SUPREME COURT OF NOVA SCOTIA
Citation: Boudreau v. Boudreau, 2013 NSSC 403

Date: 20130906
Docket: SN No. 109818
Registry: Sydney, NS

Between:

Ronald Joseph Wayne Boudreau and Mary C. Boudreau

Plaintiffs

v.

Brian Boudreau, Robin Boudreau, Kevin Boudreau and Ronald Boudreau

Defendants

Judge:	The Honourable Justice Patrick J. Murray
Heard:	March 18, 2013 in Sydney, Nova Scotia
Final Written Submissions:	May 10, 2013
Counsel:	Michael Tobin, Counsel for the Plaintiffs Darlene MacRury, Counsel for the Defendants

By the Court:

INTRODUCTION

[1] This case before me involves a dispute between two brothers over a right-of-way to land. The right-of-way travels over land containing the business of one brother, to the residence of the other brother.

[2] The Plaintiff, Wayne Boudreau (also referred to as W.B.), seeks to widen the right-of-way from twelve (12) to twenty-eight (28) feet, to allow him sufficient width to use the right-of-way for its intended purpose, access to and from his home. He states at present he cannot safely negotiate the right-of-way due to its slope, condition, and its proximity to the vehicles of the Defendant, Kevin Boudreau (also referred to as K.B.) parked nearby and adjacent to the right-of-way.

[3] At issue is whether the Court has jurisdiction to grant the Order requested by the Plaintiff and, if so, whether the right-of-way should be widened, as requested by the Plaintiff.

[4] On January 15, 2013, the Plaintiffs, Ronald Joseph Wayne Boudreau and Mary Boudreau filed a motion seeking:

> **"An Order of this Honourable Court extending the width to twenty-eight (28) feet of that portion of the existing right-of-way located on the lands of the Defendant, Kevin Boudreau."**

[5] The Defendant, K.B., maintains there is no difficulty with the right-of-way as it presently exists. He says it is of sufficient width (twelve (12) feet) and is maintained and used by the Plaintiffs without difficulty. He states further it has never been blocked, and there have been no accidents. It is used by other families and has always been adequate "to allow for passage for any and all vehicle travel". He says further the Plaintiff, W.B., has two (2) alternate routes he can use for access, if this right-of-way is unsatisfactory.

[6] The Plaintiff, W.B. maintains and plows the right-of-way. He says he has used the right-of-way in the past, but "with great difficulty". It is particularly difficult he states, in the winter when ice forms on it. It is steep, and the curved

slope makes it treacherous. As stated, the Defendant's parked vehicles and trucks present a hazard and make use of the right-of-way, difficult and dangerous.

BACKGROUND ANALYSIS

[7] The Plaintiffs, own Lot 85-1, upon which their residence is located. Their civic address is 242 Hillside Road. It is further identified as PID 15216286, on the property online mapping system.

[8] The Defendant operates a business on the land subject to the right-of-way. It is located off of the Groves Point Road, Bras d'Or. His garage and related vehicles are located to the left (on the eastern side) as one enters the driveway. His residence is located to the right (on the western side). The Defendant operates a trucking/towing and plowing business. He stores salt in a barn on his property, adjacent to the right-of-way. K.B. contracts with the Municipality to plow, salt and sand roads.

[9] Kevin Boudreau maintains in his Affidavit (Paragraph 14) that widening the right-of-way would bring it within the area of his garage on one side and his residence on the other. No survey was provided to verify this statement with any accuracy.

[10] The lands were owned by the parties' father, Amedee Boudreau. Mr. Boudreau died in 1988. It was following his death that difficulties began to arise related to the driveway. The Plaintiff's residence property is located "up the hill" and "in back" of the Defendant's property. The Plaintiff alleges the large and heavy vehicles of the Defendant have damaged the condition of the right-of-way. He (W.B.) states the right-of-way was ultimately blocked in 1998.

[11] Over the years the police have been called to the property, by one or the other of the parties. There are numerous Incident Reports completed by the CBRM Police, which have been placed in evidence. The incidents would often involve shouting matches, accusations of interference, threats of harm, and would often escalate to the point of "near blows". No charges were laid, but the parties did end up in Provincial Court, on matters relating to the property.

[12] I observe that one (1) officer noted, in a police report, as recent as 2012: "there is not much discretion being exercised or much common sense being

applied, in the circumstances". The same officer noted: "Both sides appear to be provoking one another". At times, one (1) or more nephews have been involved. The CBRM Police are familiar with the situation and the parties.

[13] The Defendant, K.B., received the residue of his father's estate. He also received the property of his late brother, Brian Boudreau, who died in recent years. The police reports indicate an escalation in activity during 2011 and 2012. K.B.'s counsel submits the Plaintiff is unhappy because Brian Boudreau's property was left to her client, Kevin Boudreau. This is denied by the Plaintiff, W.B.

PREVIOUS ORDERS

[14] Turning to the issues, the previous Orders granted in this matter, provide not only a history, but also the factual context for the issues before me. A summary of those Orders is as follows:

> **Orders previously granted**
>
> **[1] The Plaintiffs, Ronald Joseph Wayne Boudreau and Mary C. Boudreau, commenced an action against the Defendant, Kevin Boudreau, as one of four named Defendants. An Order was issued by the then Associate Chief Justice Michael MacDonald of the Supreme Court of Nova Scotia on July 5, 2000, which ordered as follows:**
>
> > **[1] THAT title to the existing right-of-way extending easterly from the northwestern corner of the Plaintiffs' land to the Groves Point Highway was conveyed to the Plaintiffs by their deed dated May 7, 1986 and is vested in the Plaintiffs.**
>
> **[2] Associate Chief Justice Michael MacDonald's decision was appealed by the Nova Scotia Court of Appeal. An Order was issued by the Court of Appeal on January 25, 2011, which ordered as follows:**
>
> > **[1] THAT the Plaintiffs have a right-of-way over the existing, and travelled, roadway, which roadway runs in a northeasterly direction from the northeast sideline of the property of the plaintiff, Mary Boudreau (Lot 85-1) across the lands of the defendants to the Groves Point Highway.**
>
> **[3] On July 27, 2001, Justice Walter R.E. Goodfellow issued a further Order which provided as follows:**

> **[1] THAT based on the finding of Associate Chief Justice Michael MacDonald and confirmed upon appeal, the Plaintiffs are entitled to a right-of-way over the existing, and travelled, roadway, which roadway runs in a northeasterly direction from the northeast sideline of the property of the Plaintiff, Mary Boudreau (Lot 85-1) across the lands of the Defendants to the Groves Point Highway.**
>
> **[2] THAT the Defendants are to provide, on an interim basis, an unobstructed right-of-way of a minimum width of 12 feet across the lands of the Defendants to the Groves Point Highway.**
>
> **[3] THAT the width of the right-of-way so established on an interim basis shall remain until it be determined by further application to this Honourable Court.**

[4] It appears that all Orders are "Final Orders" and issued under the same original action, Sn. No. 109818.

ISSUES

(1) Did this Court have jurisdiction to issue the Order (of the learned Justice Walter R.E. Goodfellow) dated July 27, 2001?

(2) Does this Court have authority to vary or make a final determination of the July 27, 2001 Order, as to the width of the right-a-way?

(3) Should the motion to extend the width of the right of way to twenty-eight (28) feet be granted?

ANALYSIS

Issue # 1 - Jurisdiction

The Defendant, K.B., submits that Justice Walter R.E. Goodfellow did not have jurisdiction to issue the Order of July 27, 2001, as the Order of the Court of Appeal was a final and binding Order.

[15] K.B. states that as a Final Order, the Order of the Nova Scotia Court of Appeal issued six (6) months earlier, on January 25, 2001, is the pre-dominant Order. As the Court of Appeal made a final determination of the case, only the Court of Appeal had jurisdiction to vary its own Order. Further, only the Court of

Appeal had the authority to correct any error or clarify any aspect of their own Order, if they determined the same was required, pursuant to the former *Rule 62.26(2);* said *Rule* being the *Rule* which the Defendant submits applied as of the date the Orders were issued.

[16] In effect, K.B. argues that Justice Goodfellow's Order, amended the Court of Appeal's Order. It is submitted, therefore, by K.B., that Justice Goodfellow had no jurisdiction to "change" the Appeal Court Order, by issuing the Order of July 27, 2001.

[17] K.B., in support of his argument, cited the case of **Murphy** v. **Wynne**, 2011 BCCA where Nelson, J.A. stated, affirming Madame Justice Ryan;

> "**Once an appeal has been heard on the merits and judgment has been given, the court has no power to reopen the appeal and only limited power to vary an Order under *Rule 50*...".**

[18] The B.C. Court of Appeal noted (again affirming Justice Ryan),

> **"That if a litigant is unhappy with the disposition of appeal in the court, any further complaints must be taken to the Supreme Court of Canada".**

[19] From this, one can see that the *Rules* of a particular province's Court may dictate what can be done in terms of varying Orders. I will return to this, as it pertains to the Nova Scotia *Civil Procedure Rules,* in the case before me.

[20] The Defendant further cited the case of **Oley** v. **Fredericton (City)**, 1983 131 APR 157 NBA. In **Oley**, the Court noted there were exceptions to the general rule that (except by way of appeal) no Court or Judge has the power to alter or vary any Order after it has been entered or drawn up. One such exception was the inherent jurisdiction of the Court to vary or clarify an Order so as to carry out the Court's meaning or make the language plain. Citing Lord Penzance in **Lawrie** v. **Lees** (1881), it was said that such "power is inherent in every Court".

[21] Finally, the Defendant cited the Nova Scotia case of **Golden Forest Holdings Ltd.** v. **Bank of Nova Scotia** (1990) 98 NSR (2d) 429 (NSCA). In that case, Hallett, J.A. made the following comments at paragraph 9:

> "**9 Apart from those matters covered by rr. 15.07 and 15.08, the inherent jurisdiction of judges of the Supreme Court of Nova Scotia does not extend to varying "final" orders of the Court disposing of a proceeding unless the order does not express the true intent of the Court's decision. If it were otherwise, there would not be the certainty or finality to Court orders that the judicial process requires..."**

[22] Justice Hallett in the above quote, affirmed in Nova Scotia, that "Final Orders" are just that, unless the Order does not express the true intent of the Court's decision. It bears repeating that the judicial process requires certainty and finality to Court Orders. It should be noted however, that such Orders must be those that "dispose of a proceeding".

[23] It is my respectful view that the January 25, 2001 Order did not dispose of the proceeding. It was clearly a Final Order which disposed of the appeal. It decreed that the Plaintiff had "a right-of-way over the existing travel roadway" and provided the location of the roadway, namely:

> **"...which roadway runs in a northeasterly direction...across the lands of the Defendants to the Grove's Point Highway".**

[24] It was noted by Justice Goodfellow (in file correspondence) that the width was not defined. It may be argued that the width was defined indirectly in the Appeal Court Order, as by default, the width would be the width of the "existing and travelled roadway" - whatever that may be.

[25] In his Brief, the Plaintiffs' counsel, Mr. Tobin states:

> **"The issue before the Court and the issue before Justice Goodfellow did not involve any change in the Appeal Court's decision to award the Plaintiff the right-of-way they sought or to change the location of the right-of-way. Both applications were to simply clarify the width of the existing and travelled right-of-way."**

[26] I accept this as making good sense.

[27] Clearly, the Order of Justice Goodfellow, while a Final Order, was not a final determination of the width. Paragraphs (2) and (3) of the Order read as follows:

> **2. THAT the Defendants are to provide, on an interim basis, an unobstructed right-of-way of a minimum width of 12 feet across the lands of the Defendants to the Groves Point Highway.**
>
> **3. THAT the width of the right-of-way so established on an interim basis shall remain until it be determined by further application to this Honourable Court.**

[28] By the words, "on an interim basis" and "until it be determined by further Application to this Court", the Order suggests the learned justice was satisfied of not only his own jurisdiction but of this Court's jurisdiction to make a further and final Order, in future. That application for a final determination is now before me.

[29] I am satisfied that this Court has jurisdiction to make an Order that would not be in conflict with the January 25, 2001 Order issued by the Nova Scotia Court of Appeal.

[30] The Defendant, K.B., through his counsel, has cited *Rule 62.26(2),* which states*:*

> **Formal Order**
> **62.26.(1) Upon judgment having been delivered or deemed delivered under rule 62.25, the Registrar shall forthwith, with the approval of the Judge presiding on the appeal, settle, sign and enter a formal order of judgment bearing the date on which judgment was delivered and providing for the disposition of the appeal as directed by the Court and shall send a copy of the order to each party and the court appealed from.**
>
> **(2) The Judge who approved the order under subrule 62.26(1), or any other Judge on application of a party, may amend the formal order of judgment to correct any errors or omissions or otherwise to better express its intent, or may refer the order to the Court for such amendment as it deems fit. An amended order shall show the date of amendment but shall be effective from its original date unless otherwise ordered. The Registrar**

> **shall sign and enter the amended order and send a copy to each party and to the court appealed from.**

[31] With respect, I do not accept that as the applicable *Rule*. This Application is not, in my view, made to correct or change the Order of the Court of Appeal.

[32] In my respectful view, *Rule 62.29(1)* is applicable to this Application. *Rule 62.29(1)* (now *Rule 90.53(1)*) reads as follows:

> **Entry by prothonotary of certified order**
> **90.53 (1) When an order of the Court of Appeal has been certified by the registrar to the prothonotary or clerk with whom the order appealed from was entered, the prothonotary or clerk must cause it to be filed, and all subsequent proceedings may be taken as if the certified order had been granted by the court appealed from.**

[33] This *Rule* was referred to by Justice Cromwell in **The Haynes Group of Lawyers** v. **Regan**, 2001 NSCA 34. In that case, the Court of Appeal held that once the appeal (to the Appeal Court from the Supreme Court) has concluded, *Rule 62.29* provides that all subsequent proceedings may be taken "as if" the Order had been granted by the Court appealed from.

[34] It is important to note that as a condition, the order referred to in *Rule 90-53(1)* must be certified by the Registrar (of the Appeal Court) to the Prothonotary or clerk with whom the order appealed from was entered. In the present case, the Order dated January 25, 2001 was certified by the Deputy Registrar, as evidenced by the her signature.

[35] In the result, I am satisfied the Application before me, being a "subsequent proceeding" may be dealt with as if the Certified Order of January 25, 2001, had been granted by this Court, being the Court appealed from. As the Appeal Court ruled on the existence of the right-of-way and its location, I am satisfied that I have jurisdiction to proceed further and determine on a final basis, its width, should I deem it appropriate to do so.

Issue #2- Variation of Right of Way

[36] Does this Court have the authority in law to vary the July 27, 2001 Order and/or make a final determination as to the width of the right-of-way?

[37] This issue (unlike Issue # 1) does not deal with the Court's jurisdiction per se. I have already ruled that this Court may proceed to consider whether a variance and/or final determination can be made. This issue pertains to whether the law of easements permit the Court to vary the easement in these circumstances.

[38] Thus, the issue may be stated, does the law permit an extension of the easement, as sought by the Plaintiff, from a minimum of twelve (12) feet to a width of twenty-eight (28) feet. The Plaintiff seeks this extension "where feasible and where no permanent structures currently exist".

[39] It must be considered whether it is even necessary to establish the actual width of the existing and travelled portion, in order to give effect to the terms of the easement. If the wording is clear, the case law states that the easement may be varied only with the consent of the owner of the fee (the servient tenement). In this case, that would be the Defendant, K.B. *(**Rafuse v. Swinimer** (2009), 279 N.S.R. (2d) 256 (SC).*

[40] Had the Court of Appeal had decided the width was twelve (12) feet or that the travelled portion was in fact twelve (12) feet, on a final basis, it is unlikely the present application could succeed, baring the need to resolve an ambiguity. Only if the language is unclear and not in need of clarification could this Court extend the width of the easement. In such case, the need to resolve an ambiguity the Court could draw assistance from surrounding circumstances. *(**Knock** v. **Fouillard** 2007 252, NSR (2d) 298).*

[41] The Plaintiff relies on the interpretation of the law relating to rights-of-way as set out in *Anger and Honsberger, Law of Real Property, (2nd Ed. 1985), vol. 2.* Relying on paragraphs 1804.3 and 1804.7, the Plaintiff states as follows:

> **"1804.3 Right of Way Created by Express Grant**
> **The nature and extent of a right of way created by an express grant depends upon the proper construction of the language of the instrument creating it. The court primarily will look at the words of the grant. However, parol evidence is admissible to show the situation at the time of the grant and of the parties and the surrounding circumstances in order to show the nature and extent of the intended user. Surrounding circumstances that are particularly material are the description and nature of**

> **the land or buildings of the dominant tenement and the nature of the locus in quo of the servient tenement over which the right of way is granted as it existed at the date of the grant."**

[42] If the extent of the right-of-way is not in question, there is no ambiguity and presumably no need to give a proper construction. Based on the evidence before, however, what constitutes the existing and travelled roadway is a matter of dispute between these parties.

[43] In Paragraph 12 of his Affidavit, the Plaintiff states as follows:

> "**12. THAT the right-of-way was at one time maintained by the County of Cape Breton and during this time I have personal knowledge of the type of snowplow used to plow this right-of-way which consisted of a 14 foot one-way blade and a wing. The right-of-way was plowed by travelling in one direction with the 14 foot wide blade and then returning in the opposite direction containing an additional 14 feet resulting in a right-of-way over which two vehicles could pass."**

[44] This suggests that the travelled roadway (in both directions) was twice the width of a fourteen (14) foot plow blade, "resulting in a right-of-way over which two (2) vehicles" could pass. This is the right-of-way the Plaintiff is seeking; that with a width of twenty-eight (28) feet).

[45] The Defendant, K.B., submits that the right-of-way, which is defined as twelve (12) feet (from 2001 to the present day) "appears to be the original right-of-way". K.B. states further there has been no interference with the right-of-way in any manner. At Paragraph 7 and 8 of his Affidavit, K.B. states as follows:

> **7. THAT I acknowledge and agree that there is by virtue of a court order, a twelve foot right-of-way that is presently utilized by the Plaintiffs herein and three other families, including myself. Attached hereto are a series of photos showing this 12 foot lane as it extends from the Groves Point Road through to the premises of the Plaintiff.**
>
> **8. THAT this twelve foot right-of-way has always been adequate for usage by the parties and it is more than adequate**

> **to allow for any and all vehicle travel that is necessary to access lands and premises of the Plaintiff's herein.**

[46] There is clearly a dispute over whether the Plaintiff and the Defendant are both interfering with the right-of-way. More to the point, there is a dispute over what constitutes the "existing and travelled portion". This goes to the extent of the right-of-away "on the ground", as compared to whether the right-of-way, the substantive right, "in rem" existed. The latter has already been decided. The former has been determined on an interim basis only.

[47] As a result of this dispute, I find there is a need to apply the rules of construction in interpreting what constitutes the existing and travelled portion. Those rules were summarized by Fichaud, J.A. in **Knock** at Paragraph 60 (referring to *Anger and Honsberger* at 17; 20:30(a), as follows:

> **"...The following rules apply in interpreting the instrument: (1) The grant must be construed in the light of the situation of the property and the surrounding circumstances, in order to ascertain and give effect to the intention of the parties. (2) If the language of a grant is clear and free from doubt, such language is not the subject of interpretation, and no resort to extrinsic facts and circumstances may be made to modify the clear terms of the grant. (3) The past behaviour of the parties in connection with the use of the right of way may be regarded as a practical construction of the use of the way. (4) In case of doubt, construction should be in favour of the grantee."**

[48] I turn now to discuss the third and final issue, in the case before me.

Issue # 3 - The Motion Itself

[49] Should the Plaintiff's motion to extend the right-of-way to twenty-eight (28) feet be granted?

[50] I have considered the evidence put forward by both parties.

[51] Based on this evidence, it is in my view, open for the Court to make a final determination, either (1) because a final determination of the width has never been made, or (2) to resolve any ambiguity with respect to the wording of the right-of-way.

[52] Turning then to the nature and intent of the original easement, its intended purpose was for the Plaintiff to have access from his property over the existing travelled roadway, to and from the Groves Point Highway. As it is worded generally, the use which may be made of the existing travelled roadway is “reasonable use”.

[53] I have been provided with little evidence as to the actual width of the existing and travelled portion. The Defendant says, the “hash marks" are there to evidence the actual travelled portion .

[54] Applying the four (4) criteria in **Knock**, in terms of surrounding circumstances, I have been given no survey evidence delineating the actual dimensions of the travelled portion. The entrance is used in common for both residential and commercial uses. The survey in the file, being M-344, dated October 17, 1985, I find to relevant, as it would have been prepared at or near the time the right-of-way was granted by Amedee R. Boudreau. Without giving dimensions, it shows a "broken line" delineating the right-of-way. These lines suggest the right-of-way is wider at the entrance to the property off of the Groves Point Highway.

[55] The plan shows also that it breaks or "veers off" to the left (when entering the Defendant's property) towards the garage of the Defendant for his use, the parking of trucks and towing vehicles of the Defendant. It continues straight (to the right, past the garage) and "up the hill" towards the dwelling (also shown on the plan to the left of the driveway, when entering) and then proceeds straight in and then "down" slightly, into Lot 85-1; being the residential property of the Plaintiffs. I take these directions not only from the plan but from a compilation of the photographs provided, as well as the video submitted by the Defendant.

[56] The right-of-way appears to "narrow" at a point where it forms a "fork" at or near the point where the Defendant travels towards his garage and the point where the Plaintiff would proceed past the garage and up the hill towards Lots 85-2 and eventually to Lot 85-1, as shown on the plan.

[57] I have reviewed the two (2) surveys attached to the Affidavit of Kevin Boudreau. Neither of those surveys, M-2052 or M-3695, are of assistance in determining a proper width, for the right-of-way.

[58] I have reviewed the one (1) survey attached to the Affidavit of Wayne Boudreau, that survey being M-166. It does not show the right-of-way in question.

[59] Mr. Tobin, for the Plaintiff, summarized the crux of the problem, as being:

> **"...with the proximity of the vehicles that are parked there. So basically...if those vehicles weren't there, even on one side, we wouldn't be here."**

[60] The Defendant, K.B., provided photos, attached to his Affidavit (Exhibit D1), to illustrate that the right-of-way is totally unobstructed with no evidence of a hazard. There is lots of room, he states. The overwhelming evidence, he states, is that it works. This is about control, he further states, not the width of the right-of-way. His brother, the Plaintiff, W.B., wants control over the right-of-way.

[61] The Defendant provided a video (Exhibit D2), showing activities over the right-of-way in February of 2013. One portion shows W.B. plowing snow and clearing the driveway in winter in his truck with a plow blade. It shows also vehicles entering and exiting the roadway off of the Groves Point Highway, to and from the Plaintiffs' property, without apparent difficulty. Another feature of the video showed one of the Defendant's trucks getting "stuck", with the driver attempting to shovel out by adding sand and then resorting to a backhoe to clear snow.

[62] The slope or incline upon which the "stuck vehicle" was parked, made it difficult for the truck to gather traction, and it kept sliding somewhat in the direction opposite to the driveway. This was in the vicinity of the salt barn.

[63] What the video did not show was the condition of the driveway, with its steep slope, when covered with ice. While the pictures do not assist in determining the exact dimension, they do provide some assistance, in assessing whether use of the right-of-way is practical, under certain conditions. According

to the rules of construction, in case of doubt, construction should favour the grantee.

DECISION

[64] The main issue appears to be whether the Plaintiffs' entitlement to reasonable use is being interfered with by the use the Defendant, K.B., is making of the servient lands and whether that use is interfering with the reasonable use of the right-of-way by the Plaintiff, W.B.

[65] I am satisfied in viewing the photos and pictures contained in Exhibit #P3, in particular those at 02-15-2013, with a time of 11:07 and the photo at Pg. 33-2, that a hazardous situation exists during these types of road conditions. This is due to weather conditions, but also due to the presence of the Defendant's vehicles, which are parked in close proximity, if not adjacent to, the right-of-way.

[66] The Defendant maintains there is a clearance of three (3) to ten (10) feet from his vehicles to the boundaries of the right-of-way on each side. Based on the evidence, I have in doubt as to whether that is accurate. I am cognizant, however, the burden is not his to establish.

[67] Moreover, I am satisfied on the balance of probabilities, and so find, that the steepness of the right-of-way, combined with the curved shape of the travelled portion, makes it somewhat treacherous to negotiate the right-of-way, in icy and wintery conditions. The fact that large vehicles are parked close at hand only adds to the potentially hazardous situation, whether those vehicles are "descending" the right-of-way to exit on Groves Point Road, or entering from the Groves Point Highway to "climb" the right-of-way.

[68] It is, therefore, in my view, unreasonable for the Defendant, K.B., to interfere with the use of the right-of-way in this manner. It is on the contrary, a reasonable request of the Plaintiff, W.B.,that the Defendant not use his land, adjacent to or in close proximity to the right-of-way, so as to create a dangerous situation. That is not in keeping with the original intent of the grantor in retaining use of a right-a-way for reasonable access.

[69] In as much as a dominant user, W.B. cannot perform activities which would "add to the burden" of the servient tenement; neither can the servient owner, K.B.

perform activities to detract from, or make it difficult for W.B. to benefit from the right-of-way.

[70] In the result, I am satisfied the right-of-way should be extended, but not to the width requested by the Plaintiff. The Plaintiff stated that if there were no vehicles, even on one (1) side, that would alleviate the problem.

[71] There is also the point made by K.B., that widening the right-of-way will not prevent "sliding" and may only increase it, by providing, "more room to slide", thereby alleviating nothing.

[72] The sheer width of the large vehicles shown in the pictures suggest that the minimum width of twelve (12) feet, if side-by-side with another vehicle, is insufficient.

[73] Whether a widening of the right-of-way will result in there being more clearance between the parked vehicles and the travelled portion is uncertain, given the lack of exact survey evidence. There is also the existence of certain structures, such as buildings and telephone poles.

[74] In my view, the existence of these are reasons not to extend the right-of-way from twelve (12) to the full width requested of twenty-eight (28) feet. They are not, however, in my view, sufficient to warrant no extension or widening of the right-of-way, at all.

[75] I am satisfied, in the circumstances, the right-of-way should be extended by six (6) feet, from twelve (12) to eighteen (18) feet in width. In doing so, I'm relying on the evidence provided in the photos, those given by the parties, as well as the survey evidence which I have referred to. My decision is an attempt overall to give effect to the intention that the existing and travelled roadway may be used reasonably and not be controlled directly or indirectly by any one (1) party.

[76] It is my view the alternative rights-of-way available to the Plaintiff are irrelevant in the case before me, which has, as the issue, solely the right-of-way in question.

[77] It is my further view, and I so find, that eighteen (18) feet for a permanent roadway, is not unreasonable so as to ensure access to the lands in question.

[78] In arriving at the width of eighteen (18) feet, increase in width, my view is that a 50% increase in width, will reduce or limit the hazard caused by the vehicles being parked nearby. It may be that the travelled portion may not be required to be physically extended, so long as the parties respect the eighteen (18) foot width.

[79] I have heard evidence that while the Defendant has additional land upon which to park his vehicles, because the land is remote, it would result in his vehicles being damaged. Without in any way attempting to minimize the risk of vandalism, I find the priority here, as between the Defendant parking his vehicles and the Plaintiff's use of the right-of-way, to be the use of the right-of-way.

[80] The Defendant will need to act accordingly in order to respect the right-of-way. The extension or widening, as stated by the Plaintiff's counsel, is subject to any structures (not vehicles or other machinery) located thereon. Indeed, a survey may be required to deliniate the exact boundaries. It is, however, hoped and expected, that an additional six (6) feet will alleviate the problem, without placing an unreasonable burden on the Defendant. As to whether this solution proves to be workable between the parties, much will depend on their efforts.

[81] As requested in the Motion, the right-of-way will be extended from twelve (12) to eighteen (18) feet on that portion of the right-of-way, located on the lands of the Defendant, Kevin Boudreau.

[82] Order accordingly.

J.