# KANHAI V. ELLIOT LAKE TEXTILES (ROAD ACCESS AND EASEMENT CASE)

Case Name:

**Kanhai v. Elliot Lake Textiles & Draperies Inc.**

Between

Ezekiel Kanhai, plaintiff, and

Elliot Lake Textiles & Draperies Inc. and Miguel

Perdigao, defendants

[2005] O.J. No. 641

Court File No. C7549/03

**Ontario Superior Court of Justice**

L.L. Gauthier J.

Heard: January 17-21 and 24, 2005.

Judgment: February 2, 2005.

(122 paras.)

*Civil evidence — Hearsay rule — Exceptions — Necessary and reliable evidence — Real property law — Easements — Creations — By prescription — By statute — Particular easements — Rights of way.*

Action by the plaintiff, Kanhai, for a declaration of a right of way or easement over lands owned by the defendant, Elliot Lake Textiles & Draperies, for injunctions to remove obstacles on the right of way and preventing the defendant from interfering with the plaintiff's passages, and for damages for trespass. At the time the plaintiff purchased the property in 1977, it was an empty hunting lot and there was no direct access to it. The plaintiff arranged access using an old logging road on a neighbour's property. The neighbour charged no fee to the plaintiff, but did charge other hunters to cross her property. At one point, the neighbour considered charging the plaintiff a fee, but she did not follow through on the plan. The plaintiff's evidence was that he used the logging road to hunt on the property every year without interruption until 2001. Over the years, the plaintiff performed some improvements to the logging road. The neighbour sold her property to the defendant in 2000. In 2001, the defendant ordered the plaintiff to cease using the route and installed a cable and chain blocking the logging road. The neighbour died in 2003. Prior to her death, the plaintiff obtained a statement from her of the relevant facts.

**HELD:** Action allowed in part. The court declared that the plaintiff established the easement claimed under the Limitations Act. The defendant was prohibited from preventing the plaintiff from accessing the logging road and was required to remove all barricades. Damages for the defendant's interference with the plaintiff's access and ability to hunt were dismissed. The plaintiff met the burden of proving the use and enjoyment of the logging road in a continuous, uninterrupted, open and peaceable manner, without objection from the neighbour, from 1979 to 2000. There were no fees, restrictions or conditions attached to the consent. The neighbour was aware of the plaintiff's improvements to the road. The simple consideration of charging a fee, not acted upon, was not an assertion of the neighbour's exclusive ownership of the logging road such as to interrupt or suspend the plaintiff's period of use of the property. The defendant was aware of the plaintiff's historical crossing of the property before it purchased the property. The neighbour's statement was hearsay, but it was necessary to admit it given the unavailability of the neighbour. The threshold of reliability was met. The statement confirmed other evidence at the trial.

**Statutes, Regulations and Rules Cited:**

Limitations Act, s. 31.

Road Access Act.

**Counsel:**

D. Peter Best, for the Plaintiff

Alan Arkilander, for the Defendants

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¶ 1 **L.L. GAUTHIER J.**:— The Plaintiff seeks the following relief:

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| | | claration that his land, being Lot 16, Concession 16, in the Township of Allan in the District of itoulin is benefited by and possessed of a private right-of-way or easement, by way of prescriptiv lands owned by the Defendant; |
| | | rmanent injunction prohibiting the Defendant from interfering with the Plaintiff's passage over th endant's property along the right-of-way; |
| | | rmanent injunction ordering the Defendant to remove existing barriers or other obstacles to the ntiff's access to the property; and |
| | | ages for trespass. |

¶ 2 In the alternative, the Plaintiff seeks relief pursuant to the Road Access Act, including a declaration the right-of-way is an access road pursuant to the Act, an order prohibiting the Defendant from interfering with the Plaintiff's passage over the Defendant's land, and damages.

FACTS:

¶ 3 [1] In 1977, the Hindman Timber Company Limited sold to the Plaintiff and another individual, Robert Ethier, two lots described as Lot 16, concession 15, and Lot 16, concession 16, in the Township of Allan, in the District of Manitoulin. These two lots were vacant lots used for hunting purposes. There was no road to the properties. As part of the transaction, the Vendor undertook to pay to the purchasers the sum of $500 for the completion of a roadway into the property. The roadway was never constructed and the monies were never paid to the purchasers.

¶ 4 [2] It was the intention of Kanhai and Ethier that consent to sever the lots would be obtained and that Kanhai would become the sole owner of Lot 16, concession 16, with Ethier becoming the sole owner of Lot 16, Concession 15. Until such plan came to fruition, each would occupy his own lot as if he were the exclusive owner of it.

¶ 5 [3] In 1980, Ethier sold his undivided interest in the two lots to Erkki Simpanen and Seppo Ruhanen. In 1983, Kanhai, Simpanen, and Ruhanen agreed to transfer Lot 16, Concession 16 to the Plaintiff. The transfer of that property occurred in July of 1987. Lot 16, Concession 15 was eventually sold to Paul Carloss.

¶ 6 [4] At the time the Plaintiff purchased the property in 1977, there was no direct access to the lot. The Plaintiff arranged to access his lot by crossing adjoining property belonging to Mr. B. Best. There is evidence that the permission to cross the Best property was withdrawn; that would appear to have occurred in 1978 or 1979.

¶ 7 [5] According to the Plaintiff's evidence, he then approached another neighbour, Leila McDougall, for permission to cross her property in order to access his own lot. The McDougall property included three lots: Lots 17 and 18, Concession 15, and Lot 17, Concession 16. The former two McDougall lots abut the road allowance which extends from the concession road known as Scotland Road. The latter of the three McDougall lots abuts the Plaintiff's lot, along the western boundary, from north to south. The lot running north to south on the eastern boundary of the Plaintiff's property belongs to Paul A. Carloss, as does Lot 16, Concession 15 which was transferred to Carloss from Simpanen and Ruhanen.

¶ 8 [6] According to the Plaintiff, he was granted permission by Leila McDougall, in 1979, to utilize an old logging road which was on her property, in order to gain access to his own lot. The logging road extends a distance of some one and a half to two miles to the Plaintiff's lot. There was no fee charged by Leila McDougall for this privilege.

¶ 9 [7] It was the evidence of the Plaintiff and of his witnesses that the logging road leading to the Plaintiff's lot, was used by the Plaintiff and his family and guests, every year, in the fall as well as in the summer, without interruption, and without a fee being paid, until 2001.

¶ 10 [8] The Plaintiff hunted on his own property, and, as well, hunted on the McDougall property, between 1977 and 2000. For the permission to hunt on the McDougall property, the Plaintiff initially paid no fee to McDougall. According to the Plaintiff, by the mid to late 1980s, McDougall began requesting a fee from the Plaintiff, for permission to hunt on her property. The hunt fee was $100.

¶ 11 [9] On July 28th, 2000, Leila McDougall sold her three lots to the Defendant Elliot Lake Textiles & Draperies Inc., which is a corporation owned equally by Miguel and Carmen Perdigao. According to the Plaintiff, he received a telephone call from Miguel Perdigao, in July 2000, during which Perdigao introduced himself as the new owner of the McDougall properties and also during which he indicated to the Plaintiff that he was aware that Kanhai was using the property to hunt and to access his own property. Perdigao told Kanhai that there would be no impediment to his access.

¶ 12 [10] The Plaintiff attended the fall 2000 hunt and used the logging road across what was now the Elliot Lake Textile property, without incident. No fee was requested from or paid to the Defendant.

¶ 13 [11] In January 2001 the Plaintiff received a letter from a lawyer on behalf of Miguel Perdigao, referring to the access route through the Defendant's property, and advising the Plaintiff that he was to "absolutely cease any use of that route across Mr. Perdigao's property effective June 30, 2001".

¶ 14 [12] In August of 2001, the Plaintiff observed a cable and chain at the entrance to the Defendant's property, which blocked the logging road and therefore access to the Plaintiff's property.

¶ 15 [13] The Defendant Perdigao took down the cable and chain barrier to allow the Plaintiff to access his property for the 2001 hunting season, on the condition that the Plaintiff would consider selling his lot to Perdigao and that he would be looking for another lot for himself.

¶ 16 [14] No satisfactory arrangement was arrived at by the parties and this action was started in July 2003.

ISSUES:

¶ 17 [15] Did the Plaintiff acquire a prescriptive right as a result of using the logging road continuously and without interruption for a period of twenty years, pursuant to Section 31 of the Limitations Act?

¶ 18 [16] It is the position of the Plaintiff that he has acquired a right of way or easement under the Limitations Act by virtue of the fact that he has used the logging trail running through the three lots of the Defendant since 1979. It is his position that his use has been continuous and uninterrupted and is based on the consent or permission he obtained from Leila McDougall in 1979. He has never paid any fee for crossing the McDougall properties.

¶ 19 [17] It is the Defendants' position that no prescriptive right was acquired by the Plaintiff as he paid for the right to cross the subject property, therefore, at best, the Plaintiff had a yearly licence to cross the three subject lots.

¶ 20 [18] As an alternative, the Plaintiff relies upon the Road Access Act and states that his only access to his property is the logging road. The unopened road allowance is not a viable alternative given the terrain, and the amount of work that would be required to develop that road, i.e. blasting, etc.

¶ 21 [19] The Defendant maintains that the unopened road allowance does, in fact, provide an alternate route to the Plaintiff and therefore the logging trail is not an access road in accordance with the Road Access Act.

ANALYSIS:

¶ 22 [20] For the reasons that follow, I conclude that the Plaintiff has met the burden of proving the use and enjoyment of the logging road in question in a continuous, uninterrupted, open and peaceable manner, and without objection from Leila McDougall, or the Defendant from 1979 to and including 2000.

¶ 23 [21] It was the Plaintiff's evidence that he attended at the McDougall residence in 1979 to request permission to cross the three McDougall lots in order to access his own property. Kanhai testified that Leila's son, Robert, who was a co-owner of the property at that time, was present at the meeting. Both Leila and Robert agreed that the Plaintiff could cross their property and they suggested that he use the old logging road to do so. The Plaintiff understood this consent or permission to be "open" in that he did not have to request it on an annual basis or otherwise. No fee for the permission to cross the property was discussed. No restrictions or conditions were attached to the consent which was given.

¶ 24 [22] There is no evidence disputing this meeting which occurred in 1979 between Kanhai and the McDougalls. There is evidence supporting the Plaintiff's version of events which came from Robert McDougall. He testified that such permission to cross was given to the Plaintiff at the McDougall residence, and that no fee was requested or paid for the right to cross.

There is also no dispute that the Plaintiff had a hunt camp on Lot 17, Concession 15 until 1997 when he moved it to his own lot.

¶ 25 [23] According to the Plaintiff, the logging road was rough and initially, i.e. as early as 1979, he began to do some clearing of that road in order for a four-wheel drive vehicle to be able to drive along it. That was accomplished in 1979, when the Plaintiff and one Wilfred Lalonde used the road in the Lalonde vehicle.

¶ 26 [24] The Plaintiff testified that over the years he performed some improvements to the logging road, for example bulldozing, filling holes with gravel, cutting dead trees, removing large rocks. Filed as exhibits were invoices indicating expenditures in the years 1982, 1985, 1998, and 2000, totaling some $1,700.

¶ 27 [25] The evidence of the Plaintiff about improvements he made to the route over the years was not disputed and in fact was supported by Robert Thibodeau, and Robert Miller. The fact that the work was done, and that Leila and Robert McDougall were kept informed of any work done was established by the Plaintiff's evidence, that of Robert McDougall and Robert Thibodeau.

¶ 28 [26] There was also no serious dispute about the Plaintiff having used the logging trail to access his property from 1979 to and including 2000. During those years, the Plaintiff used his hunting lot for the fall hunt and also for camping with his family and guests. They always used the logging road to get to the property.

¶ 29 [27] In that regard, I heard evidence from certain of the hunters who accompanied the Plaintiff during the hunting season from the years 1980 until 2001.

¶ 30 [28] Robert Miller testified that he hunted with the Plaintiff every year, from 1980 to 2001. He hunted both the Kanhai property and the McDougall property. He paid McDougall a hunting fee of $50 when he hunted on that property. When he was hunting exclusively on the Plaintiff's property, he did not pay any fee to McDougall. Mr. Miller was clear that at no time during those years did he pay a crossing fee to McDougall. It was Miller's evidence that he drove his two-wheel drive vehicle over the logging road, over the McDougall property many times, from 1980 to 2001. Occasionally, he would leave his vehicle on the concession road and travel along the logging road to the Plaintiff's property with the Plaintiff in the latter's vehicle.

¶ 31 [29] It was this witness's evidence that, in addition to going to the Kanhai property to hunt, he also accompanied the Plaintiff in the summer to prepare for the hunt and, as well to do work on the road. In addition to these activities, Miller also brought his family to camp sometimes on the McDougall property and other times on the Plaintiff's property. He never paid a crossing fee to McDougall on those occasions.

¶ 32 [30] Robert Thibodeau also hunted with Kanhai, from 1982 until 2000. It was his evidence that he traveled over the logging road to get to the Kanhai property. Although the road was rough, it was passable. He assisted the Plaintiff in removing rocks, boulders and fallen trees from the road. It was his evidence that he and the Plaintiff always stopped in at the McDougall residence to advise Leila and her son, Robert, that they were going in to do work on the logging road.

¶ 33 [31] Thibodeau testified that he paid a $100 hunting fee to McDougall in order to hunt on her property, but there was never any crossing fee levied by McDougall.

¶ 34 [32] Wayne Gervais testified that he hunted with the Plaintiff in the years 1995 to 2001. He used the logging road over the three McDougall lots to get to the Kanhai lot every year. He paid McDougall $100 in order to be permitted to hunt on her property. There was never any crossing fee paid by this witness to McDougall.

¶ 35 [33] Another individual who hunted with the Plaintiff was W.G. Hurst. He testified that he hunted on the Plaintiff's lot exclusively and did so during the three-year period from 1984 to 1986. As he did not hunt on the McDougall property, he paid no hunting fee to Leila McDougall. He did, however, pay a $60 hunting fee to Kanhai for hunting on his property. It was this witness's evidence that he drove his vehicle through the McDougall property to get to the Plaintiff's property in each of those three years. At no time did he pay any fee to Leila McDougall to cross her property.

¶ 36 [34] The real dispute is around the issue of payment of a fee to cross the McDougall property. As mentioned, the Plaintiff's witnesses were clear that neither they nor the Plaintiff paid any fee to Leila McDougall for the access through her property.

¶ 37 [35] The Defendants' witnesses, Carloss, Ransom, Sanchioni, and Lamothe, all testified that they paid a crossing fee to Leila McDougall over the years.

¶ 38 [36] By the early 1990s, and before Carloss purchased Lot 16, Concession 15 from Simpanen and Ruhanen, he had been crossing the northern part of Kanhai's lot to access his lakefront property. Some tension developed between the Plaintiff and Carloss about the exact location of boundary lines.

¶ 39 [37] In 1992, the Plaintiff gave written permission to Carloss to cross a portion of the Plaintiff's property to gain access to his own hunt camp. No fee was charged to Carloss. Again, in 1993, Carloss was permitted by Kanhai to cross the Kanhai property to access his hunt camp, without fee.

¶ 40 [38] Then, in 1994, Kanhai demanded that Carloss pay a fee to cross his property.

¶ 41 [39] In 1994, the Plaintiff wrote to Carloss and requested a fee. In his letter dated October 19, 1994, he said this:

"I have not heard from you as to whether you wish to have permission to cross my property again this year. In this regard, I want to mention that as of last year I have had to pay others a fee to gain access to my property".

¶ 42 [40] The Plaintiff testified that the above statement was not true. Kanhai was attempting to get Carloss to pay a fee to cross the property, but Kanhai himself was not paying a fee to anyone to cross.

¶ 43 [41] According to both the Plaintiff and Robert McDougall, Leila McDougall had told the Plaintiff that she was considering charging him a fee to cross the property. It is not clear when this would have occurred, however, it would appear from the evidence that it would have been in the early 1990s. Leila McDougall did not pursue this idea of charging the Plaintiff a fee. The idea was dropped and not raised again. That was the evidence of Kanhai and Robert McDougall.

¶ 44 [42] It would seem however that Leila McDougall acted on that thought of charging a fee, in connection with Paul Carloss, who also had been crossing her property to get to his own lot. According to Carloss, in 1992, Leila McDougall told him that she wanted to charge him and everyone else a fee of $50 per person for going on to her property. Carloss paid such a fee, in the amount of $350 for seven persons in 1992. He was given a written permission to cross by Leila McDougall.

¶ 45 [43] Carloss only paid this fee to McDougall on one occasion. He was not happy about having to pay this fee, so he made alternate arrangements to access his property, without having to go onto the McDougall land.

¶ 46 [44] Neither the fact that Carloss paid a crossing fee to Leila McDougall on one occasion, nor the Plaintiff's misrepresentation to Carloss in his correspondence of October 19, 1994, leads to the conclusion that the Plaintiff was paying a crossing fee to Leila McDougall at any time. Indeed, the fact that Leila McDougall considered charging Kanhai a fee in the early 90s would indicate that certainly, up to that point, the Plaintiff had not been paying any fee to cross her property.

¶ 47 [45] Leila McDougall did not pursue her idea of charging the Plaintiff for the right to cross her property. The simple consideration of charging a fee, not acted upon, and without more, is not, in my view, an assertion of McDougall's exclusive ownership of the logging road such as to interrupt or suspend the Plaintiff's period of use of the property.

¶ 48 [46] K. Ransom testified on behalf of the Defendants. He indicated that he was introduced to the Kanhai property for hunting in 1987, by the Plaintiff himself. He testified that at first he hunted on the Kanhai property, but then later hunted continuously on the McDougall property.

¶ 49 [47] According to Ransom, the Plaintiff told him, as early as 1987 that he had to pay to Leila McDougall a hunting fee of $50 as well as a crossing fee of $50. This is denied by the Plaintiff. In addition to this, Ransom paid to the Plaintiff a hunting fee of $100 to hunt on the Kanhai property.

¶ 50 [48] Ransom stopped hunting with the Plaintiff's party in 1995 and moved his camp to the lower portion of the McDougall property, close to and visible from the concession road. It was this witness's evidence that he continued to pay both a hunting fee and a crossing fee to Leila McDougall, even though he was not crossing her property to get to any other property. He was remaining at all times on the McDougall property.

¶ 51 [49] Ransom testified that the hunting fee charged by Leila McDougall went up to $100 in the mid 1990s. The crossing fee remained the same.

¶ 52 [50] In the year 2000, when he was approached by Miguel Perdigao, he agreed to continue to pay fees totalling $150, although he was hunting totally on the lower part of Lots 17 and 18, Concession 15.

¶ 53 [51] Ransom did, over the years, observe Kanhai paying money to Leila McDougall, but he could not say that it was specifically for the hunting fee or a crossing fee.

¶ 54 [52] Mr. Ransom was adamant that EVERYONE had to pay a crossing fee to Leila McDougall. While that might well have been this witness's understanding, it does not establish that Kanhai, Thibodeau, Hurst or Miller ever paid a crossing fee to Leila McDougall.

¶ 55 [53] Ransom still has his hunting camp on the Defendant's property and enjoys hunting on that property. Ransom commented very positively on the amazing amount of work that Miguel Perdigao has done on the property and how he has greatly improved the road on the property.

¶ 56 [54] J. Sanchioni began hunting on the McDougall property in 1989, with K. Ransom. Sanchioni testified that he met Leila McDougall at that time and paid her a $100 fee. There was no breakdown of what the fee was for. A few years later the fee was raised to $150.

¶ 57 [55] It was Sanchioni's evidence that, at some point in time, Kanhai stopped paying Leila McDougall a hunting fee because he was hunting on his own lot and not on McDougall's where his hunting camp was. Apparently, Kanhai told Sanchioni that he was only paying Leila $50 to cross her property, instead of the earlier $50 to cross and $50 to hunt. As well, Sanchioni and Ransom stopped paying the Plaintiff any money because they were no longer going to his lot.

¶ 58 [56] Sanchioni agreed that the main reason for paying a fee to Leila McDougall was to get the signed Landowner's Consent form required by the Ministry of Natural Resources. The matter of crossing was not significant for this witness because he did not go over to the other lots. There is no explanation for Sanchioni paying a crossing fee, in addition to a hunting fee when he was remaining, at all times, on the McDougall property.

¶ 59 [57] Sanchioni has an issue with the Plaintiff. He made that very clear in his testimony. He stated that Kanhai cheated Leila McDougall by having more people in his hunting party than what he had told Leila. He stated further that, because Kanhai's hunt camp was on the McDougall property until 1997, he should have continued to pay a hunting fee to her.

¶ 60 [58] Sanchioni went so far as to accuse the Plaintiff of having forged Leila McDougall's signature to Exhibit Three in this trial. There is no evidence to support such an allegation.

¶ 61 [59] I found this witness's evidence to be of little assistance in determining whether or not Kanhai ever paid a crossing fee to McDougall. Sanchioni has negative feelings toward the Plaintiff and clearly has an interest in the outcome of this trial. He said that if Kanhai's access is restored it would interfere "astronomically" with his own hunting experience. Sanchioni has enjoyed the generosity of Miguel Perdigao; the latter gave Sanchioni a 16-foot by 8-foot structure which he has attached to his hunt camp.

¶ 62 [60] Gaetan Lamothe testified that he also paid $50 to hunt and $50 to cross to Leila McDougall, since 1994 or 1995. The fee increased to $150 at some point. He understood the crossing fee to permit him to go wherever he wanted to go within the boundaries of the three McDougall properties.

¶ 63 [61] Lamothe testified about a meeting which occurred in 1997 between himself, Sanchioni, Leila McDougall and Robert McDougall. He stated that Leila McDougall had asked him and Sanchioni to "watch" Kanhai because he had only paid to cross and not to hunt. She wanted to know if Kanhai was hunting on her property.

¶ 64 [62] Robert McDougall was not cross-examined regarding this alleged meeting, although the fact of the meeting was known to the Defendant and his counsel. The fact of the meeting could have and should have been put to Robert McDougall. As it was not, I attach little weight to Lamothe's evidence in this regard.

¶ 65 [63] Lamothe also has an interest in the outcome of this case. His hunting experience would be negatively affected if Kanhai is permitted to resume the use of the logging road which goes across where the hunters' tree stands are.

¶ 66 [64] With regard to fees paid to Leila McDougall, I prefer the evidence of the hunters who testified for the Plaintiff. Their evidence was clear and unequivocal and did not appear motivated by any interest in the outcome of the case, nor any personal feelings toward any of the parties involved.

¶ 67 [65] Ransom, Sanchioni, and Lamothe may well have paid Leila McDougall a fee to cross her property, however, that does not displace the Plaintiff's evidence that neither he nor his guests ever paid such a fee.

¶ 68 [66] As well, it does not appear logical to pay a fee to cross, in addition to a fee to hunt, if the hunter is not going beyond the boundaries of the property for which he has permission to hunt.

¶ 69 [67] I turn now to the evidence of Miguel Perdigao. He testified that he was unaware of the Plaintiff crossing the McDougall properties, until after he had purchased the property. Had he known about any right of the Plaintiff to cross the lots, he would not have purchased the property.

¶ 70 [68] This evidence is directly contradicted by the Plaintiff, by Robert McDougall, by the Defendants' own witness Carloss, and to some extent by the terms of the Agreement of Purchase and Sale which was filed in the proceedings.

¶ 71 [69] According to the Plaintiff, he received a telephone call from Miguel Perdigao in July 2000. Perdigao introduced himself to Kanhai and told him he knew that Kanhai was using the McDougall properties to cross and to hunt and that he could continue to do so.

¶ 72 [70] This evidence is supported by Carloss's testimony that he and Perdigao had discussed the prospective purchase of the McDougall property. Perdigao told Carloss that he had spoken to Kanhai. It was Carloss's testimony that he was left with the impression that Perdigao knew of the Plaintiff crossing the three McDougall lots prior to the purchase being completed.

¶ 73 [71] Robert McDougall testified that he and his mother had met with Perdigao before the sale of the property. Leila and Robert McDougall told Perdigao that Kanhai had the right to cross the property to get to his own lot, and that they wanted Kanhai to continue to be able to do so. Perdigao apparently agreed that Kanhai could continue to use the logging road to get to his lot.

According to Perdigao, his meeting with Leila McDougall occurred after the purchase was completed. He attended at the house at which time Leila McDougall told him that no one had the right to go onto the property without permission and payment of a fee.

¶ 74 [72] Miguel Perdigao swore an Affidavit in September 2003, in connection with the Plaintiff's application for an interlocutory injunction. Paragraph 19 of that Affidavit states as follows:

"Prior to my company purchasing the property, I met with Mrs. Lane [who is also known as McDougall] on one occasion. She was quite clear in our discussions, that in the past, she had allowed the Plaintiff, Kanhai, to hunt on her back property. She also indicated to me that she allowed Mr. Kanhai, on one occasion, to being a trailer across her property on the trail to his hunting camp."

¶ 75 [73] When asked about this statement indicating prior contact with Leila McDougall, Perdigao indicated that the word “prior” was a mistake and should have read “after”, and that either he misread that line or did not read it at all.

As well, in cross-examination, he was referred once again to his Affidavit, paragraph 19 which reads:

“… I was advised by Mrs. Leila McDougall and verily believe that if people were to cross the property, they were to pay $100.00 per person to do so. I confirmed this with two other hunting groups who would pay up to $600.00 to Mrs. McDougall if they crossed the property.”

Perdigao indicated that the words “cross the property” were incorrect. What he was told by Mrs. McDougall that anyone who used (emphasis mine) the property had to pay.

This would be consistent with Ransom, Sanchioni and Lamothe paying $100 to Leila McDougall even after they stopped hunting on the Kanhai property. They were no longer “crossing” the McDougall property. Rather, they were using the property to hunt for which they paid the $100 fee.

¶ 76 [74] The evidence of Kanhai, Carloss and Robert McDougall, together with the evidence that the Plaintiff crossed the McDougall property to get to his lot during the 2000 hunting season, without interference and with the knowledge of Perdigao, in my view, suggests strongly that Perdigao was aware of the Plaintiff’s historical crossing of the property when he purchased the property.

¶ 77 [75] In addition to the above evidence, there is the matter of the Agreement of Purchase and Sale between Elliot Lake Textiles and Leila McDougall. It contains the following clause:

“Purchaser and Vendor acknowledge that access to the camp on lot 18 Conc. 16 Allan Twp. Is an unregistered trespass access or easement which may cross over lots 17 and 18 on conc. 15, and lot 17 on Conc. 16.”

¶ 78 [76] According to Perdigao, this clause related to a lot owned by D. Prestage, that he had spoken to Prestage before completing the purchase and had been assured by Prestage that the latter did not require any access through the McDougall property.

¶ 79 [77] D. Prestage was very clear in his evidence that he had not spoken to Perdigao at all until the fall of 2000, after the purchase. He knew that Perdigao had tried to contact him, but Prestage was not home, and did not connect with Perdigao until the fall.

¶ 80 [78] This evidence of Prestage casts doubt on the veracity of Perdigao on this point. If he did not speak to Prestage before the purchase, then he was purchasing a property subject to an unregistered easement or right of way across the three lots he was purchasing, without knowing anything about the nature of the trespass access or easement. Perdigao testified that he had not inspected the property except for having entered onto Lot 18, Concession 15, some 200 metres along the logging road. If he did speak to Prestage, he was nonetheless purchasing a property which could have been subject to an easement which possibly crossed all three lots.

¶ 81 [79] The evidence satisfies me that it is more likely than not that Perdigao was aware of the Plaintiff's right to cross the McDougall property when he purchased it.

¶ 82 [80] This brings me to Exhibit 3 in this trial. Exhibit 3 is a document which was prepared by the Plaintiff. According to the Plaintiff and Robert McDougall, the Plaintiff telephoned Leila McDougall and arranged to meet with her at her home on June 28, 2003.

¶ 83 [81] According to both Kanhai and Robert McDougall, the Plaintiff did attend as arranged. He read over the document to both Leila and Robert. It was read over more than once, out loud, as well as read by Leila McDougall to herself. The points contained in the document were discussed by Leila and Robert and Leila signed the document. Leila McDougall died in July 2003.

¶ 84 [82] The document is clearly hearsay, however, it was necessary to admit it given the unavailability of Leila McDougall. Insofar as the threshold reliability of the document is concerned, I was satisfied that the circumstances surrounding the signing of the statement were such that there was some guarantee of trustworthiness; the evidence of Robert McDougall and of Terence Land was to the effect that Leila McDougall's mind was not affected by her age or her illness at the time she signed the document. As indicated above, the document was read by Leila herself, read aloud so that Robert heard its contents, and the contents themselves were discussed by Leila and Robert McDougall. The document was admitted, with the ultimate issue of its weight to be considered with all of the other evidence.

¶ 85 [83] The documents confirms the evidence of the Plaintiff and of Robert McDougall, that the Plaintiff was given permission to cross the McDougall lots by way of the logging trail, in 1978 or 1979, that no fee was paid for the permission to cross, that the Plaintiff did work on the logging road, to improve it over the years, and that the Plaintiff used the road to access his property from the time the consent was given until the property was sold in 2000. It further confirms the evidence of Robert McDougall and the Plaintiff that Miguel Perdigao was aware of this use of the property by the Plaintiff when he purchased the property.

¶ 86 [84] As part of the case, the Defendants relied upon the sale documents executed by Leila McDougall in June of 2000. These documents contained warranties and declarations to the effect that the vendor knew of no claim or interest of any person which is adverse to or inconsistent with her ownership, nor were there any easements for right of way affecting the land.

¶ 87 [85] I heard from Terence Land who was Leila McDougall's solicitor for a number of years, and who acted on her behalf when she sold the land to Elliot Lake Textiles.

¶ 88 [86] It was Land's evidence that he had no recollection of Leila McDougall telling him about the Plaintiff crossing or having permission to cross the land. Had he been told about this, he would have made the necessary amendments to the sale documents to reflect that fact.

¶ 89 [87] On his evidence, it also appears however that he did not refer to the Agreement of Purchase and Sale when the sale documents were executed. The acknowledgement of the unregistered “trespass access or easement” also would have necessitated an amendment to the documents.

¶ 90 [88] His evidence simply establishes that there was no discussion at the time between Land and Leila McDougall about any right to cross her property, including any right referred to in the Agreement of Purchase and Sale.

¶ 91 [89] Based on all of the evidence, I am satisfied that the Plaintiff has established the easement claimed under the Limitations Act. The evidence establishes an original permission to use the logging road, which permission was not subsequently sought or given or withdrawn. The evidence establishes that the use of the logging road by the Plaintiff was open, peaceable, and with the knowledge of the owner. The evidence establishes that the Plaintiff used the logging road from 1979 until 2000, without objection or interruption, and that he expended monies and energy in clearing and improving the road to his property. No fee was charged and no fee was paid.

¶ 92 [90] Although I have found that the Plaintiff has discharged the burden of proving continuous use and acquiescence by Robert and Leila McDougall, and thus has established his right to use the logging road crossing the three lots, I will nonetheless go on and deal with the alternative position of the Plaintiff, being the applicability of the Road Access Act.

¶ 93 [91] It is the Plaintiff’s position that he has no alternate route to access his property, and therefore the logging road running through the three McDougall lots constitutes an access road in accordance with the Act.

¶ 94 [92] It is not disputed that the logging road is a “road” which is used or intended to be used by motor vehicles.

¶ 95 [93] The only issue is whether the unopened road allowance which is shown on Tab 8 of Exhibit 1 as running west to east, one lot below the Plaintiff’s lot, and running south to north along Lot 16, Concession 15, to the south east corner of the Plaintiff’s lot, is an alternate route available for providing access to the Plaintiff.

¶ 96 [94] The onus is on the Plaintiff to establish that the Road Access Act applies because there is no other access to his property. Bogart v. Thompson, [2002] O.J. No. 1986.

¶ 97 [95] The evidence heard during this trial establishes the following facts:

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| | | road allowance along the southern boundary of Lots 18, 17, and 16 in Concession 15 has been dozed and is in use by motor vehicles, and, is passable until it intersects the unopened road allowa ch runs from the south east corner of Lot 16, Concession 15. |
| | | distance between the intersection of the bulldozed road and the south-east corner of the Plaintiff' 16, Concession 16, is five eighths of a mile. |
| | | unopened road allowance running south from the intersection of the bulldozed road and Lot 16, cession 15, has been developed by a property owner to the south and is used as a road southward th of Lot 16, Concession 14, being five eighths of a mile. |
| | | rvey has been done of the unopened road allowance running south to north along the boundary o Concession 15 to the Plaintiff's lot, however, no work has been done on that road allowance. It is prised of bush, rock, two bluffs, and a swamp. |
| | | Plaintiff, along with any other member of the public, has a right to pass along the unopened road wance, to his property, but he cannot make any improvements to that unopened road allowance w consent of the Township. |
| | | Plaintiff requested of the Township that it develop the south-north unopened road allowance alor Concession 16, to allow access by pick-up truck. That request was not granted. |
| | | Plaintiff could apply to the Township for consent to build a road along the south-north unopened wance. If he did so, he would have to provide a survey; it appears that one is already in existence. ld have to advise the Township of the extent of the work and the Township would have the right, e of its policy, to control the work. The Plaintiff would have to indemnify the Township with res claims arising from the use of the road. The Plaintiff would be required to obtain a comprehensiv lity insurance policy with respect to the road. The Plaintiff would be responsible for the cost of a k in connection with the road, and would have to obtain the necessary governmental permits, i.e. ing. |

¶ 98 [96] On the evidence before me, I am unable to conclude that there is no alternative access route available to the Plaintiff.

¶ 99 [97] The Plaintiff conceded that cost or "unaffordability" of building a road on the unopened road allowance which runs the five eighths of a mile along Lot 16, Concession 15 is not a relevant factor for consideration in whether or not alternate access is available.

¶ 100 [98] Neither, I suggest, is the effect on the Plaintiff's privacy on his lot if a road is built on the unopened road allowance. The evidence established that if the Plaintiff built a road along the unopened road allowance, such road would give the public access to the boundary of his lot, which would negatively affect the deer hunt. That may well be, however, such consideration is not relevant in the context of an inquiry into the availability of alternate access under the Road Access Act.

¶ 101 [99] The only evidence which is before me on this issue is that outlined above. There is nothing to suggest that the relevant permits or consents from regulatory agencies could not be obtained. There is nothing to establish that it is not possible to build a road along that five eighth's of a mile distance. I accept that the topography may well make it difficult and inconvenient to build the road, however, difficulty and inconvenience do not mean impossibility. Counsel for the Plaintiff suggested that the hurdles are so great as to be virtually insurmountable. There is no evidence that that is the case.

¶ 102 [100] A property owner to the south built a road over the unopened road allowance along Lot 16, Concession 14, therefore it was possible to do so at that location.

¶ 103 [101] Counsel for the Plaintiff referred me to the decision in 992275 Ontario Inc. v. Krawczyk [2004] O.J. No. 2549, which distinguished Bogart v. Thompson, supra. The Krawczyk decision is of little assistance, given its own peculiar facts. It involved a request to close an historic trail which was part of a "Trail Guide Legend" in the District of Muskoka. Logan J. said this, at paragraph 39:

"as time passes, such a closure would be recognized as a [sic] historic mistake.". He found that the subject trail was an access road within the meaning of the Road Access Act, despite the fact that the properties in question were bordered by an unopened road allowance. The case is limited to its particular facts and does not I suggest, displace the proposition that the test is closer to impossibility than it is to inconvenience or expense.

¶ 104 [102] As I am unable to conclude, on the evidence, that there is no alternate access, there can be no declaration that the logging road which crosses Lots 17 and 18, Concession 15 and Lot 17, Concession 15 is an access road as defined by the

Road Access Act. As well, the injunctive relief requested by the Plaintiff for breach of the Act is denied, as is the claim for damages for the illegal erection of a barrier across the road.

¶ 105 [103] I turn now to the Plaintiff's claim for damages: compensatory, aggravated, and exemplary, to be paid by the Defendant Miguel Perdigao personally.

¶ 106 [104] The Plaintiff seeks damage as a result of Perdigao's interference with his access and a resulting inability to access his property to hunt.

¶ 107 [105] He was able to hunt in 2001. Perdigao opened the barrier for the Plaintiff to access his lot. There was a condition attached, i.e. that the Plaintiff consider selling to Perdigao, however, there was no deprivation suffered by the Plaintiff that year.

¶ 108 [106] The Plaintiff testified that he was prevented from hunting on his property in 2002, as a result of Perdigao's actions. There is also evidence however that in March of that year, Kanhai suffered a heart attack and a blood infection which necessitated hospitalization on seven occasions. The evidence regarding his inability to hunt on his property in 2002 is not sufficient, in my view, to result in an award of compensatory damages.

¶ 109 [107] The Plaintiff obtained an Order on October 3, 2003, that he be permitted access to the logging road for the hunting season. The Defendants were to completely remove all barricades or to provide the Plaintiff with a key to the lock. It was the Plaintiff's evidence that the Defendant refused to send or courier the key from Elliot Lake, and insisted that the Plaintiff send someone to personally pick up the key.

¶ 110 [108] Perdigao's version of the events was that he offered to send the key to the Plaintiff, but the Plaintiff wanted the key immediately and said he would send someone to collect it.

¶ 111 [109] Whichever version is true, the end result is that Mr. Thibodeau, on behalf of Kanhai drove to Elliot Lake to get the key. The inconvenience of that trip is insufficient to trigger any damages, in my view.

¶ 112 [110] The Plaintiff did access his lot for the 2003 hunting season and therefore there was no deprivation of use of his property such as to trigger entitlement to compensatory damages.

¶ 113 [111] The Plaintiff was prevented from accessing his property in 2004, as a result of the barricade. However, he did not make a request of the Defendant, to access his property, nor did he renew his request for interlocutory injunctive relief. There is insufficient evidence of any loss or deprivation to justify an award of damages for the loss of use of the logging road.

¶ 114 [112] The Plaintiff seeks aggravated damages for the anger, frustration, disappointment and hurt he felt as a result of being prevented from going across the logging road to his lot. As well, he seeks punitive damages.

¶ 115 [113] On the evidence, I cannot conclude that the conduct of Perdigao vis-à-vis the Plaintiff was of such a nature that it should attract an award of aggravated or punitive damages to deter and punish him or the corporation.

¶ 116 [114] Perdigao did prevent Kanhai from accessing his property, however, he did not do so without warning, or in a high-handed, oppressive or malicious manner, which would have caused the Plaintiff some distress and humiliation.

¶ 117 [115] The Defendants took no steps to impede the Plaintiff in the fall of 2000, although, even on his own evidence, Perdigao was aware of the Plaintiff crossing the properties.

¶ 118 [116] The Defendant’s solicitor wrote to the Plaintiff in January 2001 advising that Kanhai was to cease any use of the route across the McDougall lots, however, this was to be effective some five and a half months later, June 30, 2001.

¶ 119 [117] This is neither abrupt, nor high-handed, in my view.

¶ 120 [118] The facts around the obtaining of the key in October of 2003 do not support an award of punitive damages. There was inconvenience and perhaps some pique on the part of Miguel and Carmen Perdigao, but, again, this is not sufficient to trigger damages as punishment or deterrence.

¶ 121 [119] In conclusion the Plaintiff shall have Judgment as follows:

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| | | declared that the Plaintiff's land, legally described as Lot 16, Concession 16, in the Township of e District of Manitoulin, is benefited by and possessed of a private right-of-way or easement ove ss the lands owned by Elliot Lake Textiles and Draperies Inc., which lands are comprised of Lots Concession 15, and Lot 17, Concession 16, in the Township of Allan, in the District of Manitouli -of-way or easement comprises the logging road which appears at Tab 8 of Exhibit 1 filed at the matter. |
| | | Defendants are prohibited from preventing the Plaintiff from accessing the aforesaid logging roa shall remove all barricades or barriers, or, provide the Plaintiff with a key to any lock attached t cade or barrier. |

¶ 122 [120] In the event that the parties are unable to agree on the issue of costs, counsel are to communicate with the Trial Co-Ordinator within 30 days of this Judgment.

L.L. GAUTHIER J.