NOVA SCOTIA COURT OF APPEAL

Citation: *Halifax County Condominium Corporation No. 277 v. Halifax Regional Water Commission*, 2024 NSCA 1

Date: 20240103
Docket: CA 524882
Registry: Halifax

Between:

Halifax County Condominium Corporation No. 277 in its corporate capacity and Halifax County Condominium Corporation No. 277 in its capacity as representative of the Unitholders of the Condominium being Louise Michalos, Bernard Swan, Gregory Kerr, David Del Fabbro, Stuart Beckett, Matthew McKenzie and Sarah Berkvens, Ruben Herrera and Elaine Johnson, Sandra Lohnes, Mary Beth Walsh and Ian Walsh, Elisabeth Fraser, Amy Deeb and Andrew Charles MacMillan, Robert Moody and Janet Braunstein, Jennifer Richard, Ron Ormston and Fernande Devoste, Jennifer MacDonald and Darci Shaw, Michelle Ferreira, Roger Langen and Veronica Eley, Guy Monroe and Sharon Monroe, Megan MacLeod, Trevor Townsend and Pamela Townsend, Johanna Zaglauer, Carl Coady, Mary Elisabeth McVey as Representative of the Estate of Samuel Kerr McVey, Michele Dumaresq, Adam Peters and Amy Peters, Steven Arsenault, Scott McGaw, Angus McCormack, Jennifer Pinder, Catherine Steele, Michael Coll, Margaret Chisholm, Robert Dubourdieu, Paul Ritchie, Ellen Klein, Dr. Klara Vargha, Justin Hu and Jennifer Lam, Greg English, Jordan Murray, Cleah Bunting, Erica Corbett and Junwoo Kim, Marc Almon, Guy Kenneth Munroe and Sharon Munroe

Appellants

v.

Halifax Regional Water Commission

Respondent

Judge:	The Honourable Justice Peter M. S. Bryson
Appeal Heard:	November 30, 2023, in Halifax, Nova Scotia
Subject:	Summary Judgment on Pleadings. Trespass to Property. Nuisance. Injurious affection. Easements. Excessive use of Easements. Limitations of Action.

Cases Cited: *Nova Scotia (Attorney General) v. Carvery*, 2016 NSCA 21; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959; *Canada (Attorney General) v. MacQueen*, 2013 NSCA 143; *Sherman v. Giles* (1994), 137 N.S.R. (2d) 52; *W. Eric Whebby Ltd. v. Doug Boehner Trucking & Excavating Ltd.*, 2007 NSCA 92; *Chapman v. C. A. Realty, in Bankruptcy*, 2018 NSCA 81; *Copeland v. Greenhalf*, [1952] Ch. 488 (Eng. Ch. Div.); *Batchelor v. Marlow*, [2001] EWCA Civ 1051 (Eng. C.A.). *Robinson v. Pipito*, 2014 BCCA 200; *Niata Enterprises Ltd v. Snowcat Property Holdings Ltd*, 2023 MBCA 48; *Moncrieff v. Jamison*, [2007] UKHL 42; *Leiriao v. Val-Bélair (Town)*, [1991] 3 S.C.R. 349; *Dell Holdings Ltd. v. Toronto Area Transit Operating Authority*, [1997] 1 S.C.R. 32; *St. Pierre v. Ontario (Minister of Transportation and Communications)*, [1987] 1 S.C.R. 906; *Hunter v. Canary Wharf*, [1997] A.C. 655 (H.L.); *R. v. Horne*, 2023 NSCA 64; *R. v. R.E.M.*, 2008 SCC 51; *R. v. Sheppard*, 2002 SCC 26; *R. v. Gagnon*, 2006 SCC 17; *R. v. G.F.*, 2021 SCC 20; *Shannex Inc. v. Dora Construction Ltd.*, 2016 NSCA 89; *Nova Scotia Association of Health Organizations Long Term Disability Plan Trust Fund v. Amirault*, 2017 NSCA 50;

Legislation Cited: *Civil Procedure Rule* 13.03; *Land Registration Act*, S.N.S. 2001, c. 6; *Halifax Regional Water Commission Act*, S.N.S. 2007, c. 55; *Halifax Regional Municipality Charter*; *Limitations of Actions Act*, S.N.S. 2014, c. 35;

Authors Cited: Allen M. Linden et al, *Canadian Tort Law*, 12th ed (Toronto: LexisNexis Canada, 2022); Lewis N. Klar, *Tort Law*, 5th ed (Toronto: Carswell, 2012); Jonathan Gaunt, Q.C. & The Honourable Mr. Justice Morgan, *Gale on Easements*, 20th ed (London: Sweet & Maxwell, 2017); C. W. MacIntosh & Diana Ginn, *Nova Scotia Real Property Practice Manual*, (Toronto: LexisNexis Butterworths, 1988); *Gardner v. Davis*, [1999] EHLR 13 (CA); *Wood v. Saunders* (1875), L.R. 10 Ch. App. 582;

Summary: The former City of Dartmouth expropriated an easement over lands now occupied by the appellant condominium corporation in which the individual appellants were or had been unit holders. In 2017-18, the former City of Dartmouth successor,

the Halifax Water Commission, replaced the drainage pipe within the expropriated easement, opening some of the drainage way to the air. The appellants claimed this interfered with the use and enjoyment of their property and exceeded the authorized use of the easement. The appellants claimed in trespass, nuisance, and injurious affection. The Halifax Water Commission brought a motion for summary judgment on pleadings which was granted. The Condominium Corporation and unit holders appealed. The Commission filed a Notice of Contention maintaining the decision could be upheld for alternative reasons including that some of the claims were statute barred.

Issues:

(1) Did the judge err in law in granting summary judgment and dismissing the appellant's application because:
   (a) trespass was not properly pleaded;
   (b) nuisance was not properly pleaded;
   (c) the judge gave inadequate reasons for dismissing the claim for injurious affection;
(2) Could the decision be upheld because some of the claims were statute barred?

Result:

Appeal allowed in part. Trespass was properly pleaded. Nuisance was not properly pleaded. The reasons for dismissing the injurious affection claim were adequate. On the Notice of Contention, claims related to damages occurring during construction in 2017-18, were statute barred.

NOVA SCOTIA COURT OF APPEAL

Citation: *Halifax County Condominium Corporation No. 277 v. Halifax Regional Water Commission*, 2024 NSCA 1

Date: 20240103
Docket: CA 524882
Registry: Halifax

Between:

Halifax County Condominium Corporation No. 277 in its corporate capacity and Halifax County Condominium Corporation No. 277 in its capacity as representative of the Unitholders of the Condominium being Louise Michalos, Bernard Swan, Gregory Kerr, David Del Fabbro, Stuart Beckett, Matthew McKenzie and Sarah Berkvens, Ruben Herrera and Elaine Johnson, Sandra Lohnes, Mary Beth Walsh and Ian Walsh, Elisabeth Fraser, Amy Deeb and Andrew Charles MacMillan, Robert Moody and Janet Braunstein, Jennifer Richard, Ron Ormston and Fernande Devoste, Jennifer MacDonald and Darci Shaw, Michelle Ferreira, Roger Langen and Veronica Eley, Guy Monroe and Sharon Monroe, Megan MacLeod, Trevor Townsend and Pamela Townsend, Johanna Zaglauer, Carl Coady, Mary Elisabeth McVey as Representative of the Estate of Samuel Kerr McVey, Michele Dumaresq, Adam Peters and Amy Peters, Steven Arsenault, Scott McGaw, Angus McCormack, Jennifer Pinder, Catherine Steele, Michael Coll, Margaret Chisholm, Robert Dubourdieu, Paul Ritchie, Ellen Klein, Dr. Klara Vargha, Justin Hu and Jennifer Lam, Greg English, Jordan Murray, Cleah Bunting, Erica Corbett and Junwoo Kim, Marc Almon, Guy Kenneth Munroe and Sharon Munroe

Appellants

v.

Halifax Regional Water Commission

Respondent

Judges:	Bryson, Fichaud and Van den Eynden JJ.A.
Appeal Heard:	November 30, 2023, in Halifax, Nova Scotia
Held:	Appeal allowed in part, per reasons for judgment of Bryson J.A.; Fichaud and Van den Eynden JJ.A. concurring
Counsel:	Robert Pineo, for the appellant Heidi Schedler, K.C. and Randolph Kinghorne for the respondent

Reasons for judgment:

Introduction

[1] Sullivan's Pond is an artificial lake at the most southerly end of what used to be the Shubenacadie Canal system, connecting Dartmouth with the Bay of Fundy. When it was constructed in the early 19th century the lake drained from a small river into Dartmouth Cove in the Halifax Harbour, about half-a-kilometer away.

[2] In 1972, the former City of Dartmouth expropriated an easement for the installation of a pipe to replace the river as a means of drainage from Sullivan's Pond. The pipe was installed underground. Halifax County Condominium Corporation No. 277 is now located on part of the lands over which the 1972 easement runs. The individual appellants are unitholders or former unitholders in the Corporation.

[3] In 2017-18, the Halifax Regional Water Commission, successor in title to the former City of Dartmouth, replaced the old drainage pipe from Sullivan's Pond to Halifax Harbour. In doing so, it opened some of the drainage way to the open air in accordance with directions received from the Department of Fisheries and Oceans to facilitate fish passage between Sullivan's Pond and the Harbour.

[4] The appellants say opening the drain to the surface intruded on the Condominium's use and enjoyment of their property. So they sued the Commission claiming, among other things, trespass, nuisance and injurious affection.

[5] The Commission moved for summary judgment on the pleadings, arguing the appellants' claims were unsustainable at law. They also argued that some of the claims were statute barred.

[6] The Honourable Justice Mona Lynch agreed with the Commission, granted summary judgment, and dismissed the appellants' application (2023 NSSC 128).

[7] The Corporation, its members, and former members now appeal, alleging the judge erred in her application of the summary judgment test to their claims.

[8] The appellants say the judge erred by:

(a) misinterpreting the legal test for private nuisance by finding that misuse of an easement cannot result in a private nuisance outside of the easement;

(b) determining the scope of the appellants' easement in the course of a motion for summary judgment on the pleadings;

(c) finding the appellants did not plead sufficient material facts to support a claim in trespass; and

(d) failing to provide adequate or sufficient reasons to inform the parties of the basis for the court's dismissal of the appellants' injurious affection claim as it relates to trespass.

[9] Notwithstanding the brevity of the pleaded claims, trespass can be discerned on the face of the pleadings. The claim for trespass is not obviously unsustainable. Accordingly, the judge erred in law in granting summary judgment with respect to trespass.

[10] For its part, the Commission filed a Notice of Contention maintaining the decision should be upheld because:

(a) the historic use of the easement by way of underground piping is not a "release" or "abandonment" of the easement;

(b) the appellants failed to "put their best foot forward";

(c) the appellants' application was an abuse of process;

(d) claims for damages arising from construction in 2017-18 are statute barred.

[11] As the following reasons explain, with the exception of (d), the Notice of Contention is without merit.

[12] After an overview of summary judgment, the issues will be addressed in this order:

1. Whether trespass is made out on the pleadings;

2. Whether nuisance is made out on the pleadings (appellants' issues (a) and (b));

3. Whether sufficient reasons were given for dismissing injurious affection relating to trespass;

4. Whether the decision can be otherwise supported (the Notice of Contention).

Summary Judgment

[13] In a summary judgment motion on pleadings, the court must assume the truth of the facts pleaded.[1] Whether pleadings disclose a valid cause of action is a question of law.[2]

[14] Summary judgment can be granted if the challenged pleadings disclose "no cause of action or defence", or make a claim that is "absolutely unsustainable", or "certain to fail".[3]

[15] Provided the plaintiff pleads facts material to the cause of action, the claim should not be struck.[4] In *Hunt v. Carey*, the Supreme Court explained judicial reticence in the absence of certainty that a claim could not succeed:

> […] [I]f there is a chance that the plaintiff might succeed, then that plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues of law and fact that might have to be addressed nor the potential for the defendant to present a strong defence should prevent a plaintiff from proceeding with his or her case. […][5]

Is trespass made out on the pleadings?

[16] The tort of trespass protects a person's possession of land against wrongful interference. That interference must be direct. It is actionable without proof of damage and must be committed either intentionally or negligently.[6]

[17] Trespass can be distinguished from nuisance which involves an indirect interference with the use and enjoyment of land.[7] In practice, it may occasionally

---

[1] *Nova Scotia (Attorney General) v. Carvery*, 2016 NSCA 21 at ¶25; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at ¶30.
[2] *Canada (Attorney General) v. MacQueen*, 2013 NSCA 143 at ¶42.
[3] *Civil Procedure Rule* 13.03; *Nova Scotia (Attorney General) v. Carvery*, *supra* at ¶25.
[4] *MacQueen, supra* at ¶55.
[5] *Hunt v. Carey Canada Inc., supra* at p. 975; and see *Sherman v. Giles* (1994), 137 N.S.R. (2d) 52 at ¶15.
[6] *MacQueen, supra* at ¶85.
[7] *MacQueen, supra* at ¶86, citing *W. Eric Whebby Ltd. v. Doug Boehner Trucking & Excavating Ltd.*, 2007 NSCA 92 at ¶127-130.

be difficult to say whether an interference is direct or indirect and thus a trespass or nuisance.[8]

[18] The full extent of the Commission's 2017-18 changes is not pleaded. Those changes are more fully described in evidence which must be ignored in a motion on pleadings. But the appellants do complain of "above ground piping" in their pleading.

[19] In making the changes to the drainage system in 2017-18, the Commission relied upon the 1972 easement which the City of Dartmouth had expropriated:

> BE IT THEREFORE RESOLVED that the City now expropriates an easement over the land described in Schedule hereto including the right at any time to enter upon the land for the purpose of lying down and constructing sewers, drains, pipes for water and conduits of all kinds***, in, under, and upon the said land*** and for keeping and maintaining the same at all times in good condition and repair and for every such purpose the City shall have access to the said land at all times by its agents, servants, employees and workmen. [Emphasis added.]

[20] The judge decided the language "upon" authorized placing pipes above grade on the easement portion of the Corporation's lands.

[21] The appellants do not agree. They maintain the 2017-18 changes to the drainage system exceed the authority granted to the Commission in the easement. They claim the Commission's "excessive use" of the easement constitutes both nuisance and a trespass.

[22] The appellants plead:

> 1. For compensation for continuing trespass being an exceedance of the [Commission's] use of an easement over the [Corporation's] land.
>
> […]
>
> 8. In March of 2017, the Respondent began construction of a "daylighting" drainage system that included at and above ground piping over the easement area.
>
> 9. The change in the drainage infrastructure has impede[d] the Applicants use of the Subject Property, including:

[8] Allen M. Linden et al, *Canadian Tort Law*, 12th ed (Toronto: LexisNexis Canada, 2022) at p. 539; Lewis N. Klar, *Tort Law*, 5th ed (Toronto: Carswell, 2012) at p. 757.

> a) The inability to use the easement area as they did prior to the constructions; and,
>
> b) The current infrastructure has left a portion of the Subject Property stranded as the Applicants cannot access and use that portion of the property ("the Stranded Portion").

[23] While put somewhat indirectly, the appellants allude to the Commission's use of its easement as approaching full ownership of the easement lands:

> 11. The Applicants plead that the Respondent ***has acquired additional property rights than it originally expropriated*** and reserved at the time of the Corporation's purchase of the Subject Property. The additional property rights that the Respondent acquired amounts to all of the property rights in the easements area and constitutes at law a *de facto* expropriation. [Emphasis added.]

[24] In their reply factum, the appellants concede they "[…] do not advance arguments related to *de facto* expropriation, the acquisition of additional property rights, or the doctrine of merger". Before Justice Lynch, the appellants clarified that the second sentence of ¶11 claiming a *de facto* expropriation was being withdrawn. Nevertheless, the appellants rely on the assertions in the first sentence of ¶11 to argue that rights additional to those described in the easement were being exercised by the Commission. The appellants say that placement of pipes above ground and in the Corporation's airspace exceeds the rights enjoyed by the Commission.

[25] The Corporation argues the easement must be interpreted in accordance with "the facts and circumstances known or assumed by the parties at the time that the [easement] was executed".[9]

[26] The Corporation maintains when interpreting an easement, one looks at the language in the "deeded grant". If the language does not address the point, the surrounding circumstances, including the historic use of the easement itself, may be considered.[10]

---

[9] Jonathan Gaunt, Q.C. & The Honourable Mr. Justice Morgan, *Gale on Easements*, 20th ed (London: Sweet & Maxwell, 2017) at 9-20.

[10] C. W. MacIntosh & Diana Ginn, *Nova Scotia Real Property Practice Manual*, (Toronto: LexisNexis Butterworths, 1988) (looseleaf release 122) c 13 at p. 30-31.

[27] The Corporation adds the historic use of the easement has been for an underground water drainage system since expropriation. Above ground construction was not contemplated or implemented.

[28] The Commission counters that contractual interpretative principles do not apply because the utility easement in this case arose as a result of an expropriation, not a negotiated agreement.

[29] The Commission's position raises two interesting questions. First, the interpretation the Commission places on the use of the easement would suggest no limit on interference with the surface rights on the Corporation's lands. Courts have held that easements are limited proprietary interests and cannot amount to exclusive possession of the land.[11] The rule has been applied in Canada.[12]

[30] In *Chapman v. C. A. Realty, in Bankruptcy*[13], this Court acknowledged the limited nature of an easement:

> [71] Finally, I agree with the judge's finding that ***the appellant's alleged right of control over the ROW is incompatible with its nature as an easement. It is settled law that an easement cannot exclude the owner of the servient tenement from its own property***. The ROW cannot and does not derogate from C.A. Realty's proprietary and possessory rights in its own land. The appellant incorrectly interprets her rights in relation to the ROW in a manner that is inconsistent with C.A. Realty's ownership of its property. ***Her claim to exclusivity threatens to deprive C.A. Realty of the servient tenement of control of its own land, which is inconsistent with the limited nature of an easement***: see *Gale on Easements*, *supra*, at §1-03. [Emphasis added.]

[31] Other cases have suggested that an owner could grant an easement that excludes the owner's use of his land. In England, the high water mark for this principle is *Moncrieff v. Jamison*.[14] The House of Lords decided that a right to park which effectively excluded the owner could constitute an easement. Noting that every grant diminished the owner's use and enjoyment of property, Lord Scott said:

---

[11] *Copeland v. Greenhalf*, [1952] Ch. 488 (Eng. Ch. Div.); *Batchelor v. Marlow*, [2001] EWCA Civ 1051 (Eng. C.A.).
[12] *Robinson v. Pipito*, 2014 BCCA 200 at ¶18-22; *Niata Enterprises Ltd v. Snowcat Property Holdings Ltd*, 2023 MBCA 48 at ¶24-26.
[13] *Chapman v. C. A. Realty, in Bankruptcy*, 2018 NSCA 81.
[14] *Moncrieff v. Jamison*, [2007] UKHL 42.

> [59] […] I do not see why a landowner should not grant rights of a servitudal character over his land to any extent that he wishes. […] I would, for my part, reject the test that asks whether the servient owner is left with any reasonable use of his land, and substitute for it a test which asks whether the servient owner retains possession and, subject to the reasonable exercise of the right in question, control of the servient land.

[32] The House was not unanimous on the point, but the emphasis placed on the owner's right to grant an easement suggests that the grantor's intention—or perhaps the contractual intention of the parties—should be largely determinative. However, in this case, the easement enjoyed by the Commission has not been granted but rather expropriated. So deference to the grantor's intention disappears.

[33] The second issue arising from the Commission's argument that its easement does not originate from a grant raises other interpretive challenges. Where land is expropriated, the expropriation will be construed strictly against the expropriatory authority. In *Leiriao v. Val-Bélair (Town)*[15] at p. 357, the Supreme Court endorsed the following passage:

> "Anglo-Canadian jurisprudence has traditionally recognized, as a fundamental freedom, the right of the individual to the enjoyment of property and the right not to be deprived thereof, or any interest therein, save by due process of law". To this right corresponds a principle of interpretation: encroachments on the enjoyment of property should be interpreted rigorously and strictly. […]

[34] In *Dell Holdings Ltd. v. Toronto Area Transit Operating Authority*,[16] the Supreme Court described the strict construction in the context of expropriations:

> [20] […] To take all or part of a person's property constitutes a severe loss and a very significant interference with a citizen's private property rights. It follows that the power of an expropriating authority should be strictly construed in favour of those whose rights have been affected. […]

[35] The foregoing principles would constrain the relatively unlimited character of the Commission's interpretation of its rights to occupy the space on and above the easement lands.

[36] Whether the expropriated easement allows the Commission's claimed use of the Corporation's land requires applying interpretive principles to the facts. A summary judgment motion on pleadings is not an ideal forum for that exercise.

---

[15] *Leiriao v. Val-Bélair (Town)*, [1991] 3 S.C.R. 349.
[16] *Dell Holdings Ltd. v. Toronto Area Transit Operating Authority*, [1997] 1 S.C.R. 32.

[37] The judge did not dismiss the trespass claim for poor pleading. She dismissed it because she interpreted the easement as permitting the use of which the appellants complained:

> [26] What does HCCC plead that HFX Water has done that exceeds its easement rights? […]
>
> HCCC's position is that the statement in the pleadings that the drainage system is above ground is sufficient to defeat the motion for summary judgment. However, the pleadings indicate (para. 5) that HFX Water has the right "at any time to enter upon the land for the purpose of lying down and constructing sewers, drains, **pipes** for water and conduits of all kinds, in, under, **and upon the said land"**. HFX Water constructed a drainage system that included at and above ground piping. [Emphasis in original.]
>
> [27] HCCC submitted that the 1972 easement does not allow for an above ground "watercourse" or for the installation of "cement encasements" above ground. These details were not pleaded. For the purposes of summary judgment on the pleadings the court only knows that the drainage system includes ***at and above ground piping*** (para. 8 of the notice of application), ***which is authorized by the 1972 easement*** (para. 5). [Emphasis added.]

[38] Whether the Commission's use of its easement exceeds what is legally authorized requires both an interpretation of the easement language and then an application of that interpretation to the facts. It is not a simple matter of pleading.

[39] The Corporation has pleaded ownership and interference of its possessory rights as owner. It has pleaded the Commission has interfered with its rights by placing infrastructure on the surface of its lands in excess of the its easement rights. As the judge recognized, direct interference with the Corporation's land in principle may constitute a trespass.[17] The Corporation has pleaded the essentials of trespass. Whether the facts sustain that plea, is for another day.

[40] The claim for trespass should not have been struck and the appellants' application should not have been dismissed for that reason.

Nuisance made out on the pleadings?

[41] Nuisance involves the indirect and unreasonable interference with the use and enjoyment of land or of an interest in land.[18]

---

[17] Decision at ¶21.
[18] *St. Pierre v. Ontario (Minister of Transportation and Communications)*, [1987] 1 S.C.R. 906 at ¶10.

[42] A private nuisance can occur by:

(a) encroaching on a neighbour's land;

(b) direct physical injury to a neighbour's land; and

(c) interference with a neighbour's quiet enjoyment of his land.[19]

[43] The interference must be indirect, not direct.[20]

[44] The Commission argues that nuisance has no application here because all the alleged damages occur on the Corporation's land. The Commission reminds us of Justice Cromwell's explanation in *Whebby*, *supra*:

> [129] The view that nuisance is concerned with indirect interference is illustrated by the two cases cited by United, **Phase Three Properties Ltd. v. 529952 Ontario Ltd.** (1996), 28 C.L.R. (2d) 53 (Ont. Ct. J. (Gen. Div.)) and **R. & G. Realty Management Inc. v. Toronto (City)** (2005), 19 M.P.L.R. (4th) 250 (Ont. Sup. Ct. J.). In both, the conduct giving rise to the alleged nuisance occurred on land adjoining that of the plaintiffs and, therefore, ***the alleged interference was indirect in the sense that it results from conduct elsewhere than on the affected land itself***. [Emphasis added.]
>
> [130] This view is also consistent with first principles going back to the old forms of action. That nuisance deals with indirect interference may be traced to the distinction between an action in trespass and an action on the case. Trespass is direct entry on another's land while nuisance is the infringement of the plaintiff's property interest without direct entry by the defendant: see, for example, John G. Fleming, **The Law of Torts**, **supra** at 464 - 465; **Clerk and Lindsell on Tort**, **supra** at 20-02; John P. S. McLaren, "Nuisance in Canada" in Allen M. Linden, **Studies in Canadian Tort Law**, (Toronto: Butterworths,1968) 320 - 377 at 338. [Emphasis in original.]
>
> [131] However, it is not the dead hand of ancient legal technicality that justifies maintaining this distinction. Rather it reflects the role of the modern law of nuisance as a means of reconciling conflicting interests in connection with competing uses of land: see **Royal Anne Hotel** at 467; **Tock v St. John's Metropolitan Area Board**, [1989] 2 S.C.R. 1180 *per* LaForest, J. at 1196. ***Before there can be conflicting interests in connection with the use of land, there must be uses of different lands which come into conflict.*** [Emphasis added.]

---

[19] *Hunter v. Canary Wharf*, [1997] A.C. 655 (H.L.).
[20] *MacQueen, supra*, at ¶86, citing *Whebby, supra* at ¶127-130.

[45] The question is whether excessive use of an easement may be actionable if it affects the Corporation's property outside the easement boundaries.[21] In her decision, the judge noted the abolition of the need for dominant and servient tenements in the case of utility easements, citing s. 61A of the *Land Registration Act*, S.N.S. 2001, c. 6.[22] This abolition is not relevant because the *Act* only applies to easements created by grant, not, as here, by expropriation.

[46] The claim for nuisance is novel because the wrongful conduct complained of does not originate from other lands owned, used, or possessed by the Commission. Rather, the conduct originates on the Corporation's property as a direct result of the Commission's intentional work there. The Corporation insists that overuse of the easement creates a nuisance on its land beyond the easement boundaries. The alleged damages appear to relate to diminished use of the Corporation's property both on and outside the easement, owing to interference with access to the Corporation's property beyond the easement. The Corporation has cited no law that direct interference with a plaintiff's servient property constitutes nuisance rather than trespass. Nor do they cite any law that treats the easement itself as a "dominant tenement" for the purposes of a nuisance claim. In any event, it is not apparent why the claimed loss would not be recoverable in trespass as an effect of the alleged wrongful interference.

[47] Overuse of a drainage easement has been typically described as a nuisance.[23] Also invariably, case law illustrating this principle involves activity originating outside the plaintiff's land, resulting in an overflow on to the plaintiff's lands outside the easement. That is why the judge distinguished those cases.[24] The judge's reasons are supported by *Whebby* on which she also relied. *Whebby* confirms the longstanding rule that the complained of conduct must originate elsewhere than the plaintiff's property, triggering an indirect effect on that property. In this case, the impugned conduct neither originated elsewhere, nor was it indirect.

[48] The judge was right to strike the nuisance claim.

Were reasons for dismissing the injurious affection claim adequate?

---

[21] *Gale on Easements, supra* at 6-102.
[22] Decision, ¶18.
[23] *Gale on Easements, supra* at 6-102.
[24] Decision, ¶17 (*Gardner v. Davis*, [1999] EHLR 13 (CA); *Wood v. Saunders* (1875), L.R. 10 Ch. App. 582.

[49] The Corporation submits the judge's reasons for dismissing the injurious affection claim respecting trespass were inadequate.

[50] Reasons are adequate if, considering them as a whole in the context of the evidence and the arguments at trial, the judge's decision is "intelligible". There must be a logical connection between the decision and the basis for which it is reached. The judge's reasons are sufficient. The claim for injurious affection depends upon viable, common law causes of action. In this case, the judge found that neither nuisance nor trespass were made out on the pleadings. Since injurious affection depends upon those causes of action, it could not survive their dismissal.[25]

[51] Injurious affection also requires that the complained of conduct be taken under statutory authority. Although the easement was expropriated, the Commission does not claim a statutory authority for the 2017-18 construction, but relies on its easement. The judge's reasons say so and are therefore adequate.

The Notice of Contention

Merger

[52] The Commission says the Corporation's arguments imply abandonment of the easement rights originally granted. The Commission also infers the Corporation claims the easement was merged in the Commission's ownership of the easement lands some time subsequent to the 1972 easement and prior to the Corporation's acquisition of its property.

[53] The Corporation did not make these arguments in this Court and confirms as much in its reply factum. In any event, these arguments could not be an alternative basis for supporting the judge's decision because success on them would not be determinative of the appeal. They are not a proper foundation for a Notice of Contention.

Best Foot Forward

[54] The Commission next faults the appellants for not putting their "best foot forward". The judge did not mention that concept in her decision, nor would it

[25] *R. v. Horne*, 2023 NSCA 64 at ¶12, citing *R. v. R.E.M.*, 2008 SCC 51 at ¶35; *R. v. Sheppard*, 2002 SCC 26 at ¶54; *R. v. Gagnon*, 2006 SCC 17 at ¶13; *R. v. G.F.*, 2021 SCC 20.

have been helpful for her to do so because it is a doctrine that applies to a summary judgment motion on evidence, not pleadings.[26]

[55] A party cannot rely on evidence to succeed on a summary judgment motion on the pleadings.

Abuse of Process

[56] The Commission's "abuse of process" argument assumes success on the main issues—whether the causes of action have been adequately pleaded. It adds nothing to that analysis and has no application in this case because the pleadings, while not a model of clarity, are sufficient with respect to trespass. Again, this is not an appropriate Notice of Contention issue because it is not an alternative basis for sustaining the decision under appeal.

Statute Barred Claims?

[57] The individual applicants were unitholders of the Condominium Corporation at the time of the 2017-18 construction work by the Commission. They assert interference with the quiet enjoyment of their property during construction and compromised access to the Condominium's lands following the completion of that construction.

[58] The Commission says any claims related to disturbance during construction are statute barred. The Commission specifically objects to this claim in the Notice of Application:

> 13. The Current and Previous Unitholders plead that during the construction, they suffered a loss of the quiet enjoyment of their properties, including, but not limited to: dust drifting onto their possessions, building units, disrupted parking and noise infiltrating their units.

[59] The Commission refers to s. 32 of the *Halifax Regional Water Commission Act*:[27]

> **Limitation period**
>
> **32** For the purpose of the *Limitations of Actions Act*, the limitation period for an action or proceeding against the Commission, a Commissioner, an

[26] *Shannex Inc. v. Dora Construction Ltd.*, 2016 NSCA 89 at ¶36; *Nova Scotia Association of Health Organizations Long Term Disability Plan Trust Fund v. Amirault*, 2017 NSCA 50 at ¶14-15.
[27] S.N.S. 2007, c. 55.

> officer or employee of the Commission, or against any person acting under the authority of any of them, is twelve months.

[60] The Commission also claims the benefit of s. 376 of the *Halifax Regional Municipality Charter*:

> **Limitation of Actions Act**
>
> **376 (1)** For the purpose of the *Limitation of Actions Act*, the limitation period for an action or proceeding against the Municipality, the Council, a Council member, an officer or employee of the Municipality or against any person acting under the authority of any of them, is twelve months.
>
> **(2)** Subsection (1) applies, with all necessary changes, to a service commission and a board, commission, authority, agency or corporation of the Municipality or a board, commission, authority, agency or corporation jointly owned or established by the Municipality and one or more other municipalities or villages.
>
> […]

[61] The Commission acknowledges that the principle of discoverability embodied in s. 8(1)(a) of the *Limitations of Actions Act*[28] applies to the proceedings brought by the appellants. That section provides a two-year period "from the day on which the claim is discovered" in which to bring a claim. The Commission says that the latest point at which the appellants could reasonably have known of their claim was when construction was completed in 2018.

[62] The appellants plead that on March 15, 2017, they notified the Commission of their intention to "bring a claim for injurious affection pursuant to the *Expropriation Act* for losses related to the construction".

[63] The appellants did not file a claim with the Nova Scotia Utility and Review Board until April 20, 2021. The Board dismissed the claim on October 22, 2021, for lack of jurisdiction because no expropriation had occurred relating to the impugned construction. On January 5, 2022, the appellants started proceedings in the Supreme Court.

[64] The appellants argue that their claims were not discoverable "until the UARB dismissed the proceeding" on the basis of lack of jurisdiction. Self-evidently, the appellants' error here was not about whether they had a claim, but about in which forum to bring it.

---

[28] S.N.S. 2014, c. 35.

[65] The claims arising from construction in 2017-18 are statute barred. This would not apply to the trespass claim because the claimed trespass is ongoing.

Conclusion

[66] The appeal should be allowed with respect to the appellants' claims for trespass. Otherwise, the other grounds of appeal should be dismissed.

[67] The Commission has been successful with respect to its *Limitations of Actions Act* defence. The claims arising out of construction in 2017-18 are statute barred.

[68] Because success has been divided, there will be no costs.

Bryson J.A.

Concurred in:

Fichaud J.A.

Van den Eynden J.A.