NOVA SCOTIA COURT OF APPEAL

Citation: *Ponhook Lodge Limited v. Freeman Estate*, 2025 NSCA 3

Date: 20250109
Docket: CAC 529472
Registry: Halifax

Between:

Ponhook Lodge Limited, a body corporate

Appellant

v.

H. Charles Freeman, Richard Freeman, the Estate of Elfreda Freeman, and the Elfreda Freeman Alter Ego Trust (2015)

Respondent

Judge:	The Honourable Justice Peter M.S. Bryson
Appeal Heard:	October 17, 2024, in Halifax, Nova Scotia
Facts:	The case involves a dispute over the use of a right-of-way on rural property in Queens County, Nova Scotia. Ponhook Lodge Limited owns properties on both sides of the Freeman property and wishes to use a right-of-way across the Freeman land to access a proposed RV campground. The right-of-way was established in a 1977 deed, and the Freemans sought an injunction to prevent its use for commercial purposes, arguing it was intended for personal use only (paras 1-8).
Procedural History:	*Ponhook Lodge Limited v. Freeman Estate*, 2023 NSSC 255: The trial judge granted a permanent injunction restraining Ponhook from using the right-of-way for

commercial purposes, including accessing a campground (para 8).

Parties Submissions: Appellant (Ponhook Lodge Limited): Argued that the trial judge erred in applying legal principles, relied on subjective intentions, made unreasonable factual findings, dismissed the counterclaim incorrectly, granted an overly broad injunction, and improperly awarded costs (para 9).

Respondents (Freeman Estate and others): Sought to uphold the trial decision, arguing the right-of-way was intended for personal use and that commercial use would overburden it.

Legal Issues:

- Did the trial judge misapprehend the law in applying principles from a New Brunswick decision?
- Did the trial judge rely on subjective intentions when interpreting the right-of-way?
- Were there unreasonable findings of fact regarding the use of the right-of-way?
- Did the trial judge err in dismissing Ponhook's counterclaim?
- Was the injunction against commercial use too broad?
- Was the award of costs against Ponhook appropriate?

Disposition: The appeal was dismissed with costs awarded to the respondents.

Reasons: Per Bryson J.A. (Wood C.J.N.S. and Fichaud J.A. concurring):

- The trial judge correctly applied legal principles and did not err in relying on the New Brunswick decision as persuasive authority. The factual

differences did not impair the judge's reliance on it (paras 14-17).

- The judge did not rely on subjective intentions but rather on the objective intention of the parties ascertained from the deed and surrounding circumstances (paras 18-27).
- The findings of fact were supported by evidence and not unreasonable. The judge properly considered the surrounding circumstances and the nature of the right-of-way (paras 28-38).
- The dismissal of the counterclaim was appropriate as Ponhook conceded it was contingent on the campground proceeding (paras 39-40).
- The injunction against commercial use was justified as the proposed use would overburden the right-of-way, altering its character and nature (paras 41-48).
- The costs award was within the trial judge's discretion and not manifestly unjust, considering the settlement offers and the substantial indemnity principle (paras 49-57).

NOVA SCOTIA COURT OF APPEAL

Citation: *Ponhook Lodge Limited v. Freeman Estate*, 2025 NSCA 3

Date: 20250109
Docket: CA 529472
Registry: Halifax

Between:

Ponhook Lodge Limited, a body corporate

Appellant

v.

H. Charles Freeman, Richard Freeman, the Estate of Elfreda Freeman, and the Elfreda Freeman Alter Ego Trust (2015)

Respondents

Judges:	Wood, Fichaud, Bryson, JJ.A.
Appeal Heard:	October 17, 2024, in Halifax, Nova Scotia
Written Release	January 9, 2025
Held:	Appeal dismissed, with costs, per reasons for judgment of Bryson, J.A.; Wood, C.J.N.S. and Fichaud, J.A. concurring
Counsel:	Alex Embree, for the appellant Rory Rogers, K.C. and Sarah Walsh, for the respondents

Reasons for judgment:

Introduction

[1] This case is about use of a right-of-way.

[2] The parties own rural property on a peninsula between two lakes in Queens County.

[3] Ponhook owns property south of the Freeman property on which it operates a recreational vehicle (RV) campground. In 2017 Ponhook purchased approximately 40 acres north of the Freeman lot. As a result, the Freeman property is "sandwiched" between the two Ponhook properties. Ponhook also wished to operate an RV campground on its new property north of the Freeman lot.[1]

[4] To reach the newly-purchased Ponhook property, one must travel over a right-of-way that crosses the Freeman property. The right-of-way originated from a 1977 grant to the Freemans at a time when the lands were largely vacant.

[5] The right-of-way was created by express grant in a 1977 deed from Laura Wamboldt to Harry Freeman. Ponhook is a successor to Laura Wamboldt. The Freeman respondents are successors to Harry Freeman.

[6] The 1977 deed described the right-of-way as follows:

> The grantor reserves a right of way up to thirty feet wide (30) to be used to service her, her heirs and assigns and, her families lots situated on the so-called Ephraim Hunt lot, crown grant no. 9284 (Index sheet #32 Dept. of Lands and Forests, N.S.)

[7] Ponhook maintained the right-of-way was not limited to personal use, but allowed use by any campers visiting its proposed new campground. As a result, the Freemans sought an injunction restraining the proposed use. Ponhook counterclaimed, arguing it was entitled to improve the right-of-way with ditching, pipes and the like.

[8] The essential question for the trial judge was whether use of the new Ponhook lands as an RV campground would overburden the right-of-way across the Freeman property. Justice Darlene Jamieson decided that it would. She granted

---

[1] Sometimes referred to by the judge as the "Ponhook Rim Property".

a permanent injunction restraining use of the right-of-way "to access any campground on the Ponhook Lodge property…or any other commercial establishment" north of the Freeman land, (2023 NSSC 255).[2]

[9] Ponhook now appeals, arguing in its factum that the judge erred:[3]

1. In law when applying the principles of a New Brunswick trial decision to the facts of this case;
2. In law by relying on subjective intentions when interpreting the right-of-way;
3. By making "unreasonable" overriding errors of fact with respect to the circumstances and use of the lands and right-of-way;
4. By making overriding errors of fact when dismissing Ponhook's counter-claim;
5. In law by granting an injunction that was too broad, because it extends to any commercial use; and
6. In principle when awarding costs against Ponhook.

[10] These reasons will begin by referring to the applicable interpretive principles. Each ground of appeal then will be addressed in order.

Interpretive principles

[11] When construing an express grant, the judge must try to discern the intention of the parties from the words used in the context of surrounding circumstances. The words must be given their "ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract.[4]

[12] The judge correctly noted the objective character of the intent to be discerned:

> [128] As the surrounding circumstances consist only of objective evidence of the background facts known to both parties at the time of the deed's execution,

---

[2] November 17, 2023 Order.
[3] In its factum, Ponhook argues issue 5 first. For convenience, it has been moved.
[4] *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 47; also see: *Duncanson v. Webster*, 2015 NSCA 29; *Purdy v. Bishop*, 2017 NSCA 84; *Penney v. Langille*, 2018 NSCA 43; *Muir v. Day*, 2023 NSCA 21.

> evidence of the parties' subjective wishes, motives or intent is inadmissible (*Knock v. Fouillard*, 2007 NSCA 27, at para. 27).

[13] Applying these principles to the facts, the judge concluded the right-of-way was confined to personal use:

> [140] In my view, the language of the grant is not ambiguous when the words are considered together with the surrounding circumstances. ***The parties' intention was for there to be a private right-of-way for Laura, her heirs and assigns, and her family to use to access their residential or undeveloped wilderness*** lots north of the Freeman Property. The intent of the parties was that use of the Right-of-Way would be restricted to the owners of the lots north of the Freeman Property (and their invited guests) for the purpose of accessing their properties.
>
> [Emphasis added]

Issue One – Did the judge misapprehend the law?

[14] Ponhook insists that the judge misinterpreted the New Brunswick decision of *Roussel v. Bélanger*, 2004 NBQB 250, ignored "counsel's closing arguments and misapprehended the law with respect to rights-of-way." Ponhook complains the judge said there were "some striking similarities between the facts of this case and those in *Roussel*." Ponhook concedes there are similarities, but contends there are "material differences".

[15] Respectfully, Ponhook's criticism here is misplaced. Courts routinely rely on factually and legally similar cases. Courts are free to apply those cases as persuasive authority, even when there are differences, provided those differences do not contradict the essential reasoning upon which a trial judge relies to draw the jurisprudential analogy.

[16] Beyond pointing out some factual differences, Ponhook provides no explanation to justify its claim that the judge misinterpreted *Roussel*. It was not an error of law for the judge to observe that there were "striking similarities" between *Roussel* and this case. Ponhook does not explain how some factual differences led the judge to misinterpret *Roussel*. Nor is there any connection drawn between any alleged misinterpretation of *Roussel* and the judge's analysis in this case.

[17] The factual differences between the cases do not impair the judge's reliance upon *Roussel* as a persuasive authority. Nor does Ponhook's argument undermine the judge's identification and application of the relevant legal principles.

Issue Two – Did the judge rely on "subjective intentions"?

[18] To determine the nature and extent of the right-of-way, the judge looked at Ponhook's intended use of the right-of-way, and whether it was consistent with the purpose for which the right-of-way was created. She noted that the intention of the parties at the time the right-of-way was created is what mattered:

> [124] … The objective intention of the parties is ascertained from the words used in the deed, consistent with the surrounding circumstances known to the parties at the time the Right-of-Way was created.

[19] At various points, the judge referred to evidence of the parties in her narrative. That recitation alone does not mean she impermissibly relied on inappropriate evidence in her legal analysis.

[20] Ponhook was unable to point to any passage in the decision in which the judge relied upon subjective evidence to determine the nature and the extent of the right-of-way. Ponhook criticizes the judge's reference to discovery evidence of Elfreda and Linda Freeman. But the judge did not use this evidence to interpret the grant of right-of-way:

> [139] ***It is also important to identify the evidence that is not part of the surrounding circumstances the court can consider*** when interpreting the grant. Much was made of Elfreda's discovery evidence that Laura told her and Harry that there would be no development north of the Freeman Property except for family cottages. In my view, ***this is evidence of the parties' subjective intentions which cannot be considered in interpreting the grant***. The same is true of the hearsay statements attributed to Laura by other witnesses and offered as proof of her intentions for her remaining property on the Rim. ***I have not considered any of this evidence in interpreting the grant in the 1977 deed***.
>
> [Emphasis added]

[21] In her key finding on intention, the judge does not rely on the subjective evidence of either party but relies on their joint intention expressed as "the parties' intention":

> [140] In my view, the language of the grant is not ambiguous when the words are considered together with the surrounding circumstances. ***The parties' intention*** was for there to be a private right-of-way for Laura, her heirs and assigns, and her family to use to access their residential or undeveloped wilderness lots north of the Freeman Property. ***The intent of the parties*** was that use of the Right-of-Way would be restricted to the owners of the lots north of the

> Freeman Property (and their invited guests) for the purpose of accessing their properties.
>
> [Emphasis added]

[22] Ponhook objects to several passages in which the judge quoted hearsay of subjective intention and claims they wrongly informed the judge's conclusion about the parties' intention at the time of the grant of the right-of-way. But the judge did not rely on hearsay:

> [89] Several witnesses for both sides spoke about what Laura said to them over the years. There were no objections raised. Out of court statements made by a deceased declarant and offered for their truth fall within the rule against hearsay and are presumptively inadmissible. Such statements are also addressed in s. 45 of the *Evidence Act*, R.S.N.S. 1989, c. 154, which is intended "to discourage dishonest or ill-founded claims against estates" (*Johnson v. Nova Scotia Trust Co.*, (1973), 1973 CanLII 1233 (NS CA), 6 N.S.R. (2d) 88, 1973 CarswellNS 90 (N.S.S.C.(A.D.); *Hopgood v. Hopgood Estate*, 2018 NSSC 100, at para. 75). Since this is not a claim against Laura's estate, s. 45 does not apply.
>
> [90] As will become clear later, ***while I include these hearsay statements in my recitation of the evidence, I do not rely on them in reaching my decision.***
>
> [Emphasis added]

[23] Ponhook adds the judge must have relied on subjective intentions of Ponhook's predecessor when she found:

> [156] … it *can* be said that the parties to the grant contemplated that ***the dominant tenements would remain*** … ***natural wilderness***.
>
> [Italics in original, Ponhook's bold emphasis added]

[24] In fact the full paragraph in the decision is more forthcoming:

> [156] Accordingly, in deciding that the right-of-way could be used to service residential lots, the Supreme Court of Canada in *Laurie* concluded that it could not be said that the parties to the grant contemplated that the dominant tenement would always remain a farm. In this case, however, ***I find that it can be said that the parties to the grant contemplated that the dominant tenements would remain residential lots or natural wilderness. They could not reasonably have contemplated that the Ponhook Rim Property would be used as an extension of the original campground and that the Right-of-Way would be used by members of the public to access it, and to travel between both campgrounds at any time of the day or night.*** Even if the grant in the 1977 deed is unrestricted, the

> Defendant's proposed use would substantially alter the character, nature and extent of the Right-of-Way.
>
> [Emphasis added]

[25] The judge's finding here is a factual conclusion about joint intention drawn from all the surrounding circumstances. The judge does not rely solely or principally on subjective evidence from a Ponhook predecessor.

[26] The judge also made the following findings about the parties' intentions, all of which had evidentiary support in the record:

> [142] While some further residential development was expected, ***there is no evidence in either the wording of the grant or the surrounding circumstances that the parties could have reasonably contemplated or intended that the Right-of-Way would be used by members of the public*** – "registered" or not – ***to access a commercial establishment like an RV campground.***
>
> […]
>
> [145] While I find that the use of the Right-of-Way to service a campground with even 43 campsites will overburden it, the evidence before me is that Ponhook Lodge plans to add many more campsites, if there is sufficient demand. The Ponhook Rim Property is 40 acres in size. The 43 campsites take up approximately 1/3rd of the land. It therefore stands to reason that Ponhook Lodge could develop as many as 129 campsites. Again, ***any suggestion that use of this nature and extent is consistent with the parties' intentions at the time of the grant is completely unsupportable.***
>
> […]
>
> [148] In considering whether the respondent's use of the right-of-way was appropriate, the court found that ***the parties did not anticipate at the time of the grant that a business would be operated*** from the lot in the future. Similar to the present case, the expectation at the time was that it would be quiet cottage land.
>
> […]
>
> [151] The court's comments in *Roussel* apply equally here. The 1977 deed conveys a private, restricted right-of-way intended to be used by the owners of the dominant tenements to access their residential or undeveloped properties. ***Ponhook Lodge's proposed use of the Ponhook Rim Property as an RV campground would amount to a radical change in the character of the dominant tenement, and use of the Right-of-Way*** by campers and their guests would substantially alter the nature of the easement by using it for a totally new and different purpose. ***This use*** is different in nature and in purpose and ***would radically change the character and use of the dominant tenement***. By opening the Right-of-Way to members of the public, registered or not, Ponhook Lodge

> would place a different and far more onerous burden on the Plaintiffs' lands than what is contemplated in the grant. Ponhook Lodge cannot overburden the Right-of-Way in this manner.
>
> [Emphasis added]

[27] These findings dispense with any criticism that the judge erred by relying on subjective intention when interpreting the right-of-way granted.

Issue Three – Unreasonable findings of fact

[28] Ponhook says that the judge made several "materially unreasonable findings of fact, all of which constitute "palpable and overriding errors".

[29] The findings were neither unreasonable nor material.

Natural wilderness

[30] Ponhook says assuming admissibility of evidence respecting its predecessor's love of nature, it is still unreasonable to conclude that development of Ponhook's lands would be limited to natural wilderness or residential subdivisions. Ponhook adds that this so-called finding is inconsistent with development of its lands for residential or cottage lots. There is no such contradiction in the judge's decision. What she found was:

> [156] … the parties to the grant contemplated that the dominant tenements [the new Ponhook lands] would remain residential lots or natural wilderness. They could not reasonably have contemplated that the Ponhook Rim Property would be used as an extension of the original campground …

[31] The judge does not refer to natural wilderness as an exclusively contemplated use. Residential development was also envisaged. Ponhook sees a dichotomy where, contextually, there is none.

Traffic from 43 RV sites would overburden

[32] Ponhook claims the judge erred in finding that traffic for 43 RV sites would overburden the right-of-way. In particular, Ponhook takes exception to the judge's finding that:

> [144] … The notion that this kind of use of the Right-of-Way [as a campground] was within the reasonable contemplation of the parties in 1977 is, frankly, absurd.

[33] Ponhook then makes an argument that based on the regulatory landscape in 1977, "significant development could have occurred from subdivisions that would have created significantly more traffic over the ROW than the proposed 43 RV site campground would create." This argument does not speak to the parties' common intention. That the regulatory landscape would permit potentially greater development of Ponhook's lands in 1977 than now does not mean the parties themselves contemplated that greater use, whether as a campground or otherwise.

[34] Less regulated land use that may have permitted more extensive development of Ponhook's land in 1977 could not itself be a determinant of the parties' intentions at that time.

No history of commercial activity

[35] Ponhook adds that it was unreasonable for the trial judge to find that no commercial use could be made of the right-of-way simply because Ponhook's predecessor had not planned for such use, and there was no history of commercial activity on Ponhook's newly-acquired land. Respectfully, what Ponhook does here is to extract two of eleven factors the judge described as surrounding circumstances, all of which informed her judgment:

> [138] The surrounding circumstances at the time the deed was executed in 1977 are relevant to the proper interpretation of the grant. These include:
>
> - Laura was initially reluctant to sell the land. Harry approached her and asked her to sell it to him.
> - The Freeman family and the Wamboldt family were related. Harry and his wife Elfreda were also good friends with Laura when they purchased the land. This was a residential property transaction between family, not an arm's length transaction between commercial entities or parties operating or intending to operate a business on the Rim.
> - Harry was buying the land for the purpose of building a family cottage on it. Privacy was very important to him and Elfreda. Laura would have known this, as Harry had previously purchased a lot from Laurie and sold it when Laurie and Laura expanded the original campground to the adjacent lands.
> - After her husband's death in 1968, Laura sold lots on the Rim, south of the Freeman Property, to persons looking to build cottages or homes on them. The Freemans would have been aware of these transactions because Elfreda witnessed several of the deeds. A 30-foot right-of-way had been reserved up the Rim in relation to the lots that had been sold prior to 1977.

- The land Laura sold to Harry went from one shore to the other, meaning that her land to the north would be landlocked without the Right-of-Way. She did not except the portion of the Laurie Wamboldt Road that went over the Freeman Property and convey only the remaining land to Harry. She deeded the entire piece of land to Harry and reserved only the described Right-of-Way for her lands to the north.
- From the time of Laurie's death in 1968 until 1977, a period of nine years, Laura did not sell any lots north of the Freeman Property.
- As of 1977, the only lots subdivided from Laura's land north of the Freeman Property were the two lots given to her daughters in 1968, prior to Laurie's death.
- As of 1977, there was no commercial activity being carried out on any of the lots north of the Freeman Property. No businesses had ever been operated from these properties.
- Laura loved the land on the Rim. It was special to her and her husband. They hunted and fished on the land and appreciated it for its peacefulness. They called the area a natural forest.
- In 1977, the Laurie Wamboldt Road was rough -- a narrow country lane. Although vehicles were able to drive through what became the Freeman Property to access Laura's daughters' lots, it was not until much later when Bill took over the road that it became more suitable for vehicular traffic.
- As of 1977, Laura had no plans to use the Rim property north of the Freeman Property for a campground or other commercial enterprise which would involve inviting the public onto the property.

[36] Ponhook agrees that the judge's comments about intention and prior commercial use were supported by the evidence, but complains that the judge "extrapolated" them to conclude commercial activity was not intended. What she did was precisely what the law required: interpret the language of the deed in the context of the surrounding circumstances.

[37] The judge rightly drew a distinction between an "unrestricted" right-of-way and "unlimited" use for any purpose:

> [152] Even if I had found that the grant in this case conveyed an unrestricted private right-of-way (as it was in *Roussel*), I would still conclude that the use of the Right-of-Way proposed by the Defendant would overburden it.

[38] The judge was entitled to consider the circumstances of the case, the situation of the parties and the situation of the land at the time the grant was made.[5]

Issue Four – Factual error in dismissing the counterclaim

[39] Ponhook says the judge was wrong to dismiss its counterclaim. The judge allegedly erred in saying there was "no evidence" regarding drainage issues on the right-of-way requiring ditches or installation of pipes. This complaint is ill-founded. Ponhook conceded that the allegedly necessary work depended on it operating as an RV park on its new lands.

[40] The judge noted Ponhook's concession that its counterclaim depended upon a favourable outcome on its use of its lands as a campground. In light of this concession, the judge's consideration of this issue was understandably brief:

> [163] In any event, Ponhook Lodge confirmed at trial that the relief sought in its counterclaim is only relevant if the Proposed Campground is allowed to proceed. If there is no campground, there is no current need to widen the road, build ditches, etc. Having concluded that Ponhook Lodge is not entitled to use the Right-of-Way to service the Proposed Campground, I dismiss the counterclaim.

Issue Five – Commercial use

[41] Ponhook claims that the Freemans never sought an injunction against commercial use and it was unfair to Ponhook to decide this issue since the facts do not support this complaint.

[42] This submission is untenable.

[43] In the Freemans' defence to Ponhook's counterclaim, the Freemans made it clear they were seeking an injunction restraining Ponhook from using the right-of-way "for commercial purposes including as the roadway to Rim Campground [Ponhook's new lands north of the Freemans]". During argument, counsel for the Freemans acknowledged that they were not seeking to restrain operation of a small business which might be characterized as commercial. Their focus was on prohibiting the use of Ponhook's newly-acquired land as a proposed campground. Nevertheless, the Freemans did not seek to amend their pleadings and abandon their claim for an injunction against use of the right-of-way to access any other

---

[5] *Todrick v. Western National Omnibus Co.*; cited in *Laurie v. Winch*, 1952 CanLII 10 (SCC) at 57. [1953] 1 SCR 49.

commercial establishment. Despite the Freemans relenting slightly during argument, the judge still asked Ponhooks's counsel about an injunction against commercial use and the point was fully argued.

[44] A post trial acknowledgement could not affect trial fairness because pretrial steps, the evidence lead and arguments made by Ponhook were predicated on the pleaded case.

[45] The focus on "commercial use" resulted from Ponhook's planned RV use, which would greatly increase traffic, largely because the business would attract many third party campers who would use the right-of-way to access the campground. Many business uses would necessitate public use of the right-of-way, implicitly overburdening it. Some commercial uses may not greatly increase traffic. But that traffic would not be confined to the personal access use which the judge found was the joint intention of the parties. For convenience, that finding is repeated here:

> [140] In my view, the language of the grant is not ambiguous when the words are considered together with the surrounding circumstances. ***The parties' intention was for there to be a private right-of-way for Laura, her heirs and assigns, and her family to use to access their residential or undeveloped wilderness*** lots north of the Freeman Property. The intent of the parties was that use of the Right-of-Way would be restricted to the owners of the lots north of the Freeman Property (and their invited guests) for the purpose of accessing their properties.
>
> [Emphasis added]

[46] When concluding that the right-of-way was not intended for commercial use as a campground the judge applied the appropriate principles and cited supportive law:

> [157] The decision in *Malden Farms Limited v. Nicholson*, [1955] O.J. No. 616 (Ont. C.A.) is instructive. In that case, the Ontario Court of Appeal held that by inviting members of the public to use a private but otherwise unrestricted right-of-way as a road to a beach, trailer park and campsite, the appellant had exceeded the rights granted in the deed. In granting an injunction to restrain the appellant's use of the right-of-way, Aylesworth J.A., for the court, stated:
>
> > 6 The fee in the way is now burdened, not with a private right of way in favour of appellant, his heirs and assigns, as originally contemplated, but with a use of the way for appellant's commercial purposes by great numbers of the public who travel over respondent's lands much as though the same constituted a public highway or a busy toll-road. At the time

> appellant's easement was created it was subject to the prior "free uninterrupted right-of-way" in respondent's predecessors in title. The chronology and contrasting language of the two grants, together with the surrounding circumstances as referred to by the learned trial judge, establish very clearly, in my opinion, that appellant's present user is much beyond the extent of his legal right and ought to be restrained. Appellant's use of the way constitutes an unauthorized enlargement and alteration in the character, nature and extent of the easement.

[158] Similarly, in *Tully v. Skrabek*, [2003] M.J. No. 209 (Man. Q.B.), the dominant tenement enjoyed a right-of-way simpliciter over the servient tenement, with no express limitations as to its use. The previous owner of the dominant tenement had used the right-of-way for farming purposes. The applicants turned the dominant tenement into a berry u-pick and market garden business and allowed its customers to travel the right-of-way to pick berries. The court held that use of the right-of-way to access the u-pick amounted to a radical change in the character or identity of the user:

> 21 The evidence before me satisfies me, on balance, that the applicants' use of the right-of-way or easement in question over the respondent's land is "excessive" during the "u-pick" season, which, for purposes of certainty and based on the evidence, I find to be from June 15 to August 7 of each year. This particular use by the applicants and their licencees, invitees, and (or) customers goes far beyond what was reasonably contemplated by the parties to the easement agreement in 1985 and, in my opinion, constitutes the "radical change in the character or identity of the user" as cited from Halsbury's, supra.
>
> 22 Accordingly, I find and declare that the easement or right-of-way in question is, in essence, a private right-of-way (not for commercial purposes beyond those enterprises that existed prior to the agreement). The applicants have no right to hold out to any person or persons by any means whatsoever that the said right-of-way is other than a private right-of-way on private land. They have no right to permit or allow any persons to use the right-of-way in a manner inconsistent with a private right-of-way. …
>
> [Emphasis in original]

[47] The judge found that the proposed commercial use would radically alter the right-of-way:

> [159] In essence, Ponhook Lodge wishes to change the Right-of Way from a private one to a public one where large numbers of the general public will be utilizing it for access to the Proposed Campground from approximately May until October. As in *Malden Farms* and *Tully*, ***the use of the Right-of-Way by members of the public to travel to and from the Proposed Campground is an***

> ***unauthorized enlargement and alteration in the character, nature and extent of the easement. Such a use is inconsistent with this private right-of-way.***
>
> [Emphasis added]

[48] This finding is well-supported in the evidence.

Costs

[49] Ponhook appeals the trial judge's award of $196,858.50 plus disbursements of $9,268.22.[6]

[50] Ponhook claims the judge erred in principle by

(a) Not balancing the principle of objective substantial indemnity with what would ordinarily be charged to a client in like circumstances;

(b) Not considering the "amount involved"; and

(c) Improperly taking into account emails from the respondents as settlement offers when assessing costs.

[51] In its factum, Ponhook does not elaborate on points (a) or (b), nor did it do so in oral submissions.

[52] With respect to the emails, Ponhook objects that one "settlement offer" was incapable of acceptance and another offered a right-of-way width which did not accord with subdivision requirements. The judge disagreed. She found both offers more favourable to Ponhook than her decision. She referred to *Civil Procedure Rule* 10.03:

> **10.03 Settlement offers and costs**
>
> > ***A judge*** who determines costs ***may take into consideration a written offer of settlement made formally*** under this Rule ***or otherwise***, unless the offer was made at a settlement conference or under an agreement that the offer would not be admissible in relation to costs.
> >
> > [Emphasis added]

[53] The judge was entitled to consider the informal offers of settlement.[7]

---

[6] 2024 NSSC 1.
[7] *Armoyan v. Armoyan*, 2013 NSCA 136 at para. 13.

[54] Costs are a matter for the trial judge. They are discretionary and courts of appeal will not interfere unless the judge applied wrong principles of law or the decision is so clearly wrong as to amount to a manifest injustice.[8]

[55] The judge found that there was no obvious "amount involved" for costs purposes. Relying on appropriate authority,[9] she awarded a lump sum. She did not err in doing so.

[56] The whole point of a costs award is to afford the successful party a substantial but not complete indemnity for the legal cost of the lawsuit.[10] The costs award here represented approximately 80% of the Freemans' actual legal expense.

[57] The judge's award of costs reveals no error of principle and is not manifestly unjust.

Conclusion

[58] I would dismiss the appeal with costs of $7,500.00, inclusive of disbursements.

Bryson, J.A.

Concurred in:

Wood, C.J.

Fichaud, J.A.

[8] *Donner v. Donner*, 2021 NSCA 30 citing *Darlington v. Moore*, 2017 NSCA 67 at para. 100; *MacVicar Estate v. MacDonald*, 2019 NSCA 90 at para. 22.
[9] 2024 NSSC 1 at para. 18.
[10] *Landymore et al. v. Hardy et al.* (1992), 112 NSR (2d) 410; *Armoyan* at para. 16.