SUPREME COURT OF NOVA SCOTIA
Citation: *Halifax Regional Municipality v. Rhyno*, 2022 NSSC 152

Date: 20220603
Docket: Hfx No. 513362
Registry: Halifax

Between:

Halifax Regional Municipality

Applicant

v.

Ross Rhyno

Respondent

Decision

Judge:	The Honourable Justice Denise M. Boudreau
Heard:	May 10, 2022, in Halifax, Nova Scotia
Counsel:	Randolph Kinghorne, for the Applicant Eugene Tan, for the Respondent

By the Court:

[1] This is an application in Chambers. The applicant seeks injunctive relief, along with other relief, against the respondent in relation to an easement across the respondent's property at Cow Bay, Halifax County, Nova Scotia.

Facts

[2] The applicant obtained title to two parcels of land at Cow Bay by Warranty Deed on September 25, 2003. The vendor was Silver Sands Realty Limited; the deed to the applicant was signed by representatives of the vendor, Arthur Rhyno and (the respondent) Ross Rhyno.

[3] The two parcels of land purchased by the applicant were Lot 2 (PID # 41105248), at 1287 Cow Bay Road (now a parking lot), and Lot 3 (PID # 41105255), which is Silver Sands Beach.

[4] On paper, Lot 2 (the parking lot) is bounded to the south by the ocean. However, there is a steep cliff which makes direct access to the ocean from that parking lot practically impossible. Therefore, in practical terms, in order to travel from Lot 2 to Lot 3 one is required to cross over other lands. At the time of the

applicant's purchase of Lots 2 and 3, those "other lands" were owned by Silver Sands Realty Limited.

[5] The 2003 deed to the applicant for Lots 2 and 3 made specific provision for an easement over those pieces of land between Lot 2 and Lot 3, thereby allowing passage for the public from the parking lot to the beach.

[6] The applicant submits that their purchase of these two parcels of land was for the benefit of the public, i.e., for use as a public park/beach, with an associated parking area. This will be addressed in more detail later in this decision.

[7] In the original deed, this easement was actually in two parts. The first is in relation to a "Parcel B" property (shown on survey plan dated June 25, 2003, and containing 35,375 acres more or less). This is the easement that is in dispute before me within the present application. The deed indicates that the applicant's easement extends over this entire Parcel B property:

> TOGETHER with a right-of-way to Halifax Regional Municipality, its successors and assigns for persons and vehicles over Parcel B. attached

[8] In that same deed the easement also continued over <u>another</u> piece of land, lying adjacent to the Parcel B property and the beach property:

> TOGETHER with a right-of-way to Halifax Regional Municipality, its successors and assigns for persons and vehicles with respect to a Gravel Road to be used for Emergency

> Maintenance use only; said Gravel Road extending from the western boundary of Lot 2 to the northern boundary of Lot 3 and being geographically shown on the above referred to Plan No. 14-1092-0.

[9] That particular easement is not the subject of the present dispute. That second burdened property is now deeded to third parties (the Atkinsons) who are not involved in the present proceeding. I am advised that the applicant is in separate discussions with the Atkinsons about issues involving the easement over their property.

[10] Since the time of the 2003 conveyances, there has been a specific identifiable pathway through Parcel B which leads from the parking lot to the beach. This is the pathway which the public have consistently used over the years.

[11] The Parcel B property was transferred from Silver Sands Realty Limited to the respondent in 2012. Since then, the respondent has erected various structures presumably to contain access by the public exclusively to this pathway and to maximize privacy for himself and his home. This includes an iron fence along the pathway, additional fencing at the entry to the pathway from Lot 2, and a masonry wall and fence between Lot 2 and Parcel B.

[12] The respondent has also piled various debris, rocks, materials along the pathway in order to narrow it. Although the right-of-way specifically includes

vehicle passage, the materials deposited by the respondent have prevented a vehicle from passing.

[13] Things have only escalated since then. In 2020, the respondent decided to entirely block access to the right-of-way to the public and to the applicant. The gate at the head of the pathway (at the parking lot) was locked; access cannot be gained otherwise.

[14] A sign has been erected near that locked gate, replicating Halifax Regional Municipality ("HRM") signage, including the logo and phone number; it announces that the public right-of-way is "under construction" and that the beach is closed. The applicant advises that it did not erect this sign. The respondent made no mention of this sign in his affidavit, but the only inference I can draw is that he erected it (or caused it to be erected). Furthermore, I infer that he used HRM logos and phone numbers to imply that the path was closed with their authority.

[15] In 2001, the respondent arranged for another locked gate at the opposite end of the right-of-way.

[16] Since these events, the applicant has made numerous efforts to enforce its rights in relation to this easement. It has sent multiple letters to both the respondent and his counsel, requesting the removal of the obstructions to the right-of-way and

requesting that the respondent permit public passage as per the easement. The respondent has not done so.

Analysis

[17] The respondent raised a number of arguments in his Notice of Contest. Most of those arguments were abandoned by the time of the hearing. However, I will summarily address some of them. I do this out of an abundance of caution, but also, to note that the applicant had to spend quite a bit of needless time and effort responding to some/all of these issues.

[18] The respondent included in his Notice of Contest a claim that the easement was not meant for public use. This was abandoned by the time of the hearing. In my view, that argument would have had no merit whatsoever. It is abundantly clear from the evidence before me that the acquisition of these lands, as well as their connecting easement, was for the benefit of the public in order that they might enjoy use of the beach. If there is any ambiguity or doubt on this point, there is significant extrinsic evidence to support it (*Romkey v. Osborne*, 2019 NSSC 56).

[19] For example, the survey plan noted in the description of Parcel B in the easement (dated June 17, 2003) has as Note 4: “Parcel B is a proposed Easement and Right-of-way to be conveyed in right of HRM for public use”. In the staff

report to HRM dated July 8, 2003, the project is referred to as a "parkland site", clearly meant for the benefit of the public. Furthermore, the applicant is a municipality; in that context, it seems quite self-evident that its only interest in acquiring and developing a beach property, with a parking lot, would be for public access.

[20] I note that the easement makes reference to access by "persons and vehicles" over Parcel B. In the affidavit of Gary Young, an employee of the applicant who was involved in this project, he notes:

> 22. Paragraph #10 in the affidavits of both Arthur Rhyno and Ross Rhyno state that "from the beginning of the grant of easement, a gate was erected at the juncture of Lot 2 and the easement". The gate was actually erected by the vendor Silver Sands Realty Ltd., during or shortly after the work to construct the parking lot on Lot 2. HRM did not object to the gate as it did not want the public to be able to drive onto the easement area or onto the beach below. At this time HRM placed its own lock on the gate so HRM could use the right-of-way for emergency access and for maintenance access to the Beach. There was an open area left for pedestrian access… (emphasis added)

[21] In other words, the easement that the applicant seeks to enforce here is for public pedestrian traffic, as well as HRM vehicular traffic (for emergency or maintenance purposes).

[22] The respondent also put forward in his Notice of Contest that the applicant had agreed to maintain and repair the right-of-way, and had not done so. Once again, this was abandoned in his arguments before the Court. I have been provided

no evidence for the proposition that the applicant had/has such obligations, nor any authority as to what such obligations, if they existed, would mean in the context of an interference with an easement. The applicant did put forward evidence in response, indicating that it had performed work in the form of erosion control (shoreline stabilization work) in late 2008. There is no other work, to the applicant's knowledge, that is upon them to perform.

[23] The respondent further claimed in the Notice of Contest that there had been "abandonment" of the right-of-way. Again, those arguments were not pursued in oral argument and there is no evidence that this (express) easement has ever been abandoned by the applicant.

[24] At the time of the hearing, only one argument was put forward by the respondent in his defense to the application. It is contained in paragraph 7 of his Notice of Contest. It is an argument in relation to the "high-water mark" of Parcel B and Silver Sands Beach (Lot 3). It was expressed in the respondent's brief as "there is no contiguous boundary above the OHWM between Silver Sands Beach and the right-of-way".

[25] It is the respondent's contention that the high water mark of the beach has moved, due to erosion, since the original grant in 2003. In fact, the respondent

suggests that at high tide, the water now effectively reaches the point where the right-of-way crosses between Parcel B and the Atkinson property. He has provided photographs which appear to show that such is the case. In fact, it is the respondent's belief that some day the entirety of the beach (Lot 3) will be washed away by the ocean.

[26] The respondent notes that it is a generally accepted principle in property law that waterfront property ends at the high water mark. He further points out that this right-of-way was meant to establish a passage between Lot 2 (the parking lot) and Lot 3 (the beach). As matters currently stand, in his submission, there is no longer any connection between those two properties at the high water mark; access to the beach must be gained through another property. It is the respondent's position that the right-of-way is therefore not only affected, but extinguished.

[27] In response, the applicant notes that the original right-of-way made no explicit mention of "direct access" to the beach; it is simply an easement across the entire Parcel B property. Furthermore, that the transaction, from the beginning, involved a grant of easement across the other property (the now-Atkinson property).

[28] Further, the applicant disputes the location of the high water mark put forward by the respondent. The applicant points out that the beach still remains completely accessible from Parcel B.

[29] Richard Harvey, an employee of HRM, testified by affidavit that he visited the beach on February 15, 2022, and took photographs, which he attached. In those photographs, it can be clearly seen that there is still quite a bit of beach property left at the end of the path. The evidence does not indicate if the photographs were taken at high tide or low tide.

[30] In my view, whether the applicant or the respondent is correct about the present location of the high-water mark is not material in the context of the dispute before me. I say this because, even if the respondent is correct, and even if the seawater reaches the end of the pathway at high tide, I remain entirely unconvinced that such extinguishes the easement.

[31] I have been provided with no authority, either by way of statute or caselaw, that would support the notion that an expressly granted right-of-way could be entirely extinguished in these particular circumstances. I know of no such authority. The respondent did provide the case of *Kerrigan v. Harrison* (1921) 62 S.C.R. 374; however, in my view, that case is entirely distinguishable on its facts.

[32] The present case involves an express grant of easement over all of Parcel B. Nothing I have heard in this application alters that fact. Generally speaking, an express easement requires an express release to be recorded in order to extinguish it (*MacNeil v. Anban Holdings*, 2005 NSSC 6). To be clear, I am not precluding the possibility that there could perhaps be other methods, or factual scenarios, that could extinguish an express easement. However, I have no evidence or authority that would show that the present scenario should result in an extinguishment.

[33] Although this easement was granted over the entirety of Parcel B, the existing pathway is at the extreme outer edge of Parcel B and partly along the coastline. It seems to be the least intrusive option for the owner of Parcel B.

[34] I accept that significant erosion has occurred in this area, particularly in relation to the beach itself. However, that does not change the fact that an easement exists over Parcel B. Inasmuch as the purpose of this easement was to allow passage between Lots 2 and 3, that purpose also still exists. The question of additional passage over the Atkinson property (if needed) does not affect the Parcel B easement in my view, and in any event, was also provided for in the original grant.

[35] It is clear to me that the respondent finds this easement to be inconvenient and irritating. He has made many unilateral efforts to rid himself of it; even going so far (and boldly) as to block it altogether. It is also abundantly clear that he should not have done so, and that he had no authority in law to do so.

[36] I am prepared to grant the applicant the relief it seeks. The respondent must cease any and all efforts to block this right of way. He must allow passage to the public and the applicant as was expressly granted to the applicant in 2003.

[37] The respondent is to immediately open the pathway through Parcel B for public pedestrian access, as well as HRM vehicle access as required. If the respondent does not open the pathway and remove all impediments within a reasonable time, the applicant will be entitled to do so themselves and to subsequently recover their reasonable expenses for doing so from the respondent.

[38] I have been provided with a draft Order (on May 6, 2022) by the applicant containing a number of detailed provisions. I will allow five clear days from the date of this decision for the respondent to advise of any objections to the draft. If I do not hear any such objections, it will issue forthwith.

[39] I will also agree to hold jurisdiction over this matter for a period of 90 days from the date of the Order to address any implementation issues. I agree that such

is appropriate to ensure the orderly and efficient execution of the order and to make best use of court resources (see *Miller v. Hartlen*, 2014 NSSC 296).

[40] As to costs, I would ask that counsel discuss and attempt to reach agreement on that issue. If they cannot, I will accept submissions from counsel as to costs, which I would ask be submitted within 30 days of this decision.

Boudreau, J.