NOVA SCOTIA COURT OF APPEAL
Citation: *Zinck v. Stewart*, 2025 NSCA 43

Date: 20250605
Docket: CA 536352
Registry: Halifax

Between:

Timothy Zinck and Barbie Mosher Zinck

Appellants

v.

Barbara Stewart

Respondent

Judges:	Farrar, Fichaud and Bourgeois, JJ.A.
Appeal Heard:	June 5, 2025, in Halifax, Nova Scotia
Facts:	The case involves a dispute over a prescriptive easement or right-of-way on Quarry Road, which runs over the property owned by the appellants. The respondent, who owns adjacent property, claimed a right-of-way based on open, uninterrupted, continuous, and peaceful use of the road from 1985 to 2000 without the appellants' permission (paras 2-5).
Procedural History:	Stewart v. Zinck, 2024 NSSC 287: The hearing judge found in favor of the respondent, granting a right-of-way over Quarry Road and issuing injunctions against the appellants to prevent obstruction and to remove a fence blocking access (paras 1, 6).
Parties' Submissions:	Appellants: Argued that the hearing judge erred in finding the easement was reasonably necessary, failed to apply the correct test for establishing an easement, and

	improperly drew inferences from a view of the property. They also sought to introduce fresh evidence (paras 7, 9). Respondent: Opposed the introduction of fresh evidence and supported the hearing judge's findings on the necessity and establishment of the easement.
Legal Issues:	Should the fresh evidence be admitted? Did the hearing judge err in concluding the underlying facts supported a finding of reasonable necessity? Did the hearing judge err in failing to identify and apply the applicable test for the establishment of an easement? Did the hearing judge commit reversible error by failing to consider the issue of "neighbourliness"? Did the hearing judge commit an error by improperly drawing inferences and finding facts from the view which she took of the property?
Disposition:	The appeal was dismissed with costs awarded to the respondent in the amount of $10,000, inclusive of disbursements (headnotes, para 21).
Reasons:	The fresh evidence was not admitted as it was an attempt to impeach the respondent's trial evidence with post-trial events and did not meet the test in R. v. Palmer (paras 10-12). The hearing judge's conclusion on reasonable necessity was well-supported by evidence, and the appellants failed to establish any error in the fact-finding process (para 13). The hearing judge correctly applied the law on prescriptive easements, focusing on open and continuous use without permission and the necessity of the easement (paras 14-16). The issue of "neighbourliness" was considered and rejected by the hearing judge, who found no evidence of permission granted by the appellants or their predecessors (paras 17-19).

The hearing judge's inferences and findings from the property view were within the scope of the evidence presented and requests made by both parties (para 20).

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 21 paragraphs.

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Written Release:	June 10, 2025
Held:	Appeal dismissed with costs, per reasons for judgment of Farrar, J.A.; Fichaud and Bourgeois, JJ.A. concurring
Counsel:	Robert H. Pineo, for the appellants Jeffrey P. Flinn and Sarah Dobson, for the respondent

Reasons for judgment:

Introduction

[1] This involves an Application in Court heard by Justice Diane Rowe between September 18 – 22, 2023. On June 27, 2024 Justice Rowe gave an oral decision which was subsequently released in writing.[1]

[2] Ms. Stewart owns the property at 61 and 63 East River Point Road in Lunenburg County ("the Property"). The Property sits between East River Point Road and Quarry Road. Ms. Stewart acquired the property from her aunt in 1985 and added to it with another conveyance in 1994.

[3] The Zincks own property at 59 East River Point Road.

[4] The matter involved a dispute over the existence of a prescriptive easement or right-of-way running over the Zincks' property as part of Quarry Road.

[5] The hearing judge found that the respondent had demonstrated open, uninterrupted continuous and peaceful use of Quarry Road between 1985 and 2000, and that this use was without permission, as the Zincks passively acquiesced to the use. Further, the hearing judge found that the easement was reasonably necessary for the better enjoyment of the respondent's property given the topography and quality of the land and the circumstances of the case.[2]

[6] The hearing judge granted an Order which provides as follows:

> 1. This Court declares that the Applicant has a right-of-way over the road known as the Quarry Road (also known as the Lordly Road), in East River Point, Lunenburg County, Nova Scotia, bearing PID No. 60561958 and as shown on the Plan of Subdivision by Arthur C. Backmann, Nova Scotia Land Surveyor #474, as "Private Right of Way" between the East River Point Road (formerly Old Blandford Road) and the Public Highway #329, said Plan being dated April 21st, 1994 and filed at the Chester Registry on June 28th, 1994 as No. 2725;
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> 2. A permanent Injunction enjoining the Respondents Timothy Zinck and Barbie Zinck from obstructing and blocking the Applicant Barbara Stewart, her heirs, successors and assigns from accessing the Quarry Road, bearing PID No.

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[1] *Stewart v. Zinck*, 2024 NSSC 287.
[2] Decision, para. 77.

> 60561958, for ingress and egress, by foot or by vehicle only, to the Property of Barbara Stewart more particularly identified as PID No. 60155041;
>
> 3. A mandatory Injunction enjoining the Respondents Timothy Zinck and Barbie Zinck to remove the fence currently blocking the said Property of Barbara Stewart, being PID No. 60155041, along the southeastern boundary of a lot of land owned by Timothy Zinck and Barbie Zinck identified by PID #60561958 forthwith but no later than 60 days from the date of the decision, at their sole expense.

[7] The Zincks appealed and sought to introduce fresh evidence.

[8] At the conclusion of argument on June 5, 2025 we dismissed the motion to introduce fresh evidence and dismissed the appeal with reasons to follow. These are those reasons.

Issues

[9] I will summarize and address the appellants' motion and grounds of appeal as follows:

1. Should the fresh evidence be admitted?
2. Did the hearing judge err in concluding the underlying facts supported a finding of reasonable necessity?
3. Did the hearing judge err in failing to identify and apply the applicable test for the establishment of an easement?
4. Did the hearing judge commit reversible error by failing to consider the issue of "neighbourliness"?
5. Did the hearing judge commit an error by improperly drawing inferences and finding facts from the view which she took of the Property?

Analysis

Issue 1 - Should the fresh evidence be admitted?

[10] The fresh evidence is nothing more than an attempt to impeach Ms. Stewart's trial evidence with events that occurred post-trial and to question the hearing judge's finding that the right-of-way was reasonably necessary.[3]

[11] The evidence is of the same nature and type as evidence adduced at trial. To admit the evidence of post-trial events would allow parties on appeal to challenge credibility and factual findings in virtually any case.

[12] It does not come close to meeting the well-known test in *R. v. Palmer*.[4] In particular, it could not possibly affect the hearing judge's decision which was based on the evidence before her.

Issue 2 - Did the hearing judge err in concluding the underlying facts supported a finding of reasonable necessity?

[13] This argument is completely without merit. The hearing judge's factual findings are well supported by the evidence. In a thorough decision, she set out the evidence in detail and her conclusions based on that evidence. The appellants have not established any error in the fact-finding exercise.

Issue 3 - Did the hearing judge err in failing to identify and apply the applicable test for the establishment of an easement?

[14] Again, a review of the hearing judge's decision makes clear she clearly understood and properly applied the law relating to prescriptive easements. She focused her analysis on two issues: whether there was open and continuous use of Quarry Road without permission for a period of 20 years; and whether the use of Quarry Road is reasonably necessary.

[15] In her decision she extensively reviewed the law concerning the establishment of rights-of-way by prescription.[5]

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[3] Decision, para. 77.
[4] [1980] 1 SCR 759 at 775.
[5] Decision, paras. 18 – 23.

[16] The hearing judge clearly set out the relevant case law on easements and focused her analysis on the elements of establishing an easement. In doing so she did not err.

Issue 4 - Did the hearing judge commit reversible error by failing to consider the issue of "neighbourliness"?

[17] Before the hearing judge, the appellants argued they permitted, expressly but informally, the uses that Ms. Stewart and her husband made of Quarry Road.[6] They further said the permitted use was only granted in the spirit of "neighbourliness".[7]

[18] The hearing judge addressed the issue of permission and found there was no evidence which was accepted by the Court to support any permission by the Melvins (the Zincks' predecessors in title) or the appellants.[8]

[19] The hearing judge was alive to the issue of "neighbourliness" and rejected it.

Issue 5 - Did the hearing judge commit an error by improperly drawing inferences and finding facts from the view which she took?

[20] The hearing judge did exactly what she was requested to do by both parties. The hearing judge's comments were all related to facts put before her at the hearing and were within the scope of the requests which were made for the view.[9]

Conclusion

[21] The appellants' arguments on this appeal were completely without merit. The appeal stands dismissed, and I would award costs on the motion and the appeal to the respondent in the amount of $10,000.00 inclusive of disbursements.

Farrar, J.A.

Concurred in:

Fichaud, J.A.

Bourgeois, J.A.

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[6] Decision, para. 22.
[7] Decision, para. 22.
[8] Decision, para. 70.
[9] Decision, paras. 61 – 67.