SUPREME COURT OF NOVA SCOTIA
Citation: *Chapman v. C.A. Realty Ltd.*, 2017 NSSC 271

Date: 2017 10 17
Docket: AMH No. 327841
Registry: Amherst

Between:

Avis E. Chapman

Plaintiff

v.

C.A. Realty Ltd., in bankruptcy and
Nova Scotia Power Inc., a body corporate

Defendants

Judge:	The Honourable Justice Joshua M. Arnold
Heard:	April 10, 11 and 12, 2017, in Amherst, Nova Scotia
Counsel:	Avis Chapman, self-represented Plaintiff Christopher Keirstead, for the Defendant C.A. Realty Ltd. Joseph Burke, for the Defendant Nova Scotia Power Inc.

By the Court:

Background

[1] Avis Chapman lives at 19 Lawrence Street in Amherst. She brings an action against the Co-op Atlantic and Consumers Community Co-operative and Nova Scotia Power Inc. alleging encroachment on her property, as a result of power poles, power lines, guy wires and a transformer servicing the Co-op property at 17 Lawrence Street.

[2] Through *Companies' Creditors Arrangements Act* proceedings that took place on August 4, 2016, decided by Justice Stephenson of the New Brunswick Court of Queens Bench, and the Order dated March 29, 2017, determined by Justice Jeff Hunt of the Supreme Court of Nova Scotia, C.A. Realty Ltd. has been substituted for Co-op.

[3] Ms. Chapman claims that she has two exclusive rights-of-way: one for a driveway and another in the rear of the Co-op where NSP's electrical utility infrastructure is located. She requests that NSP's infrastructure be relocated. She also seeks unquantified damages.

Facts

[4] The Co-op was originally built at 17 Lawrence Street. In 1982 the Co-op burnt down and was rebuilt.

[5] William Fury later purchased 19 Lawrence Street. He still owned the property in 1997.

[6] In 1997, a new CEO came to Co-op. Co-op then urged their stores to renovate. As a result, the Amherst Co-op wanted to expand. This required a loading dock to be built. In order to complete the expansion, Co-op purchased part of the property at 19 Lawrence Street from Fury for this purpose. In their agreement, Co-op granted Fury a right-of-way over a driveway to be constructed on the area purchased by the Co-op, and the parties agreed to construct a fence between the properties. In the Deed, Mr. Fury was granted a right-of-way over the land located on the northwesterly side of the location of the fence. The Deed states:

> RESERVING unto the Grantor an exclusive right of way for persons and vehicles over the driveway on the hereinbefore described lands (which driveway may be relocated by the Grantee in accordance with an agreement between the Grantor and Grantee dated the 1st day of October, 1997) and the exclusive right of way over all land located on the northwesterly side of a fence to be constructed between the driveway to be constructed by the Grantee for the Grantor and the drive way and loading dock to be constructed by the Grantee for its own use, which right of way shall be for the sole use of the Grantor and no other persons and which right of way shall be for the benefit of the Grantor and his remaining lands, and his heirs, successors and assigns, and is a burden on the Grantee, its lands and its successors and assigns, and provided that the Grantee shall have no right to occupy or use the land on the Grantor's side of the fence, and the Grantee shall not grant to any other party the right to use the land on the Grantor's side of the fence.

[7] In December 1997, at the request of the Co-op, NSP installed two power poles and overhead lines between 17 and 19 Lawrence Street. NSP also installed a transformer near the northern corner of the Co-op building. The purpose of the infrastructure was to provide enhanced electrical service to the Co-op. Although both poles, the guy wire, and the electrical transformer are located entirely on the Co-op property, Ms. Chapman claims they are located within the right-of-way.

[8] Pursuant to a Release dated May 15, 1998, Mr. Fury received payment in exchange for allowing the placement of NSP's poles on the right-of-way. The Release permits Co-op and NSP to enter upon the right-of-way to maintain the poles. The Release is binding upon all of Mr. Fury's successors and/or assigns. The Release was never recorded. It states:

> In consideration of the sum of Five Thousand Dollars ($5,000.00) paid by the Purchaser to the Vendor, receipt whereof is hereby acknowledged by the Vendor, the Vendor releases to the Purchaser, its successors and assigns, all claims of any nature and land, howsoever arising, which the Vendor may now or in the future have as a result of the placing of the power/telephone poles on a portion of the Vendor's right-of-way, the delay in completing the terms of the Agreement dated October 1, 1997 and the expansion of the Purchaser's building and relocation of the loading dock.
>
> The Vendor agrees that the Purchaser, its servants, agents or assigns and third parties, for example, Nova Scotia Power Corporation and MT&T, shall have the right to enter upon the right-of-way granted to the Vendor's for the purpose of maintaining, repairing, servicing, or for any necessary purpose relating to these power/telephone poles.

[9] In 2000, Ms. Chapman visited 19 Lawrence Street. The NSP infrastructure was in place at that time. Additionally, the driveway, fence and loading dock had already been installed.

[10] In 2001, Ms. Chapman decided to purchase 19 Lawrence Street. She hired Peter Belliveau, a lawyer, to conduct the property transaction. Prior to closing, through Mr. Belliveau, Ms. Chapman became aware of certain issues regarding 19 Lawrence Street. In particular, a 1997 plan drawn up by Walter Rayworth shows that Mr. Fury did not own the driveway at 19 Lawrence Street. Ms. Chapman therefore requested and received a reduction of the $59,000.00 purchase price by $6,000.00, to $53,000.00.

[11] Additionally, Ms. Chapman retained Michael Greene to prepare a Surveyor's Location Certificate for 19 Lawrence Street. That Location Certificate, dated August 17, 2001, details the encroachments currently alleged by Ms. Chapman.

[12] Ms. Chapman purchased 19 Lawrence Street from Mr. Fury in 2001 despite knowing of the encroachments. She made no formal complaint regarding the alleged encroachments until 2005. In 2005 and 2006 Ms. Chapman began alleging to both the Co-op and NSP that she had an exclusive use right-of-way over a portion of 17 Lawrence Street, including the area where the infrastructure was situated. She says this interest exists as the result of an agreement between the Co-op and Mr. Fury at the time of the conveyance in October 1997.

[13] Ms. Chapman says she did not know about the May 1998 Release until 2005, some two and half years after she purchased the property. During cross-examination, the Release was discussed by Ms. Chapman:

> Q: So the reference here to the grass area to be maintained?
>
> A: I believe was at the front.
>
> Q: You believe it was at the front. So the reference to maintaining the lawn, you don't believe that's meant to be maintaining the two feet of grass on your side of the fence?
>
> A: Oh, no, no I don't.
>
> Q: Ok. We talked about the, you talked about the Release earlier this afternoon.
>
> A: Yes.
>
> Q: The Release is at Tab 14. Could you turn to it ma'am. You are familiar with the document. You've read it before?

A: Yes.

Q: Ok. And you indicated that you didn't receive this before you bought the property. Is that right?

A: I never saw it for about two and a half years after I bought the property.

Q: Ok. And reading this, reading this Release at paragraph 3, it says two power/telephone poles were placed in a portion of the lands purchased by the purchaser, that's Amherst Co-op, which were subject to the vendor's, that's Mr. Fury, right-of-way. It makes reference to two power or telephone poles being in the right-of-way. We'll deal with that at some point down the road in this trial, but I don't see any reference to the transformer on the lawn in the Release. Do you have any explanation for that?

A: I'm not sure that there is a specific reference using the word transformer. I don't think there is. The reference I would make is, I can't tell you which paragraph unless I look it up, and I can do that, in the Agreement of Purchase and Sale or C the Grant of Easement, which is very specific that Co-op nor its agents can go down there and do anything, and I would certainly think that one of their agents would, in this instance at least, would be Nova Scotia Power.

Q: Yes. Ok. And the Release itself, you don't have any further information surrounding the document. For instance, you don't have any reason to believe or disbelieve that it was forged?

A: No. No, I don't. I don't think it was forged. The, now the very same lawyer, the same firm who drew this Release closed on Fury's behalf when I bought from Fury and nothing was ever said about any Release.

Q: Ok. And the $5,000.00 that appears based on the document to have changed hands, do you have any reason to prove or disprove that happened?

A: Well I think you know that I do. I have searched the Registry Office. I have found where every time Ron Fury got a little money in hand he paid down the mortgage on 19 Lawrence. There's no paying down at all a partial discharge of the mortgage for around this date for this amount either and I just don't know anymore about it than what it says.

Q: Ok.

A: You do know that it's hearsay.

Q: Ok, so we'll leave that point. You didn't ever discuss the Release with Mr. Fury, did you? Did you ever discuss this document with Ronald Fury?

A: No, I didn't actually.

Q: And did you ever discuss the, these right-of-way problems with Mr. Fury after you bought the property?

A: No. Because there's nothing Mr. Fury could do about it.

Q: That's fair.

[14] Ms. Chapman continued on cross-examination:

Q: And the Deed that you, you made some comments this morning about how the Deed was different from the Agreement of Purchase and Sale, correct?

A: Yes.

Q: The one between Mr. Fury and the Co-op in 1997, and if I'm, correct me if I'm wrong, but the Agreement is a little more specific than the Deed, isn't that right? It's a little more detailed. Insofar as what was being agreed to.

A: It's not accurate, but, I don't know.

Q: But there's a difference in the level of detail between a Deed that's filed with the Registry of Deeds and an agreement between two parties, correct?

A: Yes.

Q: Alright. And it's the Deed, correct, not the Agreement of Purchase and Sale, that would have been filed with the Registry of Deeds in this case?

A: Yes.

Q: Right, and so when we look at the various documents we see a Registry stamp on the Deed, for example, but we don't see it on the Agreement and the Schedules to the Agreement.

A: No. that's right.

Q: So if Nova Scotia Power looked to see who owned the property where it was installing its poles and transformer, it wouldn't see all the details of the purported agreement between Mr. Fury and the Co-op, would it?

A: Not unless they got them from Mr. Creighton.

Q: Right. And the Release then that was referred to that Mr. Fury executed in 1998 or that bears his signature, you have no evidence to suggest that that Release is invalid, do you?

A: That it was invalid?

Q: That the Release is invalid. You have no evidence to suggest that. I think you told Mr. Keirstead you had, you didn't agree, or weren't going to say it was fraudulent, but I want to know whether you have any evidence to suggest that it was invalid in any way?

A: No, no, I wouldn't think so.

Q: Ok. Alright. And, in fact, your actions, specifically in that you closed on the property, you bought the property from Mr. Fury, they're consistent with the validity of the Release because the Release would suggest that the encroachment issue had been dealt with.

A: It would, yes.

Q: Right. And so, after Mr. Fury executed the Release in 1998, I'm going to suggest to you that from that point in time to the point in time where you purchase the property and even subsequent to that began writing to Nova Scotia Power, no one raised any issues with Nova Scotia Power insofar as its power poles and transformer and whether they may be encroaching on the adjacent property?

A: I really wouldn't know.

Q: You wouldn't know.

A: I can speculate.

Q: You can't disagree with me?

A: I can't agree or disagree with you. I would think that Mr. Fury would have complained to them. I would think the new lawyers Mr. Fury hired would have investigated that.

Q: But if I were to suggest to you that Nova Scotia Power has searched its records and has not been able to identify any complaints, correspondence or other records to suggest that Mr. Fury or anyone else prior to you had expressed dissatisfaction with that infrastructure, you couldn't argue it, could you?

A: Well, (inaudible) might have talked to them about it because the owner was not Nova Scotia Power. The owner of the land.

Q: Right.

A: It was Co-op, and Co-op certainly knew that this was an issue.

Q: Right. Co-op may have knew it was an issue, but I'm asking you if you're aware whether Nova Scotia Power knew it was an issue. You don't know that, do you?

A: I really don't know.

[15] Ms. Chapman explained the basis of part of her position during cross-examination:

Q: So Ms. Chapman, your position is that the lawn area was never sold to Co-op. Is that right?

A: That it was never sold to Co-op?

Q: Fury didn't ever sell the property to Co-op in this lawn area that we're talking about where the transformer is? Was that always Mr. Fury's property?

A: Uh, no, no, it wasn't. I have to answer you in this way. First of all, Fury sold the whole of the strip to Amherst Co-op. That's the Agreement of Purchase and Sale.

Q: Yes.

A: But then I would say probably when it occurred to Amherst Co-op that they weren't going, they haven't permission to go down Fury's right-of-way driveway, how are they going to mow the grass, and they may not have been that fond of mowing the grass anyway. So the second contract which is C, the easement, they simply made a different deal and sold the lawn area back to Ron Fury. Ron Fury's the buyer there, and at a nominal dollar, because Ron Fury had agreed that he would mow it and so they had given him, well not given to him, sold to him the right to do it, to maintain it and his driveway, we're talking about two separate things here it's the way the contract reads, and nobody else was to use it and this was in perpetuity with the right to assign to a new owner.

Q: Ok. And when you say maintain that property, where are you getting that from? Are you getting that from the Agreement of Purchase and Sale?

A: Uh, no, maintain, I am translating it to mowing the grass. There's nothing else to be maintained there except the grass.

Q: Ok, and is that coming from the Agreement of Purchase and Sale?

A: The word maintain?

Q: Yes.

A: Oh, yes it is.

Q: Ok, so that's coming from the Agreement of Purchase and Sale we've talked about at Tab 9 and there's a color copy at Tab 10. Ms. Chapman, when I review the Agreement of Purchase and Sale at Tab 9, if you have it in front of you, you have it there ma'am?

A: I'm there yes.

Q: Ok. And at the bottom of the page at clause 2C, do you see that line, Ms. Chapman?

A: Yes.

Q: Ok, so reading that line, upon completion of the vendor's driveway, the vendor was Mr. Fury, upon completion of the vendor's driveway and construction of the chain link fence, the vendor shall sod an area 2 feet on each side to be maintained as a grassed area.

A: Yes.

Q: Ok. So there's reference here to maintaining a grassed area 2 feet on either side of the fence, is that right?

A: That's at the front of Lawrence Street. The town did not want a wide, super wide asphalt or driveway look, so the town wanted 2 feet on either side of the fence, 2 feet of green grass on Ron Fury's side of the fence and 2 feet of green grass on Co-op's side of the fence from a streetscape point of view. I understand it's a by-law that they don't want endless asphalt.

Q: And was grass in fact placed on both sides of the fence?

A: Well, there is grass, some grass, on my side of the fence. There is no grass on Co-op's side of the fence and they stopped the fence considerably short of Lawrence. So there's about probably a 10 foot expanse right at Lawrence where it would be showing that it's nothing but asphalt.

…

Q: Now, where you were about to purchase the property you mentioned to Mr. Keirstead you and your lawyer, Mr. Belliveau, you retained Mr. Green to provide you with a Location Certificate, correct?

A: Yes.

Q: And you've reviewed that Location Certificate?

A: Yes.

Q: You were familiar with location certificates because you had been in the real estate business, and not only did you do that, but you viewed the property yourself, correct? At least once.

A: Yes.

Q: Ok, and I think your evidence was that you saw the infrastructure in place. You saw the poles and the transformer. Correct?

A: Yes.

Q: You did. And so, you saw those, and you saw those items marked on the Location Certificate as well, didn't you?

A: At which point, Mr. Belliveau got in touch about these…

Q: Right.

A: with (inaudible).

Q: Right. Ok. But, so you have a Location Certificate. It identifies the electrical equipment. You attend at the site. You observe the electrical equipment. You got a lawyer, Mr. Belliveau, who's aware of the equipment and despite all of that you still closed on the property, didn't you?

A: Yes.

Q: Right.

A: Because of these things can be fixed and Mr. Belliveau thought that, I've been quoted somewhere here, that Co-op would act like a good neighbour…

Q: Right.

A: and rectify these things.

Q: Right.

A: So I can't tell you if Co-op contacted Nova Scotia Power. I don't know.

Q: Right, but what I'm saying to you Ms. Chapman, is that if this was a big issue for you, and it sounds like it is because we're all here 15 years later, you went ahead and closed the property or closed the deal on the property without having made the electrical equipment or any other issues you had with potential encroachments, without making those an issue.

A: But I couldn't, I wasn't the owner. I was only someone who is buying.

Q: Right, but you didn't ask, you didn't, from what I heard this morning, you didn't speak with Mr. Fury about these concerns, correct?

A: No, Mr. Fury. No, no I didn't speak with Mr. Fury.

Q: Right. You didn't speak with the Co-op about these concerns.

A: Oh, yes we did.

Q: Before the closing?

A: Yes, and the Co-op's lawyer, Creighton. Yes. Yes.

Q: But they weren't addressed before the closing.

A: Apparently not.

Q: Apparently not, but you went ahead anyway?

A: Yes, I did.

Q: Alright, so, and what about Nova Scotia Power. Nobody inquired with Nova Scotia Power prior to closing insofar as the infrastructure on your behalf?

A: No.

Q: You or Mr. Belliveau?

A: Mr. Belliveau? Through…

Q: He dealt with the Co-op. You don't understand…

A: That's the way lawyers work, usually, is it not?

Q: But you're not aware of any contact he may have made to Nova Scotia Power before the closing to say deal with this before we close?

A: No.

Q: No. Ok. And, in fact, the way you dealt with the issue, the issue of encroachment and the driveway, and I'm going to suggest to you the power infrastructure as well, is you lowered your price. You said to Mr. Fury, I'm only going to pay this much because I, because there's an issue here. My driveway is not on my property. Isn't that right?

A: Yes. That has nothing to do with the power poles. You're misreading me there. Mr. Fury had listed the house with a side, privately owned driveway.

Q: Right.

A: When I got 2673 it's not a side, privately owned driveway. It is a right-of-way and in the real estate business that's money.

Q: Ok, but what I'm saying is you were aware of an issue with the property the fact that you weren't going to have title to your own driveway, and you addressed it prior to closing by raising it with Mr. Fury and saying this is not what I'm bargaining for, this effects the purchase price. I'm going to pay you whatever it was, $6,000.00 less, correct?

A: Yeah, I had never met Mr. Fury at that time.

Q: Right. I understand that Mr. Belliveau is handling a lot of this, but what I just want to make sure we're all crystal clear on is that that similar tactic or those, that negotiating didn't happen insofar as the electrical equipment. It just happened insofar as the driveway.

A: It didn't happen. I didn't contact Nova Scotia Power because they weren't the owner of the land.

Q: Ms. Chapman you understood, I assume, at the time of closing that the poles and the transformer that were there were there strictly for the benefit of the Co-op. Is that right?

A: Yes.

Q: And, you understood they were necessary to provide power to the Co-op. Is that…

A: I couldn't comment on how necessary they were.

Q: And that's fair enough. I wouldn't expect you to be an expert on electrical connections, but you're not aware of any benefit they serve to anyone else other than the Co-op?

A: No, I'm not aware of anything like that.

Q: They weren't there for the benefit of the general electricity buying public?

A: Uh, no they weren't, and at this point I think maybe I should tell you that after a few years of arguing with them, I suddenly began to get billed $35 a month on my Nova Scotia Power bill. So I called Nova Scotia Power customer service and said what's this? And they said, well we are finding internally here that there is a big pole on your property with a light on the top of it and you have to pay extra for specialized lights like that. And I said, no there isn't such a thing. And they said, well we'll have to send somebody up to investigate. I said, please do. And sure enough two days later in comes a guy and he can't find this none existent pole with a light over top of it.

Q: Ok. The issue with the two poles and the transformer that you believe are in your right-of-way, you only began raising that issue with Nova Scotia Power in 2006, isn't that right? The first letter, at least that I've seen, is from 2006. So for

the first nine years where you were on the property or after you had bought the property from Mr. Fury…

A: Well I wasn't on it for nine years. I took it in 2001, so five years, and I did contact Nova Scotia Power despite my feeling that they weren't the property owners, but I wasn't getting anywhere with Co-op and a for sale sign had appeared on the Co-op store.

Q: Right. Ok. So you weren't getting anywhere with the Co-op and so by 2006 you say I'm going to take a different tact here and I'm going to write to Nova Scotia Power.

A: Yeah.

Q: But up until that point you hadn't written to Nova Scotia Power?

A: No because they weren't the owners of the building.

Q: Because they weren't the owners of the property.

A: But the building now, with a for sale sign on it, maybe somebody else's and I want to get this sorted out now before it changes hands.

Q: And am I right in saying that the answer that you've received consistently from Nova Scotia Power since then is that we can't do anything about this equipment as long as there's a dispute between you and the Co-op over where this right-of-way is? Is that right?

A: Most recently that has been the case, but it's far from the whole story. Would you like me to tell you more detail?

Q: Well, I guess I'm interested in knowing, and I think I know what you're getting at, because initially, and I heard you say this morning at one point you were, somebody from Nova Scotia Power tried to get you to agree to an easement, correct?

A: Yeah, they tried to buy an easement from me.

Q: Right. That would allow them to access and service the lines and the power, correct?

A: I suppose.

Q: Presumably. Ok, but that doesn't mean that anybody from Nova Scotia Power suggested anything other than you and the Co-op need to work out your boundary situation, correct?

A: Well, they tried to buy an easement from me…

Q: Well an easement…

A: at first…

> Q: An easement would allow them to access the infrastructure to do what servicing they needed, but it wouldn't address the issue of where the boundary between the two properties lie.
>
> A: Uh, no, but I didn't think I had any boundary problems in that area.
>
> Q: Well as I understand it, right through from 2006 when you first contacted Nova Scotia Power to today, you and the Co-op have not been able to agree on where exactly the right-of-way lies, correct?
>
> A: Well, Co-op doesn't agree, but as far as I am concerned the paperwork proves.
>
> Q: Right. You know where it is and they know where it is, but there hasn't been a meeting of the minds?
>
> A: Right.

[16] Ms. Chapman says that the electrical infrastructure has encumbered her exclusive use of the right-of-way and interfered with her use and enjoyment of the right-of-way. She wants more parking for a business she runs out of 19 Lawrence Street. In addition to seeking clarification of the boundaries of the right-of-way, Ms. Chapman wants an injunction for removal of the infrastructure and general damages.

[17] C.A. Realty admits that the Deed reserved a right-of-way to Mr. Fury and that a fence was constructed. C.A. Realty says the fence construction was subject to the Agreement of Purchase and Sale between Mr. Fury and the Co-op, as well as the Deed. The Purchase Agreement and the Deed include, at Schedule "C", a Grant of Easement which states:

> IN CONSIDERATION of the sum of $1.00 paid by the Grantee to the Grantor, receipt whereof is hereby acknowledged, the Grantor grants to the Grantee, his heirs and assigns and the occupants of the lands described in Schedule A hereto ("the lands"), a right of way for persons and vehicles over the lands described in Schedule B hereto.
>
> 1. The Grantor further covenants and agrees that no other party, including the Grantor, its servants or agents, shall enter on Parcel A without the consent of the Grantee, except to repair the fence as hereinafter described.
>
> 2. The Grantor covenants and agrees to place and maintain a chain link fence between the Grantee's driveway and the rest of the Grantor's property.
>
> 3. The Grantee shall be responsible to maintain the lands, including the driveway. Upon this grant of easement, the Grantor shall not be responsible for the lands except as regards maintenance of the fence.

> 4. This easement is irrevocable and shall enure to the benefit of and be binding upon the parties hereto, their heirs, successors and assigns.

[18] In 1997, the Amherst Co-op was independently owned and operated. Because a number of independent Co-op stores could not pay their bills, they joined the Consolidated Consumer Co-operatives, which became part of Co-op Atlantic. Co-op Atlantic therefore became the "big brother" to the independent stores, including the Amherst Co-op. Once this occurred, the Amherst Co-op reported to Co-op Atlantic. Co-op Atlantic is now defunct. Through the *CCAA* process, the land belonging to the Amherst Co-op became the responsibility of C.A. Realty, in Bankruptcy. C.A. Realty is a real estate holding company that was owned by Co-op Atlantic. Grant Thornton is the Receiver for C.A. Realty.

[19] C.A. Realty admits the installation of the NSP infrastructure on the Co-op property. It says the infrastructure was installed with the knowledge and consent of Mr. Fury, and the installation does not constitute an interference with the easement provided to Mr. Fury pursuant to the Purchase Agreement and the Deed.

[20] C.A. Realty denies that it has interfered with Ms. Chapman's use of the right-of-way.

The Evidence

Walter Rayworth

[21] The only witness Ms. Chapman called, aside from herself, was Walter Rayworth, a land surveyor. In 1997, Mr. Rayworth was retained to prepare a survey of 17 Lawrence Street and 19 Lawrence Street. He prepared this plan, known as Plan 2673. In preparing Plan 2673, he conducted a physical survey of 17 and 19 Lawrence Street. He also conducted research, including reviewing a 1966 survey of these properties, entitled Plan 511. According to Mr. Rayworth, Plan 2673 shows the intended boundaries between the properties.

[22] During the evidence of Mr. Rayworth it became obvious that the version of Plan 2673 relied on by Ms. Chapman in preparation for this trial was not the same as the original Plan 2673. In particular, a solid line appears on the version Ms. Chapman was relying on in relation to one of the most critical points of contention. The solid line runs toward an iron bar located at the site area and noted on the survey.

[23] When Mr. Rayworth took the stand on direct examination he had not seen Plan 2673 since 1997. He testified on direct examination that the solid line was the property line between 17 and 19 Lawrence Street. He also initially said that an iron bar depicted on the survey marked the property line between 17 and 19 Lawrence Street as the solid line ran towards it.

[24] If Mr. Rayworth's testimony on direct examination was accurate then the Co-op store built in 1982 on 17 Lawrence Street would be encroaching onto 19 Lawrence Street. He further testified on direct that the Co-op's 1997 purchase of land from Mr. Fury, for which the survey was prepared, was intended to remedy the encroachment, giving the Co-op a way to access their new rear loading dock area.

[25] During cross-examination Mr. Rayworth was directed to the original Plan 2673, not the version relied on by Ms. Chapman. Mr. Rayworth then clarified that upon review of the original survey there should be no solid line indicating the property line. He said a broken line that appeared in the original Plan 2673 was intended to depict the property line. Additionally, having reviewed the original Plan 2673, he concluded that the location of an iron bar, which Ms. Chapman had also been relying on, actually marked the back corner of another property, the Nova Scotia Liquor Commission located behind the Co-op, and had nothing to do with the property line between 17 and 19 Lawrence Street. The iron bar marks the property line between the Nova Scotia Liquor Commission and the McSorley property.

[26] The cross-examination of Mr. Rayworth revealed that Ms. Chapman's claims rely heavily on an inaccurate version of Plan 2673 and a misunderstanding of the significance of the iron bar, and are, to that extent, unfounded.

Brian Creighton

[27] C.A. Realty called Brian Creighton, a property lawyer in Amherst. Mr. Creighton conducted the 1997 property transaction between Fury and the Co-op. He was briefly involved in the 2001 transaction between Mr. Fury and Ms. Chapman, but Mr. Fury eventually retained another lawyer to represent him on that transaction.

[28] Mr. Creighton explained that in 1997, the Co-op wanted to build a below-grade loading dock. They needed slightly more land to accomplish the upgrade. Mr. Creighton says that he was asked to conduct a collegial sale of land between

Mr. Fury and the Co-op and to prepare a driveway easement between the parties to the sale. While Mr. Creighton was not able to locate his 1997 file relating to this transaction, he did locate the original agreement between Mr. Fury and the Co-op. Schedule A of the Agreement shows the location of the new boundary that would exist following the grant of the easement. Schedule B shows the location of the intended new fence between the two properties.

[29] Mr. Creighton testified that there was no intended lawn easement between Mr. Fury and the Co-op that would give Mr. Fury the lawn space in the area of the loading dock/transformer box. According to Mr. Creighton, the "lawn" referred to in the Agreement is very limited, comprising two (2) feet on each side of the fence. Co-op agreed to run the fence to the back of the properties. However, due to safety issues, the Co-op instead ran the fence to the loading dock area. He said the Co-op moved the driveway entrance when it built the loading dock. He explained that the driveway had to be moved by the Co-op as it angled in originally, but when the loading dock was built, the driveway had to be moved and straightened out. Mr. Creighton says that lawn area by the loading dock was never part of the easement.

[30] Schedule A to the Deed refers to a Grantor and a Grantee. On cross-examination, Ms. Chapman suggested that Schedule A does not reconcile with the Agreement of Purchase and Sale and the easement contract. She asserts the Grantor and the Grantee were erroneously reversed by Mr. Creighton when he drafted the document. Mr. Creighton was adamant that there was no error.

[31] Ms. Chapman further suggested that Schedule C is a contract of sale by the Co-op to Ronald Fury. Mr. Creighton also did not agree with this suggestion. He said that this was not a sale by the Co-op to Mr. Fury. He explained that the Co-op granted an easement over the driveway at the time the driveway was built. The sale of land was for $15,000.00, with the Co-op, as purchaser buying land from Mr. Fury, the seller. He explained that Schedule C is not a contract, as there was only one contract. Schedule C is merely a schedule to the contract.

James McIntosh

[32] James McIntosh was called by C.A. Realty. He was qualified as an expert, able to provide opinion evidence in the field of legal surveys. His report was placed into evidence. In preparing his report, Mr. McIntosh carried out a survey of the boundaries, conducted title searches at the Registry of Deeds, reviewed plans and deeds, and carried out a field survey in May 2013, where he measured features, located boundary evidence and field markers.

[33] The scope of his report related to three issues: (1) the location of the property boundaries; (2) the location and scope of the easement; and (3) the location of the NSP infrastructure in relation to the property boundaries.

1) The location of the boundaries between the Chapman property and the Co-op property

[34] Mr. McIntosh concluded that the boundary he found is the same as the one found by Mr. Rayworth in 1997. It runs along the fence line until a jog in the property where the fence line ends. Thereafter it runs along the intended fence line, straight to the back of the property.

[35] Mr. McIntosh located an iron bar in the back corner of the Liquor Commission property, at the rear of the Chapman and Co-op properties. He said the iron bar has nothing to do with the boundary between the Chapman and Co-op properties.

2) The location and extent of easement in favour of Chapman over land of Co-op

[36] Mr. McIntosh prepared a plan to show where he thought the boundary of the easement was, which was along the fence, and, where there was no fence, along the intended boundary.

[37] Mr. McIntosh said that the easement was created when Mr. Fury sold the property to the Co-op. The conveyance refers to a fence to be constructed. The fence is the original monument of the boundary of the easement. An original monument in its original location marks the boundary. The original boundary of the easement was to be ten feet from, and parallel to, the property line. The fence was not installed as agreed upon, as it did not run straight to the back of the property, due to safety issues with the loading dock. Mr. McIntosh therefore followed the fence line to the back of the property in determining the property boundary.

[38] The easement is as depicted by Parcel "E" in Mr. McIntosh's 2013 Plan, which is the yellow highlighted portion of Exhibit 2, Tab 29. Mr. McIntosh relied on Mr. Rayworth's 1997 Plan 2673 in coming to his conclusions. Mr. McIntosh agrees that the easement is as depicted by the orange highlighted portion of Mr. Rayworth's 1997 Survey Plan 2673, which is Exhibit 2, Tab 8, except where the fence is misaligned.

[39] Mr. McIntosh says that Parcel "E" stops at a jog in the property line. From that point to the back of the Co-op property there is no easement. Therefore, anything outside of Parcel "E" is not part of the easement.

[40] The fence was initially intended to go all the way to the back of the property. There is a jog in the property line between the Co-op and Ms. Chapman's property. The boundary that runs straight back does not have an easement the entire distance. Co-op owns one side and Ms. Chapman owns the other side.

[41] According to Mr. McIntosh, the lawn referred to in the Purchase and Sale Agreement is the lawn that exists for two feet on either side of the fence. Beyond that, where the fence stops, there is a bit of lawn in the easement, which is what is referred to as lawn in the contract.

[42] Mr. McIntosh stated very clearly that the area of lawn (where the transformer is located) claimed by Ms. Chapman is not part of the easement. His testimony as to the actual location of the easement corresponded with that of Mr. Rayworth on cross-examination, and that of Mr. Creighton.

[43] On cross-examination by Ms. Chapman, Mr. McIntosh clarified that the maps relied on by all parties were not always to scale. He also clarified that the iron bar that Ms. Chapman had been relying on as a boundary between her property and the Co-op property was actually part of the boundary between the McSorley property and the Nova Scotia Liquor Commission, and was not relevant to her dispute.

[44] Mr. McIntosh further clarified for Ms. Chapman that the location certificate that she had been relying on was not a boundary survey, but merely shows where certain physical features are located on a property.

[45] Mr. McIntosh also stated that at the time of the 1997 agreement between the Co-op and Mr. Fury, the Co-op did not own the land, so there could be no conveyance. Schedule C was intended to be the form of the conveyance of the easement after the Co-op bought the property. The contract said that the Co-op was to convey an easement (the right-of-way driveway easement) back to Mr. Fury after the Co-op bought the land and constructed the fence. Schedule C is the form of the easement that the Co-op was supposed to convey back to Fury after they bought the strip of land from him. The Purchase and Sale Agreement is not a conveyance, it is a contract. Mr. Fury still had to convey the property to the Co-

op, and the Co-op had to convey the easement back to Mr. Fury. That is why two conveyances were required to close the deal that is outlined in the contract.

3) Location of the NSP Infrastructure

[46] During cross-examination by NSP, Mr. McIntosh confirmed that the transformer on the rear lawn of the Co-op property is not on the right-of-way, nor is the NSP utility pole at the front of the Co-op property near Lawrence Street.

[47] However, Mr. McIntosh stated that the utility pole and guy wires located midway down the driveway, and the overhead wires, are located on the right-of-way.

Analysis

[48] Where a right-of-way is created by an express grant, its scope and extent are determined according to the language of the grant: *PATCO Developments Ltd. v. 3195972 Nova Scotia Ltd.*, 2016 NSSC 9, 2016 CarswellNS 15, at para 32. C.A. Realty submits that the grant of right-of-way is ambiguous, and that extrinsic evidence is therefore required. The relevant law is summarized in *Goulden v. Nova Scotia (Attorney General)*, 2013 NSSC 253, 2013 CarswellNS 610:

> 13 When the words of a deed are not ambiguous, either in themselves or when applied to the land in question, the intention of the original grantor is to be taken from the words of the description in the deed. No further rules of interpretation are required: *Herbst v. Seaboyer* (1994), 137 N.S.R. (2d) 5 (N.S. C.A.), at para. 15; *MacDonald v. McCormick*, 2009 NSCA 12 (N.S. C.A.), at para 73. A latent ambiguity occurs when the words of a document on their face do not admit a different possible meaning, but surrounding circumstances show that two or more different meanings are possible. A party may demonstrate that a latent ambiguity exists, and attempt to resolve it, by adducing extrinsic evidence, including evidence of subjective intention. A patent ambiguity, by contrast, is "apparent from the face of the document": *Taylor v. City Sand & Gravel Ltd*., 2010 NLCA 22 (N.L. C.A.), at para. 21; Geoff R. Hall, *Canadian Contractual Interpretation Law*, 2d edn. (Toronto: Lexis Nexis Butterworths, 2012) at §2.8.5.

[49] C.A. Realty says the ambiguity must be settled by reference to the expert opinion of Mr. McIntosh, the intentions of the Co-op and Mr. Fury at the time of the transaction, Mr. Fury's subsequent acceptance of the boundaries of the right-of-way and the plaintiff's knowledge of the boundaries when she bought the property. On the evidence, I am satisfied that this is an appropriate situation to use extrinsic evidence as an aid to interpretation.

[50] C.A. Realty argues that the right-of-way does not extend over the rear part of its property. Its purpose is to provide access to the street for Mr. Fury and his successors in title. This is apparent from the subsequent conduct of Mr. Fury, and is supported by the expert's report. The location of the right-of-way is defined by the fence, which was already in place when the plaintiff bought the property. Her knowledge of the location of the fence and the edge of the driveway at the time she bought the property justifies the application of the doctrine of *caveat emptor*: see *Saueracker v. Snow* (1974), 14 N.S.R. (2d) 607, 1974 CarswellNS 249 (S.C.T.D.), at para. 30. In *Buchanan v. Saulnier* (1983), 25 A.C.W.S. (2d) 320, 1983 CarswellNS 547 (S.C.T.D.), where the court said:

> 16 Having come to these conclusions, I am satisfied from the evidence that there were mistakes in drawing the deeds. There is evidence of this. When the conveyance from Boutilier to Burton was drafted in 1951, it did not reflect the intention of the parties in that the most logical meaning of the words used, looked at without any evidence of surrounding circumstances, would indicate an intention to convey away the entire shore lot, including the right-of-way. But I am satisfied that that was not the intention of the parties and this is most evident from the fact that Mr. Hazlitt Boutilier and members of his family remained in possession of the shore lot and had access to it from the time they sold to Mr. Burton in 1951 up until the time the shore lot was sold to Mr. Beckett in 1966. I am also satisfied that a mistake was made in the conveyance when Mr. Burton sold to Mr. Saulnier in 1969. The same description was used in that deed as had been used in the conveyance from Boutilier to Burton. I am satisfied that there was no reason for Mr. Burton to know that the descriptions should have changed, he simply sold what he acquired. As I have indicated, I am satisfied to accept Mr. Burton's evidence that Mr. Saulnier was shown the eastern line as I have described it. and he knew what lie was buying The deed as drafted did not reflect the agreement of the parties. I am satisfied that neither Mr. Burton nor Mr. Saulnier knew the description did not correctly describe the land that had been agreed to be sold and to be purchased. I am satisfied there was a mutual mistake.
>
> …
>
> 21 Mr. Saulnier's claim for indemnification against Mr. Burton is dismissed as I am satisfied Mr. Saulnier was aware that he was purchasing lands up to the fence line I have described as the Burton fence. The plaintiff has not proven any damages. I do not feel it can be said that going to Prince Edward Island for a vacation was as a result of any action taken by Mr. Saulnier. The only act of trespass was committed in 1980 when the fence was constructed by Mr. Saulnier across the top of the so-called right-of-way to the south of the Johnson's Point Road.

[51] As C.A. Realty points out, when Ms. Chapman viewed and purchased the property, the NSP infrastructure was in place and visible. Even if it did interfere with the right-of-way, it would have been a patent defect, and the doctrine of *caveat emptor* would apply: *Hambrook v. Saunders* (1991), 116 N.B.R. (2d) 91, 1991 CarswellNB 250 (Q.B.), at paras. 28-29.

[52] In this case, the fence was the original monument of the location and extent of the right-of-way. Other than natural boundaries, this is the highest-ranking category of evidence of original boundaries, according to the surveyors' hierarchy of evidence: see *Goulden* at para. 16. The expert, Mr. McIntosh, concluded that the boundary of the right-of-way was established when the fence was built in its present position. I accept the expert's opinion, and I agree that the fence is the proper boundary of the right-of-way.

[53] C.A. Realty offers various alternative arguments, in the event that the court rejected the argument that the fence was the original monument. I would like to refer to one in particular: I agree that even if the fence did not mark the actual boundary, there is no substantial interference with the plaintiff's rights. Ms. Chapman complains that she would have more parking spaces available to her if the utility pole and guy wires were removed. In *Voye v. Hartley*, 2002 NBCA 14, 2002 CarswellNB 627, the court said:

> 25 It is trite law that only a "substantial interference" by the owner of the servient tenement with the enjoyment by the owner of the dominant tenement of the right of way is actionable. In *West v. Sharp*, Mummery L.J. defines what is meant by "substantial interference," at para. 35:
>
> > Not every interference with an easement, such as a right of way, is actionable. There must be a substantial interference with the enjoyment of it. There is no actionable interference with a right of way if it can be substantially and practically exercised as conveniently after as before the occurrence of the alleged obstruction. Thus, the grant of a right of way in law in respect of every part of a defined area does not involve the proposition that the grantee can in fact object to anything done on any part of the area which would obstruct passage over that part. *He can only object to such activities, including obstruction, as substantially interfere with the exercise of the defined right as for the time being is reasonably required by him* . . . . [Emphasis in *Voye*.]
>
> See, as well, *Keefe v. Amor* (1964), [1965] 1 Q.B. 334 (Eng. Q.B.) , at p. 347, per Russell L.J. and *Tibbitt v. Hobbs* (2000), [2001] E.W.J. No. 2709 (Eng. C.A.) , at para. 21, online QL (EWJ). Whether a particular activity amounts to a substantial interference is not a question of law but one of fact.

[54] On the facts of this case, I am satisfied that even if there were any infringement of the right-of-way, it would not substantially interfere with the plaintiff's use of the right-of-way for its intended purpose of providing access to the street. The right-of-way was not created to allow for increased parking.

[55] I would also accept that the plaintiff appears to be asserting a right of control over the right-of-way that is incompatible with its nature as an easement. The right apparently being asserted by the plaintiff at least implicitly threatens to deprive the owner of the servient tenement of control of its own land, which is inconsistent with the limited nature of an easement: see J.R. Grant and P. Morgan, *Gale on Easements*, 19th edn. (London: Sweet & Maxwell, 2012), at §1-03.

Conclusion

[56] I am satisfied that the property boundary and the boundaries of the easement that resulted from the Co-op's purchase of land from Mr. Fury at 19 Lawrence Street are as described by Mr. McIntosh and Mr. Creighton, and also as described by Mr. Rayworth on cross-examination.

[57] The property boundary is the fence line between the two properties, and where the fence line is disrupted by the Co-op loading dock, the property line continues along the intended boundary from the fence line to the end of the property.

[58] Schedule C to the Deed grants an easement to the owner of 19 Lawrence Street, providing for a two-foot strip of lawn immediately adjacent to the fence. The easement is as depicted by Parcel "E" in Mr. McIntosh's 2013 Plan, which is the yellow highlighted portion of Exhibit 2, Tab 29. Parcel "E" stops at a jog in the property line. From that point to the back of the Co-op property there is no easement. The boundary that runs straight back from that jog to the end of the fence line is simply the property boundary line. From there onward, Co-op owns one side and Ms. Chapman owns the other side. Anything outside of Parcel "E" is not part of the easement.

[59] The area of lawn where the transformer and utility pole are located are not part of the easement. The utility pole, guy wires and transformer located midway along the property do encroach on the easement. However, the doctrine of *caveat emptor* applies. Additionally, there is no substantial interference with Ms. Chapman's rights concerning the intended use of the right-of-way. Ms.

Chapman's claims are also incompatible with the right-of-way's nature as an easement. Ms. Chapman's claim is dismissed.

[60] The parties will bear their own costs.

Arnold, J.