CITATION: Beley Point v. Smith, 2025 ONSC 6765
BARRIE COURT FILE NO.: CV-22-1407
DATE: 20251203

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
Beley Point Farm Inc.	)	Mary Anne Cummings, for the Applicant
Applicant	)	
– and –	)	
Leslie George Smith and Susan Smith	)	Derek A. Schmuck, for the Respondents
Respondents	)	
	)	**HEARD:** September 12 and 15**,** 2025

REASONS FOR DECISION

LEIBOVICH J.

[1] The parties have filed dueling applications regarding Beley Point Farm Inc.'s ("Beley Point") right-of-way over the Smiths' property. Beley Point is owned by the McLoughlins. There is no dispute amongst the parties that the only way to access the property owned by Beley Point is to travel from an entrance off the highway using a road that is on the Smiths' property. There is also no dispute that the Smiths boarded up this roadway after they built a newer road approximately 30 meters away from the old entrance. The other homeowners impacted by this change are content with accessing their property using the new road. The owners of Beley Point are not content. They submit that they have a registered right-of-way that the Smiths cannot unilaterally change. The Smiths agree that there is an easement, but it is an easement of necessity, not a deeded and registered easement.

[2] Beley Point seeks an order confirming that it has a registered right-of-way and requests that it be restored by the Smiths. The Smiths have brought their own application seeking that the right-of-way be modified and moved to the new roadway location.

[3] This case raises the following issues:

1) Is there a registered easement?

2) If so, have the respondents substantially interfered with it?

3) If so, may the court relocate the easement to the new roadway?

Relevant Facts

[4] The McLoughlins live in California. In August 2020, they viewed the property at 20 Beley Point Road, Seguin, ("the property") through a series of virtual tours. They were unable to enter Canada at the time because of the COVID-19 pandemic. They bought the property on September 15, 2020, from the Estate of Ms. Mary Anne Beley.

[5] The property does not connect directly to Highway 632 (Peninsula Road). Its only vehicular and pedestrian access is by Beley Point Road, a private road over land owned by the respondents, Susan and Leslie George Smith. The right-of-way is registered as follows:

> Together with a Right-of-Way for Pedestrian and Vehicular Ingress and Egress and an easement for Telephone, Cable and Hydro Lines with the right to maintain said lines over that Part of said Block L designated as Part 10 on Plan 42R-13990.

[6] The respondents wanted to relocate the easement. Starting in 2016, the respondents sought to rezone their land and applied for consent to create three new lots, each with its own right-of-way. As part of that process, the Township of Seguin consulted the Ministry of Transportation ("MTO"). On November 8, 2016, MTO confirmed that it had no objections, provided that the easements for the three new lots and the retained lands were registered on title and that all access to the properties would remain through Beley Point Road.

[7] In June 2017, Susan Smith contacted MTO to inquire about relocating the easement's entrance at Highway 632. On August 28, 2017, MTO approved the proposal, subject to certain conditions. These conditions required that the existing entrance be closed and the easement restored to its original or better condition, that an Entrance Permit be obtained before construction, and that the respondents provide $10,000 in security for the relocation and restoration. MTO also required that all benefiting property owners and users receive a legally deeded easement over the full length of the private road.

[8] The respondents retained a planner, Marie Poirier, to assist with their rezoning application and the proposed relocation of the easement. On September 24, 2019, Ms. Poirier sent a letter to Ms. Mary Anne Beley acknowledging the existing easement and advising that, when the time came to amend it, the respondents' lawyer would contact her to "guide the process." Ms. Poirier wrote:

> Because Beley Point Road is a private road the deed to your property carries with it a ROW over lands owned by other people, that is, Mr. and Mrs.

> Smith, such that you may legally access your property, and they must legally provide free and unencumbered access to you over this ROW for your property.
>
> …
>
> Completing this reconfiguring of the ROW requires the services of a lawyer to appropriately and accurately update the deeds. Please be advised this process will not be of any cost to you; Mr. and Mrs. Smith will undertake the costs related to updating the ROW and your property's deed.
>
> When the time comes to amend the ROWs, you will be contacted by Mr. and Mrs. Smith's lawyer who will guide the process and will be able to answer any questions you may have on the legal aspects

[9] Mrs. Smith testified that, around the time of this letter, Ms. Mary Anne Beley told her that she would consent to the easement being transferred. Mrs. Smith testified in cross-examination as follows:

> Q. When was the consent given to you?
>
> Mr. Schmuck: For which person?
>
> Q. From Mary Anne Beley
>
> A. From, from Mary Beley? She was one of the first ones. So, if those letters went out, then it was probably before that. So, it was around September 2019.

[10] No other details of the conversation or circumstances of the conversation have been provided. There is no dispute that written consent was never provided. As Mrs. Smith testified:

> Q. I'm going to put it to you that you have never received the written agreement of Mary Anne Beley to the extinguishment of the right-of-way as it existed in 2019. Do you agree or disagree with that statement?
>
> A. Not a written.
>
> Q. And do you agree with me that you have never received the written agreement of the present owner of 20 Beley Road, the applicant in this proceeding, correct?
>
> A. Correct.

[11] There is no evidence that any lawyer followed up with Ms. Mary Anne Beley and the next official contact was from the Smiths' counsel to the McLoughlins in June 2021.

[12] On February 11, 2020, MTO received notice from the Township of Seguin that a public meeting had been scheduled for March 2, 2020. The purpose of this meeting was to consider the respondents' rezoning applications which sought to grant six easements over the respondents' lands at 10 Beley Point Road thereby formalizing the relocation of the existing entrance to Highway 632. In February 2020, the Township posted notices near the entrance to the easement to inform the public of the proposed relocation.

[13] In March 2020, the Township approved the respondents' application. At the public meeting on March 2, 2020, no one opposed the application. On March 10, 2020, the Township sent a Notice of Passing of the rezoning applications to affected residents, including Ms. Mary Anne Beley. There is no evidence that she received the notice. She died on April 6, 2020.

[14] On July 3, 2020, MTO issued an Entrance and Encroachment Permit to the respondents to relocate the easement's entrance. The permit was granted on the understanding that the Township had approved the consent applications and that deeded easements for the new alignment would be provided to all properties previously serviced by Beley Point Road. That assumption formed the basis for MTO's approval.

[15] On September 15, 2020, ownership of the property was transferred from Richard Asbury and Suzanne Asbury Wakefield, acting as the Estate Trustees for the Estate of Ms. Mary Anne Beley, to Beley Point Farm Ltd. On December 17, 2020, Beley Point Farm Ltd. transferred ownership to Beley Point Farm Inc. In both transfers, the property description included the registered easement.

[16] On August 26, 2020, before closing, the McLoughlins' solicitor sent a requisition to the vendors' solicitor regarding the easement providing access to the property. The requisition noted that the property did not front on a municipal road and was accessible only by way of the easement over privately owned lands. The following items were requested before closing:

a) Declaratory evidence from the vendors confirming that the ROW was in good standing and not subject to any dispute.

b) Details of all maintenance agreements and contracts related to the ROW.

c) Evidence from the managing party confirming that the vendor was not in default of any obligations concerning road maintenance contributions, along with an adjustment in the statement of adjustments to account for all fees associated with the access route.

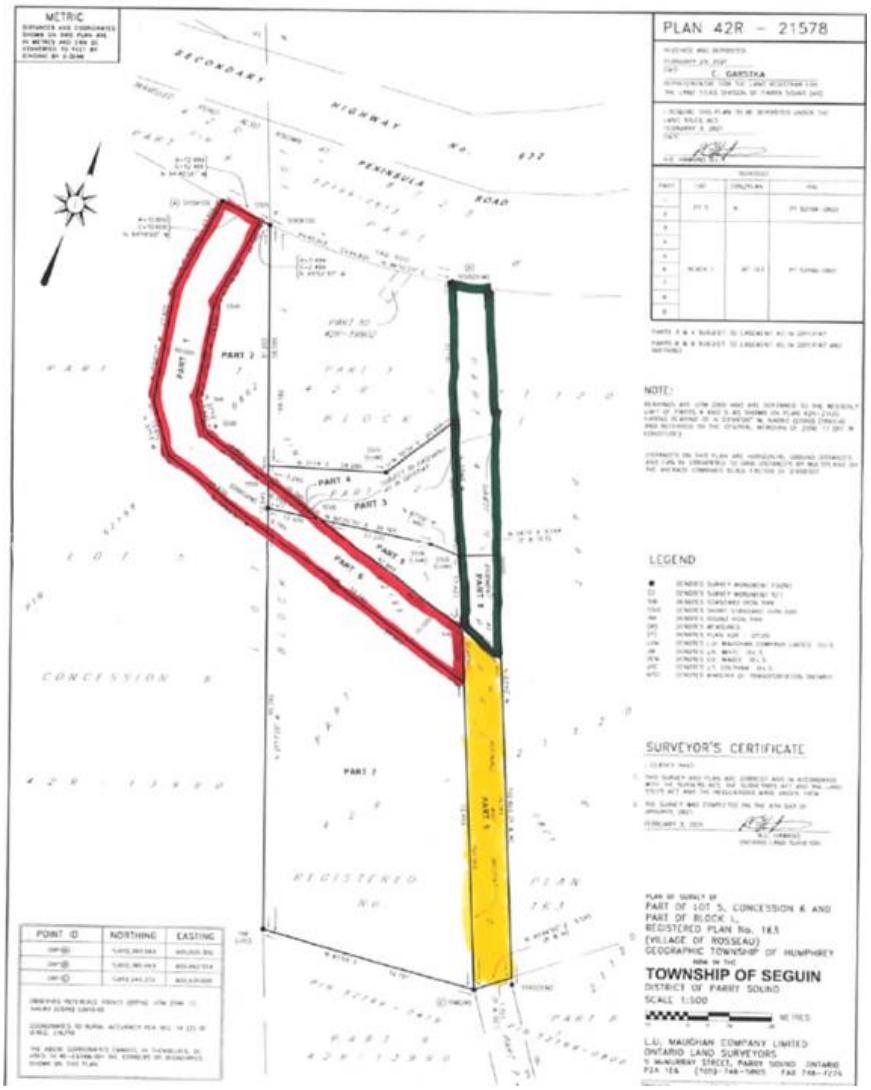
[17] On closing, the vendors, Richard Asbury and Suzanne Asbury Wakefield, acting as Estate Trustees for the Estate of Ms. Mary Anne Beley, delivered the requested statutory declaration. It confirmed that the property's access was provided by an easement over private lands, that the easement remained in good standing, and that it was not subject to any dispute.

[18] On June 8, 2021, respondents' counsel informed Brian Mcloughlin of their intention to reroute the easement. The email is reproduced below:

> I am acting for Les and Susan Smith in connection with completing the necessary Transfer Easements to reconfigure a portion of Beley Point Road. The property registered in the name of Beley Point Farm Inc., municipally known as 20 Beley Point Road, has the benefit of a right-of-way over the lands outlined in green and highlighted in yellow on the attached copy of Plan 42R-21578 and other lands. It is my understanding you have agreed to release your right-of way over the lands outlined in green in exchange for a new right-of-way over the lands outlined in red. The Township of Seguin has granted the required consent under the Planning Act for the transfer of the right-of-way over the lands outlined in red. The transfer of the new right-of-way and the release of the existing right-of-way over the lands outlined in green should be completed simultaneously.
>
> 20 Beley Point Road also has the benefit of an easement over the lands outlined in green and highlighted in yellow on the attached plan for telephone, cable and hydro lines with the right to maintain said lines. It is my understanding that the telephone line is underground, there is no cable service available and hydro service comes from across the river.
>
> Mr. and Ms Smith will pay my legal fees and expenses to complete the exchange if you choose to consent to me acting for you as well. You may, however, choose to retain your own lawyer to act for you in which case, his or her costs would be your responsibility.
>
> I would appreciate hearing from you as to whether you will be retaining your own lawyer, and if so, his or her name. In any case I would appreciate your confirming your current mailing address.

[19] The applicant advised that it opposed this proposal. In August 2021, Erica McLoughlin visited the property in-person for the first time and discovered that the easement had been blocked by a guardrail, appeared to have been bulldozed, was overgrown, and a new entrance off Highway 632 had been built.

[20] The original easement is marked in green on the diagram below. The green easement is registered. The new easement is marked on the diagram below in red:



[21] Mrs. Smith testified that the respondents have, to date, spent approximately $130,000 to move the entranceway and improve its surface, not including professional costs related to the various applications.

[22] Brian McLoughlin testified that using the new entrance took him an extra two minutes to reach his property. He testified that the new roadway is "uglier, uphill and downhill. It's in front of a commercial property going up somebody else's driveway." He testified that:

> A. Our single biggest concern is that I have a neighbour who took my right-of-way without my permission. It was a shocking level of indifference to our property rights.
>
> Q. But how did that affect you? What's your single biggest concern about the new right-of-way?

> A. I want my old right-of-way. I want the right-of-way I bought. That's what I want.

[23] The other homeowners who had a right-of-way in the old entrance have agreed to transfer their easement to the new roadway. A video illustrating the new right-of-way was entered as an exhibit on the application.

Did the applicants have a registered right-of-way?

[24] The applicant clearly has a registered right-of-way. The respondents' position that the applicant does not is contrary to the facts and contrary to their past behaviour.

[25] This case concerns a registered easement created by express grant. Section 15 of the *Conveyancing and Law of Property Act*, R.S.O. 1990, c. C.34, provides that such an easement automatically passes with the conveyance of the dominant land unless expressly excluded, and the purchaser acquires the same legal rights as the prior owner. Section 78(4) of *the Land Titles Act*, R.S.O. 1990, c. L.5, further confirms that once registered, an instrument is deemed to be embodied in the register and is effective according to its nature and intent. The respondents, in all their past communications, have taken the same position, that the applicant has a registered right-of-way. Their counsel explicitly sought the applicant's consent to have that right-of-way transferred to the new right-of-way. The June 8, 2021, email reproduced above could not be clearer.

[26] The respondents, contrary to all their past communications with Ms. Mary Anne Beley, the applicant and the Township of Seguin, raised a new argument in their factum. They submit that the easement has expired pursuant to s. 113(1) of the *Registry Act*, R.S.O. 1990, c. R.20, which holds that "[a] claim that is still in existence on the last day of the notice period expires at the end of that day unless a notice of claim has been registered". I disagree.

[27] Section 44(1) of the *Land Titles Act* states that when land is brought into the Land Titles system, it remains subject to any right-of-way or easement that is subsisting at the time of registration, unless the register expressly provides otherwise. In this case, the right-of-way was created by express grant in 1944. It was afterwards repeatedly set out in subsequent instruments on both the servient and dominant tenements and delineated on a registered plan in 1995 which was also registered against both the servient and dominant tenements. At the time of conversion in 2009, the right-of-way was a registered interest. It was carried forward into the Land Titles system and appears in the parcel description on both the servient and dominant lands. It has not expired.

[28] In any event, the respondents clearly had notice of the easement. The respondents, the Smiths and their numbered company, first appeared on the historical abstract on July 4, 2000, as purchasers of parts 4, 5, 6, 7, and 10 on registered plan 42R-13990. The conveyance to them was expressly made subject to a right of way over Part 10, which is identified on Plan 42R-13990 as a travelled 30-foot right of way runs over part 4, the very land now encumbered by the easement. This explicit language in their own conveyance, coupled with the clear depiction on the referenced registered plan, provided the respondents with direct and undeniable information regarding the existence of the right-of-way at the time of their purchase.

[29] Finally, Mrs. Smith testified that she knew that the original right-of-way was registered and not extinguished:

> Q. So, that, that -- you know that the original right-of-way was registered, correct?
>
> A. Correct.
>
> Q. You know that your planner has told you that you can only extinguish it with the consent of anyone who has the right to use it, correct?
>
> A. Correct.
>
> Q. And so, do you agree with me that the original right-of-way has not been extinguished?
>
> A. Correct.

[30] Counsel for the respondents submit that the onus is on the applicant to prove that it has a valid right-of-way and that the applicant has failed to meet its onus. The evidence is overwhelming that the applicant has a valid right-of-way, again as admitted by counsel for the respondents in the June 8, 2021 email.

[31] In *Remicorp Industries Inc. v. Metrolinx*¸ 2017 ONCA 443, 138 O.R. (3d) 109, the Court of Appeal for Ontario stated at para. 65, that extinguishment of an easement at common law can occur only where: (a) the purpose of the easement has ended; (b) its term has expired; (c) the right has been abused; or (d) the dominant and servient lands merge in one owner. None of these situations exist here.

[32] The Court of Appeal in *Remicorp*, at para. 66, also noted that an easement may be extinguished by statute or express or implied release. The respondents submit that in this case, Ms. Mary Anne Beley consented to the easement being moved. There are a number of difficulties with this assertion:

1) The onus is on the respondents to establish the facts upon which they rely. The only evidence we have that Ms. Mary Anne Beley consented to the relocation of the easement is the bare assertion from Mrs. Smith. All she said in that regard is that, around the time of the September letter from their planner, Ms. Mary Anne Beley consented to the relocation. No other details were provided regarding the extent of the conversation. There is no evidence documenting that conversation. I do not accept that Ms. Mary Anne Beley consented to the relocation of the easement.

2) There is no dispute that any consent, if it existed, was verbal and not written. Any release, in order for it to be valid must be, according to the *Statute of Frauds*, R.S.O. 1990, c. S.19, in writing. Section 2 of the *Statute of Frauds* states that no such interest "shall be assigned, granted or surrendered unless it be by deed or note in writing signed

by the party so assigning, granting or surrendering the same". As simply and clearly stated in *Joseph v. Poling*, 2013 ONSC 5580, at para. 47:

> The *Statute of Frauds* is a very old statute. It was enacted to avoid the very thing we have here: Disputes concerning rights in land arising because of insufficient evidence of the terms of agreement. In effect this statute says that rights can only be acquired in land if:
>
> "they are created by a writing, and
>
> that writing is signed by the parties creating the rights".

[33] The applicant has a registered easement over the respondents' property. Neither Ms. Mary Anne Beley nor the applicant ever relinquished that easement.

Have the respondents substantially interfered with the registered easement?

[34] The respondents have clearly substantially interfered with the registered easement. They have completed closed the road. It cannot be used to access the applicant's property. As stated by Justice Myers in *de Jocas v. Moldow Enterprises Inc*., 2020 ONSC 7160, at para. 59:

> However, I do not see this as a proper or relevant issue. The respondents have not just made a change that makes others' use of their rights of way less convenient. They have closed the rights of way with large boulders and made Brewers Close impassable. While they have offered an alternative, no one has any defined rights over the new section. I know of no law that allows the owner of a servient tenement to completely deprive the dominant tenement owner of the use of the deeded land while offering to substitute another piece of land in its place. The respondents have not interfered with the manner by which the applicants use their rights of way; they have prevented them from travelling over the rights of way altogether.

Should the court move the easement to the new roadway?

[35] This court has the ability to transfer the easement to the new roadway. Section 61(1) of the *Conveyancing and Law of Property Act*, provides as follows:

> Where there is annexed to land a condition or covenant that the land or a specified part of it is not to be built on or is to be or not to be used in a particular manner, or any other condition or covenant running with or capable of being legally annexed to land, any such condition or covenant may be modified or discharged by order of the Superior Court of Justice.

[36] In addition, s. 119(5) of the *Land Titles Act*, provides as follows:

> The first owner and every transferee, and every other person deriving title from the first owner, shall be deemed to be affected with notice of such

> condition or covenant, but any such condition or covenant may be modified or discharged by order of the court on proof to the satisfaction of the court that the modification will be beneficial to the persons principally interested in the enforcement of the condition or covenant.

[37] The Court of Appeal in *Remicorp*, at para. 89, noted that s. 61(1) of the *Conveyancing and Law of Property Act* does not indicate how a court's discretion is to be exercised and that s. 119(5) of the *Land Titles Act* requires proof that the modification will be "beneficial to the persons principally interested in the enforcement of the condition or covenant". With respect to this term, the Court of Appeal stated, at para. 90:

> In *George (Re)* (1926), 1926 CanLII 356 (ON CA), 59 O.L.R. 574, [1926] O.J. No. 72 (C.A.), this court considered whether a modification would be "beneficial to the persons principally concerned", a phrase previously contained in the *CLPA* and which is nearly identical to that found in the *LTA.* Middleton J.A. stated, at pp. 577-78 O.L.R.:
>
> > The provisions of the statute (12 & 13 Geo. V. ch. 53) are not easy to interpret. A Judge is empowered to modify or discharge building restrictions "on proof to his satisfaction that the modification will be beneficial to the persons principally concerned." If this means beneficial to the applicant the provision is senseless, for the relief would not be sought unless the applicant deemed it a benefit. If it means beneficial to the respondents it is again meaningless, for the respondents would undoubtedly release any right they may have if for their benefit. The meaning that has been given to the expression in practice is that the Judge must satisfy himself that the balance of convenience is in favour of granting the application, having regard to the rights and interests of both parties, and I think it may safely be said that the order should not be made unless the benefit to the applicant greatly exceeds any possible detriment to the respondents: *Re Button* (1925), 57 O.L.R. 161.

[38] The Court of Appeal adopted the comments in *Ontario Lime Co. (Re)*, [1927] 1 D.L.R. 765, at p. 768, that that the jurisdiction be exercised with great caution and that an order be seldom granted if prejudicial to the adjacent landowner.

[39] In *8310 Woodbine Developments Inc. v. 2261039 Ontario Limited*, 2018 ONSC 4684, McKelvey J. stated, at para. 14, that in applying the statutory provisions:

> These statutory provisions do not give guidance about how a court's discretion is to be exercised. Nevertheless, the case law has established that there is a very narrow window for a court to intervene in situations where an easement has not been abandoned.

[40] The court later stated, at para. 17, that with respect to relocating an easement, it will only do so when there is no prejudice to the responding party:

> To hold otherwise would be unfair to the responding parties as there is no provision under the legislation for compensation to be awarded to them. The court would in effect be involved in unilaterally re-writing agreements without the consent of at least one of the parties. This not only creates considerable uncertainty with respect to the rights of contacting parties but would potentially attract considerable litigation from parties seeking changes to their rights and obligations because of changed circumstances.

[41] The Smiths have agreed to have all the easements transferred to the new roadway. Counsel for the Smiths submit that:

> As herein before mentioned, the New Entrance is a substantial improvement when compared to the Old Entrance. It is wider, paved, and safer. It is therefore "beneficial to the persons principally interested in the enforcement of the condition or covenant", being the lot owners of Beley Point Road (The Applicant, the Respondents, the LaGamba's, Mr. Filippov and his partner, Inna Moltchanova).

[42] I agree with counsel for the Smiths that there is no evidence that the applicant's property value has been altered by the new roadway. I also agree that, in many ways, the new roadway appears to be a better and safer road. I also agree that the extra road travelled is minimal. Finally, it is not lost on me that the other neighbours have agreed to the transfer. However, the applicant is entitled to the easement that was registered. From their point of view, the original easement is a better, more direct route with a nicer view. I cannot say that there is no prejudice to the applicant.

[43] The Smiths submit that:

> The Applicants failed to engage, dispute, or object to any of the actions complained of in the Application despite being notified of same by notices posted in prominent locations along Beley Point Road, including right outside of the Applicant's property.'

[44] This is technically correct, however, the owners of the applicant corporation live in the United States and they would not have been aware of the change. The Smiths should have advised them of what they wanted to do before they started construction, not afterwards. The Smiths were not allowed to unilaterally interfere with the applicant's right-of-way.

What is the appropriate remedy

[45] The respondents must restore the easement, remove the barriers including a guardrail, and refrain from blocking, altering, or otherwise interfering with the applicant's use of the right-of-way. I make no comment on whether the respondents must close the new right of way that they created. The respondents' cross-application is dismissed.

[46] The applicant also seeks damages of $10,000 for nuisance. There is no basis to order the payment of any monies for nuisance. Requiring an ever so slightly longer drive to their cottage does not merit $10,000 or any amount.

[47] The applicant is the more successful party, and it is presumptively entitled to its costs, subject to any offers to settle that may have been exchanged between the parties. The applicant shall, within 15 days from the release of this decision, serve and file their submissions regarding costs, limited to three pages, with a Cost Outline, Bill of Costs, and any Offer that may affect costs attached thereto. The respondents shall, within 30 days from the release of this decision, serve and file their response, limited to three pages, with a Cost Outline, Bill of Costs, and any Offer that may affect costs attached thereto. Reply, if any, to be served and filed within 40 days from the date herein, limited to one page, without attachments

Justice H. Leibovich

Released**:** December 3, 2025