KING'S BENCH FOR SASKATCHEWAN

Citation: **2024 SKKB 202**

Date: **2024 11 20**
File No.: KBG-SC-00034-2024
Judicial Centre: Swift Current

BETWEEN:

POINT VIEW CEMETERY INC.

APPLICANT

- and -

MONTY MICHAEL ARENDT and
CORY ROBERT ARENDT

RESPONDENTS

Counsel:

Tyler K. Gray	for the applicant
Robert C. Fielding	for the respondents

FIAT — TOMKA J.
NOVEMBER 20, 2024

BACKGROUND

[1] The applicant, Point View Cemetery Inc. [Point View], is the owner and licensee of Point View Cemetery [Cemetery] located in the Rural Municipality of White Valley No. 49 [RM]. The respondents, Monty Michael Arendt and Cory Robert Arendt [Arendts], are the registered owners of land adjacent to the Cemetery. Point View claims a right of way on the adjacent lands owned by the Arendts as a result of the historical use of the said lands as access to the Cemetery. The Arendts argue that they are the registered owners, and no right of way has ever been registered on title. The

Arendts are not inclined to grant a right of way.

[2] Before me is an application pursuant to Rule 1-4(1)(b) of *The King's Bench Rules* and ss. 107 and 109(1)(a) of *The Land Titles Act, 2000*, SS 2000, c L-5.1 [*LTA*]. Sections 107 and 109(1)(a) of the *LTA* state as follows:

> **Application to court**
>
> 107(1) Any person may apply to the court for an order with respect to:
>
> (a) the operation of:
>
> (i) the land titles registry; or
>
> (ii) this Act or the regulations;
>
> (b) any decision of the Registrar with respect to any action that the Registrar is required or authorized to take pursuant to this Act;
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> (c) any order, decision or correction of the Registrar pursuant to section 101, 101.1, 169 or 202;
>
> (d) any application respecting land or an interest in land; or
>
> (e) any application respecting a transaction or contract relating to land or to an interest in land.
>
> (2) Any person applying to the court pursuant to clause (1)(b) or (c) shall notify the Registrar of the application, in writing, at the time the application is made.
>
> (3) The Registrar may apply to the court to be joined as a party in any application commenced pursuant to subsection (1).
>
> …
>
> **General jurisdiction of court**
>
> 109(1) In any proceeding pursuant to this Part, the court may make any order the court considers appropriate, and in so doing may direct the Registrar to, or authorize any person to apply to the Registrar to:
>
> (a) register, discharge, amend, postpone or assign an interest;
> …

[3] The relief requested by Point View is as follows:

1. A declaration that Point View has a right of way over the Arendts' land, legally described as NW 30-6-23-W3, Ext 4 as described on Certificate of Title 79SC01194, Ext 29 as described on Certificate of Title 87SC08998, Ext 29;

2. An order directing the Registrar of Land Titles to register the easement on the titles of both Point View's land and the Arendts' land with Point View's land registered as the dominant tenement and the Arendts' land as servient tenement; and

3. Costs of this application.

[4] The evidence I have before me on this application includes the following:

1. Affidavit of Graehme Shufletoski sworn February 5, 2024;

2. Affidavit of Cory Robert Arendt sworn June 6, 2024;

3. Reply affidavit of Graehme Shufletoski sworn June 13, 2024;

4. Affidavit of Dawn Breton sworn August 12, 2024; and

5. Affidavit of Gordon Lloyd David sworn July 26, 2024.

ISSUES

[5] The issues to be determined on this application are as follows:

1. Should this application be heard on a summary basis?

2. Do these facts support a declaration of an easement under the doctrine of equitable easement?

3. If the doctrine of equitable easement is not sufficient support, do the facts support the declaration of an easement under the doctrine of proprietary estoppel?

FACTS

[6] The Cemetery was established in 1933 and has been in continuous use and operation since its opening.

[7] The Cemetery land is nearly entirely surrounded by privately owned property save for a small portion of the south-easterly corner of the Cemetery that rests against a roadway.

[8] On about February 23, 1940, there was a meeting of the Point View Cemetery Association. The meeting minutes indicate the following:

> That Secretary be instructed to purchase from funds a Minute Book. Prop Hillock 2nd by Ed Chatard. Passed unan.
>
> That Sec be instructed to complete deal re right of way to cemetery with Geo Metzger. Said deal being that Point View Cem Ass exchange Title for Block B Plot 4 for the Right of Way from road to Cemetery. Prop Ms. Kearney 2nd Geo Hillock.
>
> (Affidavit of Graehme Shufletoski, Exhibit A)

[9] George Metzger [Metzger] is the Arendts' great grandfather.

[10] He had become the owner of Block B, Plot 4 in the Cemetery on or about February 3, 1940.

[11] Neither Point View nor Metzger completed a registration of the right of way contemplated in the meeting minutes from February 23, 1940, against Metzger's title to the lands where the right of way was to be located, legally described as:

> Blk/Par B Plan No 102221480 Extension 29, as described on Certificate

of Title 87SC08998, description 29 [Access Land].

[12] The Access Land has been transferred several times over the years. All of the registered owners have been relatives of the Arendts.

[13] The history of the transfers of the Access Land was outlined in the affidavit of Graehme Shufletoski starting at para. 7:

> 7. Between 1940 and 2005, the land on which the registered ownership of the Access Land changed several times as follows:
>
> (i) July 14th, 1943 - a Certificate of Title is issued showing George Metzger of Ravenscrag in the Province of Saskatchewan, and Alice Metzger of the same place, Wife of the said George Metzger as the registered owners (fee simple) of the relevant parcel;
>
> (ii) January 29th, 1974 - a Certificate of Title is issued showing Robert Arendt, of Eastend, Executor of the Last Well [*sic*] and Testament of George Metzger, deceased and Alice Metzger, of Ravenscrag, both in the Province of Saskatchewan as the registered owners (fee simple) of the relevant parcel;
>
> (iii) November 27th, 1978 - a Certificate of Title is issued showing Robert Arendt, of Eastend, Farmer, Executor of the Last Will and Testament of George Metzger, deceased, and Vesta Humphreys, of Moose Jaw, Executrix of the Last Will and Testament of Alice Myrtle Metzger, deceased, both in the Province of Saskatchewan as the registered owners (fee simple) of the relevant parcel;
>
> (iv) January 30th, 1979 - a Certificate of Title is issued showing Wallace Arendt of Eastend, in the Province of Saskatchewan, Farmer as the registered owner (fee simple) of the relevant parcel;
>
> (v) On January 25, 2005 - Title #128727388 is issued showing Monty Arendt as a personal representative for the estate of Wallace Arendt as the registered owner of Surface Parcel #141352602
>
> (vi) March 2, 2005 - Title #128865268 is issued to Monty Michael Arendt and Cory Robert Arendt for Surface Parcel #141352602

[14] Based on the affidavits, there was continual and uninterrupted use of the right of way on the Access Land from the time of the purported grant of Metzger until September 2016, when the Arendts blocked access to the Cemetery by putting equipment in front of the gate to the Cemetery [blockade].

[15] At para. 13 of his affidavit, Cory Arendt avers to the following:

> 13. That when my Brother and I initially started our cattle operation, there was a level of good will with the Arnal family who were part of our ranching community. We regularly swapped the use of our lands with each other to water, shelter and graze our respective cattle herds without compensation. The Arnal's managed some land between land owned by my Brother and I, and in the fall of 2015 we used this Arnal land to graze some of our cattle. (We were advised at the time by Frank and Clifford Arnal, that Clifford owned the land but was renting it to Frank.) Frank objected to our use of the land. He indicated that we were not permitted to drive over the land and that if we kept our cows there they would be impounded. My brother and I tried to resolve this dispute and offered to pay for the use of the land. Clifford was generally agreeable but Frank was opposed to our suggestions and so no agreement was reached. We had to move our cows off the Arnal land. After this we were not prepared to allow the Arnal family access to any of our lands, including the Land which is the subject of this action. My brother and I initially deterred access to the cemetery across our Land by placing some of our heavy equipment in front of the cemetery gate. Access was still available to the Cemetery across land owned by the Cemetery which adjoined with a public road. An official access road was eventually built on this land and this access has since been used by the Applicant and the general public to access the Cemetery.

[16] Due to the dispute over the right of way on the Access Land, Point View created a temporary access and entry to the Cemetery.

[17] The temporary access has resulted in the necessity of traveling over sold and unsold burial plots that are not currently in use to get into the Cemetery. Also problematic is that the secondary access road fails to meet the requirements for width under provincial legislation.

[18] The Arendts acknowledge that people have been crossing the Access

Land to enter the Cemetery both before and after they acquired ownership. However, they state that they were never of the belief that anyone had the legal right of way to be on their land.

[19] There is no dispute the RM provided maintenance to the right of way over the Access Land from at least 1980 through until the blockade. This maintenance included a) mowing the grass on the Access Land that would interfere with the use of the right of way; b) the laying of gravel on the right of way as required to enable the right of way to be used in all conditions; and c) plowing snow during the winter months to enable the right of way over the Access Land to continue to be used.

[20] The maintenance activity of mowing the grass on the right of way occurred on an as needed basis and at least annually, usually in September or October of each year.

[21] The maintenance activity of laying gravel occurred on an as needed basis and involved delivery of between six and eight yards of gravel to be spread over the approach and the right of way and the spreading of that gravel.

[22] The maintenance activity of snow plowing occurred on an as needed basis and involved plowing the approach and the right of way to continue to facilitate access to the Cemetery through the gate during the winter months. These maintenance activities occurred continuously during the time that the Access Land was used as a right of way until the blockade.

[23] In addition, Point View organized and facilitated annual maintenance of the right of way on the Access Land through the organization of clean-up days.

[24] Since the blockade, Point View has attempted to resolve the issue with the Arendts and have even asked that the RM expropriate the land necessary for the right of way over the Access Land.

LAW AND ANALYSIS

1. Should this application be heard on a summary basis?

[25] In determining this issue, I have considered the cases of *Saskatchewan Valley Potato Corp. v Barrich Farms (1994) Ltd.*, 2003 SKCA 118, 241 Sask R 87 [*Saskatchewan Valley*] and *Burnouf v Burnouf*, 2022 SKCA 6, 466 DLR (4th) 521 [*Burnouf*].

[26] In the *Saskatchewan Valley* decision, the Court of Appeal considered the scope and nature of applications which were appropriate to be brought under ss. 107 and 109 of the *LTA*.

[27] Speaking for the Court, Jackson J.A. provided an overview of the jurisdiction of the Court to make orders pursuant to ss. 107 and 109 of the *LTA*. The Court of Appeal summarized the body of Saskatchewan case law as holding that the discretion contemplates "an action to determine the claimed interest in land rather than a final determination of the issue based on a summary application" (*Block v Sceptre Resources Ltd.* (1988), 73 Sask R 68 (CA) at para 6 [*Block*]. Referencing the case of *Block*, the Court of Appeal held that there were exceptions to this general rule that would allow for a matter to be disposed of summarily, namely where:

a) the parties agree to proceed summarily;

b) the facts are simple and not in dispute; or

c) the material clearly discloses no caveatable claim.

[28] In the *Burnouf* decision, the Court of Appeal held that ss. 107 and 109 of the *LTA* were curative in nature and the Court should be hesitant to exercise its powers under s. 109 for a vesting order in the context of an interim application where there is complexity in the law and the evidence.

[29] Further, in *Burnouf*, the Court of Appeal provided direction to a Court to assist in determining whether to decide the issue summarily which was distilled to three considerations as follows:

a) the nature and degree of the dispute between the parties;

b) the completeness and complexity of the evidence; and

c) the complexity of the legal issues involved.

[30] The issues in this case have been longstanding since 2016. The parties have attempted to resolve the issues in several different forums but have been unable to come to a successful resolution. Both parties agree the issues between them should be determined summarily.

[31] I initially had some concerns about whether this matter should be determined summarily. There is no agreement as to the facts. In fact, there is a dispute whether there was initially a 1940 agreement to create a right of way in trade for a burial plot. Point View's position is that Metzger had agreed to grant a right of way over the Access Land in trade for a burial plot being allocated to him free of charge. They rely on handwritten minutes from the meeting of February 23, 1940.

[32] The Arendts argue that an agreement to grant a right of way was never completed. They say that contrary to what is suggested in the meeting minutes, the burial plot in question was instead purchased for the sum of $5.00 before the meeting discussing the trade was held. They rely on the certificate of title for the burial plot indicating as much.

[33] As I considered the issues in this application, it became clear to me that as there is no dispute that a right of way had never been registered, the principle of indefeasibility of title required by the *LTA* makes the factual dispute immaterial.

[34] I have also determined that but for the dispute regarding the purported agreement for a right of way, the facts are not in dispute, which weighs in favor of determining the application summarily.

[35] Furthermore, the law relevant to this dispute may be said to be nuanced but is for the most part not overly complex.

[36] As such, given the desire of the parties to proceed summarily and that the facts and relevant law are not overly complex, I have determined it is appropriate for me to determine the substance of this application based on the evidence that is before me.

2. Do the facts support a declaration of an easement under the doctrine of equitable easement?

[37] The requirements of a valid easement were established in the case of *394 Lakeshore Oakville Holdings Inc. v Misek*, 2010 ONSC 6007, 98 RPR (4th) 21 which are also know as the "*Ellenborough Park*" [[1955] 3 All ER 667 (CA)] requirements. They are as follows:

a) A person claiming to exercise the right must have an interest in the land which is called the dominant tenement. The person against whom the claim is made must have an interest in the land said to be bound by the easement is the servient tenement;

b) The easement claimed must better or advantage the dominant tenement land. The right claimed must be reasonably necessary for the dominant tenement;

c) Both dominant and servient tenements cannot be owned by the same person; and

d) The right claim must be capable of being the subject matter of a grant.

[38] Under Saskatchewan's land titles system, third parties and persons investigating the state of a title to a property are permitted to rely on the status of a title at the time the title was viewed under the principle of indefeasibility of title. In this general principle, individuals with an interest in the land are required to register that interest for it be enforceable against third parties. The Saskatchewan Court of Appeal discussed Saskatchewan's land title system in the case of *Dunnison Estate v Dunnison*, 2017 SKCA 40 at paras 38, 39, 60, 64, 66 and 75, [2017] 8 WWR 18 as follows:

> [38] The origin of all land titles Acts is *The Real Property Act 1858*, which was presented to the House of Assembly of South Australia by Sir Robert Torrens. Notwithstanding the common origin of the land titles Acts in Canada, each province developed its own Act responding to local exigencies. Some of the provincial Acts depart from the original legislation more than others. See, generally: Victor DiCastri, *Thom's Canadian Torrens System*, 2d ed (Calgary: Burroughs & Company Limited, 1962); and Kim Korven, *The Emperor's New Clothes: The Myth of Indefeasibility of Title in Saskatchewan* (LLM Thesis, University of Saskatchewan, 2012).
>
> [39] Saskatchewan's legislation is more like Alberta's and Manitoba's than, say, for example, the legislation of British Columbia, but there are also differences among the three prairie provinces. For example, Alberta permits title to be acquired by adverse possession, which is not a feature of Saskatchewan law (*Olney Estate v Great-West Life Assurance Co.*, 2014 SKCA 47 at paras 30–31, [2014] 8 WWR 293 [*Olney*]).
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> …
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> [60] Saskatchewan has taken an entirely different approach to the role of the certificate of title. In our view, it runs counter to the central tenets of *The Land Titles Act, 1978* [RSS 1978, c L-5] to speak of a "presumption of indefeasible title," which is capable of being rebutted as if it were an evidentiary rule. While more will be said of this later, s. 213 declares that the title is conclusive and admits of only listed exceptions. Further, in *Hermanson* [(1986), 33 DLR (4th) 12 (Sask CA)](at para 56), Bayda C.J.S. concluded our legislation gives effect to the "immediate indefeasibility theory" of title, which is a legal principle rather than an evidentiary one.

> …
>
> [64] To fully understand the Torrens system of land registration, one needs a basic understanding of the system it replaced – the deeds system. The deeds system was inherited in Saskatchewan from the English common law. Under that system, land was sold by deed – a solemn contract entered into between a seller and a buyer – but the deed was not valid unless the seller had the right to sell the land. Such a right could only be established by searching back through all the transactions dealing with the land until one reached either the first sale of the land by the Crown or until the longest period under the *Statute of Limitations* had been exhausted.
>
> …
>
> [66] The Torrens system of land registration was conceived by Sir Robert Torrens and originated in South Australia. It transformed the way people bought, sold and mortgaged land. The new method of recording ownership of land left behind the strictures and the expense of a system mired in complexity and steeped in secrecy. It allowed one to trade on the faith of the register unaffected by the secret or hidden interests of others. Under a Torrens system, the register is everything.
>
> …
>
> [75] In summary, the purpose of our land titles legislation is to provide certainty of title and to protect persons who acquire an interest in land bona fide, for value and in reliance on the register from unregistered or hidden claims. In our view, however, that is not its only purpose. The legislation also establishes a predictable method of registering interests in land within an established framework. A series of legislative and regulatory provisions create a system upon which persons rely daily to search the registry and make personal and business decisions.

[39] Relevant to the discussion at hand are ss. 13(1)(a), 14, 15, 21(1)(a) and (b), 23(1) and (2) and 150 of the *LTA*.

[40] Despite the requirements of the *LTA*, it is clear that our land titles scheme allows for the creation of an enforceable unregistered interest in land. On this point, Justice Barrington-Foote in *Zelinski v Zelinski*, 2021 SKCA 165, [2022] 2 WWR 367 [*Zelinski*] stated at para. 27:

> [27] The *LTA* does not prevent the creation and enforcement of equitable or unregistered interests in land. As noted in *Dunnison*

> *Estate v Dunnison*, 2017 SKCA 40 at para 61, [2017] 8 WWR 18, "this Court has on a number of occasions found, as the Alberta Court of Appeal did in *Passburg* [*Passburg Petroleums Ltd. v Landstrom Developments Ltd.* (1984), 1984 ABCA 78, 8 DLR (4th) 363 (Alta CA), leave to appeal to SCC refused [1984] 2 SCR viii], that, as against persons creating them, equitable and unregistered interests are valid and enforceable under a Torrens system (see: *Bensette; Fleck v Davidson Estate*, [1997] 2 WWR 60 (Sask CA) at para 1; and *Olney* [2014 SKCA 47, [2014] 8 WWR 293] at para 66)" (emphasis added). See to the same effect *Passburg Petroleums Ltd. v Landstrom Developments Ltd.* (1984), 8 DLR (4th) 363 (Alta CA) at paras 12–14, leave to appeal to SCC refused [1984] 2 SCR viii.

[41] In *Zelinski*, the Court of Appeal identified the types of equitable unregistered interests in land that will be recognized which include easements of necessity, easements by way of an implied grant otherwise known as an easement of apparent accommodation, an easement of common intention, and an easement arising from the doctrine of proprietary estoppel.

Easement of necessity

[42] The easement of necessity has been described by the Court of Appeal in *Zelinski* at paras 33-34 as follows:

> [33] There is no reason to think that the submissions made to the Chambers judge were any clearer. That was an important omission on the part of Gustav and Dolores. Easements may arise by operation of law in several ways, each of which have different requirements. Easements of necessity, for example, were described by Rouleau J.A. in *McClatchie v Rideau Lakes (Township)*, 2015 ONCA 233, 333 OAC 381:
>
> > [48] Easements of necessity are easements presumed to have been granted when the land that is sold is inaccessible except by passing over adjoining land retained by the grantor. The concept arises from the premise that the easement is an implied grant allowing the purchaser to access the purchased lot. See *Nelson v. 1153696 Alberta Ltd.*, 2011 ABCA 203, 46 Alta. L.R. (5th) 113, at paras. 40-43, leave to appeal to S.C.C. refused, [2011] S.C.C.A. No. 423; and *Dobson v. Tulloch* (1994), 17 O.R. (3d) 533 (C.J. (Gen. Div.)), aff'd (1997), 33 O.R. (3d) 800 (C.A.).
> >
> > [49] Necessity is assessed at the time of the original

> grant: *Nelson*, at para. 42; *Dobson*, at p. 541. …
>
> > [34] Easements of necessity may also be available to an original grantor who retains part of the land: *Toronto-Dominion Bank v Wise*, 2016 ONCA 629 at paras 22–23, 133 OR (3d) 195. However, as Rouleau J.A. noted in *McClatchie*, regardless of whether the party claiming the benefit of the easement is the grantor or the grantee, "[o]ne of the prerequisites for an easement of necessity is that it must be necessary to use or access the property; if access without it is merely inconvenient, the easement will not be implied" (at para 53).

[43] Point View argues that in 1940, when the issue of a right of way on the Access Land first arose, the Cemetery was land-locked and the only way to access it was by utilizing the Access Land. However, there is not sufficient evidence before me to prove that was the case in 1940. At least currently, the Cemetery has adjacent land, some of which is owned by the Arendts and some owned by others. (See: affidavit of Cory Arendt). There is no evidence before me that the situation was any different in 1940 and that access was not available by travelling over these other lands.

[44] As I understand it, there are no physical barriers like a lake, rockface or other nature feature that limited access to the Cemetery to the right of way over the Access Land. Given that there was only one road at the time, I can infer the Access Land was the most convenient access point as there was a roadway already in place from which to start. However, I have no evidence of the impossibility of other access at that time. There is not sufficient evidence to conclude that utilizing the other lands for access was more than an inconvenience in 1940. As such, Point View has not proven that that the Cemetery was land-locked, and the right of way was by necessity. All that can be said is that the use of the Access Land was apparently the most convenient point of access.

[45] In fact, after the blockade, Point View and the RM created a secondary access to the Cemetery. This would seem to end the matter on the necessity argument. However, Point View argues that the secondary access is not a permanent solution as it does not comply with the road width requirements under the regulations of *The*

Cemeteries Act, 1999, SS 1999, c C-4.01 and that utilization of the secondary access requires that individuals attending the Cemetery travel over sold and unsold unused burial plots.

[46] They further suggest that the secondary access is not workable long-term because at some point those plots that have been sold and that are now being traveled upon will have to be used. They suggest that "there remains no other way to restore a long-term road access to the Cemetery without removing burial plots other than by restoring temporary access to the Cemetery" (Affidavit of Graehme Shufletoski at para. 16).

[47] In addition, they suggest a long-term solution is necessary as they have had issues with hearses being stuck and excavators having to come into the Cemetery to remove other stranded vehicles.

[48] Even if I am wrong about the Cemetery being land-locked in 1940, based on the facts of this case, I have concluded that an easement of necessity is not available to Point View as there is a secondary access.

[49] Indeed, a secondary access has been created and has been in use for approximately eight years, specifically since 2016. Although there is some concern with the secondary access, based on the evidenced before me, I have concluded those concerns have not impacted access for Point View beyond being an inconvenience at this point.

[50] First, I am not convinced I have sufficient evidence to support the conclusionary testimony of Mr. Shufletoski that the secondary access is not a permanent solution. I remind counsel that in a summary proceeding the parties are to put their best foot forward in presenting their evidence. In that regard, I have some concerns Point View has not provided any evidence of the number of burial plots that are sold but not

used, and the number of burial plots impacted by the secondary access.

[51] In addition, there is no evidence whether the cemetery plan can be altered, *i.e.* sold plots moved to other parts of the cemetery. I was not provided a Cemetery plan to consider. Further, Exhibit G from the affidavit of Graehme Shufletoski, although hearsay, seems to indicate an opinion that "the cemetery grounds do not appear to have enough room to build a road around allowing access in and out of the cemetery and to avoid the removal of plots" This statement in the exhibit does not say that there is no room to build a road around, only that it does not appear as if it could be done. Mr. Shufletoski's statement in para. 12 of his affidavit seems to slightly overstate whether a road around is possible.

[52] Furthermore, although the secondary access road may violate regulations of *The Cemeteries Act, 1999,* there is no evidence that there has been any enforcement of the regulations over the past eight years which would legally require the temporary access to be shut down. Although the narrow road to the secondary entrance poses an inconvenience and is difficult to use, I am not convinced there is sufficient evidence for me to conclude that the temporary access is not a viable alternative into the future. Certainly, it may be time consuming and require altering of the previous Cemetery plan but I am not convinced that access to the Cemetery over the Access Land are necessary in the strict interpretation of the word consistent with the caselaw.

[53] Furthermore, I am of the view that my assessment of an easement due to necessity should not consider the circumstance at the date of the alleged grant in 1940 but should be done as the land currently stands or at the very least, as of the date the Arendts became the registered owners of the Access Land. To argue that the Cemetery was initially land-locked and that this somehow necessitates a right of way on the Access Land some 80 years later due to continuous and uninterrupted use of the right of way is difficult to accept and contrary to s. 150 of the *LTA* which states:

> 150 No right to the access and use of light or any other easement, right in gross or *profit à prendre* is:
>
> (a) acquired by any person by prescription; or
>
> (b) deemed to have been acquired by prescription at any time.

[54] Traditionally, a right of way by prescription is established by using the land in question for at least 20 years with the knowledge of the servient owner and without interference. (See *Dafina v Antunes*, 2006 CarswellOnt 3829 (WL) (Ont Sup Ct) at para 42 and *Hodkin v Bigley* (1998), 20 RPR (3d) 9 (WL) (Ont CA) at para 9.)

[55] Given the presence of a secondary access to the Cemetery and its use over the past eight years along with insufficient evidence to conclude the temporary access is not sustainable, Point View has not proven that a right of way on the Access Land is necessary. Thus, the easement of necessity is not available in this case.

Implied Grant/Easement of Accommodation

[56] In *Zelinski*, the Court of Appeal described an implied grant or easement of accommodation at paras. 35-37 which states:

> [35] Easements may also arise pursuant to the rule in *Wheeldon v Burrows* (1879), 12 Ch D 31 (CA), which is sometimes referred to as an easement by way of an implied grant or an easement of apparent accommodation. In *3021386 Nova Scotia Ltd. v Barrington (Municipality)*, 2015 NSCA 30, 357 NSR (2d) 289, the Nova Scotia Court of Appeal, and in *Roop v Hofmeyr*, 2016 BCCA 310, [2016] 12 WWR 83 [*Roop*], the British Columbia Court of Appeal adopted the summary of this rule provided in *Anger & Honsberger Law of Real Property* [loose-leaf (2021-1) 3d ed, vol 2 (Toronto: Thomson Reuters, 2021)] at §17:12:
>
> > When land owned by one person is divided and part of the land conveyed to another, even if there are no words in the instrument expressly creating an easement, a court will imply that the new owner was granted easements of necessity and any continuous and apparent easements which existed as quasi-easements during unity of ownership. Thus, the implied grant will render the retained land servient and the newly acquired portion dominant.

> The test for necessity is fairly stringent. In order to make a successful claim for an easement of necessity, it would have to be shown that it would be impossible to enjoy the dominant land otherwise. A common example is a right-of-way which would provide the only possible access to a piece of land.
>
> In order for a *quasi*-easement which was exercised during unity of ownership to become an easement by implication of law, the right claimed must meet certain criteria:
>
> > (a) it must be necessary to the reasonable enjoyment of the part granted;
> >
> > (b) it must have been used by the owner of the entirety for the benefit of the part granted up to and at the time of the grant; and
> >
> > (c) it must have been apparent at the time the land for which the easement is claimed was acquired.
> >
> > (Footnotes omitted)

[36] The rule in *Wheeldon v Burrows* was also nicely summarized by Huddart J.A. in *Babine Investments Ltd. v Prince George Shopping Centre Ltd.*, 2002 BCCA 289, 212 DLR (4th) 537, as follows:

> [16] In this Court the appellants relied primarily on the common law rule explained in *Wheeldon v. Burrows* (1879), 12 CH. D. 31 (Eng. C.A.) founded on the principle that a grantor or lessor cannot derogate from his grant or lease of the land. By this "doctrine of apparent convenience" as counsel called it, the purchaser or lessee of part of an entirety is entitled to all continuous and apparent easements over the remainder of the entirety which are necessary to the reasonable enjoyment of the part granted and have been and are at the time of the grant used by the owners of the entirety for the benefit of the part granted.

[37] In *Roop*, Smith J.A. confirmed that the conditions necessary to establish an implied grant of an easement are the same as for an implied easement of apparent accommodation, as both are based on the rule in *Wheeldon v Burrows* (*Roop* at para 5). Justice Smith also explained the distinction between an implied easement of necessity and an implied easement necessary for the reasonable enjoyment of a property:

> [38] … [A]n implied easement of necessity is to be distinguished from an implied easement necessary for the reasonable enjoyment of a property. The former arises when there is no access to the grantee's property (e.g., it is land-

> locked) and necessity requires an implied easement for any enjoyment of the property. The latter arises when there is derogation of part of a parcel of land (by a grantor) to another party (the grantee) and reasonable enjoyment of the derogated land requires an implied easement. See *Halsbury's Laws of England*, vol. 14, 4th ed. (London, UK: Butterworths, 1980) at 31, para. 61.
>
> …
>
> [40] … [W]hat is meant by "necessary for the reasonable enjoyment of the property granted" remains vague and ambiguous. What is clear is that "necessary for the reasonable enjoyment of the property granted" does not mean actual "necessity" as required for an "easement of necessity", but seems to require a lower threshold of something more than mere inconvenience but less than considerable inconvenience. See *Barrington* at paras. 27-37 and *Pertman v. Grandin Park Properties Inc.*, 2015 ABQB 262 at paras. 47-49.

[57] Another helpful description of the implied grant is outlined by the Alberta Court of Appeal in *Miywasin Friendship Centre (Medicine Hat) v 1927546 Alberta Ltd.*, 2021 ABCA 108, 27 Alta LR (7th) 50 starting at para. 17:

> [17] As explained in *Condominium Plan No 7810477 (Owners) v. Condominium Plan No 7711723 (Owners)*, (1997) 55 Alta LR (3d) 198, at paras 41-42:
>
> > The doctrine of implied grant stems from the equity in the cases. Generally speaking, when the owner of two adjoining lots conveys one of them, he impliedly grants to the grantee all those continuous and apparent easements that are necessary to the reasonable use of the property granted and which are, at the time of the grant, used by the owner of the entirety for the benefit of the parts granted. This doctrine is based in the principle that a person cannot derogate from his own grant. See *Wheeldon v. Burrows* (1879), 48 L.J. Ch. 853 (Eng. C.A.), at 856; *Hart v. McMullin* (1899), 32 N.S.R. 340 (N.S. S.C.), confirmed on appeal to the Supreme Court of Canada (1900), 30 S.C.R. 245 (S.C.C.); *Fullerton v. Randall* (1918), 44 D.L.R. 356 (N.S. C.A.).
> >
> > Upon the severance of a tenement by devise into several parts, not only do rights of way of strict necessity pass, but also rights of way which are necessary for the reasonable enjoyment of the part devised and *which had been and were up to the time of the devise used by the owner of the entirety*

> *for the benefit of such parts* .... See 11 Hals., 2nd ed., 287 cited in *DuVernet v. Eisener*, [1951] 4 D.L.R. 406 (N.S.C.A.) at 412. [Emphasis in the original]
>
> [18] In other words, the easement arises at the point that a landowner divides its property: *Nelson v 1153696 Alberta Ltd*, 2009 ABQB 732 at para 218, rev'd 2011 ABCA 203 (but not on this point).
>
> [19] The importance of focusing on the use of the land during the unity of possession was reiterated most recently by the British Columbia Court of Appeal in *Roop v Hofmeyr*, 2016 BCCA 310 at para 32:
>
> > The relevant period of time for determining if an implied easement was established is when the original grant of land by the servient tenement was made to the dominant tenement. See Anger & Honsberger, "Law of Real Property, Third Edition" (Toronto: Thomson Reuters Canada Limited, 2014) at 17-9.
>
> [20] See also paragraph 52 where the British Columbia Court of Appeal held that the lower court erred in considering the different uses of the land after the original grant of land was made.

[58] I have concluded Point View has not proven entitlement to an easement of accommodation.

[59] First, an easement of accommodation arises when an owner of two adjoining parcels of land utilizes those parcels in a certain way and then transfers one of the parcels to another. An easement is created at the time that the owner divides his property, so the past use of the lands continues as it had when both parcels were owned by the same person. There is no evidence before me that there was ever a common owner of the lands comprising of the Cemetery and the Access Land. As such, Point View has not sufficiently proven that an easement of accommodation is available in the circumstances of this case. Of note, Point View has not provided me with any authority that the doctrine would apply in a fact pattern where there was not an original owner of adjoining land.

[60] Secondly, even if I am wrong that an easement of accommodation must have its genesis in joint ownership of adjoining lands, Point View still cannot succeed

in its claim for an easement of accommodation. As I understand it, Point View's argument is based on approximately 76 years of continual and uninterrupted use of the right of way over the Access Land.

[61] They suggest that historically all registered owners of the Access Land had known of the right of way and allowed its use generation after generation. They rely on the fact that the Access Land has always been registered to relatives of the Arendts since the original grantor Metzger, with notice of the right of way. In this regard, Point View relies heavily on *Wouters v Forjay Developments Ltd.* (1998), 38 OR (3d) 369 (QL) (Ont Ct J) [*Wouters*].

[62] In *Wouters,* the Court considered an application for declaration of an equable easement dispute between two property owners. The owners had built two cabins on a sub-divided property with one owner constructing a driveway that would get used by the other owner to access their property. The driveway was the only existing means of physical access for vehicles and was in use for approximately 50 years on an uninterrupted basis with the unqualified consent of the owner whose land the driveway crossed. Ultimately, both original owners transferred their property within their families. The easement was never registered and when the owner of the servient tenement went to sell their property, the dominant tenement asked the Court to confirm the right of way easement and register it on title.

[63] The Court granted an implied easement based on an accommodation easement and held the easement was reasonably necessary based primarily on the fact that the driveway was closely associated with the use and enjoyment of the property by facilitating access for almost 50 years and continued to be reasonably necessary for the better enjoyment to the property as building a new road would be at a cost and was not a practical solution.

[64] At first blush *Wouters* seems to strongly support Point View's position.

However, in *Zelinski*, the Court of Appeal indicated that *Wouters* is best understood as having found a right of way by prescription and is not applicable due to s. 150 of the *LTA* (See: *Zelinski* at paras 40 and 42). As such, *Wouters* is not applicable in Saskatchewan.

[65] Further, Point View argues their position is supported by the case of *The Owners Strata Plan NES33 v Westshore Developments Limited*, 2015 BCSC 1280, 57 RPR (5th) 231 [*Westshore*]. In *Westshore*, a development corporation owned a large property. It granted a portion of that property to Silver Birch Strata for its use as strata units. The development corporation retained the remainder of its larger property for its own use. The Court found that such a fact pattern fell squarely within the scope of the type of grant contemplated by the doctrine, namely that there was initially one owner of adjoining lands. Again, like *Wouters*, the fact pattern in *Westshore* is distinguishable from the facts proven in this case and is also not applicable in Saskatchewan due to s. 150 of the *LTA*. As such, I am of the view that, on the facts of this case, *Westshore* provides no assistance in a determination of a grant easement of accommodation.

[66] In sum, considering the evidence as a whole, Point View has not proven the doctrine of an easement of accommodation should be applied.

Easement of Common Intent

[67] This type of easement was described in *Zelinski* at para 38:

> [38] *Barton v Raine* (1980), 114 DLR (3d) 702 (Ont CA), demonstrates another basis on which an easement may arise despite the lack of an express grant. There, a father and son owned houses located very close together on adjoining lots. A driveway located on both lots provided access to the garages located behind each house. The Ontario Court of Appeal found that the father and son had a common intention that they would each have the right to use the driveway, and that an easement could be implied despite that the driveway was not strictly necessary to access the garages. In *Sauer* [2019 BCSC 43], Weatherill J. summarized this "implied easement based on common intent" as follows:

> [77] In circumstances where two neighboring landowners have participated in a joint enterprise with the implied intention that both properties will benefit, the law of equity can intervene to provide a remedy. The benefit must be both an obvious and necessary inference from the circumstances: *Barton v. Raine* (1980), 114 D.L.R. (3d) 702 (Ont. C.A.) at 711.
>
> …
>
> [79] Examples of circumstances where the courts have found an implied easement based upon the common intentions of the parties include *Canada Lands Co. CLC Ltd. v. Trizechahn Office Properties Ltd.*, 2000 ABQB 166, where a waste system was built on one lot and the compactor and dumpsters for the waste system were built on the adjoining lot; *Bruce v. Dixon*, [1957] O.J. No. 540 (C.A.) where neighbors undertook the drillings of a well for their common use; and *Spur Valley v. Csokonay et al*, 2000 BCSC 1356, where a water system for a campground had been built to service 80 lots.
>
> See also *The Owners Strata Plan NES33 v Westshore Developments Limited*, 2015 BCSC 1280, which demonstrates the requirement that the easement must be for the benefit of both properties.

[68] Point View conceded that this doctrine does not apply on the facts of this case. As such, I will not consider it.

3. If the doctrine of equitable easement is not sufficient support, do the facts support the declaration of an easement under the doctrine of proprietary estoppel?

Proprietary Estoppel

[69] The requirements of proprietary estoppel have most recently been outlined in *Zelinsk* at para 39 as follows:

> [39] An easement may also arise if the conditions necessary to engage proprietary estoppel have been met. The elements of that doctrine were described by McLachlin C.J.C. in *Cowper-Smith v Morgan*, 2017 SCC 61, [2017] 2 SCR 754:
>
> [15] An equity arises when (1) a representation or

> assurance is made to the claimant, on the basis of which the claimant expects that he will enjoy some right or benefit over property; (2) the claimant relies on that expectation by doing or refraining from doing something, and his reliance is reasonable in all the circumstances; and (3) the claimant suffers a detriment as a result of his reasonable reliance, such that it would be unfair or unjust for the party responsible for the representation or assurance to go back on her word: see *Thorner v. Major*, [2009] UKHL 18, [2009] 1 W.L.R. 776, at para. 29, per Lord Walker; see also *Sabey v. von Hopffgarten Estate*, 2014 BCCA 360, 378 D.L.R. (4th) 64, at para. 30; *Clarke v. Johnson*, 2014 ONCA 237, 371 D.L.R. (4th) 618, at para. 52; *Idle-O Apartments Inc. v. Charlyn Investments Ltd.*, 2014 BCCA 451, [2015] 2 W.W.R. 243, at para. 49; *Scholz v. Scholz*, 2013 BCCA 309, 340 B.C.A.C. 151, at para. 31. The representation or assurance may be express or implied: see *Wolff v. Canada (Attorney General)*, 2017 BCCA 30, 95 B.C.L.R. (5th) 15, at para. 21; *Sabey*, at para. 33; B. MacDougall, *Estoppel* (2012), at p. 446; *Snell's Equity* (33rd ed. 2015), by J. McGhee, at p. 335. …
>
> …
>
> [17] Where protecting the equity of the case may demand the recognition of "new rights and interests…in or over land" (*Crabb v. Arun District Council*, [1975] 3 All E.R. 865 (C.A.), at p. 871, per Lord Denning M.R.), proprietary estoppel can do what other estoppels cannot — it can found a cause of action: see MacDougall, at p. 424; McGhee, at pp. 330-33. Where the ingredients for a proprietary estoppel are present, the court must determine whether it is appropriate to satisfy the equity by recognizing the modification or creation of property rights "in situations where there is want of consideration or of writing": *Anger & Honsberger Law of Real Property* (3rd ed. (loose-leaf)), by A.W. La Forest, at p. 28-3.

See also *Michel v Saskatchewan*, 2021 SKCA 126, where Leurer J.A. discusses and applies this reasoning from *Cowper-Smith*.

[70] The Court of Appeal in *Michel v Saskatchewan*, 2021 SKCA 126 at para 321 confirms that a proprietary estoppel binds a successor in title:

> [321] *Pilcher* [(1997), 13 RPR (3d) 42 (BCSC)] is also a case where it was found that a licence could not be revoked because the elements of a proprietary estoppel had been made out. In that case, a "contractual licence to use [an] access road became irrevocable when [the licensee] expended money building and maintaining [it]" (at

> para 26). Justice Maczko relied principally on *Stiles v Tod Mountain Development Ltd.* (1992), 64 BCLR (2d) 366 (SC) [*Stiles*], a proprietary estoppel case, to reach the conclusion that the licence could not be revoked. In *Stiles*, Huddart J. (as she then was) had considered the question as to whether the licence could be revoked on the basis that it was necessary to make out all of the elements of proprietary estoppel. This approach was adopted by Maczko J. when he quoted the following passage from *Stiles*, which equated the elements that must exist to make a licence irrevocable with those that would ground a proprietary estoppel (*Stiles* at 375, as quoted in *Pilcher* at para 25):
>
> > Thus, where a party expends money on the land of another under an expectation created or encouraged by the owner, or even where the landowner merely stands silent, the authorities establish that proprietary estoppel may found a cause of action, a revocable licence may be rendered irrevocable, or the party's interest may be found in a licence coupled with an equity, the circumstances may establish a contract between the parties, or equity may require that the fee simple [sic] be transferred. The equity is enforceable against a successor in title who takes with notice.
>
> [322] To bring the matter full circle, Huddart J. referred to *Plimmer* [(1884), 9 AC 699 (PC)] for the purposes of developing the principles applicable to proprietary estoppel. In *Cowper-Smith v Morgan*, 2017 SCC 61 at paras 17–18, 26, 28 and 48, [2017] 2 SCR 754 [*Cowper-Smith*], McLachlin C.J. referred to both *Crabb* [[1976] 1 Ch 179 (CA)] and *Pilcher* for the purposes of deciding the principles of proprietary estoppel. I will return to discuss *Cowper-Smith*.

See also *Long v Van Burgsteden*, 2014 SKCA 115, 446 Sask R 207.

[71] In my view, the evidence supports the argument of a proprietary estoppel. As a result, a right of way to the Cemetery should be granted on the Access Land.

[72] First, I have concluded there was an implied representation made by the Arendts to Point View by conduct and acquiescence that the Access Land could be used to access the Cemetery. The Access Land had been used in the same manner for several decades before the Arendts became registered owners. They have admitted as much in their affidavit. Although this is not determinative, what is determinative is that even

after the Arendts became the registered owners for a period of ten years, they allowed the Access Land to be used in the same way that it had always been used. The ten years of acquiescence to the use of the Access Land and the allowing of a third party to buildup and maintain the right of way amounts to an implied representation to Point View that the Access Land could be used for getting to and from the Cemetery and the right of way could be used as it had always been used in the past.

[73] In addition, I must consider whether Point View relied on that expectation or representation by doing or refraining from doing something and whether its reliance for doing something was reasonable in the circumstances. The evidence before me was that for the ten years after the Arendts owed the Access Land and the several decades before, Point View, the community and the RM maintained the right of way on the Access Land and expended time and resources in this regard and to buildup the right of way. Again, the maintenance of the right of way and its buildup would have come with, either a direct or indirect, monetary cost and/or time cost by way of man hours. The actual cost of these activities is unclear, but I am comfortable that they are sufficient to support the finding that Point View relied on being able to the use the right of way and did something or had something done on their behalf reasonably in reliance to that implied representation to their determent.

[74] Next, I have considered whether it would be unfair or unjust for the Arendts to go back on their implied assurances considering the detriment suffered. On this issue I agree with Point View that it would be unfair and unjust for the Arendts to go back on their implied assurances.

[75] First, although there was never a registered interest in the Access Land, the Arendts and generations of their family knew there was a right of way on the Access Land to the Cemetery. Indeed, Cory Arendt admits this as being the case in his affidavit at least on behalf of him and his brother (See Cory Arendt's affidavit at para. 6). In

addition, I am prepared to infer that the previous owners also had notice based on the evidence supporting an intention of Metzger to grant a right of way in 1940 and the evidence of the historical use and historical maintenance of the right of way on the Access Land.

[76] Although I accept that the Arendts obtained the Access Land without a registered encumbrance for the right of way, and they may be of the opinion that there was no legal right to a right of way on the Access Land, their subjective belief in a legal conclusion cannot assist.

[77] Again, they have admitted that they were aware that people had been crossing the Access Land to get to the Cemetery before and after they acquired ownership of the Access Land. Furthermore, they have not denied knowledge that Point View, the community and the RM have also expended resources *vis-a-vis* the Access Land.

[78] As such, I am not of the view that the Arendts or any of their relatives are *bona fide* purchasers or *bona fide* successors in title. To be a *bona fide* purchaser means a purchaser that acquires title without notice and for value (See *Westshore* at para 59, *CitiFinancial Canada East Corporation v Touchie,* 2010 NSSC 149 at para 34, 319 DLR (4th) 118; and *Stubbert v Scott,* [1931] 1 WWR 598 (WL) (BCSC) at para 8.

[79] I am cognizant that mere notice of an unregistered interest in land is not sufficient for a finding of propriety estoppel and something more is necessary.

[80] The something more in this case includes the fact that the Access Land has been transferred within the same extended family since the initial purported grant from the Arendts' great grandfather in 1940. This type of generational transfer and continued acceptance of the right of way within one extended family weighs in favour of equity intervention.

[81] In addition, the initial motivation for the blockade provides support that it would be unfair or unjust to allow the Arendts to rely on the indefensibility of title aspects of the *LTA* in this case. The initial blockade was not grounded in any legitimate concerns about the actual use of the Access Land by the public, the need to store equipment or the liability access may create but instead was instigated because of a dispute with one neighbour. I understand that one of the directors of Point View is related to the neighbour who is at the center of the dispute. However, the blockade's impact extends well beyond the problematic neighbour. The entire community that attends internments, visits loved ones buried or owns a burial plot located under the temporary access are impacted. In my mind, the blockade reeks of being harsh and unnecessary considering the far-reaching consequence of the actions and the historical acceptance of the right of way. The Arendts' actions in denying access were based on a dispute with one neighbour. The wider impact on the community is an important consideration when stacked along with the facts of this case.

[82] Lastly, I have considered the proportionality of the detriment suffered by Point View as compared to maintaining important individual land rights. Even with the acknowledgement that the detriment to Point View is minor in the grand scheme of things, I am still convinced that equity dictates a remedy be applied.

[83] In sum, I conclude that the doctrine of proprietary estoppel should be invoked to protect the right of way the Arendts had acquiesced to for ten years based, in part, on the historic generational right of way that had been granted since 1940 and the true motivation behind the blockade.

Conclusion

[84] Point View's application is allowed. An easement based on the doctrine of proprietary estoppel over the Access Land consistent with its historical use should be granted and as such there shall be a:

1. Declaration that Point View has a right of way over the Access Land, legally described as NW 30-6-23-W3, Ext 4 as described on Certificate of Title 79SC01194, Ext 29 as described on Certificate of Title 87SC08998, Ext 29; and

2. An order directing the Registrar of Land Titles to register the easement on the titles of both the Access Land and Point View's land with Point View's land registered as the dominant tenement and the Access Land as the servient tenement.

[85] Costs are awarded to Point View in the amount of $3,000 as they have been successful in its application.

J.
M.E. TOMKA