SUPREME COURT OF NOVA SCOTIA
Citation: *Day* v. *Muir*, 2022 NSSC 20

Date: 20220118
Docket: Hfx No. 504228
Registry: Halifax

Between:

John J. Day and Judith A. Day

Applicants

v.

David Muir and Carol Winnifred Muir

Respondents

Decision

Judge:	The Honourable Justice John A. Keith
Heard:	July 8, 2021, in Halifax, Nova Scotia
Final Written Submissions:	August 6, 2021
Counsel:	John O'Neill, for the Applicants Colin D. Bryson, Q.C., for the Respondents

By the Court:

Basic Background and Brief Conclusion

[1] In 1958, Cecil Miller and his wife, Rose Miller, bought a large lakefront property on Sandy Bottom Lake in Annapolis County. They began using the existing cottage as their summer home for themselves and their three children: Donald Miller, Carol Muir (nee Miller), and Judith Day (nee Miller).

[2] Rose Miller died on June 19, 1970. After her death, Cecil Miller began gifting parts of the lakefront property to each of his three children:

1. On December 21, 1974, Cecil Miller deeded a lot along the western boundary of the property (P.I.D. No. 0507112 and known municipally as 2173 Virginia Road, West Springhill) to his son, Donald, and Donald's wife Jean (the "**Donald Miller Property**"). Donald and Jean Miller subsequently developed their lands into a summer cottage which they still enjoy today;
2. On August 30, 1979, Cecil Miller deeded a lot along the easterly boundary of the property (P.I.D. No. 05057138 and known municipally as 2183 Virginia Road, West Springhill) to his daughter, Carol Muir (nee Miller) (the "**Muir Property**"). On July 12, 1984, Carol conveyed this lot to herself and her husband, David Muir, as joint tenants. A few weeks later, on July 30, 1984, Carol and David Muir purchased the lot of land directly behind their cottage property thus giving them direct road frontage along Virginia Road (P.I.D. No. 0507138). Over the years, Carol and David Muir also developed their lot by, for example, building their own summer cottage;
3. Cecil Miller kept the remaining lands between the Donald Miller Property and the Muir Property. This remaining lot bears P.I.D. No. 05057120 and is known municipally as 2181 Virginia Road, West Springhill). The original summer cottage was on these remaining lands. Cecil Miller lived about 20 minutes away, in Bear River, and he continued using this cottage until his death on January 6, 1991. In his will, Cecil Miller conveyed the lot to his daughter, Judith Day (nee Miller) and it is referred to in this decision as the "**Day Property**".

[3] In the end, Cecil Miller gifted a lake front lot to each of his three children who still own and enjoy separate, neighbouring lots on Sandy Bottom Lake.

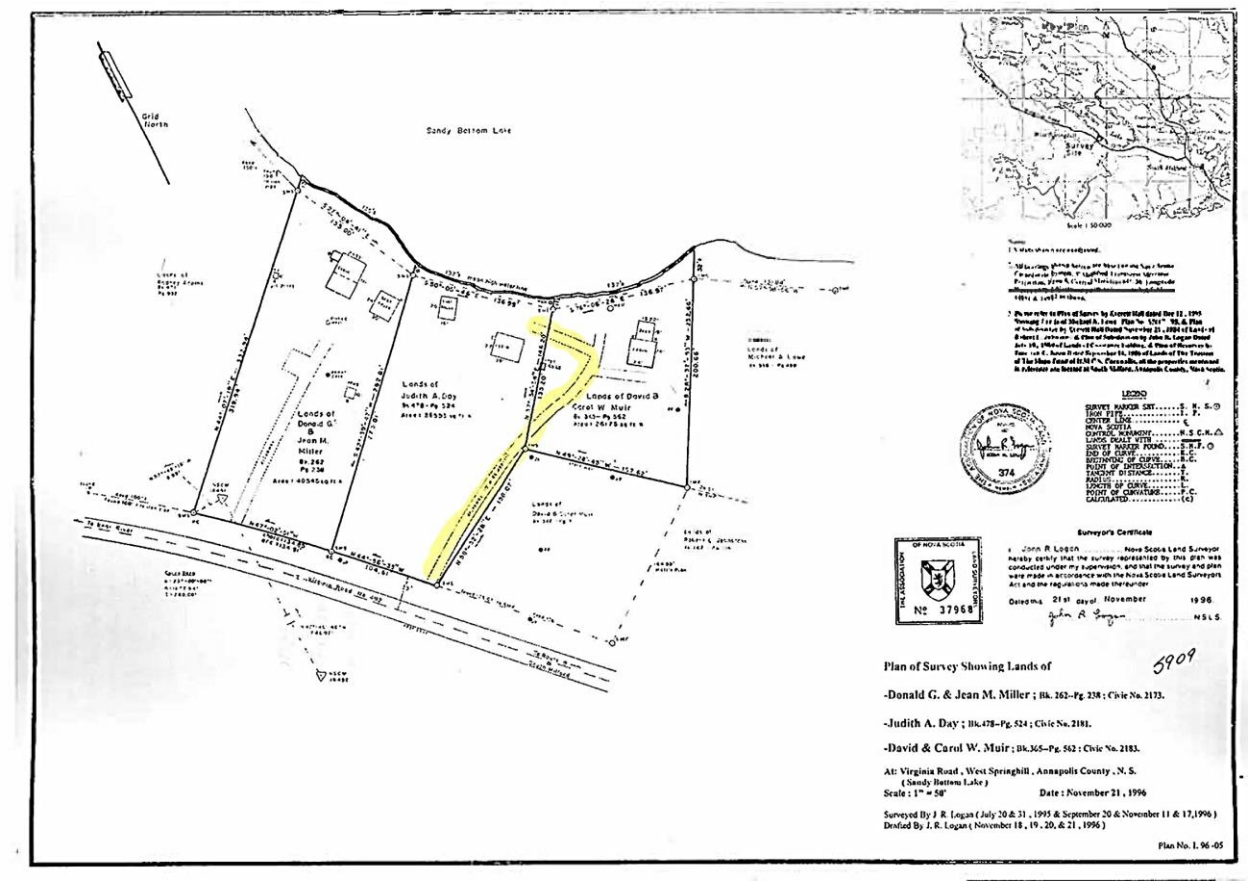
[4] This proceeding arises about 20 years after Cecil Miller's death. At issue is a driveway (the "**Disputed Driveway**") which historically serviced the Muir Property and the Day Property. The location of the Disputed Driveway is uncontested. It begins at Virginia Road on the Day Property's road frontage and snakes in a north-easterly direction towards Sandy Bottom Lake. According to a Plan of Survey prepared by John R. Logan, N.S.L.S. and stamped as of November 21, 1996 (the "**1996 Survey**"), the driveway crosses over onto the Muir Property. Then, near the shores of Sandy Bottom Lake, it veers back in a westerly direction and terminates just in front of Cecil Miller's original cottage.[1]

[5] I reproduce the survey here to orient the reader as to the location of the Disputed Driveway particularly in relation to Sandy Bottom Lake and the various structures built on the Day Property and the Muir Property. The Disputed Driveway is marked in yellow highlight. For present purposes, three preliminary comments are germane:

1. The 1996 Survey was commissioned by Cecil Miller's children (including Applicant, Judith Day, and Respondent, Carol Muir) more than 5 years after Cecil Miller's death;
2. The Disputed Driveway remained in place at the time and is identified in the survey as "Driveway 10' wide (approx.)"[2]; and
3. The survey depicts a number of structures on the Muir Property. However, in 1979 when Cecil Miller deeded a lot to Carol Muir, there were no structures on the Muir Property.

[1] Cecil Miller's original cottage was expanded over time. I return to this issue below.

[2] I note that in the 1996 Survey, there is a branch which leads towards the Muir cottage. It is not part of the Disputed Driveway. That cottage (and the branch of road leading to it) would have been developed after Cecil Miller granted a lot to Carol Muir in 1996. For the purposes of this decision, the salient point is that the location of the main driveway terminating in front of Cecil Miller's original cottage has not changed over time; and this would have been how Cecil Miller (and his successors in title) would access their cottage property both before and after gifting a lot to Carol Muir (nee Miller) in 1979.



[6] Cecil Miller used the Disputed Driveway for many years both before and after severing the Muir Property and gifting it to Carol Muir in 1979. From 1979 forward, the Muir family used the same driveway to access their newly acquired cottage property. After Judith Day inherited the Day Property following Cecil Miller's death on January 6, 1991, the Day family continued using the Disputed Driveway to access their cottage property.

[7] The Muirs subsequently became extremely frustrated by what they perceived to be an abuse of the Disputed Driveway. In particular, the Days increasingly used the Disputed Driveway for parking. The dispute came to a boil in October, 2018 when the Days unilaterally completed "upgrades" to the Disputed Driveway which included gravelling over a larger area near the end of the driveway to accommodate their parking needs. The expanded parking area was on the Muir Property.

[8] Immediately thereafter, on November 8, 2018, the Muirs' lawyer at the time (Kim Richardson) wrote a "cease and desist" letter to the Days stating that there was no right-of-way or license permitting the Days to either access their cottage lot

over the Disputed Driveway or use the Muir property as a parking lot. The letter concluded with a cryptic warning that the Muirs had "plans for their lot". No details were provided.

[9] The Muirs' unspoken "plans" became clear the next year when, without notice to the Days, they erected a fence near Sandy Bottom Lake to separate their property from the Day Property. Just in front of that fence, they also built a garage which completely blocked the Disputed Driveway.

[10] In this proceeding, the Applicants (Judith and John Day) claim a right of way to not only use any part of the Disputed Driveway located on the Muir Property but also to park on the Muir Property in an area they refer to as the "parking area". The evidence is clear that the Day's alleged "parking area" is precisely where the Days built their garage. In his affidavit sworn February 12, 2021, John Day complained that the Days "used to be able to park where the garage is and then be steps away from the concrete walkway to our doorsteps." (at paragraph 21)

[11] Litigation ensued.

[12] In this proceeding, the Days argue that they are merely continuing to use the Disputed Driveway in the same way Cecil Miller did from 1958 up until the time of his death in 1991. They say this historic usage includes parking on the Muir Property. They contend their proposed use of the Disputed Driveway is confirmed by the deed and the applicable law of contractual interpretation. Alternatively, the Days say an easement over the driveway arose by prescription (i.e., continuous, adverse, peaceful, and open use and enjoyment of the land over 20 years). The Days further claim monetary damages, including the cost of "upgrading" the Disputed Driveway and creating an alternative access route after the Disputed Driveway was blocked.

[13] The Muirs dispute that Cecil Miller reserved an easement over the Disputed Driveway when granting a cottage lot to Carol Muir. They say the 1979 deed only granted them (i.e., the owners of the Muir Property) a right of way to use that part of the Disputed Driveway located within Cecil Miller's lands (now the Day Property). Cecil Miller did not, they say, reserve a corresponding right to use that part of the Disputed Driveway located on their lands (i.e., the Muir Property). The Muirs further say that any historic use of the Disputed Driveway from 1979 forward was based on neighbourliness or implied permission between family members and, as such, it could never ripen into a prescriptive right.

[14] The Muirs also say that the Days have not used the Disputed Driveway in the same way as Cecil Miller. They say that the Days expanded the footprint of Cecil Miller's original cottage, moving it closer to the Muir Property. These renovations prompted increasing attempts by the Days to park on the Muir Property – attempts which the Days say were never permitted but rather, consistently opposed.

[15] For the reasons which follow, the following relief is granted:

1. A declaration of an easement in favour of the Applicants (including their successors in title) as owners of the Day Property (PID5057120 representing the dominant tenement) over such portion of the 10' Disputed Driveway depicted in yellow highlight on the 1996 Survey reproduced at paragraph 5 above as is located on the PID5057138 (the servient tenement) for the purposes of travelling to and from PID5057120. For clarity, the easement does not include the right to park on the Disputed Driveway or otherwise on the Muir Property;
2. An Order that the Respondents are enjoined from directly or indirectly interfering with or obstructing the Applicant's easement to use the Disputed Driveway to access the Day property; and
3. An Order that the Respondents, at their expense, shall take all necessary steps to remove obstructions constructed on the Disputed Driveway and, in particular, the garage and that part of the fence built across the Disputed Driveway. If these obstructions are not removed and free access returned in respect of the Disputed Driveway by May 31, 2022, the Applicants shall be entitled to take such steps as are necessary to complete the work with the reasonable, associated costs being at the Respondents' sole expense;

[16] The balance of the Applicants' claims including a claim for punitive damages and monetary damages in the form of costs allegedly incurred to maintain the Disputed Driveway and develop an alternate route after the Respondents blocked the Disputed Driveway is dismissed.

Summary of Issues

[17] As indicated, on August 30, 1979, Cecil Miller gifted a cottage lot to his daughter, Carol Muir (nee Miller) by deed dated August 30, 1979 (the "**1979**

Deed"). The language of the Deed is important. It described the interests being conveyed in the following metes and bounds description:

> ALL THAT CERTAIN lot, piece or parcel of land situate at Spring Hill, Sandy Bottom Lake, in the County of Annapolis and Province of Nova Scotia, more particularly bounded and described as follows,
>
> COMMENCING on the Southern shoreline of Sandy Bottom Lake at 2 Maple Trees growing between twin rocks marking the Western sideline of lands presently owned and occupied by Donald Lowe,
>
> THENCE Southerly along said Donald Lowe lands 222 feet to a stake set,
>
> THENCE Westerly along a field now or formerly of Arthur Fancy 158 feet more or less to the Northeast corner thereof to a stake set and the sideline of a private roadway leading to the cottage of the Grantor from the Virginia Road,
>
> THENCE Northeasterly generally along the said private roadway and lands retained by the Grantor to a stake set at the shore of Sandy Bottom Lake,
>
> THENCE Southeasterly along the Lake shore 137 feet to the place of beginning.
>
> TOGETHER with a right of way in company with the Grantor to the use of the said private roadway or drive providing access to the lands hereby conveyed to the Grantee and their servants and agents for all purposes necessary for the use of the property in common with the Grantor.
>
> PROVIDED always that the Grantee shall contribute equally to the upkeep and maintenance of that portion of the said right of way used by the Grantee with the Grantor and others.
>
> BEING AND INTENDED to be a portion of the lands and premises as conveyed to Cecil G. Miller and Hazel A. Miller (the latter now deceased) as joint tenants from Hugh D. Dickie as Executor of the Estate of Jean Cunard Dickie by Deed dated the 10th day of July, A.D., 1958, and recorded in the Registry of Seeds Office at Bridgetown in Book 220, Page 468.

[18] The Muirs contend that the deed does not expressly reserve a right-of-way in favour of Cecil Miller over their lands and they insist that the law precludes a grantor from subsequently undermining title to the granted parcel of land by advancing a contractual interpretation which diminishes the interests the grantor agreed to convey. Rather, the grantor has a duty to ensure that the deed accurately communicates their intention. The Muirs rely heavily upon jurisprudence (e.g., *3021386 Nova Scotia Ltd* v *Barrington (Municipality)*, 2014 NSSC 1; aff'd 2015 NSCCA 30 ("***3021386 Nova Scotia Ltd***")) which focusses upon the time-honoured rule that a grantor may not derogate from its grant. Thus, the original issue involves questions of contractual interpretation and an examination of when a

grantor may be entitled to derogate from its grant by, for example, implying an easement not otherwise expressly reflected in the governing deed.

[19] The second issue relates to whether historic usage of the Disputed Driveway by the Days and their predecessor in title, Cecil Miller, crystallized into enforceable prescriptive rights in the form of an enforceable easement.

[20] On this, any usage prior to the 1979 Deed is irrelevant to the issue of prescriptive rights because, in simple terms:

1. Prescriptive rights only arise where, among other things, a person uses land in a way which is open, notorious, and adverse to the interests of the owner; and
2. Prior to 1979, Cecil Miller owned all the land on which the Disputed Driveway is located. In other words, there was a single owner with "unity of possession". Cecil Miller broke that "unity of possession" when he conveyed a lot to Carol Muir on August 30, 1979. Any claim for prescriptive rights could only begin at that moment. Before then, by definition, Cecil Miller's use of the Disputed Driveway was not adverse and could not give rise to prescriptive rights.

[21] The basic test for an easement by prescription is well-established: Judith Day and John Day must prove, on the balance of probabilities, continuous, adverse, open, and peaceful use over a period of 20 years. The analysis is less a debate over the law as it is a dispute over the facts in this case.

[22] The Muirs say that no prescriptive rights could ever arise because any continued use of the Disputed Driveway by Cecil Miller or his successors in title (i.e., the Days) from 1979 forward was not adverse but, rather, occurred with the Muirs' implied permission and merely reflected their familial, neighbourly acquiescence.

Interpretation of Cecil Miller's Deed to Carol Muir and Implied Reservation of Rights

[23] The question is whether Cecil Miller expressly or, by operation of law, reserved a right to use any part of the Disputed Driveway when signing the 1979 Deed gifting a waterfront lot to his daughter, Carol Muir (nee Miller).

[24] The parties each refer to a number of general principles of contractual interpretation which may be distilled as follows:

1. "The overriding concern is to determine 'the intent of the parties and the scope of their understanding …. 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.'" (*Sattva Capital Corp* v *Creston Moly Corp*, 2014 SCC 53 ("***Sattva***") at paragraph 47). The relevant "surrounding circumstances" were also described as the "factual matrix" in *Sattva* (see, for example, paragraph 50). In *Sattva*, the Supreme Court of Canada explained that taking into account the "factual matrix" or "surrounding circumstances" at the time of contract formation represented a "practical, common-sense approach not dominated by technical rules of construction" (paragraph 47 of *Sattva*). Moreover, "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" (paragraph 48 of *Sattva*).

2. In determining the scope of the "factual matrix" or those "surrounding circumstances" which are relevant to interpreting a contract, three limiting principles are important:

    a. The "surrounding circumstances" or "factual matrix" at the time of contract formation "must never be allowed to overwhelm the words of that agreement" (paragraph 57 of *Sattva*). The express words chosen by the contracting parties and recorded in their written agreement predominate. "The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract …. While the surrounding circumstances are relied upon in the interpretative process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement" (paragraph 57 of *Sattva*). In *Purdy* v *Bishop*, 2017 NSCA 84 ("***Purdy***"), the Nova Scotia Court of Appeal added: "Surrounding circumstances assist the Court in interpreting the language used by the parties, but does not displace it." (at paragraph 15); and

b. The relevant "surrounding circumstances" should "…consist only of objective evidence of the background facts at the time of the execution of the contract (*King*, at paragraphs 66 and 70), that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting" (paragraph 58 of *Sattva*). Similarly, and reminiscent of the Supreme Court of Canada's caution in *Sattva*, the Nova Scotia Court of Appeal said in *Purdy*: "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" (at paragraph 16).

c. In *Romkey* v *Osborne*, 2019 NSSC 56, Arnold, J. undertook a comprehensive review of the law as to the role of "surrounding circumstances" when interpreting contracts and, more specifically for that decision, in interpreting the scope of an express right contained in a deed. He concluded, among other things, that: "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" (at paragraph 91).

d. The Court should approach the parties' subsequent conduct (i.e., their actions after contract formation) with caution. In *Shewchuk* v *Blackmont Capital Inc.*, 2016 ONCA 912, the Ontario Court of Appeal warned of the dangers which arise when the issue of contractual intent becomes tainted by subsequent conduct (at paragraphs 41 – 44). It concluded: "Evidence of subsequent conduct should be admitted only if the contract remains ambiguous after considering its text and its factual matrix" (at paragraph 46).

[25] As indicated, these are contractual principles of general application. They are refined by other, more specific principles relating to disputes around land grants and, in particular, circumstances where, as here:

1. A common owner (i.e., unity of possession) subdivides and conveys subdivided lots;

2. There are competing allegations around the existence and/or scope of a shared easement - often a mutual driveway between the subdivided lots;

3. The deeds in question may not fully or clearly address the nature or scope of an alleged, disputed easement.

[26] Primary among the more specific principles is the rule that a grantor may not derogate from his grant. This rule of non-derogation was first articulated with precedential authority in in *Wheeldon* v. *Burrows* (1879), 12 Ch. D. 31 (Eng. C.A.) ("***Wheeldon***") and has survived the test of time. See *Anger and Honsberger, Law of Real Property*, 3rd ed., at §17:13; *Canadian Encyclopedic Digest*, Easements II.5.(d) at §210; and 12 *Halsbury's*, 3rd ed., at p. 539). As indicated, the Respondents in this case repeatedly cite and rely heavily upon this principle.

[27] As an offshoot of the non-derogation rule, grantors who sever and convey land to a third party (as Cecil Miller did when signing the 1979 Deed in favour of Carol Muir) have a duty to clearly express their intentions in the deed itself and may not derogate from (or deny) any such easements without clearly communicating that intention. Thus, patent ambiguities should normally be interpreted against the grantor. Correspondingly, and without limiting the Court's ability to determine the parties' intention based on the deed as a whole, reservations or exceptions should be interpreted in favour of the person from whose title it detracts. (*Boudreau* v *Boudreau*, 2000 CarswellNS 114 (NSSC) at paragraphs 32 -33; aff'd (2001), 190 NSR (2d) 300 (NSCA) and *Purdy* at paragraph 21)

[28] Thus, the law recognizes an important distinction between a grantor who, after conveying land, seeks to reserve an implied easement versus a grantee who seeks a grant of an implied easement to fully achieve the interests being conveyed. The legal and evidentiary challenges which face a grantor will be more formidable that those facing a grantee. It is an uphill battle, and, for grantors, the hill is steeper and the path more difficult than it is for grantees.

[29] Nevertheless, the law of equity comes to the aid of deserving persons in appropriate circumstances where excessive rigidity in the common law otherwise produces an unjust result. For the purposes of this case, the jurisprudence speaks to the following types of easements which may, in appropriate circumstances, be implied into the governing deed: easements of necessity; easements of apparent accommodation and reciprocal and mutual easements.

[30] I deal with each type of implied easement below specifically in the context of a grantor seeking relief. Before doing so, the following preliminary points bear emphasis:

1. *Wheeldon* and the jurisprudence which flows from it recognize the non-derogation rule as an important consideration in determining whether equity will recognize an implied easement in the circumstances. Grantors seeking equitable relief are not entitled to lightly avoid the terms of the grant. Thus:

    a. Where a grantee seeks an equitable, implied easement, the non-derogation principle operates in favour of the grantee (and against the grantor) in support of the remedy sought. Indeed, in *Wheeldon* the Court referenced the non-derogation principle in support of an implied easement in favour of the grantee. Similarly, in *3021386 Nova Scotia Ltd* (a case relied upon by the Respondents), the grantee also relied upon the non-derogation principle in support of a request for an implied easement. In that case, however, the request was denied;

    b. The non-derogation rule is also operative when a grantor (not grantee) seeks an equitable, implied easement – and it again operates in favour of the grantee (and against the grantor).

2. Regardless of whether the grantor or grantee seeks a remedy, the non-derogation rule in *Wheeldon* is important but it is not a fixed edict of paramount importance for which equity admits no exceptions. That is, the non-derogation rule does not serve as a bar, prohibiting grantors from claiming an equitable, implied easement under any circumstances. The rule in *Wheeldon* does not dictate a particular result and it may bend in appropriate circumstances to serve the aims of equity. In short, the non-derogation rule will inform but does not entirely subsume the circumstances under which equity will recognize an implied easement in favour of a grantor.

[31] By way of summary, a grantor seeking to reserve an easement will have to confront the non-derogation principle in *Wheeldon*. And the impact of the non-derogation rule in considering if an implied easement is justified in the circumstances may depend on whether it is the grantor or grantee seeking relief. Nevertheless, equity is not so inflexible as to accept grantees seeking relief but

rigidly abandon grantors. Subject to the law set out below, grantors may still claim an equitable implied easement in appropriate circumstances.

Easements by Necessity

[32] A grantor may clearly claim an implied easement by necessity, despite the interpretive principles identified above. Notably, the legal requirements for proving an easement of necessity are the same whether the easement is sought by a a grantor or a grantee. At the same time, the legal test and evidentiary burden is onerous (see, for example, *Shea* v *Bowser*, 2013 NSCA 18 at paragraphs 38 – 47).

[33] In this case, it is not necessary to consider this potential easement further. The parties agree that there is no basis for implying an easement of necessity in the circumstances. Among other things, the Day Property (formerly belonging to Cecil Miller) is not land locked. The Day Property has significant road frontage along Virginia Road where, in fact, the Disputed Driveway begins to wind its way down to Sandy Bottom Lake.

Easement of Apparent Accommodation

[34] As indicated, the Respondents rely upon the Nova Scotia Court of Appeal case in *3021386 Nova Scotia Ltd* which examines implied easements and, in that case, an easement of apparent accommodation claimed by a grantee after acquiring one of two adjacent lots held by a single owner/grantor. Indeed, the bulk of caselaw relating to easements of apparent accommodation involve the grantee of subdivided land (or successor in title) who seeks an easement over adjacent land retained by the grantor. See, for example, *English* v *Wood* (1981), 46 N.S.R. (2d) 441 (NSSC, Trial Division) at paragraph 14; *DuVernet* v *Eisener*, [1951] N.S.J. No. 18 (S.C., A.D.); *Deforest Bros* v *Tuck*, 2020 ONSC 6439 at paragraphs 38 and 50 - 54; *Zelinski* v *Zelinski*, 2021 SKCA 165 at paragraphs 36 – 37. See also *Canadian Encyclopedic Digest*, Easements II.5.(d), Creation and Acquisition of Easements by Implication, §§210, 214, 216, 217 and 224.

[35] In cases where grantees seek to enforce an easement over the grantor's property (even though the deed does not expressly include a grant of easement), the non-derogation rule obviously figures prominently. The underlying presumption is that grantors should not be entitled to derogate from their own grant by denying existing, demonstrable easements (sometimes described as "quasi-easements") necessary to reasonably enjoy the interests being conveyed. In other

words, and in very simple terms, grantees may reasonably expect to receive those apparent and continuous easements that reasonably form part of the title to the land being granted.

[36] As indicated, in this case, the Respondents cite this law regarding easements of accommodation and fixate upon the non-derogation principle in *Wheeldon* contained in that jurisprudence. However, again, these cases typically involve grantees seeking a remedy – not grantors. As mentioned, there is a very important distinction between a grantee seeking to imply a grant of easement and a grantor seeking to imply a reservation of easement over land previously conveyed.

[37] A question arises as to whether grantors (or a successor in title) may be entitled to claim an easement of apparent accommodation after conveying subdivided lot. There is law to suggest that easements of accommodation may be available to grantors. In *Germain* v *Brar*, 2010 ABQB 530 ("***Germain***"), a successor in title to the original grantor sought an easement of convenience over a small asphalt pad located at the rear of two neighbouring properties that shared a mutual driveway. The asphalt pad was relatively small in size and located near a garage at the back of the two property properties. It was created so that the neighbouring owner could drive around a stone retaining wall which partially obstructed the mutual driveway. The neighbouring owner would cross the boundary line; move on the asphalt pad; immediately turn 90 degrees; and then return to the garage on their property. The deeds expressly recognized the shared mutual driveway but not the asphalt pad.

[38] Importantly, at the time the asphalt pad was created, there was unity of the possession between the two lots. Moreover, the lot which used the asphalt pad was developed. The neighbouring lot was not.

[39] A dispute eventually arose when the Defendant Brar purchased the undeveloped lot on which the asphalt pad was located. Brar sought to eliminate the asphalt pad or reduce how it could be used. The Plaintiffs Germains had just bought the neighbouring, developed lot and sought to preserve the asphalt pad. They were successors in title to an original grantor who had unity of possession over the two lots. Thus, among other things, they requested an implied reservation of easement over the Brar land.

[40] Jeffrey, J. concluded that the plaintiff Germains (successors in title to a grantor) were not precluded from claiming an "easement of accommodation".

However, in deference to the non-derogation principle, he acknowledged that grantors would face a higher evidentiary burden. He wrote:

> 32 …while easements can therefore exist in Alberta pursuant to the common law, despite that easement interest not being indicated on the certificate of title to the land, the Court "should be loathe to imply [them]": *Hough* v. *Alberta*, 2000 ABQB 1004 (Alta. Q.B.), at para. [4], and *Condominium Plan No. 7810477* v. *Condominium Plan No. 7711723* (1997), [1998] 4 W.W.R. 43 (Alta. Q.B.), at para. [47], both relying on the Ontario Court of Appeal decision in *Barton* v. *Raine* (1980), 29 O.R. (2d) 685 (Ont. C.A.); and this quoted statement was also affirmed recently by this Court in *Nelson* v. *Stelter*, 2009 ABQB 732 (Alta. Q.B.), at para. [175], citing Condominium Plan.
>
> 33 In *Barton*, at para. 15, when discussing the possibility of a new category of implied easement, the Ontario Court of Appeal referred to the following from *Cheshire's Modern Law of Real Property*, 12th ed. (1976) at p. 534:
>
> There are, perhaps, other cases in which easements will be implied in favour of a grantor without express reservation, but they defy exhaustive enumeration and all that can be said is that the ***scales are heavily weighted against them***. [emphasis added]
>
> 34 And more recently, in *Megarry* & *Wade*, supra, at para 28-008, the authors state:
>
> ... a grantor alleging an intended reservation of an easement bears a heavy burden of proof.
>
> 35 In this case, of course, it is the Germains facing that heavy burden."
>
> [at paragraphs 32 – 35]

[41] Jeffrey, J. then applied the test for an easement of accommodation and concluded that, in the circumstances of this case, a successor in title to the grantor (the Plaintiffs Germain) were entitled to a limited "easement of accommodation" over the asphalt pad (see paragraphs 43 – 59). Thus, an easement of accommodation was available to grantors.

[42] That said, in *3021386 Nova Scotia Ltd* the Nova Scotia Court of Appeal references the decision in *Germain* and the comments call into question Jeffrey, J's conclusion where a grantor is seeking to reserve an implied easement of accommodation. In *3021386 Nova Scotia Ltd*, the issue was whether a grantee (not grantor) had proven an easement of accommodation and so the Nova Scotia Court of Appeal's comments regarding grantors were *obiter*. Nevertheless, the Court observed that there is a significant difference between a reservation of easement in

favour of a grantor and a grant of easement in favour of a grantee. In distinguishing the two and writing for the Court, Hamilton, J.A. stated:

> 35 The appellant agrees with this but argues that the judge then errs by confusing the test for an implied grant of easement with that for an implied reservation of easement, which was the issue in *Germain* v *Brar,* 2010 ABQB 530 (Alta. Q.B.), when he states:
>
> [26] As a further general comment, the Court "should be loathe to imply" easements: *Germain* v *Brar*, 2010 ABQB 530.
>
> 36 The test for determining an implied reservation of easement is more restrictive than that for an implied grant of easement as set out in *Anger & Honsberger*, 17-10 and 17-11:
>
> An implied reservation of an easement may occur where land is severed and the quasi-dominant land is retained. Because of the rules that a grantor cannot derogate from their grant and that a grant is always strictly construed in favour of the grantee, courts are unwilling to recognize easements which have not been expressly reserved in the instrument conveying the quasi-servient land. ...
>
> Because courts are more stringent where the owner of the retained land, rather than the owner of the newly acquired land, is arguing that an easement should be implied on severance, it seems that continuous and apparent quasi-easements cannot be reserved by implication *unless such an easement also meets the test of necessity.*
>
> See also *St. Mary's Milling Co.* v. *St. Mary's (Town)* (1916), 32 D.L.R. 105, 37 O.L.R. 546 (Ont. C.A.).
>
> [emphasis added]

[43] It is not necessary to address this issue further because, in my view, the final exception described below (Reciprocal and Mutual Easements) more specifically and directly applies to the circumstances in this case.

Reciprocal and Mutual Easements

[44] The leading case on reciprocal and mutual easements is the Ontario Court of Appeal's decision in *Barton* v *Raine*, (1980), 114 DLR (3d) 702 (Ont CA). Leave to appeal to the Supreme Court of Canada was refused by Laskin, CJC, Estey and Chouinard, JJ on December 15, 1990 (see footnote at 114 DLR (3d) 702) ("***Barton***").

[45] Although *Barton* specifically confirmed a reciprocal and mutual easement in favour of a grantor, its genesis is found in *Wheeldon* where Thesiger, L.J. remained

open to the possibility of other exceptions to the non-derogation principle beyond easements of necessity or apparent accommodation. He stated: “One of these exceptions is the well-known exception which attaches to cases of what are called ways of necessity; and I do not dispute for a moment that there may be, and probably are, certain other exceptions. ...” (at page 49). Since *Wheeldon*, “certain other exceptions” have been recognized.

[46] Like many cases in which equity allows for exceptions in certain circumstances, the facts in *Barton* are important – and they are similar to the case at hand. In *Barton*, the plaintiff's father (Fred Barton) acquired his house and property in 1919. At that time the property next door was a vacant lot, which was not built upon until 1924. At all material times, a shared driveway straddled the boundary line separating the two lots. The driveway was about 12 feet wide: 4 feet on the property owned by the plaintiff’s father and 8 feet on the neighbouring property. The driveway was well-defined and used by both property owners to get to and from the garages located at the back of their respective properties.

[47] In 1941, Fred Barton purchased the neighbouring property with whom he shared a driveway. He bought the neighbouring house for his son Raymond and Raymond’s wife, Margaret. Raymond and Margaret Barton subsequently bought his house from Fred Barton in 1952. The deed from Fred Barton to Raymond and Margaret Barton was silent as to the shared driveway. Nevertheless, the manner in which the shared driveway was used by the two neighbouring owners did not change.

[48] In 1968, Fred Barton died, and his other son (the plaintiff, George Barton) acquired title to his home.

[49] In 1971, Raymond and Margaret Barton sold their home to the defendant, Kenneth Raine. As of that time, the shared driveway had been used in the same manner by the neighbouring property owners from 1919 and certainly from 1952 when Raymond and Margaret Barton bought their home. However, the deed from Raymond and Margaret Barton to Kenneth Raine was, once again, silent as to the shared driveway.

[50] A dispute arose between the plaintiff, George Barton, and the defendant, Kenneth Raine. It came to a head in May 1972 when Kenneth Raine erected a fence and gate along the two property lines. This prevented George Barton from accessing his garage because, as indicated, only 4 feet of the 12-foot share driveway was on George Barton’s property. Coincidentally, the fence was erected

one month prior to the expiry of the 20-year period necessary to ground a claim for prescriptive rights.

[51] George Barton sued as successor in title to the grantor: his father, Fred Barton, who sold the neighbouring property to Raymond and Margaret Barton in 1952. As successor in title to the grantor, George Barton sought an order requiring removal of the fence and confirming his right to use the shared driveway.

[52] Writing for the Court, Thorson, J.A. confirmed that a reciprocal and mutual easement may arise in favour of a grantor in appropriate circumstances. At paragraph 21, he articulated the test as follows:

> In my opinion, the learned trial judge was correct in the conclusion which he drew from the authorities referred to above, namely that the development of the case law since *Wheeldon v. Burrows* has softened the rigour of the general rule set out in that case or has enlarged the scope of the exceptions to the rule. On the facts of the case at Bar, I am satisfied that, although the 1952 conveyance made no mention of a right of way over the driveway between the two properties, there was, *by necessary inference from the circumstances in which the conveyance was made, a common intention* on the part of both the father on the one hand and the son and daughter-in-law on the other hand that, after the conveyance, each of them would continue to use the driveway in the same manner as, in fact, it had been used without interruption since the late 1920's. [emphasis added]

[53] In *Sauer* v *648657* B.C. Ltd, 2019 BCSC 43, Weatherill, J. summarized the test in *Barton* as follows:

> In circumstances where two neighboring landowners have participated in a joint enterprise with the implied intention that both properties will benefit, the law of equity can intervene to provide a remedy. The benefit must be both an obvious and necessary inference from the circumstances. [at paragraph 71]

[54] The conclusions in *Barton* have been accepted in Nova Scotia (*PATCO Developments Ltd* v *3193972 Nova Scotia Ltd*, 2016 NSSC 9) and, more recently, recognized by the Saskatchewan Court of Appeal in *Zelinski* v *Zelinski*, *supra*..

[55] The *Canadian Encyclopedic Digest*, Easements II.5.(f) states:

> **§237** The second exception to the general rule that a grantor must reserve expressly in a grant any right he or she intends to retain over the tenement granted, is the reciprocal and mutual easement. A conveyance by a common owner which makes no mention of a right-of-way over a driveway between two properties may, by necessary inference from the circumstances in which the

> conveyance was made, establish a common intention on the part of the grantor and grantee that, after the conveyance, each of them would continue to use the driveway in the same manner that it had been used prior to the conveyance.

[56] In the circumstances of this case, the obvious and necessary inference from the circumstances surrounding the 1972 deed from Cecil Miller to Carol Muir is very clearly sufficient to demonstrate a reciprocal and mutual easement over that part of the Disputed Driveway which travels across the Muir Property. For clarity, this easement is solely to travel along the Disputed Driveway in the same manner as Cecil Miller when accessing his cottage. I accept the Muirs' evidence on this point and conclude that it does **not** include the right to park on the Muir Property.

[57] The analysis begins with the wording of the metes and bounds description in the 1979 Deed. I note the following:

1. The description of the boundary line separating the lot granted to Carol Muir from Cecil Miller's remaining lands is important. According to the deed, that boundary begins at "a stake set and *the sideline of a private roadway leading to the cottage of the Grantor from the Virginia Road*". There is no doubt that this "private roadway" is the Disputed Driveway. The boundary then moves "Northeasterly *generally along the said private roadway and lands retained by the Grantor* to a stake set at the shore of Sandy Bottom Lake". In short, the wording of the deed suggests that Cecil Miller intended the Muir Property to the west at "the sideline of the [Disputed Driveway]" and he would, therefore, retain title to both the private roadway and the remainder lands;
2. The 1979 Deed goes on to grant Carol Muir "*a right of way in company with the Grantor to the use of the said private roadway* or drive providing access to the lands hereby conveyed to the Grantee and their servants and agents for all purposes necessary for the use of the property *in common with the Grantor*". It was necessary for Cecil Miller to include this right of way into the grant because, in 1979, the lot being granted to Carol Muir had no road frontage along Virginia Road. The Muirs would not obtain such road frontage until 1984 when they purchased the lot between their original cottage property and Virginia Road.

[58] From this perspective, the deed reveals Cecil Miller's intention to retain access to the Disputed Driveway. The reason is perfectly clear: The Disputed

Driveway was not simply the way Cecil Miller historically travelled to his cottage; it was the only driveway which led to his cottage. At the same time, he crafted the 1979 Deed to ensure that Carol Muir equally had the right to share (in common with Cecil Miller) the Disputed Driveway, to access her cottage lot.

[59] Having said that, I turn back to the 1996 Survey prepared more than 5 years after Cecil Miller's death. The boundary line which separates the Muir Property and the Day Property begins at the sideline of the Disputed Driveway, consistent with the wording of the 1979 Deed. However, the boundary in the 1996 Survey does not move "Northeasterly generally *along the said private roadway* and lands retained by the Grantor … to a stake set at the shore of Sandy Bottom Lake", as the metes and bounds description in the 1979 Deed states, emphasis added. Rather, the 1996 Survey cuts a straight line from a point about half-way down the Disputed Driveway to another point along the shores of Sandy Bottom Lake sufficient to ensure that the Carol Muir lot had 137 feet of lake front. In drawing a straight line in this manner (as opposed to going along the Disputed Driveway), the boundary line in the 1996 Survey:

1. Intersects the Disputed Driveway at a point about half-way to the shores of Sandy Bottom Lake such that about half of the Disputed Driveway is on the Muir Property and the other half on the Day Property;
2. Intersects the Disputed Driveway again just before the driveway terminates near the front of Cecil Miller's original cottage.

[60] Having said that, the 1996 Survey does ensure that the Muir Property has about 137 feet of lake frontage. That figure (137 feet):

1. Is consistent with the amount of lake frontage noted in the 1979 Deed;
2. Ensures that each of Cecil Miller's three children would receive roughly the same amount of lake frontage. According to the 1996 Survey, the Donald Miller Lot has 135 feet of lake frontage, the Day Property has 137 feet of lake frontage and the Muir Property has 137 feet of lake frontage.

[61] It is unclear why the 1996 Survey intersects the Disputed Driveway twice. The intention seems to have been to achieve 137 feet of lake frontage in a way which maximizes the land contained in the Muir Property – even though it is uncontested that the Disputed Driveway was clearly marked and in place at the time of the survey. Setting aside any issues regarding the priorities afforded

natural boundaries or existing monuments on the ground when establishing boundary lines, I also make the obvious points that the 1996 Survey was prepared 17 years after Cecil Miller's 1979 Deed to Carol Muir; and that Cecil Miller died 5 years before the 1996 Survey was created. As well, the parties were not locked in litigation at the time of the 1996 Survey. Finally, recall the Ontario Court of Appeal's warnings in *Shewchuk* v *Blackmont Capital Inc.*, *supra* around the use of subsequent conduct when interpreting contracts (see paragraph 24 above).

[62] Having said all that, the sworn evidence filed by all parties in this proceeding (including the Days as Applicants) clearly accept the boundary lines as shown in the 1996 Survey. No party asked that the boundary line be redrawn, and I am certainly not prepared to do so.

[63] At the same time, the Respondents argue strenuously that granting an easement to the Applicant Days as successors in title to Cecil Miller should not be allowed as it would overwhelm the language of Cecil Miller's 1979 Deed to Carol Muir, contrary to the Supreme Court of Canada's clear direction in *Sattva*.

[64] Respectfully, I disagree. I am emphatically of the opinion that the wording in the 1979 Deed strongly and necessarily confirms a common intention to reserve a right of way in favour of Cecil Miller and his successors in title. Finding such a common intention would not overwhelm the 1979 Deed but, in my view, better reflect the intent of the parties.

[65] In addition to the wording of the 1979 Deed, the following circumstances surrounding that deed obviously and necessarily support the inference of an implied intention that both the owners of the Day Property and the owners of the Muir Property would benefit from the Disputed Driveway:

1. In *Barton*, the Ontario Court of Appeal referred to the following fact as supportive of an implied reciprocal and mutual easement: "Throughout the whole of this period the driveway was a tangible physical fact, there to be seen by all who chose to see it, and the manner of its use would have been obvious to even the most casual observer of the physical features of the two properties. There could be no doubt that it was there to provide access to and from both garages near the rear of the two properties" (at paragraph 23). If the word "garage" in this passage were replaced with "the parties' cottages", these sentences could well have been written for the case at hand. Indeed, an implied easement in this case may be even more

compelling because, unlike a garage, the lake front (including Cecil Miller's cottage at the time of the 1979 Deed) would be the primary destination for the Day Property and the Muir Property;

2. Carol Muir candidly attests that after deeding the lakefront lot to her in 1979, "my father [Cecil Miller] continued to use the portion of the driveway over the Muir Property to access his property" and that, although they did not discuss it, "he was my father and he could continue to use the property as he always had" (Affidavit of Carol Muir sworn March 25, 2021, paragraph 19). In fact, at all times from 1958 until his death in 1991, Cecil Miller used the entirety of the Disputed Driveway without permission. In my view, it defies credulity that either:

    a. There could be any misunderstanding in 1979 between Cecil Miller and Carol Muir that the historic right to use the Disputed Driveway would continue. As indicated, it was the only existing means to access Cecil Miller's original cottage. Indeed, as indicated, Carol Muir's affidavit suggests that no such misunderstanding existed. On the contrary, there was an understanding and common intention that the grantor (Cecil Miller) and the grantee (Carol Muir) maintained the right to use the Disputed Driveway to access their respective cottage properties; or

    b. That either Cecil Miller or Carol Muir understood that Cecil Miller's continued right to use the Disputed Driveway was somehow dependent upon Carol Muir's (or her successor in title's) permission – which could be withdrawn at any time, depriving Cecil Miller of historic access to his cottage.

[66] In my view, the only reasonable and necessary inference to be drawn from all of the facts and circumstances surrounding the 1979 Deed is that each of the parties (Cecil Miller and his daughter, Carol Muir) had a common intention that Cecil Miller, as grantor, had the right to continued use of the Disputed Driveway.

[67] I declare that an implied reciprocal and mutual easement to the benefit of the owners of both the Muir Property and the Day Property arises out of the 1979 Deed from Cecil Miller as grantor to Carol Muir as grantee. This implied easement is located along the same route as Cecil Miller historically used to access his original cottage and is marked in the 1996 Survey as the 10' Driveway.

[68] Again, to be clear, this easement recognizes a right to travel to and from their respective cottage properties. It does **not** include the right of either owner as dominant tenement to park on the land of the other as servient tenement. Thus, the owners of the Muir Property may travel over (but may not park on) that part of the Disputed Driveway located on the Day Property. Similarly, the owners of the Day Property may travel over (but may not park on) that part of the Disputed Driveway located on the Muir Property.

[69] I reject the Days' contention that Cecil Miller retained any right to park on the lands granted to Carol Muir in 1979. Among other things, the 1979 Deed speaks only of a right of access. It does not mention a right to park. The right to park is neither a necessary nor obvious nor, respectfully, reasonable inference to be drawn from the circumstances surrounding the 1979 Deed. The wording of the deed does not suggest any such common intention and, indeed, the Applicants do not suggest a reciprocal or mutual easement. Rather, they claim the right to park along the Disputed Driveway is for their benefit alone (i.e., they expect the benefit of additional parking over the Muir Property but do not recognize a similar right for the Muirs to park on their property).

[70] Furthermore, I accept the Muirs' evidence that from 1958 – 1979 and beyond, Cecil Miller parked his car close to his cottage, for his own convenience, and on his own property. I further accept the Muirs evidence that:

1. The issue of parking became an issue of significant tension and controversy between the parties after Cecil Miller died and after the Days expanded the footprint of the cottage closer to the Muir Property;
2. Altering the footprint of the Days cottage coincided with the Days presuming the right to not only park on the Muir Property with increasing frequency but expanding their presumed "parking area"; and
3. This dispute over parking festered for years and eventually boiled over in 2019 when the Muirs precipitously blocked access to the Disputed Driveway just before it reached the Days cottage. I do not condone the Muirs' unilateral decision to block the Disputed Driveway. The Days' behaviour over the years may have been wrong but there were less dramatic and more appropriate methods for the Muirs to bring this dispute to a head. Still, the manner in which the Days improperly exploited the Disputed Driveway, parked with

> increasing frequency on an expanding part of the Muir Property and ignored the Muirs' complaints at least help to explain (not excuse) the Muirs' response.

[71] In sum, the common intention which attaches to the Disputed Driveway benefits both sides equally and recognizes a reciprocal right to access their cottage properties. In so far as parking is concerned, the Disputed Driveway is not a one-way street which favours the Days over the Muirs.

Adverse Possession

[72] Subject to the contractual analysis above which confirms an implied easement over the Disputed Driveway, I would also have no difficulty in finding a similar right arises by prescription.

[73] The Respondents acknowledge that:

1. Until his death in 1991 (for almost 12 years), Cecil Miller continuously and openly travelled along the Disputed Driveway in the same way he had before deeding the Muir Property to Carol Muir in 1979; and
2. Cecil Miller never sought Carol Muirs' permission to use the Disputed Driveway and, indeed, never discussed his continued use of the Disputed Driveway with the Muirs.

[74] I also find that the Days started using the Day Property after Cecil Miller's death on January 6, 1991 when the Applicant Judith Day received the Day Property in Cecil Miller's will. Like Cecil Miller before, they continuously, openly, and notoriously used the Disputed Driveway to access their cottage property, without discussing the matter with the Muirs or seeking their permission. There is evidence, which I accept, that the Days would park on the Muir Property from time to time beginning in 1991. I return to the parking issue below. For present purposes, I simply note that the Days equally continued to use the Disputed Driveway to access their cottage.

[75] In response, the Respondents Muirs acknowledge that prescriptive rights may be founded in acquiescence (or permissive tolerance) by the owner of the servient tenement (*Croft* v *Cook*, 2014 NSSC 230 at paragraphs 30 – 31). The Muirs also acknowledge that they did not speak with either Cecil Miller or the Days regarding their usage of the Disputed Driveway to access the Day Property.

There was an ongoing dispute regarding parking, which I return to below. However, nothing was said regarding the right to use the Disputed Driveway for accessing the Day Property.

[76] Notwithstanding, the Muirs argue that the absence of any discussion does not constitute acquiescence in the circumstances. Rather, they characterize it as unspoken or implied permission and a variant of neighbourliness among family members. And they point out that neighbourliness cannot give rise to prescriptive rights (*Croft* at paragraph 34).

[77] In support of this argument, the Muirs return to the 1979 Deed and say that because Cecil Miller failed to reserve an easement (when he had a duty to do so), his continued use must be seen as a form of familial indulgence or neighbourliness by Carol Muir. They further argue that attempting to characterize Cecil Miller's continuing usage as "adverse" is wrong at law because it fails to properly account for the principle in *Wheeldon* that a grantor may not derogate from the grant.

[78] In so far as the Muirs rely upon the 1979 Deed and the non-derogation principle as a defence to prescriptive rights, I repeat my findings regarding the language of the 1979 Deed in paragraphs 57 – 64 above. I further find that any usage by Cecil Miller during his lifetime would not be a function of unspoken or implied permission but, rather, a right that Cecil Miller presumed he had and corresponding acquiescence or passive tolerance on the part of the Muirs.

[79] I also reject any residual argument that ongoing usage of the Disputed Driveway by Cecil Miller or the Days was with the Muirs implied permission and a reflection of neighbourliness among family members. On this, I accept the Muirs' evidence that at some point in the late 1990s, the Muirs acknowledge that the problem of the Days parking on the Disputed Driveway emerged and became a topic of controversy between the parties. I further accept that the Muirs' evidence that they expressly and categorically denied permission to park on their property. At the same time, these are not circumstances which suggest or support the argument that use of the Disputed Driveway was somehow a reflection of neighbourliness among family members or based upon the Muirs' implied, unspoken permission.

[80] By the 1990s, the parties were already quarrelling over the rights which attached to the Disputed Driveway, but the focus was parking, not access. The Muirs otherwise acquiesced to the Days open and continuous use of the Disputed Property without permission. Such access was presumed and accepted as a right;

just as Cecil Miller's right to openly and continuously travel along the Disputed Driveway to access his property without permission had been presumed and accepted as a right.

[81] Respectfully, based on the evidence including a 20+ year festering dispute over the rights which attach to the Disputed Driveway, the Muirs cannot credibly suggest that:

1. They repeatedly and, at times, angrily rejected the Days attempts to use the Disputed Driveway to park on the Muir Property;
2. In the midst of this ongoing conflict around parking, they impliedly permitted the Days to use the Disputed Driveway as an unspoken gesture of neighbourliness among family members.

[82] The Muirs had a reason to suspect the Days were exploiting use of the Disputed Driveway and, as well, a reason to clarify. Instead, in so far as using the Disputed Driveway to access the Day Property, they did nothing. Respectfully, this is not evidence of neighbourliness or implied permission. On the contrary, this is evidence of passive tolerance or acquiescence sufficient to ground a claim for prescriptive rights.

[83] This finding cuts both ways. On the one hand, it supports the Days' prescriptive right to use the Disputed Right of Way for the purposes of accessing the Day Property. On the other hand, it undercuts the Days' claim for prescriptive rights to park on the Muir Property. As indicated, I accept the Muirs' evidence that the parking issue was a source of controversy and that they repeatedly complained (and certainly did not acquiesce) in the Days parking on the Muir Property.

[84] I further find that the Days knew of the Muirs' parking concerns. By way of example, I note the Days allege that the Muirs failed to pay their "share" in respect of $1,427.50 spent in 2018 to "upgrade" the Disputed Driveway. In pursuing this claim, Mr. Day says that Carol Muir "not only agreed to the work but also agreed that the Muir's would pay *half of the costs*". (Mr. Day's reply affidavit sworn June 13, 2021 at paragraph 18). Yet, a handwritten note on the invoice says "Sister-in-law's share $350.18" – or about 25% of the $1,427.50, not 50%. The obvious questions are: why would Mr. Day only attribute 25% of the costs as the Muir's share when he says that Carol Muir agreed to pay 50% of the costs of the work? Moreover, if the Days truly believed they had an unrestricted right to use this "parking area" consistent with historic usage, why did they not seek to hold the

Muirs responsible for half of the costs of the work consistent with, apparently, Carol Muir's statement to Mr. Day?

[85] Mr. Day's only explanation is that this amount ($350.78 or about 25% of the total cost of $1,427.50) was "the portion I wanted to collect from Muirs, but they refused to pay. I paid the balance in full myself." (at paragraph 17)

[86] Mr. Day does not clarify how or why he unilaterally determined that the Respondent's share was only about 25% of the total cost when he says that Carol Muir agreed to pay 50%. As indicated above, I find that the Day's demands to park on the Muir Property increased over time and that it was a very controversial topic as between the two neighbours. In light of this historic conflict and based on this evidence, I infer that:

1. John Day did not discuss with Carol Muir his plans to complete "upgrades" on the alleged "parking area", which included expanding this parking area;
2. Mr. Day did not discuss the contemplated expansion of the parking area with Carol Muir because it was a controversial subject. Rather, he decided to proceed with the work and pay the associated costs himself; and
3. Carol Muir neither knew nor was told that at least 50% of the work completed was not in respect of "upkeep and maintenance" but, rather, upgrading the Days' preferred parking arrangements on the Muir Property.

[87] In sum, between 1979 forward, there is ample evidence to demonstrate that the owners of the Day Property (Cecil Miller and then the Days) exercised continuous, open, and notorious use of the Disputed Driveway for well over the 20 years necessary to establish prescriptive rights. A prescriptive right in favour of the owners of the Day Property (as the dominant tenement) arises over that part of the Disputed Driveway located on the Muir Property solely for the purposes of travelling to and from the Day Property, and not parking on the Muir Property.

Remedy

[88] For the reasons given above, an Order shall issue declaring an easement in favour of the owners of the Day Property (as dominant tenement) over that part of the 10' Disputed Driveway located on the Muir Property (as servient tenement)

solely for the purposes of travelling to and from the Day Property. An easement in favour of the owners of the Muir Property (as dominant tenement) already exists with respect to that part of the Disputed Driveway located on the Day Property (as servient tenement).

[89] There is no discretion to reconfigure or relocate the Disputed Driveway (*Shea* v *Bowser*, *supra*). As such, on or before May 31, 2022 the Respondents shall take all necessary steps to restore the Disputed Driveway by removing the obstructions constructed on the 10' Disputed Driveway and, in particular, the garage and fence built across the Disputed Driveway. If these obstructions are not removed and free access returned in respect of the Disputed Driveway by May 31, 2022, the Applicants shall be entitled to take such steps as are necessary to complete the work with the reasonable, associated costs being at the Respondents' sole expense.

[90] The Applicants also claim the following damages:

1. $350.18 of a $1,437.50 invoice in respect of "work done in 2018 to upgrade the entire access road, including the portion on the Muir [P]roperty". (Affidavit of John Day sworn February 12, 2021, paragraph 17); and
2. $14,380.75 for an "alternate access road" to their cottage after the Disputed Driveway was blocked.

[91] The Applicants did not submit written argument (with legal authorities) regarding their claim for damages. Rather, they provided legal submissions regarding the existence of (and obstruction to) the easement in question and then simply concluded with a summary of the relief sought which ended: "payment of costs and damages". No detail or analysis of the alleged damages was provided.

[92] In any event, I am not prepared to award $350.18 for alleged upgrades to the Disputed Driveway in 2018. The 1979 Deed from Cecil Miller to Carol Muir does state that "the Grantee [i.e., Carol Muir] shall contribute equally to the upkeep and maintenance of that portion of the said right of way used by the Grantee with the Grantor and others." The language requiring a contribution from Carol Muir is clearly mandatory. However, it is for "upkeep and maintenance". In this case, the work completed in 2018 included:

1. Improving and attempting to more formally establish a parking pad on the Muir Property which extended beyond the 10' wide driveway;
2. Improperly presumed the right to park on the Muir Property.

[93] Moreover, even though paragraph 13 of the Notice of Application says that the Applicants "spent approximately $1,500 in 2018 alone on maintaining and upkeeping the [Disputed Driveway]", Mr. Day's own affidavit sworn February 12, 2021 does not describe the 2018 work as "upkeep and maintenance". Rather, he characterizes it as "a *fairly major upgrade* to the [Disputed Driveway] and parking area". (paragraph 16, emphasis added)

[94] The Applicants are not required to pay for the Days' upgrades. Moreover, to the extent the work involved improved parking for the Days, it was only an "upgrade" as far as the Days were concerned. From the Muirs' perspective, it was presumptuous at best and trespass at worst.

[95] On this issue, I accept the Muirs' evidence that they were not prepared to pay for the alleged upgrades. I do not accept the suggestion at paragraph 18 of John Day's reply affidavit sworn June 13, 2021 that Carol Muir "not only agreed to the work but also agreed that the Muirs would pay half of the costs". (at paragraph 18) On the contrary, and after having carefully read the affidavits and listened to cross-examination, I find that the Muirs never agreed (and consistently opposed) the right to park on their property. To the extent the Days sought Carol Muir's consent in advance of completing work on the Disputed Driveway in 2018, I accept the Muirs' evidence on this point. I find that Mr. Day did not request, and Carol Muir did not agree, to "upgrading" the Disputed Driveway so that the Muirs could enjoy expanded parking on the Muir Property. I repeat the concerns described at paragraphs 84 - 86 above regarding the costs associated with these alleged "upgrades".

[96] In the end, no agreement was reached with respect to the actual scope of work or responsibility for the associated costs.

[97] Finally, while Mr. Day's affidavit does indicate that this work extended to the "entire" Disputed Driveway, he neither mentions nor specifies how he determined which specific parts of the Disputed Driveway required upkeep and maintenance.

[98] The Days seek pecuniary damages and, as such, they bear the corresponding responsibility to prove that financial loss on a balance of probabilities. The evidence on this issue was insufficient to satisfy their evidentiary burden.

[99] I am also not prepared to award the Days damages in the amount of $14,380.75 for an "alternate access road" to their cottage after the Disputed Driveway was blocked. Again, respectfully, the Days failed to meet the evidentiary burden to prove this loss.

[100] Neither of the Respondents provided any evidence that the $14,380.75 (or any other amount) was actually paid. Rather, John Day's affidavit sworn February 12, 2021 attaches a "copy of the invoice for the cost of over $14,000 to build this [alternate] road." He neither provides proof of payment nor even states that this amount (or any other amount) was paid. Contrast this to the costs of the alleged "upgrades" described above, where Mr. Day at least attests that "I paid the balance in full myself." No similar statement or evidence of payment is offered with respect to the alternate road.

[101] Provisionally, I would have discounted the $14,380.75 claimed for building "alternate access" by 60% and reduced the amount payable by the Muirs to $5,752.30.

[102] The Days would be entitled to the reasonable cost of developing an alternate access route to their cottage following the Muirs' precipitous decision to block the Disputed Driveway. However, what the Days actually constructed was an expanded and improved version of the Disputed Driveway. Their alternate access:

1. Widened the Disputed Driveway;
2. Allowed for significant additional parking that goes well beyond a driveway which entitled them to access only;
3. Allowed for new and improved access to Sandy Bottom Lake for the purposes of creating a boat launch.

Summary

[103] Based on the foregoing and to repeat the relief summarized at paragraphs 15 – 16 above, the following relief is granted:

1. A declaration of an easement in favour of the Applicants (including their successors in title) as owners of the Day Property (PID5057120

representing the dominant tenement) over such portion of the 10' Disputed Driveway depicted in yellow highlight on the 1996 Survey reproduced at paragraph 5 above as is located on the PID5057138 (the servient tenement) for the purposes of travelling to and from PID5057120. For clarity, the easement does not include the right to park on the Disputed Driveway or otherwise on the Muir Property;

2. An Order that the Respondents are enjoined from directly or indirectly interfering with or obstructing the Applicant's easement to use the Disputed Driveway to access the Day property; and

3. An Order that the Respondents, at their expense, shall take all necessary steps to remove obstructions constructed on the Disputed Driveway and, in particular, the garage and that part of the fence built across the Disputed Driveway. If these obstructions are not removed and free access returned in respect of the Disputed Driveway by May 31, 2022, the Applicants shall be entitled to take such steps as are necessary to complete the work with the reasonable, associated costs being at the Respondents' sole expense;

[104] The balance of the Applicants' claims including a claim for punitive damages and monetary damages in the form of costs allegedly incurred to maintain the Disputed Driveway and develop an alternate route after the Respondents blocked the Disputed Driveway are dismissed.

[105] Should any party seek costs, I will accept written submissions within 30 days from the release of this decision.

Keith, J.