SUPREME COURT OF NOVA SCOTIA
Citation: *MacLellan v. Stubbert*, 2021 NSSC 278

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 26, 2021, in Sydney, Nova Scotia
Oral Decision:	June 1, 2021
Counsel:	Stephen Jamael for Mr. MacLellan Andrew Christofi for Ms. Stubbert

By the Court:

Introduction (Orally)

[1] This is a rehearing of an ex-parte motion by the Plaintiff, Scott MacLellan, in which he sought and was granted an interim injunction. The order issued on May 6, 2021 permitted Mr. MacLellan and his two man crew to continue to fish from a wharf at Point Aconi, as he, his father, and grandfather have done for decades.

[2] The Respondent is Edwinna Stubbert, whose father, Robert Stubbert, lived on the lands, which included a narrow strip leading to the wharf. Mr. Stubbert was a miner and also a fisherman. For his lifetime he leased the land, and was therefore a tenant of the owner, who at one time was the former Sydney Steel Corporation, and later the Provincial Government through the Department of Natural Resources.

[3] Following Robert Stubbert's death, steps were taken by his personal representative to acquire the land. A survey plan had been prepared in 2004 and registered in 2009. In 2010 Edwinna Stubbert acquired a Deed to the land dated January 29. The property consists of 2.43 acres.

[4] In 2020, the Respondent Ms. Stubbert, through legal counsel informed the Plaintiff that she was enforcing her rights as owner, and that he should no longer use the wharf, and that he was trespassing, in effect.

[5] Mr. MacLellan has removed his boat from the wharf, but retained legal counsel, and made inquiries of the seller, the Department of Natural Resources.

[6] Mr. MacLellan commenced legal action in March of 2021, claiming both fraudulent and negligent misrepresentation on the part of the Defendant, Edwinna Stubbert.

[7] Ms. Stubbert only recently filed a defence to that action. In it, she claims that the use of the land by Mr. MacLellan and his predecessor was with the consent of her father, Robert Stubbert and therefore, Mr. MacLellan has acquired no rights to use the land for his lobster fishery.

[8] Once again, it is acknowledged and undisputed that Mr. MacLellan's grandfather built the wharf in or about 1962 and fished from this wharf. Following

him, his son Lawrence MacLellan, the Plaintiff's father fished from the wharf (with the Plaintiff). Following Lawrence MacLellan's death, his son, Scott MacLellan fished from the wharf with his son and a crew member, who is a neighbor.

[9] Mr. MacLellan seeks to continue to do so and therefore asks the Court to continue the Order.

[10] The provisions for a rehearing of an ex-parte motion are contained in the *Civil Procedure Rules* 22.06 to 22.09. Before me are the affidavits of Mr. MacLellan and the 10 other affidavits filed in the original motion. The Respondent has filed her own affidavit, an affidavit of Janet Conrod, and an affidavit of her legal counsel, Andrew Christofi.

[11] Mr. MacLellan has filed a short affidavit in rebuttal and a reply brief, was well as Mr. Jamael's original brief.

[12] Mr. Christofi as well filed a legal brief on May 14, 2021, with a book of authorities on which he relies. Also in evidence are the fishing licences owned by Mr. MacLellan.

[13] The legal test for the granting of an interim or interlocutory injunction is well known. It is the three (3) part test as stated in ***RJR MacDonald v. Canada***, [1994] 1 S.C.R. 311. The onus is on the Plaintiff to establish that the test has been met.

[14] Before addressing the test in ***RJR MacDonald*** I wish to deal with two main arguments advanced by the Respondent, Ms. Stubbert.

Action not Properly Plead

[15] The Respondent maintains that the Court has no authority to issue an injunction because the Plaintiff has not properly pleaded that remedy and further has not pleaded a cause of action that is sustainable. These arguments to some extent overlap.

[16] As this is not a summary judgment motion, I shall deal with the submission that the Plaintiff has not properly pleaded the relief claimed.

[17] In doing so, the Respondent relies on ***Twelve Gates Capital Group v. Mizrahi Development Group***, 2018 ONSC 7656.

[18] In ***Twelve Gates***, the Court held that injunctive relieve is "an ancillary remedy to a cause of action. Therefore, if the cause of action is not pleaded, the remedy is not available". (see paras 40 – 45)

[19] In this case, the person seeking the injunction needs to pass over land that he and his family have used for fishing for 50 years. He seeks an order preventing the owner from interfering with his access.

[20] However, Mr. MacLellan has not pleaded a prescriptive right by adverse possession, but intends to amend his pleadings. Thus far, he has sought damages. This litigation is in a very early stage having been commenced in March of 2021.

[21] Relying on ***Twelve Gates***, Ms. Stubbert argues there is no underlying cause of action. The court in ***Twelve Gates*** referred in paragraph 40 to the case of ***R. v. Canadian Broadcasting Corp.***, 2018 SCC 5. At paragraph 41 of ***Twelve Gates***, the Court stated:

> [41] In *R. v. CBC*, the Supreme Court of Canada held that the Crown's application for an interlocutory injunction was in support of its application against the CBC for criminal contempt. There was no entitlement to an injunction on its own. The Supreme Court stated that "[a]n injunction is not a cause of action, in the sense of containing its own authorizing force. It is, I repeat, a remedy" (at para. 25). The Defendants are not entitled to an ancillary remedy when they make no claim for relief.

[22] It must be noted that there is a slight omission in ***Twelve Gates***; the Court quoted the Supreme Court of Canada in ***C.B.C.***, saying without qualification that an injunction is "a remedy ancillary to a cause of action". Actually, in ***C.B.C.*** (and previously in ***Amchem Products v. British Columbia***, [1993] 1 SCR 897) the Court said, "<u>In general</u>, an injunction is a remedy ancillary to a cause of action" (***Amchem***, para 51)(my emphasis). In other words, the Court was not setting out an absolute rule, rather stating a remedial principle. In addition, I would note the comments by the Court of Appeal in ***Maxwell Properties v. Mosaile Property Management***, 2017 NSCA 76, in part at para. 33:

> …"Equitable discretion involving injunctions is exercised in relation to the relief sought, not the cause of action pleaded."..

[23] The Respondent, Edwinna Stubbert, also argues the Plaintiff's pleading discloses no reasonable cause of action. Her counsel cited the ***Apogee Properties Inc. v. Livingston***, 2018 NSSC 143, a decision of Justice Arnold, to show that no

contract or agreement between the parties was pleaded, and therefore, she submits neither action for fraudulent or negligent misrepresentation can be sustainable.

[24] I have considered these submissions closely. Respectfully, I am of the view that the argument of the Respondent is without merit for essentially three reasons.

[25] First, section 43(a) of the *Judicature Act* of Nova Scotia provides very broad authority for the granting of an injunction, "when it is just and convenient to do so". It states further, "such injunctions may be granted if the Supreme Court thinks fit", and "whether the estates claimed by both or either of the parties are legal or equitable".

[26] Secondly, *Civil Procedure Rule* 41.04 is clearly applicable to this motion. This rule contains four criteria, that would permit the granting of a motion for an interim injunction. The first is contained in Rule 41.04(2)(a), which states:

> 41.04 (2) A judge who is satisfied on all of the following may grant the motion:
>
> (a) the party claims an injunction or receivership as a final remedy in the proceeding, or it is in the interests of justice that an injunction or receivership be in place before determination of the claims in the proceeding;
>
> (b) the party has moved, or will move, for an interlocutory injunction or interlocutory receivership and is proceeding without delay;
>
> (c) an urgency exists and it cannot await the determination of the motion for an interlocutory injunction or interlocutory receivership;
>
> (d) considering all of the circumstances, it is just to issue an order for an interim injunction or interim receivership.

[27] Thirdly, in terms of the proceedings themselves, paragraph 13(h) of the statement of Claim includes the following:

> 13(h) such further and other relief as the Court deems just and appropriate.

[28] It is apparent, therefore, that the Plaintiff foresaw the need for further relief when it plead this passage. It may be noted the relief claimed is somewhat similar in wording to that in the *Judicature Act.*

[29] While a more specific pleading may be advisable or even required by an amendment, the Plaintiff did not foreclose the probability of further relief.

[30] For these reasons, I am of the view that this Court has the ability to grant the motion, should it decide to do so. With respect to whether the causes of action are sustainable, as previously stated, this is not a summary judgment motion.

[31] On an application for an interim injunction, the law is clear, this Court should not delve too deeply into the merits of the case.

[32] I turn now to consider the three part test in ***RJR MacDonald*** which states:

> 25 *RJR - MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, sets out a three-part test for determining whether a court should exercise its discretion to grant an interlocutory injunction: is there a serious issue to be tried; would the person applying for the injunction suffer irreparable harm if the injunction were not granted; and is the balance of convenience in favour of granting the interlocutory injunction or denying it. **The fundamental question is whether the granting of an injunction is just and equitable in all of the circumstances of the case. This will necessarily be context-specific.**

Analysis

Serious issue to be tried

[33] The first part of the three-part test for injunctive relief requires the Court to determine, based on the evidence, whether there is a serious issue to be tried. To meet this standard, the Plaintiff needs only to show that his case is not frivolous or vexatious.

[34] There is no dispute that the Plaintiffs' family built the wharf and used it openly and continuously for decades beginning with his grandfather, Simon Fraser, who began fishing from the wharf in the 1960s.

[35] There have been multiple sworn affidavits from disinterested parties filed by the Plaintiff, to this effect. I note one in particular is from a gentleman who had been fishing alongside the Plaintiff and his family since 1954.

[36] The Defendant makes several arguments in support of her position that there is no serious issue to be tried, beginning with the consent to use the land that she says was given by her father.

[37] In addition, she says, the Plaintiff is clearly out of time under the *Land Registration Act,* s. 74, in that 10 years have passed since the parcel was first migrated or registered under the *Land Registration Act* in March 2010.

[38] First, I find there is very little evidence emanating from Edwinna Stubbert that the use was with consent. What evidence there is was provided by the Plaintiff in cross examination who stated adamantly that no consent was given.

[39] Secondly, for consent to be properly given it would normally come from the owner. Mr. Stubbert was a lessee under a lease and not the owner of the lands.

[40] In terms of the *Land Registration Act* and the Defendant's position that the Plaintiff can no longer claim an interest, there is evidence that the entity who did the initial migration the Department of Natural Resources, or its surveyor questioned whether there should be a reservation made for past users of the wharf. There is further evidence that an investigation into that matter is being undertaken.

[41] The letter of March 23, 2021 from the provincial Department of Land Administration states:

> Department staff are continuing to investigate the history of the wharf structure as well as the current status, regarding authorized access.

[42] The wording in s. 74(2) of the *Act* in that instance makes "any interest acquired by adverse possession or prescription before the date the parcel is first registered", "absolutely void against the registered owner of the parcel in which the interest is claimed." Here the registered owner would be the Respondent, Edwinna Stubbert.

[43] Now is not the time to delve too deeply into facts or credibility which analysis is best done at trial.

[44] On the one hand, there are the provisions of the *Land Registration Act* which the Defendant says is a complete bar to the Plaintiff's claim. On the other hand, the question posed by the Land and Forrest surveyor as to whether there should have been reservations or uses permitted by other users, may prove to be profound.

[45] Based on a limited review of the matter, I am not satisfied the matter is as "cut and dry" as suggested by Respondent. Now is not the time to decide difficult questions of law which require "detailed argument and mature considerations".

(See ***American Cyanamid Co. v. Ethicon Ltd.***, [1975] 1 All E.R. 504 (H.L.) at 510)

[46] While there are often similarities, the circumstances of each case are determined by the individual facts of that case. Further information may lead to a request for an amendment of the pleading at what is an early stage in the litigation.

[47] There are other relevant provisions to be considered with the purpose of the *Act* in mind.

[48] Under section 92 for example, a Court may order the registrar to record, cancel, or revise a registration or recording, and take other action that the court deems just.

[49] I recognize that Mr. Jamael in an email stated that Ms. Stubbert's counsel was "correct" in his interpretation of the relevant provision. He did not cite reasons but did indicate in the motion document itself that the matter involved complex land issues.

[50] I find there is a serious issue to be tried. This is not an onerous burden.

[51] The serious issue to be tried is whether the Plaintiff is entitled to prescriptive right to access the wharf over lands now owned by the Defendant, Edwinna Stubbert, and whether the provisions of the *Land Registration Act* govern so as to prevent the Plaintiffs Claim in law.

Irreparable Harm

[52] In ***RJR-MacDonald***, the Supreme Court described irreparable harm as follows:

> 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.** ... The fact that one party may be impecunious does not automatically determine the application in favour of the other party who will not ultimately be able to collect damages, although it may be a relevant consideration (*Hubbard v. Pitt*, [1976] Q.B. 142 (C.A.)).

[53] The cases of **Industrial Union of Marine Shipbuilding Workers of Canada, Local 1 v. International Brotherhood of Electrical Works, Local 625** , [2002] N.S.J. No. 188 and **Morrison v Morrison**, [2003] N.S.J. No. 183, support

the proposition that loss of a business livelihood and business reputation are recognized types of irreparable harm. Here the equivalent for Mr. MacLellan is the potential loss of livelihood for himself but also his crew and the unknown of the impact on his fishing business.

[54] Strictly speaking if loss can be quantified, then it does not constitute irreparable harm. Often there is uncertainty as to whether a party experiencing loss will be able to collect financially should the injunction be denied but they are successful at trial. There is no evidence of that here one way or other. It is apparent that the Respondent owns the land in question, so that is an asset upon which a judgment may attach.

[55] In terms of mitigating the harm, the Defendant argues that the Plaintiff has known since 2020 she was opposed to him continuing to use the land to access the wharf. As such, this is not an emergency or urgent and results only from Mr. MacLellan's failure to act.

[56] Mr. MacLellan's evidence is that he removed his boat from the wharf. He made inquiries as to use of the government wharf, but the berths were full. He stated that tying up next to another boat is frowned upon and typically not done.

[57] It must be kept in mind that given the extensive history of use by his family, it is reasonable to infer the Plaintiff did not necessarily believe he had to move.

[58] The Plaintiff's livelihood and that of his crew is based on fishing from this wharf from May 15 to July 15, 2021, which is the current lobster season. If no injunction is issued, the Plaintiff and his crew will be unable to fish.

[59] Very often a decision is arrived at by considering second and third branches of the test together. I do, however, find that the Plaintiff stands to suffer irreparable harm.

#3. Balance of Convenience

[60] The third part of the ***R.J.R. MacDonald*** test is the balance of convenience, which requires the Court to consider the relative impact upon the parties of granting or withholding injunctive relief. In other words, will Mr. MacLellan or Ms. Stubbert be more inconvenienced if the order is granted or withheld? The law suggests that irreparable harm and balance of convenience are closely linked and

may be considered together to arrive at a just result. Indeed, in Sharpe's *Injunctions and Specific Performance*, he writes, at para. 2.418:

> Irreparable harm and the assessment of the balance of convenience are very closely linked, [and] in some cases where the balance of convenience strongly favours an injunction, conclusive prof of irreparable harm may not be required. (See ***Reddick v MacInnis***, 2018 NSSC 20)

[61] The Plaintiff says the balance of convenience favours the status quo. Allowing the wharf to be used as it has been for a long time is minimally prejudicial to the Defendant, while not allowing the interim injunction to continue would be devastating for the Plaintiff.

[62] The right of an owner to quiet use and enjoyment of their land, must be considered as it is a right that is fundamental. I note that the Defendant did not seek to enforce her right of ownership in the land, which she acquired in 2010, until March 2020, a period of 10 years.

[63] The lobster fishing season extends for two more months until mid July or thereabout. Overall, I find the balance of convenience favours the Plaintiff, Mr. MacLellan.

Conclusion

[64] In the end, the overarching principle is whether it is just and equitable to grant the injunction in all of the circumstances. Balancing the factors I have discussed, I find it would be. I therefore continue the Order of May 6th, based on the rehearing of the Plaintiff's motion.

[65] Finally, for the above reasons, I am satisfied that the requirements of Rule 41.04(2)(a - d) have been met. The Plaintiff has filed the required undertaking and in terms of urgency this was a rehearing of the motion heard just prior to the start of the lobster fishing season on May 15, 2021. I find it is in the interests of justice that an order be in place before a determination is made in the proceeding.

Murray J.