

Court of King's Bench of Alberta

Citation: Emard v Young, 2026 ABKB 174

Date: 20260310
Docket: 2306 00521
Registry: Lethbridge

Between:

VERN EMARD

Plaintiff

- and -

**MIKE YOUNG AND BENGA MINING LIMITED
OPERATING AS RIVERSDALE RESOURCES**

Defendants

**Reasons for Decision
of the
Honourable Justice E.J. Funk**

I. Introduction

[1] Grassy Mountain is located north of the Town of Blairmore, in SW Alberta. The Grassy Mountain Road (GMR) starts approximately seven kilometres north of Blairmore and travels into Grassy Mountain, running through the MDs of Crowsnest Pass and Ranchland No.66.

[2] The Road facilitates access to activities related to the controversial Grassy Mountain Coal Project. It also provides a small number of local landowners (Adjacent Landowners) with access to their properties that lay adjacent to the lands over which the GMR runs (GMR Lands). The Road additionally provides access to some hiking trails in the area.

[3] Mr. Emard, the Applicant, is one of these local landowners. He has owned his property on Grassy Mountain since 1993. He has, until this dispute arose, used the Grassy Mountain Road to access his property without restriction.

[4] The Respondent (now known as Northback) owns the majority of the GMR Lands, with small portions of the Road running over land owned by Adjacent Landowners. Since 2015, Northback has been asserting its privacy interest over the Grassy Mountain Road. It has done so by establishing a locked gate along the Road; erecting signs that indicate the Road is private and warn against trespass; and entering into road use agreements (RUA's) with some of the Adjacent Landowners.

[5] Mr. Emard has refused to enter into any road use agreement with Northback. He takes the position the Grassy Mountain Road is either public or that an easement runs over the GMR Lands that allows him to use the Road to access his property. Mr. Emard brings this application in which he seeks:

- a. A declaration that the Grassy Mountain Road is public; or
- b. A declaration that a common law easement of necessity runs over the GMR Lands; or
- c. A direction the matter proceeds to trial for a determination of liability and damages.

[6] The primary issues for me to determine are:

- a. Whether the past owners of the Grassy Mountain Road dedicated it for public use, thereby making it a public road. Or,
- b. Whether an implied easement is absolutely necessary for Mr. Emard to access his property.

[7] As the applicant, Mr. Emard bears the burden of proof on both issues.

[8] In determining these issues, I have primarily relied on the affidavits of Mr. Emard and Mr. Lindstrom (for Northback), along with transcripts from Questioning on those affidavits.

[9] The parties additionally referred to transcripts of evidence taken at public hearings conducted by the Alberta Energy Regulator (regarding an application for Northback to operate a coal mine on Grassy Mountain). The evidence contained in these transcripts is, at times, hearsay (if not double or triple hearsay). The evidence was not taken in the context of this dispute over the Grassy Mountain Road. The evidence in those transcripts regarding historical uses of the Road has not been tested through cross examination. For these reasons, I have largely avoided reliance on the evidence in those transcripts in determining this application.

II. Preliminary matters.

[10] I heard this matter by way of a Special Chambers application on February 26, 2026. Mr. Emard filed his first application in 2023. Between 2023 and 2025, the parties have filed several affidavits in support of their respective positions. In August 2025, J Kubik granted an Interim Order regarding Mr. Emard's use of the Grassy Mountain Road and directed his application be set down for a half day Special Chambers hearing. December 9, 2025, was selected for that hearing date.

[11] The parties participated in Questioning on affidavits in October 2025. The December Special Hearing date was adjourned to February 26, to allow additional time to provide Answers to Undertakings. On December 31, the parties agreed to a Consent Order regarding deadlines for filing and exchanging briefs in advance of the February 26, 2026 hearing date.

[12] Two weeks before this hearing date, the Applicant located a phone number that led it to the previous owner of Kootenay Wood Preservers (KWP). From roughly 1990-1992, KWP owned lands on Grassy Mountain for its logging operations; it used the Grassy Mountain Road (then owned by Devon) to access these lands.

[13] On February 17th, this individual (now residing in BC) attended at a Notary Public to swear an affidavit regarding his knowledge of KWP's use of the Grassy Mountain Road between 1990-1992. Because of time constraints, Northback has not been able to conduct any Questioning on this affidavit.

[14] The Applicant seeks to tender this affidavit in this application; the Respondent is opposed. For the reasons below, the application to tender this affidavit is dismissed.

[15] The Court has discretion to admit new evidence that was not part of the original application materials. In exercising this discretion, I should consider: 1) the length of the delay; 2) the explanation for the delay; and 3) the relative prejudice to the parties: *Cornelson v Alliance Pipeline Ltd*, [2013 ABCA 378](#) at para 6.

[16] The delay here is long, with no real explanation for the Applicant's discovery of this phone number just two weeks before this scheduled hearing date. This action has been ongoing since 2023, with both Applicant and Respondent filing several affidavits in support of their respective positions. There has been ample time to marshal the evidence required to proceed with this application.

[17] Other than the Applicant recently locating a phone number that led to the proposed new evidence, I received no information regarding the reason for this delay. Put another way, I received no information regarding what, if any, efforts were made to locate this phone number, or the previous owner of KWP, earlier.

[18] The prejudice to Northback is significant. This proposed new evidence comes after Northback filed its brief in support of this application. The timing of this proposed new evidence operates, to some extent, to fill some of the gaps that arise from Northback's argument.

[19] The timing of this proposed new evidence additionally deprives Northback the ability to challenge the evidence through cross examination, or Questioning. The inability to challenge this evidence additionally prejudices the Court's ability to meaningfully consider this untested evidence. Without cross examination, the weight given to this proposed evidence (if admitted) would be so minimal as to render the evidence essentially worthless.

[20] Finally, the proposed evidence has little probative value in this application. The affiant speaks generally of his understanding of the use of the Grassy Mountain Road from 1990-92. In essence, he understood that KWP freely used the GMR during its operations in the area; he understood the Road had been used in this way for 30 years prior to this. The basis of his understanding is not stated in his affidavit. His affidavit is silent regarding any inquiries KWP might have made regarding the private vs public nature of the Road. In short, during these two years of operation on Grassy Mountain, KWP used the GMR. This evidence, if accepted, offers little in the way of assisting the Court in determining Mr. Emard's applications.

[21] For these reasons, the affidavit is not admissible.

III. Background

[22] The Road at the centre of this dispute runs mostly across lands that Northback currently owns. Before Northback purchased its GMR Lands, much of the Grassy Mountain Road ran across lands that Devon Canada owned. Kootenay Wood Preservers also owned a few parcels of land over which a small portion of the GMR runs.

[23] In the early 1990s, Kootenay Wood Preservers created two easements, that it granted to itself, over GMR Lands that it owned (the Easement Lands). KWP registered these easements on title. These easements only impacted lands that KWP owned; it did not register easements over any GMR Lands that Devon owned. These two easements grant access to specified parcels of land along the Grassy Mountain Road to permit “the owners of adjoining or neighbouring lands to access to and egress from the adjoining or neighbouring lands”.

[24] Shortly after it created these easements, KWP subdivided its Easement Lands and sold them to third parties. Mr. Emard was one of those purchasers. In 1993, he purchased his property and became a dominant tenement holder under the easements, entitling him to use Easement Lands to access his property. The servient tenements comprise only four parcels of land along which the Grassy Mountain Road runs. The vast majority of GMR Lands are not encumbered by any easements. Northback and a few Adjacent Landowners now own these Easement Lands.

[25] Prior to KWP subdividing and selling parcels of its Easement Lands to individual landowners, ownership of the GMR Lands historically passed through a series of resource extraction companies. Put another way, there is no evidence of individual land ownership of GMR Lands prior to 1992.

[26] During the time that Mr. Emard has owned his property on Grassy Mountain, the Road has been used by himself and other local landowners (including their guests) to access their properties, commercial users, and occasional hikers and campers.

[27] In 2013, Benga Mining (the predecessor to Northback) began purchasing land on Grassy Mountain, including GMR Lands and Easement Lands. In 2015, it installed a locked gate along the Road and provided keys to Adjacent Landowners.

[28] Northback continues to control access to the Grassy Mountain Road through the use of its locked gate and private security officers. It has entered into road use agreements with several Adjacent Landowners, to whom Northback has given keys to access the gate. Mr. Emard has refused to enter any RUAs with Northback.

IV. Is the Grassy Mountain Road a public road?

[29] Mr. Emard argues the Grassy Mountain Road became public at some point during Devon’s ownership of the GMR Lands. To succeed, he must establish, on a balance of probabilities, both an intention by the owner to dedicate the Road to public use and an acceptance of that dedication by the public: *Nelson v 1153696 Alberta Ltd*, [2011 ABCA 203](#) at para 16.

[30] The law requires “cogent or substantial evidence” of an intention to relinquish all proprietary rights and to divest oneself of ownership of the road, and the land it occupies. An owner’s intention to dedicate a road as public may be expressed in words or in writing. Most

often, it is a matter of inference. An inference of intention to dedicate may arise from evidence of long, continuous and uninterrupted use of the road by the public. The ultimate determination of intention must be made in consideration of the totality of the evidence available. Evidence of longstanding public use alone will not necessarily be sufficient, particularly if other, more direct, evidence to the contrary is available. A single act of interruption by the owner carries more weight, on the issue of intention, than many acts of enjoyment: *Nelson*, at paras [16-22](#).

[31] In applying this test, the beliefs of the public do not overwhelm the intentions of the owner. Evidence of an owner's acquiescence to the public use of its land does not take priority over evidence of actual intention, where such evidence exists. The test is whether there was an intention to *dedicate* the land – not merely to *permit* the public use out of a “neighbourly spirit”: *Nelson*, at paras [24-27](#).

[32] While there is no definitive list of factors to consider when determining if this common law test is met, the Court of Appeal has identified the following relevant considerations:

- a. Whether there are agreements concerning the use of the road;
- b. Whether there is long, continuous uninterrupted public use of the road;
- c. Who uses the road;
- d. Who built, maintained and controlled the road; and
- e. Whether there are signs, gates or other assertions of privacy.

Twogee Developments Ltd v Felger Farming Co Ltd, [2017 ABCA 138](#) at para [20](#).

A. Did Devon intend to relinquish its proprietary rights and dedicate the Grassy Mountain Road to the public?

1. Evidence of Intention

[33] The central inquiry is whether the totality of the evidence demonstrates that Devon intended to relinquish its proprietary interest over the Grassy Mountain Road and dedicate it for public use. In the absence of direct evidence from Devon, Mr. Emard seeks to establish this requisite intention primarily by reliance on the historical uses of the Road by members of the public and Devon's acquiescence to those uses.

[34] For the reasons explained below, I am not satisfied the evidence demonstrates more than Devon's “neighbourly tolerance” for these uses of the Grassy Mountain Road. The evidence fails to demonstrate that Devon intended to surrender its proprietary rights over the Road by throwing it open to the public.

a. Agreements governing road use

[35] The record before me reveals the existence of multiple road use agreements, written and unwritten, between Devon and Adjacent Landowners dating back to 1993. These agreements are significant in that they serve to demonstrate that Devon, as owner of the GMR Lands, treated the Road as private property over which it could control access, impose conditions, and negotiate permissions.

[36] In one of his affidavits, Mr. Emard states that, since 1993, there have been multiple agreements, written and unwritten, between the owners of the GMR Lands and Adjacent Landowners to ensure “shared use of the GMR”.

[37] One portion of the Grassy Mountain Road runs over land previously owned by the Pagonis family. Devon entered into a written road use agreement with these owners to ensure Devon's continued access over this part of the GMR. Devon paid the Pagonis family a yearly amount in exchange for this RUA.

[38] In 2003, Devon entered into a written road use agreement with individuals named Raynelle Kyle and Gerry and Janet Smith. In 2005, Devon agreed to transfer this RUA to Donkersgoed Feeders Ltd when it purchased the Kyle / Smith lands. Through this RUA, Donkersgoed is ensured continued access to the Grassy Mountain Road to access its property.

[39] Mr. Emard places great emphasis on the fact that only two written road use agreements were placed into evidence. He suggests that Devon had agreements with *only* these two landowners. Mr. Emard's argument in this regard overlooks his own affidavit evidence in which he states that "multiple" RUAs, written and unwritten, existed between owners of GMR Lands and Adjacent Landowners. His argument also assumes that, because only two written RUAs were adduced here, no other RUAs existed. I am not prepared to draw that conclusion. The absence of evidence of additional written RUAs is just that, an absence of evidence. It is not proof that no other agreements existed.

[40] The existence of these specific, documented, road use agreements – one with the Pagonis family and the other with Kyle / Smith (later assigned to Donkersgoed) – is particularly persuasive. These agreements reflect ongoing proprietary control that is inconsistent with surrender of ownership.

[41] By contrast, if the Grassy Mountain Road were public, its access or shared use would not depend on agreements between private landowners, and no landowner could lawfully impose conditions or terminate access to the Road.

b. Evidence of long, continuous, uninterrupted public use of the Road / Evidence of who uses the Road

[42] Mr. Emard claims a long history of the public using the Grassy Mountain Road, dating back decades before he purchased his property in 1993. He states no source(s) for this historical knowledge of the Road. To the extent that historical records have been tendered here, they are silent in this regard.

[43] Without evidence supporting Mr. Emard's claims regarding public use of the Road prior to 1993, I am not prepared to accept this evidence as reliable. Accordingly, I am not able to draw any inferences regarding the extent to which the public may have used the Road prior to 1993. Put another way, there is an absence of evidence regarding public use of the GMR pre-1993.

[44] From 1993 to 2015 (when Northback installed its locked gate), the Grassy Mountain Road was primarily used by commercial operators (presumably related to the resource extraction operations on Grassy Mountain), Adjacent Landowners (and their guests) to access their private properties, and occasional hikers and campers.

[45] The record does not reveal the frequency with which this last group of users actually accessed and used the Grassy Mountain Road during these years. Lack of evidence of frequency of use does not itself negate public use. The absence of this evidence means that I cannot find the *degree* to which the public used the Road.

[46] The question here is whether these uses amount to evidence of long, continuous, uninterrupted public use of the Road. To my mind, they do not.

[47] In *Nelson*, the road at issue crossed over Mr. Nelson's lands in Leduc County. The road provided the only access to Rabbit Hill Ski Resort and Shalom Park. Over decades, the road had been travelled by thousands of members of the public, including recreational patrons, employees, and service and delivery vehicles. There were no gates or other enforcement measures to regulate access to the road. The Court of Appeal overturned the trial court's determination that the road had been dedicated to the public. The Court held that even extensive, long-standing public traffic can fall short if the use is purpose-specific and evidence points to tolerance or permission rather than an intention to dedicate: *Nelson*, at paras [2-7](#), [16-18](#), [21-27](#), [58](#).

[48] In *Cook's*, the Ontario Court of Appeal held the road in issue had not been dedicated to the public. The evidence showed the road had been used for decades, mostly by seasonal traffic to provide access to cottages. The Court stated the users were a defined class (cottagers and their guests); their uses of the road were tied to private property access, not public passage; and the evidence was consistent with acquiescence not dedication: *Cook's Road Maintenance Assn v Crowhill Estates*, [2001 CanLII 24149 \(ON CA\)](#), at paras [6-9](#), [23-30](#), [33-35](#).

[49] In *Twogee*, the road at issue had been maintained by the County for over 30 years. It was used by farmers, utility workers and occasional hunters. For long periods, there were no gates on the road. The Court of Appeal upheld the decision of the Chambers judge in declining to declare the road was public. The Court found these uses of the road were functional and permissive. The County's maintenance of the road arose from agreements, not dedication. There was a lack of evidence the owner intended to surrender his proprietary rights: *Twogee*, at paras [3-8](#), [20-29](#)

[50] Taken together, these three cases confirm that neither long-standing use, nor municipal maintenance, nor owner acquiescence will establish dedication where road use is purpose-specific, limited to defined classes or private control, rather than a clear intention to relinquish proprietary rights to the public at large.

[51] Here, the Grassy Mountain Road has been in existence for approximately 70 years, since at least the mid 1900s. The evidence before me touches on only 22 of those years (from 1993 to 2015). During those years, Devon (as the owner of GMR Lands) has held road use agreements with some of the Adjacent Landowners. There is evidence of one private landowner, over who's lands the GMR crosses, controlling access to this portion of the Road through a locked gate on her property. This is direct evidence of an intention to maintain proprietary rights over, and regulate use of, the Road.

[52] Since at least 1993, the Road has been used by commercial operators, local landowners, and occasional hikers and campers. With the exception of the last group, these uses have been tied to private property access, not public passage. With all three groups, the uses of the Road have been purpose specific. These patterns of Road use are more consistent with the owner of GMR Lands granting permission or exercising tolerance, rather than an intention to dedicate.

[53] The Grassy Mountain Road does not function as part of a broader network of roads. It does not serve to connect two public roads or two communities. It is not a thoroughfare. It does not lead to any public facilities; there are no public amenities along the Road. The lands surrounding the Road are privately owned. Until 1993, the surrounding lands were owned by resource extraction companies. The character of the Road, together with its purpose-specific

uses, further supports an inference of tolerant, permission-based use as opposed to an intention to dedicate.

[54] In the end, I am not satisfied these uses of the Grassy Mountain Road amounts to evidence of long, continuous, uninterrupted public use of the Road. Mr. Emard bears the burden of adducing affirmative evidence of longstanding public use; he has failed to do so.

c. Evidence of who built, maintained and controlled the Road

[55] Little is known about who built the Grassy Mountain Road or when it was built. There is no evidence before me regarding who maintained or controlled the Road prior to 1993.

[56] In his affidavit evidence, Mr. Emard states that he has spent his time and resources to maintain the Grassy Mountain Road, through conducting removal of snow, ice and other debris. He says that he's worked with previous owners of GMR Lands to help maintain the Road.

[57] This evidence suggests that Devon viewed the Road as private infrastructure that served private interests. It does not support an inference that Devon intended to relinquish its proprietary rights over the Road.

d. Evidence of signs, gates and other assertions of privacy

[58] Mr. Emard places great emphasis on the absence of gates or "private property" signs along the Road prior to Northback installing such items in 2015.

[59] The presence of signs and gates along a road are strong indicators that the road is private. An owner's conduct that demonstrates ongoing control over the land also indicates an assertion of privacy over the land.

[60] As stated, Devon asserted control over the Grassy Mountain Road through its use of road use agreements with some of the Adjacent Landowners. Mr. Emard's neighbour, Ms. Gilmar, asserts control over the portion of the Road that crosses her property through a locked gate installed on her property. This conduct, by Devon and Ms. Gilmar, directly contradicts an intention to dedicate the Road as public.

[61] While it is possible that Devon's use of road use agreements with some Adjacent Landowners *could* co-exist with public rights of passage, the evidence here does not support this finding. Devon's use of RUA's regulate access to the *only* road into the area and reflect consistent private control over that Road. This is inconsistent with an intention to dedicate the Road to the general public.

2. Totality of the Evidence

[62] The ultimate question is whether Mr. Emard, as the Applicant, has established, on the whole of the evidence, that Devon intended to relinquish all proprietary rights in the Grassy Mountain Road.

[63] The evidence demonstrates:

- a. The existence of written and unwritten road use agreements between owners of GMR Lands and Adjacent Lands to control access to and ensure shared use of the Road;
- b. Devon and Adjacent Landowners have shared the responsibility of maintaining the Road;
- c. The Road is not a through road; it does not lead to any public facilities; it has no public amenities; it is surrounded by privately owned lands; and,

d. The primary private and industrial character of Road usage since 1993.

[64] The totality of this evidence is inconsistent with a finding that Devon intended to relinquish its proprietary interests and dedicate the Grassy Mountain Road to the public.

[65] The absence of evidence of public use of the Road prior to 1993 factors into this analysis only to the extent that Mr. Emard has failed to meet his burden of proving such public use.

[66] Because Mr. Emard has not established the first branch of the test – an intention to dedicate – it is unnecessary to address whether the public accepted such dedication. For these reasons, Mr. Emard’s application for a declaration that the Grassy Mountain Road is public is denied.

V. Is an implied easement of necessity absolutely necessary for Mr. Emard to access his property?

[67] Mr. Emard alternatively seeks a declaration that an easement of necessity exists over the Grassy Mountain Road that allows him access to his property.

[68] Easements of necessity are implied only in exceptional circumstances. Alberta courts have consistently emphasized the narrowness of this doctrine, particularly within the Torrens system of land registration, and the principle of indefeasibility of title: *Nelson v 1153696 Alberta Ltd.*, 2011 ABCA 203 at paras [34-43](#).

[69] To succeed, Mr. Emard must establish:

- a. Prior common ownership of both dominant and servient tenements.
- b. A severance of common ownership. And,
- c. As a result of severance, the dominant tenement is absolutely inaccessible without traversing the servient lands. Mere inconvenience or increased difficulty does not suffice.

1. Prior common ownership and severance

[70] Mr. Emard appears to rely on two distinct theories of historical common ownership over the GMR and Easement Lands.

a. Common ownership between Devon and Kootenay Wood Preservers

[71] In his first brief, Mr. Emard relied on the more recent ownership of the GMR and Easement Lands, immediately before Northback began acquiring land in 2013.

[72] As previously stated, prior to Northback, Devon owned the majority of the GMR Lands. Kootenay Wood Preservers owned some parcels of land that it used for its logging operations. KWP created, and registered, two easements over its own lands (the Easement Lands). KWP later subdivided its Easement Lands and sold them to various purchasers, including Mr. Emard.

[73] The Grassy Mountain Road runs over lands mostly owned by Devon. Kootenay Wood Preservers used the Road to access its Easement Lands. There is no evidence of any road use agreements between Devon and KWP and KWP registered no easements over Devon’s GMR Lands. Without such instruments, Mr. Emard argues that Devon understood and accepted that the Road was either open to the public, or that KWP had an unregistered easement over GMR

Lands that permitted it to use the Road. The benefit of this easement then passed to the subsequent Adjacent Landowners after KWP sold its lands.

[74] The record before me does not support this conclusion.

[75] First, there is no evidence that KWP's Easement Lands were otherwise "landlocked" or inaccessible without access to the Grassy Mountain Road. Mr. Emard adduced no evidence regarding alternate routes that may have existed when KWP conducted its operations on its Easement Lands. Without such evidence, Mr. Emard has not established that KWP's use of the GRM was necessary.

[76] What's more, Mr. Emard's argument that KWP must have had an implied easement over the Grassy Mountain Road is grounded in a faulty assumption. Mr. Emard assumes, because there is no evidence of any road use agreements between Devon and KWP, that no such agreements existed. An absence of evidence of any road use agreements is not proof that no agreements existed.

[77] By contrast, there is clear evidence on the record that Devon *did* negotiate and enter into road use agreements, both written and unwritten, with Adjacent Landowners after KWP sold its Easement Lands. The evidence of these agreements undermines Mr. Emard's assumption that KWP operated freely along the Grassy Mountain Road, with no agreements with Devon.

[78] The evidence of Devon's road use agreements with subsequent owners of the Easement Lands does not operate as proof that Devon also had RUA's with Kootenay Wood Preservers. It does reasonably lend itself to an inference that Devon and KWP may have had some sort of agreement – written or otherwise – that governed KWP's use of the Road. This inference is incongruent with Mr. Emard's assumption of an unregistered and perpetual easement that binds Devon's successors.

[79] To be clear, even if no road use agreements existed between Devon and Kootenay Wood Preservers, Mr. Emard failed to adduce evidence that KWP's lands were "landlocked" without access to the Grassy Mountain Road. Without providing any evidence of what alternate routes may have existed at the time of KWP's operations on Grassy Mountain, Mr. Emard cannot meet his burden of establishing necessity.

b. Historic corporate ownership dating back to Western Canadian Collieries

[80] In his surreply brief, Mr. Emard relies on the more distant history of ownership of the GMR Lands. He points to a historical chain of title that shows Western Canadian Collieries, and later related corporate successors, at various points owned both the lands that now make up the GMR and Easement Lands. Mr. Emard argues that severance of this common ownership necessarily implied a right of access over the GMR Lands.

[81] The record before me does not support this conclusion.

[82] The chain of historical transactions, as shown through land transfer documents, offers no evidence regarding available access routes at the time or the operational realities facing those historical owners. The documents provide no evidence that any parcel of land was left "landlocked" following the severance of common ownership.

[83] Implied easements only arise where, upon severance, the retained or transferred parcel becomes “absolutely inaccessible” – that is, the land cannot be used at all without crossing the servient lands: *Nelson*, at para [41](#).

[84] In tracing these historical transactions, Mr. Emard does not identify any moment at which inaccessibility resulted from the severance. Without such evidence, Mr. Emard cannot meet his burden of establishing necessity.

2. Is an implied easement “absolutely necessary” for today’s access?

[85] Even if an easement through prior common ownership were established, an easement of necessity requires absolute – not practical – necessity. *Nelson*, at paras 41, 43.

[86] The Alberta Court of Appeal has repeatedly emphasized that:

- a. Inconvenience is insufficient;
- b. Alternate routes need not be ideal, and
- c. The easement will not be implied unless the dominant land is otherwise useless or inaccessible.

Nelson, at para 43.

a. Mr. Emard’s evidence regarding alternate routes

[87] In his affidavit evidence, Mr. Emard acknowledges that at least one alternate route to his property exists. This route, according to Mr. Emard, involves approximately 35 kms of mixed or unmaintained roads and includes areas he describes as “impassable” or “not suitable for his vehicles”. He describes other alternate routes as “not viable without specialized equipment or vehicles”.

[88] Missing from Mr. Emard’s affidavits is evidence regarding whether the alternate routes are *legally* available, for example through use of Crown road allowances, unmaintained municipal road, *etc.* In describing an alternate route as “impassable” or “not suitable for his vehicles”, Mr. Emard provides no evidence regarding whether this route (or these routes) is in fact impassable for part of the year or is merely more inconvenient. Finally, Mr. Emard offers no evidence that his land is rendered unusable without access to the Grassy Mountain Road.

[89] Notably, by his own admission, Mr. Emard has used at least one alternate route to access his property. I accept his descriptions of inconvenience and increased difficulty but conclude that accessibility exists.

b. Evidence of trespass (or lack thereof)

[90] The law acknowledges that an implied grant of necessity may be recognized where the alternative access requires unavoidable trespass on the land of strangers: *Nelson*, at para [41](#) and [43](#).

[91] In oral submissions, counsel for Mr. Emard advised that Mr. Emard has accessed his property by alternate routes, but these routes “most likely” involved trespass. I pause here to note that counsel’s submissions are not evidence.

[92] As the Applicant, Mr. Emard bears the onus of establishing, through evidence, whether access to his property involved trespass. He has provided no such evidence.

[93] An assertion by counsel that Mr. Emard “most likely” committed trespass, even if accepted as evidence, would have negligible impact. The law requires evidence of *actual* trespass, not likely or possible trespass.

3. Totality of circumstances

[94] When I consider all of the evidence, I note:

- a. The evidence does not establish that an implied easement existed over GMR Lands under Devon’s and KWP’s ownership.
- b. The evidence *does* establish that Devon engaged in permissive, agreement-based access to the Grassy Mountain Road after KWP sold its Easement Lands. While not evidence of similar agreements with KWP, Mr. Emard bears the burden of proving no such agreements existed. Without such evidence, an inference that Devon and KWP may have had an agreement over use of the Road is available on this record.
- c. The evidence does not establish that an implied easement was created over GMR Lands through the historical chain of ownership and severance of the lands.
- d. Mr. Emard’s evidence does establish that alternative, though inconvenient, access routes exist to his property.
- e. The evidence does not establish that Mr. Emard’s property is rendered useless without access to the Grassy Mountain Road. And,
- f. The evidence does not establish that Mr. Emard is required to trespass over the lands of others to access his property.

[95] On this evidence, Mr. Emard has not met the strict requirements for a grant of an implied easement of necessity over the GMR Lands. His application is therefore denied.

VI. Conclusion

[96] I have denied Mr. Emard’s application for a declaration that the Grassy Mountain Road is public and his alternate application for a declaration that an easement of necessity runs over the GMR Lands. With these findings, there is no basis for me to grant Mr. Emard’s third form of relief – that being a direction to set this matter for trial for a determination of liability and damages.

[97] Mr. Emard’s application is dismissed in its entirety.

[98] While the evidentiary record before me is thin, I am satisfied the material facts, on these narrow issues, were not disputed in a way that required *viva voce* or third-party evidence. To the extent there are holes in the evidentiary record, I have addressed them within the context of assessing whether Mr. Emard met his burden. As such, I am satisfied disposing of Mr. Emard’s application in this Special Chambers hearing is appropriate.

[99] If the parties are unable to agree on Costs in relation to this application, they may make written submissions to me within 45 days of receipt of these Reasons. Such submissions shall be no longer than five typed pages, excluding attachments and authorities, and shall include a Bill of Costs.

Heard on the 26th day of February, 2026.

Dated at the City of Lethbridge, Alberta this 10th day of March, 2026.

E.J. Funk
J.C.K.B.A.

Appearances:

Urvil U. Thakor
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