Citation: Wilson et al v Kornelsen, 2023 MBCA 99
Date: 20231211
Docket: AI22-30-09761

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Marc M. Monnin
Madam Justice Diana M. Cameron
Madam Justice Karen I. Simonsen

B E T W E E N :

DAVID WILSON, NICHOLE WILSON, FREDERICK BRANSCOMBE, LILLIAN BRANSCOMBE, PIERRE DEBREUIL and DESIREE FOWLER	)	***J. A. Gietz*** *for the Appellants*
(Applicants) Respondents	)	***M. R. Lafreniere*** *and* ***P. F. Reimer*** *for the Respondents*
- and -	)	*Appeal heard:* ***January 13, 2023***
MATTHEW KORNELSEN and AIMEE KORNELSEN	)	*Judgment delivered:* ***December 11, 2023***
(Respondents) Appellants	)	

On appeal from 2022 MBQB 1

MONNIN JA

[1] The respondents, Matthew Kornelsen and Aimee Kornelsen (the Kornelsens), appeal from an order granting the applicants, their neighbours, certain prescriptive easements over their property. For the reasons that follow, I am of the view that their appeal should be allowed.

[2] The parties are all property owners of adjacent lots in the Town of Stonewall, Manitoba. For ease of reference, I will provide a brief description of the properties and ownership:

(a) David and Nichole Wilson (the Wilsons Jr.) are the owners of civic address 284 4th Street East (lot A2), while Nichole Wilson (Ms Wilson) owns civic address 272 4th Street East (lot A1);

(b) Pierre Debreuil (Debreuil) and Desiree Fowler (collectively, Debreuil/Fowler) are the owners of civic address 300 4th Street East (lot B);

(c) the Kornelsens are the owners of civic address 310 4th Street East (lot C); and

(d) Frederick and Lillian Branscombe (the Branscombes) are the owners of civic address 320 4th Street East (lot D).

[3] The lots are all adjacent, running north to south, with A1 being the most northerly and D the most southerly. The lots were formed from an original property comprising 15 acres (the original property), which was purchased in 1981 by the Wilsons Jr.'s parents, Cecil and Doreen Wilson (the Wilsons Sr.). At one time the property had been an operating quarry. The Wilsons Sr. subdivided the property into four lots (A to D) in 1988 and lived on what is now lot C. They later built their own home on lot B in 1993 and sold lot C. They moved out of the quarry in 2001.

[4] Each property is a long, narrow lot extending from west to east from 4th Street East in the Town of Stonewall. The western portion of each lot was where the quarry was located and now consists of marsh and scrub property. The homes, for the most part, are located on the eastern or middle sections of the lots.

[5] In January 1993, the Wilsons Sr., the Branscombes and the Wilsons Jr. entered into an easement agreement allowing access over the Branscombes' property, lot D, onto lots A, B and C, and between lots A, B and C, which at that time were owned by the Wilsons Sr. and Wilsons Jr. (the easement agreement). It allowed the Wilsons Jr. to construct driveways giving access to homes that were in the process of being built on those properties (the driveways). That easement agreement was registered by way of a caveat against all four lots. The driveways were constructed and used to access the properties.

[6] Attached as Appendix A to these reasons is a copy of a hand-drawn map of the parties' respective properties, which was used for the caveat applications and which fairly represents the lots and the driveways.

[7] In 2020, the Kornelsens purchased lot C. Soon after moving in they noticed some motor vehicle traffic cutting through their property, going from lot D to lot A; this traffic consisted primarily of heavy equipment and vehicles belonging to the Wilsons Jr. They were concerned that this would jeopardize the safety of their family when using the western portion of their property. They were told by the Wilsons Jr., when they inquired, that the use of the pathway from lot D to lot A (the pathway) was available to property owners to provide access to the quarry and that it would continue. Both the Kornelsens and Wilsons Jr. consulted legal counsel and these proceedings resulted. The Wilsons Jr. acknowledge that they have not used the pathway since the Kornelsens had raised their concerns about possible trespass.

Evidence

[8] The evidence before the application judge consisted of two affidavits—one from one of the owners of lot C, Aimee Kornelsen (Ms Kornelsen), and another from one of the owners of lot A2, Ms Wilson.

[9] As noted, Ms Kornelsen, who opposed the use of the pathway across her property, was a recent purchaser of lot C. The main focus of her affidavit was to set out the events which led her and her husband making an application for a declaration that no prescriptive easement existed over their property and for an injunction preventing the use of the pathway. For the most part, these events took place after their purchase of the property. The applicants later filed their own application for a declaration that a prescriptive easement existed, and the two applications were merged into this proceeding. Ms Kornelsen's affidavit includes a copy of the easement agreement.

[10] Ms Kornelsen's affidavit also contains letters written in the early stages of the dispute by the applicants (the owners of lots A, B and D), which were provided to their counsel. The letters are unsworn and primarily respond to the Kornelsens' safety concerns relating to the vehicles driving across the western portion of their property.

[11] In their letter, the Wilsons Jr. indicated that "[we] all just want what we always had, the access to our own properties for all neighbours, good neighbours with a good sense of community."

[12] In his letter, Debreuil, one of the owners of lot B, indicated that he did not use his front yard or the quarry portion of his lot save for taking scenic pictures. He stated: "I always thought I would have access to all my property.

I never thought I would have to use it on a regular basis so that I could have access when I wanted it."

[13] Finally, the Branscombes, in their letter, indicated that the use of the pathway over the years was to access the quarry portion of the property "to park heavy construction equipment so as to keep it away from the immediate area of the houses." According to them, it was also used by the Wilsons Jr. to allow a septic truck and by the neighbours at lot C and lot B to access their property from the front quarry area over the years. The Branscombes were clear that they were concerned about uninterrupted access to everywhere in the front quarry.

[14] In a brief email response attached to Ms Kornelsen's affidavit, Dave Harris, who with his wife, was an owner of lot C from 1993 to 2005, stated: "I do remember vehicles crossing that area, sewage truck and others. We did not spend time out there at all so therefore it was not a problem for us."

[15] Ms Wilson's affidavit sets out in more detail the use of the pathway to access to the quarry over the years. She describes that lot C, now owned by the Kornelsens, was owned by the Harrises until 2005, then briefly by Bruce Johnson in 2005, and then by Darla Davies from 2005 to 2020 until the Kornelsens purchased it. Having spoken to all previous owners, she states:

> . . . They all have confirmed to me that the Pathway was used continuously throughout their ownership. All agree that the use was uninterrupted throughout their ownership. All agree that the usage was open and peaceful throughout their ownership. All agree no one ever sought permission from them to use the Pathway.

Written statements from those previous owners were attached as an exhibit to her affidavit. None were sworn.

[16] The Harrises stated:

> During our almost 13 years in the home we had no issue with Dave and Nichole Wilson using the area around the quarry to access their house.
>
> We were aware that they used the quarry area by the pond to access parts of their property.
>
> We do not remember any discussions over access to their property while we lived there.
>
> We had no issues with them using the quarry area for access to their property.

[17] Bruce Johnson, who owned lot C for six months from March 2005 to September 2005, indicated that he was aware that the Wilsons Jr. and others used the pathway to access the quarry, that this access was continuous, that he had no issue with it, and that there was no written permission requested for it.

[18] Finally, Darla Davies stated that during the 14.5-year period that she owned the property, the Wilsons Jr. used the pathway "a) on a regular basis; b) without interruption; c) openly and peacefully; and d) without permission, either oral or written."

[19] Under cross-examination, Ms Wilson denied having coached any previous property owner on how to provide their statement or what to say. She only provided them with the criteria that was to be used and the rest was up to them. Neither Debreuil/Fowler nor the Branscombes provided any

further material or affidavits although they are named as applicants with the Wilsons Jr.

The Decision Below

[20] The application judge concluded that there was evidence of continuous usage of the pathway across the Kornelsen property (lot C) for a period of more than 20 years by the owners of lots A1, A2 and B. However, he came to different conclusions for each of those applicants as to what the scope of their prescriptive rights would be.

[21] As to the evidence before him, he recognized that hearsay evidence is often the only way to establish a prescriptive easement claim. Relying on *Dobrowolski v Dobrowolski*, 2020 MBCA 105 [*Dobrowolski*], and taking into account the principle of proportionality, he was satisfied that, in order to demonstrate factual matters in existence for more than 20 years, it was necessary to admit hearsay evidence. He was also of the view that the evidence submitted by the applicants, including letters from prior occupants of the land, met the test of threshold reliability. On the question of ultimate reliability, he was satisfied that "on a balance of probabilities, the evidence is sufficiently reliable on which to conclude that there has been continuous usage of the pathway for a period of more than 20 years, but less than 40 years" (at para 38).

[22] He was satisfied that the use of the entire quarry by the neighbours was an accommodation and was not capable of forming the subject matter of a grant. However, he was of the view that the applicants had established the use of the pathway as of right for the purposes of accommodating the use of and access to their own respective properties.

[23] He concluded that the owners of lot B, Debreuil/Fowler, had met the requirements to establish a prescriptive easement granting them access to the pathway to cross lot C for the purposes of accessing the westerly portion of lot B only. There was no prescriptive easement for them to use this access as a thoroughfare to lots A2 or A1. While he found that it was reasonably necessary for Debreuil/Fowler to have access to the quarry portion of lot B by way of prescriptive easement across lot C, it was reasonably necessary only insofar as it was required to access the quarry portion of lot B from the south and not as a thoroughfare through lot B.

[24] Additionally, he found that the owners of lot A2, the Wilsons Jr., had established a prescriptive right granting them access to the pathway to cross lot C and lot B for the purposes of accessing lot A2 only. There was no prescriptive right for the Wilsons Jr. to use this access as a thoroughfare to lot A1. In his view, it was not reasonably necessary for the Wilsons Jr. to have access to the portion of the pathway running through the quarry end of lot A2 by way of prescriptive right for the purposes of accessing lot A1. Nor could the Wilsons Jr. do so by obtaining permission or legal right from the owner of lot A1.

[25] He concluded that it was not reasonably necessary for the owner of lot A1, Ms Wilson, to use the pathway to cross lots B, C and D to access lot A1 as there was a legally registered driveway capable of accommodating all of the traffic accessing lot A1. Relying on the observations of Dewar J in *RPM Farms Ltd et al v Laurence Jay Rosenberg et al*, 2019 MBQB 140 at paras 58-59 [*RPM Farms*], he concluded that the existence of a legal alternative, in this case, a legally registered driveway, was a factor he could consider in concluding that the owners of lot A1 had not established a prescriptive right

to the pathway as it demonstrated that access to the pathway was not reasonably necessary in order for them to enjoy their property.

[26] He also found, although not requested to do so, that the owners of lot C, the Kornelsens, had a right of access to lot D to access their property but not to lots further north.

Issues

[27] The appellants raise several issues on appeal which, I believe, can be reframed into two distinct issues. First, whether the application judge erred in finding that there was sufficient and admissible evidence to satisfy the criteria required to find a prescriptive easement. Second, whether the application judge erred in finding that the prescriptive easement was reasonably necessary for the enjoyment of lots B, C and A2.

Standard of Review

[28] The issues raised by the parties deal with the proper application of a legal test to the facts before the trier and, as such, are issues of mixed law and fact. Barring an extricable issue of law, they must be decided on a palpable and overriding error basis (see *Housen v Nikolaisen*, 2002 SCC 33).

Law With Respect to Easements

[29] The law governing the establishment of a prescriptive easement in Manitoba has been the subject of recent judicial pronouncements (see *Niata Enterprises Ltd et al v Snowcat Property Holdings Limited*, 2023 MBCA 48 [*Niata*]; and *Klimack et al v Kroeker et al*, 2020 MBCA 98).

[30] An applicant for a prescriptive easement must satisfy the requirements of an easement as well as the requirements of *The Prescription Act 1832* (UK), 2 & 3 Will IV, c 71.

[31] To establish an easement, the applicant must demonstrate the following four criteria: (a) there is a dominant tenement and servient tenement, (b) the easement must accommodate the dominant tenement, (c) the dominant and servient owners must be different persons, and (d) the easement is capable of forming the subject matter of a grant (see *RPM Farms* at para 25).

[32] As well, because the easement is one that is created by a prescription—namely, the passage of time—the following criteria must also be met: (a) the usage must be continuous; (b) the usage must be uninterrupted; (c) the usage must be open and peaceful; (d) the usage must exist for a minimum period of 20 years; and (e) the usage must be without permission, either oral or written (see *Niata* at para 17).

[33] If the usage has occurred continuously and uninterrupted in an open and peaceful way for 40 years, proof of oral permission will not defeat the claim to the easement (see *RPM Farms* at paras 28-29). In this case, we are dealing with usage for a period of at least 20 years but not 40.

[34] A distinction must be drawn between permission and simple acquiescence. Mere neighbourly accommodation and friendly courtesy will deem the use "permissive" and will not constitute a prescriptive easement (see *Blankstein v Walsh*, 1988 CanLII 7198 (MBKB) at p 283, aff'd 1989 CanLII 7253 (MBCA). All criteria must be satisfied, both as to an easement and prescription, for a prescriptive easement to be recognized.

[35] The onus to establish both the easement and the prescription lies on the person claiming it on a balance of probabilities. A court should be wary to find prescriptive easements unless the evidence is clear and solid (see *RPM Farms* at paras 31, 44).

[36] As to the criteria for an easement proper, the Kornelsens argued before the application judge that the applicants had not demonstrated that the easement was reasonably necessary for the better enjoyment of their property. They also argued that the widespread and common usage of the entire quarry, set out in letters relied upon by the applicants, was too ill-defined and imprecise to be the subject matter of a grant.

[37] As to the prescriptive aspect of the easement, the Kornelsens asserted that the evidence upon which the applicants relied—namely, unsworn letters from some of the previous owners—did not establish a continuous, open and peaceful use of the pathway. In their submission, the evidence was inconclusive and inconsistent, amounted to hearsay and should not have been relied upon. Further, they argued that the use of the quarry was by implied neighbourly permission and not as of right.

[38] In response, the applicants argued that the pathway did not have to reach the standard of being a "necessity" to access the lots, but only that it was "reasonably necessary", meaning that it would provide a benefit to their property. The applicants submitted that the preponderance of the evidence indicated a long-standing use of the pathway occurring through the acquiescence of the servient tenements without any written permission. Finally, they argued that the pathway was capable of forming the subject

matter of a grant and that they were not claiming an easement to use the entire quarry portion of the property.

Analysis

Issue 1

[39] In my view, this appeal rests on the evidentiary issue—namely, whether the application judge had admissible and sufficient evidence to reach the conclusions he did on the issues before him.

[40] As noted earlier, the application judge recognized that most of the evidence before him was in the nature of hearsay, but he found that unsurprising given his view that hearsay evidence was often the only way that a prescriptive easement could be established. He was satisfied that "given the nature of the evidence sought to be admitted in order to demonstrate factual matters in existence more than 20 years ago, as well as the principle of proportionality applicable in a civil trial" (at para 38), it was necessary to admit the hearsay evidence.

[41] He also concluded that the evidence sought to be admitted by the applicants, including letters from prior owners of the lots, met the test of threshold reliability. As to the ultimate reliability of the evidence, he was satisfied that, on a balance of probabilities, "the evidence is sufficiently reliable on which to conclude that there has been continuous usage of the pathway for a period of more than 20 years, but less than 40 years" (*ibid*).

[42] The application judge did not distinguish between the letters provided by current land owners (Debreuil/Fowler, the Wilsons Jr. and the

Branscombes) and those provided by previous land owners. Given his findings on the right of the owners of lot B, Debreuil/Fowler, to a prescriptive easement, it would appear that he considered Debreuil's letter.

[43] The application judge recognized that there was an issue with using the evidence submitted in the form of unsworn letters from existing and previous owners. He considered the decision in *Dobrowolski*, which is this Court's latest pronouncement on the use of hearsay evidence in a civil context. *Dobrowolski* involved a dispute between family members as to the intention and purpose of a parent's support of a child's business. The evidence to be considered included conversations of third parties with the deceased father, some of which had been admitted during the course of taking *de bene esse* evidence. The trial judge in *Dobrowolski v Dobrowolski*, 2019 MBQB 126 [*Dobrowolski* QB] concluded that she could admit the evidence which was necessitated substantially by the death of the father and his wife, but that the reliability and weight of the evidence would be evaluated along with any corroborative evidence.

[44] On appeal, one of the issues was the admissibility of the hearsay evidence. Justice Burnett, for the majority, found that the trial judge had made her own "independent assessment of threshold and ultimate reliability" using a functional approach to threshold reliability that was both efficient and proportional (*Dobrowolski* at para 35). In his view, she did not confuse threshold with ultimate reliability and considered all the corroborative evidence in the context of the case. Relying on independent circumstantial or evidentiary guarantees, she was able to satisfy herself that the hearsay was "inherently reliable", attaching particular importance to a significant amount of documentation that recognized the existence of a business arrangement

(*ibid*). In Burnett JA's view, the presence of the documentation supported the trial judge's ultimate finding even if no weight was attached to the hearsay evidence.

[45] In her dissent, Beard JA reviewed at length the principles applying to the admissibility of hearsay evidence on a principled basis. While the majority indicated that they were generally in agreement with her summary of the legal principles, they did not want the decision to be taken "as a complete endorsement of that summary or as an endorsement of a rigid approach to the admission of hearsay evidence in a civil proceeding" (*ibid* at para 34).

[46] One of the principles analyzed by Beard JA was the suggestion found in David M Paciocco & Lee Stuesser, *The Law of Evidence*, 7th ed (Toronto: Irwin Law, 2015) that in a civil context "consideration be given to a more flexible application of the rules as they relate primarily to the necessity criterion . . . [given] the cost of requiring a witness to testify" (*Dobrowolski* at para 47). However, on the issue of reliability, she noted that the authors say: "On the other hand, in terms of assessing the reliability of the hearsay statements, the indicia of reliability do not change whether it is a civil or criminal case" (*ibid*).

[47] Another principle considered by Beard JA is that "the determination of the admissibility of hearsay evidence is a very contextual analysis that depends on the underlying facts and the circumstances under which the evidence came about" (*ibid* at para 53).

[48] Additionally, Beard JA noted that the courts have emphasized that, when applying the principled exception, the threshold reliability finding to determine admissibility must be addressed and kept separate from the ultimate

reliability finding to determine how much weight to give to the evidence (see *R v Bradshaw*, 2017 SCC 35 at paras 39-42; *Pfizer Canada Inc v Teva Canada Limited*, 2016 FCA 161 at paras 83-84 [*Pfizer*]; and *R v Starr*, 2000 SCC 40 at para 215). Justice Stratas's comments in *Pfizer* are worth repeating (at para 83):

> Recently, some rules of evidence have been liberalized, allowing for more flexibility. Seduced by this trend towards flexibility, some judges in various jurisdictions have been tempted to rule all relevant evidence as admissible, subject to their later assessment of weight. But according to our Supreme Court, this is heresy. The trend towards flexibility has not undermined the need for judges to take a rigorous approach to admissibility, separating that analytical step from others, such as determining the weight to be given to evidence: *R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787 at para. 59.
>
> [emphasis added]

See also *Dobrowolski* at para 54.

[49] Ultimately, Beard JA, in *Dobrowolski*, came to the following conclusion on this point where she says (at para 60):

> Thus, even in a civil case, it remains incumbent on both counsel and the judge, when applying the principled exception, to ensure that both steps—first determining threshold reliability and admissibility and then assessing ultimate reliability and weight, each based on the appropriate evidence—do not merge and become one, as the failure to correctly apply the law is an error of law.

[50] While admittedly, Beard JA's comments are in dissent, the majority recognized that they represent a fair summary of the law, which should not be applied rigidly.

[51] On this appeal, the Kornelsens argue that the application judge erred by finding that the hearsay evidence put forward by the applicants was necessary and reliable. They argue that the evidence should not have been accepted or should not have been given any weight, as it did not meet the necessity requirement. In response, the applicants argue that the Kornelsens failed to object to the admissibility of the hearsay evidence at first instance and should not be allowed to advance the argument on appeal. They also argue that the admission of the evidence by the application judge was a proper exercise of his discretion and reflects proportionality considerations.

[52] I have difficulty with the application judge's conclusion that the hearsay evidence was necessary. Hearsay evidence is admissible under the principled exception according to the principles of "necessity and reliability". The "necessity" requirement is satisfied where the evidence is "reasonably necessary" in order to obtain the declarant's version of events. Paciocco and Stuesser indicate that there is no presumption of necessity and it is not to be lightly assumed (David M Paciocco & Lee Stuesser, *The Law of Evidence*, 6th ed (Toronto: Irwin Law, 2011) at 121 [*Paciocco, 6th ed*]).

[53] Both Debreuil/Fowler and the Branscombes were parties to the litigation, participating as applicants in the matter before the application judge, yet filed no material themselves. Their only involvement appears to be their letters written at the outset of the dispute, which were included in Ms Kornelsen's affidavit. There is no explanation as to why they did not provide an affidavit setting out their evidence, which would have afforded the Kornelsens the right to cross-examine. The "necessity" of using their unsworn letters was not discussed at any length by the application judge.

[54] Further, most of the evidence from previous land owners such as the Wilsons Sr. and Darla Davies appears to have come from individuals who are still within the community and available to testify. Doreen Wilson is a resident of Stonewall and, while it is unclear where Darla Davies resided at the time of the sale of the property to the Kornelsens, it was clear that she was a practising real estate agent involved with property in the community shortly before these proceedings started. The necessity to rely upon this hearsay evidence is unclear in light of the apparent availability of these witnesses.

[55] I agree that the difficulty to obtain evidence from individuals who are no longer residents or who have passed away are factors to be considered in the necessity argument; I also agree that requiring lengthy statements or affidavits can add to the expenditures of litigation and that this should be considered in assessing the necessity argument. However, the letters in question contain short and rather perfunctory statements that could have been provided in a simple sworn affidavit, which could have been subjected to cross-examination if necessary.

[56] On threshold reliability, "[t]he function of the trial judge is limited to determining whether the particular hearsay statement exhibits sufficient indicia of reliability so as to afford the trier of fact a satisfactory basis for evaluating the truth of the statement" (*Paciocco, 6th ed* at 113)

[57] As to the reliability aspect of these letters, the application judge accepted the statements of previous owners without question, notwithstanding the fact that the statements seem to have been prepared in response to a request from one of the litigants in a format adhering to the specific criteria required by the jurisprudence. This goes to the inherent reliability of the information

set out in the statements. There is no discussion by the application judge as to why he found they satisfied threshold reliability.

[58] When dealing with the question of threshold reliability, in other circumstances, there have been factors that are said to have enhanced the ability to rely upon hearsay. For example, the statements in this case were not sworn nor were they made in circumstances that suggest that the declarant was likely to tell the truth (such as a court proceeding or examination for discovery); they were prepared, in some cases, at the suggestion and direction of a main protagonist, Ms Wilson, with assistance in setting out what information should be included. These factors go to the question of whether the application judge should have more thoroughly assessed whether the statements satisfied threshold reliability. The failure to assess threshold reliability or to distinguish it from ultimate reliability is an error of law.

[59] Finally, while the Kornelsens did not move before the application judge to declare the letters from previous owners inadmissible, they did raise the argument that they were hearsay and of little weight. The application judge's decision to consider the letters and the manner in which he did so is certainly subject to challenge on this appeal by the Kornelsens.

[60] I am of the view that the application judge erred in his analysis of the admissibility of those letters on a principled exception basis—namely, as to necessity and reliability.

[61] As well, I do not see an analysis by the application judge that explains why, in his view, the evidence is "sufficiently reliable" such that he could conclude that it was ultimately reliable. In light of the reasons outlined previously as to how these documents came into existence, and without the

individuals having been cross-examined at trial or asked to provide details about their sources or the basis of their knowledge, the amount of weight that can be given to these letters is questionable. As such, even if admitted, they should have been given only very limited consideration, if any, by the application judge.

[62] As outlined earlier, the application judge came to certain conclusions as to the availability of prescriptive easements for the various land owners. With respect to the owners of lot B, Debreuil/Fowler, he concluded that they had a limited easement over lot C in order to access their property. To do so, he must have concluded that the evidence satisfied him that this had been a right exercised continuously and uninterrupted for the 20-year period predating April 1, 2021 (the date when the first proceeding commenced). However, Debreuil (who has owned the property since at least July 2018) did not provide evidence that demonstrates that he has ever used the pathway in a manner that establishes an easement. His evidence does not establish the criteria of continuous use.

[63] As to an easement with respect to lot C, the Kornelsens were not part of the application to obtain one nor do they wish to obtain one. The applicants, on this appeal, take no issue with the Kornelsens' position and do not seek to uphold the application judge's declaration that the Kornelsens have a prescriptive easement across lot D. There is also no evidence that the Kornelsens have availed themselves of the use of the pathway to access their property since they purchased it. Again, the requirements of a continuous uninterrupted use has not been met.

[64] The Branscombes, the owners of lot D, being the servient tenement, are not entitled to a prescriptive easement. This finding is not disputed by any of the parties.

[65] This leaves us with only one prescriptive easement at issue—namely, that of the Wilsons Jr. over the three other lots. In essence, this case comes down to the ability of the Wilsons Jr. to maintain a shortcut along the pathway between their property and lot D. The evidence that is admissible must be assessed on the basis of that outcome, limited to the southernmost of the Wilsons Jr.'s lots, lot A2.

[66] The evidence relied upon by the application judge, other than Ms Wilson's, goes to the use of the pathway to access the quarry. As the application judge noted, the use of the entire quarry by the neighbours was "simply a neighbourly accommodation, and is not capable of forming the subject matter of a grant" (at para 38(c)).

[67] In his determination of whether the use by the Wilsons Jr. was as of right, as opposed to merely a neighbourly accommodation, the application judge did not mention the easement agreement. I only raise it to suggest that the need for such an agreement to set out rights of transit over the properties would have made the Wilsons Jr. aware of the legal ramifications. While not determinative of any issue, it is a factor that could be of significance in their assessment of whether they were operating over the pathway "as of right" or merely with neighbourly acquiescence.

[68] Looking at the evidence of Ms Wilson as the only admissible evidence available to satisfy the requirements of the prescriptive easement criteria, it is less than compelling. There was no doubt that the pathway was

used to move equipment from the roadway to the Wilson Jr.'s construction facilities on lot A1, and that the equipment was often left in the quarry overnight. However, apart from suggestions of use by the Wilsons Jr. to access their septic tank (which can be accessed by the driveway) and some usage by the Wilsons Jr. to get to the quarry, there is little direct evidence of a long-term and uninterrupted use of the pathway by the owners seeking to access lot A2.

[69] It has been recognized in jurisprudence that courts need to proceed with caution when determining that a usage has amounted to a prescriptive easement (see *Henderson et al v Volk et al* (1982), 132 DLR (3d) 690 (ONCA) at 695). The evidence must be of a clear and persuasive nature for a court to grant the intrusive remedy sought. The only admissible evidence available here is that of the interested party. I am of the view that the evidence is not sufficient to establish the easement sought.

Issue 2

[70] Having found on the basis of the first issue that the relief is not available, I need not consider whether or not the application judge erred in his comment that the prescriptive easement was not reasonably necessary for the enjoyment of the owners of lot A1. The application judge relied upon the decision of Dewar J in *RPM Farms* to find that he had the ability to consider that issue. I have concern about this given the reasoning set out in the Ontario Court of Appeal case of *Depew v Wilkes*, 2002 CanLII 41823, in which Rosenberg JA recognizes that there is only a need to establish a benefit to the dominant tenement and not a requirement to prove reasonable necessity. I leave this issue to be explored more fully another day.

Conclusion

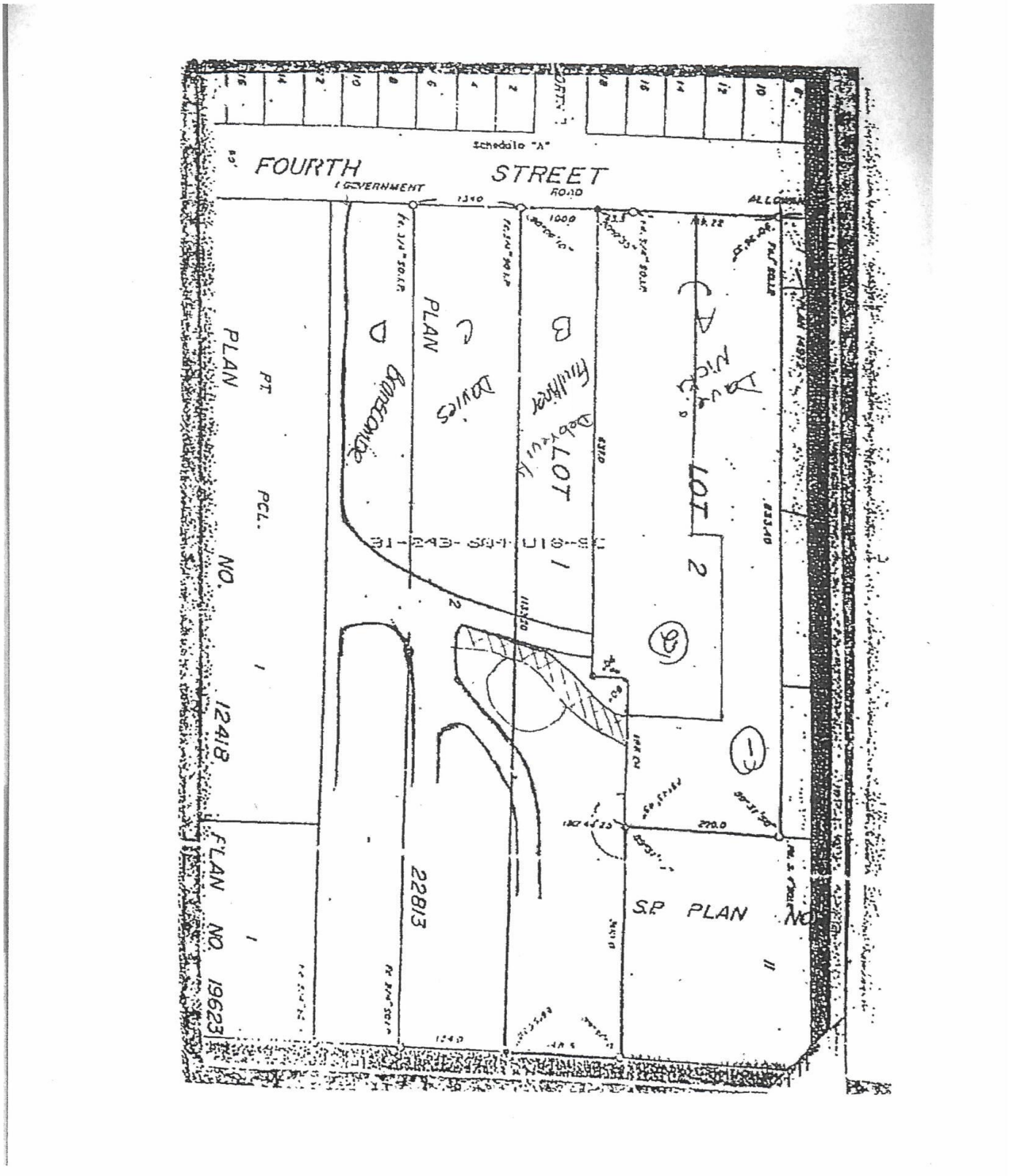
[71] For these reasons, I would allow the appeal with costs to the appellants here and in the Court below.

Monnin JA

I agree: Cameron JA

I agree: Simonsen JA

Appendix A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GOVERNMENT ROAD
ALLOWANCE
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Davies
LOT 1
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