SUPREME COURT OF NOVA SCOTIA
Citation: *Henderson v. Quinn*, 2019 NSSC 190

Date: 2019 06 21
Docket: Amh No. 460159
Registry: Amherst

Between:

Patrick Henderson, Mark W. Scales, Nicola J. Scales, Richard King, Sheila King, Timothy King, Cherie Marshall, Vicki Hallett, Jo Ann Hatfield, Edith Leadbetter, Allan Mills, Donald Quinn, Kelly Quinn, Shelley Dow, Deborah Woods, Richard Porter, Nikole McCormick, James Wissman, Lynn Wissman, Carol Brown, James Yorke, Joan Andrusaitis, David Redfield, Carol Redfield, Stephen Schrempf, Mary Schrempf, John Campbell, Karen Campbell, Kevin McCormack, M. Gail McCormick, Delphine Davies, Gardiner Patterson, James Best, Donna Best, Danny Best, Heather Best, Jimmy-Lee Best, Natasha Kyte, Owen Wood, Michael Henderson, Gwendolyn Henderson, Kevin Yorke and Eric Yorke

Plaintiffs

v.

Jacqueline Quinn and William Quinn

Defendants

Judge:	The Honourable Justice Joshua M. Arnold
Heard:	April 15, 2019, in Amherst, Nova Scotia
Counsel:	Terry Farrell and Brian Creighton, for the Applicants Dennis James, for the Defendants

By the Court:

Introduction

[1] Numerous individual plaintiffs in Greenhill, Cumberland County, have applied for an interlocutory injunction allowing them to use Old Farm Road to access Clarke Head beach. The roadway crosses a property owned by the defendants, Jacqueline and William Quinn. According to the plaintiffs, the road across the Quinn property is the only safe and practical way to access the Clarke Head beach and it has been used openly and continuously by members of the community for generations.

[2] The Quinns say the access road to Clarke Head beach is not part of Old Farm Road at all, but is instead a private lane. They say that after they purchased the property in 2015, they noticed individuals crossing their property to access the beach. The Quinns responded by blocking access to the lane, erecting numerous "No Trespassing" signs, and confronting individuals who ignored these other measures. They take the position that even if members of the public have used the lane in the past, they have no right to continue using it. The Quinns say the plaintiffs can still access Clarke Head beach from other locations and have been doing so since the Quinns blocked access across their property.

[3] The plaintiffs are seeking an interlocutory injunction requiring the defendants to remove any structures or obstructions they have placed on, or built into, the road to the beach; enjoining the defendants from interfering with the plaintiffs' use of the road for recreational and commercial uses; and allowing the plaintiffs, at their own expense, to restore the now significantly eroded roadway to a condition that would permit pedestrian and vehicle access to the beach.

Background

[4] In 2015, William and Jacqueline Quinn purchased an 80-acre property at Old Farm Road in Greenhill from Bruce W. Graham and G. Malcolm Graham. The land had been in the Graham family since 1951, when it was owned by Messrs. Grahams' father, George. The property is on a peninsula that juts into the Minas Basin. The entire peninsula was originally a farm property that the Grahams subdivided into lots, predominantly for seasonal use. At the head of the peninsula, in front of the Quinns' residence, is a beach known as Clarke Head beach.

[5] When the Quinns acquired title, the property was accessed by Old Farm Road. Old Farm Road connects with other roads on the Quinn land, including Cove Road, and roads outside it, including Gilbert Road and Two Island Road.

[6] Old Farm Road is acknowledged as a public road to a point. The primary issue in this litigation is whether the road or lane that continues from the known end of the public road to Clarke Head beach became a public road through common law dedication and acceptance.

[7] There are more than 40 plaintiffs in this action. They fall into several groups. Some plaintiffs own cottages or homes on properties subdivided from the Graham land. Some own cottages or homes on Gilbert Road. Other plaintiffs are members of the public who live within a short distance of Old Farm Road or have historical or family connection to the local community. While some of the plaintiffs intend to establish at trial that their properties benefit from a right of way to use the road that crosses the Quinn property to access the beach at Clarke Head, all the plaintiffs say they have the right to use the road to access Clarke Head beach by way of dedication of the road for public use.

The Evidence

[8] The plaintiffs filed 36 affidavits. The affidavit of Richard King was withdrawn when his health prevented his attendance in court for cross-examination. Sheila King swore two affidavits and was the only affiant cross-examined by the defendants. Since the other 33 affiants were not cross-examined, their evidence must be taken at face value, provided there is no evidence of its inaccuracy: *Gresham v. Rohaly*, 2011 ONSC 7652, [2011] O.J. No. 6467, at paras. 78-79; and *Zarandi v. Canada (Minister of Citizenship and Immigration)*, 2015 FC 1036, [2015] F.C.J. No. 1103, at para. 17. The defendants each swore an affidavit. They were both cross-examined.

<u>The Plaintiffs' Evidence</u>

[9] Sheila King was born and raised in Parrsboro, Nova Scotia, and she and her husband Richard own a cottage at 22 Gilbert Road. Ms. King's evidence is that her mother began taking her to the beach at Clarke Head when she was about four or five years old. She explained on cross-examination that her mother – a single mother – could not afford to take her away on vacation, so they went to Clarke Head beach instead. She said that going to Clarke Head beach was their vacation. Ms. King swore in her original affidavit that until 2016 when her access was

blocked, she had regularly taken her children, grandchildren and friends to Clarke Head beach for beach combing, clam digging, dulse picking, fishing for flounder, swimming, roasting hot dogs, and other recreational activities. She said they always accessed the beach using the Old Farm Road. Ms. King swore that they had never sought permission from anyone to use the road, and no one had ever attempted to impair or obstruct their use of the road.

[10] In her second affidavit, filed in response to the Quinn affidavits, Ms. King reiterated that she and her family had used Old Farm Road to access Clarke Head beach in all seasons for over 65 years, until it was blocked by the Quinns. She disputed the Quinns' assertion that there are other safe and practical ways for her family to get to Clarke Head beach. Ms. King acknowledged that there are steps adjacent to the property of Louis and Kathryn Smits at 187 Cove Road, but said these steps are steep and dangerous, are located in a gully, and are regularly damaged by water flowing into the gully. She added on cross-examination that, as of the day before the hearing, these steps are practically non-existent. Ms. King stated that she and her family have no right to use the steps by the Smits property and do not assert any such right.

[11] Ms. King further acknowledged that plaintiffs Mark and Nicola Scales constructed a private set of 170 steps on the 80-foot cliff on their property as a stopgap, allowing them to access the shore while the Quinns blocked access by Old Farm Road. Ms. King said the Scaleses had granted her and her family permission to use the steps, but that her husband, who is 74 years old and has a heart condition, gets exhausted using the steps and has to stop two or three times along the way. She said the Scaleses had permitted the Kings to put a bench on one of 13 landings on the steps as a rest stop. On cross-examination, Ms. King agreed that some plaintiffs have accessed Clarke Head beach by using a roadway on property belonging to Allison Mills. She said Mr. Mills put the road in within the last several years. Ms. King added that the individuals using the Mills road would have to obtain permission, because it is not a public way. On re-direct examination, Ms. King explained that anyone accessing Clarke Head beach from one of these other access points would be stranded there if the tide came in, and would be forced to wait until the tide went out again. She said the road over the Quinn property is the only way to get off Clarke Head beach at high tide.

[12] Each of the 33 other affiants report a history of using Old Farm Road to access Clarke Head beach. I will review some, but not all, of the affidavit evidence. James Hardy Best has lived in Parrsboro, Nova Scotia for his whole life

and had used the Old Farm Road to access Clarke Head beach for over 60 years. He said that over the years, as it became necessary, he had spent many hours maintaining, repairing and providing financial support for the upkeep of the road to the shore. James Hardy Best said his whole family had made memories using Old Farm Road to access Clarke Head beach for recreational activities, picnics, clamming, dulsing, swimming and to launch boats to go flounder and bass fishing. He said he had seen others who do not own property in the immediate area use Old Farm Road to access the beach and enjoy these activities as well. James Hardy Best further stated that, as a commercial fisherman, he had always used Old Farm Road to access the beach at Clarke Head. He had travelled the road by truck, 3-wheeler, car, and even by horse and buggy. He said he had travelled it at all hours of the day and night to catch the tide for picking bait and setting nets and trawls, and tending his boat when the weather was bad. James Hardy Best said he had never sought permission to use the road and no one had ever interfered with his use of it until William and Jacqueline Quinn blocked access to Old Farm Road.

[13] James Hardy Best's evidence was corroborated by the evidence of his wife, Donna Carol Best; his son, Danny Lee Best; and his son's wife, Heather Marie Best. Donna Carol Best is 79 years old and she and her husband own property that adjoins the Old Farm Road. She said she believes that people who do not own property in the area had been using the Old Farm Road to access the beach at Clarke Head, and that there had been weddings held at the beach that used Old Farm Road for access.

[14] Danny Lee Best is 57 years old and said he had been going to Clarke Head beach by Old Farm Road since he was 16 years old. Prior to that, his parents had taken him to Clarke Head beach using the same roadway. For as long as he could remember, he had gone to the beach at Clarke Head to swim, fish, dig for clams, pick dulse, have picnics with his cousins and aunts and uncles, search for fools' gold and rocks, and to explore the ocean floor when the tide was out. He said he had also used Clarke Head beach to fish lobster with his father for six and a half years, and that his father had kept his boat moored around the corner from the beach for 28 years. Danny Lee Best further stated that the Old Farm Road beach access had also been used by geology students on field trips. He said he and his family had never sought permission to use Old Farm Road to access the beach and, prior to the defendants acquiring property in the area, no one had ever attempted to impair or obstruct their use of the road. Danny Best stated that the beach at Clarke Head is very important to himself and his family, including his children and grandchildren.

[15] Heather Marie Best stated that she and her husband had gone on dates at Clarke Head beach forty years ago, that they had accessed the beach using Old Farm Road, and that she had loved that beach ever since. She said they had taken their children to the beach when they were young. They had always used the Old Farm Road to get to the beach and had never been denied access. Heather Marie Best said she was afraid that her two-year-old granddaughter might never know what it is like to explore the beach at Clarke Head. She echoed her husband's statement that the beach at Clarke Head is very important to her family.

[16] Natasha Kyte, the daughter of Danny and Heather Best, is 36 years old. She stated that she remembered her grandfather, James Hardy Best, along with other locals and fishermen, using gravel and other filler to fill in large holes in the roadway to Clarke Head beach that had developed through the winter months, so that it would be safe for all to use.

[17] Gardiner Patterson owns a property near the Old Farm Road and has lived on it for his entire life. It was deeded to him by his father before his death. While Mr. Patterson did not mention his exact age, he said his family has been living in the area for at least four generations. He stated that he had used the Old Farm Road to access the beach at Clarke Head for his entire life, over 50 years, and that he had seen it used by friends, neighbours, and strangers on a regular basis. Mr. Patterson said he had travelled down the road in cars, trucks, four-wheelers, motorcycles and homemade beach buggies. He also helped maintain the Old Farm Road to ensure that it could continue to be used to access the beach on foot or by vehicle. Mr. Patterson said there was never a time when he asked permission to use the road, and no one had ever attempted to deny access to the beach via Old Farm Road prior to the defendants.

[18] Carol Brown stated that she resides primarily in Florida but owns a summer cottage on Gilbert Road, which she purchased in 1990, and also owns the land below her cottage which adjoins Old Farm Road. She stated that when she purchased the property, access to Clarke Head beach over Old Farm Road had been available for all who would like to use it to get to the beach. She said it had been common knowledge in the community that it would always remain open, as it had been open for public use for many years. She further stated that the road was maintained by those who used it so that access was available by vehicle, ATV or walking. She said that she had always used an ATV to travel the road to the beach, since it was the only way for her to get there. Ms. Brown said there had often been wood piled at the top of the hill for anyone wishing to build a fire on the beach.

She stated that access to the shore over Old Farm Road had been the custom for more than three generations.

[19] John Campbell's evidence was that he and his wife own property at 132 Gilbert Road, and that for the past 25 years, he had travelled over and assisted in maintaining the Old Farm Road. He said he had used the road to go flounder fishing, boating, clam digging and to take walks on the beach. He stated that when his children were young, he and his wife would take them down Old Farm Road to the beach at Clarke Head for swimming, beach fires and hot dog roasts. He said that over the past few years, he and his wife had often taken their grandchildren down Old Farm Road to the beach. He recounted that in 2016, they had taken their grandson on a pirate treasure hunt, and the look on his face when he found the treasure would always be a great memory for them. Mr. Campbell said he had worked as a paramedic in Nova Scotia for 20 years and he had used Old Farm Road to access the beach to walk and clear his head after a bad call or just to walk down to the point and see the beautiful scenery. He stated that it had done wonders for his mental health. Mr. Campbell further stated that he and his family had never sought permission to use the Old Farm Road from anyone and, prior to the defendants acquiring the property, no one had ever attempted to impair or obstruct their use of the road.

[20] Shelley L. Dow resides at 66 Cove Road, which she purchased in 1988. When she was growing up, her family had a cottage at 81 Cove Road, which her mother purchased in 1968. Her aunt and uncle already had a cottage in the area, which they bought in 1965. Ms. Dow stated that Old Farm Road is the only access to the beach when the tide is in half way. She said people would often take their cars, ATVs, trucks and bicycles and park at the top of the road and walk down to the beach. She further stated that many people would launch their boats or take paddleboards and sea kayaks to the beach. Ms. Dow said she frequently travelled the road with an ATV, a car, or by simply walking. She noted that she lives in the area all year, so she had used the road to snowshoe and cross-country ski in winter, to pick raspberries and blueberries in the fall, to access ponds to pick fiddleheads in the spring, and to go to Clarke Head beach in the summer. Ms. Dow said that some of her most precious memories were looking for fool's gold, sea glass, crystals and rocks with her aunt Gerry. She stated that there were many times when they would build a bonfire and spend the whole day there with family and friends. She said it was common to see geologists or rock hounders on the beach, and that some had been coming to search the beach for 50 years. According to Ms. Dow, traveling down the Old Farm Road had always been so special to her family

that they sprinkled the ashes of her mother and aunt there. She said that in 53 years, she had never sought or received permission to use Old Farm Road as access to the beach, nor had anyone ever attempted to interfere with her use of the road prior to the arrival of the defendants.

[21] Gwendolyn Henderson stated that in 1949, when she was in fourth grade, her teacher, Mrs. Mary Urquhart, took their entire class in a school bus to Clarke Head beach, known at that time as Graham's Point beach. She said they accessed the beach by using the Old Farm Road. Ms. Henderson said that Mrs. Urquhart had taken the class on a nature walk and talked about the trees, flowers and butterflies. They had spent the day looking for seashells and fool's gold, and they had all eaten their lunch there together.

[22] Michael Henderson is 82 years old and said he had used Old Farm Road to get to Clarke Head since 1960, when he had taken his children down to swim and play in the safety of the beach. He said he had never sought permission to use the Old Farm Road from anyone and no one had ever attempted to impair or obstruct his use of the road. Mr. Henderson further stated that when he was managing the Glooscap Park Campground for the Town of Parrsboro, he had shown tourists and rock hounds how to use the Old Farm Road to gain an easy path to the mineral areas. He said no one had reported anyone objecting to their use of the road, nor had there been any signage to indicate restrictions to traffic. Mr. Henderson's affidavit does not indicate the years he worked at Glooscap Park Campground.

[23] Michael Henderson's son, Patrick Henderson, stated that he is very familiar with the Old Farm Road area and had childhood memories of being taken to the beach by his parents using that road to swim and look for fool's gold. He said he knew that other members of the community had used the Old Farm Road for fishing and recreational beach activities since the early 1900s. Patrick Henderson reported having seen locals using their tractors to affect repairs to the road to keep it usable by car, truck, and 4-wheelers.

[24] Edith Leadbetter is 78 years old, and said she has been familiar with the Old Farm Road and Clarke Head beach for 72 of those years. She stated that her father and his brother bought property on the Old Farm Road in the 1940s and she had started her schooling there as a young girl. Ms. Leadbetter said she and her family had used Clarke Head beach for swimming, picnics, and family gatherings since the 1940s. She purchased her aunt and uncle's property on Old Farm Road in the 1970s and had spent every summer there since. She said she had spent many hours

at Clarke Head along with many family members. Ms. Leadbetter stated that since old age and mobility issues had begun to plague her, she has had to use her 4-wheeler to get to Clarke Head beach, and that Old Farm Road is her only viable access. She said she had never sought permission to use Old Farm Road from anyone and, prior the defendants acquiring property in the area, no one had ever attempted to impair or obstruct her use of the road.

[25] Finally, Nikole McCormick stated that she resides primarily in Springhill, Nova Scotia, but had purchased property at 403 Old Farm Road in 2016. She said she had visited the area on several occasions and, after surveying the area and seeing the ease of access to the beach, decided to purchase the property. According to Ms. McCormick, access to the beach by Old Farm Road played a major role in her decision to purchase property in the area. She said that the loss of her access by Old Farm Road has limited the time that she can enjoy the beach and her love for rock hounding, since it is the only access she would have during low tide for a short window before the tide started to return. She noted that the Clarke Head continues to have a beach area through high and low tide, which is what made the Old Farm Road access so appealing. Nikole McCormick said that she had never sought permission to use Old Farm Road from anyone and, prior to the defendants blocking access, no one had ever attempted to impair or obstruct her use of the road.

The Defendants' Evidence

[26] William Quinn said he and his wife purchased the property at Old Farm Road from Bruce W. Graham and G. Malcolm Graham, and the deed was registered on July 7, 2015. Mr. Quinn noted that at the time of purchase, they were given a warranty deed for the property stating that they "shall have quiet enjoyment of the lands" and that the "lands are free from encumbrances". He said that at the time of purchase, they were aware that several rights of way existed over their property, but he denied that there was a private right of way or a public road to Clarke Head beach.

[27] Mr. Quinn said that when they purchased the property, the path that extended from Old Farm Road down to Clarke Head beach was a wide one, closely brushed in, riddled with large potholes, and it had tree roots and large stones sticking out of the ground. He stated that he and his wife put a considerable amount of time, effort, and money into renovating the property, including clearing the path of vegetation and rocks, as well as filling in potholes and widening it.

According to Mr. Quinn, when they purchased the property, the pathway was not in a condition that would allow for convenient access to the beach by vehicle or by foot.

[28] Mr. Quinn said there are other access points to the beach that do not cross their property, including two sets of steps, and a public boat launch on Pier Road in Parrsboro. He stated that this matter has caused him and his wife great stress and anxiety. He said they often care for their autistic granddaughter at the property, and the loud noises caused by ATVs and the barking dogs of those crossing their property is very distressing to her.

[29] On cross-examination, Mr. Quinn said he had been to Clarke Head beach about a dozen times before purchasing the property. The first time was when he was about six years old, and he had accessed the beach over his grandmother's property across the point. He conceded, however, that he had also accessed Clarke Head beach by Old Farm Road, and he had not asked anyone's permission to do that. He denied knowing that other people used the Old Farm Road to get to Clarke Head beach.

[30] According to Mr. Quinn, prior to purchasing the property, he and his wife asked the realtor about the road from Old Farm Road to Clarke Head beach, and they were told that it was a private lane. He recalled that the realtor had a map identifying the road as "Private Graham Lane". Mr. Quinn said he did not make any inquiries of anyone in the area as to the use of the road, but that he saw a cable hung in a tree that he assumed had been pulled across the lane at some point to make it private. He stated that he and his wife also spoke to Bruce Graham's daughter, Leslie Graham, after they bought the property and she said the lane was gated at one time.

[31] Mr. Quinn denied that anyone had a deeded right of access to the beach over their property. He said that some property owners had deeded access to the beach over Durant Road, but not over his property. He acknowledged that Durant Road had become overgrown and eroded, which he attributed to a failure to maintain it by the people who had access. Mr. Quinn said there is a high bank from the beach to Durant Road that he agreed is probably as tall as the Supreme Court building in Amherst, Nova Scotia. He disagreed with the suggestion that Durant Road, as it is now, is not a practical access to the beach, noting that someone put in a set of stairs. He agreed, however, that it is not a practical way to access the beach with a vehicle or a trailer, or to transport a boat.

[32] Mr. Quinn described the measures that he and his wife took to block access to the road. He said the only thing they had done was put wood at the top of the road because they did not want people driving fast on 4-wheelers where the bank was eroding, tipping over, and getting hurt. According to Mr. Quinn, that was the main reason they blocked the road. He agreed that they had dug a trench at the end of the roadway, just before the beach, but said it was "part of an improvement that we were going to try to make". He agreed that the trench effectively blocked people from coming up off the beach across their property in a vehicle.

[33] When asked about the tides, Mr. Quinn agreed that anyone who accessed Clarke Head beach from one of the other access points would be stranded there if the tide came in. He emphasized, however, that people in Cumberland County know how the tides work.

[34] Jacqueline Quinn's evidence was that after moving to the property, she and her husband had noticed that individuals were crossing their property to gain access to the beach. The Quinns had then blocked access from the path extending from the Old Farm Road and placed "No Trespassing" signs around the property. According to Ms. Quinn, they have not allowed anyone to reach the beach over the property since 2015, and, to her knowledge, only seven people had done so without their permission. She said there had been confrontations as a result of those crossings, which she outlined in her affidavit. Ms. Quinn noted that an offensive sign was posted on their property, which said, "Fuck you use to be an open beach". She said they have never prevented anyone from using the beach, but have only denied access over their property.

[35] Ms. Quinn stated that even though they blocked off the lane on their property, the plaintiffs have been able to access the beach by other routes. She said she was aware that her uncle, Allison Mills, had been allowing individuals to cross his land to access the beach, including Edith Leadbetter, Jack Campbell, Donnie Quinn and Danny Best. Like her husband, Ms. Quinn said this matter has caused her and her husband great stress and anxiety. She reiterated the same concerns about her granddaughter and loud noises.

[36] On cross-examination, Ms. Quinn said she first went down Old Farm Road toward Clarke Head beach with her husband one night when they were 18 years old. They didn't go down to the beach, but parked at the end of the road and looked at the stars. Since Ms. Quinn was born in 1966, this would have been in 1984. The only other time she went down Old Farm Road before purchasing the

property was with her mother's side of the family. The group of about 12 to 15 people went down to Clarke Head beach and had a family picnic. She estimated that the picnic was 20 years ago or more.

[37] Ms. Quinn noted that her grandfather used to own the parcel of land owned by the Grahams, and that her grandparents lived right across the creek from William Quinn's grandparents. Ms. Quinn said she spent a lot of time at her grandparents' home as a child. She denied having any knowledge that other people in the community were traveling on Old Farm Road to Clarke Head beach. She said she spent most of her time as a child on the beach closest to her grandparents' home, not Clarke Head beach.

[38] Ms. Quinn agreed with her husband's evidence that they had a discussion with Bruce Graham's daughter after purchasing the property, and that she said the road was private and that it used to be gated off. Ms. Quinn added that they had spoken to Bruce Graham before speaking to his daughter, and he had also confirmed that the road was private. According to Ms. Quinn, Mr. Graham said the property used to be gated off but they stopped gating it because people kept tearing it down.

[39] Like Mr. Quinn, Ms. Quinn said they were shown a map that referred to the roadway to Clarke Head beach as "Private Graham Lane". She denied having seen the sketch prepared in 2010 that described the same road as "Travelled Way".

[40] When asked about the trench, Ms. Quinn said she had obtained a permit from the Department of Natural Resources to take an excavator down to the beach to clear some trees that had been pushed over. She said she removed the trees from the beach and left the area dug out so that water would have somewhere to drain instead of taking out the whole end of the road. She denied that she was attempting to block access to that end of the road, noting that she had already blocked access at the top of the road, so there was no need to block the bottom as well. When plaintiffs' counsel pointed out that the trench would block people who were on the beach and wanted to come up, she responded, "It's not unwalkable." She agreed that anyone with a boat or vehicle would not be able to use the road to get off the beach.

[41] On cross-examination, it was put to Ms. Quinn that the Scaleses' steps and the steps at Durant Road are not navigable for seniors or anyone who has mobility problems. Ms. Quinn conceded that they are steep. She also agreed that it would be an ordeal to haul a few coolers and a barbecue down 170 steps.

[42] When asked about the tides, Ms. Quinn acknowledged that a person who accessed Clarke Head beach from one of the other access points could become stranded there by the tide, but she said she has never denied anyone an emergency exit off the beach. Ms. Quinn said people have been caught by the tide on two occasions. The first involved two people in a boat who lost power in their motor. She said they managed to row the boat out of the current to Clarke Head beach. Once they beached the boat, Ms. Quinn allowed them to use the road across the property to leave the beach. She said the people had launched their boat from the public launch on the opposite shore, off the No. 2 highway. The second occasion involved some kids who ran into a problem with a jet-ski. After their parents arrived, they fixed the jet-ski and were able to ride off without needing to cross the Quinn property.

Interlocutory Injunctions

[43] A party may seek an interim or interlocutory order before a proceeding is heard and determined, in accordance with Civil Procedure Rule 41. The parties agree that the three-part test set out in *R.J.R. MacDonald Inc. v. Canada*, [1994] 1 S.C.R. 311, applies on a motion for an interlocutory injunction:

> *Metropolitan Stores* adopted a three-stage test for courts to apply when considering an application for either a stay or an interlocutory injunction. First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits….
>
> (p. 334)

[44] The test ought not be applied mechanically. In *Saint Mary's University v. Atlantic University Sport*, 2017 NSSC 294, Associate Chief Justice Smith adopted the following passage from *Injunctions and Specific Performance* (Toronto: Thomson Reuters Canada Limited, Looseleaf, updated to 2018):

> [48] In ***Injunctions and Specific Performance*** (Toronto: Canada Law Book, looseleaf), Sharpe J. warns against taking too formalistic an approach when dealing with an injunction motion, stating at 2.600 to 2.630:
>
> > Although reference has been made throughout the discussion to the *American Cyanamid* formula, it now seems clear that neither it nor its adoption by the Supreme Court of Canada should be applied mechanically. As already noted, there has been a significant retreat from

> the assertion that consideration of the merits should never play an important role. The seeming rigidity of the remaining items in the formula is also regrettable, and the direction given by *Cyanamid* and *RJR-MacDonald* should be seen as guidelines rather than firm rules. The terms "irreparable harm", "*status quo*" and "balance of convenience" do not have a precise meaning. They are more properly seen as guides which take colour and definition in the circumstances of each case. More importantly, they ought not to be seen as separate, water-tight categories. These factors relate to each other, and strength on one part of the test ought to be permitted to compensate for weakness on another. The Manitoba Court of Appeal has quite properly held that "it is not necessary . . . to follow the consecutive steps set out in the *American Cyanamid* judgment in an inflexible way; nor it is necessary to treat the relative strength of each party's case only as a last step in the process". A similar view was expressed by the Saskatchewan Court of Appeal:
>
> > . . . the strength of case, irreparable harm and balance of convenience considerations, although prescribed and necessary parts of the analysis mandated by the Supreme Court, are nonetheless not usefully seen as an inflexible straightjacket. Instead, they should be regarded as the framework in which a court will assess whether an injunction is warranted in any particular case. The ultimate focus of the court must always be on the justice and equity of the situation in issue. As will be seen, there are important and considerable interconnections between the three tests. They are not watertight compartments.
>
> Treating the checklist of factors as a "multi-requisite test" will often produce results which do not reflect the balance of risks and do not minimize the risk of non-compensable harm. As Lord Hoffman stated, a "box-ticking approach does not do justice to the complexity of a decision as to whether or not to grant an interlocutory injunction".
>
> The list of factors which the courts have developed – relative strength of the case, irreparable harm and balance of convenience – should not be employed as a series of independent hurdles. They should be seen in the nature of evidence relevant to the central issue of assessing the relative risks of harm to the parties from granting or withholding interlocutory relief.
>
> [Citations omitted]

Serious question to be tried

[45] At the first stage of the test, the moving party must establish that there is a serious question to be tried. The Supreme Court in *R.J.R. MacDonald* said that a

motions judge should determine whether this part of the test has been satisfied "on the basis of common sense and an extremely limited review of the case on the merits": p. 348. The Court further stated:

> What then are the indicators of "a serious question to be tried"? There are no specific requirements which must be met in order to satisfy this test. The threshold is a low one. The judge on the application must make a preliminary assessment of the merits of the case. …
>
> Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable. Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable. (p. 337)

[46] The plaintiffs are asserting that the road to Clarke Head beach over the defendants' property is a public roadway, through the operation of the common law doctrine of dedication and acceptance. The defendants concede that a property dispute of this nature represents a serious issue to be tried. That said, in arguing that the plaintiffs cannot satisfy the remaining two parts of the test for injunctive relief, the defendants rely on *Gilkerson v. Langille*, (1995), 147 N.S.R. (2d) 164, 1995 CarswellNS 171 (S.C.), a case involving an application for a mandatory injunction. In *Injunctions and Specific Performance*, Robert Sharpe defines a mandatory injunction at p. 1-1:

> A mandatory injunction is one which requires the defendant to act positively. A mandatory injunction may be given to remedy past wrongs and require the defendant to undo some wrong he or she has committed. Such orders are restorative in nature, requiring the defendant to take whatever steps are necessary to repair the situation in a manner consistent with the plaintiff's rights. In other cases, mandatory injunctions look to the future and require the defendant to carry out some unperformed duty to act. In either class of case, although the general principles governing the availability of injunctive relief apply, the very fact of requiring a positive course of action raises special problems.

[47] Mandatory injunctions require the moving party to meet a higher threshold at the first stage than a serious issue to be tried. In *R. v. Canadian Broadcasting Corp.*, 2018 SCC 5, [2018] 1 S.C.R. 196, the Supreme Court of Canada, *per* Brown J., set out the framework for granting a mandatory interlocutory injunction:

[15] In my view, on an application for a mandatory interlocutory injunction, the appropriate criterion for assessing the strength of the applicant's case at the first stage of the *RJR — MacDonald* test is not whether there is a serious issue to be tried, but rather whether the applicant has shown a strong *prima facie* case. A mandatory injunction directs the defendant to undertake a positive course of action, such as taking steps to restore the status quo, or to otherwise "put the situation back to what it should be", which is often costly or burdensome for the defendant and which equity has long been reluctant to compel. Such an order is also (generally speaking) difficult to justify at the interlocutory stage, since restorative relief can usually be obtained at trial. Or, as Justice Sharpe (writing extrajudicially) puts it, "the risk of harm to the defendant will [rarely] be less significant than the risk to the plaintiff resulting from the court staying its hand until trial". The potentially severe consequences for a defendant which can result from a mandatory interlocutory injunction, including the effective final determination of the action in favour of the plaintiff, further demand what the Court described in *RJR — MacDonald* as "extensive review of the merits" at the interlocutory stage.

[16] A final consideration that may arise in some cases is that, because mandatory interlocutory injunctions require a defendant to take positive action, they can be more burdensome or costly for the defendant. It must, however, be borne in mind that complying with prohibitive injunctions can also entail costs that are just as burdensome as mandatory injunctions. While holding that applications for mandatory interlocutory injunctions are to be subjected to a modified *RJR — MacDonald* test, I acknowledge that distinguishing between mandatory and prohibitive injunctions can be difficult, since an interlocutory injunction which is framed in prohibitive language may "have the effect of forcing the enjoined party to take . . . positive actions". For example, in this case, ceasing to transmit the victim's identifying information would require an employee of CBC to take the necessary action to remove that information from its website. **Ultimately, the application judge, in characterizing the interlocutory injunction as mandatory or prohibitive, will have to look past the form and the language in which the order sought is framed, in order to identify the substance of what is being sought and, in light of the particular circumstances of the matter, "what the practical consequences of the . . . injunction are likely to be". In short, the application judge should examine whether, in substance, the overall effect of the injunction would be to require the defendant to do something, or to refrain from doing something.**

…

[18] In sum, to obtain a mandatory interlocutory injunction, an applicant must meet a modified *RJR — MacDonald* test, which proceeds as follows:

> (1) The applicant must demonstrate a strong *prima facie* case that it will succeed at trial. This entails showing a *strong likelihood* on the law and

> the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice;
>
> (2) The applicant must demonstrate that irreparable harm will result if the relief is not granted; and
>
> (3) The applicant must show that the balance of convenience favours granting the injunction.
>
> [*Emphasis added*]

[48] Sharpe notes, like the Supreme Court in *Canadian Broadcasting Corp.*, that a mandatory injunction will not always be more burdensome than a prohibitive injunction:

> … [I]t is easy to overstate the added burden imposed by a mandatory order. Prohibitive orders often have the practical effect of requiring a positive course of action. In nuisance cases, for instance, a negative injunction restraining the continuation of a nuisance in effect usually requires the defendant to take positive steps to correct a situation and these steps may be extremely costly. As will be seen, … courts do take this factor into account in nuisance cases but the concern over cost or burden is usually the focus of more explicit concern where mandatory relief is sought. **Where an interlocutory mandatory order would not entail significant costs, it will more readily be granted.** (*Injunctions and Specific Performance*, at p. 1-27)
>
> [*Emphasis added*]

[49] In *Gilkerson*, the decision cited by the defendants, the plaintiffs owned land with a deeded right of way across the defendants' shoreline. The plaintiffs and their tenants used the right of way for swimming and boating. The defendants built a wharf, a retaining wall and a chain link fence with a gate, which the plaintiffs said blocked their use of the right of way. They sought a mandatory injunction requiring the defendants to remove the obstructions. The application was dismissed. Since the plaintiffs in this case are also seeking an injunction requiring, among other things, that the defendants remove obstructions to the roadway, I must determine whether this too is a mandatory injunction case.

[50] Neither party argues that the plaintiffs are seeking a mandatory injunction and therefore must meet the higher standard of a "strong *prima facie* case". I am satisfied that this is the correct approach. While the injunction, as framed by the plaintiffs, would require the defendants to take positive action to "forthwith remove structures or obstructions which they have built into or on the Old Farm Road", it does not necessarily follow that the injunction should be characterized as mandatory. I must look past the form and the language in which the order sought

is framed to identify the substance of what is being sought and the likely practical consequences of the injunction. In my view, the true character of the injunction sought in this case is prohibitive. The plaintiffs are seeking a return to the *status quo*, by which they enjoyed unimpeded and continuous access over the roadway to Clarke Head beach. The overall effect of the injunction, in substance, would be to require the defendants to refrain from doing something – interfering with the plaintiffs' use of the roadway. As with a negative injunction restraining the continuation of a nuisance, however, some positive action on the part of the defendants is necessary to give effect to the injunction. In the circumstances of this case, that positive action – removing some logs and filling in a ditch – is minimal, and would not entail significant costs to the defendants.

In the alternative – strong *prima facie* case

[51] Even if I am wrong, and the strong *prima facie* case standard applies, I would find on the evidence that the plaintiffs have met that standard. The plaintiffs argue that the roadway from Old Farm Road to Clarke Head beach is a public road through common law dedication and acceptance. In *Nova Scotia Real Property Practice Manual*, (Toronto: LexisNexis Canada Inc., Looseleaf, updated to 2019), C.W. MacIntosh summarizes the law of dedication and acceptance at pp. 13-7 to 13-8:

> In Nova Scotia, a roadway is a public roadway only if it falls within the definition of highway provided in the *Public Highways Act* or if, on a balance of probabilities, it is shown to have been dedicated as a public roadway.
>
> A landowner may constitute a strip of land as a highway by dedicating it to the public and having the public accept the dedication by using it. Such dedication must be to the public generally and not for the benefit of a designated group. …
>
> Dedication must consist of a positive act on the part of the owner and be something more than constructing a road for access on his own property. …
>
> The requirements for creation of a public highway by dedication were laid down by Duff, J [in *Bailey v. City of Victoria*, [1920] S.C.J. No. 2, 60 S.C.R. 38] as follows:
>
> > For this purpose two concurrent conditions must be satisfied, 1st there must be on the part of the owner the actual intention to dedicate, (*Folkstone v. Brockman* [1914] A.C. 338) and 2nd, it must appear that the intention was carried out by the way being thrown open to the public and the way has been accepted by the public (*Attorney General v. Biphosphated Guano Co.*, 11Ch.3 237)

The two criteria of expressed or implied intention to dedicate and an acceptance of that dedication by the public were re-iterated in *Shannon v. Frank George's Island Investments Ltd*. [2015 NSSC 76, at para. 58]

In some instances there is written evidence of intention to dedicate, but generally this intention must be inferred from the circumstances. In *De Young v. Giles* [[1915] N.S.J. No. 24, 49 N.S.R. 398 (C.A.)], there was a roadway over 30 feet wide, used for at least 50 years, on which statute labour had been performed and telephone poles erected, with a fence on one side and a gutter on the other. In finding dedication and acceptance the Court stated that "open and unobstructed user by the public for a substantial time is the evidence from which a jury may infer both dedication and acceptance."

The proof needed to establish intent to dedicate a road to the public was considered by the Ontario Court of Appeal in a 1907 case [*Macoomb v. Welland (Town),* [1907] O.J. No. 95, 13 O.L.R. 335 (C.A.)] as follows:

> Nearly all the cases of this character, which come before the court, have to be determined upon circumstantial evidence only; no direct evidence is available. The owners who were supposed to have dedicated were sometimes unknown, and often long since dead. In such cases it is not difficult to infer from the mere fact of the existence of the way, the existence of the right of public passage over it, for such a length of time and in such a manner that it must have been with the knowledge of the owner, that its existence was actually based upon a dedication by him unless there is outweighing evidence to the contrary.

[52] MacIntosh continues at p. 13-10:

Evidence as to long use generally is obtained from older residents of the community, and this may be considered convincing evidence that a road is a public way. In *Newell v. Smith* [[1971] N.S.J. No. 183, 5 N.S.R. (2d) 533 (T.D.)], Dubinsky, J. described one such witness, in his 85th year, as follows:

> Despite his advanced age, I found him to be a most convincing witness. He was asked about Long Point Road and his reply was:
>
> > Well, I can remember back when I was about 12 or 13 years old, anyway, and it was always open down through there for people to go from – my wire fence run down through to the other side of the road and everybody went back and forth down there. At least 75 years, I'll say.
>
> The witness went on to give the names of some of the people who during past years lived at various places along this road. They all used the road, going to and from their homes and during all the years, he never knew of the road being blocked. He saw oxen and carts, horses and carts and hayracks loaded with hay going over the road.

[53] In *Gibbs v. Grand Bend (Village)*, (1995), 26 O.R. (3d) 644, [1995] O.J. No. 3709 (Ont. C.A.), Finlayson J.A., for the Ontario Court of Appeal, noted that once dedication is complete, it cannot be revoked:

> 110 Open and unobstructed use by the public for a substantial period of time is, as a rule, the evidence from which a trier of fact may infer both dedication and acceptance. This principle seems to have been generally accepted: see *O'Neil v. Harper* (1913), 28 O.L.R. 635, 13 D.L.R. 649 (C.A.); *Hunsinger v. Simcoe (Town)*, [1946] O.R. 203, [1946] 2 D.L.R. 633 (C.A.), affirmed [1948] 3 D.L.R. 224 (S.C.C.); *Foothills Municipal District No. 31 v. Stockwell*, supra, at p. 669. Once a dedication is complete, neither the owners nor their successors in title could revoke it: see *Hunsinger v. Simcoe (Town)*, and *Carpenter v. Smith*, supra. Neither the dedicator nor his successors in title can resume control of or convey the land free from the public rights to its use, nor can anything be done by the present owners to take back that which had been previously given away: see *Gion v. Santa Cruz*, 2 Cal.3d 29, 465 P. 50 (Cal. S.C., 1970), at pp. 52-53 and 60.

[54] The unchallenged evidence in this case is that the roadway over what is now the Quinn property had been openly and continuously used by neighbouring property owners and other members of the public to access Clarke Head beach for more than 60 years. They traveled the road by foot, bicycle, motorcycle, homemade beach buggy, car, truck, 3-wheeler, 4-wheeler, school bus, and even by horse and buggy. Gwendolyn Henderson's evidence was that in 1949, almost 70 years ago, her fourth grade teacher took their entire class over Old Farm Road to Clarke Head beach in a school bus and they spent the day doing a nature walk and looking for seashells and fool's gold. Michael Henderson said that when he was managing Glooscap Park Campground for the Town of Parrsboro, he had shown tourists and amateur geologists how to use the roadway to get to the mineral areas of Clarke Head beach and no one had ever reported anyone objecting to their use of the road. James Hardy Best and John Campbell gave evidence that they each assisted in repairing and maintaining the roadway to the shore. James Hardy Best's granddaughter said she remembered her grandfather, along with other locals and fishermen, using gravel and other filler to fill in large holes in the roadway to Clarke Head beach. Patrick Henderson said he had seen locals using their tractors to repair the road to keep it accessible by vehicle. Almost all of the affiants stated that they had never asked for or received permission from anyone to use the road to Clarke Head beach.

[55] In my view, the open and unobstructed use of the road by the public for more than 60 years, and the maintenance of the road by neighbouring landowners and other locals, must have been done with the knowledge of George Graham or

his wife. The only evidence offered by the defendants that anyone in the Graham family had ever treated the road as private – comments allegedly made by Bruce and Leslie Graham after the Quinns purchased the property referred to by the defendants in their testimony – is inadmissible hearsay. Considering the evidence as a whole, I find that the plaintiffs have established a strong *prima facie* case that they will succeed at trial.

Irreparable harm

[56] At the second stage of the test, the plaintiffs must establish that they will suffer irreparable harm if the injunction is not granted. In *Maxwell Properties Ltd. v. Mosaik Property Management Ltd.*, 2017 NSCA 76, Bryson J.A., for the Court of Appeal, summarized the law on irreparable harm:

> [53] Most interlocutory injunctions turn on this issue. In *RJR - MacDonald* the Supreme Court described irreparable harm in this way:
>
> > [59] "Irreparable" refers to the ***nature of the harm suffered*** rather than its magnitude. It is harm which either ***cannot be quantified in monetary terms*** or which ***cannot be cured***, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision; where one party will suffer permanent market loss or irrevocable damage to its business reputation; or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined. [citations omitted] . . .
> >
> > [*Emphasis by Bryson J.A.*]
>
> [54] Like examples of irreparable harm include the likely permanent loss of customers; loss of goodwill; and prevention of someone from earning a living (respectively *Survival Systems Industrial Ltd. v. Syrett* (1998), 165 N.S.R. (2d) 49 (SC TD); *Mario's Spaghetti House & Pizzeria Ltd. v. Italian Village Ltd.* (1976), 16 N.S.R. (2d) 650 (CA); *Fellowes & Son v. Fisher*, [1976] Q.B. 122 (CA)).
>
> [55] Lord Diplock describes how the test works in *American Cyanamid* at p. 408:
>
> > . . . the governing principle is that the court should first consider whether if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. ***If damages in the measure recoverable at common law would be adequate remedy and the***

> ***defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage.***
>
> [*Emphasis by Bryson, J.A.*]

[56] Assuming that an applicant can demonstrate irreparable harm, the Court has to consider the effect of granting the injunction on the respondent. Resorting again to Lord Diplock in *American Cyanamid* at p. 408:

> . . . If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's under-taking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. ***If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them***, there would be no reason upon this ground to refuse an interlocutory injunction.
>
> [*Emphasis by Bryson, J.A.*]
>
> . . .

[58] Mere difficulty in *calculating* damages does not constitute irreparable harm. The law confronts that difficulty every day. But it is easier to provide examples, than a definition. Supplementing those mentioned by the Supreme Court in *RJR – MacDonald* (¶ 53 above), Sharpe lists many others, (¶ 2.411-2.415.1)

[57] Sharpe says the following about irreparable harm:

> It is exceptionally difficult to define irreparable harm precisely. Courts regularly and routinely assess monetary awards for non-pecuniary injuries where it is necessary to do so. On the other hand, the courts have sometimes been prepared to view what otherwise seem readily calculable losses as "irreparable" for the purposes of interlocutory relief.
>
> In the context of preliminary relief, the test is a relative and flexible one which, it is submitted, necessarily involves an evaluation of the other factors. Indeed, it has been held that an interlocutory injunction may be granted even where "irreparable" harm has not been demonstrated. Similarly, attempts to make irreparable harm a condition precedent, and hence a threshold test, have been rejected. **These cases suggest that the "irreparable harm" requirement can**

> **only be defined in the context of the risk-balancing exercise. If the plaintiff's case looks very strong, harm may appear to be more "irreparable" than where the plaintiff has only an even chance of success. While judges seldom explicitly acknowledge that there is an "overflow" effect produced by strength or weakness of other factors, it cannot be doubt that, as a practical matter, it exists. The important point is that irreparable harm has not been given a definition of universal application: its meaning takes shape in the context of each particular case.** However it is defined, failure to establish irreparable harm is commonly cited as the primary reason for refusing injunctive relief.
>
> [*Emphasis added*]
>
> [*Injunctions and Specific Performance*, at pp. 2.48 to 2.49]

This passage was cited with approval by Bateman J.A. in *R. v. MacIntosh*, 2008 NSCA 73, at para. 18, and by Beveridge J.A. in *T.G. v. Nova Scotia (Community Services)*, 2012 NSCA 71, at para. 60.

[58] The defendants say the plaintiffs will not suffer irreparable harm if the interlocutory injunction is denied. They emphasize that nothing has changed since this action was filed in 2017, and the plaintiffs can continue to access Clarke Head beach from other locations until this matter is resolved at trial. The defendants rely on *Gilkerson* and *Yeomans v. Bourgeois*, (1993), 128 N.S.R. (2d) 225, [1993] N.S.J. No. 537 (S.C.) for their position that there is no irreparable harm here.

[59] As noted earlier, the plaintiffs in *Gilkerson* had a deeded right of way to the shore across the defendants' land. The plaintiffs and their tenants used the right of way for swimming and boating. The defendants installed a chain link fence, a wharf and a retaining wall which the plaintiffs said blocked their use of the right of way. The plaintiffs sought a mandatory interlocutory injunction requiring the defendants to remove the obstructions.

[60] The Supreme Court of Canada's decision in *R.J.R. MacDonald* does not appear to have been before Justice Gruchy. Although Gruchy J. recognized that "the threshold for a mandatory injunction is even higher than that for ordinary prohibitive injunctions", he applied the "serious issue to be tried" standard from *American Cyanamid*: para. 16. On the issue of irreparable harm, he relied on a statement of the law from Williston & Rolls - The Law of Civil Procedure (1970) adopted in *Gulf Canada v. Martin*, (1985), 70 N.S.R. (2d) 322, [1985] N.S.J. No. 428, which held, among other things, that "mandatory injunctions are never

granted except for the prevention of very serious damage": para. 41. In dismissing the application, Gruchy J. held:

> 19 I am persuaded that the plaintiffs have shown a serious issue to be tried. The claim is not frivolous or vexatious. I might even go so far as to say that the plaintiffs have a reasonable prospect of succeeding in their action.
>
> 20 But, of course, that is but the first point to be decided in this application for interim injunction. I now refer to the principles enumerated to by Grant, J. in *Gulf Canada v. Martin*:
>
> 21 1.) I do not see that the injunction sought will prevent "very serious damage". It might presently be a nuisance for the plaintiffs not to have the total access they want through the lands in question, but I see no very serious damage being occasioned to them at present. This is particularly so at this time of year when I am sure recreational sailing and swimming are not especially popular.
>
> 22 2.) I do not see that the injury to the plaintiffs, if any, is so serious that immediate restoration of the property to its former condition by the removal of the wharf, retaining wall or fence is required. I keep in mind the matter could be brought on for a trial within a few months at most and, surely, the matter can await a final determination.
>
> …

[61] Justice Gruchy concluded by noting that the defendants had proposed a "quite reasonable" interim solution whereby the plaintiffs and their tenants would be permitted to haul a boat across the lot and use the launchway adjacent to the wharf: para. 25.

[62] The *Gilkerson* decision is based on old law and is of no assistance to the defendants. As the Supreme Court stated in *R.J.R. MacDonald*, "irreparable" harm refers to the nature of the harm suffered rather than its magnitude. There is no obligation on a party seeking an interlocutory injunction, mandatory or prohibitive, to establish "very serious damage". Even if the proper test had been applied, the facts in *Gilkerson* are distinguishable. The plaintiffs in that case brought their application in October, a time of year when the inability to sail or swim was of minimal inconvenience to the plaintiffs, and Justice Gruchy was satisfied that a trial could be held within a matter of months. It would have been unreasonable in those circumstances to burden the defendants with the expense of removing a wharf, retaining wall and fence prior to a decision on the merits.

[63] The *Yeomans* decision is equally unhelpful. In that case, the plaintiffs sought an interlocutory injunction restraining the defendant from using a 20 foot

right of way over their property. The defendant, Bourgeois, bought a property on the shore of Third Lake at Windsor Junction in 1954. The sellers, the Lintamans, retained the surrounding property. Since the property was landlocked, the grantors conveyed a right of way to access the property. The right of way continued the length of the south boundary of the lot to the lakeshore. The Lintamans themselves used a private road or right of way to gain access to the Windsor Junction Road. The right granted to Bourgeois included joint use of that roadway. Bourgeois did not build a house on the land until 1969. In the meantime, his son acquired the adjoining property. The Lintaman property was acquired by a succession of owners from 1954 onward. The plaintiffs acquired it in 1988, and were not aware of the Bourgeois right of way. When the plaintiffs laid a temporary water line to the lake over the land adjacent to Bourgeois' property, Bourgeois ran over it multiple times with his garden tractor, and there was a confrontation between them as to which of them was the victim of trespass. In 1991, the plaintiffs had a survey plan prepared and learned of the location of the right of way. Justice Haliburton noted that, "Much of the right-of-way has not, in fact, been used by the owners of either of the properties": para. 9. He continued:

> 10 The lack of "use" of portions of the right-of-way by Bourgeois is one basis upon which the Plaintiffs contend Bourgeois' rights can and should be restricted. Bourgeois has, in fact, never used the right-of-way to gain access to the lake. He has adequate access to the lake on his own property. Hence, for a distance of approximately 100 feet from the lakeshore, the right-of-way appears to be in a totally unimproved state, covered with bushes, small trees, wild flowers, raspberries and the like. The upper 50 feet is used as a driveway. It provides access to the front door of the Bourgeois property, but is not the driveway of preference for Mr. Bourgeois himself. Since his son acquired the adjoining property about 1960, Bourgeois has had the free use of that property to gain access to his own. Using the son's land together with the right-of-way, he has created a circular drive around his dwelling. His normal route of entry and of exit from his house by motor vehicle is over his son's property and not over the right-of-way.
>
> 11 The Plaintiff similarly has a circular drive around his dwelling. His predecessors in title apparently preferred to use the driveway most distant from the Bourgeois property as their means of access. To use the second driveway requires joint use of the right-of-way. It is this second driveway which is now Mr. Yeoman's preferred route of access to his dwelling. To some extent, at least, it is Yeoman's enhancement of his use of that driveway which has triggered the conflict between the parties.

[64] The plaintiffs argued that Bourgeois was only entitled to use the right of way to the extent that he had in the past, and that he had no right to maintain the roadway. Justice Haliburton stated:

> 17 The dispute between the parties can be resolved only by describing the rights which Bourgeois acquired under his conveyance. There are no issues, save to interpret that conveyance. According [*sic*] Bourgeois, the rights to which I find him entitled forces the conclusion that the Plaintiff has not only failed to establish a strong *prima facie* case, but clearly indicates that the balance of convenience between the parties is in favour of dismissing the interlocutory application. The Plaintiff has failed to establish that he will suffer any harm, let alone irreparable harm before this matter comes to trial if, indeed, it does come to trial.

[65] Justice Haliburton went on to hold that the express right of way granted to Mr. Bourgeois was restricted only by its width, and that "[t]he failure to actively occupy or use either the full 20 foot 'width' or the entire 'length' of the right-of-way cannot be lost by his failure to actively occupy it": para. 23. The court concluded:

> 25 Briefly put, Bourgeois was specifically granted an easement "of entry and use" of an area which is specifically defined. The purpose of the grant was to permit the construction and occupation of a private residence. The right granted must be interpreted in accordance with modern usages. The effective use of such a right-of-way requires the complimentary and necessary right to build and maintain a roadway and other services customarily in use for the purposes intended. Such a grant of easement does not permit the Grantee to interfere with or impede others who have co-existing rights to the right-of-way, nor does it permit the Grantee to trespass on other lands of the servient tenement, nor create nuisances affecting the same.
>
> 26 The application is, accordingly, dismissed. It proceeded largely for the purpose of assisting the parties in obtaining some resolution of their respective rights. Both parties desired a preliminary skirmish in the Court so as to assess their respective positions vis-à-vis proceeding to a full trial. That being the case, I think it inappropriate to award costs at this stage. Accordingly, the costs on this application will be costs in the cause.

[66] The *Yeomans* decision bears no resemblance to the present case, and does not assist me in determining whether the plaintiffs will suffer irreparable harm.

[67] The plaintiffs, for their part, rely on the *Saint Mary's* decision. In that case, Associate Chief Justice Smith considered whether the Saint Mary's football team

would suffer irreparable harm if its players were denied the right to participate in a championship game:

> [73] I turn now to the second stage of the analysis. The Applicant has satisfied me that it will suffer irreparable harm if this interim injunction is not granted. Saint Mary's University and, more importantly, its players earned the right to play in the Loney Bowl. I acknowledge that there is an issue about the eligibility of one of the members of its team. Mechanisms are available to deal with that issue including, if appropriate, forfeiture of the game. If an interim injunction is not granted, Saint Mary's University will lose the opportunity to play in this championship game and to possibly move on to the playoffs. That is a loss that cannot be compensated for by way of damages.

[68] The plaintiffs state the following about the *Saint Mary's* decision at p. 8 of their pre-hearing brief:

> Although the granting of an interlocutory injunction to make use of a historically travelled right of way and an interim injunction granting a university football team the right to compete seem prima facie very different, the principle used to come to these decisions is the same. It is the nature of the importance of the matter to those involved. The users of the Old Farm Road to access the beach at Clarke Head have used this traveled way for generations. Memories have been made and cherished by its use. Preventing the Plaintiffs from making use of this historical right of way denies them one of, if not the, biggest benefit of attending the Parrsboro area – beach access. Without safe access to the beach at Clarke Head, the Plaintiffs cannot enjoy the rock hounding, sun bathing, swimming, camp fires, etc. that they have for almost a century. It is impossible to quantify this sort of loss by way of damages.

[69] The *Saint Mary's* decision, like the decisions relied on by the defendants, is so factually dissimilar from the situation before me that I do not find it helpful. While the right to play in the championship game was undoubtedly important to the Saint Mary's football players, that was not why A.C.J. Smith granted the injunction. She concluded that they would suffer irreparable harm because they would have lost the opportunity to play in the championship game, and the team would never have that opportunity again. It was, as the defendants noted, a perfect law school class example of irreparable harm.

[70] The court's own research produced two decisions considering whether denial of access over a right of way to a beach gives rise to irreparable harm. In *Hutchings v. Li Chong*, (2001), 119 A.C.W.S. (3d) 920, [2001] O.J. No. 5397 (Ont. Sup. Ct. J.), the plaintiffs brought an action for a declaration that they had acquired

an easement over the defendants' beachfront lots that gave them access to a beach. The defendants applied to dismiss the action, while the plaintiffs applied for an interim injunction to allow them to continue to use the easement pending trial. With respect to the injunction, Donohue J. wrote:

> 35 To succeed, the plaintiffs must satisfy three tests: serious question, irreparable harm, balance of inconvenience to the parties. (*R.J.R. - MacDonald Inc. v. Can.(A.G.)*, [1994] 1 S.C.R. 311.)
>
> 36 Is it a serious question whether the plaintiffs have established an easement to cross the defendants' lands on their way to the beach? How important is the claim of these plaintiffs to get to the beach in this particular manner?
>
> 37 The court can take judicial notice of the fact that the beach which runs for miles along the north border of Sarnia has many points of public access available within minutes of the neighbourhood in question. In comparison with questions which routinely occupy the court's attention, I do not think that this question can be considered serious.
>
> 38 Would the plaintiffs suffer irreparable harm if the injunction were not granted? What harm would they suffer? **There are other ways of getting to the beach used daily by the great majority of Sarnians.** The harm to the plaintiffs could only be classified as the loss of an intangible convenience which makes life more pleasurable. I cannot regard their temporary deprivation as irreparable harm when compared to the catastrophes and tragedies of human existence.
>
> 39 I need not deal with the third test. The plaintiffs' motion is dismissed.
>
> [*Emphasis added*]

[71] In *Clerke v. Fougère*, 2002 NBQB 138, [2002] N.B.J. No. 141, the plaintiffs claimed a right to use a reserved road known as "David's Way" to access their properties from the highway, and also the right to access the beach across the "shore lot" owned by the defendants. The defendants, taking the position that the plaintiffs had no such rights of access, blocked use of David's Way at the highway so as to prevent the Plaintiffs from using the reserved road to access their properties. The plaintiffs sought an interlocutory injunction requiring the defendants to remove all barricades, fences and other types of blockades to the access road and the beach. Before applying the test for injunctive relief, Justice Creaghan noted:

> 6 There are other reserved roads that provide alternative access to the Plaintiffs' properties, and there are other common accesses to the beach, so that at the time the originating action was commenced the Plaintiffs were not prevented from gaining some access to their properties or some access to the beach. The area of

> dispute centers on the right to use David's Way and to cross the beach lot to gain access to the beach.

[72] Justice Creaghan was satisfied that there was a serious issue to be tried. On the issue of irreparable harm, he held that denying access to David's Way precluded the plaintiffs from reasonable entry to their properties, which gave rise to irreparable harm:

> 19 To deprive a person of reasonable access to their residence is a matter of concern that goes beyond a remedy in damages. To effectively deprive Mrs. Goguen and Mrs. Lee from any use of the section of David's Way adjacent to their properties to gain entry pending determination of the rights of the parties does in my view give rise to irreparable harm to them.

[73] He reached a different conclusion, however, with respect to access to the beach:

> 24 The Defendants have maintained the right to interfere with the access to David's Way from the highway and to any right to access to the beach across the shore lot for sometime prior to the commencement of this action. Their continued interference in that regard, **given the alternative access available**, cannot be seen as giving rise to irreparable harm such that interlocutory relief should be granted.
>
> [*Emphasis added*]

[74] In both *Hutchings* and *Clerke*, the availability of other points of public access to the beaches in question was fatal to the claim of irreparable harm. In this case, although the defendants say the plaintiffs have other ways to access Clarke Head beach, all of the other access points, other than the boat launch on the opposite shore, are on private property and are not necessarily open to all of the plaintiffs. The various sets of steps referred to in the evidence are steep, impractical, or dangerous, particularly for anyone with health or mobility issues. Only one of the private access points, the road from Allison Mills's property, allows for vehicular access to the beach. In addition, accessing Clarke Head beach from these other locations leaves the plaintiffs vulnerable to being trapped by the tides. While this would often mean they would have to wait on the remaining beach area until the tide went back out, Jacqueline Quinn testified that on days of extreme high tide, the water reaches all the way to the road, leaving no beach at all.

[75] Irreparable harm will be easier to identify in some cases than in others. As Sharpe notes, it can only be defined in the context of the risk-balancing exercise. Its meaning is driven by the context of each particular case. What is clear,

however, is that the moving party does not have to show "serious harm". Such claim should not be assessed against the catastrophes and tragedies of human existence, as suggested in *Hutchings*. It is the nature of the harm that matters, not the magnitude.

[76] I am satisfied, in the circumstances of this case, that the defendants' interference with the plaintiffs' use of the road to Clarke Head beach gives rise to irreparable harm. Many of the plaintiffs have travelled the road to Clarke Head beach for generations. Clarke Head beach has been a place for family picnics, roasting hot dogs, clamming, dulsing, fishing, swimming, and boating. Accessing the beach at Clarke Head by Old Farm Road has been a fundamental part of the plaintiffs' lives, and the lives of their children and grandchildren. Some of the plaintiffs have helped maintain the road, ensuring that it remained accessible to everyone in the community. Some purchased property in the area largely due to the ease of access to Clarke Head beach. Although there are other beaches nearby, only Clarke Head typically offers a beach area regardless of the tide. Its minerals and rocks attract numerous geologists and rock hounds. Clarke Head beach is a unique and special place that is of enormous sentimental value to the plaintiffs, and the loss they have experienced by the defendants' blocking of their access over Old Farm Road, and the loss they will continue to experience until trial, cannot be quantified.

[77] The road over the defendants' property is currently the only safe and practical means for them to access Clarke Head beach. The various sets of steps are unmanageable for anyone with health or mobility issues, impassable by vehicle, and impractical to navigate when carrying the items one would typically want for a day at the beach. While Allison Mills has allowed some plaintiffs to use his road, he is under no obligation to continue to do so, and there is no evidence that this access is available to all of the plaintiffs. Finally, the road across the Quinn property is the only means of getting off the beach when the tide comes in.

[78] In finding irreparable harm, I am mindful of the defendants' argument that nothing has changed for the plaintiffs since they filed this action. I recognize that delay may serve as evidence that interlocutory relief is not justified. That does not mean, however, that a party who has suffered irreparable harm in the past and who will continue to suffer irreparable harm until trial will be denied relief merely because they did not seek that relief immediately. The impact of delay will always depend on the circumstances. I would add that in terms of delay moving the

proceeding forward, I do not have enough information before to me to determine which party is primarily responsible for the fact that pleadings did not close until early 2019.

Balance of convenience

[79] It remains to consider the balance of convenience. At this stage, I must determine "which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits": *R.J.R. MacDonald*, at p. 342.

[80] In my view, the plaintiffs will clearly suffer the greater harm if the injunction is denied. If the injunction is not granted, the plaintiffs will lose the opportunity to make memories with their friends and family on Clarke Head beach for a third summer. If the injunction is granted and the defendants are ordered to restore the plaintiffs' access (and only the plaintiffs' access) along the roadway to the beach, the plaintiffs will, at their own expense, restore the roadway to a condition that allows for vehicular and pedestrian access. William Quinn stated in his affidavit that when they purchased the property, he and his wife put a considerable amount of time, effort, and money into clearing the road of vegetation and rocks, filling in potholes and widening it. He indicated on cross-examination that the road has since narrowed significantly due to erosion. If the plaintiffs are unsuccessful at trial, the defendants will be left with a private roadway that is in far better condition than it is in now. While I have no concerns that the plaintiffs will damage the defendants' property, the plaintiffs would be required under Rule 41.06 to file an undertaking to indemnify the defendants for any losses caused by the interlocutory injunction if the proceedings are ultimately resolved against the plaintiffs.

[81] I will comment briefly on the defendants' concern that their granddaughter will be affected by the noise of vehicles and dogs on the road to the beach. Although the defendants do not mention this in their affidavits, the evidence from Sheila King was that there were no structures on the property when the Quinns purchased it, and they have not constructed any buildings on it since. Instead, the Quinns use a travel trailer which they parked directly beside and on the north side of the Old Farm Road at Clarke Head. Ms. King stated that after the Quinns purchased the property, they did improve drainage and the overall quality of maintenance on the Old Farm Road as far as their trailer, but damaged the road from there to the shore. According to the evidence, then, the Quinns have an 80-

acre property, and they have chosen to park their travel trailer right beside the roadway to the beach. If their granddaughter does experience any distress related to the sounds of ATVs or dogs, there is no evidence that it would be difficult for the defendants to move the trailer to a more suitable location on their property until this matter is resolved at trial.

[82] I find that the plaintiffs are entitled to an interlocutory injunction:

- Requiring the defendants to forthwith remove structures or obstructions which they have built into or on the Old Farm Road;

- Allowing the plaintiffs, at their own expense, to restore the roadway leading from Old Farm Road to Clarke Head beach to a condition that would permit pedestrian and vehicular access to the shore;

- Enjoining the defendants from interfering with the plaintiffs' use of the roadway to access Clarke Head beach for recreational purposes. I am not satisfied that it is necessary at this stage to include access for commercial purposes.

[83] Having been granted an injunction, the plaintiffs must move quickly to bring this matter to trial. As Sharpe notes at p. 1-15:

> A plaintiff who obtains an interlocutory injunction is required to proceed expeditiously to trial. As explained in the English case by Hoffman J., "…it is incumbent upon a plaintiff whose position has been protected … by an interlocutory injunction to proceed with the action with due diligence so as to limit as far as possible the period during which the defendant's liberty is restricted without there having been any determination of the merits.

Conclusion

[84] On a motion for an interlocutory injunction, the court's focus must always be on the justice and equity of the situation. In this case, justice and equity require that the plaintiffs' access to Clarke Head beach across the defendants' property be restored until this proceeding is heard and decided on the merits. The plaintiffs' motion for an interlocutory injunction is granted.

[85] It will be necessary to set a schedule for removal of the obstructions by the defendants and restoration of the roadway by the plaintiffs. The court will arrange for a judicial telephone conference to take place within two weeks of the release of this decision to deal with this issue and to finalize the order if the parties cannot come to an agreement.

[86] Additionally, if the parties cannot come to an agreement on costs they can file written submissions within two weeks of the release of this decision.

Arnold, J.