

Real Estate

'Rights-of-way' easement from 1930s limited to construction of water pipeline, court rules

By **Amanda Jerome**

(October 13, 2022, 1:16 PM EDT) -- An Alberta court has dismissed an application for a declaration confirming that a written easement for a parcel of land next to a farm permits construction and maintenance of an access road for residential purposes, finding that the easement "grants rights-of-way for limited purposes related to a water pipeline that was abandoned" by the Canadian Pacific Railway Company (CPR) long ago.

In *Bairn Corporation v. Gabert*, 2022 ABKB 668, the court noted that the Bairn Corporation "purchased wilderness land from the Canadian Pacific Railway Company ('CPR Land')," which it then transferred to its related company, Greenmore Corporation.

Greenmore plans to build residences on the CPR Land, which sits next to the respondents Douglas and Judy Ann Gabert's farm.

A "written easement granted in 1930 provides rights-of-way through the Gabert Farm connecting the CPR Land to a public road," the court noted, noting that the "rights-of-way pass over arable land, but have been used infrequently, if at all, for decades."

According to court documents, Bairn "acquired from the CPR, by assignment, one of the rights-of-way through the Gabert Farm, known as Block F" in 2020. However, the "scope of the easement is in dispute, including whether it entitles" the two corporations to "construct an access road on the right-of-way to facilitate residential traffic."

Before the court, the applicants, Bairn and Greenmore, sought a "declaration confirming that the written easement for Block F permits them to construct and maintain an access road."

Alternatively, the applicants asked the court to "declare an easement by necessity allowing for the road's development over the Gabert Farm." They also requested, as a further alternative, that the court "use its equitable jurisdiction to impose a 'lasting solution' for the needs of the CPR Land."

In a decision released Oct. 11, Justice Kevin Feth, writing for the Court of King's Bench of Alberta, broke down interpretation of the provisions into four parts:

- "Does the written easement grant rights-of-way over the Gabert Farm allowing access to the CPR Land from the public road and if so, what are the scope and location of each right-of-way?"
- If the Block F right-of-way exists only for a limited purpose, does that purpose include building and maintaining a roadway through the Gabert Farm?"
- Is the Gabert Farm imposed with a right-of-way by necessity permitting Greenmore to access the CPR Land from the public road?"
- Should the Court invoke its equitable jurisdiction and impose a "lasting solution" for the needs of the CPR Land?"

On the first issue, Justice Feth noted that the "language of the Transfer of Easement and the circumstances in which it was created demonstrate that three easements were granted in 1930." He concluded that a "right-of-way was established through Block F, but only for purposes related to an entrance road" on a separate corridor of land, Block G.

The judge noted that the contractual language "differentiates between the two ribbons on Block G in

a subtle but significant manner.”

“One ribbon contemplates a right-of-way that passes in, upon and under Block G. The other ribbon passes through, along, over and upon Block G. The distinctive language is presumed to be deliberate and to communicate different meanings. The former probably suggests a subsurface pipeline while the latter possibly contemplates a road,” he noted.

“In short,” he added, “the wording of the written instrument suffers from some ambiguity about the location of the entrance road. However, the language generally favours the Gaberts’ position that the entrance road was located on Block G, while the right-of-way on Block F supported that entrance road. If so, the right-of-way on Block F was not contemplated, at the time of the grant, to be a general grant for unlimited purposes.”

Considering the “factual context when the Transfer of Easement was formed,” Justice Feth stressed that in 1930 “the surrounding area was farmland with only slightly travelled roads, likely consisting of heavy clay or loam, no asphalt or paved roads, and no nearby hamlet or town. The CPR Land was likely pristine wilderness.”

Douglas Gabert’s grandfather, Samuel Gabert, signed the Transfer of Easement in “favour of the CPR and its assigns for rights-of-way through the Gabert Farm to the adjoining CPR Land” in 1930 and received \$40 for the concession.

Justice Feth noted that, at the time the transfer was created, Samuel Gabert was “working his land” and “[n]othing indicates he contemplated substantial interference with agricultural production on Block F at that time or any time in the future.”

The court noted that the Transfer of Easement “contemplated the construction, operation and maintenance of a water pipeline from a deep water creek on the CPR Land through the farm property to a public road and beyond.”

“The historical context suggests the pipeline would feed water to distant railway facilities servicing steam engines. However, all steam rail service in this part of Alberta ceased in 1960,” the court noted.

Justice Feth determined, through “the wording of the Transfer and the factual matrix, including the surrounding circumstances when the easement was formed,” that Block G was “established for the limited purpose of facilitating the construction and operation of a water pipeline and an entrance road to the CPR Land for that pipeline activity.”

He concluded that Block F was “created at the same time in support of the same pipeline project” and that the language of the transfer, “considered in the context of the circumstances existing when the easement was created,” shows that the “right-of-way on Block F was only for purposes related to the entrance road on Block G.”

“The words for all purposes, when read in the circumstances of the case, the situation of the parties and the situation of the land at the time the grant was made, do not create an unlimited or general grant of a right-of-way,” the court found.

On the second issue, the judge stressed that the right-of-way on Block F is “not in the nature of a general grant” and “has a specific purpose related to the water pipeline.”

“The burden on the servient tenement (the Gabert Farm) cannot be expanded beyond its original scope, absent consent from the Gaberts, as that would offend the intentions of the original parties to the Transfer of Easement,” he wrote, finding that “using Block F for a residential road, including a graded or gravelled pathway, was not reasonably within the contemplation of the CPR and Samuel Gabert when the right-of-way was created.”

“Accordingly,” he concluded, “the scope of the right-of-way on Block F does not include the construction and maintenance of a road, a graded pathway, or a gravelled right-of-way.”

On the third issue, Justice Feth determined that Bairn and Greenmore “failed to establish any of the

requirements for a right-of-way by necessity.”

He stressed that “to the extent Bairn and Greenmore suggest that an easement by necessity may be created to advance public policy, that proposition is incompatible with the prevailing authorities rejecting public policy as a basis for creating such an easement,” concluding that a “right-of-way by necessity has not been established.”

Finally, on the fourth issue, Justice Feth declined to “interfere with the Gaberts’ property rights based on the ill-defined claim.”

“If Bairn and Greenmore have a claim, they may proceed by way of an action after filing a Statement of Claim,” the judge concluded in dismissing the application for a declaration.

Counsel for the parties were not immediately available for comment.

The applicants were represented by Kevin Scott of First West Law LLP in Calgary.

The respondents were represented by Patrice Brideau of Stringam LLP in Grande Prairie, Alta.

If you have any information, story ideas or news tips for The Lawyer’s Daily please contact Amanda Jerome at Amanda.Jerome@lexisnexis.ca or 416-524-2152.

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