

**SUPREME COURT OF NOVA SCOTIA**  
**Citation:** *MacLellan v. Stubbert*, 2021 NSSC 277

**Date:** 20210505  
**Docket:** Syd. No. 504802  
**Registry:** Sydney

**Between:**

Scott MacLellan

*Plaintiff*

v.

Edwinna Stubbert

*Defendant*

**Judge:** The Honourable Justice Patrick J. Murray

**Heard:** May 5, 2021, in Sydney, Nova Scotia

**Oral Decision:** May 5, 2021

**Counsel:** Stephen Jamael for Mr. MacLellan

**By the Court:**

**Introduction (Orally)**

[1] This is an Application for an Interim Injunction being made by the Plaintiff, Scott MacLellan, who maintains he has been prevented from accessing a wharf (attached to lands claimed by the Defendant Edwinna Stubbert), which he and his family have used for decades.

[2] I have already given reasons, which I will not repeat for deciding to hear this matter on urgent and essential basis. Essentially, they are based on my concurrence with letter provided by counsel for the Applicant, April 30, 2021.

[3] Next, I want to deal with an important matter, and the fact that the other party Edwinna Stubbert is not present today and was not given notice of this application because it is being made on an ex-parte basis.

[4] I want to explain my reasons for allowing the matter to proceed ex-parte today and at the end of my decision I will provide further explanation as to how that may be alleviated going forward.

[5] Rule 22.03(1) states that a party may make an ex-parte application “in one of the following circumstances”, and sub (e) states when there are “circumstances of sufficient gravity to justify the making of a motion without notice”, for which examples are given in Rule 22.03(2). I have reviewed caselaw that is relevant in the matter and one is the case of Justice Moir, in *Taylor v Dairy Farmers of Nova Scotia*, 2009 NSSC 32.

[6] In that particular case, Justice Moir declined to hear the motion on an ex-parte basis.

[7] I referred to examples listed in Rule 22.03(2) and one of those is sub (d) which states a party facing an emergency has a right make a motion, when the motion can not be determined on notice within the time provided by the rules. And there is an important part, which states “even if a judge exercises the power to shorten a notice period or to direct a speedy method of notice.”

[8] I have asked a number of questions today regarding the timing of this motion both of the Plaintiff, Mr. MacLellan, and his counsel. I have asked questions of both of them. And of course, a concern the Court has, is whether the Plaintiff

waited until end of April, 2021 to make this motion, thus himself creating an emergency that he now says that he is faced with.

[9] Mr. MacLellan by all accounts lives in a tight community. He explained that he received a very lengthy document pertaining to the matter from “Lands and Forests” only in December of 2021. The allegations are serious and he has filed a Statement of Claim in March, on March 12, and he proceeded to have it served immediately on the Defendants on March 15. No defence has been filed to date.

[10] His counsel has submitted to me that his client, Mr. MacLellan, has been careful in making these allegations and that he needed time to prepare, and that he also attempted to pursue other avenues, in the hope of resolving the matter. An example of that would be the letter referred to in exhibit “D” of his affidavit, which is the letter dated March 23, 2021 from the land administration officer acknowledging Mr. MacLellan’s concerns regarding this particular property and indicating they are continuing to investigate.

[11] As I say, there was little delay, between December and March when the action was commenced and even less, a period of several days between the time the was action filed and it was served.

[12] In addition, there is also the letter attached in exhibit “D” dated September 11, 2020 written by Mr. Bain to the Minister. That letter indicates a further attempt at least by Mr. MacLellan to find a resolve to this matter, short of litigation and short of a motion such as this.

[13] This is matter of some complexity. In addition to the reasons I have already mentioned, if the time frames in Rule 23.11 were followed or even shortened, I expect that the fishing season would be placed in jeopardy especially considering the time needed to prepare for the fishery and repair the wharf.

[14] While the Court is always reluctant to proceed without hearing from both sides, I believe the circumstances here and the evidence given justify the ex-parte motion that has been made by Mr. MacLellan and his counsel on his behalf.

[15] I turn next to deal with the merits of the motion itself.

[16] I am satisfied there is ample evidence of the usage for this commercial fishery and that further there is ample evidence of the usage for an extended time

that and that the duration of the use as a commercial fishery has been for an extended period, reflecting decades of use.

[17] Thus, with the Defendant, Edwinna Stubbert acquiring ownership of the land in question in the last 10 years, this would give rise to a serious issue to be tried at a trial in this matter. That is the first part of the three-part test for the issuance of an interim injunction, in which Plaintiff's counsel has confirmed is being made here pursuant to Rule 4.

[18] With respect to the second and third parts of the test, irreparable harm and balance of convenience, as is often done, the Court has considered these together. The potential for harm to the Plaintiff here is considerable if he is unable to fish his licences, the licences that he has been issued. There is of course, the crew that would be working for him, his boat and all of those things would come to a standstill thus, resulting a substantial loss or potential loss, of livelihood. In all likelihood there will be a loss of livelihood.

[19] There is also the balance of convenience which I think clearly favours the Plaintiff. In this situation, the land in question, the wharf is located on only a portion on the entire parcel for which the Defendant received title to, that document confirms a parcel of 2.5 acres. There is a survey plan prepared in 2004 by Michael Astephen which clearly shows a substantial wharf extending from the narrow strip of land in question. As I said, this strip is only a portion of a larger piece where the Defendant and her husband (sic), I am referring to Mr. and Mrs. Stubbert, I believe Mr. Stubbert has since passed, where they built their home some 40 years previous to their attempts to purchase the property. My point is, it would come as no surprise that the wharf is there and being used, and there is evidence to that effect as to whom.

[20] Given this and the knowledge in the community, I am satisfied although notice has not been given, that this type of application should come as no surprise perhaps to anyone in the community knowing of the circumstances. I am further satisfied that the three-part test, well known, from the case of *RJR – MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311, has been met and that in all the circumstances it is just and equitable to grant the injunction sought by Mr. MacLellan in this particular case. He needs to use the wharf to commence fishing in a very short time.

[21] There are some important procedural steps however, that must be taken before this Court will be in a position to issue and sign an order. One of those, I

have already pointed out, is contained in Rule 41.06(1)(a). Mr. MacLellan does need to provide in writing a written undertaking to indemnify another party for losses caused by the interim injunction if a judge who finally determines the claim is satisfied that the injunction is not justified in light of the findings on final determination, that is one aspect.

[22] Sub paragraph 41(1)(b), to move without delay for an interlocutory injunction or for an interim injunction if the party successfully makes a motion for an interim injunction and bring the parties claim to a final determination without delay.

[23] All of those things must be contained in a written undertaking sworn to and provided by the Plaintiff, Mr. MacLellan.

[24] Secondly, there are some other applicable rules to which I must refer. One of those is Rule 22.06(1). This is the part where I indicated that to balance the interests of justice, we have a rule which states as follows: rehearing of ex-parte motion, a party who obtains an ex-parte order effecting the rights of a party not disentitled to notice, must immediately deliver a copy of the order to the effected party unless a judge orders otherwise.

[25] It states further in Rule 22.06(2) that “a party who is effected by an ex-parte order may require the motion to be heard again, in chambers, by filing a notice to that effect”. The judge rehearing the motion may set aside, vary or continue the order.

[26] The order here will remain in place however, it will include a provision that the Respondent may apply to have motion heard again in chambers pursuant to Rule 22.06(2), and that rule is in place in any event. In this case, I am requiring that the order include a rehearing of the motion upon notice at the option of the Defendant, Edwinna Stubbart in this matter.

[27] As well the terms of order as provided by Mr. Jamael, I think will need to be addressed not only to include what I have referenced in Rule 22.06, but also the fact that this motion was heard ex-parte. I believe the terms of use you have listed in your order at paragraphs 1 – 5, they include findings because the common “refrain” at the end of each clause is, “as he and his family have for the last 50 years”. Of course, that is what the evidence reflects, but once again we have only had evidence from one side and I am certainly not prepared to make those findings of fact based on an ex-parte motion.

[28] For example, it will include the Plaintiff's right to fish from the said wharf as he has in the past, but you will note what I am saying about findings of fact, he does need to have the basic provisions there to allow him to do what he needs to do, I understand that, but I am going to ask you to revise your order and provide a draft for my review, hopefully tomorrow, or as soon as possible that you can have the undertaking prepared with the order.

[29] Unless there are further questions, that conclude my decision. When the Order is issued, I confirm that the Plaintiff will be required to have a copy of the Order served upon Edwinna Stubbert, as a first step in this matter.

[30] This concludes my decision.

Murray, J.