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(Winnipeg Centre)
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COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:	**APPEARANCES:**
DAVID WILSON, NICHOLE WILSON, FREDERICK BRANSCOMBE, LILLIAN BRANSCOMBE, PIERRE DEBREUIL AND DESIREE FOWLER applicants,	Mathieu R. Lafreniere for the Applicants
- and -	
MATTHEW KORNELSEN AND AIMEE KORNELSEN, respondents.	Jesse A. Gietz for the Respondents
	Judgment delivered: January 10, 2022

TOEWS J.

INTRODUCTION

[1] This matter involves two applications for a declaration in respect of whether prescriptive rights affect certain property in the Town of Stonewall, Manitoba. The parties in both applications are the same, with the respondents in Queen's Bench application CI 21-01-32799 named as the applicants in Queen's Bench application Cl 21-01-30712, while the applicants in Queen's Bench application CI 21-01-32799 are the respondents in

Queen's Bench application Cl 21-01-30712. Both applications deal with the same matters and the arguments, in respect of each party, were advanced in the course of one hearing. There is no distinction between the arguments raised by each party in either action. As a result of the similarity between the two applications, Queen's Bench Registry closed file CI 21-01-30712 and merged the documents contained within it into file CI 21-01-32799.

[2] In the course of these reasons, the applicants will be collectively referred to as the "applicants" where it is not necessary to distinguish between them, or "the Wilsons", "the Branscombes" and "the Debreuils" when it is necessary to distinguish between the three couples. From time to time, the arguments advanced, in respect of those three sets of parties, require separate consideration of each of their claims. The respondents will be referred to as the "respondents", or "the Kornelsens", as both individuals in that set advance identical positions.

[3] In addition to the briefs filed by the applicants and the respondents, the parties filed affidavits and were cross examined on those affidavits. The Kornelsens filed an affidavit from Aimee Kornelsen, sworn March 31, 2021 (the Kornelsen affidavit). Ms. Kornelsen was cross-examined on her affidavit. The transcript of that cross-examination is dated July 19, 2021.

[4] The applicants filed an affidavit from Nicole Wilson, affirmed July 9, 2021 (the Wilson affidavit). Ms. Wilson was cross-examined on that affidavit, as set out in the transcript dated July 19, 2021. Exhibit 1 to the cross-examination of Ms. Wilson was filed with the court on September 2, 2021 as Queen's Bench Document No. 9. The applicants

also filed an affidavit from Cheryl Wilson-Janz, affirmed November 29, 2021 (the Wilson-Janz affidavit).

THE FACTS

[5] Each of the applicants, the Wilsons, the Branscombes, and the Debreuils, as well as the respondents, the Kornelsens, hold title to property that is the subject of this dispute. The Wilsons hold title to two separate pieces of property under consideration here, with both Wilsons holding title to one of the titles and Ms. Wilson holding title to another piece of property in her name alone.

[6] The property in question is comprised of five narrow strips of land held in separate titles. They run from the west where they each individually and directly adjoin 4th Street East in the Town of Stonewall, Manitoba. The Kornelsens' property is perhaps the widest, at approximately 134 feet wide and 1,133 feet long. The other properties are roughly similar in width and with the exception of the two titles held by the Wilsons, also have a similar length. The two Wilson properties are not as long.

[7] The dimensions and location of each of the five properties are set out in the map appended to the Kornelsen affidavit as Exhibit F. Beginning to the north, the property hereinafter referred to as Title A1, is owned by Ms. Wilson. The property referred to as Title A1 is used to store various construction materials and machinery. Immediately to the south of Title A1 is Title A2, which is owned by the Wilsons jointly, includes the residence in which they live.

[8] I would note for the purposes of clarification, the applicants refer to the property owned by Ms. Wilson as A2 and the property (which contains their residence) owned

jointly by the Wilsons, as A1. I have designated the property owned by Ms. Wilson, which is the strip furthest to the north, as Title A1, while the next property to the south of Ms. Wilson's property, which is owned by both Wilsons, is Title A2. In my opinion, and based on the representations of the applicants, it makes no difference to the result in this application whether it is both Wilsons or only one Wilson who own the property, since the prescriptive rights they are attempting to establish are in respect of each piece of property and is not based on the personal ownership of the property.

[9] The property ownership south of Title A2, which contain the residences of the parties in this action, is hereinafter referred to as follows:

- Title B: the Debreuils
- Title C: the Kornelsens
- Title D: the Branscombes

[10] Exhibit F in the Kornelsen affidavit also sets out two legal easements registered on Titles B, C and D. As can be seen from that exhibit, the first easement begins at 4th Street East in the west, continues east along Title D where it subsequently branches to the north and then continues to Title A2 through Titles C and B. Along the east side of that easement and within Title C, the Kornelsen property, a branch of that easement continues across Title C to the northeast where it connects to Title B, the Debreuil property. A second registered easement, designated by the "cross-hatched" feature on Exhibit F, runs north, parallel to the first registered easement across Title C and then runs through Title B where it branches to the northeast and meets with Title A1, north of Title A2. These two registered easements are in place in order to create driveways,

offering access first through Title D and then the other properties as required for Titles C, B, A2 and A1.

[11] Although not set out in Exhibit F, the driveway access extended to Titles A1 and A2, by virtue of these two easements, continues in the form of a driveway through Title A2 where it ends at the Wilson residence and through Title A1, curling around the east of Title A2 and then continuing west along the northern boundary of Title A2 to almost, but not connecting with, 4th Street East in the west. The driveways on both Title A1 and A2 do not provide any access to anyone but the owners of that property and their guests. The evidence is that the two legal easements, along with the personal driveways on Titles A1 and A2, provide access to every aspect of those two titles with one exception. It is that exception that forms an important part of the dispute between the applicants and the respondents.

[12] The prescriptive right of access being advanced by the applicants in this matter is roughly, but adequately, set out for the purposes of this application in the form of the purple line set out in Exhibit D of the Kornelsen affidavit. The purple line intersects the boundaries of the southern and northern boundaries of Title C, the Kornelsen property. The blue lines set out the perimeter of Title C and the intersecting purple line within the blue lines, sets out the disputed right of access, or pathway, across Title C.

[13] I would note at this point that the red lines in Exhibit D, designating the registered easements, extend beyond the actual extent of the registered easements and into Titles A1 and A2. For clarification, as noted earlier, those registered easements extend

to the perimeter of Titles A1 and A2 only and then continue in the form of private driveways or roadways and not as registered easements inside those two titles.

[14] All of the property included in the titles referred to in the course of these facts were originally held in one title in the name of the applicant Mr. Dave Wilson's father and mother, but was subdivided by the elder Wilsons over the years. Mr. Dave Wilson has resided in one or another location within the now subdivided property for most of his life. In approximately the center of the subdivided titles is an old quarry, and further to the west, and closer to 4th Street East, is a marsh. Although the quarry and marsh extend beyond the boundaries of Title C, this quarry and marsh on Title C is roughly everything west of, or "below", the red line set out in Exhibit D to the Kornelsen affidavit.

[15] It is the Kornelsens' evidence that they purchased Title C in February 2020. A major reason for purchasing the property was the attraction of the western half of the property, which includes the old quarry and the marsh. They saw this as a place to enjoy various nature pursuits, including biology and birdwatching, for themselves and their young children. Since there were no easements registered in that part of the property, they state there was no reason to believe there were any easements other than the driveway easements which would affect any of their rights in the quarry or the marsh. It is their evidence that the unannounced presence of heavy equipment and trucks crossing through the quarry area, across their property, was a significant cause for concern in view of the fact that their children would be using the area to play in. They state their real estate agent was unaware of any easement right over their property in

that area and told them the Wilsons simply used the route as a shortcut to their own property.

[16] After they moved into their residence on Title C, they noticed an increased amount of heavy machinery and trucks using not only the pathway through their property, but also other parts of their property well off the pathway now being sought as a prescriptive right through their property by the applicants. The Kornelsens' evidence is that the route through the quarry is approximately five seconds shorter by vehicle than along the driveway recognized by the registered easements. A request by the Kornelsens to the Wilsons, in respect of stopping the use of this pathway, was rejected by the Wilsons and they continued to use the pathway.

[17] The evidence also indicates that the Branscombes, who own Title D on the southern edge of the entire subdivision, have no vested interest in what happens in the quarry, or on the pathway through the quarry, as they have complete ability to access every part of their own property and 4th Street East. The evidence also indicates that the Debreuils have access to the quarry and the western part of their property, Title B, from their residence in the eastern part of Title B, but to do so would result in damage to landscaping if accessed by vehicle. There does not appear to be any need to have access to the quarry through the pathway through their property for reasons of maintenance, including snow clearance.

[18] It is the position of the Kornelsens that during the time the property was owned by the senior Wilsons, there might have been the occasional vehicle using the pathway through the property. This evidence is based on the recollection of previous owners of

the property, when the Kornelsens approached them to provide information regarding the usage of this pathway and the quarry. However, a subsequent letter from the same owners in February 2021, advises that one of the prior owners, Dave Harris, did remember vehicles crossing that area, including sewage trucks and others.

[19] The Kornelsens dispute the Wilsons' position that the pathway is required for the use of a septic truck to service the Wilsons' residence. Their evidence is that the driver of the septic truck advised there was no impediment to using either the registered easement or the pathway in order to carry out his business. He stated he would talk to the Wilsons about using the registered easement, but since that conversation he has not returned any calls or messages.

[20] It is the evidence of the Wilsons that the pathway has been in continuous use for over 30 years, allowing access from the southern part of the property through the Kornelsens' property, as well as Titles B and D, in order to access the northern portion of the property, which now includes Titles A1 and A2. The Wilson affidavit avers that all prior owners of Title C agree that the pathway was used continuously and without interruption throughout their ownership. The affidavit states that the usage was open and peaceful throughout their ownership and that no one ever sought permission from them to use the pathway.

[21] The affidavit states that according to the prior owners of Title B, the same conditions governed the use of Title B. Similarly, the Wilson affidavit states that the Wilsons have used the pathway continuously throughout their ownership, for the

purposes of all types of vehicular and pedestrian traffic, without interruption or without seeking consent from the other landowners.

THE LAW

[22] The applicable law governing the establishment of a prescriptive easement in Manitoba is not in dispute. The threshold for establishing a prescriptive easement is high and the courts are hesitant to recognize an easement by prescription because doing so would permit a landowner's neighbourly accommodation of sufferance to ripen into a legal burden on his or her lands, as stated in ***394 Lakeshore Oakville Holdings Inc. v. Misek***, 2010 ONSC 6007, 2010 Carswell Ont 8323, at para 96.

[23] The party asserting a dominant tenement and easement over the subservient tenant must prove the following essential elements, as written in ***Klimack et al v. Kroeker et al,*** 2020 MBCA 98, at para 16:

1. There must be a dominant tenement and servient tenement;
2. An easement must "accommodate" the dominant tenement;
3. The 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.

[24] In respect of the second essential element, the case law has established that it must be demonstrated that the easement must be reasonably necessary for the better enjoyment of the dominant tenement. It is a flexible and fact specific analysis. In ***RPM Farms Ltd. et al. v. Laurence Jay Rosenberg et al.***, 2019 MBQB 140

(CanLII), the court held at paragraphs 54 to 58:

> [54] …. The criteria that an easement must accommodate a dominant tenement has been judicially interpreted to mean that it must be reasonably necessary to the better enjoyment of the dominant tenement. In ***Depew v. Wilkes***, 2002 CanLII 41823 (ON CA), 60 O.R. (3d) 499 (Ont. C.A.), at para. 24:
>
> > 24 In the present case, I agree with the respondents that the appellants had to establish that parking was, in the words of *Ellenborough Park*, "reasonably necessary for the better enjoyment" of the dominant tenements. The reasonable necessity requirement is fact specific and must be applied in a flexible manner. As was said in *Anger and Honsberger, supra* at p. 927:
> >
> > What is reasonably necessary must be a flexible criterion and have reference to current social conditions and the prevailing patterns and trends of conduct. What today might not be regarded to be a reasonable amenity for the better enjoyment of a property might be regarded as a reasonable amenity tomorrow.
>
> [55] Nonetheless, the court went on in ***Depew*** to say that alternate options which could be employed by the owner of the dominant tenement were irrelevant. At paras. 21 and 22, the court cited the case of Caldwell v. Elia (2000), 2000 CanLII 5672 (ON CA), 129 O.A.C. 379 and said:
>
> > 21 In *Caldwell v. Elia* (2000), 2000 CanLII 5672 (ON CA), 129 O.A.C. 379 (Ont. C.A.), this court considered the conditions for easements acquired by prescription and easements of necessity. The latter is described in *Gale on Easements*, 16th ed. (1997) at p. 148:
> >
> > A way of necessity, strictly so called, arises where, on a disposition by a common owner of part of his land, either the part disposed of or the part retained is left without any legally enforceable means of access. In such a case the part so left inaccessible is entitled, as of necessity, to a way over the other part.
> >
> > 22 In *Caldwell*, the original owner had created by deed a right-of-way over one lot to provide access to a land-locked lot. However, the owners had never used that right-of-way. Instead, for many years they had used a gravel road to get access to and from the properties. At some point, the respondents sought to block the gravel road. The trial judge held that the gravel road did not accommodate the appellant's property because it was not reasonably necessary; the appellant could simply use the right-of-way. This court allowed the appeal and held that the gravel road did accommodate the appellant's property and that the appellant had acquired an easement by prescription. Austin J.A., speaking for the court at para. 14, distinguished between an easement acquired by prescription and easements of necessity:

> What [the appellant] claims is *not* a way of necessity, but rather a prescriptive right accruing by virtue of use over a period of at least twenty years. A prescriptive claim need have no element of "necessity". Accordingly, the existence of the 15' right-of-way created expressly by deed is irrelevant to [the appellant's] prescriptive claim. [Emphasis on "not" in original; other emphasis added.]
>
> [underlining added]

[56] However, Rosenberg JA went on to say at para. 23:

> 23 I do not understand the court in Caldwell to have held that reasonable necessity as understood in Ellenborough Park is not a requirement for a prescriptive easement. To the contrary, both before and after the passage quoted above, the court accepted the Ellenborough Park test.

[57] And again at para. 26:

> …The parking is connected with the normal enjoyment of the property. As the Caldwell case demonstrates, the fact that an alternative exists does not preclude a finding that the easement is reasonably necessary for the better enjoyment of that tenement. …

[58] I read the ***Depew*** decision simply to say that although the existence of an option will not automatically bar the claim for a prescriptive easement, some consideration of the words "reasonably necessary" is still necessary.

[25] In addition to the four essential elements, ***RPM Farms Ltd.***, at para 26 – 29 and 31, holds that the party claiming the prescriptive right over the land of another must demonstrate with clear evidence the following criteria where the period of usage is over 20 years:

> [26] There are a number of ways that an easement can be obtained by the person claiming entitlement to it. Obtaining an easement by prescription is only one way by which an easement may be created. There are certain criteria which must exist before a claim to an easement will be accepted as a prescriptive easement.
>
> [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] If the usage has occurred continuously and uninterrupted in an open and peaceful way for 40 years, the 20-year criteria continue to apply except that proof of oral permission will no longer defeat the claim to the easement.

….

[31] It is therefore necessary to consider whether the various claims by the defendants to easements satisfy all of the criteria set out. If any one criteria is missing, the claim to an easement will fail.

POSITION OF THE RESPONDENTS

[26] Although it is the applicants who must demonstrate that a prescriptive right has been established in respect of the respondents' property in favor of their respective properties, I will deal first with the arguments of the respondents, which challenge that assertion to a prescriptive right by any of the applicants. The failure of the applicants to demonstrate any one of the essential elements required for the establishment of a prescriptive right, results in the failure of the claim by the applicants.

[27] It should be noted that any prescriptive right attaches to the land and is not dependent upon ownership. The applicants made that position clear when the Wilsons acknowledged their access to the land, set out in Titles A1 and A2, even without asserting

access to those properties by way of the pathway crossing Title C. However, as the Wilsons point out in argument, the fact that Ms. Wilson owns Title A1 and both Wilsons own Title A2 jointly, is irrelevant to whether there are prescriptive rights allowing access to Title A2 or Title A1 through Title C. The existence of prescriptive rights in respect of Title A1 as the dominant tenement and Title A2 as the dominant tenement, both in respect of Title C as the subservient tenement, must be established separately in respect of each dominant tenement, regardless of the ownership of those properties.

[28] In this respect, I accept the position of the applicants, set out at paragraph 61 of their brief that:

> 61. In order to have a valid easement, the dominant tenement itself must benefit from the easement, as opposed to simply the owner for the time being of the dominant tenements. In this sense, the easement rights must "accommodate" the land itself.

[29] The first argument advanced by the respondents is that the applicants have not been using the pathway, which is claimed as the prescriptive right for access, for at least 20 years. The respondents assert that the evidence on which the applicants rely are a number of unsworn letters from some of the previous owners over the material time. The respondents argue the testimony of Ms. Wilson, which states the Wilsons were making continuous, open and peaceful use of the pathway throughout their ownership, should be given little to no weight. The respondents specifically point to her testimony regarding the ability of trucks, including the septic truck to access the septic tank, servicing the Wilsons' residence by using the driveway covered by the registered easement. They argue her testimony amounts to a willingness to say whatever she thought it might take to ensure that a prescriptive easement would be established.

[30] The respondents also state that the other evidence relied upon by the applicants, consisting mainly of letters from former property owners, is not only inconclusive and inconsistent, amounts to hearsay and as such, should not be relied upon by the court.

[31] The second argument advanced by the respondents is that the use of the quarry on Title C was by implied neighbourly permission and not "as-of-right". The respondents state that the widespread and common usage of the entire quarry, set out in the letters relied upon by the applicants, is too ill-defined and imprecise to be the subject matter of a grant. The respondents state the use of the quarry by all residents cannot rise to the level of an irrevocable easement.

[32] The third argument raised by the respondents is that the applicants' use of the pathway through Title C is not reasonably necessary for the better enjoyment of the property of the applicants. The respondents argue that an application of the facts in this matter demonstrate that the pathway does not establish that it is reasonably necessary since:

- the Wilsons have a clearly marked registered easement across the respondents' property that leads directly to their house;
- the Wilsons have a further vehicular route, by way of a legal easement across their property, going around the east side and behind their house, which they can and do use by all manner of vehicles in the service of both of their properties;

- the location of the respondents' property is in no respect adjacent to or close to any part of the Wilson's property that they would need in order to drive across it to get to any portion of their property; and
- the Wilsons are not delayed or inconvenienced in any material respect by using the driveway established by the registered easement, as opposed to driving through the quarry.

THE POSITION OF THE APPLICANTS

[33] The applicants take the position that the pathway, which they state is the substance of the prescriptive right being advanced, is not the same as "necessity" for the applicants to access their parcels. In this regard the applicants rely on ***Vivekanandan v. Terzian***, 2020 ONCA 110, at para 14.

[34] Neither does the existence of an alternate route to access the dominant tenement preclude the establishment of a prescriptive right. Rather, the applicants argue the correct understanding of the meaning of "reasonably necessary" is that the benefits enjoyed under the easement must have the necessary connection with the land of the dominant tenement itself, rather than simply benefiting its owner for the time being. In support of this principle, the applicants rely on the decision of the court in ***Polo Woods Foundation v. Shelton-Agar and Anor***, [2009] EWHC 1361 (Ch), at para 39.

[35] The applicants argue that in the present case, the requirement for the pathway to be "reasonably necessary" in the "accommodation" simply requires that the pathway provides a benefit to the dominant tenements as opposed to simply benefiting the

respective owners for the time being of the dominant tenements (see para 83 of the applicants' brief).

[36] The applicants also argue that the pathway is capable of forming the subject matter of a grant. The applicants are not claiming an easement to use the entire quarry (see para 92 of the applicants' brief).

[37] Finally, the applicants argue the evidence establishes that the preponderance of the evidence indicates the long-standing use of the pathway occurred through the acquiescence of the subservient tenements without any written permission, or even any verbal conversation, between the owners of the various parcels.

ANALYSIS AND DECISION

[38] My consideration of the evidence and application of the law leads me to the following conclusions:

A. There are no prescriptive rights established with respect to Title D (the Branscombe property) as the dominant tenement and Title C (the Kornelsen property) as the subservient tenement. There is a full right of access, by the owners of the Branscombe property to the Title D lands, by virtue of the driveway established by the registered easement. There is no need to utilize the Kornelsen property by way of "accommodation", nor is it established that the owners of Title D should have access even in the sense of being "reasonably necessary".

B. Subject to the restrictions that I will set out later in the course of this decision, I am satisfied that there is evidence of continuous usage of the pathway across

Title C, now the Kornelsen property, for a period of more than 20 years, by the owners of Titles A1, A2, and B. However, my final conclusions as to the scope of the prescriptive rights with each of those titles as the dominant tenement differ, as I will explain further on in these reasons.

I note that most of the evidence is in the nature of hearsay, but this is not surprising given the fact that ownership changes and hearsay evidence is often the only way in which this can be established. In ***Dobrowolski v. Dobrowolski***, 2020 MBCA 105 (CanLII), the court considered the admissibility of hearsay evidence by the trial judge on the basis of its necessity, its threshold reliability and finally, its ultimate reliability. In ***Dobrowolski***, necessity was not contested, given that certain participants involved in conversations relevant to the issues in dispute were deceased, and therefore the court focused on the issue of reliability in determining the admissibility of the hearsay evidence. At paragraph 34 of ***Dobrowolski***, Burnett, JA stated on behalf of the majority of the court:

> [34] Also instructive are this Court's comments in *Fawley* (at para 95):
>
> > However, the context of a given case in terms of the issues and the impact that the hearsay evidence may have to resolving them is always a consideration in the application of the principled approach to the hearsay rule (see *R v Couture*, 2007 SCC 28 at para 76). While that does not mean that hearsay evidence is necessarily more readily admissible in civil cases than in criminal cases, civil courts must be mindful that there are dynamics in a civil case that are different than in a criminal case, such as a lesser burden of proof, the importance of access to civil justice and the principle of proportionality. As Adams J noted in *Clark v Horizon Holidays Ltd*, 1993 CarswellOnt 929 (Gen Div), the principled exception to the hearsay rule signals "a willingness in the judiciary to design procedures and evidentiary rules to enhance the accessibility and, therefore, the relevance of our

> courts" (at para 37). See also *Dodge v Kaneff Homes Inc*, 2001 CarswellOnt 1099 at paras 23-24 (Sup Ct J).

At paragraph 35 of ***Dobrowolski***, Burnett, JA further held the following in respect of the consideration of the reliability of the evidence sought to be admitted:

> [35] The trial judge clearly made her own independent assessment of threshold and ultimate reliability. She took a functional approach to threshold reliability which was both efficient and proportional, she did not confuse threshold reliability with ultimate reliability, she considered all of the corroborative evidence in the context of the case, and she was satisfied that there were sufficient independent circumstantial or evidentiary guarantees that the hearsay was inherently reliable. She attached particular importance to "the significant amount of documentation that recognized a business arrangement between Dobrowolski and Andrew" (at para 86), and she said, "It is impossible to negate the importance of that documentation or to dismiss it" (*ibid*).

I am satisfied in this case, 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, the applicants have established the necessity of admitting the hearsay evidence.

I also find that the evidence sought to be admitted by the applicants, including the letters from prior occupants of the land, meet the test of threshold reliability. Furthermore, in the context of considering the ultimate reliability of the evidence relied upon by the applicants, I am 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.

C. In respect of the "as-of-right" usage of the pathway over this period of time, for a period of more than 20 years, I agree with counsel that it is difficult to distinguish a neighbourly accommodation of the use of the pathway from the usage of that pathway as a matter of right. However, I am satisfied that while 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, I find that the applicants, who presently own Title A1, A2 and B, have established through the evidence, with some exceptions to be set out herein, the use of the pathway as-of-right for the purposes of accommodating the use and access to their own respective properties.

D. In my opinion, the owners of Title B have met the requirements to establish a prescriptive right granting them access to the pathway crossing the Kornelsen property (Title C) for the purposes of accessing the westerly portion of their land only. There is no prescriptive right for the owners of Title B to use this access as a thoroughfare to Title A2 or Title A1. In my opinion, and I so declare, it is not reasonably necessary for the owners of Title B to have access to Title A2 or A1 by way of prescriptive right across Title C. Should the owners of Title B obtain permission, or a legal right to access the property north of Title B beyond the western portion of that property, which includes the quarry, by way of agreement with the owners of Title A1 or A2, the prescriptive right

may not be used to establish a right of way from Titles A1 or A2 across Title B and consequently Title C. The prescriptive right access across Title C to the quarry portion of Title B is reasonably necessary only insofar as is required in order to access the Title B quarry property from the south and not as a thoroughfare through that property beyond the northern boundary of that portion of the Title B property.

E. Similarly, I find that the applicant owners of Title A2 have met the requirements to establish a prescriptive right granting them access to the pathway crossing the Kornelsen property (Title C) and Title B for the purposes of accessing Title A2 land only. There is no prescriptive right for the owners of Title A2 to use this access as a thoroughfare to Title A1. In my opinion, and I so declare, it is not reasonably necessary for the owners of Title A2 to have access to the pathway running through the quarry portion of Title A2 by way of prescriptive right for the purposes of accessing property Title A1. Should the owners of Title A2 obtain permission or a legal right to access Title A1 along the pathway by way of agreement or otherwise with the owners of Title A1, the prescriptive right may not be used to establish a right of way from Title A1 to Title A2, Title B and consequently Title C. The prescriptive right access across Title C and Title B to the portion of the pathway in Title A2, in the quarry portion of Title A2, is reasonably necessary only insofar as is required in order to access the Title A2 quarry property from the south and not as a thoroughfare through that property to beyond the other

boundaries of the quarry portion of Title A2 property, or as a thoroughfare from Title A1.

F. I find that it is not reasonably necessary to use the pathway crossing the property to the south of Title A1, namely Title A2, Title B, Title C or Title D for the better enjoyment of Title A1. I recognize that the existence of an alternative legal access to Title A1, by virtue of the driveway created by the registered easement, does not preclude the creation of a prescriptive right along the pathway crossing Titles D, C, B and A2. However, in this case, after consideration of all of the factors, in my opinion a prescriptive right along the pathway with Title A1 as the dominant tenement, and Title C as the subservient tenement, does not exist since:

- The owners of Title A1 have a clearly marked, legally registered driveway (also crossing the Kornelsens' property) capable of accommodating all of the traffic utilizing Title A1, including the septic truck servicing the Wilson residence on Title A2;
- The owners of Title A1 have fully legal vehicular access to that property, which goes around the house on Title A2; and
- The owners of Title A1 are not delayed or inconvenienced in any material respect, if at all, by using the legally registered driveway, as opposed to driving through the pathway through the quarry.

While again repeating that the existence of an alternative legal access to Title A1 does not preclude the creation of a prescriptive right, it is certainly a

consideration in establishing whether or not a prescriptive right has been established. Although stated in a different factual context, the observations of Dewar, J. in ***RPM Farms Ltd.,*** at para 58 – 59, in this regard are nevertheless instructive:

> [58] I read the ***Depew*** decision simply to say that although the existence of an option will not automatically bar the claim for a prescriptive easement, some consideration of the words "reasonably necessary" is still necessary.
>
> [59] I do not consider that a decision by an owner to plant a treeline on his neighbours' property when there is nothing preventing that owner from planting the treeline on his own property makes a subsequent claim reasonably necessary for the enjoyment of that owner's property. To suggest otherwise would be to encourage a unilateral and unnecessary expansion of the limits of that owner's property. If there is a written document showing that both the owner of the dominant tenement and the owner of the servient tenement agreed on such an easement, then the notion of "reasonably necessary" is understandable, but absent such express agreement, I see no reason to encourage rewarding an aggressive landowner with an implied grant. ***How can the use of a servient tenement be reasonably necessary if the claimant could accomplish the same objective by using his own property?***

(emphasis added)

[39] In the case at bar, the existence of such a legal alternative, in this case a legally registered driveway, is one of the factors I have considered in coming to the conclusion that the owners of Title A1 have not established that a prescriptive right, along the pathway that crosses Title C, is "reasonably necessary".

CONCLUSION

[40] My conclusions in respect of the existence of prescriptive rights in this matter and in particular, insofar as what prescriptive rights may exist in relation to the pathway

crossing the Kornelsen property, or Title C, are set out above in subparagraphs A through F inclusive.

[41] In summary, I wish to make clear that the prescriptive rights, which I have determined exist in this case, do not permit the usage of the pathway that crosses Title C for the purposes of a thoroughfare from the legal easement registered against Title D to Title A1. The prescriptive right which I have found exists, allows for the use of the pathway by the dominant tenements from the registered easement on Title D by the owners of Titles B and A2, so as to allow the owners of Titles B and A2 access to the property described in those titles only, but not through their respective property so as to create a right of access by the owners of those properties into or across the property to the next property north of each title. Accordingly, there is no continuous prescriptive right along the pathway from the legal easement registered on Title D extending across Titles C, B and A2 in order to access Title A1, the most northerly piece of property under consideration.

[42] Similarly, to the extent that the owners of Title C require access to the westerly portion of their property from the registered easement on Title D, they have a similar right of access across any portion of Title D which is a part of the pathway north of the registered easement in order to access Title C, but not across the northern boundary of Title C into Title B.

[43] In view of the mixed results in this case, I make no order as to costs.

_____ J.