COURT OF APPEAL FOR ONTARIO

CITATION: Joannides v. Delaney, 2024 ONCA 540
DATE: 20240708
DOCKET: COA-23-CV-0616

Pepall, George and Dawe JJ.A.

BETWEEN

Alexander Joannides

Applicant (Appellant)

and

Dean Warwick Delaney and Luce Catherine Delaney

Respondents

AND BETWEEN

Dean Warwick Delaney and Luce Catherine Delaney

Applicants by Counter-Application (Respondents)

and

Alexander Joannides and Beatriz Arias-Joannides

Respondents by Counter-Application (Appellants)

Chris Trivisonno and Sean Grassie, for the appellants

Jonathan Chen and Nikolas De Stefano, for the respondents

Heard: February 26, 2024

On appeal from the judgment of Justice John M. Johnston of the Superior Court of Justice, dated May 11, 2023.

George J.A.:

OVERVIEW

[1] This appeal involves the interpretation of two easements. The first easement is a 15-foot wide right-of-way (the "Right-of-Way") that crosses the servient tenement lands, owned by the Joannides (the "appellants"), and connects the dominant tenement lands, owned by Delaneys (the "respondents"), to a municipal roadway. The second easement (the "Right-of-Access") provides the respondents with access to a well located on the appellants' property.

[2] The appellants, applicants in the court below, brought an application in the Superior Court of Justice for, *inter alia*: 1) a declaration that the Right-of-Way does not include any purpose other than ingress and egress, and specifically does not permit the "turnaround of vehicular activity upon the Right-of-Way"; and 2) a declaration that the Right-of-Access is null, void and expunged.

[3] The respondents, applicants by counter-application, sought, *inter alia*: 1) a declaration that the respondents enjoy an indefeasible right to the Right-of-Way; 2) a declaration that one of the instruments setting out the details of the Right-of-Way be amended *nunc pro tunc* to correct an apparent drafting error; 3) an interim and permanent injunction that the appellants keep the Right-of-Way free from all obstructions and vehicles; and 4) general and punitive damages in the amount of $100,000.

[4] The central dispute between the parties is over the respondents' use of what was referred to in the evidence as the turnaround, located on the Right-of-Way.

[5] While the nature of the Right-of-Way will be discussed in greater detail below, it might be helpful to first describe the easement and the relevant instruments. The earliest available description of the Right-of-Way is found in indentures E13017 and E13020, registered in June 1961 (the "1961 Grant"). These indentures describe the Right-of-Way as a 15-foot strip of land which crosses the appellants' property and connects to the nearby municipal roadway. Per the 1961 Grant, the easement ran with the land at the time the relevant agreements were executed: *Austerberry v. Corp. of Oldham* (1885), 29 Ch. D. 750 (Eng. C.A.); *Mihaylov v. 1165996 Ontario Inc.*, 2017 ONCA 116, 134 O.R. (3d) 401, at para. 50.

[6] The several other relevant instruments include:

1) Instrument 14491, an agreement between the parties' predecessors to give effect to certain covenants and conveyances, including allowing the appellants' predecessors to park their vehicles along and upon the 15-foot Right-of-Way (the "1964 Agreement");
2) Instrument 124135, an agreement between the parties' predecessors in January 1980, in which, among other objects, the appellants' predecessors agreed "not to obstruct [the respondents' predecessor] in his access to and

egress from the [respondents' property] by parking motor vehicles or otherwise obstructing those lands" (the "January 1980 Agreement"); and,

3) Instrument 119328, which was registered on September 11, 1980, which affirmed the existing Right-of-Way (the "September 1980 Indenture").

[7] The properties at issue overlook a cliff on the St. Lawrence River, with a steep hill up to the main roadway. The respondents argued that the turnaround is essential to access and exit their property. They claimed that if one could not use it to turn their vehicle around, they would have to back their vehicle up the hill to the municipal roadway.

[8] The appellants argued that the Right-of-Way is, and always has been, for the purpose of ingress and egress only, allowing the respondents, their predecessors, and anyone else who might need to access the respondents' property, to travel across the appellants' property. According to the appellants, the easement – either as agreed and acted upon following the 1961 Grant, or as articulated in more recent affirmations of the Right-of-Way including in the September 1980 Indenture – neither expressly, nor by necessary implication, included this now disputed turnaround. The appellants argued that there is no right created by prescription, which is to say the respondents have not had longstanding, uninterrupted, open and peaceful use of the turnaround without objection. Rather, they say permission to use the turnaround was only a neighbourly gesture of good will.

[9] With respect to the Right-of-Access, the appellants argued that it was created to permit the use of a well to draw potable water, but that this is no longer necessary because: 1) the well is contaminated, and 2) the respondents' land is now connected to the municipal water line. The respondents argued that the conditions for expunging the right did not exist.

FACTS

[10] The parties' properties are located between Brockmere Cliff Drive and the shore of the St. Lawrence River in Elizabethtown Township, just outside Brockville. The appellants' properties lie to the east of the respondents' property.

[11] On July 5, 1996, in a deed registered as LR270212, Ms. Carol Smith (formerly Delaney) conveyed to the respondents the property described by PIN 44196-0170. The respondents' lands include Parts 14, 15, 16, 33, and 34 on Reference Plan 28R-3352 (the "Reference Plan"), which is appended to these reasons as Appendix A. As the application judge found, this deed included both the Right-of-Way and Right-of-Access easements, subject to the provisions of a 1980 Agreement made between the then-owners of the parties' properties.

[12] The appellants purchased their property, described by PINs 44196 and 44196-0172, from the Hudsons in 2020.

[13] As mentioned, the 1961 Grant (indentures E13017 and E13020) offered the earliest available description of the Right-of-Way. These documents transferred

the lands, including the disputed easement lands, to the Hudsons. The 1961 Grant described the appellants' property as being: "SUBJECT TO a right-of-way for all those legally entitled thereto over, along and upon a strip of land fifteen feet (15') in perpendicular width crossing the herein before described [appellants' property] from the forty foot right-of-way [the municipal roadway] to the St. Lawrence River."

[14] On September 10, 1964, the appellants' predecessors, the Hudsons, entered into an agreement with John S. Warwick, a previous owner of the respondents' property, to give effect to certain covenants and conveyances. This is the 1964 Agreement referenced above, which: 1) conveyed to the Hudsons what is now known as Part 36 on the Reference Plan; 2) allowed the Hudsons and their guests to park their vehicles along and upon the 15-foot Right-of-Way lying to the east of the Warwick property; and 3) included a covenant by Warwick to refrain from parking any vehicles on the Right-of-Way leading to, or adjacent to, the Warwick property in such a way as to interfere with the use of the Right-of-Way by the Hudsons. The appellants suggest that the second point above, the parking allowance along and upon the Right-of-Way lying to the east of the respondents' property, created an expressly reserved "Parking Area" on Part 30.

[15] The 1964 Agreement was affirmed by Barry Delaney, the respondents' immediate predecessor, in the January 1980 Agreement. Pursuant to this agreement, the Hudsons "undert[ook] and agree[d] not to obstruct Mr. Delaney in

his access to and egress from the [respondents' property] by parking motor vehicles or otherwise obstructing those lands".

[16] An updated Plan of Survey of the properties, the Reference Plan, was prepared in February 1980. The descriptions of the disputed lands, in both the reasons below and submissions before this court, were largely made with respect to this plan.

[17] The September 1980 Indenture particularized the easements as being: 1) a Right-of-Way for the purposes of ingress and egress over, along and upon Parts 30, 31, 32, 26, 27, 24, 19 and 18; and 2) the Right-of-Access to the well located on Part 30.

[18] As shown on the Reference Plan, the listed Parts form the driveway that goes up the hill to the municipal roadway. Part 30, which is the furthest part to the west, is roughly hockey-stick shaped, with the "blade" of the stick extending south from the driveway towards the river. The dispute between the parties is over whether the respondents have the right to turn around on this section of Part 30, and use the well near the south of this section.

[19] The definition of the Right-of-Way in the September 1980 Indenture did not include Part 35, which is an irregularly-shaped piece of land that connects the west side of Part 30 to the eastern boundary of the Delaneys' property. Part 35 had been included in the January 1980 Agreement but was then omitted from the

September 1980 Indenture. The application judge described this as "an obvious error", noting that "Part 35 was and is necessary to permit access to and from the Delaney Lands", since without Part 35 the Right-of-Way would end just short of the Delaneys' property. The appellants acknowledged that the January 1980 Agreement authorized the respondents to cross Part 35 to get to and from their lands, but argued that it was unnecessary to rectify the September 1980 Indenture to include it. The application judge disagreed, and ordered rectification. This aspect of his decision has not been appealed.

REASONS BELOW

[20] The application judge found that the disputed turnaround area is included in the Right-of-Way, writing this, at paras. 46-47 of his reasons:

> The plain language of the grant of easement is clear that it includes Part 30 for the purpose of ingress and egress. Next, the grant makes reference to Plan 28R-3352, and it shows Part 30 going to the waterfront, and that it includes the 'turnaround'. Mr. Arthur Hudson [a predecessor of the appellant] believed the Right-of-Way extended to the water.
>
> The Court accepts the Respondent's [i.e., the Delaneys'] argument that had the intention been to exclude the 'turnaround' from the Right-of-Way, one would reasonably expect that Part 30 would have been split in two or more parts, so that the 'turnaround' and the 'well' would have been shown as their own Parts separate from the Right-of-Way.

[21] In arriving at this conclusion, the application judge found that the January 1980 Agreement included a latent ambiguity when it, and the 1964 Agreement,

were applied to the Reference Plan in light of the grant of easement. The application judge's reasons are somewhat imprecise as to which instrument gave rise to the Right-of-Way. While the application judge suggested the January 1980 Agreement was ambiguous when applied to the Reference Plan, considering the "grant of easement" in the September 1980 Indenture, he recognized that, prior to 1980, the Right-of-Way was "set out" in the 1961 Grant.

[22] This imprecision, however, does not necessarily compromise the application judge's conclusion. The issue in this case is not whether the Right-of-Way exists or when it came into existence; the easement was already running with the land by the time the January 1980 Agreement came into effect, per the 1961 Grant. The issue is whether the application judge erred in finding that the January 1980 Agreement, and the 1964 Agreement, reveal an ambiguity when applied to the land itself considering the existing easement.

[23] As this court explained in *Gibbs v. Grand Bend (Village)* (1995), 26 O.R. (3d) 644 (Ont. C.A.), at p. 658, the finding of a latent ambiguity allows judges to rely on extrinsic evidence, including evidence of subsequent conduct, to assist in their interpretation of an agreement: See also *Arthur Anderson Inc. v. Toronto Dominion Bank* (1994), 17 O.R. (3d) 363 (Ont. C.A.), at p. 372, leave to appeal refused, [1994] S.C.C.A. No. 189. According to the application judge, ambiguity arises from the two possible interpretations of the January 1980 Agreement: 1) one that would allow the servient tenement owners (the appellants) to park on the 'turnaround',

even if doing so blocked ingress and egress by the respondents; and 2) another which would permit the appellants to park on the 'turnaround,' but not in a way that would restrict ingress and egress. The extrinsic evidence that led the application judge to conclude that the Right-of-Way was intended to include the turnaround for the purpose of ingress and egress was, among other things, that "for 18 years before the 1980 grant and for 16 years after, the 'turnaround' was kept clear to permit use by the [respondents]". According to the application judge, this evidence supported the position that the turnaround cannot be obstructed.

[24] As discussed above, the application judge found that there was a drafting error in the September 1980 Indenture. Specifically, he found that the Instrument omitted Part 35, which is to the west of and adjacent to Part 30, from the description of the Right-of-Way, which he found to be "necessary to permit access to and from the [respondents'] Lands." Thus, pursuant to ss. 159 and 160 of the *Land Titles Act*, R.S.O. 1990, c. L. 5, he amended the September 1980 Indenture *nunc pro tunc* to include Part 35.

[25] The application judge also found that the appellants had restricted, at least to some extent, the respondents' use of the Right-of-Way by erecting fence panels that narrowed the passage onto the respondents' land. However, while he directed that the obstructions be removed, the application judge declined to award damages to the respondents because "while [he disagreed] with the [appellants']

position and interpretation of the instruments in question, it is fair to say the issues were open to interpretations".

[26] Finally, the application judge found that the Right-of-Access (to the well) had not been extinguished.

ISSUES

[27] The appellant raises two main grounds of appeal, arguing that:

i) The application judge committed extricable errors of law in his interpretation of the Right-of-Way easement; and

ii) The application judge erred by not expunging the Right-of-Access to the well.

[28] For the reasons that follow, I would reject each of these grounds and dismiss the appeal. This makes it unnecessary to consider the appellants' further argument that if the application judge did err in his interpretation of the Right-of-Way easement it was not supportable on a different basis, since this issue would only arise if the application judge committed an extricable error of law, an argument that I would reject.

ANALYSIS

The application judge did not err in his interpretation of the Right-of-Way

[29] The appellants have three complaints. First, they argue that the application judge failed to consider and apply the correct principles of contractual interpretation. Second, they argue that the application judge erred by finding a latent ambiguity, and therefore improperly relied on extrinsic evidence, in particular subsequent conduct evidence. Third, they argue that there is no basis to imply the ancillary right to perform the turnaround maneuver on the Right-of-Way.

[30] The appellants rely on this court's decision in *Herold Estate v. Canada (Attorney General)*, 2021 ONCA 579, 157 O.R. (3d) 561, leave to appeal refused, [2021] S.C.C.A. No. 400, and the Supreme Court of Canada's decision in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, for the proposition that the overriding question is what the parties to the agreement objectively intended in light of the "factual matrix", and that evidence of their subjective intentions and subsequent conduct should play no role in the interpretive exercise.

[31] The appellants contend that by interpreting the Right-of-Way easement to include the right to turn around vehicles on Part 30, the application judge conflated surrounding circumstances with subsequent conduct, and that while the former is admissible, the latter is not unless there is ambiguity in the agreement. The

appellants assert that the application judge erred by finding a latent ambiguity and by then relying on the subsequent conduct of the parties to find that the Right-of-Way easement included the right to turnaround.

[32] The subsequent conduct that the appellants say the application judge improperly relied on, all of which occurred after the September 1980 Indenture, includes:

1) evidence of the respondent, Mr. Dean Delaney, about the “use and the importance of the turnaround” from his perspective;
2) the “admission” of Mr. Arthur Hudson that it was “rare for people to back up the hill”, rather than use the turnaround maneuver, and that he “had been obliged to keep the turnaround clear, because it was part of the Right-of-Way on Part 30”;
3) evidence that the parties to the original agreements respected the respondents’ predecessors’ right to the turnaround maneuver from 1980 onward; and
4) the fact that the parties to the September 1980 Indenture used the same lawyer in executing the January 1980 Agreement yet did not expressly exclude the turnaround.

[33] The appellants contend that none of this evidence was admissible in the interpretive exercise.

[34] This ground of appeal fails for three reasons. First, the application judge did not err in his finding of a latent ambiguity. It was therefore open to him to consider extrinsic evidence, including subsequent conduct evidence. Second, the application judge considered the text of the agreements, and read them as a whole and in the context of the circumstances as they existed when the agreements were created. And, apart from the extrinsic evidence, there was sufficient objective evidence, properly considered as part of the factual matrix, to support the application judge's conclusion. Third, and finally, it was open to the application judge to find that the use of the turnaround space was necessary as an ancillary right for the use and enjoyment of the Right-of-Way.

(1) Latent Ambiguity: Using Extrinsic and Subsequent Conduct Evidence

[35] The application judge did not err in his finding of a latent ambiguity. It was therefore open to him to consider extrinsic evidence: *Herold Estate*, at para. 49. As this court explained in *Gibbs,* at p. 658, extrinsic evidence may be introduced only in the case of a latent ambiguity for the purposes of ascertaining the intention of the grantor.

[36] The test for finding a latent ambiguity is met where "the description of the land in the deed or grant, when applied to the land itself, raises an issue about the location of a boundary" (emphasis added): *Herold Estate*, at para. 49. Expressed another way, a latent ambiguity arises when the application of an instrument to the

facts or land, not the explicit terms of the instrument, gives rise to various interpretations: *Gibbs*, at p. 658; see also *Taylor v. City Sand & Gravel Ltd.*, 2010 NLCA 22, 90 R.P.R. (4th) 157, at para. 21; *Missilinda of Canada Ltd. v. Husky Oil Operations Ltd.,* 2007 MBCA 24, 212 Man. R. (2d) 252, at para. 10.

[37] As noted above, the application judge found that an ambiguity arises from the two possible interpretations of the January 1980 Agreement, when considered in light of the other relevant instruments: 1) one that would allow the servient tenement owner (the appellants) to park on the 'turnaround' even if it blocked ingress and egress by the dominant tenement owner (the respondents); and 2) another which would permit the appellants to park on the turnaround, but not in a way that restricts ingress and egress.

[38] I would not disturb the application judge's finding of a latent ambiguity. As the Supreme Court made clear in *Sattva*, a question of contractual interpretation is "inherently fact specific" and an appellate court should typically show deference to such findings: *Sattva*, at paras. 52, 55; *Shewchuk v. Blackmont Capital Inc.,* 2016 ONCA 912, 404 D.L.R. (4th) 512, at para. 30. A less deferential standard will only apply to extricable questions of law that arise during the interpretive exercise: *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.,* 2016 SCC 37, [2016] 2 S.C.R. 23, at para. 21, citing *Sattva*, at paras. 50, 53, 55; *Heritage Capital Corp. v. Equitable Trust Co*., 2016 SCC 19, [2016] 1 S.C.R. 306, at paras. 21-24. Such extricable questions of law include: the application of an incorrect principle,

the failure to consider a required element of a legal test, or the failure to consider a relevant factor: *Sattva*, at para. 53.

[39] The application judge made no extricable error in law. He clearly understood, and properly applied, the test for the finding of a latent ambiguity, which requires that the relevant instrument raise an issue about the property right when applied to the land: *Herold Estate*, at para. 49. And, in the end, he found there to be a latent ambiguity "when [the January 1980 Agreement] and Instrument 14491 [the 1964 Agreement] are applied to [the Registered Plan] in light of the grant of easement".

[40] Again, in the absence of an extricable error of law, the application judge's finding of a latent ambiguity is entitled to deference: *Casurina Ltd. Partnership v. Rio Algom Ltd.* (2004), 40 B.L.R. (3d) 112 (Ont. C.A.), at para. 34, leave to appeal refused, [2004] S.C.C.A. No. 105, citing with approval, *Chitty on Contracts*, 28 ed. (London: Sweet & Maxwell, 1998) at para. 12-046; *Keefer Laundry Ltd. v. Pellerin Milnor Corp*, 2009 BCCA 273, 57 B.L.R. (4th) 161, at paras. 57-60.

[41] Where the words in the grant of a right-of-way are unclear, the subsequent conduct, historic use, and circumstances surrounding the use of the property subject to the easement, are particularly important to understand the nature and extent of the rights conveyed: *Arthur Anderson*, at p. 372; *Markowski v. Verhey*, 2020 ONCA 472, 26 R.P.R. (6th) 1, at para 32, citing *Square-Boy Limited v. The*

City of Toronto, 2017 ONSC 7178, at para. 33; *Laurie v. Winch*, [1953] 1 S.C.R. 49, at p. 56. Here, there was evidence that, since 1962, the appellants and their predecessors consistently kept the turnaround clear so that use of the easement would not be blocked. It was therefore open to the application judge to rely on the extrinsic evidence that the respondents' predecessors' use of the turnaround was "open and notorious" when the 1980 instruments were formed.

[42] Furthermore, the application judge appropriately admitted and relied on evidence of subsequent conduct in finding that the appellants' predecessors had kept the turnaround free because they felt "obliged to keep the turnaround clear, because it was part of the Right-of-Way on Part 30", and that the respondent's predecessor had used the turnaround since the early 1960s and did not seek permission from the appellants' predecessors to use it.

[43] This subsequent conduct evidence was not just admissible in resolving the latent ambiguity in the January 1980 Agreement, for reasons explained by Strathy C.J.O. in *Shewchuk,* at paras. 53-54, it was also reliable:

> In the usual course, evidence of subsequent conduct will be more reliable if the acts it considers are the acts of both parties, are intentional, are consistent over time, and are acts of individuals rather than agents of corporations.
>
> …
>
> Evidence of subsequent conduct will have greater weight if it is unequivocal in the sense of being consistent with only one of the two alternative interpretations of the contract that generated the ambiguity triggering its

> admissibility. […] For instance, in *Chippewas of Mnjikaning First Nation v. Ontario,* 2010 ONCA 47, 265 O.A.C. 247 (Ont. C.A.), at para. 162, leave to appeal to S.C.C. refused, [2010] S.C.C.A. No. 91 (S.C.C.), this court found that the parties' subsequent conduct was of assistance in determining which of two reasonable interpretations of a contract should be accepted because the conduct in question was "overwhelmingly consistent only with the trial judge's interpretation."

[44] The evidence that the parties' predecessors had kept the turnaround clear for decades, before and after 1980, "because it was part of the Right-of-Way", is overwhelmingly consistent with an interpretation that denies the right to park in a manner that limits the respondents' right to ingress or egress by obstructing use of the turnaround. As the application judge concluded, the only discernible reason for extending the right of way to the "turnaround" area of Part 30 was to permit the owners of the dominant tenement to use it to turn their vehicles around, in order to allow them to avoid having to back up or down the steep driveway.

[45] In light of the extrinsic evidence discussed above, it was open to the application judge to accept the importance of the 'turnaround' to the use of the Right-of-Way, and to conclude that, if the original intention behind the Right-of-Way was to permit the appellants and their predecessors to both park on and block the 'turnaround', one would have expected that "[a] release of the [Right-of-Way] at the 'turnaround' would [have been] made explicit" in either the September 1980 Indenture or January 1980 Agreement.

(2) Objective Evidence and the Parties' Intentions

[46] The appellants argue further that the application judge failed to determine the intentions of the parties objectively. I would reject that submission.

[47] The application judge's task was to "read the contract as a whole, [and give] the words their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract": *Sattva*, at para. 47.

[48] In my view, the application judge followed this approach. He considered the text of the agreement and found that the "plain language of the grant of easement is clear that it includes Part 30 for the purpose of ingress and egress. Next, the grant makes reference to [the Reference Plan], and it shows Part 30 going to the waterfront, and that it includes the 'turnaround'."

[49] He then considered the nature of the parties' relationship, as created by the various agreements, in determining the meaning of the words in the agreements: *Sattva*, at para. 48. This is important because the parties knew and accepted the use of the turnaround when the January 1980 Agreement was ratified. While the September 1980 Indenture further particularized the Right-of-Way, this easement was already well-recognized and running with the land at the time the January 1980 Agreement was formed. The easement extending south to the shoreline and connecting north to the municipal highway had previously been set out in the 1961

Grant and 1964 Agreement, and the use of the turnaround to climb the hill was longstanding, having existed since at least the early 1960s. This was objective evidence, available to the application judge even in the absence of a finding of a latent ambiguity, and properly considered as part of the factual matrix.

[50] The objective evidence in this case speaks to the parties' intention to include the right to use the south-extending section of Part 30 as a turnaround. This is consistent with the language in the instrument and supports the application judge's ultimate conclusion.

(3) Ancillary Rights Doctrine

[51] An easement includes the grant of such ancillary rights as are reasonably necessary for its exercise: *Fallowfield v. Bourgault* (2003), 68 O.R. (3d) 417 (Ont. C.A.), at para. 11; *Primont (Castelmont) Inc. v. Friuli Benevolent Corporation*, 2023 ONCA 477, 484 D.L.R. (4th) 240, at para. 29. In *Boone v. Brindley* (2003), 179 O.A.C. 50 (Ont. C.A.), at para. 2, this court held that the determination of what is reasonably necessary to the enjoyment of a right-of-way requires a consideration of "the language of the conveyance creating the easement, the purpose and circumstances surrounding the creation of the right of way, the history of its development and the circumstances of its use."

[52] Although the application judge did not expressly use the term "ancillary rights," he did find that the turnaround was "essential" in order for those using the

Right-of-Way to turn their vehicles around and climb the hill. He also considered several *Boone* factors in his analysis, including the practical circumstances and historic use of the turnaround. I would note also that both the appellants and respondents made submissions on this issue.

[53] The purpose of the Right-of-Way is the ingress and egress over, along and upon Parts 35, 30, 31, 32, 26, 27, 24, 19 and 18, as particularized by the September 1980 Indenture, as rectified by the application judge. The history of the easement, going back to at least the 1961 Grant, affirms that the "right of way for all those legally entitled thereto over, along and upon a strip of land … crossing the [appellants' property] from the [municipal roadway] to the St Lawrence River" (emphasis added).

[54] Further, there was evidence, from both Mr. Delaney and Ms. Carol Smith, that from the 1960's until today, it has been "essential" for the respondents and their predecessors to use the turnaround for vehicles in order to climb the hill. Mr. Arthur Hudson admitted that it was rare for people to back up the hill, and that while possible, it posed some danger to do so. In my view, the language of the granting instruments, including the September 1980 Instrument, the purpose of the easement, and the history of its use, demonstrate that the turnaround is an ancillary right.

[55] It was therefore open to the application judge to find that reversing up or down the cliff is dangerous and difficult to do, and that the turnaround is "essential" and reasonably required for ingress and egress from the respondents' property. This is tantamount to a finding that use of the turnaround is an ancillary right, which I would not disturb.

[56] I would reject this ground of appeal.

The Right-of-Access to the well was not extinguished

[57] The appellants contend that the application judge erred in holding that the respondents' Right-of-Access to the well on Part 30 had not been extinguished. They argue that, because the purpose of the Right-of-Access easement – providing access to potable water – has permanently ended, it must be expunged. In support, the appellants rely on the fact that the well is contaminated and no longer provides potable water, and that the respondents' home is now connected to the municipal water line.

[58] Under the common law, an easement may be extinguished when the purpose for which it was created ceases to exist. As this court explained in *Remicorp Industries v. Metrolinx,* 2017 ONCA 443, 138 O.R. (3d) 109, at para. 72, "[a]n easement can be extinguished as a matter of law when some event occurs that makes the easement unusable or unnecessary." The purpose for which the right was created must be completely and permanently eradicated. The fact that a

Right-of-Access is not being used, or is no longer needed, does not mean it must be extinguished as a matter of law. This is a question of fact, which absent error is owed deference.

[59] Because the Right-of-Access was the result of an express grant, and because there was no release nor consideration provided, the appellants bear a "high onus" to demonstrate that it was extinguished: *Fyfe v. James* (2006), 42 R.P.R. (4th) 221 (Ont. S.C.), at para. 21; *Day v. Adili*, 2011 ONSC 1835, at para. 19; *Remicorp Industries*, at para. 47.

[60] The application judge accurately stated the law and properly applied the relevant principles. He then made findings of fact that were available to him, including that the well had been used in the last eight years for laundry. The appellants had to show more than that use of the well was no longer needed because an alternate source of water existed; they had to show a "radical change" to the nature of the property rendering the easement permanently unusable or unnecessary: *Hopper Estate v. Salisbury (Village)*, 2005 NBQB 448, 292 N.B.R. (3d) 124, at para. 24, aff'd 2006 NBCA 108, 49 R.P.R. (4th) 65; *British Columbia (Minister of Environment, Lands & Parks) v. Thomas* (1998), 161 D.L.R. (4th) 74 (B.C.C.A.), *per* Hall J.A. at para. 23. The application judge reasonably found that they had failed to show such a radical change.

[61] I would therefore reject this ground of appeal.

CONCLUSION

[62] For these reasons, I would dismiss the appeal.

[63] I would award costs to the respondent in the agreed upon all-inclusive amount of $20,000.

Released: July 8, 2024 “S.E.P.”

“J. George J.A.”
“I agree. S.E. Pepall J.A.”
“I agree. J. Dawe J.A.”

APPENDIX A