

**Citation:** *Anglican Parish of Shediac v Kosticki, Samuels and Samuels*, 2024 NBKB 187

**IN THE COURT OF KING'S BENCH OF NEW BRUNSWICK**

**TRIAL DIVISION**

**JUDICIAL DISTRICT OF MONCTON**

**MM-107-2024**

**BETWEEN:**

**THE CORPORATION OF THE ANGLICAN PARISH OF  
SHEDIAC**

APPLICANT

-and-

**SARAH KATHLEEN KOSTICKI, CLIFFORD HARTLEY  
SAMUELS AND JANET ELEANOR SAMUELS**

RESPONDENTS

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**DECISION**

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**BEFORE:** Justice Maya Hamou

**DATE OF HEARING:** September 25 and 26, 2024

**DATE OF DECISION:** October 7, 2024

**APPEARANCES:** Edwin G Ehrhardt, K.C., counsel appearing on behalf of the Corporation of the Anglican Parish of Shediac  
Sarah Kathleen Kosticki, Clifford Hartley Samuels, Janet Eleanor Samuels, not in attendance

## OVERVIEW

1. The Applicant, the Corporation of the Anglican Parish of Shediac (“the Parish”) seeks an order extinguishing an easement on lots 17A and 17B (identified respectively by PIDs 70632104 and 70632112) benefiting the Respondents’ property (PID 00863753).
2. This decision addresses the legal principles applicable to the extinguishment of easements by operation of law and the extinguishment of easements by implied release.

## Background

3. The Parish owns various lands in the Pointe-du-Chêne area of Shediac, New Brunswick. The Parish incorporated “road association corporations” to hold title to certain lands used by landowners and by persons leasing land in the area from the Parish. The Saint Martins Road Association Corporation #4 is one such road association corporation and owns the land which is mostly comprised of various roadways in Pointe-du-Chêne, bearing PID 70496690. The roadways constituting PID 70496690 are not municipal streets or provincial roads.
4. A portion of the land owned by the Saint Martins Road Association Corporation #4 was previously carved out to create lots 17A and 17B and these lots were conveyed to the Parish in 2017 (identified respectively by PIDs 70632104 and 70632112). Lot 17A fronts onto Third Avenue while lot 17B fronts onto Fourth Avenue.
5. The Respondents, Sarah Kathleen Kosticki, Clifford Hartley Samuels and Janet Eleanor Samuels, own property in Pointe-du-Chêne fronting on First Avenue (PID 00863753).
6. The Service New Brunswick map shows the locations of the lands in relation to each other and in relation to roadways. Traced in heavy black ink on the map is PID 70496690, which is constituted of roadways. Identified with boxes are lots 17A, 17B and R, identifying the Respondents’ property.



7. Before the creation of lots 17A and 17B, some Pointe-du-Chêne landowners were granted rights-of-way over the entire Saint Martins Road Association Corporation #4 land (PID 70496690). One such easement (Easement Registered 34242678) was granted by the Saint Martins Road Association Corporation #4 to Florence Lampert, in October of 2014, the predecessor in title to the Respondents (PID 00863753). That easement outlines the following:

Description of Easement:

Right of way in common with the Grantor, its successors and assigns and all other persons having a similar right over the said land forever over the land identified as PID 70496690.

Purpose of Easement:

To allow uninterrupted access to and egress from PID 00863753 by any means of travel over PID 70496690.

### **Application for Extinguishment of Easement**

8. The Parish filed and personally served its Application seeking the extinguishment of the easement on each of the Respondents.
9. The Respondents did not submit affidavit evidence in response to the Application, did not attend the hearing and did not otherwise express a position on this Application.

### **Position of the Parties**

10. The Parish suggests the easement on Lots 17A and 17B should be extinguished. According to the Parish, lots 17A and 17B serve no purpose, and never served the purpose for which the easement was granted; the lands are not used as a street or a road. Additionally, the Parish argues, the Respondents do not, and have never used lots 17A and 17B to access their property which is several blocks away and is not adjacent to lots 17A or 17B.
11. The Respondents did not attend the hearing or otherwise provide a position with respect to this Application.

### **ISSUES**

12. Is the easement extinguished by operation of law?
13. Is the easement extinguished by implied release?

## ANALYSIS

### Extinguishment of an Easement by Operation of Law

14. The extinguishment of an easement by operation of law was recently addressed by Justice Ivan Robichaud of the New Brunswick Court of King's Bench in *David Duncan Young v Donald Francis Dempsey and Suzanne Lang*, 2023 NBKB 213. In addressing the extinguishment of an easement by operation of law, Justice Robichaud relied upon the Ontario Court of Appeal in *Remicorp. Industries Inc. v Metrolinx*, 2017 ONCA 443.
15. Effectively, extinguishment of an easement by operation of law can occur in two ways: (1) by operation of statute, and (2) by operation of common law (*Remicorp. Industries Inc. v Metrolinx*, 2017 ONCA 443 at paragraphs 63 to 73).
16. First, in the facts arising from this Application, there is no New Brunswick statute which would provide for the extinguishment of the easement.
17. Second, turning to common law principles, an easement may be extinguished by unity of ownership, possession of the dominant and servient land, or by the destruction of either the dominant or the servient land. Additionally, an easement may be extinguished by the disappearance or expiry of the purpose for which the easement was created. The Ontario Court of Appeal in *Remicorp Industries Inc. v Metrolinx*, 2017 ONCA 443 at paragraphs 71 and 72 accepted the notion that there must be some permanence to the disappearance or expiry of the purpose for an easement to be extinguished on this basis.

[71] **Second, an easement may be extinguished by operation of the common law.** Examples include unity of ownership and possession of the dominant and servient lands or destruction of either the dominant or servient lands. **As seen from *Anger & Honsberger, Gale on Easements, and Halsbury's*, extinguishment by operation of law also includes expiry of a time-limited easement and disappearance or expiry of the purpose for which the easement was created.** It seems to me that the former would more properly be the subject matter of an express or implied release. If an easement is granted for a limited time, it follows that it must have been the subject of an express grant that expressly or impliedly provided for a release on the expiration of the time limit.

[72] **As for expiry of the purpose for which the easement was granted, an easement is not typically extinguished by temporary events that impact its use. Some permanence must exist.** [page124] In "Easement Caselaw Update" (paper presented to the Ontario Bar Association, Continuing Legal Education Program, Easements for Real Estate and Municipal Lawyers: Level II, October 6, 2016), Craig Carter writes that "[a]n easement can be extinguished as a matter of law when some

**event occurs that makes the easement unusable or unnecessary.** Some permanence must exist. A flood that washes over an easement is not extinguishment. But global warming causing a sea to cover a right of way will be."

[Emphasis added]

18. Similarly to the situation in *Remicorp. Industries Inc. v Metrolinx*, the easement on lots 17A and 17B benefit the Respondents' property, contain no time limit and despite the Respondents' lack of use or need, the purpose of the easement is still in effect (*Remicorp. Industries Inc. v Metrolinx*, para 76). The Parish concedes that some level of permanence is required for the extinguishment by operation of law and accepts that while the trees located on lots 17A and 17B impede vehicle traffic, it remains that foot traffic is possible.
19. Therefore, the easement on lots 17A and 17B for the benefit of the Respondents' property is not extinguished by operation of law.

### **Extinguishment of an Easement by Implied Release**

20. The Ontario Court of Appeal in *Remicorp Industries Inc. v Metrolinx* at paragraphs 47 to 51 described extinguishment of easements by implied release. The non-use of an easement coupled with an intention to abandon the easement, may demonstrate an implied release. The Ontario Court of Appeal emphasised that non-use is insufficient and that an intention to abandon must be proven by the party asserting a release. More importantly, this concept was recognised by the New Brunswick Court of Appeal and the decisions of the New Brunswick Court of Appeal are binding on this Court (*Blake et al. v Richard et al.*, 2013 NBCA 74, at paragraph 2 and *Crowther v Shea*, 2005 NBCA 97 at paragraph 6). The Ontario Court of Appeal also specified that the onus is on the party asserting a release.

[47] An easement may be abandoned by release which may be express or implied. **The onus of proof is on the party asserting a release:** *Liscombe v. Maughan* (1928), 1928 CanLII 450 (ON CA), 62 O.L.R. 328, [1928] O.J. No. 44 (C.A.), at p. 335 O.L.R. In *Gale on Easements*, 20th ed. (London: Sweet & Maxwell (U.K.), 2016), the authors warn, at para. 12-26: "Unless the easement is granted for a term of years, the rights conferred by an easement are perpetual and, accordingly, are actually or potentially valuable rights. Therefore it is not lightly to be inferred that the owner of such a right should give it up for no consideration." [page119]

[48] An easement can be expressly released by the dominant owner, that is, the party who has received the grant of easement -- in this case CN and

then Metrolinx. As noted by the application judge, there was no express release. This was undisputed.

[49] An easement can also be released impliedly. **Non-use coupled with an intention to abandon the easement may demonstrate implied release. On its own, non-use is insufficient. As this court explained in *Liscombe*, at p. 335 O.L.R., non-use may arise because an owner of an easement had for the time no occasion to use it as another more convenient means of employing the land was available. However, this lack of use did not prove that the owner of the easement intended to abandon it.** See, also, *Ward v. Ward* (1852), 155 E.R. 1189, 7 Ex. 838 and *Crossley and Sons Ltd. v. Lightowler* (1867), L.R. 3 Eq. 279. Indeed, in *Liscombe*, at p. 335 O.L.R., this court cited *Seaman v. Vawdrey* (1810), 33 E.R. 1032, where, despite non-use for over 100 years, an intention to abandon was not established. **To reiterate, intention to abandon must be proven.**

[50] **Intention to abandon will be found where "the person entitled to it has demonstrated a fixed intention never at any time thereafter to assert the right himself or to attempt to transmit it to anyone else":** *Shklar v. Kwiecien*, 1972 CanLII 485 (ON SC), [1972] 3 O.R. 245, [1972] O.J. No. 1843 (H.C.J.), at p. 247 O.R., citing *Tehidy Minerals Ltd. v. Norman*, [1971] 2 All E.R. 475, at p. 492. See, also, *Almel Inc. v. Halton Condominium Corp. No. 77*, 1997 CanLII 14498 (ON CA), [1997] O.J. No. 824, 98 O.A.C. 72 (C.A.), at para. 7. **To establish intention to abandon, the surrounding circumstances may be examined:** *Liscombe*, at para. 28.

[51] Inclusion of an easement in a conveyance supports the absence of an intention to abandon: *Liscombe*, at p. 335 O.L.R. As stated in *Halsbury's Laws of Canada -- Real Property* (Toronto: LexisNexis, 2016 Reissue), at HRP 316: "Where title has been perfected an extinguishment will usually require either an express release or a circumstances so cogent as to preclude a quasi-releasor from denying the release"; an intention to release a will be less readily presumed where the title to the easement has been perfected than where the title still remains inchoate": citing *Baker v. Harris* (1929), 1929 CanLII 406 (ON CA), 64 O.L.R. 513 at 514, [1929] O.J. No. 77 (C.A.), at p. 516 O.L.R. Suspension of the exercise of a right is insufficient. An intention not to exercise a right may differ from an intention to abandon it. See *Kileel and Kingswood Realty Ltd. (Re)*, 1979 CanLII 2723 (NB CA), [1979] N.B.J. No. 307, 108 D.L.R. (3d) 562 (C.A.), at p. 567 D.L.R. [page120]

[Emphasis added]

21. The Court is satisfied the language of the easement provides a right-of-way over the roadways in perpetuity for the purpose of allowing uninterrupted access to and egress from the Respondents' property by any means of travel. This is an acquired right not limited to the method of travel and not limited to the number of routes that may be taken to access the

property. That said, based on the evidentiary record presented by the Applicant, lots 17A and 17B are not being used by the Respondents for the purpose identified in the easement; to access their property. Further, the Court acknowledges that in this case, lots 17A and 17B constitute only a small portion of the original easement granting access to roadways on PID 70496690 including First Avenue, Second Avenue, Third Avenue, Fourth Avenue and St. James Street. Lots 17A and 17B are effectively an extension of St. James Street which “could” connect Third Avenue and Fourth Avenue.

22. It remains that abandonment of the easement by the Respondents must be established by the Applicant to be successful. Abandonment is a question of fact which requires consideration of all surrounding circumstances. In some cases, abandonment may be inferred (*455645 Ontario Ltd. v Rousseau*, 1981 CarswellOnt 513, [1981] O.J. No. 558 at paras. 25 to 32).
23. In this case, the Respondents were personally served with the Application. The Respondents filed no affidavit, the Respondents did not attend the hearing and the Respondents did not voice a position on the Application. Is this sufficient to be considered an abandonment of the easement? In this case, the Court finds it is sufficient to extinguish the easement in addition to the surrounding circumstances, namely the non-use of the easement on lots 17A and 17B by the Respondents and the very limited impact of removing lots 17A and 17B from the greater roadway access conferred upon the Respondents by way of easement.
24. Therefore, the Court concludes the Parish has established implied release of the easements on lots 17A and 17B.

## **DISPOSITION**

25. The Application to extinguish the easement burdening PID 70632104 and 70632112 benefiting PID 00863753 is granted.
26. As the Respondents did not participate in the proceedings, no costs will follow.

DATED at Moncton, New Brunswick, this 7<sup>th</sup> day of October 2024.

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Justice Maya Hamou  
Court of King's Bench of New Brunswick