SUPREME COURT OF NOVA SCOTIA
Citation: *Miller v. Hartlen*, 2014 NSSC 296

Date: 2014-08-07
Docket: *Truro*, No. 418615
Registry: Truro

Between:

Wayne F. Miller

Applicant

v.

Laurie Hartlen and Marjorie Hartlen

Respondents

DECISION

Judge: The Honourable Justice Patrick Duncan

Heard: April 16, 2014, in Truro, Nova Scotia

Written Decision: August 7, 2014

Counsel: Joseph A. MacDonell, for the Applicant
Laurie and Marjorie Hartlen, self-represented, with the assistance of David Merrigan

By the Court:

Background

[1] Wayne Miller applies for an order seeking a declaration permitting him to travel unimpeded on an alleged right of way over the lands of Laurie and Marjorie Hartlen (Hartlen lands), to the applicant's lands (Miller lands). The application relies upon an assertion that the right of way has been in use for over 65 years. The applicant also seeks an injunction pursuant to **Civil Procedure Rule 75** preventing the respondents from closing or locking a gate erected on the right of way by the respondents. Finally, the applicant seeks an order directing the respondents to remove the gate.

[2] The respondents deny the existence of the alleged right of way and request that the court dismiss the application.

Facts

[3] Wayne Miller, Laurie Hartlen, and Robert Salsman filed affidavits, and were subject to cross-examination in the hearing. An affidavit of Willie Hubley was also tendered. He was not subject to cross-examination. In addition there are a number of documentary and photographic exhibits that provide the title history of the lands in question as well as graphic aerial and ground level views of the lands. The applicant has also submitted a Statutory Declaration made by Wendall Wilmot Miller who passed away prior to the application having been filed. I will address its contents separately and distinguish it from other evidence which was presented for the hearing of this application.

[4] The facts are not particularly contentious. The dispute is whether those facts give rise to the remedy that the applicant seeks.

[5] I have reached the following findings of fact that I consider to be relevant and material to the disposition of this application.

> 1. There is an unpaved private roadway that begins at an intersection with Rhines Road, Upper Kennetcook, Hants County, Nova Scotia, and runs over the lands of five different landowners before terminating on the lands of the applicant. That road is locally referred to as the Barren Road.

2. The respondents own the last lot of land over which the Barren Road runs before it reaches the applicant's land. To be clear, the lands of the applicant and the respondents abut, with the respondents' lands closer to the Rhines Road.

3. The Barren Road has been in existence and used continuously by a number of people and for a variety of purposes since sometime in the early 1950's, as has been related in the personal observations and experience of the applicant. He remembered first traversing the road as a boy in approximately 1953, and he has continued to do so to the present time. The road is visible in aerial photos taken in 1964 and subsequently. The evidence of Mr. Salsman corroborates the road's existence and use since the early 1960's.

4. The lands owned by the applicant and the respondent formed part of a single parcel of land until 1991 when the then owner, Raymond Miller (brother of the applicant), died. The land was subdivided to accommodate Raymond Miller's testamentary bequests. Those two parcels became what I refer to as the Miller lands, and the Hartlen lands.

5. By deed dated August 21, 1992, registered September 17, 1992, the applicant took title to the Miller lands. There is a camp, woodhouse, outhouse and shower on the land. Wayne Miller and his invitees have used it regularly from 1992 until the current time.

6. By deed dated November 16, 1996, registered November 18, 1996, Laurie and Marjorie Hartlen took title to the Hartlen lands.

7. The Hartlens and Willie Hubley have camps on the Hartlen lands. Their camp lots are accessed by driveways that lead from the Barren Road.

8. In or after December 2012, the Hartlens erected a locked gate across the Barren Road where it first enters onto their property. The stated purpose of the gate is to control access to the Hartlen lands and thus improve security to their camps, which had been subject to some break-ins.

9. When told of the plan to erect the gate, the applicant protested. He continued to protest once it was in place, even when provided with a key to the gate and assured that he could continue to access his land by the use of the Barren Road.

10. The Miller lands have frontage on Highway 354 from which the applicant can access his camp by using an all-terrain vehicle travelling over a trail that he constructed for this purpose. The trail is not passable in a regular automobile or truck.

11. The late Raymond Miller held title to the totality of the Miller and Hartlen lands from December 1976 until his death in1991.

12. Raymond Miller took title from Lloyd and Beatrice Townsend who had owned the property from 1967 to 1976. Beatrice Townsend was a sister to Raymond Miller and to the applicant Wayne Miller.

13. Raymond Miller regularly passed over the Barren Road unimpeded during the Townsends' ownership and during his own. He harvested wood and carried out silviculture practices on the lands.

14. After acquiring the Miller lands in 1992, the applicant, together with his brother Wendall Miller maintained the Barren Road, which included grading and filling it to a condition that permitted a car to pass over the road.

15. From August 1992 until the late fall or early winter of 2012, the applicant and his invitees used the Barren Road, including that portion that passes over the Hartlen lands, without challenge or objection. During those years the applicant has stayed regularly at the camp on his land. He has cut and sawed wood for personal use and for sale. He transported a variety of equipment and wood over the Barren Road. Since the erection of the gate, the applicant has only accessed the land using an all-terrain vehicle and the trail from Highway 354, notwithstanding that the respondents' have given "permission" to use the Barren Road.

16. Roberts Salsman has also used the Barren Road since the 1960s to go fishing, and since 1992 to visit at the applicant's property, sometimes with the applicant present and sometimes not. Until the erection of the gate he was not impeded by anyone in his use of the Road.

Issue

[6] The issue is whether, having regard to the facts as I have found them, the applicant can show on the balance of probabilities that he is entitled as of right to enjoy unfettered passage over the Barren Road where it passes over the Hartlen lands.

Analysis

[7] The Barren Road has been in existence for over 60 years and has been used in its current form by various landowners and their invitees to access the properties over which it passes. It is clearly defined on the ground and capable of description in a grant.

[8] Until the death of Raymond Miller in 1991, the Miller and Hartlen lands formed one property. As such no easement in favor of Raymond Miller existed, nor was necessary, over what ultimately became the Hartlen lands after the subdivision. Therefore, a determination of the rights and burdens created by subdivision in 1992, and/or by subsequent use, are the basis upon which this dispute will have to be resolved.

[9] The deeds to the current owners are silent on the usage of the Barren Road where it crosses the Hartlen lands. There was no express grant of easement or a right of way in writing, or otherwise.

[10] If the applicant is to be successful then it can only be by finding the existence of a prescriptive easement or through acquisition by implied grant.

Easement by prescription

[11] Murphy J., writing in *Balser v. Wiles* 2013 NSSC 278 set out the law as it applies to the acquisition of an easement by prescription:

> [9] Charles Macintosh's **The Nova Scotia Real Property Practice Manual**, loose-leaf, (Markham: LexisNexis Canada Inc., 1988-2013) defines an easement as follows at p.13-51:
>
> > An easement is a right one landowner has to utilize land belonging to another and imposes a burden on that land for the benefit of the owner of the land to which the easement is attached.

[10] The four essential characteristics of an easement are set out in Anne Warner La Forest, Anger and Honsberger: **The Law of Real Property**, loose-leaf, 3rd Edition (Toronto: Canada Law Book Ontario, 2012) at p.17-3:

> (a) There must be a dominant and a servient tenement;
>
> (b) An easement must accommodate the dominant tenement;
>
> (c) The dominant and servient owners must be different persons; and
>
> (d) A right over land cannot amount to an easement unless it is capable of forming the subject-matter of a grant.

[11] An easement can be established through long-time use and enjoyment by one of two means. The first is by the operation of s.32 of the **Limitation of Actions Act,** R.S.N.S. (1989) c.258:

> No claim which may be lawfully made at the common law by custom, prescription, or grant, to any way or other easement, or to any watercourse, or the use of any water to be enjoyed or derived upon, over or from any land or water of our Lady the Queen, her heirs or successors, or being the property of any ecclesiastical or lay person, or body corporate, when such way or other matter as herein last before mentioned has been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of twenty years but, nevertheless, such claim may be defeated in any other way by which the same is now liable to be defeated and where such way or other matter as herein last before mentioned has been so enjoyed as aforesaid for the full period of twenty-five years, the right thereto shall be deemed absolute and indefeasible, unless it appears that the same was enjoyed by some consent or agreement expressly given, or made for that purpose by deed or writing. R.S., c. 258, s. 32; 2001, c. 6, s. 115.

[12] The other method for establishing an easement based on use and enjoyment is by application of the doctrine of lost modern grant. **The Nova Scotia Real Property Practice Manual**, *supra*, describes the doctrine of lost modern grant at p.13-95:

> The doctrine of modern lost grant is a judge-created theory which presumes that if actual enjoyment has been shown for 20 years, an actual grant has been made when the enjoyment began, but the deed granting the easement has since been lost. However, the presumption may be rebutted. The doctrine predates and is an alternative to a finding that a right has arisen by prescription. The doctrine is based upon usage, not a real grant.

[13] The requirements for establishing an easement under the limitations statute or the doctrine of lost modern grant are the same. In *Mason v. Partridge*, 2005 NSCA 144, at para.18, the Nova Scotia Court of Appeal adopted the following

passage from the Ontario Court of Appeal's decision in *Henderson v. Volk*, (1982) 35 O.R. (2d) 379:

> 14. It should be emphasized that the nature of the enjoyment necessary to establish an easement under the doctrine of lost modern grant is exactly the same as that required to establish an easement by prescription under the **Limitations Act**. Thus, the claimant must demonstrate a use and enjoyment of the right-of-way under a claim of right which was continuous, uninterrupted, open and peaceful for a period of 20 years. However, in the case of the doctrine of lost modern grant, it does not have to be the 20-year period immediately preceding the bringing of an action.

[14] The claimant must also establish that the use was made without violence, secrecy or evasion, and without consent or permission of the servient owner: Mason v. Partridge, *supra*, at paras.19-22.

[15] In view of the serious consequences for the servient property owner, a prescriptive easement will be found only where there is clear evidence of both continuous use and acquiescence in such use by the owner of the servient property: Henderson v. Volk, *supra*, at para.21.

Did the applicant exercise continuous, uninterrupted, open and peaceful use of the Barren Road over the Hartlen lands for a period of 20 years?

[12] The evidence is clear and persuasive and I find as a fact that the applicant enjoyed continuous, uninterrupted, open and peaceful use of the Barren Road over the Hartlen lands from at least the time of his acquisition of the property in August 1992 until the late fall or early winter of 2012, a period in excess of 20 years.

Did the respondents, and their predecessors in title, acquiesce in the applicant's use of the Barren Road where it passes over the Hartlen lands? Did the respondents give permission or consent to the applicant for his use of the Barren Road where it passes over the Hartlen lands?

[13] In *Mason v. Partridge* 2005 NSCA 144 the court enunciated the difference between acquiescence by the landowner and permission granted by the landowner for a claimant's passage over their lands. The court also set out the legal analysis that each engenders:

> [30] The trial judge's decision never touches upon the inferences that might be drawn from acquiescence on the part of a servient owner when another uses his land with his knowledge but without his express agreement. In my respectful opinion, the trial judge erred by failing to recognize that absence of consent can be established by evidence of acquiescence or evidence sufficient to raise an

inference of acquiescence. This was an error of law which resulted in a palpable and overriding error of fact.

[31] The distinction between acquiescence and permission and the importance of acquiescence to a claim by prescription is described by *Gale on Easements* at p. 215 thus:

> The law draws a distinction between acquiescence by the owner on the one hand and licence or permission from the owner on the other hand. In some circumstances, the distinction may not matter but in the law of prescription, the distinction is fundamental. This is because user which is acquiesced in by the owner is "as of right"; acquiescence is the foundation of prescription. However, user which is with the licence or permission of the owner is not "as of right". Permission involves some positive act or acts on the part of the owner, whereas passive toleration is all that is required for acquiescence. The positive act or acts may take different forms. The grant of oral or written consent is the clearest and most obvious expression of permission. But there is no reason in principle why the grant of permission should be confined to such cases. Permission may also be inferred from the owner's acts. It may be that there will not be many cases where, in the absence of express oral or written permission, it will be possible to infer permission from an owner's positive acts. Most cases where nothing is said or written will properly be classified as cases of mere acquiescence. But there is no reason in principle why an implied permission may not defeat a claim to use "as of right". Such permission may only be inferred from overt and contemporaneous acts of the owner. (Emphasis added)

[32] As stated in *Gale on Easements* at p. 207, the element relating to whether the use was "as of right" ". . . requires one to look at the quality and character of the user and to ask whether the user is of a kind which would be enjoyed by a person having such a right."

[14] Oland J. writing on behalf of the court then addressed the question of whom, as between the claimant and the land owner carries the evidentiary burden of showing whether there was acquiescence or consent.

> [45] In my view, the judge also erred in another respect of his approach to the evidence about "permission." As the passage from *Gale* cited in § 35 makes clear, once there is proof of acquiescence in acts of user which are of such a character as to support a claim of right, the claimant has established that the acts were as of right unless the owner points to some "positive acts" on his or her part which either expressly or impliedly grant permission. Here, there was no evidence that the owner, at any time, took any positive steps to prevent the use in question or did anything else from which a grant of permission reasonably could be implied.

[15] At para. 51, the Court of Appeal further held the trial judge had erred in law by failing to recognize he could "*infer from use of lands to which an owner acquiesces that such use was 'as of right' and sufficient to support a claim of prescription*".

Acquiescence

[16] I have indicated that the applicant has met the burden of proving that he exercised open, notorious, continuous, peaceful and unimpeded use of the Barren Road for a period in excess of 20 years beginning in August of 1992 with notice of his ownership taken to be as of the date on which Mr. Miller's deed was registered, being September 17, 1992. I find that the owners of the Hartlen lands from the time of subdivision in 1992 until late in 2012 acquiesced in those acts of use, which acts included the applicant's maintenance of the Barren Road, and regular passage over the Hartlen lands, more particularly described above.

Consent or permission

[17] The respondents bear the burden of proving some "positive acts" on their part which either expressly or impliedly granted permission to the applicant for passage over the Hartlen lands. There is contradictory evidence on this point.

[18] In Exhibit 7 at paras. 2 and 3 of the affidavit of Laurie Hartlen, he swears:

> 2. That Laurie and Marjorie Hartlen purchased the property in 1996. There were no indications of right of way or easements.
>
> 3. I spoke to Mr. Wayne F. Miller shortly thereafter and indicated I had no problem with him travelling over an old logging road to his camp.

[19] Wayne Miller, in his affidavit entered as Exhibit 1, at paras. 35 and 36 contradicts this evidence. He states:

> 35. That from 1992, no one has ever challenged my right to travel and use the roadway in question, which I have done so unimpeded until the notification by the respondent verbally one day in the fall of 2012 and by letter dated December 5, 2012. That my family and my predecessors in title being Lloyd and Beatrice Townsend and Raymond Miller and their families and agents have used the Barren Road continuously, openly and notoriously for over 40 years unimpeded by anyone.

> 36. That my use and the use of my predecessors in title, of the Barren Road has been without specific permission by anyone, nor has any land owner making the use of the road requested specific permission from me to use it.

[20] Determining what weight to attribute to the evidence in reaching a conclusion in this case is accomplished by looking at the words allegedly spoken, the timing of the alleged statements and the context in which they arose. I have also had the opportunity to hear the evidence of Mr. Hartlen and Mr. Miller in person, although it is of limited value as each were on the stand relatively briefly and gave no additional evidence that I found helpful to assessing the question of "permission".

[21] Mr. Hartlen's affidavit, which was sworn for the purpose of responding to this application, asserts that "*There were no indications of right of way or easements*" when they purchased the property in 1996. It may be that he was referring to the lack of an express grant of easement on the title documents, which would be accurate. However, there was clear evidence of the use of the road in 1996 as described in the testimony of Mr. Miller, Mr. Salsman and as seen in the photographic evidence showing the existence of the road prior to 1996. At the very least, the Hartlens would have been alerted to the possibility of such a right of way as is claimed in this application. I conclude this aspect of Mr. Hartlen's evidence was selective and self-serving.

[22] Arguably, the words "… *spoke to Mr. Wayne F. Miller shortly thereafter and indicated I had no problem with him travelling over an old logging road to his camp*" could be seen as evidence of an intention to suggest that Mr. Miller's right of passage over the Hartlen lands was subject to permission of Mr. Hartlen.

[23] But for this alleged statement there is no evidence that the Hartlens carried out positive acts that expressly or impliedly granted permission from 1996 until late in 2012. There were many opportunities to have done so, but the respondents did not take such actions. They did not comment when Mr. Miller worked at maintaining the road, or when he passed over it for the many uses that he described in his affidavit, including travel associated with lumbering activities on the Miller lands.

[24] I am not satisfied that these words were spoken by Mr. Hartlen to Mr. Miller. Mr. Miller's evidence denies that "specific permission" was given him. I am confident that if Mr. Miller thought that there was any possibility of Mr. Hartlen asserting such control that he would both remember it and, as he did when

the issue did arise in 2012, take action to confirm his right. I accept his evidence in this regard.

[25] In addition, I find that the affidavit does not provide any context for the statement. Knowing the whole of the alleged conversation and the actual words spoken might increase its reliability. This is particularly so in relation to a statement allegedly made some 17 years before this application was presented. The passage of time alone brings into question what weight should be attached to it. Finally, the evidence must be seen in the context of only coming forward in 2013 when the dispute is engaged and it may be advanced to bolster the respondents' position.

[26] I infer that the question of a right of way was not in the minds of the parties until the Hartlens alerted to the issue in the context of securing their own right to pass over the Barren Road which appears to have been in or around 2010. In 2010 the respondents approached the applicant and his brother, Wendall Miller, to provide Statutory Declarations as to the use of the roadway over the years. Those Declarations were provided and have also been put before the court in this application. In his Declaration, the applicant provided much of the same information as to use that he did in the hearing of this application, with detail going back to the existence of the Perc Tool Mill on the Miller lands with a working camp, laborers staying on site, and forestry products being hauled over the Barren Road. That was over 60 years ago. Wendall Miller's Declaration was to similar effect.

[27] It is a curious proposition that the Hartlens advance. The respondents say that the applicant must fail because there is no right of way over their lands stipulated in his deed, nor otherwise burdening their land. Yet, there is no right of way over the Barren Road stipulated in their deed and they continue to use that road as of right over the lands of those who are between them and the Rimes Road.

[28] Further, in 2010 the respondents took steps that were clearly intended to establish their right to use the Barren Road relying upon the same evidence that they would now suggest is insufficient to support the applicant's claim to pass over the Barren Road once it reaches their property boundary. It is that event which leads me to believe that at some point they became alert to the issues regarding passage over another landowner's property.

[29] It was only in the late fall of 2012, when they advised the applicant of their intention to erect the gate, that they finally took positive steps to indicate that their

permission was required for the applicant to continue to cross over their lands using the Barren Road. To be clear, I find as a fact that did not occur until after September 17, 2012. As a result the applicant's use was acquiesced in for a period in excess of 20 years. I am not satisfied that there is sufficient evidence, that I accept, that there was an implied or express grant of permission or consent to the applicant to pass over the Hartlen lands.

[30] There are two other statements in evidence that I will address in this context. In Exhibit 8, at para. 1, Mr. Hartlen states in his affidavit that: *"It was never our intention to stop Mr. Wayne Miller from crossing over our lands."* I believe that was always the case. I do not find that it supports a conclusion that the Hartlens felt that they had a right to control the applicant's ability to cross their lands. It may be evidence that supports the opposite conclusion but it is unnecessary for me to resolve that question.

[31] In the applicant's supplemental affidavit, Exhibit 3, he states at para. 3:

> 3. The Respondent, Mr. Hartlen, advised me in 2010 and I do verily believe that he sought a statutory declaration from me as to the use of the Barren Road to ensure that he would not be impeded in travelling over the lands of other landowners whose land the road traverses now as set out in paragraph 14 of the applicant's affidavit. Mr. Hartlen advised in 2010, and I do verily believe it to be true, that he would not interfere with my use of the Barren Road/road leading to the Miller lands, being the lands of the applicant.

[32] While this language, coming from Mr. Miller, might suggest that Mr. Hartlen was providing permission to use the road, I am not prepared to conclude that was the effect. It is equally consistent with the conclusion that Mr. Hartlen was agreeing that he did not have a right to interfere with Mr. Miller's passage over the road.

[33] Mr. Hartlen was looking for assistance to guarantee his own right to travel the road. It was a live issue, and the mutual object of the parties was to ensure that there were no outstanding issues of right to pass over the Barren Road. It is clear that Mr. Miller did not believe that Mr. Hartlen was impliedly or expressly granting permission to travel over the Hartlen lands. Mr. Hartlen does not advance this comment as an example of a positive act of permission.

Conclusion as to Prescriptive Easement

[34] I find that the applicant has met the burden of establishing the existence of a prescriptive easement over the Barren Road as it crosses the Hartlen lands.

Implied Grant

[35] It is not necessary to consider whether there was an implied grant of easement arising from the subdivision of Raymond Miller's lands into the two lots that are the subject of this application.

Land Registration Act Compliance

[36] The respondents submit that even if a prescriptive easement is found, the applicant has not recorded it with the Land Registration Office in accordance with the provisions of the **Land Registration Act** S.N.S. 2001, c. 6, as amended and so it must fail.

[37] The relevant statutory provisions state:

> 73 (1) Notwithstanding anything contained in this Act, the following interests, whether or not recorded or registered, and no other interests, shall be enforced with priority over all other interests according to law:
>
> …
>
> (e) an easement or right of way that is being used and enjoyed;
>
> 74 (1) Except as provided by Section 75, no person may obtain an interest in any parcel registered pursuant to this Act by adverse possession or prescription unless the required period of adverse possession or prescription was completed before the parcel was first registered.
>
> (2) Any interest in a parcel acquired by adverse possession or prescription before the date the parcel is first registered pursuant to this Act is absolutely void against the registered owner of the parcel in which the interest is claimed ten years after the parcel is first registered pursuant to this Act, unless
>
> (a) an order of the court confirming the interest;
>
> ….
>
> 75 (1) The owner of an adjacent parcel may acquire an interest in part of a parcel by adverse possession or prescription after the parcel is first registered pursuant to this Act, if that part does not exceed twenty per cent of the area of the parcel in which the interest is acquired.

> …
>
> (2) For the purpose of this Section, adverse possession and prescription include time both before and after the coming into force of this Act.

[38] I have concluded that the easement by prescription was acquired in September 2012. The evidence is that the properties were migrated into the land registration system in 2010. On the face of it section 74(1) bars the creation of an easement in these circumstances. Section 75(1) provides an exception by permitting the creation of the easement over the Barren Road if the area of the easement does not exceed twenty per cent of the Hartlen lands.

[39] In considering this question, it would have been preferable to have specific evidence that addressed the area of the Hartlen lands, and the area of the Barren Road where it passes over the Hartlen lands. To resolve this question, I have relied upon the deeds, aerial photos and in particular the metes and bounds of the Hartlen lands as marked on Exhibit 6, introduced into evidence by the respondents, which I have compared with the aerial views in Exhibit 3. It is readily apparent that the easement over the Hartlen lands is less than twenty per cent of those lands. Therefore I conclude that the easement is not barred by the **Land Registration Act** provisions.

Scope of the Easement

[40] I have found that the plaintiff has met the requirements of establishing a prescriptive right-of-way over the Barren Road as it passes over the Hartlen lands. I will address the permitted scope of use of this easement.

[41] Having found that an easement exists, the question arises as to whether the gate creates a substantial interference with the applicant's intended use and enjoyment of the easement.

[42] Mr. Miller's evidence is that he uses the Barren Road to access his woodland property where he has a camp and outbuildings. Until the last two years prior to the hearing he used it year around as much as three days per week and more in hunting and fishing seasons. Since the installation of the gate he has used the property far less frequently and uses a small trail as described above.

[43] The applicant testified that at an unspecified time after 1992 he cut and sold hardwood, logs and pulpwood. The equipment and vehicles used to transport these vehicles, equipment and wood products were all transported over this road. Mr.

Miller says that having to open and shut the gate each time that he accesses the property would be an inconvenience that is inconsistent with his historical access and that the gate should be ordered removed. I accept this evidence.

[44] The road has also been used by Mr. Miller's invitees. His ability to offer unimpeded passage to his invitees is also an historical usage which the existence of the gate impedes, putting an onus on Mr. Miller to either provide a key for the gate to his visitors, or arrange to meet them to allow them entry. This is a burden that is inconsistent with the scope of the easement and represents a significant change to the easement.

[45] The gate was installed over the objection of the applicant. It has changed the character of the user. It will need to be removed and I so order.

Survey and Registration

[46] A survey of the metes and bounds of the Barren Road as it crosses the Hartlen lands is to be prepared and recorded pursuant to the **Land Registration Act**.

[47] The granting of the easement is to the benefit of the applicant. The applicant will therefore bear the cost of preparing that description and having it registered. The respondents are to cooperate with the applicant or his delegates for the purpose of accomplishing this.

Public Access and Security

[48] What underlies this entire dispute is that the respondents were subject to break-ins to buildings on their lands. Mr. Hartlen's evidence is that the gate was intended to deter such incidents. It is interesting to note that the applicant has a chain at his boundary with the Hartlens' lands but objects to the Hartlens having a similar restriction on access at their boundary.

[49] I have not been asked to and so I am not prepared to order a prescriptive easement for access by the general public. The easement is restricted to use by Mr. Miller and his invitees in a manner consistent with historical use.

[50] I urge Mr. Miller to re-consider his position with respect to permitting some means by which the respondents can add security to their property.

Maintenance

[51] The terms for maintenance of the easement are:

> 1. Ongoing maintenance of the easement is to be paid for equally by the owners of the Hartlen and the Miller lands.
>
> 2. Maintenance is limited to keeping the road in its present condition, unless the parties agree otherwise.
>
> 3. The evidence is that Mr. Miller has performed ongoing maintenance of the road in the past. He is free to continue to do so. If he seeks compensation from the respondents for performing this work, he is required to obtain their consent to do the work, in advance; to agree , in advance, on value for that work; and then the respondents will pay to him one half of that value on completion of the work.
>
> 4. If there is no agreement for Mr. Miller to perform the work, then it will need to be carried out by an arm's length third party chosen by the respondents.
>
> 5. If either party uses the road in such a manner that causes more than ordinary wear and tear caused by the passage of passenger vehicles then the party responsible for that damage will be solely responsible to pay to return the road to its previous condition. For example, if either party uses the road for logging activities and the related use of the road causes damage, then the party responsible pays the costs for that damage to be repaired.

Conclusion

[52] The application is granted. I find that the applicant has an easement by prescription over the respondents' lands, the area of the easement limited to the Barren Road, so-called.

[53] I further conclude that the creation of the easement is not barred by the provisions of the **Land Registration Act**.

[54] I direct that the respondents remove the gate, and refrain from taking any actions to alter the passage of the applicant over the Barren Road.

[55] Conditions for maintenance of the easement are described herein.

Order

[56] I direct that counsel for the applicant draft the Order. If there are issues that emanate from this decision with respect to the use of the easement, and which I have not addressed the parties may apply to return the matter to court before me for clarification and such other orders as may be necessary to give effect to this decision.

[57] If the parties are unable to agree as to costs, I will receive their written submissions on a schedule to be proposed by them. If they cannot agree on written submissions then they may contact my office to schedule a hearing to determine costs.

Duncan, J.