IN THE COURT OF KING'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF BATHURST

File: BM-15-2023

Neutral Citation: 2025 NBKB 033

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BETWEEN:

DONALD FRANCIS DEMPSEY and SUZANNE LANG,

Applicants

- and -

YANNIS GREGORY MOUNTRAKIS, NADINE ANNE MOUNTRAKIS, DAVID DUNCAN YOUNG, D.H. AUTO INVESTMENTS LTD. and the REGISTRAR GENERAL OF LAND TITLES

Respondents

DECISION

BEFORE: Chief Justice Tracey K. DeWare

AT: Bathurst, New Brunswick

DATE OF HEARING: January 21, 2025

DATE OF DECISION: February 12, 2025

APPEARANCES: Christopher D.J. Isnor, for the Applicants, Donald Francis Dempsey and Suzanne Lang

Ryan Burgoyne, for the Respondents, Yannis Gregory Mountrakis and Nadine Anne Mountrakis

Philippe Frenette, for the Respondents, David Duncan Young and D.H. Auto Investments Ltd.

John C. Gillis, for the Respondent, Registrar General of Land Titles

DEWARE, C.J.

INTRODUCTION

[1] The Applicants seek an order for rectification of the title register to add the existence of an easement to three properties pursuant to sections 17(2), 17(3)(a), and 79(3) of the ***Land Titles Act***, SNB 1981, c L-1.1. Further relief is sought in the Notice of Application. However, the Court has elected to consider the rectification question first and then determine the appropriate next steps regarding the remaining remedies sought in the Notice of Application dated May 18, 2023, and filed on May 19, 2023.

FACTS

[2] The Applicants, Donald Francis Dempsey and Suzanne Lang ("the Applicants"), are the owners of real property located at 1700 Anderson Point Lane in Bathurst, New Brunswick bearing PID 20713863. The Applicants purchased the property on July 14, 2008. The Applicants' property was part of a large plot which was subdivided by the Respondent, David Duncan Young (David Duncan Young).

[3] On August 21, 2008, the Applicants and David Duncan Young, entered into an easement agreement. The easement agreement was registered on the Land Titles System on September 9, 2008 as Document # 26123878 ("the easement agreement").

[4] The terms of the easement agreement, as set out in the registered document, include the following:

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(…)

AND WHEREAS the **<u>Grantor has agreed to grant to the grantee a right-of-way and easement over a part of the Grantor's Lands, such part being shown as "Right-of-Way in Common" on the Plan</u>** of Survey titled "Family, Duncan & Geraldine Young Subdivision", prepared by Christopher M. Kane and dated July 24, 2008 (the "Plan"), attached hereto, and being hereinafter called the "Easement Lands";

NOW THEREFORE THIS AGREEMENT WITNESSETH that in consideration of the sum of ten dollars ($10.00) and other valuables consideration paid by the Grantee to the Grantor, the receipt of which is hereby acknowledged, the parties hereto agree as follows:

1. (a) Subject to the terms and conditions herein set out, the Grantor grants to the Grantee, his heirs and assigns, licensees, invitees, servants and agents on foot and with all kinds of animals and vehicles, and easement and right-of-way over, along and across the Easement Lands for the purposes of: (i) ingress and egress to and from the Grantee Lands end (ii) subject to Section 1(b), to survey, lay, construct, operate, use, inspect, remove, renew, replace, alter, enlarge, reconstruct, repair, expend and maintain across the Easement Lands to the Grantee Lands such facilities as may be reasonably required for the purpose of connecting to telecommunications, electric power and municipal water services (the "Service Connection").

(…)

3. In the event that a public street (the "New Street") is extended from Anderson Point Lane to, or in the direction of, the Grantee Lands, the Grantor shall, subject to all applicable laws, ensure that the New Street follows the path of the easement lands to the extent reasonably practicable. **<u>The right-of-way and easement hereby granted shall terminate with respect to the Easement Lands lying within the boundaries of the New Street.</u>**

(…)

[Emphasis mine]

[5] In the fall of 2022, David Duncan Young, extended Anderson Point Lane, a public street, to abut the Applicant's property. Prior to the extension of Anderson Point Lane, the Applicants could only access their property via the right of way as described in the easement agreement.

[6] The properties impacted by the easement agreement were migrated onto the Land Titles System by David Duncan Young on December 6, 2022. On the same day,

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Plan 43400689 was filed on the Land Titles System. One of the notes on this December 6, 2022 plan referenced the existence of the easement agreement in favour of the Applicants' property. Note # 10 on Plan 43400689 states as follows:

> "10. Easement in favour of PID 20713863 (see Doc No. 26123878, Reg. 2008-09-09)"

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[7] In December of 2022, David Duncan Young, filed an application with the Court, BM-43-2022, requesting a determination as to whether or not the 2008 easement agreement had been extinguished either by operation of law or express release. David Duncan Young sought the Court's determination of the issue following the construction of the extension to Anderson Point Lane which would then provide access to the Applicants' property.

[8] Justice Ivan Robichaud heard David Duncan Young's application on January 27, 2023. In addressing the questions posed in the application, Justice Ivan Robichaud, as he then was, wrote in an unreported decision dated March 31, 2023, BM-43-2022, the following at paragraphs 12, 13, 23, 24, 25, 26, 27, 28, 29, 32 and 33 as follows:

> [12] I adopt the same reasoning. The purpose of the easement was to provide access to the Respondents through the Applicant's land. That purpose has not expired. The grant did not provide for the easement to be extinguished by alternative access, except for the provisions of section 3 of Schedule "C," nor did it stipulate a time limit.
>
> [13] Even if at law, the purpose would deem the easement extinguished, the parties have displaced the common law by expressly agreeing to the circumstances that would terminate the easement.
>
> [23] In 2008, a newly constructed public street was created, reaching from the main public highway towards the Respondents' property, without reaching it.

[24] A new easement agreement was negotiated between the parties, replacing all previous such agreements.

[25] The parties were represented by counsel. A first draft was prepared by the solicitor for the Applicant. The section dealing with extinguishment of the easement read:

> 3. In the event that a public street is extended from Anderson Point Lane to, or in the direction of, the Grantee Lands, the right-of-way and easement hereby granted shall terminate with respect to that portion of the Easement Lands that is incorporated in or runs parallel to the new public street.

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[26] That wording was objected to by the Respondents and the parties agreed to and executed a grant with the following wording:

> 3. In the event that a public street (the "New Street") is extended from Anderson Point Lane to, or in the direction of, the Grantee Lands, the Grantor shall, subject to all applicable laws, ensure that the New Street follows the path of the Easement Lands to the extent reasonably practicable. The right-of-way and easement hereby granted shall terminate with respect to the Easement Lands lying within the boundaries of the New Street.

[27] In 2022, an extension of Anderson Point Lane to the boundary of the Respondents' land was completed and vested in the City of Bathurst as a public street.

[28] The new extension does not follow the path of the easement as it existed previously. The Applicant had instructed its surveyor to follow that path to the extent reasonably practicable.

[29] The Respondents have continued to use the portion of the easement that does not lie within the boundaries of the new street. That portion covers the portion of the existing road leading to the Respondents' paved entrance.

[32] I find that the Respondents did not accept the wording that would terminate the entire easement even if the new street were parallel to the existing road.

[33] Having considered the wording of section 3 of Schedule C of the 2008 grant, the entire document and the surrounding circumstances, I find that a reasonable person would conclude that the parties agreed that any extension of the street would not need to follow the exact path of the easement if it were not reasonably practicable to do so, but that in that event, only the portion of the easement within the boundaries of the new street would terminate. There is no ambiguity.

[9] On January 10, 2023, the Respondents, D.H. Auto Investments Ltd. ("D.H. Auto"), purchased property from David Duncan Young bearing PID 20919197. D.H. Auto was represented by solicitor Christopher Borden.

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[10] On January 31, 2023, the Respondents, Yannis Gregory Mountrakis and Nadine Anne Mountrakis ("Mountrakis"), purchased from David Duncan Young property bearing PID # 20919205. The Mountrakis' were represented by solicitor Florian Arseneault when they purchased the property. Solicitor Arseneault requested a CRO or a Certificate of Registered Ownership of the property which was received from the Land Titles Registry on December 29, 2022. The encumbrances listed on the CRO were the following: Bell Canada, City of Bathurst, New Brunswick Power Corporation and Rogers Communications Inc. The easement agreement registered on the Land Titles Registry on September 9, 2008 as Document # 26123878 was not included in the CRO.

[11] On March 31, 2023, Justice Robichaud's decision was issued determining that the easement agreement as registered in 2008 was not extinguished by the creation of the public road. Justice Robichaud's decision was not appealed.

[12] The existence of the right of way described in the 2008 easement agreement was not reflected in the CRO at time of the purchase by Mountrakis, nor at the time the Respondent, D.H. Auto Investments Ltd. ("D.H. Auto"). However, when the third property, bearing PID 20921177, was sold to Yves Gaetan Blanchard, Ginette Savoie and Marie Dora Savoie, the existence of the easement was noted on the CRO. Unlike the transfer of the properties to Mountrakis and D.H. Auto, the transfer

to the Blanchard and Savoies occurred following the issuance of Justice Robichaud's March 31, 2023 decision.

[13] In May of 2023, the Applicants were advised that the Mountrakis were commencing construction of their residence and the right of way to the Applicant's property would be blocked. On May 19, 2023, the Applicants filed a Notice of Application seeking interlocutory relief via injunction to restore their access to the Applicant Property through the right of way on the Mountrakis property until such time as the merits of the application could be heard as well as an order for rectification under the ***Land Titles Act***.

[14] The request for injunctive relief set out in the May 2023 application was resolved between the parties by virtue of a consent order. The terms of the consent order executed by Justice Ivan Robichaud on May 26, 2023 are as follows:

CONSENT ORDER

WHEREAS, on May 19, 2023, the Applicants filed a Notice of Application in respect of the within matter with this Honourable Court;

AND WHEREAS, also on May 19, 2023, the Applicants filed a Preliminary Notice of Motion in respect of the within matter (the "Motion") in which the Applicants sought certain interlocutory injunctive relief in respect of the Respondents Yannis Gregory Mountrakis and Nadine Anne Mountrakis (the "Mountrakis Respondents");

AND WHEREAS the interlocutory injunction requested by the Applicants pertains to their use of an easement, registered in the New Brunswick Land Titles System as Document Number 26123878 (the "Easement"), which Easement passes through a portion of the Mountrakis Respondents' property located on Anderson Point Lane in Bathurst, New Brunswick and known more particularly as 2ID 20919205 (the "Mountrakis Property");

AND WHEREAS the Applicants and the Mountrakis Respondents have agreed to adjourn the Motion sine die on the basis of an agreement (the "Interim Agreement"), a copy of which is attached hereto as Schedule "A", between the Applicants, the Mountrakis Respondents, and the Respondent David Duncan Young ("Mr. Young") allowing the Applicants to temporarily access their property

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by means of Mr. Young's property, now bearing PID 20916698 until such time as the Application can be heard on its merits;

AND UPON READING the consents of the parties contained herein;

IT IS HEREBY ORDERED THAT:

1. The Mountrakis Parties shall preserve the gravel path utilized by the Applicants for vehicular access to the Applicant Property located within the boundaries of the Mountrakis Property and as set out in the Easement (the "Easement Lands"), until a final decision with respect to the Application is issued;

2. The Applicants shall make all reasonable efforts to ensure that the Notice of Application filed in this matter is served upon all Respondents within five (5) business days of the Applicants' receipt of the same from this Honourable Court;

3. This Consent Order shall remain in full force and effect until further order of this Honourable Court; and

4. The within Motion is adjourned sine die with the Applicants retaining the right to request a new hearing date.

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[15] The Mountrakis proceeded to construct their home. The access as described in the easement agreement creates a right of way for the Applicants' property which, following the construction of the Mountrakis' residence, travels through their front yard and in close proximity to their home.

[16] The Applicants are now able to access their property directly from Anderson Point Lane. The Respondents suggest that now, following the extension of Anderson Point Lane, the access accorded to the Applicants is better than previously existed. The Applicants contest this point and argue the access is problematic and not as provided by their recognized easement agreement.

ISSUES

[17] The sole issue from the application to be considered by the Court at this time is whether or not the title register pursuant to the ***Land Titles Act*** may be rectified

by adding the easement agreement registered on September 9, 2008 for the benefit of the Applicants' property to the certificate of registered ownership (CRO) of PIDs 20919197, 20916698 and 20919205.

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POSITION OF THE PARTIES

[18] The Applicants assert it is appropriate to grant the relief sought by way of a rectification order as it is clear the easement agreement was registered under the Land Titles System prior to when the properties were purchased by Mountrakis and D.H. Auto. The Applicants further note the decision of Justice Robichaud which confirms the easement agreement was not rendered moot nor extinguished following the extension of Anderson Point Lane to provide access to the Applicants' property. The Applicant maintains the failure to include the easement agreement on the CRO at the time of purchase of the properties by Mountrakis and D.H. Auto is an obvious error and should be rectified.

[19] Mountrakis and D.H. Auto submit the provisions of the ***Land Titles Act*** are clear, an innocent purchaser will not be affected by an Application for Rectification. Mountrakis and D.H. Auto argue they had no knowledge and could not have been reasonably expected to have knowledge of the disputed right of way or easement agreement when they purchased the properties in the winter of 2023. These Respondents highlight they acquired the properties in *bona fide* sales when the title register did not reflect the existence of the Applicants' easement agreement or right of way. These Respondents suggest that if there is a remedy available to the Applicants, it is by way of indemnification as provided under the ***Act***, not a rectification order.

[20] The Respondent, the Registrar General of Land Titles ("The Registrar"), takes no position on the Applicants' request for an order for rectification under the ***Land Titles Act***. The Registrar does wish to be heard on the issue of indemnification should this Court move on to consider that request in a subsequent hearing.

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LAW and ANALYSIS

[21] This application is brought pursuant to the ***Land Titles Act***. The pertinent sections of the ***Land Titles Act*** are as follows:

> 15(4) Nothing in this Act confers on a registered owner, **claiming otherwise than as a purchaser for valuable consideration**, any better title than was held by his immediate predecessor in title.
>
> 17(2) Any person who, prior to the date on which the title to land was first registered under this Act, had the use and enjoyment of a right of way or right of access to property and such right of way or right of access is not registered against a parcel of registered land, **may apply to the court for relief**.
>
> 17(3) The court upon consideration of an application pursuant to subsection (2) **may grant relief** and notwithstanding the generality thereof may
>
> > (a) **order that the title register be rectified to show the existence of a right of way or right of access**;
> >
> > (b) determine the compensation, if any, that should be paid to any person;
> >
> > (c) order that any reasonable legal, survey and other costs actually incurred by a person involved in the application be damage suffered by reason of rectification of the title register; and
> >
> > (d) fix the costs in a lump sum or order that the costs be taxed in accordance with the Rules of Court.
>
> 79(1) In this section "decision" means decision, act, omission, refusal, determination, direction or order.
>
> 79(2) Any person who is dissatisfied with a decision of the Registrar General or a registrar may require the Registrar General or the registrar, as the case may be, to provide to him within a reasonable time written reasons for the decision.
>
> 79(3) Any person who desires rectification of the title register under section 70 or who is dissatisfied with a decision of the Registrar General or a registrar may make an application to the court stating the reason for the desired rectification or the grounds of dissatisfaction with the decision and the relief or remedy sought.

> 79(4) Before making an application to the court under this section the proposed applicant shall give to the Registrar General a notice of proposed application in prescribed form accompanied by a copy of the proposed application.
>
> 79(5) Upon receipt of the notice referred to in subsection (4), the Registrar General shall forthwith give a copy of the notice to the registrar for the district in which any land affected by the proposed application is situated and the registrar shall upon receipt make a notation of the notice in the title register and after such receipt any dealing with the land affected by the proposed application is subject to such notice.
>
> 79(6) **An application to the court under this section shall not affect a disposition for valuable consideration made in good faith and registered before receipt of notice of the application by the registrar under subsection (5).**
>
> 79(7) An application to the court under this section may not be made after the expiration of thirty days from the giving of the notice under subsection (4) or after such greater or lesser period as the court may order.
>
> 79(8) In hearing an application under this section the court may hear and consider any relevant evidence whether or not it would be admissible under the rules of evidence.
>
> 79(9) Subject to section 71, the court may make such order in respect of the application and as to costs as the circumstances of the case require.
>
> [Emphasis mine]

[22] The Applicants point out the purpose of the Land Titles System introduced in New Brunswick in 2001 was to provide guaranteed title to property. The Applicants direct the Court to Justice Morrison's comment at paragraph 47 of ***Antle et al v. McCutcheon et al***, 2014 NBQB 256 as follows:

> 47. The plaintiffs also seek an order for rectification of the title register pursuant to section 71 of the Land Titles Act, S.N.B. 1981, c. L-1.1 eliminating any reference to a right-of-way in favour of the defendants. Generally speaking, the Land Titles Act abolishes possessory title rights. **The Land Titles System operates on three basic principles, one of which is the "curtain" principle. That principle means that a purchaser in good faith is entitled to rely on the title register without having to go behind it.** Prescriptive rights are inconsistent with that principle (McKinney v. Tobias, 2006 NBQB 290). However, section 17(2) of the Land Titles Act creates an exception to the general rule where rights-of-way or access is concerned. Furthermore, **section 71 permits rectification where the affected owner had knowledge of the error in the register or in any other case where the court considers that it would be unjust not to rectify the register.**
>
> [Emphasis mine]

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[23] In the present matter, there is no question David Duncan Young was aware of the existence of the Applicants' right of way at the time he transferred the property to the Mountrakis. David Duncan Young had filed an application seeking an order to set aside the 2008 easement agreement and the transfer to the Mountrakis occurred between the time Justice Robichaud heard the application on January 27, 2023 and the time he issued the decision denying the application on March 31, 2023. While the knowledge of David Duncan Young is certain, this is not the question to be considered in the context of a rectification request. The Court's concern is what did Mountrakis and D.H. Auto know at the time they acquired the properties.

[24] All parties referred the Court to the Court of Appeal's consideration of very similar issues in ***CG Group Ltd. v. Girouard et al.***, 2018 NBCA 59. Justice Quigg explained the purpose and the impact of the introduction to the Land Titles System in New Brunswick at paragraphs 23 as follows:

> [23] The introduction of the Land Titles System in New Brunswick provided, among other things, for the security of guaranteed title, eliminated time- and money-consuming title searches, and resulted in efficient and economical transfer of real property. **The main difference from the old Registry system is the registered owner of a parcel has an indefeasible title. Individuals acting in good faith can rely on the information registered within the register as to the rights, interest and ownership limitations of a particular property title, and act on the basis of that information. With the new system, each time a lawyer undertakes a land transaction he or she requests a CRO for the relevant parcel of land. SNB issues a CRO for that property, thereby guaranteeing the quality of such title.** No further searches for that parcel are therefore necessary from that point forward.
>
> [Emphasis mine]

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[25] Mountrakis and D.H. Auto rely upon the Court of Appeal's reasoning in ***CG Group Ltd.*** in support of their assertion that the title registry will not be rectified to the detriment of innocent purchasers such as themselves. In particular, the Court is directed to Justice Quigg's comments at paragraphs 97 to 103 which state as follows:

> [97] All of this however is subject to the provisions of s. 79, which provides that any person who desires rectification of the title Registrar under s. 70 may make application to the court. **However, s. 79(6) expressly states that any such application to the court shall not affect a disposition for valuable consideration made in good faith and registered before receipt of the Notice of Application by the Registrar under 79(5).** Section 79(5) provides that, upon receipt of the notice referred to in 79(4), the Registrar is to make a notation of the notice in the title register.
>
> [98] Simply put, unless there is a notice in accordance with the *Act* on the title register, no application to court for rectification shall affect a disposition for valuable consideration made in good faith and registered before that Notice of Application is given to the Registrar.
>
> [99] This is precisely the case at bar. CG Group purchased the property in good faith from Seagull for valuable consideration. Its interest in the property was registered and a CRO issued with respect to it.
>
> [100] **Accordingly, ss. 16, 61(l), 70, 71 and 79 of the *Act* create a system under which an aggrieved land owner may apply for rectification, but subject to the rights of innocent parties who purchased for valuable consideration and whose conveyance was registered prior to the application for rectification.**
>
> [101] Again, in this particular case, there is no dispute on the facts – there is no evidence in this matter of any fraud on behalf of CG Group. The history of the title is clear. For example, in *Durrani,* there was a fraud. However, in New Brunswick, in the absence of fraud, the innocent party does not have rights to rectification.
>
> [102] Section 61(1) of the *Act* clearly indicates that, notwithstanding any rule of law or equity to the contrary, a person taking a transfer of registered land from the owner is not, except in the case of fraud by him or her, bound to inquire into, or ascertain, the circumstances by which the previous owner obtained registration. Nor is the transferee affected by any notice direct or implied or constructive of any unregistered instrument.
>
> [103] **Section 61(2) further emphasizes this, specifically stating that knowledge on the part of any person so taking title that any unregistered instrument or interest or claim is in existence shall not be imputed to be fraud. Section 79(6) confirms there can be no rectification in respect of a *bona fide* transfer for consideration.**
>
> [Emphasis mine]

[26] In their written submissions, the Applicants set out their argument the Mountrakis and D.H. Auto had an obligation to ensure there were no encumbrances registered against the property at the time of purchase. The Applicants explain this reasoning in paragraphs 45 to 49 of their pre-hearing brief as follows:

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> 45. The Applicants submit that the above-noted facts demonstrate that the Respondent Young was aware of the Easement at the time of migration and failed to take steps to protect the Applicants interests on title to the Subject Properties. This was not, however, the only failure in this case.
>
> 46. As is noted by the Court of Appeal in *CG Group, supra*, counsel for the respective purchasers of the Subject Properties did not take the necessary steps to satisfy themselves regarding title being purchased. At paragraph 48 of the *CG Group* decision, Justice Quigg specifically mentions the need for lawyers to review the plan where the Certificates of Registered Ownership refer to a plan. The Certificate of Registered Ownership for the Mountrakis Property just prior to purchase makes specific reference to the December 2022 Plan:
>
> **Schedule A | Annexe A**
>
> **PID | NID :** 20919205
> **Apparent Parcel Access | Accès apparent à la parcelle :** Public Access I Accès public
> **Status | État de la demande :** Current | Courant
> **Effective Date/time | Date et heure de prise d'effet :** 2022-12-20 15:26:29
> **Legal Description I Description officielle**
>
> **Place Name:** Bathurst
> **Parish/County:** Bathurst/Gloucester
> **Designation of Parcel on Plan:** Lot 2022-3
> **Title of Plan:** Family, Duncan & Geraldine Young
> **Registration County:** Gloucester
> **Registration Date of Plan:** 43400689
> **Registration Date of Plan:** 2022-12-0611:12:49
>
> 47. In his Affidavit, Yannis Mountrakis describes how he received advice from his counsel that the Mountrakis Property is free and clear of any encumbrances and/or easements which would impede his ability to build a residential dwelling on the Mountrakis Property.
>
> 48. If true, the Applicants are sympathetic to the Mountrakis Parties. However, the advice received is simply not true. As per the words of Justice Quigg, the Mountrakis Parties had an obligation to examine and consider the post-conversion Certificate of Registered Ownership and the December 2022 Plan referred to therein. There was, at best, a failure to do so.
>
> 49. The same can be said for counsel to D.H. Auto at the time of the sale of the D.H. Auto Property. Mere compliance with the Standards would have easily procured knowledge of the Easement; it was written clearly on the December 2022 Plan which was expressly referred to in the Certificate of Registered Ownership in that case as well.

[27] The Applicants suggest that Justice Quigg in ***CG Group Ltd.***, reviewed the obligations on solicitors when transferring property under the Land Titles regime. The Applicants maintain there remains an obligation for a solicitor to review plans in the Land Titles system and the failure to do so in this case led to the current problem. In particular, the Applicants refer to Justice Quiggs' comments at paragraphs 47 and 48 as follows:

> [47] The LSNB established the Standards in accordance with the aforementioned principles stemming from the *Act* and the Land Titles System. Thus, the Standards incorporate the doctrine of indefeasibility of title in various sections. For example, Standard 56 contemplates the reliability and the primacy of the CRO, by explicitly setting out the obligations of a lawyer on a post-conversion transaction. Standard 56 clearly states that, once a parcel has been converted to the Land Titles System, no full title search (i.e. a full historical or conventional title search) is required. Indeed, on a post-conversion transaction, the role and obligations of a lawyer are different from those of the lawyer during the first registration of a title and its conversion process.
>
> [48] This does not mean lawyers have no role or duties under the new system. As stated in the preface to the Standards, common sense and professional judgment should always be exercised in real property practice. Furthermore, Standard 56 dictates what a lawyer must examine and consider on a post-conversion transaction, namely: the current CRO, the content and the accuracy of all encumbrances and or interests revealed on the CRO, as well as the plan (if the parcel is described by plan on the CRO), along with all instruments identified on such plan which can contain information not otherwise available. Indeed, a CRO is not conclusive as to the boundaries or the extent of the land and does not provide copies of plans and/or documents revealed on it, which are necessary to complete a standard search. A search by PID (Parcel Identification Number) and a search of pending registrations (commonly referred to as a "subsearch") must also be conducted. Standard 56 reads as follows:

56. Title Search After Conversion	**56. Recherche de titre après la conversion**
56.1 Once a parcel has been converted to Land Titles it will no longer be necessary to complete a full title search at the Registry Office, however in addition to off-title investigations prescribed by these Standards, the lawyer must examine and retain to the file:	56.1 Une fois que le titre d'une parcelle a été converti au régime des titres fonciers, il ne sera plus nécessaire d'effectuer une recherche de titre complète au bureau d'enregistrement. Toutefois, outre les recherches ne se rapportant pas au titre prévues par les présentes normes, l'avocat doit :

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(a) a copy of the current (CRO) for each applicable PID;	a) examiner la copie du CPE en cours de validité pour chaque NID applicable;
(b) Repealed (February 22, 2008);	b) Abrogé (le 22 février 2008);
(c) copies of all encumbrances (except those to be retired on closing) revealed on the CRO;	c) examiner les copies de toutes les charges (à l'exception de celle qui doivent être quittancées au moment de la clôture) mentionnées dans le CPE;
(d) if the parcel is described by reference to a plan, the plan must be examined; and	d) si la parcelle est décrite par renvoi à un plan, examiner le plan;
(e) a search by PID number and a search of pending registrations must be conducted to verify that no subsequent registrations have been made prior to tendering any documents for registration.	e) avant de remettre des documents pour enregistrement, effectuer une recherche d'après le NID et une recherche des enregistrements en cours de traitement pour s'assurer qu'aucun enregistrement ultérieur n'a été fait.

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[28] While the Applicants are correct that lawyers continue to have obligation when acting for parties on a real estate traction under the Land Titles System, these obligations are all to be considered in the context of the overall scheme and purpose of the Land Titles registry. The Applicants are correct that David Duncan Young was aware of the easement agreement. However, David Duncan Young's actions or oversights cannot be attributed to the Mountrakis or D.H. Auto in these circumstances. Solicitors Florian Arseneault and Christopher Borden obtained the necessary CRO's, which do not identify the easement agreement, and proceeded with the transfer. The issue of whether or not their failure to identify the existence of the note on the December 2022 plan falls within the duties described by Justice

Quigg in paragraph 48 of the ***CG Group Ltd***, is in my view not the problem which lead to the current challenge but rather it is David Duncan Young's action in prematurely removing the easement agreement from the CRO. This suggestion was acknowledged by the Applicants at paragraph 44 of their pre-hearing brief as follows:

> 44. The Respondent Young, or his agent, was the individual responsible for migrating the Mountrakis Property and the D.H. Auto Property to the Land Titles System. The Respondent Young was explicitly aware of the Easement at the time of migration as well as the outstanding decision on reserve by this Honourable Court. In fact, the Respondent Young had brought the Young Application prior to migration specifically for the purposes of *removing* the Easement from title. The facts in this case are blatantly clear: **the Respondent Young knew about the Easement at the time of migration and failed to take the necessary steps to ensure that the Easement was reflected on title.**
>
> [Emphasis mine]

[29] The present matter is very, very similar to the factual situation considered by the Court of Appeal in ***CG Group***. One of the principals in ***CG Group*** was alerted by Mr. Girouard to a potential issue prior to the transfer of the property. Similarly, the Mountrakis Respondents may have had some awareness of a right of way at some point. However, neither the Mountrakis nor D.H. Auto are parties to any fraudulent activity related to this transfer nor is there evidence of bad faith on their part.

[30] The Respondents highlight Justice Gregory's observations in ***Arthurs v. Matthews***, 2021 NBQB 160 at paragraphs 31 to 33 as follows:

> [31] I can only conclude that this is a case of unfortunate oversight and assumption on the part of several people. But this does not and cannot work to defeat the registered and certified title to land owned by the Matthews. Even if the Matthews were told by Mr. Wood, Q.C.[12] that there is a shared driveway or if the Arthurs/Wilsons alerted them to this before they took title, as occurred in the *CG Group* case, this would not work to the Arthurs/Wilsons' benefit. This is so because there is no evidence that the lawyers migrating the Matthews' property to land titles were negligent or remiss in their property search (which nowhere indicates a right

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> of way over the Matthews' land) supporting the conversion and the issuing of the first-time CRO to the Matthews.
>
> [32] I find that I need not address the main issue of the existence of a prescriptive easement given my finding that the conversion of both properties onto the land titles system renders the issue moot. Similarly, I need not address the limitation of actions issue. As stated, **once the properties were converted to the land titles system and indefeasible title was certified to the Matthews, the only remedy for an error in that process is rectification and compensation. As stated, rectification is not available to the Arthurs/Wilsons' on the facts before me.**
>
> [33] **There is simply no evidence of fraud and no notice was given to the Registrar General before the certification of the Matthews' title.** Rectification is simply not available even if the Arthurs/Wilsons could establish the right of way by prescription.
>
> [Emphasis mine]

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[31] In the present matter, there is no evidence of fraud nor was notice given to the Registrar General before the certification of the Mountrakis nor the D.H. Auto title. While David Duncan Young, was aware of the existence of the easement as well as Justice Robichaud's decision of March 31, 2023, these factors do not impact the transfers of the Mountrakis nor D.H. Auto, as they are innocent parties who purchased the property for valuable consideration and whose conveyance was registered prior to the application for rectification. The fact the easement agreement was omitted from the CRO while David Duncan Young was aware of the existence of the easement agreement, does not alter the Court's obligation to reject the request for rectification in respect of a *bona fide* transfer for consideration.

[32] In ***Cormier v. The Registrar of Land Titles***, 2018 NBQB 219 (CanLII), the late Justice Walsh of our court considered a request for rectification under section 79(6) of the ***Act***. Justice Walsh discussed the bars to rectification under the ***Act*** as well

as the meaning of good faith. In particular, Justice Walsh commented as follows at paragraphs 23, 24, 29, 30 and 31 as follows:

> [23] In the circumstances of some applications for rectification (and this is one), Section 79 (6) of the *Land Titles Act* is relevant. That provision bars rectification of the title register in regards to a disposition for valuable consideration *made in good faith* and registered before receipt of the Notice of Application for rectification.
>
> [24] For this case it is accepted that the dispositions were made for valuable consideration and registered on title prior to the application for rectification. What remains to be decided, then, is whether the dispositions were made in "good faith"?
>
> (…)
>
> [29] The object of the Land Titles Act is the creation of a scheme that provides for "guaranteed land title" (Section 1). This purpose is manifested in the doctrine of "indefeasibility of title", which is expressed through the "mirror principle", "curtain principle", and "insurance principle" (See: CG Group v. Girouard, supra at para. 34-36; McKinney v. Tobias 2006 NBQB 290 (Glennie J.)).
>
> [30] It follows, (the "insurance principle" aside for the moment), that the Act is intended to directly protect the integrity of the title of those involved in dispositions in which they relied on the "mirror" (s. 16) and "curtain" (s. 61) principles. Viewed in this way, the legislative purpose behind Section 79 (6) in the overall scheme is revealed - **to insulate an impugned disposition from any consideration of rectification, if the disposition was registered before the application for rectification was made, if the disposition was for valuable consideration and if there was good faith reliance on the "mirror" and "curtain" principles of the Act.**
>
> [31] In my further view, this all means that in the scheme of the Act, Section 79 (6) acts as the threshold or barrier that must be crossed first in situations as here, before an aggrieved person can even access the rectification provisions embodied in Section 70 of the Act. In the narrower circumstances of this case, this translates to the requirement that for each impugned disposition for which the applicant seeks rectification of title **she must first establish that there was lack of "good faith" on the part of the purchasers/mortgagee.**
>
> [Emphasis mine]

[33] In all of the circumstances, I am of the view that the ***Land Titles Act*** bars the Applicants' ability to obtain an order for rectification in this case. The Mountrakis and D.H. Auto acquired and registered their properties prior to the filing of the application requesting rectification, and there is no evidence of any bad faith on

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behalf of the Mountrakis or D.H. Auto. The Mountrakis and D.H. Auto Respondents are not responsible for, nor can they be deemed to have acted in bad faith, as a result of the actions of David Duncan Young. In the absence of evidence to demonstrate a lack of good faith, the deficiency in the Land Title registry in these circumstances cannot become the problem of the Mountrakis or D.H. Auto.

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[34] The Applicant's have sought as an alternative remedy indemnification pursuant to subsections 73(1), 74(1) and 74(2) of the ***Land Titles Act***. These sections provide as follows:

> 73(1) **Any person who suffers damage by reason of** the rectification of the title register, **an error or omission in the title register which is not rectified**, an error or omission in a certificate of registered ownership or the loss or destruction of any document lodged at a land titles office for inspection or safe custody **is entitled to be indemnified** except in the following cases:
>
> (a) where the claimant has himself caused or substantially contributed to the damage by his fraud or negligence;
>
> (b) where the claimant derives title from a person who caused or substantially contributed to the damage by his fraud or negligence unless title is derived under a disposition for valuable consideration that is registered or protected in the title register;
>
> (c) where the claimant claims to have been deprived of any registered land or an interest or estate therein by the operation of this Act and the claimant is not barred by this Act from bringing an action for its recovery;
>
> (d) where the claimant or the person through or under whom he claims was either given notice, or not being given notice, had knowledge that the registrar was about to bring the land, in respect of which the claim arises, under this Act, or was about to do the act through which the proposed claimant claims to have suffered damage and has failed to pursue his remedies under this Act;
>
> (e) where the damage arises from the owner's breach of any trust;
>
> (f) where the damage is occasioned by the registrar's necessary delay in bringing land under this Act or in registering an instrument.
>
> (…)

> 74(1) Upon the application of a claimant, the Registrar General may determine whether or not a right of indemnity has arisen under this Act, and where he determines that such a right has arisen he may, with the approval of Service New Brunswick and with the consent of the claimant, award the claimant an amount as indemnity and may, whether or not he determines that such a right has arisen, award the claimant an amount for the reasonable expenses the claimant has incurred in making the application.
>
> 74(2) Where an award is not made pursuant to subsection (1) the claimant may, whether or not he has made an application under subsection **(1), apply to the court for an award of indemnity.**
>
> [Emphasis mine]

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[35] In the present matter, the Applicants have established an error or omission in the title register which this Court has determined cannot be rectified. The Applicants' remedy, if one is available, lies within the provisions of section 73(1) of the ***Act***. If the Applicants are able to establish that they have suffered damage and their circumstances do not fall under one of the exceptions set out in the ***Act***, they will be entitled to indemnification. The evidentiary record currently before the Court does not allow me to determine that issue at this time.

CONCLUSION and DISPOSITION

[36] The Applicants request for a rectification order pursuant to sections 17(2), 17(3)(a) and 79(3) of the ***Land Titles Act*** is denied. The parties shall advise the Court when they are prepared to proceed to a hearing on the outstanding issues in the current application following the filing of the Applicants' additional affidavit evidence and any additional responding affidavits on behalf the Respondents. A further date will be set upon request of the parties for the consideration of the outstanding issues and to hear the parties on costs.

DATED at Moncton, New Brunswick, this 12th day of February 2025.

Tracey K. DeWare
Chief Justice of the Court of King's Bench
New Brunswick, Trial Division

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