IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Forrestall v. Halifax County Condominium Corporation No. 142, 2006 NSSC 387

Date: 20061220
Docket: S.H. No. 212191
Registry: Halifax

Between:

Katherine Forrestall and Robert J. Russell

Plaintiffs

v.

Halifax County Condominium Corporation No. 142(Akins Court Condominiums), Akins Cottage Limited, and Halifax Regional Municipality

Defendants

Judge: The Honourable Justice Donald M. Hall.

Heard: In Halifax, Nova Scotia, on November 29 & 30, 2006.

Counsel: J. Brian Church, Q.C., counsel for the plaintiffs

Joshua Judah, Esq., counsel for Halifax Regional Municipality

James D. MacNeil, Esq., & Victoria Mainprize, counsel for HCCC # 142 (Akins Court Condominiums) & Akins Cottage Limited

By the Court:

[1] The plaintiffs claim a declaration that they are entitled to certain easements over lands of the defendants, that an expropriation of the land is null and void and damages for an alleged previously existing right of way. The defendants counter-claim for damages for trespass and an injunction. There is also a cross claim.

[2] The principal issues to be decided are: (1) whether the plaintiffs have a right of way over the defendants' lands under the doctrine of lost modern grant; and, (2) if the plaintiffs' predecessors in title had established such an easement, whether it was lost or extinguished by the expropriation proceeding initiated by the City of Halifax (The City), the predecessor municipal body of the defendant, Halifax Regional Municipality, in 1986.

[3] The facts are quite straight forward and for the most part are not in dispute. The plaintiffs reside at 2143 Brunswick Street in Halifax. The plaintiff, Robert Russell, is the owner of the property at 2143 Brunswick, which he purchased in 1999 from a person named Anne Auld. The plaintiff, Katherine Forrestall purchased the adjacent residence, 2145 Brunswick Street, in 2002 from a Mrs. Anastasia Miles.

[4] At the time Mr. Russell purchased 2143 Brunswick he was informed by the real estate agent that there was no right of way to the back or east side of the property, although it appeared to him that there was an obvious or clearly defined roadway leading from the south side of Cornwallis Street, across lands of the defendants to the rear of 2143 Brunswick and 2145 Brunswick. Similarly, when 2145 Brunswick was purchased, Mr. Russell knew that there was no right of way to it from Cornwallis Street. In fact, in all of the conveyances of the various parcels of land that are relevant to this proceeding there was no mention of any right of way.

[5] It appears that in 1965 the City of Halifax acquired all of the land that is the subject of this proceeding, not including 2143 Brunswick and 2145 Brunswick, but including "Akins Cottage" which is reputed to be the oldest standing house in the City and which was at one time occupied by Thomas B. Akins, a former City Solicitor and archivist. The City had acquired these properties with the intention of constructing a core roadway, to be called Harbour Drive, leading from the north to downtown Halifax. The plan was later abandoned. The City later sub-divided

the lands and sold portions to the defendants HCCC#142 (the Condo Corp.) and Akins Cottage Limited's predecessor in title, Apex Developments Limitecd.

[6] In 1986, under the provisions of the **Expropriation Act** 1973, the City expropriated the properties in question to clear up title. No notice of the expropriation was given to the adjoining landowners, in particular, the owners of 2143 Brunswick and 2145 Brunswick.

[7] At the time of the expropriation 2143 Brunswick was owned by Ms. Suzanne Kushner McDonough. Ms. McDonough had acquired the property in 1979 or 1980 from a Mr. Moir and resided there until 1991. She rented the property to a tenant until she sold it to a Ms. Anne Auld in early 1991.

[8] While she was living at 2143 Brunswick, Ms. McDonough drove her motor vehicle from Cornwallis Street to the rear of her property over an "old driveway" that crossed lands that were owned by the City, later acquired by the defendants, Condo Corp. and Akins Cottage Limited. She would park her automobile behind her property or behind the Miles property and occasionally behind Akins Cottage and would walk up the lane by Akins Cottage to access her residence from

Brunswick Street. She continued to use the driveway up until the time she sold the property, even after the Condo Corp. acquired its present land and asked her not to use the driveway, which crossed its land. When she sold the property to Ms. Auld nothing was said about there being a right of way over the driveway or otherwise. Ms. McDonough did not take any action with respect to the City's expropriation proceeding although she was well aware that her right to use the driveway was disputed.

[9] Anastasia Miles and her family moved into 2145 Brunswick in 1961, apparently having previously purchased the property. Anastasia Miles owned an automobile which was driven on a daily basis by her son and was parked at the back of the property, gaining access to the property over the driveway leading from Cornwallis Street.

[10] Anastasia Miles' daughter, Margaret, lived with her at 2145 Brunswick Street and continued to do so after her marriage to Howard Conrad in 1967. Mr. Conrad lived at the Miles residence with his wife and family until they separated in 1994. While residing in the Miles residence Mr. Conrad used the driveway from Cornwallis Street and parked his car behind the Miles property until he was

prevented from doing so after the City sold the property in question. He also walked up the lane by Akins Cottage to Brunswick Street in order to attain access to 2145 Brunswick.

[11] Some time after being informed by City officials that they could not continue to use the driveway, Anastasia Miles and her daughter Margaret consulted a lawyer to look into her claim to a right of way over the City's property. In 1988 an attempt was made to negotiate a right of way from the City which was not successful and Anastasia Miles eventually "gave up". When the property was sold to Katherine Forrestall there was no discussion about a right of way.

[12] After acquiring its property the Condo Corp. paved the driveway and put up a chain preventing access.

[13] It appears that over the years, dating back to a time well before the City acquired the properties, residents or occupants of other adjacent properties used the driveway for one purpose or another.

[14] The plaintiffs take the position that they are entitled to a right of way over the lands in question under the doctrine of lost modern grant. They maintain that the easement existed more than 20 years prior to the City acquiring title to the land and that the 1986 expropriation was not effective to extinguish it. As well, they contend that they are entitled to foot access up the walkway or stairway by Akins Cottage to Brunswick Street.

[15] The City argues that in order to establish entitlement to an easement under the doctrine of lost modern grant the use must have commenced twenty years prior to and continued to the time of acquisition of the land in question by the City in 1965. The City also submits that the evidence of the nature and extent of the easement is too vague for the court to make any determination. The City says that, in any event, any easement that might have existed was extinguished by virtue of the expropriation proceeding in 1986.

[16] The Condo Corp. and Akins Cottage Limited maintain that the claims of the plaintiffs to a right of way to 2143 Brunswick and 2145 Brunswick are separate issues and each must establish entitlement to an easement separately and in its own right. Even if the plaintiffs are able to establish an easement respecting 2145

Brunswick, it does not benefit 2143 Brunswick. Further, they say that the evidence as to the location and extent of the claimed easement to Cornwallis Street is so vague as to be incapable of determination. As well, they submit that the evidence of use of the foot path or stairway to Brunswick Street of occupants of the other adjacent properties does not count as use by the occupants of 2143 Brunswick and 2145 Brunswick and without such there is no evidence to support the necessary twenty year period of use. These defendants also adopt the City's position that by virtue of s. 592 of the **Halifax City Charter**, S.N.S. 1963 C. 52, time could not continue to run once the City acquired the land Also, it adopts the City's position that if any easements did exist prior to or following acquisition of the property by the City, they were extinguished by the 1986 expropriation.

[17] The defendants, Condo Corp. and Akins Cottage Limited, further maintain that if the plaintiffs are successful in establishing easements, they are entitled to be compensated by the City in damages for breach of the covenants in their warranty deeds from the City. They also claim that the plaintiffs committed trespasses on their lands for which they claim to be entitled to compensation in damages and an injunction restraining the plaintiffs from trespassing on their lands.

[18] The revised **Halifax City Charter** was enacted by the Nova Scotia Legislature in 1963 as S.N.S. 1963, C.52. Section 592 of the **Charter** stated as follows:

> 592 No person shall, by reason of the adverse or unauthorized possession, occupation, enjoyment or use of any land owned by the City or of any street within the City and shown upon any plan of subdivision or dedicated for use as a street whether adopted by the City as a street or not, obtain any estate or interest therein or in any such land by reason of such adverse possession, occupation, enjoyment or use thereof, and it shall be deemed that no such right has heretofore been so acquired.

[19] Section 592 of the **Charter** was in full force and effect when the City acquired the land in question in 1965. Under that section no person could obtain any right or title to land owned by the City by adverse possession or prescription. Similar provisions are contained in the successor statutes to the **Halifax City Charter**; viz., s. 68(4) of the **Halifax Regional Municipality Act**, S.N.S 1995, c. 3, and s. 50(4) of the **Municipal Government Act**, S.N.S. 1998, C. 18.

[20] Accordingly, in order for the plaintiffs to succeed they must establish that the easements they claim were in existence or had been established under the doctrine of lost modern grant prior to 1965 when the City acquired title to the land.

[21] In Anger and Honsberger, Real Property, Second Edition, the following passage appears at pages 938 - 939:

> Before the doctrine of the lost modern grant can be applied it must be established by the person claiming the easement that a burden was imposed on the servient tenement and before time can commence to run an actionable wrong must have been committed.
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> . . . .
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> Mr. E.D. Armour, K.C., in his text summarizes the doctrine of the lost modern grant as follows:
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> > . . . in all cases there must have been actual usage during the required period; not a mere claim of right to use or enjoy; and it must have been as of right, and free from interruption, dispute, and denial, during the period relied on as establishing the presumption. It must not have been in the absence or ignorance of the parties interested in opposing the claim during the period it was exercised; nor under a grant or license from them during the period relied upon. Such parties also must have been capable of resisting the claim during the period it was exercised; therefore, no right would accrue against a landlord, if during the period the enjoyment took place, the tenement were under lease. The exercise of the alleged right must have been over the land of another, and not during unity of possession of the alleged servient tenement with the alleged dominant tenement; for then the alleged enjoyment of the right would not have been of it as a right, but the enjoyment would have been of the very soil itself of the alleged servient tenement.
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> This doctrine of, and claim under, an alleged non-existing grant is as follows: From the same facts (after 20 years' enjoyment), that a presumption arose of immemorial usage, so as to support a claim by way

> of prescription, there would also in most cases arise a presumption of a grant of the right claimed; and therefore, a claimant could advance his claim either as a prescriptive right, or by pleading a grant to him from a party entitled to make such grant. The latter mode was always adopted, when the claim if made as a *prescriptive* right, could have been defeated by showing when the enjoyment was first had; whereas, by pleading the right as existing by a grant, if sufficient evidence, as by 20 years' open constant peaceable user, were given, establishing the presumption of a grant having been made of right of such user, then the non-user prior to the alleged grant, became manifestly immaterial.

[22] The doctrine of lost modern grant was considered and applied by the Nova Scotia Court of Appeal in **Mason v. Partridge,** 2005 NSCA 144. At paragraphs 17, 18 and 21, Oland, J.A., in rendering the unanimous decision of the Court said:

> [17] Mr. Mason's appeal is based on the doctrine of modern lost grant. Charles MacIntosh, *Nova Scotia Real Property Practice Manual*, at 7-21 described that doctrine as follows:
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> > . . . The [doctrine of lost modern grant] is a judge-created theory which presumes that if actual enjoyment has been shown for 20 years, an actual grant has been made when the enjoyment began, but the deed granting the easement has since been lost. However, the presumption may be rebutted.
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> [18] In **Henderson**, supra the Ontario Court of Appeal set out the requirements for establishing an easement pursuant to either a limitations statute or the doctrine of modern lost grant in the following passage:
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> > 14. It should be emphasized that the nature of the enjoyment necessary to establish an easement under the doctrine of lost modern grant is exactly the same as that required to establish an easement by prescription under the *Limitations Act*. Thus, the claimant must demonstrate a use and enjoyment of the right-of-way under a claim of right which was

> continuous, uninterrupted, open and peaceful for a period of 20 years. However, in the case of the doctrine of lost modern grant, it does not have to be the 20-year period immediately preceding the bringing of an action.
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> . . .
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> [21] The enjoyment required to acquire an easement must demonstrate certain characteristics, *Gale on Easements*, 17th ed. (London: Sweet & Maxwell 2002) at p. 208 states:
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> > The civil law expressed the essential qualities of the user, by the clear and concise rule that it should be *"nec vi, nec clam, nec precario"*. (Literally translated - Not by violence, stealth or entreaty).

[23] I agree with the position taken by Mr. MacNeil, on behalf of the defendants, Condo Corp. and Akins Cottage Limited, that the claims to easements for the two properties are separate claims and must be established separately.

[24] It may be helpful to briefly review the evidence in this regard at this point.

[25] First, with regard to 2143 Brunswick, there was the evidence of Ms. Suzanne Kushner McDonough. She acquired the property and occupied it in 1979 or 1980. She drove her car daily from Cornwallis Street over what she described as an "old driveway" to the back of her property where she parked her car on land owned by the City and walked up the lane by Akins Cottage to Brunswick Street. From her

testimony it appeared that the driveway was quite clearly defined and had been in existence for some time. About a year after the Condo Corp. acquired its portion of the land she was told by the Condo Corp. officials not to use the driveway but for the most part she ignored it and continued to use it until she moved away in 1991. There was no mention of any right of way when she sold the property to Anne Auld. Ms. McDonough did not provide any evidence as to the history of the property prior to her purchasing it.

[26] Margaret Miles, who resided in the adjoining property, 2145 Brunswick, from 1961 to 2002, testified that Mr. Moir, a prior owner of 2143 Brunswick, did not have a car of his own, but when the Moirs had visitors they always drove in the back and parked and walked to the front of the house on Brunswick Street. She also stated that Mr. Moir explained to her that everybody just started using the driveway although they didn't have permission. She also spoke of other persons using the driveway to access other portions of the City's property.

[27] Robert Joseph russell testified that he purchased 2143 Brunswick Street in 1999. He stated that at the time of the purchase he was informed that there was no right of way from Cornwallis Street to the back of the property and that he had

purchased the property at a price that did not include a right of way. After purchasing the property, with the permission of the City, he parked his car on the West side of Brunswick Street on other land of the City referred to as the “Marley” property. He parked his car there until the City sold the land to a developer in 2003. Mr. Russell also provided an historical background with reference to maps, aerial photographs and other sources, with respect to the lands in question which indicated a private roadway or a driveway of some sort had been in existence for many years from the early 20th century. Needless to say, he was unable to provide specifics of the nature of the use of the roadway or the persons who used it.

[28] An affidavit of Frederick Dockrill was also presented in evidence by consent. Mr. Dockrill deposed that his grandparents owned a residence on land now occupied by the Condo Corp. He swore that he had visited at his grandparents home from “the 1940's until approximately 1959" and that there was “motor vehicle access leading in from Cornwallis Street to the rear” of his grandparents’ home on Brunswick Street. In my opinion this evidence does not assist the plaintiffs since the Dockrill property was to the North of the plaintiffs’ properties and the “motor vehicle access”, as described, does not extend to their properties.

[29] The evidence as to the use of the driveway with respect to 2145 Brunswick was provided primarily by Ms. Miles and her former husband, Howard William Conrad. They were married in 1967 and separated in 1994 and resided at Ms. Miles' mother's home during the entire period of their cohabitation.

[30] According to Mr. Conrad he used the driveway from the time of the marriage and parked his car behind Akins Cottage and usually walked up the lane by Akins Cottage to Brunswick Street. He stated that after 1990 he parked his car in the parking lot of a nearby school where he was the janitor. He also said that the driveway was not clearly defined, that it was covered in ash and that he and the occupants of Akins House would sometimes in winter remove snow from the driveway.

[31] Margaret Elizabeth Miles testified that she moved into 2145 Brunswick with her family in 1961 when her mother purchased the property. At the time she was sixteen years old. She said that her mother owned a car which her brother drove daily, parking it "down back" of the house and that there was a driveway by Akins Cottage. She confirmed that her former husband used the driveway from Cornwallis Street during the period of time they lived together. She stated that her

mother had not been given any notice of the expropriation by the City in 1986 and that in 1988 she and her mother consulted a lawyer with a view to resolving the right of way issue but without success. Eventually she gave up without taking any action against the City. She said that she believed the City told them in 1985 that they couldn't use the right of way. She said that when the property was sold to Ms. Forrestal in 2002 nothing was said about there being a right of way.

[32] Robert Russell confirmed that when he and Ms. Forrestall bought 2145 Brunswick in 2002 there was no mention of a right of way and that he had bought it at a price that did not include a right of way. Much of his testimony respecting 2143 Brunswick is also applicable to 2145 Brunswick.

[33] Gerald Gonau, who was a former solicitor for the City and its successor, the Halifax Regional Municipality, said that the City decided to expropriate the land to clear the title as to any unacquired interests with specific reference as to the heirs of Alfred T. Gregoire, from whom the City had purchased the land in 1965.He also confirmed that no notice of the expropriation was given to the adjoining landowners.

[34] In my view the evidence of Ms. McDonough does not assist the plaintiffs in establishing a right of way to 2143 Brunswick as her use of the driveway all occurred subsequent to her purchase of the property in 1979 from Mr. Moir. At that time the City owned the land over which the driveway passed.

[35] The most helpful evidence was that with respect to the use of the driveway by visitors to the property when owned by Mr. Moir. It appears that Mr. Moir was residing at 2143 Brunswick when Ms. Miles' mother purchased 2145 Brunswick in 1961. There is no evidence, however, as to when Mr. Moir purchased the property or first started using the driveway. Furthermore, there is no persuasive evidence as to use of the driveway by the owners or occupiers of the property prior to Mr. Moir.

[36] That being the case, in my opinion, the plaintiffs have failed to establish that there was continuous use of the driveway by the owner or occupant of the property for a continuous period of twenty years prior to the City acquiring title to the Gregoire lands in 1965.

[37] With respect to 2145 Brunswick there is no history of the use of the right of way except that provided by Margaret Miles and her former husband. It, however, does not go beyond 1961 when the Miles family came to live there.

[38] As noted previously the affidavit evidence is not of assistance in either case.

[39] Accordingly, I find that the plaintiffs have failed to establish an easement or right of way with respect to either property by way of the doctrine of lost modern grant.

[40] If I am wrong in that conclusion, the question remains as to whether the expropriation proceeding in 1986 was effective to extinguish any easements that might have existed.

[41] The expropriation in question proceeded under the provisions of the **Expropriation Act**, S.N.S. 1973, C. 7. Under the **Act**, land is defined in s. 3(1)(i) to include “any estate, term, easement, right or interest in, to, over or affecting land”. The **Act** also provided that the expropriation must have been approved by the City’s council, which was done in this case.

[42] Section 11 of the **Act** sets out the procedure to be followed after approval for the expropriation has been given. It provides in part:

> 11 (1) Where a statutory authority has authority to expropriate land and it is desired to expropriate the same, the expropriating authority shall deposit at the office of the registrar of deeds for the registration district in which the land is located a document or documents setting forth
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> (a) a description of the land;
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> (b) a plan of the land;
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> (c) the nature of the interest intended to be expropriated and whether such interest is intended to be subject to any existing interest in the land;
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> (d) the statutory purpose for which the land is expropriated; and
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> (e) a certificate of approval executed by the approving authority or a true copy thereof.
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> (2) Upon the documents being deposited at the office of the appropriate registry of deeds
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> (a) the land expropriated becomes and is absolutely vested in the expropriating authority; and
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> (b) any other right, estate, or interest is as against the expropriating authority, or any person claiming through or under the expropriating authority, thereby lost to the extent that such right, estate, or interest is inconsistent with the interest expropriated.
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> (3) In the case of an omission, misstatement or erroneous description in an expropriation document deposited under this Section, the expropriating authority may deposit in the proper registry of deeds office a document replacing or amending the original document and signed by the expropriating authority, and a document registered under this subsection shall be marked to show the nature of

> the replacement or amendment and shall have the same force and effect as, and shall be in substitution for, the original document to the extent that such document is replaced or amended thereby.

[43] Section 13 provides that where there is no agreement as to the compensation to be paid, the expropriating authority shall, within ninety days after the deposit of the expropriation document in the registry of deeds, serve upon the registered owner a true copy of the expropriation documents and an offer of an amount in full compensation for the registered owner's interest.

[44] Sub-section 4 of section 13 provides:

> 13 (4) If any registered owner is not served with the offer required to be served on him under subsection (1) within the time limited by subsection (1) or by an order of a judge under subsection (3) or by agreement, the failure does not invalidate the expropriation but interest upon the unpaid portion of any compensation payable to such registered owner shall be calculated from the date of the deposit in the registry of deeds of the expropriation document.

[45] In its amended expropriation document dated July 11, 1986, the stated nature of the interest to be expropriated is "All right, title, interest, claim and demand whatsoever", in respect to the land in question. It also stated that the purpose of the expropriation of the land was "the restoration of Akins Cottage and the development of lots C-1, C-2 and C-3", the lands in question.

[46] The amended document was filed apparently because an earlier expropriation document failed to exempt the interests of Apex Developments Limited and Morguard Trust Company. The City had previously conveyed a portion of the land to Apex developments Limited, who in turn had granted a mortgage to Morguard Trust Company.

[47] The plaintiff argued that since the amended document had not been specifically approved by city council, the proceeding was a nullity. I cannot accede to this proposition. Sub-section 11(3) of the **Expropriation Act** provides specifically for such an eventuality and declares that an amending document "shall have the same force and effect as, and shall be in substitution for, the original document . . . ."

[48] The plaintiffs also argued that the City could not, in law, expropriate its own property as a device for clearing title, instead it should have proceeded under the **Quieting Titles Act,** R.S. 259. At first blush, I must agree that it does seem odd, even bizarre, that an owner should expropriate its own property. The City, however, was not limited to expropriating the fee simple title to the land, but was

entitled to expropriate any and all interests in or to the land, including easements. If in fact easements did exist at the time, as contended by the plaintiffs, they would be an appropriate subject of an expropriation proceeding.

[49] The fact that the purported owners of the easements were not given notice does not affect the validity of the expropriation proceeding. Under the terms of the **Expropriation Act** no notice is required except with respect to compensation. As s. 11(2) states, upon the depositing of the expropriation documents at the appropriate Registry of Deeds "the land expropriated becomes and is absolutely vested in the expropriating authority". Furthermore, s. 13(4) provides that failure to serve a copy of the expropriation documents and an offer of compensation as required under s. 13(1) does not invalidate the expropriation. If any complaint were to be made with respect to the lack of notice, it could only have been made with respect to compensation for the alleged right or interest expropriated and then only by the persons claiming the interest at the time of the expropriation and not by their successors in title.

[50] In my opinion, if valid easements or rights of way did exist, both with respect to the “driveway” and the foot path, they were extinguished by the 1986 expropriation.

[51] I am further of the opinion that the plaintiffs are not entitled to any compensation for the loss of any rights of way that may have existed prior to the expropriation since they have suffered no loss. They purchased the properties in question on the understanding that there were no rights of way to the back of the properties from Cornwallis Street and at prices that took that fact into account. They were not deceived by anyone in any way.

[52] As to the defendants’ claim for damages for trespass, there is no evidence whatever that Ms. Forrestall trespassed on the defendants’ property. As to Mr. Russell, the defendants presented no evidence to support their claim. The only evidence in this regard was an admission by Mr. Russell that he had entered on the defendants’ land without permission. There was no evidence whatever as to any actual damage suffered by the defendants as a result of the alleged trespass. Overall the evidence in this regard was so scanty that I am not satisfied that the defendants have proven their claim on a balance of probabilities.

[53] Therefore, the counter claim is dismissed but without costs since virtually no attention was given to it in the course of the trial.

[54] I also am not satisfied that the defendants have established any basis for an injunction enjoining the plaintiffs from entering upon the defendants' property. The defendants presented no evidence to support the need for such an injunction. Accordingly, the application for an injunction is also dismissed but without costs for the same reason as stated with respect to the counter-claim.

[55] The Condo Corp.'s cross-claim against the defendant, Halifax Regional Municipality, is also dismissed without costs.

[56] In summary, the plaintiffs' claims against the defendants are dismissed. The counter-claim of the defendants and the cross-claim of the defendant, Condo Corp. are also dismissed.

[57] The defendants, Condo Corp. and Akins Cottage Limited, will have their costs on the main action against the plaintiffs to be taxed as one bill and the

defendant, Halifax Regional Municipality, will similarly have its costs, all to be taxed under tariff A, scale 3, of the 1989 tariffs in view of the fact that the proceeding was commenced in 2002 before the new tariffs came into force. I understand that opinion is somewhat divided as to whether the new tariffs which came into force September 29, 2004, should apply to actions commenced prior to that. I believe that the weight of the authorities is in the negative, but in any event, I choose to exercise my discretion and direct that costs are to be taxed under the tariffs that came into force January 1, 1989.

Donald M. Hall, J.