SUPREME COURT OF NOVA SCOTIA
Citation: *Romkey v. Osborne*, 2019 NSSC 56

Date: 20190221
Docket: Hfx No. 460044
Registry: Halifax

Between:

Paul Romkey and Christine Romkey

Applicants

v.

Robert Osborne

Respondent

Judge:	The Honourable Justice Joshua M. Arnold
Heard:	October 22-25, 2018, in Halifax, Nova Scotia
Counsel:	Craig Arsenault, for the Applicants Kathryn Dumke, for the Respondent

By the Court:

[1] These applications arise out of a land dispute in Boutiliers Point. Paul and Christine Romkey seek a declaration that Robert Osborne's right of way over their property is a foot path, and a permanent injunction preventing him from cutting trees or making any other changes to their property. The Romkeys also claim damages against Mr. Osborne in connection with his cutting down eighty trees on their property.

[2] Robert Osborne contests the Romkeys' application and has filed a respondent's claim seeking damages and an injunction preventing the Romkeys from interfering with his right of way over their property. Mr. Osborne says his deed grants him a twelve-foot-wide right of way over the Romkey property down to the shore of St. Margaret's Bay, and that he is entitled to use it at all times and for all purposes, with or without vehicles or animals.

Background

[3] In 2008, Paul and Christine Romkey bought an ocean-front property at 31 Lerwick Lane in Boutiliers Point. The house is on a private lane, just off of St. Margaret's Bay Road. There were seven lots on the lane when the Romkeys bought their home. During the disclosure process required for the agreement of purchase and sale, the Romkeys received the property's parcel description, including a list of the benefits and burdens on the property. They understood from the parcel description that the only burden was a right of way in favour of the properties on Lerwick Lane and one property across the highway from Lerwick Lane. They interpreted the right of way as allowing the use of a foot path going from the eastern boundary of the Romkey property down to the shoreline. The grant of right of way specified that the foot path was to be used for normal pleasure purposes only.

[4] In October 2016, Paul Romkey was on his property when Robert Osborne approached him and told him that he was the new owner of the property across the highway from Lerwick Lane. He informed Mr. Romkey that he had a twelve-foot-wide right of way over the Romkey property down to the shore. This was the first Mr. Romkey had heard of a second right of way over his property. The conversation became heated, and the parties went their separate ways.

[5] In late November 2016, Mr. Romkey received a letter from Amanda Lutz, a lawyer, indicating that she had completed the migration of Robert Osborne's

property. She advised that she had amended the Romkey parcel register to include Mr. Osborne's right of way. Mr. Romkey forwarded a copy of the letter to his own lawyer, Peter Landry, who advised him that Mr. Osborne's right of way was the same foot path right of way to the shore granted to the other lot owners in the subdivision. He told the Romkeys that no action was necessary on their part.

[6] From November 19, 2016, to January 27, 2017, various exchanges took place between counsel for both parties as to the rights associated with Mr. Osborne's right of way. Mr. Landry maintained that Mr. Osborne's right of way was the same right as that of the other lot owners, allowing him to use the foot path to access the shore. Counsel for Mr. Osborne, Kathryn Dumke, insisted that her client's right of way was much broader.

[7] On January 30, 2017, Robert Osborne and his cousin went onto the Romkey property and chopped down numerous trees within what they believed was the twelve-foot-wide right of way. Returning home to find that their trees had been cut, the Romkeys called the police. An officer came to Mr. Osborne's residence. The next day, Mr. Landry wrote to Ms. Dumke, demanding that her client cease cutting trees. On February 1, Mr. Osborne returned to the Romkey property and cut more trees, until he was confronted by Mr. Romkey. The police were called again, and Mr. Osborne was directed not to take further action on the property until the matter was resolved in civil court. In total, Mr. Osborne cut down eighty trees on the Romkey property.

[8] On February 3, 2017, Paul Romkey obtained an emergency interim injunction from this court preventing Mr. Osborne from cutting trees, bulldozing ground, or making any other changes to lands within one square kilometre of the Romkey property. The order was served on Mr. Osborne that day. On February 7, the scope of the injunction was reduced to allow Mr. Osborne to do work on his own property.

[9] On October 16, 2017, Justice Ann Smith heard a motion for summary judgment brought by Robert Osborne. She dismissed the motion, holding that "the language of the Osborne right of way is ambiguous with respect to the nature and extent of the grant": 2017 NSSC 290, at para. 24. The matter was converted from an action to an application.

The History of the Lerwick Lane Subdivision

[10] In 1956, Thomas Osborne and Sarah Osborne began subdividing a large parcel of land in Boutiliers Point, abutted by St. Margaret's Bay at one end and

Highway No. 3 at the other end (the "Lerwick Lane Subdivision"). An originating subdivision of those lands created three lots – Lots No. 1, 2, and 3 – in addition to the remainder lot.

[11] Thomas and Sarah Osborne also owned a piece of land directly across Highway No. 3 from the Lerwick Lane Subdivision. On June 5, 1960, they conveyed that piece of land to Thomas Osborne's son, Harold Osborne. The parcel description included the following right of way:

> TOGETHER WITH a right of way in common with the Grantors and all other persons having a similar right at all times and for all purposes for the Grantee, his heirs and assigns, the owner or owners for the time being of the above described lands and his and their agents, servants and workmen with or without animals or vehicles through, along and over the right of way shown on a certain plan dated November 8, 1956, prepared by John A. McElmon, P.L.S. entitled "Subdivision lot of land owned by Thomas E. Osborne" at Boutiliers Point from the western side of the said highway as shown on the said plan to the eastern boundary of lot No. 1 as shown on the said plan and thence proceeding by a strip of land twelve feet wide along the southern and eastern boundaries of said lot No. 1 until it meets shore of St. Margaret's Bay at high watermark at a point immediately to the south of the southwestern corner of said lot No. 1 as shown on said plan, the said lands and the said right-of-way being immediately across this said highway from the lands hereinbefore described.

The 1956 survey plan referenced in the deed depicts a road labelled "Private Right of Way to Lot #1" that begins at Highway No. 3 and ends at the eastern boundary of Lot No. 1.

[12] At the time of the deed to Harold Osborne, the right of way over the "strip of land twelve feet wide" was a burden over Thomas and Sarah Osborne's remainder parcel. It was not burdening any other party or parcels. That changed less than three years later when, in 1963, Thomas and Sarah Osborne further subdivided the remainder parcel to create Lots No. 4 and 5. The strip was now within the boundaries of the new Lot No. 5. When Thomas and Sarah Osborne conveyed Lot No. 5 to Joseph and Winnifred Bradshaw in February 1964, however, they did not reference the right of way over the twelve-foot-wide strip. Instead, the deed stated:

> TOGETHER WITH a right-of-way for the owners from time to time of said Lot No. 5 with their servants, agents on foot or by vehicle and at all hours of the day or night from and to said Lot No. 5 to and from the highway known as Highway No. 3 as shown on the said plan over the area marked on the said plan as "New R.O.W." in common with all other persons entitled to use the said right-of-way including all

> persons entitled to use the foot path over said Lot No. 5 hereinafter described, said aforementioned right-of-way lot being more particularly described as follows.
>
> …
>
> RESERVING OUT AND FROM the aforesaid Lot No. 5 a right-of-way to use a foot path across Lot No. 5 from the aforegoing right of way to the shore, such right to be the right to go by foot over the said land, said foot path going from the eastern boundary of said Lot No. 5 at a point approximately 20 feet south from the northeastern corner of said Lot No. 5 as shown on the said plan by a line approximately parallel to the northern boundary of said Lot No. 5 as shown on the said plan to high water mark at the shore, said right also to include the right to use and enjoy the beach on the said shore below high water mark, the aforesaid right being hereby reserved to the owners from time to time of the Lots No. 1, 2, 3 and 4 as shown on the said plan and the owner or owners of the land shown on the said plan under the name "Thomas Osborne" and the owner for the time being of the land across the Highway No. 3 from the aforementioned lands now owned by H. Osborne, together with their and each of their servants, agents and guests, the aforesaid foot path and beach rights to be used only for normal pleasure purposes.

The survey plan referenced in the Bradshaw deed shows that the existing right of way – the road running from the western side of Highway No. 3 to Lot No. 1 – had been subsumed within a wider fifty-foot road from Highway No. 3 to Lots No. 1, 4 and 5, described on the plan as "New R.O.W."

[13] In 2008, Paul and Christine Romkey purchased Lot No. 5, now known as 31 Lerwick Lane, from Susan Mathieu and S. Gordon Phillips. The warranty deed conveying the property stated the following in relation to rights of way:

> TOGETHER WITH a right of way for the owners from time to time of said lot No. 5 with their servants, agents on foot or by vehicle and at all hours of the day or night from and to said Lot No. 5 to and from the highway known as Highway No. 3 as shown on the aforementioned plan No. 6793, drawer 88, over the area marked on the said plan as New R.O.W. in common with all other persons entitled to use the said right of way including all persons entitled to use the foot path over said Lot No. 5.
>
> SUBJECT TO the use of a foot path across said Lot No. 5 from the aforegoing right of way to the shore, such right to be the right to go by foot over the said land, said foot path going from the eastern boundary of said Lot No. 5 at a point approximately 20 feet south from the northeastern corner of said Lot No. 5 as shown on the said plan by a line approximately parallel to the northern boundary of said Lot No. 5 as shown on the said plan to high water mark at the shore, said right also to include the right to use and enjoy the beach on the said shore below high water mark, the aforesaid rights being hereby reserved to the owners from time to time of Lots No.

> 1, 2, 3 and 4 as shown on the said plan and the owner or owners of the land shown on the said plan under the name Thomas Osborne and the owner for the time being of the land across the Highway No. 3 from the aforementioned land now owned by H. Osborne, together with their and each of their servants, agents and guests, the aforesaid foot path and beach rights to be used only for normal pleasure purposes.

Like the Bradshaw deed before it, the Romkey deed made no mention of the twelve-foot-wide right of way to the shore granted to Harold Osborne in the 1960 deed.

[14] Harold Osborne never built on the property across the highway, living instead with his family in a home about a kilometre from the Lerwick Lane Subdivision. He contracted polio in 1972, and subsequently never used the right of way. The property across the highway remained in his name until his death. It was conveyed to his grandson, Robert Osborne, on December 15, 2015, in the course of Probate proceedings. The deed into Robert Osborne references the twelve-foot-wide right of way over Lot No. 5 to the shore.

[15] In early 2016, Robert Osborne and his wife decided to return to Nova Scotia from Ontario to set up a home and a business on the lot he inherited from his grandfather. Construction began in mid-summer of that year. In October 2016, Mr. Osborne approached Mr. Romkey to inquire about his understanding of Mr. Osborne's right of way, triggering the dispute that gave rise to this proceeding.

Positions of the Parties

[16] The parties have very different interpretations of the nature and extent of Robert Osborne's right of way over the Romkey property. The Romkeys say the right of way contained in the Osborne deed is a grant of two distinct rights of way. The first section gives the grantee, together with the grantors and the owners of Lot No. 1, a right of way at all times and for all purposes, with or without vehicle access, over the "Private Right of Way to Lot #1" depicted on the 1956 survey plan. The second section gives the grantee a right of way along the eastern and southern boundary of Lot No. 1 to the shore of St. Margaret's Bay via a "strip of land twelve feet wide." The Romkeys say the nature and extent of the right of way over the strip of land is ambiguous, allowing the court to consider extrinsic evidence to resolve the ambiguity. That extrinsic evidence, they say, shows that Mr. Osborne's right of way to the shore is by foot only, and that it was encompassed by the twenty-foot-wide foot path right of way described in the 1964 deed into the Bradshaws.

[17] Robert Osborne says the right of way contained in his deed is a grant of a single right of way, at all times and for all purposes, with or without vehicles or animals, over the "Private Right of Way to Lot #1" and the twelve-foot-wide strip of land to the shore. He contends that the language of the grant is so broad that he can do whatever he wishes with the strip, including cut down all of the trees, construct a road, or install steps to the shore. He further submits that he can use the right of way for commercial purposes. In particular, he says he can authorize customers of his future business, whatever that may be, to use the right of way to the shore. Finally, Mr. Osborne says the Romkeys are misinterpreting the Bradshaw deed as to the location and the width of the foot path right of way, and that it does not encompass his right of way.

The Evidence – Lay Witnesses

[18] In addition to their own affidavits, the Romkeys filed affidavits from Preston Allen and Dale Heisler. They also filed an affidavit and expert report from Stan Kochanoff, an arborist, and an expert report from Michael Crant, a surveyor.

[19] Robert Osborne swore two affidavits, and filed affidavits from Beverly Ann Colgan, Kirk Boutilier, and Robert Becker. He also filed an expert report from Brandon Crouse, a surveyor.

[20] I will briefly summarize the evidence from the lay witnesses. I will then review the expert opinion evidence called by each party.

<u>Christine and Paul Romkey</u>

[21] When Christine and Paul Romkey purchased 31 Lerwick Lane, they intended it to be their retirement home. They were both drawn to the privacy created by the trees on each side of the home and to the north of the beach house. For Mrs. Romkey, the beach house was the property's biggest selling feature.

[22] The Romkeys knew when they bought the property that it was subject to a right of way. Their understanding was that a twenty-foot-wide foot path right of way ran down the northern boundary line of their property to the shore, benefitting other Lerwick Lane lots that did not have water access, and the Osborne lot across the highway. According to the Romkeys, there has never been a road down the northern boundary of their property to the shore. The natural landscape of the northern

boundary is too steep, wooded and peppered with large boulders for a vehicle to pass over it.

[23] The Romkeys' evidence was that they had often seen their neighbours using the foot path to go to the shore. They said the twenty-foot width was necessary to allow users of the right of way to gradually zig-zag down the steep, wooded escarpment to the shoreline.

[24] The Romkeys said they have had previous disputes about the foot path right of way with the Boutilier family, who own several properties in the Lerwick Lane Subdivision. Mrs. Romkey agreed on cross-examination that Kirk Boutilier once told her that he wanted to build a road over the right of way down to the shore.

[25] Christine Romkey first met Robert Osborne one evening in October 2016, when he knocked on her front door and asked to discuss the right of way on her property. She told him that she was not comfortable discussing anything with him at that time. He asked if he could speak with her husband, and she said her husband was not home and asked him to leave.

[26] In his affidavit, Paul Romkey said Mr. Osborne approached him on his property in late October 2016 and said he intended to install a road from the eastern border of the Romkey property to the shore. On cross-examination, however, he conceded that Mr. Osborne might only have mentioned installing a set of steps at that time. Mr. Romkey said Mr. Osborne told him that he was going to use the right of way in operating a business. Mr. Romkey replied that the deed to his property clearly indicated that there was a foot path right of way from the eastern border to the shore, and that absolutely no construction was permitted. Mr. Osborne argued that he had a deed that said he had a twelve-foot-wide right of way. The conversation quickly became heated and Mr. Osborne left the property.

[27] On October 31, 2016, Mr. Romkey sent a letter to Mr. Osborne explaining what their deed set out and advising him to have his lawyer contact the Romkeys' lawyer. On November 24, Mr. Romkey received a letter from Amanda Lutz, a lawyer, advising that she had completed the migration of Mr. Osborne's property and had unilaterally changed the parcel description for 31 Lerwick Lane to include Mr. Osborne's right of way. Mr. Romkey forwarded that letter to his lawyer, Peter Landry, who told him that Mr. Osborne's right of way was the same as the right of way over the foot path. He advised Mr. Romkey that there was no need to take any action. Mr. Romkey followed his lawyer's advice and did not object to the registration of Mr. Osborne's interest against the property.

[28] On January 20, 2017, Paul Romkey received a letter from Kathryn Dumke, Mr. Osborne's lawyer, requesting that Mr. Romkey remove the fence from his property prior to March 1 so that Mr. Osborne could start clearing what he believed to be his right of way. Mr. Landry responded on the Romkeys' behalf, disputing Ms. Dumke's interpretation of the right of way and advising her that Mr. Osborne had the right to use the foot path, but no further rights.

[29] On January 30, 2017, Mr. Romkey arrived home from work and saw multiple trees cut down on his property. He called the RCMP and told them that he believed Mr. Osborne was the person responsible. According to Mr. Romkey, Constable Liam Haines came to his property and advised him that he had spoken to Mr. Osborne, confirmed that he had cut down the trees, and advised him to have the property dispute resolved before cutting any more trees from the Romkey property. Mr. Romkey said the officer suggested that he install surveillance cameras. Mr. Romkey immediately contacted Preston Allen of Allen Automated Systems to arrange camera installation.

[30] On January 31, Peter Landry wrote to Kathryn Dumke demanding that Mr. Osborne stop cutting trees on the Romkey property immediately. That same day, Mr. Romkey said, he was advised by RCMP Constable Jeff Rideout that Mr. Osborne was on the Romkey property cutting down trees, and that he directed him to stop.

[31] On February 1, 2017, Preston Allen and his employees installed surveillance cameras on the Romkey property. During the installation, Mr. Romkey saw Mr. Osborne cutting down trees on the property and confronted him. They had a heated exchange, with Mr. Romkey demanding that Mr. Osborne stop cutting trees and leave the property. Two RCMP officers arrived, and one officer spoke to each man. When Mr. Osborne left, the officers did as well. According to Mr. Romkey, however, Mr. Osborne returned later that day and cut more trees.

[32] On February 3, 2017, on Mr. Romkey's motion, Justice Moir granted an interim injunction preventing Mr. Osborne from cutting trees, bulldozing, or making any other changes to lands within one square kilometre of the Romkey property. The order was served on Mr. Osborne on the same day it was issued. Mr. Romkey said he did not provide the court with the wording for that injunction, and did not intend to stop Mr. Osborne from working on his own property. On February 7, the scope of the injunction was narrowed, but it continued to enjoin Mr. Osborne from cutting or bulldozing any trees or ground on the Romkey property.

[33] The Romkeys testified that Mr. Osborne's cutting of the trees has caused a dramatic loss of privacy on their property. Despite retaining Maritime Landscape Services Ltd. to plant eight trees in an attempt to mitigate some of the loss, they reported that the lights of motor vehicles driving southbound on Highway No. 3 past Lerwick Lane now shine into their home, as do the lights of vehicles on Lerwick Lane. They also said they now experience increased noise from the neighbours and from the highway, that their beach house has no privacy, and their yard and house in general have limited privacy on the north side. Mr. Romkey said the trees on the north border prevented them from seeing any of the neighbouring homes from their beach house deck. The beach house is now visible to the neighbours. Mrs. Romkey said she has found the dispute with Mr. Osborne very stressful.

Preston Allen

[34] Preston Allen is President of Allen Automated Systems Limited. He was contacted by Paul Romkey in early January 2017 for the purpose of installing surveillance cameras at 31 Lerwick Lane. On January 31, Mr. Romkey told him that he needed the cameras installed as soon as possible because Robert Osborne was cutting trees on his property.

[35] On February 1, 2017, Mr. Allen was at 31 Lerwick Lane installing outdoor surveillance cameras for about two hours. He saw two people on the property measuring the area and cutting trees. He saw Mr. Romkey have a heated conversation with one of them, who Mr. Romkey later identified as Robert Osborne. Mr. Allen heard Mr. Romkey tell Mr. Osborne to stop cutting the trees and to leave his property, but Mr. Osborne continued cutting. Within thirty minutes of this exchange, Mr. Allen spoke with Mr. Romkey, who expressed frustration with Mr. Osborne. Mr. Allen said that both Christine and Paul Romkey were visibly upset by the situation.

[36] Preston Allen was not cross-examined on his affidavit.

Dale Heisler

[37] Dale Heisler's late father, Joseph Bradshaw, bought 31 Lerwick Lane from Thomas Osborne and his wife Sarah Osborne, and built the original cottage on the property. Between 1964 and 1974, when her father sold the property, Ms. Heisler regularly spent time at 31 Lerwick Lane in the summer. She described the property as "very private and serene". Her evidence was that "the concourse of the northern

boundary of 31 Lerwick was steep and wooded" and that "[t]here was never vehicle access to the St. Margaret's Bay shoreline on the northern boundary of 31 Lerwick".

[38] Ms. Heisler was aware that there was a foot path right of way in favour of the other properties in the subdivision, and in favour of some properties on St. Margaret's Bay Road. There were never any businesses operating on or across from what is now Lerwick Lane, and the right of way was never used for commercial purposes. Before her father cleared permanent open access to the shoreline on 31 Lerwick Lane for their cottage, the family used the foot path through the woods on the northern boundary of the property. In addition to using it herself, she witnessed many people use the right of way to walk through the woods to the shoreline.

[39] Ms. Heisler believed that it was a common understanding of all people in the Lerwick Lane area that the access to the shoreline along the northern boundary of 31 Lerwick Lane was by foot only.

[40] Dale Heisler was not cross-examined on her affidavit.

Robert Osborne

[41] In 2015, Robert Osborne inherited the lot across the highway from the Lerwick Lane Subdivision from his grandfather, Harold Osborne. In early 2016, Mr. Osborne and his wife decided to return to Nova Scotia from Ontario and build a home on the lot. They also planned to open a business on the property that would require access to the waters of St. Margaret's Bay.

[42] In mid-summer or early fall, the Osbornes began construction of a building designed as a residence on the top and for commercial use below. At the same time, Mr. Osborne investigated the right of way to the waters of St. Margaret's Bay. He discovered that the Romkeys had built a fence, a rock wall, cribwork, and a parking area, effectively closing off the right of way to the shore.

[43] Robert Osborne's evidence was that when he approached Paul Romkey in October 2016, he did not have definite plans for his own property. Since inheriting the property, he and his wife had considered various business ideas, but had made no firm decision. His immediate concern, he said, was opening up the right of way to enable his family to access the shore. Mr. Osborne denied telling Mr. Romkey that he intended to install a road over the right of way, but did say that he might build steps to enable his disabled aunt to use the right of way safely. The conversation quickly soured, and Mr. Osborne left.

[44] In early January 2017, Robert Osborne instructed Ms. Dumke to prepare a letter to the Romkeys describing the right of way and requesting the removal of the fence and other obstructions so that he would be able to proceed with clearing out the right of way. The letter was provided to the Romkeys by personal service on January 20.

[45] On January 31, Robert Osborne and his cousin went onto the Romkey property and cut the trees within the twelve-foot-wide right of way. When they finished, Mr. Osborne returned home. He later received a phone call and a visit from an RCMP officer. Mr. Osborne told the officer that he had a right of way over the property and that he had called the Department of Natural Resources and "everybody who I thought would have a say on what was going to happen there and whether I could take the trees down" and that he had been told that it was his right to clear the trees. The officer told Mr. Osborne to have his lawyer get in touch with the police station and explain what was going on.

[46] The next morning, Mr. Osborne received another visit from an RCMP officer. Mr. Osborne's evidence was that the officer said he was satisfied that it was a civil matter, instructed him not to touch the fence or any other obstruction installed on the property, but told him, "as far as the twelve foot right of way, have at 'er". Mr. Osborne then returned to the Romkey property, strapped a dashboard camera to a tree, pointed it toward the top of the right of way, and began cutting more trees. Mr. Osborne said Mr. Romkey emerged and threatened to "go and get his shotgun" if Mr. Osborne did not stop cutting the trees. Mr. Osborne looked at Mr. Romkey and picked up the dashboard camera from the tree. Mr. Romkey ran back into his house. Mr. Osborne returned to his truck, which was parked in a neighbouring driveway, and called the police. Two RCMP officers came to the property, with one officer speaking to each party. Mr. Osborne was told by the police that he should stay off the Romkey property until the matter was resolved in civil court.

[47] On February 3, 2017, Robert Osborne was served with an *ex parte* order enjoining him from cutting trees, bulldozing ground or making any other changes to lands within one square kilometre of 31 Lerwick Lane. Mr. Osborne said he had already retained the services of Victor Landscaping & Excavation Inc. to install a culvert on his property and to start preparations for a septic field. Work was set to commence on February 4. On February 2, the company moved its excavator and the sixty-foot culvert on a flatbed trailer to Mr. Osborne's property. As a result of the order, Mr. Osborne said, he had to cancel the landscaping work, at a cost of $1,932. Mr. Osborne also said he was unable to commence work with an acquaintance and

had to pay him for a full day of work and for his early return ticket back to Cape Breton, at a total cost of $180 in total. On February 7, the scope of the injunction was narrowed to permit Mr. Osborne to do work on his own property.

Beverly Ann Colgan

[48] Beverly Ann Colgan is the daughter of Harold Osborne, and Robert Osborne's aunt. She was born in 1961, one year after her father was deeded the property across the highway from the Lerwick Lane Subdivision. Ms. Colgan's evidence was that Harold Osborne was a stevedore working in the Halifax shipyard all of his life, until he contracted polio in December 1972. She described her father as an avid boat builder who, over the years, built three boats in his spare time. On the weekends, he would launch the boats into the waters of St. Margaret's Bay. According to Ms. Colgan's affidavit, after she was about four years old, she would accompany her father "often, depending on weather, every weekend on boating trips and fishing trips". Ms. Colgan deposed that her father would drive down Lerwick Lane to the southeastern corner of Lot No. 1, where he would turn around and back his car and trailer with the boat on it down over the twelve-foot-wide right of way to within approximately 100 feet of the shoreline. He would then haul the boat over the rocks into the waters of St. Margaret's Bay and launch the boat from there. According to Ms. Colgan's affidavit, the topography of Lerwick Lane and the Romkey property at that time "were such that the descent to the waters of St. Margaret's Bay was relatively gentle". She deposed that she and her father used the right of way "hundreds of times" and that it was "entirely treeless and was kept that way by my father to ensure easy and simple access to St. Margaret's Bay." Her evidence was that her father stopped using the right of way when he became ill with polio, and that, over the years until her father's death, she "observed the right-of-way growing up in trees so that it eventually became impassable for vehicles."

[49] On cross-examination, however, Ms. Colgan adopted portions of her discovery evidence that were very different from her affidavit. While her affidavit indicated that she and her father used the right of way "hundreds of times", she adopted her discovery evidence that it was likely between nine and eleven times over a six-year time span. She agreed that the right of way was not "entirely treeless", that there would have been some trees and rocks, but not as many as there were before Mr. Osborne cut the trees. As to her evidence that her father backed his car down to within 100 feet of the shoreline, she conceded that she was not good with distances and said that, at the time in question, she was "just a kid" who could not tell the difference between 100 feet or 200 feet.

Robert Becker

[50] Robert Becker is a retired Nova Scotia land surveyor who was employed by ABLE Engineering in Chester, Nova Scotia, from 2010 to 2017. In 2010, he was hired by Dorothy Grantmyre, the owner of Lots No. 1 and 2 in the Lerwick Lane Subdivision, to survey those two properties, and a third on Highway No. 3. The field work for the survey was performed by Brandon Crouse, who, at that time, was an articling student with ABLE. Mr. Becker and Mr. Crouse obtained additional information through conversations with Ms. Grantmyre and various neighbouring property owners. Mr. Becker did not recall speaking to Paul Romkey. He said it was possible that Mr. Crouse had additional conversations with other individuals in the subdivision. Mr. Becker prepared a survey plan of Ms. Grantmyre's properties dated September 28, 2012.

[51] In August 2014, Mr. Becker was hired by Trevor Boutilier to survey his property at 32 Lerwick Lane. When Mr. Becker reopened the Lerwick Lane file materials, he discovered that he had made a drafting error on the Grantmyre survey plan. On that plan, Mr. Becker depicted a twenty-foot-wide right of way over the property owned by Paul and Christine Romkey. According to Mr. Becker, this was an error and did not accurately reflect the foot path right of way over the Romkey property. He said the right of way is not twenty feet in width, but instead is twenty feet away from the boundary line of Lot No. 1. He revised the Grantmyre plan accordingly. Mr. Becker denied that Trevor Boutilier had convinced him that the earlier survey plan was wrong. He did not recall any conversations with Mr. Boutilier about the Romkeys.

[52] Robert Becker was not qualified as an expert in this proceeding. While his evidence that he revised the Grantmyre survey plan, and the reason for that revision, is admissible, his opinion as to the proper interpretation of the grant creating the foot path right of way is not.

Kirk Boutilier

[53] Kirk Boutilier is Trevor Boutilier's brother, and Robert Osborne's cousin. In 1965, Mr. Boutilier's family purchased the remainder lot of the Lerwick Lane Subdivision from Thomas and Sarah Osborne. In 1972, when Mr. Boutilier was six years old, his parents, Avon and Sandra Boutilier, built a house on the lot. Since 1994, Kirk Boutilier has lived on a portion of the lot deeded to him by his parents, in a house originally built by Thomas Osborne.

[54] For many years of his life, Mr. Boutilier lived virtually opposite from the rights of way over the Romkey property. His evidence was that there was a strip of land approximately twenty feet from the southeastern corner of Lot No. 1, directly opposite from where his family lived. In his youth, he said, the area was quite open. It later grew up in trees but remained entirely passable to the shore. Mr. Boutilier said that immediately adjacent to that strip, and approximately twenty feet from the boundary of Lot No. 1 down to the water, there was a foot path right of way to the waters of St. Margaret's Bay. His family had acquired this right of way together with the remainder lot. In the 1970s, Avon Boutilier, together with the Young family who owned Lot No. 4, built a set of steps over the foot path down to the shore. The stairs eventually fell into disrepair and, in 2005 or 2006, Mr. Phillips and Ms. Matthieu, the then owners of 31 Lerwick Lane, asked if they could remove them. According to Mr. Boutilier, his father agreed, with the condition that the stairs could be reconstructed at a later date. Mr. Boutilier said he has every intention to rebuild the stairs.

[55] Although Mr. Boutilier's affidavit described the set of steps as being on the foot path right of way, he conceded on cross-examination that when his brother had a survey done, they learned that the set of steps had actually been located a few feet away from the twenty foot mark. In other words, the steps were not installed directly over the right of way, but rather on another portion of Lot No. 5. Mr. Boutilier added, however, that the description of the foot path says it begins "at a point *approximately* twenty feet south from the northeastern corner of said Lot No. 5". Mr. Boutilier denied that he, or anyone he knew, had ever interpreted the right of way as being twenty feet wide.

[56] Mr. Boutilier said the Romkeys approached him after they purchased 31 Lerwick Lane and encouraged him and his family to use a set of stairs which was close to the southern sideline of the Romkey property. On cross-examination, he agreed that his family's relationship with the Romkeys subsequently deteriorated and that, in 2014 or 2015, a dispute arose between them in relation to his intention to clear the right of way and reinstate the set of steps to the shore. Mr. Boutilier's evidence was that he once obtained a peace bond against the Romkeys' son, which was subsequently appealed and "thrown out on the wording of the Justice of the Peace". He described the suggestion that he and the Romkeys do not get along as "the polite way to put it."

[57] Mr. Boutilier said the Romkeys destroyed any access to the right of way in 2016 when they constructed fences and a rock retaining wall, and backfilled the

entire area. Mr. Boutilier agreed that his involvement in this proceeding is tied to his interest in pursuing his own foot path right of way.

[58] Mr. Boutilier denied ever speaking with Robert Becker or Brandon Crouse. He agreed that in September 2012, everyone living on Lerwick Lane was a member of the Boutilier family except the Romkeys and Grantmyres, and that Mr. Becker and Mr. Crouse may have spoken with his brother, Trevor, or his father, Avon, while they were working for Ms. Grantmyre.

The Evidence – Expert Witnesses

Brandon Crouse

[59] Brandon Crouse is a Nova Scotia land surveyor who has worked in the surveying field for fifteen years. From August 2010 until April 2014, he worked with Robert Becker at ABLE. Mr. Crouse was qualified by the court as an expert in the field of land surveying, capable of providing opinion evidence on the location of boundary lines, the beginning points of parcels of land and rights of way, drafting legal survey plans, the interpretation of legal descriptions in deeds, and the interpretation of survey plans.

[60] Mr. Crouse was retained by Robert Osborne to review the relevant deeds, to prepare a survey plan showing the site conditions and the positioning of the rights of way relating to the Romkey property, and to provide the court with an expert report summarizing his conclusions.

[61] In Mr. Crouse's opinion, the rights of way described in the Romkey and Osborne deeds "are easily defined on the ground." In his survey plan, the twelve-foot-wide strip of land is located approximately eight feet to the north of the foot path right of way. Mr. Crouse did not interpret the foot path right of way as having a width of twenty feet. He concluded instead that the right of way begins at a point twenty feet south from the northeastern corner of Lot No. 5, and continues by a line parallel to the northern boundary of the property down to the shore. Although he depicted a foot path to the south of the beginning point with a width of five feet, he said the deed is silent as to the width of the foot path. On cross-examination, Mr. Crouse rejected the suggestion that, based on the description in the deed, he could also have depicted the foot path to the north of the beginning point. When asked to elaborate, he testified:

> So if we can proceed just for a hypothetical five-foot-wide walking path, typically you wouldn't try to… start to describe a right of way by actually passing a point where it started. Like, if this is five feet wide, you would start at a point fifteen feet from the survey marker. You wouldn't start at twenty feet and then back up. That's not typically how you would write a description. You start at the point you come to first.

[62] In his report, Mr. Crouse also offered an opinion that the rights of way were obstructed by a fence, cribwork, and eleven feet of vertical infill installed by the Romkeys. He said "[t]he fence and cribwork are self explanatory as to how they are obstructions", and that "[t]he 11 feet of vertical fill obstructs the walking path": Crouse report, p. 6.

[63] Mr. Crouse's report did not contain an opinion on whether the Osborne grant is one continuous right of way with the same benefits applying to both the "Private Right of Way to Lot #1" and the strip of land, or is a grant of two distinct rights of way. On cross-examination, Mr. Crouse was shown the description in the Harold Osborne deed and gave the following evidence:

> Mr. Arsenault: Having read this before, do you agree with me that, um, looking at this description as a whole, that it provides a right to cross a private lane, and a right to access the shore?
>
> Mr. Crouse: Yes.

[64] On re-direct examination, Ms. Dumke asked Mr. Crouse to compare the descriptions of the rights of way in the Bradshaw deed, and the description of the twelve-foot-wide right of way in the Osborne deed. They had the following exchange in relation to the Osborne description:

> Ms. Dumke: So let me ask you then, when you look at this description, where in the description begins the description of the right of way that is being granted as to its location?
>
> Mr. Crouse: The beginning would be the western side of the said highway.
>
> Ms. Dumke: And where does the description of that right of way end?
>
> Mr. Crouse: The eastern boundary of Lot No. 1.
>
> Ms. Dumke: But if.. I want you to reread that.. or I'm going to read to you..
>
> Mr. Crouse: Oh and thence proceeding, sorry…
>
> Ms. Dumke: From the western side of the said highway as shown on the plan, right?

> Mr. Crouse: Okay.
>
> Ms. Dumke: And thence proceeding by a strip of land twelve feet wide along the southern and eastern boundaries of Lot No. 1 until it meets the shores of St. Margaret's Bay…
>
> The Court: Ms. Dumke, this is re-direct examination. It's not cross-examination. You can ask your witness open-ended questions. You cannot cross-examine or put pointed question to your witness.
>
> Ms. Dumke: No, I understand. I'm sorry. So that right of way, um, if you would, can you tell me where it begins and where it ends?
>
> Mr. Crouse: Yeah, sorry. It begins at the highway and it ends at the shore.
>
> Ms. Dumke: Those are my questions, My Lord.

[65] Mr. Crouse denied knowing or ever having spoken with Kirk or Trevor Boutilier.

Michael Crant

[66] Michael Crant has been a Nova Scotia land surveyor since 1972. He was qualified by the court as an expert in the field of land surveying, capable of giving opinion evidence in the same areas as Mr. Crouse. The Romkeys retained Mr. Crant to prepare a survey plan of their property and to draft a rebuttal expert report.

[67] In Mr. Crant's opinion, the right of way contained in Harold Osborne's deed is a grant of two distinct rights of way – a right of way at all times and for all purposes, with or without animals or vehicles, over the "Private Right of Way to Lot #1", and a right of way over the strip of land to the shore. He noted at page 2 of his report:

> According to the description in Book 1679, Page 848 the persons benefitting from the right of way have the right to use the right of way "with or without animals or vehicles through, along and over the right of way". This description appears to apply to the right of way up to the eastern boundary of Lot No. 1. The second portion of the right of way is a strip of land 12 ft. wide that follows the southern and eastern boundaries of Lot No. 1 to the shore of St. Margarets Bay. I interpret there to be some ambiguity as to whether or not the same rights and benefits apply to the second portion of the right of way.

[68] On cross-examination, Mr. Crant was directed to the description in the Osborne deed, and gave the following evidence:

Ms. Dumke: So when we look at the description, and I'm just going to take you through it step by step, it says, "TOGETHER WITH a right-of-way in common with the Grantors and all other persons having a similar right". Right?

Mr. Crant: Yes.

Ms. Dumke: And so that would be a benefit, because it provides, and it grants, a right of way in common with others?

Mr. Crant: That's correct. Yeah.

Ms. Dumke: And then the description goes on to say, "at all times and for all purposes, for the Grantee, his heirs and assigns". Right?

Mr. Crant: Yes.

Ms. Dumke: And so, uh, that's a benefit too, right?

Mr. Crant: Yes, it is.

Ms. Dumke: And it expands on the benefit that is in the first portion that says it's a right of way. And it expands it by giving a scope, right, to the right of way?

Mr. Crant: Yes.

Ms. Dumke: So you cannot only use it in daylight, you can use it at all times, right. Whether it snows, whether it's dark, it doesn't matter, you can use it at all times, right?

Mr. Crant: That's correct, yeah.

MS. Dumke: And then it says "and for all purposes", right?

Mr. Crant: Yeah.

Ms. Dumke: So you could use it for instance, to take a dog over it?

Mr. Crant: Yes, okay.

Ms. Dumke: You can use it to take a vehicle over it?

Mr. Crant: Well it says vehicles in here, so whatever this.. in this particular right of way…

Ms. Dumke: No no, but I mean, it doesn't matter what purpose it is, right?

Mr. Crant: Yeah.

Ms. Dumke: It's all purposes.

Mr. Crant: Okay.

Ms. Dumke: So for instance, if I had a business uh, um, on my property, that uh was a business for.. let's say a lobster fishing business, right?

Mr. Crant: Mmhmm.

Ms. Dumke: I could take the lobster traps and carry them from the water all the way up to where my place of business was, right?

Mr. Crant: Okay.

Ms. Dumke: Yes?

Mr. Crant: Okay, yes.

Ms. Dumke: And if I had a friend who came in a boat and had a bunch of oranges that I wanted to sell, I could actually take the orange boxes, right, the boxes with oranges in them, and carry them up the right of way all the way to my place of business where I might sell the oranges, right?

Mr. Crant: Yes.

Ms. Dumke: Now if I had cattle on the property that I owned, I could actually take, let's say, my cows, all the way down to the water to make them drink some salt water from the ocean which, apparently makes them more fertile.

Mr. Crant: Okay.

Ms. Dumke: Do you think I could do that? Under this description?

Mr. Crant: I don't know if this takes it to the ocean or not. Under this description. This portion of it.

Ms. Dumke: Well, it says to the shore, right? That's what the description says.

Mr. Crant: Yeah… Well I'm interpreting this as two different right of ways, actually. That's my interpretation.

[69] And later:

Ms. Dumke: So what I understand from your report is that you can go from the public highway to the eastern boundary of Lot No. 1, at all times for all purposes, with or without animals or vehicles, but then, somehow, according to your report.. you need to say yes, when you nod, otherwise the judge, it's not in the record..

Mr. Crant: Yes. Sorry. Yes.

Ms. Dumke: And then I'm going to be stuck with my vehicles, right?

Mr. Crant: Yes.

Ms. Dumke: And I'm going to be stuck with my cows?

Mr. Crant: Yes.

…

Ms. Dumke: So explain to me where in this description is any wording that limits the benefits conferred at the beginning of the paragraph?

Mr. Crant : I guess you would have to say it was an interpretation. I treated it as two different right of ways. In other words, the vehicular right of way to get to Lot 1, and then, based on what I saw with the terrain and, and so on, I interpreted this to be more or less a foot path. A foot right of way to the shore. Because it was really not navigable the way it existed.

Ms. Dumke: Okay. But sir, the question is, where in this description are there any words of limitation as to the scope that is described at the beginning of the paragraph?

Mr. Crant: I don't see it.

Ms. Dumke: There are none, right?

Mr. Crant: Right.

Ms. Dumke: And so if the intention of the grantor of this right of way had been to limit it from the eastern boundary of Lot No. 1 forward, right?

Mr. Crant: Yes.

Ms. Dumke: He would have had to say "and thence on foot proceeding"?

Mr. Crant: That's possible, yes.

Ms. Dumke: Because otherwise, nobody would know that he had it in his mind that you'd have to walk on foot after that, right?

Mr. Crant: Right.

Ms. Dumke: And so when you talk in your report about you have to look at the benefits conferred, right?

Mr. Crant: Yes.

Ms. Dumke: Isn't the problem that without such words of limitation, you have to go by what's in the paragraph? Right?

Mr. Crant: I guess so, yes.

[70] On re-direct examination, Mr. Crant gave the following evidence:

Mr. Arsenault: And now, the first series of questions, I think you didn't get to finish your answer when my friend was putting scenarios to you and suggesting, you know, can you take cattle down it, can you carry oranges up it, and you had briefly mentioned "Well I interpret it as two separate things". So just to clarify for the court, when my friend was suggesting, can you take cattle up it, can you carry oranges up it, are you referring to all the way to the shore, or the right of way that goes to Lot No. 1?

Mr. Crant: The right of way that goes to Lot No. 1.

Mr. Arsenault: And it was also put to you, you were asked to look at the words, and say, in the words, is there anything that limits the scope of what can be done on that strip of land.

Mr. Crant : That's correct, yes.

Mr. Arsenault: So it..it.. not the word, and I don't think you got to answer that but, not looking at the words, in your report you identify what the limit is.

Mr. Crant: Yes I did.

Mr. Arsenault: Being what?

Mr. Crant: Well I interpreted, in my report, I interpreted the right of way from the highway to Lot No. 1 as, you know, the one with vehicular rights, and well, basically just about anything, you know, you could do anything with it. But from the eastern boundary of Lot No. 1 to the shore, I took, or I treated that as a different, a different right of way basically.

[71] In his report, Mr. Crant agreed with Mr. Crouse that there is little doubt as to the location of the twelve-foot-wide right of way. Having examined the terrain, Mr. Crant concluded at page 2 of his report that "it would be extremely unlikely that a vehicle could navigate this strip of land. Besides being extremely rugged this portion of the right of way drops a total of 40 feet from Lerwick Lane to the shore. Slopes along this section of the right of way were found to be between 45 and 54 degrees."

[72] Mr. Crant also considered the location of the foot path right of way described in the Bradshaw and Romkey deeds. In his view, the foot path's location is "open to interpretation", but the most reasonable interpretation is that it is situated to the north of the beginning point (twenty feet south of the northeastern corner of Lot No. 5), and proceeds by a line approximately parallel to the northern property boundary down to the shore. Said differently, while Mr. Crouse interpreted the foot path right of way as being "outside the 20 ft. call for the point of beginning", Mr. Crant interpreted it to be located "within the 20 ft. call from the boundary": Crant report, p. 3. In Mr. Crant's opinion, given the nature of the terrain, the steep slopes, and the vagueness of the description in the deed, it was unlikely that the foot path followed a perfectly straight course to the shore. Instead, it could have followed an irregular course within the twenty-foot area between the northern boundary and the beginning point. Mr. Crant conceded on cross-examination, however, that he had not been aware of Kirk Boutilier's evidence that a set of steps had previously been installed over the foot path. He agreed that a set of steps would help overcome the topographical problems with the property.

[73] Mr. Crant disagreed with Mr. Crouse's conclusion that the twelve-foot-wide right of way was obstructed by the in-filled area, fence and cribwork. In Mr. Crant's view, this conclusion depends on the interpretation of the benefits associated with the right of way. If the right of way is interpreted to allow for vehicular traffic, then these features would clearly constitute an obstruction. However, if the right of way is interpreted to allow for foot traffic only, it would still be possible, despite these features, to navigate the right of way on foot.

Stan Kochanoff

[74] Stan Kochanoff is a certified professional arborist who has been carrying out arboricultural appraisals in the maritime provinces since 1973. Mr. Romkey retained Mr. Kochanoff to assess and report on the cost to replace the trees cut down by Robert Osborne. Mr. Kochanoff was qualified by this court as an expert in the field of arboriculture and tree and landscape appraising, capable of giving opinion

evidence on the value and replacement cost of the lost vegetation that was removed from the Romkey land by Mr. Osborne.

[75] In April 2017, Mr. Kochanoff visited the Romkey property to examine the site and conduct an inventory of the remaining tree stumps. He concluded that Mr. Osborne had cut down 24 large trees with diameters ranging from five inches to 14.5 inches, and 56 smaller trees with diameters ranging from 4.5 inches to one inch. The trees cut were a mixture of hard and soft woods, including white and black spruce, balsam fir, paper birch and native red maple. According to Mr. Kochanoff, trees over five inches in diameter are normally considered to be non-transplantable, and their replacement value is evaluated using the "Trunk Formula" method. For the smaller trees, the values are determined by the wholesale prices and installation costs for trees of comparable size and species used by local landscape contractors. Using these methods, Mr. Kochanoff concluded that it would cost $52,111 to replace the larger trees, and $26,444 to replace the smaller trees, for a total replacement cost of $78,555 for the eighty destroyed trees.

[76] Mr. Kochanoff was cross-examined extensively on his report. Ms. Dumke pointed out, and Mr. Kochanoff agreed, that he did not describe the Trunk Formula in any detail, or explain why he chose it over other possible approaches. Ms. Dumke repeatedly drew Mr. Kochanoff's attention to excerpts from the *Guide to Plant Appraisal*, 9th edition, a text which Mr. Kochanoff referenced in his report and which he agreed is used by all certified arborists for landscape appraisals. These excerpts, according to Ms. Dumke, indicate that: (1) appraised value should be reasonable, (2) a plant appraiser should consider the market value of the entire property when valuing the landscape, and (3) in situations involving damage to plants in or near easements, the nature of the easement rights is relevant to the value of the lost vegetation. Ms. Dumke also referred Mr. Kochanoff to an excerpt from the 10th edition of the *Guide*, released in January 2018, which contains a discussion of the strengths and weaknesses of the Trunk Formula. This discussion noted, among other things, that the Trunk Formula "may result in estimates of tree value that are greatly out of proportion to the value of the land and other property improvements, or to what people would actually pay for a replacement tree." Mr. Kochanoff maintained that market value was irrelevant to his assignment in this case, which was to determine the cost to replace the trees and restore the privacy lost by the Romkeys when Mr. Osborne cut them down. He said his appraised value was reasonable and likely would not even cover the costs involved with reinstating trees on such a steep slope. Mr. Kochanoff did not consider the interpretation of easements to be within a plant appraiser's expertise, and he valued the lost trees on

the assumption that Mr. Osborne was not legally entitled to remove them. Finally, Mr. Kochanoff said that, notwithstanding the comments in the 10th edition of the *Guide to Plant Appraisal*, he would still use the Trunk Formula to value the lost trees.

The role of "surrounding circumstances"

[77] At the hearing, both parties argued that the court cannot consider the surrounding circumstances when interpreting an express grant, unless the wording is ambiguous. They both relied on *Laamanen v. Cleary*, 2017 NSSC 55, affirmed on appeal: 2018 NSCA 12. In the application decision, the judge stated:

> [78] Where the language is ambiguous, resort can be made to the circumstances existing at the time of the grant: *Laurie v. Winch*, [1953] 1 S.C.R. 49. As Scaravelli J. observed in *Oostdale Farm* at para. 31:
>
> > It will be a rare case when resort to the surrounding circumstances will not be necessary in construing the bounds of an easement. This would only be inappropriate where the words of the grant are clear and unambiguous, and expressly and satisfactorily resolve the problem before the court: para. 31.
>
> Surrounding circumstances may include: (1) the historic use of the easement, (2) the physical conditions which existed at the time of the grant, (3) the purpose for which the easement was granted and (4) the subsequent conduct of the parties: *Viehbeck v. Pook*, 2012 NSSC 48, [2012] N.S.J. No. 59, at para. 79. Where there is doubt, the grant should be construed in favour of the grantee: *Knock*, at para. 60, quoting from Anne LaForest, Anger & Honsberger, *Law of Real Property* (Toronto: Thomson Reuters Canada Limited, 2016).

[78] The Court of Appeal confirmed this and noted:

> 17 In my view, the judge was correct when she stated that there was nothing ambiguous about the width or location of the rights of way associated with Lot 5 or the nature of the rights conveyed. She made no factual error regarding the creation and the use of the rights of way. No authorities were provided in support of the distinction between "unrestricted" and "unfettered" rights of way or limitations on changes within the dimensions of a right of way, except where found to be an unreasonable use. Moreover, resort to surrounding circumstances is only taken when the words are not clear and unambiguous. I would dismiss this ground of appeal.
>
> [Emphasis added]

[79] While the Court of Appeal's decision in *Laamanen* appears to support the position advanced by the parties, it conflicts with other recent decisions from the same court. Those other decisions, in my view, better reflect the current law as set out by the Supreme Court of Canada in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] S.C.J. No. 53.

[80] Express grants contained in a deed are subject to the same principles of interpretation as any other contract. In *Gale on Easements*, 20th ed. (London: Sweet & Maxwell, 2017), the leading English text on the topic, the authors write at page 386:

> In the case of an express grant of a right of way, the extent of the right granted depends on the express terms of the grant. Those terms must be construed in accordance with the general rules as to the interpretation of legal documents. Those rules apply to documents creating easements as they apply to other legal documents.

[81] The Supreme Court of Canada clarified the basic principles of contractual interpretation in *Sattva*. Justice Rothstein, for the Court, emphasized the importance of context to the decision-maker's search for intent:

> 47 Regarding the first development, the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding" (*Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744, at para. 27 per LeBel J.; see also *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, at paras. 64-65 per Cromwell J.). To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:
>
> > No contracts are made in a vacuum: there is always a setting in which they have to be placed... . In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.
> >
> > (*Reardon Smith Line*, at p. 574, per Lord Wilberforce)
>
> 48 The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created

> by the agreement … As stated by Lord Hoffmann in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*, [1998] 1 All E.R. 98 (H.L.):
>
> > The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. [p. 115]

[82] The Court proceeded to address the role and the nature of "surrounding circumstances":

> 56 I now turn to the role of the surrounding circumstances in contractual interpretation and the nature of the evidence that can be considered. …
>
> 57 While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement (*Hayes Forest Services*, at para. 14; and Hall, at p. 30). The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract (Hall, at pp. 15 and 30-32). While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement (*Glaswegian Enterprises Inc. v. B.C. Tel Mobility Cellular Inc.* (1997), 101 B.C.A.C. 62).
>
> 58 The nature of the evidence that can be relied upon under the rubric of "surrounding circumstances" will necessarily vary from case to case. It does, however, have its limits. It should consist only of objective evidence of the background facts at the time of the execution of the contract…, that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting. Subject to these requirements and the parol evidence rule discussed below, this includes, in the words of Lord Hoffmann, "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man" (*Investors Compensation Scheme*, at p. 114). Whether something was or reasonably ought to have been within the common knowledge of the parties at the time of execution of the contract is a question of fact.

[83] Justice Rothstein explained that evidence of surrounding circumstances is not precluded by the parol evidence rule:

> 59 It is necessary to say a word about consideration of the surrounding circumstances and the parol evidence rule. The parol evidence rule precludes admission of evidence outside the words of the written contract that would add to,

> subtract from, vary, or contradict a contract that has been wholly reduced to writing... To this end, the rule precludes, among other things, evidence of the subjective intentions of the parties... The purpose of the parol evidence rule is primarily to achieve finality and certainty in contractual obligations, and secondarily to hamper a party's ability to use fabricated or unreliable evidence to attack a written contract...
>
> 60 The parol evidence rule does not apply to preclude evidence of the surrounding circumstances. Such evidence is consistent with the objectives of finality and certainty because it is used as an interpretive aid for determining the meaning of the written words chosen by the parties, not to change or overrule the meaning of those words. The surrounding circumstances are facts known or facts that reasonably ought to have been known to both parties at or before the date of contracting; therefore, the concern of unreliability does not arise.

[84] In *Last Mountain Valley No. 250 (Rural Municipality) v. Ter Keurs Bros. Inc.*, 2019 SKCA 10, [2019] S.J. No. 18, Schwann J.A., for the Saskatchewan Court of Appeal, described the impact of *Sattva* on contractual interpretation:

> 37 Prior to *Sattva*, interpretation of a contract was based on the objective intentions of the parties with "reference to the words [the parties] used in drafting the document, possibly read in light of the surrounding circumstances which were prevalent at the time. ... Evidence of one party's subjective intention has no independent place in this determination" (*Eli Lilly & Co. v Novopharm Ltd*., [1998] 2 SCR 129 at para 54 [*Eli Lilly*]). Where an agreement was unambiguous on its face, resort to extrinsic evidence was unnecessary (at para 55).
>
> 38 *Sattva* rejected the traditional approach to contractual interpretation reflected in *Eli Lilly* and the long line of decisions that had held to similar effect. …
>
> 39 In practical effect, adoption of a common sense approach to the interpretation of contracts means that (i) the judicial exercise is no longer dominated by technical strictures, and (ii) evidence concerning the surrounding circumstances known to the parties at the time they entered into the contract is generally admissible with admission no longer restricted to instances of contractual ambiguity.

[85] In *Canadian Contractual Interpretation Law*, 3rd ed. (Toronto: LexisNexis Canada Inc., 2016), Geoff Hall explains that the "modern approach to contractual interpretation, as embodied in *Sattva* … no longer treats contractual interpretation as a two-step exercise that stops at the language of the contract if there is no ambiguity": p. 104. He continues on the same page:

> At one point, not all that long ago, the prevailing view was that contractual interpretation could consider factors other than the four corners of the contractual language only if that language contained an ambiguity which could support two or more plausible meanings.

> That approach has been almost completely abandoned, with contractual interpretation now being considered a one-step exercise in which the factual matrix is always considered.

[86] Any doubt that the principles in *Sattva* apply to the interpretation of deeds was removed by the Nova Scotia Court of Appeal in *Duncanson v. Webster*, 2015 NSCA 29, 2015 CarswellNS 211, where the unanimous court stated:

> [5] … The trial judge was justified in entertaining evidence of what the "land of Keith Duncanson" in the 1966 deed meant, because the southern boundary of that land was described as Mr. Mooney's northern boundary in that deed. As the Supreme Court observed in *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53 (S.C.C.), evidence of surrounding circumstances is always permitted:
>
> > [60] ... The surrounding circumstances are facts known or facts that reasonably ought to have been known to both parties at or before the date of contracting; therefore, the concern of unreliability does not arise.
>
> It was appropriate for the judge to consider evidence of what the "land of Keith Duncanson" meant because it describes a key fact which was known or ought reasonably to have been known to the parties at the time.
>
> [Emphasis added]

[87] Justice Bryson made a similar observation with respect to the interpretation of a right of way in *Purdy v. Bishop*, 2017 NSCA 84, 2017 CarswellNS 834:

> 15 The law requires that a contract be "read . . . as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of the formation of the contract", (*Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53, para 47). Surrounding circumstances assist the Court in interpreting the language used by the parties, but does not displace it, (*Eli Lilly & Co. v. Novopharm Ltd*., [1998] 2 S.C.R. 129, para 57).
>
> 16 The Court must interpret the intention of the parties objectively by the words they used in the deed, not by subjective wishes, motivations or recollections, (*Knock v. Fouillard*, 2007 NSCA 27, para 27; Stonehouse v. Bailey, 2014 NSCA 50).

[88] In *Penney v. Langille*, 2018 NSCA 43, 2018 CarswellNS 386, another right of way case, Bryson J.A. cited his earlier statement of the law in *Purdy*: para. 19.

[89] Neither party drew the court's attention to the Court of Appeal's decisions in *Duncanson*, *Purdy*, and *Penney*. Since these authorities were helpful to his position, Mr. Arsenault was likely unaware of them. Ms. Dumke, on the other hand, was counsel in *Penney*. As officers of the court, counsel have a duty to bring forward

all relevant case law, including cases contrary to their position: *DeMaria v. Canada (Regional Transfer Board)*, [1988] 2 F.C. 480, [1988] F.C.J. No. 45, at para. 28; *R. v. Mitchell*, 1994 ABCA 369, [1994] A.J. No. 923, at para. 19; *R. v. C.F.*, 2016 ONCJ 302, [2016] O.J. No. 2752, at para. 21. The use that could be made of surrounding circumstances was a significant issue in this case, and the court should have been provided with any relevant authority on the point.

[90] As I stated earlier, I find that the decisions in *Duncanson*, *Purdy*, and *Penney* are consistent with the modern law of contractual interpretation, while *Laamanen* reflects the pre-*Sattva* approach to the admissibility of evidence of surrounding circumstances. For this reason, I decline to follow *Laamanen* on this issue. Evidence of surrounding circumstances is always admissible to assist the court in interpreting the words of a grant.

[91] The court's first step, then, is to attempt to determine the grantor's intentions from the words of the grant, considered in the context of the circumstances that existed at the time the grant was made. Surrounding circumstances could include the historic use of the easement, the physical conditions which existed at the time of the grant, and any other background facts that were or reasonably ought to have been within the knowledge of the parties at or before the date of grant. It is only after considering the words and the evidence of surrounding circumstances that the court can decide whether the grant is ambiguous. In *Canadian Contractual Interpretation Law*, 3rd ed., Hall writes at pp. 27-28:

> **2.3.2 Ambiguity is not a precondition to consideration of the factual matrix**
>
> The factual matrix must be taken into account when interpreting a contract whether or not there is linguistic ambiguity in the text of the document. Indeed, the Ontario Court of Appeal has held that a conclusion that a contract is ambiguous cannot occur unless the factual matrix has been considered: "First, the words of the contract must be analyzed 'in its factual matrix', and a conclusion arrived at that there are two possible interpretations of the contract." As noted by the same court in a later case, "[i]ndeed because words always take their meaning from their context, evidence of the circumstances surrounding the making of a contract has been regarded as admissible in every case." Similarly:
>
> > A consideration of the context in which the written agreement was made is an integral part of the interpretative process and is not something that is resorted to only where the words viewed in isolation suggest some ambiguity. To find ambiguity, one must come to certain conclusions as to the meaning of the words used. A conclusion as to the meaning of words used in a written contract can only be properly reached if the contract is considered in the context in which it was made … .

> As the language of a contract cannot be properly understood outside the context in which that language is placed, the factual matrix must be part of the interpretive process in every case, even if the language viewed on its own is not ambiguous.

[92] If the language of the grant, considered in the context of the surrounding circumstances, is ambiguous, the court may look to extrinsic evidence to resolve that ambiguity. This evidence can include expert opinion: *Chapman v. C.A. Realty*, 2018 NSCA 81, [2018] N.S.J. No. 416, at para. 59. Subsequent conduct of the parties, which is not part of the surrounding circumstances, may also be considered: Hall, pp. 103-104; *Shewchuk v. Blackmont Capital Inc*., 2016 ONCA 912, [2016] O.J. No. 6190, at paras. 39-46; *Wade v. Duck*, 2018 BCCA 176; [2018] B.C.J. No. 837, at paras. 25-29. As the Ontario Court of Appeal noted in *Shewchuk*, however, there are some dangers associated with reliance on evidence of subsequent conduct. The parties' behaviour in performing the contract may change over time, which could permit a fluctuating interpretation of the contract: *Shewchuk*, para. 43. The evidence of subsequent conduct "may itself be ambiguous": *Shewchuk*, para. 44. Finally, "over-reliance on subsequent conduct may reward self-serving conduct whereby a party deliberately conducts itself in a way that would lend support to its preferred interpretation of the contract": *Shewchuk*, para. 45.

The Osborne right of way versus the "foot path" right of way

[93] The Romkeys argue that Thomas and Sarah Osborne did not mention Harold Osborne's right of way in the 1964 deed into the Bradshaws because this later deed effectively widens Harold Osborne's right of way from twelve feet to twenty feet. Again, the grant in the 1964 deed states:

> TOGETHER WITH a right-of-way for the owners from time to time of said Lot No. 5 with their servants, agents on foot or by vehicle and at all hours of the day or night from and to said Lot No. 5 to and from the highway known as Highway No. 3 as shown on the said plan over the area marked on the said plan as "New R.O.W." in common with all other persons entitled to use the said right-of-way including all persons entitled to use the foot path over said Lot No. 5 hereinafter described, said aforementioned right-of-way lot being more particularly described as follows.
>
> RESERVING OUT AND FROM the aforesaid Lot No. 5 a right-of-way to use a foot path across Lot No. 5 from the aforegoing right of way to the shore, such right to be the right to go by foot over the said land, said foot path going from the eastern boundary of said Lot No. 5 at a point approximately 20 feet south from the northeastern corner of said Lot No. 5 as shown on the said plan by a line approximately parallel to the northern boundary of said Lot No. 5 as shown on the

> said plan to high water mark at the shore, said right also to include the right to use and enjoy the beach on the said shore below high water mark, the aforesaid right being hereby reserved to the owners from time to time of the Lots No. 1, 2, 3 and 4 as shown on the said plan and the owner or owners of the land shown on the said plan under the name "Thomas Osborne" and the owner for the time being of the land across the Highway No. 3 from the aforementioned lands now owned by H. Osborne, together with their and each of their servants, agents and guests, the aforesaid foot path and beach rights to be used only for normal pleasure purposes.

[94] The Romkeys have always interpreted this grant as conveying a twenty-foot-wide right of way along the northern boundary of their property to the shoreline. Their evidence was that the twenty-foot width was necessary to allow users of the right-of-way to follow a "zig-zag" path down the steep, wooded escarpment to the shoreline. Paul Romkey said that this use eventually created a meandering path.

[95] The Romkeys submit that the use of the word "across" in the opening part of the grant ("a right-of-way to use a foot path *across* Lot No. 5") means that the grantees were intended to enter at the eastern boundary of their property and zig-zag back and forth over the twenty feet between the beginning point and the northern boundary until they reached the shore. They rely on an entry from "Thesaurus.com" which defines the word "across" as "traversing a space, side to side", and cites the word "crosswise" as a synonym for "across". They say that the use of both "across" and "over" in the description implies that each should be given a different meaning, and that if "across" is given the meaning "crosswise", the right of way must be interpreted as giving the grantees the right to access the shore by crossing back and forth between the twenty feet from the beginning point to the northern boundary. Interpreted in this manner, Robert Osborne's right of way would fall within those twenty feet.

[96] As to the surrounding circumstances, the 1964 deed into Joseph and Winnifred Bradshaw was executed only four years after the deed to Harold Osborne. Both deeds involved the same grantors and were prepared by the same lawyer. The Romkeys say that this evidence, together with the mention of "H. Osborne" in the 1964 deed, is inconsistent with the grantors having simply forgotten about Harold Osborne's twelve-foot-wide right of way over the property. According to the Romkeys, the only reasonable interpretation is that the grantors intended for Harold Osborne's original right of way to the shore to be encompassed by the foot path right of way.

[97] Robert Osborne disagrees with the Romkeys' interpretation. He says the Bradshaw deed contains no information about the width of the foot path. He submits

that the grant describes a right of way that begins at a point approximately twenty feet south from the northeastern corner of Lot No. 5 and proceeds in a straight line approximately parallel to the northern boundary, down to the high water mark at the shore.

[98] While the Romkeys' interpretation offers a satisfying explanation for the absence of any mention in the Bradshaw deed of Harold Osborne's twelve-foot-wide right of way, it is not, in my view, supported by the language of the grant itself. The Romkeys' emphasis on the word "across" is misplaced. The *Collins Canadian Dictionary*, 1st ed. (Toronto: Harper Collins, 2010), defines "across" as "from one side to the other side of" and "on or at the other side of". The word's origin is described as "Old French *a croix* crosswise". The same dictionary defines "crosswise" as "across" and "in the shape of a cross". The *Shorter Oxford English Dictionary*, 3rd ed. (London: Oxford University Press, 1970) defines "across" as "at right angles, or any angle with", "from side to side of, not lengthwise" and "on the other side of". It defines "crosswise" as "in the form of a cross" and "across, transversely". Neither "across" nor "crosswise" can be interpreted to mean "from one side to the other and back again in a zig-zag fashion". Furthermore, the grant reserves a "right of way to use a foot path across Lot No. 5 *from the aforegoing right of way to the shore*". The words "aforegoing right of way" refer to the right of way over Lerwick Lane (the "New R.O.W.") described in the previous paragraph of the deed description. To get from Lerwick Lane to the shore, the grantees must travel from the eastern border of the Romkey property to the western border, from one side to the other. The word "across", then, refers to the grantees crossing from the eastern side of the property to the western side, not from the beginning point twenty feet south from the northeastern corner of Lot No. 5 to the northern boundary of the property, and back again, in a zig-zag fashion, down to the shore.

[99] After establishing that the foot path crosses from the eastern border to the western, the description more precisely identifies where the path starts and ends, and describes its course as following "a line approximately parallel to the northern boundary". According to the various survey plans, the northern boundary of the property is almost a perfectly straight line. The Romkeys' proposed interpretation of the foot path's course is inconsistent with the actual words used in the grant.

[100] Although the Romkeys may indeed have regularly witnessed their neighbours zig-zagging down the steep, wooded escarpment to the shoreline, this fact cannot be relied upon to enlarge the scope of the right of way or otherwise change the meaning of the grant.

[101] There is another problem with the Romkeys' interpretation. The description in the Bradshaw deed grants the right to use the foot path to "the owners from time to time" of the other lots. In relation to the Osborne property across the highway, however, the grantors specifically limit the right to "the owner for the time being":

> …the aforesaid rights being hereby reserved to the owners from time to time of Lots No. 1, 2, 3 and 4 on the said plan and the owner or owners of the land shown on the said plan under the name Thomas Osborne and the owner for the time being of the land across the Highway No. 3 from the aforementioned land now owned by H. Osborne….

[102] If the grantors' intention, through the Bradshaw deed, was to preserve and widen the right of way contained in the 1960 deed – a right which would run with the land – it is unlikely that they would use language that limited the right to the owner of the property at that particular time. Neither party has commented on the significance of the words "and the owner for the time being" in relation to the Harold Osborne property. While it is unusual, and undermines the Romkeys' proposed interpretation of the foot path right of way, it is not, in my view, otherwise material to the analysis of the rights of way in this case.

[103] I find that the wording of the grant creating the foot path right of way, considered in the context of the surrounding circumstances, is not ambiguous. The foot path starts at a point twenty feet south from the northeastern corner of the property, and follows a relatively straight course to the shore, approximately parallel to the northern boundary. The right of way is silent as to the width of the foot path. While it is true that the 1964 deed into the Bradshaws was prepared only four years after the deed to Harold Osborne, and that the same grantors and the same lawyer were involved in both documents, this evidence cannot be used to "overwhelm the words" of the grant: *Sattva*, para. 57. While we will never know why Thomas and Sarah Osborne omitted the twelve-foot-wide right of way from the Bradshaw deed, it was not because the earlier right of way was encompassed by the foot path right of way.

[104] Having concluded that the language of the grant of the foot path right of way is not ambiguous, it is unnecessary to rely on expert opinion as to its proper interpretation. That said, the court's interpretation of the foot path's location is generally consistent with Mr. Crouse's survey plan, which depicts the foot path approximately eight feet to the south of the twelve-foot-wide right of way.

Interpreting the Osborne grant

[105] The language of the grant contained in the deed into Harold Osborne, again, is as follows:

> TOGETHER WITH a right of way in common with the Grantors and all other persons having a similar right at all times and for all purposes for the Grantee, his heirs and assigns, the owner or owners for the time being of the above described lands and his and their agents, servants and workmen with or without animals or vehicles through, along and over the right of way shown on a certain plan dated November 8, 1956, prepared by John A. McElmon, P.L.S. entitled "Subdivision lot of land owned by Thomas E. Osborne" at Boutiliers Point from the western side of the said highway as shown on the said plan to the eastern boundary of lot No. 1 as shown on the said plan and thence proceeding by a strip of land twelve feet wide along the southern and eastern boundaries of said lot No. 1 until it meets shore of St. Margaret's Bay at high watermark at a point immediately to the south of the southwestern corner of said lot No. 1 as shown on said plan, the said lands and the said right-of-way being immediately across this said highway from the lands hereinbefore described.

[106] The Romkeys argue that the grant consists of two independent sections, with the first section reading:

> TOGETHER WITH a right of way in common with the Grantors and all other persons having a similar right at all times and for all purposes for the Grantee, his heirs and assigns, the owner or owners for the time being of the above described lands and his and their agents, servants and workmen with or without animals or vehicles through, along and over the right of way shown on a certain plan dated November 8, 1956, prepared by John A. McElmon, P.L.S. entitled "Subdivision lot of land owned by Thomas E. Osborne" at Boutiliers Point from the western side of the said highway as shown on the said plan to the eastern boundary of lot No. 1 as shown on the said plan …

[107] The second section reads:

> … and thence proceeding by a strip of land twelve feet wide along the southern and eastern boundaries of said lot No. 1 until it meets shore of St. Margaret's Bay at high watermark at a point immediately to the south of the southwestern corner of said lot No. 1 as shown on said plan, the said lands and the said right-of-way being immediately across this said highway from the lands hereinbefore described.

[108] The Romkeys say their interpretation is supported by the reference in the second section to "the said lands and the said right-of-way". They say "the said lands" refers to "the strip of land twelve feet wide", while "the said right-of-way" refers to the pre-existing right of way from the western side of Highway No. 3 to the eastern boundary of Lot No. 1. The Romkeys submit that while the right to travel

over the pre-existing right of way is at all times and for all purposes, with or without vehicles, the nature and extent of the right of way over the strip is ambiguous.

[109] Robert Osborne says his deed grants a single right of way, at all times and for all purposes, with or without vehicles or animals, encompassing the "Private Right of Way to Lot #1" and the twelve-foot-wide strip of land to the shore. He submits that there are no words of limitation in the grant that would prevent the benefits associated with the pre-existing right of way from applying equally to the twelve-foot strip.

[110] I agree with the Romkeys' interpretation that the words "the said lands" refer to the "strip of land twelve feet wide", while "the said right-of-way" refers to the pre-existing right of way to the eastern boundary of Lot No. 1. This language suggests the grantors intended for the grant to be read as having two distinct components. The same can be said for the reference in the first section to "all other persons having a similar right at all times and for all purposes". The evidence shows, and Mr. Osborne agreed, that there were other persons, such as the Grantmyres, who had a similar right to use the pre-existing right of way to Lot No. 1, but that only the grantors and Harold Osborne had the right to use the strip of land. As such, these words have no application to the second portion of the grant.

[111] The conclusion that the grant should be interpreted as the Romkeys suggest finds further support in the surrounding circumstances. The physical conditions in existence at the time of the grant suggest that the grantors did not intend for the benefits associated with the pre-existing right of way to extend to the strip. The Romkeys' evidence was that when they purchased the property in 2008, it had a naturally steep escarpment that was covered in mature trees, with large boulders throughout. Photographs of the sharp slope taken both before and after Mr. Osborne cut down the trees suggest that it would be virtually impossible for a vehicle to navigate the terrain. While there was no evidence before the court from anyone who saw the land in 1960, the affidavit of Dale Heisler, the daughter of Joseph Bradshaw, confirmed that similar conditions existed in 1964, only four years after the Osborne grant. Ms. Heisler spent considerable time at 31 Lerwick Lane from 1964 to 1974 and her evidence was that "the concourse of the northern boundary of 31 Lerwick was steep and wooded", and that "[t]here was never vehicle access to the St. Margaret's Bay shoreline on the northern boundary of 31 Lerwick". Robert Osborne chose not to cross-examine Ms. Heisler. This means that her evidence must be taken at face value, provided there is no evidence of its inaccuracy: see, for example, *Gresham v. Rohaly*, 2011 ONSC 7652, [2011] O.J. No. 6467, at paras. 78-79; and

Zarandi v. Canada (Minister of Citizenship and Immigration), 2015 FC 1036, [2015] F.C.J. No. 1103, at para. 17.

[112] Ms. Heisler's evidence conflicts with that of Kirk Boutilier, whose parents purchased the remainder lot from Thomas and Sarah Osborne in 1965. According to Mr. Boutilier, when he was a child, the area of the twelve-foot-wide right of way was quite open, and later "grew up in trees". Ms. Heisler's evidence also conflicts with the evidence of Beverly Ann Colgan, who stated in her affidavit that, in the mid-to-late sixties, the topography of the northern boundary of the Romkey property was much gentler than it is now, that it was entirely treeless, and that her father used to back his car and trailer with the boat on it down over the right of way to the shore. Both Mr. Boutilier and Ms. Colgan were cross-examined on their affidavits, giving the court the opportunity to assess their credibility.

[113] There were serious problems with Beverly Ann Colgan's evidence. Her affidavit did not accord with how she presented in court, which caused me some concern. Ms. Colgan's presentation on the stand, coupled with the significant discrepancies between her affidavit and her discovery evidence, led me to conclude that her evidence on the key issues in this case was completely unreliable. In particular, I reject her evidence as to the physical condition of the land and her father's use of the right of way. Kirk Boutilier was not a disinterested witness. He is related to Robert Osborne, was hostile during his cross-examination toward the Romkey's, and has a personal interest in the outcome of this case. I am not prepared to rely on his evidence on this issue.

[114] On the other hand, Ms. Heisler has no interest in the outcome of this proceeding and was not cross-examined. Where Ms. Colgan's and Mr. Boutilier's evidence conflicts with Ms. Heisler's, I prefer and rely on the evidence of Ms. Heisler.

[115] In *Continental Insurance Co. v. Dalton Cartage Co.*, [1982] 1 S.C.R. 164, the court reiterated the burden of proof in a civil case and stated at p. 171:

> … The question in all civil cases is what evidence with what weight that is accorded to it will move the court to conclude that proof on a balance of probabilities has been established.

[116] From Ms. Heisler's evidence, I find that when Thomas and Sarah Osborne made the grant to Harold Osborne in 1960, it was not their intention, or within their

reasonable contemplation, that he would drive a vehicle along the strip of land down to the shore.

[117] Based on the wording of the grant, interpreted within the context of the surrounding circumstances, I find that the Osborne deed grants two distinct rights of way. I further find that the benefits associated with the pre-existing right of way were not meant to extend to the right of way over the twelve-foot strip. These benefits include the right to use a vehicle on the right of way, and the right to use the right of way "at all times and for all purposes". In reaching this conclusion, I am mindful of Robert Osborne's argument that the absence of any words of limitation in the grant means that the purpose and mode of usage applicable to the pre-existing right of way must apply equally to the strip of land. I disagree that there is any such general rule. In *White v. Curtis*, 2017 ONSC 2190, [2017] O.J. No. 1738, aff'd on other grounds 2018 ONCA 767, [2018] O.J. No. 4767, the Ontario Superior Court of Justice considered the meaning of the following grant of access across a right of way and then over a strip of land to the shoreline:

> TOGETHER WITH a right-of-way in common with others entitled thereto as a means of vehicular access from the south side of the forced road shown on the said plan at a point about opposite the above described parcel over and along a strip of land presently used as a roadway crossing Lots 19 and 20 in the Ninth Concession of the said Township owned by the Grantor and continuing southerly to the north shore of Upper Beverly Lake.

[118] Notwithstanding the absence of any limiting words in the grant, Abrams J. relied on evidence of surrounding circumstances to conclude that the grantor did not intend for vehicular access to extend to the strip of land running from the right of way to the north shore of the lake. The grant was made in 1977, and the evidence established that, since the early 1960s, the strip had been used to provide access for cattle to drink water from the lake. The Court concluded that this use was incompatible with vehicular access:

> 201 This use, cattle roaming freely to water at the lake, as described, has continued from the early 1960's until well after the Plaintiffs purchased 707 Daytown Road in 1990. Moreover, this use is inconsistent, and in conflict, with the grantor intending that vehicular access should extend from the right-of-way over Part 6 to the north shore of Upper Beverley Lake, for at least two reasons:
>
> 1. The presence of vehicles on Part 6 would frighten the cattle away from the water, thus defeating the purpose of watering them there; and
>
> 2. The conditions created by the cattle on Part 6, prior to the 1995 improvements, which were described as, *inter alia*, wet, damp, marshy, a bog, at the level of the

> lake etc., prohibited vehicles from entering onto Part 6, lest they should become stuck in the mud.

[119] The Court in *White* went on to find that the right over the land did not actually amount to an easement because it did not accommodate the dominant tenement and was not capable of forming the subject matter of a grant. This finding was affirmed on appeal.

[120] In my view, while the absence of any words of limitation is obviously a factor to be considered when interpreting an express grant, its significance will depend on the precise wording and the surrounding circumstances involved in each case.

[121] Although I did not need to consider extrinsic evidence to find that the Osborne deed grants two distinct rights of way, I would have reached the same conclusion if I had. While both parties retained experts to give opinion evidence in this proceeding, only Michael Crant, the Romkeys' expert, addressed this issue directly in his report. According to Mr. Crant, a land surveyor since 1972, the deed description refers to two separate rights of way, and there is "some ambiguity as to whether or not the same rights and benefits apply to the second portion of the right of way": Crant report, page 2. During cross-examination and re-direct, he explained that he interpreted the right of way from the highway to Lot No. 1 as being for all purposes, with or without animals or vehicles, while he interpreted the strip of land going from the eastern boundary of Lot No. 1 to the shore as a separate right of way intended for foot traffic only. He testified that he based his interpretation on the wording of the grant and his observations of the terrain. In other words, he interpreted the words in context. In Mr. Crant's opinion, the strip of land was too steep to be navigable by vehicle.

[122] Brandon Crouse, Mr. Osborne's expert, did not give an opinion in his report as to whether the Osborne deed grants a single right of way or two distinct rights of way. When asked on re-direct examination to indicate where the Osborne right of way begins and ends, he initially responded that it begins at the western side of the highway and ends at the eastern boundary of Lot No. 1. Only after being led by Ms. Dumke did he change his answer, testifying that the right of way begins at the western side of the highway and ends at the shore. I give Mr. Crouse's evidence on that point little weight.

[123] Having considered the evidence of both experts, I prefer Mr. Crant's opinion. If resort to extrinsic evidence had been necessary, I would have adopted Mr. Crant's interpretation of the grant in the Osborne deed.

[124] Since I have found that the benefits associated with the pre-existing right of way do not apply to the right of way over the strip of land, it follows that I do not need to decide whether a right of way "for all purposes" means "for any and all purposes regardless of the purpose for which the dominant tenement was used at the time of the grant", as argued by Mr. Osborne, or "for all purposes within the reasonable contemplation of the grantor at the time the grant was made", as argued in the alternative by the Romkeys. It further follows that the right of way over the strip is silent as to the mode of use and the purposes for which it may be used. I have already determined, based on the surrounding circumstances, that it was not intended for vehicular use. As a result, I find that Robert Osborne and his heirs, agents and others, are entitled to travel by foot only along the strip of land to the shore.

[125] As to the purposes for which the right of way can be used, the court can look to the surrounding circumstances to determine whether Thomas and Sarah Osborne intended to allow Harold Osborne to use it for commercial purposes. In conducting this inquiry, I am aware that, in *Laurie v. Winch*, [1953] 1 S.C.R. 49, the Supreme Court of Canada recognized that a right of way's purpose can evolve, so long as the change in use remains within the right of way's reasonable ambit. This point is discussed in Bruce Ziff, *Principles of Property Law*, 7th ed., (Toronto: Thomson Reuters Canada, 2018) at page 437:

> The grantee is not entitled to increase the burden on the servient lands beyond the rights initially conveyed. However, it may have been contemplated or taken as implied that the easement's use would change over time. If so, an apparent increase in the burden can be a valid use of the initial right. This latter point is well illustrated by the leading Canadian case of *Laurie v. Winch*. There, farmland (the dominant tenement) was subdivided into residential lots. The easement, which was granted as a perpetual right-of-way over a slender lot near the farm, was split into a large number of easements, one of these being attached to each new lot.
>
> The Supreme Court of Canada treated this diffusion as valid. There was nothing to suggest that it was contemplated that the lands would always be used for agricultural purposes, or that changes in the use of the dominant lands would affect the continued existence of the easement. (Indeed, at the time of the grant, nearby land had been converted into a residential subdivision.) …

[126] The properties involved in this dispute are located in "cottage country", a rural community with cottages and other residences near or directly on the water. At the time of the grant, the only structures in the Lerwick Lane Subdivision were cottages. As Dale Heisler stated in her affidavit, in 1964, only four years after the Harold Osborne deed, 31 Lerwick Lane was "very private and serene". There is no evidence

of any commercial properties in the area at the time of the grant, or that the shoreline was accessed by anyone for commercial purposes.

[127] According to Beverly Ann Colgan's evidence, which I accept on this point, Harold Osborne was a stevedore who worked in the Halifax shipyards all of his life until he became ill with polio. In other words, at the time of the grant, he had steady employment. There is no evidence that he ever planned to operate a business on the land. In my view, based on the language of the grant and the surrounding circumstances, it is more probable than not that neither the grantors nor Harold Osborne contemplated the use of the right of way by customers of a business located on the property across the highway from Lerwick Lane. It is far more likely that the grantors wanted to provide their son with a means of accessing the shores of St. Margaret's Bay even though he did not live in the Lerwick Lane Subdivision. If I am wrong, however, and the wording of the grant is ambiguous, extrinsic evidence of Harold Osborne's subsequent conduct supports the same conclusion. According to the evidence, he continued to work as a stevedore until 1972, and lived with his family in a home approximately one kilometre from the Lerwick Lane Subdivision. He never built on the property deeded to him in 1960, and, according to both Dale Heisler and Beverly Ann Colgan, the right of way was never used for commercial purposes. For these reasons, I find that the right of way was intended to be used for recreational purposes only.

[128] Before moving on, I will address the Romkeys' submission that the court can consider, as evidence of subsequent conduct, the language of the rights of way set out in the 1964 deed into the Bradshaws. Robert Osborne, on the other hand, argues that the court cannot rely on later deeds to interpret an earlier deed. Neither party cited any authority on this point. The Romkeys say the later deed is relevant because, consistent with the 1960 deed, it describes two separate rights of way, and because it indicates that access to the shoreline was intended to be by foot only, and for normal pleasure purposes. Evidence of subsequent conduct consists of "[e]vidence of the parties' post-contracting performance of their contractual obligations"; it is admissible because it "may be helpful in showing what meaning the parties attached to the document after its execution": Hall, p. 102. I am not convinced that a subsequent deed by the same grantors in relation to a different property, and into different grantees, falls within this category.

Ancillary rights and obstructions

[129] As stated in C.W. MacIntosh, *Nova Scotia Real Property Practice Manual* (loose-leaf) (Toronto: LexisNexis Canada Inc., 1988) at p. 13-55:

> The grant of an easement is *prima facie* also the grant of such ancillary rights as are reasonably necessary to its exercise or enjoyment.
>
> Examples of this right might be:
>
> …
>
> 3. Where there is an easement to go to the seashore, there is a right to construct a walkway leading to the beach.

[130] Similarly, in *Gale on Easements*, 19th ed. (London; Sweet & Maxwell, 2012) at p. 54:

> A person can alter the surface of the servient land to accommodate the right granted, as by building a made road or spreading gravel on it, so long as there is not undue interference with the rights of the owner of the servient land. So where the right of way is steeply inclined or goes over a cliff, the dominant owner may be entitled to construct steps or a staircase. …

[131] In *Fallowfield v. Bourgault*, 2003 CarswellOnt 5194, [2003] O.J. No. 5206 (Ont. C.A.), Feldman J.A., for the majority, wrote:

> 11 In interpreting the meaning and intent of an express easement, the concept of ancillary rights arises. The grant of an express easement includes such ancillary rights as are reasonably necessary to use or enjoy the easement. However, to imply a right ancillary to that which is expressly granted in the easement, the right must be necessary for the use or enjoyment of the easement, not just convenient or even reasonable. *Halsbury's* explains the concept at p. 10, para. 20, in the following way:
>
> > The express grant of an easement is also the grant of such ancillary rights as are reasonably necessary for its exercise or enjoyment. The ancillary right thus implied must be necessary for the use and enjoyment, in the way contemplated by the parties, of the right granted; it is not sufficient that such an ancillary right would be convenient, usual, common in the district or reasonable. The most usual example of such an ancillary right is the right of the dominant owner to enter the servient tenement and execute such repairs upon the subject matter of the easement as are reasonably necessary for the enjoyment of the easement. The dominant owner is entitled to protect his right to enter and repair by preventing the doing on the servient tenement of anything which would materially interfere with or render more expensive or difficult the exercise of the right, and the court will restrain such an interference by injunction. It is no defence to proceedings by the dominant

> owner to show that he may still exercise his right if he only expends more money or exercises greater skill.

[132] In *Kasch v. Goyan*, [1992] B.C.J. No. 149, 1992 CarswellBC 655 (B.C. S.C.), aff'd [1993] B.C.J. No. 1541, 1993 CarswellBC 187 (B.C. C.A.), the respondent had a five-foot-wide foot path right of way over the western boundary of the petitioners' property to the beach. As the terrain was steep and rocky, the respondent constructed a raised walkway, a staircase, and a railing to enable him to navigate the right of way safely. The petitioners sought, among other things, an order that the walkway, staircase, and railing be removed. The Court held that the respondent had an ancillary right to make such improvements to the land as were reasonably necessary to ensure that the easement could be used safely:

> 11 The remaining question is whether the respondent is entitled, as he did in 1988, to construct the walkway, staircase and railing on the land. In this perspective, I was referred to authority and the opinion of leading text writers on the subject of ancillary easements. I take from such authority that the grant of an easement is also the grant of such ancillary rights as are reasonably necessary to its exercise or enjoyment.
>
> 12 I find the construction of the walkway, staircase and railing an ancillary right in the perspective of being reasonably necessary to ensure that use of the easement can be made in safety. The structures under consideration appear to be consistent with and to serve such a purpose.

[133] On appeal, the British Columbia Court of Appeal described the analysis for determining whether a right is "reasonably necessary":

> 10 The question truly becomes: what are the precise "ancillary rights" which are "reasonably necessary" to the exercise or enjoyment of the easement?
>
> 11 In my opinion, the question of what rights are reasonably necessary incorporates into it the usual factors that accompany any question of reasonableness, namely, a consideration of all of the circumstances which are in any way relevant. That consideration should be followed by a decision whether in all of those circumstances what is done or what is proposed is "reasonably necessary" to the exercise or enjoyment of the easement.

[134] While the Court questioned whether the raised walkway needed to be so elaborate, it ultimately affirmed the lower court's decision:

> 15 On the basis of the evidence that was put before us the structure that was built seems to me to be a remarkably elaborate structure in relation to what we were told about the utilization of the right of way. We were not told about any necessity

> for the structure to be like this because of safety considerations and it seems in any event that a structure of some kind closer to the ground, perhaps of concrete, and perhaps in the steep part consisting of concrete steps, would have been at least as safe as the wooden structure and perhaps safer.
>
> 16 On the basis of the evidence which we were given I am not prepared to conclude that this structure is other than a structure reasonably necessary to the exercise of, and ancillary to, the rights granted in the easement.

[135] Although there is minimal authority on the point, ancillary rights have been held on at least one occasion to include the right to cut and remove trees. In *Donald v. Friesen*, [1990] O.J. No. 3263, 1990 CarswellOnt 2706 (Ont. Dist. Ct.) varied on other grounds, [1997] O.J. No. 122, 1997 CarswellOnt 38 (Ont. C.A.), the plaintiff grantees believed they had the right to widen a right of way over the defendant grantors' property to allow for traffic in both directions. Ignoring the defendants' objections, one of the plaintiffs went onto the defendants' property, cut down trees, and widened the road. The Court was critical of the plaintiff's conduct, but held that he did have the right to level the road:

> 37 I expressed on more than one occasion during the trial, that the plaintiffs had no right to simply enter the defendants' property and cut trees on the right of way. While the evidence shows that the plaintiff, Mr. Donald, approached the Friesens concerning the widening of the road, the subsequent refusal by Mrs. Friesen, I find, did not justify the plaintiff simply proceeding with road contractors onto the property and cutting the trees and widening the road. I accept the Friesens' evidence that Mr. Donald, at that time, simply took the position that it was "his property". I find that the plaintiff's actions, in light of the defendants' concern and the deteriorating relationship between the parties, as being somewhat insensitive and I will refer to that with respect to my decision on costs.
>
> 38 Having said that, however, there is no doubt in my mind that in law, the plaintiff does have the right to improve the quality of the road by gravelling and levelling the same. …

[136] The *Friesen* decision was cited in *MacKenzie v. Matthews*, 1998 CarswellOnt 4922, [1998] O.J. No. 5342 (Ont. Ct. J. (Gen. Div.)), varied on other grounds, 1999 CarswellOnt 3435, [1999] O.J. No. 4602 (Ont. C.A.), for the proposition that "ancillary rights also include the right to remove obstacles such as trees if that is reasonably necessary to the use of the easement": para. 21.

[137] I have found that Robert Osborne's right of way over the Romkey property is by foot, and for recreational purposes only. I accept that, prior to Mr. Osborne clear cutting the trees, the right of way was steep, heavily wooded, and peppered with

large rocks. I further accept Mr. Osborne's evidence that his aunt, Ms. Colgan, is disabled and could fall if her only option is to follow a meandering path within the right of way over the steep escarpment to the shore. I find that Mr. Osborne has the ancillary right to construct a set of steps with a railing, commencing at the top of the slope. The structure, including the railing, should be no wider than four feet.

Obstructions to the right of way?

[138] Robert Osborne argues that the Romkeys have substantially interfered with his use of the right of way through their installation of a fence with an unlocked four-foot-wide gate, a rock wall, cribwork, and a parking area. These features are depicted on the various survey plans prepared by Brandon Crouse and Michael Crant, and in photographs they obtained when they each visited the site.

[139] The grantee of a right of way does not necessarily have the right to demand that the entire width of the right of way be kept free of any obstructions. This point was addressed in *Landry v. Kirklark*, 2014 NSSC 154, [2014] N.S.J. No. 220, where Justice Hood wrote:

> 76 The plaintiffs claim that various actions of Kidlark and McKale have narrowed the right-of-way. This claim is based upon the notion that the entire width of the right-of-way must be kept free of obstructions. That is not so.
>
> 77 In *Foster v. McCoy* (1998), 203 N.B.R. (2d) 252 (NBQB), the court in para. 28 quoted from an older English decision:
>
> > 28 In the case of *Keefe v. Amor* (1964), [1965] 1 Q.B. 334 (Eng. Q.B.), Lord Justice Russell said:
> >
> > > Where a right of way exists in respect of a strip of land it is not necessarily open to the grantee to complain of obstacles on every part of the strip; he can only complain of such obstacles as impede the user of the strip for such exercise of the right granted as from time to time is reasonably required by the dominant tenant. ...I would remark that it is sometimes thought that the grant of a right of way in respect of every part of a defined area involves the proposition that the grantee can object to anything on any part of the area which would obstruct passage over that part. This is a wrong understanding of the law. Assuming a right of way of a particular quality over an area of land, it will extend to every part of that area, as a matter, at least, of theory. But a right of way is not a right absolutely to restrict user of the area by the owner thereof. The grantee of the right could only object to such activities of the owner

> of the land, including retention of obstruction, as substantially interfered with the use of the land in such exercise of the defined right as for the time being is reasonably required.

[140] As stated in *Anger & Honsberger Law of Real Property* at §17:20.30(b):

> The servient tenement, on the other hand, cannot unduly restrict the use of the right-of-way. An act which substantially interferes with the exercise of a right-of-way is a nuisance. There is an actionable disturbance of a right-of-way if the way cannot be practically and substantially exercised as conveniently as before the interference. To be actionable, the interference must be substantial. Thus the erection of a gate is not necessarily an interference with a private right-of-way if the owner of the dominant land has reasonable access to the way. In determining the degree of interference, the nature of the obstruction is relevant. Thus, where the obstruction is permanent this may be seen as creating the requisite degree of obstruction although the actual interference with the right-of-way is not great:
>
> > [W]here the thing that is complained of is the erection of a substantial and permanent structure upon the land over which the grantor has already given a right of way, it appears . . . to be almost impossible to say that there is not a real and substantial interference with the right conveyed.
>
> If the owner of the servient tenement obstructs the right-of-way, the owner of the dominant tenement may remove as much of the obstruction as is necessary in order to exercise the right-of-way, or may deviate and go around the obstruction if it cannot be easily removed. The right to deviate must be exercised in a reasonable manner.

[141] In *Voye v. Harley*, 2002 NBCA 14, [2002] N.B.J. No. 54, Drapeau J.A., for the Court, summarized the law as follows:

> 25 It is trite law that only a "substantial interference" by the owner of the servient tenement with the enjoyment by the owner of the dominant tenement of the right of way is actionable. In *West v. Sharp*, Mummery L.J. defines what is meant by "substantial interference", at paragraph 35:
>
> > Not every interference with an easement, such as a right of way, is actionable. There must be a substantial interference with the enjoyment of it. There is no actionable interference with a right of way if it can be substantially and practically exercised as conveniently after as before the occurrence of the alleged obstruction. Thus, the grant of a right of way in law in respect of every part of a defined area does not involve the proposition that the grantee can in fact object to anything done on any part of the area which would obstruct passage over that part. He can only object to such activities, including obstruction, as substantially interfere with the

> exercise of the defined right as for the time being is reasonably required by him. ... [Emphasis added]
>
> See, as well, *Keefe v. Amor*, [1965] 1 Q.B. 334, at p. 347, per Russell L.J. and *Tibbitt v. Hobbs*, [2001] E.W.J. No. 2709 at para. 21 (C.A.), online: Quicklaw (EWJ). Whether a particular activity amounts to a substantial interference is not a question of law but one of fact.

[142] Whether a gate erected on an easement by the owner of the servient tenement constitutes a substantial interference has been considered in numerous cases: *Siple v. Blow*, (1904), 3 O.W.R. 855, 1904 CarswellOnt 475 (Ont. C.A.); *Malden Farms Ltd v. Nicholson*, [1954] O.R. 740, 1954 CarswellOnt 75 (Ont. Sup. Ct. (High Ct. J.)); *Richardson v. H.G. Meyers Co.*, [1974] O.J. No. 274 (Ont. Sup. Ct. (High Ct. J.)); *Pettipas v. Watson*, [1975] W.W.D. 80, [1975] B.C.J. No. 1186 (B.C. S.C.); *Murphy v. Coughlan*, [1978] N.J. No. 30, 1978 CarswellNfld 39 (Nfld. C.A.); *MacKenzie v. Matthews*, (1999), 180 D.L.R. (4th) 674, [1999] O.J. No. 4602, (Ont. C.A.); *Kozik v. Partridge*, [2000] O.J. No. 3235, 2000 CarswellOnt 3134 (Ont. Sup. Ct. J.); and *Gardiner v. Robinson*, 2006 BCSC 1014; 2006 CarswellBC 1646.

[143] The ultimate question in each of these cases is whether the right of way can be substantially exercised as conveniently as before the occurrence of the alleged obstruction. Although every case must be decided on its own facts, the installation of an unlocked gate, without more, will not normally amount to an actionable interference with a private right of way. In *Murphy*, the Newfoundland Court of Appeal stated:

> 16 Although the question of the defendants' right to erect a gate on the right of way was not raised on the appeal the Order granting the defendants such a right requires comment. The authorities are clear that the owner of land over which a right of way has been granted has the right to do anything on his land that does not substantially interfere with the grant made to the owner of the dominant tenement. So long as there is reasonable access to the land of the dominant tenant the erection of a gate on the way does not constitute an obstruction. The possible inconvenience of having to open and close a gate is not, in my view, derogation from the grant.

[144] In *Pettipas*, McDonald J. described an unlocked gate constructed on a right of way as "nothing more than an inconvenience" to the owners of the dominant tenement: para. 10. Similarly, in *MacKenzie*, the Ontario Court of Appeal, relying on its earlier decision in *Siple*, held that an unlocked gate would constitute a "minimal interference" with the rights of the owners of the dominant tenements: para. 15. In some circumstances, even a locked gate will not amount to a substantial interference: *Gardiner*.

[145] Prior to having any knowledge of a potential second right of way over their property, the Romkeys constructed a parking area, a board fence with a four-foot-wide unlocked gate, a rock retaining wall, and cribwork. The various survey plans show that the portion of the fence that includes the gate extends across almost the entire twelve feet of the right of way. If the only concern was that users of the right of way must open an unlocked gate to access it, I would find that this constituted a minor inconvenience. Once a person proceeds through the gate, however, she cannot continue in a straight path along the right of way. The north-facing side of the fence, along with the rock wall and the cribwork below, cut across the right of way at an angle. The portion of the board fence that extends beyond the rock wall and cribwork actually forces the individual to walk outside the twelve foot width of the right of way and onto an area of the Romkey property over which they have no right to pass. With the board fence, the rock wall, and the cribwork in place, the right of way cannot be substantially exercised as conveniently as before they were installed. I find that these structures substantially interfere with Mr. Osborne's use of the right of way and they must be removed. According to the survey plans of both Mr. Crant and Mr. Crouse, the parking area does not obstruct the twelve-foot-wide right of way. Since this proceeding relates only to that right of way, I make no findings as to potential obstructions of the foot path right of way.

Damages – the Romkeys

[146] The Romkeys are seeking $80,567.50 in special damages, $1,500 in general damages for trespass, and $3,500 in punitive damages.

[147] For their general damages claim, the Romkeys rely on *McInnis v. Stone*, 2016 NSSC 69, [2016] N.S.J. No. 88. In that case, the applicant purchased a property in Sheet Harbour in 2003 and migrated it to the land registry in 2004. In 2011, the respondents bought the property that bordered the applicant's property on three sides. That same year, the respondents tried to convince the applicant to sell them a piece of his land so that they would have waterfront access. The applicant refused to sell. The respondents then began to claim ownership of the disputed land. They cut down trees, removed stumps, filled holes, constructed a fire pit, excavated portions of the land, and called the RCMP whenever they saw the applicant on the land. The applicant claimed the respondents had directly interfered with his possession of the disputed land and were liable in damages. The respondents argued that they and their predecessors had a valid possessory claim to the disputed land or,

in the alternative, that they had acquired an easement by the doctrine of lost modern grant.

[148] After reviewing all of the evidence, Pickup J. dismissed each of the respondents' claims and held that the applicant was the true owner of the disputed property. As to general damages, the applicant sought $5,000 for the loss of use and enjoyment of his land. Although Justice Pickup found that the respondents had effectively deprived the applicant of the use of his lands for approximately two years, he awarded only $1,500 in general damages.

[149] In *Burgoyne v. Hutton*, 2016 NSSC 60, [2016] N.S.J. No. 102, the defendant committed trespass over the plaintiffs' driveway by using it for the benefit of a commercial lot. Justice Muise described the evidence of trespass and its impact on the plaintiffs:

> 259 Some of this evidence of trespass over the Burgoyne Driveway by using it for the benefit of the Hutton Sales Lot is general and imprecise. Therefore, it is impossible to provide an accurate total of the incidents of trespass. However, over a period of about three years, such trespass was committed by roughly 20 more people and a dozen or more vehicles, on twenty-five or more separate days.
>
> 260 Elizabeth Burgoyne also testified that the nuisance created as a result of this equipment and these farmworkers passing over the Burgoyne Driveway has interfered with the "quiet and peaceful enjoyment" of their property. The main Burgoyne Driveway connects the Homestead Lot to Highway 1, over the Burgoyne Lot. There is a short driveway which branches off of this main Burgoyne Driveway and leads to the residence of the Burgoynes. That, to at least a small extent, would diminish the detrimental effect of this illegitimate traffic. However, I accept the evidence that the main Burgoyne Driveway is still visible from the residence of the Burgoynes. This traffic did not pass unnoticed by the Burgoynes. The vehicle and equipment traffic, particularly the heavier vehicles and equipment, more likely than not, would create perceptible or even disruptive noise. The driveway is a dirt or gravel driveway. During dry times, more likely than not, the vehicle traffic would create dust. Therefore, I accept that this traffic did interfere with the quiet and peaceful enjoyment of the Burgoyne Lot.

[150] Noting that the defendant had not altered or otherwise damaged the plaintiffs' property, Muise J. awarded $2,500 in general damages: para. 278.

[151] Robert Osborne's trespass has clearly interfered with the Romkeys' property rights and their use and enjoyment of their property. In my view, his actions are comparable to those of the defendants in *McInnis*. Although Mr. Osborne did not prevent the Romkeys from accessing a portion of their property, he clearly and

openly treated the right of way like his own property, cutting down the trees and taking the position that he could do whatever he wanted with their land. As a result of his actions, the Romkeys have spent the last two years living on a property that no longer offers the same privacy and tranquility that drew them to it in the first place. I find that the Romkeys are entitled to an award of $1,500 in general damages.

[152] The claim for $80,567.50 in special damages is based on Mr. Kochanoff's assessment of the cost to replace the trees Mr. Osborne removed from the Romkey property ($78,555), and the cost of the tree loss assessment report ($2,012.50). In addition to Mr. Kochanoff's report, the Romkeys provided evidence that they paid $5,111.75 to Maritime Landscape Services Ltd. to replace eight trees at the top of the right of way. Mr. Kochanoff testified that it would be more expensive to replace the trees further down the right of way on the steep escarpment.

[153] Mr. Osborne submits that Mr. Kochanoff's appraised value is unreasonable, and cannot be relied upon because he failed to consider the market value of the property, or to determine the extent of the easement rights prior to valuing the trees. While it was open to Mr. Osborne to retain his own expert to respond to Mr. Kochanoff's report, he did not do so.

[154] I disagree with Mr. Osborne's submission that Mr. Kochanoff's report is of no assistance to the court. Mr. Kochanoff was asked by the Romkeys to assess the cost to replace the trees cut by Mr. Osborne and restore the privacy that was lost when they were removed. He was not asked to determine the resulting diminution in property value or to interpret the right of way. In his assessment, which I accept, those factors were not relevant to the task he was asked to undertake. I find that Mr. Kochanoff's appraised value is a reliable estimate of the cost to the Romkeys to replace the trees and return their property to its pre-trespass condition. Whether replacement value is the appropriate measure of damages is a separate question.

[155] Where a party suffers a trespass, the aim of an award of damages is to place that party back in the same position as before the trespass. While this objective can often be met by an award based on the diminution in property value caused by the trespass, it is sometimes more effectively achieved through an award based on the cost of reinstatement or replacement. In *Patterson v. Municipal Contracting Ltd.*, [1989] N.S.J. No. 108, 1989 CarswellNS 108 (S.C. T.D), Tidman, J. held that, in determining the quantum of damages for trespass, each case must be decided on the basis of what is reasonable on the particular facts being considered:

> 35 The overriding consideration in trespass cases is that the plaintiff should as nearly as possible be placed in the same position as before the trespass, and generally this is considered done if the plaintiff is paid the amount of the diminution of the value of the property caused by the trespass. However, there are cases where it is reasonable, in order to fairly compensate the plaintiff, to make an award based on a consideration of the cost of reinstatement or replacement, even though such an award may exceed the diminution of the value of the property caused by the trespass.
>
> 36 I believe it is clear from the more recent tort cases, and I subscribe to the same view, that in determining the quantum of damages for trespass each case must be decided on the basis of what is reasonable on the particular facts being considered.

[156] The subjective value the owner assigns to the property is a relevant consideration when deciding on the quantum of damages for trespass. In *Wilson v. Hatt*, 2012 NSSC 349, [2012] N.S.J. No. 579, a Small Claims Court appeal, the appellants returned home from a family vacation to discover that their neighbours had cut down several trees on their property. The appellants filed a claim to recover compensation for the loss of four trees. The respondents admitted to cutting only one tree. Each party filed expert evidence as to the value of the trees. Both experts used the Trunk Formula to value the lost trees. The adjudicator determined that three trees had been cut down by the respondents, but declined to defer to either of the expert witnesses as to their value. He found that the appellants were mostly indifferent to the existence of the trees and awarded them only $2,000, which was the cost to plant smaller and younger replacement trees. The appellants argued that the adjudicator erred by rejecting the expert evidence and assessing damages on the basis of his finding that the appellants did not place a particularly high value on the trees. Justice Glen McDougall dismissed this ground of appeal:

> 12 However, the appellants … are objecting to the Learned Adjudicator's rejection of the trunk formula, and his reasons do disclose that he based that decision on his finding that the appellants "did not place a particularly high value" on the trees. In the appellants' view, it was inappropriate to consider these subjective values since, as they wrote at page 7 of their brief, the "appellants were not seeking damages for distress relating to the removal of the trees. They were seeking to be made whole for their loss."
>
> 13 True though that may be, the appellants' submission ignores the fact that determining how a person is to be made "whole" when they lose property requires an assessment of the actual value to which the owners assigned that property. As the respondents note at paragraph 29 of their brief, the "Learned Adjudicator's role was not to determine the market value of the Trees in the abstract. He instead was tasked with valuing the Appellants' loss" (emphasis in original). The appellants

> themselves, at page 4 of their brief, cite the following passage from *Remedies in Tort* (vol 4 (Toronto: Carswell, 2011) ch. 27 at 27-162.84.1):
>
> > The value of lost property is determined by assessing the actual value of the property to the plaintiff. As a general rule, market value is the best evidence of value but it is not always conclusive since it may not be ascertainable or may not establish the property's value to the owner. Some other elements which may assist in determining value are: i) the cost of replacing the lost property; ii) the value of comparable property; iii) the original cost of the property; and iv) the amount for which the property is insured. [citations omitted]
>
> Applying that to the present case, that passage acknowledges that the value of the trees as determined by the trunk formula may not establish their actual value to the appellants. In determining whether the replacement cost of the trees more accurately compensated the appellants' loss than the trunk formula, the Learned Adjudicator committed no error of law by considering the value the appellants subjectively assigned to the trees.
>
> [Emphasis added]

[157] Unlike the appellants in *Wilson*, the Romkeys placed a very high value on the trees cut by Mr. Osborne, and the privacy they created. The dramatic loss of privacy is obvious from the photographs taken before and after Mr. Osborne removed the trees. I accept the Romkeys' evidence that the privacy provided by the trees factored heavily into their decision to purchase the property in 2008, and that the loss of the trees has resulted in increased noise and light reaching their property. In this case, Mr. Kochanoff's assessment of the replacement value is consistent with the value the Romkeys' subjectively assigned to the trees, and it is reasonable, in order to fairly compensate the Romkeys, to make an award based on replacement value.

[158] Mr. Kochanoff assessed the cost of replacing all eighty trees within the twelve-foot-wide right of way at $78,555. I have found, however, that Mr. Osborne has an ancillary right to install a set of steps and a railing along the right of way, commencing at the top of the slope. It follows that some of the Romkeys' trees would have had to be removed in any event.

[159] It is impossible on the evidence to determine precisely how many trees Mr. Osborne would have needed to remove to build the set of steps, or the size and species of those trees. Although this makes quantification more difficult, it does not relieve the court of its obligation to assess damages. In *Jeffrie v. Hendriksen*, 2018 NSCA 77, [2018] N.S.J. No. 356, Farrar, J.A. reaffirmed that, where a loss has been

proven, the court must do its best to assess damages using the evidence it has available:

> 50 The cross-appellants say that the judge proceeded on a wrong principle of law when he said:
>
> > [25] ... The court has an obligation to assess damages as best it can even if the evidence does not allow precise calculation. ...
>
> 51 With respect, this is a correct statement of law.
>
> 52 In *Nova Scotia (Attorney General) v. B.M.G.*, 2007 NSCA 120, this Court explained:
>
> > [172] The principles concerning certainty of damages deal with the quantification of a loss proven to have been caused by the wrongdoer's acts. If the plaintiff establishes that a loss has probably been suffered, the difficulty of determining the amount of it does not excuse the wrong-doer from paying damages which can be proved. Even though the amount is difficult to estimate, the court must simply do its best on the evidence available: S.M. Waddams, *The Law of Damages*, 2nd ed. looseleaf (Toronto: Canada Law Book Ltd., 1991) at para. 13.30. This is often summed up by saying that difficulty of assessing damages is no bar to their recovery.

[160] Having found that Mr. Osborne is entitled to install a four-foot-wide set of steps over the sloped portion of the right of way, I assess damages for the lost trees at $52,370, or two-thirds of Mr. Kochanoff's assessment of the cost to replace all of the trees removed from the right of way's twelve foot width. As to the special damages claim for the cost of the tree loss assessment report, this expense is better claimed as a disbursement at the costs stage of the proceeding.

[161] The Romkeys are also seeking an award of punitive damages. In *National Bank Financial Ltd. v. Potter (appeal by Barthe estate)*, 2015 NSCA 47, [2015] N.S.J. No. 200, Saunders J.A., for the Court, summarized the law on punitive damages:

> 438 The legal principles to be considered when deciding whether to award punitive damages may be gleaned from a series of cases from the Supreme Court of Canada starting with *Whiten v. Pilot Insurance Co.*, 2002 SCC 18; *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30; and *Honda Canada Inc. v. Keays*, 2008 SCC 39.
>
> 439 From these and other leading authorities we know that the discretion to award punitive damages "should be most cautiously exercised" and courts "should only resort to punitive damages in exceptional cases". Punitive damages require proof

of conduct that amounts to "an independent actionable wrong", typically seen as so shocking as to "depart markedly from ordinary standards of decency ... so malicious and outrageous (to be) ... deserving of punishment on their own". Punitive damages "are directed to the quality of the defendant's conduct, not the quantity (if any) of the plaintiff's loss". The aim of punitive damages "is not to compensate the plaintiff, but rather to punish the defendant". They are "the means by which the jury or judge expresses its outrage at the egregious conduct of the defendant". Punitive damages are intended to punish the wrongdoer, express the court's clear denunciation and serve as a deterrent not only to the wrongdoer, but others who may be inclined to follow the same example.

440 In *Whiten*, supra, the Supreme Court of Canada dismissed an appeal from a jury award of $1,000,000.00 in punitive damages against an insurance company whose misconduct was found to meet the criteria I have just described. In writing for the majority, Binnie, J. said at para105:

> [t]his was an exceptional case that justified an exceptional remedy.

441 Justice Binnie said the key to any award of punitive damages is that they must be "rationally required to punish the defendant's misconduct" and they must be proportionate to the blameworthiness of the defendant's conduct. He said:

> [111] I earlier referred to proportionality as the key to the permissible quantum of punitive damages. Retribution, denunciation and deterrence are the recognized justification for punitive damages, and the means must be rationally proportionate to the end sought to be achieved. A disproportionate award overshoots its purpose and becomes irrational. A less than proportionate award fails to achieve its purpose. Thus a proper award must look at proportionality in several dimensions ...

442 Justice Binnie went on to provide a list of the types of factors which might influence the level of blameworthiness assigned to the wrongdoer. As one would expect, the more egregious the conduct, the greater the potential award. He said:

> [112] The more reprehensible the conduct, the higher the rational limits to the potential award. The need for denunciation is aggravated where, as in this case, the conduct is persisted in over a lengthy period of time (two years to trial) without any rational justification, and despite the defendant's awareness of the hardship it knew it was inflicting (indeed, the respondent anticipated that the greater the hardship to the appellant, the lower the settlement she would ultimately be forced to accept).
>
> [113] The level of blameworthiness may be influenced by many factors, but some of the factors noted in a selection of Canadian cases include [I have included the factors but omitted the case references]:
>
> (1) whether the misconduct was planned and deliberate:
>
> (2) the intent and motive of the defendant:

(3) whether the defendant persisted in the outrageous conduct over a lengthy period of time:

(4) whether the defendant concealed or attempted to cover up its misconduct:

(5) the defendant's awareness that what he or she was doing was wrong:

(6) whether the defendant profited from its misconduct:

(7) whether the interest violated by the misconduct was known to be deeply personal to the plaintiff

443 Later at para123 of his reasons Binnie, J. added:

> [123] ... The key point is that punitive damages are awarded "if, but only if" *all* other penalties have been taken into account and found to be inadequate to accomplish the objectives of retribution, deterrence, and denunciation. ...

…

445 As mentioned, *Whiten* came before the Court as an appeal from a jury award. In that context Binnie, J. included in his reasons a list of points which might be included in a jury charge to assist the jury in deciding first whether punitive damages were necessary and if so, what amount of damages would be appropriate. In my respectful view this same list offers considerable guidance to trial (and appellate) judges generally, whether in the context of a jury trial or not. In the words of Justice Binnie:

> [94] ... it would be helpful if the trial judge's charge to the jury included words to convey an understanding of the following points, even at the risk of some repetition for emphasis. (1) Punitive damages are very much the exception rather than the rule, (2) imposed only if there has been high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour. (3) Where they are awarded, punitive damages should be assessed in an amount reasonably proportionate to such factors as the harm caused, the degree of the misconduct, the relative vulnerability of the plaintiff and any advantage or profit gained by the defendant, (4) having regard to any other fines or penalties suffered by the defendant for the misconduct in question. (5) Punitive damages are generally given only where the misconduct would otherwise be unpunished or where other penalties are or are likely to be inadequate to achieve the objectives of retribution, deterrence and denunciation. (6) Their purpose is not to compensate the plaintiff, but (7) to give a defendant his or her just desert (retribution), to deter the defendant and others from similar misconduct in the future (deterrence), and to mark the community's collective condemnation (denunciation) of what has happened. (8) Punitive damages are awarded only where compensatory damages, which to some extent are punitive, are insufficient to accomplish

> these objectives, and (9) they are given in an amount that is no greater than necessary to rationally accomplish their purpose. (10) While normally the state would be the recipient of any fine or penalty for misconduct, the plaintiff will keep punitive damages as a "windfall" in addition to compensatory damages. (11) Judges and juries in our system have usually found that moderate awards of punitive damages, which inevitably carry a stigma in the broader community, are generally sufficient.

[162] Robert Osborne says the Romkeys cannot meet the test for punitive damages. He denies that his conduct can be characterized as malicious, oppressive and high-handed.

[163] Punitive damages have been awarded where a property owner has been treated in a high-handed manner. As mentioned above, in *Patterson*, Justice Tidman held that the defendant's conduct warranted an award of punitive damages:

> 47 In my view, Mrs. Patterson was treated in a high-handed and cavalier fashion by the defendant. Mr. Seaboyer says that it was virtually impossible to do work on the right of way without trespassing on Mrs. Patterson's property, and, in fact, he proceeded to do so without either asking her permission or advising her of that possibility. This, notwithstanding the fact that the defendant made arrangements to enter upon the land of the other adjoining property owner in order to do its work. According to the evidence of Mrs. Patterson, which I accept, for a period of time she and her complaints of trespass were ignored by the defendant until finally she was able to discuss the trespass with Mr. Seaboyer. She was then assured that restoration work would be done. After agreeing to do so, the defendant changed its mind without giving either Mrs. Patterson or Mr. Kochinoff notice that it had done so. Mrs. Patterson was left to believe that the matter would be taken care of, which she did believe until she contacted Mr. Seaboyer to learn that no work would be done. In my view, it is completely unacceptable conduct by a contractor to trespass and cause damage to another's property, knowing such trespass will occur, and then refuse to restore damage caused by the trespass after admitting responsibility and agreeing to do the necessary restoration work. Because of such conduct on the part of the defendant, I will award punitive damages to the plaintiff, which I assess at $5,000.

[164] In *Hendricks v. Brennan*, (1998), 169 N.S.R. (2d) 309, [1998] N.S.J. No. 247 (C.A.), the appellant and the respondent owned adjoining properties and disputed the location of the rear boundary of the respondent's property. The respondent sued the appellant in trespass. The appellant argued that he had acquired title to the rear thirty acres of the respondent's property. The trial judge held that the respondent had good title to the property and awarded him $4,200 in special damages for

trespass, $3,000 in punitive damages, and costs. On the issue of punitive damages, Cromwell J.A., for the Court, held:

> 21 The trial judge's award of punitive damages is also attacked on appeal. In this regard, the trial judge said:
>
> > ...Brennan acknowledged that he had an oral agreement with Hendricks not to do anything further on the disputed property until this litigation was resolved. In spite of that agreement, Brennan proceeded in a surreptitious manner to construct a very substantial road on the disputed property. ... Brennan's action is inexcusable and reprehensible. It is precisely the type of outrageous conduct which ought to trigger consideration of a punitive damage award. The construction of the road was an arbitrary and wilful disregard of the plaintiff's rights. It was also an indication of Brennan's disdain for the legal process.
>
> 22 The role of the Court of Appeal in reviewing punitive damages awards made at trial has been discussed recently by the Supreme Court of Canada and by this Court. The principles are summarized in *Elia v. Chater*, [1998] N.S.J. No. 105 at page 23 - 24. The trial judge's decision to award punitive damages will not be set aside provided the judge has not misdirected him or herself on any applicable principle, the decision does not give rise to an injustice and the award of punitive damages serves a rational purpose.
>
> 23 In my view, the trial judge did not misdirect himself on the applicable law, nor does his decision give rise to an injustice. On the evidence at trial, punitive damages in this case serve a rational purpose, particularly having regard to the modest award of compensatory damages. I would not interfere with the trial judge's decision respecting punitive damages.

[165] In *Cantera v. Eller*, 2007 CarswellOnt 3082, [2007] O.J. No. 1899 (Ont. Sup. Ct. J.), aff'd 2008 ONCA 876, [2008] O.J. No. 5220, the plaintiff claimed adverse possession of a narrow strip of property along the border between her lot and the lot owned by the defendants. The defendants' purchased their property with a view to demolishing the existing house and building a new one. To install a construction fence around the site, however, the defendants needed to remove a fence on the strip of land between the two properties. After speaking with the plaintiff, the defendants became aware that she claimed title to the strip of land and would not agree to the defendants removing the fence without an agreement to rebuild it in the same location. This did not dissuade the defendants, who removed the fence while the plaintiff and her husband were away from their home. The plaintiff filed an action seeking, amongst other things, general damages for trespass in the amount of $25,000, and punitive damages in the amount of $5,000. Justice Young held that the plaintiff had acquired title to the disputed land long before the defendants purchased

their property. She declined to award general damages, but allowed the punitive damages claim:

> 65 The claim for punitive damages in the amount of $5,000 is made out on the facts of this case. As I have discussed above, the defendants acted knowingly, deliberately and willfully. While they clearly did not accept the plaintiff's assertions that she had adverse possession, they knew that the plaintiff and Mr. Sdao were making these claims long before April 10, 2004. The fact that Mr. Wright may have had an "honest" belief that the claim of adverse possession was ill-founded does not in any way mitigate his conduct. Nor does his feeling that the plaintiff and Mr. Sdao were trying to bring undue pressure on him to sign a quit claim at that point. In removing the fence, he chose to bear the risk that his conduct was unlawful. In short, the defendants have acted in a high-handed and arrogant fashion and their conduct justifies an award of punitive damages: see *Furgal v. Angel*, supra, *Saly Estate v. Flabiano*, supra, *Glashutter v. Bell*, supra.

The award was upheld by the Ontario Court of Appeal.

[166] In *McInnis*, discussed above, Pickup J. allowed the claim for punitive damages, stating:

> 147 I find the actions of the respondents to have been calculated, malicious, inexcusable and a departure from a standard of decent behaviour. Their actions virtually robbed the applicant of the use and enjoyment of his property from at least 2012. He was literally forced off the land he bought, surveyed and registered under the LRA.
>
> 148 I award the sum of $3500 for punitive damages.

[167] From the first conversation Robert Osborne had with Paul Romkey, he knew there was a dispute as to the location, nature, and extent of his right of way over the Romkey property. On October 31, 2016, Mr. Romkey wrote to Mr. Osborne advising him to have his lawyer contact the Romkeys' lawyer. In January 2017, several letters were exchanged between counsel for the parties -- each advancing a very different interpretation of the grant creating the right of way. But Mr. Osborne nevertheless took matters into his own hands by entering onto the Romkeys' property and, with his cousin's assistance, chopping dozens of their trees. Even after a visit from the RCMP, he returned to the property to finish clearing the right of way. Mr. Osborne claimed that he only returned to the property because the RCMP officer told him to "have at 'er." I reject that evidence. Mr. Osborne knew his actions would almost certainly result in a confrontation with Mr. Romkey, which is why he equipped himself with a dashboard camera. Mr. Osborne believed he had the right

to cut the trees on "his" right of way, and no one was going to stop him. From a punitive damages standpoint, Mr. Osborne's personal belief as to the legality of his actions is irrelevant. He knew, or should have known, that he might be wrong. His actions were arrogant, high-handed, and malicious, and they created the real risk of violence. This kind of reprehensible behaviour cannot be countenanced by the court, and calls for punitive damages.

[168] Robert Osborne's conduct was outrageous and deserving of condemnation. Although the compensatory damages award in this case is substantial, I am satisfied that punitive damages are necessary to denounce Mr. Osborne's conduct, to punish him for his actions, and to deter him and anyone else from engaging in this kind of behaviour in the future. I award $1,000 in punitive damages. The award would have been much larger if not for the considerable compensatory damages award I have already made.

Damages – Robert Osborne

[169] Robert Osborne is claiming general damages for what he says was the Romkeys' trespass to his right to use the right of way. I have found that the Romkeys, by installing the fence, cribwork and retaining wall, have substantially interfered with Mr. Osborne's use and enjoyment of the right of way. Mr. Osborne acknowledges that general damages awards for trespass are often nominal, and, in my view, a nominal award is appropriate here. I award $300 in general damages.

[170] Mr. Osborne is also seeking $2,112 in special damages related to losses he suffered as a result of the *ex parte* order issued by Justice Moir -- $1,932 for reimbursement of the invoice to Victor Landscaping & Excavation Inc. for cancelling work, and $180 for the cost of a return ticket to Cape Breton for his acquaintance who had agreed to help him with some landscaping work.

[171] On February 3, 2017, Paul Romkey, without the assistance of counsel, obtained an order for an interim injunction preventing Mr. Osborne from cutting trees, bulldozing, or making any other changes to lands within one square kilometre of the Romkey property. The unrefuted evidence is that Mr. Romkey did not intend to stop Mr. Osborne from working on his own property and that he did not provide the court with the wording for the injunction. The scope of the injunction was narrowed on February 7 to allow Mr. Osborne to do work on his own property. When I asked Mr. Osborne's counsel for authority supporting an award against a

litigant for damages caused by the wording of a court order, she cited only Civil Procedure Rule 41.06, which provides:

> 41.06 (1) A party who makes a motion for an interim or interlocutory injunction, or an interim or interlocutory receivership, must file, with the *ex parte* motion or notice of motion, an undertaking to do all of the following:
>
> (a) indemnify another party for losses caused by the interim or interlocutory injunction or the interim or interlocutory receivership if a judge who finally determines the claim is satisfied that the injunction or receivership is not justified in light of the findings on final determination;
>
> …
>
> (2) A judge may assess damages, and grant an order for judgment on an undertaking after a claim is discontinued or dismissed.
>
> …

[172] Rule 41.06 requires a plaintiff, as a condition of obtaining an interlocutory injunction, to give an undertaking to indemnify the other party for losses caused by the interim or interlocutory injunction if the proceedings are ultimately resolved against the plaintiff. In other words, the plaintiff is liable for damages caused by the injunction where that injunction is subsequently found not to have been justified. That is not the case here. The injunction against Robert Osborne was clearly justified, and I am not prepared to order Mr. Romkey to pay damages caused by the wording of an order that he did not draft. In my view, if Mr. Osborne suffered any damages as a result of the injunction, he is the author of his own misfortune.

Conclusion

[173] The grant of a twelve-foot-wide right of way over the property at 31 Lerwick Lane contained in the 1960 deed into Harold Osborne is hardly an example of precision drafting. The Romkeys argued, however, that any uncertainty in its wording was remedied in 1964 when Thomas and Sarah Osborne conveyed 31 Lerwick Lane to the Bradshaws, subject to a twenty-foot-wide foot path right of way to the shore for other lot owners in the Lerwick Lane Subdivision and "H. Osborne". The Bradshaw deed stated that the foot path right of way was to be used for normal pleasure purposes only. There was no mention of the right of way over the property described in Harold Osborne's deed. The Romkeys said the Bradshaw deed proved that the grantors intended for Harold Osborne's original right of way to be subsumed within this wider right of way, and that the original right of way was intended to be

a foot path used for pleasure purposes only. I disagreed, finding that the foot path right of way was not twenty feet wide and was, in fact, located approximately eight feet to the south of the twelve-foot-wide right of way. The 1964 deed was of no help in deciphering the wording of the earlier grant.

[174] Both parties were able to point to aspects of the grant's wording that supported their respective interpretations. The absence of any words of limitation supported Robert Osborne's claim that it was a grant of a single right of way, at all times and for all purposes, with or without vehicles or animals, over the pre-existing right of way and the strip of land to the shore. On the other hand, the reference in the first section to "all other persons having a similar right at all times and for all purposes", and the later references to "the said lands" and "the said right-of-way" supported the Romkeys' view that it was a grant of two distinct rights of way. When I considered the words in the context of the surrounding circumstances, including the physical condition of the land at the time of the grant, the confusion receded. The strip of land along the northern boundary of the property was steep and heavily wooded, and there was never vehicle access over it to the shore. For this reason, I concluded that it was not the grantors' intention that the grantee would drive a vehicle along the strip down to the shore. Instead, they intended to grant two distinct rights of way, with the benefits associated with the right of way over the "Private Right of Way to Lot #1" having no application to the right of way over the strip of land. It followed that the right of way over the strip was silent as to the mode of use and the purposes for which it can be used. My earlier conclusion that the grantors had not intended for vehicular use of the right of way meant that only foot traffic was permitted.

[175] Robert Osborne argued that he could use the right of way over the strip of land for commercial purposes. His plan was to open a business of some sort on the property across the highway from the Lerwick Lane Subdivision and to authorize his customers to use the right of way to access the shores of St. Margaret's Bay. The surrounding circumstances at the time of the grant, including the private and serene "cottage country" setting of the properties, the lack of evidence that there were any commercial properties in the area, and the fact that Harold Osborne was already employed as a stevedore, suggested that neither the grantors nor Harold Osborne contemplated that the right of way would be used for commercial purposes. It was far more likely that the grantors wanted to ensure that their son had a means of accessing the shores of St. Margaret's Bay even though he did not live in the Lerwick Lane Subdivision.

[176] I would have reached the same conclusion if I had found that the grant was ambiguous, opening the door for the court to consider Harold Osborne's subsequent conduct. Harold Osborne continued to work as a stevedore until 1972 when he contracted polio, and he lived with his family in a home approximately one kilometre from the Lerwick Lane Subdivision. He never built on the property deeded to him in 1960, and the right of way was never used for commercial purposes. Harold Osborne clearly did not intend to set up a business on the property and to use the right of way in connection with it.

[177] Robert Osborne's right of way over the Romkey property is by foot, and for recreational purposes only. I have found that he has the ancillary right to construct a set of steps with a railing along the right of way, commencing at the top of the slope. The structure, including the railing, should be no wider than four feet. The court's order will prohibit Mr. Osborne from making any other changes to the Romkey property.

[178] I have found that the Romkeys' board fence with the unlocked gate, the rock wall, and cribwork are obstructions that substantially interfere with Mr. Osborne's use and enjoyment of the right of way. I order the Romkeys to remove them.

[179] To the Romkeys, I award $1,500 in general damages, $52,370 in special damages to replace their lost trees, and $1,000 in punitive damages due to Robert Osborne's outrageous conduct. Mr. Osborne is awarded $300 in general damages.

[180] The parties may file submissions on costs within thirty days of the release of this decision.

Arnold, J.