

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *Miller v. Hartlen*, 2015 NSSC 209

**Date:** 2015-07-21

**Docket:** Tru, No. 418615

**Registry:** Halifax

**Between:**

Wayne F. Miller

*Applicant*

v.

Laurie Hartlen and Marjorie Hartlen

*Respondents*

**Judge:** The Honourable Justice Patrick J. Duncan

**Heard:** May 20, July 13, and July 15, 2015, in Halifax, Nova Scotia

**Final Written Submissions:** July 6, 2015

**Counsel:** Joseph A. MacDonell, for the Applicant  
Jeremy Gay, for the Respondents

**By the Court:**

**Introduction**

[1] In *Miller v. Hartlen* 2014 NSSC 296 I decided that the applicant, Wayne Miller, established a prescriptive easement over the so called Barren Road, Hants County, Nova Scotia, as it crosses the land of the respondents, Laurie and Marjorie Hartlen. I directed the preparation of a survey of the metes and bounds of the material part of the Barren Road, which would then be recorded pursuant to the **Land Registration Act**. I retained jurisdiction for the purpose of resolving disagreements arising from the interpretation of my decision.

[2] Counsel for the parties contacted my office advising that the parties could not agree on the metes and bounds intended to form the easement. Two on the record conferences were held to identify the nature of the disagreement and a mechanism to resolve it. While the parties were invited to re-open the evidence if they felt it was necessary, I offered the view that I had already heard and viewed sufficient evidence to form an opinion as to what I intended the scope of the easement to be. To assist me in creating specific reference points from which to create a metes and bounds description it was agreed that I would take a view of the property in accordance with **Rule 51.12**. I sought that the parties file a survey of the area as an aid to the court in outlining a specific route for the easement. I also required a supporting surveyor's affidavit to explain the work performed.

[3] The survey and affidavit were filed. It expressed an opinion as to the location of the easement, based on the surveyor's interpretation of my decision. Counsel for the respondents objected to the admissibility of that opinion and to the survey, to the extent that it purported to show the boundaries of the easement. I concluded that the survey was not prepared in compliance with **Rule 55** and that the opinions set out in the affidavit and graphically represented were not admissible. Both parties agreed though that the survey was accurate in the manner in which it set out the Barren Road travelled portion, and landmarks such as gates, watercourses, and buildings. It set out sufficient reference points to be of assistance to me in making specific directions as to the easement's course. That is the limited purpose for which it was admitted.

[4] Prior to taking a view, I heard further submissions of counsel, following which I reserved the right to require further evidence to assist me if I was not able to resolve the dispute based on the evidence already before the court. I have concluded that I do not require further evidence.

### **Positions of the Parties**

[5] The central point of contention is whether the easement is restricted to the travelled portion of the Barren Road or includes areas of “push backs” (where dirt was pushed back during grading), and areas alleged to be necessary to the support of the travelled portion of the road.

[6] Counsel for the respondents argues that the prescribed area is limited to the travelled portion and no more. The prescribed easement would then vary in width between approximately 13’ and 17’.

[7] Counsel for the applicant submits that the easement must include the areas of push back and any other land necessary to ensure proper maintenance of the road, and the passage of modern day logging equipment. He submits that a 30’ easement is supported by the evidence.

[8] Both counsel acknowledge that a building and deck constructed by a third party on the Hartlen lands, and with their permission, encroaches to some degree on the travelled portion of the Barren Road.

### **Analysis**

[9] The law relating to the scope of an easement acquired by prescription is not contentious. Wright J., in *Croft v. Cook*, 2014 NSSC 230 describes it:

94 The general rule is that the burden on the servient tenement cannot, without consent, be increased by a substantial alteration in the character and mode of user of the easement beyond the accustomed use established by prescription. By example, I refer to the following passage from the judgment of Justice Cory in *Henderson, supra*, at para. 16:

Further, the nature of the user cannot be changed by the owner of the dominant tenement. As an ancient example, a way used for the passage of carriages cannot be used for driving horned cattle or swine. In the same vein, the user is not entitled to change the character of his land so as to substantially increase or alter the burden on the servient tenant. Nor may

the user increase the intensity of his use and thereby alter or increase the burden upon the servient tenement. See, for example, *British Railways Board v. Glass*, [1965] Ch. 538.

[10] In this case, the dimensions of the easement are established by the evidence that I relied upon in reaching my decision.

[11] I determined that the scope of the easement was governed by the historical uses of the land during the prescriptive period. These uses included passage by Mr. Miller and his invitees over the road to access his camp. It also included the passage of vehicles used for the transportation of firewood, hardwood, logs and pulpwood that he cut and sold. I also set out the terms for ongoing maintenance of the road between the parties, as there was evidence that the applicant had undertaken maintenance of the road during the prescriptive period.

[12] My decision did not detail the specific evidence that I relied upon but paraphrased or summarized the evidence to support my conclusion. To better define the easement, I have reviewed the evidence and, together with the information obtained in the view taken, I have reached certain conclusions to guide the drafting of the metes and bounds.

[13] Evidence of usage during the prescriptive period was largely provided by Wayne Miller. It was not contradicted. The travelled portion of the road is set out on the survey, and it is visible on the ground. While it needs better definition in a metes and bounds description, the parties have a common understanding of what that portion is. The disagreement is whether, or the extent to which, it is greater than that portion.

### **Road Maintenance**

[14] At paragraph 18 of Mr. Miller's first affidavit he states:

18. That over the years since 1992, my brother Wendall and I maintained the road by having gravel or stone applied from time to time as was necessary. My brother and I also used a road grader and graded the roadway as necessary over the years. We would grade it to the point that you could travel in a car.

[15] I accepted this evidence. Visual observation of the road is consistent with this testimony.

[16] The road, where it crosses the Hartlen lands, is in a backward “L” shape. On entering the Hartlen lands one is travelling east. Just past the third party camp, the road turns north where it crosses the South Branch of Robinson’s Brook and then in to the Miller lands. The worn track is clearly visible and is consistent with a reasonably wide single lane road suitable for car travel or other vehicles with a similar track.

[17] The road is well established and, except in low lying wet areas, is compacted quite hard. There are tires ruts, but they are not deep. Having said that, the view was taken on a hot, dry day and portions of the road were quite dusty. Overall it is apparent that there are portions of the road that will need to be graded and filled from time to time in order to maintain the easement in a manner consistent with its historical uses. The question, of course, is how to define that by reference points on the ground and by width.

[18] Ground has been pushed back at various places along the course of the subject lands. It forms small mounds varying in height from inches to a couple of feet. The “push back” is not constant, that is, it is sometimes on one side of the road, and sometimes it is on the other side of the road. The edge of the push back is never more than a few feet from the travelled portion of the road. There are stretches where there is no push back present on either side of the road.

[19] There is some encroachment of bushes on the road which if left unchecked will interfere in clear passage over the road.

[20] Passage over the South Branch of Robinson’s Brook is on a broken rock causeway that is not greater than 14’ wide. It is probably the narrowest part of the easement and, in my view, defines the maximum width for past vehicle passage. i.e., the track width of vehicles passing over this road had to be able to fit on this causeway.

[21] Following the road from the brook in a southerly and then westerly direction there is clear evidence of grading consistent with that testified to by Mr. Miller. I have previously described the result on the land. Pushing the soil back off of the approximate road surface is necessary to maintenance of the easement and I conclude that the applicant’s prescriptive right includes areas necessary for that purpose.

[22] There is also evidence of areas that have been filled in the past. There is some evidence of rutting, in particular in the low lying wet areas. These will need

filling from time to time in a manner consistent with the past maintenance. Bushes and trees will need to be cut back or limbed to keep the travelled portion of the road clear for passage.

[23] I have concluded that the easement will be 18' wide and generally measured 9' from the centre point of the road set out in the survey and described as "approximate road surface". There is an exception for the causeway over the South Branch of Robinson's Brook. It cannot be expanded beyond its current width. There is no evidence to support a conclusion that it has been wider since Mr. Miller acquired his land.

[24] In reaching my conclusions, I have rejected the applicant's argument for a 30' wide easement. None of the evidence before me in the hearing speaks to the exact width of usage, but rather describes the type of usage. This fact, combined with my visual observations, support the conclusion that the travelled portion of the road (approximate road surface) is never less than 12' and in some cases is as much as 16'-17' in width.

[25] My determination of the 18' width includes, as a result, that area needed for push back and for brush clearing, whether it be on one side or the other. It is impractical to isolate those areas where the current evidence of push back exists and in any event it will not always be in the same location. It is in the nature of the usage that the road maintenance is driven by the intended usage and executed in the manner conditions dictate. As such the width I have settled upon is intended to provide a definitive area that will ensure a usage consistent throughout with prior and permitted future uses of the travelled portion, and an additional narrow band of land on each side of the travelled portion to push back dirt in the grading process, or to enter upon to cut brush or limb trees.

### **The Third Party Camp Problem**

[26] The camp is on the northerly side of the road on that portion that runs east-west. A deck has been constructed on the west and south sides of the building. At one point it is approximately 7' from the centerline of the travelled portion. As such it is too close to the road surface to permit the 18' easement, calculated in other areas as 9' from the centre of the travelled portion. It is also positioned in such a way as to make it impossible to push back soil on that side. It is so close to the track that some vehicles that would otherwise be able to pass might have to move off the track toward the opposite side of the road. In fact, the travelled

portion (and this can be seen on the survey) already veers a little to the south side of the road where it approaches and passes the camp.

[27] The evidence supports the conclusion that it was built with the consent of the Hartlens. There is no evidence that Mr. Miller objected to the construction, however there is also no evidence as to whether the deck was constructed before or after the dispute arose in late 2012. It is always open to the parties to negotiate some other means to solve this problem, but if they cannot mutually agree to that “other solution” then I direct the following.

[28] There is sufficient cleared area to create the 18’ wide easement by offsetting the easement from the centre line of the travelled portion. This would permit the applicant to use all 18’ for passage, clearing and grading as necessary. The easement shall arc slightly to the south side of the road as it approaches the most southerly point of the deck. The easement will extend 18’ from the most southerly point of the deck in a southerly direction across the Barren Road.

[29] Before and after that point, allowing for some arcing in the approaches to the deck, the easement will follow the 9’ from centre line delineation I have directed. The applicant is not restricted from travelling as close to the camp side of the road as the current travelled portion allows, but will have the additional space on the south side, if necessary, to use for maintenance as set out herein and in the first decision.

### **Use By Modern Logging Equipment**

[30] Counsel for Mr. Miller proposed that the easement should be of a size to permit modern logging equipment to pass over the easement. I have no evidence of how that equipment differs from that which Mr. Miller historically used or contracted for, nor would it be useful if his goal is to secure a wider easement.

[31] As I indicated, the width (and perhaps the weight) of vehicles travelling over the Barren Road is restricted by their ability to safely pass over the existing Robinson’s Brook causeway. That cannot be expanded beyond its current width nor can it be enhanced for the purpose of supporting vehicles for which there is no history of passage.

## **Conclusion**

[32] As set out in detail herein, the applicant will have an 18' wide easement over the respondent's lands, generally calculated as 9' from the centre line of the travelled portion of the road as shown in the survey in evidence. There are two areas of exception. First, the easement over the South Branch of Robinson's Brook is restricted to the width of the causeway. Second, the path of the easement alters as it passes by the third party camp.

[33] I will continue to retain jurisdiction to respond to further difficulties or disagreements in realizing the prescribed easement in a manner contemplated by my decision.

[34] If the parties are unable to agree as to costs, I will receive their written submissions.

[35] Order accordingly.

Duncan, J.