

1987

S.H. No. 62331

**IN THE SUPREME COURT OF NOVA SCOTIA  
TRIAL DIVISION**

**BETWEEN:**

**LEONARD M. DAVIS and LINDA R. DAVIS**

Plaintiffs

- and -

**HER MAJESTY THE QUEEN in the Right of the  
Province of Nova Scotia, as represented by  
The Minister for the Department of Transport**

Defendant

**HEARD:** at Halifax, Nova Scotia, before the  
Honourable Mr. Justice John M. Davison,  
in Chambers, on December 17, 1987, and  
December 30, 1987

**DECISION:** February 2, 1988

**COUNSEL:** Joseph M. J. Cooper, Esq., for the Plaintiffs  
David G. Giovannetti, Esq., for the Defendant  
John D. MacIsaac, Q.C., for Standard Paving  
Maritime Limited and Anita Kennett

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DAVISON, J.:

This matter came before me in Chambers following the issuance of an Interlocutory Notice, Application inter partes, for an Order "determining the status of a certain road known as the 'MacPhee Road'..."

At a pre-trial conference prior to the hearing, I requested counsel for the Plaintiffs to give notice of the Application to the owners and occupiers of premises which abut the MacPhee Road.

On the date of the hearing, a number of persons attended and indicated interest in the application including counsel on behalf of Standard Paving Maritime Limited and Anita Kennett, a property owner. In addition, a number of individuals were present in the courtroom, four of whom indicated they desire to be heard but would not be retaining counsel. Those persons were Bernard Verge, Wallis Amos and Albert MacQuire all of Elmsdale and Robbie MacPhee of Stellarton.

It was apparent that the matter could not go forward on that particular day and discussions took place as to whether an application in Chambers was an appropriate forum to determine the issues. In that respect, I was advised by counsel that it was expected that the matter would take three and one-half days.

Civil Procedure Rule 9.02 reads as follows:

A proceeding, other than a proceeding under Rule 57 and Rules 59 to 61,

(a) in which the sole or principal question at issue is, or is likely to be, a question of law, or one of construction of an enactment, will, contract, or other document;

(b) in which there is unlikely to be any substantial dispute of fact;

(c) which may be commenced by an originating application, originating motion, originating summons, petition, or otherwise under an enactment;

shall be commenced by filing an originating notice (application inter partes) in Form

9.02A in a proceeding between parties, and by an originating notice (ex parte application) in Form 9.02B in an ex parte proceeding.

It is apparent from the affidavits and from the estimate of time involved that there are substantial issues of fact to be determined. It is also apparent that the time anticipated renders a Chambers hearing impractical. For these reasons, it is my view that the proceeding should be by way of trial where the presiding trial judge will have the opportunity of making findings of fact following the advantage afforded to him by the observation of witnesses.

I am prepared to order that this hearing be adjourned into court pursuant to Civil Procedure Rule 37.10(d).

Furthermore, I don't believe that I will be fettering the discretion of the trial judge if I order that the Notice and Affidavits stand as pleadings with liberty to any party to amend or add thereto or apply for particulars thereof pursuant to Civil Procedure Rule 37.10(e).

A further issue which was the subject of consideration when counsel were before me in Chambers was whether the present action should be combined with an action under the Quieting Titles Act, R.S.N.S., 1967, c.259. In Stewarts of Dartmouth Ltd. v. City of Dartmouth (1981), 48 N.S.R. (2d) 282, Mr. Justice

Burchell combined an action under the Quieting Titles Act with an application for a Mandamus and in doing so referred to s. 2(2) of the Statute which reads as follows:

2(2) The claim may be the sole claim in the action or may be joined with a claim in trespass to land, in ejectment, for the discovery of land, for mesne profits, for partition, for foreclosure of a mortgage, equity of redemption or agreement of sale, for specific performance of an agreement to convey land or with any other claim in which the title to or right to possession of land is in issue or with any combination of such claims.

The Appeal Division of the Supreme Court of Nova Scotia (79 N.S.R. (2d) 308) dismissed an appeal from the decision of Mr. Justice Burchell and quoted extensively from His Lordship's judgment including his direction to combine the action with the Quieting Titles Act and the Appeal Division made no adverse comment on this procedure.

In Spearwater v. Seaboyer and Seaboyer (J.A.) Transport Limited (1984), 65 N.S.R. (2d) 280, Mr. Justice Nathanson dealt with an action for trespass and was required to consider the ownership of a roadway. His Lordship stated at page 286:

In this case, the defendants have the burden of proving ownership by the Crown and they have failed to carry that burden. They might have called an appropriate public servant as a witness. They might have applied to join the Crown as a party to this proceeding; all actions for a declaration of title should include a claim under the Quieting of Titles Act, R.S.N.S. 1967, c.

259, and the Attorney-General of Nova Scotia should be joined as a party.

Again at page 288 the Court stated:

...the plaintiffs could have made a claim in this proceeding under the provisions of the Quieting of Titles Act and, following the usual procedure, they would have joined the Attorney-General as a party. They did not do so. I am reluctant to grant a declaration establishing that boundary under those circumstances, and I decline to do so.

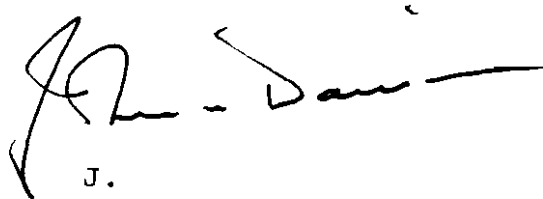
I am concerned that a trial judge in these proceedings would have the same reluctance as expressed by Mr. Justice Nathanson. The Quieting Titles Act is available to any person who claims "a property right in land". In the present proceeding, in order to determine whether the roadway is public or private the property rights of the Plaintiff and others must become issues in the proceeding.

Furthermore, the procedure outlined in the Quieting Titles Act has built in safeguards to protect all interested parties and I would expect that at the time an order for directions is sought, the court would require notice to be given to all persons who own or occupy lands abutting the roadway.

In my opinion, the order should provide for inclusion in the proceedings of an action under the Quieting Titles Act R.S.N.S., 1967, c.259.

The final issue is whether those parties who have already shown interest in these proceedings be added to the proceedings as defendants or as interveners pursuant to Civil Procedure Rule 8. Standard Paving Maritime Limited and Anita Kennett have specifically requested to be made defendants and I consider it more appropriate that any interested parties be made defendants as this is the procedure contemplated by the Quieting Titles Act.

I will sign an order incorporating my findings herein. Costs of the application will be costs in the cause.



J.

Halifax, Nova Scotia  
February 2, 1988