IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Weatherill v. Sievewright,*
2025 BCSC 480

Date: 20250319
Docket: S243994
Registry: Vancouver

Re: Section 35 of the *Property Law Act*, R.S.B.C. 1996, c. 377

And

Easement No. GB132126 Registered Against Real Property Legally Described As: Parcel Identifier 012-335-746 Strata Lot 18 District Lot 4696 Strata Plan VR. 1414 Together with an Interest in the Common Property in Proportion to the Unit Entitlement of the Strata Lot as Shown on Form 1

Before: The Honourable Justice Marzari

Reasons for Judgment

Counsel for the Petitioner:	A.L. Folino K.M. MacEwan
Counsel for the Respondents:	P.A. Brackstone I.K. Stuart
Place and Dates of Hearing:	Vancouver, B.C. November 12 and 22, 2024
Place and Date of Judgment:	Vancouver, B.C. March 19, 2025

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INTRODUCTION

[1] The petitioner, Patrick Wayne Weatherill, seeks an order modifying an easement on his recreational property on the Sunshine Coast (the "Easement"), pursuant to s. 35 of the *Property Law Act*, R.S.B.C. 1996, c. 377 [*PLA*]. The Easement provides access, by way of Mr. Weatherill's property to two properties on either side of his property, including the recreational property of the respondents in this proceeding, William and Elaine Sievewright. A copy of the Easement as registered in the Land Title Office and the explanatory plan showing the Easement as registered is attached to these reasons for reference as Schedule A.

[2] Both the Weatherill and the Sievewright properties are part of a bare land strata which descends steeply from common property to the lakeshore of Sakinaw Lake. From the common property looking downhill, the Sievewright's strata lot ("SL 19") is on the left, next to Mr. Weatherill's strata lot ("SL 18") which also adjoins the strata lot of a third party not notified of these proceedings ("SL 17"). The Easement proceeds from the common property down partway to the water and into the middle of SL 18 before splitting into a T-intersection. To the right of this T-intersection, the Easement proceeds directly into SL 17. To the left, the Easement zig zags further down the embankment in a series of switchbacks to the lakefront of SL 18, giving access to the lakefront of SL 19. The Easement provides the only road access to each of SL 17 and to SL 19. On the explanatory plan, the swithbacks that provide access to the lakefront of SL 18 and 19 are marked as area "Q".

[3] The Seivewright's property benefits from the length of the Easement. Mr. Weatherill, through this petition, seeks a modification to the Easement that would decrease the area of the Easement on his property, by reducing the extent to which area "Q" zig zags across the lower third of his property as it descends.

[4] Mr. Weatherill and a friend originally purchased both SL 18 and SL 19 in 1989 directly from the land developer. A few years later, Mr. Weatherill transferred SL 19 to his friend and he retained SL 18. The Sievewrights purchased SL 19 in 1998. The Sievewrights attest, and I accept, that they purchased this recreational property because of the then-existing driveway access, via the Easement, that provided access all the way to the lower lakeshore area of the SL 19.

[5] While the Easement provides lakefront access to SL 19, it also reduces the amount of buildable lakefront area on SL 18. It appears from the evidence that in or about 1998, Mr. Weatherill was hoping to build a cabin near the lakefront on SL 18, and the Sievewrights were hoping to build on the lakefront of their property as well.

[6] In late 1998 and early 1999, the parties discussed their respective building plans. Mr. Weatherill wanted to remove vehicle access to the lower portion of the driveway to make more room for a cabin of his own near the lakefront.

[7] The Sievewrights were firmly against the removal of vehicle access over this portion of the driveway, because this vehicle access to their desired cabin location on the lakefront was the reason for their purchase of SL 19. At the same time, the Sievewrights also wanted to construct a new cabin, and were seeking Mr. Weatherill's agreement to a variance to the strata regulations for setbacks to SL 18 to allow a garage 5 feet from the SL 18 property boundary, and a cabin 10 feet from the SL 18 property boundary.

[8] The substance of the discussions in this regard is very much in dispute, with Mr. Weatherill saying the Sievewrights agreed to a modification of the Easement to remove a substantial portion of the Easement, and to replace it with a more direct descent along the side of his property, in exchange for which he agreed to support their variance request with the strata.

[9] The Sievewrights say no such agreement was reached, but that Mr. Weatherill nevertheless unilaterally reconstructed the driveway to his liking in 1999, on what they then thought was a temporary basis.

[10] The Sievewrights have used the modified driveway on SL 18 since then while building their cabin on the lakefront, and to access their property, but have raised a series of complaints regarding the steepened grade and drainage issues, among other things over the years. They have indicated that they wish the driveway to be put back on the registered Easement area. There was some correspondence between the parties and their lawyers between 2001 and 2002, but no court proceedings were brought and nothing was resolved in this regard. More recently, the Sievewrights installed shoring to the driveway within the Easement area but outside the area of the new driveway, which led to a further dispute with Mr. Weatherill.

[11] Mr. Weatherill never did build a new cabin on the lakefront area of his property, but he now wishes to sell his property. He has been told that it will not sell unless the registered easement is modified to follow the current location of the steepened driveway, thereby allowing a larger building site at the lakefront of SL 18. To this end, Mr. Weatherill had the current driveway surveyed, and it is this survey plan that he seeks to register in place of the existing easement plan in the Land Title Office (“LTO”).

[12] The Easement providing access to SL 17 and SL 19 via SL 18 was registered against title to SL 18 on November 16, 1988, and was likely part of the creation of the bare land strata, including these three strata lots, around that time. Pursuant to the terms of the Easement, the owner of SL 18 grants the Easement for the benefit of the owners of SL 17 and SL 19.

[13] Pursuant to section 2 of the Easement, “the owners and occupiers for the time being of SL 19” and their licensees are entitled “at all times” to pass over those parts of SL 18 shown on the attached explanatory plan, “with or without vehicles of

any description for all purposes connected with the use and enjoyment of SL 19 as a private residence, but not for any other purpose whatsoever."

[14] Pursuant to section 3 of the Easement, the parties to the Easement share equally in the cost and maintenance of the Easement.

[15] Pursuant to sections 7 and 9 of the Easement, the rights and obligations granted in the Easement run with the land and apply to successors in title.

[16] Mr. Weatherill has not served the owners of SL 17 with this petition, arguing they are unaffected by the changes he seeks which are only to area "Q" of the Easement. This might have been fatal to Mr. Weatherill obtaining the relief he sought in this petition, at least without requiring notice and a further hearing, as I would not be prepared to order a change to the Easement without notice to the owners of SL 17 under s. 35(4) of the *PLA*. A change to the plan in the LTO that is registered in favour of their property, even if only the lower part of that Easement is affected, is still a change to a document that is related to the title of SL 17, and the owners of SL 17 would ordinarily be required to sign any documents changing the Easement as registered in the LTO.

[17] However, I find that no further proceeding is necessary, nor is it necessary to refer this petition to the trial list, because I find that the petitioner has not met his burden on the merits to establish that this court ought to modify the Easement pursuant to s. 35 of the *PLA* in any event. I would therefore dismiss the petition.

ISSUES

[18] This petition is brought pursuant to s. 35 of the *PLA*, which allows this Court to modify an easement, as follows:

> **35** (1) A person interested in land may apply to the Supreme Court for an order to modify or cancel any of the following charges or interests against the land, whether registered before or after this section comes into force:
>
> (a) an easement;
>
> …
>
> (2) The court may make an order under subsection (1) on being satisfied that the application is not premature in the circumstances, and that

> (a) because of changes in the character of the land, the neighbourhood or other circumstances the court considers material, the registered charge or interest is obsolete,
>
> (b) the reasonable use of the land will be impeded, without practical benefit to others, if the registered charge or interest is not modified or cancelled,
>
> (c) the persons who are or have been entitled to the benefit of the registered charge or interest have expressly or impliedly agreed to it being modified or cancelled,
>
> (d) modification or cancellation will not injure the person entitled to the benefit of the registered charge or interest, or
>
> (e) the registered instrument is invalid, unenforceable or has expired, and its registration should be cancelled.
>
> …
>
> (6) The registrar, on application and the production of an order made or a certified copy of it must amend the registrar's records accordingly.

[19] Section 35(2) is a complete code that describes all the grounds on which a court can make an order to cancel or modify a charge: *Olenczuk v. Mooney*, 2014 BCSC 825 at para. 35. The petition was argued pursuant to subsections (a)-(d) of s. 35(2), only one of which must be established for the court to have the power to modify the Easement. However, even if the grounds under s. 35(2) are satisfied, the order is discretionary: *Olenczuk* at para. 36.

[20] Although listed separately, several of the s. 35(2) conditions relate to the same essential factual question: does the Easement as registered continue to serve a useful purpose to the dominant tenement? This is phrased in various ways, including whether the Easement continues to have “practical benefit” (s. 35(2)(b)), and whether its cancellation would “not injure the person entitled to the benefit of the charge” (s. 35(2)(d)). Furthermore, if the Easement continues to provide practical benefit to the dominant tenement under s. 35(2)(b), then it is very unlikely to be found to be obsolete under s. 35(2)(a). The issue of obsolescence in s. 35(2)(a) would also apply to situations where the entire purpose of the easement itself is of no further value.

[21] The issues I must then consider with respect to the merits of this petition are as follows:

a) Is the Easement obsolete due to changes in the land, the neighbourhood or other material circumstances?

b) Is there a practical benefit of the Easement to others, and/or would the removal of the Easement have a negative effect on the dominant tenement?

c) Did the Sievewrights expressly or impliedly agree to the modification of the Easement?

d) If one or more of the above conditions is made out, should this Court make the order sought modifying the Easement?

[22] For the reasons that follow, I find that Mr. Weatherill has not established any of the above conditions on the evidence, and I would decline to make the order sought.

IS THE EASEMENT OBSOLETE?

[23] Under s. 35(2)(a), the court may modify the Easement if satisfied that because of changes in the character of the land, the neighbourhood or other circumstances the court considers material, the registered charge or interest is obsolete.

[24] A restrictive covenant only becomes obsolete when its original purpose is no longer served: *Olenczuk* at para. 54. This does not involve a balancing of interests: The petitioner must prove that the charge provides no ongoing practical benefit before the court can consider exercising its discretion to vary or cancel the charge: *Olenczuk* at para. 37.

[25] *Olenczuk* involved a petition under s. 35(2) of the *PLA* to cancel a restrictive covenant registered against three residential properties in Kelowna in favour of a property the petitioners owned. The restrictive covenant in question created a 150 foot no build buffer zone on the petitioner's properties. The petitioners argued that the restrictive covenant was now obsolete as the respondent had deforested his

property thereby eliminating the privacy the restrictive covenant was intended to protect. The Court dismissed the petition on the basis of *res judicata*, but also addressed the substantive s. 35(2) *PLA* grounds.

[26] Objectively, the original purpose of the Easement in this case, as set out in the text of the Easement, is to provide vehicular access rights to SL19 (and SL17) over the entire area of the Easement on SL 18, for the purpose of private residential use. I infer from the admitted fact that SL 19 has no other vehicular access other than via the Easement, and that the land descends very steeply from the common property road near the top of the properties to the lake shore, that the use of switchbacks in the explanatory plan for the Easement reduced the grade of driveway at some of its steepest points all the way to the lake front of SL 19. The parties are agreed that the original driveway on SL 18 generally aligned with the registered easement area.

[27] I also find on the evidence that the removal of the final switchback of the original driveway by Mr. Weatherill objectively would have, and did, significantly increase the grade of the final leg of the driveway access to the Sievewright's property.

[28] The petitioner relies on a letter prepared in October 2000 by a professional engineer regarding the safety of the new driveway as altered. This letter cannot be relied upon as expert opinion evidence as to the safety of the new driveway or the retaining walls built to support it for litigation purposes, but to the extent that it describes the nature and stated purpose of the new driveway closer to the time it was constructed, I have considered it.

[29] The letter states that the new driveway is certified for "construction access", is "not to be surfaced", and "is intended for the use of tracked and 4WD construction traffic". Despite the certification the letter provides for these purposes, I find that this letter also provides some basis for Mr. Sievewright's stated concerns regarding the long-term usefulness of the new driveway for the residential access purposes the Easement grants to SL 19.

[30] Overall, I find that the fact that the altered driveway still maintains a degree of driveway access is not sufficient to make the benefits of the original Easement obsolete. Even in cases where a new alternate access to a property is introduced, this Court has found that this is not sufficient to make the original access provided by an easement obsolete: *McCorquodale v. Baranti Developments Ltd*., 2015 BCCA 133 at para. 34; *Chivas v. Mysek*, [1986] B.C.J. No. 2547, [1987] B.C.W.L.D. 687 (C.A.).

[31] In any event, the Easement, including the contested "Q" section, is clearly not obsolete in relation to its original purpose. The Easement remains the only registered vehicular access to SL 19. In my view, the effect of the modifications to the Easement area sought by the petitioner are better considered under ss. 35(2)(b) and (d).

THE PRACTICAL BENEFIT OF THE EASEMENT AND THE EFFECT OF ITS REMOVAL

[32] I will consider s. 35(2)(b) and (d) together, as they both address the question of whether the Easement, as registered, provides a practical benefit to the Sievewrights. If the Easement provides a practical benefit to the Sievewrights under s. 35(2)(b) then it cannot be said that modifying the Easement will not injure the Sievewrights under s. 35(2)(d): *Olenczuk* at para. 60.

[33] The evidence establishes that the full use of SL 18 is impeded by the registration of the Easement, which occupies a good portion of the lower half of SL 18. The portion of the Easement closest to the lakeshore, which is the area Mr. Weatherill seeks to modify, limits the developable area near the lakeshore of SL 18. While I do not accept Mr. Weatherill's evidence, including the unqualified opinion evidence of his realtor, that SL 18 is "unsellable" with the Easement as registered, I do accept that a smaller developable area at the lakefront of SL 18 likely affects its resale value. However, I find that the reasonable use of SL 18 as a whole is not precluded as a result of the Easement. Mr. Weatherill himself purchased SL 18 with the Easement registered against it, and he has been able to use it as a recreational

property for several decades with the Easement in place. Furthermore, I find that the evidence does not establish that there is no viable building site on SL 18 with the Easement in place.

[34] In any event, proof that an easement impedes the developable area of the servient tenement is not sufficient to remove the benefits it provides to the dominant tenement. The petitioner bears the burden of establishing that the Sievewrights gain no practical benefit by keeping the Easement on title as is: *Olenczuk* at para. 56.

[35] Generally, access rights are understood to provide a practical benefit for the dominant tenement: *Langlois v. Tessaro*, 2018 BCSC 1463 at para. 34, aff'd with minor variance in 2019 BCCA 95. The character and quality of the access is important. At para. 35 of *Langlois*, this Court found that the narrowing of the width or length of an easement is "almost automatically a diminution of the practical benefit" of the easement to current and future owners."

[36] I am satisfied that Mr. Weatherill's modifications to the original driveway not only reduced the area occupied by the access driveway from that provided in the Easement, but also made the access to SL19 steeper and more difficult to navigate for regular vehicles. Although members of the Weatherill family say that the old driveway was also steep and difficult to traverse with its switchbacks, I find that the evidence establishes that this easement area is made up of steep terrain, and that the new driveway essentially eliminates two switchbacks that previously had the effect of reducing the grade of the descent. It is not enough for the petitioner to say both the old and the new driveways were steep, and that both provide access to SL 19. The petitioner must show that the smaller area with its new and steeper configuration is no worse than the original larger Easement with its more gradual descent, and that its steepening does not detract from the dominant tenement's access rights secured by way of the Easement.

[37] I accept the Sievewrights' evidence that they find the new configuration of the driveway more unsafe and less navigable. There have been several slips and falls on the driveway. It can become totally impassable if the conditions are slippery, such

as when there is snow or ice on the driveway. On at least one occasion, the Sievewrights were unable to drive up the newly configured driveway and were trapped at their cabin. After several days they were ultimately forced to walk out and abandon their vehicle.

[38] Although Mr. Weatherill seeks to cast doubt on the above evidence by providing evidence that members of their family happily use the new driveway, this does not change the Sievewrights' experience that the new driveway presents new impediments to their access. In this regard, I do not have to find that the Sievewrights have proven that the new configuration of the driveway is unsafe, only that the original Easement provides a benefit to them over the proposed configuration.

[39] Overall, I find that the evidence establishes that the Easement as registered, with its two switchbacks down the lower third of the Easement leading to the lakeshore, provides a practical benefit to the dominant tenement SL 19, and that the proposed alteration of the Easement detracts from their access rights.

[40] I find that the petitioners have not established that there is no practical benefit to the Sievewrights to maintaining the original area of the Easement. To the contrary, I find that the evidence before me establishes there is a substantial practical benefit to maintaining the Easement as registered. Preserving the existing width, length and layout of the access rights under the Easement is a relevant and practical benefit to the dominant tenements of the Easement. Conversely, I find that modifying the Easement to the proposed plan will injure the Sievewrights under s. 35(2)(d).

WAS THERE AN AGREEMENT TO MODIFY THE EASEMENT?

[41] Mr. Weatherill says that, in or about 1999, the parties agreed by way of a verbal agreement to change the Easement to move the driveway to where it is currently located.

[42] Specifically, he avers that the parties orally agreed to the following terms:

a) The Petitioner could construct the new driveway on the "Revised Easement", which would allow his family to access SL 18 and the Sievewrights to access SL 19;

b) The "Revised Easement" would replace the Easement on title to SL 18;

c) The Petitioner would use the contractor that the Sievewrights specified to build the new driveway, which was the same contractor that they were using to build their cabin;

d) Mr. Weatherill would pay the costs of constructing the new driveway; and

e) The Sievewrights could reduce their 20-foot side yard setback to 10 feet from the property line on the lower level of SL19 for the construction of their cabin and to five feet on the upper level of SL 19 for any other buildings that they wished to construct.

[43] Mr. Weatherill had the current driveway area surveyed in 2023. I understand that the surveyed area includes both the driveway he constructed in 1999, and an additional area of adjacent shoring added by the Sievewrights in 2022. He defines the surveyed area of these two improvements as the "Revised Easement", and this defined "Revised Easement" area is the crux of the agreement he says was reached verbally in 1999.

[44] I find that the evidence does not establish that there was a verbal agreement reached by between Mr. Weatherill and the Sievewrights as alleged, or at all.

[45] The burden of establishing this verbal agreement is on the petitioner.

[46] I find that Mr. Weatherill's statement that this agreement was reached to be insufficient in a number of respects.

[47] Mr. Weatherill's affidavit contains none of the evidence of what was specifically stated by himself or either of the Sievewrights that would allow this Court to consider whether an agreement was actually reached. Instead, he provides

entirely conclusory evidence that he and Bill Sievewright agreed to change the "Original Easement" to move the access road to its current location, and sets out the terms agreed upon as stated above. He provides no details of when or where this agreement was reached, other than that it was "[i]n or about April 1999".

[48] I am unable, in the absence of evidence of the words stated by each party, or any details of the verbal exchange alleged, to conclude on the evidence that such an agreement was reached, particularly in light of the evidence denying any such agreement.

[49] I should note that Mr. Weatherill does not seek the right to cross-examine on these points, and strongly protests the Sievewrights' suggestion that this petition should be moved to the trial list or incorporate other aspects of a trial procedure. Instead, he argues that, given the passage of time, the evidence before this Court on the petition is unlikely to get any clearer than what has been provided to the Court by affidavit, and might even become worse with *viva voce* evidence. I accept Mr. Weatherill's assessment in this regard.

[50] I also find that the terms of the verbal agreement Mr. Weatherill states were reached in 1999 are simply not possible. It is not possible that the parties agreed to a new easement layout defined by way of a survey plan that did not exist until more than 20 years later. While I could perhaps read into Mr. Weatherill's sworn affidavit that he did not mean to aver that the parties agreed to this particular survey plan as he defines it, but rather the area of the driveway later shown in that survey plan, that surveyed area now includes an area of shoring within the original Easement area that was added to the driveway by the Sievewrights in 2022. Therefore, even giving a generous and less precise meaning to the language used by Mr. Weatherill to describe the terms of this verbal agreement, I am not satisfied that there is evidence that the area of the "Revised Easement" was defined in 1999 to the level of certainty provided by the 2023 survey plan, or at all.

[51] Indeed, reviewing the email correspondence between the parties in early 1999, I find that this lack of clarity as to the precise area and configuration of a new

driveway was one of the reasons no agreement was reached. The email correspondence establishes that Mr. Weatherill did indicate in January 1999 that he wished to reconfigure the lower driveway, and the Sievewrights responded they were willing to consider this if Mr. Weatherill would provide a diagram and design for this proposal for their prior review. Given Mr. Sievewright's background as a civil engineer, I accept his evidence that this was very important to him and that he would not have, and did not, agree to a reconfiguration of his property's access road without this plan. No such plans were ever provided.

[52] I have reviewed the correspondence between the parties during this time, and I find that none of the correspondence between the parties specifically refers to a modification of the Easement, with the exception of the January 14, 1999 letter from Mr. Weatherill in which he expressed a desire to prevent all vehicle movement over the area of section "Q, which was presumably a reference to the Easement. Given that this proposal was clearly rejected by the Sievewrights, I find there was no agreement between the parties at that time with respect to modifying the driveway or the Easement.

[53] The fact that Mr. Weatherill made no attempt to register a change to the Easement until more than 20 years later is also indicative of the lack of agreement between the parties to such a change. Mr. Weatherill's evidence that he thought such a change was registered by his contractor is difficult to believe on its face, given that he did not arrange for a survey plan to register in the LTO at the time, never signed any LTO documents to give effect to such a change, there was no evidence that he presented a revised survey plan to either the Sievewrights or the owners of SL 17, and no evidence that he had received the endorsement of SL 17 and SL 19 to register a revised easement plan at that time.

[54] The fact that the parties continued to fight about the location of the driveway and threaten litigation against each other with respect to it for several more years, including with the assistance of counsel, makes a scenario in which Mr. Weatherill

believed he had already secured the formal written approval required to modify the Easement and register this in the LTO even more unlikely.

[55] The evidence before me also does not support that the fifth term of the verbal agreement alleged by Mr. Weatherill was ever reached. That term was that he would support the reduction in the requested Sievewrights' setbacks, including the 5-foot setback of the garage, in exchange for their agreement to the "Revised Easement". On the evidence before me, Mr. Weatherill himself did not conduct himself in accordance with this alleged term.

[56] The correspondence in this regard consists of a June 7,1999 email from Mr. Sievewright stating "You have relocated the driveway to your wishes and we would like to [proceed] with our permit. This was the agreement reached on site some months ago." To this, Mr. Weatherill responds that he would support the cabin setback requested, but that he would need more information about the garage before consenting. There is no evidence that Mr. Weatherill ever provided his support for the garage. Therefore, even if Mr. Sievewright's suggestion that they would like some *quid pro quo* for Mr. Weatherill's unilateral reconfiguration of the driveway was viewed as some tacit agreement to this change in the driveway (though not necessarily the Easement itself), the record before me indicates that Mr. Weatherill did not accept those terms, and did not support the desired setback for the Sievewright garage.

[57] I have considered whether Mr. Sievewright's words in his June 7 email above might support the existence of some tacit or implicit agreement to Mr. Weatherill's unilateral reconfiguration of the driveway, albeit after the fact. However, that is not what the petitioner pled or set out in his affidavit. Ultimately, I find that any possible implicit agreement with respect to the reconfiguration of the driveway was too vague and undefined to be enforceable on the evidence before me, and that any confusion in that regard was not, in any event, related to a registered or permanent alteration of the Easement.

[58] In a 2023 letter sent by his counsel, the petitioner also sought other modifications to the terms of the Easement that are not part of this petition, but which the petitioner suggested, somewhat inconsistently, were part of the verbal agreement in 1999. These included making the owners of SL 19 solely responsible for the costs of maintaining the Easement, and adding an indemnity clause, among other changes.

[59] In conclusion on this point, I find that there never was a meeting of the minds between the parties in respect of the specific changes to the lower portion of the driveway or to support for the Sievewrights' setbacks in 1999. No agreement was reached at that time, or later, with respect to the driveway. Nor was there any agreement reached to alter the area of the registered Easement.

SHOULD THE COURT EXCERSIZE ITS DISCRETION TO MODIFY THE EASEMENT?

[60] I have found that Mr. Weatherill has not established any of the conditions of s. 35(2) that would allow the modifications to the Easement he seeks. These findings are sufficient to dispose of this petition.

[61] I will, nevertheless, briefly address one of the petitioner's arguments under this heading. I find that the Easement contains no term requiring or contemplating modification. In this regard, I reject the petitioner's argument that "[t]he … Easement does not provide that it was to be in use in perpetuity. On its face, it applies 'for the time being'. As such, it explicitly contemplates being modified at some point in the future."

[62] This argument misconstrues the meaning of "for the time being" in an easement. As stated in *Birch v. Brenner*, 2015 BCSC 466 at para. 49, a reference to the owners "for the time being" simply acknowledges that the easement runs with the land, and the current owner may be different than the owner at the time the easement was registered in the LTO. The lack of a modification clause weighs against granting the relief sought on a discretionary basis: *Langlois* at para. 48.

CONCLUSION

[63] The Sievewrights have provided compelling evidence of the types of uses they made of the driveway as originally configured in line with the registered easement, and the difficulties they have faced with the reconfigured layout.

[64] Objectively, the proposed easement decreases the overall area of the easement granted to SL 19, resulting in a steeper grade of descent (and ascent) from SL19. It appears from the evidence that the new configuration also relies on the use and maintenance of retaining walls.

[65] Although the parties challenge each other's credibility and the nature of the discussions that led up to Mr. Weatherill building a driveway that is steeper and smaller than the registered easement area, I find that a trial is not required to determine the issues in this case. I find that Mr. Weatherill's evidence that there was a verbal agreement to register the modified easement in the LTO in 1999 is insufficient to establish such an agreement on its face, and in the context of the other evidence. As such, this case does not turn on credibility so much as on the inadequacy of the petitioner's evidence to meet his burden. I find that the requirements of s. 35(2) have not been made out.

[66] The petition is dismissed.

"Marzari J."

Schedule A