NOVA SCOTIA COURT OF APPEAL
Citation: *Cook v. St. Mary's (Municipality)*, 2021 NSCA 72

Date: 20211014
Docket: CA 499429
Registry: Halifax

Between:

Buddy Vernon Cook and Cindy Mildred Cook and Robert Leo Vernon Cook
Appellants

v.

The Municipality of the District of St. Mary's and the Attorney General of Nova Scotia representing Her Majesty the Queen in right of the Province of Nova Scotia
Respondents

Judge:	The Honourable Justice M. Jill Hamilton
Appeal Heard:	May 12, 2021, in Halifax, Nova Scotia
Subject:	Real Property; Private Right of Way; *Municipal Government Act*, S.N.S. 1998, c. 18; *Public Highways Act*, R.S.N.S. 1989, c. 371.
Summary:	The application judge engaged in substantial statutory interpretation of the *Municipal Government Act* and the *Public Highways Act*, when he found the appellants did not have a prescriptive private right of way over a gravelled road (the "Laneway"), because it was public at the time the respondent expropriated it.
Issues:	(1) Did the judge err in finding the Laneway was public and the appellants had no private right of way over it at the time of expropriation?

(2) Did the judge deny the appellants natural justice by basing his decision on arguments not put before him by the parties, without giving them the opportunity to respond?

(3) Should the appellants' motion to adduce fresh evidence be granted?

Result: Appeal dismissed.

(1) Applying the common law doctrine of dedication and acceptance, and not endorsing the statutory interpretation the judge applied, the judge did not err in concluding the Laneway was public at the time of expropriation and the appellants did not have any private right of way over it.

(2) The Cooks were not denied natural justice and had the opportunity at the hearing in this Court to make any arguments they wished to make about the statutory interpretation the judge engaged in.

(3) The Cooks' motion to adduce fresh evidence was dismissed as it is not relevant and could not reasonably have affected the result.

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Respondents

Judges:	Wood C.J.N.S, Hamilton and Bryson JJ.A.
Appeal Heard:	May 12, 2021, in Halifax, Nova Scotia
Held:	Motion to adduce fresh evidence dismissed and appeal dismissed, with provision made for submissions on costs, per reasons for judgment of Hamilton J.A.; Wood C.J.N.S. and Bryson J.A. concurring
Counsel:	Robert Pineo, Grace MacCormick and Paul Wadden for the Appellants Peter M. Rogers, Q.C. and Natasha Puka for the Municipality of the District of St. Mary's Attorney General of Nova Scotia not participating

Reasons for judgment:

[1] The issue to be resolved by the application judge on the evidence before him was whether the appellants (the "Cooks") had a prescriptive private right of way over a gravelled road (the "Laneway") running between Highway 7 and Sherbrooke Lake, at the time the respondent Municipality expropriated it on November 13, 2017. If so, the Cooks may be entitled to compensation from the Municipality for the loss of the right of way as a result of the expropriation. The parties agreed that in order for a prescriptive right of way to arise, the Laneway must be private, not public.

[2] The judge, Justice John A. Keith, summarized the situation in his reasons (2019 NSSC 374):

> [1] Sherbrooke Lake is located beside the Village of Sherbrooke, Municipality of the District of St. Mary's (the "**Municipality**"). A gravel laneway bearing PID No. 35225572 (the "**Laneway**") connects the Village with Sherbrooke Lake.
>
> [2] The lake forms an important part of the Municipality's water supply system. The Laneway has been used by the Municipality and, before that, by the Province for many years to construct and maintain the water supply system.
>
> [3] The Laneway is also used by members of the public, including the [Cooks] who own property alongside the Laneway and operate a convenience store and gas bar on Highway 7 where the northern end of the Laneway begins.
>
> [4] Robert Kelly owned a small 8' x 8' parcel of land near the southern end of the Laneway, on the shores of Sherbrooke Lake. By Warranty Deed dated June 1, 2017, Mr. Kelly conveyed title to this parcel to the [Cooks]. Also, on June 1, 2017, and by separate Quit Claim Deed, Mr. Kelly conveyed whatever interest he had in the Laneway to the [Cooks].
>
> [5] On November 13, 2017, the Municipality responded to this Quit Claim Deed by depositing documents with the Registrar of Deeds for Guysborough County expropriating the Laneway under Nova Scotia's *Expropriation Act*, R.S.N.S. 1989, c. 156 as amended (the "**Act**").
>
> [6] The Municipality then filed this proceeding under Section 17 of the *Act* to "make a determination respecting the state of title to the land and to order who had a right, estate or interest in the land as at [November 13, 2017] and the nature and extent thereof." The Municipality named the Province as a Respondent in this proceeding as well as Buddy Vernon Cook, his spouse Cindy Mildred Cook, and their son Robert Leo Vernon Cook (collectively, the "**Cooks**").
>
> [7] The Province did not participate in this proceeding and claimed no interest in the Laneway.

> [8] The Respondent Cooks do not claim to own the Laneway. Rather, they claim to have acquired, by prescription, a private right of way over the Laneway. Other than the Cooks, and despite public notice, no other person came forward to claim any right or interest in the Laneway.
>
> [9] I am asked to determine who has a right, estate or interest in the Laneway, together with the nature and extent of any such right, estate or interest.

[3] Among other findings, the judge held the Laneway was public, so that the Cooks did not have any private right of way over it:

> [10] For the reasons which follow, I have determined that the Laneway is a street which vested absolutely in the Municipality and is currently open for unobstructed use by the public pursuant to Section 308(1) of the *Municipal Government Act*, SNS 1998, c 18 as amended (the "**MGA**"). In the event this is in error and provisionally, the Laneway has been thrown open to the public. Through the doctrine of dedication and acceptance, it constitutes a "common and public highway" which vests with the Province under Sections 11(1) and (2) of the *Public Highways Act*, RSNS 1989, c. 371 as amended (the "**PHA**"). In all events, the Cooks may continue to use the Laneway as members of the public. However, they do not have any private right of way (or private control) over the Laneway. Any such private interests would be inconsistent with the existing public nature of the Laneway.

[4] Applying the common law doctrine of dedication and acceptance to determine whether a road is public, I agree with the judge's conclusion that the Laneway was public at the time of expropriation and the Cooks did not have any private right of way over it. Given the evidence and arguments in this case, this was the only matter requiring determination by the judge. Accordingly, I do not endorse the extensive statutory interpretation in which the judge engaged (paragraphs 22–31(2)) to reach his conclusion that the Laneway was a street under the *MGA*, owned by the Municipality, or, alternatively, a highway under the *PHA*, owned by the Province. I would dismiss the appeal.

ISSUES

[5] The issues are:

1. Did the judge err in finding the Laneway was public and the Cooks had no private right of way over it at the time of expropriation?
2. Did the judge deny the Cooks natural justice by basing his decision on arguments not put before him by the parties, without giving them the opportunity to respond?

3. Should the Cooks' motion to adduce fresh evidence be granted?

The judge did not err in finding the "Laneway" was public and the Cooks had no private right of way over it at the time of expropriation.

[6] The Cooks' position by the time of the hearing before the judge was the Laneway was private at the time of expropriation, they did not know who owned it and they had a prescriptive right of way over it. They agreed if the Laneway were public, they had no prescriptive right. The Municipality's position was the Laneway was public, with its strongest submission being it was deemed owned by the Province by virtue of s. 11 of the *PHA*.

[7] There are no credibility issues and there was no cross-examination of the affiants.

[8] In light of the evidence and the positions of the parties, it was unnecessary for the judge to determine ownership of the Laneway at the time of expropriation. The application before him pursuant to s. 17 of the *Expropriation Act*, R.S.N.S. 1989, c. 156 was for the sole purpose of determining who may be entitled to compensation as a result of the expropriation. No one claimed ownership of the Laneway, despite public notice of the expropriation. The Cooks conceded they did not own it. The evidence of the records at the Land Registry Office suggested it was ungranted. The Province specifically disclaimed any interest in it. The Municipality had expropriated it, making it the owner of the Laneway, responsible to pay any compensation due to the Cooks. Ownership immediately prior to the expropriation was irrelevant to the issue to be resolved.

[9] The only issue the judge needed to decide was whether the Laneway was private or public and, if private, whether the Cooks had a private right of way over it. The Judge recognized this:

> [21] Regardless, the question before me is not so much whether the Laneway is a route but, rather, whether it is a public route (as the Municipality contends) or, alternatively, a private route burdened by various private rights of way (as the Cooks maintain).

[10] The doctrine of dedication and acceptance is the test at common law for determining if a road is public. It governs here unless the evidence indicates a provision of the *PHA* or the *MGA* applies to change the test.

[11] For a road to be a "common or public highway" under the *PHA*, it must fall within s. 11(1):

> 11(1) Except in so far as they have been closed according to law,
>
> (a) all allowances for highways made by surveyors for the Crown;
>
> (b) all highways laid out or established under the authority of any statute;
>
> (c) all roads on which public money has been expended for opening, or on which statute labour has been performed prior to the twenty-first day of March, 1953;
>
> (d) all roads passing through Indian lands;
>
> (e) **all roads dedicated by the owners of the land to public use**;
>
> (f) **every road now open and used as a public road or highway**; and
>
> (g) all alterations and deviations of, and all bridges on or along any road or highway,
>
> shall be deemed to be common and public highway until the contrary is shown.
>
> (2) Every common and public highway, together with the land within the highway's boundaries, is vested in Her Majesty in right of the Province.
>
> …
>
> [Emphasis added]

[12] The only possible clauses that could apply given the evidence were (e) and (f).

[13] The Municipality argued s. 11(1)(f) applied because the Laneway was "**now** open and used as a public road or highway". As the judge recognized, s. 11(1)(f) does not apply. Section 9(2) of the *Interpretation Act*, R.S.N.S. 1989, c. 235, provides the word "now" in an enactment refers to "the time when the enactment comes into force." That date for this wording in s. 11(1)(f) of the *PHA* has been determined to be 1919; *Frank George's Island Investments Ltd v. Shannon*, 2016 NSCA 24 at paras. 17–18. While the Laneway was shown on a plan from the 1900s, there was nothing on the plan to indicate if it was private or used by the public at that time. Thus, s. 11(1)(f) does not apply to make the Laneway public.

[14] That leaves us, on the evidence in this case, with s. 11(1)(e), which adopts the common law test of dedication and acceptance, to determine if a road is public.

[15] The *MGA* provides:

> Interpretation
>
> 307 In this Part, "street" means a public street, highway, road, lane, sidewalk, thoroughfare, bridge, square and the curbs, gutters, culverts and retaining walls in connection therewith, but does not include streets vested in Her Majesty in right of the Province.
>
> Streets vested in municipality
>
> 308 (1) All streets in a municipality are vested absolutely in the municipality.
>
> (2) In so far as is consistent with their use by the public, a council has full control over the streets in the municipality.
>
> (3) No road, or allowance for a road, becomes a street until the council formally accepts the road or allowance, **or the road or allowance is vested in the municipality according to law.**
>
> (4) Possession, occupation, use or obstruction of a street, or a part of a street, does not give and never has given any estate, right or title to the street.
>
> [Emphasis added]

[16] A reasonable interpretation of s. 307 is that "street" means the stated "features" that are already public. For instance, it does not convert private roads and lanes into public roads and lanes, which would then vest in the Municipality by virtue of s. 308(1). That being the case, how does a private road become public applying the *MGA*? Section 308(3) provides it can become public either by being accepted as such by the municipal council or by being "vested in the municipality according to law". "Vested … according to law" means applying the common law test of dedication and acceptance, so again, on the evidence in this case, the *MGA* does not alter the common law test to be applied.

[17] Thus, on the basis of the evidence and the positions of the parties in this case, the test for whether the Laneway is public or private remains the common law test of dedication and acceptance, unaltered by the *PHA* or the *MGA*, making the extensive statutory interpretation engaged in by the judge unnecessary.

[18] There is, however, one error in the judge's statutory interpretation that should be pointed out. In paragraph 24 of his reasons he states:

> [24] The PHA focuses on the word "highway", as the name of the statute suggests. Section 2(f) defines a "highway" in a somewhat self-referential way as "a public highway or public road". **Section 3 narrows the scope of the statute by stating that the PHA applies to "all highways within the Province" but**

> **excludes "highways" located within the boundaries of a municipality except where expressly provided.**
>
> [Emphasis added]

[19] Section 3 of the *PHA* states:

> 3 This Act applies to all highways within the Province not included **within the boundaries of a city or town or owned by a municipality**, and does not, except where expressly provided, apply to highways **within the boundaries of cities or towns or owned by a municipality.**
>
> [Emphasis added]

[20] While s. 3 excludes from the definition of highways those located within the boundaries of a city or town, it does not exclude highways located within the boundaries of a municipality. The wording is different for a municipality. For a municipality, a highway is not excluded by virtue of being within a municipality's boundaries. It is highways **owned** by a municipality that are excluded, not necessarily those within the boundaries of a municipality.

[21] A review of the case law dealing with the law of dedication and acceptance indicates the importance of the facts to the outcome of each case. I cannot do better to explain the applicable law than to refer to the *Nova Scotia Real Property Practice Manual*, (Toronto: LexisNexis Canada Inc., Looseleaf, updated to 2019) at pp. 13-8.1 to 13-10:

> **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.** … [*Harrison v. Harrison*, [1883] N.S.J. No. 1, 16 N.S.R. 338 (C.A.); *Bedford (Town) v. Guernsey Development Group Ltd.*, [1986] N.S.J. No. 286, 75 N.S.R. (2d) 49 (TD).]
>
> 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. An owner's action permitting the public to use the land as a street for a number of years, coupled with the fact that he referred to it as a street in a deed and that the town serviced it as a street, was found by the Trial Division to constitute dedication and, although some reservations were expressed by the Appeal Division, this finding was not disturbed on appeal. [*Andrews v. R.A. Douglas Ltd*., [1975] N.S.J. No. 480, 17 N.S.R. (2d) 209 (T.D.), aff'd (1976), 17 N.S.R. (2d) 181 (C.A.).]

The requirements for creation of a public highway by dedication were laid down by Duff, J [in *Bailey v. City of Victoria*, [1920] 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.*, 11 Ch.D 327) [referred to in *Bailey, supra.*]

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 [*De Young v. Giles*, [1915] N.S.J. No. 24, 49 N.S.R. 398 (C.A.)]. In *De Young v. Giles*, 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**." [See also *Henderson v. Quinn*, 2019 NSSC 190 at para. 51; *Clark v. North Kawartha (Township)*, [2009] O.J. No. 3306 at para. 35, 36 and *Gibbs v. Grand Bend (Village)*, (1995), 26 O.R. (3d) 644, [1995] O.J. No. 3709 (Ont. C.A.), para. 110].

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.**

The expenditure of public money on maintenance of a road can be evidence of acceptance by the municipality, [*Schraedar v. Grattan*

> *Township*, [1945] O.J. No. 537, [1945] O.R. 657 (H.C.J.)] and such payment may make the road a public highway even in the absence of an intention to dedicate it. [*Rideout v. Howlett*, [1913] N.B.J. No. 3, 12 E.L.R 527 (S.C.), aff'd 42 N.B.R. 200 (C.A.).]
>
> **Where there has been no acceptance by the public, mere intention to dedicate a road does not make it a highway. Even though the road is shown on a plan, if there is no use by the public, there is no acceptance of it as a public highway**… .
>
> The status of a road serving four properties in the vicinity of Stewiacke came before the Supreme Court of Canada in 1930 [*Fulton v. Creelman*, [1930] S.C.J. No. 59, [1931] S.C.R. 221.] The Ancient proprietor Registry Book of 1780 was considered but found to be of doubtful evidentiary value. The Supreme Court, however, placed great reliance on evidence of public and uninterrupted use of the road as proof of dedication. In giving the decision for the majority, Newcombe J. stated:
>
> > The uninterrupted user of a road justifies a presumption in favour of the original *animus dedicandi* even against the Crown… ." I am persuaded that the learned Chief Justice has allowed his mind to be unduly affected by the absence of evidence of compliance with the statutory procedures for the lay out and the establishment of the road. These settlers were evidently proceeding voluntarily, and that is what might naturally have been anticipated.
> >
> > [Emphasis added]
> >
> > [Some footnotes not included]

[22] While the judge for the most part based his decision on statutory interpretation, rather than the common law test, he referred to the common law test in his reasons (paras. 10 and 30(3)(c)(ii)), and helpfully, correctly analysed the evidence relevant to it:

> [17] The Laneway is unique in a number of respects including:
>
> 1. While it has been given a PID number (PID No. 35225572), no party has been able to identify a private owner of the Laneway from the documents registered on title. …:
>
> 2. Despite having no identified owner on title:
>
> a) Several homes and at least one existing business (owned by the Cooks) used the Laneway to access their property for years. …
>
> b) One person who owned land near the Laneway and is of particular interest to these proceedings is Robert Kelly. As indicated, Mr. Kelly conveyed fee simple in the Small Parcel to all

of the Respondents (Buddy [C]ook, Cindy Cook and Robert Cook) on June 1, 2017 by way of Warranty Deed. Also, on June 1, 2017, Mr. Kelly also conveyed whatever interest he might hold in the Laneway by way of Quit Claim Deed. The difference [in] the method of conveyance is obviously significant, as mentioned. Mr. Kelly was either unwilling or unable to warrant title in the Laneway. Regardless, the Cooks do not claim to own the Laneway in any event. Instead, they argue that as successors in title to Mr. Kelly, they have acquired (as a successor in title) whatever private right of way Mr. Kelly acquired by prescription as owner of the Small Parcel from 1965 forward. At paragraph 15 of the affidavit signed by all of the Respondent Cooks, they state that "we, and our predecessors in title have used the Subject Property openly, peacefully and without permission, interference or interruption since at least 1965". However, I have no evidence from Mr. Kelly. And the evidence of prescriptive rights which might attach to the Small Parcel are limited to that single, broad statement in paragraph 15;

c) The Municipality used the Laneway to access and service its water supply infrastructure located on the shores of Sherbrooke Lake. Indeed, by 1970 and 1973 and as part of the restoration of the Historic Village of Sherbrooke, a new water supply system was constructed. This included a dam and dyke located at the end of the Laneway on the shores of Sherbrooke Lake. It also included a pump house built on the north shore of Sherbrooke Lake. The Laneway was used during construction and the water distribution line ran along the Laneway and into the Historic Sherbrooke Village. On August 14, 1989, the Municipality established a Municipal Sewer and Water Utility and on September 15, 1989, the Province formally turned control of this water infrastructure over to the Municipality. By this time, the process of expanding the system to provide water to the entire community of Sherbrooke had begun. In 2000, a water treatment plant was added to this system;

d) The Municipality frequently uses the Laneway to monitor and maintain the water infrastructure. The Municipality also ensures access by plowing the Laneway during the winter;

e) The Laneway is separately identified in various plans of survey registered in the Registry of Deeds including:

i. A plan of survey dated August 26, 1973 and prepared by Otto Rosinski, NSLS. This survey was recorded as 37544483 and contains the note "Road to the Lake. Existing Road"; and

ii. A plan of survey dated January 26, 2009 and prepared by Blake Beaton, NSLS for the Respondents Buddy Cook and Cindy (Carroll) Cook was recorded as document number 93337351 in Registry of Deeds. It depicts the Laneway with the notation "Road maintained by the Municipality of the District of St. Marys";

f) The Laneway is described in various deeds dating as far back as 1960 as a "road" leading to Sherbrooke Lake. And it actually served as a boundary for numerous parcels of land located on either side of it – both in terms of creating a physical separation between properties and also as part of the metes and bounds descriptions on the deeds of adjacent properties. Some of these Deeds involve lands currently owned by the Respondents.

[…]

[18] The Laneway in question is very clearly a well-defined strip of land which appears to be (and has been used as) a thoroughfare by adjacent landowners, the public, and the Municipality for many, many, years. This is not a case where the essential nature of land has changed or been transformed over time into some form of right of way (public or private). The essential nature of the Laneway as a route has remained consistent for as far back as the evidence seems to allow. For example, as indicated:

1. The size and location of the Laneway suggests an intentional route for use by others. It is long, narrow and connects Highway 7 with Sherbrooke Lake;

2. Nobody can identify an historic owner of the Laneway. Indeed, while the Cooks registered a document on title claiming ownership, they properly conceded that they do not claim to own the Laneway for the purposes of this proceeding. Their claim is for a private right of way, as indicated;

3. The Laneway physically separates parcels of land and has served as a means of egress for the owners of those parcels;

4. The Laneway is expressly identified as a natural boundary in the metes and bounds descriptions of adjacent properties;

5. The Laneway has served as an important access route to Sherbrooke Lake and has been used in that capacity by the Municipality to service its water supply infrastructure, adjacent landowners and members of the public.

[19] In short, the size, shape, location, usage and ambiguous title history are all consistent with a route.

[23] He later concluded the Laneway was public, albeit as part of his statutory interpretation of whether it was a "street" under s. 308(1) of the *MGA*:

> [31] …
>
> a) [The Laneway] was thrown open to the public for as long as memory serves and, during that time, had no identifiable private owner;
>
> b) It had a clearly defined location consistent with a public street and was actually used in the metes and bounds descriptions of neighbouring lots as a means of establishing boundaries;
>
> c) There were houses and businesses developed on both sides of the Laneway and the owners of these properties used the Laneway to access their property;
>
> d) It did not connect established communities within a broader transportation network but, rather, terminated at Sherbrooke Lake and was used as a means of connecting to Sherbrooke Lake;
>
> e) The municipality has used the Laneway for decades to operate and maintain critical components of the municipal water supply.

[24] Applying the common law principles of dedication and acceptance, I am satisfied the judge did not err in concluding the Laneway was public at the time of expropriation. The fact the owner is unknown does not preclude dedication, *Macoomb, supra*. Dedication, as well as acceptance, can be inferred by open and unobstructed use by the public for a substantial time, *De Young, supra*; *Henderson, supra*; *Clark, supra*; and *Gibbs, supra*.

[25] As to usage, (1) the Cooks and their customers used part of the Laneway regularly to access the parking for their store since approximately 1982; (2) owners of other properties adjacent to the Laneway had no other way to access a public road, including the owners of the 8 foot by 8 foot lot Mr. Kelly conveyed to the Cooks; (3) the Province installed a water supply system for the Village of Sherbrooke in the early 1970s, which included a dam, dyke and pumphouse at the shore of the Lake and pipes running under the length of the Laneway, to carry water from the Lake to the Village; (4) this water supply system was turned over to the Municipality in 1989; (5) a water treatment plant was installed in 2000; (6) the Municipality used the Laneway to access and service the water supply system and to monitor and maintain the water infrastructure daily and it ensures access by plowing the snow in winter. There was no evidence any signs were ever posted

suggesting the Laneway was private or the public was ever prevented from using it.

[26] Plans referenced the Laneway, showing it existed for many years in its present shape, connecting the highway to the Lake. It was important in providing access from the highway to the Lake for the Municipality, the adjacent landowners and the public. It separated the adjacent properties and was referenced as the boundary to their properties in some of their property descriptions going back to the 1960s.

[27] There is no merit to this ground of appeal. The judge did not err in concluding the Laneway was public at the time of expropriation and the Cooks had no private right of way over it.

The appellants were not denied natural justice

[28] There is no standard of review when considering an issue of natural justice. We consider that question for the first time.

[29] The Cooks argue there was a failure of natural justice because the judge found the Laneway was owned by the Municipality on the basis of s. 308 of the *MGA*, which was not argued by the parties. They say this unfairly prejudiced their ability to respond to this issue.

[30] In its pre-hearing brief, the Municipality queried whether the Laneway was owned by the Municipality, but otherwise did not specifically raise s. 308 of the *MGA*. Its brief focussed on s. 11(1)(f) of the *PHA*, arguing the use of the Laneway for the Village's water supply by the adjacent property owners and the public resulted in the Province owning the Laneway, despite the Province's denial of ownership. When questioned by the judge during the hearing about the possibility of the Laneway being owned by the Municipality, the Municipality indicated it did not see anything in the *MGA* providing for ownership by the Municipality, noting there was nothing in its records indicating it had accepted the Laneway as it suggested was required by s. 308(3).

[31] The Cooks referred to s. 308 and other sections of the *MGA* in their pre-hearing brief to support their argument that the road was not a "public road" or a "municipal road" but did not deal with the possibility that the Municipality owned it under s. 308.

[32] The parties were given the opportunity to make their arguments on the effect of s. 308 before us.

[33] The judge was very engaged in the application before him, raising with the parties many relevant issues concerning the applicable law and what their positions were. It may have been the better practice for him to alert counsel to the statutory interpretation on which he based his decision, either by raising it during the hearing or following, to give both parties the opportunity to address it. Having said that, given I am satisfied the application of the common law doctrine of dedication and acceptance applies and indicates the Laneway was public, not the statutory interpretation process in which the judge engaged, there was no denial of natural justice.

The fresh evidence should not be admitted

[34] Along with related documents, the Cooks applied for the admission of a copy of the Grant of Easement by the Municipality to Charles and Maureen Fraser, owners of a property adjacent to the Laneway. The Grant was dated and registered after the hearing before the judge and before the release of his reasons. It purports to give the Frasers a non-exclusive Access Easement to use the Laneway from the public highway to the Frasers' driveway.

[35] The test for the admission of fresh evidence applied by this Court is referred to in *Nova Scotia (Attorney General) v. Nova Scotia Teachers Union*, 2020 NSCA 17:

> [33] Rule 90.47(1) says the Court of Appeal "may on special grounds" admit fresh evidence. In *Armoyan v. Armoyan*, 2013 NSCA 99, leave to appeal refused [2013] S.C.C.A. No. 446, this Court explained "special grounds":
>
> > [131] Rule 90.47(1) permits the Court of Appeal to admit fresh evidence on "special grounds". The test for "special grounds" stems from *Palmer v. The Queen*, [1980] 1 S.C.R. 759, at p. 775. Under *Palmer*, the admission is governed by: (1) whether there was due diligence in the effort to adduce the evidence at trial, (2) relevance of the fresh evidence, (3) credibility of the fresh evidence, and (4) whether the fresh evidence could reasonably have affected the result. Further, the fresh evidence must be in admissible form. [citations omitted]

[36] The proffered evidence is not admissible because it is not relevant and could not reasonably have affected the result. The substance of the Cooks' argument is that the fresh evidence demonstrates the Municipality "believed" the Laneway was

private and amenable to private property interests. It is equally possible the Municipality was just acting in response to a resident's desire to hedge his bets in the uncertain time when the results of the matter before the judge were still unknown. This is reasonable given the discussion during the hearing of the application before the judge that there was no evidence of the Municipality's future intention as to the use of the Laneway, and if the Municipality cut off public access to it, the past position of the Nova Scotia Utility and Review Board has been that it can only order compensation for expropriations and has no jurisdiction to order an easement.

[37] In any event, the beliefs of the Municipality are not relevant to the factual and inferential analysis of the Laneway's historical character. The property rights to be determined are based on objective criteria, not subjective ones.

Conclusion

[38] I would dismiss the motion to admit fresh evidence and the appeal.

[39] The Municipality requested the parties be given an opportunity to submit their position on costs following the release of our decision. Accordingly, if the parties are unable to agree on costs, the Municipality shall have until October 25, 2021 to provide us with any written submissions on costs that it wishes to make. The Cooks shall then have until November 1, 2021 to provide any written submissions on costs they wish to make.

Hamilton J.A.

Concurred in:

Wood C.J.N.S.

Bryson J.A.