**SUPREME COURT OF NOVA SCOTIA**
**Citation:** Nickerson v. Hatfield, 2013 NSSC 238

**Date:** 20130724
**Docket:** Yar. No. 379941
**Registry:** Yarmouth

**Between:**

Debra Darlene Nickerson

Applicant

v.

Shaun Peter Hatfield and Carla Belle Hatfield

Respondents

***Decision on Costs***

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| **Judge:** | The Honourable Justice K. Coady |
| **Heard:** | By written submissions |
| **Counsel:** | Gregory Barro, for the Applicant<br>Allen Fownes, for the Respondents |

**By the Court**:

[1] The Applicant brought this application for an injunction restraining the Respondents from using a disputed right-of-way for ingress, egress and parking. In a judgment dated April 26, 2013 (2013 NSSC 133), I granted the application and found that at law there was no right-of-way. I ordered a permanent injunction against the Hatfields but refused the Applicant damages. Ms. Nickerson seeks a cost award.

[2] On the critical issue Ms. Nickerson was fully successful. She advances the principle that costs should follow the cause. She invites the court to award her costs of $12,250.00 and disbursements of $1585.05.

[3] The Respondents take the position that I should not award costs, or in the alternative, I should make a nominal award. It is well established that I have great discretion when considering costs. In this particular case I am ordering that the parties bear their own costs and disbursements.

[4] I am refusing costs to the Nickersons on the basis that they were less than forthright with their evidence. Their affidavits and oral testimony denied the existence of the right-of-way suggesting that the "looped road" was at most a footpath. Factually I found that the "looped road" was used for many years by the Hatfields. The aerial photos showed that from 1960 to 2000 it was much more than a footpath for access to the beach.

[5] I refer to para. 24 of the judgment to amplify this evidence:

> The expert Paul Lumsden provided aerial photographs of the disputed area for 1965, 1967, 1978, 1984, 1989, 2000 and 2006. He found that the 1965 photo shows the looped road "fairly well". He concluded that "there is evidence of usage on a regular basis". In relation to the 1967 photo he concluded "the disputed row is quite evident with sharp resolution and the edges are well defined". In relation to the 1978 photo he concluded "the disputed row appears to be well used and travelled". He also concluded "there is an obvious parking area immediately west of the looped road with several vehicles evident". He testified that the 1984 photo shows no changes from 1978. He concluded the 1989 photo depicts the looped road as "very well used and travelled". Mr. Lumsden testified that in the 2000 photo the disputed row was "obviously diminished considerably". He concluded the 2000 photo indicates that the "disputed row appears unused and in poor condition".

[6] I made the following factual conclusions at para. 30:

> The evidence overwhelmingly satisfies me that the Hatfields have used the looped road for ingress and egress to their cottage from 1965 until it was blocked in 1997; a period of 32 years. I am also satisfied that during this time they travelled

> this looped road by vehicle and parked their vehicles at the bottom near Edgehill Avenue. These conclusions are amply supported by the survey plans, the aerial photos and the credibility of the Hatfield's witnesses.

[7] I concluded as follows at para. 31:

> If this was the end of the case I would have no difficulty applying the principles set forth in *Lynch v. Nova Scotia (Attorney General)*, [1985] N.S.J. No. 456 and finding that the Hatfields have acquired a right-of-way over the looped road by adverse possession. It would not be a close call.

[8] It is unfortunate for the Hatfields that the land in question was owned by the Crown from 1970 to 1990. This ownership interrupted the prescriptive use of the "looped road". Mr. Fownes in his submissions accurately described my findings when he stated "the success the Applicant enjoys is as a result of the statutory provision which Your Lordship interpreted in her favour, not because of any fact evidence adduced by the Applicant."

[9] I decline to award costs.

Coady J.