SUPREME COURT OF NOVA SCOTIA
Citation: Landry v. Kidlark, 2014 NSSC 154

Date: 20140430
Docket: PIC 287773
Registry: Pictou

Between:

Joseph Philip Bernard Landry and E. Anne MacDonald Landry

Plaintiffs

v.

Jeffrey G. Kidlark, Joan C. McKale, John Peter MacKay, Vivian Carol MacKay

Defendants

Judge:	The Honourable Justice Suzanne M. Hood
Heard:	January 29, 30, 31, February 1, April 16, 17, October 8, 9, November 22, 2013, in Pictou, Nova Scotia
Counsel:	Roseanne M. Skoke, for the plaintiffs
	Alain Begin, for the defendants Jeffrey Kidlark and Joan McKale
	Brian Hebert, for the defendants J. Peter MacKay and Carol MacKay

By the Court:

Introduction

[1] This dispute revolves around a view of the Northumberland Strait.

Issues

1. interference with, enforcement of and validity of view plane to the Northumberland Strait;
2. interference with, enforcement of and validity of pedestrian right-of-way to the shores of the Northumberland Strait;
3. negligent misrepresentation;
4. trespass; and,
5. legality of underground power lines.

Facts

[2] This matter involves an unfortunate dispute among neighbours in the Braeshore area of Pictou County, land near the shores of the Northumberland

Strait. It has been ongoing since approximately 2007 and, in essence, involves the concern by one set of landowners that their view of the waters of the Northumberland Strait is not protected.

[3] The plaintiffs are husband and wife, having married in November 2004. They knew each other at the time Philip Landry began negotiations to buy the lot on which their home now sits. E. Anne MacDonald has been a lawyer in Pictou for over 30 years with a general practice including real estate matters. She acted for Philip Landry when his company bought the lot in question and continued to act for him in this matter while they were dating, prior to their marriage, until 2003. He later retained Halifax counsel with respect to the lands. Philip Landry began to build his house on Lot 5 in the fall of 2003.

[4] J. Peter MacKay and V. Carol MacKay are husband and wife. Prior to 2000, they owned a large acreage running to the shores of the Northumberland Strait. It had been farmland, as is shown on the aerial photograph from 1997 (Tab AP 1997 in Exhibit 12 which is the appendix to the expert report of George R. Sellers, N.S.L.S.). A small cottage property existed adjacent to the farmland at that time, which had been sold by the MacKay family to the Sullivan family.

[5] Jeffrey Kidlark and Joan McKale are husband and wife, and moved to Nova Scotia in the 2004-2005 period. They own lands in the Braeshore area, but have not built a home on the lands. They reside in Truro.

[6] In 2000, Philip Landry approached Peter MacKay about buying a lot out of the larger parcel. It was not a waterfront lot. Although at that time no waterfront lots had been created and no homes built, Philip Landry wanted assurance of a view of the Northumberland Strait.

[7] As a result of their negotiations, Lot 5 was created and conveyed by deed of June 9, 2000 (Tab D1 to Exhibit 12). E. Anne MacDonald acted for Philip Landry in the transaction. Title was taken in the name of Philip Landry's company, Cottage Mechanical Services Ltd. ("Cottage"). The lot so created had a right of way over Parcel A, Salty Reef Road, for access.

[8] At the same time, the parties executed an agreement (Tab D2 to Exhibit 12) which gave Cottage a pedestrian right-of-way from the lands to "the shores of the

Northumberland Strait". That same agreement provided for an easement to Cottage in the following words:

> 2. For the purpose of preserving and protecting the use and enjoyment by Cottage of the lands more particularly described in Schedule "A" hereto annexed, MacKay hereby grants to Cottage an easement over the lands described in paragraph 1 above, lying to the east of the lands described in Schedule "A" hereto annexed; said easement being in the form of a prohibition against construction or erection by MacKay, or those acting on behalf of MacKay, of any structure or object which would interfere with the view from the dwelling to be erected on the lands described in Schedule "A", of the waters of the Northumberland Strait. Nothing herein contained shall obligate MacKay to maintain said lands free and clear of vegetation or other naturally occurring things.

The lands subject to the restriction were not otherwise described.

[9] In 2001, the MacKays further subdivided their lands creating three waterfront lots, Lots 4, 6 and 7. They had originally intended to create four waterfront lots but out of consideration for Philip Landry's view plane, they reconsidered and created only three, with a resultant loss of revenue. The subdivision plan dated August 22, 2001, was approved and then recorded on October 11th, 2001. It also added Parcel B to Salty Reef Road to provide road access to Lots 4, 6 and 7. When these lots were created, an area of land remained between the new lots and Lot 5 and to the north of Lot 4. These lands have

throughout this proceeding been referred to as “the remainder lands.” Although not legally the correct term, it was used to describe a parcel of land which had no other designation until it was called Parcel A, when added to Lot 4 in 2006.

[10] To sell Lot 6, the MacKays concluded that they needed to relocate the pedestrian right-of-way used by Cottage and the Sullivans which ran through the newly created Lot 6. After negotiations, a new agreement was entered into by Cottage and the MacKays dated May 30, 2002 (Tab D3 to Exhibit 12). It extinguished the previous right-of-way and provided for a right-of-way over Parcel C, a portion of the so-called “remainder lands”. A description was attached as Schedule “A” to that agreement which provided for a pedestrian right-of-way 20 feet in width running along the boundary of Lot 4. Parcel C began at a point at the corner of Lot 5 (the Cottage lot) then to Lot 4 and along the boundary of Lot 4 to “the ordinary high water mark of the Northumberland Strait”. Except at the corner, the right-of-way did not abut Lot 5. No plan of Parcel C was prepared until March 29th, 2010. E. Anne MacDonald represented Cottage with respect to this agreement.

[11] In early 2003, the MacKays had the potential to sell the new Lot 4 to a relative of Carol MacKay who was then living in England. In the meantime, Cottage had conveyed its interest in Lot 5 to Philip Landry personally. The deed was dated May 27th, 2002, but not recorded until April 11th, 2003.

[12] There were emails between the MacKays and the prospective purchasers about the release of the view plane agreement and the negotiations by the MacKays with Philip Landry about its relocation.

[13] Just prior to the closing date for the sale of Lot 4, the purchasers' lawyer wrote to the lawyer for the MacKays (Exhibit 5, Tab 11) asking for a release of the view plane easement.

[14] On April 10, 2003, E. Anne MacDonald, acting for Philip Landry, replied. She set out certain conditions upon which he would sign a partial release of the easement. These included placing stakes on Lot 4 to show where the dwelling would be built and details of the type of dwelling. He wanted those details included in the partial release.

[15] When that sort of detail was unavailable, Philip Landry refused to grant a partial release of easement. The purchasers ultimately concluded they did not want to purchase Lot 4 with the restrictive covenant (view plane easement) in place (email dated April 23, 2003).

[16] After a meeting around this time with the plaintiffs, the MacKays sent them a letter dated April 23, 2003. In it they said they would agree to changes to the existing plans for the supply of power to their lands "contingent upon the removal of the easement to Cottage Mechanical with respect to the 'view of Northumberland Strait' easement" (Exhibit 6, Tab 13). Peter MacKay testified the proposal was for a view plane 100 feet wide running from Lot 5 to the shore. A sketch of the proposed line is attached to Carol MacKay's letter to Anne MacDonald dated April 23, 2003 (Exhibit 6, Tab 13).

[17] Later that month, on April 25, 2003, Carol MacKay wrote a letter (Exhibit 6, Tab 15) to Philip Landry. In it she said they had asked both Philip and Anne "What do you perceive to be your right to the view of the waters of Northumberland Strait?" She said they have received no reply. She went on to say they were shocked to learn the extent of the meaning of the term "easement".

She expressed concern that Philip Landry seemed to be prepared to prevent any house being built on Lot 4.

[18] Negotiations with the plaintiffs continued and a draft agreement was sent to them by the MacKays' lawyer on June 13, 2003. That draft agreement would have given Philip Landry a view plane running from his lands across Lots 4 and 6, according to the testimony of Peter MacKay.

[19] The MacKays' proposal was not accepted by Philip Landry by June 20, 2003 at which time the MacKays' lawyer wrote to E. Anne MacDonald to say his clients had decided not to proceed on the basis of that offer.

[20] Subsequently both parties retained new counsel: the MacKays by June 27, 2003 and Philip Landry by July 3, 2003. Further negotiations with respect to the release or partial release of the easement were conducted by counsel.

[21] Around the same time, there were discussions between Philip Landry and Peter MacKay with respect to power to the lots. Power lines underground could only run 250 feet from a pole. In their email to their lawyer on March 30, 2003,

(Exhibit 5, Tab 15), the MacKays referred to discussing with Philip Landry and Karen Cormier, one of the owners of Lot 6, how power would be provided to their homes. He said they all agreed about pole placements.

[22] There is other correspondence which clearly indicates the involvement of Philip Landry in discussions about power to the subdivision, either directly with him or through E. Anne MacDonald. Examples are Exhibit 6: Tabs 10, 11, 14 and 15. These pre-date the grant of easement to Nova Scotia Power (hereinafter "NSPI") on May 14th, 2003 (Exhibit 12, Tab D6).

[23] That grant of easement provided in part that NSPI had the right to:

> (a) to enter on, over, across, or under that portion of the Lands shown outlined on the sketch attached hereto as Schedule "A" (the "Easement") to lay down, install, construct, operate, maintain, inspect, patrol, alter, remove, replace, repair, reconstruct and safeguard a transmission and/or distribution facility or facilities on the Easement consisting of poles, guys, anchors, underground conduits, wires, cables and/or other structures or equipment for the distribution of electrical power and energy, and the transmission of telecommunications signals, and all other communication signals (the "Equipment") and to clear the Easement of all or any part of any trees, growth, buildings, impediments or obstructions, now or hereafter on the Easement which might, in the opinion of the COMPANY, interfere with the rights or endanger the Equipment.

[24] It also provided in part that the owner of the land subject to the easement could not:

> (b) plant or establish within the Easement any trees, shrubs or other vegetatian which could exceed a height of 4.57 metres (15 feet) and/or which could encroach within 3.04 metres (10 feet) of any pole installed in the Easement failing which the COMPANY, in its discretion, shall be entitled to remove and/or manage and control by any method deemed expedient by the Company any such vegetation without notice to and at the cost of the OWNER, payable forthwith upon demand.

[25] No description of the easement was prepared, but only a sketch which was attached to the easement document. The easement is referred to as 40 feet in width, but, according to the testimony of George Sellers, the lands were not 40 feet in width at the point where the easement meets the cul-de-sac turning circle of Salty Reef Road.

[26] After both parties retained new counsel, negotiations continued with respect to the release on the view plane easement. It was during those negotiations that counsel for Philip Landry proposed a 100 foot strip running from the pedestrian right-of-way to the shore (Exhibit 5, Tab 30). George Sellers was then retained by Philip Landry to create a plan and description of the view plane.

[27] After some discussions concerning the wording of the agreement, it was executed on July 12, 2004. The final agreement referred to protecting the view "from the Lot 5 dwelling". The agreement provides in part:

> **AND WHEREAS** the parties hereto have agreed to modify the Restrictive Covenant as set out in the Agreement dated June 9th, 2000, as hereinafter set out;
>
> ...
>
> 1. MacKay hereby covenants and agrees with Landry to observe and comply with the following restrictive covenant. The burden of the restrictive covenant shall run with all or any of the lands referenced in the Nova Scotia Land Registration System as PID #65147068 (Lot 4) as the servient tenement for the benefit of all or any of the lands described in Schedule "A" hereto (Lot 5) as the dominant tenement and the owner(s) and occupier(s) of such lands from time to time. The restrictive covenant shall be binding upon and enure to the benefit of the heirs, executors, administrators, representatives, successors in title and assigns of the parties hereto:
>
>   (a) MacKay hereby covenants with Landry that MacKay shall not permit the construction, erection, or placement of any building, structure or object, temporary or permanent, or permit the planting or cultivation of any vegetation [with the exception of flower gardens having a height at full growth of not more than two (2) feet] within that portion of Lot 4 shown as Parcel VP-2 on the Plan of Survey dated June 24, 2004 attached as Schedule "C" hereto and as more particularly described in Schedule "D" attached hereto (the "Parcel VP-2"), which in any way would have the effect of either partially or completely blocking, obstructing, impairing, or lessening the view of the Northumberland Strait from the Lot 5 Dwelling.

2. MacKay hereby grants to Landry, and all owner(s) of Lot 5 from time to time, an easement to enter over the Parcel VP-2 for the purpose of trimming naturally occurring vegetation on Parcel VP-2 to the extent that it interferes with the view of the Northumberland Strait from the Lot 5 Dwelling. This right of entry shall be subject to the owner(s) of Lot 5 giving 14 days written notice by registered mail to the owner(s) of Lot 4.

3. Landry hereby releases all remaining lands of MacKay [save and except Parcel VP-2] from the Restrictive Covenant as set out in paragraph 2 of the Agreement dated June 9th, 2000.

[28] A description and plan of Parcel VP-2 were schedules to the agreement. It was 105 feet wide at the high water mark of the Northumberland Strait and contained 49,804 square feet, plus or minus. At the cul-de-sac at Salty Reef Road, it measured 20.62 feet. Between Lot 4 and Lot 5, there was a parcel of land which Parcel VP-2 did not encumber; therefore, Parcel VP-2 did not abut Lot 5. That area is the source of this litigation.

[29] There was a power pole on Lot 4 in the VP-2 area. As part of their agreement, Philip Landry agreed that it could remain on VP-2, although in contravention of the terms of the agreement.

[30] The agreement further granted and confirmed to Philip Landry the same right-of-way previously granted to Cottage on May 30th, 2002.

[31] In late 2005, Jeffrey Kidlark and Joan McKale (hereinafter "Kidlark and McKale") began discussions with the MacKays to buy Lot 4, which contained approximately two and a half acres. However they learned that almost half, approximately one acre, was encumbered by the view plane, VP-2, which prevented any structure or any vegetation over two feet in height on VP-2. Accordingly they negotiated with the MacKays to also buy the lands abutting Lot 4, knowing there was a pedestrian right-of-way over the lands as well as a Nova Scotia Power easement.

[32] The consolidation of Lot 4 and the lands abutting, referred to as the "remainder lands", and now called Parcel A, was done by a plan dated April 3rd, 2006. The new lot 4A was conveyed to Kidlark and McKale on August 26th, 2006.

[33] In the fall of that year, Jeffrey Kidlark testified he put a small shed on Lot 4A, outside of Parcel VP-2, and brought his motorhome to the property. He also said that in 2007 he began to plant trees and testified that he planted approximately 1500 on the property. It was when Jeffrey Kidlark began to plant

trees that the problems between Kidlark and McKale and the plaintiffs began. The plaintiffs complained that the trees blocked their view.

[34] Matters escalated between these parties throughout 2007. For example, in July 2007, Philip Landry applied for a Peace Bond against Jeffrey Kidlark. The application was denied in October 2007. Relations between these parties had reached a low point. The plaintiffs commenced this action against both sets of defendants on November 2, 2007. Kidlark and McKale counterclaimed against the plaintiffs.

[35] In May 2010, Jeffrey Kidlark alleged Philip Landry trespassed on his property and assaulted him, but the charges did not proceed to court.

[36] Also in 2010, Philip Landry was advised by NSPI that the power pole servicing his property had to be relocated since it was not within the easement. After being advised of this litigation, NSPI on February 8, 2011 (Exhibit 8, third set of tabs, Tab 8) advised it would "postpone the relocation of the pole ... until a decision has been reached in the legal action in process ...".

Analysis

[37] As I have said, Philip Landry wanted a protected view to the Northumberland Strait from the house he was going to build on Lot 5. The house has now been built and the plaintiffs now have view plane agreements: one affecting the lands now owned by the defendants Kidlark and McKale (over Parcel VP-2) and the other affecting lands of a non-party, the Cormiers (over Parcel VP-1).

[38] The view plane agreement, over Parcel VP-2, at issue here encumbers part of the lands owned by the defendants Kidlark and McKale. At the time the view plane agreement was entered into, the defendant MacKays owned Lot 4 and what has been referred to as the "remainder lands" between Lot 4 and Lot 5 (later called Parcel A). As I have said, Parcel A, before its consolidation with Lot 4, was encumbered in part by a right-of-way for the benefit of the plaintiffs and another land owner, the Sullivans, and also encumbered by the NSPI easement to which I have referred above.

[39] The plaintiffs' allegations generally are that their view of the water is restricted by the actions of Kidlark and McKale, which actions they could only take because of the actions of the defendants MacKay.

(A) The claims against the MacKay defendants.

[40] After a summary judgment motion heard by Justice John Murphy, the plaintiffs amended their statement of claim. Following the unsuccessful summary judgment motion, Justice Murphy gave directions to the parties pursuant to *Civil Procedure Rule 13.07* which provides as follows:

> 13.07 (1) A judge who dismisses a motion for summary judgment on evidence brought in an action must, as soon as is practical after the dismissal, arrange to give directions, unless all parties waive this requirement.
>
> (2) The judge may provide directions for the conduct of the proceeding, including directions that do any of the following:
>
> (a) restrict discovery in view of disclosure made through an affidavit or cross-examination on an affidavit;
>
> (b) narrow the issues to be tried by identifying facts not in dispute;

> (c) regulate disclosure or production of documents, electronic information, or other evidence;
>
> (d) permit evidence on the motion for summary judgment to stand as evidence at trial;
>
> (e) provide for a speedy trial;
>
> (f) provide for a hearing, rather than a trial, under Rule 6 - Choosing Between Action and Application.

[41] The order arising from the summary judgment motion and directions following that motion provided:

> AND UPON finding there is no genuine issue of material fact for trial relating to the second view plane easement agreement dated July 12, 2004, or the second right-of-way dated May 30th, 2002;
>
> AND UPON finding that there is no genuine issue of material fact based upon bad faith;
>
> ...

It then went on to provide that paragraphs 27, 30, 33, 34, and 35 of the plaintiffs' Statement of Claim were to be amended.

[42] Subsequently the Statement of Claim was amended and filed on July 21st, 2011. With respect to the MacKays, the claims are:

1) they breached the agreements "for a right-of-way and prohibitive easement and restrictive covenants respecting the view plane" (para. 26);

2) they committed a breach of contract "by altering the dimensions of Lot 4 to include the remainder lands surrounding Lot 4 thereby placing the View Plane granted to the Plaintiff in jeopardy" and "acted without regard for the covenants contained in the agreements with the Plaintiff dated June 9th, 2000. (para. 27);

3) for "punitive damages against the **Defendants MacKay** for wrongfully altering the dimensions of Lot 4 without the knowledge or consent of the Plaintiff." (para. 30);

4) "for their actions including misrepresentation to promote their own self-interest and economic benefit which actions resulted in economic loss to the Plaintiffs by devaluing the value of the Plaintiffs land and dwelling." (para.32); and,

5) for breach of contract and "unilateral altering of remainder lands respecting the view plane easement..." (para. 34).

[43] In para. 35, the Statement of Claim states:

> 35. The Plaintiffs seek the following relief:
>
> a) a declaration of the existence and enforcement of the terms of the right-of-way agreement
>
> b) a declaration of the existence and enforcement of the terms of the restrictive Covenant contained in the view plane easement
>
> c) enforcement of agreements by order of specific performance of terms of contract respecting easement view plane and right-of-way
>
> d) extraordinary remedy of injunction, prohibiting further violation of the terms of the agreement; an order restoring the property to its original state
>
> e) general damages arising from
>
> i) tort of wrongful interference with Plaintiffs [sic] right and lands
>
> ...
>
> iii) negligent misrepresentation
>
> iv) other relief as may be determined appropriate at trial

f) economic loss

[44] After the plaintiffs closed their case, the defendant MacKays brought a non-suit motion. In deciding that motion in part in their favour, I concluded there was only one claim remaining against the MacKays. The non-suit motion was granted "with respect to all the claims against the MacKays except the claim of negligent misrepresentations alleged to have been made in 2003 and 2004."

[45] The law with respect to negligent misrepresentation is set out in *Queen v. Cognos* [1993] S.C.J. No. 3, which was also cited in the non-suit decision. I repeat that test as follows from para. 33:

> 33 The required elements for a successful Hedley Byrne claim have been stated in many authorities, sometimes in varying forms. The decisions of this Court cited above suggest five general requirements: (1) there must be a duty of care based on a "special relationship" between the representor and the representee; (2) the representation in question must be untrue, inaccurate, or misleading; (3) the representor must have acted negligently in making said misrepresentation; (4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and (5) the reliance must have been detrimental to the representee in the sense that damages resulted.

(i) Special Relationship

[46] At the time the original agreements were signed in 2000 between the MacKays and Cottage, Cottage and the MacKays were in a relationship of vendor and purchaser. The MacKays conceded that was a special relationship at that time. They do not concede that was the case in 2003-2004.

[47] The plaintiffs say their relationship as owners of dominant and servient tenements gives rise to a special relationship. However they cite no authority for that proposition. The onus is on them to satisfy me that is the case.

[48] I cannot conclude that the relationship was a special relationship. The parties were negotiating as equals through separate counsel. Furthermore, the plaintiff E. Anne MacDonald is a practising lawyer familiar with real estate transactions.

[49] In my view, having failed to establish the first of the requirements for negligent misrepresentation, the claim fails.

ii) Representations

[50] Even if I were to conclude there was a special relationship period, I accept the evidence of Peter MacKay and Carol MacKay that they made no representations to Philip Landry with respect to the view plane nor that they would sell only Lot 4 and not the so-called "remainder lands".

[51] In *Goldman* v *Devine*, 2007 ONCA 301, the Ontario Court of Appeal found no fault with the motions judge's assessment of the negligent misrepresentation claim (para. 18). They quoted him in para. 19:

> [19] The motion judge stated, "*[A]s a general proposition*, an action predicated on negligent representation must be a representation in respect of a past or presently existing fact and not in respect of a future event." [Citations omitted and emphasis added.] By this statement, the motion judge recognized that there may be circumstances where a statement about future events could arguably ground a negligent misrepresentation claim, where it is based on existing facts.

[52] Accordingly, for there to be negligent misrepresentation in this case, I would have to find that the MacKays told Philip Landry that he had a "total view" or that the MacKays told him they had no intention to sell the "remainder lands".

[53] Philip Landry said he was guaranteed a view by Peter MacKay when they discussed amending the right-of-way and the view plane. He also said Carol MacKay told him he would have a "total view" from his dwelling.

[54] E. Anne MacDonald testified negotiations were difficult with the MacKays in 2003 and that is why Philip Landry retained new counsel. She ceased to represent him in June of 2003. She said they had no direct correspondence with the MacKays between the June/July period of 2003 and the date the view plane agreement was signed in July 2004.

[55] Peter MacKay testified he never used the phrase "total view" during his discussions with Philip Landry nor did Philip Landry. He said the first time he heard the phrase was at the discoveries. He said he met fairly often with Philip Landry in April 2003. He testified Philip Landry referred to an "unobstructed view" and said that was what they offered in April 2003 and in their proposal in June 2003 (Exhibit 2, Tab 31). The phrase "total view" was not mentioned in the draft proposal.

[56] The MacKays had new counsel, William Thomson, in June 2003 and he advised them not to discuss the matter with Philip Landry and E. Anne MacDonald. Peter MacKay said he did not do so then or at any time after the agreement was signed in July 2004 or any time before the lands were sold to Kidlark and McKale. He said it was Philip Landry's lawyer who proposed the location of Parcel VP-2, which did not abut Lot 5, the Landry lot. Carol MacKay said they often asked Philip Landry what he meant by "his view", but she said he was not specific so they never knew what he meant.

[57] In a letter from Philip Landry's lawyer, Peter Bryson, Q.C., to William Thomson dated August 21, 2003 (Exhibit 5, Tab 30), he referred to the existing restrictive covenant (view plane) "in respect of Lot #4 and other adjacent lands previously owned" by the MacKays. He then proposed an area 100 feet wide on Lot 4 be delineated "extending the entire length of the southern boundary from the pedestrian right-of-way to the shores of the Strait." A similar proposal was made to the Cormiers, the owners of Lot 6, for an area 25 feet wide.

[58] The pedestrian right-of-way, as noted above, did not abut Lot 5.

[59] Subsequently, William Thomson, on June 8, 2004 (Exhibit 5, Tab 32) wrote to Sarah Kirby at McInnes Cooper to advise that his clients consented to the surveyor surveying their property and confirming instructions would be given and payment would be made by the plaintiffs.

[60] It was the plaintiffs who retained George Sellers to prepare a plan and description of Parcel VP-2 and they had a full opportunity to review it or to make changes. George Sellers testified E. Anne MacDonald had no complaint about the description of Parcel VP-2. The MacKays at the time owned both Lot 4 and the so-called "remainder lands" abutting Lot 5.

[61] I find as a fact that it was the plaintiffs' mistaken belief, not attributable to anyone else, that their view was protected by virtue of the pedestrian right-of-way and the NSPI easement. They had counsel acting for them with respect to the agreement for Parcel VP-2 and retained the surveyor. They had the opportunity to seek to have a portion of the so-called "remainder lands" abutting Lot 5 included in VP-2. I find as a fact that those lands were included in the proposals made by the MacKays in April and June 2003.

[62] With respect to the alleged negligent misrepresentation about the "remainder lands", I conclude there is no evidence the MacKays ever told the plaintiffs they would not sell those lands. In fact, there is an acknowledgement by E. Anne MacDonald that those lands might in future belong to someone other than the MacKays. When she was dealing with the MacKays' lawyer about relocating the right-of-way in 2002, she wrote to Ian MacLean on May 30, 2002 (Exhibit 5, Tab 7), saying:

> ... in all likelihood, at some point someone else will own the balance of the property including the right-of-way ...

[63] What she had foreseen then did occur in 2006 when Kidlark and McKale bought not only Lot 4 but all the "remainder lands" including the lands subject to the right-of-way.

[64] With this conclusion, all claims by the plaintiffs against the MacKays are now dismissed.

[65] The MacKays have been completely successful in defending the claims against them and are entitled to their costs. They seek solicitor-client costs.

However, I seek further submissions from their counsel and counsel for the plaintiffs on the subject of costs.

(B) The claims against Kidlark and McKale

[66] In their brief, the plaintiffs state:

> 2. The issues with respect to **Defendant Kidlark and McKale** are:
>
> a) Whether the Plaintiffs have a claim against the Defendant Kidlark and McKale for the tort of wrongful interference with easement view plan [sic] and right-of-way; which said interference resulted in damages.
>
> b) Breach of agreements and covenants arising from the right-of-way against Defendants Kidlark and McKale only and view plan [sic] agreement.
>
> c) the Plaintiff's [sic] claim against Defendant MacKay and Defendants Kidlark and McKale for breach of contract and unilateral altering of Remainder Lands respecting the view plane easement...and against the Defendants Kidlark and McKale for unilaterally altering the terms of the right-of-way.

[67] They say in their brief the actions of these defendants within Parcel VP-2 and the right-of-way include, but are not limited to:

i) altering the location and extinguishing the existing pedestrian right-of-way;

ii) removing and transferring ownership and relocation of the stairs to the beach to the Sullivan property and impeding access to the beach;

iii) altering the terms of the restrictive covenant in the view plane area by constructing an area for parking the Kidlark vehicle on the right-of-way and on the boundary line of Lot 4A and in the line of the view plane;

iv) by excavating holes and preparing the lands to erect a fence along the restricted areas; and by gating the entrance to and narrowing the right-of-way;

v) by planting trees in the view plane area; and along the boundary of the Landry property which will lessen and obstruct the view;

vi) working to erect a fence or structure to create a barrier the resultant effect of which is to extinguish the existing right-of-way;

vii) working to elevate the land by adding fill to increase the elevation which interferes with the view plane; and,

viii) attempting to alter the existing Nova Scotia Power Easement to cause further obstruction to the Plaintiffs.

[68] The claims against Kidlark and McKale are set out in the plaintiffs' pretrial brief as follows:

128. In the Plaintiffs Statement of Claim the Plaintiff seeks the following relief; at trial

a) The **Plaintiff Landry** claims damages against the **Defendants Kidlark and McKale** for breach of the terms and conditions of the Agreement of June 9th, 2000, May 30th, 2002 and July 12th, 2004.

b) The Plaintiffs seek punitive damages against the **Defendants Kidlark and McKale** for continuing to plant and carry out other activities in total disregard of the Agreements of June 9th, 2000, May 30th, 2002 and July 12th, 2004 while the Defendants are aware that the Plaintiffs objected and asserted their legal rights to enforce the terms of the agreement.

...

d) ... The Plaintiff also seeks specific performance of Agreement relating to right-of-way and view plane restrictive covenant Agreement.

[69] Jeffrey Kidlark and Joan McKale were within their rights to use their lands as long as they neither interfered with access along the pedestrian right-of-way nor breached the obligations with respect to Parcel VP-2. The issue is whether they have done so.

[70] The essence of these claims is that Kidlark and McKale have interfered with the plaintiffs' rights, especially with respect to the right-of-way and the view plane. They refer to specific acts which they say have done so.

i) Parcel VP-2

[71] Jeffrey Kidlark testified that he has not planted any trees on Parcel VP-2. I accept this evidence since it is confirmed by the evidence and exhibits of George Sellers. His plan, Exhibit 16, shows no trees on Parcel VP-2, but shows them elsewhere. Jeffrey Kidlark also testified that the parking pads are not on Parcel VP-2 and no vehicles have parked there. The location of the parking pads is shown on the George Sellers plan, referred to above. These are not on Parcel VP-2. I find as a fact that no vehicles parked on Parcel VP-2 but on the portion of Lot 4A outside Parcel VP-2.

[72] I conclude there is no evidence of any fill that has increased the elevation of Parcel VP-2 so as to interfere with the view plane. The George Sellers plan shows two flower beds on Parcel VP-2 adjacent to the end of the Salty Reef Road. He

notes they are raised about one foot. He also shows a bush 2.4 feet tall adjacent to the flower beds.

[73] The photographs do not disclose the placing of any fill nor does the video which is Exhibit 28. I find as a fact that the elevation of Parcel VP-2 has not changed.

[74] This claim is dismissed.

ii) the pedestrian right-of-way

[75] Justice Murphy concluded there was no issue with respect to the location of the right-of-way. Therefore, the issue for me is whether there has been interference with it. It is shown as Parcel C, with dashed lines, on Exhibit 16. None of the trees or shrubs shown on that plan are within Parcel C.

[76] The plaintiffs claim that various actions of Kidlark and McKale have narrowed the right-of-way. This claim is based upon the notion that the entire width of the right-of-way must be kept free of obstructions. That is not so.

[77] In *Foster* v. *McCoy* (1998), 203 N.B.R. (2d) 252 (NBQB), the court in para. 28 quoted from an older English decision:

> 28 In the case of *Keefe v. Amor* (1964), [1965] 1 Q.B. 334 (Eng. Q.B.), Lord Justice Russell said:
>
> Where a right of way exists in respect of a strip of land it is not necessarily open to the grantee to complain of obstacles on every part of the strip; he can only complain of such obstacles as impede the user of the strip for such exercise of the right granted as from time to time is reasonably required by the dominant tenant. ...I would remark that it is sometimes thought that the grant of a right of way in respect of every part of a defined area involves the proposition that the grantee can object to anything on any part of the area which would obstruct passage over that part. This is a wrong understanding of the law. Assuming a right of way of a particular quality over an area of land, it will extend to every part of that area, as a matter, at least, of theory. But a right of way is not a right absolutely to restrict user of the area by the owner thereof. The grantee of the right could only object to such activities of the owner of the land, including retention of obstruction, as substantially interfered with the use of the land in such exercise of the defined right as for the time being is reasonably required.

[78] Based upon the plan (Exhibit 16), I conclude the parking pads are not within the right-of-way and any vehicles parking on them would not block the right-of-way completely. No trees or shrubs are planted within the right-of-way according to that plan. Philip Landry testified he believed no tress could be planted on the right-of-way. There is no evidence that there continue to be holes or fencing within the right-of-way.

[79] Philip Landry testified he can walk past the trees as long as there are no cars parked in the right-of-way. E. Anne MacDonald testified she can still access the shore even though the trees are there.

[80] I conclude there has been no substantial interference with the use of the right-of-way. This claim is dismissed.

iii) the stairs

[81] The plaintiffs say their access to the beach on the right-of-way has been obstructed because Jeffrey Kidlark removed the stairs. However, they admitted at trial that Kidlark and McKale had no obligation to provide the stairs.

[82] This claim is dismissed.

iv) trees along the boundary of Lot 5

[83] The plaintiffs say that Jeffrey Kidlark planted trees along their boundary. There are four trees shown on Exhibit 16 which are close to the boundary of Lot 5. However, they are not within Parcel VP-2. There is no prohibition from planting trees on other parts of Lot 4A except within the "so-called" 40 foot wide NSPI easement which is marked in pink on Exhibit 16. The prohibition in the easement is against trees over 15 feet in height. On the 2010 plan, four trees were shown: two 13 feet high and two 17 feet in height.

[84] As George Sellers pointed out, there is a small triangular area, approximately three feet by 20 feet abutting Lot 5. This small pie-shaped area is within Lot 4A and more specifically within Parcel A. It is shown on Exhibit 16 marked in blue ink as "3' ±" by "20' ±" in the area of a survey marker on the eastern boundary of Lot 5. It is neither encumbered by the right-of-way nor the 40 foot wide NSPI easement. However, George Sellers testified nothing could be built upon it.

[85] The plaintiffs attach some significance to this small piece of land but it gives them only marginally less protection from obstruction of their view from the house on Lot 5 than they have from the existence of the right-of-way and the NSPI easement. I have described above the limits of the restrictions resulting from those encumbrances. In short, the right-of-way does not have to be kept free of all trees and vegetation and the NSPI easement only prohibits trees over 15 feet in height or within 10 feet of any power pole.

[86] I therefore do not conclude there are any rights which the plaintiffs have with respect to this small parcel.

[87] As between the plaintiffs and Kidlark and McKale, there is no prohibition against the latter planting trees or shrubs anywhere on Lot 4A except within Parcel VP-2. I find as a fact that Kidlark and McKale did not plant any trees within Parcel VP-2.

[88] This claim is dismissed, since there is no prohibition against planting trees adjacent to the boundary of Lot 5.

v) the Nova Scotia Power easement

[89] The easement was granted by the MacKays on May 14, 2003. Its location is shown on Exhibit 16. The power pole servicing Lot 5 is on Lot 4A, at one corner of Parcel VP-2. The plaintiffs' power service is underground from that pole, across the NSPI easement. The pole is outside the boundary of the easement.

[90] The plaintiffs allege that Kidlark and McKale are trying to alter the easement to obstruct them. There is correspondence in the exhibits from NSPI, referred to above, to the effect that the pole must be moved so it is within the easement. If that is the case, that is the decision of NSPI. It if is moved, the plaintiffs say it will interfere with their electrical service. NSPI is not a party to this proceeding and any dealings between NSPI and Kidlark and McKale are outside the scope of this proceeding, as are any dealings the plaintiffs have had, or may in the future have, with NSPI.

[91] The plaintiffs say that in the view plane agreement, Philip Landry agreed that the power pole could remain within Parcel VP-2. His consent to have the pole

remain in apparent contravention of the view plane agreement does not prevent the owner of Lot 4A or NSPI from insisting the pole be within the easement. His consent to its location does not bind NSPI which was not a party to the view plane agreement.

[92] This claim is dismissed. NSPI has the benefit of the easement. It is the one to complain of interference with it. The plaintiffs do not have that right.

vi) view plane

[93] The plaintiffs allege that by virtue of the consolidation of Lot 4 and Parcel A to form Lot 4A that the view plane agreement should be extended to cover the portion of Parcel A between Parcel VP-2 and Lot 5. As support for this proposition, they note that the PID for Lot 4A is the same as for Lot 4.

[94] However no authority was cited for this novel proposition. In my view, it is an argument without merit. If that principle were of general application, anyone who owned land encumbered by, for example, a view plane restriction or an easement, would be deemed to have granted those encumbrances over later

acquired land. That is not a result which accords with the basic principles of real property law. In this case, Parcel VP-2 is described in a metes and bounds description clearly setting out its limits. The plaintiffs had counsel at the time the agreement was entered into, it was their proposal for its location and they retained the surveyor to prepare the plan and description of it.

[95] The plaintiffs seek rectification of the deed from the MacKays to Kidlark and McKale. They say that it should be rectified to include an extension of Parcel VP-2 across Parcel A to the boundary of Lot 5.

[96] Their argument in favour of doing so is based upon the PID being the same for both the old Lot 4 and the new Lot 4A, after Parcel A was added to it. The submission is that accordingly the view plane should encumber all of Lot 4A under that PID.

[97] No authority was cited for that proposition. George Sellers testified that the PID is assigned by the Municipal Development Officer. In my view, the use of the same PID for the old lot (4) and the new lot (4A) does not have the legal significance the plaintiffs suggest. Parcel VP-2 has a metes and bounds

description prepared by the surveyor retained by the plaintiffs after the MacKays accepted the location proposed by the plaintiffs' lawyer.

[98] In any event, rectification is an equitable remedy and not readily granted. The leading authority on the remedy is *Performance Industries Ltd* v. *Sylvan Lake Golf and Tennis Club Ltd*., 2002 SCC 19.

[99] In that decision, Binnie, J. commented on the limited scope for granting the remedy. He said in para. 25:

> 29 When reasonably sophisticated businesspeople reduce their oral agreements to written form, which are prepared and reviewed by lawyers, and changes made, and the documents are then executed, there is usually little scope for rectification.

[100] He went on in para. 29 to set out the purpose of and requirements for the remedy. He said:

> 31 Rectification is an equitable remedy whose purpose is to prevent a written document from being used as an engine of fraud or misconduct "equivalent to fraud". The traditional rule was to permit rectification only for mutual mistake, but rectification is now available for unilateral mistake (as here), provided certain demanding preconditions are met. Insofar as they are relevant to this appeal, these preconditions can be summarized as follows. Rectification is predicated on the existence of a prior oral contract whose terms are definite and ascertainable. The plaintiff must establish that the terms agreed to orally were not written down

> properly. The error may be fraudulent, or it may be innocent. What is essential is that at the time of execution of the written document the defendant knew or ought to have known of the error and the plaintiff did not. Moreover, the attempt of the defendant to rely on the erroneous written document must amount to "fraud or the equivalent of fraud". The court's task in a rectification case is corrective, not speculative. It is to restore the parties to their original bargain, not to rectify a belatedly recognized error of judgment by one party or the other: ...

[101] He continued in that paragraph:

> In *Hart*, supra, at p. 630, Duff, J. (as he then was) stressed that "[t]he power of rectification must be used with great caution". Apart from everything else, a relaxed approach to rectification as a substitute for due diligence at the time a document is signed would undermine the confidence of the commercial world in written contracts.

[102] There are several reasons why these plaintiffs cannot obtain rectification of the deed for Lot 4A. Firstly, they were not a party to it. In my view, that is fatal to their argument.

[103] Even if they were to overcome that hurdle, there is no evidence that the parties to the deed, or one of them, made a mistake in the wording of the deed. There is no evidence that their prior oral contract was not written down correctly. Neither party to the deed, the MacKays nor Kidlark and McKale, had any intent to include anything in the deed that is not in it. Nor is either party to the deed trying to rely on, or even argue, that the document is erroneous.

[104] I also conclude there could be no successful argument for rectification of the agreement between the MacKays and Philip Landry providing for the restrictive covenant over Parcel VP-2. The terms of the proposal for the view plane were clear, were proposed by the plaintiffs' lawyer and the description of Parcel VP-2 created by the surveyor the plaintiffs themselves retained. There is absolutely no evidence of any mutual or unilateral mistake in the document.

[105] As Binnie, J. said rectification is not to be used to correct a "belatedly recognized error of judgment" or, I would add, a mistaken appreciation of the effect of a right-of-way and/or NSPI easement.

[106] The plaintiffs say that when the defendants MacKay and Kidlark and McKale registered documents pursuant to the Land Registration Act, S.N.S. 2001, c.6, their lawyers removed easements and burdens on the lands which were for the benefit of the plaintiffs.

[107] I cannot conclude this to have been the case. Neither defendant has argued that the right-of-way or VP-2 agreement was extinguished by the registration of

documents. Kidlark and McKale argue they are invalid for other reasons which I will deal with hereinafter.

[108] The evidence of George Sellers was that the right-of-way, NSPI easement and view plane agreement were in effect and bound parts of Lot 4A. He did say the view plane easement would be ineffectual if the plaintiffs had no access to Parcel VP-2 to maintain it. He did not say it was invalid.

[109] The plaintiffs say that the registering of documents has somehow affected their rights with no notice to them. However, the description of Lot 4A and the evidence of George Sellers does not support this argument. The description of Lot 4A specifically makes it subject to, *inter alia*, the NSPI easement (Exhibit 12, Tab D-3), the right-of-way in favour of Lot 5 (Exhibit 12, Tab D3), and the agreement of July 12, 2004 (Exhibit 12, Tab D4). The latter document provides for the restrictive covenant (over Parcel VP-2) and also regrants the right-of-way.

[110] The plaintiffs point out that the description of Lot 4A does not refer to the agreement of June 9, 2000 (Exhibit 12, Tab D2) and make Lot 4A subject to it. Clause 1 of that agreement provided for a pedestrian right-of-way which was

extinguished and replaced by a new one in the agreement dated May 30, 2002 (Exhibit 12, Tab D3). Clause 2 of the 2000 agreement granted a view plane over lands "lying to the east" of Lot 5. When Parcel VP-2 was created, the agreement specifically released all those lands from the restrictive covenant, except those within Parcel VP-2. The third clause of the 2000 agreement dealt with placement of a trailer on Lot 5 only until December 31, 2000.

[111] I conclude it was unnecessary to refer to the June 9, 2000 agreement in the description of Lot 4A since it had been superceded by two subsequent agreements (clauses 1 and 2) and the passage of time (clause 3).

[112] Accordingly, I conclude the documents registered pursuant to the Land Registration Act affecting Lots 4A and 5 accurately reflect the benefits and burdens affecting these lots.

[113] The claims against Kidlark and McKale are not made out and are dismissed.

(C) Plaintiffs' access to right-of-way

[114] Before I move on to consider the counterclaim, there is one more issue to consider.

[115] The plaintiffs ask for "a declaration of the existence and enforcement of both the right-of-way agreement and the view plain agreement" and 'specific performance" of those agreements.

[116] I have concluded both the right-of-way and the view plane restrictive covenant are valid. Kidlark and McKale say that the lands encumbered by these rights do not abut the plaintiffs' lands, Lot 5, and therefore the plaintiffs have no access to the right-of-way or Parcel VP-2.

[117] The plaintiffs say that the existence of the pie-shaped parcel abutting their lands and owned by Kidlark and McKale, unencumbered by either the right-of-way or the NSPI easement, is the impediment to their access. However, it does not abut their right-of-way which is only 20 feet wide. Parcel C, the right-of-way is depicted by dashed lines on Exhibit 16. It does not touch the pie-shaped parcel

shown on the plan but the pie-shaped parcel does abut the NSPI easement. However, the plaintiffs have no rights to enter onto that easement. The lands encumbered by the easement were owned by the MacKays and now by Kidlark and McKale.

[118] Kidlark and McKale say the plaintiffs do not have access to the right-of-way from Salty Reef Road. It is a private road made up of Parcel A which runs from Lodge Road to Lot 5, and parcel B, the cul-de-sac abutting Lots 4, 6 and 7. The deed to Lot 5 gives the plaintiffs a right-of-way only over Parcel A. However, it is Parcel B, the cul-de-sac portion of Salty Reef Road, which abuts the plaintiffs' pedestrian right-of-way (Parcel C) which, in turn, abuts Parcel VP-2. This too is shown on Exhibit 16.

[119] The plaintiffs say that the MacKays still own Salty Reef Road and can still provide them with access. However, I do not see that I have any authority to order them to grant such rights. Nor do I conclude the test for rectification has been made out. There is no evidence of a prior oral contract which is not reflected in the written grant of right-of-way.

[120] Alternatively, the plaintiffs say that s.280(2) of the Municipal Government Act, S.N.S. 1998, c.18, gives them the right to access the cul-de-sac (Parcel B) of Salty Reef Road. It provides:

> *Section 280 (2)* The owners of lots shown on a plan of subdivision as abutting on a private right of way are deemed to have an easement over the private right of way for vehicular and pedestrian access to the lot and for the installation of electricity, telephone and other services to the lot.

[121] In my view, this provision does not assist the plaintiffs. When their lot was created by plan of subdivision on May 19, 2000, Parcel B did not exist. The plaintiffs do have access to the private right-of-way but only to Parcel A of Salty Reef Road. In any event, they do not need to rely on the statutory provision since their rights were granted in their deed.

[122] The plaintiffs say they have a right-of-way by proprietary estoppel. They cite *Maritime Telegraph and Telephone Company* v. *Chateau LaFleur Development Corporation*, 2001 NSCA 167, as authority. In that case, one party had given up rights of access to its property in exchange for a commitment that the other party would continue to provide it with alternate access. The Court of Appeal concluded there was an equitable easement. Cromwell, J.A. (as he then

was) set out the principles respecting equitable easements at para. 37 where he said:

> [37] Equitable easements may arise through the operation of the equitable doctrines of proprietary estoppel and part performance or through the operation of related equitable principles. Proprietary estoppel comes into operation when one party is encouraged to act to its detriment in relation to its land by the promise or encouragement of another in circumstances in which it would be unjust to allow the latter to insist on its strict legal rights: J. McGhee, *Snell's Equity* (30th, 2000) at para. 39-12.
>
> [38] As stated in a leading English case, when the doctrine of proprietary estoppel is raised, the court must answer three questions: first, whether an equity is established; second, what is the extent of the equity; and, third, what relief is appropriate to satisfy the equity: **Crabb v. Arun District Council**, [1976] Ch. 179 (C.A.) at pp. 192-193. Whether an equity arises and its extent depends on the dealings between the parties, including their contract, their promises and their conduct: see, e.g. **Crabb**, above at p. 187-8. The ultimate question in light of all of this is whether it would be inequitable to permit one party to insist on its strict legal rights.

[123] In this case, Philip Landry gave up his previous right-of-way in exchange for the pedestrian right-of-way over Parcel C. He also gave up his original restrictive covenant in exchange for one over Parcel VP-2. This was done to his own benefit but also to allow the MacKays to sell Lot 6 and then Lot 4. Philip Landry acted to his detriment and now Kidlark and McKale say the plaintiffs have no ability to access the right-of-way or access parcel VP-2 to clear obstructions. Philip Landry's expectation was that he could access both.

[124] As between the plaintiffs and the MacKays, I am satisfied the equity is established and the extent of it is to give the plaintiffs access over Parcel B, the cul-de-sac portion of Salty Reef Road to the pedestrian right-of-way and thence from it to Parcel VP-2 which abuts the right-of-way. The remedy is an equitable easement over Parcel B, still owned by the MacKays.

[125] An equitable easement can be defeated by the purchase of the lands subject to the equitable easement by a third party without notice. That is not the case here with respect to Parcel B: the MacKays still own it. However, the equitable easement does affect Kidlark and McKale. Although they are not the owners of Parcel B, the equitable easement does result in the plaintiffs having access to their lands to exercise rights pursuant to the right-of-way and view plane agreements.

[126] However, when they bought Lot 4A they knew their lands were encumbered by Parcel VP-2 and the pedestrian right-of-way. The existence of the former led them to buy "the remainder lands" as well as Lot 4. The existence of the latter is acknowledged in the exhibits where Jeffrey Kidlark writes to Philip Landry saying he has trespassed on Lot 4A outside of the right-of-way.

[127] I conclude the plaintiffs have an equitable easement over Parcel B, the lands of the MacKays.

[128] Although not pleaded, the plaintiffs may also have an argument in favour of an easement of necessity, without which their right-of-way cannot be used at all and their right to clear obstructions from Parcel VP-2 cannot be exercised.

[129] I also note, although no one commented on it, that the pedestrian right-of-way does touch one corner of Lot 5 as shown by the dashed line on Exhibit 16. The right-of-way, Parcel C, is 20 feet in width and it appears that is the width of Parcel C at the cul-de-sac where a survey marker was found on the corner of Lot 5 (FDSM).

[130] Although I have concluded there is an equitable easement over Parcel B of Salty Reef Road, that easement is only for access to the pedestrian right-of-way and ultimately to Parcel VP-2. It is an easement to pass on foot and is not an easement for access to Lot 5, which has its road access via Parcel A of Salty Reef Road.

(D) The counterclaim

[131] In their amended defence and counterclaim, Kidlark and McKale claim against the plaintiffs:

> 15. The Kidlarks repeat the foregoing and claim against the Plaintiffs as follows:
>
> a. General non-pecuniary damages;
>
> b. Special damages, particulars of which will be delivered prior to trial;
>
> c. Aggravated and/or Punitive damages for repeated trespasses;
>
> d. Pre and Post-judgment interest;
>
> e. Costs of this action;
>
> f. Such further and other relief as this Honourable Court deems just.
>
> 14.[sic] The Kidlarks also seek a declaration from this Court that the view plane agreement is null and void due to the repeated material breaches of the agreement by the Plaintiffs.

15.[sic] The Kidlarks also seek a declaration from this Court that any rights-of-way and/or easements over their property are null and void.

16. The Kidlarks also seek an order for the removal of the unauthorized underground power line running on the Kidlark property.

[132] No submissions were made with respect to general damages nor were any particulars of special damages provided. I therefore conclude the counterclaim is only for: 1) trespass; 2) declarations that the VP-2 agreement, the right-of-way and easement are invalid; and, 3) an order to remove the plaintiffs' underground power line. No claim is made with respect to the power pole on Lot 4A.

[133] The plaintiffs deny trespassing and deny the invalidity of the view plane agreements, right-of-way and easement. They also say they have the right to have an underground power line in the NSPI easement.

i) Trespass

[134] The defendants Kidlark and McKale say the plaintiffs have trespassed on lands outside the granted pedestrian right-of-way. They also say it is invalid, but I will deal with that hereinafter.

[135] In a letter to Philip Landry dated June 26, 2007, (Exhibit 30), Jeffrey Kidlark complains of trespasses “over the past couple of weeks”, “today, around noon” and “yesterday in the early afternoon”.

[136] In his testimony, Jeffrey Kidlark also referred to an incident of trespassing in 2011 when he also made allegations of assault against Philip Landry.

[137] I accept that the plaintiffs have traversed an area outside the right-of-way. Based upon the evidence, it was of a minor nature and not continuing. Accordingly, I conclude it does not attract a damage award. Similarly, I am not satisfied that any ATV use on the pedestrian right-of-way or Lot 4A outside of the right-of-way was other than minor. Accordingly, I make no award of damages. Nor am I satisfied the requirements for granting an injunction have been met. No argument was made to support an injunction.

ii) Validity of view plane agreement

[138] The view plane agreement provides in summary that the owner of Parcel VP-2 will not construct any structure within VP-2 or plant anything over two feet in height on it which would obstruct the view from the plaintiffs' house on Lot 5.

[139] The plaintiffs were also granted the right to enter on Parcel VP-2 to trim any vegetation which obstructs that view.

[140] Kidlark and McKale say VP-2 is invalid for three reasons: 1) George Sellers' testimony that it is ineffectual without a right of access by the plaintiffs to trim vegetation; 2) the submission that dominant and servient tenements must be contiguous; and 3) because of breaches of the agreement by the plaintiffs.

[141] It may be that without access to Parcel VP-2, the plaintiffs' ability to trim vegetation is not possible. That does not mean the other provisions of the agreement are invalid, including the all-important one that prevents the owner of Parcel VP-2 from putting any structure or planting anything over two feet in

height on it. The video taken by Jeffrey Kidlark (Exhibit 28) does not show any such obstructions.

[142] I conclude it is unnecessary for dominant and servient tenements to be contiguous. No case authority was submitted to the contrary.

[143] In *Principles of Property Law*, 5th ed. (United States: Thomson Reuters Canada, 2010), Professor Ziff says at p. 408:

> This requirement [that the covenant must not have been intended as just a personal promise] ... means that two properties must be involved. Borrowing from the language of easements, there must be a dominant tenement (the property to be benefited) and a servient one (the burdened property). And as in the law of easements, apart from statute there cannot be a restrictive covenant in gross. It is not essential that the two properties be contiguous, though a functional proximity of inexact distance is required: a covenant affecting land in Calgary, cannot be said to benefit lands 300 kilometres away in Edmonton: ...

[144] The restrictive covenant must run with the land. The intent that this one would is clear. In his letter of August 21, 2003 (Exhibit 5, Tab 30), Peter Bryson, on page 2, specifically referred to the restrictive covenant running with the lands and being "binding on both present and future owners of Lot #4". In the agreement dated July 12, 2004 (Exhibit 12, Tab D4), clause 1 states: "The burden

of the restrictive covenant shall run with all or any of the lands ... PID # 65147068 (Lot 4) as the servient tenement ...".

[145] Restrictive covenants are often used in subdivisions where the developer makes the sale of each lot subject to restrictions on the use of that lot. If it is the intent that the restrictive covenant run with the land, it does not matter that the lands are not contiguous. Otherwise, in the case of a subdivision, if a lot to be sold was between two lots previously sold, there could be no restrictive covenant binding that lot since the developer no longer owned any contiguous land. That is not the case, nor is it the case here.

[146] I have some difficulty with the basis for Kidlark and McKale's argument that the plaintiffs have breached the view plane agreement.

[147] The agreement for the view plane put no obligations on Philip Landry with respect to the view plane other than to give 14 days written notice by registered mail of his intent to enter Parcel VP-2 to trim "naturally occurring vegetation ... to the extent that it interferes with the view ... from the Lot 5 dwelling". There is no evidence that the plaintiffs entered Parcel VP-2 to trim vegetation without the

required notice or in any other way breached the agreement, which was for their benefit and imposed no positive obligations on them.

[148] I therefore conclude that the agreement with respect to Parcel VP-2 is not invalid.

iii) Validity of right-of-way and easement

[149] Kidlark and McKale also say the plaintiffs' pedestrian right-of-way to the shore is invalid. They say the MacKays granted a right-of-way to Cottage on May 30, 2002, when Cottage had conveyed its interest to Philip Landry three days earlier (Exhibit 12, Tab D5). They say since Cottage no longer had title to the lands, the grant of right-of-way is invalid.

[150] However, when the restrictive covenant over Parcel VP-2 was granted by the MacKays to Philip Landry in July 2004, they also granted and confirmed "to Landry as successor to Cottage" the right-of-way previously granted to Cottage in that May 30, 2002 agreement. Therefore, Philip Landry, as owner of Lot 5, was granted the pedestrian right-of-way.

[151] No authority was cited by Kidlark and McKale to the effect that the July 12, 2004 agreement would not create a valid right-of-way. I conclude the plaintiffs have a valid right-of-way.

[152] Kidlark and McKale also say that there is a restraint on alienation in the May 2002 right-of-way agreement with the plaintiff and that with the Sullivans. They say the MacKays in each agreement covenanted not to grant any other rights over the right-of-way lands. In conflict with that, they then granted an easement to NSPI in 2003 which included those lands.

[153] This was an argument raised only in closing submissions by their counsel. It was not claimed as part of their counterclaim nor raised in their pre-trial brief. Nor was any authority submitted in support. I cannot conclude that this invalidates the granted right-of-way or the NSPI easement. As I have said, NSPI is not a party to this action and without its participation, it is not appropriate to make a decision with respect to the validity of its easement.

[154] It was the July 12, 2004 agreement which effectively granted the right-of-way to Philip Landry. It incorporates the provisions of the 2002 agreement and takes effect from July 12, 2004. The NSPI easement had been granted in 2003. Any restriction on alienation, if valid, would take effect only in 2004, after the NSPI easement was granted. If, on the other hand, that provision is invalid, it would be struck from the May 30, 2002 agreement and from the agreement with the Sullivans.

iv) Underground power lines

[155] The plaintiffs' house is serviced by underground power lines running under Parcel A from a power pole on the corner of Parcel VP-2, as shown on George Sellers' plan (Exhibit 16).

[156] The NSPI easement is not defined by a description, but only a sketch on a plan. It is said to be 40 feet in width, but it is not disputed that there is not 40 feet of width where it abuts Lot 5 and Salty Reef Road.

[157] Kidlark and McKale say the plaintiffs have no right to have underground power lines running from the pole on Lot 4A under Parcel A to service their house. They say the line must be removed.

[158] I have concluded above that I should make no ruling on whether the NSPI easement is valid. However, Kidlark and McKale say that the easement does not grant the plaintiffs rights, nor did the right-of-way agreement give them the right, to have underground service to their house. They say it was always the plan that the house would be serviced from the power pole in the cul-de-sac.

[159] The correspondence to which they refer dealt with the location of the power poles. However, the letter from the MacKays to the plaintiffs on April 17, 2003 (Exhibit 6, Tab 11), refers to power to a house on Lot 4, not the Landry house. It does refer to underground power from a pole in the cul-de-sac. Tab 13 is a letter to E. Anne MacDonald from the MacKays dated April 23, 2003. It refers to meeting with both plaintiffs on "Monday evening" and in that letter the MacKays refer to Philip Landry asking "if Cottage could take their power from the second last pole already installed; ...". In the letter reference is made to Peter MacKay's

discussions with NSPI and the delay in installing power while “this new concept” is considered by “Cottage and MacKay”.

[160] Tab 15 is a letter from the MacKays to Philip Landry dated April 28, 2003. In it the MacKays say “You also indicated to all three of us present that the power could/would come from the second last pole at the cul-de-sac”. They continued on page 4:

> 8. You, Philip, were present and actively participated in the decisions about he [sic] placement of power poles at the second plan and were well aware of the 250 foot maximum distance a home can be for underground power ...

[161] At Exhibit 11, Tab 22, is a sketch showing a power line running from the cul-de-sac, 250 feet to the Landry and Cormier houses and a greater distance than that to houses on Lots 4 and 7. Peter MacKay testified it was his understanding that was to be the direction in which the power lines would run.

[162] In May 2003, the MacKays granted the easement to NSPI. By July 2004, there was a power pole on Lot 4 since it was addressed in the view plane agreement because it was within Parcel VP-2.

[163] Philip Landry says NSPI told him where he could place his underground power lines. That issue is not addressed in their correspondence. Mr. Paruch of NSPI says "Mr. Kidlark insists the pole be removed from his property entirely, easement notwithstanding" (Exhibit 11, third Tab 4). He simply says "any movement of the pole would result in a [sic] power being disconnected to your home ..." (Tab 5). In a letter dated February 4, 2011 (Tab 7), he says NSPI has "an obligation to have the pole relocated within the easement area. NSPI also wishes to continue to provide Mr. Landry with electricity ... NSPI wishes to reconnect Mr. Landry's home to electricity as soon as possible ...". NSPI does not indicate from where that service reconnection would be made, but it is clear they do not intend to relocate the pole other than within the easement.

[164] Kidlark and McKale are entitled to have the power pole in its proper location. NSPI intends to relocate it and also provide the plaintiffs with electricity. Whether the plaintiffs will have underground power from the pole once relocated within the easement is a matter which involves NSPI. (I do note the easement refers to "underground conduits".) Again, since NSPI is not a party

to this proceeding, I make no order with respect to removal of the underground power lines servicing the plaintiffs' house.

[165] Kidlark and McKale seek solicitor-client costs. The awarding of such costs is not common. They were successful in defending the claims against them, but unsuccessful on their counterclaims. Accordingly, I seek further submissions from these parties on the issue of costs.

J.