IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Sheringham Water Works Ltd. v. Penner,* 2026 BCSC 554

Date: 20260227
Docket: S2512236
Registry: Victoria

Between:

Sheringham Water Works Ltd.

Petitioner

And:

Judy Lorraine Penner

Respondent

- and -

Docket: S2512443
Registry: Victoria

Between:

Judy Lorraine Penner

Petitioner

And:

Sheringham Water Works Ltd.

Respondent

Before: The Honourable Justice Morley

Oral Reasons for Judgment

Counsel for Petitioner/Respondent Sheringham Water Works Ltd.:	C. D. Haynes
Counsel for Respondent/Petitioner Judy Penner:	M. D. Waldock
Place and Date of Hearing:	Victoria, B.C. February 25, 2026
Place and Date of Judgment:	Victoria, B.C. February 27, 2026

I. OVERVIEW

[1] Sheringham Water Works Ltd. (“the Utility”) is a water utility that holds a statutory right-of way over part of a residential lot belonging to the respondent Judy Lorraine Penner (“the Landowner”) in the town of Shirley, British Columbia. The right-of-way provides access to a water tank on a neighbouring property and there is a watermain running underneath it.

[2] The terms of the right-of-way instrument in the Land Title Office give the Utility the right to enter on the right-of-way area for the purpose of maintaining, inspecting, altering and repairing the watermain under the right-of-way area and accessing the water tank. In return, the Utility’s predecessor covenanted to “as far as practicable [...] restore the surface of the said easement to the same condition as existed prior to any such entry or entries.”

[3] Before me today are two petitions, one brought by the Utility and the other by the Landowner, arising out of their conflicts over this right-of-way. The Utility has taken the position that, notwithstanding the terms of the covenant in the Land Title Office, it does *not* need to restore the surface of the right-of-way to the state it was in prior to its entries because the Landowner has now upgraded the right-of-way surface to recycled asphalt. The Landowner, for her part, has decided to obstruct access in response to various grievances and argues she has a right to do this as lawful “self help”.

[4] In its petition, the Utility seeks a declaration that its right-of-way is enforceable, and an order enjoining the Landowner from interfering with its access and permitting it to remove obstructions or barriers if they exist. The Landowner wants a declaration that the right-of-way is unenforceable or, alternatively, that it requires the Utility to restore the surface to the state it was immediately prior to each entry. The Landowner also asks for an order restricting the Utility’s ability to access the right-of-way without notice to defined emergencies and permitting her to maintain a locked gate, so long as she provides the Utility with a key.

[5] In my view, neither party should get everything they want. The terms of this right-of-way are not only not so ambiguous as to be unenforceable, but in fact provide a workable basis for the relationship between the parties. On the one hand, the Utility has no basis to resile from its obligation to restore the right-of-way surface when it disturbs it. On the other hand, the Landowner has no right to obstruct access.

[6] This is not an appropriate case for either cancelling or modifying it pursuant to s. 35 of the *Property Law Act*, R.S.B.C. 1996, c. 377. Rather, this is a case in which the disputes between the parties can be resolved by interpreting the terms of the right-of-way and by requiring each party to exercise its rights and perform its obligations in a reasonable way.

II. BACKGROUND

[7] The statutory right-of-way at issue in this case was registered against title to Lot 23 on January 4, 1973. The historical grantor of Lot 23 was Sheringham Estates Ltd., and the historical grantee was Brian Robert Diamond. The grantor reserved for itself an easement over a right-of-way area highlighted in yellow on Schedule A to the instrument filed in the Land Title Office (the “right-of-way area”). The terms of the easement are set out in the deposited instrument.

[8] Under the right-of-way area is a buried watermain that runs to a water tank located on Lot 3, directly to the east of Lot 23.

[9] The deposited instrument describes the easement in the following terms:

> The Grantor reserves unto itself an easement over that part of Lot 23, Section 81 and 95, Renfrew District, Plan 24939, lying to the North of a line drawn parallel to and perpendicularly distant 20’ Southerly from the Northerly boundary of said Lot 23, for the purposes of maintaining, inspecting, altering and repairing a watermain on and under the lands hereinbefore described and for the purpose of access to a water tank affixed to the said watermain and for the servants, agents, contractors and workmen of the Grantor to enter thereon with machinery material, vehicles and equipment necessary for such purposes.

[10] Along with this reservation of the easement is a covenant in the following terms:

> The Grantor covenants as far as practicable to restore the surface of the said easement to the same condition as existed prior to any such entry or entries.

[11] The Utility is the successor to the grantor as the holder of the right-of-way. The Utility has a Certificate of Public Convenience and Necessity from the Comptroller of Water Rights, and may hold statutory rights-of-way under s. 218 (d) of the *Land Title Act*, R.S.B.C. 1996, c. 250 pursuant to Ministerial Order No. 1317 dated April 5, 2007.

[12] From 1973 until the last eight years or so, Lot 23 was densely forested and uninhabited. No conflicts arose during this period.

[13] In or about 2018, the previous owner of Lot 23 decided to turn the parcel into a residential lot. The present house was relocated from somewhere else and fixed to the Lands, as it happens quite close to the right-of-way area. Access for that project, and subsequently to the house, was by way of a dirt driveway from the road at the centre of the property.

[14] In 2019, the Utility upgraded the surface of the right-of-way area by putting in a gravel road for access to the water tank. The gravel road encroached off the surveyed right-of-way area.

[15] Ms. Penner purchased the Property in December 2021. Shortly afterwards, she made improvements, including resurfacing the gravel access with recycled asphalt and getting rid of the previous dirt driveway.

[16] The Landowner advised the Utility of the resurfacing and asked it to contribute financially. The Utility did not agree to contribute but it did not object to the resurfacing.

[17] In 2022, the Landowner installed a gate across the driveway entrance. It is disputed whether this created an access problem for the Utility or not. I do not think I

need to address this because the Utility subsequently agreed it would give 24 hours' notice of access except in case of emergency and the Landowner agreed that she would give the Utility a key to the lock.

[18] On July 18, 2023, the Landowner wrote to the Utility seeking a number of things, including agreement to 24 hours' notice prior to access and waiver of her residential water fees. The Utility rejected the demands, except that it agreed to provide notice of intention to access where feasible.

[19] In the Fall of 2024, the parties became aware that the access route, as constructed, encroached outside the right-of-way area. They tried to negotiate a resolution to this problem, but were ultimately unable to, leading the Utility to clear and flatten a new access to the right-of-way area from Woodhaven Road.

[20] Things came to a head in the Fall of 2025. On Friday, September 19, 2025, the Utility's administrator advised the Landowner of its intent to access the right-of-way area that Sunday. But when the Utility's operator and administrator arrived to perform an inspection on the water tank, they could not do so because the Landowner had blocked the way with her truck.

[21] The Utility wrote the next day to say it would no longer provide advance notice because this had led to its access being frustrated. When it tried to access again that Wednesday and on the following Sunday, the driveway was blocked with rocks, cones, cement and other obstructions.

III. LEGAL FRAMEWORK

[22] Rights-of-ways (or easements) always have a potential for conflict.

[23] Property has long been analogized to a "bundle of sticks": Benjamin Cardozo, *The Paradoxes of Legal Science* (New York, NY: Columbia Press, 1928) at p. 129. The owner of the land over which the right-of-way is established (traditionally known as the "servient" tenement) has the same bundle as any other landowner, except that they may not exclude the owner of the easement (the "dominant" tenement, or,

in the case of statutory rights-of-way) from exercising their rights of entry over the land covered by the right-of-way and may not use the property in a way that would "substantially interfere" with the uses authorized by the right-of-way.

[24] A substantial interference is one that results in a situation in which the right-of-way can no longer be practically used as conveniently as before the interference: *Grenier v. Elliott*, 2007 BCSC 598 at para. 35, citing Anger and Honsberger, *Canadian Law of Real Property* at p. 1012; *LY Capital Inc. v. 668599 B.C. Ltd.*, 2023 BCSC 233 at para. 21. Landowners subject to a right-of-way may not engage in substantial interferences.

[25] Symmetrically, the right-of-way holder must not exercise *their* rights in a way that substantially interferes with the rights remaining in the bundle of the "servient" property owner.

[26] This departure from the Blackstonian ideal of property as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of every other individual in the universe" arises out of the practical reality that people often need rights over land that do not aspire to such total power of exclusion. But of course any situation in which property rights are shared requires compromise and, when compromise breaks down, adjudication.

[27] When, as here, there are conflicts between a right-of-way holder and the owner of the property over which it is established that the parties themselves cannot resolve, judges are called upon to "construe the terms of the easement and to decide whether certain uses of the dominant and servient tenements were reasonable": *Birch v. Brenner*, 2017 BCCA 22 [*Birch*] at para. 34.

[28] The first part of this — construing the terms of the easement — follows the contractual interpretation principles set out in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 [*Sattva*]. See *Robb v. Walker*, 2015 BCCA 117 at paras. 31–33. These principles require looking at the plain and ordinary meaning of the words of

the instrument creating the right-of-way/easement, taking into account the surrounding circumstances known to the parties as context, to determine the intention of the parties.

[29] What we are concerned with is the *expressed* intention manifested in the text, as elucidated by the surrounding circumstances. We are not concerned with private intentions. Since a right-of-way "runs with the land" (and therefore the only notice successors in title will have is what is apparent on the face of the land title document), the general contractual principle that the text prevails over unexpressed intentions is particularly important: *Smith v. Balen*, 2018 BCSC 918 at para. 54. As stated in *Sattva*, the surrounding circumstances must never be allowed to overwhelm the words of the agreement and interrelation must always be grounded in the text: *Sattva* at para. 57. At the same time, the objective circumstances in which the text was written are important in giving it meaning.

[30] The second part of the inquiry mandated by the *Birch* decision is to determine what uses of each of the respective bundles were reasonable. Either side can get legal recourse against uses that substantially interfere with their own uses. Of course, the two stages are linked. In order to determine what the uses are that should not be interfered with, it is necessary to interpret the easement: *Birch* at para. 37.

[31] This two-step inquiry does not *alter* the property rights between the parties. It just defines them. Section 35 of the *Property Law Act*, on the other hand, permits a court, in certain circumstances, to go beyond this role of interpreting the scope of the parties' correlative rights and duties and defining behaviour that crosses the line, and either cancel or modify the easement/right-of-way itself. If, but only if, one of the preconditions set out in s. 35 are met, then the court has *discretion* to cancel or modify. But because the default is to respect the existing property rights, employing s. 35 should only even be considered if interpretation and spelling out unreasonable conduct is insufficient. It is a remedy of last resort. I will therefore leave s. 35 to the end of my analysis.

IV. IS THE STATUTORY RIGHT-OF-WAY UNENFORCEABLE FOR UNCERTAINTY?

[32] Just as a contract or a contractual term can be void for uncertainty, so too can a private easement. It is not clear to me that this is even possible for a *statutory* right-of-way, such as we have here. But I do not need to resolve that interesting issue today, because it is clear to me that the terms of *this* right-of-way are not vague at all.

[33] The main argument the Landowner makes for saying the easement terms are too vague is that they have led to conflict. But that does not make the terms vague.

[34] It is important to distinguish vagueness, in the pejorative sense, from *generality*. A general principle or standard can be applied in multiple ways. But if it provides the resources to do so, it is not impermissibly vague.

[35] In this regard, context is important. A utility's statutory right-of-way over presently-undeveloped land has to be stated in general terms because future uses are inherently unpredictable. It would generally be unwise to set out detailed rules that are likely to become obsolete.

[36] In this case, the principles set out in the right-of-way instrument are clear enough. The easement holder has a right to access for the designated purposes, and the property owner is entitled to have the surface restored to the state it was in before entry, so far as practicable. The limit "so far as practicable" obviously requires the exercise of judgment in application, but there is nothing wrong with that, especially when the only alternative of specifying what is and is not practicable would require a (working) crystal ball.

[37] Beyond the text, there is the implication that each party must make its decisions in good faith and must not substantially interfere with the legitimate uses of the other. These are also principles and also require intelligent application, but are none the worse for that.

[38] There may, of course, be conflict over the *application* of those principles, but that does not make the principles unenforceable. Rather, it means they must be enforced by common sense and goodwill and, if that breaks down, by the court doing its best to determine what is practicable, what is substantial interference and what is acting in good faith.

[39] The basic principle here is freedom of private ordering. When a court has to find that a property or contractual right is unenforceable as a result of indeterminacy, it always does so with regret, since it means it cannot give effect to that principle. The fact that the grantor, in this case, had the wisdom to see that any statement of the mutual rights of the easement and freehold title holder would have to be set out in general terms should not deprive its successors their property rights.

[40] To be sure, the fact that this is a utility with a *statutory* right-of-way clearly necessary to provide an essential public good means it would be particularly difficult to dismiss general language as “vague”, rather than “general”. But I would not consider this arrangement unenforceable even between purely private parties.

V. THE UTILITY MUST RESTORE THE DRIVEWAY TO ITS IMPROVED STATE IF IT DIGS IT UP

[41] If the terms of the right-of-way are not vague, they should, at least presumptively, be enforced.

[42] The Utility took the position that it does not need to restore the surface of the right-of-way area to its improved state because the Landowner’s improvement was “unilateral” and makes that restoration more expensive than it would have been when it was simply a gravel driveway.

[43] This position flies in the face of the plain words of the easement. The Utility’s predecessor covenanted to restore the surface “to the same condition as existed prior to any such entry or entries”. Back in 1973, it would of course have been impossible to know what that condition would be fifty years later. But it is clear from the text adopted that the grantor was well aware of its lack of knowledge and

committed to restoring to the "same condition as existed prior" to the entry. The future condition of the surface was, in Donald Rumsfeld's phrase, a "known unknown". The grantor covenanted to restore the same condition, whatever it might happen to be, subject of course to the express limit found in the text, namely that it did not need to do this if it was not "practicable".

[44] That is a real limit, which of course could be invoked by the Utility in the future. But the onus is on it to demonstrate that restoration to the condition it was in prior to a specific entry is impracticable. Otherwise, it has to restore to that condition.

[45] The only other limit arises out of the principle, set out in *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7 that contractual discretion must be exercised in "good faith" (which means taking the other party's interest into account, although it does not go so far as requiring the party with the discretion to subordinate their own self-interest or to provide an unbargained-for benefit at their own expense). In my view, this principle applies to the right of the owner of the property that is subject to a utility easement to improve the surface. The Landowner must provide notice of such changes to the Utility and must make a good faith effort to accommodate concerns, but ultimately has every right to improve the land in their own interest.

[46] That is what the Landowner did when she covered the driveway with recycled asphalt. She notified the Utility, seeking cost sharing. The Utility did not raise any concerns at that time, although it declined to contribute. It does not lie in its mouth now to say it will not perform the covenant to restore the surface.

VI. ACCESS FOR THE UTILITY

[47] Clearly, at the heart of the easement is the right of the Utility's access to its water tank or to the underground watermain if necessary. The Landowner cannot substantially interfere with this access.

[48] Not surprisingly fencing or gating the right-of-way area without giving the easement holder a key or code to open a door or gate has been found to

substantially interfere with their right of access: *Gardiner v. Robinson*, 2006 BCSC 1014 at para. 36; *Hellmen v. Hartwick*, 2025 BCSC 45 at para. 42.

[49] To be sure, the Landowner has every right to exclude persons other than the Utility and I am sensitive to her security concerns. I will therefore declare that a gate is permissible, but it can only be locked if the Landowner provides the Utility with a key or access code.

[50] While the Landowner has to concede that the right-of-way, if enforceable, gives the Utility the right of access, she argues that she was justified in blocking access with her truck or other obstacles as "self-help" for what she sees as the Utility's unreasonable behaviour. She points to para. 41 of *Collinson v. Laplante*, 1991 CanLII 1609 (BC CA), in which Madam Justice Southin pointed out that the courts "recognized the lawfulness of what might be called self-help to restrict the owner of the dominant tenement to his permitted user."

[51] In my view, this dictum has to be treated very carefully. A property owner may take proportionate self-help measures to prevent a right-of-way holder from going beyond what the right-of-way actually entitles them to do. For example, the property owner could fence off a portion of the property that the easement does not reach. However, what the Landowner did here was different: she prevented the Utility from doing what it undeniably had a right to do — access the route over the watermain — in *retaliation* to what she viewed as its wrongful position about its rights. This is not *preventative* self-help, but *punitive* self-help.

[52] In my view, *Collinson v. Laplante* does not authorize punitive self-help and it would be corrosive of the rule of law if it did. Rights-of-way are property rights. If parties have disputes about the boundaries of their property, conceptually or literally, those should be addressed through negotiation or court, not by violating the acknowledged property rights of the other party.

[53] There do not appear to be any current obstacles to access, so I will give declaratory relief in this regard as on the other issues between the parties.

VII. NOTICE AND EMERGENCIES

[54] The parties' original agreement to 24 hours' notice except in emergency situations sets the standard of reasonable behaviour. I will declare that the parties must abide by such an agreement.

[55] I do not think it would be appropriate to be as prescriptive as the Landowner seeks about what constitutes an emergency. This is an inherently unpredictable thing. If the Utility decides it must access without the ordinary notice, the risk is on it to justify that after the fact based on circumstances that are sufficiently urgent to justify this lack of notice.

VIII. SECTION 35 OF THE *PROPERTY LAW ACT*

[56] Section 35 of the *Property Law Act* is a comprehensive code that permits modification or cancellation of registered charges against land. It applies to statutory rights-of-way: *Property Law Act*, s. 35(1)(c). The authority of the court to cancel or modify a charge is constrained by the specific grounds set out in s. 35(2): *Vandenberg v. Olson*, 2010 BCCA 204 [*Vandenberg*] at para. 23. However, even if these grounds are met, the order is discretionary: *Vandenberg* at para. 25.

[57] The Landowner argues that the right-of-way should be modified either under s. 35(a) ("because of changes in the character of the land, the neighbourhood or other circumstances the court considers material, the registered charge or interest is obsolete") or s. 35(d) ("modification or cancellation will not injure the person entitled to the benefit of the registered charge or interest").

[58] In my view, neither of these apply. There have of course been changes in the character of the land since 1973 when the property was forested to now when it is the site of a home. However, these changes do not render the right-of-way obsolete. It remains necessary because the water utility infrastructure is still there. As I have explained, the text of the charge anticipated changes in the surface uses.

[59] As for s. 35(d), cancellation would clearly injure the Utility. Whether modifications would do so depends on the modifications, of course, but in my view

all of the Landowner's legitimate interests can be addressed through interpretation without modification. Going further would inevitably injure the Utility.

[60] If I am wrong, I would decline to exercise my discretion to modify since the legitimate needs of both parties can be addressed through interpretation and s. 35, as a modification of existing property rights, can only be resorted to when delineating those rights does not provide an adequate remedy.

IX. CONCLUSION AND ORDERS

[61] I will make the following declarations:

a) The statutory right-of-way registered in the Victoria Land Title Office on January 4, 1973, under No. B3805 against the land legally described as Lot 23, Sections 81 and 95, Renfrew District Plan 24939, PID 000-631-884 ("Lot 23") is enforceable in accordance with its terms.

b) Pursuant to the terms of that statutory right-of-way, the holder is obliged to restore the surface of the right-of-way area to the state it was in immediately prior to each entry, unless:

   i. Such restoration is not practicable; or,

   ii. Improvements or other alterations to the surface of the right-of-way area by the owner of Lot 23 at the time of the entry were done in a manner not consistent with the occupant's duty to exercise good faith in making changes to the surface of the statutory right-of-way and that failure materially increases the cost or inconvenience of restoring the surface to the state it was in prior to entry.

c) The occupant of Lot 23 exercises good faith in improving the surface of the statutory right-of-way if:

i. The improvement is for the benefit of the owner or intended to increase the value of Lot 23;

ii. The owner provides notice of the improvement at least 28 days before initiating physical changes to the surface;

iii. In the event the holder of the statutory right-of-way provides notice of concerns no more than 14 days after receiving notice of the improvement from the occupant, the owner or a person authorized by the owner meets with a representative of the holder of the statutory right-of-way at least 2 business days before initiating physical changes to the surface to resolve those concerns; and,

iv. If the holder of the statutory right-of-way seeks directions from the court about whether the improvement is consistent with the owner's duty of good faith or the terms of the statutory right-of-way, the occupant must not initiate physical changes to the surface until authorized to do so by agreement of the holder of the right-of-way or order of the court.

d) The holder of the statutory right-of-way exercises good faith in accessing the right-of-way if the holder provides 24 hours' notice to the owner of Lot 23 prior to access, unless the circumstances are an "emergency" and the holder of the statutory right-of-way provides an explanation of the emergency within 24 hours of its being addressed. An emergency is an event such that a delay of 24 hours would materially affect the ability of the holder to prevent or mitigate damage to human health, property or the water supply.

e) It is an actionable breach of the obligations of the owner to deliberately or negligently block access to the statutory right-of-way.

f) The owner or occupier of Lot 23 is entitled to maintain a gate on the surface of the statutory right-of-way provided the gate is not locked or, if the gate is locked, the owner provides a working key or access code to the holder of the right-of-way.

[62] In light of these declarations and the fact that there does not seem to be a specific problem with access or restoration right now, I decline to make any injunctive orders.

[63] Since success is divided, each party will bear its own costs.

"J. G. Morley, J."
The Honourable Justice Morley