SUPREME COURT OF NOVA SCOTIA
Citation: Carter v. Walford, 2010 NSSC 213

Date: 20100527
Docket: Hfx. No. 326713
Registry: Halifax

Between:

Paula Lynn Carter

Applicant

v.

Lorne Walford and Dorothy Walford

Respondents

D E C I S I O N

Judge:	The Honourable Justice Suzanne M. Hood
Heard:	May 27, 2010
Written Decision:	June 9, 2010 *(Written release of oral decision of May 27, 2010)*
Counsel:	Matthew Moir for the Applicant Walter Thompson, Q.C. for the Respondents

By the Court:

[1] Paula and David Carter and Lorne and Dorothy Walford are neighbours who access their property over Strawberry Lane which is off the Old Mineville Road. Paula Carter is the owner of the Carter property. She seeks to have trees removed from the road access, Strawberry Lane, which is adjacent to her property. Lorne and Dorothy Walford own the land over which Paula Carter has rights of access and the Walfords have planted a series of Juneberry trees on the road access near the boundary of the Carter property.

[2] The issue is whether the trees planted within the access road substantially interfere with the rights of the Carters to use the road access for entrance and exit. The deed to Paula Carter gave her Lot 2B "Together with a private road access (Strawberry Lane) for entrance and exit as shown and mathematically delineated on said plan.

[3] Most of the width of the road access is not improved as a road. A copy of the plan of subdivision of the original Lot 2 which created Lot 2A, belonging to the Walfords, Lot 2B which belongs to Paula Carter and Lot 2C which belongs to the original grantor, McGinnis, is Exhibit A to the Affidavit of David Carter. Lot 2B

is approximately 30,000 square feet and Lot 2A is about 81,000 square feet which, of course, includes the road access. The subdivision plan shows a very wide lane or road ending in a cul-de-sac on Lot 2A. Adjacent to the Carter property which is Lot 2B, the road access is 73 feet wide, narrowing a bit at the far end of the Carter property to approximately 66 feet wide.

[4] The location certificate prepared by Tom Giovannetti, which is Exhibit D to David Carter's affidavit, shows the location of the travelled way within the road access. It also shows two driveways running from the travelled way to the Carter property. In addition, it depicts two rows of trees adjacent to the Carter property boundary and within the marked road access but not within the travelled way.

[5] The Walford lot, beyond the boundary with the Carter property, is approximately 52,000 square feet. According to the plan, it is 153 feet wide plus a total of 139 plus 169 plus 33 feet long and includes a portion of the road access but beyond the Carter property, presumably used only as the Walfords' driveway.

[6] From the McCulloch location certificate, which is Exhibit A to the McCulloch affidavit, it appears that the Walford residence is located closer to the

rear of their large lot, more than 250 feet from the Carter residence and the location of the trees in issue.

[7] The wording of the grant to Paula Carter is very broad and it refers to "a private road access for entrance and exit." At the time of the grant, the original owners of all of the original Lot C, created the road access with no limiting words. They subsequently sold Lot 2A to the Walfords and they no longer own Lot 2C. Lot 2A, as I have said, includes title to the road access, subject to the rights of the Lot 2B property owner, Paula Carter.

[8] Counsel for Ms. Carter refers to the Canadian Encyclopaedic Digest with respect to interference with rights of access. It says:

> ... the obstruction of a private right-of-way is not actionable unless it is substantial. The test is whether the way can be practically and substantially exercised as conveniently after as before the interference. ...
>
> ... it has also been held that an obstruction to a right-of-way is an injury which gives a cause of action to the right-of-way owner without proof of actual damage sustained because it is an abridgement of his or her easement which, if submitted to for sufficient time, will forever deprive him or her of the right to use as a right of way the portion encroached upon.

[9] The question is whether the obstruction is substantial. The test is whether the access can be practically and substantially exercised as conveniently after as before. Substantial must be viewed in the context of the wording of the grant of access and what access Paula Carter had to her property before the trees were planted. There are two driveways, but Paula Carter was not limited by the grant to any specific points of access. She had the ability to relocate the driveway or build a new one. Furthermore, access to the property was not limited by the grant to motor vehicles. Access could be by any means, including on foot. The property is otherwise landlocked. There is no means of access to the property from the public highway except over the road access.

[10] Is it as convenient to gain access to the Carter property now with the trees there as it was without? Clearly, in my view, it is not. The access points are limited by the existence of two rows of trees which, according to Exhibit "C" of Lorne Walford's affidavit, may grow to 25 feet in height. In my view, they are a substantial interference with the right of access to the Carter property. As the quote from the Canadian Encyclopaedic Digest says, the abridgement of the right of access can forever deprive one of the use of a portion of the right of way where the encroachment exists.

[11] The use by Paula Carter of only the travelled way as shown is not an abandonment by her of her rights to access her property. The right of access is not and was not fixed in time. The fact that the driveways to the Carter property are in a particular location now does not mean that Paula Carter has given up her right to access her property from other locations along the right-of-way. If the trees remain, she will be forced to give up some of her rights of access.

[12] I conclude that the original grant to Paula Carter was very broad and not, therefore, limited to any one or two points along the road access. I conclude it is a substantial interference with her rights to have the trees planted on the road access which limits her ability to access her property. It is now not as convenient to access her property by motor vehicle or on foot or otherwise because of the location of the trees.

[13] The Walfords own Lot 2A subject to a limit on their use of part of their property. Just as Paula Carter took title to Lot 2B with a broad right of access, similarly, the Walfords own Lot 2A subject to that right. It is an important restriction on their rights to use that land. If their intent was to beautify the road

access and not merely to interfere with the Carter property, trees or other things can be placed elsewhere on the road access. As Paula Carter's counsel said, trees could be placed on the opposite side of the travelled way with no interference with the access rights of Paula Carter.

[14] The Carter home seems to be attractive and well kept as shown in the photos attached to both the affidavit of Lorne Walford and that of Paula Carter. The fencing around the pool and chainlink fencing may not be to everyone's taste. The pool enclosure may not in fact be entirely finished. Since the Walford residence is 250 feet or so away, these fences are principally visible to the Walfords as they drive by the Carter home when passing along Strawberry Lane. If they are visible from the Walford home and the land they use in conjunction with it, there is no impediment to the Walfords placing trees, a fence, etc., within their own property boundary on land which is not encumbered by the road access which exists for the benefit of Lot 2B, the Carter property.

[15] Paula Carter is, of course, free to make an alternate arrangement with the Walfords short of removal of the trees, although I fear that is unlikely given the history between these parties which has led to these events and to this litigation.

One can only hope that removal of the trees could be held off unless and until Paula Carter needs to have access to her property at the location where the trees are. Now that the parties know their rights and obligations, one would hope that some agreement could be reached with respect to landscaping and maintenance of the portion of the road access not used as the travelled way. This hearing has determined the rights of the parties so those rights are clear in future and can govern the parties' actions hereinafter. The principle put forward by Paula Carter has been accepted by me.

[16] Paula Carter is entitled to have the trees removed. An order will issue that the trees will be removed. Failing agreement by the parties to some other effect, now that the parties know their rights with respect to the road access, the order can, of course, be put into effect.

[17] Counsel for Ms. Carter has also requested that a *lis pendens* which has been placed be removed and that is ordered. I leave it to the parties to determine what, if anything else, should be filed at the Registry of Deeds. The grant of access is in the Carter deed and that document has now been interpreted by this decision.

COSTS

In my discretion, I conclude an award of costs in favour of Paula Carter in the amount of $2,000.00 is appropriate, plus disbursements in the amount of $789.41.

Hood, J.