It is important to emphasize that the honest belief component of the test is not a threshold factor; rather, it was just one factor for the application judge to consider when he exercised his discretion to grant the easement. The decision required the application judge to balance all of the factors and, while his decision was not comprehensive and as clear as it could have been, a review of the entire transcript of the proceedings satisfies me that he knew the

factors and applied them to the facts of this case. I am not satisfied that he failed to apply the correct legal test such that it amounts to an error of law. His decision is entitled to significant deference.

Issue Two: Did the Application Judge Misapprehend the Evidence?

[43] Turning to the second ground of appeal, Par-Ket submits that the application judge misapprehended the evidence that clearly demonstrated 634 was negligent regarding the property lines between the two properties. Par-Ket submits that the application judge's conclusion that 634 was "not negligent", but was "perhaps somewhat careless" is not supported by the record.

[44] Similar to *Howarth* CA, this is not a case where the applicant deliberately disregarded the property lines and knew that the resulting encroachment would cause damage to the neighbouring property owners. Quite the contrary, there was evidence that 634 believed the retaining wall would be built up to the property line, but would not encroach. By February 2015, 634 discovered that the footings of the retaining wall, necessary for the purpose of supporting the fire escape, were encroaching slightly on Par-Ket's property. Once the encroachment was discovered, it was investigated to determine the cost of removing the encroachment and narrowing the fire escape, which potentially may have made the fire escape non-compliant with relevant building code requirements.

[45] Simply put, I am not satisfied that the application judge misapprehended the evidence or made any palpable and overriding errors in his factual findings or in the inferences he drew. His findings are entitled to deference.

[46] Further, because the application judge's decision was a discretionary one, it is entitled to significant deference and should not be varied on appeal absent a misdirection of law, a palpable and overriding error of fact or a clearly wrong decision occasioning "a truly unjust result" (*Howarth* CA at para 4). The application judge considered the relevant factors, including the error that caused the encroachment, its permanent nature and its relatively small size in exercising his discretion. I am not persuaded that there was any reversible error or that the decision to grant the easement yielded an unjust result.

Issue Three: Reasonable Compensation for the Encroachment

[47] Finally, Par-Ket submits, in the alternative, that the application judge erred in determining the yearly sum of $1,000 as reasonable compensation for the encroachment.

[48] I am not persuaded that the application judge erred in his assessment of the compensation payable in the circumstances. There was evidence of the market value and assessed taxable value of Par-Ket's property, the impact of the encroachment on the use of Par-Ket's property as a parking lot as well as case law in Manitoba and other jurisdictions regarding the amount of compensation payable respecting encroachments. The encroachment in this case is minimal and the amount of compensation ordered is not inconsistent with the evidence filed in this case. The application judge's finding regarding compensation is reasonably supported by the record and is not so clearly wrong as to amount to a truly unjust result.

Conclusion

[49] In conclusion, I am not persuaded that the application judge erred in law or made any errors of fact or of mixed fact and law that would invite appellate intervention. Accordingly, I would dismiss the appeal with costs to 634.

Edmond JA

I agree: Rivoalen CJM

I agree: Turner JA