SUPREME COURT OF NOVA SCOTIA

Citation: *Payne v. Elfreda Freeman Alter Ego Trust (2015)*, 2020 NSSC 59

Date: 20200220
Docket: Hfx No. 474228
Registry: Halifax

Between:

Elizabeth Payne, Janet Wile and Ponhook Lodge Limited

Applicants

v.

Elfreda Freeman, in her capacity as Trustee of the Elfreda Freeman Alter Ego Trust (2015)

Respondent

Decision

Judge:	The Honourable Justice Denise Boudreau
Heard:	December 16, 17, 18, 2019 in Halifax, Nova Scotia
Final Written Submissions:	January 27, 2020
Counsel:	Andrew Christofi, for the Applicants Roderick (Rory) H. Rogers, QC, for the Respondent

By the Court:

[1] This application deals with the issue of a right-of-way that passes over the lands of the respondent. The applicants filed an application seeking:

> (a) An order requiring the Respondent forthwith to remove a machine, a cable and signs from the Respondent's properties located on the Laurie Wamboldt Road, Queens County, Nova Scotia; and
>
> (b) A permanent injunction restraining the Respondent and its agents from interfering in any way with the Applicants' use and enjoyment of their right -of-way over the Respondent's properties.

[2] It should be noted that, by the time of the hearing before me, I was advised that the machine, cable and signs referenced in (a) above had already been removed. The question before me then is limited to (b) above.

<u>Objections to affidavit evidence</u>

[3] I note that a number of affidavits were filed by both parties in support of their respective positions. Issues arose in respect of portions of many of those affidavits, with both counsel objecting to portions of affidavits filed by the other party, as being either irrelevant, hearsay, or other various objections.

[4] By the time of the hearing, the parties had reached agreement on most of those objections and provided me with a document outlining their agreements; that document shows which portions of which affidavits should be excised, which should remain, and which remained in dispute for decision by the Court. I have made that document an exhibit for ease of reference (Exhibit 19). I have not considered those portions that were agreed to be excised.

[5] A few disputes remained and I heard submissions from counsel. My decisions relating to those remaining paragraphs are attached as Appendix A.

Material Facts

[6] There is a piece of land on Ponhook Lakes in Queens County, Nova Scotia, known as "The Rim". It is a thin strip of land running out from the mainland and back into it, in a roughly circular shape. The road that runs through this "Rim" is called the Laurie Wamboldt Road; it is a private, not public, road. This road has been in existence, in some form, for over 50 years, although during that time it has been improved and upgraded.

[7] A number of individuals own pieces of land all along that "Rim" and, therefore, there are various rights-of-way granted to various lots of land over other persons' properties, in order to access their particular piece. Much of the land was

once owned by Laura Wamboldt solely, or with her husband Lawrence (aka Laurie) Wamboldt, including all of the lands directly involved in the present litigation.

[8] Laura and Laurie Wamboldt, over the course of years, granted deeds to various family members and third parties of various parcels of land, and provided for rights-of-way in those deeds.

[9] The case of the respondent is a case in point. The land now owned by the respondent ("the Freeman lands") was sold to Harry Freeman by Laura Wamboldt on November 12, 1977. At the time of the grant, the sole existing road ran through approximately the centre of the Freeman lot in a north/south direction. The deed to Harry Freeman provided:

> The grantor reserves a right-of-way up to thirty feet wide (30) to be used to service her, her heirs and assigns and her families' lots situated on the so-called Ephraim Hunt lot, crown grant no. 9284.

[10] Although the deed does not expressly indicate where this ROW should be, there was only one existing road at that time (the "original ROW"). That road was continually used to traverse over the Freeman lands by all, including the Freemans and all owners north of their lands, both before and since the parcel was transferred to Harry Freeman. It is the Laurie Wamboldt Road.

[11] North of the Freeman lands, there are two parcels of land owned by two of the applicants, Elizabeth Payne and Janet Wile (two daughters of Laurie and Laura Wamboldt). They acquired their lands from their parents in 1968.

[12] Further lands north of the Freeman lands was granted to Laura and Laurie's son William Wamboldt and his wife, in approximately 1988. William and his wife sold this land to Ponhook Lodge (the third applicant) in the summer of 2017.

[13] At some point in the late 70s/early 80s, Harry Freeman built a cottage on the Freeman lands. It was built to the east of the Laurie Wamboldt Road / original ROW.

[14] At some point (prior to September 2016) the Freeman lands began to be occupied by Charles Freeman and his family. Mr. Charles Freeman, again prior to September 2016, decided to build a large garage on the Freeman properties, located on the west side of the original ROW. He also built another residence, on the east side of the original ROW. It would appear, based on the photographs before me, that both of those structures were built very close to the original ROW, on either side of it.

[15] Beginning in September 2016, Charles Freeman began erecting barriers to the original ROW over his property. He put up signs directing users to a detour to

the west that he had built (the "2016 ROW"). This detour was still on the Freeman lands, but passed behind the Freeman garage rather than in front of it, essentially between the garage and the adjacent shoreline. According to Mr. Freeman's evidence, he created this detour because he was concerned with the amount and speed of traffic that was passing through his lands, given the very close proximity of the road to both his home and garage.

[16] The applicants disagreed with this re-routing of the ROW. They were of the view that the 2016 ROW was, in fact, much less safe and practical than the original ROW. While the original ROW was reasonably level and straight, the 2016 ROW involved a significant drop down toward the shoreline, and then a return back up to the main road, along with a blind spot caused by the garage. Conflicts ensued between the parties.

[17] It is to be noted that the applicant Ponhook Lodge has also begun development of their property, north of the Freeman lands, for use as a new RV campground. Ponhook has begun clearing the land and installing the necessary infrastructure for this new project. It would appear that this has caused increased activity on the Laurie Wamboldt Road, including that portion that crosses the Freeman lands, including the passage of heavy equipment and machinery. This has exacerbated the problem from both sides, as the applicant Ponhook's drivers

claimed the 2016 detour to be particularly unsafe for large heavy machinery; whereas the Freemans were displeased about these heavy vehicles traversing their property. The Freemans further noted the concern that these large vehicles were unlicensed, uninspected, and uninsured, thereby creating added risk to themselves and their young grandchildren who might be near the road at any given time.

[18] I was provided with an expert report from Eric Jordan by the applicants dated June 6, 2019. Mr. Jordan, by agreement, was qualified to give opinion evidence in the areas of the safety and convenience of the use of rural roads. He conducted an analysis of the original ROW versus the 2016 ROW, by undertaking a variety of examinations and testing. He concluded the following about the 2016 ROW (at p. 4):

> B. Opinion
>
> It is my opinion that the new detour road relative to the old road is unsafe for the vehicles using the road, and also impractical and inconvenient…

[19] In the summer of 2019, the respondents unilaterally undertook an improvement of the 2016 ROW. They hired an engineering company (ABLE Engineering) to prepare a design, which was then implemented/constructed during the summer of 2019.

[20] The new road, while still following the route of the 2016 ROW, appears to have been a significant improvement to it; the roadway is wider, it is more flattened, it has improved sightlines, and it now includes a guardrail.

[21] The respondents ask that I sanction their re-location of the ROW over their lands, on the basis of their safety concerns with the original ROW. They submit that the original ROW is unsafe, due to its close proximity to buildings. They argue that the 2016 ROW is more safe, and as practical (or more practical) than the original ROW, especially taking into account the 2019 improvements.

[22] A report was prepared by Sandy Dewar, an engineer deemed able to give opinion evidence in road and street design, construction and safety, relating to the 2016 ROW. He concluded that the 2016 ROW, taking into account the 2019 improvements, was entirely safe for two way vehicular traffic and did not pose any danger to public. In his view, the original ROW was less safe (due to its proximity to buildings). He further opined that the 2019 ROW was, in fact, superior to any other portion of the Laurie Wamboldt Road along the Rim.

[23] The respondents further note that other parties (notably William Wamboldt) have made unilateral changes to the Laurie Wamboldt Road at other locations, seemingly with impunity. The respondents believe they should have the same

ability to change the road on their lands, particularly given the fact, they say, that they are creating a better and safer road. The applicants respond by saying that these other changes are irrelevant to the matter before me today.

[24] As I previously noted, the original ROW is now free of barriers. However, the respondents have advised the applicants that they are not free to use the original ROW, and that they are only to use the 2016/2019 ROW.

[25] The applicants submit that, although 2019 did bring improvements to the road, the new detour remains deficient to the original in a number of ways. The blind spot caused by the large garage remains a problem with the 2016 ROW; the original ROW is relatively straight and level with no such blind areas. Furthermore, submit the applicants, the law is settled that a ROW cannot be moved unilaterally by a servient tenement owner. The applicants seek a declaration that the original ROW remains, and that the respondent cannot prevent them from using it.

Law

[26] It is clear from a review of the caselaw that the law surrounding deeded ROWs is established, and remains fairly inflexible.

[27] In *Deal v. Palmeter*, 2004 NSSC 190, a servient tenement was subject to two ROWs over its land; due to their location, the owner was completely unable to build. She unilaterally built a new (and improved) road for the two dominant tenements in a new location. One of the dominant landowners refused to accept the new road and sought an injunction preventing interference with the original ROW.

[28] The court, although sympathetic to the respondent, found that the law relating to ROWs was clear and unequivocal. It noted that although certain cases from the US seemed to favour a practical and equitable approach, allowing changes in certain circumstances, the law in Nova Scotia was clear and did not so permit:

> 75 This Court finds itself in agreement with the equitable principles and approach applied in the *Umphres* case and explained in the Missouri Law Review. While it is arguable that it is unreasonable to permit a servient owner to unilaterally move a right of way of necessity, it is reasonable to give an adjudicator, such as a court, the authority to effect equity between dominant and servient owners.
>
> 76 Unfortunately, like the Washington Court of Appeals in *MacMeekin v. Low Income Housing Institute Inc*., I find myself bound by *Pearson* and *Deacon* as previously applied in Nova Scotia in *Wells v. Wells*.
>
> 77 The law of easements is founded on the common law. Legislation in modern society has had a tremendous effect upon traditional views of property law. Legislation is based on a public recognition of the communal interest in land, its use, and its development.
>
> 78 The common law, when applied to prescriptive easements, can lead to substantial hardship to one party and no equivalent benefit or gain to the other. It has, in its favour, predictability and stability, but it can also lead to unfair results not contemplated at the time of their creation. <u>This area of the law merits review.</u>
>
> 79 The facts of this case exemplifies the unfairness of the inflexible common law rule. The servient owner's land is effectively sterilized for development purposes

> by reason of the existence of a driveway running through it. The alternative roadway built by the servient owner for the dominant owner improves access to the dominant owner's property. The original driveway was built forty years ago when the land's appearance and occupancy was substantially different. The dominant owners bargaining position vis-a-vis the servient owner is, in the case at bar, inequitable.
>
> 80 It is with reluctance that I dismiss the defendants request for equitable relief.…
>
> (emphasis is mine)

[29] Despite the Court's suggestion that this area of the law be reviewed, changes have not come. In *Shea v. Bowser*, 2016 NSCA 18, the motions judge had found an original ROW to have been in a certain location. However, he then concluded that it was not in the interests of justice to locate it there, for a number of very practical reasons; it had partly overgrown, and the parties were actually using a new and different road. The judge therefore declared the ROW to be located elsewhere.

[30] The Court of Appeal expressed quite clearly that a ROW created by express grant cannot be relocated:

> **Analysis**
>
> ***Did the application judge have the authority to relocate a ROW created by express grant to a different location from the one originally granted?***
>
> 12. The short answer to this question is no.
>
> 13. The application judge did not identify any legal principles which could support his authority to relocate a ROW.
>
> 14. It will be clear from the applicable common law rules I will set out that absent abandonment, extinguishment, or mutual agreement by the parties to relocate, an express grant of ROW cannot simply be declared to exist elsewhere from its intended location. To do so flies int the face of clearly established principles.

> 15. The task of the application judge was to determine the location of the deeded ROW, not to create a new one. Although relocating the ROW may seem fair and practical, these considerations do not determine the outcome.

[31] The Court of Appeal in *Shea* noted and commented upon the respondent's argument that, while admittedly the judge's decision was problematic according to the existing law, the Court should allow the judge's decision to stand for reasons of equity:

> 22 Counsel for the respondents acknowledges the common law does not support the application judge's decision. Rather, respondent counsel argues equitable principles should allow the application judge to relocate the ROW. That submission was made without supporting jurisprudence and is contrary to existing authority. This is not a balancing of rights or equity-based issue.
>
> 23 A right-of-way is a limited and exceptional right. Generally speaking, a right-of-way, including its location, is defined by the grant of that right-of-way and by the circumstances surrounding it. (See *Halsbury's Laws of England*, 4th ed., vol 14. at p. 26.) Once the location of the right-of-way has been decided, neither the dominant owner nor the servient owner may unilaterally change its location. There might be some limited exceptions to this general rule; however, none apply to this case. (See *Gormley v. Hoyt* [1982] N.B.J. No. 365 (N.B.C.A.); *Wells v. Wells* (1994) 132 N.S.R. (2d) 388 (N.S.S.C.); *Deal v. Palmeter* 2004 NSSC 190 (N.S.S.C.); *Heslop v. Bishton* [2009] EWHC 607 (Eng.Ch.Div).)
>
> …
>
> 26 A right-of-way acquired through express grant may be altered through abandonment or agreement. (See *West High Development Ltd. v. Veeraraghaven* 2011 ONSC 1177 (Ont. S.C.J.).) Absent these circumstances, which do not exist in this case, or applicable legislation, court cannot themselves alter the location of a right-of-way, nor will they allow either party to unilaterally do so. (See *Gormley*). This is so even if a failure to relocate leads to unequitable consequences for one or both of the parties. (See *Deal*.)
>
> 27 Property law has its own particular, and at times rigid, set of rules. Courts uphold those rules even though that might result in overturning what may otherwise be a fair result and of benefit to both parties. (See *Gormley; Deal; Crowther v. Shea*, 2005 NBCA 97 (N.B.C.A.).)

[32] The respondent in the case at bar says that the case before me should be considered an exception to these general rules, as they have effected the re-location of a ROW due to their safety concerns. They point to the Court of Appeal's comments at paragraph 23, acknowledging "limited exceptions to the general rule", as authority for my finding an exception here.

[33] Some possible exceptions were listed at paragraph 14 of *Shea*: abandonment, extinguishment, or mutual agreement. None of those apply here. I have not been directed to any case where "safety concerns" were deemed acceptable as a reason for the unilateral relocation of a ROW.

[34] In *Gormley v. Hoyt* (1982), 43 N.B.R. (2d) 75 (N.B.C.A.), the ROW (known as the "Chapman Road"), which existed on the lands in question, was by express grant. The servient owner had done some work on the Chapman Road over his land, including the removal of a culvert and the removal of about 80 tons of earth, gravel, and rocks (which he used in the building of a new roadway for passage, called the "Hoyt Road"). The Chapman Road became much less convenient, and practically impassable. The dominant landowner claimed that his use of the ROW had been interfered with.

[35] The NBCA stated:

> 14 Mr. Hoyt was however also mistaken in believing that because he provided a new means of access over the Hoyt Road for the users of the shore lots he could interfere with the Chapman Road by making it less fit for use by those who had a right to use it. The owner of a right-of-way, in the absence of agreement with the owner over which it passes, has the burden of maintaining the right-of-way including the right to enter upon it for the purpose of making it effective: see *Dalhousie Land Complany Limited v. Bearce* (1933), 6 M.P.R. 399. The right of the owner of the right-of-way easement includes not only the right to keep the road in repair but also the right to make a road. It would follow therefore that the owner of the freehold over which the right-of-way passes has no right to remove rock, gravel and other material even though he himself owns the material if the removal has the effect of making the roadway less convenient for those enjoying the right-of-way. Likewise, he has no right to obstruct reasonable access to persons having such right-of-way.

[36] *Wells v. Wells* (1994), 132 N.S.R. (2d) 388 (N.S.S.C.) was a case involving a ROW of necessity, not of express grant. The road to a landlocked piece of land had been in continuous usage for over 40 years in the same location. The owner of the servient land constructed another driveway and sought to block the original road. The Court conducted a review of the law surrounding ROW of necessity and prescriptive easements, and concluded that:

> 23 It is thus clear that the plaintiff has no authority for his claim that he, as owner of the servient tenement, has the right to relocate the driveway, and, therefore, to alter the right of way which the defendant acquired by prescription. Indeed, there is authority to the contrary: Pearson v. Spencer, supra. See also Gormley v. Hoyt (1983) 43 N.B.R. (2d) 75 (N.B.C.A.).

[37] While *Wells* dealt with a ROW that was not expressly granted, the Court took note of some cases that had been provided by counsel dealing with express but undefined grants, that essentially came to the same conclusions (e.g., at

paragraph 15: "…*Deacon v. South Eastern Railway Co.* supra, held that the grantor of an undefined right-of-way contained in an express grant has the right to define the line of the way, but, once defined, the grantor cannot afterwards alter it…."). Nothing in the *Wells* case provides any authority to the contrary in the case of express grants.

[38] The respondent has provided me with *Weidlich v. DeKoning*, 2014 ONCA 736. The parties in that case were the owners of row houses, for which a private laneway ran behind all for vehicle access. The laneway was the subject of express granted ROW for all owners of the houses (specifically noted to be a ROW along that laneway "for the purpose of vehicular ingress and egress"). The respondent owners of one home began renovations to their garage, which, when completed, encroached partly on the ROW. However, it did not prevent vehicular passage. One of the other owners brought an application to the court seeking a declaration that the encroachment was "actionable"; that it constituted an actionable interference with their ROW.

[39] The motions judge held that the addition was not a real or substantial interference with the ROW since it was meant for vehicular access, and the laneway remained as passable by vehicle now as before the construction (although narrower at that one spot). The Ontario Court of Appeal agreed with that decision.

[40] In my view, the *Weidlich* case is entirely distinguishable from the case at bar. That was not a case involving the relocation of a ROW, but of alleged "interference" with a ROW (which the court held was not real or substantial in any event). The case was also fact specific to the ROW being "for vehicular ingress and egress". In the case before me the ROW has been entirely relocated, which is an entirely different circumstance according to the law.

[41] It should also be noted, when considering Ontario cases, that that province appears to have legislative provisions dealing with the relocation of a ROW in appropriate cases. (See s. 61 of the *Conveyancing and Law of Property Act*, R.S.O. 1990, c. C.34; s. 119 (5) of the *Land Titles Act* R.S.O. 1990, C.L.5.) No such provisions exist here.

[42] Finally, following the conclusion of the hearing before me, the parties provided me with written submissions on the very recent Court of Appeal case *Johnston v. Roode*, 2019 NSCA 98. This case dealt with a prescriptive ROW. I have reviewed that case and it seems clear to me that our Court of Appeal has, once again, repeated and confirmed the very same law as it set out in *Shea v. Bowser*:

> [51] These principles indicate that the route over which the Roodes obtained a prescriptive right of way cannot be altered without agreement of the Johnstons. No such

> agreement was in evidence and, therefore, the right must be exercised over the original path and not the post-2006 road to the extent that these differ. It was an error of law for the trial judge to conclude that the alteration in 2006 entitled the Roodes to use that route to the shore. (emphasis is mine)

[43] The law is clearly settled on this issue. In all these cases, litigants put forward many and varied reasons to seek the relocations of established ROWs, and those requests were all rejected. This was the result even where, on their face, the reasons put forward were not at all unreasonable.

[44] As to the case at bar, more specifically, I have no authority before me allowing "safety concerns" as an exception to the settled law relating to ROWs. I remain unpersuaded that this could be recognized as an exception.

[45] Moreover, even if safety concerns could (in theory) constitute an exception, in my view the evidence put forward in the present case is insufficient to support a conclusion that the original ROW is, in fact, unsafe.

[46] The respondents submit that the original ROW is unsafe because it passes very close to a residence (as noted by Sandy Dewar in his report, at p. 3). However, I cannot rely on that wholly broad and unsupported statement in reaching any conclusions on this point.

[47] For example, I have no objective evidence as to standards in road building. As noted by the applicants, it must be acknowledged that all kinds of roads pass

close to residential buildings, in all kinds of circumstances: public roads, private roads, highways, urban roads, rural roads. I have nothing before me in relation to regulations, or even industry standards, as to what is considered "safe" in relation to proximity of roads to buildings. I simply cannot conclude that this particular road is "unsafe", with what I have before me.

[48] It also seems worth pointing out that the present location of the house and garage was the choice of Charles Freeman, when he built them. At that time, the ROW already existed, and had been in existence for decades.

[49] I further confirm that, in my view, past adjustments of the Laurie Wamboldt Road over other lands (not the lands of the respondent) is irrelevant to my decision in this matter.

[50] I can appreciate the respondent's wish to make this ROW more convenient and/or less of a nuisance for itself. However, in my view I am bound by the law as described in *Shea v. Bowser*: a unilateral relocation of a ROW cannot be sanctioned by the Court, absent an exception. I find no exception to exist here.

[51] I therefore conclude that the ROW to the benefit of the applicants over the respondent's lands must pass where it has for 50 years, in its original location.

[52] The application is granted. If the parties cannot agree as to costs, I shall accept written submissions within 30 days of this decision.

Boudreau, J.

APPENDIX A

[1] The following paragraphs from the following affidavits were the subject of disputes as to their admissibility. My decisions are as follows:

Charlie Freeman affidavit, paragraph 22:

> For instance, just south of the property, the Wamboldts straightened the Laurie Wamboldt Road significantly in or around 2001. Prior to its adjustment, this stretch of road formed a large curve/loop (in a westerly direction) before it was adjusted to run straight. The Wamboldts moved this stretch of road such that it was further away from Laura Wamboldt's house at the time. This adjustment can be seen on the aerial imagery prepared by Mr. Curt Speight, just south of our property (at Exhibit A of his Affidavit).

[2] The applicant objects to this paragraph as being irrelevant. It is the applicant's ultimate argument that even if such other modifications to the Laurie Wamboldt Road at other locations were made, those are not relevant to this particular modification. The respondent disagrees and submits that the nature and use of the entirety of the Laurie Wamboldt Road is, in his view, a material issue. This was of substantial debate when the parties made their submissions at the end of the hearing.

[3] The ultimate decision of the relevance of that evidence is mine to reach. Having said that, at this point I am only dealing with threshold relevance. The respondent clearly should be able to put the necessary facts that underpin his

submission before the Court. This paragraph is not clearly irrelevant and will not be struck.

Kristopher Snarby affidavit, paragraph 20:

> I am aware that the Laurie Wamboldt Road has been moved and/or adjusted in a number of other ways and in other locations by other people along the Laurie Wamboldt Road over the years. To the best of my knowledge, William Wamboldt, an individual who formerly resided on the Rim, made those adjustments.

[4] The same arguments as in the previous paragraph were made about this paragraph. For the same reasons, I make the same decision. The applicant has further noted that Mr. Snarby did not disclose the source of his knowledge, which I acknowledge. However, the information noted in this paragraph is, in fact, not disputed and was confirmed by numerous witnesses within the course of this hearing. I see no reason or need to strike it.

Linda Freeman affidavit, paragraph 19:

> In my experience as a resident along this dirt road, driving along the 2016 ROW is much easier that the experience of driving along other areas of the Laurie Wamboldt Road.

[5] The applicant objects to this paragraph as being speculative, irrelevant, and containing opinion. The respondent notes that the observations are made based on personal experience and address a central issue in the case, in their view.

[6] Again, I am dealing with threshold relevance only at this stage, not ultimate relevance or weight. This paragraph does contain opinion, but it is an opinion that a lay person might give, based on their own observations. I do not strike this paragraph.

Sandy Dewar affidavit, numerous paragraphs:

> Para. 2:…The new section is by far superior to the old route, and in fact, it is far superior to ANY portion of the Laurie Wamboldt Road including the old Freeman easement.
>
> Para. 5:…Over the years, improvements have been made such as gravelling, bush cutting to widen roadway and straighten curves, and flattening rough humps.
>
> Para. 6:…However, it wasn't until 2017 or 2018 that the easement through the Freeman property was re-routed (realigned) around and away to the south (behind the garage) for the safety of pedestrians both adults and children. The former route went directly through lands close to residences, posing a serious danger to the residents, both adult and children. (Photo #1)
>
> Para. 6:…The report does a lot of talking about the need for vehicles to be able to pass each other, and the need to slow down. This is true of many sections of the Laurie Wamboldt Road. That is not true of the realigned section, where two vehicles can easily pass each other at normal speeds without slowing down.

[7] Mr. Dewar was qualified, by agreement, as a professional civil engineer capable of giving opinion evidence in road and street design, construction and safety. The above-noted paragraphs in Mr. Dewar's report fall into three categories: first, background information provided to Mr. Dewar by others (paras. 5 and 6); second, commentary on another expert's report (para. 6); and finally, his

opinion(s) about the safety of this and other parts of the Laurie Wamboldt Road (paras. 2 and 6).

[8] All of these types of comments are acceptable, and commonly found, in expert reports. They are admissible. The accuracy of the information relied upon by Mr. Dewar and the conclusions he reaches are matters related to the weight to be given to the report, not its admissibility. These issues are quite properly the subject of cross-examination and argument. These paragraphs are not struck.

Bill Wamboldt affidavit, paragraph 15:

> My understanding was that this was in fact illegal to have done, and the Freemans would not have any grounds to do that.

[9] Clearly this paragraph is not meant as a definitive statement of the law, nor do I take it as such. It is true that Mr. Wamboldt's opinion as to the legality of actions is not relevant. However, the paragraph is relevant (as suggested by the applicants) to provide context for the affiant's actions in response. It remains for that purpose only.

Laurie Wamboldt affidavit, paragraph 10:

> …I believe that the stake is, and pole (if it were to exist in the stake's location) would be, an unnecessary obstacle to the right-of-way. I see no reason why the stake, and potential pole, could not be located another 5 feet away from the road, to the east.

[10] This is opinion. The respondent submits that it is an opinion that a lay person could have, subject to weight. I agree.

Laurie Wamboldt affidavit, May 4, 2018, paragraphs 24, 33, 34, 35:

[11] I will not reproduce these paragraphs for the sake of efficiency. Each of those paragraphs provides information that was given by others to Mr. Wamboldt. They are clearly hearsay. I will strike those portions of his affidavit.