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(Winnipeg Centre)
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Cited as: 2024 MBKB 44

# COURT OF KING'S BENCH OF MANITOBA

**B E T W E E N:**

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| FELIPE TABET and<br>JULIANA RIVERA ALVES TABET,<br><br>plaintiffs,<br><br>- and -<br><br>THE CITY OF WINNIPEG, JAMES DUNCAN CUMMINE, GLENNA LORRAINE CUMMINE, KEVIN MARTIN JEFFREY and KATRINA ELLEN JEFFREY,<br>defendants. | ) | Alexandre Mireault<br>Braeden Cornick<br>for the plaintiffs<br><br>Kalyn B. Bomback<br>for the defendant, The City of Winnipeg<br><br>Allison C. Fehr<br>on a watching brief for James Duncan Cummine and Glenna Lorraine Cummine<br><br>Rhiannon Swan (Articling Student-at-Law)<br>on a watching brief for Kevin Martin Jeffrey and Katrina Ellen Jeffrey<br><br>Judgment Delivered:<br>March 06, 2024 |

## GRAMMOND J.

### INTRODUCTION

[1] This decision relates to the issue of whether The City of Winnipeg (the "City") has a valid easement over two parcels of land owned by the plaintiffs, commonly and

collectively known as 869 Elmhurst Road in Winnipeg (the "Properties"). In May 2023, Kroft J. (as he then was) granted permission to the plaintiffs and the City to file competing summary judgment motions to determine this issue, which all parties agreed should be decided prior to the adjudication of any other aspect of this litigation.

## BACKGROUND

[2] In September 1994, a developer, who is not a party to this litigation, entered into a development agreement with the City with respect to the subdivision of four new residential lots on Coopman Crescent in Winnipeg. The development agreement provided that the developer would obtain and provide to the City easements relative to the municipal services and works referenced in the agreement that would be installed across lands owned by the developer or private owners.

[3] Two of the new residential lots on Coopman Crescent (the "Bordering Lots") share a property line with one of the Properties. A drainage infrastructure system consisting of an inlet pipe (the "Pipe") and two swales (collectively the "Works") was constructed on the Properties[1]. In 1997, the City filed caveats on the titles to the Bordering Lots with respect to the Works, pursuant to easement agreements entered into with the owners of the Bordering Lots[2]. The City did not file caveats on the titles to the Properties.

[4] The plaintiffs purchased the Properties in 2015.

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[1] The evidence reflects that most or all of the Works were constructed on the parcel of land that shares a property line with the Bordering Lots. It is unclear whether any portion of the Works was actually constructed on the plaintiffs' second lot. Nevertheless, I will refer to the two parcels collectively as the "Properties" throughout these reasons, and my decision applies to both parcels.

[2] One of the Bordering Lots has at all material times been owned by the individual defendants James Cummine and Glenna Cummine, and the other is now owned by the individual defendants Kevin Jeffrey and Katrina Jeffrey.

## THE LAW

[5] Rule 20 of the Court of King's Bench Rules, M.R. 553/88, provides as follows:

> **Summary judgment motion**
>
> 20.01(1) A party may bring a motion, with supporting affidavit material or other evidence, for summary judgment on all or some of the issues raised in the pleadings in the action.
>
> …
>
> **Responding evidence**
>
> 20.02 In response to affidavit material or other evidence supporting a motion for summary judgment, a responding party may not rest on the mere allegations or denials of the party's pleadings, but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue requiring a trial.
>
> **Granting summary judgment**
>
> 20.03(1) The judge must grant summary judgment if he or she is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence.
>
> **Powers of judge**
>
> 20.03(2) When making a determination under subrule (1), the judge must consider the evidence submitted by the parties and he or she may exercise any of the following powers in order to determine if there is a genuine issue requiring a trial:
>
> (a) weighing the evidence;
>
> (b) evaluating the credibility of a deponent;
>
> (c) drawing any reasonable inference from the evidence;
>
> unless it is in the interests of justice for these powers to be exercised only at trial.

[6] The leading case on summary judgment is ***Hryniak v. Mauldin***, 2014 SCC 7, where the court stated:

> [49] There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts,

> and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

[7] In ***Dakota Ojibway Child and Family Services et al v. MBH***, 2019 MBCA 91, the court stated:

> [108] At the hearing of [a summary judgment] motion, the moving party must first satisfy the motion judge that there can be a fair and just determination on the merits (i.e., that the process will permit him or her to find the necessary facts and to apply the relevant legal principles so as to resolve the dispute, and that proceeding to trial would generally not be proportionate, timely or cost-effective). In so doing, the moving party bears the evidential burden of establishing that there is no genuine issue requiring a trial.
>
> [109] If those requirements are met, the responding party must meet its evidential burden of establishing "that the record, the facts, or the law preclude a fair disposition" (*Weir-Jones* at para 32; and *Stankovic v 1536679 Alberta Ltd*, 2019 ABCA 187 at para 22; see also *Stankovic* at para 29) or that there is a genuine issue requiring a trial (e.g., by raising a defence). In other words, the responding party must establish why a trial is required (see *Hryniak* at para 56). If the responding party fails to do so, summary judgment will be granted.
>
> [110] The analysis contemplated by Karakatsanis J in *Hryniak* is itself a two-step analysis (see para 66). First, the motion judge must determine if there is a genuine issue requiring a trial based only on the evidence, without using any additional fact-finding powers. If there is such an issue, the second step requires the motion judge to determine if the need for a trial can be avoided by weighing the evidence, evaluating credibility, drawing inferences and/or calling oral evidence (see r 20.07(2)).
>
> [111] There is no shifting onus; the standard of proof is proof on a balance of probabilities; and the persuasive burden of proof remains at all times with the moving party to establish that a fair and just adjudication is possible on a summary basis and that there is no genuine issue requiring a trial.

## ANALYSIS

[8] In this case, for either summary judgment motion to succeed:

a) the moving party must satisfy me that there is no genuine issue requiring a trial relative to whether there is a valid easement; and

b) the responding party must fail to meet its evidential burden of establishing that the record, the facts, or the law precludes a fair disposition of the same question on summary judgment, or that there is a genuine issue requiring a trial.

[9] In addition, as set out in ***Canada (Attorney General) v. Lameman***, 2008 SCC 14, at para. 11, and cited in ***Dakota*** at para. 75, "… [e]ach side must "put its best foot forward" with respect to the existence or non-existence of material issues to be tried. …". In other words, the parties must advance the material evidence on which they rely.

[10] In law there are three methods by which an easement can be granted, all of which were argued in this case: a statutory easement, an easement by agreement, and a prescriptive easement. The following provisions of ***The Real Property Act***, C.C.S.M. c. R30 (the "***RP Act***"), are pertinent to one or more of these issues in this case:

> **Restrictions on certificate**
>
> 58(1) The land, mentioned in a certificate of title, shall, by implication and without special mention in the certificate, unless the contrary be expressly declared, be deemed to be subject to
>
> …
>
> (c) any right-of-way or other easement, howsoever created, upon, over, or in respect of, the land;
>
> …
>
> (k) a development plan, zoning by-law or other by-law authorized under *The Planning Act* or under the charter of any city and any by-law passed by any municipal corporation under *The Municipal Act* or the charter of any city relating to residential areas or zoning.
>
> …

**Non-application**

58(1.1) Clause (1)(c) does not apply in respect of a right granted by an instrument under subsection 111(2) that has not been registered under subsection 111.1(2).

…

**Conclusive evidence — title paramount (indefeasible)**

59(1) Every certificate of title or registered instrument, as long as it remains in force and is not cancelled or discharged, is conclusive evidence at law and in equity, as against the Crown and all persons, that the owner is indefeasibly entitled to the land or the interest specified in the title or instrument.

**Exception — title subject to section 58**

59(1.1) Despite subsection (1), a person may show that a certificate of title is subject to any of the exceptions or reservations mentioned in section 58.

…

**Protection for person accepting transfer**

80(2) A person who contracts for, deals with, takes or proposes to take a transfer, mortgage, encumbrance, lease or other interest from an owner is not – except in the case of fraud or a wrongful act in which that person has participated or colluded –

…

(b) affected by any notice, direct, implied or constructive, of any trust or other interest in the land that is not registered by an instrument or caveat, despite any rule of law or equity to the contrary.

…

**Granting right that is registrable as a statutory easement**

111(2) In respect of an activity or undertaking described in subsection (3), the following may, by executing an instrument, grant to an eligible grantee a right over land that may be registered as a statutory easement:

(a) the owner of the land;

(b) any person entitled to be registered as the owner of the land;

(c) if the land has been sold by agreement of purchase and sale, both the vendor and the purchaser under the agreement or by their personal representatives or assigns.

**Activities and undertakings**

111(3) A right over land under this section may be granted in respect of the following activities or undertakings:

(a) constructing, erecting, laying, carrying, operating, maintaining or doing the following:

…

(iii) drainage or supplying drainage services,

…

(b) works and facilities that are related to the activities and undertakings described in clause (a), such as pipes, conduits, cables, wires, poles, transmission lines, waterworks and water control works.

…

**Right becomes statutory easement on registration**

111.1(1) Once the instrument is registered in accordance with subsection (2), a right granted by an instrument under section 111

(a) becomes a statutory easement and is an easement for all purposes;

(b) is an interest in land; and

(c) runs with the land notwithstanding that the benefit of the right is not appurtenant or annexed to any land of the eligible grantee in whose favour the right was granted;

and the conditions and covenants expressed in the instrument apply to and bind the respective successors, personal representatives and assigns of the grantor and grantee, except to the extent that a contrary intention appears in the instrument.

[11] The law is clear that the onus to establish an easement lies upon the party claiming it (***Niata Enterprises Ltd et al v. Snowcat Property Holdings Limited***, 2023 MBCA 48, at para. 16). The court in ***Niata*** also stated that:

> [17] … the claimant must satisfy all four essential requirements of an easement at law, … They are:
>
> 1. There must be a dominant tenement and a servient tenement.
>
> 2. An easement must accommodate the dominant tenement.

3. Dominant and servient owners must be different persons, and

4. A right over land cannot amount to an easement, unless it is capable of forming the subject matter of a grant (see *Klimack* at para 6).

[12] None of these requirements are at issue in this case.

***Statutory Easement***

[13] The plaintiff argued the pursuant to s. 111.1(1) of the ***RP Act***, a statutory easement must be registered on title to run with the land, and that in this case, since the City did not register on title to the Properties, it cannot have a statutory easement.

[14] The City argued that in late August 1994, the Committee on Planning and Community Services approved the developer's subdivision plan on various terms, including that the developer enter into a development agreement and subdivision agreement with the City. On September 21, 1994, the City enacted a by-law approving the sub-division, subject to the terms and conditions of the development agreement which was entered into on the same date. The by-law contained no provisions relative to the Works or the registration of easements. The development agreement provided that the developer would prepare and register an approved subdivision plan, and that development could not take place without the prior written approval of the Commissioner of Works and Operations.

[15] The City submitted that the application of ss. 58(1)(c) and 58(1)(k) of the ***RP Act*** give rise to a statutory easement and an exception to indefeasibility of title, because the development plan and by-law contemplated the installation of the Works, and the sub-division and development of the lots in fact proceeded.

[16] In ***Willman v. Ducks Unlimited (Canada)***, 2004 MBCA 153, the court stated at para. 66 that "… a purchaser is not affected by notice of an unregistered interest …", and that "… [t]o find otherwise would, … run counter to the basic principles of the Torrens system, and in particular, s. 80 of the [***RP Act***]".

[17] In ***Hyczkewycz v. Hupe***, 2019 MBCA 74, the court commented upon the statutory exceptions and qualifications to the principle of indefeasibility of title set out in ss. 58 and 59 of the ***RP Act***. The court also commented upon the principles underlying the Torrens land registry system, including the cardinal principle that "the register is everything", and the "curtain principle" under which a purchaser need not investigate the history of past dealings with the land or search behind the title as depicted on the register.

[18] Although a prescriptive easement, considered below, is an exception to the principle of indefeasibility of title, ss. 58(1.1), 111(2) and 111.1(1) of the ***RP Act*** make it clear that a statutory easement is not an exception to that principle, and that registration on title is required. Since the City did not register an easement on title to the Properties with respect to the Works, it is clear that it does not hold a statutory easement over the Properties.

[19] Moreover, from a practical perspective, if I accepted the City's position on this issue, prospective purchasers of property would be required to check every applicable by-law and development agreement that pertains to a property to check for statutory easements, because a tittle search would not provide notice thereof. In this case, the

relevant by-law contains no reference to the Works, and the development agreement does not reflect a clear encroachment upon the Properties.

[20] In conclusion, the plaintiffs have satisfied me that there is no genuine issue requiring a trial relative to whether there is a valid statutory easement on the Properties. The City, as the responding party, has failed to meet its evidential burden of establishing that the record, the facts, or the law precludes a fair disposition of this question on summary judgment, or that there is a genuine issue requiring a trial relative to this issue.

***Easement by Agreement***

[21] The development agreement provided that where any works were installed on lands owned by private owners, the developer would obtain and provide to the City easements to enable it to enter upon the said lands to service, repair, or otherwise deal with municipal services, improvements, or works. The development agreement also provided that the developer was responsible for installing land drainage sewers, including the construction of swales, prior to the issuance of building permits, and that the developer would provide easements with respect to the maintenance of lot drainage and underground services.

[22] Despite these clear contractual provisions, the City was unable to produce any easement agreement or other document relative to the discharge of land drainage on the Properties. To be clear, the City produced no evidence that any former owner of the Properties consented to the installation of the Works, either orally or in writing.

[23] The City submitted that its general practice on a project is to rely upon the design engineer to be satisfied that consultation has occurred with, and permission has been obtained from, the owner of any properties that are to be impacted by the project. It submitted that the court should infer that in this case consent to install the Works was obtained at the time of the development, because the Works were in fact installed on the Properties.

[24] There is a certificate in evidence dated March 2003 which reflects the City's certification that the developer met all conditions and obligations of the development agreement under the jurisdiction of the City's Water and Waste Department, including with respect to land drainage sewers. Although the agreement provides that the developer was responsible for obtaining easements, the certificate contains no reference to easements specifically. I am not prepared to infer, therefore, that the certificate constitutes evidence that any of the owner(s) of the Properties agreed to an easement at the time of the development.

[25] It is also significant that the titles to the Properties bear no registrations relative to an easement in favour of the City. The absence of caveats registered on title to the Properties is incongruous with the registration of caveats on the titles to the Bordering Lots on August 21, 1997, and the City has provided no explanation for this inconsistency. Logic dictates that if there was an easement by agreement that impacted the Properties, caveats would have been filed on title at the material time.

[26] The mere fact that the Works were installed on the Properties does not establish that the owner(s) of the Properties at the material time agreed to grant an easement to

the City. There could be any number of reasons why the Works were installed without the agreement of the property owners. Alternatively, it is possible that there was an agreement for an easement, of which no evidence exists today, or that a license was granted that did not run with the land (***Willman***, paras. 49, 50, and 63).

[27] The plaintiffs have established that there is no genuine issue requiring a trial relative to whether there is a valid easement by agreement, because there is no evidence of an agreement. The City has not, however, met its evidential burden of establishing that the record, the facts, or the law preclude a fair disposition of the question by summary judgement, or that there is a genuine issue requiring a trial relative to an easement by agreement.

***Prescriptive Easement***

[28] In ***RPM Farms Ltd. et al. v. Laurence Jay Rosenberg et al.***, 2019 MBQB 140, the court stated:

> [27] The basic theory of a prescriptive easement is that if another's land has been used in accordance with the expressed criteria for specified periods of time, the law will presume that the easement has been expressly granted, even though no actual proof of grant can be found. In Manitoba, the periods of time are specified by *The Prescription Act*, being part of the legislation of England when Manitoba became a province in 1870. As of today, *The Prescription Act* remains in force un-amended save as regards section 29 of *The Law of Property Act*, C.C.S.M. c. L90 which amendment simply takes away any prescription rights to the access and use of light to any building, structure or work.
>
> [28] There are two time periods which are specified under *The Prescription Act*, namely 20 years and 40 years. In respect of the period under 40 years, the criteria which need to exist in order to permit the usage to morph into an easement are:
>
> 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.

[29] In ***Klimack et al v. Kroeker et al***, 2020 MBCA 98, the court at para. 17 specifically approved of the foregoing passages from ***RPM*** and stated, regarding usage without permission, that:

> [21] What the courts seek is acquiescence by the servient owner. As noted by Ziff (at p 435):
>
> > Somewhere between these very close poles – between a use that is not objected to, but not permitted – one finds the servient owner who acquiesces in, or does not complain about or impede, the exercising of easement-like rights. . . . When that occurs, a claim to an easement through prescription can succeed. . . .

[30] In ***Niata***, the court stated:

> [15] … a quick review of the basic principles reveals that the Legislature, by virtue of section 58(1)(c) of the *RPA*, has chosen to make easements an exception to the indefeasibility of title which lies at the heart of Manitoba's Torrens land system. The *RPA* allows an exception for "any right-of-way or other easement, howsoever created, upon, over, or in respect of, the land".
>
> [16] Nonetheless, the onus to establish an easement lies on the person claiming it on a balance of probabilities and, in considering a prescriptive easement, the court should be cautious, and the evidence should be clear and solid (see *RPM Farms* at paras 31, 44).

[31] In this case, the City bears the onus of establishing a prescriptive easement on a balance of probabilities, and it is a heavy onus, such that I should proceed with caution (***Niata***, at para. 54, ***Vivekanandan v. Terzian***, 2020 ONCA 110, at para. 29). Having said that, there is no question that since the Works have existed on the Properties, the usage thereof has been continuous, open, and peaceful. In addition, as I have

concluded, there is no evidence that the usage of the Properties was with permission, either oral or written.

[32] The plaintiffs noted that the City's alternative arguments in this case are inconsistent with one another. More specifically, the City argued that it held both an easement by agreement and a prescriptive easement, which requires that the usage is without permission. In my view, this type of inconsistency is a common reality when alternative arguments are presented to the court. The City's submissions that there was an easement by agreement are not evidence of an agreement, and in my view its position on that point does not prejudice its position on the issue of a prescriptive easement, including the requirement that the alleged usage was without permission.

[33] Accordingly, the two criteria for a prescriptive easement that are at issue in this case are whether the usage was uninterrupted (including whether there was knowledge and acquiescence) and whether the usage has existed for the minimum period of 20 years. I will address first the question of the prescriptive period.

[34] The City submitted that the 20-year prescriptive period commenced in 1999, when the Works were completed. The City's main witness, an engineer, deposed that "the Works were constructed under engineer supervision between in or about 1994 and 1999, with the Pipe being completed in or about 1999". On cross-examination, when asked about the basis for this statement, the witness stated: "There are records in our development file at Water and Waste that indicate from their inspection reports that are in the development file that talk about works being completed. We have some timestamps on that correspondence." The witness stated also that: "… I interpreted

from the records that this is the information that applied to that file". (Transcript of Cross-Examination on Affidavit of Marek Konrad Gajda, dated December 20, 2023, p. 30 lines 24-25, and p. 31 lines 1-3 and 5-7.) Inexplicably, the documents to which the witness referred on cross-examination have not been filed as evidence on these motions.

[35] The only evidence before me, therefore, regarding the timing of the completion of the Works is the witness's assertion based upon their documentary review as described. This approach is both unfortunate and concerning, particularly given that on a summary judgment motion the parties are required to put their best foot forward and advance the material evidence upon which they rely.

[36] The plaintiffs argued that the certificate referenced in paragraph 24 above supports the argument that the Works were not completed until March 2003. Certainly, the certificate reflects that the developer met all conditions and obligations of the development agreement, but it contains no reference to when the Works were completed. Accordingly, in my view the certificate confirms nothing more than that the Works were completed some time before March 2003 when it was signed.

[37] I have considered the evidence of the City's witness in the context of the documentary evidence before me. Certainly, the asserted completion date of the Works in 1999 is in line with the completion of the development agreement and the issuance of the sub-division by-law in 1994, and the registration of easements on the Bordering Lots in 1997. I have concluded, therefore, that the evidence of the City's witness is sufficiently reliable to support the conclusion that the Works were completed in 1999,

particularly given the absence of any contradictory evidence before me. Given the nature of the Works, I have also concluded that usage began in 1999. Having said that, the applicable prescriptive period for the purposes of considering a prescriptive easement does not simply run from 1999 onward.

[38] The ***Prescription Act***, 1832, 2 & 3 Will. 4, c. 71, provides at s. 4 that the 20-year period at issue on a prescriptive easement:

> 4 … shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question and that no other act or other matter shall be deemed to be an interruption, within the meaning of this statute, unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof, …

[39] In ***Stokes et al. v. Composite Holdings Ltd.***, 2008 MBQB 124, the court in para. 13 quoted from a Manitoba Law Reform Commission Report entitled Prescriptive Easements and Profits-à-Prendre, 1982, as follows:

> [13] …
>
> (iii) … <u>The 20 and 40 year periods referred to in the Act must, according to section 4, arise immediately prior to the bringing of an action.</u> The Act does not state that an easement is created after 20 or 40 years' use; all periods referred to in the statute must precede litigation. …
>
> [emphasis in original]

[40] This approach was affirmed in ***RPM*** (at paras. 37, and 63), ***Niata*** (at para. 47), ***St. Boniface Warehousing Ltd. v. BBD Holdings Ltd.***, 2019 MBQB 181, (at para. 13) and ***Wilson et al v. Kornelsen***, 2023 MBCA 99, (at para. 62).

[41] As such, the putative 20-year prescriptive period in this case is that which immediately precedes January 5, 2022, when the plaintiffs filed the statement of claim.

[42] I will consider next whether the City can establish knowledge and acquiescence during the 20-year period. The court in ***RPM*** (at para. 50) stated that to acquiesce to usage in the context of a prescriptive easement, the owner of servient tenement must have actual or imputed knowledge of the usage by the dominant tenement for the full 20-year period.

[43] I will consider first the question of knowledge of the Works. The evidence reflects that one of the Properties had two owners before the plaintiffs and that the other property had one owner before the plaintiffs. There is no evidence before me from any previous owner of either of the Properties. As such, I have no direct evidence of their knowledge or lack of knowledge of the Works. Having said that, the photographic evidence before me reflects that the Works, including the Pipe, are plainly visible. I am prepared to infer, therefore, that the previous owners of the Properties had knowledge of the Works at all material times.

[44] I have also considered the plaintiffs' knowledge of the Works. In addition to the Works being plainly visible, in 2015, the plaintiffs filed with the City a pre-application[3] regarding the future sub-division of the Properties, wherein they suggested the removal of the Works, and the replacement thereof with catch basins and underground pipes. It is clear, therefore, that the plaintiffs had knowledge of the Works at all material times.

[3] A pre-application is defined in by-law 104/2020 as a draft form of development application, the purpose of which is to obtain comments from the Public Service and identify potential issues or concerns with a proposed development.

[45] The next issue that I must consider is acquiescence. There is no evidence that any of the previous owners of the Properties took issue with the Works in any way, and as such I accept that they acquiesced to the presence of the Works on the Properties. The question, however, is whether the plaintiffs acquiesced to the presence of the Works from and after 2015 when they purchased the Properties.

[46] The plaintiffs submitted that they started complaining about the Works in September 2015, such that any period of acquiescence is well under 20 years.

[47] In ***Monaghan v. Moore***, [1996] O.J. No. 3900 (WL), 31 O.R. (3d) 232, the court considered the issue of a prescriptive easement, and quoted ***Dalton v. Henry Angus & Co. (1881)***, 6 App. Cas. 740 (H.L.) at 773-74, where the court stated:

> ... [I]n my opinion, the whole law of prescription and the whole law which governs the presumption or inference of a grant or covenant rest upon acquiescence. … It becomes then of the highest importance to consider of what ingredients acquiescence consists. In many cases … it will be found to involve … the power of the person affected by the act to prevent such act either by act on his part or by action in the Courts; …
>
> [emphasis added]

[48] In ***Henderson et al. v. Volk et al.***, 1982 CanLII 1744 (ON CA), 35 OR (2d) 379, the court stated, in the context of an issue over a right of way: "… [t]he erection of a fence or a barrier, acquiesced in by the claimant for a period longer than a year will constitute a complete defence to the claim. …" A similar conclusion was reached in ***394 Lakeshore Oakville Holdings Inc. v. Misek***, 2010 ONSC 6007.

[49] These decisions are consistent with the provisions of s. 4 of the ***Prescription Act*** referenced above.

[50] I recognize that this case is somewhat unique in that the Works were installed by a municipality. Accordingly, had the plaintiffs physically interrupted or interfered with the Works, they could have been accused of breaching City Sewer By-Law No. 106/2018[4], which provides at s. 19 that a person must not damage or interfere with the operation of a land drainage system (which, as defined, would appear to include the Works) unless authorized by a designated City employee to do so. Understandably, the plaintiffs took no such steps.

[51] Having said that, at the hearing of these motions, counsel argued about the implications of a series of other events that unfolded from and after 2015 when the plaintiffs purchased the Properties.

[52] The plaintiffs pointed to the 2015 pre-application referenced at paragraph 44 above. Although that pre-application contained a request to remove the Works in connection with a proposed sub-division, it did not contain any reference to the issue of whether the Works were properly installed on the Properties or whether the City had a valid easement. I have concluded, therefore, the request to remove the Works was made only for the purposes of the proposed subdivision.

[53] The plaintiffs filed a second pre-application in 2018 in which they raised as a "note" the fact that the City did not have an easement on the Properties in relation to the Works. The 2018 pre-application also reflected that the Pipe "… extends to the surface without any end treatment and is currently a hazard to pets and small children".

[4] This by-law was enacted in 2018. The City acknowledged that a similar provision was in effect between 2015 and 2018.

[54] The City reviewed but did not support either the 2015 pre-application or the 2018 pre-application, and the plaintiffs' proposed subdivision does not appear to have proceeded further thereafter.

[55] On February 4, 2019, the plaintiffs' counsel wrote a letter to the City regarding the 2018 pre-application wherein he asserted the plaintiffs' rights and raised the issue of an easement. Counsel stated (at p. 2):

> In the course of conducting the necessary studies to address the aforementioned Pre-Applications, the [plaintiffs] became aware that the City was trespassing and inappropriately utilizing [the Properties]. In the absence of any Easement or Agreement in the following ways:
>
> - The [Pipe] (without appropriate end treatment) onto the Southern boundary of [one of the Properties]… and
>
> - The City allowed the neighbouring properties and a portion of the street to drain onto [the Properties]. The current design of Coopman Crescent stormwater sewer system uses a portion of [the Properties] as a depression stormwater storage resevoir [*sic*] during heavy storms.
>
> The City's continuing trespass and nuisance noted above is causing a depreciation of the writer's clients' property value, and, obviously, their enjoyment and use of the property… Therefore, it is the [plaintiffs'] position that the City needs to rectify this trespass immediately.

[56] Thereafter, some time in 2019, the City installed end treatment to the Pipe to address the safety issue regarding pets and small children. Otherwise, the Works appear to have remained unchanged since their original installation.

[57] I appreciate that the plaintiffs raised the trespass issue within the context of the 2018 pre-application and not as a stand-alone complaint. Regardless of the plaintiffs' motives or the broader context of their actions, there is no authority before me to support the argument that the owners of a servient tenement can interrupt a period of

acquiescence by simply putting the owners of the dominant tenement on notice of their opposition to an encroachment, without taking any other steps.

[58] Moreover, the plaintiffs' argument is inconsistent with s. 4 of the ***Prescription Act*** which provides that an act or matter other than an action is deemed to be an interruption of an easement only if it is submitted to or acquiesced in for one year after the party interrupted has notice thereof. In other words, an interruption of acquiescence must occur on a continuous basis, which does not accord with the giving of written notice on a particular date.

[59] In addition, I note that the court in ***Monaghan***, quoting ***Dalton***, referenced "… the power of the person affected by the act to prevent such act either by act on his part or by action in the Courts" (emphasis added). Every "act" in the cases before me relates to physical steps taken to prevent ongoing usage of an encroachment. Since in this case the plaintiffs could not take physical steps to interfere with the Works because of the applicable by-law preventing them from doing so, their only recourse was to file a claim. Nevertheless, for reasons unknown, they did not do so until January 5, 2022, over six years after they purchased the Properties.

[60] I have concluded, therefore, that the plaintiffs did not take steps to prevent the usage of the Works until the claim was filed. In other words, putting the City on notice in February 2019 that the plaintiffs took issue with the Works did not constitute an act of prevention such that acquiescence and usage of the Properties was interrupted. I have determined, therefore, that the usage of the Works was uninterrupted from some

time in 1999 until January 5, 2022, which exceeds the requisite 20-year prescriptive period.

[61] The City has satisfied me, therefore, that there is no genuine issue requiring a trial relative to whether there is a valid prescriptive easement on the Properties, because there is clear and solid evidence that all of the requirements set out in para. 28 of ***RPM*** have been met. As the respondents to the City's motion, the plaintiffs have failed to meet their evidential burden of establishing that the record, the facts, or the law precludes a fair disposition of the prescriptive easement question on summary judgment, or that there is a genuine issue requiring a trial.

## CONCLUSION

[62] The plaintiffs' motion for summary judgment dismissing the City's defence that it has a valid easement on the Properties is dismissed.

[63] The City's motion for summary judgment reflects, on its face, a request for the dismissal of the plaintiffs' claim and the granting of its counterclaim. Given that the parties agreed to argue only the easement related issues at this time, I am granting summary judgment of the relief sought at paragraph 36(a) of the City's counterclaim, as amended on January 4, 2024, namely that a prescriptive easement exists relative to the Works.

[64] If costs cannot be agreed upon, counsel may seek an appearance to make submissions.

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J.