NOVA SCOTIA COURT OF APPEAL
Citation: ***Shea v. Bowser***, 2013 NSCA 18

Date: 20130208
Docket: CA 374501
Registry: Halifax

Between:

James David Shea and Linda Shea

Appellants

v.

Loyal F. Bowser and Wendy Lynn Bowser

Respondents

Judges:	Fichaud, Beveridge and Farrar, JJ.A.
Appeal Heard:	September 18, 2012, in Halifax, Nova Scotia
Held:	Appeal allowed in part per reasons for judgment of Farrar, J.A.; Fichaud and Beveridge, JJ.A. concurring.
Counsel:	Robert H. Pineo and Jeremy P. Smith, for the appellants Myra L. Jerome, for the respondents

Reasons for Judgment:

Overview

[1] The appellants, James and Linda Shea, made an application to the Supreme Court for a declaration that they have a right-of-way over the property of Loyal and Wendy Bowser, which would allow them access to property they own known as Lot A, Lot B and the "Sheep Pen" lot (sometimes referred to collectively as the Subject Lots). The Subject Lots are located in Pleasant Point, Halifax Regional Municipality and border on the Atlantic Ocean. The application was heard before Supreme Court Justice Peter P. Rosinski over two days in September, 2011. In a decision dated December 5, 2011 (reported as 2011 NSSC 450), he found the Sheas did not have a right-of-way over the lands of the Bowsers. He dismissed their application and awarded costs to the Bowsers in the amount of $6,000 plus disbursements of $302 and HST.

[2] For the reasons that follow I would allow the appeal, in part, and remit the matter to the Nova Scotia Supreme Court for a determination of the location of the right-of-way over the Bowsers' lands. I would set aside the Order of Costs below and order no costs on the application or on this appeal.

Facts

[3] By deed dated February 11, 1925, Howard and Maizie Williams deeded to Gladys Bowser the parent parcel of land from which the Subject Properties were subdivided. The deed reserved to Howard Williams "... the privilege to use the road from the new road apart the house to the old road".

[4] In 1963 Gladys Bowser started to subdivide the parent parcel. The first lot to be subdivided was Lot A which received subdivision approval on February 11, 1963. The plan approving the subdivision contains the following notation:

> Approved Lot A with these reservations: access by private right-of-way only

[5] Lot A was conveyed to Carl Conrod on August 5, 1963. The deed from Gladys Bowser conveying Lot A to Carl Conrod contains the following easement:

> ... and the privilege to use Gladys Muriel Bowser's road leading a past her house to Lot No. A at all times, and also help to maintain this road at all times.

[6] Lot B was subdivided on September 28, 1966. Again, on the plan approving the subdivision the following notation is made:

> Approved Lot B with these reservations: with access by private right of way only.

[7] Lot B was conveyed to Lester Smiley sometime after September 23, 1966. The actual deed conveying this parcel was not in evidence. However, a right-of-way is described on the Property On Line Printout provided to the application judge and provides:

> Plan Registration Approval Date: September 28, 1966
>
> TOGETHER WITH Access by a Private Right-of-Way only, this being the privilege to use the road (Gladys Muriel Bowers road, so-called) from the new road, leading past her house to Lot No. B at all times and to also help maintain this road at all times to the Old Main Road, which had been openly used and enjoyed by all previous and present owner(s); SAID Right-of-Way being more fully described in a Deed at Document No. 827 in Book 871 at page 605.

[8] The Sheep Pen Lot was subdivided somewhere around August 3, 1972, although the plan approving the subdivision is not in evidence. A plan dated August 3, 1972, showing the Sheep Pen Lot was in evidence before the judge. Shortly thereafter, on September 5, 1972, Gladys Bowser deeded the Sheep Pen Lot to the appellants.

[9] The Sheep Pen Lot contains no deeded right-of-way.

[10] To round out the conveyances, lands now referred to as the Bowser Lot, which was also part of the original deed to Gladys Bowser in 1925, were conveyed to Gladys Bowser's son, Frederick on February 15, 1968 (The deed to Frederick Bowser is undated. However, the affidavit attached to the deed was sworn on February 15, 1968). That lot was subsequently conveyed by Mary Anna Bowser,

Frederick Bowser's widow, to the respondents in 1985. That deed contains the following reservations:

> Also reserving any rights previously granted for the use of the road to the shore.

[11] As noted earlier, the Sheep Pen Lot was conveyed to the Sheas directly by Gladys Bowser. Lot A was deeded to the Sheas by Mr. Conrod in or around 1971. Lot B was deeded to them by Lester Smiley in 1971.

[12] There is one other parcel of land that is referenced in the judge's decision. It is referred to as the Slaunwhite Lot. The Slaunwhite Lot is burdened by an easement of right-of-way referred to as right-of-way 300 (ROW 300). I will have more to say about this right-of-way later in these reasons when discussing what I consider to be the application judge's error.

Issues

[13] The appellants raise three issues for determination that can be summarized as follows:

1. Did the application judge err in finding that the rights-of-way expressly granted in the deeds did not burden the Bowser Lot?

2. Did the application judge err in failing to apply the proper legal principles relating to the establishment of a right-of-way by necessity in determining that there was no right-of-way by necessity to the Sheep Pen Lot?

3. Did the application judge err in adjudicating the rights of the appellants and parties who were not represented or a party to the proceedings when he found that the "only arguable alternative" to the easements over the Bowser Lot is ROW 300?

[14] It will not be necessary to address ground of appeal #3 as I am satisfied that the application judge erred in finding that the rights-of-way did not burden the Bowser Lot.

Standard of Review

Issue #1

[15] The appellants say that, since this involves the proper interpretation of a deed, it is a pure question of law. The respondents agree it is a question of law to be reviewed on the standard of correctness. I agree (see **MacDonald v. McCormick**, 2009 NSCA 12, ¶20-21). However, while the construction of a deed is a question of law, to the extent that the deed must be interpreted in the context of the facts and factual inferences, questions of mixed fact and law may arise. This Court will only intervene if the court below fails to consider relevant evidence, or makes palpable and overriding errors in findings of fact or drawing inferences from those facts. Hallett, J.A. in **Metlin v. Kolstee**, 2002 NSCA 81 puts it this way:

> [70] The interpretation of a deed is a question of law. If a trial judge has incorrectly interpreted a deed a court of appeal should interfere.
>
> [71] If findings of fact made by a trial judge are clearly unfounded or result from a misunderstanding of the evidence or a failure to consider relevant evidence an appeal court will interfere [citations omitted].

Issue #2

[16] The appellants allege that the application judge failed to properly apply the legal principles relating to the establishment of a right-of-way by necessity to the Sheep Pen Lot which is a question of law to be reviewed on the standard of correctness. I agree that is the proper standard. However, again in the context of the facts and the factual inferences we will not intervene unless the trial judge has failed to consider relevant evidence or has made a palpable and overriding error in the findings of fact.

Analysis

Issue #1 Did the application judge err in finding that the rights-of-way expressly granted in the deeds did not burden the Bowser Lot?

[17] The following is a key passage from the application judge's decision relating to this issue:

> [84] Both Lots A and B purportedly have express grants of right of way to allow access to them. While I have concluded that the location of these grants of right of way have not been established on a balance of probabilities to pass across the land of the Bowsers, I have specifically refrained from saying where in my opinion such express grant of right of way is located. The only arguable alternative location based on the evidence presented to me is ROW 300, however without having the owners of that/those properties as parties to this proceeding, it would be wholly inappropriate for me to pronounce upon their property rights.
>
> [85] Nevertheless, in the deeds conveying Lots A and B to the Sheas, both contain express grants of right of ways, and thus I cannot conclude that at the time of their granting, a right of way of necessity was acquired by an implied grant of a right of way, presumed to have been made on the basis that the lots were inaccessible except by passing over the adjoining land of the grantor, committing a trespass upon the land of a stranger, or in some other fashion, though inconvenient but not impossible. (My emphasis)

[18] From this, I take the following:

1. The chain of title from Gladys Bowser to the Sheas established that there was an express grant of a right-of-way.

2. It was not necessary to decide the issue of a right-of-way by necessity to Lots A and B as there was an express grant of a right-of-way.

3. He was unable to ascertain from the evidence before him the location of the right-of-way.

4. Although the application judge says he is not saying where the right-of-way is located, he does exactly that in saying that the only arguable alternative is over ROW 300 which is located on the Slaunwhite Lot.

[19] In his decision the application judge puts the essential question before him as being the location of the right-of-way. He says:

> The location of the right of way claimed by the Sheas is central to this litigation. ... (¶28)

[20] With all due respect to the application judge, that was not the central issue before him. The central issue before him was whether there was an express grant of a right-of-way over the lands of Gladys Bowser.

[21] He determined that there was an express grant of a right-of-way. However, he fell into error in speculating that the right-of-way may have been over some other parcel of land other than that from which the Sheas obtained their title. In his decision, after reviewing the evidence about the origin of the right-of-way claimed by the Sheas, he says:

> It would appear therefore that the extent of Gladys Bowser's property could have included the area surrounding ROW 300 at some time, which does not necessarily mean however that it was part of the deed of property granted to her in 1925. (¶23) (My emphasis)

[22] In this paragraph he is referencing the Slaunwhite Lot burdened by ROW 300. The application judge did not find as a fact that Gladys Bowser owned the Slaunwhite Lot. There was little or no evidence before the judge that Gladys Bowser ever owned the Slaunwhite Lot over which ROW 300 is located. However, a finding that she was the owner of that lot was essential to the determination that it was the only "arguable alternative" to the Bowser Lot.

[23] La Forest, Anne, *Anger and Honsberger: Law of Real Property*. 3rd ed., looseleaf, Vol. 2 (updated December, 2012), (Aurora, Ont.: Canada Law Book, 2006) at p. 17-3 set out the essential characteristics of an easement:

> At common law, the essential characteristics of an easement are:
>
> (a) there must be a dominant and a servient tenement;
>
> (b) an easement must accommodate the dominant tenement;

> (c) the dominant and servient owners must be different persons; and
>
> (d) a right over land cannot amount to an easement unless it is capable of forming the subject-matter of a grant.

[24] With respect to the fourth element, that is the easement must be capable of forming the subject-matter of a grant, *Anger & Honsberger, supra*, at p. 17-6 say:

> (a) one cannot grant an easement over the land of another person; ...

[25] Simply put, Gladys Bowser could not grant a right-of-way over lands she did not own. It follows, if there are only two possible alternatives for the location of the right-of-way and the Slaunwhite Lot is eliminated as one of those possibilities, that right-of-way must burden the Bowser Lot.

[26] The evidence supports this conclusion:

1. Gladys Bowser received by Deed dated February 11, 1925, the parent parcel of land from which Lots A and B were sub-divided. That Deed contained a reservation:

> > Also the privilege to use the road from the new road apart the house to the old Road.

2. When Gladys Bowser sought subdivision approval for Lots A and B the approval was granted with access by private right-of-way.

3. When Gladys Bowser conveyed Lot A to Conrod in 1963 the Deed contained an express grant of right-of-way, which is very similar in description to the road referred to in the original Deed. It says:

> > ... and the privilege to use Gladys Muriel Bowser's road leading a past her house to Lot No. A at all times, and also help to maintain this road at all times.

4. When Gladys Bowser's husband Lester Smiley conveyed Lot B, which he acquired from her in 1966 to the appellants in 1971, the Deed conveyed an express grant of right-of-way , which is very similar to the description to the road referred to in the original deed and the deed for Lot A. It provides:

> TOGETHER with the perpetual privilege to use Gladys M. Bowser's road leading past her house and also help to maintain same.

5. At the time Lots A and B were conveyed, the only land owned by Gladys Bowser was the present day Bowser Lot. The land over which ROW 300 runs was owned by George Slaunwhite.

6. Gladys Bowser lived in a house on the Bowser Lot as early as the respondent, Loyal Bowser, can remember. (He was born in 1957.)

[27] In my view, the only conclusion the application judge could have come to on the evidence before him is that the rights-of-way to Lots A and B burdened the present-day Bowser Lot. The judge properly found there was an express right-of-way to the Sheas. Having found that an express right-of-way existed, the question becomes whose land is burdened by that right-of-way. The third and final issue to be determined was the location of the right-of-way.

[28] The application judge allowed his concern about the location of the right-of-way to influence his interpretation of the express grants of right-of-way and the lands which they burden. His speculation that the right-of-way could have been over the Slaunwhite property, is just that, speculation. Proceeding as he did, the application judge's findings were, respectfully, unfounded or resulted from a misunderstanding of the task before him. Having said this, I want to emphasize that this application was far from a model of how counsel should conduct a proceeding. Deeds in the chain of title were missing, an abstract of title was not provided, and the application judge was given very little guidance from counsel as to how he was to determine the issues. It looks very much like the parties "threw" everything at the application judge and left him to deal with it. (Counsel for the Sheas on this appeal was not counsel at the application hearing). I will have more to say on this when I address costs.

[29] The location of the right-of-way is still in issue. As the application judge found that the express grant of right-of-way did not burden the Bowser Lot he did not need to go further and determine the location of that right-of-way. I realize that he looked at that issue and was unable to do so. However, had he reached the proper conclusion as to the land burdened by the right-of-way, there may have been other means of determining the location of the right-of-way. See, for example, **Langille v. Fickes**, [1996] N.S.J. No. 678 (S.C.). As a result, I would remit that aspect of the claim back to the Supreme Court for determination of the location of the right-of-way over the Bowser Lot to Lots A and B.

Conclusion

[30] I would allow this ground of appeal and find that there are express grants of right-of-way over the Bowser Lot to Lots A and B. I would remit the matter to the court for determination of the location of the right-of-way. In so doing I would not place any restrictions on the application judge to receive further evidence or submissions from the parties.

Issue #2 Did the application judge err in failing to apply the proper legal principles relating to the establishment of a right-of-way by necessity in determining that there was no right-of-way by necessity to the Sheep Pen Lot?

[31] The appellants argue that the application judge erred by concluding that they did not have a right-of-way easement by necessity to the Sheep Pen Lot.

[32] As the appellants explained:

> ... He held that there were two alternate possible access routes to the Sheep Pen Lot: by passing over Lots A and B and by water from the Atlantic Ocean. ... (Appellant's Factum, ¶55)

[33] These alternatives meant that there was no "necessity" to support their claim for a right-of-way over the Bowser Lot.

[34] The Sheas argue that the application judge erred in accepting these alternatives and they ask us to find that there was a right-of-way by necessity over the Bowser Lot to the Sheep Pen Lot.

[35] I will deal first with the application judge's suggestion that the Sheas can access the Sheep Pen Lot over Lot A. I have already found that there is an expressly granted right-of-way over the Bowser Lot to Lots A and B. The question therefore becomes: can the Sheas access the Sheep Pen Lot via Lot A or B without having a separate right-of-way over the Bowser Lot? In my view they cannot.

[36] The general rule is that the owner of a dominant tenement cannot use a pre-existing right-of-way over the subservient tenement to access a subsequently acquired property that is adjacent to the dominant tenement. (**Harris v. Flower**, (1904), 91 L.T. 816 (C.A.)). Translated to this case, the Sheas could not rely on any pre-existing right-of-way over the Bowser land to Lots A and B, which they acquired in 1971, to also access the Sheep Pen Lot when they acquired it in 1972 without illegally over-burdening the Bowser Lot. I agree with the appellants when they say that the trial judge erred by negating necessity by suggesting they could access the Sheep Pen Lot over Lot A. However, even though he made that suggestion, he went further to consider whether a right-of-way by necessity existed regardless of whether the Sheep Pen Lot could be accessed over Lots A or B.

[37] I will now turn to whether he erred in making this determination.

[38] In **Hirtle v. Ernst**, [1991] N.S.J. 531 (Q.L.)(N.S.S.C.T.D.), Nathanson J. cited Goddard, A Treatise on the Law of Easements (6th. Ed., Stevens and Sons, Limited, 1904) at follows:

> "... It frequently happens that property is so situated that, unless the owner is permitted to make some use of his neighbour's land, the property would be unusable and worthless. In cases of this kind the law generally steps in and provides the owner of the otherwise useless property with the easement he wants, because of the necessity he has for it. The most common instance of this kind of easement occurs when a piece of land is wholly surrounded by the land of other persons, so that unless the owner were permitted to pass over the surrounding land, he would have no means of getting to his own property, and it would be worthless. In this case the easement which

> the law would provide would be a right of way, commonly called 'a way of necessity ..."

And at p. 359:

> "Rights of way of necessity are acquired by implied grant. A grant of a way of necessity is presumed to have been made whenever land has been sold which is inaccessible except by passing over the adjoining land of the grantor or by committing a trespass upon the land of a stranger, or when an owner of land sells a portion and reserves a part which is inaccessible except by passing over the land sold. This species of right has been recognised from very early times, and is said to depend upon the principle that when a grant is made, every right is also presumed to have been granted, without which the subject of the grant would be useless ..."

[39] As Jonathan Gaunt, Q.C. and Honourable Mr. Justice Morgan, *Gale on Easements*, 18th ed. (London, U.K.: Sweet and Maxwell, 2008) explains, an implied grant may arise "Where without a means of access or other right, the land granted or retained would be rendered completely inaccessible or unusable". The authors state at p. 171:

> A way of necessity, strictly so called, may arise where, on a disposition by a common owner of part of his land, either the part disposed of or the part retained is left without any legally enforceable means of access. In such a case the part so left inaccessible may be entitled, as of necessity, to a way over the other part.

[40] **Hirtle v. Ernst**, **supra**, referred to by the application judge in his decision contains an extensive review of cases on the rights-of-way of necessity where water may be a means of access to a land-locked parcel of land. Justice Nathanson had to address the doctrine of right-of-way by necessity as it applied to the land partially bordering on water.

[41] In **Hirtle**, the plaintiff only had two options for accessing his land: either to cross lands he did not own, or to travel by boat through Big Mushamush Lake. Justice Nathanson explained:

> It is noted that two essential characteristics of rights of way of necessity are the existence of circumstances which give rise to an implied grant of the right and inaccessibility giving rise to a necessity for the right. I will discuss both of these

> characteristics although, as will be seen, the primary focus of these reasons is the latter one, that is, the nature of the necessity which must be proved in order to establish the existence of a right of way of necessity.
>
> Note that a grant of a right of way of necessity is presumed to have been made when land is sold which is inaccessible except by passing over the adjoining land of the owner. This situation can exist when land is severed by sale resulting in one portion being inaccessible except by passing over the other portion. Thus, the grant of a right of way of necessity is presumed when land is severed by sale so that one portion is inaccessible, except by passing over the other portion. The principle is explained in Goddard, *A Treatise on the Law of Easements,* supra, p. 361, in this manner:
>
> > "Every right of way of necessity is founded upon a presumed grant, and unless a grant can be presumed, no way of necessity can be claimed, even though a landowner is in consequence totally deprived of all means of access to his land. *A grant of this kind is generally presumed when property in land has been severed by sale*, and when one portion is inaccessible except by passing over the other, or by trespassing on the land of a stranger. No grant of right of way over the stranger's land can be presumed, and therefore no way of necessity over that land can be acquired, but a grant by the owner of one of the severed portions to the owner of the other can be presumed, and therefore a way of necessity over his soil can be claimed ..."
> >
> > ...
>
> It will also be noted that the land sold must be inaccessible, except by passing over the adjoining land of the grantor or, more particularly, except by passing over the other portion of land severed by sale. The owner has a necessity for access to the land so that it will not be unusable and worthless. ... (pp. 5-6)

[42] Justice Nathanson then had to consider what was meant by "necessity" and whether the option of water access through Big Mushamush Lake was sufficient to defeat the plaintiff's claim to a right-of-way. He goes on to say:

> It would seem to appear from the foregoing statements quoted from various texts that a fundamental requirement of a right of way of necessity is the existence of absolute inaccessibility giving rise to an absolute necessity for access. In my opinion, that is too broad a statement. It will be noted that the statements quoted from the texts refer to lots which are land-locked. There ought be no doubt that the

> general statement at the beginning of this paragraph does apply to land-locked lots, but there is reason to believe that it does not necessarily apply to lots which border on or are partly surrounded by water. (p. 7)

[43] Nathanson J. summarized the applicable principles, leading to his finding that the plaintiff had established a right of way of necessity:

> The cases which have been cited indicate that the doctrine of right of way of necessity has been continuing to evolve over the years and has evolved to the stage where a number of statements of principle can be added to the traditional conception of the doctrine:
>
> > 1. **The doctrine of right of way of necessity is public policy -- that land should be able to be used and not rendered useless** (see Goddard, *A Treatise on the Law of Easements, supra*, pp. 359-61; *Feoffees of Grammar School in Ipswich v. Proprietors of Jeffreys' Neck Passage, supra*; and *Hancock v. Henderson, supra*).
> >
> > 2. **Although there can be no right of way of necessity where there is an alternative inconvenient means of access, the requirement of an absolute necessity or a strict necessity has developed into a rule of practical necessity** (see *Redman v. Kidwell, supra*, and *Littlefield v. Hubbard, supra*).
> >
> > 3. **Water access is not considered to be the same as access over adjacent land** (see *Harris v. Jervis et al., supra*; *Michalak et al. v. Patterson et al., supra*; *Hancock v. Henderson, supra*; and *William Dahm Reality v. Cardel, supra*). That is especially so in cases where the water access is not as of right or would be contrary to law (see Megarry and Wade, *The Law of Real Property, supra*, at p. 831) where access is not available for transportation of things needed for reasonable use of the land to be accessed (see *Feoffees of Grammar School in Ipswich v. Proprietors of Jeffreys' Neck Passage, supra*), where the water access does not have transportation facilities for carrying on the ordinary and necessary activities of life to and from the land (see *Cookston v. Box, supra*), or where the water is not navigable or usable as a highway for commerce and travel (see *Peasley v. State of New York, supra*).
>
> In the present case, I find: that, without a right of way of necessity, the lot in question will not be able to be used and will be useless; that this is not a case where there exists an alternative, though inconvenient, means of access; and that

> water access over Big Mushamush Lake to the lot in question is not by right and, indeed, would probably be contrary to law pursuant to ss. 1(j) and 3 of the *Water Act*, R.S.N.S. 1989, Ch. 500. (pp. 9-10)

[44] The other case referred to by the application judge on the issue of water access in the context of a claim of necessity is **Dobson v. Tulloch**, [1994] O.J. No. 531 (Q.L.), aff'd [1997] O.J. No. 2854 (Q.L.). In **Dobson**, Justice Pardu of the Ontario Court of Justice (General Division) had to determine whether the defendants were entitled to an easement over the plaintiff's land which was completely land-locked except for a small portion that abutted the Mississagi River.

[45] Justice Pardu suggested the type or extent of water access available to a property abutting on water must be considered before it can be said that water access defeats an easement of necessity. On the facts, the decision specifically deals with one way in which water access will not negate necessity, namely, where the water is unnavigable. Justice Pardu concluded that a navigable body of water must have a useful capacity as a public highway of transportation, including some continuity and predictability in the ability to use the water course for transportation (¶46). In that case, she determined that the Mississagi River was not navigable water and concluded that the river provided no access whatsoever.

[46] The **Dobson** case is instructive in that it is a case where a strict test of necessity is applied but fails to be met despite frontage on a body of water. At ¶52 Justice Pardu said:

> 52 Without attempting to formulate a general test as to when access to water will defeat an easement of necessity, I am not satisfied that the Mississagi River provided in 1891 such access to Parcels 612 Algoma, 6927 Algoma Centre Section and Parcel 1940 Algoma Centre Section so as to make unnecessary an inference that there is access by way of implied easement of necessity over the parcel to the south belonging to the Dobsons. The ability to travel some distance from waterfall to shoal on water abutting property does not, without more, constitute access to otherwise landlocked property. ...

[47] The application judge referenced **Hirtle** and **Dobson** and concluded that the applicants were not entitled to a right-of-way of necessity. He says:

> 89 Moreover, bearing in mind the analysis and reasoning of the law in *Hirtle*, by Justice Nathanson, and *Dobson* by Justice Pardu, it would seem to me that from the aerial photograph in 1974 that the sheep pen lot is readily accessible by water as it fronts on the Atlantic Ocean. While understandably courts will be reluctant to rely on water access as the only means of access to property bordering water, in the case at Bar, it is merely another means of possible access to the sheep pen lot and therefore undermines a claim of "practical necessity" as referred to by Justice Nathanson or, as referred to in terms of the traditional requirement for "absolute necessity" of access.

[48] Although he did not review **Hirtle** and **Dobson** in the detail I have in these reasons, it is obvious from the above that Rosinski J. was of the opinion that necessity was not established from the facts regardless of whether the correct test is practical or absolute necessity. What comes from these authorities is that the nature and extent of the water access may negate a right-of-way by necessity. Where the water is navigable as a public right, the access will be sufficient to trump a claim of necessity. It is implicit from the application judge's decision here that he felt that the nature and extent of the water access was sufficient to negate a right-of-way by necessity to the Sheep Pen Lot.

[49] I would also add the appellants gave no evidence of any special circumstance that made the Sheep Pen Lot inaccessible by the ocean despite its navigability. At the appeal hearing there was some discussion that the Sheas might want to sell the Sheep Pen Lot and that access by water only would make it significantly less valuable. Beyond this, no evidence regarding the desired use of the Sheep Pen Lot or how the ocean access would make that use impossible was presented. There is currently no dwelling on the property and there is no evidence there ever has been one. In these circumstances, I am satisfied that the application judge did not err in concluding that the water access available to access the Sheep Pen Lot was sufficient to defeat the claim of necessity.

[50] I would dismiss this ground of appeal.

Costs

[51] As success on the appeal has been divided, I would decline to award costs to either party.

[52] I would rescind the costs order made on the application and order that no costs be awarded to either party on that application. I say this for the following reasons. First, success on the application would also have been divided. Even if the application judge had correctly found there was an express grant of a right-of-way over the Bowser Lot to Lots A and B, the appellants failed to establish a right-of-way to the Sheep Pen Lot.

[53] Second, although I have found that the application judge was in error in his determination of the express grant of the right-of-way to the Sheas for Lots A and B, this error is rooted in the fact that he was provided with very little guidance by plaintiffs' counsel at trial. In particular, there was no abstract of title provided to him, deeds upon which the plaintiffs were relying were not tendered and, as noted earlier, the application judge was given little assistance in determining the issues before him.

Conclusion

[54] I would allow the appeal, in part, remit the matter to the Supreme Court for determination of the location of the right-of-way on the Bowser Lot. Each party shall bear their own costs of the appeal and the application below. I will leave it to the application judge to determine what costs, if any, will be awarded on the hearing to establish the location of the right-of-way on the Bowser Lot.

Farrar, J.A.

Concurred in:

Fichaud, J.A.

Beveridge, J.A.