Exhibit "A"

Winnipeg

Planning, Property & Development Department • Service de l'urbanisme, des biens et de l'aménagement

Real Estate Division • Division des biens immobiliers

In reply please refer to / Référence à rappeler :

Barry Lucyk
(204) 986-3241
Fax / Téléc. : (204) 944-8476

October 15, 2015

Mr. Leo Pelland
843 Tache Avenue
Winnipeg, Manitoba
R2H 2C1

Dear Mr. Pelland:

RE: INQUIRY FOR LANE IMPROVEMENT/LANE LIGHTING AT REAR OF 843 TACHE
FILE (PLEASE QUOTE WHEN REPLYING)

Your telephone inquiry dated October 9, 2015, to the Mayor's office, regarding the possible installation of back lane and lighting has been referred to the Real Estate Division for response.

Public Works Department advises that there are no plans to install a back lane w/ lighting behind your property at 843 Tache Avenue.

As registered owner of 843 Tache Avenue (legally described as SP Lot 16 Plan 29652 WLTO together with the right of way for all purposes and as appurtenant to said Lot 16 over and upon SP Lot 15 as shown on said Plan in RL 76 Parish of St Boniface), the legal description states that the owner of Lot 16 has the right to cross Lot 15 in order to access Lot 16.

As the property owner you have the right of way over the City-owned Lot 15 Plan 29652 for access purposes to lot 16. The right of access remains embedded in the title even after Lot 15 Plan 29652 is sold and nothing changes with respect to the Lot 16 property owner's rights for access. It may be beneficial for you to hire a Manitoba Land Surveyor to stake your property and the area with the right of access.

According to the attached Misc. Plan No. 14966 with an aerial view of the property, it appears that Lot 15 Plan 29652 (which is City owned and not a public lane) is improved with a shed, fencing and landscaping. The right of access does not allow for these improvements. The right of way holder does not have the right to improve the land (no gravel, pavement, or other improvements). The right of way holder has the non-exclusive right to unimpeded access over and upon the land.

Lot 15 Plan 29652 (City owned) must remain unobstructed at all times, as the registered owner of 839 Tache also has a right of way over and upon Lots 15, 14, 13 Plan 29652 for access purposes to their lot.

Therefore, the City asks that you remove all improvements on said Lot 15.

Yours truly,

Barry Lucyk
Supervisor of Sales and Acquisitions
RE Division, Planning, Property and Development Department

Cc: MYO by ecopy
M. Gaudio, e copy
H. Pheifer – e copy
R. Dubeau – e copy
R. Hamilton – ecopy
C. Wong e copy
M. Pittet – e copy

document1

Exhibit "B"

Taylor McCaffrey LLP
Barristers & Solicitors

TO: **David King**

FROM: **Colin Findlay**

DATE: **September 9, 2016**

RE: **Leo Pelland - Right of Way Dispute**

You have asked me to research our client's rights with respect to a right of way for which the encumbered land is proposed to be developed for a residential condominium complex and will likely affect his right of way rights.

Issue

1) What specific rights arise out of a right of way "for all purposes"?

2) Does our client have a prescriptive easement over the encumbered land?

Facts

Our client's property backs onto land owned by the City of Winnipeg (the "City"), which is proposed to be developed. The title to the City's property is "subject to a right of way for all purposes" in favour of our client's lot. The client typically used this right of way to access his property, however, he also built a shed that encroaches on the way. The City wrote to the client in October 2015 asking him to remove the shed, but the client has ignored such request.

As per my phone conversation with the client, the shed was built over 27 years ago without the City's permission nor objection. His neighbour, who shares the same right of way and has a shed encroaching on the way, built her shed over 60 years ago. The client claims that the City knew that the sheds encroached on their land evidenced by the fact that the City was supposed to pave a back lane, but said they won't be able to pave the way so long as the two sheds remain where they are. At no point before the letter of October 2015 did the City object to the sheds' locations.

Law

I have found no authority which states that a right of way allows the owner of the dominant tenement to build a structure on the way. However, the dominant tenement does have numerous other rights. According to *Gale on Easements*, in the event that the way is obstructed in some way, the owner of the dominant tenement may exercise his right of abatement to remove the obstruction.[1] Further, the dominant owner also has a right to deviate, meaning that if an obstruction is not easy to remove, the dominant owner may "deviate into the adjoining land in order to connect the two parts of the way on each side of the obstacle."[2] However, there must first

[1] *Gale on Easements* p. 357
[2] *Ibid* p. 286.

be a "substantial" obstruction, otherwise there is no cause of action.[3] With respect to what constitutes a substantial obstruction, the courts have held certain acts by the servient owner to be an actionable obstruction, such as building on the way[4] or ploughing up the way.[5] Therefore, while the client may not have been entitled to build on the way, he will have a remedy in the event the proposed development substantially obstructs his existing right of way.

With respect to the City's request for our client to remove his shed from the right of way, provided the client's recollection of the situation is correct, it is my opinion that he would have a prescriptive easement over the land and would therefore be entitled to leave his shed where it stands. According to *Capar v. Wasylowski*[6], if the following necessary elements are made out for a period of greater than 20 years, then a prescriptive easement exists:

(a) the doing of some act by one man (the dominant tenement) upon the land of another (the servient tenement);

(b) the absence of the right to do that act;

(c) the knowledge of the person affected by it that the act is being done;

(d) the ability of the person affected by the act to prevent it either on his own or by the courts; and,

(e) the abstinence by him from any such interference for such a length of time as renders it reasonable for the court to say that he shall not afterwards interfere to stop the act being done.

Assuming our client is correct with respect to the facts, all of the above elements are made out. He built on the City's land over 20 years ago; he did not have the right to build on the land; the City know about his building on their land; the City could have had the shed removed much before the October 2015 letter; and the City did not have the shed removed. Therefore, it is my opinion that the client will not be required to have the shed removed from the way.

Conclusion

Given that the client has both à right of way over the land at issue as well as a prescriptive easement over the land on which his shed stands, it is my opinion that the client is in a position of strength. The developer will not be allowed to either obstruct the right of way nor remove the shed, and if they do, the client will have a cause of action against the developer provided he can prove damages. If costs permit, he may want to apply to the Court for an injunction to prevent the developer from ploughing up the right of way or doing any other act that would adversely affect his rights.

cbf

---

[3] *V.T. Engineering Ltd. v. Richard Barland & Co. Ltd.*, (1968) 19 P & CR 890.
[4] *Lane v. Capsey*, [1891] 3 Ch 411.
[5] *Nicol v. Beaumont*, (1883) 50 LT 112.
[6] *Capar v. Wasylowski* (1983), 146 DLR (3d) 193 (ManQB).

Exhibit "C"

MILLS & REEVE

The purpose of a right of way

March 2010

What do the words mean?

One of the most frequent legal questions that arises when deciding whether a piece of land can be developed is whether the rights of way to it will be sufficient to allow construction and then use of the development. The problem is often that the title documents do not show any right of way and the developer will have to rely on implied rights or evidence of long use ("prescription").

But even if the registered title or deeds do contain express rights of way, what do the words mean and will they allow the rights to be used for the development?

"...the case is an indication that the courts will not impose restrictions on rights of way which, taken in their context, are not contained in the document."

What was intended in a conveyance, transfer or other document which includes the grant of a right of way will be interpreted like any other contract. What the parties actually thought when they entered into it does not matter. Their "intention" is to be interpreted only from the words of the document as a whole and against the background circumstances which would have been known at the time. This also means that any decided court case depends on its own facts – that particular document and those particular circumstances – and may not apply to another case.

Cases will provide guidance, though, and a recent case shows the court avoiding too restrictive an interpretation of an express right of way.

Davill v Pull

Mr Davill owned three plots of land off Bunny Lane, Keyworth, Nottinghamshire on which he had intended and started to build three houses. The plots were approached from the south up a track which crossed other similar plots owned by Mr Pull and Ms Sanderson who also had rights of way to their plots.

The rights had been granted when terraced cottages had been conveyed, each with its own separate plot, described as a "*piece of garden ground*". These plots had evidently been intended at the time (1919-21) as an extra amenity for each cottage in addition to its coalhouse and earth closet, and rights to a communal well and drying area.

The right of way to the plots was described as a right "to use for all reasonable and usual purposes". One might have thought that description of the right was wide enough.

But, argued Mr Pull and Ms Sanderson, that meant all reasonable and usual purposes for use of the plots as "garden ground", not for Mr Davill's intended residential or development use and they persuaded the judge at first instance to agree. (This was in spite of the fact they

were, apparently, using their own plots for stabling horses; while this might be "somewhat curmudgeonly", the court said it was only "concerned with rights, not attitudes".)

So, with one house already completed, Mr Davill went to the Court of Appeal who found in his favour. There was no issue, in this case, that the use for houses would be "excessive". The fact that, in 1919, the expectation may have been that the owners of the cottages would use their plots as gardens or possibly allotments ancillary to the cottages was not relevant; there was no such restriction in the document. The words "all reasonable and usual purposes" did not limit the use of the way to that extent.

If the phrase had been for "all...purposes", there would have been no limitation. While adding the words "reasonable and usual" introduced some qualification they did not relate to any particular use of the plot. The reference to the plot in the original conveyance as "garden ground" was descriptive only and it included no restriction to such a use. Provided the use of the plot from time to time was "reasonable and usual", the right of way would support it. The building and use for houses in accordance with planning permission would be "reasonable and usual".

A case on its own facts, no doubt, but it is an indication that the courts will not impose restrictions on rights of way which, taken in their context, are not contained in the document.

Mr Davill is probably now completing his development though, as the case started at the end of 2006, he might have missed the top of the market. If, as the judgment suggests, the conveyances are the same, Mr Pull and Ms Sanderson could take comfort that, when they have done with them for horses, the track should be able to be used for any "reasonable and usual" development on their own plots.

Davill v Pull & another [2009] EWCA Civ 1309

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Exhibit "D"

The Law Dictionary

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Navigation

Search...

What is PERPETUAL EASEMENT?

term given to the right of a non-owner to use the adjoining land for right of way forever.

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Related Legal Terms

QUASI EASEMENT, INTERMITTENT EASEMENT See EASEMENT INTERMIXTURE OF GOODS, PERPETUAL FRANCHISE, EASEMENT, PERPETUAL SUCCESSION, EASEMENT APPURTENANT, LEGAL EASEMENT, PERPETUAL, EQUITABLE EASEMENT, PUBLIC EASEMENT

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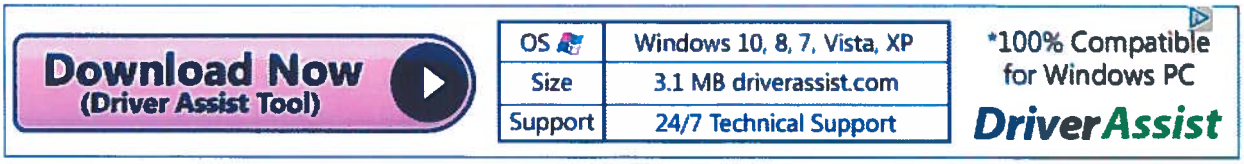

Exhibit "E"

CanLII

Fort Garry Care Centre ltd. v. Hospitality Corporation of Manitoba inc., 1997 CanLII 3523 (MB CA)

Date: 1997-12-16
Docket: AI97-30-03247
Other citations: [1998] 4 WWR 688; [1997] MJ No 650 (QL); 123 Man R (2d) 241
Citation: Fort Garry Care Centre ltd. v. Hospitality Corporation of Manitoba inc., 1997 CanLII 3523 (MB CA), <http://canlii.ca/t/1flkf>, retrieved on 2016-09-01

Suit No. AI 97-30-03247

IN THE COURT OF APPEAL OF MANITOBA
Coram: Huband, Lyon and Helper JJ.A.

B E T W E E N:

FORT GARRY CARE CENTR E LTD.	)	**J. M. Scurfield, Q.C.** and
	)	**R. M. Swystun**
(Plaintiff) Respondent	)	for the Appellant
	)	
	)	**D. N. Abra, Q.C.** and
- and -	)	**S. M. Walsh**
	)	for the Respondent
	)	
HOSPITALITY CORPORATIO N OF MANITOBA INC.	)	Appeal heard:
	)	**November 26, 1997**
	)	
(Defendant) Appellant	)	Judgment delivered:
	)	**December 16, 1997**

HUBAND J.A.

Neighbours, albeit corporate neighbours, who own and operate businesses from adjacent properties and who functioned amiably for a substantial number of years, are now at odds. The plaintiff, Fort Garry Care Centre Ltd. (the nursing home), is a private nursing home and has sued the defendant, Hospitality Corporation of Manitoba Inc. (the motor inn), seeking an order terminating certain right of way privileges which are set forth in the certificates of title to the properties, the effect of which would be to bar access to customers of the motor inn to a parking lot on the north side of the motor inn building. The trial judge granted the order, and the motor inn has appealed.

The properties in question form part of River Lot 18, as shown on a Special Survey registered in the Winnipeg Land Titles Office, in Plan No. 3219. The river lot in question is located in the Fort Garry area of metropolitan Winnipeg. The river lot extends in a westerly direction from the Red River at the eastern end for a distance of about one and a half miles. The lot is bisected by a railway line and by Pembina Highway, both of which run in a general north/south direction.

By 1946, that portion of the river lot lying to the east of Pembina Highway was divided into three parcels, with separate ownership. The total property with which this appeal is concerned had a configuration as shown in the following sketch:

(Sketch also shows general location of buildings as of trial date.)

In 1946, the three owners agreed with one another that each should have a right of way six feet in width on the other's property, the rights of way extending in an easterly direction from Pembina Highway to

the Red River along the boundary line where the northerly parcel of land is adjacent to the two southerly parcels.

The rights of way were reflected in the certificates of title which were issued to each of the owners. The legal description of the northerly parcel consisted of a description of that land, "together with a right of way for all purposes and as appurtenant" to the southerly parcels of land, and "subject to a right of way for all purposes and as appurtenant" to the southerly parcels. The legal descriptions of the southerly parcels contained similarly worded clauses.

The respective rights of way were six feet in perpendicular width, which, in practical terms, means that the combined width became twelve feet.

In April of 1965, the nursing home became the owner of the northerly parcel of land, and shortly thereafter a nursing home was constructed on the property.

In January of 1972, the Norlander Inn became the owner of the southwest parcel, and shortly thereafter a motor inn was constructed on that property. In 1978, that property was transferred to Ledohowski Motel Company Ltd. When that company changed its name to Hospitality Corporation of Manitoba Inc., a new title was issued in that name, but effectively it has been the Ledohowski property since 1978.

From 1978 through to 1987, Carlyle Conquist was a major shareholder and chief administrator of the nursing home, while Leo Ledohowski was a major shareholder and general manager of the motor inn. Both testified at trial, and their evidence was that they enjoyed a friendly relationship.

In 1982, Leo Ledohowski developed plans to expand the motor inn building by enlarging the beverage room area. He wanted to extend it in a northerly direction, up to a matter of inches from the northerly limit of the motor inn property. The effect would be an almost total encroachment upon the six-foot right of way enjoyed not only by the nursing home, but also by the owner of the southeast parcel.

Mr. Ledohowski required a zoning variation before a building permit would be issued, and the civic authorities directed that the

respective rights of way would have to be surrendered. Instead, taking a simpler course, Mr. Ledohowski purchased the southeast parcel of land, thus answering any objection that the owner of that parcel would become land-locked by the blockage of the right of way caused by the extension of the beverage room. In addition, Mr. Ledohowski approached Mr. Conquist and obtained the consent of the nursing home to the proposed development. The authorities responsible for building permits were thus satisfied and granted a permit without the necessity of amending titles. The written consent of the nursing home indicates that, while there is no objection to the proposed extension of the beverage room, it was important that a passage way remain between the motor inn and the nursing home structures sufficiently wide for the passage of emergency vehicles.

Although Mr. Conquist has sold his shares and is no longer the administrator of the nursing home, the ownership of the north parcel of land remains with the same corporate entity. It is no surprise, therefore, that the trial judge held the nursing home cannot now complain about the extension of the beverage room onto that portion of the motor inn's property covered by the nursing home's right of way. In its pleadings, as alternative remedies, the nursing home sought the removal of the structure from the right of way area and damages or rent for the interference with the right of way. The trial judge was fully justified in holding that the nursing home is estopped from complaining about that to which it had freely consented. The nursing home does not now contest that ruling.

The sale of shares and the change in the administration of the nursing home took place in 1987, and very quickly differences developed between the neighbours, focusing on the rights of way. It should be noted that, as the buildings are now situated on the properties, the nursing home makes no effective use of the rights of way. The vehicular access to the nursing home building is towards the north portion of its property. The nursing home has plans to build a new structure on its property, further to the east. While it would be open to the nursing home to use the right of way, it has no plans to do so. While it is true that the beverage room extension effectively bars usage of the right of way over the motor inn property for a distance the width of the beverage room, sufficient space remains to circumvent the beverage room structure if the nursing home were to use its own property as the means of access around the beverage room structure. That is something that would not be open to the motor

inn or its patrons without trespassing onto the nursing home property beyond the six-foot right of way, assuming vehicles of normal width.

Concerning the motor inn, the main area of ingress is to the south of its building to a parking lot located to the east of the building. However, there are parking spaces which abut the north portion of the building for a distance from near Pembina Highway back to the area where the extension of the beverage room blocks the right of way over the motor inn property. Access to these parking spaces is the crux of the dispute between the parties. Without the additional width of the right of way over the nursing home property, there would not be sufficient room to permit the perpendicular parking of vehicles adjacent to the north side of the motor inn. Those parking spaces may not be a necessity, but they certainly are a convenience to patrons of the motor inn occupying rooms on the north side of the building.

Both at trial and on appeal, counsel for the nursing home argued that the motor inn had effectively blocked its own use of the rights of way eastward from the area of the beverage room extension. What remains of the rights of way serves the purposes of the motor inn only and, therefore, on the basis of what is reasonable and fair, the right of way interests should be excised from all the certificates of title.

The learned trial judge accepted the argument and purported to make an order under the authority of s. 176(1) of *The Real Property Act*, R.S.M. 1988, c. R30 (the *Act*), which reads as follows:

> **Orders by judge**
> **176(1)** In a proceeding respecting land, or in respect of a transaction or contract relating thereto, or in respect of an instrument, caveat, memorial, or other entry affecting land, the court may, by order, direct the district registrar to cancel, correct, substitute, or issue, a certificate of title, or make an endorsement or entry on any instrument, or to do or refrain from doing any act, or make or refrain from making any entry necessary to give effect to the judgment, or order of the court.

On appeal, counsel for the motor inn contend that it was unreasonable and unfair to extinguish the rights of way, and they should be restored. It was also argued that s. 176(1) does not confer a jurisdiction on the trial judge to order changes in the certificates of title on the basis of the court's perception of what is reasonable or fair.

I agree with both of these positions.

Since the second argument is determinative of the action, I need not linger long over the first argument. The trial judge proceeded on the basis that he enjoyed discretionary powers as may exist in some jurisdictions which do not have a Torrens system. A right of way can be created by prescription or agreement, and, in the latter case, the original intentions of the parties as to the scope and duration of the right of way are to be determined by an interpretation of the agreement, including consideration of the surrounding circumstances at the time of the agreement. In the present case, there is no written agreement. The respective rights of way were simply incorporated as part of the description of the land in each of the certificates of title. There is nothing to indicate that the parties intended mutuality of use of the rights of way. Yet the purported extinguishment was ordered on the basis that it was unfair that one party should enjoy a benefit from the rights of way while the other did not. Even if the court had the kind of jurisdiction which the trial judge believed he enjoyed, this would not be a case for ordering the rights of way to be extinguished.

In Manitoba, however, the jurisdiction of the court is circumscribed. The *Act* emphasizes the significance of the certificate of title under the Torrens land registration system. Section 59(1) states that, subject to fraud and specific reservations which have no application in the present case, the certificate of title is conclusive evidence at law and in equity that the registered owner is entitled to the land described therein for the estate or interest therein specified.

Section 76(4) states that where land is subject to a right of way agreement, the agreement shall be deemed to run with the land. Hence, a person should be in a position to purchase land described in a certificate of title confident that the interest which he is purchasing will not evaporate. That concept is reinforced by s. 80, which indicates that a person contracting with a registered owner (purchasing, for example) is not required to inquire or ascertain the circumstances under which the owner came to be registered. A purchaser should not need to be concerned with whether rights of way, of the kind involved in this case, shown as they are in the land description in the certificate of title, provided mutual benefits or whether they were used exclusively by one party.

Section 62(1) states that no action for ejectment or other action for the recovery of land shall be sustained against the registered owner for the estate or interest in respect of which he is so registered. This provision is subject to exceptions, but they have no application in the present case. The present action is one for declaratory relief, rather than ejectment, but the impact of the declaration is to enable the nursing home to recover for its exclusive use that portion of its land which is subject to a right of way which was voluntarily ceded to the owners of the south parcels of land by a predecessor in title.

The full text of ss. 59(1), 76(4), 80, and 62(1) of the *Act* are attached to these reasons as Appendix "A".

The spirit of the legislation in its totality is to discourage a legal attack which would call into question what is shown on the certificate of title, except on the basis of fraud or the rectification of a mistake. I find support for that conclusion in a case decided by the Supreme Court of Canada, ***Union Bank of Canada v. Phillips and Boulter Waugh Limited*** (1919), 58 S.C.R. 385, where the Court had occasion to consider the Torrens system of land registration in Saskatchewan. The dispute involved an interpretation of the equivalent of the present s. 80 of Manitoba's *The Real Property Act*. In brief, a company, Boulter Waugh Limited, had an equitable interest in land which pre-dated a mortgage on the same property held by the Union Bank. The bank had prior knowledge of the equitable interest, but the equitable interest was not protected by the registration of a caveat, the caveat having lapsed. The mortgage, of course, was registered as an encumbrance upon the title. In equity, the mortgage would have been subject to the prior equitable interest, but under the land registration system in Saskatchewan, the content of the register was the sole consideration. Chief Justice Davies made specific reference to a New Zealand case, where a similar land registration system is in place, at pp. 387-88:

> I think the object and purpose of such statutes as the one here was very well stated by Edwards J. in delivering the judgment of the Court of Appeal in New Zealand in *Fels v. Knowles* [(1906), 26 N.Z. L.R. 604, at p. 620]:
>
> > The object of the Act was to contain within its four corners a complete system which any intelligent man could understand,

> and which could be carried into effect in practice without the intervention of persons skilled in the law. .... The cardinal principle of the statute is that the register is everything and that, except in cases of actual fraud on the part of the person dealing with the registered proprietor, such person, upon registration of the title under which he takes from the registered proprietor, has an indefeasible title against all the world. Nothing can be registered the registration of which is not expressly authorized by the statute. Everything which can be registered gives, in the absence of fraud, an indefeasible title to the estate or interest, or in the cases in which registration of a right is authorized, as in the case of easements or incorporeal rights, to the right registered.

And later, on pp. 388-89:

> This raises a clear cut issue whether the old rules of equity which section 194 was supposed to do away with still prevail and will be given effect to notwithstanding the section or whether the plain words of the section itself, which practically makes the register everything, shall prevail.
>
> I have no hesitation myself, apart from cases of fraud, in reaching the latter conclusion and that the plaintiff, whether by mistake or negligence, having allowed its caveat to be vacated, cannot invoke the old rule of notice and knowledge to maintain its priority of claim over that of the bank.
>
> Such rule has, in my judgment, been expressly abrogated by this section 194, in all cases coming within its ambit and the register alone made the sole test always of course excepting, as the section does, cases of fraud.

It is in the context of the *Act* taken in its totality and the inviolability of the register that s. 176(1) must be placed.

When *The Real Property Act* was first introduced into Manitoba, it contained a provision, s. 128, which was worded almost the same as the present s. 176(1). The provision appears in a part of the *Act* under the general heading "Jurisdiction of the Court." The first section under that heading deals with appeals from decisions, directions, or orders of a district registrar, and goes on to indicate that a dissatisfied party may appeal by way of a petition to a judge in chambers. Section

124 enables the district registrar to bring an issue before the court for its opinion by way of a stated case. Section 125 seems to be of the same general import. Section 126 authorizes the district registrar to summon a person to appear before him when the district registrar is satisfied that a certificate or other instrument has been issued in error. If the individual is disobedient to the summons, the district registrar may repair to the court, and a warrant of apprehension may be issued. Section 127 indicates that when the apprehended person is brought before the court, a judge may examine the person on oath and, where appropriate, order the person to deliver up the certificate of title or other instrument. Then comes s. 128, which, like our present s. 176(1), states that:

> **128.** In any proceeding respecting land, or in respect of any transaction or contract relating thereto, or in respect of any instrument, *caveat*, memorial, or other entry affecting land, it shall be lawful for a Judge in Chambers, by decree or order, to direct the District Registrar to cancel, correct, substitute or issue any certificate of title, or make any memorial or entry in the Register, or otherwise to do every such act and make every such entry as may be necessary to give effect to the judgment, decree or order of the Court: ....
>
> [Two further clauses have been omitted from the quotation]

In the consolidated statutes of 1902, and again in 1913, the equivalent of our present s. 176(1) is found in a portion of the *Act* under the heading "Powers and Duties of District Registrars." There are some wording changes to some of the sections, but the substance remains the same as the 1892 statute.

In 1912, the first edition of *The Canadian Torrens System*, by Douglas J. Thom, was published. The author comments on the powers of the district registrar to rectify errors and seems to view the involvement of the court under the equivalent of our present s. 176(1) as an appeal from a decision of the district registrar or as a jurisdiction ancillary to the powers of the district registrar. The author notes that the summons issued by a district registrar may be avoided or evaded, and thus it may be necessary to fall back on the authority of the court to make the appropriate orders. At p. 201, this passage appears:

> Aside from this statutory proceeding for correction of the register, which, while on its face is very wide, in practice, owing to the rule of construction quoted, is of little value except in uncontested cases, and easily balked, the ordinary remedy for recovery of the land is by

> ordinary action, based on one or more of the cases set out in this chapter, the action being for rectification of the register, and if desired in addition, possession of the land. In such action the judge may by decree or order
>
> > "direct the registrar to cancel, correct, substitute or issue any certificate of title or make any indorsement or entry on any instrument or otherwise to do every such act and make every such entry as may be necessary to give effect to the judgment, decree or order of the court."
>
> The registrar need not be a party to the action, thereby differing from the Australian practice, where it is customary to correct the register by ordering the parties on the register to execute the necessary transfers, or, if not, the registrar must be a party.

The present *Act* still contains provisions allowing the district registrar to correct errors in the register (s. 23(1)). The district registrar may summons a person to produce a certificate of title or other instrument (s. 24(1)), and may seek a warrant of apprehension if the summons is disobeyed (s. 24(2)). The court still has the jurisdiction to examine a person on oath and order that the certificate or other instrument be surrendered for cancellation or correction by the district registrar (s. 24 (3)). However, instead of following immediately thereafter, s. 176(1) now appears in a different portion of the statute.

Nevertheless, in his text, *Registration of Title to Land* (1st ed. 1987), by Victor Di Castri, Q.C., the author continues to see s. 176(1) of the Manitoba *Act* as authorizing rectification of the register to cure a mistake or remedy a fraud. In vol. 2, at p. 17-57, it is written:

> **[774]** The majority of Acts provide that in any proceeding respecting (a) land, (b) any transaction or contract relating thereto, or (c) any instrument, caveat, memorandum or entry affecting the same, the judge may direct the registrar to cancel, correct, substitute or issue any duplicate certificate or make any memorandum or entry thereon or on the certificate of title and otherwise to do every act necessary to give effect to the decree or order. Extensive and significant as these provisions may be, it is submitted that the doctrine of indefeasibility of title controls the exercise of the court's powers.

Even if the wording of s. 176(1) is given a broader interpretation, it must be readily apparent that it does not contemplate

what occurred in the present case, where, absent fraud or a mistake, the court is simply asked to readjust the interests shown in the respective certificates of title. Section 176(1) does not itself create a cause of action. Short of mistake or fraud, it does not authorize the court to conclude that a right of way for all purposes should now have limited purposes or, indeed, should not exist at all.

The Province of British Columbia, unlike Alberta and Saskatchewan, has no legislative provision comparable to s. 176(1) of the Manitoba *Act*. In British Columbia, where the land registration system has been described as a system peculiar to itself, the legislature has given the courts of that province specific judicial authority somewhat similar to that enjoyed by the courts in a non-Torrens system jurisdiction. Section 35 of the *Property Law Act*, R.S.B.C. 1996, c. 377, gives the court the power to modify or cancel an easement, a land use contract, a statutory right of way, a restrictive covenant burdening the land, or a *profit à prendre*. The court must be satisfied that circumstances have so altered as to make the registered interest obsolete, or that the reasonable use of the land will otherwise be impeded, or that the parties have expressly or impliedly agreed to the modification or cancellation, or that the modification or cancellation will not injure the person entitled to the benefit of the registered interest. It is worthy of note that, even under these provisions, a court would not seem to have the authority to cancel the rights of way in the present case. Yet it is the kind of specific authority which is missing from the Manitoba *Act*, even on the broadest reading of s. 176(1).

This is not the first time that a provision which appears to have a broad reach is circumscribed. In ***Draco Development Ltd. v. Whiteway*** (1989), 60 Man.R. (2d) 45, this Court had occasion to consider the authority of The Municipal Board of Manitoba (the Board) to readjust ownership of land following a replotting of land under the terms of Part IV of *The Municipal Board Act*, R.S.M. 1987, c. M240. Readjustments may properly be ordered to correct errors in surveys or shifts in natural boundaries. But in the ***Draco Development*** case, the Board purported to use its broad powers to readjust ownership in order to cancel a right of way which was an inconvenience to the developer of a housing subdivision. The Court concluded, at pp. 46-47, that the ostensible powers of the Board were, in fact, limited:

In my opinion, the Draco application is an invitation to the Municipal Board to exercise powers outside the statute, and therefore beyond the jurisdiction of the Board. It would constitute the forced taking of an interest in land owned by Jona Margaret Whiteway, albeit with compensation to be determined, but contrary to the wishes of Jona Margaret Whiteway.

If this is to be accomplished, it should be done not by the Municipal Board but by an expropriating authority. Section 147(3) of the **City of Winnipeg Act**, S.M. 1971, c. 105, specifically empowers the City to acquire an interest in lands by expropriation or otherwise, "for the purpose of assisting in the assembly of land" for various purposes, including residential development.

I would allow the appeal and rule that the Municipal Board does not have the authority to accommodate the request of Draco Development Ltd., to eliminate the interest in land owned by Jona Margaret Whiteway in the manner suggested.

In its pleadings, the nursing home seeks an order extinguishing the rights of way on three certificates of title, but without an appropriate foundation for making the order, as in the ***Draco Development*** case, the court does not have the jurisdiction to grant the order. The indefeasibility of title restrains the exercise of the court's powers. The appeal is therefore allowed and the order set aside, with costs.

_____ J.A.

I agree: _____ J.A.

I agree: _____ J.A.

APPENDIX "A"

Conclusive evidence

59(1) Every certificate of title, so long as it remains in force and uncancelled, is conclusive evidence at law and in equity, as against Her Majesty and all persons, that the person named in the certificate is entitled to the land described therein for the estate or interest therein specified, subject, however, to

the right of any person to show that the land is subject to any of the exceptions or reservations mentioned in section 58, or to show fraud wherein the registered owner, mortgagee, or encumbrancer, has participated or colluded and as against the registered owner, mortgagee, or encumbrancer; but the onus of proving that the certificate is so subject, or of proving the fraud, is upon the person who alleges it.

Party wall, right of way, and easement agreements

76(4) Where land under this Act is subject to, or has as appurtenant thereto, or enjoyed therewith, any rights, privileges, or easements, under a party wall agreement, a right of way agreement or easement agreement, whether the agreement was registered before or after the land was brought under this Act, those rights, privileges, or easements, and all covenants relating thereto, shall be deemed to run with the land; and an instrument affecting the land registered under this Act shall, without special mention thereof in the instrument, be deemed to be subject to, or to carry with it, all such rights, privileges, easements, and covenants, to the same extent as if the instrument were made subject to, or contained an express assignment or acknowledgment of, the party wall agreement, right of way agreement or easement agreement, and of all rights, privileges, easements, and covenants, thereunder.

Purchaser not bound to make inquiries

80 Except in the case of fraud on his part, no person, contracting or dealing with, or taking or proposing to take an instrument from, a registered owner, shall be required to inquire into or to ascertain the circumstances under, or the consideration for, which the owner or any previous owner is or was registered, or to see to the application of the purchase money or of any part thereof; nor is a person affected by notice, direct, implied, or constructive, of a trust or unregistered interest, and the knowledge that a trust or unregistered interest is in existence shall not of itself be imputed as fraud.

No actions of ejectment

62(1) No action of ejectment or other action for the recovery of land under the new system lies or shall be sustained against the registered owner for the estate or interest in respect of which he is so registered, except in the following cases:

(a) The case of a mortgagee or encumbrancer as against a mortgagor or owner of land subject to an encumbrance in default, and in that case a

mortgagee or encumbrancer is entitled to bring action notwithstanding the mortgage or encumbrance is a security only.

(b) The case of a lessor as against a lessee.

(c) The case of a person deprived of land by fraud or error as against the person registered as owner through fraud or error, or as against a person deriving his right or title, otherwise than bona fide for value, from or through a person so registered through fraud or error.

(d) The case of a person deprived of land included in a certificate of title of other land by misdescription of the other land or its boundaries, as against the registered owner of the other land, not being a transferee thereof bona fide for value or deriving from or through such a transferee.

(e) The case of a registered owner claiming under the certificate of title prior in date of registration, where two or more certificates of title have been issued in respect of the same land.

(f) For rights arising or partly arising after the date of the certificate of title under which the registered owner claims.

(g) For rights arising under any of the matters as to which the certificate of title is subject by implication.

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